# THE USE OF ART. 180 PARAGRAPH 5 OF THE POLISH CONSTITUTION TO FLATTEN THE JUDICIARY SYSTEM

## A CAUTIONARY FORECAST

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# The use of art. 180 paragraph 5 of the Constitution to flatten the judiciary system: a cautionary forecast

## The summary of the Helsinki Debate "Konstytucyjne granice zmian ustroju sądownictwa i statusu prawnego sędziów. (Nad?)użycie art. 180 ust. 5 Konstytucji RP"

WATCH THE DEBATE

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1. The Helsinki Debate outlines permissible changes to the judiciary system and the status of judges of common courts as provided for in Article 180 paragraph 5 of the Constitution, but focused mostly on proposed changes that remain outside constitutional boundaries. It may be worthwhile to formulate several general reflections. The first is an observation about the multiplicity of contexts in which it is possible to analyze the plans to „flatten" the structure of the judiciary and change the position of judges, as well as the diversity of approaches to this issue appearing in the debate.

2. To begin, the constitutional analysis shows unequivocally that Article 180 paragraph 5 of the Constitution, which provides an exception to the principle of irremovability of judges, is not an authorization to make extensive changes in the entire judicial body. It is a mistake to focus on the linguistic interpretation of a single provision without taking into account the preceding paragraphs of Article 180 of the Constitution, i.e., the entire structure of judicial irremovability. Moreover, a broader systemic interpretation is

necessary, one that considers the content of the provision in question in the context of the entire Constitution.

Thus, the norm contained in Article 180 paragraph 5 of the Constitution, which delineates the limits of irremovability of judges, should be considered with reference to the principle of judicial independence (Article 178 of the Constitution). It is unacceptable to broaden the exception to the principle of irremovability of judges, as this would threaten judicial independence. Judges' fear changes of their professional situation wrought by transfer to another court or retirement without their consent and such may naturally restrict the performance of judicial functions in accordance with the law and conscience. This state of affairs may lead judges to conformism and opportunism. The exception to the principle of irremovability of judges should be narrow and have specific boundaries.

Moreover, Article 180 paragraph 5 of the Constitution should be interpreted with reference to the principle of separation of powers (Article 10 of the Constitution), and in particular the specific provision that the judiciary remain separate and independent (Article 173 of the Constitution). The principle of irremovability of judges, which guarantees the judiciary to remain separate and independent, is necessary for the proper performance of the courts' fundamental function, i.e., protection of the rights and freedoms of individuals, as primarily expressed in the right to a fair trial (Article 45 of the Constitution). In the public perception, the legal position of judges should exemplify their independence and impartiality.

Changes to the judiciary and the status of judges based on the constitutional authorization contained in Article 180 paragraph 5 must take into account the above conditions. First of all, it is imperative that material reasons, based on constitutional values, support the "flattening" of the structure of common courts. At the same time, these reasons should outweigh the inevitable social or individual costs of the entire vast operation. In the event of preparing acts that would introduce said systemic changes, one should also consider the prohibition of excessive state interference, derived from Article 2 of the Constitution and the obligation to maintain the proportionality of restrictions on rights and freedoms (Article 31 paragraph 3 of the Constitution).

3. Politicians of the ruling party have proffered statements that introducing changes to the judiciary system, consisting of „flattening" its structure, is an internal Polish affair and is not subject to review under EU law. Their argument is, therefore, that there is no threat the adopted laws will be questioned by the European Commission or the Court of Justice of the EU.

However, as the course of the debate shows, the view presented above is not correct. Indeed, the structure of the judiciary does depend on the Member States. National law determines, for example, how many levels of the judiciary and court instances are created in the cases heard and what the role of the courts is in individual instances, how the courts are located throughout state territory, what is their territorial and substantive jurisdiction, how proceedings before courts in particular categories of cases are presented, etc. But the legal position of judges and changes introduced thereto via new laws remain within the purview of EU law. Judges of the courts of the Member States are also European judges, who apply EU law, whether directly or indirectly. Judges of national courts with jurisdiction in the areas covered by EU law are required to comply with the standards set out in the Treaties (Article 2, art. 19, sect. 1 TEU, Article 267 TFEU, Article 47 of the Charter of Fundamental Rights). This goes to the requirements of judicial independence and impartiality resulting from the rule of law and of ensuring effective judicial protection for individuals. These requirements are specified in the jurisprudence of the CJEU, often in cases concerning Poland.

