

**Notes on main legal problems  
arising from the new Bill  
on the Constitutional Tribunal  
(Report of 24 June 2016 by the Sejm's Extraordinary  
Subcommittee for the consideration of bills  
on the Constitutional Tribunal)**

Warsaw, 29 June 2016

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## **Introduction**

The Notes concern the Report of 24 June 2016 prepared by the Extraordinary Subcommittee for the consideration of bills on the Constitutional Tribunal (Sejm Papers Nos.: 558, 550, 569, and 129/8th term of the Sejm). They comprise an analysis of main legal problems arising from the version of the Bill on the Constitutional Tribunal proposed by the Subcommittee.

The analysis of the provisions of the said Bill was carried out primarily in the light of the previous jurisprudence of the Constitutional Tribunal, and in particular the Tribunal's judgments of: 3 December 2015, K 34/15; 9 December 2015, K 35/15; and 9 March 2016, K 47/15. What was also taken into account was guidance provided in the Opinion no. 833/2015 of 11 March 2016 issued by the Venice Commission.

Due to a limited time-frame for the preparation of this analysis, it does not indicate all possible problems that may arise from the adoption of the proposed solutions. The content of the Notes reflects the order in which the provisions under discussion appear in the Bill, included in the Subcommittee's Report. The numbering of the provisions – with only one exception – remains the same as in the Report of 29 June 2016 by the Sejm's Committee of Justice and Human Rights (Sejm Paper No. 667). Also, the wording of the provisions discussed in this analysis was not altered by the Committee.

## **1. Article 12(2) – the consent of the President of Poland to the termination of the mandate of a judge of the Tribunal**

The solution provided for in Article 12(2) of the Bill raises two serious constitutional reservations. Firstly, it implies interference of an executive authority (the President of Poland) with the procedure for implementing a legally effective disciplinary ruling. The said interference results in eliminating the legal effects of the ruling, by refusing to consent to the implementation of the ruling, i.e. to the termination of the mandate of a judge of the Tribunal who has been recalled from office on disciplinary grounds. Secondly, rendering the execution of a legally effective disciplinary ruling issued by the Constitutional Tribunal contingent on the consent of the President of Poland constitutes inadmissible interference of the executive with the realm of independence of the judiciary (Art. 173 of the Constitution), and thus violates the principle of the separation of and balance between powers (Art. 10 of the Constitution), as well as breaches the principle of the independence of the judges of the Tribunal (Art. 195(1) of the Constitution). One of the guarantees of the independence of the judiciary and of the independence of judges is the fact that there exists a separate judicial disciplinary procedure (see e.g. the judgment of 9 March 2016 ref. no. K 47/15, part III, point 6.1.7 of the statement of reasons).

The validity of the above evaluation of the solutions adopted in Article 12(2) of the Bill is confirmed by an analysis of the Tribunal's judgment of 9 March 2016, ref. no. K 47/15 (see part III, point 6.2.8 of the statement of reasons). The Tribunal stated there that the entrusting of the Sejm with the power to recall a judge of the Constitutional Tribunal from office as part of a special procedure, which may be commenced, *inter alia*, upon application by the President of Poland or the Minister of Justice, infringes the principle of the Tribunal's independence (Art. 173 of the Constitution), the principle of the separation of and balance between powers (Art. 10(1) of the Constitution), as well as the principle of the independence of the judges of the Tribunal (Art. 195(1) of the Constitution). In fact, the said procedure was to replace disciplinary proceedings, within the scope of which the Tribunal administered the penalty of recalling a judge of the Tribunal from office. In the statement of reasons for its judgment, the Tribunal noted that "the Sejm, as an organ of the legislative branch of government, may affect the organs of the judiciary, including the Constitutional Tribunal, only insofar this does not violate the autonomy of the judiciary, and primarily in situations set out in the Constitution (...). The role of the Sejm was restricted by the constitution-maker to the election of judges of

the Tribunal. After the election of a judge of the Tribunal, the Sejm definitely loses its influence over the status of the said judge” (part III, point 6.2.8 of the statement of reasons).

