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LEGAL ANALYSIS OF THE ELECTION PROCESS OF THE JUDGES OF THE POLISH CONSTITUTIONAL TRIBUNAL IN THE AUTUMN OF 2015

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1. Introduction

The public debate on changes in the composition of the Constitutional Tribunal (CT) that were made in the Autumn of 2015 and on their assessment have been conducted in light of the activities of the eighth Sejm (2015–2019), and do not take into account the wider political context. The gist of the matter has been skewed by an unwarranted interpretation of certain acts of authority done by the Sejm and the judgments of the CT of 3 December 2015,[1] 9 December 2015[2] and the decision of 7 January 2016.[3]

The aim of this analysis is to present and assess the sequence of legal events relating to the election of the CT judges carried out in October 2015 by the Platforma Obywatelska and Polskie Stronnictwo Ludowe (PO–PSL) ruling coalition. It intends to show the connection between the adoption of the Constitutional Tribunal Act of June 2015 and the appointment of five CT judges to posts that became vacant in the Autumn of 2015.

1 Judgment of the Constitutional Tribunal of 3 December 2015, file no. K 34/15, OTK ZU 11A/2015, item 185.

2 Judgment of the Constitutional Tribunal of 9 December 2015, file no. K 35/15, OTK ZU 11A/2015, item 186.

3 See decision of 7 January 2016, file no. U 8/15, OTK ZU A/2016, item 1.

2. Legal situation as it relates to the election of judges

2.1. Constitution of the Republic of Poland

Article 194 of the Constitution says: "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 law. No person may be chosen for more than one term of office."[4] The Constitution regulation concerning the election of CT judges has to be developed in other acts of law. The argument in favour of having the issue of electing judges of the CT regulated in the Standing Orders of the Sejm is that the Sejm is an organ that actually selects them. In the judgment of the case no. K 34/15, the Tribunal in its assessment of the time-limit for putting forward candidates for judge did not agree with this position. The Tribunal concluded that the creative function of the Sejm is not exclusively a matter of rules, and it should be regulated both in an act of the Parliament and in the Standing Orders of the Sejm.[5]

The doctrine which recognises that it is natural to ascribe competencies to determine the election procedure to the Sejm expresses doubt about the position taken by the Tribunal.[6] The splitting of issues relating to the election of CT judges suggested in the reasons for the judgment of the Tribunal case no. K 34/15 corresponds neither to the content of Article 197 of the Constitution, which assumes that the organisation of the CT and the procedures to be followed before the CT are matters regulated by statute. So the Constitution does not prejudge whether the procedure for choosing CT judges should be regulated by statute. The position taken by the Tribunal may give rise to a suspicion that it adapted its assessment of the constitutional issue to fit the political objective of the new Act on the CT, i.e. to enable the election of the five judges to fill positions vacated in the Autumn of 2015.

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[4] See, on constitutional provisions regulating the election of judges of the Constitutional Tribunal, Bogusław Banaszak: *Konstytucja Rzeczypospolitej Polskiej: Komentarz*. Warsaw, C.H. Beck, 2012. 978.; Leszek Garlicki: Teza 3, Rozdział VIII „Sądy i trybunały", artykuł 194'. In: Leszek Garlicki (ed.): *Konstytucja Rzeczypospolitej Polskiej. Komentarz*. Vol. IV. Warsaw, Wydawnictwo Sejmowe, 2005. 3.

[5] See the reasons for the judgment K 34/15, items 6.8–6.12. See also on the subject of electing judges of the Constitutional Tribunal, Andrzej Mączyński – Jan Podkowik: Commentary on Art. 194, Nb 42. In: Marek Safjan – Leszek Bosek: *Konstytucja RP. Komentarz. Arts. 87–243*. Vol. II. Warsaw, C.H. Beck, 2016. 1278. The authors repeat the arguments put forward in cases nos. K 34/15 and K 47/15.

[6] Garlicki, just like Małgorzata Masternak-Kubiak, accepts that the Constitution does not provide any elements pertaining to the procedure of electing judges of the Constitutional Tribunal. The lack of such specification means that the act of electing judges is regulated by general rules of procedure specified in the Standing Orders of the Sejm concerning the election and appointment by the Sejm of other organs of public authority (see Leszek Garlicki: Teza 5, Rozdział VIII „Sądy i trybunały", artykuł 194. In: Garlicki op. cit. 3., 5–6.; Małgorzata Masternak-Kubiak: *Ustawa o Trybunale Konstytucyjnym*. Warsaw, Wydawnictwa Prawnicze PWN, 1998. 34). See also Bogusław Banaszak: Glosa do wyroku TK z dnia 3 grudnia 2015 r. (file no. K 34/15). *Przegląd Sejmowy*, 2016/2. 105–106., on the relations between regulation by rules and by statutes concerning the procedure for appointing judges of the Constitutional Tribunal.

2.2. Election of the Constitutional Tribunal judges in the provisions of the Act of 1 August 1997 on the Constitutional Tribunal[7]

Article 5 of the Act of 1 August 1997 on the CT regulates the issue of electing its judges. This legislative provision repeated the constitutional norms concerning the fifteen-member composition, the election for nine-year term, and the requirement to possess the highest qualifications [Article 5(3)].[8] The Act further stipulated entities empowered to put forward candidates for judges [Article 5(4): at least 50 deputies or the Presidium of the Sejm]. It also made more precise the legal form of the election and determined the majority required for electing a CT judge and with what quorum.[9] Finally, it introduced the obligation to take an oath before the President of the Republic of Poland, defined the form of the oath and the consequences that follow from refusing to take it.

