COMMISSIONER FOR HUMAN RIGHTS

Warsaw, 2 August 2016

VII.511.23.2016.MW

The Constitutional Tribunal

Warsaw

Application

of the Commissioner for Human Rights

Pursuant to Article 191(1)(1) of the Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws - Dz. U. No. 78, item 483, as amended) and Article 16(2)(2) of the Act of 15 July 1987 on the Commissioner for Human Rights (Journal of Laws - Dz. U. of 2014, item 1648, as amended),

I apply for determining the non-conformity of:

1. the Constitutional Tribunal Act of 22 July 2016 (Journal of Laws - Dz. U. of 2016, item 1157) to Articles 2, 7, 112 and Article 119(1) of the Constitution,

2. Article 16(1) of the aforementioned act, in the part which includes the word “three”, to Articles 2, 10, 173, 194(2) and Article 195(1) of the Constitution,

3. Article 38(3), (4) and (5) of the aforementioned Act to Articles 2, 10 and 173 of the Constitution in conjunction with the principle of efficiency in the work of public institutions, which arises from the Preamble to the Constitution,

4. Article 61(6) of the aforementioned Act, in the part which includes the wording “unless the Act provides for the obligation of participation in the hearing”, to Articles 10, 45(1) and 173 of the Constitution in conjunction with the principle of efficiency in the work of public institutions, which arises from the Preamble to the Constitution;

5. Article 68(5)-(7) of the aforementioned Act to Articles 2, 45(1) and 173 of the Constitution as well as to Article 190(5) of the Constitution in conjunction with the principle of efficiency in the work of public institutions, which arises from the Preamble to the Constitution;

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6. Article 80(4), first sentence, of the aforementioned Act to Articles 10 and 190(2) in conjunction with Article 190(1) of the Constitution in conjunction with the principle of efficiency in the work of public institutions, which arises from the Preamble to the Constitution,

7. Article 83(1) of the aforementioned Act to Articles 2 and 45(1) of the Constitution in conjunction with the principle of efficiency in the work of public institutions, which arises from the Preamble to the Constitution,

8. Article 83(2) of the aforementioned Act to Articles 2 and 173 of the Constitution in conjunction with Articles 10 and 45(1) of the Constitution,

9. Article 84 of the aforementioned Act to Article 2 of the Constitution and to Articles 10, 45(1) and 173 of the Constitution in conjunction with the principle of efficiency in the work of public institutions, which arises from the Preamble to the Constitution,

10. Article 89 of the aforementioned Act to Article 7, Article 173 in conjunction with Article 10 as well as Article 190(2), first sentence, in conjunction with Article 190(1) of the Constitution,

11. Article 90 of the aforementioned Act to Articles 2, 173 and 194(1) of the Constitution,

12. Article 92 of the aforementioned Act to the principle of appropriate legislation, which arises from Article 2 of the Constitution.

GROUNDS FOR THE APPLICATION

I

The efficient functioning of the Constitutional Tribunal is a necessary condition for ensuring the effectiveness and efficiency of the system of protecting the rights of individuals. From the point of view of the standards of protection of freedoms and rights violated by public authorities which have regulatory powers to legislate in the field of generally applicable law, it is essential that the procedure governing proceedings before the Constitutional Tribunal provides effective protection of those freedoms and rights.

This application pertains to the Constitutional Tribunal Act of 22 July 2016 (hereinafter: "the Act"). The examination of the Act leads to the conclusion that its provisions are, in a number of instances, convergent with those of the Act of 22 December 2015 amending the Constitutional Tribunal Act (Journal of Laws - Dz. U. item 2217), which have already been found unconstitutional by the Constitutional Tribunal in its judgment of 9 March 2016 (ref. no. K 47/15). The analysis of the constitutionality of the regulatory solutions provided for in the Act should also take account of their assessment by the Venice Commission, contained in the *Opinion on amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland* (the opinion adopted by the Venice Commission - the European Commission for Democracy through Law on its 106th plenary session held in Venice on 11-12 March 2016, CDL-AD (2016) 001, no. 833/2015). The parliamentary Act challenged in the present application not only fails to implement the recommendations of the Venice Commission but also re-introduces solutions which may be considered inconsistent with the requirements of democratic rule of law, which arise from the international standards indicated in the opinion of the Venice Commission. In the opinion of the Commissioner for Human Rights, the Act not only fails to streamline proceedings before the Constitutional Tribunal but also has a further paralyzing effect on the activities of the Tribunal which, in consequence, leads to the violation of the rights and freedoms of man and citizen.

First and foremost, it should be underlined that the challenged Act encroaches, in an unacceptable way, upon the sphere of independence of the Constitutional Tribunal and the impartiality of its judges. The issue of the independence of the Constitutional Tribunal and the impartiality of its judges should be viewed from the point of the performance by the Tribunal of its constitutional obligation to protect the rights of individuals. The undermining of the independence of the Constitutional Tribunal and the impartiality of its judges is bound to lead to the erosion of the national system of protecting the rights of individuals. This interdependence has been pointed out by the Constitutional Tribunal in its judgment of 9 November 1993 (ref. no. K 11/93) stating that "the principle of separation of the powers clearly states that the legislative, executive and judicial powers are separate, that there should be balance between them, and that they should cooperate with each another. The significance of this principle is not only of organizational nature. The principle of separation of the powers seeks e.g. to protect human rights by preventing the abuse of power by any authority. An element inherent to the principle of separation of the powers, and the foundation of democratic rule of law, is the principle of impartiality of judges. The implementation of this principle has always been sought in democratic systems while its abandonment has been characteristic of totalitarian and authoritarian ones.

The above introductory observations clearly indicate that the protection of independence of the Constitutional Tribunal, and the appropriate procedural guarantees concerning proceedings before it, constitute the foundation of the protection of human rights in the Polish legal system, which provides grounds for filing, by the Commissioner for Human Rights, of an application pertaining to this matter to the Constitutional Tribunal.

II

In the opinion of the Commissioner for Human Rights, the examination of the conformity to the Constitution, carried out by the Tribunal, should in the first place cover the manner of the adoption of the challenged Act.

In recent months, the following bills relating to the Constitutional Tribunal were referred to the Sejm:

1) on 2 December 2015 - deputies' bill Amending the Constitutional Tribunal Act (Sejm paper no. 129);

2) on 10 February 2016 - deputies' bill amending the Constitutional Tribunal Act (Sejm paper no. 568);

3) on 12 May 2016 – citizens' bill on the Constitutional Tribunal (Sejm paper no. 550);

4)on 29 April 2016 - deputies' bill on the Constitutional Tribunal (Sejm paper no. 558);

5) on 29 April 2016 - deputies' bill amending the Constitutional Tribunal Act (Sejm paper no. 569).

The first reading of the bill contained in the Sejm paper no. 568 was not held (the bill was presented for its first reading on 7 June 2016). The other bills had their first readings at the Sejm sessions held on: 17 December 2016 (the bill contained in the Sejm paper no. 129), 9 June 2016 (the bill contained in the Sejm paper no. 550), 10 June 2016 (the bill contained in the Sejm papers no. 558 and 569). The bills contained in the Sejm papers nos. 129, 550, 558 and 569, after their first readings, were forwarded to the Committee on Justice and Human Rights, for it to draw up a report on them. Pursuant to Article 40(4) of the Rules of Procedure of the Sejm, the Committee on Justice and Human Rights adopted a resolution to consider the aforementioned bills jointly, and on 21 June 2016 appointed an extraordinary subcommittee for the detailed examination of the bills. The bill included in the Sejm paper no. 558 was considered to be "the baseline bill" in the works of the extraordinary subcommittee which met on 21 - 24 June 2016. The Committee on Justice and Human Rights, after considering the report of the extraordinary subcommittee on: the citizens' bill on the Constitutional Tribunal (Sejm paper no. 550), the deputies' bill on the Constitutional Tribunal (Sejm paper no. 568), the deputies' bill amending the Constitutional Tribunal Act (Sejm paper no. 569), and the deputies' bill amending the Constitutional Tribunal Act (Sejm paper no. 129), and having examined the bills in its meetings on 21 and 29 June 2016, drew up a joint report on the bills (Sejm paper no. 667).

On 5 July 2016, the second reading of the bill was held during the session of the Sejm. After the reading, in connection with the proposed amendments and motions, the bill was referred back to the Committee on Justice and Human Rights for it to draw up an additional report. On the same day, the Speaker of the Sejm, in connection with the withdrawal of the bill contained in paper no. 550 by the

bill movers, changed the decision of the Sejm[1] and referred the bills contained in papers nos. 129, 558 and 569 back to the Committee on Justice and Human Rights for restarting work on them and drawing up a report on those three bills. Notably, in the Rules of Procedure of the Sejm it is difficult to find any legal grounds allowing the Sejm Speaker to take the said decision to move the works backwards from the stage of the second reading to the stage of the Sejm committee works following the first reading (cf. Article 47 of the Rules of Procedure of the Sejm).

The Commission's report (paper no. 693) was submitted on 6 July 2016. On the same day, in the plenary session of the Sejm, the second reading of the bill was held. Already on the following day, i.e. 7 July 2016, the third reading of the bill was held at the Sejm's session during which the bill on the Constitutional Tribunal was passed.

On 11 July 2016, the bill was forwarded to the President and to Speaker of the Senate. On 21 July 2016, the Senate (by way of the Senate resolution contained in the Sejm paper no. 755) proposed its amendments to the bill on the Constitutional Tribunal. The resolution of the Senate was forwarded to the Sejm's Committee on Justice and Human Rights on the same day. The Committee's report of 21 July 2016 (Sejm paper no. 761) supported the adoption of most of the amendments moved by the Senate, except for one. On 22 July 2016, the Sejm adopted the Senate amendments to the bill on the Constitutional Tribunal, as proposed in paper no. 761, and the passed bill was forwarded to the President for signature. On 30 July 2016, the bill was signed by the President, and then on 1 August 2016 the Act was published in Journal of Laws – Dz. U. no. 1157.

