25 Parliament versus Constitutional Court

Selected Issues Pertaining to the Constitutional Dispute in Poland

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25.1 Introduction

The events taking place in Poland since October 2015 in relation to the Constitutional Tribunal have been coined as a constitutional crisis. This is how they are referred to in the national public debate. Abroad, they are also presented in a similar vein.[1] For an in-depth observer of individual stages of these events, it is indisputable that we are dealing with an unprecedented situation during the already 30-year history of the operation of the Polish constitutional court.[2] In fact, for more than six months, the topic of the Constitutional Tribunal has not only been a catalyst for political debates between the current majority and the opposition, but, at the same time, the subject of lively discussions among lawyers. We could say that "the case of the Tribunal" has become the number one topic, and invariably leans to various, sometimes extreme opinions.

The paper cannot possibly discuss all the interesting issues concerning such a complex constitutional dispute. Therefore, it presents a subjective selection of two matters that, in my opinion, determine the main direction of the ongoing conflict. The first one involves the appointment of judges and the related Constitutional Tribunal decision in the case file Ref. No. K 34/15. Here, the discussion will involve the constitutional basis for the appointment of Constitutional Tribunal judges and for the oath of office of judges before the President (provisions regarding the oath are included in the Constitutional Tribunal Act). The second discussed issue relates to the legal basis for Tribunal's decision in the case file Ref. No. K 47/15. Here, an interesting problem concerns the review of the Constitutional Tribunal Act carried out by the Constitutional Tribunal, in particular the check

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1 See examples of various commentaries relating to constitutional crisis in Poland: https://www.foreignaffairs.com/articles/poland/2016-08-25/polands-constitutional-crisis; https://euobserver.com/justice/134625; https://www.theguardian.com/world/2016/jun/01/poland-gets-official-warning-from-eu-over-constitutional-court-changes; www.nytimes.com/2016/04/14/world/europe/poland-eu-parliament.html?_r=0.

2 Similar disputes are not a rarity e.g. in countries of Central and Eastern Europe, including Romania, the Czech Republic or Slovakia. In the latter dispute, cf. A. Chmielarz-Grochal, J. Sułkowski, 'Odmowa mianowania sędziów konstytucyjnych (casus Słowacji)', *Przegląd Sejmowy* 2016 No. 2, pp. 29-46.

of the constitutionality of procedural standards that also constitute the subject of the review and determine how it is handled by the Tribunal.

The primary purpose of the article is to present the dispute concerning the Polish Constitutional Tribunal from the internal perspective. The idea is to describe the current situation and hence determine what, in my opinion, the essence of the ongoing dispute is. With this assumption in mind, I have deliberately avoided focusing on the analysis of observed problems in the context of the comparative law analysis, while objections and remarks expressed e.g. in the opinion of the Venice Commission[3] have been presented in the final part of my paper. The problems existing in Poland are not only of an internal nature. Irrespective of the differences regarding the manner of creation and organisation of a constitutional court, its particular powers or procedural differences, the regulation of the Polish Constitutional Tribunal closely relates to the model of centralised review of constitutionality applicable in many European countries, performed by a separated judicial authority. For this reason, the basic problems perceived against the backdrop of the constitutional crisis in Poland may be analysed, although in a different perspective, in relation to the manner of operation of other European constitutional courts.

The starting point of this paper is the conviction that the course of events in Poland in relation to the Constitutional Court is a result of several political factors as well as components related to the political system. Leaving aside the facet related to politics, in the political system's aspect this conflict involves the response to the key question regarding the mutual relation between the legislature, representing an authority of supreme power,[4] and a constitutional court providing judicial review of the hierarchical compliance of legal standards, introduced into the legal system by the legislature. Here, the question pertains to limits of functioning of both the legislature and the constitutional court, firstly taking into consideration the principle of separation and balance of powers (Art. 10 of the Constitution)[5] and secondly the separation of the judiciary from the other branches (Art. 173 clause 1 of the Constitution).[6] With regard to the above-described constitutional crisis, this more general question may be referred to a more specific issue: which authority – the Sejm or the Tribunal – should ultimately decide what the generally applicable law is. The assumption that the parliament is the authority that exercises the legislative function and decides about the content of the law, while the Tribunal plays only the role of the "negative

3 See: European Commission for Democracy Through Law (Venice Commission), Opinion on Amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland, 11 March 2016 (No. 833/2015), www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)001-e.

4 According to Art. 4 clause 1 of the Constitution: Supreme power in the Republic of Poland shall be vested in the Nation. Clause 2: The Nation shall exercise such power directly or through their representatives.

5 See: Art. 10 clause 1: The system of government of the Republic of Poland shall be based on the separation of and balance between the legislative, executive and judicial powers.

6 See: Art. 173 clause 1: The courts and tribunals shall constitute a separate power and shall be independent of other branches of power.

legislator" seems overly simplistic. This is particularly clear when legislative decisions begin to raise doubts from the viewpoint of applicable constitutional standards. There appears to be a problem here whether or not the parliament may fulfil the legislative function in line with the accepted assumptions solely because the source of its legitimacy to exercise powers is the legitimisation granted as a result of the general elections. If we assume that, despite everything, activities of the legislature should be subject to substantive review in respect of the content of constitutional standards, it is then necessary to accept and respect decisions of the constitutional court that is to provide such review. Legislature's difficulty to accept this viewpoint is clear precisely in relation to the conflict that has been continuing in Poland for over a year now. Interestingly, nobody challenges, as part of the dispute, the systemic role of the Tribunal or excludes its constitutional powers.[7] The dispute plays out on a slightly different plane. It concerns the party that is to determine how the Tribunal should operate. On the one hand, there is the argument that the organisation of the Constitutional Tribunal and the mode of proceedings before it are specified by statute.[8] This authorises the legislature to determine how the Tribunal is to operate. On the other hand, however, it needs to be emphasised that the basis for the reviewing function performed by the Tribunal are constitutional provisions. The very existence of the Tribunal and performance of its tasks result from the Constitution and may not depend, in its essence, on a legislative decision. Therefore, although it has the powers to determine the mode of operation of the Tribunal, the legislature has no complete freedom in this respect. Nevertheless, it is extremely difficult to establish where the freedom ends. This is clear in the current situation in Poland.

25.2 Appointment of Constitutional Tribunal Judges

25.2.1 Factual Circumstances

The dispute concerning the Constitutional Tribunal in Poland started from the appointment of five judges of the Tribunal, which occurred at the end of the 7th term of office of the Sejm. The outgoing majority, which had been ruling for two consecutive terms since 2007, decided to fill all the posts in the Constitutional Tribunal to become vacant in 2015. The legal basis for making this appointment was created on the occasion of the adoption of

7 See: European Commission for Democracy Through Law (Venice Commission), Opinion on Amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland, point 9 and 135.

8 See: Art. 197 of the Constitution: The organisation of the Constitutional Tribunal, as well as the mode of proceedings before it, shall be specified by statute.

the new Constitutional Tribunal Act in June 2015.[9] At the final stage of works involving this Act, Article 137 was introduced; according to the article, the time limit for the submission of candidates for posts to be vacated in 2015 was expiring by the end of September 2015.[10] Implementing this particular procedure, on 8 October 2015, the Sejm of the 7th term appointed Constitutional Tribunal judges on the posts that were becoming vacant, respectively, on 6 November 2015 (3 judges), and on 2 and 8 December 2015.

