COMMISSIONER FOR HUMAN RIGHTS

Adam Bodnar

Warsaw, 23 November 2015

VII.510.43.2015.ST

Constitutional Tribunal

Warsaw

Motion

of the Commissioner for Human Rights

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

I would like to move

to declare non-compliance

1) of the Act of 19 November 2015 amending the Act on the Constitutional Tribunal (Polish Journal of Laws Dz.U. item 1928) with Article 7, Article 112 and Article 119(1) of the Polish Constitution;

2) Article 137a of the Act of 25 June 2015 on the Constitutional Tribunal (Polish Journal of Laws Dz.U. item 1064 as amended) added by Article 1(6) of the Act

referred to in sec. 1 with Article 45(1), Article 180(1 and 2), and Article 194(1) in conjunction with Article 10 of the Polish Constitution, as well as with Article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms made in Rome on 4 November 1950 (Polish Journal of Laws Dz.U. of 1993 No. 61 item 284 as amended) and Article 25(c) in conjunction with Article 2 and Article 14(1) of the International Covenant on Civil and Political Rights open for signing in New York on 19 December 1966 (Polish Journal of Laws Dz.U. of 1977, No. 38, item 167);

3) Article 2 of the Act referred to in sec. 1 with the principle of proper legislation arising from Article 2 with Article 45(1), Article 180(1 and 2), and Article 194(1) in conjunction with Article 10 of the Polish Constitution, as well as with Article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms and with Article 25(c) in conjunction with Article 2 and Article 14(1) of the International Covenant on Civil and Political Rights.

Statement of grounds

Ensuring independence and autonomy of courts and of the Constitutional Tribunal, as a separate power that is independent of other branches of power (Article 173 of the Polish Constitution), is commonly recognized as the European standard. The issue of the independence and autonomy of courts and of the Constitutional Tribunal must be considered from the viewpoint of implementing the constitutional duty to

protect the rights of individuals by those institutions. As a consequence, infringing the independence and autonomy of courts and tribunals must thus lead to a threat to the protection of the rights of individuals. This correlation was noted by the Constitutional Tribunal in its ruling of 9 November 1993 (case file no. K 11/93, OTK of 1993, part II, item 37), indicating that "From the principle of separation of power it follows that the legislative, the executive and the judiciary are separate powers; moreover, there must be a certain balance ensured among them, and they must cooperate. This principle is not purely organisational in nature. The objective of the separation of powers is, among others, protection of human rights by making it impossible by any entity to abuse power. One of the elements of the principle of separation of power and of the foundations of a democratic state of law, is the principle of autonomy of the judiciary. Democratic systems always strive to implement it; in turn, totalitarian and authoritarian systems usually abolished this rule. This autonomy is guaranteed by the irremovability of judges."

It must be noted here that the constitutional complaint filed with the Constitutional Tribunal is one of the constitutional means of protecting the rights and freedoms of individuals available in the Polish legal system. Article 79(1) of the Polish Constitution provides that everyone whose constitutional freedoms or rights have been infringed, shall have the right to appeal to the Constitutional Tribunal for its judgement on the conformity to the Constitution of a statute or another normative act upon which basis a court or organ of public administration has made a final decision on his freedoms or rights or on his obligations specified in the Constitution. Looking at the constitutional complaint as a means of protecting the freedoms and rights of individuals,

the principle of independence and autonomy of the entity that considers the complaint gains particular significance. Only an entity that is independent and autonomous from the legislative and the executive is able to protect the rights of individuals effectively.

In this context, protecting the independence and the autonomy of the judiciary, including the independence and the autonomy of the Constitutional Tribunal, constitutes an inseparable element of protecting the rights of humans and citizens, which is the grounds for the position of the Commissioner for Human Rights.

Act of 25 June 2015 on the Constitutional Tribunal (Polish Journal of Laws Dz. U. item 1064) governs appointing the judges of the Constitutional Tribunal. In line with Article 17(1) of the said Act, the Tribunal is composed of fifteen judges. Judges of the Constitutional Tribunal are appointed individually, for a term of nine years, by the Polish Sejm by absolute majority of votes, in the presence of at least half of the statutory number of MPs. No person may be chosen for more than one term of office (Article 17(2) second sentence of the Act on the Constitutional Tribunal). The Sejm Presidium and a group of at least 50 MPs have the right to propose candidates for the judges of the Tribunal. The proposals regarding candidates for the judges of the Tribunal must be filed with the Speaker of the Sejm no later than 3 months before the lapse of the term of office of Tribunal's judges (Article 19(1 and 2) of the Act on the Constitutional Tribunal). Detailed requirements regarding the proposal itself and the mode of handling the proposal are specified in the rules of procedure of the Polish Sejm (Article 19(5) of the Act on the Constitutional Tribunal).

However, by passing a new Act on the Constitutional Tribunal, the legislator decided that the deadline for submitting the proposal mentioned in Article 19(2) as

regards the judges whose term of office lapses in 2015, is 30 days since the act enters into force (Article 137 of the Act on the Constitutional Tribunal). Here it must be noted that in the light of Article 98(1) first sentence of the Polish Constitution, the Polish Sejm and the Polish Senate are chosen for a four-year term of office. The term of office of the Polish Sejm and the Polish Senate 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. In practice, the implementation of Article 137 of the Act on the Constitutional Tribunal resulted in the fact that pursuant to the said provision, the Sejm of the 7th term will be able to appoint the judges for the positions that were vacated not only during its term of office, but also for the positions that will be vacated after the term of office of that Sejm lapses. As regards the appointment of judges for the positions vacated after the lapse of the terms of office of the Sejm of the 7th term, this solution causes reservations of constitutional nature, as exemplified by the motions to launch a procedure to the Constitutional Tribunal (case file no. K 29/25, with the claimants withdrawing the motion submitted, and case file no. K 34/15). The Commissioner for Human Rights, who joined the procedure (case file no. K 34/15), shares these reservations.

Pursuant to the provisions of the new Act on the Constitutional Tribunal, including the controversial Article 137 of the said Act, the Polish Sejm appointed judges of the Tribunal, deciding in its resolutions dated 8 October 2015 on the appointment of a judge of the Constitutional Tribunal, that the term of office of three judges begins on 7 November 2015 (Monitor Polski – Official Gazette, item 1038-1040), while the term of office of the remaining two judges begins on 3 December 2015

(Monitor Polski – Official Gazette, item 1041) and on 9 December 2015 (Monitor Polski – Official Gazette, item 1042).

In line with Article 21(1) of the Act on the Constitutional Tribunal, the person appointed as a judge of the Tribunal takes an oath before the President of the Republic of Poland in the wording specified in that Article. The President of the Republic of Poland is in turn obliged to accept the oath. In this context, it is noted that (see M. Zubik, "Status prawny sędziego Trybunału Konstytucyjnego" (Legal status of a judge of the Constitutional Tribunal), Warsaw, 2011, p. 94) "(...) the President does not have the right to challenge the appointment of the judge made by the Polish Sejm. The statutory obligation to accept the oath should be followed through immediately." In turn, the refusal to take the oath is equivalent to renouncing the position of the judge of the Tribunal (Article 21(1) of the Act on the Constitutional Tribunal). The contents of Article 21(2) of the Act on the Constitutional Tribunal leaves therefore no doubt that the person appointed by the Sejm takes the position of a judge of the Tribunal on the day specified in the appointing resolution. As the Supreme Court stated in its decision of 5 November 2009 (case file no. I CSK 16/09, OSP of 2011, No. 7-8, item 81), "the notion of the mandate of a judge of the Constitutional Tribunal must be understood as an entitlement to hold the position of a judge of the Constitutional Tribunal for a term of office of 9 years. The legal relationship between the judge and the state if of public-law nature. Its establishment and termination belongs to the competences specified in the provisions governing the state authorities. A mandate of a judge of the Constitutional Tribunal may expire before the lapse of the term of office only in the cases explicitly specified in the Act." These cases are currently specified in Article

36(1) of the Act on the Constitutional Tribunal, which provides that the expiry of a mandate of a judge of the Tribunal before the lapse of the term of office takes place:

1) if a judge of the Tribunal dies;
2) if a judge of the Tribunal resigns;
3) if a judge of the Tribunal is convicted with a binding court judgement for an intentional offence prosecuted by public indictment or an intentional fiscal offence;
4) if a binding decision is issued to discharge a judge of the Tribunal.

