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A "good" Change in the Polish Constitutional Tribunal?[1]

I. Political and legal background

1. 2015 elections

The parliamentary elections that took place in Poland on 25 October 2015 gave victory to the right-wing conservative party Law and Justice (*Prawo i Sprawiedliwość*, further: *PiS*) and its leader, *Jarosław Kaczyński*. With the voter turnout at 50.92 %, a total of 37.58 % of the votes gave *PiS* an overall majority in the lower chamber of the Polish Parliament (the Sejm): 235 seats out of 460.[2] This followed the presidential election in May 2015, which was won by *Andrzej Duda*, also from *PiS*. While winning both these elections gave *PiS* a lot of political strength, its majority in the Sejm does not give *PiS* a sufficient number of votes in order to change the Polish Constitution of 1997. Indeed, in the campaign leading up to the election, *PiS*'s presented manifesto did not include radical changes to the political regime. The party's slogan was "A good change", which sounded very attractive to an electorate who were weary of the eight years of conservative-liberal-popular coalition. The governing party's lack of an active social policy and arduous inertia when it came to tackling social problems meant that the opposition's "good change" slogan won over swing voters and was very popular.

2. Institutional changes after the elections

Immediately after the elections, however, *PiS* appeared to change its strategy and very quickly initiated deep institutional changes. The record for the period between November 2015 and January 2016 includes changes of a fundamental meaning for the political system of the Republic of Poland. Two amendments were enacted to the Act on the Constitutional Tribunal,[3] there were amendments to the Act on the Civil Service,[4] the Act on the Police (known as the surveillance act) [5] and the Act on Public Media,[6] along

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[1] The authors would like to thank *Mr Nicholas Faulkner* for his help in revising the language.

[2] The opposition (the party that previously ruled for eight years – Platforma Obywatelska, along with Polskie Stronnictwo Ludowe and a new liberal *party* – Nowoczesna) won 182 seats. There were 42 seats for the new populist 'party' Kukiz'15, and 1 seat for the German minority. The coalition of left wing parties did not reach the required eight per cent threshold.

[3] (1) Act of 19.11.2015, Journal of Laws 2015, item 1928; (2) Act of 22.12.2015 (known as the Sanative Act), Journal of Laws 2015, item 2217) which both amended the Act on the Constitutional Tribunal of 25.6.2015, Journal of Laws 2015, item 1064. The first amendment was found to be partially in contradiction with the Constitution, in a judgement of the Constitutional Tribunal K 35/15. The second – against which proceedings were initiated in the Constitutional Tribunal is waiting for the judgement (K 47/15).

[4] Act of 30.12.2015 amending the Act of 2008 on the Civil Service (Journal of Laws 2016, item 34). Around 1600 civil service senior positions are covered by the amendment, which abolishes contests in favour of administrative nominations. The employment relationships for the affected positions expire one month from the date of the amendment, unless an extension is offered in the meantime. The requirements for the chief of the civil service to have at least five years of experience in a managerial position and no political *party* membership for five years before taking the position have been lifted. The Civil Service Council was abolished.

[5] Act of 15.1.2016 amending the Act on the Police of 1990, Journal of Laws 2016, item 147. Its enactment was made on the basis of a draft prepared in 2015 by the former government, which was

with a new Act on the Prosecution.[7] In addition, changes concerning the status of the Commissioner for Human Rights were introduced (the procedure on depriving his immunity[8]). Changes concerning courts are under way[9] and there has been a lot of talk about initiating work that would lead to changing the Constitution.[10]

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obliged to so by a judgement of the Constitutional Tribunal (K23/11). The draft was changed, however, to remove guarantees of respecting privacy. There are doubts whether the introduced changes are in accordance with the Constitution. The amendment allows any data to be stored that is deemed to be "significant for the security of the state" and "significant for the defensive capabilities of the state," whereas a judgement of the Constitutional Tribunal (K23/11) had requested that data with no meaning for the conducted case be destroyed. Article 15 of the amendment allows the previous act to apply to any proceedings initiated and not finished before the day when the act enters into force, and to any data collected. The Constitutional Tribunal, however, stated very clearly that the provisions on acquiring data lose legal force after 6 February 2016. The legislator uses two models of prolonging the duration of operational control, one of which allows decisions to be issued extending the control for subsequent periods of up to 12 months. This means that operational control can effectively be prolonged indefinitely. The subsidiary principle (applied to the operational actions "when other measures proved ineffectual or unsuitable") does not apply to billing and location data. The control of the secret service (służb) is to take place after they receive access to the data, and not before. It is questionable whether the court will be able to properly evaluate the presented materials, in particular given that there are no categories of actions established that would allow the data to be collected. The act does not contain provisions on informing ex post anyone whose data has been collected by the police about any proceedings initiated against them.

6 The Act amending the Act on Radiophony and Television of 30.12.2016 is temporary and will be in force until the end of June 2016. In that time, a new Act on Radiophony and Television will be prepared. According to the amendment, the Minister of the State Treasury has the sole right to appoint and dismiss the members of management boards and supervisory boards of entities of public radio and television. Certain requirements from candidates for members of the supervisory board were repealed, as well as term limits for board members and prerequisites for dismissing board members. On the day the act came into force, the terms of office of the board members of Polish Television and Polish Radio expired.