In view of the above, doubts are raised even by the very pace of the legislative works on the bill as a document concerning the Constitutional Tribunal as a constitutionally-recognised state authority. The doubts are even more significant as the provisions subject to the legislative process in question relate to issues of the state governance nature. According to Article 123(1) of the Constitution of the Republic of Poland, the Council of Ministers may classify a bill as urgent, with the exception of tax bills, bills governing elections to the office of President of the Republic of Poland, to the Sejm, to the Senate and to local government bodies, bills governing the organisation and jurisdiction of public authorities, as well as law codes. The ratio legis of Article 123(1) of the Constitution, relating to the Council of Ministers, should also be taken into account when assessing the pace of work on the parliamentary bill on the Constitutional Tribunal. The intention of the legislator was undoubtedly to ensure that parliamentary works on bills that pertain to principles of fundamental significance for democratic rule of law are conducted in a manner preventing the hasty passing of such bills. The aforementioned list of dates allows the conclusion that in the case in question, the pace of the legislative works was against the obvious intention of the legislator, as expressed in Article 123(1) of the Constitution and thus jeopardised such constitutionally-recognised values as the principle of citizens' trust in the state and the law, arising from Article 2 of the Constitution, and the principle of social dialogue, arising from the Preamble to the Constitution.

The principle of citizens' trust in the state and the law assumes that in the case of legislative activity, which constitutes the foundation of the democratic rule of law, the law-making process should be carried out with account taken of all arguments, also the arguments of: the parliamentary

[1] Cf. information on the Sejm website on the status of legislative works on the bill contained in Sejm paper no. 55: http://www.sejm.gov.pl/Sejm8.nsf/PrzebiegProc.xsp?id=6EA7345584EBCE9BC1257FC7002E9B69; date of entry: 24 July 2016)

opposition, representatives of the civil society and entities which, pursuant to the applicable law, are empowered to present their position on the issue to be covered by the proposed legislation. Only in this manner trust in the developed legislation can be built. Otherwise, the developed legislation will be obviously imposed by the majority and will not be supported by any rational premises for its enactment. The principle of social dialogue and cooperation of the public powers, in turn, implies that final legislative decisions will be preceded by a dialogue with all representative participants in social life, which means their arguments will be listened to. These principles of law-making in a democratic state ruled by law have been violated in the legislative process of adopting the Constitutional Tribunal Act. As pointed out by the Constitutional Tribunal in its judgment of 9 December 2015 (ref. no. K 35/15), "the speed of the legislative process (...) in itself does not determine the unconstitutionality of the Act due to a defective manner of the adoption thereof. The Sejm, in exercising its autonomy, is de facto free to choose the pace of its legislative works. The Tribunal intends to emphasize, however, that this freedom is limited by the requirement, formulated in Article 119(1) of the Constitution, for a bill to be considered by the Sejm in the course of three readings. Consideration means analysing the bill's content, which, in turn, requires appropriate timeframe adequate to the significance and complexity of the regulated issue. Certain indications as to the types of bills which should not be adopted hastily arise from the Constitution. According to its Article 123, tax bills, bills governing elections to the office of President of the Republic of Poland, to the Sejm, to the Senate and to local government bodies, bills governing the structure and jurisdiction of public authorities, as well as law codes may not be considered as a matter of urgency.

According to Article 119(1) of the Constitution, the Parliament considers a bill in the course of three readings. As pointed out by the Constitutional Tribunal in its judgment of 24 March 2004 (ref. no. K37/03), this principle should not be understood in a purely formal way, i.e. as a requirement to examine the same bill three times. In line with the opinion of the Constitutional Tribunal, as expressed in the said judgment, it should be concluded that "the aim pursued by the system of three readings is to ensure the most accurate and thorough examination of the bill and, in consequence, the elimination of the risk of adopting underdeveloped or incidental solutions in the course of the bill's consideration. This solution should also be viewed in the context of striving to ensure more efficient operation of the Sejm. Given this assumption, it should be noted that the system of three readings implies the necessity for the Sejm to examine a given three times not only in the technical sense, but also with regard to the bill's content.

Therefore, a thorough examination of a bill in the course of three readings is not merely a formal ritual which is required to achieve compliance with the constitutional norm. The words "the Sejm considers" mean that the Sejm, during the three readings, listens to and takes account of all representative opinions on the proposed legislative measure. Otherwise, it is impossible for the Sejm's legislative decision to take account of all the aspects of the problem under consideration and to be based on legitimate and rational arguments rather than on the sole argument of voting majority and its current voting power. In the case covered by this application, despite the allegations of unconstitutionality of the proposed solutions, raised in the opinions forwarded to the Sejm by: the Commissioner for Human Rights on 4 July 2016 (letter no. VII.511.23.2016.AJK), the Presidium of the National Council of the Judiciary on 9 June 2016 (letter nos.: WO-020-64/16, 65/16, 67/16 and 20/16), the Supreme Bar Council on 5 July 2016 (letter no. NRA.12-SM.1.149.2016), the National Council of Legal Advisers on June 2016 (letter no. 547/0BSiL/2016), the Supreme Court on 27 June 2016 (letter no. BSA III-021-199/16), the Bureau of Research of the Sejm (legal opinions of: Anna

Rakowska Trela, PhD, of 30 June 2016 and prof. Marek Chmaj, PhD, of 30 June 2016) and the Helsinki Foundation for Human Rights on 4 July 2016 (letter no. 1357/2016/MPL) and in the document submitted by the Office of the Constitutional Tribunal, Department of Jurisprudence and Studies, dated 29 June 2016 (letter no. ZOS.430.9.2016), no in-depth discussion was carried out on the objections to the bill, raised by the aforementioned entities.

Furthermore, at the subsequent stage of works on the bill in the Senate no in-depth reflection was triggered off by the allegations of unconstitutionality, contained in the opinion of the Legislative Office of the Senate Chancellery (*Opinion on the Constitutional Tribunal Act*, Sejm paper no. 242 of 13 July 2016).

However, there existed no constitutional reasons to justify the hasty passing of the bill, and no such reasons were indicated in the explanatory memorandum to the bill. Moreover, the legislative measure under consideration concerned a judicial body which is not responsible before legislative bodies. According to Article 10(1) of the Constitution of the Republic of Poland, Poland's system of government is based on the separation of and balance between the legislative, executive and judicial powers. Balance, as a feature of the system of government, presupposes dialogue between the individual branches of power and does not assume dominance or dictatorship of any of the branches over another one.

In the opinion of the Commissioner for Human Rights, the hasty legislative process in question resulted in the fact that the bill has not undergone sufficient examination with regard to its content. The drafters did not carry out a critical debate on the objections which included the most serious pleas i.e. those concerning the unconstitutionality of the planned solutions. Such a lawmaking procedure not only violates the Rules of Procedure of the Sejm but is also against the workding of the oath taken by members of the Sejm. According to the oath, a member of the Sejm is obliged "to observe the Constitution and other laws of the Republic of Poland" (Article 104(2) of the Constitution).

Therefore, in the opinion of the Commissioner for Human Rights, the Constitutional Tribunal Act, even if considered passed in three readings, is still inconsistent with Article 119(1) of the Constitution, as it has not been considered by the Sejm in the meaning of the constitutional norm. "Consideration", in the meaning of Article 119(1) of the Constitution, requires e.g. starting a dialogue with judicial authorities, as a direct consequence of the principle of balance between the legislative power and the judicial power.

The Commissioner wishes to point out, however, that the Speaker of the Sejm, in connection with the withdrawal of the bill contained in the Sejm paper no. 550, changed the Sejm's decision to refer the bill to the Committee for it to draw up an additional report, and referred the bills contained in papers nos. 129, 558 and 569 back to the Committee on Justice and Human Rights for restarting work on them and drawing up a report on those three bills. At that stage, the three bills were considered to have already passed through the first reading and, therefore, the procedure was restarted by the Committee with the examination after the first reading. Thus, there are grounded doubts as to whether the material conformity of the bills provided grounds for the legislator to take such a decision. The decision disregarded the clear provision of Article 119(1) of the Constitution which does not provide for any exceptions. In this context, the arguments relating to the hasty manner of considering the bill seem even more weighty.

Such a way of lawmaking, in the opinion of the Commissioner, violates Article 119(1) of the Constitution.

According to Article 112 of the Constitution, the internal organization and conduct of work of the Sejm and the procedure of appointment and operation of its bodies as well as the manner of performance of obligations, both constitutional and statutory, by State authorities in relation to the Sejm, are specified in the adopted rules of procedure of the Sejm. Therefore, the standing orders of the Sejm, including the procedure of passing bills, are determined in the rules of procedure adopted by the Sejm. At present, they are determined by the Sejm resolution of 30 July 1992 on the Rules of Procedure of the Sejm of the Republic of Poland (Official Gazette of the Republic of Poland – Monitor Polski of 2012, item 32, as amended).

According to Article 34(2)(1) and 34(2)(2) of the Rules of Procedure of the Sejm, a bill should be accompanied by an explanatory memorandum which should indicate the need for and purpose of the proposed act and describe the current situation in the field to be regulated. In the opinion of the Commissioner for Human Rights, the explanatory memorandum to the bill on the Constitutional Tribunal fails to meet this requirement as it does not indicate the actual purpose of implementing the Act. The actual purpose is not to streamline the proceedings before the Tribunal but rather to paralyze its actions. Such objective in itself is not constitutionally legitimized.

It follows from Article 34(2)(4) of the Rules of Procedure of the Sejm that the explanatory memorandum should present the expected social, economic, financial and legal effects of implementing the Act. According to the explanatory memorandum, "the Act will restore the uniformity of proceedings before the Tribunal, which was disturbed by the operation of different legal regimes existing under the Act of 2015. This will be possible thanks to the fact that the new regulation will apply to all proceedings. The return to the well-known legislative solutions introduced in 1997, with their established way of operation and proven efficiency in the operation of the Constitutional Tribunal, will enhance a positive reception of the new normative legal act by the general public, and will provide an opportunity to restore order in the proceedings before the Tribunal. The legislator’s initiative in this field may contribute to rebuilding the authority of the Constitutional Tribunal". Nevertheless it should be noted that these statements do not reflect the realities and contribute to the deepening of the constitutional crisis in Poland. Although the act restores, in a large part, the well-known solutions provided for under the act of 1997, the unconstitutionality of the additional solutions will result, for the citizens, mainly in their longer waiting time for the judgements of the Constitutional Tribunal. The explanatory memorandum to the bill declares that the entry into force of the new Constitutional Tribunal Act will not, in principle, impose any additional burden on the state budget. The words "in principle" suggest that the drafters of the bill are aware that the new Constitutional Tribunal Act may bring about adverse economic effects e.g. in the form of lowering the financial credibility of Poland in connection with the permanent paralysis of the constitutional judicature system. Consequently, the legal certainty in the country will be further undermined. Such effects obviously cannot be considered positive for the society.

