



## The constitutional crisis in Poland (2015-2018)

### The controversial changes made to the Constitutional Court by the ruling party

The constitutional crisis began in October 2015, when the [Prawo i Sprawiedliwość](#) (Law and Justice Party - better known by its Polish acronym PiS) gained the majority of seats in [Sejm](#) (the Lower Chamber of Poland's parliament) — it had also recently won the presidency with Andrzej Duda (candidate supported by the Law and Justice Party)— and quickly began making a series of changes to many of the country's democratic institutions, inter alia the constitutional court.

### Circumstances of the constitutional crisis

In 1997, after the parliamentary elections and before the new term of the *Sejm* had started, the outgoing majority of the *Sejm* did not elect three judges of the tribunal, even though this would have been possible. The Government and legal experts argue that this precedent had created a constitutional custom which the 7th term of the *Sejm* had to respect. In 2015, this constitutional custom was broken by the Civic Platform party.

The current conflict over the composition of the [Trybunał Konstytucyjny](#) (Constitutional Tribunal) originated from actions of the previous *Sejm*. Both the previous and present majorities of the *Sejm* have taken unconstitutional actions, which seem based on the view that a parliamentary majority may change the legal situation in its favour. This practice is against the model of a democratic system based on the rule of law, governed by the principle of separation of powers.

In 2015, the constitutional conflict was initiated by the *Platforma Obywatelska* and *Polskie Stronnictwo Ludowe*. The coalition parties had elected five new judges to the Constitutional Tribunal just a few weeks before the last term (2011-2015) of the lower chamber of parliament. Three of them were to fill seats that were already vacated (judges on the tribunal serve a single nine-year term), while two others were elected to fill seats that would soon be open. This would have meant that 14 of the 15 judges of the tribunal would have been elected by Civic Platform party.

On 8 October 2015 during its last session the *Sejm* selected five judges – three to replace judges leaving on 6 November 2015, two to replace those going on 2 and 8 December respectively. Judges were selected just before the end of the current 7th term (2011-2015) of the *Sejm*.

### The political background of the crisis

During the last stint in office of the Law and Justice Party (2005 - 2007), the Constitutional Tribunal blocked several key initiatives of the Law and Justice Party (when it was an opposition party) . After the election of 2015, Law and Justice Party was starting to treat the constitutional court as a potential barrier to the implementation of its political agenda. Law and Justice Party spokesmen have called the Tribunal “*a crew of cronies defending the status quo*” (see [Politico Europe](#)) that would only try to stop the government from undertaking the changes for which the Polish people voted. Law and Justice Party party leader Jarosław Kaczyński announced that “[the current Constitutional Tribunal is a redoubt of everything that is wrong in Poland.](#)”

In the light of criticism, politics argued that Poland's current constitution was passed in 1997, under the presidency of Aleksander Kwaśniewski, who was connected with the communists during the Soviet period. Law and Justice Party members claimed that the Constitution still maintains many vestiges of the old

communist era, and that it needs to be replaced entirely.

The political vision of the sovereignty and national identity was successfully introduced in Hungary by the leader party Fidesz. The changes which were made by the Victor Orban will lay the background for Poland's ruling party.

Law and Justice Party is attempting to change Poland's democratic institutions to fit its political vision. However, the voting process displays their political vision. Even populist parties do not break the rule of law and do not interfere with democratic rules.

The current political situation has its roots in the Solidarity movement that brought the communist regime to its knees in 1989. Solidarity and the communists agreed to hold roundtable talks to pave the way for a peaceful transition to democracy. Those talks exposed a deep ideological division within Solidarity. This division is even more actual nowadays because the legendary ruler Lech Walesa was accused of collaborating with the communists.

During the roundtable, one wing was dominated by liberal groups who believed in inclusive politics during the transition period. The other wing, led by conservatives (anti-communists groups), wanted a clean break with the past. These two wings have still impact for Poland's future.

The goal of Law and Justice Party is to regain as much sovereignty as possible from Brussels to protect national sovereignty, and a national identity based on Christian values.

