

On the current status of compliance with the principle of rule of law in Poland

| | |
|---|----|
| I. Overview | 1 |
| II. Details | 2 |
| 1. Parliament | 2 |
| 2. Government | 4 |
| 3. President Andrzej Duda | 5 |
| 4. Dispute over the Tribunal | 6 |
| 5. Legislation that violates the Polish Constitution or the EU and Council of Europe laws and regulations | 11 |

I. Overview

The political party Law and Justice (Prawo i Sprawiedliwość, in short PiS), in power since mid-November 2015, has challenged the existing constitutional order based on the division of the three branches of power. According to PiS, the judiciary as a branch of power should not be on a par with the legislative and executive branches because it lacks democratic legitimacy: it is neither elective nor subject to review by the people. PiS maintains that Parliament is the “sovereign” (as an emanation of the people) and that the Government is an emanation of Parliament and consequently its freedom to govern should be unrestricted. In particular, the power of the Government cannot be limited by the existing Constitution.

PiS does not have the majority required to amend the Constitution; hence, it is “amending” the Constitution by means of ordinary acts of Parliament. As the Constitutional Tribunal could challenge such acts, the Tribunal has been paralysed through legislative and political measures. PiS politicians believe that the Tribunal intends to obstruct their power to govern; consequently, the composition of the Tribunal and the Act governing its functioning must be amended.

PiS has a majority of votes in Parliament and it can pass any laws without having to resort to political or social compromises. And PiS takes full advantage of the situation. Laws have been passed within a few hours, often at night, in an atmosphere of emergency and

parliamentary procedure has often been stretched. Major laws that define the political system of the country have been submitted not by Government but by groups of private members of parliament, while bypassing interdepartmental approval and public consultations with trade unions and non-governmental organizations. There has been no effective scrutiny over the legislative process.

The executive branch, including the President, takes over the powers of the judiciary and disparages judges and courts in public statements. The President has himself clearly demonstrated his disdain for law by pardoning, even before the criminal trial was over, of Mariusz Kamiński, a PiS politician appointed secret service coordinator. According to a number of leading legal experts, including judges of the Constitutional Tribunal and professors of law in universities, the President has breached the Constitution several times by automatically signing all hastily passed laws often within 24 hours.

Over a few weeks, the party in power has passed sudden changes to legislation:

- the Constitutional Tribunal has been captured and paralysed;
- the people in power have passed a law whereby they can legally replace at one go all managers in the public administration based on the criterion of support for the policy of the Government.
- the Public Prosecutor's Office has been subjugated to the Government. Its managers will also be replaced at one go at the sole discretion of the Minister of Justice, who is also the General Prosecutor.
- another Act of Parliament has replaced within days the managers of the public radio and television at the sole discretion of the Minister of Treasury.

Previously, managers of all these institutions (the civil service, the Public Prosecutor's Office, the public radio and television) were appointed through competitions, and Acts of Parliament laid down the requirements for candidates.

II. Details

1. Parliament

Draft Acts of Parliament imposing fundamental changes on systemic institutions are passed in violation of the law.

- a) They are tabled to the Sejm as MPs' drafts although they are known to have been drafted by the Government, which violates the Regulations of the Council of Ministers.
- b) Fundamental systemic changes are approved by the Sejm and the Senate within a matter of days, typically at night plenary sessions and committee sittings.

For instance, the Act amending the Act on Radio and Television (MPs' draft): it was tabled on 28 December, the first reading took place on 29 December, the Act was passed by the Sejm on 30 December and by the Senate on 31 December, it was signed into law by the President on 7 January 2016 and it took effect on 8 January.

- c) Resolutions passed by the Sejm invalidated resolutions of the Sejm of the previous term, which created a formerly unheard of, dangerous precedent. The resolutions

declared that five resolutions of the Sejm of the previous term electing judges of the Constitutional Tribunal have “no legal effect”. The resolutions do not refer to any legal basis. The reasoning provides that the repealed resolutions were passed incorrectly but it does not specify what was incorrect. The resolutions also provide that only the Sejm can evaluate the legality of its resolutions, and that the Constitutional Tribunal has not such power.

