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ON LEGAL CONSEQUENCES OF JUDGEMENTS OF THE POLISH CONSTITUTIONAL TRIBUNAL PASSED BY AN IRREGULAR PANEL*

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ABSTRACT

Recent years have gone down in the history of the Polish constitutional thought with an unprecedented dispute concerning the underlying principles for the activity and statutory position of the Constitutional Tribunal ('CT'). Under the dynamics of political events following the 2015 parliamentary elections the initial doubts whether some of the CT judges were appointed correctly turned into the deepest constitutional crisis in the modern history of Poland which ultimately led to decomposition of the entire state system of constitutional control. Finding all of the underlying causes of that crisis would require multifaceted analyses carried out by experts representing various scientific disciplines. Such an undertaking goes far beyond the boundaries of this study. The aim of this sketch is to reconstruct one of the episodes of the so-called Constitutional Tribunal Crisis which is a direct outcome of the appointment of CT judges by the Sejm (Parliament) to replace judges whose terms did not yet expire. This issue is of key importance for the current discussions on the nature and consequences of CT judgments. The presence of unauthorized persons in CT adjudicating panels

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became also an important symbolic turning point in the systemic transformation of the Polish constitutional court at the beginning of 2017.

Key words: Constitutional crisis in Poland, Constitutional Tribunal, constitutional review of law, invalidity of a judgment, appointment of a CT judge

1. THE SYSTEMIC SIGNIFICANCE OF THE CT JUDGMENT OF 3 DECEMBER 2015 (REF. NO. K 34/15)

The issue of appropriate appointment of CT adjudicating panels arose in connection with the successive inclusion therein of persons elected by the Sejm of the 8th term (currently in session) to the seats effectively filled by the Sejm of the 7th term (in session in the years 2011–2015)[1]. As a result, doubts as to whether the CT judgments passed in such situation have the attributes of finality and general effectiveness within the meaning of Art. 190 (1) of the Polish Constitution[2] and whether the entire constitutional review process is invalid because the CT judgements were passed by an irregular panel were bound to spring up quickly.

The legal status of persons elected to the position of a CT judge by the Sejm of the 8th term was assessed on the basis of the judgments of 3 December 2015[3], in which – having analysed constitutionality of Art. 137 of the Constitutional Tribunal Act of 25 June 2015[4] – the Tribunal

[1] Chronologically the first CT judgement passed by an irregular panel which included persons who were not CT judges was the decision of 8 February 2017 (ref. no. P 44/15, OTK ZU no. A/2017, item 3).

[2] This provision reads as follows: '1. Judgments of the Constitutional Tribunal shall be of universally binding application and shall be final.'

[3] Ref. no. K 34/15, OTK ZU no. 11/A/2015, item 185.

[4] Journal of Laws, item 1064; hereinafter: the 2015 CT Act. This case was an outcome of a motion filed on 17 November 2015 by a group of MPs challenging numerous provisions of the 2015 CT Act, among others the interim regulation (Art. 137) which allowed the Sejm of the 7th term the appointment of 2 CT judges to fill the positions which were to become vacant only during the term of the next Sejm. It was the first of a series of the CT judgments passed between 2015 and 2016 which referred to the acts specifying the organisation and mode of proceedings before the Tribunal. Those verdicts questioned suc-

found that that the basis for the election of CT judges by the Sejm of the 7th term 'to the extent pertaining to the CT judges whose term of office expires as of 6 November 2015'– conforms with the Constitution of the Republic of Poland, whereas 'to the extent it pertains to the CT judges whose terms of office expire as of 2 and 8 December 2015, respectively' – is unconstitutional.

It is worth to recap briefly the main findings of the constitutional court at that time.

First, the Tribunal explained that in its opinion it referred to the procedure for the election of CT judges carried out in the Sejm of the 7th term insofar as it was necessary to establish whether Art. 137 of the 2015 CT Act continued to be effective and could be submitted to a constitutional review. Therefore, the assessment of the electoral procedure for the selection of CT judges was an interlocutory issue. The Tribunal dealt with it as it was an element co-determining its jurisdiction in this concrete case. 'The Tribunal found that Art. 137 of the [2015] CT Act is subject to a constitutional review to the extent in which it refers to the proceedings concerning the election of a CT judge initiated in 2015 and – as at the date on which the Tribunal passed its judgement – not finalized with an oath taken before the President (see Art. 21 of the [2015] CT Act). The Tribunal found that in this part Art. 137 of the [2015] CT Act continues to be in force as a fragment of the legal mechanism initiated by a motion putting forward a candidate for a CT judge and closed by the President's taking an oath from the person elected by the Sejm to the position of a CT judge. So long as the sequence of actions provided for by law is not completed Art. 137 of the [2015] CT Act – despite the fact that it may not serve as the basis for new electoral acts – should be treated as one of the legal grounds for the proceedings with respect to filling the position of a judge for a nine-year term which is still pending'[5].

Second, in the same context the Tribunal commented on the parliamentary resolutions which invalidated the election of a CT judge by the Sejm of the previous term. In the statement of the grounds it indicated,

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cessive legal solutions adopted by the legislator which – against the binding constitutional standards – made attempts to impose its own vision of the constitutional court system.