2.3. Election of judges of the Constitutional Tribunal pursuant to the Standing Orders of the Sejm[10]

Besides being stipulated in the Act of 1997, the internal procedure followed by the Sejm in electing CT judges is provided for in Articles 26–31 of the Standing Orders.[11] Article 30(1) of the Standing Orders provides that the Presidium of the Sejm or a group of at least 50 deputies may put forward candidates for CT judge. The Standing Orders set the time-frame for putting forward candidates (30 days before the end of the term of office of the outgoing judge or 21 days in the event of expiry of his/her mandate). The election procedure was also set (the vote on the candidates may not take place earlier than on the seventh day after the day deputies received a printed form with the names of candidates, unless the Sejm decides otherwise).

A provision was set in the Standing Orders that for the election to be effective, a prior written opinion of a Sejm's committee has to be obtained. The vote may not take place earlier than one day following the receipt of the above-mentioned opinion by the deputies, but under special circumstances, the Sejm may shorten the procedure by putting the candidatures up for review without sending the opinion to the relevant committee and thus shorten this one-day time-limit (Article 30(9) of the Standing Orders).[12]

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7 Act of 1 August 1997 (Dz. U. no. 102, item 643, as amended), further also: Act on the Constitutional Tribunal of 1997.

8 http://isap.sejm.gov.pl/DetailsServlet?id=WDU19971020643; see Zdzisław Czeszejko-Sochacki – Leszek Garlicki – Janusz Trzciński: *Komentarz do ustawy o Trybunale Konstytucyjnym*. Warsaw, Wydawnictwo Sejmowe, 1999. 57–59.

9 It was supposed to be a resolution of the Sejm on the election of a judge of the Constitutional Tribunal by absolute majority of votes in the presence of at least one half of the overall number of deputies.

10 Standing Orders of the Sejm of the Republic of Poland of 30 July 1992 (Monitor Polski of 2012, item 32, as amended).

11 http://www.sejm.gov.pl/prawo/regulamin/kon7.htm.

12 See the description of procedure for electing a judge to the Constitutional Tribunal in Marek Zubik: *Status prawny sędziego Trybunału Konstytucyjnego*. Warsaw, Biuro Trybunału Konstytucyjnego, 2011. 80–83.

2.4. Legal situation with regard to the election of judges under the Act on the Constitutional Tribunal of 25 June 2015[13]

The Act on the CT of 25 June 2015 has changed the approach to setting the procedure for electing judges. In addition to repeating constitutional norms and developing them, it contained measures that provided an alternative to the applicable Standing Orders.[14] For example, adding the conjunction "*oraz*" (and), the norm of the Act expanded on the constitutional requirement in that it introduced qualifications required to hold the position of a judge of the Supreme Court and matters dealing with age when laying down the conditions that have to be met by a candidate for CT judge. A candidate had to be over 40 years of age on the day of his or her election, and could not be over 67 years of age.

The right to put forward a candidate was vested in the Presidium of the Sejm and a group of at least 50 deputies (Article 19(1)). The motion should be addressed to the Speaker of the Sejm not later than three months before the end of the term of office of the outgoing judge of the Tribunal, and in the event of earlier expiry – 21 days (Article 19(2)). If a vote failed to elect a judge of the Tribunal, the time-limit for addressing a new motion with the name of the candidate for CT judge was 14 days from the date of the vote. The relevant Sejm committee should express its opinion about the motion. As regards additional details of the legislative procedure used with respect to such motion, the Act referred to the Standing Orders.

2.5. Conclusions

Before the Act of 2015 was adopted, the election of judges to the Tribunal had been regulated by the Constitution, the Constitutional Tribunal Act of 1997 and the Standing Orders of the Sejm. The Standing Orders had fundamental importance. The adoption of the CT Act of 2015 made the legal situation more complicated. The moment the time-limit fixed for the election procedure started running and the entities empowered to put forward candidates were treated differently in the new legislative provisions and in the Standing Orders. The new law gave rise to the now famous conflict over the conjunction "*oraz*" (and), which became the starting point for finding the lack of legal force of the resolutions concerning the election of CT judges adopted in October 2015.[15]

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[13] Act of 25 June 2015 (Dz. U. item 1064, as amended); hereinafter also: Act on the Constitutional Tribunal of 2015.

[14] See Arts. 18–21 of the Act on the Constitutional Tribunal in its original wording, setting the number of judges, requirements for candidates, entities empowered to put forward candidates for judges and the election procedure (Dz. U. item 1064), http://isap.sejm.gov.pl/DetailsServlet?id=WDU20150001064.

[15] The wording of competitive norms: Article 19(1) of the 2015 Constitutional Tribunal Act: "The Presidium of the Sejm and a group of at least 50 deputies shall have the right to propose candidates for Tribunal judge"; Article 30(1) Sentence 1 of the Standing Orders of the Sejm: "Recommendations concerning the election or appointment by the Sejm of individual persons to particular State offices specified in Articles 26 and 29 may be submitted by the Marshal of the Sejm or at least 35 Deputies, except for the office of a

3. Act on Constitutional Tribunal of 25 June 2015 as an instrument of "legal conspiracy"

3.1. Hypothetical run of the procedure for electing judges in the legal situation that existed before the Act on the Constitutional Tribunal of 25 June 2015 was adopted

Autumn of 2015 saw the end of the terms of five Tribunal judges: Of three of them on 6 November, of one on 2 December, and of one on 8 December. In accordance with the CT Act of 1997 and the Sejm's Standing Orders, the deadline for proposing candidates for positions vacated in November 2015 expired on 7 October, and for positions vacated in December on 3 November and 8 November 2015, respectively.[16] Under the old provisions, applications naming candidates for the first three vacancies could be lodged by the Marshal of the Sejm with a relevant Sejm committee on 8 October 2015 (Thursday) at the earliest. The committee would most probably have started work on 13–14 October 2015 (Tuesday/Wednesday) at the earliest, and would have had to issue a written opinion, which might have been prepared on 14–15 October 2015. After its adoption, such application and the opinion would have had to be passed on to deputies.

Procedural measures to elect Tribunal judges have two modes: A standard and a fast-track one. Under the standard procedure, the committee serves the deputies with a form featuring the candidates' names, and the vote may not take place earlier than the seventh day from the date the form was served. In the then legal order, the vote on candidates for November vacancies could have been held on 22–23 October 2015.