7 Act on 28.1.2016, Journal of Laws 2016, item 177 merges the positions of General Prosecutor and Minister of Justice (separated as of 2007). The General Prosecutor will gain the right to control prosecutors' offices directly, and will be able to issue ordinances, guidelines and commands to all prosecutors, including those conducting cases. The terms of office of prosecutors directing the organisational units of the prosecution will expire on the day when the act enters into force. The position of military prosecutor will be abolished, along with the National Council of Prosecutors.

8 The budget adopted for 2016 decreases the budget of the Commissioner for Human Rights by 25 percent. The Minister of Justice explained (in a statement made for TV on 30 January 2016) that the Commissioner for Human Rights deals with matters that are not important from the point of view of problems faced by Polish citizens, for example the problems of LGBT circles. The budget of the Constitutional Tribunal was also reduced.

9 See for example: http://www.rp.pl/Rzecz-o-prawie/311219984-Zmiany-w-funkcjonowaniu-sadow-i-prokuratur-wedlug-*PiS*---opinie-prawnikow.html#ap-10.

10 See: statement made on 18.11.2015 by *J. Kaczyński* in the Sejm, during the debate on the government's opening speech [exposé]: "One must consider a review of the Constitution, and introducing changes [to the Constitution], or one can at least consider a change. Or maybe a new one is needed? The present one is 20 years old already." During the Sejm's session that began on 9.02.2015, Kukiz'15 and *PiS* put forward a motion to enact an amendment to the Constitution, to resolve the constitutional crisis. According to the draft amendment, the term of office of all present judges of the Constitutional Tribunal (i.e. the judges appointed before the date of the amendment entering into force) would expire 60 days after the amendment enters into the force. New judges would be appointed according to new rules. The Sejm would elect the judges by a two-thirds majority, in the presence of at least of half of the MPs. The number of judges would be increased to 18. The inspection of the act establishing the organisation and proceedings in the Constitutional Tribunal would be excluded from the competences of the Tribunal and given to the Supreme Court. http://www.rp.pl/Sedziowie-i-sady/302089971-Nowela-konstytucji-ma-zreformowac-Trybunal-Konstytucyjny.html

3. Concentration of power

What is striking is the concentration of the areas subjected to reforms. The most spectacular reforms concern the political regime. They affect institutions that are characteristic for liberal and deliberative democracy, constitutional control and the place of the judiciary in the separation of powers. The exchange of personnel takes place in the public media, the prosecution and the civil service. The executive branch is striving to concentrate the political power.

4. New legislative process

The legislative process is taking place at great haste.[11] Drafts are submitted as MPs' initiatives rather than the government's,[12] which enables them to be dealt with far faster. If the legislative process is initiated by the government, public consultation as well as inter-ministerial discussion and agreement is required, whereas such requirements do not apply to citizen initiatives. Deliberations in the Parliament continue non-stop, including through the night, so that the enacted law can proceed to the higher chamber of the Parliament (without any time to effectively read through or analyse the drafts) and be sent for the president's signature. The president does not exercise the right to request expert opinions on the legislation before him, and imply signs the new laws immediately. The acts contain the minimum period of vacatio legis (two weeks).[13] This remarkable pace and the scope of the institutional changes are explained by the urgent need to carry out the promised "good change", as well as through fear that the institutions and personnel (including those in the public media) nominated and shaped under the previous political regime could hinder it.[14] The "good change" slogan used in the title of the Article, considering *PiS*'s unexpected alteration of its political strategy after the elections, and the adopted procedures that raise considerable controversy from a constitutional point of view – has ironic overtones.

[11] For example, the members of the second chamber of Parliament received the enacted amendment of the Act on Public Prosecution at midnight, and started to debate it in the morning. The amendment was accepted without any changes (which seems to be the rule at the moment) and then the act was immediately signed by the President. It was enacted on 28 January, published on 15 February and entered into force on 4 March.

[12] For example: the Act on the Police, the Act on the Prosecution.

[13] See, for example, Annex 2, which presents the calendar of legislative works on the Act on the Constitutional Tribunal.

[14] See *J. Kaczyński* in an interview for TV Republika, http://wiadomosci.dziennik.pl/polityka/artykuly/507971,jaroslaw-kaczynski-w-tv-republika-trybunal-konstytucyjny-lamie-prawo.html.

II. Development of the constitutional crisis

1. Appointing new judges of the Constitutional Tribunal in 2015

The Polish Constitutional Tribunal[15] started to operate in 1986. According to the 1997 Constitution the Tribunal has 15 judges, nominated by the lower chamber of the Parliament (the Sejm), for individual terms of nine years. The judges are called into office in sequence, each taking over the place vacated by their predecessor. In order to be able to pass judgements, the judges must be sworn in by the president.

