Report

of the Team of Experts on the Issues Related to the Constitutional Tribunal

of 15 July 2016

Acting on the basis of the individual appointments by the Marshal of the Sejm of the Republic of Poland of 31 March 2016, carried out on the basis of the decision of the Sejm Marshal no. 4 of 30 March 2016, issued pursuant to §5 paragraph 2 of the Resolution No. 28 of the Presidium of the Sejm of 19 April 1995 on the principles of organisation of scientific advice to the Sejm and its bodies, the appointment of parliamentary advisors and the use of expert opinions (as amended) – and within the framework defined by the accompanying agreements with the Chancellery of the Sejm of the Republic of Poland,

the Team of Experts on the Issues Related to the Constitutional Tribunal, composed of:

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- Prof. dr hab. Andrzej Bryk
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- Prof. dr hab. Andrzej Dziadzio
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- Prof. dr hab. Jan Majchrowski (University of Warsaw) – Team Coordinator
- Prof. dr hab. Maciej Marszał (University of Wrocław)
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- Prof. dr hab. Bogdan Szlachta
- Prof. dr hab. Bogumił Szmulik (Cardinal Stefan Wyszyński University)
- Prof. dr hab. Jarosław Szymanek (University of Warsaw)

- with the participation of the Secretary of the Team, mgr. Rafał Czarski,

hereby notifies the Sejm Marshal of the Republic of Poland of the completion of its work.

In accordance with the aforementioned acts constituting the legal basis for the team's activities, and in reference to the Declaration of the Sejm Marshal of the Republic of Poland of 22 March 2016 on the political and legal conflict which arose around the Constitutional Tribunal in

which the Sejm Marshal, Mr Marek Kuchciński, announced the appointment of a team of experts to analyse in a comprehensive manner the issues related to the Constitutional Tribunal, using in its work the statements and opinions concerning the said issues made by various entities, the Team of Experts on the Issues Related to the Constitutional Tribunal hereby submits this report, emphasising at the same time that the primary opinion which was taken into account while formulating the theses and postulates of this report was the Opinion of the European Commission for Democracy through Law on the amendment of the Act of 25 June 2015 on the Constitutional Tribunal of the Republic of Poland adopted by the Venice Commission on the 106th plenary session in Venice, on 11-12 March 2016 (hereinafter referred to as the "'Opinion of the Venice Commission").

PART I

After considering a number of analyses, in particular the Opinion of the Venice Commission and justifications for the drafts of the Act on the Constitutional Tribunal which have been presented in recent weeks by political parties[1], and taking into account the legal environment which has been changing in the last year, as well as the opinions concerning the course of events of the last few years, the Team noted the tension which exists between the two ways of framing the discussed issues. They are connected with different ways of understanding the concept of state – defining it in ways which either put emphasis on its function as a political community, that is, a nation, or on the significance of the legal order. These two visions of state are neither the consequence of different lines of development of legal systems of particular countries nor the result of the presence (or lack thereof) of constitutional courts in the said countries. What they are is the answer to the question concerning the so-called internal sovereignty which indicates that the sovereign power, in its role as a legislator, has the exclusive right to shape, within a certain substantive framework, the content of applicable laws and to legitimise all public authorities[2]. The proponents of the first position put emphasis on the community understood as the so-called political nation which exercises the supreme power in the country and constitutes the fundamental law and the normative acts which are based upon it, and to which all organs of the state are subordinate. On the other hand, the proponents of the second position recognise the legal order as a domain which is not only superior (primary) in relation to the political community and binding for it and all its public bodies, but also a domain which legitimises the functioning of this community and its public bodies. While in the first case the nation as a political community of all citizens that constitute the state is the primary category, and under all circumstances the fundamental category, in the second case, the attribute of sovereignty is transferred to the law itself, in particular to the most important of normative acts – the constitution.

As a result, the proponents of the two opposing visions perceive as the sovereign either the political community (nation) or the system of legal norms represented by the constitution.

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[1] The team analysed the following drafts and opinions: (1) the parliamentary draft act on the Constitutional Tribunal of 29 April 2016. (Sejm Paper No. 558) – hereinafter referred to as the "PiS draft"; (2) the parliamentary draft act on the amendment of the Constitution of 15 December 2015 (Sejm Paper No. 166) – hereinafter referred to as the "Kukiz'15 draft"; (3) the parliamentary draft act on the Constitutional Tribunal of 10 February 2016 – hereinafter referred to as the "Nowoczesna draft"; (4) the parliamentary draft act amending the Act on the Constitutional Tribunal of 12 April 2016 - hereinafter referred to as the "PSL draft"; (5) the citizens' draft act on the Constitutional Tribunal of 20 May 2016 (Sejm Paper No. 550), hereinafter referred to as the "KOD draft"; (6) a draft act on the amendment of the Constitution of 20 April 2016 and the statement of the coalition Koalicja Odnowy Rzeczypospolitej Wolność i Nadzieja (KORWIN) of 20 April 2016 – hereinafter referred to as the "KORWiN draft"; (7) a letter from Razem party of 14 April 2016 addressed to the Sejm Marshal including the party's opinion on the publishing of the judgement of the Constitutional Tribunal.

[2] Cf. L. Ehrlich, *Prawo narodów,* K. S. Jakubowski, Lviv 1927, p. 107. The author tied the concept of internal sovereignty with the concept of "całowładność" (supreme authority) which he defined as "the authority to regulate all relations within the state".

Admittedly, the two visions of the state can lead to competing ways of perceiving the sovereign power, reflecting either the sovereignty of a political community (nation)[3] or the sovereignty of the law[4]. However, they can also be seen as interdependent, which appears to be a serious and a desirable challenge for a modern state built by the legal community[5].

To some extent both these ways of conceptualising the state are well known in the Polish history related to political systems, as they resemble the concepts which were included in the March Constitution of 1921 and the April Constitution of 1935. The first of them gave prominence to the role of the nation as a sovereign, while the second emphasised the role of the state understood as a specific legal order. Even before the outbreak of World War II, it was pointed out that the first was modelled after the French solutions, indicating the key role of the legislator acting through representative bodies[6], which were supposed to reproduce as faithfully as possible the distribution of particular groups and social forces, whereas the April Constitution was focused on the issue of unity which ought to be symbolised by a uniform legal order, which, in contrast, was based on the heritage of the experience of the German constitutionalism[7]. While the March Constitution put emphasis on the rights and freedoms of individuals, the April Constitution emphasised their duties towards the state. The first one treated the state more or less like a group of individuals creating a community which has something like a "general will" dependent on the will of its individual members, whereas the second one tied the state to the concept of normative order, granting it a "legal character" and turning it into an "anonymous entity" equipped with political power (*empire*)[8]. The concept of "common will", emphasised in the Constitution of 1921, was met with opposition as an idea which was rooted in the "democratic ideology", which was to identify the state with the currently living generation (as the sovereign). The critics of this approach pointed out that the state

[3] The concept which has been developed at least since the days of Marsilius of Padua, for example in the works of J. Locke, J.J. Rousseau and the American Founding Fathers. It should be noted that this idea was present in the times of the Polish-Lithuanian Commonwealth and J. Bodin critically commented on the system which referred to it when he wrote with scepticism about the "the sovereignty of the nobility" in the sixteenth-century Poland. Cf. his *Sześć ksiąg o Rzeczypospolitej,* trans. R. Bierzanek, Z. Izdebski, J. Wróblewski, Warszawa 1958, p. 190, 192. To read more about this concept of sovereignty of community, cf. G. Nootens, *Popular Sovereignty in the West: Polities, Contention, and Ideas,* London & New York 2013.

[4] The author of this term, which is most often associated with the Austrian legal theorist Hans Kelsen, was a Dutch lawyer, Hugo Krabbe (cf. his *Die lehre der Rechtssouveranitat. Beitrag zur Staatslehre,* J.B. Wolters, Groningen 1906). It is worth noting that the rule of the sovereignty of law (aside from the above-mentioned sovereignty of nobility) was present in the Polish-Lithuanian Commonwealth at least since the sixteenth century when the concept of *in Polonia lex est rex, non rex est lex* was strongly emphasised. Nobility perceived their country as a state based on the rule of law in which the law, and not the king, was the sovereign. Cf. W. Uruszczak, *Zasady ustrojowe I Rzeczypospolitej a Trybunał Koronny, [in:]* Lex est Rex in Polonia et in Lithuania... Tradycje prawno-ustrojowe Rzeczypospolitej – doświadczenie i dziedzictwo, *ed. A. Jankiewicz, volume XXVIII "Studiów i Materiałów Trybunału Konstytucyjnego", Warszawa 2008, p. 18.*

[5] The concept of the legal community was emphasised by the aforementioned H. Krabbe (cf. his *The Modern Idea of the State,* trans. A. Wedberg, New Jersey 2007 (reprint of the publication from 1945), pp. 223-224.

[6] Cf. R. Denoix de Saint Marc, *Histoire de la loi,* Paris 2008, p. 43ff.

[7] Cf. M. Bożek, *Władza ustrojodawcza w konstytucjonalizmie niemieckim,* Warszawa 2013, p. 41ff.

[8] Cf. W. L. Jaworski, *Notatki,* Kraków 1929, p. 135.

should rather be conceived as a "perfect creation captured mentally" – a legal order which by definition is abstract and not real. As a result, the state was to ensure the respect for the norms which did not contradict that order, and the political community was to take into account the "factor representing authority" which was appointed to act for the good of the community and not the "interests" of those who belonged to the authorities, reinforcing the sense of the common good of all citizens[9].

The tension between the two interwar constitutions[10], absent in the differently conceptualised Constitution of 3 May 1791 – which was passed before the last two partitions of Poland as one of the first constitutions in the world (emphasising the link between the actions of the legislator and the need to maintain legal order[11]) – is similar to the tension which can be found in the drafts of the Act on the Constitutional Court (prepared by various political groups) and in the Opinion of the Venice Commission[12]. While the former emphasise the language of participatory democracy similar to the language characteristic for the March Constitution, in the Opinion of the Venice Commission and the draft of the Act on Constitutional Tribunal which was prepared by its justices in 2011-2013, the dominant language is the language of constitutional democracy, similar to the language which treats the constitution as the source of legitimisation of every public authority, from the parliament (and its chambers) to the courts and tribunals. In this latter approach, the role of the sovereign, which is an issue often raised in the public debate in Poland, and which is to be understood, as indicated in the Polish Constitution of 1997, as the "political nation", is clearly weakened, and its place is taken over by the Constitution as a self-contained source of legitimacy. In this approach, the rule of law becomes superior in respect to the "sovereign entity" which is bound by the content present in the legal system guarded by the Constitutional Tribunal. This way, the place of the sovereign, the real nation (political community), is taken over by the sovereign right identified primarily with the constitution[13] which "displaces" the political nation by assuming the attributes of the sovereign[14].

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[9] Cf. *Posiedzenie Komisji Konstytucyjnej Senatu z dnia 11 grudnia 1934 r. Referat senatora Wojciecha Rostworowskiego,* "Nowe Państwo" 1935, volume III, collection 4(12), pp. 58-59.

[10] The above-mentioned tension refers also to the differences between the solutions modelled after the Constitutional Laws of 1875 and the solutions envisaged by the proponents of the normative approach, associated mainly with the concept created by Hans Kelsen.

[11] The Polish Constitution of 3 May 1791 was the only constitution of the eighteenth century which *expresis verbis* formulated the principle of the supremacy of the constitution. In its preamble, this principle is referred to as "sacred and inviolable" and in the last sentence of the preamble it is stated that "the further statutes of the present sejm" shall comply "in everything" to the constitution *(Volumina Legum, Konstytucje Sejmu pod związkiem konfederackim w Warszawie za Stanisława Augusta od 1789-1792*, volume IX, Kraków 1889, p. 220).

[12] Especially in the content of the most important (because of their most general character) allegations made by the Venice Commission in points 88-91 of the Opinion here cited.

[13] Cf. M. Granat, *Od klasycznego przedstawicielstwa do demokracji konstytucyjnej (ewolucja prawa i doktryny we Francji),* Lublin 1994, p. 131ff.

[14] For the issue of the separation of the political community (as a real entity) from the legal community embedded in the constitution (as an abstract entity), cf. P. Haberle, *L'Etat constitutonnel,* Paris 2004, p. 61ff.

This change means the loss of not only the "moment of the primary sovereignty of the Nation" (Article 4 of the Constitution of the Republic of Poland), but also the "moment of democratic character" which was related to it (Article 2 of the Constitution states after all that "the Republic of Poland shall be a democratic state ruled by law (...)", not merely a "state ruled by law" or a "state under the rule of law").

Bearing in mind the decisions contained in the Polish Constitution of 1997 which indicate that the Nation shall exercise superior authority, either through its representatives or directly, and list only two bodies exercising legislative power in its name, i.e. the Sejm and the Senate (Article 10 paragraph 1), it is worth noting that these bodies, just as all public authorities, should act "on the basis of, and within the limits of, the law" (Article 7 of the Constitution of the Republic of Poland). The constitution is referred to as the top of hierarchical structure of law in the form of "the supreme law" (Article 8 paragraph 1 of the Constitution of the Republic of Poland). However, the constitution specifies in particular in Article 10 paragraph 1 the prerogatives of the parliament in the field of law-making, which are granted to the Sejm and the Senate, indicating the separation of and balance between the legislative, executive and judicial powers, and listing the bodies representing these powers (Article 10 paragraph 2)[15]. It is worth noting that the Constitution clearly associates the

[15] When referencing the phrase *separation of powers* several times in its Opinion, the Venice Commission seems to confuse the two approaches (in the Polish translation there is an incorrect distinction introduced between the "podział władz" (separation of powers) in point 124 and "podział władzy" (separation of power) in point 126 of the Opinion, which obfuscates systemic and semantic clarity). It is therefore worth to recall that in creating the classic general formula of the separation of powers, Montesquieu referred still to the mixed form of government in which the guarantees of freedom and limited power were based on the balance between different social groups or estates. A classic example of such mixed government was the English parliamentary tradition and the Polish republican tradition, at least from the times in which Wawrzyniec Goślicki created his *De optime senatore* in 1568, which inspired, among others, Thomas Jefferson in his creation of the American constitution. By "distributing the power" between the represented (the people, subjects) and the representative, and by the construction of a mixed government as his basis, Montesquieu wanted to make it impossible for the tyranny of the majority to arise. The element of the traditional mixed government which separates the institutions into ones which represent the estates- or aristocracy-based system (the two chambers of parliament) and the ones which represent the monarch was ultimately eliminated in the nineteenth century in the parliamentary cabinet system, by *de facto* subordinating the executive to the parliament. In such a situation, however, the authority of the courts, which in Montesquieu' vision was *de facto* marginal, did not constitute the protection against the tyranny of the parliamentary majority. This function was performed by the division into the opposition and the ruling party in parliament (additionally secured by bicameralism) and free elections (see. e.g. P. Manent, *A World Beyond Politics? A Defense of the Nation State*, Princeton 2006, pp. 15-17). Montesquieu's concept was used for the first time in the system of liberal democracy in the United States of America. The American model, however, was only one of many models based on the doctrine of separation of powers of the sovereign people, since there is no single and once-for-all fixed model of the sovereign power of the people with specific separation of institutional powers (which the Venice Commission seems to suggest in its Opinion). Even James Madison, one of the authors of the US Constitution, noted after all that the institutional and constitutional separation of powers whose aim was to ensure a continuance of freedom may as well destroy this freedom if one of the authorities blocks the activities of any other authority or if a secret agreement is concluded between the authorities to implement one political will or ideology. The institutional separation of the authorities, although it was intended as a protection against arbitrary power, was also intended to facilitate the implementation of the will of the majority as expressed in elections. If blocking of such will, for example by any constitutional court, was to be the point of the separation of institutions and the system, then the consequence, as Madison argued, would be the creation of the conditions which would destabilise the political situation or even lead to a revolution, since the elections would be only a form of a ritual, not an expression of change in which the political community wants to redefine its policy objectives with respect for the rules of the democratic rule of law. After all, Madison proposed only to block the "possession of the *whole* power by a single authority *(government)* which has the *whole* power of the different

"democratic character" with the Nation, as the depositary of authority. The adjective "democratic" appears in the Constitution six times: (1) in the preamble: "Having regard for the existence and future of our Homeland, which recovered, in 1989, the possibility of a sovereign and democratic determination of its fate, we, the Polish Nation – all citizens of the Republic", (2) in Article 2: "The Republic of Poland shall be a democratic state ruled by law and implementing the principles of social justice"; (3) in Article 11 paragraph 1: "The Republic of Poland shall ensure freedom for the creation and functioning of political parties. Political parties shall be founded on the principle of voluntariness and upon the equality of Polish citizens, and their purpose shall be to influence the formulation of the policy of the State by democratic means";(4) in Article 26 paragraph 2: "The Armed Forces shall observe neutrality regarding political matters and shall be subject to civil and democratic control"; (5) in Article 31 paragraph 3: "Any limitation upon the exercise of constitutional freedoms and rights may be imposed only by statute, and only when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. Such limitations shall not violate the essence of freedoms and rights"; (6) in Article 51 paragraph 2: "Public authorities shall not acquire, collect nor make accessible information on citizens other than that which is necessary in a democratic state ruled by law."

Therefore, the Constitution points to the "democratic nature" of a state or rule of law, as well as the democratic nature of supervision or democratic methods, by referring – in almost each and every case – to the Nation as the depository of supreme authority that acts directly or indirectly through the bodies which the Nation legitimised. Nowhere in the Constitution is there any mention of "liberal democracy", "representative democracy" or "constitutional democracy".

By referring to the category of "constitutional democracy" (i.a. in point 133), the authors of the Opinion of the Venice Commission pointed to a way of understanding democracy through associations with a constitution-based legal order. It follows from this perception that one ought to derive from the constitution, in an absolute manner, not only one's competencies, but also the legitimisation of all public authority bodies, including the Constitutional Tribunal. These bodies, contrary to divergent interpretations and associations which refer to "representative democracy" (which highlights both the role of the sovereign, referred to as the people or the political nation, and the legitimacy granted by the sovereign to individual bodies), do not derive their legitimacy from the people (the sovereign, the "majority") any more, they do not derive their legitimacy from the

authority (institutional)" (see L. Fischer, *Separation of Powers*, [in:] *The Oxford Companion to the American Law*, ed. K.L. Hall, Oxford 2002, p. 735), which in the case of possibility of the legislation issued by the legislature being blocked by the Constitutional Tribunal also was a violation of the separation of powers which are ultimately anchored in the will of the sovereign people.

realm of reality, but from the "prescriptive order" crowned by the constitution. In such a case, these bodies bear far more resemblance to “bodies of legal order”, which legal order is - as this legal order is derived from the constitution - to be protected by the Constitutional Tribunal, than to bodies of the community – the sovereign. The underlying problem arising from the Venice Commission's way of presenting its arguments is that this method of presentations renders the perception of the “sovereign” flawed, as it decreases the role of the sovereign not only to a legitimacy-granting factor towards the bodies appointed under the constitution, but further to a factor whose function is limited to indicating those who are to act as part of the bodies which derive their legitimacy solely from an abstract legal order, which legal order could - should judges of the Constitutional Tribunal put forward such an interpretation – become the basis for arbitrary power eluding all supervision and lead to undermining the principles of a democratic rule of law[16].

The two theses presented in the Opinion of the Venice Commission: “constitutional democracies require checks and balances” and (2) “constitutional justice is a key component of checks and balances in a constitutional democracy”, are of paramount significance to the understanding of the nature of the position presented by means of these statements, and at the same time they are vital to comprehending the dispute over the subject of sovereignty in a modern democratic state[17]. Both theses also indicate that “constitutional democracy” ceases to exist once the

[16] In such a case the sovereignty is embedded in constitutional courts and leads to the state of doctrinal and actual juristocracy. As a consequence, it leads to the view regarding the settling of political and cultural disputes through judicial *fiat*, which may permanently disable the fundamental political and cultural disputes and transfer them into the sphere of laws or pure administration, while removing the discussion on the common good. See J. Waldron, *The Dignity of Legislation*, Oxford 1999; R. Hirsch, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism*, Cambridge, Mass. 2004; I. Shapiro, *Democratic Justice*, New Haven 1999; A. Gutmann, D. Thompson, *Democracy and Disagreement*, Cambridge, Mass. 1996; J. Allan, *Bill of Rights and Judicial Power -A Liberal's Quandary,* “Oxford Journal of Legal Studies” 1996, No 16, p. 337-352; P. Manent, *A World Beyond Politics*...; M.A. Glendon, *Rights Talk: The Impoverishment of Political Discourse*, New York 1991; L.M. Friedman, *The Republic of Choice. Law, Authority and Culture*, Cambridge, Mass. 1990.

[17] In order to achieve synergy leading to one, appropriate model and a manner of its application, it is not enough to use the term “division of powers”, even if such a model seems to be determined by the constitutional formula. Caution in the formulation of such opinions should also derive from an understanding of different systemic, political and cultural traditions of every country (of which Montesquieu was aware). Furthermore, it should be a result of an awareness of the semantic limitations of, as described by H.L.A. Hart, “open structure of the legal language” because of which even the constitutional judges may be prone to different interpretations.

In the liberal-democratic state, the possibility of applying the Kelsen model to the constitutional judiciary seems rather limited, assuming that the language of the Constitution is precise and that constitutional courts play the traditional role as its interpreters vested with a special authority to evaluate the constitutionality of the legal system as if from within the Constitution (referred to by the Americans as the “myth of the Constitution as 'the self-perpetuating machine'”, a kind of *perpetuum mobile* regulating forever the life of a given community – see. MG Kammen, *A machine That Would Go of itself*, New York 1986). If such conditions are not met, then – given that a fully accurate explanation of a text is not possible (and the 1997 Constitution of the Republic of Poland is “linguistically open” in many places) – even judges, having their own axiological and political preferences, are faced with the temptation of shaping the reality as a new legislative power. Nowadays this phenomenon manifests itself in western democracies. This means that not only in Poland the dispute over the Constitutional Tribunal is no longer just a dispute regarding an inappropriate interpretation of the constitution by one of the parties, but it becomes a fundamental dispute about the operating model of the constitutional judiciary, underpinned on the one hand, by the Tribunal’s reticence requirement and on the other – the concern that it will act to stall the legislation of democratically elected authorities.

system of checks and balances is disrupted, and that this system – and, what follows, democracy in this sense – cannot be maintained without a constitutional court. It is thus hardly surprising that since the authors of the Opinion of the Venice Commission believe that the Constitutional Tribunal is not capable of "effective" activity in Poland, they are also of the opinion that the following are in jeopardy: rule of law (key element of a "constitutional democracy") and human rights, as well as democracy understood as a "constitutional democracy", not as a majority-based system, which refers rather to the realm of reality (or, in other words, the "political domain") than to the prescriptive order. It is, however, worth reiterating that the Constitution of the Republic of Poland introduces "checks and balances", as it discerns three types of powers, each of whom acts on the basis of the Nation's supreme authority, and at the same time delegates suitable competencies to each body which exercises specific powers. The Parliament has been entrusted with prerogatives in law-making, whilst the Constitutional Tribunal was expressly tasked with executing the obligations of a judicial body, and as such a body, the Constitutional Tribunal should not interfere with the competences of the Parliament, as this could trigger changes in the political system and lead to the establishment of a "juridical court- and constitution-based state"[18].

Taking the above into account, one ought to share the positive opinion of the Venice Commission on the commitment of all the parties to the Polish dispute to the Constitutional Tribunal as a guarantor of the supremacy of the Constitution in Poland. This concept is not the subject matter of the dispute. What is more, this concept is undisputable. The issue in dispute is not that of specific provisions of the Polish Constitution and successive acts on the Constitutional Tribunal, it concerns the perception of the Tribunal's position from two different perspectives. The first standpoint reflects the underlying principles of a "representative democracy", where the supreme position is held by the sovereign, who grants legitimacy to bodies and uses the law as his tool, and finds it relatively easy - though postulatively and formally in a correct manner – to amend particular provisions of law. The other position corresponds to "constitutional democracy" where anyone, also the traditional sovereign (the Nation) must conform to the law whose provisions are finally approved and construed solely by the Constitutional Tribunal. Were one to adopt the latter standpoint, Poland's Constitutional Tribunal would serve as a body which derives its legitimacy directly from the constitution itself rather than from the will of the parliament acting as representative of the "sovereign"[19]. Under this assumption, neither the "sovereign" nor its representative are "above"

[18] See A. Vofikuhle, *Federalny Sąd Konstytucyjny a parlament,* [in:] *Wykłady w Trybunale Konstytucyjnym z lat 2011-2012,* vol. XLIX „Studia i Materiały Trybunału Konstytucyjnego", Warsaw 2014, p. 222; B. Pokol, *Jurystokratyczna forma rządów i jej strukturalne aspekty,* „Prawo i Więź" 2016, No 1(15), p. 95-113, and numerous publications by other authors quoted in this text.

