JUDGMENT

The Constitutional Tribunal Act

K 34/15

185/11/A/2015

JUDGMENT

3 December 2015

Ref. No. K 34/15*

In the Name of the Republic of Poland

The Constitutional Tribunal, in a bench composed of:

Sławomira Wronkowska-Jaśkiewicz – Presiding Judge

Leon Kieres – Judge Rapporteur

Stanisław Rymar

Andrzej Wróbel

Marek Zubik – Judge Rapporteur,

Grażyna Szałygo – Recording Clerk,

having considered – at the hearing on 3 December 2015, in the presence of the applicants, the Sejm, the Public Prosecutor-General, the Council of Ministers and the Polish Ombudsman – an application by a group of Sejm Deputies to determine the conformity of:

1) Article 3 of the Constitutional Tribunal Act of 25 June 2015 (Journal of Laws – Dz. U. item 1064) to Article 2 and 197 of the Constitution of the Republic of Poland;

2) Article 12(2) of the Act referred to in point 1 to Article 2 of the Constitution;

3) Article 12(1) and (5) of the Act referred to in point 1 to Article 144(3)(21) of the Constitution;

4) Article 18 of the Act referred to in point 1 in conjunction with Article 22(1)(3) of the Supreme Court Act of 23 November 2002 (Journal of Laws – Dz. U. of 2013 item 499, as amended) to Article 194(1) of the Constitution;

5) Article 19(2) and Article 137 of the Act referred to in point 1 to Article 112 and Article 197 of the Constitution;

6) Article 19(5) of the Act referred to in point 1 to Article 2 of the Constitution;

7) Article 21(1) and (2) of the Act referred to in point 1 to Article 194(1) of the Constitution;

8) Article 24 in conjunction with Article 42(1) of the Act referred to in point 1 to Article 2, Article 32(1) and Article 196 of the Constitution;

9) Article 104(1)(3) of the Act referred to in point 1 to Article 191(1) and Article 193 of the Constitution;

10) Article 137 in conjunction with Article 19 of the Act referred to in point 1 to Article 2 of the Constitution;

11) Article 137 of the Act referred to in point 1 to Article 62(1) of the Constitution;

12) Article 137 of the Act referred to in point 1 to Article 194(1) of the Constitution;

adjudicates as follows:

1. Article 3 of the Constitutional Tribunal Act of 25 June 2015 (Journal of Laws – Dz. U. item 1064) **is consistent with Article 2 of the Constitution of the Republic of Poland and is not inconsistent with Article 197 of the Constitution.**

2. Article 12(2) of the Act referred to in point 1 is consistent with Article 2 of the Constitution.

3. Article 12(1) and (5) of the Act referred to in point 1 is consistent with Article 144(3)(21) of the Constitution.

4. Article 19(2) of the Act referred to in point 1 is consistent with Article 112 of the Constitution and is not inconsistent with Article 197 of the Constitution.

5. Article 21(1) of the Act referred to in point 1 – interpreted other than that the President of the Republic of Poland is obliged to give the oath of office forthwith to a judge of the Constitutional Tribunal who has been elected by the Sejm – is inconsistent with Article 194(1) of the Constitution.

6. Article 24(1) and (2) in conjunction with Article 42(1) of the Act referred to in point 1 is consistent with Article 196 of the Constitution.

7. Article 104(1)(3) of the Act referred to in point 1 is consistent with Article 191(1) and Article 193 of the Constitution.

8. Article 137 of the Act referred to in point 1:

a) is consistent with Article 112 of the Constitution and is not inconsistent with Article 62(1) and Article 197 of the Constitution;

b) insofar as it concerns the judges of the Tribunal whose terms of office ended on 6 November 2015 – is consistent with Article 194(1) of the Constitution;

c) insofar as it concerns the judges of the Tribunal whose terms of office either ended on 2 December or will end on 8 December – is inconsistent with Article 194(1) of the Constitution.

Moreover, the Tribunal decides:

pursuant to Article 104(1)(2) of the Constitutional Tribunal Act of 25 June 2015 (Journal of Laws – Dz. U. items 1064 and 1928)**, to discontinue the proceedings as to the remainder.**

STATEMENT OF REASONS

[…]

III

1. The principle of the independence of the Constitutional Tribunal.

1.1. Enacted in accordance with a special procedure by the National Assembly and approved in a referendum by the Nation, the Constitution determines the rules and principles of conduct for state authorities as well as other subjects of rights and obligations, by specifying their freedoms, rights and obligations in relations with each other, as well as the basic principles of the political system of the Republic of Poland. The Constitution also manifests the order of principles and values which must be taken into account in the process of enacting and applying law. Therefore, it may not be perceived as a political declaration or manifesto. As stated in its Preamble, the Constitution has been established as “the basic law for the State, based on respect for freedom and justice, cooperation between the public powers, social dialogue as well as on the principle of subsidiarity in the strengthening the powers of citizens and their communities”. The Constitution is the supreme law of the Republic of Poland (Article 8(1) of the Constitution), within the limits and on the basis of which all state authorities are to function (Article 7 of the Constitution) and which must be observed by everyone who is subject thereto (Article 83 of the Constitution). The obligation to observe the Constitution is particularly important with regard to persons in power. This is, *inter alia*, manifested by an oath of office that must be taken before assuming the office by Sejm Deputies, Senators, the President, members of the Council of Ministers, as well as other officials.

What safeguards the principle of the supremacy of the Constitution, and ultimately also the rights and freedoms of the individual, is *inter alia* the judicial review of the constitutionality of norms, conducted by an independent authority which is separate from the legislature and the executive. Since their origins, constitutional courts in European legal culture have been conceived of as "safeguards for individuals against the tyranny of a majority" and guarantors of the precedence of law over power. After the experience of the totalitarian regimes, there is no doubt that even a democratically-elected parliament has no competence to issue determinations that would be contrary to the Constitution, even if they were justified by 'the good of the Nation', where the term is understood in an abstract way. Thus, the constitution-maker has delineated substantive and procedural limits for public authorities, within which all their determinations must fall in every case.

In a majority of European states, the review of the constitutionality of law has become centralised in character. The conduct of such a review has been assigned to one specialised organ of the state, the scope of competence of which comprises adjudication on the hierarchical conformity of norms which leads to issuing a final determination that is binding for all. Only a ruling issued by a constitutional court on the non-conformity of a statute to a constitution results in the elimination of an unconstitutional norm from the legal system, and this result implies a prohibition against applying the norm to situations in the past, the present and the future. A characteristic of constitutional courts is that the judges of those courts are usually elected by legislative, and in some cases – executive, authorities. Such a mechanism is not so much a sign of the politicisation of constitutional courts as a manifestation of the balance between the three branches of government. Nevertheless, a constitutional court – which frequently occupies a different position or place within the system of state authorities – is always supposed to be an independent organ of the state, and the judges of that court are to be independent as well. These fundamental characteristics of constitutional courts are safeguarded by various solutions specified in a constitution. The procedure for choosing judges of the constitutional court, stringent requirements as to the morals and professional qualifications of candidates for judges of the said court, as well as the principle that judges are not removable from office, are all to ensure that determinations issued by those judges will arise only from norms, principles and values expressed in a constitution.

By vesting the Constitutional Tribunal of the Republic of Poland with the power to review the hierarchical conformity of norms, the constitution-maker has determined that the rulings of the Tribunal are universally binding and final (Article 190(1) of the Constitution). The said rulings are binding for both citizens and all public authorities, and in particular authorities that are obliged to ensure the observance of the Constitution. As it has been explained by the Constitutional Tribunal, "without an explicit (positive) constitutional authorisation – and such has not been provided for in the Constitution of 2 April 1997, which is currently binding – it is not permissible to entirely, or within a certain extent, exclude, or autonomously restrict the constitutional principle (attribute) of finality of rulings (judgments) of the Constitutional Tribunal, or some of the legal consequences thereof which follow from the wording of Article 190(1) of the Constitution" (see the Tribunal's full bench decision of 17 July 2003, ref. no. K 13/02, OTK ZU No. 6/A/2003, item 72). The said solution should be regarded as the confirmation and a safeguard of the supremacy of the Constitution.

The only organ of public authority in the Republic of Poland which is competent to issue final and universally binding determinations on the conformity of law to the Constitution is the Constitutional Tribunal. The scope of the Tribunal's competence comprises, *inter alia*, the review of conformity of all statutes to the Constitution (*vide* Article 79(1), Article 188(1), and Article 193 of the Constitution). The constitution-maker has not exempted any statutes from the scope of the Tribunal's competence, including a statute regulating the functioning of the Constitutional Tribunal, referred to in Article 197 of the Constitution. Since such an exemption has not been provided for explicitly, it may not be presumed either.

The Constitutional Tribunal is not only the guarantor of the supremacy of the Constitution, but it also safeguards the tri-division of powers. Any regulations concerning the Tribunal may not lead to a situation where it would lose its capacity to carry out its activity.

Adjudicating on the constitutionality of the provisions of the Constitutional Tribunal Act is not tantamount to a judge's adjudication in his/her own case. The Tribunal is to adjudicate on the conformity or non-conformity of the Constitutional Tribunal Act to the Constitution i.e. on legal norms pertaining to the Tribunal as an organ of the state, and not to an individual interest of any of the judges of the Tribunal. No judge of the Tribunal has a personal interest in specifying the scope of competence of that organ of the state. There is a difference between a situation where the Tribunal adjudicates on provisions regulating the scope of its competence and a situation where it determines a case concerning individual interests of a particular judge of the Tribunal.

In a democratic state ruled by law (Article 2 of the Constitution), the existence of a procedure for resolving disputes in a binding way by an organ of the judiciary, and thus an independent organ of the state, is a value in itself. The presumption that the scope of judicial review comprises all kinds of disputes, including disputes between state authorities, remains fully consistent with the logic of constitutional solutions.

It should be stressed that, on several occasions, the Tribunal adjudicated on the constitutionality of provisions of law that regulated the scope of its competence or pertained to its systemic status or the status of judges (see, *inter alia*, the ruling of 11 September 1995, ref. no. P 1/95 (/s/p-195), OTK ZU of 1995, item 26, and the Tribunal's judgments of: 11 May 2005, ref. no. K 18/04, OTK ZU No. 5/A/2005, item 49; 9 November 2005, ref. no. Kp 2/05, OTK ZU No. 10/A/2005, item 114). On those occasions, the Tribunal's competence to adjudicate on the said matters raised no doubts among the participants in those proceedings. There are also no legal grounds for challenging the Tribunal's competence in the present case.

The competence of constitutional courts to review the conformity to a constitution of statutory provisions that regulate the functioning of those courts is also not denied in other European states and results from vesting those courts with the exclusive competence to examine the hierarchical conformity of norms. The constitutionality of statutory provisions regulating a constitutional court's scope of competence, review proceedings or internal organisation was examined by the constitutional courts, *inter alia*, of: Spain (cases ref. nos. 66/1985 and 49/2008), Lithuania (cases ref. nos. 33/03, 12/06, and 36/10), Moldova (ref. no. 7a/2013), the Federal Republic of Germany (ref. no. 2 BvC 2/10), and Slovenia (ref. nos. U-I-60/11 and Up-349/11).

1.2. A review of the constitutionality of the provisions of the Constitutional Tribunal Act which are challenged in the present case by the applicants needs to be preceded by an analysis determining the systemic position and legal status of the Constitutional Tribunal and its judges. Indeed, it is necessary to indicate a proper normative context which at the constitutional level sets the admissible legal framework for the legislator's activity.

The Constitutional Tribunal, as one of the two tribunals provided for in the Constitution, is an organ of the judiciary (Article 10(2) of the Constitution). Arising from Article 10(1) of the Constitution, the principle of the separation of and balance between powers impacts the position of the entire judicial branch within the system of the three branches of government and their mutual relations. Whereas one may observe certain overlapping of powers between the legislature and the executive, it is characteristic of the judiciary that this branch is separate from the other branches of government. This is confirmed by Article 173 of the Constitution, pursuant to which courts and tribunals constitute a separate branch of government and are independent of the other branches.

The Tribunal has emphasised many times that the Constitution of 1997 is not limited to the static expression of the principle of separation of powers, which consists in grouping state authorities under particular branches of government and declaring their separateness, but it renders relations between particular branches in a dynamic way, which is manifested by the formula of balance between powers (as regards the position of the judiciary, see the Tribunal's judgments of: 14 April 1999, ref. no. K 8/99, OTK ZU No. 3/1999, item 41; 18 February 2004, ref. no. K 12/03, OTK ZU No. 2/A/2004, item 8; 9 November 2005, ref. no. Kp 2/05; 19 July 2005, ref. no. K 28/04 (/s/k-2804), OTK ZU No. 7/A/2005, item 81; 29 November 2005, ref. no. P 16/04; 15 January 2009, ref. no. P 16/04, OTK ZU No. 10/A/2005, item 119; 27 March 2013, ref. no. K 27/12 (/s/k-2712), OTK ZU No. 3/A/2013, item 29; 7 November 2013, ref. no. K 31/12 (/s/k-3112), OTK ZU No. 8/A/2013, item 121; 14 October 2015, ref. no. Kp 1/15). The essence of the principle expressed in Article 10(1) of the Constitution is both the functional separation of powers and a balance between the powers, so as to guarantee respect for the said powers and to create a basis for the stable functioning of the mechanisms of a democratic state ruled by law (cf. the Tribunal's judgments of: 15 January 2009, ref. no. K 45/07 as well as 7 November 2013, ref. no. K 31/12).

The separation of powers implies that each of the branches of government should be vested with substantive powers that correspond to its nature. What is more, each of the three branches of government ought to have a certain minimum of exclusive competence that would determine the nature of a given branch. By contrast, expressed in Article 10(1) of the Constitution, the formula of "balance" between powers means that the branches of government interact and their powers are complementary. Each of the branches should have such instruments at its disposal which would allow it to limit the activities of the other branches of government. Furthermore, the balance between the powers is enriched by the requirement of cooperation between public authorities, as expressed in the Preamble to the Constitution. Particular authorities are obliged to cooperate in order to ensure the diligence and efficiency of the activity of public institutions.

