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REFORM OF THE POLISH CONSTITUTIONAL TRIBUNAL

THE AMENDMENTS OF THE CONSTITUTIONAL TRIBUNAL ACT OF 22 DECEMBER 2015 ARE NOT IN LINE WITH INTERNATIONAL LAW

SUMMARY

Since the Polish Law and Justice Party (PiS) won elections on 26 October 2015, Poland has plunged into a serious rule of law crisis, where the parliament majority, the government and the president on the one hand and the Constitutional Tribunal on the other hand are in disagreement about their respective authority in appointing judges to the Tribunal and on respective prerogatives in interpreting the Constitution.

In the middle of this crisis parliament adopted in great haste and without consultations a law that includes numerous amendments to the way that the Constitutional Tribunal operates. According to these changes: the Tribunal should decide generally as a full bench of its 15 members; the quorum would be 13 members; the majority for making a decision increases from 50% to 2/3; hearings should be scheduled within 3 or 6 months (depending on the type of case) as opposed to two weeks as has been the rule and cases should be dealt with in chronological order.

All these changes go against the essence of the way that constitutional courts operate and against the idea of an effective remedy, because each of these measures will slow down the Tribunal. The rule that the Tribunal should work down cases in chronological order sits badly with the concept of the Constitutional Tribunal as a guarantor of the balance of powers in the state, as provided in Poland's constitution. In contrast to the other branches of power, the Tribunal would not be able anymore to respond to developments based on their importance and urgency. The Council of Europe stressed that institutional independence of courts include the autonomy to decide the allocation of cases.

All the above-mentioned changes have the same effect of making the Constitutional Tribunal an ineffective body. In their entirety they will slow down the Tribunal if not paralyse it altogether. That situation violates the numerous international obligations that Poland entered into, in particular the European Convention on Human Rights, which requires that States maintain independent and impartial courts that are able to adjudicate within reasonable time limits. The neutralisation through a parliamentary law of a constitutionally mandated Constitutional Tribunal is a violation of the rule of law.

The law contains an article that indicates that it should be immediately applied by the Tribunal on all the pending cases. The article could be understood to mean that the Tribunal cannot review these amendments according to the previous version of the law. This interpretation would however not conform with the Polish constitution, which tasks the Tribunal with assessing the constitutionality of a law. Such a role cannot be overruled by a parliamentary law.

1. WHAT HAPPENED?

In the last sitting of Poland's outgoing parliament (8 October 2015), the then government majority elected five new judges to the Constitutional Tribunal. Two of these appointments were highly questionable, as the term of those two judges would have started at a time when the new, to-be-elected parliament would be in place.

Incensed by this attempt at "court packing", the new ruling party tried to stop the appointment through legal acts and the president refused to swear any of the five judges into office. Instead, parliament elected alternative five judges which were sworn in by the president. The Constitutional Tribunal on the other hand ruled that the concerns about the appointment of two of the judges were justified, considering their appointment unconstitutional. It refuses however to accept the additional three new judges, considering that the previous three were appointed correctly.

In the middle of this serious crisis, parliament adopted on 22 December 2015 a law amending a number of provisions of the Law on the Constitutional Tribunal. This briefing paper reviews these changes.

2. WHAT IS IN THE AMENDMENTS?

The Sejm amended the Constitutional Tribunal Act on 22 December 2015. The amendments include, among others:

- As a general rule, only the **full bench** of the Constitutional Tribunal takes decisions (Article 44). Under the amended law, Chambers composed of three or seven judges only adjudicate a few topics, which are listed in the law. Before these changes were adopted, the full bench only ruled on a few enumerated cases, while chambers of three and five judges dealt with most topics. For example, previously chambers of five judges decided on the constitutionality of acts and three judges chambers on the constitutionality of legal provisions enacted by the central state bodies. Now the all of these cases will have to be dealt with by the full bench.

- Until the adoption of the law, the full bench decided by simple majority. The new law requires a **two-thirds majority** if the Court decides in its full configuration (Article 10), the full bench being the rule now, as indicated above.

- The new law introduces a **quorum**. The Tribunal can only take a decision when 13 of the 15 judges are present, including the President or the Vice-President of the Court, unless otherwise specified by law (Article 10).

- **Dates for hearings** of cases are set in **chronological order**, i.e. hearings must be scheduled in accordance with their registration at the Court.