As a result of the fundamental change in the political scene after the elections on 25 October 2015, the newly formed majority in the Sejm of the 8th term took decisive steps to revise the decision made on 8 October 2015. To this end, they used, in the first place, the amendment of the Constitutional Tribunal Act,[11] which resulted, among others, in repealing Article 137 and replacing it with Article 137a, setting forth the new date of submitting the application to propose candidates for Constitutional Tribunal judges to fill the posts vacated in 2015.[12] At that time, parliamentary activities were already clearly aiming at filling all the five posts of Constitutional Tribunal judges to be vacated.[13] During the second session on 25 November 2015, the Sejm passed five identical resolutions "on the determination of the absence of legal force of the resolutions passed by the Sejm on 8 October 2015."[14] At the same time, the Sejm asked the President to refrain from taking the oath of office from the persons referred to in these resolutions. Then, during the third session on 2 December 2015, the Sejm appointed 5 persons to posts of Constitutional Tribunal judges. In the wake of the above, on 3 December, late at night, the President took the oath of office from the four persons appointed by the Sejm.[15]

Since almost the very beginning, the Constitutional Tribunal has been involved in the dynamics of the ongoing dispute in the Sejm. However, it would be a misunderstanding to treat the Tribunal as a party to the conflict. It would be much more sensible to treat it

9 The Constitutional Tribunal Act dated 25 June 2015 (Dz. U. [Journal of Laws] 1064, hereinafter: the Constitutional Tribunal Act). The Act replaced the previous Constitutional Tribunal Act that had been in effect since 1997.

10 See: Art. 137 of the Constitutional Tribunal Act of 25th June 2015: With regard to judges of the Tribunal whose terms of office end in 2015, the time-limit for submitting the proposal referred to in Art. 19(2) shall be 30 days from the date of entry into force of the Act.

11 The Act dated 19 November 2015 on Amending the Constitutional Tribunal Act (Dz. U. item 1928). This was the first act adopted by the Sejm of the 8th term.

12 Art. 137a: With regard to judges whose terms of office end in 2015, the time-limit for submitting the proposal referred to in Art. 19(2) shall be 7 days as of the entry into force of this provision.

13 The reason for the re-appointment was to maintain the pluralistic (in political and worldview terms) complement of the Tribunal. This was accompanied by the conviction that the newly elected Sejm should have the ability to appoint Constitutional Tribunal judges. Otherwise, the Tribunal – composed of persons selected by "another political option" – could, as some politicians explained, block various legal changes planned by the new majority.

14 M.P. [Official Gazette of the Republic of Poland] of 2015 items 1131-1135.

15 These persons were to replace the Constitutional Tribunal judges whose terms expired, respectively, on 6 November (three judges) and 2 December (one judge). The oath of office of the last person appointed by the Sejm on 2 December 2015 took place on 9 December 2015.

as a victim since divergent political calculations have been at the heart of the ongoing dispute, relating to an attempt to gain a greater influence on the appointment of new judges to the Tribunal. It is difficult not to be under the impression that both the Sejm of the 7th term and then the Sejm of the 8th put a stake on the "jackpot", using every means to independently fill all the posts to be vacated in the Constitutional Tribunal in 2015. To this end, the outgoing majority had used appropriately shaped transitory provisions of the Constitutional Tribunal Act. However, the majority chosen during the elections decided to determine "the absence of legal force" of the resolutions dated 8 October 2015, in order to then be able to appoint five Constitutional Tribunal judges independently. In this context, Tribunal's completion of the judicial review of the constitutionality of the law occurred in a very particular and unprecedented situation.

The first proceedings initiated before the Tribunal in connection with the dispute regarding the appointment of judges started already during the Sejm of the 7th term and were brought in at the application submitted by a group of the then members of the opposition. In the application to the Constitutional Tribunal dated 23 October 2015 (two days before the general elections), they questioned, among others, Article 137 of the Constitutional Tribunal Act and provisions of the Act concerning the oath of office of the judges submitted to the President of the Republic of Poland (Art. 21 of the Constitutional Tribunal Act).[16] After the elections, on 10 November 2015, two days before the first session of the Sejm of the 8th term, the application was withdrawn and then, with an unchanged content, submitted again to the Constitutional Tribunal by another group of deputies, at that time already representing the opposition to the newly formed parliamentary majority. This led to interesting factual circumstances. The case, ultimately resolved in the judgement, file Ref. No. K 34/15, was initiated by the deputies who, a few months back, had taken an active part in both the adoption of the contested Act, including the disputed Article 137, and had made the contested appointment thereunder of the 5 Tribunal judges.

25.2.2 Judgement K 34/15

One of the main issues examined in the case file Ref. No. K 34/15 was the evaluation of Article 137 of the Constitutional Tribunal Act, i.e. the provision that enabled to appoint Constitutional Tribunal judges by the Sejm on 8 October 2015. More importantly, the Tribunal did not speak directly about the validity of the resolutions dated 8 October 2015, since they were not subject to the challenge under the case file Ref. No. K 34/15. The Tribunal only evaluated the legal basis regulating the time limit for submitting candidates for judges and, therefore, enabling the adoption of the above-mentioned resolutions as a result of the application of Article 137 the Constitutional Tribunal Act.

16 File Ref. No. K 29/15.

The Tribunal held that the legal basis set out in the Act regarding the appointment of certain judges, specifically those appointed in the place of the judges whose term of offices has expired on 6 November, was in conformity with Article 194 clause of the Constitution; however, in respect of the other two Tribunal judges, selected for those persons whose terms of office had expired on 2 and 8 December, it was contrary to this provision.[17]

In the review of the constitutionality of Article 137 of the Constitutional Tribunal Act, the Tribunal had to answer two important questions: at what point a Constitutional judge is appointed, and when Constitutional Tribunal judges begin their terms of office. The decision regarding both issues was made by the reference to Article 194 clause 1 of the Constitution, which provided for a template for the review in this case. In accordance with this provision, "The Constitutional Tribunal shall be composed of 15 judges chosen individually by the Sejm for a term of office of 9 years from amongst persons distinguished by their knowledge of the law. No person may be chosen for more than one term of office."

Firstly, the appointment of judges itself comprises a constitutional matter. In accordance with Article 194 clause 1 of the Constitution,[18] this choice has been entrusted, on an exclusive basis, to the Sejm. Therefore, the decision on who is to be a Constitutional Tribunal judge is not dependent on a decision of another public authority.[19] Secondly, the length of the term of office of a judge (9 years) is a constitutional matter; it is to prevent the possible connection of the judge to the parliamentary majority that appoints the person.[20] Thirdly, Article 194 clause 1 of the Constitution establishes the principle of the individual term of office of judges and determines that the Tribunal is to be composed of 15 judges. The Constitution explicitly mentions "judges chosen individually by the Sejm." Therefore, upon appointment, these persons gain the status of a judge: they become Constitutional Tribunal judges.[21] However, the fact that a judge has been chose does not mean the automatic start of his/her term of office. The Tribunal is composed of 15 judges and their terms of office are individual. Therefore, it should be assumed that the term of office of a new judge begins at the earliest upon the end of the term of office of an outgoing

17 Judgement dated 3 December 2015, file Ref. No. K 34/15 (point 8, letter b and c). http://trybunal.gov.pl/en/hearings/judgments/art/8748-ustawa-o-trybunale-konstytucyjnym/.

18 Art. 194 clause 1 of the Constitution: The Constitutional Tribunal shall be composed of 15 judges chosen individually by the Sejm for a term of office of 9 years from amongst persons distinguished by their knowledge of the law. No person may be chosen for more than one term of office.

19 Unlike e.g. in case of the Ombudsman, appointed by the Sejm with the consent of the Senate for 5 years (Art. 209 clause 1 of the Constitution), or the President of the Supreme Chamber of Control, appointed by the Sejm with the consent of the Senate for 6 years.

