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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

POLAND

DRAFT OPINION ON THE ACT ON THE CONSTITUTIONAL TRIBUNAL

on the basis of comments by:

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Contents

I. Introduction

1. By letter of 12 July 2016, the Secretary General of the Council of Europe, Mr Thorbjørn Jagland, asked the Venice Commission to examine rapidly whether the draft Act on the Constitutional Tribunal of Poland, which had been adopted by the *Sejm* in second reading on 7 July 2016[1] (CDL-REF(2016)048, hereinafter the "draft Act"), follows the Commission's Opinion adopted in March 2016[2] (hereinafter "the Opinion"). In a public statement,[3] the Secretary General urged the Polish Senate, and the *Sejm* at its final reading, to take this assessment into consideration.

2. The Commission invited Ms Sarah Cleveland, Mr Michael Frendo, Mr Christoph Grabenwarter, Mr Jean-Claude Scholsem and Mr Kaarlo Tuori, who were rapporteurs for the Opinion CDL-AD(2016)001, to work also on this opinion.

3. In view of the urgency, the Bureau of the Venice Commission authorised the preparation of a preliminary opinion, for transmission to the Secretary General and the Polish authorities prior to the plenary session. However, in view of amendments introduced in the Senate to the draft Act adopted in second reading by the *Sejm*, the Secretary General requested the Venice Commission to prepare an opinion on the adopted text. The *Sejm* accepted most of the proposals by the Senate and adopted the Act on 22 July 2016. Following signature by the President of Poland, the Act was published in the Journal of Laws of Poland on 1 August 2016 (CDL-REF(2016)052). As a consequence, this opinion refers in some parts to differences between the draft Act adopted by the *Sejm* and the final adopted Act.[4]

4. Two groups of *Sejm* Deputies, the First President of the Supreme Court and the Polish Ombudsman all appealed against the new Act to the Constitutional Tribunal. Within the two week *vacatio legis* period before the Act entered into force, the Constitutional Tribunal handed down its judgment on 11 August 2016, in which it found several provisions of the Act unconstitutional. This opinion also takes into account which of the articles were found unconstitutional. The Prime Minister refused to publish this judgment because the Tribunal did not apply the Amendments of 22 December 2015, which the Tribunal had found unconstitutional in its judgment of 9 March 2016. Some appeals against the 22 July Law are still pending, inter alia with respect to the procedure for election of the President of the Tribunal.

5. On 12-13 September 2016, a delegation of the Commission, composed of Ms Cleveland, Mr Scholsem and Mr Tuori, accompanied by Mr Markert and Mr Dürr from the Secretariat, visited Warsaw and met with (in chronological order) the Supreme Court, the Senate (majority and opposition together), the Ministry of Justice, the majority in the *Sejm*, the opposition in the *Sejm* (ad hoc meeting[5]), the Commissioner for Human Rights, the Constitutional Tribunal (sitting judges, minus the sitting judges appointed by the current mandate of the Sejm and the 'December judges', who refused to meet the delegation[6]; and – in a separate meeting – the 'October judges') and the Chancellery of the Prime Minister.

[1] *Sejm* paper no. 693.
[2] CDL-AD(2016)001 Opinion on Amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland, adopted by the Venice Commission at its 106th Plenary Session (Venice, 11-12 March 2016).
[3] http://www.coe.int/en/web/portal/-/statement-by-secretary-general-jagland-on-the-adoption-by-the-*Sejm*-of-poland-of-the-draft-act-on-the-constitutional-tribunal-.
[4] For example, a limitation on the Ombudsman to participate only in proceedings on constitutional complaints was removed following a proposal by the Senate (Articles 52 and 82).
[5] The Marshall of the Sejm had scheduled only a meeting with the majority.
[6] In a letter to the Commission, these judges stated that they do not trust the Venice Commission and that they believe that the meeting would serve as a legitimisation of another unjustified, biased and negative opinion against Poland.

6. The present opinion was prepared on the basis of contributions by the rapporteurs and on the basis of translations of the draft Act and the adopted Act. Inaccuracies may occur in this opinion as a result of incorrect translations.

7. This opinion was adopted by the Venice Commission at its … Plenary Session (Venice, …).

II. European and International Standards

8. The two central standards relevant to this opinion are the independence of the Judiciary[7] and the position of the constitutional court, where it exists, as the final arbiter in constitutional issues, entailing the obligation of other branches of government to abide by the decisions of that court. These standards are explained *inter alia* in the Rule of Law Checklist of the Venice Commission.[8]

9. The Rule of law implies several fundamental principles. Some of them are particularly relevant in the context of the present opinion. First and foremost, legislation and actions of the executive must conform to the Constitution.[9] Public authorities must operate with a legal basis, and must respect both procedural and substantive law, as interpreted by the courts.[10] Their decisions must be duly motivated.[11] Their action, including their exercise of law-making power, should be effectively reviewable for its constitutionality and legality by an independent and impartial judiciary.[12] "Independent" means free from external pressure and not subject to political influence or manipulation, in particular by the executive branch,[13] including as concerns appointments and promotions, which must not be based on political or personal considerations.[14] Judicial activities may not be supervised by the executive or other public bodies.[15] All final judgments must be effectively and promptly executed.[16]

10. The conformity of governmental action, including legislation, with the constitution is ensured by the Constitutional Court, in countries where it exists.[17] This role is especially important in times of strong parliamentary majorities. The composition of the Constitutional Court must be balanced.[18] Parliament, the executive and the ordinary courts must follow and implement the decisions of the Constitutional Court and be guided by the Court's arguments in their future activities.[19]

11. These principles are also reflected in the Polish Constitution. Its Article 2 provides that "The Republic of Poland shall be a democratic state ruled by law and implementing the principles of social justice." Its Article 8.1 provides that "The Constitution shall be the supreme law of the Republic of Poland". Article 10 enshrines the principle of the separation of powers and its paragraph 2 explicitly provides "… the judicial power shall be vested in courts and tribunals".

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[7] Article 6 of the European Convention on Human Rights; Article 14 of the International Covenant on Civil and Political Rights (see also General Comment No. 32 on Right to a Fair Trial by the United Nations Human Rights Committee).
[8] CDL-AD(2016)007, Rule of Law Checklist, endorsed by the Committee of Ministers of the Council of Europe on 6 September 2016.
[9] *ibid.,* section II.A.1.ii and iv.
[10] *ibid*, section II.A.2.i and iv, par. 45-46.
[11] *ibid*. section II.C.iv.
[12] *ibid*, sections II.A.1.vi and II.A.4.ii.
[13] *ibid*, par. 74 and 86.
[14] *ibid*, par. 79
[15] *ibid*, section II.E.1.b.i.
[16] *ibid*, section II.E.2.d.i and II.E.3.iv; par. 107.
[17] *ibid*, par. 108.
[18] *ibid*, par. 112.
[19] *ibid,* section II.E.3.iii, iv and v; paragraphs 110 and 111.

III. Opinion CDL-AD(2016)001 on Amendments to the Act of 25 June 2015 on the Constitutional Tribunal

12. Opinion CDL-AD(2016)001 dealt with Amendments to the Law on the Constitutional Tribunal of 22 December 2015 (published on 28 December 2015). To the extent required to understand the Amendments, the Opinion also dealt with the intrinsically linked issue of the appointment of judges.

13. With respect to the dispute over the election to the Constitutional Tribunal in October of three judges and another set of three judges in December, the opinion called on both "majority and opposition to do their utmost to find a solution in this situation." In particular, the Commission emphasised that in a State based on the rule of law, "any such solution must be based on the obligation to respect and fully implement the judgments of the Constitutional Tribunal." (para. 136). The Venice Commission found that a proposed solution providing that all judges of the Tribunal be replaced, even if it was adopted by a constitutional majority in Parliament, would be in flagrant violation of European and international standards (para. 125).

14. With respect to the amendments adopted on 22 December, the Commission concluded that the different measures included therein, especially in their combined effect, would slow down the work of the Constitutional Tribunal and render it ineffective. The Commission observed that "Crippling the Tribunal's effectiveness will undermine all three basic principles of the Council of Europe: democracy – because of an absence of a central part of checks and balances; human rights – because the access of individuals to the Constitutional Tribunal could be slowed down to a level resulting in the denial of justice; and the rule of law – because the Constitutional Tribunal would become ineffective. Making a constitutional court ineffective is inadmissible and this removes a crucial mechanism which ensures that potential conflicts with European and international norms and standards can be resolved at the national level without the need to have recourse to European or other subsidiary courts, which are overburdened and less close to the realities on the ground" (para. 138).

