THE DRAFT OF A NEW LAW ON THE CONSTITUTIONAL TRIBUNAL

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On 11 July 2013, a new draft law on the Constitutional Tribunal was submitted to the Parliament by the President of the Polish Republic[1]. The first reading of the draft took place on 29 August 2013, then it was sent to further works in the parliamentary Committee on Justice and Human Rights and the parliamentary Legislative Committee[2].

Keywords: Polish Constitution, parliamentary Committee on Justice and Human Right, parliamentary Legislative Committee.

The draft is a comprehensive proposal of a new act. So it is not just another amendment to the law currently in force, which was passed in 1997[3]. The new act is legislatively justified by the nature and the extent of new or significantly modified solutions proposed in the draft, as well as their multiplicity. Their effective implementation requires a new conceptually coherent and structurally clear act. The existing law has been amended eight times since its adoption in 1997. It is also worth mentioning that the Law of 1 August 1997 was enacted in particular circumstances, almost directly before the entry into force of the new Polish Constitution. It was mainly due to the need of urgent implementation of new constitutional rules concerning the structure and jurisdiction of the Constitutional Tribunal. The new elements of the regulation were largely "added" to the pre-existing law, which negatively affected the consistency and completeness of this legislative act. The conditions of good legislation, also resulting from the rules on legislative techniques, speak fully for the adoption of the new law.

There are two characteristic features when it comes to the genesis of the draft of the new law. Firstly, the draft was *de facto* prepared by the judges of the Constitutional Tribunal. The study works on new solutions, which would especially improve the activities of the Tribunal from the perspective of its long-time experience, were undertaken under the direction of the President of the Constitutional Tribunal in 2011[4]. The final text of the draft was handed over in March 2013 to the President of the Republic of Poland who has the right of legislative initiative and who *de facto* holds legislative custody over acts concerning judiciary power.

[1] Sejm Paper No 1590.
[2] Stenographic record of the 47th sitting of the Sejm that took place on 29th August 2013, p. 272-294 (point 22 of the sitting).
[3] The Act on Constitutional Tribunal of 1 August 1997 (Dz. U. No. 102, item 643, with later amendments). The act repealed the previous law on the Constitutional Tribunal of 29 April 1985, which had been adopted under the socialist regime before the democratic transformation. For this first act the most characteristic feature was the limitation of the Constitutional Tribunal's role by the rule that Tribunal's decisions on the unconstitutionality of legal acts were not final and were subject to parliamentary review. This limitation was abolished by the new Constitution of the Republic of Poland of 1997.
[4] In the existing case law of the Constitutional Tribunal the Polish *acquis constitutionnel* includes about 1500 decisions.

However, it should be noted that there were also some negative opinions about such mode of preparing the draft. It was pointed out that the judges of the Constitutional Tribunal "had written the draft for themselves" and it would be possible that if the constitutionality of the adopted act was questioned in future the same judges would examine the compatibility of the act with the Constitution - so they would be the "judges in their own case". Secondly, before bringing the bill to the Sejm, the Polish President held preliminary consultations with all parliamentary clubs in order to obtain their support for the draft in the parliamentary legislative proceedings. Despite various critical opinions, none of the parliamentary clubs submitted a proposal to reject the bill in the first reading in the genuine parliamentary debate.

According to the applicant's intentions, the need for the preparation and adoption of the new Law on the Constitutional Tribunal results from a number of substantive reasons[5]. Firstly, the position of the authority - a constitutional court protecting the political and legal system of the Polish Republic - is clearly defined. Secondly, there is the need for the statutory regulation of the procedures concerning hearing cases, which would be adequate for the process of the constitutional review and appropriate only for the Constitutional Tribunal. Thirdly, there is the need to create appropriate organizational conditions for serving efficient adjudication. Fourthly, there is the need to clarify the requirements for a candidate for the position of the judge of the Constitutional Tribunal and to define a transparent procedure for selecting a group of people, out of which eligible entities would be able to nominate candidates. Fifthly, there is the need for a more detailed regulation of the status of the judge of the Constitutional Tribunal. Sixthly, there is the need to rationalize the mode of adjudication before the Constitutional Tribunal, which can take place at hearings or sittings in a camera, due to the diversity of the legal and constitutional complexity of cases and the scope and methods of parties' argumentation. Seventhly, there is the need to take into account the typology of Constitutional Tribunal's decisions and their consequences, which is determined by the extensive practice of adjudication and the views of the doctrine. Eighthly, there is the need for regulation of issues related to the conditions of the operation of the Constitutional Tribunal and the organization of its work, which would be adequate to the current professional and technical demands.

