HELSINKI FOUNDATION for HUMAN RIGHTS

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About Helsinki Foundation for Human Rights

The Helsinki Foundation for Human Rights (hereinafter: HFHR) is one of the most experienced non-governmental organizations involved in the protection of human rights in Poland and Europe.

HFHR's mission is to promote human rights protection in democratic state ruled by law. HFHR undertakes educational, legal and monitoring activities both in Poland and the countries of the former Soviet block. HFHR has a consultative status at ECOSOC and is a member of numerous research networks and platforms.

Since 2015, HFHR has been monitoring the on-going constitutional crisis and its deteriorating effect on the other aspect of the system of the state including independence of judiciary and lawyers. The hereby presented brief is based on HFHR's analysis, reports and observations.

The brief has been prepared by HFHR's lawyers: Barbara Grabowska-Moroz, Ph.D., Marcin Szwed and Małgorzata Szuleka under the supervision of members of HFHR's Board: Maciej Nowicki and Dominika Bychawska Siniarska.

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Helsinki Foundation for Human Rights, Zgoda 11, Warsaw, Poland

Executive summary

- Poland has been facing the constitutional crisis since 2015. Initially, the crisis had two elements: one was related to the process of appointing new judges of the Constitutional Tribunal while the second one was related to the legislative changes that have severely undermined the independence of the Tribunal,

- After adoption of seven different legal acts regulating the works of the Constitutional Tribunal and replacing the President of the Tribunal, the position and independence of the Tribunal have been severely weakened. Without proper protection of its independence, the Constitutional Tribunal is prone to the political influence,

- Since 2015, the governing majority has adopted numerous pieces of legislation aiming at changing the entire system of the state without, however, changing the Constitution. Majority of the key legal acts regulating the functioning of the justice system are usually adopted without proper social consultations and at an accelerated pace,

- The governing majority has continued its attempts to carry out the reform of the entire justice system. However, none of the draft legislation acts concerning the justice system presented by the governing majority referred to the key problems of the courts' functioning. Quite contrary, the main aim of the laws amending the Act on the Supreme Court, the Act on the National Council of Judiciary and the Act on the system of the common courts aimed at widening the political control over judges,

- The constitutional crisis has enhanced a debate on the judiciary, however, many voices of the debate concentrate on personal attacks towards judges or aim at discrediting the judiciary with the public.

Constitutional crisis in Poland – attacks on the independence of the Constitutional Tribunal

Since autumn 2015 Poland has been facing a serious constitutional crisis, which threatens the independence of the Constitutional Tribunal and paralyzes effectiveness of its functioning.

Origins of the crisis

The origins of the crisis are connected to the adoption of the new Act on Constitutional Tribunal by the Parliament in June 2015 (it entered into force on 30 August 2015). The new Act allowed the Sejm (the lower chamber of the Parliament) of the 7th term to elect 5 new judges to the Constitutional Court.[1] The newly elected judges were supposed to replace three judges whose tenures expired on 6 November 2015 and two judges whose tenures expired on 2 and 8 December 2015. At the same time, the Sejm's term of office ended at the turn of October and November 2015.[2]

The HFHR strongly protested against this amendment. HFHR's experts underlined that the appointment of 5 judges in a row would violate the Constitution.[3] The new law raised also serious controversies among the parliamentary opposition – the Law and Justice party (Polish *Prawo i Sprawiedliwość*). Before the parliamentary elections took place in Poland, the Law and Justice had filed a motion to the Constitutional Tribunal to verify whether the Act of 25 June 2015 on the Constitutional Tribunal was compatible with the Constitution, i.e. whether the Sejm of the 7th term was entitled, under the Constitution, to elect all five judges. This motion was, however, dropped on 10 November 2015 after the elections had already been held (and the Law and Justice party had won it) and after the date of the hearing had already been announced.[4]

Despite these controversies, the Sejm (on 8 October 2015, during its last session as the Sejm of the 7th term), acting on the basis of the newly adopted Act, adopted five resolutions in which it appointed five new judges of the Constitutional Tribunal[5]. However, according to the law (both new as well as the previous Act on Constitutional Tribunal) judges of the Constitutional Tribunal have to be sworn into office by the President. It is worth to underline that such a competence of the President is provided in the statute – the Constitution stipulates only that judges are elected by the Sejm and does not give President any special powers in this procedure.

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[1] According to Article 137 of the Act, the Lower Chamber of the Parliament (the Sejm) stated that within 30 days from the Act's entry into force, candidatures for new judges of the Constitutional Court shall be submitted. Additionally, Rules of the Sejm as well as the Act on Constitutional Court, provide that a candidature for a judge of the Constitutional Court can by submitted by the Presidium of the Sejm or by the group of 50 Mps.

[2] According to Article 98.1 of the Constitution of Poland, the term of office of the Sejm and Senate shall begin on the day on which the Sejm assembles for its first sitting and shall continue until the day preceding the assembly of the Sejm of the succeeding term of office. On 17 July 2015, the President of Poland decided that the parliamentary elections would be held on 25 October 2015.

[3] The summary of the HFHR activity in the relation of changes surrounding the CT is available here: http://www.hfhr.pl/en/constitutional-tribunal-act-the-monitoring-of-legislative-amendments/

[4] Case no. K 29/15.

[5] Paragraph 2 of each resolution provided that the tenure of each newly elected judge starts, respectively, on 7 November 2015 (three judges), and 3 and 9 December 2015. Resolutions were published in the Official Journal „Monitor Polski", positions no. 1038-1042.

The President of Poland refused to swear the new judges into office. He expressed opinion (in a press interview published on 11 November 2015) that the elections of the judges had "violated democratic rules."[6]

Invalidation of the election of the judges and the election of new judges

On 25 October 2015, the new parliamentary elections took place. The Law and Justice party won the elections by gaining almost 38% of votes and 234 seats (out of 460) in the Sejm. The first session of the newly elected Parliament started on 12 November 2015.

During the first session of the new Parliament (the Sejm of the 8th term), draft amendments to the Act on the Constitutional Tribunal were proposed. The amendment was adopted by the Parliament within 3 days,[7] that is on 19 November. The Act was signed by the President on the next day. During the legislative proceedings in the Sejm, no opinion of any expert in the field of constitutional law was heard, even though such a recommendation was made by the Legislative Bureau of the Sejm.

The amendment annulled Article 137 of the Act, which allowed the Sejm of the 7th term to elect all the five new judges of the Constitutional Tribunal, and established a 7-day timeframe for filing new motions with candidates to take up the office of judges of the Constitutional Tribunal.[8]

The abovementioned amendment was supposed to give the Sejm power to elect new judges (in an obvious contradiction to the Constitution, according to which judges of the Constitutional Tribunal are irremovable), however before it entered into force, on 25 November 2015 the Sejm adopted five resolutions which declared "the lack of legal force" of the resolutions electing five judges by the Sejm of the 7th term. The justification for the resolutions stated that the previous election procedure of Constitutional Tribunal judges was incorrect and the resolutions aim at its validation.[9]

After the "annulment resolutions" were enacted (and published within a few hours), the amendments to the Rules of the Sejm were introduced. These amendments to the Rules of the Sejm allowed the Speaker of the Sejm to establish a deadline for proposing candidates for Constitutional Tribunal judges in case "other circumstances" (than those set out in the Act on the Constitutional Tribunal) for such elections occur.[10] Such a timeframe was established on 1 December 2015 at midday; it was however not published officially anywhere.[11]

Five candidatures for new judges were submitted on 1 December 2015.[12] The session of the parliamentary Committee of Justice and Human Rights to present the opinion on the candidatures took place on 1 December 2015 at 8 p.m. During the discussion, the candidates were asked no questions by the MPs – a formal motion to end the discussion was adopted by vote.

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[6] Gazeta Wyborcza, Prezydent Duda: Sposób wyboru sędziów Trybunału Konstytucyjnego naruszył zasady demokracji, available at: wyborcza.pl/1,75478,19170279,duda-sposob-wyboru-sedziow-trybunalu-konstytucyjnego-naruszyl.html

[7] Act of 19 November 2015 - it was published in the Official Journal a few hours after the President signed the bill.

[8] Article 137a of Act on Constitutional Court. It also introduced a tenure for the President of the Court, which would result in the loss of office by the current President (3 months after the amendments enter into force).

[9] During the parliamentary discussion on the draft resolutions, it was suggested that the new Parliament needs to change the composition of the Constitutional Court, because the latter is "politically-biased." It was also stated that the change in the composition of the Constitutional Court is necessary for the parliamentary majority in order to conduct their political reforms.

[10] The Act on the Constitutional Court (Article 36) lists all possible grounds for termination of the office of the Constitutional judge. They were reflected in the Rules of the Sejm (Article 30.3 Rules of the Sejm).

[11] The same day, the deadline was prolonged until 6 p.m.

[12] They were submitted only by the Parliamentary Club of Law and Justice political party.

On 2 December 2015, after a rough debate at the plenary session, the Sejm elected five new judges. The elections were based on the Rules of the Sejm (as the Act of 19 November 2015 was to enter into force on 5 December 2015). The resolutions were published at 10 p.m. in the Monitor Polski (official journal where, among others, internal resolutions of the Sejm are promulgated). On the same day (to be precise – at night, without any media being present), the President of Poland took the oath from the newly elected judges.

Judgment of the Constitutional Tribunal of 3 December 2015

In the meantime, the group of opposition MPs filed a motion to the Constitutional Tribunal concerning the Act of 25 June 2015 on the Constitutional Tribunal to verify whether the legal basis for the elections of judges in October 2015 was compatible with the Constitution.[13] The hearing before the Constitutional Tribunal was held on 3 December 2015, just after the President took the oath from the new judges of the Constitutional Tribunal.[14] On the same day, the Tribunal issued a judgment in which it ruled that Article 137 of the Act on the Constitutional Tribunal was a constitutional basis for the elections of three judges who were to replace the judges whose tenures expired on 6 November 2015. Whereas in respect of two judges whose terms of office lapsed on the 2 and 8 December 2015, the elections of judges by the Sejm of the 7th term were found unconstitutional. Moreover, the Tribunal stated clearly that it is an obligation of the President to swear judges validly elected by the Sejm into office.

The abovementioned judgment of the Constitutional Tribunal was not immediately published by the Prime Minister, as required by the law. On 10 December 2015, Minister Beata Kempa (Head of the Chancellery of the Prime Minister) sent an official letter to the President of the Tribunal.[15] She argued that, in her opinion, the judgment of the Tribunal of 3 December 2015 was invalid, since the Tribunal adjudicated the case in the bench of 5 judges instead of a full bench. Thus, she "suspended" the publication of the judgment.[16] On 11 December 2015, the President of the Tribunal answered the letter and emphasized that according to the Constitution judgments of the Constitutional Tribunal were final and have to be immediately published. Five days later, on 16 December 2015, the judgment was finally published.[17]

Judgment of the Constitutional Tribunal of 9 December 2015

On 9 December 2015, the Constitutional Tribunal held a hearing and announced a judgement in yet another case concerning its own organization. This time it reviewed the constitutionality of the Act of 19 November 2015 amending the Act on the Constitutional Tribunal. The main point of the decision concerned the capability of the Sejm of the 8th term to again elect five new judges of the Constitutional Tribunal.

