**Procedure of appointing judges of the Polish Constitutional Tribunal**

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**1. Introduction**

The Polish Constitutional Tribunal was established by the Act of 26 March 1982 amending the Constitution of the People’s Republic of Poland. Nevertheless, a strong institutional position has been ensured in the Constitution of the Republic of Poland of 2 April 1997. It was a new institution in Polish legal system. Since establishment of the Constitution and the appointment of first judges, Tribunal had to build its authority[[2]](#footnote-2). These actions were successful, as over the years it has become a fundamental institution. The rulings were respected and let to numerous legislative changes and affected the process of law interpretation as well. The Constitutional Tribunal had great impact on the process of harmonizing Polish Law with the European Union law[[3]](#footnote-3). The legitimacy of the Constitutional Court has an impact on the reliability of constitutional review, effectiveness, and rectitude of the rulings. Consequently, it is crucial to appoint members of this institution properly. The procedure of appointing judges of the Polish Constitutional Tribunal since 2015 forms the beginning of the rule of law crisis in Poland. The public opinion polls indicate a decline in Tribunal’s prestige[[4]](#footnote-4). In order to fully understand the problems connected with the Tribunal that have arisen over the years, it is essential to present in detail the regulations concerning the granting of the status of a judge of the Constitutional Court and to indicate what improprieties occurred in this procedure.

**2. Regulation regarding appointment of judges of Constitutional Tribunal**

Firstly, concentrating on the constitutional regulations is required. In accordance with the article 194 of the Constitution of the Republic of Poland[[5]](#footnote-5), the Constitutional Tribunal is composed of 15 judges, chosen individually by the Sejm[[6]](#footnote-6) for a term of 9 years, from amongst persons distinguished by their knowledge of the law. No person may be chosen for more than one term of office. In doctrine it is assumed that the selection of a judge of the Tribunal ought to be made by the Sejm of the given term, during which the term of office of the outgoing judge comes to an end[[7]](#footnote-7). Under special circumstances that preclude selection process, this right shall exceptionally pass to the Sejm of the next term. It is inadmissible to select a judge to a position which will be vacated during the next term of office [[8]](#footnote-8). Such procedure is contrary to the wording of the Polish Constitution. Moreover, the selection of a judge by Sejm is made by definitive resolution, meaning that it is not subject to revocation. Therefore, after giving this statement, Sejm has no competence to revoke its decision, annul it or declare it void.

Although the role of Sejm in this procedure is irrecusably crucial, it this important to point out the actions that must be taken by Head of the Status, that is the President of the Republic of Poland. After selection by Sejm judges are obligated to take an oath, however it is not fundamental element to fill the position[[9]](#footnote-9). Without doing so, it is impossible to take up their duties. The oath of selected judges shall be taken before the President of the Republic of Poland. It is the constitutional duty of the Head of State to immediately take such an oath from a judge selected by the Sejm[[10]](#footnote-10). Refusal to do it should be considered as a violation of the Constitution. Court-case law[[11]](#footnote-11) also considers the view of the Constitutional Tribunal on the lack of competence of common courts and the Polish Supreme Court to review the correctness of the election of judges of the Constitutional Tribunal by the Sejm[[12]](#footnote-12)

It is worth mentioning that the President and Vice-President of Constitutional Court are appointed by the Polish President from among the candidates presented by the General Assembly of Judges of the Constitutional Tribunal. This is the prerogative of the President; therefore, signature of Prime Minister is redundant, however Head of the State may not decline all nominations given by the Assembly.

The next crucial aspect to consider is the commencement of the term of office of the selected judge. It shall begin on the day following the end of the term of office of the outgoing judge. Whereas if the selection occurred after a vacancy, the date of selection by the Sejm is considered as the start of the term of office. However, a distinction must be made between the commencement of the term and the assumption of judicial duties, which occurs after taking the oath. Therefore, the date of taking the oath does not impact the term of office of the judge and even more so does not mark the beginning of the judge’s term.

It is significant to point out that the Constitution does not contain a detailed regulation on how the selection is to be conducted, but rather determines the essential elements of the organization of the court. According to Article 197 of the Polish Constitution, the organization of the Tribunal, as well as the mode of previous proceedings, shall be specified by statute, in order to supplement the constitutional norms. By extension circumstantial regulations are placed in sub-constitutional acts. Turning to statutory regulation, from 9 September 1997 to 30 August 2015 one Act on the Constitutional Tribunal[[13]](#footnote-13) was in force in the Polish legal system, which was repealed. Currently, there are two statutes on the Constitutional Tribunal. The first one is focused on the organization and functioning of this court, while the second one regulates the status of judges[[14]](#footnote-14). From the perspective of the considerations being made, the latter is essential.