In 2015, five places were due to be vacated in the Tribunal: three on 6 November, one on 2 December and one on 8 December. Given that, on 11 November, the term of office of the Sejm of VII term was due to end, in the new Act on the Constitutional Tribunal of June 2015,[16] an inter-temporal provision (Article 137) was added allowing the Sejm of VII term to appoint judges to fill all five places that would be vacated in 2015. This was the Sejm of VII term appointed the judges "in advance", and thereby effectively depriving the Sejm of VIII term the possibility of appointing judges for two places that would be vacated in December. The judges were appointed during the last session of the Sejm of VII term – on 8 October 2015. Uncertainties as to whether these appointments were in accordance with the Constitution were voiced by politicians, the press and NGOs,[17] and the president did not swear any of the newly appointed judges into office.[18] At the time, the opposition party (*PiS*) brought proceedings against the act to the Constitutional Tribunal, and the case was registered with the Tribunal (K 29/15). Up to this moment, the situation had progressed fully in accordance with the law and constitutional customs (an application was filed to the Constitutional Tribunal against an act allegedly inconsistent with the Constitution). On 10 November 2015, after the political elections and one day before the term of the Sejm of VII term ended, the application filed by *PiS* was withdrawn from the Tribunal, but was resubmitted to the Constitutional Tribunal on 17 November 2015 by a group of MPs from the present opposition (Platforma Obywatelska). The application was to be dealt with by the Constitutional Tribunal on 3 December 2015, as case K 34/15. In the meantime, the Sejm of VIII term, where the formerly opposition party (*PiS*) now had a majority came into power on 12 November 2015, and their first move was to amend the Act on the Constitutional Tribunal aimed at overthrowing the appointment of judges made in October 2015.

2. The first amendment of the Constitutional Tribunal Act of 19 November 2015

The first amendment of the Constitutional Tribunal Act of 19 November 2015 annulled the provision on the basis of which the five judges were appointed in October 2015. In addition, it shortened the term of office of the president and the vice-president of the Constitutional Tribunal. The draft amendment was proposed on 13 November 2015 and took three days to enact. The higher chamber of Parliament (the Senate) did not propose

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[15] See Annex 1, which contains provisions of the Constitution necessary to understand the problem.

[16] Constitutional Tribunal Act of 25.6.2015, Journal of Laws 2015, item 106.

[17] http://www.hfhr.pl/en/constitutional-tribunal-act-the-monitoring-of-legislative-amendments/.

[18] Interview with the president: Gazeta Wyborcza, Prezydent Duda: Sposób wyboru sędziów Trybunału Konstytucyjnego naruszył zasady demokracji (President Duda: the method of appointing judges to the Constitutional Tribunal violated the rules of democracy), available at: wyborcza.pl/1,75478,19170279,duda-sposob-wyboru-sedziow-trybunalu-konstytucyjnego-naruszyl.html.

any amendments to the Act and it was immediately signed by the president (on 20 November 2015). Proceedings against the annulled Article 137 of the Act introducing the Act on the Constitutional Tribunal and against the Amendment Act of 19 November 2015 were initiated in the Constitutional Tribunal (K 35/15). The application in the latter case was initiated by a group of members of Parliament. The application was joined by the Human Rights Commissioner (K 37/15), the National Council of the Judiciary of Poland[19] (K 38/15) and the First President of the Supreme Court (K 40/15). The applications were joined and the case was to be settled on 9 December 2015.

3. Appointment of the judges of the Constitutional Tribunal by the Sejm of VIII term

In the meantime, on 25 November 2015, the Sejm passed a resolution that the appointment of the five judges of the Constitutional Tribunal by the Sejm of the previous term "has no legal force." This was questionable, considering that the judges of the Constitutional Tribunal in Poland cannot be dismissed through such a procedure. Moreover, a resolution acclaiming the lack of "legal force" of acts adopted by a previous Parliament is also unprecedented. In order not to exacerbate the existing chaos, the Constitutional Tribunal referred to the Sejm an order on 30 November 2015, in which it requested that the Sejm abstain from appointing new judges until the Tribunal had passed judgement in case K 34/15. The use of such a protective measure by the Tribunal with regard to the Parliament was also precedential. Despite this request, on 2 December 2015, before the amendment of the Act on the Constitutional Tribunal came into force (which happened on 5 December 2015), the Sejm appointed five new judges to the Constitutional Tribunal. The candidates were proposed two hours before the appointment, which took part in the night, and the president swore the new judges in after midnight on 3 December 2015. This was the same day when the Constitutional Tribunal was supposed to establish whether the inter-temporal provision allowing the Sejm of VII term to appoint five judges to the Constitutional Parliament for all places vacating in 2015, which initiated the crisis, was in accordance with the Constitution.

4. Situation on 3 December 2015

For the five vacancies opening in the Tribunal in 2015 ten judges had been appointed: five in October but not sworn in by the president, and five in December and sworn into office. In the "December appointment" three judges were appointed for the vacancies already occupied by the judges appointed in October, and two judges for the positions opening on 2 and 8 December.

[19] Constitution Article 186: The National Council of the Judiciary will safeguard the independence of courts and judges. // The National Council of the Judiciary may apply to the Constitutional Tribunal regarding the conformity to the Constitution of normative acts to the extent that they relate to the independence of courts and judges.

5. Judgement of the Constitutional Tribunal of 3 December 2015 (case K 34/15)

Case K 34/15 was initiated by a group of members of the Parliament (see point II. 2. above). The Constitutional Tribunal confirmed that the inter-temporal provision (Article 137) is contrary to the Constitution as far as it allowed the Sejm of VII term to appoint two judges "in advance", for the vacating places that opened up only in December 2015. The accusations from *PiS* concerning the abuses of the previous coalition were therefore confirmed. However, the judgement clearly stated that the appointment on 8 October 2015 of the three judges for the three places vacated during the term of the Sejm of VII term was without a shadow of doubt, done in accordance with the Constitution. For that reason, the judges should be sworn in by the president, which constitutes his duty in this regard, not his prerogative. Notwithstanding, the president did not take any action in this regard, and his office declared the issue had been "finally clarified".