According to Article 34(2)(7) of the Rules of Procedure of the Sejm, the explanatory memorandum should also contain a statement of the conformity of the bill to the European Union law, or a declaration that the matter covered by the proposed legislation is not covered by the European

Union law. Such a statement is included in the last sentence of the explanatory memorandum, yet it does not reflect the reality. The same statement is also included in the opinion of the Bureau of Research of the Sejm, issued pursuant to Article 34(9) of the Sejm's Rules of Procedure. However, in its judgment of 9 December 2015 (ref. no. K 35/15) the Constitutional Tribunal, sharing the opinion of the Commissioner for Human Rights, stated that "the issue of the Constitutional Tribunal, contrary to the statement included in the explanatory memorandum to the bill, is covered by the European Union law. The Constitutional Tribunal, as any other court may, pursuant to Article 267 of the Treaty on the Functioning of the European Union (consolidated version: O.J. C 326 of 26.10.2012, p. 47) refer questions to the Court of Justice of the European Union for a preliminary ruling. The CT has recently used this right by referring a question for a preliminary ruling in the case no. K61/13 initiated based on the application of the Commissioner for Human Rights (cf. the CT judgement of 7 July 2015, ref. no. K 61/13). Any change in the law, which directly or indirectly applies to the CT's system of operation and the status of its judges, is of significance for determining whether the Constitutional Tribunal is a court within the meaning of Article 267 of the Treaty on the Functioning of the European Union and, therefore, whether it has the right to refer questions for a preliminary ruling. Due to the need to take account of the European context, changes in the law concerning the CT should not be made hastily".

In the context of the aforementioned infringements of the law in the course of work on the bill on the Constitutional Tribunal it should be noted that the Constitutional Tribunal may examine not only the substantive content of a normative act, but also the procedure of its issuance. This covers not only the procedure set out in the act, but also the procedure of issuing normative acts, as defined in other legislative acts, including the Rules of Procedure of the Sejm. The said infringements lead to the conclusion that the challenged Act has been enacted with violation of the standing orders of the Sejm, which violation has its constitutional dimension. This fact provides grounds for the plea of the Act's non-conformance to Article 112 of the Constitution of the Republic of Poland. The infringement of the procedure of adopting a normative act results in the violation of the constitutional principle of the rule of law (Article 7 of the Constitution). According to this principle, the organs of public authority shall function on the basis of, and within the limits of, the law. This principle applies also to legislative bodies. In view of the presented arguments, in the opinion of the Commissioner for Human Rights the Constitutional Tribunal Act is inconsistent with Articles 2, 7, 112 and Article 119(1) of the Constitution.

III

According to Article 16(1) of the Act, the President and Vice-President of the Tribunal are appointed by the President of the Republic of Poland from among the three candidates nominated for each position by the General Assembly.

However, Article 194(2) of the Constitution provides that the President and Vice-President of the Constitutional Tribunal shall be appointed by the President of the Republic from amongst the candidates proposed by the General Assembly of Judges of the Constitutional Tribunal. The Constitution provides for the principle of appointment of the President and Vice-President of the CT by the President of Poland. The Constitution empowers the President of Poland to appoint the President and Vice-President of the Constitutional Tribunal. This competence is included among the prerogatives of the President of Poland (Article 144(3)(21) and requires the head of state to appoint, to each of the CT presidential positions, one person from amongst the candidates proposed by the General Assembly of Judges of the Constitutional Tribunal. Notably, the Constitution does not specify the number of candidates to be proposed by the General Assembly to the President of the Republic of Poland. As indicated by B. Banaszak, "given the plural form used in the Constitution, there should be at least two candidates to the office of the CT President and at least two candidates to the office of the CT Vice-President" (B. Banaszak, *Konstytucja Rzeczypolspolitej Polskiej. Komentarz*, Warsaw, 2012, p. 979).

According to Article 197 of the Constitution, the organization of the Constitutional Tribunal, as well as the manner of proceedings before it, are specified in the Act. With regard to the regulation of the organization of the Constitutional Tribunal, the Act may not however go beyond the exhaustive regulations included in the Constitution. As regards the nomination of the candidates to the offices of the President and Vice President of the Constitutional Tribunal, Article 194(2) of the Constitution contains the word “candidates” which needs to be clarified. A major doubt arises, however, as to whether the nomination of the candidates to the offices of the CT President and Vice President comes within the scope of matters regulated by the Act. The competences of the CT President and Vice President may certainly be covered by the provisions of the Act drawn up pursuant to Article 197 of the Constitution. However, the legislative power’s encroachment, pursuant to the Act, upon the relationships between the President of the Republic of Poland and the General Assembly, which relationships are regulated in Article 194(2) of the Constitution, seems ungrounded.

It follows from the principle of independence of courts and tribunals, referred to in Article 173 of the Constitution, that the Constitutional Tribunal should freely determine the number of candidates to the offices of the CT President and Vice President, to be proposed to the President of the Republic of Poland. The legislator is not entitled to arbitrarily determine a specific number of the candidates (“three” in Article 16(1) of the Act). It follows from the above-mentioned Article 173 that the Constitutional Tribunal is a separate body, distinct from other authorities. This constitutional guarantee should ensure full independence of the Tribunal’s activities and cognizance, within the scope set out by the Polish Constitution.

Attention should also be paid to the significance of the appointment of the CT President and Vice-President. According to Article 17(1) of the Act, the President of the Tribunal represents the Tribunal externally and performs actions specified in the Act and the Rules of Procedure. The CT Vice President, in turn, takes over the duties of the CT President in the case of his absence, and performs

other duties according to the division of responsibilities, determined by the CT President (Article 17(2) of the Act). According to Article 18(1), the CT President, together with the Office of the Tribunal responsible before him/her, ensures organizational and administrative conditions for the operation of the Constitutional Tribunal. The President of the Tribunal also performs extremely important functions in the course of proceedings pending before the Tribunal, as regulated by Chapter 2 of the Act.

Such encroachment of the legislative power onto the matters regulated by the Constitution and reserved as the responsibility of the judicial power, constitutes infringement of Article 10 of the Constitution. As stated by the Constitutional Tribunal in its judgment of 3 December 2015, ref. no. K34/15, "the principle of separation of and balance between the powers, arising from Article 10(1) of the Constitution, impacts the position of the overall judicial power in the system of the powers and their mutual relations. With regard to the legislative power and the executive power, we may speak of the cross-cutting competences of the two powers. Yet, the legislative power is characterised by its separateness from the other powers. This is confirmed by Article 173 of the Constitution, according to which “courts and tribunals shall constitute a separate power and shall be independent of the other powers". The ensuring of balance between the powers aims to ensure the stable operation of the mechanisms of democratic rule of law (as stated by the Constitutional Tribunal in its judgment of 15 January 2009, ref. no. K 45/07 and in its judgment of 7 November 2013, ref. no. K 31/12).

The principle of separation of the powers, expressed in Article 10 of the Constitution, is closely related to the aforementioned principle of democratic rule of law, expressed in Article 2 of the Constitution. From this principle it follows that legislative authorities may not arbitrarily establish legislation but are required to respect and develop the democratic rule of law, to the extent prescribed by the Constitution. Legislative authorities, pursuant to this principle, may not encroach upon areas subject to strict regulation by the Constitution, including regulation which precisely determines relationships between the authorities, in this case between the executive authority i.e. the President of Poland and the judicial authority i.e. the Constitutional Tribunal. It should be noted that the solution provided for in the act, which arbitrarily determines the number of candidates for the offices of the CT President and Vice-President as “three”, in fact empties the content of the constitutional guarantee of independence and distinct nature of the Tribunal, contained in Article 173 of the Constitution, and of the guarantee of impartiality of the Tribunal judges in the exercise of their office (Article 195(1) of the Constitution). The solution thus shifts the burden of the decision to appoint the CT President and Vice-President to the executive authority – the President of the Republic of Poland, which is constitutionally unacceptable and distorts the balance between the powers, guaranteed in Article 10 of the Constitution.

IV

Serious doubts are raised as to the constitutionality of Article 38(3) and, in consequence, Article 38(4) and (5) of the Act, which set out the exceptions to the principle provided for in Article 38(3) of the Act. Article 38(3) of the Act provides for the principle according to which the Constitutional Tribunal shall set the dates of hearings at which applications are considered, in the order in which cases are received by the Tribunal. It should be noted that a similar solution, provided for under Article 1(10) of the Act of 22 December 2015 amending the Constitutional Tribunal Act (Dz. U. item 2217) has been

considered inconsistent by the Tribunal, in its judgment of 9 March 2016 (ref. no. K 47/15), 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 due to the fact that they violate the rule of law by precluding reliable and efficient operation of the constitutional authority i.e. the Constitutional Tribunal and that they infringe its independence and separateness from other authorities.

The provisions of Articles 38(3), (4) and (5) relate to applications to initiate proceedings before the Constitutional Tribunal with regard to the following matters:

- abstract examination of hierarchical consistency of the law (cf. Article 191(1) in conjunction with Article 188(1) through (3) of the Constitution);

- preventive examination of the constitutionality of laws and international agreements (cf. Article 122(3) and Article 133(2) of the Constitution);

- examination of the constitutionality of the objectives and/or activity of political parties (cf. Article 191(1) in conjunction with Article 188(4) of the Constitution);

- resolving disputes between central constitutionally-recognised state authorities over their powers (cf. Article 192 in conjunction Article 189 of the Constitution);

- temporary inability to perform the office by the President of the Republic of Poland and vesting the temporary performance of the duties of the President in the Marshal of the Sejm (cf. Article 131(1) of the Constitution).

Such applications constitute the main form of initiating proceedings before the Tribunal. Based on applications, proceedings are initiated with regard to all matters within the competence of the Tribunal, except for proceedings initiated on the basis of a questions of law or a complaint concerning infringement of the Constitution.

The challenged provisions of the Act introduce a formalized mechanism of automatic setting of dates of hearings at which applications will be considered "in the order in which cases [*lege non distinguente* – all cases] are received by the Tribunal". These provisions do not apply, however, to the setting of dates of adjudication on other cases pending before the Tribunal.

It should be emphasized that the principle of efficiency in the work of public institutions, which arises from the Preamble to the Constitution, requires the development of such an organizational and procedural framework in which the tasks of those institutions will be performed in a timely manner, without undue delay, and as quickly as possible. The requirement of efficiency in the work of public institutions (in this case, the Constitutional Tribunal) also precludes the adoption of solutions whose main objective is to slow their work or to make its pace dependent on accidental circumstances.

