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"Both are valiant, both are brave,
Blessings on them both we crave."

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The War over the Constitutional Tribunal. The Dispute over the Validity of the Election of Constitutional Tribunal Judges in Poland in 2015

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Executive Summary

Since 2015, Poland has become one of the main arenas of conflict between democratically legitimized national authority and globalist political-institutional elites concentrated in Brussels, Luxembourg, and parts of Western capitals. This dispute is not merely about technical legal issues; it is fundamentally political and constitutional in nature. At stake is who exercises real power in the state—the sovereign, meaning the nation expressing its will through democratic elections, or the Brussels bureaucracy, which uses financial pressure and juristocracy—liberal judges from European courts and their law-making jurisprudence—to circumvent democracy and the treaties themselves.

Poland's Constitutional Tribunal has become a central target of this conflict because, as the guardian of the Constitution and the state's legal sovereignty, it blocked both earlier attempts by Brussels and Luxembourg to impose solutions on Poland that were contrary to the Polish Constitution, the will of the voters, and the European treaties, as well as the current unlawful actions of Donald Tusk's left-liberal government, installed with the active support of the Brussels bureaucracy. The CJEU judgment of 18 December 2025 represents a qualitative escalation of this conflict: for the first time, an EU court openly challenged the status of a constitutional body of a Member State, while additionally usurping the role of a "court of last resort" standing above national constitutions. The CJEU judgment constitutes not only a violation of the treaties and an undermining of the principles on which the

European Union is built, but is additionally based on false factual findings and erroneous interpretations of the Polish legal order.

The model applied to Poland is precedent-setting and exportable. Similar mechanisms of legal and political pressure are being used against Hungary, and the globalist opposition in Budapest openly announces its intention to implement the "Polish scenario." In practice, this scenario means undermining constitutional institutions, the instrumental use of European courts, and the full subordination of the state to the interests of the decision-making center in Brussels. This is accompanied by unlawful actions affecting tens of thousands of citizens, the failure to deliver on electoral promises, a collapse of public finances, and the breakdown of the healthcare system. The dispute over the Constitutional Tribunal is therefore not a local conflict, but part of a broader struggle over the future sovereignty of Central European states.

1. Introduction

Since 2015, Poland has become a battleground between globalists and national and conservative forces advocating the protection of state sovereignty, the defense of security, and the preservation of Christian national identity against mass migration—predominantly Islamic in character—and against woke ideology. Eight years of conservative governance constituted an attempt—partly successful—to reform the Polish state, to build the strongest land army in NATO in Europe in response to the Russian threat, and at the same time to resist the ideological, political, and economic pressures generated by left-liberal elites in Poland, Brussels, and Washington. By contrast, two years of the puppet-like, left-liberal minority government led by Donald Tusk—devoid of democratic legitimacy and installed in Poland through Brussels-based blackmail, manipulation, and electoral deception—have been marked by a period of blatant lawlessness and institutional destruction, involving violations of the law, the dismantling of reforms implemented by the previous conservative government, and the appropriation of independent constitutional institutions.

A key instrument used by globalist elites in their struggle against Poland during the eight years of conservative rule, and in the destruction of institutions under the current liberal government, has been juristocracy. This oligarchic system, which bypasses the democratic choices of the sovereign—the nation—operates through undemocratic and non-transparent European courts arrogating competences to themselves (the CJEU and the ECtHR), as well as through Polish courts that for decades have been dominated by left-wing and liberal judges, often rooted in the elites of the communist dictatorship prior to 1989.

One of the central points of contention, and a pretext for questioning the legitimacy of the Polish legal system, has been the dispute over the Constitutional Tribunal. During the eight years of conservative rule, the left-liberal opposition, the media, and—to some extent—EU central institutions challenged the legality of the election of three out of the fifteen judges of the Constitutional Tribunal. This was used as grounds to question the status of the Tribunal as such. After the left-liberal coalition led by Tusk took power in December 2023, this narrative became a pretext for refusing to recognize and publish the Tribunal's judgments. The government has refused to comply with final and universally binding judgments of the Constitutional Tribunal, invoking at the same time the Tribunal's own case law from 2015, as well as the jurisprudence of the CJEU and the ECtHR, from which, however, no such exemption from compliance can be derived.

The current attack by the left-liberal administration and Brussels-based globalists on the Constitutional Tribunal stems from the fact that this body has consistently blocked the unlawful actions of the Tusk government, which operates as a sui generis minority government. Although it holds a majority of more than half of the members of parliament, this is insufficient to override a presidential veto in the legislative process, which requires a three-fifths majority. As a result, the left-liberal coalition is unable to carry out fundamental changes to the state that must be enacted by statute without the consent of a President drawn from the conservative camp—first Andrzej Duda, and from August 2025, Karol Nawrocki. Consequently, the Tusk government initiated a process of unlawful changes carried out in defiance of statutory provisions, seizing control of and conducting purges in numerous state institutions, including public media, the prosecution service, and the courts. It refuses to accept inconvenient judgments or decisions of constitutional bodies independent of the government, including the Supreme Court, the National Broadcasting Council, and the National Council of the Judiciary.

In virtually every instance of unlawful action, the Constitutional Tribunal intervened by issuing judgments—preceded, where appropriate, by interim measures—at the request of authorized entities, siding with binding statutes and the Constitution. The Tribunal held, inter alia, that the current head of the prosecution service was appointed unlawfully, that placing public media companies into liquidation violated the law, as did the suspension, by a simple majority, of a constitutional body charged with safeguarding freedom of speech. The Tribunal found unlawful the shortening of the terms of office of court presidents and of judges serving as public prosecutors in judicial disciplinary proceedings. It invalidated the exclusion, by regulation, of the random, algorithmic system for the allocation of cases to judges. In each case, the government and subordinate institutions refused to recognize these rulings. In addition, in 2024 the parliament voted to cut funding for the remuneration of Constitutional Tribunal judges in order to weaken the institution.

These and numerous other actions against constitutional bodies became the subject of a notification submitted by the President of the Constitutional Tribunal concerning a constitutional coup d'état. In the assessment of the Tribunal's President, there is a justified suspicion that the Prime Minister, ministers, members of parliament, and senior officials and functionaries undertook actions aimed directly at violently changing the constitutional system of Poland (Article 127 of the Criminal Code), forcibly removing its constitutional organs, or exerting influence over their official activities through violence or unlawful threats (Article 128 of the Criminal Code).

In 2021, the Constitutional Tribunal also unequivocally upheld the principle of the supremacy of the Polish Constitution over European treaties and CJEU judgments, ruling that Article 19 TFEU was unconstitutional insofar as it served as the basis for CJEU judgments undermining the status of Polish constitutional organs. These rulings were issued in response to several judgments and interim measures of the CJEU that, ultra vires, questioned Polish reforms of the judicial system, in particular the structure of the Supreme Court, the shape of the constitutional body submitting motions to the President for judicial appointments, and, consequently, the status of judges appointed through that procedure. The 2021 judgments of the Constitutional Tribunal met with a sharp reaction from the European Commission, which, in retaliation, brought an action against the Tribunal before the CJEU, alleging that the Polish Constitutional Tribunal is not an independent court within the meaning of EU law and thereby challenging its status and jurisprudence. The Commission's arguments were almost

entirely endorsed in the Advocate General's opinion of March 2025, which described the Polish Tribunal's judgments affirming the supremacy of the Polish Constitution as a "rebellion."

In its judgment of 18 December 2025 in Case C-448/23, the CJEU endorsed the European Commission's position, striking at the sovereignty of a Member State and declaring itself the court of final word. The CJEU held that no one may review its judgments for potential overstepping of competences or encroachment upon the competences of the Member States.

In doing so, it carried out a direct and concrete interference in the constitutional order of the Polish state. Specifically, the CJEU accepted the Commission's position, finding that the appointment of three judges of the Polish Constitutional Tribunal in December 2015 violated fundamental rules governing appointment procedures in Poland. On this basis, the CJEU concluded that the Polish Constitutional Tribunal does not meet the requirements of an independent and impartial court established by law within the meaning of EU law. This ruling is not only ultra vires—having been issued without any basis in the Treaties and in violation of the principle of conferred competences—but is also based on false and erroneous legal assessments concerning the appointment of the three Constitutional Tribunal judges by the Polish Sejm on 2 December 2015.

As is evident, the allegedly unlawful election of three judges by the conservative majority in the autumn of 2015 is treated by the Tusk government and EU central institutions as a kind of "original sin" and as a pretext for refusing to recognize the Tribunal's judgments. Meanwhile, the entire narrative concerning the supposed "illegality" of their appointment, allegedly established by the Polish Constitutional Tribunal in 2015, has nothing to do with reality.