20 The term of office of the Sejm and Senate is 4 years.

21 A different view demonstrates that the process of appointing a Constitutional Tribunal judge ends when the oath is given. Cf. B. Banaszak, *Glosa do wyroku TK z dnia 3 grudnia 2015 r. (sygn. akt K 34/15)*, "Przegląd Sejmowy" 2016 no. 2, p. 109; A. Dziadzio, 'Quis custodiet custodes ipsos? Trybunał Konstytucyjny jako (nie) obiektywny strażnik konstytucji. Uwagi na kanwie orzeczenia K 34/15 Trybunału Konstytucyjnego z 3 grudnia 2015 r.', *Forum Prawnicze* 5 (31)/2015, p. 19.

Constitutional Tribunal judge (if appointed in his/her place before the end of the term of office) or upon the publication of a resolution regarding the appointment of a Constitutional Tribunal judge (if to take place after the expiry of the term of office of the previous Constitutional Tribunal judge). Since the term of office of a Constitutional Tribunal judge is (similarly as his/her appointment) provided for in the Constitution, neither the Sejm, nor any other public authority may decide on its beginning or end.[22]

An essential part of the interpretation of Article 194 clause 1 of the Constitution is that the right to appoint Constitutional Tribunal judges is vested only in the Sejm whose temporary scope of operation coincides with the date expiry or lapse of the term of office of a Constitutional Tribunal judge.[23] Only then can we can say that the Sejm is the authority holding the right to make the appointment. Furthermore, it should be noted that the choice of judges must be closely tied to the posts to be vacated, and correspond to the order of expiry of the term of office of judges. This results both from the principle of continuity of operation of constitutional public authorities and from the introduction of individual terms of office of Constitutional Tribunal judges. Therefore, the appointment of judges in accordance with Article 194 clause 1 of the Constitution requires inclusion two issues. The first one is an action on the part of the Sejm of the relevant term; the second involves the selection of one of the judges during the period directly preceding the expiry of his/her term of office. The Sejm may not make choices that "anticipate" the vacancy in the Constitutional Tribunal; furthermore, it may not appoint judges selectively without preserving the order of succession in the complement of the Constitutional Tribunal.

25.2.3 Review of Constitutionality versus Operation of the Parliament

Undoubtedly, the decision regarding Article 137 of the Constitutional Tribunal Act resulted in the evaluation of the correct operation of the Sejm of the 7th, which appointed Constitutional Tribunal judges on 8 October 2015. Following the interpretation of Article 194 clause 1 of the Constitution, the Tribunal questioned the basis for the selection of these Constitutional Tribunal judges who had been to start their terms of office already after the term of the Sejm that had chosen them.[24] The Tribunal found that they had been appointed by an authority without the right to adopt a resolution in this matter.

22 The determination of the start date of the term of office for a Constitutional Tribunal judge in a resolution of the Sejm regarding his/her appointment is, therefore, of a declaratory nature.

23 Cf. judgement K 34/15, part III, point 6.17.

24 The Tribunal was accused, among others, of excessive formalism. It was suggested that, in reference to the representative form of government (Art. 4 of the Constitution), the Tribunal should have negatively evaluated the legal basis for the appointment of all the five judges on 8 October 2015 because the choice had occurred shortly before the end of the term of the Sejm. Cf. Banaszak, op. cit., p. 118. It was also implied that, in its judgement, the Tribunal officially approved "anticonstitutional and law-infringing actions of the previous parliamentary majority." Cf. A. Dziadzio, op. cit., p. 24.

The judgement in the case file Ref. No. K 34/15 did not end the dispute over the appointment of Constitutional Tribunal judges. Instead, it became only one of the stages of the dispute.[25] With hindsight, we could ask whether in fact, in its judgement, the Tribunal was able to lead to a resolution of the conflict, which involved, after all, a variety of additional actions taken in the meantime by both the Sejm and the President of the Republic of Poland. Responding negatively to this question, we should emphasise that the instruments used by a constitutional court and, therefore, the Constitutional Tribunal may not comprise effective tools to resolve political disputes in which the law is used instrumentally. The Tribunal may be involved in settling such conflicts only in a manner competent for the judiciary. The essence of the judiciary is the binding resolution of disputes related to the law, which means speaking from the perspective of applicable legal standards. Their evaluation may not be, however, dependent on whether or not they have become the basis of operation of representative authorities "legitimised by high results in the elections."[26] The political character of the matter examined by the Tribunal involves setting the legal framework for the operation of political authorities, in this case: the Sejm and the President (obliged to take the oath of office from judges). Nevertheless, this does not mean that the function of reviewing the constitutionality of law vested in the Tribunal may disregard the content of the law, particularly the content of constitutional standards.

The obligation to observe the Constitution, imposed on all public authorities, may not be automatically identified with granting each and every of such authorities with the right to make an independent (and binding for other authorities) evaluation of the constitutionality of taken actions. This is crucial for the understanding of the essence of the dispute over the appointment of Constitutional Tribunal judges. Its fundamental phase did not result from the judgement in the case file Ref. No. K 34/15, but from the actions taken by the Sejm of the 8th term even before this decision was made. This means the previously mentioned resolutions dated 25 November 2015 (cf. point 1). The legal structure of these resolutions was based on the assumption according to which the Sejm could independently evaluate the legality of its actions and, as a result, decide which decisions of the Sejm were and which were not involved in the legal circulation. Therefore, it may determine an infringement of the procedure to adopt resolutions regarding the appointment of Constitutional Tribunal judges and, on this basis, recognise them consequently as having no legal force.[27] The basic problem related to the resolutions dated 25 November 2015 concerns

25 The criticism of the judgement K 34/15 included a suggestion that the Tribunal used such legal structures to "remove the sort of odium of anticonstitutional actions from the previous coalition government and put the blame for the constitutional crisis on the current President and the new parliamentary majority." Cf. A. Dziadzio, op. cit., p. 15.

26 Cf. A. Dziadzio, op. cit., p. 24.

27 Cf. the justification of deputies' draft resolution to determine the absence of legal force of the resolution of the Sejm of the Republic of Poland dated 8 October 2015 on the appointment of a Constitutional Tribunal judge, published in Monitor Polski dated 23 October 2015, item 1038 (form no. 42/VIII kad.).

the difficulty in identifying their legal basis. Public authorities, including also the Sejm, act solely on the basis and within the limits of the law (Art. 7 of the Constitution[28]). Otherwise, we would have to deal with the arbitrariness of their actions, standing in contradiction with the principle of the rule of law. Even a justified and strong belief regarding the irregularities existing in the manner how the Sejm of one term operates may not, by itself, create a right to make any kind of "verification-like" decisions by the Sejm of the following term. The Sejm may not make a specific revision of legal effects of validly adopted resolutions because there is no appropriate legal basis for this. On the list of all legally provided resolutions of the Sejm (Art. 120 of the Constitution), there are those that provide for making a specific decision.[29] Additionally, acting under Article 69 of the Standing Order of the Sejm, the Sejm may adopt resolutions that are mandatory resolutions, declarations, appeals or statements.[30] These, in turn, may not produce effects that were assigned to the resolutions dated 25 November 2015.[31] The acceptance of a different position would mean granting the Sejm with the general powers to verify and possibly determine "the absence of legal force" of all other resolutions on appointing persons to positions in public authorities if only these resolutions raised concerns (e.g. in respect of the course of their adoption). Consequently, this would give rise to a very dangerous situation in which the measure of the validity of decisions of the Sejm in respect of filling positions in public authorities was their subsequent evaluation by the new (mostly politically different) majority of the Sejm. The question of the criteria of such an evaluation seems to be rhetorical. From the political system's viewpoint, recognising such reviewing powers of the Sejm would in fact contradict the principle of separation and balance of powers according to which any disputes related to the law, including those between public authorities, are subject to judicial review

The resolutions dated 25 November 2015 were to open a door for the Sejm of the 8th term for the re-appointment of all the five judges of the Constitutional Tribunal on the posts vacated in 2015. However, they could not have had such effects both owing to their non-binding nature (partly a mandatory resolution, partly a statement)[32] and due to the fact that, when adopted, three of the judges appointed by the Sejm on 8 October 2015 had

28 Art. 7 of the Constitution: The organs of public authority shall function on the basis of, and within the limits of, the law.