In this context, it is clear that if the President of the Republic of Poland does not accept an oath from the judge of the Tribunal appointed by the Polish Sejm, the mandate of the judge does not expire. Such legal consequence may only be incurred by the refusal to take an oath, which is treated as renouncing the position of a judge of the Tribunal.

This is the legal context that must be considered while looking at the changes introduced to the Act on the Constitutional Tribunal by the Act of 19 November 2015 amending the Act on the Constitutional Tribunal. The basic impulse to introduce those changes was given by – as it can be presumed – the implementation of Article 137 of the Act on the Constitutional Tribunal. These changes pertain to appointing the President of the Constitutional Tribunal, qualification requirements for holding the position of a judge of the Tribunal, the deadlines for proposing candidates for judges of the Tribunal, taking the oath by a judge of the Tribunal, and appointing new judges of the Tribunal for the positions vacated in 2015.

According to the Commissioner for Human Rights, the priority should be given to verifying the mode of adopting the Act amending the Act on the Constitutional Tribunal under constitutional control principles. In line with Article 50(3)(1) of the Act on the Constitutional Tribunal, the subject of a complaint may pertain to the competence to issue a normative act or the mode of issuing such an act (legislative action). While the competence to issue a normative act (in this case – the competence to issue a resolution) raises no constitutional concerns, reservations pertain to the mode of passing the resolution itself.

The bill of the said Act was filed by the MPs to the Polish Sejm on 13 November 2015 (Parliamentary Document no. 12). On 17 November 2015 the bill was referred to the first reading within the Legislative Committee, the first reading within the Committee took place on 18 November 2015. Next, on 19 November 2015 the second reading was held at a sitting of the Polish Sejm, and a decision was made to immediately perform the third reading, which took place on the same day. Also on the same day, the resolution adopted by the Sejm was forwarded to the Speaker of the Sejm, who referred it for consideration by the joint Legislative Committee and the Human Rights, the Rule of Law and Petitions Committee. The Committees provided a report regarding the resolution adopted by the Sejm to the Senate (Senate Document no. 18A). Next, on 20 November 2015 (02:25-4:25 – planned sessions of the joint committees) considered the motions made with respect to the act during the session of the Senate, and the Senate passed the resolution on 20 November 2015 without any revisions. The Act was signed by the President of the Republic of Poland on 20 November 2015 and it was published in the Polish Journal of Laws (Dziennik Ustaw) on the same day.

The very pace of the work on the bill that concerns the constitutional body of the state, i.e. the Constitutional Tribunal, causes concern. These concerns are compounded by the fact that the contents of the bill pertained to the independence of that entity and to the autonomy of its judges, and therefore – the issues of systemic nature. From Article 123(1) of the Polish Constitution it follows that the Council of Ministers may classify a bill adopted by itself as urgent, with the exception of tax bills, bills governing elections to the Presidency of the Republic of Poland, to the Sejm, to the Senate and to organs of local government, bills governing the structure and jurisdiction of public authorities, and also drafts of law codes. *Ratio legis* of Article 123(1) of the Polish Constitution that concerns the Council of Ministers should also be considered while assessing the pace of work on the bill filed by the MPs to amend the Act on the Constitutional Tribunal. The intention of the systemic lawmakers was that the work on a bill pertaining to fundamental rights and freedoms of individuals and democratic rules conducted in the Parliament were held in a way that prevents passing a resolution in a too rash manner. The summary of the dates provided above leads to a clear conclusion that in this case, the pace of legislative work imposed by the parliamentary majority was contrary to the intention of the systemic lawmakers expressed in Article 123(1) of the Polish Constitution and was to the detriment of such values protected by the Constitution as the constitutional principle of trust of the citizens in the state and the law, arising from Article 2 of the Polish Constitution, or the principle of social dialogue, arising from the preamble to the Polish Constitution. The principle of trust of the citizens in the state and the law provides that the laws pertaining to the functioning of a democratic state shall be passed after consideration is given to all arguments

(including the arguments of the parliamentary opposition, the arguments of representatives of the civic society, and the arguments of the entities invited under the statute to present their positions in the matter that is the subject of the proposed regulation). This is the only way that the trust in the established law may be built; otherwise, the established law becomes the dictate of the majority, instead of being the manifestation of the arguments speaking for adopting it. In turn, the principle of social dialogue provides that the final legislative decisions will be preceded by the dialogue with all representative participants of social life, i.e. that they will be preceded by hearing their opinions. These rules of establishing law in a democratic state of law were infringed in the course of adopting the Act amending the Act on the Constitutional Tribunal.

In line with Article 119(1) of the Polish Constitution, the Sejm considers bills in the course of three readings. As it was specified by the Constitutional Tribunal in its decision of 24 March 2004 (case file no. K 37/03, OTK of 2004, no. 3/A, item 21), this principle should not be treated strictly formally, i.e. as the requirement to consider a bill with the same reference three times. After the Constitutional Tribunal it must be stated that "the objective of the principle of three readings is to ensure as detailed and thorough consideration of the bill as possible, and as a consequence, to eliminate the risk of underdevelopment or randomness of the solutions adopted in the course of the legislative work. This solution must also be considered in the context of striving to ensure a higher efficiency of the Sejm's operations. Therefore it must be stated that the principle of three readings means that the Sejm must consider the same bill three times with respect to merits, not only in the technical sense." This view was sustained by the

Constitutional Tribunal in its decision of 16 May 2009 (case file no. P 11/08, OTK of 2009, no. 4/A, item 49).

Thorough consideration of the bill in three readings as mentioned by Article 119(1) of the Polish Constitution is not a formal ritual only that must be met to satisfy this provision of the constitutional norm. The phrase "Sejm considers" means that the Sejm hears and considers all representative arguments pertaining to the proposed legislative text during all three readings. Otherwise, the legislative decision of the Sejm might not consider all aspects of the considered problem and is not based on the arguments of legitimacy and rationality, but exclusively on the argument of what the majority wants and the majority's current voting power. In the case that is the subject of the motion, despite numerous stipulations, including stipulations of constitutional nature, made regarding the bill, no opinions and expert opinions were consulted, no in-depth analysis of the very matter of the established law. The first reading of the bill took place on 18 November 2015, it was adopted by the Sejm on 19 November 2015, while its adoption by the Senate and signing by the President of Poland, as well as publication in the Polish Journal of Laws (Dziennik Ustaw) – on 20 November 2015. No constitutional considerations justified such haste in passing this act (they were also not listed in the statement of grounds accompanying the bill). Moreover, the matter under consideration concerned a judiciary entity that is not an entity subordinate to the legislative. Article 10(1) of the Polish Constitution provides that the system of government of the Republic of Poland shall be based on the separation of and balance between the legislative, executive, and judiciary powers (courts and tribunals, as specified in Article 10(2) of the Polish Constitution). In turn, balance as a systemic feature provides for the dialogue

between the individual elements of power; it does not provide for the domination and the dictate of one of the powers. Nevertheless, the judiciary entities (which will be explained later on) had not been asked for their opinion in the course of the prompt work on the subject bill. Therefore the Commissioner for Human Rights believes that the Act amending the Act on the Constitutional Tribunal is contrary to Article 119(1) of the Polish Constitution, as the Sejm adopted the bill in three readings, yet the Sejm failed to consider it in the understanding promoted by the subject constitutional norm. "Consideration", understood in line with the meaning ascribed to it in Article 119(1) of the Polish Constitution, would require, among others, undertaking dialogue with the judiciary's authorities, i.e. dialogue that is a direct consequence of the principle of the balance between the legislative and the judiciary.

From Article 112 of the Polish Constitution it follows that 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. As a result, the "conduct of work" of the Sejm, including the work on bills, is governed by the rules of procedure adopted by the Sejm. Currently, it is governed by the resolution of the Sejm of 30 July 1992 – Rules of Procedure of the Sejm of the Republic of Poland (Monitor Polski – Official Gazette of 2012, item 32, as amended).

