61/6/A/2011

JUDGMENT
of 20 July 2011
Ref. No. K 9/11*

In the Name of the Republic of Poland

The Constitutional Tribunal, in a bench composed of:

Andrzej Rzepliński – Presiding Judge
Stanisław Biernat
Zbigniew Cieślak
Maria Gintowt-Jankowicz
Mirosław Granat
Wojciech Hermeliński
Adam Jamróz
Marek Kotlinowski – 1st Judge Rapporteur
Teresa Liszcz – 2nd Judge Rapporteur
Małgorzata Pyziak-Szafnicka
Stanisław Rymar
Piotr Tuleja
Sławomira Wronkowska-Jaśkiewicz
Andrzej Wróbel
Marek Zubik,

Grażyna Szałygo – Recording Clerk,

having considered, at the hearing on 14 July 2011, in the presence of the applicants, the Sejm and the Public Prosecutor-General, an application by a group of Sejm Deputies to determine the conformity of:

1. a) Article 4(2) and (3), Article 26(3), Article 39(2) in the part which includes the wording "if voting is held on a single day", Article 39(3), Article 39(7), second sentence, in the part beginning with the wording "and if voting is held over two days" until the end of the sentence, Article 43 and Article 69(2) of the Act of 5 January 2011 - the Electoral Code (Journal of Laws - Dz. U. No. 21, item 112, as amended) to Article 2, Article 98(2) and (5) as well as Article 128(2) of the Constitution of the Republic of Poland (hereinafter: the Constitution),

   b) Article 4(2) of the Act referred to in point 1(a) above to Article 7 of the Constitution,

2. a) Article 38(1) in the part which includes the wording "taking into account the provisions of Chapter 7", Article 51(1) in the part which includes the wording "his/her proxy", the whole of Chapter 7 in Part I, Article 75(3) in the part which includes the wording "as well as the number of persons voting by proxy", Article 228(1)(3), Article 270(1)(3), Article 357(2)(3), Article 360(2)

* The operative part of the judgment was published on 21 July 2011 in the Journal of Laws - Dz. U. No. 149, item 889.

(3), Article 442(2)(3), Article 488(3)(3), Article 511, and Article 512 of the Act referred to in point 1(a) above to Article 2 and Article 62(1) in conjunction with Article 32(1) of the Constitution,

b) Article 38(1) in the part which includes the wording "taking into account the provisions of Chapter 7", Article 51(1) in the part which includes the wording "his/her proxy", the whole of Chapter 7 in Part I, Article 75(3) in the part which includes the wording "as well as the number of persons voting by proxy", and Article 228(1)(3) of the Act referred to in point 1(a) above to Article 96(2) of the Constitution,

c) Article 38(1) in the part which includes the wording "taking into account the provisions of Chapter 7", Article 51(1) in the part which includes the wording "his/her proxy", the whole of Chapter 7 in Part I, Article 75(3) in the part which includes the wording "as well as the number of persons voting by proxy", and Article 270(1)(3) of the Act referred to in point 1(a) above to Article 97(2) of the Constitution,

d) Article 38(1) in the part which includes the wording "taking into account the provisions of Chapter 7", Article 51(1) in the part which includes the wording "his/her proxy", the whole of Chapter 7 in Part I, and Article 75(3) in the part which includes the wording "as well as the number of persons voting by proxy" of the Act referred to in point 1(a) to Article 127(1) of the Constitution,

e) Article 38(1) in the part which includes the wording "taking into account the provisions of Chapter 7", Article 51(1) in the part which includes the wording "his/her proxy", the whole of Chapter 7 in Part I, Article 75(3) in the part which includes the wording "as well as the number of persons voting by proxy", and Article 442(2)(3) of the Act referred to in point 1(a) to Article 169(2), first sentence, of the Constitution.

3. Article 38(2), Article 45(2), and the whole of Chapter 8 in Part I of the Act referred to in point 1(a) to Article 2, Article 96(2), Article 97(2), Article 98(2) and (5), Article 127(1) as well as Article 128(2) of the Constitution,
4. Article 110(4), and Article 495(1)(4) of the Act referred to in point 1(a) to Article 2, Article 54(1) in conjunction with Article 31(3) as well as to Article 32(1) and (2) of the Constitution,
5. the whole of Chapter 2 in Part IV, Article 264(1), the whole of Chapter 6 in Part IV, Article 272(3), Article 273(1) and (4), as well as Article 274 of the Act referred to in point 1(a) together with Annex 2 referred to in Article 261(3) of the said Act to Article 2, Article 62(1) in conjunction with Article 32(1) as well as to Article 121(2) of the Constitution,
6. Article 10(3) of the Act of 5 January 2011 - the Introductory Law to the Electoral Code (Journal of Laws - Dz. U. No. 21, item 113), insofar as it stipulates that the following provisions shall cease to have effect: Chapter 25, Article 195(1), Chapter 29, Article 205(3), Article 206(1) and Article 207 of the Act of 12 April 2001 on Elections to the Sejm of the Republic of Poland and to the Senate of the Republic of Poland (Journal of Laws - Dz. U. of 2007 No. 190, item 1360, as amended) together with Annex 2 referred to in Article 192(4) of the said Act of 12 April 2001 to Article 100(3) in conjunction with Article 2, Article 4(2) and Article 62(1) of the Constitution,

7. Article 16(1) and Article 16(2), in conjunction with Article 1, of the Act of 5 January 2011 referred to in point 6 above - insofar as they provide for the application of the provisions of the Act referred to in point 1(a) above, and not the current provisions, to elections to the Sejm and the Senate ordered in 2011 on the basis of Article 98(2) of the Constitution - to Article 2, Article 10(1) and (2) of the Constitution,
8. the Act of 3 February 2011 amending the Electoral Code (Journal of Laws - Dz. U. No. 26, item 134) in its entirety to Article 2, Article 54(1) in conjunction with Article 31(3) as well as Article 32(1) and (2) of the Constitution,

adjudicates as follows:

1. Article 4(2) and (3), Article 26(3), Article 39(2) in the part which includes the wording "if voting is held on a single day", Article 39(3), Article 39(7), second sentence, in the part beginning with the wording "and if voting is held over two days", Article 43 and Article 69(2) of the Act of 5 January 2011 - the Electoral Code (Journal of Laws - Dz. U. No. 21, item 112, No. 26, item 134, No. 94, item 550, No. 102, item 588 and No. 134, item 777)**:**

a) insofar as they concern elections to the Sejm of the Republic of Poland and to the Senate of the Republic of Poland, are inconsistent with Article 98(2) and (5) of the Constitution,

b) insofar as they concern presidential elections, are inconsistent with Article 128(2) of the Constitution.

2. Article 4(2) and (3), Article 39(3) as well as Article 43 of the Act referred to in point 1 above, insofar as they concern elections to the European Parliament, elections to the constitutive organs of units of local self-government as well as the elections of mayors of villages, towns and cities, are not inconsistent with Article 98(2) and (5) as well as with Article 128(2) of the Constitution.

3. Article 4(2) of the Act referred to in point 1 above is inconsistent with Article 2 of the Constitution as well as is not inconsistent with Article 7 of the Constitution.

4. Article 51(1) in the part which includes the wording "his/her proxy" as well as Article 38(1) in conjunction with the provisions of Chapter 7 in Part I of the Act referred to in point 1 above:

a) insofar as they concern proxy voting in elections to the Sejm and the Senate, presidential elections as well as elections to the constitutive organs of units of local self-government, are consistent with Article 62(1) in conjunction with Article 32(1) of the Constitution, and with the principle of formal equality of electoral rights which arises therefrom,

b) insofar as they concern proxy voting in elections to the European Parliament, are not inconsistent with Article 62(1) in conjunction with Article 32(1) of the Constitution,

c) insofar as they concern elections to the Sejm, are consistent with Article 96(2) of the Constitution as well as are not inconsistent with Article 97(2) and Article 127(1) of the Constitution,

d) insofar as they concern elections to the Senate, are consistent with Article 97(2) of the Constitution as well as are not inconsistent with Article 96(2) and Article 127(1) of the Constitution,

e) insofar as they concern presidential elections, are consistent with Article 127(1) of the Constitution as well as are not inconsistent with Article 96(2) and Article 97(2) of the Constitution,

f) insofar as they concern elections to the constitutive organs of units of local self-government, are consistent with Article 169(2), first sentence, of the Constitution.

5. Article 38(2) in conjunction with Articles 62 and 66 of the Act referred to in point 1 above, insofar as it provides for voting away from the polling station of a district electoral commission:

a) as regards elections to the Sejm, is consistent with Article 96(2) of the Constitution, and with the principle of the secret ballot, expressed therein,

b) as regards elections to the Senate, is consistent with Article 97(2) of the Constitution, and with the principle of the secret ballot, expressed therein,

c) as regards presidential elections, is consistent with Article 127(1) of the Constitution, and with the principle of the secret ballot, expressed therein.

6. Articles 65 and 66 of the Act referred to in point 1 above, insofar as they mention sending ballot papers as an element of the procedure for postal voting:

a) as regards elections to the Sejm and the Senate as well as presidential elections, are consistent with Article 62(1) of the Constitution,

b) as regards elections to the European Parliament, are not inconsistent with Article 62(1) of the Constitution.

7. Article 66 of the Act referred to in point 1 above, insofar as it mentions filling in ballot papers before the day of elections as an element of the procedure for postal voting:

a) as regards elections to the Sejm and the Senate, is consistent with Article 98(2) and (5) of the Constitution,

b) as regards presidential elections, is consistent with Article 128(2) of the Constitution.

8. Article 110(4) in conjunction with Article 495(1)(4) of the Act referred to in point 1 above, is inconsistent with Article 54(1) in conjunction with Article 31(3) of the Constitution as well as is consistent with Article 32 of the Constitution.

9. The Act of 3 February 2011 amending the Electoral Code (Journal of Laws - Dz. U. No. 26, item 134) **is inconsistent with Article 2 of the Constitution and with Article 54(1) in conjunction with Article 31(3) of the Constitution, as well as is consistent with Article 32 of the Constitution.**

10. Article 260 and Article 261(1)-(3) of the Act referred to in point 1 above, as well as Annex 2 to the said Act, are not inconsistent with Article 62(1) in conjunction with Article 32(1) of the Constitution.

11. Article 260, Article 261, Article 264(1), Article 268, Article 269, Article 272(3), Article 273(1) and (4) as well as Article 274 of the Act referred to in point 1 above, and Annex 2 to the said Act, are consistent with Article 121(2) of the Constitution.

12. Article 16(1) and Article 16(2), in conjunction with Article 1, of the Act of 5 January 2011 - the Introductory Law to the Electoral Code (Journal of Laws - Dz. U.

No. 21, item 113 and No. 102, item 588)**, due to the fact that they make determining which set of electoral-law norms is to be applied conditional on the day of ordering elections, are inconsistent with Article 2 of the Constitution as well as are not inconsistent with Article 10 of the Constitution.**

Moreover, the Tribunal decides:

pursuant to Article 39(1)(1) of the Constitutional Tribunal Act of 1 August 1997 (Journal of Laws - Dz. U. No. 102, item 643, of 2000 No. 48, item 552 and No. 53, item 638, of 2001 No. 98, item 1070, of 2005 No. 169, item 1417, of 2009 No. 56, item 459 and No. 178, item 1375, of 2010 No. 182, item 1228 and No. 197, item 1307 as well as of 2011 No. 112, item 654), **to discontinue the proceedings as to the remainder.**

STATEMENT OF REASONS

[...]

III

The Constitutional Tribunal has considered as follows:

1. General remarks on the scope of the allegation and the terms of adjudicating by the Constitutional Tribunal.

1.1. The following constitute the subject of the review proceedings in the present case: a few dozen of provisions from two statutes, namely the Act of 5 January 2011 - the Electoral Code (Journal of Laws - Dz. U. No. 21, item 112, as amended; hereinafter: the Electoral Code) and the Act of 5 January 2011 - the Introductory Law to the Electoral Code (Journal of Laws - Dz. U. No. 21, item 113, hereinafter: the Introductory Law to the Electoral Code), as well as the entire Act of 3 February 2011 amending the Electoral Code (Journal of Laws - Dz. U. No. 26, item 134; hereinafter: the amending Act of 3 February 2011). The first two statutes will enter into force on 1 August 2011 (Article 1 and Article 17 of the Introductory Law to the Electoral Code), whereas the third statute entered into force on 22 February 2011 (Article 2 of the amending Act of 3 February 2011).

The main allegations put forward by the applicants regard new institutions of electoral law which either have so far been non-existent in the Polish law or have recently been introduced and have so far been applied only to a limited extent. These are, *inter alia*, regulations concerning the following institutions: two-day voting, proxy voting, postal voting, and single-member constituencies in elections to the Senate. The allegations also concern bans on the use of large-format election posters and slogans as well as paid election radio and TV ads. Additionally, the applicants have also, to some extent, challenged the legislative procedure, within the scope of which the Electoral Code has been adopted, alleging that the Senate amendments concerning single-member constituencies in elections to the Senate are unconstitutional. Also, they have requested the review of: rules governing the application of the Electoral Code to this year's elections, *vacatio legis* concerning the amending Act of 3 February 2011 as well as the repeal of the provisions of the Act of 12 April 2001 on Elections to the Sejm of the Republic of Poland and to the Senate of the Republic of Poland (Journal of Laws - Dz. U. of 2007 No. 190, item 1360, as amended; hereinafter: the Act on Elections to the Sejm and the Senate) which concern elections to the Senate.

1.2. It should be emphasised that the constitutional review in the present case has been conducted in extraordinary circumstances which must be taken into account by the Tribunal within the scope of the issued ruling.

First of all, the provisions which constitute the subject of the review in the present case are not yet legally binding. Therefore, the Tribunal has had no possibility of examining the way of applying the new institutions of electoral law, and thus no possibility of verifying the validity of allegations concerning the threat of electoral fraud which – in the opinion of the applicants – is posed by the challenged provisions. The review of provisions that have not yet entered into force is hindered considerably, for at that stage it is possible neither to examine the moment and the way they entered into force, nor to determine the consequences of the application of the provisions. Similarly to an *a priori* review (preventive review), the examination of the constitutionality of provisions pending entry into force is limited merely to the assessment of the text of those provisions, without the possibility of determining the consequences of the application thereof. This entails assuming a stronger presumption of constitutionality of such a statute. A given applicant must present convincing arguments, justifying the thesis about the unconstitutionality of the statute, and also prove that it is impossible to interpret the statute in compliance with the Constitution (see, *inter alia*, the judgments of: 24 June 1998, Ref. No. K 3/98, OTK ZU No. 4/1998, item 52; 7 February 2001, Ref. No. K 27/00, OTK ZU No. 2/2001, item 29; 20 January 2010, Ref. No. Kp 6/09, OTK ZU No. 1/A/2010, item 3; 14 June 2011, Ref. No. Kp 1/11). When assessing a statute which has not yet entered into force, the Constitutional Tribunal must act with caution, due to the Tribunal's lack of knowledge as to how the challenged provisions will be interpreted in practice (see the judgment of 28 November 2007, Ref. No. K 39/07, OTK ZU No. 10/A/2007, item 129). Also, it may not *a priori* be assumed that the statute will be applied in a way which is inconsistent with the Constitution, in the case where it is possible to interpret the statute in compliance with the Constitution.

Secondly, the adjudication in the present case occurs in a special time context. Indeed, the entry into force of the challenged provisions will coincide with a decision to order the 2011 elections to the Sejm and the Senate, issued by the President. Moreover, the application of the Electoral Code to those elections depends on the date when the President issues the decision to order elections, which results in uncertainty as to which set of electoral-law norms is to be applied. The Tribunal must take into account the special time context when examining the constitutionality of the challenged transitional regulation. Bearing in mind the effects of this ruling on the stability of the electoral system, it should be determined whether the intention of the Polish Parliament to apply the Electoral Code to this year's parliamentary elections may be respected in a situation where a transitional regulation has been constructed in a defective way. Within that scope, it is necessary to weigh different constitutional values as well as to find a solution which would take into account the principle of protection of citizens' trust in the state and its laws.

Additionally, the Tribunal wishes to note that most of the provisions which have been challenged in the present case have been adopted as a result of agreement among all the parliamentary factions of the 6th term of office of the Sejm. Work on the draft Electoral Code proposed by a group of Sejm Deputies (the Sejm Paper No. 1568/6th term), which was submitted to the Marshal of the Sejm on 24 June 2008, took over two years. At that time, the purpose of adopting that statute which – as it has been substantiated in the draft Code – was aimed at "including normative legal provisions which regulated electoral procedures in Poland in one statute" was not challenged by the Deputies. Also, there was agreement despite political differences as to the need to introduce new solutions aimed at making it easier for citizens to participate in elections (two-day voting, proxy voting and postal voting) as well as changing the way of carrying out electoral campaigns (ban on the use of large-format election

posters and slogans). The Electoral Code was passed unanimously by the Sejm. During the third reading, 430 Deputies voted for the adoption of the Code, including a considerable number of the Deputies who have submitted the application to the Tribunal in the present case, challenging the constitutionality of the Code. No Deputy voted against the draft Code and no-one abstained from voting (cf. voting no. 57 concerning the adoption of the entire draft Electoral Code, the 79th sitting of the Sejm). Enacted on the same day, the Introductory Law to the Electoral Code (the Sejm Paper No. 3586/6th term) was also adopted unanimously (cf. voting no. 60 concerning the adoption of the entire draft Introductory Law to the Electoral Code, the 79th sitting of the Sejm). The said political consensus, which so rarely occurs in the case of regulations contained in codes, concerned not only the solutions that were rendered in the Electoral Code enacted at that time, but also the intention to apply the provisions of the Code to the parliamentary elections of 2011, which was expressed in the transitional regulation. Obviously, the unanimity of the Sejm does not determine the constitutionality of the provisions challenged in the present case. However, it does manifest the intention of the representatives of the Nation to introduce new institutions of electoral law. The review by the Tribunal will be limited to the examination whether the challenged provisions do not infringe the Constitution. The usefulness of particular solutions chosen by the Polish Parliament, which have been included in the Electoral Code, falls outside the scope of adjudication.

2. The general characteristics of selected elements of electoral law.

The provisions challenged by the applicants are contained in three statutes which fall within the scope of electoral law. Therefore, the review of their constitutionality should begin with general remarks on the special character of that type of statutes, the way they are regulated in the Constitution, as well as standards concerning the procedure for the enactment of the provisions. Although, in the hierarchy of the sources of law, election statutes are equal to other statutes, the analysis of relevant constitutional provisions leads to the conclusion that they have a special character which must be taken into account in the course of a review of their constitutionality.