- **Poland's President** or the Minister of Justice **may lodge disciplinary proceedings** against the judges (Article 28a).

- New rules on the **dismissal of judges** entitle the Sejm to dismiss a judge of the Tribunal in particularly serious cases, following an application of the Tribunal in **its full configuration** (Articles 31a and 36). The President and the Minister of Justice would have a right to initiate such proceedings. Under the previous law, a judge could be dismissed if he or she were convicted for specific offences by a final court judgment.

- As a general rule, **hearings may not be scheduled** earlier than three months after the parties were invited. In case the full bench decides, hearings may only be held six months after the parties have been notified (Article 44). Under the old law, the respective deadline was two weeks.

- The amendments remove chapter 10 of the Act that specifies the **proceedings in the event of the President of the Republic being deemed incapable of exercising office**.

- The text indicates that the amendments shall **enter into force immediately** and require the Tribunal to adjudicate the pending cases pursuant to the new rules.

- The amendments **remove Article 16, which stipulates that the judges of the Tribunal are independent** and subject only to the Constitution. While it is surprising that such a provision would be removed, it should be inconsequential, given that Article 195 of Poland's Constitution, the higher ranking source of law, contains the same rule ("Judges of the Constitutional Tribunal, in the exercise of their office, shall be independent and subject only to the Constitution").

3. WHAT ARE THE CONSEQUENCES?

Currently, **chambers** composed of 3 to 5 judges decide the majority of cases. Only in more difficult and controversial cases, the Tribunal decides in full bench. Requiring the Tribunal to decide most cases in full bench considerably weakens the Court's ability to adjudicate within reasonable timeframes. Adding to this challenge, the Tribunal can only decide when 13 of the 15 judges are present, i.e. it only takes the absence of three judges for whatever reason, to deadlock the Court. Furthermore, the Tribunal can only decide by 2/3, which has the potential to slow down the Tribunal further. Article 190.5 of the Constitution stipulates that the "judgments of the Constitutional Tribunal shall be made by a majority of votes". On top of these new rules, the Tribunal proceedings will be prolonged because in full bench cases hearings may only be scheduled 6 months after the parties were invited. **The accumulated effect of these changes will be a much slowed-down, if not a paralysed, Tribunal.**

The high quorum of 13 judges has not only the potential to slow down the Tribunal but also entails the **risk of turning the Tribunal altogether dysfunctional**. If the Tribunal does not have enough judges to fulfil the quorum, it could not rule on most cases. It is conceivable that parliament strategically neuters the Tribunal by simply refusing to appoint the requisite number of judges. It is worth noticing that the constitutional court of the Czech Republic was unable to adjudicate between summer 2003 and autumn 2004 because the Czech President and the Senate - the two appointing authorities - could not agree on the candidates.

The **amendments enter into force immediately** and require the Tribunal to adjudicate pending cases pursuant to the new rules. This provision appears to contradict the whole concept of constitutional review as it attempts to create legal facts before the Court rules on the constitutionality of the law. It is difficult to see how the Court could consider these "self-empowering provisions" to be constitutional.

The requirement to schedule hearings in **chronological order** will undermine the Court's ability to deal with particularly urgent or important cases swiftly. It will also impede the Tribunal to act as a meaningful arbitrator between the other branches of government, which is one of the core functions of the Constitutional Tribunal under the Constitution. According to Article 189 of the Constitution, the Constitutional Tribunal

is mandated to "settle disputes over authority between central constitutional organs of the State". As such institutional disputes are critical for the functioning of any government system, the Tribunal must be able to adjudicate such cases in non-chronological order. Being tasked to play its role in the institutional balance of a democratic state, a constitutional court must be agile to respond to developments. If it was strictly bound to chronology, other actors could easily prevent it from dealing with important cases. The pending case on the constitutionality of the amendments of 22 December illustrates the importance of being able to rule in non-chronological order – if the Tribunal adjudicates in chronological order it would risk to pass numerous judgements on the basis of amendments that it may later find to be unconstitutional. This could negatively affect the validity of a range of judgments.

