



Strasbourg, 26 February 2016

CDL(2016)003 *

Opinion no. 833/2015

Or. Engl.

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

DRAFT OPINION

**ON AMENDMENTS TO THE ACT OF 25 JUNE 2015
ON THE CONSTITUTIONAL TRIBUNAL
OF POLAND**

on the basis of comments by:

Ms Veronika BÍLKOVÁ (Member, Czech Republic)
Ms Sarah CLEVELAND (Member, USA)
Mr Michael FRENDÓ (Member, Malta)
Mr Christoph GRABENWARTER (Member, Austria)
Mr Jean-Claude SCHOLSEM (Substitute Member, Belgium)
Mr Kaarlo TUORI (Member, Finland)

**This document has been classified restricted on the date of issue. Unless the Venice Commission decides otherwise, it will be declassified a year after its issue according to the rules set up in Resolution CM/Res(2001)6 on access to Council of Europe documents.*

Table of Contents

I.	Introduction	3
II.	General remarks – scope of the opinion.....	3
III.	Chronology	4
IV.	Pending case	7
V.	Legal Analysis.....	8
A.	Constitutional basis	9
B.	Procedure.....	10
1.	“Sequence rule”	10
2.	Attendance quorum (13 out of 15 Judges).....	12
3.	Majority for adopting decisions - 2/3 majority.....	13
4.	Delay for hearings	15
5.	Conclusion on procedural issues.....	16
C.	Disciplinary proceedings and dismissal of judges	16
D.	Removal of certain provisions from the Act.....	17
E.	Composition of the Court.....	17
1.	Adoption of Articles 137 and 137a of the Act on the Tribunal.....	18
2.	Constitutional custom preventing the outgoing majority to elect judges after parliamentary elections	19
3.	Principle of Pluralism	20
VI.	Loyal co-operation between State Powers	22
VII.	Conclusion	23

I. Introduction

1. By letter dated 23 December 2015, the Minister for Foreign Affairs of Poland, Mr Witold Waszczykowski, requested the opinion of the Venice Commission on the constitutional issues addressed in two legislative proposals, submitted to the *Sejm* on 2 and on 15 December 2015 respectively, to amend the Act on the Constitutional Tribunal of 25 June 2015 (hereinafter “the Act”). In his letter of 31 December 2015, Minister Waszczykowski transmitted to the Venice Commission the amendments to the Act, which had been adopted on 22 December 2015 and promulgated on 28 December 2015 (hereinafter, “the Amendments”). On 14 January 2016, the Ministry of Foreign Affairs transmitted an English translation of the Act and the Amendments (CDL-REF(2015)009) together with translations of the judgments of the Constitutional Tribunal of 3 and 9 December 2015 and an Explanatory Memorandum (CDL-REF(2016)015).

2. The Venice Commission invited Ms Veronika Bílková, Ms Sarah Cleveland, Mr Michael Frendo, Mr Christoph Grabenwarter, Mr Jean-Claude Scholsem and Mr Kaarlo Tuori to act as rapporteurs for this opinion.

3. On 8-9 February 2016, a delegation of the Commission, composed of Messrs Grabenwarter, Scholsem and Tuori, headed by the President of the Commission, Mr Gianni Buquicchio and accompanied by Mr Schnutz Dürr from the Secretariat, visited Warsaw. The delegation met – in chronological order – the First President of the Supreme Court and judges of the Supreme Court (in parallel to this visit, the President of the Venice Commission met the President of Poland), the Chairman of the National Council of the Judiciary and members of the Council, the Minister of Foreign Affairs together with academia, the Marshal of the Senate and representatives of the Senate (including the opposition), the Marshal of the *Sejm* and representatives of the *Sejm* (including the opposition), the Deputy Prime Minister and representatives of his Ministry and the Ministry of Justice together with academia, NGOs (the Polish Helsinki Foundation and *Ordo Iuris*), the Ombudsman, the President and Vice-President of the Constitutional Tribunal and three judges of the Tribunal, the Minister of Justice and Ministers of the Chancellery of the President of Poland. The Venice Commission is grateful to the Ministry of Foreign Affairs for the organisation of the visit.

4. The rapporteurs prepared their comments on the basis of the English translations of the legal acts made available by the Polish authorities and the results of the visit to Warsaw.

5. *This opinion was adopted by the Commission at its ... session (Venice...).*

II. General remarks – scope of the opinion

6. The request for an opinion by the Venice Commission refers to the amendments to the Constitutional Tribunal Act of December 2015. While these Amendments do not directly relate to the composition of the Constitutional Tribunal, it is evident that they have an intrinsic link to the composition of the Tribunal, not least because one of the provisions of the Amendments sets a quorum for the Tribunal (13 out of 15 judges) that cannot be reached if the Court is not fully composed.

7. In the light of this connection, the Polish authorities transmitted not only translations of the Law and the Amendments (CDL-REF(2016)009) to the Venice Commission, but also the judgments of the Constitutional Tribunal of 3 and 9 December 2015 as well as a Memorandum that covers both the Amendments of 22 December 2015 and the issue of the appointment of judges (CDL-REF(2016)015).

8. This opinion only refers to the composition of the Court where this is necessary in order to understand the constitutional situation that could result from the Amendments (see section E below). There is, however, no need to examine the Amendments of 19 November 2015, since

they were found to be unconstitutional by the Constitutional Tribunal in its judgement of 9 December 2015. This judgement seems to have settled the issues raised by those amendments.

9. The Venice Commission welcomes the fact that that all the interlocutors the delegation met during its visit had insisted that they were in favour of the Constitutional Tribunal having the power to ensure the supremacy of the Constitution. This can be taken as common ground by all political forces in Poland and as a basis for finding a solution to the current constitutional situation.

III. Chronology

10. In order to understand the constitutional situation resulting from the Amendments, it is important to recall the chronology of events leading up to their adoption. The list below is necessarily incomplete and refers only to major events that are relevant to the opinion:

11. On 11 July 2013: the then President of the Republic of Poland Komorowski submitted the Constitutional Tribunal Bill to the *Sejm* (*Sejm* Paper No. 1590). This bill had been prepared on the initiative of a working group, which included former and current judges of the Tribunal, amongst them the Tribunal's President.

12. From March to May 2015, the Special Subcommittee on the Constitutional Tribunal Bill and later the joint Legislative and Justice and Human Rights Committees prepared reports on the bill. The President of the Constitutional Tribunal, the General Prosecution Office and the National Council of the Judiciary participated in this work as invited guests of the *Sejm*.

13. On 25 June 2015, the *Sejm* adopted the Act on the Constitutional Tribunal,¹ which entered into force on 30 August 2015. In its Article 137, the Act provided for the election by the outgoing, 7th term of the *Sejm* of successors for all judges whose mandate would end in 2015, including those whose mandate would end after the end of the term of the current, 7th term of the *Sejm*.²

14. On 8 October 2015, during its last session, the *Sejm* selected five judges – three to replace judges outgoing on 6 November 2015, two to replace those outgoing on 2 and 8 December respectively. Until now, the President of Poland has not accepted the oath of any of the elected "October judges".

15. On 23 October 2015, a group of *Sejm* Deputies from the Law and Justice Party appealed to the Constitutional Tribunal challenging the constitutionality of the election of all five judges (case K 29/15). This appeal was withdrawn on 10 November 2015 and the Constitutional Tribunal discontinued the proceedings.

16. On 12 November 2015, the 8th term of the *Sejm* held its first sitting.

17. On 17 November 2015, a group of deputies (from the Civic Platform Party) re-introduced the identical appeal against the Act, which had been withdrawn on 10 November 2015 (case number K 34/15).

¹ Published on 30 July 2015, Pl. Dziennik Ustaw; item 1064.

² Article 137 of the Act: "In the case of judges of the Tribunal whose term of office expires in 2015, the deadline for lodging the application referred to in Article 19(2) shall be 30 days from the day on which this Act enters into force."

18. On 19 November 2015, the *Sejm* amended the Act.³ The amendment had been submitted to the *Sejm* three days earlier and it was signed by the President of Poland on the following day. This amendment introduced a three-year tenure of office for the President of the Constitutional Tribunal, renewable once, and terminated the tenure of the incumbent President and Vice-President. It also stipulated that the term of office of a constitutional judge starts from the moment of taking the oath before the President.

19. On 23 November 2015, a group of deputies lodged a constitutional complaint against the amendment to the Act adopted on 19 November 2015 (case K 35/15). On the same day, a similar complaint was lodged by the Human Rights Defender (K 37/15). On 24 and 30 November, respectively, other constitutional complaints were lodged by the National Council of the Judiciary and the Chief Justice of the Supreme Court (K 38/15 and 40/15).

20. On 25 November 2015, the *Sejm* adopted five resolutions invalidating the five resolutions of 8 October 2015 on the election of judges of the Constitutional Tribunal, passed by the *Sejm* during its 7th term of office.⁴

21. Two judges and the President of the Tribunal requested to be excluded from the consideration of case K 34/15 on 25 November 2015 (request accepted by the Tribunal on 30 November 2015).