The dispute over the Constitutional Tribunal began with an attempt by liberal forces to preemptively fill five of the fifteen seats on the Tribunal with judges appointed for nine-year terms. Following their defeat in the presidential elections in the spring of 2015, liberals adopted the relevant statute and, at the final sitting of the Sejm—just before the parliamentary elections they were to lose, in which conservatives secured an absolute majority in both chambers—proceeded to elect the judges. Given doubts as to the constitutionality of these actions and the submission of a motion to the Constitutional Tribunal to review the relevant provisions, the President refrained from administering the oath to the individuals elected by the Sejm. At the same time, the term of the previous Sejm expired, a new term commenced, and, as the procedure for assuming office by the five judges had not been completed, the Sejm invoked the principle of discontinuity and restarted the procedure, electing five judges on 2 December.

Under the leadership of a President of the Tribunal sympathetic to liberal forces, the Constitutional Tribunal ruled on 3 and 9 December 2015 that the provisions permitting the preemptive election of two of the five judges by the previous Sejm were unconstitutional, while simultaneously holding that the provisions allowing for the election of the remaining three were constitutional. However, such a ruling—contrary to the repeated claims of liberal commentators—does not automatically mean that the election of the three judges by the new conservative majority was annulled. Crucially, the Sejm resolutions of 2 December 2015 electing Constitutional Tribunal judges were adopted on the basis of constitutional provisions and the Act on the Constitutional Tribunal, none of which were questioned by the Tribunal. The procedure for electing judges in the new term of the Sejm was undertaken because the procedure initiated in the previous term had not been completed, as a result of the operation of the principle of discontinuity.

Moreover, even if the Constitutional Tribunal had invalidated the provisions forming the basis of the resolutions on the election of judges—which it did not—under the Constitution, Constitutional Tribunal judgments do not operate retroactively but take effect at the earliest from the date of their publication. The consequences in the form of invalidating decisions issued on the basis of the challenged provisions are not automatic but require a procedure that does not exist with respect to Constitutional Tribunal judges, who had already been elected and sworn in on the date of publication of the judgment. The Tribunal is empowered to review the conformity of normative acts with higher-ranking acts, but it has no competence to review the constitutionality of individual acts, including constitutive acts such as resolutions on the election of judges. The Tribunal itself acknowledged this in January 2016 by refusing to examine the resolutions of 2 December 2015.

Consequently, the thesis of the invalidity of the election of three Constitutional Tribunal judges and the questioning of their status, the validity of the Tribunal's judgments, and the status of the Tribunal itself—repeated in the messaging of political globalists and in the case law of Polish and European courts—has no legal or factual basis whatsoever.

2. The Constitutional Position of the Constitutional Tribunal in Poland

The constitutional position of the Polish Constitutional Tribunal was shaped by the 1997 Constitution, drafted and adopted during the period of post-communist party rule[1]. The Tribunal is an institution endowed with significant authority, enabling it to block decisions of a democratically legitimized legislature as a "negative legislator." It also allows, in the course of reviewing the conformity of lower-ranking legal acts with higher-ranking ones, for a de facto interpretation of the entire legal order. If the Tribunal is captured by progressive circles as part of a neo-Marxist "march through the institutions," it becomes an institution uniquely suited to transforming the Polish political system into a juristocracy, thereby enabling a judicial reinterpretation of the legal and social order in line with woke ideology—contrary to the will of the sovereign, that is, the Nation.

Article 194 of the Constitution provides that the Constitutional Tribunal consists of 15 judges, individually elected by the Sejm for a nine-year term from among persons distinguished by their legal expertise. Re-election to the Tribunal is not permitted.

The Constitutional Tribunal is a constitutional body established to exercise judicial review of the constitutionality of law. In particular, the Tribunal adjudicates on the conformity of: (i) statutes and international agreements with the Constitution; (ii) statutes with ratified international agreements whose ratification required prior consent expressed in a statute; and (iii) legal provisions issued by central state authorities with the Constitution, ratified international agreements, and statutes. In addition, it rules on the conformity with the Constitution of the aims or activities of political parties, examines constitutional complaints concerning violations of constitutional freedoms or rights by a normative act forming the basis of a final decision in an individual case, and considers legal questions referred by courts regarding the conformity of a normative act with the Constitution, a ratified international agreement, or a statute. Its competences also include resolving disputes over authority between central constitutional organs of the state and determining the existence of a temporary impediment to the exercise of office by the President of the Republic of Poland, in the manner provided for in the Constitution.

[1] https://www.sejm.gov.pl/prawo/konst/polski/kon1.htm (accessed: 18 December 2025).

The Constitutional Tribunal is sometimes described as a "third chamber of parliament," acting as a negative legislator. It is also a court of last word, and its decisions are final, unlike under the system in force between 1991 and 1997, when Tribunal judgments could be overridden by a two-thirds majority—equivalent to the majority required to amend the Constitution. The lengthy nine-year term is intended to help preserve political pluralism within the Tribunal's composition; however, under certain configurations, it may also result in a situation in which activist, or even overtly political, judges are able to block the actions of a parliamentary majority. Such a possibility arose in 2015.

The liberal parliamentary majority governing since 2007, following its defeat in the presidential elections in May 2015 and facing an impending loss in the parliamentary elections later that year, decided to exploit the coincidence of the expiration of the terms of five Constitutional Tribunal judges elected in 2006 during a two-year period of conservative rule. In this way, liberals sought to secure for several years a complete majority of all fifteen judges aligned with their camp, thereby ensuring the ability to block fundamental changes announced by the conservative opposition poised to assume power. To this end, on 25 June 2015 an Act on the Constitutional Tribunal was adopted, enabling the "preemptive" election of all five judges, which marked the beginning of the dispute over the composition of the Tribunal[2].

The constitutional legislator did not define in detail the procedures for selecting judges of the Constitutional Tribunal, indicating only that they are to be individually elected by the Sejm for nine years from among persons distinguished by their legal expertise (Article 194(1) of the Constitution). These matters were regulated by statute or by the Rules of Procedure of the Sejm, including provisions specifying the entities authorized to nominate candidates for Constitutional Tribunal judges and the deadlines for submitting such nominations. Pursuant to Article 30 of the Rules of Procedure of the Sejm, motions for election to the office of judge of the Constitutional Tribunal may be submitted by the Presidium of the Sejm or by at least fifty members of parliament (section 1) and must be filed with the Marshal of the Sejm thirty days prior to the expiration of a judge's term (section 3).

The Act on the Constitutional Tribunal of 25 June 2015, adopted after the Tusk party's defeat in the presidential elections and at the end of Civic Platform's term in office, regulated this matter in a fundamentally different way. Article 19 provided that a motion nominating a candidate for judge of the Constitutional Tribunal had to be submitted to the Marshal of the Sejm no later than three months before the expiration of the judge's term. However, Article 137, contained in the transitional provisions, introduced an incidental exception to this rule. Specifically, in the case of judges whose terms expired in 2015, the deadline for submitting a nomination was set at thirty days from the date the Act entered into force. This provision was designed to enable the outgoing Sejm with a liberal majority to elect judges whose terms were set to expire in November and December 2015, that is, after the parliamentary elections. It is at this point that we reach the core of the "war over the Constitutional Tribunal," which began in 2015, triggered by the attempt of the outgoing liberal majority to elect five judges in order to secure control over this institution.

[2] https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=wdu20150001064 (accessed: 18 December 2025).

3. The Cause of the Conflict: the Failed Attempt by Liberals Losing Power in 2015 to Take Over the Constitutional Tribunal

To understand the essence of the dispute over the Constitutional Tribunal, it is necessary to recall the timeline of the presidential and parliamentary elections which, in 2015, conferred full democratic legitimacy upon conservatives to exercise power.

By a decision of the Marshal of the Sejm announced on 4 February 2015, the election of the President of the Republic of Poland was scheduled for 10 May 2015, with a second round held on 24 May. In the runoff, the incumbent liberal President, Bronisław Komorowski—contrary to all early campaign polling predicting a crushing defeat of the conservative candidate—lost to the Law and Justice (PiS) candidate, Andrzej Duda. The newly elected President assumed office on 6 August 2015. At the same time, parliamentary elections were forthcoming in the autumn.

It was precisely after the presidential elections that work accelerated sharply on the draft Act on the Constitutional Tribunal, originally submitted by President Bronisław Komorowski in 2013[3]. With the votes of the then-liberal governing coalition, the Act was adopted on 25 June 2015 and signed by President Komorowski on 21 July 2015, two weeks before the end of his term of office. Published in the Journal of Laws on 30 July 2015, it entered into force on 30 August 2015. It should be recalled that the Act contained an incidental provision pursuant to which, with respect to all judges whose terms expired in 2015, candidates were to be nominated within 30 days from the date the Act entered into force, i.e., by the end of August.

