



STEFAN
**BATORY
FOUNDATION**

Sapieżyńska 10a
00-215 Warszawa
tel. +48 22 536 02 00
fax +48 22 536 02 20
batory@batory.org.pl
www.batory.org.pl

Warsaw, 6 July 2016

**Statement by the Legal Expert Group at the Stefan Batory Foundation
on the draft Constitutional Tribunal Law
(Sejm paper no. 693)**

The Polish Parliament is now working on the new Constitutional Tribunal Law that is publicised as yet another attempt to help solve the constitutional crisis that kept Poland in its grip for several months. However, the legislative proposals will have an opposite effect- they will further aggravates the deadlock by pushing for evidently unconstitutional arrangements. It is particularly disconcerting to see the same proposals on the table that both the country's Constitutional Court and the Venice Commission once found to be blatantly in violation of the concept of constitutional justice system and infringing the principle of independence of constitutional court from other branches of government.

The Bill contains the following provisions which in, our opinion, unconstitutional:

1. Disciplinary termination of a judge's mandate must be approved by the President (Art. 12 Para. 2 of the Bill)

This is unacceptable interference of the executive branch with the court's independence in assessing disciplinary torts of its judges. The need to receive presidential approval may in specific cases lead to the executive branch forcing the constitutional court to grant a mandate to exercise judiciary powers to a judge who has been found unworthy by the CT General Assembly. This would make the President a super-arbitrator and an appellate body superimposed on the supreme judiciary of the country.

2. Cases to be heard in the order of submission (Art. 38 Para. 3 of the Bill); fixed 30-day deadline for hearings

This requirement is a repetition of the provision which was found to be unconstitutional by the Constitutional Tribunal in the ruling of 9 March 2016. The repeated promotion of an unconstitutional provision is an overt manifestation of disrespect for the judgments of the Constitutional Tribunal.

The Constitutional Tribunal is a steward of the constitutionality of all laws and regulations and as such it must independently assess the urgency with which to rule on submitted cases. This is to prevent situations where the delayed qualification of a piece of legislation as unconstitutional will cause irreversible breach of the Constitution of Polish Republic or in

other ways render the Tribunal's determination practically irrelevant. Any interference by the legislature with this power of the Tribunal is a violation of the Tribunal's independence guaranteed by the Constitution. This arrangement may paralyse the Tribunal if a large number of unconstitutionality cases are filed and subsequently a blatantly unconstitutional law is passed with consequences that will have become irreversible by the time the Tribunal rules on the case (e.g. an unconstitutional amendment of the election law one month before parliamentary elections). Furthermore, the unconstitutionality of this arrangement is even more acute with the President of the country having the power to change the order of cases to be heard by CT (Art. 38 Para. 5 of the Bill). Thus the Bill gives the executive branch possibility of direct intervention in the sphere reserved for independent judiciary.

The absolute obligation to hold a hearing 30 days after parties to the procedure have been notified may have similar consequences. The notice is longer than customary notice periods in court proceedings in Poland and the Tribunal has no power to shorten it in extraordinary circumstances. This rule may lead to unreasonable delays in ruling on cases which require urgency.

3. Ombudsman deprived of the right to participate in CT proceedings except for constitutionality complaint cases (Art. 52 and 82 of the Bill)

According to the Polish Constitution, the Ombudsman is a steward of human and civil rights and liberties in the Constitution of Polish Republic and other laws and regulations (Art. 208 of the Constitution of Polish Republic) and his/her office is independent of other branches of government (Art. 210 of the Constitution of Polish Republic). By limiting the role of the Ombudsman, who has – in line with the last year amendment on the Bill on CT - had the right to be part of all CT proceedings, the bill constitutes an unjustified interference with the ombudsman powers.

It is particularly confusing to understand how this proposal is to be interpreted as one that seeks to ensure a better protection of civil rights and liberties. Not only constitutional complaints are important in the context protecting citizens against the abuse of power. The Ombudsman has often been involved in cases brought to public attention via procedures other than constitutional complaints, i.e. motions and legal queries. There is no rational reason why the Ombudsman should be stripped off that power.

4. Stalling CT rulings

The Bill contains unconstitutional provisions that allow stalling cases brought before the Constitutional Tribunal. First, hearings must be postponed if they are not attended by the Prosecutor General, where his/her presence is mandatory (Art. 61 Para. 6). This obligation gives the Prosecutor General discretion in delaying hearings before the constitutional court and so he/she will have a power to influence or even block the constitutional power of the judiciary. This clearly contravenes the division and balance of powers and the principle of court independence.

Similarly, four judges will have the power to delay the hearing twice by a total of six months (Art. 68 Para. 5-7).. The procedure is not known elsewhere in the judiciary system in Poland and it allows a minority to act against the will of a majority. The fact that the period of postponement is fixed and cannot be changed constitutes a violation of the right of parties to immediate trial - the circumstances of the case may require that it be heard sooner than the deferment date.

5. Unreasonable interference with deadlines

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

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

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

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

First, the Bill does not obligate the Polish President to swear in three judges elected legally in November 2015. Yet, it does obligate the president of the Tribunal to engage three judges elected in December 2015 by the current parliamentary majority for seats already taken in case examination and rulings (Art. 92 of the Bill). This arrangement is in breach of the CT rulings of 3 and 9 December 2015 and the recommendation of the Venice Commission, which proves the proposed Bill is not serving the solution of current constitutional crisis.

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

Thirdly, the Bill provides for only 14 days of *vacatio legis*. While this is an improvement compared with the earlier amendment which did not envisage any *vactio legis* whatsoever, the grace period is still too short for the Constitutional Tribunal to be able to assess the constitutionality of the CT Law before it enters into force. Therefore, the Constitutional Tribunal will be forced to assess the constitutionality of the new legislation while applying its very provisions. If the Tribunal does not apply the new legislation, as it did not with the

previous amendment, on the grounds that it is only bound by the Constitution, its ruling may be later questioned. If this happens it will be the legislature that will be responsible for the situation and it certainly deepen the constitutional crisis rather than resolving it.

All these provisions of the Bill discussed above prove that if adopted, in the current form and wording, will further aggravate the crisis around CT. The Bill will provide the ruling majority with the instruments which allow the executive branches to intervene with the work of the constitutional court. As such it will constitute a serious violation of the rule of law principle, tripartite division of powers and a threat to the fundamental guarantees of protection of civil rights and freedoms.