

HR HELSINKI FOUNDATION for HUMAN RIGHTS

July 4th, 2016

New draft of the Act on the Constitutional Tribunal

1. Background information

On 29th April 2016, a group of MPs from the governing party submitted a draft Act on the Constitutional Tribunal to the Parliament. This is the third time within the last ten months when the governing majority is meddling with the Act on the Constitutional Tribunal.

Unlike in the case of previous changes, the current proposal is not limited to amendments, but constitutes an entirely new piece of legislation. In their rationale for submitting an entirely new act, the MPs refer to the rules included in the “The standards of the legislative process.” According to the Standards, “should the changes introduced in the act be numerous or should they violate the structure and coherence of the act, or if the act has previously been amended many times, a new draft of the act shall be prepared”.

The authors of the draft also justify the necessity to present the new Act on the Constitutional Tribunal by referring to the judgement of the Constitutional Tribunal of 9 March 2016. The authors state that “having proceeded in the composition which is not recognised by the Constitution, the Constitutional Tribunal issued a judgement which does not fulfil the standards for the Constitutional Tribunals’ judgement”. The authors of the draft Act state that this situation and the refusal to publish the judgement lead to the situation in which there might be two separate legal systems in the country.

In vast majority, the current draft Act repeats the regulations of the Act on the Constitutional Tribunal of 1997 which was repealed in June 2015 with the enactment of the new Act on the Constitutional Tribunal. This is why the authors of the current draft claim that its adoption would be easier, since it is based on the well-known regulation from the past.

On 1st June the European Commission sent its opinion on the safeguarding the rule of law in Poland. This was a concluding part of the first stage of the rule of law framework that Commission initiated in January 2016. So far, the government has not referred nor commented the opinion.

On 7th June 2016 the Polish Parliament started its works on the new Act on Constitutional Tribunal.

2. Main changes

The draft Act is composed of 4 chapters. The first chapter refers to the composition and competences of the Tribunal. In the light of the draft, the number judges will not be changed and will still equal 15. In fact, any change of the number of judges in a normal act would be

unconstitutional, as the number is set directly in the Constitution. The process of electing judges will not be changed either. The judges will still be elected by the Sejm, while a group of 50 MPs or the Presidium of the Sejm will have the right to present candidates.

In the light of the draft, the President of the Constitutional Tribunal can only assign to cases those judges who are appointed by the Sejm and sworn into office by the President. Furthermore, in the light of the draft's temporary provisions all judges of the Constitutional Tribunal who have been sworn into office by the President should be assigned to cases on the day of the Act's coming into force. Such provision can be perceived as a tool to force the President of the Constitutional Tribunal to assign cases to the three judges elected by the current Parliament in violation of the Constitution (to replace judges elected by the previous Parliament).

In the light of the draft, the President would appoint the President and Deputy President of the Constitutional Tribunal among three candidates presented by the General Assembly of Judges of the Constitutional Tribunal.

The draft Act changes the composition of the full bench of the Tribunal. It lowers the number of judges composing a full bench from 13 (the number introduced by the amendment of December 2015) to 11 judges. The Tribunal will have to rule as a full bench on cases concerning, among others: competence disputes between state authorities, the Act on the Constitutional Tribunal and "particularly complex" cases, such as those connected with financial expenditures not provided in the budget or cases in which the adjudicating bench plans to depart from certain legal views expressed in the Tribunal's judgment initially issued as a full bench. If the President of the Constitutional Tribunal finds a case to be "particularly complex," he or she can direct it to be considered by the full bench. Furthermore, the President of the Republic of Poland and Prosecutor General in their motions to the Constitutional Tribunal could postulate that the Tribunal hear the case as a "particularly complex" case. The wording of this provision suggests that the Constitutional Tribunal will be bound by such a motion. In addition, the draft Act specifies that three judges or the bench adjudicating in a given case may ask the Tribunal to recognize the case sitting in a full bench. The majority of other cases will be recognized by a bench of 5 judges (before December 2015 the bench was defined as 5 judges).

In general, decisions can be made by a simple majority of votes.

The new draft Act retains the same order of case consideration as the one introduced by the amendment of December 2015; however, this time it includes exceptions. In general, cases submitted by, among others, a group of MPs, the President, the National Judiciary Council or the Prosecutor General should be recognised in the order in which they were lodged. However, this order will not be applicable to cases concerning, among others, the constitutionality of international agreements before their ratification, the Act on the Annual State Budget, the constitutionality of the Act on the Constitutional Tribunal and competence disputes between state authorities. Also the President of the Republic of Poland may demand that every case can be recognised without following the normal order. It is worth noting, however, that these exceptions cover only a very minor part of the Constitutional Tribunal's caseload. So, the concerns expressed in relation to the previous law as to the risk of significant prolongation of proceedings are still valid.

The draft Act also retains the rule for organising the first hearing of the case that was introduced by the amendment of December 2015. In the light of the draft, the first hearing of a case can be organised no sooner than 30 days after the notification of the parties.

Yet another new solution introduced in the draft Act is the requirement to reveal in the judgment the results judges' vote in the course of deliberations before the announcement of the judgment. Such a provision will constitute a controversial exception from the principle of confidence of judges' deliberations and may be used to de-legitimize certain judgments.

