

CoS?

HR

**THE
CONSTITUTIONAL
CRISIS IN POLAND
2015 - 2016**

Publisher:

Helsinki Foundation for Human Rights
11 Zgoda Str.
00-018 Warsaw

Authors of the report:

Małgorzata Szuleka, Marcin Wolny, Marcin Szwed

Consultation:

Piotr Kładoczny Ph.D., Danuta Przywara, Maciej Nowicki, Barbara Grabowska-Moroz

Translation:

Joanna Smętek

Desktop publishing:

Łukasz Borucki, Marta Borucka

The report uses fragments of opinions and analyses prepared by lawyers from the Helsinki Foundation for Human Rights. The authors of these publications were: Barbara Grabowska-Moroz, Marcin Szwed, Marcin Wolny, Michał Szwał (until September 2015), Aleksandra Brudnoch (until April 2016).

This publication is available under the Creative Commons Attribution + ShareAlike 3.0 Poland (CC BY-SA 3.0 PL)

Legislation in force as of 11 August 2016

TABLE OF CONTENTS

5	Introduction
6	1. Constitutional crisis in Poland – summary
7	2. Constitutional Tribunal – role and significance
8	3. Calendar of events
13	4. Act on the Constitutional Tribunal of June 2015
17	5. Election of five judges under the Act of June 2015
18	6. Motion to the Constitutional Tribunal by the Law and Justice Party MPs, parliamentary elections and refusal to take the oath from elected judges
19	7. First Act amending the Act on the Constitutional Tribunal
21	8. Resolutions of the Sejm, changes to the Sejm’s Rules of Procedure and elections of new judges of the Constitutional Tribunal
23	9. Judgements of the Constitutional Tribunal of December 2015
27	10. Second Act amending the Act on the Constitutional Tribunal
31	11. Decision of the Constitutional Tribunal of January 2016
32	12. Judgement of the Constitutional Tribunal of 9 March 2016
35	13. Opinion of the Venice Commission
37	14. New Act on the Constitutional Tribunal
41	15. Judgement of the Constitutional Tribunal of August 2016
42	16. Reactions to the constitutional crisis
52	17. Conclusions

INTRODUCTION

“Let’s have a look at what is going on around the Tribunal. Reparative acts, judgements. This has all been provoked by a political game whose aim is to annul a mechanism which is called the separation of powers. We will pay with the remnants of our legal culture, with trust, with an atmosphere that is spreading now.”

Professor Ewa Łętowska, Radio TOK FM, 11 August 2016¹

Since 2015, Poland has been going through a constitutional crisis related to the functioning of the Constitutional Tribunal. The crisis poses a serious threat to the rule of law, democracy and human rights protection.

The constitutional crisis has two aspects. The first aspect concerns the elections of new judges of the Constitutional Tribunal, the second – successive acts adopted since November 2015 amending the Act on the Constitutional Tribunal, which aimed at paralysing the Tribunal’s work.

The constitutional crisis has been developing at a fast pace and in various dimensions. Thus, a problem which could have been solved with measures foreseen by law has quickly become a dispute over the shape of the state and the meaning of the separation of powers principle.

The Helsinki Foundation for Human Rights (hereinafter: HFHR) has monitored the legislative procedure on the Act on the Constitutional Tribunal and the appointment of Constitutional Tribunal judges from the very beginning. The purpose of the current report is to document the course of events and the most important stages of the crisis. While preparing the report, we used press releases, opinions, expert analyses and publicly available documents. To illustrate the atmosphere which has accompanied the conflict, we also quote statements of politicians delivered in the course of parliamentary debates.

We hope that the publication of this report will help in determining the full scale of the problem and related risks.

¹Radio TOK FM, Prof. Łętowska: *Zapłacimy za TK. Zniszczeniem zaufania i resztek kultury prawnej. W tym demontażu chodzi o jedno*, available at: <http://www.tokfm.pl/Tokfm/1,103454,20530202,prof-letowska-zaplacimy-za-tk-zniszczeniem-zaufania-i-resztek.html#BoxNewsImg>

1 CONSTITUTIONAL CRISIS IN POLAND

SUMMARY

- The constitutional crisis has its origins in one of the intertemporal provisions of the Act on the Constitutional Tribunal of June 2015. The provision allowed the previous governing majority to choose five new judges of the Constitutional Tribunal. Whereas in 2015, three judges ended their tenure during the Sejm's 7th term and two during the term of the new Sejm, which was elected in October 2015 and had its first session on 12 November 2015.
- The constitutional crisis has disrupted the balance between different branches of power. The executive power claims the right to verify Constitutional Tribunal's judgements and refuses to acknowledge and execute them.
- The ongoing constitutional crisis has led to a deep polarisation of the views and opinions on the systemic role of the Constitutional Tribunal voiced in the public debate.
- The Constitutional Tribunal's independence was defended in interventions by courts (with the Supreme Court and the Supreme Administrative Court as leaders), units of local government, legal governments, law faculties, higher education institutions, non-governmental organisations and thousands of citizens who participated in marches and demonstrations, and signed petitions to the government.
- The events in Poland gathered interest of the international community. Representatives of the Council of Europe have multiple times expressed concerns at the changes with respect to the Constitutional Tribunal. The Secretary General of the Council of Europe, Commissioner for Human Rights and the Venice Commission have all emphasised that an independent Constitutional Tribunal is a fundamental element protecting the rule of law and a guarantee of the human rights protection system.
- In a response to the events in Poland, in January 2016 the European Commission made an unprecedented decision to initiate the rule of law procedure against Poland. This three-stage procedure may eventually result in the Commission's motion to the Council to employ one of the sanction mechanisms provided in the Treaty on the European Union.
- HFHR is of the opinion that the only solution to the ongoing crisis is to effectively appoint the three judges legally elected in October 2015 and to respect and execute the judgements of the Constitutional Tribunal.

2 CONSTITUTIONAL TRIBUNAL

ROLE AND SIGNIFICANCE

The Constitutional Tribunal is a constitutional organ of the state. Pursuant to the Constitution, judicial power is exercised by courts and tribunals. The Constitutional Tribunal is independent from the legislative and the executive. What is more, within the judiciary itself, it also occupies a position separate from common courts, the Supreme Court or the Supreme Administrative Court.

The Constitutional Tribunal reviews the constitutionality of laws, international agreements, regulations, as well as the goals and activity of political parties. Constitutional Tribunal's judgements are binding and final (Article 190 (1) of the Constitution).

The Constitutional Tribunal is composed of 15 judges elected for a single 9-year term. In the exercise of their office, judges of the Constitutional Tribunal are independent and subject only to the Constitution (Article 195 (1) of the Constitution).

The Constitutional Tribunal also plays an important role in the Polish system of human rights protection. In the light of the Constitution, everyone whose constitutional freedoms or rights have been infringed, shall have the right to appeal to the Constitutional Tribunal for its judgment on the conformity with the Constitution of a statute or another normative act upon which a court or organ of public administration has made a final decision (Article 79 of the Constitution).



Constitutional Tribunal in Warsaw. Source: Adrian Grycuk, <https://commons.wikimedia.org/w/index.php?curid=46587031>, CC BY-SA 3.0

3 CALENDAR OF EVENTS

11/07/2013	The President submitted a draft Act on the Constitutional Tribunal to the Sejm. The rationale for the draft act was developed by a team (composed, among others, of former Constitutional Tribunal judges) headed by the President of the Constitutional Tribunal
29/08/2013	The Sejm initiated works on the draft Act on the Constitutional Tribunal
03-10/2014 01-04/2015	The works of the Extraordinary Subcommittee on the draft Act on the Constitutional Tribunal
9/04/2015	Report of the Extraordinary Subcommittee after consideration of the draft Act on the Constitutional Tribunal submitted by the President to the Sejm
10/05/2015	The first round of presidential elections. Andrzej Duda obtained 34.76% of votes, while Bronisław Komorowski 33.77%
12/05/2015	During the works of the Sejm's committee, a transitional provision 135 was proposed (in the published text of the act this was Article 137) which set a deadline for submitting candidates for five judges of the Constitutional Tribunal replacing the judges whose tenures were to end in 2015
24/05/2015	The second round of presidential elections. Andrzej Duda who obtained 51.55% of votes was elected as the next President of the Republic of Poland
27/05/2015	The Sejm adopted the Act on the Constitutional Tribunal
07/06/2015	In its opinion on the new Act on the Constitutional Tribunal presented to the senators, HFHR pointed out that the transitional provision of Article 135 (in the published text of the act this was Article 137) could be unconstitutional
12/06/2015	The Senate initiated works on the Act on the Constitutional Tribunal

- 25/06/2015 The Sejm considered Senate's amendments, and the act was then presented to the President for signature
- 21/07/2015 The President signed the Act on the Constitutional Tribunal
- 06/08/2015 President Andrzej Duda assumed office
- 30/08/2015 The new Act on the Constitutional Tribunal entered into force
- 08/10/2015 The Sejm elected five new judges of the Constitutional Tribunal
- 23/10/2015 A group of MPs from the Law and Justice Party filed a motion with the Constitutional Tribunal to review the constitutionality of the new Act on the Constitutional Tribunal, including the intertemporal provision of Article 137
- 25/10/2015 Parliamentary elections. The Law and Justice Party obtained 37.58% of votes which translated into 235 seats in the Sejm
- 06/11/2015 Tenures of three judges of the Constitutional Tribunal expired: Maria Gintowt-Jankowicz, Wojciech Hermeliński and Marek Kotlinowski
- 10/11/2015 A group of MPs from the Law and Justice Party withdrew their motion to the Constitutional Tribunal which was filed in October 2015
- 12/11/2015 The Sejm's first session
- 13/11/2015 MPs from the governing majority submitted to the Sejm a draft Act amending the Act on the Constitutional Tribunal
- 17/11/2015 A group of MPs from the Civic Platform Party filed a motion with the Constitutional Tribunal to review the constitutionality of the Act on the Constitutional Tribunal of June 2015. The motion was partially analogous to the previous motion filed by the Law and Justice Party
- 17/11/2015 A draft Act amending the Act on the Constitutional Tribunal was moved for the first reading
- 19/11/2015 The Sejm concluded works on the draft Act amending the Act on the Constitutional Tribunal. The amending act was referred to the Senate
- 20/11/2015 The Senate did not propose amendments to the Act amending the Act on the Constitutional Tribunal. The amending act was presented to the President for signature

20/11/2015	The President signed the Act amending the Act on the Constitutional Tribunal of June 2015. The amending act was published in the Journal of Laws on the same day
23/11/2015	A group of MPs from the Civic Platform Party filed a motion with the Constitutional Tribunal to review the constitutionality of the Act of November 2015 amending the Act on the Constitutional Tribunal of June 2015
25/11/2015	The Sejm adopted resolutions pronouncing as null and void the resolutions of October 2015 in which the previous Sejm elected the new judges of the Constitutional Tribunal
30/11/2015	The Constitutional Tribunal issued a decision on securing a motion of a group of MPs filed on 17 November 2015. The Constitutional Tribunal called upon the Sejm to refrain from any actions with an aim of electing new judges of the Constitutional Tribunal until the Tribunal has issued a judgement
02/12/2015	The Sejm adopted resolutions on the election of five new judges of the Constitutional Tribunal
02/12/2015	Zbigniew Cieślak's tenure as a judge of the Constitutional Tribunal came to an end
2-3/12/2015 (night)	The President took the oath from the new judges of the Constitutional Tribunal
03/12/2015	The Constitutional Tribunal issued a judgement on the motion filed on 17 November 2015
04/12/2015	A group of MPs from the Civic Platform Party filed a motion with the Constitutional Tribunal to review the constitutionality of resolutions pronouncing as null and void the elections of judges in October 2015 and resolutions electing the new judges
08/12/2015	Teresa Liszcz's tenure as a judge of the Constitutional Tribunal came to an end
09/12/2015 (early morning)	The President took the oath from the fifth judge of the Constitutional Tribunal
09/12/2015	The Constitutional Tribunal issued a judgement on the Act of November 2015 amending the Act on the Constitutional Tribunal of June 2015
15/12/2015	The second draft Act amending the Act on the Constitutional Tribunal was submitted to the Sejm
17/12/2015	The first reading of the second draft Act amending the Act on the Constitutional Tribunal of June 2015
22/12/2015	The Sejm adopted the second draft Act amending the Act on the Constitutional Tribunal of June 2015

24/12/2015 (early morning)	The Senate adopted the second Act amending the Act on the Constitutional Tribunal of June 2015 without introducing amendments. The amending act was referred to the President for signature
28/12/2015	The President signed the amending act which was immediately published in the Journal of Laws. The amending act entered into force
29/12/2015	The First President of the Supreme Court filed a motion to the Constitutional Tribunal to review the constitutionality of the Act of December 2015 amending the Act on the Constitutional Tribunal of June 2015. A couple of days later, motions concerning this matter were filed by two groups of MPs, the Commissioner for Human Rights and the National Council of the Judiciary of Poland
07/01/2016	The Constitutional Tribunal discontinued proceedings concerning the resolutions passed by the Sejm in November and December 2015
12/01/2016	The President of the Constitutional Tribunal assigned two judges elected in December 2015 to cases
13/01/2016	The European Commission launched the rule of law inquiry against Poland
08-09/02/2016	The Venice Commission's delegation visited Poland in connection with the Act of December 2015 amending the Act on the Constitutional Tribunal
08-09/03/2016	Trial and delivery of the Constitutional Tribunal's judgement on the Act of December 2015 amending the Act on the Constitutional Tribunal of June 2015
11/03/2016	The Venice Commission's opinion on the Act of December 2015 amending the Act on the Constitutional Tribunal of June 2015
13/04/2016	The European Parliament passed a resolution on Poland
29/04/2016	A group of MPs from the Law and Justice Party submitted to the Sejm a draft of the new Act on the Constitutional Tribunal
03/06/2016	The Sejm began working on the draft of the new Act on the Constitutional Tribunal
07/07/2016	The Sejm adopted the new Act on the Constitutional Tribunal. The act was referred to the Senate
21/07/2016	The Senate presented amendments to the new Act on the Constitutional Tribunal
22/07/2016	The Sejm adopted some of the Senate's amendments. The act was referred to the President for signature

27/07/2016	The European Commission issued the Rule of Law Recommendation on the situation in Poland as part of the Rule of Law Framework
30/07/2016	The President signed the new Act on the Constitutional Tribunal
01/08/2016	The new Act on the Constitutional Tribunal was published in the Journal of Laws
02/08/2016	Two groups of MPs and the Commissioner for Human Rights filed motions with the Constitutional Tribunal to review the constitutionality of the new Act on the Constitutional Tribunal of August 2016
11/08/2016	The Constitutional Tribunal delivered the judgement on the Act on the Constitutional Tribunal of August 2016

4 ACT ON THE CONSTITUTIONAL TRIBUNAL

OF JUNE 2015

In 2013, the Polish President submitted a draft Act on the Constitutional Tribunal to the Sejm. The rationale for the draft act was developed by a team (composed, among others, of former Constitutional Tribunal judges) headed by the President of the Constitutional Tribunal.² The purpose of the draft was, among others, to streamline the proceedings before the Constitutional Tribunal and introduce changes in the election of judges.

As stated in the draft's rationale, *"the need to develop and adopt a new act on the Constitutional Tribunal derives from the following causes: [...] the need to create organisational conditions serving effective judicial decision making, the need to specify the criteria for election of Constitutional Tribunal judges as well as to establish a transparent procedure for selecting a pool of candidates out of which groups of MPs and the Presidium of the Sejm could submit candidates for judges."*³

In the light of the draft act, to become a Constitutional Tribunal judge a person would have to possess outstanding knowledge of the law and, for at least 10 years, serve as a judge or prosecutor, work in Poland as an attorney

²Watchdog Polska, *Czy projekt ustawy o Trybunale Konstytucyjnym może być mitycznym dokumentem wewnętrznym?*, available at: http://informacjapubliczna.org.pl/wwwdane/files/sprawy_vavn/tk_rzwp/20130322111027097_qyzn.pdf
The Constitutional Tribunal, *Act on the Constitutional Tribunal, Calendar*, available at: <http://trybunal.gov.pl/nie-tylko-dla-mediow/ustawa-o-tk-kalendarium/>

³Rationale for draft act (Sejm's publication no. 1590), available at: <http://www.sejm.gov.pl/Sejm7.nsf/druk.xsp?nr=1590>

at law, legal advisor or a notary, or perform functions in public institutions connected with the creation and application of the law (Article 18 para. 1 pt. 7 of the draft). The draft also enabled submission of candidates from among academics with a title of a law professor or doctor *habilitatus*, employed by the university or another scientific institution.

The draft act introduced a series of changes in the procedure of electing judges which was to be divided into two stages – preliminary selection of candidates and selection of candidates whose candidatures would then be voted on by the Sejm.

