TORUŃSKIE STUDIA POLSKO-WŁOSKIE XII — STUDI POLACCO-ITALIANI DI TORUŃ XII
Toruń 2016

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POLAND'S CONSTITUTIONAL CRISIS. FROM COURT-PACKING AGENDA TO DENIAL OF CONSTITUTIONAL COURT'S JUDGMENTS

DOI: http://dx.doi.org/10.12775/TSP-W.2016.022

Neither force nor will, but merely judgment*.

Riassunto. La crisi costituzionale in Polonia. Dal court packing plan al rifiuto della pubblicazione delle sentenze del Tribunale Costituzionale. Lo presente studio affronta il tema della crisi costituzionale che la Polonia sta attraversando. *Fin dal suo inizio*, il Tribunale Costituzionale gode dei *più alti livelli di fiducia sociale.* Nonostante le crtiche o le controversie che talvolta sono emerse su alcuni giudizi, fino all'anno scorso il Tribunale non è stato mai *oggetto di attacchi politici diretti.* La crisi, *provocata dal conflitto sulla sua composizione, avvenuta anche negli altri ordinamenti sotto forma del court packing plan, evolve verso* una situazione in cui *tutte le sue attività vengano compromesse.* L'*attuale* governo polacco *nega validità* alle decisioni del Tribunale e ha rifiutato di *pubblicarne* alcune. *Istituzioni internazionali, tra cui il Consiglio d'Europa e l'Unione europea, hanno sollevato gravi obiezioni in proposito.*

Parola chiave: La crisi costituzionale in Polonia; Tribunale Costituzionale; Venice Commission.

Streszczenie. Kryzys konstytucyjny w Polsce. Od planu upakowania sądu (*court-packing*) do negowania orzeczeń Trybunału Konstytucyjnego. Niniejszy artykuł dotyczy kryzysu konstytucyjnego wokół Trybunału Konstytucyjnego w Polsce. Trybunał

* Alexander Hamilton made this claim in Federalist #78. Amongst the others, he stated: "It may truly be said to have neither FORCE nor WILL, but merely judgment".

Konstytucyjny był od początku swojego istnienia uznawany za organ cieszący się jednym z wyższych wskaźników zaufania społecznego. Mimo kontrowersyjności niektórych orzeczeń i krytyki kierowanej pod ich adresem, nigdy, do ostatniego roku, TK nie był się obiektem bezpośredniego politycznego ataku. Trwający spór polityczny wokół Trybunału Konstytucyjnego, choć pierwotnie dotyczący znanego innym systemom pomysłu obsadzenia sądu „swoimi sędziami" (*court packing plan*), ewoluuje w kierunku próby pełnego sparaliżowania prac tego organu. Obecny rząd i większość parlamentarna negują ważność orzeczeń TK i odmawiają części z nich publikacji. Budzi to poważne zastrzeżenia ze strony podmiotów międzynarodowych, w tym Rady Europy oraz Unii Europejskiej.

Słowa kluczowe: krysys konstytucyjny w Polsce; Trybunał Konstytucyjny; Komisja Wenecka.

1. INTRODUCTION

The history of the Polish Constitutional Court (*Trybunał Konstytucyjny*, hereinafter: the CC) shows that it has been one of the most respected constitutional organs. Although the CC has ruled on many controversial cases, and its case-law sometimes has been heavily criticized, until 2015, it had never become the object of a direct political attack[1].

The ongoing constitutional crisis in Poland started a few months after the new Constitutional Court Act of 25th June 2015 (hereinafter: the CCA of 2015) had come into force. The CCA of 2015 replaced the previous Constitutional Court Act of 1997 (the CCA of 1997). The draft of the new Act (CCA of 2015) was presented by the former President, Bronisław Komorowski, already in 2013. Yet, the parliamentary proceeding on the draft came to a standstill until May 2015[2]. On 25th of June Sejm adopted the CAA of 2015. It was signed by the outgoing President Komorowski[3] on one of his last days in office and soon thereafter

1 A. Śledzińska-Simon, available at: *Midnight Judges: Poland's Constitutional Tribunal Caught Between Political Fronts, VerfBlog,* 2015/11/23, http://verfassungsblog.de/midnight-judges-polands-constitutional-tribunal-caught-between-political-fronts/.

2 On 29th of August 2013 the President submitted a draft Act on the CC to Sejm. The rationale for the draft act was developed by a team (composed, among the others, of former CC judges) headed by the President of the CC. On 3rd of October 2014 Sejm initiated works on the draft Act on the CC. On 1st of April 2015 the Extraordinary Subcommittee on the draft Act on the Constitutional Court started to work on the draft. On 9th of April 2015 the report of the Extraordinary Subcommittee was submitted by the President to Sejm.

3 On 10th of May 2015 the first round of presidential elections was held. Andrzej Duda ob-

became binding law. Promulgated on 30th of July 2015 it entered in force 30 days later, on 30th of August 2015).

2. "OCTOBER JUDGES"

The CAA of 2015 aimed to introduce more coherent rules of the procedure before the CC (above all the possibility to pronounce a judgment without a public hearing[4]), as well as specify the status of judges, and the selection procedure[5]. However, most of the provisions included in the draft concerning the reform of the selection procedure by participation of other actors (than Sejm) in it, such as representatives of legal processions, or universities, had been dropped. As a result, the appointment of judges of the CC remained exclusively in the hands of the majority in Sejm[6].

During the parliamentary proceeding on the draft a transition provision was introduced, which allowed the governing coalition (composed of *Platforma Obywatelska*, hereinafter: PO and *Polskie Stronnictwo Ludowe*, hereinafter: PSL) to appoint five CC judges on 8th of October 2015, shortly before the oncoming parliamentary elections that PO was likely to lose[7]. According to the new Act, the motion for the appointment of a judge in 2015 should be presented not later

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tained 34.76% of votes, while Bronisław Komorowski 33.77%. Two weeks later, in the second round of elections Andrzej Duda obtained 51.55% of votes and won the elections.

[4] The ACC of 2015 permitted the CC to adjudicate at a sitting in camera (without a public hearing) in the two *following* situations: when written statements of participants in proceedings as well as the other evidence gathered with regard to a case constitute a sufficient basis for issuing a ruling; or when a case concerns a legal matter that has been sufficiently examined in previous rulings of the CC.

[5] As stated in the draft's rationale, "the need to develop and adopt a new act on the Constitutional Tribunal derives from the following causes: […] the need to create organisational conditions serving effective judicial decision making, the need to specify the criteria for election of Constitutional Tribunal judges as well as to establish a transparent procedure for selecting a pool of candidates out of which groups of MPs and the Presidium of the Sejm could submit candidates for judges". Rationale for draft act (Sejm's publication no. 1590), available at: http://www.sejm.gov.pl/Sejm7.nsf/druk.xsp?nr=1590.

