STEFAN BATORY FOUNDATION

Sapieżyńska 10a
00-215 Warszawa
tel. +48 22 536 02 00
fax +48 22 536 02 20
batory@batory.org.pl
www.batory.org.pl

January 19th 2016

Legal opinion on the constitutionality of the Law of 22 December 2015 on Amending the Constitutional Tribunal Law

(Journal of Law of 2015 section 2217)

(abbreviated version)

This opinion was prepared by the member of the Stefan Batory Foundation Legal Experts Council, Prof. Marcin Matczak, Faculty of Law, Warsaw University[1].

1. THE SCOPE

The Senate adopted the Law of 22 December 2015 on Amending the Constitutional Tribunal Law without modifications on 24 December 2015. The Law was signed by the President of the Polish Republic and published in the Journal of Laws on 28 December 2015. With no *vacatio legis* whatsoever, the Law entered into force on the same day. It has significantly changed the position of the Constitutional Tribunal (CT), the status of judges, the powers of employees, the means of exercising judiciary powers and the process of adjudicating on cases.

Since the legislative process commenced, the amendment had increasingly raised controversy over its constitutionality. Moreover, there had been mounting concerns about the speed of the process.

This document assess the constitutionality of the amended legislation.

This opinion is based on the following legislation:

- The Constitution of the Republic of Poland of 2 April, 1997 (Journal of Laws No. 78, Section 483, as later amended);
- Law of 25 June, 2015 on Constitutional Tribunal (Journal of Laws, Section 1064);
- Law of 22 December, 2015 on Amending the Law on Constitutional Tribunal (Journal of Laws, Section 2217);
- Law of 17 November, 1964: Civil Proceedings Code (Journal of Laws 2014, Section 101, as later amended);
- Law of 21 August,1997 on Military Court System (Journal of Laws of 2015 , Section 1198);
- Law of 27 July, 2001 on Common Court System (Journal of Laws of 2015, Section 133, as later amended);

[1] This Opinion was written jointly with Szymon Łajszczak LLM.

- Law of 23 November, 2002 on Supreme Court (Journal of Laws of 2013, Section 499, as later amended);
- Law of 20 July, 2000 on Publication of Legislation and Certain Other Regulations (Journal of Laws of 2015, Section 1484);
- Attachment to the Ordinance by Prime Minister of 20 June, 2002 on Principles of Legislative Technique (Journal of Laws No. 100, Section 908,).

2. FINDINGS

It has been found that:

1. This law was adopted in violation of Article 119 Paragraph 1 and 2 of the Polish Constitution because a different draft had been submitted in the second and the third reading as opposed to the first reading;

2. The absence of *vacationis legis* is a violation of the principle of democratic state ruled by law, defined in Article 2 and the principle of Constitutional Tribunal's independence, defined in Article 173 of the Polish Constitution; the right to fair trial is violated of applicants who filed complaints or motions prior to the adoption of the amendment;

3. Despite the absence of *vacationis legis*, the amended/added provisions of the Constitutional Tribunal Law should not be applicable to the constitutionality test of the amendment because:

    - Even though the legislature is mandated to legislate the CT structure and procedures, no legislation shall be applicable if it contradicts other provisions of the of the Polish Constitution;

    - the conflict between statutory and constitutional norms must be assessed via the constitutionality test of the amending legislation and subject to the hierarchical conflict rule or *lex superior derogat legi inferiori*;

    - in the light of the comments presented in this Opinion, the amended provisions of the CT Law stand in contradiction to the provisions of the Polish Constitution both in terms of content and praxeology;

    - the amendment were to be ruled unconstitutional based on the contested provisions the ruling would be internally contradictory and thus abolishable, in accordance with Article 190 Paragraph 4 of the Polish Constitution.

    Consequently, the Constitutional Tribunal should assess the constitutionality of the amendment directly on the basis of the provisions of the Polish Constitution, in accordance with its Article 8 Paragraph 2, in connection with Article 195 Paragraph 1.

4. The provision of the amendment which indemnifies judges for their conduct prior to assuming the position, i.e. Article 1 Item 16 Letter b, violates the principle of independence of the Constitutional Tribunal, as stipulated in Article 173 of the Polish Constitution;

5. The provisions that let the Sejm participate in the process of terminating the mandates of CT judges, i.e. Article 8 Item 4 of the CT Law as modified by Article 1 Item 2 of the amendment, Article 36 Paragraph 1 Item 4 and Article 36 Paragraph 2 as modified by Article 1 Item 8 of

the amendment, violate the constitutional principle of judge and court independence (Article 173 of the Polish Constitution), irremovability of judges (Article 180 Paragraph 1 and 2 of the Polish Constitution), compromise CT judge independence (Article 195 Paragraph 1 of the Polish Constitution) and result in the Sejm's powers over the CT that are considerable wider than allowed under Article 194 Paragraph 1 of the Polish Constitution; consequently, they violate the principle of the division of powers defined in Article 10 of the Polish Constitution;

6. The provisions that allow the President or Minister of Justice file disciplinary cases including cases in connection to the dismissal of a judge by the President or Minister of Justice, i.e. Article 28a and Article 31a of CT Law, violate the constitutional principle of judge and court independence (Article 173 of the Polish Constitution), compromise CT judge independence (Article 195 Paragraph 1 of the Polish Constitution) and the principle of the division of powers (Article 10 of the Polish Constitution);

