The Act of 19 November 2015 amending the Constitutional Tribunal Act

186/11/A/2015

JUDGMENT

of 9 December 2015

Ref. No. K 35/15*

In the Name of the Republic of Poland

The Constitutional Tribunal, in a bench composed of:

Andrzej Wróbel – Presiding Judge

Mirosław Granat

Małgorzata Pyziak-Szafnicka

Piotr Tuleja – Judge Rapporteur

Sławomira Wronkowska-Jaśkiewicz,

Grażyna Szałygo – Recording Clerk,

having considered – at the hearing on 9 December 2015, in the presence of the applicants, the Sejm and the Public Prosecutor-General – the following joined applications:

1) an application submitted by a group of Sejm Deputies to determine the conformity of:
a) Article 1(6) of the Act of 19 November 2015 amending the Constitutional Tribunal Act (Journal of Laws – Dz. U. item 1928), and if the Act enters into force before the Tribunal adjudicates in the present case – Article 137a of the Constitutional Tribunal Act of 25 June 2015 (Journal of Laws – Dz. U. item 1064), to Article 2, Article 7, Article 10, and Article 194(1) of the Constitution of the Republic of Poland;
b) Article 1(4) of the Act of 19 November 2015, and if the Act enters into force before the Tribunal adjudicates in the present case – Article 21(1) and (1a) of the Constitutional Tribunal Act of 25 June 2015, to Article 194(1) of the Constitution;
c) Article 2 of the Act of 19 November 2015 to Article 2, Article 7, and Article 10 of the Constitution;
2) an application submitted by the Polish Ombudsman to determine the conformity of:
a) the Act of 19 November 2015 to Article 7, Article 112 and Article 119(1) of the Constitution;
b) Article 137a of the Act of 25 June 2015, added by Article 1(6) of the Act of 19 November 2015, to Article 45(1), Article 180(1) and (2) as well as to Article 194(1) in conjunction with Article 10 of the Constitution, as well as to Article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms, done at Rome on 4 November 1950 (Journal of Laws – Dz. U. of 1993 No. 61, item 284, as amended), and also to Article 25(c) in conjunction with Article 2 and Article 14(1) of the International Covenant on Civil and Political Rights, opened for signature in New York on 19 December 1966 (Journal of Laws - Dz. U. of 1977 No. 38, item 167);
c) Article 2 of the Act of 19 November 2015, to the principle of appropriate legislation arising from Article 2, to Article 45(1), Article 180(1) and (2) as well as Article 194(1) in conjunction with Article 10 of the Constitution, as well as to Article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms, and also to Article 25(c) in conjunction with Article 2 and Article 14(1) of the International Covenant on Civil and Political Rights;
3) an application submitted by the National Council of the Judiciary of Poland to determine the conformity of:
a) the Act of 19 November 2015;
b) Article 12(1) and (2), Article 18, Article 19(2), Article 21(1) and (1a) as well as Article 137a of the Constitutional Tribunal Act of 25 June 2015, as amended by Article 1, points 1, 2, 3, 4 and 6, of the Act of 19 November 2015;
c) Article 1(5) and Article 2 of the Act of 19 November 2015 – to Article 2, Article 7, Article 10, Article 112, Article 119(1) and Article 123 of the Constitution, due to the fact that the provisions of the Act were enacted by the Sejm in breach of the procedure required by law, i.e. without considering the opinions and motions of the National Council of the Judiciary which are provided for in Article 3(1)(6) of the Act of 12 May 2011 on the National Council of the Judiciary (Journal of Laws – Dz. U. No. 126, item 714, as amended);
4) an application submitted by the First President of the Supreme Court to determine the conformity of:

a) the Act of 19 November 2015 to Article 7 in conjunction with Article 112, Article 119(1) in conjunction with the Preamble and Article 2, as well as to Article 2 in conjunction with Article 7 and Article 186(1) of the Constitution, due to the fact that the Act was enacted by the Sejm in breach of the procedure required for the enactment thereof;
b) Article 12(1) of the Constitutional Tribunal Act of 25 June 2015, as amended by Article 1(1) of the Act of 19 November 2015 to Article 10 and Article 173 of the Constitution;
c) Article 21(1a) of the Act of 25 June 2015, added by Article 1(4)(b) of the Act of 19 November 2015 to Article 10, Article 45(1), Article 173, Article 180(1) and (2), as well as Article 194(1) of the Constitution, and also to Article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms;
d) Article 137a of the Act of 25 June 2015, added by Article 1(6) of the Act of 19 November 2015, to Article 2, Article 45(1), Article 173, Article 180(1) and (2), as well as Article 194(1) of the Constitution, and also to Article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms;
e) Article 2 of the Act of 19 November 2015 to Article 2, Article 10, Article 45(1), Article 173, Article 180(1) and (2), as well as Article 194(1) of the Constitution, and also to Article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms;

adjudicates as follows:

1. The Act of 19 November 2015 amending the Constitutional Tribunal Act (Journal of Laws – Dz. U. item 1928) **is consistent with Article 7, Article 112, Article 119(1) as well as Article 186(1) of the Constitution of the Republic of Poland.**

2. Article 12(1), second sentence, of the Constitutional Tribunal Act of 25 June 2015 (Journal of Laws – Dz. U. items 1064 and 1928), **as amended by Article 1(1) of the Act referred to in point 1, is inconsistent with Article 173 in conjunction with Article 10 of the Constitution.**

3. Article 21(1) of the Act referred to in point 2, as amended by Article 1(4)(a) of the Act referred to in point 1, in the part which includes the wording "within 30 days from the date of election", is inconsistent with Article 194(1) of the Constitution.

4. Article 21(1a) of the Act referred to in point 2, as amended by Article 1(4)(b) of the Act referred to in point 1, is inconsistent with Article 194(1) in conjunction with Article 10, Article 45(1), Article 173 as well as Article 180(1) and (2) of the Constitution.

5. Article 137a of the Act referred to in point 2, added by Article 1(6) of the Act referred to in point 1 – insofar as it concerns proposing a candidate for a judge of the Constitutional Tribunal to assume the office after the judge whose term of office ended on 6 November 2015 – is inconsistent with Article 194(1) in conjunction with Article 7 of the Constitution as well as is not inconsistent with Article 45(1), Article 180(1) and (2) of the Constitution in conjunction with Article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms, done at Rome on 4 November 1950, as amended by its Protocols Nos. 3, 5 and 8 as well as supplemented by its Protocol No. 2 (Journal of Laws –

Dz. U. of 1993 No. 61, item 284, of 1995 No. 36, items 175, 176 and 177, of 1998 No. 147, item 962, of 2001 No. 23, item 266, of 2003 No. 42, item 364 as well as of 2010 No. 90, item 587)**, and also with Article 25(c) in conjunction with Article 2 and Article 14(1) of the International Covenant on Civil and Political Rights, opened for signature in New York on 19 December 1966** (Journal of Laws – Dz. U. of 1977 No. 38, item 167).

6. Article 2 of the Act referred to in point 1 is inconsistent with Article 2, Article 7 as well as Article 45(1), Article 180(1) and (2), Article 194(1) in conjunction with Article 10 of the Constitution, as well as with Article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms, and also with Article 25(c) in conjunction with Article 2 and Article 14(1) of the International Covenant on Civil and Political Rights.

Moreover, the Tribunal decides:

pursuant to Article 104(1)(2) of the Constitutional Tribunal Act of 25 June 2015 (Journal of Laws – Dz. U. items 1064 and 1928)**, to discontinue the proceedings as to the remainder.**

STATEMENT OF REASONS

III

[…]

The Constitutional Tribunal has considered as follows:

1. The subject of the proceedings.

The subject of the Tribunal's consideration in these proceedings comprises the joined applications submitted by: the Ombudsman; a group of Sejm Deputies; the National Council of the Judiciary; the First President of the Supreme Court; (hereinafter: the applicants).

