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STUDIES AND ARTICLES

Jerzy Zajadło

Constitution-hostile Interpretation

The arguments included in this paper were first presented on October 7th 2017, in Cracow, during the symposium "On the problems of interpretation of the Constitution of the Republic of Poland." The role was difficult, because as we know, in ancient Greece the term *symposion* (*Συμπόσιον*) used, *e.g.*, by Plato meant a joyful feast, whereas this paper pertains to issues that are hard to enjoy. Actually, for lawyers they may be particularly hard to digest.

The question was whether constitutional interpretation can be lawmaking. The answer seems obvious, even banal: it certainly can, but we need to explain precisely what we understand by the relationships between the constitution and its interpretation. Firstly, it is predominantly the process of interpreting a specific provision of the basic law. Secondly, it may also mean the interpretation of lower acts with consideration of the content of the constitution. Thirdly, we may treat the text of the basic law not only as a set of norms but also as a source of certain interpretation directives. Constitutional interpretation understood this way has already been discussed in extensive source literature, so it is hard to quote here in detail.[1] Actually, it is not only

1 From the newest work, see, for example: *Wykładnia konstytucji. Inspiracje, teorie, argumenty*, ed. T. Stawecki, J. Winczorek, Warszawa 2015; *Wykładnia konstytucji. Aktualne problemy i tendencje*, ed. M. Smolak, Warszawa 2016; M. Gutowski, P. Kardas, *Wykładnia i stosowanie prawa w procesie opartym na Konstytucji*, Warszawa 2017.

the object of interest of constitutionalists and legal theoreticians but also of legal philosophers.[2]

But it all follows some basic paradigms of classic jurisprudence. In this paper, however, we attempted to identify an empirical phenomenon evading the paradigms of jurisprudence in general, constitutional law doctrine, and theory of law and legal philosophy in particular. This phenomenon can be referred to as "constitution-hostile interpretation." To a lawyer's ears, this sounds really strange, almost like an oxymoron. We are used to some phrases such as "pro-constitutional interpretation" or "constitution-friendly interpretation," so reference to the category of hostility naturally causes confusion. But upon closer examination this may turn out to be a *prima facie* conclusion, because for over two years this surprising phenomenon has really existed in Poland, as we try to prove below with some specific examples.

Nevertheless, the very term "constitution-hostile interpretation" may seem so absurd in Polish legalese that we have decided to express it using a Latin, perhaps semantically more neutral phrase: *interpretatio constitutionis hostilis*. In other languages, for example, in German, the adjective *verfassungsfeindlich* sometimes occurs, but it never refers to interpretation (*Auslegung*). Instead, it is sometimes used to refer to, *e.g.*, anti-systemic political parties. The expression *verfassungsfeindliche Auslegung* would sound as absurd as does the Polish *wykładnia wroga wobec konstytucji* ("constitution-hostile interpretation"). But the connotations of the expression and its actual meaning are two different things.

Undoubtedly, the most extensive theory of constitutional interpretation was developed in American jurisprudence. In a way, Americans had no choice: for one thing, they have the oldest valid written constitution in the world, and for another, their basic normative act is extremely brief and succinct. Numerous amendments to the American constitution have not changed much. Actually, they have only increased the spectrum of possible concepts. Hence, Americans really have a multiplicity of constitutional interpretations: from originalism, through textualism, pragmatism and structuralism, up to philosophical interpretation.[3]

2 See, for example: T. Gizbert-Studnicki, *Interpretacja wzorców konstytucyjnych z perspektywy filozofii prawa*, "Przegląd Konstytucyjny" 2017, No. 3, p. 33–49.

3 See S.A. Barber, J.E. Fleming, *Constitutional Interpretation. The Basic Questions*, New York 2007.

It is assumed that the problem of the law-making role of constitutional interpretation depends to a large extent on the concept of the constitution itself. According to Jack M. Balkin, two basic approaches can be identified in this area.[4] First, we can treat the constitution as a finished structure (the skyscraper model). In this case, both amendments and constitutional interpretation are very limited, because the interior of this structure must not be changed. Second, we can decide instead that the constitution is a specific framework, so as time goes by, we should make some transformations within the structure by means of interpretation, without changing its foundations. This apparently leads to two interpretative attitudes: passivist (the skyscraper model) or activist (the framework model). Obviously, as a representative of the so-called living constitution movement, the author prefers the latter.

Yet, there are still some authors in contemporary American jurisprudence who go even further, beyond the limits of living constitutionalism. Louis M. Seidman, using the term constitutional disobedience, is a typical example.[5] At first glance, this expression seems as absurd as the abovementioned *interpretatio constitutionis hostilis*, but this is only a pretense. In reality, according to Seidman, the possibility of refusing obedience to the constitution in some justified situations is in a way metaphoric and partially results from the character of the American constitution. So this attitude is not hostile to the constitution, but is based on a certain kind of pragmatism, since one problem recurs in American jurisprudence all the time: the question of whether a basic law that is more than two hundred years old is not simply obsolete, in spite of all the amendments.[6]

But returning to *interpretatio constitutionis hostilis*. If this phenomenon did empirically occur in our political and legal reality, I think it is worth considering its origin, essence, expressions, and mechanisms, but first of all its effects on the Polish legal system as a whole. Even if the phenomenon evades the traditional instrumentation of jurisprudence, we can of course try to approach it from the perspective of political philosophy, *e.g.*, the concept by Carl Schmitt, often referred to in public discourse.

4 See J.M. Balkin, *The Framework Model and Constitutional Interpretation*, in: *Philosophical Foundations of Constitutional Law*, ed. D. Dyzenhaus, M. Thorburn, Oxford 2016, p. 241–264.

5 See L.M. Seidman, *On Constitutional Disobedience*, Oxford, New York 2012.

6 See *Is the American Constitution Obsolete?*, ed. T.J. Main, Durham (North Carolina) 2014.

But in this dimension, the authors of *interpretatio constitutionis hostilis* may also encounter a serious disappointment. I propose the thesis that conservative political philosophers imposed a certain interpretation of Carl Schmitt on us which does not have to be true in the light of legal theory and philosophy. If we approach Schmitt as a lawyer, which has been an increasing tendency in global science recently,[7] we find out that he would also be very surprised at the possibility of constitution-hostile interpretation. Recognizing the occurrence of the so-called constitutional moment, he would himself have simply rejected the valid constitution *par force* by means of the sovereign's decision and would have adopted a new one. But he would never have thought of a hostile interpretation, because, contrary to appearances, he had great respect for the legal order. This, however, is beyond the scope of the present paper and I can only recommend new source literature, especially literature analyzing the only work by Carl Schmitt concerning legal philosophy, *On the Three Types of Juristic Thought* from 1934.[8]

Constitution-hostile interpretation is a political strategy accompanied by specific perverse political rhetoric with quite a primitive, populist character. The authors of this strategy usually demonstrate the will or even obligation to observe the constitution, but at the same time they call the constitution "internally contradictory and conflictogenic," "post-communist," "a constitution for elites, not for ordinary people," *etc.* This strategy is not even overt but deeply concealed behind the screen of showy slogans. In the current situation, the often repeated phrase "our legislature is compliant with the constitution, because it was confirmed by a verdict of the Constitutional Tribunal" is particularly perfidious, perverse, and even wicked. So in the final instance, the phenomenon of *interpretatio constitutionis hostilis* is an example of extreme instrumentalization of the process of interpretation for the needs of current politics, ergo an example of recognizing the primacy of politics over law, even at the level of the basic law.

Obviously, we could elaborate on whether the Constitutional Tribunal in the present form really meets the standards of a normal supervisory

7 See, for example: V. Neumann, *Carl Schmitt als Jurist*, Tübingen 2015; M. Croce, A. Salvatore, *The Legal Theory of Carl Schmitt*, London 2013.

8 More on the topic: J. Zajadło, *Schmitt*, Gdańsk 2016.

body, but let us leave it and focus instead on some specific examples revealing the mechanism of functioning of *interpretatio constitutionis hostilis*. We will avoid pointing to particular names, as individual names are unimportant in this discussion; what really matters is the interpretative decisions concerning norms, institutions, and procedures. Besides, due to editorial limits, we will not analyze factual and legal situations in great detail. We will only concentrate on the issue of justifying connecting certain interpretation decisions with the phenomenon of constitution-hostile interpretation.

The first example comes from the period before the latest parliamentary election and is connected with the moment of the new (current) president assuming office. As we remember, one of his first decisions was to pardon a person sentenced with a court decision that was not yet final. Doubts arose as to whether the President had the right to do so, and in response we received a certain interpretation of the provision of Article 139 sentence one in relation to Article 144 section 3 item 18 of the Constitution:[9] the power of pardon is one of the powers of the President, and the constitution provision does not limit it in any way. Indeed, *prima facie* it is hard to find a constitution-hostile interpretation here. Perhaps as a result of the clarity of this provision, we simply have two modes of extending the power of pardon: the application one arising from the content of the Code of Criminal Procedure, and the unlimited one directly arising from the basic law. This interpretation would sound rational, but for one thing. The draft constitution of 2010 prepared by the political formation represented (it does not matter whether *de nomine* or *de facto*) by the President includes the following provision in Article 71 section 1 item 13: "The President of the Republic of Poland […] shall extend the power of pardon to persons sentenced with a final court decision, in the mode laid down in the act." In logic and in rhetoric, there is an argument called *argumentum ex rerum natura*. If we were to refer to it, we could justifiably claim that the presidential political formation, even in 2010, perceived that the power of pardon by nature only applied to persons sentenced with a final court decision, which was stated *expressis*

9 The Constitution of the Republic of Poland of 2nd April 1997, Dziennik Ustaw (Official Journal of Laws of the Republic of Poland, hereinafter referred to as: "Dz.U.") 1997, No. 78, item 483, as amended; hereinafter referred to as: "Constitution."

verbis in its draft of the constitution. This institutional interpretation was later confirmed by the Supreme Court in its resolution by 7 judges of May 31st 2017, in case I KZP 4/17:[10]

> The power of pardon as a power of the President of the Republic of Poland laid down in Article 139 sentence one of the Constitution of the Republic of Poland may only be applied to persons whose guilt was stated by a final court decision (convicted).

What happened, then, to change the president's perception of *rerum* naturae? He simply needed to apply the power of pardon instrumentally in the particular factual state *ad personam* and thus make an interpretation hostile to the constitution and to his own former views. Obviously, a certain weakness of our argumentation may be pointed out: the draft we mentioned was not a valid legal act. Besides, according to a popular saying, a wise man changes his mind, a fool never will. But the issue is too serious to bring the legal discourse to this level.

Another example is especially spectacular, because we have not one but a series of interpretation decisions that can be called *interpretatio constitutionis hostilis*. We mean the long series of attempts to amend the Act on the Constitutional Tribunal.[11] Since this paper is limited in length, we will not discuss them in detail, especially that they have already been described in source literature.[12] Actually, the thing is not about specific interpretation decisions, but the whole complex of acts, drafts, opinions, expert opinions, parliamentary speeches and even media presentations that in this case create the real syndrome of constitution-hostile interpretation. From the vast material we selected one example that seems particularly illustrative. After the adoption of the Act on amending the Act on the Constitutional Tribunal on December 22nd 2015,[13] it immediately went to the Senate, where a committee within the upper house of parliament held a debate with the participation of lawyers from the parlia-

10 < http://www.sn.pl/sites/orzecznictwo/Orzeczenia3/I%20KZP%204-17.pdf >.

11 The Act of 25th June 2015 on the Constitutional Tribunal, Dz.U. 2016, item 293, consolidated text, as amended.

12 See *Spór o granice zmian organizacji i zasad działania Trybunału Konstytucyjnego: czerwiec 2015 – marzec 2016*, ed. P. Radziewicz, P. Tuleja, Warszawa 2017.

13 Dz.U. 2015, item 2217.

ment legislation services, broadcast live on television. They presented a number of doubts regarding the constitutionality of the adopted solutions, but some senators remained adamant. Astonished viewers could hardly believe they were hearing utterances such as: "these are only examples of many legal opinions, but we are going let our own consciences guide us." Undoubtedly, the reference to senators' consciences without reference to interpretation principles and rules worked out in the legal science and practice is nothing but political instrumentalization resulting in constitution-hostile interpretation, particularly that most of the parliamentary experts' doubts were later shared by the Constitutional Tribunal in its decision of March 9th 2016, in case K 47/15.[14] If we add the confusion connected with the Prime Minister's refusal to publish the Constitutional Tribunal's decisions, we can clearly see the absurdly dense atmosphere of *interpretatio constitutionis hostilis*.

The third example is especially dangerous, as it refers to the sphere of civic rights and liberties. Let us again refer to the constitution draft of 2010 prepared by the currently ruling political formation, and compare it with what it has done in the sphere of legislation since its acquisition of power. Article 36 sections 1 and 2 of the draft read:

> 1. Citizens shall have the freedom of peaceful assembly, also in public places, in order to jointly express their beliefs, opinions, or demands.
> 2. No permission shall be needed for citizens to assemble. The statute may introduce the requirement to report the intention to organize an assembly subject to applicable notification periods.

At first glance, this solution seems to be more liberal and pro-freedom than the one provided for in Article 57 of the current Constitution: "The freedom of peaceful assembly and participation in such assemblies shall be ensured to everyone. Limitations upon such freedoms may be imposed by statute." Again, we might ask what happened that the same political formation after obtaining power decided to introduce changes in the Peaceful Assembly Act[15] that raised huge doubts regarding their constitutional-

14 < http://trybunal.gov.pl/fileadmin/content/nie-tylko-dla-mediow/K_47_15_wyrokTK_2016_03_09_ADO.pdf >.

15 The Act of 24th July 2015, Dz.U. 2018, item 408, consolidated text, as amended.

ity. The introduction to the act and the preferential treatment of so-called cyclical assemblies are especially controversial. This time, it is also rather obvious that we can see a kind of political instrumentalization, because this regulation was clearly designed *ad casum* for a specific celebration that is a major propaganda project of this political formation. Ergo, again we can see a constitution-hostile interpretation, because the solution is everything but compliant with the spirit of the interpretation directive *in dubio pro libertate* resulting from the provision of Article 31 of the Constitution, particularly the proportionality principle laid down in section 3.

Such examples of *interpretatio conistitutionis hostilis* in the area of the above-mentioned relationships between the basic law and the principles and rules of interpretation could be multiplied. The newest examples would be regulations concerning amendments to the Acts on the Supreme Court[16] and the National Council of the Judiciary,[17] as well as election ordinances.[18] Thus, the phenomenon is clearly not fading, but becoming more and more widespread instead.

Let us briefly sum up then: constitution-hostile interpretation is a *sui generis* phenomenon, and actually it is hard to find a similar one in the history of constitutionalism of the states within our civilization. We do not know how it will develop, but even now we can identify its basic characteristics.

First, it is a hidden strategy, although applied fully consciously and intentionally, sometimes paradoxically camouflaged with other constitutional institutions, *e.g.*, the presidential veto or referring a law preventively or consequentially to the Constitutional Tribunal. This is logical: after all, a normal individual will never declare to observe and respect the constitution and at the same time overtly admit to making a hostile interpretation of it. Sometimes the hostility may refer to a specific provision of the basic law or a certain interpretation directive resulting from it, but sometimes it may simply involve the contestation of constitutional axiology as a whole or the creation of a negative atmosphere with regard to individual constitutional values.

16 The Act of 8th December 2017, Dz.U. 2018, item 5, as amended.

17 The Act of 20th August 1997, Dz.U. 2017, item 700, consolidated text, as amended.

18 The Act of 5th January 2011, Dz.U. 2017, item 15, consolidated text, as amended.

Second, this strategy is based on acting in bad faith. This is also logical: after all, *mala fides* must naturally be an inherent part of *hostilitas constitutionis*. Again, it is obviously hidden behind the screen of catchy declarations of respect for the constitution and the obligation to observe it. But this camouflage is hard to reconcile with the aforementioned epithets concerning the constitution, because then the mask of mock friendliness towards the constitution disappears. An expression of this bad faith is the excessive use of various legal tricks (*apices iuris*), among others, considered even by the Roman lawyer Ulpian to be inappropriate in legal discourse.[19] It also involves the formation of new interpretation principles and rules and leading *e.g.*, constitutional supervision bodies to procedural traps of a vicious circle of argumentation.[20]

Third, the most perverse logic applies to the problem of the law-making character of constitution-hostile interpretation. Paradoxically, this interpretation really is law-making, even more so than pro-constitutional interpretation. In the latter case, we act in good faith, and applying friendly constitutional interpretation we recognize certain solutions as conforming or non-conforming to the basic law, because we want only norms that meet constitutional standards to be part of the legal system. In the case of constitution-hostile interpretation, it is otherwise: its aim is mostly to forcibly include system even those normative solutions in the legal which are clearly unconstitutional, but the authors want them to become the valid law. Of course, on the basis of the adopted interpretation principles and rules we would say it is quite easy: it is sufficient to abrogate those norms from the system using the basis known to all lawyers with average knowledge: *lex superior derogat legi inferiori.* And this is the whole problem. *Interpretatio constitutionis hostilis* does not recognize any commonly accepted paradigms of jurisprudence; it creates its own, new paradigms nobody knew before.[21]

And last but not least, this strategy is very dangerous for the legal order, because using it, people consciously work toward legal chaos and introduce normative acts into the system that from the beginning are known to be contradictory to the constitution, sometimes even grossly.

19 See J. Zajadło, *Sztuczki prawne*, "Gazeta Wyborcza" 14th January 2016.

20 See J. Zajadło, *Władza bez sakiewki i miecza*, "Gazeta Wyborcza" 8th January 2016.

21 See J. Zajadło, *'Nowa' PiS-owska nauka prawa*, "Gazeta Wyborcza" 29th December 2015.

Summary

The author tries to describe very a strange phenomenon which one can observe in actual Polish constitutional practice. He calls it *interpretatio constitutionis hostilis* (constitution-hostile intepretation). The considerations are based on some legislative examples and the author comes to the conclusion that this unconstitutional strategy is: firstly, hidden, although applied fully consciously and intentionally; secondly, based on acting in bad faith; thirdly, very dangerous for the legal order.

Keywords: constitution, theory, interpretation, hostility

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Zajadło J., *Władza bez sakiewki i miecza*, "Gazeta Wyborcza" 8th January 2016.

Tomasz Tadeusz Koncewicz

On the Strategic Reading of the Constitutional Document. Mapping out Frontiers of New Constitutional Research*

1. Prologue: Polish judicial system goes down and why should we care?

The paper asks when is a constitutional design of any (domestic, international, supranational) polity in error? On the most general level such critical juncture obtains when polity's founding document (treaty, convention, constitution) protects against the dangers that **no longer exist** or **does not protect** against the dangers that were not contemplated by the Founders.[1] Constitutions not only constitute but should also protect against

* I am forever grateful to Professor Martin Shapiro for his generosity in sharing with me his wisdom and expertise on the judicial politics, on how the politics affect courts and how courts interact with other political players. Likewise I appreciate very much all the discussions in real time on problems presented here with Professor Kim Lane Scheppele. Usual disclaimer applies. This is work in progress and part of my 2017–2018 Crane Fellowship at LAPA, Princeton University, < http://lapa.princeton.edu/content/politics-resentment-and-constitutional-capture-learning-constitutional-debacles-and-thinking >. The ideas presented here go back to the presentation at the International Symposium on "The Separation of Powers. A Global Constitutional Dialogue" in Milan, 22nd May 2017. The precursor of the paper was presented at the workshop on authoritarianism organized by Princeton University on 13th–14th October 2017 and at "Rule of law and the separation of powers in flux?" during the Annual Meeting of the American Association of Law Schools in San Diego, 3rd–6th January 2018. Parts of the analysis here also were presented at the "Indiana Journal of Global Legal Studies", 26th Annual Symposium "Globalization in Question: Populist Resistance and a New Politics of Law?", Indiana University, Maurer School of Law, 11th–13th April 2018.

1 For more extensive analysis see T.T. Koncewicz, *The Capture of the Polish Constitutional Tribunal and Beyond: Of Institution(s), Fidelities and the Rule of Law in Flux*, to be published in: "Review

deconstitution. When analysed together, the cases of Hungary and Poland, South America[2] and more recently United States[3] suggest a new worrying pattern of the erosion of constitutional democracies. One may even speak of a recipe for constitutional capture in one state after another that travels in space and in time.[4] The new autocrats know that the law might be used to kill off the law and institutions and engage in a different form of "repression by stealth"[5] or the deconstruction of democracy itself by using the legal means ("autocratic legalism").[6] This process tends to result in a systemic undermining of the key components of the rule of law such as human rights, independent and impartial courts, free media. It follows a well-organised script and tends to begin with disgruntled citizens voting to break the system by electing a leader who promises radical change, often referring to the "will of the people" while trashing the pre-existing constitutional framework with cleverly crafted legalistic blueprints borrowed from other "successful" autocrats. Examples of Poland, Hungary and other "legalistic counter revolutions" (Venezuela, Turkey) are not the sort of mass human rights violations that merit close scrutiny from international level. The world has already (and luckily so) developed a framework to deal with these.

The paper asks the question whether the capture of state institutions in Poland (and Hungary before it)[7] is an outlying case, or if it portends the future of Europe more generally. Whatever the case, Poland matters,

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of Central and East European Law" 2018, < http://www.brill.com/review-central-and-east-european-law >; and *Unconstitutional Capture and Constitutional Recapture. Of the Rule of Law, Separation of Powers and Judicial Promises*, "NYU Jean Monnet Working Paper" 2017, No. 3, < https://jeanmonnetprogram.org/papers >.

2 See D. Landau, *Abusive Constitutionalism*, "University of California Davis Law Review" 2013, No. 47 (189).

3 See D. Ziblatt, S. Levitzky, *How Democracies Die*, New York 2018.

4 K.L. Scheppele, L. Pech, *Illiberalism Within: Rule of Law Backsliding in the EU*, "Cambridge Yearbook of European Legal Studies" 2017, No. 1.

5 O. Varol, *Stealth Authoritarianism*, "Iowa Law Review" 2015, No. 100 (1673).

6 K.L. Scheppele, *Autocratic Legalism*, "University of Chicago Law Review" (forthcoming), where she argues: "When electoral mandates and constitutional/legal change are used in the service of an illiberal agenda, I call this phenomenon 'autocratic legalism.'"

7 See K.L. Scheppele, *Constitutional Coups and Judicial Review: How Transnational Institutions Can Strengthen Peak Courts at Times of Crisis (with Special Reference to Hungary)*, "Transnational Law and Contemporary Problems" 2014, No. 23 (51), p. 51–119.

and more than for just the Poles. The case illuminates salient features and fissures in the bases for democratic government, the rule of law, and constitutionalism when confronted with the sweeping politics of resentment.[8] Most recently the Editorial Board of "The New York Times" saw it fit to comment on the Decision of the European Commission of 20th December 2017, to invoke against Poland Art. 7 of the Treaty on the European Union (for the first time in the history of European integration).[9] The Editors emphasized:

> An independent judiciary, however, is not only the bulwark of the democratic order to which Poland signed on when it joined the European Union, but a fundamental requirement for the functioning of a single market. Upholding the treaties on which the union is based is indisputably within the European Commission's purview. The European Commission was right to invoke Article 7. It must follow that up by sternly explaining to Mr. Kaczynski's followers and other nationalist forces across Europe that there are red lines they cannot cross — not because Brussels so wills, but for their own sake. An independent judiciary is chief among them.[10]

8 See J.W. Muller, *Defending Democracy within the EU*, "Journal of Democracy" 2013, No. 24 (138).

9 Article 7 of the Treaty on the European Union (TEU) provides for a sanctioning mechanism in the case when one of the member states does not respect the values enshrined in Art. 2 TEU. The latter provides: "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail."

10 *E.U. Reminds Poland how a Democracy Acts*, "The New York Times" 28th December 2017, < https://www.nytimes.com/2017/12/28/opinion/eu-poland-democracy-vote.html >; for American take on the European consequences of the Polish constitutional debacle see J. Traub, *The Party That Wants to Make Poland Great Again*, "The New York Times" 2nd November 2016, < https://www.nytimes.com/2016/11/06/magazine/the-party-that-wants-to-make-poland-great-again.html?_r=0 >; Ch.A. Kupchan, *The Battle Line for Western Values Runs through Poland*, "New York Times" 10th January 2018, < https://www.nytimes.com/2018/01/10/opinion/europe-western-values-poland.html >; and more recently: R. Cohen, *Awaken, Poland, before It's too Late*, "The New York Times" 16th February 2018, < https://www.nytimes.com/2018/02/16/opinion/awaken-poland-before-its-too-late.html?rref=collection%2Fcolumn%2Froger-cohen&action=click&contentCollection=opinion&region=stream&module=stream_unit&version=latest&contentPlacement=3&pgtype=collection >. For more detailed analysis see *infra*.

With this America has finally woke up[11] to the gravest of the constitutional crises that has been engulfing the European Union (hereinafter referred to as: "EU"): crisis of democracy and the rule of law within one of the member states that threaten the EU as a whole.[12] As important and devastating BREXIT and financial crisis are, they are after all crisis of governance and institutional structure. The argument presented here is that none of these crises strikes as deadly a blow to the European edifice as the crisis in which one member state tramples the values of democracy, rule of law and human rights; values said to be presumed to be common for the EU and its member states. With the rise of the politics of resentment we are not dealing with a yet another rogue government riding roughshod over its Treaty obligations (which is not such a rare occurrence after all). Rather we are facing a government that calls into question the very basis of European integration and undermines it from within. We are facing the crisis of the foundational value of the European integration and one of constitutional feature – liberal democracy.[13]

It all started with the destruction of the Polish Constitutional Court (hereinafter referred to as "the Court" or "the Tribunal") in 2015–2016.[14]

11 See S. Levitsky, D. Ziblatt, *Is Donald Trump a Threat to Democracy*, "The New York Times" 16th December 2016, < https://www.nytimes.com/2016/12/16/opinion/sunday/is-donald-trump-a-threat-to-democracy.html >. More recently see A. Huq, T. Ginsburg, *How to Lose a Constitutional Democracy*, "UCLA Law Review" 2018, No. 65 (forthcoming). Also S. Levitzky, D. Ziblatt, *How's Democracy Holding up after Trump's First Year?*, < https://www.theatlantic.com/international/archive/2018/01/trump-democracy-ziblatt-levitsky/550340 >; S. Levitzky, D. Ziblatt, *How a Democracy Dies*, < https://newrepublic.com/article/145916/democracy-dies-donald-trump-contempt-for-american-political-institutions >; *'How Democracies Die' Review – the Secret of Trump's Success*, < https://www.theguardian.com/books/2018/jan/08/how-democracies-die-by-steven-levitsky-and-daniel-ziblatt-review?CMP=share_btn_link >.

12 For a comprehensive treatment of the enforcement of values within the EU consult: *The Enforcement of EU Law and Values. Ensuring Member States' Compliance*, ed. D. Kochenov, A. Jakab, Cambridge 2017.

13 For detailed analysis and further references: K.L. Scheppele, L. Pech, *Illiberalism…*

14 It is not my intention here to retell the story of how the Polish Constitutional Tribunal was first paralyzed, and then, disabled. For a succinct and incisive analysis see L. Garlicki, *Disabling the Constitutional Court in Poland?* (p. 63–69), and M. Wyrzykowski, *Bypassing the Constitution or Changing the Constitutional Order outside the Constitution* (p. 159–179), in: *Transformation of Law Systems in Central, Eastern and Southeastern Europe in 1989–2015. Liber Amicorum in Honorem Prof. dr. dres. H. C. Rainer Arnold*, ed. A. Szmyt, B. Banaszak, Gdańsk 2016; and W. Sadurski, *What Is Going on in Poland Is an Attack against Democracy?*, "Verfassungsblog" 15th July 2016, < http://verfassungsblog.de/what-is-going-on-in-poland-is-an-attack-

After 30 years of building an impressive resume as one of the most influential and successful European constitutional courts and living proof of "the rule of law in action," the Court has fallen under the relentless attack of a rightwing populist government and succumbed to it. The time has come to move beyond what happened to the constitutional review in Poland, though and place it in the wider context. In this paper I want to move beyond the hitherto dominant perspective of "here and now" and lawyers' fixation on the **boat**, and instead focus more on the **journey** and important lessons the journey might teach us and enhance the understanding of 'our boats.' The argument will be made that the Polish case ("the boat") is much more than just an isolated example of yet another recalcitrant government. There is an important European dimension to what has transpired in Poland over the last two years. To understand what happened in Poland and why, one has to take a longer view and revisit not only the 2004 Accession, but also the 1989 constitutional moment and "negotiated transition" that followed. The constitutional debacle in Poland must be but a starting point for more general analysis of the processes of the politics of resentment and constitutional capture that strike at the core European principles of the rule of law, separation of powers, and judicial independence. With the benefit of hindsight, we now know that the disbelief about the destruction of the Polish Constitutional Court (and earlier, the Hungarian Constitutional Court) was an opening act to the total subjugation of all independent institutions of the state. With no independent constitutional court left to guarantee effective compliance

against-democracy >; T.T. Koncewicz, *Polish Constitutional Drama: Of Courts, Democracy, Constitutional Shenanigans and Constitutional Self-Defense*, "I-CONnect" 6th December 2015, < www.iconnectblog.com/2015/12/polish-constitutional-drama-of-courts-democracy-constitutional-shenanigans-and-constitutional-self-defense >; T.T. Koncewicz, *Farewell to the Polish Constitutional Court*, "Verfasungsblog" 9th July 2016, < http://verfassungsblog.de/farewell-to-the-polish-constitutional-court >; T.T. Koncewicz, *Statutory Tinkering: on the Senate's Changes to the Law on the Polish Constitutional Tribunal*, < http://verfassungsblog.de/statutory-tinkering-senate-polish-constitutional-tribunal >. For a useful and detailed recap, see also: the Helsinki Foundation for Human Rights, *The Constitutional Crisis in Poland 2015–2016*, Report (August 2016), < http://www.hfhr.pl/wp-content/uploads/2016/09/HFHR_The-constitutional-crisis-in-Poland-2015-2016.pdf >. More recently see comprehensively W. Sadurski, *How Democracy Dies (in Poland): A Case Study of Anti-Constitutional Populist Backsliding*, "Sydney Law School Research Paper" 2018, No. 1, < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3103491 >.

with the national constitution, Polish ruling party has engaged in a multi-pronged take – over of the whole of the national judiciary to enable the executive and legislative branches of the government to systematically interfere in the structure, composition and daily functioning of the judicial branch.[15] The law on the ordinary courts and on the Supreme Court have already entered into force and effectively brought the courts under the "tutelage" of the Ministry of Justice. The capture of the state and its institutions goes on…[16]

This paper argues that all this should be used as a cautionary tale. The belief that institutions will be able to defend themselves and protect the legal system proved to be over-idealistic. As important as institutions are for any constitutional system, they have a chance of survival only when their institutional pedigree and prestige are built on the popular support of civil society. There is a two-way synergy between the two. While civil society might contribute positively to the consolidation of democracy, it cannot unilaterally either bring about democracy, or sustain democratic institutions and practices once they are in place.[17] Even the strongest institutions will fall when lacking social capital. Are courts any different? Courts play a pivotal role in the process because of their supervisory functions and the embedded low-profile and arcane language of the law. There is always a *bona fide* assumption that law will speak louder than

15 At the time of writing, the capture of the judiciary has been completed with the entry into force of the new Polish Law on ordinary courts organization. See W. Sadurski, *Judicial "Reform" in Poland: The President's Bills Are as Unconstitutional as the Ones He Vetoed*, "Verfassungsblog" 28th November 2017, < http://verfassungsblog.de/judicial-reform-in-poland-the-presidents-bills-are-as-unconstitutional-as-the-ones-he-vetoed >. On the same day that Art. 7 of the TEU was triggered, the European Commission has decided to refer Poland to the Court of Justice arguing that the new law on ordinary courts violates the EU law.