In line with Article 34(2)(2) of the Rules of Procedure of the Polish Sejm, a bill must be accompanied by a statement of grounds that should present the current status of the matter that is to be regulated. The bill for the Act amending the Act on the

Constitutional Tribunal did not present the current state of the facts. The statement of grounds does not contain the information that the Sejm of the previous term has already appointed five judges for the positions to be vacated in 2015. From sec. 6 of the statement of grounds only follows that "Article 136 is revoked as a consequence of the proposed amendment of Article 18 of the Act (Article 1(2) of the bill). As regards Article 137a, the proposal involves shortening the specific deadline for submitting the motion concerned by Article 137 revoked by the bill to 7 days. The above is a natural consequence of unifying the main statutory deadline with the Rules of Procedure of Sejm by means of the bill (Article 1(3) of the bill)." Such wording of the bill in no case specifies that the positions of the judges had already been filled in the previous term of the Sejm, therefore the statement of grounds of the bill did not present the current state of the facts.

From Article 34(2)(4) of the Rules of Procedure of the Sejm it also follows that the statement of grounds for a bill should also discuss the predicted social, economic, financial and legal consequences. In this area, the drafters of the bill limited their statements to sec. 8, stating that the bill does not incur financial consequences for the state budget, to sec. 9, stating that the bill has positive social and economic consequences, and to sec. 10, stating that the subject matter of the bill is not covered by the EU legislation. These statements are laconic and deprived of any justification based on merits.

The drafters failed to justify what kind of positive social and economic consequences will be incurred by the entrance of the said act into force. The said statement contains no arguments based on merits. For the time being, the only real

social consequence of the revision implemented lies exclusively in deepening the crisis in the constitutional functioning of a state body and in undermining its legal legitimacy. However, according to the standard of a state of law, importance is ascribed not only to impartial and autonomous serving of justice, but also to the fact that it mus be clear that justice is served impartially and autonomously. This is why the social context and reception of individual regulations and conduct is important. Justice should be served in such a way that removes any potential doubts that the parties of the procedure might have as regards the impartiality and autonomy of the adjudicating panel, even if those doubts were without merits in the given case, but to observers they seemed to be justified or partially justified.

It would also be of interest to learn what do the declared positive economic consequences of the change in the functioning of the Constitutional Tribunal consist i, according to the drafters. Both the very wording of the bill itself and its statement of grounds do not allow for recognizing those declared positive economic consequences of the change of the law introduced.

Doubts are also raised by the statement made in the statement of grounds that the subject matter of the bill is not covered by the EU legislation. In fact, constitutional courts, including the Polish Constitutional Tribunal, have the right to lodge a question to the Court of Justice of the European Union in line with Article 267 of the Treaty on the Functioning of the European Union (consolidated text, Official Journal C series 326 of 26.10.2012, p. 47). The Polish Constitutional Tribunal lodged such a question to the Court of Justice of the European Union (decision of 7 July 2015 – case file no. K 61/13). Therefore, all and any legal interventions made in the area of independence and

autonomy of court authorities in the understanding of the Treaty have a tight relation to the European law, as they interfere in the functioning of the Constitutional Tribunal not only as a national entity, but also as a European court. The status of a judicial entity and the judges lodging the question to the Court of Justice of the European Union is of significance in the light of Article 267 of the Treaty on the Functioning of the European Union.

From Article 34(3) of the Rules of Procedure of the Polish Sejm it also follows that the statement of grounds should also present the results of the consultations conducted and note the variants and opinions presented, in particular if the duty to ask for such opinions is governed by the act. In the case of bills filed by committees and MPs, where no consultations have been conducted, the Speaker of the Sejm refers the bill for consultations in the mode and on the terms and conditions specified in separate acts of law before referring it for the first reading. The phrasing of Article 34(3) second sentence of the Rules of Procedure of the Polish Sejm stating that "the Speaker of the Sejm refers the bill", means that the Speaker of the Sejm has the duty to refer a bill filed by MPs for consultations, if no prior consultations had been conducted. The mode and the terms and conditions of the consultations are governed by separate acts of law. An example of such an act is the Act of 12 May 2011 on the National Council of the Judiciary of Poland (Polish Journal of Laws Dz.U. no. 126, item 714 as amended). In line with Article 3(1)(5) of the said act, the competences of the National Council of the Judiciary of Poland include issuing opinions on drafts of normative acts pertaining to the judiciary and the judges, as well as lodging motions in this respect. In turn, pursuant to Article 1(3) of the Act of 23 November 2002 on the Supreme Court (Polish Journal

of Laws Dz. U. of 2013 item 499 as amended), the Supreme Court is a judicial entity established to issue opinions on bills and drafts of other normative acts, based on which the courts issue decisions and function, as well as on other acts, to the extent that it deems it necessary.

There should be no doubt that the subject matter covered by the legislative procedure is directly related to the functioning of the courts and pertains to the judiciary. From Article 193 of the Polish Constitution it follows that any court may refer a question of law to the Constitutional Tribunal as to the conformity of a normative act to the Constitution, ratified international agreements or statute, if the answer to such question of law will determine an issue currently before such court. While considering the question of law, the Constitutional Tribunal participates in the judicial process.

From the perspective of the common courts, administrative courts and the Supreme Courts, it is of utmost significance whether the entity to which the questions of law are lodged by those courts in connection with the judicial process is an independent and autonomous entity. In practice, lack of the said independence and autonomy would mean that the elements of the dependence would also permeate the judicial process. Hence all and any systemic changes pertaining to the Constitutional Tribunal translate in to the functioning of the judiciary. Therefore, the lack of the consultations provided for in the Rules of Procedure of the Polish Sejm and the Act on the Supreme Court, and the Act on the National Council of the Judiciary of Poland constitutes a gross infringement of the procedure of establishing law.

In the light of the arguments discussed above, it must be stated that in the course of the work on the bill on amending the Act on the Constitutional Tribunal not only Article 34(2)(2 and 4) of the Rules of Procedure of the Polish Sejm was infringed by the statement of grounds that was negligent and deprived of arguments based on merits, but also an infringement of Article 34(3) of the said Rules of Procedure took place, due to the lack of mandatory consultations as well as the Article 1(3) of the Act on the Supreme Court and Article 3(1)(5) of the Act on the National Council of the Judiciary of Poland were infringed, as those constitutional entities were prevented from providing an opinion on the bill.

Due to the aforementioned infringements of the law, it must be stated that in line with Article 50(3)(1) of the Act on the Constitutional Tribunal, the Tribunal is entitled to analyse not only the subject matter of a normative act, but also the mode in which it was issued. The issue does not concern only the mode of issuing a normative act specified in the statute, but also the mode of issuing a normative act as specified in other legal acts, including the Rules of Procedure of the Polish Sejm. In the light of the case law of the Constitutional Tribunal (see decision of 23 March 2006, case file no. K 4/06, OTK of 2006, No. 3/A, item 32), not every infringement of the Rules of Procedure of the Polish Sejm that took place while considering a bill may be recognized as an infringement of the Polish Constitution. One must agree with this position. However, as regards the issue covered by this motion, as it was discussed above, a certain concentration of infringements of the Rules of Procedure of the Polish Sejm took place while working on the bill to amend the Act on the Constitutional Tribunal. Two acts governing the participation of the state's constitutional authorities in the legislative

process were infringed at the same time. According to the Commissioner for Human Rights, all of these infringements in total lead to believe that the challenged act was adopted in breach of the conduct of work of the Sejm that was of constitutional nature. As a consequence, the Act amending the Act on the Constitutional Tribunal is contrary to Article 112 of the Polish Constitution.

Infringement of the procedure to enact a normative act also means that the constitutional principle of the rule of the law (Article 7 of the Polish Constitution) was also infringed. In line with the aforementioned principle, public authority bodies function on the basis of and within the limits of the law. This principle clearly applies also to the legislative entities, which are obliged to act (also in terms of legislation) on the basis of and within the limits of the law. Therefore, infringing the Rules of Procedure of the Polish Sejm, the Act on the Supreme Court, and the Act on the National Council of the Judiciary of Poland also constitute the infringement of the constitutional principle of the rule of the law provided for in Article 7 of the Polish Constitution.

