HELSIŃSKA FUNDACJA PRAW CZŁOWIEKA
HELSINKI FOUNDATION for HUMAN RIGHTS

Warsaw, 22 July 2016

Ms. Mónica Pinto
Special Rapporteur on the Independence of Judges and Lawyers
Office of the United Nations High Commissioner for Human Rights (OHCHR)
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52 rue des Pâquis
CH-1201 Geneva, Switzerland

Dear Ms. Rapporteur,

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. It is active both in Poland and abroad (chiefly in the Russian Federation, Ukraine, Belarus, the Caucasus and Central Asia). Apart of education and awareness raising, HFHR provides legal aid to victims of human right violations, it carries out strategic litigation and international advocacy, as well as it monitors the legislative process and conducts specialized surveys. It provides expert consultation in the sphere of human rights and freedoms to individuals as well as to non-governmental organizations and state institutions (such as parliamentary committees, police, the judiciary, the prison service, the border guard, public health service). The independence of judiciary and the rule of law are among main focuses of the organization since its establishment in 1990, preceded by the underground operation of the Helsinki Committee in Poland in 1980s.

The Helsinki Foundation for Human Rights would like to draw attention of the Special Rapporteur on the Independence of Judges and Lawyers to a number of developments in Poland which have a negative impact on the rule of law and the status of the judiciary. We would like to draw your attention to (1) the constitutional crisis lasting since June 2015, (2) the Presidential pardon of persons prior to final judgment, (3) the Presidential refusal to appoint judges, (4) potential amendments to the Act on National Judiciary Council, (5) reforms of the judiciary and (6) selected statements made by the representatives of the state authorities and of the ruling party regarding the judiciary.

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I. 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.

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]

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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.

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

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.

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

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.

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.

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

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 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."

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]).

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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.

20 Available at: http://www.sn.pl/aktualnosci/SiteAssets/Lists/Wydarzenia/NewForm/2015.12.16_SN_Opinia.do.ustawy.o.TK.pdf.

21 Available at: http://www.adwokatura.pl/admin/wgrane_pliki/file-opinianranowaustawatk17122015-13851.pdf.

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.

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.

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22 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 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.

Two judges appointed in December 2015 assigned to works in the Constitutional Tribunal

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, 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. 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[26] and the Supreme Administrative Court[27], 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.[28]

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 is 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.

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26 http://www.sn.pl/aktualnosci/SiteAssets/Lists/Wydarzenia/EditForm/Uchwala_Zgr_Og_SSN_26_04_2016.pdf

27 http://www.nsa.gov.pl/komunikaty/uchwala-kolegium-naczelnego-sadu-administracyjnego-z-dnia-27-kwietnia-2016-r,news,4,309.php

28 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

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 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 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 will now be reviewed by the Sejm, which can reject them. If it does not do this, the law will be presented to the President who can, within 21 days, sign it, veto it or ask the Constitutional Tribunal to review its constitutionality.

Conclusion

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.

II. 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 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".[29]

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.[30] Retired judge 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.[31] 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.[32] Also the Council of the Faculty of Law and Administration of the

29 http://www.prezydent.pl/aktualnosci/wydarzenia/art,69,postanowilem-uwolnic-wymiar-sprawiedliwosci-od-sprawy-m-kaminskiego.html

30 http://wyborcza.pl/1,75398,19203780,nieoficjalnie-prezydent-ulaskawil-mariusza-kaminskiego.html

31 http://wyborcza.pl/1,75398,19218093,letowska-prezydent-nie-moze-wyreczac-sadow-grozi-nam-kryzys.html

32 http://www.tvn24.pl/wiadomosci-z-kraju,3/kaminski-ulaskawiony-przez-dude-sedziowie-o-decyzji-prezydenta,596914.html

Warsaw University negatively assessed the President's actions and underlined that he cannot usurp the role of a judge.[33] At the same time, some lawyers (e.g. Professor Piotr Kruszyński[34]) 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.

III. 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[35]. Subsequently, candidates

33 http://warszawa.wyborcza.pl/warszawa/1,34862,19343296,wydzial-prawa-uw-ostro-o-dzialaniach-prezydenta-dudy-i-sejmu.html

34 http://wpolityce.pl/polityka/272172-prof-kruszynski-prezydent-nie-zlamal-prawa-prawo-laski-wyplywa-z-konstytucji

35 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

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 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[36]. 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[37]. 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[38]. 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.

