

Current dispute on the Constitutional Court in Poland

Facts

1. New law on the Constitutional Court

The Parliament adopted Act of **25 June 2015** on Constitutional Court, which entered into force on 30 August 2015. According to Article 137 of the Act, the Lower Chamber of the Parliament (the Sejm)¹ stated that within 30 days from the Act's entry into force, candidatures for new judges of the Constitutional Court shall be submitted². The tenures of three judges were to terminate on 6 November 2015, and tenures of two other judges were to terminate on 2 and 8 December 2015. At the same time, the Sejm's 7th term of office was to end at the turn of October and November 2015³.

2. Election of five judges of the Constitutional Court

On **8 October 2015** the Sejm (during its last session in 7th term) adopted five resolutions in which it elected five new judges of the Constitutional Court⁴.

3. Refusal of the President to take the oaths from the elected judges

According to Article 21 of the Act on the Constitutional Court, before the assumption of the office, a newly elected judge has to take an oath before the President of Poland. Since the election of the new judges, the President of Poland has not taken their oaths. However, in press interview (of **11 November 2015**), the President of Poland expressed his opinion that the elections of the constitutional judges had "violated democratic rules".

4. Amendments to the Act on the Constitutional Court

During the first session of the new Parliament (Sejm of 8th term), on **13 November 2015**, draft amendments to the Act on the Constitutional Court were proposed. The draft act amending the Act on the Constitutional Court was adopted by the Parliament within 3 days⁵. It annulled Article 137 of the Act which allowed the Sejm of 7th term to elect all five new judges of the Constitutional Court and established a 7-day time-frame for filing new motions with candidates for offices of judges of Constitutional Court⁶. During the legislative proceedings in the Sejm, no opinion of an expert in the scope of constitutional law was heard, even though such a suggestion was formed by the Legislative Bureau of the Sejm.

5. Resolutions on the "annulment" of the resolutions of 8 October 2015

On 25 November 2015 Sejm adopted five resolutions (submitted by the group of MPs on the same day) containing "the declaration of the lack of legal force" of the resolutions adopted on 8 October 2015 by the Sejm of 7th term, namely the resolutions on the election of the five new judges of the Constitutional Court.

¹ Article 194.1 of the Constitution of Poland: *The Constitutional Court shall be composed of 15 judges chosen individually by the Sejm for a term of office of 9 years from amongst persons distinguished by their knowledge of the law. No person may be chosen for more than one term of office.*

² According to Rules of Sejm (and Act on Constitutional Court) candidature for judge of the Constitutional Court can be submitted by the Presidium of the Sejm or by the group of 50 MPs.

³ According to Article 98.1 of the Constitution of Poland, the term of office of the Sejm and Senate shall begin on the day on which the Sejm assembles for its first sitting and **shall continue until the day preceding the assembly of the Sejm of the succeeding term of office**. On 17 July 2015, the President of Poland decided that the parliamentary elections would be held on 25 October 2015.

⁴ Paragraph 2 of each resolution provided that the tenure of each newly elected judge starts, respectively, on 7 November 2015 (three judges), and 3 and 9 December 2015. Resolutions were published in the Official Journal „Monitor Polski”, positions no. 1038-1042.

⁵ Act of 19 November 2015 - it was published in the Official Journal a few hours after the President signed the bill.

⁶ Article 137a of Act on Constitutional Court. It also introduced a tenure for the President of the Court, which results in the loss of office by the current President (3 months after the amendments enter into force).

The justification for the resolutions stated that the previous election procedure for Constitutional Court judges was incorrect, and the resolutions aim at its validation⁷.

6. Amendments to the Rules of Sejm

After the “annulment resolutions” were enacted (and published within a few hours), the amendments to the Rules of the Sejm were introduced. They allow the Speaker of the Sejm to establish a time-frame for proposing candidates for Constitutional Court judges in case “other circumstances” for such elections occur⁸. Such a time-frame was established on **1 December 2015 at 12 a.m.**, it was however not published officially anywhere⁹.

On the same day (**1 December 2015**), an official meeting organised by the President of Poland with the political party leaders and with the President and Vice-president of the Constitutional Court was held. No conclusions were adopted.

7. Election of new “judges” of the Constitutional Court

Five candidatures for new judges were submitted on 1 December 2015¹⁰. The session of the parliamentary Committee of Justice and Human Rights to present the opinion on the candidatures took place on 1 December 2015 at 8 p.m. During the discussion, candidates were asked no questions by the MPs – a formal motion was voted to end the discussion.