### **The chronology of the constitutional crisis**

In order to understand the constitutional crisis, it is important to recall the chronology of major events that are relevant to the situation:

1. On 11 July 2013, the President of the Republic of Poland Bronislaw Komorowski (candidate supported by the Civic Platform) submitted the draft law on Constitutional Tribunal to the *Sejm* (No. 1590). This bill had been prepared on the initiative of a working group, which included former and current judges of the Tribunal, including the Tribunal's President.
2. From March to May 2015, the Special Subcommittee on the Constitutional Tribunal Bill and later the joint Legislative and Justice and Human Rights Committees prepared a draft law. The President of the Constitutional Tribunal, the General Prosecution Office and the National Council of the Judiciary participated in this work as invited guests of the *Sejm*.
3. On 25 June 2015, the *Sejm* adopted the Act on the Constitutional Tribunal, which entered into force on 30 August 2015. Article 137 of the Act provided for the election by the outgoing, 7th term of the *Sejm* of successors for all judges whose office would end in 2015, including those whose office would end after the end of the term of the current, 7th term of the *Sejm*.
4. On 8 October 2015, during its last session, the *Sejm* selected five judges – three to replace judges outgoing on 6 November 2015, two to replace those outgoing on 2 and 8 December respectively. The President of Poland has not accepted the oath of any of the elected "October judges".
5. On 23 October 2015, a group of *Sejm* Deputies from the Law and Justice Party appealed to the Constitutional Tribunal challenging the constitutionality of the election of all five judges (case K 29/15). This appeal was withdrawn on 10 November 2015 and the Constitutional Tribunal discontinued the proceedings.
6. On 12 November 2015, the 8th term of the *Sejm* held its first sitting.
7. On 17 November 2015, a group of deputies (from the Civic Platform Party) re-introduced the appeal against the Act, which had been withdrawn on 10 November 2015 (case number K 34/15).
8. On 19 November 2015, the *Sejm* amended the Act on the Constitutional Tribunal. The amendment had been submitted to the *Sejm* three days earlier and it was signed by the President of Poland on the following day. This amendment introduced a three-year tenure of office for the President of the Constitutional Tribunal, renewable once, and terminated the tenure of the incumbent President and Vice-President. It also stipulated that the term of office of a constitutional judge starts from the moment of taking the oath before the President. The President of Poland has not accepted the oath of any of the elected „October judges“.
9. On 23 November 2015, a group of deputies lodged a constitutional complaint against the amendment to the Act adopted on 19 November 2015 (case K 35/15). On the same day, a similar