- d) No amendments of draft acts proposed by the opposition are accepted.
- e) No third-party opinions are requested in the legislative process.

Opinions are tabled by a range of parties on their own initiative, including the National Council of the Judiciary, the General Prosecutor, the First President of the Supreme Court, non-governmental organizations and lawyers’ organizations such as the bar association. Such opinions are tabled to the Marshal of the Sejm but not published in the legislative process on the website of the Sejm or the Senate, and the parliamentary services do not always deliver them to MPs before the legislative process. No substantive recommendations included in such opinions are accepted. No comments or substantive suggestions of the Sejm Analysis Department or the Legislation Department are accepted, including warnings of non-conformity with the Constitution.

For instance, the Legislation Department of the Senate issued an opinion on the amendment of the Act on the Constitutional Tribunal, stating that “*Some of the proposed solutions arouse serious constitutional doubts. Furthermore, several amendments under the Act lead to inconsistency of provisions governing the rules of proceeding before the Tribunal as well as systemic inconsistency, i.e., inconsistency with norms laid down in other Acts concerning issues equivalent to those governed by the Act to be amended. Certain provisions of the Act could also lead to doubts in interpretation.*”

None of the comments were accepted by the Senate, and the draft Act was approved without a single amendment.

- f) The Regulations of the Sejm and of the Senate are breached or circumvented during the proceedings.

The Sejm’s agenda is published late, modified multiple times, opposition MPs are surprised by the timing of proceedings on proposed agenda items. As a rule, work continues after the whole day of sessions well into the night. The ruling majority publicly denounces protests of the opposition as their reluctance to work hard for the good of the public.

MPs have no time to read drafts or to request expert opinions. Papers are delivered several hours or even minutes before the session. The ruling majority rejects in a vote any requests for opinions to be tabled to committees.

Article 61 of the Regulations of the Senate is persistently breached; it provides that “Senate papers and other materials relating to the issues considered at a committee sitting should be handed to its members no later than the day before a sitting.” However, the texts are published on the Senate website at night, after being passed by the Sejm, and the Senate committee starts legislative proceedings in the morning. Requests of opposition Senators for time necessary to read the draft to be discussed are rejected in a vote by the ruling PiS majority. If the outcome of a vote is unfavourable to the ruling majority, a second vote is opened, for instance, under the (unfounded) pretext that persons ineligible to vote have cast a vote.

The principle that a draft should have three readings in the Sejm before being voted is breached. Fundamental modifications of drafts are added after the first reading. For instance, a dozen modifications were added after the first reading to the second amendment of the Act on the Constitutional Tribunal, including the requirement for the Tribunal to adjudicate in the order in which cases are filed.

As a part of the legislative “production line,” the President signs acts into law within minutes or hours in breach of his constitutional obligation to evaluate the conformity of Acts with the Constitution and to consider their social and economic impact. Although Acts submitted for the President’s signature are considered by lawyers to be evidently defective, the President does not exercise the option of having them first evaluated by the Constitutional Tribunal or to veto them – the President’s veto could be rejected by the Sejm by a majority of 2/3 of votes, which would require the participation of the opposition.

g) Acts of Parliament imposing fundamental systemic changes take effect without any *vacatio legis*, immediately when promulgated.

Out of 33 Acts of Parliament passed between mid-November 2015 and the end of January 2016, 11 took effect on the day of publication or on the following day, 2 after three days, 4 after 7 days, 12 after 14 days, 2 after three weeks, and 2 after three months.

2. Government

a) The Government challenges the legality of rulings of the Constitutional Tribunal and attempts to prevent their legal effect. Such unprecedented measures of the Government were taken in the case of three rulings of the Constitutional Tribunal passed during the term of this Government.