On **2 December 2015**, after a rough debate at the plenary session, Sejm elected five new “judges”. Elections were based on the Rules of Sejm (the Act of 19 November 2015 were to enter into force on 5th December 2015). The resolutions were published at 10 p.m. in Monitor Polski (official journal where internal resolutions of Sejm are promulgated). On the same day (to be precise – at night, without any media presence) **the President of Poland has taken the oaths** from the newly elected “judges”.

8. Proceedings before the Constitutional Court

8.1. Act of 25 June 2015

Before the parliamentary elections took place in Poland, the parliamentary opposition (the Law and Justice party) had filed a motion to the Constitutional Court to verify whether the Act of 25 June 2015 on the Constitutional Court is compatible with the Constitution, e.g. whether the Sejm of 7th term was entitled, under the Constitution, to elect all five judges. The motion was, however, dropped on 10 November 2015 after the elections had already been held and after the date of the hearing had already been announced¹¹.

The same motion was then sent to the Constitutional Court by a different group of MPs¹². The hearing before the Constitutional Court was held on **3 December 2015** – just after the President took the oaths from the new “judges” of the Constitutional Court.

⁷ During the parliamentary discussion on the draft resolutions, it was suggested that the new Parliament needs to change the composition of the Constitutional Court, because the latter is “politically-biased”. It was also stated that the change in the composition of the Constitutional Court is necessary for the parliamentary majority in order to conduct their political reforms.

⁸ The Act on the Constitutional Court (Article 36) lists all possible grounds for termination of the office of the Constitutional judge. They were reflected in the Rules of the Sejm (Article 30.3 Rules of Sejm).

⁹ The same day it was prolonged until 6 p.m.

¹⁰ They were submitted only by the Parliamentary Club of “Law and Justice” political party.

¹¹ Case no. K 29/15.

¹² Motion of 17th November 2015, case no. K 34/15.

8.2. Amendments of 19 November 2015

On 23 November 2015, a group of MPs filed a complaint to the Constitutional Court, arguing that the Act of 19 November 2015 violated the Constitution¹³. On the same day, the Human Rights Defender also filed his motion to the Constitutional Court¹⁴. On 24 November 2015, the motion to the Constitutional Court was filed by the National Council of the Judiciary¹⁵ and on 30 November 2015 by the Chief Justice of the Supreme Court¹⁶. The hearing of the Constitutional Court will be held on 9 December 2015.

9. Judgement of the Constitutional Court of 3 December 2015¹⁷

The Constitutional Court held a hearing on 3 December 2015. The complaint was filed by the group of MPs (*Facts*, point 8.1). The ruling was issued by the panel consisting of five judges¹⁸. The Court ruled that Article 137 of Act on Constitutional Court was **a constitutional basis for election of three judges**, who were to replace the judges whose tenure expired on 6 November 2015. Whereas in respect to **two judges** whose terms of office lapsed on the 2 and 8 December 2015 accordingly – election of the judges who would replace them, made by the Sejm of 7th term, was found **unconstitutional**. Moreover, the Court stated clearly that it is an obligation of the President to take the oath from the judges elected by the Sejm.

10. The President's message to the Nation (*orędzie*)

On the same day at 8 p.m., the President gave an address to the nation (*orędzie*) which was broadly transmitted. It confirmed that he took the oath from four (out of five) newly elected “judges”. He presented arguments that the Constitutional Court needs to be plural and that there is a need of a discussion how the judges of the Constitutional Court should be elected in the future. He did not mention the judgement of the Constitutional Court at all. He informed that a new expert group will be established to consult and prepare a new draft of law on election of the judges of the Constitutional Court.

11. The Secretary General of the Council of Europe statement

On 4th December 2015 the Secretary General of the Council of Europe published his statement on the recent constitutional situation in Poland: *“There has been a controversy about the appointment of constitutional judges in Poland recently. I welcome yesterday’s decision by the Constitutional Tribunal of Poland which clarifies the legal and constitutional situation. This decision now has to be fully implemented in all its aspects. If there are any doubts about the correct implementation of the decision by the Constitutional Tribunal, the Polish authorities could address the Council of Europe Venice Commission¹⁹.”*

¹³ Case no. K 35/15.

¹⁴ Case no. K 37/15.

¹⁵ Case no. K 38/15.