As stated by the Constitutional Tribunal in its judgment ref. no. K 47/15, the introduction of the requirement to set dates of hearings at which applications will be considered in the order in which cases are received by the Tribunal means that the pace of considering cases by the Tribunal will be dependent on circumstances not related, in any rational way, to the cases themselves. This solution also assumes that all cases received by the Tribunal are comparable and require the same amount of time to be considered. However, the time required to consider a case does not depend on the

number of other cases received by the Tribunal but on the specificities of a given case and, in particular, on the number of the challenged provisions, the complexity of their normative content and the number and complexity of the aforementioned examination paths. It is obvious, as indicated by the Constitutional Tribunal, that the examination of the constitutionality of an entire law containing e.g. a few dozen provisions requires more time than the examination of the constitutionality of a single provision of the law. The *a posteriori* examination of the constitutionality of laws, as opposed to their preventive examination, often requires the Tribunal to determine the way in which the law in question is applied by courts in practice, which further extends the time of examination of the case. Indeed, the Act, as opposed to the provisions of the Act of 22 December 2015, provides for exceptions set out in Article 38(4) and (5), which take into account the specificities of certain matters. Yet, this does not change the assessment of the provisions challenged in the present application as unconstitutional. Those provisions jointly constitute a normative act which violates the Constitution.

As is clear from the Tribunal's judgment in case ref. no. K 47/15, those provisions are, moreover, unacceptable from the point of view of the principles of independence of the judicial power and its separateness from the legislative power (Article 173 of the Constitution). The determination of the pace of considering individual cases, including the setting of dates of hearings, is related to the nature of the adjudication work of the Tribunal. The task of the legislator is to ensure optimal conditions for, rather than to interfere in, the adjudication work of the Tribunal by determining the time when it may consider specific cases. The independence of the Tribunal requires a guarantee of its freedom to adjudicate, provided by precluding the influence of other authorities not only on the Tribunals' rulings but also on the course of the adjudication procedure.

In the light of the above arguments it should be concluded that Article 38(3) of the Act and, as a consequence, Article 38(4) and (5) thereof, which set out the exceptions to the principle adopted in Article 38(3) of the Act, are dysfunctional and arbitrary, as well as unacceptable in the light of the principle of the Tribunal's independence and separateness from other authorities. Thus, the provisions are also inconsistent with the principle of efficiency in the work of public institutions and with Articles 2, 10 and 173 of the Constitution due to the fact that they violate the rule of law by precluding reliable and efficient operation of the constitutional authority i.e. the Constitutional Tribunal and that they infringe its independence and separateness from other authorities.

V

According to Article 28(6) the Act, one of the participants in the proceedings before the Tribunal is the Public Prosecutor-General. Article 30(1) of the Act provides that a participant in the proceedings shall act before the Tribunal in person or through an authorized representative. According to Article 30(5) of the Act, the Public Prosecutor-General or his/her deputy shall participate in cases considered by the Tribunal sitting in full bench, while a prosecutor of the National Public Prosecutor's Office shall participate in cases considered by other compositions of the bench. The types of matters on which the Tribunal adjudicates sitting in full bench are indicated in Article 26(1) of the Act. The participation of a representative of the Public Prosecutor-General is also compulsory in the case provided for in Article 42(2) of the Act, that is in hearings to confirm the constitutionality of the ratified international agreements.

Chapter 3, Section 1 of the Act, entitled "Hearings and sittings" (a part of Chapter 3 entitled "Principles and procedures of adjudication") contains specific regulation pertaining to the presence, in the hearings, of participants in the proceedings before the Tribunal. Inter alia, Article 60(1) of the Act provides that the Tribunal shall, in hearings, consider applications pertaining to the matters specified in Article 3. Article 61(6) of the Act, challenged in this application, provides that "Absence from the hearing of the Public Prosecutor-General or his/her representative, who has been properly notified thereof, shall not prevent consideration of the case unless his/her obligation to participate in the hearing results from the provisions of the Act". The provision constitutes a specific regulation pertaining to the Public Prosecutor-General. Article 61(5), first sentence, provides that "If the participants in the proceedings, whose presence at the hearing is obligatory, or their representatives are in default, the Tribunal may adjourn the hearing and at the same time fix a new date for the hearing."In view of the specific regulation contained in Article 61(6) of the Act, pertaining to the Public Prosecutor-General, the provision of Article 61(5), first sentence, of the Act, which makes it possible rather than compulsory for the Tribunal to adjourn the hearing ("the Tribunal may…"), will not apply to the Public Prosecutor-General as according to its provisions, his/her presence in the hearing is obligatory. At this point it should be emphasized that due to the imperative form of Article 30(5) of the Act (“shall participate”), the presence of the Public Prosecutor-General or his/her deputy is obligatory in cases considered by the Tribunal sitting in full bench. The provision of Article 61(7) of the Act, which stipulates that "Default of other participants in the proceedings shall not prevent consideration of the case; in such a case the judge rapporteur shall, at the hearing, present the opinion of the absent participant in the proceedings". It is therefore apparent from the above that the legislator has established, in a specific way, the position of the Public Prosecutor-General in the proceedings before the Constitutional Tribunal, including, in particular, his/her presence in the hearings in cases considered by the Tribunal sitting in full bench.

The analysis of the wording of the challenged provision leads to the conclusion that the absence from the hearing of the Public Prosecutor-General, or his/her representative, who has been properly notified thereof and whose presence is obligatory, may preclude the possibility of substantive examination of the case and the ruling on the case by the Constitutional Tribunal. This means that the exercise by the Constitutional Tribunal of its responsibilities set out in the Constitution is subject to decision of the Public Prosecutor-General. Bearing in mind that according to Article 61(1) of the Act, the hearing shall not be held before the expiry of 30 days from the date of delivery of the notice about the date thereof, it would be difficult to imagine a situation in which the Public Prosecutor-General or his/her deputy fails to participate in the proceedings of which he/she has been notified at least one month in advance, for any reason other than his/her conscious decision to disable the normal operation of the Constitutional Tribunal.

The obligation to ensure the efficiency in the work of public institutions arises from the Preamble to the Constitution. Therefore, the ordinary legislator is under the obligation to establish the provisions of laws in such a way as to make them implement the constitutional value indicated in the Preamble. This requirement also entails the prohibition to adopt provisions which hinder or preclude the implementation of that value. Article 10(1) of the Constitution stipulates that the system of government of the Republic of Poland shall be based on the separation of and balance between the legislative, executive and judicial powers. Therefore, the provision clearly entails the prohibition to establish provisions of laws in a manner disturbing the desired balance in such a way that certain powers vested in one branch of power will, at the same time, preclude efficient and orderly

functioning of another branch of power. In this context, Article 173 of the Constitution should be quoted which stipulates that the courts and tribunals shall constitute a separate power and shall be independent of other authorities. This provision entails the prohibition to vest, in any branch of power, such competences which encroach upon the separateness and independence of the Constitutional Tribunal, thus precluding the performance of its constitutional responsibilities.

In the opinion of the Commissioner for Human Rights, Article 61(6) of the Act, in the part containing the words " unless the obligation to participate in the hearing results from the provisions of the Act", violates the aforementioned constitutional principles and norms.

In the view of the Commissioner, the aforementioned challenged provision of the Act makes it possible to block and paralyze the works of the Constitutional Tribunal by way of possible obstruction by the Public Prosecutor-General through his/her, or his/her deputy's, non-participation in hearings in which his/her participation is mandatory. This applies, in particular, to cases considered by the Tribunal sitting in full bench. The provision of Article 61(6) of the Act, which does not prescribe any time limits, potentially opens the way to the Public Prosecutor-General's obstruction for an indefinite period. Therefore, as regards cases considered by the Constitutional Tribunal on the initiative of the courts, as a result of questions of law addressed to the CT, the contested part of the provision of Article 61(6) of the Constitutional Tribunal Act also violates Article 45(1) of the Constitution insofar as it guarantees the right to court within a reasonable period of time.

It should be also borne in mind that since the entry into force of the Act of 28 January 2016 - Law on Public Prosecutors (Journal of Laws - Dz. U. item 177), according to Article 1 (2), second sentence thereof, the office of the Public Prosecutor-General has been held by the Minister of Justice i.e. an executive body. This legislative solution translates into the actual disturbance of the balance between the executive power and the judicial power, which is against the Constitution, as well as leads to the unconstitutional encroachment of the executive power onto the separateness and independence of the Constitutional Tribunal. This prejudges the inconsistency of Article 61(6) of the Constitutional Tribunal Act, in the part containing the words " unless the obligation to participate in the hearing results from the provisions of the Act ", also with Articles 10 and 173 of the Constitution.

VI

Chapter 3, Section 2 of the Act regulates the issue of rulings of the Tribunal. Article 68(1) stipulates that the Tribunal shall announce the ruling following deliberation by the judges of the adjudicating bench, held in camera. The deliberation shall include discussion and voting on the ruling on and on the fundamental reasoning for the settlement made, as well as the drawing up of the ruling. The Constitutional Tribunal Act, challenged in this application, as compared to the previous legislation introduces, however, new solutions that raise serious doubts as to their constitutionality.

Namely, Article 68(5) of the Act states that "During a deliberation by the Tribunal sitting in full bench, at least four judges may raise an objection to a proposed settlement, if they deem that a given matter is of particular significance for the constitutional order or the public order, and they disagree with the settlement". Article 68(6) stipulates that "In the case that the objection referred to in paragraph 5 is raised, the deliberation shall be adjourned for three months, and at the next deliberation held after that period has passed, the judges who raised the objection shall present a joint proposal for a new settlement". Article 68(7), in turn, provides that "If, during the next deliberation referred to in paragraph 6, at least four judges raise objections again, the deliberation shall be adjourned for another three months. After that period has passed, a new deliberation and vote shall be held. "

In the opinion of the Commissioner for Human Rights, such a legislative mechanism may deprive citizens of the right to court (Article 45(1) of the Constitution), in particular in cases brought to the CT on the initiative of the courts, as a result of questions of law referred to the CT and pertaining to matters of extreme significance for the citizens, to be resolved by the Constitutional Tribunal. It should be emphasized that the legislator vests the power to raise objections in a relatively small group of judges of the Tribunal, smaller than a third part of the overall number of judges in the adjudicating bench. Moreover, the adjournment periods are determined as fixed periods by the legislator and do not depend on the time of development, by the objecting judges, of the proposal for a new settlement.

