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Functioning of the Constitutional Tribunal 2014-2017

Report of the Stefan Batory Foundation Legal Expert Group¹ – Introduction

In the public debate surrounding the constitutional crisis, the Stefan Batory Foundation Legal Expert Group has several times expressed its view referring to the unprecedented attack of the legislative and executive on the judiciary. One of the first targets was the Constitutional Tribunal, a body that should safeguard the supremacy of the Constitution and protect the rights and freedoms of an individual regulated in this instrument. Furthermore, in its case law, the Tribunal should set the boundaries for the activity of legislative bodies and enforce respecting these boundaries.

When we analyse the function of the Constitutional Tribunal, we should bear in mind how important it is for full implementation of powers of other state authorities. With the Tribunal's position weakened, other authorities' capacity to defend the freedoms and rights of an individual are also limited. By way of an example, we can mention the Ombudsman, who in recent years has initiated proceedings before the Tribunal to defend important constitutional freedoms and rights, such as the right to a fair trial; the principle of equality and prohibition of discrimination; personal security and inviolability; the right to protection of privacy and autonomy of information; rights connected with criminal liability; ownership and other property rights; the right of access to public information; the freedom of assembly and the freedom of speech. In this context, we should observe that the Ombudsman, by submitting applications to the Constitutional Tribunal, discharges his/her constitutional obligation of safeguarding the freedoms and rights of persons and citizens. Also courts, which form the basic system of human rights protection, can submit legal questions to the Tribunal in case of constitutional doubts.

¹ The Report prepared with the contribution of Beata Szepietowska and Michał Ziółkowski, constitutional law scholars, and edited by Katarzyna Łakomicz, secretary of the Legal Expert Group, is available in Polish at <http://www.batory.org.pl/upload/files/Programy%20operacyjne/Forum%20Idej/Funkcjonowanie%20Trybunalu%20Konstytucyjnego.pdf>

The Constitutional Tribunal was subjected to interventions intended, first and foremost, to cripple it so that the parliamentary majority could introduce unconstitutional amendments in applicable laws. Examples of such interventions include, firstly, the abrupt legislative amendments affecting the legal grounds for the operation of the CT, which amendments were analysed by the Legal Expert Group in previous years. Without an efficient Tribunal, the parliamentary majority disrespects the principles of the process of enacting laws, which in many cases lost its open and deliberative nature. In a crippled Constitutional Tribunal, part of the justices were hastily replaced in a way giving rise to constitutional doubts.

The general public is well aware of all the events described above. They were described on numerous occasions, also in opinions of the Legal Expert Group. But with regard to the measures of the legislative and executive affecting the CT another narrative appears, too. The Polish President, when he appointed Julia Przyłębska President of the Constitutional Tribunal, on 21 December 2016, emphasised how important it was for the Constitutional Tribunal to regain the ability to conduct its normal work. In more direct terms, the plans of the parliamentary majority and the Council of Ministers for the CT were presented by the Minister of Justice Zbigniew Ziobro, who, in a speech about the reform of the administration of justice, said: 'And this will have to change, but first the situation in the Polish Constitutional Tribunal has to be explained, to gain the certainty that it will not try to sidetrack this change somehow and block it by finding the changes we propose unconstitutional'.

Our report "Functioning of the Constitutional Tribunal 2014-2017" aims to examine whether the Constitutional Tribunal, after the amendments in the legal basis for its functioning and after replacement of the justices and the President of the CT, indeed acts efficiently and in accordance with the Constitution and statutes or, perhaps, quite the contrary, it is unable to protect individuals from unconstitutional measures of the Parliament. In this report we do not analyse the Tribunal's substantive decisions, the assumption being that in order for substance of the decisions to be analysed at all, we first have to determine the legal nature of the acts performed by the CT. So this report is only concerned with those aspects of activity of the CT that are related to maintaining procedural justice and independence of this body.

The first part contains the statistics concerning the number of cases that were referred to the Tribunal and the number of judgments it issued (broken down by the adjudicating activity of individual justices) in between 2014 and 2017. The second part presents the legal basis for and the practice of disqualifying CT justices from cases in 2017. The third part discusses the Tribunal's practice of changing the adjudicating panels at the beginning of 2017.

When gathering the data for our analysis of the Tribunal's work, in November 2017, the Stefan Batory Foundation submitted to the CT applications for access to public information. The applications concerned mainly changes in the adjudicating panels, disqualifications of justices, and other acts of the President of the CT relating to internal organisation of the Tribunal's adjudicating process. On 22 November 2017, the Constitutional Tribunal refused to provide the information applied for, explaining that it was part of the case files and could be provided only through access to case files, regulated in the Act on the Organisation of and Proceedings before the Constitutional Tribunal. Refusal to provide this information was a considerable handicap in gathering the data for report. However, part of the information was successfully obtained in the procedure of access to case files. Other data presented in report came from *Informacja o istotnych problemach wynikających z działalności i orzecznictwa Trybunału Konstytucyjnego* [Information about key problems resulting from the activity and case law of the Constitutional Tribunal] covering years 2014–2016 and from case law database Internetowy Portal Orzeczeń (IPO) on the website of the Constitutional Tribunal.

Activity of the Tribunal

The basic conclusion from an analysis of the data about the functioning of the Tribunal is the unprecedented and significant drop in the number of cases referred to the Constitutional Tribunal and

a considerable reduction of its adjudicating activity in 2017. Before the constitutional crisis, the Tribunal received some 500–600 cases a year (in 2014: 530 cases, in 2015: 623 cases). In 2016, the Sejm [*lower chamber of the Polish Parliament*], by passing subsequent statutes, dismantled this institution, while the number of cases referred to the CT dropped to 360, that is, nearly halved compared to the preceding year. Following the unlawful appointment of Julia Przyłębska as the President of the CT, the trust in this institution substantially dropped further. Only 282 cases were referred to the Tribunal in 2017. Also the adjudicating activity of the CT lessened noticeably compared to the period before the constitutional crisis. In 2014 and 2015, the number of judgments issued was, respectively, 119 and 173, compared to, respectively, 99 and 88 judgments in 2016 and 2017.