Since the Tribunal deemed in its judgment ref. no. K 47/15 that, after a judge of the Tribunal has been elected, the Sejm “definitely loses its influence over the status of the said judge”, then as regards the President of Poland, it should be noted that, neither before nor after the said election, the head of state should have any influence over the status of a judge of the Tribunal. The Constitution provides for no such influence on the part of the President of the Republic. Should the recall of the said judge from office be contingent upon the consent of the President of Poland, this may infringe the principle of the Tribunal’s independence (Art. 173 of the Constitution), the principle of the separation of and balance between powers (Art. 10 of the Constitution), as well as the principle of the independence of the judges of the Tribunal (Art. 195(1) of the Constitution).

Also, the Venice Commission emphasised that making a final decision to terminate the mandate of a judge of the Tribunal contingent on the discretion of the Sejm would require an explicit constitutional basis (point 94 of the Opinion). For the same reason, a statute may not grant an equivalent power to the President of Poland.

An additional circumstance that raises doubts in the light of the principle of the Tribunal’s independence and its separateness from the other branches of government (Art. 173 of the Constitution), the principle of the separation of and balance between powers (Art. 10 of the Constitution), as well as the principle of the independence of the judges of the Tribunal (Art. 195(1) of the Constitution) is that the solution proposed in Article 12(2) of the Bill leads to a situation where the Prime Minister gains the power to affect the status of the judges of the Tribunal. The said solution would indeed require collaboration between the President of Poland and the Prime Minister – an official act issued by the President of the Republic to grant consent to the recall of a judge of the Tribunal from office would have to be signed by the Prime Minister to be valid. As the indicated official act is not mentioned in the catalogue of prerogatives included in Article 144(3) of the Constitution, it would require “for [its] validity, the signature of the Prime Minister who, by such signature, accepts responsibility therefor to the Sejm” (Art. 144(2) of the Constitution). This way, also the Prime Minister, in whom the Constitution vests no powers to determine the composition of the Constitutional Tribunal, would gain influence over the implementation of legally binding disciplinary rulings to recall judges of the Tribunal from office.

## **2. Article 16(1) and (7) – the selection of candidates for the positions of the President and Vice-President of the Tribunal**

Serious constitutional reservations arise due to the proposed mechanism of selecting an unspecified number of candidates for the positions of the President and Vice-President of the Tribunal. The Bill provides for “at least three” candidates elected “from among the judges of the Tribunal who have received the largest number of votes in a secret ballot” (Art. 16(1) and (2)). At the same time, the Bill limits the number of votes that a judge may cast to one vote (Art. 16(7)). Therefore, the said proposed procedure does not rule out proposing a judge who receives only one vote (e.g. because s/he votes for him/herself) as a candidate for the position of the President or Vice-President of the Tribunal.<sup>1</sup> However, a person selected this way may not be regarded as a candidate of the General Assembly of the Judges of the Tribunal within the meaning of Article 194(2) of the Constitution. The said provision of the Constitution requires that candidates for the positions of the President and Vice-President of the Tribunal be proposed by the General Assembly. The selection mechanism proposed in the Bill may cause the competence of the General Assembly, as regards putting forward candidates for the positions of the President and Vice-President of the Tribunal, to be “emptied” of its constitutional content by means of a statute.

## **3. Article 26(1)(1)(f) and Article 26(1)(1)(g) – the catalogue of cases in which the Constitutional Tribunal adjudicates as a full bench**

It is stipulated in the Bill that the Tribunal adjudicates as a full bench, *inter alia*, in particularly complex cases (Art. 26(1)(1)(f)). Due to the principle of the Tribunal’s independence and its separateness from the other branches of government (Art. 173 of the Constitution) as well as the principle of the separation of and balance between powers (Art. 10 of the Constitution), constitutional reservations are raised with regard to the competence vested in the President of Poland and the Public Prosecutor-General to file an application for a case to be deemed particularly complex, which is binding for the President of the Tribunal. In fact, the authors of the Bill entrust the said executive authorities with the competence to decide what

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<sup>1</sup> For instance, it is possible to have a situation where two judges receive 7 votes each, and the third judge receives only 1 vote. The General Assembly will then have to present all three judges as candidates for the position of the President or Vice-President of the Tribunal. The President of Poland may choose also the judge who has received only 1 vote.

adjudicating bench of the Tribunal will consider a given case. This constitutes interference with the realm of the Tribunal's adjudication, i.e. a realm that is materially reserved by the Constitution for the judiciary. The executive branch of government may not interfere to such a great extent in the activity of the judiciary that it can determine the composition of adjudicating benches in which cases are to be examined.