The principle of the independence and separateness of the judiciary, which arises from Article 173 of the Constitution, also refers – to the same extent – to tribunals, mentioned in that provision. Hence, the systemic separateness of the judiciary, which is linked with its special powers and the placement of the organs of the judiciary, also fully applies to the Constitutional Tribunal. The above-mentioned separateness sets the context for any evaluation of statutory regulations that determine the organisation of the Constitutional Tribunal and requirements for the performance of the Tribunal's systemic tasks.

In its previous jurisprudence, on a number of occasions, the Tribunal thoroughly analysed the principle of the independence of the judiciary. The Tribunal's analyses concerned statutory solutions that directly affected the way of the functioning of courts that administered justice (Article 175(1) of the Constitution). Those findings are fully relevant in the context of the independence of the Constitutional Tribunal.

1.3. The separation of the organs of the judiciary from the other state authorities is to ensure that courts and tribunals are fully autonomous within the scope of considering and adjudicating on cases. In the context of the Constitutional Tribunal, this means enabling the Tribunal to perform its constitutional tasks independently and autonomously. This is of special significance as the Constitutional Tribunal is the only organ of the judiciary that is competent to adjudicate on the conformity of statutes and ratified international agreements to the Constitution, rule on the constitutionality of purposes or activities of political parties, settle disputes over powers between central constitutional state authorities, as well as determine the existence of an impediment to the exercise of the office by the President of the Republic of Poland (Article 131(1), Article 188 and

Article 189 of the Constitution). Thus, the independence of the Tribunal, which creates conditions for the independent review of constitutionality, at the same time becomes a principle that directly serves the protection of the Constitution itself.

The separateness and independence of the Tribunal, within the meaning of Article 173 of the Constitution, imply the separation of that organ of the state from other state authorities so as to guarantee its full autonomy within the scope of considering and adjudicating on cases. Such separateness should be construed as organisational separateness, which means that the Tribunal should be provided with mechanisms to act independently, as well as functional separateness, which entails that the exercise of the Tribunal's competence should be free from any influence exerted by the legislature or the executive. In other words, the legislature and the executive may not interfere in the realm where judges are independent (see the Tribunal's judgments of 19 July 2005, ref. no. K 28/04 and 29 November 2005, ref. no. P 16/04).

The administration of justice is exercised exclusively by courts, and other state authorities may not interfere in that realm in a way that would bring about legal effects, and so other state authorities may not interfere with the Constitutional Tribunal's competence to adjudicate on cases that fall within the Tribunal's scope of competence.

1.4. The establishment of constitutional mechanisms of cooperation between other state authorities in the procedure for shaping the internal organisation of the Constitutional Tribunal should be interpreted in the context of balance and cooperation between separate branches of government. Any correlation between the Tribunal and other state authorities may not, however, result in determining mutual relations between them in a way that would entail interference in the realm of the autonomous performance of tasks assigned exclusively to the Tribunal in the Constitution. In this context, there is a clear relation between a possibility of ensuring the protection of the Constitution by the Constitutional Tribunal, on the one side, and the activities of other state authorities that participate in determining the composition of the Tribunal, on the other side. Thus, respect for the constitutional principle of the Tribunal's independence is an obligation of all legislative and executive authorities whose activities determine conditions in which the Tribunal performs its constitutional tasks.

Functional links between the Tribunal (or in a broader sense – the judiciary) and authorities that belong to the other branches of government are limited. Such links may not affect their "core competence". This means that the other authorities may not interfere in the realm of judicial adjudication. The issuing of determinations in specific cases in which the Constitution grants jurisdiction to the Tribunal must remain the exclusive competence of the Tribunal.

1.5. The principle of the independence of the Constitutional Tribunal (Article 173 of the Constitution) is strictly related to the principle of the independence of the judges of the Tribunal. Pursuant to Article 195(1) of the Constitution, judges of the Tribunal are independent and subject only to the Constitution. These two principles rule out any forms of influence on the Tribunal's judicial activity, both by other public authorities as well as other persons (cf. the Tribunal's judgment of 14 April 1999, ref. no. K 8/99, OTK ZU No. 3/1999, item 41). In the term 'independence of judges', emphasis is placed on the lack of dependency, of judges on factors other than only legal requirements when it comes to the judges' judicial activity. The independence of judges, including the independence of the judges of the Tribunal, comprises numerous elements, namely: 1) impartiality towards participants in proceedings; 2) independence from non-judicial authorities (institutions); 3) a judge's autonomy in his/her relations with other branches of government and other organs of the

judiciary; 4) independence from political factors; 5) intrinsic independence of judges. The independence of judges is not only their right but also a constitutional obligation, whereas a constitutional obligation of the legislator and the organs of judicial administration is the protection of judge's independence (see the Tribunal's judgment of 24 June 1998, ref. no. K 3/98, OTK ZU No. 4/1998, item 52).

2. The allegation about the non-conformity of Article 3 of the Constitutional Tribunal Act to Articles 2 and 197 of the Constitution.

2.1. The applicants have challenged Article 3 of the Constitutional Tribunal Act of 25 June 2015 (Journal of Laws – Dz. U. item 1064; hereinafter: the Constitutional Tribunal Act). The first three paragraphs of the provision lay down the constitutional powers of the Tribunal within the scope of the review of the hierarchical conformity of legal norms. Article 3(1) of the Constitutional Tribunal Act constitutes a verbatim repetition of the wording of Article 188(1)-(3) of the Constitution. Article 3(2) of Constitutional Tribunal Act indicates that the Tribunal adjudicates on the conformity to the Constitution of a statute or another normative act challenged in a constitutional complaint, which is mentioned in Article 79(1) and Article 188(5) of the Constitution. By contrast, Article 3(3) of the Constitutional Tribunal Act stipulates that the Tribunal adjudicates on the conformity of a normative act to the Constitution, ratified international agreements or statutes, where the normative act is challenged in a question of law referred to in Article 193 of the Constitution.

The subsequent three paragraphs of Article 3 of the Constitutional Tribunal Act enumerate the other constitutional powers of the Tribunal. Article 3(4) of the said Act stipulates that the Tribunal adjudicates on the conformity to the Constitution of the purposes or activities of political parties. This provision is a verbatim repetition of the wording of Article 188(4) of the Constitution. Article 3(5) of the Constitutional Tribunal Act states that the Tribunal settles disputes over powers between central constitutional state authorities. It repeats the exact wording of Article 189 of the Constitution. By contrast, Article 3(6) of the Constitutional Tribunal Act indicates that the Tribunal determines the existence of an impediment to the exercise of the office by the President of the Republic and the assignment of the temporary performance of the said President's duties to the Marshal of the Sejm. Thus, the said provision enumerates the powers of the Tribunal referred to in Article 131(1), second and third sentences, of the Constitution.

2.2**.** The applicants have challenged Article 3 of the Constitutional Tribunal Act for the said Article repeats the provisions of the Constitution which specify the powers of the Tribunal. The applicants have raised two allegations as to the non-conformity of the challenged Article to the Constitution.

First of all, the applicants alleged that Article 2 of the Constitution had been infringed. The applicants argued that a statute should not repeat any of the provisions of the Constitution. When justifying their view, the applicants cited § 4(1) of the Annex to the Prime Minister's Regulation of 20 June 2002 on Rules on Legal Drafting (Journal of Laws – Dz. U. No. 100, item 908; hereinafter: the Rules on Legal Drafting), which stipulates that a statute may not repeat any of the provisions included in other statutes. In the view of the applicants, the said rule also applies to the repetition of the provisions of the Constitution. The applicants concluded that Article 3 of the Constitutional Tribunal Act infringes the Rules on Legal Drafting, as it repeats the provisions of the Constitution which specify the powers of the Tribunal. Consequently, in the applicants' opinion, the challenged provision is also inconsistent with the principle of appropriate legislation, which constitutes a vital

element of the principle of a democratic state ruled by law (Article 2 of the Constitution). Moreover, in this context, it is pointed out in the justification for the application that the principle of appropriate legislation is linked with the principle of specificity of law. However, the applicant did not explain in what way Article 3 of the Constitutional Tribunal Act allegedly infringes the principle of specificity of law.

Secondly, the applicant argued that the scope of Article 3 of the Constitutional Tribunal Act goes beyond the scope of the regulation provided for a statute on the Constitutional Tribunal in Article 197 of the Constitution. The applicants argued that it is not the task of the legislator to specify the powers of the Tribunal, as they are exhaustively regulated in the Constitution.

2.3. In the first place, the Tribunal addressed the allegation about the infringement of Article 2 of the Constitution by the challenged Article.

The principle of a democratic state ruled by law (Article 2 of the Constitution) implies requirements for legal drafting – carried out by the law-giver – which are also referred to as the principles of appropriate (correct, proper) legislation (see, *inter alia*, the judgment of the Constitutional Tribunal of 12 December 2006, ref. no. P 15/05 (/s/p-1505), OTK ZU No. 11/A/2006, item 171, part III, point 2; the decision of 27 April 2004, ref. no. P 16/03 (/s/p-1603), OTK ZU No. 4/A/2004, item 36, part II, point 3 as well as jurisprudence cited therein). The requirement that the legislator is to observe those principles is functionally linked with the constitutional principles of the certainty of law and legal security as well as the protection of citizens' trust in the state and its laws. The principles of appropriate legislation include, in particular, the requirement that provisions should be sufficiently specific, which entails that it is necessary to formulate them in such a way that they will be precise, clear and grammatically accurate (see, *inter alia*, the judgments of the Constitutional Tribunal of: 14 July 2010, ref. no. Kp 9/09, OTK ZU No. 6/A/2010, item 59, part III, point 4; 16 December 2009, ref. no. Kp 5/08 (/s/kp-508), OTK ZU No. 11/A/2009, item 170, part III, point 4; 21 April 2009, ref. no. K 50/07, OTK ZU No. 4/A/2009, item 51, part III, point 2.4, as well as jurisprudence cited therein).

In order to precisely indicate the constitutional requirements for legal drafting, the Tribunal has repeatedly referred to the Rules on Legal Drafting, which are codified in the Annex to the aforementioned Regulation issued by the Prime Minister. The Rules on Legal Drafting set out general standards for editing legal texts. They formally bind only the governmental lawgiver; however, they should be taken into account by all authorities that introduce law (see, *inter alia*, the judgment of the Constitutional Tribunal of 21 March 2001, ref. no. K 24/00, OTK ZU No. 3/2001, item 51, part III, point 18; as well as the Tribunal's judgment in the case P 15/05, part III, point 2). The legal character of those rules as an annex to the Prime Minister's Regulation and the inclusion thereof in the system of the sources of law leave no doubt that – from the point of view of the hierarchy of the sources of law – they may not constitute a direct basis (a higher-level norm) for the review of constitutionality of statutory provisions (as stated in the Tribunal's judgment in the case Kp 5/08, part III, point 4). Indeed, not all rules on drafting legislation have the "rank" of the principles of appropriate legislation within the meaning of Article 2 of the Constitution.

It is well-established in the Polish constitutional jurisprudence that non-conformity to Article 2 of the Constitution may only be deemed on the grounds of a violation of basic canons of legal drafting, rendered in the form of principles of appropriate legislation, which results in excessive interpretative freedom or the lack of a possibility of a logical, functional and systemically cohesive interpretation" (as stated in the decision in the case P 16/03, part II, point 3, the judgment in the case Kp 5/08, part III, point 4, as well as the judgment of 23 May 2006, ref. no. SK 51/05 (/s/sk-5105), OTK ZU No. 5/A/2006, item 58, part III, point 3). Undoubtedly, a violation of the principles of appropriate

legislation is also of significance when it leads to an infringement of constitutional rights or freedoms or causes serious problems with the application of law" (as stated in the Tribunal's judgment in the case P 15/05, part III, point 2).

It does not arise from the Constitution that there is an absolute prohibition against repeating its provisions in normative acts of a lower rank than statutes. Due to the supreme position of the Constitution in the system of law and the principle of the direct applicability of the Constitution (Article 8 thereof), it is in fact inadmissible to repeat or modify the provisions of the Constitution in a statute where this results in the modification of the interpretation thereof, as well as the lack of clarity, inconsistences or interpretative difficulties (see the judgment of the Constitutional Tribunal of 5 June 2012, ref. no. K 18/09, OTK ZU No. 6/A/2012, item 63). Even a mere repetition of a provision of the Constitution in an ordinary statute may result in modifying its meaning in a new normative context. Indeed, constitutional terms are understood in an autonomous way. Due to the broader interpretative context of the Constitution, they are usually interpreted in a broader way than analogical statutory terms (see, *inter alia*, the judgments of the Constitutional Tribunal of: 3 June 2008, ref. no. P 4/06, OTK ZU No. 5/A/2008, item 76, part III, point 4; 27 April 2005, ref. no. P 1/05, OTK ZU No. 4/A/2005, item 42, part III, point 3.3). Thus, the repetition of the provision of the Constitution in a statute is inadmissible if it leads to a change in the interpretation of the provision. Within this scope, the prohibition against repeating provisions of the Constitution in a statute has the rank of the principle of appropriate legislation within the meaning of Article 2 of the Constitution.

However, neither the normative construction nor content of Article 3 of the Constitutional Tribunal Act results in a violation of the said principle.

2.4. The aim of Article 3 of the Constitutional Tribunal Act is to group and enumerate all the constitutional powers of the Tribunal in one article. The said powers are laid down in various provisions and chapters of the Constitution. They are specified not only in Articles 188, 189 and 193 of the Constitution, in its Chapter VIII ("Courts and Tribunals"), but also by its Article 79 (which concerns constitutional complaints), in Chapter II ("The Freedoms, Rights and Obligations of Persons and Citizens"), as well as in its Article 131(1), second and third sentences, in Chapter V ("The President of the Republic of Poland").