¹⁶ Case no. K 40/15.

¹⁷ Press release of the Constitutional Court (in English) concerning the judgement of 3 December 2015 is available at: <http://trybunal.gov.pl/en/news/press-releases/after-the-hearing/art/8749-ustawa-o-trybunale-konstytucyjnym/>.

¹⁸ On 3rd December 2015 the Constitutional Court consisted of 11 judges. Three of them excluded themselves from the panel, since they took part in the legislative process (they attended the sessions of the parliamentary committees) when Act on Constitutional Court was adopted. To proceed in the full panel of the Court, there needs to be at least 9 judges. Since there were only 8 judges, it was decided that the court will rule case in 5-judges panel. During the hearing, there was a motion submitted by the Sejm, since – according to Sejm - new “judges” of the Court were elected and there was no longer a need to rule the case in a 5-judges panel. The Court rejected the motion.

¹⁹ Statement by Secretary General Jagland on the appointment of Constitutional judges in Poland - http://www.coe.int/en/web/portal/-/constitutional-tribunal-of-poland?redirect=http://www.coe.int/en/web/portal/home?p_p_id=101_INSTANCE_DibKFqnpE518&p_p_lifecycle=0&p_p_state=normal&p_p_mode=view&p_p_col_id=column-1&p_p_col_count=2

The press spokesman of the President (Marek Magierowski), during the interview he had given to TVN24, stated that “*we will consider and look at all the close of that judgement at a time when it will be published*”. Regarding the statement of the Secretary General of CoE, he said that “*it is not the position of the Council of Europe, it is the position of Secretary General of the Council of Europe*”. He added that “*I don't like when the Secretary General of the international organization suggests or even pushes for solutions (...). I think that the Secretary General of the Council of Europe should resist this type of wording*”²⁰.

12. Judgement of the Constitutional Court 9 December 2015²¹

On 9 December 2015 the Constitutional Court held a hearing and announced a judgement in a case concerning the Act of 19 November 2015 amending the Act on Constitutional Court. The main point of the decision concerned the possibility of Sejm of VIII term to elect again five new judges of the Constitutional Court. The Court confirmed that Sejm of VII term was entitled to elect three judges, thus Sejm of VIII term – only two judges. The Court ruled that *Article 137a of the Constitutional Tribunal Act²² – insofar as it concerns putting forward a candidate for a judge of the Constitutional Tribunal to assume the office after the judge whose term of office ended on 6 November 2015 – is inconsistent with Article 194.1 in conjunction with Article 7 of the Constitution.*

Moreover, the Court decided that:

- introduction of 3 year tenure for the president and vice-president of the Court is acceptable, however possibility of their re-election for the next tenure violates the Constitution, since it might undermine the independence of the judge;
- Article 2 of the Act of 19 November 2015 is unconstitutional. It provides that the “terms of office” of the incumbent President and Vice-President of the Constitutional Tribunal shall end after the lapse of three months as of the entry into force of the amending Act. The Court ruled that the challenged provision constitutes unauthorised interference in the realm of the judiciary by the legislator and undermines the principle that the Constitutional Tribunal is independent of the other branches of government (Article 173 of the Constitution).
- 30 days for the President to take the oath from the judges elected by the Sejm in incompatible with Article 194 of the Constitution;
- Article 21 para. 1a of the Act on Constitutional Court (“the taking of the oath of office shall commence the term of office of a judge of the Tribunal”) is unconstitutional.

13. Delay of the publication of the Court's judgement

Even though the judgement of the Constitutional Court was announced on 3 December 2015, it was not published for next 2 weeks. On 9 December 2015, when the Court announced its second judgement it was still not published in the Official Journal.

On 10 December 2015, Minister Beata Kempa (Member of the Council of Ministers, Head of the The Chancellery of the Prime Minister) sent official letter to the President of the Court²³. She argued that, in her opinion the judgement of the Court of 3 December 2015 is invalid, since it was issued by the panel of Court composed of five judges. Thus she “suspended” the publication of the

²⁰ The interview [in Polish] is available at: <http://faktypofaktach.tvn24.pl/fakty-po-faktach-czy-prezydent-przyjmie-wyrok-tk-zastanowimy-sie,600242.html>.

²¹ Press release of the Constitutional Court concerning the judgement (in English) is available at: <http://trybunal.gov.pl/en/news/press-releases/after-the-hearing/art/8793-nowelizacja-ustawy-o-trybunale-konstytucyjnym/>.