Moreover, neither Article 26(1)(1)(f) nor Article 26(1)(1)(g) of the Bill provides that the aforementioned application filed by the President of Poland, the Public Prosecutor-General, or three judges (these do not have to be judges designated to an adjudicating bench in a given case) needs to be justified by the occurrence of any premisses concerning the scope *ratione materiae*; nor do the provisions stipulate that the Tribunal can determine whether the application filed by any of the said applicants is justified. Such solutions do not ensure that the Tribunal will carry out its activity efficiently, as they permit for a vast majority of cases to be considered by a full bench. This would slow down the activity of the Tribunal, and consequently, the performance of its constitutional tasks and duties (e.g. its protection of the rule of law as well as of the rights and freedoms of citizens), which raises reservations in the light of the constitutional principle of diligence and efficiency in the work of public institutions (Preamble to the Constitution).

The undermining of efficiency in the Tribunal's activity, which raises reservations in the light of the constitutional principle of diligence and efficiency in the work of public institutions, also results from the lack of a time-limit within which any three judges of the Tribunal may file an application for a case to be deemed particularly complex (Art. 26(1)(1)(f)). Irrespective of the stage of working out a determination in a case by an adjudicating bench, any three judges of the Tribunal may at any moment decide that the case should be considered by a full bench. Thus, the work that has already been performed by a smaller panel of judges will have to be repeated.

#### **4. Article 26(2) – the minimum number of judges required for a full bench of the Tribunal**

In accordance with the Bill, adjudication by a full bench always requires the participation of at least 11 judges (Art. 26(2)). The provision of the Bill does not take account of situations where, for objective reasons, the number of judges who are able to adjudicate is lower than the number statutorily required for issuing a full bench ruling. No statutory solution may prevent the Tribunal from adjudicating on a case for which the Constitution grants competence to the Tribunal. Therefore, one should expect that Article 26(2) of the Bill will

reflect the thesis expressed by the Tribunal in its judgment of 9 March 2016, ref. no. K 47/15, namely that a full bench of the Tribunal is composed by all judges of the Tribunal who have capacity to adjudicate on the day of issuing a ruling (see part III, point 1.2 of the statement of reasons; see also the decision of 7 January 2016, ref. no. U 8/15, part II, point 2 of the statement of reasons).

## **5. Article 38(2) – setting dates of hearings at which applications are considered in the order in which cases are received by the Tribunal<sup>2</sup>**

Pursuant to Article 38(2), dates of hearings at which applications will be considered are to be set in the order in which cases are received by the Tribunal. An analogous provision (Art. 1(10)) of the amending Act of 22 December 2015) has already been ruled by the Tribunal to be inconsistent, *inter alia*, with Article 173 in conjunction with Article 10 of the Constitution, on the grounds that the said provision interferes with the judiciary's independence and its separateness from other branches of government. As pointed out by the Tribunal, “the determining of pace at which particular cases are considered – including the setting of the dates of hearings and the dates of sittings in camera – is (...) strictly linked with the essence of the Tribunal's adjudication. The legislator's task is to create optimal conditions, and not to interfere in the process of adjudication by specifying the moment when the Tribunal may consider a given case. (...) Indeed, the Tribunal's independence requires that the Tribunal be guaranteed discretion in adjudication, by excluding any impact of other authorities not only on the content of its rulings, but also on the process of issuing them” (the judgment of 9 March 2016, ref. no. K 47/15, part III, point 5.7.5 of the statement of reasons).

Also, in its Opinion of 11 March 2016, the Venice Commission noted that “an obligation to hold a hearing and to decide in a strict chronological order risks not being in compliance with European standards. There must be room for the Constitutional Tribunal to continue and finish deliberations in certain types of cases earlier than in others” (point 65 of the Opinion).

## **6. Article 43 – a restriction of the scope of the Tribunal's review**

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<sup>2</sup> In the Report of 9 June 2016 by the Sejm's Committee of Justice and Human Rights (Sejm Paper No. 667), the provision is marked as Article 38(3).