According to the draft act, at least 6 months prior to a given constitutional judge's end of tenure, the Speaker of the Sejm was to publish an announcement on the possibility of proposing persons who could later be selected as candidates for judges. At the preliminary selection stage, the right to propose persons who could later be selected as candidates was to be vested in a group of at least 15 MPs, the General Assembly of Judges of the Supreme Court, General Assembly of Judges of the Supreme Administrative Court, National Council of the Judiciary of Poland, National Council of the Prosecution, self-governments of attorneys-at-law, notaries and legal advisors, as well as councils of law faculties at universities. The draft act also foresaw a 4-year waiting period for MPs, senators and members of the European Parliament.

Next, at least 3 months prior to a given constitutional judge's end of tenure, the Speaker of the Sejm was to present to MPs and the public itself a list of persons who could be selected as candidates for a constitutional judge. At least 2 months before a given constitutional judge's end of tenure, the Presidium of the Sejm or a group of at least 50 MPs were to select and submit candidates from this pre-selected list. In the light of legislation binding at that time (i.e. the Act on the Constitutional Tribunal from 1997), elections of judges had to be conducted at least 30 days prior to the end of a given judge's tenure. In practice, this deadline had often proven too short, causing delays in the process of taking the oath from new judges. Research conducted by non-governmental organisations shows that in eight rounds of elections for constitutional judges, which took place between 2006 and 2010, in as many as five instances the oath was taken already after the departing judge's end of tenure, which meant that the Constitutional Tribunal worked in an incomplete bench.⁴

The Sejm was to vote on the candidatures at a session, electing judges with an absolute majority of votes in the presence of at least a half of all MPs.

Such a procedure of submitting candidates for Constitutional Tribunal judges fulfilled the recommendations formulated earlier by non-governmental organisations which conducted Citizen Monitoring of Candidates for Judges of the Constitutional Tribunal.



Judge of the Constitutional Tribunal, by Łukasz Borucki for the HFHR

⁴Łukasz Bojarski, Monika Szulecka, *Obywatelski monitoring kandydatów na sędziów*, available at: http://www.inpris.pl/fileadmin/user_upload/documents/obywatelski-monitoring-kandydatow-na-sedziow-raport.pdf

CITIZEN MONITORING OF CANDIDATES FOR JUDGES OF THE CONSTITUTIONAL TRIBUNAL

Since 2006, a group of non-governmental organisations (initially the Stefan Batory Foundation, then INPRIS - Institute for Law and Society, Polish Section of the International Commission of Jurists and HFHR) have conducted citizen monitoring of the election process of judges of the Constitutional Tribunal. The purpose of the monitoring is to guarantee that civil society participates in the discussion on the candidates for judges of courts and tribunals.

According to the involved organisations, courts – as the third branch of power – play a fundamental role in a state based on the rule of law and for this reason it is important to know who the judges are. The organisations emphasise that elections of judges should be transparent and should provide an opportunity for various circles, including non-governmental organisations and legal professionals (legal self-governments, law faculty councils and other interested institutions), to take a stance.

As part of their monitoring, the organisations ask candidates for judges to fill in a questionnaire concerning, among others, their education, academic achievements and professional experience. The survey also contains questions on membership in political parties, public functions obtained in general elections and social activity. If candidates for judges agree to participate, the coalition of non-governmental organisations also organises a public hearing in the course of which candidates can present themselves.

More information on Citizen Monitoring of Candidates for Judges of the Constitutional Tribunal is available at: www.inpris.pl/wazne/omx-monitoring/

The draft act also introduced changes in the proceedings before the Constitutional Tribunal. Among others, it extended the possibility of considering cases at closed hearings, changed the catalogue of grounds for discontinuation of proceedings and changed the rules of Prosecutor General's participation in the proceedings.

The draft act also extended the competences of the Commissioner for Human Rights in the proceedings before the Constitutional Tribunal. According to the draft, the Commissioner for Human Rights would be able to take part in all types of proceedings except for proceedings initiated by the President of Poland as preventive review of legislative acts (i.e. constitutional review before signature). It also set up rules for participation of social organisations in proceedings before the Constitutional Tribunal. In its light, the Tribunal would be able to request an opinion of organs or other entities on a given case and in a given time.

Between August 2013 and October 2013, opinions on the draft act were presented by the Prosecutor General, State Treasury Solicitors' Office, Polish Bar Council, National Council of the Judiciary of Poland⁵ and HFHR.⁶

⁵ Opinions are available on the Sejm's website:
<http://www.sejm.gov.pl/Sejm7.nsf/druk.xsp?nr=1590>

⁶ Helsinki Foundation for Human Rights, *Opinion of the Helsinki Foundation for Human Rights on the draft Act on the Constitutional Tribunal presented by the President of Poland (Sejm's publication no. 1590)*, 4 October 2013, available at:
<http://programy.hfhr.pl/monitoringprocesulegislacyjnego/files/2013/10/opinia-TK1.pdf>

WORKS ON THE DRAFT ACT

In August 2013, after the first reading, the draft act was moved for further consideration by a parliamentary committee. The works in the subcommittee (including with participation of constitutional judges – professor Stanisław Biernat and professor Andrzej Rzepliński – and at later stages representatives of the Constitutional Tribunal's Office, for example professor Kamil Zaradkiewicz⁷) lasted for over a year and a half. During that time, for example, the procedure for submitting candidates for judges by other entities than MPs or the Presidium of the Sejm was removed. The MPs who opted to delete this procedure argued that according to the Constitution the right to submit candidates for judges of the Constitutional Tribunal was vested only in MPs, and matters related to particular details of submitting candidates for judges should be included in the Rules of the Sejm.⁸

In April 2015, a report from the subcommittee's work was adopted.⁹ A couple of weeks later, at the last session of the Justice and Human Rights Committee an amendment was proposed which later became the source of the conflict around the Constitutional Tribunal. Robert Kropiwnicki, an MP from the then governing Civic Platform Party, submitted a proposal for a transitional provision. In the light of this provision, candidates for judges of the Constitutional Tribunal who could replace the five judges retiring in 2015, were to be submitted within 30 days of the act's entry into force.

“[...] I would like to propose that we add a provision in this chapter [...] which would regulate the elections of judges of the Constitutional Tribunal in this term. Let's go back to what we talked about during the last session of the Committee, namely the fact that a couple of judges end their tenures at the turn of the parliament's terms. As a result, a problem arises that the Tribunal's work may be blocked for a period of approximately 6 months. It is hard to imagine that the new parliament will choose the judges of the Constitutional Tribunal during its first session. There is a certain order. First, the presidia are chosen, then the government is shaped and it's safe to say that around February or March at the earliest the parliament would start working on the election of judges to the Constitutional Tribunal. And this could mean that the Tribunal would not be able to form the required bench to make decisions as a full bench or as other benches. So, in order not to block the Tribunal's work, I propose that in the case of judges whose tenures expire this year we apply such a procedure that their candidatures would have to be submitted within 30 days of the act's entry into force.”

Robert Kropiwnicki at the meeting of the Justice and Human Rights Committee on 12 May 2015¹⁰

The Sejm adopted this act at its session on 28 May 2015. When the act reached the Senate, HFHR presented its second opinion on the subject. HFHR critically assessed a number of changes introduced in the course of the legislative process (e.g. lowering of requirements for candidates or rejection of the procedure of preliminary candidate submission). HFHR also criticised the amendment introduced by MPs to elect all five judges together.

⁷List of committee and subcommittee sessions on this draft act is available on the Sejm's website:

<http://www.sejm.gov.pl/SQL2.nsf/poskomprocall?OpenAgent&7&1590>

⁸Sejm, *Extraordinary Subcommittee for examination of the draft Act on the Constitutional Tribunal presented by the President of Poland (Sejm's publication no. 1590)*, sessions on 13 January 2015, recording available at:

http://www.sejm.gov.pl/Sejm7.nsf/transmisje_arch.xsp?unid=A99F514811F120C0C1257DC6004A782D

⁹Draft Act on the Constitutional Tribunal presented by the President of Poland (Sejm's publication no. 1590),

The course of the legislative process, consideration in committees and subcommittees. Record of works is available at:

<http://www.sejm.gov.pl/SQL2.nsf/poskomprocall?OpenAgent&7&1590>

¹⁰Sejm, *Record from the session of the Justice and Human Rights Committee (no. 236) and Legislative Committee (no. 129)*, available at:

<http://orka.sejm.gov.pl/Zapisy7.nsf/wgskrnrr/SPC-236>

”

“The wording of Article 135a [i.e. Article 137 in the published text – author’s note] of the adopted Act on the Constitutional Tribunal raises serious concerns [...] In the Foundation’s opinion, such a provision is unacceptable, as it allows the current Sejm to choose two judges of the Constitutional Tribunal [...] to replace judges whose tenures expire during the term of the next Sejm.”

HFHR’s opinion on the Act of 27 May 2015 on the Constitutional Tribunal¹¹

Despite these calls, the Senate did not introduce any amendments in this respect. At its session at the end of June 2015, the Sejm adopted the final version of the act. The President signed the act on 21 July 2015.



Constitutional Tribunal in Warsaw. Source: flickr.com/Platforma Obywatelska RP CC BY-SA 2.0

¹¹Senate, HFHR’s opinion on the Act of 27 May 2015 on the Constitutional Tribunal (in: Senate’s publication no. 915), available at: http://www.senat.gov.pl/gfx/senat/userfiles/_public/k8/komisje/2015/ku/materialy/915_hfpc.pdf

5 ELECTION OF FIVE JUDGES

UNDER THE ACT OF 2015

In September 2015, a coalition of three non-governmental organisations (INPRIS, Polish Section of the International Commission of Jurists and HFHR) began monitoring the elections of candidates for judges of the Constitutional Tribunal. The organisations called upon the Speaker of the Sejm two times to publically announce the names of candidates for these posts. In their statement issued in September, the organisations expressed concern at the deadlines provided in the newly adopted act which governed the elections of new judges.

“[...] the schedule of elections with respect to one third of the Constitutional Tribunal judges is such that it de facto impedes a thorough discussion concerning the candidates. The deadline for submitting candidates passes on 29 September 2015. After this date, the Speaker of the Sejm will publish the official list of candidates for judges of the Constitutional Tribunal. As the last session of the Sejm is planned for 8-9 October 2015, it seems that there will only be a couple of days between the publication of the candidates’ names and the vote in the Sejm.”

Statement by the coalition of non-governmental organisations conducting Citizen Monitoring of Candidates for Judges of the Constitutional Tribunal¹²

After the list of candidates for constitutional judges was published at the end of September, the coalition of non-governmental organisations invited the candidates to a debate. None of the candidates attended the debate. At the last session of the Sejm on 8-9 October 2015, the governing majority chose five new judges of the Constitutional Tribunal.



Plenary Hall of the Sejm. Source: flickr.com/Sejm RP CC BY 2.0

¹²Helsinki Foundation for Human Rights, *Elections of candidates for Constitutional Tribunal judges: statement by the monitoring coalition and an invitation to the meeting*, available at:

<http://beta.hfhr.pl/wybory-kandydatow-na-sedziow-tk-oswiadczenie-koalicyi-monitorujacej-i-zaproszenie-na-spotkanie/>

JUDGES CHOSEN IN OCTOBER 2015

Roman Hauser – professor of law, since 2015 the President of the Supreme Administrative Court. His tenure was to begin on 7 November 2015,

Andrzej Jakubecki – professor of law, lecturer at Maria Curie-Skłodowska University. His tenure was to begin on 7 November 2015,

Krzysztof Ślęzak – professor of law, lecturer at Adam Mickiewicz University. His tenure was to begin on 7 November 2015,

Bronisław Sitek – professor of law, until 2015 the President of the State Treasury Solicitors' Office. His tenure was to begin on 3 December 2015,

Andrzej Sokala – professor of law, since 2012 the Dean of the Faculty of Law and Administration of the Mikołaj Kopernik University. His tenure was to begin on 9 December 2015.

6 MOTION TO THE CONSTITUTIONAL TRIBUNAL

BY THE LAW AND JUSTICE PARTY MPs, PARLIAMENTARY ELECTIONS AND REFUSAL TO TAKE THE OATH FROM ELECTED JUDGES

Two days before parliamentary elections, a group of MPs from the Law and Justice Party filed a motion with the Constitutional Tribunal to verify the constitutionality of, among others, the transitional provision which formed basis for the election of five constitutional judges.

The case was to be considered at two hearings. On 25 November 2015, the Constitutional Tribunal was to assess the provisions which served as a ground for the election of judges to replace the posts which would be released in November and December. On 21 December 2015, the Tribunal was to consider other charges.¹³ However, in the middle of November the motion was withdrawn.

¹³Ewa Siedlecka, *PiS wycofał z Trybunału Konstytucyjnego skargę na nową ustawę o TK*, Gazeta Wyborcza, available at: <http://wyborcza.pl/1,75398,19174082,pis-wycofal-z-trybunalu-konstytucyjnego-skarge-na-nowa-ustawe.html>

The parliamentary elections took place on 25 October 2015. The Law and Justice Party obtained 37.50% of votes which translated onto 235 seats in the Sejm. Thus, the Law and Justice Party was able to construct the first single-party government since 1989. The first session of the Sejm was planned for 12 November 2015.

A day before the first session of the Sejm, President Andrzej Duda in an interview for the Polish Radio called the elections of Constitutional Tribunal judges by the previous Sejm “a gross violation of democratic principles and the stability of a democratic state based on the rule of law.” In the same interview, President Andrzej Duda reflected upon the statement of former Constitutional Tribunal judges who said that “no circumstance can be quoted as a justification for the lack of conditions for taking the oath from judges chosen by the Sejm on the basis of a binding law.”¹⁴ The President stated:

“It is a shame that honourable chief justices do not pay careful attention to the manner in which these new judges were chosen by the Sejm. Shortly before the elections, we had an abrupt change of the act; then we had the elections of Constitutional Tribunal judges at the very last minute, by force, despite protests of the then opposition, protests which, in my view, were justified.”

President Andrzej Duda, Sygnały Dnia, 11 November 2015¹⁵

7 FIRST ACT AMENDING

THE ACT ON THE CONSTITUTIONAL TRIBUNAL

One of the first legislative initiatives taken by the new governing majority concerned the Act on the Constitutional Tribunal adopted in June 2015.

As the representatives of the governing majority explained, the main purpose of the amending act was to “rectify the mistakes made by the previous Sejm while changing the Act on the Constitutional Tribunal.”¹⁶ In practice, however, the amending act constituted a serious threat to the independence of the Constitutional Tribunal and its judges.

The draft Act amending the Act on the Constitutional Tribunal foresaw changes in the procedure of electing the President and Vice-President of the Constitutional Tribunal, introduced a three-year tenure of offices for the

¹⁴ Mateusz Adamski, *Oświadczenie byłych prezesów Trybunału Konstytucyjnego*, Rzeczpospolita, 10 November 2015, available at: <http://www.rp.pl/Sedziowie-i-sady/311109904-Oswiadczenie-bylych-prezesow-Trybunalu-Konstytucyjnego.html>

¹⁵ Polskie Radio, Program Pierwszy, *Prezydent Andrzej Duda: niepodległość jest zobowiązaniem dla wszystkich Polaków*, available at: <http://www.polskieradio.pl/7/129/Artykul/1543232,Prezydent-Andrzej-Duda-niepodleglosc-jest-zobowiazaniem-dla-wszystkich-Polakow>

¹⁶ Marek Ast, *Record of the Sejm's session of 19 November 2015*, available at: http://orka2.sejm.gov.pl/StenoInter8.nsf/0/40EB18089521535BC1257F020056C01D/%24File/01_ksiazka_e_bis.pdf, p. 4

President and Vice-President of the Constitutional Tribunal, terminated the tenures of the incumbent President and Vice-President of the Constitutional Tribunal within three months of the act's entry into force and contained a new transitional provision regulating the elections of constitutional judges in 2015.

The amending act was adopted at an exceptionally rapid pace. In the light of the Rules of the Sejm, the first reading of draft acts can, at the earliest, take place 7 days after the delivery of the copies to MPs, unless the Sejm or a committee resolve otherwise. In the case of this amending act, the whole legislative process lasted only seven days.

On 17 November 2015, the Speaker of the Sejm asked the National Council of the Judiciary of Poland, the Supreme Court, Prosecutor General, Polish Bar Council and the National Council of Attorneys at law for opinions on the draft act. On the same day, the Speaker of the Sejm referred the draft amending act for the first reading which took place a day later on 18 November 2015. During the first reading, at the session of the Sejm's Legislative Committee motions were submitted to request an opinion concerning the draft act from the Sejm's Bureau of Research. The second reading took place on the next day, on 19 November 2015. In the course of the session, motions were submitted to postpone the debate to allow the MPs to acquaint themselves with expert opinions. The motions were not granted and at the same session the Sejm decided not to refer the draft amending act to the committee, and to proceed with the third reading which took place on the same day. The act was carried unanimously by 268 votes (representatives of opposition parties – the Civic Platform, Nowoczesna and Polish People's Party left the room before the vote). A day later, on 20 November 2015 the Senate adopted the act without amendments.

