THE PROCESS OF "RESTORING THE RULE OF LAW IN POLAND" FROM THE PERSPECTIVE OF THE RULE OF LAW

Unlawful Actions Against the Constitutional Tribunal

Since 13 December 2023

Team of experts

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I. General Remarks

This report addresses the unlawful actions against the Constitutional Tribunal since 13 December 2023, which constitute only a fraction of the recent violations of the rule of law in Poland.

The following report provides only a general overview of the problem, and is based on official documents, in particular the notification of a reasonable suspicion of a criminal offence having been committed, dated 31 January 2025 and submitted by the President of the Constitutional Tribunal.[1]

[1] The Notification of a Reasonable Suspicion of a Criminal Offence Having Been Committed, dated 31 January 2025. The English version is available on the official website of the Constitutional Tribunal: Press Release, 22 February 2025, link. See also in Polish: Press Briefing by the President of the Constitutional Tribunal, 5 February 2025, link; Press Release (Confirmation of Submission of the Notification), 5 February 2025, link; Press Release (Information on the Notification), 11 February 2025, link; Press Release (Notice about the Commencement of the Investigation), 11 February 2025, link.

II. The Constitutional Tribunal

The Constitutional Tribunal[2] – as the constitutional court – is the most important authority of the judicial branch of government, independent from the other branches, as laid out in the Constitution of the Republic of Poland (hereinafter: the Constitution).[3] However, it does not implement the administration of justice in specific cases, but its main task is to conduct the review of the hierarchical conformity of legal norms and thus, but not only, to guarantee the special role of the Constitution as the supreme law of the Republic of Poland.

A. Judges

The Constitutional Tribunal shall be composed of 15 judges elected individually by the Sejm for a term of office of 9 years from among persons distinguished by their knowledge of the law. No person may be chosen for more than one term of office. Judges of the Constitutional Tribunal, in the exercise of their office, shall be independent and subject only to the Constitution. They shall be provided with appropriate conditions for work and granted remuneration appropriate to the dignity of the office and the scope of their duties. Judges of the Constitutional Tribunal, during their term of office, shall not belong to any political party or trade union, or perform public activities incompatible with the principles of the independence of the courts and judges. Moreover, the Constitution also provides that judges of the Constitutional Tribunal shall be irremovable, although the relevant statute details all grounds for as well as the procedure of the admissible termination of a judge's mandate. In order to strengthen these guarantees, the judges of the Constitutional Tribunal are granted immunity. The President and Vice-President of the Constitutional Tribunal shall be appointed by the President of the Republic of Poland

[2] Some quotes use the abbreviation: CT.
[3] The Constitution of the Republic of Poland of 2 April 1997. The English version is available on the official website of the Constitutional Tribunal: link.

from among candidates proposed by the General Assembly of the Judges of the Constitutional Tribunal.

B. The Constitutional Tribunal's Scope of Competence

The Constitutional Tribunal shall adjudicate on the following matters: 1) the conformity of statutes and international agreements to the Constitution; 2) the conformity of a statute to ratified international agreements whose ratification required prior consent granted by statute; 3) the conformity of legal provisions issued by central state authorities to the Constitution, ratified international agreements and statutes; 4) the conformity to the Constitution of the purposes or activities of political parties; 5) complaints concerning constitutional infringements. In addition, the Constitutional Tribunal's role is to settle disputes over powers between central constitutional authorities of the state and, last but not least, to determine whether or not there exists an impediment to the exercise of the office by the President of the Republic of Poland and to require the Marshal of the Sejm to temporarily perform the duties of the President of the Republic of Poland.

C. Parties with *Locus Standi*

Review proceedings before the Constitutional Tribunal may be instituted by a variety of parties. In regard to matters concerning the hierarchical conformity of legal acts, the parties with *locus standi* are the following: the President of the Republic of Poland, the Marshal of the Sejm, the Marshal of the Senate, the Prime Minister, 50 Deputies,[4] 30 Senators, the First President of the Supreme Court, the President of the Supreme Administrative Court, the Public Prosecutor General, the President of the Supreme Audit Office and the Commissioner for Citizens' Rights; the National Council of the Judiciary (to the extent to which normative acts relate to the independence of courts and judges); the constitutive authorities of units of local self-government, the national authorities of trade unions as well as the national

[4] Some quotes use the abbreviation: MPs.

authorities of employers' organizations and occupational organizations, and churches and religious organizations (if the normative act relates to matters relevant to the scope of their activity). It should also be noted that anyone whose constitutional freedoms or rights have been violated has the right to appeal to the Constitutional Tribunal for its judgment on the conformity to the Constitution of a statute or other normative act upon which basis a court or a public administration authority has made a final decision on freedoms or rights or on obligations specified in the Constitution. Correspondingly, 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 statutes, if the answer to such question of law will determine an issue currently before such court.

D. Rulings

The rulings of the Constitutional Tribunal have been granted special attributes. They shall be of universally binding application and shall be final. Rulings of the Constitutional Tribunal regarding matters concerning the hierarchical conformity of legal acts shall be required to be published forthwith in the official publication in which the original normative act was promulgated. If a normative act has not been promulgated, then the ruling shall be published in the Official Gazette of the Republic of Poland, *Monitor Polski*. A ruling of the Constitutional Tribunal shall take effect from the day of its publication, however, the Constitutional Tribunal may specify another date for the end of the binding force of a normative act. Such a period may not exceed 18 months in relation to a statute, or 12 months in relation to any other normative act. Where a ruling has financial consequences not provided for in the State Budget Act, the Constitutional Tribunal shall specify the date on which the binding force of the normative act concerned shall expire, after seeking the opinion of the Council of Ministers. A ruling of the Constitutional Tribunal on the non-conformity with the Constitution, an international agreement or statute, of a normative act on the basis of which a legally effective court judgment, final administrative decision, or settlement of other matters was issued, shall constitute grounds for re-opening

proceedings or for quashing the decision or other settlement, in the manner and under the principles specified in the provisions applicable to the given proceedings. Rulings of the Constitutional Tribunal shall be made by a majority of votes.

E. Procedure

The organization of the Constitutional Tribunal and the mode of proceedings before the said Tribunal are specified by statute.[5]

[5] These include: The Act of 13 December 2016 – the Introductory Provisions to the Act on the Organization of the Constitutional Tribunal and the Mode of Proceedings Before the Constitutional Tribunal and to the Act on the Status of the Judges of the Tribunal; The Act of 30 November 2016, on the Organization of the Constitutional Tribunal and the Mode of Proceedings Before the Constitutional Tribunal; The Act of 30 November 2016, on the Status of the Judges of the Constitutional Tribunal. English versions are available on the official website of the Constitutional Tribunal: link.

III. Unprecedented Revolt

Someone might ask why there has been "much ado" about the Constitutional Tribunal in recent years.

The answer is simple: the Constitutional Tribunal ensures that the Constitution is the supreme law of the Republic of Poland.

A. Advocate General Spielmann's Moment of Sincerity

The Constitutional Tribunal has issued many judgments related to international law. Two of them in particular have been discussed recently: the judgment of 14 July 2021,[6] and the judgment of 7 October 2021.[7]

On 11 March 2025, the Advocate General of the European Court of Justice, Dean Spielmann, issued an opinion in Case C-448/23.[8]

In a moment of sincerity, he pointed out:

> The position adopted by that court in its judgments of 14 July and 7 October 2021 constitutes an unprecedented revolt and seriously undermines the primacy, autonomy and effectiveness of EU law.[9]

Simply put, the Constitutional Tribunal made a revolt by adjudicating in compliance with the Polish Constitution. Therefore, the rule of law must be "restored".

B. Broader Picture

The aforementioned judgments are not exceptions. One needs only to recall the international hysteria triggered among leftist circles by the Constitutional Tribunal's judgment of 22 October 2020 on abortion.[10]

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[6] Ref. no. P 7/20, on the obligation of an EU Member State to implement interim measures pertaining to the organizational structure and functioning of constitutional authorities within the judicial branch of government of that Member State, link. Press Release: link.
[7] Ref. no. K 3/21, on the assessment of the conformity to the Polish Constitution of selected provisions of the Treaty on European Union, link. Press Release: link.
[8] Commission v Poland (Ultra vires review of the Court's case-law – Primacy of EU law), link.
[9] Ibid.
[10] Ref. no. K 1/20, link. Press Release: link.

All actions targeting the Constitutional Tribunal – taken by international organizations, foreign governments, or foreign-funded NGOs – are basically driven by two factors. Firstly, the Constitutional Tribunal is one of the last bastions or guardians of Polish sovereignty. Secondly, the Constitutional Tribunal, given the rather conservative Polish Constitution, prevents a leftist revolution from taking place in Poland.

IV. "Restoring the Rule of Law" since 13 December 2023

Following 13 December 2023, politicians of the ruling majority repeatedly made various statements aimed at insulting and defaming the Constitutional Tribunal and its judges. Among other things, judges of the Constitutional Tribunal were referred to as "doubles" and "disguises in judicial robes". Judges of the Constitutional Tribunal were threatened with legal responsibility, including criminal liability. Their judgments are ignored by the ruling majority. An extensive analysis could be prepared on this subject; this report merely hints at the problem, attempting to point out key issues in the process of "restoring the rule of law in Poland" regarding the Constitutional Tribunal. For this reason, it will focus on the official statements of the Minister of Justice – Public Prosecutor General, Adam Bodnar, who is in charge of the process.

The general problem of "restoring democracy" or "restoring the rule of law" in Poland has been presented more extensively in other reports.[11]

A. 13 December 2023

On 13 December 2023, Donald Tusk's government took power in Poland. The restoration of the rule of law was announced by the Prime Minister in his *exposé*. [12] Measures in this regard had already been announced in the coalition agreement.[13]

B. Minister of Justice

On 13 December 2023, Adam Bodnar was appointed the Minister of Justice – Public Prosecutor General.[14]

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[11] E.g. Hudson Institute, When Democrats Govern Undemocratically: The Case of Poland by P. Doran and M. Boyse, link (event: link, full report: link); "Prawnicy dla Polski" (Lawyers for Poland) Association, Rule Of Law in Ruins: Poland under the "December 13" Coalition ed. by P. Czubik and K. Wytrykowski, link.

[12] Chancellery of the Prime Minister, 13 December 2023, link.

[13] Chancellery of the Prime Minister, link.

[14] Ministry of Justice, 13 December 2023, link.

C. Inter-Ministerial Team for the Restoration of the Rule of Law and Constitutional Order

On 13 December 2023, the Prime Minister Donald Tusk established the Inter-Ministerial Team for the Restoration of the Rule of Law and Constitutional Order.[15] The Minister of Justice is its chairman.

> The tasks of the Team are primarily to identify areas and analyse issues related to the restoration of the rule of law and constitutional order in Poland, as well as to propose, analyse and give opinions on actions, especially legislative ones in this regard.
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> Importantly, the work of the Team involves not only representatives of the Ministries competent in the thematic area that is the subject of the Team's work, but also experts and representatives of bodies, organizations, institutions or other entities working for the restoration of the rule of law.[16]

The following NGOs, among others, participate in the team: the Iustitia Association of Polish Judges; the Themis Judges Association; the Helsinki Foundation for Human Rights; and the Free Courts Foundation.[17]

D. International Supporters

On 18 December 2023, representatives of more than a dozen NGOs visited the headquarters of the Ministry of Justice on the invitation of the Minister of Justice.[18] Adam Bodnar said at that time:

> "We must undertake the legislative process as soon as possible and adopt the necessary statutes that will begin to restore constitutional order and realize milestones as early as January.".
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> Minister Bodnar asked for the submission to the Ministry of Justice of draft acts that had been prepared by organizations and associations, and encouraged those present to discuss the most important problems and challenges related to restoring the rule of law and repairing the Polish justice system.
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> "I am committed to making our meeting today the first in a series of meetings in which you will share your knowledge and ideas with us," Minister Bodnar stressed.[19]

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[15] Chancellery of the Prime Minister, 13 December 2023, link.
[16] Ministry of Justice, 9 January 2024, link.
[17] Ministry of Justice, 24 January 2024, link.
[18] Ministry of Justice, 18 December 2023, link.
[19] Ibid.

On 18 December 2023, the Minister of Justice, Adam Bodnar, met with EU Member States' ambassadors accredited in Warsaw.[20]

> The Minister, Adam Bodnar, presented to representatives of the embassies of EU Member States the current activities and plans of the Polish Government related to Poland's return to the path of the rule of law, including the implementation of the so-called milestones. He also informed about a meeting scheduled for 20 December 2023 with European Commission Vice-President Vera Jourova, who would be visiting Poland.
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> (...) In doing so, he pointed to the Government's determination to implement the rulings of the Court of Justice of the EU and the European Court of Human Rights.
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> During the discussion with the ambassadors and diplomats, Minister Bodnar answered questions about, among other things, the prospects for the Government's cooperation with the Constitutional Tribunal, the reduction of the negative effects of the CT ruling of 20 October 2020 on abortion. The meeting also focused on the importance of civil society and NGOs in shaping the modern image of the Republic of Poland, including their role in preparing for the future Polish Presidency of the Council of the European Union in 2025.[21]

On 20 December 2023, European Commission Vice-President Věra Jourová visited the headquarters of the Ministry of Justice at the invitation of Adam Bodnar. The meeting focused on the Polish government's planned steps to restore the rule of law in Poland.[22]

> After the meeting, Minister Adam Bodnar and Vice-President Věra Jourová attended a press conference. The Minister of Justice thanked the Vice President of the European Commission for coming to Poland.
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> "This visit has a symbolic dimension, because this is the first time we are meeting the European Commission with the conviction that we want to really cooperate and are guided by the same values," Minister Bodnar said. "For the same values that are expressed in the Polish constitution apply at the European Union level," he added. "I am glad that we can speak a common language and work together to solve the problems that have been created over the past years," stressed the Minister of Justice.
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> Minister Bodnar noted that the Polish government was very keen to see the milestones agreed upon as a condition for the disbursement of funds from the National Recovery Program being fully met as soon as possible.
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> "This visit also has a symbolic dimension, because we have always been able to count on the interest of the European Commission, especially of President Věra Jourova," Minister Bodnar said. "I am talking about human rights defenders, defenders

[20] Ministry of Justice, 20 December 2023, link.
[21] Ibid.
[22] Ministry of Justice, 20 December 2023, link.

of the rule of law, judges' associations, the bar, prosecutors' associations, all those who fought for the survival of the rule of law in Poland," he added.

The Minister of Justice recalled one of Věra Jourova's visits to Poland, during which the Vice-President of the European Commission met with Tour de Konstytucja activists and decided to wear a T-shirt supporting the initiative. In gratitude for this commitment, Minister Bodnar – on behalf of himself and all Polish citizens who had fought for the rule of law in Poland in recent years – presented Věra Jourova with a photo by Chris Niedenthal with the slogan "This is our court". As the Minister of Justice explained, this slogan was displayed by a projector on the facade of the Supreme Court during the 2017 protests.

The Vice-President of the European Commission expressed satisfaction with the Polish government's stated intention to urgently restore the rule of law:

"Not because Brussels wants it, but for the citizens of Poland," Věra Jourová stressed.

According to Věra Jourová, solving the rule-of-law problems will make it much easier for Poland to take its rightful place in the EU:

"Poland should be one of the main players in the European Union and take an active part in making key decisions," she said.

The European Commission Vice-President criticized the reforms pushed through by the previous government, which led to chaos, reduced trust in the judiciary among Polish citizens, and slowed down judicial proceedings.

Some points of this reform, according to rulings of the Court of Justice of the European Union, were contrary to the European treaties, the European Commission Vice-President noted. "I am therefore very pleased that the current government wants to radically change course and cooperate with the European Commission in the process of restoring the rule of law in Poland," Věra Jourová declared.

The Vice-President of the European Commission stressed that any government can reform the judiciary, but in the course of this reform the provisions of the European treaties must be respected. She also expressed her delight at Poland's accession to the European Public Prosecutor's Office.[23]

On 10 January 2024, Adam Bodnar met with the US Ambassador to Poland, Mark Brzezinski.[24] The Ministry of Justice indicated that:

"I am glad that Ambassador Mark Brzezinski positively assesses the ministry's activities leading to the restoration of the rule of law in Poland. Good Polish-American relations are an important element of the foreign policy of both countries," said Minister of Justice – Public Prosecutor General Adam Bodnar (…). Ambassador Mark Brzezinski also raised issues related to respect for the rule of law and the independence of the judiciary, which have been seriously violated in recent years. In doing so, he expressed admiration for the tremendous mobilization of voters and democratic forces in Poland.

[23] Ibid.
[24] Ministry of Justice, 10 January 2024, link.

> "For the recent elections have clearly shown that Polish women and men want to return to the path of a democratic state ruled by law," said Minister of Justice Adam Bodnar. And he stressed that the restoration of respect for the elementary principles of the rule of law is a priority for the entire leadership of the ministry. He noted that the principle of the tripartite division of power must be absolutely respected. "Restricting the independence of judges and non-governmental organizations should be assessed as a threat to the constitutional order of a democratic state," he pointed out.[25]

On 19 January 2024, Adam Bodnar met with the EU Commissioner for Justice, Didier Reynders.[26]

> "We are committed to rebuilding the rule of law for citizens, for respect for constitutional values. We are in dialogue with the European Commission and completing the next steps leading to the realization of milestones," said the Minister of Justice (…).
>
> The EU Commissioner thanked the head of the Ministry of Justice for the actions of the new government. "We spoke with Minister Adam Bodnar about what needs to be done to restore the rule of law in Poland and bring the Article 7 procedure of the Treaty on European Union to an end," Didier Reynders stressed.
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> As the minister stressed at the conference, "One of the elements of restoring the rule of law will be the separation of the functions of the Minister of Justice and the Public Prosecutor General." "During the meeting, we also discussed the procedure under Article 7 of the TEU, which involves continuous supervision in the field of the rule of law. We will be preparing further documents outlining the road map leading to the completion of this process," Minister Adam Bodnar declared.
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> Commissioner Didier Reynders said that restoring the rule of law was not a simple process. "We will discuss it next week at the Justice Council, then there will be another meeting," he announced. As he noted, the European Commission is interested in restoring the National Council of the Judiciary's independence and key role in the process of judicial appointments in Poland. He also appreciated Poland's efforts to join the European Public Prosecutor's Office.[27]

On 23 January 2024, Adam Bodnar met with German Minister of Justice Marco Buschmann.[28]

> "Active cooperation between Poland, Germany and France in the area of the rule of law will provide a strong impetus for strengthening the principle of the rule of law throughout the European Union," said Minister of Justice – Public Prosecutor General Adam Bodnar (…).
>
> The Ministers of Justice of Poland and Germany discussed new challenges related to respect for the rule of law. Ministers Adam Bodnar and Marco Buschmann

[25] Ibid.
[26] Ministry of Justice, 19 January 2024, link.
[27] Ibid.
[28] Ministry of Justice, 23 January 2024, link.

> agreed that cooperation among EU member States in the administration of justice will be important for protecting civil rights and maintaining Europe as a model of freedom, security and peace. These issues will be discussed more extensively at the upcoming informal meeting of the Council of Ministers of Justice and Home Affairs, to be held this week in Brussels.[29]

On 26 January 2024, Adam Bodnar attended the EU Justice and Home Affairs Council meeting in Brussels.[30]

> "The new Polish government is pro-European and respects EU values," stressed Minister of Justice Adam Bodnar, who spoke first at today's (26 January 2024) informal meeting of the EU Justice and Home Affairs Council (JHA).[31]

On 15 February 2024, Adam Bodnar met with the President of the European Parliament, Roberta Metsola.[32]

> "Thank you for visiting Poland and for your years of leadership. I am proud to say that we are working tirelessly to restore the highest democratic standards and restore the rule of law," Minister Adam Bodnar addressed the EP President. The head of the Ministry of Justice also announced that at next week's meeting of the EU General Affairs Council he will present an action plan that will lead to the end of the procedure under Article 7 of the Treaty on European Union against Poland (the EC decided to launch it in 2017). Minister Bodnar expressed hope that this will happen before the EP elections.[33]

On 26 February 2024, the Minister of Justice met with Matteo Mecacci, Director of the OSCE Office for Democratic Institutions and Human Rights.[34]

> Minister Bodnar informed Matteo Mecacci that in matters of the rule of law, legislative work carried out on his order is aimed at implementing the judgments of the Court, and in cases that are pending, the Ministry of Justice is reviewing and revising its positions.[35]

On 27 February 2024, Adam Bodnar met with the Director General of the Council of Europe's Directorate General of Human Rights and Rule of Law, Christos Giakoumopoulos. The discussion concerned the Polish government's implementation

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[29] Ibid.
[30] Ministry of Justice, 26 January 2024, link.
[31] Ibid.
[32] Ministry of Justice, 15 February 2024, link.
[33] Ibid.
[34] Ministry of Justice, 26 February 2024, link.
[35] Ibid.

of the European Court of Human Rights' judgments on the independence of courts and the independence of judges.[36]

> Director General Christos Giakoumopoulos said that the Council of Europe recognized the involvement of the Polish authorities in the process of restoring the rule of law and pledged support for its further activities. According to Secretary Simona Granata-Menghini, the current goals of the Polish government and the Venice Commission are common, so she encouraged the ministry's leadership that new legislative projects should be consulted with the Commission. Also, representatives of the ECtHR's Department for the Execution of Judgments positively assessed the steps taken by the Polish government. They assured that the evaluation of Poland's execution of the relevant judgments of the ECtHR will take into account the entire current context.[37]

E. Action Plan for Restoring the Rule of Law

On 20 February 2024, the Minister of Justice, Adam Bodnar, presented Poland's Action Plan for Restoring the Rule of Law.[38]

> Today Minister of Justice Adam Bodnar and Deputy Minister Krzysztof Śmiszek presented Poland's Action Plan for Restoring the Rule of Law at a meeting of the General Affairs Council of the European Union today. The main points of the planned reform concern the National Council of the Judiciary (NCJ), the Supreme Court, the Constitutional Tribunal (CT), and the separation of the office of the Minister of Justice and the Public Prosecutor General.
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> "These are fundamental issues for Poland. We must do everything in our power to carry out all the necessary reforms that Polish citizens expect, and restore the rule of law," said the Minister of Justice after the meeting of the Council. "This plan is an expression of our commitment to European values, but also to our Constitution."
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> The Action Plan for Restoring the Rule of Law is a response to the justified request of the Commission in accordance with Article 7 of the Treaty on European Union and to the judgments of the Court of Justice of the European Union and the European Court of Human Rights. The implementation of the plan is intended to end the procedure initiated against Poland under Article 7 of the Treaty on European Union.
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> "The plan presented by Minister Bodnar is a step that could lead to the termination of the procedure against Poland, but there is still a lot of work to be done," said Věra Jourová, Vice-President of the European Commission.
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> The plan provides for a set of legislative and non-legislative measures that will be implemented in compliance with all the principles expressed in the Constitution of

[36] Ministry of Justice, 27 February 2024, link.
[37] Ibid.
[38] Ministry of Justice, 21 February 2024, link.

the Republic of Poland, EU law, and the principles arising from the case-law of the Court of Justice of the European Union.