1.1. The most far-reaching allegation is the allegation that the entire Act of 19 November 2015 amending the Constitutional Tribunal Act of 25 June 2015 (Journal of Laws – Dz. U. item 1928; hereinafter: the Act of 19 November 2015) is unconstitutional, due to the fact that the challenged Act was enacted in breach of the legislative procedure. (…)

1.2. Apart from the allegations about the procedure for the enactment of the Act of 19 November 2015, the applicants raised substantive allegations with regard to the specific regulations included in the Constitutional Tribunal Act of 25 June 2015 (Journal of Laws –Dz. U. item 1064, as amended; hereinafter: the 2015 Constitutional Tribunal Act). Taking account of the fact that the Act of 19 November 2015 entered into force on 5 December 2015, the Tribunal's review should include all the provisions as amended by the Act of 19 November 2015. The applicants challenged the following provisions: Article 12(1) (which concerns the possibility of reappointing judges to the position of the President or Vice-President of the Tribunal); Article 21(1) and (1a) (which pertains to the taking of the oath of office by a judge of the Tribunal); as well as Article 137a, added to the 2015 Constitutional Tribunal Act on the basis of Article 1(6) of the Act of 19 November 2015 (which regards the time-limit for submitting a proposal of a candidate for a judgeship at the Tribunal to take the office after the judges whose terms of office ends in 2015).

For this reason, the subject of the Tribunal's substantive review comprises the above-mentioned provisions of the 2015 Constitutional Tribunal Act, on the basis of Article 104(1)(2) of the 2015 Constitutional Tribunal Act discontinued the proceedings within the scope of the consideration of substantive allegations with regard to Article 1(4) and Article 1(6) of the Act of 19 November 2015, due to the inadmissibility of the issuing of a ruling.

The substantive allegations were also raised by all the applicants with regard to Article 2 of the Act of 19 November 2015, which provides for the expiry of the term of office of the incumbent President and Vice-President of the Constitutional Tribunal. (…)

3. Allegations concerning the enactment of the Act of 19 November 2015.

(…)

Determining an infringement of the provisions of the procedure for enacting a statute constitutes a sufficient ground for declaring a challenged provision of the statute to be unconstitutional (see the Tribunal's judgments of: 24 June 1998, ref. no. K 3/98, OTK ZU No. 1998, item 52; 23 February 1999, ref. no. K 25/98, OTK ZU No. 2/1999, item 23; 19 June 2002, ref. no. K 11/02, OTK ZU No. 4/A/2002, item 43). However, determining the unconstitutionality of a normative act due to the manner in which it was enacted does not exclude the admissibility of the examination of substantive allegations (see the Tribunal's judgment of 22 September 1997, ref. no. K 25/97, OTK ZU No. 3-4/1997, item 35 as well as the judgment of 28 November 2007, ref. no. K 39/07, OTK ZU No. 10/A/2007, item 29).

The content of Article 50(3) of the 2015 Constitutional Tribunal Act confirms that the criteria for assessing constitutionality, as laid down in this Act, may be applied jointly. (…)

3.3. Allegations concerning the course of the legislative proceedings in the context of the Act of 19 November 2015

(…) In the applicants' opinion, the said Bill was not considered by the Sejm within the meaning of Article 119 of the Constitution, due to the fact that the legislative proceedings were carried out in undue haste, which was not justified by any constitutional considerations, as well as

that the requisite three readings were held merely formally, without undertaking dialogue with parties concerned as well as the lack of opinions and expert opinions, despite constitutional reservations raised with regard to the content of the Bill. Also, the applicants argued that the explanatory note for the Bill did not meet the requirements arising from Article 34(1) and (2) of the Sejm's rules of procedure, since it did not present the actual state of affairs within the scope that was to be regulated as well as within the scope of forecast social, economic, financial and legal effects, and also there was no presentation of the outcome of consultation and of the information about alternative legal solutions and opinions that were provided. The Ombudsman stressed that the Tribunal was competent to make referral for preliminary rulings to be issued by the Court of Justice of the European Union, and also challenged the assertion included in the explanatory note for the Bill that the subject matter of the Bill did not fall within the scope of EU law. Moreover, in the opinion of both applicants, in the course of work conducted on the Bill of 19 November 2015, the following provisions were infringed: Article 34(3) of the Sejm's rules of procedure, due to the lack of obligatory consultation; as well as Article 1(3) of the Supreme Court Act of 23 November 2002 (Journal of Laws – Dz. U. of 2013 item 499, as amended; hereinafter: the Supreme Court Act) and Article 3(1)(6) of the Act on the National Council of the Judiciary by making it impossible for those authorities to take a stance on the said Bill. The cumulative infringement of all those provisions led the Ombudsman and the First President of the Supreme Court to conclude that the challenged Act was enacted in breach of the Sejm's Rules of Procedure concerning the conduct of work in the Sejm – where the character of the breach was related to the constitutional dimension – which entails that it is inconsistent with Article 112 of the Constitution, and moreover it was not considered by the Sejm, and thus it is inconsistent with Article 119(1) of the Constitution (…)

An additional argument that weighs in favour of the unconstitutionality of the Act of 19 November 2015 indicated by the National Council of the Judiciary was the violation of the principle that statutes concerning systemic changes should be considered at the stage of the first reading held at a plenary sitting of the Sejm.

As regards the third application (…), i.e. the application submitted by the group of Sejm Deputies (…), the justification thereof included an argument that the Bill was passed by the Sejm within 48 hours (…).

(…) Although an infringement of norms enshrined in the Constitution in the course of the legislative process constitutes a sufficient ground for ruling a statute to be unconstitutional, the

infringement of statutory norms and norms provided for in rules of procedure does not always bring about such a legal effect. An infringement of the last-mentioned norms weighs in favour of the unconstitutionality of a statute only when this affects the fulfilment of the constitutional requirements for the legislative process, thus undermining the democratic standards for the enactment of law that arise from the principle of a state ruled by law (Article 2 of the Constitution) and the principle of representation (Article 4 of the Constitution). (…) In its previous jurisprudence, the Tribunal took account of the fact whether such infringements "occur with such intensity that they make it impossible for Sejm Deputies to take a stance, in the course of the work of the committee and at a plenary sitting, on particular provisions and the entirety of the Act" (the judgment of 23 March 2006, ref. no. K 4/06, OTK ZU No. 3/A/2006, item 32; similarly, in the Tribunal's judgments of: 3 November 2006, ref. no. K 31/06, OTK ZU No. 10/A/2006, item 147; 13 July 2011, ref. no. K 10/09, OTK ZU No. 6/A/2011, item 56; 7 November 2013, ref. no. K 31/12, OTK ZU No. 8/A/2013, item 121) as well as the Tribunal took into account "the frequency of those infringements and circumstances in which a given infringement arises – e.g. an action despite serious and well-known warnings about the unconstitutionality of a proposed solution, or an action that aims at depriving some parliamentarians of the possibility to participate in a particular debate. The multitude and recurrence of infringements of norms regulating the legislative procedure may constitute one of the grounds for classifying a given infringement as a significant one in the context of the constitutional review of law and for justifying a ruling on the unconstitutionality of a normative act under review" (the Tribunal's judgment of 16 July 2009, ref. no. Kp 4/08, OTK ZU No. 7/A/2009, item 112; similarly, in the Tribunal's judgments of: 23 March 2006, ref. no. K 4/06; 3 November 2006, ref. no. K 31/06). (…)

3.5. Infringements of procedural norms in the course of enacting the Bill of 19 November 2015.

Before evaluating whether the infringements of procedural norms in the course of enacting the Bill of 19 November 2015 weigh in favour of the unconstitutionality of the said Act, it is necessary for the Tribunal to determine whether the said infringements actually occurred. (…)

The allegation about the infringement of constitutional norms pertains to the fact that, at the stage of first reading, the Sejm's did not consider the Bill at a plenary sitting and the National Council of the Judiciary had no possibility of presenting its opinion on the Bill amending the Constitutional Tribunal Act.

3.5.1. The first reading at a plenary sitting.

3.5.1.1. Pursuant to Article 119(1) of the Constitution, the Sejm considers bills in the course of three readings. When analysing the content of that provision in its previous jurisprudence, the Tribunal concluded that the rule of three readings of a bill "should not be construed in a strictly formal way, i.e. as a requirement to consider a bill with the same designation in three readings (…). The aim of the three readings is to consider a given bill as thoroughly and diligently as possible, and thus to eliminate any risk of defectiveness or randomness of solutions adopted in the course of legislative work" (the Tribunal's judgment of 24 March 2004, ref. no. K 37/03, OTK ZU No. 3/A/2004, item 21; similarly, see the Tribunal's judgments of: 24 March 2009, ref. no. K 53/07, OTK ZU No. 3/A/2009, item 27; 7 November 2013, ref. no. K 31/12).

