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

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

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

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

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

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

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

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

- 2 Cf. MPs' bills amending the Act on the Constitutional Tribunal, Sejm papers No. 476, VI term and No. 2988, VI term.
- 3 See A. Młynarska-Sobaczewska, *Opinia Naczelnej Rady Adwokackiej dotycząca poselskiego projektu ustawy o zmianie ustawy o Trybunale Konstytucyjnym* [Opinion of the Polish Bar Council (NRA) on the MPs' bill amending the Act on the Constitutional Tribunal], < [http://orka.sejm.gov.pl/Druki6ka.nsf/0/B30B4F17EBB849B5C1257754003C7B85/\\$file/2988-001.pdf](http://orka.sejm.gov.pl/Druki6ka.nsf/0/B30B4F17EBB849B5C1257754003C7B85/$file/2988-001.pdf) >; P. Chybalski, *Opinia prawna w sprawie poselskiego projektu ustawy o zmianie ustawy o Trybunale Konstytucyjnym* [Legal opinion on the MPs' bill amending the Act on the Constitutional Tribunal], Sejm paper No. 476, VI term, < <http://orka.sejm.gov.pl/rexdomk6.nsf/Opdodr?OpenPage&nr=476> >.
- 4 The Act of 1<sup>st</sup> August 1997 on the Constitutional Tribunal, *Dziennik Ustaw* (Official Journal of Laws of the Republic of Poland, hereinafter referred to as: "Dz.U.") 1997, No. 102, item 643, as amended.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

17 Stenographic transcript of the joint session of the Legislation Committee [Komisja Ustawodawcza] (386) and the Human Rights, the Rule of Law and Petitions Committee [Komisja Praw Człowieka, Praworządności i Petycji] (260) on 10<sup>th</sup> June 2015, < [http://www.senat.gov.pl/download/gfx/senat/pl/senatkomisjeposiedzenia/5793/stenogram/386uw\\_egz\\_4.pdf](http://www.senat.gov.pl/download/gfx/senat/pl/senatkomisjeposiedzenia/5793/stenogram/386uw_egz_4.pdf) >; hereinafter referred to as: "stenographic transcript of the joint session of the LC and the HRRLPC on 10<sup>th</sup> June 2015."

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

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

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

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

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

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

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

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

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

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

23 Dz.U. 2015, item 1064.



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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28 B. Szmulik, *Legal...*, p. 14.

29 J. Szymanek, *Opinia...*, p. 19–20.

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

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

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

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

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

31 B. Banaszak, *Opinia...*, p. 9

32 Transcript of the hearing of 9<sup>th</sup> December 2015 on the case K 35/15, < [http://ipo.trybunal.gov.pl/ipo/dok?dok=F-1920210452%2FK\\_35\\_15\\_1209\\_15\\_stenogram\\_ADO.doc](http://ipo.trybunal.gov.pl/ipo/dok?dok=F-1920210452%2FK_35_15_1209_15_stenogram_ADO.doc) >.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

Experts’ opinions have been sought. Majority of opinion givers did not comment on the content of Art. 26, modification of the wording of the oath was noted by two experts.<sup>42</sup> Three of the experts, namely

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41 Dz.U. 2015, item 1928.

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

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

The first of the authors noted that:

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

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

43 D. Dudek, *Ekspertyza...*, p. 9.

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

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

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

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

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

45 See M. Wiącek, *Ekspertyza dotycząca przedstawionego przez Prezydenta RP projektu ustawy o Trybunale Konstytucyjnym* [Legal expert's opinion on the bill on the Constitutional Tribunal submitted by the President of the Republic of Poland], Sejm paper No. 1590, VII term, Warszawa, 25<sup>th</sup> November 2013, < [http://orka.sejm.gov.pl/RexDomk7.nsf/0/732DE37857948F93C1257BEF0038FCB5/\\$file/i2229\\_13.rtf](http://orka.sejm.gov.pl/RexDomk7.nsf/0/732DE37857948F93C1257BEF0038FCB5/$file/i2229_13.rtf) >, p. 5–6.

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

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

46 *Stenogram rozprawy z dnia 3 grudnia 2015 r. w sprawie K 34/15* [Stenographic transcript of the hearing of 3<sup>rd</sup> December 2015 in the case K 34/15], < [http://ipo.trybunal.gov.pl/ipo/dok?dok=F-86102344%2FK\\_34\\_15\\_1203\\_15\\_stenogram\\_ADO.doc](http://ipo.trybunal.gov.pl/ipo/dok?dok=F-86102344%2FK_34_15_1203_15_stenogram_ADO.doc) >.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



## Summary

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

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

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

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

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

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