National Council of the Judiciary (NCJ)

To eliminate the influence of politicians on the composition of the National Council of the Judiciary, the Minister of Justice has presented a draft amendment to the relevant act, which introduces the rule that judge-members of the NCJ (15 out of 25 members) will be elected by persons of equal rank (other judges) in a universal and secret ballot. The Council of Ministers adopted this draft on 20 February 2024.

In the long term, a general reform of the NCJ is planned – related to, among other things, the issue of the status of judicial nominations made on the recommendation of the NCJ in the years 2018–2023.

Constitutional Tribunal

On 31 January 2024, Poland submitted its position to the Court of Justice of the European Union. Poland acknowledged the allegations concerning the improper composition of the Constitutional Tribunal and the irregularities in the election of its President. To eliminate these irregularities, Poland plans to adopt a resolution of the Sejm on the status of the Constitutional Tribunal and to introduce amendments to the Constitutional Tribunal Act.

Supreme Court (SN)

To strengthen the independence of the Supreme Court, Poland plans to introduce changes to the Supreme Court Act. These will mainly concern the Chamber of Extraordinary Review and Public Affairs, which – according to the case-law of the CJEU and the ECtHR – is not an independent tribunal established by law.

It is also planned to eliminate the institution of the extraordinary appeal from the Polish legal system, which was questioned in the pilot judgments of the ECtHR in the case of *Wałęsa v. Poland*.

Common courts

According to the judgments of the CJEU, the Polish Act on the Organizational Structure of Common Courts contains numerous provisions that undermine the independence of the courts and effective judicial protection. Taking into account the principle of the primacy of EU law, these provisions, including the so-called "muzzle law", are no longer applied by courts, and judges do not face any disciplinary liability for applying EU law.

In the future, the Ministry of Justice plans to present draft laws containing provisions strengthening the guarantees of the independence of courts and introducing the rules for delegating judges, the functioning of the self-government of judges, the appointment of presidents of courts and the activities of disciplinary officers of common courts.

Public Prosecution Service

> The Polish government plans to separate the functions of Prosecutor General and Minister of Justice. The Ministry of Justice has already presented the basic assumptions of the bill in this matter.
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> Poland has officially notified the European Commission of its accession to the European Public Prosecutor's Office.
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> Cases pending before the CJEU and the ECtHR
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> The government has already taken remedial action in the context of the revision of Polish positions in the proceedings pending before the Court of Justice of the European Union. A review of the positions, recommendations and reservations expressed by the EU institutions is also underway. Poland will also establish a system for the institutional implementation of the judgments of the European Court of Human Rights, which will define the obligations of public authorities.[39]

F. Package of Solutions Concerning the Constitutional Tribunal

On 4 March 2024, Adam Bodnar presented a package of solutions concerning the Constitutional Tribunal.[40]

> We present a package of solutions to heal the Constitutional Tribunal and restore a sense of security for Citizens. These are: a resolution of the Sejm; a citizen-led draft act on the Constitutional Tribunal; introductory provisions; and draft amendments to the Constitution.
>
> The proposed changes have been worked on, in recent years, by multitudes of lawyers, specialists in constitutional law, theory and philosophy of law, international law, civil law or human rights, as well as lawyers' organizations and associations committed to defending the rule of law. We are all committed to restoring the independence of the Constitutional Tribunal. We are creating new, strong mechanisms to safeguard the CT against appropriation by those in power now and in the future.
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> (...) For us, as the Ministry of Justice, the most important thing is to restore the independence of the CT. With the proposed changes, we can recreate the system of reviewing law in accordance with the Constitution. These are solutions that will restore a sense of security for citizens, certainty in economic transactions, and allow us to take the next step on the road to achieving the milestones of receiving more money from the National Recovery Plan for Polish women and men.[41]

The Press Release extensively describes the planned changes. Most significantly:

> 1. Resolution of the Sejm

[39] Ibid.
[40] Ministry of Justice, 4 March 2024, link.
[41] Ibid.

> The resolution of the Sejm of the Republic of Poland with regard to eliminating the effects of the 2015-2023 constitutional crisis in the context of the activity of the Constitutional Tribunal.
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> The Sejm of the Republic of Poland calls upon the judges of the Constitutional Tribunal to resign, and thus join the process of democratic changes.
>
> (...)
>
> 2. Citizen-led Draft Act on the CT and Introductory Provisions
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> This is the result of several years of work by a group of lawyers (specialists in constitutional law, theory and philosophy of law, international law, civil law or human rights) and lawyers' organizations and associations committed to defending the rule of law. Long and extensive consultations took place. The various normative solutions proposed in the draft were also the subject of academic conferences and a series of debates organized by the community of constitutional-law scholars under the auspices of the Jagiellonian University. Numerous comments made in the course of public consultations influenced the final shape of the project.
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> The idea for this project was born after the academic conference, entitled *How to Restore the Rule of Law*, organized on 14 and 15 January 2019 by the Ideas Forum of the Stefan Batory Foundation. Since then, the Foundation's Team of Legal Experts has led and coordinated the development of a new law on the CT. In its final form, the draft received the support of 48 civic organizations, including the Iustitia Association of Polish Judges, the Themis Judges Association, the Lex Super Omnia Prosecutors Association, the Free Courts Foundation, Democracy Action, and the "Watchdog Poland" Civic Network.
>
> (...)
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> 3. Constitutional Amendments
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> The proposed amendments to the Constitution are intended to install new safeguards that will give guarantees of the Tribunal's independence and impartiality now and in the future. It is particularly important to secure the judges, cut them off from political influence and allow them to work. This will safeguard Citizens from losing the Constitutional Tribunal once again.[42]

At the same time, it is important to be aware that the NGOs that drafted the aforementioned normative acts did so with the financial support of foreign entities, particularly the United States Agency for International Development (hereinafter: USAID).[43]

For example, INPRIS – the Institute for Law and Society is implementing the "ROOF – rule of law facilitation project" funded by Dexis Consulting Group (Dexis)

[42] Ibid.
[43] Cf. investigation by Gazeta Polska journalists, link.

acting on behalf of the USAID. The project includes various seminars and studies, especially an analysis of the first 6 months of efforts to restore the rule of law, prepared by Dr Barbara Grabowska-Moroz, Senior Research Fellow and Director of the Rule of Law Clinic at the CEU Democracy Institute.[44]

G. Lectures on the Rule of Law

On 27 May 2024, the Minister of Justice, Adam Bodnar, gave a lecture at the CEU Democracy Institute in Budapest.[45]

> On 27 May the Rule of Law Clinic of the CEU Democracy Institute was launched with an inaugural lecture given by the Minister for Justice of Poland, Adam Bodnar. The event provided a unique opportunity to hear a sitting member of an anti-illiberal government explain how the rule of law will be restored after nearly a decade of backsliding under the previous government. The key theme of the lecture was the endorsement of incrementalism over revolution as a means to rebuild a 'sustainable' rule of law.
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> (...) Bodnar outlined the challenge of political appointees still present in the Constitutional Tribunal and the National Council of the Judiciary (NCJ), marking out these two institutions as needing reform.
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> (...) For as long as the Constitutional Tribunal continues to function in its current configuration and issues judgments, prolonged non-compliance could strain the institutional balance in the Polish legal system.[46]

On 7 July 2024, the Minister of Justice, Adam Bodnar, delivered a lecture – "Rule of law as a key value of European integration" – as part of the "Humboldt Speeches on Europe" speech series organized by the Walter Hallstein-Institute. The conference was dedicated to the challenges facing contemporary Europe.[47]

> Minister Adam Bodnar pointed out that one of the biggest challenges is the restoration of the rule of law in Poland. He noted that the efforts of the current government in Poland are focused on rebuilding the rule of law and constitutional order. He also stressed that Polish citizens in the 2023 parliamentary elections took the first step toward restoring democratic standards in the country.

[44] INPRIS, Repository of the Rule of Law, link.
[45] RevDem The Review of Democracy, Incremental Rule of Law Restoration? Polish Minister of Justice Adam Bodnar in Budapest, link.
[46] Ibid.
[47] Ministry of Justice, 7 July 2024, link.

(…) The head of the ministry stressed that the 2015–2023 period saw the biggest crisis of the rule of law in Poland.

"It included extreme politicization of the public prosecution service, restriction of the independence of judges, politicization of the Constitutional Tribunal, and led to the undermining of the principles of judicial independence," the minister pointed out.

One of the tools for restoring the rule of law is the Action Plan (…) which includes, among other things, a comprehensive reform of the judicial system.

(…) The reform plan presented by Minister Adam Bodnar and the actions taken by the government resulted in the completion of the Article 7 procedure of the Treaty on European Union, as well as the unblocking of funds from the National Recovery Plan.[48]

I. Against Populism

On 2 October 2024, the Minister of Justice, Adam Bodnar, during the Warsaw Security Forum conference, delivered the lecture "Populism and the Future of Europe: Shaping Resilient Institutions".[49] He pointed out that:

The most important part of the process of restoring the rule of law is not only its renewal, but also rebuilding the trust of international and European institutions.[50]

On 17 October 2024, the Minister of Justice, Adam Bodnar, participated in a panel discussion titled "Is the EU turning right?" during the European Forum for New Ideas (EFNI) 2024 in Sopot.[51]

"Right-wing populism is not just about proclaiming catchy slogans referring to specific views. It tries to sideline state authorities that guard freedom and respect for democratic values," emphasized Minister Adam Bodnar in today's (…) speech. He assessed that such actions threaten the rights of various minorities. (…) "Repairing the Polish state should restore basic standards of decency and respect for the law in public life," said the minister.[52]

[48] Ibid.
[49] Ministry of Justice, 2 October 2024, link.
[50] Ibid.
[51] Ministry of Justice, 17 October 2024, link.
[52] Ibid.

J. Meeting with the EU Commissioner for Justice

On 22 November 2024, the Minister of Justice, Adam Bodnar, met with Didier Reynders, who was on his last visit to Warsaw as the EU Commissioner for Justice. The topic of discussion was the Polish government's efforts to restore the rule of law.[53]

> "We are determined to successfully implement the plan presented nine months ago. The goal is to ensure the highest standards of protection of the rule of law in Poland," Adam Bodnar declared. As the head of the Ministry of Justice stressed, Poland is no longer subject to the procedure under Article 7 of the Treaty on European Union, but functions under the standard procedures provided by the EU treaties.
>
> The Minister of Justice thanked Commissioner Didier Reynders for his support for the process of restoring the rule of law in Poland. He also spoke highly of the cooperation with the European Commission in preparing this year's report on the rule of law. The document notes Poland's progress in implementing the EC's recommendations. It also points out areas that still need improvement.
>
> Commissioner Didier Reynders also spoke. "I am glad that we have managed to make progress together towards restoring the rule of law in Poland. In my opinion, Poland will soon fully participate in the work of the European Prosecutor's Office, and I am also convinced that we will be able to restore all standards of the rule of law in Poland. Thank you for this work, for these efforts, which will certainly continue during the Polish presidency of the Council of the European Union," he added.[54]

K. Summary of a Year of the Process of Restoring the Rule of Law

On 9 December 2024, the Minister of Justice, Adam Bodnar, made a statement summarizing a year of efforts to restore the rule of law.[55]

Adam Bodnar pointed out that what he had been focusing on for the past year was the process of restoring the rule of law.

> We are constantly in the process of cleaning up the proverbial Augean Stables. They have turned out to be huge, because the problem is not only about violations of the law, but also about the functioning of various institutions where we see institutional problems on a daily basis.[56]

[53] Ministry of Justice, 22 November 2024, link.
[54] Ibid.
[55] Ministry of Justice, 9 December 2024, link.
[56] Ibid.

The Minister of Justice pointed out that the process of establishing the rule of law and restoring a normally functioning state must be carried out in accordance with democratic rules.

> "Well, and finally, there is also the question of repairing all those institutions that are needed for the normal, everyday functioning of a democratic state: the National Council of the Judiciary, the Constitutional Tribunal, and the Supreme Court," Adam Bodnar stressed.[57]

[57] Ibid.

V. The Sejm's Resolution of 6 March 2024

Pursuant to Article 87(1) of the Constitution, the sources of universally binding law of the Republic of Poland shall be: the Constitution, statutes,[58] ratified international agreements, and regulations.

Resolutions may be adopted by various authorities but, as a rule, they are only the sources of internally binding law. They cannot change the universally binding law. Resolutions are generally used to regulate organizational matters within the specific authority as well as to express non-binding opinions, or call upon certain addressees.

This means that the Sejm may change the law in Poland only under the legislative procedure specified in Article 119 of the Constitution, et seq.

A. Non-Universally Binding Legal Act as a New Way to Amend the Constitution

On 6 March 2024, the Sejm adopted its resolution with regard to eliminating the effects of the 2015–2023 constitutional crisis in the context of the activity of the Constitutional Tribunal (hereinafter: the Sejm's resolution of 6 March 2024).[59]

The Sejm's resolution of 6 March 2024 reads as follows:

> The Sejm of the Republic of Poland – acting for the purpose of eliminating the effects of the constitutional crisis and restoring the compliance of the Constitutional Tribunal's activity with the requirements of Article 7 and Article 194(1) of the Constitution of the Republic of Poland as well as Article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms (Journal of Laws – Dz. U. of 1993, No. 61, item 284 [; hereinafter: the Convention]), implementing the Constitutional Tribunal's judgments of 3 December 2015, in the case ref. no. K 34/15 (Journal of Laws – Dz. U., item 2129), and of 9 December 2015, in the case ref. no. K 35/15 (Journal of Laws – Dz. U., item 2147), as well as the judgments of the European Court of Human Rights in the case of Xero Flor v. Poland (application no. 4907/18), dated 7 May 2021, and in the case of M.L. v. Poland (application no. 40119/21), dated 14 December 2023 – states the following:
>
> (1) the resolution of 8 October 2015, adopted by the Sejm of the Republic of Poland to elect the judge of the Constitutional Tribunal (concerning Bronisław Sitek), published in the Official Gazette – Monitor Polski of 23 October 2015 (item 1041);

[58] I.e. "the acts".
[59] The Sejm's Resolution of 6 March 2024 (Official Gazette – Monitor Polski (M. P.), item 198), link.

(2) the resolution of 8 October 2015, adopted by the Sejm of the Republic of Poland to elect the judge of the Constitutional Tribunal (concerning Andrzej Jan Sokala), published in the Official Gazette – Monitor Polski of 23 October 2015 (item 1042);

(3) the resolution of 25 November 2015, adopted by the Sejm of the Republic of Poland to determine the lack of legal force of the resolution of 8 October 2015, adopted by the Sejm of the Republic of Poland to elect the judge of the Constitutional Tribunal (concerning Roman Hauser), published in the Official Gazette – Monitor Polski of 26 November 2015 (item 1131);

(4) the resolution of 25 November 2015, adopted by the Sejm of the Republic of Poland to determine the lack of legal force of the resolution of 8 October 2015, adopted by the Sejm of the Republic of Poland to elect the judge of the Constitutional Tribunal (concerning Andrzej Jakubecki), published in the Official Gazette – Monitor Polski of 26 November 2015 (item 1132);

(5) the resolution of 25 November 2015, adopted by the Sejm of the Republic of Poland to determine the lack of legal force of the resolution of 8 October 2015, adopted by the Sejm of the Republic of Poland to elect the judge of the Constitutional Tribunal (concerning Krzysztof Ślebzak), published in the Official Gazette – Monitor Polski of 26 November 2015 (item 1133);

(6) the resolution of 2 December 2015, adopted by the Sejm of the Republic of Poland to elect the judge of the Constitutional Tribunal (concerning Mariusz Muszyński), published in the Official Gazette – Monitor Polski of 2 December 2015 (item 1184);

(7) the resolution of 2 December 2015, adopted by the Sejm of the Republic of Poland to elect the judge of the Constitutional Tribunal (concerning Henryk Cioch), published in the Official Gazette – Monitor Polski of 2 December 2015 (item 1182);

(8) the resolution of 2 December 2015, adopted by the Sejm of the Republic of Poland to elect the judge of the Constitutional Tribunal (concerning Lech Morawski), published in the Official Gazette – Monitor Polski of 2 December 2015 (item 1183);

(9) the resolution of 15 September 2017, adopted by the Sejm of the Republic of Poland to elect the judge of the Constitutional Tribunal (concerning Justyn Piskorski), published in the Official Gazette – Monitor Polski of 19 September 2017 (item 873);

(10) the resolution of 26 January 2018, adopted by the Sejm of the Republic of Poland to elect the judge of the Constitutional Tribunal (concerning Jarosław Wyrembak), published in the Official Gazette – Monitor Polski of 31 January 2018 (item 134);

– were adopted in a manifest breach of law, in particular the Constitution of the Republic of Poland as well as the Convention for the Protection of Human Rights and Fundamental Freedoms, and thus they lack legal force and have not had the legal effects envisaged therein.

Consequently, the Sejm of the Republic of Poland deems that Mariusz Muszyński, Justyn Piskorski and Jarosław Wyrembak are not judges of the Constitutional Tribunal. Numerous rulings of the Constitutional Tribunal are legally defective, because:

– Mariusz Muszyński, Justyn Piskorski and Jarosław Wyrembak (and earlier Henryk Cioch and Lech Morawski) participated in the Constitutional Tribunal's adjudication activity, being involved in issuing determinations when the Tribunal was adjudicating as a single judge or as a panel of several judges;

– recusal applications concerning the above-mentioned persons, filed by the parties to those proceedings, were consistently dismissed;

– judges of the Constitutional Tribunal dismissed recusal applications for excluding the above-mentioned persons from adjudicating, and – together with the unauthorized persons – they were also involved in the Constitutional Tribunal's adjudication activity.

The Sejm of the Republic of Poland also states that the function of the President of the Constitutional Tribunal is exercised by an unauthorized person. Julia Przyłębska has been in charge of the Constitutional Tribunal since 21 December 2016, when the President of the Republic of Poland appointed her to exercise the function of the President of the Constitutional Tribunal. The said appointment, which has on numerous occasions been contested, was made without the prior obtaining of the relevant legally required resolution of the General Assembly of the Judges of the Constitutional Tribunal. Moreover, even if one were to acknowledge the fact of the defective appointment, then it follows from Article 10(2) of the Act of 30 November 2016 on the Organization of the Constitutional Tribunal and the Mode of Proceedings Before the Constitutional Tribunal (Journal of Laws – Dz. U. item 2072) that the term of office of the President of the Constitutional Tribunal shall be six years. This entails that Julia Przyłębska's term of office [as the President of the CT] expired as of 21 December 2022. Consequently, all procedural decisions within the scope of overseeing and managing the work of the Constitutional Tribunal, and in particular the decisions to determine the composition of particular adjudicating panels, made by Julia Przyłębska, may be challenged.

Seven judges of the Constitutional Tribunal, in their letters of 28 June 2018 and of 5 December 2018, pointed out that, in the practice of the Constitutional Tribunal's activity, there were instances of manipulating the composition of particular adjudicating panels. Those statements have not effected any change in the functioning of the Constitutional Tribunal, or any change in the conduct of the person in charge of the Constitutional Tribunal, i.e. Julia Przyłębska.

Due to the situation in the Constitutional Tribunal, on 15 February 2023 the European Commission referred Poland to the Court of Justice of the European Union for violations of EU law. In the view of the European Commission, the Constitutional Tribunal does not meet the requirements for an independent court within the meaning of Article 19 of the Treaty on European Union.

The violations of the Polish Constitution and of the law, committed in the course of the Constitutional Tribunal's activity, have reached a scale that makes it impossible for the said authority to carry out its constitutional tasks within the ambit of the constitutional review of law, including the protection of the rights of persons and citizens.

In the opinion of the Sejm of the Republic of Poland, the state of incapacity of the currently functioning authority to carry out the tasks of the Constitutional Tribunal set out in Article 188 and Article 189 of the Polish Constitution requires that the constitutional court be established anew, in compliance with the constitutional

> principles as well as by taking account of the voices of all political powers respecting the constitutional order. The judges of a renewed Constitutional Tribunal should be elected with the inclusion of votes of opposition factions. Determining the new composition should be spread out in time to confirm the will to establish that authority in the way that is free from the perspective of the current term of office of the Sejm of the Republic of Poland and the Senate of the Republic of Poland.
>
> It is indisputable that public authorities are obliged to adhere to the Polish Constitution, and in particular to the principle that public authorities are to function on the basis of, and within the limits of, the law, which arises from Article 7 of the Constitution. The Sejm holds the view that, as regards the Constitutional Tribunal's rulings issued in breach of law, taking into account those rulings by public authorities in their activities may be considered as those authorities' violations of the principle that public authorities are to function on the basis of, and within the limits of, the law.
>
> The Sejm of the Republic of Poland calls upon the judges of the Constitutional Tribunal to resign, and thus to join the process of democratic changes.
>
> The resolution is subject to publication in the Official Gazette of the Republic of Poland – Monitor Polski".[60]

The Sejm's resolution of 6 March 2024 contains passages of a non-binding opinion as well as those that can be considered universally binding legal provisions (e.g. the forbidding of the implementation of the Constitutional Tribunal's rulings in the activities of public authorities).

One may ask why the Sejm decided to adopt the resolution instead of amending the Constitution or enacting statues. Firstly, a 2/3 majority is required to amend the Constitution, which the current ruling majority does not have. Secondly, the liberal-left coalition (led by the Prime Minister Donald Tusk) believes that the current conservative President of the Republic of Poland (Andrzej Duda) would have vetoed (referred for re-consideration) the adopted bill or referred it to the Constitutional Tribunal for an adjudication upon its conformity to the Constitution. In the case of a veto, there would not be the required 3/5 majority necessary for the re-adoption of the bill. However, the next President of the Republic of Poland may be willing to act differently. Therefore, the Sejm's resolution of 6 March 2024, may have been intended as a temporary solution by its proponents.

[60] Ibid.