[19] This is particularly visible in constitutional courts influenced by the tradition and constitutional approach of the Federal Republic of Germany, particularly in the post-communist Europe. German tradition, however, is specific, since the German Constitutional Court, for historical reasons, *de facto* monopolised the "access" to the constitution containing very

such a court, to the contrary – they are obliged to conform to the law, similarly as the court itself, and are considered to be its "bodies". Adopting such a perspective, however, leads to a situation where, e.g. the issue of appointing judges of the Constitutional Tribunal cannot be linked with the need for ensuring pluralism of their opinions, as their duty is to act "on behalf of the law" rather than "on behalf of the sovereign", which would, by convention, correspond to the political community, i.e. the Nation. As a result, any arguments raising the need for ensuring that appointment of Tribunal's judges caters for the said pluralism are misguided. It seems that there are more robust grounds for arguments referring to the violation of the provisions of the Polish Constitution or the Act on the Constitutional Tribunal.

Taking as a starting point, mainly for praxeological reasons, not just the need for total or partial change of the 1997 Constitution of the Republic of Poland currently in force, but the need for the development of a new basis for statutory arrangements concerning the Constitutional Tribunal, the Team took into account the text of Article 10 of the Constitution of the Republic of Poland which in paragraph 1 states that: "The system of government of the Republic of Poland shall be based on the separation of and balance between the legislative, executive and judicial powers", while paragraph 2 clarifies that: "Legislative power shall be vested in the Sejm and the Senate, executive power shall be vested in the President of the Republic of Poland and the Council of Ministers, and the judicial power shall be vested in courts and tribunals." The list of legislative powers, subsequently disrupted by recognising that the "legislative path" leading to the adoption of ordinary acts[20] also includes, for example, the President of the Republic of Poland or the Council of Ministers[21], does not repeal the division described in paragraph 1 of Article 10. Therefore, the Constitutional Tribunal is not a legislative power and it would be so if one was to accept that, as suggested by the Venice Commission in its Opinion, it "must" be included in each legislative path

general normative constitutional concepts. This gives the judges of the Constitutional Court a wide range of uncontrolled interpretation, a kind of authority with the powers of the legislature (however, a similar tendency is also visible in e.g. the activities of the US Supreme Court, which not only uses general constitutional formulae such as *due process of law* or *equal protection of law* in order to attribute new laws to the text of constitution not explicitly contained therein, but it also creates new constitutional formulae, e.g. *substantive due process* or "right to privacy" that are so general that they give the Supreme Court the freedom to create constitutional provisions and principles which, in its opinion, are the boundary conditions of the constitutional change). The case of Germany is rather exceptional: for the first time the question of whether the Constitutional Tribunal may rule on the constitutionality of constitutional amendments made by the parliament was posed, which, from the perspective of democratic rule of law, is a serious issue and would indicate an absolute veto right regarding any constitutional changes provided by law, even within the framework of the democratic procedure. After the downfall of Nazism, Germany was initially treated as an occupied country and a body vested with absolute powers to interpret democratic actions of authorities in terms of their compliance with extremely broad agenda of cases not subject to change was an attempt to control the German society. This is turn was the result of the fact that the American occupation forces recognised the Constitutional Court as a kind of guarantor of control over the German society overcoming the experience of Nazism (See B. Pokol *Jurystokratyczna forma rządów*..., p. 109).

[20] In particular, Amendment to the Act on the Constitutional Tribunal adopted on 22 December 2015, referred to in point 30 of the Opinion of the Venice Commission is such an act.

[21] Which, throughout the legislative process, enjoys a specific position that goes far beyond the typical position of the applicant of the bill.

leading to the adoption of ordinary acts. The thesis stating that the Tribunal must act as a body that "approves" (or rejects) the constitutionality of an act would lead to the conclusion that it is no longer (or not only) just a judicial power (in addition to other bodies exercising such powers defined in Chapter VIII of the Constitution of the Republic of Poland), but becomes (or is also) a legislative power[22].

The fact that such thesis (negating the presumption of constitutionality of acts, widely accepted in the doctrine) builds on the concept of "sovereignty of the constitution" as the key element of a democratic state of law is problematic, as it puts the Constitutional Tribunal in the role for which the Constitution of the Republic of Poland currently in force does not provide. And yet the Tribunal is supposed to guard its supremacy as "the guarantor of the constitutionality of acts". It is worth noting that the thesis, inherent in this concept, according to which each body draws its legitimacy not from the will of political nation, the "sovereign body", but from the Constitution of the Republic of Poland, does not in any case affect the content of the above observation[23]. After all, within the

[22] Therefore, it would be worth asking the authors of the Opinion of the Venice Commission a question regarding the status of an act between its promulgation and the ruling of the Constitutional Tribunal.

[23] In point 43 of the Opinion, the Venice Commission provided a historical example: In 1803 the Supreme Court in USA declared that "the Constitution is a superior, paramount law, unchangeable by ordinary means" (Marbury v. Madison, 5 US. 137 (1803). This argument is unfortunate and constitutes some sort of historical and political presentism since it refers to incomparable situations and applies a general formula whose content had been interpreted in various ways in different countries and contexts. The decision on Marbury v. Madison set a precedence of the federal judicial review. Heavily criticised, it led to one of many constitutional crises. The most serious, still maintaining its value, polemic with Marshall's stand was started by the judge of the Supreme Court of Pennsylvania John Gibson in 1825, who in Eakin v Raub said that "the task of courts is to interpret the law, not to supervise the authority of an employer" (12 Serg.& Rawle (Pa.), p. 343-358 (1825). The justification of this reasoning was based on trust in the constitutional system, which – based on the trias politica principle – never granted any power the right to cancel acts of another power. Full power has always been held by sovereign people who, by means of the trais politica principle, delegated their power in democratic elections to the legislator, president and courts, without making the latter guardians of the constitution staying outside the political system. This resulted from several premises: (1) trust in the constitutional system of 1787 in which sovereign people "holding full and absolute power [are the only ones to hold] the power to amend abuses of the legislator by convincing representatives to reject an unjust or unconstitutional act" or changing it by means of elections. Gibson pointed out that the American constitutional system "has survived (…) tremors of powerful political party rivalry for 30 years when no legislature act was considered unconstitutional despite the fact that courts consistently claimed the right to such action in (…) certain cases" (op. cit., p. 346, 354 (1825);(2) danger that the judiciary power itself may threaten a constitutional state by forming an alliance with the present parliamentary majority and creating constitutional barriers limiting the will of sovereign people in future elections (coterminous power). Incidentally, it is worth noting that a similar situation was analysed in the American context by "Brutus", an antifederalist, who warned about a situation where the Supreme Court "would be exalted above all other power in the government, and subject to no control (…). I question whether the world ever saw, in any period of it, a court of justice invested with such immense powers, and yet placed in a situation so little responsible (…). There is no power above them, to control any of their decisions. There is no authority that can remove them, and they cannot be controlled by the laws of the legislature. (...) In short, they are independent of the people, of the legislature, and of every power under heaven. Men placed in this situation will generally soon feel themselves independent of heaven itself". (Brutus, Essay XV, 20 March 1788, The Anti- Federalists: An Abridgement of the Complete Anti-Federalist, ed. H. J. Storing, selection Murray Dry, Chicago 1985, p. 183).

In point 101, while commenting on the resolution of the Sejm on the selection of five new judges of the Constitutional Tribunal and the President of the Republic of Poland's refusal to accept their oath, the Venice Commission refers in footnote 25 to an allegedly similar problem faced by the Supreme Court of the USA in Marbury v The Madison in 1803. Again, this repeated historical argument is not adequate to the Polish situation since signing a document by the American President concluded the nominating process and its submission was a technical activity, whereas blocking a submission of nomination was a political decision. In terms of constitution, the situation in Poland is different: the nomination of the Sejm was not signed by the President as the "protector of the constitution" claiming that nomination resolution undermined the constitutional custom, violated the trias politica principle and fundamental axioms of Nemo iudex in causa sua rule of law due to direct involvement of judges of the Tribunal in the legislative process related to the

limits of competence granted to the Tribunal, the Constitution of the Republic of Poland does not allow it to act before an act enters into force (except rulings when an act is referred to the Tribunal before it is signed by the President of the Republic of Poland, which competence, according to the Tribunal's operational logic, is an exception to the rule of the follow-on actions). The Tribunal, however, has competencies in respect of its activities, once the act enters into force, even if it applies to the Tribunal itself. Therefore, while on 14 January 2016 the Constitutional Tribunal correctly held (point 33 of the Opinion of the Venice Commission) that it would consider the case K 47/15, it wrongly assumed that it would not apply the Amendment provisions to this case as it was directly related to its functioning.The Constitution of the Republic of Poland currently in force, whose supremacy should be recognised by the Constitutional Tribunal, does not provide the basis for such an exemption. It should be emphasised that the competence to indicate which acts are to be evaluated under the special procedure that would determine their entry into force has not been granted to the Tribunal. The objection of two judges, mentioned in point 33 of the Opinion of the Venice Commission, was based on the presumption of constitutionality of the Act of 22 December 2015 and lack of constitutional competence of the Tribunal to exclude certain acts from this presumption, including these relating to the Tribunal itself. Therefore, the notion included in point 36 of the Opinion of the Venice Commission should be regarded as problematic. Although *vacatio legis* allows for the examination of the constitutionality of an act before its entry into force, it is not a "constitutional principle" and cannot be established as such, e.g. by a decision of the Constitutional Tribunal, which does not have such a competence arising from the Constitution of the Republic of Poland. An argument in point 41 of the Opinion of the Venice Commission, according to which "a simple legislative act, which threatens to disable constitutional control" must be evaluated "for constitutionality before it can be applied by the court" once again makes the rule of presumption of constitutionality of an act problematic, as it transfers the dispute to an extremely high level, associated by the Venice Commission with the general model of "the constitutional judiciary".

While taking note of the above argument emphasising the importance of the principle of presumption of constitutionality of an act (included in the provisions of the Polish Constitution, e.g. in connection with Article 10), for the purposes of proper settling of cases by the Constitutional Tribunal, the requirement of a minimum quorum specified in the act currently in force and

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Act on the Constitutional Tribunal of June 2015. In the American case, a serious constitutional conflict arose between the legislative authority (Congress), dominated after the 1932 elections by the Democratic Party along with the President F.D. Roosevelt from this Party and the Supreme Court during the so-called New Deal period. In 1934-1937, the Supreme Court described current legislative as "massively [inconsistent with the Constitution] action without precedent in the American history". In 1937, in response, Roosevelt offered the Congress to amend the Judiciary Act of 1869 by nominating six additional judges in favour of reforms (Court Packing). The Congress protested; however, this threat led to a self-restraint of the Supreme Court, which adopted an interpretational doctrine (in United States v. Carolene Products Company in 1938), providing the Congress and the President with freedom in legislation in respect to the economic and social sphere without subjecting it to thorough constitution supervision, while reserving the right to scrutiny related to the actions of the legislative and executive powers in relation to citizen rights and freedoms.

undergoing evaluation should be considered as justified. Since, according to the Amendment of 22 December 2015, the quorum of 13 judges has been established, a judgement may be considered a ruling of the Constitutional Tribunal provided that the quorum was reached. Point 36 of the Opinion of the Venice Commission claims that the Tribunal currently has "only 12 sitting judges", and thus considers its inability to reach the required quorum. However, it is based on another ruling – that the judges who took the oath before the President of the Republic of Poland, but are not recognised by the Tribunal's President[24], are not judges.

A key point in the case of the described matter is the statement included in point 40 of the Opinion of the Venice Commission, "that even without such a constitutional basis" – i.e., as it seems, without competencies set out for the Tribunal in the Constitution of the Republic of Poland – an examination of the amendments of 22 December 2015 by the Constitutional Tribunal "could be justified by the special nature of constitutional justice itself[25]. It is the Constituent Power, not the ordinary legislator, which entrusts the Constitutional Tribunal with the competence to ensure the supremacy of the Constitution". This statement is justified, since it makes not from an ordinary act, but from the Constitution of the Republic of Poland, a foundation of activity of the Tribunal in terms of protection of the Constitution. However, the problem is that the legitimisation granted by the Constitution of the Republic of Poland (considered as the law-making power), rather than by the "ordinary legislator", is also determined by it and is not infinite. Nevertheless, the opinion that the "law-making power" enables the Constitutional Tribunal to define the scope of its own actions or activity as far as determining, for instance, the effective date of an act – related especially to the moment of admission by the Tribunal rather than the moment indicated in the same act by the "ordinary legislator" – is not based on the provisions of the Polish Constitution. The Tribunal may not derive its competencies in that respect from the provisions of the Constitution of the Republic of Poland. The Venice Commission itself concluded in the above-mentioned point of the Opinion that "the legislation of the Constitutional Tribunal has to remain within the bounds of the Constitution", adding at the same time that "this legal basis (...) needs to be controllable by the Tribunal". Taking into account the principle of the presumption of constitutionality of acts, the control of the Tribunal is not lifted potentially (or even postulatively) in relation to all acts adopted by the "ordinary

[24] For actions for which there are no legal bases in that respect, especially in the Act on the Constitutional Tribunal or another normative act.

[25] Contrary to dominant associations in Poland, the English term "constitutional justice" (in French: *justice constitutionnelle*) is not understood by constitutionalists as constitutional justice whose recognition could provide knowledge of the appropriate "constitutional order" similarly to "justice value". They understand it in two ways: (1) as constitutional justice meaning a set of institutions and procedures applied in order to declare on the hierarchy of norms; (2) as an effect of actions of constitutional courts, i.e. the condition of compliance with the constitutional order which results in "constitutional justice" in literal meaning. See *Constitutional Justice, East and West. Democratic Legitimacy and Constitutional Tribunals in Post-Communist Europe in A Comparative Perspective*, eds. W. Sadurski, Hague-London-New York 2002; M. Fromont, *Justice constitutionnelle comparee*, Paris 2013; F. Hamon, C. Wiener, *La justice constitutionnelle en France et a l'etranger*, Paris 2011; A.S. Sweet, *Constitutional Tribunals*, [in:] *The Oxford Handbook of Comparative Constitutional Law*, eds. M. Rosenfeld, A. Sajó, Oxford 2012, p. 816-830.

legislator". Nevertheless, the restrictions introduced in the Constitution of the Republic of Poland – which sees the Constitutional Tribunal as a guarantor of constitutionality of acts in force rather than as another necessary element of the legislative route, even if in relation only to acts on the Tribunal itself – are honoured.

The text of the Opinion of the Venice Commission consists of different contents in a methodological sense: apart from statements, also of numerous hypotheses, assessments, recommendations and proposals. It contains complex conclusions on many hidden premises. An analysis of or discussion with the contents included requires each problem to be referred to individually since a justified thesis is discussed differently than a hypothesis, assessment and proposals. The Team has analysed the statements of the Venice Commission by examining their justifications, checked the assumptions of hypotheses the Commission put forward and evaluated – in light of the facts – whether they are probable, as well as examined the evaluative statements of the Commission by analysing the values to which they refer. The Team has thoroughly looked into more or less decisive directives formulated by the Commission by verifying whether the directions of solutions it had proposed were optimum for the democratic legal order and protection of human rights in Poland. Possibilities, scope and manner of using findings, assessments and directives of the Venice Commission cannot be uniform since they depend on the character (type) of its statement, among others.

The Team shares many theses and detailed assessments of the Commission, including its directional assessment that "as a political actor, the Sejm is also best placed to establish a dialogue conducive to a political solution" and directive according to which "a solution to the current stalemate must be found". Following this directive, the Team has drawn up the present Report which, in its members' opinion, allows for "a solution to the current conflict over the composition of the Constitutional Tribunal, which originated from the actions of the previous Sejm" (point 136 of the Opinion). The Team agrees with the diagnosis of the Venice Commission that one of the most important sources (but not the only one) of the "conflict" were "the actions of the previous Sejm" (point 121 of the Opinion). "It is obvious", according to the authors of the Opinion in point 121, "that the current conflict over the composition of the Constitutional Tribunal originated from the actions of the previous Sejm". The Team shares this stance, although it also notices a deeper, e.g. axiological, political and historical background and roots of the problems. The Team also sees that the Venice Commission did not conclude that the Amendments of 22 December 2015 had not been a remedial action, but stated to have difficulties (the Opinion reads: "it is therefore not easy to establish") with the assessment of the Amendments and their impact on the improvement of the

situation related to the Tribunal[26] (despite what the media had often written, the Commission did not thus rule out that these had been remedial actions).

However, the Opinion of the Venice Commission, apart from numerous valuable statements, also contains arguments difficult to approve of, containing inferential, interpretational and semantic errors[27]. In order to show that the Commission used also arguments from outside the pool of objective justifications, it is worth pointing out the ones such as: (1) information manipulations or deficiencies (omission or belittlement of certain facts), which resulted in the Opinion containing descriptions and assessments of the actual and legal situation with mistakes and errors; (2) omission or belittlement of deep cultural, political and historical sources of problems of the Constitutional Tribunal, which resulted in the Opinion containing defective descriptions and assessments of the actual and legal situation; (3) eristic tricks (unwarranted analogies, semantic traps, manipulative changes of levels of argumentation and manipulations in conclusions and, finally, false generalisations), as a result of which the authors of the Opinion attempted to convince of certain theses and proposals, violating the rule of relevant justifications and explanations; (4) "foreseeing the future" and making multi-variant hypotheses based on poorly justified assumptions, which resulted in an attempt to make the recipients feel that the Commission is able to "foresee the future"; (5) wrong interpretation of Polish legislation, which resulted in presentation of erroneous descriptions and assessments of the legal situation of the Constitutional Tribunal.

In order to demonstrate the above-mentioned arguments, the following examples are worth quoting:

1. Manipulating information

The Venice Commission selected only some information concerning the history of problems arising around the Constitutional Tribunal. The Commission perhaps did not have other information or underestimated it. As a result, it created a one-dimensional, largely distorted version of events, which was supposed to help "understand the constitutional situation". In particular, the Commission did not analyse the content of a number of statements of judges, including the President of the Constitutional Tribunal during parliamentary work, or consciously disregarded them, which led to its incorrect assessment of the situation. In fact, the Commission observed that "in order to

[26] The Venice Commission admitted directly in its Opinion that "it is therefore not easy to establish why the Amendments of 22 December 2015 would continue to be a remedial action against the unconstitutional action of the previous majority." This means that: (a) the Commission admits that the action of the previous majority had been unconstitutional and (b) it is not easy for the Commission to determine (strictly speaking: explain) why the December amendments "would continue to be a remedial action".

[27] For methodological problems found in the Opinion of the Commission and its scope see also L. Morawski, *Opinia Komisji Weneckiej w sprawie ustawy nowelizującej z 22 grudnia 2015 roku - analiza krytyczna*, „Prawo i Więź" 2016, issue 1(15), especially p. 13-16.

understand the constitutional situation resulting from the Amendments, it is important to recall the chronology of events leading up to their adoption" and afterwards referred only "to major events that are relevant to the opinion", and noted that the list of events is "necessarily incomplete"[28]. The Team confirms that this list is indeed incomplete, and that extremely important facts not included therein and referred to below radically alter the picture of events.

The Venice Commission started the description of the chain of events from the submission to the Sejm by the President of the Republic of Poland of the draft Act on the Constitutional Tribunal prepared "on the initiative of a working group, which included former and current judges of the Tribunal, amongst them the Tribunal's President" (point 11 of the Opinion). The Team does not agree with Commission's assessment that this list of events contains the most important facts of the case since "in order to understand the constitutional situation", at least a few other relevant events should be taken into consideration (omitting them in the Opinion leads to e.g. real gaps in assumptions applied to draw conclusions and is a source of many errors in Commission's reasoning, assessment of legal situation and conclusions). According to the Team, in order to fully "understand the constitutional situation", one needs to take a much closer look at the issues of the Constitutional Tribunal, not only through a narrow context of specific facts. What is important is not a simple chronology of events, but, above all, a broad political, legal and axiological background of the situation, which was underestimated in the Opinion or considered by the Commission as undisputable.

To specific "major events that are relevant" to the assessment of the situation, should be added, above all, apart from those mentioned in the Opinion, facts related to the participation of judges of the Constitutional Tribunal in the preparation of the draft act of June 2015 and connected with the scope and form of this participation in many stages leading up to the adoption of the Act. The Venice Commission described this participation in an imprecise manner and, as a result, considered it as acceptable. The Team is of a different opinion. The judges of the Constitutional Tribunal, by drafting the act for themselves, "did not pass the impartiality test" because they created a "social impression" of partiality and transferred this impression to the whole Tribunal due to the "halo effect". The judges, including the President of the Tribunal, exercised personally (and not acting as a body, i.e. the Constitutional Tribunal) several different functions during different stages of drafting the act (even though the Constitution or the Act on the Constitutional Tribunal do not confer such competences to the judges of the Tribunal or President):

a) function of an inspirer (initiator) of the work on the draft act and function of an actual author of the original working text of the draft act of June that was prepared "on the initiative of a working group, which included former and current judges of the Tribunal, amongst them the Tribunal's

[28] Cf. point 10 of the Opinion of the Venice Commission.

President" (point 11 of the Opinion); the Team does not agree with the Venice Commission that "obtaining additional input" or "submitting comments" during the work in the parliament, as it is the case in some countries, can be considered as an autonomous drafting of the new act and afterwards inspiring the President to further work. While writing about European practice, the Venice Commission did not give any such example;

b) function of a participant in the working group preparing this draft since 2011, which – as it is written in the Opinion of the Venice Commission – i.a. "reached a consensus" concerning the pre-selection of candidates for judges; according to the Team, the judges of the Constitutional Tribunal should not participate in negotiations of such solutions concerning their group; the Team notes that "reaching consensus" is always a result of negotiations; the Venice Commission considered it acceptable that judges interested in the outcome of the work – meaning the future composition of the Constitutional Tribunal – "negotiated consensus" and after the adoption of legal solutions "negotiated" by them examined their constitutionality; the Team thinks that this is unacceptable;

c) function of experts, active participants in the stage of handling the act (prepared by them) in the parliament, and guarding their own, proprietary, "negotiated" solutions drafted earlier.

The Venice Commission did not include in its Opinion an analysis of contents of statements of the judges of the Constitutional Tribunal, including its President, during Sejm committees sittings or consciously excluded them, which – by omitting important facts – led to an incorrect assessment of the situation. In order to assess the actual scope of judges' participation in work of the Sejm on the act, the Team analysed all available statements of the judges and the President of the Constitutional Tribunal during Sejm committees sittings (the Team did not have access to records of confidential discussions within the "working group" in the Constitutional Tribunal). This analysis made it possible to establish that the judges of the Tribunal, acting as experts during work of the Sejm, used many non-substantive arguments, eristic tricks and went beyond the scope of *ad rem* arguments. In its Opinion, the Venice Commission argued, without a similar analysis of statements, that the judges of the Tribunal did not exceed their role as experts in the Sejm. However, the Team thinks that this is an incorrect assessment: an expert is after all a neutral pundit and cannot be personally involved in the matter, he/she helps to establish the facts thoroughly but is not manipulating and does not use unreliable arguments in a discourse in order to convince his/her interlocutors to change their stand.

The Team considers it necessary to give a few examples of statements of a judge and the President of the Constitutional Tribunal, made during work in the parliament on the draft of the Act of June, i.e. in the stage showing very clearly the essence of the problem created to a large extent by a part of the judges of the Tribunal, and unjustly neglected and disregarded by the authors of the Opinion of the Venice Commission (due to their volume, the examples are presented in the

footnote[29]).

[29] Example 1. Statement of the President of the Tribunal at the sitting of a Sejm committee in defence of Article 1 of the (unconstitutional) draft act of June ("the Constitutional Tribunal is a judicial authority guarding constitutional order of the Republic of Poland"):
Jan Kremer, a member of the National Council of the Judiciary, drew attention to the threats related to this provision which was drafted and supported by the judges of the Tribunal, at the sitting of 5 May 2015 of the Justice and Human Rights Committee and the Legislative Committee. J. Kremer said: "Our only concern is whether different types of competences of the Tribunal will not be extended in the subsequent acts since such a form of the act perhaps allows it, but we adopted a very mild approach stating that this matter needs to be considered without taking a stringent position". Mr Dera, a deputy from PiS, added: "However, when you read the Constitution, you see no mention that the scope of actions of the Tribunal could be in any way extended by an act". The Team also shares these opinions.

Andrzej Rzepliński, the President of the Tribunal, used in his response four unreliable arguments in order to "save" the drafted solution: "(1) Article 79 of the Constitution states that regulations concerning the mode of handling constitutional complaints are regulated in an act and they are regulated in the Act on the Constitutional Tribunal. (2) The Act on the Constitutional Tribunal regulates for example the Tribunal's competence for signalling to the Sejm. (3) And this is natural, there is no act on the constitutional court in Europe in which certain things would not be clarified. (4) After all, it is the legislator, not the Constitutional Tribunal, who does it. This is the answer to Mr Dera's question".