As a result, the aforementioned comments lead to the final conclusion that the Act amending the Act on the Constitutional Tribunal was adopted in breach of Articles 7, 112 and 119(1) of the Polish Constitution.

Irrespective of the reservations concerning the mode of adopting the Act amending the Act on the Constitutional Tribunal, constitutional concerns are also raised by the merits of the solutions introduced by means of the said act.

First of all, the legislator made an ineffective attempt to eliminate the legal consequences that arose from the implementation of Article 137 of the Act on the

Constitutional Tribunal. In line with the aforementioned provision, for the judges of the Tribunal whose term of office lapses in 2015, the deadline to propose a candidate for a judge of the Tribunal was 30 days since the day the act was announced. Therefore, the said deadline has already lapsed, candidates for judges of the Tribunal were proposed in line with Article 137 of the Act on the Constitutional Tribunal, and the Sejm appointed the judges on 8 October 2015 (Monitor Polski – Official Gazette, item 1038-1042). As it was already mentioned, the judges appointed in line with the aforementioned manner has not taken the oath before the President of the Republic of Poland (Article 21(1) of the Act on the Constitutional Tribunal) through no fault of their own, therefore they did not begin serving as judges of the Tribunal; however, they are judges, and their term of office began (or will begin) on the dates specified in the individual resolutions of the Sejm appointing them. Only the refusal to take the oath is equivalent to renouncing the position of the judge of the Tribunal (Article 21(1) of the Act on the Constitutional Tribunal). In turn, it is possible to renounce a position one only disposes of, here – the position of a judge.

According to M. Zubik (*op. cit.* , p. 102), "(...) if a new judge of the Tribunal is appointed in the place of a person whose mandate has lapsed, the term of office of the newly appointed judge may not commence earlier than upon the lapse of the 9-year term of office of the current judge. A candidate is not allowed to take up the position earlier, if only because the Constitution specifies the number of judges of the Tribunal. The appointment procedure cannot lead to increasing that number, even for a short period of time. The constitutional principle aims at ensuring continuity of operations of the Tribunal, therefore nothing prevents – and that should probably be a rule – appointing

the full panel of the Constitutional Tribunal in such a way as to ensure continuity of its operations. (...) Therefore, a 9-year term of office of a judge of the Tribunal commences on the first day following the day the term of office of the previous judge lapsed, not on the day the resolution of the Sejm appointing the given person to hold the position of a judge is passed. Also, it means that the President may and should accept the oath of a newly appointed judge on the first day the judge may hold office, which corresponds to the first day of the 9-year term of office. Nevertheless, if the oath is taken later, it has no bearing on the course of the term of office, but it is of significance for the legal ability to perform the duties of a judge. The situation is different if the Sejm appoints a new judge when the mandate of the predecessor has already lapsed. In such case, the day of appointing the given person to hold the position of a judge shall be the first day of the 9-year term of office. Unvaryingly, the day of taking the oath by the newly appointed judge conditions the commencement of their holding office. (...) The commencement of the term of office of a judge must be distinguished from the ability of their holding of office. The latter depends on taking the oath by the newly appointed judge and on their taking office, which may take place no earlier than following the lapse of the mandate of the person that holds the position of a judge of the Tribunal."

The quoted position does not raise any concerns. As a result, the term of office of three judges of the Tribunal commenced on 7 November 2015, and the term of office of the remaining two judges will commence on 3 December 2015 and on 9 December 2015, respectively. Article 137 of the Act on the Constitutional Tribunal has incurred legal consequences and lost its binding power. Revoking the said provision by virtue of Article 1(5) of the Act amending the Act on the Constitutional Tribunal is redundant

and cannot result in cancelling the appointment of the judges made by the Sejm of the previous term of office.

The discussed issue has a significant impact on the constitutional assessment of Article 137a of the Act on the Constitutional Tribunal. This provision states that for the judges of the Tribunal whose term of office lapses in 2015, the deadline to propose a candidate for a judge of the Tribunal is 7 days since the day the Act amending the Act on the Constitutional Tribunal is announced. It means that the legislator decided to appoint new judges of the Tribunal for the positions vacated in 2015, paying no heed to the fact that the appointment had already been made on 8 October 2015. This legislative decision is in obvious breach of Article 194(1) of the Polish Constitution that provides 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 law. No person may be chosen for more than one term of office. Article 137a of the Act of the Constitutional Tribunal opens the way to increasing the number of judges that is not permitted under the Constitution. The appointment of judges made on 8 October 2015 (considering the legitimate constitutional concerns regarding the contents of Article 137 of the Act on the Constitutional Tribunal with respect to the fact that the said provision allowed for appointing the judges for the positions vacated after the end of the term of office of the Sejm of the 7th term) results in the fact that there are no vacant positions of a judge of the Tribunal. As a consequence, Article 137a of the Act on the Constitutional Tribunal is contrary to Article 194(1) of the Polish Constitution in that it infringes the rule that the Constitutional Tribunal shall have 15 judges.

It is not the sole constitutional norm infringed by Article 137a of the Act on the Constitutional Tribunal. A direct consequence of implementation of Article 137a of the Act on the Constitutional Tribunal might take the form of unauthorized transfer by the Sejm of its exclusive competence to appoint the judges of the Tribunal to the executive, i.e. to the President of the Republic of Poland. The President would be able to, out of a higher number of judges appointed by the Sejm (of the 7th and 8th terms of office), select those whom the President will allow to perform their official duties of a judge of the Tribunal by accepting their oaths. Thus, it will not be the Sejm but the President who will determine the composition of the Tribunal, which serves judicial purposes, which clearly contradicts Article 194(1) of the Polish Constitution. According to the Commissioner, the challenged provisions also infringe Article 10 of the Polish Constitution.

The essence of appointing a judge of the Tribunal is to call them to public service, in this case consisting in analysing the hierarchical compliance of legal standards. Therefore, Article 137a of the Act on the Constitutional Tribunal may prevent certain appointed judges from performing their function, if the President refuses to accept their oaths. Therefore, this issue must be considered in the category of irremovability of a judge. A person with the status of a judge cannot be permanently removed from holding the office for which they were appointed, as a result of a formalised procedure by a public authority.

In line with Article 180(1) of the Polish Constitution, judges shall not be removable. Recall of a judge from office, suspension from office, transfer to another bench or position against his will, may only occur by virtue of a court judgement and only in

those instances prescribed in statute (Article 180(2) of the Polish Constitution). According to the Commissioner for Human Rights, considering the principle of appointing judges for a term of office arising from Article 194(1) of the Polish Constitution, the irremovability guarantee also applies to the judges of the Constitutional Tribunal. Here, doctrine may be quoted. According to M. Zubik (see *op. cit.*, p. 23), "as regards courts and both tribunals to the same extent, the systemic lawmaker provides for their separation and independence of other branches of power (Article 173) and the traditional rule of pronouncing judgements in the name of the state – the Republic of Poland (Article 174), not in the name of the popular sovereign – the Nation. In the remaining scope, the regulations pertaining to both parts of the judiciary are separate. However, nothing prevents the application of some provisions, like those pertaining to judges (Article 180(1) or (2)) to the judges of the Tribunal accordingly, considering the changes arising from the specific constitutional regulations, e.g. the principle of appointing the judges of the Tribunal for a term of office – Article 194. The Constitution and the Act on the Constitutional Tribunal decided to grant the Tribunal all and any organisational, and in part functional features that are typical for a <<court>> in material sense. The provisions granted the Tribunal the independence, or even separation from the legislative and the executive, as well as institutional guarantees related to the status of the Tribunal's members, which paved the way to ensuring their independence and impartiality. In this light, the Constitutional Tribunal fully meets the criteria required both by the Constitution and by the international law setting out the standard of protecting human rights, from the <<courts>>. The Tribunal is an entity that is defined by the law, separate and autonomous of other powers (Article 173 of the

Constitution), its members are independent, impartial (see Article 195(1) of the Constitution) and irremovable (for the duration of their term of office).”