Prime Minister Beata Szydło deferred the publication of the rulings (case No. K34/15 and K35/15) in the Official Journal for two weeks. Thus, by refusing to publish the rulings of the Constitutional Tribunal, the Government appropriated the power to censor the jurisprudence of the Tribunal. According to Article 190 (1 and 2) of the Constitution, judgments of the Constitutional Tribunal shall be final and shall be immediately published.

The Public Prosecutor’s Office opened a procedure in the matter of the non-publication of the rulings and confirmed that the publication of the ruling was suspended on orders of Prime Minister Szydło, which was illegal. Finally under public pressure the rulings were published after two weeks of delay.

Prime Minister Beata Szydło declined the publication of the third judgement (case reference number K 47/15) in the Official Journal. In her opinion it’s not binding. It is also an official standpoint of the President Andrzej Duda. It is still not published even though it was recommended by the Venice Commission in its opinion of March 12.

Related documents, including legal opinions are available at:

<http://citizensobservatory.pl/ustawa/judgment-of-the-constitutional-tribunal-sygn-k-4715/>

b) The Government is in breach of the rules of law-making laid down in the Regulations of the Council of Ministers

According to the Regulations, drafts tabled by the Government should be published on the website of the Government Legislation Centre (RCL) and processed in transparent intra-governmental and social consultations whose outcome should be published on the RCL

website. Drafts should also be accompanied by an impact assessment covering the social, financial and legal impact of the legislation. However, the Government tables its drafts to the Sejm as drafts of MPs, which do not need to meet the aforementioned conditions. Out of 77 drafts which are being processed or have been approved by the Sejm of this term of office, there have been 58 MPs' drafts, i.e., 75%. All drafts undermining constitutional principles (including the Acts on the Constitutional Tribunal, civil service, the public media, the Public Prosecutor's Office, surveillance) were MP's drafts actually drafted by the Government.

3. President Andrzej Duda

The President is in breach of the Constitution and Acts of Parliament. The President interferes with the powers of the judiciary. The President fails to perform his constitutional role as a guardian of the Constitution.

- a) The President has taken on the role of the court in resolving a criminal case concerning the abuse of power by an official of the ruling party and by his associates.

The President granted them clemency even though they had not been sentenced in a legally valid judgment and had not asked for clemency. The President said: *"I have decided to relieve the judiciary of this matter in my own way, since one could always claim that the courts have followed political orders, and to end the problem, to resolve the dispute taking accountability as President."*

The act of clemency amounted to "discontinuation of proceedings". Discontinuation of judicial proceedings is the exclusive prerogative of the court, and the President has no such power. According to the Constitution and the Code of Criminal Procedure, the President may only waive or reduce the consequences of conviction. According to lawyers, the President has not only abused his powers and interfered with the independence of judges and courts but also infringed on the rights of individuals: the principle of presumed innocence of a person who has been convicted by a judgment which is not legally valid, and the right to a trial of persons convicted by a judgment which is not legally valid and of victims in the case (see, for instance, the opinion of the Committee of Legal Sciences of the Polish Academy of Sciences, which considers the President's act to be "in breach of the clemency procedure and an inadmissible interference of an executive authority with the powers of the judiciary").

The clemency by means of discontinuation of proceedings was granted to PiS politician Mariusz Kamiński: with a criminal record, he could not have been appointed Minister – Co-ordinator of Special Services in the PiS Government. He has been convicted by a judgment which is not legally valid for an abuse of power committed as Head of the Central Anti-Corruption Office (CBA) in the previous PiS Government (2005-2007) by instigating a police provocation against Andrzej Lepper, Deputy Prime Minister from a coalition party (who was unsuccessfully approached with a bribery proposal).

Despite controversy in the legal community, the District Court in Warsaw ruled the clemency effective on 30 March, 2016.

- b) In breach of an obligation under the Act on the Constitutional Tribunal and in breach of a ruling of the Constitutional Tribunal, the President has not sworn in three judges elected to the Constitutional Tribunal by the Sejm of the previous term (where the current opposition had a majority of votes), thus paralyzing the functioning of the Tribunal (see section 4).

