Strasbourg, 22 February 2016

CDL-REF(2016)015
Engl. Only

Opinion No. 833 / 2015

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

POSITION OF THE GOVERNMENT OF POLAND ON MATTERS RELATED TO THE AMENDMENTS TO THE LAW ON THE CONSTITUTIONAL COURT

AND

JUDGMENTS OF THE CONSTITUTIONAL TRIBUNAL OF POLAND OF 3 AND 9 DECEMBER 2015 (CASES NO. 34/15 AND 35/15)

I. DESCRIPTION OF CONSTITUTIONAL CUSTOM REGARDING APPOINTMENT OF JUDGES

There are a number of unwritten system-related norms or customs that regulate the exercise by national authorities of the powers granted to them under the Constitution in addition to the relevant legislative provisions.

In the Polish constitutional practice developed after the entry into force of the Constitution of 2 April 1997, the following constitutional customs are applicable to the election of Constitutional Court judges:

I.1 In elections of Constitutional Court judges, as a rule, candidates put forward by parties holding a parliamentary majority are elected.

The only exception was when the Sejm elected a judge recommended by the opposition in 1995.

This method serves to ensure pluralism of the Court, guaranteeing that, given the 9-year terms held by judges and the different periods in which their terms expire, various political forces that hold a majority in the Sejm have a say in filling positions on the Court after parliamentary elections. In the Polish political system the only time that one political force remained in power for two full parliamentary terms (8 years, which is less than the term of a Constitutional Court judge) was in 2007-2015, when the Sejm's majority was held by the PO-PSL coalition.

I.2 Leaving the election of Constitutional Court judges to the Sejm elected in general elections held prior to the commencement of the judges' terms.

The possibility of electing new Constitutional Court judges during a term of the Sejm that was coming to an end, but after parliamentary elections (resulting in the voters electing a different political force to be in power than before) occurred in 1997 in connection with the entry into force of the Constitution of the Republic of Poland of 2 April 1997, which provided for a Constitutional Court composed of 15 members in place of the previous 12-member Court.

The 2nd Sejm which sat from 1993 until 1997, despite the fact that its term expired on 20 October, 1997,[1] while the Constitution of the Republic of Poland of 2 April, 1997 entered into force on 17 October, 1997, ultimately decided not to elect three members of the Constitutional Court, leaving the exercise of this right to the new Sejm representing the political force that was elected on 14 September, 1997.

Initially the party that held a majority in the Sejm of the 2nd term – SLD – planned to hold nominations, but decided not to in the wake of public criticism of this idea. It is worth noting that the then President of the Constitutional Court Andrzej Zoll expressed his opinion on the matter. In a book Państwo prawa jeszcze w budowie. Andrzej Zoll w rozmowie z Krzysztofem Sobczakiem (State ruled by law still under construction. Andrzej Zoll talks to Krzysztof Sobczak, published in Wolter Kluwer S.A., Warsaw 2013) he spoke negatively about the situation at the

[1] Unlike in the Constitution of 2 April 1997, the Constitutional Act of 17 October 1992 on Mutual Relations between the Legislative and Executive Branches of Government of the Republic of Poland and Local Government which set the date of the end of the term of the outgoing Sejm, provided that the Sejm ended its term "when deputies meet at the first sitting of the next Sejm," and not as the current Constitution says, the day preceding such a day.

time and shared his interlocutor's opinion that SLD had tried to shape the Court by political means. He pointed out that it was a "dramatic moment" when "the ruling group did everything in its power to bring about the election of three judges still before the elections. But the attempt had failed and they were elected after the elections."

Hence, this custom has developed as a result of a dispute, whose essence was a drive to ensure pluralism of the Constitutional Court's composition so as to guarantee a representation of judges appointed by different political forces.

I.3 The possibility that the President of the Republic of Poland refrains from taking an oath of office from a Constitutional Court judge.

Refraining by the President of the Republic of Poland from taking an oath of office from a person elected by the Sejm to become a member of the Constitutional Court is not without precedent.

As regards Lidia Bagińska, elected on 8 December, 2006, as a member of the Constitutional Court by a majority of the Sejm's deputies, the President of the Republic of Poland refrained from taking her oath of office on account of doubts about the trustworthiness of her professional career. Consideration was given to the idea of, among others, resumption of voting on the candidacy of Lidia Bagińska by the Sejm on account of the possibility that the deputies were misled about the candidate's ethical qualifications. Ultimately the vote was not taken. The President took the oath of office from Lidia Bagińska on 6 March, 2006, while on 12 March, 2016, she resigned from the position of a Constitutional Court judge.

The above facts clearly show that doubts arising about the ability to fulfil premises that condition the appointment to the office of a Constitutional Court judge by a person elected by the Sejm can customarily become grounds for the President refraining from taking the oath of office until doubts are cleared or a decision is taken that notwithstanding such doubts, the President can take the oath of office from such candidate. There are no grounds to assume that a similar procedure could not be applied in the event that doubts arise as to the procedure chosen to elect Constitutional Court judges.

II. POSITIONS AND OPINIONS PRESENTED BY THE EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW (THE SO-CALLED VENICE COMMISSION)

II.1.

"The elective system (of Constitutional Court judges) appears to be aimed at ensuring a more democratic representation. However, this system is reliant on a political agreement, which may endanger the stability of the institution if the system does not provide safeguards in case of a vacant position."[2]

In assessing the above argument in light of the issue under discussion, to ensure a "democratic representation" of the Constitutional Court, there is a point in appointing Constitutional Court judges in place of those whose term expired after parliamentary elections (which strongly suggest that they will bring about a change of the political majority in the Sejm) to the 8th Sejm by none other than the 8th Sejm. This point is reinforced by the fact that the same political

[2] Opinion of the Venice Commission CDL-STD(1997)20 The composition of constitutional courts – Science and Technique of Democracy, no. 20 (1997), p. 7

option that was in power in 2007-2015 had earlier elected 9 out of the 15 Constitutional Court judges.

II.2

"[…]a system in which all judges of the Court are elected by parliament on the proposal of the President "does not secure a balanced composition of the Court". In particular, "if the President is coming from one of the majority parties, it is therefore likely that all judges of the Court will be favourable to the majority. An election of all judges of the Court by parliament would at least require a qualified majority."[3]

There is an analogy between the above-mentioned concerns and the current situation with regard to the Polish Constitutional Court. The former coalition despite having filled 9 out of the 15 judicial positions in the course of two terms of the Sejm wished to fill additional 5 positions even though the term of office of the judges expired after the date of the parliamentary elections to the Sejm.