Article 43 of the Bill raises serious constitutional reservations for it does not reflect the scope of the review of the constitutionality of law set forth in Article 188(1)-(3), Article 79(1), and Article 193 of the Constitution. Firstly, it does not take account of the Tribunal's power to review competence to issue a normative act; it explicitly specifies only the possibility of reviewing the content of the act and the process in which it was issued. By contrast, Article 188(1)-(3), Article 79(1), and Article 193 of the Constitution comprise no such restriction. On the basis of the indicated provisions of the Constitution, one should draw the conclusion that any aspects of conformity of a normative act to a higher-level act are subject to review by the Tribunal, including also the competence to issue the act. A different interpretation of the indicated provisions of the Constitution would undermine the principle of the supremacy of the Constitution (Art. 8(1)), which also depends on the scope of the Tribunal's competence *ratione materiae*.

Secondly, Article 43 of the Bill does not provide for a possibility of reviewing other elements of a process resulting in the issuance of a normative act than the elements of the said process specified in the Constitution. It does not stipulate explicitly that it is possible for the Tribunal to verify whether the process of issuing a normative act comprised all the elements required by statute or the rules of procedure of a House of the Polish Parliament. Also, such a restriction is not provided for in Article 188(1)-(3), Article 79(1), and Article 193 of the Constitution.

Therefore, since the Tribunal's power to review the competence to issue a normative act and compliance with all the elements of the procedure for issuing the said act, other than the constitutional elements, explicitly arises from Article 79(1), Article Article 188(1)-(3), and Article 193 of the Constitution, one should expect that Article 43 of the Bill will reflect the content of the constitutional provisions. Otherwise, the Tribunal will have to apply the conflict-of-laws rule of *lex superior derogat legi inferiori*, which is well-settled in European legal culture, i.e. the Tribunal will directly apply the provisions of the Constitution, and overlook the statutory provisions.

## **7. Article 68(3)-(5) – judges' objection to a draft determination**

The provisions of Article 68(3)-(5) of the Bill set out a procedure allowing at least 4 judges of the Tribunal to raise an objection to a draft determination. Reservations arise due to the effects of recourse to the procedure: the adjournment of deliberations on a case for at least three months (Art. 68(6)), and – in some instances – for six months (Art. 68(7)).

Serious constitutional reservations emerge due to the automatic correlation between the adjournment of deliberations and the raising of objections by at least 4 judges. Moreover, periods of adjournment are fixed, and are not affected by the moment when the judges raising objections work out a proposal for resolving a given case (e.g. even if a determination is proposed within a month from the date of objection, deliberations may still only take place after the lapse of the three-month period of adjournment).

The mechanism set out in Article 68(5)-(7) may considerably slow down the Tribunal's work. The slackening of the pace of the said work pertains not only to the case in which the judges have raised objections, but also – e.g. in proceedings instituted by an application – other cases. Due to the obligation to set dates of hearings, for the consideration of applications, on the basis of the order in which the applications are received by the Tribunal (Art. 38(2) of the Bill), a delay would also occur in the consideration of applications other than the one with regard to which the judges have raised objections. Indeed, the Tribunal would have to first resolve the case in which the judges have raised objections, and only then it could proceed to determine subsequent cases commenced by applications.

The solutions provided for in Article 68(5)-(7) raise reservations in the light of the principle of diligence and efficiency in the work of public institutions, which is derived from the Preamble to the Constitution, and which is also applicable to the Constitutional Tribunal. As the Tribunal stressed, “in the context of the Tribunal's systemic position and the unique nature of its competence, it is particularly justified that proceedings before the Tribunal should be effective and would result – within a reasonable period of time – in issuing a final ruling, especially in cases that are of significance for the functioning of the organs of the state as well as for the exercise of rights and freedoms enshrined in the Constitution. This follows from the principle of efficiency in the work of public institutions, which arises from the Preamble to the Constitution. (...) Consequently, a statutory model of proceedings before the constitutional court needs, on the one hand, to take account of the unique nature of the Tribunal's systemic function and, on the other, ensure efficiency in the exercise of the Tribunal's powers” (the judgment of 3 December 2015, ref. no. K 34/15, part III, point 10.3 of the statement of reasons; the judgment of 9 March 2016, ref. no. K 47/15, part III, point 5.3.2 of the statement of reasons). Furthermore, “the legislator may not lower the previous standard of diligence and efficiency in the work of an existing public institution” (the judgment of 9 March 2016, ref. no. K 47/15, part III, point 5.3.3 of the statement of reasons).