- c) The President immediately signs into law Acts of Parliament which do not conform to the Constitution according to all legal opinions. The President does not exercise the constitutional power to have them first evaluated by the Constitutional Tribunal, or to veto them – the President’s veto could be rejected by the Sejm by a majority of 2/3 of votes, which would require an agreement with the opposition. The President has signed into law, among others, amendments of the Acts on the Constitutional Tribunal, the civil service, radio and television, the police and special services, the Public Prosecutor’s Office.

4. Dispute over the Tribunal

a) Election of judges

The Sejm of the previous term, where the former governing coalition had a majority of votes, elected five judges of the Constitutional Tribunal on 8 October 2015 (shortly before the end of the term of Parliament), including two judges to fill positions which did not open until December and should have been filled by the Sejm of the subsequent term. For this purpose, the governing coalition took advantage of passing a new Act on the Constitutional Tribunal, wherein it added a transitional provision authorising the Sejm of that term to elect all judges whose mandates expired in 2015. This has been criticized by some media, bar associations and non-governmental organizations.

The President and the Vice President of the Constitutional Tribunal, who were present during the work of the Sejm Committee on the draft, did not protest against the Sejm of the former term appropriating the right to fill the positions in the Tribunal which the Sejm of the subsequent term was competent to fill, for which they are now being reproached.

This event, specifically, the involvement of the President and Vice-President of the Constitutional Tribunal, has been leveraged to justify all of PiS’s actions against the Tribunal and serves to demonstrate that the Constitutional Tribunal is politically linked to the former ruling party and as such it should not assess the constitutionality of laws passed by the present parliament.

A complaint was filed with the Constitutional Tribunal regarding the legality of the election of five judges. The President of the Constitutional Tribunal set a prompt date for the review of the application on 3 December. Also former governing coalition filed a complaint with the Constitutional Tribunal to enable the Tribunal to evaluate the legality of the election of the judges.

At that point, PiS withdrew the complaint and changed its tactics: it decided to remove all five judges elected by the Sejm of the previous term by means of an amendment of the Act on the Constitutional Tribunal. On 13 November 2015, PiS tabled an amendment of the Act on the Constitutional Tribunal to the Sejm (PiS called it a “repair” law). The draft was designed to remove the transitional provisions of the Act under which the Sejm of the previous term had elected five judges to the Constitutional Tribunal. PiS believed that this would invalidate the election. The amendment gave the President a de facto option not to swear in the elected judges. If not sworn in within 30 days of the election, their election would be invalidated. The amendment was approved on 20 November and immediately signed into law by the President. Complaints against the amendment were filed with the Tribunal by the opposition, the Ombudsman, the First President of the Supreme Court, and the National Council of the Judiciary. The President of the Constitutional Court set the date of the hearing on 9 December.

On 25 November 2015, in anticipation of the Tribunal's cancellation of the amendment of 20 November invalidating the election of the five judges of the Constitutional Tribunal, PiS passed in the Sejm five resolutions invalidating the resolutions of the Sejm of the previous term electing the judges of the Constitutional Tribunal.

On 30 November, the Constitutional Tribunal issued an injunctive order, which required the Sejm to refrain from the election of judges to fill the positions "vacated" by the resolutions of 25 November until the Tribunal could evaluate the legality of the election of the judges by the Sejm of the previous term (the hearing was scheduled on December 3). Despite this injunctive order the Sejm elected five new judges of the Constitutional Tribunal on 2 December 2015 and the next day (before the court's hearing), the President swore in three of the five newly elected judges. PiS declared that they should adjudicate at the hearing to be held on that day. The judges arrived at the Tribunal one hour before the hearing, assisted by officers of the Government Security Bureau. They were allowed into the premises but not admitted to adjudicate.

On 3 December, the Constitutional Tribunal issued a ruling - it concluded that the legal basis of the election of three judges by the Sejm of the previous term was consistent with the Constitution but the election of two more judges, was unconstitutional. It also concluded that the President should have sworn in properly elected three judges immediately. The President refused on the grounds that this would add three extra judges of the Tribunal since all positions had already been filled.