With regard to thesis (1) formulated by the President of the Tribunal: the Act (at that time draft) of June states against the Constitution that such acts may determine the competences of the Tribunal. Article 79 of the Constitution does not allow, contrary to the thesis of the President of the Tribunal, for establishing in acts additional competences of the Tribunal; it concerns only the mode of operation, authorises to regulate this mode. The competence to adjudicate on complaints is included in Article 188 paragraph 5 of the Constitution. Sentence (1) used by the President of the Tribunal is not a reliable argument but only an eristic trick. The President of the Tribunal should know that this is not an example of transferring competences from the Constitution to an act. Probably, he also knew that competences are determined in the Constitution, and that authorisation for an act concerns only the regulation of the mode of operation.

With regard to thesis (2): the fact that the Act on the Constitutional Tribunal adds in Article 5 an extraconstitutional competence for the signalling (not provided for in the Constitution) is not a proof for a general right of the legislator to "add" competences of authorities in acts (exceptions must not be given a broad interpretation). The Team calls for taking this problem into account during potential work on a new constitution. Article 5 of the Act on the Constitutional Tribunal, incorrect from the legislative point of view, cannot be considered an argument opening the door wide for adding and modifying normal competences of the Tribunal in acts. The President of the Tribunal cited this exception as an argument, even though he probably knew that the competences of the Tribunal should be – for the sake of the rule of law, human rights and democracy – determined exclusively in the Constitution. With regard to the President of the Tribunal's thesis (3) arguing that in Europe, in acts on the constitutional court "certain things are clarified": this is also an unreliable argument. "Clarifying certain things" cannot be considered a synonym for "determining competences". This change of expressions constitutes a clear example of a linguistic manipulation called "redefinition", consisting in a change of term used to describe an object in order to modify associations related to it. "Determined" (competences determined in acts) does not have the same meaning as "clarified", and this was the term used by the President of the Tribunal. There are no doubts that the legislator uses the term "determined" in the sense of designated, established since it concerns competences "determined in the Constitution and in acts". It cannot be argued that in the Constitution "certain things are only clarified". If the legislator wanted to give another meaning to the term "determined", i.e. "clarified" (as it was redefined manipulatively by the President of the Tribunal), the legislator would have to write e.g. "competences established in the Constitution and clarified in acts". The President of the Tribunal used here an eristic trick consisting in a clear shift of the statement's aspect; as a result, he disputes another thesis than the one advanced in order to convince recipients.

With regard to thesis (4) referring to the authority of the Sejm: this argument is also not substantive, but constitutes an eristic trick consisting in reducing the disputed thesis to absurdity and extending this thesis beyond the limits of its substance (an eristic trick called "juggling authorities"). The President of the Tribunal's reasoning can be described in a simplified form as follows: if the Tribunal itself added some competences to the ones it had, it would naturally be a bad thing, but the legislator "can do it after all". The President of the Tribunal used the authority of the Sejm and – as he did not have any substantive arguments – employed it as a shield.

Example 2. Statement of a judge of the Tribunal:

Announcement of an "ersatz": Piotr Tuleja, a judge of the Tribunal, used, instead of a substantive argument, a standard psychological trick consisting in warning the interlocutor, a typical negotiation trick based on the pattern:

2. Omitting a wider background showing the importance of principles of correct legislation. In order to illustrate this type of error, leading to inaccurate recommendations of the Venice Commission for the Polish legislator, we can use Commission's assessment which led to a direct call for violation of principles of correct legislation applied in Poland for many years. The Team does not share Commission's disapproval of removing from the Amendment of 22 December 2015 of the Act of June provisions repeated after the Constitution of the Republic of Poland (points 95 and 96 of

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"if not, then" in order to overbear opponent's stand. The goal was to overthrow the position concerning obligatory participation of the prosecutor in proceedings before the Tribunal.

The aim of such statements is to exert strong pressure on opponents, and not to convince them. The announcement of an "ersatz" (as was the term used by the judge) and of achieving the effect by taking a roundabout approach through an indirect impact of an internal act of the Tribunal on the prosecutor, is a form of a non-substantive pressure. The judge of the Tribunal should know that what he announced was not a correct solution. The warning that the judge is considering such a method is a psychological trick.

Judge Piotr Tuleja: "I am wondering right now, if this act is adopted in such a form, whether a stipulation should be introduced to the rules of the Constitutional Tribunal, obliging the panel of judges to call every time on the general prosecutor. Naturally, we cannot impose in the rules, which are an internal act, any obligations on external entities standing before the Tribunal, but we can adopt internal regulations which will constitute an ersatz of the current solution. This will probably happen, so it would rather be much better if the current solution was simply preserved".

Example 3. Another statement of the President of the Tribunal.

The President used unethical *ad personam* eristic tricks, related to the bodies composed mostly of very experienced lawyers, the so-called indirect attack on a body, and he juggled authorities (pattern: I am an authority); moreover, he used a manipulation consisting in an unjustified generalisation. Using the power of authority instead of a substantive argument is an unfair psychological trick. The President of the Tribunal, by putting himself in the role of a teacher (eristic trick), "was attacking" members of the National Council of the Judiciary, reproaching their lack of knowledge and competences, while hoping that no one will dare to question his authority. During a Sejm committee sitting, he said to the members of the National Council of the Judiciary: "you, as a body, do not have any idea about what the constitutional process is".

The President of the Tribunal used also another eristic trick – unjustified generalisation, while accusing the National Council of the Judiciary of "deprecating the role of a judge", when the problem concerned something completely different ("a judge does not represent the court" is naturally not the same as "he will do it better, because he knows the case"). The President of the Tribunal, Andrzej Rzepliński said: "I would like to ask Your Honour a question in connection with what you have just said – that a judge does not represent the court. On which basis can we argue this, and moreover, who will do it better than one of three judges, if the court composed of three members asked a question and knows the case? (...) This is a very strange situation. It strikes me that the stand of the National Council of the Judiciary shows that you, as a body, do not have any idea about what the constitutional process is. It is different from a trial in a military, judicial or administrative tribunal, and that is why it is unjustified to deprecate the role of a judge who comes to the hearing and takes part, in a mode appropriate for proceedings before the Constitutional Tribunal, in a dialogue concerning the examination of the constitutionality of law".

Example 4. An expert of constitutional law present at the sitting of a Sejm committee.

The expert, professor Marek Chmaj, introduced at the sitting of a Sejm committee, as he said explicitly: "in agreement with the President Andrzej Rzepliński", the subject of changing rules of selecting judges. The working group for the reform of the proceedings before the Constitutional Tribunal was preparing changes in the competences of the Sejm while drafting the act, even though it is incompliant with the standing orders of the Sejm since it is the Sejm that chooses judges of Constitutional Tribunal according to the principles set out in its rules. The judges were thus preparing changes in the competences of the Sejm, and moreover, were trying to influence the Committee to additionally change these competences on a one-off basis. Professor Chmaj said on behalf of the President of the Tribunal at the Sejm committee sitting: "I am speaking in agreement with the President Andrzej Rzepliński. I would like to draw your attention to the provision of Article 19 paragraph 2: "A proposal of a candidate for the judgeship at the Tribunal shall be lodged with the Marshal of the Sejm no later than four months prior to the end of the term of office of a judge of the Tribunal". Terms of office of three judges of the Tribunal expire on 6 November this year. If we leave the time limit of four months, then even if we assume that the act will be adopted quickly, there is a *vacatio legis* of 30 days for the act, and we will in practice make it impossible to choose three judges of the Tribunal this year. If we want to give the possibility of choosing three judges of the Tribunal, then this time limit should amount to not four, but three months". The quotations are derived from full record of the sitting of the Justice and Human Rights Committee and the Legislative Committee of 6 May 2015 (Sejm Paper www.orka.sejm.gov.pl/zapisy , pages 16, 49 and 29, respectively.

the Opinion). On the contrary, the Team evaluates it unequivocally positively. Precisely "in the current situation of political and constitutional controversy", as the Commission wrote, it is particularly important – in the Team's opinion – to ensure the respect for principles of correct legislation in Poland (point 95 of the Opinion). Not repeating provisions set out in other acts is one of the rules of the Polish legislation. As a matter of fact, § 4 of the Ordinance of the Prime Minister of 20 June 2002 concerning the principles of legislative technique reads as follows: "An act shall not repeat the provisions of other acts"[30]. The repetition in acts with an inferior ranking of provisions set out in acts of parliament is not correct. Due to political reasons, authorities in Poland and in other post-communist states for several decades were consciously blurring the hierarchy of legislative acts. In the Polish People's Republic, the problem of repeating regulations, "parallel regulations" and their negative effects for the legal order was recognised and analysed in legal science, yet it could not be resolved. Repeating the contents of higher-ranking legal acts in lower-ranking legal acts posed then and still poses a real threat to the legal order. Lower-ranking regulations in the Polish People's Republic often repeated provisions literally (as in the above-mentioned case) or "translated them" ("into own words" of lower-ranking authorities). As a result, higher-ranking legal acts were functionally supplanted. These acts were becoming detached from direct use. Acts (often of an unclear legal status) of ministers in "ministry-based" Poland were practically "more important" than acts of parliament for their addressees. The sociological phenomenon of inverting in practice the hierarchy of sources of law was an important problem in the Polish People's Republic. That is why, after the political transformation in Poland, it was acknowledged that it is particularly important to ensure the correctness of the hierarchy of acts, legislation, and to avoid repetitions which distort the image of the legal system in their addressees' mind. The Venice Commission did not notice at all this "specifically post-socialist" context and proposed recommendations completely unfit for the Polish reality, promoting in fact the weakening of the rule of law.

3. Eristic tricks.

The Venice Commission used many tricks which do not constitute *ad rem* arguments or are at least disputable when it comes to their logical and empirical reliability. Some examples:

a) Unjustified analogies

The Venice Commission argued that "it is a common feature of European constitutional culture that constitutional courts may comment on reform proposals, which concern the Court itself; in many cases they are even involved in drafting groups. The reason for such inclusion is to obtain additional input and expertise". Subsequently, the Commission gave examples of Germany and Austria. The problem is that there is certainly no analogy between the actions of the President and judges of the Constitutional Tribunal in Poland and the examples provided. In particular, there is no substantial

[30] Reference of the Polish Journal of Laws: Dz.U. z 2016 poz. 283.

similarity to initiating by the President and judges of the Constitutional Tribunal (not by the Tribunal itself) the work on a draft act, writing its text and taking part in its formulation in the Sejm, as it was the case in Poland. In Germany, the constitutional court submits comments on drafts, and in Austria it is invited to comment in different stages of legislative procedure. Constitutional courts acting as bodies in western countries only respond to questions and initiatives of parliaments. In Poland, it was not the Constitutional Tribunal acting as a body, but its judges (not all of them, but the ones selected for this task by the President of the Tribunal) who drafted the act on their own initiative.

b) Semantic traps and tricks consisting in a conscious change of the level of arguments in order to create space for manipulative arguments

The representatives of the Venice Commission held talks in Poland with politicians and lawyers. Political and legal language differ at the level of conceptual frameworks (vocabulary range, content), as well as at the level of codes (construction of meanings, causal relationships, awareness of existence of many "images of the reality"). The Commission used differences between political and legal language as a "trap" and reproached in its Opinion the "government majority" for arguing that the judges represent party interests (point 116 of the Opinion). The representatives of the Venice Commission are lawyers, but they knew that they were talking not only to lawyers, but also to many politicians. However, in the Opinion they synthesised these two languages in order to manipulatively formulate their reproach. They even used the colours in which the judges were marked in the political "charts" as a political argument to show that in Poland the concept of pluralism is not correctly understood (point 118 of the Opinion).

The possibility to describe the principle of pluralism from the perspective of different sciences will always lead to using different codes of description. To reproach the Poles for not understanding pluralism and role of the judges of the Tribunal – which is visible in points 115-119 of the Opinion – is unwarranted[31], just like the fear that post-communist countries that joined the European Union in 2004 and 2007 will "slide" into "the depths" of dangerous "populist nationalism", even through democratic elections. This is a type of fear that gradually annihilates the original subsidiarity principle enshrined in EU treaties as a basis for thinking about political system in the European Union, by considering post-communist European countries as not mature enough to embrace democracy and requiring a certain supervision.

c) Unwarranted explanatory hypotheses, false generalisations, manipulated inferences, formal

[31] The necessity of providing the constitutional court with a certain political representativeness was pointed out in literature, with an ample justification. Cf. L. Garlicki, *Sądownictwo konstytucyjne w Europie Zachodniej*, Warsaw 1987, p. 97; K. Wojtyczek, *Sądownictwo konstytucyjne w Polsce. Wybrane zagadnienia*, „Studia i Materiały Trybunału Konstytucyjnego", volume XLVII, Warsaw 2013, p. 94-95. It should be noted that it was foreseen that a problem could arise as a result of a lack of political rotation in subsequent terms of the Sejm, when the ruling majority would be able to "staff full or almost full composition" of the Tribunal with their candidates, "which could diminish its political representativeness and negatively affect its legitimisation" (K. Wojtyczek, op. cit., p. 96). In this regard see: J. Zajadło, *Wewnętrzna legitymizacja sądu konstytucyjnego*, „Przegląd Sejmowy" 2009, issue 4, p. 134.

fallacies in reasoning schemes.

In its Opinion, the Commission assessed not only the law in force in Poland, but also the knowledge and intellect of Poles, for instance by suggesting that deputies (and probably all Poles) have an "immature" understanding of the constitution and a "misconception of democracy"[32].

The Commission stated that "it seems" that "some" agree with this thesis. It then draws unwarranted conclusions, thus transforming its own, uncertain thesis beyond acceptable limits. It is worth looking at thesis from point 129 of the Opinion: The Commission also found that "[i]t seems that some stakeholders were of the opinion that anything that can be done according to the letter of the Constitution is also admissible." On the basis of this uncertain thesis, the Commission drew the first hypothetical conclusion: "The underlying idea may have been that the majority can do whatever it wants to do because it is the majority", and the second hypothetical conclusion which constitutes a false generalisation: "This is obviously a misconception of democracy." Therefore the inference was made as follows: starting with "it seems that" (which indicates that the Commission was not certain), followed by "may have been" (The Commission used the subjunctive), ending with a conclusion which unexpectedly contained a final thesis which supposedly results from the above-mentioned statements: "This is obviously a misconception of democracy." The Venice Commission clearly exceeded its competencies, drawing up, on the basis of fragmentary knowledge and manipulative inferring insinuations regarding the lack of substantive expert knowledge among Polish deputies, as this remark most likely is aimed at them[33].

The suggestion contained in point 130 of the Opinion that constitutional institutions in Poland are understood in an "immature" manner is also a non-content-related manoeuvre. The Polish constitutional tradition is longer and richer than in most countries of the world. And still the Venice Commission, by adopting a paternalistic supervisory attitude, on numerous occasions used the "European and international standards" category (e.g. in points 65, 71, 72, 78, 114, 124, 125 and 143 of the Opinion), which should be met by all the Member States of the Council of Europe. Furthermore, in point 138 it stated that Poland has broken such standards when the Sejm adopted amendments to the Act on the Constitutional Tribunal in the Act of 22 December 2015, thus undermining "three basic principles of the Council of Europe: democracy – because of an absence

[32] See points 128 and 129 of the Opinion, from which the Commission's assertion of a "misconception of democracy" in Poland can be inferred.

[33] It is an unfortunate statement, if only for the reason that in the Polish political culture, at last since the Sejm Constitution of 1505, establishing the fundamental principle of the political system Nihil novi commune consensu (Nothing new without the consensus of all), initially having regard to the state society and later included into the culture code of the Polish political thought, with its principle of civil protest and opposition, it is not necessary to remind anyone that democracy has nothing to do with dominance based solely on the will of the majority. In the 18th century this problem was also presented theoretically by E. Burke or J. Madison as a phenomenon which might give rise to a totalitarian democracy (to use a phrase by J. Talmond).

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[34] – because the Constitutional Tribunal, which is a central part of the judiciary in Poland, would become ineffective." When basing one's conclusions on the Opinion of the Venice Commission, one could state that democracy, as one of the *three basic principles of the Council of Europe* should be associated not so much with having supreme power by the People, but rather a *central part of checks and balances.* It can also be inferred that human rights – the second of the three basic principles of the Council of Europe – should be associated mainly with the access of individuals to the Constitutional Tribunal. Furthermore, it can be argued that the rule of law (the third basic principle of the Council of Europe) should be referred to the key function of the constitutional court (see point 138 of the Opinion of the Venice Commission). When doing so, one can bear in mind that this reasoning problematises the conviction that democracy – contrary to its etymology – is no longer "ruling by the people", but rather a solely institutional solution (see point 129 of the Opinion). It can also be argued that the rule of law – again contrary to the thesis specified in point 129 of the Opinion – cannot be implemented without constitutional judicature (however, with the proviso that not all Member States of the Council of Europe have such judicature in place – see Article 120 of the constitution of the Netherlands). All that can be done, it should however be borne in mind that the statement, drawn on the basis of all three principles, on the existence of democracy provided checks and balances of a constitutional court which has the power to control draft acts and other normative acts are ensured in the system is a *non sequitur* logical fallacy which the Venice Commission seems to commit**.** After all, the existence of such a Tribunal does not automatically follow from the *checks and balances* principle and it is therefore not an "international or European standard" specified as the one and only obligatory model of balancing control. It seems that the perspective adopted by the authors of the Opinion of the Venice Commission leads to a conclusion that the People, whom the Constitution of Poland of 1997 grants supreme power to, not so much works through bodies which are limited in their competences and have a mutually inhibitory effect as part of the powers specified above all by the Constitution, but rather it is subordinated to "the constant supreme law". What is presented is an idea of the law which ceases to be an expression of the will of the People acting in the field of legislation through its representatives in the parliament, and becomes a "constant" normative structure protected by constitutional courts. Such a change in effect invalidates the essence of democracy and constitutes rather an expression of a specific "juristocracy" or "juridication of politics", thus making judges the guardians of hypothetical

[34] A similar allegation can be found in point 54 of the Opinion.

constitutional principles, or even exponents of a basic "justice" unacknowledged in the written Act[35].

However, there are not only concerns related to a serious change in the meanings of key terms both for legal sciences and for the language used in social sciences. One should consider to what extent the Venice Commission honours the important resolutions specified in Article 1a of the Statute of the Council of Europe ("The aim of the Council of Europe is to achieve a greater unity between its members for the purpose of safeguarding and realising the ideals and principles which

[35] The republican tradition, a key example of which is American republicanism, respects human rights and the principles of a constitutional state, however it expects – which is clearly visible in the works of Abraham Lincoln or Martin Luther King, not to mention contemporary thinkers, even those clearly liberal ones, such as e.g. John Rawls, Jürgen Habermas or Pierre Manent, that the common good and the principle of social solidarity towards the most vulnerable must be taken into account when creating the structure of a constitutional system. Contemporary liberal thought identifies a democratic state of law with a basic and legitimate principle, also expressed in the suggestions of the Venice Commission, that democracy is more than the rule of the majority, requiring protection against the tyranny of this majority. This is where the root of the constitutional liberal thought, which intends to secure the defenceless minorities and individuals from potential tyranny of the majority is; this results in the fact that the seemingly undemocratic manner of functioning of constitutional constructions and examining the constitutionality by constitutional courts is often regarded as possible to reconcile with the rule of the majority, as courts are to be a *sine qua non* condition guaranteeing that the majority is not tyrannical. This "constitutionalisation of democracy" or – to put it differently – "constitutionalisation of rights" is commonly treated as an institutional automat which guarantees these rights, a kind of legal mechanism "which breaks the structures of power frequently associated with liberal and egalitarian values (...) as well as human rights. Still, the majority of those supposed assumptions regarding constitutionalisation of such rights [through those institutions] and their capacity to break the structures of power (...) is in most cases assumed, and not verified (R. Hirsch, *Towards Juristocracy. The Origins and Consequences of the New Constitutionalism*, Cambridge, Mass. 2004, p. 2-3). However, this assumption about the antidemocratic and just nature (of the majority) of constitutionalisation of rights and constitutional judicial control of legislation with regard to guaranteeing such rights is being more frequently questioned as a common and model principle. It is because it can also mean that such antidemocratic or anti-majority constitutional security and the removal of certain decisions from under the control of elected and politically responsible representatives can in certain conditions violate those rights, as the essence of protection does not necessarily lie in the formal structure and rather the "nature of its substantial results" (ibid. p. 3). This means that in certain conditions, shifting protection of rights to judges who do not have to respond to anyone and enjoy huge, uncontrolled power can result not in the protection of rights, but rather securing the rights of an oligarchic minority, thus making constitutional judges the guarantors of a specific legal and political order compatible with their ideas, beyond the possibilities of any correction by way of decisions of democratically elected parliaments. There are several scenarios of implementing the constitutionality model and judiciary examination of constitutionality of legislative acts of a democratically elected parliament. One of them is used in post-communist Europe as the "incorporative" model. Without looking at the political, social and economic structures of these countries, this model of constitutionalism requires adopting assumedly ideal international and European standards as well as values and institutions with the exclusion of a pubic discussion and civic participation, and in consequence moving fundamental political disputes to the area of constitutional and legal matters in the hope that an adequately used universal procedure will bring favourable results. This way, as Hirsch indicated, "most citizens who are not judges or lawyers are deprived of the possibility to shape social policy in a meaningful way and are forced to transfer the responsibility for finding solutions to matters which constitute fundamental political disputes (...) to a small group of professionals, usually lawyers, academics and judges. (…) Moving fundamental questions about community identity from the political sphere to the courts favours those with professional knowledge and better access to the legal system (...). Such a shift means a serious renunciation of political responsibility, if not an obvious abdication of power by legislatures, the objective of which is taking political decisions, taking responsibility for them and subjecting themselves to the assessment of voters (...). By delegating the decision-making process [in more and more cases] to the court, the public debate (...) [makes] the judges referees of values defined by the sovereign people "(ibid., p. 187-188). In this situation, establishing one model of constitutionality of rights might not so much work for the benefit of human rights, protection of rights of individuals and minorities or justice, but rather effectively "uphold social and political status quo and block attempts to materially correct it with democratic policy (...), [even more so] that constitutional rights are never interpreted or implemented in a political or ideological vacuum. Judicial interpretation and implementing constitutional right depends to a large extent on the (...) social meta-conditions in which they operate (...), [resulting in] dubious authorisations to make moral choices by irresponsible judges who do not have to respond before anyone in the context of jurisprudence of rights (...), juridisation of politics (...) and transferring certain most important polemical political controversies to courts (...). What was called "judicial activism" evolved beyond the normative [area of constitutionalisation] of rights. A new political order – juristoccracy – quickly becomes the reality of the modern world "(ibid., p. 213-218, 222).

are their common heritage"). The concept of "common heritage" ("common" or "European and international standards") does not mean the abolition of respect for constitutional heritage and solutions characteristic for individual Member States. It is therefore worth pointing out that Polish experiences are based to some extent on traditional republican concepts of common good and community which respects human rights and principles of constitutional law[36].

4. "Predicting the future" and presenting multivariate hypotheses.

In many places of its Opinion, the Venice Commission has formed only hypotheses concerning possible negative effects of the Amendments on the functioning of the Constitutional Tribunal. They mainly concerned the possibility of blocking or interrupting the Tribunal's work after the Amendments were adopted in December 2015. In the public opinion, much of what the Commission wrote was received as a certain and true. However it is a rather questionable attitude, both for formal and content-related reasons. In some instances the Venice Commission presents only forecasts. The hypotheses formulated in the Opinion are sentences of unknown logical value, "experimental statements". The Commission adopted them temporarily as real, most probably hoping that those hypotheses in conjunction with other claims about facts will prove to be true, or rather, that they won't prove to be true, because Poland will adopt its advice. However, those hypotheses might not prove to be true for another reason as well: hypotheticality is not a syntactic or semantic property of a sentence, but rather its pragmatic property which reveals the attitude to that sentence of the Commission itself, which only predicts the future. For example it stated that "it is common all over Europe that the necessary quorum for decisions of the court exceeds the simple majority of judges of the court" (point 69 of the Opinion, highlighted by the Team). Usually it is 2/3 or 3/4. In the opinion of the Commission, "13 out of 15 judges is unusually high" and "this [...] requirement carries the risk of blocking the decision-making process of the Court (hypothesis 1). The Commission found that a high quorum "in itself" does not violate European standards, however it formulates the hypothesis that along with other provisions it "can render the Constitutional Tribunal ineffective" (hypothesis 2). Taking into account these hypotheses, however not judging other provisions equally critically, the Team finds that there is a risk of blocking the decision-making and postulates that the quorum be reduced from 13 to 11 judges in order to lower the risk of a "dysfunction of the Tribunal" resulting from the lack of quorum.