7. The deletion of Chapter 10, which potentially removes the Constitutional Tribunal's power to rule on the existence of an obstacle to the pursuit of official duties by the President (the impeachment procedure), may be deemed unconstitutional because the Constitution does grant this power to the CT in its Article 131 and Article 197 provides for the obligation to lay down detailed procedural rules for the impeachment procedure;

8. With an extended category of case types that will have to be heard and adjudicated by a full panel of judges and with the number of judges in the full panel raised to thirteen, concerns have been voiced over the dysfunctional and discriminatory character and the disproportionality of the new framework; the right to justice granted to subjects listed in Article 191 Paragraph 1 of the Polish Constitution would be limited out of proportion, which would also violate Article 45 of the Polish Constitution in connection with Article 31 Paragraph 3 of the Polish Constitution and the principles of confidence in the state and the integrity and efficiency of public institutions derived from the principle of a democratic state ruled by law specified in Article 2 of the Polish Constitution;

9. The requirement for the CT to pass rulings by a two-thirds majority of votes contravenes Article 190 Paragraph 5 and Article 45 of the Polish Constitution, which grant parties the right to have their cases examined, and Article 188 and Article 2 of the Polish Constitution, and it compromises the independents of the CT granted under Article 173 of the Polish Constitution and the principle of the division of powers, as defined in Article 10 of the Polish Constitution;

10. The requirement for cases to be examined in the order of their filing violates the independence of the Constitutional Tribunal that derives from Article 173 of the Polish Constitution and Article 45 in connection with Article 31 Paragraph 3 of the Polish Constitution; with respect to the mandate to examine the constitutionality of the budget law and provisional budget, it violates Article 224 Paragraph 2 of the Polish Constitution; the requirement contravenes the principle of integrity and efficiency of public institutions, as defined in Article 2 of the Polish Constitution;

11. The establishment of new longer minimum notification periods (time between notification of all parties involved in a case and the date of the hearing) violates Article 45 of the Polish Constitution, i.e the right to be tried without a justified delay, Article 2 of the Polish Constitution, i.e. the principle of integrity and efficiency of public institutions;

12. The requirement for resolutions of the General Assembly of the tribunal to be adopted by a two-thirds majority in the presence of at least thirteen CT judges violated Article 173 of the

Polish Constitution, that provides for the principle of the independence of the Constitutional Tribunal, in connection with Article 197 of the Polish Constitution which leaves the internal organisation of the CT to be regulated by law; it also violated the principle of the division of powers, derived from Article 10 of the Polish Constitution;

13. Article 1 Item 16 and Article 3 of the amendment violate the constitutional principle of the protection of the interests in the course of the CT legal office employees who have not yet accumulated 5 years of service, which is a precondition of taking the judiciary exam; this violated Article 2 of the Polish Constitution.

3. LEGAL ASSESSMENT

3.1. General Remarks

Major modifications proposed in the amendment bill submitted to the Sejm on 15 December 2015 r. (Sejm Paper No. 122) included:

- Deleted provision that specifies that that the Constitutional Tribunal shall be seated in Warsaw;
- Increased quorum and the required majority vote for resolutions of the General Assembly of CT Judges;
- Detailed specification of the selection process of the CT President and Vice-President;
- Judges will now take the oath before the Speaker of the Sejm rather than the President;
- Modified numbers of judges to examine the different case types, including a general rule that cases are to be examined by a full panel of CT judges and the minimum size of a full panel has now increased;
- A modified rule whereby CT rulings require a two-thirds rather than a simple majority of a full panel;
- CT legal service personnel have been deprived of the right to take judiciary qualification examinations.

The bill stated the amendment would enter into force 30 days after publication.

The amendment bill was modified significantly in the process. Provisions about the seat were deleted and new provisions were added about the size of ruling panels, access to judiciary qualification examinations to CT legal service personnel; a large number of modifications were added in the Legislative Commission meeting on 21 December; many of them were completely new and outside of the initial scope:

- The mandates of CT judges may now be terminated as a result of disciplinary proceedings only after such termination is approved by the Sejm; the President of the Republic of Poland or the Minister of Justice may initiate disciplinary proceedings against CT judges and CT judges will not be held liable in disciplinary proceedings for the conduct prior to assuming the post;
- The minimum period between serving a notification to parties and the date of the hearing has been significantly extended;
- Cased filed in CT must now be examined in the order of filing;

- Provisions regarding decisions on obstacles to the exercise of formal duties by the President of the Republic of Poland (the impeachment procedure);
- The *vacatio legis* has been modified from 30 to zero days, i.e. the amendment enters into force on the day of publication in the Journal of Laws.

Whereas the amendment differs significantly from the original bill, the next section will address formal aspects of enforcement, effective date and the scope of change.

/…/

3.2. Compliance of Legislative Process

The amendment has been adopted hastily, for which there is no justification with respect to the content. The hasty legislative process is even more evident if one considers the fact that the ultimate law differed greatly from the original bill and it could only be superficially reviewed in public consultations and parliamentary debate. Legislative work on the key provisions added to the amendment only lasted between 21 December and the night of 23 and early morning hours of 24 December.