The enumeration of constitutional powers of the Tribunal in the first chapter of the Constitutional Tribunal Act, among "general provisions", i.e. before regulations pertaining to the procedures in cases where the Tribunal is competent is meant to group and order the information. Such an action on the part of the legislator is not necessary in the light of the principles of the supremacy and direct application of the Constitution, but one may not agree with the applicants' view that this is an irrational action. It is worth adding that challenged Article 3 of the Constitutional Tribunal Act is based on Articles 2 and 3 of the previously binding Constitutional Tribunal Act of 1997 (the Constitutional Tribunal Act of 1 August 1997, Dz. U. No. 102, item 643, as amended; hereinafter: the 1997 Constitutional Tribunal Act), which enumerated the constitutional powers of the Tribunal.

The normative construction as well as the aim of Article 3 of the Constitutional Tribunal Act are clear. The said provision neither sets out nor interferes with the powers of the Tribunal. The powers of the Tribunal are explicitly specified in the Constitution. The regulations of the Constitution that lay down the powers of the Constitutional Tribunal are merely grouped and repeated in the challenged provision – either by quoting the exact same wording or by reference to a relevant article of the Constitution. The challenged provision does not lead to interpretative doubts or inconsistencies in the system of law. The normative surrounding of Article 3 of the Constitutional Tribunal Act does not lead to a different interpretation of the Tribunal's powers than the interpretation arrived at in the light of the Constitution. The applicants had no doubts in that respect, as they put forward no arguments to prove

that negative consequences appeared in the system of law as a result of the repetition of the provisions of the Constitution in the challenged Article. On the contrary, the applicants admitted that: “The content of Article 3 of the Constitutional Tribunal Act does not, and may not, give rise to nothing new” (p. 3 of the application). In the light of the well-established constitutional jurisprudence, the applicants’ doubts as to the rationality of the legislator’s choice of a certain rule of legal drafting are insufficient to determine the non-conformity of the challenged provision to Article 2 of the Constitution.

Due to the above, the Tribunal has concluded that Article 3 of the Constitutional Tribunal Act is consistent with Article 2 of the Constitution.

2.5. The applicants have also argued that challenged Article 3 of the Constitutional Tribunal Act is inconsistent with Article 197 of the Constitution. The last-mentioned provision stipulates that “the organization of the Constitutional Tribunal, as well as the mode of proceedings before it, shall be specified by statute”.

The Tribunal has stated that, in the light of the applicants’ allegations, the indicated provision of the Constitution is an inadequate higher-level norm for the review of the challenged statutory regulation. First of all, challenged Article 3 of the said Act is not inconsistent with Article 197 of the Constitution, as it regulates neither the functioning of the Constitutional Tribunal nor proceedings before the said court. Secondly, Article 197 does not imply a prohibition against enumerating the Tribunal’s constitutional powers in a statute for the purpose of grouping and ordering them. Despite the applicants’ allegations, the challenged provision does not specify (establish) those powers, but merely groups and repeats them, either in the exact same wording or by explicit reference to a relevant provision of the Constitution.

As a side remark, the Tribunal has deemed that another view presented by the applicants was inapt: namely, that the legislator could not grant the Tribunal any other powers than those provided for in the Constitution. Undoubtedly, where the exercise of certain powers granted to the Tribunal leads to interference in the essence of powers vested in other constitutional authorities (e.g. the legislative branch – in the case where a statute ceases to have effect), then those powers of the Tribunal require an explicit and clear constitutional basis. Within the said scope, regulations may only be introduced at the level of the Constitution, and the Tribunal – due to the lack of a different constitutional norm – has exclusive competence to exercise this kind of powers. This does not rule out a situation where the Tribunal may be granted other powers by statute than those provided for in the Constitution, if the exercise thereof does not lead to interference in the essence of the other constitutional authorities, and the powers are linked with the systemic role of the Tribunal (cf. the judgment of the Constitutional Tribunal of 16 April 2008, ref. no. K 40/07 (/s/k-4007), OTK ZU No. 3/A/2008, item 44). What constitutes an example of such a regulation is Article 5 of the Constitutional Tribunal Act, which allows the Tribunal to notify the organs of the state responsible for enacting law about irregularities and gaps in the law (this was also provided for in Article 4(2) of the 1997 Constitutional Tribunal Act).

For the above reasons, the Tribunal has adjudicated that Article 3 of the Constitutional Tribunal Act is not inconsistent with Article 197 of the Constitution.

3. The allegation about the non-conformity of Article 12(2) of the Constitutional Tribunal Act to Article 2 of the Constitution.

3.1. The subject of the application also comprised Article 12(2) of the Constitutional Tribunal Act. The applicants asserted that the indicated provision infringe the principle of a democratic state ruled by law, which was to weigh in favour of its inconsistence with Article 2 of the Constitution. The

challenged provision of the Constitutional Tribunal Act reads as follows: “Candidates for the position of the President of the Tribunal shall be selected by the General Assembly, no later than 3 months prior to the end of the said President’s term of office, from among the judges of the Tribunal who have received the largest number of votes. In the event that the position of the President of the Tribunal is vacated, the candidates shall be selected within the time-limit of 30 days”.

3.2. The applicants’ reservations with regard to Article 12(2) of the Constitutional Tribunal Act amount to the assertion that such wording of the provision does not specify the length of the terms of office with regard to the President and Vice-President of the Tribunal. As a result, this leads to a situation where the length of the said terms of office will be contingent on the length of the term of office of a judge of the Tribunal who is appointed President or Vice-President of the Tribunal. Consequently, in some cases the said term of office may last even 9 years.

In the applicants’ opinion, the fact that the legislator had not sufficiently specified the length of the term of office in the case of the President or Vice-President of the Constitutional Tribunal made it impossible to properly verify the fulfilment of duties assigned to persons appointed to hold the said positions. This in turn – as it is argued in the application – blocks the managerial staff turnover and constitutes a factor that hinders the development of the managed institution. The argument for the necessity to introduce fixed periods to determine the length of the term of office in the case of the President or Vice-President of the Constitutional Tribunal was the indication of solutions adopted with regard to the President of the Supreme Court and the President of the Supreme Administrative Court. In both cases, the length of the term of office is determined by constitutional norms – respectively Article 183(3) and Article 185 of the Constitution. In the applicants’ opinion, the lack of a similar solution in Article 194(2) of the Constitution does not mean a prohibition against the introduction of such a solution at the statutory level with regard to the Constitutional Tribunal. Thus, in the view of the applicants, the current solution which does not provide for a fixed period specified for the term of office of the President or Vice-President of the Tribunal is irrational. It infringes the principle of a democratic state ruled by law, due to the fact that it allows for a varied length of the term of office in the case of the President or Vice-President of the Constitutional Tribunal, depending on the length of the term of office in the case of a particular judge of the Tribunal appointed to any of these positions. The applicants claimed that Article 12(2) of the Constitutional Tribunal Act does not constitute a clear and precise legal regulation.

3.3. The Tribunal has stated that Article 12(2) of the Constitutional Tribunal Act is consistent with Article 2 of the Constitution. The way in which the applicants formulated the allegation about the unconstitutionality of the said provision in the light of the indicated higher-level norm for the review gives no grounds for asserting that in that particular context the legislator infringed the principles of a democratic state ruled by law. The applicants presented arguments that were to prove the defectiveness of the current statutory solution. They explained that the introduction of a fixed term of office in the case of the President and Vice-President of the Constitutional Tribunal could have a beneficial impact on the performance of duties assigned to the said positions. The introduction of a fixed term of office in the case of the President and Vice-President of the Tribunal would also entail relying on solutions that currently apply to the Presidents of the Supreme Court and the Supreme Administrative Court. This would be conducive to systemic coherence of the binding provisions.

The Tribunal does not question the admissibility of the arguments resorted to by the applicants. It does not deem categorically that remarks about positive aspects of the introduction of a fixed term of office in the case of the President and Vice-President of the Tribunal are groundless. It may not be ruled out that assigning different judges with the task of coordinating the work of a relatively small, 15-

person, group could have a significant, and also positive, impact on organisational arrangements concerning the work of the Tribunal. This would also entail applying a mechanism for verifying the way in which judges fulfil their duties. However, these rather general conclusions alone, arising from the arguments for the allegation, do not weigh in favour of the unconstitutionality of the statutory regulation. Even if one were to accept the applicants' assertion that Article 12(2) of the Constitutional Tribunal Act was – to use the applicants' term – "irrational", this alone may not be regarded as tantamount to the unconstitutionality of the provision. The fact that the legislator could resort to a more effective or more systemically coherent solution with regard to a given matter does not automatically imply that the enacted way of handling the matter should be deemed in breach of the standards of a democratic state ruled by law. For a constitutional issue formulated in this way to lead to a ruling on unconstitutionality, an applicant should prove – and the applicants fail to do so in the present case – that the defective solution is dysfunctional for the organ of the state in question or that it manifestly undermines the performance of public duties in a democratic state ruled by law. What is meant here is a situation where the internal organisation of an organ of the state, and in the context of the allegation under discussion – the lack of a particular mechanism, in practice undermines the proper functioning of the organ of the state and hinders the effective performance of its tasks.

Challenged Article 12(2) of the Constitutional Tribunal Act is not a solution that would pose such a threat to the functioning of the Constitutional Tribunal. At the same time, the applicants do not explain why the existing model for determining the term of office of the President and Vice-President of the Tribunal, which was already binding under the 1997 Constitutional Tribunal Act, and which is maintained in the current Constitutional Tribunal Act of 25 June 2015 is to infringe the standard set by the principle of a democratic state ruled by law. In the Tribunal's view, one may not speak of such an infringement in the case under examination.

The Tribunal has drawn a distinction between the term of office of a judge, which mainly serves the independence of judges, and the consequences of specifying the length of the term of office for managerial positions in a judicial institution, such as the Constitutional Tribunal. The term of office of the President or Vice-President is above all to guarantee the effectiveness of managing a team of employees. Holding such a managerial position for many years, without any verification carried out even by the Tribunal itself, may potentially pose certain risks. However, the Tribunal has also noticed a different circumstance in this context; namely, coordination of the work of the Tribunal in turns by different judges is closely related to the protection of the Tribunal's independence. As long as the President of the Republic of Poland, or another non-judicial authority, is involved in the procedure for appointing the President and Vice-President of the Tribunal, a legal construct determining the length of the term of office will also have to be assessed in the light of Article 173 of the Constitution, i.e. in the context of the Tribunal's independence from other branches of government.

The question of the length of the said term of office should be considered as closely related to the principle of a democratic state ruled by law and the principle of the Tribunal's independence. This also concerns the introduction of fixed terms of office for the two managerial positions in the Tribunal. Opting for such a solution, the legislator is obliged to respect principles that are binding in a democratic state ruled by law; this also applies to the legislator's introduction of new provisions. The Tribunal addressed the issue on a number of occasions, specifying – over the years – the constitutional standard for the legislator's permissible actions in the context of introducing changes in the legal system. All these remarks should be taken into account when introducing a normative change where the position of the President or Vice-President of the Tribunal will be assigned for a specified term of office, independently of the term of office of a judge of the Tribunal.

3.4. The Tribunal has stated that challenged Article 12(2) of the Constitutional Tribunal Act is consistent with Article 2 of the Constitution also within the scope concerning the principle of specificity of law.

In its previous jurisprudence, on several occasions the Tribunal discussed the principle of sufficient specificity of law, by linking it functionally with the principles of: the certainty of law; legal security; the protection of citizens' trust in the state and its laws; as well as appropriate legislation (see, *inter alia*, the Tribunal's judgments of: 28 October 2009, ref. no. Kp 3/09 (/s/kp-309), OTK ZU No. 9/A/2009, item 138, part III, point 6.1; 3 March 2011, ref. no. K 23/09 (/s/k-2309), OTK ZU No. 2/A/2011, item 8, part III, point 5.1; 29 July 2014, ref. no. P 49/13 (/s/p-4913), OTK ZU No. 7/A/2014, item 79, part III, point 4.2; as well as the jurisprudence cited in point 2.3 above). What arises from the principle of specificity of law is the requirement that provisions are to be formulated in such a way that they will be precise, communicative and linguistically accurate. In order to determine the non-conformity of the challenged provision to the principle, it does not suffice to indicate in an abstract way that the provision is unclear due to the legislator's use of a word or phrase that lacks sufficient specificity. Every normative act (or a specific legal provision) contains notions which to a larger or lesser extent lack specificity. This enhances the flexibility of the legal order, which in turn makes it possible to react quickly to occurring situations. It is only a serious lack of precision or clarity – i.e. one that may not be overridden by established interpretative methods – of a provision that may be a basis for declaring the unconstitutionality of the provision. Thus, rendering a given provision as invalid due to its lack of clarity should be considered to be an ultimate measure, and it ought to be applied only when other methods for eliminating effects of unclear provisions, in particular by relying on an interpretation in the jurisprudence of courts, may prove insufficient.

Challenged Article 12(2) of the Constitutional Tribunal Act contains no phrases that lack sufficient specificity; nor does it raise any interpretative doubts. The first sentence of this provision in a clear and precise way: determines the powers of the General Assembly of the Judges of the Constitutional Tribunal within the scope of indicating candidates for the position of the President of the Constitutional Tribunal; specifies a time-limit within which the selection of candidates is to be carried out; and introduces the criterion for selecting candidates (the largest number of votes in a vote). The same refers to Article 12(2), second sentence, of the Constitutional Tribunal Act, which defines a different time-limit for the selection of candidates for the position of the President of the Constitutional Tribunal when the position is vacated.

The applicants argued that the non-conformity of Article 12(2) of the Constitutional Tribunal Act to the principle of specificity of law arises from the fact that the length of the term of office of the President or Vice-President of the Tribunal is not specified by statute. However, the allegation formulated in such a way does not concern the so-called test of the specificity of law, which has been mentioned many times in the Tribunal's jurisprudence. Indeed, challenged Article 12(2) of the Constitutional Tribunal Act meets the criteria of precision, clarity and legislative correctness, which are related to the obligation of enacting legal provisions that are as specific as possible in a given case. At present, the current provisions do not explicitly specify "the term of office" with regard to the position of the President or Vice-President of the Constitutional Tribunal. Nor does the challenged provision raise any doubts as to the moment when judges assume the said positions and when they cease to hold those positions. A given position is assumed on the day a judge is appointed President or Vice-President of the Tribunal by the President of the Republic of Poland (Article 144(3)(21) of the Constitution). The judge ceases to hold the position of the President or Vice-President of the Tribunal on the day his/her term of office as a judge of the Constitutional Tribunal comes to an end, which was also stated by the applicants (p. 4 of the application). Consequently, the judge ceases to be the President or Vice-President of the Tribunal on the day which marks the end of his/her nine-year term of office in the Tribunal or – in the event that this occurs before the end of the term of office – on the

day of the expiry of the judge's mandate (Article 36 of the Constitutional Tribunal Act). Separation of the moment of ceasing to hold one of the aforementioned managerial positions and the end of the term of office in the case of a judge of the Tribunal occurs only when the judge decides to resign from the position of the President or Vice-President. Indeed, a judge may resign from the said position and maintain the office of a judge of the Tribunal, if his/her term of office has not yet ended. Still, also in this case, the challenged provision raises no interpretative doubts. The position of the President or Vice-President is vacated as of the date when a judge of the Tribunal resigns from the said position.

