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Helsinki Foundation for Human Rights
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INPRIS - Institute for Law and Society (inpris.pl)
Center for Citizenship Education (*Centrum Edukacji Obywatelskiej*)
Institute of Public Affairs (*Instytut Spraw Publicznych*)
Panoptykon Foundation
Stefan Batory Foundation
Civil Development Forum (FOR Foundation)
Citizens Network Watchdog Poland

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The Helsinki Foundation for Human Rights (hereinafter: HFHR), the Polish Bar Council (*Naczelna Rada Adwokacka*), INPRIS – Institute for Law and Society, Center for Citizenship Education (*Centrum Edukacji Obywatelskiej*), Institute of Public Affairs (*Instytut Spraw Publicznych*), Panoptykon Foundation, Stefan Batory Foundation, Civil Development Forum (FOR Foundation) and Citizens Network Watchdog Poland would like to draw the attention of the Venice Commission to the recent disturbing legislative developments in relation to the Polish Constitutional Court and the resolutions adopted by the Polish Parliament concerning the Court's composition.

It is our strong belief that the recently adopted legislative changes violate the rule of law and the rule of proper legislation, and pose a huge threat to the protection of human rights in Poland. This is why we would hereby like to submit a motion to the Venice Commission to prepare an opinion on the recent legislative changes in Poland.

Facts

1. On 25 June 2015, the new Act on the Constitutional Court was adopted.¹ After the bill was signed by the President of Poland, it was promulgated in the Official Journal.² It entered into force on 30 August 2015. On the basis of an inter-temporal provision of the Act, the Lower Chamber of the Parliament (the Sejm) initiated elections of the new judges to the Constitutional Court. The new judges were supposed to replace the three judges whose tenures were to terminate on 6 November 2015, but also two other judges whose tenures were to terminate on 2 and 8 December 2015.³ At the same time, the Sejm's 7th term of office was to end at the turn of October and November 2015.⁴ On

¹ The legislative process on the draft was initiated in July 2013 when it was introduced to the Sejm by the President of Poland. It is important to mention that the initial draft was prepared by a group of experts consisting of the present and former judges of the Constitutional Court: http://trybunal.gov.pl/fileadmin/content/nie-tylko-dla-mediow/Kalendarium_prac_nad_ustawa_z_dnia_25_czerwca_2015_r.pdf. The draft was afterwards presented to the President of Poland who after analyses and changes to the draft transferred it to the Sejm as a statutory initiative.

² Official Journal of 2015, position no. 1064.

³ According to Article 194 of the Constitution, the Constitutional Court is composed of 15 judges elected by the Sejm.

⁴ According to Article 98.1 of the Constitution of Poland, the term of office of the Sejm and Senate shall begin on the

17 July 2015, the President of Poland decided that the parliamentary elections would be held on 25 October 2015.⁵ In the light of these circumstances, a fundamental question was raised as to **who should elect the judges – the Sejm of 7th or 8th term**. The above-mentioned inter-temporal provision in Article 137 of the Act on the Constitutional Court stated that in the case of judges whose terms of office expire in 2015, candidatures for new judges of the Constitutional Court shall be submitted within 30 days from the Act's entry into force.⁶

2. On 8 October 2015, the Sejm (during its last session in 7th term) **adopted five resolutions in which it elected five new judges of the Constitutional Court**. 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 2015.⁷ According to Article 21 of the Act on the Constitutional Court, before the assumption of office, a newly elected judge needs to take the oath before the President of Poland. Since the election of the new judges, **the President of Poland has not taken their oath**.⁸

3. Before the elections took place, the parliamentary opposition (the Law and Justice party) had filed a **motion to the Constitutional Court to verify whether the Act of 25 June 2015 on the Constitutional Court is compatible with the Constitution**, e.g. whether the Sejm of 7th term was entitled, under the Constitution, to elect all five judges. The motion was, however, dropped on 10 November 2015 after the elections had already been held and after the date of the hearing had already been announced.⁹ The same motion was then sent to the Constitutional Court by a different group of MPs.¹⁰ The hearing before the Constitutional Court will be held on 3 December 2015.

4. During the first session of the new Parliament (Sejm of 8th term), draft amendments to the Act on the Constitutional Court were proposed.¹¹ After a few corrections had been introduced into the draft,¹² it was referred for the first reading in the Legislative Commission (*Komisja Ustawodawcza*) of the Sejm.¹³ The draft act covered:

- introduction of 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);¹⁴
- establishment of a 30-day time-frame for the President to hear the oath of a person who was elected as a judge for the Constitutional Court;
- annulment of the inter-temporal provision which allowed the Sejm of 7th term to elect all

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.

