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The Changes to the Act on the Constitutional Tribunal and the Changes in the Make-up of the Constitutional Tribunal in Poland

I. Introduction

This paper is not intended to offer a comprehensive analysis of the changes to the Act on the Constitutional Tribunal, but the analysis of the norms concerning changes to the make-up of the Tribunal.

In Poland, the justice system is held by common courts, administrative courts and military courts as well as tribunals. Tribunals are courts with specific competences and of special significance, which were established mainly to protect the Constitution by ruling on the liability for infringing the Constitution by the persons holding the highest state positions (State Tribunal) or to ensure compliance of the lower-level standards with the Constitution (Constitutional Tribunal).

Since the inception of the Constitutional Tribunal, a discussion has been ongoing in Poland about the legal character of the Tribunal. In the early period of existence of the Constitutional Tribunal, the Parliament was still able to reject the verdicts of the Constitutional Tribunal concerning compliance of the Acts of Parliament with the Constitution. The explanation for this was that if Sejm (the Polish Parliament), which insisted on such a regulation, could amend the Constitution by a 2/3 majority, it should also be able to reject a CC verdict by the same majority.

Even after the Constitutional Tribunal has been explicitly included in the judiciary system in the "Courts and Tribunals" chapter of the Constitution, the opinions which questioned the CC being a part of the judiciary have still been voiced. One of the proponents of that opinion was a former CC deputy chairman and member of the European Convent that worked on the elaboration of the European Constitution. In his view, the mandate of the CC does not fit into the mandate of any groups of the authorities of the state enumerated in the Constitution which is based on the separation of powers. Instead, it constitutes

> in comparison with the general understanding of the state supervision, a particular type of supervision, namely that of conformity of laws with the Constitution […]; in addition to legislation and application of law, it performs the third kind of constitutional activities of the bodies of the state, i.e. the control of legislation.

The Constitutional Tribunal rules in the matters related to: compliance of acts of law and international agreements with the Constitution, compliance of acts of law with ratified international agreements, whose ratification required a prior consent in the form of an act of law, compliance of the provisions of law issued by the central state authorities with the Constitution, ratified international agreements and acts of law, compliance of the objectives or activity of political parties with the Constitution and in the matter raised by constitutional complaints.

The judges of the tribunals are appointed by the Polish Sejm by absolute majority of votes. The second chamber of the Parliament, the Senate, does not participate in the appointment process. The Constitution does not specify detailed issues related to appointment of judges of the Constitutional Tribunal, leaving these issues to be regulated by the Sejm in by-laws or in an act of law. The above pertains e.g. to the deadline by which a proposal may be filed regarding submitting a candidate for a judge of the Tribunal in case a term of office of a judge of the Constitutional Tribunal expires and the entities entitled to file such a proposal. The judges begin holding their position after they

take an oath before the President of the Republic of Poland. The Constitution grants no public authorities the competences to verify the appointments made by the Polish Sejm, which means that the Polish Sejm has exclusive competence in this respect.

The term of office of a judge of the Constitutional Tribunal is defined in the Constitution and it is individual. Such a long term of office and its individual nature are intended to ensure the pluralism of views of the judges and to enable different compositions of the Sejm to appoint judges of the Constitutional Tribunal.

II. Facts and constitutional precedents

On 25 May 1997 in a referendum Polish citizens approved the Constitution that was passed by the Parliament. It entered into force on 17 October 1997.

This Constitution defined the competences of the Constitutional Tribunal slightly differently than its predecessor and increased the number of judges from 12 to 15. It legitimized the solution that became the standard practice before that date, that is the fact that each term of office of a judge is individual, and extended the term of office from 8 to 9 years. The provisions of the Constitution concerning the Constitutional Tribunal were further elaborated upon in the Act of 1 August 1997/Act on the Constitutional Tribunal.

Increasing the number of judges made it necessary to appoint 3 new judges. As the parliamentary election was to be held on 21 September 1997, the Sejm of the Second Term (1993-1997) decided not to appoint those judges and to leave the appointment to the newly-elected Sejm, despite the fact that formally its term of office ended after the Constitution entered into force – 20 October 1997 (one day before the first session of the newly-elected Sejm). Therefore, we already have a precedent consisting in leaving the appointment of the judges of the Constitutional Tribunal to the Sejm that was elected through general election preceding the beginning of the term of office of the judges of the Constitutional Tribunal, which was intended to ensure the pluralism of views of the judges of the Constitutional Tribunal. The judges were appointed on 6 November 1997.