[5] Case ref. no. K 34/15, part III, point 6. 6.

inter alia, that: 'Trying to determine if a constitutional review of Art. 137 of the [2015] CT Act was admissible the Tribunal had to answer a question whether Sejm resolutions of 25 November 2015 on finding Sejm resolutions of 8 October 2015 concerning the election of CT judges by the Sejm of the 7th term legally invalid (Journal of Laws, items 1131, 1132, 1133, 1134, 1135; hereinafter: Sejm resolutions of 25 November 2015) affected the binding force pf that provision and whether in consequence the Tribunal may to that extent continue the proceedings. (...) The Tribunal stressed that Sejm resolutions of 25 November 2015 were not subject to the review under those proceedings. However, with a view to the fact that the possibility to examine Art. 137 of the [2015] CT Act with respect to its merits is admissible insofar if at the date of pronouncing the judgment by the Tribunal the procedures of filling the positions of CT judges were still underway (...), it should be established what were the legal consequences of the adoption by the Sejm of the five resolutions of 25 November 2015 for the binding force of Art. 137 of the [2015] CT Act. That is why, to the extent determining the object of a constitutional review in this case and in consequence defining the jurisdiction of the constitutional court, the Tribunal referred to the legal nature of Sejm resolutions of 25 November 2015'[6].

Third, in the opinion of the Tribunal: 'Pursuant to Art. 69 of the Sejm Regulations the resolutions of 25 November 2015 ought to be treated as internal legal acts which are partly declarative and partly resolutionary. From the legal viewpoint their content is aimed at – firstly – at presenting the political standpoint of the Sejm in a specific case which at that time was appraised by the chamber as significant, and secondly – a legally not binding call on an authority of the state (*in casu* the President) to follow a particular course of action. The resolutions of 25 November 2015 are not of a specific and individual nature within the framework of the so-called creational function of the Sejm consisting in filling or vacating public positions and function provided for by law. In this sense they are not categorically different from Sejm resolutions concerning the election of a CT judge through which the Sejm realizes, *inter alia*, its competence laid down in Art. 194 (1) of the Polish Constitution. Hence, the resolutions

[6] Case ref. no. K 34/15, part III, point 6. 7.

of 25 November 2015 and the statements (declarations) contained therein did not affect the legality of the resolution of the Sejm of the 7th term concerning the appointment of judges whose terms of office ended on 6 November, 2 and 8 December 2015 – they could not have any legal consequence in this respect and have no impact on applicability of Art. 137 of the [2015] CT Act. Contrary to the declaration contained therein the consequences of the resolutions of 25 November 2015 should be explained in accordance with their legal nature and position in the taxonomy of Sejm resolutions'[7]. In other words, the Sejm (of the same or subsequent terms) cannot not recall its appointment of a CT judge, annul it, declare it futile ('lacking legal force') or 'convalidate' it *post factum*." The is why the Tribunal found that the adoption of the resolutions of 25 November 2015 by the Sejm of the 7th term does not exclude a constitutional review of Art. 137 of the 2015 CT Act[8].

Fourth, in its judgement of 3 December 2015 the Tribunal further explained that: 'The fact that Art. 137 of the [2015] CT Act was found unconstitutional in its scope (...) had significant legal consequences of a systemic nature which were brought up to date by the judgment of the Tribunal. In the case of two CT judges appointed to replace the judges whose terms of office expired or shall expire on 2 and 8 December, the legal basis for a fundamental phase of their electoral procedure was questioned by the Tribunal as unconstitutional. Since the positions of judges have not been filled yet because the last legally significant act (i.e. taking an oath by CT judges before the President) has not been completed, the effect of the derogation of the relevant scope of Art. 137 of the [2015] CT Act is that further proceedings should be interrupted and closed (...). Finalisation of the proceedings is unacceptable since the legal basis for one of its phases was found unconstitutional by the Tribunal. (...)On the other hand, the legal basis for the appointment of three CT judges to replace those whose terms of office expired on 6 November 2015 does not arouse any doubts.

[7] Case ref. no. K 34/15, part III, point 6. 7.

[8] The assessment of the legal status of Sejm resolutions was confirmed by the Tribunal in its decision of 7 January 2016 (ref. no. U 8/15, OTK ZU no. 1/A/2016, item 1, part II, point 4. 1) and the judgment of 9 December 2015 (ref. no. K 35/15, OTK ZU no. 11/A/2015, item 186, part III, point 7. 2).

The derogation concerning the scope of Art. 137 of the [2015] CT Act had no impact on the effectiveness of their appointment. In line with the principle that a CT judge is elected by the Sejm of the term during which his/her position was vacated, the appointment performed on that basis was in this case valid and there are no obstacles to finalizing the procedure by the persons elected as CT judges taking an oath before the President. In connection with the entry into force of this judgement the Sejm is obliged to elect two CT judges to replace those whose term of office expires on 2 December 2015 and shall expire on 8 December 2015"[9].

Thus, with respect to case K 34/15 the Tribunal expressed the view that the legal basis for the appointment of three CT judges to replace those whose terms of office expired on 6 November 2015 was compliant with the Polish Constitution, and also that the resolutions of the Sejm of the 8th term of 25 November 2015 pronouncing such appointment legally ineffective were legal acts unknown to the Polish system of law[10] and as such had to be considered as not legally binding. In particular, those resolution did not affect legal existence of the resolutions on the election of CT judges passed by the Sejm of the 7th term; the Polish system of law has never provided for such a possibility at all[11].