## **8. Article 69(2) – a two-thirds majority vote required for determining a ruling on unconstitutionality in the event of judges’ objections to a draft determination**

Article 69(2) of the Bill stipulates that rulings which are issued as a result of applying the procedure for objections of at least 4 judges (Art. 68(5)-(7)), and which declare the non-conformity of a statute to the Constitution, or an international agreement whose ratification required prior consent granted by statute, are to be determined by a two-thirds majority vote; where such a majority is not attained, proceedings are discontinued.

This solution raises serious constitutional reservations. The requirement of a two-thirds majority vote for determining a ruling on the non-conformity of examined regulations is inconsistent with the explicit wording of Article 190(5) of the Constitution, which states that judgments of the Constitutional Tribunal are to be made by a majority of votes. In the judgment of 9 March 2016, ref. no. K 47/15, the Tribunal deemed that a provision requiring the Tribunal to determine rulings by a two-thirds majority vote was inconsistent with Article 190(5) of the Constitution (Art. 1(14) of the amending Act of 22 December 2015, which modified Art. 99(1) of the 2015 Constitutional Tribunal Act). In the statement of reasons for that judgment, the Tribunal held, *inter alia*, that Article 190(5) of the Constitution “gives no grounds (...) for introducing a different majority than the one indicated in the provision. Also, it is inadmissible to interpret Article 190(5) of the Constitution as a provision that contains an empty norm for it mentions “a majority of votes”, and that the legislator has an obligation to decide what majority is implied here. This would, indeed, entail that the content of a provision of the Constitution is determined by the legislator, which may not occur in a democratic state ruled by law” (the judgment of 9 March 2016, K 47/15, part III, point 5.9.5 of the statement of reasons).

In addition, the Venice Commission, in its Opinion of 11 March 2016, noted that in most European legal systems, when it comes to a decision quorum, only a simple voting majority is required (*inter alia* points 74, 78, and 79 of the Opinion). Furthermore, the Commission deemed that to change the interpretation of Article 190(5) of the Constitution, which is well-established in Polish constitutional practice, namely that an ordinary majority is implied, would require an amendment to the Constitution (points 81 and 82 of the Opinion).

## **9. Article 80(4) – terms of publishing rulings**

Article 80(4) of the Bill provides that the President of the Tribunal files an application for the publication of judgments and decisions, and the publication of those acts is carried out

in accordance with the terms and procedure set out in the Constitution as well as in the Act on the promulgation of normative acts and certain other legal acts.

The proposed solution constitutes a departure from the previous model where the President of the Tribunal was the authority ordering the publication of rulings. The use of the word ‘application’ may erroneously suggest that the Prime Minister has the competence to evaluate the application of the President of the Tribunal (within an unspecified time-limit), and to decide whether to publish or not a given ruling of The Tribunal. Such practice would be incompatible with the constitutional obligation to publish the Tribunal’s rulings (Art. 190(2)), from which there are no exemptions, as well as it would be inconsistent with the recommendation of the Venice Commission. In the aforementioned Opinion, the Commission called on all state authorities to fully respect and implement the judgments of the Tribunal (point 136 of the Opinion).

#### **10. Article 84(1) – the requirement to apply the Bill to cases that were pending prior to the entry into force of the Bill**

Article 84(1) of the Bill establishes the obligation to apply the new provisions to cases that were pending before the entry into force of the Bill. This is linked, *inter alia*, with the obligation to consider all cases commenced by applications in the order in which they are received by the Tribunal (Art. 38(2)), regardless of the stage of work on the determination of a case. A change in the rules may slow down the process of considering cases.