Under the fast-track procedure which the Sejm could invoke in exceptional cases, the proceedings might be shortened by beginning consideration of the recommendation without referring it to the appropriate committee, and disregarding the vote timeframe (Art. 30(9) of the Standing Orders). Assuming Thursday, 8 October, was the starting point, under that procedure the vote could have been called on Friday, 9 October 2015, at the earliest. Application of the fast-track procedure to elect Tribunal judges would have looked bad in the election campaign. That is why the committee under the fast-track procedure would have been convened for Friday, 9 October, and the vote would have been held on Monday–Tuesday, 12–13 October.

3.2. Insertion of Article 137 into the Constitutional Tribunal Act of 25 June 2015

The original CT bill did not offer the PO–PSL coalition the possibility of quick election of Tribunal judges in 2015. For that reason, and because of the nearing parliamentary elections, the final stages of work on the bill saw, besides general rules, the introduction of a specific norm about electing judges for vacancies to emerge in 2015. It was Article

judge of the Constitutional Tribunal for which recommendations shall be made by the Presidium of the Sejm or at least 50 Deputies." For more on this, see Banaszak (2016) op. cit. 104–105.

[16] See Art 30(3)1 of the Sejm's Standing Orders: "Recommendations shall be lodged with the Marshal of the Sejm within a time limit: of 30 days before the expiry of the term of office" (Recommendations with respect to candidates for Tribunal judges).

135a of the bill, which eventually read as Article 137 in the adopted law, and stipulated that: "For those judges of the Tribunal whose terms of office expire in 2015, the deadline for submitting applications referred to in Article 19(2) shall be 30 days from the date on which the law enters into force." The goal behind that statute was to give the seventh Sejm the right to propose candidates for all vacating judicial positions on the Tribunal whose terms expired in 2015.

Article 137 of the CT Act of 2015 was *lex specialis* as regards Article 19(2) of this act and the time limit for proposing candidates for CT judges.[17] It was proposed by PO deputy, Robert Kropiwnicki, during a session of the joint Sejm committees on 12 May 2015.[18] Its adoption was justified by the intention to avoid a deadlocked Tribunal over the risk of coinciding dates of electing Tribunal judges and the parliamentary elections.[19] An attempt by the then opposition (Prawo i Sprawiedliwość, PiS) Party to introduce an amendment that would repeal that provision failed both at the second reading on 27 May 2015[20] and in the Senate committees.[21]

3.3. Conclusions

If the PO–PSL coalition had not adopted the 2015 CT Act, the election of judges would have run under the procedure provided for in the Sejm's Standing Orders. The former legal state would not have allowed the seventh Sejm to elect the Tribunal judges. Measures regulating the election of judges set out in the 1997 Act and in the Standing Orders offered the possibility of electing judges for the posts vacated in autumn 2015 only in mid-October 2015. Any faster appointment would not have been possible, even if the fast-track procedure had been applied. The seventh Sejm held its last session on 8 October 2015. Shortening procedural time limits in the face of parliamentary elections would have been politically risky because it would have revealed the hidden manipulation.

Inserting Article 137 into the bill was conceived as a tool to trigger the judicial election procedure by the seventh Sejm. This intent was quickly exposed. On 27 May 2015, after the Sejm rejected the amendment to delete this provision, deputy of the PiS, Wojciech Szarama, said that "The case is unequivocal; a temporary provision has been introduced whose goal is to allow this Sejm to elect all five judges of the Constitutional

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[17] Article 19(2): "Application proposing a candidate for a Tribunal judge shall be filed with the Sejm Marshal no later than three months before the expiry of the Tribunal judge's term of office."

[18] The amendment involved adding Art. 135a to the bill; at that time Art. 137 of the bill governed the entry into force of the act. See more in Bulletin 4532/VII. Committee of Justice and Human Rights (no. 236), Legislation Committee (no. 1299), 12 May 2015, http://orka.sejm.gov.pl/Zapisy7.nsf/wgskrnr/SPC-236.

[19] See ibid.

[20] Then Art. 136 of bill (amendment which was motioned a day before by the PiS parliamentary club, and received a negative opinion from the joint committees). See Sejm document no. 3397, A http://orka.sejm.gov.pl/Druki7ka.nsf/0/709AC9FC64EC8D8AC1257E5200221C1C/%24File/3397-A.pdf.

[21] Amendment no. 32, Senate document no. 915A, http://senat.gov.pl/prace/senat/posiedzenia/tematy,242,1.html. Amendment no. 83, Senate document no. 915, http://senat.gov.pl/prace/senat/posiedzenia/tematy,242,1.html.

Tribunal."[22] This statement, however, failed to provoke any public, political, media or institutional response.

4. Presidential elections as the catalyst of efforts to take over vacancies in the Tribunal

4.1. Calendar of work on the 2015 Constitutional Tribunal Act

The Tribunal began to work on a bill replacing the CT Act of 1 August 1997 in December 2010.[23] In March 2013, the Tribunal submitted the bill to President Bronisław Komorowski, who sent it to the Sejm on 11 July 2013.[24] The first reading took place on 29 August 2013, after which the bill was sent to Sejm committees. On 11 December 2013, the committees set up an extraordinary subcommittee, which concluded work on a report that was adopted on 9 April 2015.[25]

On 24 May 2015, Andrzej Duda won the second round of elections; two days later, the second reading of the CT bill took place. The bill was again referred to the committees, which on the same day issued an additional report.[26] The third reading was held on 27 May 2015. The adopted act was sent to the Senate on 28 May 2015,[27] where it was subject to legislative procedure carried out by Senate committees.[28] On 12 June 2015, the Senate proposed its amendments, and sent the bill to the Sejm.[29] Sejm committees worked on the Senate's amendments until 23 June 2015.[30] The Sejm reviewed the Senate's amendments on 25 June 2015, and adopted the CT Act. The Act was submitted to President Komorowski for signing on 30 June 2015. The President signed the bill into law on 21 July 2015. It was published in the journal of laws of the

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[22] Transcript 93 of the Sejm session, p. 168. See http://orka2.sejm.gov.pl/StenoInter7.nsf/0/8860C47B75D03EBEC1257E520073E10F/%24File/93_b_ksiazka.pdf.