This amounted to a hurried "rush on the Tribunal" in anticipation of the impending parliamentary elections. After having lost the presidential election, President Bronisław Komorowski, on 17 July 2015, ordered parliamentary elections to be held on 25 October 2015. Consequently, the regulation adopted in June by the liberal majority deprived the newly elected Sejm of the ability to elect judges whose terms would expire only after the elections. Relying on these provisions—which were subsequently challenged before the Constitutional Tribunal as unconstitutional—the liberal majority elected five Constitutional Tribunal judges whose terms expired in November and December 2015, during the final Sejm sitting held on 8–9 October 2015. However, due to doubts as to the constitutionality of the provisions forming the basis of these elections, the President refrained from administering the oath to those elected. As a result, the procedure for formally appointing the individuals elected by the Sejm as Constitutional Tribunal judges was not completed, having been suspended pending the resolution of those doubts.
On 25 October 2015, parliamentary elections were held and won by Law and Justice, which secured an absolute majority in both chambers of Parliament—the Sejm and the Senate. Given that the office of President was also held by Andrzej Duda from the same political camp, it may be concluded that PiS received a very strong popular mandate and possessed all the legal instruments necessary to implement fundamental systemic changes at the statutory level.
The authority to adjudicate on the conformity of statutes with the Constitution lies with the Constitutional Tribunal, whose judgments are universally binding and final (Article 190(1) of the Constitution). The plan by the outgoing liberal majority to elect five judges to nine-year terms—at a time when the remaining judges had likewise been elected by left-wing and liberal forces—was premised on the assumption that the Tribunal would block the legislative actions of the new

[3] https://www.sejm.gov.pl/Sejm7.nsf/PrzebiegProc.xsp?nr=1590 (accessed: 18 December 2025).

authorities through dynamic and expansive interpretation. This was thus intended as a classic juristocratic strategy: regardless of who wins elections and forms the government (the first and second branches), judges (the third branch) become the ultimate authority, even in defiance of the literal wording of the Constitution.

Pursuant to Article 98(1) of the Constitution of the Republic of Poland, the term of office of the Sejm begins on the day of its first sitting and lasts four years. The President convenes the first sitting of the newly elected Sejm within 30 days of the elections, which means that, at the earliest, the term of the new, eighth Sejm with a conservative majority could have commenced on 26 October 2015, and at the latest on 24 November 2015. Ultimately, the first sitting of the Sejm of the eighth term was held on 12 November 2015, marking the beginning of the term of the newly elected Sejm.

4. The Election of Five Judges by Conservatives in 2015

However, the Sejm of the new term, with a conservative majority, restarted the procedure for the election of five judges from the beginning and finalized it with the election and the swearing-in by the President of five Constitutional Tribunal judges in early December 2015.

In public discourse, including in certain judgments of Polish courts and even in the judgment of the European Court of Human Rights in the case of Xero Flor v. Poland of 7 May 2021, assertions have appeared claiming that in 2015 the Polish Constitutional Tribunal declared the election of three Constitutional Tribunal judges by the conservative majority to be "invalid." This narrative subsequently served as the basis for labeling those judges as "neo-judges," for questioning the validity of judgments issued with their participation, and for challenging the status of the Constitutional Tribunal itself. Similar theses were set out in the CJEU judgment of 18 December 2025. Meanwhile, the judgments of the Constitutional Tribunal of 3 and 9 December 2015 contain no grounds whatsoever for drawing such conclusions.

Before the issuance of the two Constitutional Tribunal judgments on 3 and 9 December 2015, the Sejm in its new term, with a conservative majority, undertook actions culminating in the election on 2 December of five new Constitutional Tribunal judges.

On 19 November 2015, the Sejm, already with a conservative majority, adopted an act amending the Act on the Constitutional Tribunal[4]. This amendment introduced a three-year term of office for the President and Vice-President of the Constitutional Tribunal (previously they served until the end of their nine-year terms as judges) and an incidental provision establishing a seven-day period for nominating candidates for judges whose terms expired in 2015. The latter regulation was introduced with the intention of re-electing candidates for Constitutional Tribunal judges in place of the five candidates elected in October by the Sejm of the previous term who had not been sworn in by the President before the end of that term. The Act of 19 November was challenged before the Constitutional Tribunal, inter alia, by representatives of the liberal opposition, and— as discussed below—on 9 December the Tribunal issued a judgment declaring its key provisions unconstitutional[5].

[4] https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20150001928 (accessed: 18 December 2025).
[5] https://ipo.trybunal.gov.pl/ipo/Sprawa?cid=2&dokument=13050&sprawa=16432 (accessed: 18 December 2025).

On 25 November 2015, the Sejm adopted resolutions requesting the President to refrain from administering the oath to the five judges elected in the previous term of the Sejm, taking the view that the relevant resolutions on their election lacked legal force.

Such wording could indeed give rise to doubts. In reality, however, the resolution in this respect produced no legal effects, as the Constitutional Tribunal itself subsequently stated, and had merely the significance of a political declaration. In fact, the legally relevant basis for the Sejm's actions was the principle of discontinuity, understood as a rule of constitutional custom. Specifically, the election of Constitutional Tribunal judges carried out in October 2015 by the Sejm of the previous term remained incomplete due to the failure to administer the oath to the elected candidates. Under the principle of discontinuity, this necessitated the initiation of a new procedure. Accordingly, the Sejm determined that the principle of discontinuity—pursuant to which procedures initiated in a previous term and not completed are not continued but must be commenced anew—also applied to the procedure for the election of Constitutional Tribunal judges.

At the same time, on 26 November, the Rules of Procedure of the Sejm were amended. The amendment concerned the regulation of deadlines for submitting to the Marshal of the Sejm motions for the election or appointment by the Sejm of persons to state offices, including judges of the Constitutional Tribunal. The Rules provided that, in the case of term-limited bodies (such as the Constitutional Tribunal), the deadline for presenting candidates was thirty days before the expiration of the term, but they did not regulate extraordinary situations. The amendment introduced a provision under which, in cases other than the typical, regulated ones, the deadline would be determined by the Marshal of the Sejm[6].

It should also be recalled that earlier practice permitted deviations from deadlines, in the sense that candidates for Constitutional Tribunal judges were nominated later than the statutory deadlines would suggest. This occurred, for example, where candidates were nominated within the prescribed period, but the Sejm did not elect any of them. In such cases, the Constitutional Tribunal operated with an incomplete composition, and the election took place later—effectively after the deadlines for submitting nominations had already passed. The amendment to the Rules of Procedure thus served to fill a legal gap.

On 30 November, the Constitutional Tribunal issued an interim order securing the motion filed by a group of deputies in case file K 34/15, concerning the constitutionality of the provisions of the Act of 25 June on the Constitutional Tribunal, by calling upon the Sejm to refrain from taking actions aimed at electing Constitutional Tribunal judges until the Tribunal delivered a final judgment in the case[7]. Nevertheless, the Sejm continued its actions aimed at electing new Constitutional Tribunal judges. It should be noted that the basis for the Sejm's actions was not any of the challenged provisions of the Act of 25 June or of 19 November, but rather the Rules of Procedure of the Sejm, which were not challenged in any way. Consequently, the interim order (as well as the subsequent judgment in that case) could not affect the Sejm's actions.

Ultimately, on 2 December 2015, the Sejm of the new term elected five Constitutional Tribunal judges, and the President promptly administered the oath to them.

[6] https://www.sejm.gov.pl/Sejm8.nsf/PrzebiegProc.xsp?nr=41 (accessed: 18 December 2025).
[7] https://ipo.trybunal.gov.pl/ipo/Sprawa?&pokaz=dokumenty&sygnatura=K%2034/15 (accessed: 18 December 2025).

5. Judgments of the Constitutional Tribunal of 3 and 9 December 2015

On 3 December 2015, the Constitutional Tribunal (K 34/15) [8] assessed the conformity with the Constitution of a set of provisions adopted by the liberal majority in the Act on the Constitutional Tribunal of 25 June 2015. In the relevant part, the Tribunal held that Article 137 of the Act, which provided that in the case of Constitutional Tribunal judges whose terms expired in 2015 the deadline for submitting a motion to the Marshal of the Sejm to nominate a candidate for judge of the Tribunal was 30 days from the date the Act entered into force—thus allowing the "preemptive" election of all five judges whose terms ended in 2015—was unconstitutional insofar as it concerned judges whose terms expired respectively on 2 and 8 December 2015. In the Tribunal's view, the "preemptive" election violated the principles of a democratic state governed by the rule of law because it limited the constitutional competences of the future Sejm and, consequently, the rights of the sovereign, whom the Sejm represents.

A breach of this principle entails disregarding the will of the electorate and appointing members of a constitutional authority by a parliament whose mandate is no longer valid at the time of filling the positions. This constitutes a violation of the principle of representative government derived from Article 4 of the Constitution of the Republic of Poland and leads to a situation in which a former parliamentary majority influences the composition of a key constitutional body in a manner contrary to the current democratic choice.

Accordingly, the Constitutional Tribunal emphasized that each Sejm should have the opportunity to elect Constitutional Tribunal judges whose terms fall within the duration of its own term of office, as required by the principle of the balance of powers and the protection of democratic mechanisms.