6. The problem with the publication of K 34/15 judgement

In accordance with Article 190 of the Constitution (see Annex 1), judgements of the Constitutional Tribunal must be "immediately" published in the Journal of Laws, as their coming into force depends on it. The Journal of Laws is issued by the Government Legislation Centre, a body that is subordinate to the prime minister. In the past, the Constitutional Tribunal has faced obstruction in this field (delays in publishing), which prevented judgements from entering into force (for example in case K 2/07). Never before however, not only had the judgement not been published for three weeks, but also the chief of the prime minister's office publicly considered the possibility of not publishing the judgement (which led to proceedings being initiated by a prosecutor). The chief of the prime minister's office published a letter claiming that the Tribunal had passed judgement in case K 34/15 in an improper panel, considering the meaning of the case.[20] The president of the Tribunal answered with a letter pointing out the content of Article 190 of the Constitution.[21]

7. Judgement K 35/15

Judgement K 35/15 was to adjudicate on whether the first amendment to the Act on the Constitutional Tribunal of 19 November 2015 was in accordance with the Constitution. Objections in this regard had been raised by a group of MPs, the Human Rights Commissioner, the National Council of the Judiciary of Poland and the First President of the Supreme Court. All the applications were adjudicated together, and the judgement stated that the amendment was contrary to the Constitution as far as it allowed the appointment of judges in a number exceeding the number of the judges established by the Constitution (15). In addition, the judgement clearly stated that the date of the judges being appointed by the Sejm constitutes the commencing date of their term (and not the date of

[20] The case was adjudicated by a panel of five judges (which is normal for inspecting the constitutionality of acts). It is a prerogative of the president of the Constitutional Tribunal to request a full panel of the Tribunal to adjudicate a case, considering the significance of the case (there are no obligatory prerequisites). The letter of the chief of the prime minister's office available (in Polish) at: http://www.rp.pl/Sedziowie-i-sady/312119921-Pismo-szefowej-KPRM-do-prezesa-Trybunalu-Konstytucyjnego-upublicznione-przez-TK.html#ap-2.

[21] Journal of Laws 2015, item 2129.

being sworn in by the president), and that shortening the term of the president and vice-president of the Constitutional Tribunal was contrary to the Constitution. The Tribunal did not adjudicate on the appointment of the "second" five judges – the resolutions of the Sejm were not subject to constitutionality control. The Tribunal decided that it has no competence to investigate individual acts of Parliament. Whether the resolutions of the Sejm depriving resolutions of the previous Sejm of their legal force constitute normative acts is not certain. The judgement of the Constitutional Tribunal contains three dissenting opinions in this regard. This time the judgement was published without delay.[22]

8. The refusal to investigate the acts of the individual appointment/ dismissal of judges

Legal proceedings were also instituted against the resolutions of the Sejm of 2 December 2015, which claimed to annul the resolution on the appointment of judges in October 2015 and the appointment of judges on 2 December 2015 by the Sejm of VIII term. However, the Tribunal declared that it was not competent to investigate individual acts. On this basis, the Tribunal discontinued the applications requesting an analysis (filed by a group of MPs, case U 8/15 of 7 January 2016). Whether the resolutions of the Sejm, and in particular resolutions on "annulling resolutions of the previous Sejm", are normative acts or not is not evident. Such opinions were also presented during the proceedings by the participants. The Human Rights Commissioner and the Polish Bar Council, who joined the proceedings, spoke in favour of analysing the resolutions. Resolution U 8/15, in which the Tribunal refused to inspect the constitutionality of these resolutions, was accompanied by three dissenting opinions. The Tribunal, when justifying the discontinuation, stressed[23] that it was not aiming at interpretatio extensiva when it comes to its own competences.

9. Situation after the Constitutional Tribunal judgements issued in December 2015

From among the five judges selected in October 2015, three were properly appointed, and two were appointed in violation of the Constitution (judgement K 34/15, confirmation K 35/15). The position of the president to treat per non est the appointment of judges in October 2015 has not changed. The judges appointed and sworn in December 2015 reported to the Tribunal as ready to work and were accepted, though they are not admitted to exercise their judiciary powers. The Constitutional Tribunal did not verify the resolutions on their appointment. After discontinuing the proceedings in case U 8/15, the president of the Constitutional Tribunal admitted two out of the five judges appointed in December (those appointed for the places vacated in December). The remaining three judges appointed on 2 December 2015, in the places covered by the judges appointed in October, do not participate in adjudication. Therefore, the Tribunal now has twelve active judges, (ten from before and two appointed in December) as well as three judges appointed in October but not sworn in, and three judges appointed for places already occupied at the moment of appointment, who are sworn in by the president. These six judges do not participate in adjudicating. The composition of the Tribunal is, therefore,

[22] Journal of Laws 2015, item 2147.

[23] "In interpreting the regulations on their activities, the Constitutional Court decided not to interpret them broadly ... while retaining a literal interpretation … "

simultaneously incomplete and excessive. The president and the Sejm consider the matter closed. In other words, the judgements of the Constitutional Tribunal (K 34/15 and 35/15) do not have proper legal effect.