[6] A. Śledzińska-Simon, op. cit.

[7] On 12th of May 2015, during the works of the Sejm's committee, a transitional provision 135 was proposed (in the published text of the CAA of 2015 this was Article 137) which set a deadline for submitting candidates for five judges of the CC replacing the judges whose tenures were to end in 2015.

than 3 months after the CCA of 2015 entered into force, while the general rule introduced by this law was that such motion should be presented not later than 3 months before the expiration of the term in office.

Three out of five new-appointed judges replaced the judges whose nine-year terms had expired, while two were supposed to replace the judges whose terms were going to expire soon after the parliamentary election ordered by the President on 25th of October 2015[8]. The *ratio legis* of the introduced provision was to prevent 3 seats in the CC from remaining vacant until the new Parliament commenced its work[9]. Several provisions of the CCA of 2015 were challenged at the CC by the group of the then opposition party *Prawo i Sprawiedliwość* (hereinafter: PiS) deputes, but the application was withdrawn shortly after winning in the parliamentary elections[10]. The idea behind soon became apparent: instead of resorting to a judicial remedy, the new majority party decided to remould the law to their own needs by the tools they currently had at hand: the legislative process[11]. One week later, PO, which now switched sides with PiS and moved to the opposition bench, put forward a motion to the CC to scrutinise the constitutionality of the Act, before PiS would have a chance to change it. It was an opportunistically-driven smart move if considering that the now opposition party, PO,challenged the law pushed through by PO, then the ruling party[12].

According to the Constitution of 1997 the CC judges are appointed by Sejm. Yet, both the CCA of 1997 and the CCA of 2015 provided for that it was the competence of the President to swear in the CC judges. Until 2015 the President had never delayed taking the oath from the CC judges appointed by Sejm. Nevertheless, the President of Poland, Andrzej Duda, uplifted a mere formality to a co-determination mechanism without any constitutional basis therefore and refused to take the oath of office from all the five "October judges". In consequence,

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[8] The CC judges were appointed during the last sitting of Sejm on 8th October 2015, while the end of the term of the replaced judges fell on 6th November, 2nd December and 6th December respectively.

[9] Pursuant to the Article the first sitting of the newly elected Parliament needs to be summoned by the President within 30 days after elections.

[10] Parliamentary elections were held on 25th of October 2015. The PiS Party obtained 37.58% of votes which translated into 235 (out of 460) seats in the Sejm.

[11] A. Radwan, *Chess-boxing around the rule of law – Polish constitutionalism at trial*, Allerhand Institut Working Paper 13/2016, available at: https://www.researchgate.net/publication/292156728_Chess-boxing_around_the_rule_of_law_-_Polish_constitutionalism_at_trial, p. 9.

[12] Ibidem.

three seats in the CC remained vacant. The newly selected judges got trapped in the procedural deadlock, and the pending replacement process got frozen[13].

3. "DECEMBER JUDGES"

On 25th of October, PiS party won an unprecedented absolute majority of seats in the Polish parliamentary elections. On 19th of November, shortly after the new Prime Minister Beata Szydło and her Cabinet had taken power, the new Sejm passed an amendment (the Amendment Act of 19th November 2015, hereinafter: the AA of 19th November 2015) to the existing CCA of 2015. The Amendment, adopted in record time, stipulated a limited term of the President of the CC, vacated the current seats of the President of the CC and the Vice President of the CC, and provided that the selection of judges whose term expired in this year was to take place within 7 days after the law came into force. It also made the appointment conditional upon taking the oath before the President of the Republic. The amendment was passed by the new Sejm, in absence of the opposition parties, which had left the session in an act of protest, with tacit consent of Senate, which did not propose amendments or the motion for the rejection of the draft. The amendment was challenged by the Opposition at the CC[14].

On 25th of November 2015 Sejm adopted 5 resolutions to declare the invalidity of the Sejm's resolutions of 8th October 2015, which concerned the election of the judges of the CC by Sejm during its previous parliamentary term (2011–2015)[15]. The publication of the latter resolutions in the Official Gazette completed the Sejm procedure for the election of five judges of the CC whose terms of office were to end on 6th of November, 2nd of December, and 8th of December 2015. In the explanatory note for the draft resolutions of Sejm, dated 25th November 2015 (Sejm Papers Nos. 42, 43, 44, 45, 46/8th term of the Sejm), the authors explained, *inter alia*, that:

"By determining […] the invalidity of resolutions on the election of persons to hold offices as judges of the Tribunal […], the Sejm did not dismiss the legally elected judges. Firstly, it is inadmissible to dismiss legally elected judges of the Tribunal […]; secondly, dismissal from an office may not occur, where the office was not assumed by a given person due to the invalidity of the election process.

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[13] Ibidem.

[14] See: A. Śledzińska-Simon, op. cit.

[15] Official Gazette of the Republic of Poland – *Monitor Polski* (M.P.) items 1131, 1132, 1133, 1134, and 1135; hereinafter: the Sejm's resolutions of 25 November 2015.

The Sejm is competent to evaluate its actions and eliminate the invalidity thereof. The Sejm's determination of the invalidity of the indicated resolutions, which is under discussion here, constitutes an element of the aforementioned elimination of invalidity. Still, the said determination should not be regarded as tantamount to the repeal, annulment or revocation of the legally adopted resolutions and effects thereof. Determining the invalidity of resolutions is only a determination (evaluation) that the resolutions were adopted in breach of procedural provisions. […] The consequence of such a determination is the opening up of a possibility of carrying out the election again".

In the resolutions of 25th November 2015, Sejm also requested the President to refrain from giving the oath of office to the judges of the CC elected by the previous Sejm.

As a reaction to the Sejm's resolutions of 25th November, on 30th of November the CC held in a Full Court Sitting and issued an injunction ordering all public authorities to abstain from any actions which might undermine the effectiveness of the pending review of constitutionality of the Law. The injunction was preventive in nature, had the effect of final judgment and was binding to those to whom it was addressed. Its aim was to make sure that any future decision given in the case on merits by the CC would be enforceable and devoid of purpose[16].

Despite the CC order of 30th November, at the sitting on 2nd of December, Sejm unceremoniously selected five new judges, claiming it would prevent the previously appointed five from taking office. These were sworn into office by President Duda in an after midnight, closed ceremony. PiS delegates argued that the previous appointments made by PO contradicted the existing law as well as the Polish Constitution.