[23] See the Announcement of 29 February 2016 on the work on the Constitutional Tribunal bill, proposed procedure for selecting candidates for Constitutional Tribunal judges, the progress of legislative work, and possibilities of lodging appeals against the Constitutional Tribunal Act of 25 June 2015 with the Constitutional Tribunal, http://trybunal.gov.pl/uploads/media/Komunikat_w_sprawie_prac_nad_ustawa_i_mozliwosci_jej_zaskarzenia.pdf, s. 2.

[24] Sejm print no. 590, http://orka.sejm.gov.pl/Druki7ka.nsf/0/699F4137C13BF1E7C1257BB1004B2874/%24File/1590.pdf. See also the chronology of the 2015 Constitutional Tribunal Act's adoption, http://www.sejm.gov.pl/sejm7.nsf/PrzebiegProc.xsp?nr=1590.

[25] Sejm print no. 3397, http://orka.sejm.gov.pl/Druki7ka.nsf/0/971B0657D490ED69C1257E4A004199BD/%24File/3397.pdf.

[26] Sejm print no. 3397-A http://orka.sejm.gov.pl/Druki7ka.nsf/0/709AC9FC64EC8D8AC1257E5200221C1C/%24File/3397-A.pdf.

[27] Senate print no. 915 http://senat.gov.pl/prace/senat/posiedzenia/tematy,242,1.html.

[28] Senate print no. 915A http://senat.gov.pl/prace/senat/posiedzenia/tematy,242,1.html.

[29] Senate print no. 915 Z http://senat.gov.pl/prace/senat/posiedzenia/tematy,242,1.html.

[30] Sejm print no. 3512 http://orka.sejm.gov.pl/Druki4ka.nsf/wgdruku/3512/$file/3512.pdf.

Republic of Poland (*Dziennik Ustaw*) on 30 July 2015 under item 1064, and it entered into force on 30 August 2015.[31]

Three Tribunal judges were involved in the parliamentary work on the CT bill: President of the CT, Andrzej Rzepliński, Vice-President of the CT, Stanisław Biernat, and Judge Piotr Tuleja, as well as the Head and the staff of the Tribunal's Office.

4.2. Date of parliamentary elections

On 25 October 2015, parliamentary elections were held in Poland. It was not the only date on which it was possible to call them. The Constitution of Poland sets the duration of the term of office of the Sejm and Senate, the manner in which it should be calculated, and the date of parliamentary elections. Under Article 98(2), the President of Poland orders elections on a non-working day "which shall be within the 30 day period before the expiry of the 4 year period beginning from the commencement of the Sejm's and Senate's term of office." The term of office begins on the day the Sejm assembles for its first sitting after the elections.[32]

Since the Sejm elected in 2011 (seventh Sejm) began its term of office on 8 November 2011, the President of Poland was obligated to call the 2015 elections by 10 August 2015 at the latest. Consequently, the decision could be taken by the outgoing President Bronisław Komorowski, or the incoming President Andrzej Duda, whose term of office began on 6 August 2015. President Komorowski decided to exercise his prerogative.[33] In accordance with the Constitution, elections had to be held on a non-working day between 9 October and 7 November 2015, which narrowed down the choice to four Sundays: 11 October, 18 October, 25 October, and 1 November. President Komorowski opted for the last realistic date, Sunday, 25 October 2015 (with 1 November being the All Saints' Day).

4.3. Conclusions

The speeding up of work on the 2015 CT Act coincided with presidential elections. After Komorowski lost the first round (10 May 2015), an amendment was put forward on 12 May introducing a provision that made it possible to conduct a procedure for electing Tribunal judges by the seventh Sejm to fill the positions that would become vacant in

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[31] See the chronology of the 2015 Constitutional Tribunal Act's adoption, http://www.sejm.gov.pl/sejm7.nsf/PrzebiegProc.xsp?nr=1590.

[32] Article 98(1): "The Sejm and the Senate shall be chosen each for a 4-year term of office. The term of office of the Sejm and Senate shall begin on the day on which the Sejm assembles for its first sitting and shall continue until the day preceding the assembly of the Sejm of the succeeding term of office."

[33] See the Decision of the President of the Republic of Poland of 17 July 2015 Ordering Elections to the Sejm and Senate of the Republic of Poland (Journal of Laws, item 1017, as amended).

2015. Following Komorowski's defeat in the second round of voting, President-elect Duda called on the ruling party to refrain from introducing systemic changes.[34]

The earliest possible date of parliamentary elections was 11 October 2015. The analysis that has been conducted shows that 9 October 2015 was the earliest date on which Tribunal judges could be elected pursuant to the legal regime established by the 1997 CT Act (using the extraordinary fast-track procedure). It was not until 22–23 October 2015 that Tribunal judges could be elected under the standard procedure. The election of judges under the 2015 CT Act also depended on the date of parliamentary elections. If President Komorowski had scheduled elections for 11 October, or left it up to his successor, who would have ordered that elections be held on 11 October, it would not have been possible for the seventh Sejm to use the new procedure filling any of the judicial vacancies in 2015. Judges would have had to be elected three days prior to parliamentary elections.