B. The Constitutional Tribunal's Judgment of 28 May 2024

A group of Deputies pointed out the unconstitutionality of such a solution. As a result, in its judgment of 28 May 2024, the Constitutional Tribunal assessed the Sejm's resolution of 6 March 2024.[61]

In the form of a brief summary, the President of the Constitutional Tribunal indicated that:

> In its judgment of 28 May 2024 (ref. no. U 5/24, OTK ZU A/2024, item 65), the Constitutional Tribunal conducted the constitutional review of the resolution of 6 March 2024, declaring the resolution (as a whole) to be inconsistent with Article 7 in conjunction with Article 87(1), Article 10 in conjunction with Article 173 and Article 190(1) of the Constitution of the Republic of Poland. Already at the outset of its examination, "due to the obviousness of the case under consideration, the Constitutional Tribunal held that in the resolution issued without any legal basis, which is absent from the constitutional catalogue of the sources of universally binding law, the Sejm prohibited the implementation of the Constitutional Tribunal's judgments which – in the light of the resolution – might be regarded as issued in breach of law. By manifestly violating the standards of a democratic state ruled by law in the form of the constitutional principle of the rule of law in its formal aspect and the constitutional principle of the separation and balance of powers, the Sejm "ruled" by resolution that the judges of the Constitutional Tribunal who had been holding their judicial offices for several years were not judges of the Constitutional Tribunal, and that the President of the Constitutional Tribunal appointed by the decision of the President of the Republic of Poland was not the President of the Constitutional Tribunal. For the above reasons, the Constitutional Tribunal stated that the assumptions set out in the resolution are not based on the Constitution but implicitly allude to the concept of "behavioural" (de facto) binding force of law, which envisages that mere adherence to a given legal norm and the perception thereof as lawful by an entity applying the law would weigh in favour of the binding force of the said norm, contrary to the unambiguous constitutional provisions. The adoption of the resolution manifestly violating Article 10 of the Constitution – due to undermining the constitutional principle of the separation of powers – amounts to an unprecedented abuse of state power committed by the Sejm" (the Constitutional Tribunal's judgment ref. no. U 5/24).
>
> With reference to political authorities' practice of refraining from fulfilling their legal obligation to forthwith publish rulings of the Polish constitutional court: "The Constitutional Tribunal noted that the media cited a statement made by Minister Maciej Berek, who is a member of the Council of Ministers, on 5 March 2024, in which he asserted that '[i]t follows from the resolution that the Tribunal's jurisprudence from now on in its entirety is legally flawed. And whether or not the rulings are published with the reservation that one has to look at this resolution and its effects, the outcome will be the same effect. This means that those rulings of the Tribunal should in fact be ignored in the system of state authorities from the moment of the adoption of the resolution'. 'When asked whether, in this situation, the government will publish the

[61] The Constitutional Tribunal's judgment of 28 May 2024 (ref. no. U 5/24, OTK ZU A/2024, item 65), link.

rulings, Berek replied: 'After this resolution, we will have to pause and consider whether to publish these rulings all with an asterisk referring to this Sejm resolution, which may be the neatest solution, or whether to adopt another approach'" ("Dlaczego rząd nie publikuje najnowszych wyroków TK", www.rp.pl, accessed 19 May 2024)" (ibidem).

Further on, the Constitutional Tribunal deemed that: "The practice of non-publication of the CT's judgments in the Journal of Laws by the President of the Government Legislation Centre indicates that, also on the basis of the entire content of the resolution, he reconstructed the norm excluding the application of Article 190(2) of the Constitution and Article 9(1)(6) of the Act of 20 July 2000, on the Promulgation of Normative Acts and Certain Other Legal Acts (Journal of Laws – Dz. U. of 2019, item 1461), pursuant to which 'the CT's judgments concerning normative acts published in the Journal of Laws shall be published in the Journal of Laws'" (ibidem).

Indicating the effects of its judgment issued in the case ref. no. U 5/24, with regard to the issue of the non-publication of the Polish constitutional court's rulings, the Tribunal noted that: "the legal norms derived from the substance of the resolution are clearly unconstitutional, as they were created outside of the scope of relevant competence and are manifestly inconsistent with the principles of the separation of powers, the independence of the judiciary as the branch of government and the independence of judges, as well as with the principle of the universal binding force of the Constitutional Tribunal's final rulings. Consequently, any actions taken by public authorities based on the norms derived from the resolution are also unconstitutional". (…) the ruling that the resolution is inconsistent with Article 7 in conjunction with Article 87(1) of the Constitution, and therefore the declaration of its unconstitutionality in the formal-legal aspect, is linked to the loss of validity of the normative act. As of the date of publication of the judgment in the official journal, the resolution is eliminated from the legal system, but the presumption of the constitutionality of that act was overturned as soon as the ruling was announced by the presiding judge. Secondly, the ruling that the impugned resolution is inconsistent with Article 10 in conjunction with Article 173 and Article 190(1) of the Constitution – i.e. declaring it to be unconstitutional in the substantive legal aspect – does not merely mean that it ceases to be legally binding, and does not merely imply the earlier overthrowing of the presumption of constitutionality of the legal provisions contained therein, in which the elements of the legal norm(s) are encoded. Indeed, the indicated simple derogation effect is included in the consequences arising from the determination of the non-conformity of the resolution to Article 7 in conjunction with Article 87(1) of the Constitution. By contrast, the consequences arising from the determination of the non-conformity of the resolution with Article 10 in conjunction with Article 173 and Article 190(1) of the Constitution are more complex. Their essence entails the elimination from the legal system of all the individual necessary elements, or co-determining, the content of the legal norm (legal norms) expressed in the resolution, which makes it possible to decode legal norms that are syntactically or substantively "compartmentalized" also in other provisions of the law which amount to questioning the course of the proceedings before the Constitutional Tribunal, including undermining the status of its judges or President, and consequently the attributes of universally binding force and finality of the Tribunal's rulings, as well as prohibiting public authorities from taking account of those rulings in their activities" (ibidem).

Moreover, with regard to the fact that public authorities took account of the resolution of 6 March 2024, the Tribunal stated that such actions on the part of public authorities "may be regarded as those authorities' violation of the principle that public authorities are to function on the basis of, and within the limits of, the law, which may

> in turn imply liability – especially constitutional, criminal, or disciplinary liability – for persons exercising those public functions and holding public offices. The occurrence of such a violation is not conditioned, at the same time, by the publication of this judgment in the relevant official journal, for it is determined by the very circumstance of failure to respect constitutional norms, which, in accordance with the conflict of laws rule (*lex superior derogat legi inferiori*), deprive legal norms of lower legal rank, and even more so those set out in acts that do not belong to the sources of universally binding law. (…) Elaborating on the above remarks, the Constitutional Tribunal noted in passing that the resolution did not constitute a normative change that in no way excluded or limited the responsibility of the entities obliged to publish the Tribunal's rulings in the relevant official journals, in particular, the resolution did not justify the instances of exceeding the scope of competence and of failing to fulfil duties in the aforementioned ambit" (ibidem(…)).[62]

The Constitutional Tribunal has made it very clearly that the Sejm's resolution of 6 March 2024 was based on false premises.[63] Moreover:

> The attempt to revoke the effects of the election of judges to whom, as a result of the election, the President of the Republic gave the oath of office, thus clearly violates the principle of the separation of powers provided for in Article 10 in conjunction with Article 173 of the Constitution, which confirms the Constitutional Tribunal's independence, and hence also the independence of its judges.[64]

In the Constitutional Tribunal's judgment ref. no. U 5/24, it was clearly indicated that:

> (…) the operative part of the judgment ref. no. K 34/15 did not concern those elected on 8 October 2015. The procedure for electing a judge consists of several stages, and the K 34/15 judgment concerned only the first of these stages, i.e. the legal basis for submitting applications containing the names of candidates for judges of the Constitutional Tribunal. However, the procedure commenced on 8 October 2015 was not finalized due to: discovered irregularities in the election procedure; the adoption of the resolutions of 25 November 2015, and the election of CT judges for vacant judicial offices on 2 December 2015. While adopting the resolutions of 25 November 2015, the Sejm was not aware of the CT's judgment ref. no. K 34/15, which was delivered on 3 December 2015, so the Sejm's action cannot be read as questioning the judgment. Instead, the election of CT judges on 2 December 2015 merely constitutes the application of the 2015 Constitutional Tribunal Act, due to the failure to fill in five judicial vacancies. It is worth noting that, in the operative part of the judgment, the CT could not evaluate the act of electing judges alone, since the evaluation of acts issued within the scope of the so-called "competence to appoint or dismiss" vested in the Sejm lies outside the scope of the CT's jurisdiction (see Articles 188-189 of the Constitution). After the retirement of Andrzej Rzeplinski, former President of the Constitutional Tribunal, there was the entry into force of the Act of 13 December 2016 – the Introductory Provisions to the Act on the Organization of the Constitutional Tribunal and the Mode of Proceedings Before the Constitutional Tribunal and to the Act on the

[62] Supra note 1.
[63] Supra note 61. See especially Part III, point 7 of the statement of reasons.
[64] Ibid.

Status of the Judges of the Tribunal (Journal of Laws, item 2074; hereinafter: the Act – the Introductory Provisions). On the basis thereof, the President of the Republic of Poland entrusted Judge Julia Przyłębska with the duties of the President of the Tribunal. The provisions of the said Act required that the judge performing the duties of the President of the Tribunal assign cases to the judges of the Tribunal who have taken the oath of office before the President of the Republic of Poland and create conditions that make it possible for the judges of the Tribunal to perform their judicial duties. The following judges were admitted to adjudicate: Henryk Cioch, Lech Morawski, and Mariusz Muszyński. By contrast, pursuant to Article 5 of The Act of 30 November 2016 on the Status of the Judges of the Constitutional Tribunal (Journal of Laws, item 2073, as amended), "[a] judge of the Tribunal shall commence his/her employment relationship after taking the oath of office. After taking the oath of office, a judge of the Tribunal shall arrive at the Tribunal to assume judicial duties; the President of the Tribunal shall assign cases to the judge and create conditions that make it possible to perform the judicial duties". Thus, the legislature unequivocally determined what the composition of the Constitutional Tribunal was in 2015, resolving existing disputes. The resolution that constitutes the subject-matter of the review in the present case cannot change this, being a legal act placed lower in the hierarchy of the constitutional system of the sources of law. The Constitutional Tribunal did not rule on the election of judges of the Constitutional Tribunal in the judgments ref. nos. K 34/15 and K 35/15, and in the decision ref. no. U 8/15, which it also clearly stated in the statement of reasons for the judgment of 24 October 2017, ref. no. K 1/17 (OTK ZU A/2017, item 79). In the statement of reasons for the last-mentioned judgment, the Tribunal indicated that it shares the view presented in the decisions on the refusal to exclude the judges of the Constitutional Tribunal from adjudicating, i.e. the decisions of: 15 February 2017, ref. no. K 2/15 (OTK ZU A/2017, item 7), 8 March 2017, ref. no. K 24/14 (unpublished), 19 April 2017, ref. no. K 10/15 (OTK ZU A/2017, item 27), and 27 July 2017, ref. no. U 1/17 (unpublished), namely that – contrary to the applicant's claims – the CT has not yet made a binding determination on the legal status of any of the CT's judges. The rulings invoked by the applicants are no exception to this. In particular, in the judgment ref. no. the K 34/15, it was assumed, inter alia, that Article 137 of the 2015 Constitutional Tribunal Act "insofar as it applies to the judges of the CT whose term of office expires on 6 November 2015, is consistent with Article 194(1) of the Constitution," and, by contrast, "insofar as it applies to the judges of the CT whose term of office expires on 2 December and 8 December 2015, respectively, is inconsistent with Article 194(1) of the Constitution". What is clear from the wording of this excerpt of the operative part of the judgment is that the CT ruled not on the election of judges, but on the hierarchical conformity of Article 137 of the 2015 Constitutional Tribunal Act, which determines the deadline for submitting proposals for candidates for judges of the Constitutional Tribunal, with Article 194(1) of the Constitution. The CT once again emphasized, which should be obvious, that Article 137 of the 2015 Constitutional Tribunal Act concerned only the deadline for proposing candidates for judges of the CT who were to take office after the expiry of the terms of office of five CT judges in November and December 2015. The implementation of the judgment with such an operative part should not consist in challenging the election of judges, but the regulation of the deadline for the nomination of candidates for CT judges in the future, which is consistent with Article 194(1) of the Constitution. The Constitutional Tribunal pointed out, in the CT's 2016 Annual Report, that as of 3 December 2015, the CT was composed of 15 judges, and the Sejm of the 8th term effectively declared that the election made on 8 October 2015 had no legal force. The issue of the constitutionality of Article 137 of the 2015 Constitutional Tribunal Act was not relevant during the election of judges on 2 December 2015, as it was not the basis for the said Sejm's assessment of the election made on 8 October 2015. The CT also did not address in the judgments ref. nos. K 34/15 and K 35/15 which of the Sejm's resolutions on the election

of CT judges are correct, and consequently, who is correctly elected to the office of judge of the Constitutional Tribunal. This position was upheld by the CT in its decision ref. no. U 8/15.

The attainment of the status of CT judges by Lech Morawski, Henryk Cioch, and Mariusz Muszyński raises no doubt. Bearing in mind the state of the law in effect in December 2015, a judge of the Constitutional Tribunal was a person who was elected by the Sejm pursuant to Article 194(1) of the Constitution and Article 17(2) of the 2015 Constitutional Tribunal Act, and took the oath of office before the President of the Republic, pursuant to Article 21(1) of the said Act. The conventional act was therefore established in the form of the conjunction of the election by the Sejm and the oath before the President. The conditions for the designated judges of the Constitutional Tribunal to hold the office were therefore fulfilled, as pointed out by judges of the Constitutional Tribunal Julia Przyłębska and Piotr Pszczółkowski in their dissenting opinions to the judgment of the Constitutional Tribunal of 9 March 2016, ref. no. K 47/15 (OTK ZU A/2018, item 31).

The Constitutional Tribunal stressed that it does not follow from the judgments ref. nos. K 34/15 and K 35/15, contrary to the wording in the resolution under review in these proceedings, that the Sejm of the 7th term could elect 3 CT judges to assume the offices that became vacant on 6 November 2015, while the Sejm of the 8th term could elect 2 CT judges to take the office that became vacant on 2 and 8 December 2015. The K 34/15 judgment only indicates that Article 137 of the 2015 Constitutional Tribunal Act, "insofar as it applies to judges of the CT whose terms of office expire on 6 November 2015, is consistent with Article 194(1) of the Constitution," and "insofar as it applies to judges of the CT whose terms of office expire on 2 and 8 December 2015, respectively, is inconsistent with Article 194(1) of the Constitution" (point 8 of the operative part of the judgment).

The K 35/15 judgment only indicates that Article 137a of the 2015 Constitutional Tribunal Act "insofar as it concerns the application of a candidate for a judge of the Constitutional Tribunal in lieu of a judge whose term of office expires on 6 November 2015, is inconsistent with Article 194(1) in conjunction with Article 7 of the Constitution" (point 5 of the operative part). These rulings referred only to legal regulations, since the Constitutional Tribunal, as a court of law, has no jurisdiction to interfere with the so-called "competence to appoint or dismiss" vested in the Sejm. Additionally, which the sponsors of the resolution failed to note, Articles 137 and 137a of the 2015 Constitutional Tribunal Act had nothing to do with the election of judges of the Constitutional Tribunal by the Sejm on 2 December 2015. The legal provisions indicated were not applicable in this regard – they did not constitute the legal basis for the resolutions adopted by the Sejm of the 8th term. The reference in the impugned resolution, as well as in the explanatory note for draft thereof, to the judgments ref. nos. K 34/15 and K 35/15 is obviously arbitrary, as it finds no support in any passage of the operative part that would undermine the effectiveness of the election of CT judges in December 2015.

In its ruling, however, the CT raised an important issue that is overlooked in the statements questioning the status of CT judges Lech Morawski, Henryk Cioch, and Mariusz Muszynski: "[t]he oath of office before the President (...) is not merely a solemn ceremony of symbolic nature, referring to the traditional commencement of the term of office. The event serves two important functions. First, it is a public pledge by a judge to act in accordance with the oath of office. By doing so, the judge declares his/her personal responsibility to perform the judicial duties impartially and diligently in accordance with his/her conscience and with respect for the dignity of the office.

Secondly, taking the oath of office allows a judge to begin to exercise the relevant duties, that is, to exercise the mandate entrusted to them. These two important aspects of the oath of office prove that it is not merely a solemn ceremony, but an event that produces specific legal effects. For this reason, the involvement of the President of the Republic in the giving of the oath of office to the judges of the Constitutional Tribunal elected by the Sejm should be placed in the realm of exercising the powers of the head of state" (judgment ref. no. K 34/15). This unequivocally proves that the procedure for electing a CT judge does not end when the Sejm adopts the relevant resolution, but only when the oath of office is taken before the President of the Republic. Only the combined fulfilment of these requirements produces a legal effect in the form of a person's entitlement to take up office and adjudicate. Roman Hauser, Andrzej Jakubecki, and Krzysztof Ślebzak, as well as Bronisław Sitek and Andrzej Sokala, never acquired the status of judges of the Constitutional Tribunal. The indicated persons did not take the oath of office before the President of the Republic. The acceptance of such oaths by the head of state, according to the content of the resolutions of 25 November 2015, would constitute constitutionally inadmissible interference by the President of the Republic with the so-called "competence to appoint or dismiss" vested in the Sejm. The resolutions of 8 October 2015 did not "close" the process of electing CT judges. Only the oaths of office given by the President of the Republic to the judges of the Constitutional Tribunal on 3 and 9 December 2015 had such an effect. This is because it should be remembered that within the framework of the entire procedure for the election of a CT judge, the Sejm is its "supervisor" until the elected person takes the oath of office before the President. Within the temporal limits of this procedure, the Sejm can therefore validate the actions it has taken, while no other public authority has the competence to intervene in this process in a manner that produces legal effects. However, the completion of the procedure for electing a judge of the Constitutional Tribunal, which involves the taking of the oath of office before the President of the Republic by the person elected by the Sejm, produces the legal effect of obtaining the right to take up the office and to adjudicate, and causes the Sejm to lose the said competence to validate, which is related to determining the lack of legal force and the effectiveness of the election of the person who obtained, in accordance with the described procedure, the status of a judge of the Constitutional Tribunal. This is also even more relevant to the revocation, elimination, declaration of invalidity or non-existence of such an act by the Sejm. Therefore, the Sejm's statement in the resolution that the ten Sejm resolutions indicated therein are "devoid of legal force and have not produced the effects provided for therein" is devoid of any legal significance. In other words, the resolution did not have any legal effect, with regard to the status of judges of the Constitutional Tribunal, of those elected in December 2015 who took the oath of office before the President, as well as of Justin Piskorski and Jaroslaw Wyrembak, who were elected by the Sejm on 15 September 2017 (M. P. item 873) and 26 January 2018. (M. P. item 134), and also took such oaths of office on 18 September 2017 and 30 January 2018, respectively. The impugned resolution in the present proceedings was adopted outside the temporal limits of the indicated procedures for the election of CT judges.

The arbitrariness of statements questioning the status of CT judges elected by the Sejm of the 8th term on 2 December 2015, 15 September 2017 and 26 January 2018 may illustrate the fact that the application of a similar interpretation in the future could result in the finding of lack of legal force and in failure to produce the effects provided for in any act involving the election of any public authority when the person concerned has already taken office.

As a side remark, the Constitutional Tribunal added that, as a rule, the CT's judgments produce legal effects for the future, not retrospectively, that is, they do not have cassation effects. The aforementioned judgments ref. nos. K 34/15 and K 35/15

were issued only after the completion of the procedures for the election of CT judges in December 2015. If, however, one wants to eliminate acts of applying the law issued on the basis of an unconstitutional legal provision before its unconstitutionality is determined, the procedures set forth by law must be instituted. This is because, pursuant to Article 190(4) of the Constitution, a judgment of the Constitutional Tribunal on the non-conformity to the Constitution, an international agreement or a statute, of a normative act on the basis of which a legally effective judgment of a court, a final administrative decision or settlement of other matters was issued, shall be a basis for reopening proceedings, or for quashing the decision or other settlement in a manner and on principles specified in provisions applicable to the given proceedings. However, there are no such procedures in the legal system with regard to the election of judges of the Constitutional Tribunal. For this reason, neither the resolution nor the explanatory note for the draft resolution indicates the relevant legal basis, because it simply does not exist. No public authority is vested with the competence in this regard and may not presume it. The resumption of proceedings to implement a ruling of the Constitutional Tribunal with regard to the election of CT judges, if ever such a ruling were made, would be possible only if an appropriate procedure were established *expressis verbis* in legal provisions of constitutional rank. At the same time, Article 190(4) of the Constitution may not be an autonomous basis for the resumption of such proceedings, since it does not specify the rules or procedures that are "appropriate to the proceedings in question". This autonomy does not disappear when a provision of law, rules of procedure, a resolution or a ruling is invoked with reference to Article 190(4) of the Constitution. In order for Article 190(4) of the Constitution to serve as a legal basis in conjunction with another provision, for the resumption of proceedings relating to the election of a judge of the Constitutional Tribunal, it would also be necessary to invoke a legal provision with the legal force equal to that of the Constitution, which would explicitly specify the rules and mode of such a procedure. *De lege lata* such a legal basis does not exist in the legal system that is in force in the Republic of Poland. Such a procedure would have to be established only in accordance with the procedure set forth in Article 235 of the Constitution. Therefore, there are no legal grounds for concluding that the resolution constituted an act of law application issued pursuant to Article 190(4) of the Constitution.

It should be emphasized strongly once again that the questioning of the status of CT judges has no basis in the jurisprudence (i.e. case law) of the Constitutional Tribunal. The only case – already mentioned above – recognized by the Constitutional Tribunal which directly concerned resolutions on the election of CT judges was discontinued by the Constitutional Tribunal, by the decision of 7 January 2016, ref. no. U 8/15, due to the lack of the Tribunal's jurisdiction. L. Mażewski noted that in the light of that decision, "the Sejm has full discretion in the matter of filling the 5 offices of CT judges, and thus the President of the Republic (...) could behave in accordance with the Sejm's instructions in November and December 2015." (L. Mażewski ..., p. 114). The operative part of no judgment of the Constitutional Tribunal states any of the resolutions on the election of CT judges has been annulled, revoked, rendered ineffective, invalid or non-existent; nor did any of the judgments declare the unconstitutionality of the legal bases for the election of CT judges by the Sejm of the 8 term. Therefore, the election of CT judges in December 2015, as well as in 2017 and 2018, did not in any way violate Article 7 and Article 194(1) of the Constitution.[65]

[65] Ibid.

The Constitutional Tribunal also indicated the lack of legally binding impact of the European Court of Human Rights' case law on the constitutional status of the Constitutional Tribunal judges.[66]

Consequently, there are no legal grounds for challenging the Constitutional Tribunal's rulings.

The removal of the judges of the Constitutional Tribunal from office or the annulment of the Constitutional Tribunal's rulings is only possible by amending the Constitution.