4. THE CC JUDGMENT OF THE 3RD OF DECEMBER 2015, CASE K 34/15.

On 3rd of December, in a full bench sitting, the CC gave a strong unanimous judgment in case K 34/14 on the unconstitutionality of the Law on the CCA of 2015. The CC ruled that the election of a judge of the CC carried out, in a sense, "in advance" is inadmissible. The dates of the commencement and the end of a nine-year term of office are determined individually for every judge, and thus

[16] T. T. Koncewicz, *Bruised but not dead (yet):The Polish Constitutional Court has spoken*, available at: http://verfassungsblog.de/bruised-but-not-dead-yet-the-polish-constitutional-court-has-spoken-2/.

particular nominations must be dispersed in time. Consequently, the CC held that the October election of three judges by PO was valid, while the appointment of the other two, breached the law. These two justices should have been selected by the new Sejm. In the judgment the CC also left no doubt that the Constitution vested exclusive authority to shape the composition of the CC with Sejm, and it is the duty of the President to swear in the justices selected by Sejm[17]. The CC also referred to the procedure of taking the oath from the judges by the President emphasising that it is the President's obligation to take the oath. The fact that the law does not set a deadline for this act means that it should be conducted immediately[18]. The CC pointed out that its judgements are binding and final, so "as of the moment of the entry into force of this ruling, no state authority has a legal basis for challenging – as unconstitutional – those provisions that regulate the element of the procedure for electing judges of the CC, which are deemed constitutional by the CC in this ruling"[19].

However, the judgement of the CC was not published immediately. On 10th of December 2015, Minister Beata Kempa, the Chief of the Chancellery of the Prime Minister, sent a letter to the President of the CC in which she noted that the judgement was invalid, as it had been issued by an inappropriate bench. The judgement was issued by a bench composed of five judges, while – in the opinion of the Chief of the Chancellery of the Prime Minister – it should have been issued by the full bench. In her letter to the President of the CC, Minister Beata Kempa informed the President of the CC that until the matter was clarified she would withhold the publication of the judgement[20]. In a response to the letter, the President of the CC, Andrzej Rzepliński, noted that the CC's judgements

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[17] See also: T. T. Koncewicz, *Polish Constitutional Drama: Of Courts, Democracy, Constitutional Shenanigans and Constitutional Self-Defense*, Int'l J. Const. L. Blog, Dec. 6, 2015, at: http://www.iconnectblog.com/2015/12/polish-constitutional-drama-of-courts-democracy-constitutional-shenanigans-and-constitutional-self-defense.

[18] "The CC has clearly stated that a delay in the giving of the oath of office may not be justified only by an allegation that the legal basis of the judicial election is defective. Indeed, the allegation referring to the content of the CCA would have to be transformed into an application to determine the conformity to the Constitution of the said Act by the CC." judgement of the CC of 3rd December 2015, K 34/15; English fragments of judgement K 34/15 are quoted after the official translation on the CC's website. The translation is available at: http://trybunal.gov.pl/en/hearings/judgments/art/8748-ustawa-o-trybunale-konstytucyjnym/.

[19] Judgement of the CC K 34/15, 3rd December 2015.

[20] Letter from the Chancellery of the Prime Minister, available at: http://trybunal.gov.pl/fileadmin/content/nie-tylko-dla-mediow/ustawa-kalendarium/Pismo_KPRM_z_10_grudnia_2015_r_ADO.pdf.

are final and binding, and their publication is a constitutional duty of the Prime Minister[21]. Eventually, almost two weeks after the judgement's delivery by the CC, it was finally published in the Journal of Laws on 16th of December 2015[22]. Yet it was not until a new ace was ready to come to play – a new amending act put forward by PiS on 15th of December 2015[23].

On 14th of December 2015, the Regional Prosecutor's Office in Warsaw initiated an investigation into the failure by public officials (including the Prime Minister) to fulfil their duty to publish the judgement. The Regional Prosecutor's Office had received ten notifications in that case. At the beginning of January 2016 the investigation was discontinued[24].

5. THE CC JUDGMENT OF THE 9TH OF DECEMBER 2015, CASE K 35/15.

On 9th of December the Court, composed of 5 judges, reviewed the constitutionality of the CAA Amendment of 19th of November (judgment in case K 35/15[25]). The case was initiated on the applications submitted by the Polish Ombudsman, the First President of the Supreme Court, the National Council of the Judiciary and group of MPs (PO). The applicants challenged selected provisions, but also the whole act on account of the manner in which it was adopted. According to the Commissioner for Human Rights, National Council of the Judiciary of Poland and the First President of the Supreme Court, unconstitutionality of the legislative process resulted from, among others, the failure to obtain an opinion from the National Council of the Judiciary of Poland and to consult the draft with experts.

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[21] Letter of the President of the Constitutional Tribunal, available at: http://trybunal.gov.pl/fileadmin/content/nie- tylko-dla-mediow/ustawa-kalendarium/Odpowiedz_Prezesa_TK_na_pismo_o_ogloszeniu_wyroku__K_3_4_15_ADO.pdf.

[22] Journal of Law, Position no. 2129, available at: http://dziennikustaw.gov.pl/du/2015/2129/1.

[23] See also: A. Radwan, op. cit., p. 12.

[24] Regional Prosecutor in Warsaw, Information on the discontinuation of proceedings on failure to fulfil duties connected to the lack of the publication of the Constitutional Tribunal judgement, available at: http://www.warszawa.po.gov.pl/pl/main/komunikat/id/370/alias/informacja_o_umorzeniu_sledztwa_w_sprawie_niedopelnienia_ obowiazkow_w_zwiazku_z_zaniechaniem_publikacji_wyroku_trybunalu_konstytucyjnego.html

[25] English fragments of judgement K 35/15 are quoted after the official translation on the Constitutional Tribunal's website. The translation is available at: http://trybunal.gov.pl/en/hearings/judgments/art/8792-nowelizacja-ustawy-o-trybunale-konstytucyjnym/.

The challenged CAA Amendment of 19th November annulled the appointment of the 5 judges made by the old Sejm and paved the way for the selection of new ones on 2nd of December[26]. As mentioned before, the Amendment Act introduced a limited term of the President and Vice President of the Court, applied this change to the current President and Vice-President as well as voided their terms of office. It further stipulated that the selection of the judges whose term of office expired in 2015 was to take place within 7 days of the entry into force of the Amendment Act. The Act also made the appointment conditional upon taking the oath before the President. In the judgment of 9th of December 2015 the CC unanimously declared most of the amendments unconstitutional.