It follows from the principle of efficiency in the work of public institutions, included in the Preamble to the Constitution, that there exists the obligation to shape the provisions of laws in such a way as to make them implement the constitutional value indicated in the Preamble. This requirement also entails the prohibition to adopt provisions which hinder or preclude the implementation of this value. Thus, the provisions of Article 68(5) through (7) of the Act will result in a significant slowdown in the work of the Constitutional Tribunal. The Commissioner for Human Rights intends to emphasize that this applies not only to cases considered by the Tribunal and covered by the aforesaid provisions, i.e. cases in which four judges have raised their objections to the settlement proposed during the Tribunal's sitting in full bench. The challenged provisions of the Act should be examined in the context of the other provisions of the Constitutional Tribunal Act. In particular, due to the principle according to which the Constitutional Tribunal sets the dates of hearings at which applications are considered, in the order in which cases are received by the Tribunal, as provided for under Article 38(3) of the Act, the delay in the consideration of cases will relate also to cases other than those in which the judges raised objections pursuant to Article 68(5) through (7) of the Act. One must agree with the opinion of the Office of the Constitutional Tribunal, Department of Jurisprudence and Studies, dated 29 June 2016 (letter no. ZOS.430.9.2016: *Comments on the key*

legal problems arising from the bill on the Constitutional Tribunal (a report of the Special Subcommittee for the examination of bills pertaining to the Constitutional Tribunal, dated 24 June 2016, p. 9) that "the Tribunal would first be required to adjudicate on cases in which objections were raised by the judges, and only then it would be free to move to the consideration of other cases based on the received applications". Account should also be taken of the specific legislative solutions introduced by the legislator in Chapter 4 of the Act entitled "Amending, Transitory, Adapting and Final Provisions". Article 84(1) of the Act stipulates that " Where applications filed by the entities referred to in Article 191(1) (1) through (5) of the Constitution are still pending before the date of entry into force of the Act, the Tribunal shall, within 14 days from the date of entry into force of the Act, postpone the proceedings for a period of 6 months, and shall request that the applications be supplemented in compliance with the requirements set out in Article 33(2) through (5)". Paragraph 2 of the provision stipulates that "Where the application referred to in paragraph 1 has been supplemented in compliance with the requirements set out in Article 33(2) through (5), after the time-limit specified in paragraph 1 has passed, the Tribunal shall decide on whether to resume the postponed proceedings. Otherwise, the proceedings shall be discontinued". The application of the provision to cases pending before the Constitutional Tribunal and initiated by abstract applications of entities referred to in Article 191(1)(1) through (5) of the Constitution, the proceedings will be suspended for the fixed period of 6 months, indicated in the Act, even if the filed applications do not contain any faults and meet the requirements set out in Article 33(2) through (5) of the Constitutional Tribunal Act. Moreover, Article 83(2) of the Act provides that the Tribunal shall be obliged to resolve the cases referred to in paragraph 1 (i.e. cases initiated but not completed before the entry into force of the Act), within one year from the date of entry into force of the Constitutional Tribunal Act. Taking into account all the above-mentioned provisions, considered jointly as a whole normative act, one may conclude that these solutions will lead to a significant slowdown in the work of the Constitutional Tribunal, or even to a complete paralysis and blocking of the works of the Polish constitutional court.

The joint application of all the aforementioned legislative solutions, including the provisions of Article 68(5) through (7) of the Constitutional Tribunal Act, contested in this application, hinders the appropriate functioning of the Constitutional Tribunal. Moreover, according to the Tribunal's judgment of 9 March 2016, ref. no. K 47/15, "the legislator may not reduce the current level of diligence and efficiency in the work of the existing public institutions". Article 2 of the Constitution, which stipulates that the Republic of Poland shall be a democratic state ruled by law, implies a prohibition to adopt legal regulations which establish legal mechanisms that preclude proper work of the public institutions. The Constitutional Tribunal's judgment of 7 February 2001 (ref. no. K 27/00) states that "the principle of protection of the citizens' trust in the state and the law, also referred to as the principle of loyalty of the state towards the citizens, should find its expression in such lawmaking and law enforcement activities which do not constitute a kind of trap for the citizens." Account should be taken of the fact that the Constitutional Tribunal adjudicates, primarily, on cases pertaining to vital interests of citizens, including, in particular, on cases initiated by way of questions of law addressed to the Tribunal by courts, complaints concerning constitutional infringements, applications of the Commissioner for Human Rights. Yet, the aforementioned legal mechanisms established by the Act constitute, due to their inherently contradictory and mutually exclusive nature, a kind of trap not only for the Constitutional Tribunal, but also, as a consequence, for

protecting the legal interests of Polish citizens. Therefore, it should be considered the provisions of Article 68(5) through (7) of the Constitutional Tribunal Act violate Article 2 of the Constitution.

As mentioned above, the Preamble to the Constitution provides for the principle of efficiency in the work of public institutions. As pointed out by the Constitutional Court in its judgment of 3 December 2015, ref. no. K 34/15, "in the context of the political position of the Tribunal and the specific nature of its competences, it is particularly important for the proceedings before the Court to be effective and to lead, in a reasonable time, to the final ruling, in particular on cases of vital importance for the functioning of the State and for the exercise of the freedom and rights guaranteed by the Constitution. This is supported by the principle of efficiency in the work of public institutions, which arises from the Preamble to the Constitution". In its judgment of 7 January 2004, ref. no. K 14/03, the Tribunal clarified that "the diligence and efficiency in the work of public institutions, in particular those established with the aim to implement and protect the rights guaranteed by the Constitution, is a constitutional value in itself. This clearly follows from the wording of the introduction (the so-called Preamble) to the Constitution, which sets out two main objectives of the Constitution: to guarantee the rights of the citizens, and to ensure diligence and efficiency in the work of public institutions". As a consequence, it should be concluded that Article 68(5) through (7) of the Constitutional Tribunal Act violates the principle of efficiency in the work of public institutions, which arises from the Preamble to the Constitution of the Republic of Poland.

Finally, it should be noted that Article 173 of the Constitution stipulates that courts and tribunals shall constitute a separate power and shall be independent of other branches of power. The indicated provision of the Constitution applies also to the legislative power. The Constitution legitimizes the legislator's involvement in the activities of the Constitutional Tribunal by stipulating, in Article 197, that the organization of the Constitutional Tribunal, as well as the manner of proceedings before it, shall be specified by statute. This constitutional legitimacy does not mean, however, that the legislator has full freedom in the shaping of proceedings before the Constitutional Tribunal. The adopted legislative solutions should provide appropriate legal instrumentation for the Tribunal, thus enabling its effective and efficient work and allowing it to implement its duties provided for in the Constitution, including, in particular, the duty to consider citizens' cases within a reasonable period of time, pursuant to Article 45(1) of the Constitution. As pointed out by the Constitutional Tribunal in its judgment of 18 February 2004, ref. no. K 12/03, the public authorities "are obliged to ensure diligence and efficiency in the work of public institutions (the principle of cooperation, laid down in the Constitution)." The legislator's involvement through the adoption of legislative provisions which are inadequate and disproportionate (contrary to the prohibition arising from Article 2 of the Constitution), which undermine the constitutionally protected value of efficiency in the work of public institutions, and which thus undermine the independence and autonomy of the Tribunal should be regarded as unconstitutional. Therefore, the provisions of Article 68(5) through (7) of the Constitutional Tribunal Act, challenged in this application, are also inconsistent with Article 173 of the Constitution.

The challenged provisions of Article 68(5) through (7) of the Act are also inconsistent with Article 190(5) of the Constitution. According to Article 190(5) of the Constitution, judgments of the Constitutional Tribunal shall be made by a majority of votes. The Constitution, therefore, does not require a qualified majority to determine a ruling, but requires a simple majority. If there is a simple

majority in the composition of the bench, than the provisions making it possible block decision by the outvoted minority, i.e. four judges, collide with this constitutional principle.

In its judgment of 9 March 2016 (ref. no. K 47/17), “the Constitutional Tribunal pointed out that Article 190(5) of the Constitution "provides no grounds for the legislator neither to make the majority of votes required for a ruling according to the composition of the bench, nor to determine any other majority than the majority indicated in that provision. The interpretation of Article 190 (5) of the Constitution, according to which it contains an empty provision as it relates to "any majority", and the legislator is obliged to determine what majority the provisions relates to, is unacceptable. This would mean that the content of that provision of the Constitution is determined by the legislator, which may not be the case in a democratic state ruled by law. "

In view of the above it should be concluded that Article 68(5) through (7) of the Act is in conflict with Article 190(5) of the Constitution as it introduces different principles of adjudication by the Tribunal siting in full bench, and, contrary to the Constitution, makes it possible for a minority i.e four judges to block, for a period determined in those provisions, the issuing of a ruling by the Constitutional Tribunal.

VII

Pursuant to Article 80(1) of the Act, judgments of the Tribunal shall, subject to para. 2, be published in the Dziennik Ustaw Rzeczypospolitej Polskiej (Journal of Laws of the Republic of Poland). Judgments of the Tribunal that find there to be non-conformity of a normative act with the Constitution, ratified international agreements or law shall be subject to publication without delay in the publication in which the said act was published, and if the ruling concerns an act which was not published in a publication - in the Official Gazette of the Republic of Poland ‘Monitor Polski”. Furthermore, Article 80(3) stipulates that the “The decision referred to in art. 71. para. 2 points 1-3 shall be published in the Official Gazette of the Republic of Poland - ‘Monitor Polski”.

Article 80 (4), in turn, stipulates that the “The President of the Tribunal shall refer the request to publish the judgments and decisions referred to in art. 71 para. 2 points 1-3 to the Prime Minister. Publication shall take place on the basis of and in the manner outlined in the Constitution and Act of 20 July 2000 on the publication of normative acts and certain other legal acts (Journal of Laws 2016 item 296)”. Article 71(1) of the Act specifies that The Tribunal shall pass judgments on matters concerning:

1) the constitutionality of laws and international agreements;

2) the conformity of laws with ratified international agreements whose ratification required prior consent granted by law;

3) the conformity of legal provisions enacted by central state authorities with the Constitution, ratified international agreements and laws;

4) complaints concerning constitutional infringements;

5) the constitutionality of the objectives and/or activity of political parties.

Furthermore, Article 71(2)(1) through (3) of the Act, to which Article 80(1), first sentence of the Act relates, stipulates that the Tribunal issues decisions in the following cases:

> 1) the settlement of disputes between constitutionally-recognised central state authorities over powers;
>
> 2) adjudication on the finding of impediments to the exercise of office by the President of the Republic of Poland;
>
> 3) vesting in the Marshal of the Sejm of the temporary performance of the duties of the President of the Republic of Poland.

