PRESS RELEASE AFTER THE HEARING

The Constitutional Tribunal Act of 22 July 2016

K 39/16

On 11 August 2016 at 11 a.m., the Constitutional Tribunal publicly delivered a judgment issued at a sitting in camera with regard to joined applications filed by two groups of Sejm Deputies and the Polish Ombudsman, in which the applicants requested the Tribunal to determine the constitutionality of the 2016 Constitutional Tribunal Act.

In the judgment of 11 August 2016, the Constitutional Tribunal adjudicated that:

1) Article 26(1)(1)(g) of the Constitutional Tribunal Act of 22 July 2016 **is inconsistent** with Article 197, and Article 195(1) of the Constitution;

2) Article 38(3)-(6) of the 2016 Constitutional Tribunal Act **are inconsistent** with Article 10, Article 173, Article 188, Article 191(1)(1)-Article 191(1)(5) of the Constitution, as well as with the Preamble to the Constitution;

3) Article 61(3) of the 2016 Constitutional Tribunal Act – in the part which includes the wording “With regard to questions of law, constitutional complaints and disputes over powers between central constitutional state authorities” – **is inconsistent** with Article 191(1)(1)-Article 191(1)(5) of the Constitution as well as with the Preamble to the Constitution;

4) Article 61(6) of the 2016 Constitutional Tribunal Act **is inconsistent** with Article 10, Article 173, and Article 188 of the Constitution, as well as with the Preamble to the Constitution;

5) Article 68(5)-(7) of the 2016 Constitutional Tribunal Act **are inconsistent** with Article 188, and Article 195(1) of the Constitution, as well as with the Preamble to the Constitution;

6) Article 80(4) of the 2016 Constitutional Tribunal Act **is inconsistent** with Article 190(2) of the Constitution;

7) Article 83(1) of the 2016 Constitutional Tribunal Act, construed in the way that the said provision does not undermine the effectiveness of any procedural steps taken prior to the entry into force of the said Act, **is consistent** with Article 2 of the Constitution.

8) Article 83(2) as well as Articles 84-87 of the 2016 Constitutional Tribunal Act **are inconsistent** with Article 2, Article 10, and Article 173 of the Constitution, as well as with the Preamble to the Constitution;

9) Article 89 of the 2016 Constitutional Tribunal Act **is inconsistent** with Article 10, Article 173, and Article 190(2) of the Constitution;

10) Article 90 of the 2016 Constitutional Tribunal Act **is inconsistent** with Article 194(1) of the Constitution.

Moreover, as regards the remainder of the allegations, the Constitutional Tribunal decided to discontinue the review proceedings.

Dissenting opinions to the judgment were submitted by the following judges of the Constitutional Tribunal: Judge Zbigniew Jędrzejewski, Judge Julia Przyłębska, and Judge Piotr Pszczółkowski.

The legal basis of the Tribunal's adjudication in the present case was the Constitutional Tribunal Act of 25 June 2015 (Journal of Laws – Dz. U. of 2016, item 293; hereinafter: the 2015 Constitutional Tribunal Act), in the version arising from the Tribunal's judgment of 9 March 2016, ref. no. K 47/15 (/s/k-4715). **The Tribunal applied legal provisions on the procedure for the constitutional review of law which were in force on the day of the issuance of the judgment in the present case.** They also constituted the legal basis of 22 judgments issued by the Tribunal in 2016 (cf. the list of the Tribunal's judgments awaiting publication (available only in Polish): http://trybunal.gov.pl/wyroki-oczekujace-na-ogloszenie/ (/wyroki-oczekujace-na-ogloszenie/)).

1. The Constitutional Tribunal reviewed the constitutionality of the Constitutional Tribunal Act of 22 July 2016 (Journal of Laws – Dz. U., item 1157; hereinafter: the 2016 Constitutional Tribunal Act) before its entry into force. **Statutes may be reviewed by the Tribunal from the day of their promulgation in the Journal of Laws.** One of the purposes of a period of *vacatio legis*, i.e. a period between the promulgation of a statute and its entry into force, is to make it possible for the Tribunal to review a statute before it begins to have legal effects. Similarly, a period of *vacatio legis* serves the legislator, who may, during that period, eliminate any defects noticed in a statute by adopting appropriate amendments.