II.3.

"The changing of the composition of a Constitutional Court and the procedure for appointing judges to the Constitutional Court are among the most important and sensitive questions of constitutional adjudication and for the preservation of a credible system of the rule of constitutional law. It is necessary to ensure both the independence of the judges of the Constitutional Court and to involve different state organs and political forces into the appointment process so that the judges are seen as being more than the instrument of one or the other political force. This is the reason why, for example, the German Law on the Constitutional Court (the Bundesverfassungsgerichtsgesetz) provides for a procedure of electing the judges by a two-third majority in Parliament. This requirement is designed to ensure the agreement of the opposition party to any candidate for the position of a judge at the Constitutional Court. The German experience with this rule is very satisfactory. Much of the general respect which the German Constitutional Court enjoys is due to the broad-based appointment procedure for judges". [4]

Considering the existing rules for appointing judges of the Constitutional Court provided for in the domestic legal order, it should be noted that the achievement of a similar level of positive assessment of the work of a constitutional court is possible on account of a guarantee of its pluralistic composition coming from the election of its individual members by different political parties in the course of the Sejm's successive terms. The drive to dominate the composition of the Constitutional Court by one political party contradicts the opinion about building respect for this body by negating the wide spectrum of judges' views being the result of their election by different political parties.

II.4.

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[3] Opinion of the Venice Commission CDL-AD(2011)010 Opinion on the draft amendments to the Constitution of Montenegro, as well as on the draft amendments to the law on Courts, the law on State's prosecutor office and the law on the Judicial Council of Montenegro, paragraph 27.

[4] Opinion of the Venice Commission CDL-AD(2004)043 Opinion on the Proposal to Amend the Constitution of the Republic of Moldova (introduction of the individual complaint to the constitutional court), paragraphs 18-19.

"A ruling party should not be in a position to have all judges appointed to its liking. Hence, terms of office of constitutional judges should not coincide with parliamentary terms. One way of accomplishing this can be by long terms of office or office until the age of retirement. In the former case, reappointment would be possible either only once or indeed not at all."[5]

Irrespective of the way the terms of office of constitutional judges are developed in the Polish legal order, there is (also in light of the comments made earlier) a general directive, namely that the dominant political party should not have the possibility of appointing all the judges of the constitutional court. Hence in light of the above principle, it is right to recognize the critical assessment of seeking to appoint additional five judges (in addition to the 9 judges appointed earlier) by a political party whose mandate to exercise power (determined by the date of parliamentary elections) expires before the end of the term of office of these judges of the Constitutional Court whose positions were up for election.

III. DOCTRINAL VIEWS OF APPOINTING CONSTITUTIONAL COURT JUSTICES

III.1.

The principle of the Sejm's monopoly in appointing constitutional judges contradicts the procedure for choosing common court judges that is entirely beyond parliamentary control. As far as the Constitutional Court is concerned, however, it is widely recognized that a close relationship between its decisions and a political process of exercising public authority, especially their impact on the legislative powers of the Parliament, calls for some kind of checks and balances by enabling Parliament to have a say on the court's composition. Parliamentary appointment conveys a semblance of democratic legitimacy for the Constitutional Court, as it can modify legislative decisions of the nation's representative body.

The essence of providing the Constitutional Court with that semblance of democratic legitimacy seems not only to involve officially allowing the Sejm to elect the Court judges, but also ensuring that such election should be made by the Nation's representatives to whom the voters have trusted a mandate to govern. Considering the factual circumstances of the issue at hand and the constitutional customs discussed at the beginning, it seems that the demand to provide the Constitutional Court with democratic legitimacy will be most fully met by letting its five members whose tenure starts after the parliamentary elections be chosen by the newly elected Sejm.

III.2.

It must be clearly said that, as the power to choose constitutional judges rests with a political body, the Sejm, and as the Court's tasks so much border on the sphere of politics, it would be an illusion to assume that the Sejm will not take politics into consideration in taking relevant personnel decisions. This in a way is built into the parliamentary manner of appointing justices to the Court, and it has been the standard practice since the inception of Poland's Constitutional Court. The rule of law should involve establishing safeguards to prevent a simple inclusion of Court appointment decisions in the partisan "spoils system." That is the logic behind long tenures of constitutional justices and high qualification criteria. From this point of view, Polish constitutional regulations could provide for at least three safeguards. First, some countries (Germany, Italy, Spain, Portugal, Hungary) have in place a requirement to appoint constitutional

[5] Opinion of the Venice Commission CDL-STD(1997)020 The composition of constitutional courts - Science and Technique of Democracy, no. 20 (1997), p.21.

judges by a qualified majority. Although even this system is not free of weaknesses (as it can give rise to a situation when a Parliament is unable to fill vacancies on a Constitutional Court, as was the case with Hungary in late 1990s), it does include parliamentary opposition in decision making and may prevent nominations that go beyond the standards of political decency. Second, following the example of some countries (e.g. Germany and Portugal), a constitutional requirement might be introduced to appoint partial replacements (e.g. a third) of the Court's composition from among judges of other courts, which would naturally limit political connotations behind such decisions. Third, especially in the light of Poland's experiences so far, a waiting period might be considered, which would rule out the possibility of electing serving MPs and senators to the Court.

Also this part of doctrinal views reveals a conservative assessment of solutions applied to date that govern the appointment of Constitutional Court judges; which further proposes that a rule should be introduced that Constitutional Court judges are elected by a qualified majority of votes in order to eliminate the "spoils system" mentality and ensure greater pluralism of this body, thus making it seem not so much apolitical as balanced in terms of the opinions it presents.

IV. WAYS OF GUARANTEEING PLURALISTIC COMPOSITION OF CONSTITUTIONAL COURTS IN OTHER COUNTRIES

IV.1.

