



# The draft law on the Polish Constitutional Tribunal: Genesis and key proposals

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## Introduction

Poland's Constitutional Tribunal at the beginning of the systemic transformation after the fall of Communism in 1989, when Poland's legal system was transformed from an authoritarian one, devoid of institutions for protecting individual rights and freedoms against the omnipotence of the state, into a system fitting a democratic legal state. At the time, in addition to the Constitutional Tribunal (CT), an Ombudsman, Tribunal of State, National Council of the Judiciary and administrative judiciary were also established to protect individual rights and freedoms from state violations, limit the impunity of people holding state functions, establish an independent and impartial judiciary, and create guarantees for the judicial control of the state authorities' administrative activities.

The establishment of an independent and impartial body for checking laws' constitutionality sought to create institutional mechanisms for the protection of individual rights and freedoms against discretionary abuses of legislative power by the state and political authorities.

In the three decades since it was established, the CT has permanently inscribed itself in Poland's constitutional system, becoming its intrinsic part. Its case law has served as a guarantee of the protection of individual rights and freedoms, as well as the public authorities' compliance with the principle of decent legislation in the legislative process. Over this period, a number of lines of case law were formed, consistent observance of which – supported by the views of the legal doctrine of constitutional law – was a guarantee of democratic legal standards in Poland. The key lines of case law for citizens developed during these three decades include rulings on the protection of vested rights, the

protection of pending interests, the prohibition of changes to the tax law during the fiscal year, the requirement of specificity of the law, particularly when fiscal obligations or criminal sanctions are to be imposed on an individual on its basis, the prohibition of retroactivity of the law, as well as the certainty of the law and the order to shape the law in a way that protects citizens' confidence in the state and the certainty of the law.

The system of judicial legal review in Poland ceased to function correctly during the political changes of late 2015 and early 2016, and the subsequent legal and organisational changes to the CT. Indeed, at the end of the Polish Sejm's 7<sup>th</sup> term, a new law on the CT was passed,<sup>1</sup> enabling the previous political majority to appoint five judges to the CT. This occurred in a situation in which, in accordance with the Constitution – as confirmed by the CT in its judgements of December 3, 2015 (ref. K 34/15)<sup>2</sup> and December 6, 2015. (K 35/15)<sup>3</sup> – it could only elect three judges. The provision in the 2015 Law on the Constitutional Tribunal, providing grounds for the cumulative election of five CT judges, foreshadowed the deep constitutional and organisational crisis that the CT suffered in subsequent years. Indeed, after the elections of 2015, the new parliamentary majority elected five other judges to the CT, and the Polish president refused to swear in the judges elected during the Sejm's previous term, including judges who had been duly appointed. From 2016, three people appointed CT judges began to adjudicate there in flagrant violation of the law (the so-called "doubles"). So far, these individuals have been involved in issuing several hundred CT decisions. Their participation in the CT's consideration of cases has challenged the legality of the CT rulings in both domestic and international law. The European Court of Human Rights has stated that a CT decision made with an unauthorised person's participation is not a judicial decision within the meaning of Article 6 of the European Convention on Human Rights.

The appointment of unauthorised people to the CT, as well as the consequences of rulings made with their participation, are not the only problems related to the changes in its functioning. The election of the CT president and vice-president raises serious legal questions. In fact, the CT's General Assembly of Judges did not pass a resolution, as required by law, to present the candidates for the posts of CT president and vice-president to the Polish president. Nevertheless, the latter appointed a CT president and vice-president.

The legal and organisational problems surrounding the CT were exacerbated by the legislature, which made numerous changes to the normative basis for the CT's functioning during the Sejm's 8<sup>th</sup> term. During the first 11 months following the adoption of the Law on the Constitutional Tribunal of June 25, 2015, it was amended three times and the CT challenged its constitutionality in three judgements (K 34/15, K 35/15 and K 47/15). The next law on the CT was enacted on July 22, 2016 and was in effect for just five months. During this time, it became the subject of one amendment, while the CT challenged the constitutionality of numerous provisions therein (K 39/16). Another regulation on the CT was enacted on November 30, 2016, with its normative content divided into two laws: on the organisation and procedure of proceedings at the CT and on the status of CT judges.

The changes above were introduced amid a growing constitutional crisis surrounding the CT and public protests in defence of its independence. They destroyed the internal consistency of the statutory legal framework for the functioning of the CT, which has since been in need of thorough repair.