22. 30 November 2015: On the basis of Articles 755(1) and 730(2) of the Civil Procedure Code taken together with Article 74 of the Act, the Constitutional Tribunal decided to take preventive measures requesting the *Sejm* to abstain from electing new judges until the final verdict in case K 34/15 was delivered.

23. On 1 December 2015, the Constitutional Tribunal (full bench) filed a motion with the President of the Tribunal requesting the consideration of case K 34/15 by a bench of five judges.

24. Notwithstanding the preventive measures taken by the Constitutional Tribunal, on 2 December 2015 the *Sejm*, proceeded with the election of five new judges, adopting five resolutions.⁵

25. The President of Poland accepted the oath of those judges on 3 December at 1:30 a.m. (four judges) and 9 December (one judge) respectively. The President of the Tribunal accorded these five persons the status of employees of the Tribunal, who do not perform judicial duties.

26. On 3 December 2015, the Constitutional Tribunal – in a chamber composed of five judges – rendered the decision relating to the complaint of 17 November 2015 (K 34/15). It held that the legal basis for the election of the three judges replacing those judges whose mandate expired before the end of the term of the previous *Sejm*, was valid and the President was under the obligation to accept their oath. The legal basis for the election of the other two judges was, on the contrary, found to be unconstitutional.

27. On 4 December 2015, a group of *Sejm* Deputies lodged an application with the Constitutional Tribunal alleging the unconstitutionality of the *Sejm*'s resolutions adopted on 25 November 2015 as well as the *Sejm*'s resolutions on the election of five judges of the Tribunal, adopted on 2 December 2015 (case no. U 8/15).

³ Published in the Journal of Laws (item 1928; the Act entered into force on 5 December 2015).

⁴ Official Gazette of the Republic of Poland – *Monitor Polski* (items 1131 – 1135).

⁵ *Monitor Polski* (items 1182 – 1186).

28. On 9 December 2015, the Constitutional Tribunal decided on the constitutionality of the Amendments of 19 November to the Act on the Tribunal (case no. K 35/15). It held that breaches of the Rules of Procedure of the *Sejm* alone did not render the whole amendment unconstitutional. However, Article 137a, providing the legal basis for the election of the three judges by the new *Sejm*, replacing those elected by the previous *Sejm*, was found unconstitutional. The Tribunal also held that the term of constitutional judges started with their election, not on the day on which they took their oath. The period of 30 days set for the President to take the oath from the judges elected by the *Sejm* was found unconstitutional as well. Furthermore the Tribunal held that the introduction of a three-year tenure for the President and Vice-President of the Tribunal was constitutional, but the possibility of their re-election violated the Constitution, since it might undermine the independence of the judge. Finally, the early termination of the term of office of the Tribunal's President and the Vice-President's was found to be unconstitutional.

29. In a letter of 10 December 2015, the Head of the Chancellery of the Prime Minister expressed doubts whether the Tribunal had been correctly composed in its decision of 3 December 2015 (case K 34/15) and whether this judgment could be published in the Journal of Laws. The President of the Tribunal replied that judgments of the Tribunal had to be published according to Article 190(1) and (2) of the Constitution.

30. On 22 December 2015, the *Sejm* adopted an amendment to the Act on the Constitutional Tribunal (approved by the Senate on 24 December 2015 and published on 28 December 2015). The amendment stipulates that the Tribunal shall, in general, hear cases as a full bench in a composition of 13 out of 15 judges, although some matters (individual complaints and preliminary requests) will only require the presence of seven judges. The full bench decisions will require a two-thirds majority, instead of a simple majority, as used to be the case. The Tribunal will also have to consider motions in the sequence in which they were filed. The early termination of a judge's mandate will no longer be declared by the General Assembly of the Constitutional Tribunal. Instead, the Assembly will prepare a motion to the *Sejm* to declare the "expiry" of the mandate and it will be for the *Sejm* to make such a declaration. The Amendments introduce the right for the President of Poland and the Minister of Justice to launch disciplinary proceedings against a judge of the Tribunal. Finally, the amendment removes certain provisions from the Act, for instance Article 16 (independence of judges), Article 17(1) (composition of the Tribunal), Article 17(2) (impossibility of a re-election to the Tribunal) or the whole of Chapter 10 (proceedings in the event the President is deemed incapable of exercising office).

31. On 11 January 2016, the Constitutional Tribunal announced that, in a session held in camera on 7 January 2016, it was dismissing the complaint lodged on 4 December 2015 (case no. U 8/15) against the resolutions on the election of five new judges, because these resolutions were not normative acts, controllable by the Tribunal.

32. On this basis, on 12 January 2016, the President of the Constitutional Tribunal admitted to the bench the two judges elected in December 2015, replacing the judges outgoing in December.

33. On 14 January 2016, the Constitutional Tribunal, as a full bench, decided to consider case no. K 47/15 – the examination of the constitutionality of the Amendments of 22 December 2015 – on the basis of the Constitution without applying these Amendments in this case, because they directly concern the functioning of the Tribunal. The two newly elected judges provided dissenting opinions, insisting that the Amendments of 22 December 2015 had already entered into force and had to be applied in the case that was considering these same Amendments.

34. On 30 January 2016, the *Sejm* passed the 2016 State Budget Bill, which reduced the Tribunal's budget by some 10 per cent.

IV. Pending case

35. The Amendments of 22 December 2015 have been challenged before the Tribunal and are currently pending there as case no. K 47/15.

36. The Amendments provide for their immediate entry into force (absence of a *vacatio legis*, which would enable their control before their entry into force). If the Tribunal were to apply the Amendments in this case, it would not be able to sit, because it currently has only 12 sitting judges and would not reach the required quorum of 13 Judges.

37. The Venice Commission has been confronted with the question of a possible *non liquet* in proceedings before a constitutional court in two cases. In 2006, in an opinion for Romania, the Venice Commission was asked to examine the question whether the constitutional court could be blocked because – due to recusals – the number of judges would fall below the required quorum. The Commission insisted that “(...) *it must be ensured that the Constitutional Court as guarantor of the Constitution remains functioning as a democratic institution. The possibility of excluding judges must not result in the inability of the Court to take a decision. The provisions of the Code of Civil Procedure are certainly appropriate in the context of the general jurisdiction where there are always other judges available to step in for a judge who has withdrawn. This is not the case for the Constitutional Court. If rules for challenging of a judge were deemed necessary in Romania they would have to apply specifically to the Constitutional Court and exclude the possibility non liquet applying the fundamental principle of the Constitutional Court as a guarantor of the supremacy of the Constitution.*”⁶

38. In an *amicus curiae* opinion for the Constitutional Court of Albania, the Venice Commission was asked to address the question whether or not the Court could examine the constitutionality of a law which affected the judges of the Court and where these judges would normally have recused themselves. However the recusal of several judges would have resulted in a lack of quorum and an inability for the Court to sit. In this situation, the Venice Commission found that “... [t]he authorization of the Court derives from the necessity to make sure that no law is exempt from constitutional review, including laws that relate to the position of judges. ...”⁷

39. In its decision of 14 January, accepting the motion for review of the Amendments, the Tribunal held that it can review the Amendments directly on the basis of the Constitution. While judges of the ordinary courts are bound by the Constitution and the laws (Article 178 of the Constitution), the judges of the Constitutional Tribunal are bound by the Constitution only (Article 195(1) of the Constitution). This distinction is in line with the two opinions of the Venice Commission mentioned above; it also serves as a basis for the control of the Amendments without applying the Amendments in this case.

40. However, the Venice Commission is of the opinion that even without such a constitutional basis, such a review could be justified by the special nature of constitutional justice itself. It is the Constituent Power, not the ordinary legislator, which entrusts the Constitutional Tribunal with the competence to ensure the supremacy of the Constitution. The legislation on the

⁶ CDL-AD(2006)006 Opinion on the Two Draft Laws amending Law No. 47/1992 on the organisation and functioning of the Constitutional Court of Romania, paragraph 7. See also CDL-AD(2014)020 Opinion on the Draft Constitutional Law on Introduction Amendments and Additions to the Constitutional Law on the Constitutional Chamber of the Supreme Court of Kyrgyz Republic, paragraph 34.

⁷ CDL-AD(2009)044, Amicus Curiae Opinion on the Law on the cleanliness of the figure of high functionaries of the Public Administration and Elected Persons of Albania adopted by the Venice Commission at its 80th Plenary Session (Venice, 9-10 October 2009), par. 142.

Constitutional Tribunal has to remain within the bounds of the Constitution, and this legal basis, too, needs to be controllable by the Tribunal.