HFHR called upon the President to motion the Constitutional Tribunal to conduct a constitutional review of the amending act before its signature. HFHR emphasised that the principle of judicial independence and the independence of the judiciary as a whole requires that the executive and legislative branches of power refrain from removing presidents or vice-presidents of courts and tribunals from their offices. Ignoring this principle entails exerting pressure by political bodies on the judiciary. In its call, HFHR also pointed out that the elections of five judges were carried out by the previous Sejm and cannot be invalidated by the adoption of a new act.

”

“Entry into force of the act will shake the foundations of the most important organ of the judiciary and may have direct negative impact on the level of protection of human rights and freedoms in Poland.”

HFHR's call to President Andrzej Duda, 20 November 2015¹⁹

On 20 November 2015, the act was moved to the President who signed it on the same day. The amending act entered into force 14 days after its publication in the Journal of Laws.



¹⁷ Article 37 (4) of the Rules of the Sejm, available at: <http://www.sejm.gov.pl/prawo/regulamin/kon7.htm>

¹⁸ MP draft Act amending the Act on the Constitutional Tribunal, available at: <http://sejm.gov.pl/Sejm8.nsf/PrzebiegProc.xsp?id=6F47220F552236D3C1257F00004D4A98>

¹⁹ Helsinki Foundation for Human Rights, *Call upon President Andrzej Duda, 20 November 2015*, available at: http://beta.hfhr.pl/wp-content/uploads/2015/11/HFPC_wystapienie_20112015.pdf

THE MOST IMPORTANT CHANGES INTRODUCED BY THE ACT OF NOVEMBER 2015 AMENDING THE ACT ON THE CONSTITUTIONAL TRIBUNAL

- Tenures of office of the President and Vice-President of the Constitutional Tribunal were to expire within three months of the act's entry into force,
- The provision which allowed the previous Sejm to elect five constitutional judges was repealed,
- A new transitional provision was introduced according to which candidates for judges of the Constitutional Tribunal to replace those judges whose tenures expired in 2015 were to be submitted with 7 days of the act's entry into force (Article 137a),
- Taking the oath before the President was to constitute the beginning of a judge's tenure, and the ceremony itself would have to be conducted within 30 days of the judge's election by the Sejm,
- The President of the Constitutional Tribunal was to be selected by the President of Poland from among three candidates presented by the General Assembly of Judges of the Constitutional Tribunal,
- The tenure of office of the President of the Constitutional Tribunal was set to last three years and could be renewed once.

8

RESOLUTIONS OF THE SEJM

CHANGES TO THE SEJM'S RULES OF PROCEDURE AND ELECTION OF NEW JUDGES OF THE CONSTITUTIONAL TRIBUNAL

After the adoption of the Act of November 2015 amending the Act on the Constitutional Tribunal, the governing majority once again initiated the procedure of electing five judges of the Constitutional Tribunal.

First, on 25 November 2015, the Sejm adopted five resolutions which invalidated the resolutions of October 2015 appointing five constitutional judges. This was an unprecedented move. Never before had the Sejm adopted resolutions voiding resolutions adopted by the previous Sejm. The new resolutions were published in the Polish Monitor even though there was no basis in law for such publication.

Intense debate on these resolutions lasted, with breaks, for almost 3 hours, and the President of the Constitutional Tribunal was present to listen. In the debate, representatives of the governing majority claimed, among others, that the *“resolutions are to rectify the previous elections of judges”* (MP Marek Ast). The rapporteur Stanisław Piotrowicz also commented on the act which formed basis for the election of judges and the legislative procedure in which the act was developed. Stanisław Piotrowicz indicated that the act *“was created by the judges of the Constitutional Tribunal”* who also participated in the works of parliamentary subcommittees and who defended *“the provisions they submitted to President Komorowski.”* This, in turn, was to raise doubts as to the apolitical character of the Constitutional Tribunal and placed it in an awkward position of *“a judge in one's own case.”*

“In the opinion of MPs from the Civic Platform, the Constitutional Tribunal was to be the one who would block the reforms of the country. We cannot allow that. We cannot disappoint Poles. We will fulfil our promises. We will restore the constitutional order.”

Stanisław Piotrowicz, MP²⁰

While objecting to the adoption of the resolutions, MPs from opposition parties argued that it would lead to *“the politicisation of the Constitutional Tribunal,”* violation of the standards of a democratic state based on the rule of law and an unconstitutional removal of judges from office (Kamila Gasiuk-Pihowicz, MP).²¹

“This day will go down in history. Students will write master theses and doctors their dissertations on the subject of your return to the principle of the unity of power. Your compass is wrong, it's not the right direction – you chose to go east.”

Krzysztof Brejza, MP²²

After passing the resolutions voiding the previous resolutions of October 2015, at the same session, the Sejm introduced changes to the Rules of the Sejm. Until that point, as a rule candidates for judges of the Constitutional Tribunal had to be submitted at least 30 days before the end of tenure of departing judges. However, in November 2015, the governing majority added a paragraph to this article in the light of which if *“other circumstances arise necessitating election,”* candidates were to be presented within the deadline set by the Speaker of the Sejm.²³ The Speaker of the Sejm set this deadline for 1 December 2015.

At the next session on 2 December 2015, the Sejm chose five new judges of the Constitutional Tribunal. The Sejm chose the judges based on the provisions which were not yet in force at that time (the Act of November 2015 amending the Act on the Constitutional Tribunal was to enter into force on 4 December 2015). Thus, the elections of judges did not have a legal basis.

The President took the oath from four judges at night from 2 to 3 December 2015. *“Presidential ministers and Mr Jarosław Kaczyński were present at the ceremony in the Presidential Palace early in the morning. The President of the Constitutional Tribunal professor Andrzej Rzepliński was absent, as we were not able to reach him by phone,”* said Marek Magierowski, the chief of the presidential press service.²⁴ The media was not invited to the ceremony.

²⁰ MP Stanisław Piotrowicz, *Record of the Sejm's session of 25 November 2015*, available at: http://orka2.sejm.gov.pl/StenoInter8.nsf/0/A2F2CB8309D6D12FC1257F090049000E/%24File/02_ksiazka_a_bis.pdf

²¹ MP Kamila Gasiuk-Pihowicz, *Record of the Sejm's session of 25 November 2015*, available at: http://orka2.sejm.gov.pl/StenoInter8.nsf/0/A2F2CB8309D6D12FC1257F090049000E/%24File/02_ksiazka_a_bis.pdf

²² MP Krzysztof Brejza, *Record of the Sejm's session of 25 November 2015*, available at: http://orka2.sejm.gov.pl/StenoInter8.nsf/0/A2F-2CB8309D6D12FC1257F090049000E/%24File/02_ksiazka_a_bis.pdf

²³ Resolution of the Sejm of 26 November 2015 on the changes in the Rules of the Sejm, Monitor Polski no. 1136

²⁴ „Polityka”, *Kim są wybrani przez PiS sędziowie Trybunału Konstytucyjnego*, available at: <http://www.polityka.pl/tygodnikpolityka/kraj/1642671,1,kim-sa-wybrani-przez-pis-sedziowie-trybunalu-konstytucyjnego.read>

JUDGES OF THE CONSTITUTIONAL TRIBUNAL ELECTED IN DECEMBER 2015

Lech Morawski – professor of law, lecturer at the Nicolaus Copernicus University.
Chosen for the already filled office of a judge whose tenure was to expire on 6 November 2015,

Henryk Cioch – professor of law, senator in the Senate of the 8th term.
Chosen for the already filled office of a judge whose tenure was to expire on 6 November 2015,

Mariusz Muszyński – professor of law, lecturer at the Cardinal Stefan Wyszyński University.
Chosen for the already filled office of a judge whose tenure was to expire on 6 November 2015,

Piotr Pszczołkowski – advocate, MP in the Sejm of the 8th term. His tenure began on 3 December 2015,

Julia Przyłębska – lawyer, until 2015 judge of the Regional Court in Poznań.
Her tenure began on 9 December 2015.

9 JUDGEMENTS OF THE CONSTITUTIONAL TRIBUNAL

OF DECEMBER 2015

ACT OF JUNE 2015 BEFORE THE CONSTITUTIONAL TRIBUNAL

On 17 November 2015, a group of MPs from the Civic Platform filed a motion with the Constitutional Tribunal to examine the constitutionality of selected provisions of the Act on the Constitutional Tribunal of June 2015. This was a similar motion to the one submitted by the MPs from the Law and Justice Party shortly before the parliamentary elections in October 2015. MPs questioned the constitutionality of, among others, the procedure of appointing the President of the Constitutional Tribunal, for electing judges of the Constitutional Tribunal (to the extent that it concerned the deadline for submitting candidates for judges) and the intertemporal provision which formed basis for the election of all five new judges of the Constitutional Tribunal in October 2015.

On 30 November 2015, the Constitutional Tribunal called upon the Sejm not to take any actions aiming at the appointment of judges to the Constitutional Tribunal until the Tribunal had ruled on the subject. The MPs did not comply with this call.

On 3 December 2015, the Constitutional Tribunal considered the motion. It pronounced the majority of the act's provisions as constitutional. The Constitutional Tribunal ruled that the transitional provision which allowed for the election of all five judges at once was partially unconstitutional. Insofar as it allowed for appointment of three judges whose tenures expired in November 2015, the provision was constitutional. However, insofar as it allowed for election of judges whose tenures expired in December 2015, it was – in the Tribunal's view – in violation of the Constitution.

“In the case of the two judges of the Tribunal whose terms of office either ended on 2 December or will end on 8 December 2015, the legal basis of the significant stage of the judicial election process was challenged by the Tribunal as unconstitutional. Since the judicial vacancies were not yet filled, as the last legal activity was not carried out (i.e. the taking of the oath of office by the judges before the President of Poland), the derogation of the relevant scope of Article 137 of the Constitutional Tribunal Act should result in the discontinuance and closure of the procedure [...]. However, what does not raise constitutional doubts is the legal basis of the election of the three judges of the Tribunal who were to take office after the judges whose terms of office had ended on 6 November 2015 [...]. Pursuant to the rule that a judge of the Tribunal is chosen by the Sejm during the parliamentary term in the course of which the vacancy occurs, the judicial election carried out on that basis was valid and there are no obstacles to complete the procedure by the oath of office taken, before the President of Poland, by the persons elected to the judicial offices in the Tribunal.”²⁵

Judgement of the Constitutional Tribunal of 3 December 2015, K 34/15

In the rationale for this judgement, the Tribunal also referred the procedure of taking the oath from the judges by the President. The Tribunal noted that it is the President's obligation to take the oath, and the fact that the law does not set a deadline for this act means that it should be conducted immediately.

“The Constitutional Tribunal has clearly stated that a delay in the giving of the oath of office may not be justified only by an allegation that the legal basis of the judicial election is defective. Indeed, the allegation referring to the content of the Constitutional Tribunal Act would have to be transformed into an application to determine the conformity to the Constitution of the said Act by the Constitutional Tribunal.”

Judgement of the Constitutional Tribunal of 3 December 2015, K 34/15

In the rationale for this judgement, the Constitutional Tribunal emphasised that the Tribunal's judgements are binding and final, so “as of the moment of the entry into force of this ruling, no state authority has a legal basis for challenging – as unconstitutional – those provisions that regulate the element of the procedure for electing judges of the Tribunal which are deemed constitutional by the Tribunal in this ruling.”²⁶

„The judgement of the Constitutional Tribunal is final. The Tribunal hopes that the judgement will be published,” said the chair of the bench, judge Sławomira Wronkowska-Jaśkiewicz, when closing the hearing.²⁷

However, the judgement of the Constitutional Tribunal was not published immediately. On 10 December 2015, Minister Beata Kempa, the Chief of the Chancellery of the Prime Minister, sent a letter to the President of the Constitutional Tribunal in which she noted that the judgement was invalid, as it was issued by an inappropriate bench. The judgement was issued by a bench composed of five judges, while – in the opinion of the Chief of the

²⁵ English fragments of judgement K 34/15 are quoted after the official translation on the Constitutional Tribunal's website. The translation is available at: <http://trybunal.gov.pl/en/hearings/judgments/art/8748-ustawa-o-trybunale-konstytucyjnym/> [translator's note]

²⁶ Judgement of the Constitutional Tribunal K 34/15, 3 December 2015

²⁷ Oral rationale of the judgement of the Constitutional Tribunal K 34/15, 3 December 2015, available at: <https://www.youtube.com/watch?v=5rj8mYoHxxE>

Chancellery of the Prime Minister – it should have been issued by a full bench. In her letter to the President of the Constitutional Tribunal, Minister Beata Kempa informed the President that until the matter is clarified she withheld publication of the judgement.²⁸ In a response to the letter, the President of the Constitutional Tribunal Andrzej Rzepliński noted that the Constitutional Tribunal's judgements are final and binding, and their publication is a constitutional duty of the Prime Minister.²⁹

Eventually, almost two weeks after the judgement's delivery by the Constitutional Tribunal, it was finally published in the Journal of Laws.³⁰

On 14 December 2015, the Regional Prosecutor's Office in Warsaw initiated an investigation into the failure by public officials (including the Prime Minister) to fulfil their duty to publish the judgement. The Regional Prosecutor's Office had received ten notifications in that case. At the beginning of January 2016, the investigation was discontinued.³¹

ACT OF NOVEMBER 2015 AMENDING THE ACT ON THE CONSTITUTIONAL TRIBUNAL OF JUNE 2015

On 9 December 2015, the Constitutional Tribunal considered motions submitted by a group of MPs, Commissioner for Human Rights, National Council of the Judiciary of Poland and the First President of the Supreme Court, concerning the Act of November 2015 amending the Act on the Constitutional Tribunal. The applicants challenged selected provisions, but also the whole act on account of the manner in which it was adopted. According to the Commissioner for Human Rights, National Council of the Judiciary of Poland and the First President of the Supreme Court, unconstitutionality of the legislative process resulted from, among others, the failure to obtain an opinion from the National Council of the Judiciary of Poland and to consult the draft with experts.

The Constitutional Tribunal stated that “[t]he Constitutional Tribunal has no doubts as to the fact that the legislative proceedings were conducted in breach of the provisions of the Sejm's Rules of Procedure, and that the scale of those breaches was considerable.”³² The Tribunal quoted in this respect its judgement of 2013 issued by a full bench in which it stated that the first reading of a draft act can take place in a parliamentary committee as long as it did not adversely affect the legislative process. The Constitutional Tribunal stated, however, that in this case (concerning the act of 19 November 2015) there are circumstances justifying a departure from the interpretative line drawn in 2013 and considering that the legislative procedure was in violation of the Constitution. However, to do that, in December 2015 the Constitutional Tribunal would have to rule as a full bench. This, in turn, was not possible because at the beginning of December the Tribunal was composed of 10 active judges, including two

²⁸ Constitutional Tribunal, *Letter from the Chancellery of the Prime Minister*, available at: http://trybunal.gov.pl/fileadmin/content/nie-tylko-dla-mediow/ustawa-kalendarium/Pismo_KPRM_z_10_grudnia_2015_r_ADO.pdf

²⁹ Constitutional Tribunal, *Letter of the President of the Constitutional Tribunal*, available at: http://trybunal.gov.pl/fileadmin/content/nie-tylko-dla-mediow/ustawa-kalendarium/Odpowiedz_Prezesa_TK_na_pismo_o_ogloszeniu_wyroku_K_3_4_15_ADO.pdf

³⁰ Journal of Law, Position no. 2129, available at: <http://dziennikustaw.gov.pl/du/2015/2129/1>

³¹ Regional Prosecution in Warsaw, *Information on discontinuation of proceedings on failure to fulfil duties connected to the lack of publication of the Constitutional Tribunal judgement*, available at: http://www.warszawa.po.gov.pl/pl/main/komunikat/id/370/alias/informacja_o_umorzeniu_sledztwa_w_sprawie_niedopelnienia_obowiazkow_w_zwiazku_z_zaniechaniem_publicacji_wyroku_trybunalu_konstytucyjnego.html

³² English fragments of judgement K 35/15 are quoted after the official translation on the Constitutional Tribunal's website. The translation is available at: <http://trybunal.gov.pl/en/hearings/judgments/art/8792-nowelizacja-ustawy-o-trybunale-konstytucyjnym/> [translator's note]

judges who submitted motions to be excluded from ruling on the case (President Andrzej Rzepliński and Vice President Stanisław Biernat). Due to this fact the Constitutional Tribunal could not rule on the constitutionality of the legislative procedure of the act.

“The Constitutional Tribunal wishes to maintain the view that a quick pace of legislative proceedings – even as quick as the pace of the enactment of the Act of 19 November 2015 – does not, in itself, determine [...] the unconstitutionality of the said Act, although it may be assessed negatively from the point of view of the parliamentary culture and parliamentary good manners.”

Judgement of the Constitutional Tribunal of 9 December 2015, K 35/15

Upon analysing other charges, the Constitutional Tribunal ruled that the provision regulating the tenures of the President and Vice President of the Constitutional Tribunal is partially unconstitutional. The Tribunal noted that, while the legislator has the right to regulate the term of office for these functions, it should take proper care of the independence of judges. In the Tribunal's view, allowing the country's President to choose the President of the Constitutional Tribunal for the second term is a mechanism which *“does not meet the requirement of balance and cooperation between the separate branches of government, and manifests an infringement of the principle of the independence of the Constitutional Tribunal and its judges.”* As unconstitutional, the Tribunal also considered a provision according to which the tenures of the President and Vice President of the Constitutional Tribunal were to expire within 3 months of the act's entry into force. This would, in the Tribunal's view, constitute an unjustified interference of the executive branch of power with the performance of the judicial power.

