

HR HELSINKI FOUNDATION for HUMAN RIGHTS

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The Helsinki Foundation for Human Rights (HFHR) is one of the oldest non-governmental organisations in Poland dealing with the protection of human rights and fundamental freedoms. As part of its activity, HFHR monitors the standards of human rights protection. The current document presents the most important aspects of the on-going constitutional crisis in Poland. The following analysis was prepared by HFHR experts.

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1. Constitutional crisis in Poland

Election of new judges of the Constitutional Court – based on the Act of June 2015

In June 2015, the Parliament adopted the Act on the Constitutional Court, which entered into force on 30 August 2015. It allowed the Sejm (the lower chamber of the Parliament) of the 7th term to appoint 5 new judges to the Constitutional Court.¹ The newly appointed judges were supposed to replace three judges whose tenures expired on 6 November 2015 and two judges whose tenures expired on 2 and 8 December 2015. At the same time, the Sejm's term of office ended at the turn of October and November 2015.² On 8 October 2015, the Sejm (during its last session as the Sejm of the 7th term) adopted five resolutions in which it appointed five new judges of the Constitutional Tribunal³.

The HFHR strongly protested against this amendment. HFHR's experts underlined that the appointment of 5 judges in a row would violate the Constitution.⁴

Before the parliamentary elections took place in Poland, the parliamentary opposition (the Law and Justice party) had filed a motion to the Constitutional Tribunal to verify whether the Act of 25 June 2015 on the Constitutional Tribunal is compatible with the Constitution, i.e. whether the Sejm of the 7th term was entitled, under the Constitution, to elect all five judges. This 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 announced.⁵

The President of Poland refused to swear into office the five newly elected judges

According to Article 21 of the Act on the Constitutional Tribunal, the President of Poland is responsible for swearing newly appointed judges into office. After the election of the new judges, the President of Poland did not swear the judges into office. However, the President of Poland expressed his opinion (in a press interview published on 11 November 2015) that the elections of the judges had "violated democratic rules."⁶

The Parliamentary elections – 25 October 2015

The parliamentary elections in Poland took place on 25 October 2015. The Law and Justice party (*Prawo i sprawiedliwość*) won the elections by gaining almost 38% of votes and 234 seats (out of

¹ According to Article 137 of the Act, the Lower Chamber of the Parliament (the Sejm) stated that within 30 days from the Act's entry into force, candidatures for new judges of the Constitutional Court shall be submitted. Additionally, Rules of Sejm as well as Act on Constitutional Court, provide that candidature for judge of the Constitutional Court can be submitted by the Presidium of the Sejm or by the group of 50 Mps.

² 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.

³ 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.

⁴ The summary of the HFHR activity in the relation of changes surrounding the CT is available here: <http://www.hfhr.pl/en/constitutional-tribunal-act-the-monitoring-of-legislative-amendments/>

⁵ Case no. K 29/15.

⁶ Gazeta Wyborcza, Prezydent Duda: Sposób wyboru sędziów Trybunału Konstytucyjnego naruszył zasady demokracji, available at: wyborcza.pl/1,75478,19170279,duda-sposob-wyboru-sedziow-trybunalu-konstytucyjnego-naruszyl.html

460) in Sejm. It was the first time in the last 26 years that one party took over half of the seats in the Parliament. The first session of the newly elected Parliament started on 12 November 2015.

The first set of amendments to Act on the Constitutional Tribunal

During the first session of the new Parliament (Sejm of the 8th term), draft amendments to the Act on the Constitutional Tribunal were proposed. The amendment was adopted by the Parliament within 3 days,⁷ that is, on 19th November. The Act was signed by the President on the next day. During the legislative proceedings in the Sejm, no opinion of any expert in the field of constitutional law was heard, even though such a suggestion was made by the Legislative Bureau of the Sejm.