Germany is a classic example of a country where political disputes at the outset of creating the system of constitutional control led to the adoption of legal guarantees for selecting judges. First, sections 6 and 7 of the Law on Federal Constitutional Court introduced the requirement of a two-thirds majority of parliamentarians' votes to elect a judge. In practice, this means that the majority in power and the opposition have to seek an agreement, which necessitates avoiding extreme candidates. Second, the stability of Germany's party system has led to an informal practice of "allotting" positions on the Federal Constitutional Court.

The Federal Constitutional Court is composed of two twin Senates with strictly defined competences. This is the result of a political dispute that accompanied the passing of the Law on Federal Constitutional Court of 1951. At the time, it was reckoned that one Senate would be dominated by judges leaning towards the Christian Democrats, while the other would have judges affiliated with the Social Democrats. Accordingly, in the early 1950s the Senates would be described as 'black' and 'red'. These divisions are now a thing of the past.

As regards the procedure of reaching judgements, the Senate may issue a decision if at least six (out of eight) judges are involved. In especially urgent matters, when one Senate cannot pass a judgement (e.g. because some judges have been excluded), the president may order such Senate's composition to be complemented (by drawing lots) with judges from the other Senate.

Should it become necessary to issue an urgent preliminary injunction and the Senate cannot reach a decision, such an injunction may be issued (unanimously) by three judges. Preliminary injunctions expire after one month.

When it comes to ending a constitutional judge's mandate, the Court may authorise the Federal President to retire a judge due to a lasting incapacity to serve, or dismiss a judge if he or she cannot continue in office owing to his or her personal integrity being compromised, a legally

binding sentence of deprivation of liberty exceeding six months, or a gross neglect of duties. The relevant decision is taken by the Court's plenum by a two-thirds majority of Court members. Furthermore, the Federal President pronounces a judge to be released from office upon such a judge's motion.

IV.2.

In France, the participation of Parliament – which is typical for appointing constitutional judges – has been replaced by decisions of the presidents of the houses of Parliament. This system rules out a situation where the Constitutional Council is based on the principle of party politics proportion, which is characteristic of most West European countries. Although these decisions are always political, changes to the political image of the presidency and Parliament have prevented the Constitutional Council from becoming dominated by one political party (at least for close to 20 years).

Decisions of France's Constitutional Council are taken by at least seven members (out of nine elected members, and a number – not defined by law – of members sitting on the Council by operation of law; the latter group consists of former presidents of the Republic who are nominated for life), unless this is prevented by force majeure, which has to be recorded in the proper form by way of protocol.

In a secret ballot, by an ordinary majority of all the members (including members who sit on the Council by operation of law) the Council decides whether its member has neglected his or her duties. If necessary, proceedings may be instituted into the Council's ex-officio decision to dismiss its member.

The Council ex-officio dismisses a member who conducts an activity, accepts a function or mandate that stems from elections and cannot be reconciled with Council membership, or a member who cannot exercise his or her political and civic rights. This also covers Council members who are prevented from fulfilling their functions by a chronic physical incapacity.

IV.3.

To guarantee a balanced composition of the Constitutional Court, Italy has adopted a system whereby candidates for judges are put forward by a mix of institutions: higher common and administrative courts (5), combined houses of Parliament (5), and the President (5). This makes it possible to strike a balance between 'technical' and 'political' judges.

IV.4.

To forestall politicization, judges in Portugal are elected by a two-thirds majority of votes. At the same time, pursuant to Article 279.2 of the Constitution, a provision that has been found unconstitutional may be confirmed by a two-thirds majority of deputies, with a quorum of at least half of those entitled to vote. Article 279 is subsumed under Part IV "Guaranteeing and Revision of the Constitution", and Title I "Review of Constitutionality" (it should be noted that such majority is envisioned for "organic laws").

In Portugal's constitutional court, plenary sessions and sittings of sections require the presence of a majority of members (of the whole Constitutional Court, which has 13 members, or a section, which has five members, respectively).

A judge may leave office before the end of term only due to death or lasting physical incapacity, resignation, accepting a position or performing activities that cannot be reconciled with the office of a constitutional judge, removal from office or compulsory retirement following disciplinary or criminal proceedings.

Resignations are submitted to the court president. The court pronounces on the existence of other reasons for ending a judge's mission.

IV.5.

What clearly emerges from the analysis of the above are mechanisms – arising either directly from normative acts, or from political custom and universal elections – that aim to guarantee the plurality of views among Constitutional Court judges, and preclude a total domination by people appointed by one political group, as recommended by the Venice Commission's opinions.

The lack of comparable mechanisms in the Polish legal regime has been repeatedly criticized, and led to a situation where the composition of the Constitutional Court is virtually monopolized by one political group.

V. ISSUE OF VIOLATING THE SO-CALLED LEGISLATIVE SILENCE

In his legal opinion to assess the amended Law on the Constitutional Court, Professor Bogusław Banaszak presented the principle of the so-called legislative silence that applies to parliamentary elections, developed by the case law of the Constitutional Court. In its decisions dated 3 November 2006, case no K 31/06 and 28 October 2009, KP 3/09, the Court pointed out that in the case of the election law a minimum minimorum should involve adopting material changes to election law at least six months before the next election, understood not only as an electoral act but a whole set of activities covered by the so-called electoral calendar. Any possible exceptions to thus defined dimension of not changing election law might only result from extraordinary circumstances of objective nature. According to the Court, a constitutional issue involves the legislator's violation of the term when election law is exempt from being amended with changes that qualify as "substantive changes" in the context of constitutional case law. The foregoing results from the case law of the Constitutional Court from after 2000 that addresses infringements connected with amending the election law just before the elections. The requirement to observe the exemption period from "substantive changes" to election law has been introduced recently, in conjunction with the Council of Europe's soft law, in order to prevent election law from last-minute amendments and to respect individual rights.

Professor Bogusław Banaszak goes on to note that the Constitutional Court's position on the matter is defined by a standard of a more general nature, one that does not apply solely to parliamentary elections but also to elections of supreme authorities, including Constitutional Court justices. This position should have been considered by Parliament in the process of adopting the Law on the Constitutional Court of 25 June 2015. Unfortunately, it failed to do so and, consequently, changes in the deadline for submitting candidates for Court justices could have influenced the course of the Sejm's vote and its results, since it was for October 2015 that the President called elections to Parliament, including the Sejm, i.e. a body that elects Constitutional Court justices by an absolute majority. Any shift in the proportion between parties and groupings representing the Sovereign would have entailed proposing different candidates or formation of some other majority and thus a different composition of the Constitutional Court.
The opinion concludes by stating that observing the so-called legislative silence and choosing five new Constitutional Court justices on 2 December 2015, the Sejm legitimately relied on its

then applicable rules, instead of on norms amended in the period immediately preceding the elections of Constitutional Court justices.