After the promulgation of a statute in the Journal of Laws, the statute becomes part of the Polish legal system, and thus it may be subjected to a review the purpose of which is to eliminate, from the system of law, provisions that do not meet constitutional standards. The Tribunal does not commence the constitutional review on its own initiative (it does not act *ex officio*); in every case, the moment of instituting a constitutional review is determined by an applicant filing an application for the said review, a court referring a question of law, or a complainant lodging a constitutional complaint.

All the three applications instituting the constitutional review in the present case were filed shortly after the promulgation of the 2016 Constitutional Tribunal Act in the Journal of Laws; the applicants requested that the Tribunal review the Act during the 14-day period of *vacatio legis*, arguing that, after its entry into force, the Act would produce irreversible legal effects.

2. A hearing and a sitting in camera are equivalent modes of considering applications, questions of law and constitutional complaints. None of the applicants requested, in the way prescribed by the 2015 Constitutional Tribunal Act, that the case be considered at a hearing; nor was such a decision made by the adjudicating bench of the Tribunal.

The 2015 Constitutional Tribunal Act, still in force on the day of the issuance of the judgment, permits the Tribunal to adjudicate at a sitting in camera in the two *following* situations: when written statements of participants in proceedings as well as the other evidence gathered with regard to a case constitute a sufficient basis for issuing a ruling; or when a case concerns a legal matter that has been sufficiently examined in previous rulings of the Tribunal. The Tribunal held that the second of the said premisses had been fulfilled, for the main constitutional issues in the present case concern an infringement of the principle of the tri-division of powers and the principle of the independence of the judiciary, as well as making it impossible for the Tribunal to carry out its activity diligently and efficiently; the **Tribunal had already adjudicated upon those issues on a number of occasions, in particular in its judgments in the cases ref. nos. K 34/15 (/s/k-3415), K 35/15 (/s/k-3515) and K 47/15**. The Tribunal deemed that all the legal matters in the present case had already been sufficiently examined, and hence it was possible to consider the case at a sitting in camera.

The possibility of the Tribunal considering a case, also at a sitting in camera, **does not depend on the submission of written statements by participants in proceedings.** The Tribunal requested the participants to provide such statements and, pursuant to the 2015 Constitutional Tribunal Act, indicated a time-limit within which the statements should be submitted, adjusting it accordingly to the date set by the Tribunal for the substantive consideration of the case.

3. The Constitutional Tribunal deemed that the allegations pertaining to the content of the 2016 Constitutional Tribunal Act should be given priority.

With regard to similar matters, the Tribunal had already adjudicated in its earlier judgments, especially in the judgment of 9 March 2016, ref. no. K 47/15 (/s/k-4715), where it had reconstructed constitutional standards to be met by every statute regulating the Tribunal's organisation and the mode of proceedings before the Tribunal (Art. 197 of the Constitution of the Republic of Poland). Not without significance in the present case was also the fact that, in the 2016 Constitutional Tribunal Act, the legislator repeated some of the provisions which had already been – in a similar, or the same, version and normative context – the subject of the final ruling of the Tribunal. This entails that the Tribunal's review in the present case also comprised provisions that restored unconstitutional regulations. Therefore, it was possible to consider the case at a sitting in camera, within a relatively short period from the date of the submission of the applications.

4. The Constitutional Tribunal stated that what constituted the common background of all the allegations raised by the applicants was **excessive interference on the part of the legislator which infringed the principle of the separation and balance of powers as well as the principle of the separation and independence of the judiciary.**

The Constitution of the Republic of Poland assigns a unique position to the judiciary within the constitutional separation of powers. Relations between the legislature and the executive are characterised by various forms of possible mutual interaction and cooperation; it is also admissible to have areas where the powers of the two branches of government "crisscross" or "overlap". By contrast, relations between the judiciary and the other branches of government must be based on the principle of separation. What constitutes a necessary element of the principle of the separation of powers is the independence of courts and judges. The said principle is safeguarded by the Constitutional Tribunal.