III. The second amendment of the Act on the Constitutional Tribunal of 22 December 2015[24]

1. Introduced changes

This amendment fundamentally changed the rules of functioning of the Constitutional Tribunal. In particular:

The abstract control of the constitutionality of acts is to be adjudicated by the Tribunal in a full panel. So far, controls, both abstract and specific (questions by courts, petitions from citizens) were adjudicated in principle by the Tribunal in a panel of five judges. It was the prerogative of the president of the Constitutional Tribunal to order a full panel of the Tribunal for cases of great magnitude or particularly complex.

The full panel of the Tribunal consists of at least 13 judges (previously – nine).

The specific control is adjudicated in a panel of seven judges (previously – five).

The Constitution allows judgements to be passed by the Constitutional Tribunal by a majority of votes (Article 190 para. 5), whereas an amendment requires a majority of two-thirds.

Cases are to be adjudicated in the order of receipt by the Tribunal.

Cases cannot be adjudicated earlier than three months (in a case of a specific control) and six months (for an Abstract control) from the moment of the parties bringing the case.

The amendment enters into force without a vacatio legis and intertemporal provisions (this also applies to pending cases).

The autonomy of the Tribunal in cases relating to the disciplinary responsibility of the judges of the Tribunal was limited; the respective competences were given to the Sejm and the Minister of Justice.

2. The aim and effect of the amendment

The changes slowed the work of the Tribunal and lead to paralysing its functioning. The official reason for introducing the changes was to increase the democratic legitimisation of the Tribunal. The real aim is, however, different: paralysing the Tribunal and depriving it of any real influence on legislation. Previously, three panels of the Tribunal could have worked simultaneously, according to the amendment – only one. Adjudicating cases in the order of receipt means that the most complicated cases, where it is difficult to reach an agreement among the judges, will stop the adjudication of other cases. It is also possible to address the Tribunal with highly controversial cases, which will block all other cases.

[24] Journal of Laws 2015, item 2217.

3. The circumstances surrounding the adoption of the amendment

The amendment was enacted very quickly. The draft proposal was sent to the Sejm on 15 December 2015 and the first reading took place already on 17 December. No experts were asked for their opinions, three opinions were presented by the Supreme Court,[25] the Polish Bar Council[26] and the Helsinki Foundation of Human Rights,[27] but these were disregarded. The legislative committee of the Sejm sat for 13 hours with a one-hour break. Fundamental changes were introduced to the proposed draft (for example: entry into force on the day of promulgation, extension of the duty to adjudicate in the full panel). According to the established constitutional custom, introducing fundamental changes to the proposed draft should prevent the continuation of the work of the committee and the draft should be returned to the previous stage of the proceedings. In this case, however, the amendment went ahead and was enacted on 22 December 2015. On 24 December, at 3.50 in the morning, the higher chamber of the Parliament accepted it without changes and without asking for an expert opinion. The amendment was signed by the president and published on 28 December 2015. The work on the amendment was accompanied by a propaganda campaign that emphasised the alleged inefficiency of the Tribunal in comparison with the German Constitutional Court (Bundesverfassungsgericht)[28] and the waste of public money by the Tribunal. As a result, the budget of the Tribunal was reduced in 2016.

4. Proceedings against the amendment

A group of MPs, the Human Rights Commissioner and the First President of the Supreme Court instituted proceedings against the amendment in the Constitutional Tribunal[29] (K 47/15). The problem that appeared here in this was based on the procedural question whether an act that is subject to inspection should be adjudicated according to the rules that establish the proceedings and the panel of judges that are subject to constitutional revision. The amendment came into force immediately and provides for its own application to pending cases. However, if it was to be applied in case K 47/15 – the case could not be adjudicated as the Tribunal does not currently have a panel of 13 judges, necessary to perform an abstract inspection (see points II. 1 and II. 3. above). However, since one act of law cannot be at the same time the basis and the subject of control, the Tribunal decided to adjudicate the case in the full panel existing at the moment, i. e. by

[25] http://www.sn.pl/aktualnosci/SiteAssets/Lists/Wydarzenia/NewForm/2015.12.16_SN_Opinia.do.ustwa y.o.pdf.

[26] http://www.adwokatura.pl/admin/wgrane_pliki/file-opinianranowaustawatk17122015-13851.pdf.

[27] http://www.hfhr.pl/wp-content/uploads/2015/12/HFPC_TK_opinia_17122015.pdf.

[28] Interview given by the Minister of Justice on 29 December 2015. He claimed, among other things that, the German court (16 judges) had dealt with 6811 cases, whereas the Polish Constitutional Tribunal, with its 15 judges, had dealt with 530 cases. See also the statement of the Constitutional Tribunal's Office, in which the Office clarified the unreliable statistical information concerning the number of the cases adjudicated by the constitutional courts, information about business trips of the judges of the Constitutional Tribunal, and the expenses of the Tribunal. http://trybunal.gov.pl/nietylko-dla-mediow/aktualnosci/. The idea of removing the Tribunal to a provincial town (eventually withdrawn) was another element of this campaign. The aim of these actions was to demonstrate disrespect.

[29] See also amicus curiae of the Polish Bar Council http://www.adwokatura.pl/admin/wgrane_pliki/file-amicus2022016-14501.pdf.

twelve judges[30]. Until passing the judgement in case K 47/15, the Tribunal has abstained from adjudicating in other cases, to avoid a situation where the potential judgements are challenged on the basis of an improper composition of the adjudicating panel of the Tribunal.