⁵ Decision was published in the Official Journal on 22 July 2015 (Official Journal, position no. 1017).

⁶ Helsinki Foundation for Human Rights found in its legal opinion that such a solution might be found as incompatible with the Constitution. Opinion is available at: http://www.senat.gov.pl/gfx/senat/userfiles/_public/k8/komisje/2015/ku/materialy/915_hfpc.pdf.

⁷ Resolutions were published in the Official Journal „Monitor Polski”, positions no. 1038-1042.

⁸ In the press interview (of 11th November 2015), the President of Poland expressed his opinion that the elections of the constitutional judges “violated democratic rules”.

⁹ Case no. 29/15.

¹⁰ Motion of 17th November 2015, case no. K 34/15.

¹¹ Sejm draft (*druk sejmowy*) no. 6.

¹² Sejm draft no. 12.

¹³ According to Article 37.1 of the Rules of the Sejm, the first reading of drafts on structure and jurisdiction of public authorities shall be held at the plenary session.

¹⁴ According to Article 12.1 of Law of 25th June 2015 on Constitutional Court (before the amendments), the President of the Court holds his office until the end of his/her tenure.

five new judges of the Constitutional Court;

- introduction of a similar provision which established a 7-day time-frame for filing new motions with candidates for offices of judges of Constitutional Court.¹⁵

The draft act amending the Act on the Constitutional Court was adopted within 3 days. The first reading was held on 18 November 2015, while the second and the third – on 19 November 2015. During the legislative proceedings in the Sejm, no opinion of an expert in the constitutional law was heard, even though such a suggestion was formed by the Legislative Bureau of the Sejm. On the same day (19 November 2015), the draft act was transferred to the Senate, where two commissions discussed it in the late evening hours. The commissions did not propose any amendments, even though amendments were suggested by the Legislative Bureau of the Senate.¹⁶ Afterwards, late at night, the draft act was discussed during the plenary session of the Senate and the next day, it was adopted without any amendments.¹⁷ On same day, after few hours, the President of Poland signed the amending act¹⁸ and it was promulgated.¹⁹ It will enter into force after 14 days of its promulgation (on 5 December 2015).

5. On 23 November 2015, a group of MPs filed a **complaint to the Constitutional Court**, arguing that the Act of 19 November 2015 violated the Constitution.²⁰ The same day, the Human Rights Defender also filed his motion to the Constitutional Court.²¹ On 24 November 2015, the motion to the Constitutional Court was filed by the National Council of the Judiciary.²² All the motions were registered under one case number and the hearing will be held on 9 December 2015.²³

6. On 25 November 2015, a group of MPs who constitute a parliamentary majority submitted five drafts of resolutions²⁴ containing “the declaration of the lack of legal force” of the resolutions adopted on 8 October 2015 by the Sejm of 7th term, namely the resolutions on the election of the five new judges of the Constitutional Court. Already on 25 November 2015, the Sejm held the first and second reading of the submitted draft resolutions.²⁵ The justification for the resolutions stated that the previous election procedure for Constitutional Court judges was incorrect, and the resolutions aim at its validation. 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.”²⁶ 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.

¹⁵ Article 137a of Act on Constitutional Court.

¹⁶ Senate draft no. 18. The opinion of the legislators of the Senate was not prepared in written form, since the bill was adopted by the Sejm at 5:13 p.m. and the Senate’s commission started their meeting at 6:15 p.m.

¹⁷ At 9:43 a.m.

¹⁸ The first press information that the bill was signed was published around 2 p.m.

¹⁹ Official Journal, position no. 1928.

²⁰ Case no. K 35/15.

²¹ Case no. 37/15.

²² Case no. 38/15.

²³ Decision of the President of the Court of 24th November 2015.

²⁴ Sejm drafts no. 42-46.

²⁵ Resolutions were adopted at 23.53 p.m.

²⁶ The current judges were elected between 2007 and 2015 by the Parliament in which the majority of seats belonged to the Civic Platform party.

7. After the resolutions were enacted,²⁷ the amendments to the Rules of the Sejm were introduced.²⁸ They allow the Speaker of the Sejm to establish a time-frame for proposing candidates for Constitutional Court judges in case “other circumstances” for such elections occur.²⁹

This highly complicated state of facts gave rise to a set of fundamental constitutional questions.

