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Professor Andrzej Rzepliński,
President of the Constitutional Tribunal

Mr. President,

In connection with the adoption on 22 July, 2016 of the new Constitutional Tribunal Law (hereinafter referred to as "CTL 2016" or "the Law") we wish to present the position of the Stefan Batory Foundation and its Legal Experts Group regarding the constitutionality of its provisions. Please, regard this position as an *amicus curiae* opinion.

The Foundation believes that despite vast criticism by eminent public figures the new law has not only ignored these concerns entirely but stands in glaring contradiction to the recommendations made by the Venice Commission in March 2016. Moreover, it disregards the rulings of the constitutional court. Specifically, the new legislation forces the President of the Constitutional Tribunal to mandate the judicial powers to the three individuals elected in December 2015 to replace those elected earlier in October 2015. Moreover, the new law prohibits the publication of the Constitutional Tribunal's ruling of 9 March 2016 (K 47/15), which is in violation of a clear instruction in the Polish Constitution and in defiance of the Venice Commission's recommendations made strictly within the Polish legal framework. While pushing for these clearly unconstitutional arrangements the legislature demonstrates its resolve to intentionally violate the Polish Constitution and go against the fundamental principles of collaboration, division and balance of the legislative, executive and judiciary powers.

On top of provisions that had earlier been declared unconstitutional by the Constitutional Tribunal the Parliament has now adopted an unprecedented concept of a minority veto against rulings that have gained the support of the majority of the ruling judges (Article 68 Paragraph 5-7 CTL 2016). This arrangement is in breach of the constitutional principle of majority vote rulings in the Constitutional Tribunal. This will now allow a group of judges to block the Constitutional Tribunal's rulings even though they have received support from the majority of judges. When combined with the mandate for individuals elected to already filled judge positions (and supported by the current parliamentary majority) this arrangement raises a major concern as to the motivations behind this piece of legislation. The unprecedented statutory provision that grants ruling powers to individuals who have been appointed judges in breach of the Constitution, the minority veto, the new rules for the selection of the Constitutional Tribunal President and the new rules on determining

disciplinary liability of judges effectively give the current parliamentary majority full control over the Constitutional Tribunal. The new provisions are in breach of the rule of constitutional court independence, which implies a major threat to the rule of law.

The Law contains the following specific unconstitutional provisions:

1. **Cases to be heard in the order of submission; fixed 30-day deadline for hearings (Article 38 Paragraph 3, Article 61 Paragraph 1 CTL 2016)**

This requirement was once found to be unconstitutional by the Constitutional Tribunal in the ruling of 9 March 2016. The repeated promotion of an unconstitutional provision is a token of the ill will of the proponents of the Bill and certainly not an expression of their willingness to find a compromise.

The Constitutional Tribunal is a steward of the constitutionality of all laws and regulations and as such it must independently assess the urgency with which to rule on submitted cases. This is to prevent situations where the delayed qualification of a piece of legislation as unconstitutional will cause irreversible breach of the Constitution or render the Tribunal's determination irrelevant. Any interference by the legislature with this power of the Tribunal is a violation of the Tribunal's independence guaranteed by the Constitution. This arrangement may paralyse the Tribunal if a large number of unconstitutionality cases are filed and subsequently a blatantly unconstitutional law is passed with consequences that will have become irreversible by the time the Tribunal rules on the case (e.g. an unconstitutional amendment of the election law one month before parliamentary elections).

The absolute obligation to hold a hearing 30 days after parties to the procedure have been notified may have similar consequences. The notice is longer than customary notice periods in court proceedings in Poland and the Tribunal has no power to shorten it in extraordinary circumstances with regard to constitutionality tests of new legislation. This rule unreasonably prevents expedient rulings on matters that require urgency, including case where unconstitutional provisions have material impacts that become increasingly cumbersome over time. In such cases, the Constitutional Tribunal must be free to set the date of the hearing in the public interest and in the interest of the citizens whose rights or obligations are violated by the unconstitutional legislation at hand.

2. **Illegitimate stalling of CT rulings (Article 61 Paragraph 6, Article 68 Paragraph 5-7 CTL 2016)**

The Law contains unconstitutional provisions that excessively interfere with the procedural independence of the Constitutional Tribunal and deprive it of instruments to prevent abuse by parties to a case, including intentional stalling. First, hearings must be postponed if they are not attended by the Prosecutor General, where his/her presence is mandatory (Art. 61 Para. 6). This obligation gives the Prosecutor General discretion in delaying hearings before the constitutional court and so he/she will have a power to influence or even block the constitutional power of the judiciary. This clearly contravenes the division and balance of powers and the principle of court independence.