The Constitution, to a large extent, determines the content of election statutes. The principles of electoral law, expressed in Article 96(2), Article 97(2), Article 127(1) and Article 169(2) of the Constitution (the so-called electoral adjectives), constitute solutions that determine the general shape and course of elections to the representative organs of public authority. The Constitution enumerates, in an exhaustive way, the premisses of the right to vote and the right to stand for election as regards elections to the Sejm and the Senate, and presidential elections, as well as the premisses of the right to vote in local self-government elections (Article 62, Article 99 and Article 127(3) of the Constitution). The Constitution also determines the most important elements of electoral process, such as rules for ordering elections, for determining the outcome of elections and for verifying the validity thereof. Undeniably – as the participants in the review proceedings have aptly noted – the degree of regulation of particular types of elections varies in the Constitution. Those which are regulated in the Constitution to the largest extent are “five-adjective” elections to the Sejm and “four-adjective” presidential elections. Elections to the Senate are characterised by a lesser degree of constitutional regulation, as the constitution-maker has not determined the issue whether they are equal as well as he has not specified the electoral system which is applied to those elections. Elections which are regulated in the Constitution to the least extent are local self-government elections. The Constitution does not indicate the premisses of the right to stand for election in elections to the organs of units of local self-government; nor does it specify rules for ordering local self-government elections, for determining the outcome of the elections and for verifying the validity thereof. The last type of elections with regard to

which the Electoral Code is applicable, i.e. elections to the European Parliament, is not at all regulated in the Constitution.

On the one hand, the Constitution limits the regulatory freedom of the legislator, by determining the general shape and course of elections; on the other hand – it obliges the legislator to regulate the detailed rules of electoral process. Indeed, in accordance with Article 100(3), Article 127(7) as well as Article 169(2) of the Constitution, a statute should regulate the rules and procedure for entering candidates and carrying out elections as well as the requirements to be met for elections to be valid. The restriction that electoral matters should be regulated solely by statute results from the special significance of elections in a democratic state and the need to protect the electoral rights of voters.

The analysis of certain provisions of the Constitution leads to a conclusion that election statutes may not be amended in circumstances where the state is in an extraordinary situation or for the purpose of achieving short-term political goals. Article 228(6) of the Constitution stipulates that, during a period of introduction of extraordinary measures i.e. martial law, a state of emergency or a state of natural disaster, election statutes shall not be subject to change. Within that scope, election statutes are subject to the same protection as the Constitution and statutes on extraordinary measures, which also may not be amended during a period of introduction of extraordinary measures. In addition, the constitution-maker has ruled out the possibility of classifying electoral bills as urgent in the course of legislative work (Article 123 of the Constitution). This way, he manifested the view that amendments to electoral law may not occur hastily, but must be preceded by a thorough parliamentary debate. This view overlaps with Article 37(2) of the Resolution of the Sejm of the Republic of Poland (dated 30 July 1992) – the Standing Orders of the Sejm (*Monitor Polski* - M. P. of 2009 No. 5, item 47, as amended), from which it follows that the first reading on an election bill shall be held at a sitting of the Sejm.

When shaping electoral law, the legislator should also take into account, apart from the above-mentioned constitutional provisions regulating elections, constitutional values decoded from other provisions of the Constitution. The Tribunal has on numerous occasions indicated, in its jurisprudence, various values which underlie the principles of electoral law and require the legislator's respect (see *inter alia* the judgments of: 11 May 2005, Ref. No. K 18/04, OTK ZU No. 5/A/2005, item 49; 3 November 2006, Ref. No. K 31/06, OTK ZU No. 10/A/2006, item 147; 24 November 2006, Ref. No. K 66/07, OTK ZU No. 9/A/2008, item 158; 21 July 2009, Ref. No. K 7/09, OTK ZU No. 7/A/2009, item 113; 28 October 2009, Ref. No. Kp 3/09, OTK ZU No. 9/A/2009, item 138). The Tribunal (full bench) maintains that line of jurisprudence. At the same time, intending to supplement it, the Tribunal wishes to make certain general remarks on electoral law, which will be of significance for adjudication in the present case.

Firstly, in a democratic state ruled by law, elections are an indispensable institution of public life; they make it possible to elect representatives who exercise power on behalf of the Nation. One could draw a conclusion from the principle of the sovereignty of the Nation, expressed in Article 4 of the Constitution, that electoral law is ancillary in character, as it makes it possible to elect representatives to the organs of public authority. At the same time, it should be emphasised that in a contemporary democratic state, exercising power by representatives constitutes a rule, whereas the direct exercise of power by the Nation is exceptional and complementary in character. Therefore, electoral law should be constructed in such a way that voters will be provided with the most possibilities to participate in elections, in order to select representatives who will exercise power on their behalf. The legislator may not impose restrictions on the different forms of expressing preferences by the Nation in an electoral process, making an *a priori* assumption that these forms will be abused.

Secondly, electoral law should guarantee that the outcome of elections will reflect the will of the Nation as much as possible. On the one hand, this entails the necessity to construct the electoral system in such a way that it will reflect the actual support granted to particular candidates standing for election to the representative organs of public authority. This is related to the principle of fair elections which respect the principle of substantive equality (the judgment of the Constitutional Tribunal of 3 November 2006, Ref. No. K 31/06, OTK ZU No. 10/A/2006, item 147). On the other hand, the process of electing representatives ought to be constructed in such a way that it will meet electoral standards respected in a democratic state. This is, in turn, connected with the principle of free elections, which allows voters to freely participate in elections. What arises from that principle is that voters and political parties should be guaranteed the freedom to announce candidates, the freedom to devise electoral programmes and to disseminate them, as well as the freedom of electoral choice. In the judgment of 3 November 2006, Ref. No. K 31/06 (OTK ZU No. 10/A/2006, item 147), the Tribunal stated that the essential elements of the principle of free elections were as follows: "the actual freedoms of speech and assembly, general order in the media in a given country, access to the local media market, transparent procedures for acquiring indispensable funds for electoral campaigns, as well as proper and real guarantees for the protection of electoral rights". Also, in the judgment of 21 July 2009, Ref. No. K 7/09, OTK ZU No. 7/A/2009, item 113, the Tribunal emphasised that: "one of the most important elements of free elections is a free public debate carried out during an electoral campaign by all interested citizens". Therefore, the principle of free elections requires that a fair and reliable electoral campaign should provide citizens with true information on public affairs, candidates and their political programmes.

Thirdly, an election statute does not only serve the purpose of electing the representatives of the Nation, but also has a guarantee character, making it possible to exercise active and passive electoral rights. It specifies the terms of exercising citizens' rights to elect representatives and to stand for election to the representative organs of public authority. Under the pretext of protection of electoral rights, the legislator may not, at the same time, impose restrictions on the essence of those rights. He may not *a priori* assume that citizens will abuse those rights. Although election statutes may contain criminal law provisions, the statues are not penal in character. The purpose behind those statutes is not to specify prohibited conduct during elections, but to create conditions for carrying out permissible actions.

Fourthly, electoral law must be constructed in such a way that it will make it possible to elect stable and effective authorities. To devise an appropriate electoral system which will ensure the achievement of that goal often requires weighing different constitutional values which may not simultaneously be implemented to a maximum extent. Guaranteeing the full implementation of substantive equality in elections does not always allow to elect a parliamentary majority that is able to exercise power. This was pointed out by the Constitutional Tribunal in its judgment of 3 November 2006, Ref. No. K 31/06: "The value of a democratic state comprises not only free, democratic and fair elections, but also stable and effective authorities which are elected in those elections. Therefore, devising an electoral system that would be appropriate for a given country is always (...) a compromise between the two above-mentioned values".

Fifthly, the legislator should create electoral law which will facilitate universal, equal and direct participation of citizens in public life. Such participation is an indicator of citizens' sense of responsibility for the fate of their Homeland. It is worth noting that, among electoral adjectives, the legislator, in the first place, mentions that elections are universal, which leads to a conclusion that the universal participation of citizens in elections constitutes an intrinsic constitutional value.

Sixthly, naturally, the provisions of electoral law are not unchangeable. With the emergence of new circumstances, they should gradually be adjusted to changes that occur in social, political and economic life. A rise in the number of the elderly and the disabled should be accompanied by legal changes that take into account the actual possibilities of participation of those persons in elections. Electoral law may not overlook increasing social mobility, and the fact that a considerable number of citizens are currently living abroad. Also, electoral law may not overlook fundamental developments that take place in the field of communication. Overlooking the above-mentioned significant changes by the legislator, in the context of electoral law, would be tantamount to permitting the exclusion of certain groups of citizens from taking vital decisions that concern them. Consequently, the adequacy of electoral law to the circumstances in which it is in force constitutes an equally important constitutional value as the stability of that law.

The above principles generally pertaining to all election statutes will have to be taken into consideration in the course of the review of the challenged provisions of the Electoral Code, the Introductory Law to the Electoral Code as well as the amending Act of 3 February 2011.

3. The possibility of ordering two-day voting.

3.1. The applicants have alleged that Article 4(2) and (3) as well as the other provisions of the Electoral Code concerning the possibility of ordering two-day voting infringe Article 2 as well as Article 98(2) and (5) and Article 128(2) of the Constitution. Moreover, they have alleged that Article 4(2) of the Electoral Code infringes Article 7 of the Constitution.

It has been stated in the substantiation for those allegations that the Constitution in the provisions indicated as higher-level norms for the review contain the word “elections”, construed as a collective act of electing representatives, which consists of individual acts of voting. The provisions, in each instance, mention the term “the day of the elections” in singular. Therefore, the Constitution clearly states that the act of electing representatives in parliamentary elections and in presidential elections only takes place on a single day; this is closely related to the principle of reliable elections and has been deeply rooted in the Polish tradition.

In the view of the applicants, this sets the standard of reliable elections as regards elections to the Sejm and the Senate, presidential elections, elections to the European Parliament as well as local self-government elections, which arises from Article 2 of the Constitution.

3.2. The Tribunal has determined that the applicants’ allegations are apt as regards the non-conformity of Article 4(2) and Article 4(3) of the Code - which provide for two-day voting in elections to the Sejm and the Senate as well as in presidential elections – respectively to Article 98(2) and (5) as well as Article 128(2) of the Constitution.

Article 98(2) of the Constitution stipulates that the President of the Republic of Poland shall order elections to the Sejm and the Senate to be held on a non-working day, whereas Article 98(5) of the Constitution concerning elections ordered due to the shortening of the term of office of the Sejm and the Senate - provides for the President to schedule the elections for “a day falling (...)”. Likewise, Article 128(2) of the Constitution, which regards presidential elections, stipulates that the Marshal of the Sejm sets the date for the said elections for a non-working day. In the opinion of the Tribunal, the Constitution determines

the fact that elections to the Sejm and the Senate as well as presidential elections must be held on a single day.

Due to the fact that the content of the constitutional provisions indicated as higher-level norms for the review is fundamentally concurrent (with the proviso that there is no requirement for the day of elections to be a non-working day, as regards elections to the Sejm and the Senate ordered as a result of the shortening of the term of office in the case of the two houses of the Polish Parliament), the Tribunal presents the reasoning for the non-conformity of all the said challenged provisions of the Electoral Code to the above higher-level norms for the constitutional review.

What should be pointed out is that Article 98(2) and (5) as well as Article 128(2) of the Constitution contain the term "elections", whereas Article 4 of the Electoral Code in its paragraph 1 (which has not been challenged) mentions "elections", but in its paragraphs 2 and 3, which are the subject of the review by the Constitutional Tribunal, mentions "voting in elections"; however, it clearly follows from the content of these provisions that the two terms mean the same, i.e. voting in elections.

In the light of the Constitution, the term "elections" is construed in two ways. Firstly, it is meant as an electoral process, i.e. a set of actions occurring over time, undertaken by the organs of the state, election committees, voters as well as other entities, and regulated in the Constitution and electoral law, which are aimed at electing persons to be the members of the representative organs of public authority or persons to perform certain public functions (hold certain offices) which are monocratic in character; the said actions comprise: ordering elections, registering election committees, collecting the required number of signatures of supporters by candidates in order to be allowed to enter elections, registering candidates, carrying out electoral campaigns, casting votes by persons who have active electoral rights, counting votes and publicly announcing the outcome of voting by the National Electoral Commission, a resolution of the Labour Law, Social Security and Public Affairs Chamber of the Supreme Court determining the validity of elections. The word "elections" in that sense is used in the Constitution, in its Chapter IV ("The Sejm and the Senate") – the section entitled "Elections and the Term of Office". Voting is a crucial act in that process, although it is neither the first nor the last one. Secondly, what is meant here is voting in elections, i.e. manifesting (externalising), by voters, their decisions concerning the choice of particular persons to perform certain functions or to hold given offices.

In the opinion of the Tribunal, there is no doubt that, in the provisions of the Constitution which constitute the higher-level norms for the review of Article 4(2) and (3) of the Electoral Code, the word "elections" means "voting in elections". The Tribunal does not share the stance of the Sejm that the term "elections", in the light of those provisions, does not mean voting in elections, but "the moment when all votes cast in an electoral process are accumulated by the bodies responsible for the organisation of elections (...), which also indirectly indicates that the end of the day of elections is closely linked with finalising the voting process". Adopting such an interpretation of the term "elections", which is novel and inconsistent with the Polish tradition, would result in regarding only the last day of voting as the day of elections, which could theoretically follow an infinite number of the preceding days of voting, which would not necessarily be non-working days; indeed, only a proper election day would have to meet that requirement. This is obviously inadmissible. At the same time, it should be noted that if the day of elections is understood as a day when there is "the moment when all votes cast in an electoral process are accumulated by the bodies responsible for the organisation of elections" (finalising the voting process), then one should speak about "electing" as "the effect of voting" and about "the day of electing", and not about "elections" and "the day of elections".

Also, in other provisions of the Constitution concerning electoral law, there is wording which contains the expression "the day of the elections" (the word "day" in singular), in particular in: Article 99(1) and (2) (every citizen having the right to vote, who, "no later than on the day of the elections", has attained a certain age, shall be eligible to be elected to the Sejm or the Senate), Article 105(3) ("Criminal proceedings instituted against a person before the day of his [or her] election as Deputy, shall be suspended at the request of the Sejm [...]"), Article 109(2) (The first sitting of the Sejm and Senate shall be summoned to be held "on a day within 30 days following the day of the elections"), Article 127(3) (the right to stand for presidential election in Poland shall be enjoyed by a Polish citizen who, "no later than on the day of the elections, has attained 35 years of age"), and Article 238 (2) and (3) (the indication of the end of the term of office with regard to the organs of public authority, in the event that provisions valid prior to the entry into force of the Constitution do not specify any such term of office, and from the election or appointment there has expired a period longer than that specified in the Constitution). If the constitution-maker permitted two-day elections, the cited provisions would have to be formulated differently, so that they could provide for such a possibility.

The provisions of the Constitution indicated as higher-level norms for the review mention the term "the day of the elections" (the word "day" is always in singular). Therefore, the linguistic interpretation provides grounds for assuming that it was the constitution-maker's intention that voting in elections should be held on a single day, and that, in principle, it should be a non-working day. The said provisions are unambiguous, and the interpretation thereof - based on the grammar rules of Polish - neither raises doubts nor leads to results which would be unacceptable for some reasons. Therefore, there are no grounds to look for other meanings of the provisions than those expressed straightforwardly therein. What is particularly unconvincing is the view that allegedly the use of a singular form in the context of a date of elections is of no significance as regards determining the number of days during which voting is to take place, and that it supposedly merely stems from the general manner of editing provisions which contain norms being general and abstract in character, i.e. using a singular form with reference to designata. Indeed, the linguistic interpretation of the provisions is confirmed by the historical interpretation.

One-day elections (voting) have been a long-standing tradition in Poland, continuing since 1918. Article 15 of the Decree on Elections to the Legislative Sejm of 28 November 1918 (Journal of Laws - *Dz. Praw* No. 18, item 46) stated that: "When ordering elections, the voting day shall be indicated, which should fall on a Sunday or public holiday. Voting shall be held on a single day in the entire country". This issue was regulated in a very similar way by the Act of 28 July 1922 on Elections to the Sejm (Journal of Laws - Dz. U. No. 66, item 590): "A legal act ordering elections shall specify the voting day, which should fall on a Sunday" (Article 14(1)). "Voting shall be held on a single day in the entire State" (Article 14(2)). Pursuant to Article 9 of the Act of 8 July 1935 on Elections to the Sejm (Journal of Laws - Dz. U. No. 47, item 319): "Elections to the Sejm shall be ordered by the President of the Republic of Poland, who at the same time shall indicate the voting day" (paragraph 1); "Voting shall take place on a Sunday (...)" (paragraph 2).

Also, in the People's Republic of Poland, disregarding the anti-democratic content of election statutes of that time, there was the rule of one-day voting held on a non-working day. The Act of 22 September 1946 on Elections to the Legislative Sejm (Journal of Laws - Dz. U. No. 48, item 274), in its Article 9, stipulated that: "A decision to order elections shall indicate the voting day, which should fall on a Sunday. Voting shall be held on a single day in the entire State".

In accordance with the Act of 1 August 1952 on Elections to the Sejm of the People's Republic of Poland (Journal of Laws - Dz. U. No. 35, item 246): "A resolution ordering elections shall set the date of elections for a non-working day which falls within two months after the end of the term of office in the case of the Sejm of the People's Republic of Poland" (Article 7(1)); Article 6(1) of the Act indicated that "elections shall be held in the entire State at the same time on a single day".

By contrast, pursuant to Article 9(1) of the Act of 24 October 1956 on Elections to the Sejm of the People's Republic of Poland (Journal of Laws - Dz. U. of 1960 No. 58, item 325): "A resolution ordering elections shall set the date of elections for a non-working day (...). Article 8(3) stipulated that "elections shall be held in the entire State at the same time on a single day".

An identical norm in respect of the date of elections was included in Article 9(1) of the Act of 17 January 1976 on Elections to the Sejm of the People's Republic of Poland and to National Councils (Journal of Laws - Dz. U. No. 2, item 15), and, in fact, also in Article 9 of the Act of 29 May 1985 on Elections to the Sejm of the People's Republic of Poland (Journal of Laws - Dz. U. No. 26, item 112) ("A resolution ordering elections shall set the date of elections for a non-working day").