Nonetheless, the solution included in Article 137a of the Act on the Constitutional Tribunal leads to removing some judges appointed by the Sejm from their official function. From the constitutional point of view, the judges are in fact suspended since the beginning of their term of office, and Article 137a of the Act on the Constitutional Tribunal may only make this state of suspension permanent. A judge of the Tribunal may only be suspended in line with Article 180(2) of the Polish Constitution only in the instances prescribed in the statute and pursuant to a court judgement. Therefore, it is also legitimate to state that Article 137a of the Act on the Constitutional Tribunal infringes Article 180(1) and (2) of the Polish Constitution, as it is intended to permanently remove those judges of the Tribunal from their offices that were appointed by the Sejm on 8 October 2015. This solution undermines the principle of appointing the judges of the Tribunal for a term of office, which is a fundamental element of the principle of the autonomy of judges. The principle of appointing judges for a term of office implies that subject to the exceptions specified in the statute, a person appointed to hold the position of a judge of the Tribunal will do so for the entire term of office.

Finally, considering the wording of Article 137a of the Act on the Constitutional Tribunal, it must be stated that as regards considering individual cases (e.g. constitutional complaints), the requirements arising from Article 45(1) of the Polish Constitution may apply to the Constitutional Tribunal. Therefore, such case shall be heard by the Tribunal as a competent, impartial and independent entity. From Article 173 of the Polish Constitution it follows that the courts and the Tribunals are a separate

power that is independent of other branches of power. In line with Article 195(1) of the Polish Constitution, the judges of the Constitutional Tribunal are independent in holding their office and are only subordinate to the Constitution.

According to M. Zubik (*op. cit.*, p. 112-113), "it seems that the same findings of the Tribunal itself should be applied that pertain to the systemic foundations of the independence of the courts and the autonomy of the judges. It concerns both constitutional provisions and the international legal standards, including those arising from Article 6 of the European Convention. Nevertheless, explicit provisions of the Constitution shall set the border, which – due to the specific nature of the Tribunal – modify the general constitutional principles applicable to courts and judges to fit the Tribunal."

Therefore, Article 137a of the Act on the Constitutional Tribunal should be verified also in terms of its compliance with the Constitution also from the viewpoint of Article 45(1) of the Polish Constitution. As the Constitutional Tribunal noted in the decision of 24 October 2007 (case file no. SK 7/06, OTK of 2007 no. 9/A, item 108), the constitutional right to court also involves the right to appropriately shape the system and the position of the entities adjudicating cases. In the said decision, the Constitutional Tribunal noted that "Article 45(1) of the Constitution must be interpreted in the context of the regulation included in Chapter VIII of the Constitution. The systemic interpretation of the Constitution states that the features of the court and of the procedure before the court assumed by the systemic lawmaker in Article 45(1) of the Constitution should be interpreted in the light of the relevant regulations included in Article 173 et seq. of the Constitution. Therefore, as Article 45(1) of the Constitution

required a fair hearing of the case by the competent, independent, impartial and autonomous court, the notions describing the required features must be understood in the manner arising from the provisions of Chapter VIII of the Constitution. While mentioning the independent court, Article 45(1) of the Constitution refers to the independence discussed in Article 178 et seq. of the Constitution. An independent court is made up of persons who are granted the feature of independence by the law, and it not only is a verbal declaration of this feature; the entire system of operation of the judges is shaped in such a way that this independence is effectively guaranteed." Further, the Constitutional Tribunal states in the said decision that "in line with Article 176 of the Constitution, the legislator is obliged to define the system of courts without infringing the norms provided for in the Constitution, but it may supplement the said regulation or make it more specific. Therefore, amending the constitutional premises regarding the irremovability of the judges and infringing the principle of autonomy of courts and of the independence of the judges is not allowed." The positions expressed by the Constitutional Tribunal pertaining to the system of common courts also apply to the Tribunal itself.

However, as it was already noted, the legislator has gone beyond the limits specified by the Polish Constitution within the scope covered by the motion. By means of Article 137a of the Act on the Constitutional Tribunal, the legislator created a mechanism that allows for eliminating the already appointed judges of the Tribunal from adjudicating, which infringes the principle of independence and autonomy of the Tribunal, thus infringing the right to properly shape the system and the position of this body, thus being contrary to Article 45(1) of the Polish Constitution. As mentioned above, by

considering constitutional complaints (Article 79(1) of the Polish Constitution), which serve as the individual means of protecting the rights and freedoms and questions, and by considering questions of courts, the Constitutional Tribunal participates in the justice system in Poland. From Article 190(4) of the Polish Constitution it also follows that the decision of the Tribunal on non-compliance with the Constitution, an international treaty, or an act of a normative act, based on which a legally binding court decision was issued, constitutes the basis for continuing the procedure in line with the terms and conditions and in the mode specified in the provisions of law relevant for the given procedure. Therefore, all and any principles regarding the autonomy of the courts must also be referred to the Constitutional Tribunal as a body that participates in the justice system within the limits specified by the Constitution.

Therefore, Article 137a of the Act on the Constitutional Tribunal added by Article 1(6) of the Act amending the Act on the Constitutional Tribunal is inconsistent with Article 45(1), Article 180(1) and (2), and Article 194(1) of the Polish Constitution.

Yet another problem arises in connection with the Act amending the Act on the Constitutional Tribunal that pertains to Article 2 of the said Act. This Article reads that the term of office of the current President and the Vice-President of the Constitutional Tribunal ends after the lapse of three months of entering into force of the act. The drafters specified that in this extent, the legislative solution included in Article 2 mirrors the solution included in Article 2 of the Act of 12 June 2015 amending the Act on the Supreme Court (Polish Journal of Laws Dz.U. item 1167). The problem is that the mechanism applied in the Act on the Supreme Court pertains to judges that are not judges appointed for a term of office. Their mandate is only limited by age. However,

the judges of the Constitutional Tribunal are appointed for a term of office, and as a result, using the term "term of office" requires a lot of care, so that there would be no doubt which "term of office" is actually meant.

As a consequence of the revision made and invoked by its drafters, the Act on the Supreme Court in its Article 13(2) governs the term of office of the President of the Supreme court (the President of the Supreme Court is appointed for a 5-year term of office from among the active judges of the Supreme Court and is dismissed on request of the First President of the Supreme Court by the President of the Republic of Poland). Article 2 of the Act amending the Act on the Supreme Court provides that the appointment for the position of the President of the Supreme Court expires following the lapse of 12 months since the Act enters into force. The Act on the Supreme Court explicitly provides for appointing the President for a term of office by using the phrase "term of office", while the amending act provides for expiry of the appointment for the position of the President.

The provisions of the Act on the Constitutional Tribunal present a different picture. From Article 15(1) of the Act of 1 August 1997 on the Constitutional Tribunal it followed that the President and the Vice-President of the Tribunal are appointed by the President of Poland from among two candidates proposed for each position by the General Assembly. This solution was actually repeated in the Act of 25 June 2015 on the Constitutional Tribunal. In line with Article 12(1) of the said Act, the President of the Tribunal is appointed by the President of Poland from among two candidates proposed by the General Assembly. This provision applies *mutatis mutandis* to the Vice-President of the Tribunal (Article 12(5) of the Act on the Constitutional Tribunal).

For obvious reasons (the mandate of a judge of the Tribunal is awarded for a term of office, contrary to the fact that the mandate of a judge of the Supreme Court is only limited by age), these provisions did not set the periods for which the President and the Vice-President of the Tribunal may hold their positions.

The situation was changed as a consequence of Article 1(1) of the Act amending the Act on the Constitutional Tribunal giving a new wording to Article 12(1) of the Act on the Constitutional Tribunal. In line with the new wording, the President of the Tribunal is appointed by the President of Poland from among at least three candidates proposed by the General Assembly for a period of three years. One person may hold the position of the President of the Tribunal twice. The amended Article 12(1) of the Act on the Constitutional Tribunal does not use the phrase "term of office" at all; it only mentions appointment for the position of the President of the Tribunal. Before the revision, the Act on the Constitutional Tribunal used the phrase "term of office" (Article 12(2), Article 17(2), Article 19(2)), introducing an explicit correlation with the end of the term of office of a judge of the Constitutional Tribunal. Therefore, the legislator should respect this equivalence of the phrases used until now, and therefore, Article 2 of the Act amending the Act on the Constitutional Tribunal should consistently use the phrase that refers to the appointment for the position of the President of the Constitutional Tribunal. The term "term of office", due to being derived from the Constitution (Article 194(1) of the Polish Constitution), is reserved to refer to the term of office of a judge.