For the above reasons, the Tribunal has deemed that there are no grounds for declaring the non-conformity of the challenged provision to Article 2 of the Constitution.

4. The allegation about the non-conformity of Article 12(1) and (5) of the Constitutional Tribunal Act to Article 144(3)(21) of the Constitution.

4.1. The applicants formulated a separate allegation concerning Article 12 of the Constitutional Tribunal Act, indicating the non-conformity of paras 1 and 5 of the provision to constitutional provisions that specify the catalogue of official acts issued by the President of the Republic of Poland, which are valid without any need for the signature of the Prime Minister.

Pursuant to Article 12(1) of the Constitutional Tribunal Act, "the President of the Tribunal shall be appointed by the President of the Republic of Poland from among two candidates proposed by the General Assembly"; and within the meaning of Article 12(5) of the Constitutional Tribunal Act, "with regard to the Vice-President of the Tribunal, the provisions of paras 1, 2 and 4 shall be applied accordingly".

4.2. The applicants argued that the power of the General Assembly of the Judges of the Constitutional Tribunal to propose two candidates for the positions of the President and Vice-President of the Constitutional Tribunal may not in practice force the President of Poland to make a particular decision as to the choice of persons for the said positions. The statutory limitation of the number of candidates proposed by the General Assembly to only two candidates constitutes interference in the power vested in the President of Poland, reducing the said power – as the applicants put it – to *ius nudum*. The applicants claimed that the National Assembly should select its candidates on the basis of objective criteria, such as work experience, and it should present all candidates that meet that criteria to the President of Poland to take them into consideration. The application of the quantitative criterion should be accompanied by a possibility of presenting a larger number of candidates. Only then will the decision of the President of Poland have the character of the actual exercise of power vested in the head of state.

According to the applicants, the current statutory solution "undermines the essence of the power assigned to the President of Poland" as regards appointing the President and Vice-President of the Constitutional Tribunal. In both cases, an official act issued by the President of Poland does not require – for its validity – the signature of the Prime Minister. Within this scope, the President of Poland should have a possibility of the free exercise of his/her power (prerogative). The challenged provisions of the Act transfer the essence of the power to appoint the President or Vice-President of the Constitutional Tribunal from the President of Poland to the General Assembly of the Judges of the Constitutional Tribunal. Thus, they reduce the President of Poland to the role of "a notary public", which violates the essence of the powers vested the President of the Republic.

4.3. The Constitutional Tribunal has ruled that the conformity of Article 12(1) and (5) of the Constitutional Tribunal Act is inconsistent with Article 144(3)(21) of the Constitution. First of all, it should be noted that when indicating the above-mentioned higher-level norm for the review, the applicants extensively discussed its meaning. In this context, the applicants explained that the essence of the prerogative of the head of state is “to free the President of the Republic of Poland within his/her scope of official duties from control and a possibility of obstruction on the part of the Prime Minister by means of refusal of the countersignature”. Further on, the applicants also argued that the prerogative of the President of the Republic delineates the realm of autonomous powers vested in the head of state. It specifies the realm of activity in which the said President exercises the powers “on the basis of his/her knowledge, and by relying on his/her own autonomous conviction”. Irrespective of such an understanding of the mechanism of official acts issued by the President of Poland, which fall within the scope of presidential prerogatives, the applicants themselves noted that the exercise of the prerogatives is determined by relevant provisions of the Constitution. However, they mistakenly perceived the provisions as, in principle, limiting the freedom of the activity of the head of state. Thus, they tried to prove that any provisions setting out the scope of the activity of the President of Poland were – as it is stated in the application – “limiting the positive aspect of the prerogative”.

The above interpretation of the Constitution is defective in the opinion of the Tribunal. Making a presumption that the presidential prerogatives have the character of acts which authorise the President of the Republic of Poland to undertake certain actions in an autonomous way, which is contingent only on the discretion of the President, contradicts basic assumptions underlying the system of the state which is based on the separation and balance of powers (Article 10(1) of the Constitution) and the principle that public authorities function on the basis of, and within the limits of, the law (Article 7 of the Constitution). In this context, one may not perceive the President’s powers to issue official acts referred to in Article 144(3) of the Constitution as a realm of discretionary authority of the head of state. Indeed, such an understanding of the President’s powers is not consistent with the current construct of the political system of the state; this has been discussed before by the Constitutional Tribunal in its jurisprudence (see the Tribunal’s judgments of: 18 January 2012, ref. no. Kp 5/09, OTK ZU No. 1/A/2012, item 5, part III, point 4.2.1; 13 November 2013, ref. no. P 25/12 (/s/p-2512), OTK ZU No. 8/A/2013, item 122, part III, point 6).

Constitutional provisions which assign the President with certain powers should be understood as regulations which set the way in which those powers are exercised. What is meant here is not a restriction of a generally defined realm of authority, a certain – as the applicants put it – “essence of the power assigned to the President of Poland”, but the indication of legal framework for actions with regard to a particular situation and a specific state authority. Only such rendering makes one notice a proper relation between Article 144(3)(21) of the Constitution, on the one side – which exempts an official act issued by the President of Poland from the requirement of the countersignature of the Prime Minister – and Article 194(2) of the Constitution, on the other – which determines the realm of the President’s activity linked with the appointment of the said officials and sets out the admissible legal framework for the actions of the head of state. The applicants made extensive reference to the content of Article 194(2) of the Constitution, but they did not indicate it as a higher-level norm for the review of challenged Article 12(1) and (5) of the Constitutional Tribunal Act. This way they challenged statutory provisions which constitute elaboration of Article 194(2) of the Constitution, only in the light of the higher-level norm for the review which – in itself – does not determine the scope of the Polish President’s actions in this particular case. Article 144(3)(21) of the Constitution, as the higher-level norm for the review indicated by the applicants, is limited to the exemption of a particular official act of the Polish President from the necessity to obtain the signature of the Prime Minister for the validity of the act.

The Constitutional Tribunal has deemed that Article 194(2) of the Constitution relies on a relatively general formula as regards the powers of the General Assembly of the Judges of the Constitutional Tribunal. Appointing the President and Vice-President of the Constitutional Tribunal 'from among candidates' proposed by the General Assembly makes it possible to indicate a certain minimum in respect of the content – the necessity to indicate at least two candidates, who must be persons who are currently judges of the Constitutional Tribunal. However, the Constitution does not determine whether the General Assembly may present a larger number of candidates. Nor does it clearly determine the criteria for selecting such persons by the General Assembly. It should be assumed that, within the said scope, the legislator has full discretion and a possibility of providing a detailed regulation of the procedure for electing candidates, including also the criteria for selecting persons to hold the positions of the President and Vice-President of the Constitutional Tribunal. However, this does not mean that the legislator's discretion is – within that scope – unlimited. Article 194(2) of the Constitution determines two crucial elements of the procedure provided for in that provision. Firstly, the provision indicates authorities involved in the process of appointing the President and Vice-President of the Constitutional Tribunal. Secondly, the provision includes a rule that the actions of the President of the Republic of Poland are to be determined by the preceding action taken by the General Assembly of the Judges of the Constitutional Tribunal. The President of Poland appoints the President and Vice-President 'from among candidates' proposed by the General Assembly, and not "upon application" by the General Assembly. Therefore, the President of Poland does not address here a kind of request from the Constitutional Tribunal, but carries out a task which s/he was previously assigned. In such circumstances, the President's role is clearly secondary in character with regard to the stage of the procedure which was assigned to the Constitutional Tribunal, and to the General Assembly of the Judges of the Constitutional Tribunal in particular. Although the involvement of the President of Poland in the process of appointing the President and Vice-President of the Tribunal is explicitly provided for in Article 194(2) of the Constitution, at the same time the actions of the head of state are to constitute a response to the previous determination made within the Constitutional Tribunal as regards candidates put forward for those positions. The legislator can specify more detailed elements of the procedure for indicating candidates for the positions of the President and Vice-President of the Constitutional Tribunal. However, he may not take action that goes beyond the scope delineated in the Constitution, which assigns the task of putting forward candidates – i.e. deciding about nominees for the positions of the President and Vice-President of the Constitutional Tribunal – to the General Assembly of the Constitutional Tribunal. Thus, it is the task of the General Assembly to put forward the candidates, and the President of Poland may only choose from among those candidates who to appoint to the said positions. In this context, it would be inadmissible to shape the said procedure at the statutory level in such a way that it would reduce the role of the General Assembly merely to order or group the candidates on the basis of the number of votes they received in the course of the procedure carried out in the Tribunal. Also, it would be inadmissible to extend the number of candidates, as this would entail the actual conferral on the President of Poland of the entirety of discretion and autonomy of decision with regard to appointments to the positions of the President and Vice-President of the Constitutional Tribunal, without any actual consideration of the opinion of the General Assembly in that respect.

The procedure set out in Article 194(2) of the Constitution provides for the involvement of the President of Poland when it comes to shaping the organisational structure of the Constitutional Tribunal. Such a situation indicates the competence-based inclusion of the executive authority in the realm of the internal organisation of a branch of government which is separate from and independent of the other branches. Consequently, the scope of the admissibility of actions taken by the President of Poland in the light of Article 194(2) should be interpreted in a narrow way. Indeed, it should be assumed that, in principle, the possibility that the executive will exert influence on one of the realms of

the functioning of the judiciary – in this case, the realm of internal organisation which affects the functioning of the entire institution – is an exceptional situation. The fact that the activity of the President of Poland provided for in Article 194(2) of the Constitution is also – due to the content of Article 144(3)(21) of the Constitution – one of the prerogatives means only that the issue of appointing candidates to the positions of the President and Vice-President of the Constitutional Tribunal has explicitly been exempted from the scope of the activity of another executive authority, apart from the President of Poland, i.e. the Council of Ministers. At the same time, this confirms that the procedure which involves the President of Poland, by appointing the President and Vice-President of the Constitutional Tribunal, is special in character and is not linked with conducting the internal affairs of the Republic of Poland, which constitutes the basic task of the Council of Ministers (Article 146(1) of the Constitution). Thus, the description of the Polish President's act of appointing the President and Vice-President of the Tribunal as a personal power (prerogative) of the head of state may not be construed as discretion granted to the President with regard to appointments for the said positions. Moreover, the appointment of one of the candidates proposed to the President of Poland for the position of the President or Vice-President of the Tribunal constitutes a constitutional obligation of the President. Indeed, in the light of the Constitution, there are no doubts that the President is obliged to exercise his/her competence, and that the indication of the President and Vice-President of the Tribunal is not left at his/her full discretion.

The Constitutional Tribunal has stated that the exemption of the Polish President's official act referred to in Article 194(2) of the Constitution from the requirement of validation by the countersignature of the Prime Minister does not undermine the constitutionality of Article 12(1) and (5) of the Constitutional Tribunal. In that case, the legislator has further specified one of the elements of the procedure provided for in Article 194(2) of the Constitution, and maintained all constitutional elements of the procedure for filling vacancies in the positions of the President and Vice-President of the Tribunal. Taking into account its previous analysis, the Tribunal deems that the solution adopted in the challenged provisions of the Constitutional Tribunal Act fulfils the objective and the constitutionally admissible shape of the procedure for the Polish President's appointments for the positions of the President and Vice-President of the Tribunal on the basis of Article 194(2) of the Constitution in conjunction with Article 144(3)(21) of the Constitution.

[…]

6. The allegations about the non-conformity of Article 19(2) of the Constitutional Tribunal Act to Article 112 and Article 197 of the Constitution as well as Article 137 of the Constitutional Tribunal Act to Article 62(1), Article 112, Article 194(1) and Article 197 of the Constitution.

6.1. Pursuant to Article 19(2) of the Constitutional Tribunal Act: "A proposal of a candidate for the judgeship at the Tribunal shall be lodged with the Marshal of the Sejm no later than 3 months prior to the end of the term of office of a judge of the Tribunal".

By contrast, Article 137 of the Constitutional Tribunal Act stipulates that: "With regard to judges of the Tribunal whose terms of office end in 2015, the time-limit for submitting the proposal referred to in Article 19(2) shall be 30 days from the date of entry into force of the Act".

6.2. Challenged Article 19(2) of the Constitutional Tribunal Act regulates one of the stages in the procedure for electing a judge of the Tribunal by the Sejm. The provision determines that a proposal of a candidate for a judgeship at the Tribunal should be lodged:

– with the Marshal of the Sejm, as an official representing the Sejm, and ensuring the proper conduct of the Sejm's work and the observance of deadlines in the course of the Sejm's work,

– within the time-limit which is correlated with the end of the 9-year term of office held by a judge of the Tribunal (*verba legis*: "no later than 3 months prior to the end of the term of office of a judge of the Tribunal").

Article 19(2) was included in chapter 3 of the Constitutional Tribunal Act, entitled "Judges of the Tribunal" and has the character of the procedural regulation which shapes the course and order of the initial sequence of the Sejm's activities aimed at electing a judge of the Tribunal. On the one hand, this is a regulation which is addressed to an organ of public authority which is authorised in the Constitution to elect a judge of the Tribunal for a prescribed term of office (i.e. addressed to the Sejm represented by the Marshal); on the other hand, it is also addressed to those who are authorised to propose candidates for judges of the Tribunal and to initiate proceedings in that respect in the Sejm.