2. THE CONSEQUENCES OF FINDING THE APPOINTMENT OF CT JUDGES UNCONSTITUTIONAL

In accordance with the prospective nature of CT judgments in the Polish constitutional system the judgment of 3 December 2015 and the rules for the election of CT judges by the Sejm described therein referred to the future situations and pending cases (*ex nunc* effect). In particular, constitu-

[9] Case ref. no. K 34/15, part III, point 12.

[10] Writing about the system of law and sometimes even anthropomorphising it as an active participant in certain behaviours or actions I have in mind simply the applicable substantive law, that is the collection of legal norms subject to certain relations which identify and organize it.

[11] See also the remark expressed *per obiter dictum* in the CT decision of 7 January 2016 (ref. no. U 8/15, part II, point 5).

tionally admissible retroaction of the CT judgment consisting in the right to resume the proceedings under Art. 190 (4) of the Polish Constitution was impossible in those circumstances[12]. There was neither any parliamentary procedure that would support it, nor any potential procedure for the Sejm of the 8th term to continue the election of CT judges initiated by the Sejm of the 7th term could be inferred. Apart from procedural reasons and the definitive (irrebuttable) nature of the act of appointment of a CT judge by the Sejm[13], the principle of discontinuation of parliamentary work was also an obstacle[14]. In this context – given the fact that the reviewed Art. 137 of the 2015 CT Act was of an interlocutory nature and on the date of passing the judgment by the Tribunal its scope of application expired – the judgment in the case K 34/15 could directly affect only the still pending – due to not taking an oath before the President – procedures of the appointment of five CT judges elected by the Sejm of the 7th term. That is why for three CT judges whose legal basis for election was pronounced constitutional the CT judgment of 3 December 2015 confirmed that their appointment was correct and there are no obstacles for finalising it with taking and oath, whereas as regards two CT judges TK[15] the legal basis for

[12] This provision reads as follows: 'A judgment of the Constitutional Tribunal on the non-conformity to the Constitution, an international agreement or 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.'

[13] See remarks in the CT judgment of 3 December 2015, ref. no. K 34/15, part III, point 6. 7 *in fine*.

[14] According to the principle of discontinuation of parliamentary work proceedings initiated and not finalized during a term of the Sejm shall be closed upon its expiration. The newly elected Sejm does not continue the work started by its predecessor, unless such an obligation arises as an exception from the laws. See e.g. R. Weill, 'Resurrecting legislation', 14 no. 2 *International Journal of Constitutional Law* (2016) pp. 518-531.

[15] These are CT judges within the constitutional meaning, who were elected by the Sejm and waited for taking an oath before the President of the Republic of Poland. Terminological differences in the Act and in the Polish Constitution with respect to the concept (CT judge" and the possible error of equivocation was also noted by the Tribunal: '[T]he terminology adopted, *inter alia*, on the basis of Article 21(1) of the Constitutional Tribunal Act provides that a judge of the Tribunal elected by the Sejm who has not yet taken the oath of office before the President of Poland is 'a person elected to assume the office of a judge

their appointment was unconstitutional and the procedure should be discontinued on the date of entry into force of the CT judgment[16]. This effect may be classified as a so-called systemic consequence of a CT judgment on unconstitutionality of a law (legal norm) consisting in the ban on further application of the regulation repealed as a result of a negative judgment of the constitutional court, including the prohibition to consider in the proceedings that are underway the events or legal situations relevant thereto which were in the past shaped by the unconstitutional laws (legal norms).

The legal status and legality of the appointment of CT judges by the Sejm of the 8th term was not directly the subject of the statement of the Tribunal and was outside of the substance of the case. There is no doubt, however, that the verdict contained in the CT judgment of 3 December 2015 was material to legal assessment of the electoral act which took place at the Sejm of the 8th term. Since the original appointment of three CT judges to replace those whose terms of office expired on 6 November 2015 was valid, those seats could not be filled again. The Sejm is empowered to elect a CT judge, though only when during its term there is a vacancy in the Constitutional Tribunal. In turn, the earlier mentioned 'validity' (correctness) of the election of CT judges by the Sejm of the 7th term consisted in that no charges brought against the then applicable procedures

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of the Tribunal.' Within the meaning of the Constitution, which is superior in its binding force and which has autonomous content, the status of a judge of the Tribunal should be perceived as acquired at the moment of completion of the election procedure for choosing a candidate for a judge of the Tribunal by the Sejm (*verba legis*: "The Constitutional Tribunal shall be composed of [...] judges chosen […] by the Sejm [...]"; see Article 194(1) of the Constitution).' (case ref. no. K 34/15, part III, point 6. 7 *in fine*).

[16] Strictly speaking, the legal basis for one of the phases of the electoral procedure with respect to two CT judges was found unconstitutional and in this sense was eliminated as illegal. Although this phase had been realised in the past and the consequence of the CT judgement of 3 December 2015 did not directly refer to it, on the date of passing the judgement by the Tribunal the proceedings were still pending since those judges waited for taking a statutorily required oath before the President (the Tribunal confirmed constitutionality of the statutory requirement of taking an oath in the same judgment of 3 December 2015). That is why, upon the CT's finding Art. 137 of the 2015 CT Act unconstitutional in its scope (*scil.* Entry into force of that judgment through its publication in the Journal of Laws) the proceedings concerning the election of two CT judges could no longer be continued before the President and the entire procedure including both the phase of election within both the constitutional and the statutory had to be closed *ex lege*.

and electoral acts were proved true in the proceedings before the Tribunal, that is in the institutional forms initiated by competent public authorities, which means that both the legal basis for the appointment of CT judges was constitutional and the Sejm resolutions on the appointment of a CT judge published in the official journal (*Monitor Polski*) could not be challenged either *ex lege* or any legal act of the Sejm.