The Tribunal also pronounced as unconstitutional the provision which set forth a 30-day deadline for the President to take the oath from the newly elected judges. As in the judgement of 3 December 2015, the Tribunal emphasised that taking the oath from a judge is an obligation of the President who *“should take action so that the judges elected by the Sejm could forthwith commence the exercise of the said office.”*

The Constitutional Tribunal, as in its judgement of 3 December 2015, quoted the rule that the Sejm has the right to choose judges to replace those whose tenures end within the Sejm's term. Thereby the Tribunal considered Article 137a, introducing a seven-day deadline for submitting candidates for judges whose tenures expired in 2015, as partially unconstitutional.

The Constitutional Tribunal also commented on the competence of the National Council of the Judiciary to present opinions on draft acts on the Constitutional Tribunal in the course of the legislative process. The Tribunal noted that the competence of the Council to present opinions on draft acts is set forth in an act. In the Tribunal's view, since this competence has its basis in an act and not in the Constitution, it cannot be assumed that *“the lack of an opinion presented by the National Council of the Judiciary in the legislative proceedings which concerned the Bill amending the Constitutional Tribunal Act constituted an infringement of the Constitution.”* This statement was later used by the governing majority to rebut charges that it did not request the opinion of the National Council of the Judiciary of Poland during the works on further amendments to the Act on the Constitutional Tribunal in December 2015.

The judgement was published in the Journal of Laws on 18 December 2015.



10 SECOND ACT AMENDING

THE ACT ON THE CONSTITUTIONAL TRIBUNAL

The two judgements did not end the disputed around the Constitutional Tribunal. Not even a week after the announcement of the second judgement, on 15 December 2015, the Law and Justice Party's MPs submitted to the Sejm another draft Act amending the Act on the Constitutional Tribunal.

This time, the draft act introduced much wider changes concerning the functioning of the whole Constitutional Tribunal. In its original version, the draft foresaw changes in the ruling procedure – the Tribunal would have to rule as a full bench composed of 13 judges (previously, the act required a minimum of 9 judges), and the decisions would have to be made by a two thirds majority. The draft also repealed a number of provisions of the Act on the Constitutional Tribunal of June 2015, including those guaranteeing the independence of judges, regulating their number and the election procedure. Finally, the draft aimed to repeal the provision which established Warsaw as the seat of the Constitutional Tribunal.

Immediately after the draft's submission, opinions on the draft were presented by the Supreme Court, HFHR, Polish Bar Council, National Council of the Judiciary of Poland and the Prosecutor General. All the opinions were in agreement that the draft violated the Constitution and they all assessed it negatively. Despite this fact, the draft was referred for the first reading which took place on 17 December 2015. While presenting the rationale behind the draft, the Law and Justice Party's MPs claimed that its main aim was to “clarify the internal organisation of the Constitutional Tribunal and procedure before it.”³³ As in the case of amendments of November 2015, this draft also provoked a heated debate. The speeches of MPs from opposition parties were rich both in proposals for cities which could become the Tribunal's new seat (for example Gliwice, Jaworzna, Jelenia Góra, Suwałki, Ełk, Lublin or Rzeszów), but also in substantive remarks indicating that the adoption of the draft in that shape would block the Constitutional Tribunal. The latter, in turn, would constitute a threat to the entire democratic system.

“The greatest harm which you have done is in the manner in which you treated the pillar of a democratic states based on the rule of law, the fundament – the principle of the separation of powers. You set fire, now you're adding fuel.”

Borys Budka, MP³²

MPs from the governing majority respondent with charges that the Constitutional Tribunal was implicated in the political debate: “the jurisprudence [of the Constitutional Tribunal – author's note] in the recent years, both under President Andrzej Rzepliński and previous Presidents, shows that the Constitutional Tribunal has often got involved

³³ MP Rapporteur Stanisław Piotrowicz, *Sejm's session of 17 December 2015*, record is available at: http://orka2.sejm.gov.pl/StenoInter8.nsf/0/3A69F21BA52F83CFC1257F1E005F0CBE/%24File/05_c_ksiazka_bis.pdf

³⁴ MP Borys Budka, *Sejm's session of 17 December 2015*, record is available at: http://orka2.sejm.gov.pl/StenoInter8.nsf/0/3A69F21BA52F83CFC1257F1E005F0CBE/%24File/05_c_ksiazka_bis.pdf

in the political debate” (Arkadiusz Mularczyk, MP).³⁵ The governing majority also raised charges of the low effectiveness of the work of the Constitutional Tribunal judges: “*The Constitutional Tribunal judges come to work twice a week [...] In December, there were no hearings*” (Stanisław Piotrowicz, MP).³⁶ While fending off the charges of unconstitutionality and violation of democratic principles, MP Stanisław Piotrowicz stated that the amending act was to strengthen the protection of civil rights.

“*The act answers the need to increase the protection of civil rights [...]. If the Tribunal's judges do what they were appointed to do, if they set up hearings, consider cases, if it is done only for our homeland's glory, to ensure the rule of law in the state and protection of civil rights.*”

Stanisław Piotrowicz, MP³⁷

After its first reading, the draft was referred for further works in the Legislative Committee. The session of the Committee took place on 21 December 2015 and it lasted 14 hours (ended just after midnight). The Committee rejected the opposition’s motion (similar proposals were presented by non-governmental organisations) to organise a public hearing on the draft act. Opposition’s motions to order a break and consult experts on constitutional law were also rejected.

At the Committee’s session, MPs from the Law and Justice Party proposed a series of amendments which substantially modified the draft or, even, attempted to regulate completely new matters outside of its original scope (e.g. a possibility of initiating disciplinary proceedings against a constitutional judge upon a motion of the Speaker of the Sejm or a possibility of renewing the proceedings in case of a judgement delivered with a gross violation of the procedure).

Experts from the Legislative Bureau present at the session suggested that some of the amendments could be unconstitutional, as they went outside the scope of admissible changes, and this could result in a violation of the principle of three readings. The Legislative Bureau indicated that the amendments interfere with the fundamental provisions of the Act on the Constitutional Tribunal, and submitting them during the works in the Committee could lead to bypassing the requirement of going through the full procedure in the Sejm. These reservations were, however, ignored.

The Legislative Bureau also questioned a number of other provisions in the draft, including provisions concerning the removal of judges from office by the Sejm upon a motion of the General Assembly; requirement for the Constitutional Tribunal to pass judgements by a two thirds majority; renewal of proceedings upon a participant’s motion in case of delivering the judgement in a gross violation of the procedure; and on the act’s entry into force on the day of its publication. These remarks were ignored as well.

All amendments presented by the opposition were rejected.

Eventually, the Committee adopted a report in which it proposed, among others, to add a prohibition of conducting a hearing earlier than after three months from the day the notification on the date of the hearing has been delivered to the participants of the proceedings, and for cases adjudicated in full bench – after six months. It also opted to include a requirement to consider cases in the sequence in which they were filed without exception and proposed changes in transitional provisions (including e.g. consideration of cases in the sequence in which they were filed even when the case had already been initiated but not finalised).

³⁷ MP Arkadiusz Mularczyk, *Sejm's session of 17 December 2015*, record is available at: http://orka2.sejm.gov.pl/StenoInter8.nsf/0/3A69F21BA52F83CFC1257F1E005F0CBE/%24File/05_c_ksiazka_bis.pdf

³⁸ MP Rapporteur Stanisław Piotrowicz, *Sejm's session of 17 December 2015*, record is available at: http://orka2.sejm.gov.pl/StenoInter8.nsf/0/3A69F21BA52F83CFC1257F1E005F0CBE/%24File/05_c_ksiazka_bis.pdf

³⁹ MP Rapporteur Stanisław Piotrowicz, *Sejm's session of 17 December 2015*, record is available at: http://orka2.sejm.gov.pl/StenoInter8.nsf/0/3A69F21BA52F83CFC1257F1E005F0CBE/%24File/05_c_ksiazka_bis.pdf

After the adoption of the Committee's report, on 22 December 2015 the second reading was conducted. During the reading, further amendments were proposed which were referred to the Legislative Committee for assessment. Yet again, the Committee presented negative opinions on all amendments proposed by the opposition.

At the same time, the Committee positively assessed the amendments proposed by the Law and Justice Party (supported by the opposition) concerning, among others, the removal of the provision allowing for a renewal of proceedings when a judgement was delivered with a gross violation of the procedure and the provision on the Tribunal's seat. MP Stanisław Piotrowicz stated that the proposal to move the Tribunal's seat was only a "test" of the attitude of the opposition towards Poles and towards other cities in Poland.

After the adoption of an additional report by the Legislative Committee, on the same day (22 December 2015), the draft was referred for the Sejm's plenary session to undergo the third reading. The act was adopted by 234 votes of the governing party, with all opposition parties voting against.

On 22 December 2015, the act adopted by the Sejm was referred to the Speaker of the Senate who, in turn, moved it for consideration at a joint session of the Senate's Legislative Committee and the Committee for Human Rights, Rule of Law and Petitions. The joint session took place on the next day (i.e. 23 December 2015).

At the joint session, an expert from the Senate's Legislative Bureau presented a critical opinion on the act. According to the Bureau, it was unconstitutional to increase the majority required to pass judgements (two thirds of votes), to introduce the three and six months deadlines for organising the hearing and to not foresee any *vacatio legis*. The experts also criticised the provision allowing the Sejm to remove a constitutional judge from office upon a motion of the General Assembly. In this respect, the Bureau's expert emphasised that:

"If it was not seen as independent, the Tribunal would not enjoy public trust and proper prestige. Thus, it is doubtful whether it would be able to contribute to the development of the principles of constitutionalism and democratic state based on the rule of law. To deprive a constitutional court of its independence, especially from the legislative whose work constitutes the object of constitutional scrutiny, would in the end necessarily mean that an instrument of the protection of rights and constitutional freedoms in the form of a constitutional complaint set forth in Article 79 (1) of the Constitution would be perceived as an illusory measure."

Katarzyna Konieczko, expert on legislation in the Legislative Bureau in the Chancellery of the Senate³⁸

The representative of the Prosecutor General was equally critical towards the amending act. The representative pointed out that a series of provisions violates the Constitution and many, even if constitutional, are not practical from the perspective of the effectiveness of proceedings before the Constitutional Tribunal.

The act was also criticised by the representatives of non-governmental organisations present at the session: the Civic Legislative Forum, Panoptikon Foundation, Amnesty International and HFHR. They presented a joint statement raising a series of concerns both with respect to the manner of proceeding (i.e. the exceptionally rapid pace of legislative works, disregard for critical remarks concerning the constitutionality of the act, adoption of amendments far exceeding the original normative scope of the act) and substantive solutions foreseen by the act.

Despite those reservations, the Committees rejected all amendments proposed by the opposition and recommended adoption of the act without amendments. After adoption of the Committees' report, on the same day the act was referred for the plenary session of the Senate. Having debated for many hours, at around 4 a.m. on 24 December 2015, the Senate adopted the act without amendments. On the same day, the Minister of Foreign Affairs Witold Waszczykowski requested the Venice Commission to prepare an opinion on the adopted act (see further *The Opinion of the Venice Commission*, p. 35).

As with the amending act of November 2015, on the day when the act was moved for signature to the President, HFHR called upon the President to motion the Constitutional Tribunal to review the act's constitutionality

³⁶Senate, *Joint session of the Legislative Committee (no. 11), Human Rights, Rule of Law and Petitions Committee (no. 8) on 23 December 2015*, available at: www.senat.gov.pl/prace/komisje-senackie/przebieg,6282,1.html

before signature. HFHR pointed out that the act violates the principles of judicial independence, independence and separate character of the judicial power and the separation of powers. HFHR emphasised that the act was adopted in violation of the rules of the legislative procedure, and that its execution would entail a paralysis of the Constitutional Tribunal.

”

*“The hasty pace of work in the Sejm and Senate combined with the lack of *vacatio legis* – a period when public authorities and participants of proceedings pending before the Constitutional Tribunal could adjust their decisions to the new law before it becomes binding – violate the principles of the state’s loyalty towards its citizens and reliability of the laws it adopts.”*

HFHR statement to the President of Poland, 24 December 2015³⁹

The President signed the act on 28 December 2015. On the same day, the act was published in the Journal of Laws.

THE MOST IMPORTANT CHANGES INTRODUCED IN THE ACT OF DECEMBER 2015 AMENDING THE ACT ON THE CONSTITUTIONAL TRIBUNAL

- The minimum number of judges composing the full bench was increased – previously the law required 9 and the act changed it to at least 13,
- Decisions have to be made by a two thirds majority,
- Cases have to be considered in the sequence in which they were filed, without exception,
- A hearing can be organised no earlier than after three or six (in cases considered by the full bench) months after the notification of the parties,
- A judge can be removed from office “in particularly serious cases” by the Sejm in a resolution adopted upon a motion of the General Assembly of Judges of the Constitutional Tribunal,
- Disciplinary proceedings can be initiated against a Tribunal’s judge upon a motion of the Minister of Justice or the President of Poland,
- Lack of *vacatio legis* – the act entered into force on the day of its publication.



³⁹Helsinki Foundation for Human Rights, *President urged not to sign new law on Constitutional Tribunal*, available at: www.hfhr.pl/apel-do-prezydenta-o-niepodpisywanie-ustawy-o-tk/

11 DECISION OF THE CONSTITUTIONAL TRIBUNAL

OF JANUARY 2016

At the beginning of December, a group of MPs from the Civic Platform Party filed a motion with the Constitutional Tribunal to review the constitutionality of the Sejm's resolutions passed in November and December 2015. The group questioned both those resolutions which invalidated the previous resolutions of October 2015 (on the appointment of five judges of the Constitutional Tribunal) and those which appointed new judges.

The Constitutional Tribunal considered this motion at a closed hearing in January 2016 and decided to discontinue the proceedings. The decision was passed by a bench composed of 10 judges.

The Constitutional Tribunal decided that the resolutions invalidating the resolution of October 2015 are not normative acts and cannot be examined by the Tribunal.

When it comes to the resolutions appointing five new judges, the Tribunal considered them as *"a category of not law-making resolutions through which the Sejm would exercise its creative function in relation to public authority bodies."* Thus, they do not fulfil the criteria of a normative act either.

What is more, in its decision, the Tribunal emphasised:

"[...] in the spirit of responsibility for the state's constitutional order, respecting the principle of cooperation of powers set forth in the preamble to the Constitution, and protecting constitutional values, [the Constitutional Tribunal – author's note] has made attempts to cooperate with the legislative and executive powers, especially with the President, becoming a party to the dialogue in an effort to find a constitutional solution of disputed matters [...] So far, it has not brought the desired results. On the contrary, one has the impression that it has escalated the actions whose aim is to limit the Tribunal's capacity to perform the function vested in it by the constitutional legislator."

Decision of the Constitutional Tribunal of 7 January 2016, U 8/15

As a result of this decision and on the basis of judgements passed in December 2015, the President of the Constitutional Tribunal Andrzej Rzepliński assigned judges Piotr Pszczołkowski and Julia Przyłębska, chosen to replace those judges whose terms of office expired in December 2015, to adjudicate cases.

From then on, there have been 12 adjudicating judges in the Tribunal.

12 JUDGEMENT OF THE CONSTITUTIONAL TRIBUNAL

OF 9 MARCH 2016

A day after the Act of December 2015 amending the Act on the Constitutional Tribunal entered into force, a motion to review its constitutionality was filed with the Constitutional Tribunal by the First President of the Supreme Court. A couple of days later, motions were also filed by the Commissioner for Human Rights, National Council of the Judiciary of Poland and two groups of MPs. Amicus curiae briefs were submitted in the proceedings by the Polish Bar Council, National Council of Attorneys at law, HFHR and the Stefan Batory Foundation. In its opinion, HFHR emphasised that *“the totality of changes introduced in the Act amending the Act on the Constitutional Tribunal aims to increase the influence of the legislative and executive powers on the constitutional court and to slow down the proceedings before the Tribunal, so as to make the timely and effective control of acts’ compliance with the Constitution impossible.”*⁴⁰

All applicants motioned for the whole amending act to be pronounced as unconstitutional. Additionally, the First President of the Supreme Court, National Council of the Judiciary of Poland and a group of MPs motioned for the case to be considered under the Act on the Constitutional Tribunal in the wording from before the amendment. The Constitutional Tribunal considered the case on the basis of the Constitution and those provisions of the Act of June 2015 which were not questioned. The Constitutional Tribunal ruled as a bench composed of 12 judges.

In the middle of February, the Prosecutor General presented an extensive position on the case. At the beginning of March 2016, the amendments to the Act on the Prosecution entered into force. The amendments joined the office of the Minister of Justice with that of the Prosecutor General. Four days before the hearing, the Minister of Justice submitted a brief in which it completely withdrew the position presented by the previous Prosecutor General and, at the same time, motioned for the hearing to be postponed by 14 days.