This ruling therefore undermined the constitutionality of the provisions that constituted the basis for the "preemptive" election of two judges carried out by the liberal majority in October, at the final sitting of the outgoing Sejm. At the same time, the Tribunal found the provisions of the Act constitutional insofar as they formed the basis for the election, at that time, of the remaining three judges. The Tribunal thus adopted the criterion of the duration of the Sejm's term and the principle that judicial positions becoming vacant during a given parliamentary term should be filled by the Sejm of that term. Since the term of the Sejm began on 12 November and the terms of three judges expired on 6 November, the provision allowing their election by the Sejm of the previous term was deemed constitutional. It is worth noting, incidentally, that although the President convened the first sitting of the new Sejm (thereby determining the commencement of its term and the end of the previous one) on 12 November, he could have done so as early as 26 October. Consequently, the terms of all five judges could have expired during the term of the new Sejm.

What is crucial, however, is that—contrary to repeatedly asserted false claims—the judgment of the Constitutional Tribunal of 3 December 2015 did not state (nor could it have stated) the invalidity of the election by the new conservative majority of three Constitutional Tribunal judges whose terms expired at the end of the previous Sejm's term.

Equally unfounded is the thesis that in its judgment of 3 December 2015 the Constitutional Tribunal determined that the three judges elected by the Sejm of the seventh term with a liberal majority

[8] https://ipo.trybunal.gov.pl/ipo/Sprawa?&pokaz=dokumenty&sygnatura=K%2034/15 (accessed: 18 December 2025).

were elected correctly. The Tribunal merely held that the provision of the then-applicable Act on the Constitutional Tribunal (Article 137), which constituted the formal statutory basis for the election of those judges, was consistent with the Constitution. This does not mean that the election could not have been affected by a legal defect other than reliance on an unconstitutional statutory basis. The Tribunal did not examine the entire election process, in particular the stage of nominating candidates for Constitutional Tribunal judges, but assessed only the permissibility of electing judges by the Sejm during the specified period. The frequently cited fragment of the reasoning stating that "no constitutional doubts arise with respect to the legal basis for the election of three Tribunal judges to replace judges whose terms expired on 6 November 2015" and that "there are no obstacles to finalizing the procedure by administering the oath before the President to the persons elected to the office of judge of the Tribunal" constitutes merely obiter dictum (and, moreover, an incorrect one). The binding force of a Constitutional Tribunal judgment is limited to its operative part, and the attributes of finality and universally binding force do not extend to the reasoning[9]. Nothing in the operative part of the judgment goes beyond the statement that Article 137 of the Act on the Constitutional Tribunal, insofar as it served as the basis for the election of three judges whose terms expired on 6 November 2015, is consistent with the Constitution (Article 194(1)); it does not establish that any person elected by the Sejm of the seventh term with a liberal majority is a judge of the Constitutional Tribunal, nor that such election was valid.

In its judgment of 9 December 2015 (K 35/15) [10], the Constitutional Tribunal examined Article 137a added by the Act of 19 November 2015, which provided that in the case of judges whose terms expired in 2015 the deadline for submitting such a nomination was seven days from the date the provision entered into force. The Tribunal declared this provision unconstitutional insofar as it concerned the nomination of a candidate for judge of the Constitutional Tribunal to replace a judge whose term expired on 6 November 2015.

These judgments therefore did not concern—and, given the Tribunal's competences, could not concern—the validity or invalidity of the election of judges, but rather the constitutionality of statutory provisions, which in any event did not constitute the formal basis for the election of Constitutional Tribunal judges carried out by the Sejm on 2 December 2015.

The procedural basis for that election was Article 30 of the Rules of Procedure of the Sejm (as amended on 26 November). The substantive legal basis of the resolutions (as expressly indicated therein) was Article 194(1) of the Constitution, pursuant to which the Constitutional Tribunal consists of 15 judges, individually elected by the Sejm for nine years from among persons distinguished by their legal expertise, with re-election being inadmissible, as well as Article 17(2) of the Act of 25 June 2015 on the Constitutional Tribunal, under which judges of the Tribunal are individually elected by the Sejm for nine-year terms by an absolute majority of votes in the presence of at least half of the statutory number of deputies, with re-election being inadmissible. This provision was in force at the time the resolutions were adopted and was never challenged before the Constitutional Tribunal.

[9] L. Garlicki, "Article 190," in: *The Constitution of the Republic of Poland. Commentary*, ed. L. Garlicki (Warsaw: Sejm Publishing House, 2007), vol. 5, para. 6.
[10] https://ipo.trybunal.gov.pl/ipo/Sprawa?&pokaz=dokumenty&sygnatura=K%2035/15 (accessed: 18 December 2025).

Accordingly, the judgments of 3 and 9 December did not have as their subject either the acts of election of judges carried out on 2 December or the provisions constituting the basis for those acts. The scope of the constitutional review did not encompass the provisions forming the basis for the Sejm's decisions, which is decisive for concluding that the Constitutional Tribunal's judgments could not in any way affect the validity of the acts electing the five judges. This conclusion is not altered by the fact that, in its reasoning—which lacks binding force, unlike the operative part of the judgment—the Tribunal formulated assessments exceeding the scope of the matters adjudicated.

Judgments of the Constitutional Tribunal declaring statutory provisions unconstitutional neither operate retroactively (they enter into force on the date of publication or later—Article 190(3) of the Constitution) nor automatically invalidate individual and concrete acts adopted earlier on their basis. This issue is expressly regulated by the Constitution, which provides that a judgment of the Constitutional Tribunal declaring a normative act unconstitutional, inconsistent with an international agreement, or inconsistent with a statute, on the basis of which a final judicial decision, final administrative decision, or other final ruling was issued, constitutes grounds for reopening proceedings, setting aside the decision, or otherwise revising the ruling under the principles and procedures specified in the provisions governing the given proceedings (Article 190(4)). In the case of the election carried out on 2 December, it should be recalled that no issue arises regarding the unconstitutionality of the provisions forming the basis of the election, as those provisions were never challenged. Even if they had been, there is no applicable procedure under which, pursuant to Article 190(4) of the Constitution, the decisions of the Sejm and the President could be set aside. It appears that, if such a procedure were to exist, it would require an explicit constitutional basis[11].

The judgments of 3 and 9 December were published with a delay of several days—on 16 and 18 December respectively—due to the clarification of legal doubts concerning their legality.

The resolutions of 2 December 2015 on the appointment of Constitutional Tribunal judges were themselves challenged before the Tribunal by a group of Civic Platform deputies. In its decision of 7 January 2016, the Tribunal discontinued the proceedings, finding that it lacked competence to adjudicate individual and concrete acts[12], which confirms the obvious conclusion that there can be no talk of the "invalidity" of the election of Constitutional Tribunal judges carried out on 2 December 2015.

It should also be noted that the provisions of the Act of 25 June 2015 allowing for the "preemptive" election of Constitutional Tribunal judges also violated the so-called principle of legislative silence, derived by the Constitutional Tribunal from the principle of a democratic state governed by the rule of law enshrined in Article 2 of the Constitution. They introduced significant changes to the rules governing the election of members of the Constitutional Tribunal only two or three months before the expiration of their terms. In the context of parliamentary elections, the Constitutional Tribunal has held that the requirement of legislative silence should amount to at least six months, which constitutes a well-established standard in Polish constitutional jurisprudence. This principle can likewise be applied to other areas, including the election of Constitutional Tribunal judges.

[11] Mariusz Muszyński, Consilium 20 Iuridicum 7, 2023, pp. 22-26.
[12] https://ipo.trybunal.gov.pl/ipo/Sprawa?cid=1&dokument=13241&sprawa=16536 (accessed: 18 December 2025).

6. Significance of the Principle of Discontinuation

It is worth considering more broadly the principle of discontinuation and the correctness of its application to the nomination procedure for Constitutional Tribunal judges[13].

The principle of discontinuation obviously applies to processes that have not been completed. The key issue from the standpoint of the legal argument concerning the status of the three contested judges is therefore the answer to the question whether, in the case at hand, the process of creating Constitutional Tribunal judges had been completed or not. In other words, is the act of electing a Constitutional Tribunal judge completed at the moment of the vote in the Sejm, or only at the moment the oath is taken before the President. If one assumes that completion of the act of electing a judge occurs through the oath, then the second issue is whether the principle of discontinuation applies to such an "unfinished" act.

Article 194(1) of the Constitution of the Republic of Poland provides that Constitutional Tribunal judges are elected by the Sejm. By contrast, pursuant to Article 21(1) of the Act of 25 June 2015, which elaborates this procedure, a person elected to the office of a judge of the Constitutional Tribunal takes an oath before the President of the Republic of Poland.

This gives rise to the question whether election by the Sejm, understood as the act of passing the resolution by vote, is sufficient for a person to become a judge of the Tribunal, or whether the process is completed only at the moment the oath is taken and thus constitutes a complex, multi-stage procedure encompassing the nomination of candidates, their review, the vote, and the oath.