C. Resolution of the General Assembly of the Judges of the Constitutional Tribunal

On 26 August 2024, the General Assembly of the Judges of the Constitutional Tribunal adopted the following resolution:

> Pursuant to § 4(2) of the Rules of Procedure of the Constitutional Tribunal, in conjunction with Article 6(2)(11) of the Act of 30 November 2016 on the Organization of the Constitutional Tribunal and the Mode of Proceedings Before the Constitutional Tribunal (Journal of Laws [*Dziennik Ustaw*], 2019, item 2393)
>
> The General Assembly of the Judges of the Tribunal considers the assertions made by the Sejm – and contained in the Sejm's resolution of 6 March 2024 with regard to eliminating the effects of the 2015-2023 constitutional crisis in the context of the activity of the Constitutional Tribunal – concerning the election of the Tribunal judges Mariusz Muszyński, Justyn Piskorski and Jarosław Wyrembak, to be unfounded.
>
> A resolution by the Sejm on the election of a specific candidate to the position of judge of the Constitutional Tribunal takes legal effect from the moment the elected candidate takes the oath before the President of the Republic of Poland and assumes the office of judge of the Tribunal.
>
> The matter of the validity of the election of judges has been reviewed by the Tribunal on multiple occasions in connection with applications submitted by parties for the recusal of a judge. The Tribunal has found on forty occasions that there were no grounds for excluding judges Mariusz Muszyński, Justyn Piskorski and Jarosław Wyrembak from adjudicating.
>
> All current judges of the Tribunal have been elected in the manner in force in Poland since 1990, namely by a majority of the Sejm. They then took an oath before the President of the Republic of Poland, and were authorized to adjudicate (they took office). At the time of the election of the judges of the Tribunal, the judicial offices were vacant, as no other persons had taken the oath before the President, declared their readiness to adjudicate, and assumed the office of judge of the Constitutional Tribunal. The constitutionality of the provisions underlying the election of Judges Mariusz

[66] Ibid. For a detailed analysis see especially Part III, point 7.1.4 of the statement of reasons.

Muszyński, Justyn Piskorski and Jarosław Wyrembak was not challenged by the Constitutional Tribunal.

The General Assembly shares the reasoning presented in the judgment ref. no. U 5/24 concerning the unconstitutionality of the Sejm's resolution of 6 March 2024 with regard to eliminating the effects of the 2015-2023 constitutional crisis in the context of the activity of the Constitutional Tribunal.

The General Assembly of the Judges of the Constitutional Tribunal considers the Sejm's attempt to challenge the status of Tribunal's judges to be a fundamental threat to the rule of law. The acceptance of such practice would mean that the Sejm is authorized to invalidate the elections of other constitutional authorities as well.[67]

D. Remarks of the President of the Constitutional Tribunal

The President of the Constitutional Tribunal in his aforementioned notification indicated that:

In the context of the above, it should at this point be clearly stated that – due to the issue of the publication of the Constitutional Tribunal's rulings being regulated at the constitutional and statutory level – the resolution of 6 March 2024, constituting a legal act of the Sejm of an internal nature, cannot be a basis for the effective exemption of public authorities from their obligation to forthwith publish the Constitutional Tribunal's rulings. There is no doubt that in a legal system built on the principle of the hierarchy of legal norms – where public authorities may operate only on the basis of, and within the limits of, the law – an internal legal act of the Sejm may not constitute a legal basis for a public official to refrain from fulfilling the obligation regulated by the Constitution and statutes. This means that the Sejm, acting outside the scope of its competence and in violation of fundamental constitutional principles, made a failed attempt to legalize the illegal actions of public authorities. In other words, the Sejm attempted to create a legal basis that negate the unlawfulness of the actions of the publishers of relevant official journals, thereby protecting certain persons holding public offices from possible legal liability, including criminal liability.

Thus, taking into account the normative provisions in force and the operative part of the Constitutional Tribunal's judgment issued in the case ref. U 5/24 (together with the theses, extensively quoted above, from the statement of reasons thereof), it should be emphasized that the resolution of 6 March 2024 has never constituted a legal basis for Prime Minister Donald Tusk's approach of refraining from fulfilling the legal obligation to forthwith publish the Constitutional Tribunal's rulings (starting with the judgment issued in the case ref. no. SK 123/20); the said obligation should be fulfilled by the Prime Minister through the Government Legislation Centre, headed by the President of the GLC – Joanna Knapińska.[68]

[67] The Resolution of the General Assembly of Judges of the Constitutional Tribunal of 26 August 2024.
[68] Supra note 1.

VI. Improper or No Publication of the Constitutional Tribunal's Rulings

Pursuant to Article 190(1) of the Constitution, the Constitutional Tribunal's rulings shall be of universally binding application and shall be final. There are no exceptions to this rule. All public authorities are obliged to implement the Constitutional Tribunal's judgment from the moment it is announced in the courtroom. An unconstitutional legal norm may not be further applied.

For formal reasons, but relevant to the standards of the rule of law, Article 190(2) of the Constitution requires that rulings of the Constitutional Tribunal regarding matters concerning the hierarchical conformity of legal acts be published forthwith in the official publication in which the original normative act was promulgated. Pursuant to the general rule, expressed in Article 190(3) of the Constitution, the formal elimination of an unconstitutional legal norm from the legal system occurs on the date of official publication of the judgment. In other words, although formally still in force, such a legal norm also may not be applied from the moment of the judgment's announcement to its date of publication.

The official publication of the Constitutional Tribunal's rulings is ordered by the President of the Constitutional Tribunal, but the technical act of publication itself is executed by the executive authorities (in most cases – by the Prime Minister and the Governmental Legislation Center).

A. Improper Publication of Rulings

Prior to 13 December 2023, the Constitutional Tribunal's judgments were usually published forthwith, within a few days, and no interference was made in the content of the judgments. Unfortunately, these standards have been abandoned. As the President of the Constitutional Tribunal indicated:

> Immediately after the new government was formed on 13 December 2023, the executive authorities, in their activities, developed a practice that consisted of annotating selected rulings of the Constitutional Tribunal with additional "notes", thus indicating the alleged defectiveness of the Constitutional Tribunal's panel adjudicating on a particular case. Subsequently, the executive authorities' approach became more

radical – namely, they refrained from fulfilling the obligation to publish judgments of the Constitutional Tribunal. The factual circumstances surrounding the non-publication of rulings (or publication with "notes") were as follows:

(…) On 18 December 2023, Maciej Berek (Minister – a member of the Council of Ministers, Chairman of the Permanent Committee of the Council of Ministers) informed the public that selected rulings of the Constitutional Tribunal would be published with "an appropriate note" (see Maciej Berek (@MaciejBerek)/the X platform; accessed 22 January 2025).

(…) On the same day, the Constitutional Tribunal's judgment of 5 December 2023, ref. no. P 2/17, was published in the Journal of Laws of the Republic of Poland (Journal of Laws – Dz. U. of 2023, item 2698). Between the indication of the item under which the judgment was published and the first line of the judgment's operative part, the following note was inserted: "In accordance with the judgments of the European Court of Human Rights in the cases Xero Flor v. Poland (dated 7 May 2021, application no. 4907/18), Wałęsa v. Poland (dated 23 November 2023, application no. 50849/21), and M.L. v. Poland (dated 14 December 2023, application no. 40119/21), the Constitutional Tribunal lacks the attributes of a tribunal established by law when an adjudicating panel of the Constitutional Tribunal includes an unauthorized person. In the light of the aforementioned rulings [of the ECtHR], the Constitutional Tribunal's judgment published below was issued by the adjudicating panel composed in breach of the fundamental principle applicable to the process of selecting judges to the Constitutional Tribunal, and thus this violates the essence of the right to a tribunal established by law".

(…) Equivalent notes were also inserted into subsequent judgments of the Constitutional Tribunal, namely the judgments of: a) 11 December 2023, ref. no. K 8/21 (Journal of Laws – Dz. U. of 2023, item 2735); b) 11 December 2023, ref. no. Kp 1/23 (Official Gazette – Monitor Polski, M. P. of 2023, item 1468); c) 18 January 2024, ref. no. K 29/23 (Journal of Laws – Dz. U. of 2024, item 960).

The other judgments from December 2023 (issued in the cases ref. nos.: SK 110/20, P 20/19, P 12/20, and SK 109/20) as well as the judgment from January 2024 (issued in the case ref. no. K 23/23) were published in their original versions. The last published judgment of the Constitutional Tribunal was its judgment of 27 February 2024, ref. no. SK 90/22. It was published in the Journal of Laws on 4 March 2024, under item 300.[69]

B. No Publication of Rulings

After the adoption of the Sejm's resolution of 6 March 2024, the practice of those responsible for publishing the Constitutional Tribunal's rulings has worsened:

The subsequent rulings of the Constitutional Tribunal were not published (as determined on the date of filing this notification; those were the judgments issued in the cases with the following ref. nos.: SK 123/20, SK 59/21, U 1/24, K 27/23, U 5/24, SK 140/20, SK 22/21, K 7/24, K 13/20, K 8/24, U 4/24, K 15/23, K 2/24, P 3/23, SK 58/22,

[69] Supra note 1.

SK 67/20, U 2/24, P 11/24, SK 13/24, K 14/24, U 10/24 and SK 89/19 – a total of 22 rulings).[70]

To date, this number has increased to 27 rulings (also ref. nos.: SK 47/22, SK 87/19, K 6/24, SK 100/22 and U 16/24).

Importantly:

> It ought to be noted that initially the judgment ref. no. SK 123/20 was included in the register of documents awaiting publication, which is run by the Government Legislation Centre. Moreover, it was also indicated when the judgment would be published at the latest. Ultimately, however, the judgment was removed from the register. What is worth noting is that none of the other indicated judgments was included in the register.
>
> The President of the Constitutional Tribunal on a number of occasions appealed to the Prime Minister and the President of the Government Legislation Centre to publish the rulings of the Tribunal in accordance with legal provisions.[71]

C. Resolution of the General Assembly of the Judges of the Constitutional Tribunal

On 26 August 2024, the General Assembly of the Judges of the Constitutional Tribunal adopted the following resolution:

> Pursuant to § 4(2) of the Rules of Procedure of the Constitutional Tribunal, in conjunction with Article 6(2)(11) of the Act of 30 November 2016 on the Organization of the Constitutional Tribunal and the Mode of Proceedings Before the Constitutional Tribunal (Journal of laws [*Dziennik Ustaw*], 2019, item 2393)
>
> The General Assembly of Judges of the Constitutional Tribunal:
>
> 1) finds that the Government Legislation Centre's failure to publish the judgments of the Constitutional Tribunal in the cases ref. nos. SK 123/20, SK 59/21, U 221/24, K 27/23, U 5/24, SK 140/20, SK 22/21 and K 7/24 constitutes a blatant violation of the law, in particular of the Constitution of the Republic of Poland and of the Act of 20 July 2000 on the Promulgation of Normative Acts and Certain Other Legal Acts (consolidated text, Journal of Laws, 2019, item 1461);
>
> 2) points out that the judgments that were unjustifiably not published by the Government Legislation Centre concerned matters of fundamental significance for citizens, and some of them were issued as a result of constitutional complaints. The judgments concerned matters such as: the terms of acquiring real estate through inheritance (SK 123/20); appeals against decisions denying exemption from court costs (SK 59/21); rules of procedure of ordinary courts (U 1/24); the Sejm's competence to adopt resolutions (U 5/24); retirement benefits (SK 140/20); and the penal sanction of a prohibition on operating motor vehicles (SK 22/21);

[70] Ibid.
[71] Ibid.

3) recognizes that the situation of non-publication of the judgments poses a threat to the principle of the tripartite separation of powers and judicial oversight of enacted laws. The unlawful non-publication of the Tribunal's judgments denies citizens the opportunity to scrutinize the constitutionality of laws passed by the Sejm;

4) finds that resolutions of the Sejm, which do not constitute sources of law, may not serve as the basis for actions taken by public authorities, particularly the Government Legislation Centre, against the courts and the Constitutional Tribunal. Citing resolutions of the Sejm as the legal basis for actions is a clear manifestation of a deliberate violation of the law;

5) urges the President of the Constitutional Tribunal to continue publishing the content of judgments on the Tribunal's website and to take other measures necessary to ensure the effectiveness of the Constitutional Tribunal's jurisprudence.[72]

D. Remarks of the President of the Constitutional Tribunal

The President of the Constitutional Tribunal in his aforementioned notification indicated that:

At this point, it should be noted that the actions of the public authorities managing the relevant official journals (i.e. the Journal of Laws and the Official Gazette – Monitor Polski) – which consisted in annotating selected judgments of the Constitutional Tribunal with "appropriate notes" and, ultimately, in refraining completely from fulfilling the obligation to publish the Constitutional Tribunal's rulings forthwith – lack legal grounds.

Pursuant to Article 190(2) of the Constitution: "Judgments of the Constitutional Tribunal regarding matters specified in Article 188, shall be required to be immediately published in the official publication in which the original normative act was promulgated. If a normative act has not been promulgated, then the judgment shall be published in the Official Gazette of the Republic of Poland, Monitor Polski". The matters specified in Article 188 comprise adjudicating with regard to the following: (1) the conformity of statutes and international agreements to the Constitution; (2) the conformity of a statute to ratified international agreements whose ratification required prior consent granted by statute; (3) the conformity of legal provisions issued by central state authorities to the Constitution, ratified international agreements and statutes; (4) the conformity to the Constitution of the purposes or activities of political parties; and (5) constitutional complaints.

The constitutional regulation with regard to the publication of the Constitutional Tribunal's rulings is further specified in more detail in the aforementioned Act on Promulgation, which sets out the rules and procedure for publishing normative acts and certain other legal acts, as well as the rules and procedure for publishing official journals. Pursuant to Article 2(1) of the Act on Promulgation, "[t]he publication of a normative act in an appropriate official journal

[72] The Resolution of the General Assembly of the Judges of the Constitutional Tribunal of 26 August 2024.

shall be mandatory", while Article 3 of the said Act provides that normative acts are to be published forthwith.

Normative acts and other legal acts subject to publication shall be published in the form of an electronic document within the meaning of the Act of 17 February 2005, on the digitalization of the activity of entities assigned with the performance of public tasks (Journal of Laws of 2019, items 700, 730 and 848), unless otherwise provided by statute. Official journals are to be published in electronic forms, unless otherwise provided by statute. For each official journal published in an electronic form, the publisher is required to maintain a separate website (see Art. 2a of the Act on Promulgation).

Pursuant to Article 9(1)(6) of the Act on Promulgation, rulings of the Constitutional Tribunal concerning normative acts published in the Journal of Laws are also to be published in the Journal of Laws; by contrast, Article 10(1)(4) of the Act on Promulgation requires that the Constitutional Tribunal's rulings concerning normative acts published in the Official Gazette – Monitor Polski – or normative acts that have not been promulgated are to be published in the Official Gazette – Monitor Polski. Decisions of the Constitutional Tribunal determining whether or not there exists an impediment to the exercise of office by the President of the Republic, and to entrust the Marshal of the Sejm with the temporary performance of the duties of the President of the Republic of Poland, as well as the Constitutional Tribunal's decisions on resolving disputes over powers between central constitutional authorities of the state are also required to be published in the Official Gazette – Monitor Polski (see, respectively, Art. 10(2)(5) and (6) of the Act on Promulgation).

Moreover, the Constitutional Tribunal's rulings on normative acts of the authority publishing a relevant official journal and of the central offices the said authority supervises, as well as the Council of Ministers' resolutions revoking orders of the minister publishing a relevant official journal, are to be published in the official journals of the ministers in charge of government administration departments and in the official journals of central offices (see Art. 12(1)(3) in conjunction with (1) and (2) of the Act on Promulgation).

Pursuant to Article 15(1) of the Act on Promulgation, "[t]he basis for the publication of a normative act or another legal act shall be an act in the form of an electronic document with a qualified electronic signature of the authority that is competent to issue the act". If the published act is a ruling, the basis for the publication thereof is a copy of the ruling in the form of an electronic document, certified as a true copy of the original, and affixed with a qualified electronic signature of a person authorized to prepare the said copy, as well as a copy of the ruling in the form of a paper document (see Art. 15(4) of the Act on Promulgation). In the case of a ruling, the note certifying that a given copy is a true copy of the original, as referred to in paragraph 4, also includes the indication of the institution and the names and surnames of the members of the adjudicating panel who issued and signed the ruling, as well as the mention of any dissenting opinions submitted by the judges, where applicable (see Art. 15(5) of the Act on Promulgation).

In accordance with Article 21(1)(1) of the Act on Promulgation, the Journal of Laws and the Official Gazette – Monitor Polski are published by the Prime Minister, with the assistance of the Government Legislation Centre, where the said Centre may commission specialized entities to perform certain activities related to the publication of those official journals in the manner specified in Article 2a(2), i.e. in an electronic form, unless otherwise provided by statute.

Reference to the Act on Promulgation is made in Article 114(1) of the Act of 30 November 2016 on the Organization of the Constitutional Tribunal and the Mode of Proceedings Before the Constitutional Tribunal (Journal of Laws – Dz. U. of 2019, item 2393; hereinafter: the Act on the Organization of the Constitutional Tribunal), which stipulates that the rulings of the Tribunal are published in an appropriate official journal in accordance with the rules and procedure laid down in the Constitution and in the Act on Promulgation.

Article 14a of the Act of 8 August 1996, on the Council of Ministers (Journal of Laws – Dz. U. of 2024, item 1050; hereinafter: the Act on the Council of Ministers) provides that the Government Legislation Centre (hereinafter also: the GLC) operates in cooperation with the Prime Minister as a state organizational unit subordinate to the Prime Minister. Pursuant to Article 14c(6) of the Act on the Council of Ministers, the GLC provides legal services to the Council of Ministers by publishing, with the authorization granted by the Prime Minister – in accordance with the rules and procedure laid down in separate provisions – the Journal of Law [Pol. Dziennik Ustaw] and the Official Gazette of the Republic of Poland – Monitor Polski. The GLC is overseen and managed by the President of the GLC, with the assistance of Vice-Presidents of the GLC and directors of organizational units of the GLC. The President of the GLC is appointed by the Prime Minister from among candidates selected through an open and competitive recruitment process. The President of the GLC is dismissed by the Prime Minister (see Art. 14e(1) and (2) of the Act on the Council of Ministers).[73]

Taking the above into account, the President of the Constitutional Tribunal stated that:

Firstly, the obligation to publish a specified category of the Constitutional Tribunal's rulings, including those listed in subsection 2.1., has a constitutional and statutory basis;

Secondly, Prime Minister Donald Tusk, by virtue of having assumed the office on 13 December 2023, is legally obliged to publish forthwith all judgments of the Constitutional Tribunal the publication of which has been ordered by the President of the Tribunal (or the judge overseeing and managing the work of the Tribunal pursuant to Article 11(2) of the Act on the Organization of the Constitutional Tribunal);

Thirdly, the legal obligation to forthwith publish the Constitutional Tribunal's rulings should be fulfilled by the Prime Minister, through the GLC, headed by the President of the GLC, who is appointed and dismissed by the Prime Minister – at present Joanna Knapińska (appointed on 19 January 2024);

Fourthly, the publication of the Constitutional Tribunal's rulings in an appropriate official journal is an action of a technical nature, i.e. it merely consists in publishing, intact, the content of the operative part of the Tribunal's ruling (as provided by the President of the Constitutional Tribunal) in the form of an electronic document in the official journal issued in an electronic form.

In the binding legal system, there is no legal norm authorizing the publishers of official journals to annotate published acts with content constituting political assessment of the activity of the authority that has issued the act provided for

[73] Supra note 1.

publication. The publisher of an official journal may lawfully add the names of the journal such as Dziennik Ustaw and Monitor Polski as well as graphic images of vignettes (including, in particular, the name of the official journal, the image of the eagle with the crown, and the place and date of the promulgation of the legal act). Moreover, the publisher of the publication may not eliminate specific content from the published ruling.

Consequently, the above entails that it is unlawful to insert into the content of the act subject to publication (between the indication of the item under which the ruling is published and the first line of the ruling's operative part) the following note: "In accordance with the judgments of the European Court of Human Rights in the cases Xero Flor v. Poland (dated 7 May 2021, application no. 4907/18), Wałęsa v. Poland (dated 23 November 2023, application no. 50849/21), and M.L. v. Poland (dated 14 December 2023, application no. 40119/21), the Constitutional Tribunal lacks the attributes of a tribunal established by law when an adjudicating panel of the Constitutional Tribunal includes an unauthorized person. In the light of the aforementioned rulings [of the ECtHR], the Constitutional Tribunal's judgment published below was issued by the adjudicating panel composed in breach of the fundamental principle applicable to the process of selecting judges to the Constitutional Tribunal, and thus this violates the essence of the right to a tribunal established by law", or a similar note. Such an action lacks a legal basis and goes beyond the technical nature of the action of publishing the Constitutional Tribunal's ruling. Also, it leads to the presentation of political authorities' assessment of a particular ruling of the Constitutional Tribunal, which represents a separate branch of government, i.e. the judiciary, and this may be seen by the addressees of the published act (especially the authorities applying the law) as an attempt to review the said ruling, despite the fact that, pursuant to Article 190(1) of the Constitution, rulings of the Constitutional Tribunal are universally binding and final, and the legislation in force does not provide for renewal procedures to contest the Tribunal's rulings. What is more, even the Constitutional Tribunal itself has no jurisdiction to review its own rulings, except for the possibility of deviating from the legal view expressed in the statement of reasons for its ruling.

Fifthly, the Polish law in force provides for certain automatism of the publication process in the case of the Constitutional Tribunal's rulings. After the President of the Tribunal (or the judge overseeing and managing the work of the Tribunal pursuant to Art. 11(2) of the Act on the Organization of the Constitutional Tribunal) has ordered the publication of a ruling of the Constitutional Tribunal, on the basis of Article 114(2) of the Act on the Organization of the Constitutional Tribunal, the ruling is to be published forthwith. This means that the authorities publishing relevant official journals have no competence to review the submitted ruling, whether in terms of assessing the admissibility of adjudication in the case or conducting the substantive evaluation of the way the case has been determined by the Tribunal's adjudicating panel.

Taking the above into consideration, it ought to be concluded that the instances of the insertion of "an appropriate note" into the content of published judgments of the Constitutional Tribunal, and of the non-publication of the Constitutional Tribunal's rulings submitted for publication, constitute flagrant breaches of the law, and thus

persons resorting to such practices should face legal liability, including criminal liability.[74]

[74] Ibid.

VII. Violations of the Constitutional Tribunal's Judgments and Decisions

The executive authorities' failure to officially publish the Constitutional Tribunal's rulings is combined with a general practice of violation of the Constitutional Tribunal's rulings.