16 In its reasoned proposal for a decision of the Council on the determination of a clear risk of a serious breach of the rule law by Poland, the Commission succinctly pointed out that Polish authorities have adopted over a period of two years no less than 13 laws affecting the entire structure of the justice system in Poland, impacting the Constitutional Tribunal, Supreme Court, ordinary courts, National Council for the Judiciary, prosecution service and National School of Judiciary and analysis: D. Kochenov, L. Pech, K.L. Scheppele, *The European Commission's Activation of Article 7: Better Late than Never?*, < https://verfassungsblog.de/the-european-commissions-activation-of-article-7-better-late-than-never >.

17 See P.C. Schmitter, *Civil Society East and West*, in: *Consolidating the Third Wave Democracies. Themes and Perspectives*, ed. L. Diamond, M.F. Plattner, Y. Chu, H. Tien, Baltimore 1997, p. 239–262, especially p. 240.

any transient urges of the powers that be and that in the end the law will enforce its primacy. That assumption might be correct in the best of times when everything goes according to plan. When it does not, courts look fragile and vulnerable, as the only protective tool they wield – 'the law' – is taken away from them by the sheer power of political sleight of hand. The question then arises as to whether political exigencies could bring about self-re-imagination on the part of the courts so as to make them protectors of constitutional essentials in such emergency situations. In other words, could capture of the state and institutions be countered by judicial recapture?

The Polish example is instructive here and shows how existing mechanisms open important legal avenues to strike back at capture. Yet embarking on any such recapture must be linked not only to the **normative** and **technical** (here the question would be: "Does the system contain enough to build a good legal case for exercising such powers?"), but also to the **mental** (here we would ask the uneasy question "Are judges willing and ready to use these mechanisms to protect democracy?"). The paper will argue that even a symbolic act of resistance in pursuit of a judicial promise is crucial. It builds institutional memory and a legacy that goes beyond disappointment and failure 'here and now.' For the system to regain its liberal credentials, the courts and the public must have something tangible to fall back on. I call this act of resistance a 'symbolic jurisprudence' because it reminds us that survival of the system must be anchored in a long-term fidelity, which goes beyond and transcends the present day.

This symbolic jurisprudence has also European dimension as there is an important role to be played by the Court of Justice of the EU.[18] Having said that, I am aware that such advocated thinking creates a fuzzy picture (two levels of governance of self-defense), distorts the constitutional landscape (leaning on the outside institution to tame the domestic political power) and upsets established doctrines (separation of powers). These concerns are justified in the normal times. However, the paper

18 On this European dimension see T.T. Koncewicz, *The Consensus Fights back: European First Principles against the Rule of Law Crisis*, < https://verfassungsblog.de/the-consensus-fights-back-european-first-principles-against-the-rule-of-law-crisis-part-1 >; and part II, < https://verfassungsblog.de/the-consensus-fights-back-european-first-principles-against-the-rule-of-law-crisis-part-2 >.

does not address normal times when things go as planned and the political game is played with respect for pre-ordained rules and conventions. Rather, the paper focuses on the journey in times of constitutional upheavals and attacks on the rule of law and separation of powers (process called below: "politics-of-resentment-driven capture"). The reinterpretation (process called "defend-the-constitution-driven recapture") that might (or not) follow the capture creates a new *status quo* that will factor in the mechanism and instruments that were used to rebuild the system. A new *status quo* emerges as the result of the interplay between these 'capture – recapture' dynamics.[19]

2. Constitutional Recapture. What's in a name?

Separation of powers stresses the importance of keeping the balance of power within governmental settings. We tend to assume that everything goes right. For the sake of my argument, the main rationale of separation of powers is to constrain and enforce the spirit of limited government. In an ideal world, separation of powers would keep rogue tendencies in check. Occasional setbacks and imperfections would be corrected from within the system. My main concern and starting point is different. The question here is not what happens when separation of powers functions, but rather what happens when its operation is systematically undermined? We often assume that things go in accordance with plan, but sometimes they do not and an uneasy question looms large: "What happens then to the separation of powers?" To be brought back into constitutional cycle it must be fought for, or – recaptured. 'Constitutional recapture' is the antithesis of 'unconstitutional capture.' It is a generic term resorted to in order to win back respect for constitutional essentials

19 While the literature on the populism has been growing beyond imagination, the question of how (institutionally and procedurally) to deal with the rise of populist politics, received only scant attention. For rare analysis see C.R. Kaltwasser, *Populism and the Question of how to Respond to It*, in: *The Oxford Handbook of Populism*, ed. C. Rovira Kaltwasser, P. Taggart, P. Och Espejo, P. Ostiguy, Oxford 2017, p. 490; for political science perspective consult S. Rummens, K. Abts, *Defending Democracy: The Concentric Containment of Political Extremism*, "Political Studies" 2010, No. 58 (649) and more recently G. Badano, A. Nuti, *Under Pressure: Political Liberalism, the Rise of Unreasonableness, and the Complexity of Containment*, "The Journal of Political Philosophy" 2017, No. 1.

and to ensure the integrity of the constitutional document. Constitutional recapture, as understood here, is a necessary response to the relentless and no-holds-barred politics of the parliamentary majority of the day keen on redrawing constitutional lines and instrumentalizing the basic principles of constitutional order. The notion of constitutional recapture also responds to the malaise of the European decision-making process. Constitutional recapture demonstrates the resilience of the constitutional document to fight back and reestablish constitutional equilibrium, as best exemplified by checks and balances and separation of powers. My idea of constitutional recapture is firmly rooted in the Polish Constitution itself and its basic principles. The *demos* have chosen independent judges and courts as dispute resolvers, subject only to the Constitution and statutes (Arts. 173 and 178 of the Polish Constitution[20]), with rule of law serving as a meta-principle of the legal order and the state (Art. 2). The *demos* have also elevated the Constitution to the status of the supreme law of the land (Art. 8), made the separation of powers with checks and balances one of the cornerstones of the Republic of Poland (Art. 10) and decreed the judgments of the Tribunal universally binding and final (Art. 190). Last but not least, the demos has recognized the direct application of the Constitution (Art. 8(2)). Having done all that, the *demos* must then accept that the courts will be ready to take these systemic features seriously and rule against the instrumental politics of the day. Their response must have at its core the defense of the constitutional essentials mentioned above. Judges cannot simply stand by and watch the legal order torn apart in the name of 'the people.' They must defend the Republic and uphold the law. This is exactly what they are sworn to do. No more, no less. The question remains however: "How is this to be done?"

3. Emergency judicial review

Constitutional review exercised by the ordinary courts has been an option in the Polish legal order since the adoption of the 1997 Constitution.

20 The Constitution of the Republic of Poland of 2nd April 1997, Dziennik Ustaw (Official Journal of Laws of the Republic of Poland) 1997, No. 78, item 483, as amended; hereinafter referred to as: "Constitution." English version is available at: < http://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm >.

Proponents of extending review to the ordinary courts were politely acknowledged, but their views were never taken seriously. It was widely accepted that only the Tribunal wielded a constitutional monopoly and the ordinary courts would follow its judgments, pursuant to the Constitution. Nobody ever contemplated a situation in which the Tribunal would be unable to exercise its constitutional powers as a result of political attacks and rewriting the Constitution by way of statutes. The idea was unthinkable. It is no longer so. Views have been expressed in Polish legal doctrine and voiced in the Supreme Court's case law on the possibility of constitutional review by ordinary courts checking the compatibility of statutes with the Constitution. However, the "centralization model" dominated the mainstream legal discourse. Ordinary courts cannot refuse to apply a statute (statutes are presumed to be constitutional until their invalidation by the Tribunal). Only the Tribunal is empowered to rule on the unconstitutionality of a statute. As long as a statute is in force, the courts are bound to apply it unless they ask the Tribunal question(s) of constitutionality and the Tribunal declares the statute unconstitutional. This line of argument flows from Article 178 of the Polish Constitution, according to which, in the exercise of their duties, judges are subject to the Constitution and statutes. As a result, constitutional review of statutes is centralized and exercised exclusively by the Tribunal. Direct application of the Constitution assumes co-application of the Constitution and statutes. At present, all ordinary courts can do is to apply a pro-constitutional interpretation. Although this strand of constitutional narrative has been predominant, there has also been a second strand. Subjecting courts to the Constitution and statutes could be read as allowing the courts the power to refuse to apply a statute that is incompatible with the Constitution. Direct application of the Constitution entails much more than mere interpretation in conformity with the Constitution and sending question on the compatibility of statutes to the Tribunal. In the case of a conflict, the courts must follow the act of higher rank (the Constitution as the supreme law of the land – Art. 8(1)) in accordance with *lex superior derogat legi inferiori*). Two options would be possible. On the one hand, a court finding a statute unconstitutional could refuse to apply such a statute outright in a case it decides. Here, the court would act as a full-blown constitutional review institution,

not only deciding on the issue of constitutionality but also mandating the consequences of such a finding. On the other hand, an 'intermediate' option is available. Should the court find a statute unconstitutional, it would be left with no discretion but would be obliged to refer the question to the Tribunal. In this scenario, the court would be debarred from applying a statute that it deems unconstitutional. The refusal by an ordinary court to apply a statute would not necessarily infringe upon the review powers of the Tribunal, since a plausible argument could be made that a review exercised by an ordinary court is limited and deals only with the case at hand. In other words, it is *in concreto* review as opposed to *in abstracto* review by the Tribunal. The latter deals with the law with an *erga omnes* effect and removes an unconstitutional provision from "legal circulation," thus acting more in the spirit of a quasi-chamber of the Parliament, whereas ordinary courts are in charge of the administration of justice in individual cases.

My argument falls somewhere in between these two lines of thinking. The system of government in Poland is based on the Tribunal's monopoly of constitutional review. In other words, constitutional review is centralized. However, the assumption that underpins the centralized model is that constitutional review by the Tribunal is operational and effective. But what if that is not so? Depending on the circumstances of each and every case, direct application of the Constitution could range from parallel application of the statute and the Constitution to self-standing application of the Constitution. For the sake of argument, four situations should be discerned. First, the most common and uncontroversial is when a judicial decision is based directly on a statute, with the Constitution used as an ornament. Second, when a judicial decision is based on both a statute and the Constitution, the latter shedding light on interpretation of the statute. Third, there is a more radical version of direct application that I call 'transformative application.' Here the court is aware of the incompatibility of the statute and feels ready to make it constitutional by (re)-interpreting it in the light of the Constitution. The Constitution is no longer a mere source of inspiration, but provides a normative tool for judicial modification of the statute that ensures its normative consistency with the Constitution. Beyond that third option lies 'emergency review,'

with outright refusal to apply the statute, which is our fourth option. When constitutional review faces systemic and permanent dysfunction for whatever reasons, emergency review must be resorted to. Emergency review is defined by complementarity *vis-à-vis* the Tribunal's power of review. It accompanies, and runs in parallel with, the Tribunal's constitutional review, but does not replace it. Emergency review is instrumental to securing respect for the status of the Constitution as the supreme law of the land. Constitutional defiance by the parliamentary majority must be countered by intra-constitutional resilience and trigger self-defending mechanisms from within the Constitutional text. It is important to make clear here that my call for 'emergency constitutional review' by the ordinary courts does not question the Tribunal's monopoly of constitutional review, but is in order to shield the constitutional order from being further weakened and disassembled.

My argument in favor of domestic emergency constitutional review by the ordinary courts is further reinforced by the system of decentralized enforcement as the linchpin of the EU system of judicial protection. European empowerment of the ordinary courts has already happened in Poland and undermined the Polish centralized model of constitutional review. Moreover, this empowerment of ordinary courts in the name of the full effectiveness of the EU law was even accepted by the Tribunal when it held in case P 37/05:[21] "National courts shall not only be authorized, but also obliged to refuse to apply a domestic law norm, where such norm is in conflict with European law norms." EU law is based on the doctrines of direct effect[22] and supremacy[23] constructed by the European Court of Justice, which constitute the true building blocks of the new legal order to which EU law aspires. As for enforcement, EU law looks to a national court entrusted with overseeing the full effect of the provisions of EU law, if necessary refusing of its own motion to apply a conflicting provision of domestic legislation: "It is not necessary for the court

21 Order (in Polish) available at: < http://trybunal.gov.pl/fileadmin/content/omowienia/P_37_05_PL.pdf >.

22 Judgment of the European Court of Justice of 5th February 1963, case C-26/62, *Van Gend en Loos* v. *Netherlands Inland Revenue Administration*, EU:C:1963:1.

23 Judgment of the European Court of Justice of 15th July 1964, case C-6/64, *Costa* v. *E.N.E.L.*, EU:C:1964:66.

to request or await the prior setting aside of such provision by legislative or other constitutional means."[24] National courts are called on to disregard any provision of domestic law (on the the European Court of Justice reading of supremacy, its scope is all-encompassing as it catches 'any' provision of domestic law, be it constitutional, statutory, sub-statutory or administrative decisions) that is inconsistent with EU law and without waiting for the constitutional court to take a stand on the conflict. Each court of each Member State has the power of judicial review over national legislation in cases pending before it. Judicial review is limited to disapplication of conflicting domestic law *in concreto* in order to ensure the *effet utile* of EU law 'here and now.' The constitutional court retains the power to declare such legislation null and void *in abstracto* and to require the national parliaments to modify legislation to make it compatible with relevant EU law. This judicial review is not exceptional, but rather forms the backbone of the EU legal system and is exercised by national courts on a daily basis. All of this has already recalibrated the role of European constitutional courts, and the supremacy of EU law has made inroads into their monopoly of constitutional review of statutes. Review of statutes for their compatibility with EU law is now within the powers of the ordinary courts. As a result, the system is decentralized, or, as one author argued, 'Americanized.'[25] It is important to bear the EU law mechanism in mind, as it strengthens my argument in favor of emergency judicial review exercised by Polish courts with regard to domestic law inconsistent with Poland's Constitution. Emergency judicial review would entail loss by the Tribunal of its constitutional monopoly over statutes. In exceptional situations, review of the constitutionality of a statute might be exercised by the ordinary courts. Such review would be an extension to national law of the decentralized enforcement already forming part of the EU mandate of Polish courts since 2004. Last but not least, this EU-based decentralized review must take on even greater importance now. With the Tribunal gone and the Constitution being short-circuited at every turn, it is time for the Charter of Fundamental Rights to play a more

24 Judgment of the European Court of Justice of 9th March 1978, case C-106/77, *Amministrazione delle Finanze dello Stato* v. *Simmenthal SpA*, ECLI:EU:C:1978:49, § 24.

25 See V.F. Comella, *Constitutional Courts and Democratic Values*, New Haven 2009, p. 126 (inverted commas in original).

prominent role as an important adjudicatory benchmark. The Charter could be seen as a compensatory legal instrument and pick up where the Constitution left off. With permanent incapacitation of the Tribunal, the Polish courts could use more vigorously Article 267 of the Treaty on the Functioning of the European Union[26] and send more references for preliminary rulings to the Court of Justice. These are all challenges that constitutional recapture brings about.[27]

4. "Constitutional Recapture" and looking beyond the polls

The concept "emergency constitutional review" is called "emergency" because it is triggered by exceptional circumstances, particularly when the "the exceptional" becomes – as it is now in Poland currently – a norm. The review should be exercised with caution and restraint, and be limited to egregious breaches of constitutional standards and rights. Democracy has been shifting for some time from predominance of the electoral processes to citizen-inspired movements holding rulers accountable between elections. The concept of the "emergency constitutional review" is part of what Pierre Rosanvallon has called "counter-democracy"[28] to capture how democratic systems have been evolving from the symbolic casting of a vote to exercising societal control between elections and irrespective of their results. Rosanvallon identified three methods whereby citizens can hold the elected to account: oversight, prevention, and judgment. The first deals with citizens and/

26 Art. 267 of the Treaty on the Functioning of the EU gives each court of the member state a power (in certain "constellations" it imposes a duty) to refer questions to the Court of Justice on the interpretation and/or validity of the EU norms. This procedure has been long hailed as one the success stories of the EU law. See D. Edward, *The National Courts – The Powerhouse of Community Law*, "Cambridge Yearbook of European Legal Studies" 2002, No. 5 (1). On various procedural "constellations" in using Art. 267 and the switch from "a discretion to refer" to "a duty," consult K. Lenaerts, I. Maselis, K. Gutmann, *EU Procedural Level*, Oxford 2015. See also analysis *infra*.

27 For important words of caution and limits to the decentralized ("private") enforcement through national courts see M. Blauberger, D. Kelemen, *Can Courts Rescue National Democracy? Judicial Safeguards against Democratic Backsliding in the EU*, "Journal of European Public Policy" 2016, No. 24 (321), p. 326–329.

28 P. Rosanvallon, *La contre-democratie: La politique à l'âge de la défiance*, Paris 2006; for the English-language edition, see P. Rosanvallon, *Counter – Democracy: Politics in the Age of Distrust*, Cambridge 2008.

or their non-governmental organizations monitoring the political process by citizens and/or making the behaviour of the elected more visible. The second refers to the capacity of citizenry to mobilize and channel resistance to policies and decisions taken by the elected. Finally, the third describes juridification and the trend of turning to courts so as to bring about social change and/or enforce the limits put on the elected. Constitutional recapture backed up by emergency constitutional review falls into the 'judgment' category and must be seen as a democratic constraint on the will of the majority, as a manifestation of constitutional self-defense. If, as it appears, the Polish Government and Parliament do not consider themselves bound by constitutional limits, those who oppose this trend must find ways to ensure that the Polish constitutional system is able to defend itself from within. Emergency constitutional review is a good start. Making the Constitution operational every time the Tribunal is denied its constitutional powers is now a priority of the highest order, wherein "operational" means that the ordinary courts treat the Constitution as part of the law that they are bound to apply and on which they must build their decisions. Even before the final demise of the Tribunal, there have been signs that shielding the Constitution through the case law of ordinary courts had already been taking place. On 17th March 2016, the Polish Supreme Court delivered a judgment in which it declared unconstitutional one of the provisions of the Tax Code.[29] Crucially, the Supreme Court found it unnecessary to send questions to the Tribunal and proceeded with its own constitutional review of the provision in question. In clearly circumscribed reasoning, it pointed to a judgment of the Tribunal from 2013 which had already declared unconstitutional a provision in the Code that was identical to the provision under consideration in the before the Supreme Court. The Supreme Court acknowledged that formally speaking the Tribunal should be also given an opportunity to declare this new provision of the Code to be unconstitutional, because ruling

29 Judgment of the Supreme Court of Poland of 17th March 2016, V CSK 377/15, < http://www.sn.pl/sites/orzecznictwo/Orzeczenia3/V%20CSK%20377-15-1.pdf >. For more on the case see K. Żaczkiewicz-Zborska, *Sąd Najwyższy stwierdził niekonstytucyjność przepisu, bo TK w kryzysie*, < www.lex.pl/czytaj/-/artykul/sad-najwyzszy-stwierdzil-niekonstytucyjnosc-przepisu-bo-tk-w-kryzysie >.

on the compatibility of statutes with the Constitution falls within the exclusive competence of the Tribunal. However, the Supreme Court referred directly to the unclear situation currently surrounding the Tribunal and concluded: "Formalism cannot get the better of common sense. Bearing in mind the current exceptional situation, referring questions to the Tribunal now would be incomprehensible to the interested parties." This is 'emergency constitutional review' at its most clear. This groundbreaking decision might usher in a new era of constitutional empowerment. Importantly, the Supreme Court took pains to precisely delimit and condition its emergency constitutional review. It made clear that its review does not exclude the Tribunal's competence: the Tribunal (when independent) continues to be the guardian of constitutionality in Poland. On the other hand, the Supreme Court was well aware of attempts to undermine the Tribunal and its powers. The 2016 refusal by the government to publish the Tribunal's judgments may have been the last straw in prompting the Supreme Court to stand up and side with the rule of law. Importantly, the Supreme Administrative Court followed the Supreme Court in this regard. In one of its most recent judgments, it quashed a judgment of the lower court and instructed it to take into account the unpublished judgment of the Constitutional Tribunal of 28th June 2016 in case SK 31/14.[30]

The defensive aspect aside, emergency judicial review also plays an important mobilizing role. It can act as a catalyst for pro-democracy initiatives, bringing a sense of vindication and recognition to those who oppose mainstream anti-democratic politics of resentment, and who demand a return to respecting democratic values. "Calling a spade a spade" by the judiciary would provide a crucial focal point for societal resistance. A judicial pronouncement in defense of the constitutional order would transform into a symbolic point of reference as a source of loyalty to oppressed constitutional values.[31] Clarity about the institutional state

30 The Judgment (in Polish) is available at: < https://www.senat.gov.pl/gfx/senat/userfiles/_public/k9/dokumenty/trybunal/2017/sk_31_14.pdf >.

31 See T. Ginsburg, *The Politics of Courts in Democratization. Four Junctures in Asia*, in: *Consequential Courts: Judicial Roles in Global Perspective*, ed. D. Kapiszewski, G. Silverstein, R.A. Kagan, Cambridge 2013, p. 48: "Only when there is agreement on what constitutes a violation and mutual expectations that citizens will in fact enforce the rules will democracy emerge

of play and constitutional interpretation will focus resistance and move it forward. As a result, the relevant question today is no longer whether such a review is warranted, but rather whether ordinary judges are willing to accept their new role and whether judicial empowerment will trickle down to the lower courts. If there is one lesson to be learned from the landmark US Supreme Court case of *Marbury*,[32] it is the "principle [that is] supposed to be essential to all written constitutions, that a law repugnant to the Constitution is void and it is the duty of the judges to say what the law is." If Polish courts embrace and internalize this message, then constitutional recapture of the rule of law will at least be given a chance as it hangs on how judges will respond. As of this writing, nobody really knows this. Only time will tell. One fact, however, is beyond doubt: Polish judges are faced with the most fundamental challenge they have seen in the post-1989:[33] survival of the constitutional legal order and their own judicial legitimacy.[34]

5. Emergency judicial review and judicial self – defense

Law has two faces: textual and contextual. The former is built and developed through various mechanisms at the level of regulation (law on books), while the former is more flimsy and difficult to pinpoint. It is about culture

and be sustained […] in some limited conditions, court decisions can survive as focal points in helping citizens coordinate, and force the autocracy to liberalize […] a court decision can provide clarity as to what constitutes a violation of the rules by the government. Lacking an authoritative pronouncement, regime opponents might disagree about whether a violation occurred and may thus fail to coordinate to enforce the rules […]." See also text at note 41, *infra*.

32 Full text is available at: < https://www.law.cornell.edu/supremecourt/text/5/137 >.

33 I am well aware that my plea for the emergency judicial review hangs in the balance with the now pending case in the Court of Justice. In the case the Commission alleges that the capture of the judiciary in Poland calls into question whether the requirement of the independence is satisfied with regard to the whole of the judiciary. The unprecedented capture of the courts might indeed lead the Court to set aside the principle of mutual trust and stop recognizing Polish courts as courts within the meaning of EU law. See D. Kochenov, L. Pech, K.L. Scheppele, *The European…* On the other hand, one might argue that the Court should proceed with extreme caution here and that the analysis should be made on a case-by-case basis, rather than *in abstracto*.

34 For other doubts see T.T. Koncewicz, *In Judges We Trust? A Long Overdue Paradigm Shift within the Polish Judiciary*, part I: < https://verfassungsblog.de/in-judges-we-trust-a-long-overdue-paradigm-shift-within-the-polish-judiciary-part-i >; part II: < https://verfassungsblog.de/in-judges-we-trust-a-long-overdue-paradigm-shift-within-the-polish-judiciary-part-ii >.

and fidelity to the values that underpin law on the books. The former might be changed overnight, while the latter is based on a long-term vision, not only to build a state governed by laws, but more importantly to sustain it long-term. Importantly, both faces form part of the same narrative: rule of law and our trust in the transformative power of the law. For our faith to be rooted beyond the "here and now," and to make a constitutional document resistant to the changing fortunes of law in the books, though, law must never stray too far away from culture and fidelity to make a constitutional document resistant to the changing fortunes of law on the books. Fears of conflict between ordinary judges and constitutional courts[35] are premised on a well-functioning system of judicial review in which the constitutional court, as mandated by the Constitution, effectively wields its power of judicial review. This changes when review is debilitated and the court emasculated. This is an important caveat in my analysis, as emergency judicial review is always the second-best scenario in light of the disablement of judicial review and the marginalization of the constitution.[36] In extraordinary times of unconstitutional capture, beggars cannot be choosers. The institution is given a shield to protect against the attentions of another body, or is given a sword it can use to repel or deter an attack.[37] Self-defense mechanisms are created in order to protect the institution but that is not their only purpose. While being used against another body, they might also contribute to betterment of the constitutional system. That is, they are not only reactionary, but also productive.

Emergency judicial review is indeed a self-defense mechanism against concerted attack by the government on the integrity of the legal system and existing checks and balances. Some argue that ordinary courts do not have the competence to wield constitutional review and that such competence has not been conferred onto them by the drafters of the foundational legal document. However, as Barber argues, "If the capacity

35 See N. Dorsen, M. Rosenfeld, S. Baer, A. Sajo, *Comparative Constitutionalism. Cases and Materials*, St. Paul 2003, p. 381.

36 On this see M. Wyrzykowski (*Bypassing…*, p. 175), who, in the case of Poland, rightly speaks of "changing the constitutional order outside the constitution."

37 See N.W. Barber, *Self-Defence for the Institutions*, "Cambridge Law Journal" 2013, No. 72, p. 558–577.

it confers is attractive, the mechanism may be said to have this [protective – T.T.K.] function, even if it may not have been created for this purpose."[38] He goes on to say:

> […] whilst the conferral of the capacity was not a psychological reason for the mechanism's creation – it was not a reason in the mind of the creators – it remains a justificatory reason that supports the existence of the mechanism – a reason for us to want the mechanism to remain part of the constitutional order.[39]

This is exactly the case for emergency judicial review I am espousing here.

The purpose of emergency judicial review is to defend the separation of powers, and more broadly, the integrity of the constitutional system. It is attractive because it might be effective when all other mechanisms have failed and/or have been disabled by the majority as part of the unconstitutional capture. With emergency review, the courts do not use capacities that run contrary to the Constitution. Rather, they take advantage of implicit empowerments contained in the constitutional text that never closed the door definitively on the competence of the ordinary courts to exercise such review powers. The granting of exceptional powers based on a reading of implicit empowerments in the constitutional document is informed by the self-defense rationale. The latter provides justificatory reason for such a reading of the constitution. Self-defense becomes part of the judicial mandate. Resort to self-defense is not predicated on the self-aggrandizement of courts (even though it might lead incidentally to growth of judicial power across the board) but first and foremost aims at preventing the constitutional system from disintegration. Barber argues that there is always a cost for the body against which the powers of self-defense are exercised, but also a cost for the body that wields the powers of self-defense mechanism and the end result is that "where one institution acts against another, the whole constitution works less smoothly."[40] Yet the situation is different with emergency judicial review

38 N.W. Barber, *Self-Defence*…, p. 559.

39 N.W. Barber, *Self-Defence*…, p. 560.

40 N.W. Barber, *Self-Defence*…, p. 563–564.

as an instance of the self-defense mechanism. The Constitution and its ordinary mechanisms had already stopped working under the pressure of incessant unconstitutional capture. Self-defense by the courts now aims at restoring some equilibrium. The price that comes with resorting to self-defense is endangerment of the judicial branch as a whole, as the risk is that the parliamentary majority behind unconstitutional capture might feel threatened and may decide to strike back and intensify its attempts at total capture. The Constitution read as a whole produces a self-defense mechanism in the form of emergency judicial review to save those constitutional essentials that are yet to be captured. Emergency judicial review as a self-defense mechanism is instrumental in that it is reconstructed with one aim and one aim only: to protect the separation of powers from falling into oblivion and to maintain the minimum effectiveness of the Constitution. Emergency review as a self-defense mechanism is not meant to inhibit the functioning of the constitution: quite the contrary.

Emergency judicial review is employed at the service of the separation of powers, and, more broadly, survival of the constitution as the supreme law of the land. One branch of government (the courts) not only protects itself against the executive and legislative, but in so doing it restores constitutional integrity. With emergency judicial review in operation, the constitutional landscape and the separation of powers themselves are reshuffled and will never be the same. The courts will either survive, strengthened by newly-claimed judicial review (a 'new' separation of powers will emerge), or fall in the process together with the separation of powers and the Constitution they set out to defend. In either case the contours of the separation of powers will shift considerably as one branch (the courts) might be vindicated or marginalized and swept aside by capture completed by the two remaining branches (the executive and the legislature) behind the capture. Importantly, though, a court wielding emergency judicial review sends important signals to the public as:

> […] (judicial) decision can frame the issue and crystallize it in the public imagination, as well as provide persuasive evidence for agreement among citizens. By creating common knowledge that a violation

> of the rules has in fact occurred, a court decision can help citizens overcome the collective- action problem.[41]

It is unclear whether the drafters of the constitution designed the system with an emergency review in mind. Certainly, unconstitutional capture of the kind that has been engulfing the Polish constitutional system was not their main concern. They might even not have anticipated that things might get out of hand so badly and so quickly. Yet their state of mind at the time of drafting must not be conclusive in our attempt to build a case for judicial review by the ordinary courts. What matters is, first, whether the constitutional text contains enough arguments to make a plausible case for such a review, and second, what function the review would serve.

6. The next step: What about judges?

The fascinating problem of judicial resistance has been in vogue recently.[42] Yet resistance by judges described in this paper takes on a special meaning when the discussion turns not simply on laws that are unjust, but rather on laws that strike at the very core of a democratic state governed by the rule of law. These are laws whose very democratic pedigree could be questioned. Such laws are "wicked"[43] in a systemic sense. We must also ask, then, what happens to judges, faced with laws that undermine the democratic credentials of the state?

Disagreement between the branches of government are nothing extraordinary. Quite the contrary: they make the system move forward. As argued by A. Barak:

> Tension between the courts and the other branches is natural and […] also desirable […]. The legislative viewpoint is political; the judicial viewpoint is a legal one. Other branches seek to attain efficiency; the courts seek to attain legality. The different viewpoints, the need to give explanations to the court and the existing danger – which at

41 T. Ginsburg, *The Politics…*, p. 48.

42 See D.E. Edlin, *Judges and Unjust Laws. Common Law Constitutionalism and the Foundations of Judicial Review*, Ann Arbor 2010; H.P. Graver, *Judges against Justice: On Judges when the Rule of Law Is under Attack*, Berlin, Heidelberg 2015.

43 See T.R.S. Allan, *Justice and Integrity: The Paradox of Wicked Laws*, "Oxford Journal of Legal Studies" 2009, No. 29, p. 705–728.

> times is realized – that an executive action is not proper, and the courts will determine is as such, create a constant tension between the courts and the other branches.

He continues, on a more somber note:

> Matters begin to deteriorate, however, when the criticism is transformed into an unbridled attack. Public confidence in the courts may be harmed, and the checks and balances that characterize the separation of powers may be undermined. When such attacks affect the composition or jurisdiction of the court, the crisis point is reached. This condition may signal the beginning of the end of democracy. What should judges do when they find themselves in this tension? Not much. They must remain faithful to their judicial approach; they should realize their outlook on the judicial role. They must be aware of this tension but not give in to it. Indeed, every judge learns, over the years, to live with this tension.[44]

Emergency constitutional review does not respond simply to legal change[45] or to tension between the branches. It staves off systemic revolution brought about by unconstitutional capture of institutions and concepts. As such it is an instance of judicial meta-resistance. The defense of constitutional integrity and values is more important than the protection of separation of powers. The latter should be understood as instrumental for the realization of the former, and when necessary, adapted to the exigencies of the times. Otherwise, separation of powers would be flouted at will by the majority with the argument that such actions are justified within the classical separation of powers (parliament legislates, the executive implements, judges apply the law). Should we agree with this narrative, we would in fact be allowing the enemies of democracy to dictate their skewed understanding of the separation of powers. This doctrine has always had at its core prevention of unfettered discretion, and to this end, it must be as much about separation, as it is about checks and balances.

44 A. Barak, *The Judge in a Democracy*, Princeton 2006, p. 216–217.

45 M. Tokson, *Judicial Resistance and Legal Change*, "The University of Chicago Law Review" 2015, No. 82 (2), p. 901–973.