41. A simple legislative act, which threatens to disable constitutional control, must itself be evaluated for constitutionality before it can be applied by the court. Otherwise, an ordinary law, which simply states “*herewith, constitutional control is abandoned - this law enters into force immediately*” could be the sad end of constitutional justice. The very idea of the supremacy of the Constitution implies that such a law, which allegedly endangers constitutional justice, must be controlled – and if need be, annulled – by the Constitutional Tribunal before it enters into force.

42. During the visit, the delegation of the Venice Commission was informed that the Government would wait in expressing its position in the pending case until the Venice Commission had given its opinion. This is unfortunate, because the position paper could have been helpful in the preparation of this opinion. However, the absence of such a position cannot prevent the Constitutional Tribunal from adjudicating in this case, the decision in which is urgent for the whole constitutional justice system of Poland.

43. Whatever the outcome of this judgment, European and international standards require that the decision of the Constitutional Tribunal be respected.⁸

V. Legal Analysis

44. This analysis focuses on the key aspects of the Amendments of 22 December 2015 which directly relate to the efficient functioning of the Constitutional Tribunal. This opinion does not examine other aspects, such as the removal of certain important procedures, e.g. establishing an obstacle to holding of the office by the President of Poland. The Venice Commission is aware that these other changes are the object of review by the Tribunal itself in pending case no. K 47/15.

45. From the outset, the Venice Commission has referred to the criticism made by the Government of the fact that, since 2010, judges of the Constitutional Tribunal and, in particular, its President, have participated in discussions of a working group on the reform of the procedure of the Constitutional Tribunal. While it is not the function of a constitutional court and its members to participate in political debate, including debates on the reform of the Constitution *in general*, it is a common feature of European constitutional culture that constitutional courts may comment on reform proposals, which concern the Court itself; in many cases they are even involved in drafting groups. The reason for such inclusion is to obtain additional input and expertise.

46. For instance, it is common practice in Germany to send draft laws and international treaties concerning the competences and the procedure of the Federal Constitutional Court to the Court for comments. In Austria, the Constitutional Court is informed about many draft federal laws and invited to comment in the pre-parliament procedure of drafting a law. In exceptional cases, Parliament will invite the Austrian Constitutional Court to participate in its work or at least comment. In such cases, the Austrian Constitutional Court exerts self-restraint. It often refers to possible future proceedings where the issue may arise and therefore does not provide comments. However, when it comes to the procedure and the

⁸ For the situation in the United States, the Supreme Court held already in 1803 that “[i]t is emphatically the province and duty of the judicial department to say what the law is” and “The Constitution is a superior, paramount law, unchangeable by ordinary means”, *Marbury v. Madison*, 5 U.S. 137 (1803)

competences of the Constitutional Court itself, it regularly submits comments to the Government and/or Parliament.⁹

47. Finally, it should be pointed out that on 25 November 2015, the President and the two Judges of the Tribunal who had acted as experts in the drafting process for the new Act on the Tribunal withdrew from the deliberation of the constitutionality of the Act (case no. 34/15). In this context, and within these parameters, the participation of the Judiciary in discussions relating to this draft Act is not prejudicial to the Constitutional powers of the Parliament to legislate.

48. Against this background, the Venice Commission cannot share the criticism expressed regarding the participation of the Constitutional Tribunal in discussions regarding its own competences and procedure, as long as this does not create a situation whereby the judges exceed their role as experts.

A. Constitutional basis

49. The Constitution of Poland of 1997 regulates the composition and competences of the Tribunal in Chapter VIII on Courts and Tribunals, particularly in the section entitled “the Constitutional Tribunal”. Articles 188-193 enumerate the competences of the Constitutional Tribunal. Article 194 states 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. No person may be chosen for more than one term of office*” (par. 1). Article 195 stresses that “judges of the Constitutional Tribunal, in the exercise of their office, shall be independent and subject only to the Constitution” (par. 1) and that “*during their term of office, [they] shall not belong to a political party, a trade union or perform public activities incompatible with the principles of the independence of the courts and judges*” (par. 3). Article 197 adds that “*the organization of the Constitutional Tribunal, as well as the mode of proceedings before it, shall be specified by statute*”. This statute was originally enacted in 1997.

50. General regulations on the Constitutional Tribunal can be found in Articles 188-197 of the Constitution of the Republic of Poland. These rules say little about the organisation of the Constitutional Tribunal and the proceedings before it – a matter that is assigned to the legislator. Article 197 of the Constitution is worded as follows: “*The organization of the Constitutional Tribunal, as well as the proceedings before it, shall be specified by statute.*”

51. However, the Constitution ensures the independence of the judges of the Constitutional Tribunal in the exercise of their office (Article 195(1)). Other constitutional provisions deal with the election of the judges (Article 194), their working conditions (Article 195(2)), incompatibilities (Article 195(3)) and immunity (Article 196).

52. Article 190(5), of the Constitution contains a specific majority-requirement for a judgment made by the Constitutional Tribunal: “*Judgments of the Constitutional Tribunal shall be made by a majority of votes.*”

⁹ In Austria, a Constitutional Convention was established in 2003-2005 with 10 sub-committees. In subcommittee no. 9, which dealt with the reform of the Judiciary, the three Presidents of the (supreme) Administrative Court, the Supreme Court and the Constitutional Court participated. Two more judges of the Constitutional Court were members of this subcommittee, one as the chairman and another as a member of the Presidium of the Convention.

B. Procedure

53. The amendments of 22 December 2015 change the procedure of the Court considerably and in a number of aspects. The main elements are that when the Tribunal sits as a full bench¹⁰ it must have a quorum of 13 out of 15 judges, that decisions on the unconstitutionality of laws can only be taken by a majority of two-thirds of the sitting judges and that all cases must be decided in the sequence in which they were registered. These procedural elements need to be examined individually and in their combined effect.

1. “Sequence rule”

54. According to amended Article 80(2) of the Act, the dates for hearings or proceedings in camera, where applications are considered, shall be established in the sequence in which the cases were registered at the Constitutional Tribunal. There are no exceptions foreseen by this rule and, according to Article 2 of the Amendment, this rule applies to all pending cases for which no date for a hearing has been set yet. This reading of the provision was confirmed to the Venice Commission’s delegation, including by the Government and the parliamentary majority, who see this as a means of increasing citizens’ right to a fair trial within a reasonable period of time.¹¹ This is in some way logical, but aggravates the impact of the new rule on the work of the Court. Before the Amendment, no such rule existed.

55. Before considering the Amendment legally, reference must be made to the reason for this amendment. During the Venice Commission’s delegation’s visit, the length of proceedings before the Constitutional Tribunal was criticised. The length of proceedings is an important issue under the European Convention on Human Rights.¹² If it turned out that there was a systemic problem of length of proceedings, it would not only be politically legitimate to react to such a situation, but there might also be an obligation to do so according to the Convention.¹³

56. However, the statistics and material presented to the Venice Commission before, during and after its visit, do not support the assumption that there was such a structural problem calling for immediate and a far-reaching reaction. According to the Constitutional Tribunal’s statistics, the average period for the consideration of a case that was subsequently determined by the issuance of a judgment was 21 months and only four cases, from 2012 and 2013, are still pending before the Tribunal.

57. It has to be pointed out that Article 80(2) of the Act does not explicitly state that the applications to the Tribunal shall be decided in the sequence in which the cases were registered at the Tribunal. If the meaning of the above-mentioned provision is to determine the

¹⁰ The Amendments provide that the Tribunal normally sits as a full bench, with the following exceptions:

“2) in a bench of seven judges of the Court – in cases:

a) initiated by a Constitutional complaint or a question of law,

b) concerning the conformity of acts with international agreements whose ratification required prior consent expressed by means of an act;

3) in a bench of three judges of the Court – in cases:

a) concerning the further consideration of or the refusal to further consider a Constitutional complaint or an application of the entity referred to in Article 191 para.1 items 3–5 of the Constitution,

b) concerning the exclusion of a judge.” (Article 44, par. 1–3).

This means that in abstract cases, initiated by State institutions, the Tribunal sits as a full bench.

¹¹ Government slide no. 9.

¹² CDL-AD(2006)036, Study on the Effectiveness of National Remedies in respect of Excessive Length of Proceedings adopted by the Venice Commission at its 69th Plenary Session (Venice, 15-16 December 2006).

¹³ European Court of Human Rights, *Broniowski v. Poland*, no. 31443/96, judgment of 22 June 2004, par. 189 seq.

order of the beginning of the examination or consideration of a case, this would not rule out the possibility that the Constitutional Tribunal may decide some cases earlier (or later), because of the particular circumstances of the specific proceedings. Sometimes, even a constitutional court may be required to stay or expedite certain proceedings.

58. From a comparative perspective, there are only a few states in which constitutional courts are obliged to examine the incoming cases in a certain chronological order. The case of Luxembourg, mentioned by the Government, has to be distinguished from the new Polish legislation. According to Article 3 of the Law on the Constitutional Court of Luxembourg, the Constitutional Court shall keep a general register in which cases are catalogued and signed by the President of the Court and in which all cases shall be recorded in the sequence in which they are received. The record in the general register shall determine the sequence in which cases are heard. However, the court may, in view of particular circumstances, decide to hear a case as a matter of priority.