Furthermore, it must be noted that at the date of adopting the Law on the Constitutional Court (25 June 2015) there was no date set for elections to the Sejm and Senate: President's order on calling the elections was issued on 17 July 2015 and published in the Journal of Laws on 22 July 2015 (Dz. U. Item 1017). However, taking into account the fact that, pursuant to Article 98 paragraph 2 of the Polish Constitution, the President calls elections on a holiday that falls within 30 days before the lapse of 4 years from the start of the term of the Sejm and Senate and that the 7th Sejm started on 8 November 2011, elections to the Sejm and Senate could have been called for 11, 18 or 25 October or 1 November 2015. At the adoption date of the Constitutional Court Law, which provided for elections of five Constitutional Court justices by the 7th Sejm, it was already known that, irrespective of the parliamentary elections date, the end of tenure of the outgoing justices and start of tenure of the justices that would replace them would fall after the election date.

VI. ISSUE OF BREACH OF THE CUSTOM TO ELECT CC JUDGES BY THE SEJM CHOSEN IN ELECTIONS HELD BEFORE THE BEGINNING OF THE TERM OF OFFICE OF JUDGES

The Law on Constitutional Court of 25 June 2015, notwithstanding the election of judges pursuant to resolutions of the 7th Sejm on 8 October 2015, violated the principle referred to in point I.2 above, according to which the election of Constitutional Court judges should be left to the Sejm that was chosen in elections held prior to expiry date of the term of office of judges whose positions were up for election.

From this standpoint, a negative assessment should be made of the judgement of the Constitutional Court of 3 December, 2015, file no. K 34/15, which in the scope applicable to a review of the provision of the Constitutional Court Law of 25 June 2015 providing the grounds for electing judges (Art. 137) related to the period of the term of the 7th Sejm, which was determined by the President of the Republic of Poland's calling of the first sitting of the 8th Sejm, which could occur, pursuant to Article 109 paragraph 2 of the Constitution of the Republic of Poland, within 30 days from the date of parliamentary elections, i.e. from 25 October, 2015.

It should be noted that five judges were elected by the 7th Sejm on 8 October, 2015.

Considering that the term of the "first" three Constitutional Court judges (the constitutionality of whose election was not questioned by the Constitutional Court) expired on 6 November, 2015, on the day their successors to be elected it was still not known whether this date would fall during the 7th or already during the 8th Sejm.

For this reason it appears that the judgement of the Constitutional Court of 3 December, 2015, file no. K 34/2015, even though it was issued in the already known and established factual state, was based on an assessment of the constitutionality of statutory norms not in abstract and general terms, but was determined by the event, which on the date the provision was applied in the scope that the Constitutional Court found it unconstitutional, was a future and uncertain event. If, however, the President had decided to call the first session of the 8th Sejm for 6 November, 2015 or earlier, the date of expiry of the term of office of the three Constitutional Court judges would have also fallen during the term of the 8th Sejm – which would require accepting that in such factual circumstances, the Constitutional Court judgement ought to have been different. The problem would not have arisen if, following the established constitutional

custom referred to in point I.2, the caesura in the competences of the Sejm to elect new judges would have been the date of parliamentary elections that determine the shape of a new political order, according to the will of the Sovereign.

VII. PARTICIPATION OF THE COURT'S MEMBERS IN THE WORK ON THE LAW OF 25 JUNE 2015 ON THE CONSTITUTIONAL COURT

While analysing the issue of legislative work on the Law of 25 June 2015 on the Constitutional Court, it should be noted that the preliminary draft of that law was developed with the active involvement of the Court itself.

Without questioning the fact that some legal regulations which were eventually incorporated into the Law had been developed in the course of parliamentary work, it should be noted that Court judges – Andrzej Rzepliński, Stanisław Biernat and Piotr Tuleja – also took part in the work of the Sejm Committee that discussed the draft.

At the same time, as noted by the Court itself in its judgment of 13 December 2005, case no. SK 53/04, the European judicature strongly emphasized the importance of judges' impartiality for the implementation of the right guaranteed under Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. In its judgment of 8 February 2000 on McGonnell v. the United Kingdom (case no. 28488/95), the ECHR concluded that any direct involvement in the law- or regulations-making process could lead to doubts as to the impartiality of the judge who then decides whether there are grounds to depart from the literal wording of these provisions (paragraph 55 of the Explanatory Memorandum). The existence of legitimate concerns as to the impartiality of a judge was the basis on which the ECHR recognised the violation of Article 6 (1) of the Convention in the case Procola v. Luxembourg (judgment of 28 September 1995, case no. 14570/89). In this case, the threat of judicial impartiality was related to the fact that members of the Council of State of Luxembourg had previously participated in issuing an opinion on the draft regulations, based on which a complaint against an administrative decision was later investigated.

Subsequently, in its judgment of 15 October 2009 in the case Micallef v. Malta, the ECHR noted that the existence of national procedures for ensuring impartiality, i.e. rules governing the preclusion of judges, is an important factor.

Such provisions are an expression of the national legislator's concern aiming to eliminate any reasonable doubt as to the impartiality of a given judge or a court, and an attempt to ensure impartiality by eliminating the reasons for such concerns. Regardless of guaranteeing the absence of actual bias, these provisions aim at removing any outward signs of bias, and so they serve to promote the confidence the courts should inspire in a democratic society (ECHR's judgment of 15 July 2005, case no. 71615/01, MEŽNARIĆ v. Croatia).