Aharon Barak adds:

> […] The response to an incorrect judgment is not to abandon communication and break the rules of the game but to use the existing relationship to create a situation in which the result of the mistake will be corrected. Breaking the rules of the game crosses the red line, and is likely to take on many forms: wild and unrestrained criticism of the judgment, attacks on the very legitimacy of the judicial decision, recommendations […] to narrow the scope of the courts' jurisdiction, threats to create new courts in order to overcome undesirable judgments, attempts to increase the political influence on judicial appointments and promotions, calling for prosecution of judges […], demands to terminate judicial appointments […] All these lead, in the end, to the breakdown of the relationship. This is the beginning of the end of democracy.[46]

We have seen all this and more unravel in Poland. What has not been seen so far is a judicial response to this onslaught, one that would be in line with the judicial oath to uphold the law and defend the Constitution. Emergency judicial review and constitutional recapture are but expressions of judicial faithfulness to the constitutional document and translate judges' commitment to the legal order into daily controversies. Through emergency judicial review that shields the constitutional legal system against disintegration, judges express their loyalty to the values and principles underlying the constitutional document. As such, emergency judicial review is not contrary to or outside of the separation of powers. Rather, it must be seen as forming part and parcel of the separation of powers and should inform judges' actions in times when not everything is going according to the script and red lines are being crossed as a matter of routine.

Again, as we try to move on, where are the judges in all this? Two options are possible here. On the one hand, a judge may always continue business as usual and keep to the traditional role of:

> […] an operator of a machine designed and built by legislators. His function [would be] a mechanical one […] the civil law judge is not a culture hero or a father figure, as he often is with us. His

46 A. Barak, *The Judge*…, p. 239–241.

> image is that of a civil servant who performs important but essentially uncreative functions.[47]

However, when our constitutional world comes crashing down, this comfortable *non-possumus* must be rejected out of hand.[48] Instead, the argument built here aimed at making a case for a more engaged judiciary, one that is ready to leave the comfort zone of a rule-book conception of the rule of law,[49] respond to constitutional exigency and fight back in the name of the constitutional document. When the constitution is disregarded and the court responsible for overseeing the separation of powers is ridiculed and destroyed, judges face their ultimate test of belonging and fidelity, or, as A. Barak points out:

> [H]e (the judge) should remain loyal to the democratic system and to society, continue to honour the legislative branch, and work toward the realization of the judicial role. The judge must guard the part of the relationship that remains. The judge must be aware of what is going on around him. The judge must not surrender to the ill winds. […] At the foundation of this approach is the basic view that the court does not fight for its own power. The efforts of the court should be directed toward protecting the constitution and its values.[50]

Judges face all of this while always staying within the four corners of the separation of powers and democracy and… in defense of it. The elegant and lofty "protecting the constitution and its values" from Barak is the key phrase for our analysis and defines the gist of the judicial promise.[51] It provides the ultimate logic behind judicial resistance and constitutional recapture, a logic that fundamentally transforms the separation

47 J.H. Merryman, *The Civil Law Tradition. An Introduction to the Legal Systems of Western Europe and Latin America*, Stanford 1969, p. 38.

48 T.T. Koncewicz, *The Court Is Dead, Long Live the Courts? On Judicial Review in Poland in 2017 and "Judicial Space" beyond*, < https://verfassungsblog.de/the-court-is-dead-long-live-the-courts-on-judicial-review-in-poland-in-2017-and-judicial-space-beyond >.

49 For the formal 'rule-book' and more justice-driven 'rights' conceptions of the rule of law, see R. Dworkin, *Political Judges and the Rule of Law*, London 1980; R. Dworkin, *A Matter of Principle*, Cambridge 1985, p. 11–12.

50 A. Barak, *The Judge…*, p. 240.

51 See A. Garapon, *Le Gardien des promesses Justice et démocratie*, Paris 1996.

of powers and its contours, in times when new authoritarians would love to see separation of powers disappear altogether. For the doctrine itself and its survival, the stakes could not be higher: either rely on the self-defense mechanisms of the legal system and hope for its capacity to persevere, evolve and strike back **or** give in and risk total constitutional oblivion.

7. Challenge of going beyond lawyers' heads

Finally. What about us, lawyers, and the academia?

There is more general lesson to be learnt from the Polish constitutional debacle. With constitutional essentials of our respective legal systems on the line, lawyers (not only constitutionalists) must change and adapt their vocabulary and conceptual arsenal in order to better prepare for constitutional times when, more often than not, things do not go according to the script. There is important work to be done in the civic sphere and every one of us has his own role to play. We must start translating a constitution for our fellow citizens in the spirit of greater inclusion so as to make it their constitution.[52] We must help building constitutional culture that will strengthen the constitutional law and individual fidelities to the founding document. Sometimes stopping by and taking issue with the popular paranoid slogans of how the mythical "they" steal from us, how my misfortunes are the result of world-wide conspiracies, how Germans plot against Poland *etc*., will provide the critical voice and counter-narrative of common sense, reason and honest defence that our liberal democracy needs today. Saying nothing equals throwing in the towel and invites all these paranoias in our public discourse.

Summary

The paper asks when is a constitutional design of any (domestic, international, supranational) polity in error? On the most general level such critical juncture obtains when polity's founding document (treaty, convention, constitution) protects against the dangers that no longer exist or does not protect

52 See T.T. Koncewicz, *"A Good Constitution" and the Habits of Heart*, "Verfassungsblog" 30th December 2017, < http://verfassungsblog.de/a-good-constitution-and-the-habits-of-heart >.

against the dangers that were not contemplated by the Founders. The paper asks the question whether whether the capture of state institutions in Poland (and Hungary before it) is an outlying case, or if it portends the future of Europe more generally. Whatever the case, Poland matters, and more than for just the Poles. The case illuminates salient features and fissures in the bases for democratic government, the rule of law, and constitutionalism when confronted with the sweeping politics of resentment. Courts play a pivotal role in the process because of their supervisory functions and the embedded low-profile and arcane language of the law. There is always a *bona fide* assumption that law will speak louder than any transient urges of the powers that be and that in the end the law will enforce its primacy. That assumption might be correct in the best of times when everything goes according to plan. When it does not, courts look fragile and vulnerable, as the only protective tool they wield – 'the law' – is taken away from them by the sheer power of political sleight of hand. The question then arises as to whether political exigencies could bring about self-re-imagination on the part of the courts so as to make them protectors of constitutional essentials in such emergency situations. In other words, could capture of the state and institutions be countered by judicial recapture? The Polish example is instructive here and shows how existing mechanisms open important legal avenues to strike back at capture. Yet embarking on any such recapture must be linked not only to the normative and technical (here the question would be: "Does the system contain enough to build a good legal case for exercising such powers?"), but also to the mental (here we would ask the uneasy question "Are judges willing and ready to use these mechanisms to protect democracy?"). The paper will argue that even a symbolic act of resistance in pursuit of a judicial promise is crucial. It builds institutional memory and a legacy that goes beyond disappointment and failure 'here and now.' For the system to regain its liberal credentials, the courts and the public must have something tangible to fall back on. Such act of resistance serves as an example of 'symbolic jurisprudence' because it reminds us that survival of the system must be anchored in a long-term fidelity, which goes beyond and transcends the events of here and now.

Keywords: courts, judicial review, politics of resentment, constitutional capture and recapture, institutional self, defence, constitutional essentials, judicial resistance, constitutional fidelity

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Marek Zubik

A.D. 2015/2016. *Anni horribili* of the Constitutional Tribunal in Poland*

1. The year 2016 marks the 30th anniversary of issuing the very first ruling of the Constitutional Tribunal of Poland. It is supposed to be a significant occasion to celebrate, to be proud of its legacy. After all, it paid a prominent role in creating the foundations of the state of law. However, the recent changes give us rather a handful of doubts. I guess they give us the reasons not to celebrate, but rather to be worried about the future of the Tribunal as an independent body.

The case of the crisis revolving around the Polish Tribunal is most likely familiar to the international public opinion, either from the opinion of the Venice Commission of 11th March 2016[1] or just from the media.[2] Many lawyers[3] and politicians comment on the crisis,[4] trying to explain

* The text is a revised version of a paper given during the 1st Congress of the Association of Constitutional Justice, Chişinău, Moldova, 30th June 2016, Kishiniev. The text is also posted on the website of the Moldovan Constitutional Court: < http://www.bbcj.eu/d-2015-2016-anni-horribili-constitutional-tribunal-poland >.

1 *Opinion on the Amendments to the Act of 25th June 2015 on Constitutional Tribunal of Poland*, < http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2016)001-e >.

2 For example: *Poland's Constitutional Crisis*, "The New York Times" 18th March 2016, < http://www.nytimes.com/2016/03/18/opinion/polands-constitutional-crisis.html >.

3 For example: E. Łętowska, A. Wiewiórska-Domagalska, *A "Good" Change in the Polish Constitutional Tribunal*, "Ostreuropa-Recht" 2016, No. 1, p. 79–93, < https://www.bwv-verlag.de/digibib/bwv/apply/viewpdf/opus/200638/contribution/6064 >. See also: T.T. Koncewicz, *Farewell to the Polish Constitutional Tribunal*, < http://verfassungsblog.de/farewell-to-the-polish-constitutional-court >.

4 For example: *Remarks by President Obama and President Duda of Poland after Bilateral Meeting*, Warsaw, 8th July 2016, < https://www.whitehouse.gov/the-press-office/2016/07/08/remarks-president-obama-and-president-duda-poland-after-bilateral >; or E. Trudeau, U.S. Department

it, find the guilty or proposing solutions. Furthermore, on 13th January 2016, the European Commission held a first indicative debate in order to assess the situation in Poland. The Commission decided to examine the situation under the Rule of Law Framework which provides guidance for a dialogue between the European Commission and a Member State aimed at preventing escalation of systemic threats to the rule of law.

In this presentation I should like to refer to the text of the Polish Prof. Boguslaw Banaszak, the lawyer who generally supported the new political decision of the majority in Poland and whose text has been published on the website of our host, the Constitutional Court of Moldova.[5]

2. Let me remind you just of few of the major circumstances. The year 2015 – the most exceptional year in the history of the Tribunal – was the beginning of the crisis. A lot of different events has led us to the current situation.

Firstly, it was the year in which the terms of 5 (out of 15) judges came to an end – of 3 of them during the 7th term of the first chamber of Polish parliament (the Sejm), and of 2 of them during the 8th term.

Secondly, based on the new Act on the Constitutional Tribunal of 25th June 2015,[6] the Sejm of the 7th term (which lapsed on 11th November 2015) elected 5 new judges, including those 2 who were supposed to be elected by the Sejm of the 8th term (which started on 12th November 2015).

Thirdly, the results of both the parliamentary and presidential elections[7] brought a significant change to the Polish political scene. The then-ruling Civic Platform party lost, and then-opposition Law and Justice party won both elections – Andrzej Duda became the President, and Law and Justice got the majority of votes in both chambers of the parliament, and was able to form a single-party government.

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of State, "Daily Press Briefing" 22nd July 2016, < https://2009-2017.state.gov/r/pa/prs/dpb/2016/07/260394.htm >.

5 See B. Banaszak, *Constitutional Tribunal of Poland: Changes in the Appointment of Judges (Legal Analysis)*, < http://www.constcourt.md/libview.php?l=en&idc=9&id=741&t=/Media/Publications/Constitutional-Tribunal-of-Poland-changes-in-the-appointment-of-judges-legal-analysis >.

6 The Act of 25th June 2015 on the Constitutional Tribunal, Dziennik Ustaw (Official Journal of Laws of the Republic of Poland, hereinafter referred to as: "Dz.U.") 2016, item 293, consolidated text, as amended.

7 The presidential elections were held in two rounds: the 1st round on 10th May and the 2nd round on 24th May 2015. The parliamentary elections were held on 25th October 2015.

Fourthly, the newly-elected Sejm decided that the election of all of the 5 judges of the Tribunal made by the 7th Sejm was invalid, so the new MPs elected another 5 judges.

3. The new President of the Republic of Poland, Andrzej Duda, claimed his refrain from administering the oath to those 5 new judges (while administering the oath to the later 5 judges chosen by the 8th term of the Sejm). It raised new questions about the definition of the mandate of the judge, as well as the impact of the President on the process of appointment. The misunderstanding arisen leads to endangering the independence of the judges and even of the Tribunal. The main problem is whether or not the candidate elected by the Sejm is already a judge.

Prof. Banaszak, as well as the parliamentary majority, claims that such a person is just 'a person appointed.' These words are known from the Act on the Constitutional Tribunal, not from the Constitution.[8] I can certainly agree with Prof. Banaszak about the wording awareness of the rational lawgiver, however, the lawgiver should have in mind the content of the constitutional provisions, as well as the fact of the supremacy of the Constitution. The Tribunal stated in its ruling of 3rd December 2015 in case K 34/15[9] – in which I was the judge rapporteur – that even if a judge has not started his term of office, he is a judge, not just 'a person appointed.' The Constitution in its Article 194 § 1 provides that: 'The Constitutional Tribunal shall be composed of 15 judges chosen individually by the Sejm […],' calling such a person directly a judge. The only body mentioned in the provision of Constitution as participating in the process of the appointment is only the Sejm. The President of Poland is not even mentioned there, as his participation results only from the Act on the Tribunal, where he is the one administers the oath (before 1997 it was the Speaker of the Sejm who administers the the oath).

This leads us to the next problem: whether or not the President could refrain from administering the oath to the newly-elected, but already judges. The Tribunal in the said ruling No. K 34/15 named it an obligation

8 The Constitution of the Republic of Poland of 2nd April 1997, Dz.U. 1997, No. 78, item 483, as amended; hereinafter referred to as: "Constitution."

9 < http://trybunal.gov.pl/en/hearings/judgments/art/8748-ustawa-o-trybunale-konstytucyjnym >.

of the President to administer the oath to an elected judge. Despite that, Prof Banaszak recognizes the possibility for the President to refrain from fulfilling this obligation. His concept is based on the case of the judge elected in December 2006, against whom the doubts arose. President Duda had been an Undersecretary of State in the Chancellery of President Kaczyński, who – on the contrary – finally administered the oath. While doing this, President Kaczyński stated that – according to the Constitution – he had to do this and there was no other solution.[10] It makes the argument irrelevant and the alleged precedent unsuitable to the current situation.

Besides, the Tribunal has specifically stated that the 'delay […] may not be justified only by an allegation that the legal basis of the judicial election is defective.'[11] If the President had any doubts about such legal basis, he should have challenged it before the Tribunal. He could have done it from 6th August – his first day of term as the President of Poland.

However, the head of the press department in Chancellery of the President literally stated that the President, as I mentioned before, would not administer the oath to the 5 judges elected in October.[12] The President had no doubt about the appointments of the judges elected on 2nd December and – during the night of 3rd December – administered the oath. It happened just hours before the issuing of the K 34/15 judgment. The President – as well as the parliamentary majority – considered the conflict to be solved, claiming that the another appointment eliminated the problem.

4. The Tribunal in the judgment K 34/15 ruled that the provisions – in the context of enabling the 7th Sejm to elect two additional judges – were inconsistent with the Constitution, and in the context of the remaining three judges – consistent with the supreme act. Prof. Banaszak fairly emphasize that the Tribunal did not analyse the appointments themselves, but the norms that allowed the 7th Sejm to do so. It is right, although there

10 See B. Wróblewski, *Sędzia Bagińska reaktywacja?*, < http://wyborcza.pl/1,75398,6100636,Sedzia_Baginska_reaktywacja_.html?disableRedirects=true >.

11 Judgment of the Constitutional Tribunal of 3rd December 2015, K 34/15, pt 8.5.2.

12 See *Magierowski: prezydent nie przyjmie ślubowania od sędziów TK wybranych przez poprzedni parlament*, < http://www.polsatnews.pl/wiadomosc/2015-12-08/magierowski-prezydent-nie-przyjmie-slubowania-od-sedziow-tk-wybranych-przez-poprzedni-parlament >.

is clearly a problem with understanding the outcome of what the Tribunal ruled. By ruling that these norms were – with reference to the two judges – inconsistent with the Constitution, while the others were consistent, the Tribunal, in fact, deprived the appointment of the two judges made by the 7th Sejm its legal basis. Following that, it must be admitted that even though the Tribunal was, indeed, not competent to rule whether the appointment itself was correct, it indirectly did so. Therefore, the Sejm of the 8th term was supposed to appoint only 2 judges, as the Tribunal in fact considered the basis for the appointment of the three judges made by the 7th Sejm correct. This is the reason why the President of the Tribunal allowed only 2 judges chosen by the 8th term of the Sejm to adjudicate. Those were the 2 judges whose terms was set to start on the 3rd and 8th December 2016, respectively.

5. The turn of the year did not bring any solution, but even more complications instead. The MPs of the majority submitted the bill with the amendments to the Act on the Tribunal. It was enacted on 22nd December 2016. A group of MPs of three oppositional parties, as well as the First President of the Supreme Court, the Ombudsman and the National Council of the Judiciary challenged the Act before the Constitutional Tribunal. The judgment in case K 47/15 was held on 9th March 2015 and was another milestone in the deepening crisis.[13]

The Tribunal ruled the December amendments were inconsistent with the Constitution.

6. The spokesman of the Government said: 'the Government of the Republic of Poland cannot publish this statement of some of the judges of the Tribunal, which is not based on law.'[14]

The refusal of publishing the judgment is the infringement of the obligation of the Prime Minister under the Article 190 of the Constitution. Despite the commencing of tort, the decision of the PM started the most dangerous problem that could have ever happen to the state

13 Judgment of the Constitutional Tribunal of 9th March 2015, K 47/15, < http://trybunal.gov.pl/en/hearings/judgments/art/8859-nowelizacja-ustawy-o-trybunale-konstytucyjnym >.

14 *Protests as Poland Rejects Top Court's Ruling*, < http://www.dw.com/en/protests-as-poland-rejects-top-court-ruling/a-19113165 >.

of law – the two parallel legal systems. Some courts, bodies and institutions – those independent from the Government – declare that they will apply the not-published judgments. The Government and all its institutions *etc.* refuse to recognize them. Some representatives even called the next judgments of the Tribunal as 'opinions made at the meeting with coffee and cookies.'

7. Right after the opinion of the Venice Commission was released, the Government decided not to extend the term of office of the members of the Venice Commission, Hanna Suchocka and Krzysztof Drzewiecki.[15] Instead, the Government appointed new Polish representatives – Prof. Banaszak,[16] whose text I commented on earlier, and Prof. Mariusz Muszyński, one of the judges appointed in December 2015 by the current majority (one of those appointed by the current majority for the post already occupied, as the Tribunal stated). The latter did even his own remarks on the opinion of the Venice Commission. He described it as 'full of scandalous mistakes, invalid simplifications and manipulations,' stating that it is not suitable to apply and concluding that it proves only the lack of knowledge about Polish law.[17]

8. The crisis is not only of the political or legal character, but it was backed by the opponents of the Tribunal with their PR actions, which aim is to malign the Tribunal. Let me begin with the fact that the Tribunal is being called 'the body of the party,' 'the part of the post-communist chains,' which comes along with the statements on the lack of pluralism in the institution, as well as the alleged political nature of the judges.

15 See *Polish Members of the Venice Commission to Be Replaced*, < http://www.thenews.pl/1/10/Artykul/248439,Polish-members-of-Venice-Commission-to-be-replaced >.

16 On 20th April 2016 Prof. Banaszak was also appointed the member of the Legislative Council, the body advisory to the Prime Minister.

17 See M. Muszyński, *Krótka analiza opinii Komisji Weneckiej z 11 marca 2016 r. dotyczącej Trybunału Konstytucyjnego dla pana Andrzeja Rzeplińskiego, Prezesa TK*, attached to: S. Janecki, *Prof. Mariusz Muszyński, sędzia TK i przedstawiciel Polski w Komisji Weneckiej, miażdży jej opinię*, < http://wpolityce.pl/polityka/295429-nasz-news-prof-mariusz-muszynski-sedzia-tk-i-przedstawiciel-polski-w-komisji-weneckiej-miazdzy-jej-opinie >. See also M. Muszyński, *Analiza opinii Komisji Weneckiej z 11 marca 2016 r.*, "Prawo i Więź" ("Law & Social Bonds") 2016, No. 1, p. 45–61.

The Government supporters very often name the Tribunal 'the work of Jaruzelski,'[18] aiming to show its supposed communist history.

There happened to be many personal attacks as well. The main aim of the attackers was the President of the Tribunal, who was being blamed for not achieving any consensual solution to the crisis, and was being presented as the main problem of the crisis. The end of his term was considered to be the possible end of the crisis.

The Tribunal was now also being ignored by the other two powers. Their representatives did not show up at the hearings in the Tribunal, even though they have the obligation to do so, and sometimes their presence would be useful. Their motions, opinions and other files, submitted earlier, had been withdrawn.

All of these allegations and actions were aimed to discredit the Tribunal and justify the actions of the Government as the necessary measures taken in order to heal the state.

9. At the beginning of July 2016, the Polish parliament has enacted completely new Act on the Constitutional Tribunal, that is supposed to solve the problem, according to the Government. However, the first glimpse gives an utterly different feeling. So thinks the European Commission,[19] taking the second stage of the precedent 'rule of law' procedure, issuing the recommendations and stating that the new Act does not focus on solving the most controversial problems.

The new Act on the Constitutional Tribunal will not be any solution at all. Its only function seems to be making the people believe that the Government is ready to bury the hatchet. Nevertheless, it looks obvious that the executive power now aims to gain a broad control of the judicial power.

Take a look at some of the provisions. Even though it is the obligation of the Prime Minister to publish the judgments immediately, the new Act redefines it, providing that the President of the Tribunal submits a motion to the PM. In fact, it gives the Prime Minister the right to refuse the request and the publication at all.

18 Wojciech Jaruzelski (1923–2014) – the communist general and the First Secretary of the Polish Communist Party, who imposed the martial law in 1981.

19 See *Commission recomendation of 27.7.2016 regarding the rule of law in Poland*, < http://ec.europa.eu/justice/effective-justice/files/recommendation-rule-of-law-poland-20160727_en.pdf >.

Despite the fact that among the provisions of this Act there are many more interesting ideas, I would like to draw your attention to the most alarming one, though even the media do not quite talk about it. This Article 89 stipulates that:

> By the 30 days after the Act comes into force, the settlements of the Tribunal made with the infringement of the Act of 25th June 2015 on Constitutional Tribunal shall have been published, except for the decisions concerning the normative acts that have lost its binding force.

This is exceptionally upsetting in a few different dimensions. Firstly, of course, it is fulfilling the demand of the public opinion: the unpublished judgments of the Tribunal will be published. However, not all of them. The Article mentions the exception. At the day of entry into force of the Act of 7th July 2016,[20] 'the normative acts that have lost its binding force' would mean the Act on the Constitutional Tribunal of 25th June 2015 – the one which was the object of control in case K 47/15. That means that at least the judgment K 47/15 will not be published. It was the first one that has not been published yet, and – at the same time – the most important one.

Next, it is a constitutional obligation to publish the judgments, not implied just from the Act. Moreover, nobody knows whether these judgments will be published as rightful ones or just as historical ones. There is also no certainty whether the executive and the legislative will take those finally published judgments as final ones, or what will be their status at all.

According to the Article 190 § 2 of the Constitution, it is the obligation of the Prime Minister to publish the judgments of the Tribunal. Nobody is allowed to control and rule on the validity of the judgments. The new Act misleads about the fact that this Act can be – exceptionally – the basis of the publication of the judgments by the Prime Minister. By this, the Sejm hereby takes the responsibility for not publicising them off the Government, accepting the rhetoric of the latter.

20 16th August 2016. The act was repealed on 20th December 2016 by successive acts regarding the functioning of the Constitutional Tribunal. The provision of a similar meaning as quoted in Art. 89 has been repeated.

The lawgiver interestingly composed the words of this provision. On one hand, he uses the word 'the settlements' – no matter how we translate it, it must be obvious that he consciously avoids using the word 'the judgments' or 'the rulings' – on the contrary, the Constitution itself uses these words. That already undermines the power of these judgments.

The new act describes most of the judgments of 2016 as 'made with the infringement of the Act of 25th June 2015.' Here we have the legislative claiming in the actual legal act that it has the power to decide which of the judgments were made correctly, and which were not. The Act does not define who shall judge on the correctness of the judgments. In the lack of such definition, it will likely be the Government that will do it. It means that the executive power, thanks to the legislative one, will be able to judge on the judgments of an independent judicial power. Though, it seems like the intention of the lawgiver was to claim that every single one of the judgments made before 20th July 2016 was made with the infringement of the Act of 25th June 2015. The ruling regime puts its medial rhetoric against the Tribunal into the words of the legal act. Unprecedented as it is, we all must be aware that not only does it crash the Tribunal, but also turns the tri-partite division of the power and the mechanism of checks-and-balances into a written illusion.

10. All in all, the 30th anniversary of issuing of the first ruling of the Tribunal happens to be the great occasion to perform – unfortunately – a sad reflection on the future of the work of the Tribunal, on its independence and the Tribunal in general. The legislative and executive authorities do not seem to be planning to do anything that could really give hope that the normal functioning of the Tribunal will be restored. Until now, the Government has yet not published all judgments of the Tribunal ruled before 2017. In this context, I feel it is essential to remind that the lawgiver cannot do anything more than what the Constituent Power conferred upon him. The majority cannot do whatever it likes. The current crisis endangers the Tribunal, the judicial power, the mechanism of checks and balances and – eventually – the rule of law. I would really like to – especially since I am the judge of the Tribunal – give you a different conclusion, to tell you that we finally solved this problem, but I cannot.

Moreover, after the exceptionally intense and difficult time in 2015, nothing foreshadows that 2016 will bring any change.

And very last remark. If there is any sense of cooperation between the constitutional courts, it is about support and mutual loyalty. The cooperation of our courts is essential in defence of our own independence and of the principles of the democratic state of law. Therefore, at these challenging times, the constitutional courts of different countries should support one another.[21]

Summary

The article is a polemic with the main theses presented on the website of our host, the Constitutional Court of Moldova. These theses were officially presented, among others, by persons in power in Poland since November 2015, when political decisions were made regarding the Polish Constitutional Court. These actions actually led to undermining the authority of the Tribunal. This happened on the eve of the thirtieth anniversary of the establishment of this body in Poland. The article presents the legal circumstances that took place in 2015 and 2016. It presents the findings of the Constitutional Tribunal, which are most often different than the theses published on the website of the Moldovan Court. This is mainly about the Polish Tribunal clarifying the separation of competences of the Sejm and the President in the case of appointing judges of the Tribunal and the competence of the head of state to take the vow. Finally, the article presents the actions of state organs destroying the Constitutional position of the Tribunal. The text indicates the practice of not announcing the Tribunal's judgments and adopting subsequent acts regarding the functioning of the Tribunal. Attention was also paid to the process of degrading the social authority of the Tribunal, in campaigns conducted in public media.

Keywords: Constitutional Tribunal, independence of judiciary, appointment of judges, constitutional crisis, publication of the judgments, rules of law

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21 I am grateful to my assistant, Adam Oleksy, for helping me prepare this presentation. Of course, all mistakes remain to be entirely mine.

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Zbigniew Witkowski, Maciej Serowaniec

"Political Offenses" against the Nationwide Referendum in Poland*

1. Introduction

After the introduction of the principle of nation's sovereignty in the Constitution of the Republic of Poland[1] it seemed that a nationwide referendum was bound to become an important instrument allowing the expression of opinions and formulation of decisions by the sovereign. In fact, as a form of participation in determining public matters it serves as the immediate expression of the political will allocated to the citizen.[2] However, it needs to be remembered that according to the intentions of the founders of the Constitution the direct democracy institutions should not restrict the dominant position of the parliament, hence in the Constitution a national referendum was attributed a "supplementary character" in relation to the activities of representative organs – the Sejm and the Senate.[3] The above view was also

* This paper is a revised version of an article: Z. Witkowski, M. Serowaniec, *The Role of "Controlled" Referendum in Polish Democracy*, in: *Liberal Constitutionalism: between Individual and Collective Interests*, ed. A. Bień-Kacała, L. Csink, T. Milej, M. Serowaniec, Toruń 2017, p. 145–161, which was presented at the International Society of Public Law (ICON·S) 2017 Conference on "Courts, Power, Public Law" in Copenhagen, 5th–7th July 2017.

1 The Constitution of the Republic of Poland of 2nd April 1997, Dziennik Ustaw (Official Journal of Laws of the Republic of Poland, hereinafter referred to as: "Dz.U.") 1997, No. 78, item 483, as amended, hereinafter referred to as: "Constitution."

2 See more: Z. Witkowski, M. Serowaniec, *The Views of the Polish Political Class on the Institution of a Nationwide Referendum*, "Kultura i Edukacja" 2016, No. 4 (114), p. 165–168.

3 *Cf.* M. Pietrzak, *Demokracja reprezentacyjna i bezpośrednia w Konstytucji RP* [Representative and direct democracy in the Polish Constitution], in: *Referendum konstytucyjne w Polsce* [Constitutional referendum in Poland], ed. M.T. Staszewski, Warszawa 1997, p. 31–32.

shared by the Polish Constitutional Court in point 11.5 of judgment K 11/03 as of 27th May 2003.[4] The Court recognised there that:

> […] the thesis on the supplementary character of direct democracy finds its justification… in the legal character of a referendum from the point of view of the entity entitled to refer to (initiate) the referendum procedure. In the Polish legal system we do not speak of a civil right to a referendum, as the citizen (group of citizens) does not have a legally effective possibility to initiate actions whose immediate result consists in calling a referendum.[5]

The Polish Constitution of 2nd April 1997 provides for holding a referendum in three following cases:

1) in matters of particular importance for the state (Art. 125);
2) in a matter of expressing a consent to the ratification of an international agreement on whose basis Poland will delegate to an international organization or international institution the competence of organs of State authority in relation to certain matters (Art. 90);
3) in a matter of an approval of a law on amending the Constitution, as far as its provisions interfere with the content of Chapter I – 'Commonwealth', II – 'Liberties, rights and obligations of the man and citizen' and XII – 'Amendments to the Constitution' (Art. 235).

In none of the above cases, however, there is an obligation to conduct a referendum, it is always optional and held if an authorised entity files a motion and a proper decision is taken by authorised organs.

The objective of this paper is to discuss the "Political Offenses" against the Nationwide Referendum in matters of particular importance for the state (Art. 125). Such a referendum can be called by the Sejm by an absolute majority of the votes in the presence of at least half of the statutory number of members of the Sejm or by the President of the Republic of Poland with the consent of the Senate expressed by an absolute majority of votes in the presence of at least half of the statutory number of senators. In the first, the Sejm can make a resolution on holding a referendum by an absolute majority of votes. A draft resolution

4 Dz.U. 2003, No. 98, item 904. An identical opinion on this issue is expressed by Prof. M. Jabłoński, *Polskie referendum akcesyjne* [Polish accession referendum], Wrocław 2007, p. 106, fn. 333.

5 M. Jabłoński, *Polskie*…, p. 106.

on the order of a nationwide referendum may be submitted by the Presidium of the Sejm, a Sejm committee or a group of at least 69 deputies. Moreover, a request to order a referendum can be submitted to the Sejm by the Senate, the Council of Ministers, or a group of 500.000 citizens. The popular initiative, however, may not concern such issues as expenditures, incomes, defence capability of the State and amnesty. It is the Sejm duty to examine the submitted request, however, ordering a referendum is left to the recognition of the chamber. For the second, the decision to hold a referendum can be made by the President. Such a decision must be approved by the Senate by an absolute majority of votes. The Senate should take the appropriate resolution within 14-days of the date of submission of the draft provisions of head of state.[6] At the same time it should be noted that it is the President who determines the entire content of an ordinance to conduct a referendum, thus he decides which matters are of particular significance for the state, formulates the questions and indicates the date thereof, whereas the role of the Senate is limited to issuing a consent, *i.e.* passing a resolution that allows or rejects a referendum in the date and form defined by the President. ln this way, the Polish Constitution precludes the Head of State from holding a referendum without the consent of the Parliament. Such solution remains in accordance with the rationalised parliamentary system, which operates on the basis of the Constitution 1997.