In this context, several theses from CJEU judicature may be cited, which should be considered by Polish legislative and executive authorities in the event of their preparation and implementation of efforts to „flatten" the judiciary structure, if they wish to avoid non-compliance with EU law.

This should begin with the fact that EU law prohibits legislation related to the judiciary that deteriorates and weakens the rule of law. Changes in the judiciary must not threaten the independence of judges and raise concerns about the susceptibility of judges to external pressures.

Premature retirement may raise doubts as to compliance with the principle of irremovability of judges, unless it is shown that this is due to genuine overriding reasons and

the decisions are not arbitrary. Similarly, the assignment of judges to new courts should be carried out in a way that does not threaten their independence. It is required that decisions in this regard be taken according to appropriate procedural rules and be based on objective and verifiable criteria. Decisions concerning judges in the process of organizational changes should be subject to review by courts that meet EU standards.

Importantly, the CJEU considers the cumulative nature of legal solutions of Member States and examines the actual objectives of statutory changes.

4. It is indicative that despite politicians' relatively numerous announcements concerning the intent to introduce the referenced organizational changes, it is impossible to find any developed explanation of the social benefits these changes might bring.

In spite of, or perhaps because of this, the participants devoted plenty of space to considering the motives of the planned project to „flatten" the structure of the judiciary. There was unanimity on this issue: proponents of the idea do not seek to improve the functioning of the judiciary; in particular, they do not look to increase its efficiency or shorten case review times. Therefore, proponents of changes to the judiciary may be accused of abusing constitutional norms and acting in bad faith. Official, perfunctory declarations mask the real goals of changing the judicial system.

The goal is the further subordination of courts and judges to political authority and the elimination or weakening of the position of those judges who pass judgments contrary to the desires of the executive or actively criticize violations of the rule of law in Poland. Overall, the proposed organizational operation would be a serious challenge to judicial independence. The very prospect of mass verification of the judiciary body may have a chilling effect and lead to conformism and opportunism. In addition, structural changes would allow loyalists to decision-makers fill numerous leadership positions in courts or reap other rewards. One can also imagine a scenario where instead of instituting and conducting disciplinary proceedings against inconvenient judges, which is sometimes burdensome and evokes general social resonance, a similar result may be attained by the seemingly constitutional transfer of such judges to distant courts and lower levels, or their transfer to a state of rest.

The discussed changes may weaken public trust in and perceived prestige of judges.

5. The assumptions about the actual motives, as well as the supposed course and effects of the discussed change of the judicial system, are based, in the opinion of debate participants, on the discouraging experiences of hitherto judicial „reforms" conducted in recent years.

There are many examples of organizational and other undertakings that may serve as warnings for the future. First, mention should be made of the 2017 Act amending the Act on the Supreme Court, which resulted in the establishment of two new chambers, including the Disciplinary Chamber, considered in the opinion of most lawyers as inconsistent with the Constitution, and also recognized as non-compliant with the standards of EU law by the CJEU, as well as the Extraordinary Control and Public Affairs Chamber. The same act resulted in the premature retirement of several dozen judges of the Supreme Court and the shortening of the term of office of the First President of the Supreme Court in clear violation of Article 183 paragraph 3 of the Constitution. Said changes were withdrawn as a result of the intervention of the CJEU in 2018, which remains the only intervention of EU institutions that successfully overturned destructive transformations in the judiciary.

Another undertaking involved amendments to the Law on the System of Common Courts in 2017, which the Minister of Justice exploited to replace over one hundred presidents and vice-presidents of common courts. A further example is the so-called the muzzle act of 2019, which limited the independence of courts, including judicial assemblies, as well as judicial independence, by extending the scope of their disciplinary liability. The European Commission appealed this law to the CJEU. In July 2021, the CJEU issued an interim decision enjoining implementation of the muzzle act in the portions concerning disciplinary liability. As of this writing, there is no evidence of compliance with the CJEU rulings, which may result in Poland incurring fines.