VIII. MEASURES INTRODUCED BY THE LAW OF 22 DECEMBER 2015 AIMED TO ENSURE THE IMPLEMENTATION OF THE RULE OF PLURALISM AND TO INCREASE EFFICIENCY AND LEGITIMACY OF THE CONSTITUTIONAL COURT

VIII.1. OUTLINE OF PROVISIONS

The Law of 22 December 2015 deals with the following issues:

• provides specific wording of Art. 1 of the Law describing its subject matter by providing that: “The Constitutional Court is an organ of the judiciary power established to exercise the competencies set out in the Constitution.”;

• provides specific wording of Art. 10.1 establishing the rules of operation of the General Assembly of the CC, providing that: “The General Assembly shall adopt resolutions by a majority of 2/3 votes, in the presence of at least 13 Court judges, including the President and the Vice-President of the Court, unless the Law provides for otherwise”;

• provides specific wording of Art. 12 of the Law laying down the procedure for selecting candidates for the President of the Court, by adding par. 2a which reads: “A candidate for the position of President of the Court may be put forward by at least three judges of the Court. A judge of the Court may put forward only one candidate.”; by adding pars 3a-3c which read: “3a. Voting on the election of candidates for the position of the President of the Court may not take place earlier than after the elapse of three days from the day on which the candidates were put forward. 3b. The first name and surnames of candidates are listed in alphabetical order on the ballot card prepared to elect candidates for the position of the President of the Court. 3c. A judge of the Court may cast his or her vote for only one candidate for the position of the President of the Court.”; wording of par. 5 shall be amended to read: “5. Provisions of pars. 1-2a and 3a-4 shall apply respectively to the Vice-President of the Court.”;

• new Art. 28a is added that supplements provisions on disciplinary proceedings, which reads: “Art. 28a. Disciplinary proceedings may be initiated also on the motion of the President of the Republic of Poland or the Minister of Justice within 21 days of the date of receipt of such motion, unless the President of the Court decides that the motion is groundless. The decision to refuse to initiate disciplinary proceedings with grounds shall be delivered to the applicant within seven days of the date the decision was issued.”;

• Art. 31a is added which reads: “Art. 31a. 1. In particularly flagrant cases the General Assembly shall request the Sejm to depose a Court judge from office. 2. The General Assembly may adopt a resolution or file a motion in the matter referred to in par. 1, also at the request of the President of the Republic of Poland or the Minister of Justice within 21 days of the date of receipt of such motion. 3. A resolution to refuse to file a motion referred to in par. 1 including grounds shall be delivered to the applicant referred to in par. 2 within 14 days of the day when the resolution was adopted.”;

• amends Art. 36 of the Law that lays down the reasons for expiry of a mandate of a Court judge to read as follows: “Art. 36. 1. Expiry of a mandate of a judge of the Court prior to the end of his or her term of office occurs in the event of: 1) the death of a judge of the Court; 2) resignation from office of a judge of the Court; 3) sentencing a judge of the Court by a legally binding court judgement for intentional offence prosecuted by public prosecution or an intentional fiscal offence; 4) deposing from office of a judge of the Court by the Sejm on the motion of the General Assembly. 2. The motion to the Sejm for ending a mandate of a judge of the Court in the circumstances referred to in par. 1 shall be filed by the General Assembly after conducting an appropriate explanatory procedure.”;

• amends the wording of Art. 44.1-3 of the Law that specifies the benches to read as follows: ”1. The Court hears a case: 1) sitting as a full bench, unless the Law provides for otherwise; 2) by a bench of 7 judges of the Court in cases: a) instituted by a constitutional complaint or question of law, b) of compliance of statutes with international agreements whose ratification requires prior consent expressed in a statute; 3) by a bench of three judges of the

Court in cases dealing with: a) entertaining or refusing to entertain a constitutional complaint or a motion by the entity referred to in Art. 191.1.3-5 of the Constitution, b) excluding a judge. 2. If a case provided for under par. 1.2 and par. 1.3 is very complex or significant, it may be handed over to be heard by the Court sitting as a full bench. The decision to hand over the case shall be taken by the President of the Court, also at the request of the judges appointed to hear the case. 3. Hearing a case by judges sitting as a full bench requires the participation of at least 13 judges of the Court.";

• the wording of Art. 80 of the Law shall be amended so that the existing wording becomes par. 1, and par. 2 is added to read as follows: "2. Dates of hearings or closed sessions at which motions are heard shall be designated in the order in which cases are filed with the Court.";

• the wording of Art. 81 that sets out the rule for dividing cases into those that are heard in closed sessions and in hearings, by giving expression to the principle of accusatorial procedure governing proceedings before the Constitutional Court, is amended by adding par. 1a to read: "1a. The Court reviews an application, a question of law or a complaint at a hearing, when a motion for review at a hearing was included in the application, a question of law or a complaint."; The wording of par. 2 is amended as follows: "2. The bench shall decide whether to hear a case at a hearing, in the event that no motion referred to in par. 1a was filed.";

• Article 87 that lays down the rules for hearing cases at hearings is amended so that par. 2 now reads as follows: "2. A hearing may not take place earlier than after the lapse of three months from the date the participants in the proceedings were handed notice of its date and for cases heard by a full bench – after the lapse of six months."; par. 2a is added which reads: "The President of the Court may accordingly shorten by half the time-limit referred to in par. 2 in cases: 1) instituted pursuant to a motion of the President of the Republic of Poland; 2) in which the complaint or question of law concerns a violation of the liberties, rights and obligations of men and citizens laid down in Chapter II of the Constitution, 3) in which provisions of the Rules of the Sejm or the Rules of the Senate are the subject of the review.";

• Art. 99.1 is amended to read as follows: "1. Judgements of the Court delivered by a full bench shall be passed by a 2/3 majority of votes.";

• The entire chapter 10 of the Law concerning the President of the Republic of Poland and several other legislative provisions of the Law repeating as a rule legislative provisions of a higher order have been repealed;

• The Law is supplemented with detailed interim provisions set out in its Articles 2 through 4;

• by operation of Article 5, the Law entered into force on the day it was promulgated.

VIII.2. POSITION OF THE GOVERNMENT ON ISSUES UNDER CRITICISM

1. Repeal of Art. 16 of the Law of 25 June 2015 on the Constitutional Court (the provisions on the independence of Constitutional Court judges)

- The repeal of this provision does not produce any legal consequences, since an identically worded provision ensuring the independence of Constitutional Court judges is found in Art.195 (1) of the Constitution of the Republic of Poland. The purpose of this legislative

amendment is to remove a legislative defect consisting in repeating the content of a higher-order act in a lower-order act.