A similar regulation was also included in Article 8(2) of the Act of 7 April 1989 on Elections to the Sejm of the People's Republic of Poland – the 10th term of office for the years 1989-1993, pursuant to which: "A resolution ordering elections shall set the date of elections for a non-working day which falls within two months after the end of the term of the Sejm. The resolution also specifies an election calendar which sets dates for particular actions related to elections".

By contrast, the Act of 28 June 1991 on Elections to the Sejm of the Republic of Poland (Journal of Laws - Dz. U. No. 59, item 252), in its Article 4(2), stated as follows: "The President of the Republic of Poland shall order elections no later than 4 months before the end of the term of office of the Sejm, setting the date of elections for a statutory non-working day which falls within the last month before the end of the term of office of the Sejm (...)".

The Act of 23 May 1993 on Elections to the Sejm of the Republic of Poland (Journal of Laws - Dz. U. No. 45, item 205), in its Article 1(2), stipulated that: "The day of elections shall be a non-working day which falls within the month preceding the end of the term of office in the case of the Sejm of the Republic of Poland, or – in the event of the dissolution of the Sejm – a non-working day falling no earlier than 3 months and no later than 4 months after the end of the term of office of the Sejm".

Finally, the Act of 12 April 2001 on Elections to the Sejm of the Republic of Poland and to the Senate of the Republic of Poland (Journal of Laws - Dz. U. of 2007 No. 190, item 1360), in its Article 9(1), provided that: "The elections shall be ordered by the President of the Republic of Poland, by means of a decision, no later than 90 days before the expiry of the four-year period beginning with the commencement of the Sejm's term of office".

The provisions cited from the various acts of electoral law, issued when different constitutions were in force, are unambiguous and manifest the consistent approach of the legislator, based on certain axiology, as regards specifying the date of voting in elections. They all indicate one day, being a Sunday or a statutory non-working day. The Constitution of 1997, which is currently in force, has transferred that consistent statutory regulation onto the constitutional level, which means that the constitution-maker accepted that axiology in the said year. The Tribunal has not identified any extraordinary circumstances since that time, which would justify the re-interpretation of the provisions of the Constitution in that regard.

Also, the Tribunal does not share the view, expressed *inter alia* by the Sejm, that voting held on a single day constitutes a minimum guarantee for the exercise of active electoral rights by citizens (the principle of universal elections). The said minimum may be

expanded by means of an ordinary statute, the result of which is to be two-day voting. In other words, in the opinion of the Sejm, two-day voting is "pro-citizen expansion of the constitutional principles and norms"(the Sejm's letter, p. 31).

Such a thesis is inadmissible due to its non-conformity to the principle of the primacy of the Constitution in the legal system, which is stated in Article 8(1) thereof (see e.g. the judgment of the Constitutional Tribunal of 27 April 2005, Ref. No. P 1/05, OTK ZU No. 4/A/2005, item 42, which concerns the European arrest warrant). The thesis undermines the legal character (binding force) of the provisions of the Constitution, regarding them as *sui generis* semi-imperative norms which allow for the ordinary legislator's law-making powers to "correct" the constitution-maker with regard to expanding or enhancing the principles of democracy.

In addition, the Tribunal acknowledges arguments for two-day voting – i.e. increasing election turnout and enhancing the implementation of the principle of universal elections. However, a change within that scope may only be introduced by means of the constitution-maker's decision, as this issue is regulated at the constitutional level.

3.3. With regard to elections to the Sejm and the Senate, held due to the end of their term of office, as well as presidential elections, the principle of one-day voting is related to the requirement that the voting day should be a non-working day, which is a tradition in Polish electoral law. The provisions of the Constitution which constitute the higher-level norms for the review in the present case do not mention "a non-working day specified by statute", but only "a non-working day". However, *ratio legis* of that requirement presupposes that this is a day off, in principle, for all employees, so that they could cast their votes without any impediment. Such is only the character of "statutorily specified days free from work", as referred to in Article 66(2), first sentence, of the Constitution. They are enumerated in the Act of 18 January 1951 on Non-Working Days (Journal of Laws - Dz. U. No. 4, item 28, as amended). This is confirmed by Article 151^9(1) of the Polish Labour Code (Journal of Laws - Dz. U. of 1998 No. 21, item 94, as amended; hereinafter: the Labour Code), pursuant to which: "Non-working days shall be Sundays and public holidays specified in provisions on non-working days".

Other non-working days, which are usually (though not always) Saturdays, due to an average five-day week, do not have such a character. After many years of hesitation and several swings of opinion in that regard, the Polish Supreme Court eventually ruled – in the resolution by a bench of seven Justices of the Supreme Court, dated 25 April 2003, Ref. No. III CZP 8/03, which has been entered in the book of legal principles – that Saturdays were not non-working days within the meaning of Article 115 of the Act of 23 April 1964 – the Civil Code (Journal of Laws - Dz. U. No. 16, item 93, as amended) in conjunction with Article 165(1) of the Act of 17 November 1964 - the Code of Civil Procedure (Journal of Laws - Dz. U. No. 43, item 296, as amended) (OSNC No. 1/2004, item 1; see also the decision of the Supreme Court of 24 May 2007, Ref. No. V CZ 43/07, Lex No. 611447).

The substantiation for the resolution states that what determines whether a given day is a statutorily specified non-working day is the indication of that day, first of all, as a non-working day in a statutory provision, and secondly as a universal non-working day, i.e. not a non-working day solely for certain institutions or companies, or for selected groups of employees. By contrast, the issue which day is the second non-working day in a week, apart from Sundays, due to an average five-day working week, is determined not by statute (or another legal act equivalent to a statute), but by a collective system of work, workplace regulations, an agreement between parties to an employment contract, or a unilateral order issued by the law-maker, with reference to certain workplaces or groups of employees, or even a particular employee. This may be a random day of the week, different in different

weeks, and also there may be a different number of those "additional" non-working days in different weeks, since a working week lasts five days on average in the reference period (Article 129(1) of the Labour Code).

Another argument for the assumption that the said provisions of the Constitution concern a day which is specified by statute as a non-working day (i.e. a Sunday or public holiday) is provided by a historical interpretation. The 1918 Decree of the Governor of the State imposed an obligation to order elections for a Sunday or public holiday, whereas all other election statutes, including the Act of 1946, required that elections be held on Sunday. Subsequent election statutes, enacted after the entry into force of the Act of 18 January 1951 on Non-Working Days, *expressis verbis* required that the date of elections be set for a day specified by statute as a non-working day.

As a side remark, it is worth noting that, in the Little Treaty of Versailles, signed on 28 June 1919 (Journal of Laws - Dz. U. of 1933 No. 110, item 728), Poland declared: "her intention to refrain from ordering or permitting elections, whether general or local, to be held on a Saturday, nor will registration for electoral or other purposes be compelled to be performed on a Saturday" (Article 11, second paragraph). This supplemented a more general commitment made by Poland, expressed in the first paragraph of that Article, namely that: "Jews shall not be compelled to perform any act which constitutes a violation of their Sabbath, nor shall they be placed under any disability by reason of their refusal to attend courts of law or to perform any legal business on their Sabbath".

For all these reasons, it should be stated that a non-working day within the meaning of Article 98(2) and Article 128(2) of the Constitution is only a day specified by statute as a non-working day, as referred to in Article 66(2), first sentence, of the Constitution (see also L. Garlicki, commentary on Article 98, [in:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Vol. I, L. Garlicki (ed.), Warszawa 1998, pp. 20 and 25)

Permitting two-day voting could be inconsistent with the requirement that voting should be held on a non-working day within the meaning established above, as there are only two dates repeated every year where two statutorily specified non-working days are consecutive, i.e. Easter and Christmas. Also, in different years there is concurrence of other non-working days specified by statute, the date of which, however, might not be appropriate as regards an election calendar. Article 4(3) of the Electoral Code clearly states that, in the case of two-day voting, the date of voting shall be set for a non-working day and the day preceding it (regardless of whether it is a non-working day or not).

For the above reasons, the Tribunal has stated that the provisions of the Electoral Code which permit two-day voting are inconsistent with Article 98(2) and (5) as well as with Article 128(2) of the Constitution.

3.4. Also, the applicants have alleged that Article 4(2) and (3) as well as other provisions of the Electoral Code concerning two-day voting infringe the principle of reliable elections, derived from Article 2 of the Constitution (from the principle of a democratic state ruled by law). It should be emphasised that the applicants have referred the said higher-level norm for constitutional review to any elections - not only to elections to the Sejm and the Senate as well as presidential elections, but also to elections to the European Parliament and local self-government elections, which are not, in principle, regulated in the Constitution.

In the opinion of the applicants, the principle of reliable elections requires that the provisions of electoral law ensure that elections are carried out in a reliable (fair) way at any stage thereof. The Tribunal confirms that the said principle is legally binding, *inter alia*, in the judgment of 21 July 2009, Ref. No. K 7/09, by stating that "the constitutive characteristics of a democratic state include free and fair elections". The Tribunal states that the phrases "reliable elections" and "fair elections" are synonymous.

The applicants have alleged that two-day voting poses a threat of electoral fraud during the night after the first day of voting and before the second one. At that time, the members of a district electoral commission are away from the polling station, and they do not observe a given ballot box, electronic files and other documents related to elections, whereas the obligation to secure the premises together with the ballot box – pursuant to Article 43(3), second sentence, of the Electoral Code - lies with the mayor of a given village, town or city, even if s/he is personally interested in the outcome of elections. Depending on the size of a village, town, city or commune, the mayor may be obliged to secure from several up to over a dozen (and in Warsaw over 1000) polling stations, and to fulfil this obligation s/he needs to involve third parties. At that time, there are also no observers overseeing the election, as they may oversee the activities of a district electoral commission only throughout the voting day (Article 42(4) of the Electoral Code).

The Tribunal disagrees with those allegations as they have not been supported with any arguments. It also wishes to note that two-day voting was held during the EU-accession referendum (on 7-8 June 2003) and no electoral fraud was noticed then during the night after the first day of voting. Therefore, due to declaring the challenged provisions to be inconsistent with Article 98(2) and (5) as well as with Article 128(2) of the Constitution, the proceedings within that scope have been discontinued.

3.5. The applicants have focused on Article 4(2) and (3) of the Code in the substantiation for the application, although they have also indicated other provisions concerning two-day voting as the subject of the allegation, thus intending to eliminate, from the Code, all the provisions regulating that issue. In the opinion of the Tribunal, this is an admissible and reasonable way of proceeding, as it would be inappropriate if, after eliminating - from the Code - the provision providing for two-day voting in elections, the regulations specifying the consequences of ordering such voting would still remain therein. Consequently, the Tribunal has declared the unconstitutionality of all provisions that appear in conjunction with those provisions, stating that the arguments for the unconstitutionality of the institution of two-day voting refer to the entirety of the provisions concerning that electoral-law institution.

3.6. The applicants have also challenged the provisions on two-day voting, insofar as they concern elections to the European Parliament, elections to the constitutive organs of units of local self-government as well as the elections of mayors of villages, towns and cities. They have indicated Article 98(2) and (5) as well as Article 128(2) of the Constitution as higher-level norms for the review. The former of the provisions concerns elections to the Sejm and the Senate, whereas the latter pertains to presidential elections. Both higher-level norms for the review are inadequate in the context of the review of provisions on elections to the European Parliament and local self-government elections. For that reason, the Tribunal has adjudicated that Article 4(2) and (3), Article 39(3) as well as Article 43 of the Electoral Code, insofar as they concern elections to the European Parliament, elections to the constitutive organs of units of local self-government as well as the elections of mayors of villages, towns and cities, are not inconsistent with Article 98(2) and (5) as well as Article 128(2) of the Constitution.

4. The choice between one-day voting or two-day voting depends on a decision of the authority ordering elections.

4.1. The applicants have also alleged that, as regards all types of elections, Article 4(2) and Article 4(3) of the Electoral Code are inconsistent with the principle of specificity of law,

arising from Article 2 of the Constitution, as well as with the principle that the organs of public authority are to function on the basis of, and within the limits of, the law, expressed in Article 7 of the Constitution.

In the view of the applicants, the infringement of Article 2 of the Constitution, as regards the principle of specificity of law, is primarily caused by the fact that the said provision does not specify the premisses which the authority ordering elections should take into account when deciding about two-day elections, and thus it grants unlimited freedom to that authority in that respect. Another argument presented by the applicants is that the challenged provision does not specify when the authority ordering elections may issue such a decision - whether only at the time of ordering elections or also at a different date. In addition, there is some concern that the said authority, when deciding about two-day elections and choosing a date for issuing a decision in that regard, may be guided not only by objective legal premisses, but also by political ones.

The Tribunal confirms the validity of the applicants' allegations as regards the non-conformity of Article 4(2) of the Electoral Code to the principle of a democratic state ruled by law, as expressed in Article 2 of the Constitution, however within a different scope than the applicants expected. According to the applicants, the said provision is inconsistent with "the principle of sufficient specificity of legal regulations". At the same time, the arguments which the applicants present in the substantiation for the allegation do not, in fact, concern the specificity of provisions, but the issue whether the authority ordering elections decides if voting in given elections will be held on a single day or over two days, since the said authority enjoys unlimited freedom in that regard. The Tribunal has assumed in that case that *falsa demonstratio non nocet*, and assessed the challenged provision in the light of the principle of reliability of law (legal security), which arises from Article 2 of the Constitution.

As it has already been said, the provisions of electoral law should be unambiguous and should provide a sense of certainty to participants in elections as regards essential elements of the electoral system. Such certainty is not provided by the challenged provision, which makes determining whether voting will be held on a single day or over two days conditional on a decision of the authority ordering elections; the said decision is not determined by any objective premisses, which means it may be taken arbitrarily.

The challenged provision does not indicate, in particular, whether the decision in that regard should be included in a decision to order elections, or whether it should, or may, constitute a separate legal act to be issued by the authority ordering elections. Nor does the provision determine whether - if the decision in that regard constituted a separate legal act - it should be issued on the same day as the decision to order elections, or whether it might be issued at a different time, in particular at a later date. This creates a risk that the authority ordering elections may issue a decision about two-day voting shortly before the date of elections, which may be more surprising to some election committees than to others.

However, in accordance with the principle of reliability of law, the issue whether voting in elections of a certain type should be held on a single day or over two days should follow from a statute, and not ensue from a decision of an executive authority.

The Tribunal has ruled Article 4(2) of the Electoral Code to be unconstitutional in the context of all types of elections, i.e. also including elections to the European Parliament and elections to the organs of units of local self-government, with regard to which it has stated that two-day voting does not infringe the Constitution. The ruling declaring the unconstitutionality of Article 4(2) of the Electoral Code does not change the fact that, in the context of the two last-mentioned types of elections, two-day voting is admissible, but it means that this needs to be determined by the legislator.

4.2. The applicants have alleged that Article 4(2) of the Electoral Code also infringes Article 7 of the Constitution, which states that "the organs of public authority shall function

on the basis of, and within the limits of, the law". What seems to follow from the laconic substantiation for that allegation is that the authority ordering elections, which is an executive authority, is to decide about a vital issue from the scope of electoral law on the basis of that provision, whereas the issue should be determined by the legislator. The Tribunal has decided that Article 7 of the Constitutional is an inadequate higher-level norm for the review of the allegation, and hence it has adjudicated that Article 4(2) of the Electoral Code is not inconsistent with Article 7 of the Constitution.

5. Proxy voting

5.1. Another group of challenged provisions concerns the electoral-law institution of a proxy for voting. The applicants have requested the Tribunal to declare the unconstitutionality of the following provisions of the Electoral Code: Article 38(1) in the part which includes the wording "taking into account the provisions of Chapter 7", Article 51(1) in the part which includes the wording "his/her proxy", the whole of Chapter 7 in Part I, Article 75(3) in the part which includes the wording "as well as the number of persons voting by proxy", Article 228(1)(3), Article 270(1)(3), Article 357(2)(3), Article 360(2)(3), Article 442(2)(3), Article 488(3)(3), Article 511 as well as Article 512.

The challenged provisions may be divided into two groups.

The first group comprises provisions regarding the essence of proxy voting, i.e. Article 51(1) of the Electoral Code as well as Article 38(1) of the Code in conjunction with the provisions of Chapter 7 in Part I of the Code. The first one indicates three categories of persons who may cast votes in elections. These are: voters whose names have been entered in a list of voters, their proxies, as well as voters whose names are added to the list of voters on the voting day. The said provision is challenged in the part which includes the wording "his/her proxy", and thus insofar as it authorises a proxy to cast a vote on behalf of a voter. By contrast, Article 38(1) of the Electoral Code formulates the requirement that voters cast votes in elections in person, with the proviso that an exception to that rule will be the possibility of proxy voting. The proviso has been made by reference to Chapter 7 entitled "Proxy voting". The provisions of that chapter (Articles 54-61 of the Electoral Code) specify the requirements to be fulfilled by voters who vote by proxy and by candidates for proxies, as well as set out a procedure for issuing a proxy vote certificate.

The other group of the challenged provisions is constituted by provisions which merely refer to the electoral-law institution of a proxy for voting, but in fact regulate completely different issues. The following distinctions can be made:

a) provisions which require that voting records include information concerning the number of voters who vote by proxy (Article 75(3) of the Electoral Code – voting records prepared by a district electoral commission, Article 357(2)(3) of the Electoral Code - voting records prepared by the National Electoral Commission in elections to the European Parliament, Article 360(2)(3) – records concerning the election of members to the European Parliament prepared by the National Electoral Commission, Article 442(2)(3) of the Electoral Code – the list of voting results in a constituency prepared by a communal electoral commission in elections to communal councils, Article 488(3)(3) of the Electoral Code – records of voting results and of election results prepared by a communal electoral commission in elections of mayors of villages, towns and cities),
b) provisions which require that voters who vote by proxy be counted by electoral commissions (Article 228(1)(3) of the Electoral Code – counting carried out by a district electoral commission in elections to the Sejm, Article 270(1)(3) of the

Electoral Code – counting carried out by a district electoral commission in elections to the Senate),

c) provisions which penalise the act of charging a fee for casting a vote on another person's behalf (Article 511 of the Electoral Code) as well as the act of granting a proxy vote in exchange for any financial or personal gain (Article 512 of the Electoral Code).

As it follows from the substantiation of the application, the applicants challenge the essence of the institution of a proxy for voting, claiming that the mere introduction of that institution into the legal system, regardless of the way of shaping a statutory regulation, infringes the constitutional standards. Therefore, the Tribunal has commenced the review of constitutionality, focusing on basic provisions concerning that institution, i.e. Article 51(1) of the Electoral Code as well as Article 38(1) of the Code in conjunction with the provisions of Chapter 7 in Part I of the Code. Including the other challenged provisions in the scope of the review would be purposeful only if the institution of a proxy for voting was deemed unconstitutional.