The constitutional doubts which relate to the wording of Article 80(4), first sentence 1 of the Act are, first and foremost relate to its non-compliance with the Constitution's Article 190(2) in conjunction with Article 190(1) of the Constitution. Article 190(2) of the Constitution stipulates that "Judgments of the Constitutional Tribunal regarding matters specified in Article 188, shall be required to be immediately published in the official publication in which the original normative act was promulgated. If a normative act has not been promulgated, then the judgment shall be published in the Official Gazette of the Republic of Poland, *Monitor Polski*". Furthermore, Article 190(1) of the Constitution stipulates that "Judgments of the Constitutional Tribunal shall be of universally binding application and shall be final".

The formula of the motion which the President of the Constitutional Tribunal is obliged to make to the Prime Minister, and which is adopted in the provision of Article 80(4) and challenged by the Ombudsman, assumes the Prime Minister's right to assess whether the judgement of the Constitutional Tribunal should at all be published in the official journal, whereas the very act of the p4ublication is merely technical. In the present legal state, Article 105(2) 2 of the Act of 25 June 2015 stipulates that "the publication of the Tribunal's rulings shall be ordered by the President of the Tribunal". Similar were the provisions in the Act of 1 August 1997 on the Constitutional Tribunal (Journal od Laws No. 102, item 643, as amended). Article 79(3) of the aforementioned Act stipulates that "the publication of the Tribunal's rulings shall be ordered by the President of the Tribunal." In light of the above, Article 80(4), first sentence which is subject to the challenge hereby, introduced a legal mechanism (not envisaged by the Constitution) instructing the President of the Tribunal to submit requests to the Prime Minister for the publication of judgements and rulings which, after all, are not under the obligation of being positively assessed by that particular organ. Thus not only is

Article 190(2) of the Constitution infringed, but so is Article 190(1) as such a legal mechanism would undermine the final nature of the Constitutional Tribunal's rulings. As the requests by the President of the Tribunal for the publication of a judgement or decision could stay with no response indefinitely, it would in fact result in contradicting the merits of the judgements passed by the constitutional court.

The efficiency in the work of public institutions is an obligation which derives from the Preamble to the Constitution. Furthermore, in the case of the Constitutional Court, the directive determines that the rulings of the Constitutional Court be promulgated without delay. Such conclusion is *supported* expressis verbis by Article 190(2) of the Constitution which imposes the duty to publish the rulings of the Tribunal in the official journal without delay. The mechanism of filing requests, in whose nature the possibility of delay on the part of the executive power, i.e. the Prime Minister, is immanently inscribed, is thus non-compliant with the principle of the efficient functioning of public institutions which derives from the Preamble to the Constitution. It should be added that the very deadline for the President of the Tribunal to make a request results in Article 80(4), first sentence of the law being unconstitutional.

Furthermore, the provision of Article 80(4), first sentence of the Constitutional Tribunal Act is non-compliant with Article 10 of the Constitution, as the latter assumes a balance among the three powers. The provision of the Act under challenge, however, introduces a peculiar type of the Constitutional Tribunal's dependence on one of the segments of the executive power, which is constitutionally inadmissible. The countersignature of the Prime Minister vis-à-vis the final rulings of the Constitutional Tribunal is thus irreconcilable with Article 10 of the Constitution.

VIII

It should be underlined that the Commissioner for Human Rights has questioned the constitutionality of a number of provisions contained in Chapter 4 of the Act entitled "Transitional, interim, adapting an final provisions". The above fact should be stressed as the aim of the said provisions is to facilitate the new regulation being entered into force, as well as to create appropriate conditions for its application in the changing circumstances, and to provide protection

for the accompanying transformation of the law. However, a great number of provisions contained in Chapter 4 are highly constitutionally doubtful, and their careful analysis results in the conclusion that despite the justification declared in the draft law, they can only hinder the functioning of the Tribunal, slower the pace of considering cases or even paralyse, to an effect, the constitutional court. Furthermore, some of the provisions which impose specific time frames for considering cases are also highly doubtful as to the feasibility of their execution. As a result, it may all lead to unexpected legal results which would place the Tribunal – thus also the individuals – in a situation of legal uncertainty which is unacceptable according to the Constitution.

IX

Pursuant to Article 83(1) of the Constitutional Tribunal Act, "In the cases pending prior to the entry into force of the present Act, the provisions of the present Act shall apply". This intertemporal provision means that, as of the coming into force of the new act, it is necessarily applicable to all the cases pending before the Tribunal which had been opened before the Constitutional Tribunal Act came into force and which have not yet been closed. It should be stressed that the solution adopted refers to all the cases before the Tribunal, regardless of whether they had been lodged by means of a constitutional complaint, a legal question posed by a court, or a challenge by one of the entities specified in Article 191(1)(1) through (5) of the Constitution of the Republic of Poland.

As already been mentioned, a directive and a duty of the effective functioning of public institutions in Poland derives from the Preamble to the Constitution. As it has been underlined by the Constitutional Tribunal in its judgement of 3 December 2015, file no K 34/15, "in the context of the Tribunal's position in the system of the state and due to its specific competences, it is most highly justified for the proceedings before the Tribunal to be effective and to arrive at – in a reasonable time – the final ruling, in particular in cases of utmost importance to the functioning of the organs of the state or the enjoyment of freedoms and rights guaranteed by the Constitution. The above stems from the principles of the effective functioning of public institutions deriving from the introduction to the Constitution". Considering the context, it is important to note that the duty provided for in Article 83(1) to apply the new act to all cases pending before the Tribunal, changes the rule of proceedings, in that it shall profoundly delay them and procrastinate the time of considering cases before the constitutional court. Furthermore, other connected legal solutions should be taken into consideration, which add to the delay or can even put the work of the Tribunal

on halt (Article 61(6), Article 68(3) through (5), or Article 84 of the act). For reasons of the above, it should be stated that Article 83(1) of the Constitutional Tribunal Act is non-compliant with principle of the effective functioning of public institutions deriving from the preamble to the Constitution. It should also be stressed that the legal solution contained in Article 83(1) leads to serious doubts – for reasons presented above – as to their compliance with the rules of a democratic state of law thus violating Article 2 of the Constitution.

It should further be added that in cases in which courts have addressed the Constitutional Tribunal with legal questions, the regulation of Article 83(1) of the Act violates the requirement to consider a case without unjustified delay as provided for in Article 45(1) of the Constitution. The delay thus caused shall entail a procrastination of proceedings before the court which has addressed the Tribunal with its constitutional doubts, and, therefore, cannot be considered justified in light of Article 45(1) of the Constitution.

It should be highlighted that a similar intertemporal regulation which was contained in Article 2 of the Act of 22 December 2015 on the amendment to the Constitutional Tribunal Act (Journal of Laws item 2217) was deemed unconstitutional by the Tribunal in its judgement of 9 March 2016, file no K 47/15, as violating the constitutional standards mentioned above.

X

Article 83(2) of the Act stipulates that "The Tribunal is obliged to resolve the cases specified in paragraph 1 within a year upon the entering into force of the Act. The term of one year does not apply, however, to the cases specified in Article 84". Therefore, the above provision refers to all cases pending before the Tribunal except for those specified in Article 84. The provision of Article 83(2) of the Act does not cover the cases specified in Article 191(1)(1) through (5) of the Constitution. Therefore, Article 83(2) of the Act applies to cases launched in response to the legal questions posed by courts, as well as the result of constitutional challenges.

It could appear that the provision of the Act does fulfil the directive resulting from the Constitution's Preamble, i.e. the duty of the effective functioning of public institutions. A similar directive derives from Article 45(1) of the Constitution, which guarantees the right to court in a

reasonable time. The standard is also applicable in reference to the work of the Constitutional Tribunal in the context of legal questions posed by courts. It should be noted, however, that only in one case do the provisions of the Constitution determine the date in which the Tribunal is to issue its ruling in a given case. Article 224(2) of the Constitution provides that in case the President of the Republic of Poland addresses the Tribunal requesting the examination of the constitutionality of the budget act or the interim budget act, the Tribunal passes the judgement in the case no later than within a month upon the application has been lodged.

However, the judgement of the Constitutional Tribunal of 9 March 2016, file no K 47/15, reads that "the task of the legislator is to create optimum conditions, and not to intervene in the process of adjudication by determining the moment in which the Tribunal can deal with a given case … Only exceptionally and in justified cases can the legislator determine the maximum period for considering the case by the Tribunal and, in doing so, cannot intervene in the order nor the pace with which the Tribunal undertakes different activities when considering the case. The independence of the Tribunal requires that it is guaranteed freedom of adjudication by excluding the possible influence of other organs not only on the judgements, but also on the procedure in which they are passed". Such intervention of the legislator, which goes beyond the limits determined by the Tribunal in the aforementioned judgement, is in violation of Article 173 in reference to Article 10 of the Constitution.

The Commissioner for Human Rights also wishes to draw attention to the connection between the editorial units of the two paragraphs in Article 83 of the act. In light of this connection, the obligation of the Tribunal which stems from Article 83(2) of the Act to complete all the proceedings falling under the instruction within one year upon the new Act on the Tribunal coming into force, and which would have to be conducted in line with the provisions of the new act, is not compliant with the principle of correct legislation provided for in Article 2 of the Constitution. As it has been rightly observed in the opinion of the National Council of Legal Advisers (p. 12) of 6 June 2016 in reference to the draft bill on the Constitutional Tribunal (publication no 558), "such obligation would make sense only and exclusively when the envisaged … period of one year would really be of an interim nature, and was needed to finalise the proceedings pending pursuant to the regulation thus far in place".

In summary, the regulation contained in Article 83(2) of the Act should be deemed dysfunctional and arbitrary and, furthermore, inadmissible in light of the principles of the Tribunal's

independence and its autonomy from other authorities. Thus the provisions are non-compliant with Articles 2 and 173 in reference to Articles 10 and 45(1) of the Constitution, since they make it impossible for the constitutional organ, that being the Constitutional Tribunal, to function in a diligent and effective manner. Furthermore, by intervening in the Tribunal's independence and autonomy from other powers, the aforementioned provisions violate the rule of law.