The CT judgment of 3 December 2015, including section 8 letter b of its conclusion, is generally applicable and is final under the earlier quoted Art. 190 (1) of the Constitution. It should be noted that it has also been published in the Journal of Laws. The legal opinion as to the principles of appointment of CT judges, upheld in later judgments of the Tribunal, retains its currency. It is by no means weakened or even more so counterbalanced by glosses, commentaries and statements of a different tenor formulated by a part of the doctrine of law, some public officers or mass media. There is a need to separate public criticism of the judgments of the constitutional court from sustainability and legal nature of CT findings as an activity in the area of the power to judge in the name of the Republic of Poland. Therefore, no state authority has the right to question the CT judgment of 3 December 2015, and any possible behaviour contrary to that judgment should be appraised as a potentially tortious act, including – with respect to the group of persons specified by law – as a constitutional transgression.

3. BINDING FORCE OF CT JUDGMENTS PASSED BY AN IRREGULAR PANEL

Those circumstances determine that from the legal viewpoint the assertion that including into the adjudicating panels persons elected by the Sejm of the 8th term to replace the CT judges whose term of office expired on 6 November 2015 and from who then took an oath before the President is unjustified[17]. Those persons were appointed to the position of a CT judge

[17] On the other hand, the status of the persons elected by the Sejm of the 8th term to replace those whose term of office expired on 2 and 8 December 2015 (i.e. Piotr Pszczółkowski and Julia Przyłębska) is disputable. Those persons filled the vacancies which – as interpreted

against the provision of the first sentence of Art. 194 (1) of the Constitution, which reads that 'The Constitutional Tribunal shall be composed of 15 judges chosen individually by the Sejm for a term of office of 9 years from amongst persons distinguished by their knowledge of the law.' From this provision it follows that the duty to elect a CT judge is borne by the Sejm of the term during which a judicial position has been vacated. Therefore, it is not any Sejm, but the one whose temporal scope of activity overlaps the date of expiration or termination of the term of office of a CT judge[18]. A CT

by the Sejm of the 8th term – had not been filled by the previous Sejm. The appointment of the CT judges on 2 December 2015 was found ineffectual on the basis of alleged irregularities in parliamentary work committed by the Sejm of the 7th term which were then publicized in special Sejm resolutions of 25 November 2015 on annulment of the appointment of CT judges (the Sejm of the 8th term annulled the appointments made during the previous term of: Roman Hauser, Andrzej Jakubecki, Krzysztof Ślebzak, Bronisław Sitek, Andrzej Jan Sokala, and adopted resolutions on replacing them with: Henryk Cioch, Lech Morawski, Mariusz Muszyński, Julia Przyłębska and Piotr Pszczółkowski). It was not, however, based on the CT judgment of 3 December 2015 (ref. no. K 34/15), which found the legal grounds for the election of two CT judges to replace those whose terms expired 2 and 8 December 2015 defective. That judgment was passed after the make-up of the Tribunal had been already supplemented by the Sejm of the 8th term (judges had been elected a day before it was pronounced at a hearing) and has never been implemented (the President of the Republic of Poland has not abided by its tenor). Therefore, it would be justified to assume that the persons elected on 2 December 2015 by the Sehm of the 8th term were appointed to the seats which had been either already filled (this concerned: H. Cioch, L. Morawski, M. Muszyński), or at the time of election were filled (this concerned J. Przyłębska and P. Pszczółkowski). The legal status of all five people elected by the Sejm of the 8th term was exactly the same. On the date of the appointment those persons double-filled the judicial seats at the CT which had been previously filled by the Sejm of the 7th term and the case concerning constitutionality of the legal basis for the election was still pending. In that manner, the composition of the Tribunal was *per fas et nefas* increased to the number unforeseen in the Polish constitutional system (i.e. 20 CT judges), and persons who could not be treated as CT judges were appointed to adjudicate at the Tribunal. As has been already mentioned, it became possible to legally fill some of the judicial vacancies only after the CT judgment of 3 December 2015 had been passed, in which the Tribunal found that the two seats vacated by judges whose terms of office expired on 2 and 8 December 2015 had never been effectively filled by the Sejm of the 7th term and the obligation to fill them promptly – upon the entry of the judgement into force – rested on the Sejm of the 8th term. The chronology of those events is of paramount importance for the assessment of validity of judicial appointments to the CT in 2015.

[18] It is, of course, possible that when the Sejm fails to fill a judicial seat at the Tribunal owing to various factual circumstances, e.g. absence of support for a candidate or short

judge may not be appointed as if in advance (before time) for the judicial position which will be vacated during the term of office of a future Sejm. This principle works also the other way, which means that the Sejm may not retroactively invalidate or rebut the appointment of a CT judge performed by the Sejm of the previous term thus taking over for its own competence the possibility of filling a vacancy in the Tribunal as if it has never been filled. The Sejm which would do so should be considered an unauthorised (incompetent) body and would manifestly violate constitutional standards.