The Act of 25 June 2015 on the Constitutional Tribunal provides important guidance in this respect, because it not only required the oath to be taken, but also introduced the concept of a "person elected to the office of a judge of the Tribunal," who is to take the oath before the President. At the same time, refusal to take the oath was equivalent to relinquishing the office of a judge of the Tribunal (Article 21(2)). This provision might suggest that a person elected to the office of a judge is already, at the moment the Sejm adopts the resolution, regarded as a judge of the Constitutional Tribunal. Refusal to take the oath is treated as a relinquishment of office, which would suggest that the person had already been elected to that office earlier. On the other hand, it should be noted that the obligation to take the oath is imposed not on a judge, but on a person elected to the office of a judge.

Under the principle of the rational legislator, since the legislator uses the term "person elected to the office of a judge of the Tribunal," rather than "judge of the Tribunal," this indicates a difference in status. A contrario, this is confirmed by other provisions concerning similar bodies, for example the Act on the Supreme Audit Office (NIK), which provides that the President of the Supreme Audit Office, before commencing the performance of duties, takes an oath before the Sejm. In that case, this means that the person is already the President of the Supreme Audit Office, and the oath is merely a condition for beginning the performance of duties.

[13] For an extensive discussion of this issue, see: Bogumił Szmulik, Jarosław Szymanek, Legal dispute over the Constitutional Court in Poland, Warszawa 2020.

Moreover, it is worth noting that a Constitutional Tribunal judge's term begins not at the moment of election, but only on the day the oath is taken. This is significant because the 2015 Act expressly allowed the election of persons to the office of a Tribunal judge before the end of the term of the judge they were to replace. Consequently, it cannot be assumed that both the person currently holding the office and the person elected to replace that person are simultaneously judges of the Constitutional Tribunal. If that were so, the Tribunal would have more than 15 members, which would be inconsistent with Article 194 of the Constitution, which unequivocally sets the Tribunal's composition at 15 judges.

It must be emphasized clearly that, especially under the Act of 25 June 2015, one cannot adopt an interpretation under which election to the office of a judge of the Constitutional Tribunal occurs at the moment of the Sejm vote as the final act in the process of creating the officeholder. In the factual situation at the time, such an interpretation would lead to an obvious contradiction with the Constitution, resulting in a composition of the Constitutional Tribunal of 20 rather than 15 judges, which would directly violate Article 194 of the Constitution. Even apart from the specific 2015 context, adopting the principle that a person becomes a judge of the Constitutional Tribunal at the moment of election by the Sejm would, due to the rules on submitting candidates and the practice of applying them, inherently lead to violations of Article 194 of the Constitution, which sets the maximum number of Tribunal judges at 15. Accordingly, that interpretation not only in the situation at the time but also in the future could regularly generate contradictions with the constitutional norm, which unequivocally confirms its incorrectness. Under the principle of systemic interpretation, an interpretation cannot lead to a contradiction with higher-order norms, especially constitutional norms. Therefore, an interpretation of this kind is entirely inadmissible.

A linguistic interpretation, despite some ambiguity, indicates that a person elected to the office of a judge is not yet a judge of the Tribunal, which means that taking the oath is a necessary condition for completing the entire procedure of electing a judge. Additional systemic considerations point in the same direction. Consequently, the oath is not declaratory but constitutive, meaning that only its taking completes the process of filling the office of a judge of the Constitutional Tribunal.

This interpretation is confirmed by the reasoning of the already discussed judgment of 3 December 2015 (K 34/15), which stated that, with respect to the persons elected "in advance" by the liberal majority of the Sejm of the 7th term, the judicial offices had not yet been filled at the time the judgment was issued because the final legally significant act (i.e., the oath of the Tribunal judges before the President) had not been completed. This is a logical consequence of the premise adopted by the Tribunal in that judgment, according to which "[t]he oath taken before the President pursuant to Article 21(1) of the Act on the Constitutional Tribunal [the 2015 Act] is not merely a solemn ceremony of a symbolic character, referring to the traditional inauguration of the period of office. This event serves two important functions. First, it is a public commitment by the judge to act in accordance with the wording of the oath taken. In this way, the judge declares personal responsibility for impartial and diligent performance of duties in accordance with one's own conscience and with respect for the dignity of the office held. Second, taking the oath allows the judge to commence office, that is, to perform the mandate entrusted to him. These two important aspects of the oath demonstrate that it is not merely a solemn ceremony, but an event producing specific legal effects. For that reason, the President's role in receiving the oath from Constitutional

Tribunal judges elected by the Sejm should be located in the sphere of the Head of State's exercise of powers."

These arguments imply the soundness of the thesis that the procedure for filling a judge's office is not completed at the moment of election by the Sejm, but only upon taking the oath before the President.

Next, it is necessary to assess the President's decision to refrain from receiving the oath. This raises the question whether the President violated the Constitution by not promptly receiving the oath from the five persons elected by liberal Sejm majority to the office of a judge of the Constitutional Tribunal.

This is suggested by Article 21 of the Act of 25 June 2015, which unequivocally provides that the oath is taken by a person elected to the office of a judge. It follows that the body receiving the oath should not create any obstacles or complications preventing it from being taken. Moreover, that provision states that refusal to take the oath means relinquishment of the office of a judge, which suggests that such a decision must result from the will of the person elected, rather than being the consequence of external factors, such as the President's refusal to receive the oath. In light of this regulation, this could mean that delaying the receipt of the oath by the President could raise doubts as to the compliance of such conduct with the statute and the Constitution.

It is also worth recalling a constitutional precedent in which the President of the Republic refrained from receiving an oath where doubts arose as to the correctness of the election of a judge, even understood very broadly. Such a situation occurred in December 2006, when Lidia Bagińska, elected as a judge of the Constitutional Tribunal, was not immediately sworn in by the President due not to possible procedural defects, but to doubts concerning her earlier activity as a receiver. The President's action was not criticized at the time, because it stemmed from the need to assess whether abuse had occurred in the election process. Ultimately, after taking the oath, Judge Lidia Bagińska resigned from the position; however, the key aspect of this precedent is the fact that the President, having doubts, decided to postpone the oath. This confirmed that receiving the oath by the President is not merely a formality, but constitutes an essential element of the process of assuming the office of a judge of the Constitutional Tribunal. It should be noted that this precedent occurred under the legal framework of the 1997 Act on the Constitutional Tribunal; however, in the relevant respect, the wording of the regulation was analogous[14].

There is no doubt that the President's decision to refrain from receiving the oath constitutes the only practical method enabling the resolution of potential doubts concerning the correctness of the election of a candidate to the office of judge of the Constitutional Tribunal. Existing practice demonstrates that, where doubts arise as to the legality of a judge's election, the President's decision to withhold the oath does not constitute a violation of the law, but rather serves as a mechanism allowing for verification of the conformity of the election with legal provisions and with the principles of a democratic state governed by the rule of law. This is particularly significant in light

[14] See: art 5 ust. 5 i 6 ustawy z dnia 1 sierpnia 1997 r. o Trybunale Konstytucyjnym (Dz. U. z 1997 r. Nr 102, poz. 643 z późn. zm.)
https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU19971020643/U/D19970643Lj.pdf (accessed: 18 December 2025).

of the already mentioned Article 190(4) of the Constitution. That provision governs the effects of a Constitutional Tribunal judgment declaring a normative act unconstitutional on the validity of acts applying the law that were previously issued on its basis. The Constitution provides that such a ruling constitutes grounds for reopening proceedings, setting aside a decision, or otherwise revising a ruling, under the principles and procedures specified in the provisions governing the relevant proceedings. In the case of a finding of unconstitutionality of provisions forming the basis for the election of judges, however, no such procedure exists. Consequently, refusal to administer the oath appears to be the only available substitute for such a procedure, allowing for the protection of the rule of law.

The Constitutional Tribunal took a different position in its judgment of 3 December 2015, holding that Article 21(1) of the Act on the Constitutional Tribunal of 25 June 2015, if interpreted in a manner other than as imposing an obligation on the President of the Republic of Poland to immediately receive the oath from a judge of the Tribunal elected by the Sejm, is inconsistent with Article 194(1) of the Constitution. However, this judgment was delivered only after the Sejm had resolved the scope of application of the principle of discontinuation, elected new candidates, and the President had received the oaths from the newly elected candidates for judges of the Constitutional Tribunal.

In its more recent case law, the Constitutional Tribunal has departed from the view of an unconditional obligation of the President of the Republic of Poland to receive the oath from a person elected to the office of judge of the Constitutional Tribunal. In its judgment of 29 July 2025 (case no. Kp 3/24), the Tribunal held that it is not possible to assume that the President, as the guardian of the Constitution, may receive the oath from a person elected to the office of judge of the Constitutional Tribunal in a situation where the lawfulness of that election raises justified doubts. In such a case, according to the Tribunal, the proper conduct of the guardian of the Constitution is to refrain from receiving the oath until those doubts have been clarified. In the practical functioning of the state, it cannot be excluded that extreme situations of an extraordinary nature may arise, which objectively impose on the President an obligation to protect fundamental constitutional values. These values include, in particular, the principle of democracy, the principle of the rule of law, the principle of legality, the principle of the separation of powers, as well as the independence of the Constitutional Tribunal, the independence of its judges, and the proper composition of its bench, which in such circumstances may justify refraining from receiving the oath.

