Position Paper by the Government of the Republic of Poland concerning the Draft Opinion of the Venice Commission no. 833/2015 on the amendment to the Act of 25 June, 2015 on the Constitutional Tribunal

The Government of the Republic of Poland wishes to thank the European Commission for Democracy through Law (the Venice Commission) for its draft Opinion no. 833/2015 on the amendment to the Act of 25 June, 2015 on the Constitutional Tribunal. At the same time, the Government of the Republic of Poland wishes to address a number of assessments made by the Commission which raise serious doubts in the light of the legal and factual situation surrounding the Constitutional Tribunal.

I. Principal comments

I.1. Scope of the opinion

The scope of the opinion, which the Polish side had requested, was outlined in the letter by the Minister of Foreign Affairs of the Republic of Poland dated 23 December, 2015 and was limited to constitutional issues (and not overall situation) concerning the substance of the amendment to the Act of 25 June 2015 on the Constitutional Tribunal. Meanwhile the Commission, without a prior notice and without consulting the Polish side significantly exceeded its mandate and, as a result, addressed the request made by the Polish government only to a limited extent.

The Commission justifies exceeding the scope of the request on the basis of a thesis it formulated in advance about the alleged incompleteness of the composition of the Constitutional Tribunal. In para. 6 of the draft Opinion, the Commission maintains that because the amendment establishes a quorum for the Tribunal it is also necessary to examine the issue of appointment of judges in view of the suggested incomplete composition of the Tribunal. At the same time the Commission in para. 119 claims that there is no relevant connection between the controversies regarding the appointment of judges and provisions adopted on 22 December 2015.

Another reason for an arbitrary extension of the subject matter of the Opinion (para. 7) is the fact that the Government had sent to the Commission materials that account for the whole current controversy surrounding the Constitutional Tribunal. In para. 98 the

Commission in turn decided to extend its opinion on the basis of the presentation of the Act of 22 December as a "remedial action" with respect to the situation existing so far.

The Government sustains its argument that the Act of 22 December was a remedial action; however it applied to a situation created by the binding force of the Act adopted on 25 June 2015 and not to controversies regarding the elections of judges. Therefore, in order for the Commission to be able to properly form an opinion about the whole issue, it was provided with materials to enable it to do so. For this reason, the materials were consistently referred to as background. Not in the least can the efforts by the Polish Government to present in the possibly most comprehensive and all-around way the legal situation and the accompanying political context be considered as an expression of the alleged intention to extend the contents of the request of 23 December.

It seems that one should avoid a situation in which a state requesting the Venice Commission is forced to consider carefully whether it really ought to send additional information to the Commission which could be understood to mean that the request is being extended. This would have introduced an unwanted element of suspicion and lack of trust between the parties, making it impossible to engage in work based on dialogue. If that had been the intention, it would have been expressed openly in a separate letter to the Commission. If, however, the Commission were to suspect the existence of a similar intention that was not openly expressed, then it should have asked directly whether the fact that specific materials were sent meant that there is an intention to extend the original request. The Commission has not asked this type of question, while an arbitrary decision to go beyond the request seriously undermines standards of trust which should enjoy special care in such a delicate situation as assessing legislative measures of a sovereign state.

I. 2. Doubts about the merits of the way issues exceeding the scope of the request were presented.

The Commission seems to accept without reservation a number of arguments strongly advocated by the President of the Constitutional Tribunal A. Rzepliński. It fails to analize them critically. This speaks in favour of limiting the opinion strictly to the request.

a. Allegedly vacating posts of judges of the Constitutional Tribunal (CT)

The first uncritically accepted argument by the Commission is the statement that allegedly some judicial posts were still vacated, expressed in paragraphs 6 and 36 and in para. 107. This argument serves the President of the CT to justify actions that he had undertaken without any

legal ground, hence violating the principle of legalism of the activities of state authorities as expressed in Art. 7 of the Constitution by not allowing three judges elected and sworn in on 3 December 2015 to adjudicate and by trying to arbitrarily create the status of "an employee of the Tribunal that does not discharge his/her judicial duties" (para. 25) which is a concept unfamiliar to Polish law.

Thus, the Commission in its Opinion disregards the undisputed fact that the status of persons elected by resolutions on 2 December as judges of the CT is confirmed by:

1) the fact that they received the judicial degree from the President of the CT;
2) their collection of a judge's remuneration;
3) their registration in the Social Insurance Institution as CT judges.

For these reasons, non-admission of CT judges elected on 2 December 2015 to adjudicate and their treatment as non-adjudicating CT employees (point 25) is illegal (contrary to Art.7 of the Constitution). This illegal action by the President of the Constitutional Tribunal influences to a significant extent the correct functioning of the CT. Notwithstanding the fact that the Commission attaches great importance to the issue of uninterrupted work by the CT, it didn't even mention this problem.

b. Significance of the judicial oath in the context of the procedure for appointing judges.

