

Constitutional Tribunal wrecked in Poland

By Ewa Siedlecka, Gazeta Wyborcza, Warsaw, July 1, 2016 (shortened version)

<http://wyborcza.pl/1,75398,20332247,trybunal-konstytucyjny-zrujnowany-przez-pis.html>



The opposition and the Committee for the Defence of Democracy (KOD) have protested for several months in defence of the Constitutional Tribunal demanding that constitutional compliance be restored. In this picture: KOD picket in front of the Constitutional Tribunal in Warsaw on 12 March 2016 (ADAM STĘPIEŃ)

Law and Justice Party (PiS) plants a self-destruction mechanism into the Constitutional Tribunal Law. It secures a majority vote and a complete control over its rulings.

The Justice Select Committee of the Polish Parliament adopted a draft Constitutional Tribunal Law last Wednesday night. It was supposed to be a fusion of four bills drafted by PiS and other parties/associations: KOD, PSL and Kukiz '15. Eventually, the Committee released the PiS draft without any provisions proposed by the opposition or the Committee for the Defence of Democracy (KOD).

The bill does not follow the Venice Commission's recommendations, including to publish the Tribunal's ruling of 9 March and to swear in legitimately elected judges. The bill is based on the Constitutional Tribunal Law of 1997, which contains a number of new provisions previously qualified by the Tribunal (in what is known as the Corrective Law) as unconstitutional. Examples include the first-in-first-ruled rule or the President's power to appoint dates of Tribunal hearings irrespective of the date of case submission.

The President will have the right to choose the date on which the Tribunal will rule on the Human Rights Ombudsman's motion regarding the Surveillance Law, Prosecution Service Law or Civil Service Law. He may set a date, say, five years from now (the exemption from the rule-in-order-of-submission rule does not only mean 'earlier' but also 'later'). Conversely, the President may choose a very short deadline so that judges have no time to prepare for and agree on the ruling.

Veto and case closing powers

The new law provides for the right to veto a ruling of the Tribunal by at least four judges during the voting procedure. Such a veto will stall the case for three months, after which the ruling may be vetoed again and put off by another three months. If a two-thirds majority is not secured six months later to pass a judgment, the case will be considered as closed. PiS can use this method to block any motion submitted by the Human Rights Ombudsman or the opposition parties. Three judges have been already acting exactly according to PiS expectations: they have submitted dissenting opinions stating that the Tribunal rules according to a wrong procedure. PiS is soon going to have not three but six judges in the Constitutional Tribunal.

PiS has also made sure the new law should allow the executive branch to block the Tribunal. The President and the Prosecutor General will have the right to decide which cases are to be assessed by the full panel of judges (thus subject to the said veto).

Doubles will rule

PiS will have six judges in the Constitutional Court when the new law becomes effective. While the President of the Tribunal, Professor Andrzej Rzepliński, could not be made to empower three PiS-elected doubles of the three judges legitimately elected by the previous parliament (the Polish President did not swear in the latter), PiS is empowering them by statutory means. A self-destruction mechanism is thus installed in the Tribunal: rulings passed by panels of judges that include the three doubles will later raise legality concerns. PiS may later use it a reason not to publish Tribunal's rulings and consider them as null and void. Besides, PiS reserves the right to censor the Tribunal's rulings: it is the Prime Minister rather than the President of the Tribunal (as is the case today) that will manage the publication of rulings.

Rulings passed after 10 March will be published within 30 days after the new law becomes effective, including the ruling made on 9 March, in which the Tribunal invalidated the 'Corrective Law', will not be published at all. PiS leader, Jarosław Kaczyński, did mention in an interview, however, that the ruling at hand may be published as a 'historic', whatever it may mean.

The new law is to act retroactively, i.e. it will apply to cases which have already been submitted to the Constitutional Tribunal. The Tribunal is expected to rule on all of them, i.e. over 200 cases, within 12 months, in the order of submission. Otherwise, the cases will be considered as closed.

Constitutional Tribunal Law not for the Constitutional Tribunal to assess

The draft law submitted to parliament by PiS two months ago had one advantage: the Constitutional Tribunal could assess its constitutionality immediately and in line with a procedure it had defined, thus bypassing the case queue. This means the Tribunal was able to remove the unconstitutional provisions. However, it failed after a sub-committee had added a provision that empowered the doubles. The new bill specifically provides that they will take part in the ruling over the Constitutional Tribunal Law. Their legitimacy as ruling judges is dubious (they were elected to already occupied positions, which was unlawful according the Constitutional Tribunal ruling of 3 December 2015) so the rulings they make will be questioned in the future.

Moreover, doubles and the other three judges elected by PiS may use the veto power. There will be six of them so the Tribunal will not secure a two-thirds majority to pass rulings. The Constitutional Tribunal Law case will be closed and the Tribunal will operate under the PiS-enacted law, under the scrutiny of the President and Prosecutor General and Prime Minister Beata Szydło will be able to censor the rulings.

From next June on, PiS will have a majority and an amenable presiding judge in the Tribunal.

The West still hopes for a compromise

We are told by diplomatic sources that the European Commission and US diplomats have so far believed that PiS can be talked into a compromise over the Constitutional Tribunal.

It has been suggested recently, e.g. during the visit of the European Commission Vice-President, Frans Timmermans, that judges elected in October could possibly be sworn in to replace the judges whose tenure is expiring. Furthermore, PiS could potentially back down on legislation that has disabled the Tribunal. US Ambassador to Poland, Paul W. Jones, has talked to Jarosław Kaczyński about a compromise. He is the only Western diplomat to have access to PiS leader. Brussels is hoping for a deal with Kaczyński so that the Commission is not forced to launch the second phase of the Rule of Law Framework. It could save itself the discussion among EU Member States in the dire aftermath of the UK's decision to leave the EU. The Americans, on the other hand, want to see the issue resolved before the NATO summit so that Poland's internal turmoil does not overshadow the summit's symbolic message. The NATO Summit must be a success, says a diplomat. Developments in the Polish parliament demonstrate that PiS is not disconcerted by the pressure. Our sources strongly suggest compromise, if any, can be the subject of discussion only before the NATO Summit.