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.

36 See: decision of the Constitutional Court of 19 June 2012, No. SK 37/08, OTK ZU 2012, No. 6A, item 69.

37 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.

38 See: http://www.hfhr.pl/en/niepowolani-sedziowie-zlozyli-skargi-konstytucyjne/ (access: 12 July 2012).

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 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[39]. In this context it is also worth to recall OSCE Kyiv Recommendations[40] 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[41]. 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".

39 See: statement of the International Commission of Jurists of 25 October 2007, http://www.hfhrpol.waw.pl/precedens/aktualnosci/oswiadczenie-miedzynarodowej-komisji-prawnikow.html.

40 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.

41 See: http://www.hfhrpol.waw.pl/precedens/images/stories/Pdfy/deklaracja.pdf.

IV. Draft of the amendments to the Act on National Judiciary Council

On 2 May 2016 the Government published a draft of the Amendment Act to the Act on the National Judiciary Council. The draft provides far reaching changes regarding composition of the Council and its role in the process of judicial appointments, what may negatively influence the independence of the judiciary.

The National Judiciary Council is a constitutional body whose main duty is to safeguard the independence of courts and judges. The Council is composed of the representatives of the executive (the Minister of Justice and the member appointed by the President), legislature (4 members chosen by the Sejm from amongst its Deputies and 2 members chosen by the Senate from amongst its Senators) and judiciary (the First President of the Supreme Court, the President of the Supreme Administrative Court, 15 judges chosen from amongst the judges of the Supreme Court, common courts, administrative courts and military courts). The term of office of the elected member of the Council is 4 years. Competences of the Council include, among others, submitting motions for review of constitutionality of legal acts concerning the judiciary, preparing opinions to legal acts and, what is especially important, participating in the process of judicial appointments.

According to Article 179 of the Constitution, judges shall be appointed by the President of the Republic on the motion of the National Council of the Judiciary. The details regarding the procedure are regulated on the statutory level – in the Act on the System of the Common Courts and the Act on the National Judiciary Council. Generally, the role of the President in the judicial appointments is limited to the mere act of appointment of a judge. In particular, he cannot appoint a candidate who was not nominated by the Council. There are serious controversies as to the question if he is authorized to refuse to appoint a candidate nominated by the Council (see: below).

The draft provides significant change in this regard. According to the projected Article 37(1) of the Act, if there are more applications than one for a given judicial position, the National Judiciary Council has to review all candidatures jointly and recommend the President at least two candidates. Such a requirement would completely change the roles of the Council and the President in the process of judicial appointments. The President would get a real influence on the appointments as he would be authorized to choose between various candidates nominated by the Council. And on the other hand, the role of the Council would be significantly diminished as it would be obliged to recommend the President at least two candidates even if it believes that only one of them is proper. In the HFHR opinion such an amendment violates the principle of judicial independence because it grants the President, that is the head of the executive, too far reaching influence on the judiciary. If the candidate for a judge (assessor) or judge before promotion knew that his appointment/promotion depends on the decision of the President, his independence would become illusory. What is more, the draft law disregards clear wording of constitutional provisions which gave the President competence only to appoint judges and not to elect them.

Yet another potentially unconstitutional provision of the draft is its Article 5, according to which terms of office of all elected members of the Council will be terminated within 4 months since the entry into force of the Act. According to the authors of the draft such a drastic solution is justified by the changes in the composition of the Council (distribution of the seats between different courts) and procedure of election of its members. However, sudden dismissal of all members of the Council may be perceived as politically motivated form of pressure on this constitutional body. Such a conclusion is justified even more by the fact that the Council has been critical to many recent laws proposed by the Law and Justice Government, including its reforms of the organization of the Constitutional Tribunal. It is worth to underline that in the past the Constitutional Tribunal

invalidated several laws which terminated terms of office of certain constitutional organs without convincing reasons (e.g. judgment of 23 March 2006, ref. no K 4/06 – removal of members of the National Council of Radio Broadcasting and Television; judgment of 9 December 2015, ref. no K 35/15 – removal of the President and Vice-President of the Constitutional Tribunal).

The Act has not been adopted yet – the draft has not been officially submitted to the Parliament and the legislative works are still in the phase of the inter-ministerial consultations.