15. The Venice Commission saw no alternative to the approach taken by the Constitutional Tribunal, i.e. that in the proceedings before the Constitutional Tribunal, the December amendments of these rules were not applicable when the Tribunal examined their constitutionality, because they would block the Tribunal in fulfilling its function according to the Constitution. In reply to the announcement that the Prime Minister would not publish the Constitutional Tribunal's judgment, the Commission held: *"A refusal to publish judgment 47/15 of 9 March 2016 would not only be contrary to the rule of law, such an unprecedented move would further deepen the constitutional crisis triggered by the election of judges in autumn 2015 and the Amendments of 22 December 2015. Not only the Polish Constitution but also European and international standards require that the judgments of a Constitutional Court be respected. The publication of the judgment and its respect by the authorities are a precondition for finding a way out of this constitutional crisis"* (para. 143).

16. In conclusion, the Opinion recalled that "*[c]onstitutional democracies require checks and balances. In this respect, where a constitutional court has been established, one of the central elements for ensuring checks and balances is the independent constitutional court, whose role is especially important in times of strong political majorities.*" And *"[a]s long as the situation of constitutional crisis related to the Constitutional Tribunal remains unsettled and as long as the Constitutional Tribunal cannot carry out its work in an efficient manner, not only is the rule of law in danger, but so is democracy and human rights"* (para. 135).

17. By calling for a solution of the constitutional crisis on the basis of the Constitution and the judgments of the Tribunal, the Venice Commission insisted that the crisis is a legal problem, which must be resolved consistent with fundamental principles of the rule of law.

18. Finally, the Venice Commission made the following specific recommendations:
    1. The Commission called both on majority and opposition to do their utmost to find a solution to the problem of the appointments, by fully respecting the judgments of the Tribunal.
    2. The Commission warned against crippling the Tribunal's effectiveness by slowing down its work.
    3. The Commission recommended that Poland should hold a principled and balanced debate, providing enough time for full participation by all institutions, on reform of the procedure and organisation of the Court and whether and what types of proceedings warrant reasonable time limits before the Tribunal.
    4. The Commission strongly insisted on the publication of Judgment 47/15 of 9 March 2016 as an indispensable condition to avoid deepening the current constitutional crisis and to help solving it.
    5. The Commission recommended that – in the long run – the Constitution be amended, either to introduce a qualified majority for the election of the judges of the Constitutional Tribunal by the *Sejm* or to introduce a system by which one third of the judges of the Constitutional Tribunal is appointed / elected by each of the three State powers – the President of Poland, Parliament (by 2/3 majority) and the Judiciary.

IV. Chronology since the adoption of Opinion CDL-AD(2016)001 of 11 March 2016

30 March 2016 — The Marshal of the *Sejm* established an expert team to examine Opinion CDL-AD(2016)001 and make recommendations.

6 April 2016 — Following the judgment of 11 March 2016, the Constitutional Tribunal adopted 21 judgments, but the Government did not publish them because they were not adopted according to the Amendments to the Act of 22 December. Two judges elected in December 2015 who were assigned cases participated in these cases.

27 April 2016 — The Presidium of the Supreme Court adopted a resolution stating that the judgments of the Constitutional Tribunal are binding even if they are not published. Several mayors also declared that they would apply unpublished judgments of the Tribunal.

28 April 2016 — The President of Poland accepted the oath of a new judge elected by the *Sejm*.

7 July 2016 — The *Sejm* adopted in second reading a completely new Act on the Constitutional Tribunal based on the 1997 Act that was in force before the June 2015 Act.

12 July 2016 — The Secretary General of the Council of Europe requested an urgent opinion on this draft Act from the Venice Commission and called on the Polish Senate and *Sejm* to take this opinion into account in adopting the law. In light of amendments introduced in the Senate, the Secretary General asked the Commission to give its opinion not on the draft Act but on the final adopted text.

21 July 2016 — The Senate made 27 proposals for amendments to the draft Act.

21 July 2016 — The *Sejm* accepted most of the 27 proposals and subsequently adopted the Act in final reading on 22 July.

27 July 2016 — The President of Poland signed the new Act on the Constitutional Tribunal.

1 August 2016 — The new Act was published in the Journal of Laws, item 1157.

1 August 2016 The expert group established by the Marshal of the *Sejm* rendered its report,[20] which criticised the opinion of the Venice Commission and found that the President of the Constitutional Tribunal had no legal basis for refusing to assign cases to the December judges. The report, *inter alia,* proposed electing judges of the Tribunal with a three-fifths majority in the *Sejm*. If that majority could not be achieved, the judges would be elected by a simple majority.

8 August 2016 The Supreme Administrative Court applies a non-published judgment of the Constitutional Tribunal (SK 31/14 of 28 June 2016) in its judgment II FSK 1021/16.[21]

11 August 2016 The Constitutional Tribunal annulled several provisions of the new Act. The Government refused to publish that judgment.

16 August 2016 The new Act entered into force.

16 August 2016 The Government published 21 so-called 'illegally adopted' judgments of the Tribunal pursuant to the new Act, but not the judgments of 9 March and 11 August 2016.[22]

18 August 2016 One of the December judges initiated criminal proceedings against the President of the Tribunal because the President was preventing the December judges from working as judges. The case was transferred to the Katowice prosecution service, reportedly because the competent Warsaw prosecution service was overloaded.

31 August 2016 The head of the PiS majority parliamentary group called for removal from the Tribunal of judges who do not respect the 22 July 2016 Act on the Tribunal as adopted.

V. The new Act on the Constitutional Tribunal adopted on 22 July 2016

19. This opinion first analyses the extent to which the Act follows the main recommendation of the Commission that the Act should not affect the effective functioning and independence of the Constitutional Tribunal. In addition, it examines whether individual recommendations of Opinion CDL-AD(2016)001 have been followed.

20. While the Venice Commission cannot examine the procedure of adoption of the Act of 22 July, it should be noted that the opposition informed the delegation of the Venice Commission that alternative proposals were withdrawn in protest because the Sejm dealt only with the proposal introduced by the majority. Furthermore, the Act was adopted during the holiday season and while there was a *vacatio legis* - as opposed to the Amendment of 22 December to the previous Act - the period of two weeks was unusually short for such important legislation. This made the control of the Act before its entry into force very difficult.

21. The Venice Commission recalls that institutional legislation, like that on the Constitutional Tribunal, needs thorough scrutiny and the opinions of all relevant stakeholders should be

[20] http://www.sejm.gov.pl/media8.nsf/files/ASEA-ADRKC8/%24File/Report%20of%20the%20Team%20of%20Experts%20on%20the%20Issues%20Related%20to%20the%20Constitutional%20Tribunal.pdf

[21] http://orzeczenia.nsa.gov.pl/doc/678DC69420.

[22] Article 89 of the Act of 22 July 2016 provides that the Tribunal's rulings "issued in breach of the provisions of the Constitutional Tribunal Act of 25 June 2015 before 20 July 2016 shall be published within 30 days from the entry into force of this Act, with the exception of rulings concerning normative acts that have ceased to have effect". This provision was found unconstitutional by the Tribunal in its unpublished judgment of 11 August 2016.

considered in a reasoned manner, with appropriate time for transparent public debate. Even if Parliament is not obliged to follow these views, this input can avoid unconstitutional provisions or provisions with technical errors, which defeat the purpose of the legislation.[23]

A. Dismissal of judges

22. The Commission notes that it is consistent with the recommendations of Opinion CDL-AD(2016)001 that the Act does not provide for the initiation of disciplinary proceedings by the President of Poland and the Minister of Justice. The Opinion had insisted that disciplinary proceedings against judges should not be initiated by the President and the Government: *"It is not clear what the justification is for introducing such a provision into the Polish Act. The Act does not grant the power to initiate such proceedings to any other external actor and the President and the Minister of Justice have no special role in the criminal proceedings that might be brought against constitutional judges under the conditions set out in Articles 24-27 of the Act."* (par 93).

23. Moreover, contrary to the amendments of 22 December 2016, the Act no longer provides for the dismissal of judges by the *Sejm* upon the motion of the Assembly of the Constitutional Tribunal. This is welcome.