Furthermore, the Venice Commission has also hypothesised that the joint effect of procedural changes "would seriously hamper the effectiveness of the Constitutional Tribunal" (hypothesis 3,

[36] See more in i.a. L. Morawski, *Opinia Komisji Weneckiej* [Opinion of the Venice Commission]..., particularly p. 38-43.

point 88 of the Opinion). The Team acknowledges that the "serious consequences" of the correct functioning of the Constitutional Tribunal do not have to mean hampering of its effectiveness. On the contrary, they can be beneficial for the Tribunal. The right qualified majority, a high quorum and the order of adjudication can also significantly strengthen the Constitutional Tribunal's authority as the guarantor of the Constitution's precedence in the legal system. The Commission's hypothesis is as warranted as the opportunity indicated by the Team. After all, there is no evidence that one cannot work efficiently and quickly with such organisation. It is the people who create organisations; a change in management and pace of work is possible, just like it is possible to increase the engagement of judges, simplify procedures and reduce the time of proceedings.

The Team recognises that one also needs to reckon with the negative – although, in its opinion unreasonable – impression made on the Venice Commission by dynamising solutions which also create the institution's image. In order to set aside the Commission's doubt that a tribunal organised in line with the principles indicated in the Amendments would "become ineffective in the role of guarantor of the Constitution" (hypothesis 4) and having in mind the impression which the new Polish solutions made on the Commission – the Team is suggesting several changes in the Act. In the Team members' opinion, this will help reassure the Commission.

Also the hypothesis (hypothesis 5) suggesting that the Constitutional Tribunal's compliance with the Amendments "could lead to a serious slow-down of the activity of the Tribunal and could make it ineffective as a guardian of the Constitution" (point 137 of the Opinion) is – according to the Team – poorly justified, constitutes merely a projection of the future and is based on subjective assessments. What does this hypothesis actually predict? Is it unambiguous? The terms "blocking", "dysfunction", "crippling the effectiveness" and "serious slow-down" define a whole range of different possibilities. How can the probability of their occurrence be assessed? It must be stated that the Commission has identified various terms and failed to ascribe any concrete consequences to them.

5. Interpretative fallacies, disregarding the legalism principle and the principle of presumption of constitutionality of an act of law.

Furthermore, the Venice Commission has made serious errors in the interpretation of the Polish law [37]. The Constitution of Poland clearly indicates that all public authorities should act on the basis and within the limits set out by the law (Article 7). No authority in the country has the right to disregard an applicable act of law in its actions, there is also no such exception provided in the

[37] See more i.a. in. M. Muszyński, *Analiza opinii Komisji Weneckiej z 11 marca 2016 r.,* „Prawo i Więź" 2016, Issue 1(15), p. 45-61.

Constitution of Poland for the Constitutional Tribunal, and especially its President, who has not been vested the power to refuse to apply an act by any legislative act. The Tribunal is obliged to act with respect for the legalism principle and the principle of presumption of constitutionality of an act of law.

The Team does not share the opinion of the Venice Commission and the Constitutional Tribunal that supposedly the Tribunal has the right to decide that "it can review the Amendments directly on the basis of the Constitution" (see point 39 of the Opinion). Functional interpretation in the Polish legal culture (even if the arguments of the President of the Tribunal were to be recognised) does not authorise the Tribunal in this case to violate the principles of linguistic interpretation. Linguistically, the law is clear: The Constitution of Poland stipulates that judges of the Constitutional Tribunal in terms of adjudicating are subject solely to the Constitution, however in terms of organisation of the Tribunal and the proceedings before it, they are also subject to the act. An argument in favour of the Tribunal's obligation to act
on the basis of the Act on the Constitutional Tribunal is the principle of the presumption of constitutionality of an act.

The refusal of judges of the Constitutional Tribunal to comply with the promulgated Act has no legal basis. Furthermore, the Polish law, unchallenged by the Constitutional Tribunal, in exceptional cases provides for the entry into force of a normative act without *vacatio legis*. Article 4 of the Act on promulgation of normative acts stipulates that "in justified cases normative acts, subject to paragraph 3, can enter into force in a period shorter than fourteen days, and if a valid interest of the State requires immediate entry into force of a normative act and it is not precluded by the principles of a democratic state of law, the date of promulgation of the Act in the Journal of Laws can be the day on which the act enters into force" [38]. The Team recognises that if a valid interest of the State requires immediate entry into force of a normative act and it is not precluded by the principles of a democratic state of law, then "the day on which the Act enters into force is the date of promulgation of the Act in the Journal of Laws". This is precisely the case in question, given the entire sequence of events which preceded it, resulting from the actions taken during the previous Sejm term of office and judges of the Constitutional Tribunal from the so-called working group, for the sake of the rule of law, democracy and human rights, there is an urgent need do supplement the composition of the Tribunal and take immediate action.

[38] Reference of the Polish Journal of Laws: Dz. U. z 2011 Nr 197 poz. 1172.

PART II

Referring to earlier comments concerning the approach of the Venice Commission, according to which "in order to understand the constitutional situation resulting from the Amendments, it is important to recall the chronology of events leading up to their adoption" and admitting at the same time that "the list below is necessarily incomplete and refers only to major events that are relevant to the opinion", the Team found it necessary to supplement that chronology. A reliable presentation of the issues in question without presenting a broader context (listing significant events) would be impossible. For that reason, what follows is a list which does not ignore the most important facts.

Date	Event
2011	The Constitutional Tribunal has commenced works on amendments to the act specifying the organisation and proceeding before the Tribunal[39]. The President of the Tribunal and a group of judges of the Constitutional Tribunal, including retired judges participated in the works.
March 2013	The works on the draft act on the Constitutional Tribunal prepared by the President of the Tribunal and a group of judges of the Constitutional Tribunal have been concluded. The draft act was submitted to the Office of the President of Poland, Bronislaw Komorowski.
08 March 2013	Citizens Network Watchdog Poland submitted a request for public information about the Constitutional Tribunal draft act simultaneously to the President of the Constitutional Tribunal and to the President of Poland.
11 and 22 March 2013	The President of the Constitutional Tribunal informed the Network in question that "the trustee and host of the draft act on amending the Act on the Constitutional Tribunal is the Office of the President of Poland", and furthermore, that "any work on the draft act on amending the Act on the Constitutional Tribunal should be treated as internal documents"[40]. On the other hand the President of Poland sent the draft act to the Network, at the same time informing it that it was prepared by "judges of the Constitutional Tribunal and transmitted to the Office of the President of Poland with the request to consider the legislative initiative"[41].
April 2013	Representatives of the Citizens Network Watchdog Poland, unsatisfied with the answers provided in the mode of

[39] See: Justification for the judgement of the Supreme Administrative Court of 10 January 2014, Court File No. I OSK 2213/13, p. 2.
[40] Based on information posted on 30.12.2013 on the following website: http://informacjapubliczna.org.pl (accessed on 21.04.2016).
[41] Based on information contained in the letter from the Office of the President of Poland dated 22 March 2013

	public information (as responses to answers about the authors of the project and possible agreements concluded with them), lodged a complaint to the Regional Administrative Court against the inaction of the President of The Constitutional Tribunal [42]. The President of the Constitutional Tribunal applied that the complaint be dismissed from the Regional Administrative Court, indicating that "since 2011, the Constitutional Tribunal has been conducting study and design works on new solutions for the organisation and functioning of the Tribunal – under the direction of the President of the Constitutional Tribunal. The nature of these works is limited to the development of concepts and proposals for new or amended solutions streamlining the Tribunal's activity and desired solely from the point of view of the Tribunal (in the sense being subjective and "a draft"). Neither the Tribunal nor its President hold the right to make legislative initiatives, hence all proposals in this regard have been and can be merely suggestions (anticipation of a given regulation), as their final shape and the formal status of the draft normative act or amendments to an act in force depends on the assessment and will of the entity which has the right to legislative initiative under Article 118 of the Constitution of Poland".[43].
June 2013	The Regional Administrative Court in Warsaw passed a judgement[44] in which it upheld the position of the President of the Tribunal, stating that "conceptual thoughts, proposals, study works in the scope of amendments to the Act do not have the features of a »draft act« of an act of public law", and "intentions of the President of the Tribunal taken in this regard do not fall within the area of constitutional and statutory activity of that body. (…) A study of changes presented by the President of the Tribunal can gain the status of a draft act only if the President of Poland finds them valuable and the changes to be expedient and will adopt the presented proposals as his own. Only at this stage can we state that we are dealing with actions taken by a public authority taken in the field of amendments to an act"[45]. Representatives of the Citizens Network Watchdog Poland appealed against the judgement to the Supreme Administrative Court, indicating the erroneous interpretation of Article 61 of the Constitution of Poland, leading to the assumption that the document prepared by the judges of the Constitutional Tribunal and sent to the President of Poland does not constitute public information and that the decision-making process does not require social control at its every stage.

[42] Compare: Justification for the judgement of the Supreme Administrative Court of 10 January 2014, Court File No. I OSK 2213/13, p. 2.
[43] Ibid.
[44] Court file number II SAB/Wa 147/13.
[45] Justification for the judgement of the Supreme Administrative Court of 10 January 2014, Court File No. I OSK 2213/13, p. 2.

11 July 2013	After certain modifications had been made, the project developed by a group of judges of the Constitutional Tribunal was brought to Sejm by the President of Poland (Sejm Paper 1590).
29 August 2013	The Sejm commenced work on the Constitutional Tribunal draft act. After the first reading, the Constitutional Tribunal draft act was referred to the work of the Committee on Justice and Human Rights and the Legislative Committee.
02 December 2013	In a letter constituting a response in the mode of public information directed to the Citizens Network Watchdog Poland, the Office of the Constitutional Tribunal listed the following creators of the Amendments to the Act on the Constitutional tribunal: the incumbent President of the Constitutional Tribunal (Prof. Andrzej Rzepliński) and retired judges of the Constitutional Tribunal (Prof. Andrzej Zoll, Prof. Andrzej Mączyński and Prof. Mirosław Wyrzykowski). Furthermore, the letter stated that "concepts of the draft and proposals for new regulations were the subject of working discussions held among judges of the Constitutional Tribunal"[46].
December 2013	The exchange of correspondence between representatives the Citizens Network Watchdog Poland and the Office of the Constitutional Tribunal, i.e. regarding the controversial statement made by the Office of the Constitutional Tribunal regarding directing the draft act on the Tribunal to the Office of the President of Poland "as part of direct cooperation". The Network's letter indicted to the President of the Tribunal that "neither the Constitution, nor the Act on the Constitutional Tribunal provide for "continuous cooperation" with the President of Poland other than the powers under Articles 1-4 of the Act on the Constitutional Tribunal". In response the Office of the Constitutional Tribunal stated, that "there was no correspondence exchanged in contact with the Office of the President" and that there are no "legal grounds which would prohibit ad hoc and working cooperation and consultation between bodies of the State which is the essence of the principle of cooperation specified in the Constitution of Poland"[47].
11 December 2013	The Special Subcommittee on the Constitutional Tribunal draft act was established (paper 1590). Intensification of the work of the Subcommittee took place in the following periods: March-October 2014 and January-April 2015.

[46] Based on information posted on 30.12.2013 on the following website: http://informacjapubliczna.org.pl (accessed on 21.04.2016).
[47] Ibid.

10 January 2014	The Supreme Administrative Court passed a judgement repealing the judgement of the Regional Administrative Court regarding the examination of the Network's application for making public information available. It was stated in the justification to the judgement that "the application of the applicant, i.e. the Network regarded a specific draft of amendments to the Act prepared by judges of the Tribunal and presented to the President of Poland by the President of the Tribunal." (…) It is impossible (...) to agree with the ascertainment of the Court of the first instance that the proposals of changes presented by the President of the Tribunal receive the status of a draft act only after the President of Poland finds them valuable and adopts the presented proposals as his own. Assuming that only a presidential draft and not previous

	proposals of changes prepared by judges of the Constitutional Tribunal becomes public information undermines not only constitutional principles and values such as transparency of the actions taken by bodies of public authorities and citizens' participation in the exercising of public authority, but also the right to information. It also undermines ratio legis of the Act on access to public information in the scope of making public information available in the area of ^designing normative acts ^"[48].
09 April 2015	After almost a year and a half of proceedings, the Special Subcommittee chaired by the Civic Platform deputy, Robert Kropiwnicki, presented a report on the work on the Constitutional Tribunal draft act (Sejm Paper 1590).
06 May 2015	The Special Subcommittee's report received positive opinions of the two Sejm Committees: Committee on Justice and Human Rights and Committee on Legislation.
10 May 2015	The first round of presidential elections takes place on 10 May; Andrzej Duda received 34,76 percent of votes, while Bronislaw Komorowski received 33,77 percent of votes.
12 May 2015	During a joint committee meeting, Robert Kropiwnicki, a Civic Platform deputy, reported the addition of Article 135a which would regulate the selection of judges of the Tribunal (to replace the judges outgoing 6 November and 2 and 8 December) still during the 7th term of the Sejm. The judges of the Constitutional Tribunal and representatives of other public authorities did not submit any comments to this amendment. The amendment was adopted after being voted in.
24 May 2015	The second round of presidential elections takes place on 24 May; Andrzej Duda received 51,55 percent of votes, while Bronislaw Komorowski received 48,77 percent of votes.

[48] Justification for the judgement of the Supreme Administrative Court of 10 January 2014, Court File No. I OSK 2213/13, p. 6-7.

26 May 2015	During the Sejm session there was a second reading of the Constitutional Tribunal draft act (Sejm Paper 1590).
27 May 2015	During the Sejm session there was a third reading of the draft act and the Act on the Constitutional Tribunal was adopted in the version revised by the Sejm Committees on Justice and Human Rights and Legislation (containing the above-mentioned Article 135a).
29 May 2015	The president-elect Andrzej Duda appealed to the government and the parliamentary majority to refrain from introducing systemic changes and avoid unnecessary conflicts.
12 June 2015	The Senate passed Amendments to the Act on the Constitutional Tribunal. The changes included i.a. forgoing the 4-year term of office of the President of the Tribunal and the circle of entities entitled to submit candidates to judges of the Tribunal to the Sejm was expanded (this second regulation was to take effect on 1 January 2016).
23 June 2015	Commencement of the procedure in the Sejm on considering the Senate's amendment (proceedings of the Committee on Justice and Human Rights and the Commission on Legislation).
25 June 2015	After consideration of the Senate's amendments, the text of the Act of 25 June 2015 on the Constitutional Tribunal (i.e. the amendment on expanding the circle of entities entitled to submit candidates to judges of the Tribunal to the Sejm was not taken into account and foregoing of the term of office of the President of the Tribunal was taken into account) was transferred to President Bronisław Komorowski.
17 July 2015	President Bronisław Komorowski set the date of the election for 25 October 2015, the last possible date for the election to be held.
21 July 2015	President Bronisław Komorowski signed the Act of 25 June 2015 on the Constitutional Tribunal.
30 July 2015	The Act of 25 June 2015 on the Constitutional Tribunal was published in the Journal of Laws.
06 August 2015	Andrzej Duda took an oath before the National Assembly and took office as President of the Republic of Poland.
30 August 2015	The Act of 25 June 2015 on the Constitutional Tribunal entered into force after 30 days from its promulgation.
08 October 2015	During the last session of the 7th term of the Sejm, the parliamentary session elected 5 judges of the Constitutional Tribunal (Roman Hauser, Andrzej Jakubecki, Bronisław Sitek, Krzysztof Ślebzak and Andrzej Sokala).

23 October 2015	A group of Law and Justice (PiS) deputies filed a complaint to the Constitutional Tribunal against the lack of constitutionality of provisions of the Act of 25 June 2015 on the Constitutional Tribunal (the case received the reference number K 29/15). The complaint indicated i.a. the lack of constitutionality of extending the competences of the Tribunal under the Act, the lack of the term of office of the President and Vice-President of the Tribunal, violation of the principle of the Sejm's autonomy in terms of regulations and the violation of the principle that proceedings are initiated by a complaint (accusatorial principle). Furthermore, the complaint indicated the lack of adequate *vacatio legis* (violation of the principle of the so-called legislative silence principle, which in an analogous case in electoral law is 6 months before the election) and introduction of the inadmissible possibility to select several judges *en bloc* (violation of the principle of individual terms of office of judges of the Tribunal. The applicants withdrew the complaint on 10 November.
25 October 2015	The general election to the Sejm and the Senate ended in a defeat for the previous parliamentary majority and a victory of Law and Justice (PiS).
04 November 2015	The Constitutional Tribunal set a date for the hearing in case K 29/15 for 25 November and 21 December 2015 (a few days later, as indicated above, the applicants withdrew the complaint).
06 November 2015	The following judges of the Constitutional Tribunal completed their term of office: Maria Gintowt-Jankowicz, Wojciech Hermeliński and Marek Kotlinowski.
12 and 13 November 2015	During the first sitting of the 8th term of the Sejm a deputies' project on the amendment of the Act of 25 June 2015 on the Constitutional Tribunal was submitted by deputies of the Law and Justice Parliamentary Club. On the next day, the project (Sejm Paper No. 6) was directed to the first reading and, on the same day, withdrawn. On the same day, another deputies' project of Law and Justice was submitted (Sejm Paper No. 12)
17 November 2015	A group of Civic Platform (PO) deputies submitted a motion to the Constitutional Tribunal on the examination of compliance of provisions of the Act of 25 June 2015 on the Constitutional Tribunal with the Constitution, identical to the motion submitted by Law and Justice deputies (K 29/15) which was withdrawn on 10 November 2015 (the case received the reference number K 34/15).
18 November 2015	The first reading of the project on the amendment of the Act of 25 June 2015 on the Constitutional Tribunal (Sejm Paper No. 12) was held by the Legislative Committee .
19 November 2015	The second and third reading of the project on the amendment of the Act of 25 June 2015 on the Constitutional Tribunal (Sejm Paper No. 12) was held. The Sejm adopted the Act of 19 November 2015 on the amendment of the Act on the Constitutional Tribunal and referred it to the Senate.

19 November 2015	The President of the Constitutional Tribunal set a date for the hearing in case K 34/15 (regarding the Act of 25 June on the Constitutional Tribunal): 3 December 2015. In connection with the adoption of the Act on the amendment of the act on the Constitutional Tribunal by the Sejm of the 8th term which repeals Article 137 of the Act on the Constitutional Tribunal of 25 June 2015 (provision specifying the mode of electing judges in 2015) and which entered into force on 5 December 2015, setting the date of the hearing for 5 December 2015 would result in the fact that the Constitutional Tribunal (pursuant to Article 104 point 4 of the Act on the Constitutional Tribunal) would have to discontinue proceedings in this case due to the fact that Article 137 of the current Act on the Constitutional Tribunal would no longer be in force.
20 November 2015	The Senate did not submit amendments to the Act of 19 November 2015 on the amendment of the Act on the Constitutional Tribunal adopted by the Sejm. This Act was referred to be signed by the President of Poland. After the Act was signed by the President Andrzej Duda, it was published in the Journal of Laws.
23 November 2015 and subsequent	A group of Civic Platform (PO) deputies submitted an application to the Tribunal on the examination of compliance of provisions of the Act of 19 November 2015 on the Constitutional Tribunal with the Constitution (reference number: K 35/15). On subsequent days complaints on the act were directed to the Tribunal by the Ombudsman, the National Council of the Judiciary and the First President of the Supreme Court. On 24 November, the Tribunal set the date of the hearing in case K 35/15 for 9 December 2015.
25 November 2015	The parliamentary majority introduced drafts of resolutions on stating the lack of legal force of the five resolutions of the Sejm of the 7th term of 8 October 2015 on the election of candidates for the position of judges of the Constitutional Tribunal into the agenda. After the resolutions were adopted by the Sejm, they were published in the Polish Monitor

30 November 2015	The Constitutional Tribunal passed a decision on excluding the President of the Tribunal, Andrzej Rzepliński, and the judges who co-authored the draft of the Act on Constitutional Tribunal, Stanisław Biernat and Piotr Tuleja, who on 25 November submitted a motion to be excluded from the procedure of examining the constitutionality of the provisions of the Act of 25 June 2015 on the Constitutional Tribunal (reference no K 34/15). It was stated in the justification that "these judges took part in the legislative work on the Act on the Constitutional Tribunal in Sejm committees and subcommittees not as private persons, but representatives of the Tribunal, formally invited (...) to meetings of those bodies by their chairs". When endorsing those motions on being excluded, the Tribunal underlined that the reason for that was only "leaving an impression on some of the public" that judges participating in the meetings of committees and subcommittees could be deemed to be acting "in their own interest"[49].
30 November 2015	The Constitutional Tribunal made a decision on securing the motion of a group of deputies in case K 34/15 by calling upon the Sejm to refrain from taking any actions aiming at electing judges of the Constitutional Tribunal until the Tribunal passes a judgement in case K 34/15. The indicated legal basis of the decision was Article 755 § 1 and Article 730^1 § 2 of the Code of Civil Procedure in connection with Article 74 of the Act on the Constitutional Tribunal. The Tribunal's decision derogated from its previous practice concerning securing motions.
01 December 2015	The parliamentary majority presented five candidates for the position of judge of the Tribunal (Henryk Cioch, Lech Morawski, Mariusz Muszyński, Julia Przyłębska and Piotr Pszczółkowski). The candidates received a positive opinion of the Committee on Justice and Human Rights.
01 December 2015	The Constitutional Tribunal (in the full 9-person bench) submitted an application to the President of the Tribunal on the hearing of the case with reference no. K 34/15 (regarding the Act of 25 June) by a 5-person bench. That way, the President of the Tribunal was not forced to allow the judges who were to be elected on 2 December to rule (without them it was not possible to rule in a full, at least 9-person bench, as three judges were excluded from ruling in this case).
02 December 2015	The President of the Tribunal, Andrzej Rzepliński, and the Vice-President of the Tribunal, Stanisław Biernat, submitted a motion to be excluded from the procedure of examining the constitutionality of the provisions of the Act of 19 November 2015 on the Constitutional

[49] Cf. Justification for the judgement of the Constitutional Tribunal of 30 November 2015, (Court File No. K 34/15, p. 5-8.

	Tribunal (reference no. K 35/15). In the justification, they indicated that i.a. Article 2 of the Act in question, which provides for the expiry of the term of office of the President and Vice-President of the Tribunal, will be subject to the Tribunal's proceedings. The Tribunal's decision endorsed this motion.
02 December 2015	Judge Zbigniew Cieślak concluded his term of office in the Constitutional Tribunal.
02 December 2015	The Sejm adopted a resolution on electing five judges of the Constitutional Tribunal (Henryk Cioch, Lech Morawski, Mariusz Muszyński, Julia Przyłębska and Piotr Pszczółkowski).
03 December 2015	Four of the judges of the Constitutional Tribunal elected by the Sejm on 02 December 2015 (H. Cioch, L. Morawski, M. Muszyński and P. Pszczółkowski) took an oath before the President. However the President of the Tribunal did not allow them to rule.
03 December 2015	The Constitutional Tribunal presiding in a 5-person bench (the full bench would make it necessary for the judges who were appointed several hours earlier to rule) passed a judgement in case K 34/15. In the conclusion of its judgement, the Tribunal decided that Article 137 of the Act of 25 June 2015 on the Constitutional Tribunal: "b) in the scope in which it applied to judges of the Tribunal whose term ends on 6 November 2015, it complies with Article 194 paragraph 1 of the Constitution c) in the scope in which it applied to judges of the Tribunal whose term ends on 2 and 8 December 2015, it does not comply with Article 194 paragraph 1 of the Constitution". Article 137 of the Act of 25 June 2015 stipulated that "in the case judges of the Tribunal whose term ends in 2015, the deadline for submitting the motion referred to in Article 19 paragraph 2 is 30 days after the entrance into force of the act". The Constitutional Tribunal in the case K 34/15 decided that the deadline for submitting three of the candidates for judge of the Tribunal on 29 September 2015 complied with the Constitution, while in the case of the other two judges, the submission of candidacies did not comply with the Constitution.
04 December 2015	A group of Civic Platform (PO) deputies submitted a motion to the Constitutional Tribunal to declare the lack of constitutionality of the Sejm's resolution adopted on 25 November 2015 and the Sejm's resolutions on the election of five judges of the Tribunal adopted on 2 December 2015 (case no. U 8/15).
08 December 2015	Teresa Liszcz concluded her term of office in the Constitutional Tribunal.
09 December 2015	The President took an oath from Julia Przyłębska, the last of the judges of the Constitutional Tribunal elected by the Sejm on 2 December 2015.