The draft is quite comprehensive as it includes 138 articles, which raises doubts about its excessive casuistry and triggers the need to transfer statutory legal regulations of certain matters to the Rules of the Constitutional Tribunal[6]. That is why, the author of the article limits himself only to signaling major solutions proposed in the draft.

The art. 1 of the bill draws attention to the cumulative definition of the Constitutional Tribunal's constitutional role as the authority of the judiciary power "guarding the constitutional order of the Republic of Poland". This formula refers to art. 10 and art. 188 of the Constitution, but also takes into account the role of the Tribunal resulting from its significant case law concerning European affairs. In its decisions the Tribunal confirms in fact that the principle of the primacy of the Constitution of the Republic of Poland in the Polish legal order - as defined in art. 8 of the Constitution - also applies to the application of EU law in the Polish legal system. According to the Tribunal, even the constitutional authority to transfer the competencies of public authorities to EU in "certain cases" (art. 90 of the Constitution) is limited. The Tribunal confirms the superior

[5] The explanation to the draft of the new Law on the Constitutional Tribunal, p. 1-2.
[6] Compare, for example, the speech of the MP Wojciech Szarama (Stenographic record…, p. 227).

position of the Constitution, which is an expression of the sovereign will of the nation, in relation to the whole legal order in the area of state sovereignty. However, it does not affect the "core" competencies determining - according to the preamble to the Constitution - a sovereign and democratic deciding about the fate of the Republic of Poland. In the parliamentary debate concerning the proposed formula some doubts were raised[7], as according to art. 126 par. 2 of the Constitution, the President of the Republic of Poland shall ensure observance of the Constitution. In response to this question, the President of the Tribunal pointed out a clear difference between the political position of the President and the Tribunal, which serves as a constitutional safeguard in the form appropriate for the authority of judicial power acting only on request, and never *ex officio*. On the other hand, the President of the Republic of Poland is in his function an "active" constitutional entity[8].

The status of a judge of the Constitutional Tribunal is regulated by the Constitution only in a very basic range, and the so far statutory regulation is also fragmented in this respect and refers broadly to the appropriate application of the Law on the Supreme Court. The previous case law has highlighted, however, that the office of judge of the Constitutional Tribunal has clearly distinct features which should be regulated separately and the provisions of the Law on the Supreme Court are applied only to a minor extent – concerning the rights of employees. The draft quite broadly and specifically regulates and clarifies the status of a judge of the Tribunal, including the rights of judges who have retired. In the latter case it is suggested, under the influence of past experience, that a retired judge of the Tribunal could be called, elected or appointed to the position in state authorities (but only those which involve non-membership in political parties) or in the bodies of international or supranational organizations operating under agreements ratified by the Republic of Poland (art. 45 of the draft). In art. 18 it is proposed, among others, to introduce the statutory minimum age (40 years) for a candidate to the Tribunal[9]. Another proposal to introduce a four year-long "grace period" for parliamentarians, proposed in art. 18 par. 3 of the draft, turned out to be very controversial in the parliamentary debate[10]. Due to the intentions of the draft supporters, this solution would create for a future judge of the Constitutional Tribunal a time distance from his previous work as a legislator, the results of which are often subject to the review made by the Tribunal. It can be assumed that to some extent it would be a solution related to the "de-politicization" of the composition of the Tribunal. However, in the course of the parliamentary debate, in many speeches[11] the proposal was simply referred to as "anti-parliamentarian" and unconstitutional as introducing the discriminatory diversity of candidates, only deceptively solving the problem of politicization of the composition of the Tribunal and - taking into account the possibility of excluding a judge from considering a particular case - unnecessary. However, it should be noted that in the opinion of the National Judicial Council on the draft law, which was submitted to the Sejm, there was not only the approval of the