2. The role of nationwide referendum in Polish democracy

The conclusions that can be drawn from the current practice of use of the institution of referendum in Poland are also not optimistic. From the very beginning of the implementation of this institution in the Polish legal system it was accompanied by political horse-trading. The members of the of the Constitutional Committee of the National Assembly challenged the importance of the institution of referendum by raising the argument that it created the premises for the establishment of "a permanent referendal republic" thus providing "a very dangerous window for numerous initiatives that would create divisions in the society and burden

6 *Cf.* K. Prokop, *Polish Constitutional Law*, Białystok 2011, p. 80–81.

the state's budget," which was seconded by some of the representatives of science of law.[7] It was prophesied that instead of strengthening the democratic legitimacy of a new state a referendum would act as a convenient form of exerting constitutional pressure on the Sejm and create cycles of tensions that would destabilise the state should the motions for a referendum be rejected by the Sejm. The final resolution concerning the institution of a referendum in the Constitution of 1997 clearly showed that within the members of the National Assembly passing the Constitution the dominant conviction was that the sovereign, and thus the totality of citizens, are not only not "fully prepared for personal and direct governance" but, moreover, that the faint political culture of the sovereign means that he should not be provided by the basic law with the real possibility to influence the initiation of procedures that could result in participation in shaping the most important state decisions that concern him (the sovereign). It was recognised that such civic participation would lead to destabilisation and threaten the state of law rather than contribute to the development of civic democracy. And this was the principal reason why a nationwide referendum was turned into a merely decorative and secondary element. It should be straightforwardly admitted that the institution of referendum was marginalised in Poland by being assigned the features of a supplemental mechanism for indirect rule or responsible government.[8] Hence, although the adopted nationwide referendum mechanism in Poland fulfils the task of protection against its too frequent and not always justified use, at the same time it does not eliminate the risk of its entirely instrumental *ad hoc* use by currently ruling political majority.[9] However, the worst part is that this way the Polish political class expressed its real negative view on the need to "establish

7 See "Biuletyn Komisji Konstytucyjnej Zgromadzenia Narodowego" [Bulletin of the Constitutional Committee of the National Assembly] 1997, vol. XLIV, p. 151–152. See also M. Rachwał, *Prawo do zarządzania referendum ogólnokrajowego w Polsce w latach 1992–2009. Przyjęte rozwiązania i postulowane zmiany* [The right to call a national referendum in Poland in the years 1992–2009. The adopted solutions and postulated changes], in: *Prawo wyborcze i wyboru. Doświadczenia dwudziestu lat procesów demokratyzacyjnych w Polsce* [The right of vote and election. The experience gained in the twenty years of democratisation processes in Poland], ed. A. Stelmach, Poznań 2010, p. 115–116, 120.

8 *Cf.* on that topic M. Jabłoński, *Polskie…*, p. 105.

9 *Cf.* M. Jabłoński, *Polskie…*, p. 106.

citizens," the necessity to transform citizens into the actual public authority and not merely addressees and subjects/objects of its imperative actions.[10] Moreover, according to the beliefs represented by the majority of politicians the institution of referendum may only be identified with the time-consuming and costly vote of no-confidence referring to actions undertaken by democratically elected representatives. Further, they also emphasised the lack of social recognition in voting, considering the fact that each vote may turn into a sort of a survey and not a substantive determination of a crucial national matter.[11] Simultaneously, attention was paid to the fact that a referendum is not a mechanism allowing for negotiations, thus it does not create the opportunities to foster consensus capable of satisfying the demands of all the stakeholders. On the contrary, it forces opting for a particular solution, which may lead to major societal conflicts. Unfortunately, constant references to the above arguments also prove that the political class does not treat citizens as equal and fully rightful partners in the processes of governance.[12]

The latest nationwide referendum so far took place on 6th September 2015 on the initiative of Bronisław Komorowski, the former President of the Republic of Poland.[13] In this referendum, the citizens were requested to provide answers to three questions concerning: single-mandate electoral districts, political party funding and the principles of settling ambiguous issues in favour of the taxpayer. In a common view, this initiative, on account of the questions posed was treated as an attempt to take over Paweł Kukiz' constituents and ensure reelection. However, less than three months before that time, before the referendum campaign commenced, the majority of Poles (58%) had no awareness of what it would be about. Only 39%

10 *Cf.* D. Dudek, *Konstytucyjna aksjologia wyborów* [Constitutional axiology of elections], in: *Sędziowie kustoszami wyborów* [Iudices electionis custodes], ed. F. Rymarz, Warszawa 2007, p. 47.

11 *Cf.* M. Jabłoński, *Referendum ogólnokrajowe w pracach Komisji Konstytucyjnej Zgromadzenia Narodowego (1993–1997)* [National referendum in the works of the Constitutional Committee of the National Assembly (1993–1997)], "Przegląd Prawa i Administracji" 2002, vol. XLIX, p. 99–118.

12 *Cf.* M. Jabłoński, *Referendum ogólnokrajowe w polskim prawie konstytucyjnym* [National referendum in the Polish constitutional law], Wrocław 2001, p. 135.

13 See the Decision of the President of the republic of Poland of 17th June 2015 on calling a national referendum, Dz.U. 2015, item 852.

of people declared to have knowledge on the issue, with only 17% being able to vouch for their knowledge.[14] As the commentators emphasised, presidential decision 'will not increase the citizens' trust of democracy, but conversely, the citizens will distance themselves from politics, from democracy, and will not feel subjectified.[15] Eventually, the turnout was only 7.8% and has been the lowest of all recorded national elections held in Europe after 1945.[16] The referendum became a symbolic defeat of entire Polish democracy, for which politicians hold responsibility.

Another attempt at an instrumental use of the institution of referendum could be the initiative of the President of the Republic of Poland, Andrzej Duda, by conducting a referendum with regard to changes in the Constitution. According to the President, the Poles should be able to comment on the constitution that has been in force for 20 years and the political system defined in it. Moreover, the President wants the referendum on constitutional changes to be held next year on November 11th or to be extended to two days: November 10th and 11th. The said referendum is to be nationwide and intended as a consultative referendum. The constitutionalist stressed that, according to the rules in force, an outcome of a national referendum may be of a consultative or advisory character when the turnout is less than 50% of those entitled to participate, whereas a higher turnout means that the referendum is binding. Thus, one can ask the following question: what happens if the referendum – meant by the President as consultative, yet conducted in the area of the constitution – is binding? This would mean that the Sejm and the Senate are required to adopt the constitution in concord with the results of the referendum, however in order to adopt amendments to the constitution it is required to obtain two-thirds (votes) in the Sejm and an absolute majority in the Senate. At the moment it seems impossible to achieve such a majority. Thus, what would this commitment of the Sejm and the Senate mean? In political terms, such a referendum makes sense,

14 *Cf.* CBOS survey message No. 89/2015 Referendum – first reactions before the commencement of the campaign, < https://www.cbos.pl/SPISKOM.POL/2015/K_089_15.PDF >.

15 *Cf.* A. Szczęśniak, *Referenda Became a Toy in the Hands of Politicians*, < http://wiadomosci.onet.pl/szczesniak-referenda-staly-sie-zabawka-w-rekach-politykow/kvs33q >.

16 *Cf.* G. Osiecki, M. Potocki, *Referendum przeszło do historii* [Referendum went down in history], "Dziennik Gazeta Prawna" 8th September 2015.

for example, as a challenge to ensure such a majority with regard to constitutional changes in the present and upcoming parliament. On the legal side, with regard to this particular parliament it seems that it would be difficult to enforce the results of the referendum if it were binding. This would mean a commitment that in practice would be difficult to keep. The discussion on the constitution and its possible changes is needed, although to many people these issues are very difficult. Another problem is concerned with a constitutional referendum which is to acknowledge the amendments to the constitution adopted by the parliament. According to the provisions of the constitution such a referendum may – but does not have to – be ordered if the amendments pertain to the provisions stipulated in chapters I, II or XII of the Constitution. These are chapters concerned with the principles defining the political system of the state, freedoms, rights and obligations of persons and citizens, and the procedures for amending the constitution. Indeed, it is clearly visible that the procedure of introducing changes in the constitution was intended for the purpose of correcting the constitution rather than changing it completely. In the situation where the entire constitution is subject to modification, *i.e.* also chapters I, II and XII, the matter of conducting a confirmatory referendum thus becomes more complicated. Therefore a question arises: what should be the object of such a referendum? Should it be chapters I, II and XII exclusively or the entire constitution? It seems that the latter, as what would it mean, for example, if the amendments to the three chapters were rejected (in the referendum)? In such a situation the entire constitution should be submitted to a referendum as a completely new normative act. A confirmatory referendum is not obligatory and if an agreement is reached on the political scene such as referendum is not conducted. However, with current extensive and sharp political disputes, it can be assumed that there will be a will to hold a referendum that is "constitutional by character" to end the procedure of changing the constitution.

As practice shows, the issues that were the subject of voting were not sufficiently recognised by a larger part of the society. From the society's point of view, the referenda did not appear as procedures of direct participation in the process of exercising power but as a call for taking sides or even

granting political support to a particular person or political group. A referendum, on account of the properties of human psyche, has a tendency to turn into a personal plebiscite which aims at building or denying support to a particular politician, or a group of politicians who authored the draft that has been put to vote. The draft and its properties, advantages and disadvantages are of secondary importance. As shown in practice, most frequently it becomes an act of investiture, approval or disapproval of the representatives.

3. "Political offenses" against the nationwide referendum in Poland

A referendum has been and still is commonly treated by the political classes as an element of political struggle between particular parliamentary and extra-parliamentary groups that take advantage of it for their ongoing purposes. Different political hubs attach different expectations to referenda. Some politicians treat them solely as a test of popularity of their own group. Hence, a referendum is oftentimes considered as a test for political elites, which provides more of an indication of what the current distribution of powers on the political scene is, rather than binding solutions on issues that are essential to the state. Referenda have become toys in the hands of politicians who use them as tools in electoral competition and an element of the 'game of power.' The institution of the referendum has thus become another means for running their political campaign on an extended scale, which enables gathering numerous constituents rather than a real procedure that ensures direct exercise of power for the public.[17] It is not uncommon for the political classes to use the institution of a referendum as a tool that ensures political success for the purpose of achieving a particular electoral goal. A further point concerns taking advantage of a referendum to build a position on a political scene by the actors of political life who wish to remind the voters about their existence. This certainly does not build the authority of the institution contributing to a low turnout and its gradual devaluation.

17 *Cf.* Z. Witkowski, *Siedem grzechów głównych polskiej klasy politycznej wobec wyborców, wyborów i prawa wyborczego* [Seven cardinal sins of the Polish political class in relation to their voters and the election law], Toruń 2015, p. 7.

The issue of a cryptic formulation of questions that are the subject of the referendum needs to be addressed. Regardless of their intentionality, such vague and imprecise formulation of questions obliterates the potential effect of the referendum from the start. Political parties try to convert the issue posed at the referendum into a plebiscite around particular people or political orientations that support or contest a given solution. In the experience to date, vague questions, ambiguity, insufficient, substantive and organisational preparation of the voting contribute to a low turn out in a referendum. It thus may be *a priori* assumed that the answers to questions formulated in such a vague manner will not lead to any accurate conclusions. Worse still, the result of such a referendum will do very little in practice, but it will surely become a subject of political disputes between the governing party and the opposition. In such atmosphere the citizens may be dissuaded from taking part in law-making procedures in this form. If the decision-makers assume that social engineering of that kind will help them reach their intended goals, then the referendum will not bring the desired result. If a referendum is to fulfil what is expected of it, then the questions must be formulated with the highest possible degree of precision, as only then the correct interpretation of its results will be possible. Otherwise, it is possible to imagine a situation in which a referendum turns into a plebiscite of popularity and resentment, and not a way of making binding decisions.[18]

The political class loses campaigns for referenda with a systematic precision. The entities that take part in them should demonstrate and explain the benefits and dangers of the proposed solutions to the public. However, political parties in our country are unable to present the advantages of the proposed solutions to an average citizen. Political powers in this country treat referendum campaigns not as debates about a pivotal issue for the state, but as a way of building electorate and mustering up the voters. The studies also show that campaigns that propagate the referendum in mass media have been delivered to the public in a limited manner. It is far from being optimistic to realise that the campaigns prior to the referenda have been a display of demagogy rather than a substantial

18 *Cf.* M. Jabłoński, *Referendum de lege lata i de lege ferenda*, "Przegląd Prawa i Administracji" 1997, vol. XXXIX, p. 84.

and factual debate with arguments. A referendum has thus become a tasty morsel for politicians in their fight to strengthen the position of their parties rather than educate the voters. However, what is even more surprising, the referendum-holding authority, as seen in previous cases, refrains from running an extensive referendum campaign and utilising the dedicated transmission time. In such a situation, the subject of the referendum becomes less important as the main goal of the participation in the referendum campaign is the emphasis of one's own political independence and distinctness. It should come as no surprise that the information campaigns held to date have been shallow in terms of substance, chaotic and focused on political competition. An obvious underlying political context, badly prepared questions and the lack of a real referendum campaign held in media and the largest parties, translate into a very low turnout. Thus, the voters' indifference with regard to the possibility to make decisions about the affairs of the state comes as no surprise. They have lost a sense of any real impact on the actions of the authorities as they have no guarantees that, regardless of the governing political elites, they will make decisions on the affairs that are essential to the state and, most importantly, for themselves.

4. Conclusions

A general reflection on the lost opportunities in terms of the functioning of political institutions due to insufficient professionalism both in the process of shaping appropriate legal measures as well as applying them in practice, remains. In order for a referendum to be able to fulfil its basic functions, certain requirements need to be met. Firstly, the issues that are to be regulated must be clearly and precisely formulated. It must also be preceded by a sufficiently long and thorough campaign, in which the society will have a chance to be confronted with different standpoints. This way it becomes subjectified and at the same time the possibility of any manipulations that political parties may be tempted to inflict is diminished.[19]

19 See M. Rachwał, *Demokracja bezpośrednia w procesie kształtowania społeczeństwa obywatelskiego w Polsce* [Direct democracy in the process of shaping the civil society in Poland], Warszawa 2010, p. 89–90.

Summary

Afer the introduction of the principle of nation sovereignty in the Constitution of the Republic of Poland, it seemed that a nationwide referendum was bound to become an important instrument allowing the expression of opinions and formulation of decisions by the sovereign. The nation is a source of power and may assume the role of an arbitrator in conflict situations between constitutional state organs but also in disputes between the subjects of the political scene, which is reflected in aiming the activities of public authorities according to the will expressed via a referendum. The conclusions that can be drawn from the use of nationwide referendum in Poland are much less optimistic. From the very beginning of its implementation, it was accompanied by political horse-trading. A referendum has been and still is commonly treated by the Polish political classes as an element of political struggle between particular parliamentary and extra-parliamentary groups that take advantage of it for their current purposes. Referenda have become toys in the hands of politicians who use them as tools in electoral competition and an element of the 'game of power.'

Keywords: the principle of nation's sovereignty, nationwide referendum, public authorities, Polish political class

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Radosław Puchta

Constitutional Requirements Regarding the Use of Administrative Sanctions (Remarks with Regard to the Constitutional Tribunal's Rulings)

1. The expansion of regulations that provide for administrative sanctions, primarily monetary penalties, has been recognised and subjected to critical analysis in legal literature.[1] Sanctions used to be imposed in a hardly consistent manner in various laws regulating different branches of the public law, forcing the lawmakers to react. 2017 saw an extensive amendment to the Code of Administrative Procedure, which also included general rules for imposing and meting out administrative monetary penalties.[2] Before the amendment, administrative courts needed to resolve any doubts on their own, including those surrounding the automatic nature of administrative sanctions and their use in conjunction with penal sanctions. These issues were also repeatedly the subject of proceedings before the Constitutional Tribunal, with objections raised against, *inter alia*, a disproportionate reaction of the state against violations of law ("excessive repressiveness") and violation of the *ne bis in idem* principle.

1 See, *e.g.*, D. Szumiło-Kulczycka, *Prawo administracyjno-karne, czy nowa dziedzina prawa?*, "Państwo i Prawo" 2004, Issue 9, p. 3–16.

2 See Section IVa ("Administrative monetary penalties") of the Code of Administrative Procedure of 14th June 1960, Dziennik Ustaw (Official Journal of Laws of the Republic of Poland, hereinafter referred to as: "Dz.U.") 2017, item 1257, and Dz.U. 2018, item 149, consolidated text, as amended (hereinafter referred to as "the Code of Administrative Procedure," "CAP"), introduced pursuant to Art. 1(41) of the Act of 7th April 2017 on the Amendment to the Code of Administrative Procedure and certain other acts, Dz.U. 2017, item 935 (hereinafter referred to as "the Amendment to the Code of Administrative Procedure").

Although the issue of administrative liability has not been directly addressed in the Constitution,[3] it does not mean that it is constitutionally indifferent.[4] Provisions on which decisions of administrative bodies are based and which affect the rights and responsibilities of individuals need to meet constitutional conditions for the permissibility of interference with fundamental rights and freedoms. Every legal regulation is subject to an assessment from the perspective of the fundamental principles of the legal system pertaining to the status of an individual (*i.e.* the principle of dignity, liberty and equality) and the political system (which encompass principles that stem from the democratic state ruled by law clause, including the rule of good law).

The Constitutional Tribunal's rulings have undoubtedly had a considerable impact on legal changes aimed at standardising the rules of using administrative sanctions and reducing their severity.[5] However, the rulings have yet to provide a sufficiently unambiguous answer to all questions that arise from this issue, in particular from the perspective of constitutional requirements; in certain matters, they remain plainly inconsistent.[6]

2. From a constitutional point of view, it is beyond question that the aim of the lawmakers in a state governed by the rule of law is to shape, while complying with constitutional requirements, a legal regulation so as to ensure that objectives established by the lawmakers can be pursued effectively. The effectiveness of law constitutes a condition *sine qua non*

3 The Constitution of the Republic of Poland of 2nd April 1997, Dz.U. 1997, No. 78, item 483, as amended, hereinafter referred to as: "Constitution."

4 See A. Nałęcz, *Sankcje administracyjne w świetle Konstytucji RP*, in: *Sankcje administracyjne. Blaski i cienie*, ed. M. Stahl, R. Lewicka, M. Lewicki, Warszawa 2011, p. 637–645; M. Stahl, *Sankcje administracyjne w orzecznictwie Trybunału Konstytucyjnego*, in: *Instytucje współczesnego prawa administracyjnego. Księga jubileuszowa profesora zw. dra hab. Józefa Filipka*, ed. I. Skrzydło-Niżnik *et al.*, Kraków 2001, p. 651–659; M. Wiącek, *Nakładanie kar administracyjnych w świetle Konstytucji RP*, in: *Wdrożenie ogólne rozporządzenia o ochronie danych osobowych. Aspekty proceduralne*, ed. E. Bielak-Jomaa, U. Góral, Warszawa 2018, p. 123–141; M. Wyrzykowski, M. Ziółkowski, *Sankcje administracyjne w orzecznictwie Trybunału Konstytucyjnego*, in: *System Prawa Administracyjnego. Tom 2. Konstytucyjne podstawy funkcjonowania administracji publicznej*, ed. R. Hauser, Z. Niewiadomski, A. Wróbel, Warszawa 2012, p. 361–378.

5 See M. Stahl, *Sankcje…*, p. 659.

6 See A. Nałęcz, *Sankcje…*, p. 638.

of the rule of law.[7] A regulation that does not ensure the accomplishment of objectives established by the lawmakers violates the rule of good law.[8] Consequently, the lawmakers must take into consideration the risk of an occurrence of unlawful acts and therefore establish legal measures to enable public authorities to enforce the observance of law.[9] Without an appropriate sanction, a regulation becomes a dead letter, and failure to meet an obligation habitual.[10]

By virtue of Article 83, the Constitution explicitly imposes the obligation to comply with Polish law on every person. However, the provision does not determine the nature of measures that may be taken in order to enforce this obligation. The Constitution directly regulates the rules of punishment exclusively with regard to criminal liability (Articles 42–44). It allows for a punitive measure in the form of forfeiture of property in statutory cases and pursuant to a final and binding court ruling (Article 46); deprivation of public rights or suffrage pursuant to a court ruling (Article 62(2)); and, under certain conditions, extradition of a Polish citizen for an offence committed in another country (Article 55). Termination or limitation of parental rights are also allowed in statutory cases and pursuant to a final and binding court judgment (Article 48(2)). The Constitution specifies the conditions for banning political parties and other organisations (Article 13), setting forth the procedure for banning political parties (Article 188(4)). Lastly, it provides for the possibility of prosecution for causing environmental degradation, although it delegates the establishment of specific rules in that regard to the lawmakers (Article 86).

Obviously, the constitutional provisions indicated above must not be interpreted as depriving the lawmakers of the power to use legal sanctions in instances other than set out in those provisions; nor do they imply that the only possible response to a violation of law is criminal prosecution.

7 See, *e.g.*, Judgment of the Constitutional Tribunal (hereinafter referred to as: "CT") of 20th June 2017, P 124/15, OTK ZU-A 2017, item 50, pt III.3.1.

8 See, *e.g.*, Judgment of the CT of 30th November 2011, K 1/10, OTK ZU-A 2011, No. 9, item 99, pt III.2.1.

9 See, *e.g.*, Judgment of the CT of 9th October 2012, P 27/11, OTK ZU-A 2012, No. 9, item 104, pt III.4.

10 See, *e.g.*, Judgment of the CT of 25th March 2010, P 9/08, OTK ZU-A 2010, No. 3, item 26, pt III.4.

The lawmakers may derive their power to establish mechanisms of responding to a violation of law other than those belonging to the areas of criminal law directly from Article 83 in connection with Article 2 of the Constitution. Legal sanctions may therefore assume various forms and various degrees of severity. At the same time, they have to be commensurate with the nature of social or economic relationships and the degree of social harm.[11] Accordingly, each area of law is provided with its own instruments for responding to violations of substantive norms.

3. The permissibility of administrative sanctions, including monetary penalties,[12] as a response to a violation of administrative duties, has never raised doubts in the Constitutional Tribunal's rulings.[13] The Tribunal recognises the advantages[14] as well as disadvantages[15] of such sanctions. As a rule, it also accepts their constructional differences, which largely consist in the fact that administrative sanctions: (1) are imposed for a violation of an administrative duty itself and, consequently, with no regard to the motivation (fault) of the offender; (2) cannot be adjusted to match specific circumstances of a given case; (3) may be imposed on both natural persons and organisational units; (4) are imposed pursuant to decisions issued by administrative bodies; (5) are subject to judicial review exercised by administrative courts with regard to their legality.[16]

As a result of constructional differences, provisions regarding administrative sanctions may not, as a rule, be directly reviewed in the light of Article 42 of the Constitution, which sets forth the rules of criminal prosecution,[17] as Article 42(3) of the Constitution implies that guilt

11 See, *e.g.*, Judgment P 124/15, pt III.3.1.

12 See the definition included in Art. 189b of CAP.

13 See, *e.g.*, Judgment P 9/08, pt III.4. *Cf.* Judgment of the CT of 15th January 2007, P 19/06, OTK ZU-A 2007, No. 1, item 2, pt III.3; Judgment of the CT of 1st July 2014, SK 6/12, OTK ZU-A 2014, No. 7, item 68, pt III.5.

14 In particular, the promptness, effectiveness and cheapness of administrative proceedings on monetary penalties (see Judgment SK 6/12, pt III.5.2).

15 See Judgment of the CT of 18th November 2010, P 29/09, OTK ZU-A 2010, No. 9, item 104, pt III.5.4.

16 See, *e.g.*, Judgment of the CT of 21st October 2015, P 32/12, OTK ZU-A 2015, No. 9, item 148, pt III.3.5.

17 *Cf.* M. Wiącek, *Sankcje…*, p. 127.

is the basis of criminal liability.[18] The perpetrator of a criminal offence is presumed innocent until proven guilty under a final and binding judgment of a court (*i.e.*, pursuant to Article 45(1) of the Constitution, an independent and impartial body separate from the legislature and the executive). Criminal liability may not, *a contrario*, be enforced by administrative bodies that are subordinated to the executive, and in forms applicable to administration (*i.e.* pursuant to an administrative decision). As far as criminal liability is considered, an individual is protected by the following safeguards: (1) the statutory definition of attributes of a criminal offence and sentence; (2) the prohibition on *ex post facto* criminal laws and the retroactive application of more stringent criminal sanctions; (3) impermissibility of double jeopardy; (4) the right of defence; (5) presumption of innocence; (6) exclusive jurisdiction of a court to adjudicate guilt and carry out sentences.

Therefore, the Tribunal needed to seek models of constitutional review of provisions regarding administrative sanctions outside Article 42 of the Constitution. It invoked general principles of the legal system, in particular the principle of a democratic state under the rule of law. The Tribunal assumes that the prescription for a public authority to act in a manner that provides citizens with a sense of legal security arising from Article 2 of the Constitution is strictly associated with requirements such as: (1) the need for a clear and precise definition of administrative duties transgression of which constitutes the basis for imposing administrative sanctions (the principle of definiteness of an administrative transgression); (2) the impermissibility of introducing retroactive sanctions (*lex retro non agit*) or retroactive application of more stringent sanctions (*lex severior retro non agit*);[19] (3) the prohibition of double jeopardy; (4) the rule of proportionality of the sanction to the nature of the transgression (prohibition of excessive "repressiveness").[20] The lawmakers may not impose administrative sanctions that are "evidently inappropriate,

18 See Judgment of the CT of 3rd November 2004, K 18/03, OTK ZU-A 2014, No. 10, item 103, pt III.5.3.

19 See Judgment of the CT of 23rd July 2013, P 36/12, OTK ZU-A 2013, No. 6, item 81.

20 See, *e.g.*, Judgment P 124/15, pt III.3.3; also M. Wiącek, *Sankcje…*, p. 128 and 129; M. Wyrzykowski, M. Ziółkowski, *Sankcje…*, p. 365.

irrational or excessively severe, detached from the degree of culpability of an individual's conduct in relation to applicable law."[21]

It follows that the Tribunal's rulings share certain noticeable similarities regarding the requirements for criminal liability and administrative liability. Nevertheless, there are still marked differences, associated predominantly with the imposition of the burden of proving an individual guilty of a criminal offence on public authorities and exclusive jurisdiction of courts to adjudicate guilt and pass sentences for criminal offences.

When classifying a sanction as administrative or criminal in the light of constitutional requirements, the Tribunal is not bound by the lawmakers' will. If it finds that the lawmakers have authorised an administrative body to use sanctions in instances where criminal liability system would have applied, it may rule a violation of Article 42 of the Constitution, the reason being that an administrative law may be challenged on the grounds that it constitutes an attempt to bypass constitutional requirements regarding criminal liability. In that case, Article 42 becomes an appropriate model of constitutional review of provisions regarding formally administrative sanctions. Without doubt, Article 42 of the Constitution not only stipulates that criminal laws be formulated in compliance with safeguards listed therein but also prevents bypassing such safeguards by transferring the punitive instruments to laws formally outside the areas of criminal law.

4. Consequently, it is often debatable whether a given legal solution that provides for formally administrative sanctions should be subject to review from the perspective of constitutional principles of administrative liability derived from the democracy under the rule of law clause or Article 42, which sets forth the rules of criminal liability. Considering the above, the question which standard should apply cannot be determined by the lawmakers' decision whether to include provisions regarding a sanction in an administrative or criminal law (formal criterion). Under the Constitution, a sanction may not be classified as "administrative" only because the lawmakers have conferred the power to apply it on an administrative body acting under administrative procedure and under the supervision of an administrative court. It is true that:

21 See, *e.g.*, Judgment P 9/08, pt III.4.

> […] a line of reasoning that would only take into account the administrative nature of imposing sanctions or the position of authorities that adjudicate on sanctions within the public authority structure as criteria for identifying an administrative sanction should be deemed in contravention with the principle of autonomous interpretation of constitutional norms.[22]

Meanwhile, the Tribunal has yet to formulate unambiguous and consistent substantive criteria. The Tribunal admits that:

> […] there is no clear, universal substantive criterion that would determine the differentiation of situations where a given phenomenon or act is (pragmatically should be) qualified as subject to a criminal penalty or administrative (monetary) penalty.[23]

In practice, the Tribunal invokes criteria such as the basis for liability, function (purpose) of a sanction, its severity or social implications.

According to the Tribunal:

> […] the main criterion for assessing the legal nature of a specific type of legal measure is the analysis of the function that is attributed to it. If a specific legal measure fulfils the repressive function as the main function of a specific type of liability, that measure should be included in the area of broadly defined criminal law and provided with relevant constitutional safeguards required for criminal liability.[24]

> What distinguishes 'penalty' as defined in criminal regulations from 'penalty' understood as an administrative sanction is that the former needs to be individualised, *i.e.* may only be administered if a natural person has met the statutory criteria of a crime […] whereas the latter […] is applied automatically, on the grounds of strict liability, and is used primarily as a preventive measure. In this case, the fact that the administrative penalty is also a disciplinary and repressive measure is not of critical importance.[25]

22 See M. Wyrzykowski, M. Ziółkowski, *Sankcje…*, p. 369.

23 See Judgment of the CT of 14th October 2009, Kp 4/09, OTK ZU-A 2009, No. 9, item 134, pt 3.5.3; Judgment of the CT of 12th April 2011, P 90/08, OTK ZU-A 2011, No. 3, item 21, pt III.4.1.

24 Judgment of the CT of 21st October 2014, P 50/13, OTK ZU-A 2014, No. 9, item 103, pt III.5.4.

25 Judgment of the CT of 22nd September 2009, SK 3/08, OTK ZU-A 2009, No. 8, item 125, pt III.2.1.

Criminal liability:

> […] has strong moral implications that are essentially not involved where an administrative penalty is imposed. A conviction by a criminal court entails a certain stigmatisation and occasionally produces further, adverse effects for the person convicted, *e.g.* a partial or complete ban from public office or certain positions in other areas of employment. Therefore, administrative monetary penalties are generally perceived as less severe than fines for criminal offences, although their immediate financial severity may occasionally be greater.[26]

It seems that the substantive criteria applied by the Tribunal are of limited use.[27] A classification based on whether liability is fault-based or strict would make the classification dependent on the basis of liability adopted by the lawmakers. In addition:

> […] the notion of 'function' in the Tribunal's rulings is understood intuitively, without a definition of its meaning […] The Constitutional Tribunal does not elaborate on why and how the preventive function prevails over the repressive function in view of a specific sanctioning norm and thereby may be classified as a norm of administrative rather than criminal law.[28]

As a matter of fact, every sanction serves both the preventive and, as a measure that is a response to a violation of law, "repressive" function at the same time. It is also common that administrative sanctions, in particular monetary penalties, are immediately more severe than sentences carried out for criminal offences. On the other hand, the criterion of moral implications and social perception of sanctions is subjective.

As a differentiating criterion, authors have proposed the importance of rights protected by law. Rights of particular significance such as those strictly attached to human dignity (life, health, personal freedom) and the proper functioning of the state (independence, sovereignty, proper electoral procedures) should be protected with a criminal sanction.[29] In order to prove

26 Judgment SK 6/12, pt III.4.

27 See dissenting opinion of Justice T. Liszcz on Judgment P 32/12. See also M. Wiącek, *Sankcje…*, p. 132 and 133.

28 M. Wyrzykowski, M. Ziółkowski, *Sankcje…*, p. 374.

29 See M. Wiącek, *Sankcje…*, p. 129 and 130.

the lawmakers' decision to transfer a certain category of matters from the criminal liability system to the administrative liability system unconstitutional, one would have to demonstrate that "the importance of the given legal right is so great that introducing criminal liability for its violation is necessary and settling for administrative liability alone insufficient."[30]

The permissibility of conferring the power to use sanctions, in particular monetary penalties, on administrative bodies should primarily depend on whether the power is supposed to be exercised by those bodies in matters that can be linked to the constitutional sphere of the administration's responsibilities. It must therefore be related to the implementation of laws within the functions of public administration such as ensuring public services and public order policing.

> The function of public administration in respect of disciplining entities administered must be the execution of public administration responsibilities within the executive rather than the exercise of justice.[31]

Furthermore, administrative sanctions may only be imposed on a person who is the addressee of provisions defined in an administrative law in a precise manner, *i.e.* an entity remaining in a specific administrative relationship (administrative situation). As a result, even if a given category of matters is subject to jurisdiction of administrative bodies, administrative sanctions may not be deemed permissible against a person who is not the addressee of responsibilities explicitly set out in the administrative law.