A day before the hearing, the Deputy Minister of Justice stated in an interview that the delivered judgement will not be binding.

”

“Tomorrow, this will not be a hearing of the Constitutional Tribunal, but a gathering of people who sit in the Tribunal at best. From the institutional point of view, tomorrow’s events, if they take place, will be an absolute scandal [...]. The judges of the Tribunal are free people. They can meet when they want to, they can order espresso and cookies, and they can meet. We are not able to use any coercive measures, but we appeal and we ask. Do not destroy the Polish state.”

Deputy Minister of Justice Partyk Jaki, Radio Zet, 7 March 2016⁴¹

⁴⁰ Helsinki Foundation for Human Rights, *Constitutional Tribunal Act – the monitoring of legislative amendments*, available at: <http://www.hfhr.pl/en/constitutional-tribunal-act-the-monitoring-of-legislative-amendments/>

⁴¹ Radio Zet, *Gość Radia Zet: Patryk Jaki*, available at: <http://www.radiozet.pl/Radio/Programy/Gosc-Radia-ZET/Artykuly/Patryk-Jaki-u-Moniki-Olejnik-00019704>

The narrative formulated by the Deputy Minister of Justice on “*a private meeting of judges*” was used by the governing majority to explain why none of the government’s representatives appeared at the hearing.

At the hearing on 8 March 2016, the Constitutional Tribunal examined the motions. After a day-long hearing, on the next day, the Tribunal delivered its judgement in which it pronounced the Act amending the Act on the Constitutional Tribunal as unconstitutional.

First and foremost, the procedure in which the act was adopted was considered not in compliance with the Constitution. The pace was accelerated to the extent that it made the actual consideration of the draft act impossible, despite repeatedly expressed concerns as to its possible unconstitutionality. The Constitutional Tribunal compared the legislative procedure on this amending act with the procedure concerning the Act of November 2015 amending the Act on the Constitutional Tribunal and arrived at a conclusion that the scale of violations with respect to the December act was much bigger. This was, among others, due to the addition of significant amendments after the first reading without their first reading, failure to ensure a seven-day break between the delivery of the draft to MPs and its first reading, as well as a violation of the obligation to consult the draft with relevant bodies.

” *“The Tribunal wished to emphasise that the legislative process – as a set of constitutional and lower-level rules determining the manner for adopting acts – has to fulfil two basic tasks – provide an act with a democratic mandate and give it substantive legitimacy. The violations indicated by the Tribunal which had taken place in the process of adopting the amending act justify a claim that in the case at hand, it did not fulfil any of those tasks.”*

Judgement of the Constitutional Tribunal of 9 March 2016, K 47/15

As unconstitutional, the Tribunal also considered the provision which stated that the act enters into force on the date of its publication. The Tribunal ruled that due to the extent and depth of introduced changes it was impossible for the Tribunal “*to immediately adjust to them so as to be able to effectively perform its constitutional role, and it deprived other interested parties of the possibility of acquainting themselves with the changes and properly prepare for them.*”

The Constitutional Tribunal stated that the changes concerning its adjudicating procedure, for example the requirement of a full bench in the majority of cases, would slow down the proceedings, while the rules of assigning cases to particular benches were not based on rational criteria. Furthermore, the requirement to consider cases in the sequence in which they were filed, in the Tribunal’s view, violated the Constitution. The Tribunal stated that the legislator’s task “*is to create optimal conditions for adjudicating cases and not interfere with the ruling process by setting dates when the Tribunal can deal with a given case.*” According to the Constitutional Tribunal, these provisions make it impossible for the Tribunal to “*act thoroughly and effectively, and by interfering with its independence and separation from other powers, they violate the principle of the rule of law,*” and thus violate the Constitution.

Similarly, the Constitutional Tribunal pronounced as unconstitutional the provision which required that the hearing be organised at least three or six months after the notification of the participants. Additionally, transitional provision which foresaw application of the new regulations to “pending” cases, i.e. cases initiated before the act’s entry into force, were also deemed in violation of the Constitution.

As violating the separation of powers principle, the Constitutional Tribunal considered provisions which allowed for an initiation of disciplinary proceedings upon a motion of the Minister of Justice and which gave the Sejm the power to remove a judge from office upon a motion of the General Assembly.

The Constitutional Tribunal pointed out that the amending act’s legal implications are annulled due to the Tribunal’s finding of its unconstitutionality. This, in turn, means that the provisions of the Act on the Constitutional Tribunal in the wording from before the amending act were restored.

The representatives of the government and the governing majority did not accept this judgement.

“In this particular case, fortunately, we do not have to do with a judgement, with a ruling and a lawful action. This meeting of judges in the Constitutional Tribunal was not a meeting of the constitutional court, but a meeting of judges who inaptly tried to deliver a ruling which they could not have passed, since they acted in violation of the Act on the Constitutional Tribunal, which governs the functioning of the Tribunal, and in violation of the Constitution.”

Minister of Justice Zbigniew Ziobro⁴²

Prime Minister Beata Szydło, in turn, even before the judgement was delivered had said that she would not be able to publish it. In her opinion, to publish a decision which is not a judgement of the Constitutional Tribunal would violate the Constitution.⁴³

In March 2016, Warsaw prosecution registered 100 notifications on a potential crime, which consisted in not publishing the judgement of the Constitutional Tribunal of 9 March 2016, perpetrated by government officials. At the end of April, the Regional Prosecutor’s Office for Warsaw-Praga refused to initiate pre-trial proceedings in the case. The rationale stated that “the verification proceedings did not reveal any signs of failure to fulfil duties by the Prime Minister, Minister-Member of the Council of Ministers and the President and employees of the Governmental Centre of Legislation.”⁴⁴

In the middle of May, HFHR filed an appeal against this decision. In HFHR’s assessment, the refusal to publish the Constitutional Tribunal’s judgement caused a damage of a systemic, political, economic and reputational character. “Such behaviour of the authorities leads directly to a significant risk of legal dualism whereby some bodies will abide by the case law of the Constitutional Tribunal and some may not acknowledge it. This directly influences the legal security of an individual,” the statement read.⁴⁵

In the meantime, the Constitutional Tribunal returned to adjudicating. Since March, it has functioned on the basis of the Act on the Constitutional Tribunal of June 2015. During this time, the judges have passed more than 20 judgements concerning the compliance of various legal acts with the Constitution. Until August, none of them had been published.



⁴² Rzeczpospolita, Ziobro: dzisiejsze orzeczenie TK nie ma mocy prawnej, available at: <http://www.rp.pl/Sedziowie-i-sady/303099902-Ziobro-dzisiejsze-orzeczenie-TK-nie-ma-mocy-prawnej.html>

⁴³ Rzeczpospolita, Wyrok Trybunału Konstytucyjnego z 9 marca ws. nowelizacji ustawy o TK autorstwa PiS, available at: <http://www.rp.pl/Sedziowie-i-sady/303099926-Wyrok-Trybunalu-Konstytucyjnego-z-9-marca-ws-nowelizacji-ustawy-o-TK-autorstwa-PiS.html>

⁴⁴ Polskie Radio, Jest decyzja prokuratury w sprawie nieopublikowania wyroku TK, available at: <http://www.polskieradio.pl/5/3/Artykul/1612924,Jest-decyzja-prokuratury-w-sprawie-nieopublikowania-wyroku-TK>

⁴⁵ Helsinki Foundation for Human Rights, Zażalenie na postanowienie o odmowie wszczęcia śledztwa, available at: http://www.hfhr.pl/wp-content/uploads/2016/06/HFPC_zazalenie_publikacja_wyroku_TK.pdf

13 OPINION OF THE VENICE COMMISSION

At the beginning of December 2015, a group of nine organisations (HFHR, Polish Bar Council, INPRIS – Institute for Law and Society, Centre for Civic Education, Institute of Public Affairs, Panoptykon Foundation, Stefan Batory Foundation, Civic Development Forum, Citizens Network Watchdog Poland), sent a letter to the Venice Commission in which it noted the changes that had been introduced with respect to the Constitutional Tribunal.

The European Commission for Democracy through Law (the so-called Venice Commission) is an advisory body of the Council of Europe composed of experts on constitutional law. As part of its activity, the Commission delivers opinions on draft acts and acts adopted in the countries of the Council of Europe, in particular in countries under transformation. Multiple times, the Commission has presented its opinions, among others, on matters concerning particular countries (e.g. Ukraine and Hungary), but also on specific issues (e.g. the oversight of secret services).

The Venice Commission can issue opinions, among others, upon a motion of a member of the Council of Europe. Non-governmental organisations do not have a mandate to motion for such an opinion. In a response to the statement sent by organisations, the President of the Commission Gianni Buquicchio informed them that the Commission *“is monitoring the events in Poland with attention and concern.”*⁴⁶

After the Senate adopted the Act of December 2015 amending the Act on the Constitutional Tribunal, the Minister of Foreign Affairs requested the Venice Commission to prepare an opinion on the amending act.

The Ministry explained that *“political circumstances have arisen around the Tribunal which have revealed not only interpretational concerns as to the wording of the Act on the Constitutional Tribunal currently in force, but also a lack of legal mechanisms helping to solve complicated questions which have recently appeared in the judicial practice of the Tribunal.”*⁴⁷

At the beginning of February 2016, the Venice Commission visited Poland. In the course of the visit, it met representatives of the Sejm, Senate, Ministry of Justice and the Constitutional Tribunal as well as the Commissioner for Human Rights and non-governmental organisations.

At the beginning of March, the Venice Commission published its opinion (in an atmosphere of controversy caused by the publication of the opinion by the media in the form in which it was presented to the government)⁴⁸. The opinion of the Venice Commission was clear – blocking the work of the Constitutional Tribunal constitutes a threat to the principle of the rule of law, democracy and protection of human rights.

⁴⁶ Helsinki Foundation for Human Rights, *Venice Commission on situation in Poland*, available at: <http://www.hfhr.pl/komisja-wenecka-na-temat-sytuacji-w-polsce/>

⁴⁷ Ministry of Foreign Affairs, *Minister Waszczykowski wystąpił o opinię w sprawie Trybunału Konstytucyjnego do Komisji Weneckiej*, available at: https://www.msz.gov.pl/pl/aktualnosci/wiadomosci/minister_waszczykowski_wystapil_o_opinie_w_sprawie_trybunalu_konstytucyjnego_do_komisji_weneckiej

⁴⁸ Ewa Siedlecka, *Komisja Wenecka ostro krytykuje zmiany dotyczące Trybunału Konstytucyjnego*, *Gazeta Wyborcza*, available at: <http://wyborcza.pl/1,75398,19687673,komisja-wenecka-ostro-krytykuje-zmiany-dotyczace-trybunalu-konstytucyjnego.html>

The Venice Commission was critical of the solutions introduced in the amending act. In the Commission's opinion, they could slow down or block the Constitutional Tribunal's work, which – in turn – is unacceptable in the light of European standards.

A part of the opinion was also devoted to the manner of electing judges of the Constitutional Tribunal. The Venice Commission indicated that the conflict around the election of three judges to replace those whose tenures expired in November 2015 became the source of conflict.

“As the composition of Parliament changes after elections, the new Parliament must not be deprived of its power to take its own decisions on issues that arise during its mandate. It would be in conflict with democratic principles if Parliament could choose public officials including judges (far) in advance even if the term of office expires within the term of office of the subsequent term of Parliament. Vice versa, the subsequent Parliament has to respect the decisions of the former Parliament with regard to appointments of public officials.”

Opinion of the Venice Commission of 11 March 2016 on the Act amending the Act on the Constitutional Tribunal⁴⁹

The Venice Commission also concluded that the on-going constitutional crisis in Poland would not be the right moment to change the Constitution. The Commission did, however, recommend that the Constitution be amended in the long run to introduce a qualified majority for the elections of the Constitutional Tribunal judges.

In its opinion, the Commission also included the judgement of the Constitutional Tribunal of 9 March 2016. It emphasised that a refusal to publish it would not only be contrary to the rule of law, but it would also lead to “an unprecedented deepening of the constitutional crisis” (see also *Judgement of the Constitutional Tribunal of 9 March 2016*, p. 32).

THE MOST IMPORTANT RECOMMENDATIONS INCLUDED IN THE OPINION OF THE VENICE COMMISSION ON THE ACT AMENDING THE ACT ON THE CONSTITUTIONAL TRIBUNAL

- **Consideration of cases in the order of their submission (“sequence rule”)** – The Venice Commission assessed that “any imposition of an obligation to hold a hearing and to decide – in a strict chronological order risks not being in compliance with European standards.”
- **Two thirds majority for adopting decisions** – The Venice Commission stressed that in the light of the Polish Constitution, decisions are made by a majority of votes, which suggests a simple majority of votes. A change of this rule would require a change of the Constitution.
- **Three or six months long delay of hearings** – According to the Venice Commission, such a requirement could deprive the Tribunal's measures of much of their effect and “in many cases even make them meaningless.”
- **Implementation of Constitutional Tribunal's judgements** – The Venice Commission stated that “[n]ot only the rule of law but also the European Constitutional Heritage require the respect and effective implementation of decisions of constitutional courts.” The Venice Commission called upon all “[s]tate organs and notably the Sejm to fully respect and implement the judgments of the Tribunal.”

⁴⁹ Venice Commission, *Opinion on amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland, adopted by the Venice Commission at its 106th Plenary Session (Venice, 11-12 March 2016)*, available at: [www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2016\)001-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2016)001-e). The Polish translation of the opinion is available at: www.hfhr.pl/komisja-wenecka-krytycznie-o-nowelizacji-ustawy-o-tk-tlumaczenie-opinii/

At the end of March, the Speaker of the Sejm Marek Kuchciński announced that he would establish the Team of Experts on the Issues of the Constitutional Tribunal. The first meeting of this expert group composed of 15 people took place on 31 March 2016.⁵⁰ The experts were to propose a solution to the problems of the Constitutional Tribunal for the Sejm. In their work, the experts were to use a number of opinions and analyses, including those by the Venice Commission. According to initial declarations, the expert report was to be ready within two months.⁵¹ However, its first version was finalised at the beginning of June.⁵² The report was published at the beginning of August 2016. It is divided into three chapters, the first one contains an analysis of the Venice Commission's opinion; the second one is devoted to the analysis of events which "have played a part in the creation and evolution of the political and legal conflict around the Tribunal;" and the third one contains ten recommendations for the legislator and potential changes to the Constitution.⁵³

14 NEW ACT ON THE CONSTITUTIONAL TRIBUNAL

On 29 April 2016, without waiting for the report of the Team of Experts on the Issues of the Constitutional Tribunal set up by the Speaker of the Sejm, a group of MPs from the Law and Justice Party submitted to the Sejm a draft Act on the Constitutional Tribunal. The works on this draft, together with a draft submitted by the Polish People's Party and a citizen initiative were initiated on 3 June 2016. The choice of this date could have been motivated by the development of events in relation to the Rule of Law Framework initiated by the European Commission (see further *Reactions to the constitutional crisis – international community*, p. 42).

After they were referred to the Sejm's Justice and Human Rights Committee, all three draft acts on the Constitutional Tribunal were transferred to the subcommittee set up specifically for the purpose of selecting the leading draft. The subcommittee decided that the Law and Justice Party's draft act, in its entirety based on the Act on the Constitutional Tribunal of 1997, would be the leading document.

⁵⁰Warsaw University Professor Jan Majchrowski became the coordinator. Among experts composing the Team there were: Jan Kochanowski University Professor Arkadiusz Adamczyk, Wojciech Arndt Ph.D., Professor Bogusław Banaszak, Professor Adam Bosiacki, Professor Andrzej Bryk, Cracow University of Economics Professor Paweł Czubik, Professor Andrzej Dziadzio, Professor Jolanta Jabłońska-Bonca, Professor Anna Łabno, Wrocław University Professor Maciej Marszał, Supreme Court Judge Emeritus Bogusław Nizieński, Professor Bogdan Szlachta, Cardinal Stefan Wyszyński University Professor Bogumił Szmulik, Warsaw University Professor Jarosław Szymanek. Sejm, *Meeting of the Team of Experts on the Issues of the Constitutional Tribunal*, available at: <http://www.sejm.gov.pl/sejm8.nsf/komunikat.xsp?documentId=56063CB59E91F3C8C1257F870053B175>

⁵¹Polskie Radio, *Zespół Ekspertów ds. Problematyki Trybunału Konstytucyjnego przedstawił pierwsze wnioski*, available at: <http://www.polskie-radio.pl/5/3/Artykul/1608865,Zespolekspertow-ds-Problematyki-Trybunalu-Konstytucyjnego-przedstawil-pierwsze-wnioski>

⁵²Telewizja Republika, *Projekt raportu sejmowego zespołu ekspertów ds. problematyki TK „w najbliższym czasie”*, available at: <http://telewizja-republika.pl/projekt-raportu-sejmowego-zespołu-ekspertow-ds-problematyki-tk-quotw-najblizszym-czasiequot,35457.html>

⁵³Sejm, *Press release*, available at: <http://sejm.gov.pl/Sejm8.nsf/komunikat.xsp?documentId=9F6F6F6374648877C125800200373967>

From the onset, the selected draft raised numerous concerns of a constitutional nature. They were reflected in the opinions of the Supreme Court, National Council of the Judiciary of Poland, National Council of Attorneys at law, Polish Bar Council, HFHR and the Sejm's Bureau of Legislation. In its opinion presented to the MPs, HFHR stated:

"[...] the draft [prepared by the Law and Justice Party – author's note] introduces many solutions which subordinate the Constitutional Tribunal to the executive. Unfortunately, it is impossible to agree with the opinions of its creators indicating that it constitutes yet another step towards a legislative solution to the problems which have accumulated recently around the systemic position of the Constitutional Tribunal. It is hard to accept that it constitutes an attempt to fulfil the recommendations of international organisations as regards solving the dispute about the Constitutional Tribunal."