59. When examining Article 80(2), the possibility of a preliminary ruling by the Court of Justice of the European Union (ECJ) under Article 267 of the Treaty on the Functioning of the European Union must also be taken into account. According to this provision, national courts deciding in final instance on cases relating to the interpretation of the EU treaties or the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union, shall request a preliminary ruling from the Court of Justice of the European Union.

60. During the last two decades, various constitutional courts (among them the Italian, Belgian, German and Austrian Courts) have requested a preliminary ruling from the ECJ. References of constitutional courts to the European Court of Justice are a feature of European Constitutional Law and are no longer an exception. The Polish Constitutional Tribunal followed these examples and filed a request on 20 July 2015 in the case of *Rzecznik Praw Obywatelskich* (RPO – Case C-390/15).

61. Therefore, it must be ensured that such a preliminary request to the European Court of Justice does not block the functioning of the Tribunal. Preliminary requests necessarily slow down national court proceedings, because the national proceedings are suspended during the proceedings before the Court of Justice. A strict application of the sequence rule of Article 80(2) of the Act would result in the inability of the Tribunal to decide any other case until the Court of Justice has given its ruling and would thus bring Polish law in conflict with EU law.

62. Even outside such extreme cases, a different sequence of cases may be required under the European Convention on Human Rights. Both Article 6 ECHR and Article 47 of the Charter of Fundamental Rights of the European Union require a reasonable length of proceedings. As early as 1996, the European Court of Human Rights (sitting as Grand Chamber) found that the role of a constitutional court “*as guardian of the Constitution makes it particularly necessary for a Constitutional Court sometimes to take into account other considerations than the mere chronological order in which cases are entered on the list, such as the nature of a case and its importance in political and social terms*”.¹⁴ The NGOs that met the Venice Commission’s delegation made this point with reference to family law and other issues of crucial human rights questions, including the NGO that was – in principle – in favour of the amendments adopted on 22 December 2015. The Tribunal has to be in a position to deal with urgent human rights cases as a matter of priority.

63. Furthermore, constitutional courts have to be able to quickly decide urgent matters also in cases concerning the functioning of constitutional bodies, for instance when there is a danger of a blockage of the political system, as is the case now in Poland.

¹⁴ European Court of Human Rights, *Süßmann v. Germany*, no. 20024/92, of 16 September 1996, par. 56.

64. It is therefore not unusual that ordinary law sets – sometimes very short and strict – time limits for certain types of urgent proceedings.¹⁵

65. In conclusion, the imposition of an obligation to decide - in a strict chronological order - would not be in line with European standards. There must be room for the Constitutional Tribunal to continue and finish deliberations in certain types of cases earlier than in others. Such discretion on the side of the Constitutional Tribunal thus is in line with European standards such as Articles 6 ECHR and 47 TFEU.¹⁶

66. If the aim is to avoid a backlog, more appropriate rules may be adopted. For example, in Belgium, the Constitutional Court must decide cases within six months of their registration. This deadline can be extended to a maximum of one year. In order to avoid any doubt regarding the sequence in which cases are considered, the current system of automatic allocation of cases to judges in alphabetical order and the state of advancement of all cases could be made fully transparent, e.g. on the web-site of the Tribunal.

2. Attendance quorum (13 out of 15 Judges)

67. The amended Article 10 (1) (Article 1(3) of the Amendment) states that *“The General Assembly shall decide by a majority of two thirds of votes, in the presence of least 13 judges of the Court, including the President or the Vice-President of the Court, unless the Act stipulates otherwise.”*

68. This new attendance quorum applies for the General Assembly (Article 10(1) of the Act, as amended) and for cases decided in full bench (Article 44(1) of the Act, as amended). Article 10(2) and 10(3) provides for exceptions, notably for individual complaints or questions of law (cases submitted by ordinary courts). The former version of the Act required, for a decision by the Plenary Court, the presence of at least *nine* judges (Article 44 (3), item 3 of the Act before the amendment).

69. From a comparative perspective, most European legal systems with a specialised constitutional court have attendance quorums. It is common all over Europe that the necessary quorum for decisions of the court exceeds the simple majority of judges of the court. Two-thirds attendance quorums within the constitutional court seem to be the most common in European countries, e.g. in Albania, Armenia, Austria, Azerbaijan, Belarus, Bulgaria, the Czech Republic, Georgia, Hungary, Lithuania, the Republic of Moldova, Romania and the Russian Federation. The German Federal Constitutional Court consists of two senates with eight judges each. According to Article 15(2) of the Federal Constitutional Court Act, each Senate shall have a quorum of at least six judges present. That means an attendance quorum of three-fourths of the senate members. The same attendance quorum must be met in the Constitutional Court of Andorra and in the Constitutional Court of Georgia when sitting as a board (equivalent of a chamber). On the other hand, it is not very common that a constitutional court is quorate if just a simple majority of the judges is present, as in the case of Slovenia.

70. The Austrian system, which was faced with a situation of an inability of the Constitutional Court to act under precarious political circumstances in the 1930s, which led to its elimination, provides for particular safeguards aimed at having a full bench for every case. The aim of safeguarding the proper functioning of the Court is achieved by using a system of six substitutes for the 12 judges of the Court. A reduced number of judges sitting on the bench only

¹⁵ In Austria, for instance, there are short time limits of only four weeks for the examination of elections to the European Parliament and of presidential elections and in the case of applications concerning the establishment and the activities of investigating committees of the National Council.

¹⁶ Protocol no. 30 of the Lisbon Treaty is not an obstacle to this assumption.

occurs if – in adjourned cases – the number of judges is reduced (which rarely is the case); in such a case, the law provides for a minimum requirement of eight judges (not including the President), which corresponds to at least two-thirds.

71. The comparative overview outlined above shows that the requirement for the participation of at least 13 judges of the constitutional court when adjudicating as a Plenary Court of 15 judges goes considerably further than corresponding requirements in other European states. While, according to common European standards, the attendance quorum within a constitutional court should be higher than half of the judges of the court, 13 out of 15 judges is unusually high, especially if there is no system of substitute judges like in Austria or in the European Court of Human Rights. The reason that such a high quorum cannot be found in other European countries is obvious: this very strict requirement carries the risk of blocking the decision-making process of the Court and rendering it ineffective, making it impossible for the Court to carry out its key task of ensuring the constitutionality of legislation.

72. The question whether or not this very high quorum falls short of European standards on its own, has to be considered within the context of other provisions, notably by taking into account whether its combination with other provisions can lead to a dysfunction of the Tribunal.

3. Majority for adopting decisions – 2/3 majority

73. According to the amended Article 99(1) of the Act, judgments of the Constitutional Tribunal sitting as a full bench (for abstract cases) require a majority of two-thirds of the judges sitting. With a view to the new (higher) attendance quorum (see above) this means that a judgment must be approved by at least nine judges if the Constitutional Tribunal adjudicates as a full bench. The same rules - attendance quorum and 2/3 majority of votes - also apply to the General Assembly of the Court, which wields wide organisational competences.¹⁷ Only, if the Tribunal adjudicates in a panel of seven or three judges (individual complaints and preliminary requests from ordinary courts), a simple majority of votes is required.

74. A comparative overview shows that, with regard to the decision quorum, in the vast majority of European legal systems, only a simple voting majority is required. There are a few – and limited – exceptions to this rule in Europe. The Government refers to them (CDL-REF(2016)015), but, without taking into account their distinguishing features, which is needed in order to properly evaluate these cases.

75. A two-thirds majority is required in cases of some specific competences of the constitutional courts in Armenia, Germany, Hungary, Romania, the Russian Federation, Serbia, “the former Yugoslav Republic of Macedonia” and Turkey. The German Federal Constitutional Court decides on the forfeiture of fundamental rights, on the ban of political parties, on the impeachment of the Federal President by the *Bundestag* or the *Bundesrat* and on the impeachment of federal and *Land* judges (Section 13 par. 1 no. 1, 2, 4 and 9 of the Federal Constitutional Court Act) with a two-thirds majority. In these cases of repressive jurisdiction, the requirement’s purpose is to protect a minority, a particular (opposition) party or the Head of State, against a far-reaching interference with their fundamental rights and their participation in the democratic process. Therefore, this example cannot be used as a comparative argument in support of the legitimacy of a general rule that applies to all cases before a Court that are decided in full bench.