[7] *Ibidem*, as well as the speech of the MP Andrzej Dera (Stenographic record…, p. 278).
[8] Stenographic record…, p. 290.
[9] The age census was questioned as unconstitutional in the parliamentary debate (Stenographic record…, p. 277), but on the other hand, there were also proposals to introduce the maximum age of the candidates to the Constitutional Tribunal (Stenographic record…, p. 285 and p. 293).
[10] According to art. 18 p. 3, persons who are deputies to the Sejm, senators or deputies to the European Parliament can run for the position of the judge of the Constitutional Tribunal if on the election day at least four years have passed since the date of the expiry of their mandate.
[11] Stenographic record…, p. 277, 279, 282, 284, 288.

proposal, but also a suggestion to extend the "grace period" to former members of the government[12].

A very large or perhaps even the biggest interest concerning presidential draft, not only in the parliamentary debate but also in the media, was related to the mode of the selection of judges of the Tribunal, especially the "socialization" of the process and the ability to assess a candidate. This problem has indeed been present for years in media and political debates, because of the clear weaknesses of current practice and highly controversial cases. The above mentioned issues are regulated in art. 19-25 of the draft.

In accordance with art. 19, not later than six months before the expiration of the term of office of a judge of the Tribunal, the Marshal of the Sejm (in the form of the notice published in the Official Gazette "Monitor Polski") shall inform about the "opportunity to nominate persons from whom the candidates for judges of the Tribunal will be chosen". Such persons could be nominated within two months from the announcement of the above mentioned notice. It would be so a specific designation of a "potential" candidate. In accordance with art. 20 of the draft, the "right to nominate" these persons would be assigned to 1) a group of at least 15 deputies, 2) the General Assembly of Judges of the Supreme Court, 3) the General Assembly of Judges of the Supreme Administrative Court, 4) the National Council of Judiciary, 5) the National Council of Prosecution, 6) the competent national authorities of professional lawyers – attorneys, legal councilors and notaries, 7) the councils of university law faculties which are authorized to confer the degree of habilitated doctor in legal science, the Scientific Council of the Institute of Legal Science and the Committee of Legal Sciences of the Polish Academy of Sciences as well as the Legal Committee of the Polish Academy of Knowledge (art. 1). Authorized entities can nominate one person for one position of a judge of the Constitutional Tribunal, attaching the explanation and the written consent of the person proposed (art. 2). According to the intensions of the draft's proponents, such range of entities represents a wide representation of legal professions and also guarantees the comprehensive set of official candidates with high qualifications.

In the next stage of the electoral process – not later than three months before the expiration of the term of office of a judge of the Tribunal – the Marshal of the Sejm would inform deputies and the public about the "list of persons, among whom candidates for judges of the Tribunal are to be chosen" (art. 22 par. 1), which clearly indicates that anybody who is not on the list can become a candidate for a judge of the Constitutional Tribunal.

The right to nominate candidates for judges of the Tribunal from persons on the list would be assigned to (in the sense of competence - as in the currently existing legislation) the Presidium of the Sejm and a group of at least 50 deputies. They should make a choice no later than two months before the expiry of the term of office of a judge (art. 23). Such solution provides nearly two months of detailed analysis (in the Sejm – its internal bodies and political environment) and public evaluation of candidates, including their hearing. The bill also contains relevant provisions that would be applied in the event of a vote in which a judge is not chosen and in the event of expiry of the mandate of a judge before the end of his term. According to the authors of the bill, the proposed procedure of "the designation of the circle of candidates" for the position of a judge of the Tribunal socialize the process of selection persons with outstanding legal knowledge and

[12] Letter Nr WOK-020-98/13 of 20 September 2013 to the Deputy Chief of the Chancellery of the Sejm, signed by the Vice-President of the National Council of the Judiciary.

ensure that deputies and the Sejm have an adequate knowledge of the achievements and personal qualities of candidates for one of the most important public offices in a modern democratic state[13].

This solution, which in media has been proposed as a model for several years, raised significant doubts and reservations in the parliamentary debate, concerning not only specific issues, but also the idea itself. It was pointed out that the current mode has rarely led to the situation that the number of candidates for the position of a judge of the Tribunal was significantly greater than the number of vacancies. What is more, the new proposal could lead to a very awkward situation, in which several candidates are designated for one place, which would put deputies (the Sejm) in opposition to recognized scientific and legal practice environments[14].