In this light, the defect of the appointment of CT judges by the Sejm of the 8th term has become irremovable. In particular, any interventions of the legislator which with the interlocutory provisions of subsequently issued legal acts on the CT system in 2016 tried to convalidate or decree their status proved ineffectual[19]. As a matter of fact, those efforts were an unsuccessful attempt to sanction the state of unconstitutionality prompted by the appointment of so-called redundant CT judges[20]. Moreover, they constituted a prohibited statutory interference into the constitutional matter and anticipated the use of a forbidden legal measure[21].

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time-limits for carrying out the appointment procedure because of the coming parliamentary elections. In such case, the obligation to appoint a CT judge passes naturally onto the Sejm of the next term. Constitutionally acceptable is also a temporary vacancy at the Tribunal providing that it is a result of a justified coincidence of factual circumstances rather than a strategy or a means of action selected by a state authority.

[19] See e.g. Art. 90 of the Constitutional Tribunal Act of 22 July 2016 (Journal of Laws item 1157) or Art. 21 (2) of the Act of 13 December 2016 – The Introductory Provisions to the Act on the Organisation 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 (Journal of Laws item 2074). Cf. also the position of the Tribunal on this subject presented in the judgement of 11 August 2016 (ref. no. K 39/16, part III, point 1. 1. 14, still unpublished in the Journal of Laws; awaiting publication).

[20] Also emptying one of the irregularly filled seats as a result of a fortuitous event (L. Morawski's death in 2017), if it is not filled by one of the judges correctly appointed by the Sejm of the 7th term and waiting for taking an oath before the President, shall not mean that there is a vacancy in the Tribunal – in the constitutional sense that seat will continue to be filled by the Sejm of the 7th term.

[21] The appointment of a CT judge is reserved for the Sejm as part of its creational function which is realized in the sphere of law application rather than lawmaking. That is why an appropriate means of Sejm's activity are resolutions of a specific and individual character (i.e. acts of law application) rather than statutory regulations.

The clarity of the legal status of persons elected to the already filled judicial positions has been at a discord with the complexity of the operating practice of the Tribunal since the position of the CT President was taken by Julia Przyłębska at the beginning of 2017. As the persons who lack the status of a CT judge have been systematically included in the adjudicating panels and have been taking part in the work of the Tribunal just like the judges.

It should be noted that in the day-to-day operation of the Tribunal it is the CT President that is exclusively authorized to set the adjudicating panels and bears responsibility in this respect (within the statutory limits). CT judges may, at most, submit objections and call for correcting a specific procedural decision. The CT President is not bound by the above. Apart from that, CT judges may not file requests to exclude a CT judge from an adjudicating panel or otherwise contribute to changing an irregular panel. At the same time, in every circumstance CT judges are obliged to perform their constitutional duties: safeguard fundamental rights, the supremacy of the Constitution and other values of a democratic state of law[22]. This also refers to a situation whereby the CT President allows unauthorized persons (*de facto* though not *de iure* judges) to sit on the adjudicating panel and whereby those persons do not refrain from performing judicial duties themselves. In such circumstances a CT judges may express his or her positions by filing a dissenting opinion.

The irregular setup of the adjudicating panel of the Tribunal is not, however, tantamount to *a limine* questioning of the validity of a judgment passed in such circumstances. Even such a serious transgression of a systemic and procedural nature as including unauthorized persons in the adjudicating panel does not have to make the outcome of a constitutional review, i.e. a CT judgment, invalid or challengeable,

Invalidity of the proceedings before the Tribunal understood as finding all acts performed thereunder and outcome thereof in the form of

[22] See *inter alia* the CT judgment of 9 March 2016 (ref. no. K 47/15, still unpublished in the Journal of Laws; awaiting publication). The duty to adjudicate by a judge which cannot be evaded is correlated with the right to a trial. This is a firm standard of modern legal systems (see e.g. A.M. Rabello, 'Non Liquet: From Modern Law to Roman Law', 10 *Annual Survey of International & Comparative Law* (2004) p. 1-25).

a judgment legally ineffective retroactively, namely from the moment of its initiation (*ab initio*) may occur – as a matter of principle – in two cases. First, when such a consequence is conventionally provided for by the applicable legal norms which specify the procedure, grounds and effects of passing judgments by an irregular panel. Second, when invalidity, including invalidity because of an irregular adjudicating panel, is in the legal practice recognized as a rule for the construction of a given branch or system of law – or as an obvious presumption or an implicit consequence of this system, or as a durable though normatively undescribed element of the legal culture of the society which prescribes that any doubts as to the validity of judicial decisions be resolved in this way. None of these allows for finding the CT judgments passed with the participation of persons who were elected by the Sejm of the 8th term to fill the vacancies which had been effectively filled by the Sejm of the 7th term invalid. Contrary to legal intuitions directing the argumentation towards the analogy with other branches of law (e.g. civil or administrative proceedings) in the Polish constitutional system the defect of invalidity does not concern judgments of the Tribunal. Their status is regulated by Art. 190 (1) of the Constitution and the principle of finality of CT judgements contained therein.

The repeatedly voiced position of the Tribunal that its decisions concerning the hierarchical compliance of legal regulations (norms) are unconditionally final retains its currency also in the situation whereby the adjudicating panel includes an unauthorized person. This is a serious defect and gives rise to other legal consequences, but does not eliminate the constitutional attributes of a judgment referred to in Art. 190 (1) of the Constitution. In particular, the provisions concerning invalidity of proceedings provided for in the Polish civil procedure may not be applied to CT judgments[23]. Although Art. 36 of the Act of 30 November 2016 on the Organisation of and the Mode of Proceedings before the Constitutional Tribunal[24] allows for the application of the Code of Civil Procedure

[23] See otherwise, although without providing arguments, CT judge Stanisław Rymar in the dissenting opinion to the CT judgment of 4 April 2017, ref. no. P 56/14, OTK ZU no. A/2017, item 25.

