

HR HELSINKI FOUNDATION for HUMAN RIGHTS

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The Helsinki Foundation for Human Rights (HFHR) is one of the oldest non-governmental organisations in Poland dealing with the protection of human rights and fundamental freedoms. As part of its activity, HFHR monitors the implementation of human rights. The current analysis of the on-going constitutional crisis in Poland presents the HFHR's key concerns and opinions regarding the crisis. The main focus of the hereby-presented paper is the Amendment to the Act on the Constitutional Tribunal adopted by the Parliament in December 2015.

This paper was prepared in cooperation with the Stefan Batory Foundation. However, all the opinions and observations presented in this paper remain the HFHR's own analysis.

1. Contextual information

On 10 and 24 May 2015, two rounds of presidential elections were held in Poland. Andrzej Duda, the Prawo i Sprawiedliwość (Law and Justice) party candidate, came out victorious. The electoral process triggered no controversy, its validity confirmed by the Supreme Court. On 20 July 2015, Andrzej Duda took the presidential oath before the National Assembly and took office as the President of the Republic of Poland.

On 25 October 2015, the parliamentary elections were held in Poland, constituents electing members of both houses: the Sejm (lower house) and the Senat. The Law and Justice Electoral Committee won with 235 seats (51%) and 61 seats (61%) in the Sejm and Senate, respectively.

On 13 November 2015, President of the Republic of Poland Andrzej Duda appointed Law and Justice representative Beata Szydło as the Prime Minister (President of the Council of Ministers). Three days later, the Sejm passed a vote of confidence in the newly appointed cabinet.

Since that day, practically all legislative and executive power in Poland remains with the representatives or supporters of the Law and Justice party. For the first time in 26 years – ever since the communist system in Poland collapsed – a single party received a sufficient number of votes allowing for independent law-making (acts of law), except for the amendments to the Constitution (the process requires a two-thirds majority in the Sejm).

Once the new authorities were formed, an intense process of “good change” – to quote the representatives of the ruling party in their reference to the key reform package – commenced. Reform is to result in the creation of a “strong, solidarity-based state.” Law and Justice believes that the objective requires a consolidation of state structures and a more just (more equal) distribution of benefits offered by Poland's economic development.

Beata Szydło's cabinet is the seventeenth government since the system transformation in Poland (in 1989). President Andrzej Duda is the sixth President of the Republic of Poland.

Constitutional crisis

Currently, Poland is witnessing a crisis concerning the functioning of the Constitutional Tribunal. In June 2015, the former Parliament adopted the Act that enabled the Sejm to appoint 5 judges of the Constitutional Tribunal, replacing the judges whose tenures expired in November and December 2015. In October 2015, the former Parliament appointed 5 judges. The Act on Constitutional Tribunal states that the judges of the Constitutional Tribunal have to be sworn into office by the President. However, the President of the Republic of Poland did not swear those 5 judges into office.

After the elections, on 25 November 2015, the Parliament adopted resolutions annulling the appointment of 5 judges in October 2015. The governing majority then introduced changes to the Rules of the Sejm allowing 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. Such a deadline was established on 1 December 2015 at midday; however, it was not officially published anywhere. On 2 December 2015, after a rough debate at the plenary session, the Sejm elected 5 new judges. The elections were based on the Rules of the Sejm. The resolutions were published at 10 p.m. in Monitor Polski (official journal where internal resolutions of the Sejm are promulgated). On the same day (to be precise – at night, without any media presence), the President of Poland took the oath from the newly elected judges.

On 3 December 2015, the Constitutional Tribunal ruled¹ on the amendment of the Act adopted in June 2015. The Tribunal stated that the appointment of 2 of the 5 judges appointed by the previous parliament violated the Constitution. Furthermore, the Tribunal ruled that the Sejm had the right to appoint 3 judges in October 2015. In other words, the Tribunal underlined that the Sejm had a right to appoint a judge of the Constitutional Tribunal who will replace a judge whose tenure's expiry date overlaps with the Parliament's tenure. In its resolutions Sejm indicates which judge is going to be replaced by the appointed new judge. Furthermore, in its judgement the Tribunal referred to the President's obligation to swear the judges into office. The Tribunal emphasised that it was the President's obligation to immediately receive the oaths from the judges. However, the President has still not sworn into office the 3 judges appointed in October 2015.

In January 2016, the Constitutional Tribunal recognised a complaint from a group of MPs regarding the resolutions annulling the appointment of judges in October 2015 and appointing new judges in December 2015. The Constitutional Tribunal ruled that it did not have competences to decide on the resolutions, since they had no character of law-making acts². As a consequence of the judgement of 3 December 2015 and this ruling, in January 2016 the President of the Constitutional Tribunal assigned two judges appointed in December 2015 to the cases.