HFHR's opinion of 15 June 2016 on three draft acts on the Constitutional Tribunal⁵⁴

The provisions which raised most doubts included: an obligation imposed on the President of the Constitutional Tribunal to assign cases to judges elected by the Sejm of the 8th term; conditioning the expiry of a constitutional judge's tenure on the consent of the President of Poland; granting the President of Poland and the Prosecutor General the competence to decide when the Constitutional Tribunal should consider a case as a full bench; and a rule of considering cases in the sequence in which they were filed, unless the President of Poland motions otherwise.

Other provisions proposed in the draft act submitted by MPs from the Law and Justice Party were also assessed negatively. They included: excessively long (up to 120 days) period of delay before a hearing could be set up; a need to adjourn the hearing due to the absence of a properly informed Prosecutor General; changes in the manner of publishing judgements of the Constitutional Tribunal which, pursuant to the act, would be published upon a motion of the President of the Constitutional Tribunal.

"Mr Chairman, once again we should not assess the law in a casuistic manner, that is whether the Prosecutor General was present or not. [...] I understand that you now look at it in those categories that the President is the best possible, the Prosecutor General almost as good as the President, and that you-know-who watches over it all, and that everything will be fine. But, if in a couple of years – God willing – the situation changes, they you will say that these solutions are bad. Let's create laws which are not designed for particular persons, particular persons who hold offices. The separation of powers principle was established to avoid such situations."

Borys Budka, MP⁵⁵

Representatives of the opposition were also critical towards an obligation imposed on the Tribunal to finalise all submitted cases within a year of the act's entry into force and to suspend for six months all cases in which the document initiating the proceedings would not fulfil the new formal requirements. The exclusion of the Commissioner for Human Rights from the majority of proceedings before the Tribunal was also assessed critically.

Despite all these reservations, it was precisely the Law and Justice Party's draft which became the foundation for the future Act on the Constitutional Tribunal. Neither the opinions presented by external parties nor the texts of draft acts submitted by other parliamentary clubs and Legislative Initiative Committee were included in its text. The only significant modification considered shortening to at least 60 days of the period after which a trial was possible.

⁵⁴ Helsinki Foundation for Human Rights, *Uwagi Helsińskiej Fundacji Praw Człowieka do poselskiego projektu ustawy o Trybunale Konstytucyjnym (druki sejmowy nr 558), obywatelskiego projektu ustawy o Trybunale Konstytucyjnym (druk sejmowy nr 550) oraz poselskiego projektu ustawy o zmianie ustawy o Trybunale Konstytucyjnym (druk sejmowy nr 569)*, available at: http://www.hfhr.pl/wp-content/uploads/2016/06/HFPC_opinia_tk_15062016.pdf

⁵⁵ Sejm, *Record from the Justice and Human Rights Committee session (no. 25) of 29 June 2016*, available at: <http://orka.sejm.gov.pl/Zapisy8.nsf/wgskrrnr/SPC-25>

During the works in the Sejm's Justice and Human Rights Committee, the draft act received only minor changes and in such a form was referred for the second reading in the Sejm. During the second reading, MPs from the Law and Justice Party submitted amendments which significantly altered the draft act. Before the vote on the draft, however, the representative of the Legislative Initiative Committee, Jarosław Marciniak announced that the Committee he represented withdrew its draft. As a result, after consultations with the Sejm's Bureau of Research, the Speaker of the Sejm Marek Kuchciński decided to once again move the drafts authored by the Law and Justice Party and the Polish People's Party to the Justice and Human Rights Committee for their repeated consideration.

In the course of those renewed considerations, the subcommittee decided yet again that the Law and Justice Party's draft will be the leading act. The subcommittee modified the draft act by adding amendments submitted by the MPs from the governing parliamentary majority in the course of the second reading. As a result, the competence of the President and Prosecutor General to decide when the Tribunal should rule as a full bench was removed. However, an equivalent competence was vested in a group of 3 judges of the Constitutional Tribunal. The composition of the Constitutional Tribunal's bench required to assess the compliance of acts with the Constitution was reduced from seven to five judges.

The most important changes were, however, made to Article 68. The Article introduced a procedure of raising an objection as to the content of a proposed judgement. When raised in the course of deliberations in a full bench by at least four judges, an objection would cause a need to postpone deliberations by three months. After this period, raising another objection during repeated deliberations would imply a need to defer the process by another three months and a necessity to vote on the ruling by a two thirds majority of sitting judges. Additionally, transitional provisions were modified. They obliged the Tribunal to proceed in accordance with the new act in every case which was subject to Tribunal's consideration. Even if a particular bench had already been assigned or a judgement had already been waiting to be announced.

The act was eventually passed on 7 July 2016. During its debate on the draft, the Senate decided to introduce amendments eliminating some of the constitutional concerns invoked in the course of the legislative process. As a result, the President lost the competence to decide on the expiry of a constitutional judge's mandate. The President of the Constitutional Tribunal, in turn, received a competence to decide on suspending the sequence rule (i.e. adjudicating cases in the order in which they were filed) if this was justified by the protection of freedoms and civil rights, national security and the constitutional order.

The Constitutional Tribunal was directly endowed with a competence to examine the procedure required by law to adopt a normative act, and not as initially – to only examine the procedure prescribed by the Constitution. The Senate also decided to empower the Commissioner for Human Rights to be able to participate in every proceedings before the Constitutional Tribunal. It also modified the wording of Article 89 which, in the opinion of MPs submitting the draft, was to be the basis for publication of all judgements of the Constitutional Tribunal after 10 March 2016, that is with exclusion of the judgement of 9 March 2016. The new version of this provision stated that, within 30 days of the act's entry into force, the rulings of the Constitutional Tribunal delivered before 20 July 2016 in violation of the Act on the Constitutional Tribunal shall all be published with an exception of those rulings which concern normative acts which lost their legal force. In other words, the provision yet again excluded this particular judgement from publication.

After the act was adopted by the Sejm, the members of HFHR's Board and Council as well as the Helsinki Committee in Poland issued a joint statement.

“The Act betrays the principle of the separation of powers and paves the way for a dictatorship of the parliamentary majority which is not limited by the Constitution. This an assault on constitutional democracy. We protest.”

Joint statement by the members of HFHR's Board and Council
as well as the Helsinki Committee in Poland, 22 July 2016⁵⁶

⁵⁶Helsinki Foundation for Human Rights and Helsinki Committee in Poland, *Statement of 22 July 2016*, available at: http://www.hfhr.pl/wp-content/uploads/2016/07/stanowisko_kh_hfpc_22072016.pdf

The President signed the Act on the Constitutional Tribunal on 30 July 2016. The act foresaw a 14-day *vacatio legis*. It was published in the Journal of Laws on 1 August 2016.

THE MOST IMPORTANT ELEMENTS OF THE ACT ON THE CONSTITUTIONAL TRIBUNAL OF JULY 2016

- Immediate taking up of their duties by all judges who took the oath before the President,
- Consideration of cases in the sequence in which they were filed, unless the President of the Constitutional Tribunal decides otherwise,
- Necessity to defer the hearing in a full bench in case of an absence of the Prosecutor General,
- Necessity to defer deliberations on the judgement even by six months in the case when an objection is raised as to the content of the judgement by at least four judges,
- Publication of Tribunal's judgement upon a motion of the President of the Constitutional Tribunal filed with the Prime Minister,
- Exclusion of the judgement of 9 March 2016 from publication,
- Transitional provisions which would slow down consideration of cases before the Tribunal,
- Imposition on the Tribunal of an obligation to finalise all cases within one year of the act's entry into force,
- Necessity to suspend the proceedings for six months in the case when the initiating document does not fulfil formal criteria,
- Necessity to apply the new act to all proceedings before the Tribunal,
- Only a 14-day-long *vacatio legis*.



15 JUDGEMENT OF THE CONSTITUTIONAL TRIBUNAL OF AUGUST 2016

A day after the publication of the act in the Journal of Laws, two groups of MPs and the Commissioner for Human Rights submitted motions in this case to the Constitutional Tribunal. A couple of days later, a similar motion was filed by the First President of the Supreme Court. The applicants motioned for the whole act to be deemed unconstitutional, but they also formed charges against particular provisions.

The Tribunal considered the motions of MPs and the Commissioner for Human Rights at a closed hearing and announced the judgement on 11 August 2016.

The Constitutional Tribunal ruled that the Act on the Constitutional Tribunal of July 2016 is partially not compliant with the Constitution. As unconstitutional, the Tribunal considered, among others, the obligation imposed on the President of the Constitutional Tribunal to assign cases to three judges chosen for posts which had already been filled; introduction of provisions allowing selective publication of Tribunal's judgements, excluding publication of the judgement issued on 9 March 2016; introduction of the procedure whereby the President of the Tribunal motions the Prime Minister to publish judgements and the necessity to defer the trial due to the absence of a properly notified Prosecutor General. The Tribunal also deemed as unconstitutional the provisions on considering cases in the sequence in which they were filed and on the obligation to consider cases in a full bench upon a motion of at least three judges.

At the same time, the Tribunal discontinued the proceedings with respect to the procedure of electing the President of the Constitutional Tribunal by the President from among three candidates submitted by the General Assembly of Judges of the Constitutional Tribunal. The Tribunal opined that the motions initiating review in this respect were formulated too narrowly and did not include all relevant regulations, which made the review of their constitutionality impossible.

The Act on the Constitutional Tribunal of June 2015 lost its binding force with the entry into force of the Act on the Constitutional Tribunal of July 2016. The latter, in turn, will not be binding to the extent to which the Constitutional Tribunal found its provisions unconstitutional. However, the Tribunal's consideration of practically all of the transitional provisions as unconstitutional may cause significant problems in applying the law.

The judgement of the Constitutional Tribunal of 11 August 2016 has not been published.

16 REACTIONS TO THE CONSTITUTIONAL CRISIS

The constitutional crisis has provoked plenty of controversy and protests. In autumn 2015, the debate ensued on the role and significance of the Constitutional Tribunal, and the arguments raised and statements issued were strongly polarised.

The events in Poland attracted the attention of international organisations which began closely monitoring the situation surrounding the Constitutional Tribunal.

INTERNATIONAL COMMUNITY

Representatives of the European Union, Council of Europe, United Nations, various states and international non-governmental organisations all have made statements on the situation in Poland.

THE REACTION OF THE EUROPEAN UNION

When in December 2015, the Sejm worked on the Act amending the Act on the Constitutional Tribunal, the First Vice-President of the European Commission Frans Timmermans sent a letter to the Minister of Foreign Affairs Witold Waszczykowski and the Minister of Justice Zbigniew Ziobro with a call concerning the amendments.

“This amendment, on the basis of the information at our disposal, concerns the functioning of the Court as well as the independence of its judges. I would expect that this law is not finally adopted or at least not put into force until all questions regarding the impact of this law on the independence and the functioning of the Constitutional Tribunal have been fully and properly assessed.”

Frans Timmermans, First Vice-President of the European Commission
in a letter to the Minister of Justice Zbigniew Ziobro⁵⁷

Meanwhile, Jean Asselborn, the Minister of Foreign Affairs of Luxembourg, a country holding presidency in the Council at that time, spoke on the situation in Poland. “*The development in Warsaw is unfortunately reminiscent of the course taken by dictatorial regimes,*” he said.⁵⁸

⁵⁷ TVN24.pl, *List z Komisji Europejskiej do Warszawy: oczekuje, że ustawa nie zostanie przyjęta*, available at: <http://www.tvn24.pl/wiadomosci-ze-swiata,2/wiceprzewodniczacy-ke-napisal-list-do-waszczkowskiego-i-ziobry,605562.html>

⁵⁸ Reuters, *INTERVIEW-Luxembourg minister warns Poland against path to dictatorship*, available at: <http://uk.reuters.com/article/poland-constitution-eu-idUKL8N14C1YC20151223>

The President of the European Parliament Martin Schulz spoke earlier in a similar spirit when he stated that *“the recent developments in Poland have the characteristic of a coup and are dramatic. I think that this week, at the latest during the January session we will widely debate on this subject in the European Parliament.”*⁵⁹

The tension between Warsaw and Brussels intensified a week later when the Sejm adopted, at a similarly accelerated pace as in the case of the Act on the Constitutional Tribunal, the Act amending the Act on the Radio and Television Broadcasting which *de facto* subordinated public media to the government. At that time as well, the First Vice-President of the European Commission called upon the Polish authorities to present an explanation.

At the beginning of January, Minister of Justice Zbigniew Ziobro responded to the European Commission. The Minister stated that he first learned of the *“unfounded allegations and unjustified conclusions”* of the Vice-President from the media and only then from official correspondence. *“For those reasons, I perceive your letter as an attempt to exert pressure on a democratically elected parliament and a government of a sovereign Polish state,”* we read in the response. In further parts of the letter, the Minister of Justice explains that actions undertaken had a rectifying character and aimed at restoring pluralism within the Constitutional Tribunal. The Minister of Justice also noted that it is the *“political ambitions”* of the Tribunal’s President Andrzej Rzepliński which are the greatest threat for the independence of the Tribunal.⁶⁰

The Commission did not consider these explanations as satisfactory. *“Recent events in Poland, in particular the political and legal dispute concerning the composition of the Constitutional Tribunal, have given rise to concerns regarding the respect of the rule of law,”* reads the Commission’s communique.⁶¹ On this basis, the Commission decided to activate, for the first time in history, the Rule of Law Framework against Poland.

The Rule of Law Framework employed by the Commission is one of several mechanisms for monitoring the state of the rule of law within the European Union. Introduced in 2014, the procedure was to fill in the gaps between soft forms of safeguarding fundamental rights within the Union on the one hand and sanction mechanisms on the other. The procedure is composed of three stages. The first stage is a “structural dialogue” between the European Commission and the state under proceedings. If this stage does not eliminate the threats for the rule of law, the Commission issues an opinion on the state of compliance with the rule of law in a given country and sets a deadline for implementing recommendations. If this stage does not breed desired results either, the European Commission may motion the Council to initiate the procedure under Article 7 of the Treaty on the European Union which may result in imposing sanctions.

After the decision on the initiation of the Rule of Law Framework against Poland was announced on 19 January 2016, the European Parliament held a debate in the presence of the Polish Prime Minister, Beata Szydło. During the debate, the Prime Minister explained, similarly to Minister Ziobro, that undertaken actions had a rectifying character towards the Constitutional Tribunal and aimed at restoring pluralism within it. When fending off charges of violation of the rule of law and separation of powers principles, Prime Minister Szydło stated:

“I think that Poland does not deserve to undergo examination by the European Commission because human rights are not violated, nor is the rule of law [...]. We should deal with our Polish matters within our Polish borders. Foreign assistance has not always worked well for us.”