At the end of December 2006, a person was appointed by the Polish Sejm to be a judge of the Constitutional Tribunal, with respect to whom there were some doubts as to their activity before appointment and as to the lack of the qualifications required of a judge of the Constitutional Tribunal. Taking the oath was postponed by the President due to these doubts. The Polish Sejm failed to resolve them, and as a result, the President took the oath in March 2007. Next, the Tribunal itself commenced a procedure to decide on any disciplinary proceedings against the subject judge. However, the judge in question resigned earlier from her position as a judge of the Constitutional Tribunal.

Here we have a precedent that consists in recognizing that the President of the Republic of Poland may refrain from taking an oath from a judge if there are doubts as to the appointment of the given person to hold the position of a judge of the Constitutional Tribunal. Over that period, the President undertakes measures to have a relevant authority clarify the doubts.

On 25 June 2015 a new Act on the Constitutional Tribunal was passed at the initiative of the President of the Republic of Poland. The Sejm of the seventh term was aware of the fact in May 2015 that the President ordered a vote (parliamentary election) to be held on 25 October 2015. At the time, the pre-election polls predicted that the opposition would win.

The Head and the Deputy Head of the Constitutional Tribunal, accompanied by some of the judges, took an active part in drawing up the draft of the new Act on the Constitutional Tribunal. The changes introduced by that act included specifying the deadline for the proposal to submit a candidate for a judge and the entities entitled to do so. They also provided for a special mode for appointing judges of the Constitutional Tribunal, whose

term of office lapsed in 2015. Based on the aforementioned provisions, the Polish Sejm appointed 5 judges of the Constitutional Tribunal on 8 October 2015. In this context, the parliamentary majority at the time wished to eliminate the impact of the newly elected Sejm on the composition of the Constitutional Tribunal until the end of 2015.

On 25 October 2015 the previous opposition won the parliamentary election, gaining the number of MPs that slightly exceeded the absolute majority in the Sejm. On 11 November 2015 the seventh term of office of the Sejm ended – a day before the first session of the newly elected Sejm of the eighth term of office. On 6 November 2015 the term of office of 3 judges of the Constitutional Tribunal lapsed. The President of the Republic of Poland refrained from taking the oath from their successors, raising doubts as to whether all 5 judges appointed on 8 October 2015 were appointed correctly (this matter will be further discussed in this paper).

On 19 November 2015 the Polish Sejm revised some provisions of the Act on the Constitutional Tribunal dated 25 June 2015. The revision introduced precise definitions of the term of office of the Head and Deputy Head of the Constitutional Tribunal, whose term of office lapses in 2015. As there were doubts as to whether all 5 judges appointed on 8 October 2015 were appointed correctly, it provided for appointment of new judges to those positions. In the revised Act on the Constitutional Tribunal dated 19 November 2015 aimed at enabling the Polish Sejm to appoint judges of the Constitutional Tribunal in the situation where the appointment made by the Sejm of the seventh term of office on 8 October 2015 turned out to be defective in procedural terms.

On 25 November 2015, the Polish Sejm passed five resolutions that confirmed that the five resolutions passed by the Sejm on 8 October 2015 pertaining to the holders of the positions of the judges of the Constitutional Tribunal are deprived of legal force. Also, the Polish Sejm asked the President of the Republic of Poland to refrain from taking the oath from the persons specified in the resolutions of the Sejm dated 8 October 2015.

On 2 December 2015 the Sejm appointed 5 new persons to hold the positions of the judges of the Constitutional Tribunal based on the standards provided for by the by-laws of the Sejm. On 3 December 2015 the President took the oath of 4 judges for the 4 positions of the judges of the Constitutional Tribunal whose term of office lapsed on that day, and on 9 December 2015 the President took the oath from the judge that was vacated a day before that day.