24. According to Article 12, a judge of the Tribunal can be dismissed in disciplinary proceedings by the Tribunal itself. A draft provision according to which such a disciplinary ruling would have required the consent of the President of Poland (draft Article 12.2) was removed on the basis of a proposal of the Senate. This amendment is welcome.[24]

B. Appointment of the President of the Constitutional Tribunal

25. Under the July 2016 Act, the President of Poland can choose the President of the Tribunal from among three candidates presented by the General Assembly of the Judges (Article 16). Compared to the 2015 Act (Article 12) and the previous Act of 1997 (Article 15), the number of candidates for the Presidency of the Tribunal has been increased from two to three, while the total number of judges – as determined by the Constitution – remains 15 and *de facto* at the moment only 12 judges participate in decision-making. Each judge has only one vote and the three candidates with the highest number of votes are communicated to the President of Poland. A total of three candidates must be presented.[25] In the current situation, when there are only 12 judges, a group of 3 judges can ensure that their preferred candidate is on the list, even though that candidate may not have the confidence of the other judges. It should be noted that 3 of the 12 judges, who participate in decision-making, were elected by the current Sejm.

26. In the past, the Venice Commission has recommended the election of the President of the Constitutional Court by the judges as good practice,[26] but a comparative survey shows that there is no definitive European standard on this.[27]

[23] CDL-AD(2016)007, Rule of Law Checklist, point II.A.5 and II.E.3; CDL-AD(2016)001, par. 132., CDL-AD(2016)017, Georgia - Opinion on the Amendments to the Organic Law on the Constitutional Court and to the Law on Constitutional Legal Proceedings, par. 13.

[24] Any discretion of the President in accepting or rejecting the dismissal of a judge would have been problematic. The discretionary consent that would have been provided for by the President cannot be compared to the formal dismissal of constitutional court judges in other countries. In Germany, for instance, according to § 105 of the Law on the Federal Constitutional Court, it is the Court which may "authorise" the Federal President to remove a judge of the Federal Constitutional Court from office, and this removal is simply a formal act implementing the decision of the Court.

[25] The draft Law adopted by the Sejm in second reading had provided for "at least" three proposals for candidates. The Senate proposal to remove the words "at least" was accepted by the Sejm.

[26] CDL-AD(2011)016, Opinion on the new Constitution of Hungary, paragraph 94.

27. Art. 194.2 of the Constitution requires that candidates for the President of the Constitutional Tribunal are "proposed by the General Assembly of the Judges of the Constitutional Court". In Article 194.2, the Polish Constitution thus establishes a mixed system whereby the General Assembly of the Tribunal makes a proposal to the President of Poland, who then can choose among the candidates presented. The aim of this system is obviously to give the Tribunal substantial influence on its Presidency. If the number of candidates presented by a body of 15 judges is raised from two to three, this influence is largely eliminated.

28. In such a system, when there is a very small number of voters (twelve in the current situation, 15 once the issue of the appointments is settled) have to elect a relatively high number – three – candidates (25 per cent or 20 per cent respectively), restricting each judge to a single vote is likely to lead to severe distortions of the result compared to the intentions of the General Assembly. It could easily happen that the third and maybe even the second candidate will be proposed by very few or even a single judge - potentially only by him- or herself. Such a situation should be avoided, preferably by attributing to each judge a number of votes equal to the number of candidates required to be presented to the President of Poland. Only such a system can ensure that the proposals will represent the preferences of the General Assembly rather than an arbitrary result reflecting the will of a small minority of judges, which seems to contradict the goal of the Article 194 of the Constitution.

29. Article 16 should be amended to ensure that only candidates with substantial support in the Tribunal can be elected can be proposed to the President of Poland (e.g. by removing the rule that judges have a single vote as well as the requirement that three candidates be proposed).

30. During the visit, the delegation of the Venice Commission learned that following the judgment of 11 August 2016, two more applications against the Act of 22 July are pending before the Tribunal (by the First President of the Supreme Court and by a group of deputies of the *Sejm*). They seem to relate *inter alia* to the constitutionality of Article 16 of the Act. It will be up to the Tribunal itself to decide whether this is compatible with Art. 194.2 of the Constitution However, it is the view of the Venice Commission that, particularly in light of the current configuration of the Tribunal, this provision gives the President of Poland excessive leverage over the work of the Tribunal.

C. Attendance quorum – 11 out of 15 judges

31. In Article 26.2, the attendance quorum for the plenary session was lowered from 13 to 11 out of 15 judges. While this quorum – some 70 per cent of judges -- is still higher than in most European states (see comparative information in section V.B.2 of the Opinion CDL-AD 2016(001), it is not such a high level as to endanger the functioning of the Tribunal if the judges of the Court respect their obligation to be present at the proceedings of the Tribunal. Since currently 12 judges participate in decision-making, this new rule could also enable the Prime Minister's office to publish future judgments of the Court without contradicting its previous (erroneous) legal position.

[27] Election of the President of the court is performed by the judges in Albania, Brazil, Croatia, Italy, Kosovo, Latvia, Moldova, Monaco, Portugal, Romania, Serbia, "the former Yugoslav Republic of Macedonia", Turkey and, Ukraine; appointment/election is performed by political organs in: Austria, Belarus, Czech Republic, France, Germany, Hungary, Lithuania, Luxembourg, Netherlands, Norway, Russia, Slovakia, South Africa and Switzerland; see also CDL-STD(1997)020, Report on the Composition of Constitutional Courts - Science and Technique of Democracy, no. 20 (1997) and www.CODICES.coe.int.

D. Referral of cases to the full bench

32. Article 26.1.1 provides that the Court shall decide in full bench cases regarding conflicts of power between central State authorities, on the existence of impediments to the exercise of the office of the President of Poland, on the constitutionality of the goal or the activity of political parties, on *a priori* control of bills, on international agreements before their ratification, on the Act on the Constitutional Tribunal and on particularly complex cases and cases in which a bench wants to depart from earlier case-law. The President of the Tribunal can declare a case to be particularly complex (Article 26.1.1.f). In addition, three judges can refer a case to the full bench (Article 26.1.1.g).

33. A requirement that the Tribunal sit as a full bench, if applied frequently, is quite burdensome to the functioning of the Tribunal. What makes Article 26.1.1.g questionable is that other judges cannot reject such a request. In systems where such a referral to the plenary of the Court exists (such as Austria) there is either no such restriction on the ability of the plenary to reject a referral, or the plenary can decide in fast track or summary proceedings if it finds that the case does not raise a serious issue under the Constitution.

34. In its judgment of 11 August 2016, the Constitutional Tribunal held that Article 26.1.1.g, which enables three judges of the Tribunal to refer a case to the full bench, is inconsistent with Article 197 of the Constitution (on the regulation by statute of the organisation of the Tribunal and its proceedings) and with Article 195 of the Constitution (on the independence of the judges of the Tribunal). The Tribunal noted that a request by three judges does not need to be substantiated and cannot be evaluated by the President of the Tribunal or the adjudicating bench. In addition, the principle of diligence derived from the Preamble of the Constitution is violated because the rule that only the most significant and serious matters should be dealt with by a full bench can be infringed. Finally, according to the Constitutional Tribunal, the principle of effectiveness of the work of the Tribunal would be infringed because the provision could lead to a situation where most cases were dealt with in full bench.

35. The decision of the Constitutional Tribunal is convincing and in line with the position of the Venice Commission expressed also in its recent Opinion on the Amendments to the Organic Law on the Constitutional Court and to the Law on Constitutional Legal Proceedings of Georgia.[28] In the absence of a possiblity for the other judges to reject a transfer request, there is a danger of politicisation and obstruction to the effective functioning of the Tribunal.

E. Presence of the Prosecutor General

36. Article 61.6 provides that hearings can take place in the absence of the duly notified Prosecutor General, unless his/her presence is required. Article 30.5 requires the presence of the Prosecutor General in all cases before the full bench, which include, according to Article 26, particularly complex cases. This means that the Prosecutor General can prevent hearings in complex cases from taking place simply by staying away. There seems to be no procedure that would allow the Tribunal to proceed even in case of a repeated absence of the Prosecutor General. The combination of these provisions could easily be abused to prevent the Tribunal from taking a decision in the absence of the Prosecutor General.

37. Furthermore, it should be noted that since March 2016 the functions of the Prosecutor General and the Minister of Justice have been merged. The Minister of Justice now fulfils the competences of the Prosecutor General, as was the case before the year 2011. Notably as legislation under review by the Tribunal will often have been proposed by the Minister of Justice or other ministries, the Minister has a direct interest in the proceedings of the Tribunal and should not be able to block or delay the proceedings.

[28] CDL-AD(2016)017, par. 38-41.