76. Another example mentioned in this context is an *ex-officio*-competence, which can be found in Serbia and in the Russian Federation. According to Article 50 of the Law on the Constitutional Court of Serbia, the procedure for assessing the constitutionality or legality of general acts may be initiated by the Constitutional Court itself, on the basis of a decision taken

¹⁷ Article 10(1) as amended and 8 of the Act on Constitutional Tribunal.

by a two-thirds majority of the votes of all its judges. Again this is a special competence for proceedings initiated by the court itself, a competence most courts – including the Polish Tribunal – do not have. Article 72 of the Federal Constitutional Law of the Constitutional Court of the Russian Federation stipulates that decisions on the interpretation of the Constitution¹⁸ of the Russian Federation shall be adopted by a majority of no less than two-thirds of the number of acting judges, whereas the cases of finding of unconstitutionality are decided by a simple majority. The requirement of a two-thirds majority has the function, in this case, of limiting a particular – far reaching – competence of the Constitutional Court. For this reason, the examples of Russia and Serbia cannot be used either as a comparative argument in support of the legitimacy of a general rule that applies to all cases of a Court decided by the full bench.

77. Another feature of constitutional justice is the requirement of unanimous decisions when only a small number of judges – generally three – is competent to decide a case. In Austria, the “small formation” of five judges takes decisions not to accept applications by unanimous vote; other decisions are taken by simple majority. It has to be considered that this requirement protects the power of the plenary: if no unanimous decision can be reached, a decision on the merits must be rendered. Moreover, every judge of the Court (even those not sitting in the particular formation) may reassign a case from the small formation to the plenary. The German Federal Constitutional Court, sitting in a panel of three judges, decides by unanimous vote on the inadmissibility of individual complaints (Article 93d(1) of the Federal Constitutional Court Act). However, this is not the end of the proceedings; when unanimity among the three judges cannot be reached, the case is referred to a larger panel, i.e. the Senate (Article 93b). Here, the requirement of unanimity is compensation for the reduction of the bench and is a safeguard in favour of the applicants. Therefore, the stricter requirements for committees of three or five judges (instead of the full bench) also cannot be used as a comparative argument in support of the legitimacy of a general rule that applies to all cases of a court decided by the full bench.

78. These highly context-specific cases cannot be used in support of the argument that a qualified majority is a European standard; they mostly refer to specific decisions, which often neither settle a case, imply an interpretation of the Constitution, nor annul a law.

79. Against the background of the comparative overview above, a decision quorum of two-thirds is clearly not the general rule for plenary or chamber decisions in constitutional courts in Europe. Such a very strict requirement carries the risk of blocking the decision-making process of the Tribunal and of rendering the Constitutional Tribunal ineffective, making it impossible for the Tribunal to carry out its key task of ensuring the constitutionality of legislation.

80. According to the law on the Constitutional Court of the Czech Republic, certain decisions of the Constitutional Court also require a qualified majority – nine judges present out of a maximum of 15 judges. The quorum for the Court to sit is ten judges. If all judges are present, this is equivalent to a three fifths majority (60 per cent); when there are fewer judges, e.g. due to illness, this ratio automatically rises. This special majority applies in cases of high treason of the President of the Republic and the devolution of his or her powers to the Prime Minister, the control of treaties prior to ratification, and the annulment of statutes and individual provisions thereof.

81. What distinguishes the Polish from the Czech example is that Article 190(5) of the Polish Constitution stipulates that judgments of the Constitutional Tribunal “*shall be made by a majority of votes*”. While the Government maintains that the absence of the word “simple” would allow for the introduction of a qualified majority, such an interpretation seems to defy the wording of this provision. It was the standing practice of the Constitutional Tribunal, on the basis of Article 190(5), and also the prevailing or even unanimous opinion among Polish

¹⁸ In such non-litigious proceedings, there is no challenge to the constitutionality of an act. The Court provides a generally binding interpretation of a provision of the Constitution.

constitutional lawyers, that this provision requires a simple majority, indicating that this reading has become part of constitutional practice.

82. This established constitutional practice cannot be altered by the ordinary legislator, but only by a constitutional amendment requiring a qualified majority. A change introducing a higher judicial majority by ordinary legislation is contrary to the principle of the rule of law, possibly under national law. Whether indeed Article 99(1) of the Act, as amended, is also unconstitutional is a question of interpretation of Polish constitutional law, which has to be determined with final and binding effect by the competent organ, which is the Constitutional Tribunal.

83. Finally, it should be pointed out that providing for a qualified majority in abstract cases, initiated by State bodies, and a simple majority in individual cases is incoherent. This means that a law could be challenged in abstract proceedings before the full bench and even if there is a simple majority of judges finding the law unconstitutional, the law might “survive” because no two-thirds majority can be achieved. The same law might be challenged through an individual complaint and, in such a case, a simple majority of four out of seven judges would be able to annul the law. It is true that abstract proceedings are considered to be more complex and that a higher level of scrutiny might apply. Nonetheless, the fact remains that the same provision could be subject to different standards of control and its annulment or not would depend on the type of proceedings that were brought to challenge that provision. This contradiction should be resolved by reducing the majority for full bench decisions to a simple majority.

4. Delay for hearings

84. According to amended Article 87(2), *“[t]he hearing may not take place earlier than after three months from the day the notification on the date of the hearing has been delivered to the participants of the proceedings, and for cases adjudicated in full bench – after six months”*.

85. A time limit of at least three months may have no major negative consequences for a number of cases. There is no doubt that a time limit of three months would enable the parties to prepare their case thoroughly. For this reason, it is the practice of many constitutional courts to announce a hearing one or two months in advance, but without a strict minimum rule requiring it. The courts are guided instead by the general principles of a fair hearing and the equality of arms when they decide on time limits. A factor which could lead to a longer time limit may be the particular complexity of the case, as was the case in the ESM/OMT-proceedings before various courts. The Austrian Constitutional Court, for instance, gives notice to the parties as a rule only two weeks before the hearing, in urgent cases only one week before.

86. There is no uniform European rule regarding a concrete length for time limits for hearings, but there is a rule that the court needs discretion in setting time limits for proceedings and notably in setting dates for public hearings. In particular, in times of crisis, constitutional courts need flexibility. Reference should be made here to terrorist cases, such as the “Schleyer-Red Army Fraction”-proceedings before the German Federal Constitutional Court, where a large number of passengers and a leading manager were held hostage by terrorists, the outcome of the constitutional proceedings was a question of life or death.¹⁹

87. Mandating such long time lapses for hearings could deprive the Tribunal’s measures of much of their effect, and in many cases even make them meaningless, even when taking into account the exemptions granted in paragraph 2a (request by the President of Poland,

¹⁹ Judgment of 16 October 1977; no. 1 BvQ 5/77.

cases relating to human rights and cases relating to the Standing Orders of the *Sejm* or Senate). There is no general provision that would let the Tribunal reduce these deadlines in urgent cases. This situation, again, contradicts the requirements for a reasonable length of proceedings under Article 6 of the European Convention on Human Rights.

5. Conclusion on procedural issues

88. While each of the procedural changes examined above is problematic on its own, their combined effect would seriously hamper the effectiveness of the Constitutional Tribunal by rendering decision-making extremely difficult and slowing down the proceedings of the Tribunal. This will make the Tribunal ineffective as a guarantor of the Constitution. The requirement of a two-thirds majority, combined with a high quorum of presence and the sequence rule of dealing with cases, have severe consequences on the proper functioning of the Constitutional Tribunal.

89. In its Report on the Rule of Law, the Venice Commission pointed out that “[e]veryone should be able to challenge governmental actions and decisions adverse to their rights or interests. Prohibitions of such challenges violate the rule of law.”²⁰ and “[t]here has to be a fair and open hearing, and a reasonable period within which the case is heard and decided.”²¹ “The rights most obviously connected to the rule of law include: (1) the right of access to Justice... the right to an effective remedy (Article 13 ECHR)... and a reasonable period within which the case is heard and decided. ...”²²

90. The Amendments endanger not only the rule of law, but also the functioning of the democratic system,²³ because they would render an important factor of checks and balances ineffective. Human rights would be endangered since the right to a fair trial before an independent court²⁴ – the Constitutional Tribunal – is compromised as well as the Tribunal’s ability to ensure that national legislation respects human rights.

91. In order to accommodate the desire to speed up the proceedings of the Tribunal and to ensure that there is no undue discretion in the sequence rule of dealing with cases, the Venice Commission recommends that other measures which are in line with the rule of law be introduced, e.g. making the existing case distribution and case-flow system in the Tribunal more transparent and by providing reasonable deadlines for the resolution of cases.

C. Disciplinary proceedings and dismissal of judges

92. According to amended Article 28a, “[d]isciplinary proceedings may also be instituted further to an application from the President of the Republic of Poland or the Minister for Justice no later than three weeks after the date of receipt of the application, unless the President of the Court

²⁰ CDL-AD(2011)003rev, Report on the rule of law – Adopted by the Venice Commission at its 86th plenary session (Venice, 25-26 March 2011), par. 53.

²¹ *Ibid*, par. 56.

²² *Ibid*, par. 60.