V. Announcements of further reforms

Since the Law and Justice party came to power in autumn 2015, the Minister of Justice announced several times that the Government is planning to introduce a far-reaching reform of the system of judiciary. Although no official draft has been publicly presented yet, certain proposals announced in the media may raise serious doubts as to their constitutionality.

One of the most important proposal includes abolishing of the district courts, which are the courts of the lowest level within the hierarchy of the Polish judicial system. After the reform, there would be only two levels of courts: circuit courts and courts of appeal. The reform cannot be criticized as *per se* unconstitutional, because the Constitution does not specify exactly what levels of courts have to be organized – the only requirement in these regard is to establish two instances of judicial proceedings. However, the introduction of the reform may raise serious practical problems and may be used to exert pressure on the judiciary. In particular, it has not been specified yet what the status of the judges of the abolished courts would be. If the statute specified that they would be re-appointed for the position of the judges of circuit courts, then, taking into account abovementioned competence of the President to refuse to appoint a judge, the whole reform could be used to remove (or reassign) large number of judges.

The media reported about proposal of several other reforms which however have not been officially published yet and some of them were not officially confirmed by the government. In November 2015 media outlets informed about proposals included in the political program of the Law and Justice party according to which competence to adjudicate in disciplinary proceedings against judges would be transferred from the judiciary itself to the special body established under the aegis of the President.[42] Such a draft has not been prepared so far and the only officially published legal proposal concerned changes in the catalogue of disciplinary sanctions against judges. The draft proposes introduction of the sanction of lowering the judge's salary up to 15% for the maximum period of 2 years. Yet another media report concerned so-called de-communization of the courts – according to one right-wing internet portal, the Ministry of Justice had been working on the reform which would move around 80% of judges who started their judicial careers under the communist regime onto a compulsory retirement.[43] In June 2016 three Law and Justice's MPs asked the Minister of Justice if he planned to undertake a thorough de-communization of the courts, however the Vice-Minister denied, arguing that current law is sufficient and that around 75% of the Polish judges were born after 1964.[44] In July 2016 the media informed that the Ministry of Justice plans to strengthen the role of jurors (*ławnik* – non-professional member of the adjudicating bench elected from amongst the citizens by the municipal councils).[45] The Vice-Minister of Justice informed however that so far no legislative proposals have been prepared, but the Ministry works on the concept of the future reform of the judiciary, which may include also changes of the role of citizens in the system of

42 http://prawo.gazetaprawna.pl/artykuly/903789,pis-nowy-sad-dysycplinarny-dla-sedziow.html
43 http://niezalezna.pl/82090-wojna-z-sadowa-skamielina-koniec-awansow-za-sluzenie-ukladom
44 http://www.sejm.gov.pl/Sejm8.nsf/InterpelacjaTresc.xsp?key=226F5FFC&view=6
45 http://www.rp.pl/Sedziowie-i-sady/307109985-Sedzia-bedzie-sie-musial-liczyc-z-lawnikiem.html#ap-2

justice. It is difficult to assess at this moment if such changes would threaten independence of the judiciary.

VI. 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[46].

1. 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[47]

[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[48]

"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

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46 E.g. Barthold v. the Federal Republic of Germany, judgment of 25 March 1985, application no. 0/1983/66/101.
47 http://www.prezydent.pl/aktualnosci/wypowiedzi-prezydenta-rp/wywiady/art,33,wywiad-dla-tygodnika-der-spiegel.html
48http://www.sejm.gov.pl/Sejm8.nsf/komunikat.xsp?documentId=A87DC2997352B6D2C1257F10005A1932

"... 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[49]

"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[50]

"[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[51]

„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[52]

"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[53]

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[54]

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49 http://www.polskieradio.pl/5/3/Artykul/1556365,Pismo-szefowej-KPRM-do-prezesa-Trybunalu-Konstytucyjnego-upublicznione-przez-TK-dokumentacja

50 https://www.youtube.com/watch?v=LCK_biZe_KU

51 http://wiadomosci.onet.pl/tylko-w-onecie/trybunal-konstytucyjny-wyrok-tk-w-sprawie-noweli-pis/q72lp6

52 http://trybunal.gov.pl/fileadmin/content/nie-tylko-dla-mediow/Pismo_Prokuratora_Generalnego_z_5_kwietnia_2016_r..pdf