The amendment annulled Article 137 of the Act, which allowed the Sejm of the 7th term to elect all five new judges of the Constitutional Tribunal, and established a 7-day timeframe for filing new motions with candidates to take up the office of judges of the Constitutional Tribunal.⁸

On 23 November 2015, a group of MPs filed a complaint to the Constitutional Tribunal, arguing that the Act of 19 November 2015 violated the Constitution.⁹ On the same day, the Human Rights Defender also filed his motion with the Constitutional Tribunal.¹⁰ On 24 November 2015, a motion to the Constitutional Tribunal was also filed by the National Council of the Judiciary¹¹ and on 30 November 2015 by the Chief Justice of the Supreme Court.¹²

Elections of new judges of the Constitutional Tribunal

On 25 November 2015, the Sejm adopted five resolutions (submitted by a group of MPs on the same day) which declared “the lack of legal force” of the resolutions appointing five judges adopted on 8 October 2015. The justification for the resolutions stated that the previous election procedure of Constitutional Tribunal judges was incorrect and the resolutions aim at its validation.¹³

After the “annulment resolutions” were enacted (and published within a few hours), the amendments to the Rules of the Sejm were introduced. These amendments to the Rules of the Sejm allowed the Speaker of the Sejm to establish a deadline for proposing candidates for Constitutional Tribunal judges in case “other circumstances” (than those set out in the Act on the Constitutional Tribunal) for such elections occur.¹⁴ Such a timeframe was established on 1 December 2015 at midday it was however not published officially anywhere.¹⁵

Five candidatures for new judges were submitted on 1 December 2015.¹⁶ The session of the parliamentary Committee of Justice and Human Rights to present the opinion on the candidatures

⁷ Act of 19 November 2015 - it was published in the Official Journal a few hours after the President signed the bill.

⁸ 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).

⁹ Case no. K 35/15.

¹⁰ Case no. K 37/15.

¹¹ Case no. K 38/15.

¹² Case no. K 40/15.

¹³ 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.

¹⁴ 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).

¹⁵ The same day, the deadline was prolonged until 6 p.m.

¹⁶ They were submitted only by the Parliamentary Club of “Law and Justice” political party.

took place on 1 December 2015 at 8 p.m. During the discussion, the candidates were asked no questions by the MPs – a formal motion was adopted by vote to end the discussion.

On 2 December 2015, after a rough debate at the plenary session, the Sejm elected five new judges. The elections were based on the Rules of Sejm (the Act of 19 November 2015 was 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 took the oath from the newly elected judges.

2. The judgments of the Constitutional Court concerning the amendment to Act on the Constitutional Tribunal

Judgment of 3 December 2015

The group of MPs filed a motion to the Constitutional Tribunal concerning the Act of 25 June 2015 on the Constitutional Tribunal to verify whether the legal basis for the elections of judges in October 2015 was compatible with the Constitution.¹⁷ The hearing before the Constitutional Tribunal was held on 3 December 2015, just after the President took the oath from the new judges of the Constitutional Tribunal.

The ruling was issued by the panel consisting of five judges.¹⁸ The Tribunal ruled that Article 137 of the Act on the Constitutional Tribunal was a constitutional basis for elections of three judges who were to replace the judges whose tenures expired on 6 November 2015. Whereas in respect of two judges whose terms of office lapsed on the 2 and 8 December 2015, the elections of judges by the Sejm of the 7th term were found unconstitutional. Moreover, the Tribunal stated clearly that it is an obligation of the President to swear judges validly elected by the Sejm into office.

Judgement of 9 December 2015

On 9 December 2015, the Constitutional Tribunal held a hearing and announced a judgement in the case concerning the Act of 19 November 2015 amending the Act on the Constitutional Tribunal. The main point of the decision concerned the possibility of the Sejm of the 8th term to again elect five new judges of the Constitutional Tribunal.

The Tribunal confirmed that the Sejm of the 7th term was entitled to elect three judges, and thus the Sejm of the 8th term only two judges. The Tribunal ruled that “Article 137a of the Act on the Constitutional Tribunal¹⁹ – 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.”

¹⁷ It was the same motion that was dropped by Law and Justice on 10 November 2015.

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 “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”.

Moreover, the Tribunal decided that the introduction of a 3-year tenure for the President and Vice-president of the Tribunal is acceptable. However, the possibility of their re-election for a further tenure violates the Constitution, since it might undermine the independence of the judge. Furthermore, the Tribunal ruled that Article 2 of the Act of 19 November 2015 is unconstitutional. The Article 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 Tribunal 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). The Tribunal also ruled that the deadline of 30 days for the President to take the oath from the judges elected by the Sejm violates the Constitution. Last but not least, the Tribunal ruled that Article 21 para. 1a of the Act on the Constitutional Tribunal which provides that the taking of the oath of office shall commence the term of office of a judge of the Tribunal is unconstitutional.