29 E.g. a resolution on establishing a Sejm investigative committee (Art. 111 clause 1 of the Constitution); a resolution on a state of war (Art. 116 clause 1 of the Constitution); a resolution on granting approval to the Council of Ministers (Art. 226 clause 2 of the Constitution).

30 Mandatory resolutions are resolution calling a specified state authority to take a one-off action; declarations determine an obligation to a specific action; appeals call for specific conduct, taking an initiative or task; statements express an attitude in a specific matter (Art. 69 of the Standing Order of the Sejm).

31 Cf. Constitutional Tribunal decision dated 7 January 2016, U 8/15, OTK ZU [Official Compilation of Constitutional Tribunal Decisions] no. A/2016, item 1, part II, point 4.1. The Tribunal stated that "the resolutions on the absence of legal force cannot be regarded as a legally binding determination of invalidity of the appointment of Constitutional Tribunal judges made on 8 October 2015."

32 Cf. Judgement K 34/15, part III, point 6.7.

already started their term of office.[33] This way, by passing the resolutions on the appointment of Constitutional Tribunal judges on 2 December 2015, the Sejm tried to fill again the three posts that, at the time, had already been filled. For this reason, the Sejm could not have, at that particular moment, use its powers to choose Constitutional Tribunal judges, since not even the Sejm of the 8th term, holding the powers to appoint the judges, could have duplicated the posts at the Constitutional Tribunal that had already been filled. However, this does not change the fact that the Tribunal itself, using the judgement in the matter regarding the hierarchical compliance of standards, could not have achieved an effective resolution of the dispute related to the selection of Constitutional Tribunal judges. For this to happen, it would have to assume and use the logic that became the reason for adopting the resolutions of the Sejm passed on 25 November and 2 December 2015. However, this would mean going beyond the role of a court reviewing constitutionality assigned to the Tribunal.

25.2.4 Oath of Constitutional Tribunal Judges

In addition to the problem of constitutionality of Article 137 of the Constitutional Tribunal Act, the second principal issue resolved in the case file Ref. No. 34/15 K was the matter of the oath made by Constitutional Tribunal judges to the President of the Republic of Poland (Art. 21 clause 1 of the Constitutional Tribunal Act). When evaluating the constitutionality of Article 21 clause 1 of the Constitutional Tribunal Act, the Tribunal used the formula for an interpreting judgement and determined that this provision cannot be construed otherwise than as stipulating the obligation of the President to promptly receive the oath of a Constitutional Tribunal judge appointed by the Sejm. It was to emphasise that the President was not free to decide whether he would accept the oath or not. Otherwise, the President would become one more – apart from the Sejm – entity making decisions regarding the complement of the Constitutional Tribunal, which would be without any legal basis in Article 194 clause 1 of the Constitution. The President is required to take the oath in order to enable a Constitutional Tribunal judge to start performing the official functions entrusted to him/her. However, the President cannot independently evaluate the legal basis of the appointment made by the Sejm.[34]

The fundamental problem underlying the Tribunal's decision involved the determination of systemic-based meaning of the oath submitted to the President by Constitutional Tribunal judges. Reconstructing the issue, it should be noted that the institution of the oath of office refers to all constitutional organs of the state, including those originating from

33 This took place on 7 November 2015, on the day following the end of the term of office of the previous three Constitutional Tribunal judges.

34 Judgement K 34/15, part III, point 8.5.

the general elections: the President of the Republic of Poland (submitting the oath of office before the National Assembly – Article 130 of the Constitution), and deputies and senators (Art. 104 clause 2 and Art. 108 of the Constitution). This has implications going beyond the traditional symbolism because it inaugurates the performance of an official function and, at the same time, is a public promise to hold a particular position in a particular manner. It is obvious that the oath may only be submitted by a person elected or appointed to perform a particular function, and the oath of office is to enable him/her to perform it.[35] This also means that the oath itself (although it may take into account the participation of another authority than the one appointing the person to the position) does not form a part of the subsequent review of such appointment or choice. This is only to ensure the appropriate official status of the person, entitling him/her to exert the power in the name of the state.

The oath of Constitutional Tribunal judges has not been provided for in Article 194 clause 1 of the Constitution or in any other provision of the Constitution relating to the Constitutional Tribunal. On the basis of the constitutional provisions, the role of the President of the Republic of Poland in the sphere of internal organisation of the Constitutional Tribunal is limited only to the appointment of the President and Vice President of the Constitutional Tribunal from among the candidates presented by the General Assembly of the Judges of the Constitutional Tribunal (Art. 194 clause 2 of the Constitution). Therefore, while the oath the basis of which is Article 21 clause 1 of the Constitutional Tribunal Act ends the sequence of events associated with the appointment of Constitutional Tribunal judges by the Sejm, this event may not be given the same status as the one related to powers of the Sejm as provided for in Article 194 clause 1 of the Constitution.[36] The legal basis of the appointment of judges prevails over the one that authorises the President to take the oath of Constitutional Tribunal judges. This determines the manner of interpretation of provisions regarding the oath. Firstly, it provides no basis to identify the role of the authority appointing the judges (the Sejm) with the role of the entity taking the oath (the President). Secondly, it requires the oath to be interpreted as an event subordinated to the appointment: one that poses immediate conditions for the performance of duties of a judge.

35 The determination that the oath is submitted by "persons chosen for the post of a judge" (Art. 21 clause 1 of the Constitutional Tribunal Act) does not mean that the persons are not judges. The oath may in fact be submitted only by the persons chosen in advance by the Sejm (Art. 194 clause 1 of the Constitution). For this reason, "the refusal to submit the oath is tantamount to the renunciation of the post of a Constitutional Tribunal judge" (Art. 21 clause 2 of the Constitutional Tribunal Act).

36 Here, it is necessary to distinguish the stage of obtaining the status of a Constitutional Tribunal judge (resulting from a resolution of the Sejm regarding the appointment) from the status of an incumbent Constitutional Tribunal judge that is obtained upon submitting the oath before the President.

The decision of the Tribunal in relation to Article 21 clause 1 of the Constitutional Tribunal Act[37] was made in very specific factual circumstances. The President did not accept the oath in relation to the judges appointed on 8 October 2015, citing doubts about the constitutionality of the legal basis for this choice. However, he refused to wait for a resolution of these concerns by the Constitutional Tribunal. A few hours before the judgement in the case file Ref. No. K 34/15, he took the oath of the persons appointed as judges on 2 December 2015. In this regard, he did not have any objections of a constitutional nature.