5.2. The applicants have challenged the provisions regulating proxy voting, in the context of the following principles: the principle of direct elections, the principle of equal electoral rights as well as the principle of protection of citizens' trust in the state and its laws.

The applicants have derived the principle of direct elections from Article 96(2) of the Constitution ("Elections to the Sejm shall be [...] direct"), Article 97(2) of the Constitution ("Elections to the Senate shall be [...] direct"), Article 127(1) of the Constitution ("The President of the Republic shall be elected by the Nation in [...] direct elections") as well as Article 169(2), first sentence, of the Constitution ("Elections to constitutive organs [of units of local self-government] shall be [...] direct"). In the opinion of the applicants, the principle of direct elections requires voting in person by voters, and thus it excludes the possibility of casting votes in elections by proxies.

The principle of equal electoral rights is derived by the applicants from Article 62(1) in conjunction with Article 32(1) of the Constitution. The applicants argue that, unlike a voter, a proxy has two votes, i.e. a vote s/he casts on his/her own behalf and a vote s/he casts on behalf of a person granting the proxy vote. The applicants emphasise that the voter has no influence on the action or negligence of the proxy, to whom the vote has been granted. As a result, the proxy may cast the vote contrary to the will of the voter.

Another allegation formulated by the applicants concerns the infringement of Article 2 of the Constitution, and in particular electoral standards decoded therefrom which are binding in a democratic state as well as the principle of protection of citizens' trust in the state and its laws. In the substantiation of that allegation, the applicants indicate irregularities which may occur with regard to proxy voting, thus distorting the final results of elections. In their opinion, "one may not rule out the risk of exerting pressure on the disabled or the elderly to make them «grant proxy votes», with a view to affecting the final results of elections (p. 26 of the application). They also argue that voting by proxy is an electoral-law institution "which facilitates «buying» the rights to vote from the disabled or the elderly" (p. 27 of the application). However, the applicants do not specify electoral standards which the challenged institution allegedly infringes.

5.3. Proxy voting is applied, *inter alia*, in the Netherlands, Belgium, France and the United Kingdom. This method of voting was introduced in those countries at different points in time, and also it was subject to many changes. The currently binding legal provisions vary as regards specifying the group of persons who may grant a proxy vote, the group of persons who may be proxies, the maximum number of proxy votes which may be granted to a single

person, a period for which a proxy vote is granted, the possibility of withdrawing it as well as the procedure for issuing a proxy vote certificate. Nevertheless, a comparison of solutions adopted in that regard in those countries, as well as the directions in which the solutions have evolved, enables the Tribunal to make certain general observations for the purpose of a comparative analysis of the provisions challenged in the present case.

The most possibilities concerning proxy voting are provided for in the Dutch legal system. In that country, any voter may resort to proxy voting if s/he suspects that s/he may not be able to vote in person. In Belgium, France and the United Kingdom, this method of voting may only be used by voters who fulfil premisses specified by statute. However, those premisses are broadly delineated. They include not only a bad state of health of a voter who grants a proxy vote, but also the lack of possibility to appear at a given polling station, e.g. due to work-related duties. In France, proxy voting may be resorted to by voters who provide care to persons who are ill or senile, as well as by prisoners, students or persons on holiday who on the day of elections remain away from their place of residence. In Belgium, initially only the members of a voter's family might be authorised to cast such a vote; later on, also persons who were not relatives were authorised to do so. At present in that country, similarly to the Netherlands and the United Kingdom, a proxy may be any voter, whereas in France this may be a person who has been entered in an electoral register in the same constituency as the person granting a proxy vote. In all those countries, a proxy vote certificate is issued by an organ of the state (usually an organ of a commune) upon request of an interested voter. In the Netherlands, a proxy vote certificate may not be withdrawn; after granting a proxy vote, a given voter may not vote in person. In Belgium, France and the United Kingdom, the withdrawal of a proxy vote certificate is admissible. In those countries, a proxy vote certificate may be granted for a specified period (usually for particular elections). Only in the United Kingdom, a proxy for voting may be appointed for an indefinite period.

Proxy voting was regarded as permissible by the European Commission for Democracy through Law (the Venice Commission) in its Opinion no. 190/2002 of 5 July 2002, entitled "Code of Good Practice in Electoral Matters", and approved by the Resolution of the Parliamentary Assembly of the Council of Europe of 23 May 2003. This form of voting has been included as an element of a broader issue i.e. the freedom of elections. The Code of Good Practice in Electoral Matters, in its point 3.2.(V), stipulates that very strict rules must apply to voting by proxy and that the number of proxies a single voter may hold must be limited.

5.4. Proposals to introduce that alternative method of voting have been put forward in Poland for many years. The first time a concrete proposal in that regard was put forward was in 1992 by the National Electoral Commission. All of its three bills on elections to the Sejm included a chapter with the identical title - "Proxy voting" (cf. *Ordynacja wyborcza do Sejmu Rzeczypospolitej Polskiej. Projekty*, Wydawnictwo Krajowego Biura Wyborczego 1992). Additionally, the need for the introduction of that method of voting was also signalled by the Polish Ombudsman. In his letter of 13 July 2009 to the Prime Minister (Ref. No.: RPO-572441-I/07/AB), he stated that: "I, as well as my predecessors holding the office of Ombudsman, have made altogether a few dozen submissions in that regard (only since 2007 there have been 17 letters requesting that the requirement to vote in person at polling stations be lifted)". Also, its own proposal for proxy voting was put forward by the Institute of Public Affairs (see *Aktywny obywatel, nowoczesny system wyborczy*, L. Kolarska-Bobińska, J. Kucharczyk and J. Zbieranek (eds.), Warszawa 2006, pp. 53-58)

A proposal to introduce that method of voting have been put forward a number of times in the course of legislative work. For the first time it appeared during work on an election bill. The report of 9 February 2001 (see the Sejm Paper No. 2599/3rd term), prepared

by the Special Committee to review bills on elections to the Sejm and the Senate as well as amendments to the Act on the Election of the President of the Republic of Poland, contained minority motions, with the proposal to introduce proxy voting. Eventually, such a method of voting was not included in the Act of 12 April 2001 on Elections to the Sejm and the Senate. The proposal was repeated in 2003, in the course of work on the Nationwide Referendum Act. The proposal to introduce proxy voting in a referendum was put forward at the sitting of the Legislative Committee on 14 January 2003 (see the Bulletin No. 1404/4th term). Relevant solutions have been introduced into the bill prepared by the Committee (see the Sejm Paper No. 1256/4th term). However, they were rejected and they were not included in the Act of 14 March 2003 on the Nationwide Referendum (Journal of Laws - Dz. U. No. 57, item 507).

Three years later, on 20 April 2006 a group of Senators requested the Marshal of the Senate to undertake legislative initiative in order to introduce the possibility of proxy voting into all election statutes and the Nationwide Referendum Act (the Senate Paper No. 133/6th term). Also, this initiative ended in failure. Analogical solutions, which took into account the proposals put forward by the National Electoral Commission after the elections of 2005, were also included in the bill amending the Act on Elections to the Sejm and the Senate (see the Sejm Paper No. 1699/5th term), prepared by the Legislative Committee, which was received by the Marshal of the Sejm on 16 March 2007. The work on that bill was interrupted due to the shortening of the term of the Sejm.

After the parliamentary elections on 21 August 2007, the National Electoral Commission submitted a report entitled "Information on the implementation of provisions of the Act on Elections to the Sejm and the Senate in the last elections and proposals for amendments" (the letter of 18 February 2008, Ref. No. ZPOW-500-2/08). In that report, the National Electoral Commission again put forward a proposal for the introduction of proxy voting. The proposal was taken into account both in the draft Electoral Code, which was received by the Marshal of the Sejm on 24 June 2008 (see the Sejm Paper No. 1568/6th term), as well as in the bill amending the Act on the Election of the President of the Republic of Poland, the Act on Elections to the European Parliament and the Nationwide Referendum Act, which was submitted on 29 October 2008 (see the Sejm Paper No. 1391/6th term). The first bill provided for the use of that method of voting in all types of elections, whereas the second one – only in elections to the European Parliament. In the course of legislative work on the latter bill, doubts were raised as to the conformity of the new electoral-law institution to the principle of direct elections (*inter alia* at the joint sitting of the Committee on the European Union and the Legislative Committee held on 10 February 2009 – the Bulletin No. 1821/6th term and in the opinion presented by Mr P. Chybalski, an expert of the Bureau of Research of the Chancellery of the Sejm); however, the proposal was supported by a parliamentary majority. This way, by the Act of 12 February 2009 amending the Act on the Election of the President of the Republic of Poland, the Nationwide Referendum Act and the Act on Elections to the European Parliament (Journal of Laws - Dz. U. No. 202, item 1547), the possibility of proxy voting was introduced in elections to the European Parliament. The said Act was to enter into force before the elections to the European Parliament of 7 June 2009. However, before signing the Act, the President requested the Constitutional Tribunal to review it. In the judgment of 28 October 2009, Ref. No. Kp 3/09 (OTK ZU No. 9/A/2009, item 138), the Tribunal adjudicated that the challenged regulations were consistent with the Constitution. The said amending Act entered into force on 16 December 2009. It should be added that the electoral-law institution of a proxy for voting was not the subject of the review conducted by the Tribunal in the case Kp 3/09.

The enactment of the Electoral Code was preceded by one more statute which introduced proxy voting – this time in the context of presidential elections and local self-government elections. The bill was submitted to the Sejm for it to consider it on

10 September 2009 (see the Sejm Paper No. 2376/6th term) and, as regards the institution of a proxy for voting, it contained similar solutions to those introduced in the Act on Elections to the European Parliament and those contained in the draft Electoral Code, on which the Sejm was working at the same time.

Two months later, on 19 November 2009, the Act amending the Act on the Election of the President of the Republic of Poland, the Act on Elections to Communal Councils, Poviat Councils and Voivodeship Assemblies as well as the Act on Direct Elections of Mayors of Villages, Towns and Cities was enacted (Journal of Laws - Dz. U. No. 213, item 1651), which introduced the possibility of proxy voting in presidential elections and local self-government elections. The statutory regulations were supplemented by the following two regulations by the Minister of Interior and Administration: of 21 April 2010 on issuing a proxy vote certificate in presidential elections (Journal of Laws - Dz. U. No. 66, item 426) as well as of 1 September 2010 on issuing a proxy vote certificate in elections to communal councils, poviat councils and voivodeship assemblies (Journal of Laws - Dz. U. No. 170, item 1146).

New solutions were quickly applied in practice. In the first round of presidential elections on 20 June 2010, 6 456 persons voted by proxy (see the announcement of 21 June 2010 by the National Electoral Commission), and in the second round on 4 July 2010 – 11 613 voters (see the announcement of 5 July 2010 by the National Electoral Commission). No irregularities regarding proxy voting were noted at that time, and the Supreme Court, in its resolution of 3 August 2010 (Ref. No. III SW 370/10, OSNP No. 3-4/2011, item 43), stated that the elections were valid.

Those two amending Acts, which preceded the enactment of the Electoral Code and which introduced proxy voting into the Polish legal system, to some extent, provide an explanation why the said institution was not the subject of dispute in the course of work on the Electoral Code. The analysis of materials from legislative proceedings leads to a conclusion that there was a political consensus both as to the need for introducing that form of voting and as regards its shape. In the explanatory note for the bill (see the Sejm Paper No. 1568/6th term), it was indicated that proxy voting would allow "the disabled to actively participate in public life". The Electoral Code, containing the provisions on the new electoral-law institution, was unanimously enacted by the Sejm on 3 December 2010. Amendments to those provisions put forward by the Senate were mainly editorial in character and did not change the essence of adopted solutions (cf. the resolution of the Senate of 17 December 2010 on the Electoral Code, the Sejm Paper No. 3730/6th term).

To sum up the above findings, it should be stated that the proposal for introducing proxy voting has been considered in Poland for over 20 years. It was repeated at the time of almost every major amendment introduced to electoral law, beginning with the year 2001. The proposals which were put forward at different stages of legislative proceedings were very similar to those which were ultimately included in the Electoral Code. In 2009, a legal possibility was created for proxy voting in presidential elections, elections to the European Parliament and local self-government elections. The only legal act which did not provide for that form of voting was the Act on Elections to the Sejm and the Senate. The Electoral Code has taken over the solutions that were previously introduced, extending the application thereof to parliamentary elections.

5.5. Proxy voting is regulated in Chapter 7,Part I, of the Electoral Code. It constitutes an exception to the rule that in general elections voters cast their votes in person (Article 38(1) of the Electoral Code). The narrow scope of that institution is manifested by statutory restrictions imposed on its application. They primarily concern the group of voters who may resort to that form of voting, as well as a group of voters who may cast votes on behalf of other voters as their proxies. Proxy voting may be chosen by persons who, for health

reasons or due to their elderly age, may have difficulties to cast their votes in person at a polling station. The legislator provides for such a possibility for voters who are, to a large extent or to some extent, disabled and to voters who are over 75 (Article 54(1) and (2) of the Electoral Code). At the same time, it should be emphasised that the said persons must have full legal capacity, i.e. they have attained the age of 18 and have not been incapacitated. Such requirements, which need to be fulfilled by every voter as set out in Article 62 of the Constitution, guarantee that, when appointing a proxy, a given voter will act in a conscious and responsible way. Indeed, proxy voting makes it easier for (and at times it even enables) the disabled or the elderly to exercise their right to vote, although it burdens them with the obligation to find someone who is trustworthy, and whom they could authorise to cast a vote on their behalf. A proxy may only be a person who has been entered in an electoral register in that same commune as the person granting the proxy vote or a person with attestation that s/he has the right to vote (Article 55(1) of the Electoral Code). A proxy may not be a member of a district electoral commission for the polling district of the voter granting the proxy vote, an observer overseeing an election or a candidate in a given election (Article 55(4) of the Electoral Code). The circumstances which determine the ability to grant a proxy vote and receive it are verified by an organ of a commune, as an application for a proxy vote certificate needs to be accompanied by a current medical report confirming the degree of disability of a voter who is granting a proxy vote; as regards voters who have EU citizenship, but not Polish one – what is required is a sworn translation of such a document, and also a copy of a certificate confirming that a person who is to be a proxy has the right to vote – in the case where that person has not been entered in an electoral register in the same commune as the person granting the proxy vote and special provisions concerning such elections provide for the acquisition of such a certificate (Article 56(3) of the Electoral Code).

A proxy may represent only one person; by way of exception - two persons, if at least one of them is the proxy's ascendant, descendant, spouse, sibling, or a person related to the proxy by adoption, or for whom the proxy is a guardian (Article 55(2) and (3) of the Electoral Code). This restriction is to prevent the risk of "buying" votes by persons who, in that way, want to affect election results. For the same reason, the legislator has introduced a prohibition against charging a fee for casting a vote on another person's behalf, which is subject to a fine, as well as a prohibition against granting a proxy vote in exchange for any financial or personal gain, which is subject to arrest or a fine.

Proxy voting may only take place in permanent polling districts. This form of voting does not apply to polling districts established directly in the place where voters may be staying on the day of elections, i.e. health-care centres, care homes, prisons and pre-trial detention facilities (as well as divisions thereof), student dormitories (or clusters of such dormitories), as well as in polling districts established abroad and aboard Polish ships (Article 54(4) of the Electoral Code).

The Electoral Code contains an extensive guarantee regulation which is to ensure that a decision about selecting a proxy will be taken consciously and will be well thought out, as well as that persons authorised to cast a vote on behalf of another voter will not abuse the authorisation. Apart from the above-mentioned regulations limiting the group of persons who may grant a proxy vote and the group of persons who may vote as a proxy, and also regulations which limit the number of polling districts where this method of voting may be applied, a guarantee character is also assigned to provisions concerning the procedure for granting a proxy vote.

A proxy vote shall be granted in the presence of a mayor or an employee of the office of a relevant commune who has been authorised by the mayor, upon a request submitted by a given voter no later than on the 10th day before the day of elections (Article 56(1) and (2) of the Electoral Code). A proxy vote certificate is prepared in the place of residence of the voter,

unless the voter indicates another place within the boundaries of the commune in his/her application. The said certificate is issued in three copies, one of which is given to the voter, the second one – to his/her proxy, and the third one – remains in the office of the commune. Every commune is obliged to keep records of all issued proxy vote certificates, where the fact of issuing such a certificate is noted (Article 56(7) of the Electoral Code). Activities connected with issuing a proxy vote certificate falls within the scope of tasks assigned to a given commune and are free of charge.

A proxy vote is granted on a one-off basis and concerns only a particular election. For that reason, in the application for a proxy vote certificate, the voter is obliged to indicate the election during which the proxy vote will be cast. Therefore, there is no possibility to authorise the proxy to vote on behalf of the voter in all subsequent elections.

The proxy vote can be cancelled. The voter has the right to cancel it by lodging a statement in that regard with the mayor no later than 2 days before the day of elections or by handing it over to the relevant district electoral commission on the voting day (Article 58(1) of the Electoral Code). A proxy vote expires *ex lege* in the following cases: the death of the voter granting the proxy vote or the death of the proxy, or the loss of the right to vote by the first or the latter; the lack of premisses which determine that one may be a proxy or the occurrence of premisses which rule out the possibility of being a proxy; as well as in the case where the person granting the proxy vote has already voted in person (Article 58(2) of the Electoral Code). The withdrawal or expiry of the proxy vote, before a list of voters is handed over to the chairperson of a given district electoral commission, is noted in the list of voters by the mayor, and after the list is handed over – by the district electoral commission for the polling district of the voter granting the proxy vote (Article 58(3) of the Electoral Code). The detailed procedure for issuing a proxy vote certificate, the templates of an application for issuing a proxy vote certificate, a written consent to receive a proxy vote and a proxy vote certificate, as well as the template of and the way of keeping and updating records of all issued proxy vote certificates, in order to ensure the efficiency and reliability of procedure as well as the credibility of a proxy vote certificate, are to be specified in a regulation by the minister who is competent within the scope of public administration, after consulting the National Electoral Commission.

5.6. The main allegation of the applicants concerns the fact that proxy voting infringes the principle of direct elections, which requires voters to vote in person. It is indisputable that a voter who votes by proxy does not vote in person. Consequently, to resolve the allegation raised by the applicants, it is of primary importance to determine whether the principle of direct elections really encompasses the requirement to vote in person.