In the end of June, during its works the Parliamentary Sub-commission added a significant change to the draft. If the case should be recognised by the full bench, Tribunal issues decisions after judges' consultation *in camera*. During such a consultation, four judges can express their objections toward the suggested solution of the case. After such an objection the consultation should be postponed for 3 months. During the second consultation the four judges who objected to the previous solution, should present a suggestion of a judgement. During the second consultation, if four judges present their objection to the draft of the judgement, again the consultation should be postponed for 3 months. If the judgement concerns constitutionality of the Act or international agreement the decision should be made in 2/3 majority. If, after two rounds of consultations, it is impossible to reach such majority, the proceeding in this case should be discontinued.

The draft Act resigns from certain controversial provisions introduced in December 2015 in the area of disciplinary responsibility of judges of the Constitutional Tribunal (e.g. removal of judges by the Parliament upon the motion of the Assembly of the Constitutional Tribunal). However, it still limits the independence of the Tribunal, as according to the draft Act, a disciplinary judgment sentencing a judge to be removed from office will have to be approved by the President before it can be enforced.

The draft Act also contains a completely new provision which was not present in the Act on the Constitutional Tribunal of 1997 or 2015. The provision limits the competence of the Tribunal to invalidate acts on formal grounds. According to this proposal, in its assessment of the procedural constitutionality of a normative act, the Tribunal can take into account only the procedural requirements set forth in the Constitution. However, the Constitution does not specify the procedures for issuing many sub-statutory acts of law. These are provided, for example, in statutes. This may potentially lead to the impossibility of invalidating such acts on formal grounds.

The draft Act also changes the rules of publication of the Constitutional Tribunal's judgments. Currently, the law provides that the President of the Tribunal orders the publication of the judgment in the Journal of Laws. According to the draft Act, the President of the Constitutional Tribunal will not order publication, but only file a motion to the Prime Minister to publish a judgment. There is a risk that this provision could be interpreted as authorizing the Prime Minister to review the legality or purposefulness of the motion.

The draft Act also includes a set of temporary provisions. In their light, all the proceedings which were initiated before the adoption of this Act should be ended within a year after the Act comes into force. Furthermore, the cases initiated upon a motion of a competent authority (e.g. Commissioner for Human Rights, Prosecutor General), other than constitutional complaints, in which the decisions have not been made before the Act's coming into force, should be suspended for 6 months. Only constitutional complaints filed by citizens and

constitutional questions submitted by courts will be exempted from the suspension. Moreover, the Act obliges the Constitutional Tribunal to resolve all pending cases within one year since the Act comes into force.

3. The HFHR's assessment of the draft

There are two important points concerning this draft. First of all, it seems that the Constitutional Tribunal would be able to rule on the constitutionality of this draft in accordance with its provisions. According to the draft Act, its constitutionality will have to be reviewed by 11 judges, while in the Tribunal there are currently 12 judges validly elected, sworn into office and authorized to adjudicate. This could limit the dispute on whether the Tribunal's judgement is issued in accordance with the law (this issue is the main reason for the government's refusal to publish the judgement of 9 March 2016).

Secondly, if the Constitutional Tribunal finds some of these regulations unconstitutional then there will be no regulation which would automatically replace the provisions that were found unconstitutional, as this is an entirely new act. If the Constitutional Tribunal rules on amendments to acts and finds some of the amended provisions unconstitutional then these provisions are not binding and the "old" ones automatically come back to force. In the current case, if the Constitutional Tribunal rules on the new regulation, there is no regulation in place that could replace the unconstitutional provisions. Given the tense atmosphere surrounding the Constitutional Tribunal such a situation may lead to further paralysis of the Tribunal.

4. The situation surrounding the Constitutional Tribunal

The constitutional crisis in Poland remains unsolved. The President still has not sworn into office the three judges legally appointed by the Sejm in October 2015. Right now, the Constitutional Tribunal is composed of 12 acting judges and 3 judges that have the status of the Constitutional Tribunal's employees. The Tribunal still hears and rules on cases. The government does not publish its judgements.

In April 2016, the Sejm appointed a new judge of the Constitutional Tribunal, Professor Zbigniew Jędrzejewski. The appointment process was carried out without any proper and comprehensive civic monitoring and effective discussion within the Parliamentary Commission (the candidate did not answer any questions asked by the MPs from the opposition parties). The voting in the Sejm on this candidacy was carried out not without a scandal either – one of the members of the opposition party (Kukiz'15) voted for herself as well as for her colleague from the party. Both of the MPs were excluded from their party. The next judge's tenure which is about to expire is the term of the President of the Constitutional Tribunal. Professor Rzepliński's term of office expires in December 2016.

In March 2016, the Speaker of the Sejm created a team of experts whose main task is to verify the opinion of the Venice Commission. So far, the team has not published a solution to the constitutional crisis in Poland. The media reported that each member of the team had prepared their own opinion on the opinion of the Venice Commission. When the draft of the new Act on the Constitutional Tribunal was presented on 29 April 2016, the representative of the MPs suggested that the MPs would not wait for the results of their work.