A. Violations of Judgments

The non-publication of the Constitutional Tribunal's rulings prevents citizens from re-opening proceedings or quashing a decision or other settlement affected by unconstitutionality, and is useful to some public authorities in continuing their unconstitutional actions. In brief, it serves to perpetuate a state of unconstitutionality.

This includes: 1) non-appealability of an order denying exemption from court costs issued for the first time by the court of second instance;[75] 2) the Minister of Justice's regulation on the examination of applications for the recusal of judges on the grounds of the circumstances of their appointment;[76] 3) the resolution on the elimination of the effects of the constitutional crisis, adopted by the Sejm of the Republic of Poland;[77] 4) calculating old-age pensions due: the pension receivable upon retirement adjusted by deducting the amount of previously received pensions;[78] 5) lifetime ban on driving any motor vehicle;[79] 6) the professional confidentiality privilege of tax advisers in the light of the amendments to the Polish Tax Code – tax scheme reporting;[80] 7) a preliminary application for holding the President of the National Bank of Poland accountable before the Tribunal of State;[81] 8) the scope of the activity of the Sejm's inquiry committee;[82] 9) the procedure for recalling the court's

[75] The Constitutional Tribunal's judgment of 8 May 2024 (ref. no. SK 59/21), link.
[76] The Constitutional Tribunal's judgment of 16 May 2024 (ref. no. U 1/24), link.
[77] Supra note 61.
[78] The Constitutional Tribunal's judgment of 4 June 2024 (ref. no. SK 140/20), link.
[79] The Constitutional Tribunal's judgment of 4 June 2024 (ref. no. SK 22/21), link.
[80] The Constitutional Tribunal's judgment of 23 July 2024 (ref. no. K 13/20), link
[81] The Constitutional Tribunal's judgment of 20 August 2024 (ref. no. K 8/24), link.
[82] The Constitutional Tribunal's judgment of 10 September 2024 (ref. no. U 4/24), link.

president or vice-president;[83] 10) the obligation to impose an administrative fine for the late filing of a report on the types and amounts of produced, imported and exported liquid fuels, and on their intended use;[84] 11) no possibility of filing an appeal against a public prosecutor's decision on the use of operational surveillance material in proceedings concerning another criminal offence;[85] 12) no possibility of at least partial payment of fees in the course of proceedings for legal representation provided by a court-appointed attorney;[86] 13) the Sejm's resolution on appointing a particular inquiry committee;[87] 14) recognition of depreciation costs as income generation costs;[88] 15) limitation to two months for the exercise of retired public prosecutors' rights to return to active service upon their requests;[89] 16) amendment on the terms and manner of organizing religious instruction in state kindergartens and schools;[90] 17) no possibility to file a complaint against the inaction of the authority after it has completed the administrative proceedings and issued a final decision;[91] and 18) the rules of procedure of common courts.[92]

The Constitutional Tribunal also ruled on the mode of enacting statutes.[93]

B. Violations of Decisions

Moreover, public authorities whose actions are controlled by the ruling majority can be held responsible for the failure: 1) to enforce 9 interim decisions issued by the Constitutional Tribunal in the course of preliminary review, despite them having been served on the participants of the proceedings; 2) to enforce 7 interim protective measures issued by the Constitutional Tribunal in the course of substantive review,

[83] The Constitutional Tribunal's judgment of 16 October 2024 (ref. no. K 2/24), link.
[84] The Constitutional Tribunal's judgment of 17 October 2024 (ref. no. P 3/23), link.
[85] The Constitutional Tribunal's judgment of 23 October 2024 (ref. no. SK 58/22), link.
[86] The Constitutional Tribunal's judgment of 5 November 2024 (ref. no. SK 67/20), link.
[87] The Constitutional Tribunal's judgment of 6 November 2024 (ref. no. U 2/24), link.
[88] The Constitutional Tribunal's judgment of 21 November 2024 (ref. no. P 11/24), link.
[89] The Constitutional Tribunal's judgment of 22 November 2024 (ref. no. SK 13/24), link.
[90] The Constitutional Tribunal's judgment of 27 November 2024 (ref. no. U 10/24), link.
[91] The Constitutional Tribunal's judgment of 26 February 2025 (ref. no. SK 100/22), link.
[92] The Constitutional Tribunal's judgment of 6 March 2025 (ref. no. U 16/24), link.
[93] The Constitutional Tribunal's judgments of: 19 June 2024 (ref. no. K 7/24), link; 26 November 2024 (ref. no. K 14/24), link; 18 February 2025 (ref. no. K 6/24), link.

following applications filed by authorized entities, despite them having been served on the participants of the proceedings.[94]

[94] Press Release, 11 February 2025, link.

VIII. Removal of the Constitutional Tribunal's Judges from Office and Nullification of Rulings

Other actions against the Constitutional Tribunal also involve the legislature. However, it should be noted that the new law within that scope has not yet entered into force.

A. Draft Amendments to the Constitution

On 6 March 2024, the senators of the ruling majority submitted a bill amending the Constitution of the Republic of Poland[95] (hereinafter: the Draft Amendments to the Constitution).

The Draft Amendments to the Constitution constitute an element of a package of solutions on the Constitutional Tribunal presented by the Minister of Justice, Adam Bodnar, on 4 March 2024, to implement "Poland's Action Plan on Restoring the Rule of Law," presented on 20 February 2024, at the meeting of the General Affairs Council of the European Union.

The most important issue is specified in Article 2(1) of the Draft Amendments to the Constitution, according to which:

> On the date of entry into force of this Act, the term of office of the current judges of the Constitutional Tribunal shall expire. The judges shall hold their positions until their successors are elected.

The proposed constitutional amendment thus implies a purge of the Constitutional Tribunal's judges – only because they were elected by previous majorities in the parliament.

It should be pointed out that only by amending the Constitution is it possible to shorten *ex lege* the term of tenure of the Constitutional Tribunal's judges. However,

[95] Senate Paper no. 55/11th term, link. English version is available on the official website of the Venice Commission: link.

this requires a 2/3 majority in the Sejm, which is unlikely to be possible in the foreseeable future.

B. Acts on the Constitutional Tribunal

On 13 September 2024, during the 17th session of the Sejm of the 10th term, the Act on the Constitutional Tribunal[96] (hereinafter: the Act on the Constitutional Tribunal) and the Act – the Introductory Provisions of the Act on the Constitutional Tribunal[97] (hereinafter: the Act – the Introductory Provisions) were enacted. They are intended to replace the current legislation.[98]

The Acts are elements of a package of solutions on the Constitutional Tribunal presented by the Minister of Justice, Adam Bodnar, on 4 March 2024, to implement "Poland's Action Plan on Restoring the Rule of Law" presented on 20 February 2024, at the meeting of the General Affairs Council of the European Union.

Already at the stage of legislative work, the drafts of the aforementioned acts raised numerous constitutional and legal doubts expressed by the Supreme Court, the National Council of the Judiciary, and professors of law.

In particular, the following provisions of the Act on the Constitutional Tribunal should be pointed out:

Article 33(1):

> A judge of the Tribunal shall be liable to disciplinary proceedings for manifest and flagrant misconduct or a violation of the law, a violation of the dignity of the office of a judge of the Tribunal, or other unethical behaviour that may undermine confidence in their impartiality and independence.

Article 33(2):

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[96] Sejm Paper no. 253/10th term, link. English version is available on the official website of the Venice Commission: link.

[97] Sejm Paper no. 254/10th term, link. English version is available on the official website of the Venice Commission: link.

[98] I.e. the Act of 13 December 2016, the Introductory Provisions to the Act on the Organization of the Constitutional Tribunal and the Mode of Proceedings Before the Constitutional Tribunal and to the Act on the Status of the Judges of the Tribunal; The Act of 30 November 2016, on the Organization of the Constitutional Tribunal and the Mode of Proceedings Before the Constitutional Tribunal; The Act of 30 November 2016, on the Status of the Judges of the Constitutional Tribunal.

> A judge of the Tribunal shall also be liable to disciplinary proceedings for their conduct prior to taking the office, if their conduct resulted in failure to fulfil the duty of the state office or proved unworthy of the office of judge of the Tribunal, and the circumstances of this proceeding were not known on the day of their election.

Article 38(1):

> A retired judge of the Tribunal shall be liable to disciplinary proceedings for undermining the dignity of the office of a judge after retirement and for undermining the dignity of the office of a judge while serving as a judge of the Tribunal.

Article 33(1) and (2) and Article 38(1) of the Act on the Constitutional Tribunal use vague expressions ("a violation of the dignity of the office of a judge of the Tribunal") that may allow political accountability of judges of the Constitutional Tribunal for the content of their rulings, which is unacceptable in a democratic state of law. Firstly, the repressive nature of disciplinary liability, involving not only the possibility of punishment by admonishment, reprimand, reduction of remuneration, but also removal from office, as well as deprivation of the status of a retired judge, is inconsistent with the principle of the specificity of law. A judge must be guaranteed the ability to easily foresee the consequences of his/her actions. Secondly, judges of the Constitutional Tribunal, pursuant to Article 195(1) of the Constitution, in the exercise of their office, shall be independent and subject only to the Constitution. It should be noted that judges of the Constitutional Tribunal in their opinions may, however, differ on certain issues related to their understanding of the Constitution, which is a normal state of affairs in the constitutional judiciary. However, the indicated provisions of the Act on the Constitutional Tribunal create the possibility of exerting pressure on a judge of the Constitutional Tribunal by other judges of the Constitutional Tribunal whose views related to the interpretation of the Constitution s/he may not share. The possibility of holding judges disciplinarily liable for their views is inconsistent with the principle of judicial independence.

The disciplinary liability of a judge of the Constitutional Tribunal for his/her legal views expressed in rulings violates the recommendations of the OSCE Office for Democratic Institutions and Human Rights (hereinafter: the ODIHR) on the

independence and accountability of judges.[99] Indeed, it is necessary to clearly define disciplinary offences.[100] In addition, violations of ethical standards alone cannot be grounds for disciplinary liability.[101]

Furthermore, the ODIHR opinion issued on 24 August 2024 is also relevant.[102] The opinion pointed out that it is important to require a clear definition of what acts or omissions constitute a disciplinary offence. It recommended supplementing the norms in the catalogue of disciplinary sanctions with a provision indicating which offences entail specific penalties, or a provision stipulating a directive for the adjudication of a proportional penalty, clarifying that only the most serious violations may entail removal from the office of judge of the Constitutional Tribunal. It was further noted that the draft Act on the Constitutional Tribunal does not specify the rules regarding the majority vote in the disciplinary court's adjudication. The requirements of legal certainty dictate that the Act on the Constitutional Tribunal should specify the rules for majority voting in adjudication, including the establishment of stricter requirements related to the punishment of removal from office (qualified majority).[103]

Article 10 of the Act – the Introductory Provisions should also be pointed out:

> 1. Judgments of the Constitutional Tribunal, hereinafter referred to as the "Tribunal", rendered by a panel of judges that included a person appointed to the position of a judge of the Tribunal in violation of the Act of 25 June 2015 on the Constitutional Tribunal (Journal of Laws of 2015, item 1064, as amended) and the judgments of the Constitutional Tribunal of 3 December 2015, ref. no. K 34/15 (Journal of Laws of 2015, item 2129), and of 9 December 2015, ref. no. K 35/15 (Journal of Laws of 2015, item 2147), as well as the person appointed in their place, hereinafter collectively referred to as a "person not authorized to adjudicate", are invalid and do

[99] OSCE Office for Democratic Institutions and Human Rights (ODIHR), Recommendations on Judicial Independence and Accountability (Warsaw Recommendations) 2023, link.
[100] Ibid, recommendation 24: "To promote the principle of foreseeability and to mitigate the risk of abuse and overreach in the application of grounds for disciplinary proceedings, acts or omissions that constitute disciplinary offences should be clearly defined by law."
[101] Ibid, recommendation 25: "The laws and by-laws defining disciplinary offences and sanctions pursuant to them should be clearly distinguished from codes of ethics. Despite interplay between them, ethical rules should not be used as grounds for disciplinary proceedings, and the bodies that oversee breaches of ethical norms should be separate from those competent to hear a disciplinary case."
[102] OSCE Office for Democratic Institutions and Human Rights (ODIHR), Opinion on Two Bills of the Republic of Poland on the Constitutional Tribunal (Sejm Prints no. 253 and 254, as of 24 July 2024), link.
[103] Ibid.

not have the effects specified in Article 190(1) and (3) of the Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws No. 78, item 483; of 2001, No. 28, item 319; of 2006, No. 200, item 1471; of 2009, No. 114, item 946), subject to paragraph 4.

2. The decisions referred to in Article 103(2)(1) of the Act of 30 November 2016 on the organization of the Constitutional Tribunal and the mode of proceedings before the Constitutional Tribunal (Journal of Laws of 2019, item 2393), issued by a panel of judges which included a person not competent to adjudicate, shall be invalid and devoid of legal effect.

3. All procedural actions performed in proceedings before the Tribunal that concluded with the decisions referred to in paragraphs 1 and 2 must be repeated.

4. Judicial decisions and final administrative decisions, no longer appealable at the time of entry into force of this Act, rendered in individual cases on the basis of the legal status formed by the judgment referred to in paragraph 1, shall remain in effect.

5. Within 1 month from the date of entry into force of the Act, the Tribunal shall compile and make public a list of judgments and orders that are invalid under paragraphs 1 and 2. The list shall be published in the Official Gazette "Monitor Polski".

It should be noted that the legal norms contained in the Act – the Introductory Provisions, which assume *ex lege* recognition of the Constitutional Tribunal's rulings as invalid by a statute adopted by a simple parliamentary majority, raise serious concerns for the ODIHR.[104]

In addition, the Act – the Introductory Provisions includes a provision that ends the terms of office of the Constitutional Tribunal's President and Vice-President, and puts all the Constitutional Tribunal's employees at risk of losing their jobs (enabling mass layoffs).

C. The Venice Commission's Opinion

The European Commission for Democracy through Law (hereinafter: the Venice Commission), which is an advisory body to the Council of Europe, adopted an opinion on the legal changes to the Constitutional Tribunal (hereinafter: the Opinion) during its 141st plenary session on 6–7 December 2024.[105]

[104] Ibid.

[105] European Commission For Democracy Through Law (Venice Commission), Poland – Opinion on the draft constitutional amendments concerning the Constitutional Tribunal and two laws on the Constitutional Tribunal, adopted by the Venice Commission at its 141st Plenary Session (Venice, 6-7 December 2024), CDL-AD(2024)035-e, link.

The Opinion was issued at the request of Minister of Justice Adam Bodnar, who in a letter dated 3 September 2024 had asked the Venice Commission to present its opinion on the draft acts.

The conclusions of the Opinion include the following:

> 70. As concerns ensuring the lawful composition of the Constitutional Tribunal, the Venice Commission notes that the Act on the provisions introducing the Act on the Constitutional Tribunal does not unequivocally address the status of the three irregularly appointed judges, nor the consequences of their continued involvement in pending decisions. For the Venice Commission this is a crucial matter, which should be addressed as a matter or priority at the legislative level: the three irregularly appointed judges should be required to immediately withdraw from all pending cases, with no new cases being allocated to them. Such a withdrawal should be mandatory and operate *ex lege*, should the judges not withdraw themselves within a short deadline.
>
> 71. The solution proposed in the draft constitutional amendments to restore the lawful composition of the Constitutional Tribunal by completely renewing its membership is something that the Venice Commission cannot support. All the criticism that can be levelled at the Constitutional Tribunal for its role in undermining the Polish constitutional order and contributing to the systemic deficiencies of the judicial system (as highlighted in the case-law of the ECtHR and CJEU) does not change the fact that 12 out of the 15 current judges of the Constitutional Tribunal have been elected in accordance with the constitutionally prescribed procedure, with their mandates not yet having come to an end. As the Venice Commission has stated before, "security of tenure of constitutional court judges is an essential guarantee of their independence. Irremovability is designed to shield the constitutional court judges from influence of the political majority of the day", so as to avoid each new government being able to replace sitting judges with newly elected ones of their own choice. At the same time, the Venice Commission has accepted that, in the case of reforms introducing a significant improvement of the overall system, the tenure of sitting office holders could be prematurely terminated, in order not to paralyse the necessary reform efforts. However, in Poland, given that before any amendments can be made to the Constitution, new appointments could already lead to a more pluralistic composition of the Constitutional Tribunal, it cannot be said that the irremovability of the sitting judges of the Constitutional Tribunal would "paralyse the necessary reform efforts" and that at the time of the future adoption of the constitutional amendments there would be a pressing need to interrupt the mandate of all sitting judges of the Constitutional Tribunal. Indeed, as the draft constitutional amendments currently do not stand a credible chance of being adopted, the best chances of changing the composition of the Constitutional Tribunal are by filling any upcoming vacancies. Maintaining the term of office of the current judges whose mandate will not have expired at that point in time would have an added benefit of staggering future appointments, preventing that the same qualified majority would be able to elect 15 judges in one go. While radical measures, even if adopted by a constitutional majority, may seem necessary, this may run the risk of appearing to be prompted by a desire to rid the Tribunal of any remaining judges appointed by a previous majority, giving the draft amendments an objectionable *ad personam* character, and simply providing arguments to a future constitutional majority to do the same.

72. As concerns addressing the status of decisions adopted with the participation of irregularly appointed judges, the Act on the introductory provisions to the Act on the Constitutional Tribunal envisages an *ex lege* invalidation of all judgments and orders of the Constitutional Tribunal rendered by panels that included irregularly appointed judges. The Venice Commission considers that, in normal circumstances, it cannot be accepted that the legislator invalidates by an ordinary law the judgments of the Constitutional Tribunal. A fundamental difference in this respect is that it is not the Polish legislator but an international court rendering binding judgments, the ECtHR, that decided that judgments involving irregularly appointed judges cannot be considered as judgments handed down by an "independent and impartial tribunal established by law". However, any solution in addressing the status of these judgments would have to be proportionate to its aim, striking a careful balance between addressing violations of the right to a fair trial and the need for legal certainty (*res judicata*, in particular in view of persons having acquired rights in good faith). While recognising the margin of appreciation of Member States in deciding on the exact nature of the general measures to be taken to execute ECtHR judgments, the Venice Commission takes the view that the aim of addressing violations of the right to a fair trial could be achieved through more moderate means than by declaring all judgments that involve irregularly appointed judges invalid. This is all the more so since it does not follow from the ECtHR judgment in the case of Xero Flor that all decisions adopted with the participation of irregularly appointed judges should be declared null and void. Rather, the reopening of proceedings should be possible. In this context, the Venice Commission emphasises the importance of distinguishing between effects *ex nunc* and *ex tunc*. While absolute nullity of decisions could entail *ex tunc* effects, annullability may imply *ex nunc* effects only. In the context relevant for the situation at stake, the ECtHR does not require more than annullability of decisions. The Venice Commission therefore considers it crucial to clarify under what conditions a decision is removed or not, and under what conditions proceedings can be reopened. With this in mind, it recommends that the authorities reconsider the *ex lege* invalidation of judgments and orders involving irregularly appointed judges, providing for a more tailored approach, thereby safeguarding legal certainty, through envisaging the possibility for persons concerned and entities with standing before the Constitutional Tribunal to apply to have proceedings reopened.

73. As concerns preventing undue influence on the appointment of judges of the Constitutional Tribunal, the Venice Commission welcomes that a three-fifths majority for election of constitutional judges and new incompatibility requirements have now been included both in the Act on the Constitutional Tribunal and the draft constitutional amendments, with the aim of depoliticising the election of constitutional judges, and that a broader category of entities than just the Sejm and the Presidium of the Sejm can propose candidates for judges of the Constitutional Tribunal. The qualified majority needed for the election of constitutional judges under the new Act (and the constitutional amendments in the future) underlines the need for an effective antideadlock mechanism, in particular in the current polarised political climate. Such an anti-deadlock mechanism would need to be stronger than a reinitiation of proceedings (or the election by a simple majority after two months, as envisaged by the draft constitutional amendments). Recalling what the Venice Commission said in respect of Poland in 2016, a valid alternative would certainly be to introduce a system by which a third of the constitutional judges are each elected by three State powers, the President of Poland, the Sejm and the judiciary. This would go some way to detaching the election of constitutional judges from the political majority of the day. However, even in such a system, it would be important for the parliamentary component to be elected by a qualified majority.

> 74. Apart from measures pertaining to the implementation of the Xero Flor judgment, both the Act on the Constitutional Tribunal and the draft constitutional amendments contain a number of positive features inspired by the events of the last nine years. This includes the clarification that accepting the oath of constitutional judges by the President of the Republic is mandatory, not optional. However, the Venice Commission recommends further amendments to the Act on the Constitutional Tribunal, reconsidering membership of a political party (in the last four years) as an ineligibility requirement for candidates for judges of the Constitutional Tribunal, reconsidering the limitations on judges' trade union membership in the Act (and eventually the Constitution), clarifying that the immunity provided to constitutional judges comprises functional immunity only and formulating with greater precision which conduct constitutes a disciplinary offence (or having this lack of precision compensated by additional procedural safeguards for disciplinary offences for which particularly severe sanctions can be applied) and which sanctions apply, while also explicitly providing that disciplinary sanctions should be proportionate to the disciplinary offence and clarifying which disciplinary offences may lead to removal from office *ultima ratio*.[106]

The opinion was a stern warning to the ruling majority in Poland.

Nowhere in the Opinion is there any mention of the need to "remove" the allegedly "irregularly appointed" judges of the Constitutional Tribunal. The only solution that is permissible under the Opinion is to "withdraw" these judges from adjudication. This is to be done by excluding them from the panels to which they were appointed, as well as not assigning them new cases. The Opinion does not contain any statements that would imply a shortening of their term of office. In view of this, it can be assumed that these judges remain members of the Constitutional Tribunal, but should not participate in its jurisprudential work that may involve possible violations of Article 6(1) of the ECHR. Under the Opinion it is not acceptable for the ruling majority to paralyze the work of the Constitutional Tribunal, including by not filling judicial vacancies or, even more so – and as the Venice Commission did not envision in its Opinion – by reducing the funds of the Constitutional Tribunal. Neither is it permissible to invalidate by statute the judgments of the Constitutional Tribunal. Moreover, all rulings of the Constitutional Tribunal, including those issued with the participation of designated "irregularly appointed" judges, must be officially promulgated. Any deviation from this obligation constitutes a flagrant violation of the rule of law.

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[106] Ibid.