Article 19(2) of the Constitutional Tribunal Act was provided for as a permanent element of the procedure for electing a judge of the Tribunal, which means that – in accordance with the legislator's intention – it should be applied in all subsequent elections to the office of a judge of the Tribunal, which will take place after the entry into force of the Constitutional Tribunal Act, except for the elections of the judges of the Tribunal in 2015, which are to be carried out on the basis of a separate regulation in Article 137 of the Constitutional Tribunal Act.

6.3. In Article 19(1) of the Constitutional Tribunal Act, the legislator has specified that – by analogy with the previous legal situation in the light of Article 5(4) of the 1997 Constitutional Tribunal Act – the right to propose a candidate for a judgeship at the Tribunal shall be vested in the Presidium of the Sejm and a group of at least 50 Sejm Deputies. The proposal is subject to feedback from the Sejm committees which are competent within the scope *ratione materiae* on the basis of the Sejm's resolution of 30 July 1992 – the Standing Orders of the Sejm of the Republic of Poland, which provides the rules of procedure of the Sejm (Official Gazette – *Monitor Polski* of 2012 item 32, as amended; hereinafter referred to as: the Sejm's Rules of Procedure)[1], and subsequently the Sejm elects a judge of the Tribunal by an absolute majority vote, from among candidates that were proposed in compliance with the relevant provisions, and then the Sejm adopts a resolution in that respect (see Article 194(1) of the Constitution; Article 19(4) of the Constitutional Tribunal Act; Article 26, Articles 30-31 of the Sejm's Rules of Procedure). Detailed requirements concerning the proposal and the procedure for considering the proposal are specified in the Sejm's Rules of Procedure in conjunction with Article 19(5) of the Constitutional Tribunal Act.

[…]

6.4. Article 19(2) of the Constitutional Tribunal Act is directly related to Article 137 of the Constitutional Tribunal Act. The latter Article introduces an exception to the general rule provided for in Article 19(2) of the Constitutional Tribunal Act, which stipulates that the proposal of a candidate for the office of a judge of the Tribunal is to be lodged with the Marshal of the Sejm no later than 3 months prior to the end of the term of office of a judge of the Tribunal. In Article 137 of the Constitutional Tribunal Act, the said time-limit has been shortened to 30 days and also it is correlated with the date of entry into force of the [Constitutional Tribunal] Act". According to the legislator, the said date marks the beginning of the period within which the proposal may be lodged with the Marshal of the Sejm.

Article 137 is included in Chapter 13 of the Constitutional Tribunal Act, entitled “Transitional provisions and provisions adapting relevant provisions”. This is a transitional solution and its scope *ratione tempori* is limited to the election of 5 judges of the Tribunal in 2015 (*verba legis*: “judges of the Tribunal whose terms of office end in 2015”).

6.5. Both Article 19(2) and Article 137 of the Constitutional Tribunal Act were introduced into the Constitutional Tribunal Act in the course of the legislative work in the Sejm.

Originally, the Constitutional Tribunal Bill, put forward by the President of the Republic of Poland, (the Sejm Paper No. 1590/7th term of the Sejm; hereinafter: the Constitutional Tribunal Bill) provided for an extended procedure for electing judges of the Tribunal which was to commence 6 months prior to the date when the term of office of an incumbent judge of the Tribunal was to end (see Articles 19-25 of the Constitutional Tribunal Bill). In the course of the work carried out by the Sejm committees after the first reading of the said Bill, the legislator departed from that concept and returned to the model of the election process for judges of the Tribunal which was provided for in the 1997 Constitutional Tribunal Act. Consequently, changes were also introduced into the regulation concerning the lodging of a proposal of a candidate for a judgeship at the Tribunal with the Marshal of the Sejm, which eventually was included in the Constitutional Tribunal Act as Article 19(2). […]

The inclusion of Article 19(2) in the Constitutional Tribunal Act was a legislative consequence of the Sejm’s choice of another model for electing judges of the Tribunal than the one provided for in the original Constitutional Tribunal Bill; the matters regulated in Article 137 of the Constitutional Tribunal Act constituted complete novelty. The Constitutional Tribunal Bill did not provide for any special procedural solutions with regard to the election of a judge of the Tribunal in 2015. They emerged in the course of legislative work in the Sejm committees after the first reading and were motivated by pragmatic reasons – by anticipated necessity to guarantee that the Tribunal would have capacity to adjudicate, also sitting as a full bench, during the transitional period after the entry into force of the Constitutional Tribunal Act […].

6.6. The applicants pondered whether Article 137 of the Constitutional Tribunal Act could constitute the subject of the Tribunal’s review, and eventually they drew the conclusion that, although the scope of the application of the transitional provision setting the time-limit for proposing candidates for the office of a judge of the Tribunal in 2015 had already been “exhausted”, the provision should be assumed to be still binding in a substantive sense. […]

The Tribunal has partly agreed with the stance of the applicants. Indeed, the scope of the application of Article 137 of the Constitutional Tribunal Act has already been “exhausted”, since on the basis of the provision all candidates were proposed for all judicial vacancies in the Tribunal that needed to be filled in 2015. Also, it is impossible to restore the 30-day time-limit for lodging proposals as this time-limit expired *ex natura.* In this sense, Article 137 of the Constitutional Tribunal Act may not be applied *pro futuro*, but it only remains the basis of certain legal activities that were carried out in the past and which constituted an obligatory element of the procedure for the election of the judges of the Tribunal by the Sejm in 2015. In addition, it ought to be noted that the Constitutional Tribunal Act does not provide for any procedure for invalidating or resuming proceedings to elect a judge of the Tribunal with regard to whom the Sejm has already adopted a resolution on his/her election to the said office (i.e. carried out a vote that resulted in electing a judge of the Tribunal). Thus, there are no grounds for “returning” to the stage of proposing candidates for a judgeship at the Tribunal on the basis of Article 137 of the Constitutional Tribunal Act. Such provisions are described in the jurisprudence of the Tribunal as regulations where the scope of application has been “exhausted” and they are regarded as no longer binding within the meaning of the Constitutional Tribunal Act […].

Although this was suggested by the applicants, a basis for continuing proceedings by the Tribunal may not be Article 104(3) of the Constitutional Tribunal Act. Neither the proposal of a candidate for a judgeship at the Tribunal by the Presidium of the Sejm or a group of 50 Sejm Deputies, nor the mere election of such a person to the office of a judge of the Tribunal creates any constitutional subjective rights or legal claims (to being chosen for that office by the Sejm). The issue of the election of the judges of the Tribunal bares no relation to the constitutional protection of rights and freedoms (this ground is mentioned in Article 104(3) of the Constitutional Tribunal Act); this is a matter that is strictly systemic in character.

However, regardless of the above remarks, the Tribunal has deemed that Article 137 of the Constitutional Tribunal Act is subject to constitutional review, insofar as it concerns activities undertaken for the purpose of electing a judge of the Tribunal, initiated in 2015 and – on the day of adjudication by the Tribunal – they did not result in the taking of the oath of office in the presence of the President of the Republic (see Article 21 of the Constitutional Tribunal Act). The Tribunal has stated that, in that part, Article 137 of the Constitutional Tribunal Act is still binding as part of a legal mechanism, initiated by a proposal of a candidate for a judgeship at the Tribunal, and completed by the giving of the oath of office by the President of the Republic of Poland to a person elected to the office of a judge of the Tribunal. As long as the sequence of activities provided for by law is not completed, Article 137 of the Constitutional Tribunal Act – despite the fact that it may not constitute a basis of new electoral activities – should be regarded as one of the legal bases of the process to fill a judicial vacancy for a nine-year term of office which is still ongoing.

6.7. When determining if it is admissible to conduct a review of the constitutionality of Article 137 of the Constitutional Tribunal Act, the Tribunal needs to address the question whether the resolutions of 25 November 2015 adopted by the Sejm to declare the invalidity of the Sejm's resolutions of 8 October 2015, which concerned the election of the judges of the Tribunal by the Sejm during its previous, i.e. the 7th, parliamentary term [2011-2015] (Official Gazette of the Republic of Poland – *Monitor Polski* (M.P.) items 1131, 1132, 1133, 1134, and 1135; hereinafter: the Sejm's resolutions of 25 November 2015) affected the binding force of that provision and whether, as a result, the Tribunal may continue its proceedings in that respect.

As mentioned above, the Sejm's resolutions of 25 November 2015, all five of them, declared the invalidity of the resolutions adopted by the Sejm during its previous parliamentary term with regard to the election of the judges of the Tribunal. The publication of the latter resolutions in the Official Gazette completed the Sejm procedure for the election of five judges of the Tribunal whose terms of office were to end on 6 November, 2 December, and 8 December 2015. In the explanatory note for the draft resolutions of the Sejm dated 25 November 2015 (Sejm Papers Nos. 42, 43, 44, 45, 46/8th term of the Sejm), the authors explained, *inter alia*, that: "By determining (…) the invalidity of resolutions on the election of persons to hold offices as judges of the Tribunal (…), the Sejm did not dismiss the legally elected judges. Firstly, it is inadmissible to dismiss legally elected judges of the Tribunal (…); secondly, dismissal from an office may not occur, where the office was not assumed by a given person due to the invalidity of the election process. The Sejm is competent to evaluate its actions and eliminate the invalidity thereof. The Sejm's determination of the invalidity of the indicated resolutions, which is under discussion here, constitutes an element of the aforementioned elimination of invalidity. Still, the said determination should not be regarded as tantamount to the repeal, annulment or revocation of the legally adopted resolutions and effects thereof. Determining the invalidity of resolutions is only a determination (evaluation) that the resolutions were adopted in breach of procedural provisions. (…) The consequence of such a determination is the opening up of a possibility of carrying out the election again".

In the resolutions of 25 November 2015, the Sejm also requested the President to refrain from giving the oath of office to the judges of the Tribunal elected by the Sejm during its 7th parliamentary term.

The Tribunal stresses that the Sejm's resolutions of 25 November 2015 do not constitute the subject of the review in the present case. However, due to the fact that the possibility of a substantive review of Article 137 by the Tribunal is admissible, provided that on the day of the Tribunal's adjudication the activities undertaken to fill the judicial vacancies in the Tribunal are still ongoing (see the earlier remarks on the question of the validity of Article 137 of the Constitutional Tribunal Act), it should be determined what legal effects for the validity of Article 137 were brought by the Sejm's adoption of the five resolutions of 25 November 2015. Therefore, within the scope of determining the subject of the constitutional review in the present case, which in turn sets the scope of the Tribunal's jurisdiction, the Tribunal has made reference to the legal character of the Sejm's resolutions of 25 November 2015.

Pursuant to Article 69 of the Sejm's Rules of Procedure, the Sejm's resolutions of 25 November 2015 should be regarded as legal acts that are internal in character, and which partly display characteristics of a statement and a recommendation. From the legal point of view, their content comprises – primarily – the presentation of a political stance taken by the Sejm in a particular case which at a given point of time was deemed significant by that house of the Polish Parliament, and secondly – a call which has no legal effect for a state authority (in this case the President of the Republic of Poland) to undertake particular action. The Sejm's resolutions of 25 November 2015 do not constitute determinations which are specific and individual in character within the scope of the Sejm's power to fill or vacate public offices and positions. In this respect, they constitute a different category than the Sejm's resolutions on the election of a judge of the Tribunal, by the means of which the Sejm exercises, *inter alia*, its power specified in Article 194(1) of the Constitution. The Sejm's resolutions of 25 November 2015 and statements (declarations) included therein by definition did not influence the binding force of the resolutions issued by the Sejm during its 7th parliamentary term with regard to the election of the judges of the Tribunal whose terms of office were to end on 6 November, as well as 2 and 8 December 2015; they could not have any legal effects and do not affect the binding force of Article 137 of the Constitutional Tribunal Act. Despite the declaration included therein, the consequences of the resolutions of 25 November 2015 should be recognised in accordance with their legal character and their position in the system of the Sejm's resolutions.

At the same time, it is irrelevant that the terminology adopted, *inter alia*, on the basis of Article 21(1) of the Constitutional Tribunal Act provides that a judge of the Tribunal elected by the Sejm who has not yet taken the oath of office before the President of Poland is "a person elected to assume the office of a judge of the Tribunal". Within the meaning of the Constitution, which is superior in its binding force and which has autonomous content, the status of a judge of the Tribunal should be perceived as acquired at the moment of completion of the election procedure for choosing a candidate for a judge of the Tribunal by the Sejm (*verba legis*: "The Constitutional Tribunal shall be composed of [...] judges chosen […] by the Sejm [...]"; see Article 194(1) of the Constitution). A resolution of the Sejm in that respect is conclusive and may not be challenged. The Sejm (during the same parliamentary term, or its subsequent parliamentary terms) may not revoke its election outcome, invalidate it, or determine that it is unfounded ("has no legal effects") or *ex post facto* "eliminate" the invalidity thereof.

Therefore, the Constitutional Tribunal has deemed that the adoption of the resolutions of 25 November 2015 by the Sejm does not rules out a constitutional review of Article 137 of the Constitutional Tribunal Act.

6.8. The applicants argued that Article 19(2) and Article 137 of the Constitutional Tribunal Act are inconsistent with Article 112 of the Constitution, which stipulates that: “The internal organization and conduct of work of the Sejm and the procedure for appointment and operation of its organs as well as the manner of performance of obligations, both constitutional and statutory, by State organs in relation to the Sejm, shall be specified in the rules of procedure adopted by the Sejm”.

According to the applicants, a time-limit for proposing a candidate for the office of a judge of the Tribunal is an issue that falls within the scope of rules of procedure and may not be regulated in the Constitutional Tribunal Act. The time-limit for proposing candidates for judicial vacancies in the Tribunal constitutes an element of “conduct of work of the Sejm” and “operation of its organs”, i.e. it concerns issues which Article 112 of the Constitution requires to be specified in the rules of procedure of the Sejm.