5.6.1. The review of the challenged provisions should be preceded by an analysis of constitutional provisions from which the principle of direct elections may be decoded. These are, in particular, the following provisions: Article 96(2) of the Constitution ("Elections to the Sejm shall be [...] direct"), Article 97(2) of the Constitution ("Elections to the Senate shall be [...] direct"), Article 127(1) of the Constitution ("The President of the Republic shall be elected by the Nation in [...] direct elections") as well as Article 169(2), first sentence, of the Constitution ("Elections to constitutive organs [of units of local self-government] shall be [...] direct"). It should be noted that all the said provisions refer the attribute of 'directness' to elections, and not to the act of voting as such. The literal interpretation of the provisions leads to the conclusion that the adjectives "direct", "universal", "equal" or "proportional" describe elections. Thus, the principle of direct elections implies certain guidelines that need to be taken into account by the legislator when constructing the electoral system. The principle of direct elections entails that voting has only one stage, i.e. voters directly vote for their candidate (to be a member of a representative organ of public authority or to hold an office), and not for electors who will make the final choice. The principle of direct elections also

gives rise to a requirement to construct the electoral system in such a way that a voter will be able to cast his/her vote for a particular candidate whose name s/he knows. In that sense, the principle of direct elections rules out the possibility of applying the so-called system of closed (fixed) lists, in the case of which voters vote exclusively for party lists, and a given seat is won based on the place of a given candidate on the list. The principle of direct elections, understood this way, is implied in Article 170 of the Constitution, which provides for the possibility of dismissing "an organ of local government established by direct election". The direct election referred to in that provision is an election where a representative is elected by voters, and not by other groups (indirect stages in the electoral process). From the point of view of the principle of direct elections understood this way, the manner of casting a vote (in person or by proxy) does not matter.

The statement that the principle of direct elections does not encompass the obligation to vote in person is also confirmed by the juxtaposition of that electoral principle with the principle of the secret ballot. The latter explicitly specifies the manner of casting votes in elections. Since the principle of direct elections, unlike the principle of the secret ballot, does not determine the manner of casting votes by voters, then the requirement to vote in person may not be derived from Article 96(2), Article 97(2), Article 127(1) as well as Article 169(2), first sentence, of the Constitution.

5.6.2. The requirement to vote in person appears to be derived by the applicants also from Article 62(1) of the Constitution, although they do not indicate that provision as a higher-level norm for the review within the scope of the allegation of the infringement of the principle of direct elections. However, in the substantiation for the application, the applicants state that: "The provisions specifying citizens' right to vote, in particular Article 62(1) of the Constitution, establish an unspecified subjective right which constitutes a component of the status of the citizen in the state. As part of a particular electoral process (...), the said right changes into a specific right to vote (...). The said right is undoubtedly personal in character and may not be transferred to another person" (p. 16 of the application). Similar arguments are presented by W. Skrzydło and M. Chmaj, who claim that "the requirement to vote in person arises from the strictly personal character of political rights (including the right to vote), which – in contrast to, for instance, property rights – may not be transferred to another person by means of a power of attorney" (M. Chmaj, W. Skrzydło, *System wyborczy w Rzeczypospolitej Polskiej*, Kraków 2002, p. 53; an identical view has been earlier presented by Z. Jarosz, see that author's *Prawo konstytucyjne*, Warszawa 1987, p. 326). Therefore, it should be considered whether the requirement to vote in person may actually be derived from Article 62(1) of the Constitution. Pursuant to that provision: "If, no later than on the day of vote, he [she] has attained 18 years of age, Polish citizen shall have (...) the right to vote for the President of the Republic of Poland as well as representatives to the Sejm and Senate and organs of local government". The right to elect representatives, which is also specified as the right to vote, is not limited in that provision to a choice made in person. Thus, there is no reason why one could not assume that a Polish citizen may elect a representative by voting by proxy. Such a broad interpretation of the provision establishing constitutional law is consistent with the interpretation that is favourable to citizens. In addition, the requirement to vote in person does not arise from the essence of the right to vote, especially that the constitution-maker has not determined in what way that right is to be exercised.

There is still one more provision that requires to be taken into consideration in this context. This is Article 4(2) of the Constitution, in accordance with which: "The Nation shall exercise such power directly or through their representatives". In that provision, direct exercise of power could actually be regarded as equivalent to the exercise of power directly by the Nation; however, it should be noted that directness refers here to a collective entity (the Nation), and not to its particular members. Article 4(2) of the Constitution - being one of the

general constitutional principles, and hence a guideline as to how to interpret other provisions of the Constitution - clearly sets out two ways of exercising power by the Nation - directly or through representatives. The election of representatives is also one of the ways to exercise power directly by the Nation. Nevertheless, this does not mean that the action of voting must be undertaken by a voter solely in person. Since a proxy is also a person who has the right to vote, then casting a vote by the proxy, on behalf of a person granting the proxy vote, still constitutes the case of direct exercise of power by the Nation.

The statement that the principle of direct elections does not encompass the requirement to vote in person by a voter is also confirmed by solutions which have for years been present in the Polish electoral law. Although statutory regulations do not determine the meaning of constitutional terms, they however indicate how the legislator understands those terms. The previous electoral provisions allowed a disabled voter, upon his/her request, to rely on another person's assistance when casting his/her vote, with the exception of the members of an electoral commission and observers overseeing an election (Article 69 of the Act on Election to the Sejm and the Senate, Article 54 of the Act of 27 September 1990 on the Election of the President of the Republic of Poland; Journal of Laws - Dz. U. of 2010 No. 72, item 467, as amended), Article 46 of the Act of 16 July 1998 on Elections to Communal Councils, Poviat Councils and Voivodeship Assemblies; Journal of Laws - Dz. U. of 2010 No. 176, item 1190, as amended). Broadly rendered in those provisions, "assistance" might include casting a vote on behalf of a given voter who, despite being present at a polling station, was not able to verify that the vote was cast in accordance with his/her will, due to his/her state of health (e.g. a blind voter). Assistance provided to a blind voter who did not vote in person has not so far been questioned from the point of view of the principle of direct elections.

To sum up the above findings, it should be stated that the principle of direct elections, as referred to in Article 96(2), Article 97(2), Article 127(1) as well as Article 169(2), first sentence, of the Constitution, entails that voting has only one stage and that there is no obligation to vote in person, which could otherwise rule out proxy voting. Such a view is held by most representatives of the doctrine of law (see F. Siemieński, *Prawo konstytucyjne*, Warszawa 1976, pp. 176-178; L. Garlicki, comment no. 25 on Article 96 of the Constitution, [in:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, L. Garlicki (ed.), Warszawa 1999, pp. 15-16; P. Winczorek, "Bezpośredniość wyborów", *Rzeczpospolita* Issue No. 58/2009; S. Gebethner, *Wybory na urząd Prezydenta Rzeczypospolitej Polskiej. Komentarz do ustawy o wyborze Prezydenta RP*, Warszawa 2000, p. 28; W. Skrzydło, *Ustrój polityczny RP w świetle Konstytucji z 1997 r.*, Kraków 2004, p. 140; J. Buczkowski, *Podstawowe zasady prawa wyborczego III Rzeczypospolitej*, Lublin 1998, pp. 176-178; K.W. Czaplicki, "Głosowanie elektroniczne (e-voting) – wybrane zagadnienia" [in:] *Demokratyczne standardy prawa wyborczego Rzeczypospolitej Polskiej. Teoria i praktyka*, F. Rymarz (ed.), Warszawa 2005, p. 45; K. Wojtyczek, "Konstytucyjna regulacja systemu wyborczego w III Rzeczypospolitej" [in:] *10 lat demokratycznego prawa wyborczego Rzeczypospolitej Polskiej (1990-2000)*, F. Rymarz (ed.), Warszawa 2000, pp. 125-126; M.P. Gapski, "Nowe techniki głosowania w świetle zasady bezpośredniości wyborów", *Przegląd Sejmowy* Issue No. 2/2009, p. 80; A. Żukowski, *System wyborczy do Sejmu i Senatu RP*, Warszawa 2004, p. 17). Thus, proxy voting does not infringe the principle of direct elections, as the requirement to vote in person does not arise from that principle.

5.7. The other allegation formulated by the applicants concerns a contradiction between proxy voting and the principle of equal electoral rights (the principle of equal elections in a formal sense). The said provision entails that voters should have the same number of votes, which in practice entails adopting the formula: "one voter – one vote". The

applicants argue that, unlike a voter who votes in person, a proxy has in fact two votes – his/her own vote and a vote to be cast on behalf of another voter who has chosen him/her as a proxy. In order to address that allegation, one primarily needs to determine the character of a vote that a proxy casts on behalf of a person granting the proxy vote. In particular, it should be determined whether, in the case of proxy voting, it is a voter grating a proxy vote (a voter-grantor) that votes or whether the right that s/he originally enjoyed is transferred to a proxy. In the latter case, it should actually be recognised that the proxy has two votes, and this would lead to the conclusion that the said method of voting infringes the principle of equal elections in a formal sense.

An analysis of the provisions of the Electoral Code leads to the conclusion that a proxy casts a vote on behalf of a given voter, and not on his/her own behalf. Granting a proxy vote does not deprive a given voter of his/her electoral rights. A voter who has granted a proxy vote is not crossed out from an electoral register or a list of voters. What is more, granting a proxy vote is not earlier noted in the electoral register, although the list of voters is – in principle – prepared by a given commune. It is only after showing a proxy vote certificate at a district electoral commission by a proxy (together with a document confirming his/her identity) that the commission enters the first and last name of the proxy in the list of voters, enclosing the proxy vote certificate to the list (Article 59(3) of the Electoral Code). The proxy receives a ballot to vote on behalf of the voter who has granted the proxy vote, which s/he confirms with his/her own signature in the space provided in the list for certifying the receipt of a ballot paper by the voter who has granted him/her the proxy vote (Article 59(4) of the Electoral Code). The commission enters the first and last name of the proxy in the space under the heading "Annotations", corresponding to the section where the name of the voter was entered with the notation "proxy" (Article 59(3) of the Electoral Code). A person granting the proxy vote may withdraw it until the day of elections, by arriving at the polling station with a relevant statement (alternatively, s/he may lodge that statement with a mayor of a given commune two days before the day of elections), and vote in person in the elections. If, however, the voter who has granted a proxy vote, casts his/her vote before his/her proxy does so, than the proxy vote expires *ex lege,* which should be noted in the list of voters by a district electoral commission. But even if the voter does not notify the commission about the proxy vote that s/he has granted and this is not noted in the list of voters, casting a vote by that voter will deprive the proxy of a possibility of voting on that person's behalf. Indeed, if a proxy vote has been cancelled or has expired (e.g. as a result of casting the vote previously by the voter), the district electoral commission will refuse to give a ballot paper to the proxy and will keep the proxy vote certificate (Article 58(2)(3) of the Electoral Code).

To sum up the above findings, it should be stated that a proxy does not vote on his/her own behalf, but casts a vote on behalf of a given voter who has granted the proxy vote (a voter-grantor). The vote that the proxy casts on behalf of another voter is not equivalent to the vote s/he casts on his/her own behalf. The allegation that he has two votes as a voter is thus groundless.

5.8. The third allegation raised by the applicants concerns the infringement of Article 2 of the Constitution by provisions regulating proxy voting. However, it should be noted that the said allegation has not been substantiated appropriately. Firstly, the applicants have not specified electoral standards derived from Article 2 of the Constitution which, in their opinion, the challenged regulation infringes. Secondly, indicating dangers which may be related to proxy voting, they have not shown that the sources of the dangers are actually the challenged provisions. Thirdly, the applicants have not indicated which elements of a guarantee regulation are insufficient from the point of view of constitutional requirements. In the view of the Tribunal, the provisions of the Electoral Code considerably minimise the risk

of irregularities in the course of issuing proxy vote certificates. Formalising the character of the procedure for issuing proxy vote certificates and including an official element in it guarantee that a decision to opt for that form of voting will be a conscious and well-thought-out choice, and the decision will not be taken under pressure from other persons. Fourthly, the allegations raised by the applicants concerning irregularities and abuse which may accompany proxy voting were not made probable to the extent that would justify the examination thereof. In the judgment of 15 October 2009, Ref. No. K 26/08 (OTK ZU No. 9/A/2009, item 135), the Tribunal stated that: "Only proving that the scale of irregularities, mistakes and abuse results in the permanent distortion of the challenged norm could lead to taking into account that state of affairs in the assessment of the constitutionality of the norm itself". In the case of legal acts which are only being introduced into the legal system and which have not yet been applied (such as the Electoral Code), the Tribunal has no possibility of assessing a given provision on the basis of the practice of its application, as such practice is non-existent. Therefore, before the entry into force of the Electoral Code, it is not possible to determine whether the irregularities, mistakes and abuse mentioned by the applicants will at all take place or whether their scale will lead to a permanent change of the shape of the challenged provisions.

Bearing in mind the fact that the applicants have not justified the allegation of non-conformity of the challenged regulation, concerning a proxy for voting, to Article 2 of the Constitution as well as that they have not presented any evidence to support it, it ought to be stated that the application within that scope does not fulfil the requirements referred to in Article 32(1)(4) of the Constitutional Tribunal Act. Thus, the proceedings concerning that allegation have been discontinued on the grounds that issuing a judgment is inadmissible.

5.9. Since the Tribunal has stated that the basic provisions on proxy voting, i.e. Article 51(1) in the part which includes the wording "his/her proxy" as well as Article 38(1) in conjunction with the provisions of Chapter 7 of the Electoral Code, are consistent with the Constitution, then there are no grounds to examine the constitutionality of the other provisions which merely refer to that electoral-law institution. The proceedings concerning them have been discontinued on the grounds that issuing a judgment is inadmissible for several reasons. Firstly, the other provisions have been challenged conditionally, in case the Tribunal declares the unconstitutionality of the framework provisions regulating the said institution. Assuming that in such a situation it would be desirable to eliminate any reference to the institution regarded as unconstitutional, the applicants have challenged all provisions which contain such reference. Conducting a review of such provisions would be justified only if the Tribunal declared the unconstitutionality of the framework provisions. However, since this was not the case, the review of those conditionally challenged provisions is inadmissible. Secondly, the applicants have not in any way justified the allegation of the unconstitutionality of provisions which – apart from regulating other issues – contain merely reference to the provisions about a proxy for voting. In particular, they have not explained what is the nature of alleged unconstitutionality of provisions which imply the requirements to count voters voting by proxy (Article 228(1)(3) and Article 270(1)(3) of the Electoral Code) as well as to include that information in records by electoral commissions (Article 75(3), Article 357(2)(3), Article 360(2)(3), Article 442(2)(3), and Article 488(3)(3) of the Electoral Code). Also, they have not justified the allegation of unconstitutionality with reference to two challenged criminal-law provisions which penalise the act of charging a fee for casting a vote on another person's behalf (Article 511 of the Electoral Code) and the act of granting a proxy vote in exchange for any financial or personal gain (Article 512 of the Electoral Code). Thirdly, the applicants have indicated no higher-level norms for review which would be adequate for the review of the provisions which merely make reference to the institution of a proxy for voting.

For these reasons, the proceedings concerning the review of the constitutionality of the above-mentioned provisions have been discontinued.

5.10. Making an assumption that constitutional electoral standards equally pertain to all types of elections governed by the regulations of the Electoral Code, the applicants have challenged the possibility of proxy voting not only in elections to the organs of the state, but also in elections to the European Parliament. In that context, the applicants have argued that proxy voting in elections to the European Parliament infringes the principle of equal electoral rights of citizens and, as a higher-level norm for the review, they have indicated Article 62(1) in conjunction with Article 32(1) of the Constitution. By contrast, what follows from the consistent jurisprudence of the Constitutional Tribunal is that higher-level norms for review derived from the Constitution are inadequate in the case of a review of provisions concerning elections to the European Parliament, as this subject matter is not included in the Constitution. In its judgment of 31 May 2004, Ref. No. K 15/04 (OTK ZU No. 5/A/2004, item 47), the Tribunal stated that: "the way of legitimising the organs of the European Union does not fall within the range of matters regulated by the Polish Constitution, but within the range of matters concerning the EU law and Polish law implementing the EU principles within the scope of jurisdiction of the Polish State". The Tribunal maintained the said thesis in its judgment of 11 May 2005, Ref. No. K 18/04 (OTK ZU No. 5/A/2005, item 49), by stating that: "It is not (...) the role of the Polish Constitution to regulate elections to the organs of the Communities and the European Union. This constitutes the subject of international agreements establishing the Communities and the European Union, ratified by the Republic of Poland. For that reason, regulations concerning the validity of elections to the European Parliament should be looked for in international treaties establishing the Communities and the European Union". Although, in the case Kp 3/09, the Tribunal did review the constitutionality of two provisions of the amendments to the Act of 23 January 2004 on Elections to the European Parliament (Journal of Laws - Dz. U. No. 25, item 219, as amended), but it did so only from the point of view of the principles derived from Article 2 of the Constitution (*vacatio legis*, and the principle of specificity of law). This was about the allegations concerning the way of shaping the statutory regulation and the introduction thereof into the legal system, and not about specific solutions concerning elections to the European Parliament. Thus, the ruling in the case Kp 3/09 falls within the scope of the previous line of jurisprudence of the Constitutional Tribunal, from which it follows that the European Parliament is not an organ of public authority exercising power in the Republic of Poland, whereas matters related to elections to the European Parliament are not regulated in the Constitution. That view has been adopted as a starting point also in the present case. The Tribunal has therefore adjudicated that Article 38(1) in conjunction with Chapter 7 in Part I of the Electoral Code, insofar as it concerns proxy voting in elections to the European Parliament, is not inconsistent with Article 62(1) in conjunction with Article 32(1) of the Constitution.

6. Postal voting.

6.1. Another group of the provisions challenged by the applicants is related to the institution of postal voting (Article 38(2) and Article 45(2) of the Electoral Code and the whole of Chapter 8 in Part I of the Electoral Code). It follows from the substantiation for the application that the applicants do not question the admissibility of postal voting in principle - as they have done in the case of proxy voting; they merely challenge certain elements of that institution which – in their opinion – do not meet constitutional requirements. This is indicated by wording contained in the substantiation for the application: "What the applicants

challenge is not the apt idea, but the unfortunate legislative rendering thereof" (p. 30 of the application). With regard to the legislative regulation, the applicants raise three types of allegations.