Having resolved these preliminary issues, it is possible to reconstruct the argumentation justifying the application of the principle of discontinuation to an unfinished nomination procedure for a Constitutional Tribunal judge.

The principle of discontinuation is not expressly formulated in any constitutional provision; however, it is recognized in practice by the Sejm, the Senate, and the Constitutional Tribunal. The position of these bodies within the constitutional system of Poland indicates that any modification of this principle could occur only by statute or through appropriate provisions in the Rules of Procedure of the Sejm and the Senate.

Under the principle of discontinuation, the expiration of the term of office of the Sejm and the Senate results in the termination of all unfinished matters that were the subject of parliamentary proceedings. This means that all motions, submissions, and other matters in respect of which parliamentary procedures were not completed are deemed definitively terminated in the sense that

they did not produce legal effects. The subsequent parliament, having obtained new democratic legitimacy to act, may not continue interrupted work at the stage at which it was halted; it may, however, initiate such work anew if it considers this appropriate.

The principle of discontinuation also applies to proceedings initiated during a given term by parliamentary bodies and members of parliament, even if they do not directly concern the legislative process.

The Constitutional Tribunal accords this principle a broad scope, extending beyond parliamentary work as such. The Tribunal has held that the principle also affects proceedings pending before the Constitutional Tribunal initiated by the Sejm or the Senate, which suggests that its scope also encompasses other constitutional bodies, such as the President of the Republic of Poland.

Accordingly, it must be concluded that the principle of discontinuation also covers the process of filling the office of a judge of the Constitutional Tribunal if that process was not completed before the end of the Sejm's term. This means that an unfinished procedure for the election of a judge is subject to discontinuation, and the new Sejm must conduct it anew if it intends to fill the given position.

The principle of discontinuation has, above all, a constitutional justification. It is directly linked to the principle of representative government, indirect democracy, and the sovereignty of the Nation, as expressed in Article 4 of the Constitution of the Republic of Poland. Its fundamental purpose is to ensure that the work of parliament, as a representative body, corresponds to the will of the sovereign, that is, the Nation.

The absence of the principle of discontinuation would in practice entail the necessity of continuing work on matters that do not reflect the will of the electorate of the newly elected parliament. This principle was already shaped during the period of the Second Polish Republic and has been observed to this day. It has not, however, been expressly established in the Constitution or in statute, even of a general character. Instead, it constitutes a constitutional custom that is widely recognized as binding, with departures from it being rare.

Although the legislator has not decided to establish a general norm affirming the absence of continuity, it does formulate exceptions to this principle. It is assumed that such exceptions should be explicitly regulated (expressis verbis). An example of such an exception is the requirement to continue work on citizens' legislative initiatives submitted by at least 100,000 citizens. Another exception is the possibility for a Sejm of the next term to adopt the report of an investigative committee.

Accordingly, it must be concluded that the principle of discontinuation applies and should be observed in all cases except those in which provisions explicitly provide for a departure from it. The process of electing judges of the Constitutional Tribunal has not been explicitly designated anywhere as excluded from the operation of this principle.

The principle of discontinuation, justified by the principles of national sovereignty and representative democracy, finds particular justification with respect to the Sejm's appointive function. It does not bind the Sejm of a new term by unfinished decision-making processes concerning the personal composition of bodies undertaken by the previous Sejm, which no longer enjoys democratic

legitimacy. It may even be argued that appointive tasks should be linked to the principle of discontinuation to an even greater extent than the legislative function.

This is of particular importance in the case of appointing judges of the Constitutional Tribunal by the Sejm, because the Constitution of the Republic of Poland explicitly assigns this competence to parliament, which is the emanation of the will of the Nation in accordance with the principle of representation expressed in Article 4 of the Constitution. For this reason, the Sejm plays a key role in this process, and its decisions should reflect the current choice of citizens made in parliamentary elections.

A second important issue is whether the principle of discontinuation may extend to actions that go beyond parliament itself. In the present case, this concerns the non-completion of a certain appointive process due to the failure to take the oath before the President—that is, due to the absence of an element of the process that lies outside parliamentary procedures, which within parliament had already been fully completed. Thus, even if it were accepted that the process of electing judges was still ongoing, an argument against applying the principle of discontinuation would be that the Sejm would no longer express its will in any manner in the given matter. The will of the Sejm had been materialized in the resolutions on the election of Constitutional Tribunal judges (in the present case, those of October 2015 issued by the liberal majority), which would mean that, from the perspective of the Sejm, work aimed at filling the personal substrate of the Tribunal had been definitively closed.

However, existing practice demonstrates that the principle of discontinuation covers not only intra-parliamentary procedures, but also all proceedings that originate in parliament yet are directed to external addressees. An example is a situation in which the President does not sign a statute (suspensive veto), and the statute does not return to the Sejm due to the expiration of its term. In such a case, the presidential veto, which in principle is a suspensive veto that may be overridden by a three-fifths majority in the Sejm, transforms into an absolute veto, because the statute can no longer be reconsidered by the new parliament and thus does not enter into force. Another example is a situation in which a group of members of parliament submits an application to the Constitutional Tribunal for a review of the constitutionality of a statute. If the Tribunal does not manage to examine the case before the end of the Sejm's term, the application is subject to discontinuation and is not further processed by the Tribunal. The principle of discontinuation therefore applies also when a matter does not "return" to parliament—just as in the case of the process of electing and swearing in before the President persons elected as judges of the Constitutional Tribunal.

The foregoing considerations demonstrate that the principle of discontinuation also encompasses the process of filling the office of a judge of the Constitutional Tribunal that was not completed before the end of the Sejm's term. Since such a procedure has not been expressly excluded from the operation of the principle of discontinuation, and constitutional practice shows that this principle also applies to actions extending beyond strictly parliamentary procedures, it should also cover an unfinished process of appointing a Constitutional Tribunal judge if it was not completed by the taking of the oath before the President of the Republic of Poland. And since the creator and interpreter of this constitutional custom is the very constitutional body to which the custom applies, the Sejm was fully entitled, both in substantive-law and formal-procedural terms, to recognize the applicability of the principle of discontinuation in this respect.

7. Continuation of the "war over the Constitutional Tribunal" on the domestic and international stage

After the conservative majority of the Sejm of the 8th term elected five new judges of the Constitutional Tribunal, three of them were not allowed to adjudicate by the then liberal President of the Tribunal. In 2016, the Tribunal delivered judgments (including those which, by statute, were required to be issued by the full bench) without the participation of the judges who had not been admitted to adjudicate, which prompted dissenting opinions by certain judges, in which they challenged the lawfulness of the adjudicating panel in a given case (e.g., in case K 47/15). On 11 August 2016, the Constitutional Tribunal announced its judgment in case K 39/16, examining joined motions filed by groups of MPs and by the Commissioner for Human Rights concerning new regulations on the functioning of the Tribunal adopted by the conservative majority in 2016. The statute was found partially inconsistent with the Constitution, and the Tribunal invalidated nine out of ten challenged provisions. Among those found unconstitutional was, inter alia, a provision imposing an obligation to admit to adjudication the three judges elected by the Sejm of the 8th term.

The situation changed only with the change in the office of President of the Tribunal in December 2016, when all judges were admitted to adjudicate. Since then, repeated attempts were made to exclude the three judges previously barred from adjudicating from panels in specific cases. One example is the motion filed by the Commissioner for Human Rights on 10 February 2017 in case K 2/15. The Commissioner argued that the election of the three judges was tainted by a legal defect, which the Tribunal was purported to have determined in a series of rulings (beginning with the judgment in case K 34/15), and that therefore these judges could not adjudicate. The Tribunal examined the motion on 15 February 2017 and issued a decision refusing to exclude the indicated judges from the adjudicating panel. That decision initiated a stable, long-standing line of case-law in which the Tribunal (in various compositions) consistently refused to exclude either those judges or the persons elected to replace two of them after their deaths.

After 2015, certain domestic liberal courts, directly or indirectly, questioned the Constitutional Tribunal in its "new" composition. For example, in its resolution of 23 January 2020 (the so-called "three chambers resolution"), the Supreme Court concluded that it was obliged to disregard Article 86(1) of the new Act on the Constitutional Tribunal (the 2016 Act on the organization of and proceedings before the Constitutional Tribunal), due to its alleged incompatibility with EU law, consisting in preventing the execution of a CJEU judgment. That provision stipulates that the initiation of proceedings before the Constitutional Tribunal results in the suspension of proceedings before authorities conducting a competence dispute. Despite the initiation of such proceedings, the Supreme Court nevertheless adopted the aforementioned resolution. Ultimately, that resolution itself was removed from the legal order by a judgment of the Constitutional Tribunal (case U 2/20). Similar actions—aimed at directly or indirectly deprecating the Constitutional Tribunal—also occurred in ordinary courts and administrative courts; however, they never developed into a stable line of case law. In any event, they constitute an example of how juristocracy, acting contra legem and in defiance of the constitutional system of competences of state authorities, seeks to protect the interests of liberal interest groups.