According to article 3 of the Act on the Status of Judges of Constitutional Tribunal, the sole formal criterion regarding the qualification a judge should possess to hold this position, is to excel in legal knowledge. Distinguishing oneself with legal knowledge is a premise of a non-focused and evaluative nature. However, it does not mean total arbitrariness. It should be seen as a preliminary criterion for determining the superiority of a given candidate over others of comparable status[[15]](#footnote-15). This requirement is justified by the specificity of the work of judges of the Tribunal, after all, they rule on fundamental issues – the constitutional foundations of the state and the rights and freedoms of the individual[[16]](#footnote-16).

 Moreover, potential judge is obligated to meet the requirements crucial to hold the office as a judge of the Supreme Court or the Supreme Administrative Court. Thus, this regulation introduces an obligation to apply the provisions contained in the act on Supreme Court[[17]](#footnote-17) or the act on Supreme Administrative Court[[18]](#footnote-18).

Article 30 of Act on the Supreme Court statutes that a candidate for a judge, not only is obligated to meet the obvious requirements regarding the granting of the status of judge[[19]](#footnote-19), but also must meet additional criteria. Firstly, there is an age criterion. A potential judge must be at least 40 years old. Secondly, they need to have immaculate character. This regulation creates a query because what does it mean to have immaculate character? The doctrine indicates that this concept is broader than impunity and the same time strongly evaluative[[20]](#footnote-20). What is more, the Supreme Administrative Court pointed out that immaculate character ought to be understood as characteristics such as nobility, righteousness, honesty. Therefore, those qualities value a person in the ethical and moral sphere[[21]](#footnote-21). It was also noted that the integrity of character should be verified by past conduct assessed based on specific facts. The assessment criteria should be universal and not corporate, ideological, or political[[22]](#footnote-22). Additionally, the Supreme Court indicated that it may also consist of appropriate proceedings in the marital relationship[[23]](#footnote-23).

In addition, the person shall have at least ten years of experience as a judge, prosecutor, the President of the Prosecutor General’s Office of the Republic of Poland, its vice-president, counselor or for the same period practiced the profession of attorney, legal counsel, or notary An exception applies to persons who hold the title of professor, or the degree of doctor habilitated in legal sciences and who have taken up teaching at a Polish university, the Polish Academy of Sciences, a research institute, or another scientific institution (article 30 §1 p 8 and § 2).

In the case of judges of the Supreme Administrative Court, the requirements are analogous, with one exception, namely, if a judge has been a judge of a voivodship administrative court for at least 3 years, they do not have to meet the requirement to be over 40 years old. Consequently, under these circumstances, a candidate for the Constitutional Tribunal may be a person who is 38 years old, since a judge of the voivodship administrative court can be appointed after the age of 35.

Lastly, in the context of the requirements concerning a judge of the Tribunal, mentioning article 371 the Act on the Supreme Court is required. According to this regulation a judge of the Supreme Court shall retire from the day they reach the age of 65. A person who has attained that age does not meet the criteria for holding the office of a Supreme Court judge. Pursuant to article three of Act on the status of judges of the Constitutional Tribunal, the provisions of the Act on the Supreme Court are directly applied. Thus, a judge who turned 65 years old could not become a Supreme Court judge, ergo could not be a judge of the Constitutional Court.

 The regulation of appointment of judges are also incorporated in the Rules of Procedure of the Sejm, according to article 2 § 2 p2 of Act of status of judges of Constitutional Tribunal. In accordance with this act, motions for judges’ selection by the Sejm may be submitted by the Presidium of the Sejm[[24]](#footnote-24) or by at least 50 deputies. Such a request must be submitted to the Marshal of the Sejm within 30 days before the end of the term of office, or within 21 days from the date of revocation or termination of the mandate, or as determined by the Marshal of the Sejm in the event of other circumstances necessitating the election. Proposals for the selection Sejm may not be put to the vote earlier than 7 days from the date of delivery of the press containing the candidatures to the deputies unless the Sejm decides otherwise. Proposals are addressed to the appropriate Sejm committee by the Marshal of the Sejm for an opinion. The opinion shall be submitted inwriting to the Marshal of the Sejm. In special cases, the Sejm may shorten the proceedings by proceeding to consider the motion (without sending it to the competent committee, within a shorter period). Individuals are elected by an absolute majority of votes.

