JUDGMENT
IN THE NAME OF THE REPUBLIC OF POLAND

Warsaw, 9 March 2016

The Constitutional Tribunal, in a bench composed of:

Andrzej Rzepliński – Presiding Judge

Stanisław Biernat – Judge Rapporteur

Mirosław Granat

Leon Kieres

Julia Przyłębska

Piotr Pszczółkowski

Małgorzata Pyziak-Szafnicka

Stanisław Rymar

Piotr Tuleja

Sławomira Wronkowska-Jaśkiewicz

Andrzej Wróbel

Marek Zubik,

Grażyna Szałygo – Recording Clerk,

having considered – at the hearing on 8 March 2016, in the presence of the applicants – the following joined applications:

1) the application submitted by the First President of the Supreme Court to determine the conformity of:

a) Article 10(1), Article 44(1)(1) and Article 44(3), Article 80(2), Article 87(2) and Article 99(1) of the Constitutional Tribunal Act of 25 June 2015 (Journal of Laws – Dz. U. item 1064, with further amendments), as amended by Article 1, points 3, 9, 10, 12 and 14, of

the Act of 22 December 2015 amending the Constitutional Tribunal Act (Journal of Laws – Dz. U. item 2217), to Article 10(2) and Article 173 in conjunction with the Preamble to the Constitution, Article 2 and Article 45(1) of the Constitution, as – by virtue of making it impossible for the public institution to carry out its activity diligently and efficiently – they infringe the principles of a state ruled by law, within the scope of constitutional review conducted by the Constitutional Tribunal, as well as the principle that the legislator is to act in a rational way;

b) Article 2 of the Act of 22 December 2015 referred to in point 1(a) to Article 10(2) and Article 173 in conjunction with the Preamble to the Constitution, Article 2 and Article 45(1) of the Constitution, as – by virtue of making it impossible for the public institution to carry out its activity diligently and efficiently – they infringe the principles of a state ruled by law, within the scope of constitutional review conducted by the Constitutional Tribunal, as well as the principle that the legislator is to act in a rational way;

c) Article 28a, Article 31a and Article 36 of the Constitutional Tribunal Act of 25 June 2015 referred to in point 1(a), as amended by Article 1, points 5, 7 and 8, of the Act of 22 December 2015 referred to in point 1(a), to Article 10(1), Article 173 and Article 195(1) in conjunction with Article 8(1) of the Constitution;

d) Article 8(4), Article 28a, Article 31a, Article 36(1)(4) and Article 36(2) of the Constitutional Tribunal Act of 25 June 2015 referred to in point 1(a), as amended by Article 1, points 2, 5, 7 and 8, of the Act of 22 December 2015 referred to in point 1(a), to Article 119(1) of the Constitution;

e) Article 5 of the Act of 22 December 2015 referred to in point 1(a) to Article 2 in conjunction with Article 8 and Article 188 of the Constitution;

2) the application of 29 December 2015 submitted by a group of Sejm Deputies to determine the conformity of the Act of 22 December 2015 referred to in point 1(a) to Article 2, Article 7, Article 118, Article 119(1) and Article 186(1) of the Constitution, as well as to Article 13 of the Convention for the Protection of Human Rights and Fundamental Freedoms, done at Rome on 4 November 1950 (Journal of Laws – Dz. U. of 1993 No. 61, item 284, as amended);

3) the application of 31 December 2015 submitted by a group of Sejm Deputies to determine the conformity of the Act of 22 December 2015 referred to in point 1(a) to Article 2 in conjunction with Article 118(3) and Article 119(1), Article 173 in conjunction with Article 10, as well as to Article 195(1) of the Constitution, due to a defective legislative process in the course of which the Act was enacted as well as the introduced rules for the functioning of the constitutional organ of public authority which lead to dysfunctionality and the lack of the possibility of the diligent exercise of constitutional powers; or to determine the conformity of:

a) Article 8(4) and Article 36(2) of the Constitutional Tribunal Act of 25 June 2015 referred to in point 1(a), as amended by Article 1(2) and (8) of the Act of 22 December 2015 referred

to in point 1(a), to Article 2 and Article 173 in conjunction with Article 10 of the Constitution;

b) Article 10(1) of the Constitutional Tribunal Act of 25 June 2015 referred to in point 1(a), as amended by Article 1(3) of the Act of 22 December 2015 referred to in point 1(a), to Article 2, Article 173 in conjunction with Article 10 and Article 195(1) of the Constitution, as well as to the principle of efficiency in the work of public institutions, expressed in the Preamble to the Constitution;

c) Article 28a of the Constitutional Tribunal Act of 25 June 2015 referred to in point 1(a), added by Article 1(5) of the Act of 22 December 2015 referred to in point 1(a), to Article 2, Article 173 in conjunction with Article 10 and Article 195(1) of the Constitution,

d) Article 31a and Article 36(1)(4) of the Constitutional Tribunal Act of 25 June 2015 referred to in point 1(a), respectively – added by Article 1(7) and amended by Article 1(8) of the Act of 22 December 2015 referred to in point 1(a), as well as Article 1(6) of the Act of 22 December 2015 referred to in point 1(a), to Article 2, Article 180(1) and (2), Article 173 in conjunction with Article 10, Article 195(1), Article 197 in conjunction with 112, as well as to Article 78 of the Constitution;

e) Article 44(1) and (3) of the Constitutional Tribunal Act of 25 June 2015 referred to in point 1(a), as amended by Article 1(9) of the Act of 22 December 2015 referred to in point 1(a), to Article 2 and Article 173 in conjunction with Article 10 of the Constitution, as well as to the principle of efficiency in the work of public institutions, expressed in the Preamble to the Constitution;

f) Article 80(2) of the Constitutional Tribunal Act of 25 June 2015 referred to in point 1(a), as amended by Article 1(10) of the Act of 22 December 2015 referred to in point 1(a), to Article 2 and Article 173 in conjunction with Article 10 of the Constitution, as well as to the principle of efficiency in the work of public institutions, expressed in the Preamble to the Constitution; and insofar as it concerns applications for determining the constitutionality of the State Budget Bill or the Interim State Budget Bill referred to the Constitutional Tribunal by the President of Poland – also to Article 224(2) of the Constitution;

g) Article 87(2) and Article 87(2a) of the Constitutional Tribunal Act of 25 June 2015 referred to in point 1(a), respectively – as amended and added by Article 1(12) of the Act of 22 December 2015 referred to in point 1(a), to Article 2, Article 45 and Article 173 in conjunction with Article 10 of the Constitution, as well as to the principle of efficiency in the work of public institutions, expressed in the Preamble to the Constitution; and insofar as they concern applications for determining the constitutionality of the State Budget Bill or the Interim State Budget Bill referred to the Constitutional Tribunal by the President of Poland – also to Article 224(2) of the Constitution;

h) Article 99(1) of the Constitutional Tribunal Act of 25 June 2015 referred to in point 1(a), as amended by Article 1(14) of the Act of 22 December 2015 referred to in point 1(a), to Arti-

cle 2, Article 190(5), Article 173 in conjunction with Article 10 of the Constitution, as well as to the principle of efficiency in the work of public institutions, expressed in the Preamble to the Constitution;

i) Article 1(16) of the Act of 22 December 2015 referred to in point 1(a), insofar as it repeals Articles 19 and 20 of the Constitutional Tribunal Act of 25 June 2015 referred to in point 1(a), to Article 197 in conjunction with Article 112 and Article 173 in conjunction with Article 10 of the Constitution;

j) Article 1(16) of the Act of 22 December 2015 referred to in point 1(a), insofar as it repeals Article 28(2) of the Constitutional Tribunal Act of 25 June 2015 referred to in point 1(a), to Article 195(1) and Article 173 in conjunction with Article 10 of the Constitution;

k) Article 2 of the Act of 22 December 2015 referred to in point 1(a) to Article 2, Article 173 in conjunction with Article 10 and Article 45 of the Constitution;

l) Article 3 of the Act of 22 December 2015 referred to in point 1(a) to Article 2 of the Constitution;

m) Article 5 of the Act of 22 December 2015 referred to in point 1(a) to Article 2 of the Constitution and the principle of an appropriate period of *vacatio legis*, arising therefrom;

4) the application submitted by the Polish Ombudsman to determine the conformity of:

a) the Act of 22 December 2015 referred to in point 1(a) to Article 7, Article 112, and Article 119(1) and (2) of the Constitution;

b) Article 1, points 2, 7 and 8, of the Act of 22 December 2015 referred to in point 1(a) to Article 173 in conjunction with Article 10, Article 180(2) and Article 195(1) of the Constitution;

c) Article 1(3) of the Act of 22 December 2015 referred to in point 1(a) to the principle of appropriate legislation, arising from Article 2 of the Constitution;

d) Article 1(5) of the Act of 22 December 2015 referred to in point 1(a) to Article 173 in conjunction with Article 10 and Article 195(1) of the Constitution;

e) Article 1(9) of the Act of 22 December 2015 referred to in point 1(a) to the principle of appropriate legislation, arising from Article 2 of the Constitution, to Article 45(1), Article 122(3), first sentence, and Article 188 of the Constitution, as well as to Article 47 of the Charter of Fundamental Rights of the European Union (OJ C 303, 14.12.2007, p. 1);

f) Article 1(10) of the Act of 22 December 2015 referred to in point 1(a) to the principle of appropriate legislation, arising from Article 2 of the Constitution, to Article 45(1) of the Con-

stitution, as well as to Article 47 of the Charter of Fundamental Rights of the European Union;

g) Article 1(12) of the Act of 22 December 2015 referred to in point 1(a) to the principle of appropriate legislation, arising from Article 2 of the Constitution, to Article 45(1) of the Constitution, as well as to Article 47 of the Charter of Fundamental Rights of the European Union;

h) Article 1(14) of the Act of 22 December 2015 referred to in point 1(a) to Article 122(3), Article 133(2), Article 189 and Article 190(5) of the Constitution;

i) Article 1(16) of the Act of 22 December 2015 referred to in point 1(a), insofar as it repeals Articles 19 and 20 of the Constitutional Tribunal Act of 25 June 2015 referred to in point 1(a), to Article 173 in conjunction with Article 10 of the Constitution;

j) Article 2 of the Act of 22 December 2015 referred to in point 1(a) to the principle of appropriate legislation, arising from Article 2 of the Constitution, to Article 45(1) of the Constitution, as well as to Article 47 of the Charter of Fundamental Rights of the European Union;

k) Article 5 of the Act of 22 December 2015 referred to in point 1(a) to the principle of certainty of law, arising from Article 2 of the Constitution, as well as to Article 88(1) and Article 188 of the Constitution;

5) the application submitted by the National Council of the Judiciary to determine the conformity of:

a) the Act of 22 December 2015 referred to in point 1(a) to Article 2, Article 7, Article 10, Article 45(1), Article 118, Article 119(1) and Article 123(1) of the Constitution;

b) Article 1(15) of the Act of 22 December 2015 referred to in point 1(a) to Article 2, Article 7, Article 8, Article 131(1), and Article 197 of the Constitution;

c) Article 5 of the Act of 22 December 2015 referred to in point 1(a) to Article 2, Article 7, Article 8, and Article 188 of the Constitution, as well as to Article 45(1) of the Constitution in conjunction with Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

d) Article 8(4) in conjunction with Article 36(1)(4), Article 36(2) and Article 31a of the Constitutional Tribunal Act of 25 June 2015 referred to in point 1(a), as amended by Article 1, points 2, 7 and 8 of the Act of 22 December 2015 referred to in point 1(a) – insofar as they take away the competence of the General Assembly of the Judges of the Tribunal to determine the expiry of the mandate of a judge of the Tribunal and entrust the Sejm (an organ of the legislature) with the power to recall a judge of the Tribunal from office, which results in the expiry of the mandate of the judges, whereas they entrust the President of Poland and the Minister of Justice with the power to lodge an application for the recall of a judge of the Tri-

bunal from office – to Article 2, Article 7, Article 8, Article 10, Article 173, Article 194(1) and Article 195(1) and (2) of the Constitution;

e) Article 28a of the Constitutional Tribunal Act of 25 June 2015 referred to in point 1(a), as amended by Article 1(5) of the Act of 22 December 2015 referred to in point 1(a) – insofar as it provides for instituting disciplinary proceedings with regard to a judge of the Constitutional Tribunal upon application by the President of Poland and the Minister of Justice – to Article 2, Article 7, Article 8, Article 10, Article 173, and Article 195(1) and (2) of the Constitution;

f) Article 44(3) in conjunction with Article 99(1) of the Constitutional Tribunal Act of 25 June 2015 referred to in point 1(a), as amended by Article 1(9) and (14) of the Act of 22 December 2015 referred to in point 1(a), to Article 2, Article 7, Article 8, and Article 190(5) and Article 197 of the Constitution, as well as to Article 45(1) of the Constitution in conjunction with Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

adjudicates as follows:

I

1. The Act of 22 December 2015 amending the Constitutional Tribunal Act:

a) is inconsistent with Article 7, Article 112 and Article 119(1) of the Constitution of the Republic of Poland, as well as with the principle of appropriate legislation, arising from Article 2 of the Constitution;

b) is consistent with Article 186(1) of the Constitution;

c) is not inconsistent with Article 123(1) of the Constitution.

[*defects in the legislative process*]

2. Article 1(6) of the Act of 22 December 2015 referred to in point 1, repealing Article 31(3) of the Constitutional Tribunal Act of 25 June 2015 (Journal of Laws – Dz. U. of 2016 item 293), is inconsistent with Article 173 in conjunction with Article 10(1) of the Constitution.

[*crossing out 'the recall of a judge of the Tribunal from office' from the catalogue of disciplinary penalties]*

3. Article 1(15) of the Act of 22 December 2015 referred to in point 1, repealing Chapter 10 of the Act of 25 June 2015 referred to in point 2, is inconsistent with Article 118(1)

as well as Article 119(2) of the Constitution, as well as with Article 197 of the Constitution.

[*the repeal of provisions on determining the existence of an impediment to the exercise of the office by the President of the Republic – defects in the legislative process as well as substantive defects*]

4. Article 1(16) of the Act of 22 December 2015 referred to in point 1, insofar as it repeals Article 19(1) of the Act of 25 June 2015 referred to in point 2:

a) is inconsistent with Article 112 and Article 173 in conjunction with Article 10 of the Constitution;

b) is not inconsistent with Article 197 of the Constitution.

[*the repeal of provisions on submitting proposals of candidates for a judgeship at the Tribunal*]

5. Article 1(16) of the Act of 22 December 2015 referred to in point 1, insofar as it repeals Article 28(2) of the Act of 25 June 2015 referred to in point 2, is inconsistent with Article 173 in conjunction with Article 10(1) as well as Article 195(1) of the Constitution.

[*the crossing out of a separate regulation concerning the disciplinary responsibility of judges of the Constitutional Tribunal for their conduct before taking office*]

6. Article 1(2) of the Act of 22 December 2015 referred to in point 1 and amended Article 8(4) of the Act of 25 June 2015 referred to in point 2 are inconsistent with Article 118(1) and Article 119(2) of the Constitution, as well as with Article 173 in conjunction with Article 10(1) as well as with Article 195(1) of the Constitution.

[*depriving the General Assembly of the Judges of the Tribunal of its competence to determine the expiry of the mandate of a judge of the Tribunal*]

7. Article 1(3) of the Act of 22 December 2015 referred to in point 1 and amended Article 10(1) of the Act of 25 June 2015 referred to in point 2 are inconsistent with Article 2 and Article 173, in conjunction with the Preamble to the Constitution, and Article 10 of the Constitution, as – by virtue of making it impossible for a constitutional organ of the state, i.e. the Constitutional Tribunal, to carry out its activity diligently and efficiently, as well as by undermining its independence and separateness from the other branches of government – they infringe the principles of a state ruled by law.

[*the introduction of the requirement that the General Assembly is to adopt resolutions by a two-thirds majority vote, in the presence of at least 13 judges of the Tribunal*]

8. Article 1(5) of the Act of 22 December 2015 referred to in point 1 and added Article 28a of the Act of 25 June 2015 referred to in point 2 are inconsistent with Article 118(1) and Article 119(2) of the Constitution, as well as with Article 173 in conjunction with Article 10(1) as well as with Article 195(1) of the Constitution.

[*entrusting the President of Poland and the Minister of Justice with the power to lodge an application for the recall of a judge of the Tribunal from office*]

9. Article 1(7) of the Act of 22 December 2015 referred to in point 1 and added Article 31a of the Act of 25 June 2015 referred to in point 2:

a) are inconsistent with Article 118(1) and Article 119(2) of the Constitution, as well as with the principle of specificity of law – arising from Article 2 of the Constitution, with Article 78, Article 173 in conjunction with Article 10(1) and Article 195(1) of the Constitution;

b) are not inconsistent with Article 180(1) and (2) of the Constitution.

[*a new procedure for the recall of a judge of the Tribunal from office by the Sejm*]

10. Article 1(8) of the Act of 22 December 2015 referred to in point 1, insofar as it amends Article 36(1)(4) of the Act of 25 June 2015 referred to in point 2, and amended Article 36(1)(4) of the Act of 25 June 2015 referred to in point 2:

a) are inconsistent with Article 118(1) and Article 119(2) of the Constitution, as well as with the principle of specificity of law, arising from Article 2 of the Constitution, with Article 78, Article 173 in conjunction with Article 10(1) and Article 195(1) of the Constitution;

b) are not inconsistent with Article 180(1) and (2) of the Constitution.

[*entrusting the Sejm with the power to recall a judge of the Tribunal from office, upon application by the General Assembly of the Judges of the Tribunal*]

11. Article 1(8) of the Act of 22 December 2015 referred to in point 1, insofar as it amends Article 36(2) of the Act of 25 June 2015 referred to in point 2, and amended Article 36(2) of the Act of 25 June 2015 referred to in point 2 are inconsistent with Article 118(1) and Article 119(2) of the Constitution, as well as with Article 173 in conjunction with Article 10(1) as well as with Article 195(1) of the Constitution.

[*entrusting the Sejm with the power to determine the expiry of the mandate of a judge of the Tribunal*]

12. Article 1(9) the Act of 22 December 2015 referred to in point 1, insofar as it amends Article 44(1) and (3) of the Act of 25 June 2015 referred to in point 2, and amended Ar-

ticle 44(1) and (3) of the Act of 25 June 2015 referred to in point 2 are inconsistent with Article 2 and Article 173, in conjunction with the Preamble to the Constitution, as well as Article 10 and Article 45(1) of the Constitution, as – by virtue of making it impossible for a constitutional organ of the state, i.e. the Constitutional Tribunal, to carry out its activity diligently and efficiently, as well as by undermining its independence and separateness from the other branches of government – they infringe the principles of a state ruled by law.

[*the composition of adjudicating benches (in terms of the number of judges), and the requirement that adjudication by a full bench must involve the participation of at least 13 judges of the Tribunal*]

13. Article 1(1) of the Act of 22 December 2015 referred to in point 1, and added Article 80(2) of the Act of 25 June 2015 referred to in point 2 are inconsistent with Article 2 and Article 173, in conjunction with the Preamble to the Constitution, as well as Article 10 and Article 45(1) of the Constitution, as – by virtue of making it impossible for a constitutional organ of the state, i.e. the Constitutional Tribunal, to carry out its activity diligently and efficiently, as well as by undermining its independence and separateness from the other branches of government – they infringe the principles of a state ruled by law.

[*the dates of hearings or the dates of sittings in camera, at which applications are considered, are to be set in the order in which cases are received by the Tribunal*]

14. Article 1(12)(a) of the Act of 22 December 2015 referred to in point 1 and amended Article 87(2) of the Act of 25 June 2015 referred to in point 2 are inconsistent with Article 2 and Article 173, in conjunction with the Preamble to the Constitution, as well as Article 10 and Article 45(1) of the Constitution, as – by virtue of making it impossible for a constitutional organ of the state, i.e. the Constitutional Tribunal, to carry out its activity diligently and efficiently, as well as by undermining its independence and separateness from the other branches of government – they infringe the principles of a state ruled by law.

[*the earliest admissible dates for conducting hearings*]

15. Article 1(14) of the Act of 22 December 2015 referred to in point 1 and amended Article 99(1) of the Act of 25 June 2015 referred to in point 2 are inconsistent with Article 190(5) of the Constitution.

[*the introduction of the requirement that rulings issued by a full bench are to be determined by a two-thirds majority vote*]

16. Article 2 of the Act of 22 December 2015 referred to in point 1

a) is inconsistent with Article 2 and Article 173, in conjunction with the Preamble to the Constitution, as well as Article 10 and Article 45(1) of the Constitution, as – by virtue of making it impossible for a constitutional organ of the state, i.e. the Constitutional Tribunal, to carry out its activity diligently and efficiently, as well as by undermining its independence and separateness from the other branches of government – it infringes the principles of a state ruled by law;

b) is inconsistent with Article 2, by virtue of providing for the application of the Act of 22 December 2015 to cases that were already pending before the Tribunal on the date of the entry into force of the Act.

[*transitional provisions on the consideration of cases pending before the Tribunal – dates of hearings, composition of adjudicating benches*]

17. Article 3 of the Act of 22 December 2015 referred to in point 1 is consistent with the principle of the protection of justly acquired rights and the principle of the protection of interests that are pending, which arise from Article 2 of the Constitution.

[*transitional provisions, inter alia, on the revocation of the right of assistants to judges of the Tribunal to apply for an examination to be admitted to the profession of judge*]

18.Article 5 of the Act of 22 December 2015 referred to in point 1:

a) is inconsistent with Article 2 and Article 188(1) of the Constitution;

b) is not inconsistent with Article 8(1) of the Constitution.

[*the entry into force of the Act on the day of its publication – the lack of a period of vacatio legis*]

II

Article 44(1) of the Constitutional Tribunal Act of 25 June 2015 (Journal of Laws – Dz. U. of 2016 item 293)**, as amended by Article 1(9) of the Act of 22 December 2015 amending the Constitutional Tribunal Act** (Journal of Laws – Dz. U., item 2217)**, will cease to have effect after 9 (nine) months from the date of the publication of the judgment in the present case**.

Moreover, the Tribunal decides:

pursuant to Article 104(1)(2) and Article 104(1)(3) of the Constitutional Tribunal Act of 25 June 2015 (Journal of Laws – Dz. U. of 2016, item 293)**, to discontinue the proceedings as to the remainder.**

STATEMENT OF REASONS

[…]

II

The hearing on 8 March 2016 was attended by the Ombudsman and his deputy as well as by the representatives or attorneys of all the other applicants. The hearing was also attended by the representatives or attorneys of the authorities and bodies that had submitted their opinions to the Tribunal as *amici curiae*. Despite having been properly notified by the Tribunal, the representatives of the following authorities were absent at the hearing: the Sejm, the Public Prosecutor-General, and the Council of Ministers.

The presiding judge of the adjudicating bench informed the participants that the Public Prosecutor-General, in his letter of 4 March 2016, citing Article 74 of the Constitutional Tribunal Act of 25 June 2015 (Journal of Laws – Dz. U. item 1064, as amended; hereinafter: the 2015 Constitutional Tribunal Act) in conjunction with Article 156 of the Act of 17 November 1964 – the Civil Procedure Code (Journal of Laws – Dz. U. of 2014 item 101, as amended), had requested the Tribunal to postpone the hearing for at least 14 days "due to the need to make due preparations for the review proceedings".

The participants in the proceedings requested the Tribunal to dismiss the motion of the Public Prosecutor-General.

The Tribunal indicated that the proper legal basis of such a motion should be Article 87(3) of the 2015 Constitutional Tribunal Act, pursuant to which: "the Tribunal shall adjourn the hearing where there is no evidence that the notification of the said date [of the hearing] has been served on the participants in proceedings, or where it has been deemed that the notification was not properly served, or for any other serious reason". The Tribunal pointed out that the decision to consider the case at a hearing, issued on 14 January 2016, was served on the Public Prosecutor-General on 18 January 2016. The Public Prosecutor-General took a stance on the case in his letter of 10 February 2016, and on 12 February 2016 he received the order about the date of the hearing. The Tribunal noted that although the Act of 28 January 2016 on Public Prosecution (Journal of Laws – Dz. U. item 177), cited by the Public Prosecutor-General, had entered into force on 4 March 2016, it had actually been adopted on 28 January 2016. The Tribunal stated that a new appointment to the position of the Public Prosecutor-General, in the light of the principle of the continuity of state authority, should not have affected the stance taken by that authority before the Constitutional Tribunal. In cases where the Tribunal adjudicates as a full bench, the Public Prosecutor-General or one of his/her deputies is required to be present at hearings (cf. Article 57(3) of the 2015 Constitutional Tribunal Act). In the view of the Tribunal, a deputy of the Public Prosecutor-General was properly prepared for the review proceedings, even if s/he did not support the stance adopted in the letter of 10 February 2016. Therefore, the Tribunal deemed that there were no "serious reasons" within the meaning of Article 87(3) of the 2015 Constitutional Tribunal Act, which could constitute grounds for adjourning the hearing.

The participants in the review proceedings confirmed the stances and arguments presented in their procedural documents. The representatives or attorneys of the Polish Bar Council, the National Council of Legal Advisers, the Helsinki Foundation for Human Rights,

and the Stefan Batory Foundation presented the main theses of their *amicus curiae* opinions submitted to the Tribunal.

In response to the question of the adjudicating bench about the effects of a judgment issued in the present case, the participants in the proceedings indicated that the effect of the determination of the non-conformity to the Constitution of the whole of the Amending Act of 22 December 2015, or particular provisions thereof, would be recourse to the norms of the 2015 Constitutional Tribunal Act in the version before the said Amending Act.

After hearing the answers to the questions posed for the participants and the other parties that took part in the hearing, as well as after the presentation of final conclusions by the participants, the Constitutional Tribunal stated that the case was sufficiently examined to issue a determination, and closed the hearing.

III

The Constitutional Tribunal has considered as follows:

1. The basis of the adjudication

1.1. The First President of the Supreme Court, two groups of Sejm Deputies (in their applications of 29 December 2015 and 31 December 2015; hereinafter, respectively: the first and second group of Sejm Deputies), the Ombudsman, and the National Council of the Judiciary requested the Constitutional Tribunal to review the constitutionality of the Act of 22 December 2015 amending the Constitutional Tribunal Act of 25 June 2015 (Journal of Laws – Dz. U. item 2217; hereinafter: the December Amending Act), as well as a majority of amendments provided therein and incorporated into the Constitutional Tribunal Act of 25 June 2015 (Journal of Laws – Dz. U. item 1064, as amended; the updated consolidated version: Dz. U. of 2016 item 293; hereinafter: the 2015 Constitutional Tribunal Act). The amendments concerned, *inter alia*, the mode of proceedings before the Tribunal, including: rules for preparing a hearing and a sitting in camera; rules for determining the composition of adjudicating benches of the Tribunal; as well as the order in which cases were to be considered. Pursuant to Article 5 of the December Amending Act, the said Amending Act was to enter into force as of the day of its publication, which took place on 28 December 2015.

Relying on Article 8(2), Article 188(1) and Article 195(1) of the Constitution, all the applicants stressed the necessity to consider the present case forthwith, directly on the basis of the Constitution, and bypassing the provisions included in the December Amending Act (the Ombudsman argued that it would be sufficient to refuse to apply Article 5 of the said Amending Act, which concerns the lack of a period of *vacatio legis*). According to the applicants, it is inadmissible for a review to be conducted on the basis of provisions that constitute the subject of the review in a given case. The applicants also pointed out that the Sejm has no right to limit the constitutionally determined jurisdiction of the Tribunal by means of statutes. The Tribunal is obliged to exercise its constitutional powers, in spite of any potential statutory provisions hindering its efficient and diligent functioning.

1.2. By the decision of 14 January 2016, ref. no. K 47/15 (OTK ZU of 2016), the Constitutional Tribunal decided to refer the case for consideration at a hearing. The ruling was justified, *inter alia*, by the fact that the Constitutional Tribunal is obliged to perform its systemic tasks in any circumstances. Undoubtedly, those tasks comprise the review of the constitutionality of statutes, including a statute that regulates the functioning of the Tribunal (cf. Article 188(1) of the Constitution). The said ruling also emphasised that the assessment of the constitutionality of the December Amending Act was of unique systemic significance, as it would make it possible to determine whether the amended statutory bases of the internal organisation and conduct of work of the constitutional court did, or did not, threaten the Tribunal's adjudication in other cases that were pending before the Tribunal. Moreover, the Constitutional Tribunal held that a full bench of the Tribunal comprises all the judges of the Tribunal who have the capacity to adjudicate on the day of the issuing of a judgment.

The Constitutional Tribunal deems that the above findings are fully relevant in the present case.

1.3. The Tribunal states that a ruling to be issued in the present case will concern the provisions of the Constitutional Tribunal Act which, at the same time, constitute a legal basis of the Tribunal's judicial activity, including essential procedural steps that need to be taken for the issuance of the ruling. One may not accept a situation where the subject of a legal dispute before the Tribunal also constitutes the systemic and procedural basis of the resolution of the dispute. A possible ruling of the Constitutional Tribunal on the unconstitutionality of the challenged provisions would then undermine the very process of adjudication (and, consequently, its outcome i.e. the ruling itself) as one carried out on the unconstitutional basis. The said paradox – which results, *inter alia*, from challenging the provisions of the Constitutional Tribunal Act which pertain to the internal organisation and conduct of work of the constitutional court in accordance with the procedure for an *ex post* (*a posteriori*) review of the constitutionality of a statute – leads to a situation where the consideration of the present case should begin with determining the proper framework of adjudication in the said case.

1.4. The evaluation of the constitutionality of a statute regulating the mode of proceedings before the Tribunal must be given priority. The Constitutional Tribunal may not act (and, in particular, adjudicate) on the basis of provisions that have been challenged and raise serious reservations as to their conformity to the Constitution. This would threaten adjudication in cases pending before the Tribunal, infringe the rights and freedoms of citizens who are waiting the consideration of a constitutional complaint or a question of law, as well as affect the stability and predictability of the system of law (cf. the aforementioned decision ref. no. K 47/15).

The Constitutional Tribunal points out that – pursuant to Article 190(1) of the Constitution – its rulings are universally binding and final. The Constitution does not provide for any procedure for the review or revocation of the rulings of the Tribunal due to their procedural defects (Article 190(4) of the Constitution is not applicable in that context; the said Article provides for a possibility of reopening proceedings in the event of the issuance of a ruling in an individual case on the basis of provisions regarded as inconsistent with the Constitution). Neither the Tribunal nor any external authority could revoke or change a ruling that

concluded proceedings and was issued by an adjudicating bench of the Tribunal, even if the said ruling was issued on the basis of provisions which were later declared to be inconsistent with the Constitution.

In particular, it is inadmissible to apply civil procedure provisions on the invalidity of proceedings accordingly to the judgments of the Constitutional Tribunal. Although Article 74 of the 2015 Constitutional Tribunal Act permits the application of the Act of 17 November 1964 – the Civil Procedure Code (Journal of Laws – Dz. U. of 2014, item 101, as amended), but merely "in matters not regulated by the [Constitutional Tribunal] Act" and only "accordingly". By contrast, Article 190(1) of the Constitution explicitly states that the rulings of the Tribunal are "final", which entails that, in this context, there is no possibility of applying measures from the civil procedure accordingly. The lack of a possibility of reopening proceedings before the Constitutional Tribunal in a case concluded with a judgment of the Tribunal, with the application of the provisions of the Civil Procedure Code, was confirmed by the Tribunal's decision of 17 July 2003, ref. no. K 13/02 (OTK ZU No. 6/A/2003, item 72).

Due to the said irreversibility of procedural defects of the judgments of the Tribunal, it is extremely important that any potential constitutional reservations as to a basis for the Tribunal's adjudication are dispelled before the provisions are applied. In this sense, this ruling is issued in an emergency situation. The ruling is indispensable to address the reservations concerning the Constitutional Tribunal Act and constitutes a *sine qua non* requirement for the constitutional adjudication of the Tribunal in future cases.

At the same time, it should be noted that the Tribunal is the only organ of the state which may, in a final and universally binding way, assess the hierarchical conformity of law (see Art. 188 and Art. 190(1) of the Constitution), including the conformity of the Constitutional Tribunal Act to the Constitution. In the present legal situation, no other organ of the state – including the Supreme Court and the Supreme Administrative Court – is competent to relieve the Tribunal from that obligation or take over its role and include it in its own scope of activity. Thus, the Tribunal may not declare the lack of its competence to conduct a constitutional review of the Constitutional Tribunal Act and refuse to adjudicate on the present case.

1.5. The Constitution provides for two ways of determining the conformity of a statute to the Constitution prior to the entry into force of the statute.

First of all, in such situations, the President of Poland may request the constitutional court to conduct an *ex ante* (*a priori*) constitutional review, before the said President signs the bill adopted by the Polish Parliament (cf. Art. 122(3) in conjunction with Art. 126(2) of the Constitution).

Secondly, it is also possible and desirable, in case of doubt, to review the constitutionality of a statute during the period of *vacatio legis*, i.e. between the publication of the statute and its entry into force. For the said possibility not to be illusory, the period of *vacatio legis* must be "appropriate". In the case of the Constitutional Tribunal Act, this should include a reasonable time-frame for competent applicants to prepare applications for the review of the statute (the Tribunal may not take initiative in this case), as well as an appropriate time-frame for the thorough examination of the case by the Constitutional Tribunal, the receipt of statements submitted by participants in the proceedings and required by law, the preparation of a

draft judgment with a statement of reasons, and finally – the ordering and conducting of a possible hearing (cf. also below).

The application of the said legal measures with regard to the December Amending Bill adopted by the Parliament, would make it possible to determine in a binding way (within the scope of the constitutional system of the state) whether the new rules for the internal organisation and conduct of work of the Tribunal are consistent with the Constitution. However, such a situation did not occur. The President of Poland did not lodge an application for a constitutional review with the Tribunal before signing the December Amending Bill adopted by the Parliament, and the legislator had determined that the Act was to enter into force as of the day of its publication (cf. the said Article 5 of the said Amending Act).

1.6. As a result of the above decisions of the said state authorities and due to the obvious need to issue a ruling forthwith with regard to the issuance of the December Amending Act and its amendments to the 2015 Constitutional Tribunal Act, the Tribunal is therefore forced to resort to a possibility that arises from Article 195(1), *in fine*, of the Constitution. In accordance with that provision, the judges of the Constitutional Tribunal, "in the exercise of their office, shall be independent and subject only to the Constitution", i.e. – in certain circumstances – they may refuse to apply a binding statute. This also refers – *lege non distinguente* – to the Constitutional Tribunal Act.

In the present case, adjudication by the Constitutional Tribunal with the application of Article 195(1), *in fine*, of the Constitution requires some further comments.

Firstly, the principle that the judges of the Constitutional Tribunal are subject only to the Constitution is primarily derived from the judicial tasks of the constitutional court, which comprise the review of binding statutes. The said principle is not merely relevant with regard to the basis of a final determination on the conformity of challenged provisions which concludes the Tribunal's proceedings. This also concerns the Tribunal's acts of applying law, including taking procedural steps, which constitute an indispensable element of the entire complex process of reviewing the constitutionality of a statute and issuing a ruling on the merits of the case (e.g. the setting of a date for a hearing).

Secondly, the principle of being subject only to the Constitution in the case of a judge of the Constitutional Tribunal and (which constitutes the practical manifestation of thereof) a possibility of bypassing a statutory provision that is inconsistent with the Constitution fall within the scope of the application of law. This way, the Tribunal does not determine the lack of the legal effect of the bypassed provision; nor does it "derogate" it. Incidental refusal to apply it and the adoption of a constitutional regulation, or another binding statutory regulation (e.g. *lex generalis*), in that place may be motivated differently than – if this takes place – the assessment of the constitutional review of the Constitutional Tribunal Act. Similarly, the judges of the common, military or administrative courts, or of the Supreme Court, may refuse to apply, in a given case under examination, the provisions of sub-statutory acts that are inconsistent with acts of a higher level. On the basis of Article 178(1) of the Constitution, they are subject "only to the Constitution and statutes" (their scope of being bound by law is greater than in the case of the judges of the Constitutional Tribunal, who are subject "only to the Constitution").

Thirdly, the Tribunal's application of Article 195(1), *in fine*, of the Constitution and the bypassing of those binding provisions of the Constitutional Tribunal Act which also constitute the subject of the allegation in the case before the Tribunal, does not in itself undermine the presumption of the constitutionality of the challenged provisions (i.e. the assumption that they are consistent with the Constitution as long as, in the proceedings before the Tribunal, it is not proved otherwise). *De lege lata* the said presumption is one of the foundations of the legal system and one may speak of the revocation thereof only after the public delivery of a judgment of the Constitutional Tribunal, in which the Tribunal determines the non-conformity of a statute to the Constitution (cf. the judgment of 11 May 2007, ref. no. K 2/07, OTK ZU No. 5/A/2007, item 57). At the stage of establishing the basis of adjudication, the Tribunal neither assumes the direction of a future substantive review of the bypassed provision of the Constitutional Tribunal Act nor determines the result of the said review – that issue will be resolved by the subsequent constitutional review.

1.7. In the light of Article 195(1), *in fine*, of the Constitution, the judges of the Tribunal are unconditionally obliged to adjudicate in accordance with procedural rules provided for in the Constitution. Within that scope, the Constitution does not contain exhaustive regulations; on the contrary, it leaves "the mode of proceedings before the Tribunal" to be regulated by statute (cf. Article 197 of the Constitution). Since the Constitution may not be the sole basis of adjudication by the Tribunal, it is necessary, within that scope, to include also indispensable statutory provisions. This necessitates determining whether the point of reference here should be the 2015 Constitutional Tribunal Act in the version before or after the amendments, and also which provisions contained therein should be applied, and which ought to be bypassed when analysing the present case.

1.8. The Constitutional Tribunal has determined that the basis of this ruling should comprise the directly applicable provisions of the Constitution and the 2015 Constitutional Tribunal Act amended by the December Amending Act, with the exclusion of several statutory provisions. What will be bypassed is a number of those provisions which concern the mode of proceedings before the Constitutional Tribunal and which could be potentially applicable in the present case (cf. details below). Indeed, as it has already been mentioned above, it is not admissible for the same provisions to constitute both the basis and subject of adjudication at the same time.

At the same time, it should be stated that (despite the proposals of the applicants), there is no possibility of applying, in these proceedings, the 2015 Constitutional Tribunal Act in the version before the amendments. Before the Constitutional Tribunal examines the conformity of the December Amending Act to the Constitution, it may not be determined whether the said Act has caused effective changes in the 2015 Constitutional Tribunal Act, as the presumption of constitutionality of the Amending Act is binding here. When determining the procedural bases of adjudication, the Constitutional Tribunal may not anticipate the result of the proceedings, and the constitutionality or unconstitutionality of the challenged provisions may not determine the correctness of the review procedure.

Additionally, it should be noted that adjudication on the basis of the 2015 Constitutional Tribunal Act in the version before the amendments would be linked with the risk of

issuing a judgment on the basis of provisions that are not binding. If, indeed, the Constitutional Tribunal did not agree with the applicants' reservations as to the legislative process of enacting the December Amending Act and the content thereof, it would have to be deemed that the said Amending Act introduced effective changes into the 2015 Constitutional Tribunal Act, which entered into force before the issuance of this judgment, and the previous wording of the amended provisions ceased to have effect.

1.9. When translating the above findings into specific rules for proceeding in the present case, it should be explained in detail why the case is being determined at a hearing by a simple majority vote by an adjudicating bench composed of 12 judges, bypassing the order in which cases are received by the Tribunal, as well as, at the same time, obliging the participants to submit their statements within a shortened time-limit. Indeed, within that scope, the solutions adopted by the Constitutional Tribunal depart from those provided for in Article 44(3), Article 80(2), Article 87(2) and Article 99(1) of the 2015 Constitutional Tribunal Act in the version after the amendments, as well as in Article 1(16) of the December Amending Act, insofar as it repeals Article 82(5) of the 2015 Constitutional Tribunal Act.

1.10. When determining the competent adjudicating bench in the present case, the Constitutional Tribunal took account of the following circumstances:

Firstly, in the factual and legal circumstances that exist on the day of issuing the ruling in the present case, the full bench of the Tribunal comprises 12 judges. In its judgment of 3 December 2015, ref. no. K 34/15 (OTK ZU No. 11/A/2015, item 185), the Tribunal ruled that the two judges of the Tribunal elected on 8 October 2015 by the Sejm during its 7th parliamentary term – to replace the judges whose terms of office were to end on 2 and 8 December 2015 – were not effectively elected. By contrast, the three judges of the Tribunal whose terms of office were to end on 6 November 2015 were elected by the Sejm on the same day, as the two aforementioned judges, on the constitutional legal basis, but they have not yet taken the oath of office before the President of Poland. The Tribunal is *ex officio* familiar with the above-mentioned judgment, which – pursuant to Article 190(1) of the Constitution – is final and universally binding also with regard to the Tribunal.

Secondly, in the light of Article 194(1) of the Constitution, there are no doubts that a full bench of the Tribunal may be composed of maximum 15 judges. These are also all the judges who are constitutionally authorised to issue determinations. Indeed, if the Tribunal issues a ruling in a situation where a few judges are not authorised to adjudicate, due to the lack of a requisite action that needed to be taken by a state authority other than the Tribunal (cf. the said judgment ref. no. K 34/15), and at the same time all judges of the Tribunal who are authorised to adjudicate participate in the issuing of the said determination, then the adjudicating bench selected in this way is indeed "a full bench".

For the above reasons, the Tribunal assumed that a full bench of the Tribunal comprises all the judges of the Tribunal who may adjudicate in a given case (with a possible exclusion of some judges from the adjudicating bench, if – in accordance with the binding law – there are justified grounds for doing so). In other words, 'a full bench' denotes a full bench of the Tribunal within the meaning of the Constitution, where all the judges of the bench are authorised to adjudicate in a given case (see Article 194(1) of the Constitution).

Thus, the Tribunal has decided to reject the outcome of an interpretation of amended Article 44(3) of the 2015 Constitutional Tribunal Act, which implied that the legislator – despite being aware of the Tribunal's judgment ref. no. K 34/15 (published on 16 December 2015, i.e. a day after the submission of the December Amending Bill to the Sejm) – enacts provisions the implementation of which causes the Tribunal to act in breach of its own ruling, which is universally binding, or enacts a provision that may not be applied at all.

However, at the same time, the Tribunal does not conduct its proceedings in accordance with the legal situation before the December Amending Act, where it was sufficient to for a full bench ruling to be issued by 9 judges. At this stage of proceedings, it may not be determined whether the change in the hitherto rules (i.e. challenged Article 44(3) of the 2015 Constitutional Tribunal Act) is inconsistent with the Constitution and whether – in such a case – this causes recourse to the previous rules.

1.11. Amended Article 99(1) of the 2015 Constitutional Tribunal Act, challenged herein, stipulates that full bench rulings of the Tribunal are to be determined by a two-thirds majority vote. Previously it was assumed that a simple majority vote sufficed in such contexts.

The Tribunal has decided to bypass the said provision. Instead, the Tribunal has opted to directly apply – as *lex superior* – Article 190(5) of the Constitution, which provides for a simple majority vote for determining a ruling.

For the above reasons, the basis of the decision within that scope is not Article 99(1) of the 2015 Constitutional Tribunal Act in the version before the amendments (although its content repeats the norm contained in Article 190(5) of the Constitution).

1.12. Pursuant to challenged Article 80(2) of the 2015 Constitutional Tribunal Act as amended by the December Amending Act: "The dates of hearings or the dates of sittings in camera, at which applications are considered, shall be set in the order in which cases are received by the Tribunal". Amended Article 87(2) of the said Act stipulates that: "The hearing may not be held earlier than after 3 months following the service of the notification of the said date, and as regards cases considered by a full bench of the Tribunal – after 6 months". Added Article 87(2a) of the 2015 Constitutional Tribunal Act permits the shortening of the above time-limits, but only by half and in accordance with the rules provided for in that provision.

The issuance of a judgment in the present case takes place by bypassing the above-mentioned provisions. They constitute the subject of the allegation in the present case, and the Tribunal deemed that there are vital reasons to refrain from the application of such rules. Indeed, it is objectively necessary to consider the allegations pertaining to the December Amending Act, before any other cases pending before the Tribunal are considered. What is at stake here is not only the guarantees for the subjects of constitutional rights and freedoms (e.g. persons who have lodged constitutional complaints with the Tribunal), but also the general stability and predictability of the legal system, which is affected by the judgments of the Tribunal.

1.13. Article 1(16) of the December Amending Act provides for the repeal of Article 82(5) of the 2015 Constitutional Tribunal Act, which grants the President of the Constitutional Tribunal a possibility of setting a different time-limit (a shorter or longer one than 2 months) for a participant in proceedings to submit his/her statement.

The participants in the proceedings in the present case were called to submit their statements until 29 January 2016. The said time-limited was extended until 8 February 2016.

The Constitutional Tribunal confirms that this was admissible. The time-limits for providing the statements were instructional in character, and failure to submit the said statements, or submitting them with a delay, does not suspend the consideration of the case. Due to the constitutional principle of cooperation between public authorities, expressed in the Preamble to the Constitution, those obliged to provide the said statements should however fulfil the said obligation within the shortest possible time-limit (and, in any case – before the date set for a relevant hearing).

It should be noted in this context that, in the present case, a statement was provided only by the Public Prosecutor-General on 10 February 2016 (however, it was withdrawn by the letter of 4 March 2016); no statements were submitted by the Sejm and the Council of Ministers.

1.14. The Constitutional Tribunal states that the other provisions of the 2015 Constitutional Tribunal Act, which were neither amended nor challenged, create sufficient bases for examining and determining the present case.

2. The subject of the review and higher-level norms for the review

2.1. Allegations raised in the applications may be divided into two groups.

The first group comprises allegations concerning the legislative process that resulted in the enactment of the December Amending Act as well as the date of the entry into force of the said Act, which were raised by all the applicants with regard to the amending Act. In the opinion of the Constitutional Tribunal, the subject of the allegation, indicated in this way, is correct and requires no further comment.

The other group of allegations comprises reservations as to the content of particular solutions provided for in the December Amending Act, which involve changing or repealing certain provisions of the 2015 Constitutional Tribunal Act, or adding new provisions thereto, or constitute transitional provisions. Most applicants raised the allegations with reference to the provisions of the 2015 Constitutional Tribunal Act as amended by the December Amending Act, as to in the December Amending Act itself – the applicants only challenged repealing or transitional provisions. A different stance was presented only by the Ombudsman, who claimed that the subject of this review should only comprise the December Amending Act. In his opinion, challenging provisions of the 2015 Constitutional Tribunal Act as amended by the December Amending Act could result in a legal gap, which would aggravate the existing paralysis of the Tribunal's judicial activity.

2.2. When assessing the above differences in the way of formulation of the applications, the Constitutional Tribunal takes account of the fact that the December Amending Act

was challenged not during its period of its *vacatio legis* (such a period is actually not provided for in the said Act), but already after the entry into force of the said Act (i.e. after its promulgation). It is assumed in the jurisprudence of the Constitutional Tribunal that, in such a situation, a constitutional review of an amending statute is justified depending in such a situation on the type of allegations that are raised. In typical cases, only formal allegations raised with regard to the said statute remain relevant, i.e. those that concern the constitutionality of the legislative process for the enactment of the statute as regards procedural and competence issues. By contrast, substantive reservations are considered by the Tribunal with regard to the provisions amended by the challenged statute (cf. e.g. the judgments of: 12 December 2005, ref. no. SK 20/04, OTK ZU No. 11/A/2005, item 133; 13 March 2007, ref. no. K 8/07, OTK ZU No. 3/A/2007, item 26; 2 September 2008, ref. no. K 35/06, OTK ZU No. 7/A/2008, item 120; 13 March 2014, ref. no. P 38/11, OTK ZU No. 3/A/2014, item 31 and 7 May 2014, ref. no. K 43/12, OTK ZU No. 5/A/2014, item 50).

The Constitutional Tribunal states that the subject of a review and higher-level norms for the review should be determined at the beginning of proceedings before carrying out any assessment as to the conformity of challenged provisions to the Constitution. Otherwise a possible ruling might not be free from logical defects, as preliminary formal assumptions on the admissible limits of the consideration of a case would be determined by the final outcome of proceedings.

For is reason, by taking into account the stances of all the applicants, the Constitutional Tribunal assumes that the subject of substantive allegation will comprise the provisions of the December Amending Act, as well as the corresponding amended or added provisions of the 2015 Constitutional Tribunal Act. An exception will only be the transitional provisions of the December Amending Act – which comprise autonomous procedural norms to be applied in the transitional period, and do not affect the content of the provisions of the 2015 Constitutional Tribunal Act, and thus they constitute a separate subject of the review – as well as the repealing provisions thereof, which are, however, always considered by taking account of the content of provisions that are being repealed.

2.3. In this context, the Constitutional Tribunal points out that – in accordance with Article 50(3)(1) of the 2015 Constitutional Tribunal Act – the subject of the allegation about unconstitutionality may comprise not only the content of a normative act, or part thereof, but also competence to issue the normative act or the legislative process for enacting the act. In the case of a substantive review, the Tribunal's adjudication on the conformity of a statute to the Constitution involves comparing the content of a challenged norm with a higher-level norm for the review, as well as determining relations between them. In case of a procedural review, the said subject comprises procedural steps taken by the lawmaker, and the point of reference is a set of relevant procedural rules. In a democratic state ruled by law, all the organs of public authority are obliged to act on the basis of and within the limits of law (cf. Article 7 of the Constitution). The said obligation also concerns state authorities that participate in the process of enacting statutes. The fulfilment of the constitutional requirements for the legislative procedure by the said authorities is a prerequisite for a statute to be effective. The scope competence of particular authorities in this process is strictly defined, and actions taken in breach of law – are inadmissible (see the judgments of: 27 May 2002,

ref. no. K 20/01, OTK ZU No. 3/A/2002, item 34; 23 March 2006, ref. no. K 4/06, OTK ZU No. 3/A/2006, item 32 and 7 November 2013, ref. no. K 31/12, OTK ZU No. 8/A/2013, item 121).

Determining an infringement of procedural provisions may suffice to rule a challenged act unconstitutional (see the judgments of: 24 June 1998, ref. no. K 3/98, OTK ZU No. 4/1998, item 52; 23 February 1999, ref. no. K 25/98, OTK ZU No. 2/1999, item 23 and 19 June 2002, ref. no. K 11/02, OTK ZU No. 4/A/2002, item 43). Determining the unconstitutionality of a normative act due the legislative process in which it was enacted does not exclude the admissibility of examining substantive-law allegations about the content of particular provisions of the said act (see the ruling of 22 September 1997, ref. no. K 25/97, OTK ZU Nos. 3-4/1997, item 35 as well as the judgment of 28 November 2007, ref. no. K 39/07, OTK ZU No. 10/A/2007, item 129). The parallel application of the two kinds of criteria for the assessment of constitutionality is provided for in Article 50(3) of the 2015 Constitutional Tribunal Act, which is also confirmed by the Tribunal's practice.

In the present case, the Tribunal deems that it is necessary to have a review at both above-indicated levels for two reasons. Firstly, four out of five applications contain separate allegations about the process of enacting the December Amending Act and the content of particular provisions; this corresponds to the dual distinction drawn with regard to the subject-matter of allegations in Article 50(3) of the 2015 Constitutional Tribunal Act. Thus, the Tribunal should address both categories. Secondly, a ruling limited to the declaration of the unconstitutionality of the December Amending Act on the grounds of serious procedural defects of the enactment process would not allow the Tribunal to verify numerous allegations concerning the content of the challenged provisions. However, such verification is also needed in case the legislator is to undertake further legislative activities with regard to the organisation and functioning of the Tribunal. Indeed, this facilitates indicating normative solutions which are potentially incompatible with the Constitution and which fall outside the scope of the legislator's discretion.

2.4. The constitutional issues indicated by the applicants were subdivided into several groups. First, the Tribunal examines formal allegations about the enactment of the December Amending Act and the Act's entry into force without a period of *vacatio legis*. Next, the Tribunal assessed changes provided for in the said Amending Act within the scope of adopting resolutions, the process of adjudication, as well as the status of the judges of the Tribunal (including the modification of disciplinary proceedings). The final part of the statement of reasons is devoted to the repeal by the said Amending Act of provisions on proposals of candidates for judicial vacancies at the Tribunal, a procedure for determining the existence of an impediment to the exercise of the office by the President of Poland, as well as the elimination of special rules for being admitted to a judicial examination. A detailed analysis of the subject of the review and higher-level norms for the review is presented in the subsequent parts of the statement of reasons, in chapters devoted to particular allegations.

3. The assessment of the legislative process that led to the enactment of the December Amending Act

3.1. The allegations of the applicants and the statements of the participants in the proceedings

Allegations about the unconstitutionality of the December Amending Act, due to a defective process of enacting the Act, were raised in all the applications submitted to institute the proceedings in the present case.

The excessively quick pace of legislative work was stressed in the applications of: the first and second group of Sejm Deputies, the Ombudsman, and the National Council of the Judiciary. In the applicants' view, the pace of the work on the December Amending Bill was justified neither by the subject-matter under regulation nor by the circumstances. The haste did not facilitate careful consideration and reflection on the essence of drafted amendments; in fact, the said pace undermined a substantive parliamentary debate. The Sejm Deputies of the parliamentary opposition received no answers to questions referred to the Deputy-Rapporteur; there was no referral for legal opinions. The Marshal of the Sejm drastically shortened the time allocated for voicing opinions in the course the debate on the Bill. In the view of the applicants, the democratic enactment of law is not exhausted in the formal aspects of the legislative process, as it should guarantee the taking into account of various considerations and arguments, which creates a possibility of rational legislative decision-making. Furthermore, in the applications submitted by the first group of Sejm Deputies, the Ombudsman and the National Council of the Judiciary, it was pointed out that the pace of legislative work entailed, in fact, bypassing Article 123(1) of the Constitution, which stipulates that the power to adopt a bill as urgent is reserved solely to the Council of Ministers and only in certain matters. However, according to the Public Prosecutor-General, Article 123(1) of the Constitution is an inadequate higher-level norm for the review in the present case, since the challenged statute was drafted and submitted to the Sejm by Sejm Deputies, and not by the Government (yet the said Prosecutor's statement was withdrawn by the letter of 4 March 2016).

All the applications raised an allegation about the Sejm's breach of the admissible scope of amendments to the Bill. Normative novelties that – in the applicants' opinion – were not related to the substance of the Bill were added both at the stage of work carried out by the competent Sejm committee after the first reading of the Bill as well as in the course of the second reading. In total, there were circa 20 significant amendments which modified the original Bill submitted by a group of Sejm Deputies, but "were not considered in the course of three readings" (i.e. the full legislative procedure). This way the December Amending Bill gained content that had not been intended and proposed by its authors. The said allegation was not supported by the Public Prosecutor-General (in his statement that was ultimately withdrawn), who deemed that the amendments introduced after the first reading of the Bill fell within the scope of the original Bill.

Additionally, the Ombudsman stated that the Bill was not considered in the course of three readings. Provided for in Article 119(1) of the Constitution, the activity of "consideration" should not be treated as "a formal ritual", as it is a necessity for the Sejm to hear and take into account representative views concerning the subject-matter of a bill. "Otherwise, a legislative decision of the Sejm may not take into account all aspects of the problem under consideration and is not based on arguments of equity and rationality, but only on the argument about the will of a majority and the current strength of its voice". The Ombudsman iden-

tified significant elements of the "consideration" of the Bill as comprising: making reference to legal analyses and expert opinions; conducting a thorough debate; and "undertaking a dialogue with the organs of the judiciary".

In the application filed by the second group of Sejm Deputies, it was noted that – despite the requirement set in Article 118(3) of the Constitution – in the explanatory note for the Bill there was no presentation of the financial effects of the execution of the Bill. It is grossly insufficient, as well as untrue, to merely state that "the Bill will produce no financial effects for the state budget". Even considering only delays in proceedings that will arise from the amendments to the 2015 Constitutional Tribunal Act, and damages paid for the said delays, will be a burden for the state budget. The shortcomings of the explanatory note to the Bill were also pointed out by the Ombudsman, who challenged numerous remarks made by the authors of the Bill. In his view, the explanatory note did not *inter alia* clarify the actual goal and need for introducing the said Bill, the social effects of the Bill were not estimated properly, as well as it was incorrectly assessed that the Bill does not fall within the scope of EU law.

The applicants, and in particular the first group of Sejm Deputies and the Ombudsman, questioned the lack of consultation with the National Council of the Judiciary and the Supreme Court about the final version of the Bill. However, in his original statement (withdrawn on 4 March 2016), the Public Prosecutor-General argued that the competence to present opinions which is vested with the National Council of the Judiciary has no basis in the Constitution, but only in the relevant statute. The lack of an opinion presented by the National Council of the Judiciary with regard to that matter may not therefore be regarded as an infringement of the Constitution.

Also, the application of the second group of Sejm Deputies contained an additional allegation about an infringement of Article 163a(1) and (2) in conjunction with Article 189(1) of the Sejm's Resolution of 30 July 1992 – the Rules of Procedure of the Sejm of the Republic of Poland (the Official Gazette – *Monitor Polski* of 2012 item 32, as amended; hereinafter: the Sejm's Rules of Procedure), which consists in the inadmissible resumption of voting for ordering a recess in the proceedings of the Sejm's Legislative Committee.

3.2. The subject of the review and higher-level norms for the review

3.2.1. The Constitutional Tribunal states that the allegations raised in the applications are to a varied degree justified and differ in their significance. Bearing this in mind, it should be assumed that a substantive review should be carried out with regard to, partly interrelated, reservations concerning the following:

– the excessively quick pace of the legislative proceedings;
– the Sejm's introduction of amendments to the Bill which fall outside the scope of admissible statutory amendments;
– no consultation with the National Council of the Judiciary.

The first and the last of the allegations challenge the constitutionality of the entire legislative process, which resulted in the enactment of the December Amending Act, and thus they should be referred to the said statute as a whole.

By contrast, the second allegation concerns the irregularities that occurred in the enactment of only certain provisions of the December Amending Act. The Constitutional Tribunal states that the allegation was sufficiently justified only with regard to Article 1,

points (2), (5) and (7), and also partly point (8) of the said Amending Act, as well as in the context of added or amended – by the provisions of the Amending Act – Article 8(4), Article 28a, Article 31a, Article 36(1)(4) and Article 36(2) of the 2015 Constitutional Tribunal Act, as well as with regard to Article 1(15) of the Amending Act, which repealed Chapter 10 of the 2015 Constitutional Tribunal Act. As to the remainder, proceedings with regard to the said allegation should be discontinued on the basis of Article 104(1)(2) of the 2015 Constitutional Tribunal Act due to the inadmissibility of adjudication.

The Constitutional Tribunal held that the other reservations raised by the applicants were related to the above basic reservations and did not constitute the basis of separate allegations.

3.2.2. The applicants indicated numerous higher-level norms for the review, which were partly repetitive, or which addressed analogous constitutional issues from various perspectives. The justification for the applications and the arguments included therein did not always make it possible to precisely assign a given higher-level norm for the review to a specific procedural allegation. Entire amalgamations of issues were juxtaposed with the same provisions of the Constitution. For this reason, bearing in mind the applicants' intentions and applying the principle of *falsa demonstratio non nocet*, the Tribunal sorted out the bases for the constitutional review of the December Amending Act and assumed that the higher-level norms for the review would be as follows:

– the principle of appropriate legislation, arising from Article 2 of the Constitution, as well as Article 7, Article 112 and Article 119(1) of the Constitution – as to the question of the pace of the legislative proceedings in the Sejm as well as the consideration of the Bill in the course of three readings;
– Article 118(1) and Article 119(2) of the Constitution – as to the scope of the amendments to the Bill;
– Article 186(1) of the Constitution – as to the bypassing of consultation with the National Council of the Judiciary.

Agreeing with the original statement submitted by the Public Prosecutor-General (which later was withdrawn by the letter of 4 March 2016), the Tribunal held that Article 123(1) of the Constitution was an inadequate higher-level norm for the review in the context of the allegation about the quick pace of the legislative proceedings. The Bill in question was proposed by a group of Sejm Deputies and was adopted on the basis of the general provisions of the Sejm's Rules of Procedure, although certain legal mechanisms were resorted to so as to considerably shorten the length of the proceedings. The applicants regarded the legal institution of classifying bills as urgent, which is reserved only for bills drafted by the Council of Ministers, as equivalent to the quick pace of legislative work carried out in the Sejm, which is the actual state of affairs in given legislative proceedings. However, Article 123(1) of the Constitution has no application to bills drafted by Sejm Deputies, whereas the review proceedings in the present case do concern a bill submitted by a group of Sejm Deputies.

3.3. The course of the legislative process – general characteristics

3.3.1. The December Amending Bill drafted by a group of Sejm Deputies (cf. the Sejm Paper No. 122/8th term of the Sejm) was lodged with the Sejm on 15 December 2015. It

provided for: amendments to seven provisions of the 2015 Constitutional Tribunal Act (i.e. Art. 10(1), Art. 12, Art. 21(1), Art. 44(1)-(3), Art. 81(2), Art. 93(1) and Art. 99(1)); the repeal of over ten provisions of the 2015 Constitutional Tribunal Act (enumerated in Art. 4); two transitional provisions (marked as Art. 2 and Art. 3); as well as the entry into force of the Bill after the lapse of 30 days from the date of its publication (marked as Art. 5).

3.3.2. On 16 December 2015, "The Introductory Legislative Opinion on the Deputies' Bill amending the 2015 Constitutional Tribunal Act" was presented by the Legislative Bureau of the Sejm (ref. no. BL-1600-346/15).

The said opinion indicated that the explanatory note for the Bill did not meet the requirement arising from Article 34(3) of the Sejm's Rules of Procedure, and thus before the first reading of the Bill, the Marshal of the Sejm should have sent it for consultation to the Supreme Court, the Public Prosecutor-General, the Polish Bar Council, the National Council of Legal Advisers, and the National Council of the Judiciary.

It was also stated that "What should be considered is the submission of the Bill for the first reading at a sitting of the Sejm on the basis of Article 37(3) of the Sejm's Rules of Procedure (the premiss of important considerations)".

Moreover, reservations were raised with regard to legal matters, including allegations as to the constitutionality of the Bill; at the same time, it was stated that "raised allegations, due to the short period for the preparation of the said opinion, are only preliminary in character (…) the said matters require a thorough analysis, and therefore they should be the subject of a detailed legal opinion". The Legislative Bureau of the Sejm noted, *inter alia*, that:

- an amendment to Article 99(1) of the 2015 Constitutional Tribunal Act, which provides that full bench rulings of the Tribunal are to be determined by a two-thirds majority, raises reservations in the light of Article 190(5) of the Constitution;
- rules for determining rulings by the General Assembly of the Judges of the Constitutional Tribunal (hereinafter: the General Assembly) by a two-thirds majority vote and for proposing candidates for the positions of the President and Vice-President of the Tribunal may turn out to be dysfunctional.

3.3.3. Opinions on the December Amending Bill, which was included in the Sejm Paper No. 122/8th term of the Sejm, were presented by the following authorities:

- the First President of the Supreme Court (the opinion of 16 December 2015, ref. no. BSA III- 021 -506/15; hereinafter: the opinion of the First President of the Supreme Court);
- the Helsinki Foundation for Human Rights (the opinion of 16 December 2015, ref. no. 2961/2015/MPL; hereinafter: the opinion of the Foundation);
- the Polish Bar Council (the opinion of 17 December 2015, ref. no. NRA.018-SEK-3.12.2015; hereinafter: the opinion of the Polish Bar Council);
- the National Council of the Judiciary (the opinion of 18 December 2015, ref. no. WO-020-205/15; hereinafter: the opinion of the National Council of the Judiciary);
- the National Council of Legal Advisors (the opinion of 21 December 2015, ref. no. 12362/2015; hereinafter: the opinion of the National Council of Legal Advisors); as well as
- the Public Prosecutor-General (the opinion of 21 December 2015, ref. no. PG VII G 025/388/15; hereinafter: the opinion of the Public Prosecutor-General).

3.3.4. On 16 December 2015, the Marshal of the Sejm submitted the said Amending Bill for the first reading, which took place at the sitting of the Sejm on 17 December 2015. Solutions proposed in the Bill were negatively evaluated by the Sejm Deputies of the parliamentary opposition, who filed a motion for the dismissal of the Bill at the stage of the first reading (the motion did not receive the required majority of votes, cf. the shorthand report on the 5th sitting of the Sejm, 17 December 2015).

After the stage of the first reading, the said Amending Bill was referred to the Sejm's Legislative Committee for consideration. On 21 December 2015, legislative work was carried out by the Committee (cf. the full transcript of the 5th sitting of the Legislative Committee/ the 8th term of the Sejm, 21 December 2015), as a result of which on 22 December 2015. The Legislative Committee presented a report on the Bill together with the recommendation that the Sejm should adopt it as well as minority motions (cf. the Sejm Paper No. 144/8th term of the Sejm). The report was supplemented with another version of the Bill, which provided for: modifications in eleven provisions of the 2015 Constitutional Tribunal Act (i.e. in Art. 1, Art. 8(4), Art. 10(1), Art. 12, Art. 31, Art. 36, Art. 44(1)-(3), Art. 80, Art. 81(2), Art. 87, Art. 93(1) and Art. 99(1)); the addition of new provisions, namely, Art. 28a, Art. 31a and Art. 105a; the extension of the catalogue of repealed provisions including, *inter alia*, entire Chapter 10 of the 2015 Constitutional Tribunal Act (repealed provisions were enumerated in Art. 1(16) and (17)); the new version of transitional provisions (still marked as Art. 2 and Art. 3); as well as the provision indicating that the December Amending Act will enter into force as of the date of its publication (marked as Art. 4). The Sejm Deputies of the parliamentary opposition filed ten minority motions requesting that most of the proposed provisions be crossed out and a 2-month period of *vacatio legis* be introduced.

3.3.5. The second reading of the December Amending Bill was held on 22 December 2015 (cf. the shorthand report on the 6th sitting/ the 8th term of the Sejm, 22 December 2015). At that time, the second motion to reject the Bill in its entirety was submitted to a vote (it did not receive the required majority of votes). Also, all the above-mentioned amendments, proposed during the work of the Sejm's Legislative Committee, were accepted, except for the provision on the possibility of "re-opening proceedings until the delivery of a ruling", if it has been issues in glaring breach of provisions" (cf. Art. 1(15) of the December Amending Act, which provided for adding Art. 105a to the 2015 Constitutional Tribunal Act).

Consequently, the Sejm decided to return the Bill to the Sejm's Legislative Committee so that the Committee could examine the amendments and present another report. The Legislative Committee undertook work the very same day i.e. on 22 December 2015, and presented a report with recommendation for the adoption of five out of 29 amendments proposed during the second reading of the Bill (cf. the Sejm's Paper No. 144-A/8th term of the Sejm). The motions of the parliamentary majority that were taken into account concerned modifying Article 1(11) and (17) as well as two transitional provisions of the Bill, and crossing out Article 1(15) of the Bill, which has been mentioned above.

3.3.6. The third reading of the December Amending Bill was held on the same day as the second reading thereof, i.e. on 22 December 2015. During the rounds of voting held then, the Sejm addressed *inter alia* the motion to reject the Bill, the proposed amendments, and the filed minority motions. In the end, the Bill was passed, in the version determined in the course

of work carried out by the Sejm's Legislative Committee, including the five amendments recommended by the Committee.

3.3.7. After the adoption by the Sejm, the December Amending Bill was referred to the Senate on 22 December 2015 (see the Senate's Paper No. 58/9th term of the Senate). On 23 December 2015, the Bill became the subject of the joint sitting of the following two Senate committees: the Legislative Committee as well as the Committee on Human Rights, Rule of Law and Petitions (cf. the full transcript of the joint sitting of the Legislative Committee (11th) as well as the Committee on Human Rights, Rule of Law and Petitions (8th); the 9th term of the Senate). In their report presented on 23 December 2015, both committees included motions for the adoption of the said Bill without any amendments. Also, minority motions were filed, including a motion for the rejection of the Bill (see the Senate Paper No. 58A/9th term of the Senate). The joint sitting of the two committees comprised the presentation *inter alia* of "Remarks on the December Bill amending the 2015 Constitutional Tribunal Act" (the Senate Paper No. 58, 23 December 2015), prepared by the Legislative Bureau of the Chancellery of the Senate (hereinafter: the opinion of 23 December 2015 by the Legislative Bureau of the Chancellery of the Senate), where numerous reservations were formulated with regard to the constitutionality of the Bill. Also, the representatives of certain social organisations took the floor.

On 24 December 2015, the Senate adopted the said Bill without any amendments (see the Senate's Resolution of 24 December 2015 on the December Bill amending the 2015 Constitutional Tribunal Act, as well as the shorthand report on the 6th sitting/ the 9th term of the Senate, 23 December 2015).

3.3.8. The December Amending Bill adopted by the Parliament was referred to the President of Poland on 28 December 2015, who signed it on the same day and ordered its promulgation. The December Amending Act was published in the Journal of Laws on 28 December 2015 at 4.44 p.m.