The CC stated that:

> "[t]he CC has no doubts as to the fact that the legislative proceedings were conducted in breach of the provisions of the Sejm's Rules of Procedure, and that the scale of those breaches was considerable".[27]
>
> The CC quoted in this respect its judgement of 2013 issued by the full bench, in which it stated that the first reading of a draft act can take place in a parliamentary committee as long as it did not adversely affected the legislative process. In the analyzed case there were circumstances justifying a departure from the interpretative line drawn in 2013. However, considering that the legislative procedure violated the Constitution, to do that the CC would have had to rule as a full bench in December 2015. This, in turn, was not possible because at the beginning of December the CC was composed of 10 active judges, including two judges who submitted motions to be excluded from ruling on the case (President Andrzej Rzepliński and Vice President Stanisław Biernat). Due to this fact the CC could not rule on the constitutionality of the legislative procedure of the Amendment Act.

The CC, as in its judgement of 3rd December 2015, quoted the rule that Sejm had the right to choose judges to replace those whose tenures ended within the Sejm's term. Thereby the CC considered Article 137a, introducing a seven-day deadline for submitting candidates for judges whose tenures expired in 2015, as partially unconstitutional.

The judgement's publication in the official gazette was again unduly postponed by the government, but eventually published in the Journal of Laws on 18th of December 2015.

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[26] T. T. Koncewicz, *Bruise but not dead*….

[27] http://trybunal.gov.pl/en/hearings/judgments/art/8792-nowelizacja-ustawy-o-trybunale-konstytucyjnym/.

6. THE AMENDMENT OF THE CONSTITUTIONAL COURTS ACT OF 22ND DECEMBER 2015

On 22nd of December 2015, as a reaction to CC judgments in cases K 34/15 and K 35/15**,** Sejm passed another amendment to the CCA (hereinafter: Amendment Act of 22nd December 2015), which introduced a two-third majority and the mandatory participation of at least 13, instead of 9, of the 15 judges during the full court sitting[28]. Furthermore, according to the Amendment Act of 22nd December 2015 pending constitutional proceedings had to wait in the docket for six months, and under exceptional circumstances for three months. The CC was bound to handle the cases according to the date of receipt. CC judges might be dismissed on request of Sejm, the President or the Department of Justice. The amended procedural rules should also apply to already pending cases (under certain circumstances) and the statute became effective on the day of its publication (no *vacatio legis*). The President and the Minister of Justice were granted the competence to file applications for disciplinary proceedings against Tribunal judges. Both of them (as well as *Sejm*) were given a role in the procedure leading to the expiration of the term of the office of Tribunal judges. Dates of court hearings were to be set in the sequence of submitted applications, irrespective of their constitutional urgency or significance, and the earliest three/six months after the parties had been notified of the applications.

The bill was approved by Senat (the second chamber of the Polish parliament) on 24th of December 2015 after an overnight session, and signed by President Andrzej Duda on 28th of December 2015. The Act was challenged to the CC by the First President of the Supreme Court, two groups of Sejm Deputies (PO and Nowoczesna), the Polish Ombudsman, and the National Council of the Judiciary of Poland. Applicants criticized the Act for removing important checks on the government's power and paralysing the CC. In a leaked draft report, legal experts from the Council of Europe rights watchdog – The European Commission for Democracy through Law (the so-called Venice Commission[29]) warned

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[28] The regulation was introduced despite very clear constitutional provision which stipulates that "judgments of the CC shall be made by a majority of votes".

[29] The so-called Venice Commission is an advisory body of the Council of Europe composed of experts on constitutional law. As part of its activity, the Commission delivers opinions on draft acts and acts adopted in the countries of the Council of Europe, in particular in countries under transformation. Multiple times, the Commission has presented its opinions, among others, on matters concerning particular countries (e.g. Ukraine and Hungary), but also on specific issues (e.g. the oversight of secret services).The Venice Commission can issue opinions, among others, upon a motion of a member of the Council of Europe.

that the reforms undermined democracy, human rights as well as the rule of law in Poland[30].

7. THE CC DECISION OF 7TH JANUARY 2016 U 8/15

At the beginning of December 2015, a group of MPs from PO challenged the constitutionality of the Sejm's resolutions passed in November and December 2015. The group questioned both those resolutions which invalidated the previous resolutions of October 2015 on the appointment of five judges of the CC (November 2015) and those which appointed new judges (December 2015).

The CC considered this motion at a closed hearing in January 2016, and decided to discontinue the proceedings. The decision was passed by a bench composed of 10 judges. The CC decided that the resolutions invalidating the resolution of October 2015 were not normative acts, and therefore could not be reviewed by the CC. When it comes to the December resolutions appointing five new judges, the CC held that they did not fulfill the criteria of a normative act either, as they are "a category of not law-making resolutions through which Sejm would exercise its creative function in relation to public authority bodies".

The CC emphasised:

> "[...] in the spirit of responsibility for the state's constitutional order, respecting the principle of cooperation of powers set forth in the preamble to the Constitution, and protecting constitutional values, [the Constitutional Tribunal – author's note] has made attempts to cooperate with the legislative and executive powers, especially with the President, becoming a party to the dialogue in an effort to find a constitutional solution of disputed matters […] So far, it has not brought the desired results. On the contrary, one has the impression that it has escalated the actions whose aim is to limit the Tribunal's capacity to perform the function vested in it by the constitutional legislator"[31].

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[30] At the beginning of December 2015, a group of non-governmental organisations, sent a letter to the Venice Commission in which it noted the changes that had been introduced with respect to the CC. Since non-governmental organisations do not have a mandate to motion for such an opinion, the President of the Commission Gianni Buquicchio informed them that the Commission, "is monitoring the events in Poland with attention and concern". After Senat adopted the Amendment Act of 22nd December 2015, the Minister of Foreign Affairs requested the Venice Commission to prepare an opinion on the Amendment Act available at: https://www.msz.gov.pl/pl/aktualnosci/wiadomosci/minister_waszczykowski_wystapil_o_opinie_w_sprawie_trybunalu_konstytucyjnego_do_komisji_weneckiej.

[31] Decision of the CC of 7th January 2016, U 8/15.

As a result of this decision and on the basis of judgements passed in December 2015, the President of the CC, Andrzej Rzepliński, assigned judges Piotr Pszczółkowski and Julia Przyłębska, chosen to replace those judges whose terms of office expired in December 2015, to adjudicate cases. From then on, there have been 12 adjudicating judges in the CC[32].

8. THE CC JUDGMENT OF 9TH MARCH 2016, CASE K 47/15.

A day after the Amendment Act of 22nd December 2015 entered into force, a motion to review its constitutionality was filed with the CC by the First President of the Supreme Court. A couple of days later, motions were also filed by the Commissioner for Human Rights, National Council of the Judiciary of Poland and two groups of MPs. *Amicus curiae* briefs were submitted in the proceedings by the Polish Bar Council, National Council of Attorneys at law, HFHR and the Stefan Batory Foundation. All applicants motioned for the whole Amendment Act to be pronounced as unconstitutional. Additionally, the First President of the Supreme Court, National Council of the Judiciary of Poland, and a group of MPs motioned for the case to be considered under the ACC of 2015 in the wording from before the amendment. The CC considered the case on the basis of the Constitution and those provisions of the CCA 2015 which were not challenged.