From this point of view, a regulation that provides for imposing of a monetary penalty on a participant of gambling organised without a licence, permit or notification equal to 100% of their winnings should be considered constitutionally dubious.[32] The penalty is imposed by an administrative body regardless of whether the participant knew that the game was organised illegally or not.[33] Furthermore, the sanction is imposed automatically,

30 M. Wiącek, *Sankcje…*, p. 131.

31 M. Wincenciak, *Przesłanki wyłączające wymierzenie sankcji administracyjnej*, in: *Sankcje administracyjne. Blaski i cienie*, ed. M. Stahl, R. Lewicka, M. Lewicki, Warszawa 2011, p. 605.

32 See Art. 89(1)(6) and (4)(5) of the Gambling Act of 19th November 2009, Dz.U. 2018, item 165, hereinafter referred to as "Gambling Act," "GA."

33 For relevant doubts of constitutional nature, see K. Ryszard, in: M. Bik *et al.*, *Gry hazardowe. Komentarz do ustawy o grach hazardowych*, Warszawa 2013, p. 272.

as the regulations do not grant the head of the customs and tax office the power to discharge the offender or reduce the penalty due to the facts of the case. Most importantly, however, the monetary penalty is imposed not on a person who is the addressee of provisions defined in the Gambling Act but rather a person who is supposed to be protected by that act.[34] A monetary penalty is imposed on participants of gambling by an administrative body despite the fact that they are not an entity in an administrative relationship. The Gambling Act regulates the operation of professional gaming and betting operators, not consumers of such services. The *ratio legis* for monetary penalties provided for in the act is to prevent the professional operators from operating without adhering to statutory requirements.[35] Since it should be a rule that "an administrative penalty is inapplicable, if the act is not stipulated for by [an administrative] law,"[36] granting administrative bodies the power to impose monetary penalties on persons who are not the addressees of administrative duties constitutes a bypassing of constitutional standards of criminal liability defined primarily in Article 42 of the Constitution.[37] Regardless of formally administrative liability, anyone who participates in gambling organised or held against statutory regulations or terms of licence or permit is subject to a fine of up to 120 daily rates,[38] whereas the court obligatorily adjudges forfeiture[39] and may additionally publish the judgment.[40]

34 See Art. 1(1) of GA; also, *e.g.*, Art. 15(1d) of GA.

35 See statements of reasons for the draft Gambling Act, Sejm paper No. 2481, VI term, p. 46, < http://orka.sejm.gov.pl/proc6.nsf/opisy/2481.htm >.

36 A. Kisielewicz, *Kary administracyjne przewidziane ustawą z dnia 19 listopada 2009 r. o grach hazardowych w praktyce orzeczniczej sądów administracyjnych*, "Zeszyty Naukowe Sądownictwa Administracyjnego" 2013, No. 5, p. 10. See also P. Przybysz, *Funkcje sankcji administracyjnych*, in: *Sankcje administracyjne. Blaski i cienie*, ed. M. Stahl, R. Lewicka, M. Lewicki, Warszawa 2011, p. 162–170.

37 The problem of the permissibility of imposing an administrative monetary penalty in conjunction with a penalty for a tax offence on a participant of illegal gambling was the subject of the Polish Ombudsman's motion of 11th November 2013. The Tribunal discontinued proceedings on formal grounds. See Decision of the CT of 7th March 2017, K 40/13, OTK ZU-A 2017, No. A, item 12.

38 See Art. 109 of the Penal Fiscal Code of 10th September 1999, Dz.U. 2017, item 2226, and Dz.U. 2018, item 201, hereinafter referred to as "PFC."

39 See Art. 30 § 5 of PFC.

40 See Art. 35 of PFC.

5. Indicating the nature of an administrative sanction, the Tribunal highlights the principle of strict liability, where:

> […] imposing administrative monetary penalties is detached from the necessity to establish fault and other facts of the case. It is sufficient to establish the very fact of a violation of law or requirements of an administrative decision.[41]

Nonetheless, latest rulings have shown a gradual departure from the absolutisation of the strict liability principle. The Tribunal has even stated that:

> […] the use of administrative penalties must not be based on the idea of strict liability in its pure sense, entirely detached from the facts of a given case, including the offender's fault. […] In exceptional circumstances, substantive law should enable the body competent to impose monetary penalties to determine the amount of the penalty and even discharge the offender altogether.[42]

For this reason, regulations that oblige an administrative body to impose, "somewhat mechanically and rigidly, regardless of different causes and circumstances," a monetary penalty for the removal of a tree or shrub without a permit are an example of disproportionate interference with the ownership of real property.[43]

This position seems extreme, as it may blur the distinction between administrative and criminal liability. It is advisable to exercise caution when considering legal solutions that would grant administrative bodies the power to independently review exceptional circumstances of a specific case, including the offender's motivation, and independently determine the severity of the sanction, *e.g.* the amount of the monetary penalty, on those grounds.[44] Such solutions would require granting administrative courts greater control over the process of reviewing facts of the case and determining the severity of the sanction by administrative bodies. Article 45(1) of the Constitution stipulates that access must be ensured

41 Judgment of the CT of 5th May 2009, P 64/07, OTK ZU-A 2009, No. 5, item 64, pt III.5.

42 Judgment SK 6/12, pt III.5.2.

43 Judgment SK 6/12, pt III.6.2.

44 See dissenting opinion of Justice M. Zubik on Judgment SK 6/12.

to the "competent" court, *i.e.* the court that follows a procedure "suitable for the subject matter of the case being heard."[45]

In any event, it may undoubtedly be inferred from the analysis of the Tribunal's rulings that the strict liability principle must not be of absolute nature.[46] The Tribunal requires that the lawmakers enable a person facing a sanction to demonstrate the existence of facts beyond their control that release them from liability. According to the Tribunal:

> […] administrative law, as is the case with criminal law and law of contraventions, should take into account a possible conflict of rights, values and interests that justify an individual's failure to comply with rules set out in provisions of law the violation of which is governed by law […] The requirement to ensure a citizen a fair administrative procedure derived from Article 2 of the Constitution obligates the lawmakers, *inter alia*, to organise the procedure so as to allow the administrative body to thoroughly examine facts of the case and handle the case, taking into account and, if necessary, weighing the conflicting rights, values and interests […] A fair hearing [required under Article 45(1) of the Constitution requires that the court be provided with a statutory framework that would allow it to take into account all facts of the case, including those justifying a decision not to impose an administrative sanction.[47]

For these reasons, an administrative procedure whereby administrative bodies are not allowed to waive the sanction of seizing a driving licence, although they established that the speed limit in a built-up area was exceeded by over 50 km/h due to necessity, does not meet constitutional requirements. Nevertheless, "the necessity referred to herein must not be given a broad definition or be equated with 'exceptional cases'."[48]

Also within the system of administrative liability, imposing a penalty should only be regarded permissible if the relevant person's action can

45 See Judgment of the CT of 29th January 2013, SK 28/11, OTK ZU-A 2013, No. 1, item 5, pt III.3.2.

46 *Cf.* M. Wyrzykowski, M. Ziółkowski, *Sankcje…*, p. 373.

47 Judgment of the CT of 11th October 2016, K 24/15, OTK ZU-A 2016, item 77, pt III.7.4.

48 Judgment K 24/15, pt III.7.4. For definitions of "necessity" in administrative law, see M. Wincenciak, *Przesłanki…*, p. 607 and 608.

be classified as culpable in specific circumstances.[49] However, culpability denotes not only internal motivations of the offender and their attitude to the violation of law (fault) but also the fact that their behaviour was objectively harmful to society from the perspective of values protected by law.[50] The impossibility of avoiding the effects of a violation of a law or administrative decisions, if the violation was committed in order to protect another, at least equally significant value, or if the occurrence of the violation was beyond one's control, would be a sign of excessive "repressiveness" of law and would undermine the sense of fairness. Consequently, one should approach the permissibility of granting administrative bodies the power to individually determine the severity of sanctions (*e.g.* the type of sanction, the amount of the monetary penalty) with caution, administrative laws must confer on the bodies the power to waive sanctions, if the offender raises valid statutory defences. As stated by the Tribunal:

> […] a person who failed to comply with an administrative duty must have the possibility of avoiding liability by demonstrating that their failure to comply was caused by circumstances beyond their control (force majeure, necessity, actions of third parties for which they are not liable).[51]

6. Before the Amendment to the Code of Administrative Procedure came into force, certain administrative laws provided for the possibility of avoiding liability for violations of law. For instance, proceedings are not initiated in cases regarding monetary penalties imposed for a violation of duties or conditions of road transport, and proceedings initiated in such cases are discontinued, if evidence and facts of the case indicate that the person who provided transport or other transport-related services had no control over the occurrence of the violation and the violation occurred due to events and circumstances that the person could

49 See M. Wiącek, *Sankcje…*, p. 136.

50 Under the Declaration of the Rights of Man and of the Citizen of 1789, law can only prohibit such actions as are hurtful to society (Art. 5); and shall provide for such punishments only as are strictly and obviously necessary (Art. 8).

51 Judgment SK 6/12, pt III.5.2.

not foresee.[52] Thus, "the extremely stringent criteria of liability, based on objective guilt, were […] relaxed by introducing statutory defences, *i.e.* defences against liability of a given person, into the Road Transport Act."[53] However, the lawmakers recognised the need to lay down a general sentencing framework and standardise and adapt those penalties.[54] Drawing on the Constitutional Tribunal and the Supreme Administrative Court rulings, it was found that:

> […] the imposition of an administrative monetary penalty should be premised on the occurrence of a subjective element of fault, and a person who may be subject to administrative liability should have the right of defence, including by demonstrating that the violation was caused by circumstances beyond their control.[55]

Currently, provisions of Section IVa of CAP apply in all cases where other laws do not specify separate rules of imposing or meting out monetary penalties.[56] The minimum constitutional requirement is satisfied by the statutory rule that a party is not subject to a penalty, if the violation of law was caused by force majeure.[57] However, the lawmakers went much further, granting administrative bodies the power to (obligatorily) waive a monetary penalty, if the violation of law is "negligible" and the party ceased to commit the violation.[58] As a result, administrative bodies are to individually judge the "harmful effects" of an administrative transgression. The bodies also gained the right to refrain from imposing a penalty in other cases,

52 See Art. 92c(1)(1) of the Road Transport Act of 6th September 2001, Dz.U. 2017, item 2200, as amended, hereinafter referred to as "RTA"; M. Wincenciak, *Przesłanki…*, p. 612–616.

53 P. Daniel, *Odpowiedzialność administracyjna z tytułu naruszenia obowiązków lub warunków przewozu drogowego w świetle nowelizacji ustawy o transporcie drogowym*, "Zeszyty Naukowe Sądownictwa Administracyjnego" 2012, No. 5, p. 38 *et seq*.

54 Statement of reasons for the draft Amendment to the Code of Administrative Procedure, Sejm paper No. 1183, VIII term, p. 5, < http://sejm.gov.pl/Sejm8.nsf/PrzebiegProc.xsp?id=865EB634847B7E85C125809D004A32C9 >.

55 Statement of reasons for the draft Amendment…, p. 69. The authors invoked Ruling of 1st March 1994, U 7/93 (OTK ZU-A 1994, No. 1, item 5), where the Tribunal named "a subjective element of fault" as the basis for imposing an administrative sanction. The Tribunal also reaffirmed that ruling in Judgment SK 6/12.

56 See Art. 189a of CAP.

57 See Art. 189e of CAP.

58 See Art. 189f § 1(1) of CAP.

"if it fulfils the purposes for which the monetary penalty would otherwise have been imposed" and impose a time limit for the party to present evidence that the violation of law has been removed or notifying the relevant entities of the violation. If the party presents such evidence, the body waives the penalty.[59] The amendment to the Code of Administrative Procedure also introduced a rule that whichever administrative law is more lenient for the perpetrator of a violation is the applicable law[60] and defined the "statutes of limitations" for imposing and enforcing a penalty.[61] Wherever administrative laws grant administrative bodies the power to determine the amount of the monetary penalty, Article 189d of CAP obligates those bodies to take into account: (1) the severity and circumstances of the violation of law, in particular the need to protect life or health, defend valuable property or defend an important public interest or particularly important interest of the party, and the duration of the violation of law; (2) the frequency of failure to comply with a duty or breach of a ban of the same type as failure to comply with a duty, or punishable breach of a ban in the past; (3) a history of being sentenced for the same criminal offence, tax offence, contravention or fiscal contravention; (4) the degree of contribution of the party on whom the administrative monetary penalty is imposed to the violation of law; (5) actions willingly taken by the party in order to avoid the effects of the violation of law; (6) the amount of benefit the party received or loss they avoided; (7) personal conditions of the natural person on whom the monetary penalty is imposed. This solution is to ensure administrative bodies "appropriate levels of discretion."[62]

7. Another safeguard against the abuse of administrative sanctions by public authorities is the *ne bis in idem* principle, which prevents a person from

59 See Art. 189f § 2 and 3 of CAP.

60 Pursuant to Art. 189c of CAP, if the law applicable at the time when the decision on the administrative monetary penalty was issued was different than the law applicable at the time of the violation of law for which the penalty was imposed, the new law shall apply; however, the previous law shall apply, if it is more lenient for the party.

61 See Art. 189g–189j of CAP.

62 M. Niezgódka-Medek, M. Szubiakowski, *Przepisy dotyczące kar administracyjnych (art. 260g––260n)*, in: *Reforma prawa o postępowaniu administracyjnym. Raport zespołu eksperckiego*, Warszawa 2016, p. 269, < http://www.nsa.gov.pl/wydarzenia-wizyty-konferencje/raport-ekspercki-nt-reforma-prawa-o-postepowaniu-administracyjnym,news,24,313.php >.

being punished twice (or multiple times) for the same offence. Admittedly, the principle has not been explicitly stated in the Constitution, but the Constitutional Tribunal's rulings make it plain that it is not only an element of the general principle of a democratic state under the rule of law but also one of the fundamental guarantees in the area of criminal law and a constituent of the right to a fair trial.[63]

The Tribunal adopts a broad definition of the *ne bis in idem* principle, finding that it applies not only to sentences for criminal offences but also any other forms of punishment. The principle must therefore be considered both in the case of two (or more) concurrent criminal penalties and in the event of a concurrent criminal penalty and, for example, administrative sanction, provided that the sanction mainly fulfils a "repressive" function. In practice, this condition makes it possible to determine the permissibility of aggregating penalties imposed in different proceedings. Thus, criminal prosecution does not stand in the way of initiating a disciplinary procedure against the same person.[64] Furthermore:

> […] criminal liability and administrative liability are not [as a rule] unconstitutional punishment for the same offence. As they are different effects of an offence that infringes different rights protected by law, it is reasonable to use different sanctions.[65]

It is therefore permissible to, for instance, impose an administrative sanction in the form of seizing a driving licence in concurrence with a fine for a contravention on a driver who exceeded the speed limit in a built-up area by more than 50 km/h.[66] It is even constitutional for an administrative body to impose a monetary penalty on the organiser of illegal gambling who has previously been sentenced by a final and binding judgment of a court to pay a fine for the same offence constituting a fiscal contravention under Article 107 of PFC.[67]

63 See, *e.g.*, Judgment P 50/13, pt III.3.1; Judgment P 32/12, pt III.7.1. See also Judgment of the CT of 21st April 2015, P 40/13, Dz.U. 2015, item 601, pt III.5.1.

64 Judgment of the CT of 8th October 2002, K 36/00, OTK ZU-A 2002, No. 5, item 63, pt III.4.

65 Judgment P 32/12, pt III.7.3.

66 Judgment K 24/15.

67 Judgment P 32/12.

The Tribunal's rulings have established a test used to verify whether challenged regulations violate the *ne bis in idem* principle. According to the Tribunal, the first step should be to determine whether the nature of specific measures provided for by the lawmakers as a response to specific behaviour is "repressive." If it is true for two (or more) measures, it is necessary to establish whether they fulfil the same or different purposes. The fact that various "repressive" measures serve the same purposes should lead to a conclusion that the *ne bis in idem* principle has been violated.[68] On the other hand, if cumulated sanctions serve different purposes, there is no reason to rule a violation of the said principle, even if the sanctions were "repressive." The *ne bis in idem* principle is only violated, if sanctions of criminal law as defined by the Constitution that serve the same purpose (to protect the same socially significant interest) are imposed twice (or multiple times) on the same person in connection with the same offence.

The criteria adopted by the Tribunal, *i.e.* the obligatory "repressive" function of cumulated sanctions and, secondly, identical purposes of the sanctions, give the lawmakers excessive freedom to punish the same person for the same offence.[69] From the perspective of the principle of citizens' trust in government and legislation, it is difficult to accept a situation where someone is punished with a monetary penalty by the competent administrative body for a violation of an administrative duty and then, upon notification by that body, law enforcement authorities initiate a criminal procedure against the same person for the same offence. It seems more appropriate to adopt an approach, which is incidentally detectable in the Tribunal's rulings, where "the cumulation of administrative liability and liability for fiscal contraventions reflects excessive fiscalism and shows no regard for the interest of the taxpayer on whom the said administrative penalty was imposed."[70] Instead, mechanisms should be proposed whereby proceedings on administrative

68 *Cf.* Judgment P 50/13, pt III.3.3; Judgment P 40/13, pt III.5.1; and Judgment of the CT of 1st December 2016, K 45/14, OTK ZU-A 2016, item 99, pt III.4.1.

69 See dissenting opinion of Justice T. Liszcz on Judgment P 32/12. *Cf.* M. Wiącek, *Sankcje…*, p. 139.

70 Judgment of the CT of 29th April 1998, K 17/97, OTK ZU 1998, No. 3, item 30, pt III. See also Judgment of the CT of of 4th September 2007, P 43/06, OTK ZU-A 2007, No. 8, item 95, pt III.6.

sanctions may be suspended until the criminal procedure is concluded (and discontinue the administrative proceedings, at least in the case of a conviction) or the administrative sanction may be taken into account when imposing the sentence for a criminal offence. The omission of this solution in regulations on sanctions for certifying untruth in a shipping document[71] was ruled by the Tribunal to be a violation of the *ne bis in idem* principle and the principle of proportionate justice derived from Article 2 of the Constitution.[72]

After the amendment to the Code of Administrative Procedure came into force, the possibility of cumulating administrative and criminal liability was restricted by Article 189f § 1(2) of CAP, which stipulates that an administrative body waives an administrative monetary penalty, if another administrative monetary penalty has previously been imposed on the perpetrator of a violation for the same offence by another administrative body or if the perpetrator has been sentenced by a final and binding ruling for a criminal offence and the previous penalty fulfils the purpose for which the administrative monetary penalty would have been imposed. However, the protection arising from this provision is limited.[73] Firstly, it only applies to administrative sanctions in the form of monetary penalties. Secondly, the exclusion of liability cumulation depends on the authority's opinion whether the previous penalty fulfilled the purpose.

8. The Tribunal's rulings as well as successive legislative changes, most importantly the amendment to the Code of Administrative Procedure, cause a gradual blurring of differences between administrative liability

71 Pursuant to Art. 92a(5) of RTA, if a violation of duties or conditions of road transport also meets the statutory criteria of a contraventions, only regulations on administrative liability apply in the case of a natural person. This exclusion does not apply to cases where the violation may also be qualified as a criminal offence, *e.g.* certyfing untruth in a document (see Art. 271 § 1 of the Criminal Code of 6th June 1997, Dz.U. 2017, item 2204, as amended).

72 Judgment P 124/15.

73 This is confirmed by the provisions of Art. 189d(3) of CAP, which stipulates that by meting out an administrative penalty, the authority only takes into consideration the previous penalty for the same criminal offence, fiscal offence, contravention or fiscal contravention. Therefore, the previous penalty does not always have to rule out the permissibility of a concurrent administrative monetary penalty. See P. Przybysz, *Kodeks postępowania administracyjnego. Komentarz aktualizowany*, Serwis Informacji Prawnej LEX/el. 2018, note 3 to Art. 189b.

and criminal liability. Contrary to what might seem, however, the process has not dispelled doubts surrounding the use of administrative sanctions. From the systemic point of view, there arises the question of whether it is permissible to create a separate, relatively consistent punitive system parallel to the system of criminal liability, yet without the need to retain all guarantees arising from Article 42 of the Constitution. Another issue is the permissible scope of transferring the power to impose penalties for violations of law to administrative bodies at the cost of the exclusive power of courts to exercise justice (Article 175(1) in connection with Article 45(1) of the Constitution), in particular to establish fault (Article 42(3) of the Constitution). Last but not least, there is the recurrent issue of whether administrative courts, which should meet the constitutional requirement of being the "competent court," have sufficient tools to exercise effective control over the review of premises for the use of administrative sanctions and their severity by administrative bodies (Article 184 in connection with Article 45(1) of the Constitution).

Summary

The aim of the article is to present the constitutional limits for the application of administrative sanctions in the Polish legal system. Although the issue of administrative liability has not been directly addressed in the Constitution, it does not mean that it is constitutionally indifferent. Polish Constitutional Tribunal has developed significant case law posing several conditions which are to be taken into account by the lawmakers and the administrative courts. In 2017 the lawmakers have made an effort to unify rules of the application of administrative sanctions by adopting a wide amendment to the Code of Administrative Procedure. This amendment provides for, *i.e.*, the principle of non-responsibility for violations of law caused by force majeure, the power of an administrative body to determine the amount of the monetary penalty in according to conditions set forth by this Code, the principle of application of a law more lenient for the perpetrator of a violation of law and the *ne bis in idem* principle. Despite the development of the constitutional case law and the recent legislative intervention, several questions concerning administrative sanction remain, above all the permissible scope of transferring the power to impose penalties for violations of law to administrative bodies at the cost of exclusive power of courts

to exercise justice and the adequacy of tools used by the administrative courts to exercise control over decisions of these bodies in this field.

Keywords: Administrative sanctions, Code of Administrative Procedure, Polish constitutional law, Polish Constitutional Tribunal's case law

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Anna Chmielarz-Grochal, Jarosław Sułkowski

Appointment of Judges to the Constitutional Tribunal in 2015 as the Trigger Point for a Deep Constitutional Crisis in Poland*

1. Election of Constitutional Judges has aroused interest of the legal community for many years. Efforts to launch a reform of the election of Judges to the Constitutional Tribunal were undertaken by the Helsinki Foundation for Human Rights, INPRIS – Institute for Law and Society and the Polish Section of the International Commission of Jurists which monitors elections of Judges to the Constitutional Tribunal within the frame of the Civic Monitoring of Candidates for Judges programme.[1] Legislative initiatives on this aspect have also been taken in the past.

* Text written with references to the content of the following: J. Sułkowski, *Kryteria oraz procedura wyboru sędziego Trybunału Konstytucyjnego* [Criteria and procedure of appointment of Judge of the Constitutional Tribunal], in: *Konstytucyjny spór o granice zmian organizacji i zasad działania Trybunału Konstytucyjnego: czerwiec 2015 – marzec 2016*, ed. P. Radziewicz, P. Tuleja, Warszawa 2016, p. 29–70; J. Sułkowski, *Ślubowanie osoby wybranej na stanowisko sędziego Trybunału Konstytucyjnego wobec Prezydenta* [Taking the oath before the President by a person elected as Judge of the Constitutional Tribunal], in: *Konstytucyjny spór o granice zmian organizacji i zasad działania Trybunału Konstytucyjnego: czerwiec 2015 – marzec 2016*, ed. P. Radziewicz, P. Tuleja, Warszawa 2016, p. 132–149; A. Chmielarz-Grochal, A. Michalak, J. Sułkowski, *Polska* [Poland], in: *Powoływanie sędziów konstytucyjnych w wybranych państwach europejskich*, ed. A. Chmielarz-Grochal, A. Michalak, J. Sułkowski, Warszawa 2017, p. 239–271.

1 The objective of this programme is to involve civil society in the process of electing judges and judges to the most important national and international courts and tribunals, namely the Constitutional Tribunal, the Supreme Court, the State Tribunal, the Supreme Administrative Court, the European Court of Human Rights in Strasbourg and the Court of Justice of the European Union. The programme aimed at developing model solutions which would encourage participation by representatives of the society in a public debate on the candidates for these institutions based on generally available information and objective evaluation criteria. In their appeals addressed to the Speaker of the Sejm, other non-governmental organisations

Two bills concerning the election of Judges to the Tribunal were submitted in 2010, during the 6th term of the Sejm.[2] These bills introduced a principle whereby candidates for the office of a Judge were to be nominated by the Electoral College composed of, among others, representatives of judges of the Supreme Court, the Supreme Administrative Court, the National Council of the Judiciary, academic faculties of law, and the Committee for Legal Sciences of the Polish Academy of Sciences. The aim was to hold back the impact of current politics on constitutional judiciary and put in place additional guarantees of the Constitutional Tribunal's independence. Both bills were defeated in the first reading in the Sejm and reviewed with critique by experts.[3]

2. Another amendment of the Tribunal Judges' election procedure was proposed in the Presidential bill on the Constitutional Tribunal submitted to the Sejm in July 2013. Compared with the Act of 1997,[4] the bill expanded the Judge appointment procedure.

As regards the election of Judges, the bill was founded on a number of underlying conjectures. Firstly, the scope of election process

such as Iustitia – the Association of Polish Judges highlight that the process of nominating candidates for the office of Constitutional Tribunal Judges should be open and the submitted candidates should be subject to evaluation by the legal circles. Already in 2010, the above mentioned Association held that the Constitutional Tribunal is one of the most important guarantors of the rule of law, therefore it should be composed of dauntless and trustworthy Judges of the highest professional qualifications and impeccable moral standing. According to the Association of Polish Judges, only this will guarantee that, when giving their verdicts, the Judges will be guided by the Constitution rather than by particular interests of their communities. However, these appeals have not been successful.

2 *Cf.* MPs' bills amending the Act on the Constitutional Tribunal, Sejm papers No. 476, VI term and No. 2988, VI term.

3 See A. Młynarska-Sobaczewska, *Opinia Naczelnej Rady Adwokackiej dotycząca poselskiego projektu ustawy o zmianie ustawy o Trybunale Konstytucyjnym* [Opinion of the Polish Bar Council (NRA) on the MPs' bill amending the Act on the Constitutional Tribunal], < http://orka.sejm.gov.pl/Druki6ka.nsf/0/B30B4F17EBB849B5C1257754003C7B85/$file/2988-001.pdf >; P. Chybalski, *Opinia prawna w sprawie poselskiego projektu ustawy o zmianie ustawy o Trybunale Konstytucyjnym* [Legal opinion on the MPs' bill amending the Act on the Constitutional Tribunal], Sejm paper No. 476, VI term, < http://orka.sejm.gov.pl/rexdomk6.nsf/Opdodr?OpenPage&nr=476 >.

4 The Act of 1st August 1997 on the Constitutional Tribunal, Dziennik Ustaw (Official Journal of Laws of the Republic of Poland, hereinafter referred to as: "Dz.U.") 1997, No. 102, item 643, as amended.

participants was to be outspread to include academic circles and legal practitioners, which, according to the bill mover, was to warrant their broad representation and guarantee the appointment of highly qualified candidates as Judges.[5]

Secondly, the intention of the bill proponent was to accommodate a social factor in the Judge election process and to provide the general public with detailed information on the candidates for the office. The solutions put forward catered to the expectations of a greater socialisation of the process of selecting persons distinguished by their outstanding knowledge of the law and ensuring that MPs and the Sejm were adequately informed about the accomplishments and personal merits of candidates for this – one of the most important in a modern democratic state – public office.[6]

Thirdly, in view of the requirement laid down in Art. 194(1) of the Constitution[7] that Judges are to be elected from amongst persons distinguished by their outstanding knowledge of the law, the intention of the bill mover was to define the qualifications required for the position of a Constitutional Judge. In this respect, the bill made reference to the regulations applicable to the judges of the Supreme Court and the Supreme Administrative Court.

Fourthly, the President proposed that a pre-list of nominees for candidates for Constitutional Judges be made and submitted to the MPs and to the general public by the Speaker of the Sejm at least 3 months before the expiry of a Judge's tenure. The nominees were to be listed in alphabetical order and the information on the nominator of each of them as well as the grounds for the nomination were to be provided. Based on the nominee list, the Presidium of the Sejm and a group of at least 50 MPs was to propose candidates for the position of a Constitutional Judge.

3. The greater part of the legislative work took place in 2015, pending the imminent end of the 7th term of the Sejm. The time coincidence

5 Statement of reasons for the bill on the Constitutional Tribunal proposed by the President, Sejm paper No. 1590, VII term, < http://orka.sejm.gov.pl/Druki7ka.nsf/0/699F4137C13BF1E7C1257BB1004B2874/$File/ 1590.pdf >, p. 8.

6 Statement of reasons for the bill on the Constitutional Tribunal…, p. 9.

7 The Constitution of the Republic of Poland of 2nd April 1997, Dz.U. 1997, No. 78, item 483, as amended, hereinafter referred to as: "Constitution."

of the end of the Sejm's term and the expiry of the tenure of five Judges of the Constitutional Tribunal dominated the final phase of the legislative procedure. In May 2015, a proposal was put forward to regulate the procedure of electing those Judges to the Tribunal who were to replace the Judges retiring in 2015. To that end, the bill included a transitional provision, according to which candidates were to be submitted within 30 days of its entry into force. In this respect, the most important aspects of the then pending legislative procedure deserve a special mention.

The proposed provisions regulating the election procedure of a Tribunal Judge were scrutinised and considered at a joint session of the Justice and Human Rights Committee and the Legislation Committee on 6th May 2015. MP Krystyna Pawłowicz proposed amendments (deleting Art. 19 and Art. 20), as she was of an opinion that election of Judges is governed by the Standing Orders of the Sejm and, furthermore, she disagreed with the lengthy duration of this procedure.[8] Then, the floor was taken by prof. Marek Chmaj, who said:

> I am speaking in agreement with the President [of the Constitutional Tribunal – A.C.-G., J.S.], Andrzej Rzepliński. I would like to draw your attention to Art. 19(2): 'The motion regarding a candidate for a Judge of the Tribunal shall be submitted to the Speaker of the Sejm at the latest four months before the date of expiry of the Tribunal Judge's tenure.' This year, tenures of three Judges of the Tribunal will expire on the 6th of November. If we leave the four month term, then even assuming that the bill will be passed quickly, the legislative act will have a *vacatio legis* of 30 days and in fact we will have thwarted the election of three Judges to the Tribunal this year. If we want the make the election of three Judges to the Tribunal viable, then the time limit should be three months instead of four.[9]

In consequence, prof. Witold Pahl proposed a corrective amendment of Art. 19(2), according to which motions regarding candidates for

8 Full transcript of the session of the Justice and Human Rights Committee [Komisja Sprawiedliwości i Praw Człowieka] (Sejm paper No. 235, VII term) and the Legislation Committee [Komisja Ustawodawcza] (Sejm paper No. 128, VII term) of 6th May 2015, < http://orka.sejm.gov.pl/Zapisy7.nsf/0/57E9E415582DFB1EC1257E44004CA7FC/$file/0452907.pdf >, p. 29; hereinafter referred to as: "full transcript of the session of the JHRC and the LC of 6th May 2015."

9 Full transcript of the session of the JHRC and the LC of 6th May 2015, p. 29.

the office of a Judge of the Tribunal should be submitted to the Speaker of the Sejm at the latest three months before the date of expiry of the Tribunal Judge's tenure.[10]

The floor was also taken by a representative of the Chancellery of the Sejm, Przemysław Sadłoń, who expressed the following reservation:

> […] we are aware of the […] difficulty posed by the ending term of the Sejm […] it seems that cutting down this time limit from four to three months is no guarantee that these elections would proceed without any complications. […] At this point in time it is difficult to predict when the Sejm will adopt the bill and when the entire legislative process will be completed […]. In the context of time limits for submitting the motions, I leave to your consideration the option of introducing a remedial provision applicable to the election of three Judges whose tenures expire concurrently with the end of the Sejm's term and introducing some kind of a regulation regarding the time limit, some kind of a special regulation, on the election of these three Judges.[11]

This view was criticised by MP Krystyna Pawłowicz, in whose opinion the Standing Orders of the Sejm 'precisely regulate who and how should submit a candidate and the number of MPs needed.'[12] According to MP Krystyna Pawłowicz, 'a legislative act cannot be drafted as if in fear that the balance of power will tilt during the next term of the Sejm.'[13] Eventually, committees adopted the corrective amendment in the wording proposed by MP Witold Pahl.