Attention should also be paid to the inconsistency of the proposed model, which – on one hand - allows certain entities to "designate" a potential candidate, but - on the other hand - still provide that final candidates for judges of the Tribunal can be chosen only by the members of Parliament.

A potential conflict is exacerbated on the background of the proposal that the right of designation, among others, belongs to the group of fifteen deputies and then the group of fifty deputies has the right to select a candidate from the list of designated persons. The candidates designated by deputies seem to have a greater chance of being treated preferentially later on. This leads to the conclusion that either the current system should be kept or the Sejm should vote over all persons designated in the "socialized " process as candidates to the Constitutional Tribunal without the additional step of selection[15]. During the debate, the Undersecretary of State in the Ministry of Justice[16] stated that the objective can be achieved much more effectively than by "socialized" designation procedure by increasing the transparency of the process of selecting particular candidates, for example by their active participation in public debates. This would force political parties to designate serious candidates. When it comes to specific issues - if the proposal is maintained, the right to designate candidates should also be granted to the Senate of the Republic of Poland[17].

The draft of the new law on the Constitutional Tribunal provides a series of solutions concerning the improvement of the proceedings before the Tribunal, which are based on the Tribunal's experience, as well as the experience of other constitutional and international courts. According to the estimates made by the Constitutional Tribunal, they would help to shorten the average time of dealing with a case about few months (now it takes 19 months on average)[18].

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[13] The explanation to the draft of the Law on the Constitutional Tribunal, p. 9.
[14] Stenographic record…, p. 277-278.
[15] *Ibidem*, p. 279.
[16] *Ibidem*, p. 287-288, provided that this is not the official statement of the Council of Ministers or the Minister of Justice, but only voice in the debate because of respect for the President as the applicant of the bill.
[17] *Ibidem*, p. 289.
[18] The explanation to the draft of the Law on the Constitutional Tribunal, p. 19; It is worth mentioning that in 1998, so one year after the entry into force of the current law on the Constitutional Tribunal, about 200 cases were introduced to the Tribunal, while now there are about 500 cases each year (from the speech of the representative of the applicant – Under-Secretary of State in the Chancellery of the President of the Republic of Poland, Stenographic record…, p. 273). The shortest average time of considering a case in the history of the Tribunal (14 months) was in the early years of XXI century (from the speech of the President of the Constitutional Tribunal, Stenographic record…, p. 290).

A particular attention is drawn to the proposal which provides that the Tribunal should make the preliminary control of constitutional complaints and applications submitted by entities specifically authorized (art.191 par. 3-5 of the Constitution) in benches of three judges (art. 47 par. 1 of the draft). According to the current course of proceedings, a preliminary control, which involves the examination if a constitutional complaint (or an application submitted by an entity specifically authorized) meets the requirements set out in the law is done by a single judge of the Tribunal. In case of Tribunal's refusal to continue the proceedings, the complaint against such decision is examined by the bench of three judges. According to the authors of the bill[19], the proposal to consider such matters only once (without the admissibility of the complaint against refusal), but by the bench of three judges stems from the analysis of the practice and case-law of the Tribunal in this respect. In practice, about 15 % of the complaints and applications presented by entities with special authorization is annually referred to the substantive recognition of the Tribunal after the initial control. This reflects the Tribunal's detailed control whether a complaint or an application meets the statutory requirements or not[20]. The two "stages" significantly lengthen the time, and the effectiveness of this mode is highly disproportionate. The proposal presented in the draft provides versatile examination whether the statutory requirements are met as well as balanced assessment of the possibilities to continue proceedings and substantially consider the complaint (or the application) by the Tribunal[21].