Disqualifications of CT justices

As the Constitutional Tribunal refused to provide statistics concerning disqualifications of CT justices from adjudicating panels in the preceding years, the report contains data for 2017, which was the first year of application of the new Act on Organisation and Functioning of the CT and also the first year with Julia Przyłębska as the President of the CT.

In 2017, there were 20 motions for disqualification of justices. Seven of them were submitted by the Ombudsman, six came from CT justices in their own cases (recusal), three were made by a person elected by the Sejm of the 8th (current) term for the post of CT justice lawfully filled by the Sejm of the 7th (previous) term, two by the Prosecutor General, one by a local authority, and one by the General Assembly of Supreme Court Justices.

For the first time in the Tribunal's history, motions to have justices disqualified from a case were substantiated by lack of authority to sit on the adjudicating panel. In this period it appeared the most frequently used argument (nine motions). None of these motions resulted in disqualification of a member of the adjudicating panel.

The highest number of motions concerned disqualifying from examination of the case: Mariusz Muszyński (seven); Henryk Cioch (four); CT Justice Marek Zubik (four). As for participants of the proceedings, the highest number of their motions concerned disqualification of persons elected by the Sejm of the 8th term for the posts of CT justices lawfully filled by the Sejm of the 7th term. Most often - in 14 cases - they submitted motions for disqualification from the adjudicating panel of persons elected by the Sejm of the 8th term for posts of CT justices lawfully filled by the Sejm of the 7th term.

In 17 out of 19 cases examined by panels of three Constitutional Tribunal justices, the president of the panel was a CT justice elected by the Sejm of the 8th term or a person elected by the Sejm of the 8th term for a post of CT justice lawfully filled by the Sejm of the 7th term. The same proportion was maintained in the case of rapporteurs. It was only in two cases that the President of the CT chose justices elected by the Sejm of the 6th or 7th term to sit on adjudicating panels.

In all cases initiated by an motion of a participant of the proceedings for disqualification of a person elected by the Sejm of the 8th term for a post lawfully filled by the Sejm of the 7th term, the President of the CT elected adjudicating panels composed solely of CT justices and persons elected by the Sejm of the 8th term. In three of the cases initiated by an motion of a participant of the proceedings for disqualification of a person elected by the Sejm of the 8th term for a post lawfully filled by the Sejm of the 7th term, the adjudicating panels included persons with the same legal status as those covered by the motions (i.e. persons elected by the Sejm of the 8th term for posts lawfully filled by the Sejm of the 7th term).

Changes in CT panels

In January and February 2017, the President of the CT, Julia Przyłębska, changed the adjudicating panels in 49 cases (issuing 53 orders). In 80% of cases the function of the rapporteur was performed by a CT justice elected by the Sejm of the 8th term or a person elected by the Sejm of the 8th term for the post of CT

justice lawfully filled by the Sejm of the 7th term. Those who were most frequently entrusted with the function of rapporteur were H. Cioch, L. Morawski (eight cases each) and M. Muszyński (six cases).

It is unprecedented that in 49 out of 53 orders concerning changes of the adjudicating panels issued in January and February 2017 there is no mention of the legal basis for the power of the President of the CT to change the panel members. Moreover, 21 orders concerning change of the adjudicating panel issued in January and February 2017 did not include a statement of reasons. Also in 22 correctly issued orders, due to the end of the term of CT Justice Andrzej Rzepliński and in order to include CT Justice Michał Warciński in the adjudicating panel, the President of the CT – without stating the legal basis – additionally included in the adjudicating panel persons elected by the Sejm of the 8th term for posts of CT justices lawfully filled by the Sejm of the 7th term.

In early 2017, adjudicating panels were changed in as many as 29% of the cases referred in 2016. The changes made in that period resulted in the formation of adjudicating panels where, in 77% of cases, the function of the panel's president and in 80% of cases the function of rapporteur was entrusted either to CT justices elected by the Sejm of the 8th term or to persons elected by the Sejm of the 8th term for the post of CT justice lawfully filled by the Sejm of the 7th term.

On the basis of data presented in report, it becomes obvious that adjudicating panels are chosen so as to ensure domination of CT justices elected by the Sejm of the 8th term and persons elected by the Sejm of the 8th term for the posts of CT justices lawfully filled by the Sejm of the 7th term. This begs the question about the reasons for such composition of the panels. It also justifies concerns about the possibility of the current CT management using its powers to achieve a specific decision on the merits. These concerns are deepened by the statement of Mariusz Muszyński added to the decision of the Constitutional Tribunal of 22 March 2018, case No. K 9/16, where he states that the President of the Constitutional Tribunal can 'change the rapporteur as a result of the panel's failure to accept the submitted draft'. It can be suspected that similar motivations underpin the changes made by the President of the CT in the adjudicating panels.

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Stefan Batory Foundation Legal Expert Group at the evaluates the legal amendments proposed by the government and the parliament that concern the state system and the place of public and civic institutions in the legal order. The Group members monitor legal bills and analyse them, first and foremost, in terms of compliance of the introduced solutions with the Polish Constitution, international norms, and standards of democracy and the rule of law. They also evaluate the level of interference of regulations with civil and human rights as well as the course of systemic changes set by enacted laws.

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