3.4. The assessment of the conformity of the December Amending Act to: Article 7, Article 112 and Article 119(1) of the Constitution, as well as to the principle of appropriate legislation, arising from Article 2 of the Constitution

3.4.1. The consideration of a bill in the course of three readings (cf. Art. 119(1) of the Constitution) may not be understood only formally (as the requirement of three readings of a text marked in the same way), but above all it facilitates carrying out a diligent and thorough analysis, and consequently it minimises the risk of adopting sloppy or random solutions in the course of legislative work (see the Tribunal's judgments of: 24 March 2004, ref. no. K 37/03, OTK ZU No. 3/A/2004, item 21; 24 March 2009, ref. no. K 53/07, OTK ZU No. 3/A/2009, item 27; 7 November 2013, ref. no. K 31/12, OTK ZU No. 8/A/2013, item 121 and 9 December 2015, ref. no. K 35/15, OTK ZU No. 11/A/2015, item 186). Considering a bill in haste as well as refraining from applying legislative measures and procedures – which enable one to thoroughly explain and critically assess proposed legal solutions – neither improve the quality of drafted legislation nor enhances the substantive legitimacy of a legislative process itself.

The autonomy of the Sejm (cf. Art. 112 of the Constitution) does not imply complete discretion and randomness in determining particular elements of the legislative process and the practice of applying them. As stated by the Tribunal, in the aforementioned judgment ref. no. K 35/15, "solutions adopted within that scope in the rules of procedure of the House of Parliament must (…) take account of both constitutionally determined stages of the legislative process as well as the competence of authorities that the Constitution authorises to participate in that process. Moreover, solutions provided for in the rules of procedure must take account of constitutional norms, principles and values which do not directly refer to the legislative proceedings, but which set general standards of a democratic state ruled by law, which must be respected in such proceedings".

The requirement of the consideration of bills in the course of three readings, as referred to in Article 119(1) of the Constitution, is specified more in the provisions of the Sejm's Rules of Procedure by the indication of particular actions to be taken as part of the legislative process by the Sejm, its authorities, as well as particular Sejm Deputies. The Sejm's determination of what the consideration of bills in the course of three readings actually involves constitutes not merely a power of the Sejm, but also its obligation arising from Article 112 of the Constitution. Indeed, pursuant to the last-mentioned provision, "the conduct of work of the Sejm (…) shall be specified in the rules of procedure adopted by the Sejm". Expressed in this wording, the autonomy of the Sejm's Rules and Procedures comprises the Sejm's discretion to determine the conduct of work on a bill, with the proviso that activities undertaken as part of the said work should guarantee the actual, and not merely formal, consideration of the said bill by the Sejm. In other words, when determining the order of work on a given bill, the Sejm is bound by the wording of the Constitution, including Article 119(1) of the Constitution. A violation of the last-mentioned provision by not ensuring that the Sejm considers a bill in the course of three readings may occur both at the stage of enacting the provisions of the Rules of Procedure as well as at the stage of the application thereof.

In the light of the previous jurisprudence of the Constitutional Tribunal, the consideration of bills in the course of three readings should be manifested in at least four ways.

Firstly, this should comprise a sequence of particular activities undertaken by the organs of the Sejm so as to thoroughly consider the purpose and nature of planned legal changes. In accordance with the Sejm's Rules of Procedure, the first reading of a bill consists of justification provided by the author of the bill, a debate on general principles of the bill, as well as Sejm Deputies' questions in that respect and answers of the author (Art. 39(1) of the Sejm's Rules of Procedure)[1]. The stage of the second reading primarily comprises providing the Sejm with a report by a Sejm committee, and also carrying out a debate as well as proposing amendments and motions (cf. Art. 44(1) of the Sejm's Rules of Procedure). By contrast, the stage of the third reading includes the presentation of an additional report prepared by the Sejm committee, or –if the bill has not been referred again to the committee – a Deputy-Rapporteur's presentation of amendments and motions proposed during the second reading, as well as a vote (cf. Art. 49 of the Sejm's Rules of Procedure). The consideration of a bill in the

[1] The full text of an English translation of the Sejm's Rules of Procedure (officially entitled: The Standing Orders of the Sejm of the Republic of Poland) is available at the Sejm's website: http://oide.sejm.gov.pl/oide/en/index.php?option=com_content&view=article&id=14798:the-standing-orders-of-the-sejm-of-the-republic-of-poland&catid=7&Itemid=361; for the sake of brevity, in the translation of the Tribunal's judgment, the Sejm's document is consistently referred to as 'the Sejm's Rules of Procedure'.

course of three readings also comprises work conducted by Sejm committees between the first and second reading, and possibly between the second and third reading; these stages are also referred to as 'considering' a bill and 'deliberating' thereon (cf. Art. 40-42 and Art. 47 of the Sejm's Rules of Procedure). The Sejm's Rules of Procedure grant Sejm committees with competence to appoint subcommittees to consider a bill in a more detailed way, as well as a possibility to request other committees to present their opinions on the bill, or part thereof, as well as to order a public hearing, and also to hear the opinions of invited experts (cf. Art. 41 and Art. 42 of the Sejm's Rules of Procedure). The work of the committees leads to producing reports which are provided to the Sejm, and are then discussed at a sitting of the Sejm (cf. Art. 43 and Art. 47 of the Sejm's Rules of Procedure).

Secondly, the consideration of a bill by the Sejm, as referred to in Article 119(1) of the Constitution, requires providing an adequate time-frame, adjusted to the significance and complexity of matters to be regulated. Hence, in the Sejm's Rules of Procedure, proceeding with the subsequent stages of reading a bill is contingent on giving Sejm Deputies sufficient amount of time to familiarise themselves with the results of work carried out at earlier stages of legislative proceedings, and to prepare for further stages. Thus, the first reading may take place no earlier than on the seventh day from the service of the copy of a bill on Sejm Deputies, whereas the second reading – no earlier than on the seventh day from the date a Sejm committee's report is served on Sejm Deputies (cf. Art. 37(4) of the Sejm's Rules of Procedure). These time-limits may be bypassed on the basis of a decision of the Sejm, and in the context of the second reading – also a decision of the committee (cf. Art. 39(2) and Art. 44(3) of the Sejm's Rules of Procedure).

In the opinion of the Constitutional Tribunal, a time-frame set by the Sejm for legislative proceedings should not, however, negatively affect the course of those proceedings. One may speak of such a negative effect when – due to the extensiveness of the submission, or the complexity of matters to be regulated – the bypassing of such a time-frame prevents Sejm Deputies from preparing themselves for further proceedings to the extent that guarantees the actual consideration of a bill. Although, within the scope of its autonomy, the Sejm has discretion to choose the pace of its legislative work, the said discretion is limited by Article 119(1) of the Constitution, and the requirement to consider a bill, which is derived from that provision. Proceeding with bills within exceptionally short time is definitely not conducive to considering them within the meaning of the above-mentioned provision. Thus, such legislative proceedings may take place when the quick adoption of a bill is justified by serious reasons, and at the same time, this is consistent with the principles of a democratic state ruled by law, including the right of the parliamentary opposition to be heard in the course of legislative proceedings.

Certain recommendation as to which statutes should not be enacted in haste arise from the Constitution. Pursuant to Article 123(1), the following bills drafted by the Council of Ministers may not be classified as urgent: tax bills; bills on presidential elections, elections to the Sejm and the Senate, and local self-government elections; bills governing the structure and jurisdiction of public authorities; and also drafts of law codes. In addition, any bills amending the Constitution should not be introduced in haste either; thus, time-frames for proceedings on amendments to the Constitution, indicated in Article 235 of the Constitution, are much longer than the time-frames for ordinary legislative proceedings.

Thirdly, the consideration of a bill by the Sejm in the course of three readings also requires taking account of the pluralist character of the Parliament. In its previous jurisprudence, the Tribunal stressed the necessity to examine whether "the course of parliamentary proceedings did not deprive a given parliamentary group of the possibility of presenting its viewpoint at particular stages of legislative proceedings" (the judgment ref. no. K 4/06; cf. also the aforementioned judgment ref. no. K 35/15 and the judgment of 18 November 2014, ref. no. K 23/12, OTK ZU No. 10/A/2014, item 113). Due to the fact that the Sejm adopts bills by a majority vote, the consideration of bills in the course of three readings requires respect on the part of a parliamentary majority for the rights of a parliamentary minority. The said rights comprise not only the possibility of proposing minority motions and amendments to a bill, but also the possibility of demanding that the Sejm will actually consider them, i.e. will diligently analyse them together with the opinions of independent experts and the opinions of public authorities that are competent to provide such opinions.

Fourthly, the consideration of bills in the course of three readings require providing room for an actual, and not only potential, debate on the quality of drafted legislation, including the conformity thereof to the Constitution. Apart from the authors of a bill, the following are competent to participate in a debate within the scope of legislative proceedings: all Sejm Deputies and Senators, as well as all authorities and bodies that are competent to provide opinions on the bill. The consideration of a bill, which is referred to in Article 119(1) of the Constitution, not only requires permitting the presentation of views on the matter by one party to a political or legal dispute, where such a dispute exists, but it also implies providing a possibility of analysing and discussing the views by the other party to the dispute. Only after such consideration of the bill, it may be adopted by the Sejm, including possible amendments proposed in the course of the proceedings, provided that they were approved of by a parliamentary majority. The requirement of the consideration of a bill which includes taking account of critical views thereon, voiced by the parliamentary opposition as well as authorities and bodies that are competent to present their opinions, not only limits the discretion of the legislator, and – in practice – the discretion of a parliamentary majority that is capable of voting in favour of adopting the bill, but also constitutes a means of enhancing the quality of drafted legislation.

3.4.2. Applying the above conclusions to the manner of proceeding with the December Amending Bill, the Constitutional Tribunal assumes that, in this context, standards determined in the aforementioned judgment ref. no. K 35/15 should be applied accordingly. Indeed, the subject of that judgment comprised similar procedural allegations to those formulated by the applicants in the present case, as they concern a very similar actual situation, namely the adoption of the previous amendments to the 2015 Constitutional Tribunal Act, i.e. the enactment of the Act of 19 November 2015 amending the Constitutional Tribunal Act of 25 June 2015 (Journal of Laws – item 1928; hereinafter: the November Amending Act). In the said judgment, the Tribunal marked certain boundary points for the legislator, and going beyond those boundaries not only renders a legislative process defective, but also results in the unconstitutionality thereof. The arguments presented in that judgment are fully relevant in the context of the evaluation of the Act of 22 December 2015 amending the Constitutional Tribunal Act of 25 June 2015 (hereinafter: the December Amending Act), which is the subject of the review in the present case, and which was enacted merely a month after the November Amending Act.

3.4.3. When comparing breaches of procedural norms that occurred in the process of enacting the November Amending Act and the December Amending Act, the Tribunal concluded that the degree of intensity of those breaches was much greater in the context of the latter amending Act. This is confirmed by the following arguments:

Firstly, when enacting the December Amending Act, the Sejm – to a larger extent than in the context of the November Amending Act – infringed Article 37(2) of the Sejm's Rules of Procedure – pursuant to which the first reading of the December Amending Bill should take place at a sitting of the Sejm, as is the case with all bills regulating the organisation and competence of public authorities. The first reading of the November Amending Bill was held at a sitting of the Sejm's Legislative Committee, which the Tribunal ruled to be an infringement of Article 37(2) of the Sejm's Rules of Procedure. The first reading of the December Amending Bill took place at a sitting of the Sejm. Yet, subsequently, at a sitting of the Sejm's Legislative Committee after the first reading and during the second reading at a sitting of the Sejm, amendments introducing new normative content were proposed to the said Bill (cf. below). Those new elements of the Bill were not at all subjected to the procedure of the first reading – whether at a sitting of the Sejm or a sitting of the Committee. Consequently, whereas the first reading of the November Amending Bill was held in breach of the provisions of the Sejm's Rules of Procedure, the first reading of certain provisions of the December Amending Bill did not occur at all. Such defectiveness of the legislative process not only violates Article 37(2) of the Sejm's Rules of Procedure, but, above all, it infringes Article 119(1) of the Constitution, pursuant to which the Sejm considers bills in the course of three readings. Hence, the December Amending Bill, in the part concerning proposed amendments, was considered only in the course of two readings, and therefore the process of enacting the said Bill was unconstitutional.

Secondly, in the context of both above-mentioned amending statutes, there was no application of the guarantee rule arising from Article 37(4) of the Sejm's Rules of Procedure, in accordance with which the first reading of a bill should be held no earlier than on the seventh day from the date Sejm Deputies are served with the copy of the bill. The said provision permits that, on the basis of a decision of the Sejm or a committee, by way of exception, the first reading may be held without observing the said time-limit. In the case of the November Amending Bill, the first reading was held after 5 days from the submission of the Bill to the Marshal of the Sejm; in contrast, as regards the first reading of the December Amending Bill, it took place only after 2 days after it had been lodged with the Marshal of the Sejm. Hence, in the context of the latter Bill, Sejm Deputies had much less time to familiarise themselves with the content of the Bill and prepare for further legislative proceedings, despite the fact that the Bill provided for much more numerous and far-reaching systemic changes.

In the course of enacting the December Amending Bill, unlike in the context of the November Amending Bill, there was one additional circumstance that weighed in favour of devoting more time to preparations for further proceedings. On the day of referring the December Amending Bill to be considered at the first reading (16 December 2015), the Marshal of the Sejm had already received opinions indicating the unconstitutionality of solutions adopted in the Bill, i.e. the opinion of the Legislative Bureau of the Chancellery of the Sejm and the opinion of the First President of the Supreme Court. On the day of the first reading of the December Amending Bill (i.e. 17 December 2015), the Sejm received two additional legal

opinions which also challenged the constitutionality of solutions adopted in the Bill: one from the Polish Bar Council, and the other from the Helsinki Foundation for Human Rights. However, in spite of reservations raised in those opinions, the Marshal of the Sejm did not decide to request the Sejm's Legislative Committee to present its opinion, in accordance with Article 34(8) of the Sejm's Rules of Procedure, and to preserve a seven-day time-limit referred to in Article 37(4) of the said Rules, which should elapse between the date of service of the Bill on Sejm Deputies and the date of holding the first reading.

Thirdly, in the case of the two compared amending statutes, the Sejm resorted to bypassing the second guarantee norm, in accordance with which the second reading of a bill may take place "no earlier than on the seventh day from the date when Sejm Deputies are served with a Sejm committee's report" (cf. Art. 44(3) of the Sejm's Rules of Procedure). The second reading of the November Amending Bill was held on the day following the presentation of the report by the committee, which – as the Tribunal noted in its judgment ref. no. K 35/15 – "may be considered to be sufficient time for reading the report, but there are doubts as to whether it was possible to make proper preparations for further proceedings on the Bill". By contrast, the second reading of the December Amending Bill was held much sooner, namely, on the same day as the Sejm's Legislative Committee provided the Sejm with its report on the said Bill. Thus, Sejm Deputies had even less time, than in the case of the November Amending Bill, to familiarise themselves with the report of the Committee, i.e. a document that was of vital importance for further legislative proceedings.

Moreover, an analysis of the report on the December Amending Bill leads to the conclusion that, within the set time-limit of one day, Sejm Deputies were unable to prepare diligently for further proceedings. Indeed, the report contained numerous amendments and minority motions, which concerned vital elements of proceedings before the Constitutional Tribunal and the status of the judges of the Tribunal, and which partly exceeded the scope of the original version of the Bill (cf. below). By contrast, the report by the competent committee on the November Amending Bill included a motion for the adoption of that Bill without any amendments, although – which should be emphasised – the Tribunal still had reservations whether in the case of such important changes, one day was sufficient to make adequate preparations for further proceedings. Thus, the defectiveness of that aspect of the legislative proceedings in the present case must be evaluated more harshly than the analogous evaluation pertaining to the November Amending Act, which was included in the Tribunal's judgment ref. no. K 35/15. Indeed, the Tribunal has no doubt that, in the present case, the time-limit provided to Sejm Deputies for familiarising themselves with the committee's report was definitely insufficient.

Additionally, one should bear in mind that between the first and second reading of the December Amending Bill, another three extensive opinions were received by the Sejm, which challenged the constitutionality of numerous solutions adopted in the Bill. Two of those opinions – one by the National Council of Legal Advisors and the other by the Public Prosecutor-General – were received on 21 December 2015, i.e. only one day before the second reading. All those opinions presented numerous, and substantively similar, constitutional allegations with regard to the drafted provisions, indicating threats, *inter alia*, to the independence of the judges of the Tribunal, the independence of the constitutional court as well as the principle of the separation of and balance between powers in a democratic state ruled by

law. Despite such reservations and doubts, the Sejm's Legislative Committee, after receiving the said Bill on 21 December 2015, spent only one day working on it, and on the following day presented the Sejm with a report on the Bill, recommending that the Bill should be enacted with all the new modifications. The Committee did not consult any experts; what is more, it did not hear an expert from the Helsinki Foundation for Human Rights who was present for a few hours at the sitting of the Committee, and who – as stressed in the minutes from that sitting of the Committee – made several futile attempts to voice his views, with the support of the Sejm Deputies of the parliamentary opposition (see the full transcript of the 5th sitting of the Legislative Committee/ the 8th term of the Sejm, 21 December 2015, pp. 22, 34 and 56).

Fourthly, the Sejm breached its obligation to consult both aforementioned Bills with competent authorities and bodies. Before the first reading of the November Amending Bill, the Marshal of the Sejm requested opinions on the Bill from the National Council of the Judiciary, the Supreme Court, the Public Prosecutor-General, the Polish Bar Council, and the National Council of Legal Advisers; yet, on that day, he referred the Bill for consideration in the course of the first reading, and the Bill was enacted before the opinions were received. By contrast, as regards the December Amending Bill, opinions of the said authorities and bodies were received by the Sejm at the initial stage of proceedings on the Bill; however, subsequently, during the work of the Sejm's Legislative Committee, after the first reading, new solutions were incorporation into the Bill, and they could not be the subject of the consultation procedure due to the pace and scale of the legislative work (cf. details below).

The Constitutional Tribunal notes that the above-mentioned irregularity was pointed out to Sejm Deputies towards the end of the sitting of the aforementioned Committee on 22 December 2015. At that time, Mr P. Sadłoń, a legislator from the Legislative Bureau of the Chancellery of the Sejm, drew attention to the fact that the consultative obligation: "arises when, during the consideration of a bill, new content is added, and that content proves vital for the bill. In the opinion of the Legislative Bureau, there is such new content in the case of this Bill. And so we hold the view that the consultative obligation arises on the part of the five authorities and bodies I've just mentioned, which means that the established practice is to provide a report of the Committee to those authories and bodies. The report should be provided in such a way that they can exercise their competence in this respect".

Despite what was said above, the chairperson of the Sejm's Legislative Committee decided to hold a vote on the entire Bill forthwith, which resulted in the adoption of the Bill (see the full transcript of the 5th sitting of the Legislative Committee/ the 8th term of the Sejm, 21 December 2015, p. 137).

All things considered, the breach of the consultative obligation in the context of the December Amending Bill should be regarded as much more serious than in the legislative proceedings on the November Amending Bill. Whereas in the second example opinions were requested, but the November Amending Bill was adopted before they were received, in the first example, after new content was added to the December Amending Bill, no such requests were made, despite explicit recommendation from the Legislative Bureau of the Chancellery of the Sejm.

At the same time, it needs to be emphasised that, in the case of both statutes, the consultative obligation concerned all the above-mentioned authorities and bodies, i.e. the National Council of the Judiciary, the Supreme Court, the Public Prosecutor-General, the Polish Bar

Council, and the National Council of Legal Advisers; however, in the context of the National Council of the Judiciary, the said obligation was of special significance and, within that scope, the allegation about the breach of that obligation was considered separately (see further below).

Fifthly, what should have weighed against the Sejm's hasty proceedings on both aforementioned Bills was their subject-matter.

There is no doubt that the subject-matter concerning such vital systemic issues required thorough and diligent consideration by the Sejm. Indeed, the new provisions pertained to the following matters: disciplinary proceedings instituted with regard to a judge of the Tribunal and the termination of the said judge's mandate before the end of his/her term of office; a procedure for selecting candidates for the positions of the President and Vice-President of the Tribunal; as well as the organisation of the Tribunal's work, including the order in which cases are to be considered, the composition of adjudicating benches, rules for preparing hearings or sittings in camera, and the number of judges' votes that is required for issuing a ruling. Thus, it was necessary to impose a reasonable time-frame on the legislative work, taking account of at least the standard rules provided for in the Sejm's Rules of Procedure (i.e. without shortening the time-limits provided for particular stages of the legislative process; see e.g. Art. 37(4) and Art. 44(3) of the Sejm's Rules of Procedure).

The quick pace of the work carried out on the December Amending Bill was not desirable also due to the significance of the drafted provisions for the functioning of the constitutional court and the novel character of a number of adopted solutions, which had not been known before in the Polish legal system. The changes introduced into the 2015 Constitutional Tribunal Act by the December Amending Bill were much more extensive and significant than changes imposed by the November Amending Act. They affected more provisions on systemic and procedural matters, some of which were radically altered, and some others were repealed altogether.

The scope of the amendments introduced by the December Amending Bill and the depth thereof constitute additional circumstances determining that the Sejm should have worked on the said Bill with due caution and within a reasonable time-frame, which would have made it possible to actually (and not merely formally) consider the Bill in the course of three readings.

Sixthly, while working on the December Amending Bill, the Sejm repeated actions that were deemed defective by the Tribunal in its judgment ref. no. K 35/15.

The same infringements of the Sejm's Rules of Procedure, whereas they could raise doubt in the course of proceedings on the November Amending Bill, in the proceedings on the December Amending Bill – they were indisputable. The legislative work on the latter amending Bill began one week after the delivery of the aforementioned judgment, in which the Tribunal pointed out to the legislator the above-mentioned irregularities that had occurred during the adoption of the November Amending Bill. The repetition of the same mistakes with greater intensity, in the course of the legislative work on the December Amending Bill, manifests the perpetuation of the inappropriate practice in the Sejm.

Moreover, serious and clear allegations concerning solutions adopted in the December Amending Bill, as well as the way of conducting the legislative process related thereto, were raised by the parliamentary opposition, the legislative staff of the Sejm and the Senate,

as well as the authorities and bodies that had submitted their opinions in the course of the legislative proceedings, i.e. the First President of the Supreme Court, the Polish Bar Council, the National Council of Legal Advisers, the Helsinki Foundation for Human Rights, and the Public Prosecutor-General. The Sejm's manner of proceeding with the Bill, by ignoring conclusions arising from the judgment ref. no. K 35/15 and allegations against constitutionality raised in the course of the legislative proceedings, confirms the thesis that the Sejm consciously infringed the requirement to act on the basis of and within the limits of law (cf. Art. 7 of the Constitution).

3.4.4. Taking into account the above circumstances, the Tribunal states that the December Amending Act was enacted in breach of the Constitution, and in particular its Article 7, Article 112 and Article 119(1), as well as in breach of the principle of appropriate legislation, arising from Article 2 of the Constitution.

The Sejm infringed the requirement to consider bills in the course of three readings (cf. Art. 119(1) of the Constitution), by proceeding with the December Amending Bill in breach of the rules which the Sejm itself had established within the scope of the autonomy of the Sejm's Rules of Procedure (cf. Art. 112 of the Constitution). Due to the fact that the procedure for considering bills in the course of three readings is specified in a detailed way in the Sejm's Rules of Procedure, the breach of the said procedure was inconsistent both with Article 119(1) and Article 112 of the Constitution. During the legislative work conducted by the Sejm with regard to the December Amending Bill, the Sejm repeated irregularities previously recognised by the Tribunal in the context of the enactment of the November Amending Bill.

The above-mentioned circumstance as well as the fact that the legislative work continued despite numerous negative opinions provided to the Sejm lead to the conclusion that the December Amending Act also infringes the principle of appropriate legislation (cf. Art. 2) and the principle that public authorities function on the basis of, and within the limits of, law (cf. Art. 7 of the Constitution). The Tribunal took account of the fact that not all legislative irregularities automatically result in the non-conformity of a statute under review to Articles 2 and 7 of the Constitution. This is deemed by additional circumstances of a given legislative process which reveal particularly reprehensible context of undertaken legislative steps, which is related, *inter alia*, to: the frequency of breaches of parliamentary law; the restriction of Sejm Deputies' participation in the consideration of a bill; or the deprivation of the said Deputies of the possibility of voicing their views on particular provisions or an entire bill, in the course of work carried out by a Sejm committee or during a debate in the Sejm (see e.g. the Tribunal's judgments of: 16 July 2009, ref. no. Kp 4/08, OTK ZU No. 7/A/2009, item 112; 3 November 2006, ref. no. K 31/06, OTK ZU No. 10/A/2006, item 147, and the judgment ref. no. K 4/06). In the light of the above findings, all the said circumstances occurred – in great intensity – in the course of the legislative work on the December Amending Bill. The breaches of law (cf. Art. 7 of the Constitution) consciously committed by the relevant organ of the state (in this case – the Sejm), during the enactment of the said Bill, constitute an infringement of the principle of appropriate legislation, which is one of the fundamental principles of a democratic state ruled by law (cf. Art. 2 of the Constitution).

To conclude this part of the discussion, the Tribunal wishes to emphasise that a legislative procedure – as a collection of constitutional principles and procedural rules that govern the process of adopting a bill – is to fulfil two basic functions: to guarantee the democratic

legitimacy of a bill and to legitimise the substance of the bill. The procedural breaches pointed out by the Tribunal, which occurred in the process of enacting the December Amending Act, confirm the assertion that, in the case under review, neither of the above-mentioned functions were fulfilled. First of all, the said legislative process did not guarantee the actual participation of all political fractions represented in the Parliament. Secondly, hasty proceedings, conducted without providing diligent justification for proposed solutions and evaluation of the effects thereof, did not minimise the risk of adopting inapt and unconstitutional provisions.

3.5. The assessment of the conformity to Article 118(1) and Article 119(2) of the Constitution of the following challenged provisions: Article 1, points 2, 5, 7, and 8, of the December Amending Act, insofar as they amend Article 36(1)(4) and Article 36(2) of the 2015 Constitutional Tribunal Act; Article 8(4), Article 28a, Article 31a, Article 36(1)(4) and Article 36(2) of the 2015 Constitutional Tribunal Act, added or amended by the aforementioned Article 1; as well as Article 1(15) of the December Amending Act, which repeals Chapter 10 of the 2015 Constitutional Tribunal Act

3.5.1. In the light of the previous jurisprudence of the Constitutional Tribunal, the proposal of amendments implies the right to table motions to delete, add, or replace by other wording, certain words or particular passages of a given bill (see e.g. the judgment ref. no. K 37/03). When interpreting the notion of an amendment, the Tribunal made reference to the two meanings of the said term: "a correction, the elimination of a defect or mistake" as well as "supplementation, the introduction of a justified change, a modification"; the two meanings imply a relation between an amendment and "a certain basic element" (i.e. the content of a bill; see the above-mentioned judgment ref. no. K 37/03).

The consistent line of the Tribunal's jurisprudence indicates the necessity to draw a distinction between 'an amendment' and 'the right to introduce legislation', even if only for the simple reason that they are separate constitutional terms (cf. Art. 118(1) and (2) as well as Art. 119(2) and (3) of the Constitution). The introduction of legislation entails subjecting all proposed wording to a full parliamentary procedure before the wording is enacted, whereas 'an amendment' is proposed in the course of legislative work on a bill (or at the stage where the bill is being debated in the Senate, after having been passed by the Sejm), and hence an amendment is never subjected to consideration at all stages of the legislative procedure. "The right to propose amendments may not become a substitute for the right to introduce legislation, and thus there are certain limits which may not be exceeded by the content of amendments put forward by Sejm Deputies" (the judgment ref. no. K 3/98; similarly, in the judgments of: 21 December 2005, ref. no. K 45/05, OTK ZU No. 11/A/2005, item 140 and 16 April 2009, ref. no. P 11/08, OTK ZU No. 4/A/2009, item 49).

Whether particular solutions fall within the scope of the constitutional notion of an amendment to a bill depends primarily on two circumstances:

Firstly, amendments proposed to a bill should be linked with the bill submitted by its authors; the said link should be both formal and substantive in character. Particular amendments must be properly related to the content of the bill; they must be intended to modify the content of the bill, and not to draft a new bill (see the above-mentioned judgment ref. no. K 37/03). In this context, the Tribunal emphasised a difference between the "depth" of an amendment (which pertains to the subject-matter of a bill) and the "width" of the amendment

(determined by the limits of the scope *ratione materiae* of the regulated subject-matter). In the Tribunal's opinion, the determining of the admissible limits of the "depth" and "width" of an amendment should each time be considered in the context of the subject-matter of a given amendment (see e.g. the judgment ref. no. K 11/02).

Secondly, the assessment of the admissibility of amendments, to a large extent, depends on the stage of parliamentary work at which they are proposed.

In legislative proceedings carried out in the Sejm, it is possible to considerably modify a bill at the stage of work performed in a Sejm committee, i.e. between the first and second reading of the bill. There are no obstacles to proposing a new version of the bill in the report of a competent Sejm committee, even if this new version proves considerably remote from the original version of the introduced bill. Indeed, the introduction of such modifications still occurs at an early stage, and the protection of the rights enjoyed by the initiators of the legislative proceedings is guaranteed in Article 119(4) of the Constitution, which permits the authors of a bill to withdraw the bill in the course of legislative proceedings in the Sejm until the conclusion of the second reading.

There are more restrictions concerning the right to propose amendments at the stage of the second reading and the further stages of legislative proceedings in the Sejm. This principle is manifested in Article 119(3) of the Constitution, which provides that the Marshal of the Sejm may refuse to put to a vote any amendment which has not been submitted previously to a committee (see the judgment ref. no. K 25/98).

In any case, there is a constitutional requirement that "the basic content which is to be ultimately included in a bill should be subjected to the complete legislative procedure in the Sejm so that there will be enough time and opportunities to think over proposed solutions and to take a stance on them. What violates this requirement is such application of the procedure for proposing amendments where significant new content is introduced into a bill at the final stages of the legislative process in the Sejm. This may particularly concern amendments proposed as late as at the stage of the second reading, where they were not previously considered by any of Sejm committees" (see the above-mentioned judgment ref. no. K 3/98).

3.5.2. As it follows from the documentation of the legislative process, the content of the December Amending Bill, submitted by a group of Sejm Deputies, (cf. the Sejm Paper No. 122/8th term of the Sejm) was considerably changed in the course of the legislative work carried out in the Sejm. The most far-reaching amendments with regard to the proposals presented in the original version of the Bill were put forward and incorporated into the Bill after the first reading, at the stage where the Bill was being analysed by the Sejm's Legislative Committee.

Firstly, Article 28a was added, which stipulated that disciplinary proceedings with regard to a judge of the Tribunal could also be instituted upon an application filed by the President of Poland of the Minister of Justice.

Secondly, the previous model of judicial disciplinary proceedings was modified. The power to recall a judge of the Tribunal from office before the end of the judge's term of office (upon application by the General Assembly) was granted to the Sejm; by contrast, previously the recall of a judge of the Tribunal from office could only result from a legally effective ruling issued in disciplinary proceedings before the Tribunal. A mechanism introducing the above changes was specified in new Article 8(4), Article 31a and Article 36 (and more pre-

cisely: Art. 36(1)(4) and Art. 36(2)); also, with relation to this, Article 31(3) of the 2015 Constitutional Tribunal Act was repealed.

Thirdly, procedures for referring cases to be considered at hearings and sittings, as well as dates for holding them, were changed (see added Art. 80(2) as well as amended Art. 87(2) and (2a) of the 2015 Constitutional Tribunal Act).

Fourthly, Article 105a provided for the legal institution of the re-opening of proceedings before the Tribunal. Subsequently, the said provision was crossed out by an amendment proposed at the stage of the second reading of the Bill (see point 20 of the additional report of the Legislative Committee, the Sejm Paper No. 144-A/8th term of the Sejm).

Fifthly, entire Chapter 10 of the 2015 Constitutional Tribunal Act was repealed (which was entitled "Proceedings to determine the existence of an impediment to the exercise of the office by the President of the Republic").

Sixthly, new transitional provisions were added. This extended the regulation of the impact of the December Amending Bill on cases that had been pending before the Tribunal.

Seventhly, the last provision was amended to eliminate a 30-day period of *vacatio legis* provided for in the December Amending Bill.

3.5.3. The Constitutional Tribunal deems that not all of the above-mentioned amendments were sufficiently related to the subject-matter of the December Amending Bill, i.e. matters addressed in the original version of the Deputies' Bill. At the same time, it should be stressed that the said subject-matter is determined not only by amending and transitional provisions of the December Amending Bill, but also by its final and repealing provisions.

Firstly, the Bill included in the Sejm Paper No. 122/8th term of the Sejm regulated elements of the disciplinary procedure for the judges of the Tribunal. In Article 4 of the Bill, its authors decided to derogate two provisions of the 2015 Constitutional Tribunal Act which pertained to the disciplinary responsibility of a judge of the Tribunal for his/her conduct before assuming the office (repeal of Art. 28(2)) as well as to the exclusion of the possibility of filing a cassation appeal against a disciplinary ruling issued at second-instance proceedings (the repeal of Art. 30). In the course of further legislative work, the Bill was extended by adding more provisions within that ambit, i.e. challenged Article 8(4), Article 28a, Article 31a, Article 36(1)(4) and Article 36(2) of the 2015 Constitutional Tribunal Act in the version after the amendments (cf. Art. 1(2), (5), (7) and (8) of the December Amending Act). In the opinion of the Constitutional Tribunal, they constituted excessively broad revision of the original legislative concept and therefore they were inadmissible. The legislator decided, by means of those provisions, to modify the mechanism of disciplinary responsibility of a judge of the Tribunal – eliminating from the scope of the mechanism one of the prerequisites for terminating the mandate of a judge of the Tribunal before the end of the term of office – and have special proceedings with the involvement of the Sejm and the General Assembly.

From the point of view of procedural allegations formulated by the applicants, especially those raised in the application of the First President of the Supreme Court, the Tribunal deemed that the stage at which the said amendments were proposed (i.e. the work of the competent committee between the first and second reading) was sufficiently early to take account of even "deep" modifications of the original legislative concept, which also indirectly affected the aspects of the modified legal institution. However, on no account could those changes concern the introduction of a totally new legal institution of the recall of a judge of the Tribu-

nal from office by the Sejm. Such a solution constituted a normative novelty which fundamentally changed the prerequisites for terminating the aforementioned mandate before the end of the judge's term of office (cf. a detailed discussion below).

Secondly, nor did the Bill included in the Sejm Paper No. 122/8th term of the Sejm provide changes in the content of Chapter 10 of the 2015 Constitutional Tribunal Act entitled "Proceedings to determine the existence of an impediment to the exercise of the office by the President of the Republic". None of the provisions included in that chapter (cf. Arts. 116-120) was indicted as being subject to repeal by Article 4 of the Bill. It was only at the sitting of the Sejm's Legislative Committee on 21 December 2015 – as a result of the adoption of the amendment no. 14, which involved the adding of the provision ultimately marked as Article 1(15) to the December Amending Bill – that the whole of Chapter 10 of the 2015 Constitutional Tribunal Act was crossed out. Mr P. Sadłoń, a representative of the Legislative Bureau of the Chancellery of the Sejm, indicated that "the addition of that amendment at the stage of analysing the Bill, considering the nature of that amendment and the subject-matter of Chapter 10, raises reservations in the light of the principle that bills are to be considered in the course of three readings (the full transcript of the 5th sitting of the Legislative Committee/ the 8th term of the Sejm, 21 December 2015, p. 90).

In the light of the above arguments, the repeal of Chapter 10 of the 2015 Constitutional Tribunal Act, as a result of the amendment proposed at the stage of the committee's work, constituted a normative novelty, as it was not part of the original version of the December Amending Bill. At the same time, this was an amendment that significantly modified the content of the 2015 Constitutional Tribunal Act, as it eliminated – from the said Act – all provisions regulating the procedure for determining the existence of an impediment to the exercise of the office by the President of Poland.

As a side remark, it may be noted that, after the amendments to the 2015 Constitutional Tribunal Act, Article 56(14) – referring to Article 117(3) of the said Act – was kept, although the latter provision – as one of the provisions of Chapter 10 of the 2015 Constitutional Tribunal Act – was repealed with the entire chapter, by Article 1(15) of the December Amending Act. This is an additional argument proving the lack of legislative diligence on the part of the legislator.

3.5.4. Taking the above circumstances into consideration, the Tribunal stated that:

– Article 1(2) of the December Amending Act and amended Article 8(4) of the 2015 Constitutional Tribunal Act,
– Article 1(5) of the December Amending Act and added Article 28a of the 2015 Constitutional Tribunal Act,
– Article 1(7) of the December Amending Act and added Article 31a of the 2015 Constitutional Tribunal Act,
– Article 1(8) of the December Amending Act, insofar as it amends Article 36(1)(4) of the 2015 Constitutional Tribunal Act, and amended Article 36(1)(4) of the 2015 Constitutional Tribunal Act,
– Article 1(8) of the December Amending Act, insofar as it amends Article 36(2) of the 2015 Constitutional Tribunal Act, and amended Article 36(2) of the 2015 Constitutional Tribunal Act, as well as

– Article 1(15) of the December Amending Act, repealing Chapter 10 of the 2015 Constitutional Tribunal Act,

are inconsistent with Article 118(1) and Article 119(2) of the Constitution.

3.6. The assessment of the conformity of the December Amending Act to Article 186(1) to the Constitution

3.6.1. The systemic position of the National Council of the Judiciary and the Council's competence to issue opinions, in a context resembling the one that is relevant for the present case, have been discussed extensively in the Tribunal's judgment ref. no. K35/15, which has already been referred to earlier on in this statement of reasons. The Tribunal maintains its stance expressed in that judgment.

Pursuant to Article 186(1) of the Constitution, the National Council of the Judiciary is to safeguard the independence of courts and judges. The said task is performed, *inter alia*, by involving the Council in procedures for adopting law and for reviewing the constitutionality of law, where legal provisions concern the independence of courts and their judges. The Council's competence to issue opinions on draft normative acts is of special significance in legislative proceedings; indeed, a statute is the only permissible form of interference of legislative authorities with matters pertaining to the judiciary. The said interference must fall within the scope delineated by the Constitution; thus, the Council's competence to provide opinions on parliamentary bills concerning the judiciary and judges fulfils a vital guarantee function. Therefore, although an opinion of the Council is not legally binding, and it only contributes to broadening the knowledge of persons involved in the legislative process, it is still always necessary where a bill pertains to the independence of courts and their judges.

Law does not determine the stage of legislative proceedings where the said consultative obligation should be fulfilled. What follows from Article 34(3), first sentence, of the Sejm's Rules of Procedure is that the consultative procedure should take place already at the stage of drafting a bill, as an explanatory note for a bill is to provide information on received opinions where the obligation to obtain such opinions arises from a statute. In the context of bills drafted by parliamentary committees and by Sejm Deputies with regard to which no consultation has been carried out, before referring such a bill to be considered in the course of the first reading, the Marshal of the Sejm is obliged to request an opinion on the bill from a competent authority or body (cf. Art. 34(3), second sentence, of the Sejm's Rules of Procedure). The consultative procedure should also be commenced at subsequent stages of legislative proceedings if a bill is modified by amendments concerning the independence of courts and their judges, and the National Council of the Judiciary had no possibility of presenting its opinion at any of the earlier stages. There is no need to request the Council for another opinion again, if proposed amendments remain within the same scope of regulation as a relevant bill, and where the said Council evaluated, or could evaluate, the bill in its original opinion. Hence, the Tribunal has emphasised that: "the requirement to obtain an opinion from the National Council of the Judiciary is met if the Council provides its opinion, in a form prescribed by law, at the stage of the government's legislative work, and the essential elements of the regulation do not change in a way that renders the Council's opinion outdated" (the judgment of 13 June 2013, ref. no. P 35/12, OTK ZU No. 5/A/2013, item 59; see also the ruling of 19 November 1996, ref. no. K 7/95, OTK ZU No. 6/1996, item 49, as well as the judgments of: 27 November 2000, ref. no. U

3/00, OTK ZU No. 8/2000, item 293 and 18 January 2005, ref. no. K 15/03, OTK ZU No. 1/A/2005, item 5). However, if an amendment proposed in the course of the Sejm's work goes beyond the original scope of the subject-matter of a bill in a way that changes matters addressed in the bill and assumptions underlying the bill, then again the obligation arises to consult the said Council in this respect (see the judgment ref. no. K 3/98).

3.6.2. As regards the December Amending Bill, the National Council of the Judiciary presented its opinion on 18 December 2015. It should be noted that the first reading of the Bill was held on 17 December 2015, whereas the Sejm's Legislative Committee carried out its work, between the first and second reading, on 22 December 2015. Thus, the participants in the legislative proceedings could familiarise themselves with the arguments of the National Council of the Judiciary and they could – even at least theoretically – take account of comments and reservations presented by the said Council.

By contrast, the National Council of the Judiciary did not provide a written statement on the amendments modifying the original version of the December Amending Bill drafted by a group of Sejm Deputies (cf. above).

3.6.3. Considering these circumstances in the light of the binding provisions, similarly to the case ref. no. K 35/15, the Tribunal has stated that the competence of the National Council of the Judiciary to provide opinions on normative acts – insofar as they refer to the independence of courts within the meaning of Article 175(1) of the Constitution, i.e. the Supreme Court, common courts, administrative courts and military courts, as well as to the independence of the judges of those courts – has a statutory basis. Therefore, even if no opinion had been provided by the National Council of the Judiciary, it might not be assumed in the legislative proceedings that the process of the adoption of the December Amending Act infringed the Constitution.

For this reason, the Tribunal has adjudicated that the December Amending Act is consistent with Article 186(1) of the Constitution.

4. The assessment of the lack of a period of *vacatio legis*

4.1. The challenged provision

Pursuant to Article 5 of the December Amending Act, the said Act "shall enter into force on the day of its publication".

4.2. The allegations of the applicants and the statements of the participants in the proceedings

The rules for the entry into force of the December Amending Act were challenged in all the applications considered in the present case.

4.2.1. The First President of the Supreme Court requested the Tribunal to rule that Article 5 of the December Amending Act is inconsistent with Article 2 in conjunction with Article 8 and with Article 188 of the Constitution. In the justification for her application, the First President indicated that challenged Article 5 of the December Amending Act deprives the Constitutional Tribunal of the possibility of evaluating the constitutionality of the said Amending Act in accordance with the hitherto binding rules. Thus, the said Amending Act

"excludes itself" from the scope of the jurisdiction of the Constitutional Tribunal. The First President of the Supreme Court considers this to be an infringement of Article 188 of the Constitution, which does not provide for excluding, from the scope of the Tribunal's competence, statutes that change the Tribunal's organisation and the mode of proceedings before the Tribunal.

Due to the unconstitutionality of solutions provided for in the December Amending Act, Article 5 of the said Act also leads to a situation where the Constitution ceases to be the supreme law with regard to the Constitutional Tribunal. What becomes the said supreme law is the 2015 Constitutional Tribunal Act in its newly amended version – until the moment of determining the non-conformity thereof to the Constitution on the basis of the new rules. In the view of the First President of the Supreme Court, this entails overriding Article 8(1) of the Constitution.

Moreover, in her opinion, the challenged provision is inconsistent with Article 2 of the Constitution, for the addressee of the regulation – i.e. the Constitutional Tribunal – is deprived of the possibility of making adjustments to the new situation resulting from the lawmaker's radical interference with the legal status of the Tribunal.

4.2.2. In the *petitum* of their application, the first group of Sejm Deputies formulated a general allegation that the December Amending Act infringes Article 2, Article 7, Article 118 and Article 119(1) as well as Article 186(1) of the Constitution, and also Article 13 of the Convention for the Protection of Human Rights and Fundamental Freedoms, done at Rome on 4 November 1950 (Journal of Laws – Dz. U. of 1993 No. 61, item 284, as amended; hereinafter: the Convention). In the justification for the application, the allegation about an infringement of the principle of an appropriate period of *vacatio legis* is referred to Article 5 of the December Amending Act and is explicitly linked with Article 2 of the Constitution.

In the opinion of the first group of Sejm Deputies, the entry into force of a statute concerning the organisation of a constitutional organ of the state on the date of the publication of the statute is inadmissible in the light of the standards of a state ruled by law. The legislator did not indicate what important interest of the state necessitated the immediate entry into force of the amending Act; provisions included therein were unexpected by citizens – parties to proceedings before the Tribunal; thus, the provisions infringe the principle of the protection of citizens' trust in the state and its laws.

According to the first group of Sejm Deputies, an appropriate period of *vacatio legis* for the challenged Act should be at least 2 months. The said period should make it possible for the Constitutional Tribunal to conduct a potential constitutional review of the Act, and should provide the Parliament with time to eliminate possible flaws in the Act and any contradictions in the system of law.

4.2.3. The second group of Sejm Deputies requested the Tribunal to determine that the whole of the December Amending Act is inconsistent with the standards of a democratic state ruled by law, derived from Article 2 in conjunction with Article 118(3) and Article 119(1) as well as with Article 173 in conjunction with Article 10, and also with Article 195(1) of the Constitution.

The said Deputies' request for the examination of the conformity of Article 5 of the December Amending Act to the principle of an appropriate period of *vacatio legis*, which arises from Article 2 of the Constitution, was presented as a detailed application filed as an alternative to the above allegation. In the applicants' opinion, due to considerable changes in the functioning of the Tribunal which have been introduced by the challenged Amending Act, the said provision constitutes "an obvious infringement" of Article 2 of the Constitution.

4.2.4. The Ombudsman challenged the conformity of Article 5 of the December Amending Act to the principle of certainty of law, which arises from Article 2 of the Constitution, as well as to Article 88(1) and Article 188 of the Constitution.

In his opinion, the requirement to provide an appropriate period of *vacatio legis* is a reflection of the principle of certainty of law. The Ombudsman indicated that the entry into force of the December Amending Act on the day of its publication would "actually paralyse the activity of the constitutional organ of the state", and thus it may not be justified in the light of the requirements arising from Article 4(2) of the Act of 20 July 2000 on the promulgation of normative acts and certain other acts (Journal of Laws – Dz. U. of 2015 item 1484, as amended; hereinafter: the Act on the Promulgation of Normative Acts).

In the Ombudsman's opinion, the only intention of the legislator was to prevent a constitutional review of the December Amending Act during the period of *vacatio legis*, which constitutes an infringement of Article 188 of the Constitution. Additionally, he pointed out that the December Amending Act was published in the Journal of Laws on 28 December 2015 at 4.44 p.m., but it had entered into force at the beginning of that day. This entailed that the Act became binding before it was promulgated, which violates Article 88(1) of the Constitution.

4.2.5. The National Council of the Judiciary requested the Tribunal to determine that Article 5 of the December Amending Act is inconsistent with Article 2, Article 7, Article 8, Article 45(1) of the Constitution in conjunction with Article 6 of the Convention, as well as with Article 188 of the Constitution, due to the fact that the Act entered into force on the day of its publication, without an appropriate period of *vacatio legis.*

The negative effects of the lack of a period of *vacatio legis* are manifested – in the opinion of the National Council of the Judiciary – in the following three ways:

– the lack of a possibility on the part of the participants in proceedings pending before the Constitutional Tribunal to familiarise themselves with the introduced changes before the day of entry into force of the December Amending Act; thus, according to the National Council of the Judiciary, citizens' trust in the state and its laws has been undermined;
– the lack of a possibility on the part of the Constitutional Tribunal to adjust to the new rules, which may result in the paralysis of the Tribunal and a period during which the Tribunal will not perform its tasks specified in the Constitution, and, consequently, which may lead to delays in proceedings;
– the lack of a possibility of examining the constitutionality of the December Amending Act before its entry into force.

When justifying the above allegations, the National Council of the Judiciary indicated that matters regulated by the December Amending Act are systemic in character, and the

significance of the Act for the activity of the sole constitutional court in Poland as well as the effects of the Act for citizens are considerable enough that it was the legislator's obligation to introduce an extended period of *vacatio legis*, which, for that kind of statutes, should be no shorter than six months.

4.3. The subject of the review and higher-level norms for the review

4.3.1. Despite the differences in the wording of the above applications, the Tribunal deems that the allegation about an infringement of the principle of an appropriate period of *vacatio legis* was expressed with regard to Article 5 of the December Amending Act, and not with reference to the said Act as a whole. The said provision should be regarded as the basic source of the applicants' allegations, although there is no doubt that the provision sets a time-limit for the entry into force of all the provisions of the December Amending Act.

4.3.2. On the basis of an analysis of the applicants' justification for their applications, the Constitutional Tribunal assumes that Article 2 of the Constitution, cited by all the participants initiating the proceedings, should be indicated as the central reference point for the above allegation.

However, a separate analysis should be carried out with regard to two detailed allegations, namely, that: Article 5 of the December Amending Act infringes the principle that the Constitution is the supreme law of the Republic of Poland; and the said Act has a negative impact on the scope of the jurisdiction of the Constitutional Tribunal. The Tribunal assumes that adequate higher-level norms for the review in this case comprise – respectively – Article 8(1) as well as Article 188(1) of the Constitution.

The allegations in the context of Article 7, Article 45(1), Article 88(1) and Article 188(2)-(5) of the Constitution were not properly justified, which results in the necessity to discontinue proceedings within the said scope, on the basis of Article 104(1)(2) of the 2015 Constitutional Tribunal Act on the grounds that the issuing of a judgment is inadmissible.

4.4. The course of the legislative process

4.4.1. The rules for the entry into force of the December Amending Act, provided for in Article 5 of the said Act, were formulated as a result of an amendment adopted by the Sejm after the first reading of the December Amending Bill.

4.4.2. The original Bill stipulated (without any detailed justification) that the Bill was to enter into force "after 30 days from the date of entry into force of the Act" (cf. Art. 5 of the Bill; the Sejm Paper No. 122/8th term of the Sejm, p. 3). In the explanatory note for the Bill, there were no comments on the issue of a period of *vacatio legis* for the proposed Bill. Such a solution raised no reservations of those who provided opinions on the Bill as well as of the participants attending the first reading.

4.4.3. During the sitting of the Sejm's Legislative Committee on 21 December 2015, a representative of the authors of the Bill, Mr S. Piotrowicz, a Sejm Deputy, presented an amendment no. 18 to the Bill, which read as follows: "Article 4 shall be crossed out, and a new Article 4 shall be introduced with the following wording: 'The Act shall enter into force on the date of its publication'." Next, he slightly rephrased the proposed provision to make it more precise: "the Act shall enter into force as of the date of its publication" (cf. the full tran-

script of the 5th sitting of the Legislative Committee/ the 8th term of the Sejm, 21 December 2015, pp. 126 and 131).

The said proposal raised reservations both among the members of the Sejm's Legislative Committee as well as the representatives of the Legislative Bureau of the Chancellery of the Sejm. Mr P. Sadłoń, one of the legislators, pointed out that: "Assessing the changes included in the Bill, as well as recognising the considerable significance of those changes and the assumption that an appropriate period of *vacatio legis* should be analysed in the context of the capacity of the addressees of legal norms to take account of the new statute, the Legislative Bureau states that the entry into force of those solutions as of the date of the publication thereof raises serious reservations in the context of Article 2 of the Constitution" (the full transcript of the 5th sitting of the Legislative Committee/ the 8th term of the Sejm, 21 December 2015, p. 132).

In the report of 22 December 2015 prepared by the Sejm's Legislative Committee, the Sejm was presented with the Bill stipulating that "the Act shall enter into force as of the day of its publication" (cf. Art. 4 of the Bill, the Sejm Paper No. 144/8th term of the Sejm, p. 7). Minority motions appended to the Bill proposed the introduction of a 2-month period of *vacatio legis* (cf. the amendment no. 10, the Sejm Paper No. 144/8th term of the Sejm).

In debates during the second and third reading at a sitting of the Sejm on 22 December 2015, some Sejm Deputies of the parliamentary opposition expressed their reservations with regard to the lack of an appropriate period of *vacatio legis* in the case of the December Amending Bill and formulated conclusions as to potential effects arising from such a solution. Presented arguments pertained, in particular, to the lack of a possibility of reviewing the conformity to the Constitution of the December Amending Act on the basis of the hitherto binding provisions (cf. the shorthand report on the 6th sitting/ the 8th term of the Sejm, 22 December 2015; opinions voiced by the following Sejm Deputies: K. Brejza, R. Kropiwnicki and M. Suchoń, pp. 79, 99, 182 and 184). The amendment proposing the introduction of a 3-month period of *vacatio legis*, put forward by several Sejm Deputies of the parliamentary opposition, was rejected (cf. the amendment no. 29, the Sejm Paper No. 144-A/8th term of the Sejm).

Reservations concerning the conformity of the December Amending Bill to the principle of a democratic state ruled by law, in the context of protecting of the rights of citizens, were also raised during the sitting of the Sejm's Legislative Committee on 22 December 2015, which considered amendments proposed during the second reading of the said Bill (cf. the full transcript of the 6th sitting of the Legislative Committee/ the 8th term of the Sejm, 22 December 2015, p. 47).

4.4.4. In the opinion of 23 December 2015 issued by the Legislative Bureau of the Chancellery of the Senate, it was stated that: "The proposed changes are undoubtedly of fundamental importance for the functioning of the Tribunal, which is a constitutional organ of the state, and thus, *inter alia*, also for the protection of constitutional rights and freedoms. Therefore, the legislator is bound to determine an adequate time-frame for the entry into force of the said Amending Bill. One may not agree that the said expectations would be met by Article 5. (…) The significance of the introduced changes appears (…) to weigh in favour of the exten-

sion of the time-frame set in Article 5 to one exceeding 14 days" (pp. 6-7 of the opinion of the Legislative Bureau of the Chancellery of the Senate).

During the debate in the Senate on 23 December 2015, Senators pointed out that the lack of a period of *vacatio legis* would cause "a paralysis of the Constitutional Tribunal", as the Tribunal would not be able to deliberate as a bench of 13 judges, which is required by the said Bill, and it would not have the possibility of assessing the constitutionality of this new amending statute in accordance with the rules that were binding before the entry into force of the said statute (cf. the shorthand report on the 6th sitting/ the 9th term of the Senate, 23 December 2015; opinions voiced by the following Senators: J. Rulewski, B. Borusewicz, B. Klich, M. Augustyn and W. Komarnicki, pp. 28, 84, 86, 90 and 93).

Making reference to the reasons for introducing Article 5 of the December Amending Bill, the Senator-Rapporteur, Mr M. Seweryński, stated that there was nothing extraordinary about enacting "a statute without a period of *vacatio legis*. In the history of the Polish parliamentarism, even the most recent one, such instances were well-known. We know such instances from the past, and we deem that the authors, the drafters, of the said Bill decided that this would be the best solution in the case of that statute" (the shorthand report on the 6th sitting/ the 9th term of the Senate, 23 December 2015, s. 105).

4.5. The constitutional principle of an appropriate period of *vacatio legis* – general characteristics

4.5.1. The lawmaker may not prescribe an arbitrary or default time-frame for the entry into force of a legal act. His discretion in this respect is limited by constitutional principles and values.

In the light of the jurisprudence of the Constitutional Tribunal and the views of the doctrine, the obligation to introduce an appropriate period of *vacatio legis* – although not formulated explicitly in the text of the Constitution – is justified by the principle of a democratic state ruled by law, expressed in Article 2 of the Constitution. Adherence to the requirement of an appropriate period of *vacatio legis* is necessary so as to guarantee such values of a state ruled by law as the security of law and the certainty of law. The application of the legal institution of *vacatio legis* is also required by the following principles, derived from Article 2 of the Constitution: the principle of the protection of citizens' trust in the state and its laws (which is also referred to as 'the principle of the state's loyalty towards citizens'); and the principle of diligent (appropriate) legislation (cf. the judgments of: 27 February 2002, ref. no. K 47/01, OTK ZU No. 1/A/2002, item 6; 10 December 2002, ref. no. K 27/02, OTK ZU No. 7/A/2002, item 92; 16 September 2003, ref. no. K 55/02, OTK ZU No. 7/A/2003, item 75; 15 February 2005, ref. no. K 48/04, OTK ZU No. 2/A/2005, item 15; 12 December 2012, ref. no. K 1/12, OTK ZU No. 11/A/2012, item 134; 2 December 2014, ref. no. P 29/13, OTK ZU No. 11/A/2014, item 116; S. Wronkowska, "Publikacja aktów normatywnych – przyczynek do dyskusji o państwie prawnym", [in:] G. Skąpska (ed.), *Prawo w zmieniającym się społeczeństwie*, Toruń 2000, p. 347; T. Zalasiński, *Zasada prawidłowej legislacji w poglądach Trybunału Konstytucyjnego*, Warszawa 2008, p. 160; J. Potrzeszcz, *Bezpieczeństwo prawne z perspektywy filozofii prawa*, Lublin 2013, p. 369).

4.5.2. The purpose of the legal institution of *vacatio legis* is primarily to guarantee that the subjects of legal rights and obligations have enough time to familiarise themselves

with new solutions and to make necessary adjustments, in particular where provisions that are entering into force interfere with cases that are pending. What is meant here is the elimination of a situation where newly introduced, or amended, provisions surprise the addressees thereof (cf. the judgments of: 28 October 2009, ref. no. Kp 3/09, OTK ZU No. 9/A/2009, item 138; 28 February2012, ref. no. K 5/11, OTK ZU No. 2/A/2012, item 16 as well as the said judgments ref. no. K 1/12 and P 29/13).

However, the Tribunal pointed out that a period of *vacatio legis* may also serve the legislator himself, who has a possibility of correcting any flaws or internal contradictions in a normative act, or any solutions that cause contradictions in the system of law, when this is noticed already after the enactment of the said act (see the judgments of: 18 February 2004, ref. no. K 12/03, OTK ZU No. 2/A/2004, item 8 and 20 July 2011, ref. no. K 9/11, OTK ZU No. 6/A/2011, item 61 as well as the said judgment in the case K 31/06, as well as: W. Sokolewicz, comments on Art. 2, [in:] L. Garlicki (ed.), *Konstytucja Rzeczypospolitej Polskiej. Komentarz, Vol. V,* Warszawa 2007, p. 45).

4.5.3. Since 1991 statutory provisions have stipulated that acts published in the Journal of Laws enter into force after the lapse of a certain period from the date of the publication of the acts, and not as of the date of the publication. The Act on the Promulgation of Normative Acts, in its Article 4, sets out a standard period of *vacatio legis* that is binding. The said Act states that normative acts which contain provisions that are universally binding, and which are published in official journals, enter into force after 14 days from the date of their publication, unless there is a longer period prescribed in those acts. The standard period of *vacatio legis* is at least 14 days in Poland, and every case of shortening the said period requires mentioning circumstances that justify such a decision.

4.5.4. The appropriateness or adequacy of a period of *vacatio legis* constitutes a category that is variable and flexible, and which requires consideration in the context of the legal character of a given act and its impact on the legal situation of the addressees of legal norms. The assessment of "appropriateness" of a period of *vacatio legis* is thus contingent on the substance and nature of provisions entering into force as well as on their political and socio-economic context (cf. the judgment of 22 September 2005, ref. no. Kp 1/05, OTK ZU No. 8/A/2005, item 93).

It is indicated in the doctrine that – when determining a period of *vacatio legis* – the lawmaker should take account of such factors as:

– the effectiveness of fulfilling a purpose for enacting a statute;
– the harmonious functioning of a legal system into which the statute is incorporated;
– avoidance of taking addressees by surprise;
– a period of preparation for the implementation of the statute;
– factual circumstances which are prerequisite for the proper functioning of enacted norms

(cf. S. Wronkowska, M. Zieliński, *Komentarz do zasad techniki prawodawczej*, Warszawa 2004, p. 111; S. Wronkowska, *Publikacja aktów normatywnych* …, p. 343; S. Wronkowska, *Podstawowe pojęcia prawa i prawoznawstwa*, Poznań 2005, p. 53, L. Morawski, *Wstęp do prawoznawstwa*, Toruń 2002, p. 75). When enacting provisions concerning institutions or authorities, the lawmaker should bear in mind, in particular, the necessity to ensure that they can continue their activity (cf. S. Wronkowska, *Publikacja aktów normatywnych* …, p. 343; also *Podstawowe pojęcia prawa i prawoznawstwa*, Poznań 2005, p. 53). The lawmaker is also

obliged to guarantee time for carrying out necessary institutional preparations and for becoming fully familiarised with the content of new provisions (cf. L. Morawski, *Wstęp do prawoznawstwa*, Toruń 2002, p. 75).

Requirements for determining an "appropriate" period of *vacatio legis* are rendered in a similar way in the jurisprudence of the Tribunal (cf. the judgments of: 20 January 2010, ref. no. Kp 6/09, OTK ZU No. 1/A/2010, item 3; 8 May 2012, ref. no. K 7/10, OTK ZU No. 5/A/2012, item 48; 15 July 2013, ref. no. K 7/12, OTK ZU No. 6/A/2013, item 76; and 31 July 2015, ref. no. K 41/12, OTK ZU No. 7/A/2015, item 102), which particularly stresses the need to take account of:

- a degree of difficulty of new provisions;
- an extent to which they differ from previous provisions;
- a possibility for addressees, and other interested parties, to become familiar with the content of new norms; as well as
- a real possibility of running their affairs in a way that fully takes account of new provisions.

4.5.5. So far, the Tribunal has taken a stance with regard to, *inter alia*, a minimum period of *vacatio legis* for provisions within the following scope:

- tax law (cf. the judgment ref. no. K 48/04);
- electoral law (cf. the judgments ref. nos. K 31/06 and K 9/11);
- criminal law (cf. the judgments of: 19 November 2008, ref. no. Kp 2/08, OTK ZU No. 9/A/2008, item 157; 7 April 2011, ref. no. K 4/09, OTK ZU No. 3/A/2011, item 20; and 6 Marc2013, ref. no. Kp 1/12, OTK ZU No. 3/A/2013, item 25);
- civil law (cf. the judgment of 17 December 1997, ref. no. K 22/96, OTK ZU Nos. 5-6/1997, item 71);
- commercial law (cf. the judgment of 21 June 2005, ref. no. 25/02, OTK ZU No. 6/A/2005, item 65);
- provisions on changes in the borders of the units of local self-government (cf. the judgment of 1 June 2004, ref. no. U 2/03, OTK ZU No. 6/A/2004, item 54).

4.5.6. The requirement of an appropriate period of *vacatio legis* is not absolute in character. In the event of exceptional circumstances, both the principle of an appropriate period of *vacatio legis*, derived from the Constitution, as well as the Act on the Promulgation of Normative Acts provide for exceptions. Within the meaning of Article 4(2) of the said Act, "in justified cases, normative acts (…) may enter into force within a time-limit shorter than 14 days, and if a vital state interest requires the immediate entry into force of a normative act, and the principles of a democratic state ruled by law do not contradict that, the day of entry into force may be the day of publishing the said act in an official journal".

However, a departure from the standard period (of at least 14-day) of *vacatio legis* always requires particularly strong justification based on the circumstances of a given case (cf. the judgment ref. no. U 2/03). This is admissible solely "in exceptional circumstances when another constitutional-law principle weighs in favour of this" (cf. the judgment of 30 June 2009, ref. no. K 14/07, OTK ZU No.6/A/2009, item 87, and the judgment ref. no. K 27/02).

In the light of the previous jurisprudence of the Tribunal, a vital public interest, which in particular circumstances weighs in favour of shortening the period of *vacatio legis*, may *inter alia* be:

– the protection of the stability of public finance, and especially the need to preserve a balanced state budget (cf. the said judgments in the cases ref. nos. Kp 6/09, K 1/12 and K 7/12; as well as the judgments of 16 June 1999, ref. no. P 4/98, OTK ZU No. 5/1999, item 98, and 17 November 2003, ref. no. K 32/02, OTK ZU No. 9/A/2003, item 93);
– the necessity to regulate rules concerning the acquisition of rights arising from social insurance (cf. the judgment of 3 March 2011, ref. no. K 23/09, OTK ZU No. 2/A/2011, item 8);
– the elimination of a norm from the legal system with regard to which allegations of non-conformity to the Constitution were raised and confirmed (cf. the judgment ref. no. K 14/07), also by a constitutional state authority (the Ombudsman);
– the necessity to execute a judgment of the Tribunal within a set time-limit and to adjust the law to constitutional requirements indicated in the ruling (cf. the judgment of 24 July 2013, ref. no. Kp 1/13, OTK ZU No. 6/A/2013, item 83).

4.6. The assessment of the conformity of Article 5 of the December Amending Act to the principle of an appropriate period of *vacatio legis*, which arises from Article 2 of the Constitution

4.6.1. The Constitutional Tribunal is going to assess the challenged provision in two areas. It should be determined whether the entry into force of the December Amending Act as of the date of its publication was admissible due to:

– the scope and complexity of amendments introduced by the said Act, as well as
– the possibility of adjusting the legal situation of addressees to new statutory solutions.

At this point, one should bear in mind that the addressees of legal norms included in the challenged Amending Act comprise not only the Constitutional Tribunal but also participants in proceedings before the Tribunal as well as parties whose rights or obligations are the subject of those proceedings.

4.6.2. An analysis of previous normative solutions concerning the Tribunal's organisation and the mode of proceedings before the Tribunal indicates that a period of *vacatio legis* set by the lawmaker ranged from 30 days to several months. The 2015 Constitutional Tribunal Act provided for a 30-day period of *vacatio legis*, and it entered into force on 30 August 2015. Article 93 of the Constitutional Tribunal Act of 1 August 1997 (Journal of Laws – Dz. U. No. 102, item 643, as amended: hereinafter: the 1997 Constitutional Tribunal Act) stipulated that the 1997 Act was to enter into force on 17 October 1997. By contrast, the Constitutional Tribunal Act of 29 April 1985 (Journal of Laws – Dz. U. of 1991 No. 109, item 470, as amended; hereinafter: the 1985 Constitutional Tribunal Act) set the date of the entry into force of the 1985 Act for 1 January 1986, and thus the period of *vacatio legis* prescribed by the legislator was over 8 months. Similarly, Article 50 of the Resolution of 31 July 1985 issued by the Sejm of the People's Republic of Poland, with regard to detailed rules for proceedings before the Constitutional Tribunal (Journal of Laws – Dz. U. No. 39, item 184), stipulated that the said Resolution was to enter into force on 1 January 1986.

4.6.3. The December Amending Act has significantly modified rules concerning the functioning of the Constitutional Tribunal as regards:

– the adoption of resolutions by the General Assembly (cf. Art. 1(3) of the said Amending Act);
– the selection of candidates for the positions of the President and Vice-President of the Tribunal (cf. Art. 1(4) of the said Amending Act);
– the election of judges of the Tribunal by the Sejm (cf. Art. 1(16) of the said Amending Act, insofar as it repeals Art. 17(2), second sentence, Art. 19, and Art. 20 of the 2015 Constitutional Tribunal Act);
– disciplinary proceedings with regard to judges of the Tribunal (cf. Art. 1(5) and (6) as well as Art. 1(16) of the said Amending Act, insofar as it repeals Art. 28(2) and Art. 30 of the 2015 Constitutional Tribunal Act);
– the recall of a judge of the Constitutional Tribunal from office (cf. Art. 1(7) of the said Amending Act);
– the expiry of the mandate of a judge of the Constitutional Tribunal before the end of the term of office (cf. Art. 1(8) of the said Amending Act);
– the determination of the composition of adjudicating benches in cases pending before the Tribunal (cf. Art. 1(9), Art. 2(1) as well as Art. 1(16) of the said Amending Act, insofar as it repeals Art. 45(2) of the 2015 Constitutional Tribunal Act);
– the specifying of a majority vote for determining a ruling by the Tribunal (cf. Art. 1(14) of the said Amending Act);
– the course of proceedings in cases pending before the Tribunal (cf. Art. 1(16) of the said Amending Act, insofar as it repeals Art. 70(2), Art. 82(5), and Art. 112(2) of the 2015 Constitutional Tribunal Act);
– the referral of cases to be considered at a hearing or at a sitting in camera (cf. Art. 1(11) and (13) as well as Art. 4 of the said Amending Act);
– the setting of dates for hearings and for sittings in camera (cf. Art. 1(10) and (12) as well as Art. 2(2)-(4) of the said Amending Act);
– the repeal of provisions on proceedings to determine the existence of an impediment to the exercise of the office by the President of Poland (cf. Art. 1(15) of the said Amending Act);
– the rights of legal service professionals of the Tribunal (cf. Art. 3 and Art. 1(16) of the said Amending Act, insofar as the latter repeals Art. 125(2)-(4) of the 2015 Constitutional Tribunal Act).

The Constitutional Tribunal states that the said provisions are of fundamental significance not only for the functioning of the organs of the Tribunal and for the status of the judges of the constitutional court, but also for the mode of proceedings before the Tribunal. The provisions comprise very different rules from the hitherto binding ones (cf. the discussion and assessment of specific provisions presented in the further part of this statement of reasons for the judgment).

4.6.4. The immediate entry into force of the said provisions could have negative consequences for the addressees thereof. In the view of the Constitutional Tribunal, this stems from two basic reasons.

4.6.5. Firstly, when making decisions about new rules for the functioning of the Tribunal, the legislator did not take account of existing factual and legal circumstances, ensuing *inter alia* from the legislator's earlier activities.

The December Amending Act provides that the adoption of resolutions by the General Assembly of the Judges of the Tribunal and the issuance of rulings by a full bench of the Tribunal (which was supposed to be a rule with regard to cases commenced by an application) require a quorum of at least 13 judges of the Tribunal (cf. Art. 10(1) and Art. 44(3) of the 2015 Constitutional Tribunal Act, as amended by Art. 1(3) and (9) of the December Amending Act).