It should be stressed that Article 21 of the Constitutional Tribunal Act of 25 June 2015 clearly refers to people chosen by the Sejm as "persons elected to the post of a judge", rather than using the term "judge" alone. As "judges" the Act describes not only persons elected by the Sejm, but also those sworn in by the Polish President. There are 15 such persons at the moment, which is the number envisaged in the Constitution, even though the President of the Constitutional Court continues to bar three of them from adjudicating.

The Commission uncritically copies the argument forced by one of the parties to the political dispute, placing a sign of equality, on one hand, between three persons designated in Sejm resolutions dated 8 October 2015 as CT judges, which resolutions were considered by the Sejm on 25 November 2015 to be without legal effect, and on the other hand, persons designated for these judicial posts in resolutions of 2 December 2015, and who were later sworn in by the President of the Republic of Poland. The arguments of the other party to the dispute were completely ignored, especially the significance of the judicial oath accepted by the Head of State as being an integral element of the procedure of appointing judges ensuring

that the President plays an important role in this process. Oath taking is a necessary condition for assuming numerous public offices under Polish law. It applies not only to CT judges, but also to the President of the Republic of Poland, Deputies and Senators, local government authorities, the common court judge or a civil servant, hence it applies not only to functions assumed through elections, but also many posts assumed through appointment.

In the Polish legal system, oath taking means a public taking of an oath that the oath taker swears to fulfil a post in a manner that complies with the values mentioned in the text of the oath and which are necessary in order to properly perform specific duties. For this reason the texts of the oaths are always adjusted to the specific nature of a public function.

At the same time the possibility of withholding from accepting the oath from a person who does not give a guarantee of proper fulfilment of the duties of a CT judge was expressly sanctioned in the precedent case of Lidia B. when, the Polish President Lech Kaczyński, not only with the approval of, but also in the clear expectation by the Constitutional Tribunal, had withheld for over three months the taking of an oath from Lidia B., who was elected a CT judge in 2006, and accepted her oath only when he was given a guarantee of her prompt relinquishment of the judicial post. Moreover, even though she had been a sworn judge of the CT for six days, the Constitutional Tribunal effectively denied her the status of a retired judge. This goes to show that the requirement to accept the oath by the President fulfils an important control function in Polish constitutional law throughout the procedure of appointing a judge which in no way can be boiled down to just its ceremonial aspect. This solutions finds additional support from an analogous German precedent dating to 1963 – the so-called Creifelds case.

c. Temporary validity of CT judgements

Waiving aside doubts raised by the Constitutional Tribunal in its judgement K 35/15 which makes the constitutionality of a legislative provision condition on whether it was applied before or after the event whose date was not known at the time the action was taken on its basis, the position adopted by President Rzepliński and repeated by the Commission in point 26 is groundless for other reasons as well.

Most of all, the Commission tries to give a retroactive nature to the effects of the CT judgement. Meanwhile CT judgements are normative in that they repeal the binding force of a specific legislative provision which continues to be in force until a CT judgement that deprives it of the legal force is published. As any normative act, in order to enter into force, it

must be published – this transpires directly from Art. 190(2) of the Polish Constitution. The sentence of a judgement finding a legislative provision unconstitutional is published in the Journal of Laws (*Dziennik Ustaw*) because the legal force of a CT judgement finding a legislative provision unconstitutional is equal to the legal force of the legislative provision whose constitutionality was challenged. Hence the earliest moment that we can speak about the effectiveness of CT judgement is the moment of its publication, unless the Tribunal specified a later date pursuant to Art. 194(3) of the Constitution. Given that a CT judgement becomes legally effective when its operative part is published, its application is governed by the same rules that apply to a Statute provision. Since in a state ruled by law retroactive application of law is prohibited (*lex retro non agit*), the same is true of CT judgements on the unconstitutionality of legislative provisions.

Marek Safjan, currently the European Union Court of Justice judge, wrote about it emphatically back in 2003, when he was a CT judge. In examining the complex issue of the effectiveness of CT judgements (especially in the context – without significance for the current situation – of the specificity inherent to the examination of constitutional complaints), he provided the following summary of his arguments on the subject of the effectiveness of CT judgements (underlining added):

"*First, it seems thus certain that the termination of the binding force of a provision declared unconstitutional occurs only after the entry into force of the judgment, and not before. Hence the judgment is of law-creating nature; however it is a negative act.*

Second, <u>the termination of the binding force does not entail invalidation of legal status existing before, which would lead to automatic annihilation with that moment of all earlier legal consequences</u>.

<u>d. Problem of legal significance of Art. 137 and 137a</u>

The applicability of Art. 137, and the later adopted Art. 137a of the Constitutional Tribunal Act, contested by the Tribunal on 9 December 2015, should be examined in this normative context.