At the hearing on 8th of March 2016, the CC examined the motions as a bench composed of 12 judges. None of the government's representatives appeared at the hearing.

On 9th of March 2016, the CC reached probably the most important, and most extraordinary in its substance, verdict since its establishment thirty years ago (judgment in the case K 47/15)[33]. The CC decided that the whole Amendment Act of 22nd December 2015 was non-compliant with constitutional provisions regarding parliamentary legislation procedure. The legislative process which culminated in the adoption of Amendment Act of 22nd December 2015 evidenced that Sejm *deliberately* disregarded constitutional standards: the amend-

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[32] See also: *The constitutional crisis in Poland 2015–2016. Report of the Helsinki Foundation of Human Rights*, available at: http://www.hfhr.pl/wp-content/uploads/2016/09/HFHR_The-constitutional-crisis-in-Poland-2015-2016.pdf, pp. 31–32.

[33] However, as P. Starski points out, the CC judgment's strength was overshadowed by the fact that it was leaked a day before its announcement, P. Starski, *The Power of the Rule of Law: The Polish Constitutional Tribunal's Forceful Reaction*, available at: http://verfassungsblog.de/the-power-of-the-rule-of-law-the-polish-constitutional-tribunals-forceful-reaction/, DOI: https://dx.doi.org/10.17176/20160317-165259.

ment had undergone only two readings instead of three within Sejm, members of parliament had not had sufficient time to analyze the amendment draft which touched upon constitutionally highly significant matters before its first and second reading, the draft had been modified too extensively between the first and the second reading, thereby violating the rules on legislative initiative, and additionally consultations with external bodies had been omitted[34].

The CC struck down also many sections of the Act as they prevented the honest and proper functioning of the CC, by interfering in its independence and separation from other powers, thus violating the principles of the rule of law.

The CC held that the parliament failed to put forward weighty reasons for setting the principle of *vacatio legis* aside and stipulating that the Amendment Act of 22nd December 2015 became effective on the day of its promulgation. The Amendment Act of 22nd December 2015 limited the CC's competence of constitutional review. Procedural changes introduced by the Act, even taken separately, would lead to a considerable slowdown in the CC's decision-making process and in their combination ultimately to a paralysis of the CC, which violated in a decidedly arbitrary manner judicial independence, the separation of powers and the right to a fair trial. The CC pointed out particularly that the sequence rule would lead to the effect that procedures initiated after the day the amendment had become effective (28th December 2015) could only be adjudicated after 174 previously submitted cases would be closed. The CC was very explicit in unraveling the true motives behind the Amendment Act, which was to make it *de facto* impossible to submit legislation adopted during the ongoing parliamentary session to an effective and prompt constitutional review. The CC pointed out that statutory provisions which installed the participation of other organs in the initiation of disciplinary proceedings against judges of the CC infringed the core of judicial independence and were incompatible with the separation of powers. The same applied to the engagement of the President, the Minister of Justice as well as Sejm in the proceedings leading to the termination of a CC judge's term of office.

The CC decided that the object of the review (the CAA of 2015 as amended by the Amendment Act of 22nd December 2015) could not be at the same time its

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[34] The CC emphasised that: "…the legislative process – as a set of constitutional and lower-level rules determining the manner for adopting acts – has to fulfil two basic tasks – provide an act with a democratic mandate and give it substantive legitimacy. The violations indicated by the CC which had taken place in the process of adopting the amending act justify a claim that in the case at hand, it did not fulfil any of those tasks". Judgement of the CC of 9th March 2016, K 47/15. See also: P. Starski, op. cit.

very basis. Hence, the CC did not obey the amended procedural rules in rendering its judgment thereby reinstating the supremacy of the constitution over ordinary legislative acts. Taking the factual circumstances into account the 12 judges, who had signed the judgment, constituted the CC's "full bench" irrespective of the fact that the constitution stipulates that the CC is composed of 15 judges. Only these 12 judges had been constitutionally appointed and sworn in, and were hence competent to adjudicate[35]. Dissenting opinions to the judgment were submitted by two "December judges", Julia Przyłębska and Piotr Pszczółkowski. Nevertheless they signed it.

Since the Amendment Act of the 22nd December 2015 introduced a "double 2/3 requirement", which meant that the CC was only competent to render judgments with a 2/3 majority if 2/3 of its members were present, Prime Minister Beata Szydło as well as the Minister of Justice Zbigniew Ziobro regarded the CC judgment as a mere „communiqué" of an informal meeting of judges lacking any binding effect. According to the government, the CC disrespected the procedural requirements established by the amended act and refused to publish the judgment in the law gazette, which is a prerequisite for the voidness of the provisions declared unconstitutional. As such course of events was easy to predict, the CC had anticipated this move and addressed it clearly in its judgment. It stressed the finality and binding nature of its judgment after its announcement in the court room, and the lack of any other bodies competent to question it. The CC declared to be bound by its judgment as well all courts to be obliged not to apply the annulled rules[36]. In effect, the provisions of the ACC of 2015 in the wording from before the Amendment Act of 22nd December 2015 were restored.

The representatives of the government and the governing majority did not accept this judgement[37]. The Minister of Justice, who thanks to recent legislation simultaneously serves as the General Prosecutor, announced that he "has recom-

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[35] Ibidem.

[36] Ibidem.

[37] Minister of Justice Zbigniew Ziobro stated that: "In this particular case, fortunately, we do not have to do with a judgement, with a ruling and a lawful action. This meeting of judges in the CC was not a meeting of the constitutional court, but a meeting of judges who inaptly tried to deliver a ruling which they could not have passed, since they acted in violation of the Act on the CC, which governs the functioning of the CC, and in violation of the Constitution."; Rzeczpospolita, Z. Ziobro: Dzisiejsze orzeczenie TK nie ma mocy prawnej, available at: http://www.rp.pl/Sedziowie-i-sady/303099902-Ziobro-dzisiejsze-orzeczenie-TK-nie-ma-mocy-prawnej.html; see also: Helsinki Foundation for Human Rights' Report: Constitutional crisis in Poland, 2015-2016, available at: http://www.hfhr.pl/wp-content/uploads/2016/09/HFHR_The-constitutional-crisis-in-Poland-2015-2016.pdf.

mended" the competent regional prosecutor to investigate possible felonies involved in this matter[38]. This statement, however, shows inconsistency in the government's position regarding the judgment. (Was it a mere „communiqué" of an informal meeting of judges lacking any binding effect or the CC's judgment?)[39]. Prime Minister Beata Szydło, in turn, even before the judgement was delivered had said that she would not be able to publish it. In her opinion, publishing a decision which is not a judgement of the CC would violate the Constitution[40].