Some commentaries to the judgement K 34/15 indicated that the Constitutional Tribunal should have ruled the conformity of Article 21 clause 1 of the Constitutional Tribunal Act with Article 194 clause 1 of the Constitution, or "simply" determine the unconstitutionality of this provision, thus eliminating the statutory basis for the submission of oaths by Constitutional Tribunal judges before the President.[38] Both possibilities were known to the Tribunal. However, it does not seem that the adoption of any of the above-mentioned versions would in fact resolve the constitutional problem underlying this case. Its essence was to determine the extent of powers of the President taking the oath of Constitutional Tribunal judges. In particular, it was about emphasising that his role in this respect could not be associated with any possible review of the correctness of the appointment of Constitutional Tribunal judges made in the Sejm. This only had a nature of a review of standards, while actions of the President taken after 8 October 2015 only confirmed how provisions of the Act regarding the oath of Constitutional Tribunal judges could be understood. The role of the Tribunal was to determine whether the standards, decoded from the reviewed provision of the Act, were within the framework set out by the Constitution. The declaration of unconstitutionality of Article 21 clause 1 of the Constitutional Tribunal Act could, instead, raise doubts as to legal consequences of such a decision in relation to the judges who had previously submitted the oath before the President. This could lead to the questioning of their official status. Therefore, instead of removing this provision from the Act that gave a judge the basis to start his/her judicial functions at the Constitutional Tribunal, a decision was made to indicate which standard resulting from it was in line with the Constitution.

As a side note, it may be added that already at the time of passing the judgement file Ref. No. K 34/15, the decision of the Tribunal regarding the oath of Constitutional Tribunal

37 Art. 21 clause 1: A person elected to assume the office of a judge of the Tribunal shall take the following oath in the presence of the President of the Republic of Poland: "I solemnly declare that, by fulfilling my duties as a judge of the Constitutional Tribunal, I will faithfully serve the Polish Nation and safeguard the Constitution of the Republic of Poland, and that I will do so impartially, in accordance with my conscience, with the utmost diligence and with respect for the dignity of the office." The oath may be taken by adding the following wording: "So help me God."

38 Cf. M. Wiącek, 'Glosa do wyroku TK z dnia 23 grudnia 2015 r. (sygn. akt K 34/15)', *Przegląd Sejmowy* 2016 no. 2, pp. 126-127.

judges had practically a very limited importance in the conditions of the ongoing dispute. In fact, the actions taken by the Sejm and the President formed completely different factual circumstances of the whole issue even before the Tribunal had the opportunity to make a judicial review of the constitutionality of provisions of the Constitutional Tribunal Act. Therefore, so far, the generally binding and final judgement in the case file Ref. No. K 34/15[39] has not caused the legal effects it has provided for.

25.3 The Review of the Constitutionality of the Constitutional Tribunal Act

25.3.1 Constitutional Tribunal Act Dated 22 December 2016

The dispute concerning the appointment of Constitutional Tribunal judges, initiated in the Sejm of the 7th term and continued in the Sejm of the 8th term, rather quickly took on the form of a constitutional conflict unfolding among the three powers: the legislature, the executive and the judiciary. A thesis could be proposed that, from the very beginning, its primary motive was – and still is – a different (from the previous one) perception of the importance of the legislature and of the role of the constitutional court by the parliamentary majority in the Sejm of the 8th term. This is about redefining the mutual relationship of these public authorities, aiming at delineating the scope of their properties anew. It is interesting that this sometimes very dynamic process is occurring within a political system laid down in the Constitution of the Republic of Poland, one that has not been subject to any major modifications since that time. For this reason, some – it would seem – well-established issues of the political system, which have not aroused any serious doubts so far, are now topics of serious debates and, unfortunately, very divergent interpretations.

An example of an action to redefine the relationship of the Sejm and the Constitutional Tribunal was the adoption of the Act dated 22 December 2015 on Amending the Constitutional Tribunal Act.[40] The entry into force of the amendment (28 December 2015) and its subsequent review made in the judgement dated 9 March 2016 (K 47/15) highlighted all the principal causes of the ongoing crisis in Poland since autumn 2015. Furthermore, they transferred the main burden of the ongoing dispute from the issue of appointment of Constitutional Tribunal judges to the issue of the legal basis for the judicial activity of the Tribunal.

39 There is no doubt that the judgement file Ref. No. K 34/15 came into force, which is confirmed by its publication (Dz. U. item 2129).

40 Dz. U. item 2217.

The amendment to the Constitutional Tribunal Act came into force on 28 December 2015 without the *vacatio legis* period. It has introduced, among others, the principle of reviewing all matters at full complement and increasing the minimum number of judges constituting the full complement from 9 to 13.[41] Additionally, it has also provided for the principle of examining applications submitted to the Constitutional Tribunal in the order of receipt, and introduced at least 3- and 6-month deadlines for conducting hearings, counted from the date of notification of participants of proceedings. It has also stipulated that reviewing panels of the Constitutional Tribunal are to be determined in accordance with the rules introduced by the amending act.[42]

The extent of legislative amendments introduced at a relatively fast pace, made in a specific political context, almost immediately raised many doubts the manifestation of which was the submission of five applications to the Constitutional Tribunal to review the constitutionality of the Act dated 22 December 2015.[43] By the judgement dated 9 March 2016, the Constitutional Tribunal declared the unconstitutionality of individual provisions as well as the entire amending act dated 22 December 2015. Since the judgement has not been published yet, on the one hand, this gives rise to undermining its legal effectiveness[44] and, on the other hand, it is now a basis for challenging the legality of subsequent decisions of the Tribunal made after the judgement K 47/15 under the Constitutional Tribunal Act excluding the provisions deemed as unconstitutional.[45]

25.3.2 Circumstances of Judgement K 47/15

Before December 2015, in the nearly 30 years of judicial practice, the Constitutional Tribunal had never ruled on the constitutionality of the Constitutional Tribunal Act. The first such situation occurred in the above-discussed judgement dated 3 December 2015 (K 34/15) and then in the judgement dated 9 December 2015 (K 35/15), passed a few days later. The subject matter of the review in the case file Ref. No. K 34/15 were provisions of the Constitutional Tribunal Act in force, and the judgement itself was not challenged due to the fact that the Tribunal spoke "in its own case." The Judgement K 35/15 involving

41 An exception to reviewing cases at full complement would be proceedings instituted by a legal question or a constitutional complaint, and cases to examine the conformity of acts with international agreements ratified by the consent granted under an act (a panel made of 7 judges), and initial review of constitutional complaints and applications and exclusions of a judge (a panel made of 3 judges).

42 Cf. Art. 2 clause 1 of the Act dated 22 December 2015.

43 The applications were submitted by: the First President of the Supreme Court; two groups of deputies; the Ombudsman; and the National Council of the Judiciary. All these applications were combined for joint examination by the Tribunal under the file Ref. No. K 47/15.

44 In this context, we could quote some statements of politicians as well as experts who said that the judgement dated 9 March 2016 was an opinion issued by a group of Tribunal judges.

45 As at 4 July 2016, in addition to the judgement K 47/15, 18 other judgements of the Constitutional Tribunal have been waiting for publication in the relevant official gazette.

provisions of the Act dated 19 November 2015 on Amending the Constitutional Tribunal Act was also not contested owing to this reason.

There were different reactions to the judgement in the Case K 47/15, which was a third consecutive decision made by the Tribunal in respect of the constitutionality of the Constitutional Tribunal Act. The basic formal objection against the Tribunal involved the fact that, in ruling on the case, it waived the application of certain rules of proceedings, introduced by the amending act dated 22 December 2015. The unlawfulness of such actions of the Tribunal is to be proven by the wording of Article 197 of the Constitution according to which "the organisation of the Constitutional Tribunal, as well as the mode of proceedings before it, shall be specified by statute." By waiving the application of the new rules regarding the determination of the complement, making decisions by a qualified majority of votes, and ruling on cases in the order of receipt, the Tribunal was to independently create the basis for its operation. As a result, the Sejm majority and the government have not recognised the judgement dated 9 March 2016 in the case file Ref. No. K 47/15 as a Tribunal decision, treating it as a non-binding legal opinion of the judges. This resulted in the above-mentioned lack of publication of the judgement in the Journal of Laws, which is also to indicate the lack of effectiveness of the decision.