Firstly, the applicants hold the view that voting away from the polling station of a district electoral commission infringes the principle of the secret ballot, arising from Article 96(2) of the Constitution ("Elections to the Sejm [...] shall be conducted by secret ballot"), Article 97(2) of the Constitution ("Elections to the Senate [...] shall be conducted by secret ballot") and Article 127(1) of the Constitution ("The President of the Republic shall be elected [...] in [...] elections, conducted by secret ballot"). The Tribunal states that the provisions from which it is possible to decode a legal norm stating that postal voting takes place away from the polling station of a district electoral commission are the following: Article 38(2) in conjunction with Article 62 and Article 66 of the Electoral Code. The first one stipulates that postal voting in polling districts established abroad also constitutes voting in person. That provision should be read in conjunction with Article 38(1) of the Electoral Code, which specifies two possible forms of voting, i.e. voting in person and proxy voting. Therefore, postal voting is regarded by the legislator as a type of voting in person, the special character of which consists in the fact that it takes place away from the polling station of a district electoral commission. Article 38(1) of the Electoral Code does not, however, contain that last stipulation, hence - for the full decoding of the legal norm - it is necessary to review that provision in conjunction with Article 62 and Article 66 of the Electoral Code. It follows only from the content of the last-mentioned provisions that postal voting takes place away from the polling station of a district electoral commission. Article 62 of the Electoral Code provides for the possibility of postal voting for voters whose names have been entered in the list of voters and who vote abroad; at the same time, the said Article obliges a consul to disseminate information on the possibility of postal voting and the rules related thereto. By contrast, pursuant to Article 66 of the Electoral Code, postal-ballot return envelopes with ballot papers filled in by voters are sent to a competent consul who transfers them to a district electoral commission. The postal-ballot return envelopes transferred by the consul are placed in a ballot box, whereas those received by a district electoral commission after the close of poll are destroyed.

The second allegation raised by the applicants concerns one of the elements of the procedure for postal voting, which is sending ballot papers. The applicants note that the intermediaries in the process of sending ballot papers are "postal institutions which carry out their activity in foreign countries, and whose efficiency and reliability, including the level of protecting the secrecy of correspondence and the degree of being "watertight" when it comes to persons and institutions that may be interested in affecting the results of Polish elections or in violating their secrecy, including secret services, varies in different countries (...). In those circumstances, Polish public authorities are unable to guarantee that ballot papers will reach a given voter in time and will be served on him/her, that the ballot paper in a return envelope will be filled in by a given voter himself/herself, that its content will not be seen by any outside persons during the transfer from the voter to a consul, that those persons will not resort to fraud consisting in changing the content of the ballot paper or replacing it, and that eventually it will reach the consul in time" (pp. 29-30 of the application). For these reasons, the applicants conclude that postal voting does not guarantee the fair exercise of citizen's right to vote, and thus is inconsistent with Article 62(1) of the Constitution. The challenged element of postal voting, i.e. sending ballot papers, has been regulated in Article 65 and Article 66 of the Electoral Code. The first of those provisions describes the procedure for sending the so-called ballot package, which includes a ballot paper, to a voter by a consul, whereas the other provision concerns the procedure for sending a postal-ballot return

envelope with the ballot paper filled in to the consul by the voter. Therefore, the review of constitutionality within the scope of that allegation has been limited to these two provisions.

The third allegation of the applicants regards the fact that, as part of postal voting, ballot papers are filled in several or over a dozen days before the day of elections. The applicants refer to this phenomenon as "electoral false start" (p. 30 of the application). The procedure for filling in a ballot paper by a given voter and sending it in a return envelope to the consul is regulated by the above-mentioned Article 66 of the Electoral Code, and that very provision has been subject to review within the scope of that allegation. In the opinion of the applicants, filling in ballot papers before the day of elections is inconsistent with the principle that parliamentary elections (Article 98(2) and (5) of the Constitution) and presidential elections (Article 128(2) of the Constitution) may only be held on a single day. Also, the applicants indicate that casting a vote before the day of elections may result in wasting the vote, in the case where a candidate one has voted for dies or withdraws his/her consent to stand for election before the day of elections, which leads to crossing the candidate's name from a given list of candidates.

The Tribunal has discontinued proceedings within the scope of review of the other provisions on postal voting, due to the fact that the allegation of unconstitutionality concerning them has not been justified. Additionally, the applicants have not challenged the institution of postal voting as such, which would allow to review the entire chapter regarding that legal institution, as has been done in the case of proxy voting. Therefore, the review has been conducted only with regard to the provisions which have been challenged with the three above-mentioned allegations formulated by the applicants.

Also, the applicants claim that the regulations providing for postal voting infringe "standards of reliable elections in a democratic state and the principle of protection of citizens' trust in the state and its laws, which makes them inconsistent with Article 2 of the Constitution" (p. 30 of the application). However, the said allegation has not been justified in the application. The applicants have not specified the standards of reliable elections which – in their opinion – have been infringed. In addition, they have not indicated in what way the provisions on postal voting have infringed the principle of protection of citizens' trust in the state and its laws. In that regard, the application does not meet the requirements arising from Article 32(1)(4) of the Constitutional Tribunal Act; hence, the proceedings concerning Article 2 of the Constitution as a higher-level norm for the review have been discontinued on the grounds that issuing a judgment is inadmissible.

What is more, the applicants have challenged the provisions on postal voting in elections to the European Parliament, requesting that the provisions be reviewed in the light of Article 62(1) of the Constitution. The Tribunal maintains its view that the constitutional provisions constitute an inadequate higher-level norm for the review in that regard, as elections to the European Parliament are not regulated by the Constitution. For these reasons, the Tribunal has adjudicated that Article 65 and Article 66 of the Electoral Code, insofar as they mention sending ballot papers as an element of the procedure for postal voting in elections to the European Parliament, are not inconsistent with Article 62(1) of the Constitution.

6.2. Postal voting makes it possible to cast votes by voters staying abroad who frequently have problems with arriving at district electoral commissions, due to the distance from those commissions to their place of residence or stay.

The Tribunal wishes to note that the said method of voting is admissible in many European states. Statutory regulations in that regard reveal numerous differences. In some states, postal voting is only provided for citizens staying abroad (e.g. Italy or the Netherlands), and in others – for citizens who live in their own country, but who, for various

reasons, may not cast their votes in person at a polling station in their country (e.g. Germany or the Great Britain). There are also countries which have completely withdrawn from the possibility of postal voting, which had been previously introduced (e.g. France in 1975). The European Commission for Democracy through Law (the Venice Commission), in point 3.2. (iii) of its Opinion no. 190/2002 entitled "Code of Good Practice in Electoral Matters", has stated that postal voting should be allowed only where the postal service is safe and reliable. Postal voting may be made accessible, *inter alia*, to voters living abroad.

For years the proposal to introduce that form of voting in Poland has been put forward by the representatives of the doctrine of law, the Polish Ombudsman or the National Electoral Commission. It usually accompanied the proposal to introduce proxy voting, although in the course of legislative work it was much less frequently put forward than the latter. In 2003 a proposal to introduce postal voting was considered during the course of work conducted by the Committee on the European Union and the Administration and Internal Affairs Committee on bills concerning the election of Members of the European Parliament (see the Sejm Papers Nos 1785 and 1968/4th term). It was formally put forward as an amendment to the bill only during the second reading on 12 December 2003, and then it was recommended by the two above-mentioned committees in their additional report (see the Sejm Paper No. 2243A/4th term). Adopted by the Sejm on 18 December 2003, the Act on Elections to the European Parliament in its Article 2(3), introduced the principle that "voting may take the form of voting in person at a polling station or postal voting". Postal voting was permitted in the case of voters who permanently lived in the country, including those staying in hospitals, care homes, prisons and pre-trial detention facilities, as well as voters who were staying abroad temporarily. The statutory regulation was however very laconic and comprised only three provisions of that Act. Therefore, in the opinion lodged with the Marshal of the Sejm, the National Electoral Commission stated that "holding elections in a proper way, on the basis of such provisions, is impossible" and put forward its proposals for changing them (see the letter of 5 January 2004, Ref. No. ZPOW-062-31/03). The Senate stated that supplementing the Act to such a large extent, which would be desirable, was not possible, and submitted amendments deleting the provisions on postal voting. In the substantiation for the resolution of the Senate of 14 January 2004 concerning the Act on Elections to the European Parliament (see the Sejm Paper No. 2416/4th term), it was stated that: "the Senate decided to eliminate the possibility of postal voting from the Act (...), being of the opinion that provisions of the Act are incomplete and inconsistent in that regard, which makes them literally unenforceable. The necessity to provide the National Electoral Commission with additional funds to carry out elections in the case of the possibility of postal voting, as well as the conviction that the said innovation should first be introduced into the Polish electoral system in the context of elections at the local level, caused the Senate to adopt the concept of traditional voting". The said amendments were not rejected by the Sejm, as a result of which the promulgated Act of 23 January 2004 on Elections to the European Parliament (Journal of Laws - Dz. U. No. 25, item 219, as amended) contained no provisions on postal voting.

Postal voting was not provided for in the draft Electoral Code, proposed by a group of Sejm Deputies, which was submitted to the Marshal of the Sejm on 24 June 2008 (see the Sejm Paper No. 1568/ 6th term). The introduction of that form of voting was, however, discussed at the sitting of the Special Committee for considering certain bills within the scope of electoral law on 21 October 2010 (see the Bulletin No. 4277/VI). Invited to that sitting as an expert, Mr J. Zbieranek (coordinator of a legal programme in the Institute of Public Affairs) presented draft provisions providing for the possibility of postal voting by Polish citizens staying abroad. During the sitting of the committee, a proposal was made that the said method of voting should also be made available to Polish citizens voting in Poland. The issue of postal voting was addressed during the two subsequent sittings of the Special Committee

on 9 November 2010 (see the Bulletin No. 4351/VI) and 15 November 2010 (see the Bulletin No. 4352/VI). Eventually, amendments adding provisions on postal voting were put forward during the second reading of the draft Electoral Code in the Sejm. In an additional report concerning the said draft Code, the Special Committee for considering certain bills within the scope of electoral law recommended the adoption of those amendments (see the Sejm Paper No. 3578-A/6th term). The Electoral Code, containing provisions on postal voting, was adopted unanimously. Amendments to those provisions, proposed by the Senate, were editorial in character (cf. the resolution of the Senate of 17 December 2010 concerning the Electoral Code, the Sejm Paper No. 3730/6th term).

6.3. The analysis of the three above-mentioned allegations from the application should be commenced with presenting the statutory regulation concerning postal voting. The issue is dealt with in Chapter 8 of the Electoral Code, entitled "Postal voting in polling districts established abroad". It follows from Article 62 of the Electoral Code that the said method of voting is reserved for a narrow group of voters, i.e. those who are staying abroad and are included in the list of voters prepared by a consul who has territorial competence in that regard. Postal voting has an optional character, as voters who belong to that group may also cast their votes in person at a polling station set up outside the borders of the Polish state. The intention to cast a postal vote should be notified by voters to a consul who has territorial competence in that regard until the 15th day before the day of elections (Article 63(1) of the Electoral Code). Forthwith after receiving ballot papers form a competent electoral commission, however no later than until the 10th day before the day of elections, the consul sends a ballot package containing an addressed return envelope, a ballot paper or ballot papers, an envelope for the ballot paper or ballot papers, a statement about voting in person and in secret, as well as voting instructions (Article 65(1) of the Electoral Code). Under the heading "Annotations" in the list of voters, corresponding to the entry of the last name of a given voter who expressed his/her intention to cast a postal vote, the consul adds information about sending the ballot package to the voter (Article 65(4) of the Electoral Code). Voters who cast postal votes, after filling in ballot papers, put the papers in envelopes for ballot papers which they seal, and then they place the envelopes inside return envelopes together with signed statements, and send them at their own expense to the address of the competent consul (Article 66(1) of the Electoral Code). The consul transfers the return envelopes to the competent district electoral commission no later than on the 3rd day before the day of elections (Article 66(2) of the Electoral Code). The return envelopes transferred by the consul are placed in the second ballot box, which is prepared solely for that purpose. The return envelopes transferred to the district electoral commission after the close of poll are destroyed without being opened.

The template and size of a return envelope, an envelope for a ballot paper, a statement about voting in person and in secret as well voting instructions for postal voting in polling districts established abroad are specified in the resolution of the National Electoral Commission of 6 June 2011 (Official Gazette – M.P. No. 47, item 540). Technical conditions concerning postal voting are specified in the second resolution of the National Electoral Commission of the same day (Official Gazette – M.P. No. 47, item 541). What follows therefrom is that ballot packages should be transferred to voters casting postal votes as registered letters, received upon confirmation of posting or in any other way – by signing for the packages. After receiving return envelopes, the consul has the obligation to store them in a way that rules out the possibility of access by unauthorised persons. Where possible, the packages should be stored in a safe. The resolution, in detail, describes the manner of transferring the ballot packages by the consul to the district electoral commission, the commission's procedure for handling the return envelopes delivered before the close of poll,

ballot papers placed in those envelopes as well as the procedure for handling the return envelopes delivered after the close of poll.

6.4. According to the first allegation formulated by the applicants, voting away from a polling station infringes the principle of the secret ballot. The said principle implies that no-one else but voters themselves know the content of their individual voting decisions. Secret ballot is a necessary guarantee of unrestrained expression of individual electoral preferences. Also, in a certain way, it protects voters from possible effects of voting, regardless of the fact whether those effects would have a positive or negative character.

For voters, secret ballot is a privilege, but not an obligation. Casting one's vote not anonymously has no negative legal consequences, as long as this does not constitute an element of an electoral campaign. Also, the principle of the secret ballot is not infringed by sharing voluntarily one's voting decision with others, regardless of the fact whether this takes place before or after elections.

What follows from the principle of the secret ballot for the organs of the state is the obligation to set up a polling station which makes it possible to cast votes so that no one could know the voting decision of a particular voter. In the case where voters decide to vote away from the polling station of a district electoral commission, they consciously decide to give up the guarantee of the secret ballot provided by the state, at the same time taking over the obligation to ensure that they will have appropriate conditions for the secret ballot. For that reason, an element of a ballot package which a voter casting a postal vote receives is a statement about voting in person and in secret. The said statement should be signed and sent in a return envelope together with a filled-in ballot paper to the address of the competent consul. The obligation to guarantee the secrecy of the voting decision that has been taken is transferred from the voter to the consul only at the moment of delivery of the ballot papers to the consul. It follows from the above-mentioned resolution of 6 June 2011, issued by the National Electoral Commission with regard to the technical conditions of postal voting in polling districts established abroad, that the consul should store the envelopes in a way which prevents unauthorised access. Where possible, the packages should be stored in a safe. The consul transfers the return envelopes, without opening them, to a district electoral commission where they are placed in a given ballot box; if the envelopes are received after the close of poll, they are destroyed without being opened.

To sum up the above findings, the Tribunal states that in the case of postal voting it is voters who become obliged to guarantee the secrecy of the act of voting. The obligation to guarantee the secrecy of the voting decision that has been taken is transferred from the voter to the consul at the moment of delivery of the ballot papers to the consul. Such a manner of regulating the procedure for voting away from the polling station of a district electoral commission does not infringe the principle of the secret ballot, as the legislator has indicated persons who are responsible for the implementation of the said principle at particular stages of the electoral process and created the above-mentioned complex mechanism which guarantees that the content of the voting decision of a particular voter will not be made known to third parties.

6.5. Another allegation raised in the application concerns the issue that sending ballot papers via the postal service in foreign countries, where Polish authorities may not carry out any supervision, does not guarantee the reliable exercise of citizens' active electoral rights, and thus is inconsistent with Article 62(1) of the Constitution. In the applicants' opinion, due to possible irregularities and electoral fraud that may occur during sending ballot papers, the outcome of voting may not reflect the actual preferences of voters.

It follows from the formulation of the allegation that – according to the applicants – the mere fact of sending ballot papers in the territory outside the jurisdiction of the Republic of Poland determines the unconstitutionality of the challenged provisions. The applicants *a priori* assume that, at that stage of electoral process, there will be irregularities which Polish authorities will not be able to prevent or counteract. Therefore, the said allegation concerns the realm of application of law, and the verification of the validity of the allegation requires the knowledge about the functioning of the challenged provisions, which in the present case – due to the fact that on the day of adjudication the Electoral Code has not yet entered into force – is impossible. Irregularities discovered in the course of applying the procedure for postal voting would be of significance only if they occurred on such a scale that they would result in a permanent distortion of those provisions. In the present case, the applicants have not made it probable that electoral irregularities may occur on such a scale. Thus, it should be stated that the presumption of constitutionality of the challenged provisions within the scope of that allegation has not been refuted. For these reasons, the Tribunal has adjudicated that Article 65 and Article 66 of the Electoral Code, insofar as they mention sending ballot papers as an element of the procedure for postal voting in parliamentary and presidential elections, are consistent with Article 62(1) of the Constitution.

6.6. The last allegation concerns the issue that in postal voting voters cast their votes at least a few days before the day of elections, which infringes the requirement to hold elections on a single day (Article 98(2) and (5) as well as Article 128(2) of the Constitution).

In the case of postal voting, the procedure for casting votes is indeed extended in time – beginning with the moment of sending a ballot paper in a ballot package by the consul, then filling it in by a voter and sending it back to the consul, until the moment of placing it in a ballot box (together with the whole return envelope). The last-mentioned action, although it is not done directly by the voter, but by the members of a district electoral commission, may only take place on the day of elections.

Due to this extended-in-time procedure for postal voting, it should be considered at which point in postal voting voters cast their votes in elections. Undoubtedly, voters make their choice by filling in ballot papers, writing the "X" mark in the box to the left of the name of a candidate or candidates. Filling in a given ballot paper properly guarantees the validity of a vote; however, it is not a prerequisite for casting the vote. Indeed, the vote is cast at the moment of placing the ballot paper in a ballot box, but - for the effectiveness of that action - it is irrelevant whether the ballot paper has been filled in or not. If a voter, in person, places a ballot paper which s/he has not filled in a ballot box, this will also be a form of casting a vote, although the vote will be regarded as invalid during the counting of votes conducted by a district electoral commission. On the other hand, if the voter fills in the ballot paper, and then – instead of placing it in a ballot box – it will destroy it or take it away from a given polling station, this will not be regarded as casting the vote in elections.

For that reason, the Tribunal states that casting votes in elections occurs not at the moment of filling in ballot papers by voters, but at the moment of placing them in a ballot box. The said rule applies both to voters voting at a polling station as well as to voters voting by post. In the case of the last actions, the action of filling in ballot papers precedes the action of placing them in a ballot box. However, what determines that a vote is cast is the latter action, which takes place on the day of elections. This means that the allegation about voting before the day of elections in the case of voters who vote by post is groundless.