6.9. The principle of the autonomy of the Sejm’s rules of procedure specifies the systemic position of that organ in the system of state authorities; it manifests a more general principle – the autonomy of the Parliament, which implies that each of the houses of parliament decides about matters related to its own internal organisation and functioning. In the doctrine of constitutional law, it is stressed that the autonomy of the Parliament pertains not only to its internal organisation and parliamentary proceedings, but also, *inter alia*, to its exclusive right to take decisions concerning the appointment of officials or members of the bodies within the two Houses of Parliament [the Sejm and the Senate], its budget and the execution thereof, and the immunity of parliamentarians as well as the exclusive right to manage the property of the Parliament. The said autonomy constitutes a prerequisite for the Parliament’s independent and autonomous position as well as for a balance in relations between the legislature and the other branches of government […].

The content of the principle of the autonomy of the Sejm’s rules of procedure has been analysed in the Tribunal’s jurisprudence before. In its ruling of 26 January 1993 (ref. no. U 10/92, OTK in 1993, part I, item 2) – which was issued prior to the entry into force of the Constitution of 1997, which is currently binding – the Tribunal held that: “the Parliament’s autonomy primarily comprises its right to autonomously adopt its rules of procedure which specify the internal organisation and functioning of the Parliament – the right is usually referred to as the autonomy of the rules of procedure of the parliamentary Houses. The emergence of the said autonomy is strictly related to the issuing of the rules of procedure in the form of a resolution, which rules out any influence of external factors on the content of the said rules of procedure. In the political systems based on the separation of powers, the said form is usually not a statute, as the procedure for enacting a statute requires the involvement of the executive (the government or the head of state) at particular stages of the legislative process. Rules of procedure adopted as a resolution of the parliament (its houses) are thus regarded as a manifestation of respect for the autonomy of the parliament”.

6.10. In the Constitution, the principle of the autonomy of the Sejm’s Rules of Procedure is expressed in Article 112. By contrast, Article 124 of the Constitution stipulates that Article 112 should be applied accordingly to the Senate. Article 112 must be interpreted in the context of other constitutional provisions concerning parliamentary rules of procedure. Pursuant to Article 61(4) of the Constitution, procedures for providing citizens with information on the activity of the Sejm and the Senate are specified in the rules of procedure of those organs of the state. By contrast, Article 123(2) of the Constitution stipulates that the Sejm’s rules of procedure and the Senate’s rules of procedure

are to define modifications in the legislative procedure when a bill has been classified as urgent. The indicated provisions of the Constitution express the principle of the exclusive scope of the rules of procedure of the Sejm and the Senate as regards matters specified therein.

The principle of the autonomy of the Sejm's rules of procedure establishes an exception to the unlimited scope *ratione materiae* of a statute, which means that the constitutionally specified exclusive scope of the rules of procedure which comprises the regulation of certain matters directly affects the limits of legislation. A statute that overlaps with the scope exclusively reserved for the Sejm's rules of procedure will infringe the provisions of the Constitution that determine that exclusive scope […].

On the other hand, the Constitution requires that many matters concerning the functioning of the Parliament – including issues related to the organisation and conduct of work of the Parliament – be regulated by statute. What is meant here is, *inter alia*: Article 63 – procedures for considering petitions, complaints and proposals submitted to the Sejm; Article 105(6) – detailed principles of and procedures for holding Sejm Deputies criminally liable; Article 112 – the *modus operandi* of the Sejm's investigative committee; as well as Article 118(2) – the procedure related to citizens' right to introduce legislation. Thus, there is no doubt that the Constitution provides for diverse sources of parliamentary law. Apart from the provisions of the Constitution, some matters may be regulated by statute, whereas others may be determined in the rules of procedure of a particular House of Parliament. The assignment of various matters to different sources of law depends on guidelines explicitly expressed in the Constitution, and in the case of the lack thereof or difficulties with a clear-cut classification – the said assignment is contingent on the essence of a given regulation.

In that context, in the judgment of 14 April 1999 (ref. no. K 8/99), the Tribunal stated that the Constitution does not rule out from the scope of the Sejm's rules of procedure the regulation of matters which are not mentioned in Article 61(4), Article 112 and Article 123(2) of the Constitution. However, the said rules of procedure may not regulate matters that are reserved for a statute. Those matters comprise, in particular, the rights and obligations of the individual. Thus, the provisions of the rules of procedure alone may not impose obligations on the individual and other private parties that are involved in legal transactions; nor may they specify obligations imposed on those persons by statute. Also, they may not entrust the Sejm and its authorities with powers that have legal effects; nor may they assign other public authorities with new obligations that have not been indicated in a statute. By contrast, the Sejm's rules of procedure may present in more detail constitutional and statutory regulations which specify the obligations of state authorities towards the Sejm and its authorities. Therefore, in the light of the Constitution, the following may be distinguished:

1) the scope of matters that may be regulated exclusively by statute, and which may not be regulated by parliamentary rules of procedure;

2) the scope of matters that may be regulated exclusively by the rules of procedure of the Sejm and the Senate, and which may not be regulated by statute; as well as

3) the scope of matters which may be regulated by statute and – in a way that is more detailed – in parliamentary rules of procedure. The last-mentioned scope of matters comprises – pursuant to Article 112 of the Constitution – detailed matters related to the fulfilment of constitutional and statutory obligations of state authorities with regard to the Sejm. The provisions of parliamentary rules of procedure which concern those matters must be consistent not only with the Constitution, but also with statutes […].

It is also noted in the Tribunal's jurisprudence that it may be difficult to draw a clear-cut distinction between the scope of matters that are to be regulated exclusively by statute and the scope of matters that are reserved exclusively for parliamentary rules of procedure […]. What exemplifies this is the scope of matters that are regulated exclusively by statute as regards appointing members

of the National Council of Radio and Television Broadcasting (Article 215 of the Constitution), appointing and dismissing the authorities of the National Bank of Poland, including *inter alia* the Council for Monetary Policy (Article 227(7) of the Constitution) – this concerns the appointment and dismissal of the said authorities by the President as well as by the Sejm and the Senate. In the opinion of L. Garlicki, the subject matter of parliamentary law sometimes concerns issues that are on the borderline between the scope of the Sejm's (the Senate's) activity and the activity of other constitutional authorities, which may weigh in favour of statutory regulation due to relations to the constitutional scope of matters that are required to be regulated exclusively by statute and for the purpose of preserving the comprehensive character of a given regulation (see L. Garlicki, *op. cit.*, pp. 14-15).

6.11. The applicants have questioned only one of the elements of the procedure for electing judges of the Tribunal by the Sejm – the time-limit for submitting a proposal of a candidate for a judgeship at the Tribunal. Before the entry into force of the Constitutional Tribunal Act, this matter was regulated in Article 30(3)(1) of the Sejm's Rules of Procedure (NB on the day of the Tribunal's adjudication, the said provision was not yet adapted to the legislative changes). The 1997 Constitutional Tribunal Act did not specify the time-limit for submitting the said proposal, but it regulated other elements of the Sejm's proceedings with regard to the election of a judge of the Tribunal – individuals and bodies that are competent to propose candidates for a judgeship at the Tribunal as well as the number of votes that allow the Sejm to adopt resolutions on the election of the judges of the Tribunal (see Article 5(4) of the 1997 Constitutional Tribunal Act).

In the present case, the Tribunal has limited its ruling to the constitutional issue raised in the application i.e. to the question whether the legal basis of the time-limit for submitting the aforementioned proposal, which has been set in Article 19(2) and Article 137 of the Constitutional Act, is consistent with the principle of the autonomy of the Sejm's rules of procedure. As indicated by the applicants, the scope of the Tribunal's consideration in the present case does not include other matters related to the Sejm's election of the judges of the Tribunal on the basis of the Constitutional Tribunal Act and the Sejm's Rules of Procedure.

6.12. The Tribunal has taken account of the fact that the principle of the autonomy of the Sejm's rules of procedure concerns all aspects of the activity of the said organ of the state, i.e. both its legislative and oversight function (see Article 95 of the Constitution) as well as its power to appoint and dismiss state authorities, or persons that those authorities are composed of, including the election of the judges of the Tribunal (Article 194(1) of the Constitution).

The applicants indicated that the time-limit for submitting a proposal of a candidate for a judgeship at the Tribunal falls within the scope of the conduct of work of the Sejm and the operation of its authorities,[2] i.e. – in accordance with the wording of Article 112 of the Constitution – the said issue should be regulated in the Sejm's Rules of Procedure. The Tribunal disagreed with that argument.

The procedure for electing judges of the Tribunal is not merely an internal issue falling within the scope of the organisation of work of the Sejm and the division of powers between its internal authorities. This issue is much more complex. One may not overlook the fact that choosing judges of the Tribunal individually for a nine-year term of office constitutes one of constitutional guarantees of the systemic position of the Tribunal and of the status of its judges. By filling judicial vacancies in the constitutional court, the Sejm affects the actual capacity of that organ of the state to exercise its powers. Thus, the Sejm indirectly affects the activity of an organ of the state which is independent of the Sejm, and which in turn determines the manner of exercising the powers of other constitutional

state authorities that, in a way, remain systemically correlated (see e.g.: Article 122(3) of the Constitution – *a priori* review of the constitutionality of a statute, Article 193 of the Constitution – a question of law; Article 189 of the Constitution – settling disputes over powers). Therefore, regulations concerning the election of a judge of the Tribunal may have an impact on the entire system of exercising public power and may potentially imply negative effects for the function of the state in many areas. In this context, it should be stressed that the preservation of the continuity of the judicial activity of the Tribunal and the observance of the principle that a judge of the Tribunal is chosen for the term of office of 9 years constitute assumptions underlying the political system of the state adopted on the basis of the Constitution. Obviously, the Tribunal may carry out its activity being composed of a smaller number of judges; however, this should always be regarded as an exception and a result of significant and extraordinary circumstances which are caused by objective events; on no account may this be a result of the practice of state authorities that are responsible for filling judicial vacancies in the Tribunal.

Consequently, the Tribunal has stated that, apart from aspects that are clearly technical and – from the point of view of the conduct of the Sejm's work – merely internal, the issue of the time-limit for submitting a proposal of a candidate for a judgeship at the Tribunal also has a dimension that exceeds the exclusive scope of the Sejm's rules of procedure. As it has already been mentioned, the filling of judicial vacancies in the Tribunal in an efficient and timely manner is an obligation of competent state authorities, and they may not neglect the said obligation […]. By contrast, the legislator's obligation is to regulate, by statute, the issue of the time-limit for submitting a proposal of a candidate for a judgeship at the Tribunal in a way that will guarantee the protection of the constitutionally specified term of office of a judge of the Tribunal, the continuous activity of the Tribunal, as well as the effectiveness, transparency and diligence of the entire electoral process.

6.13. Therefore, the Tribunal has adjudicated that Article 19(2) and Article 137 of the Constitutional Tribunal Act are consistent with Article 112 of the Constitution.

6.14. In the applicants' view, Article 137 of the Constitutional Tribunal Act is inconsistent with Article 194(1) of the Constitution, as it provides for a procedure that infringes the Sejm's right to elect a judge of the Tribunal during its 8th parliamentary term.

Setting a time-limit for proposing candidates to the office of a judge of the Tribunal within 30 days from the date of entry into force of the Constitutional Tribunal Act made it possible for "a majority in the Sejm to, sort of *en bloc*, determine, in one moment, persons who would assume judicial offices in the Tribunal after the judges whose terms of office were to expire at different dates". By contrast, the election of a judge of the Tribunal carried out, in a sense, "in advance" is inadmissible. The dates of the commencement and end of a nine-year term of office are determined individually for every judge, and thus particular nominations must be dispersed in time. Consequently, the transitional provision which allows the Sejm "whose parliamentary term is about to come to an end to elect judges to replace the judges of the Tribunal whose mandates will expire during the following parliamentary term of the Sejm" is inconsistent with Article 194(1) of the Constitution.

6.15. Pursuant to Article 194(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".

In the case of a vacant judgeship at the Tribunal, it is a constitutional obligation of the Sejm – in accordance with provided procedures – to fill in the vacancy forthwith. In the literature on the subject, it is noted that there are no constitutional obstacles for the Tribunal to adjudicate as a smaller bench, just as there are no obstacles to the introduction of procedural provisions that would specify the possibility of issuing final determinations by benches that are composed of smaller numbers of judges […].

Article 194(1) of the Constitution specifies that the term of office in the case of a judge of the Tribunal is a fixed period of nine years. The introduction of a relatively long term of office for judges of the Tribunal confirms that, in the Polish political system, there has been an elimination of any ties between the constitutional court and a political composition of the Sejm during a given parliamentary term. The constitutional norms implicitly provide that the Tribunal's composition may include judges elected by the Sejm during its two (and sometimes even three) consecutive parliamentary terms, which ensures *sui generis* pluralism in the composition of the Tribunal as well as facilitates the preservation of impartiality and independence in relation to changing parliamentary majorities" (L. Garlicki, *op. cit.*, p. 8).

The Constitution provides for the election of a judge of the Tribunal which is carried out individually. The commencement and end of the term of office is individually determined for every judge of the Tribunal; judicial nominations are dispersed in time, based on the natural (chronological) order in which the offices are vacated by incumbent judges.

6.16. In order to dispel doubts raised by the applicants as to whether Article 137 of the Constitutional Tribunal Act infringes on the Sejm's competence to choose a judge of the Tribunal during its 8th parliamentary term, the Tribunal needs to reconstruct the sequence of actions taken to elect judges of the Tribunal in 2015.

The first sitting of the Sejm during its 7th parliamentary term was convened on 8 November 2011 and on that day (*verbal legis*: "on the day on which the Sejm assembles for its first sitting") the four-year parliamentary term began (see Article 98(1) in conjunction with Article 109(2) of the Constitution). Pursuant to Article 98(1) *in fine* of the Constitution, the parliamentary term commenced on 8 November 2011 continued "until the day preceding the assembly of the Sejm of the succeeding term of office". The first sitting of the Sejm of the 8th term took place on 12 November 2015, and this was also the first day of the new parliamentary term.

In 2015, the terms of office of five judges of the Tribunal are to end – in the case of three judges, this already took place on 6 November, whereas as regards the other two the judges – one finished his term of office on 2 December and, in the case of the other, this will happen on 8 December. Thus, the end of the term of office in the case of three judges occurred during the 7th term of the Sejm, whereas as regards the other two judges – during the 8th term of the Sejm.