The new law entitles the Sejm to **dismiss a judge** of the Tribunal in particularly serious cases of misconduct, following an application of the Tribunal in its full configuration. Additionally the Minister of Justice or the President may request the Sejm to dismiss a judge for the same reason. Serious cases of misconduct require violation of the law, compromising the dignity of the Tribunal or other further specified unethical conduct (Articles 28 in conjunction with 31a and 36). The new law is considerably vaguer than the previous law. Under the old rules, judges could be dismissed if they were convicted for specific offences by a final court judgment. The new rules could compromise the judges' security of tenure. Combined with the new rights of the President and the Minister of Justice to launch disciplinary proceedings, the new law could weaken the independence of the judges, in particular if the Constitutional Tribunal would not have the decisive role in the process (the new Article 31a is not completeley clear on this point).

According to the amendments, Chapter 10 would be deleted in its entirety. It specifies the proceedings for determining whether the President of the Republic is unable to discharge his or her duties (incapacity). This is a surprising deletion, given that Article 131.1 of the Constitution makes clear that the Tribunal shall determine whether the President of the Republic is unable to discharge the duties of his office, in cases where he/she cannot communicate that fact.[1] The deletion of Chapter 10 removes more detailed rules on how Article 131 Constitution should be implemented.

The law contains an article indicating that it should be immediately applied by the Tribunal on all the pending cases. The article could be understood to mean that the Tribunal cannot review these amendments according to the previously existing law. This interpretation would however not conform with the Polish constitution which tasks the Tribunal with assessing the constitutionality of laws, which implies that they are not applied before their constitutionality is being ascertained. The Constitutinal Tribunal's role under the constitution cannot be overruled by a parliamentary law.

It is noteworthy that the complex amendments to the Law on the Constitutional Tribunal were adopted in a matter of few days without any consultation process. Such a hasty process on the law that affects the fundamental institutional architecture of the state raises serious concerns. The Polish government claims that these changes have not been well understood. If this is the case the hasty process has not done anything to aid the public understanding of the law.

4. WHAT ARE POLAND'S OBLIGATIONS UNDER INTERNATIONAL LAW?

Poland is Party to the **European Convention on Human Rights (ECHR)**. Article 6 ECHR stipulates that "everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law". In other words, the ECHR obliges Poland to establish and maintain independent and impartial courts that are able to adjudicate within reasonable time. With the Constitutional Tribunal playing a key role in adjudicating cases that fall within the remit of the ECHR, its set-up should conform to the requirements of the Convention. Judicial independence "has an objective and a subjective component. The objective component is the indispensable quality of the judiciary, while the subjective component is the right of individuals to have their rights and freedoms determined by an independent judge. This principle is protected, on the European level, by Article 6 ECHR and Article 47 of the Charter of Fundamental Rights of the European Union."[2]

The **European Court of Human Rights (ECtHR)** has specified Article 6 in its ample case law. It ruled that the right of access to a court must be "practical and effective" (Bellet v. France, § 38). For the right of access to be effective, an individual must "have a clear, practical opportunity to challenge an act that is an interference with his rights" (Bellet v. France, § 36). The ECtHR also ruled the right to a court includes the right to obtain a determination of the dispute by a court (Kutic v. Croatia, § 25). The ECtHR has consistently stressed that the executive, the legislature and any other State authority, regardless of its level, have to abide by the judgments and decisions of the courts, even when they do not agree with them. The ECtHR issued various rulings specifying the independence of judges – judges may only be dismissed on

[1] Article 131 Constitution: „ If the President of the Republic is temporarily unable to discharge the duties of his office, he shall communicate this fact to the Marshal of the Sejm, who shall temporarily assume the duties of the President of the Republic. If the President of the Republic is not in a position to inform the Marshal of the Sejm of his incapacity to discharge the duties of the office, then the Constitutional Tribunal shall, on request of the Marshal of the Sejm, determine whether or not there exists an impediment to the exercise of the office by the President of the Republic. If the Constitutional Tribunal so finds, it shall require the Marshal of the Sejm to temporarily perform the duties of the President of the Republic."

[2] Venice Commission of the Council of Europe, page 27: http://www.venice.coe.int/webforms/documents/?pdf=CDL-PI%282015%29002-e

serious grounds defined in law and judges must have secure tender.