As noted by the Tribunal in its judgment of 7 November 2013, ref. no. K 31/12, it does not follow from the wording of Article 119(1) of the Constitution that each of the three readings needs to be held at a plenary sitting. The course of particular readings and the sitting where they are held fall within the scope of the conduct of work by the Sejm, which is regulated separately by each of the Houses of the Polish Parliament [i.e. the Sejm and the Senate] within the scope of discretion granted to each of them (Article 112 of the Constitution). (…) Exercising the said parliamentary autonomy arising from Article 112 of the Constitution, the Sejm has decided that the first reading of bills may take place at a plenary sitting or a sitting of a Sejm committee (Article 37(1) of the Sejm's Rules of Procedure); however, the said rule does not concern: bills amending the Constitution; state budget bills; tax bills; bills concerning the election of the President of the Republic of Poland, elections to the Sejm and the Senate as well as elections of local self-government authorities; bills which regulate the organisational structure and competence of public authorities; as well as draft legal codes. Indeed, in accordance with Article 37(2) of the Sejm's Rules of Procedure, the first reading of the aforementioned bills takes place at a sitting of the Sejm. In order to determine the meaning of the norm which requires that the first reading be held at a sitting of the Sejm, one should also take account of Article 39 of the Sejm's Rules of Procedure; it follows from the said provision that the first reading comprises, *inter alia*, a debate on general assumptions underlying a given bill (para 1), and may end in the rejection of the bill as a whole, but only when the aforementioned reading is held at a sitting of the Sejm (para 2). Thus, the first reading is aimed at considering matters pertaining to the essence of a bill. Hence, in the case of bills that are significant for the state, the Sejm has decided that the first reading is to be held at a plenary sitting of the Sejm.

3.5.1.2. There is no doubt that the first reading of the Bill of 19 November 2015 was not held at a plenary sitting of the Sejm, but it took place at a sitting of a Sejm committee. Hence, there was an infringement of Article 37(2) of the Sejm's Rules of Procedure, as the said Bill regulated the organisational structure of a public authority, and more precisely – the organisational structure of the Constitutional Tribunal. (…)

In the present case, there were fewer than 24h between the first and second reading. The Bill was not referred to a subcommittee; nor was it analysed at a few sittings by the committee; moreover, no public hearing was ordered to be held. Indeed, there was only one sitting of the Legislative Committee at which the first reading and a follow-up analysis of the Bill were held. Furthermore, the first reading of the said Bill was held after 5 days from the date of lodging the Bill with the Marshal of the Sejm. This means that, in the case under discussion, the committee refrained from applying the guarantee rule arising from Article 37(4) of the Sejm's Rules of Procedure, in accordance with which the first reading should take place no earlier than on the seventh day from the date of service of a bill on Sejm Deputies. (…) In this case, the Sejm also refrained from applying the second guarantee rule, arising from Article 44(3) of the Sejm's Rules of Procedure, in accordance with which the second reading may take place no earlier than on the seventh day from the date of service of a competent committee's report on Sejm Deputies. In the case under discussion, fewer than 24h elapsed between the first and second reading, which may be considered to be sufficient time for reading the report, but there are doubts as to whether it was possible to make proper preparations for further proceedings on the Bill. This, in turn, breaches the requirement that all parliamentary stakeholders should have the possibility of active participation in legislative proceedings. A debate on the general assumptions of the Bill of 19 November 2015 was held at the sitting of the committee; fewer than 24 hours later, the second reading was held, and then forthwith afterwards, on the same day, the third reading was held, in the course of which the Bill was passed by the Sejm.

The Constitutional Tribunal has no doubts as to the fact that the legislative proceedings were conducted in breach of the provisions of the Sejm's Rules of Procedure, and that the scale of those breaches was considerable. However, the Tribunal takes account of its judgment issued by a full bench on 7 November 2013, ref. no. K 31/12, in which the Tribunal deemed that the holding of the first reading at sitting of a committee, and not at a plenary sitting of the Sejm, constitutes an infringement of Article 37(2) of the Sejm's Rules of Procedure, but it had no negative impact on further stages of the legislative process. In particular, this did not prevent Sejm Deputies, including

those who were not members of the competent committee, from participating in the legislative process. (…)

The circumstances of the present case could justify a departure from the view expressed in the case K 31/12, in accordance with which the holding of the first reading of a bill on the organisational structure and competence of public authorities at a sitting of a committee constitutes no breach of the Constitution. In particular, there are serious doubts as to whether it was possible for all the parliamentary stakeholders to participate in such a legislative process. Yet, a departure from a view expressed by a full bench of the Tribunal would also require a ruling by a full bench, as provided for in Article 44(1)(1)(e) of the 2015 Constitutional Tribunal Act. In the current situation, it is not possible for the Tribunal to adjudicate as a full bench. Therefore, seeing no procedural possibilities of determining the unconstitutionality of the breaches of the legislative procedure, the Constitutional Tribunal agreed with the stance of the Public Prosecutor-General, and deemed that the Act of 19 November 2015 is consistent with Article 7, Article 112, Article 119(1) as well as Article 186(1) of the Constitution.

3.5.2. Making it impossible for the National Council of the Judiciary to present its opinion on the said Bill.

3.5.2.1. Pursuant to Article 186(1) of the Constitution, the National Council of the Judiciary safeguards the independence of courts and judges. The said task is carried out, *inter alia*, by involving the National Council of the Judiciary in procedures for enacting law concerning the independence of courts and judges as well as for determining the constitutionality of the said law. As part of the procedure for enacting law, the National Council of the Judiciary is authorised to provide opinions on normative acts concerning courts and judges, as well as to propose motions in that respect (Article 3(1)(6) of the Act on the National Council of the Judiciary). (…)

Thus, although the opinion of the National Council of the Judiciary is not legally binding and merely serves the broadening of the knowledge of an authority that prepares a draft of a normative act and an organ of public authority that considers the bill, then taking account of the said opinion is always necessary when the bill concerns the independence of courts and judges. (…)

The law does not specify at which stage of legislative proceedings a bill should be referred to the National Council of the Judiciary for it to issue an opinion on the bill. However, what follows

from Article 34(3), first sentence, of the Sejm's Rules of Procedure, the procedure for issuing the opinion should be applied as early as the stage of drafting the bill, since an explanatory note for the bill ought to include issued opinions, if there is a statutory obligation to request such opinions. (…)

3.5.2.2. In the present case, the need to request an opinion from the National Council of the Judiciary with regard to the Bill amending the Constitutional Tribunal Act was pointed out in the preliminary opinion of 17 November 2015, which was prepared by the Legislative Bureau of the Chancellery of the Sejm. On the very same day, the Marshal of the Sejm requested the National Council of the Judiciary to present an opinion on the Bill, but, at the same time, he referred the Bill for the first reading at a sitting of the Legislative Committee. In its letter of 19 November 2015, the National Court of the Judiciary stated that it would express its opinion on the Bill at an extraordinary sitting on 24 November 2015. However, without waiting for an opinion of the National Council of the Judiciary, on 19 November 2015 the Sejm passed the Bill amending the Constitutional Tribunal Act, and on 20 November 2015, the Senate adopted the said Bill without any amendments and on that day the President signed the Bill, and subsequently the amending Act was published in the Journal of Laws.

When assessing those circumstances in the light of the binding provisions, it should be first determined whether providing an opinion on the Bill amending the Constitutional Tribunal Act falls within the scope of the basic task of the National Council of the Judiciary, i.e. the task of safeguarding the independence of courts and judges. (…) Despite all those links between the independence of courts and the independence of the Constitutional Tribunal, it should be stated that the National Council of the Judiciary is not a body established to safeguard the independence of the Constitutional Tribunal. Unlike the other judges, the judges of the Constitutional Tribunal have no representatives in the composition of the National Council of the Judiciary. Nor does the National Council of the Judiciary have such powers with regard to the judges of the Constitutional Tribunal as it has in the context of the other judges, for instance, within the scope of the procedure for appointing judges or the procedure for retiring judges. (…)

The competence of the National Council of the Judiciary to present opinions on normative acts is not explicitly expressed in the Constitution, but is included in Article 3(1)(6) of the Act on the National Council of the Judiciary. Insofar as it concerns normative acts regarding the independence of courts within the meaning of Article 175(1) of the Constitution, i.e. the Supreme Court, common courts, administrative courts and military courts, as well as the independence of the judges of those courts, it has its legal basis in Article 186(1) of the Constitution. However, within

the scope in which the same competence refers to normative acts that pertain to the independence of the Constitutional Tribunal, the only basis for the said competence is the statute. It guarantees that the National Council of the Judiciary has the right to present its opinions on normative acts concerning all judges, i.e. also the judges of the Constitutional Tribunal, and this is due to the link between that subject matter and the independence of courts and judges. Since the said competence can be traced back to a statute, it may not be assumed that the lack of an opinion presented by the National Council of the Judiciary in the legislative proceedings which concerned the Bill amending the Constitutional Tribunal Act constituted an infringement of the Constitution that confirmed the defectiveness of the procedure for enacting the Act of 19 November 2015. For this reason, the Constitutional Tribunal has adjudicated that the said Act is consistent with Article 186(1) of the Constitution.