In the category of matters aimed to facilitate the work of the Constitutional Tribunal there are also proposals to regulate objective criteria for selecting the composition of benches by the President of the Tribunal as well as to grant to the President of the Tribunal the right of determining the date of the first meeting of a bench, depending on the assessment of the subject, the nature and the importance of a particular case (art. 48). The novelty of the draft is also art. 51, which explicitly formulate the principle of Tribunal's limitation by the scope of a constitutional complaint, a legal question or an application. The subject of the complaint may concern a "legislative activity" (which means the competence to issue a legislative act and the procedure of its adoption) or the "content" of a normative act. The provision of art. 83 of the draft expands existing possibility to "join the case" by the Commissioner for Citizens' Rights to all cases of the posterior review of norms (now it is possible only in case of constitutional complaints).

Art. 67 of the draft extends the requirement of the mandatory representation of an applicant. An attorney (or a legal counsel) would not only be required to prepare and submit a constitutional complaint, as it is now, but also to represent the applicant in all proceedings before the Tribunal.

The draft also includes provisions concerning temporary decisions that may be issued by the Tribunal in connection with the recognition of constitutional complaints, in order to suspend the proceedings or suspend the enforcement of a judgment related to the complaint (art. 69). It is proposed that if the Tribunal - after initial review of a complaint –

[19] The explanation to the draft of the Law on the Constitutional Tribunal, p. 20.

[20] In the years 1997-2012, when the overall number of such complaints and applications introduced to the Tribunal was 4493, the benches composed of one judge issued 3281 decisions to refuse to continue the proceedings. Against such decisions 1821 complaints were introduced (in 40,5% of the cases), which were considered by benches of three judges. At this stage 5% of them (90 complaints) were accepted.

[21] In the parliamentary debate the representative of the Ministry of Justice described the proposal to withdraw from the review of decisions regarding the preliminary control as "incomprehensible", suggesting to maintain the instance control (Stenographic record…, p. 287).

decides on the unconstitutionality of the questioned legal provision, the previously issued temporary decisions will remain in force for three months from the date of the entry into force of the Tribunal's decision. This should allow the applicant to take legal measures aimed at the resumption of the proceedings with a guarantee that the enforcement proceedings will not be resumed by this time.

Recognizing the importance of the constitutional review initiated by a group of deputies (Senators), the draft proposes a new solution (art. 70- art.72). In such cases the end of the term of office of the Sejm (the Senate) would not cause the end of the proceedings before the Tribunal. The proceedings would be only suspended for six months, with the possibility to take legal action if within that time the deputies (Senators) of the next term of office of the Sejm (the Senate) would request so. Only after the expiry of that period, the Tribunal would discontinue the suspended proceedings. But if the date of hearing or sitting in camera is set after the end of the parliamentary term of office and the Tribunal informs the applicant about it before the end of the parliamentary term of office, the proceedings is not suspended and can be continued without the participation of the applicant. In the parliamentary debate the extension of the six month long period was proposed, and there was even a proposal to abolish the rule of "discontinuity" of parliamentary work in such cases[22]. The limitation of the "discontinuity" rule would allow for a rational continuation of the often quite advanced proceedings already initiated in the Tribunal. This can be seen as "pro-constitutional economy". Another thing is that despite that the Act on Constitutional Tribunal does not provide the explicit rule of discontinuity now, in fact it is applied in the practice of Tribunal adjudication.

One of the most important issues regulated in the draft is the mode of adjudication of the Tribunal (art. 82 and art. 94). It is proposed that the Constitutional Tribunal should be able to decide on considering the case at the hearing or at a sitting in camera . This diversification is based on a fundamental principle of written form in the proceedings before the Tribunal (art. 55) and the conditions of its application, as well as diverse - in terms of the scope and the constitutional and legal complexity - nature of cases referred to the Constitutional Tribunal. Regardless of the mode of considering the case, the Tribunal's decision must be issued within a specified period of time and always publicly announced. The bench of judges would decide whether the case should be considered at the hearing (art. 82), taking into account (art. 94) whether the written views expressed by the parties as well as other evidences gathered are sufficient to give a ruling or whether the case involves a question of law which has already been explained sufficiently clear in the current case-law of the Tribunal. The criteria for referring the matter to a sitting in camera are largely objectified. According to the authors of the draft, the adoption of the proposed solutions is aimed to increase the speed and efficiency of adjudication by the Tribunal[23]. On a side note it can be added that similar solutions, where hearings are performed exceptionally, are provided and successfully applied in the proceedings before the constitutional courts of many European Union countries (eg. Austria, Italy, Hungary and Lithuania), as well as in international courts (the European Court of Human Rights - especially after the procedural reforms in the years 2011 - 2012 and the Court of Justice of the European Union - under the rules of 2012). The recognition of a constitutional complaint at a sitting in camera is, to a limited extent, allowed by the current Law on the Constitutional Tribunal. According to art. 59, the Tribunal may examine at a sitting in camera a complaint concerning