The scope of amendments submitted in the Legislative Commission meeting on 21 December went significantly further than the draft presented on Sejm Paper No. 122. It could be argued that the amendments were a new legislative proposal. The case-law of the Constitutional Tribunal stresses that "*the interpretation of the provisions regarding amendments submitted in the Sejm and in the Senate must be done in a manner that prevents blurring the borderline between the legislative proposal and its amendments, thus bypassing the requirements imposed by the Polish Constitution on legislative proposals.*" The content limitations on legislative amendments made in the legislative process include the principle of three readings, as stipulated in Article 119 Paragraph 1 of the Polish Constitution. According to this provision, "*the Sejm shall examine bills in three readings*". Derived from this is "*a necessity for the Sejm to examine the same bill on merit and not just on formal aspects three times. Therefore, the bill must have an identity of content. The three-reading principle determines the extent or depth of amendments. Amendments may go as much as to fully change the direction of legislation versus the original intention of the proponent. However, they must retain the scope of the original proposal submitted by an authorised body and subject to the first reading.*"[2]

The enforcement of the three-readings principle is a guarantee of "*an insightful analysis and assessment of the bill, it supports the development of coherent legislation that is not in conflict with other laws and regulations, and it is free from gaps and ambiguity.*"[3] In this case, however, the amendments added, modified or deleted provisions that defined the shape of legal institutions that had not been referred in the original bill submitted to the Sejm Speaker. Moreover, the time for the assessment of these amendments was significantly shortened and there was very limited scope for an insightful assessment.. The legislative process limited the role of the various parties that had submitted their comments to the original bill. Their comments inherently related to the original draft of the amendment and this had limited the role of the comments submitted by the First President of the Supreme Court, Presidium of the National Judiciary Council, Prosecutor General, General Bar Council and the National Chamber of Legal Advisors.

Summing up, as the second and third readings related to an inherently different bill than the first reading, the law was adopted in violation of Article 119 Paragraph 1 and 2 of the Polish Constitution.

---

[2] CT ruling of 18 November 2014, ref. K 23/12, OTK ZU No. 10/A/2014, Section 113.

[3] W. Skrzydło, *Commentary to Article 119 of the Polish Constitution [in Polish]* [in:] *The Polish Constitution. Commentary*, LEX 2013.

3.3. No *vacationis legis*

According to Article 5 of the amendment, "*The law shall enter into force on the day it is published",* i.e. no period of vacationis legis has been allowed. The CT case-law offers a widely accepted view that the absence of vacatio legis, deemed to be a valuable procedural safeguard, is tantamount to a constitutional infringement[4]. The opinions presented in the CT case-law is reflected in the the Law of 20 July, 2000 on the Publication of Legislation and Certain Other Regulations. This law was referred to by the Legislation Department of the Senate in its review of the draft where it stated *"that [in accordance with Article 4 of this law] all legislation containing widely applicable provisions and published in official journals shall enter into force fourteen days after its publication, unless the bill specifies a later date. In accordance* with *Paragraph 2 of this Article, in justified cases, legislation may enter into force earlier than 14 days after the publication and if an important national interest exists for legislation to be enforced immediately such legislation may enter into force on the day of its publication in an official journal, provided that no principles of the rule of law prohibit that. The explanatory notes to the bill do not address vacatio legis, which was supposed to be 30 days (Article 5 in Sejm Paper No. 122), the case for deviating from an established principle can hardly be assessed".*

The length of *vacatio legis* should be determined on a case by case basis while considering the content of new provisions and the extent to which they affect the legal position of the parties at hand. For legislation that modifies the legal framework for courts and judiciary procedures, a vacatio legis of several months has normally been used to allow courts to come to compliance and to secure procedural guarantees for parties before the Constitutional Tribunal. There was nothing in the content of the amended legislation that would support the complete removal of the vacatio legis. It must be concluded that Article 5 of the amendment that provides for the entry into force on the day of publication violates Article 2 of the Polish Constitution. The National Judiciary Council expressed a similar position on 23 December 2015. The Council said it was "*strongly critical of the lack of vacatio legis. The amendment is systemic in nature and has such a great bearing on the operation of the Constitutional Court and citizen rights so the legislature ought to determine an adequate vacatio legis*."

(...) Deleted section on "Consequence of Lacking Vacationis Legis For the Procedure of Assesing the Constitutionality of the Amendment"

3.4. Amendments affecting the position of the Constitutional Tribunal in the state system

3.4.1. Amendments concerning disciplinary proceedings

The Amendment significantly modifies the provisions governing the scope and mode of disciplinary proceedings against judges of the Constitutional Tribunal. The amended provisions

- exclude the liability of judges for their conduct prior to taking office;
- add a new procedure of dismissing a judge of the Tribunal with the participation of the Sejm;
- add a procedure of initiating disciplinary proceedings (including proceedings to dismiss a judge) by the President and the Minister of Justice.