On 3 December 2015 the Tribunal considered the request to analyse compliance with the constitution of certain standards of the Act on the Constitutional Tribunal dated 25 June 2015. The request was submitted by the MPs, the majority of which voted for adopting the said Act. Originally, the request was to be considered in full composition of the Tribunal, but as the judges involved in the works on the draft of the said act in the Parliament excused themselves from adjudicating, the panel of 5 judges considered the case. The Tribunal ruled that the provision (Article 137 of the Act on the Constitutional Tribunal dated 25 June 2015 that provided for a special mode of appointing judges of the Tribunal, whose term of office lapses in 2015, is not consistent with the Constitution with respect to 2 judges whose term of office lapses in December 2015. In this respect, the Tribunal confirmed the doubts of the President and the parliamentary majority. The Constitutional Tribunal ruled that the said provision with respect to the 3 judges whose term of office lapses on 6 November 2015 was compliant with the Constitution. While ruling on the constitutionality of Article 137 and while issuing the judgement, the Constitutional Tribunal did not rule on the correctness of appointment of some or all judges made the Sejm of the seventh term of office on 8 October 2015. It only ruled on the compliance of the norm with the Constitution, based on which the appointment was made.

On 9 December 2015 the Tribunal considered the request to analyse the constitutionality of the revised Act on the Constitutional Tribunal dated 19 November 2015 and ruled that some of its norms are inconsistent with the Constitution, including Article 137a that provided that if judges of the Tribunal, whose term of office lapses in 2015, the deadline to file a proposal submitting the candidate for a judge of the Constitutional Tribunal is 7 days since entering into force of the Act amending the Act on the Constitutional Tribunal. It means that the legislator decided to appoint the judges of the Tribunal for the positions vacated in 2015. Actually, the parliament appointed judges of the Constitutional Tribunal for the positions vacated in 2015 earlier than the said act provided for, taking advantage of the procedure provided for in the Sejm's by-laws.

In both judgements, the Constitutional Tribunal ruled that the statutory norms pertaining to the appointment of the judges of the Constitutional Tribunal are consistent with the Constitution, yet it did not analyse whether the appointment of the judges of the Constitutional Tribunal made on 8 October 2015 was correct. The Constitutional Tribunal is not competent to control such an act of appointment of the Sejm.

Both the judgement of 3 December 2015 and the judgement of 9 December 2015 were issued by a 5-person panel of judges, despite the fact that originally the matters were to be considered by the Tribunal in its full make-up (at least 9 judges). The legislative and the executive powers expressed their doubts as to whether these judgements were issued correctly.

III. Legal controversies regarding the appointment of the judges of the Constitutional Tribunal of 8 October 2015

The Sejm of the eight term of office was aware of the doubts as regards whether the judges of the Tribunal were appointed correctly on 8 October 2015. The doubts were reported by the opposing MPs in October 2015, by the President of the Republic of Poland, refraining from taking the oath, experts – authors of legal opinions presented to the Sejm wrote about them. Major reservations of legal nature that undermined the appointment of the judges of the Tribunal of 8 October 2015 are as follows:

1. Procedural defects

Law studies emphasize the role of following a relevant procedure to make democratic decisions. "As modern democracy is more than just the rule of the majority, and as it also involves respecting various minorities ("otherness"), and the conflict of interest is something that cannot be avoided, it is the procedures, negotiations, tenders, joint participation that are the practical way to enable the operation and legitimization of the state and its powers. Democracy requires procedures, as democracy itself is only a way, a method of functioning of the society. Otherwise, it would not be possible to express the interests of the minorities"[1].

Article 19(2) of the Act on the Constitutional Tribunal dated 25 June 2015 reads:

> The proposals regarding candidates for the judges of the Tribunal must be filed with the Speaker of the Sejm no later than 3 months before the lapse of the term of office of Tribunal's judge.

[1] *E. Łętowska,* Bariery naszego myślenia o prawie w perspektywie integracji z Europą, (Barriers of our thinking about the law in the context of the European integration) Państwo i Prawo 1996, z. 4–5.