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[13] As to its content, it was the same motion that was dropped by Law and Justice on 10 November 2015 (see above).
[14] The hearing date was set already in November 2016. The nomination of five judges by the Seim and taking the oath from them by the President deliberately took place before the hearing started
[15] Available (in Polish) at: http://trybunal.gov.pl/fileadmin/content/nie-tylko-dla-mediow/Pismo_KPRM_z_10_grudnia_2015_r..pdf.
[16] It is important to notice that the Council of Ministers – participant in the proceedings before the Court – did not file any motion concerning the composition of the Court during the proceeding. Such a motion – to transfer the case to a full panel (consisting of judges elected on 2 December 2015) and postpone the hearing – was filed by the Sejm. During the hearing on 3 December 2015, the Court decided not to accept the motion.
[17] Official Journal, position no. 2129 – http://dziennikustaw.gov.pl/du/2015/2129/1.

The Tribunal confirmed that the Sejm of the 7th term was entitled to elect three judges, and thus the Sejm of the 8th term – only two judges. The Tribunal ruled that "Article 137a of the Act on the Constitutional Tribunal[18] – insofar as it concerns putting forward a candidate for a judge of the Constitutional Tribunal to assume the office after the judge whose term of office ended on 6 November 2015 – is inconsistent with Article 194.1 in conjunction with Article 7 of the Constitution."

Moreover, the Tribunal decided that the introduction of a 3-year tenure for the President and Vice-president of the Tribunal was acceptable. However, the possibility of their re-election for a further tenure violated the Constitution, since it might undermine the independence of the judge. Furthermore, the Tribunal ruled that Article 2 of the Act of 19 November 2015 was unconstitutional. The Article provided that the "terms of office" of the incumbent President and Vice-President of the Constitutional Tribunal shall end after the lapse of three months as of the entry into force of the amending Act. The Tribunal ruled that the challenged provision constituted unauthorised interference in the sphere of the judiciary by the legislator and undermined the principle that the Constitutional Tribunal is independent of the other branches of government (Article 173 of the Constitution). The Tribunal also ruled that the deadline of 30 days for the President to take the oath from the judges elected by the Sejm violated the Constitution. Last but not least, the Tribunal ruled that Article 21 para. 1a of the Act on the Constitutional Tribunal which provided that taking of the oath of office shall commence the term of office of a judge of the Tribunal was unconstitutional.

The two abovementioned judgments of the Constitutional Tribunal did not lead to the end of the constitutional crisis. Quite contrary – the crisis even escalated due to the fact that it was unclear how many judges were authorized to adjudicate cases. There was no doubt as to the fact that 2 judges were elected by the Sejm of the 7th term on the basis of unconstitutional provision, while 3 of them were elected correctly, but not sworn into office by the President. Five judges elected by the Sejm of the 8th term were sworn into office by the President but they were elected for the places already occupied by the judges elected in the 7th term.

"Remedial" Act on the Constitutional Tribunal

The Parliament continued to enact further legislative changes aimed at paralysing the Constitutional Tribunal. On 15 December 2015, at 10 p.m., a new draft of the amendment to the Act on the Constitutional Tribunal was announced on the Sejm's website. In the light of the proposed draft, the Constitutional Tribunal would have to rule in all pending cases as a full panel which would have to be composed of at least 13 judges. The draft also stated that the judgments might be adopted only by a majority of 2/3 of votes (whereas Article 190.5 of the Constitution states that "judgments of the Constitutional Tribunal shall be made by a majority of votes"). The draft also included a controversial regulation stating that the Constitutional Tribunal's premises shall be relocated outside Warsaw.[19] Last but not least, the draft stated that if the cases pending before the Tribunal were assigned to a panel of five judges (different than required by the draft of law) they would need to be re-assigned and "initiated again."

[18] "With regard to judges whose term of office ends in 2015, the time-limit for submitting the motion referred to in Article 19(2) [*what is meant here is a motion to put forward a candidate for a judge of the Constitutional Tribunal*], shall be 7 days as of the entry into force of this provision".

[19] This proposal was dropped during the parliamentary discussion.

On 17 December 2015, three legal opinions concerning the draft were presented to the Sejm (by the Supreme Court,[20] the Polish Bar Council[21] and the Helsinki Foundation for Human Rights[22]). Also a group of NGOs sent a statement to all MPs arguing that such a fundamental change in the rules of the Constitutional Tribunal should have been consulted with the civil society within a reasonable time.[23]

The first reading of the draft took place on 17 December 2015 and it was decided to transfer the draft to the Legislative Committee of the Sejm (*Komisja Ustawodawcza*). The meeting of the Committee took place on 21 December 2015 and lasted almost 13 hours (with a 1 hour break). During the meeting of the Committee a set of new amendments was proposed, e.g. concerning cases which would have to be decided by the full panel. Moreover, the Committee decided that the Act would enter into force on the day of its publication in the Official Journal (there was no *vacatio legis*).

The next day, the draft law was adopted by the Sejm at the plenary session. The Senate adopted the bill without any amendments after the whole day of discussions in the parliamentary commission and at the plenary session.[24] On 28 December 2015, the President of Poland signed the bill which was published in the Official Journal on the same day.[25]

The newly adopted Act on the Constitutional Tribunal introduced numerous significant changes concerning the functioning of the Tribunal. First of all, the General Assembly (*Zgromadzenie Ogólne*) of the Tribunal (deciding on disciplinary proceedings, budget and internal issues of the Tribunal) shall be composed of at least 13 judges and shall make decisions by a majority of 2/3. Furthermore, the Minister of Justice or the President of Poland might initiate disciplinary proceedings against the judges of the Constitutional Tribunal. The General Assembly is entitled to motion the Sejm to terminate the tenure of a judge of the Constitutional Tribunal.

The amended Act also included changes in relation to the process of ruling by the Constitutional Tribunal. The Act stated that, as a rule, the Tribunal shall adjudicate a case in the full panel composed of at least 13 judges; however, cases initiated by a constitutional complaint or a judicial questions shall be considered by the panel of 7 judges. The cases should be examined in the order they were lodged with the Tribunal. The hearing cannot take place earlier than 3 months after the notification of the parties about its date; in cases considered by the full panel, such a period is 6 months. In the light of the Act, the judgments issued by the full panel of judges shall be made by a majority of 2/3 votes. The intertemporal provisions state that the new law is applicable to cases pending before the Tribunal, unless the parties were notified about the panel which will rule on the case. In cases pending before the Tribunal, the hearing can take place after 45 days since the notification of the parties on the date of the hearing (if the case is ruled by the full panel – after 3 months), but not later than 2 years after the Act enters into force.

[20] Supreme Court, Opinia o projekcie ustawy o zmianie ustawy o Trybunale Konstytucyjnym, available at: https://goo.gl/1YZfYo

[21] National Bar Association, Opinia w sprawie projektu ustawy o Trybunale Konstytucyjnym (druk nr 122), available at: http://www.adwokatura.pl/admin/wgrane_pliki/file-opinianranowaustawatk17122015-13851.pdf.

[22] Helsinki Foundation for Human Rights, Uwagi Helsińskiej Fundacji Praw Człowieka do poselskiego projektu ustawy o zmianie ustawy o Trybunale Konstytucyjnym (druk sejmowy nr 122), available at: http://www.hfhr.pl/wp-content/uploads/2015/12/HFPC_TK_opinia_17122015.pdf.

[23] The common argument presented in those opinion is that ineffective procedure before the Constitutional Court violates a constitutional right to court (art. 45) and a right to a constitutional complaint (art. 79).

[24] The final voting took place at 3.50 a.m. on 24 December 2015.

[25] Official Journal, position no. 2217 – http://dziennikustaw.gov.pl/du/2015/2217/1.

The First President of the Supreme Court, the Commissioner for Human Rights and two groups of MPs submitted motions to the Constitutional Tribunal to verify whether the newly adopted Act on the Constitutional Tribunal violates the Constitution.

The discontinuation of proceedings before the Constitutional Tribunal concerning the resolutions reversing the appointment of 5 judges

On 11 January 2016, the Constitutional Tribunal informed the public that it had discontinued the proceedings concerning the appointment of 5 judges in October 2015. In December 2015, a group of MPs submitted a motion to the Constitutional Tribunal to verify whether the Parliament's resolutions of November 2015 reversing the initial appointment of judges and the ensuing five resolutions of December 2015 appointing five new judges did or did not violate the Constitution. The Constitutional Tribunal recognised that the resolutions of November 2015 could not be considered normative acts but only individual acts, so as a consequence the proceeding in this regard had to be discontinued. In reference to the resolutions of December 2015, the Constitutional Tribunal ruled that they were non-legislative measures through which the Parliament would be able to execute its creative function in relation to organs of public authorities.

On 12 January 2016, the President of the Constitutional Tribunal assigned two judges appointed by the Parliament in December 2015 to rule on cases submitted to the Tribunal. After this decision, there are 12 judges of the Constitutional Tribunal assigned to cases.

The Constitutional Tribunal's judgement on the amendment of December 2015

On 8 and 9 March 2016, the Constitutional Tribunal heard the complaints – submitted by the Commissioner for Human Rights, the First President of the Supreme Court, National Judiciary Council and two groups of the Sejm deputies – against the amendment to the Constitutional Tribunal Act passed in December 2015 (the so-called "Remedial" Act).

On 9 March, the Tribunal issued the judgment sitting in a panel of 12 judges. The Tribunal held that it may neither operate nor adjudicate on the basis of laws whose constitutionality raises significant doubts. According to the Tribunal, this would threaten the effective adjudication of cases already present on its docket.

The Constitutional Tribunal ruled that the amendment to the Constitutional Tribunal Act is contrary to the Constitution in its entirety. Above all, the legislative procedure applied to the enactment of the amendments was declared unconstitutional. The Tribunal ruled that this procedure was so hasty that in practice it prevented a review of the amendment's draft despite numerous concerns over it likely being unconstitutional. Also the legal rule that enabled the amendment to enter into force upon publication (without any *vacatio legis*) was found contrary to the Constitution. Moreover, the Constitutional Tribunal held that the newly introduced attendance quorum that required it to decide certain cases in full bench would have led to delays of proceedings.

Although the judgements of the Constitutional Tribunal are binding and final, the Government refused to recognise the binding force of the judgement and declined to publish it in the Official Journal. The Government argues that the judgment is invalid because it was issued in a procedure inconsistent with the requirements of the Act on Constitutional Tribunal – the same which constitutionality was reviewed in that case.

Venice Commission opinion

On 9 March 2016, the Venice Commission issued an opinion on the amendments to the Act on Constitutional Tribunal adopted in December 2015.[26] The Commission in its opinion criticized all the changes introduced by the amendment. According to the opinion, the changes would slow down or even paralyse the work of the Constitutional Tribunal, and doing so would be unacceptable according to European standards. The opinion states "the paralysation of the work of the Constitutional Tribunal poses a threat to the rule of law, democracy and protection of human rights."

In its opinion, the Venice Commission also considered the March 9 judgement of the Tribunal, which found the amendments to the act entirely incompatible with national law, although the Government has refused to publish this decision. The Commission emphasized that the Government's refusal to publish the Tribunal's decision would not only be contrary to the rule of law, but such an unprecedented move would also further deepen the constitutional crisis.