On 7 May 2021, the European Court of Human Rights delivered its judgment in Xero Flor sp. z o.o. v. Poland[15]. The case concerned a company that had previously filed a constitutional complaint with the Constitutional Tribunal, but those proceedings ended in discontinuance. The company alleged that the participation of Judge M.M. in the adjudicating panel violated Article 6 of the European Convention on Human Rights. The ECtHR upheld the company's allegations and, based on an analysis of the Tribunal's case-law (in particular the judgments in cases K 34/15 and K 35/15), found that there had been a manifest breach of domestic law through the election of three judges (including M.M.) in a manner inconsistent with Article 194(1) of the Constitution. It should be emphasized, however, that the judgment nowhere declares the election of those judges invalid (apart from the fact that the ECtHR has no such competence). On the contrary, the judgment repeatedly treats the persons elected by the conservative majority of the Sejm of the 8th term as judges of the Constitutional Tribunal (this is how they are described in the judgment). The effect of that judgment is that it must be executed; however, the method of execution is determined by the respondent State. It may do so by adopting appropriate general or individual measures. To date, no legal changes have been introduced in the scope covered by the Xero Flor judgment. This does not mean, however, that the Polish State has not addressed the judgment at all.

As a result of the Xero Flor v. Poland judgment, domestic courts in isolated cases began to question the composition of the Constitutional Tribunal and, consequently, the effectiveness of judgments issued with the participation of judges elected to the Tribunal in 2015 (see, for example, the Supreme Court judgments of 9 February 2023, II KS 21/22, and of 8 February 2023, II KK 79/22, as well as the decision of 28 February 2023, III KK 23/23; and the Supreme Administrative Court judgment of 16 November 2022, III OSK 2528/21). However, once again this did not develop into a stable line of case law, and those courts subsequently and repeatedly recognized the validity of Constitutional Tribunal judgments issued by panels including those judges.

In its judgment of 24 November 2021 in case K 6/21[16] (issued by a composition not contested by anyone), the Constitutional Tribunal held that Article 6(1), first sentence, of the Convention (the provision formulating the right to a fair trial), insofar as it grants the ECtHR competence to assess the legality of the election of Constitutional Tribunal judges, is inconsistent with Article 194(1) in conjunction with Article 8(1) of the Constitution (i.e., respectively, the provision establishing the Tribunal as a constitutional body and the provision stating that the Constitution of the Republic of Poland is the supreme law in the Republic). The judgment stated that the ECtHR has no competence to assess the legality of appointing a Constitutional Tribunal judge and that, therefore, the Xero Flor judgment was issued outside its competence (ultra vires), cannot have the status of a judgment; it is a non-existent judgment (sententia non existens) and, as such, produces no effects (it lacks the attribute of enforceability).

As a consequence of the Xero Flor judgment, repeated attempts were made by various state authorities and by applicants to exclude the judges identified in that judgment from adjudicating. The Tribunal, however, consistently refused to exclude them, arguing that there are no grounds to

[15] https://hudoc.echr.coe.int/#{%22itemid%22:[%22001-211749%22]} (accessed: 18 December 2025).
[16] https://ipo.trybunal.gov.pl/ipo/Sprawa?&pokaz=dokumenty&sygnatura=K%206/21 (accessed: 18 December 2025).

conclude that those persons are not judges or that they lack the right to adjudicate solely because of the procedure of their election.

The situation deteriorated significantly after 13 December 2023, when Donald Tusk's left-liberal government came to power. The first action directed against the Tribunal was the placement (without any legal basis) of annotations in the Journal of Laws, the official publication used for promulgating legal acts and Constitutional Tribunal judgments, appended to the Tribunal's decisions. The content of the annotation suggested that the Tribunal's rulings might violate Article 6 of the Convention. By taking such actions, the government violated the principle of legality in Article 7 of the Constitution, which provides that public authorities act on the basis of and within the limits of the law.

The next unlawful action directed against the Tribunal was the adoption by the Sejm of a resolution of 6 March 2024[17] on removing the effects of the constitutional crisis of 2015–2023 in the context of the activity of the Constitutional Tribunal. The resolution stated that Sejm resolutions concerning the election of certain Constitutional Tribunal judges in 2015–2018 and the resolutions contesting the election of judges in 2015 by the then liberal majority were adopted with a gross violation of law. Consequently, the Sejm, acting by the current left-liberal majority, declared that three persons lack the status of Constitutional Tribunal judge and indicated that numerous Tribunal decisions are tainted by a legal defect. The Sejm further held that the office of President of the Constitutional Tribunal is held by an unauthorized person, pointing to defects in the procedure of that person's election and the expiry of the term of office. It thereby questioned the effectiveness of organizational and procedural decisions taken. The resolution also stressed that the Tribunal does not meet the standards of an independent court, which prevents it from properly exercising its constitutional competences. Accordingly, the Sejm called for a renewed, Constitution-compliant formation of the Constitutional Tribunal, with the participation of all political forces respecting the constitutional order, including the opposition, and for spreading that process over time. At the same time, it indicated that applying Tribunal decisions issued in violation of law may breach the principle of legality, and it appealed to the Tribunal's judges to resign in order to enable the democratic reconstruction of the body.

The consequence of that entirely unfounded Sejm resolution was a boycott of the Tribunal's activity by obligatory participants in proceedings before the Tribunal (representatives of the Sejm and of the Prosecutor General ceased to participate in proceedings, and the authorities themselves did not submit positions in cases pending before the Tribunal). The publication of Constitutional Tribunal judgments in the Journal of Laws also ceased. All of these actions were undertaken in connection with the Sejm resolution, even though a resolution is not a source of law and does not provide any legal basis for those actions.

A Council of Ministers resolution of 18 December 2024[18] was drafted in a similar tone, in which the government declared that it would consistently refrain from publishing Constitutional Tribunal judgments. It also asserted that the Tribunal is unable to fulfill its constitutional tasks and that "actions taken to resolve the rule-of-law crisis must begin by preventing further effects of the Constitutional Tribunal's activity that is contrary to the Constitution of the Republic of Poland,

[17] https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WMP20240000198 (accessed: 18 December 2025).
[18] https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WMP20240001068 (accessed: 18 December 2025).

international law, and European Union law." Of course, a Council of Ministers resolution—like a Sejm resolution—is not a source of law and gives the government no legal basis to omit the duty to publish Constitutional Tribunal judgments.

The last action directed against the Tribunal that should be mentioned here is the amendment to the draft Budget Act made by the Sejm in late 2024. The Sejm introduced an amendment under which it reduced the Tribunal's budget by nearly PLN 11 million, thereby preventing the payment of salaries to all Constitutional Tribunal judges who were not in retirement status. Those salaries are guaranteed to them by virtue of their service relationship, the statute on the status of a Constitutional Tribunal judge, and the Constitution of the Republic of Poland itself. The provisions of the Budget Act for 2025 were, in this respect, held unconstitutional in the Constitutional Tribunal's judgment of 6 May 2025 in case K 2/25[19]; yet despite that judgment, it was not promulgated in the Journal of Laws and the Minister of Finance did not transfer the missing funds to the Tribunal. In response to the President of the Tribunal's letter on this matter, the Ministry of Finance stated that the legislator's clear intent was to deprive the Tribunal of those funds and that, as an executive authority, it could not oppose the will of the Sejm. The Tribunal's judges were thus ultimately deprived of the funds allocated for their remuneration.

8. Judgment of the CJEU of 18 December 2025

On 18 December 2025, the Court of Justice of the European Union delivered a judgment in connection with the European Commission's 2021 action against Poland (Case C-448/23) [20], which undermines the status of the Polish Constitutional Tribunal and the Polish Constitution in their relationship to the European treaties.

It should be recalled that the CJEU is an international court composed, not infrequently, of former globalist politicians. Its composition is determined through a non-transparent procedure that allows for the blocking of non-liberal candidates. It currently serves as a primary instrument for the concentration of power in Brussels through law-creating jurisprudence, used to appropriate competences—that is, in violation of the principle of conferral enshrined in the treaties—at the expense of the sovereignty of the Member States.

The activism of the CJEU toward Poland (as well as Hungary) has a particular character, as in many areas it exceeds its competences and undermines the sovereignty of those states, as well as conservative regulations adopted in both countries concerning protection against immigration, woke ideology, and—in the case of Poland—state reforms in the field of the judiciary.