In turn, Article 137 provided for an exception from that rule, reading as follows: "the deadline for submitting the proposal mentioned in Article 19(2) as regards the judges whose term of office lapses in 2015, is 30 days since the act enters into force". The Act on the Constitutional Tribunal dated 25 June 2015 entered into force on 30 August 2015. The appointment pertained to the positions of the judges whose term of office lapses in November (3 judges ended their term of office on 6 November 2015) and in December 2015 (one judge ended their term of office on 2 December 2015, the other one – 8 December 2015). The legislator used two points of reference to determine the deadline for submitting the proposal – the rule, i.e. the day the term of office of a judge of the Tribunal lapses, and the exception – the day the act enters into force.

The statutory regulations differed from the current regulations included in the by-laws of the Sejm. The by-laws, which in reality has the same legal power as an act of law in terms of appointing judges of the Constitutional Tribunal, was not amended. The by-laws provide for only one point of reference – the day the term of office of a judge of the Constitutional Tribunal lapses.

Article 19(1) of the Act of 25 June 2015 on the Constitutional Tribunal reads: "The Sejm Presidium and a group of at least 50 MPs have the right to propose candidates for the judges of the Tribunal". Compared to the wording of the by-laws of the Sejm in Article 30(1), the legislator introduced an important change, replacing the conjunction "albo (or)" with the conjunction "oraz (and)". Additionally, it must be noted that in the previous Act on the Constitutional Tribunal of 1997 Article 5(4) contained a provision that was equivalent to the provision of the by-laws, reading that the Sejm Presidium or a group of at least 50 MPs have the right to propose candidates for the judges of the Tribunal.

Considering the significance of linguistic interpretation of law, it must be emphasized that the amendment of the Act on the Constitutional Tribunal of 25 June 2015 leads to a significant difference in how the entity entitled to propose candidates for the judges of the Constitutional Tribunal is defined. The conjunction "albo" (or) means that both sentences or parts of a sentence are mutually exclusive or mutually exchangeable. The conjunction "oraz" (and) connects two parts of a syntactic phrase and has the meaning equivalent to "i" (and). It means that the legislator provided for that the Sejm Presidium and a group of at least 50 MPs have the right to propose candidates for the judges of the Tribunal. Article 30(1) of the by-laws of the Sejm it follows that such a right is bestowed upon either the Sejm Presidium or separately upon a group of at least 50 MPs.

Due to the differences in the statutory regulations and the provisions of the by-laws, it must be noted what is the relationship between both acts of law. It is important from the viewpoint of the principle of the parliamentary autonomy that is derived from Article 112 of the Constitution. It means that the norms included in the Sejm's by-laws serve to specify constitutional norms, to define the manner in which they are implemented, or to fill in the gaps in the Constitution. The relationship between them and the statutory regulations is not simple and in no way is a hierarchic one. The by-laws are in no way subordinate to the act.

2. Exceeding the time limit of its term of office by the Sejm that appointed the judges

The Sejm, while appointing the judges on 8 December 2015, exceeded the time limit of its term of office, thus infringing Article 119 in conjunction with Article 4 of the Constitution. Additionally, pluralism, which is provided for in Article 2 TEU, was also infringed. The appointment of a judge of the Constitutional Tribunal was not made by the

composition of the Sejm elected in general election before the lapse of the term of office of the judge of the Constitutional Tribunal. It made it possible to form a pluralist composition of the Constitutional Tribunal and a result – to influence 14 out of the 15 positions of judges in the Constitutional Tribunal – by the same parliamentary majority. Here it is vital to mention the precedent of 1997 discussed in the schedule that the Sejm of the seventh term of office should look up to. The precedent is important, as it is directly related to the entrance of the Constitution into force and to interpreting by the Sejm of the relation between Article 119 and Article 4 of the Constitution.

3. Infringing the principle of equality before the law

The essential criterion for appointment of judges of the Constitutional Tribunal on 8 October 2015 was the age criterion specified in Article 18(2) of the Act on the Constitutional Tribunal dated 25 June 2015. The act introduced an age limit for candidates of the judges of the Constitutional Tribunal – they must be no less than 40 years of age and no more than 67 years of age upon the date of appointment. While specifying a bottom age limit is a common practice in democratic states of law with respect to the holders of positions by appointment, specifying the upper age limit might raise doubts as to the compliance of this solution with the Constitution. There are no grounds in the Constitution to apply age as an appointment criterion for the candidates of the judges of the Constitutional Tribunal. Thus, the appointment is made in line with the upper age limit of candidates set at 67 years of age should be recognized as discrimination of the elderly and infringement of Article 32(2) of the Constitution and Article 2 of TEU, which prohibit discrimination in public life for any reason, including age.