Government's refusal to publish judgments of the Constitutional Tribunal – risk of legal duality

After the judgment of 9 March, the Tribunal began adjudicating other pending cases. While doing this, it refused to apply those provisions of the Act on the Constitutional Tribunal which were held unconstitutional in its decision. In the period between 9 March and 5 July 2016 the Constitutional Tribunal issued 18 judgments. None of them was officially published. Some of the decisions concerned vital human rights issues, for example access to public information, deprivation of liberty of persons under guardianship or access of persons with disabilities to reasonable accommodation during driving license exam. Due to lack of publication the legal consequences of the judgments are unclear, however certain courts, including the Supreme Court[27] and the Supreme Administrative Court[28], issued the resolutions with the clear statement that the judgments of the Tribunal, even those not published, cannot be ignored. Similar resolutions were adopted by some municipal councils.[29]

In April 2016, HFHR submitted a notification to the Prosecutor's Office in Warsaw about the suspicion of committing the crime of the offence of failing to discharge law enforcement's duties by the Prime Minister. The Prosecutor Office refused to initiate the investigation in this case, so HFHR appealed against this decision to the court. In its appeal, HFHR stated that the ruling of 9 March 2016 must be considered a judgment of the Constitutional Tribunal that is subject to mandatory publication. HFHR underlined that the lack of publishing the judgements may result in a significant risk of the emergence of a legal dualism, in which some bodies would abide by the Tribunal's rulings while other would not recognise them. This directly affects the legal safety of individuals. Furthermore, HFHR argued that the refusal of publication of the Constitutional Tribunal's ruling caused a constitutional, political,

[26] Venice Commission, CDL-AD(2016)001-e
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: http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2016)001-e

[27] Statement of the General Assembly of the Judges of the Supreme Court, available at: http://www.sn.pl/aktualnosci/SiteAssets/Lists/Wydarzenia/EditForm/Uchwala_Zgr_Og_SSN_26_04_2016.pdf

[28] Resolution of the Council of the Supreme Administrative Court's judges, available at: http://www.nsa.gov.pl/komunikaty/uchwala-kolegium-naczelnego-sadu-administracyjnego-z-dnia-27-kwietnia-2016-r,news,4,309.php

[29] See e.g. http://www.rp.pl/Spor-o-Trybunal-Konstytucyjny/304269938-Rada-Miasta-Poznania-podjela-decyzje-o-stosowaniu-sie-do-wyrokow-TK.html; http://www.portalsamorzadowy.pl/komunikacja-spoleczna/gorzowska-rada-z-uchwala-w-sprawie-trybunalu,80101.html

economic and publicity loss.[30] In October 2016, the court in Warsaw accepted HFHR appeal and ordered the Prosecutor's Office to start an investigation.[31] However, in February 2017, the Prosecutor's Office discontinued the investigation.

The judgements of 10 March 2016 and 11 August 2016 (please see further: The Constitutional Tribunal's ruling on the second Act on the Constitutional Tribunal) have not been published by the Prime Minister. Until December 2016, both judgements were available at the official website of the Constitutional Tribunal. However, after the change on the position of the President of the Constitutional Tribunal in December 2016, both judgements were removed from the sites. Now, the judgements are only available in among others legal databases or at the Commissioner for Human Rights' website.

New draft of the Act on the Constitutional Tribunal

On 29 April 2016, a group of MPs from the governing party submitted a draft Act on the Constitutional Tribunal to the Parliament. Unlike in the case of previous changes, this proposal was not limited to amendments, but constitutes an entirely new piece of legislation. Generally, the draft law provided reintroduction of provisions which were in force before 30 August 2015, however it provided also certain potentially unconstitutional rules.

According to the draft, as a rule judgments of the Tribunal could be issued by a simple majority of votes. However, if the case is heard by a full bench and concerns, among others, the constitutionality of an act or international agreement, unconstitutionality of the statute of a political party, or a case in which the constitutional standard is based on certain specific articles of the Constitution (e.g. the principle of the separation of powers, the rule of law, the prohibition of discrimination), the decision should be made by the 2/3 majority of votes.

Another worrisome provision of the draft Act authorized President and the Prosecutor General to issue a motion to the Constitutional Tribunal to review a given case in a full bench. The Constitutional Tribunal would be bound by such a request, what could be used by political organs to exert pressure on it and obstruct its functioning.

The new draft Act retained similar order of case consideration as the one introduced by the amendment of December 2015; however, this time it included certain exceptions. In general, cases submitted by, among others, a group of MPs, the President, the National Judiciary Council or the Prosecutor General should be heard in order in which they were lodged. However, this order will not be applicable to cases concerning, among others, the constitutionality of international agreements, the Act on the Annual State Budget, the constitutionality of the Act on the Constitutional Tribunal, and competence disputes between state authorities.

Moreover, the draft Act provided that disciplinary judgments of the Constitutional Tribunal regarding a removal of a judge would require an approval of the President for their effectiveness. Similar solution was provided in the December Act, although that Act made the removal of a judge dependent on the approval of the Sejm, and it was held unconstitutional in the Tribunal's judgment of 9 March. The

[30] Helsinki Foundation for Human Rights, HFHR appeals in proceedings regarding refusal to publish Constitutional Tribunal's judgment, available at: http://www.hfhr.pl/en/hfhr-appeals-in-proceedings-regarding-refusal-to-publish-constitutional-tribunals-judgment/

[31] Helsinki Foundation for Human Rights, Court order prosecutor's office to reopen investigation in case of non-publication of Constitutional Tribunal's judgment, available at: http://www.hfhr.pl/en/court-order-prosecutors-office-to-reopen-investigation-in-case-of-non-publication-of-constitutional-tribunals-judgment/

Constitutional Tribunal underlined that the principle of independence of the judiciary requires that courts and tribunals are autonomous in the sphere of disciplinary proceedings and that other branches of power do not interfere in this autonomy.

On 24 June 2016, the draft Act was reviewed by the Sub-Committee in the Committee of Justice and Human Rights of the Sejm, which introduced certain amendments to it. Unfortunately, those changes not only did not eliminate abovementioned controversial provisions, but also added more worrisome solutions. The most important among them provided that if the Constitutional Tribunal reviews the case in a full bench, four judges (out of 11) may oppose against the proposed judgment. In that case, the pronouncement of the judgment is postponed for 3 months. If the four judges still oppose against the judgment, the proceedings are postponed for further 3 months. After that time the judgment must be issued with 2/3 majority, otherwise the proceedings are discontinued. Another provision obliges the Prime Minister to publish judgments issued after 10 March 2016 (the judgment of 9 March still would not be published), but at the same time it declares that they were issued with violation of the Act on Constitutional Tribunal. The draft provides also that the President of the Constitutional Tribunal will be obliged to allocate cases to all judges sworn into office by the President, although – as it was mentioned above – some of them were elected invalidly.

The draft law in the version proposed by sub-committee was adopted, with certain minor changes, by the Committee of Justice and Human Rights of the Sejm on 29 June 2016. However, on 5 July 2016, the proceedings were returned to first hearing due to withdrawal of citizens' draft act which was reviewed by the Committee jointly with the MP's draft. The Sejm decided that in such situation the MP's draft has to be reviewed once again, this time separately.

The proceedings in the Committee began on 5 July at 8 pm and finished on 6 July around 3:30 am. The Committee recommended removal of certain controversial provisions, for example – the competence of the President and Prosecutor General to require the Constitutional Tribunal to review a given case in a full bench or the rule according to which when four judges oppose against the judgment, the decision has to be issued with 2/3 majority. However, many other potentially unconstitutional regulations mentioned above were not eliminated.

On 7 July 2016 the draft was adopted by the Sejm. The most problematic provisions were:

- the requirement of presidential approval of disciplinary judgments regarding the removal of the judge;
- the President's power to introduce cases with priority (being reviewed despite the introduction order);
- veto power of 4 judges of the full bench: however, the law to some extent changed the consequences of the veto. According to its version adopted by the Sejm, first veto delays the deliberations over the judgment for 3 months and the second veto – for further 3 months. After that time (6 months) the judgment has to be adopted with simple majority (unlike the original version of the draft which required 2/3 majority);
- limitation of the Ombudsman's right to intervene in the proceedings to only those which were initiated via individual's constitutional complaints;
- impossibility to conduct a hearing if the Prosecutor General (or its representative) does not attend it although his presence is obligatory, even if he was correctly notified (such a solution might be abused by the Prosecutor General, who is now at the same time Minister of Justice, in order to prevent the Constitutional Tribunal from deliberations over the case).

- obligation to publish only those judgment which were issued after 10 March 2016 (ie. not judgment of 9 March regarding the Act on Constitutional Tribunal) and description of those judgments as "issued with violation of the Act on Consitutional Tribunal";
- suspension of all cases pending before the Constitutional Tribunal for 6 months in order to complete the new formal requirements;
- obligation of the President of the Constitutional Tribunal to allocate cases to judges which were incorrectly elected by the Sejm of this cadence.

After the adoption of the law by the Sejm, it was delivered to Senate for further legislative works. On 21 July 2016, the law was adopted by the Senate with certain amendments which eliminated some of potentially unconstitutional provisions. The Senate removed in particular:

- the requirement of presidential approval of disciplinary judgments regarding the removal of the judge;
- the President's power to introduce cases with priority (being reviewed despite the introduction order);
- limitation of the Ombudsman's right to intervene in the proceedings to only those which were initiated via individual's constitutional complaints.

However, a number of other controversial provisions remained unchanged or were amended in a way which did not eliminate all doubts as to their constitutionality. In particular, the Senate did not decide to remove the "delay-veto power" of 4 judges of the full bench, what may threaten the effectiveness of the proceedings before the Constitutional Tribunal. Also the provision which disallows the Constitutional Tribunal to proceed if the Prosecutor General does not attend the hearing in those cases when it is obligatory remained unchanged. Similarly, the law still obliged the President of the Constitutional Tribunal to allocate cases to judges which were elected incorrectly by the Sejm of current term of office. Yet another provision which was not amended is the controversial intertemporal rule according to which all pending cases are going to be suspended for 6 months. On the other hand, the provision regarding publishing of so far unpublished judgments was only slightly amended. Currently, it obliges to publish all judgments issued "with violation of the Act on Constitutional Tribunal" before 20 July 2016, with exception to those judgments which concerned the acts which were already derogated. Such a change does not change the essence of the provision which is the statutory assessment of the Constitutional Tribunal's judgments as issued in contradiction to the Act on Constitutional Tribunal and prevention of the publication of the judgment of 9 March 2016. The Senate's amendments also slightly changed the rules on the order of cases adjudication. The introduction order would still remain as a rule, however the President of the Constitutional Court would be able to skip this order, if a case concerns rights and freedoms of citizens, public safety and constitutional order.

The amendments of the Senate were partially accepted by Sejm. The Act was adopted on 26 July 2016, and four days later the President signed the law. The Act was published in the Journal of Laws on 1 August 2016.

The Constitutional Tribunal's ruling on the second Act on the Constitutional Tribunal

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.