On the other hand, if President Komorowski had scheduled elections for 18 October, under the old legal regime, it would have been necessary to call an extra Sejm sitting during the week ending on the day of parliamentary elections, while the election of Tribunal judges would have had to be held according to the fast-track procedure (in the standard procedure, the voting would have had to take place on the Thursday/Friday before the election Sunday), which would have laid bare the government's intentions and no doubt, tarnished its image. Alternatively, with the date of elections set by President Komorowski for 25 October, the election of Tribunal judges under the old legal regime would have taken place in the week preceding the week at the end of which fell the day of parliamentary elections (fast-track procedure), or during the election week (standard procedure). This would have just as likely ended in political disaster. Meanwhile, the new legal regime made it possible to elect judges if parliamentary elections were to be scheduled for 18 or 25 October 2015.

5. Constitutional Tribunal and its involvement in political dispute

5.1. Constitutional Tribunal as the author of Constitutional Tribunal bill

The initial version of the CT bill was drawn up by the CT. Work on the bill involved a group of retired judges (Andrzej Mączyński, Mirosław Wyrzykowski and Andrzej Zoll), who were presided over by the President of the CT, and supported by the Tribunal's Office Staff. The team would consult with all the active judges of the Tribunal.[35]

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[34] See the comments by President Andrzej Duda following upon receiving resolution confirming his election at http://www.gazetaprawna.pl/artykuly/874517,duda-apeluje-do-rzadu-nie-dokonujcie-powaznych-zmian-ustrojowych.html

[35] See the Announcement of 29 February 2016 cited in n. 23. In its announcement of 29 February 2016, the Tribunal recalls that in opinion no. 3 of 19 November 2002 for the Council of Europe's Committee of Ministers on the principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviour and impartiality, the Consultative Council of European Judges pointed out that "judges […] should […] play an active part in the preparation of legislation concerning their statute and, more generally, the functioning of the judicial system" (item 34 of the opinion). Playing an active

According to the reasons for starting the drafting of a new bill by the Tribunal, posted on the CT's website:

> "Given the increase in caseload of the Constitutional Tribunal over the years, the Constitutional Tribunal Act of 1 August 1997 […] proved to be obsolete and dysfunctional in many points. […]. As these changes remained unnoticed for external entities which have the right to introduce legislation, […] it was unrealistic to expect that any of them would take the initiative to introduce relevant legislation. […] In addition, in response to many public demands and voices in the legal circles, the bill also envisaged a new way of selecting candidates for judges of the Constitutional Tribunal."[36]

The proposed new procedure for putting forward "candidates for candidates" for CT judges was struck out at a sitting of the extraordinary subcommittee on 13 January 2015.[37] Instead, Article 137 was inserted into the bill in May 2015, providing for faster election of the Tribunal's judges whose posts would become vacant in 2015.

5.2. Constitutional application by a group of Prawo i Sprawiedliwość deputies

On 23 October 2015, a group of PiS deputies applied to the Tribunal for examining the constitutionality of provisions of the 2015 CT Act.[38] Article 137 of the Act was among the challenged provisions. On 4 November 2015, the President of the adjudicating bench scheduled a hearing of the case for 25 November 2015. What the Tribunal applied here was a new institution provided for in Article 70(2) of the 2015 CT Act. It made it possible to continue with the examination of an application filed by a group of deputies or senators, even in the absence of the applicant, if the Tribunal notified the applicants of the date of the hearing before the end of term of the Sejm and the Senate.[39]

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part does not mean interfering with parliamentary powers by drafting a bill. Owing to their practical experience and familiarity with the subject matter to be regulated, representatives of the Constitutional Tribunal may only be heard during legislative work.

[36] Announcement of 29 February 2016 (n. 23).

[37] Ibid.

[38] For case documents, see http://ipo.trybunal.gov.pl/ipo/Sprawa?&pokaz=dokumenty&sygnatura=K%20 29/15.

[39] This solution was an exception to the rule whereby cases which the Constitutional Tribunal received during one term of the Sejm and did not manage to hear had to be suspended and decided in the subsequent term of the Sejm. The institution of suspending proceedings was a normative novelty. Pursuant to the 1997 Constitutional Tribunal Act, the expiry of a parliamentary term led to the discontinuation of the case (see decision by the full bench of 21 November 2007, case no. U 3/07, OTK ZU no. 10/A/2007, item 146, and prior rulings referred to there). Statement of reasons for the 2015 Constitutional Tribunal bill suggested that the new approach to applications by a group of deputies or senators took account of the significance of scrutinizing the constitutionality of law, undertaken by a group of entities strictly defined in the Constitution (see Sejm print no. 1590, seventh Sejm).

The fact that the Tribunal applied Article 70(2) of the 2015 CT Act raised doubts as to whether the body's actions were reasonable, all the more so as Article 88 of the 2015 CT Act made it, in principle, obligatory for the applicant or his or her representative or plenipotentiary to be present at the hearing. If the applicant or his or her representative or plenipotentiary were not to appear despite having been duly notified, the Tribunal was obligated to discontinue or defer the hearing.[40] On 10 November 2015, a representative of the applicants withdrew the application, and the proceedings were discontinued.[41]

5.3. Injunction of 30 November 2015

After the group of PiS deputies withdrew their application, a new one, copying the contents of the PiS deputies' application, was filed by a group of PO deputies on 17 November 2015.[42] At the same time, the Sejm was in the process of electing new CT judges. At the applicants' request, on 30 November 2015, the Tribunal issued an injunction on the application made by the group of deputies "by calling on the Sejm of the Republic of Poland to abstain from actions that would lead to selecting judges of the CT, until the CT issues a final ruling on case no. K 34/15."[43]

In the reasons for its decision, the Tribunal explained that the judgment regarding the case whose hearing was set for 3 December 2015, will settle, among other things, the question of constitutionality of procedural provisions concerning the filling of judicial posts in the CT that become vacant in 2015 (Article 137 of the 2015 CT Act). The Tribunal conceded that in its previous rulings, it sanctioned injunctions on cases brought by means of constitutional complaints. This resulted from provisions of the CT Act. In its decision of 30 November 2015, the Tribunal found that Article 68 of the CT Act of 2015 did not preclude issuing injunctions in other cases, especially so as to prevent constitutional crises. As the legal basis, the Tribunal pointed to the provisions of the Code of Civil Procedure which were referred to in Article 74 of the CT Act of 2015.