The second constitutional principle underlying the judgment in the present case was **the principle of diligence and efficiency in the work of public institutions**, derived from the Preamble to the Constitution. The Tribunal pointed out that the principle limits the legislator when it comes to regulating the Tribunal's organisation and the mode of proceedings before the Tribunal (judgment of 3 December 2015, ref. no. K 34/15 (/s/k-3415)). In other words, while enacting a statute that is to regulate these matters (as provided for in Article 197 of the Constitution), the legislator is obliged to guarantee that the Tribunal will carry out its activity diligently, efficiently, and effectively.

5. Article 26(1)(1)(g) of the 2016 Constitutional Tribunal Act introduced the requirement that a full bench of the Tribunal should adjudicate in situations where three judges of the Tribunal will file a relevant motion in this respect within 14 days from the date of receiving the certified copies of constitutional complaints, applications, or questions of law. The Tribunal ruled that the said provision is inconsistent with Article 197 of the Constitution as well as with the principle of diligence and efficiency in the work of public institutions, derived from the Preamble to the Constitution.

Firstly, the legislator violated here the requirement of efficiency in the work of the public institution. The said motion filed by three judges of the Tribunal, who may not even be designated as the members of a relevant adjudicating bench, is not contingent on the characteristics of a given case, and in particular on the number of challenged provisions and the degree of complexity of their normative content as well as on the number and complexity of indicated higher-level norms for review. The motion does not have to be justified in a substantive way; nor is it subject to evaluation by the President of the Tribunal or by the judges of the adjudicating bench of the Tribunal that has already been designated to consider the case.

Secondly, the legislator breached the requirement of diligence in the work of the public institution. Since the consideration of a case by a full bench of Tribunal was made contingent exclusively upon a motion put forward by a minority of judges, the application of the challenged provision could lead to a departure from the general rule that only the most significant and serious constitutional cases are considered by a full bench of the Tribunal. The legislator turned an exception, i.e. the consideration of a case by a full bench of the Tribunal, into a general rule.

Thirdly, the legislator infringed the requirement of effectiveness in the work of the public institution. The application of the challenged provision, in conjunction with the provision requiring the consideration of applications in the order in which cases are received by the Tribunal as well as the provision that increases the number of judges of the Tribunal that is necessary for the consideration of a case by a full bench of the Tribunal, may result in a situation where all cases will be referred for consideration by a full bench of the Tribunal, and thus will preclude the efficient functioning of the Tribunal.

6. The provisions of Article 38(3)-(6) of the 2016 Constitutional Tribunal Act regulate the setting of the dates of hearings as well as the determining of the date of a hearing by bypassing the requirement that applications are considered in the order in which cases are received by the Tribunal. The said provisions pertain to hearings at which applications are to be considered “in the order in which cases are received by the Tribunal” and do not concern dates of adjudication in cases concerning questions of law and constitutional complaints. The Tribunal held that the indicated provisions are inconsistent with Article 10, Article 173, Article 188, Article 191(1)(1)-Article 191(1)(5) of the Constitution, as well as with the principle of diligence and efficiency in the work of public institutions, expressed in the Preamble to the Constitution.

The provisions of Article 38(3)-(6) of the 2016 Constitutional Tribunal Act differentiate between the review of applications on the one side and the review of questions of law and constitutional complaints on the other, which undermines the credibility and consistency of the constitutional system of human rights protection, and may lead to the delegitimisation of the activities of authorities and organisations referred to in Article 191(1)(1)-Article 191(1)(5) of the Constitution. Applications for an abstract review of norms constitute a basic procedural means of instituting proceedings before constitutional courts; cases commenced by applications are of fundamental significance for the public interest. Competence to file an application in cases referred to in Article 188 of the Constitution is constitutional in character and fulfils important public-law functions. Apart from questions of law and constitutional complaints, applications for an abstract review of norms constitute a basic tool for the protection of constitutional rights and freedoms, and applications filed by groups of Sejm Deputies or Senators constitute an additional procedural guarantee of the implementation of the principle of political pluralism.

What does not affect the assessment of the constitutionality of the challenged provision is the possibility provided to the President of the Tribunal to set the date of a hearing by bypassing the requirement that applications are considered in the chronological order. The said provision constitutes an exception and should not be interpreted in a broadening way.