[4] Conf. CT ruling of 2 March, 1993, K 9/92, OTK 1993, No.1, Section 6, p. 20, 41; ruling of 25 November, 1997 r., K 26/97, OTK 1997, No. 5-6, Section. 64

Until the effective date of the Amendment, judges of the Constitutional Tribunal had disciplinary liability for any violation of the law, conduct hurting the reputation of a judge of the Tribunal, and other unethical conduct which could undermine confidence in the judge's impartiality or independence (according to Article 28(1) of the Act on the Constitutional Tribunal), including conduct prior to taking office, if the judge was in breach of any obligation of a state official or was unworthy of being a judge of the Tribunal (Article 28(2) of the Act on the Constitutional Tribunal). The Amendment excludes the liability of judges to the latter extent. According to the reasoning provided for the draft Amendment, the modification is based on the assumption that the conduct of a judge prior to being appointed a judge of the Constitutional Tribunal may only be evaluated by Parliament, and only when discussing the candidacy of the judge, while the exiting solution interfered with the powers of the Sejm vested in it under Article 194 of the Constitution.

This position has been challenged by the National Judiciary Council, which stated that "*It is not possible to share the position of the authors of the draft; the Article to be repealed simply allows the Tribunal to ensure the requisite ethical standards of its judges, which is of special relevance given that the decisions of the Tribunal are final. Even if the decision in disciplinary proceedings against a judge of the Tribunal to the extent of Article 28(2) of the Act on the Constitutional Tribunal is to dismiss the judge, it should be noted that this mainly protects the solemnity of the Tribunal by eliminating the adjudication of constitutional norms by individuals whose integrity is questionable.*"[5] A similar position has been taken by the First President of the Supreme Court, who stated that "*It cannot be ruled out that circumstances suggesting a judge's unethical action before taking office may be unknown when the Sejm is making an appointment and only become known later when in office … Hence, disciplinary liability should include evaluation of the judge's conduct prior to taking office.*"[6]

Thus, the solution in question may be considered to violate the scope of the constitutional principle of independence of the Tribunal enshrined in Article 173 of the Constitution of the Republic of Poland, which provides that "*The courts and tribunals shall constitute a separate power and shall be independent of other branches of power.*" The independence of the Tribunal not only requires that no other branches of power interfere with its activity and organization; it also requires adequate ethical standards for its judges, ensured independently within the Tribunal. The applicable standards should not differ from those applicable to common courts of law and military courts. This has been pointed out by the First President of the Supreme Court, who concluded that there are no grounds to differentiate the status of judges given that disciplinary liability for tort prior to taking office is provided for in Article 52(2) of the Act on the Supreme Court, Article 107(2) of the Act on Common Courts of Laws, and Article 38(3) of the Act on Military Courts.[7]

The Amendment revokes the existing procedure of dismissing judges of the Constitutional Tribunal in disciplinary proceedings. This was provided for under Article 31(3) of the Act on the Constitutional Tribunal, which included a list of disciplinary penalties, including termination of the mandate of a judge. Until the effective date of the Amendment, dismissal of a judge:

- required a disciplinary procedure;
- ensured contradictory disciplinary proceedings;

[5] Opinion of the National Judiciary Council of 18 December 2015 on the MP draft Act amending the Act on the Constitutional Tribunal (Sejm Bulletin No. 122), p. 9.

[6] Opinion of 16 December 2015 r. on the draft Act amending the Act on the Constitutional Tribunal, (Sejm Bulletin No. 122), ref. no.: BSA III-021-506/15, pp. 4-5.

[7] Opinion of 16 December 2015 …, p. 4.

– in the event of an appeal, required that the case be reviewed in two instances: in the first instance, by three judges, and in the second instance by five judges, according to Article 29(1) of the Act on the Constitutional Tribunal.

The Amendment eliminates dismissal of a judge of the Tribunal from the list of disciplinary penalties, and adds a new procedure under Articles 31a and 36 of the Act on the Constitutional Tribunal, whereby the Sejm may decide to terminate the mandate of a judge. The General Assembly of the Judges of the Tribunal may request the Sejm to terminate a mandate, acting on its own initiative or at the request of the President or the Minister of Justice.

/…/

It should be noted that the solution does not safeguard rights of the judge whose conduct is to be evaluated to the extent available under disciplinary proceedings in the strict sense. In particular, no provisions stipulate any procedural safeguards for the accused, including the right of defense or the right to appeal.

Serious constitutional doubts arise in this context due to the participation of the Sejm in the termination of the mandate of a judge of the Constitutional Tribunal. This has been pointed out by the National Judiciary Council, which stated that "*It is unacceptable in a democratic state ruled by law in the light of the principle of the division of powers that a legislative authority (the Sejm) could be given powers to decide the dismissal of a judge of the Tribunal, whichever authority is eligible to file for the procedure. The draft Act does not specify the terms of the procedure preceding the filing for the dismissal of a judge. The draft solution transfers powers of the judiciary to the legislative branch;*"[8] and by the Legislation Department of the Senate, which noted that regulations providing that the Sejm has the power to definitively decide to dismiss a judge of the Tribunal under Article 36(1)(4) in conjunction with the new Article 31a(1) of the Act on the Constitutional Tribunal must be considered "*incompatible with the constitutional principle of independence of judges of the Constitutional Tribunal.*"[9]