The same conclusion may be drawn also with a slightly different electoral calendar in the parliamentary elections of 2015. Indeed, it may be assumed that during the legislative work on the Constitutional Tribunal Bill and at the moment of the promulgation thereof, it was not yet known for what date the President of Poland would schedule the elections, or indicate the first sitting of the Sejm to commence its 8th parliamentary term. Considering that the 7th term of the Sejm commenced on 8 November 2011, the last date when the parliamentary elections could take place was 1 November 2015. This implies that the 7th parliamentary term could last only until 30 November (the date of 1 December marked the lapse of the time-limit for convening the first sitting of the Sejm to commence its subsequent term). Therefore, even with such a parliamentary schedule, the end of the term of office in the case of two judges of the Tribunal, respectively on 2 and 8 December 2015, would also have occurred after the commencement of the Sejm's 8th parliamentary term.

6.17. The Tribunal has deemed that it follows from Article 194(1) of the Constitution that the obligation to choose a judge of the Tribunal lies with the Sejm during the parliamentary term in the course of which the vacancy in the Constitutional Tribunal occurs. The wording 'the Constitutional Tribunal shall be composed of 15 judges chosen individually by the Sejm' implies that what is meant here is not any Sejm, but the Sejm whose parliamentary term overlaps with a date marking the end of the term of office in the case of a judge of the Tribunal. Obviously, it is possible that the Sejm does not manage to fill a vacated judgeship the Tribunal due to various factual circumstances, such as, for instance, the lack of support for a candidate for the said office or short time-limits for choosing the judge because of upcoming parliamentary elections. In such a case, naturally, the obligation to choose a judge of the Tribunal falls within the scope of duties of the succeeding Sejm. In this context, it needs to be emphasised that the continuity of the functioning of the constitutional court and the protection of the terms of office of the judges of the Tribunal are safeguarded by the Constitution, and should constitute a point of reference for all state authorities that take part in filling judicial vacancies in the Tribunal. What is also admissible from the point of view of the Constitution is a temporary judicial vacancy in the Tribunal, provided that it results from justified factual circumstances, and it is not a strategy or an element of the *modus operandi* of a given state authority.

The Tribunal has agreed with the applicants' allegations that Article 137 of the Constitutional Tribunal Act – insofar as it concerns the judges of the Tribunal whose terms of office either ended on 2 December or will end on 8 December 2015 (i.e. the judges whose terms of office end after the beginning of the 8th parliamentary term of the Sejm) – is inconsistent with Article 194(1) of the Constitution. The said judges were chosen by an organ of the state that was unauthorised to carry out the judicial elections. A judge of the Constitutional Tribunal may not be elected, in a sense, in advance (i.e. too early) with regard to judicial offices that will be vacated during the next parliamentary term of the Sejm. Applying the principle of *reductio ad absurdum*, the mechanism provided for in Article 137 of the Constitutional Tribunal Act could be used with regard to not only the judges of the Tribunal whose terms of office end in 2015, but also with regard to judicial offices that will be vacated in the years to come. This would constitute a dangerous precedent.

6.18. The *ratio legis* of Article 137 of the Constitutional Tribunal Act may not be justified by arguments referring to the unique character of the transitional period related to the entry into force of the new comprehensive Constitutional Tribunal Act of 25 June 2015; nor may it be justified by practical difficulties arising from the coincidence of the parliamentary elections and the elections of the judges of the Tribunal.

The Tribunal points out that the Constitutional Tribunal Bill was submitted to the Sejm on 11 July 2013 and there were no obstacles to correlate, in a diligent and balanced way, the moment of adopting the Bill by the Parliament and the period of *vacatio legis* related thereto with the electoral activities in 2015, which were numerous. The effects of constitutional norms, including Article 194(1), may not be contingent upon the date of entry into force of the Constitutional Tribunal Act or the temporary determinants of the electoral procedures of the said Act. It was the legislator's task to provide adequate transitional provisions which would rule out a potential conflict with a constitutional norm; ultimately, the legislator could have even postponed the application of new solutions until the elections of the judges of the Tribunal in the years to come. The scope of the legislator's regulatory discretion was broad. From that perspective – unlike it was argued in the course of the legislative work in the Sejm – Article 137 of the Constitutional Tribunal Act was neither necessary nor could it counteract any hypothetical obstruction of the judicial activity of the constitutional court.

6.19. Considering the above, the Tribunal rules that Article 137 of the Constitutional Tribunal Act – insofar as it concerns the judges of the Tribunal whose terms of office either ended on 2 December or will end on 8 December – is inconsistent with Article 194(1) of the Constitution.

[…]

8. The allegation about the non-conformity of Article 21(1) and (2) of the Constitutional Tribunal Act to Article 194(1) of the Constitution.

8.1. The applicants indicated Article 21(1) and (2) of the Constitutional Tribunal Act, arguing that those provisions are inconsistent with the principle of the Sejm's autonomy. What was indicated as a higher-level norm for the review of those provisions was Article 194(1) of the Constitution.

Pursuant to Article 21(1) of the Constitutional Tribunal Act: "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'". And in accordance with Article 21(2) of the said Act: "Refusal to take the oath of office shall be tantamount to resignation from the office of a judge of the Tribunal".

8.2. In the applicants' view, the inclusion of the President in the procedure for appointing judges of the Constitutional Tribunal at the stage of the taking of the oath of office by the judges violates the essence of the rule that the judges are chosen by the Sejm (Article 194(1) of the Constitution). This also undermines the coherence of the "institutional system" provided for in the Constitution. The applicants asserted that the taking of the oath of office, referred to in Article 21 of the Constitutional Tribunal Act, should be understood as an element of an extensive process of electing judges. The taking of the oath of office is to complete the said process, and at the same time allows an elected judge to assume the office. The regulation that follows from the challenged provision manifests the separation of the authority choosing the judges from the authority giving the oath of office. The said solution is not provided for in the Constitution, and thus – as claimed by the applicants – it is contrary to the wording of Article 194(1) of the Constitution.

The applicants gave examples of constitutional solutions concerning the election of the members of the Tribunal of State and the Ombudsman. In this context, they argued that the constitutional rule is to leave a procedure for giving an oath of office to persons chosen to hold certain offices to a state authority that has chosen those persons. Indeed, the giving of the oath of office confirms support granted by the authority that has chosen the said persons. According to the applicants, the validity of the above-mentioned rule is the reason why the Constitution lacks a regulation of the taking of the oath of office by judges of the Constitutional Tribunal. They should take the said oath of office before the Sejm, or alternatively before the Marshal of the Sejm.

8.3. Before assessing the allegation formulated by the applicants with regard to Article 21(1) and (2) of the Constitutional Tribunal Act, it is necessary to make reference to a higher-level norm for the review in the present case. Pursuant to Article 194(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". The quoted provision of the Constitution regulates a number of elements that determine the legal status of a judge of the Constitutional Tribunal. Taking account of the doubts and allegation raised by the applicants, the Tribunal assessed the constitutionality of challenged Article 21 of the Constitutional Tribunal Act only in the light of the part of Article 194(1) of the Constitution which expresses the rule that judges of the Tribunal are chosen by the Sejm.

Article 21(1) of the Constitutional Tribunal Act contains the phrase 'a person elected to assume the office of a judge of the Tribunal'. The same wording was used in Article 5(5) of the 1997 Constitutional Tribunal Act. The Tribunal points out that an interpretation of that statutory provision must take account of the unambiguous wording of the constitutional norm arising from Article 194(1) of the Constitution and the other provisions that specify the status of a judge of the Constitutional Tribunal. After the Sejm chooses a person to hold the office of a judge of the Tribunal, this person is the said judge, even if the person has not yet commenced his/her term of office and assumed the office. This is an analogous solution to the one where a person elected, in a general election, as a Sejm Deputy or Senator – in the true meaning of the term – may begin to exercise his/her mandate only after taking the relevant oath of office (Article 104(2) in conjunction with Article 105(2) of the Constitution).

Although the applicants have formally challenged the whole of Article 21 of the Constitutional Tribunal Act – i.e. also its para 2, which specifies the effects of refusal to take the oath of office by a person chosen to hold the office of a judge of the Tribunal, the justification of the application does not contain a separate allegation of the non-conformity of Article 21(2) of the Constitutional Tribunal Act to Article 194(1) of the Constitution. The applicants have requested the Tribunal to conduct a constitutional review of that provision, but their reservations focus only on the issue that the President of Poland is the authority indicated to give the oath of office to a judge of the Tribunal. The regulation in Article 21(2) of the Constitutional Tribunal Act, although it is closely related to the wording of para 1 of the said Article, concerns not so much the taking of the oath of office as the legal effects of refusal to take the said oath. Those effects – which needs to be emphasised – do not refer to the President of Poland, but to a person who refuses to take the said oath of office. The applicants questioned the very fact of taking the oath of office before the President of Poland, but they made no reference to the regulation included in Article 21(2) of the Constitutional Tribunal Act, which is separate in its normative content. The Constitutional Tribunal may not review that provision, as the applicants have not explained in what way the provision is inconsistent with Article 194(1) of the Constitution. The review of Article 21(2) of the Constitutional Tribunal Act would have to be triggered by a separate allegation raised as to the non-conformity of the said provision to the indicated higher-level norm for the review. However, the Constitutional Tribunal is not authorised to do that, for it is bound by the scope of the application (Article 50(1) and (2) of the Constitutional Tribunal Act). For this reason, on the basis of Article 104(1)(2) of the Constitutional Tribunal Act, the Tribunal has discontinued the proceedings within the scope of reviewing Article 21(2) of the Constitutional Tribunal Act in the light of Article 194(1) of the Constitution, on the grounds that the issuing of a ruling is inadmissible.

8.4. The rule that judges of the Constitutional Tribunal are chosen by the Sejm, as expressed in Article 194(1) of the Constitution, implies that the Sejm has exclusive competence within the scope of determining the composition of the constitutional court. Already at the constitutional level, the issue of choosing judges of the Tribunal is linked to a decision of a particular organ of public authority whose members are elective representatives. Such a systemic role of the Sejm in relation to the Constitutional Tribunal – although it pertains to the crucial issue linked with the functioning of the

Tribunal, i.e. the determination of the composition of the Tribunal – may not be perceived as one that results in any dependency or subordination of the constitutional court with regard to the will of a parliamentary majority.

The exercise of the said competence of the Sejm, granted thereto in Article 194(1) of the Constitution, should be perceived from the systemic perspective, i.e. in accordance with the principles of cooperation between public authorities and balance between separate powers of the three branches of government, which are expressed in the Preamble to the Constitution and its Article 10(1), as well as the principle of the separateness and independence of the Tribunal in relation to the legislature and the executive, as stipulated in Article 173 of the Constitution. Expressed in the last-mentioned provision, the principle of the independence of the Constitutional Tribunal must be respected by other public authorities, in particular when the said authorities are included in the process of taking decisions that directly concern the realm of the functioning of the Tribunal. An example of such a process is the assignment of the Sejm with the task of choosing judges of the Tribunal. Thus, the said task must be regarded as a procedure pertaining to an independent organ of the judiciary, i.e. the Constitutional Tribunal. No action taken by the Sejm may contradict that principle. The process of choosing judges of the Tribunal should primarily be perceived as a procedure which is to guarantee that the Tribunal will be capable of fulfilling its constitutional duties. What is meant here is the creation of conditions in which relevant tasks may be performed independently by the constitutionally determined composition 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”. Thus, one may not interpret constitutional or statutory provisions on the procedure for choosing judges of the Tribunal in such a way that would contradict the principle of the independence of the said organ of the judiciary or would hinder the proper functioning of the Tribunal with such an organisational structure as arises from the binding constitutional solutions.

The legislator has an obligation to specify in detail certain elements of the procedure for choosing judges of the Tribunal. However, he remains bound by the principles arising from the Constitution, and in particular by the basic rule expressed in Article 194(1) of the Constitution, namely, that the Sejm chooses judges of the Tribunal. Thus, the legislator may not regulate the above-mentioned procedure in such a way that the process of choosing judges of the Tribunal could be assigned to another organ of the state, not even to the National Council of the Judiciary. Also, the legislator may not introduce regulations that would make it possible to transfer the competence to determine the composition of the Constitutional Tribunal from the Sejm to any other public authority. Nor is it admissible to devise a procedure for selecting or evaluating candidates which would not assign the Sejm with the final determination in that respect.

8.5. Article 21(1) of the Constitutional Tribunal Act expresses a norm governing competence which imposes an obligation on the President of Poland to give the oath of office forthwith to a judge of the Constitutional Tribunal. An adoption of a different view – namely, that the head of state has discretion as regards giving or refusing to give the oath of office to a judge chosen by the Sejm – would entail creating a statutory norm which would designate the President of Poland, apart from the Sejm, as an additional authority vested with the right to decide about the composition of the Constitutional Tribunal. Such an interpretation of Article 21(1) of the Constitutional Tribunal Act has no legal basis in Article 194(1) or in any other provision of the Constitution.

The taking of the oath of office before the President of Poland in accordance with Article 21(1) of the Constitutional Tribunal Act is not merely a solemn ceremony that is symbolic in character and which represents a traditional way of commencing a term of office. The said event plays two important roles. Firstly, it is a public pledge made by a judge that s/he will adhere to the oath during the term of

office. Thus, the judge declares personal responsibility for the impartial and diligent performance of judicial duties in accordance with the judge's conscience and with respect for the dignity of the office. Secondly, the taking of the oath of office enables the judge to commence the exercise of judicial duties, i.e. the exercise of his/her mandate. These two significant aspects of the taking of the oath of office show that this is not merely a solemn ceremony but an event that brings about specific legal effects. For this reason, the involvement of the President of Poland in the giving of the oath of office to judges of the Constitutional Tribunal, who have been chosen by the Sejm, should be regarded as consistent with the exercise of powers vested in the head of state.