38. Since the Prosecutor General can be represented by his or her deputy according to Article 30.5, there is no justification why the absence from a hearing of the duly notified Prosecutor General or his or her representative should prevent the Tribunal from going ahead with a hearing. As adopted, this provision enables a member of the Government to interfere with the work of the Tribunal and to delay decisions in particularly important cases, which may be of major importance for the Government.[29] Article 61.6 is a serious risk for the effectiveness of the Tribunal.

39. The fact that these provisions were already part of the 1997 Act (Articles 29.5 and 60.4) does not change this assessment, not least because, as noted above, the Act of 22 July substantially increases the jurisdiction of the full bench and allows three judges or the President to refer any case to the full bench without enabling the other judges to refuse such a transfer.

40. On 11 August 2016, the Tribunal held that Article 61.6 of the Act is inconsistent with Article 10 (separation of powers), Article 173 (independence of the judicial power), and Article 188 of the Constitution (powers of the Constitutional Tribunal), as well as with the Preamble to the Constitution (principle of diligence and efficiency in the work of public institutions), because the repeated absence of the Prosecutor General could lead to an indefinite suspension of a case.

41. The annulment by the Tribunal of the ability for the Prosecutor General to block the proceedings of the Tribunal removes a danger to the efficient functioning of the Tribunal.

F. Sequence of cases

42. Article 38.3 of the Act provides that hearings on admissible cases should be scheduled in the order in which cases are received by the Tribunal. The Article includes some exceptions, in particular for cases involving the *a priori* control of bills, control of the constitutionality of international treaties before their ratification, control of the Budget law, control of the Act on the Constitutional Tribunal, cases involving the obstacles to the exercise of the office of the President of Poland, cases involving competence disputes between state authorities and for the control and activity of the goals and acts of political parties[30] (Article 38.4). Article 38.5 provides that the President of the Tribunal may set the date of a hearing and bypass the sequence rule if this is justified by necessity to safeguard the rights or freedoms of citizens, national security or the constitutional order. Upon a motion by five judges, the President of the Tribunal may reconsider a decision about the date of a hearing.[31]

43. The Opinion criticised the sequence rule in the Amendments of 22 December 2015 because "constitutional courts have to be able to quickly decide urgent matters also in cases concerning the functioning of constitutional bodies, for instance when there is a danger of a blockage of the political system" (par 63). The relevant provisions of the Amendments were also found unconstitutional in Judgment 47/15 of 9 March 2016.

44. In addition to the exceptions in Article 38.4, which concern specific proceedings, Article 38.5 covers a wider range of situations in which the President of the Tribunal may advance

[29] CDL-AD(2016)007, Rule of Law Checklist, par. 74.
[30] This last exception was added following a proposal by the Senate accepted by the Sejm.
[31] Draft Article 38.5 of the Act had provided that the President of the Constitutional Tribunal could set a date outside the "sequence order", if the President of the Republic of Poland so requested. This request by the President would also be an official act requiring the counter-signature of the Prime Minister (Article 144.2 of the Constitution). Such a dependence of the Tribunal on both the President of Poland and the Prime Minister would have been in clear conflict with the principle of the separation of powers and the Tribunal's independence. It is important that this provision was removed upon proposal by the Senate.

hearings in certain important circumstances (to safeguard the rights or freedoms of citizens, national security or the constitutional order). While this increased flexibility is welcome, it still seems questionable whether and why such rules are needed at all. It is important to the independence and effective functioning of the Tribunal for it to be able to determine the order of its proceedings. The influential position given to the President of the Tribunal over this issue makes it all the more important that the President should enjoy the confidence of his or her colleagues (but see above under section B).

45. The Act also still does not provide for an exception for preliminary requests to the Court of Justice of the European Union, as was recommended in the Opinion: *"… it must be ensured that such a preliminary request to the European Court of Justice does not block the functioning of the Tribunal. Preliminary requests necessarily slow down national court proceedings, because the national proceedings are suspended during the proceedings before the Court of Justice. A strict application of the sequence rule of Article 80(2) of the Act would result in the inability of the Tribunal to decide any other case until the Court of Justice has given its ruling and would thus bring Polish law in conflict with EU law."* (par. 61). The Commission is concerned that no exception has been introduced in this respect. It is doubtful whether a reference under Article 267 TFEU would be covered by the exception of Article 38.5 ("necessity to safeguard the rights or freedoms of citizens, national security or the constitutional order"). Therefore, a specific exception would also need to be provided for this situation in Article 38.4.

46. In its judgment of 11 August 2016, the Constitutional Tribunal held that the provisions on the sequence rule and exceptions to it (paragraphs 3 to 6 of Article 38) are inconsistent with Article 10 (separation of powers), Article 173 (independence of the judicial power), Article 188 (powers of the Constitutional Tribunal) and paragraphs 1 to 5 of Article 191.1 of the Constitution (bodies entitled to appeal to the Tribunal) as well as with the Preamble to the Constitution (diligence and efficiency). Discriminating against abstract review cases initiated by State bodies in the way foreseen in Article 38 undermines the credibility and consistency of the constitutional system. According to the Tribunal, cases brought by groups of *Sejm* deputies (a parliamentary minority) are a guarantee for the implementation of the principle of political pluralism.

47. The complete removal of the sequence rule by the Tribunal is positive because it ensures necessary flexibility in the work of the Tribunal which would be difficult to achieve even with the exceptions under Article 38.5. In addition, it solves the problem of the missing exception for preliminary requests to the Court of Justice of the European Union.

G. Delay of hearings

48. Article 61.1 of the Act establishes an obligation to hold a hearing no earlier than 30 days after notification (of the parties). Article 61.2 makes exceptions to this rule for *a priori* review of budget laws and for the determination of an impediment to the exercise of the office by the President. These types of proceedings do not fall under the sequence rule and should be examined immediately. Under Article 61.3, for questions of law (referrals from ordinary courts), constitutional complaints and cases relating to conflicts of power between central constitutional state authorities, the President of the Tribunal may reduce this period by half unless the referring court, the complainant or the applicant, respectively, objects to such a reduction within 7 days.

49. The Opinion was very critical of the rule in the Amendments of 22 December 2015 providing that hearings could not be held earlier than six months after notification: *"Mandating such long time lapses for hearings could deprive the Tribunal's measures of much of their effect, and in many cases even make them meaningless, even when taking into account the exemptions granted in paragraph 2a (request by the President of Poland, cases relating to human rights and cases relating to the Standing Orders of the Sejm or Senate). There is no general provision that would let the Tribunal reduce these deadlines in urgent cases. This*

situation, again, contradicts the requirements for a reasonable length of proceedings under Article 6 of the European Convention on Human Rights." (par 87).

50. The period of 30 days is clearly preferable to the earlier six month period, but the Tribunal should still be able to make exceptions in all types of urgent cases, because *"the court needs discretion in setting time limits for proceedings and notably in setting dates for public hearings. In particular, in times of crisis, constitutional courts need flexibility."* (par 86).

51. Referring to the same reasons as relevant to Article 38 above, the Constitutional Tribunal held in its judgment of 11 August 2016 that the clause *"[w]ith regard to questions of law, constitutional complaints and disputes over powers between central constitutional state authorities"* of Article 61.3 is inconsistent with Article items 1 to 5 of Article 191.1 of the Constitution (bodies entitled to appeal to the Tribunal) as well as with the Preamble to the Constitution (principle of diligence and efficiency of public institutions). The Tribunal thus removed the limitation to certain types of proceedings (requests from ordinary courts, constitutional complaints and conflicts of the power) of the power of the Tribunal President to reduce the 30 day period before a hearing can be held to 15 days. As a consequence, the Tribunal's President can reduce this period in all cases.

52. The enlargement by the judgment of 11 August 2016 of the power of the President to reduce the 30 day period before a case can be heard to all types of cases is in line with the recommendations made in the Opinion. It provides flexibility for the work of the Tribunal in urgent cases, which is important to preserve the court's effectiveness and independence. However, the uncompressible period of 15 days may still be too long in very urgent cases.

H. Postponement of cases upon request by four judges

53. Under Article 68.5, in full bench cases, four judges may request postponement of the deliberation if they deem that a given matter is of particular significance for the constitutional order or the public order, and they disagree with the conclusion. The judges then present an alternative draft for another deliberation after three months' time (Article 68.6). If at that deliberation four judges (not necessarily the same) raise again an objection (likely against the conclusions of the majority of judges), the deliberation is postponed again for three months. At that deliberation, six months after the first deliberation, a vote is held (Article 68.7).

54. The two periods of three months cannot be reduced by the Tribunal. Their uncompressible length does not even depend on the wish of the four judges. Even if they were to ask for a shorter period of postponement, the draft Act does not allow for it.