The dispute related to the procedure for passing the judgement in the case file Ref. No. K 47/15 refers to the relationship of the legislature and the constitutional court that reviews actions of the former. In such a designated dispute, each party presents its arguments. The Sejm seeks to change the manner of operation of the Constitutional Tribunal, referring to the powers it has to legislate in the form of an act. It also alludes to Article 197 of the Constitution that makes an express reference to the act regarding the organisation and mode of proceedings before the Constitutional Tribunal. The Tribunal emphasises, however, that it is the sole authority established in the Constitution to make binding and final judgements regarding the constitutionality of acts. Therefore, it is also entitled to evaluate the constitutionality of the act that refers to itself. In this context, it refers to the wording of Article 195 clause 1 of the Constitution according to which "judges of the Constitutional Tribunal, in the exercise of their office, shall be independent and subject only to the Constitution."

25.3.3 Powers of the Sejm in Respect of the Constitutional Tribunal

It would be fair to begin from a rather obvious statement granting the parliament – in this case, the Sejm – the right to exercise the legislative function also in relation to the judiciary, including also in respect of the Constitutional Tribunal. However, it is no coincidence that the Constitution thoroughly – and, at the same, in detail – determines the powers of the Tribunal, lists entities legitimised to initiate the review of constitutionality, and specified

the status of judges of the Constitutional Tribunal. Nevertheless, it does not regulate exhaustively all the issues relating to the internal organisation, namely the mode of proceedings of the Tribunal. Therefore, Article 197 of the Constitution refers to an act that is to determine some issues in more detail. The reference included in Article 197 of the Constitution concerns specifically the organisation and mode of proceedings,[46] but does not include e.g. the jurisdiction of the Constitutional Tribunal or the appointment of judges.[47] Those matters are, in fact, exhaustively regulated in the Constitution itself. This means that the legislature, although entitled to exercise its legislative functions in relation to the Tribunal, is not completely free in this respect. This is related to the wording of the Constitution in respect of what it is required to regulate. However, it should be noted that, even to this limited extent, the scope of issues left to be regulated by the legislature is quite broad. The standardisation of organisation of a public authority and its proceedings may, in fact, involve a number of detailed issues. This raises the question whether, in exercising the powers provided for in Article 197 of the Constitution, the legislature is not also bound by a manner of regulating the issues indicated therein. The answer to this question is positive and is the consequence of the Constitution being the supreme law of the Republic of Poland (Art. 8 clause 1 of the Constitution). This means that the legislature cannot introduce solutions, even ones falling within the scope of the reference under Article 197 of the Constitution, which would be contrary to the content of constitutional standards. Firstly, it must take into account these elements of the organisation and the mode of proceedings before the Constitutional Tribunal that comprise a constitutional subject matter.[48] Secondly, it must create conditions for Constitutional Tribunal's exercise of its functions under the Constitution. Therefore, the purpose of determination of the rules of organisation and the mode of proceedings of the Constitutional Tribunal is to enable the Tribunal to perform the function of hierarchical review of standards and other tasks.[49] Actions contrary to this basic assumption would mean granting the Sejm the powers to decide whether a relevant public authority – in this case, the Constitutional Tribunal – would be to function at all. This, in turn, would place the Sejm and the legislature in a position supreme to other

46 A similar scope of the reference is included in Art. 201 of the Constitution concerning the Tribunal of State. Art. 201 of the Constitution: The organisation of the Tribunal of State, as well as the mode of proceedings before it, shall be specified by statute.

47 A much wider legislative reference is provided for in e.g. Art. 176 clause 2 of the Constitution concerning common courts. In this case, an act is to determine the system, jurisdiction and proceedings before courts.

48 E.g. passing Constitutional Tribunal judgements by a majority of votes (Art. 190 clause 5 of the Constitution); rules of appointment of Constitutional Tribunal judges (Art. 194 clause 1 of the Constitution); the mode of appointment of the President and the Vice President of the Constitutional Tribunal, and powers of the General Assembly of the Judges of the Constitutional Tribunal (Art. 194 clause 2 of the Constitution).

49 "No act may independently determine the framework for performing the review of constitutionality of law." Cf. M. Safjan, 'Polityka a Trybunał Konstytucyjny. Konstytucja – ostatni środek obrony przed polityką', *Ruch Prawniczy, Ekonomiczny i Socjologiczny* 2016, No. 1, p. 41.

authorities, which is not justified in the light of the principle of separation and balance of powers (Art. 10 clause 1 of the Constitution).[50]

There is no doubt that the Constitution is to be the criterion for the operation performed by the legislature. The dispute is about who – which public authority – would be to review the compliance with the Constitution by other authorities, including the legislature, and eliminate these decisions that would infringe the Constitution. This issue – key for understanding the essence of the analysed dispute – is comprehensively regulated in the Constitution itself. According to Article 188 clauses 1-3 of the Constitution, the Constitutional Tribunal has been entrusted with the adjudication regarding the conformity of acts and other legal provisions adopted by central public authorities with the conformity of legal provisions adopted by central public authorities. In order to make the performance of this function binding on other public authorities, judgements of the Tribunal are universally binding and final (Art. 190 clause 1 of the Constitution). At the same time, already at the level of the Constitution, major guarantees have been introduced for the independent performance of this function by the Tribunal. One of such guarantees is expressed in Article 195 clause 1 of the Constitution. According to this provision, "Judges of the Constitutional Tribunal, in the exercise of their office, shall be independent and subject only to the Constitution." It is clear that the cited provision of the Constitution does not put Constitutional Tribunal judges "above the law". This provision clearly relates to the sphere of "holding their office", namely the performance of one of the functions assigned to the Tribunal by the Constitution. This is to enable, among others, the binding and definitive determination of the conformity of acts with the Constitution. In order to make this possible, judges that perform the above-described task are not, in this particular range, bound by the content of the reviewed legal standard. Otherwise, they could not make their substantive evaluation or decide of their removal from the legal system.[51] However, since being "subject only to the Constitution" applies solely to the official sphere and is designed to enable the performance of the function of the Tribunal, these provisions must be strictly construed. This means that the lack of binding by the content of acts does not automatically exclude their application in respect of Constitutional Tribunal judges; it refers only to those provisions of a relevant act the constitutionality of which the Tribunal is reviewing in relevant proceedings. Here, it does not matter whether they are substantive-law or procedural provisions. Article 195 clause 1 of the Constitution makes no such distinction. If relevant provisions are subject to the review and the Tribunal is to determine their constitutionality, they are not, in this respect, binding for judges of the Tribunal adjudicating

50 Cf. another viewpoint showing the supreme position of the Sejm against other public authorities, L. Morawski, 'Opinia Komisji Weneckiej w sprawie ustawy nowelizującej z 22 grudnia 2015 r. – analiza krytyczna', *Prawo i Więź*, No. 1 (15) 2016, p. 23.

51 Cf. L. Garlicki, Art. 195, note 5, p. 3 v. IV.

in this respect. It is obvious here that the act whose selected provisions are under the review of constitutionality is binding for the judges in other respects.