3.5.3. The quick pace of the legislative proceedings

3.5.3.1. The other allegations raised in the present case with regard to breaches of the Sejm's Rules of Procedure in the course of the legislative proceedings are mostly related to the pace of work carried out on the Bill amending the Constitutional Tribunal Act. (…) The allegations pertain to the lack of consultation with entities concerned before the Bill was submitted to the Sejm as well as only formal referral by the Marshal of the Sejm to competent authorities for presenting their opinions, and further proceedings without waiting for receiving the opinions (Article 34(3) of the Sejm's Rules of Procedure). The quick pace of the legislative proceedings was also manifested by the resignation from the seven-day time-limit which should lapse between the date of service of the Bill on Sejm Deputies and the date of the first reading of the Bill (Article 37(4) of the Sejm's Rules of Procedure) as well as between the date of service of the committee's report and the date of the second reading of the Bill (Article 44(3) of the Sejm's Rules of Procedure). Furthermore, the Sejm made the decision to hold the third reading forthwith, without referring the Bill to the committee after the second reading, although during the second reading, motions and amendments were proposed (Article 48 of the Sejm's Rules of Procedure). As a result of expediting proceedings as much as possible, resorting to all available measures to shorten time-limits and bypass certain stages, the Bill amending the Constitutional Tribunal Act was considered in the Sejm for two days and, afterwards, during the following day – the Bill adopted by the Sejm was considered by the Senate, signed by the President, and published in the Journal of Laws.

3.5.3.2. (…) In the present case, the Constitutional Tribunal wishes to maintain the view that a quick pace of legislative proceedings – even as quick as the pace of the enactment of the Act of 19 November 2015 – does not, in itself, determine the unconstitutionality of a statute due to a defective procedure for the enactment thereof. As part of the autonomy granted thereto, the Parliament enjoys discretion as regards setting the pace of legislative work. Nevertheless, the Tribunal wishes to emphasise that the said discretion is limited by the requirement that the Sejm considers bills in the course of three readings, as stipulated in Article 119(1) of the Constitution. The consideration of a bill means the substantive consideration of the bill, which in turn requires an appropriate time-frame that is adjusted to the significance and degree of complexity of the subject matter under regulation. Certain guidelines concerning statutes that should not be enacted in haste arise from the Constitution. (…)

The subject matter that pertains to such important systemic issues (…) required thorough and diligent consideration thereof by the Sejm, and this would have been possible only by setting a reasonable time-frame for the legislative procedure. The quick pace of the legislative work on the Act of 19 November 2015 was not desirable not only due to the significance of the subject matter under regulation and the novel character of the adopted solutions, but also for the reason that the matters pertaining to the functioning of Constitutional Tribunal – despite what had been claimed in the explanatory note for the Bill – falls within the scope of EU law. Like any other court, the Constitutional Tribunal is authorised – on the basis of Article 267 of the Treaty on the Functioning of the European Union (consolidated version, OJ C 326 of 26.10.2012, p. 47) – to make a referral for a preliminary ruling to be issued by the Court of Justice of the European Union. The Constitutional Tribunal resorted to exercising that power recently, when referring to the Court of Justice for a preliminary ruling in the context of the case K 61/13 (see the Tribunal's decision of 7 July 2015, ref. no. K 61/13). Any amendment made to law which directly or indirectly concerns the organisational structure of the Constitutional Tribunal as well as the status of the judges of the Tribunal is of relevance when assessing whether the Constitutional Tribunal is a court within the meaning of Article 267 of the Treaty on the Functioning of the European Union, and thus whether the Tribunal is competent to make referrals for preliminary rulings. Due to the necessity to take account of the said European context, amendments to legal provisions on the Constitutional Tribunal should not be adopted in a hasty manner.

Despite the fact that the legislative proceedings in the course of which the Act of 19 November 2015 was enacted were conducted very quickly, the said quick pace does not yet determine – as it has been mentioned earlier on – the unconstitutionality of the said Act, although it

may be assessed negatively from the point of view of the parliamentary culture and parliamentary good manners.

4. The assessment of the conformity of Article 12(1), second sentence, of the Constitutional Tribunal Act of 25 June 2015, as amended by Article 1(1) of the Act of 19 November 2015, to Article 173 in conjunction with Article 10 of the Constitution.

4.1. (…) Article 21(1) stipulates that: “The President of the Tribunal shall be appointed by the President of the Republic of Poland for the period of three years, from among at least three candidates proposed by the General Assembly. The same person may be appointed the President of the Tribunal twice.”. In the opinion of the President of the Supreme Court, the said provision undermines the principle of the separation of powers and the principle of the independence of the Constitutional Tribunal, as it implies that the President of the Tribunal applying for reappointment is dependent on an executive authority. The President of the Supreme Court argues that such a solution is dysfunctional and distorts the balance between the President of Poland and the Constitutional Tribunal. A Constitutional Tribunal composed of judges who are subject to supraconstitutional dependency on the President of Poland will no longer bear the characteristics of an independent and impartial organ of the judiciary.

(…) [T]he subject of the allegation solely comprises Article 12(1), second sentence, of the 2015 Constitutional Tribunal Act as amended by Article 1(1) of the Act of 19 November 2015 – indeed, the President of the Supreme Court does not question the legislator’s introduction of a three-year term of office with regard to the President of the Tribunal. The applicants’ allegations focus only on the possibility of reappointment to the position of the President of the Tribunal in the case of a person who has already held that position. (…)

In accordance with Article 12(5) of the 2015 Constitutional Tribunal Act, the said regulation is also applicable to the Vice-President of the Tribunal. (…)

4.2. (…) [R]elying on the views presented by the representatives of the doctrine, it is worth noticing that, in the case of the judges of the Constitutional Tribunal, “the scope *ratione materiae* of their independence comprises (…) not only any activities undertaken by the Constitutional Tribunal within the ambit of adjudication (…), but also any activities related to the management of the process of adjudication, as well as any situations where a judge as a person in whom the public repose confidence will be appointed to a non-judicial organ of public authority (e.g. the National Electoral Commission)” (L. Garlicki, comments on Article 195, [in:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, (ed) L. Garlicki, vol. 4, Warszawa 2005, p. 3). (…)

4.3. In the light of the above assumptions about the principle of the independence of the Constitutional Tribunal, the Tribunal maintains its previous stance that the scope of the legislator’s discretion permits the introduction of a fixed term of office with regard to the positions of the

President and Vice-President of the Tribunal. However, the legislator's discretion in that respect is not unlimited (…).

As regards the solution under discussion, when regulating the issue of filling in vacancies in the positions of the President and Vice-President of the Constitutional Tribunal, the legislator provided for a possibility that an executive authority may evaluate the work of a judge who has been the incumbent President or Vice-President. What follows from the explanatory note to the amending Bill is that the legislator explicitly assumed that, depending on the result of the evaluation, the President of Poland could "reward" a person whom s/he considers to be an effective administrator, granting the person the further performance of the duties assigned to the President (Vice-President) of the Tribunal. Such a mechanism does not meet the requirement of balance and cooperation between the separate branches of government, and manifests an infringement of the principle of the independence of the Constitutional Tribunal and its judges.

A procedure for filling vacancies in managerial positions in the Tribunal in accordance with which it is permissible to apply for reappointment creates room for an executive authority to interfere in an unauthorised way in the functioning of the constitutional court. A judge who has prospects for reappointment to the same managerial position may be subject to pressure exerted by an authority that is competent to determine who is appointed to the said position. Article 12(1), second sentence, of the 2015 Constitutional Tribunal Act creates a possibility which might trigger on the part of the President of Poland a temptation to interfere in the way the President of the Tribunal manages the adjudication process. In addition, it may not be ruled out that the prospect of reappointment could also affect the judge's performance of judicial duties. In such circumstances, a judge who both holds the position of the President (Vice-President) of the Tribunal and intends to apply for reappointment may be perceived as susceptible to certain suggestions as to the content of issued rulings, or even as a judge who anticipates such suggestions. A mere potential risk of that kind might result in the judge's loss of reputation as an independent and impartial judge. (…)

Such a situation may lead to irregularities – a person having prospects for reappointment to the current position may be particularly at risk of being pressurised by those who decide about the reappointment. By contrast, the legislator's obligation is to shape the position of the judges of the Tribunal in such a way that they will be guaranteed freedom from any such pressure.