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1 Law of June 25, 2015 on the Constitutional Tribunal (Journal of Laws, item 293 unified text of 2016).

2 Journal of Laws, item 2129 of 2015.

3 Journal of Laws, item 2147 of 2015.

The constitutional crisis – associated with the improper selection of CT judges, the flawed appointment of the CT’s president and vice-president, the apparent deficit of independence and integrity, as well as the instability of the normative basis for the CT’s functioning – have led to a significant decline in the quality of judgements, as well as the CT’s organisational destabilisation. It manifests itself in the notorious cancellation of pre-scheduled hearings and frequent changes in the panel of judges, which raise serious legal questions, among other things. These changes have eroded public confidence in the CT, resulting in a significant decline in the number of constitutional complaints, legal questions and applications submitted to the CT and, consequently, a sharp drop in the number of rulings.

## **The genesis of the civil society draft law on the Constitutional Tribunal**

The changes to the CT since 2015 – as well as the analogous changes to the National Council of the Judiciary, the Prosecutor’s Office, the Supreme Court and the judiciary overall – have distanced us from the constitutional standards inherent in a democratic state of law. The Stefan Batory Foundation’s Team of Legal Experts (hereinafter: **the Team**) was established to monitor these changes and provide the public with an independent opinion on their compliance with the Constitution. The Team has been carrying out this task for years, preparing opinions on successive amendments eroding the Polish judiciary’s independence and impartiality, or presenting an amicus curiae opinion in proceedings at the CT (K 39/16).

On January 14-15, 2019, the Stefan Batory Foundation organised a conference entitled “How to Restore the Rule of Law?”, which aimed to present and discuss papers on restoring the rule of law in various areas of the judiciary. They spanned the CT, the National Council of the Judiciary, the Supreme Court, common courts and the Prosecutor’s Office. The conference resulted in a book, in which we presented the most urgent changes in the above-mentioned areas – including, above all, at the Constitutional Tribunal – needed to restore the rule of law.

As a result of the conference, the Team decided to develop a civil society draft law on the CT, as an expert-driven and completely apolitical normative solution aimed at creating a basis for the proper functioning of the CT. This is because the CT’s activities are crucial for restoring the rule of law, both in terms of restoring the due protection of individual rights and freedoms, and healing the legal system as well as cleansing it of regulations contrary to the Polish Constitution.

The work on the civil society draft law on the CT (hereinafter: **the Draft**) has been carried out since 2020, with its first version drafted in 2021. The Draft then underwent consultations with experts and legal organisations, whose comments helped improve its quality. The current version of the Draft (July 2022) takes into account the results of the consultations. This version of the Draft was also approved by the Team, which decided to make it public.

We hope that the Draft will contribute to the creation of a permanent normative basis allowing the restoration of the CT’s authority as well as effective, reliable and independent control of the constitutionality of law in Poland.

## Fundamental changes to the functioning of the Constitutional Tribunal included in the Draft

The work on the new legal regulation on the CT was based on the following assumptions:

- **Restoring a functional system of judicial review does not require constitutional amendments.** The current Polish Constitution defines the constitutional shape of the CT exhaustively (Articles 188–197 of the Constitution). Therefore, it should first be ensured that it is respected and that existing constitutional guarantees and standards are implemented. Of course, if a constitutional majority interested in strengthening the guarantees of the CT's independence were to be formed, more far-reaching changes consolidating the principles of the CT's and its judges' independence could be introduced. The proposal shows how the system of judicial review in Poland can be rebuilt without changing the Constitution.
- **Rebuilding the system of judicial review in Poland cannot be limited to restoring the normative state prior to 2015. This is because its functioning prior to 2015 was not flawless.** For this purpose, it was necessary to analyse the CT's entire normative environment; both the historical one, from 1985 onwards, and the changes between 2015 and 2022. This served as a basis for determining the fundamental directions of the necessary normative changes. The draft law on the CT was created on the basis of independent, substantive and apolitical analysis of the previous normative environment (without taking into account the political affiliation of individual drafts, including ones submitted during the constitutional crisis).
- **The Draft was developed based on an analysis of all the laws on the CT** in force since 1985, drafts of their amendments, suggested amendments articulated in the doctrine of constitutional law, a critical analysis of the CT's previous case law, and, insofar as necessary, comparative analyses depicting the functioning of the systems of judicial review and constitutional courts in other countries.
- **The methodology of work on the Draft required the determination of the normative base, the starting point for further work. It was assumed that this base would be the Law on the CT of 1997,** as it constituted the longest-standing normative basis for the proper functioning of the system of constitutional review in Poland.
- **For legislative reasons, it was also assumed that the Draft should regulate the entire normative basis for the functioning of the CT.** Therefore, the solution positing that procedural aspects of judicial activity and the status of CT judges should be regulated by two separate acts of statutory rank was abandoned.
- **The Draft's incorporation into the legal system requires the development of appropriate introductory, transitional and adjusting provisions.** In accordance with the standards of correct legislation, a separate law was therefore drafted: the Regulations Introducing the Law on the Constitutional Tribunal.