55. Such a rule is highly unusual. According to it, a minority of four out of the 15 judges (approximately a quarter) can obtain the postponement of a case for a total period of six months.

56. It is a legitimate and valid aim to allow judges more time for preparing a particularly complex case. In this respect Article 68.4 of the Act already provides for postponement of the deliberation for two weeks. Article 68.5-7 also does not depend on the complexity of the case but only on the disagreement between the majority of judges and the four dissenters. The second three month period in particular lacks any justification, because the four judges are not even required to prepare an alternative solution. In any case, it should be left to the Tribunal to develop solutions for addressing disagreements among the judges. Rigid rules adopted by the legislature should be avoided and these rules provide an incentive for judges to disagree instead of reaching consensus.

57. The rules allowing postponement of a case for a maximum of six months upon request by four judges thus lack justification. In any event, they do not reflect the necessary understanding

for safeguarding an effective judiciary in the field of constitutional justice. They could easily be abused to slow down proceedings in delicate cases. Furthermore, strict delays of a considerable minimum length which are not requested by the parties (being of internal nature) delay the handling of cases. Moreover, rules of this nature proceed from the assumption that the Constitutional Tribunal and its President are not able to take appropriate measures to ensure speedy proceedings while respecting the time needed for judges to present opinions and, in addition, they provide an incentive for judges to stick to maximalist position instead of accepting to reach compromises. They thus risk further compromising its effective functioning and independence.

58. Notably in constitutional complaint cases involving individuals – following their transfer to the plenary session by three judges under Article 26.1.1.g – such delays could lead to a violation of the right to a reasonable length of proceedings under Article 6 ECHR. The postponement rule could negatively affect the efficient functioning of the Tribunal and should be removed.

59. In its judgment of 11 August 2016, the Constitutional Tribunal held that paragraphs 5 to 7 of Article 68 are inconsistent with Article 188 (powers of the Constitutional Tribunal) and Article 195.1 of the Constitution (independence of the judges of the Constitutional Tribunal), as well as with the Preamble to the Constitution (principles of diligence and efficiency). According to the Court, the provisions of Article 68 could lead to situations where a group of four judges exerts influence on the presiding judge without any justification in a manner not related to the merits of the case.

60. The decision of the Tribunal to annul the provision enabling four judges to obtain a postponement of a case for six months removes a danger of frustrating the work and independence of the Tribunal.

I. Majority for adopting decisions

61. The Amendments of 22 December introduced a two-thirds majority requirement for decisions of the full bench. Article 69.1 of the Act reverts to a simple majority for making decisions in all cases.

62. The Opinion insisted that the established constitutional practice of voting by simple majority *"cannot be altered by the ordinary legislator, but only by a constitutional amendment requiring a qualified majority"* (par 82) and *"[s]uch a very strict requirement carries the risk of blocking the decision-making process of the Tribunal and of rendering the Constitutional Tribunal ineffective, making it impossible for the Tribunal to carry out its key task of ensuring the constitutionality of legislation."* (par 79). Indeed, the two-thirds majority was found to be unconstitutional by the Constitutional Tribunal in its judgement of 9 March 2016.

63. The introduction of a simple majority for voting in all cases is welcome, as it removes one of the problems of the functioning of the Tribunal created by the Act of 22 December 2015.

J. Suspension of pending cases brought by State institutions

64. According to Article 83.2 of the Act, the Tribunal must "terminate" all pending proceedings within one year from the entry into force of the Act. Article 83 remains unclear what "terminate" means and especially what happens with cases that are not terminated in time.

65. This provision only relates to individual complaints (Article 191.1.6 of the Constitution) and referrals from ordinary courts (Article 193 of the Constitution). Other pending proceedings initiated by State institutions, the President of the Republic, the Marshal of the *Sejm*, the Marshal of the Senate, and the Prime Minister, as well as by, *inter alia,* parliamentary

minorities, the presidents of the supreme courts, the ombudsman, local self-government, trade unions and churches (Article 191.1.1 to 191.1.5 of the Constitution), would be adjourned for 6 months (Articles 83.2 and 84 of the draft Act) in order to allow the parties to adapt their requests to the requirements of the new draft Act.

66. Article 85 provides that following the entry into force of the Act, all scheduled hearings are to be deferred and to be scheduled anew under the Act. Article 86 provides the same for the public delivery of rulings of the Tribunal. Article 87 provides that petitions submitted by local self-government, trade unions, national employers' organisations and occupational organisations and religious organisations that were already found admissible under the 2015 Act will remain admissible also under the new Act.

67. A "re-registration" of pending institutional cases seems completely unnecessary and the period of six months seems unreasonably long. It is also not understandable why such re-registration and rescheduling should be required for some types of cases but not for others. A transitional rule providing which new procedural rules are to be applied to acts of the Tribunal in pending cases would be sufficient.

68. These provisions would have the effect that individual complaints and questions of law (referral cases) would continue, whereas all other pending proceedings would be blocked for six months. Individual complaints and referrals are of course very important categories of cases, notably because of the right to a trial within a reasonable time under Article 6 ECHR. However, there may also be individual complaints and referral cases from ordinary courts that are not particularly urgent. On the other hand, the categories of cases delayed by this provision will include very important cases which may also be of major importance from the perspective of the protection of human rights.

69. According to Article 85.2, cases that are not re-registered shall be discontinued. This includes cases that have already been found to be admissible. Discontinuing these cases by default amounts to a retroactive interference into the rights of the parties, which is unacceptable.

70. Finally, it is not logical that certain cases need to be suspended six months for re-registration while constitutional complaint cases and referrals from ordinary courts can continue without any re-registration.

71. In its judgment of 11 August 2016, the Constitutional Tribunal held that Articles 83.2 and 84 to 87 of the Act are inconsistent with Article 2 (democratic state ruled by law and implementing the principles of social justice), Article 10 (separation of powers), and Article 173 (independence of the Judiciary) of the Constitution, as well as with the Preamble to the Constitution. According to the Tribunal, these provisions would be impossible to fulfil in practice and would result in a delay of all proceedings, including constitutional complaints.

72. The annulment by the Tribunal of the provisions on the suspension of pending cases avoids seriously interfering with the work of the Constitutional Tribunal and is consistent with the recommendations of the Venice Commission.

K. Publication of Judgments

1. 'Application' by the President of the Tribunal for publication of judgments

73. Article 80 provides that a judgment of the Tribunal shall be published in the *Dziennik Ustaw Rzeczypospolitej Polskiej* (Journal of Laws of the Republic of Poland). Under Article 80.4, the President of the Tribunal shall "lodge an application" for publication of a judgment with the

Prime Minister according to the Act on the Promulgation of Normative Acts and Certain Other Legal Acts.

74. According to Article 105.2 of the 2015 Act (and Article 79.3 of the 1997 Act), the President of the Tribunal shall "order" the publication of judgment. Article 80 of the new Act, however, only provides for an "application" to the Prime Minister. Given the problems regarding publication of the judgments of 9 March and 11 August 2016 (and the 21 judgments handed down since 9 March that were published only after a long delay and an act of the legislature), such a shift seems likely to exacerbate the risk that judgments will not be published in a timely manner, by giving the Prime Minister a potential basis for denying the publication of judgments, and the risk that Article 190.2 of the Constitution requiring the immediate publication of judgments will be violated.

75. The Opinion stated that *"[a] refusal to publish judgment 47/15 of 9 March 2016 would not only be contrary to the rule of law, such an unprecedented move would further deepen the constitutional crisis triggered by the election of judges in autumn 2015 and the Amendments of 22 December 2015. Not only the Polish Constitution but also European and international standards require that the judgments of a Constitutional Court be respected. The publication of the judgment and its respect by the authorities are a precondition for finding a way out of this constitutional crisis."* (par. 143).

76. Under the rule of law and in particular the principle of the independence of the judiciary[32], the validity and force of judgments cannot depend on a decision of the executive or the legislature. In particular, refusal to publish the judgements of a Constitutional Tribunal without sanction constitutes a fundamental challenge to the court's authority and independence as the final arbiter on constitutional issues.