The starting point relates to the question of **who (the Sejm of 7th or 8th term) shall appoint the judges elected to replace the judges whose tenure ends in 2015** (respectively in November and December). Three seats became vacant on 6 November 2015 – after the parliamentary elections took place, but before the 7th term of the Sejm ended. Two seats will be vacant on 2 and 8 December 2015. The fundamental nature of the question who shall conduct the procedure of electing the new judges of the Constitutional Court should have already been answered by the Constitutional Court. The motion to verify whether Article 137 of the Act of 25th June 2015 on the Constitutional Court is compatible with the Constitution was filed by the MPs of the Law and Justice party on 23 October 2015 and dropped 2 weeks later after Law and Justice won the parliamentary elections.

In parallel, the President's failure to hear the oath of three judges whose tenure should have started on 7 November 2015 was based on the argument that the elections of the judges held on 8 October 2015 gave rise to a set of constitutional doubts. The President, however, did not initiate any proceedings before the Constitutional Court to verify those doubts. The lack of a clear answer whether Article 137 is compatible with the Constitution resulted in a number of actions undertaken by the Sejm without an authoritative ruling on this issue by the Constitutional Court.³⁰ **Thus, it is doubtful whether the President was entitled to refuse to hear the oath of the three judges elected on 8 October 2015 without constitutional verification.**³¹ The lack of any attempts to initiate such a constitutional verification process could justify an opinion that the President may well have committed a constitutional offence.³²

In a similar case concerning Slovakia, where it is the President of the Republic of Slovakia who appoints judges of the Constitutional Court, the Venice Commission expressed an opinion that “the newly elected President has no power under the Constitution to refuse to accept the submission of the oath by the judges appointed by the outgoing President, nor does he have the power to appoint three other persons from the list of candidates submitted by the National Council.”³³

²⁷ They were published in Monitor Polski, positions no. 1131-1135.

²⁸ Resolution of 25th November 2015 amending the Rules of the Sejm. Published in the Official Journal, position no. 1136.

²⁹ 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).

³⁰ Hearing of the Court to resolve this issue will be held on 3rd December 2015. There is an ongoing discussion whether there is a sufficient number of judges of Constitutional Court to rule the case.

³¹ The Venice Commission in its Opinion on the amendments to the law on the Constitutional Court of Armenia CDL-AD(2006)017 stated that “The decision on a violation of the procedure of appointing a judge to the Constitutional Court (...) should to be taken by the Court itself and not an ordinary court (without the participation of the judge concerned). In general, all grounds for termination of membership (...) should be subject to at least a formal decision or declaration of the Constitutional Court itself.” (§ 20)

³² B. Marciniak, *Poland: constitutional crisis or coup d'etat?*, available at: <http://constitutional-change.com/poland-constitutional-crisis-or-coup-detat/>.

³³ Opinion on the procedure for appointing judges to the Constitutional Court in times of the Presidential transition in the Slovak Republic, adopted by the Venice Commission at its 99th Plenary Session (Venice, 13-14 June 2014),

In the light of the whole Act on the Constitutional Court, a situation when the executive branch can *de facto* veto a decision of the Sejm without any direct and precise legal basis results in a danger to the Court's stability, since the system does not provide safeguards against vacant positions.³⁴

The President's failure to hear the oath of the newly elected judges enabled the Sejm to take legislative steps to undermine the legitimacy and efficiency of the elections of judges conducted in October 2015. Within 3 days (between 18 and 20 November 2015), the amendment to the Act on the Constitutional Court was adopted and signed by the President.³⁵ It repeals Article 137 of Act on the Constitutional Court without determining whether this change affects the resolutions adopted by the Sejm on 8 October 2015. **It is difficult to find any legal grounds to assume that repealing Article 137 automatically quashed the resolutions of 8 October 2015 appointing new judges of the Constitutional Court.** Also, the justification of the draft lacks any such arguments. The suggestions presented by the Legislative Bureau of the Sejm that a detailed legal opinion in this respect shall be ordered were ignored. It is highly controversial **whether the Sejm of 8th term is entitled to disregard – without any prior constitutional review by the Constitutional Court – judicial elections conducted by the previous Parliament.**

From the perspective of the civil society, **the fact that the act amending the foundations of the system of independent judiciary is adopted within 3 days, without any public discussion, undermines the basic principles of a democratic state, in particular the rule of law.**³⁶

Additionally, the Act adopted on 19 November 2015 results in a dismissal of the President and Vice-president of the Constitutional Court after 3 months from its entrance into force.³⁷ It is a consequence of the introduction of fixed terms (3 years) for these offices³⁸ with a possibility of re-appointment. In the light of the established European standards in this respect,³⁹ it raises doubts

CDL-AD(2014)015-e.