Furthermore, the ECtHR specified the meaning of "to be heard within a reasonable time". Unless caused by the parties to a court case or the complexity of the case, the ECtHR has stressed the importance of administering justice without delays which might jeopardise its effectiveness and credibility (H. v. France, § 58; Katte Klitsche de la Grange v. Italy, § 61). An accumulation of breaches by the State constitutes a practice that is incompatible with the Convention (Bottazzi v. Italy [GC], § 22). Accordingly, Article 6 § 1 obliges the Contracting States to organise their legal systems so as to enable the courts to comply with its various requirements.[3]

Importantly, the ECtHR derived from the term "tribunal" that any court must satisfy a series of requirements – independence, in particular of the executive; impartiality; duration of its members' terms of office; guarantees afforded by its procedure (Le Compte, Van Leuven and De Meyere v. Belgium, § 55; Cyprus v. Turkey [GC], § 233). In other words, the ability to pass effectively binding judgments independently and impartially within reasonable time defines what a court is. An institution that does have these features is arguably not a court.[4]

As a member of the **Council of Europe**, the Polish government should also reflect findings by the Council of Europe's Venice Commission.[5] On the question of keeping Constitutional Courts functional, the Venice Commission indicated: "A useful method of alleviating the court's case load can be the creation of smaller panels of judges when deciding matters initiated by one of the type of individual access, where the plenary only acts if new or important decisions need to be decided."[6]

The Venice Commission clearly identified the matter of case handling as a central aspect of the institutional independence of the judiciary: "The judiciary must be independent and impartial. Institutional judicial independence focuses on the independence of the judiciary from the other branches of state power (external institutional independence). (…) Institutional independence can be assessed by four criteria. The first criterion is independence in administrative matters, which means that the judiciary should be allowed to handle its own administration and make decisions without any external interference. **It should also be autonomous in deciding the allocation of cases**" (emphasis added).[7]

As an **EU Member State**, Poland is obliged to respect the rule of law, which is one of the fundamental values of the EU. Article 2 TEU states that the "Union is founded on the values of respect for […] the rule of law." As stated by the ECtHR, one of the fundamental aspects of the rule of law is the principle of legal certainty, which requires, *inter alia*, that where the courts have finally determined an issue, their ruling should not be called into question. The rule of law includes a separation of power and access to independent courts.[8]

Poland is also Party to the **International Covenant on Civil and Political Rights (ICCPR)**. According to Article 14 ICCPR, "everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law". In this sense, Article 14 echoes largely Article 6 ECHR. The practice and case law under the ICCPR confirms many of the ECtHR findings.

5. HOW TO EVALUATE THE AMENDMENTS OF THE CONSTITUTIONAL TRIBUNAL LAW?

In light of Poland's international obligations, it is clear that courts must be able to perform their judicial function, i.e. to adjudicate cases independently, impartially and in time. The rule of law is an empty shell if a Court is rendered unable to adjudicate cases independently and in reasonable time spans. As stated by the ECtHR, a court or a tribunal is characterised by its judicial function, that is to say determining matters within its competence on the basis of rules of law and after proceedings conducted in a prescribed manner (Sramek v. Austria, § 36; Cyprus v. Turkey [GC], § 233). A power of decision is inherent in the very notion of "tribunal" (Benthem v. the Netherlands, § 40).

The law of 22 December affects the Tribunal's institutional independence by imposing on it a rigid system of working cases down in chronological order. The law also contradicts the usual practice of making the case load manageable by letting most cases be decided by chambers of judges, instead requiring the full bench as the standard configuration to decide cases. In addition it increases the quorum and majority requirements, which will further slow down the Tribunal (if three members are not available, the court has no quorum).

Each of these measures is questionable, making it more difficult for the Constitutional Tribunal to play the role that the Constitution has laid out for it. These measures combined lead to the Tribunal's inability to effectively adjudicate cases and may even cause paralysis. The Tribunal would not be able to fulfil the role of a constitutional court contrary to the obligations under the ECHR, the EU Treaty and the ICCPR. The changes are thus not in line with international law.

3 http://www.echr.coe.int/Documents/Guide_Art_6_ENG.pdf PRACTICAL GUIDE TO ARTICLE 6 – CIVIL LIMB

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5 The Venice Commission will publish an opinion on the changes to the Constitutional Tribunal law.

6 Page 51: http://www.venice.coe.int/webforms/documents/?pdf=CDL-PI%282015%29002-e

7 Page 27: http://www.venice.coe.int/webforms/documents/?pdf=CDL-PI%282015%29002-e

8 Calliess, Article 2, No 26

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