2. Repeal of Art. 19 and Art. 20 of the Law on the Constitutional Court (the provisions on the Constitutional Court judges appointment procedure)

- Art. 112 of the Constitution of the Republic of Poland is the basis for regulating, in the Sejm's rules of procedure, the appointment procedure for the state's most important positions. In accordance with this provision, "the internal organization and conduct of work of the Sejm and the procedure for appointment and operation of its organs as well as the manner of performance of obligations, both constitutional and statutory, by State organs in relation to the Sejm shall be specified in the rules of procedure adopted by the Sejm."

- All the judges of the Constitutional Court, both in office and those whose term of office has ended, were elected by the Sejm as specified in the Sejm's rules of procedure.

- It should be recalled that it was only the Law on Constitutional Court of 25 June 2015 that incorporated detailed rules on to the procedure for electing judges into an act of Parliament. Previously, the issue of the procedure for electing Constitutional Court judges was only addressed in the Sejm's rules of procedure. The legal regime applicable before the entry into force of the Law of 22 June 2015 has not been challenged as unconstitutional.

3. Procedure for deposing a judge of the Constitutional Court – Art. 31(a)(1) of the Law on the Constitutional Court

- According to the new Law, the deposition of a Constitutional Court judge no longer takes effect from the moment a relevant punishment is imposed upon the judge in disciplinary proceedings, but at the request of the General Assembly of the Court Judges upon a decision by the Polish Sejm.

- Provisions of the Law of 22 December 2015 have strengthened the normative guarantees of the independence of a Constitutional Court judge referred to in Art. 195 of the Constitution, since they introduced an additional condition for the judge's deposition. There is no doubt that the Constitutional Court itself (the General Assembly) still plays a key role in the revised procedure for deposing a judge and without its initiative and consent no decision will be taken on this matter.

- It cannot be overlooked that under the amended legislation, due to the extended catalogue of conditions necessary to depose a judge, but also due to the fact that the General Assembly adopts resolutions by a 2/3 majority and not by a simple majority as was the case earlier (Art. 10(1) of the Law on Constitutional Court), the deposition of a judge will be more difficult than before.

4. Motion of the President of the Republic of Poland or the Minister of Justice to depose a Court judge from office – Article 31a(2) of the Law on the Constitutional Court

- It must be stated that deposing a Court judge from office and initiating a relevant procedure in this respect, depends on the autonomous decision of the General Assembly of the Constitutional Court Judges. Only the General Assembly, after adopting a resolution by two-thirds majority vote in the presence of at least 13 Court judges (Article 10(1) of the Law on the Constitutional Court), is empowered to present to the Sejm a motion to depose a Court judge.

- The motion of the President of the Republic of Poland or the Minister of Justice referred to in Article 31a(2) of the Law on the Constitutional Court, is not binding on the General Assembly. The General Assembly may pass a resolution refusing to launch the procedure for deposing a Court judge (Article 31a(3) of the Law on the Constitutional Court). In such a case, the President and the Minister of Justice have no legal recourse to challenge such resolution.

5. Changes regarding adjudicating panels of the Constitutional Court – Article 44 of the Law on the Constitutional Court

- It should be argued that this issue clearly belongs to matters regulated by statute, i.e. it falls within the competence of the legislator.

- there are doubts expressed about the poor legitimacy of judgements repealing a properly adopted act of Parliament delivered by a bench of 5 judges, instead of a full bench. Under the previous Law, a judgement declaring statutes unconstitutional could be delivered by only three votes with two votes against.

- Plenary court, or at least an extended adjudicating panel required by the Law of 22 December 2015 ensures more legitimacy to the delivered judgements. It makes it possible to take advantage of the knowledge and experience of a higher number of judges and increases the pluralism of the Court.

6. Order of examining applications – Article 80 of the Law on the Constitutional Court

- The order of examining cases is of significance for the entity that initiates the proceedings. Each initiating entity is clearly interested in its case being handled as soon as possible.

- The provision stipulates that the dates for hearings or proceedings in camera where applications are considered, shall be established by order in which the cases are submitted to the Court. This principle creates an objective basis for assessing the credibility, efficiency and equal treatment of the entities initiating the proceedings. It significantly improves the predictability of the Court's operations and should create more trust in the Court.

7. Adjudicating by a qualified majority of two-thirds votes – Article 99(1) of the Law on the Constitutional Court

- The very principle of adjudicating by a qualified majority has axiological grounds, as it eliminates the threat of challenging socially and democratically accepted legal institutions by a slim majority of votes.

- The principle of assumed constitutionality of acts of law makes it possible to adopt solutions that preserve the binding force of an act of law: when there is no majority in the Constitutional Court convinced about the unconstitutionality of a given act of law, such act of law is kept in the legal system.

- The constitutional legislator uses the notion of "majority" inconsistently, sometimes referring to a "simple majority" (e.g. Article 120 of the Constitution), but it is not clear whether it

should be inferred from it that Article 190(5) of the Constitution indeed leaves the question of the required majority to be determined by an ordinary act of law.

- Representatives of the doctrine emphasize that the Constitution does not specify what type of majority is required to deliver rulings of the Constitutional Court. They also recognize that Article 190(5) of the Constitution only excludes the introduction of the principle of unanimity.

8. Vacatio legis – Article 5 of the Law of 22 December 2015 amending Law on the Constitutional Court

- The principle of relevant vacatio legis is analysed as an obligation of the legislator to ensure that those affected by a legal norm have the time to adapt to the amended regulation and to make decisions regarding their further actions.

- The amendment is addressed to the Constitutional Court and does not impose any direct obligations on the citizens. It seems that the determining of vacatio legis would have no impact on the ability of an individual to adjust to the new legal order and to properly manage his or her affairs.

9. Revoking Article 30 of the Law of 25 June 2015 on the Constitutional Court, which provided that it is not possible to submit a cassation complaint against a disciplinary judgement issued in the second instance, does not mean that a Court judge could earlier file such a complaint; in the case filed by Lidia Bagińska to determine the existence of the rights arising from the term of office of a Court judge whose expiry was specified by the General Assembly of Constitutional Court Judges, as a result of an allegedly forced resignation from the position of a Constitutional Court judge, the Supreme Court in its judgement of 5 November 2009, case file no. I CSK 16/09, ruled that there are no constitutional or statutory requirements to consider such a case on its merits and upheld the decision to dismiss the statement of claim.