The subject matter of the proceedings in Case C-448/23 were the judgments of the Polish Constitutional Tribunal of 14 July and 7 October 2021, in which the Polish Tribunal questioned the compatibility with EU law of interim measures and of the interpretation of EU law applied by the Court of Justice of the European Union. Both rulings of the Polish Constitutional Tribunal were responses to a series of earlier ultra vires judgments of the CJEU, in which the Court interfered with the constitutional structure of Polish constitutional organs—particularly the Supreme Court, the

[19] https://ipo.trybunal.gov.pl/ipo/Sprawa?&pokaz=dokumenty&sygnatura=K%202/25 (dostęp: 18 grudnia 2025 r.).
[20] https://curia.europa.eu/juris/documents.jsf?num=C-448/23 (accessed: 18 December 2025).

competences of the President in the area of judicial appointments, and the National Council of the Judiciary—despite lacking competence in these matters.

In the proceedings before the CJEU, the Polish government initially submitted a position critical of the European Commission's action, arguing that the case concerned exclusively domestic matters lying outside the jurisdiction of the CJEU. However, after coming to power, Donald Tusk's left-liberal government withdrew that position and submitted a new one fully supporting the Commission's action.

In March 2025, Advocate General Dean Spielmann, in his Opinion (which constitutes a form of prejudgment—formally non-binding on the CJEU judges, but in practice the Court's subsequent judgment usually aligns with it), found virtually all of the Commission's allegations to be well founded.

The CJEU delivered a judgment consistent with the Advocate General's Opinion, holding that Poland had infringed EU law through the adjudicative activity of the Constitutional Tribunal. The Court explicitly emphasized the primacy of EU law over national law and stated that the question of whether a given competence has been conferred on the European Union by the Member States may be determined exclusively by EU courts, and not by national courts.

What is also significant is that the CJEU (as previously the Advocate General) endorsed the European Commission's allegations concerning purported serious irregularities in the appointment of three judges and the President of the Polish Constitutional Tribunal. According to the CJEU, this undermines the Tribunal's status as an independent and impartial court within the meaning of EU law. Consequently, in the CJEU's view, the Polish Constitutional Tribunal cannot be regarded as an independent court established by law. By doing so, the CJEU called into question the status of a Polish constitutional body which, within the Polish legal system, is of fundamental importance for assessing the conformity of all legal acts in force on the territory of Poland with the Polish Constitution, and thus for the sovereignty of the Polish state.

According to the CJEU, the irregularities in the election of the three Constitutional Tribunal judges consisted in their election to positions that were allegedly already filled. The CJEU based its findings entirely on the Constitutional Tribunal's judgment of 3 December 2015 (K 34/15) and on the ECtHR judgment in Xero Flor v. Poland. In doing so, the CJEU completely ignored both the arguments of the Polish government submitted in the proceedings before the ECtHR and the subsequent case law of the Constitutional Tribunal itself (concerning refusals to exclude judges and the updated position on the President's obligation to administer the oath to a person elected to the office of Constitutional Tribunal judge).

The CJEU's reasoning regarding the alleged irregularities in the election of the President of the Constitutional Tribunal is even more superficial. The Court stated that, at first glance, the election appeared to be consistent with the procedure, but since three judges previously deemed to have been elected in a procedure allegedly violating the law participated in the vote on the President's election, the election of the President itself was therefore also defective.

Notably, the CJEU judgment does not concern the current President of the Constitutional Tribunal (elected under a procedure different from that applied in 2016), nor does it concern the judges elected to replace two judges elected to the Tribunal in 2015 who later died. The judgment concerns

exclusively three judges identified by name, who currently do not adjudicate in the Tribunal (two have died and one has retired). The judgment also does not state that any person elected to the Tribunal is not a Constitutional Tribunal judge; consistently, those individuals are referred to as judges. Their status was therefore not invalidated by the judgment.

The Polish Constitutional Tribunal responded to the CJEU judgment[21], stating in an official communiqué that the CJEU judgment (referred to in the communiqué as a decision) has no effect on the functioning of the constitutional organs of the Republic of Poland, as it was issued outside the scope of that court's competences. The CJEU has no authority to assess either the Polish Constitution or the constitutional position and activity of the Constitutional Tribunal. The Tribunal emphasized that the supreme law in the Republic of Poland remains the Polish Constitution, not decisions of international bodies. By acceding to the European Union, Poland did not relinquish the principle of the supremacy of the Constitution, nor did it confer on EU institutions competences in the organization of the judiciary or the administration of justice. The Tribunal also referred to its judgment of 11 May 2005, in which it stated that "the Constitution of the Republic of Poland remains—by virtue of its special force—the 'supreme law of the Republic of Poland' with respect to all international agreements binding upon the Republic of Poland, including agreements constituting the basis for the transfer of competences 'in certain matters.' The primacy of European Union law referred to in Article 91(3) of the Constitution applies exclusively to statutes, not to the Constitution."

The CJEU judgment triggered an intense international debate not only about the Polish Constitutional Tribunal, but also about the limits of the competences conferred upon the European Union. The CJEU effectively asserted for itself the competence to assess the adjudicative activity of constitutional courts of Member States and to sanction those states where it concludes that such courts challenge the primacy of EU law over national law, including over the constitution of a given state. This position met with substantial criticism, aptly illustrated by a statement of the Hungarian Minister for European Affairs, János Bóka, who wrote: "Today, the Court of Justice of the European Union upheld the European Commission's action against Poland and ruled that the Polish Constitutional Tribunal cannot be considered an independent and impartial court under EU law." He further pointed out that particularly troubling is the fact that the CJEU, invoking the principle of the primacy of EU law, is attempting to interfere with the constitutional identity of the Member States, which constitutes a serious confusion of roles, involving an overstepping of competences and a violation of the principle of separation of powers enshrined in the Treaties.

9. Possible scenarios of action by the Tusk left-liberal administration following the CJEU judgment of 18 December 2025

At present, the Tusk government is contesting the status of the Constitutional Tribunal and refusing to recognize its judgments, including those that have challenged the legality of numerous actions undertaken by the current government, such as the takeover of the prosecution service and the courts. One scenario being considered within the liberal circles of the Tusk administration goes further and involves using the CJEU judgment to definitively undermine the status of the Constitutional Tribunal and to assume full control over this constitutional body, which is crucial for

[21] https://trybunal.gov.pl/wiadomosci/uroczystosci-spotkania-wyklady/art/reakcja-na-decyzje-trybunalu-sprawiedliwosci-unii-europejskiej (accessed: 19 December 2025).

the coherence of the legal system. Taking control of the Tribunal would enable the government to eliminate—through the law-creating activity of newly appointed liberal judges of the Constitutional Tribunal—statutory regulations that prevent the government from legally taking over independent institutions. The expected liberal, law-making jurisprudence of newly installed judges would also constitute an element of the left-liberal "march through the institutions." It must be recalled that the current left-liberal coalition does not hold a parliamentary majority sufficient to enact statutes in situations where the President exercises his suspensive veto, which may be overridden only by a three-fifths majority of deputies. As a result, during the present parliamentary term the only ways to introduce fundamental institutional changes in the state are either the systemic violation of statutes and the refusal to comply with Constitutional Tribunal judgments (a practice the government has pursued for two years), or a radical transformation of the legal system through the juristocratic model—that is, contrary to the democratic decisions of the sovereign, namely the Nation.

At the same time, the Constitutional Tribunal—apart from its role as a "negative legislator"—possesses other significant powers, such as resolving competence disputes between constitutional organs and declaring political parties unconstitutional. In public debate, proposals have appeared calling, for example, for the delegalization of the Law and Justice party. The unlawful deprivation of public funding from Law and Justice, despite Supreme Court judgments ordering its disbursement, confirms that such scenarios cannot be ruled out.

The Constitutional Tribunal may also temporarily suspend the President from performing the duties of office. Under Article 131 of the Constitution, the Constitutional Tribunal, upon a motion by the Marshal of the Sejm (currently the former communist Włodzimierz Czarzasty), determines the existence of a temporary incapacity of the President to hold office. In such a case, the Tribunal entrusts the temporary performance of presidential duties to the Marshal of the Sejm. A purported ground for such "temporary incapacity" could be the claim that the validity of the President's election in July 2025 was not confirmed—according to the government—by a competent authority, as the ruling was issued by a chamber of the Supreme Court whose status is contested, including by the CJEU in its judgment of 4 September 2015. The thesis concerning the "illegality" of that chamber during proceedings on the validity of elections was also advanced by the Prosecutor General. Consequently, the temporary assumption of presidential duties by the Marshal of the Sejm from the ruling camp—pending confirmation of the election by a "lawful" chamber of the Supreme Court—would allow for the signing of all statutes previously vetoed by the President and for the taking of other actions, including appointments, that would lead to the complete de facto appropriation of the state by the left-liberal coalition. In view of the looming criminal liability faced by Donald Tusk and his entourage for serious crimes against the state, he is strongly determined that "power once seized must never be relinquished."