7. Bans on the use of large-format election posters and slogans as well as paid election radio and TV ads.

7.1. Point 8 of the operative part of the judgment concerns Article 110(4) in conjunction with Article 495(1)(4) of the Electoral Code, which bans - under the penalty of a fine - the use of election posters and slogans the surface area of which exceeds 2 square meters. And point 9 of the operative part of the judgment concerns the Act of 3 February 2011 amending the Electoral Code, which bans the broadcast of paid election radio and TV ads by state-owned and private broadcasters, and introduces the penalty of a fine for the violation of that ban.

In the case of both regulations, the applicants allege that the bans limit the freedom to express opinions, to acquire and to disseminate information, as stated in Article 54(1) of the Constitution, are contrary to the principle of proportionality of restrictions, as expressed in Article 31(3) of the Constitution, as well as are inconsistent with Article 2 of the Constitution ("with the standard of freedom of electoral rivalry in a democratic state") as well as with Article 32(1) and (2) of the Constitution (the principle of equality and non-discrimination).

With regard to the amending Act of 3 February 2011, the applicants also indicate the non-compliance with the requirement, derived from Article 2 of the Constitution, that significant amendments should not be introduced into electoral law later than six months before beginning the implementation of electoral procedure, and raise the allegation that a statute was amended during the period of *vacatio legis* where this was not necessary, and also argue that the extraordinary pace of work on that Act precluded a substantive discussion.

7.2. Due to the applicants' indication of Article 54(1) of the Constitution as a higher-level norm for the review as well as the basic concurrence of arguments for the unconstitutionality of the two points of the operative part of the judgment, the Tribunal presents joint substantiation concerning both of the points.

The Constitutional Tribunal has stated that the challenged provisions are inconsistent with Article 54(1) in conjunction with Article 31(3) of the Constitution.

Similarly to the doctrine, the Tribunal assumes that Article 54 of the Constitution, the content of which is often described as "the freedom of speech", comprises three interrelated kinds of freedom: a) the freedom to express opinions, b) the freedom to acquire information, c) the freedom to disseminate information (see the judgment of 5 May 2004, Ref. No. P 2/03, OTK ZU No. 5/A/2004, item 39), see also P. Sarnecki, commentary on Article 54 of the Constitution, [in:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz,* Vol. 3, L. Garlicki (ed.), Warszawa 2003, p. 3).

Despite the fact that the freedom of speech is regulated in Chapter II of the Constitution, entitled "The Freedoms, Rights and Obligations of Persons and Citizens", in the section entitled "Personal Freedoms and Rights", it has a "mixed" character - being a personal freedom in the realm of private life and a political freedom in the realm of public life.

The freedom of speech in private life is enjoyed only by individuals and is regarded as an aspect (component) of other personal freedoms (in particular personal freedom - *sensu stricto* – Article 41(1) of the Constitution; the right to private life – Article 47 of the Constitution; the freedom of communication – Article 49 of the Constitution; the freedom of conscience and religion – Article 53 of the Constitution). Thus, its autonomous significance in that realm is restricted (see P. Sarnecki, *op. cit*., p. 3).

By contrast, what is of fundamental significance is the freedom of speech in public life. When juxtaposed with Article 14 of the Constitution ("The Republic of Poland shall ensure freedom of the press and other means of social communication"), it ceases to be merely a freedom of the individual (or of a collective entity), and it also gains the characteristics of a systemic principle (cf. P. Sarnecki, *op. cit*., p. 1). The effective functioning of modern democracies requires the application of various means of communication,

including, in particular, electronic ones. Unrestrained and vast flow of views and information from political parties and election committees to citizens (voters) is particularly important at the time of elections to the organs of public authority and the elections of individuals to hold particular offices, i.e. at the time of the most intense manifestation of the existence and functioning of democracy. "Since free elections, the freedom of expression and, in particular, free political debates together constitute the foundation of every democratic system, they are interrelated and enhance each other" (M. A. Nowicki, commentary on Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms, [in:] *Wokół Konwencji Europejskiej. Komentarz do Europejskiej Konwencji Praw Człowieka*, Warszawa 2009, p. 2).

7.3. In the light of Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms (Journal of Laws - Dz. U. of 1993 No. 61, item 284; hereinafter: the Convention), the freedom to express opinions is placed as if between political and personal freedoms, which "means that – on the one hand - the said freedom must be considered in a macro aspect, i.e. as a principle of the organisation and functioning of «democratic society». The freedom to express opinions constitutes one of the most important instruments guaranteeing pluralism, tolerance and openness, i.e. values without which a democratic society cannot exist. That freedom implies the existence of political democracy, i.e. free presentation of programme alternatives and different candidates to voters, respect for minority views and the guarantee of access to «the free market of views and ideas» for everyone (...); on the other hand, the freedom to express opinions must be considered in the individual (micro) aspect as an essential element of the dignity and autonomy of the individual" (L. Garlicki, commentary on Article 10 of the Convention, [in:] *Konwencja o ochronie praw człowieka i podstawowych wolności,* Vol. 1, Warszawa 2010).

In the light of Article 10 of the Convention, the subjects of the freedom of expression are not only individuals, but also legal entities and other collective entities, as long as they formulate utterances or act as a go-between in the process of formulating them. The protection under Article 10 concerns, in particular, political parties and subjects of a similar character (see the ECHR judgment of 24 February 1994, Application no. 15450/89, the case of Casado Coca v. Spain, as well as of 30 January 1998, Application no. 133/1996, the case of the United Communist Party of Turkey and Others v. Turkey).

The same arguments weigh in favour of the statement that those entitled to the freedom of speech, as expressed in Article 54(1) of the Constitution, may be individuals (natural persons) as well as collective entities, including political parties and election committees, which are indeed composed of individuals and it is on their behalf that they voice opinions.

The freedom to express opinions and the freedom to disseminate information, in the context of implementing democracy, and especially during elections, are particularly significant to political parties and election committees created by those parties, as well as coalitions of parties or voters. The freedom to acquire information is primarily the right of citizens, as voters, to learn as much as possible about parties participating in elections and their candidates, if they are to make a conscious choice.

7.4. The expression of views in public entails, *inter alia*, externalising evaluation, opinions, proposals, forecasts and speculations concerning the activity of authorities and public functionaries or political parties, as well as concepts for the solution of different political and social problems. Attention should be drawn to the fact that Article 54(1) of

the Constitution provides for the expression of one's own opinions, although it is assumed that someone else's opinions may be disseminated as information (see P. Sarnecki, *op. cit.*, p. 3).

Views may be expressed in various ways, not only verbally (in speech or writing), but also by means of images, including various types of posters, or even by wearing certain clothes or emblems.

Disseminating information is understood as providing given information (data) to selected third parties as well as propagating it, i.e. making it known to the public, *inter alia*, by using means of social communication.

The freedom to acquire information means a freedom to look for information on one's own, by applying any of the means falling within the scope of statutes. There is no doubt that, in our times, the main sources of acquiring and disseminating information are the means of social communication, and the most important of them are electronic media.

In the realm of private life, both the freedom to acquire information as well as the freedom to disseminate it are subject to numerous restrictions arising from various norms protecting personal freedoms, in particular the right to privacy. In the public realm, the boundaries of the freedom of speech in that form are much broader.

Challenged by the applicants, the ban on the use of election posters and slogans the size of which exceeds a certain limit set forth in the Code as well as the ban on broadcasting paid election radio and TV ads, even when assessed separately, undeniably restrict not only the freedom to express opinions and to disseminate information (on the part of political parties and election committees), but also the freedom to acquire information (on the part of voters). The accumulation of those bans intensifies the restrictions even more. At the same time, it is an apt argument that those kinds of restrictions, especially concerning television and radio ads, may lead to acquiring majority over parliamentary opposition and the opposition outside the Parliament in electronic media by the parties in power, as the ruling parties have numerous occasions every day to present in the media, free of charge, their own achievements and intentions via their members or supporters representing various state organs and agendas.

These restrictions do not pass the test of proportionality, as specified in Article 31(3) of the Constitution, primarily because one may not indicate values, among those enumerated in the provision, which would justify the ban on using large-format election posters or slogans, or on broadcasting paid election radio or TV ads. Certainly, the bans are not necessary for the reasons of state security, or the protection of the natural environment, health or public morals, or the freedoms and rights of other persons.

In the opinion of the Tribunal, the restrictions are justified neither by the general clause about public order, nor by the arguments - used in the explanatory note to the draft Code (see the Sejm Paper No. 3813/6th term) - that such bans were to "improve the quality of political discourse" as well as optimise the spending of funds allocated for electoral campaigns which, in the case of a political party, mainly come from the state budget. If the *ratio legis* of those restrictions was to be a change in the way funds are spent on campaigns by election committees, then the legislator should appropriately modify the provisions on financing electoral campaigns, rather than force changes in this regard by means of instruments which would limit the freedom of speech**.**

The Tribunal points out that the said restrictions concern one of the fundamental personal and political freedoms as well as a systemic principle. Therefore, declaring that the restrictions are constitutional would require irrefutable premisses, which are missing in this case.

7.5. Moreover, the applicants have alleged that the regulations referred to in points 8 and 9 of the operative part of the judgment infringe the principle of equality, as expressed in

Article 32 of the Constitution, by the fact that the challenged bans restrict the freedom to express opinions and the freedom to disseminate information by candidates in elections and by election committees, and an analogical ban does not concern "any other category of entities sharing an essential common characteristic, such as having interest in presenting one's evaluation, opinions and proposals in public". To give an example of such entities, the applicants mention tenderers providing commercial products and services, as well as NGOs and cultural institutions. Making reference to the examples of electoral campaigns in other countries, the applicants claim that it is possible to place billboards in the public space by entities other than election committees, which "in their content or form allude to the slogans or political agendas of particular candidates and factions in order to support them or undermine them".

The Tribunal has not shared those allegations. The entities indicated by the applicants as those which have been treated by the statute in violation of the principle of equality have no common characteristic that is relevant in the context of electoral law, which comprises the challenged legal regulations.

On the one hand, these are entities which take part in elections: election committees and candidates, and on the other hand – entities which do not participate in elections: entrepreneurs, NGOs and unspecified cultural institutions. In order to assess whether there has been no violation of the principle of equal treatment, comparison is drawn only between entities characterised by the same essential (relevant) feature, i.e. in this case these are various election committees and candidates standing for election, and the challenged bans on the use of "billboards" as well as paid election radio and TV ads in electoral campaigns concern the said entities to the same extent. The Tribunal wishes to point out that these bans could even facilitate providing equal opportunities to election committees and their candidates that have fewer funds, and that cannot afford "billboards" and paid election ads in the electronic media.

For these reasons, the Tribunal has stated that the challenged provisions are consistent with Article 32 of the Constitution.

7.6. Apart from the allegation of the infringement of Article 54(1) of the Constitution, which has been referred to both the ban on the use of "billboards" as well as the ban on paid election radio and TV ads, the applicants have argued that the entire amending Act of 3 February 2011, which has introduced the ban on the use of election radio and TV ads, infringes Article 2 of the Constitution, due to the fact that it "introduces significant amendments to the rules of electoral law later than six months before the day of ordering an election, is aimed at affecting the outcome of the election, infringes the principles of free rivalry among political factions in a democratic state, the principle of reliability of law, the principle of protection of maximally formed legitimate expectations and the principles of appropriate legislation". In the substantiation of those allegations, the applicants mention that Article 119(2) of the Electoral Code, in its original wording (before the amendment introduced by the challenged Act) - for the period of electoral campaign - established a claim of election committees – the claim having the character of a maximally formed legitimate expectation before the campaign – with regard to public radio and TV broadcasters as to the paid broadcast of election ads on equal terms for all the committees. Hardly a week elapsed from the publication of the Act providing for such an expectation in the Journal of Laws (...) when, in the same journal, the amending Act was published, ruling out the said expectation and announcing that potential conduct which would be consistent with that expectation would be subject to a fine".

The applicants argue that the challenged amending Act was enacted during the period of *vacatio legis* concerning the Electoral Code, and that it follows from the jurisprudence of the Tribunal that this is only admissible when justified by exceptional circumstances, which

are absent in this case. They also indicate the unusual hurry in which parliamentary work was carried out on the draft version of the Act, despite the fact that the bill had been proposed by a group of Deputies, and thus was not subject to the procedure provided for government bills classified as urgent.

The Tribunal has adjudicated that the challenged Act is inconsistent with Article 2 of the Constitution – the principle of a democratic state ruled by law, due to the infringement of the principles of reliable legislative process and the principle that significant amendments should not be introduced to electoral law later than at least six months before the day of ordering elections. The challenged amending Act of 3 February 2011 was enacted during the period of *vacatio legis* concerning the Electoral Code, and was published only a week after the publication of the Code.

In its jurisprudence, the Constitutional Tribunal has, in principle, negatively assessed the introduction of amendments to provisions during the period of *vacatio legis*, stating that, "in the light of the principle of appropriate legislation and the principle of protection of citizens' trust in the state and its laws, it is not proper legislative practice to amend provisions during the period of *vacatio legis*. The said practice is abused, does not enhance the reliability of law, and undermines the authority of the legislative branch of government. Indeed, *vacatio legis* is, in its essence, an institution the aim of which is to rule out a situation of surprise on the part of the addressees of legal norms as well as to allow them to adjust to a new regulation (...). Additionally, one should take into account the fact that adequate *vacatio legis* is also a period during which the legislator has an opportunity to rectify any errors, internal contradictions, or solutions leading to contradictions within the legal system, which he notices after the enactment of a given normative act, or to prevent negative effects of the entry into force of the enacted, but not yet binding, regulations. It may not be ruled out that, in some situations, due to extraordinary circumstances, it will be justified to amend the provisions that have been recently adopted" (the judgment of 18 February 2004, Ref. No. K 12/03, OTK ZU No. 2/A/2004, item 8).

There is no doubt that, in the case of the Act under examination, there were no such extraordinary circumstances that would justify the introduction of the amendments during the period of *vacatio legis*. Indeed, the said amendment did not consist in rectifying an error or a contradiction with other provisions, noticed after the enactment of the Electoral Code, but in introducing new restrictions into electoral law as regards the way of conducting electoral campaigns, which completely contradicted the regulations adopted in that regard in the Code, which had been enacted shortly before the amending Act. Moreover, the said amendment was introduced in breach of the obligatory six-month period of "legislative silence". Although that infringement was insignificant and, as such, it might not result in unconstitutionality, but together with other defects in the legislative process concerning the Act – it constitutes the basis of such determination.

At the same time, the Tribunal states that the amendment introduced to electoral law by the said Act is significant. In accordance with the jurisprudence of the Tribunal, the issue of "significant amendments" to electoral law should be assessed in the context of a particular amendment. In principle, "a significant amendment" to electoral law is an amendment which significantly affects the course of voting and the outcome thereof, and therefore there is a requirement to notify the addressees of a given legal norm about the fact that an amendment has been introduced (see the judgment of the Constitutional Tribunal in the case K 3/09). In the judgment of 3 November 2006 (Ref. No. K 31/06), the Tribunal stated that: "the following measurable factors have a vital impact on the ultimate outcome of elections, in the context of electoral law: a) the size of constituencies, b) the value of possible «electoral thresholds» in a proportional system, c) an adopted system of determining election results (counting votes and allocating them to seats)". However, this

does not mean that only amendments to electoral law, within the indicated scope, may be regarded as significant, but that such amendments are - by their very nature, as they concern the basic elements of law – significant, whereas amendments to other elements are subject to assessment in each case separately.

In the opinion of the Tribunal, the amendment introduced unexpectedly by the challenged Act – the ban on the use of paid election radio and TV ads, in a situation where so far they have been widely used as a very effective (though brief and simplistic) form of disseminating the content of political messages from election committees to large numbers of voters – may have an impact on the outcome of elections. In particular, it may lead to worse election results of those election committees which have limited access to the media, including the public media, due to the fact that the entities that established the committees may not be involved in the exercise of power or may remain in opposition.

The Tribunal also negatively assesses the course of legislative work on the challenged Act, namely the unusual hurry, which was substantively unjustified. The first reading of the bill proposed by a group of Deputies (see the Sejm Paper No. 3813) was held on 1 February 2011, and on the same day a relevant Sejm committee began and finished work on the bill. The second reading was held on the following day, and the third reading (vote in the Sejm) – on 3 February. On 4 February, the bill passed by the Sejm was examined by the Senate, which proposed no amendments thereto, and on the same day the bill was signed by the President. On 7 February (i.e. on the 6th day after the first reading), the Act was published in the Journal of Laws.

The exceptional pace of work on the Act, which concerns *inter alia* an essential personal and political freedom, i.e. the freedom of speech, is not justified by any extraordinary circumstances of the case. The enactment of the Act in such a hurry does not facilitate consideration and reflection, *inter alia*, as regards the conformity of the enacted law to the Constitution. Also, the President had no time to evaluate the Act in that regard, since he signed the Act on the same day that it was ultimately adopted by the Sejm.

In conclusion, the Constitutional Tribunal states that, during the course of enacting the challenged Act, there were such irregularities which jointly result in declaring it to be inconsistent with the principle of a democratic state ruled by law, as expressed in Article 2 of the Constitution.

The ruling by the Constitutional Tribunal that the Act of 3 February 2011, as an amending Act, is in its entirety inconsistent with the Constitution means that the process of changing the Act to be amended, in other words the Electoral Code, was not successfully carried out by the legislator, i.e. the substantive provisions contained in the amending Act did not become part of the Electoral Code.

8. Single-member constituencies in elections to the Senate.

8.1. In order to carry out elections to the Senate, the Electoral Code provides for establishing 100 single-member constituencies with boundaries which do not infringe the boundaries of constituencies established for elections to the Sejm. The division into constituencies in elections to the Senate is to be carried out in accordance with the uniform norm of representation, calculated by dividing the total number of population in the country by 100, taking into account detailed rules set out in Article 261 of the Electoral Code. The boundaries and numbers of particular constituencies, as well as the offices of constituency electoral commissions, are specified in Annex 2 to the Electoral Code. In each constituency, an election committee may announce one candidate for a Senator. A Senate seat is won by the candidate who receives the largest number of valid votes. In the case of

registering only one candidate, s/he is considered to have been elected if, during the voting process, s/he receives more than half of the total number of valid votes.

The above-mentioned regulations introducing single-member constituencies in elections to the Senate are set out in Article 260, Article 261, Article 264(1), Article 268, Article 269, Article 272(3), Article 273(1) and (4) as well as Article 274 of the Electoral Code. The applicants have challenged not only the content of those provisions, but also the procedure for the enactment thereof. Within that scope, they have formulated three allegations concerning constitutionality.