77. In April 2016, the Presidium of the Polish Supreme Court concluded that the unpublished judgments of the Constitutional Tribunal are effective and should be acted upon. In a judgment of 8 August 2016, the Supreme Administrative Court also applied an unpublished judgment of the Constitutional Tribunal. The Supreme Court's declaration and the decision of the Supreme Administrative Court are aimed at preserving the effectiveness of judgments and this consistent with the principle of the binding force of Constitutional Court judgments enshrined in the Polish Constitution and the constitutions and legislation of other Council of Europe member states. According to Article 31 of the German Federal Constitutional Court Act, the decisions of the Federal Constitutional Court are binding upon federal and Land constitutional organs as well as on all courts and public authorities. If a law is declared to be compatible or incompatible with the Basic Law or other federal law, or if it is annulled, the relevant operative part of the decision

[32] See also United Nations Human Rights Committee, General Comment No. 32 on Right to a Fair Trial:**.** ICCPR Article 14(*1*) preserves the right to a fair trial before a "competent, independent and impartial tribunal established by law."
"19. The requirement of competence, independence and impartiality of a tribunal in the sense of article 14, paragraph 1, is an absolute right that is not subject to any exception. The requirement of independence refers, in particular, to the procedure and qualifications for the appointment of judges, and guarantees relating to their security of tenure until a mandatory retirement age or the expiry of their term of office, where such exist, the conditions governing promotion, transfer, suspension and cessation of their functions, and the actual independence of the judiciary from political interference by the executive branch and legislature. States should take specific measures guaranteeing the independence of the judiciary, protecting judges from any form of political influence in their decision-making…. A situation where the functions and competencies of the judiciary and the executive are not clearly distinguishable or where the latter is able to control or direct the former is incompatible with the notion of an independent tribunal." and *"27. An important aspect of the fairness of a hearing is its expeditiousness. While the issue of undue delays in criminal proceedings is explicitly addressed in paragraph 3 (c) of article 14, delays in civil proceedings that cannot be justified by the complexity of the case or the behaviour of the parties detract from the principle of a fair hearing enshrined in paragraph 1 of this provision."*

shall be published in the Federal Law Gazette by the Federal Ministry of Justice and Consumer Protection. It is widely recognised that this publication is not constitutive; the decision of the Federal Constitutional Court becomes effective upon the pronouncement or delivery of the decision.

78. In Austria, a judgment by the Constitutional Court that declares a law unconstitutional obliges the Federal Chancellor or the competent Land Governor to publish the judgment without delay (Article 140.5 of the Federal Constitutional Law). Nevertheless, the judgment itself has the effect of repealing the unconstitutional provisions.[33] Thus, in Austria, the annulment of a law is effective and binding for the parties as of the date on which the judgment is served on the parties, regardless the date of its publication in the official journal.

79. In the United States, all opinions of the U.S. Supreme Court are published in the United States Reports, by the Reporter of Decisions of the Supreme Court of the United States, a position created by Congress. No discretion is exercised by the Reporter over what opinions are published, and all opinions have legal force and may be cited as binding legal precedent as of the moment that they are issued by the Court.[34]

80. The solution may be somewhat different in other countries. In Belgium, for example, a judgment annulling a law has legal authority only when published in the Official Gazette, but this publication is automatic and depends solely on the Court. Anyway, no valid system of constitutional justice can be conceived of where the validity of the judgments of the Court depends on the goodwill of political authorities.

81. The legal force of a court judgment cannot be dependent on whether or not that decision is published by some actor other than the Court. Such control over the legal force of a judgement would egregiously violate the independence of the court and the rule of law.[35] When this concerns the Constitutional Tribunal this is a challenge to its authority as the final arbiter on constitutional issues.

82. Article 80 should be revised in order to ensure that a judgment has binding force without any interference from the executive. Moreover, consistent with the position of the Supreme Court, issuance of a decision by the Tribunal on its web-site must be recognised as having legal value in itself and should then be followed by publication in official gazette.[36]

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[33] Judgment of the Constitutional Court of 28 June 1958, G 15-19, 31, 33/58, Collection of decisions of the Constitutional Court 3378/1958.

[34] The Supreme Court's practice, since its creation in 1790, is to announce opinions from the bench. That practice is embodied in Supreme Court Rule 41, which states: *"Opinions of the Court will be released by the Clerk immediately upon their announcement from the bench, or as the Court otherwise directs. Thereafter, the Clerk will cause the opinions to be issued in slip form, and the Reporter of Decisions will prepare them for publication in the preliminary prints and bound volumes of the United States Reports."* The Supreme Court's opinions are authoritative on the meaning of the law, and have legal force, upon issuance. This is powerfully illustrated by the Court's own practice of giving immediate precedential effect to its decisions in pending cases. See, e.g., *Wall v. Stanek,* No. 15-518 (June 28, 2016) (order vacating an Eighth Circuit decision based on the Supreme Court's ruling, five days earlier, in *Birchfield v. South Dakota*, No. 14-1468 (June 23, 2016)). As Rule 41 indicates, the Reporter's publication of the Court's opinions merely disseminates the decisions; it has no effect on the legal force of the Court's decisions. The limited role of publication is also clear from the statute that establishes the position of Reporter. See 28 U.S.C. 673. Section 673 states in relevant part: "*(b) The reporter shall, under the direction of the Court or the Chief Justice, prepare the decisions of the Court for publication in bound volumes and advance copies in pamphlet installments."* 28 U.S.C. 673(b) (emphasis added). As the emphasized language makes clear, the Reporter is conducting an administrative task under the direction of the Court or the Chief Justice.

[35] CDL-AD(2016)007, Rule of Law Checklist, point II.E.1 and para. 86.

[36] CDL-AD(2016)017, Georgia - Opinion on the Amendments to the Organic Law on the Constitutional Court and to the Law on Constitutional Legal Proceedings, par. 60.

83. In its judgment of 11 August 2016, the Constitutional Tribunal held that Article 80.2 is inconsistent with Article 190.2 of the Constitution (publication of the judgments of the Constitutional Tribunal) because that article requires immediate publication and the role of the publisher of the official journal is purely technical only. Requiring an "application" for publication to the Prime Minister suggests an unconstitutional power to evaluate the judgments to be published and the procedure to be followed.

84. The annulment by the Tribunal of the provision that the President of the Tribunal must apply to the Prime Minister for publication of the Tribunal's judgments is in line with the recommendations of the Venice Commission. It is essential to the rule of law that the judgments of the Constitutional Tribunal be recognised as having legal force and be published immediately after adoption, without any external interference.

2. Publication of Judgment 47/15 of 9 March 2016 and other judgments since 9 March 2016

85. Judgment 47/15 of 9 March 2016 has not been published to date in the official journal by the office of the Prime Minister. Between 9 March and 11 August 2016, the Tribunal adopted 21 other judgments, none of which were published until the entry into force of the new 2016 Act.

86. The discussions of the delegation of the Commission in Warsaw showed a wide variety of interpretations by the State authorities of the issue of publication. The representative of the majority in the Senate presented his view that Article 89 of the Act had lost its force because of the Tribunal's judgment of 11 August. As a consequence, no procedure for the publication for the Tribunal's judgments would be available anymore and therefore none the Tribunal's judgments could not be published henceforth. The delegation did not receive a reply to the question how a judgment that was considered to be illegal could have such an effect.

87. The majority representatives in the *Sejm* limited their position to the motto *"dura lex, sed lex"* (the law is harsh, but it is the law), without discussing the question of constitutionality with the Commission's delegation.

88. The Ministry of Justice, on the other hand, seemed to develop a theory of absolute nullity of the Tribunal's judgments not only because of the number of signatures but because all the provisions of the December Amendments had not been applied when the Tribunal reviewed them on 9 March 2016. This included the Tribunal's issuance of the 11 August judgment without conducting an oral hearing. However, the Ministry could not explain who would be competent to determine such nullity, nor did they explain the legal basis for the exercise of such authority by the executive.

89. The Chancellery of the Prime Minister, which is in charge of publication, stated that they exercise control by examining the validity of the Tribunal's judgments before publication, but that they limit that control to determining the procedural compliance of a judgment. As the judgments of 9 March and 11 August did not have 13 signatures as foreseen by the Amendments of 22 December 2015, the Chancellery had not published them. However, the Chancellery could not explain on what legal basis such control was exerted by the executive.

90. The Chancellery also confirmed to the delegation that the President of the Constitutional Tribunal had ordered that certain judgments be published, and that those requests remain unanswered. This concerned not only the judgments of 9 March and 11 August 2016 but also all other 21 judgments adopted in between. This is also deeply problematic. Basic principles of the rule of law require that, at minimum, the Prime Minister must give a reasoned explanation, in writing, to the President of the Tribunal when the latter orders the publication of judgments and the Prime Minister refuses to do so. The Prime Minister's Chancellery told the

Commission's delegation that the Tribunal had been informed about the non-publication via the media.