The issue of appointment of Judges to fill the offices of those who were to retire in 2015 was brought back during the next sitting of the Justice and Human Rights Committee and the Legislation Committee on 12th May 2015. During that sitting, 'after consulting the Legislative Office,' MP Robert Kropiwnicki proposed adding Art. 135a that would regulate the election of Judges during the 7th term of the Sejm. According to the mover of this corrective provision:

10 Full transcript of the session of the JHRC and the LC of 6th May 2015, p. 29.

11 Full transcript of the session of the JHRC and the LC of 6th May 2015, p. 30.

12 Full transcript of the session of the JHRC and the LC of 6th May 2015, p. 31.

13 Full transcript of the session of the JHRC and the LC of 6th May 2015, p. 31.

> […] the work of the Tribunal might be blocked for approximately 6 months. It is unimaginable that the new Parliament were to elect the Judges of the Tribunal at the first sitting. […] First, the presidiums must be elected, then the government is formed, and one may say that […] the parliament would deal with the election of Judges to the Constitutional Tribunal sometime around February or March […] to prevent the work of the Tribunal from being blocked, I propose to adopt such an election procedure with regard to those Judges whose tenures expire this year to be able to submit candidates within 30 days of the act's entry into force.[14]

The need for such a corrective amendment was confirmed by Przemysław Sadłoń, representative of the Legislative Office, who said:

> Indeed, we have pointed to a certain […] difficulty caused, on the one hand, by the end of the Sejm's term and, on the other hand, by the expiry of tenures of five Judges of the Constitutional Tribunal, of which three Judges retire at the beginning of November, and two Judges in December 2015. […] Considering that the legislative act provides for a 30-day *vacatio legis*, […] the entry into force of this act, most likely in August, would render it impossible to comply with this 3-month time limit for submitting the motion. […] As far as the direction of this solution is concerned, the Office did not in any way impose this direction.[15]

The corrective amendment of MP Robert Kropiwnicki was seconded by 20 members of the committees at their joint session, with 4 votes against and 1 abstention. This amendment was embraced in Art. 135 of the text of the bill passed to the Senate.

The bill referred to the Senate for consideration was passed to the Legislative Office of the Chancellery of the Senate for an opinion. The Helsinki Foundation for Human Rights expressed its position on the bill by pointing that, amongst others, Art. 135 permits the vacancies in the offices of two

14 Full transcript of the session of the Justice and Human Rights Committee (Sejm paper No. 236, VII term) and the Legislation Committee (Sejm paper No. 129, VII term) of 12th May 2015, < http://orka.sejm.gov.pl/Zapisy7.nsf/0/E2C9A07EE682E54EC1257E4B004B1307/$file/0453207.pdf >, p. 29–30; hereinafter referred to as: "full transcript of the session of the JHRC and the LC of 12th May 2015."

15 Full transcript of the session of the JHRC and the LC of 12th May 2015, p. 30.

Judges, whose tenure will expire during the 8th term of the Sejm, to be filled by the Sejm of the 7th tenure, and this violates the Constitution.[16]

The bill was considered at a joint session of the Senate's Legislative Committee and the Committee on Human Rights, Rule of Law and Petitions on 10th June 2015.[17] The question how to regulate the elections of Tribunal Judges in 2015 was raised again at that time. Prof. Marek Chmaj, who participated in the discussion, reminded that the last sitting of the Sejm during its 7th term will be held on 24th–25th September 2015, the elections will most likely take place in mid-October, and the first sitting of the newly elected Sejm will most probably be convened by the President at the turn of November, which in his view would mean the necessity of filling three judicial vacancies.[18] Prof. Chmaj also pointed out that 'if the first sitting of the newly elected Sejm will be held at the beginning of November, there will be no chance to fill the vacancy created by the retirement of the Judge Cieślak.'[19] The expert in constitutional law also reminded that MPs take the oath and the Sejm's organs are elected during the first sitting of the newly elected Sejm, hence:

> […] the prospective election of Judges to the Tribunal will have to take place during the second sitting. Since candidates must be proposed thirty days before the expiry of the tenure, and this date will fall after the tenures will have expired, it will be necessary to […] amend the Act on the Constitutional Tribunal to elect new Judges.[20]

Therefore, in the opinion of prof. Marek Chmaj, Art. 135 should have been left in the text of the bill. On the other hand, Senator Michał

16 *Opinia Helsińskiej Fundacji Praw Człowieka do ustawy z dnia 27 maja 2015 r. o Trybunale Konstytucyjnym* [Opinion of the Helsinki Foundation for Human Rights on the Act of 27th May 2015 on the Constitutional Tribunal], Senate paper No. 915, VIII term, < http://www.senat.gov.pl/gfx/senat/userfiles/_public/k8/komisje/2015/ku/materialy/915_hfpc.pdf >.

17 Stenographic transcript of the joint session of the Legislation Committee [Komisja Ustawodawcza] (386) and the Human Rights, the Rule of Law and Petitions Committee [Komisja Praw Człowieka, Praworządności i Petycji] (260) on 10th June 2015, < http://www.senat.gov.pl/download/gfx/senat/pl/senatkomisjeposiedzenia/5793/stenogram/386uw_egz_4.pdf >; hereinafter referred to as: "stenographic transcript of the joint session of the LC and the HRRLPC on 10th June 2015."

18 Stenographic transcript of the joint session of the LC and the HRRLPC on 10th June 2015, p. 10.

19 Stenographic transcript of the joint session of the LC and the HRRLPC on 10th June 2015, p. 10.

20 Stenographic transcript of the joint session of the LC and the HRRLPC on 10th June 2015, p. 10.

Seweryński was of the opposite opinion and recalled, in reference to the opinion of the Helsinki Foundation for Human Rights, the constitutional qualms evoked by the potential election of Judges to the Tribunal in advance of the 8th term of the Sejm. Senator Seweryński also emphasised that fears that the newly elected Sejm would not have the time to appoint Judges need not have to transpire. Furthermore, in the opinion of the Senator, Art. 135 of the bill is:

> […] a deliberate provision which is to pave way for the present parliamentary powers to make appointments in order to fill vacating positions, which, in keeping with good parliamentary practice, should not be done.[21]

The Senator also proposed that the bill should enter into force on 1st January 2016 without the solutions envisaged in the contested Art. 135. Eventually, the Committee opted in favour of deleting Art. 135 from the bill.

By a resolution of 12th July 2015 on the criteria and procedure of election of Judges, the Senate restored the greater part of the solutions proposed by the President in his original version of the bill and, additionally, introduced a two-month period for the submission of candidates for the position of a Judge of the Tribunal as part of the Judge election procedure. The Senate also decided to apply the new multi-phase judge election procedure to the extent involving submitting candidates for the position of a Tribunal Judge from amongst persons on the list, starting with the election of a Judge conducted in connection with the expiry of a Judge's tenure after 1st January 2016 or the expiry of a Judge's mandate after this date, but before the expiry of the tenure (Art. 134a of the bill). On the other hand, with regard to the deadline for the submitting candidates, the Senate modified the bill whereby a candidate must be submitted at the latest 2 months before the expiry of a Tribunal Judge's tenure (Art. 19(2)). The Senate decided not to delete Art. 135 of the examined bill.[22]

To recapitulate, in the text of the legislative act passed by the Sejm of the 7th term on 25th June 2015[23], the standing as candidate for Judge

21 Stenographic transcript of the joint session of the LC and the HRRLPC on 10th June 2015, p. 13.

22 Resolution of the Senate of the Republic of Poland of 12th June 2015 on the Act of the Constitutional Tribunal, < http://orka.sejm.gov.pl/Druki7ka.nsf/0/69371811718A8926C1257E660047C86F/%24File/3507.pdf >.

23 Dz.U. 2015, item 1064.

of the Constitutional Tribunal was made conditional upon the fulfilment of two criteria: possessing qualifications required to hold the office of a judge of the Supreme Court and being aged at least 40 and not more than 67 on the date of the election (Art. 18). As regards the procedure for election of a Tribunal Judge, it was limited to vesting the competence to submit a candidate for a Tribunal Judge in the Presidium of the Sejm and a group of at least 50 MPs (Art. 19(1)). The Act also provided that a motion to nominate a candidate for a Tribunal Judge shall be submitted to the Speaker of the Sejm at the latest 3 months before the expiry of the tenure of a Tribunal Judge (Art. 19(2)). Detailed requirements concerning the motion and the procedure which the motion was to follow were to be specified in the Standing Orders of the Sejm.

Notably, the transitional provision, Art. 137, was eventually included in the act. According to this provision, in the case of Judges of the Tribunal whose tenure expired in 2015, the time limit for submitting a motion concerning nominating a candidate for the position of a Judge of the Tribunal was 30 days from the date of entry into force of the act.

4. Based on the new act, the Sejm of the 7th tenure initiated the election procedure of the Judges of the Tribunal. The tenure of five Judges of the Tribunal expired on 6th November, 2nd December and 8th December 2015 respectively. At a sitting held on 8th October 2015, the Sejm of the 7th term appointed all five Judges to their offices.[24] The legal grounds for electing the Judges 'in advance' was Art. 137 of the Act on the Constitutional Tribunal, according to which, in the case of Judges of the Tribunal whose tenure expired in 2015, the time limit for submitting a motion concerning nominating a candidate for the position of a Judge of the Tribunal was 30 days from the date of entry into force of the act.

The parliamentary elections were held on 25th October 2015 and the term of the newly elected Sejm began on 12th November 2015. The chronology of events shows that three Judges of the Constitutional Tribunal retired from their office during the 7th term of the Sejm, while two Judges retired after the Sejm of the next term was constituted.

24 *Cf.* five resolutions of the Sejm of the Republic of Poland of 8th October 2015 on election of Judge of the Constitutional Tribunal, "Monitor Polski" (official journal, hereinafter referred to as: "M.P.") 2015, items 1038, 1039, 1040, 1041, 1042.

Following the parliamentary elections, legislative efforts aimed at challenging the election of Constitutional Judges by the Sejm of the 7th term were undertaken in the Sejm of the 8th term. These efforts were based on opinions of prof. Bogumił Szmulik,[25] prof. Jarosław Szymanek[26] and prof. Bogusław Banaszak,[27] written upon request of the Bureau of Research of the Sejm on 18th, 23rd and 24th November. All the three authors believed that the procedure of electing Tribunal Judges whose tenures expired in 2015 was defective, which undermined its lawfulness.

Having analysed the Act on the Constitutional Tribunal of 2015, the first of these authors came to the conclusion that:

> […] [the] procedure of nominating 5 candidates for a Judge of the Constitutional Tribunal was applied in a way which was not conformant with Art. 19 [of the Act – A.C.-G., J.S.], as the candidates were nominated by the Presidium of the Sejm only, while according to the Act,

25 See B. Szmulik, Legal opinion of 18th November 2015 (duplicate typescript).

26 See J. Szymanek, *Opinia w odpowiedzi na pytania 1) Czy przepisy ustawy z dnia 25 czerwca 2015 r. o Trybunale Konstytucyjnym (Dz.U. z 2015, poz. 1064) dotyczące wyboru sędziów Trybunału w 2015 r. są zgodne z Konstytucją? oraz 2) Czy nie zakończona ślubowaniem przed Prezydentem procedura obsadzania stanowiska sędziego TK, ma – w świetle wzorca konstytucyjnego i ustawowego – charakter zamknięty, a w szczególności czy podlega zasadzie dyskontynuacji?* [Opinion in response to the questions: 1) Are the provisions of the Act of 25th June 2015 on the Constitutional Tribunal (Dz.U. 2015, item 1064) concerning the elections of Tribunal Judges in 2015 consistent with the Constitution? and 2) Given the constitutional and legislative model procedure, is the procedure for appointment of a Constitutional Tribunal Judge, which did not end with an oath taken before the President, complete and, in particular, is the principle of discontinuation of the parliament applicable to it?], Bureau of Research of the Sejm [Biuro Analiz Sejmowych], Warszawa, 23rd November 2015.

27 See B. Banaszak, *Opinia prawna stanowiąca odpowiedź na dwa pytania: 1. Czy przepisy ustawy z dnia 25 czerwca 2015 r. o Trybunale Konstytucyjnym (Dz.U. z 2015, poz. 1064) dotyczące wyboru sędziów Trybunału w 2015 r. są zgodne z Konstytucją? 2. Czy nie zakończona ślubowaniem przed Prezydentem procedura obsadzania stanowiska sędziego TK, ma – w świetle wzorca konstytucyjnego i ustawowego – charakter zamknięty, a w szczególności czy podlega zasadzie dyskontynuacji?* [Legal opinion containing answers to the following questions: 1) Are the provisions of the Act of 25th June 2015 on the Constitutional Tribunal (Dz.U. 2015, item 1064) concerning the elections of Tribunal Judges in 2015 consistent with the Constitution? and 2) Given the constitutional and legislative model procedure, is the procedure for appointment of a Constitutional Tribunal Judge, which did not end with an oath taken before the President, complete and, in particular, is the principle of discontinuation of the parliament applicable to it?], Bureau of Research of the Sejm, Warszawa, 24th November 2015, < http://www.sejm.gov.pl/media8.nsf/files/WBOI-A4LGYH/$File/69-15A_Banaszak.pdf >.

> the candidates should have been nominated by the Presidium of the Sejm and a group of at least 50 MPs.[28]

This view was also shared by prof. Bogusław Banaszak. In the opinion of prof. Jarosław Szymanek, the provisions of the Act on the Constitutional Tribunal of 2015 that apply to the procedure of appointing Judges of the Tribunal, among others:

> […] violate the principle of separation of the said Act and the Standing Orders of the Sejm (Art. 112 of the Constitution), thus undermining the Sejm's right to independently determine the procedural conditions for the election of Judges to the Constitutional Tribunal, and thus collide with the constitutional principle of the Sejm's monopoly as regards electing Judges of the Tribunal (Art. 194(1) of the Constitution); violate the teleological and axiological guidelines in the Constitution relating to relations between constitutional organs of the state which rely not only on the principle of separation of powers, but also on the system of checks and balances and the principle of cooperation to ensure a reliable and efficient operation of public institutions (the Preamble to the Constitution); raise reasonable doubts as regards violation of the principle of a democratic state governed by the rule of law (Art. 2 of the Constitution) by introducing intertemporal law based on (seemingly) insufficient grounds and, above all, by the unspoken, yet probably true intention of violating the substantive separation of the statutory law and rules of procedure by circumventing the deadlines specified in the Standing Orders for submitting candidates for Constitutional Tribunal Judges, which in the end effect was to endow the Sejm of the 7th term with monopoly to submit nominations and elect five Judges to the Constitutional Tribunal.[29]

A similar (critical) approach of the Act on the Constitutional Tribunal of 2015 was taken by prof. Bogusław Banaszak who, noting the analogy with the prohibition ruled by the Constitutional Tribunal on introducing significant amendments to the electoral law less than 6 months before elections, held that any change in the so far applicable procedure

28 B. Szmulik, Legal…, p. 14.

29 J. Szymanek, *Opinia…*, p. 19–20.

and deadline for submitting the motion regarding nominating a candidate for the position of a Tribunal Judge made less than six months before the expiry of the Tribunal Judge's tenure is a violation of the rule of law. Furthermore, according to the author of the opinion, violation of the rule that the Sejm of a given term can only fill the vacancies created by retirement of the Constitutional Tribunal Judges whose tenure ended during that parliamentary term is tantamount to petrifying the will of voters which is already out of date at the time the Judge's mandate expires, which implies violation of the principle of representative democracy (Art. 4 of the Constitution).[30]

These opinions had a direct bearing on legislation of the Sejm during the 8th term. As the MP Marek Ast (Law and Justice party) explained during the hearing before the Constitutional Tribunal in the case K 35/15, the resolutions finding that the elections held on 8th October 2015 are not legally binding were declaratory by nature and validated a certain state of facts, which was known to the Sejm. 'It was a known state of facts that the procedure was violated at the time of electing the five Judges of the Constitutional Tribunal.'[31] And this was known to the House:

> […] at the moment of requesting legal opinions from the Bureau of Research of the Sejm, and these legal opinions were commissioned by the Bureau of Research of the Sejm and written. I mean here the legal opinion of prof. Banaszak and the legal opinion of prof. Szymanek. So, these doubts of the Sejm were simply already then as if […] well, they have been actually also confirmed by opinions of experts on the constitutional law.[32]

Contrary to the Constitution, the Sejm of the 8th term decided on 25th November 2015 that Judges of the Tribunal may be removed from their office and adopted resolutions 'finding that the resolutions of the Sejm of the Republic of Poland of 8th October 2015 on the election of a Judge of the Constitutional Tribunal published in the Polish Monitor

30 See B. Banaszak, *Opinia…*, p. 7 and 10.

31 B. Banaszak, *Opinia…*, p. 9

32 Transcript of the hearing of 9th December 2015 on the case K 35/15, < http://ipo.trybunal.gov.pl/ ipo/dok?dok=F-1920210452%2FK_35_15_1209_15_stenogram_ADO.doc >.

of 23rd October 2015 under item 1038–1042 were not legally binding.'[33] Later, on 2nd December 2015, the Sejm elected another five persons to hold the office of a Judge of the Constitutional Tribunal.[34] The same night, on 3rd December 2015 already, the President administered the oath to four persons elected Judges of the Tribunal the day before,[35] however, did not allow taking the oath by Judges elected by the Sejm of the 7th term. The events of 3rd December 2015 are of crucial importance for the understanding the nature of the constitutional crisis[36] because the hearing on conformity of Art. 137 of the Act on the Constitutional Tribunal with the Constitution, which was the legal grounds for the election of five Judges by the Sejm of the 7th term, was actually scheduled to be held before the Constitutional Tribunal on that day.

5. In its Judgment of 3rd December 2015,[37] the Constitutional Tribunal ruled that the contested Art. 137: a) is compliant with Art. 112 of the Constitution; b) is compliant with Art. 194(1) of the Constitution to the extent it concerns the Judges of the Tribunal whose tenure expire on 6th November 2015; c) is not compliant with Art. 194(1) of the Constitution to the extent it concerns the Judges of the Tribunal whose tenures expire respectively on 2nd and 8th December 2015. The Tribunal also ruled that Art. 19(2) of the contested Act is compliant with Art. 112 of the Constitution, and Art. 21(1) of Act is not compliant with Art. 194(1) of the Constitution, if it is construed to have a meaning other than laying down the duty on the part of the President of the Republic of Poland to administer the oath to a Judge of the Tribunal elected by the Sejm without undue delay.

33 M.P. 2015, items 1182, 1183, 1184, 1185, 1186.

34 M.P. 2015, items 1131, 1132, 1133, 1134, 1135.

35 M.P. 2015, items 1182, 1183, 1184, 1185, 1186.

36 For more on the constitutional crisis, see: L. Garlicki, *Die Ausschaltung des Verfassungsgerichtshofes in Polen? (Disabling the Constitutional Court in Poland?)*, in: *Transformation of Law Systems in Central, Eastern and Southeastern Europe in 1989–2015*, ed. A. Szmyt, B. Banaszak, Gdańsk 2016, p. 63–78; M. Wyrzykowski, *Bypassing the Constitution or Changing the Constitutional Order outside the Constitution*, in: *Transformation of Law Systems in Central, Eastern and Southeastern Europe in 1989–2015*, ed. A. Szmyt, B. Banaszak, Gdańsk 2016, p. 159–176; *The Constitutional Crisis in Poland*, < http://www.hfhr.pl/wp-content/uploads/2016/09/ HFHR_The-constitutional-crisis-in-Poland-2015-2016.pdf >.

37 K 34/15, OTK ZU-A 2015, No. 11, item 185.

The Tribunal did not examine the charge relating to the qualifications required to stand as candidate for the office of a Constitutional Judge. Ruling on this issue was inadmissible because in the statement of reasons, the applicant challenged an individual act of exercise of the law by the Sejm, *i.e.* the election as Judge of the Constitutional Tribunal, on 8th October 2015, a candidate with a Master's degree in canon law instead of the 'common' law. The Tribunal reminded that scrutiny of the application of the law, including its case-related interpretation by public authorities, does not, in principle, fall within the scope of the Tribunal's cognizance. However, the Tribunal drew attention to the fact that:

> […] the Constitution defines the criterion for being elected as Judge of the Tribunal in a very general way, and its more precise rendering, that is specifying the substantive conditions determining the legal capacity to be appointed as Judge and to hold the office of a Judge of the Constitutional Tribunal, was left to the legislator.

These conditions should be of a general as well as abstract nature, and closely correlated with the requirement that only persons 'distinguished by their outstanding knowledge of the law' (within the meaning of Art. 194(1) of the Constitution) should be appointed Constitutional Judges. The precise rendering in a legislative act of the criteria to be fulfilled by candidates for the position of Tribunal Judge is intended to guarantee that, in keeping with the powers of the Tribunal, its Judges are distinguished professionals and to eliminate arbitrary or discretionary election of Judges.

As regards the correlation between the Act and the Standing Orders of the Sejm in respect of the procedure for the appointment of Constitutional Judges, the Tribunal highlighted the sphere of matters that may be regulated in a legislative act and refined to a greater detail in the parliamentary rules of procedure. In the opinion of the Tribunal, this sphere covers, in accordance with Art. 112 of the Constitution, specific aspects related to the manner of fulfilment of state bodies' constitutional and statutory duties towards the Sejm. According to the Tribunal, this includes the procedure of electing a Constitutional Judge. The Tribunal was of an opinion that the said procedure was not merely an internal matter of organising the work of the House and dividing competences

amongst its internal bodies as it embraces one of the constitutional guarantees of the Tribunal's position in the state and the status of its Judges. The Tribunal accentuated that a systemic assumption of the Constitution is 'to maintain the continuity of the Tribunal's operation and to observe the principle of handover of power after the expiry of the tenure of a Tribunal's Judge.' Although a temporary operation of the Constitutional Tribunal with a reduced number of Judges is admissible, yet it should be regarded as an exception driven by extraordinary circumstances caused by events of an objective nature, and it cannot arise due to practices of state authorities responsible for appointment of a Judge of the Tribunal.

The Tribunal also analysed the 2015 elections calendar and came to the conclusion that even considering a certain flexibility of the constitutional time limits (specified for example in Art. 98(2) of the Constitution), the tenure of two Tribunal Judges (ending on 2 and 8th of December 2015) would nevertheless expire already during the 8th term of the Sejm. Furthermore, the constitutional flexibility of the date of the opening sitting of the Sejm's new term (Art. 98(1) and Art. 109(2) of the Constitution) would result in the 8th term of the Sejm starting before 6th November 2015.

The Tribunal emphasised that Art. 194(1) of the Constitution imposes a duty to elect a Judge of the Tribunal by the Sejm of the same term during which the office of a Tribunal Judge was vacated. From the phrase 'the Constitutional Tribunal shall be composed of 15 Judges elected individually by the Sejm' it follows that it is not just any Sejm, but the Sejm whose term coincides timewise with the date of end or expiry of a Tribunal Judge's tenure.

The Tribunal also saw the likelihood that the Sejm would not be able to fill the office of a Judge due to various circumstances, such as, for example, lack of support for a candidate or short deadlines for the election procedure due to the imminent parliamentary elections. In the opinion of the Tribunal, under such circumstances, the duty to elect a Judge of the Tribunal passes to the Sejm of the next term. A temporary vacancy in the Tribunal is also a constitutionally acceptable solution, provided that it transpired as a result of a confluence of justified fact-based circumstances rather than a strategy or means to achieve an end by a state authority.[38]

38 *Cf.* B. Banaszak, *Glosa do wyroku TK z 3 XII 2015 r., K 34/15* [Commentary on the Judgment of the Constitutional Tribunal of 3rd December 2015, K 34/15], "Przegląd Sejmowy" 2016, No. 2, p. 98–123; M. Bidziński, M. Chmaj, *Nowa ustawa o Trybunale Konstytucyjnym.*

Furthermore, the Tribunal expressed its opinion on the resolutions of the Sejm of 25th November 2015 which pronounced the resolutions on the election of Tribunal Judges passed by the Sejm of the 7th term

Wyrok z dnia 3 grudnia 2015 r., K 34/15 – komentarz [The new Act on the Constitutional Tribunal. Judgment of 3rd December 2015, K 34/15 – commentary], in: *Na straży państwa prawa. Trzydzieści lat orzecznictwa Trybunału Konstytucyjnego*, ed. L. Garlicki, M. Derlatka, M. Wiącek, Warszawa 2016, p. 904–932; A. Dziadzio, *Quis custodiet custodes ipsos? Trybunał Konstytucyjny jako (nie) obiektywny strażnik konstytucji. Uwagi na kanwie orzeczenia K 34/15 Trybunału Konstytucyjnego z 3 grudnia 2015 roku* [*Quis custodiet custodes ipsos?* The Constitutional Tribunal as a (not) objective guardian of the Constitution. Comments based on the Judgment No. K 34/15 of the Constitutional Tribunal of 3rd December 2015], "Forum Prawnicze" 2015, No. 5, p. 12–29; B. Grabowska-Moroz, *Kryzys konstytucyjny z Trybunałem Konstytucyjnym w roli głównej. Cz. 1* [Constitutional crisis with the Constitutional Tribunal in the lead role. Part 1], "Kwartalnik o Prawach Człowieka" 2016, No. 1, p. 5–12; W. Łączkowski, *Uwagi do aktualnych wydarzeń wokół polskiego Trybunału Konstytucyjnego* [Comments on current developments around the Polish Constitutional Tribunal], "Ruch Prawniczy, Ekonomiczny i Socjologiczny" 2016, No. 1, p. 51–56; E. Łętowska, A. Wiewiórowska-Domagalska, *A "Good" Change in the Polish Constitutional Tribunal?*, "Osteuropa-Recht" 2016, No. 1, p. 79–93; J. Mikołajewicz, *Czy dobrze się bawimy? O zadaniach nauki prawa w warunkach kryzysu konstytucyjnego* [Are we playing it right? On the role of jurisprudence in the context of the constitutional crisis], "Forum Prawnicze" 2016, No. 1, p. 3–22; J. Mikołajewicz, *Kilka uwag o legitymizacji Trybunału Konstytucyjnego w kontekście obsady stanowisk sędziowskich* [Few comments on the legitimacy of the Constitutional Tribunal in the context of appointing judges], in: *Wykładnia Konstytucji. Aktualne problemy i tendencje*, ed. M. Smolak, Warszawa 2016, p. 207–220; M. Muszyński, *Orzeczenie Trybunału Konstytucyjnego K 34/15 z dnia 3 grudnia 2015 r. w zakresie jego skutków prawnych – analiza krytyczna* [Judgment of the Constitutional Tribunal No. K 34/15 of 3rd December 2015 and its legal consequences – critical analysis], "Prawo i Więź" 2016, No. 1, p. 82–94; P. Radziewicz, M. Safjan, *Polityka a Trybunał Konstytucyjny. Konstytucja – ostatni środek obrony przed polityką* [Politics and the Constitutional Tribunal. Constitution – the last line of defence against politics], "Ruch Prawniczy, Ekonomiczny i Socjologiczny" 2016, No. 1, p. 35–42; J. Stępień, *Rewolucja – świadoma czy nieświadoma* [Revolution – deliberate or undeliberate], "Ruch Prawniczy, Ekonomiczny i Socjologiczny" 2016, No. 1, p. 19–33; A. Sulikowski, *Trybunał Konstytucyjny a polityczność. O konsekwencjach upadku pewnego mitu* [Polish Constitutional Court and the political: On the consequences of the fall of a certain myth], "Państwo i Prawo" 2016, vol. 4, p. 3–14; M. Wiącek, *Glosa do wyroku TK z 3 XII 2015 r., K 34/15* [Commentary on the Judgment of the Constitutional Tribunal of 3rd December 2015, K 34/15], "Przegląd Sejmowy" 2016, No. 2, p. 124–132; J. Zajadło, T. Koncewicz, *Sprawiedliwość konstytucyjna czy polityczne targowisko: kogo i jak wybierać do sądu konstytucyjnego?* [Constitutional judge or political fair: whom and how to appoint to a constitutional court?], "Gdańskie Studia Prawnicze" 2016, No. 35, p. 533–543; A. Zoll, *Sposób wyboru sędziów Trybunału Konstytucyjnego* [The method of appointing judges of the Constitutional Tribunal], "Ruch Prawniczy, Ekonomiczny i Socjologiczny" 2016, No. 1, p. 43–50.

not legally binding.[39] The Tribunal emphasised that these resolutions should be regarded as internal legal instruments, partly approximating a declaration, and partly a resolution. In the legal sense, their content was to reveal the political position of the Sejm on a certain issue, regarded as important by the House at that point in time, as well as make a legally non-binding appeal addressed to a state body (the President in this case) to act in a certain way. According to the Tribunal, these resolutions are neither specific nor individual as required under the so-called appointments function of the Sejm, and the statements (declarations) contained therein did not, by definition, endow the resolutions on the election of Tribunal Judges passed by the Sejm of the 7th term with a binding force. This position was confirmed by the Tribunal in its ruling of 7th January 2016.[40] The Tribunal emphasised that the regulations in force do not provide for any power on the part of any organ, including the Sejm, to declare invalidity of a Sejm's resolution on the election of a Judge to the Constitutional Tribunal nor any procedure to be followed to achieve this end. Therefore, in the opinion of the Tribunal, the resolutions on non-binding force cannot be regarded as legally binding to the extent they declare of election of Judges to the Constitutional Tribunal held on 8th October 2015 invalid.

6. The constitutional crisis was (no doubt) aggravated by the President who remained passive and prevented the Judges elected by the Parliament of the 7th term from taking their oath and, despite his qualms (expressed in the opinion of the amicus curiae and presented publicly by the President's representative before the Tribunal at a hearing held on 3rd December 2015), at night, just few hours before the Constitutional Tribunal delivered its judgment, administered the oath to the persons elected to fill vacancies which have already been filled. There can be no misgivings that adherence, pursuant to Art. 190 in conjunction with Art. 126(1) of the Constitution, to the Judgment in the case K 34/15, would have made it possible to resolve the dispute. Furthermore, the President signed the Act of 19th November

39 Resolutions on 25th November 2015 finding that the resolutions of the Sejm of the Republic of Poland of 8th October 2015 on the election of a Judge of the Constitutional Tribunal were not legally binding, M.P. 2015, items 1038–1042.

40 U 8/15, OTK ZU-A 2016, No. 1, item 1.

2015 amending the Act on the Constitutional Tribunal.[41] According to the bill proponents, it was intended to provide grounds for the election of Judges by the Sejm of the 8th term, while the mechanism of filling the vacancies created by retirement of Judges whose tenure ended in 2015 closely resembled the solutions adopted in the Act of June 2015. Furthermore, the President refrained from challenging both the Act on the Constitutional Tribunal and the Act amending the Act on the Constitutional Tribunal despite numerous voices from different legal circles that questioned the conformity of these acts with the Constitution.

During the phase of legislative work on the Act of June 2015, the provision proposed by the President (Art. 26 of the bill) regarding taking the oath by a Tribunal Judge was in principle the same as the corresponding provision of the then binding 1997 Act on the Constitutional Tribunal. Only the wording of the oath was modified. According to the bill, the Judge elected to the Tribunal was to take the following oath before the President:

> I do solemnly swear that, in the performance of my duties as a Judge of the Constitutional Tribunal, I will faithfully serve the Nation and uphold the Constitution of the Republic of Poland, and I shall do so impartially, following my conscience, with utmost diligence, and protecting the dignity of my office.

The sentence 'So help me God' was an optional add-on to the oath. The bill also envisaged that the refusal to take the oath was equivalent with the waiver of the office of Tribunal Judge. Nonetheless, this provision was not discussed in the explanatory memorandum to the bill.