7. Article 61(3) of the 2016 Constitutional Tribunal Act permits the President of the Tribunal to shorten, to 15 days, the time-limit after which a hearing may be held with regard to questions of law, constitutional complaints, and disputes over powers. The Constitutional Tribunal stated that the indicated provision, in the part which includes the wording “With regard to questions of law, constitutional complaints and disputes over powers between central constitutional state authorities”, is inconsistent with Article 191(1)(1)-Article 191(1)(5) of the Constitution, as well as with the principle of diligence and efficiency in the work of public institutions, expressed in the Preamble to the Constitution. What determines the unconstitutionality of the said provision is a number of arguments presented in point 6 of this press release. The constitutional character of the competence to file an application for an abstract review, the systemic significance of that competence for the protection of rights, freedoms and systemic principles, as well as the procedural equivalence of applications, constitutional complaints and questions of law, clash with the regulation that assigns absolute and automatic precedence to the consideration of constitutional complaints, questions of law, and applications concerning disputes over powers, in contrast to the consideration of other applications.

8. Article 61(6) of the 2016 Constitutional Tribunal Act makes the consideration of a case contingent upon the attendance of the Public Prosecutor-General, or his/her representative, at a hearing, where the said persons have been notified in a proper way, in circumstances where the Act provides for the mandatory participation of those persons. The Tribunal held that the indicated provision is inconsistent with Article 10, Article 173, and Article 188 of the Constitution, as well as with the principle of diligence and efficiency in the work of public institutions, expressed in the Preamble to the Constitution.

In the event of the absence of the Public Prosecutor-General, the Tribunal could only adjourn the hearing and set a new date for the hearing. Thus, the correlation between the Tribunal’s capacity to review the constitutionality of law with the actions taken by the Public Prosecutor-General might make it impossible for the Tribunal to issue a ruling in a case considered by a full bench of the Tribunal. The legislator does not mention a time-limit for the effect of the absence of the Public Prosecutor-General, or his/her representative, at a hearing, where the said persons have been notified in a proper way, and so the consideration of the case might be suspended for an indefinite period. By contrast, both the Constitution and the Constitutional Tribunal Act require that cases be considered without undue delay and that rulings be issued after cases have been thoroughly examined.

What does not undermine the negative evaluation of Article 61(6) of the 2016 Constitutional Tribunal Act is its concurrence with Article 60(4) of the Constitutional Tribunal Act of 1 August 1997 (Journal of Laws – Dz. U. No. 102, item 643, as amended; hereinafter: the 1997 Constitutional Tribunal Act), for the provisions of the 2016 Act in a different and more complex way determine the position of the Public Prosecutor-General, by introducing additional mechanisms that make it possible to preclude the issuing of a ruling, which implies a serious change in the normative context of the analysed legal institution.

9. The provisions of Article 68(5)-(7) of the 2016 Constitutional Tribunal Act regulate terms on which judges of the Tribunal may raise an objection to a proposed determination with regard to a case considered by a full bench of the Tribunal. The effect of the objection would be the adjournment of the judges' deliberation for three months, and in the event of another objection – the adjournment for another three months. The Tribunal stated that the provisions are inconsistent with Article 188 of the Constitution as well as with the principle of diligence and efficiency in the work of public institutions, expressed in the Preamble to the Constitution.

Firstly, the legislator violated the requirement of efficiency in the work of the public institution. Allowing a group of judges of the Tribunal to raise an objection, the legislator did not specify any restrictions applicable to the said objection within the scope *ratione personae*, *ratione materiae* and *ratione temporis*. The objection may be raised by a group of four judges of the Tribunal, but the legislator did not rule out a possibility of raising more objections by the same group, or by a slightly different group, of judges of the Tribunal. Article 68(7) of the 2016 Constitutional Tribunal Act, insofar as it stipulates that "another deliberation and vote shall be held", does not rule out the admissibility of raising another objection by a different group of four judges of the Tribunal or a new objection, in the same case, by the group of judges of the Tribunal that has already raised an objection. Theoretically, it is possible to form 1365 groups of four judges of the Tribunal which will be varied in composition, and which could raise an objection during deliberation by a full bench of the Tribunal. An objection of each of the groups would automatically result in the adjournment of deliberation: the first time – by three months, and subsequently – by another three months. Additionally, the validity of the objections is not subject to evaluation by the adjudicating bench, and the effect, i.e. the adjournment of the hearing, occurs automatically.