Similarly to the judgement of March 2016, also this judgement has not been officially published either.

Venice Commission's opinion on the Act on the Constitutional Tribunal of July 2016

In October 2016 the Venice Commission adopted a second opinion concerning Act on Constitutional Tribunal of July 2016. Commission found that despite some of improvements, numerous provisions of the Act could still delay and obstruct the work of the Tribunal. It was underlined that the Act does not respect the judgments of the Tribunal issued in December 2015 and cannot solve the issue of appointment of judges in accordance with the rule of law. The Commission concluded that by adopting the Act of 22 July (and the Amendments of 22 December), the Polish Parliament assumed powers of constitutional revision which it does not have when it acts as the ordinary legislature, without the requisite majority for constitutional amendments.[32]

After the opinion was published the Minister of Foreign Affairs announced that Poland had ended the cooperation with the Venice Commission.[33]

[32] Venice Commission, CDL-AD(2016)026-e
Poland - Opinion on the Act on the Constitutional Tribunal, adopted by the Venice Commission at its 108th Plenary Session, (Venice, 14-15 October 2016), available at: http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2016)026-e

[33] Polskie Radio, Polski rząd kończy współpracę z Komisją Wenecką, available at: http://www.polskieradio.pl/5/3/Artykul/1680850,Polski-rzad-konczy-wspolprace-z-Komisja-Wenecka

Three new acts regulating the works of the Constitutional Tribunal

Contrary to the Acts adopted in November 2015, December 2015 and July 2916 that aimed at paralysing the Tribunal's works, the three Acts adopted at the end of 2016 mainly aimed at the securing for the governing majority the chance to appoint the new President of the Constitutional Tribunal.

On 19th December 2016, the President of Poland signed three acts regulating the works of the Constitutional Tribunal: the Act on the status of the judges of the Constitutional Tribunal, the Act on organisation of the Constitutional Tribunal and proceedings before the Tribunal and the Act introducing the provisions on the status of the judges and provisions regulating the organisation of the Tribunal included several provisions that might be find unconstitutional.

The Act on the status of judges of the Constitutional Tribunal introduced new provisions regulating among others the immunity of the judges of the Tribunal and their disciplinary responsibility. In the light of the new Act, the judges of the Constitutional Tribunal may face disciplinary proceeding among others in case they violate the Code of Ethics of the Judge of the Constitutional Tribunal. The same provision is applicable to judges-emeritus of the Constitutional Tribunal. In July 2017, media reported that the former President of the Constitutional Tribunal Judge Jerzy Stępień was notified about the imitating of the disciplinary proceedings against him. The current President of the Constitutional Tribunal Judge Julia Przyłębska stated in the TV interview that the reason to initiate the disciplinary proceeding against Judge Stępień was the fact that he participated in one of the public assemblies.[34]

The third Act, Act on the introducing the provisions on the status of the judges and provisions regulating the organisation of the Tribunal included several provisions that might be find unconstitutional. The Act introduced a function of a "judge acting as the President of the Constitutional Tribunal". The Polish Constitution includes provisions regarding the position of Deputy President of the Tribunal and does not foresee the possibility of appointing another judge who might have a power to act as the President of the Tribunal. The "judge acting as the President of the Constitutional Tribunal" was given the power to organise the General Assembly of Judges of the Constitutional Tribunal. Furthermore, this judge could have assigned to cases three judges appointed by the governing majority without legal basis in 2015.

The Act introducing the provisions on the status of the judges and provisions regulating the organisation of the Tribunal came into force a day after their publication in the Official Journal (on 20th December 2016).

The appointment of the new President of the Constitutional Tribunal

On 19th December 2016, the previous President of the Constitutional Tribunal Professor Andrzej Rzepliński's term of office expired. On the same day, the President of Poland signed three new Acts regulating the works of the Constitutional Tribunal. On 20th December 2016, the President of Poland appointed Judge Julia Przyłębska on the position of the "judge acting as the President of the Constitutional Tribunal". Immediately after this decision, Judge Przyłębska announced the organisation of the General Assembly of Judges of the Constitutional Tribunal that took place a couple hours later. The General Assembly was supposed to appoint candidates for the position of the President of the Constitutional Tribunal and made a resolution in this regard.

[34] Wilgocki M., Jerzy Stępień będzie miał postępowanie dyscyplinarne w Trybunale Konstytucyjnym, Wyborcza.pl, available at: http://wyborcza.pl/7,75398,22165569,jerzy-stepien-bedzie-mial-postepowanie-dyscyplinarne-w-trybunale.html

14 judges (seven "old" judges and seven judges appointed by the 8th Sejm) took part in the General Assembly's session. Judge Przyłębska allowed three persons appointed for the position of judges in December 2015 to participate in the session even though in accordance with the Tribunal's own jurisprudence their appointments were made without a valid legal basis.[35]

According to the documents which Helsinki Foundation for Human Rights obtained upon the access to public information[36], 8 judges of the Constitutional Tribunal refused to vote in the process of appointing candidates for the president of the Constitutional Tribunal including judge Piotr Pszczółkowski, legally appointed in December 2015, who challenged the validity of the General Assembly. Given that, the General Assembly did not adopt a resolution on presenting to the President of Poland the candidates for the President of the Tribunal. However, Judge Przyłębska decided that voting on candidates is tantamount to voting on the resolution for the President. She was the only person who signed the minutes of the General Assembly.

On 21 December 2016, the President of Poland appointed Julia Przyłębska as the President of the Constitutional Tribunal.

The motion of the Prosecutor General

O 13th January 2017, the Prosecutor General (who is the Minister of Justice at the same time) submitted a motion to the Constitutional Tribunal upon verification of the Parliament's resolution of 26 November 2010 upon which the Parliament appointed 3 new judges of the Constitutional Tribunal. The Prosecutor General raised a question whether the process of appointing those judges was constitutional, since they were appointed upon one resolution instead of adopting three individual resolutions.

It was a common practice in the Parliament to appoint the new judges of the Constitutional Tribunal in a separate voting that was concluded in one resolution. For 6 years, none has questioned the legality of appointing three judges in 2010. However, it seems that Prosecutor General's motion served as an excuse for the President of the Tribunal for dismiss those three judges from ruling. For example, on 27 February 2017 sitting in full bench the Constitutional Tribunal was supposed to hear the case concerning the provisions regulating the work of the courts guardians. The hearing was adjourned as a result of the Prosecutor General's motion to exclude those three judges from the bench. Furthermore, on 16 March 2017 the Constitutional Tribunal issued a judgement concerning the amendment to the Act on Assemblies. The Tribunal sit in a bench composed of 11 judges (including 3 persons appointed for the positions of judges without a valid legal basis and without 3 judges covered by the motion of the Minister of Justice/Prosecutor General of January 2017). The decision was made by the majority of 7 votes. 4 judges presented dissenting opinion in which they pointed at among others the unconstitutional composition of the bench.

The Constitutional Tribunal after the reforms

One of the first decisions made by Judge Przyłębska was assigning cases to the three judges who were appointed without valid legal basis in 2015. The fact that the persons who are not legally appointed judges will rule on cases submitted to the Constitutional Tribunal raises serious concerns about the

[35] The Constitutional Tribunal ruled in this case in its judgement of 3 and 9 December 2015
[36] Helsinki Foundation for Human Rights, Chief Justice of Poland's Constitutional Court elected at illegal session?, available at: http://www.hfhr.pl/en/chief-justice-of-polands-constitutional-court-elected-at-illegal-session/

legality of such a decision. In July 2017, one of these three persons Professor Lech Morawski died. Despite appointing for his position one of the judges legally appointed by the previous governing majority in October 2015, the President of Poland decided to appoint to this position a person chosen by the Parliament. Still in the Constitutional Tribunal, there are three persons acting as judges appointed for this position without a valid legal basis.

According to the Constitution, the Constitutional Tribunal decisions are final and binding. There is no legal procedure to appeal against these decisions. However, in the Code of Civil Procedure (on which the proceedings before the Constitutional Tribunal are based) provides a term of "non-valid judgement". Such a judgement could be issued by a bench of judges that is composed incorrectly. In this case, if the Constitutional Tribunal issues a judgement in a bench composed of three judges appointed without legal basis, the common courts should have to decide whether or not to follow this decision in their jurisprudence. This uncertainty of law will lead to serious practical problems and severely undermine the rule of law in Poland.

Furthermore, the pace of works of the Constitutional Tribunal has slowed down. By 30 June 2017, the Tribunal issued only 49 decisions while in the same period in 2016 there were 51 decisions, in 2015 - 86 decisions and in 2014 - 61 decisions. Also, the number of cases submitted to the Constitutional Tribunal has dropped down. By 30 June 2017, the Constitutional Tribunal accepted 47 cases, while in the same period of 2016 there were 60 cases, 153 cases in 2015 and 66 cases in 2014.[37]

Conclusions

All legislative actions undertaken by the current ruling party since it came to power in November 2015, such as a requirement of 2/3 majority to issue a judgment, competences of the executive organs to dictate the Tribunal a bench in which it should proceed, raising *quorum* required for a full bench, were aimed at paralysis of the Constitutional Tribunal.

Even more worrisome is the refusal of publication of the Tribunal's judgments by the Prime Minister, what is an unprecedented act of violation of the principle of separation of powers and independence of the judiciary. As the Constitutional Court is authorized to review legislative acts and individual complaints, without its effective functioning, all guarantees of human rights are illusory, as there is no other organ authorized to review the constitutionality of legal acts.

Two judges appointed without legal basis in December 2015 and one judge who replaced Professor Lech Morawski in September 2017 were assigned to cases by the new President of the Constitutional Tribunal. The fact that the persons who are not legally appointed judges will rule on cases submitted to the Constitutional Tribunal raises serious concerns about the legality of such a decision. The fact that the judgements of the Constitutional Tribunal are issued by the persons who are not judges raises serious doubts regarding the validity of such decisions.

In its statement of January 2017, HFHR stated that „the Constitutional Tribunal's ability to perform its constitutional functions have been called into question as the judges appointed without a valid legal basis took up their official duties and the Tribunal's President was elected in contravention of the law. A major loophole will appear in the human rights protection system".[38]

[37] Constitutional Tribunal, Dane statystyczne z postępowania właściwego w Trybunale Konstytucyjnym w latach 2014-2017, available at: http://trybunal.gov.pl/fileadmin/content/dokumenty/statystyka/Dane_statystyczne_2014-2017.pdf
[38] Helsinki Foundation for Human Rights, Constitutional Tribunal: what next?, available at: http://www.hfhr.pl/en/constitutional-tribunal-what-next/

The "reform" of the justice system

The systemic attack on the independence of the justice system did not stop with taking the control over the Constitutional Tribunal. Quite contrary, in 2017 the governing majority proposed several drafts of legal acts which concerned other parts of the justice system (e.g. National Council of the Judiciary or the Supreme Court).

The draft Act on the National Council of the Judiciary

On 24 January 2017, the Ministry of Justice presented a draft of amendments concerning functioning of the National Council of the Judiciary in Poland (the Council)[39]. The process of public consultation was limited by deadline of 31 January 2017.