09 December 2015	The Constitutional Tribunal, ruling in a five-judge bench (the full bench would make it necessary for the judges who were appointed several days earlier to participate), passed a judgement stating the lack of constitutionality of a part of provisions of the Act of 19 November 2015 on the amendment of the Act on the Constitutional Tribunal (K 35/15). One of the provisions which was found non-constitutional was the provision pursuant to which the commencement of a term of a judge would depend on taking an oath by that judge.Furthermore, the possibility of terminating the current terms of office of the President and Deputy President of the Tribunal was questioned.
10 December 2015	The Head of the Office of the Chairman of the Council of Ministers in a letter to the Constitutional Tribunal addressed to the President of the Tribunal indicating the violation of procedure of ruling in the case of amending the Act of the Constitutional Tribunal in the scope of determining the composition of the bench. It was underlined in the letter that "the premise »on the particular complexity and importance of the case« remains valid", and thus in case K 35/15 the Tribunal should be ruling in a full bench.
15 December 2015	The Sejm commenced work on the draft of the act on amending the Act on the Constitutional Tribunal (Sejm Paper 12).
22 December 2015	The Sejm adopted the Act of 22 December 2015 on amending the Act on the Constitutional Tribunal, which then was transferred to the Senate.
23 and 24 December 2015	The Senate adopted the Act without amendments.
28 December 2015	The Act of 22 December 2015 was transferred to the President of Poland, and, after being signed by him, it was published in the Journal of Laws. It entered into force on the date of its publication.
29 December 2015 to 15 January 2016	The Constitutional Tribunal received motions on examining the constitutionality of the Act of 22 December 2015 on amending the Act on the Constitutional Tribunal. The motions were submitted by the opposition (Civic Platform [PO], PSL and Nowoczesna), the First President of the Supreme Court, the Ombudsman and the National Council of the Judiciary.
07 January 2016	The Constitutional Tribunal ruling in a 10-person bench passed a decision on the discontinuance of proceedings in case U 8/15 (regarding resolutions of the Sejm on the basis of which 5 judges of the Tribunal were elected on 2 December 2015).
12 January 2016	The President of the Tribunal decided that two judges elected by the Sejm on 2 December 2015 (Julia Przyłębska and Piotr Pszczółkowski) will undertake their judicial duties and at the same time maintained the decision on excluding three judges sworn in by the President on 9 December 2015 from ruling.
13 January 2016	The European Commission, acting pursuant to Article 7 of the Treaty on European Union, decided to initiate the first stage of the assessment of the rule of law in Poland.

14 January 2016	The Constitutional Tribunal ruling in a 12-person bench decided to examine the constitutionality of Act of 22 December 2015 on amending the Act on the Constitutional Tribunal in a hearing regarding the motions submitted by: the First President of the Supreme Court and the Ombudsman (case no. 47/15). An opinion other to the decision taken by the Tribunal was reported by P. Pszczółkowski and J. Przyłębska, who indicated primarily the violations of the Act on the Constitutional Tribunal currently in force (which was amended on 22 December 2015, indicating i.a. that the Tribunal should rule in a full bench of at least 13 judges).

09 February 2016	At the invitation of the Minister of Foreign Affairs of Poland, a delegation of the European Commission for Democracy through Law (Venice Commission) visited Poland in order to prepare an opinion on the changes in the Polish legislation regarding the Constitutional Tribunal. The mandate of the Venice Commission was defined by the Minister of Foreign Affairs of Poland in a letter dated 23 December 2015 and the task of the Commission was to issue a legal opinion on the compliance of certain solutions of the amendment of the Act of 25 June 2015 on the Constitutional Tribunal adopted in December 2015 with constitutional and international standards.
09 February 2016	The President of the Constitutional Tribunal did not allow for a meeting between the Commission and the four judges of the Tribunal selected by the Sejm majority who wished to present a different perspective on the issue in question.
10 February 2016	Kukiz'15 submitted a compromise proposal to solve the problem of the Constitutional Tribunal, providing for the amendment of the Constitution of Poland. The project was rejected by the other opposition parties.
12 February 2016	The Constitutional Tribunal set the date of the hearing in case no. K 47/15 (regarding the constitutionality of the Act of 22 December 2015 on the amendment of the act on the Constitutional Tribunal) for 8 and 9 March 2016.
27 February 2016	Theses of the opinion of the European Commission for Democracy through Law (Venice Commission) reached the Polish media. The Polish media learned the assumptions of the report before it was sent to the Polish government.
08 March 2016	The website Wpolityce.pl made public the content of the judgement of the Constitutional Tribunal which was planned to be announced on 9 March. There was thus an unprecedented leak of the content of a judgement of the Constitutional Tribunal which was ready even before the hearings of 8 and 9 March took place. The editorial office of Wpolityce.pl claimed that the draft decision has been the subject of correspondence between Civic Platform (PO) politicians for two weeks.

8 and 9 March 2016	After the hearings with case no. 47/15 of 8 and 9 March took place, the Constitutional Tribunal, ruling in a 12-person bench, announced on 9 March a judgement on the act of 22 December 2015 on the amendment of the Act on the Constitutional Tribunal, stating the lack of constitutionality of the act in question with provisions of the Constitution of the Republic of Poland. Basing the decision only on the provisions of the Constitution of Poland was explained by the ruling bench by the lack of possibility to act (and, in particular, rule) “on the basis of provisions which raise considerable doubts as to constitutionality". P. Pszczółkowski and J. Przyłębska reported a different opinion than the one specified in the Ruling.
11 March 2016	The Venice Commission announced its opinion on the amendment of the Act of 25 June 2015 on the Constitutional Tribunal of the Republic of Poland.
12 March 2016	The government decided to transfer the Opinion of the Venice Commission to the Sejm and not to publish the judgement of the Tribunal of 9 March due to "the lack of possibility to publish the position of certain judges of the Constitutional Tribunal, which is not based on the provisions of law".
23 March 2016	The Marshal of the Sejm of the Republic of Poland issued a Statement on the political and legal conflict related to the Constitutional Tribunal. He stated that "the rights of the Sejm have been violated. This was due to the Constitutional Tribunal's disregard for the applicable Act on the Constitutional Tribunal which was adopted and later amended by the Sejm. This Act defines the organisation and the procedure before the Constitutional Tribunal and in accordance with Article 197 of the Constitution should constitute the basis for the Tribunal's operation. The Sejm has a constitutional duty to adopt such an act, and the Tribunal – to apply it, even when it is examining the constitutionality of the Act on the Constitutional Tribunal itself").
30 March 2016	The Marshal of the Sejm established a Team of Experts on the Constitutional Tribunal.

PART THREE

The result of the Team's work are theses and postulates submitted hereby to the Marshal of the Sejm of Poland. The Team hopes that they will form the basis for regulating the organisation, mode and principles of functioning of the Polish Constitutional Tribunal.

I.

The subjective scope of the act regulating the Constitutional Tribunal should lie within strict limits of constitutional delegation to its issue. Provisions of the Constitution of Poland should, in as much detail as possible, refer to issues relating to the Constitutional Tribunal regime.

The indicated Article 197 stipulates that "organisation of the Constitutional Tribunal and the procedure before the Constitutional Tribunal are stipulated in an act". The intention of the legislator was therefore to create a relatively narrow range of legal regulation which – contrary to the adopted solutions[50] – was to relate only to two issues, namely: 1) organisation of the Constitutional Tribunal and 2) procedure before the Constitutional Tribunal. All the other issues which are within the scope of "organisation" and "procedure" should be regulated by other normative acts, not the Act to which the provision in Article 197 clearly refers. Such normative acts can include the Constitution of Poland (which in such a case should regulate the Constitutional Tribunal regime to a much greater extent) or the standing orders of the Sejm, since it is the Sejm – pursuant to Article 194 – which selects judges to the Constitutional Tribunal, which suggests that cases related e.g. to the electoral procedure should be regulated in its standing orders[51]. From there one could conclude that the Constitutional Tribunal regime could be regulated by at least three normative acts in parallel, i.e.: 1) The Constitution of Poland (in a broader scope than currently); 2) an act, but in a significantly narrowed down scope, to include only the organisation and procedure, and not the Act on the Constitutional Tribunal *(nota bene* the act which would be adopted under Article 197 should have

[50] Which has been applied from the very beginning of the Constitutional Tribunal anyway.

[51] After all, one should not qualify the procedural issues related to election of judges for the Constitutional Tribunal as part of the Tribunal's organisation. It is understood that the term "organisation" refers to the body which already has a specified composition, which means that the creation of a given body's organisation – to which the legislator is authorised under Article 197 of the Constitution of Poland – should apply already to a body with a specified composition and the selection of that composition is not within the term "organisation". After all, the term "organisation" can apply only to a body with an established composition, i.e. selected members thereof. The election procedure does not belong to the subjective scope of an organisation or the mode of its operation.

the following title: "the act on the organisation and procedure before the Constitutional Tribunal") and 3) the standing orders of the Sejm (particularly with regard to regulating the electoral procedure regarding judges to the Tribunal, as they are – pursuant to the Constitution – elected by the Sejm, and the mode of electing judges is separate from the organisation of the Tribunal).

It is also possible, under the Constitution in force, to adopt a second, parallel act on the Constitutional Tribunal (possibly adoption of one act with a narrowed-down subjective scope which in consequence would have a precisely indicated title). The basis for its adoption could be provision of Article 195 paragraph 2 of the Constitution, which clearly indicates that "judges of the Constitutional Tribunal will be provided with working conditions and remuneration corresponding to the dignity of the office and the scope of their responsibilities". After all, those conditions are not a component of the Tribunal's organisation or – even less so – the procedure before the Constitutional Tribunal, and it would be difficult to include such procedures in the Constitution or the standing orders of the Sejm. For that reason, in addition to the basic act on the Constitutional Tribunal with a relatively narrow subjective scope, i.e. the act on the organisation and procedure before the Constitutional Tribunal (based on Article 197 of the Constitution of Poland), it would be possible to adopt a "smaller" act, entitled "the act on working conditions and remuneration of judges of the Constitutional Tribunal" (based on Article 195 paragraph 2 of the Constitution of Poland). Alternatively, it would also be possible to adopt one act –"on the organisation and procedure before the Constitutional Tribunal and working conditions and remuneration of judges of the Constitutional Tribunal".

It follows from the foregoing that the correct regulation of the Constitutional Tribunal regime should be included in at least three specific normative acts, i.e.:

1) the Constitution of Poland, which would regulate certain regime-related and procedure-related issues in greater detail than it does presently, thus eliminating the possibility of any detailing at the level of acts;

2) the standing orders of the Sejm (which would include a detailed electoral procedure with regard to judges to the Tribunal, the basis of which is the general provision authorising the Sejm to elect the full composition of the Constitutional Tribunal (see Article 194), whereas the exclusivity of the standing orders of the Sejm in regulating this issue follows from, firstly, the clear wording of Article 194 which vests the power to elect judges of the Constitutional Tribunal in the Sejm, and, secondly, the narrowed down subjective scope of the legal regulation of issues related to the Tribunal and their regulation solely with regard to organisation and procedure, as well as working conditions and remuneration of judges of the Tribunal;

3) The act on the organisation and procedure before the Constitutional Tribunal, for the adoption of which there is a direct constitutional basis (see Article 197) along with regulation of working conditions and remuneration of judges of the Constitutional Tribunal (see Article 195 paragraph 2).

A strict demarcation of subjective scopes of individual normative acts, making up the regulation of the Constitutional Tribunal regime would not only better represent the constitutional mandate of the Constitutional Tribunal, but would also prevent any possible disputes or conflicts in the future and the issue with regulatory adequacy of a given normative act which is often invoked in such cases[52]. The title of the act on the Constitutional Tribunal should be as follows: "act on the organisation and procedure before the Constitutional Tribunal and working conditions and remuneration of judges of the Constitutional Tribunal".

II.

The Team recommends a statutory solution consisting in the introduction of a requirement that candidates for the position of judge of the Constitutional Tribunal can be proposed by a minimum of 15 deputies. Judges of the Tribunal should first be elected by the Sejm with a qualified majority of 3/5 votes. Secondly, (in the event none of the candidates were voted in with a qualified majority), the Sejm would select a judge of the Tribunal with a simple majority from among two candidates who obtained the largest number of votes in the first voting.

The current standing orders of the Sejm, providing for a group nature of certain rights of deputies continue the tradition of the pre-war constitutionalism[53]. It does so primarily by specifying a minimum number of 15 deputies with the right to introduce legislative initiative. It should be noted that the number of 15 deputies also has a political aspect, as such a group (15 deputies) corresponds to the group necessary to form a parliamentary club which in turn – from the point of view of an actual decision-making process taking place in the parliament – constitutes the key object of all

[52] Draft act developed by PiS, Nowoczesna and KOD do not recognise this problem and are titled: "act on the Constitutional Tribunal" or "act on amending the act on the Constitutional Tribunal". PSL, Kukiz'15 and KORWiN did not propose changes in this regard. Razem also fails to notice this problem.

[53] The standing orders of the Sejm of 16 February 1923 (issued on the basis of the March Constitution of 17 March 1921) in Article 19 stipulated that a deputies' application can be the subject of Sejm deliberations "if it is backed by the signatures of at least 15 deputies". In turn, Article 25 of those standing orders stipulates that an interpellation directed to the government should be signed by at least 15 deputies. Furthermore, Standing orders of 5 October 1935 (issued on the basis of the April Constitution of 23 April 1935) in Article 35 paragraph 2 stipulated that "draft acts and motions can be accepted by the Marshall if they are backed by the signatures of at least 15 deputies".

Sejm works. Hence is should be concluded that a group of 15 deputies corresponds to both a group which under the standing orders of the Sejm in force has the right to introduce legislative initiative, submit amendments to a draft act at the second hearing stage or, finally, establish a parliamentary club. Therefore the submission of candidates to the Tribunal by a group of 15 deputies, as postulated by the Team, is in line with the general values specified in the standing orders, corresponding to the Polish parliamentary tradition. Another argument in favour of this solution will be the possibility to engage Sejm minorities into the process, which would strengthen their actual political position in the Sejm.

The Team acknowledges that the process of submitting candidates for judge of the Tribunal may be accompanied by political controversies. The selection of a judge to a constitutional court is always a political decision and the candidate is subjected to scrutiny by deputies and their constituents[54]. Hence it seems justified, particularly given the transparency of public life, to conduct hearing of the candidates which should be open and public. The hearing would also strengthen the expertise and lack of political affiliation of the designated candidate for judge of the Constitutional Tribunal. At the same time, the candidate would have the right to refuse giving an answer to a question.

Furthermore, the Team postulates that a candidate for judge of the Constitutional Tribunal be selected with a qualified majority of 3/5 votes. However, if none of the submitted candidates for judge of the Constitutional Tribunal are voted in with a qualified majority, then in the second round the Sejm would select a judge of the Tribunal with a simple majority from among two candidates who obtained the largest number of votes in the first voting. In the event only one candidate is submitted, the selection would be made with an absolute majority of votes. For each of the voting to be valid, at least half of the statutory number of deputies would have to be present.

The right to submit a candidate for the position of judge of the Tribunal solely by groups of at least 15 deputies will be a good way of implementing the Sejm's power to decide on the composition of the Tribunal, as during the proposal of candidates, ideological and axiological diversity of the parliamentary political scene is taken into account to a greater extent. Submission of candidates by a specified authority of the Sejm as an alternative to the deputies' initiative has no deeper justification, and the recent events have shown that this can lead to serious political and systemic complications.

The Team is of the opinion that candidates for the position of judge of the Tribunal should meet the qualifications required for taking the position of a judge of the Supreme Court. The

[54] See: K. Wojtyczek, Sądownictwo Konstytucyjne w Polsce…, p. 94.

requirement of age between 40 and 67 years (on the date of election) should be adopted as adequate. For several reasons (both ethical and practical) it is justified to exclude the possibility of being a candidate for the position of judge of the Tribunal for individuals who previously worked (were officers) or collaborated (openly or in secret) with the repression authorities of the Polish People's Republic. Judges of the Constitutional Tribunal should be characterised by impeccable character and honesty, and cooperation with the totalitarian repression apparatus constitutes a serious failure in this regard.

The Team is of the opinion that in accordance with Article 194 paragraph 1 of the Constitution, election of judges of the Constitutional Tribunal is the exclusive competence of the Sejm. It brings together all the powers relating to the election of judges of the Constitutional Tribunal. Hence the Constitution precludes the possibility of transferring these powers under an act to other authorities and entities, including also the right to propose candidates for the post of judge of the Tribunal. The election of judges of the Constitutional Tribunal as the Sejm's exclusive prerogative is justified in the system of representative democracy, where the Tribunal, as the so-called negative legislator, should have a partial legitimacy of a representative body. The impact of the Tribunal's jurisdiction on legislation thus requires the balancing out of its position by providing the Sejm with the exclusive power of selecting the composition of the Tribunal. Furthermore, the Team notes that Article 194 paragraph 1 of the Constitution provides for individual selection of judges of the Tribunal by the Sejm, which is to guarantee that one parliamentary majority does not decide in full on the composition of the Tribunal. That way the Sejm in its subsequent terms has the right to impact the composition of the Tribunal, taking into account the axiological preferences of the current parliamentary majority. Therefore, the current legal situation in which judges of the Tribunal are selected with absolute majority remains in line with the intention specified in the Constitution.

In this regard, the Team calls to mind a remark made by the Venice Commission (point 118) based on a misunderstanding in defining "pluralism" in the context of the Tribunal's activity. The arguments in favour of pluralism in that context did not consist in indicating the political affiliation of candidates as a condition of selection of candidates for the position of judge of the Tribunal, but making clear the importance that the Polish constitutional order in the selection of judges to the Tribunal assumes that the right to select by the current Sejm majority also serves the following purpose: the values adhered to by the proposed candidates should correspond to the axiological preferences of those who will be voting. Hence the guarantee of objectivity and impartiality of the judicial function of the Tribunal, as a court of law with a political authorisation, is the world-view

plurality of the judges which are members of the Tribunal. After being elected, the judge of the Tribunal naturally becomes independent from the Sejm in the sense that he/she may change his/her value system, on which the electing body has no impact.

III

An important condition for the functioning of an independent constitutional court is ensuring the political neutrality of its judges. The necessary minimum in this respect is set out in the Constitution of Poland. The requirement of political neutrality of judges should be regulated in an act, furthermore, it would be recommended to develop an ethical code of the Constitutional Tribunal. The recommended guarantee should be not only the prohibition of engaging in public activity which is impossible to reconcile with the principles of the Tribunal's organisational independence and the independence of its judges, but also the prohibition of belonging to political parties (and being candidates in political elections) of candidates for the position of judges within five years preceding the day of election.

Pursuant to Article 195 paragraph 3 of the Constitution of Poland, "Judges of the Constitutional Tribunal in the period of their term shall not belong to a political party, trade union or perform public activities impossible to reconcile with the principles of the independence of courts and the independence of judges".

Despite the fact that there is a view in literature that the judges' refraining from political behaviours and actions applies only to their term of office as the judge[55], it should also be applied to the time when the judge is retired and for that reason enjoys certain privileges. In this context., the statements and behaviour of certain retired judges, including judges of the Tribunal, should be considered particularly flagrant given their political intensity. Statutory limitations regarding the period of "retirement", when such a person actually remains a judge and should maintain an appropriate distance from the political sphere seem to be in every respect legitimate and desirable. Regardless of how we assess *de lege lata* the current regulations in this regard, the possibility of introducing statutory limitations regarding the term in which a judge of the Tribunal is retired should

[55] See: P. Winczorek, *Komentarz do Konstytucji Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r.*, Warsaw 2000, p. 254: "(...) however, unlike the case of the judges employed in judicial authorities (see Article 175), judges of the Constitutional Tribunal serve their function temporarily (see Article 194 paragraph 1), and being a judge in not a profession but a public office. That is why limitations specified in Article 195 paragraph 3 apply only to the period in which a given person is in office (...)".

be considered. Specified engagement of a retired judge of the Tribunal in political activity should in each case result in his/her disciplinary liability.

In order to eliminate the possibilities of political engagement of judges of the Constitutional Tribunal to the highest possible extent and at the same time in order to create an adequate distance between political activity and judiciary activity, the Team suggests adopting a requirement of a 5-year period before the date of electing to the position of judge of the Tribunal without being a member of a political party, having a mandate of deputy or senator and being a candidate in political elections[56].

Independence of courts and independence of judges is the guarantee of impartiality of judiciary decisions. The Constitutional Tribunal as a constitutional body is independent from legislative and executive authorities, which, apart from the institution's independence is reinforced by the independence of judges. Pursuant to Article 195 paragraph 1 of the Constitution of Poland, "Judges of the Constitutional Tribunal hold their office independently and are subject only to the Constitution." This independence is tantamount to the requirement to "use objective assessment criteria of constitutionality of law and one's inner conviction as to the accuracy of that assessment and its independence from any external influence and pressure when passing decisions". Whereas being subject to the constitution means "the obligation to apply the norms and its code of values on which those norms are based and which are implemented in the constitution"[57]. Political neutrality of judges of the Tribunal seems to be a significant challenge due to the manner in which they are selected. The creation function performed in this regard by the Sejm means that it at the same time takes decisions of a political-like nature, and the election procedure is associated with a general assessment of candidates, taken also from the point of view of values and views represented by them[58]. This essentially distinguishes judges of the Constitutional Tribunal from judges of the

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[56] In the doctrine it is adopted that an ordinary legislator can extend limitations in terms of ensuring political neutrality of judges. See: L. Garlicki, *Sądy i Trybunały,* Article 195, [in:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz,* p. 7. It is worth noting here that an attempt of such a limitation was taken into account in the draft of the so-called working group of judges of the Constitutional Tribunal of 2013, which was maintained in the presidential draft act of July 2013, however, in the end it was not passed in the act of June 2015. See in this context also the draft act by Nowoczesna, Article 11 paragraph 2: "A person who is a member of a political party and in the previous four years before the election day was a member of a political party, a deputy, senator, member of the Council of Ministers, secretary of state or deputy secretary of state in the Office of the President of Poland or the Office of the President of the Council of Ministers cannot be a candidate for the position of judge of the Tribunal". Article 23 in the KOD draft act: "A judge cannot be a member of the political party, trade union or conduct any political activity which cannot be reconsolidated with the principle of independence of judges". In the draft amendment to the Constitution proposed by KORWiN, Article 194 would have a new wording thanks to the addition of the following words: "who, on the moment of their election, are not members of any political parties". Razem on the other hand finds it justified to render it impossible for politicians to candidate for a period of 5 years after they have stopped serving public functions.

[57] K. Działocha, Przepisy utrzymane w mocy, rozdział 4, art. 33a, [in*:]* Komentarz do Konstytucji RP, edit. L. Garlicki, Warsaw 1995, p. 48-49.

[58] See*:* K. Wojtyczek, Sądownictwo konstytucyjne w Polsce*…, p.* 94.

judiciary system and indicates a certain democratic entitlement of the former[59].

The constitutional requirement to be met by candidates for the position of judge of the Tribunal is being "a person with an outstanding legal knowledge" (Article 194 paragraph 1) and it has the purpose of selecting individuals who work independently, based on their above-average expertise and vast experience, to rule in cases regarding constitutionality of acts of law. Their independence is based on outstanding knowledge of the law which is the *sine qua non* condition of an independently acting constitutional judge.

The second feature of independence of a judge of the Tribunal (and every judge in general) is not being subject to any external influences and pressures. It must be underlined that a judge should be free not only from influences and pressures of parties, political circles or trade unions, but also other influences and pressures, and thus influences of academic circles (even those made up of the most outstanding lawyers) and professional associations should be deemed unacceptable. A judge of the Constitutional Tribunal is independent not only from public administration authorities and politicians, but also judges; prominent judges of international courts are not an exception.

The Constitution orders the judges of the Tribunal to "refrain from political activity which cannot be reconciled with the principles of independence of courts and independence of judges". Judges should first and foremost refrain from commenting on current political events. Each such statement can be perceived as support or criticism of the commented political position, which at the same time can raise doubts as to the judge's impartiality. The Constitutional Tribunal's authority could be significantly undermined if its judges spoke out about political programmes, activity of specific political parties or attitudes of given political leaders. In the event of implementing the procedure of examining constitutionality of objectives or actions of a political party (under Article 188 point 4), the Constitutional Tribunal could be put in a very awkward situation by judges who had failed to show sufficient restraint.

In order to ensure the required impartiality, judges of the Tribunal should refrain from engaging in legislative projects. This is supported not only by the principle of division of knowledge which is enshrined in our legal culture. It should be assumed that each of such projects can become the subject of proceedings before the Tribunal. Furthermore, each of the projects constituting competition (which is often the expression of political competition) can become the subject of such proceedings. Independence of the Tribunal in such cases is associated with impartiality of its judges. Here it is worth recalling a statement made by the Venice Commission, according to which it is

[59] See: L. Garlicki, *Sądy i Trybunały,* Article 194, [in:] *Konstytucja*..., Op. cit., p. 4.

possible for judges of the Tribunal to propose comments to draft acts on the Tribunal and even participate in the meetings of working groups[60]. Putting aside the questionable statement: "common feature of European constitutional culture", if only due to the fact that not every country has a constitutional court in place, it must be emphasised that in Poland it is possible for the Tribunal, as an institution, to answer questions and parliamentary initiatives. However, under provisions of law in force, judges of the Constitutional Tribunal do not have jurisdiction to personally participate in working groups preparing any draft legislation. Taking into account the objective set out for the Tribunal by the Constitution in force, political neutrality of judges requires a clear distance from participation in the law-making processes. This applies both to the preparation of draft normative acts and the parliamentary stage of work on the project.