The requirement to apply the Bill to all cases that were pending prior to the entry into force of the Bill – which is related, among others, to interference with the order in which cases commenced by applications are considered – raises doubts in the light of the principle of a democratic state ruled by law (Art. 2 of the Constitution), the principle of diligence and efficiency in the work of public institutions (the Preamble to the Constitution), the principle of the Tribunal’s independence and its separateness from the other branches of government (Art. 173 of the Constitution), as well as the principle of the separation of and balance between powers (Art. 10 of the Constitution). In its judgment of 9 March 2016, the Tribunal declared the unconstitutionality of a similar transitional regulation (Art. 2 of the amending Act of 22 December 2015) in the light of the above-mentioned provisions of the Constitution (see the judgment of 9 March 2016, ref. no. K 47/15, part III, point 5.10.5 of the statement of reasons).

## **11. Article 84(2) – a time-limit for determining cases that were pending prior to the entry into force of the Bill**

Article 84(2) of the Bill imposes on the Tribunal the obligation to determine cases that were pending prior to the entry into force of the Bill, within one year from the date of entry into force. The indicated obligation pertains to all cases with the exception of those commenced by applications (Art. 84(2), second sentence, in conjunction with Art. 85), i.e. cases commenced by questions of law and constitutional complaints.

Such a solution constitutes interference with the process of the Tribunal's adjudication. By contrast, as already pointed out above, in the view of the Tribunal, "[t]he legislator's task is to create optimal conditions, and not to interfere in the process of adjudication by specifying the moment when the Tribunal may consider a given case. (...) [o]nly in exceptional and justified instances may the legislator specify the maximum time-limit for the consideration of a case by the Tribunal (...). Indeed, the Tribunal's independence requires that the Tribunal be guaranteed discretion in adjudication, by excluding any impact of other authorities not only on the content of its rulings, but also on the process of issuing them" (the judgment of 9 March 2016, ref. no. K 47/15, part III, point 5.7.5 of the statement of reasons). The Constitution only in its Article 224(2) sets a time-limit for the Tribunal as regards the issuance of a ruling (*a priori* review of the State Budget Bill or the Interim State Budget Bill).

Additionally, it should be noted that the solution drafted in Article 84(2) may, for a certain period, make it impossible for the Tribunal to adjudicate on cases that are received by the Tribunal after the entry into force of the Bill. Indeed, in the first place, the Tribunal will have to resolve cases commenced by constitutional complaints and questions of law before the entry into force of the Bill, so as to observe the time-limit set in Article 84(2).

The obligation imposed on the Tribunal in Article 84(2) of the Bill raises serious reservations in the light of the principle of a democratic state ruled by law (Article 2 of the Constitution), the principle of the separation of and balance between powers (Art. 10 of the Constitution), the principle of the Tribunal's independence and its separateness from the other branches of government (Art. 173 of the Constitution), as well as the principle of the separation of and balance between powers (Art. 10 of the Constitution). In its judgment of 9 March 2016, ref. no. K 47/15, the Tribunal declared the unconstitutionality of a similar regulation (Art. 2(2) of the amending Act of 22 December 2015) in the context of the above-mentioned provisions of the Constitution (see the judgment of 9 March 2016, ref. no. K 47/15, part III, point 5.10.5 of the statement of reasons).

## **12. Article 85(1) – an obligation to stay proceedings**

Article 85(1) of the Bill provides for staying, for a period of 6 months, all proceedings that are pending and which were instituted by applications, so that the applications may be supplemented in compliance with the requirements set in the Bill. The date when the stayed proceedings are resumed does not depend on the moment when the applications are supplemented. Such a transitional regulation is bound to result in a delay in the issuance of rulings in cases commenced by applications, which raises serious reservations in the light of the constitutional principle of diligence and efficiency in the work of public institutions, derived from the Preamble to the Constitution and applicable also to the Tribunal. As already noted above, the Tribunal emphasised that: “in the context of the Tribunal’s systemic position and the unique nature of its competence, it is particularly justified that proceedings before the Tribunal should be effective and would result – within a reasonable period of time – in issuing a final ruling, especially in cases that are of significance for the functioning of the organs of the state as well as for the exercise of rights and freedoms enshrined in the Constitution. This follows from the principle of efficiency in the work of public institutions, which arises from the Preamble to the Constitution. (...) Consequently, a statutory model of proceedings before the constitutional court needs, on the one hand, to take account of the unique nature of the Tribunal’s systemic function and, on the other, ensure efficiency in the exercise of the Tribunal’s powers” (the judgment of 3 December 2015, ref. no. K 34/15, part III, point 10.3 of the statement of reasons; the judgment of 9 March 2016, ref. no. K 47/15, part III, point 5.3.2 of the statement of reasons). Furthermore, “the legislator may not lower the previous standard of diligence and efficiency in the work of an existing public institution” (the judgment of 9 March 2016, ref. no. K 47/15, part III, point 5.3.3 of the statement of reasons).