Both provisions were temporary (intertemporal) ones and retained their normative value solely with respect to procedure of filling Tribunal posts vacated in 2015. It should be emphasized that they did not constitute, as the Commission wrongly claims in paragraphs 28 and 102 of the Opinion, the legal basis for the election of judges, but provided for a specific manner of determining the time limit for proposing candidates for Tribunal judges. Judges are elected by the Sejm pursuant to Art. 17 (2) of the Constitutional Tribunal Act.

Provisions of Art. 137 and Art. 137a have now no legal significance. Art. 137a was in its entirety questioned by the Tribunal in judgement K 35/15 and ceased to be effective on its promulgation on 18 December 2015, while Art. 137 ceased to be effective in part on the promulgation of judgement K 34/15 (16 December); however as of 9 December 2015, when the President took oath from the last of the persons nominated for the function of a Constitutional Tribunal judge on 2 December 2015, the two provisions had *de facto* lost their legal significance. Therefore, the promulgation of judgements K 34/15 and K 35/15 respectively on 16 and 19 December 2015 did not bring about any effects, as there were no factual situations they could apply to (vacant judge positions, freed in 2015).

Thus, the determination that Article 137 a was unconstitutional, just as the determination that Article 137 was partially unconstitutional, had no bearing on the validity of the election of the Tribunal's judges. First, the basis for these elections was Article 17(2), not Article 137 a. Second, they predated the issuance and publication of the judgement of 3 December, which was in no way concerned with Article 17(2) of the Constitutional Tribunal Act. Consequently, the presumption of constitutionality applied both to Article 137 and Article 137 a. What decided on the lack of legal force of the resolutions appointing constitutional judges was **not** the Tribunal's judgement of 3 December 2015, but the Sejm resolutions of 20 November which found the resolutions of 8 October to have no legal force. These resolutions had no legal effects as the persons named in them had not been sworn in, which is why the Sejm was able to find them not applicable and issue new resolutions. As the Constitutional Tribunal acknowledged in decision no. U 8/15 of 7 January 2016 r, the Tribunal had no powers to review the constitutionality of these resolutions. It should be strongly highlighted that in case no. K 34/15 the Constitutional Tribunal did not examine the constitutionality of the Sejm resolutions of 8 October or 2 December, nor did it examine the constitutionality of the grounds for issuing these resolutions. They are only subject to political control of the Sejm itself, which exercised such control on 20 November in respect of October's resolutions.

e. Scope of binding content of Tribunal judgements

It should be emphasised that legal validity extends to that part of the Tribunal's judgement which has been promulgated in the Journal of Laws pursuant to Art. 194(2) of the Constitution, that is its operative part. Thus, reasons for the judgement, notwithstanding their explicative, doctrinal and argumentative significance, do not give rise to legal obligations for addressees of norms the constitutionality of which is under review. Thus, the Commission's

conferring the value of a legally binding norm on the quoted grounds of the judgement is contrary to the Polish Constitution. Only the content published in the Journal of Laws may give rise to obligations with statutory force.

This standpoint is widespread in the doctrine and case law of common courts, including the Supreme Court. Common courts are consistent in asserting that they are only bound by the conclusions of Constitutional Tribunal judgements published in the Journal of Laws, rather than the interpretation of the Constitution contained in the grounds. The Supreme Court stated this explicitly, among others in resolution no. SN III PZP 2/09 of 17 December 2009, which was then quoted in numerous subsequent judgements.

f. "Preventive measure" K 34/15

Another uncritically accepted thesis which was not reviewed in the light of Polish laws, including the Tribunal's case law, is the treatment of decision K 34/15 about "preventive measure" in paragraphs 22, 24 and 103 as unquestionable. However, the Tribunal's activities in this field raise serious doubts.

The applicability of the Civil Procedure Code (CPC) on the basis of a reference to relevant use provided for in Art. 74 of the current Constitutional Tribunal Act (Art. 20 of the previous Constitutional Tribunal Act of 1997) is clearly limited by the nature of constitutional justice. As the Tribunal sitting in full bench (15 judges) observed in its decision of 22 February 2006 (K 4/06), reiterating the reasons for the decision of 17 July 2003 (K 13/02), "institutions and rules of procedure used in court civil proceedings may — pursuant to a disposition Art. 20 of the Constitutional Tribunal Act — be applied to proceedings before the Tribunal only insofar as allowed by the unique character of the Constitutional Tribunal's decision making and cases within its purview."