²³ “Constitutional justice is a key component of checks and balances in a constitutional democracy.”, CDL-AD(2013)012, Opinion on the Fourth Amendment to the Fundamental Law of Hungary Adopted by the Venice Commission at its 95th Plenary Session, Venice, 14-15 June 2013, par. 76.

²⁴ See e.g. *Hirschhorn v. Romania*, 29294/02, 26 July 2007, par. 49; *Hornsby v. Greece*, 18357/91, 19 March 1997, par. 40; *Burdov v. Russia*, 59498/00, 7 May 2002, par. 34ff; *Gerasimov and Others v. Russia*, 29920/05, 3553/06, 18876/10, 61186/10, 21176/11, 36112/11, 36426/11, 40841/11, 45381/11, 55929/11, 60822/11, 1 July 2014, par. 168. For Article 14.1, first sentence, ICCPR: “Article 14 encompasses the right of access to the courts in cases of determination of criminal charges and rights and obligations in a suit at law. Access to administration of justice must effectively be guaranteed in all such cases to ensure that no individual is deprived, in procedural terms, of his/her right to claim justice. ...”, Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, U.N. Doc. CCPR/C/GC/32 (2007), par. 9.

decides that the application is unfounded.” Before the Amendment, the Executive branch was not entitled to institute disciplinary proceedings.

93. It is true that disciplinary proceedings against judges of the Constitutional Court can also be initiated in other countries, e.g. in Germany and Austria, but in these countries the political authorities have no role in initiating disciplinary proceedings. It is not clear what the justification is for introducing such a provision into the Polish Act. The Act does not grant the power to initiate such proceedings to any other external actor and the President and the Minister of Justice have no special role in the criminal proceedings that might be brought against constitutional judges under the conditions set out in Articles 24-27 of the Act.

94. Particularly worrying, from the viewpoint of the independence of the Tribunal and the separation of powers, is that new Article 31a(1) of the Act provides that “[i]n particularly gross cases, the General Assembly shall apply to the Sejm to depose the judge of the Court.” This action of the General Assembly could be caused by an application by the President of the Republic or the Minister of Justice (Article 31a(2)), although the Constitutional Tribunal remains free to decide. Moreover, the final decision will be taken by the Sejm. These new provisions are highly questionable, because a judge’s mandate can now be terminated by Parliament which by its very nature also decides on the basis of political considerations. In any case, such provisions cannot be introduced without an explicit constitutional basis.

D. Removal of certain provisions from the Act

95. The Amendments repeal Article 16 of the Act, which sets out the principle of the independence of the judges of the Tribunal. The Ministry of Justice argued that this deletion, like others discussed below, would be a simple clean-up of the Act in order to avoid repeating provisions set out in the Constitution. However, even if the principle of independence is enshrined in Article 185(1) of the Constitution, in the current situation of political and constitutional controversy, the removal of this Article from the Act would obviously give the wrong signal at the wrong time.

96. Articles 17, 19 and 20 of the Act set out the procedure for the election of the judges of the Tribunal. With the exception of Article 17, these provisions have been repealed by the Amendment. The annulment of these provisions means that the election of the judges is regulated by the Rules of Procedure of the Sejm, as was the case until the adoption of the new Act in June 2015. This is regrettable because – as is shown by the current crisis – the election of judges to the Constitutional Tribunal is an issue of particular importance to constitutional justice and should be regulated by a law, the constitutionality of which can be controlled by the Tribunal itself.

97. Finally, a number of other provisions have been deleted without apparent reason. Whether the removal of these provisions is constitutional will be determined by the Tribunal.

E. Composition of the Court

98. As set out above in section II on the scope of the opinion, the request for an opinion of the Venice Commission refers to the constitutional situation arising out of amendments of the Constitutional Tribunal Act of 22 December 2015. In all their submissions, the authorities consistently argued that the December Amendments are a “remedial action” against the early appointment of judges by the previous Sejm. This opinion should therefore also address these appointments.

1. Adoption of Articles 137 and 137a of the Act on the Tribunal

99. The Amendments of 22 December 2015, subject to this opinion, were preceded by changes enacted by the *Sejm* in its old composition, before the elections in 2015 (for more details, see the chronology presented in the appendix). In June 2015, Parliament adopted the Act on the Constitutional Tribunal, which came into force on 30 August 2015. An important proposal, which had found a consensus in a working group preparing the Law on the Tribunal, was removed in the process of adopting the Law: i.e., that neutral institutions such as universities, the judiciary or the bar should be entitled to propose candidates for judges to the *Sejm* (pre-selection). Instead, a transitional provision – Article 137 – was introduced, providing that “[i]n the case of Court judges whose term expires in 2015, the time for submitting the petition referred to in Art. 19 Para. 2, shall be 30 days after the day of the Act’s entry into force”. By covering the year 2015 in its entirety, this meant that the *Sejm* of the 7th term would be able to elect judges to the Constitutional Tribunal even beyond the end of its own mandate.

100. According to Article 98(1) of the Constitution, the term of office of the *Sejm* begins on the day on which the *Sejm* assembles for its first sitting and continues until the day preceding the assembly of the *Sejm* of the succeeding term of office. The parliamentary elections in Poland took place on 25 October 2015. The first session of the new 8th term of the *Sejm* started on 12 November 2015. This means that the 7th term of the *Sejm* lasted until 11 November 2015.

101. In practice, judges elected by the 7th term of the *Sejm* were supposed to replace not only three judges whose term of office expired on 6 November 2015, but also two judges whose term of office expired on 2 and on 8 December 2015, respectively. Indeed, during the last session of the 7th term on 8 October 2015, the *Sejm* adopted five resolutions in which it elected five new judges of the Constitutional Tribunal. However, following the judges’ election, the President of Poland did not accept their oath.²⁵

102. During the first session of the *Sejm* of the 8th term, draft amendments to the Act were proposed. The amendments annulled Article 137 of the Act and added a new Article 137a,

²⁵ In *Marbury v. Madison*, 5 U.S. 137 (1803), the United States Supreme Court was confronted with a somewhat analogous issue. In that case, the departing U.S. President (John Adams) appointed a number of individuals to public office with the advice and consent of the Senate, including William Marbury, who was appointed to be a Justice of the Peace. The Secretary of State of the new President, from a different political party, however, declined to deliver the commissions appointing those individuals, and Marbury sued.

The Supreme Court declared that the appointment had been completed when made, and that the failure to deliver the commission was illegal. The Court held that appointment was completed “when the last act required from the person” making the appointment was completed. *Id.* at 157. This act was the President’s signature and sealing of the commission. The subsequent delivery of the commissions was not part of the process of appointment. The Court observed that “Some point of time must be taken when the power of the Executive over an officer, not removable at his will, must cease. That point of time must be when the constitutional power of appointment has been exercised. And this power has been exercised when the last act required from the person possessing the power has been performed.” at 157.

The Court further observed that, once the appointment was made and the Commission was signed, the Secretary of State of a subsequent President, from a different political party, could not properly decline to deliver it based on the instructions of that President. “This is not a proceeding which may be varied if the judgment of the Executive shall suggest one more eligible, but is a precise course accurately marked out by law, and is to be strictly pursued.” *id.* at 158. Moreover, “when the officer is not removable at the will of the Executive, the appointment is not revocable, and cannot be annulled. It has conferred legal rights which cannot be resumed. The discretion of the Executive is to be exercised until the appointment has been made. But having once made the appointment, his power over the office is terminated in all cases, where by law the officer is not removable by him.” *Id.* at 162 “To withhold the commission, therefore, is ... violative of a vested legal right.”

which allowed the new *Sejm* to retroactively fill all vacancies of the year 2015. The amendment was adopted on 19 November 2015 and signed by the President of Poland the next day.

103. On 25 November 2015, the *Sejm* adopted resolutions stating that the election of five judges of the Constitutional Tribunal on 8 October 2015 was null and void. Five candidates for new judges were submitted on 1 December 2015. Disregarding a preventive measure imposed by the Constitutional Tribunal on 30 November 2015, the *Sejm* elected five new judges of the Constitutional Tribunal on 2 December 2015. During the night of 2 December 2015, the President of Poland accepted the oath of the newly-elected judges.

104. On 3 December 2015, the Constitutional Tribunal ruled that Article 137 of the Act is consistent with Article 194(1) of the Constitution in respect to the three judges of the Constitutional Tribunal whose term of office expired on 6 November 2015, but is unconstitutional in respect to the two judges of the Constitutional Tribunal whose term of office expired on 2 and on 8 December 2015.

105. On 9 December 2015, the Constitutional Tribunal ruled that Article 137a of the Act is inconsistent with Article 194(1) in conjunction with Article 7 of the Constitution in respect to the three vacancies of 6 November 2015.

106. Following the inadmissibility decision in case no. U 8/15 of 7 January 2016 (announced on 11 January 2016), dismissing the complaint against the *Sejm*'s resolutions of 2 December 2015 because they are not normative acts subject to the jurisdiction of the Tribunal, the President of the Tribunal admitted to the bench the two judges elected in respect of the vacancies opened on 2 and on 8 December 2015.