Secondly, the legislator breached the requirement of diligence in the work of the public institution. The application of the challenged provision would make the further consideration of a case in which an objection is raised contingent upon the discretion of a group of four judges of the Tribunal. Indeed, the said objection does not require any justification. The premiss concerning the great significance of a matter for the constitutional order or the premiss concerning the protection of the public order is addressed only to a judge of the Tribunal who raises the objection, and is not subject to verification by the full bench of the Tribunal. Consequently, the adjournment of deliberations was, in fact, made contingent solely upon the expression of will by a minority of judges, for which no justification would be required, and which could not be confronted with the stance of a majority of the adjudicating bench. Hence, the arbitrariness of the provisions as well as their automatic effect could impact the diligent exercise of the Tribunal's constitutional competence.

Thirdly, the legislator infringed the requirement of effectiveness in the work of the public institution. The application of the challenged provision would make it impossible to issue rulings forthwith in cases in which no objections were raised. Together with provisions on the order of setting dates for hearings and provisions on the consideration of cases by a full bench of the Tribunal, this would cause a constitutionally unjustified delay in proceedings instituted by applications. The dates of hearings in such cases are set in the order in which all cases are received by the Tribunal, and the exercise of the statutory right by a group of four judges would not only result in the adjournment of a hearing in the case where an objection was raised, but it would also hinder consideration at a hearing with regard to cases commenced by applications lodged with the Tribunal after the case in which an objection was raised.

10. The Tribunal deemed that **Article 26(1)(1)(g) as well as Article 68(5)-(7) of the 2016 Constitutional Tribunal Act, which concern the independence of a judge of the Tribunal in relation to other judges of the Tribunal** (the so-called internal aspect of the independence of judges) are inconsistent with Article 195(1) of the Constitution. Both the competence to put forward a motion for a case to be considered by a full bench as well as the competence to raise an objection to a proposed determination refer to the scope of the exercise of the office within the meaning of the Constitution. However, they pertain to the process of considering a case and carrying out judicial activities. The challenged provisions would permit arbitrary interference with the independence of judges who have been designated to consider a case and with their competence to assess whether the case is particularly complex. The motion of three judges could be lodged without any justification and could have a procedural effect even before an adjudicating bench designated for the consideration of the case could decide whether or not to exercise the competence provided for in Article 26(1)(1)(g) of the 2016 Constitutional Tribunal Act.

By contrast, the provisions of Article 68(5)-(7) of the 2016 Constitutional Tribunal Act permit a situation where, a group of four judges may exert an influence on the presiding judge, without any justification and in a manner that is not related to the merits of the case, and in extreme instances – might prevent the presiding judge from presenting arguments for a determination s/he proposes as well as a further discussion by the full bench of the Tribunal.

In the opinion of the Tribunal, the attempts at institutionalising “a judicial minority”, by analogy with the procedural guarantees known in parliamentary law, does not correspond to the Tribunal’s function as an organ of the judiciary and to the individual status of independent judges of the Tribunal.

11. Article 83(1) of the 2016 Constitutional Tribunal Act is a transitional provision. When introducing transitional solutions with regard to the way of finalising proceedings that are pending before the Tribunal at the moment of the entry into force of the 2016 Act, the legislator relied on the principle of the direct application of a new law, and determined that in cases pending prior to the date of entry into force of the 2016 Act, the provisions of the said Act should apply.

The direct application of new provisions constitutes a simple legislative technique, and guarantees the expeditious replacement of an old law with a new law; however, recourse to such a mechanism on the part of the legislator may prove disloyal to interested parties and may weaken the sense of certainty of law. This may also cause effects that are similar to the retroactivity of law. For the above reasons, the legislator must take account of requirements arising from the following principles: the stability of determinations issued by the organs of public authority, the certainty of law, as well as the protection of justly acquired rights and the protection of interests that are pending, which arise from the principle of a democratic state ruled by law.

The transitional solution provided for in Article 83(1) of the 2016 Constitutional Tribunal Act, in itself, does not infringe constitutional standards, provided that it is construed in the way that it does not undermine the effectiveness of the Tribunal’s activities carried out in proceedings that are pending prior to the entry into force of the 2016 Act.