Dispute concerning the publication of the judgement of the Constitutional Tribunal

Even though the judgment of the Constitutional Tribunal was announced on 3 December 2015, it was not published for the next 3 weeks. On 10 December 2015, Minister Beata Kempa (Head of the Chancellery of the Prime Minister) sent an official letter to the President of the Tribunal.²⁰ She argued that, in her opinion, the judgment of the Tribunal of 3 December 2015 was invalid, since the panel of the Tribunal issued it composed of five judges. Thus, she “suspended” the publication of the judgment.²¹

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

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

The judgment of 3 December 2015 was finally published on 16 December 2015²² and the judgment of 9 December 2015 was published on 18 December 2015.²³

Second set of amendments to the Act on the Constitutional Tribunal

On 15 December 2015, at 10 p.m., a new draft of the amendment to the Act on the Constitutional Tribunal was announced on the Sejm's website. In the light of the proposed draft, the Constitutional Tribunal would have to rule in all the pending cases as a full panel which shall be composed of at least 13 judges. The draft also stated that the judgments might be adopted only by a majority of 2/3 of votes (whereas Article 190.5 of the Constitution states that “judgments of the Constitutional Tribunal shall be made by a majority of votes”). The draft also included a controversial regulation stating that the Constitutional Tribunal's premises shall be relocated outside Warsaw.²⁴ Last but not

²⁰ Available (in Polish) at: http://trybunal.gov.pl/fileadmin/content/nie-tylko-dla-mediow/Pismo_KPRM_z_10_grudnia_2015_r..pdf.

²¹ 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.

²² Official Journal, position no. 2129 – <http://dziennikustaw.gov.pl/du/2015/2129/1>.

²³ Official Journal, position no. 2147 – <http://www.dziennikustaw.gov.pl/DU/2015/2147/1>.

²⁴ This proposal was dropped during the parliamentary discussion.

least, the draft stated that if the cases pending before the Tribunal were assigned to a panel of five judges (different than required by the draft of law) they would need to be re-assigned and “initiated again.”

On 17 December 2015, three legal opinions concerning the draft were presented to the Sejm (by the Supreme Court,²⁵ the Polish Bar Council²⁶ and the Helsinki Foundation for Human Rights²⁷). Also a group of NGOs sent a statement to all MPs arguing that such a fundamental change in the rules of the Constitutional Tribunal should have been consulted with the civil society within a reasonable time.²⁸

The first reading of 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 Committee took place on 21 December 2015 and lasted almost 13 hours (with a 1 hour break). During the meeting of the Committee a set of new amendments were proposed, e.g. concerning cases which will have to be decided by the full panel. Moreover, the Committee decided that the Act will enter into force on the day of its announcement in the Official Journal.

The next day, it was adopted by the Sejm at the plenary session. The Senate adopted the bill without any amendments after the whole day of discussions in the parliament commission and at the plenary session.²⁹ On 28 December 2015, the President of Poland signed the bill which was published in the Official Journal on the same day.³⁰

The newly adopted Act on the Constitutional Tribunal introduces numerous significant changes concerning the functioning of the Tribunal. First of all, the General Assembly (*Zgromadzenie Ogólne*) of the Tribunal (deciding on disciplinary proceedings, budget and internal issues of the Tribunal) shall be composed of at least 13 judges and shall make decisions by a majority of 2/3. Furthermore, the Minister of Justice or the President of Poland might initiate disciplinary proceedings against the judges of the Constitutional Tribunal. The General Assembly is entitled to motion the Sejm to terminate the tenure of a judge of the Constitutional Tribunal.

The amended Act also includes changes in relation to the process of ruling by the Constitutional Tribunal. The Act states that, as a rule, the Tribunal shall rule on a case in the full panel composed of at least 13 judges; however, cases initiated by a constitutional complaint or a judicial questions shall be considered by the panel of 7 judges. The cases should be examined in the order in which they were lodged with the Tribunal. The hearing cannot take place earlier than 3 months after the notification of the parties about its date; in cases considered by the full panel, such a period is 6 months. In the light of the Act, the judgments issued by the full panel of judges shall be made by a majority of 2/3 votes. The intertemporal provisions state that the new law is applicable to cases pending before the Tribunal, unless the parties were notified about the panel which will rule on the case. In cases pending before the Tribunal, the hearing can take place after 45 days since the notification of the parties on the date of the hearing (if the case is ruled by the full panel – after 3 months), but not later than after 2 years after the Act enters into force.