An instructive, although dissuasive example of the undertakings thus far is the reorganization of the prosecutor's office under a 2016 Act. It included systemic changes but primarily involved personnel changes along with granting far-reaching powers to the post of Public Prosecutor General, which was merged once again with that of the Minister of Justice, after several years of separation. It is true that the transformations in the judiciary

could not coincide with those in the prosecutor's office, but the motives and directions are similar.

All in all, a consistent picture emerges from the legislative changes to date in the judiciary: they aim to strengthen the executive at the expense of the judiciary and limit the independence of courts and judges in various ways. No wonder then that the participants of the debate assume that the announced change intended to „flatten" the structure of common courts, which would be implemented by the same political camp and even by the same politicians using the same rhetoric, would pursue the same goals.

6. In the event of the implementation of the project in question, the executive branch would decide the fate of all common court judges. Executive bodies would designate the courts in which judges are to adjudicate and have the power to retire inconvenient judges. The partial information available on the proposed changes does not indicate what role the legislative authority would play. Therefore, it is unclear how detailed the statutory regulation will be and how the power to make decisions would be apportioned among various bodies. It is also impossible to predict whether and what criteria would be defined for making systemic and individual decisions. In this context, the previously mentioned principles of separation of powers and judicial independence raise concerns about possible constitutional violations.

One of the most important, and at the same time vague, issues in the proposed project is the designation of authorities competent to decide on the future of common court judges in the event of „flattening" the structure of the judiciary, i.e. the transfer of judges between courts or their retirement. The participants of the debate considered this issue on the basis of the Constitution and statutes, as well as taking into account the experience from previous organizational changes.

One possibility is to apply Article 179 of the Constitution and accept that it will be necessary for the president to reappoint judges to the „reformed" courts. This would require over 10,000 proceedings, with the participation of the National Council of the Judiciary empowered to make the relevant applications. The scale of such an operation would therefore be enormous and the appointment of judges would certainly take a long time. The results of judicial appointment proceedings would be tainted by allegations of non-compliance with

the Constitution due to the lack of independence of the National Council of the Judiciary from the legislative and executive powers. CJEU jurisprudence further confirms this.

Another possibility is that the reappointment of judges is not required pursuant to the above-cited provision of the Constitution, and that their transfer would suffice. This would mean that the Minister of Justice will be authorized to decide on cases involving judges, pursuant to Article 73 § 3 and 75 § 3 of the Law on the System of Common Courts.

In both variants presented above, executive bodies would be competent to decide on the new situation of judges. It is a solution that raises doubts in the context of the constitutional principles of the separation of powers as well as the separation and independence of the judiciary. However, it would be more acceptable to grant powers to the presidency, were it not for the present, unconstitutional position of the National Council of the Judiciary, which participates in the procedure of appointing judges. It would be controversial to grant decision-making powers to the Minister of Justice. The role of this minister towards the common judiciary, initially consisting of the administrative supervision of the courts, has been expanded in recent years. Empowering the minister to change the status of judges as part of the operation of „flattening" the structure of the entire common judiciary would be a threat to the independence of the judiciary and judges. Significantly, the Minister of Justice is also the Public Prosecutor General who heads the entire prosecutor's office. Public prosecutors may be involved, in a variety of ways, in all court proceedings. The personal characteristics of the individual who is currently the Minister of Justice - Prosecutor General cannot be overlooked.

Another issue is ensuring that judges have the right to appeal to a court against decisions concerning them (Article 73 § 2 and 75 § 4). This is a necessary minimum, especially considering the current position of the National Council of the Judiciary, as has already been mentioned, and the lack of a genuine constitutional review of the law. In the case of an audit performed by the Supreme Audit Office of the Supreme Court and the Public Affairs of the Supreme Court, one should bear in mind the allegations concerning the legitimacy of individuals adjudicating in this chamber.