Prime Minister Beata Szydło during the debate in the European Parliament, 19 January 2016⁶²

⁵⁹ Dziennik.pl, *Martin Schulz: Sytuacja w Polsce jak zamach stanu. Potrzebna jest debata w PE*, available at: <http://wiadomosci.dziennik.pl/swiat/artykuly/508115,martin-schulz-porownal-sytuacje-w-polsce-do-zamachu-stanu.htm>

⁶⁰ Letter from the Minister of Justice Zbigniew Ziobro to the First Vice-President of the European Commission, available at: <https://n-0-119.dcs.redcdn.pl/dcs/o2/tvn/web-content/m/p1/f/1bc0249a6412ef49b07fe6f62e6dc8de/7a736b0b-1574-4727-b62c-4a-9425a7de1d.pdf>

⁶¹ European Commission, *College Orientation Debate on recent developments in Poland and the Rule of Law Framework: Questions & Answers*, available at: http://europa.eu/rapid/press-release_MEMO-16-62_en.htm

⁶² Debate in the European Parliament, 19 January 2016, available at: <http://www.europarl.europa.eu/ep-live/en/plenary/video?debate=1453218960960>

The European Commission considered the opinion of the Venice Commission on the Act on the Constitutional Tribunal as important. A couple of weeks after the adoption of its final version, at the beginning of April, the First Vice-President Frans Timmermans visited Warsaw. The representatives of the Polish government were to assure him that “an attempt to begin dialogue and find a solution to the crisis surrounding the Constitutional Tribunal has been made.” In a response to those assurances, the European Commission consistently claimed that the publication and implementation of Constitutional Tribunal’s judgements should be a starting point for solving the crisis.⁶³

In April 2016, the European Parliament adopted a resolution on Poland in which it gave support to the European Commission’s decision to activate the Rule of Law Framework. The European Parliament called upon the Polish government to: “respect, publish and fully implement without further delay the Constitutional Tribunal’s judgment of 9 March 2016 and to implement the judgments of 3 and 9 December 2015.”⁶⁴

At the turn of April and May 2016, it became more obvious that the talks between Warsaw and Brussels would not bring the expected effects. At a press conference in the middle of May, the chairman of the Law and Justice Party Jarosław Kaczyński commented on the calls to publish the Constitutional Tribunal’s judgement of 9 March 2016 and to take the oath from three judges chosen in October 2015. “Under no circumstances will we begin the talks by surrendering, as this is in fact the essence of those proposals,”⁶⁵ he said. While a couple of days later, after a debate in the Sejm, the MPs adopted a resolution on the defence of sovereignty of the Polish Republic and protection of the rights of Poles.⁶⁶ At the end of May, Frans Timmermans came to Poland for the second time. After his return to Brussels, at a session of commissioners closed to the media, he was supposed to inform the other members of the Commission that “the dialogue with the Polish government carried on, but there is little progress.”⁶⁷

Lack of progress at the first stage of the Rule of Law Framework resulted in the adoption by the Commission of the opinion on the threats to the rule of law in Poland. The Polish government received the opinion on 1 June 2016 and had two weeks to present a response to the information it contained. Two days later, on 3 June 2016 the Sejm initiated works on the new draft Act on the Constitutional Tribunal submitted by the Law and Justice Party (See further *New Act on the Constitutional Tribunal*, p. 37).

At the end of June, the Polish Ministry of Foreign Affairs sent a response to the European Commission in which it described the works ongoing in the Sejm on the new Act on the Constitutional Tribunal.⁶⁸ After the adoption of the new Act on the Constitutional Tribunal, when it finally became clear that this law would not solve the crisis, the European Commission published its recommendations on the rule of law in Poland. The Commission presented its reservations, thus initiating the second (out of three) stage of the Rule of Law Framework.

⁶³ *Gazeta Prawna.pl*, *Timmermans w Warszawie: Opublikowanie i wdrożenie wyroku TK punktem wyjścia do dialogu*, available at: <http://www.gazetaprawna.pl/artykuly/933563,timmermans-wyrok-tk-dialog-ke.html>

⁶⁴ European Parliament, *European Parliament resolution of 13 April 2016 on the situation in Poland (2015/3031(RSP))*, available at: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2016-0123+0+DOC+XML+V0//PL>

⁶⁵ *TV Republika*, *Prezes PiS zapowiada prace nad ustawą przejściową ws. TK. Kaczyński: Nie rozpoczniemy rozmów od kapitulacji*, available at: <http://televizjarepublika.pl/prezes-pis-zapowiada-prace-nad-ustawa-przejsciowa-ws-tk-kaczynski-nie-rozpoczniemy-rozmow-od-kapitulacji,33543.html>

⁶⁶ *Sejm*, *Sejm podjął uchwałę w sprawie obrony suwerenności Rzeczypospolitej Polskiej i praw jej obywateli*, available at: <http://www.sejm.gov.pl/sejm8.nsf/komunikat.xsp?documentId=CDCB6F44963B63E5C1257FB900579C69>

⁶⁷ *Polsat News*, *Timmermans po wizycie w Warszawie: jest dialog i na razie tyle. Następna rozmowa o Polsce 1 czerwca*, available at: <http://www.polsatnews.pl/wiadomosc/2016-05-25/timmermans-po-wizycie-w-warszawie-jest-dialog-i-na-razie-tyle-nastepna-rozmowa-o-polsce-1-czerwca/>

⁶⁸ *Gazeta Wyborcza*, *Polska odpowiedziała na opinię Komisji Europejskiej w sprawie rządów prawa*, available at: <http://wyborcza.pl/1,75398,20311195,polska-odpowiedziala-na-opinie-komisji-europejskiej-w-sprawie.html>

RECOMMENDATIONS OF THE EUROPEAN COMMISSION ON THE RULE OF LAW IN POLAND

- Implementation of the judgements of the Constitutional Tribunal of 3 and 9 December 2015, thus also the appointment of the three judges elected in October 2015,
- Publication of the judgement of the Constitutional Tribunal of 9 March 2016,
- Ensuring full compliance of the amendments to the act on the Constitutional Tribunal with the Tribunal's judgements and the opinion of the Venice Commission,
- Ensuring that the Constitutional Tribunal can perform a constitutional review of the new Act on the Constitutional Tribunal adopted on 22 July 2016 prior to the act's entry into force; publication and full implementation of the judgement in this case.

The Commission set a three-months deadline to implement those recommendations.

REACTION OF THE COUNCIL OF EUROPE

The changes around the Constitutional Tribunal were also monitored by the Council of Europe. After the Tribunal's judgement of 3 December 2015, the Secretary General of the Council of Europe Thorbjørn Jagland stated that the judgement clarified the situation concerning the elections of new constitutional judges and that it should be fully implemented.⁶⁹ Two weeks later, when the Sejm was working on the Act amending the act on the Constitutional Tribunal, the President of the Parliamentary Assembly of the Council of Europe (hereinafter: "PACE"), Anna Brasseur called "*on my parliamentary colleagues in Poland not to enact – precipitously – legislation relating to the Constitutional Tribunal which may seriously undermine the Rule of Law.*"⁷⁰

Then, at the winter session of PACE, a motion to hold a debate on Poland was presented for a vote. The motion, however, was not passed and the debate did not eventually take place. At the same session, the PACE's Political Affairs and Democracy Committee made a decision to hold an orientation debate on the situation in Poland at the next session. The debate took place at the beginning of March and it was attended by the representatives of the governing party and the opposition, as well as representatives of non-governmental organisations (including HFHR) and the media (Gazeta Wyborcza and Polish Television).

In 2016, Nils Muižnieks, the Commissioner for Human Rights of the Council of Europe, prepared a report on the protection of human rights in Poland. The report concentrated on the independence of the justice system and its functioning, the freedom of the media and the rights of women and equality of sexes. The Commissioner was particularly concerned by the changes around the Constitutional Tribunal. According to the Commissioner, the paralysis of the Tribunal's work had a negative impact on the protection of human rights of all citizens.

“Recent far-reaching changes to Poland’s legal and institutional framework threaten human rights and undermine the rule of law, on which the protection of human rights ultimately depends. Lawmakers and the Government should urgently change course”

Nils Muižnieks, the Council of Europe Commissioner for Human Rights, June 2016⁷¹

⁶⁹ Council of Europe, *Poland Constitutional Tribunal decision “welcome”: Secretary General*, available at: www.coe.int/en/web/portal/-/constitutional-tribunal-of-poland?redirect=http://www.coe.int/en/web/portal/home?p_p_id=101_INSTANCE_DibKFqnpE518&p_p_lifecycle=0&p_p_state=normal&p_p_mode=view&p_p_col_id=column-1&p_p_col_count=2

⁷⁰ Helsinki Foundation for Human Rights, *Constitutional Tribunal Act – the monitoring of legislative amendments*, available at: <http://www.hfhr.pl/en/constitutional-tribunal-act-the-monitoring-of-legislative-amendments/>

⁷¹ Council of Europe, *Erosion of rule of law threatens human rights protection in Poland*, available at: www.coe.int/en/web/commissioner/view/-/asset_publisher/ugj3i6qSEkhZ/content/erosion-of-rule-of-law-threatens-human-rights-protection-in-poland?_101_INSTANCE_ugj3i6qSEkhZ_languageId=en_GB

The Commissioner's report was severely criticised by the Polish Ministry of Foreign Affairs (hereinafter: "MFA"). In the MFA's view, the Commissioner's report's *"lack of symmetry and selectiveness can easily be detected in the presentation of critical remarks on the actions taken by the Polish government dependent on whether this concerns the period preceding or following the last elections."* According to the MFA, the report is also *"selective"* and *"biased"* at some points. With respect to the description of the situation surrounding the Tribunal, MFA stated that the report *"highlighted some events while completely omitting others, which presents the situation around the Constitutional Tribunal in a biased manner and, as a consequence, must lead to the equally biased conclusions."*⁷²

The Council of Europe equally closely monitored the works on the Act on the Constitutional Tribunal of July 2016. Already during considerations in the Sejm, the Secretary General of the Council of Europe Thorbjørn Jagland requested the Venice Commission to present an opinion on the draft act.⁷³ The draft opinion was supposed to be ready before the draft act reached the Senate;⁷⁴ however, several days later the Secretary General yet again wrote to the Venice Commission, this time requesting that the Commission withholds adoption of the opinion on the new Act on the Constitutional Tribunal until the legislative process is concluded.⁷⁵

OTHER REACTIONS

The situation of the Constitutional Tribunal was also an object of interest of the American administration. In the middle of February, three American Senators sent a letter to the Polish Prime Minister, Beata Szydło, in which they expressed concern about the changes surrounding the Constitutional Tribunal. *"We are writing to express concern about recent actions taken by the Polish Government that threaten the independence of state media and the country's highest court and undermine Poland's role as a democratic model for other countries,"* wrote John McCain, Dick Durbin and Ben Cardin in their letter.⁷⁶

During the NATO summit in Warsaw, Barack Obama himself also referred to the ongoing constitutional crisis.

"I expressed to President Duda our concerns about certain actions and the impasse around Poland's Constitutional Tribunal. I insisted that we are very respectful of Poland's sovereignty and I recognized that parliament is working on legislation to take important steps [...]. And as your friends and ally we've urged all parties to work together to sustain Poland's democratic institutions."

US President Barack Obama at the NATO summit in Warsaw⁷⁷

⁷² PAP, MSZ: *Raport Komisarza Praw Człowieka Rady Europy z wizyty w Polsce*, available at: [http://centrumprasowe.pap.pl/cp/pl/news/info/56805,,msz-raport-komisarza-praw-czlowieka-rady-europy-z-wizyty-w-polsce-\(komunikat\)](http://centrumprasowe.pap.pl/cp/pl/news/info/56805,,msz-raport-komisarza-praw-czlowieka-rady-europy-z-wizyty-w-polsce-(komunikat))

⁷³ Council of Europe, *Statement by Secretary General Jagland on adoption by Sejm of Poland of draft Act on Constitutional Tribunal*, available at: <https://www.coe.int/en/web/portal/-/statement-by-secretary-general-jagland-on-the-adoption-by-the-sejm-of-poland-of-the-draft-act-on-the-constitutional-tribunal-?desktop=true>

⁷⁴ TVN24, TVN24: *opinia Komisji Weneckiej ws. ustawy o TK w ciągu tygodnia*, available at: <http://www.tvn24.pl/wiadomosci-ze-swiata,2/komisja-wenecka-opinia-ws-ustawy-o-tk-w-ciagu-tygodnia,660179.html>

⁷⁵ Polskie Radio, *Komisja Wenecka wstrzyma się z opinią ws. ustawy o Trybunale Konstytucyjnym*, available at: <http://www.polskieradio.pl/5/3/Artykul/1643903,Komisja-Wenecka-wstrzyma-sie-z-opinia-ws-ustawy-o-Trybunale-Konstytucyjnym>

⁷⁶ Gazeta Wyborcza, *Trzech wpływowych senatorów USA napisało list do Szydło: „Wzywamy rząd do przestrzegania zasad demokracji”*, available at: <http://wyborcza.pl/1,75399,19623559,wplywowi-senatorowie-z-usa-napisali-list-otwarty-do-szydlo.html>

⁷⁷ U.S. Embassy in Warsaw, *Wystąpienie Prezydenta Obama po spotkaniu dwustronnym z prezydentem Dudą*, available at: https://pl.usembassy.gov/wp-content/uploads/sites/23/2016/07/remarks_polish.pdf

The American Department of State also commented on the Act on the Constitutional Tribunal adopted in July 2016. *“First, today, Poland’s parliament approved new legislation regarding the constitutional tribunal. While the new law has addressed some Venice Commission recommendations regarding legislation passed last year that was later ruled unconstitutional, it impedes a compromise resolution to the seating of six judicial nominees,”* read the statement.⁷⁸

In December 2015, the OHCHR Regional Office for Europe also took a stance on the Act amending the Act on the Constitutional Tribunal and called upon the Senate and President not to adopt the proposed changes in the Act on the Constitutional Tribunal. *“Any reforms involving constitutional courts should be designed to strengthen these independent institutions, not to weaken them,”* wrote the office’s director Jan Jarab.⁷⁹

International non-governmental organisations also joined voices criticising the changes concerning the Constitutional Tribunal, among them the Civic Solidarity Platform and the Human Rights House Network.

REACTIONS IN THE COUNTRY

Since autumn 2015, the views expressed in the public discussion on the systemic position of the Constitutional Tribunal and its activity have become strongly polarised. On the one hand, the legal community, non-governmental organisations, a part of the media and social movements strongly objected to the changes concerning the Constitutional Tribunal. On the other hand, the charges against the Constitutional Tribunal and the judges themselves have been gaining more public attention.

REACTIONS OF THE SOCIETY

One of the first demonstrations against the changes in the Act on the Constitutional Tribunal took place at the end of November in front of the Sejm. The participants gathered under the common slogan “Hands off of the Tribunal!” They protested against the manner in which the decisions concerning the Constitutional Tribunal were made.⁸⁰ A couple of days later, also in front of the Sejm, another demonstration took place, but this time against the manner of electing new judges. At the same time, followers of the governing party also organised a parallel demonstration.⁸¹

In the middle of December in Warsaw and many cities in Poland protest were organised by the Committee for the Defence of Democracy. It is estimated that the demonstration in Warsaw itself gathered (dependent on the agency gathering data) between 17 and 50 thousand people.⁸² A day after, also in Warsaw, the Law and Justice Party organised its own demonstration. Even though its aim was to commemorate the introduction of the state of war and its victims, many of the participants manifested their support for the government and the changes it had introduced.

⁷⁸ U.S. Embassy and Consulat in Poland, *Oświadczenie Rzecznika Departamentu Stanu w sprawie Trybunału Konstytucyjnego*, available at: <https://pl.usembassy.gov/pl/oswiadczenie-rzecznika-departamentu-stanu-w-sprawie-trybunalu-konstytucyjnego/>

⁷⁹ OHCHR Regional Office for Europe, *UN human rights office seriously concerned about measures affecting the Constitutional Tribunal*, available at: <http://www.europe.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=10056&LangID=E>

⁸⁰ Gazeta Wyborcza, *„Ręce precz od Trybunału”. Obywatele protestują pod Sejmem*, available at: <http://wyborcza.pl/1,75398,19253010,rece-precz-od-trybunalu-obywatele-protestuja-pod-sejmem.html>

⁸¹ Sebastian Klauziński, *Posłowie wybierają sędziów TK, a pod Sejmem trzy demonstracje*, Gazeta Wyborcza, available at: <http://wyborcza.pl/1,75398,19283886,poslowie-wybijaja-sedziow-tk-a-pod-sejmem-trzy-demonstracje.html>

⁸² Wp.pl, *Ilu naprawdę było uczestników marszów w Warszawie? Rozbieżne szacunki władz miasta i policji*, available at: <http://wiadomosci.wp.pl/kat,1342,title,ilu-naprawde-bylo-uczestnikow-marszow-w-Warszawie-Rozbiezne-szacunki-wladz-miasta-i-policji,wid,18042182,wiadomosc.html?ticaid=1178bc>

The December demonstrations organised by the Committee for the Defence of Democracy provoked a series of demonstrations and protests organised in various Polish cities and in front of Polish diplomatic missions abroad. In January 2016, people gathered to protest against the changes in the public media. At the end of February, thousands of people marched the streets of Warsaw in defence of the Tribunal and democracy. At the beginning of May, the Committee for the Defence of Democracy, together with opposition parties, organised a march in Warsaw. It is estimated that it gathered (depending on the agency gathering data) from 30 to 240 thousand people.⁸³

Numerous non-governmental organisations protested against the changes in the laws concerning the functioning of the Constitutional Tribunal. HFHR has been monitoring the legislative process in this respect from the outset, presented five legal opinions, an amicus curiae brief to the Constitutional Tribunal in the case concluded by the judgement of 9 March 2016 and has issued a series of statements and calls.⁸⁴ The members of the Helsinki Committee have expressed critical opinions on the adopted changes as well.