The constitutional context of the dispute regarding the procedure to pass the judgement K 47/15 must relate both to Article 197 and Article 195 clause 1 of the Constitution. No legal argument may be built by referring only to the first of the cited provision, forgetting about the other. Furthermore, these provisions are to be explained in a relevant context of the political system in which both the Sejm and the Tribunal are to perform their relevant functions, taking into account the principle of separation and balance of powers (Art. 10 clause 1 of the Constitution). In the first case, this is about the legislative function, which does not mean a complete freedom in regulating everything in a way that suits the relevant majority of the Sejm. In the second case, this concerns the function for the binding resolution of disputes related to the law, including, among others, adjudication on the conformity of acts with the Constitution. The fact that Constitutional Tribunal judges are "subject only to the Constitution" is closely linked to the performance of this function and does not exclude the obligation to Tribunal's actions on the basis and within the limits of the law (Art. 7 of the Constitution). In this context, the basic precondition is that the authorities referred to in the Constitution act and perform entrusted tasks. This is directly related to the obligation of cooperation among the separated and balanced authorities (Art. 10 clause 1 in connection with the introduction to the Constitution), defining the constitutional principle of the political system to which they relate. The cooperation of every authority appropriately to its characteristics may not involve the mutual obstruction that prevents operation; this may not involve taking over the powers of one authority by another, or lead to questioning the legal basis of the tasks that the Constitution clearly separates. The Constitutional Tribunal has the power to review the constitutionality of all applicable acts, including also the Constitutional Tribunal Act. At that time, it does not speak "in its own case" because, as a public authority, it has no "own interest", but only performs the task laid down in the Constitution. Similarly, when speaking about the constitutionality of this or any other act, including those that address them (e.g. tax or criminal acts), Constitutional Tribunal judges do not adjudge in their individual (personal) interest, but perform the official function with which they have been entrusted. It is important that this function is performed on a permanent basis, comprising the necessary condition for the actual effectiveness of the Constitution. Tribunal's waiver of ruling on the constitutionality of acts, apart from the lack of legal basis, would practically mean that a decision on the binding force of the Constitution was left to Constitutional Tribunal judges themselves. This would, in turn, contradict not only the principle of them being bound "only by the Constitution" but would also make the Tribunal an authority standing above the Constitution.

25.3.4 *Basis for the Review of Constitutionality of the Constitutional Tribunal Act*

The dilemma concerning the possibility of Constitutional Tribunal rulings on the constitutionality of the Constitutional Tribunal Act was linked, in the case file Ref. No. 47/15, with yet another problem. Namely, it involved the admissibility of evaluation of these provisions of the Constitutional Tribunal Act that also determined the procedural basis for the review of the constitutionality. The allegation indicating the inadmissibility of passing the judgement K 47/15 concerned the defective filling of the reviewing panel in this case. One of the changes introduced by the amending act dated 22 December 2015 was the determination of the minimum number of judges comprising the full complement of the Constitutional Tribunal, namely 13 judges. The application of this rule in conjunction with the order to examine all applications submitted to the Tribunal by the full complement and the order of compliance with the sequence of reviewing matters by the Constitutional Tribunal was to postpone the possibility of reviewing the constitutionality of the amending act. The previously described factual and legal situation, formed after the judgement of the Tribunal in the case file Ref. No. K 34/15, made it impossible to fill the full complement of the Constitutional Tribunal in accordance with the rules provided for in the amendment dated 22 December 2015. The legislature must have been aware of this but decided to use its legislative powers in fact without having regard to the Tribunal's judgement.

When starting the examination of the case file Ref. No. K 47/15, the Tribunal could use one of the two solutions. Either consider that procedural changes introduced to the Constitutional Tribunal Act were mandatory and binding for the Tribunal, regardless of whether they had become the subject of the constitutional review. That would mean, however, that the amendment of the Constitutional Tribunal Act in respect of the mode of proceedings excluded, in principle, the possibility of making its review. Or, acting under Article 195 clause 1 of the Constitution, determine that the exercise of the function of the constitutionality review in respect of the Act dated 22 December 2015 required the adoption of such rules of proceedings that would enable to pass a judgement excluding the reviewed provisions of the Constitutional Tribunal Act. The Tribunal opted for the second solution.[52] The argument for this decision was that the review of the constitutionality of all acts was the obligation of the Tribunal; this way, the Tribunal exercised the function related to resolving disputes between public authorities. Therefore, provisions concerning the Tribunal could not lead to a situation in which the authority lost its ability to operate. The proceedings-related aspect of this position was the recognition that the full complement of the Constitutional Tribunal was made of "all the judges who have the ability to pass a judgement

52 In the decision dated 14 January 2016 (K 47/15), the Tribunal decided to examine combined applications at a hearing in the case file Ref. No. K 47/15.

on a relevant day."[53] In respect of the case file Ref. No. K 47/15, the full complement consisted of 12[54] judges and the case was reviewed in this complement on 9 March 2016.

Tribunal's determination of the legal framework to adjudicate in the case file Ref. No. 47/15 K was a precedent because it involved vesting the priority to one value over others. In this case, the decisive importance was attributed to the need of performing the function of reviewing the constitutionality, limiting the effectiveness of statutory procedural standards that could exclude the possibility of ruling by the Constitutional Tribunal at full complement.[55] It seems reasonable here to recognise this ruling as moderate. It involved only the refusal of application of procedural provisions under Article 195 clause 1 of the Constitution, without the simultaneous determination (even before passing the judgement) of the absence of binding force of the entire amending act. This neither was based on the evaluation of the content of this act, nor undermined the presumption of its constitutionality.[56] We could say that, as in the case of a dispute concerning the appointment of Constitutional Tribunal judges resolved on the occasion of the judgement K 34/15, also in the case file Ref. No. K 47/15, the Tribunal did not have too many options to take action. It had to face the problem of the "judgement paradox" in which the standard determining the mode of proceedings of the constitutional court was also the procedural basis for the completed review and its subject matter. The possible subsequent identification of the unconstitutionality of such a standard could invalidate the entire reviewing process and, thereby, also undermine the lawfulness of the judgement.[57] Therefore, the waiver of the application of certain provisions of the Constitutional Tribunal Act, modified by the amendment dated 22 December 2015, was to protect the Constitutional Tribunal from the risk of subsequent repealing of the legal basis to rule in the case file Ref. No. K 47/15.

The position that the full complement of the Tribunal is comprised *in casu*, regardless of the wording of the act, of "all the judges who have the ability to pass a judgement on a relevant day" resulted from Article 194 clause 1 of the Constitution and the assumption that the legislature could not, referring to the exercise of the powers referred to in Article 197 of the Constitution, determine the validity of the standard of the political system, which was the exercise of the reviewing capacity by the Constitutional Tribunal. This solution has, on the one hand, individual meaning limited in this case to the analysis of

53 Decision dated 14 January 2016, file Ref. No. K 47/15, part II, point 3.

54 A different viewpoint shows the actual possibility of resolving the case file Ref. No. K 47/15 by 15 judges. since the complement includes judges chosen on 2 December 2015 and whose oath was taken by the President. L. Morawski, op. cit., p. 18.

55 Cf. M. Safjan, op. cit., p. 40.

56 P. Radziewicz, *Podstawy prawne wydania przez Trybunał Konstytucyjny wyroku z dnia 9 marca 2016 r., K 47/15*, LEX/el. 2016, point 4.

57 The more so because the subject matter of Constitutional Tribunal's review was the allegation regarding the correct mode of constituting the amending act. The invalidation of this process would mean the abolition of the unconstitutional act *ab ovo*. Cf. P. Radziewicz, op. cit., point 5.

the case file Ref. No. K 47/15. However, it cannot be ruled out that the viewpoint of the Tribunal will constitute a kind of "safeguard" to additional protect the ability of operation of the constitutional court in the future. In this case, however, we should clearly indicate the framework in which the Tribunal determined the legal basis for its actions bypassing statutory standards. The refusal to apply provisions of the amending act concerned, firstly, the procedural standards that had been challenged in the proceedings before the Tribunal and, secondly, those whose application would result in the lack of possibility of adjudication by the Tribunal. Therefore, undoubtedly, this is a particular situation in which we cannot automatically refer to other cases. In more general terms, this is a clear signal for the legislature. It emphasises the fact that the determination of the mode of proceedings before the Constitutional Tribunal in an act may not be subject to the introduction of rules that prevent the constitutional court from performing its constitutional tasks.