³⁴ “The Venice Commission has repeatedly stressed the importance of providing for **anti-deadlock mechanisms** in order to ensure the functioning of the state institutions” CDL-AD(2013)028 Opinion on the draft amendments to three constitutional provisions relating to the Constitutional Court, the Supreme State Prosecutor and the Judicial Council of Montenegro, § 5-8; “In some countries, **vacant seats at the Constitutional Court were not filled within time for political reasons.** In one case this led to the Court being unable sit due to the lack of a quorum. In order to guarantee the uninterrupted functioning of the Constitutional Court the members of the court should continue in their functions until their successor is appointed.” CDL-AD(2006)017 Opinion on the amendments to the law on the Constitutional Court of Armenia, § 22 and 31(2).

³⁵ The Helsinki Foundation for Human Rights presented a statement arguing that the act is incompatible with the Constitution. Opinion is available at:

³⁶ „The changing of the composition of a Constitutional Court and the procedure for appointing judges to the Constitutional Court are among the most important and sensitive questions of constitutional adjudication and for the preservation of a credible system of the rule of constitutional law” (CDL-AD(2004)043 Opinion on the Proposal to Amend the Constitution of the Republic of Moldova, §18-19). A. Śledzińska-Simon, *Midnight Judges: Poland's Constitutional Tribunal Caught Between Political Fronts*, available at: <http://www.verfassungsblog.de/midnight-judges-polands-constitutional-tribunal-caught-between-political-fronts/#.VloHo3rU48q>.

³⁷ Article 2 of the Act of 19th November 2015 amending Act on Constitutional Court.

³⁸ Article 12.1 of the amended Act on the Constitutional Court.

³⁹ “Although the principle of irremovability of judges with regard to their adjudicating functions is upheld, given the fact that the chairpersons will keep their position as an ordinary judge after the termination of term of office as court chairpersons, their independence could still be endangered by the possibility of re-appointment. The possibility and hope to be reappointed might influence the attitude of a judge towards the executive in such a way that his/her independence and even his/her integrity could be jeopardised. Excluding any possibility of reappointment is also a guarantee against politicization. On the other hand a short-term appointment can undermine courts presidents' possibilities to realise effective leadership and to ensure a solid and strong courts' organisation.”

whether such a solution is compatible with protection of acquired rights and with the principle of judicial independence.⁴⁰

Three motions by a group of MPs, the Human Rights Defender and the National Council of the Judiciary were filed to Constitutional Court arguing that the Act of 19 November 2015 violates the basic constitutional rules: independence of the judiciary and the separation of powers. Without waiting for the judgement of the Constitutional Court and without waiting for the Act of 19 November 2015 to enter into force, the Sejm adopted – without any legal basis – five resolutions aimed at “invalidating” the resolutions adopted on 8 October 2015 by the Sejm of 7th term.

Previously, the Venice Commission “strongly recommended” with respect to the Amendments to the Constitution of Ukraine that a decision on dismissing the constitutional judges “be entrusted to the Constitutional Court itself. Such a provision would strongly contribute to guaranteeing the independence of the judges.”⁴¹ Additionally, “a dismissal of a judge should always be subject to a fair procedure and involve a decision of the High Council of the Judiciary.”⁴² Whereas in the case of the resolutions of 25 November 2015, the **decisions of the Sejm were based on an extra-statutory cause to terminate the mandate of the judges of the Constitutional Court before their term-in-office has expired without any judicial review of such decisions.**

In addition, the procedure proposed by the amendments to the Rules of the Sejm on 26 November 2015 is contrary to the proceedings prescribed by the statute – even by the Act adopted on 19 November 2015 which enters into force on 5 December 2015. **It does not allow for a transparent and well-discussed procedure of electing the judges of the Constitutional Court.** Press information indicate that the deadline to submit candidatures for judges of the Constitutional Court falls on 1 December 2015, which raises a reasonable suspicion that the “elections” based on the “invalidating” resolutions of 25 November 2015 and amendments to the Rules of the Sejm will be held on 2 or 3 December 2015, when the plenary session of the Sejm will take place. **Such a procedure prevents any verification of the candidates' profiles and background. Bearing in mind that the elections of judges for the Constitutional Court are one of the most important in a democratic state, such a procedure based on the Rules of the Sejm, but contradictory to the Act on the Constitutional Court – and illegal in their nature, since the judges of the Constitutional Court had already been elected in October 2015 – does not constitute transparent proceedings required by the rule of law.**⁴³

Unfortunately, the ongoing legislative process is being reinforced by a strong political discussion

CDL(2014)027-e Draft Opinion on the Draft Law on introducing Amendments and Addenda to the Judicial Code of the Republic of Armenia; § 30.