Also the participation of judges of the Tribunal in the public debate and the assessment of adopted legal acts which potentially can become subject to the Tribunal's scrutiny should be considered action undermining judges' independence and a gross violation of Article 195 paragraph 3 of the Constitution. Each of the judges of the Tribunal should take efforts to maintain the image of an independent constitutional court made up of impartial judges. On the basis of the Constitution, the Tribunal rules in cases initiated in a clearly defined manner. It has no power to initiate proceedings ex officio. Therefore, the positions of the Office of the Constitutional Tribunal implemented with regard to selected draft acts and adopted acts which are not subject of pending proceedings before the Tribunal initiated through a motion or legal inquiry provided for in the Constitution in the previous months should be deemed to exceed its competences.[61]. The Office of the Constitutional Tribunal is subject to the President of the Tribunal and therefore the Office's public engagement (and the comments included in positions published on the website must be considered public engagement) questions the Tribunal's independence as an institution, as well as its President's impartiality.

In view of the above, judges of the Tribunal should refrain from participating in public debates and *ipso facto* make efforts to ensure that the image of impartiality is maintained. That way they will not be subject to suspicions of engagement in political disputes and the Tribunal itself will

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[60] See point 45 of the Opinion of the Venice Commission: "(...) it is a common feature of European constitutional culture that constitutional courts may comment on reform proposals, which concern the Court itself; in many cases they are even involved in drafting groups. The reason for such inclusion is to obtain additional input and expertise".

[61] See: Note of the Office of the Constitutional Tribunal regarding the analysis of a deputies' draft act on the Constitutional Tribunal submitted to the Sejm on 29 April 2016 in light of the case law of the Constitutional Tribunal ((http://trybunal.gov.pl/fileadmin/content/nie-tylko-dla-mediow/Notatka_BTK_ – accessed on 30.05.2016) and Communication of the Office of the Constitutional Tribunal regarding the amendment of the act on the police ((http://trybunal.gov.pl/fileadmin/content/nie-tylko-dla-mediow/Komunikat_BTK_w_zwiazku _z_nowela_ – accessed on 30.05.2016).

gain authority as a body strengthening the democratic, constitutional order[62]. The Team concludes that there is no need to expand the Act on the Constitutional Tribunal by adding an excessive number of provisions specifying requirements towards judges which result from the constitutional guidelines of political neutrality of a judge of the Tribunal other than the aforementioned ones. However, it seems necessary to develop an ethical code to be followed by the Constitutional Tribunal and this is what the Team hereby recommends.

IV.

In the Polish political and legal tradition, being sworn in plays an important and special role as a sign of loyalty and a form of assurance that obligations will be met. This justifies the maintenance of the regulation obliging a judge of the Constitutional Tribunal to take an oath. Refusal to take the oath should be tantamount to renunciation of the position of judge of the Tribunal.

The Venice Commission questioned the significance and role of the oath[63] in the Polish legal system, as well as the President's refusal to accept the oath of the newly selected judges of the Constitutional Tribunal. Members of the Venice Commission, probably unaware of the Polish political and legal tradition, stated that "the acceptance of the oath by the President is certainly important – also as a visible sign of loyalty to the Constitution – but it has a primarily ceremonial function". In the opinion of the Team of Experts on the Issues Related to the Constitutional Tribunal, taking an oath in the Polish doctrine of constitutional law plays a special role which cannot be limited solely to a ceremonial function. Its role results from both historical and religious premises. It is a type of a *pro futuro* oath in which persons taking the oath ensure that they will honour their

[62] See: E.-W. Böckenförde, *Państwo prawa w jednoczącej się Europie,* translated by P. Kaczorowski, Warsaw 2000, p. 84: "Regardless of the regulations and considerations on how – in the name of democracy – the decision-making power of the constitutional court should be balanced, it must be said that the responsibility for ensuring that the constitutional judiciary strengthens the democratic order and does not change it, lies to a large extent in the judges of the constitutional court. They must be fully aware of the specific tasks, conditions and limitations of their office. On the other hand it is the responsibility of the political bodies who grant the necessary democratic legitimacy and credibility to judges, to select such persons to the position of judge who meet the high demands of that office. They must be free from the temptation of pursuing, under the cover of the office, their policy using methods of constitution interpretation, instead of setting out legal frameworks for policy. Both of these kinds of responsibly cannot be either delegated or replaced, they must be undertaken in a free way. To a large extent this is also what decides on whether constitutional judiciary becomes what it can and should be".

[63] Pursuant to Article 21 paragraph 1 of the Act of 25 June 2015 on the Constitutional Tribunal, the judge of a Constitutional Tribunal is sworn in. In its opinion, the Venice Commission used the concept of "oath". As pointed out by G. Maroń, the difference between the oath and being sworn in follows from the content of the oath, however, in everyday language the concepts are used interchangeably. An oath as a rule has a religious nature. Compare: G. Maroń, *Instytucja przysięgi prezydenta w polskim porządku prawnym,* „Przegląd Prawa Konstytucyjnego", 2012, issue 2, p. 159-160.

obligations[64]. Quoting an outstanding Polish lawyer, Professor of the Jagiellonian University, Konstanty Grzybowski, an oath in the Polish legal tradition "has the power of public law and plays a state function", and thus officers taking the oath strengthen their obligations under the new function[65]. The oath is therefore a public and solemn commitment to perform specific tasks with particular importance for the state. In the opinion of the Team it is irrelevant whether the oath is taken on the basis of the constitution or a lower-ranking act of law. The meaning and function of the oath remains the same: taking upon oneself certain obligations required by the law. The oath is undoubtedly taken by authorised persons (elected or appointed), which the law indisputably requires to take on a public commitment. In the case indicated by the Venice Commission, the indisputability did not apply and the President had the right to refuse to accept the oath.

The Constitution of Poland of 1997 does not provide for an oath being taken by judges of the Tribunal. However, the Act of 1997 included such a regulation. Similarly, the Act of 2015 regulates the taking of an oath. This Act, like its predecessor, uses the term "being sworn in". We can speak of an oath when its content includes the phrase "So help me God".

The Team proposes to change the oath's legal structure in terms of the status of the person taking the oath and in consequence to transfer the role of the Sejm and the President of Poland in relation to the solutions adopted in amendments to the Act on the Constitutional Tribunal of 19 November 2015, as well as those resulting from the judgement of the Constitutional Tribunal of 9 December 2015 (K35/15). In line with this proposal, the oath would be taken by a judge and not a person who was elected to the position of judge. Such a change would not be merely a technical and stylistic measure, as the proposed legal regulation is constitutive in nature in terms of determining the status of the person taking the oath. The wording clearly indicates that upon election, the hitherto candidate for judge of the Tribunal is granted the status of judge of that court. Election to the position of judge made by the Sejm is authorised by a resolution adopted by that body. Making the Sejm's decision on electing a judge of the Tribunal a constitutive decision is justified in the Sejm's special position in the system, the Sejm being elected in a general election made by the People who exercise their powers through their representatives (Article 4 of the Constitution of Poland). The significance of function of a judge of the Constitutional Tribunal, and thus a court which has exclusive control over the constitutionality of acts, justifies in a special way the granting of the constitutive status to the appointment of judges.

The team advocates the constitutionalisation of the swearing in of judges of the Constitutional Tribunal. Such a solution is supported both by historical arguments due to the Polish

[64] See more in: G. Maroń, *Instytucja przysięgi...,* p. 179-191.
[65] K. Grzybowski, *Ustrój Polski współczesnej,* Kraków 1948, p. 159.

tradition of the political system, as well as arguments resulting from the essence of the Constitution, and hence its particular legal force and axiological significance. Constitutional regulation will therefore strengthen the legal, ethical and moral significance of being sworn in.

V.

The Team recommends a solution providing for the appointment of the President of the Tribunal by the President of Poland from among at least three candidates proposed by the General Assembly for a period of three years, with an indication that this period cannot exceed the term of office of the judge of the Tribunal. In the elections each judge has only one vote which he/she casts for the selected candidate. The same principles should also apply to the position of Vice-President of the Tribunal.

Article 194 paragraph 2 of the Constitution specifies only the basic elements of the manner of appointing President and Vice-President of the Tribunal. They include appointment by the President of Poland from among the candidates proposed by the General Assembly of the Constitutional Tribunal. The Constitution leaves detailed regulation of the term of office of the President and Vice-President of the Tribunal to the ordinary legislator.

Article 15 paragraph 2 of the Act of 1997 on the Constitutional Tribunal failed to specify the length of the term of office of the President of the Tribunal and only specified that the President of the Tribunal should be elected not later than three months before the expiry of the term of office of the incumbent President, and in the event the position of President is vacated prematurely, the new President was to be selected with a period of one month. As a result the length of the term of office of the President of the Tribunal was not specified at all in the act and depended on the period which the person elected to be the President of the Tribunal had until the end of term of office as judge of the Tribunal. In extreme cases it could therefore be equal to the term of office of the judge and last 9 years. The same applies to the position of Vice-President of the Tribunal.

Pursuant to the Act of 1997 on the Constitutional Tribunal, the General Assembly of the Constitutional Tribunal presented the President of Poland with two candidates for each position, selected in a secret ballot. In practice, the shortest terms of office of President of the Tribunal have so far been: 1 year and less than

6 6 months (B. Zdziennicki) and 1 year and less than 8 months (J. Stępień), and the longest term of office lasted 8 years and 10 months (M. Safjan). It is worth recalling that the original draft act on the Constitutional Tribunal submitted by President Komorowski limited the terms of office of President and Vice-President of the Tribunal to 4 years (although regulations on those terms of

office had not been included in the previous version of the project which was developed by the "working group" of judges of the Tribunal). On the last stage of legislative work – when examining amendments proposed by the Senate – the Sejm adopted an amendment which removed this limitation from the act.

The Act of 19 November 2015 on the amendment of the act on the Constitutional Tribunal stipulated the following wording of Article 12 paragraph 1 sentence 1: "The President of the Tribunal is appointed by the President of Poland from among at least three candidates proposed by the General Assembly for a period of three years". This provision was not found to be unconstitutional in the judgement of the Constitutional Tribunal of 9 December 2015 (ref. no K 35/15). Thus the solutions in force are: a 3-year term of office of the President of the Tribunal and the appointment by the President of Poland of the President and Vice-President of the Tribunal from among at least three candidates proposed by the General Assembly of the Constitutional Tribunal. Article 12 of the Act on the Constitutional Tribunal in the currently applicable version continues as follows: "2. Candidates for the position of President of the Tribunal are selected by the General Assembly in the last month of the term of office of the incumbent President of the Tribunal from among judges of the Tribunal who received the largest number of votes in the ballot. In the event the position of the President of the Tribunal is vacated, candidates are selected within a period of 21 days.

2a. A candidate for the position of the President of the Tribunal must be proposed by at least 3 judges of the Tribunal. One judge of the Tribunal can propose only one candidate.

3. The proceedings regarding the selection of candidates for the position of the President of the Tribunal are chaired by the oldest judge of the Tribunal.

3a. The vote on the selection of candidates for the position of the President of the Tribunal cannot be held before the lapse of three days after the candidates were proposed.

3.b. Names of the candidates for the position of the President of the Tribunal are specified on the voting chart in alphabetical order.

3.c. One judge of the Tribunal can vote in favour of only one candidate for the position of the President of the Tribunal.

4. The resolution on the selection of candidates for the position of the President of the Tribunal is transmitted immediately to the President of Poland.

The Team fully agrees with the need for a statutory determination of the length of the term of office of the President and Vice-President of the Tribunal, at the same time underlining that until December 2015 this was the only term of office of guardians of a supreme constitutional body which

were not regulated in detail. In the previous state of law, the length of that term of office could exceed the longest terms of office provided for in the Constitution (6 years)[66].

The issue of determining the length of the term of office of the President and Vice-President of the Tribunal was subject to intense discussions in the course of legislative works preceding the adoption of the Act of 25 June 2015 on the Constitutional Tribunal. The Tribunal found a 3-year term of office of the President and Vice-President of the Tribunal to be constitutional in the aforementioned judgement of 9 December 2015 and in its justification stated that it "maintains its previous position, pursuant to which introducing the principle of the term of office of the President and Vice-President of the Tribunal is within the legislator's freedom[67].

The following arguments support maintaining a 3-year term of office of the President and Vice-President of the Tribunal:

- terms of office "are natural consequence of eligibility"[68];

- terms of office ensure "objective verification of the correct fulfilment of tasks by he President and Vice-President of the Tribunal[69];

- terms of office of managerial functions in the Tribunal – as in the case of not only other public authorities – is related to "the issue of counteracting the natural tendency of absolutising one's authority, as their objective is to make monopolisation more difficult"[70];

- given the changes in the composition of the Tribunal resulting from the lapse of the terms of office of individual judges of the Tribunal taking place during the term of office of the President and Vice-President of the Tribunal, the terms of office of the later positions ensures the Tribunal's pluralism;

- lack of specification of the length of term of office of the President and Vice-President of the Tribunal violates the standards of a democratic state and the principle of specificity of law derived

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[66] See draft act created by PiS Article 15 (3 candidates) and draft act created by Kukiz'15 (3 candidates – amendment of Article 194 of the Constitution). The draft act created by Nowoczesna (2 candidates) proposes extending the term of office to 5 years (Article 6), and in the draft act created by KOD – 6 years and 2 candidates (Article 12).

[67] One could add that also the First President of the Supreme Court found the 3-year term of office of the President and Vice-President of the Tribunal to be constitutional. Compare Justification for the judgement of the Constitutional Tribunal of 09 December 2015, (Court File No. K 35/15)

[68] M. Chmaj, *Opinia prawna dotycząca przedstawionego przez Prezydenta RP projektu ustawy w Trybunale Konstytucyjnym, „Zeszyty Prawnicze BAS",* 2014, volume. 1, p. 193-194.

[69] Ibid.

[70] Justification of a judgement of the Constitutional Tribunal of 15 July 2009, ref. no. K 64/07 (OTK ZU No 7/A/2009, point 110 with a reference to article by A. Ławniczak and M. Masternak-Kubiak, *Zasada kadencyjności Sejmu - wybrane problemy,* „Przegląd Sejmowy" 2002, issue 3, p. 9. In the cited judgement the Tribunal examined the provisions of the Act on housing cooperatives and the issue of terms of office of the members of the supervisory board of cooperatives).

from the principle of the democratic rule of law expressed in Article 2[71].

The Team is in favour of maintaining the regulation specified in the current wording of Article 12 paragraph 12-14 of the Act of 25 June 2015 on the Constitutional Tribunal. However it proposes that elections of the President and Vice-President of the Tribunal be held within one month after the lapse of the term of office. In these elections the decisions would be taken by new judges commencing their term of office rather than retiring judges, as it is the case currently. The current regulations make it impossible for the new judges to participate in the selection of candidates to the position of President and Vice-President of the Tribunal despite of the fact it applies to their exercising the function of judge of the Tribunal.

The Constitution adopted the principle that the President and Vice-President of the Tribunal are appointed by the President of Poland. By granting the President of Poland the competence to appoint the President and Vice-President of the Tribunal, it includes it in the prerogatives of the Head of State (Article 144 paragraph 3 point 21) and obliges him to appoint one person for each of those positions from among the candidates proposed by the General Assembly of the Judges of the Tribunal. All judges of the Tribunal make up the General Assembly of the Judges of the Tribunal. However, the Constitution does not specify the number of candidates which should be proposed to the President of Poland by the Assembly for each of the two positions, nor the requirements which those candidates should meet. The constitutional lawmaker decided to leave this and other issues related to the appointment of the President and Vice-President of the Tribunal to regulations of the authors of the Act. It follows from the above that those issues cannot be regulated by a lower-rank act – e.g. the rules and regulations of the Constitutional Tribunal. However, the plural form used in the Constitution indicates that there must be at least two candidates – or more – for both the position of the President of the Tribunal and Vice-President of the Tribunal. This solution shows the intention of the constitutional lawmaker that the works of the Tribunal should be headed by persons who enjoy the trust of both the President of Poland and the judges who propose candidates.

Until June 2015, authors of the Act stipulated that the President of Poland appoints the President and Vice-President of the Tribunal from among two candidates selected by the largest number of votes by the General Assembly of the Tribunal. However it was not regulated who can propose candidates. In an extreme case where one of the candidates would enjoy the trust of a vast majority of the Assembly, the other candidate could be selected with one vote.

The following arguments support maintaining the principle of presenting the President of

[71] See position of a group of Civic Platform (PO) deputies in a motion to the Tribunal on the examination of compliance of provisions of the Act of 25 June 2015 on the Constitutional Tribunal with the Constitution, see judgement of the Tribunal of 3 December 2015, ref. no. K 34/15.

Poland with at least 3 candidates for the position of the President of the Tribunal and at least 3 candidates for the position of the Vice-President of the Tribunal:

- ensuring pluralism by allowing the presentation of more than two candidates presenting inherently a wider range of views of judges of the Tribunal;

- ensuring conditions for presenting the President with the opportunity to make an actual choice from among candidates, and thus ensuring broader possibilities of his competence.

Although the Constitution does not specify the level of detail of the regulation in the act of the issue in question, in opinion of the Team the meaning for the system warrants a more detailed regulation of appointing the President and Vice-President of the Tribunal. The Team proposes introduction of the following specific regulations:

- the requirement that candidates must be nominated by at least 3 judges of the Constitutional Tribunal; thus ensuring that the selected candidates enjoy the trust of the General Assembly and ensuring pluralism;
- listing the names of candidates in alphabetical order, which constitutes a standard solution in electoral law;
- allowing a judge to cast a vote only for one candidate, thus ensuring equality of choice;
- selecting the President and Vice-President within one month after the end of the term of office, thus eliminating a period of dual power in leadership positions in the Tribunal;

Given that the term of office of the President of the Tribunal would not overlap with the term of office of the Vice-President of the Tribunal, a monthly vacancy in one of these positions would not cause negative effects on the functioning of the Tribunal and there would always be a managerial position filled in the Tribunal. It should also be added that in 1997 there was a vacancy lasting slightly over one month in the position of the President of the Tribunal and it had no negative consequences for the functioning of the Constitutional Tribunal.

VI.

Maintaining the model of adjudication by the Constitutional Tribunal in both the full bench or a smaller number of judges is an optimal solution. For the sake of protecting basic values of the political system, it is justified to introduce a mechanism allowing to a greater extent than hitherto the adjudication of the Tribunal in the full bench (at least 11 judges). With regard to the

majority necessary for the Constitutional Tribunal to make a final decision, it should be sought to ensure that on the one hand the Tribunal functions effectively, and on the other hand, for the constitutional principles and standards to be implemented in full, including in particular providing for adjudication by the Tribunal majority. Taking into account also suggestions of the Venice Commission, the necessary majorities should be differentiated depending on the nature of the case before the Constitutional Tribunal and whether the Tribunal is adjudicating in a full bench or smaller adjudication benches. As a result, the Tribunal should adjudicate with a majority of votes in the smaller benches and majority of the constitutional number of judges of the Constitutional Tribunal in the event of adjudicating in a full bench.

Effective adjudication on defective legal norms should reconcile at least several substantive assumptions, the most important ones of which should be: 1) observing the principle of separation and balance of powers[72]; 2) protecting the Sejm's rights, which in the opinion of the Tribunal itself is "the host of each act of law"[73]; 3) guaranteeing the fundamental principle of the presumption of constitutionality of an act, which on the one hand aims at the protection of the will of the People (the sovereign), and on the other hand the stability of the law; 4) making decisions based on the majority, the value of which corresponds to the legal and political meaning of the case in question. Determining the majority threshold required for ruling in cases within a specific group should be based on the above-mentioned criteria, with additional observance of the principle of rationality. The Team is aware of the ambiguity of the notion of rationality, however in this case the decisive factor should be judicial practice, in particular of the Constitutional Tribunal. It will allow for possible verification of solutions introduced by the legislator. As a result of the findings, as well as taking into account the formation of a European model of adjudication by the constitutional courts and Polish experience of thirty years of activity of the Constitutional Tribunal, in the opinion of the Team it would be an optimal solution to maintain the model of adjudication by the Constitutional Tribunal both in the full bench and in benches with fewer judges[74]. The team proposes solutions based on the existing principles of functioning of the Tribunal but at the same time aiming at increasing the protection of the values indicated above by way of introducing a mechanism allowing for adjudication by the Tribunal in the full bench and passing judgements in a full bench with a

[72] See Article 10 of the Constitution of Poland

[73] See Judgement of the Constitutional Tribunal of 23 November 1993, ref. no. K 5/93 (OTK 1993 part 2, point 39).

[74] See S. Pawela, Kształtowanie się modelu postępowania przed Trybunałem Konstytucyjnym, [in:] Trybunał Konstytucyjny. Księga XV-lecia., edit F. Rymarz, A. Jankiewicz, Warsaw 2001, p. 64 and subsequent

majority of the constitutional number of judges to a greater extent than hitherto.

The number of judges in the adjudicating benches in individual countries varies. There is no uniform standard which would apply, but generally in the literature it is assumed that by determining the number of judges in the adjudicating benches, the legislator should be guided by rational premises which include:

- ensuring fair examination of the case and the reality of performing the adjudication function;
- ensuring examination of cases within a reasonable time;
- ensuring the independence of judges by allowing for excluding them from adjudication in justified cases, at the same time ensuring the undisturbed functioning of the tribunal; furthermore the significance of the case and the number of judges in a full bench should be in reasonable proportion to the number of judges provided for by law.

The Team is in favour of increasing the number of judges in adjudicating benches and the introduction of a so-called full bench made up of at least eleven judges for ruling in cases with a significant political and legal importance (e.g. examination of constitutionality of the activities of political parties). However, the list of cases to be adjudicated by the Tribunal in a full bench would remain open and the Tribunal should be granted the competence to accept every significant case for adjudication in such a bench. The proposed solution is factually justified and transparent, as it is "problem-specific" and flexible. Even more so that the list of cases to be examined in the full bench is open. It is fitting to make the bench dependent on the substantial significance of the case instead of implementing rigid arrangements. The anticipated flexibility applies not only to the examination of constitutionality of the Act, but also the examination of constitutionality of other acts of law. The Tribunal should therefore adjudicate in a full bench with regard to cases which the legislator finds to be of key importance to a democratic rule of law. Similarly, all important issues for the internal functioning of the Tribunal should be adopted by the full bench of the Tribunal, as resolutions of the General Assembly of the Tribunal regard the work of every judge of the Tribunal and shape its legal and organisational situation.

In the event the subject of the examination is an act, the rational proportion of the number of judges in the bench for adjudicating in that matter to the full bench should be taken into account. In the opinion of the Team, a 7-person bench remains in reasonable proportion to the full bench. A 7-person bench ensures the efficiency of work of the Tribunal and allows for simultaneous examination of two cases in the scope of controlling acts of law.

However in cases regarding examination of constitutionality, in particular lower-rank acts of law with the constitution, complaints regarding decisions passed in preliminary proceedings, and

generally speaking in matters of internal activities of the Tribunal, the Team recommends adjudication in a 3-judge bench.

Furthermore, the Team finds it expedient to equip the President of the Tribunal, three judges of the Constitutional Tribunal, the adjudicating bench designated for examining the given case and the President of Poland with the right to submit a binding request to the President of the Tribunal regarding the examination of a case in the full bench. Granting such a power to the President of Poland results from the principle of separation and balance of powers, but also – if not more importantly – the President of Poland's function of guardian of the Constitution provided for in the Constitution (see Article 126 of the Constitution of Poland). It should be recognised that the President's motion on the examination of a case by the Tribunal in a full bench would be a competence aiming at implementation of the function of guardian (guarantor) of the Constitution and would implement the presidency model better and, most of all, more fully[75]. The President of Poland may decide that a case should be examined by the full bench of the Tribunal, following his own belief, which may be the result of various premises, not only the complexity of the case, but also e.g. significance for the economy, the State budget and the social, cultural, religious importance, etc.These premises can be similar to those which determine the presidential veto and cannot be covered by a rigid legal framework. Moreover, it should be noted that the President of the Republic, as the guardian of the constitution, should take particular efforts to ensure this act of law is applied correctly.

Taking into account the complexity of this subject matter, it should be recommended to maintain the functioning of the Constitutional Tribunal in the existing forms, i.e. both in the full bench and in the so-called adjudicating benches. At the same time, recognising the arguments in favour of the Tribunal's acting in the full bench, one can postulate a complementary solution which will allow – in certain proceedings – for a transition from the "adjudicating" bench to a full bench of the Tribunal.

The practice of constitutional courts has not developed strict rules regarding the majorities necessary for recognition of the legitimacy of the decisions made. The Venice Commission also does not set out strict rules in this regard. Still, the existence of certain regularities can be recognised; they can constitute specific patterns of adopted regulations in the various countries, also in Poland. First and foremost the basic criterion for determining the application of a certain majority is the significance of cases examined by the constitutional court. In the event of cases with particular

[75] Where it is indicated that certain functions (e.g. guardian of the constitution) are not followed by specific competences, and thus the entire function is implemented in a weak manner. For more on this topic, see: B. Szczurowski, *Prezydent Rzeczypospolitej Polskiej jako organ czuwający nad przestrzeganiem konstytucji*, Warsaw 2016.

significance for the state, for instance examination of the constitutionality of actions taken by political parties, this majority is even set out to be at the level of a qualified majority of 2/3. Generally speaking, the legislator has full discretion in this regard.