At the time of legislative work on the December Amending Bill, there were 10 judges in the Tribunal who had capacity to adjudicate on cases as well as to vote as part of the above-mentioned General Assembly and a full bench of the Tribunal. This should have made the legislator realise that the introduction of the quorum of 13 judges into Art. 10(1) and Art. 44(3) of the 2015 Constitutional Tribunal Act, with the concurrent lack of a period of *vacatio legis*, may lead to a situation where the Constitutional Tribunal will be unable to exercise its powers set out by statute (cf. for a more detailed discussion, see the next point of this statement of reasons). The legislator is obliged to enact law in a responsible way, taking account of the existing realities.

4.6.6. Secondly, the entry into force of the December Amending Act as of the date of its publication is particularly striking in the context of transitional provisions which include the requirement to apply the new statute (with certain modifications) to cases that are "pending". What follows from the data of the Registry of the Constitutional Tribunal is that the number of cases that were pending before the date of entry into force of the said Amending Act was 174, out of which 15 cases were referred to be considered by a full bench, 144 cases – by a bench of 5 judges, and 15 cases – by a bench of 3 judges.

Article 2(1), second sentence, of the said Amending Act stipulates that "in every case the composition of an adjudicating bench shall be determined on the basis of the provisions of this Act". This means that the composition of adjudicating benches should be determined anew in all cases that were pending before 28 December 2015 (including cases where deliberations have already been carried out). The December Amending Act has modified, *inter alia*, the number of judges in adjudicating benches (cf. amended Art. 44(1) of the 2015 Constitutional Tribunal Act), rules for determining the composition of a full bench of the Tribunal (cf. amended Art. 44(3) of the 2015 Constitutional Tribunal Act), and rules for designating a judge rapporteur (cf. amended Art. 45(2) of the 2015 Constitutional Tribunal Act). In numerous instances, these rules considerably differ from the hitherto binding ones. In addition, it should be borne in mind that the transitional provisions specified in Article 134 of the 2015 Constitutional Tribunal Act are still binding; they stipulate that in cases which were pending before the Tribunal prior to 30 August 2015, the provisions of the 1997 Constitutional Tribunal Act should be applied. The President of the Constitutional Tribunal, who is competent to determine the composition of an adjudicating bench (cf. Art. 45(1) of the 2015 Constitutional Tribunal Act), would have to carry out verification of the above-indicated cases in the light of the rules that arise from the December Amending Act, and the Registry of the Constitutional Tribunal would have to execute any orders issued as a result of such verification, which includes informing the participants in proceedings about the changes.

Practical difficulties may also occur in the course of setting dates for hearings. Pursuant to Article 2(2) of the December Amending Act, with regard to proceedings that were pending before the entry into force of the said Amending Act, a hearing may not be held earlier than after 45 days from the date of service of the notification about the date of the hearing, and in cases considered by a full bench – after 3 months; however, in both situations, this should be no later than 2 years after the date of the entry into force of the Act. By contrast, Article 2(3) and (4) of the December Amending Act states that it will be necessity to set the dates of all hearings and all sittings in camera anew, taking into account the order in which applications were received by the Tribunal. Article 4 of the December Amending Act indicates that in cases where prior to the entry into force of the said Amending Act, an adjudicating bench did not determine whether to consider an application, a question of law or a constitutional complaint at a sitting in camera, upon application by a participant in proceedings, the cases shall be considered at a hearing.

The implementation of the said provisions will primarily require an analysis of all cases pending before the Tribunal, as to whether applications were filed for the consideration of those cases at a hearing. Subsequently, it is necessary to determine the already set or planned dates for hearings anew, including the coordination of dates set by the presiding judges of particular adjudicating benches in such a way that the dates would also respect the order in which cases were received by the Tribunal. It may also prove necessary to separate cases that were joined so as to be considered together due to the equivalence of the subject of allegation (since, in principle, they are received by the Tribunal at different dates). It should be stressed in this context that although the indicated provision concerns the order of determining cases commenced by an application, it will have a considerable impact on the order of considering other cases pending before the Tribunal, i.e. those commenced by a constitutional complaint or a question of law (the said issue is analysed in detail in the next point of this statement of reasons).

Taking the above into consideration, it should be stated that, as a result of the lack of a period of *vacatio legis*, the Constitutional Tribunal was deprived of the possibility of properly preparing itself, in organisational terms, for the requirements introduced by the December Amending Act. This may result in the lack of continuity in the Tribunal's exercise of its powers set out in the Constitution as well as in the excessively slow pace of proceedings before the Tribunal.

Article 5 of the December Amending Act also negatively affects the rights and obligations of subjects participating in proceedings before the Tribunal. The entry into force of the above-mentioned procedural changes has had a significant impact on the course of cases pending before the Tribunal, and thus on the rights and freedoms of citizens who filed constitutional complaints of individuals or entities that are parties to proceedings pending before courts referring questions of law to the Tribunal, as well as of parties on behalf of whom applicants, such as the Ombudsman, appeared before the Tribunal. The legislator provided for no adaptation period during which the addressees of the norms specified in the December Amending Act could adjust to new regulations and plan their actions, taking account of all legal consequences related thereto.

4.6.7. Thirdly, solutions introduced by the December Amending Act may not be regarded as "announced" or "expected" within a sufficiently long time-frame.

It should be emphasised once more that the legislative process – from the moment of submitting the said Amending Bill to the Sejm until the date of the adoption of the Bill by the Senate without any amendments – took 9 days. Solutions included in the December Amending Bill changed several times during parliamentary proceedings, which were also held at night, in the days preceding Christmas. The Bill adopted by the Polish Parliament was referred to the President of Poland for signature on 28 December 2015, who signed it on the very same day, and in the afternoon the Act was published in the Journal of Laws and it entered into force. The enactment of the December Amending Act was not preceded by a public debate (cf. an analysis of the course of the legislative proceedings presented above in this statement of reasons).

4.6.8. In the light of the thesis that a departure from the principle of a period of *vacatio legis* may only be admissible by exception, a provision by which a statute enters into force as of the date of the publication of the statute may be ruled constitutional if the legislator proves that the said departure was justified by exceptional circumstances.

In the case of the December Amending Act, the legislator indicated neither a serious public interest nor important constitutional values which determined that provisions on the Tribunal's organisation and on its *modus operandi* in cases pending before the Tribunal had to enter into force as of the day of their publication.

In particular, one may not accept that an argument that justified the lack of a period of *vacatio legis* in the context of the December Amending Act was the necessity to introduce legal solutions adjusted to "the political programme objectives of the parliamentary majority" (cf. the explanatory note for the Bill, the Sejm Paper No. 122/8th of the term of the Sejm, p. 4). The Constitutional Tribunal agrees with the view that a statute – as a general act – should not be used as a tool for handling in political disputes, and in any case, it may not change "the rules of the game" with regard to a dispute that has been ongoing, since this may result in regarding the statute merely as a means to a political goal and may constitute an additional argument for its unconstitutionality (cf. the dissenting opinion of Judge L. Garlicki appended to the judgment of 3 November 1999, ref. no. K 13/99, OTK ZU No. 7/1999, item 155). A period of *vacatio legis* should be long enough so as to rule out a suspicion that a change is "a derivative of particular political interests of the current parliamentary majority, which are being identified at the moment of undertaking a relevant statutory initiative" or a suspicion that the change is to "replicate a model of political cooperation between political parties that make up the current parliamentary majority" (cf. the dissenting opinion of Judge M. Wyrzykowski appended to the judgment ref. no. K 31/06).

Also, the elimination of a period of *vacatio legis* may not be justified by the argument that there was a need to introduce some "order and stability into the work of the Constitutional Tribunal", which was mentioned in the media dispatches (cf. the opinion voiced by S. Piotrowicz, the Law and Order Party in the press article entitled "Teraz TK ma służyć wszystkim Polakom" [Eng. "Now the Tribunal Will Serve All Poles"], *Rzeczpospolita* of 23 December 2015). In fact, it is disputable whether solutions included in the December Amending Act may be useful for attaining that purpose (cf. below). The Tribunal agrees with the view of the Public Prosecutor General, expressed in his previous statement (withdrawn by the letter of 4 March 2016) that no special considerations which were based on constitutional values weighed in favour of the legislator's departure from setting a period of *vaca-*

tio legis in the context of the statute regulating the organisational structure of the Constitutional Tribunal.

4.6.9. To sum up the above findings, the Tribunal states that the lack of a period of *vacatio legis* in the context of the December Amending Act – considering the extent and depth of introduced changes – made it impossible for the Tribunal to adjust to the changes forthwith so as to carry out its constitutional tasks efficiently, and deprived other interested parties of the possibility of familiarising themselves with the changes and making relevant adjustments. For these reasons, the Constitutional Tribunal has ruled that the legislator's failure to provide for a period of *vacatio legis* in the December Amending Act infringes the constitutional standards derived from the principle of a democratic state ruled by law. Article 5 of the December Amending Act is thus inconsistent with Article 2 of the Constitution.

4.6.10. The Constitutional Tribunal notes that the first group of Sejm Deputies explicitly requested the Tribunal to specify a minimum period of at least 2 months *vacatio legis* for any changes introduced in a statute on the Constitutional Tribunal. In the opinion of the National Council of the Judiciary, the said time-frame should be 6 months.

In the view of the Constitutional Tribunal, such a fixed solution, which would be binding regardless of the scope *ratione materiae* of potential changes, would not however be advisable.

The legislator enjoys legislative discretion in this respect, which is limited by the aforementioned principle of "an appropriate period" of *vacatio legis* derived from Article 2 of the Constitution. Additionally, the legislator should take account of the detailed guidelines set out in this judgment, and in particular the necessity to guarantee an appropriate amount of time for:

– the organisational adjustment of the Tribunal and any parties that are participants in proceedings before the Tribunal with regard to new rules; as well as
– the dispelling of possible reservations as to the constitutionality of the introduced changes (in particular, if they were raised already at the stage of the legislative proceedings and were dismissed then, and the Bill itself was not the subject of an *ex ante* review).

4.7. The assessment of the conformity of Article 5 of the December Amending Act to Article 8(1) of the Constitution

4.7.1. The first President of the Supreme Court deemed that – due to the non-conformity of solutions included in the December Amending Act – Article 5 of the said Act leads to a situation where the Constitution ceases to be the supreme law with regard to the Constitutional Tribunal, and the status of the said law is assigned to a relevant statute on the Constitutional Tribunal – until the statute is deemed inconsistent with the Constitution in accordance with the terms set out in the said statute. In the opinion of the applicant, this constitutes an example of "bypassing" Article 8(1) of the Constitution.

4.7.2. Article 5 of the December Amending Act, challenged by the applicant, specifies a date for the entry into force of the said Amending Act. By contrast, Article 8(1) of the Constitution ensures that the provisions of the Constitution have the status of "the supreme law of the Republic of Poland".

In the opinion of the Constitutional Tribunal, Article 8(1) of the Constitution is not an adequate higher-level norm for the review of the challenged provision. The lack of a period

of *vacatio legis* in the context of the December Amending Act has no impact on the principle of the supremacy of the Constitution. It still remains the supreme legal act in the hierarchy of Polish law, and all acts of lower rank must be consistent therewith (including the 2015 Constitutional Tribunal Act).

4.7.3. For the above reasons, the Constitutional Tribunal states that Article 5 of the December Amending Act is not inconsistent with Article 8(1) of the Constitution.

4.8. The assessment of the conformity of Article 5 of the December Amending Act to Article 188(1) of the Constitution

4.8.1. The First President of the Supreme Court, the Ombudsman and the National Council of the Judiciary expressed the view that the purpose for Article 5 of the December Amending Act was to prevent the Constitutional Tribunal from carrying out the review of the said Act before its entry into force, and thus the challenged provision is inconsistent with Article 188(1) of the Constitution.

4.8.2. Article 188(1) of the Constitution stipulates that "the Constitutional Tribunal adjudicates in cases (…) concerning the conformity of statutes and international agreements to the Constitution". It specifies one of the basic areas of the Tribunal's activity, i.e. the hierarchical review of the conformity of legal norms to the Constitution. It provides for subjecting all statutes – *lege non distinguente* – to a review conducted by the Tribunal, without any consideration for their scope *ratione materiae*. In the current legal situation, there are no doubts that the scope of the Tribunal's jurisprudence also comprises the assessment of the constitutionality of a statute on the Constitutional Tribunal, mentioned in Article 197 of the Constitution.

4.8.3. When assessing Article 5 of the December Amending Act in terms of its conformity to Article 188(1) of the Constitution, it should be deemed that the challenged provision has had not only partial impact on the Tribunal's capacity to adjudicate – as, indeed, it ruled out the possibility of assessing the provisions of the said Amending Act before its entry into force. Such an intention on the part of the legislator – although not explicitly stated – appears to be reflected clearly by the course of legislative work on the said Amending Bill. As it has been mentioned above, previously the entry into force of the Act was set for a date after 30 days from the day of the publication of the Act, but the period of *vacatio legis* was completely eliminated as a result of the amendment introduced to the Bill several days later, at the sitting of the Legislative Committee, after the stage of the first reading, with the objection raised by the Sejm legislators and the Sejm Deputies of the parliamentary opposition.

By contrast, Article 5 of the December Amending Act does not rule out a constitutional review of the said Act after the entry into force thereof – however, only in accordance with rules provided therein, which the Constitutional Tribunal considers to be inadmissible (cf. part III point 1 of this statement of reasons for the judgment).

4.8.4. Taking the above findings into account, and in particular that an appropriate length of a period of *vacatio legis* weighed in favour of provisions introduced by the December Amending Act, the need for the re-organisation of the Tribunal's work as well as taking into account the possibility of entering the Bill into force was not justified by any important public interest. The Tribunal stated that Article 5 of the amending Act fulfilled the purpose of

hindering or even preventing the conducting of a constitutional review of the said Act. In the view of the Constitutional Tribunal, the indicated action of the legislator aimed at bypassing Article 188(1) of the Constitution. In the light of the above circumstances, it should be deemed that Article 5 of the December Amending Act is inconsistent with Article 188(1) of the Constitution, by the fact that it made it impossible for the Tribunal to adjudicate on the conformity of the December Amending Act to the Constitution before the entry into force of the said Act.

5. The evaluation of changes within the scope of adopting resolutions by the General Assembly of the Judges of the Constitutional Tribunal and the process of adjudication by the Constitutional Tribunal

5.1. The allegations of the applicants and the statements of the participants in the proceedings

5.1.1. The allegation that the 2015 Constitutional Tribunal Act, after the December amendments, contains provisions which make it impossible for the Tribunal to function diligently and efficiently is raised in four out of the five applications which have been submitted to institute the proceedings in the present case, namely in the applications of: the First President of the Supreme Court; the second group of Sejm Deputies; the Ombudsman; as well as the National Council of the Judiciary. The allegation about the legislator's infringement of the requirement of diligence and efficiency in the work of the Tribunal does not appear in the application of the first group of Sejm Deputies, in which the legislative process of enacting the December Amending Act is challenged.

5.1.2. The First President of the Supreme Court requested the Tribunal to determine that Article 10(1), Article 44(1)(1) and Article 44(3), Article 80(2), Article 87(2), as well as Article 99(1) of the 2015 Constitutional Tribunal Act, as amended by Article 1, points 3, 9, 10, 12(a) and 14 of the December Amending Act, as well as Article 2 of the latter Act, are inconsistent with Article 10(2) and Article 173 of the Constitution, in conjunction with the Preamble to the Constitution, Article 2 and Article 45(1) of the Constitution, "as – by virtue of making it impossible for the public institution to carry out its activity diligently and efficiently – they infringe the principles of a state ruled by law within the scope of constitutional review conducted by the Constitutional Tribunal, as well as the principle that the legislator is to act in a rational way".

5.1.3. By contrast, the second group of Sejm Deputies referred the allegation formulated in this way to the entire December Amending Act, and in the event that the allegation is dismissed – alternatively – to a number of provisions of the amended 2015 Constitutional Tribunal Act.

In point 1 of the application, the second group of Sejm Deputies requested the Tribunal to determine that the entire December Amending Act is inconsistent with Article 2 in conjunction with Article 118(3) and Article 119(1), Article 173 in conjunction with Article 10, as well as with Article 195(1) of the Constitution, "due to the introduction of rules for the functioning of a constitutional organ of public authority which result in its dysfunctionality and prevent it from the diligent exercise of its constitutional powers". Among the provisions expressing the basic assumptions of the December Amending Act, which cause the unconstitu-

tionality of the entire Act, the second group of Sejm Deputies included provisions challenged by the First President of the Supreme Court, and also provisions that increase the powers of the Sejm with regard to the judges of the Constitutional Tribunal (changes within the scope of: recalling a judge of the Tribunal from office and determining the expiry of the judge's mandate; the revocation of disciplinary responsibility for conduct prior to assuming the judicial office) as well as provisions that interfere with the internal autonomy of the Tribunal (amendments within the scope of disciplinary proceedings).

Alternatively, with regard to the said allegation, the second group of Sejm Deputies requested the Tribunal to determine that:

– Article 10(1) of the 2015 Constitutional Tribunal Act, as amended by Article 1(3) of the December Amending Act, is inconsistent with Article 2, Article 173 in conjunction with Article 10, as well as with Article 195(1) of the Constitution as well as the principle of efficiency in the work of public institutions, expressed in the Preamble to the Constitution;
– Article 44(1) and (3) of the 2015 Constitutional Tribunal Act, as amended by Article 1(9) of the December Amending Act, is inconsistent with Article 2 and Article 173 in conjunction with Article 10 of the Constitution, as well as to the principle of efficiency in the work of public institutions, expressed in the Preamble to the Constitution;
– Article 80(2) of the 2015 Constitutional Tribunal Act, as amended by Article 1(10) of the December Amending Act, is inconsistent with Article 2 and Article 173 in conjunction with Article 10 of the Constitution, as well as with the principle of efficiency in the work of public institutions, expressed in the Preamble to the Constitution; and insofar as it concerns applications referred to the Constitutional Tribunal by the President of Poland to determine the constitutionality of the State Budget Bill or the Interim State Budget Bill – is also inconsistent with Article 224(2) of the Constitution;
– Article 87(2) and Article 87(2a) of the 2015 Constitutional Tribunal Act, as amended by Article 1(12) of the December Amending Act, is inconsistent with Article 2, Article 45 and Article 173 in conjunction with Article 10 of the Constitution, as well as to the principle of efficiency in the work of public institutions, expressed in the Preamble to the Constitution; and insofar as it concerns applications referred to the Constitutional Tribunal by the President of Poland to determine the constitutionality of the State Budget Bill or the Interim State Budget Bill – is also inconsistent with Article 224(2) of the Constitution;
– Article 99(1) of the 2015 Constitutional Tribunal Act, as amended by Article 1(14) of the December Amending Act, is inconsistent with Article 2, Article 190(5), Article 173 in conjunction with Article 10 of the Constitution, as well as to the principle of efficiency in the work of public institutions, expressed in the Preamble to the Constitution;

Furthermore, the second group of Sejm Deputies requested the Tribunal to issue a ruling that Article 2 of the December Amending Act is inconsistent with Article 2, Article 173 in conjunction with Article 10, as well as with Article 45 of the Constitution.

5.1.4. The same allegation concerning new rules for the functioning of the Tribunal was formulated in a different way by the Ombudsman, who challenged the provisions of the December Amending Act, and not – as in the case of the First President of the Supreme Court and the second group of Sejm Deputies – the provisions of the 2015 Constitutional Tri-

bunal Act after the amendments. The Ombudsman requested the Tribunal to determine, *inter alia*, that:

– Article 1(3) of the December Amending Act (amending the content of Article 10(1) of the 2015 Constitutional Tribunal Act) is inconsistent with the principle of appropriate legislation, which arises from Article 2 of the Constitution;
– Article 1(9) of the December Amending Act (amending the content of Article 44(1)-(3) of the 2015 Constitutional Tribunal Act) is inconsistent with the principle of appropriate legislation, which arises from Article 2 of the Constitution, with Article 45(1), Article 122(3), first sentence, and Article 188 of the Constitution, as well as with Article 47 of the Charter of Fundamental Rights of the European Union (OJ C 303, 14.12.2007, p. 391; hereinafter: the Charter);
– Article 1(10) of the December Amending Act (adding para 2 to Article 80 of the 2015 Constitutional Tribunal Act) is inconsistent with the principle of appropriate legislation, arising from Article 2 of the Constitution, with Article 45(1) of the Constitution, as well as with Article 47 of the Charter;
– Article 1(12) of the December Amending Act (amending the content of Article 87(2) of the 2015 Constitutional Tribunal Act) is inconsistent with the principle of appropriate legislation, arising from Article 2 of the Constitution, with Article 45(1) of the Constitution, as well as with Article 47 of the Charter;
– Article 1(14) of the December Amending Act (amending the content of Article 99(1) of the 2015 Constitutional Tribunal Act) is inconsistent with Article 122(3), Article 133(2), Article 189 and Article 190(5) of the Constitution.

Similarly to the First President of the Supreme Court and the second group of Sejm Deputies, the Ombudsman also challenged the constitutionality of Article 2 of the December Amending Act, arguing that the said provision is inconsistent with the principle of appropriate legislation, arising from Article 2 of the Constitution, with Article 45(1) of the Constitution, as well as with Article 47 of the Charter.

5.1.5. By contrast, the National Council of the Judiciary requested the Tribunal to determine that the December Amending Act is in its entirety inconsistent, *inter alia*, with Article 2, Article 7, Article 10 and Article 45(1) of the Constitution, due to the fact that the legal solutions introduced by the said Act make it impossible for the Constitutional Tribunal to function independently of the legislature and the executive as well as hinder the Tribunal's efficient and diligent review of normative acts within the scope of their conformity to the Constitution, thus resulting in a paralysis of the Tribunal. What follows from the justification for the application of the National Council of the Judiciary is that such legal solutions are included in Article 10(1), Article 44(1)(1), Article 99(1), Article 80(2) and Article 87(2) of the Constitutional Tribunal Act.

5.1.6. The allegation about the dysfunctionality of a majority of solutions introduced to the 2015 Constitutional Tribunal Act after the amendments was supported by the Public Prosecutor-General in his statement of 10 February 2016, withdrawn by the letter of 4 March 2016.

5.2. The subject of the review and higher-level norms for the review

5.2.1. When comparing the subject of the review indicated in each of the four applications, the Tribunal stated that the First President of the Supreme Court and the second group of Sejm Deputies questioned selected provisions of the amended 2015 Constitutional Tribunal Act, whereas the Ombudsman challenged the provisions of the December Amending Act. In addition, the National Council of the Judiciary and, alternatively, the second group of Sejm Deputies challenged the entire December Amending Act, raising the allegation about the unconstitutionality of the basic assumptions of the Act.

The only provision of the December Amending Act which was concurrently indicated as a higher-level norm for the review by the First President of the Supreme Court, the Ombudsman and the second group of Sejm Deputies is Article 2 of the said Act, i.e. a transitional provision.

The First President of the Supreme Court, as part of one (joint) allegation, mentions several provisions, namely: Article 10(1), Article 44(1)(1) and Article 44(3), Article 80(2), Article 87(2) and Article 99(1) of the 2015 Constitutional Tribunal Act as well as Article 2 of the December Amending Act, arguing that they all make it impossible for the public institution to carry out its activity diligently and efficiently".

An analogous allegation can be found in the application of the National Council of the Judiciary, but it is referred to the December Amending Act, which provides for legal solutions that – in the view of the National Council of the Judiciary – "make it impossible for the Constitutional Tribunal to function independently of the legislature and the executive as well as hinder the Tribunal's efficient and diligent review of normative acts within the scope of their conformity to the Constitution, thus resulting in a paralysis of the Tribunal". It follows only from the justification for the application that the applicant meant Article 10(1), Article 44(1)(1) and Article 44(3), Article 80(2), Article 87(2) and Article 99(1) of the 2015 Constitutional Tribunal Act, i.e. the same provisions as those indicated in the *petitum* of the application of the First President of the Supreme Court.

By contrast, the second group of Sejm Deputies as well as the Ombudsman challenge the constitutionality of all those provisions separately within the scope of different, though concurrent, allegations.

The second group of Sejm Deputies renders the subject of the review in a broader way, challenging the whole of paragraph 1 of Article 44 of the 2015 Constitutional Tribunal Act, and not – like the First President of the Supreme Court – only point 1 of the said paragraph; additionally, the Sejm Deputies challenge Article 87(2a) of the 2015 Constitutional Tribunal Act. In the justification for the application of those Sejm Deputies, there are however no allegations which directly refer to the last-mentioned provision which makes it possible for the President of the Constitutional Tribunal to shorten by half the period of "waiting" for a hearing in certain cases.

By contrast, the Ombudsman challenged the wording of Article 1(9) of the December Amending Act, within an even broader scope comprising the amendment to Article 44(1)-(3) of the 2015 Constitutional Tribunal Act, although in the justification for the application, there are no allegations directly concerning Article 44(2). Likewise, within a broader scope, reservations were raised with regard to the wording of Article 1(12)(a) of the December Amending Act, i.e. not only as regards the amendment to Article 87(2) of the 2015 Constitutional Tribunal Act, but also the addition of Article 87(2a) to the said Constitutional Tribunal Act. How-

ever, the allegation about the unconstitutionality of the last-mentioned provision was not separately justified.

For those reasons, the Tribunal decided to discontinue the proceedings with regard to the review of the constitutionality of Article 1(9) of the December Amending Act, insofar as it amends Article 44(2), and Article 1(12)(b) of the December Amending Act, insofar as it adds Article 87(2a) to the 2015 Constitutional Tribunal Act, whereas subject the other above-mentioned provisions to the review in the present case. Thus, the subject of the review comprises the following:

– Article 1(3) of the December Amending Act and amended Article 10(1) of the 2015 Constitutional Tribunal Act;
– Article 1(9) of the December Amending Act, insofar as it amends Article 44(1) and (3) of the 2015 Constitutional Tribunal Act, as well as amended Article 44(1) and (3) of the 2015 Constitutional Tribunal Act;
– Article 1(10) of the December Amending Act and added Article 80(2) of the 2015 Constitutional Tribunal Act;
– Article 1(12)(a) of the December Amending Act as well as amended Article 87(2) of the 2015 Constitutional Tribunal Act;
– Article 1(14) of the December Amending Act as well as amended Article 99(1) of the 2015 Constitutional Tribunal Act, as well as
– Article 2 of the December Amending Act.

5.2.2. Discrepancies among the four applications that commenced proceedings in the present case also concern higher-level norms for the review.

The First President of the Supreme Court formulated in that respect one allegation, and he indicated the following higher-level norms for the review: Article 10(2) and Article 173 of the Constitution in conjunction with the principle of diligence and efficiency in the work of public institutions, Article 2, and Article 45(1) of the Constitution.

By contrast, the second group of Sejm Deputies indicated Article 2 in conjunction with Article 118(3) and Article 119(1), Article 173 in conjunction with Article 10 of the Constitution as well as the principle of efficiency in the work of public institutions, expressed in the Preamble to the Constitution, with regard to all the above-mentioned provisions of the amended 2015 Constitutional Tribunal Act; moreover, as regards Article 10(1) of the said Act, an additional higher-level norm for the review is Article 195(1) of the Constitution, with regard to Article 87(2) of the Act – Article 45 of the Constitution, and as far as Article 99(1) of the Act is concerned – Article 190(5) of the Constitution. In the context of Article 80(2) and Article 87(2) of the 2015 Constitutional Tribunal Act, insofar as they comprise applications pertaining to the constitutionality of the State Budget Bill or the Interim State Budget Bill referred to the Constitutional Tribunal by the President of Poland, the second group of Sejm Deputies also indicated Article 224(2) of the Constitution. As higher-level norms for the review, the said group of Sejm Deputies indicated Article 2, Article 173 in conjunction with Article 10, as well as Article 45 of the Constitution.

By contrast, the Ombudsman indicated the same higher-level norms for the review as regards Article 1, points 9, 10 and 12, as well as Article 2 of the December Amending Act, mentioning here Article 2 and Article 45(1) of the Constitution as well as Article 47 of the Charter. However, when justifying the alleged non-conformity of the said provisions to Arti-

cle 47 of the Charter, the Ombudsman did not present any new arguments apart from those formulated in the context of Article 45(1) of the Constitution. Hence, the Tribunal decided to discontinue proceedings as regards reference to the said Article 47 as a higher-level norm for the review. Apart from those indicated above, additional higher-level norms selected by the Ombudsman are Article 122(3), first sentence, and Article 188 of the Constitution, within the scope of an allegation pertaining to Article 1(9) of the December Amending Act. Yet, the Ombudsman differently rendered the higher-level norms for the review with regard to Article 1(3) of the December Amending Act, indicating here only Article 2 of the Constitution and the principle of appropriate legislation, which is derived therefrom; in addition, in the context of Article 1(14) of the December Amending Act, higher-level norms for the review indicated by him are: Article 122(3), Article 133(2), Article 189, as well as Article 190(5) of the Constitution.

The National Council of the Judiciary indicated the following higher-level norms for the review: Article 2, Article 7, Article 10(1) and (2) as well as Article 45(1) of the Constitution.

After the consideration of the higher-level norms for the review indicated by the applicants, the Tribunal stated that all the applications raised allegations about the infringement of the principles of appropriate legislation (cf. Art. 2 of the Constitution), as well as the principle of the Tribunal's independence and its separateness from the other branches of government (cf. Art. 173 in conjunction with Art. 10 of the Constitution), to an extent that negatively affected citizens' right to a fair trial (cf. Art. 45(1) of the Constitution) as well as the principle of diligence and efficiency in the work of the Tribunal (cf. the Preamble to the Constitution).

Consequently, the Tribunal deemed that adequate higher-level norms for reviewing the dysfunctionality of new rules for proceedings before the Tribunal, expressed in Article 1, points 3, 9, 10, 12(a) and 14, as well as Article 2 of the December Amending Act, as well as in amended Article 10(1), Article 44(1) and (3), Article 80(2) and Article 87(2), and Article 99(1) of the 2015 Constitutional Tribunal Act, are the following: Article 2 and Article 173 in conjunction with Article 10, and – as regards all reviewed provisions with the exception of Article 10(1) of the 2015 Constitutional Tribunal Act – Article 45(1) of the Constitution as well as the principle of diligence and efficiency in the work of public institutions, enshrined in the Preamble to the Constitution.

Additionally, with regard to Article 1(14) of the December Amending Act and Article 99(1) of the 2015 Constitutional Tribunal Act, the applicants indicated Article 190(5) of the Constitution as a higher-level norm for the review. The Constitutional Tribunal states that this is a different allegation than the allegation about the infringement of the requirement to ensure diligence and efficiency in the work of a public institution, and the possible consideration thereof would make it redundant to evaluate the functionality of the analysed solution.

As regards the other higher-level norms for the review, including Article 2 in conjunction with Article 118(3), Article 122(3), Article 133(2) as well as Article 197 in conjunction with Article 112 of the Constitution, the Tribunal decided to discontinue the proceedings on the basis of Article 104(1)(2) of the 2015 Constitutional Tribunal Act, due to the lack of appropriate justification for the allegations. By contrast, Article 224(2) of the Constitution, indicated in the application of the second group of Sejm Deputies, was declared to be an element of reasoning, and not a basis of separate allegations.

5.2.3. Due to the fact that all above-mentioned provisions concern the Tribunal's way of proceeding with cases that fall within the scope of its competence, the assessment of the impact of the provisions on the activities of that institution requires a complex approach.

Therefore, the Tribunal must evaluate not only the constitutionality of particular provisions, as it does in the context of other cases concerning the constitutional review of law, but, in addition, it should assess them jointly insofar as they express a certain – coherent and rational – concept put forward by the legislator as regards the new *modus operandi* of the Constitutional Tribunal. Indeed, particular procedural solutions are linked, and only the statement that each of them separately and all of them together have a dysfunctional character may lead to ruling them unconstitutional.

The determination of the unconstitutionality of the Tribunal's new mechanism for proceeding with cases requires, first, the assessment of particular elements making up the said mechanism, and then the evaluation of the mechanism as a whole, taking account of links between its elements.

5.3. The constitutional requirement of diligence and efficiency in the work of public institutions – general characteristics

5.3.1. The constitutional requirement of diligence and efficiency in the work of public institutions, which arises from the Preamble to the Constitution, and is primarly addressed to the legislator, has been the subject of the Tribunal's analyses several times in the course of constitutional review of law. The Tribunal sometimes explicitly indicated the principle of diligence and efficiency in the work of public institutions, as a higher-level norm for the review of various challenged provisions (see the judgment of 12 March 2007, ref. no. K 54/05, OTK ZU No. 3/A/2007, item 25 as well as the judgment ref. no. K 31/06), as well as, at other times, the constitutional court made only indirect reference to the said principle, supporting its reasoning within the scope of a review in the light of other higher-level norms selected from the articles of the Constitution (see the judgments of: 7 January 2004, ref. no. K 14/03, OTK ZU No. 1/A/2004, item 1; 7 November 2005, ref. no. P 20/04, OTK ZU No. 10/A/2005, item 111; 22 September 2006, ref. no. U 4/06, OTK ZU No. 8/A/2006, item 109 and 15 January 2009, ref. no. K 45/07, OTK ZU No. 1/A/2009, item 3, as well as the judgment ref. no. K 12/03).

5.3.2. The meaning and significance of the principle of diligence and efficiency in the work of public institutions was explained in the most general way by the Tribunal in its judgment ref. no. K 14/03, in which the Tribunal declared the unconstitutionality of the provisions of the Act of 23 January 2003 on general insurance in the National Health Fund (Journal of Laws – Dz. U. No. 45, item 391, as amended). The Tribunal stressed then that: "Diligence and efficiency in the work of public institutions, and in particular those institutions which have been set up to implement and protect the rights guaranteed in the Constitution, fall within the scope of values that are constitutional in character. This clearly follows from the introduction to the Constitution (the so-called Preamble), in which the following two main goals for enacting the Constitution are mentioned: to guarantee the rights of the citizens, and to ensure diligence and efficiency in the work of public institutions. Where the wording of provisions does not facilitate the diligence or efficiency in the work of institutions whose tasks are

to protect constitutional rights, those provisions constitute an infringement of those rights, and thus it is justified to deem them unconstitutional".

The meaning of the principle of diligence and efficiency in the work of courts was elucidated by the Tribunal in its judgment ref. no. P 20/04. The Tribunal stated that "the organisation of courts is to implement, in most general terms, two most important constitutional requirements, i.e. to ensure that courts, as public institutions, carry out their activity in a diligent and efficient way. The regulation of the organisation of courts is subordinate with regard to everyone's right to a fair and public hearing of his/her case, without undue delay, before a competent, impartial and independent court (Article 45(1) of the Constitution). Diligence in the work of courts primarily implies, in this context, their impartiality and independence, whereas efficiency entails the elimination of any delays in court proceedings that are unjustified". Additionally, in its judgment of 14 October 2015, ref. no. Kp 1/15 (OTK ZU No. 9/A/2015, item 147), the Tribunal stressed that it appreciated "the efficiency of proceedings. However, means of attaining it may not infringe the basic guarantees of the independence and impartiality of a judge as well as may not interfere with the administration of justice. (…) The efficiency of proceedings may not be regarded as a value that justifies interference with the independence of judges". The above findings presented in the said judgment remain relevant with regard to all organs of the judiciary, and thus also with regard to the Constitutional Tribunal.

In the judgment ref. no. K 34/15, the principle of diligence and efficiency in the work of public institutions was directly referred to the Constitutional Tribunal. It was stated therein, *inter alia*, that: "In the context of the systemic position of the Tribunal and the particular scope of its powers, it is especially justified that proceedings before the Tribunal should be effective and ought to lead – within a reasonable time-limit – to the issuance of a final ruling, in particular in matters that are essential for the functioning of the organs of the state or for the exercise of the freedoms and rights that are constitutionally guaranteed. What weighs in favour of that is the principle of efficiency in the work of public institutions, expressed in the Preamble to the Constitution. (…) Consequently, the statutory model of proceedings before a constitutional court must, on the one hand, take account of the unique systemic function of the Tribunal and, on the other hand, guarantee the effectiveness of the exercise of the competence granted thereto".

5.3.3. Considering the above findings, it should be stated that the legislator's discretion within the scope of meeting the requirement of diligence and efficiency in the work of public institutions is greater with regard to institutions that are being established, and the only legal basis of the activity of those institutions is made up of statutory provisions. By contrast, as regards institutions the existence of which is provided for in the Constitution, and which have been operating at least since the entry into force of the Constitution, the legislator's discretion, within the scope of shaping the legal bases of those institutions, is considerably limited. On the one hand, the legislator is bound by constitutional principles, norms and values which determine the position of such an institution within the system of the organs of the state, as well as by constitutional provisions that specify the organisation, competence and *modus operandi* of the institution. On the other hand, the legislator may not lower the current level of diligence and efficiency in the work of an existing public institution. The Preamble to

the Constitution obliges the legislator to "ensure diligence and efficiency in the work of public bodies", and the said obligation of 'ensuring' implies the preservation of the existing level of diligence and efficiency in the work of public institutions, and where necessary – the raising of that level.

5.4. The position of the Constitutional Tribunal within the system of the organs of the state – general characteristics

5.4.1. In order to establish whether the new rules for the functioning of the Constitutional Tribunal make it possible for that institution to exercise its powers diligenty and efficiently, at least at the current level, requires specifying the position of the Tribunal, as set by the provisions of the Constitution. The Constitutional Tribunal is a constitutional organ of the state which was established on the basis of the Constitution and which functions in accordance with the provisions thereof; the objective of the institution is to safeguard the Constitution, its unique legal force as the supreme law of the Republic of Poland, as well as to protect the rights and freedoms of the individual which are guaranteed in the Constitution.

5.4.2. The introduction of the judicial review of the constitutionality of law in Poland in the 1980s was a vital element of the process of democratisation of the state's political system. Indeed, it should be pointed out that a major reason for the rejection of the idea of the constitutional judiciary during the years of the People's Republic of Poland was the adopted concept that state authority was unitary and that the Sejm occupied the supreme position within the structure of the organs of the state. The then doctrine of law was dominated by the conviction that in a socialist state, the conformity of law to the Constitution "occurs, in a sense, naturally – without any need for providing further safeguards" (Z. Czeszejko-Sochacki, *Sądownictwo konstytucyjne w Polsce na tle porównawczym*, Warszawa 2003, p. 50). Any forms of non-parliamentary review of the constitutionality of statutes were regarded as "a restriction of the representation of the nation caused by an entity that in such a way surpassed the organ of the supreme power of the nation" (S. Rozmaryn, "Kontrola konstytucyjności ustaw", *Państwo i Prawo* No. 12/1948, p. 13). The political crisis of the 1970s and the 1980s raised awareness of the problem that there were no institutional guarantees of civil rights, and created conditions to introduce in Poland, first, the judicial review of the legality of administrative decisions, and subsequently the judicial review of the constitutionality of law (see E. Zwierzchowski, "Geneza oraz organizacja i funkcjonowanie sądowej kontroli konstytucyjności aktów normatywnych w Polsce", *Studia Iuridica Silesiana* No. 7/1990, pp. 10-11). The democratisation of the political system of the state was manifested in the establishment of institutions overseeing the activity of the state and safeguarding the rights of citizens. Thus, first, by the Act of 31 January 1980 on the Supreme Administrative Court as well as on amendments to the Code of Administrative Procedure (Journal of Laws – Dz. U. No. 4, item 8), the Supreme Administrative Court was established. Then, by the Act of 8 October 1980 amending the Constitution of the People's Republic of Poland (Journal of Laws – Dz. U. No. 22, item 81), legal bases were created for the establishment of the Supreme Audit Office, and the Act of 26 March 1982 amending the Constitution of the People's Republic of Poland (Journal of Laws – Dz. U. No. 11, item 83) introduced provisions on the Constitutional Tribunal and the Tribunal of State to the Constitution of the People's Republic

of Poland of 22 July 1952 (Journal of Laws – Dz. U. of 1976 No. 7, item 36, as amended; hereinafter: the Constitution of the People's Republic of Poland).

Article 33[a], which was added by the last-mentioned Act to the Constitution of the People's Republic of Poland, did not determine the place of the Tribunal within the system of the organs of the state, as well as it did not specify the competence of the Tribunal in an exhaustive way. However, the content of that article made it apparent that the adopted model of the constitutional review of law was a result of a compromise. On the one hand, it was guaranteed that the judges of the Tribunal would enjoy independence in the exercise of their office and would be subject only to the Constitution (cf. Art. 33[a](5) of the Constitution of the People's Republic of Poland). On the other hand, the rulings of the Tribunal on the unconstitutionality of statutes were not final, which created a possibility that the Sejm could dismiss them (cf. Art. 33[a](2) of the Constitution of the People's Republic of Poland). The binding constitution of that period, i.e. the Constitution of the People's Republic of Poland, did not determine numerous basic systemic issues, for instance, the number of the judges of the Constitutional Tribunal, the length of their terms of office, or the organs of the Tribunal. It was the ordinary legislator – pursuant to Article 33[a](6) of the Constitution of the People's Republic of Poland – who was to specify "the jurisdiction and organisation of the Constitutional Tribunal as well as the mode of proceedings before the said Tribunal". Hence, the legislator's power to regulate not only procedural matters but also systemic and competence ones actually weakened the position of the Tribunal at that time in relation to the legislature.

The first Constitutional Tribunal Act of 1985 was enacted three years after the introduction of the said institution into the Constitution that was in force then; by contrast, the second statute on the Tribunal was passed after the enactment of the Constitution of 2 April 1997, which is currently binding (see the Constitutional Tribunal Act of 1 August 1997[2]).

5.4.3. The Constitution of 1997 included the Tribunal among the organs of the judiciary, which is one of the three branches of government that are separate but equal in significance (cf. Art. 10 of the Constitution). At the same time, the Constitution determined that the Tribunal, as part of the judiciary, is separate and independent from the other branches of government (cf. Art. 173 of the Constitution), and that the judges of the Tribunal, in the exercise of their office, are to be independent and subject only to the Constitution (cf. Art. 195(1) of the Constitution).

The currently binding Constitution does not authorise the legislator to specify the jurisdiction and organisational structure of the Constitutional Tribunal, since the Constitution itself regulates those issues. Thus, it is constitutionally inadmissible for the legislator to modify the scope of the Tribunal's competence or to determine its position within the system of the organs of the state. Pursuant to Article 197 of the Constitution, what should be specified by statute is "the organization of the Constitutional Tribunal, as well as the mode of proceedings before it". These are also matters that should be regulated by the constitution-maker in such a

[2] The English translation of the Constitutional Tribunal Act of 1997 is available at: http://trybunal.gov.pl/en/about-the-tribunal/legal-basis/the-constitutional-tribunal-act/archive/.

way so that it can be ensured that the activity of that public institution – as stated in the Preamble to the Constitution – is diligent and efficient. The requirement in Article 197 of the Constitution is realised in the current legal system by the reviewed Constitutional Tribunal Act of 2015 as amended by the December Amending Act.

The basic constitutional principles that currently determine the position of the Constitutional Tribunal within the system of the organs of the state are therefore as follows: the principle of the separation of powers (Art. 10 of the Constitution) as well as the principle of the judiciary's independence and its separateness from the other branches of government (Art. 173 of the Constitution). The first of the principles is supplemented by the formula of "balance between the legislative, executive and judicial powers", which implies that the branches of government affect each other and their powers are mutually complementary. Each of the said branches should have instruments which allow it to limit the activities of the other branches. Moreover, the balancing out of the branches of government is also enriched by the requirement of cooperation between public authorities, as referred to in the Preamble to the Constitution. Particular authorities are obliged to cooperate to ensure diligence and efficiency in the work of public institutions (the Tribunal's judgment ref. no. K 34/15; likewise – its judgment ref. no. Kp 1/15). The requirement of cooperation between public authorities must however be implemented with full respect for the special position of the judiciary. Although, with regard to the legislature or the executive, there is an overlap of powers, it is characteristic of the judiciary that this branch of government is separate from the other branches (see the Tribunal's judgments of: 21 November 1994, ref. no. K 6/94, OTK in 1994, part II, item 39; 22 November 1995, ref. no. K 19/95, OTK ZU in 1995, part II, item 35; the judgments of: 14 April 1999, ref. no. K 8/99, OTK ZU No. 3/1999, item 41 and 29 November 2005, ref. no. P 16/04, OTK ZU No. 10/A/2005, item 119). The separateness and independence of the judiciary may not however lead to the elimination of the mechanism of the necessary balance between the branches of government, since such a requirement explicitly arises from Article 10 of the Constitution (see the Tribunal's judgments ref. nos.: K 8/99, K 12/03 and K 45/07), as well as at least implicitly from the requirement of cooperation between public authorities, which is mentioned in the Preamble to the Constitution.

The independence of the Tribunal, which is so strongly emphasised in the present Constitution, requires special protection for two reasons.

Firstly, it guarantees that the Tribunal has necessary discretion within the scope of the review of the law-making activity of the Polish Parliament and other organs of public authority as regards the conformity of that activity to the Constitution and other legal acts. Thus, the Tribunal may play the role of the guarantor of the supremacy of the Constitution, which the constitution-maker has assigned thereto, and none of state authorities, including also the legislator, may deprive the Tribunal of that role.

Secondly, the said independence guarantees that the Tribunal has the capacity to effectively protect the rights and freedoms of the individual, by adjudicating on the unconstitutionality of provisions that infringe those rights and freedoms. Thus, the Tribunal can fulfil the second role assigned thereto, namely the role of the guarantor of the constitutional rights and freedoms of the individual.

Consequently, the independence of the constitutional court is the prerequisite for an effective review of the constitutionality of law, and that is why at times it is the subject of

attacks by legislative and executive authorities. The examples of constitutional crises which resulted from political decisions paralysing the activity of constitutional courts were described in a detailed and extensive way in an opinion submitted in the present case by the Helsinki Foundation for Human Rights. They occurred during the period between the WWI and the WWII (the example of Austria), and more recently – in certain states in South America and Asia (e.g. Peru, Ecuador, and India) as well as in some states in Central and Eastern Europe (e.g. Russia, Belarus, Romania, Hungary and Slovakia). In a majority of those states, an attempt was made to subordinate a constitutional court to a government or a parliamentary majority by restricting the court's powers as well as by interference with the court's *modus operandi* and the composition of the court. Those actions resulted in lowering the standards of the protection of the individual's rights and in infringing principles that are fundamental for the functioning of a democratic state ruled by law, such as the principles of the tri-division of power. Hence, in the conclusion of its opinion, the Helsinki Foundation for Human Rights stressed that in its opinion "the experiences of other states, in particular those in Central and Eastern Europe, indicate that hasty changes of law which are aimed at undermining the position of a constitutional court may result in a serious constitutional crisis and a distortion in mechanisms for balancing out the three branches of government".

5.4.4. As it was stated by the Tribunal in the recently issued judgments ref. nos. K 34/15 and K 35/15: "What safeguards the principle of the supremacy of the Constitution, and ultimately also the rights and freedoms of the individual, is *inter alia* the judicial review of the constitutionality of norms, conducted by an independent authority which is separate from the legislature and the executive. Since their origins, constitutional courts in European legal culture have been conceived of as 'safeguards for individuals against the tyranny of a majority' and guarantors of the precedence of law over power. After the experience of the totalitarian regimes, there is no doubt that even a democratically-elected parliament has no competence to issue determinations that would be contrary to the Constitution, even if they were justified by 'the good of the Nation', where the term is understood in an abstract way. Thus, the constitution-maker has delineated substantive and procedural limits for public authorities, within which all their determinations must fall in every case". In the present case, the Tribunal fully maintains that view. The essence of the constitutional review of law defined in this way constitutes a starting point for the examination of the allegations raised in the present case.

5.5. The allegation about the dysfunctionality of: Article 1(3) of the December Amending Act and amended Article 10(1) of the 2015 Constitutional Tribunal Act

5.5.1. The challenged provisions

Pursuant to Article 10(1) of the 2015 Constitutional Tribunal Act, as amended by Article 1(3) of the December Amending Act, "the General Assembly shall adopt resolutions by a two-thirds majority vote, in the presence of at least 13 judges of the Tribunal, including the President or Vice-President of the Tribunal, unless the Act provides otherwise".

5.5.2. The allegations of the applicants and the statements of the participants in the proceedings

In the opinion of the First President of the Supreme Court, Article 10(1) of the 2015 Constitutional Tribunal Act does not enhance the efficiency of the Tribunal's work, since the

General Assembly may "not be able to adopt certain resolutions, due to the lack of the required majority as well as the lack of the required quorum".

In the opinion of the second group of Sejm Deputies, "a potential effect of the entry into force of the challenged provisions is the complete paralysis of the functioning of the Constitutional Tribunal, as regards all matters reserved in the Tribunal's Rules of Procedure for the scope of competence of the General Assembly, i.e. both in budgetary, financial, organisational as well as personal matters". The second group of Sejm Deputies also argued that – in the event of a necessity to exclude more than two judges, due to their illness or incapacity to participate in the General Assembly for other reasons – the said Assembly will not have the quorum that is required for the adoption of a resolution.

By contrast, the Ombudsman stated that Article 1(3) of the December Amending Act "undermines the efficient adoption of resolutions by the General Assembly of the Judges of the Constitutional Tribunal. The solution introduced by the legislator is not only (…) dysfunctional, but it may also, in extreme instances, lead to the paralysis of the activity of the constitutional organ of the state".

The National Council of the Judiciary deemed that the challenged provision is "an irrational solution that may in practice constitute an obstacle to adopting resolutions that may prove indispensable for the functioning of the Tribunal (…). This may lead to serious legal consequences, as failure to adopt a resolution, e.g. as regards the income and expenditure of the Tribunal within an appropriate time-limit, may make it impossible for the Tribunal to fulfil its judicial duties, for the performance of which it was established".

The Public Prosecutor-General in his original statement (withdrawn on 4 March 2016) asserted that amended Article 10(1) of the 2015 Constitutional Tribunal Act is "a solution that not only leads to the internal inconsistency of a statute, but it is also dysfunctional, unpragmatic and irrational".

5.5.3. The course of the legislative process

Reasons for modifications in the content of Article 10(1) of the 2015 Constitutional Tribunal Act introduced by Article 1(3) of the December Amending Act were not clarified in the explanatory note for the December Amending Bill (cf. the Sejm Paper No. 122/8th term of the Sejm). The authors of the said Bill stated only that: "The General Assembly of the Judges of the Constitutional Tribunal should work and adopt resolutions being composed of a larger number of judges and by a higher majority vote. Hence, the introduction of the amendment that increases the number of judges to 13, and raises the required majority of votes to a two-thirds majority vote".

The authors of the Bill emphasised a need for introducing a change, without explaining what the change would involve.

In the course of the legislative proceedings, negative opinions on the new content of Article 10(1) of the 2015 Constitutional Tribunal Act were presented by: the National Council of the Judiciary; the Public Prosecutor-General; the National Council of Legal Advisers; the Helsinki Foundation for Human Rights; as well as the Legislative Bureau of the Chancellery of the Senate.

In its opinion of 16 December 2015, the Helsinki Foundation for Human Rights, pointing out to the lack of any reasons for the amendment to Article 10(1) of the 2015 Constitutional Tribunal Act in the explanatory note for the December Amending Bill, stated that

"the introduced requirements must be regarded as arbitrary in character. The aim underlying those requirements is to prevent the General Assembly of the Judges of the Tribunal, in its current (…) composition, from adopting resolutions. This implies limitations to the scope of the Tribunal's discretion, *inter alia*, within the ambit of disciplinary matters as well as decisions concerning the mandate of a judge of the Tribunal" (p. 2 of the Foundation's opinion).

In its opinion of 18 December 2015, the National Council of the Judiciary deemed that the proposed new wording of Article 10(1) of the 2015 Constitutional Tribunal Act is "an irrational solution that may in practice constitute an obstacle to adopting resolutions that may prove indispensable for the functioning of the Tribunal", which "may result in destabilising and disorganising the Constitutional Tribunal, thus negatively affecting the possibility of carrying out basic judicial activities. Furthermore, the proposed solution poses a threat to the independence of the Constitutional Tribunal, guaranteed in the Constitution; indeed, the introduction of the requirement of circa 90% of votes for the adoption of a resolution in every case – by the way, such a requirement does not occur in the context of any other assembly – exceeds the organisational and technical capacity for adopting resolutions. The absence of at least 3 judges of the Tribunal at a sitting of the General Assembly would render this assembly unable to adopt a legally effective resolution in any case" (p. 2 of the opinion of the said Council).

In his letter of 21 December 2015, the Public Prosecutor-General stated that the requirement of a two-thirds majority vote – obtained in the presence of at least 13 judges of the Tribunal – for the adoption of a resolution by the General Assembly "may result in a decisional paralysis of the said assembly. Indeed, it suffices that three judges of the Tribunal fail to be present, due to temporary incapacity – caused, for instance, by illness – and the General Assembly will be deprived of the possibility of adopting resolutions" (p. 6 of the Prosecutor's opinion).

In its opinion of 21 December 2015, the National Council of Legal Advisers argued that both raising the majority threshold that is required for the adoption of resolutions by the General Assembly and increasing the quorum "will have a negative impact on the effectiveness of the said assembly's activity" as well as "may cause dysfunctional effects within the scope of the performance (…) of the General Assembly's tasks, and consequently may lead to serious distortions in the functioning of the entire Tribunal. At the same time, one may not overlook the fact that, in the laconic explanatory note for the Bill, the applicants presented no substantive arguments for the introduction of such a significant change (p. 2 of the said Council's opinion).

By contrast, the opinion of 23 December 2015 submitted by the Legislative Bureau of the Chancellery of the Senate stressed the dysfunctionality of the solution adopted in Article 10(1) of the 2015 Constitutional Tribunal Act, as regards entrusting the General Assembly with the competence to commence the procedure to determine the expiry of the mandate of a judge of the Tribunal. It was stated in the said opinion that: "If due to the lack of the required quorum (13 judges), caused e.g. by an illness or another obstacle affecting more than two judges, the General Assembly is not able to adopt a resolution about referring an application to the Sejm, the process of choosing a new judge for the vacancy that has occurred will be suspended" (pp. 3-4 of the said opinion).

To sum up, the Tribunal concludes that the solution where the General Assembly adopts resolutions by a two-thirds majority vote in the presence of at least 13 judges of the Tribunal was negatively evaluated by all the authorities that submitted their opinions on the Sejm Paper No. 122/8th term of the Sejm. The all pointed out unanimously that amended Article 10(1) of the 2015 Constitutional Tribunal Act is dysfunctional and arbitrary, and that it may lead a decisional paralysis of the Tribunal. The authors of the Bill did not indicate, in the explanatory note thereto, even one argument to prove that the solution under discussion is reasonable and functional.

5.5.4. The process of adopting resolutions by the General Assembly of the Judges of the Tribunal – general characteristics; changes in comparison with the previous legal provisions

Article 10(1) of the 2015 Constitutional Tribunal Act, before the December amendments, stipulated that the General Assembly should adopt resolutions "by a simple majority vote, in the presence of at least two-thirds of the total number of the judges of the Tribunal, including the President or Vice-President of the Tribunal". Similarly, the previously binding Constitutional Tribunal Act of 1997 provided that the General Assembly "shall adopt resolutions if at least two-thirds of the total number of judges of the Tribunal, including the President and Vice President, take part therein" (cf. Art. 14(2)) as well as that "the resolutions of the General Assembly shall be adopted by a simple majority of votes, unless a statute provides otherwise" (cf. Art. 14(6)).

Thus, in accordance with the previous legal provisions, for the General Assembly to adopt a resolution, it was in principle necessary to have at least 10 judges of the Constitutional Tribunal present, most of whom voted in favour of the resolution, rather than against it. Pursuant to Article 10(1) of the 2015 Constitutional Tribunal Act, as amended by Article 1(3) of the December Amending Act, for the General Assembly to adopt a resolution, it is in principle necessary to have at least 13 judges of the Tribunal present, two-thirds of whom, i.e. at least nine judges of the Tribunal, vote in favour of the resolution. This is, in a sense, a doubly qualified majority, which meets both the requirement about the quorum (13 out of 15 judges), as well as the one about the majority needed for the adoption of a resolution (a two-thirds majority vote).

5.5.5. The assessment of the conformity of Article 1(3) of the December Amending Act and amended Article 10(1) of the 2015 Constitutional Tribunal Act with Article 2 and Article 173, in conjunction with the Preamble to the Constitution, as well as Article 10 of the Constitution

Addressing the allegation of the dysfunctionality of Article 1(3) of the December Amending Act and Article 10(1) of the 2015 Constitutional Tribunal Act requires specifying cases in which the General Assembly is obliged to adopt resolutions, i.e. cases where the provisions under examination are applicable.

Pursuant to Article 8 of the 2015 Constitutional Tribunal Act, resolutions of the General Assembly are adopted to:

– approve a report presenting information on significant issues arising from the activity and jurisprudence of the Tribunal (which is annually provided to the Sejm);

– select candidates for the positions of the President and Vice-President of the Tribunal
– consent to a judge of the Tribunal being held criminally liable and deprived of liberty;
– determine the expiry of the mandate of a judge of the Tribunal (amended as follows: prepare an application to be lodged with the Sejm for the expiry of the mandate of a judge of the Tribunal in cases specified in Article 36(1) of the Constitutional Tribunal Act [in the amended version]);
– determine that a judge of the Tribunal has lost his/her status as a retired judge of the Tribunal;
– adopt the rules of procedure of the Tribunal;
– adopt the rules and regulations of the Office of the Tribunal;
– adopt a draft estimate of revenue and expenditure of the Tribunal;
– perform other duties assigned to the General Assembly in the Act and in the rules of procedure of the Tribunal.

Only with regard to granting consent to a judge of the Tribunal being held criminally liable and deprived of liberty, the Act provides for different rules for adopting resolutions by the General Assembly. In both those circumstances, the said Assembly adopts resolutions by an absolute majority vote (cf. Art. 27(1) of the 2015 Constitutional Tribunal Act). As regards the other above-mentioned matters, resolutions are adopted in accordance with rules set out in Article 10(1) of the 2015 Constitutional Tribunal Act, i.e. – as introduced by Article 1(3) of the December Amending Act – by a majority of two-thirds of votes cast in the presence of at least 13 judges of the Tribunal. This entails that the lack of the quorum renders the said Assembly unable to exercise its competence to adopt resolutions; also, failure to obtain the required majority of two-thirds of votes makes it impossible to adopt a resolution in a given case.

When analysing matters with regard to which the legislator obliged the General Assembly to adopt a resolution, it should be stated as follows:

First of all, most of resolutions of the General Assembly should be adopted within a strictly specified time-frame:
– a resolution on the selection of candidates for the positions of the President and Vice-President of the Tribunal should be adopted in the last month of the terms of office of the incumbent President and Vice-President of the Tribunal; in the event that those positions become vacant earlier – within the time-limit of 21 days (cf. Art. 12(2) in conjunction with Art. 8(2) of the 2015 Constitutional Tribunal Act);
– at its annual sitting, the General Assembly should adopt a resolution to approve a report presenting information on significant issues arising from the activity and jurisprudence of the Tribunal (cf. Art. 6(1) in conjunction with Art. 8(1) of the 2015 Constitutional Tribunal Act) as well as ought to adopt an estimate of the Tribunal's revenue and expenditure (cf. Art. 8(8) of the 2015 Constitutional Tribunal Act);
– a resolution to express consent to a judge of the Tribunal being held criminally liable and deprived of liberty should be adopted by the General Assembly no later than within one month from the date of the submission of a relevant application (cf. Art. 27(1) in conjunction with Art. 8(3) of the 2015 Constitutional Tribunal Act);
– a resolution on the expiry of the mandate of a judge of the Tribunal as well as on the loss of the status of a retired judge of the Tribunal should be adopted forthwith in the case

where a judge of the Tribunal resigns from office or renounces the status of a retired judge of the Tribunal, a judge of the Tribunal is convicted by a legally effective court judgment for a premeditated offence prosecuted *ex officio* or for a premeditated fiscal offence, or a judge of the Tribunal is recalled from office or is deprived of the status of a retired judge of the Tribunal by a legally effective ruling (cf. Art. 36(1)(2) and Art. 41 of the 2015 Constitutional Tribunal Act).

Additional time-limits arise from special statutes (e.g. an estimate of the Tribunal's revenue and expenditure ought to be adopted within time-limits derived from the Public Finance Act of 27 August 2009 (Journal of Laws – Dz. U. of 2013, item 885, as amended).

In all those circumstances, the legislator is obliged to determine the mode of adopting resolutions by the General Assembly in such a way – both as regards obtaining the quorum required for the adoption of a resolution as well as the required majority of votes – that there is a realistic possibility of adopting those resolutions within set time-limits. By increasing the quorum and raising a majority of votes required for the adoption of a resolution, but without making the time-limits set for the General Assembly more flexible, the legislator creates a higher risk that there will be no legal possibility for the General Assembly to make a required decision within time-limits prescribed by law.

Secondly, the adoption of documents that are basic for the functioning of the Tribunal, i.e. the Tribunal's rules of procedure and the rules and regulations of the Office of the Tribunal, as well as the modification of the content of those documents also require – in the light of the provisions of the amended Constitutional Tribunal Act – a resolution passed by the General Assembly by a two-thirds majority vote held in the presence of at least 13 judges. A doubly qualified majority has never been provided for, as regards adopting the rules of procedure as well as rules and regulations in the context of public institutions. Indeed, such a form of determining the content of rules of procedure as well as of rules and regulations is contrary to the nature of those documents, since the documents should be modified in a flexible way, adjusted to the need to ensure the efficiency and effectiveness of activity of a given organ of public authority. Hence, the rules of procedure of the Supreme Court are adopted by the General Assembly of the Supreme Court by a simple majority vote (cf. Art. 16(3) in conjunction with Art. 3(2) of the Supreme Court Act of 23 November 2002; Journal of Laws – Dz. U. of 2003, item 499, as amended). Similarly, the rules of procedure of the Supreme Administrative Court are adopted by the General Assembly of the Judges of the Supreme Administative Court by an absolute majority vote in the presence of at least half of the total number of the members of the Assembly (cf. Art. 43 in conjunction with Art. 46(5) of the Act of 25 July 2005 on the Organisational Structure of Administrative Courts; Journal of Laws – Dz. U. of 2014, item 1647, as amended). Thus, the requirement of a doubly qualified majority is contrary to the nature of changes introduced into the rules of procedure and into the rules and regulations. Nor is the said requirement provided for in the context of a change in analogous provisions by the other highest organs of the judiciary. Moreover, the lack of a possibility of changing the rules of procedure of the Constitutional Tribunal – which regulate the procedure for processing applications, questions of law, and constitutional complaints – may, in the circumstances where this is needed, negatively affect the process of determining cases by the Tribunal.

Thirdly, rules for adopting resolutions provided for in Article 10(1) of the 2015 Constitutional Tribunal Act, as amended by Article 1(3) of the December Amending Act, are inconsistent with rules set out in other provisions, and the differences take no account of the significance of matters that are subject to voting. Indeed, one should note that a resolution passed by the General Assembly to express consent to a judge of the Tribunal being held criminally liable and deprived of liberty is currently adopted by an absolute majority vote with the exclusion of a judge who is indicated in the motion (cf. Art. 27(1) and (3) of the 2015 Constitutional Tribunal Act); by contrast, previously it was adopted by a two-thirds majority of votes cast by the judges of the Tribunal participating in a relevant sitting of the General Assembly (cf. Art. 7(3) of the 1997 Constitutional Tribunal Act). Consequently, the binding provisions depart from the principle that such resolutions by the General Assembly require greater support than the other resolutions which were adopted by that assembly by a simple majority vote. At present, it is much easier for the General Assembly to deprive a judge of the Tribunal of the fundamental guarantees of his/her independence (this requires obtaining only 6 votes) than to take decisions on organisational and technical matters such as the confirmation of an annual report, as well as the adoption of the Tribunal's rules of procedure or the rules and regulations of the Office of the Tribunal (in the case of which 9 votes need to be obtained). By contrast, the raising of standards with regard to the first type of resolutions is justified since a resolution of the General Assembly adopted to grant consent to a judge of the Tribunal being held criminally liable and deprived of liberty, in fact, eliminates the formal immunity of a judge of the Tribunal and the privilege of his/her personal inviolability, i.e. two guarantees of the judge's independence provided for in Article 196 of the Constitution.

Fourthly, the legislator did not mention any substitute ways of taking the decisions by a different organ of the Tribunal, if the General Assembly were not able to adopt a relevant resolution, due to the lack of the required quorum or the required majority. Such a situation where one organ of the Tribunal is vested with the sole competence within the scope of adopting decisions on a given matter obliges the legislator to devise an optimal procedure in this respect. Raising requirements for taking decisions, including the formulation of requirements that hinder the adoption of decisions is only possible when it is duly justified. Indeed, too stringent requirements may prevent an organ of the Tribunal from taking decisions, which – in the event of no alternative procedure – may result in the actual deprivation of the said organ of its legally granted competence. As regards Article 1(3) of the December Amending Act, and the amendment to Article 10(1) of the 2015 Constitutional Tribunal Act provided therein, the authors of the December Amending Bill in no way justified the raising of standards concerning the adoption of resolutions by the General Assembly. It should be deemed in such a situation that by introducing the requirement of a doubly qualified majority for the adoption of a resolution by the General Assembly and, at the same time, by providing an alternative procedure for taking decisions, the legislator at least acknowledged that in circumstances where the requirement is not met, a resolution provided for by statute will not be adopted.

Fifthly, what weighs against the challenged solution is a number of pragmatic considerations as well as life experience. The requirement of at least 13 judges participating in a sitting of the General Assembly could be regarded as possible to be met only if it is deemed highly improbable that at a given point more than two judges of the Tribunal will be unable to

participate and if it is to be considered certain that the General Assembly will always comprise at least 13 judges. However, the first of those situations may not be regarded as highly unlikely, as it may happen that three judges of the Tribunal will not be able – for various reasons, including health problems – participate in a sitting of the General Assembly. Also, the other situation may not be deemed certain, since if the Sejm delays the election of judges of the Tribunal to fill in vacancies after judges whose terms of office have expired, or if the President of Poland delays the giving of the oath of office to the judges of the Tribunal elected by the Sejm, then the General Assembly may comprise fewer judges than 13, which is a number required for adopting a resolution. The wording of Article 10(1) of the 2015 Constitutional Tribunal Act, as amended by Article 1(3) of the December Amending Act, does not take account of both of those situations, which are possible, and – in fact – in the second case, these are the circumstances in which the Tribunal is now.

In this context, it should be noted that the Tribunal belongs to the same category of the organs of the judiciary as courts do. Although solutions introduced by the legislator with regard to courts and tribunals do not have to be identical, it is inadmissible to regulate the same matters differently, when this is not justified by the unique nature of one of the segments of the judiciary. The General Assembly of the Judges of the Constitutional Tribunal has a similar organisational structure and analogous powers as the general assemblies of judges in other courts. Therefore, there should be a similar (though not necessarily identical) procedure for taking decisions by the said assembly, especially that this was the case earlier. However, Article 1(3) of the December Amending Act introduced, into Article 10(1) of the 2015 Constitutional Tribunal Act, a doubly qualified majority for adopting resolutions by the General Assembly of the Judges of the Tribunal, which is much higher than a majority required from the general assemblies of judges of other courts. Resolutions of the general assembly of the judges of a voivodeship administrative court and of the General Assembly of the Judges of the Supreme Administrative Court (cf. Art. 24(3) and Art. 46(5) of the Act on the Organisational Structure of Administrative Courts; Journal of Laws – Dz. U. of 2014, item 1647, as amended), similarly to resolutions of the general assembly of the judges of a court of appeal as well as of the general assembly of the judges of a circuit court (cf. Art. 33(5) and Art. 35(7) of the Act of 27 July 2001 on the Organisational Structure of Common Courts; Journal of Laws – Dz. U. of 2015, item 133, as amended) are passed by an absolute majority vote. By contrast, resolutions of the General Assembly of the Judges of the Supreme Court are adopted by a simple majority vote (cf. Art. 16(3) of the Supreme Court Act of 23 November 2002; Journal of Laws – Dz. U. of 2013, item 499, as amended). In this situation, the introduction of the requirement to adopt resolutions of the General Assembly of the Judges of the Constitutional Tribunal by a two-thirds majority of votes cast in the presence of at least 13 judges of the Constitutional Tribunal, and thus the unfounded differentiation within the scope of decision-making by analogous organs of the judiciary, must be regarded as arbitrary and as a hindrance to the efficient functioning of the Tribunal's General Assembly.

In conclusion, it should be stated that the unique nature of matters with regard to which the General Assembly is obliged to adopt a resolution requires that the legislator devise an appropriate decision-making procedure. The introduction of a doubly qualified majority which hinders – and at times prevents – the adoption of a relevant resolution is not based on any reasonable grounds, and hence it must be deemed arbitrary and contrary to the require-

ment of efficiency in the work of the said Assembly. In addition, the indicated solution undermines the significance of resolutions passed by the General Assembly with regard to the most important systemic matters, i.e. granting consent to a judge of the Tribunal being held criminally liable and deprived of liberty, in comparison with resolutions concerning merely organisational and technical matters.

Taking the above into consideration, Article 1(3) of the December Amending Act and amended Article 10(1) of the 2015 Constitutional Tribunal Act are inconsistent with Article 2 and Article 173, in conjunction with the Preamble to the Constitution, as well as Article 10 of the Constitution, as – by virtue of making it impossible for a constitutional organ of the state, i.e. the Constitutional Tribunal, to carry out its activity diligently and efficiently, as well as by undermining its independence and separateness from the other branches of government – they infringe the principles of a state ruled by law.