Experts' opinions have been sought. Majority of opinion givers did not comment on the content of Art. 26, modification of the wording of the oath was noted by two experts.[42] Three of the experts, namely

41 Dz.U. 2015, item 1928.

42 Andrzej Herbet and Marzena Laskowska emphasised that the bill provides for a different wording of the oath to be taken by the elected Judge (Art. 26(1) of the bill on the Constitutional Tribunal). Apart from minor editorial changes of no substantial significance, the manner in which Judges of the Tribunal are to 'faithfully serve the Nation and uphold the Constitution' is defined in a slightly different way (Art. 5(5) of the Act on the Constitutional Tribunal is more accurate when it comes to performance of the duties entrusted to Judges). According to the wording of the new oath, the appointed Judge would take an oath to do so impartially, following his conscience, with utmost diligence, and protecting the dignity of his of-

prof. Dariusz Dudek, prof. Marek Chmaj and dr hab. Marcin Wiącek, recognised the need for a more precise rendering of Art. 26 in the bill.

The first of the authors noted that:

> […] the draft does not set the time limit for taking an oath by a Judge. The relevant provision […] can be completed by adding that a refusal to take the oath or not taking the oath within 30 days from the date of being elected as Judge shall be tantamount to waiver of the office of Judge of the Tribunal.[43]

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fice.' Inasmuch as the need to protect the dignity of the office seems an appropriate addition to the former text of the oath (although one may wonder whether a comma has been correctly placed before the word 'and' and whether the word 'protecting' should not have been replaced by a phrase 'to protect'), yet the addition of the phrase 'following my conscience' preceded by a comma in the bill distorts the logic of the oath to be taken by a Judge of the Court, since impartial exercise of the office may at times be difficult to reconcile with one's conscience. It seems that a bill mover's intentions would have been expressed more precisely by an oath devoid of the comma that separates the word 'impartially' from the phrase 'following my conscience' (as in the oath taken upon appointment as a judge of the Supreme Court, *cf.* Art. 27 § 1 of the Act of 8th December 2017 on the Supreme Court, Dz.U. 2018, item 5, as amended). Such an oath would not allow to hand down judgments following one's conscience, but would impose a duty to act in a way which the Judge of the Tribunal in his conscience considers impartial – *cf.* A. Herbet, M. Laskowska, *Opinia prawna dotycząca przedstawionego przez Prezydenta RP projektu ustawy o Trybunale Konstytucyjnym* [Legal opinion on the bill on the Constitutional Tribunal submitted by the President of the Republic of Poland], Sejm paper No. 1590, VII term, Warszawa, 28th November 2013, < http://orka.sejm.gov.pl/RexDomk7.nsf/0/9B8DA73A928E279BC1257BF3003CE8C4/$file/i2229-13_.rtf >, p. 16–17. On the other hand, prof. Dariusz Dudek noted that the wording of the oath of Constitutional Tribunal Judges in the bill (Art. 26(1)) differs from the oath currently in force. Although some of the additions, such as the full name of the Constitution, and the added requirement of impartiality, the conscience clause and the duty to protect the dignity of the office are reasonable, yet the wording of this provision leads to certain ambiguity whether these requirements apply to the performance of duties (which would have been quite appropriate) or to the upholding of the Constitution. In this respect, the former oath taken by a Judge, which refers twice to the performance of duties, is nonetheless more clear. Perhaps it is worth examining whether the wording of the oath should include a phrase referring to a new description of the fundamental function of the Constitutional Tribunal, namely the safeguarding of the constitutional order of the Republic of Poland – *cf.* D. Dudek, *Ekspertyza prawna w sprawie wniesionego przez Prezydenta Rzeczypospolitej Polskiej projektu ustawy o Trybunale Konstytucyjnym* [Legal expert's opinion on a bill on the Constitutional Tribunal submitted by the President of the Republic of Poland], Sejm paper No. 1590, VII term, Warszawa, 26th November 2013, < http://orka.sejm.gov.pl/RexDomk7.nsf/0/9B8DA73A928E279BC1257BF3003CE8C4/$file/i2229-13_.rtf >, p. 8–9.

43 D. Dudek, *Ekspertyza…*, p. 9.

In the opinion of prof. Marek Chmaj, Art. 26 of the bill should specify the exact time of commencement of a Judge's tenure, 'for example by adding that a tenure begins on the date of taking the oath.'[44]

The expert Marcin Wiącek noted that the work on the Act on the Constitutional Tribunal was a good opportunity to amend the Act to avoid recurrence of the circumstances that arose after the election of a Constitutional Tribunal Judge on 8th December 2006, when the oath which was the starting point of the Judge's tenure was taken as late as on 6th March 2007. The expert mentioned that 'the Constitution does not provide for any participation of the President of the Republic of Poland in the Constitutional Tribunal Judges' election procedure. Accordingly, the President is not endowed with the power to refuse administering an oath or any other powers influencing a Judge's ability to hold office in the Constitutional Tribunal. Henceforth, Art. 26 could be amended to explicitly provide that the President's part in the said procedure (given that such participation was foreseen, which was not necessary) is symbolic rather than sovereign in nature (for example the time limit for taking the oath).[45]

The oath raised no major qualms during the work on the bill. No comments were submitted on the provision regarding taking of an oath before the President as part of the Tribunal Judge appointment procedure during the joint sitting of the Judge and Human Rights Committee and the Legislative Committee on 24th April 2014. In the final wording of the Act, the obligation to take the oath was laid down in Art. 21 and was subsequently examined by the Constitutional Tribunal in the case K 34/15.

It was during the proceedings before the Tribunal that the President expressed his reservations against the solutions adopted in the new Act

44 M. Chmaj, *Opinia na temat przedstawionego przez Prezydenta RP projektu ustawy o Trybunale Konstytucyjnym* [Opinion on the bill on the Constitutional Tribunal submitted by the President of the Republic of Poland], Sejm paper No. 1590, VII term, Warszawa, 4th November 2013, < http://orka.sejm.gov.pl/RexDomk7.nsf/0/93245FAED0346A25C1257BEC00374BA3/$file/i2348-13A.rtf >, p. 8.

45 See M. Wiącek, *Ekspertyza dotycząca przedstawionego przez Prezydenta RP projektu ustawy o Trybunale Konstytucyjnym* [Legal expert's opinion on the bill on the Constitutional Tribunal submitted by the President of the Republic of Poland], Sejm paper No. 1590, VII term, Warszawa, 25th November 2013, < http://orka.sejm.gov.pl/RexDomk7.nsf/0/732DE37857948F93C1257BEF0038FCB5/$file/i2229_13.rtf >, p. 5–6.

with regard to his participation in the appointment procedure. According to the President, in the case of five appointees elected to hold the office of a Constitutional Tribunal Judge by the Sejm of the 7th term who did not take the oath and whose election process was not completed, the principle of discontinuation of the work of the Parliament which is a long-lasting element of parliamentary practice in Poland, has been violated. The President also mentioned breaking the so-called legislative silence, which applies to determining election rules of other state bodies, by the Sejm of the 7th term. In the view of the President, it is inadmissible to change the procedure for the appointment of Constitutional Tribunal Judges during a period of six months immediately preceding the elections. As a result of such violation, the Sejm of a given term transgresses the powers of the subsequent term of the Sejm, which is tantamount to disregarding the will of the people (the sovereign) who elected the new parliament. The President also noted a contradiction between the Act on the Constitutional Tribunal and the Standing Orders of the Sejm with regard to the date of submission of candidates and determining the nominators empowered to submit the candidates. In the President's opinion, this contradiction leads to violation of the Sejm's autonomy in the area of laying down in own rules of procedure.

During the hearing in the case K 34/15, when asked by the panel of Judges about the Head of State's definition of the act of administering the oath to a Sejm-elected Judge of the Constitutional Tribunal and the constitutional grounds for the President's participation in the Judge appointment procedure, the President's representative emphasised that the President shares the opinions commissioned by the Bureau of Research of the Sejm, according to which the process of 'appointment of a Judge ends at the moment of taking the oath before the President of the Republic of Poland.'[46] As the grounds for this assertion, the President's representative invoked Art. 21 of the Act on the Constitutional Tribunal of 2015, according to which the oath is not taken by a Judge but by an appointee elected to hold the office of Judge. Referring to the legal grounds for the President's participation in the procedure of appointing a Constitutional Tribunal Judge, the Presi-

46 *Stenogram rozprawy z dnia 3 grudnia 2015 r. w sprawie K 34/15* [Stenographic transcript of the hearing of 3rd December 2015 in the case K 34/15], < http://ipo.trybunal.gov.pl/ipo/dok?dok=F-86102344%2FK_34_15_1203_15_stenogram_ADO.doc >.

dent's representative pointed to the Act on the Constitutional Tribunal and the constitutional prerogative of the Head of State to appoint Judges (Art. 144(3) of the Constitution), with the reservation that:

> […] the procedure [of taking the oath – A.C.-G., J.S.] is not […] explicitly laid down in constitutional provisions, since it partly relies on the status of a Judge and partly on the so-called appointments function vested in the Parliament.[47]

Moreover, the President's representative added that the President refused to administer the oath to five Judges elected by the Sejm of the 7th tenure on account of non-compliance with the requirement of cooperation in submitting candidates between the Presidium of the Sejm and a group of 50 MPs, imposed by Art. 19(1) of the Act on the Constitutional Tribunal.[48]

It must be admitted that the President's way of discharging his statutory duty of administering the oath to the Constitutional Judges elected by the Sejm was the greatest driver behind the emergence and escalation of the conflict around the Constitutional Tribunal. Few remarks should be made in this respect.

Firstly, the President erred in assuming that the Sejm elects not a Judge, but an appointee who is then appointed Judge upon taking the oath. This view is not compatible with Art. 194 of the Constitution and the principle derivable from Art. 8 of the Constitution that constitutional provisions cannot be interpreted in legislative acts.[49] In fact, the practice so

47 *Stenogram rozprawy z dnia 3 grudnia 2015 r…*

48 While exchanging opinions on the connective, MP Borys Budka asked: 'if the President of the Republic of Poland interprets this provision as being cumulative […], then what was the basis for administering the oath yesterday to four judges who were not submitted […] jointly by the Presidium of the Sejm and a group of MPs, but […] upon the motion of a group of MPs.' The MP noted that on the one hand the President underlined that the '*ratio legis* of this provision […] and the use of the connective 'and' was to guarantee the cooperation of a group of MPs and the Presidium of the Sejm when submitting candidates for the office of Constitutional Tribunal judge' and on the other hand, the President administered the oath to judges elected lacking the legally required cooperation of a group of MPs with the Presidium of the Sejm – see *Stenogram rozprawy z dnia 3 grudnia 2015 r…*

49 The fact that the Act on the Constitutional Tribunal refers to a person elected as a judge of the Tribunal may not affect the understanding of Art. 194 of the Constitution, and it may at most indicate that this provision is unconstitutional.

far has shown that reservations relating to Judge appointee cannot lead to a refusal to administer the oath. The Sejm's obligation to elect a Judge to the Tribunal is fulfilled at the time of passing a resolution with the required majority of votes. Subsequent events, such as the announcement of the resolution in the official journal Monitor Polski or taking an oath affect neither the validity nor the scope of this obligation.

Secondly, even assuming that the Head of State participates in the appointment of Judge to the Tribunal, the principle of discontinuation of the work of the Parliament is immaterial as not taking the oath by a Judge has no legal effects upon the Sejm. Inaction of the President does not eradicate the election because the Sejm has discharged its constitutional duty and cannot take any further action. Thus, it is a logical slip on the part of the President to assume discontinuation of an already completed procedure.

Thirdly, in the Judgment of 3rd December 2015, the Constitutional Tribunal ruled that the Head of State has a duty to immediately administer the oath to a Judge elected by the Sejm, and that any other interpretation of the Act's provision on oath is inconsistent with the Constitution.

Fourthly, referring to the Judgment of the Constitutional Tribunal of 9th December 2015,[50] a situation whereby a President, relying on a legislative act, could block the appointment of a Judge elected in accordance with the Constitution by the Sejm, thus gaining grounds for above-constitutional influence on the election process, was considered by the Tribunal to be an example of 'disruption of the principle of separation and balance of powers as well as separation and independence of the judiciary.' Another conduct which the Tribunal has qualified as 'disruption' of the principle of separation and balance of powers was an attempt to influence, by fixing the date of taking the oath, the beginning of a tenure of a Constitutional Tribunal Judge. According to the Constitutional Tribunal, such an action would constitute a breach of Art. 173 of the Constitution which provides for the separation of the judiciary (item 6.3.2).

7. Until recently, the recognition of constitutional importance of the separation and independence of the judiciary and the supremacy

50 K 35/15, OTK ZU-A 2015, No. 11, item 186.

of the Constitution was not called into question. These guarantees have long been taken for the precept of a modern democratic state and the belief that they should be safeguarded was indeed a commonplace. These values are universal and therefore the norms governing the political system of the state that underlie these values should remain stable. Change of these norms, although viable, affects the most sensitive aspects of the division of power, the rule of law and, what must be duly emphasised, the legal security of individuals.

The dispute over the Constitutional Tribunal has made clear in all sharpness that appointment of a Constitutional Judge is of crucial importance for Members of Parliament, while influence on the composition of the Tribunal primarily serves the purpose of electing 'our guys' as Judges, which has little in common with the principle of separation of powers. However, this crisis should not be downgraded to a mere dispute over the personal composition of the Constitutional Tribunal. Its origins should be seen in the ruling political powers' failure to recognise the existing constitutional order as a value which is inviolable (except for the mechanisms of constitutional amendments provided for by the legislature).

As a consequence, failing to score in parliamentary elections a majority sufficient to amend the Constitution, what remains is to interpret its provisions in a way which squares with the political interests of the ruling parliamentary majority. Acceptance of the interpretation which was contrary to the generally accepted principles of interpreting the law, in the absence of consent between political powers, has brought not only an impasse in the Constitutional Judges election procedure, but has also destabilised the constitutional system and violated the constitutional order of the Republic of Poland.

In turn, being in charge of scrutiny over compliance with the Constitution, the President should have been expected to bring the constitutional crisis to an end rather than to escalate it. Regrettably, the President has had many contributions to Poland being now perceived as a country with a weak democracy where the supremacy of the Constitution, the authority of the constitutional court, the guarantees of impartiality and the independence of Constitutional Judges and the judiciary have been subverted.

Summary

The paper is meant to briefly present the sequence of events and the analysis of the constitutional crisis in Poland that is not be reduced to the personal matters and solely to the composition of the Constitutional Tribunal. Such crisis seems to result from the lack of recognition for current constitutional order and from the fact that major political forces seem not to value inviolability of constitutional *status quo*.

It shall be pointed out that in the lack of qualified constitutional majority (that have not been achieved in the last election) preventing from any legal changes to the Constitution, political majority keeps forcing such interpretation of the Constitution which is accordance with their political interests. This rises imbalance of the entire constitutional system in Poland.

The constitutional crisis has also resulted in lowering the position of the Constitutional Tribunal in the public eye, as well as in questioning the guarantees of impartiality and independence of constitutional judges. The dispute has turned into a serious crisis of this branch of judiciary that have been challenged as a necessary part of democratic state of law.

The paper ends with the conclusion of a strong need of the multilevel public debate – involving legal, political and social arguments – on the role of constitutional court in democracy, that may be – particularly in so-called 'young democracies' – exposed to extra-legal political pressure.

Keywords: constitutional crisis, constitutional justice, politicization of justice, judicial independence

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GLOSS

Monika Florczak-Wątor

Commentary on the Polish Constitutional Tribunal's Judgment of 16th March 2017, Case No. Kp 1/17*

1. Introduction

The Judgment of the Polish Constitutional Tribunal (hereinafter referred to as: "CT") of 16th March 2017 issued in case Kp 1/17,[1] whereby the phenomenon of 'cyclical assemblies' was legalised, merits attention not only because of the importance of the challenged provisions, the controversial nature of the decision, and the fact that it was issued with the participation of persons not authorised to sit as judges of the CT, but also – or perhaps predominantly – because of the new vision of the relationship between the individual and the state that we find in the statement of reasons. It differs from the one we used to deduce from the current Polish Constitution of 1997.[2] This vision assumes that the individual is subordinate to the state and that

* The commentary was earlier published in Polish on Serwis Informacji Prawnej LEX (LEX/el. 2017, No. 324075) and on konstytucyjny.pl, < http://konstytucyjny.pl/glosa-do-wyroku-tk-z-dnia-16-marca-2017-r-sygn-akt-kp-117-monika-florczak-wator >.

1 OTK ZU-A 2017, item 28.

2 The Constitution of the Republic of Poland of 2nd April 1997, Dziennik Ustaw (Official Journal of Laws of the Republic of Poland, hereinafter referred to as: "Dz.U.") 1997, No. 78, item 483, as amended, hereinafter referred to as: "Constitution."

the individual's freedoms can be radically limited to protect the rights of the majority, precedence being given to such forms of enjoying this freedom as the state prefers.

The commented judgment was issued in the preventive review procedure, initiated by an application submitted by the President of the Republic of Poland before signing the Act of 13th December 2016 on Amendments to the Act – Law on Assemblies (the 'Amending Act'). In respect of this Act, the President formulated three objections, two of which have finally been examined by the CT on their merits, while proceedings concerning the third one were discontinued. After the judgment was issued, the President signed the aforementioned Act and ordered its promulgation in the Official Journal of Laws of the Republic of Poland (Dziennik Ustaw).[3] The Act came into force on 2nd April 2017.

2. The objection of privilege of cyclical assemblies

2.1. Subject-matter of the objection

The first objection formulated by the President in his application to the CT concerned the unconstitutional differentiation of the status of public gatherings, whereby a category of cyclical assemblies was distinguished and granted privilege. These are assemblies organised by the same entity in the same place or along the same route at least four times a year according to an existing schedule or at least once a year on state or national holidays, provided that such events have taken place in the preceding three years, even if they were not assemblies, and aimed in particular to commemorate momentous events of great importance for the history of the Republic of Poland.

In the light of the challenged provisions, consent for cyclical organisation of assemblies is issued by a voivode (province governor). The consent confers, for the three subsequent years, an exclusive right to organise gatherings in a given place or along a given route, at dates fixed in advance. Cyclical assemblies are privileged over other public gatherings in that the organisers of the former have precedence in choosing the place and time of the assembly, even over assemblies that have been notified

3 Dz.U. 2017, item 579.

earlier.[4] Moreover, the municipal authority has a duty to issue a decision prohibiting another assembly scheduled in the same place and time as the cyclical one, even when the former does not infringe the law, or pose a threat to human life or health, or a considerable threat to property.[5] If that were not enough, once the voivode has agreed for the cyclical assembly to take place, the municipal authority, within 24 hours of the receipt of this information, is obligated to prohibit the organisation of assemblies notified previously, which were due to be held in the same place and at the same time. If no such decision is issued, the province governor immediately issues a substitute order forbidding any assemblies other than the cyclical ones.[6]

In the President's opinion, all peaceful assemblies should be guaranteed freedom of assembly under Art. 57 of the Constitution to the same extent. Public authorities have a duty to provide conditions for the exercise of freedom of peaceful assembly regardless of the form in which individuals want to exercise it. The President furthermore emphasises that Art. 57 of the Constitution does not provide any grounds for differentiating the legal status of gatherings depending on the criteria of purpose or frequency.

2.2. The essence of the freedom of assembly as defined by the CT

What commands particular attention is the way in which the CT presents the essence of the freedom of assembly in the commented judgment. The CT did not refer to its existing rich case law relating to this freedom,[7] and in defining its essence it relied on rather vague opinions 'from literature,' without quoting even one specific source. Consequently,

4 *Cf.* Art. 12(1) of the Act of 24th July 2015 – Law on Assemblies, Dz.U. 2018, item. 408, as amended; hereinafter referred to as: "the Law on Assemblies."

5 *Cf.* Art. 14(3) of the Law on Assemblies.

6 *Cf.* Art. 26b of the Law on Assemblies.

7 *Cf.* Judgment of the CT of 18th September 2014, K 44/12, OTK ZU-A 2014, No. 8, item 92; Judgment of the CT of 10th July 2008, P 15/08, OTK ZU-A 2008, No. 6, item 105; Judgment of the CT of 18th January 2006, K 21/05, OTK ZU-A 2006, No. 1, item 4; Judgment of the CT of 10th November 2005, Kp 1/04, OTK ZU-A 2004, No. 10, item 105; Judgment of the CT of 28th June 2000, K 34/99, OTK ZU 2000, No. 5, item 142; resolution of the CT of 16th March 1994, W 8/93, OTK ZU 1994, No. 1, item 18.

the definition of assembly that the CT used as its starting point was expressed in very general – not to say banal – terms. The CT states:

> In the literature it is assumed that 'assembling' means many persons gathering together. In other words, what is meant is a gathering (grouping, meeting) in a single place of at least several people, among whom there is an in-group psychological association resulting in a mutual willingness to exchange views.

The CT stresses also that the repeatability and regularity of assemblies are their defining features. It states:

> If the sole common criterion for distinguishing a group of people who take part in an assembly is the intellectual relationship that participants of the assembly have among themselves, which integrates them, nothing will strengthen this bond better than the repeatability and regularity of assemblies.

Meanwhile Art. 57 of the Constitution gives no grounds for any privilege of regularly repeated assemblies over one-off assemblies, while Art. 3(1) of the Law on Assemblies is even an argument that the latter are the typical ones. In the light of this provision, an assembly is a gathering of persons in an open space accessible to persons who are not named, in a specific place, in order to hold common deliberations or jointly express a standpoint on public matters. The purpose of the assembly identified in the Act is rather one-off than repeatable, while the notion of space accessible to persons who are not named indicates that public assemblies are open.

But the most surprising statement in the commented judgment is the one which introduces the actual reflections about the essence of assemblies. The CT considers that while:

> […] it is the notification model in the organisation of assemblies that most fully implements the freedom of assembly, other methods of determining the legal framework in which this freedom is realised are also permissible. The legislator has discretion in choosing the system of regulating the freedom-related rights.

The formulation of a thesis of this kind leads to the conclusion that the CT is not aware of the distinction between rights and freedoms and the importance of this distinction for the legislator. Yet the legislator can only set the boundaries of freedoms, rather than permit their exercise, which is the case with rights. Thus we cannot assume that the legislator can apply a system of permits (consents) in the regulation of constitutional freedoms in the same way as the system of notifications is applied. In the Judgment of 18th January 2006,[8] the CT clearly stated that:

> […] it is unacceptable – from the constitutional point of view – for any regulation to remove notification as the basic construction, provided for by the 'original' statute, that is, the Law on Assemblies.

On that occasion, the CT stressed that:

> The constitution does not permit enacting such regulations that, in a specific matter, undermine the constitutional model of a given freedom or right. Such undermining can consist in replacing the requirement of prior notification of municipal authorities with the requirement of obtaining a permit to hold an assembly. The need to obtain a permit would have to 'repeal' the conception of notifying the municipal authorities and, as a stronger means of influence of public authorities on assembly organisers, it annuls the basic construction provided for in the Law on Assemblies.

Considering the above findings, included by the CT in judgment K 21/05, one should observe that consent for the organisation of a cyclical assembly means in fact annulling the effect of a prior notification of another assembly to be held in the same place and at the same time. So this is a typical 'regulation removing notification as the basic construction,' held unacceptable by the CT. However, in the commented judgment the CT did not even refer to the view it had earlier expressed in judgment SK 21/05, so it is hard to find whether the change of view was the Tribunal's conscious decision.

Early on, it should be mentioned that the CT, in the commented judgment, does not devote any attention to the problem of an evaluative

8 SK 21/05, OTK ZU-A 2006, No. 8, item 103.

nature of the criteria of granting consent for a cyclical assembly to be held. The voivode is actually completely free in evaluating whether the assemblies held earlier were 'aimed in particular to commemorate momentous events of great importance for the history of the Republic of Poland.' The expression 'in particular' means that the past assemblies could have also had other aims, not mentioned by the legislator. Also the criterion of 'commemorating' and that of certain events being 'momentous' and 'of great importance' for Poland's history are evaluative in nature. All the above criteria are capable of being interpreted and applied by the province governor in a discretionary manner, which obviously infringes the principle of legalism formulated in Art. 7 of the Constitution, which requires public authorities to function on the basis of the law and within its limits.

2.3. The problem of rationality of special regulation concerning cyclical assemblies

In its reconstruction of the *ratio legis* of the statute which introduced cyclical assemblies into the Polish legal system, the CT provided three arguments in favour of the need to cover them with special statutory regulation.

Firstly, the CT found that the statutory regulation of cyclical assemblies was:

> […] an attempt to accommodate the changing social situation by means of a formula systematising new facts. This concerns classifying the newly appearing ways in which realisation of the freedom of assembly is manifested, which can be systematised and which, due to their particularities, require separate norms.

Of course, the legislator can also extend the scope of regulation to the newly appearing social phenomena if they remain outside such regulation. However, cyclical assemblies had not previously been outside the scope of regulation of the Law on Assemblies. Quite the contrary, they were subject to the same statutory regime as any other public assembly. The amendments did not, therefore, aim to cover them with the existing legal regulation, but to exclude them from its scope of application and subject them to a new legal regime, created especially for them. Similarly, one cannot accept the CT's view that there are 'newly appearing

ways in which realisation of the freedom of assembly is manifested.' When the Amending Act entered into force, there was only one kind of assembly that met the requirements pertaining to cyclical assemblies: the monthly assemblies held to commemorate the victims of the Smolensk plane crash (the so-called Smolensk monthlies). Other assemblies, even if organised repeatedly, too, did not fulfil the statutory criteria of cyclical assemblies in terms of the frequency or the aim for which they were held, and thus they remained outside the scope of regulation of the Amending Act.

Secondly, in the CT's view, 'the need to ensure order and safety' is an important reason for covering cyclical assemblies with a special statutory regulation. This argument should be dismissed as completely incomprehensible. Accepting it would require proving that the participants of cyclical assemblies are exposed to particular danger, which is not present in the case of other public assemblies. Meanwhile, at the stage of applying for the province governor's consent for holding assembles cyclically, the organiser is not required to demonstrate any particular threats. Moreover, in order to forbid an assembly due to take place in the same place and at the same time as the cyclical one, there is no need to show that it is highly likely that the former might pose a threat to the latter. Even if both assemblies were peaceful ones, it would not be legally possible to organise them at the same time if either of them were not a cyclical assembly. This way the legislator, assuming that citizens would exercise their freedom of assembly in a confrontational manner, decided to simply ban competing assemblies at the given time and in the given place. From a range of the possible ways to address the problem, the legislator has chosen the one that is the most onerous for citizens, moreover one that is applied automatically, regardless of the actual threat for the participants of both assemblies. At the same time the CT held in the judgment in question that cyclical assemblies 'are safer from the state's point of view and give better guarantees of public order, as well as the state's stability, so they are more conducive to the common good.' Yet it is not the state's role to name which assemblies are better from the state's perspective, while no common good justifies such a drastic restriction of the freedom of assembly as the absolute ban on organising any assemblies at a given time and place. As the CT stressed in judgment in case K 21/05:

> […] public authorities have a duty to guarantee implementation of […] the freedom of [of assembly], regardless of the party affiliation and political views, because the freedom of assembly is a constitutional freedom and not a value defined by a democratically legitimated political majority that holds power at a given point in time.

Moreover, in the same judgment the CT stated that:

> […] [the] constitutional safeguards of the freedom of assembly imply that public authorities are prohibited from taking this freedom away […] when the message that is communicated is inconsistent with the set of values professed by those holding public power. The public authorities have no right to ascribe the assembly organisers any aims or intentions and – on this basis – to formulate evaluations that lead them to forbid the assembly. The moral convictions of those holding public power are not synonymous with 'public morality' as the grounds for restraining freedom of assembly.

The commented judgment completely contradicts the views expressed in judgment K 21/05, to which the CT did not make any reference at all.

Thirdly, the CT asserts in the commented judgment that deeper interference in the exercise of the freedom of assembly in the form of cyclical assemblies is justified 'by the need to […] provide guarantees to other persons or entities.' In this context, it is unclear who those 'other persons or entities' are. The use of the word 'other' seems to suggest rather that these are not the participants of the cyclical assembly. But once those other persons – not the participants of the cyclical assembly – are prohibited from organising another assembly at the same time and place, it can hardly be considered a method of guaranteeing to those persons the ability to exercise the freedom of assembly. So it seems that even though the CT formulated the above view, it had failed to consider the question of the rights and freedoms of other persons who might wish to organise another gathering at the place reserved for the cyclical assembly. The CT limited itself to stating that cyclical assemblies:

> […] do not eliminate, for assembly organisers, the possibility of exercising the freedom of assembly in other forms (*i.e.* by means of notified or spontaneous assemblies) if they are […] forced to refrain

> from exercising their right to freedom of assembly at a given place and time.

Many more similarly controversial tips for citizens who would like to enjoy freedom of assembly can be found in the commented judgment. And so the CT states that once cyclical assemblies are granted precedence, there are 'no obstacles to holding another assembly at a distance greater than 100 m' and also that:

> […] the legislator, by granting to organisers of cyclical assemblies precedence in choosing the place and time, does not, by any means, preclude organising another assembly, unless the latter is held at same place and time.

Thus the CT completely ignores the fact that the right to choose the place and time of holding an assembly is one of the basic rights of a person exercising the freedom of assembly. If a person is forced to organise an assembly at a different place and time than they wished, this is a violation of said person's freedom, which the CT confirmed as early as in the interpretative resolution of 16th March 1994 (W 8/93), where it stated:

> A voivode – when issuing […] a decision forbidding an assembly at a given place, time and along a specified route […] – cannot specify another place, time of assembly and another route for the march.

The commented judgment does not even mention the above interpretative resolution.

2.4. The problem of privilege of cyclical assemblies

In the commented judgment, the CT asserts that cyclical assemblies need to be privileged over other public assemblies, because they:

> […] enable emphasising certain publicly important values and make them the subject of public debate. It is precisely because of the defined subject-matter that they should have the guarantee that they will be able to be held at a specific place and time.

This statement gives rise to considerable doubts in view of Art. 57 of the Constitution, which guarantees the same protection to all peaceful assemblies, regardless of their aim and subject matter. Additionally, the CT's general thesis about it being permissible to differentiate between public gatherings is justified in a rather unconvincing way.

First, the CT argues that 'Art. 57 of the Constitution does not indicate any criteria for differentiating assemblies,' thus the legislator is free to apply any criteria. We can find this argument strange if we realise that the only criteria for any differentiation that the Constitution might mention – though none are mentioned – are negative. It is hard to imagine the constitution legislator formulating any positive criteria on whose basis the regular legislator could differentiate the right of citizens to exercise the freedom of assembly.

Secondly, the CT stresses that 'Art. 31(3) of the Constitution […] confirms that such a differentiation can be introduced.' Meanwhile this provision does not even concern the problem of differentiating the rights and freedoms of the individual. This issue is regulated by Art. 32 and Art. 33 of the Constitution, which generally prohibit such differentiation and to which the CT made no references in this part of its argumentation. The quoted Art. 31(3) of the Constitution defines the conditions for restraining the constitutional rights and freedoms and does not contain – contrary to what the CT asserts – a general permission for differentiating those rights and freedoms. It is just the opposite: differentiating the rights and freedoms is a form of restraining them, permissible as an exception and subject to the conditions defined in this provision.

Thirdly, in order to justify the permissibility of differentiating public gatherings, the CT makes references to statements it has never formulated, which statements are identified as ones apparently already existing in CT case law. In this respect the CT stated that it upheld 'also its existing standpoint that the legislator can apply various legal solutions that will match the kind of the public assembly, the number of its participants, its reach, and other circumstances.' This is a statement without any grounds whatsoever in CT case law, just like the next one, according to which 'within the category of public assemblies, the legislator has already introduced certain differentiations that have not been challenged

before the Constitutional Tribunal.' The only differentiations introduced by the legislator with reference to public assemblies were those concerning spontaneous assemblies and this was a consequence of a CT judgment confirming that spontaneous assemblies – if peaceful – are lawful assemblies and enjoy the protection guaranteed by Art. 57 of the Constitution.[9] The provisions on spontaneous assemblies have never been challenged before the CT, hence it is impossible to draw any conclusions from the fact this body has never questioned them.

Fourthly and finally, the CT asserts that:

> An argument in favour of giving priority to cyclical assemblies is the aim of holding them, which influences the formation of specific attitudes. In particular, they are worth supporting if the individualising criterion is values of special importance from the point of view of the state as the common good.