XI

The intertemporal provisions contained in Article 84 of the Constitutional Tribunal Act create a legal mechanism which has thus far been unknown to Polish constitutional judiciary, and which evokes extremely grave constitutional concerns. Article 84(1) of the Act stipulates that "in case of an application lodged by entities specified in Article 191(1)(1) through (5) of the Constitution, which has not be resolved by the date of the act's entering into force, the Tribunal shall, within 14 days as of the entering into force of the present act, suspend the proceedings for 6 months and call for the application to be completed according to the requirements specified in Article 33(2) through (5)". Therefore, the regulation also applies to the application lodged by the Ombudsman, as well as other entitled bodies: the President, Speaker of the Sejm, Speaker of the Senate, Prime Minister, 50 MP's, 30 Senators, the First President of the Supreme Court, the President of the Supreme Administrative Court, Prosecutor General, President of the Supreme Chamber of Audit, The National Judicial Council, local and regional authorities, the national organs of trade unions, national authorities of employer organisations and professional organisations, as well as churches and other religious associations. In Article 84(2), it is stipulated that "should the application specified in paragraph 1 be completed in line with the requirements specified in Article 33(2) through (5) of the Act after the expiry of the term specified in paragraph 1, the Tribunal decides on reopening of the suspended proceedings. Otherwise, the proceedings shall be discontinued". The application of the said provision shall lead to a situation in which, with respect to the cases pending before the Constitutional Tribunal and launched in consequence of the abstract applications lodged by the entities specified in Article 191(1)(1) through (5) of the Constitution, the proceedings will be suspended for the fixed period of 6 months, while the applicant will be called upon by the Tribunal to complete their applications.

The Commissioner for Human Rights is of the opinion that the provision results in the

suspension of proceedings in all the cases launched by an application, many of which are of paramount importance to the citizens. The suspension of proceedings would include all the cases initiated by an application, regardless of whether there is a need to complete the application or not. It should also be noted that in the justification (grounds) to the draft bill, no references have been made as to the reason for such a solution. It must be stressed here that, according to the estimates of the Ombudsman, there are some eighty cases pending before the Tribunal with the file number including the letter "K", i.e. launched as a result of the abstract application requesting the hierarchical examination of norms to be under the aforementioned regulation of Article 84 of the act. It must also be underlined that the applications lodged pursuant to Article 191(1)(1) through (5) of the Constitution are prepared by eligible entities, hence the provision of the Constitutional Tribunal Act obliging these entities to formally complete their applications is not only petty, but also superficial, as it essentially serves the goal of procrastinating proceedings before the Tribunal. As such, the aforementioned provision is in violation of the right to court in reasonable time which is guaranteed by Article 45(1) of the Constitution. In the opinion of the Ombudsman, the aforementioned provision also violates the principle derived from the Preamble to the Constitution on the effective functioning of public institutions. As the Constitutional Tribunal stated in its judgement of 3 December 2015, file no K 34/15, "in the context of the Tribunal's position in the system of the state and due to its specific competences, it is most highly justified for the proceedings before the Tribunal to be effective and to arrive at – in a reasonable time – the final ruling, in particular in cases of utmost importance to the functioning of the organs of the state or the enjoyment of freedoms and rights guaranteed by the Constitution. The above stems from the principles of the effective functioning of public institutions deriving from the introduction to the Constitution." No doubt, Article 84 not only does not contribute to the execution of the objectives indicated in the constitutionally legitimate aims indicated in the jurisprudence of the Tribunal, but indeed hinders their realisation and, in extreme cases even makes them impossible to achieve.

The critical assessment of the constitutionality of Article 84 of the Act is further intensified by the dysfunctional character of the solution contained therein, in the context of Article 83(2) of the act. As the National Council of Legal Advisors rightly points out in its opinion (pp. 12-13) of 6 June 2016 in reference to the draft bill on the Constitutional Tribunal (publication no 558), "if indeed the Tribunal is to complete all the pending proceedings within a year, then the introduction of the obligation of suspending proceedings for the period of 6 months practically reduces this time to only

half a year". It is, therefore, legitimate to agree with the conclusion, that such a solution can lead to the blocking of the Constitutional Tribunal's work once the suspended proceedings are reopened. It may happen due to a huge number of cases which would have to be considered in a very limited time, i.e. half a year. Furthermore, taking into consideration the possibility of the judges resorting to the institution of objection specified in Article 68(5) through (7), allowing for a sitting in full panel to be twice delayed for the total period of 6 months, it may turn out that the period of one year is not sufficient to consider certain cases at all. The above assessment is not changed by the fact that, pursuant to Article 83(2), first sentence of the act, the term of one year does not relate to cases specified in Article 84. The entire set of the normative solutions of the Act is constructed in such a way, however, that any blockages or delays in considering one type of cases have an automatic negative impact on the possibility of the Tribunal considering cases of another type.

The exceptionally long time for the formal completion of an application, as adopted in the challenged draft act, should also be underlined. Whilst in the case of the judiciary the standard time for filling in any formal gaps is 7 days upon delivery of the subpoena, here the period provided for in Article 84(1) is six months, which is exceptionally long. Even if it was assumed that there were constitutional merits on which the addressees of the new legal solutions could adapt to the new requirements, it should be remembered that in this case the addressees are professional entities, for whom a period of several days at most would be sufficient. It is for also this reason that it can be assumed that the period of 6 months of suspension of proceedings, as stipulated by the legislator, is solely aimed at delaying the work of the Constitutional Tribunal. Such provision should, therefore, be deemed as an inadmissible infringement by the legislative power of the separateness and independence of the Tribunal, and thus a violation of Articles 10 and 173 of the Constitution.

In addition, it should be noted that remedying the formal shortcomings in the application does not lead to the automatic reopening of proceedings, as in order for this to happen - in line with Article 84(2) of the Act - a separate decision of the Tribunal is needed. Such a mechanism presents the applicants with a situation of legal uncertainty, particularly that the Act does not determine the term by which such a decision it to be issued. The above evokes very serious concerns as to the compliance of Article 84 with Article 2 of the Constitution.

As it has been stressed by the Constitutional Tribunal in its judgement from 9 March 2015, file no K 47/15, "the legislator cannot reduce the level of the diligence and effectiveness that it has presented thus far as an existing public institution". Also for this reason, therefore, Article 84 of the

Act should be deemed non-compliant with Articles 2 and 45(1) of the Constitution in reference to the directive on the effective functioning of public institutions deriving from the Constitution's Preamble.

XII

Article 89 of the Act stipulates that "within a period of 30 days upon the coming into force of the act, the rulings of the Tribunal passed before 20 July 2016 and in violation of the Act of 15 June 2015 on the Constitutional Tribunal are published, with the exception of rulings pertaining to normative acts which have lost their binding power". The adopted legal solution evokes serious constitutional doubts.

As mentioned in the previous part of this application, the rulings of the Tribunal, pursuant to Article 190(2) of the Constitution of the Republic of Poland, are subject to immediate promulgation in the official journal in which the normative act had been promulgated. For this very reason, the term contained in Article 89 of the act, which refers to the as yet unpublished rulings of the Tribunal, and in a way which modifies the time determined by the constitutional provision, should be deemed in violence of Article 190(2), first sentence of the Constitution of the Republic of Poland. The requirement of the immediate promulgation refers not only to each and single one of Tribunal's rulings, and the Constitution does not allow the introduction of a mechanism of publishing the Tribunal's judgements in bulk. Such was the view represented in the jurisprudence of the Constitutional Tribunal, expressed in its judgement of 9 December 2015, file no K 35/15, in which the Tribunal stated that the immediate publication of a Tribunal's judgement in the appropriate official journal requires an immediate action, without delay in the given circumstances. In terms of constitutionality, it is particularly the final part of Article 89 of the Act that should be met with utmost criticism, as it envisages an exception to the rule of publishing the Tribunal's judgement in reference to those passed before 20 July 2016, formulated in the first part of the said provision. The exception stipulates that the obligation of promulgation does not apply to the rulings referring to the normative acts which have lost their binding power. It should be recalled here that the Act adopted by the Polish Sejm on 7 July 2016 and passed on to the Polish Senate had a different wording of the exception. In the Act passed on to the Senate, the proposed provision was: "The rulings of the Tribunal which have been passed in violation of the provision of the Act of 25 June 2015 on the Constitutional Tribunal in the period from 10 March 2016 to 30 June 2016 are subject to

promulgation in the appropriate official journal within 30 days of the Act coming into force". The provision is direct and clear in expressing the will of the legislator to exempt the judgement of the Constitutional Tribunal of 9 March 2016, file no K 47/15, from publication in the official journal. However, in a letter which arrived during the legislative process and which was from the President of the Board of the "Ordo Iuris" Institute for Legal Culture, dated 12 July 2015, it was claimed that "a criterion for publication thus formulated may possibly be accused of arbitrariness in determining the time framework for the passing of the Constitutional Tribunal's rulings subject to publication" (page one of the letter). The opinion was generally taken into consideration by the Senate which proposed an amendment adopted by the Sejm in the final and present wording of Article 89. It should be stressed, however, that the amendment is purely semantic and does not change the basic meaning of the regulation. Article 89 of the Act does stipulate that the obligation of promulgation does not apply to the rulings pertaining to normative acts which have lost their binding power. There is no coincidence in the fact that Article 92 of the act, providing for the Act coming into force within 14 days of its publication, leads to the loss of the binding power of the normative act, i.e. the Act of 25 June 2015 on the Constitutional Tribunal, to which the judgement of the Tribunal of 9 March 2016, file no K 47/15, pertains. It should, therefore, be concluded that Article 89, challenged hereby, is in violation of Article 190(2) 2, first sentence in reference to Article 190(1) of the Constitution of the Republic of Poland due to the exclusion of the said judgement from the obligation of official publication and aiming, in substance and in consequence, for the said judgement to lose its final and commonly binding nature.

Finally, it must be noted that the wording contained in Article 89: "The rulings of the Tribunal which have been passed in violation of the provision of the Constitutional Tribunal Act of 25 June 2015" should also be seen as in violence of the principle of the final nature of the judgements of the Constitutional Tribunal contained in Article 190(1) 1 of the Constitution of the Republic of Poland. Neither this nor any other constitutional provision gives the power to any organ of the authority, including the legislative power, to question or assess the correctness or legality in which the Tribunal applies the provisions of the Act in the process of adjudication. Such wording of Article 89 of the Act thus also infringes Article 7 of the Constitution, which stipulates that the organ of public authority acts on the basis and within the limits of law. It should be added that the legislative solution adopted in Article 89 of the Act is also gravely doubtful from the point of view of its compliance with the principle of the Constitutional Tribunal's independence, provided for in Article 193 of the

Constitution, in reference to the principle of checks and balances (Article 10 of the Constitution).

XIII

Article 90 of the Act stipulates that "the judges of the Tribunal who have been sworn in by the President of Poland and have not, until the date of the present Act coming into force, assumed their duties as a judge, shall, on the date of the present Act coming into force, be included by the President of the Tribunal in the adjudicating panels and assigned cases". The provision refers to three out of the five judges of the Constitutional Tribunal selected by the present Sejm on 2 December 2015.