The first President of the Supreme Court, the Human Rights Defender and two groups of MPs submitted motions to the Constitutional Tribunal to verify whether the newly adopted Act on the

²⁵ Available at:

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

²⁶ Available at: http://www.adwokatura.pl/admin/wgrane_pliki/file-opinianranowaustawatk17122015-13851.pdf.

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

²⁸ 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).

²⁹ The final voting took place at 3.50 a.m. on 24 December 2015.

³⁰ Official Journal, position no. 2217 – <http://dziennikustaw.gov.pl/du/2015/2217/1>.

Constitutional Tribunal violates the Constitution. The hearing concerning this case will take place on 8 and 9 March 2016.

It is the subject of public discussion whether the Tribunal will rule on this case on the basis of the procedure established by the Act on 22 December 2015, which provides, among other things, that the full panel shall be composed of at least 13 judges and that the case should be decided by a 2/3 majority.

The discontinuation of proceedings before the Constitutional Tribunal concerning the resolutions reversing the appointment of 5 judges

On 11th January 2016, the Constitutional Tribunal informed the public that it had discontinued the proceedings concerning the appointment of 5 judges in October 2015. In December 2015, a group of MPs submitted a motion to the Constitutional Tribunal to verify whether the Parliament's resolutions of November 2015 reversing the initial appointment of judges and next five resolutions of December 2015 appointing five new judges did or did not violate the Constitution. The Constitutional Tribunal recognised that the resolutions of November 2015 could not be considered normative acts, so as a consequence the proceeding in this regard had to be discontinued. In reference to the resolutions of December 2015, the Constitutional Tribunal ruled that they were non-legislative measures through which the Parliament would be able to execute its creative function in relation to organs of public authorities.

Two judges appointed in December 2015 assigned to works in the Constitutional Tribunal

On 12 January 2016, the President of the Constitutional Tribunal assigned two judges appointed by the Parliament in December 2015 to rule on cases submitted to the Tribunal. After this decision, there are 12 judges of the Constitutional Tribunal assigned to cases.

The Constitutional Tribunal's judgement on the amendment of December 2015

On 8 and 9 March, the Constitutional Tribunal heard the complaints – submitted by the Commissioner for Human Rights, President of the Supreme Court, National Council of Judiciary and two groups of the Sejm deputies – against the amendment to the Constitutional Tribunal Act passed in December 2015.

On 9 March, the Tribunal issued the judgment sitting in a panel of 12 judges. The Tribunal held that it may neither operate nor adjudicate on the basis of laws whose constitutionality raises significant doubts. According to the Tribunal, this would threaten the effective adjudication of cases already present on its docket.

The Constitutional Tribunal ruled that the amendment to the Constitutional Tribunal Act is contrary to the Constitution in its entirety. Above all, the legislative procedure applied to the enactment of the amendments was declared unconstitutional. The Tribunal ruled that this procedure was so hasty that in practice it prevented a review of the amendment's draft despite numerous concerns over it likely being unconstitutional. Also the legal rule that enabled the amendment to enter into force upon publication was found contrary to the Constitution. Moreover, the Constitutional Tribunal held that the newly introduced attendance quorum that required it to decide certain cases in full bench led to delays of proceedings.

Although the judgements of the Constitutional Tribunal are binding and final, the government refused to recognise the binding force of the judgement and refused to publish it in the Official Journal.

Venice Commission opinion

On 9 March 2016, the Venice Commission issued an opinion on the amendments to the Act on Constitutional Tribunal adopted in December 2015. The Commission in its opinion criticized all changes introduced by the amendment. According to its opinion, the changes would slow down or even paralyse the work of the Constitutional Tribunal, and doing so would be unacceptable according to European standards. The opinion states “the paralysation of the work of the Constitutional Tribunal poses a threat to the rule of law, democracy and protection of human rights”.

In its opinion, the Venice Commission also considered the March 9 decision of the Tribunal, which also found the amendments to the act entirely incompatible with national law, although the government has refused to publish this decision. The Commission emphasized that the government’s refusal to publish the Tribunal’s decision would not only be contrary to the rule of law, but such an unprecedented move would also further deepen the constitutional crisis.

New draft of Act on the Constitutional Tribunal

On 29 April 2016, a group of MPs from the governing party submitted a draft Act on the Constitutional Tribunal to the Parliament. Unlike in the case of previous changes, this proposal is not limited to amendments, but constitutes an entirely new piece of legislation.