7. It is indicative that the statements of politicians about the intentions of introducing changes in the system of common courts, consisting of „flattening" the structure

of the judiciary, do not contain many practical specifics that would explain what these changes would involve. Observers are therefore left to speculate. It would be possible, for example, to eliminate the courts of one of the three currently existing levels (highest, intermediate, lowest). However, the change of structure would likely be further-reaching and consist of establishing two levels of the judiciary that do not coincide with those currently in existence. In any case, it would be necessary to issue and implement very complex provisions determining the substantive jurisdiction of the new courts. The transitional provisions would be of particular importance here.

The statutory regulations would have to be much more extensive. An important element thereof would be the criteria for changing the status of judges, assigning competence in this respect to relevant authorities and regulating the course of procedures in question. Establishing a new status of judges as „common court judges" would raise many legal problems regarding the features of their new service relationship. It would be difficult to organize new courts in terms of both the infrastructure and the people involved: management, judges and other employees.

8. The above brief overview of the issues that would require regulation and implementation shows what a vast and complex undertaking the legislative and executive branches would have to face. Changing the jurisdiction and location of courts, as well as the verification of all judges resulting in many thousands of changes in the assignment to specific courts, as well as the retirement of some judges would undoubtedly paralyze pending and new cases. The change in the structure of the courts involves not only the transfer of judges, but also other court employees, as well as files and all equipment. Carrying out such an operation would require great efficiency and discipline.

In order to consider the chances of its execution, it is necessary to take as a starting point the current state of the judiciary, which is partially the result of prior pseudo-reforms. The current situation in the judiciary has been negatively assessed and the constitutional right to a fair trial is under threat. The time it takes courts to review cases is growing longer. Moreover, uncertainty about the stability of many judgments is rising, given doubts about the status of some judges appointed using procedures and involving a body that many lawyers consider unconstitutional. Many judges are in conflict with court management over rule-of-law violations. The current system of disciplinary liability of judges is a threat

to their independence and has been criticized by the CJEU. In this state of affairs, it becomes obvious that changes in the status of judges would be highly controversial and generate conflict.

The participants of the debate agreed that implementing the planned organizational changes would be practically impossible and doomed to fail. Such an operation would create a state of unimaginable chaos and confusion. The current shortcomings of the judiciary would be amplified and extended over a long period of time.

In addition, it can be assumed that the planned changes would likely be initiated by the sudden introduction of bills to the Sejm, without prior consultation with relevant stakeholders, and with the intent to ram through adoption without any opportunity for a deep discussion in the parliament or, for example, a public hearing. The above assumption is supported by, apart from similar examples in the last few years, the many political speeches on the subject of „flattening" the judicial system made over a lengthy period of time, which contain little actual information and many off-putting declarations of intent. This points to the confrontational nature of the project in question, which seems directed against a significant number of judges, rather for the benefit of the justice administration.

9. The results of this Helsinki Debate are unequivocal: there are many indications that the planned change of the judiciary system consisting of „flattening" the structure of common courts would be an abuse of Article 180 paragraph 5 of the Constitution. The question mark in the debate title should therefore be omitted. The laws that would introduce the changes to the judiciary in question should be overturned by a properly functioning constitutional court. Unfortunately, such does not seem realistic under current reality in Poland. The organizational operation in question would also probably be incompatible with European Union law. Moreover, it does not seem realistic that it could be carried out without destroying the judiciary, which is already in bad shape.

The above assessment and the formulation of a forecast as to the effects of the planned change in the judicial system suggest that such a change should not be made. Unfortunately, one may expect that the so-called political will to implement changes at a time favorable for the executive, motivated by the reasons mentioned above, will outweigh the contraindications, even though these may already be predicted with high probability.

The thorough legal analysis conducted by debate participants of the planned changes to the court system and status of judges, as well as the attendant consequences, is intended as a cautionary tale. Awareness of the planned scheme should be an impulse to prevent its implementation or counter such in a timely and effective manner.

If, however, the changes in the judiciary were implemented, it would not be possible to explain later that one did not know about the intention to carry them out!


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