Establishing a high majority threshold fosters collegiality of actions of constitutional courts, as well as the necessary pluralism of their decisions. Furthermore, it forces weighing arguments in the decision-making process. It should be underlined that an increased majority requirement in examination of cases by a constitutional court fosters better and fuller application of the principle of separation and balance of powers, reconciling the requirement for control of constitutionality with the principle of the presumption of constitutionality of an act, which is – in line with classic concepts – an expression of the general will expressed by the parliament.

The constitutional lawmaker's exclusion in 1997 of the ordinary legislator's possibility to set out a majority different than an ordinary majority with regard to judgements passed by the Tribunal in a full bench seems to be incomprehensible since – as it follows from examples presented in the Opinion of the Venice Commission[76] – in the case of many European states, a majority of 2/3 is a rule with regard to certain competences of constitutional courts, such as examining the constitutionality of objectives or actions of political parties.

It is not possible to accept the view in which the Polish constitutional system excludes in advance the possibility of increasing standards for the Constitutional Tribunal in the case of decisions of fundamental significance, such as outlawing of a political party which undermines the principle of political pluralism which is of key importance to a liberal democracy. If every decision passed by the Constitutional Tribunal, regardless of its significance, required solely an ordinary majority, the Polish constitutional system would be a rarity in Europe. Increasing the necessary majority to a qualified majority, at least in certain cases, was clearly suggested by the Venice Commission; with the reservation that in the current *de lege ferenda the foundation* state, a different kind of majority than the one provided for in the constitution cannot be a rule, and only an exceptional solution used in a limited number of cases[77]. However, such a list was suggested by the Venice Commission, which indicated that it is possible and even desirable to define categories of cases with a higher majority regime than the one specified in the provisions of the Constitution. Furthermore, it follows from the explanations of the Venice Commission that such cases as a rule should not apply to the basic, judiciary function of the Tribunal, however they are entirely justified and even desirable in a list of non-judiciary functions.

[76] Examples in point 75 Opinion of the Venice Commission

[77] This corresponds with other excerpts of the opinion, where it is indicated that many defective solutions relating to the Polish Constitutional Tribunal are determined by the burden of stipulations of the Constitution of Poland which – perhaps – should be amended.

In view of the above, general solutions regarding the manner in which majority is calculated should be recommend. They should be correlated with both the operating mode of the Constitutional Tribunal (adjudicating in the full bench and smaller adjudicating benches), as well as the rank of cases brought before the Constitutional Tribunal. They should also respect the current constitutional status. For that reason the Team postulates solutions which are in full compliance with Article 190 paragraph 5 of the Constitution and which provide: 1) for smaller adjudication benches, an ordinary majority 2) for the full bench of the Constitutional Tribunal, which is associated with the significance of cases under its jurisdiction, the majority of the constitutionally specified number of judges of the Tribunal; 3) for examining the constitutionality of the Act on the organisation and procedure before the Constitutional Tribunal, a majority of 2/3 of votes of the constitutionally specified number of judges of the Tribunal (considering the rank of that act of law).

The proposed method of voting on important systemic issues where the Tribunal adjudicates in the full bench is used i.a. by the German Federal Constitutional Tribunal in those cases where the Federal Constitutional Court Senate examines cases of particular significance, such as the lack of constitutionality of the activity of a political party[78]. A higher quorum required to take a decision by the Constitutional Tribunal in examining the constitutionality of acts is a solution known in European constitutional orders, the best example of which is the Act on the Constitutional Court of the Czech Republic[79] (point 80 of the Opinion of the Venice Commission). The Team proposes to introduce, for decisions of the Tribunal taken in the full bench, the majority of the constitutionally specified number of judges of the Tribunal; such a majority on the one hand will guarantee protection of the presumption of constitutionality of acts of the parliament and will make the Tribunal an actual guardian of the Sejm's right as the so-called negative legislator, and on the other hand will eliminate the problem in relation to the judges' deliberation in a full bench with an even number of judges.

Article 190 paragraph 5 of the Constitution in the statement that the judgements of the Tribunal "are passed with a majority of votes" aims at excluding situations where in the event of adjudication by 14-person and 12-person benches the judgement would not be passed due to an even distribution of votes. In such an event the judges are forced to obtain a majority of votes as a *sine*

[78] A majority of 2/3 votes of judges of a given Senate in proceedings before the German Federal Constitutional Court is required in the event of: § 13 No 1 abuse of fundamental rights § 13 No 2 lack of compliance of a party with the constitution § 13 No 4 a complaint of the Bundestag or the Bundesrat against the President § 13 No 9 a complaint against a federal or state judge.

[79] In the proceedings before the Czech Tribunal, 9 votes out of the general number of 15 is always required e.g. in adjudicating in the case of non-constitutionality of an act, non-constitutionality of international agreements before their ratification or in cases where the Constitutional Tribunal plans to depart from the legal opinion expressed in the judgement passed with a full bench.

qua non condition of passing a judgement. As a result one of the judges would have to change his or her view on the legal assessment of the case in question for the judgement to be passed in accordance with the order specified in the Constitution. Such a practice violates the principle of judicial independence at adjudication. Other judges should also not impact the mode a judge of the Tribunal rules.

As a result of the above analysis, both with regard to the number of judges adjudicating and the required majority to ensure legitimacy of a decision, the Team proposes the following detailed solutions.

1. The Tribunal adjudicates in a full bench in cases:

a) regarding disputes with regard to competences between central constitutional bodies of the state;

b) regarding the statement of an obstacle in the performing of the office by the President of Poland and entrusting the Marshal of the Sejm with temporary performance of the responsibilities of the President of Poland;

c) regarding the constitutionality of objectives or actions of political parties;

d) initiated by a motion of the President of Poland on examining the constitutionality of an act before signing of that act or an international agreement before its ratification;

e) examining the constitutionality of the act on the organisation and procedure before the Constitutional Tribunal;

f) regarding the control of standards, if initiated by: the president of the Tribunal, three judges of the Tribunal, the President of Poland, the adjudicating bench designated for the examination of this case;

g) where the adjudicating bench plans to depart from the legal opinion expressed in the judgement passed with a full bench.

2. The Tribunal adjudicates in a 7-person bench in cases:

a) regarding constitutionality of acts and international agreements;

b) compliance of acts with international agreements the ratification of which requires prior consent expressed in an act.

3. The Tribunal adjudicates in a 3-person bench in cases:

a) compliance of provisions of law published by central state authorities with the Constitution, ratified international agreements and acts;

b) compliance of other normative acts with the Constitution, ratified international agreements and acts of law;

c) regarding transferring or refusing to transfer a constitutional complaint and motion of an entity

referred to in Article 191 paragraph 1 points 3-5 of the Constitution;

d) exclusion of a judge.

4. Examination of a case in the full bench requires the participation of at least eleven judges of the Tribunal. A hearing is chaired by the President or Vice-President of the Tribunal and in the event of obstacles in chairing by those individuals – by the oldest judge..

5. Judgements of the Tribunal are passed by a majority of votes, unless the act specifies otherwise.

6. Judgements of the Tribunal in the full bench are passed by a majority of votes of the constitutional number of judges of the Tribunal.

7. The judgement on the constitutionality of the act on the organisation and procedure before the Tribunal is passed with a majority of 2/3 of the constitutional number of judges of the Tribunal.

8. Judges of the adjudicating bench, including the chair of the bench and the judge-rapporteur, taking into account the order of receipt of cases, are designated by the President of the Tribunal, observing in particular the principle of equal distribution of cases among individual judges.

VII.

When adjudicating on the compliance of the Act on the organisation of, and proceedings before, the Constitutional Tribunal with the Constitution, the Constitutional Tribunal should sit as a full bench, and adopt a judgment with a two-thirds majority of the constitutional number of Tribunal judges.

Within the given framework indicated in the relevant provision of the Polish Constitution, the Constitutional Tribunal Act is like any other act in a hierarchically structured system of sources of law. This means that it may be subject to the procedure of being challenged before the Tribunal and, consequently, to an assessment of its compliance or non-compliance with the Constitution (in both formal and material terms).[80] It should be stressed that in the existing legal framework delineated by the wording of the present Constitution of the Republic of Poland, there are no grounds to remove the act regulating the Constitutional Tribunal's operations from the cognizance of the constitutional court (just like there are no grounds to do so for any other act with

[80] The same applies to all acts that are in force in the Republic of Poland, irrespective of the fact that one may distinguish various categories or types of acts based on the different procedures of their adoption or their scope. See e.g. L. Garlicki, M. Zubik, "Ustawa w systemie źródeł prawa", in *Konstytucyjny system źródeł prawa w praktyce*, ed. by A. Szmyt, Warsaw, 2006, p. 46 and ff.

a different scope). Another thing that should be emphasised is that there are no grounds to establish a different system of assessing the constitutional compliance of this Act and to entrust the said task to another body, such as, for example, the Supreme Court or the Supreme Administrative Court, which also controls the legal compliance of normative acts to a certain extent.[81] Therefore, one should recognise that assessing the constitutional compliance of the Constitutional Tribunal Act is the prerogative of the Tribunal itself. The Constitution does not stipulate any special or different control procedure here, nor does it stipulate that there should be no such proceedings.[82] Consequently, controlling the constitutional compliance of the act regulating the functioning of the constitutional court lies within the remit of this very body. What is more, the opinion of the Venice Commission clearly states that removing this particular Act from the review would be contrary to the principles of constitutional justice (point 40 of the opinion of the Venice Commission).[83]

However, one should acknowledge that the Constitutional Tribunal Act, when reviewed by the Tribunal itself, should fall under a different review procedure, especially since this situation gives rise to suspicions that the Constitutional Tribunal may be acting as both 'judge and jury'. After all, abiding by the principle of *nemo iudex in causa sua* is one of the foundations of the rule of law. This is why the recommended solution, established *expressis verbis* for this one act, should be a stricter review procedure.[84]

An optimum solution that results directly from the literal interpretation of the Constitution would be to have the Tribunal adjudicate in full bench (with a quorum of at least 11 judges) with stricter majority rules for this one particular case. One should pay particular attention to this last element, as it proposes that in this specific case of the Act on the organisation of, and proceedings before, the Constitutional Tribunal, the Tribunal's judgment would require a majority of two-thirds of its constitutional composition, i.e. at least ten judges of the total number of 15. This solution would provide for a stricter review of the Act forming the basis of the functioning of a constitutional court, at the same time adhering to the constitutional principle according to which Constitutional Tribunal judgments are made by a majority of votes. It would also be in line with the opinion of the

[81] This is sometimes put forward so as to avoid a situation when the Constitutional Tribunal adjudicates on matters that concern the Tribunal itself. The tabled proposals most often indicate the Supreme Court as the competent body in that respect.

[82] This would in fact be contrary to rule of law, as there may be no act of law whose compliance with the Constitution would not be subjected to the cognizance of an adjudicating body.

[83] The Venice Commission goes even further in its opinion, stating that an act regulating the functioning of the Constitutional Tribunal should be subjected to an obligatory compliance check with the Constitution, yet this proposal is too far-reaching, since – pursuant to the provisions of the Constitution of the Republic of Poland– no act undergoes obligatory checks of its compliance with the Constitution.

[84] Since no other control mechanisms may be implemented in the current legal situation, regulated by the provisions of the Constitution of the Republic of Poland.

Venice Commission, which clearly suggests that the regulator is free to decide which majority is required for the Tribunal to pass a judgment, depending on the type of case it examines. The only line that cannot be crossed in these actions, as is underlined by the Venice Commission, is the majority of votes stipulated in the present Constitution for judgments made by the Constitutional Tribunal. However, according to the Venice Commission, this simply means that a majority vote should be the rule (as is laid down *expressis verbis* in the Constitution), but it is admissible (and even advisable) to establish a different, qualified majority for specifically listed cases. The majority of votes, clearly stipulated by the regulator in Article 190 paragraph 5, does not mean that a different, qualified majority should not apply in specific, exceptional cases. However, these cases should first of all be exceptional, i.e. they cannot refer to the majority of or to all cases reviewed by the Tribunal. Secondly, they should be sufficiently and – above all – rationally justified. It would seem that a list of such cases should include, among others, the Act regulating the organisation of, and proceedings before, the Constitutional Tribunal.

The suggested solution lies within the regulator's competence[85], as Article 197 of the Constitution stipulates that the organisation of, and proceedings before, the Constitutional Tribunal should be determined by statute, and at the same time strengthens the presumed constitutional compliance of this act. In the case of this one act, adjudicating by a majority of two-thirds of the Constitutional Tribunal's constitutional composition would additionally protect the principle of presuming the constitutional compliance of the Act and the extraordinary activity of the constitutional court in this respect, as it *nolens volens* acts as both 'judge and jury' here.[86] Adjudicating by such majority would additionally protect the Tribunal's independence.[87] These fears result from the fact that a group of judges currently sitting in the Constitutional Tribunal took an active part in preparing the draft act on the Tribunal, which – according to the current legislator – requires far-reaching amendments that would safeguard the Sejm's right to draft laws implementing specific state policies.[88] Introducing stricter rules of the constitutional review of the act regulating the basis of the Tribunal's functioning is motivated by concern for balanced and

[85] See I. Chojnacka, "Swoboda władzy ustawodawczej w stanowieniu prawa w orzecznictwie Trybunału Konstytucyjnego," *Zagadnienia Sądownictwa Konstytucyjnego*, no. 2 (2011), p. 137 and ff.

[86] Irrespective, of course, of the interpretative differences of such action.

[87] Hence the problem of the majority required for the Constitutional Tribunal to pass judgments should be definitely correlated with the independence of the Tribunal's judges. See J. Zajadło, "Sędzia konstytucyjny – profil filozoficznoprawny," in *Dyskrecjonalność w prawie*, ed. by W. Staśkiewicz, T. Stawecki, Warsaw, 2010, p. 15 and ff.

[88] Which only serves to confirm that the dispute concerning the Tribunal may largely be construed as a dispute concerning the policy of the state and the state's freedom to shape it. This is a typical dispute in the network of tensions characteristic of democratic political systems, and is specific not only to Poland. See e.g. P. Laidler, "Aktywizm polityczny trzeciej władzy: na przykładzie Sądu Najwyższego USA," in *Instytucje prawa konstytucyjnego w perspektywie politologicznej*, ed. by Z. Kiełmiński, J. Szymanek, Warsaw 2013, p. 324 and ff.

objective adjudication on amending the Act whose provisions were drafted by active judges of the Constitutional Tribunal. These actions infringed the principle of *nemo ius sibi dicere potest* (no one can take decisions concerning the basis of his actions). Even at the current stage of reviewing the constitutional compliance of the Constitutional Tribunal Act, this principle may negatively affect the objectivity of judgment, which is the basis of the proper legitimacy of each constitutional court.[89] These proceedings cannot give rise to any doubt with respect to disregarding – or a semblance thereof – the standards of objectivity (our concerns were raised, for example, by the Constitutional Tribunal Bureau's assessment of the Sejm's ongoing law-making activity, which is tolerated by the President of the Constitutional Tribunal). The fact that the Constitutional Tribunal seems to "review" the actions of the Sejm also raises our serious reservations concerning the impartiality and objectivity of the Tribunal's decision-making. This practice is in stark contradiction to the accompanying declaration that the remarks published on the official website "do not represent the position of the Tribunal's judges nor should they be construed as judgments, and have no binding effect".[90]

It should be emphasised once again that the constitutional principle is that of assuming the constitutional compliance of each act adopted by the Sejm. Refuting this presumption should – by definition – be an exception to the rule[91], made in a specific procedural framework of questioning the constitutionality of the incriminated regulation. On the other hand, constitutional jurisprudence in Poland would suggest a different model: the common custom is to assume that the given act violates the Constitution, and this presumption is only refuted after a positive constitutional review of the incriminated norm by the Constitutional Tribunal.

VIII.

Applications submitted to the Constitutional Tribunal should be examined by adjudicating panels on the basis of the sequence in which they were registered. At the same time, it should be

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[89] See M. Safjan*, "Demokracja parlamentarna a władza sędziów," in* W trosce o rodzinę. Księga pamiątkowa ku czci Profesor Wandy Stojanowskiej*, ed. by M. Kosek, J. Słyk, Warsaw 2008, p. 419.*

[90] Unfortunately, this practice only confirms the thesis put forward by certain circles, according to which "constitutional courts are granted legislative powers", since "legislative powers are conferred upon two bodies, i.e. the parliament and the constitutional court" – see D. Minich, "Trybunał Konstytucyjny - czy tylko negatywny ustawodawca? Refleksje nad statusem ustrojowym TK w dobie kryzysu nowoczesności", in *Konstytucja Rzeczypospolitej Polskiej w pierwszych dekadach XXI wieku wobec wyzwań politycznych, gospodarczych, technologicznych i społecznych,* ed. by S. Biernat, Warsaw 2013, p. 137.

[91] Which is the point of all legal presumptions. See F. Przybylski-Lewandowski, "Domniemanie prawne," in *Leksykon współczesnej teorii i filozofii prawa. 100 podstawowych pojęć,* ed. by J. Zajadło, Warsaw 2007, p. 55 and ff.

possible to apply exceptions to the sequence rule listed in the Act. Our Team deems it appropriate to fully implement the recommendations of the Venice Commission described in point 91 of the Opinion of the Venice Commission by increasing the transparency of the existing case distribution and case-flow system in the Tribunal and by providing reasonable deadlines for the resolution of cases.

The President of the Constitutional Tribunal should submit each application instituting proceedings (unless there are formal obstacles to do so) to be examined by a relevant adjudicating panel, and then oversee the efficiency of proceedings and timeliness of drafting justifications.[92] In subsequent applications submitted to the Constitutional Tribunal, the President of the Tribunal would appoint judges to adjudicating panels, including presiding judges and judges-rapporteurs, by selecting judges based on their alphabetical order.[93] When appointing the presiding judge and rapporteur, the President should also take into account other cases they examine, their type and number. The President could refrain from the alphabetical order and appoint the same presiding judge in subsequent cases, if the cases are related. He could also – by way of exception – refrain from the alphabetical order in other justified cases, in particular following his assessment of the possibility to maintain the timely order of meetings and hearings. The principles and order of appointing judges to panels adjudicating on constitutional complaints and legal questions should be defined in the rules and regulations of the Tribunal.

The President of the Constitutional Tribunal would notify the participants of the proceedings of submitting the application to be examined by an adjudicating panel (again referring to both constitutional complaints and legal questions). The presiding judge would be legally obligated to set dates without undue delay, in particular the dates of meetings and hearings, in line with the general order of hearing cases assigned by the President of the Constitutional Tribunal. The date of the first meeting could be set by the President of the Constitutional Tribunal. Each presiding judge would be obligated to keep a general schedule of procedural steps taken in the process of examining applications. This general schedule should be open and available online. The open nature of the

[92] See Article 37 paragraph 2 in the Law and Justice (PiS) draft act: "The dates for hearings at which requests are examined shall be established based on the sequence in which the cases were registered at the Tribunal". Any exceptions are specified in paragraphs 3–5.

[93] See Article 45 paragraph 2 of the Polish People's Party (PSL) draft act: "Judges for the Tribunal's formation, including the presiding judge and rapporteur, shall be selected from among all judges of the Tribunal based on alphabetical order, taking into account the type, number and sequence of cases registered at the Tribunal." The wording is similar in Article 35 of the Modern (Nowoczesna) party draft act: "Judges for the Tribunal's formation, including the presiding judge and the rapporteur, shall be selected by the President of the Constitutional Tribunal based on the alphabetical list of judges, taking into account the scope, number and sequence of cases registered at the Tribunal." See also Article 45 in the draft act tabled by the Committee for the Defence of Democracy (KOD).

system of assigning cases and the sequence of steps published online is a form of social oversight of the application of the sequence rule. The principle of external openness is one of the foundations of court procedure.

Adhering to the sequence rule for applications means adopting the principle of internal and external sequencing. Internal sequencing means examining applications assigned to the given panel on the basis of the date of registering the said application at the Constitutional Tribunal, including: issuing, without undue delay, orders by the appointed presiding judge aimed at the proper preparation of meetings and establishing the date of the hearing as well as issuing the judgment and drafting its justification without undue delay. External (general) sequencing means that unless there are formal obstacles preventing their examination, all applications submitted to the Tribunal should be examined based on the general principle of the sequence in which they were registered. This principle should allow for statutory exceptions. Adherence to the sequence rule should be supervised by the President of the Tribunal.

The sequence rule is a general procedural rule at the Constitutional Tribunal, but it does not represent a strict norm referring to the dates of each hearing and publication of each judgment. Neither does it represent, in practice, an absolute obligation to set the dates of hearings based on the sequence in which applications were registered at the Constitutional Tribunal (and the obligation to adjudicate in the sequence order decided in advance). However, adhering to the above principles, judgments will be issued more or less according to the sequence rule. Possible deviations from this rule (e.g. due to adjourning a hearing or postponing the publication of a judgment) may result from the complexity or – on the other hand – simplicity of certain cases. Owing to democratic oversight and external openness of schedules, such deviations may not result from unjustified and uncontrolled manipulation of time. This principle will contribute to strengthening the rights of citizens to a fair and fully open trial taking place within a foreseeable deadline.

Applications on the following matters should be examined, and hearings set by the presiding judge, out of turn (i.e. without adhering to the sequence rule and possibly taking into account particular deadlines):

a) legal compliance of an act before it is signed or legal compliance of an international agreement before its ratification;

b) constitutional compliance of a budget act or provisional budget before they are signed; in this case, the Constitutional Tribunal should be obligated to adopt its judgment within 2 months from the date of registering the application at the Tribunal at the latest;

c) constitutional compliance of a normative act, where a judgment of the Constitutional

Tribunal may result in financial contributions that are not stipulated in the budget or provisional budget act – in this case, the President of the Constitutional Tribunal should be obligated to apply to the Council of Ministers for its opinion. On the other hand, the Council of Ministers should be obligated to issue its opinion within 2 months. Failing to meet the deadline for issuing such an opinion would not postpone examining the case at hand;

d) determination of an impediment to exercise the office of President of the Republic of Poland and provisionally conferring the obligations of President of the Republic of Poland upon the Marshal of the Sejm;

e) a competence conflict between central constitutional bodies of the state;

f) constitutional compliance of the Constitutional Tribunal Act.

Participants of the proceedings should present their written position on the case within 2 months from the receipt date. The presiding judge should set the date of the first meeting without undue delay. This date could also be set by the President of the Constitutional Tribunal. The presiding judge could then summon the participants of the proceedings to present additional positions. Then, he would set the hearing date. The hearing should take place not earlier than after 2 months from serving the participants of the proceedings with a notification of its date, and for cases adjudicated as a full bench – after 4 months.

The above rule concerning the time of setting the hearing would not apply in two cases:

a) preventive review of the budget act (Article 224 paragraph 2 of the Constitution) and

b) submitting an application on the determination of an obstacle to exercising the office of President of the Republic of Poland (Article 131 paragraph 1 of the Constitution).

In the latter case, the Constitutional Tribunal should act immediately.

Our Team backs the position of the Venice Commission that introducing the sequence rule for applications to Article 80 of the amended Act of December 2015 is "logical", as it is "a means of increasing citizens' right to a fair trial within a reasonable period of time".[94] The statutory sequence rule strengthens the guarantee of adhering to the rule of law.

The memo of the Constitutional Tribunal Bureau includes wrong accusations that the statutory regulation of the sequence rule is "inadmissible in view of the principles of judiciary independence and its separation from the executive branch", because "setting the dates of hearings and proceedings in camera is closely related to the essence of the Tribunal's adjudication on matters referred to in Article 188 and 189 of the Constitution".[95] This is a poor argument, since Article 197

[94] Point 55 of the Opinion of the Venice Commission.

[95] See memo of the Constitutional Tribunal Bureau (whose legal status is unclear) on the deputies' draft act on the Constitutional Tribunal tabled in the Sejm on 29 April 2016. www.trybunal.gov.pl

of the Constitution stipulates that the procedure before the Constitutional Tribunal be regulated by way of statute rather than by the Tribunal itself, and procedural requirements, such as the requirement to adhere to the order, are an element of procedure before courts and tribunals, the guarantee of treating all entities equally. The Constitutional Tribunal is not an isolated body standing above the law and as such it is not devoid of a statutory framework for action. Its legal avenue to issue a judgment is established by the legislative branch. This is a poor argument also on account of the fact that the above solution allows for numerous statutory exceptions concerning the cited provisions in particular. A similar solution is used, e.g., by the Supreme Administrative Court[96] and it is not deemed dysfunctional or in breach of any principles related to the "essence of adjudication" by an independent court in a democratic rule of law.