107. As a consequence, the Tribunal now has 12 sitting judges and two sets of three judges each, the so-called "October judges" elected by the 7th *Sejm* and the "December judges", elected by the 8th *Sejm*.

2. Constitutional custom preventing the outgoing majority to elect judges after parliamentary elections

108. The delegation of the Venice Commission was informed that in 1997, after the parliamentary elections and before the new term of the *Sejm* had started, the outgoing majority of the *Sejm* did not elect three judges of the Tribunal even though this would have been possible. The Government and legal experts argue that this precedent had created a constitutional custom which the 7th term of the *Sejm* had to respect.

109. By its very nature as an unwritten part of a Constitution, constitutional custom is not easy to identify. The report on Constitutional Amendment of the Venice Commission examined the mechanisms for establishing constitutional custom and found that they develop mostly in older constitutions and "*evolve over time, reflecting the actions and normative perceptions of the political actors*".²⁶

110. Concerning the situation in Poland, it seems premature to identify constitutional custom based on a single event, which was not even followed the next time that there was occasion to do so, in 2015. In any event, the body entitled to identify constitutional custom – the Constitutional Tribunal – did not identify such a custom in its judgment of 3 December 2015. In fact, if the new majority in 1997 had wished to turn the precedent from that year into a binding rule, Parliament could have adopted it as an amendment to the Law on the Constitutional Tribunal.

²⁶ CDL-AD(2010)001, Report on Constitutional Amendment adopted by the Venice Commission at its 81st Plenary Session (Venice, 11-12 December 2009), par. 115 seq.

111. By introducing Article 137 in the Act on the Constitutional Tribunal, the 7th term of the *Sejm* violated the Constitution as was held by the Tribunal in its judgment of 3 December 2015. The Tribunal's position notably is also in line with the Venice Commission's 2014 Opinion on the procedure for appointing judges to the Constitutional Court in times of the Presidential transition in the Slovak Republic.²⁷

112. The position of the Constitutional Tribunal seems even more grounded in the European constitutional heritage if one takes the democratic aspect of the appointment procedure into account. The appointment of constitutional court judges by Parliament representing the people confers democratic legitimacy on the judges and the Court. As the composition of Parliament changes after elections, the new Parliament must not be deprived of its power to take its own decisions on issues that arise during its mandate. It would be in conflict with democratic principles if Parliament could choose public officials including judges (far) in advance even if the term of office expires within the term of office of the subsequent term of Parliament. *Vice versa*, the subsequent Parliament has to respect the decisions of the former Parliament with regard to appointments of public officials.

3. Principle of Pluralism

113. During the meetings in Warsaw and in the Government Memorandum, the authorities referred to the "principle of pluralism" applying to constitutional courts. As the basis for this principle, the Venice Commission is cited: *"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."*²⁸

114. The Venice Commission indeed regularly recommends establishing mechanisms which help to ensure a balanced composition of constitutional courts.²⁹ In its 1997 Report, the Commission explained what it means by pluralism: *"Constitutional justice must, by its composition, guarantee independence with regard to different interest groups and contribute towards the establishment of a body of jurisprudence which is mindful of this pluralism."*³⁰ Here, the emphasis is on the independence of the judges and their respect for pluralism, not their "representation" of party interests.

115. In Poland, the governmental majority argues that the current opposition had time during two terms of the *Sejm* to nominate judges at its will. As a consequence, most judges at the Constitutional Tribunal are seen to be "opposition judges". According to this logic, the principle of pluralism was violated because the outgoing majority wanted to occupy 14 out of the 15 seats at the Constitutional Tribunal.

116. This view of the Constitutional Tribunal with judges "belonging" to one party and other judges "belonging" to the other party seems to equate the Tribunal with another chamber of Parliament. This was strikingly visible when the judges were marked in a particular colour in the charts presented to the Venice Commission delegation as if they were a group in Parliament. The Venice Commission cannot subscribe to such an approach and it has difficulty understanding the aim of establishing "pluralism" in the Constitutional Tribunal if this just means

²⁷ CDL-AD(2014)015, Opinion on the procedure for appointing judges to the Constitutional Court in times of the Presidential transition in the Slovak Republic, adopted by the Venice Commission at its 99th Plenary Session (Venice, 13-14 June 2014), par. 24.

²⁸ CDL-STD(1997)020, Report on the Composition of Constitutional Courts, Science and Technique of Democracy, no. 20 (1997), p. 21.

²⁹ CDL-AD(2009)014, par. 13; CDL-AD(2011)010 par. 27; CDL-AD(2013)028, par. 21, CDL-AD(2015)027, par. 24.

³⁰ CDL-STD(1997)020, p. 21.

appointing a sufficient number of one's own "representatives" to the Tribunal. This logic seems to assume that a lack of such party pluralism is legally relevant, but there is no constitutional basis for such a concept.

117. While Members of Parliament legitimately represent the ideas of political parties, this is very different from the role of constitutional court judges. Constitutional judges have a "duty of ingratitude" towards the authority that elected or appointed them. They may well be nominated by a party and elected by the MPs of that same party, but they can never represent that party. As judges, they are independent, their loyalty is to the Constitution, not to those who have elected them.

118. During its visit to Warsaw, the delegation of the Commission was informed that three judges of the Tribunal were in fact elected with the votes of the opposition. Counting these judges as "opposition judges" is not appropriate. Moreover, the other judges, who were elected by a majority vote, cannot be seen as representatives of the party that voted for them.

119. It should also be pointed out that, since the judgement of 3 December 2015, 14 judges were not elected during the mandate of the previous majority. The two judges who were elected by the 8th *Sejm*, in accordance with that judgment, already sit on the Tribunal. It is therefore not easy to establish why the Amendments of 22 December 2015 continue to be a remedial action against the unconstitutional action of the previous majority.

120. Furthermore, the Governmental majority argues that all five vacancies could have taken place during the 8th *Sejm* if the President had fixed a slightly earlier date for the parliamentary elections. This argument is somewhat hypothetical. The delegation of the Venice Commission did not hear of any allegations that the President of the Republic deliberately delayed the call for elections in order to allow the 7th *Sejm* to elect three judges. In its judgment of 3 December 2015, the Constitutional Tribunal held that the dates of the end of the term of the 7th *Sejm* and the beginning of the 8th *Sejm* determined which vacancies could be filled by the respective convocation of Parliament.

121. As a political actor, the *Sejm* is also best placed to establish a dialogue conducive to a political solution. A solution to the current stalemate must be found and, in a constitutional democracy, the solution must be based on the Constitution as interpreted by the Constitutional Tribunal as the competent body. The solution must be achieved on the basis of the rule of law, respecting the judgments of the Constitutional Tribunal. The Venice Commission therefore calls upon the *Sejm* to revoke the resolutions made on the basis of provisions declared unconstitutional by the Tribunal.

122. Decisions of a constitutional court which are binding under national constitutional law must be respected by other political organs; this is a European and international standard that is fundamental to the separation of powers, judicial independence, and the proper functioning of the rule of law. This is particularly valid in the case of the decision of the Tribunal on the nomination of new judges in October/December 2015. The Constitutional Tribunal decided that the election of those judges, whose vacancy opened up in December 2015, i.e. after the new *Sejm* has resumed work, was not a competence of the old *Sejm*. This verdict has to be respected by the old government, now the opposition. The election of these judges by the 8th *Sejm* had a constitutional basis. On the other hand, the election of the judges who occupy a position that opened up during the mandate of the 7th *Sejm* has a constitutional basis as well and the new *Sejm* has to respect that election.

123. Finally, the delegation of the Venice Commission learned that, while it was in Warsaw, a proposal for constitutional amendments was tabled in Parliament. The Commission has not had an opportunity to analyse these draft amendments, but it seems that they include a provision terminating the terms of office of all judges of the Constitutional Tribunal. Such a radical

measure, even adopted with a constitutional majority, would be in flagrant violation of European and international standards, notably the rule of law and the separation of powers.

VI. Loyal co-operation between State Powers

124. As shown by the judgments of the Constitutional Tribunal of Poland, both the previous and the present majorities of the *Sejm* have taken unconstitutional actions, which seem to be based on the view that a (simple) parliamentary majority may change the legal situation in its favour, going right to the constitutional limits – and beyond. This practice runs against the model of a democratic system based on the rule of law, governed by the principle of separation of powers.

125. On the basis of the information received during the visit in Warsaw, an overall assessment shows that there is a policy of a simple majority in Parliament, which aims at influencing the composition of the Constitutional Tribunal and its procedure in a way that is not in line with the principle of the rule of law under European and international standards.