There are several reasons why the Tribunal's actions were unlawful when it was issuing the decision:[44]

1) the issuing of the decision involved judges who had been excluded from examining case no. K 34/15 (they took part in drafting the 2015 CT Act);[45]

[40] According to commentary on Article 60 of the 1997 Constitutional Tribunal Act, whose paragraph 2 governed the applicant's obligation to be present at the hearing, failure to appear at the hearing on the part of the applicant should be understood as not sustaining the application (see Czeszejko-Sochacki–Garlicki–Trzciński op. cit. 192–193.).

[41] See the decision of the Constitutional Tribunal of 25 November 2015, case no. K 29/15, OTK ZU no. 10A/2015, item 176.

[42] http://ipo.trybunal.gov.pl/ipo/Sprawa?&pokaz=dokumenty&sygnatura=K%2034/15.

[43] http://trybunal.gov.pl/uploads/media/K_34_15_postanowienie_o_zabezpieczeniu_ADO.pdf, decision of 30 November 2015, case no. K 34/15 (unpublished).

[44] For more, see: Mariusz Muszyński: Analiza opinii Komisji Weneckiej z 11 marca 2016 r. *Prawo i Więź*, 2016/15. 47.

[45] http://ipo.trybunal.gov.pl/ipo/Sprawa?cid=2&dokument=13040&sprawa=16426, decision of 30 November 2015, case no. K 34/15 (unpublished).

2) Article 68 of the 2015 CT Act deals with the possibility of issuing a provisional decision only in proceedings concerned with constitutional complaints, and only with respect to rulings by common courts;[46]
3) the possibility of suspending a complaint pursuant to Article 68 of the 2015 CT Act is not identical with the injunction on complaint, as provided for in the Code of Civil Procedure. The Tribunal approved of this approach in its previous rulings.[47] Moreover, if Article 68 of the 2015 CT Act allowed the Tribunal to issue decisions whose effects were similar to those of injunctions provided for the civil procedure, then it is unlawful to apply this procedure to expand the powers arising from Article 68 of the CT Act;
4) the Tribunal has similar powers when it comes to examining disputes over authority between central constitutional organs of the state. In accordance with Article 115(2) of the 2015 CT Act, the Tribunal may, after familiarizing itself with positions of the parties to the proceedings, issue a provisional decision settling the dispute, in particular when this is warranted by an important public interest. Since the legislator regulated by statute the objective scope of the powers to issue such decisions, these powers cannot be shifted into other objective fields.

But if we were to assume that it had been possible to invoke injunction proceedings, note should be taken of the fact that the Tribunal pointed to Article 755 and Article 730^1 (2) of the Code of Civil Procedure as the legal grounds for its actions.

The aim of injunction proceedings is to protect specific claims when the absence of injunction could thwart or impede the enforcement of a ruling, or otherwise thwart or impede the achievement of the objective of proceedings. Proceedings before the Tribunal in case no. K 34/15 were supposed to examine the constitutionality of certain provisions of the 2015 CT Act. Calls on the eighth Sejm to refrain from electing judges bore no relation to the case pending before the CT. The Tribunal may not assess the election of Tribunal judges conducted by the Sejm. Interference with the Sejm's creative function by issuing an injunction runs counter to the principle of separation of powers.

However, the Tribunal did adopt an injunction in order to block the Sejm's path to electing new judges of the Tribunal, and make it possible for itself to issue the ruling of 3 December 2015. Moreover, such a step was unreasonable from the legal point of view, as the Tribunal's ruling covers the sphere of law, while the injunction was concerned with the Sejm's creative rather than legislative function.

5.4. Judgment of 3 December 2015, case no. K 34/15, regarding Article 137 of the 2015 Constitutional Tribunal Act

It is widely believed that by its judgment of 3 December 2015 in case no. K 34/15, the CT recognized as legal the election of three judges of the CT, conducted in October 2015. That such reasoning is flawed is demonstrated by an analysis of this judgment's

[46] See the decision of 22 February 2006, case no. K 4/06, OTK ZU no. 2A/2006, item 24.

[47] Ibid.

conclusion and statement of reasons. The conclusion of the judgment has the following to say about Article 137:

– to the extent that it affects the Tribunal judges whose terms of office end on 6 November 2015, it conforms with Article 194(1) of the Constitution,
– to the extent that it affects the Tribunal judges whose terms of office end on 2 and 8 December 2015, respectively, it does not conform with Article 194(1) of the Constitution.

Judges who end their terms of office fall within the objective scope of Article 137. The same wording can be found in the conclusion of the judgment. Had the Tribunal intended to rule on the norm in the context of candidates proposed to replace the judges whose terms of office ended on 6 November, and on 2 and 8 December, respectively, it should have written in the judgment "candidates for judge" rather than "judges whose terms of office end." The judgment is therefore only effective with respect to the departing judges. The principle of *falsa demonstratio non nocet* cannot be applied in this case.[48]

The Tribunal had right neither to pronounce on the election of judges in the conclusion of the judgment, as the Sejm's creative function lies outside its powers,[49] something it confirmed in the decision of 7 January 2016 (U 8/15).[50] However, it is publically argued that the eighth Sejm did not have the right to elect the new judges on 2 December 2015. The Tribunal *post factum* formulated an opinion to the effect that the Sejm did not have competences in the above matters in what was a statement of reasons for the ruling (i.e. in the part that is non-binding and not subject to promulgation).[51] The opinion was

[48] Mariusz Muszyński: Orzeczenie Trybunału Konstytucyjnego K 34/15 z dnia 3 grudnia 2015 r. w zakresie jego skutków prawnych – analiza krytyczna. *Prawo i Więź*, 2016/15. 88.