The fact that these rules will be laid down in an Act rather than in the rules and regulations of the Constitutional Tribunal is justified by the Tribunal's particular position and the exceptional nature of its tasks. These rules ensure the equal treatment of all entities which apply to the Constitutional Tribunal. What is more, they do not infringe upon individual human rights in the slightest. Each application, irrespective of its axiology, will have an equal opportunity of being examined within a reasonable deadline. This will strengthen the sense of subjectivity in a democratic rule of law. As a rule, abstract control initiated by way of an application has no direct effect on individuals.

If the President of the Constitutional Tribunal had the freedom of choosing the sequence of cases to be examined by the Tribunal, this could have a negative impact on the assessment of his or her work and give rise to suspicions of manipulating the sequence of hearing cases submitted to the Tribunal.[97] On account of the exceptional role of the President of the Constitutional Tribunal, he or she should be granted with such statutory work conditions that the Act, while organising the sequence of cases, would even preclude any possibility of suggesting any form of manipulation. The President of the Constitutional Tribunal organises its work and is under a statutory obligation to monitor the timeliness and succession of cases. In no circumstances may the person overseeing the workflow at the Constitutional Tribunal give rise to even a semblance of bias, lack of objectivity or independence. If this element of the procedure was not regulated by statute, this would at least hypothetically open up the possibility to suppress applications that are socially or politically

[96] See the Rules and Regulations of the Supreme Administrative Court adopted in a resolution of the General Assembly of SAC Judges of 8 November 2010 r. (Official Gazette of the Republic of Poland reference: MP z 2010 r. nr 86 poz. 1007).

[97] The Together (Razem) Party is of a different opinion: "The Tribunal must have the right to choose the course of its work, so as to examine cases not based on the sequence in which the requests were registered, but based on an assessment of their weight and urgency." (letter to the Marshal of the Sejm of 14 April 2016).

inconvenient for various reasons, or else to speed up proceedings (i.e. in matters with a strong influence of the public opinion, interest groups, media or political pressure). All in all, this solution represents a threat to the authority of the President of the Constitutional Tribunal and is therefore inadmissible according to our Team.

This situation (to quote the Vice-President of the Constitutional Tribunal S. Biernat, who underlined that the procedure should be organised in such a way that places the body above suspicion) "may give rise to a suspicion that the body is opportunistic or politicised".[98] This possibility should be legally excluded for the benefit of the independence of the Tribunal and its judges. The rules and regulations of the Supreme Court, like those of the Supreme Administrative Court, also include the relevant provisions on ensuring the order and timeliness of examining cases.[99] The rule of examining cases based on the sequence in which they were registered at the court applies to the entire judiciary in Poland. Elevating this rule to the rank of an Act is justified by the Constitutional Tribunal's special competence. According to Article 73 paragraph 1 of the rules and regulations of the Supreme Court: "Cases are heard on the basis of the sequence in which they were registered at the Supreme Court, unless a specific provision stipulates otherwise", and paragraph 2 reads: "In particularly justified cases, the President of the Supreme Court (head of the department) may order that a case be heard out of turn".[100] Article 21 of the rules and regulations of the Supreme Administrative Court stipulates that the head of the adjudicating department manages the work of the department and, among others, "monitors setting the dates of hearings by judges", "controls the validity of adjourning hearings and the course of cases with lengthy proceedings", and "controls the timeliness of drafting justifications". According to Article 44 paragraph 1 of the rules and regulations: "The head of the department sets the dates of hearings for subsequent three-month periods", and paragraph 2 reads: "Cases for each of the hearings (sessions) are assigned on the basis of the sequence in which they were registered (...) taking into account cases that are to be examined out of turn". Article 49 further stipulates that: "Cases resulting from remedies concerning the judgments of voivodship administrative courts should be examined on the basis of the sequence in which they were registered at the court, unless a specific provision stipulates otherwise".

In Poland, the level of confidence in state bodies, including in the judiciary, is very low. This is confirmed by many research studies.[101] Unfortunately, the Venice Commission failed to

[98] Constitutional Tribunal judge S. Biernat said so during a session of the Sejm committees debating on the Constitutional Tribunal draft act in May 2015, orka.sejm.gov.pl/zapisy.

[99] See the Rules and Regulations of the Supreme Court adopted in a resolution of the General Assembly of Supreme Court Judges of 1 December 2003 (Official Gazette of the Republic of Poland reference: MP 2003 nr 57 poz. 9).

[100] See above.

[101] E.g. Opinion poll on the image of the judiciary, assessment of the reform of the judiciary, current social awareness

consider that. In view of the importance of statutory guarantees for improving the level of confidence, the sequence rule, which strengthens such guarantees, should be taken into account. Judges of the Constitutional Tribunal very clearly described this problem. Here's an example: during the discussion that took place at the session of Sejm committees devoted to the Constitutional Tribunal draft act, Vice-President S. Biernat – referring to another problem – pointed to the dangers that appear when a body is free to choose cases to examine (the matter at hand was the lack of the obligatory presence of the prosecutor during a Constitutional Tribunal hearing, which de facto means abandoning the rule of examining cases one by one, leaving it at the prosecutor's discretion), as this "may give rise to a suspicion that the body is opportunistic or politicised". At the Sejm committee sitting, S. Biernat said: "I appeal to the honourable deputies to uphold the obligatory participation of the Prosecutor General in proceedings before the Tribunal. It is not negligible whether the Prosecutor may select cases that are of interest to him or not, as unfortunately this may give rise to a suspicion that the body is opportunistic or politicised".[102] Since the Vice-President of the Constitutional Tribunal noticed that "selecting cases" by a state body (an analogy to the lack of a statutory order of hearing cases at the Constitutional Tribunal and the possibility to "select cases" by the President of the Tribunal) may give rise to "a suspicion that the body is opportunistic or politicised", and directed this remark at the independent Prosecutor General – for this very reason he should approve of the statutory limitation of "selecting the order" of applications by the President of the Tribunal.

Another argument for the statutory organisation of sequencing was cited by the Venice Commission, when it stated that "during the (...) visit, the length of proceedings before the Constitutional Tribunal was criticised", and "it would not only be politically legitimate to react to such a situation, but there might also be an obligation to do so".[103] However, at the same time the Venice Commission acknowledged (which de facto merely represents the Commission's subjective assessment), that the average time of 21 months to hear a case and adopt a judgment is not a "systemic" or "structural problem calling for immediate or a far-reaching reaction".[104] Our Team does not agree with this conclusion of the Venice Commission. On the contrary, one should recognise that such a "structural problem" exists and – according to our Team – requires an

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of alternative methods of solving conflicts and the rights of crime victims, Report of the Ministry of Justice, Warsaw 2009, J. Bełdowski, M. Ciżkowicz, D. Sześciło, *Efektywność polskiego sądownictwa w świetle badań międzynarodowych i krajowych,* Civic Development Forum (FOR) Report, Warsaw 2010.

[102] Report of the Justice and Human Rights Committee and Legislative Committee on the Constitutional Tribunal draft act tabled by the President of the Republic of Poland, Chancellery of the Sejm orka.sejm.gov.pl/zapisy May 2015.

[103] Point 55 of the Opinion of the Venice Commission.

[104] Point 56 of the Opinion of the Venice Commission.

"immediate and far-reaching reaction". The criticism of the time one has to wait for a Constitutional Tribunal judgment in Poland is fully justified. This problem should be seen in a broader context than that assumed by the Venice Commission. Poland has to catch up following several decades of the communist rule, and this requires a much higher working speed and greater activity of all bodies that serve the rule of law, human rights and democracy.

Another argument for the sequence rule was also provided by the Venice Commission.[105] The Commission stated that there are "a few states in which constitutional courts are obliged to examine the incoming cases in a certain chronological order", so this is both admissible and implemented in European practice. What is meant here is the principle of structuring the incoming applications, maintaining order. A principle thus construed is not tantamount to an absolute obligation of adjudicating and issuing judgments in strict chronological order.

A subsequent argument is provided by the position of the Grand Chamber of the European Court of Human Rights, which also regarded the chronological order of registering cases as the rule, noting that "other considerations than the mere chronological order in which cases are entered on the list" should only "sometimes" be taken into account by the constitutional court.[106] It follows that the ECHR also recognizes exceptions to the sequence rule, and precisely that is proposed by our Team. One should take into account the arguments of the Venice Commission that the sequence rule should not be absolutely binding. The main responsibility for external sequencing is vested in the President of the Constitutional Tribunal, and for internal sequencing – in judges presiding over adjudicating panels.

From the axiological and pragmatic standpoint, it would be valuable and proper to maintain this ordering principle. This rule provides for exceptions and is not understood as a mechanical obligation of setting strict dates for hearings already on the day the application is registered at the Constitutional Tribunal, but as a principle according to which applications submitted earlier are efficiently processed before those submitted later. The fact that the general schedule of the Constitutional Tribunal's work will be fully available online will serve as a strong social barrier protecting against violating this rule. According to our Team, the full external openness in that respect represents the foundation of the democratic procedure.

The proposed solution takes into account the fact that cases differ in terms of their importance and complexity. Consequently, some have been given priority by being enumerated in the Act, and in terms of others, such wording of the principle does not preclude the presiding judge

[105] See point 55 of the Opinion of the Venice Commission.
[106] Point 62 of the Opinion of the Venice Commission.

from establishing a slightly later or earlier date of the hearing than would result from the strict sequence in which the cases were registered at the Constitutional Tribunal. Introducing a statutory principle and external openness (transparency) will make it more difficult to block applications or move them along the waiting list for politically motivated reasons.

"Examining the application" should be interpreted as the entire process starting with the President of the Constitutional Tribunal assigning the case to a relevant adjudicating panel, through the presiding judge establishing the composition and date of the meeting and hearing, to issuing a judgment and publishing a justification. According to the Act, all of the above actions should be undertaken without delay, and their dates should be available to the public so as to enable the external social oversight of a fair and successive examination of cases.

Owing to this interpretation of the sequence rule, each presiding judge of an adjudicating panel will take autonomous decisions concerning the dates of individual cases, taking into account – as one of the important premises – the general sequence rule, which in no way violates such judge's independence.

IX.

The contemporary constitutional court is not only a negative legislator, but also a court safeguarding the constitutional rights and freedoms of the individual. It performs this function through the institution of the constitutional complaint. Owing to the so-called 'narrow' form of the complaint stipulated in the Constitution, our Team is inclined to call for a deep reform of this instrument of protecting human rights (Article 79 paragraph 1). The basis of its application should be extended to include final decisions in both administrative and court proceedings[107], and possibly also omissions of the executive. Since such a far-reaching reform would require an amendment to the Constitution of the Republic of Poland, our Team is absolutely of the opinion that until such an amendment is adopted, the applicable solutions should be those stipulated in the 1997 Constitutional Tribunal Act, in particular those referring to appealing against a decision on refusing to review a constitutional complaint.

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[107] *See* L. Garlicki, *"Ewolucja funkcji i zadań Trybunału Konstytucyjnego (dwadzieścia pięć tez na dwudziestopięciolecie)", in* Księga XXV-lecia Trybunału Konstytucyjnego. Ewolucja funkcji i zadań Trybunału Konstytucyjnego - założenia a ich praktyczna realizacja, *ed. by K. Budziło, Warsaw 2010, pp. 21–22; P. Tuleja, M. Grzybowski, "Skarga konstytucyjna jako środek ochrony praw jednostki w polskim systemie prawa", in* Sądy i trybunały w Konstytucji i w praktyce, *ed. by W. Skrzydło, Warsaw 2005, p. 123; A. Łabno, "Skarga konstytucyjna jako środek ochrony praw człowieka. Przyczynek do* dyskusji*", Przegląd Prawa Konstytucyjnego, no. 4(2012), p. 42 and ff.*

The opinion of the Venice Commission is based on a number of important axiological assumptions, including those related to perceiving the activities of the constitutional courts from the perspective of protecting the individual. This central theme clearly corresponds with the contemporary view of the function of the constitution and general evolution of constitutional courts. This way of perceiving the activity of constitutional courts is also seen in the theory and doctrine of Polish constitutional law, as testified by numerous academic publications. Our Team believes that this fragment of the Venice Commission's statement should be emphasised, especially in the context of analysing the constitutional measures of protecting human rights, including in particular the assessment of the effectiveness of the constitutional complaint. The constitutional complaint, introduced for the first time to the Polish Constitution in 1997, has the so-called 'narrow' form, which in many cases largely limits the actual protection of human rights. It only concerns situations when the human rights violation resulted from the unconstitutionality of the norm which formed the basis of ruling in the given case (Article 79 paragraph 1 of the Constitution). Executive and judiciary actions, which may also result in violating rights and freedoms, remain beyond the scope of review on account of protecting the individual.

According to our Team, the constitutional complaint requires thorough reform, as indicated by experience from its functioning in Poland and many other European countries. Without prejudice to the final shape of such reforms, our Team is of the opinion that the application of the complaint should be extended to include final decisions in both administrative and court proceedings.[108] One should also consider the possibility to extend the scope of the constitutional complaint to additionally include legislative and executive omissions. However, in the former case, the regulator's activity should be particularly careful and balanced, as this competence is very clearly associated with the Sejm's law-making capacity. The potential conflict of competence between bodies whose authority is differently legitimised would be a highly unfavourable outcome. The proposals put forward by our Team are on the one hand aimed at extending the Constitutional Tribunal's competence in a discipline that seems to be the natural field of operation of the judiciary, i.e. safeguarding the rights of the individual, and on the other at maintaining judiciary operations within the limits resulting from the nature of its authority.

The reform of the constitutional complaint has to take into account the specific nature of this institution, including in particular its subsidiary character. Consequently, the possibility of

[108] L. Garlicki, "Ewolucja funkcji...", pp. 21–22; P. Tuleja, M. Grzybowski, "Skarga konstytucyjna jako środek ochrony...", p. 123; A. Łabno, "Skarga konstytucyjna jako środek ochrony praw człowieka...", p. 42 and ff.; see also L. Bosek, M. Wild, "Komentarz do art. 79 ust. 1 Konstytucji RP", in *Konstytucja. Komentarz*, ed. by M. Safjan, L. Bosek. vol. I, Warsaw 2016, p. 1824 and ff.

applying this complaint to the results of law application by courts should be regulated accordingly. The practical considerations of applying the complaint are also important in the context of providing an adequate underlying norm. The regulator should take into account not only the substantial aspects of applying the constitutional complaint, but also the Constitutional Tribunal's actual capacity to perform this function. This is why the said reform should be implemented with particular attention to the Constitutional Tribunal's actual capacity to hear cases on a complaint basis; its premises should be regulated so as to maintain the sense of legal protection, but provide strict preliminary selection criteria. What should be used here is the broad experience of Spain, Germany as well as Hungary, and the legal solutions adopted by these countries.

X.

The establishment of transparent, and at the same time logical and functional principles of disciplinary proceedings against judges of the Constitutional Tribunal (both active and retired) is a necessary requirement of a democratic rule of law, in which public authorities and their functionaries act on the basis and within the limits of the law.[109] Furthermore, a correctly regulated accountability procedure concerning judges of the Constitutional Tribunal is an important element of legitimising constitutional judicature. One should also bear in mind the additional moral requirements applying to persons exercising public functions, and above all to judges. The mechanism of calling judges to disciplinary account should first and foremost safeguard the authentic independence of the Constitutional Tribunal and its judges.

Disciplinary proceedings against judges of the Constitutional Tribunal should be "locked" within the Tribunal, which means that other, external entities may not be involved in the procedure of enforcing disciplinary accountability. It should also be stressed that the President of the Constitutional Tribunal bears particular responsibility in disciplinary proceedings, which serves as another argument in favour of establishing a term of office for this post. However, confining disciplinary proceedings against judges of the Constitutional Tribunal within the Tribunal itself does not preclude external bodies from filing relevant notifications. It should be stressed that such a request does not launch any disciplinary proceedings against a judge, merely serving as a preliminary element, whose legitimacy is assessed by the President of the Constitutional Tribunal – autonomously and with full respect for the Tribunal's independence. The relevant recommendation should be to establish (by way of an act) a body that is particularly predestined to submit the said notification on the basis of the Constitution. This is the President of the Republic of Poland, whose

[109] See Article 7 of the Constitution of the Republic of Poland.

role is unquestionable here, as he is the guardian of the Constitution (see Article 126).

In Poland, a judge of the Constitutional Tribunal – like any other citizen of this country – is obliged to abide by the law. However, on account of the function performed and social status enjoyed by the judges, their fulfilment of the above obligation should have a qualified character. In no case should judicial independence be interpreted as a characteristic that relieves judges of their responsibility. Consequently, judges should be held accountable for violating the law, including for dishonourable conduct.

In Poland, the principles of holding judges to account are regulated solely by an ordinary act adopted on 25 June 2015 as the Act on the Constitutional Tribunal and amended by the Act of 22 December 2015. Pursuant to Article 28 paragraph 1 and 3 of the said Act, a judge of the Constitutional Tribunal may be held to disciplinary (and solely disciplinary) account before the Tribunal for violating the provisions of the law, offending the dignity of the office or other unethical behaviours that could undermine trust in his or her impartiality or independence.[110]

The Act of 25 June 2015, amended by the Act of 22 December 2015, does not regulate the question of initiating disciplinary proceedings against judges of the Constitutional Tribunal. Consequently, it should be assumed that all citizens of the Republic of Poland may notify (inform) the President of the Constitutional Tribunal of disciplinary offences committed by judges of the Tribunal. In response to the said notification, the President of the Constitutional Tribunal should appoint (at random) one of active judges of the Tribunal to act as the disciplinary spokesperson responsible for examining the given case. Having completed the investigation procedure, the disciplinary spokesperson should either refuse to file the application to institute disciplinary proceedings in the case at hand with the President of the Constitutional Tribunal or file such an application (in the former case, the spokesperson should communicate his or her decision to the person who submitted the notification, who may then appeal the spokesperson's decision within 7 days from the receipt date; such appeals should be examined by a panel of three judges randomly appointed by the General Assembly of Judges of the Constitutional Tribunal).

The amended Constitutional Tribunal Act of 22 December 2015 confers a particular role in instituting disciplinary proceedings against a judge of the Constitutional Tribunal upon the President of the Republic of Poland and the Minister of Justice. Article 28a reads: "Disciplinary proceedings may also be instituted further to an application from the President of the Republic of Poland or the

[110] A "disciplinary act" was very similarly defined in the Czech Republic. In the Act of 16 June 1993 (in §§ 132–142), it was referred to as "an action that consists in decreasing the solemnity and dignity of the function, behaviour that may result in the loss of trust." In Slovakia, on the other hand, in the Act of 10 January 1993, the following were indicated: "violating official duties, violating the solemnity of the post or a threat to trust enjoyed by judges".

Minister of Justice within 21 days from the date of receipt of the application, unless the President of the Tribunal decides that the application is unfounded. The applicant shall be served with the decision on refusing to institute disciplinary proceedings, with reasons stated, within 7 days from the date of issuing the said decision." Before the above-mentioned amendment of the Act, the Executive branch (President of the Republic of Poland, Minister of Justice) "was not entitled to institute disciplinary proceedings" (point 92 of the Opinion of the Venice Commission). The Venice Commission questioned this legal regulation on the grounds that "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" (point 93 of the Opinion of the Venice Commission).

According to the Team of Experts on the Issues Related to the Constitutional Tribunal, the above remarks concerning the President of the Republic of Poland are not legitimate for the following reasons: the President of the Republic of Poland is the guardian of the Constitution (Article 126 paragraph 2 of the Constitution), appoints the President and Vice-President of the Constitutional Tribunal, is held to account before the State Tribunal (Article 198 paragraph 1 of the Constitution), i.e. he is not accountable before the Constitutional Tribunal. Consequently, there are no constitutional obstacles that would prevent him from acting as an external body influencing the Constitutional Tribunal in the event of illegal or political actions undertaken by constitutional judges.

Moreover, the Venice Commission's remark in point 93 of the Opinion – that the President of the Republic of Poland has "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" – is a poor argument against granting him initiative to institute disciplinary proceedings, as criminal and disciplinary proceedings are two different and separate types of proceedings. It should further be noted that enabling the President of the Republic of Poland, as an external body, to submit the application referred to in Article 28a of the amended Act would facilitate instituting disciplinary proceedings, as initiating such proceedings "from the inside" (in particular with respect to the President or Vice-President of the Constitutional Tribunal) could be difficult.

As is clear from the above deliberations, the relevant provisions regulating the disciplinary accountability of constitutional judges are in place in Poland. Not all European countries have adopted similar regulations. In France, for example, the Constitutional Council Act of 6 November

1958 does not contain any provisions concerning the disciplinary accountability of members of the Council. In Spain there is only a provision enabling the Constitutional Court to depose a constitutional judge from his/her office, in Hungary – a provision allowing to remove a judge's immunity, and in Lithuania – a provision on suspending the powers of a Constitutional Court judge. In some countries, disciplinary proceedings against judges are the sole prerogative of the Constitutional Court (e.g. Spain, Portugal, Turkey); in others, disciplinary proceedings include a judge investigator (e.g. Portugal, Turkey), and in others still, provisions of the criminal procedure apply to disciplinary proceedings (Turkey, Slovakia). In Austria, on the other hand, disciplinary proceedings against constitutional judges are governed by provisions on the accountability of common court judges. In terms of instituting disciplinary proceedings against a constitutional judge, in Turkey this decision is taken by the Tribunal sitting as a full bench, in the Czech Republic – by the President of the Constitutional Court, and in Latvia – by the President of the Court, his deputy or three constitutional judges. In terms of the number of judges adjudicating on disciplinary matters, the most prevalent solution in the first instance are panels of three judges (e.g. the Czech Republic, Romania, Slovakia, Turkey). In Latvia, in the first instance, the Tribunal adjudicates as a full bench. Appealing the court judgment of the first instance in a disciplinary case to the full bench is possible, e.g. in the Czech Republic, Portugal and Slovakia, whereas certain countries have no provisions that would stipulate the possibility to appeal such a judgment (e.g. Latvia, Germany, Romania or Turkey).

In the Polish legal regulation governing disciplinary proceedings against a constitutional judge, the relevant application to institute such proceedings is submitted to the court of first instance by the President of the Constitutional Tribunal, with a panel of three judges adjudicating in the case (Article 29 paragraph 1 of the Act of 22 December 2015). The President of the Constitutional Tribunal decides on the judges to sit on first- and second-instance panels in a draw (Article 29 paragraph 1 and 2 of the Act). Our Team proposes to amend this fragment of the regulation by introducing retired judges of the Constitutional Tribunal to adjudicating in disciplinary cases on a voluntary basis. Consequently, such judges would be entitled rather than obligated to adjudicate in disciplinary proceedings. Like active judges, retired judges would also be selected by the President of the Constitutional Tribunal in a draw. However, they would not be able to preside over the panels, which would be enlarged accordingly: five judges in the first instance, including two retired ones, and seven judges in the second instance, including three retired ones.

In terms of disciplinary sanctions applicable to a judge of the Constitutional Tribunal for committing a disciplinary offence, the Act of 22 December 2015 lists the penalty of caution and

reprimand (Article 31) which may be administered in disciplinary proceedings before the Constitutional Tribunal, and the penalty of deposing a judge of the Tribunal which may be administered by the Sejm. This penalty may be requested from the Sejm, in particularly gross cases only, by the General Assembly of Judges of the Constitutional Tribunal acting on its own initiative or based on an application of the President of the Republic of Poland or Minister of Justice (Article 31a paragraph 1 and 2 of the Act). This solution has been clearly questioned by the Venice Commission (see point 94 of the Opinion). It is worth noting, however, that the Sejm is the very body that appointed the judge of the Constitutional Tribunal and that this sanction is related to violating the provisions of the law, offending the dignity of the post of a constitutional judge or other unethical behaviours that may undermine trust in the judge's impartiality or independence (this sanction may also apply to judges of the Constitutional Tribunal with respect to their conduct before assuming the post if they failed to discharge their obligations related to a public post held or proved unworthy of the post of a constitutional judge, as was stipulated by the previous statutory regulations). One should also mention the fact that the adopted statutory solution regarding the disciplinary penalty of deposing a judge of the Constitutional Tribunal, which may be administered by the Sejm, is related to similar solutions in place in Germany and Austria.

It should also be stressed that the disciplinary penalty of deposing a judge is limited to "particularly gross cases" (Article 31a paragraph 1 of the Act of 22 December 2015) and that it was fully justified to entrust a different body than the Constitutional Tribunal to decide upon the highest possible sanction. On the other hand, the position of the Venice Commission expressed in point 94 of the Opinion – that the new provisions enable the Sejm to decide upon deposing a judge on the basis of political considerations – should be regarded as groundless. After all, the Sejm is fully bound with the wording of the application submitted by the General Assembly of Judges of the Constitutional Tribunal. Whether or not such an application is served on the Sejm at all remains at the full discretion of the Tribunal.

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