53 http://www.tvn24.pl/wiadomosci-z-kraju,3/rzecznik-pis-beata-mazurek-o-sadzie-najwyzszym-zespol-kolesi,639007.html

"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[55]

"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[56]

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, 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[57]

"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[58]

"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

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54 https://www.youtube.com/watch?v=KI5lz3FO4jY
55 http://www.wsieci.pl/wsieci-wywiad-z-prezydentem-pnews-2648.html
56 https://www.youtube.com/watch?v=dikebA-zDu4
57 https://www.youtube.com/watch?v=dikebA-zDu4
58 http://tv-trwam.pl/film/wywiad-z-premier-beata-szydlo

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
Telewizja Republika, W punkt, 11 December 2015[59]

"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[60]

„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[61]

"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[62]

„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

59 https://www.youtube.com/watch?v=LCK_biZe_KU
60 http://www.rp.pl/Polityka/312289894-Jaki-Administracja-nie-moze-gardzic-PiS.html#ap-3
61 https://www.youtube.com/watch?v=2TNEyDk0OQU
62 https://www.wprost.pl/kraj/10013968/Spor-o-Trybunal-Konstytucyjny-rozgorzal-na-nowo-Profesor-Rzeplinski-poczul-syndrom-Boga.html

Nasz Dziennik, 2 lipca 2016[63]

2. Statements regarding judiciary as a whole

The debate around judicial system in Poland triggered a number of comments. During one of the interviews Paweł Kukiz, chairman of Kukiz 15 political group commented that the judiciary is a *"prosecutorial-judicial mafia"*.

TVN broadcaster, program "Kropka nad i", 4 February 2016[64]

The Association of Judges Iustitia issued a statement on 3 February 2016, highlighting that the formulation of P. Kukiz was insulting and that he did not give any arguments supporting his statement.

Regarding the sentencing of Head of Central Anti-Corruption Bureau

"You know that case perfectly and you're conscious of what was going on when the judgment in the first instance was passed. You know what the judge Łączewski did with that. He made this case political, that he was writing a justification for five months and he publicly announced it just before the elections".

Andrzej Duda, President of Poland

18 November 2015[65]

"The judgment passed by the judge Wojciech Łączewski is scandalous, shameful. That judgment can be compared to the most unjust judgments passed in the previous system".

Zbigniew Ziobro, Minister of Justice

Gazeta Prawna, 24 November 2015[66]

„That judgment shows that process of becoming more similar to Belarus, which began seven years ago [when power was taken by a coalition of PO-PSL], is getting faster and more intense".

Jarosław Kaczyński, chairman of Law and Justice

8 April 2015[67]

VII. Conclusions

The above described developments are increasingly worrying and affect the rule of law and separation of powers. The Constitutional Court 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 in the public. Moreover, the executive power, by the non-appointment of judges and the numerous statements, constantly undermines the authority of the judiciary. The proposed legal changes can have a long lasting effect on the independence of the judiciary. The HFHR would like to stress that the incidents around the Constitutional Court crisis, as well as the proposed legal reforms go against the UN Bangalore Basic Principles on the Independence of the

63 http://www.naszdziennik.pl/polska-kraj/161177,to-prezydent-mianuje-sedziow.html

64 http://www.tvn24.pl/wiadomosci-z-kraju,3/kukiz-mowi-o-prokuratorsko-sadowniczych-list-otwarty-sedziow,616569.html

65 http://300polityka.pl/live/2015/11/18/duda-krytykuje-sedziego-laczewskiego-i-mowi-uwolnilem-wymiar-sprawiedliwosci-od-sprawy-kaminskiego/

66 http://prawo.gazetaprawna.pl/artykuly/907390,kaminski-cba-krs-ataki-na-sedziego-laczewskiego-nieuprawnione.html

67 http://www.kancelaria.lex.pl/czytaj/-/artykul/sad-zada-scigania-podszywajacych-sie-pod-sedziego-laczewskiego

Judiciary[68], art. 10 of the Universal Declaration of Human rights and art. 14 of the International Covenant on Civil and Political Rights.

We would therefore kindly ask the Special Rapporteur, according to the mandate, to study the situation in Poland and if possible to build a set of conclusions and recommendations concerning the presented allegations.

On behalf of Helsinki Foundation of Human Rights,

Yours faithfully,

Danuta Przywara
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68 Adopted by 7th UN Congress on 26 August to 6 September 1985.