In this connection, it should be emphasized that the extent to which the Sejm may influence the composition of the Constitutional Tribunal is limited under Article 194(1) of the Constitution of the Republic of Poland, which provides that "*The Constitutional Tribunal shall be composed of 15 judges chosen individually by the Sejm …*"; if follows that apart from the appointment of the judges, the Sejm has no powers to interfere with the composition or activity of the Tribunal. Any derogation from this principle by a statute is excluded specifically in Article 197 of the Constitution of the Republic of Poland, which delegates to the legislator only the organization of the Constitutional Tribunal and the mode of proceedings before it. The draft solution must be deemed to violate the principle of separation and independence of the Constitutional Tribunal under Article 173 of the Constitution of the Republic of Poland. According to literature, "*Separation referred to in Article 173 should be understood as organizational separation, which means that the judiciary is a separate, autonomous organizational structure within the system of public authorities, and as functional separation, which means that neither the legislative nor the executive can influence the functioning of the judiciary, this being a guarantee of the independence of the judiciary (including its independence of the other powers).*"[10]

[8] Opinion of the Bureau of the National Judiciary Council of 23 December 2015 …

[9] Comments of the Legislation Office of the Senate of 23 December 2015 to the Act amending the Act on the Constitutional Tribunal (Bulletin No. 58), p. 2.

[10] J. Trzciński, *Chapter VIII "Sądy i trybunały", Article 173* [in:] *Konstytucja Rzeczypospolitej Polskiej*, Wydawnictwo Sejmowe, p. 11.

The autonomy of the Tribunal derived from this principle should allow it to evaluate the conduct of judges independently.

Furthermore, serious doubts arise as to the addition of disciplinary proceedings (including a separate procedure of dismissing judges) initiated by the Minister of Justice and the President according to the new Articles 28a and 31a(2) of the Act on the Constitutional Tribunal. On the one hand, the filing for such proceedings is to be reviewed by:

- the President of the Tribunal in the event of disciplinary proceedings in the strict sense;
- the General Assembly of the Judges of the Tribunal in the event of proceedings to dismiss a judge.

However, it should be noted, in particular in the latter case, that the deadlines set in the Act on the Constitutional Tribunal and their vagueness may arouse doubts in conjunction with the new requirements for resolutions of the General Assembly under Article 10(1) of the Act on the Constitutional Tribunal (see comments in section 3.6.1 hereof).

To summarize:

- the provisions of the Amendment excluding liability of judges for their conduct prior to taking office, i.e., Article 1(16)(b), are in conflict with the principle of independence of the Tribunal under Article 173 of the Constitution of the Republic of Poland;
- the provisions stipulating the participation of the Sejm in the new procedure of terminating the mandate of a judge of the Tribunal, i.e., Article 8(4) of the Act on the Constitutional Tribunal in the wording under Article 1(2) of the Amendment, and Article 36(1)(4) and Article 36(2) in the wording under Article 1(8) of the Amendment, are in conflict with the constitutional principles of independence of judges and courts (Article 173 of the Constitution of the Republic of Poland) and non-removal of judges (Article 180(1)-(2) of the Constitution of the Republic of Poland), violate the independence of judges (Article 195(1) of the Constitution of the Republic of Poland), and grant such powers to the Sejm over judges of the Constitutional Tribunal that go beyond the scope permitted under Article 194(1) of the Constitution of the Republic of Poland, and consequently violate the division of the three branches of government under Article 10 of the Constitution of the Republic of Poland;
- the provisions adding a procedure of initiating disciplinary proceedings (including proceedings to dismiss a judge) by the President and the Minister of Justice, i.e., Articles 28a and 31a of the Act on the Constitutional Tribunal, violate the principle of independence of judges and courts (Article 173 of the Constitution of the Republic of Poland), the principle of independence of judges of the Constitutional Tribunal (Article 195(1) of the Constitution of the Republic of Poland) and the principle of the division of the three branches of government (Article 10 of the Constitution of the Republic of Poland).

3.4.2. Repealed provisions governing the exercise of the CT power to ascertain an obstacle to the discharge of the duties of the President (the impeachment procedure)

The Amendment repeals provisions governing the exercise of the CT power to ascertain an obstacle to the discharge of the duties of the President of the Republic of Poland in Chapter 10 of the Act on the Constitutional Tribunal. According to the position presented in the debate in Parliament, the

derogation from these provisions is intended to avoid the risk of a "coup d'état instituted by the Marshal and judges", which cannot be ruled out given that the Constitution of the Republic of Poland does not specify the precise meaning of the term "inability to discharge duties." Therefore, it follows that the amendment is meant to render the procedure under Article 131 of the Constitution dysfunctional. Even assuming that, in the absence of any procedural provisions in the Act on the Constitutional Tribunal, it would not be impossible to ascertain such an obstacle (e.g., directly under the Constitution of the Republic of Poland), the regulation in question merits an unequivocally negative assessment. This has been pointed out by the Legislation Department of the Senate.[11]

According to the position of the National Judiciary Council, "*Article 131 of the Constitution empowers the Constitutional Tribunal to ascertain an obstacle to the discharge of the duties of the President but it does not regulate procedural issues. In such cases, in view of the subject matter and its fundamental importance to the functioning of the state, the procedure should be regulated in a statute, which is the only way to safeguard the necessary procedural guarantees and the transparency of the procedure.*"[12]

Further to the foregoing, the deletion of Chapter 10 which potentially prevents the Constitutional Tribunal from exercising its powers may be deemed to be in conflict with Article 131 and Article 197 of the Constitution of the Republic of Poland. (…)

3.5. Amendments affecting the exercise of the right to fair trial

The second category of amendments to the Act on the Constitutional Tribunal should be considered mainly from the perspective of the rights of participants in proceedings before the Constitutional Tribunal. The amendments may significantly extend the period of time from the opening of the proceedings to the decision, in extreme cases rendering it impossible to complete the proceedings. In this context, the following amendments should be scrutinized:

- the extension of the list of matters to be reviewed by the full bench;
- the requirement of a majority of 2/3 for rulings given by the full bench;
- the requirement to review applications in the order in which they were received; and
- the extension of the minimum period of time between the notification of the date of the hearing and the hearing.