126. In its 2012 opinion on Romania, which shows some similarities, the Venice Commission pointed out that *“[i]nstitutions have not been kept separate from persons occupying them. This is shown in the way office holders have been treated as representatives of the political forces which had nominated them or voted them to office. Office holders may have been expected to favour the positions of respective political parties, and a new parliamentary majority may feel justified to dismiss the office holders appointed by a previous majority. Such a lack of respect for institutions is closely linked to another problem in the political and constitutional culture: namely disregard of the principle of loyal cooperation between the institutions.”*

127. The Commission also found that *“[i]t seems that some stakeholders were of the opinion that anything that can be done according to the letter of the Constitution is also admissible. The underlying idea may have been that the majority can do whatever it wants to do because it is the majority. This is obviously a misconception of democracy. Democracy cannot be reduced to the rule of the majority; majority rule is limited by the Constitution and by law, primarily in order to safeguard the interests of minorities. Of course, the majority steers the country during a legislative period but it must not subdue the minority; it has an obligation to respect those who lost the last elections.”*³¹

128. A mature understanding of constitutional institutions is required, which accepts that even after a strong impetus for political reform, such reform has to remain within the limits of the Constitution and it is for the competent organ, the Constitutional Tribunal, to decide when these limits have been overstepped.

129. The Venice Commission was also informed about defamatory declarations reportedly directed against members of the Constitutional Tribunal. Again, elements of the Commission’s opinion on Romania may be relevant. The Commission pointed out that:
“62. Statements, whether they come from the President, members of the Government or Parliament, undermining the credibility of judges are of serious concern, even if they do not formally prevent the judges from fulfilling their constitutional mandate. Even if such

³¹ CDL-AD(2012)026, Opinion on the compatibility with Constitutional principles and the Rule of Law of actions taken by the Government and the Parliament of Romania in respect of other State institutions and on the Government emergency ordinance on amendment to the Law N° 47/1992 regarding the organisation and functioning of the Constitutional Court and on the Government emergency ordinance on amending and completing the Law N° 3/2000 regarding the organisation of a referendum of Romania, Adopted by the Venice Commission at its 93rd Plenary Session (Venice, 14-15 December 2012), para. 74.

statements are later withdrawn, the damage to the state institutions and thus the state as a whole is already done.

63. A public authority, in its official capacity does not enjoy the same freedom of expression as does an individual who is not entrusted with public functions. State bodies may of course also publicly disagree with a judgment of the Constitutional Court but in doing so they have to make clear that they will implement the judgment and they have to limit criticism to the judgment itself. Personal attacks on all judges or individual judges are clearly inadmissible and jeopardize the position of the judiciary and the public trust and respect it requires.

64. The independence and neutrality of the Constitutional Court is at risk when other state institutions or their members attack it publicly. Such attacks are in contradiction with the Court's position as the guarantor of the supremacy of the Constitution (...) and they are also problematic from the point of view of the constitutionally guaranteed independence and irremovability of the judges of the Court (...).

65. Another aspect of the necessary respect for the Constitutional Court is the execution of its judgments. Not only the rule of law but also the European Constitutional Heritage require the respect and effective implementation of decisions of constitutional courts. ..."

130. Finally, it is obvious that the Resolutions of 25 November and 2 December 2015 as well as the amendments of 17 November and 22 December 2015 were adopted in a rushed way without sufficient scrutiny in Parliament. This hasty adoption often did not even allow for adequate consultation with the opposition and civil society.³² Institutional legislation, like that on the Constitutional Tribunal, needs thorough scrutiny and the opinions of all relevant stakeholders should be considered. Even if Parliament is not obliged to follow their views, this input can avoid technical errors, which can defeat the purpose of the legislation. This rushed adoption cannot be justified by the fact that "bad precedents" had been made by the previous majority. The Amendments of 19 November and 22 December 2015 were of an institutional nature and, as such, deserved full and complete parliamentary debate. This sheds a negative light on the legislative process in these cases.

131. The Venice Commission urges the Polish authorities to be guided by the principle of loyal co-operation between State organs in the relations between the President of the Republic, Parliament, the Government and the Constitutional Tribunal in Poland.

VII. Conclusion

132. This opinion, requested by the Minister of Foreign Affairs of Poland, examines the constitutional situation arising from Amendments to the Law on the Constitutional Tribunal of 22 December 2015 (published on 28 December 2015). As these Amendments were explicitly adopted to remedy a dispute regarding the appointment of judges to the Constitutional Tribunal, the opinion refers to this situation to the extent required to understand the Amendments themselves.

133. Constitutional democracies require checks and balances.³³ In this respect, where a constitutional court has been established, one of the central elements for ensuring checks and

³² CDL-AD(2013)012, Opinion on the Fourth Amendment to the Fundamental Law of Hungary Adopted by the Venice Commission at its 95th Plenary Session, Venice, 14-15 June 2013, par. 131.

³³ On the role of the judiciary, the Supreme Court of the United States held: "Notwithstanding the deference each branch must accord the others, the "judicial Power of the United States" vested in the federal courts by Art. III, par. 1, of the Constitution can no more be shared with the Executive Branch than the Chief Executive, for example, can share with the Judiciary the veto power, or the Congress share with the Judiciary the power to override a Presidential veto. Any other conclusion would be contrary to the basic concept of separation of powers and the checks and balances that flow from the scheme of a tripartite government. The Federalist, No. 47, p. 313 (S. Mittell ed. [p705] 1938). We therefore reaffirm that it is the province and duty of this Court "to say what the law is" with respect to

balances is the independent constitutional court, whose role is especially important in times of strong political majorities. Therefore, the Venice Commission welcomes the fact that all the interlocutors, whom its delegation met in Warsaw, expressed their commitment to the Constitutional Tribunal as a guarantor of the supremacy of the Constitution in Poland. However, as long as the situation of constitutional crisis related to the Constitutional Tribunal remains unsettled and as long as the Constitutional Tribunal cannot carry out its work in an efficient manner, not only is the rule of law in danger, but so is democracy and human rights.

134. A solution to the current conflict over the composition of the Constitutional Tribunal must be found. In a State based on the rule of law, any such solution must be based on the obligation to respect and fully implement the judgments of the Constitutional Tribunal. The Venice Commission therefore calls on all State organs to fully respect and implement the judgments of the Tribunal and in particular calls upon the *Sejm* to revoke the resolutions, that were made on the basis of provisions declared unconstitutional by the Tribunal. By contrast, a dismissal of all judges of the Tribunal, as envisaged in a proposal currently pending in Parliament, cannot be part of any solution that respects the rule of law.

135. With respect to the Amendments of 22 December 2015, they cannot be justified as a remedial action against an absence of "pluralism" in the composition of the Tribunal. Such a claim misunderstands the role of a pluralism in a constitutional tribunal, which is not to represent political interests and parties. Furthermore, rather than speeding up the work of the Tribunal these amendments, individually or taken together, will lead to a serious slow-down of the activity of the Tribunal and will make it ineffective as a guardian of the Constitution.

136. Crippling the Tribunal's effectiveness will undermine all three basic principles of the Council of Europe: democracy – because of an absence of a central part of checks and balances; human rights – because the access of individuals to the Constitutional Tribunal could be slowed down to a level resulting in the denial of justice; and the rule of law – because the Constitutional Tribunal, which is a central part of the Judiciary in Poland, would become ineffective. Making a constitutional court ineffective is inadmissible and this removes a crucial mechanism which ensures that potential conflicts with European and international norms and standards can be resolved at the national level without the need to have recourse to European or other subsidiary courts, which are overburdened and less close to the realities on the ground.

137. The provisions of the Amendments of 22 December 2015, affecting the efficiency of the Constitutional Tribunal, should be removed. Instead, a proposal of a working group preparing the Law on the Tribunal, but which was – unfortunately – removed in the process of adopting the Law, could be taken up again: institutions such as universities, the judiciary or the bar should be entitled to make proposals for candidates for judges; the *Sejm* should be obliged to select judges among these proposed candidates.

138. In addition, the Venice Commission recommends that Poland should hold a principled and balanced debate, which provides enough time for full participation by all institutions, on:

- reform of the procedure and on the organisation of the Court and
- whether and what types of proceedings warrant reasonable time limits before the Tribunal.

139. While it is obviously not a good moment, under the present circumstances, to discuss reform of the Constitution and possible amendments, the Venice Commission nonetheless recommends that the Constitution be amended in the long run to introduce a qualified majority

the claim of privilege presented in this case. *Marbury v. Madison*, supra at 177." *United States v. Nixon*, 418 U.S. 683 (1974)

for the election of the Constitutional Tribunal judges by the *Sejm*, combined with an effective anti-deadlock mechanism.

140. A valid alternative would be to introduce a system by which a third of the judges of the Constitutional Tribunal are each appointed / elected by three State powers – the President of Poland, Parliament and the Judiciary. Of course, even in such a system, it would be important for the parliamentary component to be elected by a qualified majority.

141. The Venice Commission remains at the disposal of the Polish authorities for any further assistance that they may need.