- complaint was lodged by the Ombudsman (K 37/15). On 24 and 30 November, respectively, other constitutional complaints were lodged by the National Council of the Judiciary and the Chief of the Supreme Court (K 38/15 and 40/15).
10. On 25 November, the new legislature annulled the five nominations by the previous legislature, and on 2 December, nominated five new judges.
  11. Two judges and the President of the Tribunal requested to be excluded from the consideration of case K 34/15 on 25 November 2015 (request accepted by the Tribunal on 30 November 2015).
  12. On 30 November 2015: on the basis of Articles 755(1) and 730(2) of the Civil Procedure Code, the Constitutional Tribunal decided to take preventive measures requesting the *Sejm* to abstain from electing new judges until the final verdict in case K 34/15 was delivered.
  13. The President of Poland accepted the oath of the new judges on 3 December (four judges) and 9 December (one judge) respectively. The President of the Tribunal accepted these five judges as employees of the Tribunal, who do not perform judicial duties.
  14. On 3 December, the Constitutional Tribunal ruled that the previous legislature was entitled to nominate three judges for seats vacated during its mandate, but was not entitled to make the two nominations for seats vacated during the term of the new legislature.
  15. On 4 December 2015, a group of *Sejm* Deputies lodged an application with the Constitutional Tribunal alleging the unconstitutionality of the *Sejm's* resolutions adopted on 25 November 2015, as well as the *Sejm's* resolutions on the election of five judges of the Tribunal, adopted on 2 December 2015 (case no. U 8/15).
  16. On 9 December 2015, the Constitutional Tribunal decided on the constitutionality of the Amendments of 19 November to the Act on the Tribunal (case no. K 35/15). It held that breaches of the Rules of Procedure of the *Sejm* alone did not render the whole amendment unconstitutional. However, Article 137a, was found unconstitutional to the extent that it provided for the election of the three judges by the new *Sejm*, replacing judges whose term ended on 6 November 2015. The Tribunal also held that the term of constitutional judges started with their election, not on the day on which they took their oath. The period of 30 days set for the President to take the oath from the judges elected by the *Sejm* was also found unconstitutional. Furthermore, the Tribunal held that the introduction of a three-year tenure for the President and Vice-President of the Tribunal was constitutional, but the possibility of their re-election violated the Constitution, since it might undermine the independence of the judge. Also, the early termination of the term of office of the Tribunal's President and the Vice-President's was found unconstitutional. In general, on 9 December, the Constitutional Tribunal ruled that the new legislature was not entitled to annul the nominations for the three appointments under the previous legislature, but that it was entitled to appoint the two judges whose mandate began under the incoming legislature.
  17. On 10 December 2015, the Head of the Chancellery of the Prime Minister expressed doubts about whether the Tribunal had been correctly composed in its decision of 3 December 2015 (case K 34/15) and whether this judgment could be published in the Journal of Laws. The President of the Tribunal replied that the judgments of the Tribunal had to be published according to Article 190(1) and (2) of the Constitution.
  18. On 22 December 2015, *Sejm* adopted an amendment to the Act on the Constitutional Tribunal. The amendment stipulates that the Tribunal shall hear cases as a full bench in composition of 13 out of 15 judges. The decisions taken by the court must be made with a two-thirds majority, rather than just a simple majority as had previously been the case.
  19. On 23 December 2015, the Polish Government asked for an opinion of the Venice Commission on the law of 22 December 2015. In fact, the Polish government did not await this opinion before making a new law enter into force.
  20. On 11 January 2016, the Constitutional Tribunal announced that on 7 January 2016, it would dismiss the complaint lodged on 4 December 2015 (case no. U 8/15) against the resolutions on the election of five new judges, because these resolutions were not normative acts, controllable by the Tribunal.
  21. On this basis, on 12 January 2016, the President of the Constitutional Tribunal admitted to the bench the two judges elected in December 2015, replacing the judges outgoing in December.

22. On 13 January 2016, the College of Venice Commission held a first orientation debate in order to assess the situation in Poland under the Rule of Law Framework adopted in March 2014. The debate ended with the conclusion of the Commission to initiate the monitoring procedure of the rule of law in Poland.
23. On 14 January 2016, the Constitutional Tribunal, as a full bench, decided to consider case no. K 47/15 – the examination of the constitutionality of the Amendments of 22 December 2015 – on the basis of the Constitution without applying these Amendments in this case, because they directly concern the functioning of the Tribunal. The two newly elected judges provided dissenting opinions, insisting that the Amendments of 22 December 2015 had already entered into force and had to be applied in the case that was considering these same Amendments.
24. On 19 January 2016 The Venice Commission took part in a European Parliament Plenary debate on the situation in Poland with Polish Prime Minister Beata Szydło. The Commission explained its concerns and stressed that its analysis in the dialogue with Poland under the rule of law framework would be objective, non-partisan and evidence-based. The Prime Minister of Poland Beata Szydło had to defend the arguments of the Polish Government. PM Szydło used many arguments to convince everyone that Poland is a democratic country, she argued that: *„our history has taught us that our Polish issues should be settled in our Polish home. Because whenever they were fixed for us by others, we ended up very badly”*.
25. On 30 January 2016, the *Sejm* passed the 2016 State Budget Bill, which reduced the Tribunal’s budget by some 10%.
26. On 9 March 2016, the Constitutional Tribunal ruled that this new law (Act on 22 December 2015) was unconstitutional. The government refused to publish the ruling, which is the next legal step necessary for it to be enacted. The government accused the Tribunal of not following the procedure foreseen in the amendments. In reply to the announcement that the Prime Minister would not publish the Constitutional Tribunal’s judgment, the Venice Commission held: *“A refusal to publish judgment 47/15 of 9 March 2016 would not only be contrary to the rule of law, such an unprecedented move would further deepen the constitutional crisis triggered by the election of judges in autumn 2015 and the Amendments of 22 December 2015. Not only the Polish Constitution but also European and international standards require that the judgments of a Constitutional Court be respected. The publication of the judgment and its respect by the authorities are a precondition for finding a way out of this constitutional crisis”* (para. 143).
27. On 11 March 2016 the Venice Commission issued an opinion ([The First Opinion CDL-AD\(2016\)001 dealt with Amendments to the Law on the Constitutional Tribunal of 22 December 2015](#)) in which it found the amendments of 22 December incompatible with the rule of law. The refusal to publish the judgment of 9 March stipulates a level of uncertainty which undermines the proper functioning of constitutional justice in Poland.
28. On 30 March 2016, the marshal of the *Sejm* established an expert team to examine the Opinion of the Venice Commission and make recommendations.
29. On 6 April 2016, following the judgment of 9 March 2016, the Constitutional Tribunal adopted 21 judgments, but the Government did not publish them because they were not adopted according to the Amendments to the Act of 22 December 2015. Two judges elected in December 2015 were assigned cases and participated in these cases.
30. On 27 April 2016, the General Assembly of the Supreme Court adopted a resolution stating that the judgments of the Constitutional Tribunal are binding even if they are not published. Several units of local self-government also declared that they would apply the unpublished judgments of the Tribunal.
31. On 28 April 2016, the President of Poland accepted the oath of a new judge elected by the *Sejm*.
32. On 7 July 2016, the *Sejm* adopted a completely new Act on the Constitutional Tribunal based on the old provisions of Law of 1997 which was in force before June 2015.
33. On 12 July 2016, the General Secretary of the Council of Europe requested an urgent opinion on this draft Act from the Venice Commission and called on the Polish Senate and *Sejm* to take this opinion into account in adopting the law. In light of amendments introduced by the Senate, the Secretary General asked the Commission to give its opinion not on the draft Act but on the final adopted text.