5.6. The allegation of the dysfunctionality of: Article 1(9) of the December Amending Act, insofar as it amends Article 44(1) and (3) of the 2015 Constitutional Tribunal Act; as well as amended Article 44(1) and (3) of the 2015 Constitutional Tribunal Act

5.6.1. The challenged provisions

The provisions of Article 44(1)-(3) of the 2015 Constitutional Tribunal Act, as amended by Article 1(9) of the December Amending Act, read as follows:

"1. The Tribunal shall adjudicate:

1) sitting as a full bench, unless the Act provides otherwise;

2) sitting as a bench of seven judges of the Tribunal in cases:

a) commenced by a constitutional complaint or a question of law,

b) concerning the conformity of statutes to ratified international agreements whose ratification required prior consent granted by statute;

3) sitting as a bench of three judges of the Tribunal in cases concerning:

a) the further consideration or dismissal of a constitutional complaint or an application filed by authorities referred to in Article 191(1), points 3 to 5, of the Constitution;

b) the exclusion of a judge of the Tribunal from the Tribunal's consideration of a case.

2. If cases referred to in para 1 points 2 and 3 are of particular complexity and significance, it is possible to refer them for adjudication by a full bench. The decision about referral shall be made by the President of the Tribunal, also upon motion by the adjudicating bench.

3. Adjudication by a full bench shall require the participation of at least 13 judges of the Tribunal."

5.6.2. The allegations of the applicants and the statements of the participants in the proceedings

In the opinion of the First President of the Supreme Court, adjudication by a full bench of the Tribunal, which requires the participation of at least 13 judges of the Tribunal, means that "the pace of the Tribunal's work will slow down – on the one hand, due to the lack of the possibility of referring cases to the three adjudicating benches composed of five judges,

and on the other, due to difficulties that may arise from the prescribed majority of two-thirds of votes for the issuance of a ruling".

According to the applicant, the implementation of amended Article 44(1)(1) and Article 44(3) of the 2015 Constitutional Tribunal Act will "considerably hinder the efficiency of the Tribunal's adjudication. One may not rule out instances where – due to failure to obtain the required majority – a ruling will not be issued, which would, in a sense, constitute refusal to determine a constitutional issue, and thus would be tantamount to an infringement of Article 8(1) of the Constitution, pursuant to which the Constitution is the supreme law of the Republic of Poland, and a violation of the right to a fair trial".

In the opinion of the second group of Sejm Deputies, the provisions of amended Article 44(1) and (3) of the 2015 Constitutional Tribunal Act make up "a highly dysfunctional construct and it will inevitably diminish the efficiency of the functioning of the Constitutional Tribunal to the extent which will make the performance of the Tribunal's constitutional tasks impossible, which poses a risk of the paralysis of the Tribunal". The second group of Sejm Deputies also argued that the indicated provisions constitute excessive interference on the part of the lawmaker with the realm of independence of the judiciary, since the provisions will – by being in force – result in preventing the Tribunal from the effective performance of its constitutional duties.

The Ombudsman also pointed out that Article 1(9) of the December Amending Act, which makes it impossible for the Tribunal to consider cases within a reasonable time-frame, is contrary to Article 45(1) of the Constitution and to the principle of the consideration of cases without undue delay, which arises therefrom. He also noted that the introduction of full bench adjudication as a general rule may, in some instances, prevent the Tribunal from performing its constitutional duties.

The National Council of the Judiciary stated that the new wording of Article 44 of the 2015 Constitutional Tribunal Act "may result in complete ineffectiveness of the Constitutional Tribunal or may at least significantly hinder the performance of tasks assigned to the Tribunal in Article 188 and 189 of the Constitution (…). The Tribunal's full bench adjudication should be limited only to cases that are most vital for the legal order of the state".

In the opinion of the Public Prosecutor-General, "the new wording of Article 44(1) of the 2015 Constitutional Tribunal Act (…) seem to clash with the requirement of efficiency in the work of public institutions", and within that scope the said provision "may be inconsistent with Article 2 in conjunction with the Preamble to the Constitution". However, "the consideration of virtually every case which was submitted by an application, even when it concerns only one provision of a statute or a regulation (…), by a full (13-person) bench of the Tribunal may lead to a paralysis of that Constitutional Court" (a thesis of the statement withdrawn on 4 March 2016).

5.6.3. The course of the legislative process

In the explanatory note for the December Amending Bill (cf. the Sejm Paper No. 122/8th term of the Sejm), the authors of the Bill argued for the amendments to Article 44(1)(1) and Article 44(3) of the 2015 Constitutional Tribunal Act in the following way: "The requirement that cases should be considered by the Tribunal sitting as a full bench arises from the necessity to analyse constitutional problems thoroughly and comprehensively, due to their special significance for the public good. In the Constitutional Tribunal Act of

25 June 2015, the said requirement was undermined because of the assumption that most cases received by the Tribunal may be considered by five judges. Such a solution should not be approved of, considering that the Tribunal is composed of 15 judges" (p. 3 of the explanatory note for the December Amending Bill).

Further on, in the explanatory note, the authors of the Bill addressed the question of increasing the minimum number of judges of the Tribunal that is required for a full bench of the Tribunal. By making reference to the previous provisions – from which it followed that full bench adjudication required the participation of at least 9 judges – they concluded that: "The difference between 9 and 15 persons is too considerable to claim that 9 judges constitute a full bench of the Tribunal. By contrast, the requirement of 15 persons may pose a problem in a situation where it is necessary to exclude a judge of the Tribunal from the consideration of a case. Thus, it is justified to raise the minimum number of judges that is necessary for a full bench of the Tribunal to at least 13 judges. This will guarantee the high quality and impartiality of rulings, as well as provide a certain "safety margin" in the event of excluding a judge from the Tribunal's consideration of a case" (p. 4 of the explanatory note for the Bill).

In the course of the legislative proceedings, the new wording of Article 44(1)(1) and Article 44(3) of the 2015 Constitutional Tribunal Act was negatively evaluated by the following authorities and bodies: the First President of the Supreme Court; the National Council of the Judiciary; the Public Prosecutor-General; the Polish Bar Council; the National Council of Legal Advisers; the Helsinki Foundation for Human Rights; as well as the Legislative Bureau of the Chancellery of the Senate.

The First President of the Supreme Court stated that such a solution implies "potential immense delays, and, in fact, a paralysis of the Tribunal. If the constitutional number of 15 judges and the assembly itself are preserved, the Tribunal will not be able to consider all in-coming cases within a reasonable time-limit. It is hard to evaluate this in any other way than as a glaring infringement of the rights and freedoms of citizens". The First President also pointed out that "the authors of the December Amending Bill failed to take account of the obvious lack of axiological justification for full bench adjudication, in particular in less significant cases, e.g. the conformity of sub-statutory acts to statutes" (p. 3 of the opinion of the First President of the Supreme Court).

The solution adopted in amended Article 44(1)(1) and Article 44(3) of the 2015 Constitutional Tribunal Act was also negatively evaluated by the Polish Bar Council. In the Council's opinion, full bench adjudication by 13 judges is inevitably bound to result in a paralysis of the Tribunal, and consequently in a disproportionate – as well as difficult to predict and justify – restriction of citizens' right to a fair trial (…)". The Council also noted that "the authors of the December Amending Bill did not provide for a procedure to be applied by the Constitutional Tribunal if (for instance) there were grounds for excluding more than two judges from the Tribunal's consideration of a case. The obligation to determine cases by an adjudicating bench composed of 13 judges would entail that the Tribunal could not fulfil its constitutional obligation, i.e. conduct an effective review of the constitutionality of law on the basis of a properly submitted application". Making reference to the current situation, the Polish Bar Council also stressed that: "in the event of the entry into force of the December Amending Bill, the paralysis of the Constitutional Tribunal will occur right away. The Tribunal is currently composed of ten judges and also, additionally, three judges to whom the

President of Poland has not yet given the oath of office, despite the said President's obligation to do so, as provided for in the 2015 Constitutional Tribunal Act and the Constitution, and as emphasised in the Tribunal's judgment of 3 December 2015, ref. no. K 34/15. A situation where three judges, properly elected by the Sejm during its 7th parliamentary term, may not commence the performance of their judicial duties and where, at the same time, a requirement is introduced that all cases should be considered by an adjudicating bench composed of 13 judges entail that, after the entry into force of the December Amending Bill, the Constitutional Tribunal will lose the capacity to exercise its competence" (pp. 4 and 5 of the Council's opinion).

Also, the Helsinki Foundation for Human Rights negatively evaluated the new rules for adjudication by a full bench of the Tribunal, stressing that: "this solution is ineffective and it blocks the Tribunal's activity, especially in the context of the current constitutional crisis. The Tribunal – which is currently composed of 10 judges of the Tribunal who exercise their mandate and 3 judges to whom the President of Poland has not given the oath of office – will not be able to effectively adjudicate on cases concerning constitutional infringements due to the lack of the required number of judges for the Tribunal to adjudicate as a full bench. In the view of the author of that proposal, the drafted solution 'enhances the gravity and significance of a ruling by the Constitutional Tribunal'. However, the said assumption will not be realised where the Tribunal will not at all be capable of effective adjudication" (p. 3 of the Foundation's opinion).

The National Council of the Judiciary stated that the proposed solution would "result in complete inefficiency of the Constitutional Tribunal (…). In the view of the Council, adjudication by a full bench of the Tribunal should continue to be reserved only for cases of utmost importance for the state's legal order (…). It is totally unjustified to have a full bench of the Tribunal consider the conformity of a sub-statutory act to a higher-level act. It ought to be emphasised that hitherto the legislator did not provide for any court to be bound, in principle, by the requirement to adjudicate as a full bench". In addition, the Council argued that: "The authors of the December Amending Bill presented no research results or analyses which could confirm the thesis that the Constitutional Tribunal, adjudicating as a larger panel of judges, would more thoroughly and comprehensively consider constitutional issues being subject to its review. What undermines such an argument is the fact that the public have great confidence in the rulings of the Constitutional Tribunal (regardless of the number of judges that determined a particular ruling). This is, *inter alia*, confirmed by the growing number of cases referred to the Tribunal". Therefore, the Council concluded that: "It is not the number of judges, but the careful and thorough process of selecting judges – which would take account of their expertise – that will guarantee the highest quality of the jurisprudence of the Constitutional Tribunal" (pp. 3 and 4 of the Council's opinion).

The Public Prosecutor-General deemed that what weighed against the requirement of the Tribunal's full bench adjudication was a number of "pragmatic considerations. Even if the judges of the Tribunal intensified their efforts, the Tribunal would not be able to consider incoming cases without undue delay". He also pointed out that the Tribunal's consideration of cases pertaining to the constitutionality of sub-statutory acts "does not seem to be significant enough to require the involvement of a full bench of the Tribunal". With regard to the requirement that a full bench of the Tribunal should be enlarged to comprise 13 judges, the Pub-

lic Prosecutor-General stated that the said solution: "may considerably hinder the functioning of the Tribunal in a situation where it will be impossible to have an adjudicating bench composed of that number of judges, e.g. due to a prolonged period of illness of some judges or the exclusion of more than 2 judges from the Tribunal's consideration of a case" (p. 4 of the Prosecutor's opinion).

According to the National Council of Legal Advisers, the solution proposed in Article 44(1)(1) and Article 44(3) of the 2015 Constitutional Tribunal Act "contradicts the principle that the legislator is to act in a rational way, as well as elementary rules that shape the effectiveness of adjudication, and thus it undermines the constitutional right to a fair trial, which constitutes one of the most important guarantees of the protection of the rights and freedoms of the individual in a democratic state ruled by law (…). The proposal in question is also unreasonable, due to its systemic inconsistency. What has been excluded from full bench adjudication is the category of cases concerning the conformity of statutes to international agreements ratified upon consent granted by statute, i.e. the category of cases that are – from the point of view of the hierarchy of the sources of law and the coherence of the legal order – of greater significance than, for instance, the review of the conformity of sub-statutory acts to the Constitution, international agreements and statutes, which the authors of the December Amending Bill intended to have examined, in every case, by a full bench of the Tribunal". The National Council of Legal Advisers also stated that: "the proposal to change the hitherto mode of considering cases by the Constitutional Tribunal contradicts the axiology of the judiciary. When proposing the consideration of cases by a full bench of the Tribunal, the authors of the said Bill justify that change by 'a need for thorough and comprehensive consideration of constitutional issues, due to their great significance for the good of the public'. Such justification shows complete lack of understanding with regard to the core functioning of the judiciary and the professional character of the Tribunal. Judges elected by the Sejm hold the highest qualifications within the scope of adjudication (…). Thus, regardless of its numerical composition, each adjudicating bench of the Constitutional Tribunal has proper competence to conduct thorough and comprehensive consideration of systemic problems, as, naturally, this results from the education of persons making up an adjudicating bench, their professional experience and career in the field of law" (pp. 3 and 4 of the aforementioned opinion).

The proposed amendments to Article 44(1)(1) and Article 44(3) of the 2015 Constitutional Tribunal Act were also evaluated negatively by the Legislative Bureau of the Chancellery of the Senate. In the Bureau's opinion of 23 December 2015, it was pointed out that: "the necessity to exclude more than 2 judges or their temporary indisposition will prevent the Tribunal from adjudicating as a full bench" (p. 5 of the opinion). It was also argued that: "the proposal for determining the composition of competent adjudicating benches (Art. 44) is not based on uniform criteria (the initiator of proceedings, the subject of a review), and, above all, it leads to a surprising effect i.e. a requirement for the Tribunal to adjudicate as a full bench on the conformity, to higher-level acts, of legal provisions issued by central state authorities, whereas e.g. the constitutionality of a statute in the context of review proceedings commenced by a question of law is to be determined – on the basis of Article 44(1)(2)(c) – by an adjudicating bench of 7 judges of the Tribunal" (p. 10 of the Bureau's opinion).

5.6.4. Adjudication by a full bench of the Constitutional Tribunal – general characteristics; changes in comparison with the previous legal provisions

Before the December Amending Act, adjudication by a full bench of the Tribunal required the participation of at least 9 judges of the Tribunal. A full bench of the Tribunal adjudicated in cases concerning:

- the conformity to the Constitution of: bills adopted by the Polish Parliament before they were signed by the President of the Republic of Poland; and international agreements before their ratification;
- the existence of an impediment to the exercise of the office by the President of Poland and the assignment of the temporary performance of the said President's duties to the Marshal of the Sejm;
- the conformity to the Constitution of the purposes or activities of political parties;
- disputes over powers between central constitutional state authorities;
- a situation where an adjudicating bench of the Tribunal intended to depart from a stance taken previously in a ruling issued by a full bench of the Tribunal;
- matters that were particularly complex or significant.

The Tribunal adjudicated sitting as a bench of 5 judges in cases on the conformity of statutes and international agreements to the Constitution as well as the conformity of statutes to international agreements whose ratification required prior consent granted by statute.

By contrast, the Tribunal adjudicated sitting as a bench of 3 judges in cases concerning:

- the conformity of legal provisions issued by central state authorities to the Constitution, ratified international agreements, and statutes;
- the conformity of other normative acts to the Constitution, ratified international agreements, or statutes;
- the further consideration or dismissal of a constitutional complaint or an application filed by authorities referred to in Article 191(1), points 3 to 5, of the Constitution;
- the exclusion of a judge of the Tribunal from the Tribunal's consideration of a case.

When comparing the previous content and amended wording of Article 44 of the 2015 Constitutional Tribunal Act, it needs to be stated that, with regard to cases concerning the exercise of the Tribunal's constitutional powers other than the review of the constitutionality of law, the Tribunal has always been obliged to adjudicate as a full bench. Differentiation is only made in the context of the constitutional review of law. Before the December Amending Act, within the scope of an *ex ante* review, a full bench of the Tribunal was required to consider an application filed by the President of Poland to determine the constitutionality of bills adopted by the Polish Parliament, before they were signed by the said President, and the constitutionality of international agreements before their ratification. As to an *ex post* (*a posteriori*) review, the Tribunal was able to adjudicate as a full bench in situations where an adjudicating bench of the Tribunal intended to depart from a stance taken previously in a ruling issued by a full bench of the Tribunal as well as with regard to matters that were particularly complex or significant. A case was to be deemed particularly complex or significant by the President of the Tribunal alone, or by the said President upon motion by an adjudicating bench (cf. Art. 44(2) of 2015 Constitutional Tribunal Act), with the proviso that particularly significant cases especially included cases the resolution of which might entail incurring expenditure not provided for in the State Budget Act. Thus, the criterion for selecting a

case for the Tribunal's full bench adjudication comprised two elements: the significance and impact of the case.

The other cases were considered by adjudicating benches composed of 3 or 5 judges, but the criterion for selecting an appropriate adjudicating bench was the rank of a legal act in the hierarchy of the sources of law. Statutes and international agreements were considered by adjudicating benches of 5 judges, whereas sub-statutory acts – by adjudicating benches of 3 judges.

Consequently, in the previous provisions, the Tribunal's full bench adjudication on cases concerning the review of the constitutionality of law constituted an exception when it comes to an *ex post* review, and a rule without exceptions as regards an *ex ante* review instituted by the President of Poland. In the light of Article 1(9) of the December Amending Act and Article 44(1) of the 2015 Constitutional Tribunal Act, it has become a rule that the Tribunal is to adjudicate as a full bench in cases falling within the scope of an *ex ante* review as well as in cases included in the scope of an *ex post* review, although with regard to the latter category of cases, adjudication by a bench of 7 judges of the Tribunal is provided for as an exception.

5.6.5. The assessment of the conformity of Article 1(9) of the December Amending Act, insofar as it amends Article 44(1) and (3) of the 2015 Constitutional Tribunal Act, as well as amended Article 44(1) and (3) of the 2015 Constitutional Tribunal Act, to Article 2 and Article 173 of the Constitution, in conjunction with the Preamble to the Constitution, as well as Article 10 and Article 45(1) of the Constitution

With regard to Article 1(9) of the December Amending Act and amended Article 44(1) and (3) of the 2015 Constitutional Tribunal Act, two types of allegations were raised. Firstly, in the context of cases considered by a full bench of the Tribunal, reservations were raised as to the number of judges that were to make up a full bench, arguing that the introduction of the requirement of a full bench composed of at least 13 judges of the Tribunal poses a risk of paralysing the Tribunal. Secondly, it was pointed out that there were no rational criteria for dividing cases into those considered by a full bench and those considered by an adjudicating bench composed of 7 judges, which implies that the legislator had specified the composition of adjudicating benches in an arbitrary and random way, without taking account of the unique character of particular cases.

The modifications of Article 44(1)-(3) of the 2015 Constitutional Tribunal Act, introduced by Article 1(9) of the December Amending Act, were justified by the authors of the December Amending Bill by a need for "thorough and comprehensive consideration of constitutional issues, due to their great significance for the good of the public" (the Sejm Paper No. 122/8th term of the Sejm). In the opinion of the Constitutional Tribunal, the above wording is unclear, and hinders the determination of the actual *ratio legis* of the analysed solution.

If the Polish phrase '*problemy konstytucjonalne*' (Eng. constitutional issues) used by the authors of the aforementioned Bill is construed by them as the Polish notion of '*problemy konstytucyjne*' (Eng. constitutional issues), which is defined in jurisprudence and literature on the subject, then the explanatory note for the Bill does not explain why there is a need for "thorough and comprehensive consideration" of a case commenced by an application and referred to a full bench, whereas there is no mention of such a need in the context of – re-

ferred to a panel of 7 judges of the Tribunal – cases commenced by constitutional complaints or questions of law as well as cases concerning the conformity of statutes to international agreements whose ratification required prior consent granted by statute. The Tribunal states that any case pertaining to the issue of the constitutionality of law requires "thorough and comprehensive consideration". In the judicial practice of the Tribunal, cases that are most problematic are those directly related to citizens, which primarily comprises cases commenced by constitutional complaints or questions of law, as those cases emerge from court proceedings involving particular individuals, and those proceedings continue after the Tribunal's issuance of its judgment. Similarly, cases concerning the conformity of statutes to international agreements whose ratification required prior consent granted by statute – despite being excluded by the legislator from the requirement of the Tribunal's full bench consideration – constitute cases that require "thorough and comprehensive consideration"; this is so, because they pertain to specific international-law obligations of the Republic of Poland as well as the problem of a conflict between domestic law and international law, which is, in practice, difficult to resolve. However, the legislator has decided that these two categories of cases are to be determined by an adjudicating bench composed of 7 judges. By contrast, according to the legislator, due to the need for "thorough and comprehensive consideration", a full bench of the Tribunal should examine all the other cases, including those concerning the constitutionality of regulations or other sub-statutory acts issued by central state authorities. In other words, the legislator has deemed that an abstract review of the constitutionality of law, which is instituted by parties indicated in Article 191 of the Constitution, most of which are public authorities, requires "thorough and comprehensive consideration" by a full bench of the Tribunal, whereas the review of the constitutionality of law in the context of specific cases, which is instituted by citizens by the submission of constitutional complaints or by courts referring questions of law, does not require such "thorough and comprehensive consideration" and may be conducted by an adjudicating bench composed of 7 judges of the Tribunal. Such an assumption is unreasonable and contrary to the principles of a democratic state ruled by law; furthermore, it undermines the right to a fair trial, which is closely linked with the constitutional review of law carried out with regard to specific cases.

What is more, the explanatory note for the December Amending Bill indicated that an adjudicating bench composed of 13 judges of the Tribunal – by contrast to a panel of 9 judges – "will guarantee the quality and impartiality of rulings". Consequently, since cases commenced by constitutional complaints or questions of law as well as cases concerning the conformity of statutes to international agreements whose ratification required prior consent granted by statute are to be considered by 7 judges of the Tribunal, then one may conclude that the legislator has deemed, *a contrario*, that they may be considered by a certain number of judges that does not "guarantee" – as argued by the authors of the above-mentioned Bill – the quality and impartiality of rulings. The presumption that the legislator is to act in a constitutional and rational way entails that such conclusions – which directly arise from the explanatory note for the Bill – should be rejected as fallacious and completely unacceptable. Indeed, such reasoning leads to the conclusion that the legislator's purpose is to selectively guarantee that only certain cases will be examined in a way that "will guarantee the quality and impartiality of rulings".

The legislator does not have full discretion to determine matters which are as fundamental for the functioning of the organs of the judiciary as the numbers of judges that make up particular adjudicating benches. Pursuant to the Preamble to the Constitution, when regulating this matter, the legislator is obliged to guarantee diligence and efficiency in the work of courts and tribunals. Therefore, the composition of adjudicating benches must be determined in such a way that they will guarantee the consideration of cases which is diligent – i.e. impartial, independent and decisionally autonomous – as well as efficient, i.e. conducted without undue delay. When specifying rules for determining the composition of adjudicating benches, the legislator must also take account of the necessity to respect the independence of the Tribunal and its judges. In particular, the said rules should allow the judges of the Tribunal to exercise the guarantees of their independence, such as e.g. the legal institution of excluding a judge of the Tribunal from the Tribunal's consideration of a case. If judges of the Tribunal should resort to that legal institution, this may not paralyse the work of the Tribunal.

What follows from the explanatory note for the December Amending Bill is that the authors thereof declared their intentions to ensure diligence in the work of the Tribunal, and in particular to guarantee the quality and impartiality of the Tribunal's rulings. However, to achieve that goal, inadequate means have been chosen. An adjudicating bench composed of a larger number of judges does not guarantee a higher quality and greater impartiality of issued rulings. Indeed, the number of adjudicating judges does not directly translate into the quality of a determination issued by the Tribunal.

The Tribunal notes that larger panels of judges often entail working out compromises accepted by a majority of the judges. Every member of an adjudicating bench composed of more than one judge – apart from the possibility of voting for or against a determination – can additionally file a dissenting opinion. The bigger an adjudicating bench, the greater likelihood that a ruling will not be adopted unanimously, or will be a result of reaching a compromise. Also, an adjudicating bench composed of a number of judges guarantees a possibility of taking account of different viewpoints presented by persons who have knowledge of various fields as well as varied professional experience. Moreover, such an adjudicating bench allows to have a discussion in a bigger group, and as part thereof – a dispute, or even a critique, which is not possible when a ruling is issued by only one judge.

When specifying the number of judges for a particular adjudicating bench, the legislator should, however, also take account of the necessity to guarantee efficiency in the work of the Tribunal. Involving all judges in the consideration of one case limits the possibility of their involvement in the parallel examination of other cases. Mentioned in the previously binding provisions, the requirement to consider most cases by panels of 3 or 5 judges of the Tribunal made it possible to have five adjudicating benches of 3 judges and three adjudicating benches of 5 judges, examining cases simultaneously. Introduced in Article 1(9) of the December Amending Act and in amended Article 44(1)(1) of the 2015 Constitutional Tribunal Act, the rule that a full bench of the Tribunal, composed of at least 13 judges, considers the constitutionality of statutes as well as the conformity of sub-statutory acts to the Constitution or statutes makes it impossible to compose another parallel adjudicating bench that would, at the same time, be examining another case. Thus, the rules of arithmetic lead to the conclusion that time needed to process cases concerning sub-statutory acts may increase fivefold, and as regards cases pertaining to the constitutionality of statutes – threefold.

When determining the number of judges that will make up an adjudicating bench, the legislator is obliged to take account of all the above arguments, and then weigh up all the advantages and disadvantages of a particular solution under consideration. Therefore, he may not rely solely on the assumption, proved above to be erroneous, that the larger an adjudicating bench, the better a ruling. The said logic undermines the point of having smaller panels of judges, or even single judges, adjudicating on cases, but such adjudicating benches have been known in the Polish civil-law, criminal-law and administrative-court procedures, and the said benches have never been challenged as lacking impartiality or failing to guarantee thorough and comprehensive consideration of cases. Diligence in adjudicating – which is construed as impartiality, independence and decisional autonomy – is guaranteed by the expertise of persons making up an adjudicating bench, their professional experience and high moral standards, and not by the number of the said judges.

Also, the legislator does not have full discretion as regards determining the composition of an adjudicating bench for a given case.

When determining that different cases will be considered by adjudicating benches composed of different numbers of judges of the Tribunal, the legislator is obliged to divide cases on the basis of properly selected and reasonable criteria. Cases that are more complex or concern the constitutionality of legal acts positioned higher in the hierarchy of the sources of law should be considered by larger panels of judges, unlike cases which are simpler or pertain to the constitutionality of legal acts of a relatively low rank. Thus, the legislator may not divide cases among various adjudicating benches in a random and arbitrary way, as this, in a sense, constitutes a form of categorisation of cases considered by the Tribunal on the basis of their significance and impact. Applying irrational and illogical criteria when dividing cases among differently composed adjudicating benches may lead to a situation where cases of greater importance to citizens – concerning the constitutionality of legal norms directly applicable to citizens – will be downgraded to the category of less significant cases.

An analysis of Article 1(9) of the December Amending Act and amended Article 44(1) and (3) of the 2015 Constitutional Tribunal Act leads to the conclusion that the legislator had no rational criteria in mind when dividing cases for consideration by adjudicating benches composed of different numbers of judges. On the one hand, cases of considerable significance and impact – i.e. those commenced by constitutional complaints and questions of law as well as cases concerning the conformity of statutes to international agreements whose ratification required prior consent granted by statute – have been assigned by the legislator to a smaller panel of judges. On the other hand, with regard to all cases commenced by an application – irrespective of their subject-matter and the significance of a constitutional issue raised therein – the legislator has required that such cases should be considered by a full bench of the Tribunal. Consequently, cases pertaining to the constitutionality of sub-statutory acts, such as regulations, resolutions or orders, were deemed to be more important than cases concerning statutes challenged by a constitutional complaint or a question of law.

The irrationality of such an approach also arises from the fact that a full bench of the Tribunal would have to consider cases concerning sub-statutory acts which common courts, with a single judge adjudicating, or administrative courts, with a panel of 3 judges, may bypass. At the same time, represented by an adjudicating bench that is almost twice as small in

comparison to a full bench, the Tribunal is to examine the constitutionality of statutes which bind courts on the basis of Article 178(1) of the Constitution.

What is more, for completely incomprehensible reasons, the legislator has decided that cases in which statutes are challenged will be examined by the Tribunal by different adjudicating benches, depending on what is indicated as a higher-level norm for a review. Thus, the constitutionality of a statute is to be examined by a full bench of the Tribunal, whereas the conformity of that very statute to international agreements whose ratification required prior consent granted by statute – by an adjudicating bench of 7 judges, although – as aptly noted by the Ombudsman – the substance of the two cases may be virtually the same (indeed, the provisions of the Constitution often correspond to e.g. provisions included in the European Convention for the Protection of Human Rights). Thus, this leads to the conclusion that an adjudicating bench in a given case will, in fact, be determined by the initiator of proceedings, by selecting higher-level norms for a review.

The lack of distinctions between the significance of cases when determining the composition of adjudicating benches is also confirmed by the fact that a full bench of the Tribunal is to consider cases where the subject-matter and a higher-level norm for a review are positioned lower in the hierarchy of the sources of law than the subject-matter and a higher-level norm for a review in cases considered by adjudicating benches composed of 7 judges. In the light of the legal solutions adopted in Article 1(9) of the December Amending Act and in amended Article 44(1) and (3) of the 2015 Constitutional Tribunal Act, the conformity of a substatutory act (e.g. a regulation issued by an organ of the executive, or an order) to a statute is to be examined by a larger panel of judges than in the context of examining the conformity of a statute to an international agreement whose ratification required prior consent granted by statute.

To sum up, it should be stated that the authors of the December Amending Bill did not indicate a reasonable criterion for selecting cases to be considered by a full bench, and an analysis of the content of the challenged provisions leads to the conclusion that there is no such criterion. The legislator's division of cases in this respect has been completely random, without taking account of the significance and impact of the cases as well as the subject-matter of a review and higher-level norms for the review.

In the light of the above circumstances, the Tribunal has stated that Article 1(9) of the December Amending Act and amended Article 44(1) and (3) of the 2015 Constitutional Tribunal Act are arbitrary and dysfunctional, and they pose a threat to citizens' exercise of the right to a fair trial in cases commenced before the Tribunal by a question of law or a constitutional complaint. The introduction of the requirement to have cases considered by a full bench of the Tribunal composed of at least 13 judges is inconsistent with Article 2 and Article 173, in conjunction with the Preamble to the Constitution, as well as Article 10 and Article 45(1) of the Constitution, as – by virtue of making it impossible for a constitutional organ of the state, i.e. the Constitutional Tribunal, to carry out its activity diligently and efficiently, as well as by undermining its independence and separateness from the other branches of government – it infringes the principles of a state ruled by law.

When adjudicating on the non-conformity of Article 1(9) of the December Amending Act and amended Article 44(1) and (3) of the 2015 Constitutional Tribunal Act to Article 45(1) of the Constitution, the Tribunal disagreed with the Public Prosecutor-General, who

(in his statement, which was ultimately withdrawn) considered the last-mentioned provision to be an inadequate higher-level norm for the review. Although questions of law and constitutional complaints are subject to consideration by an adjudicating bench of 7 judges, and not – as applications – by a full bench of the Tribunal, the lack of efficiency in the work of the Tribunal – caused by the number of cases requiring consideration by a full bench – together with the requirement to consider cases in chronological order will prolong the time needed for the consideration of questions of law and the waiting time for the issuance of rulings on cases concerning constitutional complaints. A further result of those requirements will be an infringement of the right of a party to court proceedings to have its case considered without undue delay, which is guaranteed in Article 45(1) of the Constitution.

5.7. The allegation of the dysfunctionality of: Article 1(10) of the December Amending Act and added Article 80(2) of the 2015 Constitutional Tribunal Act

5.7.1. The challenged provisions

Pursuant to Article 80(2) of the 2015 Constitutional Tribunal Act, added by Article 1(10) of the December Amending Act: "The dates of hearings or the dates of sittings in camera, at which applications are considered, shall be set in the order in which cases are received by the Tribunal".

5.7.2. The allegations of the applicants and the statements of the participants in the proceedings

In the opinion of the First President of the Supreme Court, added Article 80(2) of the 2015 Constitutional Tribunal Act "is a strikingly dysfunctional provision which may deprive the Tribunal of its ability to react in crisis situations, where the issuing of a ruling by bypassing the chronological order of cases may prove necessary, e.g. in the event that the Tribunal needs to determine temporary incapacity of the President of Poland to exercise the office or the constitutional court has to resolve a dispute over powers".

In the view of the second group of Sejm Deputies "the approach to determining the order in which cases are to be considered by the Tribunal", which has been adopted in added Article 80(2) of the 2015 Constitutional Tribunal Act, "does not meet the standards of rationality and functionality (…). Indeed, the approach takes no account of the fact that cases vary in their complexity" and that some of them should be given priority. The Sejm Deputies emphasised that: "the said provision will, in an obvious way, undermine the efficiency of the Tribunal, and will also interfere with the constitutionally guaranteed independence of the judiciary, which should have the autonomy to decide about the order of considering cases pending before the organs of the judiciary".

By contrast, the Ombudsman argued that Article 1(10) of the December Amending Act displays internal inconsistency, since – on the one hand – it manifests the legislator's intention to have questions of law and constitutional complaints considered bypassing the chronological order of cases, and – on the other hand – it requires that the dates of hearings and the dates of sittings in camera be set in the order in which cases are received by the Tribunal. Hence, the provision violates the principles of appropriate legislation. Moreover, the Ombudsman pointed out that: "the approach where cases are considered only in chronological order is a dysfunctional approach. The degree of complexity of cases reaching the Tribunal, as well as the degree of complexity of legal issues related thereto, varies".

The National Council of the Judiciary stated that added Article 80(2) of the 2015 Constitutional Tribunal Act considerably hinders the efficiency of proceedings before the Tribunal. The Council emphasised that: "The adoption of the rule that the dates of hearings should be set in chronological order deprives the President of the Tribunal of the mechanism to reasonably and effectively manage the work of the Tribunal, in particular in the event of a need to react quickly in emergency situations which require the immediate issuance of a determination".

According to the opinion of the Public Prosecutor-General (expressed in his statement, which was ultimately withdrawn), added Article 80(2) of the 2015 Constitutional Tribunal Act rules out the possibility of the Tribunal's earlier consideration of cases the prompt determination of which may be of vital significance for the state's interests or may be necessary to guarantee the rights and obligations of persons and citizens".

5.7.3. Setting the dates of hearings or the dates of sittings in camera – changes in comparison with the previous legal provisions

Until the adoption of the December Amending Act, none of the previously binding statutes on the Constitutional Tribunal provided for setting the dates of hearings or the dates of sittings in camera in chronological order. Each case was regarded as separate from other cases, and the decision of the presiding judge of an adjudicating bench in this respect was autonomous. The decision could be based on factors such as: the degree of complexity of a case; the significance of the case; or the concurrence of the views of the Tribunal's judges on the extent to which the case has been resolved and on the proposal for a determination.

Article 1(10) of the December Amending Act and added Article 80(2) of the 2015 Constitutional Tribunal Act, which are challenged herein, introduce a formalised mechanism for setting the dates of hearings or the dates of sittings in camera, at which applications are considered, in an automatic way, "in the order in which [*lege non distinguente* – all] cases are received by the Tribunal". However, the said provisions do not refer to time-frames for determining other cases pending before the Tribunal.

5.7.4. The course of the legislative process

Article 80(2) of the 2015 Constitutional Tribunal Act was not included in the original version of the December Amending Bill (cf. the Sejm Paper No. 122/8th term of the Sejm). The said provision was proposed as an amendment to the Bill during the work of the Sejm's Legislative Committee after the first reading.

During the second reading of the Bill, at the Sejm's sitting on 22 December 2015, Mr A. Mularczyk, a Sejm Deputy, justified the need for introducing the amendment in the following way: "We're also introducing legislative solutions that will cause the Constitutional Tribunal to adjudicate in the order in which cases are received by the Tribunal. The key is to eliminate the possibility of juggling with cases, where certain cases are not determined for two, three, five years, whereas others are determined within a month or three weeks" (the shorthand report on the 6th sitting /the 8th term of the Sejm, 22 December 2015, p. 89).

Due to the proposal of the said amendment at such a late stage, it was not evaluated by the authorities and bodies that had submitted their opinions on the original Bill.

Allegations that the solution adopted in added Article 80(2) of the 2015 Constitutional Tribunal Act was neither constitutional nor reasonable were raised by certain Sejm Deputies at the sitting of the Sejm's Legislative Committee on 22 December 2015. It was ar-

gued that: "This is yet another provision aimed at slowing down the work of the Tribunal. (…) Setting the dates of sittings in camera at which applications are to be considered, by relying on the chronological order of cases, may result in a situation where, for instance, very similar cases – which nowadays are joined by the Tribunal and adjudicated upon in one sitting – will not be joined due to the strict requirement to consider cases in the order in which they are received by the Tribunal. We believe that this will, in a sense, paralyse the work of the Tribunal" (the opinion voiced by Mr M. Rząsa, a Sejm Deputy; the full transcript of the 6th sitting of the Legislative Committee/ the 8th term of the Sejm, 22 December 2015, p. 26). It was also pointed out that: "This provision will hinder the determination of cases that are of significance, due to being urgent or being landmark cases. It is obvious that the Tribunal receives cases which vary in significance. The President of the Tribunal, who has citizens' best interests at heart, should be able to proceed and decide which of those cases are urgent. There are objective factors that contribute to the urgency of a case, e.g. the order of reviewing the constitutionality of a State Budget Bill, or the constitutionality of EU acts which need to be implemented before a certain deadline, so as not to risk being held responsible for far-reaching consequences. The Constitutional Tribunal should verify the constitutionality of such acts more expeditiously than in the context of its constitutional review of other acts. It is also worth noting that it is perfectly justifiable to join various cases. Where cases pertain to the same subject-matter, they should be joined and considered during the same sitting. The introduction of the said provision will prevent joining cases and considering them together. (…) At this point, the lack of a possibility of joining such cases on the part of the Constitutional Tribunal will result in a complete paralysis of that institution. We may not create institutions that will be dysfunctional by definition" (the opinion voiced by Ms K. Gasiuk-Pihowicz; the full transcript of the 6th sitting of the Legislative Committee/ the 8th term of the Sejm, 22 December 2015, pp. 26 and 27).

During the second reading of the Bill at the sitting of the Sejm on 22 December 2015, the Sejm Deputies of the parliamentary opposition pointed out that: "This is yet another provision that will negatively affect citizens. This provision will paralyse the Constitutional Tribunal. It will ultimately extend the time of adjudication on cases that concern Polish citizens. This is also a provision which will lead to a situation where the President of the Tribunal will not be able to apply the criterion of significance when referring cases for consideration, for instance with regard to cases pertaining to the conformity of statutes to international agreements" (the opinion voiced by Ms M. Wielichowska; the shorthand report on the 6th sitting/ the 8th term of the Sejm, 22 December 2015, p. 170).

5.7.5. The assessment of the constitutionality of: Article 1(10) of the December Amending Act and added Article 80(2) of the 2015 Constitutional Tribunal Act

In proceedings before the Tribunal, there are two types of applications.

The first type comprises applications by means of which proceedings are instituted before the Constitutional Tribunal in the following cases concerning:

– an abstract review of the hierarchical conformity of law (cf. Art. 191(1) in conjunction with Art. 188(1)-(3) of the Constitution);
– an *ex ante* (*a priori*) review of the conformity of statutes and international agreements to the Constitution (cf. Art. 122(3) and Art. 133(2) of the Constitution);

– the determination of the conformity to the Constitution of the purposes or activities of political parties (cf. Art. 191(1) in conjunction with Art. 188(4) of the Constitution);
– the resolution of disputes over powers (cf. Art. 192 in conjunction with Art. 189 of the Constitution);
– temporary incapacity of the President of Poland to exercise the office as well as the assignment of the Marshal of the Sejm with the temporary performance of the duties of the head of state (cf. Art. 131(1) of the Constitution).

The said applications constitute a basic means for instituting proceedings before the Tribunal – upon application, proceedings are instituted in all cases falling within the scope of the Tribunal's jurisdiction, except for cases commenced on the basis of a question of law or a constitutional complaint.

The other group of applications, in proceedings before the Tribunal, comprises various interlocutory applications which are subject to consideration at a hearing or a sitting in camera. For instance, a participant in proceedings may file e.g. a request that a judge of the Tribunal be excluded from the consideration of a relevant case (cf. Art. 48(1) of the 2015 Constitutional Tribunal Act), an application for dispelling doubts as to the content of a ruling of the Tribunal (cf. Art. 107(1) of the 2015 Constitutional Tribunal Act), evidentiary submissions that are necessary for the determination of a case (cf. Art. 58(1) of the 2015 Constitutional Tribunal Act); and a complainant may file a request for the reimbursement of the costs of proceedings in accordance with the prescribed norms (cf. Art. 73(1) of the 2015 Constitutional Tribunal Act). Furthermore, pursuant to Article 74 of the 2015 Constitutional Tribunal Act, in matters not regulated by the Act, with regard to proceedings before the Tribunal, the provisions of the Civil Procedure Code are to be applied accordingly, which implies a possibility of filing applications in proceedings before the Tribunal also on the basis of the said Code.

The Constitutional Tribunal states that Article 1(10) of the December Amending Act and added Article 80(2) of the 2015 Constitutional Tribunal Act, which are under review herein, are applicable to both above-mentioned categories of applications, as the wording of those provisions gives no grounds for any exclusion. Since none of applications lodged with the Tribunal may be considered in a different way than at a hearing or at a sitting in camera, it needs to be concluded that the indicated provisions require that each such application should, regardless of its subject-matter, be considered within a time-frame set on the basis of the order in which cases are received by the Tribunal.

Before examining the constitutionality of Article 1(10) of the December Amending Act and corresponding Article 80(2) of the 2015 Constitutional Tribunal Act, it should be pointed out that they contradict other provisions of the last-mentioned Act which set fixed time-limits for considering an application lodged with the Tribunal. Although the Tribunal does not examine the horizontal conformity of legal acts, the legislator's enactment of provisions which make it impossible to apply other provisions, without repealing the latter, falls within the scope of the Tribunal's review from the point of view of compliance with the principles of appropriate legislation. Mutually contradictory provisions concerning the *modus operandi* of a public authority make it impossible also for that authority to conduct its work diligently and efficiently.

Firstly, in accordance with Article 85(1) of the 2015 Constitutional Tribunal Act, which repeats the wording of Article 224(2) of the Constitution, in a case where the President of Poland requests the Tribunal to examine the conformity to the Constitution of the State Budget Bill or the Interim State Budget Bill, before they are signed, the Tribunal is required to issue a ruling within 2 months from the date of the submission of the application. The examination of the application filed by the President of Poland in this respect in the order in which cases are received by the Tribunal entails that the observance of the said time-limit will not be possible due to circumstances that are not related to the challenged application (the number of cases that are awaiting consideration by the Tribunal). Thus, one may derive a norm from Article 224(2) of the Constitution (repeated in Article 85(1) of the 2015 Constitutional Tribunal Act), in accordance with which the said President's application to determine the conformity to the Constitution of the State Budget Bill or the Interim State Budget Bill should be considered as a priority before other applications. This is, in turn, excluded by Article 1(10) of the December Amending Act and corresponding Article 80(2) of the 2015 Constitutional Tribunal Act, which do not provide for an exception to the principle of the consideration of all applications, and thus also this application, in the order in which cases are received by the Tribunal. Indeed, the said provisions do not contain the proviso: "unless the Constitution or a statute states otherwise". Even if such a proviso were included therein, it is dubious whether Article 224(2) of the Constitution or Article 85(1) of the 2015 Constitutional Tribunal Act could be regarded as provisions that "state otherwise". The necessity to consider the application of the President of Poland as a priority in a case concerning the conformity to the Constitution of the State Budget Bill or the Interim State Budget Bill, before they are signed, arises from the time-limit set in those provisions for the issuing of a ruling, and not from the fact that they provide for a different order of considering cases.

Secondly, in the light of Article 86(1) of the 2015 Constitutional Tribunal Act, the presiding judge of an adjudicating bench is obliged to set a date for the first deliberation no later than within 2 months from the lapse of the time-limit for the submission of statements by participants in proceedings. By contrast, pursuant to Article 82(2) of the 2015 Constitutional Tribunal Act, a participant in proceedings is required to present a written statement on the case within two months from the date of service of the notification. Since the judges' deliberation takes place at a sitting in camera, it should be governed by Article 1(10) of the December Amending Act and corresponding Article 80(2) of the 2015 Constitutional Tribunal Act, which require that a date of that sitting should be set in the order in which cases are received by the Tribunal. Neither Article 86(1) nor Article 82(2) of the 2015 Constitutional Tribunal Act provides for any exceptions to the time-limits laid down in their wording. Although the first one makes reference to Article 45(3) of the 2015 Constitutional Tribunal Act, which stipulates that the President of the Tribunal (and, thus, not only the presiding judge of an adjudicating bench) may set a date of the first deliberation of the adjudicating bench. When determining the said date, the President of the Constitutional Tribunal is, however, also bound by Article 86(1) and Article 82 of the 2015 Constitutional Tribunal Act. Yet, it is impossible to apply the two provisions, since the former sets a time-limit for expediting proceedings, and the latter requires that the date should be set only after the date of a hearing or a sitting in camera in cases which were received by the Tribunal later.

Thirdly, Article 1(10) of the December Amending Act and added Article 80(2) of the 2015 Constitutional Tribunal Act raise reservations in the light of Article 83 of the 2015 Constitutional Tribunal Act, pursuant to which if, in at least two applications, questions of law or constitutional complaints, the subject of a review has been specified in the same way, the President of the Tribunal may order that those applications, questions of law or constitutional complaints be considered jointly. The decision to jointly consider applications, questions of law or constitutional complaints is made by the President of the Tribunal, who determines the composition of an adjudicating bench. The President of the Tribunal may order the joint consideration of cases also upon motion by the adjudicating bench. If the President of the Tribunal resorts to this solution, the decision to jointly consider cases commenced by two applications makes it problematic how to determine the date of a hearing or a sitting in camera. Indeed, pursuant to Article 80(2) of the 2015 Constitutional Tribunal Act, added by Article 1(10) of the December Amending Act, the dates of hearings or the dates of sittings in camera, at which the applications are to be considered, should be set in the order in which cases are received by the Tribunal. Cases that are selected to be considered jointly are received by the Tribunal in a different order, hence setting one date for a hearing or a sitting in camera would infringe Article 1(10) of the December Amending Act, and added Article 80(2) of the 2015 Constitutional Tribunal Act. This leads to a conclusion that the last-mentioned provisions make it impossible to join two cases commenced by applications.

In addition, what complicates the situation is the fact that Article 83 of the 2015 Constitutional Tribunal Act permits joining not only cases that are commenced in the same way, but also creates a possibility of considering jointly an application and a question of law or a constitutional complaint, if the subject of a review was specified therein in the same way. In this context, joining those cases would result in a situation where cases commenced by a complaint or a question of law – due to the fact that they are to be considered together with a case commenced by an application – would also be subject to Article 1(10) of the December Amending Act, and added Article 80(2) of the 2015 Constitutional Tribunal Act. The cases to be considered jointly that were commenced by means of a constitutional complaint or a question of law would have to be assigned a date for a hearing or a sitting in camera in the order in which cases are received by the Tribunal.

Having considered the above findings, it ought to be stated that Article 1(10) of the December Amending Act and added Article 80(2) of the 2015 Constitutional Tribunal Act make it impossible for the Tribunal to take account of other provisions of law in the process of adjudication, and in particular of: Article 224(2) of the Constitution, repeated in the content of Article 85(1) of the 2015 Constitutional Tribunal Act; and also Article 86(1) and Article 83 of the 2015 Constitutional Tribunal Act.

Moving on directly to the evaluation of the constitutionality of the challenged provisions, it needs to be pointed out that the principle of efficiency in the work of public institutions requires the construction of such an organisational and procedural framework that the institutions could perform their tasks within prescribed time-limits, without undue delay, working as efficiently as possible. Also, the said principle rules out the adoption of solutions which are devised to slow down the work of the institutions or to correlate the pace of the said work with random circumstances.

The introduction of the requirement to set the dates of hearings and the dates of sittings in camera, at which applications are to be considered, in the order in which cases are received by the Tribunal – as provided for in Article 80(2) of the 2015 Constitutional Tribunal Act, added by Article 1(10) of the December Amending Act – entails correlating the pace of the Tribunal's examination of a case with circumstances that are not related in any reasonable way with the case. The said solution also implies that all cases received by the Tribunal are comparable and that the consideration thereof takes the same amount of time. However, time needed for the consideration of a case does not depend on the number of other cases received by the Tribunal, but on the unique character of a particular case, and especially on the number of challenged provisions, the complexity of the normative content of the provisions, as well as the number and complexity of indicated higher-level norms for the review. Needless to say, the review of the constitutionality of an entire statute comprising e.g. several dozen provisions requires more time than the examination of the constitutionality of only one provision of such a statute. Unlike in the Tribunal's *ex ante* review, during its *ex post* review, it is often necessary for the Tribunal to determine courts' practice of applying a challenged statute, which additionally prolongs the time needed for the consideration of a case. None of those circumstances, arising from the unique characteristics of a given case, was taken into account while drafting the solution provided for in Article 1(10) of the December Amending Act, and corresponding Article 80(2) of the 2015 Constitutional Tribunal Act.

In addition, the said provisions are also inadmissible in the light of the principles of the independence of the judiciary and its separateness from the legislature. Indeed, determining the pace of examining particular cases, which includes setting the dates of hearings and the dates of sittings in camera, is closely related to the core of the Tribunal's adjudication. The legislator's task is to create optimal conditions, and not to interfere with the process of adjudication, by determining a moment when the Tribunal may examine a given case. Indeed, all cases initiated by an application are considered by the Tribunal either at a hearing or at a sitting in camera, which entails that Article 1(10) of the December Amending Act and added Article 80(2) of the 2015 Constitutional Tribunal Act determine certain steps that make up the consideration of a case. By contrast, only by way of exception and where justified, the legislator may specify a maximum time-limit for the Tribunal's consideration of a case; by doing so, he may not affect the order and pace of particular steps taken by the Tribunal in the course of its consideration of a case. The independence of the Tribunal implies that the Tribunal should be guaranteed autonomy by eliminating the influence of other authorities, not only on the content of the Tribunal's rulings but also on the course of the procedure for the issuance thereof.

The requirement to ensure efficiency in the work of the Tribunal arises not only from the Preamble to the Constitution, but also – in the context of cases initiated by questions of law – from Article 45(1) of the Constitution. The said provision requires that courts consider cases "without undue delay", which constitutes a vital element of the constitutional right to a fair trial. Thus, proceedings before the Tribunal commenced by a question of law, referred by a court examining a case in the context of which the question has arisen, falls within the scope of the requirement to conduct the proceedings "without undue delay". Any delay that is undue defers the relevant court proceedings in breach of Article 45(1) of the Constitution. Consequently, adopted in Article 1(10) of the December Amending Act, and in corresponding Article 80(2) of the 2015 Constitutional Tribunal Act, the mechanism to defer the Tribunal's con-

sideration of a case until the dates of hearings and sittings in camera are determined in cases received earlier by the Tribunal violates the requirement that a court referring a question of law should consider a relevant case without undue delay. Since the authors of the December Amending Bill did not, in any way, explain the need to defer the Tribunal's consideration of a case, and there is also no rational explanation for such deferral, then it may not be deemed that such deferral does not cause undue delay in the consideration of a case in the context of which a court has referred a question of law to the Tribunal.

In the light of the above arguments, the Tribunal has stated that Article 1(10) of the December Amending Act and added Article 80(2) of the 2015 Constitutional Tribunal Act are dysfunctional and arbitrary, as well as inadmissible in the light of the principle of the Tribunal's independence and its separateness from the other branches of government. Therefore, the provisions are inconsistent with Article 2 and Article 173, in conjunction with the Preamble to the Constitution, as well as Article 10 and Article 45(1) of the Constitution, as – by virtue of making it impossible for a constitutional organ of the state, i.e. the Constitutional Tribunal, to carry out its activity diligently and efficiently, as well as by undermining its independence and separateness from the other branches of government – they infringe the principles of a state ruled by law.

5.8. The allegation of the dysfunctionality of Article 1(12)(a) of the December Amending Act and amended Article 87(2) of the 2015 Constitutional Tribunal Act

5.8.1. The challenged provisions

Pursuant to Article 87(2) of the 2015 Constitutional Tribunal Act, as amended by Article 1(12)(a) of the December Amending Act, a hearing before the Tribunal may not be held earlier than after 3 months following the service of the notification about the date of the hearing, and as regards cases considered by a full bench of the Tribunal – after 6 months.

5.8.2. The allegations of the applicants and the statements of the participants in the proceedings

In the opinion of the First President of the Supreme Court, the implementation of amended Article 87(2) of the 2015 Constitutional Tribunal Act will result in "slowing down the work of the Tribunal, which is primarily disadvantageous to those filing applications or constitutional complaints (…). The said provision contradicts the principle of efficiency and diligence in the work of public institutions, for the Tribunal may be ready to hold a hearing, but the statute requires the Tribunal to wait with holding the hearing and issuing a ruling".

According to the second group of Sejm Deputies, amended Article 87(2) of the 2015 Constitutional Tribunal Act is not justified "in the light of constitutional requirements concerning the right to have a case considered without undue delay (…). Interfering with the principles of the independence of the Constitutional Tribunal, the statutory solution under review provides for time-limits that are bound to be regarded as causing undue delay in proceedings before the Tribunal".

In the Ombudsman's opinion, the only objective underlying Article 1(12)(a) of the December Amending Act is to "extend the time of the consideration of cases pending before the Tribunal. In fact, the legislator is trying to achieve an objective that contradicts the essence of the principle of a democratic state ruled by law, as specified in Article 2 of the Constitution, which will lead to the inefficiency of a constitutional organ of the state".

The National Council of the Judiciary stated that amended Article 87(2) of the 2015 Constitutional Tribunal Act was dysfunctional, and emphasised that: "There is no compliance with the constitutional standard in a situation where, despite the Tribunal's readiness to consider a case, the constitutional court may not do so only because the legislator has introduced an unreasonable 'waiting' period with regard to a case – namely between the date a party is served with the notification about the date of a hearing and the set date of the hearing – especially that this undermines the interests of a participant in proceedings who is, in principle, interested in obtaining a ruling from the Tribunal as soon as possible".

By contrast, the Public Prosecutor-General pointed out that – similarly to the above-mentioned Article 80(2), added to the 2015 Constitutional Tribunal Act – amended Article 87(2) of the said Act: "prevents the Tribunal from the earlier consideration of cases that may be of great significance for the interests of the state or may necessitate the safeguarding of the rights and obligations of persons and citizens". However, the Prosecutor's statement was withdrawn on 4 March 2016.

5.8.3. The course of the legislative process

Amended Article 87(2) of the 2015 Constitutional Tribunal Act was not included in the original version of the December Amending Bill (cf. the Sejm Paper No. 122/8th term of the Sejm). The said provision was proposed as an amendment to the Bill during the work of the Sejm's Legislative Committee after the first reading.

The sole reason for the introduction, into the legal system, of the new wording of Article 87(2) of the 2015 Constitutional Tribunal Act – by means of Article 1(12)(a) of the December Amending Act, was mentioned by the authors of the amendment during the second reading of the December Amending Bill at the sitting of the Sejm on 22 December 2015. The purpose for the provision was to "eliminate (…) the possibility of manipulating the dates of hearings", and in particular "to deprive the President of the Tribunal of any discretion as regards (…) determining the dates of hearings" (the opinion voiced by Mr A. Mularczyk, a Sejm Deputy; the shorthand report on the 6th sitting/ the 8th term of the Sejm, 22 December 2015, p. 89).

Due to the addition of the said amendment to the December Amending Bill at such a late stage, it was not provided to competent authorities and bodies for consultation. Consequently, no mention of the amendment was made in the opinions presented by the following: the First President of the Supreme Court; the National Council of the Judiciary; the Public Prosecutor-General; the Helsinki Foundation for Human Rights; the Polish Bar Council; and the National Council of Legal Advisers.

Allegations that the solution was neither constitutional nor reasonable were raised by certain Sejm Deputies at the sitting of the Sejm's Legislative Committee on 22 December 2015. It was argued that: "By introducing such a statutory regulation, at the very onset of the review we cause an undue delay in proceedings. So far there have been no signals from the Tribunal or the competent authorities required to participate in the Tribunal's proceedings on a regular basis that the time-limit of 14 days is insufficient and needs to be extended. Already at this stage, we make it difficult for citizens to assert their rights" (the opinion voiced by Mr A. Myrcha, a Sejm Deputy; the full transcript of the 6th sitting of the Legislative Committee/ the 8th term of the Sejm, 22 December 2015, p. 31). It was also argued that: "this is yet another provision that will result in slowing down the work of the Constitu-

tional Tribunal" (the opinion voiced by Ms K. Gasiuk-Pihowicz, a Sejm Deputy; the full transcript of the 6th sitting of the Legislative Committee/ the 8th term of the Sejm, 22 December 2015, p. 31).

During the second reading of the Bill at the sitting of the Sejm on 22 December 2015, some Sejm Deputies pointed out that the introduction of such lengthy "waiting" periods for setting the date of the first hearing would lead to a paralysis of the Tribunal" and would "excessively prolong proceedings" (see the opinion voiced by Mr T. Szymański, a Sejm Deputy; the shorthand report on the 6th sitting/ the 8th term of the Sejm, 22 December 2015, p. 173), as well as they inquired about reasons for the adoption of such a statutory solution (see the questions of the following Sejm Deputies: Mr K. Brejza and Mr B. Dolniak; the shorthand report on the 6th sitting/ the 8th term of the Sejm, 22 December 2015, p. 92, 99 and 173).

In its opinion of 23 December 2015, the Legislative Bureau of the Chancellery of the Senate stated as follows: "Amended Article 87(2) will significantly prolong the waiting period for the Tribunal's determination of a case, and it may not be deemed that such a delay of a hearing (3 or 6 months) may be justified by any objective grounds. Considering the fact that the Tribunal analyses questions of law, this legislative solution will result in prolonging proceedings pending before courts that refer such questions to the Tribunal on the basis of Article 193 of the Constitution. This in turn raises concern as to the preservation of the standard of the right to a fair trial, understood as the right to have a case considered without undue delay (…). Also, respect for guarantees related to the right to be given a binding determination without undue delay is indispensable in the context of a constitutional complaint lodged with the constitutional court" (p. 6 of the said opinion).

5.8.4. The earliest available dates of hearings before the Constitutional Tribunal – general characteristics; changes in comparison with the previous legal provisions

Before the amendments, Article 87(2) of the 2015 Constitutional Tribunal Act stipulated that a hearing before the Tribunal might not be held earlier than after14 days following the service of the notification about the date of the hearing.

The December Amending Act has significantly extended a period of waiting for a hearing (preserving the rule that the lapse of a given period is counted from the date of service of the notification about the date of a hearing), and has diversified the length of those periods depending on the composition of an adjudicating bench assigned for the consideration of a case. The time-limits were as follows: at least 6 months for cases adjudicated upon by a full bench (*inter alia* with regard to all applications); and at least 3 months in cases adjudicated upon by smaller panels of judges (*inter alia* with regard to constitutional complaints and questions of law – cf. amended Art. 44 of the 2015 Constitutional Tribunal Act). The two "waiting" periods provided therein were to be applied by the Tribunal to all cases considered at hearings.

Pursuant to Article 87(2a) of the 2015 Constitutional Tribunal Act, added by Article 1(12)(b) of the December Amending Act, the President of the Tribunal may shorten by half the above-mentioned "waiting" periods for a hearing in cases:

– commenced upon application by the President of the Republic of Poland;

– in which a constitutional complaint or a question of law directly concerns an infringement of the freedoms, rights and obligations of persons and citizens, laid down in Chapter II of the Constitution;
– which involve a review of the rules of procedure of the Sejm or of the Senate.

In those three categories of cases, provided that the President of the Tribunal will exercise the competence referred to in added Article 87(2a) of the 2015 Constitutional Tribunal Act, a hearing may not be held earlier than after one and a half month from the date of service of the notification about the date of the hearing, and in cases considered by a full bench – after 3 months.

5.8.5. The assessment of the constitutionality of the following: Article 1(12)(a) of the December Amending Act and amended Article 87(2) of the 2015 Constitutional Tribunal Act

According to the Constitutional Tribunal, Article 1(12)(a) of the December Amending Act and amended Article 87(2) of the 2015 Constitutional Tribunal Act are unconstitutional for the same reasons as Article 1(10) of the December Amending Act and added Article 80(2) of the 2015 Constitutional Tribunal Act.

Firstly, they prevent the Tribunal from taking account of other provisions of the 2015 Constitutional Tribunal Act in the course of the adjudication process, and in particular of: Article 83, Article 85(1), Article 86(1), as well as Article 117(1).

Secondly, the introduction of the requirement of a long "waiting" period for a hearing disregards the unique character of particular cases which necessitates considering those cases at a different pace and giving them priority.

Thirdly, such a considerable deferral of a hearing in cases which are ready for determination – without any rational justification for the deferral – must be regarded as inadmissible interference of the legislature with the Tribunal's adjudication process, and thus with the Tribunal's independence and its separateness from the other branches of government.

Fourthly, the groundless deferral of the Tribunal's consideration of a case for 3 or 6 months breaches the requirement that a court referring a question of law to the Tribunal should consider, without undue delay, a case in the context of which the said question has arisen. The said deferral prolongs court proceedings, and the waiting period for a hearing may not be regarded as a necessary delay, since that period is not utilised for a more thorough consideration of the case, but on the contrary – it slows down the said consideration.

Fifthly, periods indicated in the challenged provisions are excessively long. This is particularly striking when they are compared with much shorter time-limits for the presentation of written statements or opinions by participants in proceedings (Art. 82(2), Art. 84(2) and Art. 85(1) of the 2015 Constitutional Tribunal Act provide for a time-limit of 2 months which may be shortened; similarly, the Ombudsman has 30 days for notification about his/her participation in proceedings, and another 30 days for the submission of his/her statement – cf. Art. 82(3) of the 2015 Constitutional Tribunal Act). In this context, it should be stressed that the hitherto 14-day notice was deemed optimal in the light of the experience of the Ombudsman as well as advocates and legal advisers represented in these proceedings by the Polish Bar Council and the National Council of Legal Advisers.

Also, the challenged provisions significantly increase the standard provided for in other court procedures where a one-week notice about a hearing is deemed sufficient

(cf. Art. 149(2), third sentence, of the Civil Procedure Code and Art. 91(2), third sentence, of the Act of 30 August 2002 on Proceedings Before Administrative Courts – a one-week notice, with a possibility of shortening it to 3 days; Journal of Laws – Dz. U. of 2012, item 270, as amended; Art. 353(1) of the Act of 6 June 1997 – the Criminal Procedure Code – a notice of at least 7 days; Journal of Laws – Dz. U. No. 89, item 555, as amended).

Sixthly, Article 1(12)(a) of the December Amending Act and amended Article 87(2) of the 2015 Constitutional Tribunal Act make it impossible for the Tribunal to issue a judgment on an application filed by the President of Poland with regard to the constitutionality of the State Budget Bill or the Interim State Budget Bill within the time-limit indicated in Article 224(2) of the Constitution, i.e. within 2 months from the date of the submission of the application in the Tribunal. The said application commences an *ex ante* review, and for that reason it is considered by a full bench of the Tribunal, which means that a hearing may not be held earlier than after the lapse of 6 months from the date when participants in proceedings are served with the notification about the date of the hearing. Even if, on the basis of added Article 87(2a)(1) of the 2015 Constitutional Tribunal Act, the said time-limit got shortened by half by the President of the Tribunal, it would still be impossible to meet the time-limit indicated in Article 224(2) of the Constitution. Also, in that situation, there must be three months between the date of service of the notification about the date of a hearing and the hearing. Thus, it should be concluded that amended Article 87(2) of the 2015 Constitutional Tribunal Act not only makes it impossible for the Tribunal to carry out its activity diligently and efficiently, by prolonging the waiting period for a hearing without any reasonable grounds, but it also rules out adjudication within a time-frame set for the Tribunal in Article 224(2) of the Constitution. This is an additional circumstance that determines the unconstitutionality of that provision.

Considering the above, the Tribunal states that Article 1(12)(a) of the December Amending Act and amended Article 87(2) of the 2015 Constitutional Tribunal Act are dysfunctional and arbitrary, and also inadmissible in the light of the principle of the Tribunal's independence and its separateness from the other branches of government. The said requirement of a waiting period for a hearing, despite the lack of reasonable grounds for this, also infringes citizens' right to have their case considered without undue delay, where proceedings before the Tribunal are instituted by the submission of a question of law or a constitutional complaint. Consequently, Article 1(12)(a) of the December Amending Act and amended Article 87(2) of the 2015 Constitutional Tribunal Act are inconsistent with Article 2 and Article 173, in conjunction with the Preamble to the Constitution, as well as Article 10 and Article 45(1) of the Constitution, as – by virtue of making it impossible for a constitutional organ of the state, i.e. the Constitutional Tribunal, to carry out its activity diligently and efficiently, as well as by undermining its independence and separateness from the other branches of government – they infringe the principles of a state ruled by law.

5.9. Allegations concerning Article 1(14) of the December Amending Act and amended Article 99(1) of the 2015 Constitutional Tribunal Act

5.9.1. The challenged provisions

Article 99(1) of the 2015 Constitutional Tribunal Act, as amended by Article 1(14) of the December Amending Act, reads as follows: "Full bench rulings of the Tribunal shall require a two-thirds majority vote".

5.9.2. The allegations of the applicants and the statements of the participants in the proceedings

The First President of the Supreme Court argued that the application of that provision would "considerably hinder the efficiency of adjudication. One may not rule out situations where, due to the lack of the required majority, a ruling will not be issued; this would, in a sense, constitute refusal to determine a constitutional matter, and thus would infringe Article 8(1) of the Constitution, which stipulates that the Constitution is the supreme law of the Republic of Poland, and would violate the right to a fair trial (Art. 45(1) of the Constitution)".

The application of the second group of Sejm Deputies mentioned the risk that: "in most cases determined by a full bench of the Tribunal, the constitutional court will prove incapable of issuing a ruling due to the lack of the required majority". Moreover, it was stated that the content of amended Article 99(1) of the 2015 Constitutional Tribunal Act contradicts Article 190(5) of the Constitution, which provides that rulings of the Tribunal are to be determined by a simple majority of votes.

The Ombudsman emphasised that since "the Constitution regulates, in a complete way, what majority of votes is required for an adjudicating bench of the Constitutional Tribunal to determine a ruling, it is inadmissible to correct, at the statutory level, any decisions made in that respect by the constitution-maker". Moreover, the Ombudsman asserted that Article 1(14) of the December Amending Act was "also a totally dysfunctional provision".

According to the National Council of the Judiciary, amended Article 99(1) of the 2015 Constitutional Tribunal Act "may result in a situation where, due to the lack of an appropriate majority of votes, the Constitutional Tribunal will not be able to determine a ruling and examine a constitutional issue, although it is obliged to do so on the basis of the provisions of the Constitution.

In the opinion of the Public Prosecutor-General (expressed in the application that was ultimately withdrawn), "the action of the ordinary legislator, which consisted in specifying a majority referred to in Article 190(5) of the Constitution, should be regarded as unauthorised and constitutionally inadmissible. Indeed, the said action constituted the introduction of a qualitative change into a provision of the Constitution, by means of an ordinary statute".

5.9.3. The course of the legislative process

The explanatory note for the December Amending Bill stated as follows: "The requirement in amended Article 99(1) – which stipulates that full bench rulings of the Tribunal are to be determined by a two-thirds majority vote – enhances the gravity and significance of rulings of the Constitutional Tribunal". At the same time, the said note mentioned that, although Article 190(5) of the Constitution stipulated that rulings of the Tribunal were determined by a majority of votes, the said provision did "not specify what majority was meant there" (p. 4 of the explanatory note; the Sejm Paper No. 122/8th term of the Sejm).

In the course of the legislative proceedings, amended Article 99(1) of the 2015 Constitutional Tribunal Act was evaluated negatively by the following authorities and bodies: the First President of the Supreme Court; the National Council of the Judiciary; the Public Prosecutor-

General; the National Council of Legal Advisers; the Helsinki Foundation for Human Rights; as well as the Legislative Bureau of the Chancellery of the Senate.

In her opinion of 16 December 2015, the First President of the Supreme Court pointed out that: "the requirement to arrive at determinations by a two-thirds majority vote is clearly inconsistent with Article 190(5) of the Constitution. Indeed, whenever a statute mentions [the term] 'a majority', without any modifiers, the term should be understood as a simple majority of votes. Article 190(5) of the Constitution requires that a majority of the judges of an adjudicating bench should be in favour of a determination. A statute may not specify the said majority in such a manner that the Tribunal will be deprived of the possibility of adjudicating in an effective way" (p. 3 of the opinion of the First President of the Supreme Court).

In its opinion of 16 December 2015, the Helsinki Foundation for Human Rights stated that: "none of the binding court procedures in Poland provides for the requirement of a specified, qualified majority of necessary votes; in particular, such a solution is non-existent in the Polish civil procedure, on the basis of which the Constitutional Tribunal adjudicates. The aforementioned solution, which is copied from solutions provided for e.g. in parliamentary law, is inadequate for court procedures. Thus, drafted solutions lead to a situation where the Polish Parliament may pass a bill by a simple majority vote (Art. 120 of the Constitution), whereas the Tribunal will be able to adjudicate on any infringements of the Constitution caused by statutes only by obtaining a qualified majority. Such a solution makes the procedure for reviewing the constitutionality of normative acts disproportionately more difficult to complete than the adoption of a bill by the legislator, and hence such a solution would not safeguard the rights and freedoms of citizens". The Helsinki Foundation for Human Rights also noted that: "the Constitution itself provides that rulings of the Tribunal are determined by a majority of votes (Article 190(5)). So far the interpretation of that provision has raised no doubts". Due to the well-established practice in constitutional law, the meaning of a constitutional norm may not be arbitrarily changed by statute. The Foundation also asserted that the lack of the qualified majority required by amended Article 99(1) of the 2015 Constitutional Tribunal Act would result in a situation where: "the Tribunal will not be able to issue a ruling at all. This will in turn generate a considerable number of cases which will be pending before the Tribunal, but will not actually be determined" (p. 3 of the Foundation's opinion).