Warsaw, 16 December 2015

Item 2129
JUDGEMENT
OF THE CONSTITUTIONAL COURT
of 3 December 2015
Ref. No. K 34/15

The Constitutional Court, in a bench composed of:

Sławomira Wronkowska-Jaśkiewicz – Presiding Judge,
Leon Kieres – Rapporteur,
Stanisław Rymar,
Andrzej Wróbel,
Marek Zubik – Rapporteur,
Recording Clerk: Grażyna Szałygo,

having considered, at the hearing on 3 December 2015, in the presence of the applicant as well as the Sejm, the Public Prosecutor-General, the Council of Ministers, and the Ombudsman, the application submitted by a group of deputies to determine the conformity of:

1) Article 3 of the Act of 25 June 2015 on the Constitutional Court (Journal of Laws item 1064), with Article 2 and Article 197 of the Constitution of the Republic of Poland,
2) Article 12 para.2 of the Act referred to in item 1, with Article 2 of the Constitution,
3) Article 12 para.1 and 5 of the Act referred to in item 1, with Article 144 para.3 item 21 of the Constitution,
4) Article 18 of the Act referred to in item 1 in conjunction with Article 22 § 1 item 3 of the Act of 23 November 2002 on the Supreme Court (Journal of Laws of 2013, item 499, as amended), with Article 194 para.1 of the Constitution,
5) Article 19 para.2 and Article 137 of the Act referred to in item 1, with Article 112 and Article 197 of the Constitution,
6) Article 19 para.5 of the Act referred to in item 1, with Article 2 of the Constitution,
7) Article 21 paras.1 and 2 of the Act referred to in item 1, with Article 194 para.1 of the Constitution,
8) Article 24 in conjunction with Article 42 para.1 of the Act referred to in item 1, with Article 2, Article 32 para.1, and Article 196 of the Constitution,
9) Article 104 para.1 item 3 of the Act referred to in item 1, with Article 191 para.1 and Article 193 of the Constitution,
10) Article 137 in conjunction with Article 19 of the Act referred to in item 1, with Article 2 of the Constitution,
11) Article 137 of the Act referred to in item 1, with Article 62 para.1 of the Constitution,
12) Article 137 of the Act referred to in item 1, with Article 194 para.1 of the Constitution,

adjudicates as follows:

1. Article 3 of the Act of 25 June 2015 on the Constitutional Court (Journal of Laws item 1064) is consistent with Article 2 of the Constitution of the Republic of Poland and is not inconsistent with Article 197 of the Constitution.

2. Article 12 para.2 of the Act referred to in item 1 is consistent with Article 2 of the Constitution.

3. Article 12 paras.1 and 5 of the Act referred to in item 1 is consistent with Article 144 para.3 item 21 of the Constitution,

4. Article 19 para.2 of the Act referred to in item 1 is consistent with Article 112 of the Constitution and is not inconsistent with Article 197 of the Constitution.

5. Article 21 para.1 of the Act referred to in item 1, construed in a manner different than that it stipulates the obligation on the part of the President of the Republic of Poland to immediately receive the oath of a judge of the Court elected by the Sejm, is inconsistent with Article 194 para.1 of the Constitution.

6. Article 24 paras.1 and 2 in conjunction with Article 42 para.1 of the Act referred to in item 1, is consistent with Article 196 of the Constitution.

7. Article 104 para.1 item 3 of the Act referred to in item 1, is consistent with Article 191 para.1 and Article 193 of the Constitution.

8. Article 137 of the Act referred to in item 1:

a) is consistent with Article 112 of the Constitution and is not inconsistent with Article 62 para.1 and Article 197 of the Constitution,

b) within the scope in which it applies to the judges of the Court whose term of office expires on 6 November 2015, is consistent with Article 194 para.1 of the Constitution,

c) within the scope in which it applies to the judges of the Court whose term of office expires on 2 and 8 December 2015, respectively, is inconsistent with Article 194 para.1 of the Constitution.

Moreover, the Court decides:

pursuant to Article 104 para.1 item 2 of the Act of 25 June 2015 on the Constitutional Court (Journal of Laws item 1064), to discontinue the proceedings as to the remainder.

Sławomira Wronkowska-Jaśkiewicz

Leon Kieres *Stanisław Rymar*

Andrzej Wróbel *Marek Zubik*

Warsaw, 18 December 2015

Item 2147
JUDGEMENT
OF THE CONSTITUTIONAL COURT
of 9 December 2015
Ref. No. K 35/15

The Constitutional Court, in a bench composed of:

Andrzej Wróbel – Presiding Judge,
Mirosław Granat,
Małgorzata Pyziak-Szafnicka,
Piotr Tuleja – Rapporteur,
Sławomira Wronkowska-Jaśkiewicz,
Recording Clerk: Grażyna Szałygo,

having considered, at the hearing on 9 December 2015, in the presence of the applicants as well as of the Sejm and the Public Prosecutor-General, the joined applications:

1) submitted by a group of deputies, to determine the conformity of:

   a) Article 1 item 6 of the Act of 19 November 2015 amending the Act on the Constitutional Court (Journal of Laws item 1928), and in the event that it comes into force before the Court adjudicates in this matter – of Article 137a of the Act of 25 June 2015 on the Constitutional Court (Journal of Laws item 1064), with Article 2, Article 7, Article 10 and Article 194 para.1 of the Constitution,

   b) Article 1 item 4 of the Act of 19 November 2015, and in the event that the Act comes into force before the day when the Court adjudicates in this matter – of Article 21 paras.1 and 1a of the Act of 25 June 2015, with Article 194 para.1 of the Constitution,

   c) Article 2 of the Act of 19 November 2015, with Article 2, Article 7, and Article 10 of the Constitution,