91. The Ministry of Justice and the Chancellery of the Prime Minister claimed that the refusal to publish the judgments was based only on the Tribunal's failure to comply with appropriate procedures, and did not purport to contradict the Tribunal's interpretations of substantive law. However, the Commission is of the opinion that this distinction cannot stand, because the Court, in order to be able to operate effectively and independently, must have authority to interpret its own procedures, and also because procedural determinations importantly affect substantive outcomes.

92. Both the variety of legal interpretations and the absence of any reasoned reply to the President of the Tribunal by the Prime Minister reveal a serious problem of the rule of law. State organs took a political stance on an essential issue of constitutional law, conveyed this message via the media to the Constitutional Tribunal and did not even provide any formal reasoned reply to the President of the Constitutional Tribunal.[37]

93. The stance of the Prime Minister also endangers the rights of individuals who cannot be sure whether the judgment on their constitutional complaint will be published or not.

94. Even following the reasoning of the Ministry of Justice would not lead to a different result. Whether or not an action of a government authority is absolutely null has to be decided by a court and in this circumstance, that court must be the Tribunal itself. The Tribunal, including dissenting judges, clearly is not of the opinion that its judgments are procedurally defective or lack legal force. This is corroborated by both the declaration of the Presidium of the Supreme Court recognising the legal force of unpublished judgments, as well as by the Supreme Administrative Court in its judgment II FSK 1021/16 of 8 August 2016, which applied the unpublished judgment SK 31/14 of 28 June 2016 of the Constitutional Tribunal[38].

95. Article 89 of the Act[39] provides that Tribunal rulings "issued in breach of the provisions of the Constitutional Tribunal Act of 25 June 2015 before 20 July 2016 shall be published within 30 days from the entry into force of this Act, with the exception of rulings concerning normative acts that have ceased to have effect". Such a provision is unacceptable in a State governed by the rule of law. Neither the executive nor the legislative power may pick and choose which judgments of a court are to be published and which are not to be published.[40]

96. Without justification, this provision singles out Judgment 47/15 of 9 March 2016, because after the entry into force of the new Act on the Tribunal, the Amendments of 22 December to the Act of 25 June 2015 would have "ceased to have effect" with the Act itself.

97. This provision declares that all rulings since 9 March 2015 were issued in breach of the Act on the Tribunal. Declaring judgments of a Constitutional Court 'illegal' through legislation contradicts Article 190.2 of the Constitution. Moreover, through this provision the legislature openly questions the position and authority of the Constitutional Tribunal as the final arbiter in constitutional issues. Like the purported exercise of such authority by the executive, rejecting

[37] CDL-AD(2016)007, Rule of Law Checklist, par. 68.
[38] This is one of the 21 judgments adopted since 9 March 2016, which – after the judgment of the Supreme Administrative Court - was published by the Prime Minister's Chancellery as being in breach of the Act on the Tribunal.
[39] Article 91 of the draft Act provided that all decisions handed down by the Tribunal after 10 March 2016 should be published. The reference to 10 March 2016 singled out the judgment of 9 March as the only one which is not to be published. Upon proposal by the Senate, this provision was amended and became Article 89 of the adopted Act.
[40] CDL-AD(2016)007, Rule of Law Checklist, par. 74.

the authority of a court in such a way flouts the principle of independence of the judiciary and constitutes another flagrant violation of the rule of law.

98. The strong recommendation of the Opinion to publish and comply with this judgment clearly has still not been followed. Moreover, as stated above, judgments of the Constitutional Tribunal must be recognised as having legal force as of the time that they are issued, regardless whether they are published in the official journal.

99. In its judgment of 11 August 2016, the Constitutional Tribunal held that Article 89 is inconsistent with Article 190.2 of the Constitution (immediate publication of the judgments of the Constitutional Tribunal) because the legislature does not have the power to decide which rulings of the Tribunal should be published. According to the Tribunal, the legislature thus granted itself the competence to choose judgments of the Tribunal that would be subject to publication. The judgments adopted since 9 March 2016 were stigmatised as violating the law without factual or substantive grounds. According to the Tribunal, this infringed the principle of the separation and balance of powers, the requirement of cooperation between constitutional state authorities, judicial independence and the constitutional order.

100. The annulment by the Tribunal of the publication of 'illegal' judgments is welcomed because that provision would have endangered the respect for the very judgments which were published. On the day of entry into force the Act, on 16 August 2016, the Chancellery of the Prime Minister published 21 judgments that had been adopted since 9 March 2016, but not the judgments of 9 March and of 11 August. While the publication of these 21 judgments is positive, the Chancellery of the Prime Minister published them on the basis of Article 89 of the Act, which also identified them as breaking the law. This provision already had been found unconstitutional by the Tribunal. The public portrayal of the Tribunal's judgments as 'illegal' questions the position of the Constitutional Tribunal as the final arbiter in constitutional issues and is an attack on the Tribunal's authority, contrary to the principle of loyal cooperation between state organs which is a constitutional precondition in a democratic state governed by the rule of law. Rejecting the authority of a court in such a deliberate way violates the rule of law.

L. Composition of the Tribunal

101. Article 90 provides that judges who have taken the oath of office and who have not yet assumed judicial duties shall be included in adjudicating benches and shall be assigned cases immediately after the entry into force of the Act.

102. Since January 2016, the Constitutional Tribunal has had twelve sitting judges. The President of Poland refused to accept the oath of the "October judges," but he accepted the oath of the three "December judges", who according to the case law of the Tribunal were elected in violation of the Constitution. Article 90 would oblige the President of the Tribunal to assign cases to the three December judges.

103. The Opinion recommended solving the issue of the appointment of the judges by fully respecting the judgments of the Tribunal. A full respect of the Tribunal's judgments, notably that of 3 December 2015, would result in the integration of the October judges into the Tribunal. This has not happened.

104. In April 2016, a vacancy at the Tribunal was not used to give the oath to one of the October judges but the *Sejm* elected a new candidate and the President of Poland accepted his oath. This new candidate became one of the twelve sitting judges.

105. The problem of the appointment of judges has not been solved as recommended. Article 90 is not a solution in line with the principle of the rule of law.[41]

106. In its judgment of 11 August 2016, the Constitutional Tribunal held that Article 90 is inconsistent with Article 194.1 of the Constitution (appointment of the judges of the Constitutional Tribunal). Referring to its judgments in the cases K 34/15, K 35/15 and K 47/15, as well as its decision in the case ref. no. U 8/15, the Tribunal reiterated that the legal basis for the election of the three October judges had been valid and that therefore there were no vacancies to be filled when the *Sejm* proceeded to the election of the December judges. Therefore, the implementation of Article 90 requesting the Tribunal's President to assign cases to the December judges would be contrary to the Tribunal's judgments, which are universally binding and thus bind all state authorities, including the Tribunal and its President.

107. The annulment by the Tribunal of the provisions purporting to create an obligation to assign cases to the December judges is consistent with the recommendations of the Venice Commission because through that provision the legislative power improperly made itself the final arbiter in constitutional issues.

M. The judgment K39/16 of 11 August 2016

108. In its Judgment K39/16 of 11 August 2016, the Constitutional Tribunal examined the Act on the Tribunal upon request by two groups of Members of the *Sejm* and the Ombudsman. The Tribunal found several provisions of the Act to be inconsistent with the Constitution. The Tribunal held that *"the common background of all the allegations raised by the applicants was excessive interference on the part of the legislator which infringed the principle of the separation and balance of powers as well as the principle of the separation and independence of the judiciary."*[42]

109. Contrary to the judgment of 9 March 2016, the Constitutional Tribunal was not obliged to decide on the new Act at a moment when it already had been in force. The Tribunal was able to decide on the constitutionality of the Act during the short *vacatio legis* of two weeks before the Act entered into force (Article 92 of the Act). Therefore, the judgment was adopted on the basis of the Act of June 2015 and not on the basis of the new Act. The Tribunal applied the 2015 Act without the Amendments of 22 December 2015, which had been found unconstitutional by the Tribunal in its judgment of 9 March 2016.

110. The Tribunal examined the case without a hearing, on the basis of Article 93 of the 2015 Act. This provision allows the Tribunal to decide cases without a hearing cases when "the case concerns a legal issue that has been sufficiently clarified in earlier rulings of the Court".