This category of amendments should be considered from the perspective of the constitutional right to fair trial. It includes three elements:

- the right to a trial by a fair, impartial and independent court, i.e., the right to bring an action;
- the right to adequate organization of court procedures according to the principles of fairness and transparency;
- the right to a court ruling, i.e., the right to binding resolution of a case by the court.

The amendments of the Act on the Constitutional Tribunal mainly affect the exercise of the right of plaintiffs, applicants and participants of proceedings to have their case reviewed under an adequately organized procedure. This special formal aspect of the right to fair trial requires an adequate organization of proceedings before the Constitutional Tribunal, ensuring that the applicable solutions do not prevent the passing of a ruling in the case or defer it unreasonably. Moreover, the procedure should be organized so as to ensure that no group of persons eligible to file for the review of the

[11] See: Comments of the Legislation Office of the Senate of 23 December 2015 …, p. 3.
[12] Opinion of the Bureau of the National Judiciary Council of 23 December 2015 …, p. 2.

conformity of normative acts with acts of higher rank is discriminated against in the exercise of this right.

In this regard, the right to a trial is related to the principle of fairness and efficiency of public institutions, including the Constitutional Tribunal, derived from Article 2 of the Constitution of the Republic of Poland. The principle requires that "*regulations governing the functioning of such institutions are organized to ensure their fair and efficient functioning. Regulations which do not support the fairness or efficiency of such institutions which are to protect the constitutional rights violate such rights and thus should be deemed to be non-constitutional*."[13]

3.5.1. Amendments affecting panels of the Tribunal

Article 44(1) of the Act on the Constitutional Tribunal in the wording under Article 1(9) of the Amendment modifies the requirements for panels of the Constitutional Tribunal for different types of cases reviewed by the Tribunal. (…)

The amendments, first, exclude the option of having any cases reviewed by a panel of five judges and, second, add a general rule whereby the basic panel of the Tribunal is the full bench.

During the work in Parliament, comments were raised that the new criteria are not uniform. According to the Legislation Department of the Senate, "*the proposed determination method of formations (Article 44) is not based on a uniform criterion (party filing for proceedings, subject matter of review), and furthermore they have a surprising effect which requires the Tribunal to give rulings on the conformity of legal acts issued by central public authorities with acts of higher rank in the full bench formation, whereas the conformity of statutes with the Constitution is to be reviewed by a paneln of seven judges under Article 44(1)(2)(a) where the proceedings are filed by means of a legal question*."[14] This comment may suggest that the new provisions are inadequate and, consequently, disproportionate. According to the decision of the Constitutional Tribunal of 9 June 1998 (case K 28/97), "*Under special, exceptional conditions, the right to fair trial may be in conflict with another constitutional norm which protects values of equivalent or even greater importance to the functioning of the state or the development of an individual. The requirement to accommodate both constitutional norms may impose certain limitations on the objective scope of the right to a trial. Such limitations are admissible in the absolute minimum where the given constitutional value cannot be achieved otherwise. They have to fulfil the conditions under Article 31(3) of the Constitution. They may only be approved in a statute, and only where necessary in a democratic state for reasons of its safety or public order or the protection of the environment, public health and morals, or freedoms and rights of other individuals. They must not violate the essence of the freedoms and rights which they limit*." No criterion seems to justify discrimination against persons eligible under the Constitution of the Republic of Poland to file for proceedings, i.e., under Article 191, the President of the Republic, a group of Members of Parliament, the National Judiciary Council, among others. …

The only adequate criterion of stricter requirements for panels of the Constitutional Tribunal is the importance of the legal issue reviewed by the Tribunal, including the position of a challenged legal act in the hierarchy of normative acts.

---

[13] Constitutional Tribunal in the ruling of 7 January 2004, case K 14/03. See also: ruling of the Constitutional Tribunal of 4 October 2006, case K 31/06, and ruling of the Constitutional Tribunal of 12 March 2007, case K 54/05.

[14] Comments of the Legislation Office of the Senate of 23 December 2015 …, p. 10.

The new provisions should be considered in conjunction with Article 44(3) of the Act on the Constitutional Tribunal in its new wording, whereby "*Rulings determined by the full bench shall require the participation of at least 13 judges of the Tribunal.*" The amended provisions of the Act on the Constitutional Tribunal require that the full bench formation is not nine judges, as before, but thirteen judges. This amendment generates a significant risk that the full bench cannot be formed in the event of long illness of judges or any reasons for them to be recused. In that event, it is particularly relevant that no provisions offset the consequences of the stricter requirements by means of exceptions under which cases could be reviewed by a smaller panel. This implies that the Act on the Constitutional Tribunal in its wording under the Amendment does not provide for an adequate procedure enabling the Tribunal to exercise its powers under Article 188 of the Constitution of the Republic of Poland and, consequently, it may be considered to be in conflict with Article 197 of the Constitution of the Republic of Poland to such extent.