The Constitutional Tribunal Act provides for a possibility of issuing a remedy similar to a "temporary decision", but solely in cases instituted under constitutional complaint. The Tribunal does not have comparable powers as regards applications for abstract review just because that is not allowed by the specific nature of the Tribunal's decisions on the constitutionality of general and abstract legal acts. It may not be accordingly introduced by referring to Art. 74 of the Constitutional Tribunal Act, by the application of Art. 755(1) and 730(2) of the CPC. The Tribunal has clearly ruled out the subsidiary application of those CPC articles in the decisions of 17 July 2003 (K 13/02) and of 11 May 2004 (K15/04), as well as in

decisions issued by the Tribunal in full bench (15 judges) on 22 February 2006 (K 4/06), on 4 October 2006 (case No. K 31/06) and on 11 April 2007 (K 2/07). The Tribunal stated that the unique nature of constitutional justice prevents the applicability of the CPC in this scope and that the Tribunal may issue a decision with a similar effect without applying the CPC but Art. 68 of the Constitutional Tribunal Act instead, and only in cases arising from constitutional complaint with respect to decisions by judicial or executive authorities, but never to actions taken in fulfilment of the Sejm's prerogatives as the legislative authority. Departure from this established case law is not impossible, but it calls for an adequate explanation, which was missing in the decision of 30 November 2015. In its decision, the Tribunal, without giving reasons, not only departed from the consistent case law, which it had also upheld by sitting in full benches, but also breached the autonomy of the Sejm that results from Art. 10 of the Constitution (the principle of the separation of powers) and is reflected in Art. 112 of the Constitution, which was thus breached by the decision.

The context irrefutably shows that the Constitutional Tribunal exploited the provisions of the CPC and the Constitutional Tribunal Act in an attempt to pursue a political action. This conclusion is made plausible by the fact that website featuring documents of case K 34/15 (http://ipo.trybunal.gov.pl/ipo/Sprawa?&pokaz=dokumenty&sygnatura=K%2034/15) does not include a motion of opposition deputies to apply the preventive measure, which was the declared basis for the Tribunal's action. That could also substantiate a claim that the Tribunal was acting in an informal understanding with a group of opposition deputies rather than pursuant to a formally submitted motion.

I.3. Conclusions

Summing up issues related to the request for a Venice Commission opinion of 23 December 2015, the Polish Government wants to emphasize that it did not lodge an explicit or implicit request with the Venice Commission for an opinion about the controversies surrounding the appointment of Constitutional Tribunal judges in 2015, but rather about the constitutional matters concerning the amendments to the Constitutional Tribunal Act of 22 December 2015. Consequently, the Polish Government strongly upholds this position, all the more so as the Commission's comments that go beyond the scope of the request and deal with the controversies surrounding the appointment of judges have many flaws in terms of identifying the appropriate regulatory environment. Furthermore, they are strongly biased and uncritically repeat arguments of one side of the dispute, while overlooking relevant

substantive elements of the issues the Commission took up, thus going beyond the scope of the request. For this reason, the Commission's mandate covers de facto only the description contained in paragraphs 44-97 of the draft opinion, and possibly also paragraphs 35-43 on case no. K 47/15. Paragraphs 6-34 should be substantially reduced and adjusted to the opinion's scope. Paragraphs 98-129 are completely beyond the mandate the Government granted the Commission. The principle of loyal cooperation between the Government and the Commission necessitates their deletion from the opinion. The same is true for paragraphs 121, 131, 134 which are entirely at odds with the nature of a legal opinion. A political appeal that takes the form of a resolution, it is more characteristic of political bodies than expert organs. Therefore, the presence of this paragraph in the opinion is highly inappropriate. After these exclusions have been taken into account, the conclusion itself should also be modified.

The Venice Commission may address the issue of judicial appointments upon request by a different eligible organ, but there is clearly no agreement on the part of the Polish Government to abuses when considering the request of 23 December 2015. This protest is all the more stronger as the position the Commission has taken in its draft opinion is blatantly one-sided. True to the maxim *audiatur et altera pars*, an objective examination of the issue at least calls for hearing the judges appointed in December 2015. It should be stressed that the President of the Constitutional Tribunal prevented the Venice Commission delegation from meeting not only the three judges whom he has barred from performing judicial functions without grounds, but also the two remaining judges who already adjudicate in the Constitutional Tribunal. It is thus absolutely necessary that the opinion be restricted to the issues that are strictly related to the December amendments to the Constitutional Tribunal Act. Such restriction will be the yardstick of the Venice Commission's objectivity and political impartiality.

II. Content of the opinion covered by the scope of request

In connection with what has already been stated, below we present issues that we consider to be covered by the Commission's mandate, as outlined in the request of 23 December 2015. In terms of merits, this covers sections IV and V.A-D, as well as certain topics raised in the conclusion.