[22] Stenographic record…, p. 280. 284, 289.
[23] The explanation to the draft of the Law on the Constitutional Tribunal, p.16.

constitutional infringements if, from the pleadings submitted by the participants in the proceedings in writing, it results without dispute that the normative act, on the basis of which a court or organ of public administration has made a final decision in respect of freedoms or rights or obligations of the person making the complaint, is in non-conformity to the Constitution. The decision given in this procedure shall be subject to publication.

Because of the need to liberalize the way of choosing the mode of considering cases, art. 92 of the draft deserves recognition. It provides that Tribunal's decisions together with their explanations shall be subject to publication within three months from closing the hearing. In case of the sitting in camera, the corresponding obligation would have to be fulfilled within one month (art. 94). The rule that decisions must be published simultaneously with their full explanation would also allow for better realization of the judges' right to submit a dissenting opinion.

The Tribunal shall decide the case by passing a judgment or an order (art. 95 of the draft). The judicial decisions shall be made by a majority of votes (art.100). The "majority" formula is clear and has indeed fixed pedigree, but the representative of the main opposition party spoke very strongly against it in the parliamentary debate. The deputy even advocated the introduction of a qualified majority of the full bench of the Tribunal in cases of major systemic character[24]. She pointed out that in case of the benches of three or five judges one vote can decide about breaking the will of a democratic legislature. On a side note it is worth noting that the Tribunal rightly criticized the identification of democracy with the power of the majority in its judicial decisions. However, the bill does not provide any modification to the "majority" rule, which would for example, depend on the subject matter of the case or the number of the announced dissenting opinions of the judges of the bench. The judicial practice has provided examples of cases where the number and the scope of dissenting opinions illustrate the scale of significant controversy surrounding the decision. Without denying the need to decide on cases by the majority of votes, it might be worth considering whether it should always be the same rule of the majority.

The provisions of the bill concerning adjudication on the conformity to the Constitution of the purposes and/or activity of political parties make it clear that the Tribunal recognizes such applications in the mode provided for applications concerning the constitutionality of normative acts (art. 110-111). The burden of proof in case of non-compliance with the Constitution of the aims or activities of political parties rests with the applicant and all doubts which cannot be explained should be decided in favor of political parties (art. 111 par. 2-3). At the core of these provisions there is an assumption that in a democratic state the banning of a political party should be the *ultima ratio*. A normative novelty is the proposal to regulate the proceedings concerning the conformity of the "statute" of a political party in a separate mode than in case of the conformity to the Constitution of the purposes and/or activities of political parties (art. 112 - the mode provided for a legal question).

The draft contains (Chapter 10) the proposal of complete - as opposed to the previously incomplete – regulation of proceedings before the Tribunal, concerning the competence to decide on the obstacles in the exercise of the office of the President and (Chapter 9) the proceedings in case of disputes between constitutionally recognized central State organs with respect to their powers.

[24] Stenographic record…, p. 284.

The above comments do not constitute a complete presentation and analysis of the draft of the new law on the Constitutional Tribunal. They are only a synthetic introduction into regulated matters. They focus on novelties, supplements and the most important modifications. First of all, they correspond to the shortcomings perceived by the Constitutional Tribunal itself in the course of judicial practice. Many of these issues have been discussed for many years, as a part of a discussion concerning the future "reform". The draft of a new law is basically limited to these analyzes and frameworks, without destroying the existing structure radically. In this sense, it is limited and pragmatic . Its characteristic feature is that it was conceived exclusively under the current Constitution. So the draft does not create the new philosophy of functioning of the Constitutional Tribunal but intends to improve it. Perhaps the above assumptions are the reason why there are no reference to the fundamental sphere of the enforcement of Tribunal's decisions. For many years this domain has been perceived as requiring a strong repair.