The President refused to act on the ruling of the Constitutional Court because according to him that would mean the number of judges would increase from 15 to 18. Prime Minister Beata Szydło suspended the publication of the ruling in the Official Journal and challenged its legality. PiS insisted that the Tribunal should have issued the ruling in plenary. The ruling was given by a bench of five judges because the President, the Vice President and one of the judges recused themselves. The reason was that they had participated as experts in the parliamentary work on the Act on the Constitutional Tribunal to be reviewed in the case.

On 9 December, shortly before the hearing at the Tribunal, the President swore in two judges elected by the Sejm of the current term to fill the positions which had opened in December and had been illegally filled by the Sejm of the previous term. According to PiS, the two judges should have been immediately admitted to adjudicate.

On 9 December, the Tribunal gave a ruling on the "repair" amendment of the Act on the Constitutional Tribunal of 19 November. It concluded among others that the removal of the provision under which the Sejm of the previous term had elected five judges did not invalidate the election. It also reiterated that three judges had been elected legally by the Sejm of the previous term and two judges (filling the positions that opened during the new term of the Sejm) had been elected illegally. It also reiterated that the President was obliged to swear in the three legally elected judges.

The publication of the ruling was suspended. Eventually, under public pressure, the ruling of 3 December was published on 16 December and the ruling of 9 December on 18 December.

On 7 January 2016, the Tribunal issued a decision whereby it considers itself to have no jurisdiction to review the resolutions of the Sejm invalidating the election of judges by the Sejm of the previous term. Complaints against the resolutions had been filed by a group of opposition MPs. However, in its decision, the Tribunal recalls that its ruling of 3 December states that "The resolution of 25 November 2015 and the statements

(declarations) contained therein by definition do not affect the legal effect of the resolutions of the Sejm of the 7th term electing judges of the Tribunal whose mandate ended on 6 November, 2 and 8 December 2015 – they could not have any legal effect in this regard.” Therefore, the Tribunal concluded that the Sejm of the current term did not effectively invalidate the election by the Parliament of the previous term.

b) New rules for the Constitutional Tribunal

On 15 December, PiS tabled another amendment of the Act on the Constitutional Tribunal to the Sejm. It amended the procedures of the Tribunal in such a way as to paralyze its functioning. The Act was passed on 22 December, it was signed into law by the President on 28 December, and it took effect immediately. Complaints against the amendment have been filed with the Tribunal by the Ombudsman, the National Council of the Judiciary, the First President of the Supreme Court, and two groups of opposition MPs.

Complaints have been filed against the entire amendment, which provides for the following:

- the Constitutional Court shall adjudicate in cases in the order in which they are filed. Bearing in mind the number of pending and newly filed cases of varying weight and degree of complication, this will prevent the Constitutional Court from processing cases in reasonable time;
- the Constitutional Court shall mainly adjudicate in plenary, in the presence of at least 13 judges (formerly 9 judges);
- rulings shall be determined by a majority of 2/3 of votes;
- a hearing shall take place no earlier than 3 months or, if adjudicated in plenary, 6 months after notifying the parties (at present, 14 days);
- at the request of a party, cases shall be reviewed in a hearing (until now, the Tribunal could review simple cases in an ex parte sitting);
- the President and the Minister of Justice (and Prosecutor General, at the same time) may file for disciplinary action against a judge;
- the General Assembly of the Constitutional Tribunal shall no longer have the power to terminate the mandate and to dismiss a judge; the Sejm shall decide this at the request of the General Assembly;
- the new procedures of the Tribunal shall apply in cases which have not been notified to parties and assigned to a bench. However, in cases already assigned to a bench, the hearing shall take place not earlier than 45 days after notification is given to the parties.

The National Judiciary Council, the Supreme Court, the Ombudsman and two opposition political parties each filed an unconstitutionality claim to the Constitutional Tribunal with respect to this law. Amicus curie opinions stating the unconstitutionality of the law were filed by bar associations, the Stefan Batory Foundation and the Helsinki Foundation for Human Rights. Note that the Prosecutor General originally filed an opinion which questioned the constitutionality of the law but the opinion was cancelled before the hearing as the former Prosecutor General was replaced.