II. 1. Pending case

As a matter of principle, the petitioner's intention did not cover motion no. K 47/15 for the examination of the constitutionality of the Act of 22 December 2015. On the other

hand, there is no doubt that the said request was concerned with the Act's content, so its assessment in this opinion cannot be ruled out. The case itself is covered in paragraphs 39-43 (the other ones relate earlier statements by the Commission). As regards para. 39, where the Commission, without an in-depth analysis, again embraces the position of only one party to the ongoing dispute, the following remarks should be made:

a. First, while there is no doubt that the CT judges are subject only to the Constitution in light of Article 195(1) of the Constitution, there is no doubt either as to the fact that the constitutional judges are bound by Article 197 of the Constitution, which stipulates that the organization of the Constitutional Tribunal, as well as the rules of proceeding before it, shall be specified by a statute. The Commission itself admits in para. 50 that the constitutional provisions say little about the Tribunal's mode of work. It is therefore deeply surprising to read the Commission's statement according to which the Tribunal can scrutinise the Act of 22 December 2015 without applying the rules of proceeding provided in it. Disregard for the applicable provisions regulating the rules of proceedings before the Constitutional Tribunal represents a violation of Article 197 of the Constitution, whose binding nature for the constitutional judges is undisputable.
b. Second, assuming that the Tribunal was able to proceed based on the Constitution alone, Article 194(1) of the Constitution states that the Tribunal must adjudicate in a panel of 15 judges. However, in the wake of the Tribunal President's decision to bar the three judges sworn in on 3 and 9 December 2015 from adjudicating, the CT would not be able to adjudicate on the basis of the Constitution, even if the latter contained some procedural provisions.

The Commission utterly failed to take these circumstances into consideration when drafting para. 39, which merely reflects the political position of the circles that question the election of CT judges pursuant to Article 17.2 on 2 December 2015.

Doubts also arise with respect to para. 41, where the Commission makes the controversial point about the presumption of unconstitutionality of the Act of 22 December 2015. Only the President of the Republic is authorized to exercise the preventive control of an act before its promulgation. Constitutional Tribunal has no competence to suspend the effectiveness of an act which is correctly adopted, signed and published.

In a completely arbitrary fashion, the Commission considered that the act threatened to disable constitutional control, and as such deemed it not applicable, even though it had been adopted and published in the Journal of Laws in a legal manner. Such a position raises

concerns whether in drafting its opinion the Venice Commission may have been guided by a presupposition that it is not even trying to justify in detail.

Doubts also surround para. 42 of the opinion, where the Venice Commission contradicts itself by expressing regret over the Government's refusal to furnish a position on case K 47/15. It should be noted that in light of Article 7 of the Constitution, the Government must act on the basis of the applicable law. So to draft its position, it would have had to act on the basis of the Act of 22 December 2015, which the CT refused to apply in this case. Therefore, what should be the basis and procedure for the Government's drafting of its position? Unfortunately, it is a point the Commission does not clarify.

At the same time, there are two reasons for which serious concerns arise about the expression of disappointment over the lack of a Government position that could have been helpful to the Venice Commission in preparing its opinion. First, the Commission did receive the Government's position on amendments to the Constitutional Tribunal Act, which makes the disappointment expressed in para. 42 incomprehensible. Second, the draft opinion of the Commission shows that the materials provided to the Commission have not been examined in detail. Consequently, considerable doubts arise about the sincerity of regret expressed in para. 42.

As regards para. 43, it can only be said that European and international standards, just as Article 197 of the Constitution, require that the constitutionality of statutes be checked on the basis of the applicable procedure. It is dismaying to read justifications for non-legal actions by disregarding the applicable procedure, on the one hand, and calls for complying with international standards, on the other hand.

In conclusion, paragraphs 39-43 are deeply disappointing on account of their clearly persuasive character and incoherence, which is accompanied by a legal analysis that is less than superficial.

II. 2. Sequence rule

As regards the sequence in which the Tribunal proceeds with cases pursuant to Article 80(2) of the Constitutional Tribunal Act (sequence of registering), the Venice Commission failed to take into account two circumstances.

First, the sequence of registering does not cover all cases considered by the Tribunal, but only the abstract review of constitutionality performed upon application. Consequently,

this procedure does not include constitutional complaints. It is to them that the doubts raised by the Commission in paragraphs 59-61 are most likely to refer, and most certainly the remarks made in para. 62. In this respect, the Commission's doubts are groundless.

Second, as the Commission rightly observes in para. 57, Article 80(2) talks about setting hearings or proceedings in camera, and not about the obligation to decide a case in the order of registering. This means that even with respect to applications for abstract review there is no obstacle to the proper actions, as described by the Commission in paragraphs 59-61, being taken after the first hearing and before a decision is issued.

For these reasons, the conclusions in para. 65 seem to be too far-reaching and not justified by the provision they refer to. The wording of para. 65 is all the more striking as in para. 56 the Commission takes note of the difference between setting proceedings concerning an application for abstract review, and issuing a decision on this. Even so, a categorical position has been taken that supports arguments of only one and the same side of the political dispute.

Consequently, this part of the opinion:

- should be supplemented with information about the limited scope of application of Article 80(2);
- should be supplemented with corrections to paras. 59-61, in relation to the issues raised in para. 57;
- should have a nuanced wording of para. 65 that would convey the limited scope of reservations and the likelihood (rather than certainty) of the occurrence of the dysfunctions feared by the Commission.