The events of the constitutional crisis have also been monitored by Amnesty International which has prepared opinions and statements on the matter. At the beginning of December 2015, Amnesty International issued a statement in which it noted that *“non-substantive and political motives cannot decide about the process of changes which have influence on the principles and values expressed in the Constitution of Poland.”*⁸⁵

The Citizens Network Watchdog Poland has made efforts to make the draft Act on the Constitutional Tribunal public since the moment the rationale for it was developed. In 2013, Watchdog Poland filed a freedom of information request with the President of the Constitutional Tribunal and the Chancellery of the President to obtain the rationale for the draft act. While the Chancellery of the President made the document public, the President of the Constitutional Tribunal refused to disclose it arguing that *“it is the Chancellery of the President which is the host and holder of the draft act on the Constitutional Tribunal.”*⁸⁶ In 2014, the Supreme Administrative Court issued a judgement in which it obliged the President of the Constitutional Tribunal to disclose the document encompassed by the Association’s motion.⁸⁷ In November 2015, Watchdog Poland issued a statement in which it referred critically to the changes surrounding the Constitutional Tribunal.

“The crisis surrounding the Constitutional Tribunal shows that as citizens we should much more attentively monitor the changes which politicians want to introduce. Especially when justified doubts appear as to whether an institution established to safeguard our rights and freedoms will remain independent. Separating the discussion from political games will be the greatest challenge.”

Citizens Network Watchdog Poland, Statement of 23 November 2015⁸⁸

⁸³ Dziennik.pl, *To ile było ostatecznie uczestników? Trzy marsze na ulicach Warszawy*, available at: <http://wiadomosci.dziennik.pl/polityka/artykuly/520043,to-ile-bylo-ostatecznie-uczestnikow-trzy-marsze-na-ulicach-warszawy.html>

⁸⁴ Helsinki Foundation for Human Rights, *Constitutional Tribunal Act – the monitoring of legislative amendments*, available at: <http://www.hfhr.pl/en/constitutional-tribunal-act-the-monitoring-of-legislative-amendments/>

⁸⁵ Amnesty International, *Oświadczenie Amnesty International: Niebezpieczeństwo osłabienia i umniejszenia rangi Trybunału Konstytucyjnego*, 2 December 2015, available at: <https://amnesty.org.pl/o%c5%9bwiadczenie-amnesty-international-niebezpiecze%c5%84stwo-os%c5%82abienia-i-umniejszenia-rangi-trybuna%c5%82u-konstytucyjnego/>

⁸⁶ Citizens Network Watchdog Poland, *Skarga na bezczynność Prezesa Trybunału Konstytucyjnego w sprawie rozpoznania wniosku o udzielenie informacji publicznej*, available at: http://informacjapubliczna.org.pl/wwwdane/files/sprawy_vavn/tk_rzwp/skarga_na_bezczynnosc_tk_8pjk.pdf

⁸⁷ Citizens Network Watchdog Poland, *Trybunał Konstytucyjny też musi być transparentny*, available at: http://informacjapubliczna.org.pl/11,905,trybunal_konstytucyjny_tez_musi_byc_transparentny.html

⁸⁸ Citizens Network Watchdog Poland, *Oświadczenie w sprawie zmian ustawy o Trybunale Konstytucyjnym z 23 listopada 2015 r.*, available at: <http://siecobywatelska.pl/oswiadczenie-w-sprawie-zmian-ustawy-o-trybunale-konstytucyjnym/>

The Stefan Batory Foundation and its Citizen Legislation Forum has also issued critical statements on the changes concerning the Constitutional Tribunal. In March 2016, the Foundation submitted an amicus curiae brief in the proceedings before the Constitutional Tribunal and presented its opinion at the Tribunal's hearing on the new act of July 2016.⁸⁹ Critical statements have also been made by: INPRIS, Association of Professional Governments and Legal Associations, Polish Section of the International Commission of Jurists and the Polish Association of Constitutional Law.⁹⁰

Non-governmental organisations have also played a significant role in mobilizing citizen protests against the introduced changes. For instance, 30 thousand people signed a petition posted by Akcja Demokracja to publish the March judgement of the Constitutional Tribunal.⁹¹

REACTIONS OF THE LEGAL COMMUNITY

The dispute around the Constitutional Tribunal has provoked outrage within the legal community. In November 2015, the Committee for Legal Sciences of the Polish Academy of Sciences issued a statement in which it *“opposed any display of constitutional and legal nihilism, of contempt shown for the principles of a democratic state ruled by law, of circumventing or abusing the law, and of exploiting and abusing democratic mechanisms to curtail democracy and the rule of law.”*⁹²

A couple of days later, as a response to the Act amending the Act on the Constitutional Tribunal, the Faculty of Law and Administration of the Jagiellonian University issued a statement. The Faculty's Council expressed *“deep concern at the events provoked by the highest state organs. The actions taken by state authorities endangered the independence of the judiciary, especially the Constitutional Tribunal.”*⁹³

„We call upon the President, an alumnus of our Faculty and a member of the academic community of the Jagiellonian University, to respect the values of which the Cracow University is a guardian: rights and freedoms of citizens.”

Resolution no. 303/XI/2015 Council of the Law and Administration Faculty
of the Jagiellonian University of 30 November 2015

From the beginning, judges have also made statements on the constitutional crisis. At the end of 2015, common courts started adopting resolutions expressing concerns at the deepening of the constitutional crisis and objecting to the violations of the separation of powers principle. Such resolutions were adopted by judges in appellate circuits of Łódź, Szczecin, Katowice and Rzeszów.⁹⁴ Similar resolutions were adopted by judges of the Regional Courts in Opole, Bydgoszcz, Konin and Toruń.

⁸⁹ Summary of NGO actions related to the changes concerning the Constitutional Tribunal is available at: <http://obserwatoriumdemokracji.pl/temat/trybunal-konstytucyjny/>

⁹⁰ See also *Statement no. 5/2015 of Association of Professional Governments and Legal Associations on the changes in the Act on the Constitutional Tribunal of 2 December 2015*, available at: http://www.inpris.pl/fileadmin/user_upload/documents/Porozumienie_Stanowisko_5_2015.pdf, INPRIS, HFHR and the Polish Section of the International Commission of Jurists, *Oświadczenie koalicji organizacji obywatelskich monitorujących wybory sędziów do Trybunału Konstytucyjnego (OM TK 2015)*, available at: <http://www.inpris.pl/co-sie-dzieje-w-inpris/artikul/t/oswiadczenie-koalicji-organizacji-obywatelskich-monitorujacych-wybory-sedziow-do-trybunalu-kons/>

⁹¹ Akcja Demokracja, *W obronie Trybunału Konstytucyjnego*, available at: <https://dzialaj.akcjademokracja.pl/campaigns/tk>

⁹² Committee for Legal Sciences of the Polish Academy of Sciences, *Resolution No. 1/2015 of the Committee for Legal Sciences of the Polish Academy of Sciences adopted on 26 November 2015*, available at: <http://www.knp.pan.pl/>

⁹³ Faculty of Law and Administration of Jagiellonian University, *Resolution no. 303/XI/2015 of Council of the Law and Administration Faculty of the Jagiellonian University of 30 November 2015*, available at: <http://www.wpia.uj.edu.pl/documents/41601/89321185/201512010845.pdf>

⁹⁴ See also Association of Polish Judges IUSTITIA, *Uchwała Zgromadzenia Przedstawicieli Sędziów Apelacji Łódzkiej z dnia 30 listopada 2015 r.*,

After the Constitutional Tribunal's judgement of 9 March 2016, there appeared a risk that two separate legal systems would emerge. On the one hand, governmental administration did not acknowledge the judgement of the Constitutional Tribunal and its representatives called it a private opinion of the judges (see further *The Judgement of the Constitutional Tribunal of 9 March 2016*, p. 37). On the other hand, the Constitutional Tribunal started working again and after the March judgement began to issue judgements in other cases.

At the end of April, the General Assembly of Judges of the Supreme Court adopted a resolution in which it stated:

“an unpublished judgement of the Constitutional Tribunal finding an act unconstitutional revokes the act's presumption of constitutionality at the moment when the Tribunal announces its judgement.”

Resolution of the General Assembly of Judges of the Supreme Court, 26 April 2016⁹⁵

The Supreme Court's resolution was met with a harsh reaction from the representatives of the governing majority. The spokesperson of the Law and Justice parliamentary club Beata Mazurek described the Supreme Court's resolution as adopted by *“a bunch of buddies who protect the status quo of the former government.”*⁹⁶ The opposition MPs filed a complaint in relation to this statement with the Sejm's Ethics Committee which punished the MP with a reprimand.

A day after the adoption of the resolution by the Supreme Court, a similar resolution was passed by the Collegium of the Supreme Administrative Court. The Supreme Administrative Court's judges called for:

“respect for the independence of judges and the Tribunal which in a democratic state ruled by law such as Poland, are a branch of power separate and independent of other powers and guarding the rights and freedoms of citizens.”

Collegium of the Supreme Administrative Court, 27 April 2016⁹⁸

The judges of the Supreme Administrative Court considered *“as inadmissible and outrageous the statements by some politicians describing judges of the Supreme Court sitting at the General Assembly as a «bunch of buddies.» [...] Mutual relations between organs of public authorities should be based on the respect for freedom and justice, cooperation of powers, social dialogue and the subsidiarity principle strengthening the rights of citizens and their communities.”*

In April 2016, the National Council of the Judiciary in Poland adopted a resolution in which it strongly objected to the attempts at *“interfering with and influencing the judges of the Constitutional Tribunal by the Minister of Justice and*

available at: www.iustitia.pl/uchwaly/1094-sedziowie-apelacji-lodzkiej-w-sprawie-tk-oraz-publicznych-wypowiedzi-dotyczacych-sadow; Association of Polish Judges IUSTITIA, *Uchwała Zgromadzenia Ogólnego Sędziów Apelacji Szczecińskiej z dnia 1 grudnia 2015 r.*, available at: www.iustitia.pl/uchwaly/1095-sedziowie-apelacji-szczecinskiej-w-sprawie-tk-oraz-publicznych-wypowiedzi-dotyczacych-sadow; *Uchwała Zgromadzenia Przedstawicieli Sędziów Apelacji Katowickiej z dnia 14 grudnia 2015 r.*, available at: http://trybunal.gov.pl/fileadmin/content/nie-tylko-dla-mediow/uchwala_apelacji_katowickiej.pdf; *Uchwała Zgromadzenia Ogólnego Sędziów Apelacji Rzeszowskiej z dnia 11 stycznia 2016 r.*, available at: http://www.rzeszow.sa.gov.pl/dmdocuments/A-0000_4_15_59.pdf

⁹⁵ Supreme Court, *Uchwała Zgromadzenia Ogólnego Sędziów Sądu Najwyższego z dnia 26 kwietnia 2016 r.*, available at: http://www.sn.pl/aktualnosci/SiteAssets/Lists/Wydarzenia/EditForm/Uchwala_Zgr_Og_SSN_26_04_2016.pdf

⁹⁶ TVN24, *“Zebrał się zespół koleśi”*. *Rzecznik PiS o Sądzie Najwyższym*, available at: <http://www.tvn24.pl/wiadomosci-z-kraju,3/rzecznik-pis-beata-mazurek-o-sadzie-najwyzszym-zespol-kolesi,639007.html>

⁹⁷ Onet.pl, *Beata Mazurek ukarana za słowa o “zespole koleśi”*, dostępne na: <http://wiadomosci.onet.pl/kraj/beata-mazurek-ukarana-za-slowa-o-zespole-kolesi/r9ed4y>

⁹⁸ Supreme Administrative Court, *Uchwała Kolegium Naczelnego Sądu Administracyjnego z dnia 27 kwietnia 2016 r.*, available at: <http://www.nsa.gov.pl/komunikaty/uchwala-kolegium-naczelnego-sadu-administracyjnego-z-dnia-27-kwietnia-2016-r,news,4,309.php>

*Prosecutor General.*⁹⁹ In April 2016, the courts of various instances yet again started adopting resolutions, among others, calling upon the Prime Minister to publish the Constitutional Tribunal's judgement of 9 March 2016. The General Assembly of Judges in the Płock Circuit called upon “*all state bodies to abide by the principle of the democratic state ruled by law, in particular to respect the judgement of the Constitutional Tribunal of 9 March 2016.*”¹⁰⁰ The judges from the Regional Court in Poznan, in turn, repeated in their resolution that the judgements of the Constitutional Tribunal are binding and final.

“*The Assembly of Judges notes that the Prime Minister’s obligation to publish the judgement [...] has a technical character. Its performance cannot be conditioned upon the assessment that in the opinion of the authority obliged to publish the judgement it is unlawful*”

Resolution of the General Assembly of the Judges of the Regional Court in Poznan, 9 May 2016¹⁰¹

Similar resolutions were passed by general assemblies of regional court judges from, among others, Cracow, Torun, Płock, Zielona Góra, Gliwice, Lublin, Radom, Bielsko-Biała and Częstochowa and the general assemblies of appellate court judges from Warsaw and Wrocław.¹⁰²

Judges’ associations have also expressed their stance on the constitutional crisis. These were IUSTITIA, Themis, Association of Family Judges in Poland and the Association of Family Judges Pro Familia which in their joint statement of June 2016 all criticised the draft new Act on the Constitutional Tribunal authored by the MPs from the Law and Justice Party.¹⁰³

Last but not least, the on-going constitutional crisis was one of the reasons why the National Council of the Judiciary of Poland decided to call the Extraordinary Congress of Polish Judges which took place on 3 September 2016.

RESOLUTIONS OF LOCAL GOVERNMENTS

Since April 2016, organs of local governments have adopted resolutions on the application of judgements of the Constitutional Tribunal, including those which had not been published in the Journal of Laws.

Such resolutions were passed by city councils in Łódź, Warsaw, Cracow and Wrocław, and parliaments of Lubuskie, Pomorskie and Łódzkie voivodeships.¹⁰⁴

At the end of April, a similar resolution was passed by the members of the city council in Słupsk. However, the Pomorskie Voivode invalidated this resolution, claiming that it had been passed “*in violation of the law.*”¹⁰⁵

⁹⁹ National Council of the Judiciary of Poland, *Stanowisko Krajowej Rady Sądownictwa z 7 kwietnia 2016 r. w sprawie wystąpienia Ministra Sprawiedliwości-Prokuratora Generalnego do Prezesa Trybunału Konstytucyjnego z 5 kwietnia 2016 r.*, available at: <http://www.krs.pl/pl/aktualnosci/d,2016,4/4053,stanowisko-krajowej-rady-sadownictwa-z-7-kwietnia-2016-r-w-sprawie-wystapienia-ministra-sprawiedliwosci-prokuratora-generalnego-do-prezesa-trybunalu-konstytucyjnego-z-5-kwietnia-2016-r>

¹⁰⁰ Association of Polish Judges IUSTITIA, *Uchwała Zgromadzenia Ogólnego Sędziów Okręgu Płockiego z dnia 12 kwietnia 2016 r.*, available at: <http://www.iustitia.pl/uchwaly/1228-uchwala-zo-sedziow-plockiego>

¹⁰¹ Association of Polish Judges IUSTITIA, *Uchwała Zgromadzenia Ogólnego Sędziów Sądu Okręgowego w Poznaniu z dnia 9 kwietnia 2016 r.*, available at: <http://www.iustitia.pl/uchwaly/1244-uchwala-zgromadzenia-ogolnego-so-poznan-9-maja>

¹⁰² See also Association of Polish Judges IUSTITIA, *Uchwały*, available at: <http://www.iustitia.pl/uchwaly>

¹⁰³ Wyborcza.pl, *Stowarzyszenia sędziowskie ostro o ustawie PiS o Trybunale*, available at: <http://wyborcza.pl/1,75398,20420426,stowarzyszenia-sedziowskie-ostro-o-ustawie-pis-o-trybunale.html>

¹⁰⁴ Data on the resolutions adopted by local government bodies, as well as materials and statements connected to the constitutional crisis are gathered on a website Observatory of Democracy at: <http://www.obserwatoriumdemokracji.pl>

¹⁰⁵ Onet.pl, *Wojewoda pomorski unieważnił stanowisko Rady Miasta Słupska ws. TK*, available at: <http://wiadomosci.onet.pl/trojmiasto/wojewoda-pomorski-uniewaznil-stanowisko-rady-miasta-slupska-ws-tk/sxmkgb>

17 CONCLUSIONS

The legislative works concerning the functioning of the Constitutional Tribunal have been ongoing since June 2015. The new Act on the Constitutional Tribunal has been amended twice and then replaced with another act. None of the legal changes concerning the Constitutional Tribunal, passed since November 2015, has in any degree approximated the solution to the constitutional crisis.

The Constitutional Tribunal has delivered four judgements concerning each of the legal acts adopted since June 2015. Each of those judgements faced severe criticism of the executive, and two of them have not been acknowledged at all.

The constitutional crisis has revealed a disquieting trend in which the executive and legislative branches of government have tried to change the entire system of the state without changing the Constitution. This creates a severe risk of violating the principles of the separation of powers and the rule of law.

A dispute, which in its initial phase could have been solved by respecting the legally established procedures, has grown into a problem which constitutes a serious threat to the functioning of a democratic state based on the rule of law.



Constitutional Tribunal's Judgement [in Polish: Wyrok Trybunału Konstytucyjnego - TK], by Łukasz Borucki for the HFHR

Follow us on:

www.hfhr.pl/en
Facebook.com/HFPCz
Twitter.com/hfhrpl
Youtube.com/thehhr
Instagram.com/hfhrpl