In its opinion of 17 December 2015, the Polish Bar Council deemed that the drafted change was "manifestly inconsistent with Article 190(5) of the Constitution", as "the term 'a majority of votes' referred to in Article 190(5) of the Constitution may on no account be specified by an ordinary statute – a law-maker other than the constitution-maker may not 'complement' a constitutional norm by an ordinary statute". Additionally, the Polish Bar Council pointed out that the authors of the December Amending Bill did not explain why a two-thirds majority vote was to apply only to full bench rulings of the Tribunal, and would not refer to the Tribunal's rulings issued by adjudicating benches composed of seven or three judges. The Council also noted that: "failure to obtain the required majority of votes will lead to a situation – as one may deduce from the Bill – where a ruling will not be issued at all, and thus where applicants will be completely deprived of their right to a fair trial, for instance when they lodge a constitutional complaint to challenge the provisions of a statute or another normative act (…). Therefore, the Bill may result in an infringement of Article 45(1) and Article 79(1) of the Constitution as well as of Article 188 and Article 189 of the Constitution,

thus preventing the Tribunal from issuing rulings on the conformity of normative acts to higher-level normative acts, on the conformity to the Constitution of the purposes or activities of political parties, as well as on disputes over powers between central constitutional state authorities; in other words, the Tribunal will be prevented from exercising its constitutional powers and duties. As a result of the drafted solutions, there may occur an unusual and rare situation – for the system of the organs of the judiciary which operate in democratic states – where the Constitutional Tribunal will not be able to issue a substantive ruling on a case under consideration" (p. 6 of the Council's opinion).

In its opinion of 18 December 2015, the National Council of the Judiciary asserted that: "the introduction of a qualified majority vote required for the issuance of a ruling by the Tribunal raises serious reservations as to its conformity to Article 190(5) of the Constitution. In the instances where the constitution-maker intended to have a qualified majority vote, he explicitly stated this in the provisions of the Constitution (…). There is no doubt that the judgments of common courts in civil and criminal cases are determined by a simple majority vote. The said principle is also binding in administrative courts and the Supreme Court. The introduction of the requirement that rulings of the Tribunal should be determined by a doubly qualified majority of votes will not only be something unusual in the legal system (…), but it may also result in an inconsistent interpretation of legal provisions regulating the same statutory matters, and thus undermine the coherence of the legal system" (p. 6 of the Council's opinion).

In his opinion of 21 December 2015, the Public Prosecutor-General emphasised that: "the requirement of a qualified majority of votes for full bench adjudication by the Tribunal raises considerable reservations as to the constitutionality of such a requirement. Article 190(5) of the Constitution provides that rulings of the Tribunal are determined by a majority vote, without specifying what majority is meant here. A majority of votes is usually construed as a simple majority of votes cast in favour of a proposed decision (a simple majority). The introduction of a different statutory rule appears to be inconsistent with Article 190(5) of the Constitution, as well as to go beyond the scope of a statute provided for in Article 197 of the Constitution. If the intention of the constitution-maker had been the introduction of a qualified majority vote for rulings of the Tribunal, one should expect that this would have been expressed in the Constitution" (p. 5 of the opinion of the Public Prosecutor-General).

In its opinion of 21 December 2015, the National Council of Legal Advisers expressed the view that the content of amended Article 99(1) of the 2015 Constitutional Tribunal Act: "is inconsistent with Article 190(5) of the Constitution (…). There may be no doubt that, in the above-mentioned provision, the constitution-maker opted for the so-called "simple majority of votes", which is unambiguously interpreted as the total number of votes "for" exceeding the total number of votes "against", and is not understood as a qualified majority of votes. In accordance with the principle that the lawmaker is to act in a rational way, whenever the constitution-maker wishes to have a majority vote other than a simple majority vote, he explicitly states this in a provision of the Constitution, as regards both an absolute majority (…) as well as the so-called qualified majority (…). The proposed solution clashes with the judicial tradition to determine cases by a majority of votes cast by the judges of an adjudicating bench. (…) Apart from the obvious inconsistency with the above-mentioned norm from the Constitution, as well as with the well-established practice of the organs of the judiciary,

amended Article 99(1), in the version proposed in the Bill, may result in far-reaching limitations to the Tribunal's exercise of its adjudication duties" (pp. 5-6 of the opinion of the National Council of Legal Advisers).

Last but not least, the Legislative Bureau of the Chancellery of the Senate also evaluated the content of amended Article 99(1) of the 2015 Constitutional Tribunal Act in a negative way. In its opinion of 23 December 2015, the Bureau pointed out that: "In the doctrine of law (…) there is general agreement that in those places where the constitution-maker wished to correlate decision-making with the obtaining of a qualified majority of votes, he did so by expressing this in the Constitution. (…) Therefore, it was inadmissible for the ordinary legislator to specify the majority referred to in Article 190(5)". The opinion also drew attention to "the risk underlying such a solution", namely that in the event of the lack of the required majority, the Tribunal will not be able to issue a ruling on a case. The qualified majority is needed regardless of whether a ruling negates or confirms the validity of allegations (cf. p. 4 of the Bureau's opinion).

To sum up the above, it should be stated that all the authorities and bodies that presented their opinions in the course of the legislative process concluded that Article 99(1) of the 2015 Constitutional Tribunal Act, as amended by Article 1(14) of the December Amending Act, is unconstitutional. The unconstitutionality of the provision was perceived as resulting from its non-conformity to Article 190(5) of the Constitution – which stipulates that the rulings of the Tribunal are to be determined by a majority of votes – as well as from its dysfunctionality.

5.9.4. A majority of votes required for the issuance of a ruling by the Constitutional Tribunal – general characteristics; changes in comparison with the previous legal provisions

Before the amendments, Article 99(1) of the 2015 Constitutional Tribunal Act stipulated that a ruling of the Tribunal was to be determined by a majority vote. Since, during a vote, the judges of the Tribunal may not abstain from voting, but are obliged to either support or oppose a given determination, it should be presumed that the majority of votes mentioned in that provision is a simple majority. Also, it ought to be noted that, in its original wording, Article 99(1) actually repeated the content of Article 190(5) of the Constitution.

Amended by Article 1(14) of the December Amending Act, Article 99(1) of the 2015 Constitutional Tribunal Act provides that full bench rulings of the Tribunal require a two-thirds majority vote. However, the provision does not specify what majority vote would be required to determine rulings by the Tribunal's adjudicating benches composed of three or seven judges.

5.9.5. The assessment of the constitutionality of: Article 1(14) of the December Amending Act and amended Article 99(1) of the 2015 Constitutional Tribunal Act

Pursuant to Article 190(5) of the Constitution, rulings of the Tribunal are determined "by a majority of votes".

In the Tribunal's view, on the basis of the provision, the legislator has no grounds to draw a distinction, based on the number of judges adjudicating on a case, as to a majority of votes required to determine a ruling; nor does the legislator have any grounds to introduce a different majority of votes than the one indicated in the provision. At the same time, it is inadmissible to interpret Article 190(5) of the Constitution in the way that the provision com-

prises an empty norm, for it mentions 'a majority', and the legislator's obligation is to determine what majority is meant in that provision. In fact, such an interpretation would entail that the content of a provision of the Constitution is determined by the legislator, which is not permissible in a democratic state ruled by law.

Article 190(5) of the Constitution unambiguously determines a majority of votes required for determining rulings by the Tribunal. This follows not only from the content of that provision, but also from the structure of the Constitution and from the wording of other provisions of the Constitution concerning the requirement of a majority vote for various bodies to arrive at decisions. The proviso that a decision of a body is determined by a majority vote always implies a simple majority, unless a provision of the Constitution indicates a different majority vote. The qualified majority of two-thirds of votes that is required for a House of the Polish Parliament to adopt a resolution is mentioned in Article 90(2), Article 98(3), Article 235(4), Article 239(1) of the Constitution; by analogy, for the National Assembly, this is indicated in Article 131(2)(4) and Article 145(2) of the Constitution. By contrast, the requirement of the qualified majority of three-fifths of votes is provided for in Article 122(5) and Article 156(2) of the Constitution. In addition, an absolute majority vote is required in Article 90(4), Article 113, Article 121(3), Article 125(2), Article 154(2) and (3), Article 231, and Article 235(4) of the Constitution.

Article 120 of the Constitution mentions "a simple majority vote" required for the adoption of a bill by the Sejm, unless the Constitution provides for another majority. However, it should be noted that specifying the majority of votes by the adjective 'simple' results from the voting system in the Sejm, where Sejm Deputies may not only vote "in favour of" or "against" the adoption of a bill, but they may also abstain from voting. The way of treating abstain votes is a criterion for differentiating between a simple majority of votes and an absolute majority. A simple majority of votes implies that there are more Sejm Deputies who have voted "for" than "against", regardless of the number of abstain votes. By contrast, an absolute majority of votes means that there are more votes "for" than the sum of votes "against" and abstain votes.

A definition of the majority of votes construed in this way (i.e. without specifying whether it is 'simple' or 'absolute') appears to be included in Article 127(4) of the Constitution, which stipulates that the election of the President requires obtaining the "required majority of votes", clarifying that this entails receiving "more than half of the valid votes". In presidential elections, there is also no possibility of abstaining from voting; one may only cast an invalid vote. Therefore, in the context of those elections, drawing a distinction between a simple and absolute majority of votes is irrelevant. Similarly, Article 235(6) of the Constitution provides that an amendment to the Constitution is adopted if it has been approved of by "the majority of those voting" in a relevant referendum. In this case, the voters also have no possibility of abstaining from voting, and thus it should be assumed that the requirement here is a majority of votes in favour of, rather than against, amendments to the Constitution. A similar notion of 'a majority of votes' (without specifying exactly what majority is meant) occurs in Articles 158 and 159 of the Constitution, which regulate the procedure for carrying out a vote of no confidence concerning – respectively – a government and an individual minister. The phrase "a majority of votes of the statutory number of Deputies", which is used in

those provisions, allows one to conclude that a vote of no confidence is passed when a majority of voters out of 460 Sejm Deputies support this, i.e. at least 231 Deputies.

A majority of votes, without any further details as to what majority, also occurs in Article 155(1) of the Constitution – which regulates the third stage of the procedure for appointing the Council of Ministers – as well as in Article 160 of the Constitution, pertaining to a vote of no confidence in the Council of Ministers. The doctrine of law and the parliamentary practice in this respect show that there have never been any doubts that both provisions imply a simple majority of votes.

The wording that rulings of courts are determined by "a majority of votes" is found in Article 324(2), third sentence, of the Civil Procedure Code, Article 111(1) of the Criminal Procedure Code, as well as Article 137(2), third sentence, of the Act on Proceedings Before Administrative Courts. In all those provisions, the issuing of a ruling is contingent on obtaining the approval of a majority of voting judges. Indeed, the judges of the Supreme Court, a common court, or an administrative court have no possibility of abstaining from voting on a ruling. The principle of a simple majority of votes is also provided for in the European Convention on Human Rights in the context of the European Court of Human Rights and in the Treaty on the Functioning of the European Union (OJ C 326, 26.10.2012, p. 47) with regard to the Court of Justice of the European Union.

Taking the above arguments into consideration, the Tribunal states that Article 1(14) of the December Amending Act and amended Article 99(1) of the 2015 Constitutional Tribunal Act are inconsistent with Article 190(5) of the Constitution.

A separate assessment of the conformity of those provisions to Article 2 and Article 173, in conjunction with the Preamble to the Constitution, as well as to Article 10 and Article 45(1) of the Constitution is hence redundant; the proceedings within that scope are subject to discontinuance on the basis of Article 104(1)(3) of the 2015 Constitutional Tribunal Act.

5.10. The allegation of the dysfunctionality of Article 2 of the December Amending Act

5.10.1. The challenged provision

Article 2 of the December Amending Act reads as follows:

"1. In cases where prior to the entry into force of this Act, the President of the Tribunal did not notify participants in proceedings about the referral of an application, a question of law or a constitutional complaint for consideration by an adjudicating bench, the proceedings shall be conducted in accordance with rules laid down in this Act. However, in every case the composition of an adjudicating bench shall be determined on the basis of the provisions of this Act.

2. With regard to proceedings that were pending before the entry into force of this Act, a hearing may not be held earlier than after 45 days from the date of service of the notification about the date of the hearing, and in cases considered by a full bench – after 3 months; however, in both cases, this should be no later than 2 years after the date of the entry into force of this Act.

3. The dates of hearings at which the Tribunal shall consider applications from proceedings that were pending before the entry into force of this Act shall be set in the order in which cases are received by the Tribunal.

4. The provisions of paras 2 and 3 shall apply to a sitting in camera at which an adjudicating bench issues a ruling that closes a case."

5.10.2. The allegations of the applicants and the statements of the participants in the proceedings

The First President of the Supreme Court formulated the same allegation of dysfunctionality with regard to Article 2 of the December Amending Act as she did in the context of all the other provisions analysed above. She asserted that the application of the provision: "will slow down the consideration of cases pending before the Tribunal", as well as that "this way the legislator is creating a solution which may not be regarded as reasonable due to dysfunctional effects it will trigger within the scope of the right to a fair trial".

The application of the second group of Sejm Deputies stated that Article 2 of the December Amending Act undermines citizens' trust in the state and its laws in the context of cases that need to be considered anew, due to the necessity to adjust the composition of adjudicating benches to meet the requirements of the amending provisions. Furthermore, by deferring the consideration of cases already received by the Tribunal, the challenged provision infringes citizens' right to have their cases determined without undue delay, as well as the principle of the independence of the Tribunal.

The Ombudsman stated that: "the level of unclarity and legislative inaccuracy characterising the provisions of Article 2 of the December Act amending the 2015 Constitutional Tribunal Act sufficiently justifies (…) the allegation that the challenged provisions are inconsistent with the principle of appropriate legislation, derived from Article 2 of the Constitution".

In the opinion of the Public Prosecutor-General, a literal interpretation of Article 2(1) of the December Amending Act leads to the conclusion that with regard to cases referred to in that provision, proceedings are not conducted on the basis of the 2015 Constitutional Tribunal Act, but solely on the basis of rules specified in the December Amending Act. According to the Public Prosecutor-General, the conclusion is that: "in those cases, it is not at all possible – based on the explicitly expressed intention of the legislator – to continue proceedings. Indeed, vital procedural elements, which constitute prerequisites for carrying out such proceedings, are included in the amended Act, and not in the amending Act" (the theses of the withdrawn statement of 10 February 2016).

5.10.3. The course of the legislative process

The content of the transitional provisions included in the December Amending Act underwent a number of changes in the course of the legislative work.

In the original version of the December Amending Bill (cf. the Sejm Paper No. 122/ 8th term of the Sejm), Article 2 read as follows: "If proceedings pending before the entry into force of this Act are not conducted by an adjudicating bench that meets the requirements of this Act, the proceedings shall be instituted anew". In the explanatory note for the Bill, its authors stated that: "Article 2 requires the immediate revision of the composition of adjudicating benches. In the event of the statutory obligation to have a case considered by a full bench of the Tribunal, the norm prescribes that proceedings should be commenced anew. This entails moving back to the onset of proceedings, for the sake of applicants. The consideration of

a case by a full bench of the Tribunal guarantees more thorough examination than a review carried out by a smaller panel of judges. This also applies to cases that are pending before the Tribunal" (p. 4 of the explanatory note).

In the course of the legislative proceedings, the original wording of Article 2 of the December Amending Bill was evaluated negatively by the following authorities and bodies: the First President of the Supreme Court; the National Council of the Judiciary; the Public Prosecutor-General; the National Council of Legal Advisers; and the Helsinki Foundation for Human Rights.

In her opinion of 16 December 2015, the First President of the Supreme Court stated that the implementation of new solutions to approximately 150 cases pending before the Tribunal – i.e. that most cases should be considered by a full bench composed of at least 13 judges of the Tribunal, who determine rulings by a two-thirds majority vote – would mean "potential immense delays, and, in fact, a paralysis of the Tribunal", as well as would constitute "a glaring infringement of the rights and freedoms of citizens, including the right to a fair trial" (p. 3 of the opinion of the First President of the Supreme Court).

In its opinion of 17 December 2015, the Polish Bar Council argued that most cases to which Article 2 of the December Amending Bill would be applicable comprised "constitutional complaints and questions of law". "In many instances, these are cases that are vital for the protection of the rights and freedoms of individuals, cases concerning ordinary citizens. For each of such cases, an adjudicating bench was assigned. Some of those cases were waiting several years before they were considered; in the context of those cases, the re-institution of the proceedings will again prolong waiting time for a ruling, even for a few more years, considering the fact that the Tribunal is, in principle, to adjudicate sitting as a full bench" (p. 8 of the Council's opinion).

In its opinion of 18 December 2015, the National Council of the Judiciary stated that the proposed Article 2 of the December Amending Bill: "is not reasonable, and above all it will result in the judicial inefficiency of the Constitutional Tribunal. The Council finds no legal arguments to justify the introduction of such a transitional provision. The impact of that regulation will undermine citizens' interests, negatively affecting the pace of proceedings that are pending" (p. 6 of the indicated opinion).

In its opinion of 16 December 2015, the Helsinki Foundation for Human Rights emphasised that the proposed Article 2 of the December Amending Bill: "will drastically extend the duration of proceedings before the Tribunal. (…) This contradicts the principle of the protection of proceedings that are pending, as well as this will contribute to slowing down the Tribunal's work and paralysing the Tribunal. (…) [C]ases commenced and pending should be processed in compliance with the current rules" (p. 4 of the Foundation's opinion).

In his opinion of 21 December 2015, the Public Prosecutor-General deemed that: "the transitional solution included in Article 2 of the Bill (…) aggravates a potential paralysis of the Tribunal that may result from the introduction of the requirement of full bench adjudication, and the determination of the composition of a full bench as comprising at least 13 judges of the Tribunal" (p. 5 of the Prosecutor's opinion).

In its opinion of 21 December 2015, the National Council of Legal Advisers "strongly criticised" the proposed Article 2 of the December Amending Bill, arguing that: "it constitutes inadmissible interference of the legislature with the competence of the Constitutional

Tribunal within the scope concerning the mode of proceedings. In this respect, the said Article infringes both the principle of the separation of powers, set out in Article 10 of the Constitution, as well as the principle of a democratic state ruled by law, expressed in Article 2 of the Constitution, in particular as regards the principles of the certainty of law and its non-retroactivity. Moreover, the said proposal is not reasonable, considering that the model of the constitutional judiciary, which has been in place in Poland for nearly 30 years, provides for no possibility of the re-institution of proceedings before the Constitutional Tribunal in the same case" (p. 7 of the said opinion).

Article 2 of the December Amending Act, in the above-cited and currently binding version, was presented as an amendment to the Sejm's Legislative Committee after the first reading of the Bill. During the debate about this amendment, held at the sitting of the said Committee on 22 December 2015, it was argued that: "the introduction of such a provision will infringe a fundamental principle, since an initiator of proceedings will face different rules than the ones that were binding when that party instituted the proceedings" and "that this will create chaos in proceedings that are currently pending before the Constitutional Tribunal" (the opinion voiced by Mr A. Myrcha, a Sejm Deputy; the full transcript of the 6th sitting of the Legislative Committee/ the 8th term of the Sejm, 22 December 2015, pp. 41 and 42). Moreover, at the same sitting, Mr P. Sadłoń, a legislator from the Legislative Bureau of the Chancellery of the Sejm, stated that: "particular paragraphs of Article 2 contain several legislative irregularities. The said irregularities vary in significance and type. Considering that these are transitional provisions, and taking account of the jurisprudence of the Constitutional Tribunal, one may raise reservations in the context of Article 2, as regards drafting provisions in such a way that the addressee thereof will be certain as to the legal situation that is regulated by the provisions. When juxtaposed with the provision about the entry into force of the December Amending Bill, the transitional provisions also raise reservations in the light of the principle of the certainty of law" (the full transcript of the 6th sitting of the Legislative Committee/ the 8th term of the Sejm, 22 December 2015, p. 46).

In the course of the legislative proceedings, the final wording of Article 2 of the December Amending Bill was negatively evaluated by the Legislative Bureau of the Chancellery of the Senate. In its opinion of 23 December 2015, the Bureau raised the same allegations with regard to these provisions as in the context of Article 87(2) of the 2015 Constitutional Tribunal Act. Thus, it was pointed out that the said provisions would "considerably prolong waiting time for the determination of a case by the Tribunal", and that they were not justified by objective considerations and would infringe citizens' right to a fair trial, construed as the right to have one's case considered without undue delay.

5.10.4. The nature of transitional rules provided for in the challenged provisions

What follows from the basic principle of transitional law is that provisions of an amended statute should be applicable to cases commenced after the entry into force of the said statute. However, the authors of the December Amending Bill assumed that – due to interference with the activity of the existing organ of the state – it was necessary to regulate cases that were pending. This is the subject-matter of Article 2 of the December Amending Act.

Article 2 of the December Amending Act is applicable to two categories of cases (proceedings), namely:

– cases where prior to the entry into force of the Act, the President of the Tribunal did not notify participants in proceedings about the referral of an application, a question of law or a constitutional complaint for consideration by an adjudicating bench (Art. 2(1) of the Act); as well as
– proceedings that were pending before the entry into force of the Act (Art. 2(2)-(4) of the Act).

Therefore, the indicated article concerns cases that were "pending", that is cases under consideration by the Tribunal, on the date of entry into force of the December Amending Act, i.e. on 28 December 2015. However, the latter of two above-mentioned categories is more capacious, as it comprises all proceedings that were pending before the entry into force of the December Amending Act, including those where the President of the Tribunal notified participants in proceedings about the referral of an application, a question of law or a constitutional complaint for consideration by an adjudicating bench, as well as where no such notification was made.

With regard to the cases where the President of the Tribunal did not notify participants in proceedings about the referral of an application, a question of law or a constitutional complaint for consideration by an adjudicating bench, the proceedings are to be conducted on the basis of the amended provisions; the other cases should however be considered in accordance with the previous provisions.

In the view of the Tribunal, a general transitional rule formulated in this way, which corresponds to the standard usually adopted in statutes modifying rules for court proceedings and administrative proceedings ("with regard to cases that are pending, the previous provisions shall apply"), would permit the smooth implementation of the new procedure, in particular as regards the continuation of the process of considering cases in which procedural steps have already been taken, including the determination of the composition of adjudicating benches, and even the setting of the dates of hearings or of sitting in camera. Considering the fact that, according to the Registry of the Tribunal, in all cases that were pending before the Tribunal, participants in proceedings had been notified about the referral of the cases for consideration by an adjudicating bench, the further examination of the cases would be conducted in accordance with the procedure on the basis of which the proceedings were instituted.

However, the point is that the reasonable solution arising from Article 2(1), first sentence, of the December Amending Act, has been completely thwarted by the provisions of Article 2(1), second sentence, and Article 2(2) and (3) (quoted above). The actual transitional norm which arises from a joint interpretation of all the three paragraphs of Article 2 of the said Act is exactly the opposite to what is declared at the beginning of that article; namely, it follows from the further paragraphs of Article 2 that all cases pending before the Tribunal on the date of entry into force of the December Amending Act are subject to the new provisions, i.e. the amended provisions of the 2015 Constitutional Tribunal Act as well as Article 2(2) and (3) of the December Amending Act. If the composition of adjudicating benches is to be determined on the basis of the new rules, the dates of hearings are to be set in chronological order, as well as hearings are to be held at least 45 days after the date of service of the notification thereof and in cases considered by a full bench of the Tribunal – after 3 months, then it is hard to indicate which provisions preceding the December Amending Act (apart from

strictly technical ones, concerning the circulation of documents) would be applicable in cases pending before the Tribunal.

A complete assessment of the constitutionality of the solution adopted in Article 2 of the December Amending Act may be carried out only after the presentation of the practical consequences of the application of transitional rules established in the said provision.

5.10.5. The assessment of the constitutionality of Article 2 of the December Amending Act

Article 2(1) of the December Amending Act provides that the rules set out in that Act would be applicable to proceedings on cases with regard to which, until 28 December 2015, the President of the Tribunal did not notify participants in proceedings about the referral of an application, a question of law or a constitutional complaint for consideration by an adjudicating bench. According to the Registry of the Tribunal, there are no such cases. This means that Article 2(1), first sentence, of the December Amending Act establishes a transitional rule that will not be applied in practice.

Moreover, the second transitional rule arising from Article 2(1), first sentence, of the December Amending Act – which implies that the other cases (i.e. in practice all cases that are pending) should be subject to the 2015 Constitutional Tribunal Act before the amendments – is, in fact, overridden by the final part of that provision. Indeed, pursuant to Article 2(1), second sentence, of the December Amending Act, in every case the composition of an adjudicating bench should be determined on the basis of the provisions of that Act, i.e. in compliance with the rules set out in amended Article 44(1)-(3) of the 2015 Constitutional Tribunal Act. Since the indicated provisions introduce new – non-existent in the previous provisions – compositions of adjudicating benches, this entails, in practice, that in all cases where adjudicating benches are changed, the cases will need to be considered anew. On the date of entry into force of the December Amending Act, i.e. on 28 December 2015, there were 174 proceedings pending before the Tribunal, including 15 cases being considered by a full bench of the Tribunal, 144 cases – by an adjudicating bench of 5 judges, and 15 cases – by an adjudicating bench of 3 judges. Due to the fact that the two last-mentioned adjudicating benches are not provided for in amended Article 44(1)-(3) of the 2015 Constitutional Tribunal Act, at least in those 159 cases the composition of adjudicating benches should be determined anew. According to the data of the Office of the Tribunal, out of that number of cases, in 59 instances there would be a need for a full bench determined on the basis of the new rules, including 49 cases which were being considered before 28 December 2015 by an adjudicating bench of 5 judges and 10 cases which were being considered before 28 December 2015 by an adjudicating bench of 3 judges. At the same time, in 100 cases pending before the Tribunal, there would be a need to determine an adjudicating bench of 7 judges, which was non-existent in the previous provisions. As regards 15 cases which were being considered prior to 28 December 2015 by a full bench, it would also need to be verified whether they should not be referred for consideration by an adjudicating bench of 7 judges, provided that these are cases indicated in amended Article 44(1)(2) of the 2015 Constitutional Tribunal Act.

Determining the composition of adjudicating benches in such a large number of cases again as well as conducting proceedings in those cases anew would, in an obvious way, prolong the proceedings. Thus, according to the Tribunal, the solution under discussion is unconstitutional for the same reasons as Article 1(9) of the December Amending Act and

amended Article 44(1) and (3) of the 2015 Constitutional Tribunal Act, as well as due to the retroactivity of the last-mentioned provisions with regard to cases being considered by an adjudicating bench determined in compliance with the previously binding provisions. The requirement to determine the composition of adjudicating benches again in cases that are being considered by the Tribunal, which entails the requirement to commence the consideration of the cases anew, implies interference of the legislature with the adjudication process. Consequently, the said provisions infringe the principle of the Tribunal's independence and its separateness from the other branches of government. In the context of cases where courts referred questions of law to the Tribunal, the said provisions also violate the requirement that cases need to be considered without undue delay, as expressed in Article 45(1) of the Constitution. Indeed, since there are no rational reasons for changing the composition of an adjudicating bench and for considering a case anew by the Tribunal, then the ensuing delay – which in turn causes a delay in proceedings before the court that has referred a question of law for the Tribunal to dispel the said court's doubts as to the constitutionality of given provisions – may not be deemed justified in the light of Article 45(1) of the Constitution.

By contrast, Article 2(2) of the December Amending Act to an extent repeats solutions adopted in Article 1(12)(a) of the December Amending Act and amended Article 87(2) of the 2015 Constitutional Tribunal Act, stipulating that with regard to proceedings that were pending before the entry into force of the said Amending Act, i.e. before 28 December 2015, a hearing may not be held earlier than after 45 days from the date of service of the notification about the date of the hearing, and in cases considered by a full bench – after 3 months. These time-limits are half the length of the time-limits indicated in Article 1(12)(a) of the December Amending Act and amended Article 87(2) of the 2015 Constitutional Tribunal Act; however, all the above arguments for the dysfunctionality, arbitrariness and unconstitutionality of that solution are adequate also with regard to the solution adopted in Article 2(2) of the December Amending Act. In the context of the last-mentioned provision, unconstitutionality is aggravated by the fact that the new solution which requires the "waiting period" before the holding of a hearing is to be applied to proceedings that were pending before the entry into force of the Act which introduces the said solution. Contrary to Article 1(12)(a) of the December Amending Act and amended Article 87(2) of the 2015 Constitutional Tribunal Act, the so-called waiting period for a case is not only to precede a hearing, but also – pursuant to Article 2(4) of the December Amending Act – a sitting in camera. Undoubtedly, such a solution will additionally prolong the period of considering cases pending before the Tribunal. Furthermore, one should point out that the number of cases to which such a transitional rule would apply is 174.

Article 2(3) of the December Amending Act – which stipulates that the dates of hearings at which the Tribunal considers applications from proceedings that were pending before the entry into force of the said Act should be set in the order in which cases are received by the Tribunal – repeats the solution adopted in Article 1(10) of the December Amending Act and corresponding Article 80(2) of the 2015 Constitutional Tribunal Act (and reinforces the dysfunctionality of the said solution), which constitutes a decisive factor for declaring its unconstitutionality for the same reasons as the unconstitutionality of the last-mentioned provision. Indeed, as regards cases received by the Tribunal after the entry into force of the December Amending Act, i.e. after 28 December 2015, it will be possible to consider them only

after considering 174 cases which were received by the Tribunal before the said date. Therefore, this is yet another legislative solution that interferes with the Tribunal's adjudication process, and hence violates the principle of the Tribunal's independence and its separateness from the other branches of government, as well as – in the context of cases commenced by questions of law – infringes the right of citizens to have their cases considered by a court without undue delay.

To sum up, it should be stated that Article 2 of the December Amending Act is inconsistent with:

– Article 2 and Article 173, in conjunction with the Preamble to the Constitution, as well as Article 10 and Article 45(1) of the Constitution, as – by virtue of making it impossible for a constitutional organ of the state, i.e. the Constitutional Tribunal, to carry out its activity diligently and efficiently, as well as by undermining its independence and separateness from the other branches of government – it infringes the principles of a state ruled by law;
– Article 2 of the Constitution, by virtue of providing for the application of the December Amending Act to cases that were already pending before the Tribunal on the date of entry into force of the said Amending Act.

5.11. The dysfunctionality of the entire new adjudication mechanism of the Tribunal

All the above findings lead to the conclusion that all the elements of the new mechanism of the Tribunal for adjudicating on cases falling within the scope of the Tribunal's competence – which are set out in the amended or added wording of Article 10(1), Article 44(1) and (3), Article 80(2) and Article 87(2), as well as the corresponding provisions of the December Amending Act, and also in Article 2 of the December Amending Act – are dysfunctional, for they do not create conditions facilitating the Tribunal's diligent and efficient activity. In addition, Article 1(14) of the December Amending Act and amended Article 99(1) of the 2015 Constitutional Tribunal Act are contrary to Article 190(5) of the Constitution.

All the above-mentioned provisions concern the nature of the adjudication process, as they pertain to the composition of adjudicating benches, rules for setting dates of hearings and sittings, as well as the way of arriving at decisions by the General Assembly of the Judges of the Tribunal in matters directly regarding the adjudication process, such as e.g. the adoption or modification of the Tribunal's rules of procedure. Thus, one may state that these provisions create a new mechanism of adjudication for the Tribunal with regard to cases falling within the ambit of the Tribunal's competence.

There is no doubt that the actual application of each of the solutions included in the above-mentioned provisions would slow down the process of the Tribunal's adjudication and would cause a delay in no way justifiable in the light of constitutional norms, principles and values. The introduction of the requirement of the consideration of cases by a full bench of the Tribunal composed of 13 judges of the Tribunal rules out the possibility of adjudicating on cases in the event of the indisposition of even three judges as well as limits the judges' capacity to get involved, at the same time, in the consideration of other cases. The requirement of a two-thirds majority vote for determining rulings increases the probability of a backlog of unresolved cases in the Tribunal, due to failure to obtain the required majority of votes. The introduction of a few-month waiting period for the date of a hearing or a sitting in cam-

era, and the requirement that cases should be considered by the Tribunal in chronological order, as well as the linking of these two approaches with the necessity of considering cases received by the Tribunal prior to the entry into force of the December Amending Act earlier than subsequent cases, and the requirement to determine – pursuant to Article 2 of the said Act – the new composition of adjudicating benches, i.e. in fact considering the said cases anew, in chronological order and after the lapse of the waiting period for the date of a hearing or a sitting in camera – all this means that the adjudication process will considerably slow down, although in no way will this be justified by the circumstances of a particular case. Moreover, this also manifests the legislator's interference with the judicial competence of the constitutional organ of the state, i.e. the Tribunal, due to the imposition of a prohibition against adjudicating on cases that are actually ready for adjudication. Such an enforced delay in issuing a ruling by the Tribunal infringes the right to have one's case determined without undue delay by a court referring a question of law to the Tribunal; the right is guaranteed to everyone in Article 45(1) of the Constitution.

Included in the provisions reviewed by the Tribunal, particular solutions are shaped in such a way that, taken together, they create a mechanism which paralyses the functioning of the Tribunal. When implemented separately, each of the solutions would still considerably diminish the efficiency of the Tribunal and extend time needed for the exercise of the said court's powers. All those solutions taken together virtually deprive the Tribunal of its capacity to adjudicate. Since the prohibition against adjudicating before the lapse of a certain time-limit refers not only to new cases, but also – pursuant to Article 2 of the December Amending Act – to cases that are pending, this entails that before the lapse of that time-limit (calculated from the date of entry into force of the December Amending Act), the Tribunal may not consider any cases.

What is more, since the legislator introduced the requirement that the Tribunal should determine the new composition of adjudicating benches and re-consider cases that were pending before the entry into force of the December Amending Act, and do so before considering any cases received by the Tribunal after that date, with the assumption that all those cases are subject to new solutions hindering proceedings before the Tribunal, then, in fact, this results in a mechanism which would prevent the Tribunal from reviewing any statutes enacted by the Parliament during its current term of office. Indeed, there is no way of shortening the time-limits for the Tribunal's proceedings – neither in an *ex ante* (*a priori*) review nor in an *ex post* (*a posteriori*) review – so as to review statutes enacted by the current Parliament. The same refers to the review of normative acts adopted by the current Government, instituted by applications, for the review of any sub-statutory acts require the involvement of a full bench of the Tribunal; also, the said acts are subject to all the solutions slowing down proceedings before the Tribunal. The lack of procedural measures for reviewing acts adopted by current state authorities implies, in fact, the exclusion of those acts from the scope of the Tribunal's competence, which is in breach of Article 188 of the Constitution.

An additional element paralysing the activity of the Tribunal is the circumstance that the new solutions entered into force on the date of the promulgation of the December Amending Act, and hence the Tribunal had no possibility of preparing itself for the application thereof (the said issue has already been discussed in detail above).

The Tribunal states that there is no way of arriving at an interpretation of the reviewed provisions that would be consistent with the Constitution, as the content and the underlying purpose of the provisions – i.e. to block the Tribunal – are incompatible with the requirement of diligence and efficiency in the activity of the Tribunal. Also, the solutions included in the reviewed provisions are so dysfunctional that it would be impossible to rectify them in the practice of applying the law.

The negative evaluation of the new adjudication mechanism of the Tribunal to a large extent ensues from a comparison with the previous mechanism, which the Tribunal knows by virtue of its duties. It is on that basis that it should be deemed that proceedings on matters falling within the scope of the Tribunal's competence will be conducted less efficiently and diligently than so far; as regards a review of the law adopted by the current Parliament and Government, such proceedings will not be possible at all.

The legislator's decision to apply the amended provisions forthwith, with the lack of a period of *vacatio legis*, clearly contradicts the declarations of the authors of the December Amending Bill, who claimed that the Bill was intended for "mending" or "improving" the functioning of the Tribunal. On the contrary, the assumed goal (although not stated explicitly) was to deprive the Tribunal of the possibility of conducting a constitutional review of law, at least for a certain period.

Consequently, the Tribunal has concluded that the entire mechanism for adjudicating on cases that fall within the scope of the Tribunal's competence – namely, the mechanism determined by the amended or added wording of Article 10(1), Article 44(1) and (3), Article 80(2) and Article 87(2) of the 2015 Constitutional Tribunal Act, as well as the corresponding provisions of the December Amending Act, and also Article 2 of the December Amending Act – is inconsistent with Article 2 and Article 173, in conjunction with the Preamble to the Constitution, as well as with Article 10 of the Constitution and (except for amended Article 10(1) of the 2015 Constitutional Tribunal Act) with Article 45(1) of the Constitution, as – by virtue of making it impossible for a constitutional organ of the state, i.e. the Constitutional Tribunal, to carry out its activity diligently and efficiently as well as safeguard rights and freedoms, and also by undermining its independence and separateness from the other branches of government – the said mechanism infringes the principles of a state ruled by law. By contrast, Article 1(14) of the December Amending Act and amended Article 99(1) of the 2015 Constitutional Tribunal Act are inconsistent with Article 190(5) of the Constitution, which renders the review of their functionality redundant.

6. The assessment of the amendments concerning the status of the judges of the Constitutional Tribunal

The challenged provisions of the December Amending Act – by modifying the wording of Article 8(4), Article 31, Article 36 of the 2015 Constitutional Tribunal Act, by introducing Article 31a and Article 28a into the 2015 Constitutional Tribunal Act, as well as by repealing Article 28(2) and Article 31(3) thereof – provide for significant changes in the status of the Tribunal's judges. In particular applications, reservations put forward with regard to those provisions were rendered in different manners within the scope of one or separate allegations. However, due to the fact, that they concern issues related to the status of the judges of

the Constitutional Tribunal, they were considered in a separate part of this statement of reasons.

The constitutional issues indicated by the applicants, which make up this set of matters have been divided into four groups:

– authorities that are competent to institute disciplinary proceedings with regard to judges of the Constitutional Tribunal (cf. Art. 1(5) of the December Amending Act, as well as added Art. 28a of the 2015 Constitutional Tribunal Act);
– the recall of a judge of the Constitutional Tribunal from office (cf. Art. 1(6), (7) and (8) of the December Amending Act, as well as added Art. 31a and amended Art. 36(1)(4) of the 2015 Constitutional Tribunal Act);
– the expiry of the mandate of a judge of the Constitutional Tribunal (cf. Art. 1(2) and (8) of the December Amending Act, as well as amended: Art. 8(4) and Art. 36(2) of the 2015 Constitutional Tribunal Act);
– the disciplinary responsibility of a judge of the Constitutional Tribunal for acts committed before taking up a judgeship at the Tribunal (cf. Art. 1(16) of the December Amending Act insofar as it repeals Art. 28(2) of the 2015 Constitutional Tribunal Act).

6.1. The allegation about Article 1(5) of the December Amending Act and added Article 28a of the 2015 Constitutional Tribunal Act

6.1.1. The challenged provisions

Article 28a of the 2015 Constitutional Tribunal Act, added by Article 1(5) of the December Amending Act, reads as follows: "Disciplinary proceedings may also be instituted upon application by the President of the Republic of Poland or the Minister of Justice within 21 days from the date of receiving the application, unless the President of the Tribunal deems that the application is unjustified. A decision on refusal to institute disciplinary proceedings together with a statement of reasons shall be served on the applicant within 7 days from the date of the issuance of the decision."

6.1.2. The allegations of the applicants and the statements of the participants in the proceedings

In the opinion of the First President of the Supreme Court, added Article 28a of the 2015 Constitutional Tribunal Act, by granting the President of Poland and the Minister of Justice the power to lodge, with the President of the Tribunal, an application to institute disciplinary proceedings distorts a balance between the legislature, the executive and the judiciary as well as it undermines the foundations of the political system based on the separation of powers.

The second group of Sejm Deputies pointed out that, from the point of view of the Tribunal's systemic position, entrusting executive authorities with competence to institute disciplinary proceedings implies an infringement of general systemic principles, such as the principle of the tri-division and balance of powers (cf. Art. 10 of the Constitution), as well as a violation of the principle of the judiciary's independence and separateness from the other branches of government (cf. Art. 173 of the Constitution), as this creates room for interfering in matters that fall within the scope of the Tribunal's autonomy.

In the Ombudsman's opinion, entrusting the President of Poland and the Minister of Justice with the power to file an application to institute disciplinary proceedings with regard to judges of the Tribunal results in a relation of dependency between persons holding those offices and non-judicial authorities, which affects the independence of judges. A procedure that is commenced in this way – even if it is deemed completely unjustified by the President of the Tribunal – may still affect the way in which a judge is perceived and may undermine his/her trustworthiness, and the trustworthiness of the Constitutional Tribunal itself.

By contrast, in the opinion of the National Council of the Judiciary, the challenged provision interferes with the independence of the Tribunal and its judges, by going beyond the admissible boundaries of the overlap between the executive and the judiciary. The said provision allows executive authorities to exert influence on the judges of the Tribunal, and thus affect the judicial activity of the Tribunal.

6.1.3. The subject of the review and higher-level norms for the review

The First President of the Supreme Court, when justifying the allegation of an infringement of Article 8(1) of the Constitution, only pointed out that the challenged legal solutions – by undermining the independence of the Tribunal and its judges – were inconsistent with Article 8(1) of the Constitution.

The National Council of the Judiciary did not present any arguments for the allegation that added Article 28a of the 2015 Constitutional Tribunal Act – insofar as it provides for a possibility of instituting disciplinary proceedings with regard to a judge of the Constitutional Tribunal upon application by the President of Poland or the Minister of Justice – infringes Article 2, Article 7, Article 8, Article 10(2), and Article 195(2) of the Constitution.

By contrast, the application filed by the second group of Sejm Deputies did not mention arguments concerning the non-conformity of the provisions under analysis to Article 2 of the Constitution, as regards the aspect of the requirement to "assign the tasks of the state to those authorities that have the capacity to perform the said tasks, respecting general systemic values". The said allegation was raised in the context of infringements concerning the principles of the independence of the Tribunal and its judges.

Within the above scope, the applications fail to meet the formal requirement of appropriate justification for an allegation, arising from Article 61(1)(3) of the 2015 Constitutional Tribunal Act. In this part, the proceedings are subject to discontinuance on the basis of Article 104(1)(2) of the 2015 Constitutional Tribunal Act, on the grounds that the issuance of a ruling is inadmissible.

For this reason, within the scope of this allegation, the Tribunal examined the conformity of Article 1(5) of the December Amending Act and of added Article 28a of the 2015 Constitutional Tribunal Act, in the light of Article 173, in conjunction with Article 10(1), and Article 195(1) of the Constitution.

6.1.4. The course of the legislative process

The December Amending Bill drafted by Sejm Deputies (cf. the Sejm Paper No. 122/8th term of the Sejm) did not provide for adding Article 28a to the 2015 Constitutional Tribunal Act. Article 1(5) of the December Amending Act, which added the said provision, was proposed as an amendment in the course of work carried out by the Legislative Committee after the first reading.

During the sitting of the Sejm's Legislative Committee on 21 December 2015, Ms K. Pawłowicz, a Sejm Deputy, justified the need to add Article 28a to the 2015 Constitutional Tribunal Act, in the following way: "There may not be a situation where not even a remark may be made in public about the judges of the Tribunal. Very frequently making such a remark, or filing the application by the Minister of Justice or the President of Poland will have the character (…) of making a remark in public about undesirable phenomena in a situation where, until, as long as we don't change the Constitution, judges are exempted from any oversight and are actually above the law" (the full transcript of the 5th sitting of the Legislative Committee/ the 8th term of the Sejm, 21 December 2015, p. 35).

6.1.5. The previous jurisprudence and practice of the Constitutional Tribunal

The provisions concerning the disciplinary responsibility of the judges of the Constitutional Tribunal have not so far been the subject of the Tribunal's adjudication. There is also no practice as regards disciplinary proceedings concerning judges of the Tribunal. It happened only once that the President of the Tribunal convened the General Assembly to assess if it was justified to appoint a disciplinary officer with reference to reservations as to the ethical attributes of one of the judges of the Tribunal elected by the Sejm in December 2006. Due to the fact that, before the planned sitting of the General Assembly, the said judge resigned from the office, the Constitutional Tribunal undertook no action which could result in instituting disciplinary proceedings.

The assessment of the allegation concerning Article 1(5) of the December Amending Act and added Article 28a of the 2015 Constitutional Tribunal Act should be preceded by presenting the way of instituting disciplinary proceedings with regard to the judges of the Tribunal as well as the determination in which way the challenged provisions modify the way of initiating the said proceedings, as well as the presentation of relations between authorities that are competent to submit an application in accordance with the challenged provisions – i.e. the President of Poland and the Minister of Justice – and the Constitutional Tribunal.

Neither the 2015 Constitutional Tribunal Act in the version before the challenged amendments nor the 1997 Constitutional Tribunal Act provided for a regulation corresponding to Article 28a added to the 2015 Constitutional Tribunal Act. Also, the 1985 Constitutional Tribunal Act, which was enacted at the time when the political system was regulated by the Constitution of the People's Republic of Poland, did not provide for a possibility of submitting an application by the President of Poland or the Minister of Justice to institute disciplinary proceedings with regard to judges of the Tribunal. Consequently, Article 28a of the 2015 Constitutional Tribunal Act, added by Article 1(5) of the December Amending Act, is the first regulation that provides for the possibility of submitting an application by executive authorities to institute disciplinary proceedings with regard to a judge of the Constitutional Tribunal.

Until the enactment of the December Amending Act, the issue of instituting disciplinary proceedings with regard to judges of the Tribunal was not regulated in the subsequent statutes concerning the Tribunal, but the said statutes made reference to the Supreme Court Act and required that its provisions would be applied accordingly (see Art. 43 of the 2015 Constitutional Tribunal Act, Art. 6(8) of the 1997 Constitutional Tribunal Act, and Art. 18(1) of the 1985 Constitutional Tribunal Act). A modification in the regulation concerning the institution of disciplinary proceedings with regard to judges of the Tribunal, which arises from

adding Article 28a to the 2015 Constitutional Tribunal Act by Article 1(5) of the December Amending Act, is limited to vesting two executive authorities – the President of Poland and the Minister of Justice – with powers to submit an application for instituting the said proceedings.

6.1.6. The institution of disciplinary proceedings – general characteristics; changes in comparison with the previous legal provisions

The disciplinary responsibility of the judges of the Tribunal was partly regulated in the 2015 Constitutional Tribunal Act, and partly by making reference to the provisions of the Supreme Court Act. Pursuant to Article 43 of the 2015 Constitutional Tribunal Act, the duties and rights, including the employment relationship, as well as the disciplinary responsibility of judges of the Tribunal are regulated accordingly by the provisions of the Supreme Court Act, with the proviso that the powers of the First President of the Supreme Court are to be exercised by the President of the Tribunal, and the powers of the Board of the Supreme Court – by the General Assembly of the Judges of the Tribunal.

In the 2015 Constitutional Tribunal Act, there is no provision regulating rules for instituting disciplinary proceedings with regard to judges of the Tribunal, and in particular it was not specified which persons or entities have the initiative in this respect. Hence, the issue of instituting disciplinary proceedings with regard to judges of the Tribunal – even after adding Article 28a to the 2015 Constitutional Tribunal Act by Article 1(5) of the December Amending Act – is still primarily regulated by reference to the Supreme Court Act. In the context of the institution of the said proceedings, Article 56(1) of the Supreme Court Act is to be applied accordingly. Pursuant to that provision, the disciplinary officer of the Supreme Court undertakes disciplinary steps upon request by the First President of the Supreme Court, the Board of the Supreme Court, or on the said officer's own initiative, after s/he has initially established necessary circumstances to determine the characteristics of an offence, as well as after the judge in question has provided an explanation, unless providing the said explanation is not possible. What follows from the above is that, having carried out preparatory inquiries, the disciplinary officer takes a decision whether to institute, or not to institute, disciplinary proceedings. An analogous construct for instituting disciplinary proceedings was provided with regard to judges of common courts (see Art. 114(1) of the Act on the Organisational Structure of Common Courts) and administrative courts (see Arts. 9 and 29 of the Act on the Organisational Structure of Administrative Courts in conjunction with Art. 114(1) of the Act on the Organisational Structure of Common Courts), including the Supreme Administrative Court (see Arts. 9 and 49 of the Act on the Organisational Structure of Administrative Courts in conjunction with Article 56(1) of the Supreme Court Act).

What follows from Article 43 of the 2015 Constitutional Tribunal Act in conjunction with Article 56(1) of the Supreme Court Act is that disciplinary steps concerning a judge of the Constitutional Tribunal are undertaken by the disciplinary officer upon request by the President of the Tribunal or the General Assembly of the Judges of the Tribunal.

In accordance with Article 29(2) of the 2015 Constitutional Tribunal Act, a disciplinary officer is selected by a draw carried out by the President of the Tribunal. As part of preparatory inquiries, the disciplinary officer initially establishes necessary circumstances to determine the characteristics of an offence, and the judge in question provides an explanation,

unless providing the said explanation is not possible (cf. Art. 43 of the 2015 Constitutional Tribunal Act in conjunction with Article 56(1) of the Supreme Court Act). Only later, after carrying out preparatory inquiries, and if there are grounds for that, the disciplinary officer institutes disciplinary proceedings and produces a written account of allegations (cf. Art. 43 of the 2015 Constitutional Tribunal Act in conjunction with Article 56(2) of the Supreme Court Act). This means that, in the case of obtaining information on the occurrence of circumstances justifying the consideration of the validity of instituting disciplinary proceedings, the President of the Tribunal and the General Assembly may take steps aimed at selecting a disciplinary officer and request the disciplinary officer to carry out preparatory inquiries. Subsequently, the disciplinary officer takes a decision on the validity of the institution of disciplinary proceedings.

Challenged Article 1(5) of the December Amending Act and corresponding Article 28a of the 2015 Constitutional Tribunal Act authorise the President of Poland and the Minister of Justice to submit an application to institute disciplinary proceedings with regard to a judge of the Tribunal. It should be noted that there are no analogous solutions in the context of disciplinary proceedings with regard to the judges of the Supreme Court and the judges of the Supreme Administrative Court.

However, the power of that kind is granted to the Minister of Justice with regard to the judges of common courts (cf. Art. 114(1) of the Act on the Organisational Structure of Common Courts). This is linked with the position of the Minister of Justice in relation to common courts, as specified in the Constitution (s/he is a member of the National Council of the Judiciary, which safeguards the independence of courts), in the Act on the Organisational Structure of Common Courts, and in the Act of 4 September 1997 on the Division of the Government Administration (Journal of Laws – Dz. U. of 2015 item 812, as amended; see Art. 187(1)(1) in conjunction with Art. 186(1) of the Constitution, as well as Art. 24(1)(1) and Art. 24 (3) of the Act on the Division of the Government Administration). What follows from the jurisprudence of the Tribunal is that the role of the Minister of Justice, within the scope of disciplinary proceedings carried out with regard to judges of common courts, is limited to referring to the disciplinary officer with a non-binding application for carrying out preparatory inquiries (see the Tribunal's judgment of 14 October 2015, ref. no. Kp 1/15).

Article 1(5) of the December Amending Act and added Article 28a of the 2015 Constitutional Tribunal Act do not specify with whom the President of Poland or the Minister of Justice would have lodge an application for instituting disciplinary proceedings concerning a judge of the Constitutional Tribunal. Due to the fact that there is no permanent disciplinary officer in the Tribunal, the competent person to whom the said application should be addressed appears to be the President of the Tribunal. Indeed, this is a competent authority when it comes to requesting the carrying out of preparatory inquiries as well as the convening of the General Assembly, which is also competent to request that preparatory inquiries be carried out. What weighs in favour of such a solution is the content of Article 1(5) of the December Amending Act and corresponding Article 28a *in fine* of the 2015 Constitutional Tribunal Act, which entrust the President of the Tribunal with the competence to deem that the application is "unjustified".

A procedure for instituting disciplinary proceedings as a result of an application of the President of Poland or the Minister of Justice would look as follows: the President of Po-

land or the Minister of Justice lodges with the President of the Tribunal an application for instituting disciplinary proceedings; then, the President of the Tribunal evaluates – within 21 days – whether the application is justified. In the event of a negative evaluation of the application, Article 28a of the 2015 Constitutional Tribunal Act, added by Article 1(5) of the December Amending Act, stipulates that "a decision on refusal to institute disciplinary proceedings together with a statement of reasons shall be served on the applicant within 7 days from the date of the issuance of the decision". It does not follow from the said provision who is to issue such a decision. By contrast, when it is deemed that the application filed by the President of Poland or the Minister of Justice is justified, the President of the Tribunal – exercising his/her power to commence preparatory inquiries – carries out a draw to select a disciplinary officer and requests the officer to conduct the said inquiries. After the said inquiries, and where justified, the disciplinary officer institutes disciplinary proceedings.

It should be noted that triggers for the President of the Tribunal or the General Assembly to request the disciplinary officer to institute disciplinary proceedings may come from various sources, *inter alia*, from other state authorities, private parties or the mass media. The competent authorities of the Tribunal should evaluate information that could potentially lead to the institution of disciplinary proceedings, so as – on the one hand – they would not make a hasty decision about instituting the proceedings and – on the other hand – they should not underestimate a situation where the carrying out of the proceedings would be required in the light of Article 28 of the 2015 Constitutional Tribunal Act. Challenged Article 1(5) of the December Amending Act and corresponding Article 28a of the 2015 Constitutional Tribunal Act are the only provisions that formalise a procedure preceding the commencement of disciplinary proceedings, imposing an obligation on the President of the Tribunal to consider an application filed in this respect by the President of Poland or the Minister of Justice.

6.1.7. The assessment of the conformity of Article 1(5) of the December Amending Act and of added Article 28a of the 2015 Constitutional Tribunal Act to Article 173, in conjunction with Article 10(1), as well as Article 195(1) of the Constitution

The Constitutional Tribunal indicated in its jurisprudence that the introduction of procedures concerning disciplinary responsibility arises from the unique character of various professional groups as well as the need to protect their autonomy and self-governing nature (cf. the Tribunal's judgment of 8 December 1998, ref. no. K 41/97, OTK ZU No. 7/1998, item 117). This also refers to the singling out of the disciplinary responsibility of judges (cf. the Tribunal's judgment of 4 March 2008 ref. no. SK 3/07, OTK ZU No. 2/A/2008, item 25), including the judges of the Tribunal.

The disciplinary responsibility of judges is aimed at maintaining the proper position of the Tribunal, thus enabling the Tribunal to attain the proper ethical level of judges, which directly affects the Tribunal's judicial activity. On the one hand, the disciplinary responsibility of the Tribunal's judges provides assurance that judges adjudicating on a case would comprise only persons of impeccable moral character, thus guaranteeing diligent adjudication that is independent of any external and internal factors. On the other hand, the realisation of the said disciplinary responsibility is of significance to counteract any conduct that might cause judges – and also the Tribunal – to lose credibility in the eyes of the public. The said responsibility is one of the means intended for guaranteeing that the addressees of the Tribunal's

rulings would perceive the said organ of the judiciary as one composed of persons who preserve the dignity of the office, to the extent which justifies their competence within the scope of the constitutional review of statutes and other normative acts.

In order to evaluate the validity of the aforementioned allegation, it is useful to present relations between the Tribunal and authorities that are competent to submit an application to institute disciplinary proceedings on the basis of the challenged provisions.

In the light of the provisions of the Constitution, at the most general level, relations between the President of Poland and the Constitutional Tribunal are determined by the principle of the separation of and balance between powers (cf. Art. 10 in conjunction with Art. 173 of the Constitution). The relations are manifested in the following areas:

– the appointment of the President and Vice-President of the Constitutional Tribunal by the President of Poland from among candidates proposed by the General Assembly (cf. Art. 194(2) and Art. 144(3)(21) of the Constitution);
– the competence of the President of Poland to lodge applications with the Constitutional Tribunal (cf. Art. 191(1)(1), Art. 192, Art. 122(3), Art. 133(2), Art. 144(3)(9) of the Constitution);
– the competence of the Constitutional Tribunal to determine – upon application by the Marshal of the Sejm – the existence of an impediment to the exercise of the office by the President of Poland (cf. Art. 131 of the Constitution).

The 2015 Constitutional Tribunal Act – apart from provisions that specify the context of the above-indicated constitutional regulations – also describes further relations between the President of Poland and the Constitutional Tribunal. In accordance with Article 21(1) of the 2015 Constitutional Tribunal Act, a person elected to the office of a judge of the Constitutional Tribunal takes the oath of office before the President of Poland (see the judgment of 3 December 2015, ref. no. K 34/15). The 2015 Constitutional Tribunal Act also specifies situations in which the President of Poland is a participant in proceedings before the Tribunal (cf. Art. 56) as well as it indicates that the President of the Tribunal sends a copy of the Tribunal's ruling together with the statement of reasons and dissenting opinions regardless of the fact whether the head of state participated in the proceedings or not (cf. Art. 103(2)). Also, one may indicate relations pertaining to notifying the President of Poland and other state authorities about the Tribunal's activity. This entails providing information by the President of the Tribunal about significant issues arising from the activity and jurisprudence of the Tribunal (cf. Art. 6(3) of the 2015 Constitutional Tribunal Act), as well as the invitation of the President of Poland by the President of the Tribunal to participate in a sitting of the General Assembly, during which significant issues arising from the activity and jurisprudence of the Tribunal are discussed (cf. Art. 11(2) of the 2015 Constitutional Tribunal Act).

By contrast, the Constitution lacks provisions regulating relations between the Minister of Justice and the Constitutional Tribunal. The 2015 Constitutional Tribunal Act contains only provisions on providing information on the Tribunal's activity to other state authorities, including the Minister of Justice (see Art. 6(3) and Art. 11(2) of the 2015 Constitutional Tribunal Act).

Thus, it should be stated that the competence vested in the President of Poland and the Minister of Justice, arising from the challenged provisions, is not linked with the position of the President of Poland in relation to the Tribunal, where the said position is regulated in

the Constitution and by statute; consequently, nor is it linked with the position of the Minister of Justice in relation to the Tribunal. The said competence has a completely new and different character.

Considering the constitutional position of the Tribunal, it ought to be deemed that – contrary to what the Public Prosecutor-General argued in his statement, which was ultimately withdrawn – the issue of disciplinary responsibility of the judges of the Tribunal falls within the scope of the Tribunal's independence and autonomy, and should be handled entirely by the Tribunal. When arguing for the constitutionality of added Article 28a of the 2015 Constitutional Tribunal Act, the Public Prosecutor-General failed to notice, *inter alia*, that interference of external, non-judicial authorities with the said realm, which consists in filing a formal request for disciplinary proceedings to be instituted, could affect the way of perceiving the Tribunal as an independent organ of the judiciary which can guantee the due exercise of its own powers. Provided for in Article 1(5) of the December Amending Act, and corresponding Article 28a of the 2015 Constitutional Tribunal Act, a mechanism for applying for the institution of disciplinary proceedings does not take account of the systemic separation of the judiciary, and hence also of the Tribunal, from the other branches of government, with is linked with the special powers of that organ of the judiciary, which involve the assessment of normative acts, including those issued by the President of Poland (see e.g. the judgment of 29 November 2007, ref. no. SK 43/06, OTK ZU No. 10/A/2007, item 130; the decision of 20 May 2009, ref. no. K 25/08, OTK ZU No. 5/A/2009, item 77) and the Minister of Justice (see e.g. the judgments of: 16 March 1999, ref. no. SK 19/98, OTK ZU No. 3/1999, item 36; 22 July 2008, ref. no. K 24/07, OTK ZU No. 6/A/2008, item 110). The granting of the competence to file the aforementioned application to executive authorities indirectly affects conditions in which the Tribunal carries out its judicial activity and, for this reason, it is inconsistent with the principle of the Tribunal's independence.

In accordance with the previous jurisprudence of the Constitutional Tribunal, the independence of judges, including the judges of the Tribunal, which arises from Article 195(1) of the Constitution, comprises numerous elements, namely:

– impartiality with regard to participants in proceedings;
– independence from non-judicial authorities (institutions);
– the autonomy of a judge in relations with judicial authorities, other judges, and the organs of the judiciary;
– independence from political factors;
– the decisional autonomy of a judge.

The independence of a judge is not merely the right of the judge, but it is also the judge's constitutional obligation, just as the legislator's constitutional obligation is to safeguard the independence of the judge (see the judgment of 3 December 2015, ref. no. K 34/15, as well as its judgments ref. no. K 3/98 and ref. no. Kp 1/15).

The Constitutional Tribunal has stressed that the independence of judges is part of the essence of the proper exercise of the office of a judge, and thus it also constitutes a guarantee of civil rights and freedoms. A particularly striking example of failure to fulfil the obligations linked with the principle of independence is a breach of the judges' obligation to remain impartial, which may *inter alia* involve adjusting the content of issued rulings to the

suggestions or instructions communicated to a judge from the outside (see the judgments ref. no. K 3/98 and ref. no. Kp 1/15).

To make it possible to judges to maintain their independence, which arises from Article 195(1) of the Constitution, it is indispensable to have legal guarantees of the said independence. One of them is to leave the Tribunal the initiative within the scope of handling the disciplinary responsibility of the judges of the Tribunal. This is necessary to ensure the independence of the Tribunal from other state authorities, whether belonging to the legislature, the executive or the judiciary. By contrast, the provisions of ordinary statutes should rather create further guarantees for ensuring the independence of judges, and not to vest executive authorities with powers to directly affect the situation of the judges of the Tribunal.

It should be deemed that Article 1(5) of the December Amending Act and added Article 28a of the 2015 Constitutional Tribunal Act – by entrusting executive authorities with the competence to file an application to institute disciplinary proceedings – infringe the independence of judges, by correlating a decision concerning a judge with non-judicial authorities and political factors. At the same time, it is not a decisive factor that a decision on the validity of the application as well as the commencement of disciplinary proceedings are determined by the President of the Tribunal. Even the mere possibility of submitting such an application may negatively affect a judge of the Tribunal and has an impact on the perception of the independence of the judge.

It should also be stressed that the disciplinary responsibility of the judges of the Tribunal does not exclude their criminal, fiscal and criminal, or administrative liability or responsibility determined in the so-called lustration process. Disciplinary responsibility is an additional form of oversight over the judges of the Tribunal, which is to guarantee that the Tribunal will only be composed of such persons who fulfil stringent ethical criteria and whose conduct does not undermine the dignity of the office of a judge, as well as who obey the provisions of law. In this context, it needs to be concluded that it was inapt for the Sejm Deputy to justify the addition of the above-mentioned challenged provision to the 2015 Constitutional Tribunal Act, at the sitting of the Sejm's Legislative Committee on 21 December 2015, by stating that: "judges are exempted from any oversight and are actually above the law" (the full transcript of the 5th sitting of the Legislative Committee/ the 8th term of the Sejm, 21 December 2015, p. 35).

Taking the above conditions into consideration, the Constitutional Tribunal adjudicated that Article 1(5) of the December Amending Act and added Article 28a of the 2015 Constitutional Tribunal Act are inconsistent with Article 173, in conjunction with Article 10(1), as well as with Article 195(1) of the Constitution.

6.2. Allegations concerning: Article 1(6) of the December Amending Act, which repeals Article 31(3) of the 2015 Constitutional Tribunal Act; Article 1(7) of the December Amending and added Article 31a of the 2015 Constitutional Tribunal Act; Article 1(8) of the December Amending Act, insofar as it amends Article 36(1)(4) of the 2015 Constitutional Tribunal Act; and amended Article 36(1)(4) of the 2015 Constitutional Tribunal Act

6.2.1. The challenged provisions.

By Article 1(7) and (8) of the December Amending Act, the legislator introduced a possibility of recalling a judge from office by the Sejm upon an application filed of the General Assembly (cf. added Art. 31a and amended Art. 36(1)(4) of the 2015 Constitutional Tribunal Act). This is linked with the elimination of the recall of a judge of the Tribunal from office from the catalogue of disciplinary penalties that may be administered in disciplinary proceedings concerning the judges of the Tribunal (cf. Art. 1(6) of the December Amending Act).

Article 1(6) of the December Amending Act reads as follows: "in Article 31, para 3 shall be repealed". Prior to the said repeal, Article 31 of the 2015 Constitutional Tribunal read as follows:

"The disciplinary penalties shall be as follows:

1) a warning;
2) a reprimand;
3) the recall of a judge of the Tribunal from office".

Pursuant Article 31a of the 2015 Constitutional Tribunal Act, added by Article 1(7) of the December Amending Act:

"1. In particularly striking instances, the General Assembly shall lodge an application with the Sejm to recall a judge of the Tribunal from office.

2. The General Assembly may adopt a resolution or lodge an application in the case referred to in para 1, also upon application by the President of the Republic of Poland or the Minister of Justice within 21 days from the date of receiving the application.

3. A resolution on refusal to lodge the application referred to in para 1 together with a statement of reasons shall be served on the applicant indicated in para 2 within 14 days from the date of the adoption of the resolution."

By contrast, Article 36(1)(4) of the 2015 Constitutional Tribunal Act, as amended by Article 1(8) of the December Amending Act, stipulates that: "The mandate of a judge of the Tribunal shall expire before the end of the judge's term of office in the case of (…) the recall of the said judge from office by the Sejm, upon application by the General Assembly".

6.2.2. The allegations of the applicants and the statements of the participants in the proceedings

In the view of the First President of the Supreme Court, the challenged provisions distort the balance between the legislative, executive and judiciary powers, by creating non-constitutional powers which consist in providing the Sejm as well as the President of Poland and the Minister of Justice with the possibility of undertaking actions that will infringe the independence of the Tribunal and its judges. The introduction of the legal institution of recalling a judge of the Tribunal by the Sejm upon application by the General Assembly means correlating the fate of a judge with the stance of a parliamentary majority, and this results in politicising the Tribunal.

In the opinion of the second group of Sejm Deputies, the challenged provisions infringe: the standards of appropriate legislation; the principle that judges are not removable; the requirement of court adjudication on the recall of a judge from office; as well as the principle of the independence of the judiciary and the principle of the independence of judges. The singling out of the penalty of recalling a judge from office from the catalogue of disciplinary penalties and the vesting of the competence to administer the said penalty with the Sejm

result in creating two competing modes of addressing the disciplinary responsibility of the Tribunal's judges; the modes are diverse in terms of a procedure, sanctions and an authority that administers the sanctions. The first mode provided for in Article 29 of the 2015 Constitutional Tribunal Act meets the standards of judges' independence, whereas the second one, provided for in Article 31a added to the 2015 Constitutional Tribunal Act fails to meet the said standards. Moreover, Article 31a includes a term lacking sufficient specificity – 'in particularly striking instances', which is used to describe a situation which justifies the institution of proceedings aimed at recalling a judge from office. What follows from the systemic position of the Tribunal and the constitutional status of the judges of the Tribunal is the need for special safeguards for the judges against interference of the other authorities. Making a decision on the recall of a judge of the Tribunal from office dependent on the will of a parliamentary majority creates room for the Sejm's influence on the process of the Tribunal's adjudication, especially that proceedings on the recall of the judge from office may be instituted upon application by the President of Poland or the Minister of Justice. Main reservations of the second group of Sejm Deputies are raised also by the fact that the stage of proceedings in the Sejm with regard to the application for the recall of the judge from office, has not been regulated in any of the statutory provisions on the Constitutional Tribunal, which means that a procedure in this respect is determined by the rules of procedure of the Sejm. Also, according to the second group of Sejm Deputies, proceedings referred to in Article 31a added to the 2015 Constitutional Tribunal Act do not meet standards arising from Article 78 of the Constitution.

The Ombudsman pointed out that the competence vested in the President of Poland and the Minister of Justice to lodge applications with the General Assembly to institute proceedings to recall a judge of the Tribunal from office may constitute a form of influence, , exerted by political authorities on a judge of the Tribunal, which is inadmissible in the light of the Constitution. In the opinion of the Ombudsman, the application of Article 180(2) of the Constitution with regard to the judges of the Tribunal determines that the recall of a judge from office may only occur on the basis of a court ruling, in this case – a ruling issued by the judges of the Tribunal. No non-judicial authority may adjudicate on the recall of a judge from office.

The application of the National Council of the Judiciary stressed that the challenged provisions infringe the principle of the tri-division and balance of powers, expressed in Article 10 of the Constitution, as well as they introduce the possibility of 'interference of the legislative with the judiciary", which violates the independence of the Tribunal and its judges.

6.2.3. The subject of the review and higher-level norms for the review

In the *petitum* of her application, the First President of the Supreme Court challenged entire amended Article 36 of the 2015 Constitutional Tribunal Act. However, what follows from the justification for the application is that the provision is challenged within the scope in which it concerns: the recall of a judge of the Tribunal from office (cf. amended Art. 36(1)(4) of the 2015 Constitutional Tribunal Act) as well as the Sejm's determination of the expiry of the mandate of a judge of the Tribunal upon application by the General Assembly (cf. amended Art. 36(2) of the 2015 Constitutional Tribunal Act). Thus, in the light of the principle of *falsa demonstratio non nocet*, it should be deemed that the applicant's intention

was only to challenge amended Article 36(1)(4) and amended Article 36(2) of the 2015 Constitutional Tribunal Act.