34. On 21 July 2016, the Senate made 27 proposals for amendments to the draft Act.
35. On 21 July 2016, the *Sejm* accepted most of the 27 proposals and subsequently adopted the Act in final reading on 22 July.
36. On 27 July 2016, the President of Poland signed the new Act on the Constitutional Tribunal.
37. On 1 August 2016, the new Act was published in the Journal of Laws, item 1157.
38. On 1 August 2016 The expert group established by the marshal of the *Sejm* rendered its report, which criticised the opinion of the Venice Commission and found that the President of the Constitutional Tribunal had no legal basis for refusing to assign cases to the December judges. The report, inter alia, proposed electing judges of the Tribunal with a three-fifths majority in the *Sejm*. If that majority could not be achieved, the judges would be elected by a simple majority. ([See full report in Polish](#)).
39. On 8 August 2016, the Supreme Administrative Court (case II FSK 1021/16) applies a non-published judgment of 28 June 2016 of the Constitutional Tribunal (SK 31/14) in its judgment ([see full text of judgment in Polish](#)).
40. On 11 August 2016, the Constitutional Tribunal annulled several provisions of the new Act. The Government refused to publish that judgment.
41. On 16 August 2016, the new Act entered into force.
42. On 16 August 2016, the Government published 21 so-called ‘illegally adopted’ judgments of the Tribunal pursuant to the new Act, but not the judgments of 9 March and 11 August 2016.
43. On 18 August 2016, one of the December judges initiated criminal proceedings against the President of the Tribunal because the President was preventing the December judges from working as judges.
44. On 31 August 2016, the head of the Law and Justice majority parliamentary group called for removal from the Tribunal of judges who do not respect the Law of 22 July on the Constitutional Tribunal as adopted.
45. On 14 October 2016, the Venice Commission issued a [second opinion](#). The Venice Commission remains at the disposal of the Polish authorities and the General Secretary of the Council of Europe for further assistance in this matter and notably to examine the future legislation on the Constitutional Tribunal that has been announced.