It must also be added that while ruling on the compliance of the Act on the Constitutional Tribunal dated 25 June 2015 with the Constitution, the Tribunal did not consider that issue. The Constitutional Tribunal is bound by the contents of the request and that issue was not raised in the request.

4. Infringement of the so-called legislative blackout

The Constitutional Tribunal emphasized this principle with respect to the parliamentary election and provided for a requirement of the so-called six-month legislative blackout period, during which no essential changes to the election law may be introduced that apply to the election process ordered before the lapse of such period. This requirement only applies to significant changes[2] and to such changes that explicitly influence the course of the voting and its results, and that require informing the subjects of the legal norm about its introduction[3]. The Constitutional Tribunal ruled: "the blackout period with respect to election law in terms of introducing «significant changes» before the date of the election is derived from the case law of the Constitutional Tribunal from the period after 2000, in response to the infringements related to amending the election law just before the election. It was introduced recently, in combination with the soft law of the Council of Europe, to prevent changes to the election law at the last minute and to respect subject rights"[4].

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2 See judgement of 3 November 2006 , K 31/06, OTK-A 2006, No. 10, item 147.

3 Judgement of 28 October 2009, K 3/09, OTK-A 2009, No. 9, item 138.

4 Ibid.

The position of the Constitutional Tribunal sets out the standard that is more general in nature and applies not only to parliamentary election, but also to appointment and election of other main authorities, including the judges of the Constitutional Tribunal. This position should also be considered by the parliament while adopting the Act on the Constitutional Tribunal dated 25 June 2015. Unfortunately, the Parliament did not do so, and as a result, changes to the deadlines to submit proposals of candidates for the judges of the Tribunal could have a clear impact on the course of voting in the Sejm and its results, as in October 2015 the President of the Republic of Poland ordered a vote – Sejm election, i.e. the body that appoints judges of the Constitutional Tribunal by absolute majority of votes. Any changes in the ratio between the parties and societies for MPs representing the nation could imply proposing other candidates or creating a new majority, therefore the appointment of other members of the Constitutional Tribunal.

The Sejm, respecting the legislative blackout requirement and appointing the judges of the Constitutional Tribunal on 2 December 2015, based its actions on the binding norms of the Sejm's by-laws, not on the norms amended in the period that directly preceded the appointment of the judges of the Constitutional Tribunal.

IV. The principle of discontinuing the work of the previous parliament

The President of the Republic of Poland refrained from taking oath from the persons appointed as judges of the Constitutional Tribunal (contrary to what people say – he did not refuse to take it), while striving to clarify all and any doubts regarding all stages of the appointment of the judges of the Constitutional Tribunal completed up to that point. It seems that he did so based on the constitutional precedent established in 2007, discussed in the schedule. In the meantime, the procedure of appointing the judges of the Constitutional Tribunal was interrupted[5] due to the principle of discontinuing the work of the previous parliament. The principle of discontinuing the work of the previous parliament is not expressed in any constitutional norm. Despite that, both chambers of the parliament and the Constitutional Tribunal[6] deemed it as binding. Due to the place of those authorities in the state system it seems that amending or suspending the application of that principle is allowed by means of an act or the Sejm's by-laws.

The lapse of the term of office of the Sejm and the Senate, in line with the principle of discontinuation that is commonly accepted in the democratic states, results in the fact that the matters that were the subject of the works of the parliament are no longer considered, which means that "upon the end of the term of office, all matters, requests, submissions with respect to which the parliamentary works had not been completed, are deemed as ultimately resolved in the sense that they were ineffective"[7]. The newly elected parliament gains the competence to hold its function and cannot continue the interrupted works. The new parliament could initiate the relevant procedures from the beginning, if it recognized that it is reasonable to perform such works.

It must be emphasized that the Constitutional Tribunal ascribes a more extensive significance to the discontinuation principle and does not relate it exclusively to the work of the parliament itself. It extends this principle to the procedures initiated in the course of

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[5] More information about it can be found in the opinion by *J. Szymanek* for BAS, http://www.sejm.gov.pl/media8.nsf/files/WBOI-A4LGY2/%24File/69-15A_Szymanek.pdf.