**3. The improprieties in appointing judges of Constitutional Tribunal since 2015**

After discussing the regulations regarding appointment procedure, it is fundamental to move on to present the actions that have been undertaken improperly in past few years. At the end of 2015, there were five vacancies in the Constitutional Tribunal. The term of office of three judges was to end on 6 November and the term of office of two judges was to end on 2 and 8 December respectively. The Seventh-Term Sejm passed the Act of 25 June 2015 on the Constitutional Tribunal, which gave it the competence to select judges for all vacancies in 2015. The outgoing Sejm of the Seventh-Term selected five judges of the Constitutional Tribunal during its last session, on 8 October 2015. However, the term of Sejm ended on 11 November 2015, meaning it occurred before the expiry of the term of office of two judges of the Constitutional Tribunal.

It is necessary to analyze what was wrongly conducted in those actions. Firstly, the selection of Constitutional Tribunal judge should be made by the Sejm of the term of office during which the term of office of the outgoing judge ends, as it was stated above. Therefore, the first unconstitutional act is to select, as it were, two judges in advance, despite the fact that there are no vacancies for these posts. Nevertheless, selection of other three judges was correct, by extension their term began the day after the end of the outgoing judges’ term, that is on 7 November 2015.

In the political arena, there were allegations that the term of office of the judges selected on 8 November 2015 did not begin, due to the fact that the Polish President did not take the oath from them. However, they are inaccurate. The commencement of the term of office of Constitutional Tribunal’ s judge is not connected with the taking of the oath. On the other hand, taking the oath is necessary for judge to assume their duties. Such an omission by the Head of the State constitutes a breach of a constitutional obligation. However, this did not prevent the term of office of those judges from starting.

 Following the completion of the process of electing new representatives to parliament, the crisis related to the Constitutional Tribunal has deepened. Namely, on 25 November 2015 the new Sejm of the eighth term (with a different majority) adopted five resolutions on the “lack of legal force” of the resolutions on the selection of five judges of the Constitutional Tribunal made by the previous Sejm. Such action should be considered contrary to the Polish Constitution since the selection resolution does not allow changes to be made to its content or its nullity to be declared. There is no procedure or legal tool that would make such actions constitutional and legitimate.

Moreover, on 2 December 2015, the Sejm chose five new judges. The Polish President immediately took the oath from four of those judges on the night of 2 to 3 December 2015. Thus, for the 3 already filled positions in November 2015, additional persons were chosen, who are now called “doubles”[[25]](#footnote-25).

It is important to point out that one post became vacant on 2 December 2015, therefore it could be filled by person chosen by Eight-Term Sejm. The term of office of this judge started on 3 December. Another vacancy appeared on 8 December 2015 and on that day the President of Republic of Poland took the oath from the fifth person selected by the Eighth-Term Sejm.

Problems related to Constitutional Tribunal’ crisis not only concern the appointment of new judges to the posts, but also to the lack of appropriate qualifications required by the Act on the Constitutional Tribunal, the Act on the Supreme Court and Act on the Administrative Court. The three “doubles” were highly qualified lawyers, while the other two judges had legitimate concerns about their independence due to their links to the Law and Justice Party. Lack of high level of legal knowledge as well as concerns regarding their immaculate character were alleged towards those judges[[26]](#footnote-26).

Another accusation raised in the public debate was the lack of apoliticality of judges, which is one of the most important attributes of an ordinary judge, let alone a judge holding such a high and reputable position. The concerns related to their membership in Sejm as deputies. Doctrine states that the reasonable period between being a deputy in parliament and candidating to the Constitutional Tribunal is four years[[27]](#footnote-27). One judge was elected as a deputy in 2015, which indicates that they were not apolitical. Therefore, they did not meet the requirements for the office of judge of the Constitutional Tribunal.