## **The new Act on the Constitutional Tribunal adopted on 22 July 2016**

### *A. Dismissal of judges*

Contrary to the amendments of 22 December 2016, the Act no longer provides for the dismissal of judges by the *Sejm* upon the motion of the Assembly of the Constitutional Tribunal. According to Article 12, a judge of the Tribunal can be dismissed in disciplinary proceedings by the Tribunal itself. A draft provision according to which such a disciplinary ruling would have required the consent of the President of Poland (draft Article 12.2) was removed on the basis of a proposal of the Senate.

### *B. Appointment of the President of the Constitutional Tribunal*

Under the July 2016 Act, the President of Poland can choose the President of the Tribunal among three candidates presented by the General Assembly of the Judges (Article 16). Compared to the 2015 Act (Article 12) and the previous Act of 1997 (Article 15), the number of candidates for the Presidency of the Tribunal has been increased from two to three, while the total number of judges – as determined by the Constitution – remains 15 and de facto, at the moment, only 12 judges participate in decision-making. Each judge has only one vote and the three candidates with the highest number of votes are communicated to the President of Poland. A total of three candidates must be presented. In the current situation, when there are only 12 judges, a group of 3 judges can ensure that their preferred candidate is on the list, even though that candidate may not have the confidence of the other judges. It should be noted that 3 of the 12 judges, who participate in decision-making, were elected by the current *Sejm*.

### *C. Attendance quorum – 11 out of 15 judges*

In Article 26.2, the attendance quorum for the plenary session was lowered from 13 to 11 out of 15 judges. While this quorum – some 70 per cent of judges -- is still higher than in most European states (see comparative information in section V.B.2 of the Opinion CDL-AD (2016)001), it is not such a high level as to

endanger the functioning of the Tribunal if the judges of the Court respect their obligation to be present at the proceedings of the Tribunal. Since currently 12 judges participate in decision-making, this new rule could also enable the Prime Minister's office to publish future judgments of the Court without contradicting its previous (erroneous) legal position.

#### *D. Referral of cases to the full bench*

Article 26.1.1 provides that the Court shall decide in full bench cases regarding conflicts of power between central State authorities, on the existence of impediments to the exercise of the office of the President of Poland, on the constitutionality of the goal or the activity of political parties, on a priori control of bills, on international agreements before their ratification, on the Act on the Constitutional Tribunal and on particularly complex cases and cases in which a bench wants to depart from earlier case-law. The President of the Tribunal can declare a case to be particularly complex (Article 26.1.1.f). In addition, three judges can refer a case to the full bench (Article 26.1.1.g).

A requirement that the Tribunal sit as a full bench, if applied frequently, is quite burdensome to the functioning of the Tribunal. What makes Article 26.1.1.g questionable is that the other judges cannot reject such a request. In systems where such a referral to the plenary of the Court exists (such as Austria), there is either no such restriction on the ability of the plenary to reject a referral, or the plenary can decide in fast track or summary proceedings if it finds that the case does not raise a serious issue under the Constitution. The adoption of a similar approach in Poland could have avoided these problems.

#### *E. Presence of the Prosecutor General*

Article 61.6 provides that hearings can take place in the absence of the duly notified Prosecutor General, unless his/her presence is required. Article 30.5 requires the presence of the Prosecutor General in all cases before the full bench, which include, according to Article 26, particularly complex cases. This means that the Prosecutor General can prevent hearings in complex cases from taking place simply by staying away. There seems to be no procedure that would allow the Tribunal to proceed even in case of a repeated absence of the Prosecutor General. The combination of these provisions could easily be abused to prevent the Tribunal from taking a decision in the absence of the Prosecutor General. Furthermore, it should be noted that since March 2016, the functions of the Prosecutor General and the Minister of Justice have been merged.

#### *F. Sequence of cases*

Article 38.3 of the Act provides that hearings on admissible cases should be scheduled in the order in which the cases have been received by the Tribunal. The Article includes some exceptions, in particular for cases involving the a priori control of bills, control of the constitutionality of international treaties before their ratification, control of the Budget law, control of the Act on the Constitutional Tribunal, cases involving the obstacles to the exercise of the office of the President of Poland, cases involving competence disputes between state authorities and for the control and activity of the goals and acts of political parties<sup>30</sup> (Article 38.4). Article 38.5 provides that the President of the Tribunal may set the date of a hearing and bypass the sequence rule if this is justified by necessity to safeguard the rights or freedoms of citizens, national security or the constitutional order. Upon a motion by five judges, the President of the Tribunal may reconsider a decision about the date of a hearing.