On March 9, 2016, the Constitutional Tribunal (case No. K47/15) has assessed the legality of the amendment not according to the amended procedure but according to the previous

rules. Most legal experts believe this is a right decision because no piece of legislation can be both the subject and tool of assessment at the same time. The decision is based on the Constitution. It provides that judges in the Constitutional Tribunal shall only be held liable exclusively under the Constitution.

The Tribunal ruled the amended Constitutional Tribunal Act of 22 December 2015 unconstitutional and enacted by Parliament in breach of the principle of appropriate legislation. The ruling repealed the amendment completely because the rules of procedure of the Sejm had been violated in the process and it also ruled that a dozen or so provisions of the law were unconstitutional. The Constitutional Tribunal stated that the assessment of conformity to the Constitution of the Act (regulating the course of proceedings before the Tribunal) should have a priority character. The Constitutional Tribunal may not act (and, in particular, adjudicate) on the basis of provisions that raise serious doubts in terms of their conformity to the Constitution.

Prime Minister Beata Szydło declined the publication of this judgment in the Official Journal (*Dziennik Ustaw*). She claims that the judgment was supposed to be made on the basis of the Parliament Act of 22 December 2015. Since the Tribunal acted directly on the Constitution and not the Parliament Act of 22 December, in her opinion it's not binding. The Government proclaimed it was not a ruling but a 'communication issued by a group of judges' and as such it will not be published in the Official Journal. It is also an official standpoint of the President Andrzej Duda.

Institutions, non-profits, bar associations and a judiciary appeals to Prime Minister that the judgment of the Constitutional Tribunal must be published and a situation when it is not published is a very serious violation of the Constitution.

European Commission for Democracy through Law (Venice Commission) stated in her report that the judgment 47/15 of 9 March 2016 should be published. 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.

Further, the Venice Commission found that:

- the provision of the law may paralyze the Constitutional Tribunal's capacity to make rulings, which compromises the rule of law and human rights and undermines the democratic foundations. It demolishes a mechanism of managing conflicts between domestic and EU legislation;
- the Government should publish and act upon rulings of the Constitutional Tribunal;
- the major condition precedent to solving the conflict is the enforcement of the Constitutional Court rulings (the President would have to swear in three legitimately elected judges and resolutions replacing them with three new judges would have to be rendered ineffective);
- the Constitutional Court has the right to rule on 22 December case, which paralysed its work, while ignoring the contested provisions and referring directly to the Constitution;

- in the long term, when the situation settles down, it is feasible that new legislation could be passed to make the constitutional court more effective and possibly modify the judge election process.

Related document, including legal opinions are available at:

<http://citizensobservatory.pl/ustawa/judgment-of-the-constitutional-tribunal-sygn-k-4715/>

c) State of play in the Constitutional Tribunal

Following the ruling of 9 March, the Constitutional Tribunal resumed its adjudication work. However, the Government has refused to honour its rulings stating they are not legitimate because they are made while ignoring the law of 22 December (which the Tribunal found unconstitutional). As stressed by Vice-President of the European Commission Frans Timmermans and Secretary of the Council of Europe Thorbjorn Jagland, there is a major risk of two concurrent legal orders in Poland. Public administration will ignore rulings of the Constitutional Tribunal while making their decisions as opposed to some or possibly all courts in the country.

The National Judiciary Council, a constitutional steward of the independence of judges and courts, has expressed a view that even though the ruling made by the Constitutional Court has not been published it is still generally applicable and nobody is exempted from compliance with it. In accordance with Article 190 Paragraph 1 of the Polish Constitution, Constitutional Tribunal rulings are generally applicable and final. Furthermore, the Minister of Justice and Prosecutor General has no power to audit rulings made by the Constitutional Court. Statements like these are a form of pressure and intimidation of the Constitutional Tribunal judges. They undermine the division of power inscribed in the Constitution as one of the foundations of a democratic rule of law.