[24] Journal of Laws, item 2072.

of 17 November 1964[25], but exclusively in matters unregulated in the Act '[on the Organisation of and the Mode of Proceedings before the Constitutional Tribunal]' and only 'accordingly'. As the Tribunal correctly noted in its judgment of 11 August 2016: 'The existing constitutional order does not provide for any room to create procedures for verifying the contents of constitutional court judgments or their formal requirements. The specificity of CT judgments is reflected primarily by their relation to the area of effectiveness of the law, which radically distinguishes them from the decision of those courts which are focused exclusively on the area of application of the law'[26]. The certainty of the act of a normative change as a result of a CT judgment requires indication of a precise and irreversible point of time at which such a change takes place. Therefore, should there be any procedure for controlling constitutional court decisions, it should have - like the object and legal effects of a CT judgment - a direct normative outline in the fundamental act (at least as regards its jurisdictional outline)[27]. It is by no means possible to restrict or condition the finality of a CT judgment with an institution of a statutory rank (legal power lower than the constitution). Such a possibility lies beyond the legislative freedom of the so-called ordinary legislator. The attribute of finality of a judgement makes it possible to make legal relations binding and official and definitively solve any dispute concerning constitutionality of a law. By the same tokes it blocks unending recourses, which stabilizes the legal order and guarantees its predictability[28].

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[25] Journal of Laws of 2016, items 1822 and 1823.

[26] Case ref. no. K 39/16, (part III, point 9. 2, still unpublished in the Journal of Laws; awaiting publication). See also the CT judgment of 9 March 2016 (ref. no. K 47/15, part III, point 10. 5 and 10. 6).

[27] It should indicate *inter alia* whether CT judgments are to be verified under separate specialized proceedings with its own special rules (not under the constitutional review procedure) or as an incidental issue in the course of a hierarchical review; and also whether it is to be carried out by the CT itself under its jurisdiction or rather it should be passed over to another judicial authority which would in this way become empowered to perform an appellate review of the judgement of the constitutional court. This discussion is *de constitutione lata* just theoretical.

[28] Art. 190 (1) of the Polish Constitution makes it possible *inter alia* to avoid a question whether hypothetical CT judgements finding a CT judgement passed by an irregular panel invalid is in itself final and is not subject to the rules of invalidation.

There are no such indisputable constructional rules in the Polish legal order which would – in the circumstances described above – make a CT judgement *ex lege* invalid. In particular, inacceptable is the concept of 'no act' (*actus nullus*) pursuant to which anyone could simply evade legal consequences of a judgment as non-existent and without following any special procedure and form at that. It is hard to disregard the fact that CT judgments shall – nonetheless - give rise to (some) legal consequences with respect to (at least some) entities[29] and shall undoubtedly be also published in the official journal. The latter (promulgation) is, in turn, of colossal importance for the foundations of our thinking about state and law with the presumption of validity of an act of a public authority at the forefront, the fiction of general knowledge of law (including the law which has been shaped by a CT judgment) and consequences of the *ignorantia iuris nocet* and *ignorantia legis non exusat* principles[30].

Under the current Constitution of the Republic of Poland the category of defective, invalid or non-existent judgments of the Constitutional Tribunal has no raison d'être.

4. DISCONTINUITY OF THE SYSTEM OF LAW

Irregularity of the adjudicating panel of the Constitutional Tribunal which included persons appointed to previously filled vacancies is a fact. The responsibility for such a state of affairs rests on the Sejm of the 8th

[29] Despite the fact that acts which are issued in the name of the state with an intention to be directed to the addressee and give rise to the legal consequences provided for in their contents are called 'non-existent' in the doctrine may have paramount practical consequences supported by public authority (including state coercion), which cannot be disputed with theoretical arguments.

[30] On 'no act' and its equivalent in the CT caselaw – a so-called void act in the theoretical sense, the CT decision of 7 January 2016, ref. no. U 8/15, OTK ZU no. 1/A/2016, item 1, part II, point 4. 1, and polemical remarks in: P. Radziewicz, 'Kontrola konstytucyjności uchwał Sejmu (uwagi na marginesie postanowienia TK w sprawie U 8/15)' [*Control of Constitutionality of Sejm Resolutions (Remarks Relating to the CT Decision No. U 8/15)*], 7 *Państwo i Prawo* (2016) pp. 57–62.

term, the President of the Republic and the CT President who applied the inappropriate practice. The basis and scope of that responsibility constitute a separate issue which should be analysed in-depth, also from the penal law perspective. It is worth noting, however, that the issue of the status of a CT judgment has also an axiological dimension as it reflects a serious conflict of legal interests which surfaced and continues to intensify in connection with infringements of law when filling judicial vacancies in December 2015. A resolution of this problem which would favour the stability and certainty of the system of law and at the same time would prevent its confusion and decomposition refers to a specific preference of values which in itself could a matter of dispute. Nevertheless, one shall not lose sight of the fact that the existence of an effective system of law as such with its fundamental attributes[31] is a *sine qua non* condition for the protection of constitutional rights and freedoms of individuals as well as the existence and continuity of state institutions. In this sense, The CT judgments passed by an irregular panel constitute a cost of sorts which is hard to be accepted and which devastates the sense of justice, though calculated in the stabilizing function of Art. 190 (1) of the Polish Constitution.