In March 2016, Warsaw prosecution registered 100 notifications on a potential crime, which consisted in not publishing the judgement of the CC of 9th March 2016, perpetrated by government officials. However, at the end of April, the Regional Prosecutor's Office for Warsaw–Praga refused to initiate pre-trial proceedings in the case, claiming that, "the verification proceedings did not reveal any signs of failure to fulfil duties by the Prime Minister, Minister-Member of the Council of Ministers and the President, as well as employees of the Governmental Centre of Legislation"[41].

Despite the lack of publication of the judgment, the CC has functioned since March 2016, on the basis of the ACC of June 2015. It returned to adjudicating. Between March and August 2016, the CC passed more than 20 judgments, none of which had been published until August 2016[42].

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[38] A day before the hearing, the Deputy Minister of Justice stated in an interview that the delivered judgement will not be binding. "Tomorrow, this will not be a hearing of the CC, but a gathering of people who sit in the CC at best. From the institutional point of view, tomorrow's events, if they take place, will be an absolute scandal […]. The judges of the CC are free people. They can meet when they want to, they can order espresso and cookies, and they can meet. We are not able to use any coercive measures, but we appeal and we ask. Do not destroy the Polish state". Deputy Minister of Justice Patryk Jaki, Radio Zet, 7th March 2016; available at: http://www.radiozet.pl/Radio/Programy/Gosc-Radia-ZET/Artykuly/Patryk-Jaki-u-Moniki-Olejnik-00019704; see also: Helsinki Foundation for Human Rights' Report.

[39] P. Starski, *The Power of the Rule of Law: The Polish Constitutional Tribunal's Forceful Reaction*, available at: http://verfassungsblog.de/the-power-of-the-rule-of-law-the-polish-constitutional-tribunals-forceful-reaction/, DOI: https://dx.doi.org/10.17176/20160317-165259.

[40] Rzeczpospolita, Wyrok Trybunału Konstytucyjnego z 9 marca ws. nowelizacji ustawy o TK autorstwa PiS, available at: http://www.rp.pl/Sedziowie-i-sady/303099926-Wyrok-Trybunalu-Konstytucyjnego-z-9-marca-ws-nowelizacji-ustawy-o-TK-autorstwa-PiS.html, see also: Helsinki Foundation for Human Rights'.

[41] Polskie Radio, Jest decyzja prokuratury w sprawie nieopublikowania wyroku TK, available at: http://www.polskieradio.pl/5/3/Artykul/1612924,Jest-decyzja-prokuratury-w-sprawie-nieopublikowania-wyroku-TK, see also: Helsinki Foundation for Human Rights' Report.

[42] Helsinki Foundation for Human Rights' Report, p. 34.

After the CC's judgement of 9th March 2016, there appeared a risk that two separate legal systems would emerge. On the one hand, governmental administration did not acknowledge the judgement of the CC. On the other hand, the CC started working again and began to issue judgements in other cases[43].

In response to this threat the General Assembly of Judges of the Supreme Court adopted a resolution at the end of April, in which it stated:

> "an unpublished judgement of the CC finding an act unconstitutional revokes the act's presumption of constitutionality at the moment when the Tribunal announces its judgement"[44].

The Supreme Court's resolution was met with a harsh reaction from the representatives of the governing majority. The spokesperson of the PiS parliamentary club Beata Mazurek described the Supreme Court's resolution as adopted by, "a bunch of buddies who protect the status quo of the former government"[45]. The opposition MPs filed a complaint in relation to this statement with the Sejm's Ethics Committee, which punished the MP with a reprimand[46].

A similar resolution was passed by the Collegium of the Supreme Administrative Court a day after the adoption of the resolution by the Supreme Court. The Supreme Administrative Court's judges called for:

> "respect for the independence of judges and the CC, which in a democratic state ruled by law, such as Poland, are a branch of power separate and independent of other powers and guarding the rights and freedoms of citizens"[47].

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[43] Ibidem, p. 50

[44] Supreme Court, Uchwała Zgromadzenia Ogólnego Sędziów Sądu Najwyższego z dnia 26 kwietnia 2016 r., available at: http://www.sn.pl/aktualnosci/SiteAssets/Lists/Wydarzenia/EditForm/Uchwala_Zgr_Og_SSN_26_04_2016.pdf; see also: Helsinki Foundation for Human Rights' Report.

[45] TVN24, "Zebrał się zespół kolesi". Rzecznik PiS o Sądzie Najwyższym, available at: http://www.tvn24.pl/wiadomosci-z-kraju,3/rzecznik-pis-beata-mazurek-o-sadzie-najwyzszym-zespol-kolesi,639007.html; see also: Helsinki Foundation for Human Rights' Report: Constitutional crisis in Poland, 2015-2016, available at: http://www.hfhr.pl/wp-content/uploads/2016/09/HFHR_The-constitutional-crisis-in-Poland-2015-2016.pdf.

[46] Onet.pl, Beata Mazurek ukarana za słowa o "zespole kolesi", dostępne na: http://wiadomosci.onet.pl/kraj/beata-mazurek-ukarana-za-slowa-o-zespole-kolesi/r9ed4y; see also: Helsinki Foundation for Human Rights' Report: Constitutional crisis in Poland, 2015-2016, available at: http://www.hfhr.pl/wp-content/uploads/2016/09/HFHR_The-constitutional-crisis-in-Poland-2015-2016.pdf.

[47] Supreme Administrative Court, Uchwała Kolegium Naczelnego Sądu Administracyjnego

Supreme Court recognized also the possibility to shield the constitutional order from being further weakened and disassembled through emergency decentralized constitutional review whereby regular courts would review the constitutionality of laws[48]. In a judgment on 17th of March 2016, the Supreme Court declared a tax law provision unconstitutional without referring the question to the CC, as is commonly the case[49]. Although such a solution deviates from the core of the centralized judicial review system established in the Polish constitution, it might be legitimized as "constitutional self-defense" in light of the systemic dysfunction of the CC. The Supreme Court, while clearly recognizing the CC's prerogative to deal with the matter, argued in the above mentioned judgment, that the ongoing constitutional crisis could not be neglected. Nevertheless, the case was rather specific, as the non-applied statutory provision was similar to a one invalidated in an earlier case by the CC as unconstitutional. Another important issue which should be reminded while considering the option of emergency constitutional review is the fact, that innovative judgments of the Supreme Court only bind the parties to a case, whereas the CC's rulings have general application[50].