2) submitted by the Ombudsman to determine the conformity of:

   a) the Act of 19 November 2015, with Article 7, Article 112, and Article 119 para.1 of the Constitution,

   b) Article 137a of the Act of 25 June 2015, added by Article 1 item 6 of the Act of 19 November 2015, with Article 45 para.1, Article 180 paras.1 and 2, and with Article 194 para.1 in conjunction with Article 10 of the Constitution, as well as with Article 6 para.1 of the Convention for the Protection of Human Rights and Fundamental Freedoms, done in Rome on 4 November 1950 (Journal of Laws of 1993, No. 61, item 284, as amended) and with Article 25 subpara. c in conjunction with Article 2 and Article 14 para.1 of the International Covenant on Civil and Political Rights, opened for signature in New York on 19 December 1966 (Journal of Laws of 1977, No. 38, item 167),

   c) Article 2 of the Act of 19 November 2015 with the principle of good legislation that follows from Article 2, with Article 45 para.1, Article 180 paras.1 and 2, and with Article 194 para.1 in conjunction with Article 10 of the Constitution, as well as with Article 6 para.1 of the Convention for the Protection of Human Rights and Fundamental

Freedoms, and with Article 25 subpara. c in conjunction with Article 2 and Article 14 para.1 of the International Covenant on Civil and Political Rights,

3) submitted by the National Council of the Judiciary, to determine the conformity of:

a) the Act of 19 November 2015,

b) Article 12 paras.1 and 2, Article 18, Article 19 para.2, Article 21 paras.1 and 1a, and Article 137a of the Act of 25 June 2015, in the wording as determined by Article 1 items 1, 2, 3, 4 and 6 of the Act of 19 November 2015,

c) Article 1 item 5 and Article 2 of the Act of 19 November 2015,

– with Article 2, Article 7, Article 10, Article 112, Article 119 para.1 and Article 123 of the Constitution, in that they were passed by the Sejm not in keeping with the procedure required by the applicable law, i.e. without considering the opinions and motions of the National Council of the Judiciary as stipulated by Article 3 para.1 item 6 of the Act of 12 May 2011 on the National Council of the Judiciary (Journal of Laws No. 126, item 714, as amended),

4) of the First President of the Supreme Court, to determine the conformity of:

a) the Act of 19 November 2015 with Article 7 in conjunction with Article 112, Article 119 para.1 in conjunction with the preamble and Article 2, as well as with Article 2 in conjunction with Article 7 and Article 186 para.1 of the Constitution, in that it was passed by the Sejm not in keeping with the procedure required for it to be passed,

b) Article 12 para.1 of the Act of 25 June 2015, in the wording as determined by Article 1 item 1 of the Act of 19 November 2015, with Article 10 and Article 173 of the Constitution,

c) Article 21 para.1a of the Act of 25 June 2015, added by Article 1 item 4 subpara.b of the Act of 19 November 2015, with Article 10, Article 45 para.1, Article 173, Article 180 paras.1 and 2, and with Article 194 para.1 of the Constitution, as well as with Article 6 para.1 of the Convention for the Protection of Human Rights and Fundamental Freedoms,

d) Article 137a of the Act of 25 June 2015, added by Article 1 item 6 of the Act of 19 November 2015, with Article 2, Article 45 para.1, Article 173, Article 180 paras.1 and 2, and with Article 194 para.1 of the Constitution, as well as with Article 6 para.1 of the Convention for the Protection of Human Rights and Fundamental Freedoms,

e) Article 2 of the Act of 19 November 2015, with Article 2, Article 10, Article 45 para.1, Article 173, Article 180 paras.1 and 2, and with Article 194 para.1 of the Constitution, as well as with Article 6 para.1 of the Convention for the Protection of Human Rights and Fundamental Freedoms,

adjudicates as follows:

1. The Act of 19 November 2015 amending the Act on the Constitutional Court (Journal of Laws item 1928) is consistent with Article 7, Article 112, Article 119 para.1 and Article 186 para.1 of the Constitution of the Republic of Poland.

2. Article 12 para.1 second sentence of the Act of 25 June 2015 on the Constitutional Court (Journal of Laws items 1064 and 1928), in the wording as determined by Article 1 item 1 of the Act referred to in item 1, is inconsistent with Article 173 in conjunction with Article 10 of the Constitution.

3. Article 21 para.1 of the Act referred to in item 2, in the wording as determined by Article 1 item 4 subpara. a of the Act referred to in item 1, in the part consisting of the words “within 30 days from the day of election”, is inconsistent with Article 194 para.1 of the Constitution.

4. Article 21 para.1a of the Act referred to in item 2, in the wording as determined by Article 1 item 4 subpara. b of the Act referred to in item 1, is inconsistent with Article 194 para.1 in conjunction with Article 10, Article 45 para.1, Article 173, and Article 180 paras. 1 and 2 of the Constitution.

5. Article 137a of the Act referred to in item 2, added by Article 1 item 6 of the Act referred to in item 1, within the scope in which it refers to submitting a candidate for the judge of the Constitutional Court in place of a judge whose term of office expires on 6 November 2015, is inconsistent with Article 194 para.1 in conjunction with Article 7 of the Constitution and is not inconsistent with Article 45 para.1, Article 180 paras.1 and 2 in conjunction with Article 6 para.1 of the Convention for the Protection of Human Rights and Fundamental Freedoms, done in Rome on 4 November 1950, amended then by Protocols No. 3, 5 and 8 and supplemented by Protocol No. 2 (Journal of Laws of 1993, No. 61, item 284, of 1995, No. 36, items 175, 176 and 177, of 1998, No. 147, item 962, of 2001, No. 23, item 266, of 2003, No. 42, item 364, and of 2010, No. 90, item 587) and with Article 25 subpara. c in conjunction with Article 2 and Article 14 para.1 of the International Covenant on Civil and Political Rights, opened for signature in New York on 19 December 1966 (Journal of Laws of 1977, No. 38, item 167).

6. Article 2 of the Act referred to in item 1 is inconsistent with Article 2, Article 7 and Article 45 para.1, Article 180 paras. 1 and 2, and with Article 194 para.1 in conjunction with Article 10 of the Constitution, as well as with Article 6 para.1 of the Convention for the Protection of Human Rights and Fundamental Freedoms, and with Article 25 subpara. c in conjunction with Article 2 and Article 14 para.1 of the International Covenant on Civil and Political Rights.

Moreover, the Court decides:

pursuant to Article 104 para. 1 item 2 of the Act of 25 June 2015 on the Constitutional Court (Journal of Laws items 1064 and 1928), to discontinue the proceedings as to the remainder.

Andrzej Wróbel

Mirosław Granat
Piotr Tuleja

Małgorzata Pyziak-Szafnicka
Sławomira Wronkowska-Jaśkiewicz