Controversies over the legality of the office of judges of the Constitutional Tribunal arose again during the selection of two judges in 2019. The objections concerned their affiliation with the Law and Justice party as well as their repeated candidacy for the Sejm on behalf of the same party. One of them ran for the Sejm in the same year but failed to gain a mandate. However, contraindications to their appointment were also connected with their age. During selection procedure they were 67 years old, and as previously mentioned, a Constitutional Tribunal judge cannot be older than 65 years.

The last element of the Constitutional Tribunal crisis is the term of office of the President of the Tribunal. According to article 10 of the Act on the organization and procedure of proceedings in front of the Constitutional Tribunal the term lasts six years. The term of current President stared at 20 December 2016; therefore, it expired in 2022. However, this person still holds the office. Such action is a clear violation of the wording of the Polish Constitution.

**4. Conclusions**

The problems presented show the complexity of the dispute surrounding the Constitutional Tribunal. Many procedural requirements have been breached, including the selection of judges in advance, the appointment to filled posts, the infringement of criteria relating to age, apoliticality and independence of judges, and even the appointment of the President after the end of the term of office. Nowadays the legality of the Constitutional Court is questionable. The lack of knowledge as well as incompetence and connection with Law and Justice party are visible in numerous judgements given by Tribunal. The Constitutional Tribunal undermines the basis of Polish legal system and the role of Poland in European Union. Therefore, currently its authority is undermined and overcoming this crisis is aggregative.

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2. S. Soja, *The Constitutional Court-genesis and development institutions*, “Miscellanea” Studies in Legal Science 2016 no 6, p. 319. [↑](#footnote-ref-2)
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5. The Constitution of the Republic of Poland of 2 April 1997 (Dz. U. Polish Journal of Laws of 1997, no. 78 item 483, as amended). [↑](#footnote-ref-5)
6. Sejm is the lower house of the Polish parliament. [↑](#footnote-ref-6)
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15. M. Florczak-Wątor, M. Pach, *What needs to change in the procedure of election of Constitutional Tribunal justices in Poland?*, “State and Law” 2018 no. 5, p. 30. [↑](#footnote-ref-15)
16. A. Mączyński, J. Podkowik, *Constitution of the Republic…*, article 194. [↑](#footnote-ref-16)
17. Act of 8 December 2017 on the Supreme Court (Dz. U. Polish Journal of Laws of 2023, item1093, as amended). [↑](#footnote-ref-17)
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19. In order to become a judge in Poland, a candidate is required to hold only Polish citizenship and to enjoy full civil and public rights, to graduate from higher law studies in the Republic of Poland or to obtain a master’s degree or foreign law studies recognized in the Republic of Poland. Moreover, a person has not been legally convicted of an intentional offence prosecuted by public prosecution or an intentional tax offence graduated. A candidate must be fit, due to a state of health, to perform the duties of a judge and did not serve, work or cooperate with the state security authorities listed in Article 5 of the Act of 18 December 1998 on the Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation (Dz. U. Polish Journal of Laws of 2016 items 152, 178, 677, 749). [↑](#footnote-ref-19)
20. K. Szczucki, *Act on the Supreme Court. Commentary*, ed. II, Warsaw 2021, art. 30. [↑](#footnote-ref-20)
21. Judgment of the Supreme Administrative Court of 18 June 2001, II SA1610/00, LEX no 53475. [↑](#footnote-ref-21)
22. Judgment of the Supreme Administrative Court of 18 March 1998, II SA 42/98, LEX no. 654815. [↑](#footnote-ref-22)
23. Resolution of the Supreme Court of 23 November 2017, SNO 50/17, LEX no. 2434717. [↑](#footnote-ref-23)
24. The Presidium of the Sejm consists of the Marshal and Deputy Marshals (Article 11 of the Rules of Procedure of the Sejm). The Head of the Sejm Chancellery participates in the meetings of the Sejm Presidium in an advisory capacity. The Marshal of the Sejm may also invite other persons to a meeting of the Presidium. [↑](#footnote-ref-24)
25. Currently, two of the selected doubles had passed away and their places have been taken by other people, while one judge remains the same. Thus, the problem remains topical and unresolved. [↑](#footnote-ref-25)
26. The second person selected did not have a professorship or any academic record. Judicial competence was also questionable, as it adjudicated only at the Poznan District Court, and decisions were often effectively appealed, and errors of performance were repeatedly alleged. [↑](#footnote-ref-26)
27. M. Florczak-Wątor, M. Pach, *What needs to change in the…*, p. 33. [↑](#footnote-ref-27)