The indicated legislative irregularities are not exclusively of technical nature; they translate into the understanding of the merits of the wording of Article 2 of the Act amending the Act on the Constitutional Tribunal. It may be interpreted in such a way

that the term of office of judges currently holding the positions of the President and the Vice-President of the Tribunal expires following the lapse of three months since the act enters into force. The very presence of such doubts as to the actual contents of Article 2 of the Act amending the Act on the Constitutional Tribunal should be verified with respect to the standards of correct legislation (Article 2 of the Polish Constitution) and the standards arising from Article 45(1), Article 180(1 and 2), and Article 194(1) of the Polish Constitution.

Standards of proper legislation, also referred to as good legislation, are an element of the democratic state of law. These standards must apply to all editorial units of each and every normative act. Upon assessing the given regulation that contains several provisions or upon analysing different norms contained in one legal act it must be considered whether they are consistent and logically related (see the decision of the Constitutional Tribunal of 27 February 2007, case file no. P 22/06, OTK of 2007, No. 2/A, item 12). Moreover, the proper legislation standards require the provisions to meet three requirements. First of all, each regulation that restricts constitutional rights or freedoms must be worded in such a way that it is possible to unambiguously determine the subject and the situation concerned by the restriction. Secondly, a provision should be precise enough, so that it ensures uniform interpretation and application. Thirdly, it must be presented in such a way that its scope of application covers only the situations that the legislator, acting reasonably, intended while introducing a regulation that restricts the constitutional rights and freedoms (see decision of the Constitutional Tribunal of 9 October 2007, case file no. SK 70/06, OTK of 2007, No. 9/A, item 103, decision of 5 December 2007, case file no. K 30/06, OTK of 2007, No. 11/A, item 154).

Article 2 of the Act amending the Act on the Constitutional Tribunal does not meet the aforementioned requirements specified in the case law of the Constitutional Tribunal. Its wording may lead to two diametrically opposed conclusions. The first one provides that it results in the expiry of the appointment for the positions of the President and the Vice-President of the Tribunal. The second one provides that Article 2 of the Act amending the Act on the Constitutional Tribunal causes the expiry of the term of office of the current President and Vice-President understood as it has been until now, i.e. in line with the general principle of appointing judges of the Tribunal for a term of office, as expiry of the mandate of a judge of the Tribunal. It is a sufficient substantiation of the claim that Article 2 of the Act amending the Act on the Constitutional Tribunal is contrary to the principle of correct legislation derived from Article 2 of the Polish Constitution.

The uncertainty as to the actual meaning carried by Article 2 of the Act amending the Act on the Constitutional Tribunal also substantiates the claim that this provision is in conflict with Article 45(1) of the Polish Constitution, Article 180(1 and 2), and Article 194(1) of the Polish Constitution. A democratic state of law has no place for such legal regulations that create even a shadow of a doubt as to the composition of courts and tribunals. The term of office of a judge of the Tribunal lasts 9 years (Article 194(1) of the Polish Constitution) and cannot be terminated by the legislator, and its continued validity cannot be subject to any controversies. Judges of the Tribunal cannot be removed while holding office (Article 180(1 and 2) of the Polish Constitution). Acting in line with Article 45(1) of the Polish Constitution, the legislator is not permitted to change the constitutional basis for the irremovability of judges nor to

infringe the principle of independence of courts and tribunals. More extensive argumentation in this respect was already provided as substantiation for the claim that Article 137a of the Act on the Constitutional Tribunal is contrary to the Constitution.

As a result, it must be acknowledged that Article 2 of the Act amending the Act on the Constitutional Tribunal is contrary to Article 2, Article 45(1), Article 180(1 and 2), and Article 194(1) in that it creates a state of legal uncertainty as to the continuation of the mandate of an active judge of the Tribunal by the current President and Vice-President of the Tribunal. According to the Commissioner for Human Rights, the inconsistency of Article 137 of the Act on the Constitutional Tribunal with the Constitution did not entitle the legislator to introduce legal solutions that not only fail to remove this inconsistency, but also extend this inconsistency with the Constitution.

The Commissioner for Human Rights would also like to emphasize that the legal norms challenged by this motion also raise serious concerns as regards their compliance with international law, in particular with the Convention for the Protection of Human Rights and Fundamental Freedoms as well as with the provisions of the International Covenant on Civil and Political Rights.

The principle of autonomy of judges and the principle of irremovability of judges derived from the former principle, which also applies to the judges of the Constitutional Tribunal, is recognized as a foundation of the legal order in a democratic state and as a notion necessary for effective protection of human rights. The principles of independence and impartiality of courts[1] also belong to the principles that serve as the basis for a state of

[1] See *Communication from the Commission to the European Parliament and the Council. A new EU Framework to strengthen the Rule of Law* of 19 March 2014 (COM(2014)158final/2), document available at: http://ec.europa.eu/justice/effective-justice/files/com_2014_158_en.pdf

law, derived from the case law of the European tribunals and from the documents drawn up by the Council of Europe. To certain extent, these principles are subject to the protection provided for in international conventions on human rights. Moreover, the recommendations in the area of respecting the principle of autonomy of judges were specified in multiple *soft law* international documents, i.e. documents that are not formally legally binding, though they provide for very important standards that may influence the interpretation of domestic law.

International conventions on human rights comment on the issue of autonomy in two ways. First of all, the right of an individual to court may be respected only if the court is autonomous and impartial. Therefore, the autonomy of judges is a condition for respecting the rights and freedoms of humans. For example, in the judgment of 30 November 2010 in the case *Henryk Urban and Ryszard Urban v. Poland* (application no. 23614/08), the European Court of Human Rights (hereinafter also referred to as: European Court or ECHR) explicitly stated that the irremovability of judges must in general be considered as a corollary of their independence and thus included in the guarantees of Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred also referred to as: Convention or ECPHR).

However, the second aspect of irremovability takes precedence in the subject case. Some international courts believe that the rights of the judges themselves may be infringed, if the judge is dismissed from their position in a manner that is contrary to democratic standards.

ECHR outlined the principles relating to the applicability of Article 6 of the ECPHR to ordinary labour disputes between the state and a public official (including judges) in the

judgement of 19 April 2007 in the case *Vilho Eskelinen and others v. Finland* (application no. 63235/00). The European Court stated that as a rule, the guarantees provided for under Article 6 of the ECPHR apply to such cases. In order to exclude the protection embodied in Article 6, two conditions must be fulfilled. Firstly, the State in its national law must have *expressly* excluded access to a court for the post or category of staff in question. Secondly, the exclusion must be justified on objective grounds in the State's interest. As regards the first requirement, ECHR specifies that "access to court" may be ensured not only if a judge may file a complaint on the fact that they were deprived of the right to court *in strict sense*, but also if supervisory functions are served by an administrative or parliamentary body. For example, in the judgement of 9 January 2013 in the case *Volkov v. Ukraine* (application no. 21722/11), ECHR recognized that the fact of considering the case of the applicant, a judge of the Supreme Court of Ukraine dismissed for disciplinary reasons, by the Council of Judges and parliamentary committee, meant that the domestic law did not *explicitly* exclude access to court. As a consequence, ECHR was entitled to analyse the entire procedure as regards its compliance with Article 6 of the Convention.

In the judgement of 27 May 2014 in the case *Baka v. Hungary* (application no. 20261/12; the judgement is not yet final due to the referral to the Grand Chamber of ECHR submitted by the Hungarian government), the European Court considered an application of a former president of the Hungarian Supreme Court who was dismissed from their office. The cause of the dismissal was the reform of the Supreme Court in the form of Transitional Provisions for the new Fundamental Law, which introduced new requirements with respect to the judges applying for the position of the President of the Supreme Court, and the applicant failed to meet them. While analysing the application as regards the principles set

out in the case *Vilho Eskelinen v. Finland*, ECHR recognized that the national did not expressly excluded access to court to the applicant. The lack of access to court was not due to the contents of the provisions based on which the applicant, A. Baka, was dismissed, but it was due to the form of the legal act that legislated for their dismissal. The applicant had been dismissed from his position under the Transitional Provisions for the new Fundamental Law of Hungary, which were outside the cognition of the local Constitutional Court. Contrary to the Vice-President of the Supreme Court, who was dismissed from their position under an act of law, the applicant could not have filed a constitutional complaint. Nevertheless, the European Court reminded that in the light of the case *Vilho Eskelinen v. Finland*, in order to exclude the protection embodied in Article 6, the State in its national law must have *expressly* excluded access to a court for the post or category of staff in question. This circumstance itself was sufficient to have the case analysed with respect to Article 6 of the Convention; nevertheless the Court also stated that even if one was to recognize that the first condition of *Vilho Eskelinen* was met, the second condition had not been met. Depriving the applicant of the right to court was not legitimate, as the Hungarian government did not prove that the dispute pertained to the issues related to the exercise of State power or the special bond of trust and loyalty between the civil servant and the State.