II. 3. Attendance quorum

All the Commission's observations on the number of Tribunal judges sitting as a full bench, pursuant to Article 10(1) in the wording introduced by the amendment of 22 December 2015, again reflect the criticism of the amendments levelled on many occasions by the President of the Constitutional Tribunal. He creates the impression as if the adopted normative solutions had no worldwide precedent and posed a serious obstacle to the Tribunal's functioning. Unfortunately, the Commission did not take into account how the Constitutional Tribunal had operated in practice before. According to research by Paweł

Króliczak of the University of Silesia in Katowice, over 83% of cases the Tribunal decided in 1998-2015 were considered by a panel of 13-15 judges, which corresponds to today's full bench. So the many years of practice show that setting the full bench of judges at 13 will not hamper or delay the Tribunal's work. Moreover, as the full bench is again competent only for considering applications for abstract review, constitutional complaints can be considered by smaller panels. Thus, fears over too high quorum of the Tribunal's adjudicating panels seem completely unfounded.

At the same time it should be emphasized that in para. 56 the Commission itself quoted statistics as a major argument. It should not disregard them now either.

In light of the past practice of the Constitutional Tribunal, the amendments introduced in December only eliminate discretion on the part of the Tribunal's President to set the number of panel members. Criticism of this solution does not in fact address any real threat of dysfunctions of the new regulations, but rather defends the absolute discretion of the Tribunal's President in this regard.

For these reasons, the Polish Government requests that para. 72 be replaced with data stemming from Paweł Króliczak's calculations, and a conclusion be added that despite concerns *in abstracto,* the existing operational practice of the Constitutional Tribunal shows that setting the full bench at at least 13 judges should not hamper its functioning in the future and should be seen as reflecting current practice not as introducing a completely new solution.

II. 4. Qualified majority of 2/3

The Venice Commission criticized the provisions, according to which decisions on the unconstitutionality of statutes are taken by a 2/3 majority of votes in the abstract review procedure. Though very categorical in tone, the Commission's criticism should take into account the following circumstances:

- Poland has the right to adopt its country-specific solutions that are line with other solutions which are in force in our country. Their originality compared with solutions applicable abroad does not have to mean that they are dysfunctional. A case in point is the number of judges sitting on adjudicating panels. Empirical data gleaned from years of practice show that what the draft opinion held in para. 71 to be an unusual and very strict solution, which threatens to block the Tribunal's work, turns out to have been *de facto* in place for over

a decade. There are no reasons to reply differently to the Commission's fears about too high a majority that is needed to pronounce a norm unconstitutional.

- The distinction between majorities needed to find a norm unconstitutional in abstract (application) and individual (constitutional complaint) review procedures, as raised in para. 83 of the opinion, is by no means unjustified. There is an important difference between the way judgments are reached when considering constitutional complaints and abstract applications. Entities with the right to lodge applications are often political bodies that are guided by political considerations. Meanwhile, in order to file a constitutional complaint it is necessary to meet strict conditions, which means that the majority of complaints are not considered for formal reasons. Moreover, in the case of an ordinary citizen lodging a complaint, the severity of a possible infringement of the Constitution is already a circumstance existing at the present moment, whereas it is only a hypothetical state in the case of abstract applications. Both these and other arguments warrant different solutions in terms of the majority needed to pronounce on the unconstitutionality of norms which are subject to abstract and individual scrutiny.

II.5 Delayed hearings

It is difficult to agree with the Commission's assessment of the effects of Article 87(2) of the Act as "contradicting the requirements for a reasonable length of proceedings" under Article 6 of the ECHR (para. 87). This assessment stands in embarrassing contrast to another assessment of the Commission, made in paragraphs 55-56 of the opinion, where it stated that it could see no lengthy proceedings in the fact that the average waiting period for the Tribunal's determination was 21 months (despite it is one of the longest waiting periods in Europe)[1]. In light of these, period set forth in art. 87(2) is not much relevant for the waiting period for Tribunal's judgment. It is therefore incomprehensible why the Commission finds this regulation as jeopardizing the rights guaranteed by Article 6 of the ECHR.

It seems that regarding the length of proceedings before the Tribunal, the Commission takes different positions, depending on what could serve better the purpose of undermining the changes introduced by the Act of 22 December 2015. This observation is unfortunately only a part of a general characteristic of the draft opinion, which can hardly be

[1] For example Constitutional Council in France adjudicates within 2 weeks; average waiting period for constitutional court judgment in Austria is 8 months, in Belgium 12 months; in Bulgaria and Estonia even most complicated issues are considered in no longer than 6 months. In Spain most of the cases are determined in 12 months (apart from cases regarding most controversial issues); in Slovakia and Slovenia average waiting period is 9-10 months.

deemed unbiased or treating the arguments of all the parties to the ongoing constitutional controversy on equal terms.