Furthermore:

- the provisions, which are potentially dysfunctional, limit the right to fair trial of persons referred to in Article 191(1) of the Constitution of the Republic of Poland, and consequently they are in conflict with Article 45 of the Constitution of the Republic of Poland;
- such limitation should be deemed inadequate and unnecessary, and consequently to fail the test of proportionality applied to assess its conformity with Article 31(3) of the Constitution of the Republic of Poland;
- the right to file petitions granted to a given category of persons without ensuring the adequate procedure of their review is in conflict with the principle of confidence in the state derived from the principle of a democratic state ruled by law enshrined in Article 2 of the Constitution of the Republic of Poland.

3.5.2 Rulings determined by a majority of 2/3 of votes

According to the new wording of Article 99(1) of the Act on the Constitutional Tribunal, "*A ruling of the Tribunal shall be made by a majority of 2/3 of votes.*" This provision is in conflict both with the general rules of judicial proceedings and with Article 190(5) of the Constitution of the Republic of Poland, whereby "*Rulings of the Constitutional Tribunal shall be made by a majority of votes.*" In the absence of a precise definition of majority, it follows that it is an ordinary majority and no other. This is corroborated by other provisions of the Constitution of the Republic of Poland which specify the type of majority wherever a qualified majority is required and refer to an ordinary majority otherwise.

This position has been endorsed by the Legislation Department of the Senate, which pointed out that "*wherever the lawmakers of the constitutional system intended to make a decision dependent on a qualified majority, this is explicitly stated in the Constitution, for example in Article 90(2), Article 98(3), Article 113, Article 121(3), Article 122(5), Article 125(2) and Article 145(2) of the Constitution. Consequently, it is unacceptable for the legislator to qualify the majority referred to in Article 190(5).*"[15] Concerning the general rules of proceedings, it should be noted that no court procedure requires a majority other than the ordinary majority in the deliberations of judges. This follows from the obvious assumption that a vote must lead to a ruling with a specific content. With a majority other than the ordinary majority, a stalemate could occur where the required number of judges would be unable to give a ruling with the same content. This eventuality should be deemed to be in conflict with

[15] Comments of the Legislation Office of the Senate of 23 December 2015 …, p. 4.

the constitutional right to fair trial (Article 45 of the Constitution of the Republic of Poland) understood as the right to a ruling in the case. According to the case-law of the Constitutional Tribunal, the right to file a case with the competent court entails both the obligation to review the case and the obligation to give a ruling in the case.[16] …

Furthermore, it should be emphasized that the amendment imposed by a statute, changing the ordinary majority required for a ruling of the Tribunal, would constitute a systemic modification because a raised threshold of the proportion of votes necessary to determine a ruling would change the balance of the powers, weakening the Tribunal and reinforcing the legislative power. Such a change, affecting the relationship between the legislative and the judicial branches, is a matter of the Constitution. Consequently, only an amendment of the Constitution could raise the majority necessary for the Constitutional Tribunal to give its rulings.

In summary, Article 99(1) of the Act on the Constitutional Tribunal in the wording under the Amendment:

- is in conflict with Article 190(5) of the Constitution of the Republic of Poland, which provides that rulings of the Constitutional Tribunal shall be made by a majority of votes;
- is in conflict with Article 45 of the Constitution of the Republic of Poland, which establishes the right of participants to proceedings before the Constitutional Tribunal to handling their case; unless negative conditions of proceedings arise, handling a case must be understood to mean a ruling which resolves the matter of the case;
- is in conflict with Article 188 of the Constitution of the Republic of Poland, which grants the Tribunal the power to adjudicate certain matters. The grant of the power not only authorizes the Constitutional Tribunal to review them but also obligates it to review every case filed with the Tribunal;
- creates the risk, be it hypothetical, of a stalemate occurring in the passing of rulings by the Constitutional Tribunal, which is unacceptable in the light of the principle of a democratic state ruled by law;
- violates the principle of independence of the Tribunal under Article 173 of the Constitution of the Republic of Poland, preventing it from exercising its functions, and the principle of the division of the three branches of government under Article 10 of the Constitution of the Republic of Poland to the extent that the principle requires a balance of the branches, which depends on an efficient system of judicial control of the constitutionality of statutes.

3.5.3 Requirement of reviewing applications in the order in which they were filed

According to the new Article 80(2) of the Act on the Constitutional Tribunal added by the Amendment, "*The date of a hearing or a sitting in camera, where an application is reviewed, shall be determined in the order in which cases are filed with the Tribunal.*" While it apparently adds a principle widely used in procedural regulations, this provision has many drawbacks which make it incompatible with the Constitution of the Republic of Poland, in particular for the following reasons:

- the provisions are unconditional, preventing any derogation from the rule, which is different from all other procedural regulations. The judicial practice includes frequent cases where the

[16] See: P. Sarnecki, *Chapter II "Wolności, prawa i obowiązki człowieka i obywatela", Article 45* [in:] *Konstytucja Rzeczypospolitej Polskiej*, Wydawnictwo Sejmowe p. 3.