Some comfort is provided by the fact that any system of law is capable of regenerating itself. The irregularities that may occur therein, for instance in connection with illegal acts of public authorities, are in most cases countered by institutions and legal measures which are its immanent components. In this way the system of law automatically defends itself against behaviours that extend beyond its boundaries[32]. One of the legal institutions whose aim is to provide internal defence of the system of law is also constitutional judicature, in the conditions of the Polish political system performed on an exclusive basis by the Tribunal. However, it may also happen that the system of law is not able to counter the abuse of its

[31] In particular, without the irreconcilable or irremovable duality of legal orders created by public authorities responsible for lawmaking and law application (including constitutional review), which both fail to recognize one another's decisions.

[32] See classical works by K. Loewenstein on the need to defend democratic state institutions from the 1930s: – K. Loewenstein, 'Militant Democracy and Fundamental Rights', 31 no. 3 *American Political Science Review* (1937) p. 417–432 and no. 4, pp. 638-658. See also e.g. J.-A. Santos, 'Constitutionalism, Resistance and Militant Democracy', 28 no. 3 *Ratio Juris* (2015) pp. 392–407.

norms *hic et nunc*. The intensity of those transgressions, their new form or unlawful behaviour of state form may lead to consolidated application of legal acts of an extra-systemic nature (i.e. illegal acts). Because it is impossible to eliminate them and enforce their abidance by state coercive measures, those acts (e.g. acts of major legal significance, events that *ex lege* give rise to legal consequences, normative acts) will in fact constitute legal reality for some time. That was the situation of the Polish Constitutional Tribunal, which as a result of intensified legislative action of the legislator lost the ability to operate efficiently. Its institutional standing, which has been built for almost thirty years, was also undermined. Referring to the well-known theory of Nicholas W. Barber it may be said that in relations with the legislative and executive branches of government the Tribunal had neither a shield, nor a sword[33]. It was specifically defenceless vis-à-vis legal acts and actions of state administration bodies unforeseen by the Polish legal order and aimed against it. It could react exclusively by passing judgments assessing constitutionality of successive changes in its systemic position, work organisation and procedures. Those acts were in legal journalism paradoxically called at that time as 'reparative' – each successive one contained solutions wholly or partly contrary to the theses of the CT judgments[34]. The Tribunal had to keep its judgments within the scope

[33] See N. W. Barber, 'Self–defence for Institutions', 72 no. 3 *Cambridge Law Journal* (2013) pp. 558–577.

[34] On the essence and depth of changes of the structure of Polish constitutional judicature and the legislator's motives see e.g. M. Wyrzykowski, 'Bypassing the Constitution or changing the constitutional order outside the constitution', [in:] A. Szmyt, B. Banaszak (eds.), *Transformation of Law Systems in Central, Eastern and Southeastern Europe in 1989–2015* (Gdańsk University Press 2016) 168–176; L. Garlicki, *Disabling the Constitutional Court in Poland?*, [in:] A. Szmyt, B. Banaszak (eds.), *Transformation of Law Systems in Central, Eastern and Southeastern Europe in 1989–2015* (Gdańsk University Press 2016) pp. 63–78; T. Koncewicz, 'Of institutions, democracy, constitutional self-defence and rule of law: The judgments of the Polish Constitutional Tribunal in Cases K 34/15, K 35/15 and beyond', 53 *Common Market Law Review* (2016) p. 1753–1792; P. Radziewicz, P. Tuleja (eds.), *Konstytucyjny spór o granice zmian organizacji i zasad działania Trybunału Konstytucyjnego, czerwiec 2015–marzec 2016* [*Constitutional Dispute over the Limits of Organizational Structure and Procedures of the Constitutional Tribunal, June 2015-March 2016*] (Wolters Kluwer Polska 2017). See also opposing arguments among which worthy of notice is an attempt to present the constitutional crisis in Poland as a legitimate debate of advocated of various theoretical models of the constitutional judicature and judicial attitudes (i.e. judi-

of challenges and charges formulated in the requests for a constitutional review since in the Polish legal order the Tribunal does not act *ex officio*. The legal measures used by the Tribunal were sometimes precedential[35], though they always fit within the boundaries of a constitutional state of law – they were intersubjectively verifiable and discursive; they referred to the Polish Constitution as an act of the superior legal force and inherited jurisprudential lines.

Returning to the main topic of the discussion it should be repeated that the system of law is capable of regenerating itself and – what is important – this regeneration is possible also after some time, that is when the political and legal conditions are favourable. Therefore, the future legislator will be responsible for restoring the rule of law and take appropriate measures with respect to illegal behaviours and the resulting legal consequences. If necessary, special normative (solutions) acts should be prepared to this end to be applied *pro futuro* which – in accordance with the constitutional norms – will resolve the sustainability of the legal system shaped by the acts of public authorities once taken in violation of law. Such an approach makes it possible to restitute and maintain continuity of the system of law; however, it involves a serious risk. It may happen (which at the moment we do not know) that the degradation of the system of law becomes irreversible and the foreseeable future will not provide us with an opportunity to start its rehabilitation with measures that fit within it limits. The alternative will be then to erect at an opportune moment a new system of law with its constitutional foundation and – alas – all inconveniences and dangers that are connected therewith. However, one may still

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cial activism and passivism), e.g. M. Młynarska-Sobaczewska, 'Polish Constitutional Crisis: Political Dispute or Falling Kelsenian Dogma of Constitutional Review', 23 no. 3 *European Public Law* (2017) pp. 489–506.