Taking the above into consideration, the Tribunal deems that Article 12(1), second sentence, of the 2015 Constitutional Tribunal Act, as amended by Article 1(1) of the Act of 19 November 2015, is inconsistent with Article 173 in conjunction with Article 10 of the Constitution.

5. The allegation about the non-conformity of Article 21(1) of the 2015 Constitutional Tribunal Act to Article 194(1) of the Constitution.

5.1. The subject of the allegation.

5.1.1. The group of Sejm Deputies requested the Tribunal to determine that Article 21(1) is inconsistent with Article 194(1) of the Constitution. Pursuant to the said provision:

"A person elected to assume the office of a judge of the Tribunal shall take the following oath in the presence of the President of the Republic of Poland within 30 days from the date of election (…)".

5.1.2. What the applicants indicated as the subject of the review is the whole of Article 21(1) of the 2015 Constitutional Tribunal Act. Article 21(1), as amended by the Act of 19 November 2015, mostly repeats the previous wording of that provision, i.e. it stipulates that a certain oath of office is to be taken before the President of the Republic of Poland by a person elected by the Sejm to hold the office of a judge of the Constitutional Tribunal. The Act of 19 November 2015 added the following wording to Article 21(1) of the 2015 Constitutional Tribunal Act, thus specifying the time-limit for taking the oath: "within 30 days from the date of election". (…)

5.1.3. As regards a higher-level norm for the review of Article 21(1) of the 2015 Constitutional Tribunal Act, the group of Sejm Deputies indicated Article 194(1) of the Constitution. Pursuant to that provision: "The Constitutional Tribunal shall be composed of 15 judges chosen individually by the Sejm for a term of office of 9 years from amongst persons distinguished by their knowledge of the law. No person may be chosen for more than one term of office".

(…) In the opinion of the group of Sejm Deputies, in the light of the amended provision, the President of Poland becomes a co-participant of the process of choosing judges of the Tribunal. Should the President refuse to give the oath of office to a newly-elected judge, or should s/he on purpose delay the giving of the said oath of office, this will directly impact – in the view of the group of Sejm Deputies – the possibility of exercising the office by the newly-elected judge of the Tribunal, and will hence affect the composition of the Tribunal. Undoubtedly, such a solution is contrary to the guarantee provided for in Article 194(1) of the Constitution.

5.2. A constitutional issue that still remains to be resolved after the Tribunal's judgment of 3 December 2015, ref. no. K 34/15.

5.2.1. In its judgment of 3 December 2015, ref. no. K 34/15, the Tribunal assessed the conformity of Article 21(1) of the 2015 Constitutional Tribunal Act, in the version before the amendment introduced by the Act of 19 November 2015, to Article 194(1) of the Constitution. (…) According to the said judgment, Article 21(1) of the 2015 Constitutional Tribunal Act, interpreted other than that the President of the Republic of Poland is obliged to give the oath of office forthwith to a judge of the Constitutional Tribunal who has been elected by the Sejm, is inconsistent with Article 194(1) of the Constitution. The Tribunal did not question, in principle, the legislative solution where the wording of the Constitutional Tribunal Act provides that a judge of the Tribunal takes the oath of office before the President of Poland. However, it held that any other interpretation of Article 21(1) of the 2015 Constitutional Tribunal Act – than that the President of the Republic of Poland is obliged to give the oath of office forthwith to a judge of the Constitutional Tribunal who has been elected by the Sejm – would violate the principle that judges of the Constitutional Tribunal are to be chosen by the Sejm (Article 194(1) of the Constitution). (…)

5.2.2. The subject of the review in the present case is Article 21(1) of the 2015 Constitutional Tribunal Act, as amended by the Act of 19 November 2015, where the latter Act did not substantially change the wording of the challenged provision. By the Act of 19 November 2015, only the following words, concerning the taking of the oath of office, were added: "within 30 days from the date of election". In its judgment of 3 December 2015, ref. no. K 34/15, the Tribunal conducted the constitutional review with regard to the previous wording of Article 21(1) of the 2015

Constitutional Tribunal Act – in the light of Article 194(1) of the Constitution – which did not include the words "within 30 days from the date of election", pertaining to the time-limit for taking the oath of office, as these words were later added by the Act of 19 November 2015.[1] Consequently, the constitutional issue that was not addressed in the above-mentioned judgment, and still remains to be resolved in the present case, is the issue whether the 30-day time-limit for taking the oath of office before the President of Poland by a person elected to the office of a judge of the Tribunal, which was added by the Act of 19 November 2015 to the wording of Article 21(1) of the 2015 Constitutional Tribunal Act, is consistent with Article 194(1) of the Constitution.

5.3. The assessment of the constitutionality of the amendment to Article 21(1) of the 2015 Constitutional Tribunal Act – introduced by the Act of 19 November 2015 – in the light of Article 194(1) of the Constitution.

5.3.1. Article 21(1) of the 2015 Constitutional Tribunal Act, as amended by the Act of 19 November 2015, stipulates that a person elected to the office of a judge of the Tribunal takes the oath of office before the President of Poland "within 30 days from the date of election". Such a solution contradicts the Tribunal's judgment of 3 December 2015, in which the Tribunal ruled that Article 21(1) of the 2015 Constitutional Tribunal Act, interpreted other than that the President of the Republic of Poland is obliged to give the oath of office forthwith to a judge of the Constitutional Tribunal who has been elected by the Sejm, is inconsistent with Article 194(1) of the Constitution. At the same time, the Tribunal stressed that a delay in the giving of the oath of office may not be justified by an allegation about the defectiveness of the legal basis of the election. (…)

5.3.2. (…) What follows from the principle that the organs of public authority function on the basis of, and within the limits of, the law and the principle of a democratic state ruled by law is a clear conclusion that in the case where legal norms do not explicitly provide for a power of a state authority, the said power must not be presumed and, on the basis of a different kind of power, an intention may not be attributed to the legislator where he did not express such an intention. This is even more true in the case of the constitution-maker, to whom such an intention may not be attributed, and who in Article 194(1) of the Constitution – unlike in other provisions which regulate the appointment of the members of other constitutional organs of the state – provides solely for the participation of the Sejm in the election procedure concerning judges of the Tribunal.

The giving of the oath of office to a new judge of the Tribunal, elected by the Sejm, is an obligation of the President of Poland, who should take action so that the judges elected by the Sejm could forthwith commence the exercise of the said office. The realm of the said President's activity related to the implementation of the norm arising from Article 21(1) of the 2015 Constitutional Tribunal Act is determined strictly by the wording of Article 194(1) of the Constitution, as well as Article 126(1) of the Constitution. This way the President of Poland exercises his/her statutory power, at the same time ensuring the continuity of judicial authority.

The adoption of the interpretation that Article 21(1) of the 2015 Constitutional Tribunal Act implies a possibility that the President of Poland could refuse to give the oath of office to a judge of the Tribunal who has been elected by the Sejm and who is ready to take the said oath might prevent the Tribunal from considering cases as a full bench. This would be contrary, *inter alia*, to the Tribunal's scope of competence with regard to the President of Poland, i.e. to the range of cases, specified in the Constitution, which the Tribunal should consider. (…)

In its judgment of 23 March 2006, ref. no. K 4/06, the Tribunal stressed that when the legislator's action disrupts the continuity of the functioning of a constitutional authority, this results in an infringement of the principle of a democratic state ruled by law as well as the principle that public authorities are to function on the basis of, and within the limits of, the law. Such an effect would indeed result from action taken by the President of Poland where the said President would refuse to give the oath of office to the judges of the Tribunal who were elected to take office after the judges whose terms of office had expired, to such an extent that the Tribunal would not be able to consider cases as a full bench. Such negligence would make it impossible for the said judges to perform their judicial duties and participate in the issuing of rulings in cases considered by the Tribunal. (…)

Moreover, an interpretation that, in the light of Article 21(1) of the 2015 Constitutional Tribunal Act, the President of Poland has the power to refuse to give the oath of office, i.e. the power not to complete the composition of the Tribunal by including the person elected by the Sejm, together with setting a fixed date for the end of the judge's term of office (namely, the date when a judgeship in the Tribunal is vacated), would also be contrary to the 2015 Constitutional Tribunal Act. Article 17(2) of the 2015 Constitutional Tribunal Act stipulates that the Sejm elects judges of the Constitutional Tribunal by an absolute majority vote in the presence of at least half of the statutory number of Sejm Deputies. By contrast, Article 20 of the 2015 Constitutional Tribunal Act provides that if a vote in the Sejm has not resulted in "the election of a judge of the Tribunal", then new candidates are to be proposed. Therefore, the election of a judge of the Tribunal is construed as a positive result of the vote in the Sejm, which is not regarded as an element of the procedure in which the President of Poland participates.