Regarding the key principles of the CT, the Draft envisages the following changes:

- **Changing the principle of the one-person management of the CT's activity by its president, in favour of the principle of collegiality.** Many of the CT president's previous powers and competencies would be transferred to the Assembly's catalog of powers and competencies. This seeks to emphasise and give a real dimension to the principle of collegiality in the CT's activities and to limit the possibility of one-person influence by the president on the CT's judicial activities. The Draft envisages entrusting the Assembly with the power to select the CT's panels of judges and make changes to them. This change is a consequence of the deep legal doubts concerning

the current acting CT president's practice of making numerous changes to panels of judges in recent years. The Draft obliges the CT president to convene the Assembly at least once a month. During the Assembly, the most important decisions would be made regarding the procedure for hearing cases brought before the Tribunal, the appointment of panels of judges, changes to these panels, the exclusion of judges, or possible conflicts of interest. The purpose of the law is to ensure that the process of appointing and changing the panels of judges is collegial and transparent. Above all, this would guarantee the independence of the panels of judges, from both external and internal factors, including the CT president's sole influence on the panels.

- **Control of the lawmaking process of its own accord.** The Draft unequivocally resolves the dispute in the doctrine of constitutional law and the discrepancies occurring in the CT's case law regarding whether the Tribunal is obliged, of its own accord, to review the constitutionality of the process of enacting the normative act presented for review. The Draft makes this control obligatory. This is because the CT, when performing the hierarchical control of the compliance of legal norms in the legal system, must first determine whether it is dealing with properly established legal norms.
- **CT president's term of office.** The Draft stipulates that the CT president is appointed for a three-year term. He or she may only be reappointed once for a consecutive term. The Draft states precisely that the presentation of candidates for the posts of CT president and vice-president to the Polish president requires the adoption of a separate resolution by the General Assembly.
- **New rules for the election of CT judges.** According to the Draft, CT judges will be elected by the Sejm with a qualified majority of three-fifths of the vote. The change in the required majority – from ordinary to qualified majority – seeks to foster the presentation of candidates who, through their legal knowledge and experience, can gain broad support in the Sejm, including among the opposition. This regulation aims to counteract the practice of appointing CT judges who are not distinguished by their legal knowledge and professional experience, but rather have a close relationship with the party that has a parliamentary majority. The circle of entities that can nominate a candidate for a judge is expanded. In addition to the Sejm Presidium and a group of 50 MPs, this right is extended to the Polish president, a group of at least 30 senators, the General Assembly of Judges of the Supreme Court, the General Assembly of the Supreme Administrative Court, the National Chamber of Legal Advisers, as well as the Supreme Bar Council and the National Council of Prosecutors. In addition, the Draft provides for a screening procedure by the speaker of the Sejm to examine whether the candidacies were submitted by an authorised entity, whether the candidates meet the statutory criteria to apply for the post of a CT judge, an opinion on the candidacies by the National Council of the Judiciary as to their suitability to hold the post of a judge, and a public hearing of the candidates at an open session of the Sejm Committee.
- **CT judges' disciplinary responsibility.** To date, the rules on CT judges' disciplinary responsibility have been modeled on the analogous solutions for Supreme Court and Supreme Administrative Court judges. However, this parallel is proving unreliable, as the CT's Assembly of Judges features 15 judges. According to existing regulation, the disciplinary court of the first instance includes five judges, while the disciplinary court of the second instance has seven judges of the Tribunal. What is more, the CT president (who carries out the formal control of the application for the initiation of disciplinary proceedings and is responsible for drawing the disciplinary ombudsman and the composition of the disciplinary court adjudicating in the first and second instance) and the judge acting as the disciplinary officer are excluded from adjudication in the disciplinary court. As a result, it turns out that conducting disciplinary proceedings requires the involvement of 14 judges. If, in this situation, even one of the judges is excluded (for example, due to health problems or a conflict of interest, or if it was a CT judge who filed the disciplinary proceedings), or if the disciplinary charge involved more than one judge, a disciplinary court of the second