In the opinion of the Commissioner for Human Rights, the content of Article 90 evokes serious doubts as to its constitutionality. It should be recalled that in its judgement of 3 December 2015, file no K 34/15, the Tribunal decided that the provisions regulating the election of the three judges to replace those whose tenure had expired on 6 November 2015 were in line with the Constitution. What the Tribunal deemed unconstitutional, however, was Article 137 of the Constitutional Tribunal Act of 25 June 2015, within the scope that allowed the previous Sejm (2011-2015) to elect two judges of the Tribunal to replace those whose tenure expired on the 2 and 8 December 2015 respectively.

In the grounds stated to the judgement, file no K 34/15, the Tribunal decided that Article 194(1) of the Constitution of the Republic of Poland imposes the duty to elect judges of the Tribunal by the Sejm of the tenure during which the position of the Tribunal's judge becomes vacant. The Tribunal stated that the election of a Tribunal's judge to the position which would be vacated already during the next tenure of the Sejm cannot take place in advance (ahead of time). The consequence of the judgement of the Tribunal is that in the case of two judges of the Tribunal, whose term in office expired on 2 and 8 December 2015, the legal basis for the election of their successors was found unconstitutional.

In reference to the above, the President of the Constitutional Tribunal decided to include two of the judges elected by the present Sejm on 2 December 2015 into the group eligible to adjudicate. Upon the submission of the present application by the Ombudsman, the Constitutional Tribunal is composed of 12 adjudicating judges, as the President of the Republic of Poland had not sworn in three judges who had been constitutionally elected on 8 October 2015 by the Sejm of the

previous term.

In view of the above, it should be concluded that Article 90 of the Act, pursuant to which "the judges of the Tribunal who have been sworn in by the President of Poland and have not, until the date of the present Act coming into force, assumed their duties of a judge, shall, on the date of the present Act coming into force, be included by the President of the Tribunal in the adjudicating panels and assigned cases" is non-compliant with Article 194(1), first sentence of the Constitution of the Republic of Poland, which stipulates that "The Constitutional Tribunal shall be composed of 15 judges chosen individually by the Sejm for a term of office of 9 years from amongst persons distinguished by their knowledge of the law." The above analysis leaves no room for doubt that Article 90 of the Act is in violation of the position of the Tribunal expressed in the quoted judgment, file no K 34/15, in the scope in which it has confirmed the validity of the election of the three judges elected by the previous Sejm on 8 October 2015 to replace the judges of the Tribunal whose tenure expired on 6 November 2015. It should thus be concluded that Article 90, in the scope pertaining to the replacement of the three judges elected by the previous Sejm on 8 October 2015 by judges elected on 2 December 2015 by the present Sejm, is non-compliant with the constitutional norm expressed in Article 194(1), first sentence of the Constitution of the Republic of Poland, pursuant to which the Constitutional Court is composed of 15 judges, as these judges have been elected to positions which had not been vacant in the Tribunal.

Article 90 of the Constitutional Tribunal Act also leads to the violation of Article 194(1), first sentence of the Constitution as a result of an excessive intervention of the executive power into the competences of the legislative power by assuming that the organ of the executive power (the President of the Republic) has a decisive role in the process of filling in the posts of judges of the Tribunal. However, Article 194(1), first sentence of the Constitution unequivocally stipulates that the role is assigned to the Sejm.

By accepting that the judges who have been sworn in by the President of the Republic of Poland can be allowed to adjudicate in the Tribunal, Article 90 of the Act further allows for an excessive intervention of the executive branch in the judiciary. It should also be added that Article 6(7) of the Act stipulates that "a judge, upon being sworn in, presents him/herself to the Tribunal so as to assume duties, and the President of the Tribunal assigns him/her cases and organises the conditions necessary for him/her to perform the duties of a judge". Thus the Act imposes obligations on the President of the Tribunal resulting in the President of the Republic of Poland encroaching

onto not just the entitlements of the Sejm as to the election of constitutional judges, but also into the independence of the Tribunal itself. It should, therefore, be concluded, that Article 90 of the Act is also not compliant with Article 173 of the Constitution, which, in reference to the principles of check and balances, reads that "The courts and tribunals shall constitute a separate power and shall be independent of other branches of power."

It should also be recalled that in the grounds to the judgement cited above, file no akt K 34/15, the Tribunal has stated that Article 21(1) of the Constitutional Tribunal Act of 25 June 2015 on the swearing in of the newly elected judges of the Tribunal before the President of the Republic of Poland imposes on the head of the state the duty of immediately taking such oath. The President of the Republic of Poland is not an organ electing Tribunal judges. The Constitution does not, in any way, provide for his/her participation in the process of filling in the posts of Tribunal judges. The provision of the Act cannot, therefore, be interpreted as assigning these creative competences to the head of the state. The President of the Republic of Poland may not, by his actions, impede the assumption of duties by a Tribunal judge who has been previously elected by the Sejm pursuant to Article 194(1) of the Constitution of the Republic of Poland. The Constitution does not envisage the possibility of refusal to swear in a newly elected Tribunal judge, and any possible doubts the head of state may have as to the constitutionality of the legal provisions pursuant to which the election of Tribunal judges has taken place, should be examined exclusively by the Constitutional Tribunal. The swearing in of newly elected judges is the legal obligation of the President of the Republic. Such taking of oath allows for the assumption of official duties by a Tribunal judge elected by the Sejm, and serves to preserve the continuity of the Tribunal's execution of its competences.

XIV

Pursuant to its Article 92 , the Act comes into force 14 days upon its promulgation.

The Constitutional Tribunal has many times presented the position that the rule of law in a state is exercised not only in the prohibition of retrospective application of norms detrimental to the citizen, but also in the order to maintain a *vacation legis* when enforcing these norms. The requirements are mutually complementary, and constitute a manifestation of the certainty of law and the principle of citizens' trust in the state and the law it produces.

In the jurisprudence of the Constitutional Court, the duty to enforce normative acts upon the

expiry of the appropriate *vacation legis* has been stressed on more than one occasion, including the period preceding the incorporation of the Constitution of the Republic of Poland in 1997 (e.g. the ruling of 2 March 1993, file no K 9/92; the ruling of 1 June 1993 r., file no P 2/92). The summed up body of rulings of the Constitutional Tribunal has found its normative expression in the Act of 20 July 2000 on the promulgation of normative acts and other legal Act (Journal of Laws of 2015, item 1484 with amendments). Article 4(1) of the said Act stipulates that the normative acts which contain commonly binding provisions and are published in an official journal, come into force fourteen days upon the day of their promulgation unless the given normative Act stipulates a longer term. However, in justified cases, normative acts may come into force in a term shorter than fourteen days if a significant interest of the state is at stake requiring its immediate entering into force, and the rules of the democratic state of law do not stand in the way. In such a case, the day of the given Act coming into force may be the day of its publication in the official journal (Article 4(2) of the Act on the promulgation of normative acts and other legal acts).

Therefore, the constitutional obligation arising from Article 2 of the Constitution of the Republic of Poland is not only to establish *vacatio legis* but also to give it an appropriate time framework. The Constitutional Tribunal has indicated (and it has been considered and expressed in Article 4(1) of the Act on the promulgation of normative acts and other legal acts) that this time framework should at least be fourteen days. By guaranteeing the minimum fourteen day *vacatio legis* frequently means the avoidance of an accusation that a norm has entered into force before it has actually reached its addressees. However, the adequacy of the 14-day period before a normative act comes into force is subject to assessment against each specific regulation. After all, the "adequacy" of *vacatio legis* can also mean the need for prolongation beyond the 14 days. The Constitutional Tribunal has indicated (ruling of 18 October 1994, file no K 2/94) that the examination of the constitutionality of the new provisions being put into force must always be based on the material determination what *vacatio legis* is "adequate" to their content and nature.

In Article 92 of the Constitutional Tribunal Act, the legislator has adopted a 14-day *vacatio legis*. In the judgement of the Constitutional Tribunal of 7 February 2001, file no akt K 27/00, "the adoption of new norms by the legislator cannot surprise their addressees who should have the time to adapt of the changed regulation and make a decision as to their further proceedings in a deliberate fashion". The new Constitutional Tribunal Act is an act of a systemic nature which regulates the mode of the functioning of a central organ of a constitutional state, i.e. the

constitutional court, whose duties include adjudication on the constitutionality of the law. For that reason, and taking into account the above, it should be concluded that in light of the constitutional requirements and the jurisprudence of the Constitutional Tribunal, the period of 14 days of *vacatio legis* with respect to the Constitutional Tribunal Act is inadequate, i.e. too short.

It should particularly be recalled that in reference to the regulation pertaining to constitutional judiciary, the Tribunal has underlined that the adequacy of *vacatio legis should be assessed with respect to the legal situation of the addressees of the new legislative solutions (judgement of the Constitutional Tribunal of 9 March* 2016, file no K 47/15). In reference to the acts regulating the organisation of the Constitutional Tribunal and the mode of proceedings before it, the Tribunal has clearly stated in the aforementioned judgment that – when determining the *vacatio legis* – it is particularly "necessary to ensure adequate time to appropriately adapt the organisation of the Tribunal, and the entities being parties to the proceedings before the Tribunal, to the new regulation and to resolve potential objections as to the constitutionality of the changes introduced (especially when they were raised already at the time of the legislative process and were not addressed then, and when the Act itself was subject to preventive control)".

In addition, it should be noted that the legislator itself underlines the significance and importance of the Constitutional Tribunal Act by making an exception in the Act challenged herein to the "first come, first served" principle pertaining the order in which the Tribunal is to consider cases. It does so in reference to the applications lodged which challenge the constitutionality of the Constitutional Tribunal Act (Article 38(4)(3) of the act). Therefore, the legislator has fallen into an easily detectable contradiction which results in making the unconstitutionality of Article 92 of the Act even more apparent.

It should be underlined that the Venice Commission, in its opinion from 11 March 2016, indicated that the Constitutional Tribunal should have, prior of its entering into force, the possibility of examining a common Act of law which regulates its functioning. The afore conclusion derives from the principle of the supremacy of the Constitution (Article 8(1) of the Constitution of the Republic of Poland). In any other case, it would be feasible to eliminate the system of control of the state's constitutionality by means of a simple Act of law.

For reasons of the above, it should be concluded that Article 92 of the Act is in violation of the principles of proper legislation as inscribed in Article 2 of the Constitution.

Therefore, taking into account the need for the protection of rights and freedoms, I hereby

apply as set out in the introductory part hereof.