25.4 Conclusions

The ongoing constitutional dispute in Poland may be examined, in a wider perspective, as an attempt to redefine the position of the constitutional court in the political system and the court's relationship with the legislature and the executive. I am convinced there are at least several reasons of the conflict that accompany this redefinition. I would like to focus on two of them.

First of all, the existence of such a dispute stems partly from the natural tensions inherent in a system where one of the authorities – in this case the constitutional court – may, by its decision, revoke literally every act of another public authority, namely the legislature. By playing the role of a guardian of the Constitution, the constitutional court is, therefore, in principle, on the "collision course" with the parliament which, on its part, is responsible for the creation of the legal framework for the operation of all public authorities, including the judiciary.[58] The review of the constitutionality that, originally, is the "judgement of law", needs to involve the review of actions performed by the legislature within its legislative function. Therefore, to some extent, it may also be deemed as a form of the judgement of the parliament, specifically of decisions of a particular parliamentary majority. Although the primary determinant and the systemic reason for such a review is the preservation of constitutional guarantee, its effects may, in certain cases, go far beyond the mere evaluation of the hierarchical compliance of standards. The awareness of this fact may convince the legislature to perceive the constitutional court not so much as the guarantor of the respect for constitutional "rules of the game", but rather as an authority that, in some dimension, would set out such rules, obviously in a manner different from

58 Cf. M. Hein, 'Constitutional Conflicts between Politics and Law in Transition Societies: A systems-Theoretical Approach', *Studies of Transition States And Societies*, Vol. 3, No. 1, pp. 7-19.

specific expectations of the legislature. Although difficult to accept, this way of reasoning could be noticed in the public debate in Poland from the very beginning of the so-called Tribunal dispute. It seems that the primary and continuously repeated argument, justifying actions of the current Sejm,[59] is precisely the specific fear that the Tribunal could seek to block potential legal reforms planned by the current parliamentary majority, determined after the 2015 autumn elections. The actions initially focused on the issue of the appointment of Constitutional Tribunal judges, later concentrating on changes of the organisation and mode of proceedings before the Constitutional Tribunal. The current scope of conflict between the Sejm and the Constitutional Tribunal is the issue of selecting the successor of the current President of the Constitutional Tribunal, whose term of office will end in December 2016.

Secondly, the reason for the current conflict may be a change in the perception of the role to be played by the Constitutional Tribunal. In more than 30 years of its operation, the Tribunal, as an institution, had no "natural enemies." The emphasis of the material importance of the Constitutional Tribunal in the constitutional system was also included in the canon of political and legal debates.[60] Meanwhile, since the issue of its first judgement in May 1986, the Tribunal has played very different roles. In the initial period of its operation, the Tribunal played a very important and, in retrospect, much appreciated role of an authority that, by interpreting constitutional provisions, co-created the manner of understanding of the fundamentals of the state's political system and the system of individual's freedoms and rights. As an example, we could refer to the determination of detailed rules of the political system, included in the more general concept of a democratic state of law. This role of the Tribunal was particularly evident in the period before the adoption of the 1997 Constitution, but continued (yet in a slightly different manner) also after its entry into force. After 1997, to a greater extent, the Tribunal was becoming an important guarantor rather than only a co-creator of the understanding of constitutional principles. This was the purpose of statements regarding the legal framework for the validity of the new Constitution. Today, almost 20 years after the adoption of the 1997 Constitution, we can see the moment when the previously "collision-free" coexistence of the parliament and the constitutional court ceased to be so obvious and became subject of a serious dispute. As I have already mentioned, its resolution requires rethinking the relationship of the constitutional court and its role as a guardian of the principle of the rule of law in relation to the parliament that performs a legislative function.

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59 Cf. for example the recent statement of Andrzej Duda, President of the Republic of Poland: "if someone thought that by raiding the Constitutional Tribunal they would prevent us from making changes in Poland or implementing our program, they were wrong."

60 Cf. A. Sulikowski, 'Trybunał konstytucyjny a polityczność. O konsekwencjach upadku pewnego mitu', *Państwo i Prawo* 2016 No. 4, pp. 7-8.

Comments and recommendations expressed in the opinion of the Venice Commission dated 11 March 2016 have not contributed to resolving the ongoing dispute. It seems particularly important to underline that the Commission has stressed the basic assumptions underlying the existing political system. They mean the inclusion of the constitutional source of Tribunal's reviewing powers. This means it is necessary to limit the scope of legislative decisions related to the Tribunal with the content of relevant constitutional provisions.[61] Preserving the principle of supremacy of the Constitution is also connected to the need for a mechanism to review parliament's legislative activities with regard to the Tribunal. The exclusion of the review due to the often heard argument of "the Tribunal speaking in its own case" would, in practice, mean the approval of parliament's full freedom in the creation of the legal framework for the functioning of the constitutional court. More detailed comments of the Venice Commission could also provide a point of reference for the discussion regarding statutory solutions related to the Tribunal. Here, I mean e.g. considerations regarding the procedure to rule on cases in the order of receipt.[62] Although the determination of this principle by the legislature does not seem, in itself, to raise any special objections, ultimately it must not lead to a situation where the legislature will fully decide which cases and when will be examined by the Tribunal. This impact on the mode of proceedings of the constitutional court should be regarded as going beyond the freedom of its regulation by the legislature. The Commission drew the attention pertinently to the fact that the problem of evaluating statutory solutions concerning the Tribunal did not involve the use of a new part of the procedure. It was about the joint introduction of several mechanisms that, precisely by connecting them together, threatened Tribunal's effective performance of its functions.[63] In fact, this joint perception of individual legislative solutions could ensure their proper evaluation. The condition for this approach, however, is the adoption of the primary principle according to which the mere organisation of Tribunal's operation and mode of proceedings by the legislature has to have its limits. The constitutional court has to have, in certain situations, the ability to affect the order of cases to be examined. This is an expression of its independence from other authorities, including from the legislature.

Sadly, the assessment of the developments in Poland from the viewpoint of the last few months does not lead to overly optimistic conclusions. This is not a dispute that falls within the "rules of the game" accepted in the Constitution, but entails their questioning by practices of legislative and executive authorities. The questioning of the principle of supremacy of the Constitution is particularly evident in reference to some basic rules of

61 See: European Commission for Democracy Through Law (Venice Commission), Opinion on Amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland, point 40.

62 See, ibidem, point 65.

63 See, ibidem, point 88-89.

operation of the Constitutional Tribunal[64] and bypassing them using statutory solutions that raise constitutional doubts.[65]

64 Among others, questioning the principle of finality of Constitutional Tribunal decisions expressed directly in Art. 190 clause 1 of the Constitution.

65 This is confirmed by assumptions of the newly adopted Constitutional Tribunal Act dated 22 July 2016. Similarly as for the two previous amendments to the Constitutional Tribunal Act dated 25 June 2015, the Sejm re-introduced solutions providing for e.g. the need to rule on cases in the order of receipt. The Act was the subject matter of the judgement of the Tribunal dated 11 August 2016, file Ref. No. K 39/16. See: http://trybunal.gov.pl/en/hearings/judgments/art/9307-ustawa-o-trybunale-konstytucyjnym/.