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The 5-judge panel of the Constitutional Tribunal ruled the case.

² Case no. U 8/15. The Tribunal confirmed in its decision that the resolutions adopted by Sejm on 25 November 2015 were declaratory in their nature and had not created any legal norm.

Parallel to the crisis regarding the appointment of the new judges of the Constitutional Tribunal, the **amendments to the Act on the Constitutional Tribunal** were introduced. The first amendments to the Act on the Constitutional Tribunal were introduced in November 2015³. In its judgement of 9 December 2015, the Constitutional Tribunal found part of amendments unconstitutional.

In December 2015, the Parliament adopted the second Act amending the Act on the Constitutional Tribunal. The National Council of the Judiciary of Poland, the Commissioner for Human Rights, Chief Justice of the Supreme Court and two groups of MPs submitted their complaints regarding the amendment.⁴ The Constitutional Tribunal has still not indicated the date of the hearing in this case. The focus of the current paper is a detailed analysis of the amendment adopted in December 2015.

2. Legislative procedure

The scope of the original draft Act amending the Act on the Constitutional Tribunal

On 15 December 2015, a group of MPs submitted to the Sejm a draft Act amending the Act on the Constitutional Tribunal.⁵ The originally designed provisions could be classified in three categories: the Constitutional Tribunal's ruling process, status and independence of the Tribunal's judges and organisational aspects.

In the light of the draft, the Constitutional Tribunal should recognise all cases sitting in full bench composed of 13 judges (instead of 9, as it was stated in the previous Act on the Constitutional Tribunal) and all rulings should be made in a 2/3 majority. In special exemptions (for example in cases concerning the ratified international agreements), the Constitutional Tribunal could rule sitting in bench of 7 judges (instead of 5 as it was in the previous Act on the Constitutional Tribunal). Furthermore, the draft Act stated that all the proceedings that had been initiated before the Constitutional Tribunal [and heard by different bench than required by the draft] but were not completed yet, should have been re-open and recognise over again.

Furthermore, the draft Act also included important changes in relation to the **status of judges of the Constitutional Tribunal**. First of all, the draft Act proposed to change the rules for electing the President and Deputy President of the Constitutional Tribunal – the candidates to these posts would be nominated by at least 3 judges and each judge would be able to vote only for one candidate. Furthermore, in the light of the draft Act, the newly appointed judge should be sworn into office by the Speaker of the Sejm (not by the President as it was stated in the previous Act on the Constitutional Tribunal). The draft Act also removed shifted the provisions guaranteeing the independence of judges (this provision repeated the exactly the same provision of the Constitution) and allowed for initiating disciplinary proceedings against a judge for acts committed before they became a judge. Furthermore, the draft Act removed shifted the provision guaranteeing a cassation appeal after the judgement of the second instance in the disciplinary proceeding.

³ Act of 19 November 2015 amending Act on Constitutional Tribunal (Journal of Laws item. 1928). It was signed by the President of Poland on 20 November 2015 and promulgated on the same day. It was to enter into force on 5 December 2015.

⁴ Case no. K 47/15

⁵ Draft no. 122 available at: <http://sejm.gov.pl/Sejm8.nsf/PrzebiegProc.xsp?nr=122>.

Last but not least, the draft Act included several regulations concerning the functioning of the Tribunal. In the light of the draft, the decisions made by the Plenary Assembly of Judges of the Constitutional Tribunal should be undertaken with a 2/3 majority in the presence of at least 13 judges. The draft Act also changed the provision stating that the Tribunal's premises are in Warsaw. Finally, it stipulated that the amendment would come into force 30 days after its publication in the Journal of Laws.

The works on the draft in the Sejm

Next day after its submission, the draft was directed to the first reading at the plenary session of the Parliament. The Parliament did not adopt a motion to dismiss the draft after the first reading, so it was directed to further works in the Parliamentary Commission.

Before the session of the Parliamentary Commission, the Supreme Court, the National Bar Association and the National Council of Judiciary of Poland submitted their opinions regarding the draft. All of those institutions strongly criticised the draft stating, among others, that the provisions would deepen the constitutional crisis, paralyse the works of the Constitutional Tribunal (by adopting the provision of a 2/3 majority) and threaten the independence of judges (by changing the rules of disciplinary proceedings and removing the provisions guaranteeing the judges' independence).

The Helsinki Foundation for Human Rights (HFHR) also submitted its opinion regarding the draft. HFHR pointed at, among others, a very limited and unconvincing justification of the draft. HFHR underlined that the adoption of the Act may lead to paralysis of the Constitutional Tribunal.