The First President of the Supreme Court did not justify the allegation about the infringement of Article 8 of the Constitution by added Article 31a and amended Article 36 of the 2015 Constitutional Tribunal Act. In the justification for the application of the second group of Sejm Deputies, there were no reasons for the allegation about the infringement of Article 2, Article 78, Article 180(1) and (2), Article 195(1) and Article 197 in conjunction with Article 112 of the Constitution by Article 1(6) of the December Amending Act. In this respect, the applications do not meet the formal requirement of providing justification for an allegation, which arises from Article 61(1)(3) of the 2015 Constitutional Tribunal Act. For that reason, the proceedings are subject to discontinuance within the indicated scope, on the basis of Article 104(1)(2) of the 2015 Constitutional Tribunal Act on the grounds that the issuing of a ruling is inadmissible.

In the view of the second group of Sejm Deputies, added Article 31a and amended Article 36(1)(4) of the 2015 Constitutional Tribunal Act infringes Article 197 in conjunction with Article 112 of the Constitution, due to the fact that: "the stage of proceedings in the Sejm with regard to the application for the recall of a judge of the Tribunal from office has not been regulated in detail in the Constitutional Tribunal Act". It should be stressed that this is an allegation about a legislative omission, which may not constitute the subject of the Tribunal's adjudication. A legislative omission occurs when the legislator does not at all enact certain legal provisions, and in the opinion of an applicant instituting a constitutional review, the introduction of them into the legal system is necessary from the point of view of the Constitution. The Tribunal has consistently held that it has no jurisdiction to adjudicate on cases of that kind. For that reason, the proceedings within the scope of the reviewing added Article 31a and amended Article 36(1)(4) of the 2015 Constitutional Tribunal Act in the light of Article 197, in conjunction with Article 112, of the Constitution are subject to discontinuance on the basis of Article 104(1)(2) of the 2015 Constitutional Tribunal Act, due to the inadmissibility of adjudication.

In conclusion, within the group of the allegations under discussion, the Tribunal examined the conformity of:

– Article 1(6) of the December Amending Act, which repeals Article 31(3) of the 2015 Constitutional Tribunal Act, to Article 173, in conjunction with Article 10(1), of the Constitution as well as
– Article 1(7) of the December Amending Act and added Article 31a of the 2015 Constitutional Tribunal Act, as well as Article 1(8) of the December Amending Act, insofar as it amends amended Article 36(1)(4) of the 2015 Constitutional Tribunal, and Article 36(1)(4) of the Constitutional Tribunal Act, in the light of the principle of specificity of law, which arises from Article 2 of the Constitution, and also to Article 78, Article 173 in conjunction with Article 10(1), Article 180(1) and (2) as well as Article 195(1) of the Constitution.

In this context, it ought to be pointed out that Article 1(6) of the December Amending Act is the first one of several repealing provisions which are challenged in the present case. The content of that type of provisions – in formal terms – amounts to eliminating over a dozen components of the 2015 Constitutional Tribunal Act from the legal system. In the light of the doctrine, and the previous jurisprudence of the Constitutional Tribunal,

there are no obstacles to examining the constitutionality of such normative solutions (cf. A. Mączyński, "Kontrola konstytucyjności przepisów uchylających i zmieniających", [in:] *Trybunał Konstytucyjny. Księga XV-lecia*, Warszawa 2001, p. 157 *et seq.*; S. Wronkowska, "O źródłach prawa i aktach normatywnych raz jeszcze", [in:] *Prawo prywatne czasu przemian*, Poznań 2005, in particular pp. 128-133; as regards the jurisprudence, especially the judgments of: 20 April 2005, ref. no. K 42/02, OTK ZU No. 4/A/2005, item 38; 12 June 2006, ref. no. K 38/05, OTK ZU No. 6/A/2006, item 63, as well as the judgment ref. no. K 53/07, and also the decision of 17 July 2014, ref. no. P 28/10, OTK ZU No. 7/A/2014, item 83). In such a case, in the light of higher-level norms for the review indicated by the applicant instituting the review proceedings, the essence of the constitutional review is to assess whether it was admissible to repeal provisions enumerated in the repealing provision challenged in the review. What becomes the subject of the review is the conformity of a specific legal gap to the Constitution, i.e. the lack of regulations within a scope which was hitherto regulated, and – in the light of the Constitution – which should still be regulated.

6.2.4. The course of the legislative process

The original version of the December Amending Bill, proposed by a group of Deputies, (cf. the Sejm Paper No. 122/8th term of the Sejm) did not provide for: repealing Article 31(3) of the 2015 Constitutional Tribunal Act, adding Article 31a to the said Act, and amending Article 36(1)(4) of the said Act. The provisions repealing Article 31(3) of the 2015 Constitutional Tribunal Act, adding Article 31a to the said Act, and amending Article 36(1)(4) of the said Act were submitted in the form of an amendment after the first reading of the Bill at the sitting of the Sejm's Legislative Committee on 21 December 2015.

During the said sitting, Ms K. Pawłowicz, a Sejm Deputy, justified the need to repeal Article 31(3) of the 2015 Constitutional Tribunal Act as follows: "our proposal is that the wording 'the recall of a judge of the Tribunal from office' should be replaced by different wording, since we opt for a model where an authority that is competent to appoint should also have the power to recall from office and determine the expiry of the mandate. We do not deprive the Constitutional Tribunal of its right to decide whether a judge of the Tribunal deserves such a serious penalty or not. We propose that the current point 3 be crossed out [from Art. 31 of the 2015 Constitutional Tribunal Act] and additional Article 31a be added" (the full transcript of the 5th sitting of the Legislative Committee/ the 8th term of the Sejm, 21 December 2015, p. 26).

When arguing for the introduction of Article 31a and an amendment to Article 36(1)(4) of the 2015 Constitutional Tribunal Act, Ms K. Pawłowicz pointed out that: "this [i.e. the General Assembly's submission of an application to the Sejm for the recall of a judge of the Tribunal from office] remains the power of the General Assembly. The Sejm does nothing on its own initiative. In paragraph 2, there is a possibility for the President of Poland and the Minister of Justice to file an application for the administration of a disciplinary penalty. The sovereign here is the General Assembly, which may refuse to file such an application and to carry out such proceedings. However, such a possibility for the President of Poland or the Minister of Justice should be provided. This has nothing to do with a violation of judges' independence, as there may be circumstances which virtually require conducting general supervision in certain drastic situations, such as those we're facing now, with the President of the Tribunal, Judge Rzepliński, or retired judges of the Tribunal (although such suspension will

not be applicable to retired judges), who undermine the dignity of a judge by taking on the role of a politician. Let me once again repeat that what I mean is the submission of the said application. By contrast, a decision to proceed with the application and the effects thereof fall entirely within the scope of the Tribunal" (the full transcript of the 5th sitting of the Legislative Committee/ the 8th term of the Sejm, 21 December 2015, pp. 26-27).

6.2.5. Proceedings concerning the recall of a judge of the Tribunal from office – general characteristics; changes in comparison with the previous legal provisions

The said provisions have vested the Sejm with competence to recall a judge of the Tribunal from office, at the same time depriving the Tribunal of such competence. Neither the 2015 Constitutional Tribunal Act, in the version before the amendments, nor the 1997 Constitutional Tribunal Act provided for such competence of the Sejm. According to the previous legal provisions, the recall of a judge of the Tribunal from office could only be determined in the course of disciplinary proceedings (cf. Art. 10 of the 1997 Constitutional Tribunal Act).

The catalogue of all statutory changes arising from the challenged provisions, within the scope of the allegations, is as follows:

– depriving the Constitutional Tribunal of its competence to administer the disciplinary penalty consisting in recalling a judge of the Tribunal from office (the repeal of Article 31(3) of the 2015 Constitutional Tribunal Act);
– devising – apart from disciplinary proceedings – a separate procedure for recalling a judge of the Tribunal from office (cf. added Art. 31a and amended Art. 36(1)(4) of the 2015 Constitutional Tribunal Act);
– vesting the President of Poland and the Minister of Justice with competence to apply for the commencement of the procedure for recalling a judge of the Tribunal from office (cf. added Art. 31a(2) of the 2015 Constitutional Tribunal Act);
– limiting the role of the General Assembly of the Judges of the Tribunal to the lodging of an application with the Sejm to recall a judge of the Tribunal from office (cf. added Art. 31a and amended Art. 36(1)(4) of the 2015 Constitutional Tribunal Act);
– vesting the Sejm with competence to recall a judge of the Tribunal from office upon an application of the General Assembly (cf. added Art. 31a and amended Art. 36(1)(4) of the 2015 Constitutional Tribunal Act).

The wording of the challenged provisions is not clear, and it does not follow therefrom whether the procedure for recalling a judge of the Tribunal from office, as set out in added Article 31a and amended Article 36(1)(4) of the 2015 Constitutional Tribunal Act, is to be implemented as part of disciplinary proceedings for judges of the Tribunal or as separate parallel proceedings. This is of great significance, *inter alia*, as regards the commencement of the procedure as such, the disciplinary responsibility of judges, as well as steps that need to be taken when deciding whether the General Assembly should, or should not, lodge a relevant application in this respect. Added Article 31a of the 2015 Constitutional Tribunal Act does not specify in what situations the General Assembly would have to lodge an application for the recall of a judge of the Tribunal from office, as the provision includes a phrase lacking sufficient specificity, namely 'in particularly striking instances'.

If one were to presume that the procedure for recalling a judge of the Tribunal from office – which is provided for in the December Amending Act – is to be executed as part of

disciplinary proceedings, then it should be assumed that, in the course of those proceedings, a competent adjudicating bench ought to determine the matter by issuing a ruling on the necessity to recall the judge from office, together with a motion that the General Assembly should lodge an application with the Sejm for the recall of the judge from office. Then the recall of a judge of the Tribunal from office would constitute a penalty for the disciplinary responsibility of the judge which is administered in a complex procedure requiring the participation of a competent organ of the legislature. Given such an interpretation of the challenged provisions, in disciplinary proceedings, the Tribunal, and more precisely – an adjudicating bench, would still be the body that takes a decision on the recall of a judge of the Tribunal from office, whereas the Sejm would be obliged to take steps resulting in the recall of the judge from office in every case of receiving the application of the General Assembly.

What appears to weigh in favour of a different interpretation – where the challenged provisions permit the recall of a judge of the Tribunal from office on the basis of a procedure that is separate from disciplinary proceedings – is the content of Article 1(7) of the December Amending Act and added Article 31a(2) of the 2015 Constitutional Tribunal Act. The said provisions vest the President of Poland and the Minister of Justice with competence to lodge an application with the General Assembly for taking steps to recall a judge of the Tribunal from office. Considering that the competence to file an application for instituting disciplinary proceedings has been granted to those authorities separately in Article 28a of the 2015 Constitutional Tribunal Act, it should be deemed that the legislator's intention was to separate these two procedures.

Due to the indicated lack of clarity, on the basis of the challenged provisions, it is impossible to reconstruct, in a definite way, the course of the entire procedure, set by the challenged provisions, the execution of which results in the recall of a judge of the Tribunal from office. There is no doubt that "in particularly striking instances" the General Assembly would have the possibility of referring to the Sejm for the recall of a judge of the Tribunal from office, whether on the Assembly's own initiative or upon application by the President of Poland or the Minister of Justice (cf. Art. 1(7) of the December Amending Act and added Art. 31a(1) and (2) of the 2015 Constitutional Tribunal Act). There is also no doubt that the Sejm would have competence to recall a judge of the Tribunal from office, upon application filed by the General Assembly (cf. Art. 1(8) of the December Amending Act and amended Art. 36(1)(4) of the 2015 Constitutional Tribunal Act). Furthermore, the President of Poland and the Minister of Justice may file an application with the General Assembly to take steps to recall a judge of the Tribunal from office (cf. Art. 1(7) of the December Amending Act and added Art. 31a(2) of the 2015 Constitutional Tribunal Act). If the application of the said President or Minister were deemed unjustified, the General Assembly would adopt a resolution on refusal to lodge an application in this respect with the Sejm. The resolution together with a statement of reasons would be served on the said President or Minister within 14 days from the date of the adoption of the resolution (cf. Art. 1(7) of the December Amending Act and added Art. 31a(3) of the 2015 Constitutional Tribunal Act).

6.2.6. The assessment of the conformity of Article 1(6) of the December Amending Act – which repeals Article 31(3) of the 2015 Constitutional Tribunal Act – to Article 173, in conjunction with Article 10, of the Constitution

Challenged Article 1(6) of the December Amending Act in a significant way modifies the disciplinary responsibility of judges of the Tribunal, by eliminating the most severe penalty administered by the Tribunal. After the adoption of the challenged provision, the catalogue of penalties that may be administered in disciplinary proceedings was limited to two penalties, namely, a warning and reprimand, (cf. Art. 31(1) and (2) of the 2015 Constitutional Tribunal Act). The repeal of Article 31(3) of the 2015 Constitutional Tribunal Act, which provides for the disciplinary penalty of the recall of a judge of the Tribunal from office, entails that – after the entry into force of the December Amending Act – the Tribunal has no possibility of taking a decision to exclude, from the judges of the Tribunal, a person whose conduct: undermines the dignity of the office of a judge of the Tribunal; is unethical; or contravenes the provisions of law. Within the scope of this allegation, the constitutional issue amounts to answering the following question: does the deprivation of the Tribunal of its competence to determine the recall of a judge of the Tribunal from office in the course of disciplinary proceedings infringe the Tribunal's independence?

The singling out of the disciplinary responsibility of the judges of the Tribunal, above all, serves the protection of the Tribunal's autonomy and independence, as well as contributes to preserving due respect for the Tribunal's rulings among the addressees of the rulings. It should be noted that the penalty of a warning and the penalty of a reprimand will not be adequate measures for all potential misconduct which may undermine the dignity of the office of a judge of the Tribunal. Where justified, it is necessary to administer the penalty of the recall of a judge of the Tribunal from office so as to remove from office a person who fails to meet the requirements which are indispensable for the performance of judicial duties. Therefore, the disciplinary penalty of the recall of a judge of the Tribunal from office constitutes one of the legal guarantees of the Tribunal's independence. Consequently, the elimination of the provision on the said disciplinary penalty ought to be regarded as a breach of the principle of the Tribunal's independence, expressed in Article 173, in conjunction with Article 10(1), of the Constitution.

As a side remark, it should be noted that legal provisions on disciplinary proceedings concerning judges of the Supreme Court (cf. Art. 55(1)(4) of the Supreme Court Act), judges of common courts (cf. Art. 109(1)(5) of the Act on the Organisational Structure of Common Courts), as well as judges of administrative courts (see Art. 9, Art. 29 of the Act on the Organisational Structure of Administrative Courts in conjunction with Art. 109(1)(5) of the Act on the Organisational Structure of Common Court), including judges of the Supreme Administrative Court (cf. Art. 49 of the Act on the Organisational Structure of Administrative Courts in conjunction with Art. 56(1) of the Supreme Court Act), mention a possibility of recalling a judge from office in the course of disciplinary proceedings. The repeal of the provision on the recall of a judge of the Tribunal from office should, in this context, be considered as the legislator's attempt to undermine the autonomy of the judiciary, which violates basic constitutional principles that regulate the organisational structure of the organs of the judiciary. Within the scope of their autonomy, the said organs should have measures to guarantee that a person holding the office of a judge meets the necessary criteria to preserve the dignity of the office.

In the light of the above arguments, the Constitutional Tribunal has adjudicated that Article 1(6) of the December Amending Act, which repeals Article 31(3) of the 2015 Consti-

tutional Tribunal Act, is inconsistent with Article 173, in conjunction with Article 10(1), of the Constitution.

6.2.7. The assessment of the conformity to the principle of specificity of law (derived from Article 2 of the Constitution) of the following provisions: Article 1(7) of the December Amending Act and added Article 31a of the 2015 Constitutional Tribunal Act; Article 1(8) of the December Amending Act, insofar as it amends Article 36(1)(4) of the 2015 Constitutional Tribunal Act; and amended Article 36(1)(4) of the 2015 Constitutional Tribunal Act

In accordance with the requirement of specificity of law, which arises from Article 2 of the Constitution, legal provisions should be formulated in a correct, precise, and clear way. It may be considered an infringement of the Constitution when the legislator adopts provisions that are vague, permit diverse interpretations, and make it difficult for citizens to predict the legal consequences of their conduct (see the judgment of 22 May 2002, ref. no. K 6/02, OTK ZU No. 3/A/2002, item 33). The legislator is required to draft legal provisions that will be as specific as possible in a given context, both as regards their content and form. The two dimensions of the analysed principle comprise criteria that make up the so-called test of specificity of law, which should be applied to every examined regulation. The said test comprises the following criteria: the precision of legal provisions; the clarity of the provisions; and the legislative correctness of the provisions. The precision of provisions should be understood as a possibility of decoding unambiguous legal norms, and the effects thereof, from the provisions, by means of established interpretative rules. The clarity of provisions implies that they are understood at the level of general language. By contrast, the legislative correctness of provisions means that they are consistent with the requirements of the principles of appropriate legislation (see the Tribunal's judgment of 28 October 2009, ref. no. Kp 3/09, OTK ZU No. 9/A/2009, item 138).

The challenged provisions do not meet the above-defined criteria for the specificity of law.

Above all, one should agree with the second group of Sejm Deputies that the use of the phrase lacking sufficient specificity, namely, 'in particularly striking instances', to describe situations which justify lodging an application with the Sejm for the recall of a judge of the Tribunal from office, as rendered in Article 1(7) of the December Amending Act and in added Article 31a(1) of the 2015 Constitutional Tribunal Act, makes the said provisions fail to meet the standard of precision for a legal regulation. The above-mentioned phrase is not a constitutional term; nor does it appear in other statutory provisions on criteria for the disciplinary responsibility of public officials. As one may suspect, 'a particularly striking instance' is an unusual situation that is both in breach of law and should be condemned on moral grounds. However, it does not follow from the wording of the analysed provisions that the said situation is to involve particular, manifestly reprehensible conduct on the part of a judge of the Tribunal against whom disciplinary proceedings are being instituted. It is also possible to interpret the provision in the way that the phrase 'in particularly striking instances' refers to circumstances that do not concern the judge's conduct, or that are even beyond the judge's control. Thus, one may not rule out that a basis for recalling a judge of the Tribunal from office would be "particularly striking instances" of actions taken by state authorities, including the Sejm or the President of Poland, as regards electing or swearing in a judge of the Tribunal.

This would constitute a serious threat to the independence of the judges of the Tribunal. Due to the significance of the action mentioned in the said provisions for the status of a judge of the Tribunal, it is necessary to regulate – in a way as detailed as possible – conditions for establishing responsibility that may lead to the recall of a judge of the Tribunal from office.

Moreover, with regard to the procedure set out in added Article 31a and amended Article 36(1)(4) of the 2015 Constitutional Tribunal Act, as well as the corresponding provisions of the December Amending Act, it is unclear whether to apply the criteria for disciplinary responsibility included in Article 28 of the 2015 Constitutional Tribunal Act, or whether the procedure introduces a different form of responsibility which has not so far been provided for by statute.

It does not follow unambiguously from the content of those provisions what effect will result from the aforementioned application lodged by the General Assembly with the Sejm. Does this trigger the Sejm's obligation to recall a judge of the Tribunal from office? Or does this merely commence a procedure resulting in the recall of the judge from office, which is to be applied by the Sejm? Such doubts were also raised in the withdrawn statement of the Public Prosecutor-General. Also, one may have doubts as to the scope of competence granted to the General Assembly in Article 1(7) of the December Amending Act and in added Article 31a(2) of the 2015 Constitutional Tribunal Act, namely: do the provisions mean the possibility of adopting a resolution on the recall of a judge of the Tribunal from office, since the resolution seems to concern "the case referred to in para 1", or rather, do the provisions pertain to a resolution on refusal to lodge the application with the Sejm, which is mentioned in Article 1(7) of the December Amending Act and in added Article 31a(3) of the 2015 Constitutional Tribunal Act?

Due to the indicated lack of clarity in the challenged provisions, in the context of such thorny matters, it is impossible to decode unambiguous legal norms from those provisions, as well as the effects thereof, by means of the well-established rules for interpreting law. It should be stressed that this refers to statutory provisions with repressive functions, in the context of which the requirement of clarity and precision is particularly salient. This implies that the challenged provisions do not meet the standards set by the principles of appropriate legislation as well as they infringe the principle of specificity of law, arising from Article 2 of the Constitution.

Taking the above into consideration, the Constitutional Tribunal adjudicated that:

– Article 1(7) of the December Amending Act and added Article 31a of the 2015 Constitutional Tribunal Act, as well as
– Article 1(8) of the December Amending Act, insofar as it amends Article 36(1)(4) of the 2015 Constitutional Tribunal Act, and amended Article 36(1)(4) of the 2015 Constitutional Tribunal Act

are inconsistent with the principle of specificity of law, derived from Article 2 of the Constitution.

6.2.8. The assessment of the conformity to Article 173 in conjunction with Article 10(1), and also to Article 195(1), and Article 78 of the Constitution of the following provisions: Article 1(7) of the December Amending Act and added Article 31a of the 2015 Constitutional Tribunal Act; Article 1(8) of the December Amending Act, insofar as it amends Article 36(1)(4) of the Constitutional Tribunal Act; and amended Article 36(1)(4) of the 2015 Constitutional Tribunal Act

Within the scope of this allegation, the constitutional issue amounts to answering the question whether vesting the Sejm with competence within the scope of recalling a judge from office in accordance with a special procedure that may be commenced, *inter alia*, upon application by the President of Poland or the Minister of Justice does not infringe the independence of the Tribunal and its judges.

The Sejm, as an organ of the legislature, may have an impact on the organs of the judiciary, including the Constitutional Tribunal; this may occur only within the limits that do not violate the principle of the separateness of the judiciary, and in particular in situations set out in the Constitution.

Relations between the Sejm and the Constitutional Tribunal which are specified by the Constitution are binary in nature. Article 194(1) of the Constitution grants the Sejm competence within the scope of electing the judges of the Tribunal. By contrast, the Constitutional Tribunal is an organ of the judiciary which is competent to evaluate the conformity to the Constitution of all statutes and normative resolutions passed by the Sejm. Moreover – in the case of an application submitted by the President of Poland – the Tribunal may determine the fate of a bill passed by the Sejm, which is awaiting the signature of the said President and which is thus not yet binding, as to its conformity to the Constitution on the basis of Article 122(3) of the Constitution. Pursuant to Article 239(1) of the Constitution, within two years from the date of the entry into force of the Constitution (i.e. until 16 October 1999), the rulings of the Tribunal, except for those issued with regard to questions of law, were subject to consideration by the Sejm, which could reject them by a two-thirds majority vote in the presence of at least half of the statutory number of Sejm Deputies. In the current legal situation, the Tribunal's rulings – including those which result in the elimination of statutes enacted by the Sejm from the system of law – are final and are not subject to any verification procedure (cf. Art. 190(1) of the Constitution). The Constitutional Tribunal is the sole organ of the judiciary which is competent to adjudicate in cases concerning the conformity of statutes to the Constitution and ratified international agreements whose ratification required prior consent granted by statute (cf. Art. 188(1) and (2) of the Constitution). It is the possibility of reviewing the effects of the Sejm's work, i.e. all statutes and normative resolutions enacted by the Parliament, that constitutes the most important form of the Tribunal's impact on the legislature in the Polish constitutional order. The judicial review of the constitutionality of law, exercised by an organ of state authority which is independent and separate from the legislature and the executive, guarantees adherence to the principle of the primacy of the Constitution, and ultimately – ensures respect for the rights and freedoms of the individual (see the judgment of 3 December 2015, ref. no. K 34/15). In order to guarantee the diligent exercise of the competence by the Tribunal, it is necessary to ensure the legal guarantees of the independence of the Tribunal and its judges, whereas any powers of the Sejm which could affect the status of the judges of the Tribunal must be based on the Constitution.

As it has been aptly pointed out in the statement of the Public Prosecutor-General (which was ultimately withdrawn), the only provision of the Constitution granting the Sejm the competence with regard to the judges of the Tribunal is above-mentioned Article 194(1), which stipulates that the Sejm elects the judges of the Tribunal. It does not follow from that provision that the Sejm is granted any further powers pertaining to the status of a judge, and

in particular such that would be linked with terminating the performance of judicial duties before the expiry of the mandate. The role of the Sejm has been systemically limited to the election of the judges of the Tribunal. After the election of a judge of the Tribunal, the Sejm definitively loses its influence over the status of the judge.

In the light of the Constitution, the constitutional order of the state is based on the tri-division and balance of powers (cf. Art. 10 of the Constitution), and every organ of public authority may act only within the limits of law (cf. Art. 7 of the Constitution). There are no grounds for concluding that there is the presumption of the Sejm's competence in areas other than law-making activity.

The fact of granting competence to recall a judge of the Tribunal from office – in Article 36(1)(4) of the 2015 Constitutional Tribunal Act, as amended by Article 1(8) of the December Amending Act – may affect the way of exercising competence that falls within the scope of the essence of the constitutional judiciary, and thus may impact the quality of a constitutional review of statutes. The granting of that competence to the Sejm constitutes interference of the legislature with the realm falling within the scope of the Tribunal's independence as regards its basic functions related to the consideration of cases and to adjudication. In addition, the said circumstance that it is statutes, i.e. normative acts enacted by the Sejm, that in practice constitute the main subject of the Tribunal's adjudication rules out – in the light of the principle of the separation of powers as well as the principle of the independence of the Tribunal and the independence of the judiciary – the vesting of the Sejm with any competence to recall a judge of the Tribunal from office. When drafting provisions concerning the judges of the Tribunal, the legislator should rely on Article 173, in conjunction with Article 10(1), of the Constitution, and the ensuing requirement that the judges of the Tribunal should be provided with proper conditions for conducting an independent hierarchical review of normative acts, and this way the legislator should contribute to the protection of the Constitution itself. What follows from that requirement is a norm which is constitutional in character, in accordance with which a judge of the Tribunal may not, before the end of his/her term of office, be recalled from office by an organ of the legislature or the executive. However – by adopting the aforementioned changes in the wording of Article 36(1)(4) of the 2015 Constitutional Tribunal Act in Article 1(7) and (8) of the December Amending Act, and by introducing a procedure for lodging an application with the Sejm for recalling a judge of the Tribunal from office in added Article 31a of the 2015 Constitutional Tribunal Act – the legislator took an opposite approach, which aims at depriving the Tribunal of the legal guarantees of its independence, at the expense of entrusting the Sejm with additional powers permitting interference with matters related to the composition of the Constitutional Tribunal.

The principle of the independence of the Constitutional Tribunal (cf. Art. 173 of the Constitution) is closely related with the principle of the independence of the judges of the Tribunal (cf. Art. 195(1) of the Constitution). Both those principles exclude any forms of impact – by the organs of public authority – which could affect the judicial activity of the Tribunal (see the judgments ref. nos. K 8/99 and K 34/15). The granting of such far-reaching competence to an organ of the legislature interferes with the independence of a judge of the Tribunal, in particular his/her independence from non-judicial organs (institutions) and political factors. It is inadmissible to have a situation where the Sejm determines the validity of terminating the judicial activity of a judge of the Tribunal before the end of his/her term. Granting

such far-reaching competence to the Sejm, in an obvious way, creates a possibility of exerting pressure on a judge and affects the judge's judicial activity.

By vesting a non-judicial organ of the state, i.e. the Sejm, with the power to decide about penalising a judge, the challenged provisions infringe the rights of a person holding the office of a judge of the Tribunal. The lack of the regulation of a relevant procedure, of standards guaranteed within the scope of court proceedings or disciplinary proceedings, including the right to appeal against the decision to recall a judge from office, infringes, *inter alia*, Article 78 of the Constitution, indicated as a higher-level norm for the review, which provides for the right to appeal decisions issued in first-instance proceedings.

Pursuant to that provision, each of the parties to proceedings has the right to appeal against judgments and decisions made at first stage. At the same time, the provision stipulates that a statue should specify exceptions to this principle and a procedure for such appeals. In the jurisprudence of the Tribunal, it is pointed out that the norm expressed in Article 78 of the Constitution concerns not only court proceedings and administrative proceedings, but also disciplinary proceedings (see the judgment of 19 March 2007, ref. no. K 47/05, OTK ZU No. 3/A/2007, item 27 and the judgment ref. no. K 41/97). However, the said norm is not absolute in character, and it permits the introduction of exceptions by the legislator. Still, the legislator does not have full discretion when it comes to introducing such exceptions. A departure from the principle arising from Article 78 of the Constitution should be caused by specified circumstances that justify depriving a party to proceedings of a means of appeal (see the judgment of 12 June 2002, ref. no. P 13/01, OTK ZU No. 4/A/2002, item 42).

It should be noted that, pursuant to Article 180(2) of the Constitution, the recall of a judge from office may occur only by virtue of a court ruling and solely in those instances prescribed by statute. The cited provision constitutes an extension of the principle of the independence of judges, expressed in Article 178 of the Constitution. Yet, Article 180(1) and Article 180(2) of the Constitution refer to "judges of courts", and thus it ought to be deemed that they are not adequate higher-level norms for the review of the constitutionality of the challenged provisions on judges of the Tribunal.

By contrast, Article 195(1) of the Constitution, which expresses the principle of the independence of the judges of the Tribunal, does not further specify that principle, *inter alia*, in the context of the recall of a judge of the Tribunal from office. However, there are no grounds to conclude that the independence of the judges of the Tribunal is protected to a lesser extent than the independence of judges who adjudicate in other courts. For this reason, it should be assumed that Article 195(1) of the Constitution suffices to state that the recall of a judge of the Tribunal may only occur by virtue of a determination issued by the Tribunal.

Also, the vesting of the competence to apply for the commencement of the procedure for recalling a judge of the Tribunal from office with the President of Poland and the Minister of Justice – as provided for in Article 31a(2) of the 2015 Constitutional Tribunal Act added by Article 1(7) of the December Amending Act – infringes the principle of the independence of the Tribunal and its judges. The involvement of executive authorities at any stage of disciplinary proceedings, as well as in any other procedure concerning the evaluation of the conduct of a judge of the Tribunal and the judge's status, constitutes unjustified interference with the realm of the autonomy of the Constitutional Tribunal. The circumstance that it is the General Assembly of the Judges of the Tribunal that takes a final decision on the validity of the

aforementioned application and on the institution of the proceedings does not eliminate the infringement of the independence of a judge of the Tribunal, since even the possibility of filing such an application may have a negative impact on a judge of the Tribunal and the perception of his/her independence.

Taking the above into consideration, the Constitutional Tribunal adjudicated that:

– Article 1(7) of the December Amending Act and added Article 31a of the 2015 Constitutional Tribunal Act, as well
– Article 1(8) of the December Amending Act, insofar as it amends Article 36(1)(4) of the 2015 Constitutional Tribunal Act, and amended Article 36(1)(4) of the 2015 Constitutional Tribunal Act

are inconsistent with Article 78, Article 173 in conjunction with Article 10(1) and Article 195(1) of the Constitution as well as they are not inconsistent with Article 180(1) and (2) of the Constitution.

6.3. Allegations concerning: Article 1(2) of the December Amending Act and amended Article 8(4) of the 2015 Constitutional Tribunal Act; Article 1(8) of the December Amending Act, insofar as it amends Article 36(2) of the 2015 Constitutional Tribunal Act; and amended Article 36(2) of the 2015 Constitutional Tribunal Act

6.3.1. The challenged provisions

Pursuant to Article 8(4) of the 2015 Constitutional Tribunal Act, as amended by Article 1(2) of the December Amending Act, the competence of the General Assembly of the Judges of the Tribunal comprises preparing "an application to be lodged with the Sejm for the expiry of the mandate of a judge of the Tribunal in cases specified in Article 36(1)".

Article 36(2) of the 2015 Constitutional Tribunal Act, as amended by Article 1(8) of the December Amending Act, reads as follows: "An application to determine the expiry of the mandate of a judge of the Tribunal, in the cases referred to in para 1, shall be lodged with the Sejm by the General Assembly, after conducting appropriate explanatory proceedings".

6.3.2. The allegations of the applicants and the statements of the participants in the proceedings

In the opinion of the First President of the Supreme Court, entrusting the Sejm with the power to terminate the mandate of a judge of the Tribunal upon application by the General Assembly leads to an infringement of the constitutional balance between the legislature and the judiciary. In this way, the Sejm gains the possibility of blocking the Tribunal's activity by delaying the consideration of an application for the expiry of the aforementioned mandate lodged with the Sejm.

The second group of Sejm Deputies argued that reserving the power to determine the expiry of the mandate of a judge of the Tribunal for the exclusive competence of the organs of the Tribunal manifests the principle of the separateness and independence of the judiciary from the other branches of government. The action of determining the expiry of the said mandate falls within the scope of the internal autonomy of the Tribunal, and more precisely – into the category of personnel matters related to the judges of the Tribunal. There is no constitutional or systemic justification for transferring that power to the scope of the Sejm's compe-

tence. The fact that the judges are elected by the Sejm in no way determines their subordination to the Sejm; nor does this weigh in favour of entrusting the Sejm with competence within the scope of the above-mentioned personnel matters.

In the opinion of the Ombudsman, from the point of view of the Constitution, the issue of the mandate of a judge of the Tribunal constitutes an internal matter of the Tribunal and it may be determined solely by the organs of the Tribunal. By contrast, vesting the Sejm with adjudication on the expiry of the said mandate infringes the principle of the independence of the Tribunal and its judges. The Sejm's competence to have the last word as to the expiry of the mandate of a judge should be perceived as a form of inadmissible pressure exerted on the judge. Relations between the Sejm and the Tribunal have been specified exhaustively in the Constitution and amount to the election of a judge of the Tribunal on the basis of Article 194(1) of the Constitution.

By contrast, in the opinion of the National Council of the Judiciary, depriving the General Assembly of competence within the scope of determining the expiry of the mandate of a judge of the Tribunal violates the principle of the tri-division of powers, expressed in Article 10(1) of the Constitution, as well as the principle of the independence of the Tribunal and its judges.

6.3.3. The subject of the review and higher-level norms for the review

Within the scope of this allegation, the applicants challenged the deprivation of the General Assembly of the competence to determine the expiry of the mandate of a judge of the Tribunal and questioned the granting of the said competence to the Sejm. However, the prerequisites for the expiry of the mandate of a judge of the Tribunal – which are specified in amended Article 36(1) of the 2015 Constitutional Tribunal Act – have not been challenged. By contrast, amended Article 36(1)(4) of the 2015 Constitutional Tribunal Act constitutes the subject of this review within the scope of a separate allegation.

The Ombudsman justified the alleged infringement of Article 180(2) of the Constitution by the provisions on the recall of a judge of the Tribunal from office (cf. added Art. 31a and amended Art. 36(1)(4) of the 2015 Constitutional Tribunal Act), instead of the provisions on the determination of the expiry of the aforementioned mandate (cf. amended Art. 36(2) of the 2015 Constitutional Tribunal Act).

The National Council of the Judiciary did not present any arguments for the non-conformity of the amended or added wording of Article 8(4) in conjunction with Article 36(1)(4), Article 36(2) as well as Article 31a(1), (2) and (3) of the 2015 Constitutional Tribunal Act, within the scope delineated in the application, to Article 2, Article 7, Article 8, Article 10(1), Article 194(1) and Article 195(2) of the Constitution.

Consequently, the applications fail to meet formal requirements arising from Article 61(1)(3) of the 2015 Constitutional Tribunal Act, which justifies the discontinuance of the proceedings in this respect on the basis of Article 104(1)(2) of the 2015 Constitutional Tribunal Act, on the grounds that the issuing of a judgment is inadmissible.

When justifying the allegation about an infringement of Article 2 of the Constitution, the second group of Sejm Deputies pointed out that any violation of the principle of the tri-division of powers (cf. Art. 10(1) of the Constitution) also undermines the standards of a democratic state ruled by law, which are derived from Article 2 of the Constitution. In ac-

cordance with the well-established jurisprudence of the Tribunal, if the special provisions of the Constitution explicitly express certain norms, then higher-level norms for a review of the conformity of any challenged regulations subject to review should comprise those special provisions, with no need to refer to Article 2 of the Constitution. Such a situation occurs in the present case (see e.g. the judgment of 10 February 2015, ref. no. SK 50/13, OTK ZU No. 2/A/2015, item 12). For these reasons, the Constitutional Tribunal discontinued the review proceedings as regards the examination of the conformity of amended Article 8(4) and amended Article 36(2) of the 2015 Constitutional Tribunal Act to Article 2 of the Constitution, on the basis of Article 104(1)(3) of the 2015 Constitutional Tribunal Act on the grounds that the issuing of a ruling is useless.

In conclusion, within the scope of this allegation, the Tribunal examined the conformity of:

– Article 1(2) of the December Amending Act and amended Article 8(4) of the 2015 Constitutional Tribunal Act, as well as
– Article 1(8) of the December Amending Act, insofar as it amends Article 36(2) of the 2015 Constitutional Tribunal Act, and amended Article 36(2) of the 2015 Constitutional Tribunal Act

to Article 173, in conjunction with Article 10(1), as well as Article 195(1) of the Constitution.

6.3.4. The course of the legislative process

The changed wording of Article 8(4) and Article 36(2) of the 2015 Constitutional Tribunal Act was not provided for in the original version of the December Amending Bill (cf. the Sejm Paper No. 122/8th term of the Sejm). Similarly to a majority of solutions challenged in the present case, it was proposed as an amendment during the work of the Sejm's Legislative Committee after the first reading of the Bill on 21 December 2015.

Ms K. Pawłowicz, a Sejm Deputy, justified the need for introducing a change in the wording of Article 8(4) of the 2015 Constitutional Tribunal Act in the following way: "We actually make the assumption – let me state this now – that the right to terminate the mandate is meant for the authority that appoints. So, in no way do we deprive the Tribunal and the General Assembly of competence, but the said competence should be intended for the Sejm. Obviously, this is upon application by the General Assembly" (the full transcript of the 5th sitting of the Legislative Committee/ the 8th term of the Sejm, 21 December 2015, p. 19).

By contrast, when making reference to an amendment to the wording of Article 36 of the 2015 Constitutional Tribunal Act, Ms K. Pawłowicz noted: "Maybe also Article 36. Here we have a link between Article 8 and the point we're adding that the General Assembly lodges an application with the Sejm for the expiry of the mandate. Where there are particularly striking instances, the General Assembly may refer to the Sejm with such an application. We're taking away the competence of the President of the Tribunal in accordance with the rule that the mandate is terminated by the one who appointed. Article 36, which I've just mentioned, is related to Article 8, as the present Article 36 specifies situations when the mandate of a judge of the Tribunal expires. (…) Paragraphs 2 and 3 specify the procedure which takes place inside the Tribunal, which is supervised by the President of the Tribunal, and which results in the expiry of the mandate. We're taking away those powers from the President of the Tribunal. We're giving the entire General Assembly the right to determine whether there are actually any striking instances. Then the General Assembly refers to the Sejm and here is

that bit: the recall of a judge of the Tribunal from office upon application by the General Assembly. After completing relevant proceedings, the General Assembly refers an application to the Sejm for the termination of the mandate of a judge of the Tribunal in instances set out in paragraph 1. Article 31 specified disciplinary penalties; Article 36 specifies all instances of the expiry of the said mandate, apart from the administration of a disciplinary penalty, including also the conviction of a judge by a legally effective court judgment, as well as the resignation of a judge from office and the death of a judge. We shift all those powers, all those situations to Article 8 so that the General Assembly could refer to the Sejm with an application for the expiry of the mandate of a judge in such situations, in accordance with the principle that the one who appoints is the one who terminates the mandate in the end. Let me stress one thing: all those instances occur upon application by the General Assembly. There is no possibility here of the Sejm's own initiative" (the full transcript of the 5th sitting of the Legislative Committee/ the 8th term of the Sejm, 21 December 2015, p. 27).

6.3.5. The procedure for determining the expiry of the mandate of a judge of the Tribunal

The typical stage of handing over judicial duties by a judge of the Tribunal is at the end of his/her nine-year term of office. The other option is when the expiry of the mandate of the judge is determined before the end of the term of office; this may occur in situations specified in the Constitutional Tribunal Act.

The new wording of challenged Article 8(4) and Article 36(2) of the 2015 Constitutional Tribunal Act, as amended by Article 1(2) and (8) of the December Amending Act, has considerably changed the procedure for determining the expiry of the mandate of a judge of the Tribunal. The said procedure has been changed within the scope of all of its three stages, namely as regards: 1) initiating the procedure; 2) conducting explanatory proceedings; 3) determining the expiry of the mandate, as well as, partly, as regards criteria for determining the expiry of the mandate of a judge of the Tribunal.

In the previous legal provisions, preceding the enactment of the December Amending Act, the following were competent to determine the expiry of the mandate of a judge of the Tribunal, depending on particular circumstances: the General Assembly of the Judges of the Tribunal, or the President of the Constitutional Tribunal.

Article 8(4) of the 2015 Constitutional Tribunal Act, in the version before the amendments, stipulated that the General Assembly was competent to determine the expiry of the mandate of a judge of the Tribunal. Pursuant to the previous wording of Article 36(2) of the said Act, the General Assembly determined the expiry of the mandate of a judge of the Tribunal, by issuing a resolution, in the case of: the said judge's resignation from the office; the conviction of the said judge by a legally effective court judgment for a premeditated offence prosecuted *ex officio* or a premeditated fiscal offence; a legally effective ruling on the recall of the judge of the Tribunal from office. The said competence was also vested in the General Assembly under the rule of the Constitutional Tribunal Act of 1 August 1997, where Article 11(1) enumerated situations in which the General Assembly was to determine the expiry of the mandate of a judge of the Tribunal.

By contrast, Article 36(2)(1) of the 2015 Constitutional Tribunal Act, in the version before the amendments, stipulated that in the case of the death of a judge of the Tribunal, the

expiry of the mandate of the judge was determined by the President of the Tribunal, by issuing a decision. An identical solution was provided for in the 1997 Constitutional Tribunal Act (see Art. 11(2)).

The current version of Article 36 of the 2015 Constitutional Tribunal Act contains no wording that corresponds to the previous wording of Article 36(3) of the 2015 Constitutional Tribunal Act, which stated that the President of the Tribunal should forthwith provide the Marshal of the Sejm with a decision or resolution determining the expiry of the mandate of a judge of the Tribunal. This is related to the change of Article 8(4) and Article 36(2) of the 2015 Constitutional Tribunal Act by Article 1(2) and (8) of the December Amending Act, which has resulted in the General Assembly and the President of the Tribunal losing their competence to determine the expiry of the mandate of a judge of the Tribunal.

Pursuant to Article 36(2) of the 2015 Constitutional Tribunal Act as amended by Article 1(8) of the December Amending Act, the Sejm is the organ of the state with which the General Assembly should lodge an application to determine the expiry of the mandate of a judge of the Tribunal, after conducting appropriate explanatory proceedings.

It should be noted that criteria for determining the expiry of the aforementioned mandate – apart from the criterion specified in amended Article 36(1)(4) of the 2015 Constitutional Tribunal Act – have not been changed. In accordance with amended Article 36(1), the mandate of a judge of the Tribunal expires before the end of the judge's term of office in the case of:

- the death of the judge of the Tribunal;
- the said judge's resignation from the office;
- the conviction of the said judge by a legally effective court judgment for a premeditated offence prosecuted *ex officio* or a premeditated fiscal offence;
- the recall of the said judge from office by the Sejm, upon application by the General Assembly.

The 2015 Constitutional Tribunal Act before the amendments did not provide for a special regulation concerning the commencement of the procedure for determining the expiry of the aforementioned mandate; the entire procedure was to be executed by the organs of the Tribunal. At present, Article 8(4) of the 2015 Constitutional Tribunal Act, as amended by Article 1(2) of the December Amending Act, stipulates that the General Assembly is to prepare an application to be lodged with the Sejm for the expiry of the mandate of a judge of the Tribunal in cases specified in amended Article 36(1) of the 2015 Constitutional Tribunal Act.

Neither before nor after the entry into force of the December Amending Act, there were provisions regulating explanatory proceedings which precede the determination of the expiry of the said mandate. Amended Article 36(2) of the 2015 Constitutional Tribunal Act merely states that the General Assembly conducts such proceedings before lodging its application with the Sejm. The significance of explanatory proceedings varies depending on which situation has occurred, from those resulting in the expiry of the mandate. In the case of the death of a judge of the Tribunal, or in the case of the conviction of the said judge by a legally effective court judgment for a premeditated offence prosecuted *ex officio* or a premeditated fiscal offence, the determination of the occurrence of circumstances resulting in the expiry of the mandate amounts to the verification of the validity of official documents and judgments confirming the circumstances. By contrast, in the case of the said judge's resignation from the office, the situa-

tion may be less clear. The General Assembly should evaluate actual reasons for the judge's resignation from the office, and in particular determine whether this was not an outcome of external pressure exerted on the judge. At the same time, it is stressed that the proceedings should be carried out discreetly so that in the case of personal reasons, a judge of the Tribunal could resign from the office without disclosing the details of his/her personal situation (see M. Zubik, *Status prawny sędziego Trybunału Konstytucyjnego*, Warszawa 2011, pp. 107-108).

In conclusion, after the entry into force of the December Amending Act, the procedure for determining the expiry of the mandate of a judge of the Tribunal is regulated in Article 1(2) and (8) of the December Amending Act as well as, consequently, in amended Article 8(4) and Article 36 of the 2015 Constitutional Tribunal Act. After the occurrence of one of the circumstances triggering the expiry of the said mandate, which are set out in amended Article 36(1) of the 2015 Constitutional Tribunal Act, the General Assembly conducts explanatory proceedings. Where it is confirmed that there has occurred one of the aforementioned circumstances, the General Assembly drafts an application to determine the expiry of the mandate and lodges it with the Sejm. Amended Article 36(2) of the 2015 Constitutional Tribunal Act does not unambiguously specify the competence of the Sejm within the scope of determining the expiry of the mandate, but merely states that the General Assembly refers its application in this respect to the Sejm.

6.3.6. The assessment of the conformity to Article 173, in conjunction with Article 10(1), and Article 195(1) of the Constitution of the following provisions: Article 1(2) of the December Amending Act and amended Article 8(4) of the 2015 Constitutional Tribunal Act; Article 1(8) of the December Amending Act, insofar as it amends Article 36(2) of the 2015 Constitutional Tribunal Act; and amended Article 36(2) of the 2015 Constitutional Tribunal Act

Within the scope of this allegation, the constitutional issue amounts to answering the question whether, ensuing from the challenged provisions, the deprivation of the General Assembly and the President of the Tribunal of their competence to determine the expiry of the mandate of a judge of the Tribunal and the vesting of that competence with the Sejm do not infringe the principle of the independence of the Tribunal and its judge.

Pursuant to Article 10(1) of the Constitution, the constitutional order of the Republic of Poland is based on the separation and balance of legislative, executive and judicial powers, whereas Article 173 of the Constitution expresses the principle that courts and tribunals are separate and independent from the other branches of government. The Sejm, as an organ of the legislature, may have an impact on the Constitutional Tribunal within the scope that does not infringe the principle of the separateness of the judiciary – in the situations specified in the Constitution.

As regards justification for the above allegation, one should fully rely on the conclusions drawn with regard to the allegation about provisions vesting the Sejm with the competence to recall a judge from the office of the Tribunal. What follows from the provisions of the Constitution on relations between the Tribunal and the Sejm is that there is no norm authorising the Sejm to affect the status of a judge of the Tribunal in another situation than the one specified in Article 194(1) of the Constitution (competence to elect judges of the Tribunal). As it has already been pointed out above, Article 173, in conjunction with Article 10(1), of the Constitution

does not imply a norm in accordance with which a judge of the Tribunal may be recalled from office before the end of his/her term of office by a legislative or executive authority. The purpose of the norm is to guarantee that the judges of the Tribunal will have proper conditions to impartially conduct the review of the hierarchical conformity of normative acts; this contributes to safeguarding the Constitution itself. Therefore, the reasoning of the Sejm Deputy who proposed amending the wording of Article 8(4) and Article 36(2) of the 2015 Constitutional Tribunal Act should be regarded as unfounded; the said Deputy claimed that the indicated competence of the Sejm also implied a basis for vesting the Sejm with competence within the scope of determining the expiry of the mandate of a judge of the Tribunal. The significance of the Tribunal's competence to carry out a constitutional review of statutes enacted by the Sejm so as to implement the principle of the supremacy of the Constitution excludes any possibilities of the Sejm's impact on the status of the adjudicating judges of the Tribunal. However, the granting of the competence to determine the expiry of the judicial mandate directly affects the status of the judges of the Tribunal. Consequently, the granting of the competence to determine the expiry of the mandate of a judge of the Tribunal to the Sejm, i.e. an organ of the legislature, constitutes an infringement of Article 173, in conjunction with Article 10(1), of the Constitution, due to the inadmissible violation of the independence of the Constitutional Tribunal. The granting of such far-reaching competence to an organ of the legislature – namely the competence within the scope of determining the expiry of the said mandate - interferes with the independence of a judge of the Tribunal, in particular his/her independence from non-judicial organs (institutions) and political factors.

Taking the above into consideration, the Constitutional Tribunal adjudicated that:

– Article 1(2) of the December Amending Act and amended Article 8(4) of the 2015 Constitutional Tribunal Act;
– Article 1(8) of the December Amending Act, insofar as it amends Article 36(2) of the 2015 Constitutional Tribunal Act, amended Article 36(2) of the 2015 Constitutional Tribunal Act

are inconsistent with Article 173, in conjunction with Article 10(1), as well as Article 195(1) of the Constitution.

6.4. The allegation concerning Article 1(16) of the December Amending Act, insofar as it repeals Article 28(2) of the 2015 Constitutional Tribunal Act

6.4.1. The challenged provision

Repealed by Article 1(16) of the December Amending Act, Article 28(2) of the 2015 Constitutional Tribunal Act read as follows: "A judge of the Tribunal shall also be subject to disciplinary proceedings for his/her conduct prior to taking up the office, if the said judge failed to fulfil official state duties or proved to be unworthy of the office of a judge of the Tribunal".

6.4.2. The allegations of the applicants and the statements of the participants in the proceedings

The second group of Sejm Deputies have challenged Article 1(16) of the December Amending Act, insofar as it repeals Article 28(2) of the 2015 Constitutional Tribunal Act.

In their opinion, the repeal of Article 28(2) of the 2015 Constitutional Tribunal Act manifests a restriction of the principle of judges' independence (cf. Art. 195(1) of the Consti-

tution) by weakening the essential guarantees of respecting that principle, as well as it infringes the principle of the independence and separateness of the judiciary (cf. Art. 173 in conjunction with Art. 10(1) of the Constitution). The repeal of that provision paves the way for taking up the office of a judge of the Tribunal by persons who blatantly fail to meet the standards of the said office. One may not rule out a situation where, during the term of office of a judge, certain revealed circumstances constitute an obvious reason for instituting disciplinary proceedings with regard to the judge.

6.4.3. The course of the legislative process

In the explanatory note for the December Amending Bill (the Sejm Paper No. 122/8th term of the Sejm), the authors of the Bill justified the repeal of Article 28(2) of the 2015 Constitutional Tribunal Act in the following way: "Article 28(2) – which is to be repealed – provides for evaluating the conduct of a judge for the period prior to assuming the office. Such a solution constitutes interference with the scope of the competence of the Sejm. It is the Sejm that evaluates the conduct of a candidate before elections and expresses approval by the act of election. Preserving the norm would allow the Tribunal to undermine the Sejm's evaluation, which would be contrary to Article 194 of the Constitution".

As one may suppose on the basis of the content of the explanatory note – in the opinion of the authors of the Bill – the repeal of Article 28(2) of the 2015 Constitutional Tribunal Act was to eliminate, from the scope of disciplinary proceedings, the possibility of evaluating the conduct of a judge of the Tribunal for the period prior to assuming the office.

6.4.4. The disciplinary responsibility of judges for their conduct prior to taking office – general characteristics; changes in comparison with the previous legal provisions

The basic principles of disciplinary responsibility of the judges of the Tribunal have been regulated in Article 28(1) of the 2015 Constitutional Tribunal Act. The said provision enumerates three types of disciplinary breaches for which a judge is liable to disciplinary action. Pursuant to the content of that provision, a judge of the Tribunal is subject to disciplinary proceedings before the Tribunal for a breach of provisions of law, conduct that undermines the dignity of the office of a judge of the Tribunal, or any other unethical conduct that may weaken trust in the said judge's impartiality or independence.

Before the entry into force of the December Amending Act, the 2015 Constitutional Tribunal Act in detail regulated the disciplinary responsibility of a judge of the Tribunal for his/her conduct prior to taking office. The legislator had decided to specify – in detail and in a different way than the general terms of disciplinary responsibility – the categories of conduct for which the judge is subject to disciplinary proceedings with relation to his/her conduct prior to taking office. These were the following situations: "the said judge failed to fulfil official state duties"; s/he "proved to be unworthy of the office of a judge of the Tribunal".

The result of the repeal of Article 28(2) of the 2015 Constitutional Tribunal Act is that, at present, the responsibility of the judges of the Tribunal for their conduct prior to taking office is not regulated directly in the 2015 Constitutional Tribunal Act.

The way of regulating disciplinary responsibility after the entry into force of the December Amending Act is the same as in the 1997 Constitutional Tribunal Act, which also did not differentiate the disciplinary responsibility of a judge of the Tribunal for actions prior to and after taking office. The wording of Article 8 of the 1997 Constitutional Tribunal Act,

which stipulated that a judge of the Tribunal was to be subject to disciplinary proceedings before the Tribunal for a breach of provisions of law, conduct that undermined the dignity of the office of a judge of the Tribunal, or any other unethical conduct that might weaken trust in the said judge's impartiality or independence. It resembled the wording of Article 28(1) of the 2015 Constitutional Tribunal Act, which, in the current legal system, is the only provision specifying the terms of the disciplinary responsibility of the judges of the Tribunal.

6.4.5. The assessment of the conformity of Article 1(16) of the December Amending Act, insofar as it repeals Article 28(2) of the 2015 Constitutional Tribunal Act, to Article 195(1) as well as Article 173 in conjunction with Article 10(1) of the Constitution.

For the evaluation of the validity of the allegation raised by the second group of Sejm Deputies, it is vital to determine what effects within the scope of the disciplinary responsibility of the judges of the Constitutional Tribunal were triggered by the repeal of Article 28(2) of the 2015 Constitutional Tribunal Act.

As it has been indicated above, as a result of the amendments, at present the disciplinary responsibility of the judges is specified in a similar way as in the 1997 Constitutional Tribunal Act. In the context of that Act, it was indicated in the literature on the subject that since, in the said Act, within the scope of disciplinary responsibility, there were no rules for holding a judge of the Tribunal responsible for his/her conduct prior to taking office, then – on the basis of Article 6(8) of the 1997 Constitutional Tribunal Act, which referred to the Supreme Court Act – it was proper to apply Article 52(2) of the Supreme Court Act in that respect, as that Article provides for the disciplinary responsibility of a judge for his/her conduct prior to taking office (see M. Zubik, *Status prawny*…, pp. 166-169).

Within the scope of disciplinary responsibility, the possibility of holding judges of the Tribunal responsible for their conduct prior to taking office is also confirmed by the practice of the Tribunal under the rule of the 1997 Constitutional Tribunal Act. In March 2007, the Tribunal undertook steps to carry out a preliminary investigation and possibly institute disciplinary proceedings with regard to a judge of the Tribunal for the judge's conduct prior to taking office. The President of the Tribunal set the date of a sitting of the General Assembly where it was to be decided if there was a need to appoint a disciplinary officer. The said proceedings were not completed, due to the fact that the judge in question had resigned from office.

It should be noted that Article 28(1) of the 2015 Constitutional Tribunal Act does not specify a time-limit for the disciplinary responsibility of the judges of the Tribunal. It does not follow at all from the provision that the three types of disciplinary breaches mentioned therein are linked only with a judge's conduct after taking office. Thus, this could lead to a conclusion that, after the repeal of Article 28(2) of the 2015 Constitutional Tribunal Act, the disciplinary responsibility of the judges of the Tribunal specified in Article 28(1) of the 2015 Constitutional Tribunal Act concerns the conduct of a judge of the Tribunal both after taking office, as well as before that. However, it should be stressed that the clear intention of the authors of the December Amending Act and the legislator was a restriction of the scope *ratione temporis* of the disciplinary responsibility of the judges of the Tribunal, which consists in excluding, from the scope of the disciplinary responsibility, any conduct prior to taking office.

The disciplinary responsibility of the judges of the Tribunal may not however be limited to breaches committed only during the period of holding the office. A judge of the Tribunal whose past conduct undermined the dignity of the office, may be subjected to external pressure, which – from the point of view of the Tribunal's independence and the independence of its judges – is inadmissible. Expending the scope of the disciplinary responsibility to comprise conduct prior to taking office is to ensure that the Tribunal as an organ of the judiciary has proper authority among the addressees of its rulings and the general public. Such scope *ratione temporis* of the disciplinary responsibility is necessary for the protection of the Tribunal's dignity in a situation where only during the term of office of a judge, past conduct regarded as a disciplinary breach is revealed. From this point of view, an argument included in the explanatory note for the December Amending Act, in accordance with which the Sejm, during the election procedure, "accepts" the past conduct of a judge before the judge takes office seems insufficient for excluding past conduct of the judge from the scope of disciplinary responsibility. There is no doubt that, when electing a judge, Sejm Deputies may not have complete knowledge about the conduct of the candidate that may undermine the dignity of the office of a judge of the Tribunal.

In conclusion, it should be deemed that a restriction of the scope *ratione temporis* of the disciplinary responsibility of the judges of the Tribunal, which consists in excluding responsibility for conduct prior to taking office, is inadmissible from the point of view of the principle of the Tribunal's independence, the principle of the separation of powers, as well as the principle of the independence of judges of the Tribunal. Thus, Article 1(16) of the December Amending Act, insofar as it repeals Article 28(2) of the 2015 Constitutional Tribunal Act, is inconsistent with Article 173, in conjunction with Article 10(1), and Article 195(1) of the Constitution.

7. The assessment of the repeal of statutory provisions on proposing candidates for a judgeship at the Constitutional Tribunal

7.1. The challenged provision

Article 1(16) of the December Amending Act stipulates that: "The following provisions shall be repealed: Article 16; Article 17(1); Article 17(2), second sentence; Article 19; Article 20; Article 28(2); Article 30; Article 45(2); Article 70(2); Article 82(5); Article 112(2); Article 125(2)–(4); and Article 137a".

Articles 19 and 20 of the 2015 Constitutional Tribunal Act, which were repealed by the aforementioned Article 1(16), read as follows:

1. The right to propose a candidate for the office of a judge of the Tribunal shall be vested in the Presidium of the Sejm and a group of at least 50 Sejm Deputies.

2. A proposal of a candidate for the judgeship at the Tribunal shall be lodged with the Marshal of the Sejm no later than 3 months prior to the end of the term of office of a judge of the Tribunal.

3. Where the mandate of a judge of the Tribunal expires before the end of the judge's term of office, the time-limit for submitting the proposal referred to in para 2 shall be 21 days.

4. An opinion on the proposal referred to in para 2 shall be provided by a competent authority indicated in the rules of procedure of the Sejm.

5. The rules of procedure of the Sejm shall specify detailed requirements concerning the proposal and the procedure for considering the proposal.

Article 20

If a vote in the Sejm has not resulted in the election of a judge of the Tribunal, the time-limit for proposing another candidate for a judge of the Tribunal shall be 14 days as of the date of the vote.

7.2. The allegations of the applicants and the statements of the participants in the proceedings

The constitutionality of the repeal of Articles 19 and 20 of the 2015 Constitutional Tribunal Act by Article 1(16) of the December Amending Act was challenged in the application of the second group of Sejm Deputies as well as in the Ombudsman's application.

When justifying the said allegation, the applicants stressed that the aim of the challenged regulation was to eliminate from the 2015 Constitutional Tribunal Act any provisions on the election of the judges of the Tribunal and to create a situation where they will only arise from the rules of procedure of the Sejm. By contrast, the organisation of the Constitutional Tribunal – and thus the procedure for filling judicial vacancies at the Tribunal – falls within the scope of statutory subject-matter. The said issue does not fall within the scope of matters assigned in Article 112 of the Constitution for regulation in the Sejm's Rules of Procedure, as the Constitutional Tribunal is an independent organ of the judiciary, and not an organ of the Sejm.

Additionally, the Ombudsman noted, relying on the Tribunal's judgment ref. no. K 34/15, that statutory regulations are more "resilient" to hasty changes than the rules of procedure of the Sejm, and they better protect "the Tribunal's legal position and the employees of the Tribunal". In his opinion, the Sejm's Rules of Procedure may not therefore be the sole basis for specifying the process of electing the judges of the Constitutional Tribunal.

The Public Prosecutor-General, in his letter of 10 February 2016 (withdrawn on 4 March 2016), agreed with the stance of the second group of Sejm Deputies that the process of determining the composition of the Tribunal falls within the scope of the Tribunal's "organisation" within the meaning of Article 197 of the Constitution, and thus constitutes a matter that is required to be regulated by statute. He also drew attention to the fact that, due to the Tribunal's systemic position, the said issue may not be regulated in the Sejm's Rules of Procedure. It should be the subject of a statutory regulation "to the same extent", as this occurs in the systemic statutes concerning common courts, military courts, administrative courts, as well as the Supreme Court.

For the constitutional review of Article 1(16) of the December Amending Act within the scope under discussion, the participants in the proceedings indicated the following higher-level norms: Article 173 in conjunction with Article 10 of the Constitution as higher-level norms for the review (both applications, and the withdrawn statement by the Public Prosecutor-General); and Article 197 in conjunction with Article 112 of the Constitution (only the second group of Sejm Deputies and the Public Prosecutor-General).

7.3. The subject of the review and higher-level norms for the review

Before undertaking an analysis of the allegations raised with regard to the challenged provision, it should be determined what is the admissible scope of the substantive review thereof.

7.3.1. As the subject of the review in the present case, the applicants indicated Article 1(16) of the December Amending Act, insofar as it repeals the two provisions of the 2015 Constitutional Tribunal Act which have been mentioned by the applicants, i.e. Articles 19 and 20 of the Constitutional Tribunal Act.

A comparison of the *petitum* in each of the applications with the justification provided therein leads to the conclusion that the justification is general character and does not refer directly to each of the issues regulated in the repealed provisions.

Firstly, when it comes to matters addressed in Article 19(2) and Article 20 of the 2015 Constitutional Tribunal Act, it should be noted that the proper regulation of time-limits for proposing candidates for judicial vacancies at the Constitutional Tribunal was already discussed by the Tribunal in its above-mentioned judgment ref. no. K 34/15 (cf. in particular part III, point 6 of the statement of reasons). In the operative part of the judgment, the Tribunal held that Article 19(2) of the 2015 Constitutional Tribunal Act is consistent with Article 112 of the Constitution and is not inconsistent with Article 197 of the Constitution, which generally dispels the doubts raised by the applicants in the present case. The subject of the allegation in the present case comprises not so much the binding force as also the repeal of the statutory provisions that regulate time-limits for proposing candidates for judges (i.e. Article 19(2) and Article 20 of the 2015 Constitutional Tribunal Act); however, the essence of the constitutional issue and the basic higher-level norms for the review are the same. The National Council of the Judiciary and the Ombudsman did not indicate why, after the judgment ref. no. K 34/15, they are still relevant, which should be considered as a serious deficiency in the justification of their applications.

Secondly, the applicants do not present any evidence or arguments in support of preserving the binding force of repealed Article 19(4) and (5) of the 2015 Constitutional Tribunal Act. The said provisions comprised the requirement of providing opinions about candidates by the competent organ of the Sejm as well as they made reference to the Sejm's Rules of Procedure.

Therefore, in this part, the applications fail to fulfil the formal requirement arising from Article 61(1)(3) of the 2015 Constitutional Tribunal Act. As a result, the proceedings on the conformity to the Constitution of Article 19(2)-(5) and Article 20 of the 2015 Constitutional Tribunal Act are subject to discontinuance on the basis of Article 104(1)(3) of the 2015 Constitutional Tribunal Act, on the grounds that the issuing of a judgment is inadmissible.

7.3.2. According to the applicants, the challenged regulation is inconsistent with Article 173 in conjunction with Article 10 of the Constitution, and – in the opinion of the second group of Sejm Deputies – also with Article 197 in conjunction with Article 112 of the Constitution.

The said higher-level norms for the review have constituted the subject of the Tribunal's discussion (cf. especially in the context of the 2015 Constitutional Tribunal Act – the judgment ref. no. K 34/15, as well as the analysis presented earlier on in this statement of reasons), and thus there is no need to analyse them in detail at this point. It suffices to point out

that Article 173 of the Constitution expresses the principle that courts and tribunals are separate from and independent of the other branches of government; the principle specifies the systemic position of those organs of the judiciary, apart from the general principle of the separation of and balance between legislative, executive and judicial powers (cf. Art. 10 of the Constitution). The other two provisions indicate the scope *ratione materiae* of the Constitutional Tribunal Act (cf. Art. 197 of the Constitution) and the Sejm's Rules of Procedure (cf. Art. 112 of the Constitution).

The Constitutional Tribunal notes that, in the justification of the application filed by the second group of Sejm Deputies, there is no discussion of a link between the last two provisions. The allegations raised in the light of those provisions (although presented in the same part of the justification) are formulated separately. The applicants claim that rules for appointing judges of the Constitutional Tribunal do not fall within the scope of rules of procedure but need to be regulated by statute. Although Articles 112 and Article 197 of the Constitution contain constitutional authorisation for further law-making activities, the form and content of acts provided for therein varies; they concern – respectively – the Sejm's Rules of Procedure and the Constitutional Tribunal Act. It should be deemed that, in the light of the principle of *falsa demonstratio non nocet*, the applicants' intention was to assess the challenged provision in terms of its conformity to each of those higher-level norms for the review (cf. an analogous set of higher-level norms in the judgment ref. no. K 34/15 with regard to Article 19(2) of the 2015 Constitutional Tribunal Act).

7.3.3. To sum up, the subject of the review in the present case is the conformity of Article 1(16) of the December Amending Act, insofar as it repeals Article 19(1) of the 2015 Constitutional Tribunal Act, to Article 112, Article 173 in conjunction with Article 10, and Article 197 of the Constitution.

7.4. The course of the legislative process

7.4.1. The repeal of Article 19 of the 2015 Constitutional Tribunal Act was proposed in Article 4 of the December Amending Bill, which mentioned several provisions of the 2015 Constitutional Tribunal Act that had been selected for the repeal (cf. the Sejm Paper No. 122/8th term of the Sejm).

When justifying the need for the introduction of that provision, the authors of the Bill indicated in general terms (with regard to all provisions of the 2015 Constitutional Tribunal Act derogated therein) that its role was to "make some order": "The objective is to make some order in the 2015 Constitutional Tribunal Act, by eliminating the statutory repetitions of provisions included in the Constitution, deleting provisions that have been executed or that are otiose, eliminating solutions that were competing with the Sejm's Rules of Procedure, as well as adjusting legal solutions to the objectives of the political programme of the parliamentary majority. Additionally, what is eliminated is a set of provisions claimed by the authors of the Bill to be in breach of the principles of equality or to be socially unjustified (the Sejm Paper No. 122/8th term of the Sejm, p. 4)

The *ratio legis* underlying the repeal of Article 19 of the 2015 Constitutional Tribunal Act was explained in one sentence: it was deemed that the provision constitutes "a solution that competes with the Sejm's Rules of Procedure, thus contradicting the Rules and interfering with the Sejm's autonomy within the scope of the election of the Tribunal's judges" (the Sejm Paper No. 122/8th term of the Sejm, p. 5).

7.4.2. The intention to repeal Article 19 of the 2015 Constitutional Tribunal Act was assessed negatively in most of the opinions enclosed in the Sejm Paper No. 122/8th term of the Sejm before the stage of the first reading.

The First President of the Supreme Court stated in her opinion of 16 December 2015 that the derogation of Article 19 of the 2015 Constitutional Tribunal Act and the transfer of rules for electing judges of the Constitutional Tribunal to the Sejm's Rules of Procedure undermined "the public and democratic procedure set out by statute". Moreover, she pointed out that the Sejm's Rules of Procedure could not be "the source of systemic norms applicable outside the Sejm (…) and addressed to third parties that were candidates" for a judgeship at the Constitutional Tribunal. She also emphasised that, although the filling of judicial vacancies was undoubtedly a political decision, it was still limited by constitutional values. In her opinion, the Bill aimed at guaranteeing "unrestrained" decisional discretion, which contradicted the Constitution (cf. p. the opinion of the First President of the Supreme Court).

The Helsinki Foundation for Human Rights, in its opinion of 16 December 2015, cited an extensive passage from the Tribunal's judgment ref. no. K 34/15, which concerned relations between Article 19 of the 2015 Constitutional Tribunal Act and Article 112 of the Constitution. The proposal for repealing of the statutory provisions on the process of electing judges of the Tribunal was evaluated negatively. The Helsinki Foundation for Human Rights held that: "the said regulation addresses matters that are required to be regulated by statute, and aims at ensuring the proper functioning of the Constitutional Tribunal. The elimination of the said provisions from the statute will result in a legal gap at the statutory level, and will leave only regulations in the Sejm's Rules of Procedure, i.e. an internal act". Moreover, she drew attention to the fact that both a relevant statute and the Sejm's Rules of Procedure regulate the course of appointing the Ombudsman, which "so far has not raised any reservations" (p. 6 of the opinion of the Helsinki Foundation for Human Rights).