Also, the case law of the UN Human Rights Committee (HRC) provides that the cases related to dismissing a judge from their office should be conducted with respect to the fundamental procedural principles. The standards in this respect were set out by the Committee in the views adopted on 19 August 2003 in the case *Pastukhov v. Belarus)* (no. CCPR/C/78/D/814/1998). In 1994, the applicant was elected a judge of the Constitutional Court by the Byelarusian Parliament. The term of office was to last 11 years; however, in

1997 the President issued a presidential decree terminating the term of office of the applicant. The decree was substantiated by the fact of entrance into force of a new Constitution. The judge made an attempt to appeal against the presidential decree, yet the court refused to admit the application for consideration on the grounds that the courts were not competent to control the actions of the president. Upon analysing the case, the Committee noted that the applicant was appointed a judge in line with the binding law, and the judge's term of office was to expire in 11 years. The sole grounds invoked by the president upon issuing the decree was the fact that the term of office allegedly expired upon entrance into force of the new Constitution, which was not true. The Byelarusian law did not grant the applicant any effective legal measures that could be taken advantage of to challenge the decision of the president. Therefore, the Committee recognized that the dismissal of a judge of the Constitutional Court several years before the lapse of the judge's term of office was an attempt to diminish the independence of the judiciary and an infringement of Article 25(c) of the International Covenant on Civil and Political Rights (hereinafter also referred to as: ICCPR), governing the right to access to public service on general equal terms, in conjunction with Article 14(1) of the ICCPR (right to a fair trial) and Article 2 of the ICCPR (no discrimination).

Similar conclusions were reached by the Committee in the views of 19 August 2003 in the case *Adrien Mundyo Busyo et al. v. Democratic Republic of the Congo* (no. CCPR/C/78/D/933/2000). Here it was also recognized that dismissal of judges by the president without giving them the right to refer the matter to court infringes Article 25(c) in conjunction with Article 14(1) and Article 2 of the ICCPR. The Committee also emphasized

that the State should reinstate the dismissed judges to their previous positions and to pay compensation for the time they were out of work.

For the purposes of comparison and for auxiliary reasons, one may also quote the case law of the Inter-American Court of Human Rights (hereinafter referred to as IACH). One of the major judgements that should be invoked here is the judgement of 31 January 2001 in the case *Constitutional Court v. Peru*. The case pertained to dismissal of several judges of the Peruvian Constitutional Court by the Parliament, following a judgement that was unfavourable to the Alberto Fujimori, who was president of Peru at the time. The Parliament was entitled to dismiss the judges from their positions, yet solely within the *impeachment* procedure. In this case, this procedure was infringed e.g. by the fact that no grounds for dismissing a judge was effected, and by the fact that the judges were deprived of their right to defence. IACH recognized that such conduct violated Article 8 of the American Convention on Human Rights (hereinafter referred to as: ACHR), which guarantees the right to a fair trial and Article 25 of the ACHR which provides for the right to judicial protection.

In turn, in the judgement of 30 June 2009 in the case *Reverón Trujillo v. Venezuela*, IACH emphasized that the guarantees to autonomy that is essential for the exercise of the judicial function, has both institutional and individual aspect, i.e. the guarantees also protect specific judges, e.g. against unjustified removal from the position. These principles were also invoked by IACH in the judgement of 28 August 2013 in the case *Miguel Campa Campos et al v. Republic of Ecuador*, which, like the aforementioned Peruvian case, pertained to dismissal of several judges of the Constitutional Tribunal of Ecuador. IACH noted that judges of the Constitutional Tribunal should have a guaranteed stability during their term of

office, and that they may only be dismissed due to disciplinary infringements based on clear provisions of the Constitution or the act, and in line with the principle of a fair trial.

To sum up, the standards of judicial autonomy defined in the provisions of international law provide that the legislative and the executive entities respect e.g. the irremovability of judges. It means that the judges may only be dismissed under the law (act or Constitution) for disciplinary or health reasons. The dismissal procedure, while allowed as *impeachment* procedure before the Parliament, should guarantee relevant procedural rights to the dismissed judges (the principle of a fair trial) and recourse. Infringing the irremovability principle may lead to infringing the autonomy of the judiciary as an institution and to infringing the rights of individual judges.

It must be emphasized that in the light of the international legal standards discussed here, the principle of autonomy protects not only judges against being removed from the judiciary, but also the presidents of courts against being arbitrarily dismissed from their positions.

The Venice Commission in its opinion no. 768/2014 of 16 June 2014 on the reform of the justice system in Armenia[2] emphasized the need to ensure the stability to the presidents of courts. One of the changes introduced by the discussed reform was to introduce terms of office for presidents of courts (they used to hold their positions indefinitely under the previous law). Upon introduction of terms of office limited by time, the proposed amendment was to terminate the terms of office of the current presidents with a relatively short period of *vacatio legis*. In its opinion, the Venice Commission noted that the retroactivity of a new regulation is doubtful in general. If it affects rights ensured by or

[2]The document is available at:
http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2014)021-e.

legitimate expectations based on the law before the amendment took effect, there should be compelling reasons to justify it. These reasons must be even stronger, as the interest of maintaining the independence judges requires that the judges be protected against arbitrary dismissal. The Commission noted that the presidents of the Court appointed for an indefinite period of time could have a *legitimate expectation* that they will keep their positions until retirement. These expectations were justified by the provisions of law. The short period of *vacatio legis*, after the lapse of which the term of office of the presidents was to expire, could give the impression that the only reason of the transitional rule is to create the opportunity of a radical change of court chairpersons. The principles of legal certainty and judicial autonomy require a longer transitory period – the Commission suggested a four-year period in the quoted opinion.

The case law of the European Court of Human Rights also follows the approach that the presidents of courts are covered by the protection guaranteed in Article 6 of ECPHR. A dismissal of the president of the Supreme Court was the subject of the application in the case *Baka v. Hungary* referred to above. The Court did not share the arguments made by the Hungarian government, as if the specific nature of the work of the president of the Supreme Court could justify dismissing them without taking heed of the principles of a fair trial.

It should also be emphasized that the premature dismissal of the president of the Hungarian Supreme Court also met with negative reactions of the European Union and the Venice Commission. In the European Parliament resolution of 16 February 2012 on the recent political developments in Hungary (no. 2012/2511(RSP))[3] called on the European Commission to monitor closely the possible amendments implemented in Hungary in order

[3] The document is available at: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2012-0053+0+DOC+XML+V0//PL.

to ensure “that the independence of the judiciary, in particular ensuring that the National Judicial Authority, the Prosecutor's Office and the courts in general are governed free from political influence, and that the mandate of independently-appointed judges cannot be arbitrarily shortened”. In the reasoning behind the resolution the Parliament explicitly referred to the dismissal of president A. Baka after two years of him serving as the president of the Supreme Court, even though his term of office should last six years in line with the law. In turn, the Venice Commission in its opinion of 19 March 2012 no. 663/2012[4] emphasized that it is highly uncommon to enact regulations that are retroactive and lead to the removal from a high function such as the presidents of courts. Such conduct might be interpreted as an intentional action to dismiss judges that are not desired politically. Even if the intention was not to do so, the principle of autonomy of courts may still be harmed.