#### *G. Delay of hearings*

Article 61.1 of the Act establishes an obligation to hold a hearing no earlier than 30 days after notification (of the parties). Article 61.2 makes exceptions to this rule for a priori review of budget laws and for the determination of an impediment to the exercise of the office by the President. These types of proceedings do not fall under the sequence rule and should be examined immediately. Under Article 61.3, for 'questions of law' (referrals from ordinary courts), constitutional complaints and cases relating to conflicts of power between central constitutional state authorities, the President of the Tribunal may reduce this period by half unless the referring court, the complainant or the applicant, respectively, objects to such a reduction within 7 days.

There is no general provision that would let the Tribunal reduce these deadlines in urgent cases. This situation, again, contradicts the requirements for a reasonable length of proceedings under Article 6 of the European Convention on Human Rights. (Par. 87).

#### *H. Postponement of cases upon request by four judges*

Under Article 68.5, in full bench cases, four judges may request postponement of the deliberation if they deem that a given matter is of particular significance for the constitutional order or the public order, and

they disagree with the conclusion. The judges then present an alternative draft for another deliberation after three months' time (Article 68.6). If at that deliberation four judges (not necessarily the same ones) raise again an objection (likely against the conclusions of the majority of judges), the deliberation is again postponed for three months. At that deliberation, six months after the first deliberation, a vote is held (Article 68.7).

The two periods of three months cannot be reduced by the Tribunal. Their uncompressible length does not even depend on the wish of the four judges. Even if they were to ask for a shorter period of postponement, the draft Act does not allow for it. Such a rule is highly unusual. According to it, a minority of four out of the 15 judges (approximately a quarter) can obtain the postponement of a case for a total period of six months.

#### *I. Majority for adopting decisions*

The Amendments of 22 December introduced a two-thirds majority requirement for decisions of the full bench. Article 69.1 of the Act reverts to a simple majority for making decisions in all cases.

#### *J. Suspension of pending cases brought by State institutions*

According to Article 83.2 of the Act, the Tribunal must "terminate" all pending proceedings within one year from the entry into force of the Act. Article 83 remains unclear what "terminate" means and especially what happens with cases that are not terminated in time.

This provision only relates to individual complaints (Article 191.1.6 of the Constitution) and referrals from ordinary courts (Article 193 of the Constitution). Other pending proceedings initiated by State institutions, the president of the Republic, the marshal of the *Sejm*, the marshal of the Senate, and the Prime minister, as well as by, inter alia, parliamentary minorities, the presidents of the supreme courts, the ombudsman, local self-government, trade unions and churches (Article 191.1.1 to 191.1.5 of the Constitution), would be adjourned for 6 months (Articles 83.2 and 84 of the draft Act) in order to allow the parties to adapt their requests to the requirements of the new draft Act. It is not logical that certain cases need to be suspended six months for re-registration while constitutional complaint cases and referrals from ordinary courts can continue without any re-registration.

#### *K. Publication of judgments*

Article 80 provides that a judgment of the Tribunal shall be published in the *Dziennik Ustaw Rzeczypospolitej Polskiej* (Journal of Laws of the Republic of Poland). Under Article 80.4, the President of the Tribunal shall "lodge an application" for publication of a judgment with the Prime Minister according to the Act on the Promulgation of Normative Acts and Certain Other Legal Acts.

The annulment by the Tribunal of the provision that the President of the Tribunal must apply to the Prime Minister for publication of the Tribunal's judgments is in line with the recommendations of the Venice Commission. It is essential to the rule of law that the judgments of the Constitutional Tribunal be recognised as having legal force and be published immediately after adoption, without any external interference.

Judgment 47/15 of 9 March 2016 has not been published to date in the official journal by the office of the Prime Minister. Between 9 March and 11 August 2016, the Tribunal adopted 21 other judgments, none of which were published until the entry into force of the new 2016 Act.