The National Council of the Judiciary of Poland, in its opinion of 18 December 2015, referred only to the repeal of Article 19 of the 2015 Constitutional Tribunal Act. In that context, the Council indicated that the transfer of the subject-matter concerning the judicial elections from the 2015 Constitutional Tribunal Act to the Sejm's Rules of Procedure would "cause the process of electing judges of the Tribunal to be stripped of the indispensable guarantees of its stability and transparency, as well as it might lead to the exclusion of that subject-matter from the scope of a constitutional review. The process of electing judges of the Constitutional Tribunal should, in a detailed way, be regulated by statute" (p. 9 of the Council's opinion).

The National Council of Legal Advisers, in its opinion of 21 December 2015, expressed the view that the justification provided by the authors of the Bill with regard to the analysed change was "bizzare". In its opinion, the hitherto binding provisions of the 2015 Constitutional Tribunal Act "fully complemented" the Sejm's Rules of Procedure, and did not compete with them. The argument about the need to "adjust" the 2015 Act to the Sejm's Rules of Procedure undermines the current relations between the two types of the two sources of law, including in particular the principle that the Sejm's Rules of Procedure may not regulate issues falling within the scope of statutory matters, which undoubtedly include the organisational structure and competence of state authorities. The justification of the changes by the need to adjust legal solutions to the objective of the political programme of the parliamentary

majority undermines the foundations of a state ruled by law (and in particular, the assumption about the precedence of legal norms over political norms). The shift of rules for the election of the judges of the Constitutional Tribunal from the 2015 Act to the Sejm's Rules of Procedure "creates much greater possibilities of modifying them without any participation of the other authorities involved in the legislative process, which results in the lack of stability of such regulations" (pp. 9 and 10 of the opinion of the National Council of Legal Advisers).

7.4.3. During the work carried out in the Sejm's Legislative Committee, after the first reading of the Bill, the Sejm Deputies of the parliamentary opposition indicated (making reference to the judgment ref. no. K 34/15) that: "the regulations concerning the election of a judge of the Tribunal may affect the system of exercising power and the legislator is obliged to regulate the time-limit for proposing a candidate for a judgeship at the Tribunal at the statutory level" (the full transcript of the 6th sitting of the Legislative Committee/ the 8th term of the Sejm, 22 December 2015, p. 38). Similar arguments were raised also at the stage of the second reading of the Bill, when it was argued that the repeal of Articles 19 and 20 of the 2015 Constitutional Tribunal Act was contrary to the judgment in the case ref. no. K 34/15 (cf. the shorthand report on the 6th sitting/ the 8th term of the Sejm, 22 December 2015, p. 178).

Moreover, Mr P. Sadłoń, a legislator from the Legislative Bureau of the Chancellery of the Sejm, during the deliberations of the Legislative Committee, pointed it out twice that the repeal of over 10 provisions of the 2015 Constitutional Tribunal Act in one provision of the December Amending Bill breaches § 94(2) of the Annex to the Prime Minister's Regulation of 20 June 2002 on "Rules on Legal Drafting" (Journal of Laws – Dz. U. No. 100, item 908; hereinafter: the Rules on Legal Drafting; cf. the full transcript of the 5th sitting of the Legislative Committee/ the 8th term of the Sejm, 21 December 2015, p. 117, as well as the full transcript of the 6th sitting of the Legislative Committee/ the 8th term of the Sejm, 22 December 2015, p. 40).

7.4.4. The regulation under analysis also ignited much controversy in the course of the work conducted by the Senate.

In the opinion of 23 December 2015 presented by the Legislative Bureau of the Chancellery of the Senate, extensive passages were cited from the Tribunal's judgment ref. no. K 34/15 and it was concluded that the repeal of Articles 19 and 20 of the 2015 Constitutional Tribunal Act "raised serious reservations as to its constitutionality", for those provisions were indispensable "from the point of view of the systemic position of the Tribunal and the status of the Tribunal's judges". Also, the allegation about an infringement of § 94(2) of the Rules on Legal Drafting was repeated there (cf. pp. 5,6 and 11 of the opinion of the Legislative Bureau of the Senate).

7.5. The manner of regulating the procedure for electing judges of the Constitutional Tribunal – general characteristics; changes in comparison with the previous legal provisions

7.5.1. Before the entry into force of the challenged provision, the procedure for the election of the judges of the Constitutional Tribunal by the Sejm was regulated both in the 2015 Constitutional Tribunal Act, as well as in the Sejm's Rules of Procedure.

By limiting the discussion to the period since the entry into force of the present Constitution, it should be indicated that from 17 October 1997 until 29 August 2015 the Sejm's Rules of Procedure repeated the rules provided for in the Constitutional Tribunal Act, as regards:

– a majority of votes required for the validity of the election (cf. Art. 5(4), second sentence, of the 1997 Constitutional Tribunal Act as well as Art. 17(2), first sentence, of the 2015 Constitutional Tribunal Act),
– authorities that are competent to propose candidates for judicial vacancies at the Tribunal (cf. Art. 5(4), first sentence, of the 1997 Constitutional Tribunal Act as well as Art. 27a(1) of the Sejm's Rules of Procedure, which were binding from 17 October 1997 until 14 June 2002, and subsequently – Art. 30(1) of the Sejm's Rules of Procedure, which have been binding since 15 June 2002).

The Sejm's Rules of Procedure independently regulated only internal matters related to proceedings with proposals of candidates for judicial vacancies (i.e. the content of the proposals, dates for carrying out a vote, rules for providing opinions about the proposals by the Sejm's committee and the service of the opinions on Sejm Deputies – cf. Art. 125, Art. 27a and Art. 28 of the Sejm's Rules of Procedure in the version that was binding from 17 October 1997 to 14 June 2002, and then – Art. 26, Art. 30 and Art. 31 of the Sejm's Rules of Procedure in the version that has been binding since 15 June 2002, with Art. 30(3)(5) added in the amendment of 26 November 2015).

7.5.2. After the entry into force of the 2015 Constitutional Tribunal Act, in the period that directly preceded the enactment of the December Amending Act, the scope of "symmetrical" provisions broadened slightly. The following provisions were included in the 2015 Constitutional Tribunal Act and the Sejm's Rules of Procedure:

– authorities that are competent to propose candidates for a judgeship at the Tribunal (cf. repealed Art. 19(1) of the 2015 Constitutional Tribunal Act and Art. 30(1) of the Sejm's Rules of Procedure);
– time-limits for lodging relevant proposals with the Marshal of the Sejm (cf. repealed Art. 19(2), Art. 20 and Art. 137a of the Constitutional Tribunal Act as well as Art. 30(3)(1), Art. 30(3)(2) and Art. 30(3)(5) of the Sejm's Rules of Procedure);
– the obligation of a competent authority in the Sejm to provide opinions on the proposals (with the restriction that Art. 19(4) of the 2015 Constitutional Tribunal Act implied the obligation of issuing such an opinion and, within the remaining scope, the provision made reference to the Sejm's Rules of Procedure, which addressed those issues in more detail in Art. 30(5)-(7));
– a majority of votes required for the election of a judge of the Tribunal to be effective (cf. Art. 17(2), first sentence, of the 2015 Constitutional Tribunal Act as well as Art. 31 of the Sejm's Rules of Procedure).

Moreover, the 2015 Constitutional Tribunal Act indicated that "detailed requirements concerning the proposal as well as the procedure for processing the proposal" should be regulated in the Sejm's Rules of Procedure (cf. repealed Art. 19(5) of the 2015 Constitutional Tribunal Act). The said requirements were included *inter alia* in Article 30(2), (4), (8) and (9) of the Sejm's Rule of Procedure.

7.5.3. Article 1(16) of the December Amending Act has introduced a significant change in the way of regulating the procedure for the election of judges of the Tribunal.

This consists in the modification of the legal bases of the subject-matter under regulation. Three out of four provisions of the 2015 Constitutional Tribunal Act that were binding in that respect (i.e. Art. 19, Art. 20 and Art. 137a) got repealed in their entirety. The statutory rank was only preserved in the case of the norm which states that judges of the Tribunal are chosen individually by an absolute majority vote in the Sejm (cf. Art. 17(2), first sentence, of the 2015 Constitutional Tribunal Act). As a result, those provisions of the Sejm's Rules of Procedure which functioned in parallel with the repealed provisions became "autonomous". After 28 December 2015, Article 30(1), (3), (5) and (6) of the Sejm's Rules of Procedure became the only legal provisions which specify authorities that are competent to propose candidates for a judgeship at the Tribunal, the time-limit for submitting the proposals and the obligation to provide an opinion on proposed candidates by a competent authority in the Sejm.

At the same time, Article 1(16) of the December Amending Act caused only insignificant substantive changes to the procedure for electing judges of the Constitutional Tribunal. The principles provided for in repealed Article 19 of the 2015 Constitutional Tribunal Act were repeated in Article 30 of the Sejm's Rules of Procedure, i.e. basic rules for proposing candidates for judges of the Tribunal were preserved. Repealed Article 137a of the 2015 Constitutional Tribunal Act had limited and specific application (it determined time-limits for proposing candidates for judicial positions that were to be vacated in 2015). By contrast, what has been eliminated from the legal system is the 14-day time-limit for proposing new candidates for the office of a judge of the Constitutional Tribunal in the event of a fiasco of an earlier vote (repealed Article 20 of the 2015 Constitutional Tribunal Act). However, the said circumstances should be assessed, taking into account the fact that since 26 November 2015, the right to set such atypical time-limits has been granted to the Marshal of the Sejm (cf. Art. 30(3)(5) of the Rules of Procedure of the Sejm).

7.6. The assessment of the constitutionality of Article 1(16) of the December Amending Act, insofar as it repeals Article 19(1) of the 2015 Constitutional Tribunal Act

7.6.1. The regulation of the Sejm's powers to appoint and dismiss certain public officials in systemic statutes and the Sejm's Rules of Procedure is a well-established and indisputable standard, whose functionality is confirmed by long-standing practice.

7.6.2. A statutory form for specifying detailed rules for appointing or electing members of the National Council of the Judiciary of Poland, the National Council of Radio and Television Broadcasting as well as the authorities of the National Bank of Poland is explicitly required, respectively, by Article 187(4), Article 215 and Article 227(7) of the Constitution.

In the other cases, the Constitution requires that a statute should specify, *inter alia*, "the organisation" of a given organ of the state (cf. Art. 197 – concerns the Constitutional Tribunal; Art. 201 – pertains to the Tribunal of State; Art. 207 – regards the Supreme Audit Office) or its "scope of activity and *modus operandi*" (cf. Art. 208(2) of the Constitution – on the Ombudsman). This does not constitute a restriction of the subject-matter of relevant systemic statutes. Regardless of the wording of the cited "authorisation" provided for in the Constitution, the legislator consistently assumed that it is insufficient to render the procedure for electing

or appointing members of those organs of the state in the Sejm's Rules of Procedure, and always provided for at least partial statutory regulation in that respect.

The degree of detail in the case of the statutory regulation of the Sejm's powers to appoint and dismiss certain public officials is varied (the highest degree is in the context of judicial elections to the Constitutional Tribunal – in the version the 2015 Constitutional Tribunal Act before the amendments – as well as the appointment of the Ombudsman and the President of the Supreme Audit Office).

Systemic statutes specified:

– persons or entities authorised to file an application for election or appointment (cf. Art. 9 of the Act of 29 August 1997 on the National Bank of Poland, Journal of Laws – Dz. U. of 2013, item 908, as amended; hereinafter: the National Bank of Poland Act; Art. 3(1) of the Act of 15 July 1987 on the Ombudsman, Journal of Laws – Dz. U. of 2015 No. 8, item 30, as amended; hereinafter: the Ombudsman Act; Art. 14(1) of the Act of 23 December 1994 on the Supreme Audit Office, Journal of Laws – Dz. U. of 2015 item 1096, as amended, hereinafter: the Supreme Audit Office Act; as well as repealed Art. 19 of the 2015 Constitutional Tribunal Act);
– time-limit for proposing candidates (cf. repealed Art. 19(2) and (3) as well as Art. 20 of the 2015 Constitutional Tribunal Act);
– time-limits for electing or appointing public officials by the Sejm (cf. Art. 14 of the Act of 26 March 1982 on the Tribunal of State, Journal of Laws – Dz. U. of 2002 No. 101, item 925, as amended, and Art. 13(3) and (7) of the National Bank of Poland Act).

In this context, the unconditional and complete derogation of the statutory rules for the election of judges of the Constitutional Tribunal by the Sejm, expressed in Articles 19 and 20 of the 2015 Constitutional Tribunal Act, should be assessed as an exception to the hitherto adopted unified solutions. Although such an exception is not *a priori* excluded, it would require convincing and proper justification, for it results in the varied status of provisions concerning particular organs of the state. In particular, this concerns the elimination of the statutory catalogue of persons and entities that are authorised to put forward candidates for judicial vacancies at the Tribunal, which is difficult to explain in rational terms in the context of leaving that kind of provisions in the three other above-mentioned systemic statutes.

7.6.3. The procedure for electing judges of the Constitutional Tribunal has been regulated in various ways by the statutes on the Constitutional Tribunal and subsequent versions of the Sejm's Rules of Procedure since the establishment of the Tribunal in 1986.

During the period of almost thirty years of the coexistence of provisions in the Sejm's Rules of Procedure and statutory provisions which concerned the election of judges to the Tribunal, there were no contradictions between these two sets of provisions. The rule was that the Sejm's Rules of Procedure repeated statutory provisions concerning a majority of votes required for carrying out the election as well as persons and entities that were authorised to propose candidates for judicial vacancies. The said Rules of Procedure autonomously regulated further more detailed aspects of internal proceedings aimed at processing applications for the appointment of judges of the Constitutional Tribunal (cf. Art. 26, Art. 30 and Art. 31 of the Sejm's Rules of Procedure in the version that has been binding since 15 June 2002).

The situation changed only with the entry into force of the 2015 Constitutional Tribunal Act, where time-limits for proposing candidates for judicial vacancies were regulated

by statute for the first time, in a slightly different way than this had been done so far in the Sejm's Rules of Procedure.

Casting aside the provisions on the election of judges to the Tribunal in 2015 (cf. Art. 137 and Art. 137a of the 2015 Constitutional Tribunal Act), there was a clear contradiction as regards only one issue and it occurred in the period from 30 August until 4 December 2015. It consisted in a different way of setting a time-limit for proposing candidates for a judgeship at the Tribunal due to the lapse of his/her term of office: Art. 19(2) of the 2015 Constitutional Tribunal Act provided for 3 months, whereas Article 30(3)(1) of the Sejm's Rules of Procedure – for 30 days. The said discrepancy was eliminated by the aforementioned November Amending Act (of 19 November 2015). Pursuant to Article 1(3) thereof, the statutory provisions were adjusted within the indicated scope to the Sejm's Rules of Procedure (as indicated in the explanatory note for the November Amending Bill – cf. the Sejm Paper No. 12/8th term of the Sejm, p. 2).

There was also another difference between the 2015 Constitutional Tribunal Act and the Sejm's Rules of Procedure as regards determining the time-limit for proposing candidates for a judgeship at the Tribunal in the event of terminating the mandate of a judge of the Tribunal before the lapse of the judge's term of office. In both acts, the said time-limit was 21 days, but it was counted from a different event: according to the 2015 Constitutional Tribunal Act – from the date of "the expiry of the mandate" (cf. its Art. 19(3)), whereas according to the Sejm's Rules of Procedure – from the date of "determining the expiry of the mandate" (cf. Art. 30(3)(2) of the Sejm's Rules of Procedure).

Moreover, in both legal acts, certain divergent provisions may be indicated in this respect (i.e. Art. 20 of the 2015 Constitutional Tribunal Act as well as Article 30(3)(5) of the Sejm's Rules of Procedure, added on 26 November 2015). However, they do not concern typical situations of the election of a judge of the Tribunal and could be interpreted in such a way so as to avoid a conflict of provisions.

The above findings allow one to verify the declarations of the authors of the December Amending Bill that its Article 1(16) was intended to eliminate "solutions competing" with the Sejm's Rules of Procedure and "contradicting" them (cf. the Sejm Paper No. 122/8th term of the Sejm, p. 5). It should be noted that in the course of work carried out in the Sejm with regard to the December Amending Bill (from 15 until 22 December 2015), the only evident discrepancy between the 2015 Constitutional Tribunal Act and the Sejm's Rules of Procedure had already been eliminated: this was done by the November Amending Act, which entered into force on 5 December 2015. Thus, mentioned in the explanatory note for the December Amending Bill, the *ratio legis* underlying the repeal of Article 19(1)-(3) and Article 20 of the 2015 Constitutional Tribunal Act was not up-to-date.

7.6.4. In the opinion of the Constitutional Tribunal, the parallel regulation of rules for electing judges to the Constitutional Tribunal by the Sejm – in the 2015 Constitutional Tribunal Act and the Sejm's Rules of Procedure during the years 1986-2015 – was a functional solution. Until recently this caused no controversy. In particular, it was indisputable that the subject-matter under discussion required statutory regulation, and a possible mention of statutory solutions in the Sejm's Rules of Procedure was only a repetition and was to facilitate the application of the solutions.

In this context, it may be noted that what violates the Rules on Legal Drafting is the mere repetition of statutory provisions in other statutes, or sub-statutory acts e.g. resolutions and decisions (cf. § 4(1), § 118 and § 137), and the said principle is not absolute in character. It is assumed in the doctrine that, on a case-by-case basis, the repetition of provisions of other normative acts may be admissible by way of exception in such acts as the rules and regulations or the rules of procedure of certain organs of public authority, which often constitute, for certain addressees, the basic source of information on normative provisions within a given scope, or where this is justified by the structure or communicativeness of a given legal act (cf. S. Wronkowska, M. Zieliński, *Komentarz…*, Warszawa 2004, pp. 32 and 239).

In such cases, however, it is indispensable to take care of the coherence of the repeated regulations and the symmetry of changes introduced therein so as to avoid the situation where "the addressees and authorities applying the law" are disoriented (the judgment of 3 December 2002, ref. no. P 13/02, OTK ZU no. 7/A/2002, item 90; the thesis was repeated in the context of Art. 19(5) of the 2015 Constitutional Tribunal Act in the judgment ref. no. K 34/15, part III, point 7.5 of the statement of reasons). The direction of adjustments made to provisions should not be accidental, but should arise from the fact which regulation was primary in character, and which only constituted "a reflection" of the source provision. This is directly contingent on the content of those provisions and the extent of their regulation which is required by the Constitution (cf. similarly, the judgment ref. no K 35/15, part III, point 6.10 of the statement of reasons).

7.6.5. However, despite the nearly 30-year tradition and the common practice of repeating other statutory provisions in the Sejm's Rules of Procedure, the legislator may decide that there is a need for the total separation of the provisions of the Constitutional Tribunal Act from those of the Sejm's Rules of Procedure as regards the procedure for proposing candidates for a judgeship at the Constitutional Tribunal. In such a case, the legislator is obliged to determine a boundary between those two acts, in a way that will not be random, but which will take account of the provisions of the Constitution.

The Constitutional Tribunal states that it may be difficult to draw a distinction between the exclusive scope of a statute and the exclusive scope of parliamentary rules of procedure (cf. the judgment of 8 November 2004, ref. no. K 38/03, OTK ZU No. 10/A/2004, item 104 as well as the judgment ref. no. K 8/99). However, when it comes to the issue of electing judges of the Tribunal, the Constitution provides for certain requirements which facilitate devising proper relations between the Constitutional Tribunal Act and the Sejm's Rules of Procedure.

Such requirements are included in provisions indicated by the applicants as higher-level norms for the review. They may be divided into two groups. The first group comprises provisions that are technical and legislative in character, which determine the scope *ratione materiae* of the Sejm's Rules of Procedure and of the Constitutional Tribunal Act (i.e. Arts. 112 and 197 of the Constitution). The other group comprises substantive provisions which determine relations between the Constitutional Tribunal and the other branches of government (i.e. Art. 173 in conjunction with Art. 10 of the Constitution).

7.6.6. Within the meaning of Article 112 of the Constitution, the Sejm's Rules of Procedure should regulate, *inter alia*, "the internal organization and conduct of work of the Sejm and the procedure for appointment and operation of its organs". In this context, in the

Polish legal system, it is presumed that the Sejm's Rules of Procedure are the proper provisions here, only with the exceptions indicated in the Constitution (cf. the requirement of the statutory regulation of certain aspects of the functioning of the Parliament in Art. 63, Art. 105(6), Art. 111(2) or Art. 118(2) of the Constitution). This comprises – *lege non distinguente* – the exercise of all powers by the Sejm, including the powers to appoint or elect other officials or bodies. The election of the judges of the Tribunal constitutes one of the most important powers of the Sejm, as it pertains to determining the composition of a full bench of the only organ of public authority, in the Polish constitutional order, that is competent to review the constitutionality of statutes, and to issue rulings in that respect that are final and universally binding (cf. Art. 188(1) and Art. 190(1) of the Constitution).

However, it needs to be clearly pointed out that the Sejm's Rules of Procedure are to regulate comprehensively and exhaustively only "the procedure for appointment" of organs within the Sejm's structure. By contrast, the Constitutional Tribunal constitutes an organ of the judiciary that is independent of and separate from the legislature (cf. Art. 173 of the Constitution). The members of the Tribunal are elected solely by the Sejm, but – obviously – they may not be regarded as belonging to the organs of the Sejm. Article 112 of the Constitution, insofar as it requires that the Sejm's Rules of Procedure should regulate the "procedure for appointment" of the organs of the Sejm, it has no application to the Constitutional Tribunal, and in particular one may not derive therefrom the right of the Sejm to introduce into its Rules of Procedure changes concerning the election of all 15 judges of the Tribunal at any time.

In the above-mentioned provision of the Constitution, there are however other remarks as to the constitutionally prescribed content of the Sejm's Rules of Procedure. Since the election of the judges of the Tribunal undoubtedly depends (on the basis of Article 194(1), first sentence, of the Constitution) on the exclusive competence of the Sejm, then it must be regulated in the Sejm's Rules of Procedure, insofar as it concerns "the internal organization and conduct of work of the Sejm" as well as the "operation of its organs".

In the view of the Constitutional Tribunal, Article 112 of the Constitution may not be interpreted in a broadening way, assuming that any matter falling within the scope of the Sejm's activity should be regulated entirely in the Sejm's Rules of Procedure only because it requires a certain organisational framework and the activity of the organs of the Sejm. On the contrary, when interpreting that notion, each time one should take account of regulated subject-matter, and in particular whether in its entirety it concerns merely the internal matters of the Sejm, or whether it affects the activity of other organs of public authority or the protection of the rights and freedoms of citizens.

Bearing in mind that the election of the judges of the Tribunal directly determines efficiency and diligence in the work of the Tribunal, it should be deemed that the scope of the autonomy of the Sejm's Rules and Procedures as regards the election of the judges of the Tribunal must be much narrower than in the case of appointing the organs of the Sejm. In the long-standing and, hitherto, indisputable practice, it has been assumed that the said scope comprises such aspects as: formal requirements for proposals of candidates for a judgeship at the Tribunal; specified procedures for providing opinions on those proposals by competent Sejm committees; or time-limits for carrying out particular activities by the organs of the Sejm with regard to proposed candidates (cf. Art. 30(2), points 4 to 9 of the Sejm's Rules of Procedure).

The Constitutional Tribunal states that the said scope should not include regulations about persons and entities authorised to propose candidates for a judgeship at the Tribunal. Although the regulations are addressed to the organs of the Sejm, their significance goes beyond the internal matters of the Sejm. Indeed, one may imagine such regulation of procedural norms which would provide, within the scope under analysis, for the competence of only one person or entity (e.g. the Marshal of the Sejm or a Sejm committee) in the Parliament, and in an extreme case – outside the Parliament (e.g. a special pre-selection council under the auspices of the Minister of Justice). This would distort the constitutional requirement that judges of the Tribunal should be elected (i.e. all relevant stages of the election procedure should be carried out) by the entire Sejm (cf. Art. 194(1) of the Constitution), thus limiting the role of the Sejm merely to voting for or against a candidate imposed by an organ of the Sejm or an external authority. In order to minimise such a risk, the question of who is authorised to propose candidates for a judgeship at the Tribunal definitely needs to be regulated in its entirety by statute.

One may not agree with the opinion included in the explanatory note for the December Amending Bill that repealed Article 19(1) of the 2015 Constitutional Tribunal Act "interfered with the Sejm's autonomy within the scope of the election of judges of the Tribunal" (cf. the Sejm Paper No. 122/8th term of the Sejm, p. 5). On the contrary, the above-mentioned effect of the derogation of that provision by Article 1(16) of the December Amending Act, i.e. the provisions of the Sejm's Rules of Procedure "becoming independent", should be deemed inconsistent with Article 112 of the Constitution.

7.6.7. Pursuant to Article 197 of the Constitution, a statute should determine "the organization of the Constitutional Tribunal" as well as "the mode of proceedings before it". Thus, the constitution-maker has established the requirement of a statutory form for regulations on the organisation of the constitutional court and a procedure for the consideration of cases by that court.

The principle of the autonomy of the Tribunal's rules of procedure was guaranteed – to a varied extent – by relevant provisions of all the constitutions which were in force from the establishment of that institution until today. Article 33^{a} of the Constitution of the People's Republic of Poland of 1952, after the amendments of 26 March 1982, provided that "the competence, organisation and procedure of the Constitutional Tribunal shall be specified by statute". The scope of the Constitutional Tribunal Act was rendered in a similar way in Article 77 of the so-called Small Constitution of 1992, which stipulated that "the competence, organisation and procedure of the Constitutional Tribunal shall be specified by statute".

Article 197 of the Constitution of 1997, which is currently in force, makes reference to the statute within a narrower scope than the previously binding provisions, comprising only matters related to the Tribunal's organisation and the mode of proceedings before the Tribunal, by granting the ordinary legislator a much smaller role than with regard to common and administrative courts as well as the Supreme Court (cf. L. Garlicki, comments on Art. 197, [in:] L. Garlicki (ed.), *Konstytucja Rzeczypospolitej Polskiej. Komentarz, t. IV*, Warszawa 2005, p. 2). Within the meaning of that provision, the legislator has the right and the obligation to determine the Tribunal's organisation and the mode of proceedings before the Tribunal at a statutory level in such a way that the Tribunal could effectively exercise its powers set out

in Article 188 and Article 131(1) of the Constitution. Article 197 of the Constitution contains no authorisation for issuing a statute specifying the Tribunal's organisation and the mode of proceedings before the Tribunal, as this would be redundant in the context of the general statutory competence of the Sejm and the Senate. However, it expresses a norm obliging the legislator to regulate matters indicated therein. At the same time, the said provision restricts the scope of the legislator's regulatory discretion. A statute to in Article 197 of the Constitution must specify the Tribunal's organisation and the mode of proceedings before the Tribunal in such a way that the Tribunal would be able to effectively carry out all tasks assigned thereto by the Constitution. Yet, it may not go beyond the said scope of regulation, in particular, in such a way so as to eliminate or restrict the judicial powers of the Tribunal. A relevant statute that does not meet that requirement constitutes an infringement of Article 197 of the Constitution. In addition, one should assume that the said provision does not contain an exhaustive catalogue of matters that need to be regulated by statute, but it merely indicates the necessary elements of such a statute which do not arise from the other provisions of the Constitution. This is so because statutes, in principle, have an unlimited scope *ratione materiae*.

Undoubtedly, the procedure for proposing candidates for a judgeship at the Tribunal does not fall within the scope of an authorisation to specify, by statute, "the mode of proceedings before" the Tribunal. As indicated above, the entire process of appointing judges of the Tribunal constitutes an element of "the mode of proceedings" before the Sejm, and none of stages thereof takes part before the Constitutional Tribunal.

However, it may not be assumed that – contrary to the stance of the second group of Sejm Deputies and the view expressed in the withdrawn statement of the Public Prosecutor-General – the said matter falls within the ambit of "the Tribunal's organisation", which is reserved for statutory regulation. Such a broadening interpretation of the term 'the Tribunal's organisation' is not confirmed in the other provisions of the Constitution that contain an authorisation to enact systemic statutes. What rules out that interpretation is, in particular, Article 227(7) of the Constitution, where "the organization and principles of activity" of the National Bank of Poland juxtaposed with "detailed principles for the appointment and dismissal of its organs" are treated as two separate areas of statutory regulation. Such spheres may not be regarded as identical.

Therefore, Article 197 of the Constitution is not an adequate higher-level norm for the review of Article 1(16) of the December Amending Act within the challenged scope.

7.6.8. Article 173 of the Constitution stipulates that "the courts and tribunals shall constitute a separate power and shall be independent of other branches of power", thus specifying, in greater detail, a general rule of separation of and balance between powers, expressed in Article 10 of the Constitution. In the light of the previous jurisprudence of the Constitutional Tribunal, the said provisions imply an obligation to ensure that the Tribunal will enjoy organisational and functional autonomy, in particular in the realm of its judicial activity (cf. more on that in the judgment ref. no. K 34/15, part III, point 1 of the statement of reasons as well as the judgment ref. no. K 35/15, part III, point 4.2 of statement of reasons, and also see the discussion in the parts of this statement of reasons). The implementation of the said requirement necessitates the adoption of provisions, at a level lower than the Constitution,

which both in terms of the form and content will best guarantee the 'separateness and independence' of the Tribunal.

Undoubtedly, the election of the judges of the Tribunal constitutes a realm where the legislature and the judiciary overlap. The Sejm, as an organ of the legislature, is the only competent body to specify the composition of the Constitutional Tribunal as an independent organ of the judiciary, which has been recently stressed in the jurisprudence in the context of the role of the President (cf. the judgment ref. no. K 34/15, part III, point 8 of the statement of reasons).

That the composition of the Tribunal will be determined in an efficient, prompt and transparent way is a factor directly affecting the Tribunal's capacity to exercise its constitutional powers (cf. likewise: the judgment ref. no. K 34/15, part III, point 6.12 *in fine* of the statement of reasons). Ultimately, this has an impact on the guarantees of the realisation of civil rights (cf. in particular Art. 79(1) of the Constitution – a constitutional complaint) as well as on the exercise of competence by other organs of the state (cf. e.g. Art. 122(3) of the Constitution – an *ex ante* review of the constitutionality of a statute, Art. 193 of the Constitution – a question of law referred to the Tribunal by a court, Art. 189 of the Constitution – the resolution of disputes over powers).

The aforementioned significance of proposing candidates for judges for the systemic position of the Tribunal determines that the basic elements of that procedure (including the analysed issue as to who is competent to propose candidates for a judgeship at the Tribunal) need to be regulated by statute. Such a form of regulation will – to a greater extent than the Sejm's Rules of Procedure –guarantee that detailed solutions pertaining to persons and entities competent to propose candidates and to time-limits for exercising the said competence – correspond to requirements derivable from Article 173 in conjunction with Article 10 of the Constitution. It should indeed be noted that the most important elements of the process of drafting statutes are regulated in the Constitution (cf. in particular, the right to introduce legislation – Art. 118, the principle that bills are considered in the course of three readings – Art. 119, the involvement of the Senate and the President of Poland – Arts. 121 and 122, the possibility of an *ex ante* review – Art. 122(3), the narrow scope of the legislative procedure for bill classified as urgent – Art. 123, the obligation to request an opinion of the National Council of the Judiciary – arising from Art. 186(1) of the Constitution). The above-mentioned solutions are to contribute to the adoption of provisions that are rational, effective, coherent and consistent with the Constitution, as well as that are relatively stable. There is no doubt that the said characteristics are desirable in the context of the statutory provisions concerning the election of the judges of the Tribunal and that they are conducive to the 'independence and separateness' of the Tribunal from the other branches of government. As a side remark, one may point out that it is not accidental that statutes also regulate rules for appointing judges of common courts, administrative courts and the Supreme Court (cf. Arts. 55-62 of the Act on the Organisational Structure of Common Courts, Arts. 5-7 of the Act on the Organisational Structure of Administrative Courts as well as Arts. 21-28 of the Supreme Court Act). In this context, the repeal of statutory provisions on the election of judges of the Constitutional Tribunal should be read as a diminished guarantee of the judges' independence.

The constitutional provisions merely state that the Sejm's Rules of Procedure are to be "adopted by the Sejm", with the exclusion of any other organs of public authority. In prac-

tice, this guarantees that the Sejm has greater regulatory freedom than in the case of statutes, both regards procedures and the content of adopted regulations. The Constitution provides for no restrictions as regards expeditious adoption and changes of measures that meet short-term needs of a given parliamentary majority, without a detailed analysis of the consequences thereof for the legal system and legal practice. Such characteristics of changes made to the Sejm's Rules of Procedure have been confirmed by the latest amendments to the said Rules of Procedure, introduced with relation to current events, i.e. the intention to fill the disputable judicial vacancies that occurred in 2015, before the Tribunal issued its judgment in the case K 35/15. On 26 November 2015, the Sejm's Rules of Procedure were extended by adding powers vested in the Marshal of the Sejm to specify a non-standard time-limit for putting forward motions for the election of a judge of the Tribunal in the event of "circumstances other" than the lapse of the term of office or the expiry of the mandate of a judge (cf. Art. 30(3)(5) in conjunction with Art. 30(3)(1) and Art. 30(3)(2) of the Sejm's Rules of Procedure as well as the Resolution of 26 November 2015 by the Sejm on amendments to the Sejm's Rules of Procedure, Official Gazette – M.P., item 1136). In the view of the Constitutional Tribunal, excessive changeability of a procedure for electing judges of the Tribunal is a disadvantageous phenomenon.

Therefore, it ought to be deemed that Article 1(16) of the December Amending Act, insofar as it repeals Article 19(1) of the 2015 Constitutional Tribunal Act, is inconsistent with Article 173 in conjunction with Article 10 of the Constitution.

7.6.9. For the above reasons, the Constitutional Tribunal has ruled that a derogation of a statutory catalogue of persons competent to propose candidates for a judgeship at the Tribunal is inconsistent with Articles 112 and 173 in conjunction with Article 10 of the Constitution as well as is not inconsistent with Article 197 of the Constitution.

8. The assessment of the repeal of statutory provisions on the procedure for determining the existence of an impediment to the exercise of the office by the President of the Republic

8.1. The challenged provision

Pursuant to Article 1(15) of the December Amending Act, Chapter 10 of the 2015 Constitutional Tribunal Act "shall be repealed".

The derogated provisions included therein had the following wording:

"Article 116. In an application to determine the existence of an impediment to the exercise of the office by the President of the Republic, the Marshal of the Sejm shall indicate circumstances which temporarily make it impossible for the President of the Republic to exercise his/her office and to notify the Marshal of the Sejm thereof.

Art. 117. 1. The Tribunal shall consider the application of the Marshal of the Sejm forthwith, but no later than within 24 hours from the submission thereof.

2. The Tribunal shall consider the application at a hearing in camera.

3. The following shall be participants in the proceedings:

1) the Marshal of the Sejm;
2) the Marshal of the Senate;
3) the First President of the Supreme Court;
4) the Public Prosecutor-General;

5) the Head of the Chancellery of the President of the Republic of Poland.

4. If a participant in the proceedings may not be present at the hearing, s/he may designate a representative.

5. The representative:

1) of the Marshal of the Sejm may be a Vice-Marshal of the Sejm whom the said Marshal has authorised to act in such capacity;

2) of the Marshal of the Senate may be a Vice-Marshal of the Senate whom the said Marshal has authorised to act in such capacity;

3) of the First President of the Supreme Court may be a President of the Supreme Court whom the First President has authorised to act in such capacity;

4) of the Public Prosecutor-General may be his/her deputy authorised to act in such capacity;

5) of the Head of the Chancellery of the President of the Republic may be his/her deputy authorised to act in such capacity.

6. The absence of a participant or his/her representative at the hearing shall not prevent the consideration of the application.

Art. 118. 1. If any doubts arise at the hearing with regard to the circumstances mentioned in Article 116, the Tribunal may, by issuing a decision, commission the Public Prosecutor-General to take certain measures within a specified time-limit as well as adjourn the hearing.

2. The hearing may not be adjourned for longer than 24 hours.

3. The Public Prosecutor-General shall forthwith notify the Tribunal about the effects of the measures taken to execute the decision referred to in para 1.

Art. 119. 1. The Tribunal shall issue a decision in which it determines the existence of an impediment to the exercise of the office by the President of the Republic and assigns the Marshal of the Sejm with the temporary performance of the duties of the President of the Republic for a period no longer than three months.

2. The decision shall cease to have effect:

1) if, before the lapse of the time-limit specified therein, the President of the Republic of Poland shall notify the Marshal of the Sejm and the Tribunal about his/her capacity to exercise the office;

2) if there occur circumstances specified in Article 131(2), points 1, 2, 4 or 5, of the Constitution.

Art. 120. 1. Where – after the lapse of the time-limit for which the Tribunal assigned the Marshal of the Sejm with the temporary performance of presidential duties – the circumstances which temporarily make it impossible for the President of the Republic to exercise the office have not ceased to exist, the Marshal of the Sejm may again, for the last time, refer to the Tribunal with an application to determine whether or not there exists an impediment to the exercise of the office by the President of the Republic.

2. The application submitted again by the Marshal of the Sejm to determine the existence of an impediment to the exercise of the office by the President of the Republic shall be considered on the basis of the provisions of Articles 117-119.”.

8.2. The allegations of the applicants and the statements of the participants in the proceedings

The National Council of the Judiciary requested the Tribunal to determine that Article 1(15) of the December Amending Act is inconsistent with Article 2, Article 7, Article 8(1) and (2), Article 131(1) as well as Article 197 of the Constitution, "due to the fact that it repeals Chapter 10 [of the 2015 Constitutional Tribunal Act], which regulates the procedure for determining the existence of an impediment to the exercise of the office by the President of the Republic of Poland, where there are no other statutory provisions regulating the said subject-matter, although the Constitution, in its Article 197, expresses the requirement that the Tribunal's organisation and the mode of proceedings before the Tribunal are to be specified by statute".

When justifying the above allegations, the National Council of the Judiciary pointed out that the Constitution does not regulate the mode of proceedings before the Tribunal when – upon application by the Marshal of the Sejm – the Tribunal determines the existence of an impediment to the exercise of the office by the President of the Republic, in accordance with Article 131(1) of the Constitution. In the applicant's opinion, Article 197 of the Constitution obliges the legislator to regulate the Tribunal's organisation and the mode of proceedings before the Tribunal with regard to every case falling within the ambit of the jurisdiction of the constitutional court, including proceedings to determine the existence of an impediment to the exercise of the office by the President of the Republic. Due to the subject of the Tribunal's determination and the fundamental significance thereof for the functioning of the state, the mode of proceedings in such cases should be regulated in a legal act that is equivalent to a statute, for only this would ensure necessary procedural guarantees and the transparency of proceedings.

In the applicant's view, Article 1(15) of the December Amending Act, which repeals entire Chapter 10 of the 2015 Constitutional Tribunal Act and does not replace the repealed provisions with new ones, is inconsistent with the Constitution, and in particular with its Article 197.

A similar stance was taken by the Public Prosecutor-General, in his statement which was subsequently withdrawn, where he emphasised, *inter alia*, that: "the elimination of Chapter 10 from the amended Act results in the lack of a procedure for operationalising constitutional norms". In his opinion, Article 1(15) of the amending Act is inconsistent with Article 2 in conjunction with Article 197 and Article 131(1) of the Constitution.

8.3. The subject of the review and higher-level norms for the review

An analysis of the application leads to the conclusion that the National Council of the Judiciary presented only arguments in support of its allegation about an infringement of Article 197 of the Constitution by Article 1(15) of the December Amending Act.

For these reasons, the Constitutional Tribunal decided, on the basis of Article 104(1)(2) of the 2015 Constitutional Tribunal Act, to discontinue proceedings within the scope of reviewing the conformity of the challenged provision to Article 2, Article 7, Article 8(1) and (2) as well as Article 131(1) of the Constitution on the grounds that adjudication is inadmissible.

8.4. The course of the legislative process

8.4.1. In the original version of the December Amending Bill, drafted by a group of Sejm Deputies and submitted to the Sejm on 15 December 2015 (cf. the Sejm Paper No. 122/8th term of the Sejm), the authors of the Bill did not propose to repeal Chapter 10 of the 2015 Constitutional Tribunal Act would be repealed.

8.4.2. On 21 December 2015, during the sitting of the Sejm's Legislative Committee, after the first reading of the Bill, Ms K. Pawłowicz, a Sejm Deputy, proposed an amendment no. 14 to the Bill, requesting that the whole of Chapter 10 of the 2015 Constitutional Tribunal Act be repealed.

When justifying the proposed amendment, Ms Pawłowicz pointed out that Article 131(1) of the Constitution does not specify reasons "which could constitute a basis for an application of the Marshal of the Sejm and (…) for which the Constitutional Tribunal would determine temporary incapacity. It could be said that there is a gap. In this respect, the Constitution is under-regulated. In such a situation, the drafting and introducing of a new chapter which supplements, which replaces the Constitution, and which groundlessly, outside of the Constitution, vests in the Marshal of the Sejm in the application for the Tribunal, in a case to determine the existence of an impediment to the exercise of the office by the President of the Republic, and indicates circumstances which cause temporary incapacity of the President, etc. This is absolutely inconsistent with the Constitution". Next, the Sejm Deputy added that: "[in] an extreme situation, which has already been discussed in the media, it may happen that the Marshal of the Sejm will abuse his powers. Let's say if we hadn't won the parliamentary elections, and President Duda would be in power, we can imagine that the Marshal of the Sejm or the Civic Platform Party, which these days accuses the President of Poland of the worst crimes and wants him to face the Tribunal of State merely because – against that party's wishes – he refused to give the oath of office… one could imagine this would be a sufficient reason for a certain judicial coup d'état or a coup d'état by the Marshal of the Sejm and judges. Of course, I'm speculating, but such theoretical possibilities are not ruled out by that chapter. Due to serious reservations concerning a situation which is absolutely unconstitutional, the lack of a constitutional basis for entrusting the Marshal of the Sejm with discretion to decide, without any assessment criteria whatsoever, whether the President of Poland can or cannot perform his duties, and for what reasons. I argued that a representative of the President of Poland should be allowed to participate in such proceedings, as they wanted to recall the President from office without any witnesses, so to speak. I absolutely insist, and although I hold the view that one may not be certain of anything in life, I do believe that the Law and Justice Party has the obligation to prevent the introduction of a statutory basis of a certain marshal-tribunal coup d'état (the full transcript of the 5th sitting of the Legislative Committee/ the 8th term of the Sejm, 21 December 2015, p. 86).

With reference to the proposed amendment, Mr S. Sadłoń, a legislator from the Legislative Bureau of the Chancellery of the Sejm, argued that "in the event of deleting (…) that chapter [10 of the 2015 Constitutional Tribunal Act], proceedings to determine the existence of an impediment to the exercise of the office by the President of Poland will be the only proceedings provided for in the Act which will not be specified in the provisions of the Act. (…) From the point of view of the completeness of the 2015 Constitutional Tribunal Act, it seems that certain elements of such proceedings should be regulated in the Act. Perhaps it's a matter

of discussion how detailed the regulation should be. Still, according to the Legislative Bureau, given certain generality of Article 131 of the Constitution, it is advisable to regulate the proceedings more precisely, in more concrete terms in the 2015 Constitutional Tribunal Act" (the full transcript of the 5th sitting of the Legislative Committee/ the 8th term of the Sejm, 21 December 2015, pp. 90-91).

8.4.3. During the sittings of the Sejm's Legislative Committee, both after the first and second reading of the December Amending Bill, Sejm Deputies raised reservations as to the repeal of Chapter 10 of the 2015 Constitutional Tribunal Act. Attention was drawn to the need to regulate the mode of proceedings before the Tribunal in a precise way at the statutory level, due to the necessity to guarantee the proper functioning of state authorities in an emergency situation referred to in Article 131(1) of the Constitution. This entailed in particular setting time-limits, determining the mode of adjudication and specifying the type of an issued determination, as well as indicating participants in proceedings to determine the existence of an impediment to the exercise of the office by the President of Poland (cf. the full transcript of the 5th sitting of the Legislative Committee/ the 8th term of the Sejm, 21 December 2015; opinions voiced by the following Sejm Deputies: Mr R. Kropiwnicki, Mr G. Długi and Mr K. Brejza, pp. 87-89; as well as the full transcript of the 6th sitting of the Legislative Committee/ the 8th term of the Sejm, 22 December 2015, opinions voiced by the following Sejm Deputies: Mr R. Kropiwnicki, Ms B. Dolniak and Mr E. Kłopotek, pp. 35-37). Similar remarks were also made at the stage of the third reading at the Sejm's sitting on 22 December 2015 (cf. the shorthand report on the 6th sitting/ the 8th term of the Sejm, 22 December 2015; opinions voiced by two Sejm Deputies: Mr R. Kropiwnicki and Ms J. Schmidt, pp. 176-177).

8.5. Proceedings to determine the existence of a temporary impediment to the exercise of the office by the President of Poland – general characteristics; changes in comparison with the previous legal provisions

8.5.1. Article 131 of the Constitution specifies a procedure to be applied in the event of temporary or permanent incapacity of the President of Poland to perform presidential duties. What is of significance for resolving the constitutional problem presented in the application filed by the National Council of the Judiciary is Article 131(1) of the Constitution, which concerns the occurrence of temporary incapacity of the President of Poland to exercise his/her office. In such a situation, the constitution-maker has provided for the involvement of the Constitutional Tribunal as an organ of the state which is to issue a determination on the existence of a temporary impediment to the exercise of the office by the President of Poland.

Article 131(1), first sentence, of the Constitution pertains to a situation where the President of Poland recognises that s/he is temporarily unable to exercise the office. In such a situation, the said President notifies the Marshal of the Sejm, who then temporarily takes over the duties of the head of state. By contrast, Article 131(1), second and third sentences, of the Constitution refers to a situation where the President of Poland is unable to notify the Marshal of the Sejm about his/her incapacity to exercise the office. In that case, upon application by the Marshal of the Sejm, the Constitutional Tribunal determines whether or not there exists an impediment to the exercise of the office by the President of Poland. Should the Constitutional Tribunal deem that there exists a temporary impediment to the exercise of the office by the

said President, it assigns the Marshal of the Sejm with the temporary performance of the duties of the President. Where the Marshal of the Sejm cannot perform the duties of the President of Poland, the duties are assigned to the Marshal of the Senate (cf. Art. 131(3) of the Constitution).

8.5.2. The participation of the Constitutional Tribunal in the procedure for determining the existence of a temporary impediment to the exercise of the office by the President of Poland has been provided for – for the first time – in the Constitution of 1997, which is currently in force. Implementing the norm included in Article 197 of the Constitution, the legislator introduced into the 1997 Constitutional Tribunal Act several dispersed provisions on the mode of proceedings before the Tribunal in this respect.

Article 2 of the said Act, specifying the scope of the Tribunal's competence, stipulated in its para 3 that: "The Tribunal shall, upon the application of the Marshal of the Sejm, adjudicate in any matter referring to an impediment to the exercise of his office by the President of the Republic of Poland, where the President is not able to notify the Marshal of the Sejm about his inability to exercise the office. If a temporary inability to perform the office by the President has been found, the Tribunal shall vest the performance of the duties of the President of the Republic of Poland in the Marshal of the Sejm".

Article 25(1)(1)(b) of the 1997 Constitutional Tribunal Act determined the composition of an adjudicating bench of the Tribunal, stating that in cases concerning the existence of an impediment to the exercise of the office by the President of Poland and the assignment of the Marshal of the Sejm with the temporary performance of the said President's duties, adjudication is to be conducted by a full bench of the Tribunal.

Article 28 of the 1997 Constitutional Tribunal Act specified participants in proceedings to determine the temporary incapacity of the President of Poland to exercise his/her office, and indicated that the following authorities are required to participate in person in the said proceedings: the Marshal of the Sejm, the Marshal of the Senate, the First President of the Supreme Court, and the Public Prosecutor-General. By contrast, Article 70(2), points 2 and 3, of the 1997 Constitutional Tribunal Act set out the type of determinations issued by the Tribunal, stipulating that the Tribunal was to issue decisions in cases concerning the existence of an impediment to the exercise of the office by the President of Poland and pertaining to the assignment of the Marshal of the Sejm with the temporary performance of the said President's duties.

The Rules of Procedure of the Constitutional Tribunal, which constituted an annex to the resolution of 3 October 2006 adopted by the General Assembly of the Judges of the Constitutional Tribunal (the Official Gazette of the Republic of Poland – *Monitor Polski*; hereinafter: 'the 2006 Rules of Procedure of the Tribunal'), in their § 25, provided that applications filed by competent authorities in cases specified in Article 131(1) of the Constitution were subject, respectively, to § 24(1) and § 24(2) of the said Rules of Procedure, which regulated the procedure for processing applications and questions of law.

8.5.3. Proceedings before the Tribunal in cases specified in Article 131(1) of the Constitution was regulated in Chapter 10 of the new Constitutional Tribunal Act of 2015, entitled "Proceedings to determine the existence of an impediment to the exercise of the office by the President of the Republic".

When justifying the introduction of such provisions, it was indicated that: "The provisions of Chapter 10 contain a proposal for complete regulation – unlike the previous regulation – of proceedings before the Tribunal to exercise the competence to determine the existence of an impediment specified in Article 131(1), second and third sentences, in conjunction with Article 131(3) of the Constitution with regard to the exercise of the office of the President of Poland" (the Sejm Paper No. 1590/7th term of the Sejm, p. 24).

Chapter 3 of Section VI in the Rules of Procedure of the Constitutional Tribunal, which constitute the annex to the resolution of 15 September 2015 by the General Assembly of the Judges of the Constitutional Tribunal (the Official Gazette of the Republic of Poland – *Monitor Polski*, item 823; the 2015 Rules of Procedure of the Tribunal), specifies a procedure for processing an application to determine an impediment to the exercise of the office of the President of Poland. The 2015 Rules of Procedure of the Tribunal regulate *inter alia* the way of serving notification about the date of a hearing, the content of a decision provided for in Article 118(1) of the 2015 Constitutional Tribunal Act, the process of designating judges to participate in activities commissioned to the Public Prosecutor-General, as well as the terms of issuing a decision referred to in Article 119 of the Constitutional Tribunal Act (cf. § 57-§ 59).

8.6. The assessment of the conformity of Article 1(15) of the December Amending Act to Article 197 of the Constitution

8.6.1. Pursuant to Article 197 of the Constitution, the organisation of the Constitutional Tribunal, as well as the mode of proceedings before it, is to be specified by statute.

What follows from the assumption expressed by the constitution-maker in Article 197 of the Constitution is that the Constitution does not comprise all indispensable provisions concerning the Tribunal's organisation and the mode of proceedings before it, and thus matters within that scope should be specified by statute. In the context of Article 1(15) of the December Amending Act, what is of significance is the regulation concerning "the mode of proceedings", which should be construed as a manner of exercising constitutionally specified powers of the Tribunal, i.e. as a procedure before the constitutional court (see the Tribunal's judgment of 3 December 2015, ref. no. K 34/15).

In the view of the Constitutional Tribunal, the requirement provided in Article 197 of the Constitution – namely, that such matters should be regulated by statute – entails that the enactment of a relevant statute is a constitutional obligation of authorities involved in the legislative process. A statute ought to regulate all significant matters concerning the mode of proceedings before the Tribunal. At the same time, the legislator is obliged to determine a procedure before the constitutional court in such a way that makes it possible for the Tribunal to properly exercise all its powers laid down in the Constitution. Therefore, Article 197 of the Constitution constitutes a higher-level norm for reviewing not only the fulfilment of the obligation to specify the mode of proceedings before the constitutional court, but also the effectiveness of the procedure.

8.6.2. Article 131(1) of the Constitution, which concerns steps that need to be taken in the event of temporary incapacity of the President of Poland to exercise his/her office, is very laconic. In comparison with norms that have been in force so far in the Polish constitutional tradition, as well as when juxtaposed with constitutional law regulations existing in

other European states, this is not a unique solution (cf. M. Florczak-Wątor, "Konstytucyjne uregulowania problematyki zastępstwa prezydenta w Rzeczypospolitej Polskiej i państwach z nią sąsiadujących", *Przegląd Prawa Konstytucyjnego* No. 2-3/2010, pp. 185 and 204; M. Woch, "Rozstrzyganie w sprawie przejściowej bądź trwałej niemożności sprawowania urzędu przez Prezydenta Rzeczypospolitej Polskiej", [in:] S. Bożyk (ed), *Aktualne problemy reform konstytucyjnych*, Białystok 2013, pp. 186-192). However, the narrow scope of the regulation included in the Constitution entails that the provisions contained therein do not constitute a sufficient procedural basis for considering the aforementioned applications, and it is necessary to supplement them with appropriate statutory provisions. In this respect, there is a substantive relation between Article 131(1) and Article 197 of the Constitution.

8.6.3. So far the Tribunal has not adjudicated on applications to determine the temporary incapacity of the President of Poland to exercise his/her office.

However, the usefulness of the regulations provided for in Article 131(1) of the Constitution may not be measured by the frequency of the application thereof. Solutions referred therein are applicable in a crisis situation. They are provided just in case, and are based on the assumption that it is necessary to maintain the continuity of exercising the office of the President of Poland. This is of particular significance with regard to a public official, for the performance of duties in the case of such an authority is more prone to be affected by any mishaps than in the context of any multi-member entities. In Poland, the head of state is elected in general elections, which means that a potential vacancy in the office may not be filled in forthwith by appointment made by another authority that is not affected by the crisis situation. Furthermore, the office of the President of Poland implies considerable powers, including the safeguarding of the sovereignty and security of the state (cf. W. Brzozowski, "Niemożność sprawowania urzędu Prezydenta w świetle Konstytucji RP", *Ruch Prawniczy, Ekonomiczny i Socjologiczny* No. 1/2011, p. 53).

8.6.4. In the view of the Tribunal, the legislator's decision to repeal all the provisions of the 2015 Constitutional Tribunal Act pertaining to the procedure for determining a temporary impediment to the exercise of the office by the President of Poland constitutes a violation of the obligation arising from Article 197 of the Constitution. What is more, this would hinder the exercise of the Tribunal's power which has been granted thereto by the constitution-maker and which is referred to in Article 131(1), second and third sentences, of the Constitution, should a need to exercise the said power arise.

It ought to be emphasised that the said competence of the Tribunal is unique; it differs considerably from the hierarchical review of norms, the resolution of disputes over powers, or the assessment of the constitutionality of the purposes or activities of political parties. Indeed, the Tribunal acts in this context not so much as a constitutional court whose task is to evaluate law but as an organ in which the public repose confidence and which gives special guarantees of impartial adjudication, and which is to confirm the validity of facts referred to in Article 131(1) of the Constitution (cf. Z. Czeszejko-Sochacki, L. Garlicki, J. Trzciński, *Komentarz do ustawy o Trybunale Konstytucyjnym*, Warszawa 1999, p. 44). The said competence may require the application of special measures which are not resorted to by the constitutional court in the course of its regular judicial activities. What is meant here in particular is the permissibility of access to medical documents concerning the state of health of the President of Poland or the possibility of obtaining necessary operational information from functionaries of competent ser-

vices, if the temporary incapacity to exercise the office was caused by the President gone missing or taken hostage (cf. W. Brzozowski, *Niemożność sprawowania urzędu Prezydenta…*, p. 59).

All the above considerations suffice to conclude that the determination of the existence of a temporary impediment to the exercise of the office by the President of Poland must take place on the basis of a separate, special procedure. It is not possible in this respect to apply accordingly the provisions of the 2015 Constitutional Tribunal Act which concern the exercise of the Tribunal's competence specified in Articles 188 and 189 of the Constitution.

In the case of the competence granted to the constitutional court in Article 131(1) of the Constitution, what is also of significance is the factor of time. In order to ensure that state authorities will function properly in a crisis situation, it is highly important to precisely regulate the mode of proceedings before the Tribunal. The constitutional court may not face uncertainty as to the mode of proceedings that is applicable in an emergency situation, especially that so far no practice has been established in this respect.

At the same time, the Constitutional Tribunal may not regulate the entire mode of proceedings, which was provided for in Chapter 10 of the 2015 Constitutional Tribunal Act, in a legal act that is internal in character, since such subject-matter should be regulated by statute, in accordance with the will of the constitution-maker, expressed in Article 197 of the Constitution. The rules of procedure of the Tribunal, which are referred to in Article 15(1) of the 2015 Constitutional Tribunal Act, constitute a legal act that ranks lower than a statute and specifies "the internal organisation of work carried out by the Tribunal and the organs of the Tribunal, including the duties of the judges of the Tribunal arising therefrom, as well as other matters indicated in the Act".

8.6.5. In the view of the Tribunal, the legislator's repeal of all the provisions on the procedure for determining the existence of an impediment to the exercise of the office by the President of Poland may not be justified by the fact that Article 131(1) of the Constitution does not specify reasons which could constitute a basis of an application by the Marshal of the Sejm. It is in situations where there is no precise norm specifying substantive-law grounds for undertaking a given action that the role of a properly regulated procedure increases.

As pointed out in the literature on the subject, constitutions rarely specify reasons for the incapacity of the head of state to exercise the office, but rather contain general wording: "temporary incapacity". It would definitely be extremely difficult to predict all potential causes of such a state of affairs. There may be causes that exclude any mental or physical ability of the President of Poland to notify the Marshal of the Sejm about his/her incapacity to exercise the office, as well as causes that do not deprive the President of Poland of any possibility of making such notification (cf. M.M. Wiszowaty, "Problematyka niemożności pełnienia urzędu przez głowę państwa – *sede plena, sede vacante* i kwestia zastępstwa, jako przykłady regulacji kryzysowych na gruncie polskiej i europejskich regulacji konstytucyjnych", [in:] J. Oniszczuk (ed), *Normalność i kryzys – jedność czy różnorodność. Refleksje filozoficznoprawne i ekonomiczno-społeczne w ujęciu aksjologicznym*, Warszawa 2010, p. 405; M. Florczak-Wątor, *Konstytucyjne uregulowania problematyki zastępstwa prezydenta…*, p. 192). Similar considerations took precedence in the context of the Polish Constitution. During the course of work conducted by the Constitutional Committee of the National Assembly, it was considered whether to specify the causes of temporary incapacity that may prevent the Presi-

dent of Poland from exercising the office, it was however concluded that it was not possible to enumerate them in an exhaustive way (cf. the sitting no. 19 of the Constitutional Committee of the National Assembly on 30 May 1995, the Bulletin No. XX, pp. 90-93).

Furthermore, the repeal of Chapter 10 of the 2015 Constitutional Tribunal Act may not be justified by the Sejm Deputies' reservations concerning a risk that the powers set out in Article 131(1) of the Constitution might be abused by the Marshal of the Sejm or the Constitutional Tribunal. The existence of an impediment to the exercise of the office by the President of Poland is determined by the Constitutional Tribunal upon application by the Marshal of the Sejm. By contrast, reasons for the said President's temporary incapacity to perform his/her duties are verified by both those authorities, and hence evaluation carried out by the Tribunal may differ from that of the Marshal of the Sejm. The provision under discussion explicitly stipulates that the matter is "determined" by the Constitutional Tribunal, and only "if the Constitutional Tribunal so finds", it assigns the Marshal of the Sejm with the temporary performance of presidential duties. The application of the Marshal of the Sejm is not binding for the Tribunal. The constitutional court may refuse to determine the temporary incapacity of the said President to exercise the office when the application of the Marshal of the Sejm is groundless, and also when the incapacity of the head of state is indisputable and permanent (cf. P. Sarnecki, comments on Art. 131, [in:] L. Garlicki (ed), *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Vol. I, Warszawa 1999, p. 3). The involvement of the Tribunal is a stabilising factor in the event of any discrepancies in the evaluation of the said President's situation. Allowing the Tribunal to issue a determination in this respect reflects the intention to ensure particularly strong guarantees of impartial adjudication.

8.6.6. The Tribunal states that what follows from Article 197 of the Constitution is the legislator's obligation to regulate the mode of proceedings before the constitutional court for an emergency situation where the President of Poland is unable to notify the Marshal of the Sejm about his/her incapacity to exercise the office. The legal institution of standing in for the President of Poland should guarantee the continuity of the exercise of the office in emergency situations. Therefore, it is required that the regulation of such matters should be complete, coherent, and clear.

The mechanism provided for in Article 131(1) of the Constitution needs to be made more precise and to be supplemented. At the statutory level, there should be a reflection of at least the basic elements of that procedure, namely: a time-limit for the consideration of the application of the Marshal of the Sejm; the composition of an adjudicating bench of the Tribunal; the manner of the Tribunal's verification of circumstances mentioned in the application of the Marshal of the Sejm; the indication of participants in proceedings; the form of proceedings (a hearing, a hearing in camera, or a sitting in camera); the type of a ruling (a decision or judgment); as well as the indication of a period for which the Tribunal assigns the Marshal of the Sejm with the performance of presidential duties. The legislator should also ensure that he devises the procedure in such a way that the Tribunal will exercise its competence most effectively, due to the nature of the case and its significance for the proper functioning of the state.

8.6.7. The allegation raised by the National Council of the Judiciary with regard to Article 1(15) of the December Amending Act concerns only the legislator's repeal of Chapter 10 of the 2015 Constitutional Tribunal Act. When analysing the said allegation, the Con-

stitutional Tribunal did not carry out a substantive review of Articles 116-120 of the 2015 Constitutional Tribunal Act, included in the repealed chapter.

The procedure for determining the existence of a temporary impediment to the exercise of the office by the President of Poland is the only procedure, within the ambit of competence granted to the Tribunal, which will – after the repeal of Chapter 10 of the 2015 Constitutional Tribunal Act – remain outside statutory regulation. In the view of the Tribunal, the lawmaker does not have full discretion to repeal provisions when given matters were previously regulated by statute, and the obligation to introduce certain norms is provided for in the Constitution. This particularly refers to provisions on mutual relations between constitutional state authorities. Therefore, the Tribunal agrees with the view, presented in the application of the National Council of the Judiciary and in the withdrawn statement of the Public Prosecutor-General, that the actions of the legislator, who repealed the whole of Chapter 10 of the 2015 Constitutional Tribunal Act and did not introduce any new regulations to replace the repealed provisions, are contrary to the obligation arising from Article 197 of the Constitution.

For the above reasons, the Constitutional Tribunal has stated that Article 1(15) of the December Amending Act is inconsistent with Article 197 of the Constitution.

9. The assessment of rules for terminating special terms provided to the legal service professionals of the Tribunal as regards taking an examination to be admitted to the profession of judge

9.1. The challenged provision

Pursuant to Article 3 of the December Amending Act: "1. Persons employed in positions indicated in Article 124(1) of the Act amended in Article 1 may, after working in those positions for at least 5 years, take an examination to be admitted to the profession of judge within the time-limit of 36 months from the date of the entry into force of this Act. 2. The persons referred to in paragraph 1 above shall be subject to the previous wording of the provisions of Article 125(3) and (4) of the Act amended in Article 1".

9.2. The allegations of the applicants and the statements of the participants in the proceedings

The constitutionality of the above provision was challenged in the application of the second group of Sejm Deputies.

In the opinion of those Sejm Deputies, the challenged provision constitutes significant interference with the acquired rights and legitimate expectations of persons employed in the Constitutional Tribunal, where the interference appears unjustified from the point of view of the principle of proportionality. Article 3 of the December Amending Act infringes the principle of the protection of acquired rights and the principle of the protection of interests that are pending, derived from Article 2 of the Constitution.

9.3. The subject of the review and higher-level norms for the review

The scope of the allegations indicated in the application does not raise any reservations on the part of the Constitutional Tribunal.

However, it should be noted that the reservations of the said Sejm Deputies concern the transitional provisions which comprise a time-limit within which certain employees of the Tribunal may exercise the right to take an examination to be admitted to the profession of judge on the terms set out in Article 125(2)-(4) of the 2015 Constitutional Tribunal Act.

By contrast, the applicants raised no allegations as to the repeal of the provisions which mentioned the said right (i.e. Art. 125(2)-(4) of the 2015 Constitutional Tribunal Act, repealed by Art. 1(16) of the December Amending Act). The applicants only raised reservations as to the rules for terminating the right which are provided for in Article 3 of the December Amending Act.

9.4. The course of the legislative process

9.4.1. Article 4 of the December Amending Bill, submitted to the Sejm by a group of Sejm Deputies on 15 December 2015, provides for the repeal of several provisions of the 2015 Constitutional Tribunal Act, including Article 125(2)-(4) of that Act. The authors of the Bill did not include any transitional provisions. In point 18 of the explanatory note for the December Amending Bill, it was pointed out that: "Article 125(2)-(4) provide the employees of the Constitutional Tribunal who hold positions directly related to the judicial activity of the Tribunal, and who assist the judges of the Tribunal in that respect, with the possibility of taking an examination to be admitted to the profession of judge. They regulate technical matters in this respect. With regard to the employees of the Supreme Court and the Supreme Administrative Court who have similar responsibilities to those described above, no such possibility was permitted. Thus, maintaining the said privilege in law is not justified in the light of the constitutional principle of equality. Such solutions should be generally formulated in relevant statutes" (the Sejm Paper No. 122/8th of the term of the Sejm, p. 6).

9.4.2. In the course of legislative proceedings, the repeal of Article 125(2)-(4) of the Constitutional Tribunal Act, was negatively evaluated by the Helsinki Foundation for Human Rights. In its opinion, the Foundation stated that the proposed solution changes the legal situation of a certain group of persons who have had a legitimate expectation, since the entry into force of the Constitutional Tribunal Act of 25 June 2015, that working for 5 years in a position linked with judicial activity constituted a basis for taking an examination to be admitted to the profession of judge. The repeal of the said provisions infringes their acquired rights and their legitimate expectations to acquire the said rights, which are protected on the basis of Article 2 of the Constitution. What follows from that provision is also a principle in accordance with which the legislator may not surprise the individual with his legislative solutions. This is particularly [important] due to the fact that the drafted amendment was not supplemented with any transitional provisions. In comparison, (…) a person in a similar situation – i.e. an assistant to a judge in a common court – may, having worked in that position for 5 years, take an examination to be admitted to the profession of judge (Art. 155(7) [of the Act on the Organisational Structure of Common Courts]). Therefore, the explanatory note for the Bill provides an insufficient argument for an infringement of rights protected in the light of Article 2 of the Constitution; nor does it suffice to prove discrimination, caused by Article 125(2)-(4) of

the 2015 Constitutional Tribunal Act, against other persons in analogous circumstances" (p. 7 of the opinion).

9.4.3. During the sitting of the Sejm's Legislative Committee on 21 December 2015, which was held after the first reading of the Bill, Mr P. Sadłoń, a legislator from the Legislative Bureau of the Chancellery of the Sejm, pointed out that the provisions of Article 125(2)-(4) of the 2015 Constitutional Tribunal Act vest certain employees of the Office of the Constitutional Tribunal with rights to take an examination to be admitted to the profession of judge. The authors of the Bill did not refer to situations where persons eligible to take the said examination have already commenced the procedure. In this context, the December Amending Bill provides no transitional regulations. Consequently, the repeal of Article 125(2)-(4) of the 2015 Constitutional Tribunal Act may raise reservations in the light of the principle of the protection of acquired rights (cf. the full transcript of the 5th sitting of the Legislative Committee/ the 8th term of the Sejm, 21 December 2015, p. 118).

During the sitting of the Sejm's Legislative Committee on 22 December 2015, which took place after the second reading of the Bill, Mr S. Piotrowicz, a Sejm Deputy, the representative of the authors of the Bill, presented an amendment no. 26 to the Bill, which involved adding new Article 2a, with the following wording: "Persons holding positions referred to in Article 124 (…), who have worked in those positions for at least 5 years, may – within the time-limit of 36 months from the date of entry into force of this Act – take an examination to be admitted to the profession of judge. Persons referred to in paragraph 1 shall be bound by Article 125(3) and (4) of the Act amended in Article 1 in the version that has been in force so far" (the full transcript of the 6th sitting of the Legislative Committee/ the 8th term of the Sejm, 22 December 2015, p. 46). Mr P. Sadłoń, the aforementioned legislator from the Legislative Bureau of the Chancellery of the Sejm, noted that: "the lack of such a provision was pointed out (…) by the Legislative Bureau during the sitting of the Committee, indicating this as a reservation on the basis of Article 2 [of the Constitution]. The said provision improves the situation of the employees of the Office of the Tribunal who hold positions referred to in Article 124(1) of the 2015 Constitutional Tribunal Act. The said provision is a regulation resulting from the elimination of paragraphs 2 to 4 from Article 125 of the 2015 Constitutional Tribunal Act" (the full transcript of the 6th sitting of the Legislative Committee/ the 8th term of the Sejm, 22 December 2015, p. 47).

9.4.4. Ultimately, Article 1(16) of the December Amending Act repealed several provisions of the 2015 Constitutional Tribunal Act, including Article 125(2)-(4) of that Act. By contrast, the transitional regulation providing for the possibility of taking the aforementioned examination within the time-limit of 36 months from the date of entry into force of the December Amending Bill has been included in Article 3 of the Bill.

9.5. The status of the legal service professionals of the Constitutional Tribunal – general characteristics; changes in comparison with the previous legal provisions

9.5.1. Article 3 of the December Amending Act concerns the employees of the Office of the Constitutional Tribunal who fall within the category of legal service professionals of the Tribunal.