The cases of dismissing presidents of courts, in particular high courts, were condemned by the UN bodies. The position of the United Nations Special Rapporteur on the independence of judges and lawyers concerning the dismissal of presidents of high courts in Slovakia and Sri Lanka. The Slovakian case pertained to the request filed with the Parliament to dismiss the president of the Supreme Court, Stefan Harabin, from his position. The Rapporteur *explicitly* stated that a president of a court cannot be treated as a governmental official who may be dismissed in line with the terms and conditions provided for the administrative authorities. Such interpretation would be contrary to the principle of autonomy of courts. The ability to dismiss a president of a court before the expiry of their term of office would be contradictory to the constitutional guarantee of irremovability of

[4] The document is available at: http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2012)001-e.

judges. In the report of 25 January 2001 (no. E/CN.4/2001/65/Add.3)[5] the Rapporteur stated that an attempt to remove a president from their office without proving their guilt before an independent court would constitute an infringement of the international and regional principles of the autonomy of judges. A president of the Supreme Court was also dismissed in Sri Lanka, yet in this case, the dismissal was effected by the Parliament operating under the *impeachment* procedure. In the context of this case, the United Nations Special Rapporteur reminded[6] that the judges may be dismissed only on serious grounds of misconduct or incompetence, after a procedure that complies with due process and fair trial guarantees and that also provides for an independent review of the decision.

As it was mentioned above, the standards of autonomy of courts and of irremovability of judges at the international level are also derived from the *soft-law* documents. In the first international document of its kind, i.e. in the *Basic Principles on the Independence of the Judiciary* adopted by the United Nations (hereinafter referred to as: "UN Principles")[7] the significance of respecting the principle of irremovability to ensure the autonomy of judges was emphasized. In line with this document, "judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists. Judges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties."

An independent entity should decide on the dismissal.

[5]The document is available at: http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/a79f3cc87e9cca5bc1256a1100325f2a/$FILE/G0110571.doc.

[6] Comments of the Special Rapporteur quoted on the official website of the UN: http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=12790&LangID=E.

[7] The *Basic Principles on the Independence of the Judiciary* adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985 (document available at: http://www.ohchr.org/EN/ProfessionalInterest/Pages/IndependenceJudiciary.aspx).

The Council of Europe has also contributed to drawing up the very important standards of protecting the judicial autonomy. In 1998, the European Charter on the statute for judges was drawn up[8]. The Charter provides that vigilance is necessary about the conditions in which judges' employment comes to be terminated. It is important to lay down an exhaustive list of the reasons for termination of employment in domestic law. On occurrence of the events which are grounds for termination of employment other than the ones - i.e. the reaching of the age limit or the coming to an end of a fixed term of office - which may be ascertained without difficulty, they must be verified by an entity that is independent of the legislative and the judiciary powers. The Recommendation of the CM/Rec(2010)12[9] of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities of 17 November 2010 is another document that enacts important standards. It must be emphasized that this document *explicitly* stated that the recommendation is applicable to all persons exercising judicial functions, including those dealing with constitutional matters. Like the UN Principles referred to above, the said recommendation of the Council of Europe also emphasized the need to respect the principle of irremovability of judges to ensure the independence of courts and the autonomy of judges. Judges should have guaranteed tenure until a mandatory retirement age, where such exists, or until the end of the term of office laid down by law, unless they are no longer able to perform their judicial functions or commit a serious breach of disciplinary provisions.

[8] The European Charter on the statute for judges drawn up between 8-10 July 1998 (the document is available at: https://www.coe.int/t/dghl/monitoring/greco/evaluations/round4/European-Charter-on-Statute-of-Judges_EN.pdf).
[9] The document is available at: https://wcd.coe.int/ViewDoc.jsp?id=1707137.

As regards the documents drawn up by international organisations associating judges, the Universal Charter of the Judge[10], drawn up under the auspices of the International Association of Judges, is one of the major documents. It also contains a provision that guarantees irremovability to judges. More extensive recommendations are included in the IBA Minimum Standards of Judicial Independence (hereinafter referred to as: IBA Standards)[11]. The Standards provide, i.a., that the power to remove a judge must be vested in an independent institution. The proceedings for discipline (or removal) of judges should ensure fairness to the judge and adequate opportunity for hearing. Moreover, the grounds for removal of judges shall be fixed by law and shall be clearly defined.

A third category of *soft-law* documents is composed by the recommendations drawn up by international groups of experts. The Mount Scopus International Standards of Judicial Independence serve as one of the major documents in this respect (hereinafter referred to as: Mt Scopus Standards)[12]. As regards the irremovability, this document recommends as follows: "The power to discipline or remove a judge must be vested in an institution which is independent of the Executive. The power of removal of a judge shall preferably be vested in a judicial tribunal. A judge shall not be subject to removal, unless by reason of a criminal act or through gross or repeated neglect or serious infringements of disciplinary rules or physical or mental incapacity he has shown himself manifestly unfit to hold the position of judge."

[10] Universal Charter of the Judge adopted by the International Association of Judges on 17 November 1999 (the document is available at: http://www.iaj-uim.org/universal-charter-of-the-judges/).
[11] IBA Minimum Standards of Judicial Independence adopted in 1982 (the document is available for downloading at: http://www.ibanet.org/Document/Default.aspx?DocumentUid=bb019013-52b1-427c-ad25-a6409b49fe29).
[12] Mount Scopus International Standards of Judicial Independence drawn up by the International Association of Judicial Independence and World Peace on 19 March 2008 (the document is available at: http://www.jiwp.org/#!mt-scopus-standards/c14de).

Some international standards do not exclude the participation of the legislative power in the process of removing a judge from the position; nevertheless, the said participation may not be arbitrary in nature. For example, the UN Principles allow for removal of a judge by the parliament under an *impeachment* procedure, yet in this case the grounds for dismissal from the position should be limited to disciplinary or health reasons[13]. In turn, Mt Scopus Standards provide that the Legislature may be vested with the powers of removal of judges, upon a recommendation of a judicial commission or pursuant to constitutional provisions or validly enacted legislation[14]. Also, IBA Standards do not exclude the competence of the parliament to remove judges, yet they recommend that it takes place exclusively upon a recommendation of an independent judicial commission. Also, the document prohibits passing legislation which would negatively impact the status of the already appointed judges[15].

Both Article 137a of the Act on the Constitutional Tribunal, specified in sec. 2 of this motion and Article 2 of the Act specified in sec. 3 of this motion, infringe Article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms and Article 25(c) in conjunction with Article 2 and Article 14(1) of the International Covenant on Civil and Political Rights.

It must be emphasized that in the case of both statutory provisions, the legislator did not sufficiently prove that the applied measures were necessary in the understanding of the second condition imposed in the judgement of the ECHR in the case *Vilho Eskelinen*. Therefore, an interference in the subjective rights of the judges were infringed, who had the

[13] Sec. 20 of the UN Principles.
[14] Sec. 3.6 of the Mt Scopus Standards.
[15] Sec. 4(c) and 20(a) of IBA Standards.

reasonable right to expect that they will hold their positions for full 9 years of the term of office, in line with Article 194(1) of the Polish Constitution. As the interference was made in the manner that absolutely contradicts the principles of due process, it must be recognized that the claim that Article 6(1) of the Convention was infringed is fully legitimate.

Moving on to the ICCPR, it must be emphasized that contrary to ECPHR, this legal document in its Article 25(c) *explicitly* protects the right of an individual to equal access to public service: "Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions (...) to have access, on general terms of equality, to public service in his country." As it was already discussed above, the position of a judge and of a president of a court are public functions in the understanding of this provision. As a consequence, removing a judge from their position should take place in line with Article 14(1) of ICCPR that reads: " All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law." The Human Rights Committee usually interprets these provisions together with Article 2 of ICCPR, which in sec. 1 imposes the principle of equality, the duty of state parties to implement the standards under the ICCPR in sec. 2, and the obligation of state parties to ensure legal protection and the right to effective recourse under the law to individuals. According to the Commissioner for Human Rights, the challenged provisions do not meet these requirements. The judges, the President and the Vice-President of the Constitutional

Tribunal were deprived of the right to public service in an arbitrary manner, without ensuring any procedural guarantees.

Therefore, as the human and civic rights must be protected, the Commissioner for Human Rights deemed it necessary to file the instant motion to the Constitutional Tribunal.