²² “With regard to judges whose term of office ends in 2015, the time-limit for submitting the motion referred to in Article 19(2) [what is meant here is a motion to put forward a candidate for a judge of the Constitutional Tribunal], shall be 7 days as of the entry into force of this provision”

²³ Available (in Polish) at: http://trybunal.gov.pl/fileadmin/content/nie-tylko-dla-mediow/Pismo_KPRM_z_10_grudnia_2015_r..pdf.

judgement²⁴. On 11 December 2015, the President of the Court answered the letter and emphasized the constitutional provisions relevant in this respect:

- according to Article 190.1 of the Constitution, the Court's judgements “shall be of universally binding application and shall be final”;
- according to Article 190.2 of the Constitution, judgements “shall be required to be immediately published in the official publication in which the original normative act was promulgated”.

The judgement of 3 December 2015 was finally published on 16 December 2015²⁵. The judgement of 9 December 2015 has not been published yet.

14. Draft of the new amendments to Act on Constitutional Court

On 15 December 2015, at 10 p.m., new draft of amendment to Act on Constitutional Court was announced on the Sejm's website. It aims at slowing down and – finally – at paralysing the Court. It requires that i.e.:

- the Court will have to rule all the cases pending before it in the full panel, which needs to be composed of at least 13 judges;
- the judgements might be taken only with the majority of 2/3 votes (whereas Article 190.5 of the Constitution states that “*judgments of the Constitutional Tribunal shall be made by a majority of votes*”);
- the seat of the Court shall be relocated outside Warsaw;
- if the cases pending before the Court were assigned to a panel of five judges (different than required by the draft of law) they need to re-assigned and need to be “initiated again”.

On 17 December 2015 three legal opinions concerning the draft was presented to the Sejm (of the Supreme Court²⁶, the Polish Bar Council²⁷ and Helsinki Foundation for Human Rights²⁸). Also the group of NGOs sent a statement to all MPs arguing that such a fundamental change in the rules of Constitutional Court shall be consulted with the civil society within reasonable time. The common argument presented in those opinion is that ineffective procedure before the Constitutional Court violates a constitutional right to court (art. 45) and a right to a constitutional complaint (art. 79). In addition two other opinions were presented to Sejm by the National Council of Judiciary and the National Council of Legal Advisers arguing that there is lack of justification for many proposed provisions because they are contrary to the fundamental principles of the democratic state.

The first reading the draft took place on 17 December 2015 and it was decided to transfer the draft to the Legislative Committee of the Sejm (*Komisja Ustawodawcza*). The meeting of the Legislative Committee was to take place at 7 p.m., however it was cancelled. The meeting of the Committee will take place on 21 December 2015 at 10 a.m. The public statements of the MPs of the parliamentary majority confirms that the draft will be adopted “before the Christmas”. As far as now the President of Poland did not comment on new draft of 15 December 2015 and how it affects his statement about broad consultations he mentioned in his message on 3 December 2015.

Additional note: At the moment, the Court is composed of 10 judges. Additional 5 judges elected on

²⁴ It is important to notice that the Council of Ministers – participant in the proceedings before the Court – did not file any motion concerning the composition of the Court during the proceeding. Such a motion – to transfer the case to a full panel (consisting of judges elected on 2 December 2015) and postpone the hearing – was filed by the Sejm. During the hearing on 3 December 2015, the Court decided not to accept the motion.

²⁵ Official Journal position no. 2129 – <http://dziennikustaw.gov.pl/du/2015/2129/1>.

²⁶ Available at: http://www.sn.pl/aktualnosci/SiteAssets/Lists/Wydarzenia/NewForm/2015.12.16_SN_Opinia.do.ustawy.o.TK.pdf.

²⁷ Available at: http://www.adwokatura.pl/admin/wgrane_pliki/file-opinianranowaustawatk17122015-13851.pdf.

²⁸ Available at: http://www.hfhr.pl/wp-content/uploads/2015/12/HFPC_TK_opinia_17122015.pdf.

2 December 2015 are entitled to enter the Court however the President of the Court did not assign them any case. Three judges elected in October 2015 still were not able to give the oath and are not entitle to start their office. In such situation, requirement that the Court needs to rule the cases in the full panel composed of 13 judges makes it impossible for the Court to rule cases²⁹.

²⁹ At the moment majority of the cases are decided by the panel composed of five judges. The full panel requires 9 judges.