The draft Act is composed of 4 chapters. The first chapter refers to the composition and competences of the Tribunal. In light of the draft, the number judges will not be changed and will still be 15. In fact, any change in the number of judges in a normal act would be unconstitutional, as the number is prescribed directly by the Constitution. The process of electing judges will not be changed either. The judges will still be elected by the Sejm, while a group of 50 MPs or the Presidium of the Sejm will have the right to present candidates.

The draft Act changes the composition of the full bench of the Tribunal. It lowers the number of judges composing a full bench from 13 (the number introduced by the amendment of December 2015) to 11 judges. This number, however, is still higher than that required by law before December 2015 (9 judges).

In general, decisions can be made by a simple majority of votes. However, if the case is recognised by a full bench and concerns, among others, the constitutionality of an act or international agreement, unconstitutionality of the statute of a political party, or a case in which the constitutional standard is based on certain specific articles of the Constitution (e.g. the principle of the separation of powers, rule of law, the prohibition of discrimination), the decision should be made by the 2/3 majority of votes.

In the light of the draft, the President of the Constitutional Tribunal can only assign to cases those judges who are appointed by the Sejm and sworn into office by the President. Such provisions can be perceived as a tool to force the President of the Constitutional Tribunal to assign cases to the three judges elected by the current Parliament in violation of the Constitution (to replace judges elected by the previous Parliament).

The new draft Act retains the same order of case consideration as the one introduced by the amendment of December 2015; however, this time it includes exceptions. In general, cases submitted by, among others, a group of MPs, the President, the National Judiciary Council or the

Prosecutor General should be recognised in the order in which they were lodged. However, this order will not be applicable to cases concerning, among others, the constitutionality of international agreements, the Act on the Annual State Budget, the constitutionality of the Act on the Constitutional Tribunal and competence disputes between state authorities.

3. Media law

On 28th December 2015, a group of MPs presented a draft amendment to the Act on Public Media.

The amendment gave the minister responsible for the State Treasury the power to appoint and dismiss members of public media organisations' management and supervisory boards. Furthermore, the authorities of the public media will no longer be selected through open and public competition procedures. The amendment also stated that members of the governing bodies of public media organisations would no longer serve a certain term of office. Last but not least, as of the Act's entry into force, the incumbent senior management of public radio and televisions were removed from office.

The Act also limits the role of the National Broadcasting Council. The role of the National Broadcasting Council is described in the Constitution. The Council's pivotal role is to protect the freedom of speech, right to information and public interest in radio and television. So far, the National Broadcasting Council has taken part in appointing the members of the management and supervisory boards of public media institutions. The Council had the right to organise open and public competition procedures for candidates of the supervisory boards' members. The limitation of the Council's role in this process may raise serious doubts concerning the compatibility of the amendment with the Constitution.

Similarly to the Act on the Constitutional Tribunal, the Act on Public Media was also adopted at an accelerated pace without any consultations with civil society. The Parliament started working on the amendment on 28 December and the Act was adopted on 31 December. The President signed it on 7 January 2016. Furthermore, this Act also came into force the day after its publication in the Journal of Laws (7 January 2016). Immediately after, the persons nominated by the member of the government replaced the heads of the Polish Television and Polish Radio. On 8 January 2016 Jacek Kurski, Law and Justice National MP in 2005-2009 and European Parliament MP in 2009-2014, was nominated by the Minister of State Treasury as the Head of the Polish Public Television. Jan Pawlicki, former journalist of TV Republika, has been nominated as TV Channel One Director, after his predecessor Piotr Radziszewski resigned. Maciej Chmiel, a TV producer, has been appointed as the Television Channel Two Director. The new head of the television Channel TVP Kultura is Mateusz Matyszkowicz, former journalist of the right-wing "Frona Lux" weekly.

A board of three members have been nominated for the Polish Radio: Barbara Stanisławczyk (journalist), Jerzy Kłosiński (journalist) and Marcin Palade (sociologist). On 8 January 2016 the Director of Polish Radio One ("Jedynka"), Kamil Dąbrowa, was dismissed. The same day, Magdalena Jethon, the Director of Polish Radio Three ("Trójka") resigned from the post. On 8 January 2016 a number of journalists and editors preparing information programs at the public TVP were dismissed (e.g. presenter Piotr Kraśko, director of newsroom Maciej Czajkowski). On 9 January 2016 in Warsaw and 19 cities in Poland, protests were organized in order to demonstrate discontent with the political influence on media. According to the estimates of the Journalists' Association, over 160 journalists of public radio and television have been fired or resigned from work since January 2016³¹.