## **13. Article 91 – the publication of the Tribunal’s judgments issued between 10 March 2016 and 30 June 2016**

The Bill stipulates that the Tribunal’s rulings “issued in breach of the provisions of the Constitutional Tribunal Act of 25 June 2015” between 10 March 2016 and 30 June 2016 are to be published in a relevant official publication within 30 days from the date of entry into force of the Bill. The above regulation may raise constitutional reservations.

First of all, pursuant to Article 190(2), first sentence, of the Constitution, rulings of the Constitutional Tribunal are to be immediately published in the official publication in which the

original normative act was promulgated. Therefore, constitutional reservations may arise as regards any time-limit set by statute which could distort the understanding of the obligation to publish rulings immediately, which explicitly arises from the Constitution. The provision of a 30-day time-limit for the publication of rulings may erroneously suggest that the observance of the said time-limit suffices to fulfil the constitutional obligation to immediately publish the Tribunal's rulings. In fact, the immediacy of publication should be specified with regard to each ruling on a case-by-case basis. As the Tribunal has noted, the immediacy of publishing a ruling of the Tribunal in a relevant official publication requires immediate action, without undue delay (the judgment of 9 December 2015, ref. no. K 35/15, part III, point 10 of the statement of reasons) in given circumstances.

Secondly, it is unclear why Article 91 of the Bill overlooks the question of the publication of the judgment of 9 March 2016, ref. no. K 47/15, especially that the Venice Commission regarded the refusal to publish the said judgment as contrary to the principle of the rule of law. In the Opinion of the Commission, such refusal would constitute an unprecedented move that would further deepen the constitutional crisis. The publication of the judgment of 9 March 2016, ref. no. K 47/15, is a precondition for finding a way out of this constitutional crisis (point 143 of the Opinion).

Thirdly, the wording "issued in breach of the provisions of the Constitutional Tribunal Act of 25 June 2015" raises serious reservations in the light of the principle of the Tribunal's independence (Art. 173 of the Constitution) as well as the principle of the separation of and balance between powers (Art. 10 of the Constitution). The Constitution does not entrust any public authority with competence to evaluate the accuracy of the Tribunal's application of the provisions of the Constitutional Tribunal Act in the process of adjudication.

#### **14. Article 92 in conjunction with Article 6(7) – effects of the taking of the oath of office by a judge of the Tribunal**

In accordance with the judgment of 3 December 2015, ref. no. K 34/15, Article 137 of the Constitutional Tribunal Act of 25 June 2015 is inconsistent with the Constitution as regards the election of three judges of the Tribunal by the Sejm during its previous term of office. The judgment dispelled doubts as to the constitutionality of a controversial element of the procedure for the election of the judges. Thus, the election of the judges must be deemed valid, and the President of Poland is obliged by the Constitution to give the oath of office to the said judges (i.e. the judges elected for the terms of office that began on 7 November 2015). The Tribunal

confirmed that stance in its decision of 7 January 2016, ref. no. U 8/15 (part II, point 5 of the statement of reasons). As a side remark, it is worth adding that the necessity to implement the judgment of 3 December 2015, ref. no. K 34/15, by the President and other public authorities was also emphasised by the Venice Commission (points 108-109 of the Opinion).

The application of Article 92 of the Bill might theoretically lead to a situation where judicial duties are not assumed by the three judges validly elected by the Sejm during its previous term of office, on the basis of constitutional provisions, but by the three persons elected by the Sejm during its current term of office, on 2 December 2015, to whom the President of Poland gave the oath of office on 3 December 2015, and who have not yet assumed the said duties. Still, the Tribunals' judgment of 3 December 2015, ref. no. K 34/15, is universally binding (Art. 190(1) of the Constitution). Thus, it is also binding for the Constitutional Tribunal itself and the President of the Tribunal. Consequently, the application of Article 92 of the Bill may not eliminate the effects of the judgment of 3 December 2015, ref. no. K 34/15.