9. THE OPINION OF THE VENICE COMMISSION OF 11TH MARCH 2016

The delegation of the Venice Commission visited Poland at the beginning of February 2016. At the beginning of March Venice Commission`s opinion was published[51]. According to the Commission, blocking the work of the CC constitutes a threat to the principle of the rule of law, democracy and protection of human rights. The Commission was critical of the solutions introduced in the Amendment Act of 22nd December 2015, and pointed out that they could slow down or even paralyze the CC's work. This, in turn, would be unacceptable in the light of European standards.

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z dnia 27 kwietnia 2016 r., available at: http://www.nsa.gov.pl/komunikaty/uchwala-kolegium-naczelnego-sadu-administracyjnego-z-dnia-27-kwietnia-2016-r,news,4,309.php; see also: Helsinki Foundation for Human Rights' Report: Constitutional crisis in Poland, 2015-2016, available at: http://www.hfhr.pl/wp-content/uploads/2016/09/HFHR_The-constitutional-crisis-in-Poland-2015-2016.pdf.

[48] See also: T. T. Koncewicz, *'Emergency Constitutional review': thinking the unthinkable. A letter from America*, available at: http://verfassungsblog.de/emergency-constitutional-review-thinking-the-unthinkable-a-letter-from-america/.

[49] P. Starski, op. cit.

[50] Ibidem.

[51] It happened in an atmosphere of controversy caused by the publication of the draft of the opinion.

A part of the opinion was also devoted to the manner of electing judges of the CC. In this regard the Commission held:

> "As the composition of Parliament changes after elections, the new Parliament must not be deprived of its power to take its own decisions on issues that arise during its mandate. It would be in conflict with democratic principles if Parliament could choose public officials including judges (far) in advance even if the term of office expires within the term of office of the subsequent term of Parliament. Vice versa, the subsequent Parliament has to respect the decisions of the former Parliament with regard to appointments of public officials"[52].

The Commission emphasised also that the refusal to publish the CC judgement of 9th March 2016 would not only be contrary to the rule of law, but it would also lead to, "an unprecedented deepening of the constitutional crisis"[53]. In this respect The Venice Commission stated that, "not only the rule of law but also the European Constitutional Heritage require the respect and effective implementation of decisions of constitutional courts", and therefore it called upon all "the state organs and notably Sejm to fully respect and implement the judgments of the CC"[54].

10. THE NEW ACT ON CC OF 22ND JULY 2016

On 3rd of June 2016, the parliamentary works on three drafts of the new act on the CC were initiated[55]. After they had been referred to the Justice and Human Rights Committee of Sejm, all three drafts were transferred to the subcommittee

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[52] Venice Commission, Opinion on amendments to the Act of 25th June 2015 on the Constitutional Tribunal of Poland, adopted by the Venice Commission at its 106th Plenary Session (Venice, 11–12 March 2016), available at: www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2016)001-e. See also: Helsinki Foundation for Human Rights' Report: Constitutional crisis in Poland, 2015–2016, available at: http://www.hfhr.pl/wp-content/uploads/2016/09/HFHR_The-constitutional-crisis-in-Poland-2015-2016.pdf.

[53] Ibidem.

[54] Ibidem.

[55] Together with a draft submitted by the Polish People's Party (Polskie Stronnictwo Ludowe, abbreviated to PSL) and a citizen initiative were initiated. The choice of this date could have been motivated by the development of events in relation to the Rule of Law Framework initiated by the European Commission (see further Reactions to the constitutional crisis – international community, p. 42).On 29th of April 2016 a group of MPs from PiS Party submitted to Sejm a draft of a new act on the CC.

set up specifically for the purpose of selecting the leading draft. The subcommittee decided that the PiS's draft act, would be the leading document. The selected draft raised numerous concerns of constitutional nature. Despite all these reservations, PiS had rushed it through the parliament, having MPs to work day and night, ahead of the NATO summit in Warsaw in early July.

The new Act on the CC was eventually adopted on 22nd of July 2016[56]. The following points were the most important elements of the new ACC of 22nd July 2016:

- The immediate taking up of their duties by all judges who took the oath before the President.
- Consideration of cases in the sequence in which they were filed, unless the President of the CC decides otherwise.
- The necessity to defer the hearing in a full bench in case of the absence of the Prosecutor General.
- The necessity to defer deliberations on the judgement even by six months in a case when an objection is raised as to the content of the judgement by at least four judges.
- The publication of CC's judgement upon a motion of the President of the CC filed with the Prime Minister.
- The exclusion of the judgement of 9th of March 2016 from the publication.
- Transitional provisions which would slow down consideration of cases before the CC.
- The imposition on the CC of an obligation to finalise all cases within one year of the act entering into force.
- The necessity to suspend the proceedings for six months in a case when the initiating document does not fulfil formal criteria.
- The necessity to apply the new act to all proceedings before the CC.
- Only a 14-day-long *vacatio legis*[57].

11. THE JUDGMENT OF THE 11TH AUGUST 2016

The new ACC of 22nd July 2016 was challenged before the CC by two groups of MPs just a day after its publication in the Journal of Laws. A couple of days

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[56] The President signed the ACC of 22nd July 2016 on 30th of July 2016 and it was published in the Journal of Laws on 1st of August 2016.

[57] See: Helsinki Foundation for Human Rights' Report…, p. 40.

later, a similar motion was filed by the First President of the Supreme Court. The applicants motioned for the review of the whole ACC of 22nd July 2016, but they also formed charges against particular provisions.

On 11th of August 2016 (after a closed hearing) the CC ruled that the ACC of July 2016 was partially not compliant with the Constitution (judgment of 11th of August 2016, case K 39/16). Among others the CC considered as unconstitutional: the obligation imposed on the President of the CC to assign cases to three judges chosen for posts which had already been filled; the introduction of provisions allowing selective publication of CC's judgements, excluding publication of the judgement of 9th March 2016; the introduction of the procedure whereby the President of the CC motions the Prime Minister to publish judgements, and the necessity to defer the trial due to the absence of a properly notified Prosecutor General. The CC also deemed as unconstitutional the provisions on considering cases in the sequence in which they were filed and on the obligation to consider cases in a full bench upon a motion of at least three judges.

At the same time, the CC discontinued the proceedings with respect to the procedure of electing the President of the CC by the President from among three candidates submitted by the General Assembly of Judges of the CC. The review of their constitutionality was impossible, since the charges in this respect were formulated too narrowly and did not include all the relevant provisions.

"Not even a democratically elected parliament has the right to set regulations that conflict with the fundamental law", the judge-rapporteur, Andrzej Wróbel, announced when presenting the verdict. He added that the Polish constitution of 1997 determines the division of powers between different institutions in the country and must be respected.