5.3.3. Introduced by the Act of 19 November 2015, the 30-day time-limit for taking the oath of office infringes the principle that a judge of the Tribunal elected by the Sejm should be able to take the said oath forthwith after his/her election. Therefore, a possibility to take the said oath should be created forthwith by the President. Challenged Article 21(1) of the 2015 Constitutional Tribunal Act should be read in conjunction with the provision which introduces a certain sanction for failure to take the oath of office. Indeed, pursuant to Article 21(2) of the 2015 Constitutional Tribunal Act, "refusal to take the oath of office shall be tantamount to resignation from the office of a judge of the Tribunal", which – in the light of Article 36(1) of the 2015 Constitutional Tribunal Act – means the expiry of the mandate of a judge of the Tribunal. The identical wording was in Article 5(6) of the 1997 Constitutional Tribunal Act. Such a far-reaching result (in fact, the loss of the judgeship in the Tribunal) is linked by the legislator with the judge's action that involves refusal to take the oath of office.

If legal norms do not explicitly provide for a particular power of a given state authority, for instance, a power to decide about the election of the judges of the Tribunal in a negative way, i.e. by refusing to give the oath of office, the said power should not be presumed. When giving the oath of office to a new judge of the Tribunal elected by the Sejm, the President of Poland does not block the result intended by the constitution-maker, namely that a judge elected by the Sejm could forthwith commence the performance of his/her judicial duties. By contrast, the challenged provision introduced such a possibility with a certain temporal scope, and thus it granted the President of Poland a power to co-participate in the procedure for choosing the composition of the Tribunal, which contradicts Article 194(1) of the Constitution.

5.3.4. In conclusion, the Tribunal maintained the view presented in its judgment of 3 December 2015, ref. no. K 34/15. When specifying, in greater detail, the procedure for electing judges of the Tribunal, the legislator remains bound by the rules that arise from the Constitution, including Article 194(1) of the Constitution, within the meaning of which it is the Sejm's task to

choose judges of the Tribunal. The legislator may not assign the task of choosing the judges to another state authority; nor may he introduce solutions that would permit the transfer of powers to determine the composition of the Tribunal from the Sejm to another public authority. Article 21(1) of the 2015 Constitutional Tribunal Act expresses a norm governing competence which imposes on the President of Poland the obligation to forthwith give the oath of office to a judge of the Tribunal who has been elected by the Sejm. (…)

The Tribunal has deemed that Article 21(1) of the 2015 Constitutional Tribunal Act is inconsistent with Article 194(1) of the Constitution.

6. The allegation about the non-conformity of 21(1a) of the 2015 Constitutional Tribunal Act to Article 10, Article 45(1), Article 173, Article 180(1) and (2), Article 194(1) of the Constitution as well as Article 6(1) of the European Convention for the Protection of Human Rights.

6.1. The subject of the allegation.

6.1.1. The group of Sejm Deputies and the First President of the Supreme Court requested the Tribunal to determine that Article 21(1a) of the 2015 Constitutional Tribunal Act is inconsistent with Article 194(1) of the Constitution. Moreover, the first President of the Supreme Court requested the Tribunal to determine that Article 21(1a) of the 2015 Constitutional Tribunal Act is also inconsistent with Article 10, Article 45(1), Article 173, Article 180(1) and (2) of the Constitution as well as Article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms, done at Rome on 4 November 1950, as amended by its Protocols Nos. 3, 5 and 8 as well as supplemented by its Protocol No. 2 (Journal of Laws – Dz. U. of 1993 No. 61, item 284, as amended; hereinafter: the Convention). Arguments presented by the First President of the Supreme Court which referred to an infringement of the Convention are general in character, and hence the Tribunal concentrates at this point on arguments that concern the higher-level norms for the review indicated in the Constitution.

Pursuant to Article 21(1a) of the 2015 Constitutional Tribunal Act, as amended by the Act of 19 November 2015: “The taking of the oath of office shall commence the term of office in the case of a judge of the Tribunal”. The explanatory note for the Bill amending the Constitutional Tribunal Act, the Sejm Paper No. 12/8th term of the Sejm) indicates that: “pursuant to Article 194 of the Constitution, judges of the Tribunal are chosen by the Sejm. (…) Including a date for the commencement of the term of office by a judge of the Tribunal in the Constitutional Tribunal Act which is determined on the basis of the moment of taking the oath of office will bring about a normative order in the situation of the judges of the Tribunal and will constitute efforts to meet the proposals of the doctrine (…)”. However, the explanatory note does not mention any examples of situations, in the last decades, in the practice of shaping the composition of the Tribunal, where doubts would arise as to the beginning of the term of office in the case of a judge of the Tribunal, which might justify the introduction of a different solution in practice than the one provided for in the challenged provision. (…)

6.1.3. A constitutional issue that needs to be determined in the present case is the question as to whether the legal solution, where the term of office of a judge of the Tribunal begins from the moment of taking the oath of office before the President of Poland, is consistent with Article 194(1) of the Constitution, which regulates the election of the judges of the Tribunal, in conjunction with Article 10, Article 45(1), Article 173, as well as Article 180(1) and (2) of the Constitution, i.e. the

constitutional principle of the separation of and balance between powers, the principle of the right to a fair trial, the principle of the independence of the judiciary and the principle that judges shall not be removable.

6.2. Changes in the composition of the Constitutional Tribunal (…)

6.2.2. The Constitution in a detailed way regulates the composition of the Constitutional Tribunal as well as the procedure for choosing judges of the Constitutional Tribunal, and it does not leave much discretion to the legislator as regards specifying the way of appointing judges of the Tribunal (election of the members to this organ of the state). Pursuant to Article 194(1) of the Constitution, the Constitutional Tribunal is composed of 15 judges. They are chosen individually by the Sejm for a term of office of 9 years, with the proviso that no person may be chosen for more than one term of office. The constitution-maker has determined the organ of the state authorised to choose judges of the Tribunal as well as the total number of the judges. One of the goals of the constitution-maker was to rule out the possibility of a vote on a list of several candidates for judges of the Tribunal (see "Biuletyn Komisji Konstytucyjnej Zgromadzenia Narodowego" No. XXV, p. 12). Thus, with regard to the judges of the Constitutional Tribunal, the Constitution provides for a term of office that is individualised, may be granted only once to a given person and stretches over a strictly defined period. (…)

6.2.3. In its judgment of 3 December 2015, ref. no. K 34/15, the Tribunal (…) stressed that the involvement of the President of Poland in the procedure that results in the taking up of the office by a newly-elected judge of the Tribunal (the involvement provided for in the 2015 Constitutional Tribunal Act) may not be regarded as tantamount to the power of the head of state to appoint judges, which is expressed in Article 179 of the Constitution. Indeed, the President of Poland does not consider an application of the Sejm for appointing a given person to the office of a judge of the Tribunal, and only – due to embodying the majesty of the state – stresses the significance and rank of the act of taking the oath of office, in which a given person assumes the obligation of serving the Nation. (…)

6.2.4. Pursuant to Article 21(1a) of the 2015 Constitutional Tribunal Act, the term of office of a judge of the Tribunal commences at the moment of taking the oath of office. The challenged provision modifies the way of determining the commencement of the term of office in the case of a judge of the Tribunal in comparison with how this has been determined so far. In accordance with the well-established practice of state authorities, the term of office of a judge of the Tribunal commences at the moment of his/her election by the Sejm, unless the office to which the judge is elected is not yet vacant. In the latter case, the term of office commences when the said office is vacated by the judge whose term of office ended. The term of office may not commence earlier than the end of the term of office of the judge who is to be replaced by a person elected by the Sejm, for this would result in exceeding the maximum number of the judges of the Tribunal, which is specified in Article 194(1) of the Constitution (see M. Zubik, *Status prawny sędziego*…, pp. 102-103).