order of reviewing cases other than the order in which they were filed is justified by reasons of judicial economics (where cases concerning the same subject matter are combined) or substance (particularly relevant, urgent or high-priority *ex lege* cases, e.g., adjudication of the constitutional conformity of the Budget Law, where the Tribunal only has two months to adjudicate under Article 224(2) of the Constitution of the Republic of Poland);

- even assuming that the provisions are not unconditional, as suggested in statements made during the work on the Amendment, their enforceability is doubtful due to their vagueness. The provisions refer both to cases reviewed in open sessions and in sittings in camera without specifying whether the order in which they are reviewed should be determined jointly or separately for both types of sessions;
- the provisions do not address situations where a case is taken off the schedule for objective reasons: the only solution consistent with the literal wording of Article 99 of the Act on the Constitutional Tribunal would be to set the first available date after the cessation of the reason for which the hearing could not take place at its original date. However, this would affect the handling of other cases. The issue is augmented by the requirement imposed by the Amendment to set the date of the hearing in cases reviewed by the full bench as long as six months (or exceptionally three months) before the date of the hearing.

These provisions constitute an unjustified interference with the passing of rulings by the Tribunal and will certainly affect the effective exercise of its powers. According to the position of the National Judiciary Council, "*The solution where the President of the Constitutional Tribunal sets the date of a hearing or a sitting in camera only in the order in which the cases were filed deprives the President of the Tribunal of an instrument necessary to manage the work of the Constitutional Tribunal rationally and effectively.*"[17] As a result, it will certainly cause unjustified delays of proceedings. As such:

- it violates the independence of the Constitutional Court under Article 173 of the Constitution of the Republic of Poland;
- it violates the principle of proportionality (Article 31(3) of the Constitution of the Republic of Poland), which implies that the dates of hearings should be set adequately to the nature of the case, allowing for urgent or high-priority cases to be treated as a priority, which is justified in particular in those cases where time augments the adverse impact of regulations which are incompatible with the Constitution of the Republic of Poland;
- as a consequence, it also violates the right to fair trial in conjunction with the principle of proportionality.

3.5.4. Extended waiting period before the hearing

The amendment of Article 87 of the Act on the Constitutional Tribunal extends the minimum period of time from the notification of the date of the hearing given to participants of the proceedings to the date of the hearing. According to Article 87 of the Act on the Constitutional Tribunal in the wording under the Amendment, "*The hearing shall be held no earlier than three months after the delivery of the notification of the hearing to the participants of the proceedings, or six months for cases reviewed by the full bench.*" The period may be shorter, but not shorter than one half of that period, and only in cases:

[17] Opinion of the Bureau of the National Judiciary Council of 23 December 2015 …, p. 2.

- filed by the President of the Republic of Poland;
- where the complaint or legal question concerns a direct violation of personal and civic freedoms, rights and obligations enshrined in Chapter II of the Constitution;
- which review regulations of the Sejm or regulations of the Senate."

These provisions may be deemed to violate the right to fair trial as they prevent the case from being reviewed without undue delay. This has been raised by the National Judiciary Council , which stated that "*The draft contains no reasoning to justify the purpose of the period of time, which is much longer than provided for in the Act (three and six months), required between the notification of the date of the hearing given to a participant of the proceedings and the date of the hearing. The amendment may delay proceedings before the Tribunal, which will have adverse consequences for the functioning of the judiciary and the protection of civic rights.*"[18]

As a result, the provisions should be deemed to be in conflict with Article 45 of the Constitution of the Republic of Poland.

3.6. Other amendments imposed by the Amendment

3.6.1 Quorum and majority required for resolutions of the General Assembly

According to Article 10(1) of the Act on the Constitutional Tribunal in the wording under Article 1(3) of the Amendment, "*The General Assembly shall adopt resolutions by a majority of 2/3 of votes, in the presence of at least 13 judges of the Tribunal, including the President or Vice-President of the Tribunal, unless a statute provides otherwise.*" It was pointed out during the legislative work that "*the regulations under Article 1(3) provide for no exceptions, which implies that the General Assembly of the Judges of the Tribunal – as mentioned above – may be unable to pass resolutions in matters reserved for its exclusive jurisdiction, e.g., approving regulations of the Tribunal (amendments thereof), approving draft budgets of the Tribunal.*"[19] These provisions are a grave violation of the independence of the Tribunal understood as the legislator's obligation to enable CT's effective internal organization. As such, these provisions are in conflict with:

- Article 173 of the Constitution of the Republic of Poland, which establishes the principle of independence of the Constitutional Tribunal, in conjunction with Article 197 of the Constitution of the Republic of Poland, which delegates the power to determine the internal organization of the Tribunal in a statute;
- as a consequence, by violating the autonomy of the Tribunal, violate the principle of the division of the three branches of government under Article 10 of the Constitution of the Republic of Poland.

In particular, the provisions may arouse doubts in the event of resolutions concerning the dismissal of a judge of the Tribunal. In such cases, one of the judges will be recused by principle, and other judges may be recused as well due to personal relations between the judges. This implies that a quorum of 13 judges in such cases may not be available.

/…/ *[For the abbreviated version of the opinion the section "Access of employees of the office of the Constitutional Tribunal to judge examinations" has been deleted]*

[18] Opinion of the Bureau of the National Judiciary Council of 23 December 2015 …, p. 2.
[19] Comments of the Legislation Office of the Senate of 23 December 2015 …, p. 9.