[35] In the light of the Act of 22 December 2015 amending the Constitutional Tribunal Act (Journal of Laws item 2217) the Tribunal also had to resolve how to carry out a constitutional review of a law in a situation whereby its object and procedural provisions for adjudication were the same. The Tribunal constructed a legal mechanism which is quite original in the Polish judicial system and which allowed not only for successful adjudication in the case on hand, but also outlined a new institution of constitutional law which invoked the antinomy of self-reference ('liar paradox'). See on this subject: P. Radziewicz, 'Refusal of the Polish Constitutional Tribunal to Apply the Act Stipulating the Constitutional Review Procedure', 28 no. 1 *Review of Comparative Law* (2017), pp. 23–40.

hope that with time the consequences of the present constitutional crisis and the crisis itself will prove to be nothing more than merely a temporary deviation from the principles of constitutional democracy[36].

5. SUMMARY

The article presents the analysis of legal consequences of the judgments passed by an irregular adjudicating panel of the Polish Constitutional Tribunal. One of the episodes of the constitutional crisis in Poland in the years 2015-2017, which concerned the systemic position, organizational structure and procedures of the CT, was the appointment to the judicial positions of persons who from the legal point of view could not be treated as CT judges as they were by the Sejm to fill the vacancies which had been already filled. Nevertheless, those persons take part in the work of the Tribunal, including passing judgments. This situation gives rise to questions as to the validity of such verdicts and their legal consequences in a broader context of the principle of legal security of individuals and continuity of the institutional of a democratic state of law.

REFERENCES

Ackerman Bruce. 1989, 'Constitutional Politics/Constitutional Law', 99 no. 3 The Yale Law Journal 99 no. 3 (1989) p. 453-547.

Fallon R. H. Jr. 2007, 'Executive Power and Political Constitution', 1 Utah Law Review (2007) p. 1-23;

[36] On the modification of the systemic framework of state in a manner contrary to the principles arising from constitutional norms, invoking the principle of the sovereignty of a nation which is reflected in the will of the legislative body, see – on the example of the United States – *inter alia*: R. H. Fallon Jr., 'Executive Power and Political Constitution', 1 *Utah Law Review* (2007) p. 1-23; B. Ackerman, 'Constitutional Politics/Constitutional Law', 99 no. 3 *The Yale Law Journal* 99 no. 3 (1989) p. 453-547.

Garlicki Lech. 2016, Disabling the Constitutional Court in Poland?, [in:] A. Szmyt, B. Banaszak (eds.), Transformation of Law Systems in Central, Eastern and Southeastern Europe in 1989–2015, Gdańsk University Press.

Koncewicz Tadeusz. 2016, 'Of institutions, democracy, constitutional self-defence and rule of law: The judgments of the Polish Constitutional Tribunal in Cases K 34/15, K 35/15 and beyond', 53 Common Market Law Review (2016) pp. 1753–1792.

Loewenstein K. 1937, 'Militant Democracy and Fundamental Rights', 31 no. 3 American Political Science Review (1937) p. 417–432 and no. 4, pp. 638-658.

Młynarska-Sobaczewska M. 2017, 'Polish Constitutional Crisis: Political Dispute or Falling Kelsenian Dogma of Constitutional Review', 23 no. 3 European Public Law (2017) pp. 489–506.

Rabello A. M. 2004, 'Non Liquet: From Modern Law to Roman Law', 10 Annual Survey of International & Comparative Law (2004) p. 1-2.

Radziewicz Piotr, 'Kontrola konstytucyjności uchwał Sejmu (uwagi na marginesie postanowienia TK w sprawie U 8/15)' [Control of Constitutionality of Sejm Resolutions (Remarks Relating to the CT Decision No. U 8/15)], 7 Państwo i Prawo (2016) pp. 57–62.

Radziewicz Piotr, Tuleja Piotr (eds.). 2017, Konstytucyjny spór o granice zmian organizacji i zasad działania Trybunału Konstytucyjnego, czerwiec 2015–marzec 2016 [Constitutional Dispute over the Limits of Organizational Structure and Procedures of the Constitutional Tribunal, June 2015-March 2016], Wolters Kluwer Polska.

Radziewicz Piotr. 2017, 'Refusal of the Polish Constitutional Tribunal to Apply the Act Stipulating the Constitutional Review Procedure', 28 no. 1 Review of Comparative Law (2017), pp. 23–40.

Santos José-Antonio. 2015, 'Constitutionalism, Resistance and Militant Democracy', 28 no. 3 Ratio Juris (2015) pp. 392–407.

Weill Rivka. 2016, 'Resurrecting legislation', 14 no. 2 International Journal of Constitutional Law (2016) pp. 518-531.

Wyrzykowski M. 2016, 'Bypassing the Constitution or changing the constitutional order outside the constitution', [in:] A. Szmyt, B. Banaszak (eds.), Transformation of Law Systems in Central, Eastern and Southeastern Europe in 1989–2015, Gdańsk University Press.