[49] See Articles 188–189 of the Constitution. For more about the scope of the Tribunal's powers, see Andrzej Mączyński – Jan Podkowik: Komentarz do art. 188, Nb 81–82. In: Safjan–Bosek op. cit. 1148–1149.; Krzysztof Wojtyczek, *Sądownictwo konstytucyjne w Polsce. Wybrane Zagadnienia*. Warsaw, Biuro Trybunału Konstytucyjnego, 2013. 85–112.; Banaszak (2012) op. cit. 922–945.; Marek Zubik – Marcin Wiącek: Kompetencje sądu konstytucyjnego a granice swobody orzekania przez sędziów Trybunału Konstytucyjnego. *Przegląd Sejmowy*, 2009/4. 25–58.; Leszek Garlicki: Teza 4, Rozdział VIII „Sądy i trybunały", artykuł 188. In: Garlicki op. cit. 4–5.; Janusz Trzciński: Trybunał Konstytucyjny – regulacja konstytucyjna i praktyka. In: Wiesław Skrzydło (ed.): *Sądy i Trybunały w Konstytucji i w praktyce*. Warsaw, Wydawnictwo Sejmowe, 2005. 93.; Andrzej Mączyński: O tak zwanych wyrokach interpretacyjnych Trybunału Konstytucyjnego. In: Piotr Winczorek (ed.): *Teoria i praktyka wykładni prawa. Materiały konferencji naukowej Wydziału Prawa i Administracji Uniwersytetu Warszawskiego odbytej w dniu 27 lutego 2004 roku*. Warsaw, Liber, 2005. 159–162.; Czeszejko-Sochacki–Garlicki–Trzciński op. cit. 10–15.

[50] See the decision of 7 January 2016, no. U 8/15. The literature emphasizes that the Constitution provides an exhaustive list of the Constitutional Tribunal's powers. The Constitution does not provide for the possibility of granting new powers to the Tribunal by virtue of statute. Hence the Tribunal cannot be given new powers without amending the Constitution. See: Andrzej Mączyński: Orzeczenia Trybunału Konstytucyjnego. In: Marek Zubik (ed.): *Księga XX-lecia orzecznictwa Trybunału Konstytucyjnego*. Warsaw, Biuro Trybunału Konstytucyjnego, 2006. 82.

[51] See the Tribunal's ruling of 5 November 1986, case no. U 5/86 (OTK in 1986, pp. 7–31), in which the Tribunal said that: "only determinations contained in a ruling have binding force, in other words a normative act may be found to be, or not be, compliant with the Constitution, with all the consequences

formulated in a manner contrary to the conclusion of the ruling, which pertained to the outgoing judges but not persons elected to the office of judge. Furthermore, the opinion was given after the Sejm on 25 November 2015 passed resolutions on the nullity of resolutions on the election of the Tribunal judges on 8 October 2015, and after the judges were elected on 2 December 2015, and took the oath (four out of five judges).

Describing the effects of the judgment with case no. K 34/15, the Tribunal also noted that

> "in the case of the two Tribunal judges elected to replace the judges whose terms expired or expire on 2 and 8 December 2015, the Tribunal questioned the legal grounds for an important part of their election procedure as unconstitutional. As the judicial vacancies had not yet been filled, the reason being that the last legally significant act was not completed (i.e. the President's taking the oath from the Tribunal judges), derogation from the applicable scope of Article 137 of the CT Act results in further proceedings having to be interrupted and closed.[52] The completion of such proceedings is not acceptable, since the legal basis of one of their stages has been found to be unconstitutional by the Tribunal."

The Tribunal also wrote in the statement of reasons that:

> "Because according to Art. 190(1) of the Constitution, judgments of the Constitutional Tribunal shall be of universally binding application and shall be final, once this judgment has entered into force no public authority has legal grounds for questioning the constitutionality of those provisions governing the element of the procedure to elect a new judge to the Tribunal which the Tribunal has found in this judgment to be compliant with the Constitution."

Further to the above, it must be noted that when the Sejm adopted the resolutions of 25 November 2015, it did not know the Tribunal's judgment, and its actions cannot be interpreted as questioning that judgment. On 2 December 2015, it only applied the CT Act and the Sejm's Standing Orders because as a result of the breach of election

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thereof, only in the substance of a ruling. The statement of reasons for the ruling only includes the grounds and arguments on which the Tribunal has based its findings and its determination. Therefore, the statement of reasons cannot by itself […] produce the same results as those that the Act […] on the Constitutional Tribunal associates with the determinations contained in the ruling." The Tribunal repeats this position in the statements of reasons for its subsequent rulings (e.g. judgment of 18 April 2000, case no. K 23/99, OTK ZU no. 3/200, item 89) and in the doctrine, e.g. Andrzej Mączyński – Jan Podkowik: Komentarz do art. 190, Nb 57. In: Safjan–Bosek op. cit. 1189., and the sources quoted therein; Leszek Garlicki: Teza 6, Rozdzial VIII „Sądy i trybunały", artykuł 190. In Garlicki op. cit. 7–8.; Piotr Winczorek: *Komentarz do Konstytucji RP z dnia 2 kwietnia 1997 r.* Warsaw, Liber, 2000. 247.

[52] Different effects of the Tribunal's judgment of 24 November 2003, case no. K 26/03, OTK ZU no. 9/A/2003, item 95, which concerned the election of a member of the Monetary Policy Council, were connected exactly with the fact that the case then involved a person effectively appointed to a post.

procedures it turned out that the election on 8 October 2015 was not effective. The Sejm was still unaware of the judgment of 3 December 2015 as it had not yet been given.