The giving of the oath of office to judges of the Tribunal may not be perceived as falling within the scope of discretion of the head of state. The President of Poland is obliged to give the oath of office to judges chosen by the Sejm on the basis of Article 194(1) of the Constitution. Within that scope, there is no possibility of evaluating, independently and freely – based solely on one's own discretion, the legal bases of the outcome of the judicial election in the Sejm or the accuracy of the procedure which was applied in a given case by the Sejm. Indeed, being an executive authority, the President of Poland has no competence to issue a final and universally binding determination on the conformity of legal norms to the Constitution. Nor is the said President competent to assess the legality of activities undertaken by the Sejm on the basis of the universally binding law. Granting the President of Poland an unlimited possibility of providing evaluation within the above-mentioned scope would entail carrying out activities without a legal basis. This would violate the principle that public authorities function on the basis of, and within the limits of, the law (Article 7 of the Constitution) as well as would contradict the principle that the President of Poland exercises his/her duties within the scope of and in accordance with the principles specified in the Constitution and statutes (Article 126(3) of the Constitution).

The Tribunal has pointed out that refraining from giving the oath of office to a judge of the Tribunal could, in some instances, make it impossible for the Tribunal to consider a case sitting as a full bench, which would be inconsistent with the constitutionally-specified scope of the Tribunal's powers even with regard to the President of Poland, i.e. with the scope of cases that fall within the Tribunal's jurisdiction, as set out in the Constitution. To exemplify this, it may be pointed out that, in accordance with Article 117(1) [of the Constitutional Tribunal Act] and Article 133 of the Constitution in conjunction with Article 44(1) of the Constitutional Tribunal Act, the Tribunal adjudicates as a full bench to determine the existence of an impediment to the exercise of the office by the President of Poland and to assign the temporary performance of the said President's duties to the Marshal of the Sejm, if the President of Poland is incapable of notifying the Marshal of the Sejm about his/her incapacity to perform presidential duties. The Tribunal should consider the application of the Marshal of the Sejm forthwith, but no later than within 24 hours from the submission thereof.

8.5.1. The giving of the oath of office to a judge of the Tribunal who has been chosen by the Sejm is an obligation of the President of Poland. However, the said President's competence provided for in Article 21(1) of the Constitutional Tribunal Act does not consist in determining the composition of the Constitutional Tribunal. The said task has been assigned exclusively to the Sejm on the basis of Article 194(1) of the Constitution. The President of Poland, by his/her actions, is to create conditions that will make it possible for a judge of the Tribunal, chosen by the Sejm, to forthwith commence the performance of judicial duties. Thus, in this respect, the role of the President of Poland is secondary, as well as subordinate, in its essence, to the effect which arises from the exercise of the Sejm's competence to choose judges of the Tribunal. The President of Poland is not an authority that chooses judges of the Tribunal; also, s/he is obliged to exercise the competence to give the oath of office to the said judges in accordance with the rules specified, *inter alia*, in the Constitution

(Article 126(3) of the Constitution). The President of Poland is required to act, on the one hand, as the supreme representative of the Republic of Poland and, on the other, as the guarantor of the continuity of state authority (Article 126(1) of the Constitution). Therefore, the realm of the said President's activity related to the implementation of the norm arising from Article 21(1) of the Constitutional Tribunal Act is strictly determined by the wording of both Article 194(1) of the Constitution and Article 126(1) of the Constitution. In this context, the obligation to give the oath of office to judges of the Tribunal chosen by the Sejm (Article 194(1) of the Constitution) is even more striking, as is the requirement implied in that obligation that the said President acts forthwith in that respect. Only in this way may the President of Poland exercise his/her statutory competence within that scope, thus ensuring the continuity of state authority – and in this case, judicial authority. Failure to give the oath of office to judges of the Tribunal who have been chosen by the Sejm should be regarded as contrary to the role of the head of state within the binding constitutional system, as this makes it impossible for the judges to commence the performance of judicial duties, which results in the lack of continuity of authority exercised by the Constitutional Tribunal.

8.5.2. As it has already been emphasised, it is an obligation of the President of Poland to give the oath of office to a newly-elected judge of the Tribunal. The lack of a time-limit, set in the provision, for the fulfilment of the said obligation should be construed in the way that the said obligation must be fulfilled forthwith so as to enable the Tribunal to act as a bench of fifteen judges.

The Constitutional Tribunal notes that, in certain exceptional circumstances, there may be situations which would objectively require the President of Poland to protect a higher value – than the fulfilment of the obligation to give the oath of office forthwith – such as the supremacy of the Constitution. All officials exercising public authority are – during the exercise of the competence vested in them – obliged to single-handedly assess the conformity of their actions with law. However, this does not give them powers to "review" the activities of other authorities. A basis of such oversight or review powers must always be the explicit provisions of law (Article 7 of the Constitution). In a democratic state ruled by law, disputes within that regard are most often resolved in judicial review proceedings. In isolated cases, a valid question may arise as to the necessity to balance out values which are objectively contradictory and impossible to reconcile, and to decide which value should take precedence.

The occurrence of an extraordinary, objective and unambiguous situation which may not rationally be predicted and prevented may require that the principle of the protection of the supremacy of the Constitution will bind the President to take certain action and will justify extending a period for the giving of the oath of office, but only as much as it is rationally necessary to dispel the doubts. However, a situation justifying the extension of a period for giving the oath of office must be linked to an obvious and unambiguous circumstance indicating that: the Sejm did not adopt a resolution within the meaning of Article 120, second sentence, of the Constitution; a given person has no legal capacity to assume the mandate of a judge of the Tribunal; or, already after the election of the judge, a permanent and insurmountable impediment to the exercise of the judicial office has emerged, due to previously-unknown personal circumstances of the judge. Only after determining that, in a given case, one of those situations occurs could the President of Poland consider extending a waiting period for taking the oath of office. However, this is only admissible under the condition that the result of extending the period of not giving the oath of office will not bring about consequences that are not even less acceptable constitutionally, such as a paralysis of the activity of the Constitutional Tribunal, whose capacity to act constitutes a constitutional value in itself. When making such a decision, the President takes full responsibility – provided for in the Constitution – for the consequences of the decision.

The Constitutional Tribunal has clearly stated that a delay in the giving of the oath of office may not be justified only by an allegation that the legal basis of the judicial election is defective. Indeed, the allegation referring to the content of the Constitutional Tribunal Act would have to be transformed into an application to determine the conformity to the Constitution of the said Act by the Constitutional Tribunal. Indeed, the Constitution does not grant the President of Poland any powers as regards issuing a final determination on the hierarchical conformity of norms.

The occurrence of extraordinary circumstances may lead – under the above-mentioned conditions – to the extension of a period that falls within the scope of "indispensable time" for the fulfilment of the obligation. However, this may not constitute a basis for creating competence to refuse to give the oath of office. The Constitutional Tribunal rules out an interpretation of Article 21(1) of the Constitutional Tribunal Act which would allow the President of Poland to refuse to give the oath of office to a judge of the Tribunal who has been chosen by the Sejm.

8.5.3. The Constitutional Tribunal does not question the admissibility of the solution introduced by the legislator where a person elected by the Sejm to the office of a judge of the Tribunal takes the oath of office before the President of Poland.

On no account may the said President's participation in the procedure preceding the commencement of the judge's exercise of judicial duties in the Tribunal be regarded as tantamount to the competence of the head of state to appoint judges, referred to in Article 179 of the Constitution. Indeed, the Sejm does not lodge with the President of Poland a proposal for the appointment of a person to the office of a judge of the Tribunal; the President – by virtue of embodying the majesty of the state – adds to the meaning and high significance of the act of taking the oath of office, by which a given person publicly pledges to serve the Nation.

Separate procedures specified in Article 179 and Article 194(1) of the Constitution are related only by the fact that they refer to judges. Moreover, they both provide for the President's involvement. However, in each of them, the head of state plays a different role. The President's participation in the appointment of judges has a constitutional basis (Article 179 of the Constitution), whereas his/her giving of the oath of office to judges of the Tribunal chosen by the Sejm is provided for in Article 21(1) of the Constitutional Tribunal Act.

However, the Constitutional Tribunal has deemed that the competence provided for in Article 21(1) of the Constitutional Tribunal Act should be interpreted in the context of the exercise of powers granted to the head of state in the Constitution and statutes. This is linked with the necessity to exercise the said powers in the form of official acts (Article 144(1) of the Constitution). The oath of office given by the President of Poland to judges of the Tribunal who have been newly elected by the Sejm may be considered in the context of more general competence of the head of the state which concerns the giving of an oath of office to all judges in Poland. The constitutional term "appointing", referred to in Article 144(3)(17) of the Constitution, should be assigned an autonomous definition. The said term also comprises an element that concerns the giving of the oath of office to judges who are to commence the performance of their judicial duties. In this light, the statutory competence of the President of Poland to give the oath of office also to a newly-elected judge of the Tribunal falls within the scope of Article 144(3)(17) of the Constitution. Thus, this competence does not require, for its validity, the signature of the Prime Minister. Otherwise, it would not be possible to include the President of Poland in the procedure that allows a judge of the Tribunal who has been elected by the Sejm to commence the performance of judicial duties. Since the Constitution does not provide for the participation of the Council of Ministers in the election of the judges of the Tribunal, it would be impossible to include the Prime Minister in the procedure by means of the obligation to provide a signature to validate an official act issued by the head of state.

8.6. The Constitutional Tribunal has stated that Article 21(1) of the Constitutional Tribunal Act – interpreted other than that the President of the Republic of Poland is obliged to give the oath of office forthwith to a judge of the Constitutional Tribunal who has been elected by the Sejm – is inconsistent with Article 194(1) of the Constitution. The Tribunal has assessed the content of challenged Article 21(1) of the Constitutional Tribunal Act and ruled that any other interpretation of the provision, other than that the President of Poland is required to give the said oath of office, is constitutionally inadmissible. In principle, the Tribunal does not undermine the statutory wording of the Constitutional Tribunal Act that a judge of the Tribunal is to take the oath of office before the President of Poland. However, the Tribunal holds the view that any other interpretation of Article 21(1) of the Constitutional Tribunal Act infringes the principle that judges of the Constitutional Tribunal are chosen by the Sejm (Article 194(1) of the Constitution). A version of the said procedure which would make it impossible to forthwith take the oath of office, and as a result to commence the performance of judicial duties by a judge of the Tribunal who has been elected by the Sejm, would remain contrary to the competence granted to the Sejm on the basis of Article 194(1) of the Constitution and the systemic role of the President of Poland.

[…]

12. The effects of the judgment.

The Tribunal rules that Article 137 of the Constitutional Tribunal Act is unconstitutional within a certain scope. However, irrespective of the Tribunal's ruling, the transitional character of that provision renders it inapplicable as a basis for proposing candidates for a judgeship at the Tribunal in the future (i.e. after the entry into force of this judgment). Also, the constitutional regulation of the legal effects of the Tribunal's judgment provides for no possibility that the Sejm could return to any election processes initiated pursuant to Article 137 of the Constitutional Tribunal Act.

A determination that Article 137 of the Constitutional Tribunal Act is unconstitutional within a certain scope brings about significant legal effects which are systemic in character, and which are actualised by the Tribunal's ruling. In the case of the two judges of the Tribunal whose terms of office either ended on 2 December or will end on 8 December 2015, the legal basis of the significant stage of the judicial election process was challenged by the Tribunal as unconstitutional. Since the judicial vacancies were not yet filled, as the last legal activity was not carried out (i.e. the taking of the oath of office by the judges before the President of Poland), the derogation of the relevant scope of Article 137 of the Constitutional Tribunal Act should result in the discontinuance and closure of the procedure (different effects of the Tribunal's judgment of 24 November 2003, ref. no. 26/03, OTK ZU No. 9/A/2003, item 95 – which concerned the appointment of a member of the Council for Monetary Policy – were related to the fact that the case pertained to the effective appointment of a certain person to the said position). The completion of the aforementioned procedure is inadmissible, as the legal basis of one of the stages was deemed to be unconstitutional by the Tribunal.

Since, in accordance with Article 190(1) of the Constitution, the Tribunal's rulings are universally binding and final, then as of the moment of the entry into force of this ruling, no state authority has a legal basis for challenging – as unconstitutional – those provisions that regulate the element of the procedure for electing judges of the Tribunal which are deemed constitutional by the Tribunal in this ruling.

However, what does not raise constitutional doubts is the legal basis of the election of the three judges of the Tribunal who were to take office after the judges whose terms of office had ended on 6 November 2015. The derogation of Article 137 of the Constitutional Tribunal Act within the indicated scope does not affect the election of those judges. Pursuant to the rule that a judge of the Tribunal is chosen by the Sejm during the parliamentary term in the course of which the vacancy occurs, the judicial election carried out on that basis was valid and there are no obstacles to complete the procedure by the oath of office taken, before the President of Poland, by the persons elected to the judicial offices in the Tribunal.

Due to the entry into force of this judgment, the Sejm is obliged to elect two judges of the Tribunal who will to take office after the judges whose terms of office either ended on 2 December or will end on 8 December 2015.

For the above reasons, the Tribunal has adjudicated as in the operative part of this judgment.

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* (typo3/#_ftnref1) The operative part of the judgment was published on 16 December 2015 in the Journal of Laws – Dz. U. item 2129.

[1] (typo3/#_ftnref2) [the translator's note: the English translation of the Sejm's Rules of Procedure is available at: <http://libr.sejm.gov.pl/tek01/txt/regulamin/esejm.html (http://libr.sejm.gov.pl/tek01/txt/regulamin/esejm.html)>]

[2] (typo3/#_ftnref3) [the translator's note: the Polish term '*organy*' is rendered in the English translation of the Polish Constitution as 'organs', but the Polish term is much broader and covers not only competent bodies but also certain competent individual officials (e.g. the President of the Republic of Poland, the Prime Minister, the Marshal of the Sejm, as well as others), and thus in this translation the Polish term is, in a number of instances, rendered more broadly as 'authorities'.]

(http://ipo.trybunal.gov.pl/ipo/Sprawa?&pokaz=dokumenty&sygnatura=K%2034/15)

Dokumenty w sprawie (IPO) (http://ipo.trybunal.gov.pl/ipo/Sprawa?&pokaz=dokumenty&sygnatura=K%2034/15)