5. Case K 47/15

On 9 March 2016 the Tribunal adjudicated that the entire act was contrary to the Constitution, due to numerous infringements of the legislative proceedings during its enactment. In addition, the Tribunal declared the majority of the provisions of the act as also being not in accordance with the Constitution, because they lead to paralysing the constitutionality control in Poland, which infringes the rule of law. The government refuses to publish the judgement, claiming that it is only "an announcement" issued by the Tribunal, because it does not meet the requirements necessary to make it a judgement (the Tribunal did not follow the procedure established by the amendment).[31]

6. Opinion of the European Commission for Democracy Through Law (Venice Commission)]

On 23 December 2015 the Minister of Foreign Affairs of Poland sent a letter to the Venice Commission, requesting its opinion on the constitutional issues addressed in the amendments submitted to the Sejm on 2 and 15 December 2015. The opinion was adopted by the Commission on 11 March 2016,[32] though a draft was publicised in the press already on 28 February.[33] In its opinion, the Venice Commission stated (among other things) the following:

– A solution to the current conflict over the composition of the Tribunal, based on the obligation to respect and fully implement the judgements of the Constitutional Tribunal, must be found.

– The amendments of 22 December 2015 will lead to a serious slow-down of the activity of the Tribunal and will make it ineffective as a guardian of the Constitution.

– Crippling the Tribunal's effectiveness will undermine all three basic principles of the Council of Europe: democracy, human rights and the rule of law.

– The provisions of the Amendment of 22 December 2015, affecting the efficiency of the Constitutional Tribunal should be removed.

The Commission stressed that not publishing the judgement in case K 47/15 "would not only be contrary to the rule of law", but also "such an unprecedented move would further deepen the constitutional crisis […]". Moreover: "Not only the Polish Constitution but also European and international standards require, that the judgements of a Constitutional Court be respected".

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30 The judges of the Tribunal are subject only to the Constitution (Article 195 para 1 of the Constitution), whereas other judges are subjected to the Constitution and statutes (Article 178 of the Constitution). This difference allows the judges of the Tribunal not to adhere to the procedure established in the act that is subject to its control.

31 http://www.rp.pl/Spor-o_Trybuna-Konstytucyjny/303099890-Rzecznik-rzadu-nie-mozemy-opublikowac-komunikatu-TK.html#ap-2.

32 The Ministry of Foreign Affairs requested the Venice Commission to postpone the adoption of the opinion until June. The Commission refused.

33 http://wyborcza.pl/1,75478,19687673,komisja-wenecka-ostro-krytykuje-zmiany-dotyczace-trybunalu-konstytucyjnego.html.

The Commission called on all state organs to fully respect and implement the judgements of the Tribunal, and in particular on the Sejm to revoke the resolutions made on the basis of provisions declared unconstitutional by the Tribunal. It also recommended that Poland should hold a principled and balanced debate, which provides enough time for full participation by all institutions on reform of the procedure and on the organisation of the Tribunal as well as warranties of reasonable time limits before the Tribunal.

The Commission sees the publication of the judgement and its respect by the authorities as a precondition for finding a way out of the constitutional crisis.

7. Reactions on the opinion

The opinion of the Venice Commission was met with very negative reactions by the governing party. *Jarosław Kaczyński* in a radio interview given on 3 March 2016 stated that the Commission had "disgraced" itself by allowing the draft opinion to be publicised before the official adoption.[34] He further claimed that, in his opinion, the Commission had not evaluated the situation in the given country from a legal point of view. The content of the opinion indicates that the Venice Commission is a body of a clearly political character, and its opinion is not binding for Poland. As he said, "the opinion is only of an advisory character, or even less than advisory, and in no way it is binding on us".[35]

IV. The symbolic meaning of the Constitutional Tribunal reform in Poland – winter is coming?

The Polish constitutional judiciary is currently in the state of a crisis. The future of this branch of the judiciary is not known at the present time. In any case, keeping the current situation or reinstating its previous meaning as one of the foundations of a democratic state of law is not going to happen swiftly – and moreover – is not certain. Much depends in this context on the general political atmosphere in Poland, which does not favour liberal democracy as such. The most general foundations of the crisis are based on majority democracy in its classical, parliamentarian meaning. Unfortunately, it is not a type of democracy that is friendly towards the judiciary, or monitoring constitutionality and the division and balance of powers, or deliberating to protect minorities, taking account the criticism voiced in the media, etc. What Poland now has is a democracy that puts its faith in the advantages of concentrating power, and it does not matter much whether the concentration of power refers to the dominance of the executive branch or of a political leader, no matter whether and which official positions he holds. Democracy of this type will not suffer fuses that may tame or slow down decisions from the centre of power. This seems to be true for the Constitutional Tribunal (as well as the Human Rights Commissioner, who definitely is not loved presently by the executive branch). Reducing these institutions to a mere facade, making them slow and inefficient by depriving them of the conditions necessary to function effectively (personnel, budget, ostentatious disregard) can be compared to unscrewing fuses. Electricity will still flow,

[34] Two weeks before adopting opinions the Venice Commission sends out drafts to representatives of 47 members of the Council of Europe and it does happen that the opinions are publicised before their formal adoption.