111. The Ministry of Justice told the delegation of the Venice Commission that the Tribunal could not rely on Article 93 because that provision applies only to decisions on inadmissibility. Furthermore, the Ministry noted that the Act of 22 July 2016 contained new provisions that had not been dealt with in previous judgments of the Tribunal (e.g. the delay for hearings for twice three months upon request by four judges) and therefore this issue had not been "sufficiently clarified" in earlier decisions for Article 93 to apply.

112. Article 93 is not limited to decisions on admissibility. This is confirmed by the text of Article 81.1 of the 2015 Act which deals with proceedings with and without a hearing: *"The Court shall examine the petition, question of law or complaint at a hearing or a closed door session."*

[41] CDL-AD(2016)007, Rule of Law Checklist, par. 79.
[42] http://trybunal.gov.pl/en/news/press-releases/after-the-hearing/art/9311-ustawa-o-trybunale-konstytucyjnym/.

Since the 2015 Act entered into force, 24 out of the 50 judgments of the Tribunal were adopted according to this written procedure.

113. Moreover, the judges of the Tribunal explained to the delegation that the 'legal issue' raised by the 22 July Act that must have been "sufficiently clarified" for Article 93 to apply did not concern just particular provisions of the Act but the wider question of whether provisions of the Act had the same legal defect as the Amendments of 22 December, in that they would block the functioning of the Tribunal. This issue had already been examined by the Court in its judgment of 9 March 2016, which had concluded that similar legal provisions constituted "*excessive interference on the part of the legislator which infringed the principle of the separation and balance of powers as well as the principle of the separation and independence of the judiciary".* In other words, what matters is whether the constitutional issue has been previously clarified, and not the application of that principle to identical normative acts.

114. Regardless whether the judgment of 9 March 2016 was published, the Tribunal held that that judgment breaks the presumption of constitutionality of the provisions found unconstitutional which therefore can no longer be applied. In light of the unconstitutional situation created by the failure to publish that judgment, this reasoning of the Tribunal is coherent and provides a reasonable basis for the application of the Tribunal's judgments. The Presidium of the Supreme Court supported that reasoning in its resolution of 27 April 2016.

115. With the judgment of 11 August 2016, the constitutional crisis is not settled, both because that judgment has not been published and because Government and Parliament do not share this approach of the Tribunal and, therefore, do not fulfil their legal duty of publishing the judgments and recognising their legal force. They consider the new Act in force as including the articles that were found to be unconstitutional, and they therefore may similarly challenge future judgments of the Tribunal that decline to apply the unconstitutional provisions.

116. It is interesting to note that dissenting opinions to the 11 August judgment were submitted by three judges of the Constitutional Tribunal who were elected during the current mandate of the *Sejm*. The fact that they participated in the case and delivered dissenting opinions supports the legitimacy of the judgment

117. Two more appeals against the Act are pending before the Tribunal, one from the 1st President of the Supreme Court, another one from a group of Deputies of the Sejm.

118. A completely new Act, replacing the Act adopted on 22 July 2016, has been announced for autumn 2016. This Act would be based on the report of the expert group established by the Marshall of the *Sejm*. Furthermore, legislation removing the retirement pension of the judges of the Tribunal has been announced.

119. Any new proposed legislation on the Tribunal should be adopted in a transparent manner that allows appropriate time for reasoned input from all political perspectives and with sufficient public debate.

VI. Conclusion

120. This opinion examines whether the new Act on the Constitutional Tribunal of 22 July 2016 follows the Commission's Opinion CDL-AD(2016)001, adopted on 11 March 2016. The core of that Opinion was the issue whether the legislation on the Tribunal is detrimental to the proper functioning of the Constitutional Tribunal, which is essential for the separation of powers in a democratic State, and whether its provisions sufficiently guarantee the independence of the Tribunal, consistent with the rule of law.

121. The draft Act contains some improvements, partly due to amendments introduced in the Senate, as compared to the Amendments of 22 December 2015. These concern notably:

1. the lowering of the quorum requirement from 13 to 11 judges (out of 15). This quorum is still quite high but does not raise the same objections (Article 26);
2. the reduction of the majority vote for a judgment from two-thirds to a simple majority (Article 69);
3. the introduction of additional exceptions to the sequence rule (Article 38) and elimination of the power of the President of Poland to request exceptions to the sequence rule that had been included in the draft adopted in second reading;
4. the absence of provisions on the initiation of disciplinary proceedings against judges by the President of Poland and the Minister of Justice;
5. the absence of a provision on the dismissal of judges by the *Sejm* upon the motion of the Assembly of the Constitutional Tribunal and avoiding interference by the President of Poland in the dismissal of judges (Article 12);
6. the reduction of the period between the notification of the parties and the hearing from six months to 30 days (Article 61).

122. However, the effect of these improvements is very limited, since numerous other provisions of the adopted Act would considerably delay and obstruct the work of the Tribunal and make its work ineffective, as well as undermine its independence by exercising excessive legislative and executive control over its functioning. These concern notably:

1. the sequence rule and the scope of the exceptions to it, which do not allow sufficient flexibility for the work of the Tribunal (Article 38);
2. the referral of a case to the full bench without the possibility for the other judges reject that referral (Article 26);
3. the postponement of a case for up to of six months upon request by four judges, which lacks justification and could easily be abused to delay delicate cases (Article 68);
4. the provision allowing the duly notified Prosecutor General to block a hearing of the Tribunal by his or her absence, which could both delay and politicise the functioning of the Tribunal (Articles 30 and 61);
5. the suspension of all institutional cases for six months followed by re-registration, which would delay the work of the Tribunal on important pending cases, and the requirement that other cases be terminated within one year (Articles 83-87);
6. the lack of flexibility to reduce the time before a hearing in certain categories of cases (Article 61).

123. Furthermore, the system of proposing candidates for the President of the Tribunal to the President of Poland endangers the independence of the Tribunal because it gives the President of Poland excessive leverage over the work of the Tribunal. The Venice Commission recommends avoiding the possibility that a candidate with little support in the Tribunal can be appointed as its President (Article 16).

124. Article 90, obliging the President of the Tribunal to attribute cases to the "December judges" immediately after the entry into force of the Act, does not respect the judgments of the Tribunal and cannot solve the issue of appointment of judges in accordance with the rule of law. In addition, Judgment 47/15 of 9 March 2016 has not been published in the official journal, contrary to the strong recommendation in the Opinion.

125. Without any constitutional or legal basis, the Chancellery of the Prime Minister has purported to arrogate the power to control the validity of the judgments of the Constitutional Tribunal, by refusing to publish its judgments. The procedural choices of the Tribunal have implications for the substance of the cases it decides and refusing to accept these choices challenges the constitutional position and independence of the Tribunal. The Prime Minister's refusal to publish judgments was not even communicated with an explanation to the Tribunal, which instead was informed via the media. Under the rule of law such an important decision,

like any administrative act, has to be reasoned and has to be notified transparently and in writing to the organ concerned.

126. By adopting the Act of 22 July (and the Amendments of 22 December), the Polish Parliament assumed powers of constitutional revision which it does not have when it acts as the ordinary legislature, without the requisite majority for constitutional amendments.

127. Individually and taken together, these shortcomings show that instead of unblocking the precarious situation of the Constitutional Tribunal, the Parliament and Government continue to challenge the Tribunal's position as the final arbiter of constitutional issues and attribute this authority to themselves. They have created new obstacles to the effective functioning of the Tribunal instead of seeking a solution on the basis of the Constitution and the Tribunal's judgments, and have acted to further undermine its independence. By prolonging the constitutional crisis, they have obstructed the Constitutional Tribunal, which cannot play its constitutional role as the guardian of democracy, the rule of law and human rights.

128. On 11 August 2016, during the *vacatio legis,* the Constitutional Tribunal examined the adopted Act and found several of the abovementioned provisions unconstitutional. However, the Chancellery of the Prime Minister published 21 other judgments adopted since 9 March, but not the judgments of 9 March and 11 August 2016, which the Government continues to view as legally ineffective. Even the publication of the 21 judgments violates the rule of law because they were only published pursuant to an Act of the legislature, which purported to assume the authority to legitimate or illegitimate judgments of the Tribunal and simultaneously characterised the published judgments as 'breaking the law'. This action itself constitutes arrogation of the power of constitutional review by the legislature.

129. Since the judgment of 11 August has not been published and is not recognised as legally effective by the Government and Parliament, this judgment of itself also cannot solve the constitutional crisis and or restore the rule of law in Poland, since the other organs of the Government continue to reject it.

130. The Venice Commission remains at the disposal of the Polish authorities and the Secretary General of the Council of Europe for further assistance in this matter and notably to examine the future legislation on the Constitutional Tribunal that has been announced.