#### *L. Composition of the Tribunal*

Article 90 provides that judges who have taken the oath of office and who have not yet assumed judicial duties shall be included in adjudicating benches and shall be assigned cases immediately after the entry into force of the Act.

## **Conclusions**

According to the opinion of the Venice Commission, the "principle of pluralism" applies to constitutional courts. As the basis for this principle, the Venice Commission cites, "A ruling party should not be in a position to have all judges appointed to its liking. Hence, terms of office of constitutional judges should not coincide with parliamentary terms." CDL-STD(1997)020, Report on the Composition of Constitutional Courts, Science and Technique of Democracy, no. 20 (1997), p. 21.

In the opinion of the Venice Commission, a refusal to publish judgment 47/15 of 9 March 2016 is crucial because not only would it be contrary to the rule of law, but such an unprecedented move would also further deepen the constitutional crisis triggered by the election of judges in autumn 2015 and the

Amendments of 22 December 2015. Not only the Polish Constitution, but also European and international standards require that the judgments of a Constitutional Court be respected. (See more on para 143 of the opinion of the Venice Commission).

Two central standards (independence of the judiciary and position of constitutional court) are explained *inter alia* in the Rule of Law Checklist of the Venice Commission. The supremacy of the Constitution is ensured by the Constitutional Court. This role is especially important in times of strong parliamentary majorities. The composition of the Constitutional Court must be balanced.

The Polish Government began to conclude the legislative process without waiting for the answer of the Venice Commission. The provisions of the new Act of 22 July 2016 on the Constitutional Tribunal (Official Journal, number 1157) came into force on 14 August 2016. In general, the new law returns to old provisions made before 1997. Changes that were made in the Constitutional Court are a fight for gaining power in this area. However, when the previous government acted in the same way, the European Commission and the Venice Commission were not interested, and nobody wanted to take a closer look at the case.

On the day of entry into force of the Act, on 16 August 2016, the Chancellery of the Prime Minister published 21 judgments that had been adopted since 9 March 2016, but not the judgments of 9 March and of 11 August. While the publication of these 21 judgments is a positive action, the Chancellery of the Prime Minister published them on the basis of Article 89 of the Act, which also identified them as breaking the law. This provision already had been found unconstitutional by the Tribunal. The public portrayal of the Tribunal's judgments as 'illegal' questions the position of the Constitutional Tribunal as the final arbiter in constitutional issues and is an attack on the Tribunal's authority, contrary to the principle of loyal cooperation between state organs, which is a constitutional precondition in a democratic state governed by the rule of law. Rejecting the authority of a court in such a deliberate way violates the rule of law.

These principles are also reflected in the Polish Constitution. Its article 2 provides that: "The Republic of Poland shall be a democratic State ruled by law and implementing the principles of social justice". Its article 8 para 1 provides that: "The Constitution shall be the supreme law of the Republic of Poland". Article 10 enshrines the principle of the separation of powers and its paragraph 2 explicitly provides that "...the judicial power shall be vested in courts and tribunals."

Currently, three judges elected on October 8, 2015 by the previous Parliament: Roman Hauser, Andrzej Jakubecki and Krzysztof Ślęzak, are waiting to take the oath. Three judges, chosen on 2 December, from which President Andrzej Duda received the oath (judge Henryk Cioch [died in 2017], judge Lech Morawski [died in 2017] and judge Mariusz Muszyński - were expecting to take judicial duties. The judge Mariusz Muszyński is the vice-president of the Constitutional Tribunal since 5 July 2017.

It seems that the Parliament and Government continue to challenge the Tribunal's position as the final arbiter of constitutional issues, and attribute this authority to themselves. They have created new obstacles to the effective functioning of the Tribunal instead of seeking a solution on the basis of the Constitution and the Tribunal's judgments, and have acted to further undermine its independence. By prolonging the constitutional crisis, they have obstructed the action of the Constitutional Tribunal, which cannot play its constitutional role as the guardian of democracy, the rule of law and human rights.

As long as the situation of constitutional crisis related to the Constitutional Tribunal remains unsettled, and as long as the Constitutional Tribunal cannot carry out its work in an efficient manner, not only is the rule of law in danger, but also democracy and human rights.

Michał Zawislak, 19 March 2019