The taking of the oath of office after a few weeks of waiting for being given the oath of office by the President of Poland (which happened, for instance, in 2006) did not mean, in the hitherto practice, a shift of the date of the commencement of the said term of office in relation to the date of the Sejm's election of the judges (the result of which was the end of the term of office which fell, for instance, in 2015).

6.3. The assessment of the conformity of Article 21(1a) of the 2015 Constitutional Tribunal Act to Article 194(1) in conjunction with Article 10, Article 45(1), Article 173 as well as Article 180(1) and (2) of the Constitution.

6.3.1. The Tribunal agrees with the applicants' allegation of the unconstitutionality of Article 21(1a) of the 2015 Constitutional Tribunal Act. The solution which consists in correlating the commencement of the term of office, in the case of the judges of the Tribunal, with the taking of the oath of office would mean a delay in determining the beginning of the term of office, and also the direct inclusion of the President of Poland in the procedure for choosing judges of the Tribunal, despite the fact that the Constitution, in the context of that procedure, provides only for the involvement of the Sejm. What is of key significance for the consideration of the present case is Article 194(1) of the Constitution, pursuant to which "the Constitutional Tribunal shall be composed of 15 judges chosen individually by the Sejm for a term of office of 9 years (…)".

On the basis of the well-established practice that complies with Article 194(1) of the Constitution, state authorities have hitherto assumed that the beginning of the aforementioned 9-year term of office falls not on the date of taking the oath of office, but on the date of the Sejm's election of a judge of the Tribunal or a later date when the office to which a judge was elected becomes vacant. If a judge of the Tribunal is elected by the Sejm before the judgeship is vacated, the term of office of the newly-elected judge commences after the end of the term of office of the judge who leaves the office. However, if the judge is elected by the Sejm after the end of the term of office of an incumbent judge, the term of office of the newly-elected judge commences on the day of his/her election.

6.3.2. Article 194(1) of the Constitution should be interpreted in the present case in conjunction with more general constitutional principles indicated by the First President of the Supreme Court. The above practical effect of the challenged provision would be inconsistent with Article 10 of the Constitution, in accordance with which the system of the Republic of Poland is based on the separation of and balance between the judiciary (the Sejm and the Senate), the executive (the President of Poland and the Council of Ministers) and the judiciary (courts and tribunals), as well as Article 173 of the Constitution, in the light of which courts and tribunals constitute a branch of government that is separate from and independent of other branches. The distortion of the separation of and balance between powers as well as the separation and independence of the judiciary would take place if, on the basis of a statute, the President of Poland could block the election of a judge of the Tribunal carried out by the Sejm in accordance with the Constitution; thus, the said President would gain a basis for exerting supraconstitutional influence on the election process, which could affect the foundations of the political system based on the separation of powers, which is established in Article 10 of the Constitution. (…)

6.3.3. In conclusion, a solution that consists in correlating the commencement of the term of office in the case of the judges of the Tribunal elected by the legislature (more precisely – the Sejm) with the action of taking the oath of office – for which to occur, it is necessary for the President of Poland (the executive) to give the said oath of office– would imply the indirect inclusion of the executive in the process of shaping the composition of the Tribunal and a delay in determining the beginning of the commencement of the term of office in contrast to the practice which has hitherto been adopted in the light of the Constitution, which would contradict Article 194(1) of the Constitution. Pursuant to Article 197 of the Constitution, a statute is to specify the organisation of the Tribunal as well as the procedure before the Tribunal. The legislator's task is, where necessary, to specify, in more detail, constitutional rules regulating – quite precisely – the status of the Constitutional Tribunal. The ordinary legislator may not however modify constitutional provisions. By contrast, the challenged provision of the Act indirectly involves the President of Poland in – broadly understood – the procedure for filling a vacancy in the office of a judge of the Tribunal, despite the fact that in the procedure the Constitution provides only for the participation of the Sejm.

The Tribunal has deemed that Article 21(1a) of the 2015 Constitutional Tribunal Act is inconsistent with Article 194(1) in conjunction with Article 10, Article 45(1), Article 173 as well as Article 180(1) and (2) of the Constitution.

7. The unconstitutionality of Article 137a of the 2015 Constitutional Tribunal Act within a certain scope.

7.1. The subject of the review in the present case is also Article 137a of the 2015 Constitutional Tribunal Act, which reads as follows: "With regard to judges of the Tribunal whose terms of office end in 2015, the time-limit for submitting the proposal referred to in Article 19(2) shall be 7 days from the date of entry into force of this provision". (…)

Article 19(2) of the 2015 Constitutional Tribunal Act has already been the subject of a review by the Constitutional Tribunal, but the previous version of that provision set a 3-month period for lodging a proposal of a candidate for a judgeship at the Tribunal. In its judgment of 3 December 2015, ref. no. K 34/15, the Constitutional Tribunal stated that the said provision is consistent with Article 112 of the Constitution. In the said case, the applicants alleged that the issue of a time-limit within which a proposal should be submitted to put forward a candidate for a judgeship at the Tribunal is a matter that falls within the scope of rules of procedure, and for that reason it may not be regulated in the Constitutional Tribunal Act. In the opinion of the applicants in the above-mentioned case, the time-limit for proposing candidates for a judgeship at the Tribunal is supposed to be an element of the "conduct of work of the Sejm" and of the "operation of its organs", and thus it concerns issues which Article 112 of the Constitution assigns to the rules of procedure of the Sejm. The Constitutional Tribunal disagreed with that allegation, justifying that the

procedure for choosing judges of the Tribunal is not merely an internal issue of the organisation of the parliamentary House and the division of powers among the organs of the Sejm. (…) Therefore, in its judgment of 3 December 2015, ref. no. K 34/15, the Constitutional Tribunal deemed that a time-limit for proposing candidates for a judgeship at the Tribunal – due to the guarantee character of the said time-limit – should arise from the statute, and not from the rules of procedure of the Sejm.

Article 137a of the 2015 Constitutional Tribunal Act, which is the subject of the review in the present case, modifies the time-limit for submitting a proposal of a candidate for a judgeship at the Tribunal, set in Article 19(2) of the 2015 Constitutional Tribunal Act. The said modified time-limit is 7 days and is calculated from the date of entry into force of the Act of 19 November 2015, i.e. from 5 December 2015.

7.2. What constitutes a prerequisite for the admissibility of adjudication on the conformity to the Constitution of Article 137a of the 2015 Constitutional Tribunal Act is the determination of the scope of its application. In this context, significance should be assigned to conclusions drawn by the Tribunal in its judgment of 3 December 2015, ref. no. K 34/15, with regard to Article 137 of the 2015 Constitutional Tribunal Act, which introduced a 30-day time-limit calculated from the date of entry into force of the Constitutional Tribunal Act, i.e. from 30 August 2015, for submitting a proposal of a candidate for a judgeship at the Tribunal with regard to the judges of the Tribunal whose terms of office were to end in 2015. The Tribunal ruled that Article 137 of the Constitutional Tribunal Act, insofar as it concerns the judges of the Tribunal whose terms of office ended on 6 November 2015, is consistent with Article 194(1) of the Constitution, and, insofar as it concerns the judges of the Tribunal whose terms of office ended, respectively, on 2 and 8 December – is inconsistent with Article 194(1) of the Constitution.

Therefore, it indisputably follows from the judgment of 3 December 2015, ref. no. K 34/15, that the scope *ratione materiae* of Article 137 of the 2015 Constitutional Tribunal Act comprised the election of five judges of the Tribunal whose terms of office were to end in 2015. Until the issuing of the Tribunal's judgment, the said provision enjoyed the presumption of constitutionality. The said presumption was valid with regard to the provision when on 8 October 2015 five judges of the Tribunal were elected, as well as when on 19 November 2015 the Act challenged in present case was enacted. At the same time, it is irrelevant that Article 1(5) of the challenged Act repealed the above-mentioned Article 137 of the 2015 Constitutional Tribunal Act, as the scope of the application of that provision had been exhausted on 8 October 2015, when the

said election of five judges of the Tribunal took place. The Act of 19 November 2015 introduced a provision that regulated the procedure for choosing five succeeding judges of the Tribunal; this created a legal possibility of filling vacancies in the judicial offices in the Tribunal in a number that would exceed the number of judges provided for in Article 194(1) of the Constitution. Indeed, the latter provision stipulates that the Tribunal shall be composed of 15 judges chosen individually by the Sejm for a term of office of 9 years.