[6] See e. g. decision of 22 October 1997, K 7/97, OTK-A 1997, No. 3-4, item 49; decision of 14 November 2001, K 10/01, OTK-A 2001, No. 8, item 262; decision of 26 October 2005, K 29/04, OTK-A 2005, No. 9, item 107.

[7] *L. Garlicki*, Zasada dyskontynuacji prac parlamentarnych (The principle of discontinuation of parliamentary works), Studia Iuridica 1995, No. 28, p. 45.

terms of offices of chambers, their bodies or MPs, even if they are not strictly related to parliamentary work, and to the procedures initiated before the lapse of the term of office, it states: "the principle of discontinuation has a direct impact on the procedure before the Constitutional Tribunal conducted at the initiative of the Sejm or the Senate"[8]. This clearly also applies to the procedures before other constitutional authorities, including the President of the Republic of Poland.

This logic is not modified by the judgement of the Constitutional Tribunal dated 3 December 2015, as the Constitutional Tribunal did not recognize the principle of discontinuation that has constitutional significance as a control criterion. It was not specified in the requests filed with the Constitutional Tribunal, which is understandable, as they pertained to the constitutionality of the statutory norms of the Act on the Constitutional Tribunal dated 25 December 2015. The discontinuation principle was one of the legal bases for undertaking by the Sejm of the eight term of office of the works on revising the Act on the Constitutional Tribunal dated 25 June 2015.

It must be added that Article 21(1) of the Act of 25 June 2015 on the Constitutional Tribunal reads that "the person appointed as a judge of the Tribunal" takes an oath before the President. The legislator uses the phrase "person appointed as a judge of the Tribunal", not "a judge of the Tribunal". In line with the principle of reasonable actions of the legislator that is derived from the principle of a democratic state of law (Article 2 of the Constitution), it must be adopted that certain phrases were used intentionally to achieve the intended results. Should the legislator recognize that the process of appointing judges is finalised after the appointment by the Sejm, it would be reflected in the relevant norm governing the oath. Let us take Article 15(1) of the Act on the Supreme Audit Office, as an example, which reads: "Before commencing their duties, the Head of the Supreme Audit Office takes an oath before the Sejm." Here, the legislator states that the person appointed by the Sejm already holds the position after the appointment is made and before the oath is taken. The situation is similar in the case of the Commissioner for Human Rights (Article 5 of the Act on the Commissioner for Human Rights). As the legislator did not use a phrase that clearly recognizes a person appointed to be a judge of the Tribunal as a judge of the Constitutional Tribunal, it means that the appointment process ends upon taking the oath. This reasoning is justified even more so, when the Sejm appoints a judge of the Constitutional Tribunal before the term of office of the predecessor has not lapsed yet. Thus, treating the appointment process of judges of the Constitutional Tribunal as completed after the voting in the Sejm ends would mean that the Constitutional Tribunal would have more judges than the number 15 specified in Article 194 of the Constitution in the period starting on the appointment date and ending on the day that the term of office of the predecessor lapses.

V. Conclusions

In line with Article 2 of TEU, 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. The actions of the Sejm elected on 25 October 2015 are intended to restore these values in the process of appointing the judges of the Constitutional Tribunal. This is to be assured by:

[8] Judgement of CT of 17 December 2007, Pp 1/07, OTK-A 2007, No. 11, item 165.

– ensuring the pluralism principle in defining the make-up of the Constitutional Tribunal by depriving the resolutions on the appointment of judges of legal force long before the positions of judges are vacated, to prevent the newly democratically elected Sejm to appoint judges to such positions;
– emphasizing the necessity to adhere to the procedures governing the appointment process of the judges of the Constitutional Tribunal that is so important for the democratic process;
– appointing judges of the Constitutional Tribunal considering the principle of not amending the appointment rules in the period immediately preceding the appointment, which is of immense significance for the democratic process;
– considering the prohibition of discrimination of the elderly in the access to public positions;
– considering the principle of discontinuation of the works of the previous parliament that is commonly recognized in democratic states.