II. 6. Conclusions on procedural issues

In view of the above remarks, the assessments made in para. 88 raise fundamental doubts. In light of empirical data, neither regulations on the number of judges constituting a full bench, nor the minimum waiting time for a hearing can be considered as introducing real change to the functioning of the Tribunal. What they do limit to a certain extent is the discretion (so far absolute) of the Tribunal's President in programming the Tribunal's work. The rules of considering applications (not issuing judgements) for abstract review according to the sequence of registering, and of taking decisions on the unconstitutionality in this field by a qualified majority do not have to necessary block or hamper the Tribunal's work.

For these reasons, the far-reaching conclusion reached in para. 90 should be considered totally illegitimate. It would even seem that observations in paragraphs V.B.1-4 were primarily made to feign grounds for making such a far-reaching conclusion that nonetheless rested on very shaky foundations. The Commission formulated its conclusion on the threat to the rule of law, the democratic system, and human rights posed by a statute that introduces transparency and limits the arbitrary powers of the Tribunal's President, sanctioning a practice that had already been common in the Constitutional Tribunal before, while also ensuring more flexibility in considering individual cases, which is likely to result in rather better than worse protection of the citizens' constitutional rights.

This situation is especially striking given the unconditional acceptance of actions by the Tribunal's President, who resorts to such drastic measures as barring sworn-in judges from adjudicating without any legal basis. Thus, the Venice Commission's opinion advocates the totally arbitrary power of the Tribunal's President, and considers the introduction of any legal norms that could restrict this arbitrary discretion to be a threat to democracy.

In view of the above, it is strongly recommended that para. 90 be struck out as presenting a view that is not founded in the facts described here.

II. 7. Return to the rules of electing Constitutional Tribunal judges valid before 25 June 2015.

The Venice Commission also criticised the repeal of statutory provisions, which made it possible to return to electing judges pursuant to the Rules of Procedure of the Sejm. The criticism was manifested especially in para. 96, where such a solution was described as regrettable. The reason for this far-reaching conclusion is the Commission's belief that it is only statutory regulations of this subject matter that can ensure the possibility of scrutinizing the constitutionality of these regulations. This view stems from misunderstanding the nature of the Sejm's Rules of Procedure within Poland's constitutional system. As long as it is the Sejm which elects the Tribunal judges, such an election must take place as part of the Sejm's proceedings. In accordance with Article 112 of the Constitution, the Rules of Procedure of the Sejm are the only legal act regulating the Sejm's work. It is an act that is directly anchored in the Constitution; its normative significance cannot be disparaged in any way; it originates from the Sejm's regulatory autonomy and the principle of the separation of powers (Article 10 of the Constitution). Provisions of the Sejm's Rules of Procedure that give rise to universally applicable norms are obviously subject to constitutional review. In a judgment of 26 January 1993 (U 10/92) the Tribunal for the first time admitted its competence to examine the constitutionality of the Sejm's Rules of Procedure.

In any case, the draft opinion mentions constitutional scrutiny of the Sejm's Rules of Procedure in para. 87. The statutory rules of electing judges, introduced in June 2015, have proved to be dysfunctional, while no remarks have so far been made about the functionality of the Sejm's Rules of Procedure in this respect. Hence the view expressed in para. 96 is blatantly unfounded and should be corrected by deleting the last sentence of paragraph 96.

In turn, the view presented in para. 97, whereby a number of other provisions have been deleted "without apparent reason," is very shallow and only goes to show the Commission's negative attitude towards the regulation under review, which takes the place of an assessment on merits of the reviewed legislative solutions, and as such is unfortunate.

The Venice Commission's views in paragraphs 98-131 will not be commented upon here, as they exceed the mandate the Government granted to the Commission. An exception shall be made as regards the issue of pluralism, because it featured in the government's reasoning and received special treatment by the Commission.

II. 8. Disciplinary responsibility of Constitutional Tribunal judges

Modification of the rules of disciplinary responsibility as implemented by the amendment does not constrain the Tribunal's autonomy in any material way. The conducting of disciplinary proceedings and, above all, appraisal of the grounds of a motion, rest with the Tribunal. Certainly, introducing a possibility of other entities taking part in such proceedings limits to a degree the absolute discretionary powers of the Tribunal's President, but at the same time increases the autonomy of ordinary judges.

The Commission's argument (Item 94) that the new law would enable the Sejm to decide to depose judges on the basis of political considerations is utterly unfounded. The Sejm is fully bound by the content of a request. Indeed, the Sejm as a body that nominates a person to hold the office of judge has been given a corresponding power to depose him, but whether such a request is lodged with the Sejm is left solely to the Tribunal's discretion. What is more, the applicability of the most severe sanction against a judge has been additionally limited by raising the character of an offence to the level of "particularly gross cases". The Sejm's involvement in this regard means the introduction of additional judicial independence guarantees, as it does not eliminate the Tribunal's key role but introduces an added element to the deposition procedure. It should be noted that the solution concerning the authority empowered to take a final decision to depose a judge has been modelled in the amendment law after German and Austrian laws. Also in the US decisions to impeach a Supreme Court justice are taken in both houses of parliament.