Dissenting opinions to the judgment were submitted by the following judges of the Constitutional Tribunal: Judge Zbigniew Jędrzejewski[58], Judge Julia Przyłębska, and Judge Piotr Pszczółkowski.

As a result of the CC judgment of 11th of August 2016, the ACC of June 2015 lost its binding force with the entry into force of the ACC of July 2016. However, the CC's consideration of practically all of the transitional provisions as unconstitutional may cause significant problems in applying the law. Moreover, Jarosław Kaczyński, the leader of PiS dismissed the judgment as "political" and "an act of private nature" already in the eve of its rendering, adding that the

[58] On 29th of March 2016, the government nominated its own candidate, Zbigniew Jędrzejewski, to replace CC judge Mirosław Granat whose term expired in April 2016. Opposition parties have not nominated their candidates.

government would not respect it and, as it was easy to predict, the government refused to publish it.

12. THE CONCLUSIONS AND PERSPECTIVES.

The ongoing constitutional crisis in Poland is far more than yet just another example of "court packing" agenda[59]. It rather resembles the Hungarian case, where the Orbán's Fidesz has "successfully" marginalised the role of the Hungarian Constitutional Court. However, unlike in Hungary, PiS did not win in democratic elections the supermajority needed to amend the Constitution of 1997. As A. Radwan points out, in spite of that fact, Kaczyński's party now attempts to get there through dubious by-passes trampling the rule of law and spoiling political and constitutional culture. But it is still more complex than just to say that the incumbents strive for the marginalisation of the CC. It equally appears to make a part of an attempted redefinition of elites and societal structure of post-socialist Poland, as defined by the renowned Round Table Talks and accompanying negotiations that led to a bloodless transformation started in 1989[60]. The Polish case illustrates that even seemingly well-established constitutional courts may get into serious trouble once the generalized support to the idea of limited government and the separation of powers, and finally the principle of judicial review, is di-

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[59] The term was originally used in reference to 1937 plan prepared by Roosevelt administration to increase the number of Supreme Court judges from 9 to 15 (allegedly to make it more efficient). After the plan was announced, the Supreme Court changed its tune and became more amenable to upholding economic regulations. In March of 1937, the Court decided *West Coast Hotel Co. v. Parrish* and before minimum wage legislation was about to be struck down, one conservative justice switched position and voted to uphold the law in question, in a change of direction that was called the "switch in time that saved nine". After this and several similar decisions, Congressional support for Roosevelt's packing plan collapsed. Eventually, in cases like *United States v. Carolene Products Company*, the U.S. Supreme Court gave legislators the ability to impose economic regulations, and SCOTUS scrutiny of such matters grew more minimal. Nevertheless, Roosevelt's court packing plan is badly remembered as a proposal that threatened the independence of the judiciary, a threat that proved successful. See further on this issue: B. A. Perry, H. J. Abraham, *Franklin Roosevelt and the Supreme Court. A New Deal and a New Image*, in: *Franklin D. Roosevelt and the Transformation of the Supreme Court*, eds. S.K. Shaw, W.D. Pederson, M.R Williams, Routledge 2015. However, an older illustration of "court packing" agenda were "midnight appointments" made by President John Adams on his last day in office which led to the pivotal Marbury v. Madison judgment of the Supreme Court in 1801.

[60] A. Radwan, op. cit., p. 16

minishing[61]. For the first time Sejm annulled a valid election of judges; for the first time, the Polish government has openly ignored a clear command of the CC (judgments 3rd and 9th December 2015) and the government has called a binding CC judgment a mere communiqué (judgment of 9th March)[62].

Moreover, Poland has become the subject of the EU Rule of Law Framework which allows the European Council to impose sanctions on countries found to be in serious and persistent breach of fundamental EU values (Article 2 of TFUE). In the worst-case scenario it means suspending voting rights of the Member Country. In January 2015, the European Commission decided to undertake a preliminary investigation of whether there were clear indications of a 'systemic threat to the rule of law' and initiate a dialogue with the member state concerned. In response, the Polish government strongly opposed Commission interference and insisted that it was an internal matter of a political rather than legal nature. However, it also tried to de-escalate the dispute by saying that it was open to dialogue with the Commission and consultations with opposition leaders to find a compromise solution. On 27th of July 2016, the Commission moved to the next stage of the procedure issuing an official 'rule of law recommendation' urging the Polish government to: swear in the judges elected by the previous parliament; publish and fully implement all tribunal rulings; screen the latest tribunal law for compliance with the Venice Commission; and report on progress within three months[63]. The Commission, however, has no powers to impose sanctions on Poland as the 'rule of law' framework only constitutes a political dialogue without any legally binding recommendations. These can only arise if the Commission proposes them to the EU Council under Article 7 TFUE, where they require unanimity in one of the three stages of voting. It is worth mentioning that the Hungarian government has already made it clear that it will veto any attempt to introduce such measures[64].

The ongoing crisis triggers debate on further perspectives of the CC. Currently the government appears to be employing delaying tactics and waiting till December 2016 when the term of the current President of the CC, Andrzej

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[61] A. Śledzińska-Simon, *op. cit*.

[62] P. Starski, op. cit.

[63] *Further on this issue see: A. Sczerbiak*, Is there an end in sight to Poland's constitutional crisis? https://polishpoliticsblog.wordpress.com/2016/08/02/is-there-an-end-in-sight-to-polands-constitutional-crisis/.

[64] See A. Sczerbiak, *How Will The EU's 'Rule Of Law' Investigation Affect Polish Politics?* https://www.socialeurope.eu/2016/02/how-will-the-eus-rule-of-law-investigation-affect-polish-politics/.

Rzepliński, ends[65]. One can only wait for the Government's showdown regarding this matter. Undoubtedly PiS will attempt to impact on the selection procedure, which is a part of the CC General Assembly competence.

No matter how the Polish constitutional crisis will develop one thing is certain- it has proved the accuracy of A. Hamilton's assessment of the judicial branch's position within the tri-partite division of powers, when he claimed that:

"Whoever attentively considers the different departments of power must perceive, that, in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them. The Executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments"[66].

As Kim L. Scheppele points out, the separation of power is a contact sport[67]. In times of tension between a constitutional court and a parliament or a government, the former has merely judgments to defend its position. Although courts have powerful weapon, judicial activism, the Polish case shows that sometimes it is simply not enough.

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[65] See further on this issue: P. Starski, op. cit.

[66] A. Hamilton, The Federalist No. 78, available at: http://www.constitution.org/fed/federa 78.htm.

[67] See: K. L. Scheppele, *A Comparative Role of Chief Justice's Role. Guardians of Constitution: Constitutional Court Presidents and the Struggle for the Rule of law in Europe*, University of Pennsylvania Law Review, Vol. 154, p. 1760.

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