Article 83(2) of the 2016 Constitutional Tribunal Act imposes on the Tribunal the obligation to consider all cases commenced by a constitutional complaint or a question of law within one year from the date of entry into force of the 2016 Act. It may appear that such a solution meets the requirement of efficiency in the work of public institutions, which arises from the Preamble to the Constitution. Yet, in practice the said provision imposes on the Tribunal an obligation that is impossible to fulfil, which

follows: first of all, from a large number of cases which the Tribunal would have to consider within a year; secondly, from the hitherto average period of considering a case, which was 21 months; thirdly, from the rules for designating judges to adjudicating benches which require all the judges of the Tribunal to be involved in a constitutional review (full bench) or at least one-third of them (a bench of 5 judges); fourthly, from transitional the provisions which require that all cases be considered anew by a changed adjudicating bench of the Tribunal.

The short time-limit would make it impossible for the Tribunal to consider a case diligently, which is required by the Constitution. Indeed, on the one hand, the legislator introduced the requirement that all the aforementioned cases should be considered within a year, but, on the other hand, he also introduced solutions that would prevent the Tribunal from issuing a ruling within the time-limit of one year for reasons that would be beyond the Tribunal's control. It is possible to specify in the provisions of the Constitution a maximum period for considering a case by the Tribunal; so far, the only example of such a solution has been in Article 224(2) of the Constitution. An exception to this rule may not be introduced by statute. The prohibition against specifying the said maximum period by statute arises from the principle of the tri-division of powers, as such action would be a form of interference on the part of the legislature with the core activity of the judiciary.

As regard Articles 84-87 of the 2016 Constitutional Tribunal Act, the Constitutional Tribunal deemed that the said provisions were intended for undermining the procedural steps taken in cases pending prior to the entry into force of the 2016 Act. Indeed, the legislator prescribed that the Tribunal should re-evaluate applications in terms of their compliance with formal requirements, determine the new composition of adjudicating benches, set new dates of hearings, and – in the case of constitutional complaints with regard to which there was no decision to proceed prior to the entry into force the 2016 Act – carry out preliminary consideration of the complaints. Thus, Articles 84-87 of the 2016 Constitutional Tribunal Act would complement, in an unconstitutional way, the principle of the applicability of the new law, expressed in Article 83(1) of the 2016 Act.

Considering the scale of the changes and the brief period of *vacatio legis*, the challenged transitional provisions were drawn up in such a way that the Tribunal has no possibility of adjusting to the new law. They would lead to a disadvantageous change in the procedural situation of the applicants referred to in Article 191(1)(1)-Article 191(1)(5) of the Constitution and, as a result, to the undermining of the legal institution of an application as a means of an abstract review of norms. Irrespective of when the applicants lodged their applications and regardless of whether they were requested to eliminate formal defects in the applications, they would be obliged to adjust their applications to meet the new procedural requirements. However, the fulfilment of the said obligation would be irrelevant for the course of their cases, as the dates of commencing the proceedings were not affected by the time-limits for supplementing the applications. Subjecting all applications that have not yet been considered, first, to suspension and, then, to consideration in the order in which cases are received by the Tribunal would result in delay in proceedings, and thus would hinder the determination of serious – from the point of view of the constitutional order and the protection of the individual's rights and freedoms – constitutional issues. The challenged transitional provisions would have a similar effect on cases commenced by constitutional complaints, since – depending on the stage of consideration – they would necessitate either a change in procedural rules and "further proceedings" in compliance with the new law, or the repetition of activities carried out at the stage of preliminary consideration, if there was no decision to proceed with the constitutional complaints prior to the entry into force the Act.

12. The Constitutional Tribunal deemed that its **rulings concerning the hierarchical conformity of legal norms are, unconditionally, final**. In the present constitutional order, there is no possibility of devising procedures for the verification of determinations issued by the constitutional court, whether as to their substance or their compliance with formal requirements.