instance could not be selected. The regulation of disciplinary proceedings therefore required a major overhaul. Consequently, the Draft decided that the composition of the disciplinary court of the first and second instances would be appointed by lot by the CT president from among the CT judges – active and retired. After all, retired CT judges are liable for disciplinary action on terms analogous to those for CT judges. The Draft also expands the catalog of entities that can file a motion to initiate disciplinary proceedings. Until now, it could only be filed by a CT judge or the president at the request of the prosecutor general, after consulting with the first president of the Supreme Court. According to the Draft, a motion to initiate disciplinary proceedings can be filed by the Polish president, the prosecutor general, and by a CT judge – active or retired.

- **Legitimacy of civil society organisations to apply to the CT.** So far, in its case law, the CT has assumed that civil society organisations (including the national bodies of trade unions and the national authorities of employers' and professional organisations) have very limited legitimacy to apply to the CT. The Draft seeks to change this practice, in accordance with the principle of opening up the CT as widely as possible to applications from civil society organisations.
- **The scope of recognition of constitutional complaints.** The previous regulation significantly limited the effectiveness of the constitutional complaints filed. This is because, in a complaint, it was possible to challenge only the norms of the law that served as the grounds for final court rulings or administrative decisions on the freedoms, rights or duties of an individual. In many cases, this restriction – a case of excessive formalism – made it de facto impossible to challenge the provision that made it unconstitutional. The Draft stipulates that a constitutional complaint should indicate the legal norm constituting the basis for the final decision by a public authority, and thus not only the provision that is the procedural basis for the decision, but also any regulation of substantive law that affected the content of the decision in an individual case.
- **New definition of a "case of particular complexity".** The Draft provides for the possibility of considering a case of particular complexity to be of significant social importance, rather than, as before, only of legal or financial importance. On this basis, cases of significant social importance can be heard by the full CT.
- **The CT will hear cases during a public hearing, open to the public.** Previous legislation featured a visible tendency to reduce the number of CT hearings and increase the number of cases heard during closed sessions. As practice shows, this is not conducive to a comprehensive review of the case and reduces the transparency of the process of reviewing the constitutionality of the law. The Draft introduces the opposite principle: all cases pending before the CT should be considered at an open, transparent hearing. A closed session would only be possible in exceptional circumstances; that is, when the case is uncontested (in the CT's opinion) and the positions of all the participants in the proceedings converge on the conclusion.

The most significant changes in the Draft of Law Introducing the Law on the Constitutional Tribunal include:

- **The annulment of judgements issued with the participation of the so-called "doubles".** The Draft states that CT judgements issued with the participation of people who are not authorised to adjudicate are invalid and do not have the legal effects provided for in Article 190(1) and (3) of the Polish Constitution. By a person who is not authorised to adjudicate, the Draft understands a person appointed a CT judge in violation of the Law of June 25, 2015 on the Constitutional Tribunal and CT judgements K 34/15 and K 35/15, as well as a person appointed in his or her place. Similarly, the Draft responds to the CT's decisions issued in cases involving competence disputes. The Draft also introduces an obligation to repeat all the procedural actions that people who were not authorised to adjudicate took part in.

- **Protection of the effects of judgements issued as a result of constitutional complaints and legal questions.** The Draft stipulates that, with regard to constitutional complaints and legal questions, the invalidity of a CT judgement does not entail consequences for the validity of judgements issued in individual cases. This exception applies when, following a CT judgement issued with the participation of a person not authorised to adjudicate, court proceedings were resumed or a judgement or administrative decision was issued in an individual case.
- **Re-election of the CT president.** The Draft stipulates that, when the law enters into force, the duties of the CT president shall be performed by the judge with the longest judicial tenure at the CT. Within three months of the law's entry into force, the Assembly shall present candidates for the posts of CT president and vice-president to the Polish president.
- **The CT's administrative and expert facilities.** The Draft provides for the elimination of the dualism of the division between the CT's Registry and the CT's Legal Service Office. It also provides the basis for rebuilding the CT's expert, assistant and administrative facilities within 18 months after the Draft enters into force.

It should also be emphasised that **people who are not authorised to adjudicate** (the so-called “doubles”) cannot take part in the CT's adjudicatory activities, and that the Sejm should implement the CT's judgements in cases K 34/15 and K 35/15 and declare the selection of the “doubles” invalid.

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