⁴⁰ “The fact that the Constitutional Court’s president is elected by a political actor and not the Court itself is a widely accepted phenomenon. Nevertheless, the election of the President by the Court itself is, of course, preferable from the perspective of the independence of the court.” CDL-AD(2008)029 Opinion on the Draft Laws amending and supplementing (1) the Law on Constitutional Proceedings and (2) the Law on the Constitutional Court of Kyrgyzstan, § 8.

⁴¹ CDL-AD(2005)015 Opinion on the amendments to the Constitution of Ukraine, § 46.

⁴² CDL-AD(2009)014 Opinion on the Law on the High Constitutional Court of the Palestinian National Authority, § 19.

⁴³ As the Venice Commission found in its opinion on the Draft Law on the Constitutional Court of Montenegro (CDL-AD(2008)030) “the procedure before the election has to be as transparent as possible in order to ensure a high professional level of the judges” (§ 19).

suggesting that the Constitutional Court is politically biased, since its members were elected and appointed by the Sejm of 6th and 7th term, which had a different political majority. It clearly aims at undermining the society's trust in the Court – especially in the light of the hearings before the Constitutional Court that will be held on 3 and 9 December 2015. The situation is even more complicated in the light of an increasing number of vacant seats in the Constitutional Court.

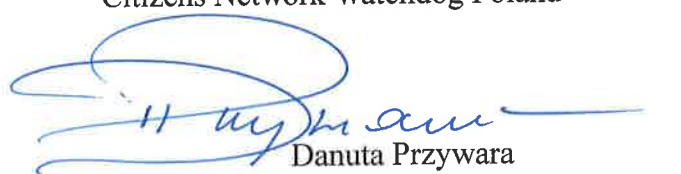
Conclusion

The Helsinki Foundation for Human Rights, the Polish Bar Council (*Naczelna Rada Adwokacka*), INPRIS – Institute of Law and Society, Center for Citizenship Education (*Centrum Edukacji Obywatelskiej*), Institute of Public Affairs (*Instytut Spraw Publicznych*), Panoptykon Foundation, Stefan Batory Foundation, Civil Development Forum (FOR Foundation) and Citizens Network Watchdog Poland would like to ask that the Venice Commission, at its own initiative, carry out research on the recent legislative decisions in relation to the Polish Constitutional Court. It is highly probable that the ongoing actions by the current Parliament were motivated by the introduction of Article 137 into the Act of 25 June 2015 on the Constitutional Court, which was carried out by the Sejm of 7th term. Unfortunately, the legal (and political) steps to deal with this potentially unconstitutional provision also violated basic constitutional principles, especially that of the rule of law.⁴⁴

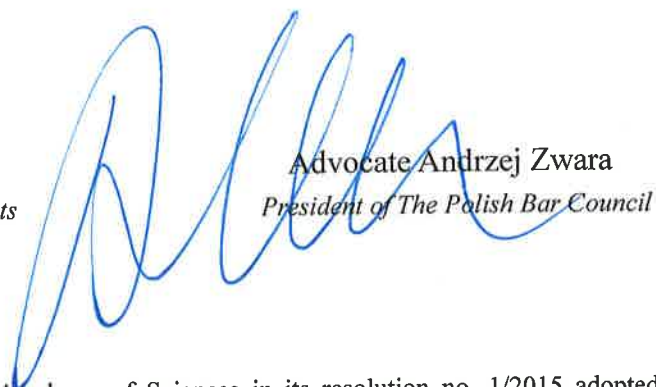
Taking into consideration all the recent developments and a disturbing prognosis of the problem's further escalation, we would like to use this opportunity to kindly ask the members of the Venice Commission to consider issuing an opinion on the recent changes in the functioning of the Constitutional Court.

On behalf of

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⁴⁴ Committee for Legal Sciences of the Polish Academy of Sciences in its resolution no. 1/2015 adopted on 26 November 2015 stated that above-described developments “are instances violating the principle of separation of powers, the principle of the independence of the judiciary, and the principle of judicial autonomy”. Resolution is available at: http://www.knp.pan.pl/images/stories/KNP_PAN/KNP_Resolution_ang.