The Tribunal also found that:

> "Constitutional doubts do not appear as regards the legal grounds for the election of the three Tribunal judges to replace the judges whose tenures expired on 6 November 2015. Derogation from the scope of Article 137 of the Constitutional Tribunal Act has not affected the effectiveness of their election. In line with the principle that a Tribunal judge is elected by the Sejm during whose term the judge's office has vacated, the election based on such grounds was in that case valid and no obstacles exist for the procedure to be finalised by taking the oath before the President by persons elected Tribunal judges."[53]

It must be accordingly noted that the election procedure has a few stages. In its judgment K 34/15, the Tribunal only ruled on a norm that makes it possible to submit applications naming candidates. A multiple-stage election procedure was not finalised, since:

- faults in the election procedure were revealed;
- resultantly, Sejm resolutions of 25 November 2015 appeared on the declaration of nullity;
- judges were elected as soon as 2 December 2015, i.e. earlier than the judgment was delivered, to fill judicial vacancies (the appointment procedure not having finished yet).

Furthermore, the Tribunal stated in the reasons that "[o]n account of the judgment's entry into force, the Sejm is obliged to elect two judges to the Tribunal whose terms expire on 2 December 2015 and 8 December 2015." Such thesis cannot create a legal norm as it is contained in a statement of reasons for the judgment. No basis exists in Polish law on which the CT in the statement of reasons for its judgment can obligate a public authority to specific action.

5.5. Decision no. U 8/15 about Sejm resolutions

On 7 January 2016, pursuant to Article 104(1)2 of the CT Act of 2015, the Tribunal discontinued the proceedings on the constitutional review of the five Sejm resolutions of 25 November 2015 on the declaration of nullity of five resolutions to elect five Tribunal judges on 8 October 2015 and five resolutions to elect Tribunal judges on 2 December 2015 owing to the inadmissibility of the ruling.[54] The Tribunal thus confirmed that

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[53] See the statement of reasons for the judgment of 3 December 2015, case no. K 34/15.

[54] http://trybunal.gov.pl/rozprawy-i-ogloszenia-orzeczen/postanowienia/art/8877-uchwaly-sejmu-rp-w-sprawie-stwierdzenia-braku-mocy-prawnej-uchwal-sejmu-rp-z-dnia-8-pazdziernika/.

it lacks cognition to review the Sejm's creative function and the Sejm's measures as regards its self-assessment of how this function is fulfilled.[55]

That did not prevent the Tribunal from giving an assessment of the Sejm's actions in the statement of reasons for its decision on discontinuation, even though that fell outside its competences.[56] The Tribunal contained in the statement of reasons what it could not state in the conclusions and what it formally confirmed by discontinuation. The Tribunal also reviewed resolutions of 8 October 2015 that were not the subject of the submitted application.[57]

5.6. Conclusions

Since the beginning of the crisis around the CT, the Tribunal's activities focused on defending the election of Tribunal judges, made on 8 October 2015. The Tribunal exercised measures within its purview as well as unlawful ones. The former include the judgment of 3 December 2015, in which the Tribunal ruled on the partial constitutionality of the provision on the time limit for proposing candidates for Tribunal judges. The conclusions read that the constitutionality pertains to the vacancies arising at the Tribunal. Irrespective of the Tribunal's judgment, the Sejm did not question the time limit for proposing candidates when it found the election of judges in October 2015 to be ineffective. It invoked other defects, including the incorrect submission of candidates with respect to eligible entities.

Unlawful measures involved the Tribunal's injunction addressed to the Sejm. The Tribunal violated the Constitution here in that by overstepping its powers and interfering in the Sejm's creative powers it attempted to influence the Sejm's specific actions. Actions bordering on law and politics can best illustrate the grab at the Tribunal attempted by the coalition of PO and the PSL and the political role of the Tribunal itself. During the work on the CT bill of 2015, the participating judges did not say a word about the unconstitutionality of draft Article 137. In the course of constitutional review, they attempted to expand the actual significance of the judgment of 3 December 2015 in the statement of reasons, for both that judgment and the decision of 7 January 2016. Next, they wanted to make those reasons universally binding law, despite the fact that what is universally binding is only the conclusion published in a relevant official gazette.

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[55] For the significance of proceedings discontinuation, see Andrzej Mączyński – Jan Podkowik: Komentarz do art. 190, Nb 22. In: Safjan–Bosek op. cit. 1179.

[56] http://ipo.trybunal.gov.pl/ipo/Sprawa?sprawa=16536&dokument=13241&cid=1.

[57] "When analysing the documents related to the election of judges made on 8 October 2015, the Tribunal did not find that legal requirements had been breached in its course; in particular, it cannot be deemed true that an obvious, indisputable and gross defect exists of the conventional act under review, a defect which would made it possible to treat such act as non-existent." (Decision of 7 January 2016, case no. U 8/15).

6. Final remarks

By adopting the Act of 25 June 2015 with Article 137 in the final months of its term, the seventh Sejm sought legal grounds allowing the PO–PSL coalition to fill all places at the Tribunal that were vacated in 2015. According to the derogated legal state, the PO–PSL coalition could fill no position vacated at the CT in 2015 sooner than mid-October. President Komorowski endorsed the legislative manipulation described here by his refusal to leave the decision to call parliamentary elections to a new President. By that decision he wanted to provide a convenient time frame for the PO–PSL coalition to make a grab for the Tribunal.

The Constitutional Tribunal became involved in that process which sought to install at least three candidates from the nominees selected by PO for the Tribunal. The Tribunal took that action despite the fact that the Sejm found the October election to be legally invalid. Contrary to the judgment of 3 December 2015, attempts are being made to make public opinion and the world of politics believe that the Tribunal upheld the legality of the judicial election in October 2015; to that end, resort is made to selected arguments in the statements of reasons. In the scrutiny procedure launched by a group of Sejm deputies the Constitutional Tribunal is a court of law, not a court of facts. The Tribunal has no powers to review the process of selecting the judges by the Sejm. During the proceedings in which it passed the judgment case no. K 34/15, it could only rule on the constitutionality of a general and abstract legal norm.[58]

[58] See Leszek Garlicki: Teza 11, Rozdział VIII „Sądy i trybunały", artykuł 194. In: Garlicki op. cit. 11–12.