However, when referring to Polish law, a remark should be made. The Opinion cannot be agreed with to the extent that it states that the Constitutional Tribunal, by its judgments of 3 December 2015, ref. no. K 34/15, and 9 December 2015, ref. no. K 35/15, ruled that the election of two judges by the Sejm of the 7th term and three judges by the Sejm of the 8th term was unconstitutional. There are no such passages in the operative parts of the aforementioned judgments of the Constitutional Tribunal. The constitutional role of the Constitutional Tribunal is to adjudicate the hierarchical conformity of legal norms, not the constitutionality of specific conventional actions. The Constitutional Tribunal has never adjudicated – in the operative part of its judgment – on the correctness of the election of the Constitutional Tribunal's judges, since it is a court of law, not of fact. In the judgments ref. nos. K 34/15 and K 35/15, the Constitutional Tribunal did not assess the constitutionality of the norms that formed the basis for the election of its judges in December 2015. The Constitutional Tribunal at the time adjudicated only on the constitutionality of legal norms that did not apply in the procedure for the election of judges on 2 December 2015 (but were applicable in October 2015). It may not be concluded that the individual acts of the election of judges of the Constitutional Tribunal on 2 December 2015 allegedly violated Article 7 and Article 194(1) of the Constitution. An extensive analysis in this regard was presented by the Constitutional Tribunal in the statement of reasons of the judgment ref. no. U 5/24. The Constitutional Tribunal in its jurisprudence further stated that the judgments of the ECtHR in the cases of *Xero Flor v. Poland* and *M.L. v. Poland* were issued *ultra vires*. Therefore, there are no irregularly appointed judges of the Constitutional Tribunal.

D. Applications of the President of the Republic of Poland

The Act on the Constitutional Tribunal and the Act – the Introductory Provisions have not yet entered into force, as Polish President Andrzej Duda, before

signing them, pursuant to Article 122(3) of the Constitution, submitted applications to the Constitutional Tribunal to examine their compliance with the Constitution.[107]

The applications were outlined in the press release as follows:

> The Constitutional Tribunal will review the compliance with the Constitution of:
>
> - the Act of 13 September 2024 on the Constitutional Tribunal, with regard to which the following allegations have been made:
>
> I. Article 7(2)(10), in conjunction with Article 54(1) and (2), of the Act is alleged to be inconsistent with Article 2, Article 188 and Article 197 of the Constitution, and with the principle of efficiency and diligence in the work of public institutions, arising from the preamble to the Constitution;
>
> II. Article 16(2) of the Act is alleged to be inconsistent with Article 194(1) in conjunction with Article 2 and in conjunction with Article 7 of the Constitution;
>
> III. Article 17(2) of the Act – insofar as, with respect to a person who has held the office of the President of the Republic of Poland, it provides for the prohibition of candidacy for the position of judge of the Constitutional Tribunal before the lapse of 4 years from the end of the person's presidential term – is alleged to be inconsistent with Article 126(1) and (2) and with Article 127(1) and (3) of the Constitution;
>
> IV. Article 19(5), in conjunction with Article 16(1), of the Act – which, because of providing for an insufficiently specified timeframe for actions to be taken "forthwith" by persons involved in the procedure for reviewing candidates and electing judges of the Constitutional Tribunal, does not guarantee adherence to the constitutional requirement that the Sejm should permanently ensure that the Constitutional Tribunal is composed of all 15 judges [i.e. comprises the total number of the said judges] – is alleged to be inconsistent with Article 194(1) of the Constitution;
>
> V. Article 20(2) of the Act – insofar as it establishes that, "no later than 14 days from the date of the Sejm's election of a judge of the Tribunal", the President of the Republic of Poland is required to allow the judge of the Constitutional Tribunal to solemnly take the oath of office – is alleged to be inconsistent with Article 126(2) and (3) in conjunction with the preamble to the Constitution and Article 2 of the Constitution;
>
> VI. Article 20(3) of the Act is alleged to be inconsistent with Article 7 and Article 126(3) of the Constitution;
>
> VII. Article 34(1) and (4) and Article 35(2) in conjunction with Article 35(3) of the Act – insofar as those provisions vest retired judges of the Constitutional Tribunal with the power to institute and conduct disciplinary proceedings as well as adjudicate on the disciplinary liability of judges of the Constitutional Tribunal – are alleged to be inconsistent with Article 194(1), Article 10(1) and (2), and Article 173 of the Constitution;

[107] Ref. nos. Kp 3/24 and Kp 4/24.

- and the Act of 13 September 2024 – the Introductory Provisions of the Act on the Constitutional Tribunal, with regard to which the following allegations have been made:

I. Article 10 of the Act is alleged to be inconsistent with Article 190(1) of the Constitution and Article 173 in conjunction with Article 10 and Article 7 of the Constitution;

II. Article 10, Article 11 and Article 12 of the Act are alleged to be inconsistent with Article 2 and Article 7 of the Constitution;

III. Articles 10(1), 11(1), 12(2) and 15(2) of the Act – insofar as they comprise the wording "person unauthorized to adjudicate" – are alleged to be inconsistent with Articles 194(1) and 195(1) in conjunction with Article 10 of the Constitution;

IV. Article 14 (1) of the Act is alleged to be inconsistent with Article 2, Article 7, Article 10, Article 173, and Article 194 (2) in conjunction with Article 144 (3) (21) of the Constitution.

The Act of 13 September 2024 on the Constitutional Tribunal.

Re I. The challenged provisions of Article 7(2)(10), in conjunction with Article 54(1) and (2), of the Act of 13 September 2024 on the Constitutional Tribunal (hereinafter: the Act on the Constitutional Tribunal) defining the rules for the General Assembly of the Judges of the Constitutional Tribunal to designate panels of judges, or make changes to them, in conjunction with the provision on the quorum for adopting a resolution on these matters, raise, in the opinion of the President of the Republic of Poland (hereinafter: the Applicant), doubts as to their compliance with the principle of efficiency and diligence in the work of public institutions, arising from the preamble to the Constitution. In the Applicant's opinion, taking into account one of the basic functions of the Constitutional Tribunal, as a guarantor of the existence of real rights and freedoms of citizens, the challenged provisions affect the implementation of the constitutional principle of citizens' trust in the state, and are inconsistent with Articles 2, 188 and 197 of the Constitution and the preamble to the Constitution.

Re II. Article 16(2) of the Act on the Constitutional Tribunal introduces a rule previously unheard of in the statutes regulating the operation of the Constitutional Tribunal since 1997, in light of which a judge of the Tribunal may continue to hold his/her office even after the nine-year term has expired – until the Sejm elects the judge's successor.

The Applicant points out that the principle of tenure requires that the maximum duration of the term of office of a given body, or of its members, be precisely determined before the election. According to the Applicant, the challenged provision allowing a CT judge to perform his/her duties until the judge's successor is elected is a form of extending the term of judicial office, the duration of which has been specified explicitly in Article 194(1) of the Constitution. Such extension contradicts the nine-year term specified therein. The challenged provision is also conjunctively contrary to Article 7 of the Constitution, as it allows a CT judge to act without a constitutionally compliant legal basis, the Applicant points out.

Re III. In the opinion of the Applicant, Article 17(2) of the Act on the Constitutional Tribunal – insofar as, with respect to a person who has held the office of the President of the Republic of Poland, it provides for the prohibition of candidacy for

the position of judge of the Constitutional Tribunal before the lapse of 4 years from the end of the person's presidential term – is inconsistent with Article 126(1) and (2) as well as Article 127(1) and (3) of the Constitution. This is because, in the Applicant's opinion, there are no legal, axiological or functional obstacles, in particular related to the principle of independence of the Constitutional Tribunal and the independence of its judges, which would support the opposite rule adopted by the challenged provision of the Act on the Constitutional Tribunal.

Re IV. The mechanism adopted in Article 19(5) of the Act on the Constitutional Tribunal, operating with insufficiently specified requirement for actions to be taken "forthwith", without indicating specific timeframes, does not ensure, in the Applicant's opinion, the efficiency of persons involved in the process of evaluating candidates and electing judges of the Constitutional Tribunal. As a result, it does not guarantee the implementation of the constitutional requirement that the Sejm should permanently ensure the Constitutional Tribunal is composed of all 15 judges [i.e. comprises the total number of the said judges], which, in the Applicant's view, is contrary to Article 194(1) of the Constitution.

Re V. In the opinion of the Applicant, the regulation contained in Article 20(2) of the Act on the CT does not comply with the constitutional principle of proportionality. It also does not comply with the principle of appropriate legislation, since, given the possibility of the President of the Republic of Poland exercising other powers, in particular outside the country, it may in fact impose an impossible obligation. In addition, the Applicant points out that the challenged norm does not take into account the time necessary for the President of the Republic of Poland to obtain, beyond any reasonable doubt, the evidence necessary for the implementation of the norm of Article 20(2) of the Act on the Constitutional Tribunal, in fact shortening the time limit significantly, and thus introducing the obligation to act immediately, which is inconsistent with Article 126(2) and (3) in conjunction with the preamble to the Constitution and Article 2 of the Constitution.

Re VI. The provision of Article 20(3) of the Act on the CT, according to the Applicant, is unconstitutional. It contains an unauthorized assumption about the President of the Republic of Poland's failure to fulfil the obligation in Article 20(2) of the Act on the Constitutional Tribunal, which conditions the assumption and exercise of the office of a judge, and thus violates the principle expressed in Article 7 of the Constitution that public authorities function on the basis of, and within the limits of, the law, which also refers to the President of the Republic of Poland (Article 126(3) of the Constitution).

Re VII. The Applicant argues that Articles 34(1) and (4) and Article 35(2) of the Act on the Constitutional Tribunal, by granting retired judges of the Tribunal the power to initiate and conduct disciplinary proceedings and adjudicate on the disciplinary liability of judges of the Constitutional Tribunal, violate Article 194(1) of the Constitution. The legal norm providing for the involvement of retired judges of the Constitutional Tribunal in the procedure for determining the disciplinary liability of judges currently holding offices at the Tribunal – in the Applicant's view – is inconsistent with the principle of the separation and balance of powers (Art. 10(1) and (2) of the Constitution) and the principle of the independence of courts and tribunals (Art. 173 of the Constitution).

- The Act of 13 September 2024 – the Introductory Provisions of the Act on the Constitutional Tribunal.

Re I. Pursuant to Article 10 of the Act of 13 September 2024 – the Introductory Provisions of the Act on the Constitutional Court (hereinafter: the Act – the Introductory Provisions), judgments of the Constitutional Tribunal, as well as decisions in matters of competence disputes, issued in panels comprising persons unauthorized to adjudicate, are to be deemed invalid and devoid of the legal effects specified in Article 190(1) and (3) of the Constitution. In the opinion of the Applicant, such regulation is based on the assumption that the Parliament has the competence to review the legality of the rulings of the Constitutional Tribunal. However, any competences of a public authority must arise from legal provisions and they must not be presumed. This therefore precludes, in the Applicant's opinion, that the review in question is constitutionally admissible. The Constitutional Tribunal is a public authority whose scope of competence is explicitly set out in the Constitution, and its rulings are final and may not be challenged by any other authority, including the Tribunal itself. Thus, the Parliament's recognition of the Tribunal's rulings as "non-acts" (i.e., non-existent acts), in the Applicant's opinion, violates the constitutional principle that public authorities function on the basis of, and within the limits of, the law.

The Applicant further points out that a statute, as an act of inferior legal force to the Constitution, cannot, without express constitutional authorization, exclude completely, exclude to a certain extent, or autonomously restrict, the constitutional principle of finality of the Constitutional Tribunal's rulings, or some of its legal consequences arising from the wording of Article 190(1) of the Polish Constitution.

According to the Applicant, Article 10 of the Act – the Introductory Provisions also raises doubts about its compliance with Article 173 in conjunction with Article 10 of the Constitution. The legislature's interference with the minimum of the Polish constitutional court's competence, i.e. with its adjudicatory activity within the scope provided for in the Constitution, deprives this body of its distinctiveness and independence.

Re II. The Applicant points out that in light of the Constitution in force, there are two features of the Constitutional Tribunal's rulings: the so-called attribute of finality; and the attribute of universally binding force. In both situations, they are assessed as *erga omnes* acts, not subject to change or repeal in any way, and creating a state of affairs known as *res judicata*. The legislature's arbitrary elimination of the indicated qualities of the Constitutional Tribunal's rulings violates the principle expressed in Article 7 of the Constitution [namely that public authorities function on the basis of, and within the limits of, the law] and does not meet the standards arising from Article 2 of the Constitution.

Re III. The Act – the Introductory Provisions introduced into the legal order the concept of a "person unauthorized to adjudicate". According to the wording of Article 10(1) of the Act – the Introductory Provisions, this is a person elected to the position of a judge of the Tribunal in violation of the provisions of the Act of 25 June 2015 on the Constitutional Tribunal and the Tribunal's judgments of 3 December 2015, ref. no. K 34/15, and of 9 December 2015, ref. no. K 35/15. Thus, the legislature declared invalid the judgments issued with the participation of persons "unauthorized to adjudicate".

Through this regulation, the legislature in fact introduced into the legal system a completely new category of judge of the Constitutional Tribunal, one that had not previously functioned in the legal order, and one primarily unknown to the Polish Constitution. The legislature, by deciding which judges are authorized to adjudicate and which are not, in fact undermines their status, authority and, consequently, also their independence, which is a constitutional guarantee of the independence of

adjudication and independence from other authorities and branches of government. Moreover, it undermines the Sejm's decision to select a given candidate for the office of judge. In the Applicant's view, this violates Articles 194(1) and 195(1) in conjunction with Article 10 of the Constitution.

Re IV. The Applicant points out that the Act – the Introductory Provisions in Article 14(1) introduced the wording according to which "As of the date of entry into force of the Act referred to in Article 1, the duties of the President of the Constitutional Tribunal shall be performed by the judge with the most judicial seniority in the Constitutional Tribunal". This provision entails that the goal of the legislature was to interrupt the current term of office of the Constitutional Tribunal's President, appointed by the Polish President's decision, as of the date of entry into force of the Act of 13 September 2024 on the Constitutional Tribunal.

According to the Applicant, the challenged provision constitutes an encroachment by the legislature on the constitutional authority of the Polish President to appoint the President and Vice-President of the Constitutional Tribunal, which violates Article 194(2) in conjunction with Article 144(3)(21) of the Constitution as well as the principle of separation and balance of powers, arising from Article 10 of the Constitution.[108]

At the Constitutional Tribunal, these applications have been referred for joint consideration. The hearing has been set for 2 April 2025.

[108] Ibid.

IX. The Council of Ministers' Resolution of 18 December 2024

Pursuant to Article 93 of the Constitution, resolutions of the Council of Ministers as well as orders of the Prime Minister and ministers shall be internal in nature and shall bind only those organizational units subordinate to the competent issuing authority. The said resolutions shall be subject to scrutiny regarding their compliance with universally binding law.

A. Another Non-Universally Binding Legal Act as a Way to Amend the Constitution Once Again

On 18 December 2024, the Council of Ministers adopted resolution no. 162 with regard to counteracting the negative effects of the constitutional crisis in the judicial system (hereinafter: the Council of Ministers' resolution of 18 December 2024).[109]

In brief, it is worth quoting its description given by the President of the Constitutional Tribunal:

> The Constitutional Tribunal is addressed in § 1 of the resolution of 18 December 2024, divided into five subparagraphs. The first one constitutes a kind of diagnosis or assessment by the Council of Ministers with regard to the Constitutional Tribunal and the irregularities in the Tribunal's operation that occurred, in the Council's opinion, in the years 2015–2023. Importantly, the Council of Ministers referred to the assessment presented in the resolution of 6 March 2024, disregarding the circumstance of the unconstitutionality of that resolution as established by the Tribunal in the judgment ref. no. U 5/24, which already at this point should raise reservations in terms of accuracy.
>
> In § 1(2) of the resolution of 18 December 2024, the Council of Ministers expressed the political assessment that "the Constitutional Tribunal, due to its current composition, is incapable of performing the tasks set out in Articles 188 and 189 of the Constitution of the Republic of Poland. The Council of Ministers considers it justified to consistently take corrective measures to restore the functioning of the constitutional court in accordance with the constitutional standard".
>
> With regard to the issue of the publication of judgments of the Tribunal, the Council of Ministers assessed – reasonably – that the obligation to publish rulings in official journals may only apply to acts that have been adopted by a legitimate authority in the procedure provided for by law (see § 1(3) of the resolution of 18 December 2024). As also noted by the Council of Ministers, it is undisputed that the measures taken to

[109] The Council of Ministers' Resolution of 18 December 2024 (Official Gazette – Monitor Polski (M. P.) item 1068), link.

resolve the crisis of the rule of law must begin by preventing further effects of the Constitutional Tribunal's activities that are contrary to the Constitution of the Republic of Poland, international law and EU law. This implies the necessity to rule out the possibility of introducing further determinations of the Constitutional Tribunal into the legal system (see § 1(4) of the resolution of 18 December 2024).

The crux of the resolution of 18 December 2024, as regards the approach to the Constitutional Tribunal, is expressed in § 1(5), which reads as follows: "having considered the above, the Council of Ministers holds the view that the publication of the Constitutional Tribunal's determinations in official journals could perpetuate the rule-of-law. Therefore, the Council of Ministers considers that it is not admissible to publish documents that have been issued by an authority lacking legitimacy. This is because, in accordance with the resolution of 6 March 2024 by the Sejm of the Republic of Poland with regard to eliminating the effects of the 2015–2023 constitutional crisis in the context of the activity of the Constitutional Tribunal, the taking account of the Tribunal's determinations by public authorities in their activities may be considered as those authorities' violations of the principle that public authorities are to function on the basis of, and within the limits of, the law." (…)

Pursuant to § 3 of the resolution of 18 December 2024, the obligation to implement the resolution lies with the Prime Minister and the Minister of Justice.[110]

B. Statement of the President of the Constitutional Tribunal

On 19 December 2024, the President of the Constitutional Tribunal issued the following statement:

(…) The Council of Ministers adopted a resolution indicating "the necessity to rule out the possibility of introducing further determinations of the Constitutional Tribunal into the legal system". Consequently, the Council of Ministers stated that the promulgation of the Constitutional Tribunal's rulings in the Journal of Laws or the Official Gazette – Monitor Polski, explicitly required by Article 190(2) of the Constitution, is inadmissible. The attempt to amend the Constitution through a resolution of the Council of Ministers has no precedent in the history of Poland, but bears direct resemblance to the practice of the socialist era, i.e. the legal realities of the People's Republic of Poland, long rejected by Poles and legal scholars.

In adopting the resolution, the Council of Ministers did not indicate any statutory legal basis for its action, since the applicable legal provisions do not grant the Government the competence to be active in the area that is the subject of the resolution. It is worth noting that the Constitutional Tribunal, in its judgment of 28 May 2024, ref. no. U 5/24 (...), declared the Sejm's resolution of 6 March 2024 unconstitutional. The Tribunal indicated in its statement of reasons that the adoption of a resolution in gross violation of Article 10 of the Constitution, as a result of undermining the constitutional principle of the separation of powers in its very essence, is an unprecedented abuse of state power by the Sejm.

In light of the above, the resolution of the Council of Ministers is solely an expression of the political views of the members of the Council of Ministers, clearly has

[110] Supra note 1.

no legal effect, and is not an excuse for the constitutional violation of not publishing 21 judgments of the Constitutional Tribunal in 2024 by the Prime Minister and the President of the Government Legislation Center, nor for the refusal declared in the resolution to publish judgments of the Tribunal in the future.

The resolution was adopted 2 days after the President of the Constitutional Tribunal addressed letters to the most important people in the State, representing the legislature, the executive and the judiciary, inviting them to engage in dialogue in order to develop compromise solutions that would guarantee the independent functioning of the Tribunal for the benefit of Poland and all citizens of the Republic, so that the activity of the Constitutional Tribunal could remain beyond political disputes.

It is to be hoped that this is not the response of the Prime Minister, Donald Tusk, to the letter addressed to him from the President of the Constitutional Tribunal inviting him to talks.[111]

C. Remarks of the President of the Constitutional Tribunal

As the President of the Constitutional Tribunal remarked in his aforementioned notification:

When assessing the impact of the resolution of 18 December 2024 on the fulfilment of the legal obligation of Prime Minister Donald Tusk to forthwith publish the Constitutional Tribunal's rulings, through the Government Legislation Center, headed by the President of the GLC, Joanna Knapińska, it should be noted that:

Firstly, the Council of Ministers' resolution of 18 December 2024 makes reference to the Sejm's resolution of 6 March 2024, where the latter was declared unconstitutional by the Constitutional Tribunal's judgment in the case ref. no. U 5/24. Consequently, the Council of Ministers invokes an act that (in its entirety) is no longer binding, due to having been deemed unconstitutional. It is hard to reasonably assume that any action of a public authority may be taken on the basis of, or at least in connection with, an act inflicted with numerous legal defects, which are then identified and indicated by the Constitutional Tribunal in the statement of reasons for its judgment ref. no. U 5/24, and the entire act is repealed as manifestly violating the foundations of the constitutional order of the Republic of Poland. In other words, the Council of Ministers, as an executive authority, by means of its resolution of 18 December 2024, referring to the act of legislative lawlessness by the Sejm, attempts to bring about the neutralization or annihilation (beneficial from the perspective of its activity) of the constitutional court, which conducts the review of normative acts issued by the government (regulations) and those adopted with the involvement of the government (e.g. government bills).

Secondly, in the light of Article 93(1) of the Constitution, the Council of Ministers' resolution of 18 December 2024 is solely internal in nature, and is binding only for those organizational units subordinate to the authority that issues such an act, that is, to the Council of Ministers. Even if one were to assume that the resolution of 18 December 2024 is formally binding for Prime Minister Donald Tusk (who, nota bene, is a member of the Council of Ministers within the meaning of Article 147(1) of the

[111] Press Release, 18 December 2024, link.

Constitution, and not an organizational unit subordinate to the Council of Ministers; representing the Council of Ministers and managing the Council's work, pursuant to Article 148(1) and (2) of the Constitution) and for the President of the Government Legislation Center, Joanna Knapińska (nota bene within the meaning of Article 14a of the Act on the Council of Ministers, the Government Legislation Center (hereinafter also: the GLC) operates in cooperation with the Prime Minister, and not the Council of Ministers, as a state organizational unit subordinate to the Prime Minister, and not to the Council of Ministers), it is impossible to accept the legal opinion that the said resolution may constitute a legal basis for the Prime Minister's approach of refraining from fulfilling the legal obligation to forthwith publish the Constitutional Tribunal's rulings, where the said obligation should be fulfilled by the Prime Minister through the Government Legislation Center, headed by the President of the GLC – Joanna Knapińska

The legal views expressed in the context of the defectiveness of the Sejm's resolution of 6 March 2024, generally remain valid also in the context of the Council of Ministers' resolution of 18 December 2024. It is impossible to accept the view that a legal act of an internal nature may abolish the legal obligation arising from the Constitution and the legislation in force, which lies with public authorities – that, pursuant to Article 7 of the Constitution, are to function on the basis of, and within the limits of, the law – including the legal provisions on the obligation to forthwith publish rulings of the Constitutional Tribunal.