[35] Similar opinions were expressed by the Prime Minister *Beata Szydło*: http://www.polskatimes. http://www.polskatimes.pl/fakty/polityka/a/do-rzadu-wplynela-wstepna-opinia-komisji-weneckiej-wstk-szydlo-ona-nie-jest-wiazaca,9445143/, and the Minister of Foreign Affairs *Witols Waszczykowski*: http://www.msz.gov.pl/pl/aktualnosci/wiadomosci/minister_waszczykowski_do_sg_re_jaglanda.

but the damage that will occur in the event of a break-down is greater than when the system contains fuses. Withdrawal from liberal democracy and the institutions and proceedings that characterise it – namely an active constitutional judiciary, questioning the reasons behind the work of the Human Rights Commissioner, negating the guarantees that secure minority interests, renouncing the need for public discussion, limiting the freedom of the media that watches over the acts of government, negating the idea of checks and balances and friendly co-operation between the various branches of power – all these elements hinder the actions of the executive branch and make concentrating power in the hands of the executive more difficult.

The concentration of power is accompanied by placing people that can be trusted by the new government in positions where decisions are made. This is spoils system, introduced by enacting legislation after the elections that limits the term limits on positions. Regrettably, the Constitutional Tribunal appears to also be treated as an element of the spoils system. It was proposed,[36] for example, that in order to solve the crisis "politically", the judges should be appointed again, with the panel of judges being "divided" between the governing party and the opposition. This proposal, which attributes an overtly political meaning to the Tribunal, sounds a little like putting out a fire with gasoline. It should be emphasised that for years politicians have opposed the idea that the candidates for the judges of the Constitutional Tribunal could be submitted also by academic and legal circles, rather than just only the political parties.

Fighting "malicious impossibilism" in Poland is carried out in the name of "the will of the people" that cannot be tamed or stopped by law,[37] which places itself above the people. This argument, which has a baleful historical and political genesis, is recalled in Poland without any reflection. It does not mean, however, that it is not dangerous. On a clearly intellectual level, one can see in it references to the decisionism of *Carl Schmitt*.

This is, therefore, the place where one should look for the source of the easily identifiable legal nihilism, the erosion of the state of law[38] that comes to light through the procedures, the pace and the atmosphere of the reforms carried out in Poland between November 2015 and March 2016. We have tried to present the course of events in points I–III. above, where we also gave examples of the disregard for the standards of legislative work, its procedures, the consultation periods, the deadlines, the expert opinions, the public consultations, the inspection procedures, the renunciation of control abilities in the legislative process by the Sejm, the Senate and the president. We emphasise also – as a particular danger – the populist language that accompanies these changes, which replaces the merit-based critique.

Constitutional judiciaries of other states of East and Central Europe have also experienced crises. It is, in a way, a characteristic and universal phenomenon. It has happened in different forms and of various intensity in Russia, the Czech Republic, Hungary and Romania. What is clear is that the culture of the state of law, and more generally – the idea of liberal democracy is not well-rooted there. At the same time, it is not an idea or culture that would be commonly appreciated by society. The elites did not take the time and effort to explain the meaning and the magnitude of the mechanisms that guarantee the control of constitutionality. When it comes to the control of constitutionality, the

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[36] Prime Minister *Beata Szydło* presented this a compromise solution 21 January 2016.

[37] *Kornel Morawiecki*, MP from *PiS* during the parliamentary proceedings on 26 November 2015, when the changes of the legal regime of the Constitutional Tribunal were discussed. This statement, authored by a respectable politician was picked up and repeatedly passed on by other politicians and the media that support the government.

[38] The changes in the legal regime of the Constitutional Tribunal were presented to the Venice Commission.

attitude of the Constitutional Tribunal can also come under some criticism. More attention when it comes to communicating judgements to society would have given it wider public support.

Does the constitutional crisis mean that the 1997 Constitution has been broken, or only that constitutional custom has been breached? The only body with the "licence to adjudicate non-conformity with the constitution" is the Constitutional Tribunal. Judgements K 34/15 and K 35/15 clearly indicate that the Constitution has been violated (the Sejm appointing judges for positions already occupied, the constitutional delict of not swearing appointed judges into the office[39]). However, most of the constitutional infringements committed recently have not been subjected to control by the Constitutional Tribunal. This situation is caused by several reasons: the lack of application, the lack of the Tribunal's ability to control some of the acts of the Sejm, and the visible reluctance of the Tribunal to inspect parliamentary proceedings.[40]

What can be expected in the present situation? Optimists will quote *Alexandre Dumas* – "Wait and Hope", the pessimists will quote *Georges R. R. Martin* – "Winter is coming!"