Two attributes of the Tribunal's judgments, namely that they are final and universally binding, emerge already at the stage of issuing the judgments, which takes place at the moment of the public delivery thereof in the courtroom. At that time, the presumption of the constitutionality of the challenged regulation is either confirmed or overturned, which in the latter instance affects the practice of the further application of unconstitutional provisions. Provisions ruled by the Tribunal to be unconstitutional cease to have effect on the date of the publication of the Tribunal's judgment in the Journal of Laws of the Republic of Poland, which the competent authority responsible for the publication is to carry out "immediately" (cf. Art. 190(2) of the Constitution).

The Tribunal held that the "immediacy" of the publication of the Tribunal's judgment in the official journal may not be determined by the practice of the publisher of the Journal of Laws. The constitution-maker has provided for the "immediacy" of publication only with regard to the judgments of the Tribunal, without modifying that obligation by adding any restrictions or conditions. Therefore, a judgment of the Tribunal is to be published as soon as possible in particular circumstances, regardless of the other work and duties of the authority responsible for the publication.

The authority responsible for the publication of the Tribunal's judgments takes no responsibility for the content of the published determination, and has no competence to define the legal status of the determination. The said role is purely technical, which in the era of the digital dissemination of documents amounts, in fact, merely to running relevant computer software. Therefore, the Tribunal adjudicated that Article 80(4) and Article 89 of the 2016 Constitutional Tribunal Act raise serious reservations as to their constitutionality.

Article 80(4) of the said Act correlates the publication of a ruling of the Tribunal with "an application" by the President of the Tribunal, submitted to the Prime Minister; this suggests that the providing of the ruling to the publisher of the official journal (without the required "application") does not determine the publication of the ruling. Also, the publication of the Tribunal's rulings upon "application" implies that the application lodged by the President of the Tribunal may be subject to evaluation, or may even be the subject of a procedural controversy (e.g. as to whether it complies with formal requirements prescribed for such documents, and whether it has an appropriate form, or proper content). In accordance with the binding legal provisions, the publication of the Tribunal's rulings "shall be ordered by the President of the Tribunal" (Art. 105(2) of the 2015 Constitutional Tribunal Act). There was a similar regulation under the rule of the 1997 Constitutional Tribunal Act. Those provisions properly reflect the formal character of the act of publication, which constitutes a prerequisite for the entry into force of a ruling, but does not affect its legal character. **The constitutional regulation rules out any discretion in this respect on the part of the government authority, and does not assign the publisher of the official journal with any tasks other than technical ones.**

The other of the above-mentioned challenged provisions of the 2016 Constitutional Tribunal Act – Article 89 – divided the Tribunal's judgments into those that were to be published in the official journal and those that would not be published. Thus, the legislator granted himself the competence to choose judgments of the Tribunal that would be subject to publication. He did so on the basis of the two criteria: one concerning the scope *ratione temporis* (the Tribunal's judgments issued before

20 July 2016); and the other one concerning the scope *ratione materiae* (the Tribunal's judgments pertaining to normative acts that have not ceased to have effect on the day of entry into force of the 2016 Act). However, the essence of the constitutional issue is more profound, and concerns not so much the admissibility of the Sejm's selection of the Tribunal's judgments, as the bases of interference with the constitutional system of publishing the Tribunal's rulings. **The legislator does not have the power to determine which of the rulings of the constitutional court may be published and which do not deserve publication.** These matters do not at all fall within the ambit of statutory subject-matter, which is implied in Article 190(2) of the Constitution.

It needs to be noted that Article 89 of **the 2016 Constitutional Tribunal Act includes a stigmatising statement about the Tribunal's rulings, namely: "issued in breach of the provisions of the Constitutional Tribunal Act of 25 June 2015". Not only did the legislature exceed the scope of its systemic competence by making such a statement, it also failed to provide any factual or substantive grounds in support thereof.** Such interference of the legislature with the realm of the judiciary […] is inconsistent with the standards of a state ruled by law […]. The legislator evaluated selected judgments of the Constitutional Tribunal, issued by particular judges of the Tribunal in certain cases, and concluded that the said judges had acted in breach of law. According to the legislator, this justified the earlier refusal to publish the judgments by the authority responsible for publishing the official journal. The legislator conceived of the act of publishing a ruling of the Tribunal as dependent on the discretion of the legislature. In the light of the Constitution, the evaluative statement included in Article 89 of the 2016 Constitutional Tribunal Act may not, and does not, have any legal significance; **such practice infringes the principle of the separation and balance of powers, the requirement of cooperation between constitutional state authorities, the independence of courts and tribunals, as well as all the norms and principles which underlie the constitutional order of the state**.