#### **15. Article 94 – *vacatio legis***

Pursuant to Article 94 of the Bill, the said Bill is to enter into force after the lapse of 14 days from the date of its publication. In the context of such a significant change in the legal system as the introduction of a new statute regulating the functioning of one of the most important central constitutional organs of the state, the legislator provided for a period of *vacatio legis* that is in principle required for the provisions of universally binding law by the Act of 20 July 2000 on the promulgation of normative acts and certain other legal acts (Art. 4(1); Journal of Laws – Dz. U. of 2016, item 296). One may have serious doubts as to whether the 14-day period of *vacatio legis*, provided for in Article 94 of the Bill, meets the constitutional criterion of appropriateness, which arises from Article 2 of the Constitution (the principle of appropriate legislation)

As indicated many times by the Tribunal, Article 2 of the Constitution requires that a period of *vacatio legis* should be appropriate. The said appropriateness ought to be assessed in the context of the scope and complexity of introduced changes as well as a possibility of adjusting the legal situation of the addressees to new statutory solutions (see e.g. the judgment of 9 March 2016, ref. no. K 47/15, part III, point 4.6.1 of the statement of reasons).

With regard to statutes that regulate the Tribunal's organisation and its procedure, the Tribunal explicitly pointed out that, when determining a period of *vacatio legis*, the following



should be taken into account: “the necessity to guarantee an appropriate period of time for organisational adjustment, with regard to new regulations, for the Tribunal and parties that are participants in proceedings before the Tribunal, as well as for the dispelling of any possible doubts as to the constitutionality of the introduced changes (in particular, if they were raised at the stage of legislative proceedings, but were not addressed then, and the statute itself was not the subject of an *a priori* review).” (the judgment of 9 March 2016, ref. no. K 47/15, part III, point 4.6.10 of the statement of reasons).

The 14-day period of *vacatio legis* will, in fact, make it impossible for the Tribunal to review the Bill before its entry into force, unless the President of Poland exercises his power to file an application for an *a priori* review of the statute (Art. 122(3) of the Constitution). Consequently, the Tribunal would again face a situation where “its future ruling will concern the provisions of the Constitutional Tribunal Act which constitute, at the same time, a legal basis of the Tribunal’s judicial activities, including important procedural activities which lead to the issuance of the ruling” (the judgment of 9 March 2016, ref. no. K 47/15, part III, point 1.3 of the statement of reasons). By contrast, “[o]ne may not accept a situation where the subject of a legal dispute before the Tribunal is both the systemic and procedural basis of a determination in the dispute. A possible ruling of the Tribunal on the unconstitutionality of the challenged provisions would then undermine the very process of adjudication (and, as a result, the judgment itself) as one carried out on the unconstitutional basis” (*ibidem*). The Tribunal described such a situation as “a paradox” (*ibidem*), and held that the underlying purpose was to overlook Article 188(1) of the Constitution (see the judgment of 9 March 2016, ref. no. K 47/15, part III, points 4.8.3 and 4.8.4 of the statement of reasons).

In its Opinion of 11 March 2016, the Venice Commission stressed that the Constitutional Tribunal must have a possibility of reviewing an ordinary statute that regulates the functioning of the Tribunal before the statute enters into force. This is required by the principle of the supremacy of the Constitution. Otherwise, an ordinary statute might be used to abolish the system of constitutional review (point 41 of the Opinion).

In addition, one needs to take account of the fact that the Bill is not an amending statute, but a separate regulation which considerably differs from the currently binding Constitutional Tribunal Act of 2015. Although the authors of the Bill to a large extent return to the legal solutions of the 1997 Constitutional Tribunal Act, one should note the 2015 Act has significantly changed the Tribunal’s organisation and its procedure; thus, a return to the previously binding legal solutions requires an appropriate period of adjustment thereto.

Taking the above circumstances into consideration, it needs to be stated that providing for only 14 days as the period of *vacatio legis* for the Bill which introduces significant changes in the functioning of the Tribunal means the repetition of mistakes that led, in the judgment ref. no. K 47/15, to declaring Article 5 of the amending Act of 22 December 2015 to be inconsistent with Article 2 of the Constitution (the principle of appropriate legislation) and Article 188(1) of the Constitution.