Annex 1

– Article 2: The Republic of Poland shall be a democratic state ruled by law and implementing the principles of social justice.
Article 8: 1. The Constitution shall be the supreme law of the Republic of Poland. 2. The provisions of the Constitution shall apply directly, unless the Constitution provides otherwise.
– Article 10: 1. The system of government of the Republic of Poland shall be based on the separation of and balance between the legislative, executive and judicial powers […]
– Article 188: The Constitutional Tribunal shall adjudicate regarding the following matters: the conformity of statutes and international agreements to the Constitution; the conformity of a statute to ratified international agreements whose ratification required prior consent granted by statute; the conformity of legal provisions issued by central State organs to the Constitution, ratified international agreements and statutes; the conformity to the Constitution of the purposes or activities of political parties; complaints concerning constitutional infringements, as specified in Article 79, para. 1.
– Article 190: 1. Judgments of the Constitutional Tribunal shall be of universally binding application and shall be final. 2. Judgements of the Constitutional Tribunal regarding matters specified in Article 188 shall be required to be immediately published in the official publication in which the original normative act was promulgate […] 3. A judgment of the Constitutional Tribunal shall take effect from the day of its publication, however, the Constitutional Tribunal may specify another date for the end of the binding force of a normative act. Such time period may not exceed 18 months in relation to a

[39] This concerns the president. One can see a violation of the Constitution by the president in one more case. The president granted a pardon to a person convicted with an unsafe judgement for an abuse of power (while the judgement was waiting for adjudication by a court of II instance). Granting a pardon is a constitutional prerogative of the president (Article 139 of the Constitution), but it can only be granted to a person convicted with a judgement against which there is no further right of appeal. The pardon (granted on 16 November 2015) was necessary because the person it concerned was nominated for the position of a minister – coordinator of the secret service. As a convict (he had this status while waiting for the judgement of the appeal court), he could not have entered the government.

[40] In case K 35/15, where applications in this regard were filed by the National Judiciary Council and the Human Rights Commissioner.

statute or 12 months in relation to any other normative act. Where a judgment has financial consequences not provided for in the Budget, the Constitutional Tribunal shall specify date for the end of the binding force of the normative act concerned, after seeking the opinion of the Council of Ministers […]
– Article 194: The Constitutional Tribunal shall be composed of 15 judges chosen individually by the Sejm for a term of office of nine years from amongst persons distinguished by their knowledge of the law. No person may be chosen for more than one term of office. The President and Vice-President of the Constitutional Tribunal shall be appointed by the President of the Republic from amongst candidates proposed by the General Assembly of the Judges of the Constitutional Tribunal.
– Article 195: Judges of the Constitutional Tribunal, in the exercise of their office, shall be independent and subject only to the Constitution. Judges of the Constitutional Tribunal shall be provided with appropriate conditions for work and granted remuneration consistent with the dignity of the office and the scope of their duties. Judges of the Constitutional Tribunal, during their term of office, shall not belong to a political party, a trade union or perform public activities incompatible with the principles of the independence of the courts and judges.
– Article 196: A judge of the Constitutional Tribunal shall not be held criminally responsible or deprived of liberty without prior consent granted by the Constitutional Tribunal. A judge shall be neither detained nor arrested, except for cases when he has been apprehended in the commission of an offence and in which his detention is necessary for securing the proper course of proceedings. The President of the Constitutional Tribunal shall be notified forthwith of any such detention and may order an immediate release of the person detained.
– Article 197: The organization of the Constitutional Tribunal, as well as the mode of proceedings before it, shall be specified by statute.

Annex 2:

Summary of events (courtesy of Helsinki Foundation for Human Rights)

June 2015	The Parliament adopted an amendment to the Act on the Constitutional Tribunal. One of the provisions of the amendment enables the Parliament to appoint 5 judges by the end of the Parliament's tenure.
8 October 2015	The Sejm appointed 5 judges of the Constitutional Tribunal.
25 October 2015	Parliamentary elections.
17 November 2015	The Parliament started work on the amendment to the Act on the Constitutional Tribunal.
20 November 2015	The President signed the amendment.
25 November 2015	The Parliament adopted resolutions that aim to cancel the appointment of 5 judges in October 2015.
2 December 2015	The Sejm appointed 5 new judges. The President swore them into office.
3 December 2015	The Constitutional Tribunal stated that the amendment of June 2015 violated the Constitution. The Tribunal ruled that the

	Sejm was entitled to appoint only 3 out of 5 judges. The Tribunal stated that the President should swear the judges into office immediately.
9 December 2015	The Constitutional Tribunal ruled on the amendment of November 2015. The Tribunal found the majority of the introduced regulations to be unconstitutional.
11 December 2015	The Chief of the Chancellery of the Prime Minister requested an explanation from the President of the Constitutional Tribunal. The publication of the judgment from 3 December is postponed until the explanation is submitted.
15 December 2015	The Parliament started work on the next (third) amendment to the Constitutional Tribunal.
23 December 2015	The Parliament started the works on the Act on Police.
24 December 2015	The Parliament started the works on the amendment to the Act on the Prosecution.
24 December 2015	The Parliament adopted the amendment to the Act on the Constitutional Tribunal.
28 December 2015	The President signed the amended Act on the Constitutional Tribunal. The Act came into force.
28 December 2015	The Parliament started work on the Act on public media (described also as a preliminary Act on public media).
7 January 2016	The President signed the amended Act on public media. The Act came into force.
8 January 2016	The persons nominated by the member of the government replaced the chiefs of Polish Television and Polish Radio. The chiefs of the Radio Programme 1 and Programme 3 were relieved of their duties.
11 January 2016	The Constitutional Tribunal informed about the decision on discontinuation the proceeding concerning the resolutions shifting the appointment of judges in October 2015 and appointing new judges in December 2015.
12 January 2016	The President of the Constitutional Tribunal informed about assigning to cases two judges appointed in December 2015.
15 January 2016	Sejm adopted the amendments to the Act on Police. The draft was transferred to the Senate.