Pursuant to Article 124 of the 2015 Constitutional Tribunal Act, these are employees "whose responsibilities are directly linked with the judicial activity of the Tribunal and assistance within that scope provided to the judges of the Tribunal".

Detailed provisions concerning that group of employees at the Office of the Tribunal were for the first time introduced in the Constitutional Tribunal Act of 25 June 2015. In the explanatory note for that Bill, it was indicated that this is a separate group of lawyers "who perform tasks in certain positions directly linked with the judicial activity of the Tribunal and the work of the judges of the Tribunal, including assistants to judges and legal analysts – all of them, in fact, carrying out tasks corresponding to the responsibilities of judges' assistants. (…) The said proposal alludes to practice already existing in the Tribunal – namely, lawyers working as assistants and legal analysts, performing tasks directly related to the substance of the Tribunal's jurisprudence (…) constitute a separate group of employees under the rules and regulations of the Office of the Tribunal, the rules of procedure, as well as the terms of remuneration. Consequently, the creation of the "corps" of legal service professionals by statute is fully reasonable and adequate to the institution of assistants to judges in common and administrative courts, as well as in the Supreme Court and the Supreme Administrative Court (the Sejm Paper No. 1590/7th term of the Sejm, pp. 25-26).

The list of positions held by the employees comprising the legal service professionals of the Tribunal, as well as detailed requirements for qualifying for those positions are specified in the Order ref. no. 1/2015 of 16 September 2015 by the President of the Constitutional Tribunal, issued on the basis of Article 124(2) of the 2015 Constitutional Tribunal Act, upon application by the Head of the Office of the Constitutional Tribunal. These are the following positions: assistants, legal analysts, and the managerial positions in the departments of the Office of the Tribunal.

The detailed scope of duties in those positions and the manner of performing them are set out in the rules and regulations of the Office of the Tribunal, which constitute an annex to the resolution of the General Assembly of 15 September 2015.

At present the "corps" of legal service professionals of the Tribunal comprises 58 employees, of whom 31 persons hold a PhD and 3 persons have a post-PhD degree (Pl. *doctor habilitowany*).

9.5.2. Pursuant to (still binding) Article 125(1) of the 2015 Constitutional Tribunal Act, employees of the Tribunal holding the positions of legal service professionals may, in accordance with rules and procedures laid down in separate provisions: apply for an entry in the register of advocates or legal advisers; apply for a position of an assistant judge; apply for employment in the position of a solicitor in the State Treasury Solicitors' Office; apply to take an examination to be admitted to the profession of advocate, legal adviser or notary public. The explanatory note for the 2015 Constitutional Tribunal Act stated that: "the qualifications and experience of employees who belong to the corps of lawyers – acquired and further developed at work in the Tribunal – make them fully eligible to access other legal professions on preferential terms, by analogy with persons relying on such preferential terms on the basis of relevant statutes" (the Sejm Paper No. 1590/7th term of the Sejm, p. 26).

In addition, Article 125(2) of the 2015 Constitutional Tribunal Act, in the version before the entry into force of the December Amending Act, made it possible for the legal service professionals of the Tribunal to take an examination to be admitted to the profession of judge

after five years of working in one of the aforementioned positions. Requirements for taking the said examination were set out in Article 125(3)-(4) of the 2015 Constitutional Tribunal Act. It follows from the explanatory note for the 2015 Constitutional Tribunal Act that, when introducing the possibility for the legal service professionals of the Tribunal to take the aforementioned examination, an analogy was drawn with terms provided within that scope to assistants to judges in common courts, in accordance with the terms set out in Article 155(7) of the Act on the Organisational Structure of Common Courts (cf. the Sejm Paper No. 1590/7th term of the Sejm, p. 26). Pursuant to the said provision: "An assistant to a judge may, after working in that position for at least 5 years, take an examination to be admitted to the profession of judge. An application for an examination to be admitted to the profession of judge is to be submitted to the Director of the National School of Judiciary and Public Prosecution by the said assistant, and the payment of the required fee needs to be made, no later than three months prior to the examination".

9.6. The assessment of the conformity of Article 3 of the December Amending Act to the principle of the protection of acquired rights and the principle of the protection of interests that are pending, which arise from Article 2 of the Constitution

9.6.1. What follows from the principle of a democratic state ruled by law, expressed in Article 2 of the Constitution, and mentioned by the second group of Sejm Deputies, is *inter alia* the principle of the state's loyalty towards citizens. On the basis of that principle, the Tribunal has derived further detailed rules governing, *inter alia*, subsequent changes in law. They include the rule which requires the legislator to protect acquired rights and interests that are pending (cf. judgments of: 25 November 2010, ref. no. K 27/09, OTK ZU No. 9/A/2010, item 109; 24 February 2010, ref. no. K 6/09, OTK ZU No. 2/A/2010, items 15, and 10 February 2015, ref. no. P 10/11, OTK ZU No. 2/A/2015, item 13).

The principle of the protection of acquired rights implies the protection of public and private subjective rights, as well as a prohibition against the arbitrary revocation or restriction of subjective rights which have been granted to the individual or other private entities in the legal system. The principle of the protection of acquired rights is closely related to the notions of: subjetive rights and maximally formed legitimate expectations (cf. the judgment of 8 January 2009, ref. no. P 6/07, OTK ZU No. 1/A/2009, item 2). Thus, the allegation about an infringement of acquired rights may be formulated with regard to a particular subjective right (alternatively, a maximally formed legitimate expectation), which was revoked or restricted (cf. the judgment ref. no. P 20/04).

It follows from an analysis of the Tribunal's jurisprudence that "the protection of acquired rights" is not absolute in character. This entails that departures therefrom are permissible, but the assessment of their admissibility may be carried out in the context of a particular situation, taking account of all the circumstances (cf. the judgment of 15 September 1999, ref. K 11/99, OTK ZU No. 6/1999, item 116). The admissibility of restrictions imposed on acquired subjective rights, in each case, requires the consideration whether:

– a basis for the introduced restrictions comprises other constitutional norms, principles or values which should be given priority;
– there are no possibilities to realise a constitutional norm, principle or value without infringing acquired rights;

– constitutional values, for the realisation of which the lawmaker restricts acquired rights, may take precedence over values underlying the principle of the protection of acquired rights;
– the lawmaker has undertaken indispensable actions aimed at allowing the individual to adjust to a new regulation (cf. the judgment of 26 February 2013, ref. no. K 15/10, OTK ZU No. 2/A/2013, item 18 as well as the judgments ref. nos. K 32/02 and K 43/12).

By contrast, the principle of the protection of interests that are pending safeguards certain undertakings that were commenced under the rule of hitherto binding regulations and are on-going at the moment of the change of provisions. The protection of interests that are pending and legitimate expectations arising therefrom are, in principle, temporary and transitional, determined by a time-frame set by the legislator. In this respect, the Constitutional Tribunal precisely determined requirements that must be met jointly for interests that are pending to be subject to constitutional protection:
– provisions of law should delineate a time-frame for the carrying out of particular undertakings;
– an undertaking must be stretched in time and may not be completed as a result of one economic event;
– the individual actually commenced the carrying out of a given undertaking during the period when given provisions were in force (cf. the judgments ref. nos. P 6/07, Kp 6/09 and K 7/12).

Thus, the constitutional protection of interests that are pending concerns such situations where provisions of law set a certain time-frame for completing a given undertaking. It does not comprise colloquially understood interests "in general", but the interests the significance of which was specified in the above-mentioned jurisprudence of the Constitutional Tribunal. The principle of the protection of interests that are pending guarantees that the present norms with given content will be binding within a certain time-frame, if a subject of rights and obligations has undertaken certain activities or actions. Due to the protection of interests that are pending, the legislator's obligation is to determine provisions that make it possible to complete commenced undertakings in compliance with provisions that were binding at the time of their commencement or will provide for another possibility of adjusting to amended legal regulations (cf. the judgment ref. no. P 10/11). This not only concerns investment undertakings, understood as running economic and financial affairs (cf. the Tribunal's judgments of: 25 November 1997, ref. no. K 26/97, OTK ZU No. 5-6/1997, item 64 and 7 February 2001, ref. no. K 27/00, OTK ZU No. 2/2001 item 29). In its judgment of 19 April 2006, ref. no. K 6/06, the Tribunal deemed that training as an advocate also falls under the category of interests that are pending (OTK ZU No. 4/A/2006, item 45).

9.6.2. In the view of the Constitutional Tribunal, the allegation of the second group of Sejm Deputies that Article 3 of the December Amending Act infringes the principle of the protection of acquired rights, arising from Article 2 of the Constitution, is inapt.

The challenged article provides for a sufficient time-limit for the exercise of the right acquired by certain employees after working for 5 years as legal service professionals at the Tribunal. Without any additional requirements (e.g. the necessity to be further employed in the Office of the Tribunal or even to further perform duties related to the application or en-

actment of law), the legislator has provided the employees who acquired the right to take an examination to be admitted to the profession of judge with a three-year period for taking the decision, making preparations, and taking the examination.

9.6.3. Also, the Tribunal disagrees with the applicants' allegation as to the infringement of interests that are pending, with regard to legal service professionals of the Tribunal who have acquired the right to take the aforementioned examination.

In accordance with information provided by the Head of the Office of the Tribunal, who – pursuant to Article 123(1) of the 2015 Constitutional Tribunal Act – is the supervisor of the employees of the Office, no person from among the legal service professionals of the Tribunal has filed an application to take the said examination or requested the President of the Tribunal to provide a required opinion in this respect. In other words, the employees of the Office of the Tribunal did not undertake any steps provided for in Article 125(3) of the 2015 Constitutional Tribunal Act, aimed at the realisation of the right specified in Article 125(2) of the Act (for which they were eligible until 27 December 2015) or the right provided for Article 3 of the December Amending Act (for which they were eligible until 28 December 2018). Thus, one may not conclude that Article 3 of the December Amending Act – which allows the legal service professionals of the Tribunal to exercise the aforementioned right, acquired on the basis of Article 125(2) of the 2015 Constitutional Tribunal Act, within 36 months from the date of entry into force of the December Amending Act – infringes the employees' interests that are pending. The challenged provision, as the course of the legislative process shows, was introduced by the legislator to safeguard rights acquired by a certain group of the employees of the Office of the Tribunal as well as possible undertakings commenced under the rule of the 2015 Constitutional Tribunal Act, and permits the realisation of the rights within a specified time-limit.

9.6.4. For the above reasons, the Constitutional Tribunal has deemed that Article 3 of the December Amending Act is consistent with the principle of the protection of acquired rights and the principle of the protection of interests that are pending, which arise from Article 2 of the Constitution. The Tribunal also agrees with the view presented in the withdrawn statement of the Public Prosecutor-General that the challenged provision falls within the ambit of the legislator's regulatory discretion.

10. The effects of the judgment

10.1. Before specifying the effects of the judgment in the present case, one should begin by summing up the Tribunal's conclusions as to the scope of unconstitutionality determined by the Tribunal. The said unconstitutionality has been determined in five areas.

First of all, in point 1 of the operative part of the judgment, the Tribunal has ruled the whole of the December Amending Act to be unconstitutional due to the defective enactment procedure, and in particular due to the non-conformity of the Act with Article 7, Article 112, Article 119(1), and the principle of appropriate legislation, arising from Article 2 of the Constitution.

Secondly, in points 2-5 of the operative part of the judgment, Tribunal has ruled the unconstitutionality of certain provisions of the December Amending Act which derogate particular provisions of the 2015 Constitutional Tribunal Act. The unconstitutionality within that

scope has been adjudicated with regard to provisions that: eliminate the penalty of the recall of a judge of the Tribunal from office from the catalogue of disciplinary penalties; do not provide for the disciplinary responsibility of judges of the Tribunal for their conduct before they took office; repeal rules for determining the existence of an impediment to the exercise of the office by the President of Poland; as well as repeal the catalogue of persons and entities who can propose candidates for a judgeship at the Tribunal.

Thirdly, in points 6-15 of the judgment, the Tribunal has declared the unconstitutionality of certain provisions of the December Amending Act as well as some provisions of the 2015 Constitutional Tribunal Act that were added or amended by the said Amending Act. Unconstitutionality within that scope was ruled with regard to provisions concerning the new procedure for determining the expiry of the mandate of a judge of the Tribunal by the Sejm, the adoption of resolutions by the General Assembly of the Judges of the Tribunal, the composition of adjudicating benches, the consideration of cases in the order in which cases are received by the Tribunal, the earliest admissible dates of hearings, full-bench adjudication by a two-thirds majority of votes, the rights of the President and the Minister of Justice to institute disciplinary proceedings with regard to a judge of the Tribunal, as well as the new procedure for recalling a judge of the Tribunal from office by the Sejm.

Fourthly, in point 16 of the operative part of the judgment, the Tribunal has declared the unconstitutionality of Article 2 of the December Amending Act, which comprises transitional provisions on cases pending before the Tribunal.

Fifthly, in point 18 of the operative part of the judgment, the Tribunal has ruled that the provision by which the December Amending Act was to enter into force as of the date of its publication (Art. 5 of the Act) is unconstitutional.

Thus, the Tribunal has declared the unconstitutionality of the December Amending Act due to:

– an infringement of the procedure on the basis of which the Act was enacted;
– the unconstitutional content of certain provisions of the Act;

as well as the modified wording of the 2015 Constitutional Tribunal Act as determined by the December Amending Act (by repealing or amending certain provisions, or adding new ones).

10.2. It should be pointed out that before the consideration of the case, the Constitutional Tribunal excluded the application of certain provisions of the 2015 Constitutional Tribunal Act after the introduced amendments, which made it possible to issue a ruling without delay. This concerned:

– the participation of at least 13 judges to form a full bench of the Constitutional Tribunal (cf. Art. 44(3));
– the setting of dates of hearings at which applications are considered, in the order in which cases are received by the Tribunal (cf. Art. 80(2));
– the setting of dates of hearings in cases considered by a full bench of the Tribunal no earlier than after the lapse of 6 months from the day when the notification about the date of the hearing is served (cf. Art. 87(2));
– the determination of full-bench rulings by a two-thirds majority vote (cf. Art. 99(1)).

By deciding to bypass the above regulations on the process of applying the law, the Tribunal did not however determine the issue of its binding force or conformity to the Constitution.

The consideration of the case has proved that all the above-mentioned provisions are inconsistent with the Constitution, irrespective of the unconstitutionality of the entire Amending Act. This means that bypassing them while determining the proper bases of adjudication in the present case did not affect the accuracy of the issued the judgment.

10.3. Moving on to the findings concerning the legal effects of the unconstitutionality of the December Amending Act due to the defective mode of the enactment thereof, the Tribunal states that as of the date of the publication of the Tribunal's ruling, all legal effects caused by the said Amending Act will be annulled in the system of law. In other words, by reversing the legal effects of the December Amending Act, the Tribunal's judgment will restore the legal situation prior to the amendments. By specifying the effects of this judgment, the Tribunal makes reference to its previous jurisprudence (see e.g. the judgments of: 20 December 1999, ref. no. K 4/99, OTK ZU No. 7/1999, item 165; 12 December 2005, ref. no. SK 20/04; 12 June 2006, ref. no. K 38/05; 24 March 2009, ref. no. K 53/07 and 17 May 2006, ref. no. K 33/05, OTK ZU No. 5/A/2006, item 57 as well as the decision of 21 March 2000, ref. no. K 4/99, OTK ZU No. 2/2000, item 65). Furthermore, the Tribunal points out that the provisions of the 2015 Constitutional Tribunal Act, with regard to which the presumption of constitutionality had not been overturned, or even challenged, were replaced by the December Amending Act, which is inconsistent with the Constitution.

10.4. The declaration of the unconstitutionality of the December Amending Act and the amended provisions of the 2015 Constitutional Tribunal Act creates necessity to determine the legal bases for further processing of cases received by the Tribunal:

– prior to the date of entry into force of the December Amending Act, i.e. before 28 December 2015, as well as

– from that date, including within the period from the entry into force of the said Act until the delivery of this judgment in the courtroom, i.e. from 28 December 2015 until 9 March 2016.

Pursuant to the well-established jurisprudence of the Tribunal and the consistent stance of the doctrine, the provisions regarded by the Tribunal to be inconsistent with the Constitution may not be applied to any situations from the past, the present and the future.

Since the result of the Tribunal's ruling is a return to the legal situation before the December Amending Act, the 2015 Constitutional Tribunal Act in the version before the challenged Amending Act is applicable to legal situations that exist at the moment of the delivery of the Tribunal's ruling and legal situations that will occur in the future.

10.4.1. Therefore, the Constitutional Tribunal states, with regard to the first set of cases mentioned above, that cases lodged with the Tribunal before the entry into force of the December Amending Act, i.e. prior to 28 December 2015, should be considered in accordance with the provisions of the 2015 Constitutional Tribunal Act prior to the amendments or – in some instances – the provisions of the 1997 Constitutional Tribunal Act. The latter possi-

bility arises from the transitional regulation included in Article 134 in conjunction with Article 139 of the 2015 Constitutional Tribunal Act.

10.4.2. The second set of cases comprise those received by the Tribunal after the entry into force of the December Amending Act, i.e. after 28 December 2015. The said cases, in accordance with the legislator's requirement, were to be considered on terms specified in the said Act.

However, the Tribunal has ruled that the December Amending Act is inconsistent with the Constitution, which results in the annulment of its legal effects. Thus, this restores the application of the provisions of the 2015 Constitutional Tribunal Act in the version before the said Amending Act. Hence, cases received by the Tribunal during the period from 28 December 2015 until the date of the delivery of the judgment in the present case, as well as cases that will be received after the said delivery should also be considered on the basis of those provisions.

In the light of the above arguments, this judgment rules out the application of the mechanisms provided for in the December Amending Act (with the exception of Article 44(1) of the 2015 Constitutional Tribunal Act in the new version – cf. below) in any cases pending before the Constitutional Tribunal, regardless of the date when they were received by the Tribunal.

10.5. Pursuant to Article 190(1) of the Constitution, the Tribunal's rulings are final and are universally binding. Both those characteristics apply to the Tribunal's rulings from the moment of their issuance, and in the case of the Tribunal's judgments – this occurs as of the moment of their delivery in the courtroom (cf. e.g. the aforementioned judgment ref. no. K 2/07 and other rulings cited therein).

Then, the presumption of constitutionality, with regard to a challenged legal act, is either confirmed or overturned, which is not without impact on the practice of further application of the unconstitutional provisions. The loss of the binding force in the case of provisions ruled by the Tribunal as unconstitutional occurs on the day of the publication of the Tribunal's judgment in the Journal of Laws, which a competent public authority is obliged to do "immediately" (cf. Art. 190(2) of the Constitution). The publication of the Tribunal's ruling in an official journal constitutes an action that is technical in character and which does not affect the legal status of the ruling, although it does determine some of its legal effects. The significance of the publication of a ruling of the Tribunal in the Journal of Laws is thus different than the significance of the publication of a statute that becomes a binding law only as of the moment of its publication. Indeed, the publication of a statute in the Journal of Laws completes a legislative process. By contrast, the publication of the Tribunal's ruling in the same official journal occurs already after the end of the constitutional review of law.

The moment of the publication of a ruling of the Tribunal in the Journal of Laws is however linked with the effect of the Tribunal's ruling on the unconstitutionality of a statute by depriving the said statute of its binding force. The delay of the official publication of a ruling of the Tribunal results in maintaining, in the system of binding law, provisions in the context of which the presumption of constitutionality has been overturned in a manner that is final and universally binding. Such a situation poses a threat to the rights and freedoms of citizens as well as infringes their trust in the state and its laws, and also undermines the cer-

tainty of law. For this reason, Article 190(2) of the Constitution contains a guarantee norm, pursuant to which "judgments of the Constitutional Tribunal regarding matters specified in Article 188, shall be required to be immediately published in the official publication". The requirement of immediate publication has not, by contrast, been formulated at the constitutional level with regard to statutes.

In its previous jurisprudence – see e.g. the judgments ref. nos. SK 38/03, SK 40/04 and K 38/07 – the Constitutional Tribunal repeatedly stressed that a provision with regard to which the presumption of constitutionality has been overturned by a ruling of the Tribunal, but which temporarily remains in the system of law, is subject to application, taking into account the principle of the direct application of the Constitution (cf. Art. 8(2) of the Constitution). The preservation of the unconstitutional provision in the system of law, and thus its further application, however, requires a clear ruling of the Tribunal issued on the basis of Article 190(3) of the Constitution. In the present case, the only provision maintained in force is amended Article 44(1) of the 2015 Constitutional Tribunal Act, which will cease to have effect after the lapse of 9 months from the publication of this judgment, unless the legislator amends the Act in question before the lapse of that time-limit. The other provisions ruled by this judgment as unconstitutional may no longer be applied due to the overturning of the presumption of constitutionality in their context as well as the lack of deferred loss of binding force in their case on the basis of Article 190(3) of the Constitution. This also concerns the period between the delivery of the Tribunal's ruling in the courtroom and its subsequent publication in the Journal of Laws.

The overturning of the presumption of constitutionality is of relevance, above all, to the Tribunal itself. Indeed, the Tribunal is obliged *ex officio* to respect its rulings as final and universally binding. The said circumstance has already been specified in part III point 1 of the statement of reasons for this judgment in the context of the Tribunal's judgment ref. no. K 34/15. Of course, this matter is also of relevance to courts, as organs of public authority that are responsible for applying the law and which may not bypass rulings issued by the Tribunal also before the formal loss of their binding force by provisions deemed unconstitutional. The Constitutional Tribunal is in a particular way linked with the said principle of the direct of application of the Constitution, as the constitution-maker determined that the judges of the Tribunal are subject only to the Constitution (cf. Art. 195(1) of the Constitution). For this reason, until the date when the provisions cease to have effect as a result of the publication of this judgment in the Journal of Laws, the Tribunal is obliged in its further judicial activity to bypass those statutory provisions in the context of which the presumption of constitutionality has been overturned by this judgment (excluding aforementioned Article 44(1) of the 2015 Constitutional Tribunal Act – cf. below).

10.6. The fact that this judgment is final and universally binding (cf. Art. 190(1) of the Constitution) means that, in the light of the Constitution, it may not be effectively challenged by other state authorities. However, those authorities are obliged to execute and respect the judgment.

It should be emphasised at the same time that the judgment does not rule out the possibility that the legislator may introduce statutory amendments within the scope of the Tribu-

nal's organisation and the mode of proceedings before the Tribunal. The said modifications must however fall within the scope delineated by the Constitution.

10.7. In accordance with Article 190(3) of the Constitution, the Tribunal is competent to determine the date when a provision deemed unconstitutional by the Tribunal ceases to have effect in a different way than by indicating that this is the date of the publication of the judgment. The Tribunal has adjudicated that Article 44(1) of the 2015 Constitutional Tribunal Act, as amended by Article 1(9) of the December Amending Act, will cease to have effect after the lapse of 9 months from the date of the publication of the judgment. The above entails that the period of 9 months from the publication of the judgment or – in the case of an earlier intervention of the legislator – until the legislator amends the said wording of Article 44(1) of the 2015 Constitutional Tribunal Act, the composition of adjudicating benches in proceedings before the Tribunal, which were instituted after the entry into force of the December Amending Act, i.e. after 28 December 2015, will be determined on the basis of the said provision amended by Article 1(9) of the said Amending Act. This does not concern cases in the context of which the composition of adjudicating benches was specified before the entry into force of the December Amending Act, as they fall outside of the scope of the regulation of Article 44(1) of the 2015 Constitutional Tribunal Act. The composition of adjudicating benches in those cases, determined on the basis of the hitherto binding provisions, will not be changed. This follows from the adjudicated unconstitutionality of Article 2 of the December Amending Act. The deferral of the loss of binding force does not affect Article 44(3) of the 2015 Constitutional Tribunal Act as amended by the December Amending Act. The minimum number of judges that is required to adjudicate as a full bench is specified in the 2015 Constitutional Tribunal Act in the version before the introduced amendments.

Grounds for ruling the loss of binding force of an unconstitutional normative act after the lapse of the time-limit indicated in Article 190(3) of the Constitution have not been specified by the constitution-maker (see the judgment of: 19 May 1998, ref. no. U 5/97, OTK ZU No. 4/1998, items 46 and 24 October 2007, ref. no. SK 7/06, OTK ZU No. 9/A/2007, item 108). The deferral of the loss of binding force of a provision deemed unconstitutional should serve the protection of certain constitutional values and principles. In the present case, the Tribunal has deemed that a value that is subject to protection is the stability of provisions concerning the way of determining the composition of adjudicating benches. Taking into account the fact that the loss of binding force on the part of Article 44(1) of the 2015 Constitutional Tribunal Act in the wording amended by the December Amending Act at the moment of publishing this judgment would cause an immediate return to the previous rules for determining the composition of adjudicating benches, the Tribunal adjudicated about the temporary maintenance of the said provision despite the overturning of the presumption of constitutionality in this respect.

Amended Article 44(1) of the 2015 Constitutional Tribunal Act will thus cease to have effect after nine months after the publication of this judgment in the Journal of Laws`, although the assumption is that before the lapse of that time-limit, the legislator will replace the provision in question with a new legal regulation. The time-limit of nine months should suffice for the legislator to devise rules for determining the composition of adjudicating benches of the Constitutional Tribunal in the way which meets the precepts of the Constitu-

tion, and in particular in a way that guarantees diligence and efficiency in the work of the Constitutional Tribunal together with respect for the independence of the Tribunal and judges (see part III, point 5.6.5 of the statement of reasons).

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

Dissenting Opinion
of Judge Julia Przyłębska
to the judgment of the Constitutional Tribunal
of 9 March 2016, ref. no. K 47/15

On the basis of Article 99(2) of the Constitutional Tribunal Act of 25 June 2015 (Journal of Laws – Dz. U. of 2016, item 1064), I submit this dissenting opinion to the Tribunal's judgment of 9 March 2016, ref. no. K 47/15.

I justify my dissenting opinion as follows:

1. In its decision of 14 January 2016, the Constitutional Tribunal ruled that the joined applications filed by the First President of the Supreme Court, two groups of Sejm Deputies and the Ombudsman, in the case ref. K 47/15, would be considered at a hearing. The decision was adopted by an adjudicating bench of 12 judges of the Constitutional Tribunal. I maintain the stance expressed in my dissenting opinion submitted to the said decision of the Tribunal, and I make that stance integral part of this reasoning.

2. Article 44(1)(1) of the Constitutional Tribunal Act of 25 June 2015 (Journal of laws – Dz. U. of 2016 item 1064; hereinafter: the 2015 Constitutional Tribunal Act), as amended by the Act of 22 December 2015 amending the Constitutional Tribunal Act of 25 June 2015 (Journal of Laws – Dz. U. item 2217; hereinafter: the December Amending Act), stipulates that the Constitutional Tribunal adjudicates sitting as a full bench, unless the statute provides otherwise.

3. The applicants requested the Tribunal to conduct a constitutional review of selected provisions of the 2015 Constitutional Tribunal Act, in the version after amendments, and of the December Amending Act. In such a case, the Tribunal should adjudicate sitting as a full bench.

4. Article 44(3) of the 2015 Constitutional Tribunal Act, as amended by the December Amending Act, stipulates that adjudication by a full bench of the Tribunal requires the participation of at least 13 judges of the Tribunal.

5. Proceedings in the case ref. no. K 47/15 were instituted after the entry into force of the December Amending Act.

6. The applicants did not request the Tribunal to consider the case at a hearing. Article 81(2) of the 2015 Constitutional Tribunal Act, as amended by the December Amending Act, stipulates that where there is no application for the consideration of a case at a hearing, this is to be determined by a bench of the Tribunal adjudicating on the case. An adjudicating bench in the present case, in accordance with the currently binding provisions, comprises at least 13 judges of the Tribunal.

7. Given the wording of Article 44(1)(1) of the 2015 Constitutional Tribunal Act, as amended by the December Amending Act, adjudication in the case ref. no. K 47/15 – also as regards the consideration of a case at a hearing – by a different adjudicating bench than the bench of at least 13 judges of the Tribunal infringes the provisions of the said Amending Act, which enjoys the presumption of constitutionality.

8. I disagree with the claim that it is possible not to apply provisions of the December Amending Act in the present case.

9. The Constitution does not contain provisions regulating the mode of proceedings before the Tribunal. Article 197 of the Constitution states that the mode of proceedings before the Tribunal is to be specified by statute. Within that scope, I agree with the view of Judge M. Zubik, formulated in the publication entitled *Status prawny sędziego Trybunału Konstytucyjnego* (Warszawa 2011, p. 116), namely that: "As regards the examination of cases, the judges of the Tribunal are bound by all statutory provisions on proceedings before the constitutional court. They may not bypass such provisions, even if they find them 'manifestly' unconstitutional. However, there is no obstacle for the Tribunal to adjudicate on the unconstitutionality of the Constitutional Tribunal Act, or other procedural norms that bind the Tribunal, provided that this takes place in compliance with an appropriate procedure".

10. At the hearing on 9 March 2016, the Constitutional Tribunal issued a judgment on the joined applications ref. nos. K 47/15, K 48/15, K 1/16, K 2/16 and K 4/16, which pertained to the constitutionality of the provisions of the December Amending Act.

11. When examining the case ref. no. K 47/15, the Tribunal did not apply provisions on the mode of proceedings before the Tribunal which were included in the 2015 Constitutional Tribunal Act as amended by the December Amending Act, and in particular provisions on the following matters:

1) an adjudicating bench of the Tribunal (Art. 44(1) and (3) of the 2015 Constitutional Tribunal Act);

2) the order of the consideration of cases with relation to setting dates for hearings (Art. 80(2) of the 2015 Constitutional Tribunal Act)

3) time-limits for presenting written statements on a case by participants in proceedings (Art. 82(2) of the 2015 Constitutional Tribunal Act).

4) the setting of the date of a hearing and the notification of participants in proceedings about the date (Art. 87(2) of the 2015 Constitutional Tribunal Act).

Pursuant to amended Article 44(1) of the 2015 Constitutional Tribunal Act:

"Article 44

1.The Tribunal shall adjudicate:

1) sitting as a full bench, unless the Act provides otherwise;

2) sitting as a bench of seven judges of the Tribunal in cases:

a) commenced by a constitutional complaint or a question of law,

b) concerning the conformity of statutes to ratified international agreements whose ratification required prior consent granted by statute;

3) sitting as a bench of three judges of the Tribunal in cases concerning:

a) the further consideration or dismissal of a constitutional complaint or an application filed by authorities referred to in Article 191(1), points 3 to 5, of the Constitution;

b) the exclusion of a judge of the Tribunal from the Tribunal's consideration of a case."

By contrast, amended Article 44(3) of the said Act stipulates that: "3. Adjudication by a full bench shall require the participation of at least 13 judges of the Tribunal".

Taking into consideration the wording of amended Article 44(1) of the 2015 Constitutional Tribunal Act, there is no doubt, in my opinion, that the case ref. no. K 47/15 should have been considered by a full bench of the Tribunal, which – pursuant to amended Article 44(3) of the 2015 Constitutional Tribunal Act – ought to comprise at least 13 judges of the Tribunal.

12. Article 194(1) of the Constitution stipulates that the Constitutional Tribunal is composed of 15 judges. Thus, if one were to directly apply the Constitution to the review proceedings, the Tribunal should adjudicate as a bench of 15 judges.

13. The judgment ref. no. K 47/15 was issued by an adjudicating bench of 12 judges, which is not provided for in the Constitutional Tribunal Act. In the statement of reasons for its judgment, the Tribunal assumed that: "a full bench of the Tribunal comprises all the judges of the Tribunal who have the capacity to adjudicate on the day of the issuing of a judgment". At present, there are 15 judges in the Tribunal, apart from the 12 judges that were present in the courtroom at the hearing in the case ref. no. K 47/15, there are also Judge Henryk Cioch, Judge Lech Morawski and Judge Mariusz Muszyński, who have taken the oath of office before the President of Poland. This entails that in the current legal situation, the capacity to adjudicate refers to 15 judges and they make up a full bench that is to adjudicate on cases on the basis of amended Article 44(1)(1) of the 2015 Constitutional Tribunal Act. Neither the Constitution nor the Constitutional Tribunal Act vests the Constitutional Tribunal with powers to decide about the judges' capacity to adjudicate, except in situations referred to in Article 46(1) of the 2015 Constitutional Tribunal Act, which concern the exclusion of a judge from the Tribunal's consideration of a case. The Tribunal did not discuss circumstances that necessitated the exclusion of the three judges of the Tribunal from the Tribunal's consideration of the case. Nor did the judges themselves request to be excluded in that respect.

In the statement of reasons for its judgment, the Tribunal touched upon the election of judges of the Tribunal held on 8 October 2015. I disagree with the view that in the judgment of 3 December 2015, ref. no. K 34/15, the Tribunal ruled that two judges of the Tribunal, elected to the Constitutional Tribunal in place of the two judges whose terms of office were to end respectively on 2 and 8 December 2015, had not been elected effectively, and three judges of the Tribunal elected to assume offices after the judges whose terms of office ended on 6 November 2015, had been elected by the Sejm on a constitutional basis, but they did not take the oath of office before the President.

In point 8 of the operative part of the said judgment, published in the Journal of Laws of 2015, item 2129, the Tribunal stated merely that:

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

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

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

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

The effects of such a ruling – considering the scope of the powers of the Tribunal provided for in the Constitution – have no impact on the election of a judge which is carried out by the Sejm, pursuant to Article 194(1) of the Constitution. Cited Article 137 of the 2015 Constitutional Tribunal Act concerned a time-limit for proposing candidates for a judgeship at the Tribunal by the Presidium of the Sejm as well as a group of at least 50 Sejm Deputies, whereas the operative part of the said judgment refers to "judges whose terms of office ended or will end (…)".

The election of 8 October 2015 was, due to its defectiveness, legally ineffective, which was stated in the Sejm's resolutions of 25 November 2015. By contrast, the Tribunal itself is not competent to review acts of applying the law. Thus, the Tribunal may not determine who was effectively elected, and who was not. This does not fall within the ambit of the Tribunal's powers. Therefore, arguments arising from the statement of reasons for the judgment ref. no. K 34/15 do not elucidate why the Tribunal assumed that a full bench of the Tribunal comprises 12 judges.

14. The Tribunal did not apply the provisions about the order of considering applications. Article 80(2) of the 2015 Constitutional Tribunal Act, as amended by the December Amending Act, stipulates that: "The dates of hearings or the dates of sittings in camera, at which applications are considered, shall be set in the order in which cases are received by the Tribunal". The Act permits no excerpts to that rule.

Cases considered under the reference number K 47/15 were received by the Tribunal during the period from 29 December 2015 until 15 January 2016. On 12 February 2016, the dates of hearings for that case were set for 8 and 9 March 2016, which implies that the prescribed chronological order for the consideration of cases had been bypassed.

In the view of the Tribunal, there were serious reasons for not applying the provision on the chronological order for the consideration of applications. The Tribunal decided to do so for the sake of guarantees for the subjects of constitutional rights and freedoms as well as for the sake of the general stability and predictability of the system of law, which is affected by the Tribunal's judgments. In my view, the Tribunal did not sufficiently clarify what underlay the serious reasons for departing from the implementation of provisions on the order of considering applications. By refusing to apply the provisions of the 2015 Constitutional Tribunal Act, as amended by the December Amending Act, the Tribunal proceeded with the case on the basis of rules that had arisen neither from the Constitution nor from the statute.

15. What follows from the statement of reasons for the judgment in the case ref. no. K 47/15 is that the Tribunal based its ruling on the directly applicable provisions of the Constitution as well as on the amended Constitutional Tribunal Act, with the exclusion of

some of the provisions of the latter. The Tribunal bypassed the challenged provisions on the mode of proceedings before the Tribunal, which might potentially be applicable in the present case. At the same time, the Tribunal stated that, in the review proceedings, it had no possibility of applying the 2015 Constitutional Tribunal Act in the version before the amendments. Hence, a question arises as to what provisions were applied by the Tribunal when it decided to consider the joined applications in the present case in that particular order or when it set the date of the hearing. The Tribunal did not apply the binding provisions of the amended 2015 Constitutional Tribunal Act. Nor did it apply the provisions of the 2015 Constitutional Tribunal Act in the version before the amendments. Since the Constitution does not specify a procedure within that scope, one should deem that the Tribunal created a legal norm and, in my opinion, it was not competent to do so. The Tribunal is not authorised by the Constitution to enact acts of universally binding law and, consequently, it acted without any legal basis. Article 7 of the Constitution stipulates that: "the organs of public authority shall function on the basis of, and within the limits of, the law".

The norms concerning the order of considering applications are not merely internal in character. In fact, they are addressed to all participants in review proceedings before the Constitutional Tribunal. Thus, the violation of those norms infringes the rights of those parties.

16. Despite Article 82(2) of the 2015 Constitutional Tribunal Act, which was not challenged in the case ref. no. K 47/15, and which states that "a participant in proceedings shall, within two months of the date of service of the notification, present a written statement on the case", the participants in these review proceedings were required to submit their written statements until 29 January 2016, and subsequently the deadline was deferred until 8 February 2016.

In the statement of reasons for its judgment, the Constitutional Tribunal confirmed that such practice was admissible. It explained that time-limits for the submission of written statements are merely instructional, and failure to submit them, or submission after a set deadline, does not suspend the consideration of a case. However, due to the constitutional principle of cooperation between public authorities, expressed in the Preamble to the Constitution, persons or entities required to submit their written statements fulfil that obligation as soon as possible (in any case, before the set date of a hearing in the case).

I disagree with the above arguments. Although the lack of written statements of participants in proceedings does not suspend the consideration of a case, this does not justify restricting the right of participants in proceedings to take a stance on a case pending before the Tribunal by shortening time-limits within that scope. Respect for the principle of cooperation between public authorities justifies allowing participants in proceedings to diligently prepare a written statement on the constitutional review of a particular law, especially in cases as extensive and complex as the case ref. no. K 47/15. Therefore, if – pursuant to Article 51 of the 2015 Constitutional Tribunal Act – in the course of its proceedings, the Tribunal examines all significant circumstances in order to thoroughly examine a case, then it is even more vital to provide participants in proceedings with at least a statutory time-limit for the submission of the statements.

Even if one were to count the time-limits in such a way that on 29 December 2015 the participants in these proceedings – pursuant to Article 80(1) of the 2015 Constitutional Tribunal Act – received notification about the referral of a case for consideration by an adjudicating bench, then the two-month time-limit for the submission of a written statement would elapse on 29 February 2016. Still, one should point out that the case ref. no. K 47/15 comprised joined applications of several applicants. The last of the applications was received by the Tribunal on 15 January 2016. What follows from this is that the participants were given even less time to address the last of the joined applications.

17. Pursuant to Article 87(2) and (2a) of the 2015 Constitutional Tribunal Act, as amended by the December Amending Act:

"2. The hearing may not be held earlier than after 3 months following the service of the notification of the said date, and as regards cases considered by a full bench of the Tribunal – after 6 months.

2a. The President of the Tribunal may shorten by half the time-limits indicated in para 2 in cases:

1) commenced upon application by the President of the Republic of Poland;

2) in which a constitutional complaint or a question of law directly concerns the freedoms, rights and obligations of persons and citizens, laid down in Chapter II of the Constitution;

3) which involve a review of the rules of procedure of the Sejm or of the Senate."

The dates of the hearings were set for 8 and 9 March 2016. The participants in proceedings received notification about that date on 12 February 2016 – it is on that day that the information about the hearing was announced to the public on the Tribunal's website. If the case ref. no. K 47/15 was considered by a full bench of the Tribunal, and the case was not initiated by an application of the President of Poland, it was neither a constitutional complaint nor a question of law, as well as it did not concern the provisions of the rules of procedure of the Sejm or of the Senate, then – disregarding other procedural mistakes made in the course of the proceedings – there would have to be a lapse of 6 months between the notification about the date of the hearing and the hearing. Yet, this was not the case. The aforementioned period was much shorter than 6 months, required by Article 87(2) of the 2015 Constitutional Tribunal Act, as amended by the December Amending Act.

When determining the date of the hearing, the Tribunal did not act on the basis of either the Constitution or the amended 2015 Constitutional Tribunal Act. Similarly to the bypassing of the order of considering applications, the Tribunal also in this respect created a norm which was universally binding in character, and again the Tribunal was not competent to do so. Thus, the Tribunal arbitrarily set the date of the hearing. The participants had the right to believe that an organ of the state which acts on the basis of and within the limits of law, by realising the right to a proper court procedure, would allow them to properly prepare themselves for the hearing, and that the time-limit provided in the statute would be preserved. The participants in the proceedings could also expect that they would be able to plan activities related to their participation in the case ref. no. K 47/15 within the scope set out by statute.

18. Article 197 of the Constitution states that the mode of proceedings before the Tribunal is to be specified by statute. The Constitution does not entrust the judges of the Tribunal with competence to devise their own procedures for proceedings before the Tribunal, especially that the norms created in the context of the present case are universally binding. Therefore, the Tribunal's activity related to the proceedings in the case ref. no. K 47/15 constitutes an infringement of the constitutional principle of the separation and balance of powers. One ought to bear in mind that the separation of the judiciary may never be complete. The balance of powers in relations between the Constitutional Tribunal and the other organs of the state entails that the Tribunal (the judiciary) adjudicates on the conformity of certain normative acts to the Constitution, whereas the Parliament (the legislature), by means of a normative act (a statute), specifies the mode of proceedings. The adoption of a different stance clashes with the core competence of both branches of government and contradicts the principle of a democratic state ruled by law. By acting otherwise, the Tribunal infringed Article 2 of the Constitution.

For the above reasons, I hold the view that this dissenting opinion is necessary and justified.

Dissenting Opinion
of Judge Piotr Pszczółkowski
to the judgment of the Constitutional Tribunal
of 9 March 2016, ref. no. K 47/15

On the basis of Article 99(2) of the Constitutional Tribunal Act of 25 June 2015 (Journal of Laws – Dz. U. item 1064, 1928, 2129, 2147 and 2217), I submit this dissenting opinion to the whole of the Tribunal's judgment of 9 March 2016 as regards the consideration of joined applications submitted by the First President of the Supreme Court, two groups of Sejm Deputies, the Ombudsman, as well as the National Council of the Judiciary in the case ref. no. K 47/15.

What follows is a number of reasons underlying the submission of the dissenting opinion with regard to the judgment of the Constitutional Tribunal, which was issued despite my objection raised with regard to the unlawfulness of the composition of the adjudicating bench that determined the judgment and the unlawfulness of the Tribunal's adjudication on the present case by bypassing the provisions of the Constitutional Tribunal Act of 25 June 2015 (Journal of Laws – Dz. U. item 1064, as amended; hereinafter: the 2015 Constitutional Tribunal Act), amended by the Act of 22 December 2015 amending the Constitutional Tribunal Act of 25 June 2015 (Journal of Laws – Dz. U. item 2217; hereinafter: the December Amending Act).

I. The composition of the adjudicating bench of the Constitutional Tribunal in the present case contradicts the provisions of law

In the statement of reasons for the judgment, pursuant to Article 190(1) of the Constitution, the rulings of the Constitutional Tribunal are universally binding and final. Indeed, the Constitution does not provide for any procedure for reviewing or appealing the Tribunal's rulings on the grounds of procedural defects (Article 190(4) of the Constitution, which provides for the re-opening of proceedings, does not apply to them). It is due to the lack of *de lege lata* judicial review for determining the conformity of the Tribunal's rulings to law that, in my view, the said rulings should be determined in a manner which rules out any legal doubts.

Regardless of the applied legal provisions (the 2015 Constitutional Tribunal Act amended by the December Amending Act; the application of the Constitution alone, on the basis of Article 195(1) *in fine*) the case ref. no. K 47/15 should be considered by a full bench of the Constitutional Tribunal.

Such a requirement arises from Article 44(1)(1) of the 2015 Constitutional Tribunal Act, as amended by the December Amending Act. Pursuant to the wording of Article 194(1) of the Constitution, the Tribunal is composed of 15 judges, this is the only composition of the Tribunal which is mentioned in the Constitution. Given the application of the December Amending Act on the basis of Article 197 of the Constitution – a full bench of the Tribu-

nal comprises 15 judges, but full-bench adjudication requires the participation of at least 13 judges. The statutory requirement for adjudication by a full bench of the Tribunal with the participation of at least 13 judges (the December Amending Act) arises from praxeological considerations. Within the scope of competence assigned thereto in Article 197 of the Constitution, the legislator assumed that gathering all 15 judges of the Tribunal may be impossible or difficult due to various circumstances. The statutory quorum of the Tribunal specified in the December Amending Act falls within the limits of the Tribunal's composition specified in Article 194(1) of the Constitution. It should be stressed that the quorum required for the Tribunal's full bench adjudication may not be applied to deprive the other judges of the Tribunal of the possibility of being included in the composition of a full bench. What follows from Article 80 of the 2015 Constitutional Tribunal Act is the obligation that lies with the President of the Constitutional Tribunal to refer a case for consideration by a competent adjudicating bench of the Constitutional Tribunal. Such orders were issued in the present case by the President of the Tribunal. There is also no legal basis for the actions of the President of the Tribunal which involve "allowing" or "not allowing" judges of the Tribunal to adjudicate on this or other cases, determined by a full bench of the Tribunal. Although in any particular case – including cases where a full bench of the Tribunal adjudicates on the basis of Article 46(1) and (2) of the 2015 Constitutional Tribunal Act – it is possible to exclude a judge of the Tribunal from the Tribunal's consideration of a case (by decisions of, respectively, the President of the Tribunal or the Tribunal), but in the case ref. no. K 47/15 such a situation did not take place. When adjudicating on the present case, 15 judges had competence to adjudicate, but the President of the Tribunal issued an order specifying the composition of "a full bench of the Tribunal", overlooking the names of the following judges: Henryk Cioch, Lech Morawski, and Mariusz Muszyński.

A judge of the Constitutional Tribunal is a person elected by the Sejm, on the basis of Article 194(1) of the Constitution and Article 17(2) of the 2015 Constitutional Tribunal Act, who has taken a relevant oath of office before the President of Poland (Art. 21(1) of the 2015 Constitutional Tribunal Act). At present, the above requirements are met by 15 judges. The status of 12 judges of the Constitutional Tribunal – as those "allowed" to adjudicate in these proceedings – is not challenged by the Tribunal and the President of the Tribunal. The orders of the President of the Tribunal and the statements of reasons for the Tribunal's rulings undermine – in my view, unlawfully – the "capacity to adjudicate" of the three judges of the Tribunal. These are persons elected on 2 December 2015 by the Sejm during its 8th parliamentary term on the basis of Article 194 of the Constitution, to whom the President of Poland gave the oath of office on 3 December 2015, on the basis of Article 21(1) of the 2015 Constitutional Tribunal Act. The legal status of those judges should not raise any legal or factual reservations. Both constitutional and statutory requirements of exercising the office of a judge of the Tribunal were met by Professor Henryk Cioch, Professor Lech Morawski, and Professor Mariusz Muszyński. Also, the actual status of those judges seems obvious. Right after the election and the taking of the oath of office, the said judges were admitted as judges of the Tribunal, they were assigned chambers, and they have been receiving remuneration allocated to the judges of the Tribunal. Without any legal basis, judges H. Cioch, L. Morawski and M. Muszyński were not "allowed" to adjudicate in the present

case. Nor do they adjudicate on other cases considered by the Tribunal. Despite some opinions, the status of those judges could not be, and is not, specified by the Tribunal's judgment of 3 December 2015, issued in the case ref. no. K 34/15. The operative part of that judgment states that Article 137 of the 2015 Constitutional Tribunal Act, on the basis of which the Sejm (7th parliamentary term) proposed five persons for judicial vacancies at the Tribunal on 8 October "insofar as it concerns the judges of the Tribunal whose terms of office ended on 6 November 2015 – is consistent with Article 194(1) of the Constitution" and "insofar as it concerns the judges of the Tribunal whose terms of office either ended on 2 December or will end on 8 December – is inconsistent with Article 194(1) of the Constitution". It ought to be emphasised that the judgment ref. no. K 34/15, published – in compliance with Article 190(2) of the Constitution – on 16 December 2015 was determined after the Sejm (8th parliamentary term) had already elected Judge Henryk Cioch, Judge Lech Morawski, and Judge Mariusz Muszyński, and after those judges had taken the oath of office before the President of Poland. What follows from the above-indicated chronology of events is that the Tribunal's judgment of 3 December 2015 could not and did not change the legal status of the said three judges. One should note that Article 137 of the 2015 Constitutional Tribunal Act, evaluated in the judgment ref. no. K 34/15, was not a legal basis for appointing the judges of the Tribunal. It merely constituted a legal basis for lodging proposals for candidates for judicial vacancies at the Tribunal with the Marshal of the Sejm. What constituted the legal basis for the appointment of the judges was the two following provisions: Article 194(1) of the Constitution, and Article 17(2) of the 2015 Constitutional Tribunal Act. The election of Professor Henryk Cioch, Professor Lech Morawski and Professor Mariusz Muszyński was respected by some actions of the President of the Tribunal, when on 4 December 2015 he provided them with chambers in the building of the Tribunal and when he decided that they should receive judicial remuneration. Such actions were not taken with regard to any of the judges elected by the Sejm on 8 October 2015 (7th parliamentary term), even after the Tribunal's judgment of 3 December 2015 was published on 16 December 2015. Therefore, an analysis of the legal provisions and facts permitted to indicate, without any doubts, that Professor Henryk Cioch, Professor Lech Morawski and Professor Mariusz Muszyński are judges of the Tribunal. Apart from terms specified in Article 194(1) of the Constitution and Article 21(1) of the 2015 Constitutional Tribunal Act, there are no other provisions of law that make it possible for one to evaluate "capacity to adjudicate" in all matters of the Tribunal by the aforementioned persons who were elected by the Sejm as judges of the Tribunal and were sworn in by the President of Poland. "Capacity to adjudicate" in the context of a judge of the Tribunal may be evaluated only as regards the exclusion of a judge from adjudication in a given case (Art. 46(1) and (2) of the 2015 Constitutional Tribunal Act), which was not applicable here. To sum up, there is no legal basis which would justify depriving the three judges of the Tribunal, i.e. Henryk Cioch, Lech Morawski and Mariusz Muszyński, of their right to adjudicate. On the contrary, adjudication in the case ref. no. K 47/15 is their constitutional obligation and right. The judges were elected by the Sejm, whose members received their mandates from the sovereign in general elections, and they took the oath of office before the President of Poland so as to safeguard the Constitution for 9 years of their constitutionally determined terms of office. Any efforts to prevent the judges of the Tribunal from performing their duties, or to shorten their terms of office, in an obvious way infringes the Constitution, in particular the principle that

public authorities function on the basis of, and within the limits of, law, as stated in Article 7 of the Constitution. Taking the above into consideration, the composition of the Constitutional Tribunal was not correctly determined in these review proceedings. Three judges of the Tribunal were refused the right to adjudicate in the present case; the right which they were granted by the Sejm on the basis of the Constitution. Due to the attribute of finality which arises *de lege lata* from Article 190(1) of the Constitution with regard to a ruling of the Constitutional Tribunal, even when issued in breach of law, the above-described situation should have never taken place. In the present case, the Tribunal may not adjudicate as a bench of 12 judges, which is inconsistent with binding legal norms.

One should definitely challenge the competence of the Tribunal and of its President as regards enforcing, by means of the Tribunal's activities (by preventing Henryk Cioch, Lech Morawski and Mariusz Muszyński from participating in the adjudicating bench in the present case), legal views that do not arise from the wording of the operative parts of the Tribunal's rulings, but are included in the statements of reasons for the rulings. In particular, this concerns the views which were so often expressed in the present case in the statement of reasons for the Tribunal's judgment of 3 December 2015, ref. no. K 34/15, which was issued by an adjudicating bench of five judges. Only the operative parts of the Tribunal's rulings issued in cases referred to in Article 188 of the Constitution are either published in the Journal of Laws, or in the Official Gazette of the Republic of Poland – *Monitor Polski.* After that publication, the Tribunal's rulings enter into force (Art. 190(3) of the Constitution), and become final and universally binding. The content of the statement of reasons for the Tribunal's judgment may of course facilitate the interpretation of the operative part of a judgment. However, a statement of reasons for a given judgment may never constitute a basis for a broadening interpretation of the judgment's operative part. It should be stressed that the statement of reasons does not constitute part of the judgment. Such a conclusion may directly be drawn from the provisions of the 2015 Constitutional Tribunal Act. Article 100(1) of the 2015 Constitutional Tribunal Act, which indicates components of a ruling of the Tribunal, does not mention a statement of reasons. By contrast, pursuant to Article 103(1) of the 2015 Constitutional Tribunal Act, a certified copy of a ruling with a statement of reasons and dissenting opinions are served forthwith on participants in proceedings. The wording of the last-mentioned provision leaves no doubt that the judgment and the statement of reasons are two separate documents, and only judgments of the Tribunal are universally binding and final, and not statement of reasons for the judgments.

My remarks on the lack of legal bases for challenging the "capacity to adjudicate" on the part of Judge H. Cioch, Judge L. Morawski and Judge M. Muszyński are supported by the content of the operative part of the decision ref. no. U 8/15 of 7 January 2016 issued by the Tribunal. In the decision, the Constitutional Tribunal did not eliminate, from the legal system, the five resolutions of 25 November 2015 and the five resolutions of 2 December 2015, which were the subject of the application in the said case (including the resolutions on the election of Judge H. Cioch, Judge L. Morawski and Judge M. Muszyński). Pursuant to Article 190(1) of the Constitution, the rulings of the Constitutional Tribunal are universally binding and final. They bind the Tribunal itself. However, what follows from the operative part of the Tribunal's decision is that there was no elimination of the resolutions from the legal system. As a result, they constitute part of the binding legal order. The *modus operandi* of the Tribunal, which

consists in ignoring those resolutions, whereas earlier on the Tribunal deemed itself incapable of eliminating them from the legal system, actually constitutes an attempt to assign the normative content to the statement of reasons for the Tribunal's rulings in the cases ref. nos. K 34/15 and U 8/15, and at the same time depriving both rulings of the normative content, where they *de lega lata* have that characteristic. Regardless of views presented in the statement of reasons for those rulings, the Constitutional Tribunal is bound by the content of all resolutions of the Sejm which were challenged in the case ref. no. U 8/15. Therefore, in conformity to the operative part of its own rulings, the Tribunal should neither contest the election of Judge H. Cioch, Judge L. Morawski and Judge M. Muszyński nor express in its rulings the view about "the lack of capacity" of those judges to adjudicate, regardless of whether this is done directly or in accordance with the principle of *argumentum a contrario.*

II. Legal bases for adjudicating in the present case are contrary to the provisions of law

In the statement of reasons for the Tribunal's decision of 14 January 2016, which was issued in the present case, it was stated that in all circumstances the Tribunal has the obligation to carry out its systemic tasks. It was pointed out that the tasks comprise the examination of the conformity of statutes to the Constitution, including the statute regulating the functioning of the Tribunal. The said view *de lege lata* deserves approval. *De lege ferenda,* one should consider assigning adjudication in this respect to another entity, thus implementing the principle of *nemo iudex in causa sua*. What rules in favour of that proposal is the defectiveness of proceedings in the present case and the genesis of mistakes made by the Tribunal within the scope of proceedings. As a result of a departure from the principle that 'nobody may be a judge in his/her own case', in these proceedings a view was formulated on "the admissibility of adjudication in proceedings with the exclusion of binding provisions of the statute regulating the course of proceedings". The view does not deserve approval. Also, with regard to a departure from the principle of *nemo iudex in causa sua*, in the case ref. no. K 47/15, a non-legal concept was adopted, which proved to be absurd in its consequences, namely: 'a prohibition against adjudication on the basis of provisions constituting the subject of adjudication'. The effect of applying that concept is the Tribunal's elimination of provisions challenged by the applicants from the basis of adjudication. This led to the unacceptable setting of legal bases for adjudication in these proceedings by the applicants. In the course of its proceedings, the Tribunal is to examine all significant circumstances in order to thoroughly examine a case (Art. 50(1) of the 2015 Constitutional Tribunal Act). This entails that the Constitutional Tribunal examines only those provisions the constitutionality of which is challenged in a given application. Since in the present case the Tribunal has adopted the view that one may not proceed on the basis of those provisions which are the subject of the Tribunal's evaluation, the mode of proceedings in the present case was determined, in fact, by the applicants by the scope of their applications. When challenging the provisions of the December Amending Act, the applicants eliminated them from the bases of the Tribunal's adjudication in the present case. Adopted in the case ref. no. K 47/15, the concept of 'a prohibition against adjudication on the basis of provisions constituting the subject of adjudication' result-

ed in the Tribunal giving away the choice of legal bases for adjudication in the present case to the applicants.

Article 197 of the Constitution provides for constitutional authorisation to regulate the Tribunal's organisation and the mode of proceedings before the Tribunal by statute. What follows therefrom is that the Tribunal's organisation and the mode of proceedings before the Tribunal fall within the ambit of legal regulation enacted in the form of the so-called ordinary statute. It is worth stressing here that the Constitution does not exhaustively specify proceedings before the Tribunal, leaving this to be done by the so-called ordinary statute, which is to be enacted by the legislator in accordance with Article 197 of the Constitution. This way the so-called ordinary legislator is authorised to determine the mode of proceedings before the Tribunal and the organisation of that court (see P. Winczorek, *Komentarz do Konstytucji Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 roku*, Warszawa 2008, pp. 383–384; M. Zubik, *Status prawny sędziego Trybunału Konstytucyjnego*, Warszawa 2011, pp. 64–68; K. Wojtyczek, *Sądownictwo konstytucyjne w Polsce. Wybrane zagadnienia*, Warszawa 2013, pp. 104–106; W. Skrzydło, *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Warszawa 2013, p. 261).

Until the issuance of the judgment in the present case, there was no doubt in the doctrine of law that the judges of the Constitutional Tribunal were bound by the provisions of the Constitutional Tribunal Act when adjudicating on cases. "As regards the examination of cases, the judges of the Tribunal are bound by all statutory provisions on proceedings before the constitutional court. They may not bypass such provisions, even if they find them 'manifestly' unconstitutional. However, there is no obstacle for the Tribunal to adjudicate on the unconstitutionality of the Constitutional Tribunal Act, or other procedural norms that bind the Tribunal, provided that this takes place in compliance with an appropriate procedure" (M. Zubik, *op.cit*. p. 116). Similarly, the previous judgments of the Tribunal concerning the conformity to the Constitution of various provisions of the Constitutional Tribunal Act were issued on the basis of procedures indicated in the currently binding Constitutional Tribunal Act (see the Tribunal's judgment of 3 December 2015, ref. no. K 34/15; the Constitutional Tribunal Act of 9 December 2015, ref. no. K 35/15).

When determining the dispute over the Tribunal's capacity to adjudicate on the present case with the exclusion of the provisions of the December Amending Act, the wording of the Constitution is binding. Article 8(1) of the Constitution stipulates that the Constitution is the supreme law of the Republic of Poland. In Article 8(2) of the Constitution, it is stipulated that the provisions of the Constitution are to be applied directly, on condition that the Constitution itself does not state otherwise. "The Constitution permits exceptions to the rule of the direct application of its provisions, but only when it stipulates that the scope of the applicability of constitutional norms may be restricted by statute (e.g. Art. 37(2)) or that a statute is to specify the implementation of constitutional norms (e.g. Art. 66(1))" (B. Banaszak, *Konstytucja Rzeczypospolitej Polskiej, Komentarz*, Warszawa 2012, p. 98). The provision of Article 8(2) of the Constitution clearly specifies that the norms of the Constitution are not to be applied directly if the Constitution itself provides otherwise. This refers to situations where the Constitution authorises the legislator to adopt statutory provisions regulating certain matters, and requires the legislator to do so, and – upon the authorisation provided for in the Constitution – the legislator issues such provisions. In the Constitution, the constitution-maker

included Article 197, which binds the Constitutional Tribunal as regards the application of the provisions of a statute regulating the Tribunal's organisation and the mode of proceedings before the Tribunal. In my view, what follows from Article 8(2) and Article 197 of the Constitution, as well as from a systemic interpretation of the Constitution, which lacks specific and precise provisions on the Tribunal's organisation and the mode of proceedings before the Tribunal, is the necessity to proceed in the present case on the basis of the provisions of the 2015 Constitutional Tribunal Act, as amended by the December Amending Act.

What bears great significance for determining whether in the present case it is possible to bypass the provisions of the December Amending Act is the content of Article 7 of the Constitution, which requires the Tribunal to function on the basis of, and within the limits of, law. The indicated statute enjoys the presumption of constitutionality. It will be binding in the Polish legal system until the publication of a judgment of the Tribunal in which the constitutional court declares the unconstitutionality of the said Act with the Constitution (Art. 190(3) of the Constitution). So far the provisions of the December Amending Act, and the ensuing amended provisions of the 2015 Constitutional Tribunal Act, have constituted and will still constitute the sole legal basis of proceedings before the Tribunal. Also in the present case.

Apart from the breaches of Article 197 of the Constitution and of the principle of the presumption of constitutionality, another argument for the Tribunal's adjudication in the case ref. no. K 47/15 on the basis of the aforementioned statutory provisions is the problem of a certain "pre-judgment", understood as disclosure, and in this case – in fact, a clear manifestation of the Tribunal's preference for a particular line of reasoning before the issuance of a judgment. Indeed, a question arises: how can a participant in proceedings effectively persuade the Tribunal about the constitutionality of a provision requiring the involvement of at least 13 judges of the Tribunal at a hearing for full bench adjudication, if the Tribunal comprises 12 judges? The same problem concerns all other provisions of the December Amending Act which – in the course of adjudication on the case ref. no. K 47/15 – were bypassed by the Tribunal before the issuance and publication of the judgment. Of course, one may pose a question as to the legality of a ruling issued on the basis of statutory provisions that will subsequently be ruled unconstitutional by the Tribunal. The answer is obvious. The December Amending Act constitutes binding law, and thus enjoys the presumption of constitutionality. This will change as of the publication of the Tribunal's judgment ref. no. K 47/15 in the Journal of Laws. Since, *de lege lata*, there is no competent authority to consider an application for re-opening proceedings, a ruling of the Tribunal may not be the subject of the re-opening of proceedings. Therefore, it was not apt that the necessity to reject the provisions of the December Amending Act, as a basis of proceedings in the present case, was justified by concern that the proceedings might be reopened in the event of the Tribunal's potential confirmation of the unconstitutionality of the provisions of the December Amending Act. Such justification was derived from Article 190(4) of the Constitution. Obviously, in the present case, a judgment issued in compliance with the provisions of the December Amending Act would not be under such a threat. On the contrary, it would have been issued on the basis of the binding provisions of law. The above-cited question, which was raised by some participants in the proceedings in the present case, could easily be reversed by formulating it in the following way: will a ruling of the Tribunal be legal in a situation where the Tribunal issues it by bypassing provisions on the mode of proceedings before the Tribunal, which will subse-

quently be ruled constitutional by the Tribunal? In the present case, the Tribunal was obliged to take account of such a situation at the stage of determining the composition of the Tribunal and the legal basis of adjudication.

The above-mentioned issues are not the only reasons why I disagree with the view that it was admissible in the present case to bypass certain provisions of the December Amending Act. I am not convinced by the argument that the bypassing of procedures provided for in the said Act could be justified by the necessity to quickly dispel any potential doubts as to the constitutionality of the basis of the Tribunal's adjudication in other cases. It was possible for the Tribunal to prevent any such potential efforts by adjudicating in the present case, and at the same time respecting all the provisions of the December Amending Act. The said Act does not impose procedures on the Tribunal which the Tribunal could not handle to conduct a review of the constitutionality of the Act within a reasonable time-frame. It was possible to meet the requirement that a full bench of the Tribunal should be composed of at least 13 judges, which was specified in Article 1(9) of the December Amending Act. Likewise, it was possible to consider the present case after setting the dates of hearings in cases where applications had not yet been considered (Art. 1(10) of the December Amending Act). Also, it was possible to set the date of a hearing after the lapse of 6 months from the date of notifying the participants in the proceedings (Art. 1(12)(a) of the December Amending Act). If the Tribunal had deemed that waiting for 6 months for the setting of the date of a hearing in the present case would disrupt the proper functioning of the Tribunal, the constitutional court could have considered the case at a sitting, without any need to observe the six-month time-limit (Art. 1(11)(a)), due to the lack of an application filed by any of the applicants for the consideration of the case at a hearing, in conjunction with Article 93(1)(1) of the 2015 Constitutional Tribunal Act). By the order issued by the President of the Tribunal, the application of the First President of the Supreme Court in the case ref. no. K 47/15 was joined for consideration with the other applications subsequently received by the Tribunal. The last one of the five applications considered in the present case was filed by the National Council of the Judiciary on 15 January 2016. The consideration of the last-mentioned application together with the earlier applications was reasonable, although it was not obligatory. Considering the statutory requirement of two months for filing a statement on a case by participants in proceedings (due to the repeal of para 5 in Art. 82 of the 2015 Constitutional Tribunal Act by Art. 1(16) of the December Amending Act), in the present case, taking account of all the requirements arising from the December Amending Act, a judgment of the Tribunal could have been determined 10 days later than the judgment actually issued in the present case, i.e. after 18 March 2016. That date marked the lapse of the time-limit for submitting statements by the participants in the proceedings in accordance with the December Amending Act. Consequently, shortly, after the issuance of the judgment in the present case, the Tribunal would have had a possibility of evaluating all five applications filed for a constitutional review in this context, thus respecting all the provisions of the said Amending Act.

In the circumstances of the constitutional crisis we have been facing since October 2015, it is crucial for the Tribunal to comply with any procedures in the most meticulous way and avoid arriving at its determinations in any way that would raise legal reservations. Therefore, I objected to the issuance of a ruling by bypassing provisions enacted on the basis of Article 197 of the Constitution, and eliminated as a basis of adjudication by the Tribunal in

the light of highly evaluative criteria derived outside of the Constitution, such as the "dysfunctionality" of provisions or the claim that a determination in this respect should be "given priority".

In the present case, the Constitutional Tribunal should have taken an approach that, in the adjudication process, the Tribunal is bound by all the provisions of the binding Amending Act (Art. 8(2) in conjunction with Art. 197 of the Constitution in conjunction with Art. 7 of the Constitution). However, in the case ref. no. K 47/15, the Tribunal undertook an attempt to adjudicate on the basis of Article 195(1) *in fine* of the Constitution, bypassing certain provisions of the December Amending Act. Yet, despite declarations made in the statement of reasons, in the course of adjudication on the present case, the Tribunal did not proceed on the basis of Article 195(1) *in fine* of the Constitution, bypassing certain provisions of the said Amending Act. Indeed, to actually do so, the Tribunal should have adjudicated as a bench of 15 judges – the only constitutionally specified composition of the Tribunal (Art. 194(1)). Such a requirement would have been imposed on the Tribunal by Article 8(2) of the Constitution, which stipulates the direct application of the provisions of the Constitution. The direct application of the Constitution entails that a determination should be based directly on the provisions of the Constitution, which then constitute the legal basis of the issued determination (cf. B. Banaszak, *Konstytucja Rzeczypospolitej Polskiej Komentarz*, Warszawa 2011, p. 89). A prerequisite for the potential direct application of the provisions of the Constitution (a possibility which I personally rule out in the context of the present case) is that a norm of the Constitution should be sufficiently specific and precise (unambiguous) i.e. that it should be fit for direct application. Such a specific and precise norm in the context of the present case is, without a doubt, Article 194(1) of the Constitution, which specifies the composition of the Tribunal. Taking account of the composition of the adjudicating bench of the Tribunal in the present case, the Tribunal did not meet the requirement of the direct application of the provisions of the Tribunal, expressed in Article 8(2) of the Constitution. This is manifested by the fact that 12 judges of the Tribunal adjudicated on the present case, and 15 judges. If the Tribunal had really resorted to the direct application of the provisions of the Constitution, its adjudication would have had to be carried out by the only constitutionally prescribed composition of the Tribunal (Art. 194(1)), i.e. by 15 judges. Consequently, in the present case, the Tribunal did not adjudicate on the basis of Article 195(1) *in fine* of the Constitution.

In my view, during its adjudication, the Constitutional Tribunal could bypass the statutory provisions specifying the mode of proceedings before the Tribunal only if the provisions of the relevant statute were literally contradictory to the Constitution (e.g. they required an adjudicating bench composed of 20 judges of the Tribunal) or if the application of the provisions of the statute actually prevented the issuing of a judgment within a reasonable time-limit. However, such circumstances did not occur in the present case.

III. The lack of a possibility of evaluating the allegations of the applicants

Considering the views presented in parts I and II of this dissenting opinion, it would be misguided of me, and it would manifest a lack of consistency on my part, to conduct a detailed analysis of the content of the applications. The consequence of the above-mentioned

procedural irregularities that occurred in the course of issuing the judgment must be a stance which negates the evaluation of the constitutionality of particular provisions of the December Amending Act. For the same reasons, it is impossible to evaluate the legislative process that resulted in the enactment of the said Amending Act.

The basic task of a judge of the constitutional court is to adjudicate. Also, in a situation where a judge questions the lawfulness of the composition of the Constitutional Tribunal and of rules for carrying out proceedings adopted by a majority of the adjudicating bench of which the judge is obliged to be a member. Indeed, until the issuance of a judgment, the obligation of a judge of the Tribunal is to make every effort to change the mode of proceedings if s/he considers it to be defective. I have fulfilled that obligation. And, when a judgment being mostly contrary to the judge's standpoint is issued, it is the judge's right to file a statement of reasons for his/her dissenting opinion, which I have done above.