The CT repeats this view later in the commented judgment. More precisely it stated that the regulation at issue enables the 'formation of specific civic attitudes.' The Constitution does not allow the state to accord any preferential treatment to certain assemblies because of the aims pursued by their organisers. The freedom of assembly comprises also the freedom to choose any goal for these assemblies. The state cannot give privilege to assemblies whose aim is convenient or advantageous for those holding political power. By its nature, the freedom of assembly does not serve to express support for the state, but rather public disapproval. For this reason assemblies organised by public authorities remain outside the scope of regulation of the Law on Assemblies.[10] The freedom of assembly is a political freedom, enjoyed particularly by those dissatisfied with the state's policies. In this context, it is a cause for concern that the CT endorses the following view:

9 This concerns Judgment of the CT of 10th July 2008, P 15/08, OTK ZU-A 2008, No. 6, item 105. *Cf.* approving commentaries on the Judgment by A. Niżnik-Mucha, "Przegląd Sejmowy" 2009, No. 2, p. 175–183, and by R. Rybski, "Przegląd Sejmowy" 2012, No. 3, p. 227–232.

10 *Cf.* Art. 2(1) of the Law on Assemblies. The same exclusion appeared in the previous version of the statute. *Cf.* Art. 4(1) of the Act of 5th July 1990 – Law on Assemblies, Dz.U. 2013, item. 397, as amended.

> When the […] participants' goals further at the same time the goals of the state as the community of citizens (common good), the state should give them priority and grant privilege to the form of assembly by which these goals are pursued.

And later the CT adds that:

> […] introducing a precedence for cyclical assemblies […] is an implementation of the state's obligation to protect assemblies […] thanks to establishing a rule to resolve the physical collision of assemblies. This is confirmed in the […] case law of this Tribunal and the European Court of Human Rights.

So again the CT uses an argument from authority without naming judgments of either court to justify its assertion. Yet, more importantly, in this case the assertion made by the CT is also unfounded. Both the CT[11] and the European Court of Human Rights (hereinafter referred to as: "ECtHR"),[12] in their respective case law, accepted that the very fact of a gathering being a counter-rally did not justify banning it. Even the Law on Assemblies permits holding two or more assemblies in the same place and at the same time. The statute only prohibits them when it is impossible to hold them in such a way as to avoid threats to human life or health, or significant threats to property. Meanwhile, with regard to cyclical assemblies the legislator adopts the opposite rule, namely that it is never possible to hold them together with other assemblies, because the latter will always pose a threat to human life or health, or a significant threat to property. Thus the legislator presupposes ill will

11 *Cf.* in particular Judgment of the CT of 18th January 2006, K 21/05, OTK ZU-A 2006, No. 1, item 4.

12 *Cf.* in particular: Judgment of the ECtHR of 10th October 1979, App. No. 8191/78, *Rassemblement Jurassien* v. *Switzerland*; Judgment of the ECtHR of 6th March 1987, App. No. 13079/87, *G.* v. *Germany*; Judgment of the ECtHR of 21st June 1998, App. No. 10126/82, *Plattform "Ärzte für das Leben"* v. *Austria*; Judgment the of the ECtHR of 30th January 1998, App. No. 133/1996/752/951, *United Communist Party of Turkey and Others* v. *Turkey*; Judgment of the ECtHR of 24th November 2005, App. No. 46336/99, *Ivanov and Others* v. *Bulgaria*; Judgment of the ECtHR of 20th October 2005, App. No. 59489/00, *United Macedonia Organisation Ilinden-Pirin and Others* v. *Bulgaria*; and Judgment of the ECtHR of 20th September 2005, App. No. 45454/99, *Yesilgoz* v. *Turkey*.

on the part of participants of assemblies other than the cyclical ones, which it is not allowed to do in the light of the Constitution.

The CT asserts that '[t]he idea of cyclical assemblies devoted to certain topics of public or historical importance facilitates the formation of certain civic attitudes and has an educational function.' It also stresses that cyclical assemblies 'can contribute to the creation of social conditions for development, which is an argument in support of their special legal position.' This is a recurring theme in the statement of reasons of the commented judgment. Meanwhile a democratic state has no right to educate its citizens by naming the preferred aims or forms of exercise of their freedoms. The only obligation of public authorities, as the CT stated in its Judgment of 28th June 2000 (K 34/99), is to remove obstacles to the enjoyment of the sphere of freedom of assembly and to abstain from unjustified interference with this sphere, as well as to take positive steps aimed at implementing this right.

2.5. Cyclical assemblies v. spontaneous assemblies

When justifying the constitutionality of cyclical assemblies, the CT makes several references to spontaneous assemblies. In this context it quotes a fragment of the statement of reasons of its Judgment of 18th September 2014 (K 44/12), concerning the last category of assemblies, which reads as follows: 'There are […] no grounds for differentiating assemblies on the basis of Art. 57 of the Constitution in terms of the extent of their protection, applying the criterion of how a given gathering of persons was organised,' and adds that '[t]he thesis advanced by the Tribunal holds true also for the cyclical assemblies introduced by the Amending Act.' Meanwhile the thesis about the inadmissibility of differentiating the extents of public assemblies' protection, formulated in the judgment in case K 44/12, leads to precisely the opposite conclusion. Indeed, the main objection raised by the Polish President was that the legislator, when introducing the category of cyclical assemblies, unconstitutionally differentiated the protection accorded to public assemblies, which is prohibited in the light of the quote from the judgment in case K 44/12.

Similarly, one cannot share another view presented by the CT in the commented judgment, namely that notified assemblies take precedence over

spontaneous ones, because the latter must not disturb the former. Although Art. 27 of the Law on Assemblies does indeed provide that the participants of a spontaneous assembly cannot disturb the course of a notified one, but this does not mean that the participants of a notified assembly are permitted to disturb the course of a spontaneous one. The prohibition of disturbing the course of another assembly applies equally to all assemblies and does not permit establishing any hierarchy of assemblies on this basis. Similarly, it is not true – as the CT asserts – that 'the procedure of organising cyclical assemblies is stricter than the procedure of organising notified assemblies.' In case of the former it is enough to obtain a single consent guaranteeing reservation of the place and time of the assembly for three years, while in the latter case the requirement of notification has to be fulfilled before every single assembly. Even the application for consent to organise a cyclical assembly need not contain such detailed information as the notification submitted in case of organising a notified assembly. In the application, the organiser only provides the justification of the aim why cyclical assemblies are organised, identifying their number and dates. Meanwhile the notifier of a notified assembly is obligated to provide detailed information referred to in Art. 10(1) of the Law on Assemblies. By the same token, another thesis put forward by the CT is disproved:

> Once the […] procedure of organising cyclical assemblies is stricter than the procedure of organising notified assemblies, granting to the former (cyclical) assemblies precedence displaying the features of privilege in fact compensates for the degree of legislative interference in the exercise of the freedom to hold such assemblies.

The CT expresses yet another unacceptable view, namely that in case of cyclical assemblies there exists a 'right to organise the assembly at the specified time and place, which right has been acquired under an administrative instrument' and that:

> […] this right should be given stronger protection, because it has double safeguards: in the Constitution and in the statute. This fact also justifies the precedence of a cyclical assembly over any other kind of assembly if they were to be held at the same place and time.

This argumentation method leads to the conclusion that it is legitimate for the legislator to identify the preferred form in which citizens should exercise their constitutional freedoms and then privilege this form over other available forms. This would amount to negating the freedoms guaranteed by the Constitution, for whose exercise the state merely defines the legal framework, without interfering in how the citizens enjoy their freedoms within the defined legal framework.

Another surprising statement of the CT is that 'the organisers of an assembly that was prevented from taking place because of a cyclical assembly held in the given place and at the given time can also resort to the formula of a spontaneous assembly.' This statement practically encourages circumventing the law by means of holding spontaneous assemblies in the same place and at the same time as cyclical ones. The former cannot be prohibited in advance, because they are not notified. Moreover, it is obvious that not every assembly that has not been notified is spontaneous. In order to be one it has to meet the conditions specified in Art. 3(2) of the Law on Assemblies, namely it has to take place in connection with the occurrence of an unexpected and previously unforeseeable event connected with the public sphere, and holding it at a different time would be irrational or of little importance from the point of view of the public debate.

2.6. The prohibition of organising assemblies other than cyclical ones

In the CT's view, the prohibition of organising an assembly in the same place and at the same time as one of the cyclical assemblies is justified by 'the state's obligation to ensure safety of those exercising the freedom of assembly.' This statement is not confirmed by the contents of Art. 14 of the Law on Assemblies, which lists three independent cases when the municipal authority can issue a decision prohibiting the assembly. The first one is a situation when the aim of the assembly infringes the freedom of peaceful assembly, when it is organised by persons without full legal capacity or persons holding firearms, explosives, pyrotechnic articles or other dangerous materials or devices, as well as when the principles of organising assemblies or the aim of the assembly or holding the same are criminal offences. The second situation justifying a decision to forbid an assembly

is when holding it can pose a threat to human life or health or a considerable threat to property, including if such a threat cannot be removed in ways regulated by statutory law. And, lastly, the third situation is the one added by the Amending Act: the issue of a decision prohibiting an assembly if it is due to be held in the same place and at the same time as an assembly organised on a cyclical basis. Concerns about safety are clearly the factor behind the decisions issued in the first two cases, but in the third situation they play no role at all. In this case the only factor taken into account is the sameness of the place and time of the prohibited assembly and the one organised on a cyclical basis. Therefore, as far as this criterion is concerned, the authority does not evaluate the questions of safety and it is impossible not to issue a decision prohibiting the assembly even if both assemblies were mutually friendly and peaceful in character.

Resolving conflicts of rights and freedoms of individuals requires balancing the underlying values and considering to what extent one right or freedom can be limited in order to protect the other, without encroaching upon the essence of the former. A general ban on any assemblies at the time and in the place designated for a certain cyclical assembly means granting absolute protection to participants of the latter assembly, while violating the freedom of assembly of all other persons. Meanwhile, in the statement of reasons for the commented judgment the CT holds that:

> The challenged regulation does not violate the essence of the freedom of assembly, but harmonises the mutual exercise of the freedom of assembly with other human freedoms and rights, while striving to ensure public order and realise common good.

Once the state completely deprives the citizens of the possibility to exercise freedom of assembly in the place and at the time when other citizens organise cyclical assemblies, any mention of the mutual harmonisation of freedom of assembly is beyond comprehension.

3. The objection of lack of possibility to challenge the substitute order

The second objection expressed by the President in the application submitted to the CT concerned the unconstitutionality of Art. 1(4)

of the Amending Act to the extent to which, by inserting Art. 26b(4) in the Law on Assemblies, it precluded the possibility of the assembly organiser challenging the voivode's substitute order that forbids the assembly. Pursuant to the challenged provision, if a municipal authority, within 24 hours of becoming aware that the voivode issued a consent for holding a cyclical assembly, fails to prohibit other assemblies that were scheduled to be held in the same place and time as the aforementioned cyclical assembly, the voivode is obligated to immediately issue a substitute order prohibiting those other assemblies. As the applicant submits, a substitute order is a means of supervision over the activities of local authorities, thus it can only be challenged – pursuant to Art. 98(3) of the Act on Municipal Self-Government[13] – by a municipality or an association of municipalities. The applicant believes that it is not only the right to a fair trial that is infringed if the organiser of the assembly covered by the prohibition has no means to challenge the order, but it also contradicts the principle of equality, because organisers of assemblies covered by such prohibitions issued by municipal authorities can appeal against them to a court, while the addressees of a voivode's substitute order cannot do so.

In the commented judgment the CT held that 'the legislator did not expressly state that there is no legal remedy or appeal against this decision,' while and Art. 98(3) AMSG, from which the applicant infers the closure of the judicial path of the assembly organisers wishing to challenge the voivode's substitute order, was not challenged in this case. The last statement of the CT appears completely incomprehensible. It is obvious that the President, in the preventive review procedure, could not have challenged a provision in force, namely Art. 98(3) AMSG. Moreover, the President did not question the constitutionality of this provision. Instead, he stated that the provision prevented the assembly organiser from appealing against the substitute order of a voivode, hence such a possibility should be provided for in Art. 26b(4), inserted into the Law on Assemblies.

Continuing this argumentation, the CT states that once the applicant's objection:

13 The Act of 8th March 1990 on the Municipal Self-Government, Dz.U. 2017, item 1875, consolidated text, as amended; hereinafter referred to as: "AMSG."

> […] concerns in general the lack of possibility to challenge the voivode's substitute order before the relevant court, this objection should refer to the provision which excludes the judicial path, rather than the provision indicating the substitute order as a form of operation of a public administration authority.

In this regard, the CT fails to indicate which provision specifically the applicant should have challenged; we should add that in the system of law there is no provision that prevents the assembly organiser from challenging the substitute order. Similarly, there is no provision that would enable citizens to appeal against the order to a court and it is precisely the reason why the President concluded that such orders could not be appealed against. However, the CT discontinued proceedings in respect of this important objection, stating that the applicant should have challenged a provision that in fact does not currently exist in the legal system.

Moreover, in several subsequent paragraphs the CT – in its own words – 'as a side note to the examined objection,' tried to demonstrate that the assembly organiser was able to appeal against the voivode's substitute order and, to justify this assertion, provided three mutually exclusive legal bases. Firstly, it asserted that:

> […] the right to appeal against the voivode's substitute order to an administrative court, enjoyed by the entities that have a legal interest in doing so, resulted from the general jurisdiction of administrative courts to examine appeals against administrative decisions.

Secondly, it asserted that 'if a voivode's substitute order achieves the same goals as those achieved by a municipal authority's decision prohibiting an assembly and has the same effects, then the voivode's order should be treated as an instrument of a particular nature.' This instrument will be 'covered by the relevant verification procedure specified in Art. 16 of the Law on Assemblies.' Thirdly, the CT reached the conclusion that:

> […] regardless of which understanding of the challenged legal mechanism becomes more widespread, it is not excluded from evaluation by courts. […] [I]n view of the silence of the statute, the presumption of judicial path can be inferred from Art. 45(1) of the Constitution.

None of these three arguments is supported by the Constitution or the existing case law of the CT. The very fact that the CT does not provide a single specific legal basis to justify that a substitute order can be appealed against, but three different ones (with various courts being mentioned), already gives rise to considerable doubts. According to the first argument, the assembly organiser might challenge the substitute order before an administrative court, which the CT admitted. In line with the second argument, the assembly organiser could challenge the same order before a regional court (the court mentioned in Art. 16 of the Law on Assemblies). Finally, in keeping with the third argument provided by the CT, the district court would have jurisdiction to hear appeals of assembly organisers against substitute orders of voivodes, because if the legal basis for the appeal were to be found in Art. 45(1) of the Constitution, then jurisdiction of common courts should be presumed (Art. 177 of the Constitution) and among those courts, pursuant to Art. 16(1) of the Code of Civil Procedure,[14] district courts should be presumed to have jurisdiction. The assumption that the applicable laws allow a citizen to appeal against the same substitute order of a voivode to three different courts is dysfunctional in itself, therefore also unconstitutional. We can barely consider that the law enables the citizen to obtain a fair and public hearing of his case, without undue delay, before a competent court, as required by Art. 45(1) of the Constitution, if the case could be heard by three different courts at the same time and each of them would have jurisdiction in the CT's view.

It should also be observed that two of the methods that, according to the CT, are available to assembly organisers to appeal a voivode's substitute order, do not guarantee having the case heard before the planned date of the assembly.[15] If the order were to be challenged on the basis of the 'general jurisdiction of administrative courts to examine appeals against administrative decisions,' it would be highly unlikely for administrative courts of the first and second instances to hear the matter within

14 The Act of 17th November 1964 – Code of Civil Procedure, Dz.U. 2018, item 155, consolidated text, as amended; hereinafter referred to as: "CCP."

15 The need to guarantee the possibility of obtaining, before the planned time of the assembly, a final decision concerning the prohibition of an assembly is a consequence of the ECtHR Judgment of 3rd May 2017, App. No. 1543/06, *Bączkowski and Others* v. *Poland*. Article 16 of the Law on Assemblies does take into account the conclusions from this Judgment.

hours. Similarly, there are no such guarantees if the order is challenged on the basis of Art. 45(1) of the Constitution. Only challenging the substitute order on the basis of Art. 16 of the Law on Assemblies would guarantee exhaustion of the judicial path before the schedule time of the assembly. Article 26b(4) of the Law on Assemblies does not, however, refer to the aforementioned Art. 16 of the same Act, and without such a reference it is impossible to demonstrate that the amendment automatically extended the scope of regulation of the latter provision to include the new instrument, namely the voivode's substitute order.

The last argument used by the CT in this part of the statement of reasons is also peculiar. It goes as follows:

> […] without major problems the challenged regulation can be interpreted in such a way that the right of the relevant entities to appeal against such an order of a voivode was not excluded by the Amending Act.

Obviously, the voivode's order forbidding an assembly is a new instrument and as such could not have been appealable before the law that introduced it entered into force. And if it were so, the latter Act did not have to exclude the possibility of appealing against a substitute order. Quite the contrary, it should have provided for such a possibility. This omission was precisely the subject matter of the President's application in the part which the CT did not examine on the merits.

Why the CT discontinued proceedings to the extent relating to assembly organisers being deprived of the possibility to appeal against a substitute order of the voivode prohibiting the assembly is incomprehensible in that once – in the CT's view – appeal is possible, so the assembly organiser has the right to a fair trial, then the challenged provisions should be considered compatible to Art. 45(1) of the Constitution. Instead, the CT evaded deciding the case on the merits and only – in its own words – 'as a side note to the examined objection,' did it try to demonstrate that the right to a fair trial was available and did it thrice, each time indicating a different legal basis.

Regardless of the above argument, which speaks for the need to examine the objection of the lack of judicial path on the merits, there may be serious

doubts about whether the CT could have discontinued proceedings with regard to an objection raised by the President, relating to a specific provision of the bill awaiting the signature of the head of state. According to paragraphs 3 and 4 of Article 122 of the Constitution, the CT can pronounce the challenged provision in conformity or non-conformity to the Constitution, and in the latter case it can additionally adjudicate that the unconstitutional provision is inseparably connected with the whole bill. Neither of those paragraphs of Art. 122 of the Constitution provides for any other CT decisions or gives the President the right to decide himself on the objection of unconstitutionality to the extent to which no decision was issued by the CT. While it would be permissible to discontinue proceedings with regard to a specific benchmark for review, if the challenged provision is considered incompatible to another benchmark for review, discontinuing the proceedings with regard to the subject matter of review leaves open the President's doubts about the constitutionality of the law. And where the doubts were not removed by the CT, the President, as the authority ensuring observance of the basic law (Art. 126(2) of the Constitution) should not, without laying himself open to the accusation of violating said law, hence to constitutional liability before the Tribunal of State, have signed a bill that he considered unconstitutional.

4. Objection of defectively expressed intertemporal provisions

The last objection raised by the President concerned Art. 2 of the Amending Act, according to which assemblies whose organisation was notified before the day when the Act entered into force and which were to be held at the same place and time as some cyclical ones should be prohibited by the municipal authority's decision or, failing such a decision, by the voivode's substitute order. According to the applicant, the challenged Art. 2 of the Amending Act means that 'holding an assembly will be prohibited for reasons that did not exist on the day of the notification'; moreover, it threatens to violate 'important constitutional principles: that of citizens' trust in the state and the law; that of protection of acquired rights and – pivotally for the case in point – that of non-retroactivity of laws.' The President also submits that Art. 2 of the Act of 13th December

2016 on Amendments to the Act – Law on Assemblies is inconsistent with Art. 2 of the Constitution, because no arguments have been presented that would enable justifying retroactivity of this law. No constitutional value has been named that would require protection at the expense of introducing solutions with retroactive effect, no important state interest has been indicated as a valid reason for violating one of the fundamental principles of the rule of law, the *lex retro non agit* principle.

Yet the CT did not find a violation of the principle of non-retroactivity, justifying it as follows: if 'events initiated under the regime of the previous provisions are continuous ones and are still continuing, the new provisions apply to them.' It is difficult to say what continuity would mean in case of assemblies notified to municipal authorities in whose respect the relevant authorities did not issue decisions prohibiting their organisation. A notification is a one-off act, just like a decision prohibiting the assembly, which can be issued no later than 96 hours before the start of the assembly. The lapse of this time limit results in a closed set of facts, which should not be evaluated in the light of provisions subsequently introduced into the legal system. Furthermore, in the context of this objection, the CT repeats yet another time its peculiar argument that:

> The new provisions do not prevent the exercise of the freedom of assembly by the persons who notified the municipal authority of the intention to organize the assembly. There are no obstacles to their holding the assembly at a different place or time. The Amending Act does not deprive them of the possibility of holding a spontaneous assembly.

However, as mentioned earlier, it is precisely the fact of having to organise the assembly at a different time and place than the organiser would wish that violates the essence of the freedom of assembly.

5. Doubts concerning the adjudicating panel

5.1. Selection of the adjudicating panel

Regardless of the aforementioned doubts relating to the merits of the commented judgment, one cannot fail to observe that it was issued by a panel with defectively appointed members. Apart from CT judges, the panel

that issued the judgment consisted of unauthorised persons, appointed to fill positions that had been filled by the Sejm in the previous term (Henryk Cioch, Lech Morawski and Mariusz Muszyński). This circumstance was confirmed by the CT in its Judgment of 3rd December 2015 (K 34/15),[16] in which the Tribunal stated that the provision being the basis for the election of judges by the Sejm of the previous term, *i.e.* Art. 137 of the Act on the CT of 2015, to the extent concerning justices of the Tribunal whose tenure ended on 6th November 2015, was consistent with Art. 194(1) of the Constitution. In the statement of reasons for this judgment, the CT stressed that the election by the Sejm of the previous term of three judges to replace the judges whose tenure ended on 6th November 2015 was 'valid and there are no obstacles for the procedure to be finalised with the persons elected judges of the Tribunal taking the oath before the President.' Thus the election, by the Sejm of the new term, of three more persons to fill the posts of judges whose tenure ended on 6th November 2015, was legally ineffective.[17] The Constitution does not allow the Sejm to elect more than 15 CT judges.[18] The fact that the defectively elected 'CT judges' took the oath before the Polish President the night before promulgation of Judgment of the CT in case K 34/15 did not result in convalidation of the defective election. The fact that the CT adjudicated with unauthorised persons sitting on the panel, one of whom

16 OTK ZU-A 2017, No. A, item 28.

17 It should be added that there are also doubts relating to the lawfulness of the election by the Sejm of the VIII term of two more persons to the posts of CT judges, namely Julia Przyłębska and Piotr Pszczółkowski. Although in its Judgment in case K 34/15 the CT did find the legal grounds for the election of two previous CT judges unconstitutional, opening the path to the election of new judges to those vacated posts, J. Przyłębska and P. Pszczółkowski were elected before the promulgation of this Judgment, when these posts were filled. As the CT assets in the Judgment in case K 34/15 it is only 'in connection with the entry into force of this Judgment that the Sejm has a duty to elect two judges of the Tribunal whose respective tenures end on 2nd December 2015 or will end on 8th December 2015.' But since the issue of filling those two posts would require a more in-depth analysis, beyond the framework of this commentary, it will no longer be discussed here.

18 It should be added that the Sejm of the new term defectively elected these persons to fill the previously filled posts in contravention of the injunctive order issued by the CT on 30th November 2015, in which the CT requested the Sejm to 'refrain from any measures intended to elect judges of the Constitutional Tribunal until the Constitutional Tribunal has issued a final Judgment in case K 34/15.'

as the rapporteur probably drafted the commented judgment, is important for the consequences of this judgment, to which we shall return later.

The fact that some members of the adjudicating panel were not authorised to sit as judges was not the only irregularity relating to the panel adjudicating in this case. The other irregularity was the failure to disqualify from the panel Judge Michał Warciński, who participated in parliamentary work on the bill as the person who approved, on behalf of the Sejm's Bureau of Research (BAS), two legal opinions about it.[19] The first one was the opinion about the bill's conformity to EU law,[20] the second one concerned how the bill **implemented** EU law.[21] The Tribunal provided two reasons for its failure to disqualify Judge M. Warciński from examining the case. The first one was that both opinions concerned 'matters that are not in any way related to the scope of review in case Kp 1/17,' the second that Judge M. Warciński was neither the author, nor the reviewer of the opinions, while his approval confirmed by his signature and name stamp was 'merely an element of the official procedure of delivering opinions to the Speaker of the Sejm.' Neither argument is true, because the opinions concerned the bill that introduced into the Law on Assemblies the provisions that were the subject of review, while the role of the BAS director is not just to forward the opinions to the Speaker. The BAS director is responsible for the contents of the opinions and his approval is necessary for giving them the status of BAS documents. Considering the bill and the earlier CT case law, there are no doubts that he should have been disqualified from hearing the case, which the CT failed to do in its decision of 15th March 2017. Additionally, the decision was issued with the participation of a person who was not a judge of the CT. One of the members of the adjudicating panel was Henryk Cioch, appointed to the post filled by the Sejm of the 7th term. For this reason, the decision not to disqualify Judge M. Warciński gives rise to the same doubts as the doubts relating to the judgment that ended the proceedings in this case, which were discussed above.

Yet another irregularity concerning the composition of the panel adjudicating in case Kp 1/17 was the unlawful disqualification of three CT judges:

19 *Cf.* the bill amending the Law on Assemblies, Sejm paper No. 1044, VIII term.

20 BAS opinion of 16th November 2016, ref. No. BAS – WAPEiM – 2442/16.

21 BAS opinion of 16th November 2016, ref. No. BAS – WAPEiM – 2443/16.

Piotr Tuleja, Stanisław Rymar and Marek Zubik. They were disqualified by CT decision of 8th March 2017 as a consequence of an application made by the Prosecutor General the day before. According to the Prosecutor General, the reason for their disqualification was the fact that in his application of 11th January 2017, concerning a completely different case, he questioned the constitutionality of the resolution whereby these judges were appointed. In the statement of reasons for the decision, the CT held that:

> […] the situation where one of the participants (the Prosecutor General) formally challenged a judge's legitimacy to adjudicate and where the actions of a participant in the proceedings may result in annulling a CT judge's mandate, may influence this judge's attitude towards this participant.

Disqualification of these three judges was, however, unlawful, because the CT is not authorised to examine 'a judge's legitimacy to adjudicate,' hence the proceedings initiated by the Prosecutor General in this case should have been discontinued. The CT's delay in doing so cannot serve as a pretext for disqualification of CT judges in a different case. It is also worthy of note that at the time of disqualification of the three CT judges, the resolution in the matter of their appointment still enjoyed the presumption of constitutionality and, it being a specific and individual instrument, the CT did not have jurisdiction to review it. Yet just as importantly, the decision to disqualify these three judges was issued by an adjudicating panel on which sat two persons who were not CT judges, namely Henryk Cioch and Mariusz Muszyński. The decision issued in these proceedings arises exactly the same doubts as the final judgment and the aforementioned decision not to disqualify Judge M. Warciński from the case.

Another irregularity regarding the adjudicating panel was the fact that Deputy President of the CT, Stanisław Biernat, was unlawfully prevented from adjudicating in this case. The scope of this commentary does not allow expanding on this issue, so the reader is advised to consult the opinion of A. Sobczyk published in the press.[22] The unequivocal conclusion

22 *Cf.* A. Sobczyk, *Urlop sędziego Biernata, czyli o powszechnym łamaniu kodeksu*, "Rzeczpospolita" 9th May 2017.

from the opinion is that, regardless of the constitutional doubts, also under the Labour Code[23] it was not permissible to force Judge Biernat to take a leave of absence, preventing him from adjudicating in this case.

5.2. Consequences of the CT sitting as a deficiently composed panel

The above reflections lead to the conclusion that in case Kp 1/17 the adjudicating panel was defectively composed, because it included persons who were not CT judges and one judge who should have been disqualified, and furthermore four CT judges were prevented from adjudicating under the pretext of disqualification or because of a forced leave of absence. Therefore, the main question relating to case Kp 1/17 concerns the consequences of the CT sitting as an defectively composed panel.

The Act of 30th November 2016 on the Organisation of and Procedure before the Constitutional Tribunal[24] does not regulate situations of this kind, so it should be evaluated – pursuant to Art. 36 of said Act – according to the Code of Civil Procedure applied *mutatis mutandis*. Therefore, Art. 379(4) CCP should apply *mutatis mutandis*. It provides that if the composition of the adjudicating panel is inconsistent with the law, the proceedings are null and void. The logical conclusion is that the proceedings before the CT in case Kp 1/17 were null and void due to the unlawful composition of the adjudicating panel. But this does not mean that no judgment was issued in the null and void proceedings. This last issue is separately resolved by Art. 386(2) CCP, according to which if proceedings are found to be null and void, the court of second instance sets aside the judgment appealed against, cancels the proceedings to the extent affected by nullity, and refers the case to the court of first instance for re-examination. In the current state of law there is, however, no possibility to apply Art. 386(2) CCP *mutatis mutandis* in proceedings before the CT, because in this kind of proceedings there is no second instance. Following this train of thought, we reach the conclusion that although the proceedings before the CT in case Kp 1/17 were null and void, there is no procedure that would enable setting aside the judgment issued in this case. The invalidity of these proceedings, resulting in invalidity

23 The Act of 26th June 1964, Dz.U. 2018, item 155, consolidated text, as amended.

24 Dz.U. 2016, item 2072.

of the judgment issued by the CT, should however be taken into account by courts adjudicating in cases of citizens affected by the prohibition of organising assemblies in the place reserved for cyclical assemblies. Although the Amending Act became part of the applicable legal order, the courts, when applying its provisions, should at the same time directly apply the Constitution, as Art. 8(1) of the Constitution requires them to do. The provisions on cyclical assemblies, though pronounced constitutional by the CT, can still be questioned by courts. No affirmative judgment of the CT, especially when issued by a defectively composed panel, makes the presumption of constitutionality non-rebuttable.

6. Conclusion

Summing up the reflections concerning the commented judgment, we should express an unequivocally critical assessment, both in terms of how the CT resolved each of the three objections formulated in the President's application and in terms of the reasons for these decisions. The CT's new conception of the relationship between the individual and the state has absolutely no grounds in the Constitution in force. This conception assumes that the individual is 'steered' by the public authorities by means of granting, in the law, certain privileges for such exercise of the individual's freedoms that are conducive to achieving the goals set by the public authorities. In the light of this conception, the only way to resolve conflicts of constitutional rights and freedoms is depriving of these rights the individuals who do not realise the common good in the meaning ascribed to this term by public authorities.

Determination of the legal consequences of the commented judgment for the practice of applying the challenged provisions is the more difficult that the proceedings before the CT in which the judgment of issued were null and void due to the deficiently composed adjudicating panel. Yet the provisions in force do not anticipate any procedure that would enable setting aside a judgment issued by the CT in proceedings that were null and void. The aforementioned doubts about the constitutionality of provisions challenged in case Kp 1/17, which the CT failed to resolve, will be evaluated by the courts applying them.

Summary

In December 2016, the President of the Republic of Poland applied to the Constitutional Tribunal for the constitutional review of the Act of 13th December 2016 on Amendments to the Act – Law on Assemblies. The Amending Act introduced the concept of "cyclical assemblies," defined as assemblies organized on an annual basis within last three years or at least four times a year. When this Act entered into force, there was only one kind of assembly that met the requirements pertaining to cyclical assemblies: the monthly assemblies held to commemorate the victims of the Smolensk plane crash (the so-called Smolensk monthlies). In respect of the Amending Act, the President formulated three objections, two of which have finally been examined by the CT on their merits, while proceedings concerning the third one were discontinued. The CT has ruled that the Amending Act granting privileges to cyclical assemblies are in conformity with the Constitution. The author of the commentary expressed critical assessment, both in terms of how the CT resolved each of the three objections and in terms of the reasons for these decisions. Determination of the legal consequences of the commented judgment is difficult as the panel that issued the judgment consisted of unauthorised persons, appointed to fill positions of judges of the CT that had been filled by the Sejm in the previous term.

Keywords: freedom of assembly, cyclical assembly, Polish Constitutional Tribunal

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