Last but not least, on 21 December 2015, the Prosecutor General submitted an opinion criticising the draft Act. The Prosecutor General pointed out that several provisions included in the draft might be unconstitutional and may have negative influence on the effectiveness of the Constitutional Tribunal's functioning.

The **Parliamentary Commission's session** took place on 21 December 2015 and lasted over 14 hours. During this session, the Parliamentary Commission dismissed all the motions submitted by the members of the opposition parties and **introduced new provisions** to the draft changing significantly the scope of the original draft. Among these provisions, there were: the possibility to initiate disciplinary proceedings against the Constitutional Tribunal's judge by the Minister of Justice, the possibility to dismiss a judge "in the most severe cases" upon the motion of the Plenary Assembly of the Judges of the Constitutional Tribunal and the possibility to re-open the procedure before the Constitutional Tribunal if a judgement was issued in violation of the law. The members of the Parliamentary Commission also submitted changes to the draft that had a significant impact on the Tribunal's functioning. For example, the members submitted a change in light of which the cases should be recognised in order of their submission. Furthermore, the Commission adopted a change stating that the first hearing of a case can be organised only after 3 or 6 months (depending on the nature of the case) after notification of the parties. During the session, the representatives the Parliamentary Bureau of Legislation argued that introducing such provisions, widening significantly the scope of the draft, might violate the rules of the legislative procedure. During this session, some of the

previously introduced provisions were changed. For once, the *vacatio legis* was removed, as the Act was to enter into force on the date of its publication.⁶

The **second reading** took place on the next day, i.e. 22 December 2015. After the second reading, the Commission dismissed the provision allowing for re-opening of the procedure if a judgement was issued in violation of the law and the provision changing Article 2 of the Act on the Constitutional Tribunal, stating that the Tribunal's premises are in Warsaw.

The **third reading** took place on the same day during which the draft was adopted in a version including the changes submitted during the second reading. The Act was adopted by the Sejm and directed to the Senate.⁷

The works on the draft in the Senate

On 23 December 2015, two joint Senate commissions started the works on the draft. During this session, the expert of the Senate Bureau of Legislation pointed at numerous provisions of the draft which might be found unconstitutional.⁸ For example, the expert stated that giving the Sejm the competences to dismiss the judges of their posts might violate constitutional guarantees. Furthermore, in the opinion of the Senate Bureau of Legislation, increasing the majority up to 2/3 in the decision making process violated the Constitution. The Bureau underlined that the provision stating that the first hearing in a case should be organised 3 or 6 months after the notification of the parties violated the Constitution as well as the European Convention of Human Rights with respect to access to justice and fair trial. The Bureau underlined that the lack of *vacatio legis* violated the Constitution. Above all, the Bureau stated that numerous provisions are contradictory to each other, irrational and not justified enough.

Despite these comments as well as the opinions presented by NGO experts who participated in this session, the Senate commissions decided to adopt the draft without changes. The draft was then presented to the Senate plenary session where it was adopted after hectic discussion lasting until 4 a.m.

The President signed the draft on 28th December 2015.

Conclusions

In HFHR's opinion, the amendment to the Act on the Constitutional Tribunal was adopted with severe violation of the legislative procedure.

First of all, the accelerated pace of the procedure (violating the Rules of the Sejm) did not allow for any kind of consultations with experts and stakeholders. Neither the opinion of the Senate Bureau of Legislation nor the opinions submitted by the Supreme Court, Polish Bar Council or Prosecutor General was taken into consideration.

The draft after the works of the Parliamentary Committee – draft no. 144 available at: <http://sejm.gov.pl/Sejm8.nsf/druk.xsp?nr=144>.

⁷ The statute adopted by the Sejm is available at: <http://senat.gov.pl/download/gfx/senat/pl/senatdruki/7559/druk/058.pdf>.

⁸ Opinion of the Senate Bureau of Legislation is available at: <http://senat.gov.pl/gfx/senat/pl/senatekspertyzy/3346/plik/058.pdf>.

Secondly, during the works on the draft, the Sejm's commission adopted changes that significantly widened the original scope of the Act. Introducing changes at this moment in the works not only bars experts and stakeholders from expressing their opinions regarding the draft, but might also violate the rules of legislative procedure.

Furthermore, the draft Act missed a comprehensive justification. The justification attached to the draft stated that the pivotal aim of the amendment was to reform the Constitutional Tribunal. However, the regulations included in the draft were contradictory to this assumption. The draft included numerous provisions aiming at paralysing the works of the Tribunal, e.g. the requirement of a 2/3 majority in the decision making process or analysing the cases in order of their submission.