The National Council of the Judiciary in Poland is an administrative body composed of judges and representatives of the Parliament and the President. Its pivotal responsibilities are to protect the independency of the justice system, nominate the candidates for judges and present opinions on the draft legislation concerning the justice system.

According to Article 187.1 of the Constitution the National Council of the Judiciary shall be composed of:

- the First President of the Supreme Court, the Minister of Justice, the President of the Supreme Administrative Court and an individual appointed by the President of the Republic;
- 15 judges chosen from amongst the judges of the Supreme Court, common courts, administrative courts and military courts;
- 4 members chosen by the Sejm from amongst its Deputies and 2 members chosen by the Senate from amongst its Senators.

Such a composition of the Council was supposed to guarantee its independence. The draft proposal changed the procedure of appointing judges-members of the National Council of the Judiciary in Poland. In the light of the draft, 15 judges would be elected by Sejm (first chamber of the Parliament). According to existing regulations, judges-members of the Council are elected by the representative assemblies of each level of the courts (common, administrative, military). This procedure was criticized by judges arguing that the judges appointed to regional courts (*sądy rejonowe*) – first instance courts – are not adequately represented in the Council. The Ministry of Justice argued that the new procedure, when Sejm would appoint the judges-members of the Council, guarantees the proper representativeness of the Council. However, the courts would be deprived of any influence on who will be appointed as a member of the Council.

The draft also changed the procedure of appointing judges of common courts. In the light of the current regulations, the entire Council is responsible for selecting and evaluating the candidates for the offices of judges in the courts and presenting them to the President of Poland who should swear them into office. In the light of the draft, the selection of a candidate for the position of a judge will require two positive opinions from two assemblies. In a case of contrary opinions, the Council will vote in plenary,

[39] The first draft of amendments was published in May 2016. The draft of 24 January 2017 is a continuation of the first one.

and 17 votes will be necessary to accept the candidate. Such regulations will expand the political control over the process of appointing new judges of the common courts.

The Council of Judiciary in Poland and the European Network of Councils for the Judiciary criticized the draft Act.[40]

The government adopted this draft on 7th March 2017, and week later (on 14th March 2017) the draft was submitted to the Parliament. The Parliament has not started its works on this draft yet.

International documents, including the European Charter on the Status of Judges of the Council of Europe, emphasize that it is vital that the body, which is responsible for the selection of candidates to the position of a judge, their promotion and dismissal, must be independent. By contrast, the draft law gave meaningful powers to the legislative branch. The Consultative Council of European Judges (CCJE) stated that a judicial council can be either composed solely of judges or have a mixed composition. When there is a mixed composition, such as proposed in the draft, the CCJE considers that, in order to prevent any manipulation or undue pressure, a substantial majority of the members of the judicial council should be elected by its peers[41]. Also, the OSCE/ODIHR found that the draft law raised serious concerns with regard to key democratic principles, in particular the separation of powers and the independence of the judiciary. By transferring the power to appoint judge members to the National Council of the Judiciary from the judiciary to the legislature, and by introducing new procedures for selecting judges which will be under the decisive influence of the legislative and executive, the draft amendments would seriously jeopardize the independence of a body which is the guarantor of judicial independence in Poland.[42]

Despite these protests, Sejm adopted the law on 12th July 2017.

Act on the Supreme Court

At the same day when the Parliament adopted the draft law on the National Council of Judiciary, a group of MPs submitted to the Sejm the draft Act on the Supreme Court. Since the draft law was submitted as the initiative of the members of the Parliament it did not have to undergo the process of social consultations.

One of the most controversial provisions of the draft law stated that the tenures of all judges currently sitting on the Supreme Court would be terminated once the Act is implemented. Under this provision, the Minister of Justice would be able to decide which judges would remain in office and which judges' terms of office would be effectively terminated. The judges selected by the Minister of Justice to stay in office would have to go through a three-stage reappointment procedure. Furthermore, the draft Act on the Supreme Court also empowered the Minister of Justice to prepare the Statute of the Supreme Court, which regulates the way the Court is organized.

[40] The opinions of the Councils are available here: https://www.encj.eu/images/stories/pdf/Members/opinion_krs_draft_laws_feb_2017.pdf

[41] CCEJ, Opinion no. 10 (2007) of the Consultative Council of European Judges to the attention of the Committee of Ministers of the Council of Europe on the Council for the Judiciary at the service of society (adopted at the 8th meeting, Strasbourg, 21-23 November 2007), p. 5.

[42] OSCE/ODIHR, Final Opinion on Draft Amendments to the Act of the National Council of the Judiciary and Certain Other Acts of Poland, available at: http://www.osce.org/odihr/315946

Furthermore, the draft law stated that the term of office of the First President of the Supreme Court expires when they turn 65 year of age. Judge Małgorzata Gersdorf, the current First President of the Supreme Court, will turn 65 in November 2017.

The Supreme Court's competences are very wide and it plays a crucial role in sustaining the independence of the justice system in Poland. First of all, the Supreme Court supervises the works of the courts of lower instances in terms of „judiciary control." For example, the Court can adopt decisions in which it presents the legal interpretation of particular provisions. Such a decision is binding for the courts of lower ranks. At the beginning of this year, when the Constitutional Tribunal was taken over by the governing majority, the President of the Supreme Court underlined that now it is the role of common courts to protect, implement and interpret the Constitution. Secondly, the Supreme Court confirms the validity of parliamentary and presidential elections.

Thirdly, the Supreme Court has the right to issue opinions about draft legislation. For example, in 2016 the Supreme Court presented a very strong opinion regarding the draft Law on Assemblies in which it called the draft legislation „an attempt to violate the constitutional order of the Republic of Poland."

The draft Act was adopted by the Sejm at an accelerated pace (within a time span of a mere 10 days) and met with massive protests across Poland. The Act also met with strong criticism from the Ombudsman's Office, the National Council of the Judiciary, associations of judges and lawyers as well as many human rights non-governmental organizations.

Act on the system of common courts

In April 2017, a group of MPs submitted to the Parliament a draft law on the system of common courts. The most controversial aspects of this law concerned lowering judges' retirement age and empowering the Minister of Justice to dismiss all presidents of courts and later arbitrarily appoint their replacements without the need to consult with judges of a given court.

The amendment enables the Minister of Justice to appoint presidents of courts without the obligation to consult representatives of the judges working in a given court. This solution contravenes the jurisprudence of the Constitutional Tribunal, which ruled that the Minister of Justice, as the administrator of all courts, needs to participate in the process of the presidents' appointment. However, as the Tribunal observed, the Minister's power of appointment cannot surpass that of the judiciary. The proposed measures deprive judges of the opportunity to evaluate a candidate for the court president's post, thus prevents any control over the actions of the Ministry of Justice.

In addition to the above, the Minister gained new powers in respect of a dismissal of a court president: he is able to rely on a new ground for dismissal, namely the "ascertainment of particularly ineffective performance of a president's administrative supervision or work organisation function in the court over which they preside or in the courts subordinate thereto". Moreover, an opinion on a dismissal issued by the National Council of the Judiciary of Poland will bind the Minister only if it is adopted by the qualified majority of two-thirds of voting Council members.

In any case, within six months from the amendment's entry into force (namely until the end of February 2018), the Minister of Justice's powers will be even more extensive. During this period, he will be able to dismiss all presidents and deputy presidents of common courts without the obligation to ask for the National Council's opinion, and without cause.

The law also lowered the retirement age of judges, introducing different retirement thresholds for women and men (60 and 65 years, respectively). A judge may serve past the above age limits but only with the Minister of Justice's approval. Under current law, a judge may declare his or her will to remain on the bench to the Minister of Justice and is allowed to do so on condition that he or she presents a medical certificate of fitness for performing a judicial function.

The Sejm adopted this law on 12 July 2017.

Presidential vetoes and new draft laws on the Supreme Court and National Council of the Judiciary

Changes to the Supreme Court legislation have resulted in a series of protests across Poland, which started on Saturday, July 15. Crowds of citizens continued to protest in front of the Sejm, the Presidential Palace and in front of the Supreme Court. On July 16th, 18th and 20th a „Chain of Light" has been organized, where thousands of protesters lit candles in a gesture of support for judges. A protest village erupted in front of the Sejm, where demonstrators stay around the clock.

Judicial associations, multiple nongovernmental organizations, and opposing political parties (one of which suggested more than one thousand amendments to the bill) have also strongly protested the proposed legislation changes.

On 24 July 2017, the President of Poland announced that he vetoed the Acts on the Supreme Court and the Act on the National Council of Judiciary. While justifying his decisions, the President stated among others that in Poland „there is no such a tradition in which the Prosecutor General may interfere with the works of the Supreme Court or its judges. And I do agree with all of these people stating that it shouldn't be that way and it this can't be allowed to happen".[43]

At the same time the President decided to sign the third Act – Act on the common courts, and announced that he would prepare his own drafts regarding the Supreme Court and the National Council of the Judiciary in Poland.

After two months, on 25th September 2017, the President presented his drafts law. The Presidential draft law on the National Council of Judiciary in Poland changes the procedure of appointing judges members of the Council (15 out of 25 members are judges). According to the draft, judges will be elected by the Parliament with the qualified majority 3/5. Candidates will be presented by group of 25 judges or by group of 2.000 citizens. If the majority is not be gained, then each MP will be entitled to vote for one candidate.

Also, the Presidential draft law on the Supreme Court presents several controversial provisions. First of all, the draft law changes the provisions on the judges' retirement age. After turning the retirement age (65 years) the decision whether judge can still reside in the office depends on President who can allow a judge to stay in the office for next three years. Such a permission can be granted twice. As a consequences approx. 40% of judges can be removed from the office (the draft describes this process as "interference with human resources of Supreme Court").

[43] Chancellery of the President of Poland, Oświadczenie Prezydenta RP ws. ustaw dot. wymiaru sprawiedliwości, available at: http://www.prezydent.pl/aktualnosci/wypowiedzi-prezydenta-rp/wystapienia/art,256,oswiadczenie-prezydenta-rp-ws-ustaw-dot-wymiaru-sprawiedliwosci.html

Most probably the term of office of the Chief Justice (Małgorzata Gersdorf) will be terminated as well (she turns 65 in November 2017). Whereas, according to the Constitution, the First President of the Supreme Court shall be appointed by the President of the Republic for a 6-year term of office.

Secondly, the draft introduces new procedure which allows to verify final judgements issued by common court – so called "extraordinary complaint". Such a complained will not directly submitted by the citizens to Supreme Court but indirectly - by other institutions such as e.g. Prosecutor General, Ombudsman or group of MPs. Within three years after new law enters into force, it will be possible to "review" any judgement which became final after 17 October 1997 (the day when Constitution entered into force). Decision to creating such instrument is purely populist, since already extraordinary measures exist in the Polish legal system and allow to review judgement on limited legal grounds. Drafted provisions are highly dangerous to stability of the whole legal order and rights of citizens.

Also, the draft introduces the institution of "lay judges" - non-lawyers who will be appointed to Supreme Court proceedings. They will be elected by Senate for 4-year term. They will preside in the bench (together with professional judges) in cases involving disciplinary proceedings and extraordinary complaints. Assistant jury are present in the common courts in the first instance proceedings. According to the draft they will decide in most complicated legal issues directed to the Supreme Court.