It should be strongly emphasized that an internal legal act may not cause constitutional and statutory regulations to be devoid of the normative content of establishing a legal obligation to publish judgments of the Constitutional Tribunal.

Also, it is not possible to create a mechanism for the review of the Constitutional Tribunal's rulings by authorities publishing official journals, where such a mechanism has not been provided for in the Constitution. It should be noted that since the Constitution defines the attributes of the Tribunal's rulings – namely, finality and universal binding force (see Article190(1)) and expresses the obligation that the rulings are to be published forthwith (see Article 190(2)), a possible mechanism of reviewing the rulings by any public authority (constituting a departure from and an exception to the indicated provisions) should also be regulated in the Constitution. No ratified international agreement whose ratification required prior consent granted by statute, and indeed no statute, may provide for competence that is incompatible with a constitutional norm. Therefore, a legal act of an internal nature is even less appropriate for creating such competence. The adoption of a different position would result in the undermining of fundamental elements of the Polish legal order, in particular the following: the principle of a democratic state ruled by law, implementing the principles of social justice (see Art. 2 of the Constitution); the principle that public authorities function on the basis of, and within the limits of, the law (see Art. 7 of the Constitution); the separation of and balance between the legislative, executive and judicial powers (Art. 10 of the Constitution); the independence of the judiciary from the other branches of government (see Art. 173 of the Constitution); and the principle that the Constitutional Tribunal's rulings are universally binding and final (see Art. 190(1) of the Constitution).

In a democratic state ruled by law, the above-presented usurpation of powers should constitute grounds for legal liability, including criminal liability, of persons who resort to such usurpation.

Thirdly, the Council of Ministers' resolution of 18 December 2024 may be seen as a means of inciting Prime Minister Donald Tusk (who is legally obliged to forthwith publish the Constitutional Tribunal's rulings, and who should fulfil the said obligation through the Government Legislation Center, headed by the President of the GLC – Joanna Knapińska) to act contrary to the Constitution and statutes.[112]

[112] Supra note 1.

X. Refraining from Mandatory Participation in Proceedings Before the Constitutional Tribunal

The President of the Constitutional Tribunal in his aforementioned notification indicated that:

> Another area of activity undertaken by the legislature and the executive against the Constitutional Tribunal since 13 December 2023 is the practice of refraining from fulfilling the statutory obligation to provide submissions in cases considered by the Constitutional Tribunal as well as the practice of repeated non-appearance at hearings in the Tribunal's building.[113]

A. Legal Basis

The obligation to provide statements and participate in hearings in proceedings before the Constitutional Tribunal is clearly defined:

> Article 42 of the Act on the Organization of the Constitutional Tribunal comprises the catalogue of participants in proceedings before the Tribunal. By virtue of the Act, the Public Prosecutor General is required to participate in proceedings in every case heard by the Tribunal (Art. 42(7) of the Act on the Organization of the Constitutional Tribunal). Also, of significance here is Article 42(3) of the said Act, which provides that an authority that has issued a normative act that is the subject of review by the Tribunal is also a participant in those proceedings. Statistics show that the Tribunal most often conducts reviews of statutory provisions, hence the Sejm is frequently such a participant.
>
> Pursuant to Article 63(1) of the said Act, the President of the Tribunal notifies participants in proceedings about the referral of an application, a question of law or a constitutional complaint for consideration by an adjudicating panel, provides them with certified copies of the application, the question of law or the complaint, and also instructs them about their right to submit written statements. The President of the Tribunal may set a time-limit for participants in proceedings within which the participants are to submit their written statements.[114]

B. Reprehensible Instances

Unfortunately, the reality is different:

> The said issue was already pointed out in the Constitutional Tribunal's statement of reasons for its judgment in the case ref. no. U 5/24, where the Tribunal stated that: "[a]lso on the basis of the entire resolution [of 6 March 2024], rather than

[113] Ibid.
[114] Ibid.

a specific excerpt, the mandatory participants in the proceedings before the Constitutional Tribunal refuse to participate in those proceedings, thus reconstructing a legal norm (general and abstract), which excludes the application of the provisions of the Act on the Organization of the Constitutional Tribunal".

Since the Sejm's adoption of its resolution of 6 March 2024, certain participants in proceedings before the Constitutional Tribunal have failed to fulfil the obligation assigned to them by the lawmaker within the scope of the constitutional-court proceedings.

In this regard, it is primarily necessary to mention Public Prosecutor General Adam Bodnar, who since 6 March 2024 has not provided any substantive submissions in any case (earlier, in the first months in office, Public Prosecutor General Adam Bodnar provided a substantive submission in, inter alia, the case ref. no. SK 13/24). Since 6 March 2024, representatives of the Public Prosecutor General have not attended any hearing held at the Tribunal's building (previously, a representative of the said Prosecutor attended, e.g. the hearing on 11 January 2024 in the case ref. no. K 23/23). In lieu of fulfilling the statutory obligations of a participant in the proceedings, the Public Prosecutor General has consistently been sending letters to the Tribunal, informing that he will not take a substantive stance in a particular case due to alleged irregularities in the Tribunal's activity (see, instead of many, the letter of the Public Prosecutor General of 17 November 2024, concerning the case ref. no. K 14/24).

(...) A similar procedural approach has been manifested by Adam Bodnar in his role as the Minister of Justice (see e.g. the Minister of Justice's letter of 22 March 2024, with regard to the case ref. no. U 1/24).

(...) Also, the Minister of Education, Barbara Nowacka, did not present her stance on the case in which, on the basis of statutory provisions, the minister – as the authority that had issued the act under review – was a participant in the proceedings (see her letter of 24 September 2024, with regard to the case ref. no. U 10/24).

(...) A slightly different procedural approach was taken by the Sejm, represented by its Marshal, Szymon Hołownia. Firstly, a representative of the Sejm participated in hearings before the Constitutional Tribunal even after the adoption of the resolution of 6 March 2024 (Paweł Śliz MP participated in the hearing on 28 May 2024, in the case ref. no. U 5/24 and in the hearing on 19 June 2024, in the case ref. no. K 7/24, but in both cases the said MP left the courtroom during the hearing, without the consent of the presiding judge). Secondly, the Sejm submits motions for the recusal of judges (see, instead of many, the motion of 5 December 2024 for the recusal of Judge Justyn Piskorski and Judge Jarosław Wyrembak from the case ref. no. Kp 3/24).

(...) However, what is worth pointing out is that the Marshal of the Sejm does not provide the Tribunal with the Sejm's substantive submissions presenting its stance on cases, despite the fact that drafts of such submissions are prepared by the legal service staff of the Sejm, and also the legislative committee gives its opinion on the draft submissions put forward to the committee (e.g. in cases ref. nos. U 6/24, SK 57/24, P 4/24).

Failure to provide substantive submissions by participants of proceedings with regard to the issues considered by the Tribunal also obstructs the Tribunal's adjudication at sittings in camera, necessitating the holding of hearings (even in cases sufficiently examined in the existing jurisprudence (case law)), which considerable prolongs the proceedings. Pursuant to Article 92(2), second sentence, of the Act on the

Organization of the Constitutional Tribunal, for the consideration of an application, a question of law or a constitutional complaint at a sitting in camera, it is necessary to receive relevant submissions from all participants in proceedings. The repeated failure to provide substantive submissions by the Public Prosecutor General (a participant in all proceedings pending before the Tribunal) may in the very near future completely rule out the possibility of applying Article 92 of the Act on the Organization of the Constitutional Tribunal as a legal basis for issuing a judgment at a sitting in camera.[115]

Therefore, the following may be concluded:

To sum up the above, it should be stated that participants in the proceedings should comply with the letters addressed to them by the Constitutional Tribunal or the Constitutional Tribunal's authorities, adequately to their content. If a participant is obliged to provide a substantive submission, then a letter constituting a response should contain the participant's stance on the merits of the case, taking account in particular of the allegations formulated by the applicant, the court referring a question of law, or the complainant with regard to the normative act under review. Failure to comply with that obligation should be regarded as unlawful.[116]

[115] Ibid.
[116] Ibid.

XI. Refraining from Filling Judicial Vacancies at the Constitutional Tribunal

One may conclude that the current ruling majority is not so much questioning the status of the judges of the Constitutional Tribunal or the legality of the Constitutional Tribunal's rulings, but actually believes that a constitutional court is simply not needed. It is worth noting that:

> Another approach aimed at annihilating the Constitutional Tribunal is the failure to fulfil the Sejm's obligation to fill judicial vacancies at the Constitutional Tribunal. On 3 December 2024, the terms of office of the Constitutional Tribunal Judges Mariusz Muszyński and Piotr Pszczółkowski expired, and on 9 December 2024, the term of office of Constitutional Tribunal Judge Julia Przyłębska ended. Thus, as of 10 December 2024, the Tribunal has comprised 12 judges.[117]

A. Obstruction of the Constitutional Tribunal through Judicial Vacancies

The President of the Constitutional Tribunal clearly indicated that the inaction of the Sejm is aimed at obstructing the Constitutional Tribunal:

> Pursuant to Article 194(1) of the Constitution, "[t]he Constitutional Tribunal shall comprise 15 judges chosen individually by the Sejm for a term of office of 9 years from among persons distinguished by their knowledge of the law. No person may be chosen for more than one term of office". Thus, the Sejm is responsible for filling judicial vacancies at the Tribunal and this is the Sejm's duty, not a right that may be exercised in a discretionary manner by the political decision-makers of a particular parliamentary majority. The Constitutional Tribunal is a constitutional institution, and the framers of the Constitution assigned to the Tribunal responsibility for an important area of the functioning of the state, namely the review of the law enacted in Poland. The Constitution establishes the Tribunal and defines its composition (by indicating the number of judges), while also designating the body responsible for selecting persons who, upon completion of the procedure provided for by law, will assume judicial office at the Tribunal; hence, there is no doubt that it is the task of the Sejm to take actions to ensure that judicial offices at the Tribunal are filled at all times. Obviously, the occurrence of temporary, short-term vacancies is permissible (which may arise, for example, from the completion of previous employment duties of a person elected to the office of a judge, at a stage prior to taking the oath of office before the President); however, such a situation should not ensue from deliberate actions by the Sejm and the persons overseeing and managing its work, which is currently the case in Poland. The consequences of such an approach are nowhere close to the standards of a democratic state ruled by law.

[117] Ibid.

Pursuant to Article 2(2), second sentence, of the Act of 30 November 2016 on the Status of the Judges of the Constitutional Tribunal (Journal of Laws, Dz. U. of 2018, item 1422), "[t]he terms of election and dates for carrying out proceedings shall be specified by the rules of procedure of the Sejm". In this respect, the statutory provision makes reference to the Sejm's resolution of 30 July 1992 (Official Gazette – Monitor Polski, M.P. of 2022, item 990; hereinafter: the Sejm's Rules of Procedure), which stipulates in Article 26(1) that the Sejm elects the Judges of the Constitutional Tribunal. Pursuant to Article 30(1) of the Rules of Procedure, "Recommendations concerning the election or appointment by the Sejm of individual persons to particular State offices specified in Articles 26 and 29 may be submitted by the Marshal of the Sejm or at least 35 MPs, except for the office of a judge of the Constitutional Tribunal for which recommendations shall be made by the Presidium of the Sejm or at least 50 MPs, and for the office of the Ombudsman for Children for which recommendations shall be made by the Marshal of the Sejm, the Marshal of the Senate or a group of at least 35 MPs or at least 15 Senators. Article 4(2), second sentence, shall apply mutatis mutandis". Recommendations are to be lodged with the Marshal of the Sejm within a time limit of 30 days before the expiry of the term of office (see Article 30(3)(1) of the Rules of Procedure). Recommendations concerning the election or appointment by the Sejm of individual persons to particular State offices specified, inter alia, in Article 26, may be put to a vote no earlier than on the 7th day following the delivery of the paper containing the candidacies, unless the Sejm decides otherwise (see Article 30(4) of the Rules of Procedure). Recommendations concerning the election or appointment by the Sejm of individual persons to particular State offices specified, inter alia, in Article 26 or dismissal therefrom shall be referred by the Marshal of the Sejm to an appropriate Sejm committee for its opinion. Other committees concerned may send representatives to the sitting of a relevant committee (see Article 30(5)).

Pursuant to Article 30(6) of the Rules of Procedure, opinions in relation to recommendations, referred to in Article 30(1), shall be given by the committee, in writing, to the Marshal of the Sejm, who shall order delivery to the MPs of a printed copy of the committee's opinion (see Article 30(7)). In accordance with Article 30(8) of the Rules of Procedure, consideration by the Sejm of the recommendation may occur no sooner than the day following the delivery to the MPs of a printed copy of the committee's opinion. Article 30(9) of the Rules of Procedure provides a basis for shortening the proceedings.

Pursuant to Article 31(1) of the Rules of Procedure, the election or appointment of individual persons to State offices specified in Articles 26–29 (including the Constitutional Tribunal) shall be passed by an absolute majority of votes. A resolution concerning such election, appointment or dismissal shall be published in the Official Gazette of the Republic of Poland – Monitor Polski (see Article 31(3) of the Rules of Procedure).

Based on publicly available information, it should be noted that within the original time limit set out in Article 30(3)(1) of the Rules of Procedure, the eligible persons did not propose any candidates for the judicial vacancies at the Constitutional Tribunal to replace the judges whose terms of office ended on 3 and 9 December 2024.

In view of the above, the Marshal of the Sejm set an additional deadline for the submission of candidates. In the renewed procedure, two candidates were proposed by groups of MPs on 11 December 2024: Marek Ast (Sejm Paper no. 898) and Artur Kotowski (Sejm Paper no. 899). On 12 December 2024, both motions were referred to the Justice and Human Rights Committee for its opinion. The matters do not appear

on the list of planned work of the committee in January 2025 (see Justice and Human Rights Committee – Sejm of the Republic of Poland; accessed 15 January 2025).

At the same time, in the media, representatives of the parliamentary majority make consistent claims that the Sejm will not fill the judicial vacancies at the Tribunal in the near future. As a result, for over a month, the Tribunal has been performing its work while comprising only 12 judges (with the terms of office of another 2 judges ending later this year).[118]

B. Unsuccessful Attempt to Fill Judicial Vacancies

On 11 December 2024, Deputies submitted 2 candidacies in an attempt to fill judicial vacancies.[119] On 12 December 2024, the candidates were referred to the Justice and Human Rights Committee for its opinion.

The ruling coalition announced that it would not support the candidacies. As a result, on 19 February 2025, the Justice and Human Rights Committee gave negative opinions on both candidates.[120]

Consequently, the Sejm did not approve (rejected) the candidacy proposals during a vote in its session on 21 February 2025.

[118] Ibid.
[119] Sejm Papers nos. 898/10th term, link, and 899/10th term, link.
[120] Sejm Papers nos. 1019/10th term, link, and 1020/10th term, link.

XII. Depriving the Constitutional Tribunal of Funds

Pursuant to Article 195(2) of the Constitution, the judges of the Constitutional Tribunal shall be provided with appropriate conditions for work and granted remuneration consistent with the dignity of the office and the scope of their duties.

Adopted by the parliamentary majority, the 2025 State Budget Act does not provide for any funds for the remuneration of the Constitutional Tribunal's judges.

The ruling majority most likely believes that by withholding judges' remuneration, it will encourage them to resign.

A. The 2025 State Budget Act

The President of the Constitutional Tribunal in his aforementioned notification indicated that:

> On 9 January 2025, the State Budget Act was enacted for the year 2025. The State Budget Act, submitted to the President of the Republic of Poland for signature, does not provide for the necessary funds for the remuneration of the judges of the Constitutional Tribunal.
>
> (…) The original State Budget Bill for the year 2025 allocated funds for the remuneration of the judges of the Constitutional Tribunal, since the Council of Ministers, as the sponsor of the Bill, was obliged to include in the Bill the submission made by the Constitutional Tribunal. Pursuant to Article 139(2) of the Public Finance Act of 27 August 2009 (Journal of Laws 2024, item. 1530), "the Minister of Finance shall include in the State Budget Bill the revenues and expenditures of: the Chancellery of the Sejm, the Chancellery of the Senate, the Chancellery of the President of the Republic of Poland, the Constitutional Tribunal, the Supreme Audit Office, the Supreme Court, the Supreme Administrative Court together with voivodship administrative courts, the National Council of the Judiciary, common courts, the Ombudsman, the Ombudsman for Children's Rights, the National Council for TV and Radio Broadcasting, the President of the Office for Personal Data Protection, the Institute of National Remembrance – the Commission for the Prosecution of Crimes against the Polish Nation, the National Electoral Office, and the State Labour Inspectorate". (…)
>
> As the sponsor of the State Budget Bill, the Council of Ministers lacks competence to modify the revenues and expenditures of the Constitutional Tribunal. Any relevant changes can only be introduced in the course of parliamentary work on the said Bill.
>
> At the stage of the Sejm's legislative work, the amount of current expenditures of the Constitutional Tribunal was reduced by PLN 10 million in comparison to the amount in the government proposal. The reduced amount corresponds to the total sum

of the annual remuneration of all judges of the Constitutional Tribunal. The purpose of the introduced change was bluntly indicated by the chairman of the Sejm's public finance committee, Janusz Cichoń MP. During the meeting on 21 November 2024, with regard to the changes in the expenditures of the Constitutional Tribunal, he stated that "[t]hey [the Judges of the Constitutional Tribunal – my addition] have no legitimacy to adjudicate, in our opinion. Hence such a decision", and he also acknowledged that "[t]he intention of the sponsors of the Bill was that there should be no funds for the remuneration of the members of the Tribunal in this budget" (see Record of proceedings – Sejm of the Republic of Poland; accessed 15 January 2025). The above-mentioned statements of the chairman of the Sejm's public finance committee demonstrate emphatically that the amendment to the Tribunal's budget expenditure was not caused by objective factors of economic nature, e.g. the difficult situation of public finance and the need for savings in the public sector, but the undisguised purpose for the amendment was an attempt to exert pressure on the judges of the Tribunal to compel them to cease their judicial activity. Such an action not only constitutes an attempt to interfere with the independence of constitutional judges, but is also an example of the instrumental treatment of the State Budget Act as a mechanism for exerting political pressure and an attempt to illegally interfere with the activities of an independent judicial authority. However, this is not what the role of the State Budget Act should be, which by definition should only serve the purpose of implementing budgetary policies in a given year, i.e. financing the activities of the state.

Although the Senate submitted amendments to the 2025 State Budget Act, none of them addressed the issue of the Constitutional Tribunal's expenditures. Thus, the reduced expenditure amount was provided for in the final version of the State Budget Act, as sent to the President of the Republic of Poland for signature.

(...) Taking the above into consideration, it ought to be noted that:

Firstly, in the light of the preamble to the Constitution, the framers of the Constitution wanted to ensure diligence and efficiency in the work of public institutions. It is impossible to guarantee the efficient operation of a public institution if de facto the judges who adjudicate therein are deprived of their remuneration. The Constitutional Tribunal, as a judicial authority – established first and foremost to conduct the review of the constitutionality of the law – can only perform its constitutional tasks with the participation of judges who form particular panels designated to adjudicate on specific cases. Pursuant to the provisions of the Act on the Organization of the Constitutional Tribunal and the Mode of Proceedings Before the Constitutional Tribunal, the participation of the judges of the Tribunal and its President at all stages of the adjudication process (from the registration of the case, the appointment of the panel, through the preliminary review – when required – to the conclusion of the proceedings in the case) is mandatory. Even the best-qualified legal service and administrative staff (due to obvious legal constraints) cannot replace the work done by the said judges.

Thus, depriving the judges of their remuneration may result in the abolition of the constitutional review of law in Poland, and would entail depriving citizens and other subjects of law of their legal protection. Parties entitled to submit applications, legal questions and constitutional complaints have the right to expect their cases to be heard without undue delay, but such a state of affairs may not be attainable in the situation of the judges of the Constitutional Tribunal being deprived of their remuneration, which in principle constitutes their only source of income.

> Secondly, the deprivation of remuneration clearly violates Article 195(2) of the Constitution, pursuant to which judges of the Constitutional Tribunal shall be provided with appropriate conditions for work and granted remuneration consistent with the dignity of the office and the scope of their duties. Thus, a judge of the Constitutional Tribunal has a constitutional right to be provided with adequate remuneration. The rules for determining the amounts of remuneration of the judges are set out in Article 16 of the Act of 30 November 2016 on the Status of Judges of the Constitutional Tribunal. Pursuant to paragraph one of that provision, the basic remuneration of a judge of the Tribunal shall be the multiple of a remuneration base obtained by applying the multiplier of 5.0. Pursuant to paragraph two, The remuneration base used for the determination of the basic remuneration of a judge of the Tribunal in a particular year shall be the average remuneration in the second quarter of the previous year, as published in the Official Gazette of the Republic of Poland – Monitor Polski by the President of the Central Statistical Office, in accordance with Article 20(2) of the Act of 17 December 1998 on Old-Age and Disability Pensions from the Social Insurance Fund (Journal of Laws – Dz. U. of 2016, item 887).[121]

B. Decision of the President of the Republic of Poland and judgment of the Constitutional Tribunal

On 17 January 2025, the Chancellery of the President of the Republic of Poland informed that the head of State had signed the 2025 State Budget Act. At the same time, it was announced that the President of the Republic of Poland would refer the provisions regarding the deprivation of funds for a constitutional review.[122]

As a consequence of the State Budget Act's entry into force, the Constitutional Tribunal was deprived of funds for judges' remuneration.

On 26 February 2025, the President of the Republic of Poland sent an application to the Constitutional Tribunal to review the constitutionality of the 2025 State Budget Act.[123] 1. On 6 May 2025, the Constitutional Tribunal – after considering, at the hearing, the application of the President of the Republic of Poland, lodged to institute an *a posteriori* review – delivered its judgment on the 2025 State Budget Act's provisions determining expenditure ceilings for the Constitutional Tribunal and the National Council of the Judiciary.

The Tribunal adjudicated that:

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[121] Ibid.
[122] Chancellery of the President of the Republic of Poland, 17 January 2025, link.
[123] Chancellery of the President of the Republic of Poland, 26 February 2025, link.