On account of the above, the two last sentences in item 94 should be deleted.

The Parliament's involvement in the final stage of the deposition procedure is of the nature of an additional guarantee of judicial independence, and not its limitation. It should not be forgotten that quite a hermetic circle of Tribunal judges might also exert pressure on individual judges. Therefore, disciplinary proceedings left entirely at the discretion of the Tribunal and its President may constitute a means of pressure on a judge. Accordingly, making additional entities involved in the proceedings serves to enhance judicial independence guarantees and pluralism among the judges.

II. 9. Pluralism in the Tribunal's composition and functioning

The Commission in its arguments about pluralism is pushing an ungrounded proposition that the Government allegedly reduces this issue to the degree of the Tribunal's

politicisation (Paragraphs 113-123 and 135). The Commission completely ignores the fact here that ensuring diverse political forces the influence on appointing constitutional judges is by itself not tantamount to attaining pluralism, but is an effective tool to ensure pluralism of ideological viewpoints among the Tribunal judges. Therefore, linking the pluralism of ideological viewpoints with a procedural instrument to ensure it by way of taking political decisions by the parliament should not be a surprise. The Commission's remarks cause all the greater consternation as even the Commission itself admits (para. 112) that there is a significant link between the political election of constitutional judges by the Sejm and the democratic legitimacy of their activity. In this context, attributing the intention of the Tribunal' politicisation to the government of a sovereign state is an odd measure in a text that aspires to be a legal opinion.

Indeed, provisions in the act of 22 December 2015 which curb the discretionary powers of the Tribunal's President by formalising as legal norms the prevailing practice of the Tribunal's functioning as to its numerical composition, allow the protection of pluralism of opinion within the Tribunal. That purpose is further served by statutory solutions that limit the discretionary powers of the Tribunal's President in disciplinary proceedings, by engaging other state authorities in the process and with Tribunal judges' retaining their powers of full control over the course of disciplinary proceedings.

Limiting the full discretionary powers of the Tribunal's President by legal norms is of fundamental importance to preserving pluralism. The Venice Commission had a chance to learn what a real threat to pluralism means in the Constitutional Tribunal's operations, when its President did not allow a meeting between the Commission delegation and the 5 judges sworn in in December 2015. It is deplorable that the Opinion failed to mention this fact and allow for it in the drafting process. The Venice Commission seeks the reasons behind the slowing of the Tribunal's operations in the Act of 22 December 2015 without paying the slightest attention to the fact that they were paralysed by its President's arbitrary decisions, taken without any legal grounds and in breach of Art. 7 of the Constitution.

III. Conclusion

The opinion's conclusion is like a lens in that it focuses all the questionable elements of the opinion. At the very beginning of the conclusion, the authors make yet another attempt at justifying the fact that the Commission's mandate has been exceeded, and that the

appointment of judges has been included in the opinion (para. 132). They again contradict the facts by stating that December's election of judges was based on an unconstitutional provision (para. 134), and insist on constructs that are hardly consistent with the Polish system, e.g. claims about a central part of the Constitutional Tribunal in the judiciary of Poland (para. 136), while completely ignoring the role of the Supreme Court.

Given the fact that the Commission's claims (paragraphs 135-136) that the adopted amendments would slow down the Tribunal's work have been proven unfounded above, there can be no grounds either for making assessments (in paragraphs 90, 133 and 135) on the same basis about the violation of the fundamental principles of the Council of Europe.

What is especially peculiar in this case are the Commission's calls for obligating a democratically elected Parliament to choose judges from among proposals made by small professional circles (para. 137). Whilst claiming the right to evaluate the democratic character of Polish State institutions, the Venice Commission also suggests that a democratic Parliament should to a considerable degree be bound by decisions of small professional circles. What such a proposal reflects is in fact the willingness to impose oligarchic rule that would give the appearance of democracy. Ever since the mid-15th century, democracy has been for the Poles a group of institutions ensuring that civil society has had a real say in exercising power, while oligarchic tendencies supported by centres from abroad have always been seen as a threat.

For the sake of protecting trust in relations between the Venice Commission and the Polish Government, we expect the Commission to:

1) Adapt the opinion's content to reflect the scope of the Polish Government's request (analysis of the Act of 22 December 2015)

2) In the opinion, take into account substantive remarks on a) the framework in which the Constitutional Tribunal's judgments retain their binding legal force; b) Polish regulations creating the context that is necessary to properly analyse the subject matter covered by the request; c) take into account statistical data about the Tribunal's functioning so far, and the relevant comparable data from other jurisdictions (waiting times for constitutional court decisions).

3) Delete groundless statements that stigmatize Poland and allege that the amendments of 22 December 2015 pose a threat to the democratic system and human rights.