On 5 April, one day before the first sitting of the Constitutional Tribunal after it ruled the Law of 22 December unconstitutional (the first sitting after the ruling of 9 March), the Prosecutor General, a mandatory participant of the procedure before the Tribunal, sent a letter to the Tribunal informing that that his representatives will not take part in any hearings before the Constitutional Court if such hearings are not conducted in compliance with the provisions of the Law of 22 December (ruled unconstitutional). 'No attempts by the Constitutional Tribunal to act outside the constitutional and statutory framework will ever be legitimized by the participation of the Prosecutor General. At best, they may be subject to the Prosecutor's General compliance audit', concluded the letter. These last words have been clearly interpreted by the judiciary community as a threat at judges in the Constitutional Tribunal. The National Judiciary Council (a steward of the independence of judges and courts) and associations of judges immediately published their statements in which they called upon the Government to publish and respect the ruling of 9 March.

The Government has informed it will not publish the ruling of the Constitution Tribunal of 6 April in the Journal of Laws. Prosecutor General, Zbigniew Ziobro, who is also a cabinet member as Minister of Justice, has instructed the Prosecution Service to investigate into an alleged abuse of power by the President of the Constitutional Tribunal. The alleged crime: the Tribunal made a ruling on 9 March on the amended Constitutional Tribunal legislation while not observing its very provisions that were claimed to be unconstitutional.

While speaking to Polish Radio Channel 3 on 23 March, Minister Zbigniew Ziobro suggested that judges who rule in compliance with the Constitutional Tribunal's judgements will risk

disciplinary sanctions (Justice Minister is authorised to request such disciplinary proceedings).

The Government announced it will not act upon the recommendations of the Venice Commission. Subsequently, it changed the tactic: Prime Minister, Beata Szydło sent an opinion to the Speaker of the Sejm in which she asks him to appoint a 'panel of experts' to deal with the matter. The Speaker appointed 15 arbitrarily selected lawyers. Most of them spoke in public about the Constitutional Tribunal crisis and supported the Government's position. The panel is expected to 'use' the Venice Commission's opinion and possibly other opinions to develop recommendations for the next steps regarding the Constitutional Tribunal. The panel held its first meeting on 31 March 2016. These recommendations will not be binding.

d) The Constitutional Tribunal under attack

Who is supposed to have ultimate power, the last word in a democratic state governed by the rule of law, the Parliament or non-parliamentary body? This is what the Constitutional Tribunal dispute is all about in Poland, said Professor Wojciech Seweryński, lawyer and Chair of the Senate Legislative Committee during the process of amending the Constitutional Tribunal Law. This message has often been found in statements of PiS politicians.

PiS politicians have openly deprecated the Constitutional Tribunal judges and its President, Andrzej Rzepliński. They have claimed the judges are political nominees who pursue party agendas in the Tribunal and are likely to malevolently disrupt the government. The Constitutional Tribunal has published its official reply to the allegations.

PiS leader, Jarosław Kaczyński, has regularly belittled the Constitutional Tribunal and its President. *Judges violate the rule and regulations that impose political neutrality on them. Judges make statements through their rulings and this also applies to the judges in the Constitutional Tribunal. These statements are scandalous as such and should be grounds for disciplinary proceedings (...)* We have to resolve this issue in the interest of Poles and and in the interest of Polish democracy, stated PiS leader, Jarosław Kaczyński on TV Republika.

And more:

Judge Rzepliński has committed further disciplinary offences. He would resign if he had a bit of honour. The Constitutional Tribunal must not consist of individuals who break the law and mock their mission. They mock the society and their sovereign, i.e. the government elected by Polish people. This is a diverse group with some outstanding people but still very random and of varied quality.

Finally, the Minister of Justice and Prosecutor General made threats in the said letter to the Constitutional Tribunal in which he made hints about possibly taking legal measures against judges for making rulings while ignoring the Law of 22 December.