The draft creates new chamber in the Supreme Court (Disciplinary Chamber) and allows President to appoint special disciplinary commissioner to initiate disciplinary proceeding in a concrete case. Draft introduce also broad amendments to disciplinary proceedings concerning judges of common courts.

Last but not least, the new chamber will be established in the Supreme Court. It will hear "extraordinary complaints" but also "public affairs" such cases involving the legality of elections or referendum. The chamber will be composed of new judges selected by new NCJ composed of judges elected by the Parliament.

Conclusions

The reform of the justice system has not been ended with the President's vetoes. The legislative works on the other legislative acts are still on-going. The works head in a direction of further widening the political control over the justice system. In August 2017, the HFHR presented to the President of Poland a policy brief listing the main problems in functioning of the justice system. In HFHR's opinion the areas such as an organization of works of judges in common courts, access to legal aid, lack of a comprehensive regulation on the expert witnesses or lack of improvement in access to justice for persons with disabilities are the key problems in the functioning of the justice system which require urgent reform.[44] However, all the pieces of legislation proposed since 2016 failed to address these problems.

Presidential pardon to a person convicted by a not final judgment

In November 2015, the President granted pardon to former head of the Central Anti-Corruption Bureau and three ex-officers of this Bureau. All of them were convicted by the court of first instance for the

[44] Helsinki Foundation for Human Rights, Jakiej reforms wymiaru sprawiedliwości potrzebujemy? Materiał do dyskusji, available at: http://www.hfhr.pl/wp-content/uploads/2017/08/Reforma-wymiaru-sprawiedliwosci-policy-paper-2017-08-29.pdf

abuse of power. However, at the moment of pardon the appellate proceedings were still pending as the accused and the prosecutor filed their appeals. In these circumstances, the President's decision was highly debatable – so far, the power of pardon was used only after the delivery of final and binding criminal judgments. The President explained that he wanted to "release the system of justice from dealing with this controversial case".[45]

The presidential pardon gave rise to many controversies among the lawyers. The former President of the Constitutional Tribunal, Professor Andrzej Zoll, criticized it as a direct interference with the sphere of justice, which is not constitutionally legitimized.[46] The judge-emeritus of the Constitutional Tribunal, Professor Ewa Łętowska, argued that the President cannot replace the courts by issuing an order to discontinue criminal proceedings, and that that was the essence of the presidential pardon before a final conviction.[47] The Assembly of Appeal Judges of Warsaw issued a resolution in which it underlined that it did not assess the constitutionality of the President's decision but protests against suggestions that the judiciary is unable to deal with the case and has to be "released" by the Head of State.[48] Also the Council of the Faculty of Law and Administration of the Warsaw University negatively assessed the President's actions and underlined that he cannot usurp the role of a judge.[49] At the same time, some lawyers (e.g. Professor Piotr Kruszyński[50]) argued that the President did not violate the Constitution.

Also the HFHR published its critical analysis of the presidential pardon. It argued that the institution of pardon, regulated in the Article 139 of the Constitution, is applicable only to final judgments. The power to issue an order to discontinue pending criminal proceedings is not a "pardon" but an individual abolition act, and the Constitution does not grant the Head of State such a competence. The purpose of the pardon is to mitigate the consequences of the conviction. The pardon neither invalidates the court's judgment nor acquits the convicted person. Power to grant pardons does not authorize the President to decide which cases may be adjudicated by the courts and which may not. The President's decision is unacceptable as it may lead to a creation of a dangerous practice – the head of executive would be authorized to interfere within the sphere of judiciary in arbitrary and uncontrollable way, at the expense of the principle of the independence of judiciary but also rights of crimes' victims. The HFHR pointed out that in this particular case, the victim, who was acting in the proceedings as the auxiliary prosecutor, appealed against the first instance judgment and so the presidential pardon violated his right to court.

Nevertheless, on 30 March 2016 the Circuit Court in Warsaw decided to discontinue the criminal proceedings. It explained that the Constitution does not limit presidential power of pardon and the court cannot review the reasons that stay behind the President's decision. However, the auxiliary

[45] Chancellery of the President of Poland, „Postanowiłem uwolnić wymiar sprawiedliwości od tej sprawy", available at: http://www.prezydent.pl/aktualnosci/wydarzenia/art,69,postanowilem-uwolnic-wymiar-sprawiedliwosci-od-sprawy-m-kaminskiego.html

[46] Wilgocki M., Prezydent Andrzej Duda ułaskawił Mariusza Kamińskiego, Gazeta Wyborcza available at: http://wyborcza.pl/1,75398,19203780,nieoficjalnie-prezydent-ulaskawil-mariusza-kaminskiego.html

[47] Orłowski M., Łętowska: Prezydent nie może wyręczać sądów. Grozi nam kryzys konstytucyjny, Gazeta Wyborcza, available at: http://wyborcza.pl/1,75398,19218093,letowska-prezydent-nie-moze-wyreczac-sadow-grozi-nam-kryzys.html

[48] TVN24.pl, "Żadna władza nie jest zwierzchnią nad pozostałymi". Sędziowie o ułaskawieniu Kamińskiego, available at: http://www.tvn24.pl/wiadomosci-z-kraju,3/kaminski-ulaskawiony-przez-dude-sedziowie-o-decyzji-prezydenta,596914.html

[49] Karpieszuk W., Wydział Prawa UW ostro o działaniach prezydenta Dudy i Sejmu. Po dużym boju, Gazeta Wyborcza, available at: http://warszawa.wyborcza.pl/warszawa/1,34862,19343296,wydzial-prawa-uw-ostro-o-dzialaniach-prezydenta-dudy-i-sejmu.html

[50] wpolityce.pl, Prof. Kruszyński: Prezydent nie złamał prawa. Prawo łaski wypływa z Konstytucji, available at: http://wpolityce.pl/polityka/272172-prof-kruszynski-prezydent-nie-zlamal-prawa-prawo-laski-wyplywa-z-konstytucji

prosecutors appealed against this decision to the Supreme Court. In February 2017, a three judges panel of the Supreme Court heard the complaints and referred a question of law to the Court's panel of seven judges, asking whether the President could legally pardon persons convicted with a non-final judgment and what would happen if the pardon was considered illegal. In May 2017, the Supreme Court ruled that the President can not pardon a person who was not found guilty in the final judgement.

A couple months later, in August 2017 the panel composed of three judges of the Supreme Court decided to suspend the proceeding. The Supreme Court motivated its decision by the fact that before the Constitutional Tribunal there was another proceeding pending which regarded this case. In June 2017, the Speaker of the Sejm submitted a motion to the Constitutional Tribunal to rule whether the Supreme Court had a power to verify the President's pardoning.[51] None of these proceedings (neither before the Supreme Court nor the Constitutional Tribunal) have been completed.

Refusal of appointment of judges by the President

On 22 June 2016, the President refused to appoint 10 candidates for the position of judges (among them were both candidates for their first judicial office and candidates for promotion). He did not provide any reasons for the refusal, although media informed that some of the candidates adjudicated in politically controversial proceedings (i.e. civil proceedings between left-wing politician and the leader of the Law and Justice party, which supports the current President).

The President's competence to decline the appointment of a judge raises serious controversies as it is not explicitly specified in the Constitution. The Constitution provides only that "judges shall be appointed for an indefinite period by the President of the Republic on the motion of the National Judiciary Council" (Article 179) and that in order to use its competence to appoint judges the President does not need signature of the Prime Minister (art. 144 section 2).

Until 2007 Presidents had never declined to appoint candidates nominated by the National Judiciary Council. In 2007, the Chancellery of the President informed the National Judiciary Council that the President had refused to appoint nine of the candidates who had been positively assessed by both the Council and the Minister of Justice. Formal decisions of the President in this matter were issued in January 2008. The President did not state any reasons for the refusal. Non-appointed judges complained on the decisions to the Provincial Administrative Court in Warsaw but it dismissed the complaints. The court declared itself not competent to rule in the case because in making judicial appointments the President did not act as a public administration body[52]. Subsequently, candidates filed cassation complaints to the Supreme Administrative Court, but the proceedings before it were suspended due to the fact that simultaneously the candidates lodged constitutional complaints to the Constitutional Tribunal. In their complaints, non-appointed candidates contended that the statutory procedure of judicial appointments violated several constitutional principles, including the principle of the rule of law, separation of powers, right of access to public service on an equal basis and the principle of the independence of judiciary. They also pointed out that challenged provisions violated

[51] TVN24.pl, Sprawa Kamińskiego się komplikuje. "Sąd Najwyższy wpadł we własną pułapkę", available at: https://www.tvn24.pl/wiadomosci-z-kraju,3/postepowanie-kasacyjne-w-sprawie-kaminskiego-sn-zawiesza-i-co-dalej,761392.html

[52] See: decisions of the Provincial Administrative Court in cases of the following numbers: II SAB/Wa 21/08, II SA/Wa 2066/10, II SAB/Wa 17/08, II SA/Wa 2118/10, II SAB/Wa 8/08, II SA/Wa 2067/10, II SAB/Wa 18/08, II SA/Wa 279/11, II SAB/Wa 136/07, II SA/Wa 2138/07, II SA/Wa 2065/10, II SA/Wa 1946/07, II SAB/Wa 16/08, II SA/Wa 283/11, II SAB/Wa 15/08, II SA/Wa 2139/07, II SA/Wa 105/11, II SA/Wa 204/11, II SA/Wa 170/11, II SAB/Wa 20/08, II SA/Wa 64/08, II SA/Wa 171/11.

the Constitution by allowing the possibility of not appointing a judge by the President despite the National Judiciary Council recommendation on the basis of unspecified criteria and without giving reasons.

On 19 June 2012, the Constitutional Tribunal decided to discontinue the proceedings initiated by judges' complaints[53]. In the reasons for its decision, the Court pointed out that the basis for the appointment of judges is art. 179 of the Constitution and not the statute questioned by the complainants. The Tribunal explained that the President's authority to appoint candidate for the office of a judge was governed entirely by the Constitution and the statute does not contain any further normative content. Therefore, the Constitutional Tribunal held that in fact the complaints questioned the practice of applying constitutional provisions by the President and such complaint cannot be the subject of the constitutional review. Regardless of these arguments, the Tribunal also held that the proceedings have to be discontinued because the applicants had not exhausted all available legal remedies (they did not file cassation appeals to the Supreme Administrative Court). However, it is worth noting that three of the judges submitted dissenting opinions to the decision. In particular, judge Piotr Tuleja underlined that establishing complexed, multi-stage procedures for selection of candidates would be pointless if at the end of this process the President could issue totally arbitrary, unrestricted decision. Also the constitutional position of the National Judiciary Council would be undermined if judges' appointment took place in the manner indicated above.