Similarly, four judges will have the power to delay the hearing twice by a total of six months (Article 68 Paragraph 5-7 CTL 2016). The procedure is not known elsewhere in the judiciary system in Poland and it allows a minority to act against the will of a minority. The fact that the period of postponement is fixed and cannot be changed constitutes a violation of the

right of parties to immediate trial — the circumstances of the case may require that it be heard sooner than the deferment date.

3. Unreasonable interference with deadlines for Constitutional Tribunal rulings (Article 84 Paragraph 1, Article 83 Paragraph 2 CTL 2016)

The final provisions of the Bill allow the legislature to interfere unreasonably with the process of examining cases before the Constitutional Tribunal. One of them allows suspension of all pending cases for six months if they are initiated by an abstract motion to check constitutionality. The suspension is to allow parties to complete formalities required under the Bill (Art. 85). The deadline is disproportionately long bearing in mind that that formal requirements imposed on documents that trigger the proceedings before the Tribunal a nearly identical in the Bill and in the previous law. The lack of proportionality unreasonably delays CT proceedings. It must also be noted that the deadline is fixed, which means the Tribunal cannot reduce it if this is justified by the circumstances.

On the other hand, the legislation imposes an obligation on the Tribunal to rule on all other cases (mainly constitutional complaints and legal queries) within 12 months after the law is enforced (Art. 84 Para. 2). Again, such a fixed deadline is an unwarranted interference of the legislative branch in the mechanics of the Constitutional Tribunal proceedings. The diversity of cases and the different times required for assessing them make it completely unreasonable to specify one relatively short deadline for all of them.

4. Pressure to adopt provisions that are against the recommendations of the Venice Commission and earlier rulings of the Constitutional Tribunal

The Law contains a number of provisions that are clearly in conflict with the earlier recommendations of the Venice Commission outline in its opinion of 11-12 March 2016 and earlier CT rulings, including the ruling of 3 and 9 December 2015 and of 9 March 2016.

First, the Law does not obligate the Polish President to swear in three judges elected in November 2015. Yet, it does obligate the president of the Tribunal to allow three judges illegally elected in December 2015 to engage in case examination and rulings (Art. 92 of the Bill). This arrangement is in breach of the CT rulings of 3 and 9 December 2015 and the recommendation of the Venice Commission and proves that the legislative branch has not accomplished the objective of resolving the constitutional crisis.

Secondly, the legislative branch assumes the right to decide which Constitutional Tribunal rulings will and which will not be published. Article 91 of the Bill distinguishes between rulings passed before 10 March - these will not be published, and after the date - these will be published. Consequently, the ruling of 9 March 2016 that confirmed the unconstitutionality of the December amendment of the CT Law, a critical ruling for resolving the constitutional crisis, will not be published. The concept of putting the responsibility of deciding on the publication of rulings passed by the constitutional court on a branch of government other than the judiciary is one of the most fundamental breaches of the division and balance of power by the Bill. This breach is exacerbated by the implementation of a mini-procedure under which the president of the Tribunal may file a publication request to the Prime Minister (Art. 80 Para. 4). This process is directly against the constitutional rule that CT. If used to block the publication of future CT rulings, the procedure is likely to deepen the constitutional crisis.

Thirdly, the Law provides for only 14 days of *vacatio legis*. While this is an improvement compared with the earlier amendment (no *vactio legis* was envisaged there whatsoever) , the grace period is still too short for the Constitutional Tribunal to be able to assess the constitutionality of the CT Law before it enters into force. Therefore, the Constitutional Tribunal will be forced to assess the constitutionality of the new legislation while applying its very provisions. If the Tribunal does not apply the new legislation, as it did not with the previous amendment, on the grounds that it is only bound by the Constitution, its ruling may be later questioned. If this happens it will be the legislature that will be responsible for the situation and it certainly deepen the constitutional crisis rather than resolving it.

All the defects of the newly passed legislation listed above make the earlier major concerns raised by the Legal Experts Group at the Batory Foundation still very topical (see Statement of the Legal Experts Group at the Batory Foundation of 6 July, 2016). Contrary to publicly announced intention of the parliamentary majority to develop provisions that would end the crisis over the Constitutional Tribunal the new legislation not only fails to end the crisis but makes it even deeper.

Finally, it is our firm opinion that the Law on Constitutional Tribunal of 22 July, 2016 signed by the President of the Republic of Poland is unquestionably unconstitutional.

While the constitutional ramifications of this legislation appear to have been sufficiently explicated in the CT jurisprudence to date we believe the Tribunal should consider ruling on the Law in a secret session without a hearing (pursuant to Article 93 of the CT Law of 2015). Should the Tribunal decide to hold a hearing to rule on the case the Batory Foundation will submit its *amicus curiae* statement and authorise its representative to present our opinion in the course of that hearing.