5. Legislation that violates the Polish Constitution or the EU and Council of Europe laws and regulations

a) Amended Constitutional Tribunal Law (see section 4).

b) Amended Civil Service Law

- senior civil service positions will now be appointed rather than selected in a competitive process as before (appointment being the least protected form of employment as one may be dismissed at any time without the right to appeal in a labour court);
- the employment relationship with individuals currently in senior positions in the civil service has expired under law;
- the head of the civil service no longer has to prove at least five-year management experience in government administration or at least seven-year management experience in the public sector; he/she no longer has to meet condition of no political affiliation for five years prior to assuming a civil service post; individuals will be appointed/dismissed subject to known criteria or grounds.

c) Modifications in the Broadcasting Law

- management boards and supervisory boards in public media will be appointed/dismissed at discretion by the State Treasury Minister;
- no more competitive selection of supervisory board members (candidates were nominated by collegial bodies of universities and had to go through a competitive quality selection before);
- no more terms of office for governing bodies and mandatory statement of grounds for dismissal of management board/supervisory board members;
- current terms of office of members of existing governing bodies in public television and radio are terminated as of the effective date of the new legislation (no *vacatio legis*).

d) Prosecution Service Law

- The Prosecutor General (in short PG) and the Justice Minister have become one position;
- Each prosecutor will directly report to PG. PG will be authorised to instruct prosecutors to perform key pre-trial measures (open the case, make charges, arrest, indict and the content of indictment);
- PG can request that Police or other services put specific individuals under surveillance including *agent provocateur*, phone/internet usage checks, physical surveillance;
- PG can disclose case details to the public or any specific parties without the prior consent of the prosecutor leading the case;
- PG will appoint prosecutors at discretion. This includes management positions. There will be no quality criteria, competitive selection or specified terms of office;
- The National Prosecution Council, a steward of prosecutorial independence, is dissolved;
- The appellate prosecution service to be closed and all appellate prosecutors to be terminated. It will be replaced by the 'regional' prosecution service;
- The National Prosecution Service to open a specialized unit for prosecuting crimes committed by judges or prosecutors;
- The General Prosecution Service is to be closed and all its prosecutors will be terminated and/or may be transferred to any other position;
- PG has the right to second any prosecutor to a different prosecution service unit without his/her consent and for an essentially unlimited period of time (all it takes is an annually renewed administrative decision);
- Prosecutors will not be held liable under disciplinary proceedings for any abuse of their position if motivated by public interest;
- Military Prosecution Service is to be closed;

- All prosecutors in management positions are terminated on the day the new legislation enters into force, ie. 4 March 2016.

e) Amended Police and Special Force Law, aka 'surveillance law

The law was supposed to enforce the ruling of the Constitutional Tribunal of July 2014 which imposed constraints or controls on various forms of surveillance. In the opinion of all institutions and organisations that have reviewed the bill it only enforces a very small proportion of the ruling. As a matter of fact, it completely ignores the European Court of Justice rulings C-293/12 and C-594/12 Digital Rights Ireland, Seitlinger and others, which imposed considerable constraints on the right of enforcement agencies to collect, retrieve and use telecommunication data. The new legislation imposed by PiS has not introduced any of the constraints, which puts it in breach of the EU Charter of Fundamental Rights. So far, Poland has recorded over 2 million telecommunication data retrievals per year. In addition, the law allows essential uncontrolled retrieval of online data. Previously, police and other services could request such retrievals solely to support ongoing investigations of concrete individuals and were required to make written requests to Internet service providers. The limitations are gone and such data can now be retrieved electronically via a permanent link. Furthermore, it is not clear what data can legitimately be retrieved. No content of messages must be retrieved but it is not certain whether the authorization includes lists of downloaded files or visited websites. There have been concerns over possible instances of remote disc search by the police or other services without prior consent of a court or prosecution warrant.

The only safeguard includes six-month statistical reports submitted to a court which may but is not obligated to perform random checks of telephone or online data retrievals.