³¹ Towarzystwo Dziennikarskie, „Dobra zmiana w mediach”, available at: <http://towarzystwodziennikarskie.org/>

In March 2016, the Commissioner for Human Rights submitted a motion to the Constitutional Tribunal upon verifying the constitutionality of the provisions of this Act with the Constitution.

Big media reform

The Act adopted in December 2015 is called “a small media law reform” and its provisions are binding until the end of June 2016. On 21 April 2016 the new media law package proposal was submitted to the Polish Parliament. The package consists of three draft laws: 1) National Media Act, 2) Audiovisual Dues Act, and 3) Law Introducing National Media Law Act and Audiovisual Dues Act.

The proposal confers very broad competence on the new institution which it establishes – the National Media Council (*Rada Mediów Narodowych*) – with regard to all public media, without providing at the same time sufficient guarantees which could minimize the risk of political dependency of this body. In particular this refers to the way the members of the Council are to be elected as well as to the rules for appointing the Chairman of the Council (all six members are to be elected directly by political organs: the two chambers of the Parliament - Sejm, Senate - and the President; only one of the members is to be elected from candidates presented by the political opposition; the Chairmen is to be appointed by the Speaker of the Sejm). Such a mechanism does not meet the standard that supervisory bodies in public media should be in principle composed of members reflecting different political backgrounds and pluralistic views.

The proposed regulations significantly limited the role of the constitutional organ – the National Broadcasting Council – by transferring some of its competences to the National Media Council. Furthermore, the draft National Media Act introduced a definition of the public mission. The definition is very broad and does not include the promotion of tolerance, pluralism and political inclusiveness.

Similarly to the adoption of the Act of December 2015, there were no public consultations at the stage of preparation of the draft Act. However, in May 2016, the Parliamentary Commission organised a public hearing concerning the Act.

A coalition of more than 40 NGOs dealing with culture and media freedom called upon the Parliament for public consultations on the law. On 17 May 2016, the Committee of Culture and Media of the Parliament organized a public hearing on the draft laws. All organizations, media representatives and citizens present at the meeting were granted the right to speak. The same day, in the evening, Deputy Minister of Culture and National Heritage Krzysztof Czabański (author of the drafts) announced that changes would need to be introduced in the draft. He referred in particular to the amount of the license fee, which was not discussed during the hearing.

Suspension of works on the “Big media reform”

In early June 2016, Deputy Minister of Culture and National Heritage Krzysztof Czabański announced that it would not be possible to adopt the “Big media reform” by the end of June. He also stated that it was necessary to adopt another temporary Act on Public Media. On 8 June 2016, the Parliament started works on the new draft of the Act on Public Media. Again, this draft was also not a subject of public consultations and so far has been processed in a speedy manner. In the opinion of the HFHR, the new draft Act does not limit political control over media and media content. Similarly to the previous version of the draft Act on Public Media, this version also includes provisions regulating the establishment of the National Media Council – the authority that would supervise the works of public media. In light of this draft, the Council would be composed of

5 members – 3 members would be appointed by the Parliament while the President would appoint 2 members among the candidates presented by the opposition parties. However, the draft Act does not describe the specific qualifications that the candidates to the National Media Council should meet. Furthermore, the draft Act does not set any deadline for the President to appoint the candidates. The Council can make decisions with a *quorum* of 3 votes. Moreover, the draft Act does not eliminate the most serious concerns regarding the changes introduced by the small media law reform (for example, it does not set transparent criteria or a procedure for selecting the members of the management and supervisory boards of the public media institutions). The new proposal also further restricts the competences of the National Broadcasting Council.

4. Changes to the Act on Police

In January 2016, the Sejm adopted the amendment to the Act on the Police and several other acts concerning the functioning of secret services. The purpose of this amendment is to implement the Constitutional Tribunal's judgement of 2014. In this judgement, the Tribunal noted that Polish law does not foresee any independent supervision of access to telecommunication data (e.g. phone billings, location data). The Tribunal argued that this gap should be regulated.

The amendment poses a serious threat to human rights protection, including the right to privacy. First of all, the amendment fails to create a system of independent control over the actions of law enforcement services. In the light of this amendment, every six months the Police and secret services are obliged to send to the court a summary of obtained data. In such a case, the court's control over this data is *post factum* and it might not be comprehensive enough. The court is entitled (but not obliged) to verify the operational material gathered by the security services. The court can inform the services about the results of the control, but is not entitled to order any steps, e.g. to delete the data.