When assessing the constitutionality of Article 137a of the 2015 Constitutional Tribunal Act, from that point of view, one should also take account of one more event which took place before the consideration of the present case. In the above-mentioned judgment of 3 December 2015, ref. no. K 34/15, the presumption of constitutionality assigned to Article 137 of the 2015 Constitutional Tribunal Act was confirmed within the scope in which the said provision concerns the judges of the Tribunal whose terms of office ended on 6 November 2015 as well as the said presumption was overturned within the scope in which the provision pertains to the judges of the Tribunal whose terms of office ended, respectively, on 2 and 8 December 2015. The Tribunal's confirmation of the presumption of the constitutionality of Article 137 has the effect that, at the moment, the said presumption is binding for all state authorities. This means that Article 137a of the 2015 Constitutional Tribunal Act, insofar as it concerns the judges of the Tribunal whose terms of office ended on 6 November 2015, is inconsistent with Article 194(1) in conjunction with Article 7 of the Constitution. Since, in its judgment of 3 December 2015, ref. no. K 34/15, the Tribunal confirmed the conformity to the Constitution of Article 137 of the 2015 Constitutional Tribunal Act as a legal basis for choosing three judges to assume the offices after the judges of the Tribunal whose terms of office ended on 6 November 2015 and who were elected by the Sejm during its 7th term of office, then another election of the same number of the judges of the Tribunal by the Sejm during its 8th term of office on the basis of a different provision (more precisely: Article 137a of the 2015 Constitutional Tribunal Act, which is under review in the present case) would inevitably increase the number of the judges of the Tribunal to 18 judges.

Therefore, the Public Prosecutor-General is right in arguing that Article 137a of the Constitutional Tribunal Act creates a possibility of "increasing the number of the judges of the Tribunal in a way that is inconsistent with the Constitution. Only the election of two judges of the Tribunal to assume the offices after the judges whose terms of office end during the 8th term of office of the Sejm, i.e. the Sejm's current parliamentary term may be regarded in the light of that provision as admissible" (pp. 45-46 of the procedural document of 4 December 2015 submitted by the Public Prosecutor-General). (…)

8. The allegation about the non-conformity of Article 2 of the Act of 19 November 2015 to Article 2, Article 7 and Article 10 of the Constitution.

8.1. The issue of the expiry of the term of office in the case of the President and Vice-President of the Constitutional Tribunal.

Another allegation raised by the applicants concerns the conformity to the Constitution of Article 2 of the Act of 19 November 2015. The challenged provision stipulates that: "The terms of office of the incumbent President and Vice-President of the Constitutional Tribunal shall expire after the lapse of three months from the date of entry into force of the Act".

(…)

8.5. The constitutional issue.

The subject of the Tribunal's substantive review is the regulation concerning the expiry of the terms of office of the incumbent President and Vice-President of the Constitutional Tribunal. With regard to the provision introducing the said mechanism, the applicants formulated several allegations that are systemic in character, indicating *inter alia* the legislator's infringement of the principle of the separation of powers and principles that are related thereto: the principle of the independence of the judiciary and the principle of the independence of judges. Thus, the constitutional issue that has arisen here amounts to answering the question as to whether, in the light of the constitutional provisions, when specifying the length of the term of office in the case of the President and Vice-President, the legislator had competence also to separately regulate the legal situation of persons who have been the incumbent President and Vice-President and, in fact, to shorten, by statute, the period for which they may hold the said positions, or whether the introduction of a fixed period for holding the position of the President or Vice-President of the Constitutional Tribunal could only have *pro futuro* effects.

(…)

8.7. The assessment of the conformity of Article 2 of the Act of 19 November 2015 to Article 7 and Article 10 of the Constitution as well as to Article 2 in conjunction with Article 180(1) and (2) in conjunction with Article 194(1) of the Constitution.

(…)

8.7.2. Agreeing with the view presented by the applicants, the Constitutional Tribunal deems that the challenged provision constitutes an unauthorised interference on the part of the legislator in the realm of the judiciary and undermines the principle of the Tribunal's independence from the other branches of government, and consequently – in the principle of the separation of powers (Article 10 of the Constitution). The solutions that pertain to the status of the President and Vice-President of the Tribunal and, in particular, to the length of the period for which the said managerial positions may be held are indeed closely linked with the principle of the independence of the Tribunal as such. (…)

8.7.3. (…) a period of holding the position [of the President or Vice-President of the Tribunal] was directly determined by the provisions of the Constitution as well as by an individual and specific act of the President of Poland, by means of which s/he appointed, to those

positions, candidates selected by the General Assembly of the Judges of the Tribunal. The period of holding the said positions which is determined in the said way is subject to constitutional protection in a similar way in which the term of office of incumbent officials is protected.

Thus, from the moment of appointment by the President of Poland until the loss of the status of a judge of the Tribunal, a person holding the said office is subject to protection, the scope of which comprises, *inter alia*, the guarantee of the stability of exercising the office to which the said person was appointed. This stance is confirmed by the earlier reasoning of the Tribunal – in the light thereof, *mutatis mutandis*, the act of appointment of a judge of the Tribunal to the position of the President or Vice-President of the Tribunal implies not only that a period of holding the office falls within defined limits, but it also implies a requirement of the stability of staffing during the period of exercising the office (see the Tribunal's ruling of 23 April 1996, ref. no. K 29/95, OTK ZU No. 2/1996, item 10).

In its previous jurisprudence, the Tribunal also indicated that "possible changes in the length of the term of office should have *pro futuro* effects, i.e. with regard to authorities that will be elected in the future. (…)" (the Tribunal's judgment of 26 May 1998, ref. no. K 17/98, OTK ZU No. 4/1998, item 48).

From that point of view, challenged Article 2 of the Act of 19 November 2015 also constitutes the legislator's interference in the constitutional competence of the President of Poland to appoint the President and Vice-President of the Tribunal. (…) since at the constitutional level, the constitution-maker determined that the course of filling vacancies in the said positions is based on the division of powers between the General Assembly of the Judges of the Constitutional Tribunal (the exclusive power to have initiative in this respect) and the President of Poland (the exclusive power to take decisions), then the legislator may not, by means of a normative act, eliminate the effects of the exercise of the said powers and, in a sense, in a retroactive way interfere in the act of appointment carried out by the President of Poland. (…)

Taking account of the fact that – on the one hand – the length of the period in every case is possible to be reconstructed and – on the other hand – that the guarantee of stability in the performance of duties by the President and Vice-President of the Tribunal constitutes a significant guarantee of the independence of the constitutional court, the Tribunal agreed with the applicants' stance.

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9. The assessment of the conformity of Article 2 of the Act of 19 November 2015 to Article 45(1) of the Constitution, Article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms, and also with Article 25(c) in conjunction with Article 2 and Article 14(1) of the International Covenant on Civil and Political Rights.

9.1. The applicants also alleged that the mechanism adopted by the legislator for the expiry of the term of office of the incumbent President and Vice-President undermines the principle of the independence of the judges of the Constitutional Tribunal. (…) In the context of the present case, it should be pointed out that the principle of the independence of judges implies, *inter alia*, that "proper conditions are created so that, in the performance of their duties, judges could take impartial decisions, in accordance with their conscience, and being free from direct or indirect external pressure".

(…)

Allowing a situation where an organ of the legislative branch may, at any moment, shorten the period for which a judge of the Tribunal holds a managerial position in the Tribunal would mean that there are no proper conditions for the judge to perform his/her judicial duties in accordance with the judge's conscience and in a way that is impartial. Given that the role of a constitutional judge primarily amounts to conducting a review of the hierarchical conformity of norms, a judge who, apart from performing his/her judicial duties, also holds the position of the President or Vice-President could, within the scope of adjudication, be subjected to pressure from the organs of the legislative branch that are competent to deprive judges of the said managerial positions. Such a possibility alone would deprive a judge who holds the position of the President or Vice-President of external attributes arising from the independence of judges. Therefore, from the point of view of guaranteeing the principle of the independence of judges, it is highly important to ensure stability in the performance of duties for judges appointed to hold the said managerial positions, throughout the entire period arising from the act of appointment.

Taking the above into consideration, the Tribunal deems that Article 2 of the Act of 19 November 2015 infringes Article 45(1) of the Constitution. (…)

For the above reasons, the Constitutional Tribunal has adjudicated as in the operative part of the judgment.

[1]* The operative part of the judgment was published on 18 December 2015 in the Journal of Laws – Dz. U. item 2147.

[2][1] [the translator's note: The Act of 19 November 2015 entered into force on 5 December 2015.]

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