Following the decision of the Constitutional Court the proceedings before the Supreme Administrative Court were resumed, however all cassation complaints were dismissed[54]. The court ruled there were no legal grounds to assume that presidential judicial appointments were an example of the President's public powers subject to administrative courts' review. In fact, judicial appointment decision-making powers are among the prerogatives of the Head of State and thus fall outside the scrutiny of the courts. According to the Supreme Administrative Court, the President has the right to personally assess the judicial candidates and his decision whether or not to appoint a judge is discretionary. Therefore, the President's refusal to appoint a judge cannot be challenged before the administrative courts. In response to the above decision, in February 2013 four non-appointed candidates once again submitted their complaints with the Constitutional Court[55]. However in 2013 the Constitutional Tribunal ruled that the complaints were inadmissible, reiterating its previous arguments that the complaints actually challenged the practice of application of the constitutional provisions by the President. In 2014 the Tribunal upheld its decisions, finalizing by thus the proceedings in this regard. After exhaustion of all domestic remedies, the non-appointed judges filed applications to the ECtHR, however they were rejected as inadmissible.

The President's refusal to appoint judges in 2007 raised serious controversies. In particular, special attention should be paid to the statement of the International Commission of Jurists (ICJ), issued in response to the HFHR's letter, which underlined the President's decisions may undermine confidence in the independence of the Polish judiciary. The ICJ emphasized the role of the National Council of the Judiciary in ensuring the efficient administration of justice. Therefore, as it explained, the role of the executive power should be rather to support than undermine the authority of the institution. Motions issued by the National Judicial Council should be executed by the President because it would give a guarantee of independence, and hence the widespread confidence in the administration of

53 See: decision of the Constitutional Court of 19 June 2012, No. SK 37/08, OTK ZU 2012, No. 6A, item 69.
54 See: decisions of the Supreme Administrative Court of the following numbers: I OSK 1872/12, I OSK 1882/12, I OSK 1874/12, I OSK 1883/12, I OSK 1875/12, I OSK 1890/12, I OSK 1873/12, I OSK 1891/12, I OSK 1878/12, I OSK 1879/12, I OSK 1885/12, I OSK 1870/12, I OSK 1871/12, I OSK 1887/12, I OSK 1880/12, I OSK 1881/12, I OSK 1884/12, I OSK 1886/12, I OSK 1888/12, I OSK 1876/12, I OSK 1877/12, I OSK 1889/12.
55 See: http://www.hfhr.pl/en/niepowolani-sedziowie-zlozyli-skargi-konstytucyjne/ (access: 12 July 2012).

justice. The ICJ also expressed their concern that the decision of the President did not provide any reasons for the refusal. According to the ICJ, the recommendation of the independent judiciary body should only be departed from in exceptional circumstances, and only where clear reasons are provided for the decision[56]. In this context it is also worth to recall OSCE Kyiv Recommendations[57] according to which the procedure and criteria for judicial selection must be clear and transparent. Where the final appointment of a judge is with the State President, the discretion to appoint should be limited to the candidates nominated by the selection body and refusal to appoint such a candidate may be based only on procedural grounds and must be reasoned. In this case the selection body should re-examine its decision, it may also be equipped with the authority to overrule a presidential veto by a qualified majority vote.

In addition, the Plenary of the Consultative Council of European Judges (CCJE) during its 9th plenary meeting (12-14 November 2008), adopted the declaration concerning the practice of judicial appointments in Poland[58]. In the declaration the CCJE recalled the Recommendation No. R (94) 12 of the Committee of Ministers of the Council of Europe, which states that *authority taking the decision on the selection (...) of judges should be independent of the government and administration* and its member should be elected by the judiciary, even *where the constitutional or legal provisions and traditions allow judges to be appointed by the government*. The Recommendation calls for guarantees *to ensure that the procedures to appoint judges are transparent and independent in practice,* especially that the government follows in practice advice provided by an independent body and that a guarantee for concerned candidate of a right of appeal against a decision to the independent body is established. Moreover, the CCJE stated that while it is widely accepted that appointment can be made by an official act of the Head of State, yet given the importance of the judges in society, Heads of State must be bound by the proposal from the Council of Judiciary.

Taking into account all controversies around refusal of appointment of judges in 2005, the analogous situation in 2016 has to be perceived as particularly worrisome and a serious threat to judicial independence. As a response to the President's decision the National Judiciary Council issued a statement in which it underlined that the principle of independence of the judiciary requires harmonious cooperation between the President and the Council, and transparency is needed in all actions undertaken during the process of judicial appointments. Also the Helsinki Committee and HFHR in their joint statement criticized the President's decision: "The President's refusal to appoint ten judges on the motion of National Judiciary Council (…) is another proof of limiting the independence and significance of the judicial authority. This results in influencing the attitude of the personnel of judges and is an attempt to transform it into being conformable to executive power and its expectations".

On 29 December 2016, the Provincial Administrative Court in Warsaw dismissed the complaints of judges who had been denied presidential appointments. The Court ruled that presidential authority to appoint judges is a discretionary power and as such is not subject to a judicial review. The administrative court referred to a 2012 decision of the Supreme Administrative Court, which was issued in a similar case that concerned President Lech Kaczyński's refusal of a judicial appointment. However, it must be noted that the SAC decision was at the time criticised by experts in constitutional law. Furthermore, a new law on the National Council of the Judiciary was subsequently enacted, which

[56] See: statement of the International Commission of Jurists of 25 October 2007, http://www.hfhrpol.waw.pl/precedens/aktualnosci/oswiadczenie-miedzynarodowej-komisji-prawnikow.html.
[57] The Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia, Kyiv 23-25 June 2010, http://www.osce.org/odihr/71178.
[58] Consultative Council of European Judges (CCJE), Declaration, 24 November 2008, available at: http://www.hfhrpol.waw.pl/precedens/images/stories/Pdfy/deklaracja.pdf.

provided the President with the right to apply to the NCJ for reconsideration of a given judicial candidature. HFHR submitted a cassation appeal in this case.[59]

The reunification of the Offices of the Minister of Justice and Prosecutor General

In January 2016, the Parliament adopted new Act on Prosecutor Office. The main change introduced by this Act was the reunification of the Offices of the Minister of Justice and Prosecutor General.

Until 2009, the Minister of Justice acted also as the Prosecutor General. Such a convergence of roles posed a potential (or sometimes real) danger of subjecting the prosecutors' work to political influences. In 2009, the reform of the prosecution was introduced. In the light of this reform, these two offices were separated and the Prosecutor General's office became independent, although Prosecutor General had an obligation to present annual summaries of its work before the Parliament.

The Act adopted in January 2016 reversed the reform of the Prosecution introduced in 2009. In the light of Act, the prosecution is entirely supervised by the Ministry of Justice. Furthermore, the Act widens the competences of the Prosecutor General. For example, the Prosecutor General is able to appoint or dismiss a head of the prosecution unit on the basis of a discretionary decision without the necessity of carrying out a transparent and open recruitment process.

Furthermore, the Prosecutor General is able to issue decisions regarding specific investigations. The Act on Prosecutor Office gave to the Prosecutor General the power to release to the media the information from any investigation.

Selected statements made by the representatives of the state authorities and of the ruling party regarding the judiciary

Below we present selected statements of the representatives of the ruling party and the Government which may be perceived as attacks on the independence of the judiciary or exertion of political pressure on it. The need to grant protection to the judicial authority has been underlined on several occasions by the European Court of Human Rights in cases relating to freedom of expression[60].

Statements regarding the Constitutional Tribunal

Regarding the validity of the judgements made by the Constitutional Tribunal

"It would be incorrect to think that the Constitutional Tribunal gave me clear guidelines for the swearing in of the judges. Such an interpretation of law is currently represented by many opposition politicians and journalists, and it is incorrect. I am saying that also as a lawyer".

Andrzej Duda, President of Poland
Interview for "Der Spiegel" weekly, 25 December 2015[61]

[59] Helsinki Foundation for Human Rights, First instance administrative court dismisses complaints of judges denied appointments. HFHR to file a complaint in cassation, available at: http://www.hfhr.pl/en/first-instance-administrative-court-dismisses-complaints-of-judges-denied-appointments-hfhr-to-file-a-complaint-in-cassation/
[60] E.g. Barthold v. the Federal Republic of Germany, judgment of 25 March 1985, application no. 0/1983/66/101.
[61] Chancellery of the President of Poland, Wywiad dla tygodnika "Der Spiegel", available at: http://www.prezydent.pl/aktualnosci/wypowiedzi-prezydenta-rp/wywiady/art,33,wywiad-dla-tygodnika-der-spiegel.html

[pursuant to article 194 of the Constitution] "*the Constitutional Tribunal is composed of 15 judges. And at the moment, there are 15 judges. (...) Everyone who says that he [the President] should appoint new judges, wants the President to breach the Constitution. The President won't do that".*

Andrzej Duda, President of Poland
TVP Info, „Dziś wieczorem", 2 February 2016

*"As regards the today's ruling of the Constitutional Tribunal, I wish to say that its value is primarily historical as it refers to a legal situation that has undergone a major change in recent days"***.**

Marek Kuchciński, Speaker of the Sejm
Statement of 3 December 2015[62]

"The publication of the Constitutional Tribunal's ruling of 3 December has no impact on the decision of the President Andrzej Duda who did not swear in the Constitutional Tribunal judges elected by the previous Sejm." (...) "They [the Sejm resolutions passed in October] do not exist under law. The only ones that exist are the recent ones, whereby the Sejm elected five judges."

Andrzej Dera, Secretary of State in the Chancellery of the President of the Republic of Poland
16 December 2015 for the Polish Press Agency

"... The Tribunal breached Article 7 of the Constitution of the Republic of Poland. In effect, the judgement is invalid, in my opinion. The foregoing gives rise to serious doubts as to the possibility of publishing the said judgement in the Journal of Laws of the Republic of Poland."

From the letter of Beata Kempa, the head of the Chancellery of the Prime Minister of Poland, to the President of the Constitutional Tribunal dated 10 December 2015, regarding Constitutional Tribunal's judgement of 3 December 2015[63]

"A ruling of that type must not be published in any case. Because its legal status is absolutely unclear, to say the least (...). This ruling is questionable, to the greatest extent possible, also for procedural reasons".

"I hope that the Speaker of the Sejm will approach the Tribunal pursuant to the Civil Procedure Code, and request annulment of that judgement..."
Jarosław Kaczyński, chairman of Law and Justice
Telewizja Republika, W punkt, 11 December 2015[64]

"[this is not a judgment] These are merely opinions of the Tribunal – opinions of members of Constitutional Tribunal. (...) Tribunal may not comment on the choices made by the Parliament".
Ryszard Terlecki, MP, Deputy Speaker of the Sejm, Law and Justice
Onet.pl, 9 March 2016[65]

[62] Sejm, Oświadczenie marszałka Sejmu, available at: http://www.sejm.gov.pl/Sejm8.nsf/komunikat.xsp?documentId=A87DC2997352B6D2C1257F10005A1932
[63] Polskie Radio, Pismo szefowej KPRM do prezesa Trybunału Konstytucyjnego, upublicznione przez TK (dokumentacja), available at: http://www.polskieradio.pl/5/3/Artykul/1556365,Pismo-szefowej-KPRM-do-prezesa-Trybunalu-Konstytucyjnego-upublicznione-przez-TK-dokumentacja
[64] Telewizja Republika, Jarosław Kaczyński (PiS), W Punkt, 12 November 2015, available at: https://www.youtube.com/watch?v=LCK_biZe_KU
[65] Onet.pl, Spory ws. orzeczenia Trybunału Konstytucyjnego [RELACJA], available at: http://wiadomosci.onet.pl/tylko-w-onecie/trybunal-konstytucyjny-wyrok-tk-w-sprawie-noweli-pis/q72lp6

„The Tribunal's attempts to act beyond the constitutional and statutory regime would not be legitimized by the participation of the Prosecutor General in them. They may only be the subject of his legal audit".