Furthermore, the services' powers to obtain data have been extended to "online data", which will be accessible through ITC networks without the obligation to submit a relevant application before each instance of data collection. The draft includes a regulation in light of which the Police or secret services will have a possibility to sign agreements with telecommunication operators. On the basis of such agreements, the Police and secret services will have permanent access to "online data"/internet data in real-time.

Last but not least, the draft also fails to guarantee protection of information covered by professional confidentiality obligations, such as attorney-client privilege or reporter's privilege. Pursuant to the draft law, such information shall be disclosed to the prosecutor, who – however – has no power to have it destroyed, and later to the court.

The amendment was adopted by the Senate on 29 January 2016, signed by the President on 3 February 2016 and entered into force on 7 February 2016.

Venice Commission opinion

In June 2016, the Venice Commission adopted an opinion on the amended Act on Police. The Commission noted that the amendment implements the Constitutional Tribunal's judgement to a significant degree. However, the Commission pointed to numerous gaps that should be filled by the legislator. In the Commission's opinion, the grounds on the basis of which the police and secret services may have access to telecommunication and Internet data are too wide. The opinion states that "procedural safeguards and material conditions set in the Police Act for implementing secret surveillance are still insufficient to prevent its excessive use and unjustified interference with the

privacy of individuals." The Venice Commission recommends specific amendments that should be adopted to the Act on Police. Among them are strengthening the proportionality principle, by elaborating the test applicable to the secret surveillance, and prohibiting within the Act the surveillance of communications which are facially covered by a lawyer-client privilege.

5. Changes in the justice system – reunification of the Offices of the Minister of Justice and Prosecutor General

In December 2015, the Parliament started the works on the new Law on Prosecutor Office. The main change postulated by this draft is the reunification of the Offices of the Minister of Justice and Prosecutor General.

Until 2009, the Minister of Justice acted also as the Prosecutor General. Such an convergence of roles posed a potential (or sometimes real) danger of subjecting the prosecutors' work to political influences. In 2009, the reform of the prosecution was introduced. In the light of this reform, these two offices were separated and the Prosecutor General's office became independent, although Prosecutor General had an obligation to present annual summaries of its work before the Parliament.

Draft of new Law on Prosecutor Office aimed at reversing the reform of the Prosecution introduced in 2009. In the light of the draft, the prosecution will be entirely supervised by the Ministry of Justice. Furthermore, the draft widens the competences of the Prosecutor General. For example, the Prosecutor General will be able to appoint or dismiss a head of the prosecution unit on the basis of a discretionary decision without the necessity of carrying out a transparent and open recruitment process. Furthermore, the Prosecutor General will be able to issue decisions regarding specific investigations. The Prosecutor General will also have the power to release to the media the information from any investigation.

The draft was adopted by Sejm (28 January 2016) and Senate (30 January 2016) and signed by the President (12 February 2015). It came into force on 4 March 2016.

6. Summary of events

June 2015	The Parliament adopted an amendment to the Act on the Constitutional Tribunal. One of the provisions of the amendment enable 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 explanations 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.

13 January 2016	The European Commission launched a dialogue on the situation in Poland and the Rule of Law Framework
15 January 2016	Sejm adopted the amendments to the Act on Police. The draft was transferred to the Senat.
28 January 2016	Sejm adopted the amended Law on Prosecutor Office
29 January 2016	Senat adopted the amended Act on Police
3 February 2016	The President signed the amended Act on Police
7 February 2016	The amended Act on the Police came into force
12 February 2016	The President signed the Law on Prosecutor Office
4 March 2016	The Law on Prosecutor Office came into force
9 March 2016	The Constitutional Tribunal's judgement on the Act amending the Act on the Constitutional Tribunal of December 2015
11 March 2016	Venice Commission's opinion on the Act amending the Act on the Constitutional Tribunal of December 2015
21 April 2016	The package of draft Acts on "big media reform" was submitted to the Sejm
29 April 2016	The draft Act on the Constitutional Tribunal was submitted to the Parliament
1 June 2016	The European Commission adopted an Opinion concerning the rule of law in Poland
8 June 2016	The Parliament started works on the new temporary Act on Public Media
10 June 2016	Venice Commission adopted an opinion on the Act on Police