"1. Article 1(2) of the 2025 State Budget Act of 9 January 2025, in the part concerning Annex no. 2 part 06 on the Constitutional Tribunal – insofar as it determines a lower expenditure ceiling for the Constitutional Tribunal than the amount set in the 2025 State Budget Bill, submitted to the Sejm by the Council of Ministers on 30 September 2024, as a result of which the challenged provision limits the Constitutional Tribunal's possibility of performing its constitutionally specified tasks – is inconsistent with Article 10, Article 188 and Article 189 in conjunction with Article 195(2) of the Constitution of the Republic of Poland.

2. Article 1(2) of the Act referred to in point 1, in the part concerning Annex no. 2 part 52 on the National Council of the Judiciary – insofar as it determines a lower expenditure ceiling for the National Council of the Judiciary (NCJ) than the amount set in the 2025 State Budget Bill, submitted to the Sejm by the Council of Ministers on 30 September 2024, as a result of which the challenged provision limits the NCJ's possibility of performing its constitutionally specified tasks – is inconsistent with Article 10, Article 179 and Article 186 of the Constitution of the Republic of Poland".

The Tribunal discontinued the review proceedings as to the remainder. The ruling was unanimous

Uniqueness of the case

The present case was precedential in nature for two reasons. Firstly, it concerned the situation where – in a manner, so far, unheard of in the history of a democratic state ruled by law – the legislative branch of government had introduced an unprecedented limitation to the budget of the Constitutional Tribunal and to the budget of the National Council of the Judiciary, which would hinder or prevent the performance of duties by those constitutional state authorities. Secondly, the subject

of the review did not comprise general and abstract norms, but financial plans of public-sector entities recognised in the State Budget Act. In the Polish legal system, a State Budget Act primarily functions as an act of financial planning which, on the one hand, encompasses public-sector revenue forecasts and, on the other hand, provides authorisation for eligible entities to incur expenditure up to the set spending ceilings.

A State Budget Act constitutes a legal act for which the Constitution has determined the substance and the period of being in force (Art. 219 of the Constitution). The Constitution, in a detailed way, also regulates the autonomous procedural rules for drafting a State Budget Bill, enacting the Bill, and reporting the implementation of the State Budget Act. In particular, the Constitution regulates time limits for the relevant activities of the executive (Art. 222 and 224(1), Art. 225, Art. 226(1) of the Constitution), the legislature (Art. 223, Art. 225, Art. 226(2) of the Constitution), and the judiciary (Art. 224(2) of the Constitution). The purpose underlying the constitution-maker's detailed regulation of the procedure for adopting a State Budget Act is to provide a basis for managing state finances. The existence of the state's binding financial plan is indispensable for the effective functioning of public authorities. The constitution-maker has granted this matter precedence over the principle that public authorities act on the basis of, and within the limits of, the law (Art. 219(4) of the Constitution).

Pursuant to Article 188(1) of the Constitution, the Constitutional Tribunal adjudicates in cases concerning the conformity of statutes to the Constitution. The said competence of the Tribunal has not been ruled out with regard to a State Budget Act – in fact, the Constitution explicitly provides for such a possibility in its Article 224(2). Nevertheless, so far, the Tribunal had not ruled on the unconstitutionality of any provisions of a State Budget Act. In its jurisprudence (case law), the Tribunal indicated that: "only in exceptional circumstances – in the case of a manifest violation of constitutional values – may the Tribunal interfere with the state's financial plan, such as a State Budget Act, and declare specific provisions thereof to be in breach of constitutional norms. With regard to a State Budget Act, the

presumption of constitutionality is particularly strong" (cf. the Tribunal's judgment of 13 December 2004, ref. no. K 20/04, OTK ZU 11A/2004, item 115).

The above-mentioned characteristics of a State Budget Act give rise to two fundamental problems which the Constitutional Tribunal had to take into account in the present case. Firstly, what constituted the subject of the Tribunal's review was the state's financial plan, which the Constitution explicitly requires to be binding. Public authorities must prevent a situation where the state will be deprived (even partially) of a state financial plan. That requirement also applies to the Constitutional Tribunal, within the scope of examining the present case, as well as to the government, the legislature, and courts, which in the course of enacting or applying the law will implement this judgment. Due to the particularly strong presumption of constitutionality of a State Budget Act, the elimination thereof from the legal system (whether in its entirety or with regard to particular provisions on financial planning) may only occur as a last resort. By eliminating an unconstitutional legal norm, the Tribunal should make all efforts to preserve a State Budget Act, and all its financial planning components, in force. Hence, in the first place, the Tribunal should examine whether it is possible to eliminate an unconstitutional legal norm by derogating a given provision only within a certain extent.

Secondly, the subject of the review comprised financial planning components [of the State Budget Act] setting expenditure ceilings for public-sector entities. Thus, the Tribunal examined legal norms which were not made up of words, but of figures. If a judgment, to a certain extent, eliminates a given norm from the legal system, then that extent needs to be specified. Consequently, when issuing its judgment on unconstitutionality within a certain extent, the Tribunal was required to indicate a specific numerical point of reference. The judgment would otherwise have failed to fulfil its elementary function. Indeed, a judgment failing to specify the said extent would not have resulted in eliminating the unconstitutional legal norm, but it would have comprised a mere proposal which neither the legislature nor the government would have the obligation to implement. A judgment declaring the unconstitutionality of a provision of the State Budget Act within a certain extent – without specifying the

said extent, by indicating a numerical point of reference – would in its nature have resembled a signalling decision, and would not have constituted the outcome of a properly conducted hierarchical review of norms.

The Constitutional Tribunal does not question the legislature's competence to shape the content of a State Budget Act. However, this does not entail that such a statute – which is an outcome of the legislature's activity – may not be subjected to the Tribunal's review of the statute's conformity to the Constitution, even if it concerns the Tribunal itself.

Budgetary autonomy

The so-called "budgetary autonomy", i.e. the legal institution set out in Article 139 of the Public Finance Act, does not, in itself, constitute a constitutional value. However, it does play a key role in the protection of other constitutional values – above all, in the context of the principle of the separation and balance of powers, expressed in Article 10(1) of the Constitution. With regard to the executive (the government), the said "budgetary autonomy" directly limits the possibility of affecting the financial plans of entities that are separate from the executive (the government), including the Constitutional Tribunal, which constitutes part of the judicial branch of government – being separate and independent of the other branches of government, as well as including the National Council of the Judiciary, which safeguards the independence of courts and judges.

State-budget funds must be continuously guaranteed to constitutional authorities so that they could efficiently, and without any interruption, fulfil their constitutional and statutory duties, as well as pay their liabilities. It is natural that, in a democratic state ruled by law, where the constitutional order is based on the separation and balance of powers, the activities of independent constitutional public authorities clash with the short-term political interests of the government and parliament. Thus, in order to enable the said authorities to carry out their constitutional and statutory tasks, it is necessary to provide those authorities with a

permanent source of revenue. Budgetary independence constitutes an indispensable component of the systemic and competence independence.

The constitution-maker has ultimately decided that the state's basic financial plan is adopted in the form of a single act (the principle of the formal unity of a State Budget Act) and has not chosen to regulate an independent budget for judicial authorities (such a solution exists e.g. in Bulgaria). Thus, the aforementioned "budgetary autonomy" constitutes a kind of compromise to reconcile two values, namely: the formal unity of a State Budget Act and the need to enable constitutional authorities to perform their tasks effectively.

Position of the legislature in the procedure for adopting the Budget Act.

The special nature of a State Budget Act also determines the legislature's position in the procedure for adopting the said statute. First of all, unlike in the case of other acts, the legislature may not, at any time, decide whether or not to adopt the said statute. This is a constitutional obligation that the legislature must fulfil by observing the numerous requirements, time-limits, and restrictions set out in Chapter X of the Constitution. Also, of great significance is the fact that the Constitution does not only limit the legislature's freedom in formal aspects, but also as regards the substance.

A State Budget Act constitutes a financial plan forecasting state revenue and expenditure. In accordance with the principle of completeness (universality) and the principle of formal unity, the said plan must encompass the expenditure directly arising from the Constitution, statutes, international agreements, or any other sources of liabilities. In a democratic state ruled by law, it is inconceivable for public authorities to refuse to pay a legally determined benefit. A State Budget Act must, with no exception, include any legally determined expenditure. Indeed, with reference to such expenditure, a State Budget Act does not introduce anything new, but it merely reflects the state's financial needs arising from other relevant legal acts.

The effect of the judgment

The judgment leaves in force the financial planning components of the 2025 State Budget Act which are declared unconstitutional therein. However, the legislature should forthwith amend the 2025 State Budget Act to adjust the relevant financial planning components of the Act to the content of the judgment. Until the legislature implements the judgment, the Minister of Finance – as a member of the Council of Ministers – is obliged to provide the Constitutional Tribunal and the National Council of the Judiciary with indispensable funds, from appropriate budget reserves, without which the said authorities cannot perform their constitutionally specified tasks, including within the scope of their necessary personnel spending.

The judgment (for obvious reasons) does not modify the constitutional and statutory duties of the Tribunal and the NCJ. Neither does it affect the amounts of those authorities' liabilities, e.g. with regard to judges or employees.

However, it should be borne in mind that although the Constitutional Tribunal has ruled that the provisions of the State Budget Act regarding deprivation of the funds are unconstitutional, this does not in fact automatically mean that the situation will change. The Constitutional Tribunal, as a negative legislator, cannot by itself change legal provisions. This must be done by the legislative branch of government. Given the current practice of the ruling majority, it is doubtful whether it will implement the Constitutional Tribunal's ruling. Moreover, there is a risk of illegal government inaction. In other words, two situations are possible. Firstly, the Sejm may refrain from fulfilling its duty to change the law, which is what is happening now. Secondly, the Minister of Finance can *de facto* block the transfer of the relevant funds to the Constitutional Tribunal's bank account, as he clearly communicated, inter alia, in his letter of 30 April 2025 (Annex 1, p. 92). Therefore, the problem may not be easy to solve, and the Constitutional Tribunal's activities may be paralyzed.

XIII. Unsuccessful Attempt to Resolve the Crisis

The Constitutional Tribunal has repeatedly called on public authorities to respect the rule of law. The President of the Constitutional Tribunal has addressed letters to, among others, the Prime Minister, the Marshal of the Sejm, and the President of the Governmental Legislation Center. The General Assembly of the Judges of the Constitutional Tribunal has adopted various resolutions. The Constitutional Tribunal itself, in its judgments and decisions adjudicated within the last year, has clearly indicated the importance of respecting the principle of independence of the judiciary.

A. Initiative of the President of the Constitutional Tribunal

On 16 December 2024, the President of the Constitutional Tribunal sent a letter to representatives of the most important institutions in the State, inviting them to discuss the future of the Constitutional Tribunal. He considered it essential to ensure the efficient and independent functioning of the Constitutional Tribunal pursuant to the principles of a democratic state ruled by law, arising from the Constitution. The President was keen to engage in dialogue with representatives of the legislative, executive and judicial branches of government, as well as other people who hold important public functions in a democratic state. Those invited to the talks were: the Marshal of the Sejm, the Marshal of the Senate, the Prime Minister, the First President of the Supreme Court, the President of the Supreme Administrative Court, the President of the National Council of the Judiciary, the Commissioner for Citizens' Rights, the President of the National Bank of Poland, the President of Law and Justice, the President of the Polish People's Party, as well as representatives of the Confederation – Freedom and Independence and the New Left.[124]

[124] Press Release, 16 December 2024, link.

B. Reaction of the Authorities

Many representatives of the most important institutions in the State were engaged in a dialogue with the President of the Constitutional Tribunal. Among them were: the President of the Republic of Poland, the First President of the Supreme Court, the President of the National Council of the Judiciary, organizations of judges, representatives of the parliamentary opposition.

Unfortunately, representatives of the ruling majority did not take up the invitation issued by the President of the Constitutional Tribunal. The Minister of Justice – Public Prosecutor General, Adam Bodnar, said – even before the President of the Constitutional Tribunal issued the invitation – that he saw no room for talks concerning the Constitutional Tribunal with him.[125]

This turned out to be the position of the entire ruling coalition. Its response was the aforementioned resolution of 18 December 2024.

C. Last Call

On 27 January 2024, the President of the Constitutional Tribunal called for an end to violations of the Constitution and the restoration of the proper functioning of the Constitutional Tribunal.[126]

The Prime Minister has been called upon to instruct the President of the Governmental Legislation Center to forthwith publish 22 judgments of the Constitutional Tribunal in the official publication. The President of the Constitutional Tribunal informed that by letters dated 16 May, 2 July and 20 August 2024, he requested the top management of the Governmental Legislation Center to publish the Constitutional Tribunal's judgments, which has not happened to date. He has also warned that persistent non-publication of the Constitutional Tribunal's judgments constitutes a constitutional violation, and may constitute a criminal offence.

[125] Polish Press Agency, 13 December 2024, link.
[126] Press Release, 27 January 2025, link.

The terms of office of 2 judges of the Constitutional Tribunal expired on 3 December 2024 and 9 December 2024, the term of office of the previous President of the Constitutional Tribunal expired as well, and hence the current President of the Constitutional Tribunal reminded the Marshal of the Sejm of the constitutional obligation to fill judicial vacancies. It should be noted that the current ruling majority could easily choose candidates it deems suitable.

XIV. Notification and Public Prosecutor's Investigation

Pursuant to Article 304(2) of the Criminal Procedure Code of 6 June 1997, state and local government institutions that, in connection with their activities, have become aware of the commission of a crime prosecuted *ex officio*, are obliged to forthwith notify the public prosecutor or the Police and take the necessary measures.

A. Notification by the President of the Constitutional Tribunal

Due to the unsuccessful attempt to resolve the crisis caused by the unlawful actions against the Constitutional Tribunal, its President recognized that he was obliged to file an appropriate notification. During a press briefing on 5 February 2025, he announced that he had signed a 60-page notification of a reasonable suspicion that a criminal offence may have been committed. [127]

In a notification dated 31 January 2025, the President of the Constitutional Tribunal notified the Deputy Public Prosecutor General of the reasonable suspicion that the Prime Minister, ministers, the Marshal of the Sejm, the Marshal of the Senate, Sejm deputies and senators of the ruling coalition, the President of the Governmental Legislation Center, certain judges and public prosecutors, as well as other individuals, may have committed a criminal offence consisting in the following:

> during the period from 13 December 2023 until the date of the submission of this notification, in Warsaw as well as in other locations in Poland, the aforementioned persons acting as an organized criminal group, in relatively short intervals, with a premeditated intent, aiming to change the constitutional order of the Republic of Poland, as well as acting with the purpose of eliminating – or ceasing the activity of – the Constitutional Tribunal, i.e. a constitutional authority of the Republic of Poland, as well as other constitutional authorities, including the National Council of the Judiciary and the Supreme Court, undertook, in collusion with other persons, the activity aimed at achieving those purposes, by force and by an unlawful threat, by way of depriving the Constitutional Tribunal and other constitutional authorities, including the National Council of the Judiciary and the Supreme Court, of the possibility of functioning, resorting to modus operandi that, inter alia:
>
> (1) resulted in the situation where – derived from legal norms regulating the constitutional order – the systemic status of the Supreme Court's Extraordinary Review and Public Affairs Chamber, and the systemic status of Supreme Court judges,

[127] Press briefing by the President of the Constitutional Court, 5 February 2025, link.

as well as the legal force of rulings issued by the Supreme Court, and, in particular, by its Chamber of Extraordinary Review and Public Affairs, were undermined;

(2) resulted in the situation where the Government Legislation Center ceased to publish the rulings of the Constitutional Tribunal, undermining the status of legally appointed judges of the Constitutional Tribunal;

(3) resulted in the adoption of the resolution of 6 March 2024 by the Sejm of the Republic of Poland with regard to eliminating the effects of the 2015–2023 constitutional crisis in the context of the activity of the Constitutional Tribunal (Official Gazette – Monitor Polski, M. P. of 2024, item 198);

(4) resulted in the adoption of the resolution no. 162 of 18 December 2024 by the Council of Ministers with regard to counteracting the negative effects of the constitutional crisis in the judicial system (Official Gazette – Monitor Polski, M. P. of 2024, item 1068);

(5) resulted in the situation where mandatory participants in proceedings before the Constitutional Tribunal ceased to provide their submissions and participate in hearings;

(6) resulted in the situation where judicial vacancies at the Constitutional Tribunal were not filled;

(7) resulted in the enactment of the 2025 State Budget Act (the Sejm's 10th parliamentary term; Sejm Paper no. 687), depriving the Constitutional Tribunal of the funds for the remuneration of the Constitutional Tribunal's judges;

(8) resulted in the situation where – derived from legal norms regulating the constitutional order – the systemic status of the National Council of the Judiciary, and of its members, as well as the systemic status of judicial appointments made with the Council's involvement, were undermined;

i.e. concurrently, the criminal offences under Article 127(1) and Article 128(1) and (3) of the Polish Criminal Code, in conjunction with Article 65 of the Criminal Code in conjunction with Article 12 of the Criminal Code and Article 258(1) of the Criminal Code.[128]

In view of the fact that this notification concerns persons holding the highest public offices, and in particular the Prime Minister and the Minister of Justice – Public Prosecutor General, the President of the Constitutional Tribunal requested that criminal proceedings should be conducted within the scope of a public prosecutor's investigation by the Deputy Public Prosecutor General, Michał Ostrowski.

[128] Supra note 1.

B. Public Prosecutor's Investigation and Political Interference

The Deputy Public Prosecutor General, Michał Ostrowski, forthwith interrogated the President of the Constitutional Tribunal as a witness, and launched an investigation.[129]

The Deputy Public Prosecutor General noted that his goal is to "objectively and comprehensively clarify the circumstances of the events referred to in the notification". He also stressed that: "While I do not prejudge its outcome, it is my duty to carry out evidentiary activities in such an extremely serious case in a calm and objective manner".[130] During the investigation the Deputy Public Prosecutor General interrogated as witnesses nine people, including the First President of the Supreme Court and the President of the National Council of the Judiciary.

On 10 February 2025, Deputy Public Prosecutor General Michał Ostrowski, was suddenly suspended for 6 months by the Minister of Justice – Public Prosecutor General, Adam Bodnar. The reason for the suspension was the mere fact of launching and conducting the investigation. In doing so, he was accused of failing to maintain objectivity and impartiality.[131] In addition, legal action has since been taken against Michał Ostrowski, including criminal proceedings.[132]

C. Response from the President of the Constitutional Tribunal

On 11 February 2025, the President of the Constitutional Tribunal issued a statement. He indicated that he received with disbelief and indignation the information about Adam Bodnar's suspension of Michał Ostrowski. The President of the Constitutional Tribunal pointed out that the suspension was unlawful. It confirms that there have been violations of the law indicated in the notification.[133]

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[129] Polish Press Agency, 5 February 2025, link.
[130] Polish Press Agency, 6 February 2025, link.
[131] Polish Press Agency, 11 February 2025, link.
[132] National Public Prosecutor's Office, 11 February 2025, link i, link ii.
[133] Press Release, 11 February 2025, link.

On 26 February 2025, the President of the Constitutional Tribunal made a written submission to the Public Prosecutor General, Adam Bodnar. The President of the Constitutional Tribunal indicated in his submission that all procedural actions in the indicated investigation should be undertaken only by legally appointed Deputy Prosecutors General. In this case, after the unlawful suspension of Deputy Prosecutor General Michal Ostrowski, this will be the Deputy Prosecutor General for Organized Crime and Corruption, Beata Marczak. In the opinion of the President of the Constitutional Tribunal, the continuation of the investigation by a legally appointed public prosecutor is crucial to maintaining the highest standards of impartiality in the proceedings in question.[134]

[134] Press Release, 26 February 2025, link.

Annex 1.

Text of the letter from the Minister of Finance regarding the replenishing the Constitutional Tribunal's budget with funds for the salaries of Constitutional Tribunal judges.

Mr Bogdan Swieczkowski
President of the
Constitutional Tribunal

Dear Mr. President,

With reference to the Constitutional Tribunal's requests to increase the budget for 2025 under part 06 – Constitutional Tribunal, from special-purpose reserve item 16 – matured liabilities of the State Treasury, letter P.311.1.2025.2 of 17 March 2025, and the earlier letter from the Minister of Finance, I emphasize once again that the Minister of Finance, pursuant to Article 139(2) of the Public Finance Act, includes in the draft Budget Act the revenues and expenditures of the Constitutional Tribunal in the amounts submitted by the Tribunal.

At this point, I emphasize that the Parliament of the Republic of Poland is the only body that may interfere in the budgets of the entities listed in the aforementioned Article 139(2), and that the Minister of Finance, in relation to these entities, is solely the body that implements the Budget Act.

I note that the Sejm has exercised its constitutional and statutory powers by eliminating all planned funding for the salaries of judges of the Constitutional Tribunal.
It is worth noting that, in this matter, the intention of Parliament cannot be in doubt, as it was clearly articulated not only in the form of the amendments submitted to the

draft Budget Act put forward by the Government, but also in statements made by members of Parliament.

Therefore, this is not a case of a mistaken or unintentional reallocation of specific funds from particular budgetary classifications of the Constitutional Tribunal, but rather a purposeful action based on the earlier-adopted Resolution of the Sejm of the Republic of Poland of 6 March 2024 on eliminating the effects of the constitutional crisis of 2015–2023* in the context of the activities of the Constitutional Tribunal, and clearly indicated during the meeting of the Sejm Public Finance Committee on 21 November 2024. The Sejm's decision was also confirmed in this respect by the Senate.

I note that the Council of Ministers has also expressed its position on the matter in the form of a resolution*.[135]

In view of the above, any action by the Minister of Finance aimed at replenishing the Constitutional Tribunal's budget with regard to the classifications covered by the Parliament's action could be regarded as a modification of the Parliament's decision at the implementation stage of the Act. In such a situation, this would amount to circumventing the decision of Parliament and disregarding the aforementioned resolutions, by which the Minister of Finance is bound.

Accordingly, the proposals concerning the judges' salaries will be rejected.

Yours respectfully

$Name_and_Surname_of_signer

Minister of Finance

[135] Resolution No. 162 of the Council of Ministers of 18 December 2024 on counteracting the negative effects of the constitutional crisis in the area of the judiciary.

** Note from the Constitutional Tribunal:*

It should be noted that neither the resolution of the Sejm of 6 March 2024 nor the resolution of the Council of Ministers of 18 December 2024 constitute a universally binding law of the Republic of Poland. Article 87(1) of the Polish Constitution clearly sets out a fixed catalogue of such acts, whereas the legal nature of resolutions, in particular adopted by the Council of Ministers and the Sejm outside of the legislative procedure, is defined in Article 93 as being of "an internal character and shall bind only those organizational units subordinate to the organ which issues such act".

Therefore, acts of an internal character cannot serve as a legal basis for public authorities to omit duties under the Constitution and universally binding law.