Zbigniew Ziobro, Minister of Justice
Letter to the President of the Constitutional Tribunal, 5 April 2016[66]

"I assess today's resolution of the Supreme Court [regarding the necessity to comply with unpublished judgments of the Constitutional Tribunal] unequivocally. This is a further spread of anarchy in our country. In fact, it was just a meeting of some bunch of buddies who want to defend the status quo of the previous regime".

Beata Mazurek, MP, spokesperson of the Law and Justice
TVN24, 26 April 2016[67]

Regarding the role of the Constitutional Tribunal in the legal system

"The Constitutional Tribunal is a specific institution. It has enormous power, totally uncontrolled, and at the same time a very weak mandate. It is, in fact, a political body. (...) a party-ruled body. And that is absolutely unacceptable. And that is why it needs to be changed".
"This is actually a post-communist institution, like the entire judicial system".

Jarosław Kaczyński, chairman of Law and Justice
Telewizja Republika, W punkt, 25 November 2015[68]

"The question is: who rules in Poland? Is it the democratically elected Sejm or is it the Constitutional Tribunal? The Sejm Deputies, members of the Government are accountable for their actions to the citizens, for example during the next elections. And what is the accountability of the Tribunal judges for their decisions? None. Even if they don't perform their basic duties properly".

Andrzej Duda, President of Poland
"wSieci", 23 January 2016[69]

"The power of that Tribunal is really enormous. It is not as much a constitutional court as a political court. (...) the third chamber of the parliament, with enormous power, with power to halt the changes".

Zbigniew Ziobro, Minister of Justice
Radio Maryja, Rozmowy Niedokończone, 4 December 2015[70]

Regarding the political involvement of the Tribunal's judges

"The evaluations [are] very general because those judgements are frequently based on a statement that something is in conflict with the idea of a state of law (...). This depends on the individual opinions,

[66] Prokurator Generalny, List do Prezesa Trybunału Konstytucyjnego, 5 April 2016, avaialble at: http://trybunal.gov.pl/fileadmin/content/nie-tylko-dla-mediow/Pismo_Prokuratora_Generalnego_z_5_kwietnia_2016_r..pdf
[67] TVN.24, "Zebrał się zespół kolesi". 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
[68] Telewizja Republika, Jarosław Kaczyński (Prezes PiS), W Punkt, 25 November 2015, available at: https://www.youtube.com/watch?v=KI5lz3FO4jY
[69] wSieci, "wSieci": wywiad z prezydentem!, available at: http://www.wsieci.pl/wsieci-wywiad-z-prezydentem-pnews-2648.html
[70] Radio Maryja, Zbigniew Ziobro o sprawie Trybunału Konstytucyjnego, available at: https://www.youtube.com/watch?v=dikebA-zDu4

view, leanings of those judges. And let's say, they are of the view that the proposal to give 500 zlotys per each child is in conflict with the state of law principle for whatever reason, then it can turn out that the commitment passed by the Sejm, and by the Senate, and signed by the President – the commitment our government made to Poles – will be 'blown up''..., destroyed (...). Well, such a threat is very, very real..."

Zbigniew Ziobro, Minister of Justice
Radio Maryja, Rozmowy Niedokończone, 4 December 2015[71]

"I am not saying that it will happen but that it might happen. Let us assume that the [opponents of the reforms] appeal to the Tribunal all the social projects enacted by the Parliament (...) [including 500 zlotys per child and lowering the retirement age]. It may be assumed that the Tribunal as the protector of the judiciary, protecting the Constitution, should follow only and exclusively the interest expressed in the Constitution and the will of the people. (...) [however] "it is hard to feel that it will be like that when the Tribunal Chairman is so active politically. (...) they [the opponents of the reforms] protect their own privileges and their own interests".

Beata Szydło, President of the Council of Ministers
Telewizja Trwam, 25 December 2015[72]

"As regards the other cases with the Tribunal, it is a kind of redoubt – a locked position, to use the military jargon, which protects all that is wrong in Poland. All the defects of the Polish democracy, all the defects of Polish law, and – which is the most important thing, or at least very, very important – all what is wrong with the Polish social life. That great injustice. (...) It is about the basic rights – the retirement age, the 500 zlotys, the income tax threshold at 8000 zlotys...

Jarosław Kaczyński, chairman of Law and Justice
Telewizja Republika, W punkt, 11 December 2015
https://www.youtube.com/watch?v=LCK_biZe_KU

"The judges of the Constitutional Tribunal (...) They earn some 20,000 zlotys. They are guaranteed retirement after 9 years of work, regardless of their age. The legislator wanted that the judges of the Constitutional Tribunal do what they had been appointed to do. The reality looks different though. (...) in addition to their work on Constitutional Tribunal, the judges also take up many, many other activities at various universities in Poland. This begs a question: Doesn't entering into an employer – employee relationship violate the principle of neutrality and independence?"

Stanisław Piotrowicz, MP, chairman of the Committee for Justice and Human Rights
the 6th session of the Sejm
22 December 2015

Regarding Professor Andrzej Rzepliński, President of the Constitutional Tribunal

"Judge Rzepliński commits one disciplinary violation after another. If he had at least an ounce of honour left, he and the other two judges would simply resign. But don't bet on it. This problem will need to be solved in some way because the members of the Constitutional Tribunal must not be people who blatantly break the law and make a mockery of their mission".
Jarosław Kaczyński, chairman of Law and Justice

[71] Radio Maryja, Zbigniew Ziobro o sprawie Trybunału Konstytucyjnego, available at: https://www.youtube.com/watch?v=dikebA-zDu4
[72] TV Trwam, Wywiad z premier Beatą Szydło, available at: http://tv-trwam.pl/film/wywiad-z-premier-beata-szydlo

Telewizja Republika, W punkt, 11 December 2015[73]

"Judge Rzepliński violated the moral rules so many times that if he wants to save the remains of the Tribunal's authority he should resign from his office".
Patryk Jaki, Vice-Minister of Justice
Rzeczpospolita, 28 December 2015[74]

„We defend the Constitution and President Rzepliński is its main enemy. He is the enemy of democracy, principles of sovereignty of people, separation of powers and legality (...)"
Jarosław Kaczyński, chairman of Law and Justice
Congress of Law and Justice, 2 July 2016[75]

"Professor Rzepliński felt syndrome of God, he felt that he was able to independently evaluate what is constitutional and what is not".
Maciej Wąsik, minister in the Chancellery of the Prime Minister and deputy Coordinator of Special Services
Wprost, 5 July 2016[76]

„I repeatedly say that today the problem of the Constitutional Tribunal is its President Rzepliński, who does not even conceal that he became a politician, and even more – leading politician of the opposition".
Stanisław Piotrowicz, MP, chairman of the Committee for Justice and Human Rights
the 6th session of the Sejm
Nasz Dziennik, 2 lipca 2016[77]

Statements regarding judiciary as a whole

"The judicial system in Poland is a "the prosecutorial-judicial mafia".
Paweł Kukiz, chairman of Kukiz 15 political group
TVN broadcaster, program "Kropka nad i", 4 February 2016[78]

„The Polish justice system is a huge scandal, and it has to be ended"
Jarosław Kaczyński, leader of the PiS political group
Public radio interview, 10 February 2017[79]

[73] Telewizja Republika, Jarosław Kaczyński (PiS), W Punkt, 12 November 2015, available at: https://www.youtube.com/watch?v=LCK_biZe_KU
[74] Nizinkiewicz J., Jaki: Administracja nie może gardzić PiS, Rzeczpospolita, available at: http://www.rp.pl/Polityka/312289894-Jaki-Administracja-nie-moze-gardzic-PiS.html#ap-
[75] Congress of Law and Justice, 2 July 2016, available at: https://www.youtube.com/watch?v=2TNEyDk0OQU
[76] Wprost, Spór o Trybunał Konstytucyjny rozgorzał na nowo. "Profesor Rzepliński poczuł syndrom Boga", available at: https://www.wprost.pl/kraj/10013968/Spor-o-Trybunal-Konstytucyjny-rozgorzal-na-nowo-Profesor-Rzeplinski-poczul-syndrom-Boga.html
[77] Nasz Dziennik, To prezydent mianuje sędziów, available at: http://www.naszdziennik.pl/polska-kraj/161177,to-prezydent-mianuje-sedziow.html
[78] TVN24, Sędziowie reagują na słowa Kukiza o "mafiach prokuratorsko-sądowniczych", available at: http://www.tvn24.pl/wiadomosci-z-kraju,3/kukiz-mowi-o-prokuratorsko-sadowniczych-list-otwarty-sedziow,616569.html
[79] Rzeczpospolita, J. Kaczyński: polskie sądownictwo to gigantyczny skandal, available at: http://www.rp.pl/Sedziowie-i-sady/302109967-J-Kaczynski-polskie-sadownictwo-to-gigantyczny-skandal.html

"The National Council of Judiciary was created in 1989 by the last communist Parliament and it was created to fix post-communism in the judiciary system. In our opinion courts are the last bastion of post-communism in Poland. At the peak of this is the Supreme Court which has extensive achievements when it comes to the protection of people serving the former regime and numerous very dubious judgements. At the same time, leftism and subordination to foreign forces is spreading there."
Jarosław Kaczyński, leader of the PiS political group
Interview for Onet, 17 March 2017[80]

"We replace „judgecracy" by democracy. In the name of the superior authority of the nation, these changes are necessary. Judges do not rule in their own names, but in the name of the state, society, in the name of all citizens. And these citizens should have impact, even the smallest one, on who and how become a judge"
Marcin Warchoł, undersecretary of state in the Ministry of Justice
Speech during Parliament's session, 5 April 2017[81]

Social campaign against courts

In September 2017, the Polish National Foundation (an organization launched by 17 state-owned companies) started a social campaign „Fair Courts". The campaign was supposed to be an answer to the massive protests which took place in July 2017 (the protests were organized under the slogan „Free Courts"). The campaign's aim was to explain the necessity to reform the justice system. The main communication channel of the campaign, which total budget was almost 19 million PLN (ca. 5 million EUR), were billboards presenting the cases of the most controversial decisions of the courts or cases of judges against whom the disciplinary or criminal proceedings were initiated. The Supreme Court has issued several statements referred to the specific pieces of content of the campaign and correcting the facts.

Conclusions

In the opinion of the HFHR, the above described developments pose serious threat to the rule of law and separation of powers. Since 2015, the governing majority has been continuing its attempts to change the entire system of the state without, however, changing the Constitution.

The on-going works on the reform of the justice system raise concerns about the protection of the independence of judges. The draft acts presented by the President in September 2017 and by the governing majority failed to address the main problems in functioning of the justice system, but rather concentrated on widening the political control over judges and their work.

The public discussion on the constitutional crisis and projected reform of the justice system is hectic and highly polarized. It also serves as an excuse to attacks on judges and discrediting their position.

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