13. Pursuant to challenged Article 90 of the 2016 Constitutional Tribunal Act: "The judges of the Tribunal who have taken the oath of office before the President of the Republic, and who have not so far assumed the judicial duties, shall be included in adjudicating benches of the Tribunal, and shall be assigned cases, by the President of the Tribunal as of the date of entry into force of [the] Act.".

The said provision introduces certain adjustments, and its scope of application was limited to the actual situation that existed on the day of the promulgation of the Act. The legislator's intention was to regulate the legal status of particular judges of the Tribunal who had been elected by the Sejm partly during its 7th term and partly during its 8th term. The last group of the judges had taken the oath of office before the President of Poland.

The Tribunal stated that, firstly, **juristic acts that are intended to result in the election of a judge by the Sejm as well as in the taking of the oath of office by a judge of the Tribunal before the President of Poland fall under the category of acts of applying the law**, performed always with regard to particular candidates as well as particular judges of the Tribunal. The legislator may not replace those actions with an act that is general and abstract in character, on the one hand – in a sense, taking over the duties of the President of the Tribunal, and on the other – determining which actions of electing judges of the Tribunal conducted in the past by the Sejm, during its 7th and 8th terms, were valid.

Secondly, **the Tribunal pointed out that it had already presented its view on the legal basis for the election of judges of the Tribunal carried out in relation with the vacancies that occurred in 2015, and that this view is still relevant in the present case** (see the Tribunal's judgments in the cases ref. nos. K 34/15 (/s/k-3415), K 35/15 (/s/k-3515) and K 47/15 (/s/k-4715), as well as its decision in the case ref. no. U 8/15). In the judgment in the case ref. no. K 34/15, the Tribunal declared the constitutionality of the legal basis for the election of the three judges of the Tribunal who were to take office after the judges whose terms of office had ended on 6 November 2015; it also stated that the Sejm's resolutions of 25 November 2015 (adopted by the Sejm to declare the invalidity of the Sejm's resolutions of 8 October 2015, which concerned the election of the judges of the Tribunal by the Sejm during its previous, i.e. the 7th, parliamentary term – see the Official Gazette of the Republic of Poland (M.P.), items 1131, 1132, 1133, 1134, and 1135) did not refer to the process of electing judges of the Tribunal, and partly displayed characteristics of a statement and a recommendation. In that situation, the election of judges of the Tribunal by the Sejm during its 8th term was carried out with regard to judicial positions where there were no vacancies. Therefore, in such circumstances, the implementation of the requirements provided for in Article 90 of the 2016 Constitutional Tribunal Act by the President of the Tribunal would be contrary to the Tribunal's judgments, which are universally binding and thus bind all state authorities, including the constitutional court and the President thereof.

14. In the present case, the Constitutional Tribunal adjudicated during the period of *vacatio legis* set for the 2016 Constitutional Tribunal Act. At the moment of the public delivery of the judgment in the present case, the provisions that had been ruled unconstitutional ceased to enjoy the presumption of constitutionality.

This occurred before the date when the 2016 Constitutional Tribunal Act is to enter into force and is to begin to be have legal effects. **All state authorities, including the Constitutional Tribunal, are obliged to refrain from applying the unconstitutional provisions of the 2016 Constitutional Tribunal Act.** The Tribunal is *ex officio* obliged to respect its own judgments as final and universally binding.

The presiding judge of the adjudicating bench in the present case was the President of the Constitutional Tribunal, Judge Andrzej Rzepliński, and the 1st Judge Rapporteur was Judge Andrzej Wróbel, and the 2nd Judge Rapporteur was Judge Piotr Tuleja.

(http://ipo.trybunal.gov.pl/ipo/Sprawa?&pokaz=dokumenty&sygnatura=K%2039/16)

Dokumenty w sprawie (IPO) (http://ipo.trybunal.gov.pl/ipo/Sprawa?&pokaz=dokumenty&sygnatura=K%2039/16)