Firstly, they have challenged the validity of the legislative procedure, in the course of which the said provisions were introduced into the Electoral Code, and have raised the allegation of the infringement of Article 121(2) of the Constitution. In the applicants' opinion, the amendments proposed by the Senate, which determined the final version of the provisions, fell beyond the scope of amendments which the Senate may put forward with regard to a bill referred to it for consideration. Secondly, the applicants have argued that constituencies in elections to the Senate have been established in breach of the principle of equal elections in its substantive aspect, as the challenged provisions fail to maintain uniform proportion of the number of residents in a given constituency to the number of Senators to be elected there. The applicants derive the principle of equal elections from Article 62(1) in conjunction with Article 32(1) of the Constitution. Thirdly, they have formulated the allegation that the provisions on single-member constituencies are inconsistent with Article 2 of the Constitution, and the ensuing requirement "to preserve the basic standards of a democratic state ruled by law, when electing representatives of the nation to grant them the exercise of power" (p. 12 of the application).

Moreover, the applicants have challenged the constitutionality of Article 10(3) of the Introductory Law to the Electoral Code, insofar as it stipulates that the following provisions shall cease to have effect: Chapter 25, Article 195(1), Chapter 29, Article 205(3), Article 206(1) and Article 207 of the Act on Elections to the Sejm and the Senate together with Annex 2 thereto. As higher-level norms for the review of Article 10(3) of the Introductory Law to the Electoral Code, the applicants have indicated as follows: Article 100(3) of the Constitution in conjunction with Article 2, Article 4(2) and Article 62(1) of the Constitution. The said allegation is conditional in character, which is indicated in this excerpt from of the application: "Assuming that [...] the regulation providing for the election of Senators in 100 single-member constituencies is inconsistent with the Constitution, the legislator has also infringed the Constitution by the fact that - by enacting new unconstitutional provisions – his intention was to cause the current provisions to cease to have effect; thus, he has endangered the legal system, by posing a risk of a regulatory gap within the scope of elections to the Senate, which are required to be regulated by statute, pursuant to Article 100(3) of the Constitution. The gap would appear if the Code, within that scope, did not enter into force due to its unconstitutionality" (p. 37 of the application). In the applicants' opinion, declaring the unconstitutionality of Article 10(3) of the Introductory Law to the Electoral Code, insofar as it stipulates that the current provisions of the Act on Elections to the Sejm and the Senate concerning the election of Senators shall cease to have effect, will lead to a situation where the said provisions will remain in force and may be applied in lieu of the provisions of the Electoral Code, derogated by the judgment of the Constitutional Tribunal.

8.2. The examination of constitutionality of provisions introducing single-member constituencies in elections to the Senate should be commenced by considering the allegations concerning the defectiveness of the procedure for the enactment thereof, due to the fact that the Senate went beyond the scope of admissible amendments (Article 121(2) of the

Constitution). In the opinion of the applicants, the introduction of single-member constituencies into the Electoral Code "constitutes a significant systemic change in electoral law [...]. As such, it should be preceded with a thorough debate in a democratic state and it may not be initiated by means of an amendment proposed at the last stage of legislative work in the Parliament (p. 33 of the application). The applicants have also argued that the authors of the Electoral Code did not intend to introduce any changes in the electoral system with regard to elections to the Senate, including the replacement of multi-member constituencies with single-member constituencies.

As the subject of the review of that allegation, the applicants have indicated the whole of Chapter 2 in Part IV, entitled "Constituencies", which comprises two provisions (Article 260 and Article 261 of the Electoral Code), Article 264(1) of the Electoral Code which provides for the possibility of entering only one candidate for a Senator in a given constituency, the whole of Chapter 6 in Part IV, entitled "The Manner of Voting and Terms of Validity of Votes", which comprises two provisions (Article 268 and Article 269 of the Electoral Code), Article 272(3) of the Electoral Code - specifying rules for drafting minutes concerning voting results and election results in a given constituency, Article 273(1) and (4) of the Electoral Code - specifying the manner of determining election results of a given Senator in a constituency, as well as Article 274 of the Electoral Code concerning the announcement of election results in a constituency by a constituency electoral commission.

The above-mentioned provisions on single-member constituencies in elections to the Senate were shaped as a result of appropriate amendments submitted by the Senate, in the resolution of 17 December 2010 (see the Sejm Paper No. 3730/6th term), which were not rejected by the Sejm. The amendment no. 183 determined the content of current Article 260 and Article 261 of the Electoral Code, the amendment no. 184 – Article 264(1) of the Electoral Code, the amendments nos 187 and 188 – Article 268 of the Electoral Code, the amendments nos 189 and 190 – Article 269 of the Electoral Code, the amendment no. 195 – Article 272(3) of the Electoral Code, the amendments nos 196 and 197 – Article 273(1) and (4) of the Electoral Code. The last challenged provision, i.e. Article 274 of the Electoral Code, was adopted in the version passed during the third reading in the Sejm, as the amendment no. 198, in which the Senate proposed to delete that Article, was rejected by the Sejm (see voting no. 189 at the 82th sitting of the Sejm, the 6th term, on 5 January 2011). The Tribunal has stated that all provisions challenged within the scope of the allegation under discussion, which were considered in the amendments proposed by the Senate, may be the subject of the review, in the light of Article 121(2) of the Constitution.

Moreover, the applicants have challenged the constitutionality of Annex 2 to the Electoral Code, which contains the list of 100 single-member constituencies in elections to the Senate, with the indication of their boundaries and numbers. The content of the Annex was shaped by the amendment no. 312 provided by the Senate, and included in the above-mentioned resolution of 17 December 2010. The Constitutional Tribunal assumes in its jurisprudence that an annex to a legal act may be the subject of review, if it has a normative character, and not only a "technical" one (cf. e.g. the judgments of: 25 May 1998, Ref. No. U 19/97, OTK ZU No. 4/1998, item 47; 14 December 1999, Ref. No. K 10/99, OTK ZU No. 7/1999, item 162; 19 February 2002, Ref. No. U 3/01, OTK ZU No. 1/A/2002, item 3; 16 January 2007, Ref. No. U 5/06, OTK ZU No. 1/A/2007, item 3; 11 May 2007, Ref. No. K 2/07, OTK ZU No. 5/A/2007, item 48; 23 November 2009, Ref. No. P 61/08, OTK ZU No. 10/A/2009, item 150). Annex 2, which constitutes an integral part of the Electoral Code, meets the criterion for normativity that makes it possible to review it by the Constitutional Tribunal. Indeed, it specifies – for the needs of future elections to the Senate – the boundaries and numbers of constituencies, and this way contains a normative novelty in its content, which goes beyond the issues which are strictly technical. For that reason, the Tribunal has

stated that Annex 2 to the Electoral Code may constitute the subject of the review in the present case.

8.3. The examination of the procedural allegations, which have been raised by the applicants, requires an analysis of the entire legislative proceedings, within the scope of which provisions concerning single-member constituencies in elections to the Senate were added to the Electoral Code.

The draft Electoral Code proposed by a group of Sejm Deputies, was received by the Marshal of the Sejm on 24 June 2008 (see the Sejm Paper No. 1568/6th term), the issue of constituencies in elections to the Senate was regulated in Chapter 30 in Part IV (Articles 231 and 232). To begin with, it should be pointed out that the draft Code in that part repeated the solutions contained in the Act on Elections to the Sejm and the Senate. As previously in elections to the Senate, 100 Senators were to be elected by a simple majority vote, and in every constituency Senators would be elected in the number of 2 to 4. A given constituency was to comprise the area of a voivodeship or part thereof. The number of seats for the Senate to be allocated to particular viovodeships did not change in respect of the number set out in Article 192(2) of the Act on Elections to the Sejm and the Senate. If a voivodship did not constitute one constituency, then the number of Senators to be elected in such constituency was to be determined – in the same way as in the Act on Elections to the Sejm and the Senate - according to a uniform voivodship quota of representation, calculated by dividing the number of the population of the voivodship by the total number of Senators to be elected in the voivodship. The number of Senators elected in particular constituencies, the numbers and boundaries of constituencies, as well as the offices of constituency electoral commissions were specified by Annex 2 to the draft Electoral Code.

The first reading of the draft Code was held at the sitting of the Sejm on 19 March 2009, and then the draft was referred to the Special Committee for considering certain bills within the scope of electoral law. The draft was considered during 27 sittings of the Special Committee, the first of which was held on 2 April 2009, and the last one took place on 15 November 2010. The proposal to introduce eight amendments to the draft Code, which would allow to hold elections to the Senate in 100 single-member constituencies, was put forward by Mr Marek Wójcik, a member of the Special Committee and Deputy of the Sejm, at the 17th sitting of the Committee on 20 May 2010 (see the Bulletin No. 3778/6th term). The proposed amendments were handed out in a written form to the members of the Committee at that sitting. Then it was decided that they would be referred to a sitting of a working group, whereas the applicant was additionally obliged to prepare and present a draft annex specifying the boundaries of constituencies. This subject was again discussed at the two subsequent sittings of the Special Committee on 24 June 2010 (see the Bulletin No. 3893/VI) and 8 July 2010 (see the Bulletin No. 3973/VI). During those sittings, none of the members of the Committee challenged the validity of the introduction of single-member constituencies, whereas the discussion mainly concerned editorial issues. During the 27th sitting of the Committee on 15 November 2010 (see the Bulletin No. 4352/VI), the members of the Committee unanimously adopted a report on the draft Electoral Code (see the Bulletin No. 3578/VI), which included provisions on single-member constituencies to the Senate as well as an annex containing the list of those constituencies.

The second reading of the draft Code was held at the meeting of the Sejm on 1 December 2010. Mr Witold Gintowt-Dziewałtowski, Deputy of the Sejm, presented a report in which the draft was recommended, and stated, *inter alia*, that: “We have introduced single-member constituencies in elections to the Senate. From now on, as the Special Committee proposes, the number of constituencies in elections to the Senate in the Republic of Poland will be 100 and in each of the constituencies one candidate will be elected among those

proposed by election committees" (Verbatim Record from the 79th sitting of the Sejm, 1 December 2010, p. 26). During the parliamentary debate, support for the solution providing for single-member constituencies was declared by a representative of the parliamentary club of the Civic Platform (p. 29), whereas the representatives of the parliamentary club of the Law and Justice (p. 31) and the parliamentary club of the Democratic Left Alliance (p. 33) announced that there would be amendments aimed at restoring multi-member constituencies. The issue of single-member constituencies was raised in the subsequent speeches during that sitting.

After the second reading, the draft was referred to the Special Committee, which in an additional report requested the Sejm to reject the amendments aimed at restoring multi-member constituencies (see the Paper No. 3578-A). During the third reading which was held at the sitting of the Sejm on 3 December 2010, despite the application of the Special Committee, amendments aimed at establishing multi-member constituencies in elections to the Senate were adopted. This way the solutions which were originally in the draft Code were restored.

That version of the Electoral Code was referred to the Senate; it was referred to the Legislative Committee, the Committee of Human Rights, Lawfulness and Petitions as well as the Committee of Local Self-Government and Public Administration. The last-mentioned committee considered the Code at the sitting on 8 December 2010 and it recommended in its report (see the Senate Paper No. 1052A) that the Senate should adopt a resolution introducing the amendments nos 8-13 aimed at restoring single-member constituencies in elections to the Senate as well as the amendment no. 18 – containing Annex 2 with the list of 100 constituencies. Having considered the Code at the joint sittings on 13 and 14 December 2010, the Legislative Committee as well as the Committee of Human Rights, Lawfulness and Petitions, in their report (see the Senate Paper No. 1052B), also suggested restoring the solutions which provided for single-member constituencies in elections to the Senate (see amendments nos 190-205 and no. 297 in the report of those committees).

At the sitting of the Senate on 15 December 2010, the above-mentioned reports of the committees were presented. Since, during the debate in the Senate, amendments to the Electoral Code were submitted, they were referred to the Legislative Committee, the Committee of Human Rights, Lawfulness and Petitions as well as the Committee of Local Self-Government and Public Administration, so that they could consider them and prepare a joint report. At the joint sittings held on 15 and 16 December 2010, the committees considered the submitted amendments and adopted a joint report (see the Senate Paper No. 1052Z), in which they recommended, *inter alia*, the introduction of single-member constituencies in elections to the Senate.

During the voting that took place on 17 December 2010, the Senate adopted the resolution which *inter alia* adopted the amendments restoring single-member constituencies. The said resolution was referred to the Sejm on 22 December 2010 (see the Sejm Paper No. 3730/6th term); it was referred to the Special Committee for considering certain bills within the scope of electoral law. In the prepared report (see the Paper No. 3742), the Special Committee requested the Sejm not to reject the amendments concerning single-member constituencies in elections to the Senate, which had been proposed by the Senate. At the sitting of the Sejm on 5 January 2011, the said amendments were not rejected; as a result, the provisions challenged in the present case were included in the Electoral Code.

8.4. The issue of admissible scope of amendments proposed by the Senate with regard to a bill passed by the Sejm has on a number of occasions been analysed in the jurisprudence of the Constitutional Tribunal, both in the light of the previous constitutional provisions (see

inter alia the rulings of: 23 November 1993, Ref. No. K 5/93, OTK ZU in 1993, item 39; and 22 September 1997, Ref. No. K 25/97, OTK ZU No. 3-4/1997, item 35), as well as after the entry into force of the Constitution of 1997, which is currently in force (see *inter alia* the judgment in the case K 3/98; the judgments of: 23 February 1999, Ref. No. K 25/98, OTK ZU No. 2/1999, item 23; 14 April 1999, Ref. No. K 8/99, OTK ZU No. 3/1999, item 41; 19 June 2002, Ref. No. K 11/02, OTK ZU No. 4/A/2002, item 43; 24 June 2002, Ref. No. K 14/02, OTK ZU No. 4/A/2002, item 45; 24 March 2004, Ref. No. K 37/03, OTK ZU No. 3/A/2003, item 21; 22 May 2007, Ref. No. K 42/05, OTK ZU No. 6/A/2007, item 49; 21 December 2005, Ref. No. K 45/05, OTK ZU No. 11/A/2005, item 140; 19 September 2008, Ref. No. K 5/07, OTK ZU No. 7/A/2008, item 124; 4 November 2009, Ref. No. Kp 1/08, OTK ZU No. 10/A/2009, item 145).

In its previous jurisprudence, the Tribunal has indicated the need to distinguish between two separate institutions: the Senate's right to introduce legislation (Article 118(1) of the Constitution) and the Senate's right to propose amendments to a bill passed by the Sejm (Article 121(2) of the Constitution). An amendment put forward by the Senate is a secondary proposal in comparison with legislation introduced by the Senate, and the Senate's right to propose amendments may not be transformed into a substitute of its right to introduce legislation (see the judgment of the Constitutional Tribunal of 24 June 1998, Ref. No. K 3/98). Legislation introduced by the Senate is an autonomous legislative proposal which initiates legislative proceedings in their full scope, including the procedure of three readings of legislation in the Sejm. An amendment proposed by the Senate is introduced in the course of work on a bill that has already been passed by the Sejm, and thus, due to its nature, it may not be considered at the first stage of legislative proceedings which comprises three readings in the Sejm. The scope ratione materiae of legislation to be introduced depends solely on its author, whereas an amendment must fall within the scope of the substance of a given bill to which it has been proposed.

The limited scope of amendments which may be proposed by the Senate in accordance with the procedure set out in Article 121(2) of the Constitution is justified by the advanced stage of parliamentary work on a bill, as well as by the model of two-house system adopted by the constitution-maker in the Polish Parliament, where one of the houses has a dominant position over the other.

The Tribunal has on a number of occasions emphasised that the more advanced the legislative process is, the fewer possibilities there are for modifying the subject thereof. Amendments proposed in the course of proceedings aimed at passing a bill - on the basis of Article 119(2) of the Constitution - may, to a large extent, change solutions which were originally proposed in the bill. They may be submitted until the end of the second reading, and until then the author of the bill may withdraw the bill if s/he concludes that the proposed amendments have given it a shape which differs from the one that was his/her intention. The Senate's amendments proposed in accordance with the procedure set out in Article 121(2) of the Constitution occur at the subsequent stage of legislative proceedings, which is preceded by passing the bill by the Sejm. Therefore, these are not amendments to a bill, but to a bill passed by the Sejm. The possibilities of having a parliamentary debate on amendments proposed in accordance with Article 121(2) of the Constitution are limited. Firstly, the Sejm may only decide to reject or not to reject a resolution of the Senate containing amendments, but it has no possibility of modifying the proposals put forward within the scope of the amendments. Secondly, at this stage of legislative proceedings, amendments may not be proposed by other authorities that are competent to do so; thus, there are no possibilities to consider solutions which are alternatives to solutions put forward in the Senate's amendments. Thirdly, the author of the draft legislation may not withdraw the bill which has already been

passed by the Sejm, regardless of the fact how much the Senate's amendments depart from his/her original intention.

Limited possibilities that the Senate has, as regards proposing amendments to a bill passed by the Sejm, also arise from the unequal position of both parliamentary houses in the legislative process. The Sejm passes bills and determines their final shape. The Senate merely takes a stance with regard to bills referred thereto for consideration by the Marshal of the Sejm. It may adopt a bill without any amendments, adopt amendments to the bill or resolve to reject the bill as a whole. If, within 30 days following the submission of the bill, the Senate fails to adopt an appropriate resolution, the bill shall be considered adopted in the version drafted by the Sejm. A resolution of the Senate containing amendments or rejecting the bill is subject to consideration by the Sejm, which ultimately decides whether to reject or accept it. Therefore, the Senate has no possibility of introducing amendments to a bill passed by the Sejm if the said amendments are not approved by the Sejm and are rejected by an absolute majority vote taken in the presence of at least half of the statutory number of Deputies. It is only after the Sejm fails to reject the Senate's amendments that they become part of the bill.

The limited character of amendments proposed by the Senate to a bill passed by the Sejm is manifested both in their "depth" and "width". The "depth" of an amendment concerns the subject matter of the bill already passed by the Sejm, whereas the "width" of an amendment makes it possible to determine the boundaries of the scope ratione materiae of the regulated subject matter. It is not possible to specify the admissible boundaries of the "depth" and "width" of the Senate's amendments in an abstract way. Such limitations should be considered in each case separately, in the light of the subject matter they concern. Nevertheless, it ought to be considered inadmissible when the Senate's amendments go beyond the subject matter of the bill passed by the Sejm and referred to the Senate for consideration. The concept of a bill passed by the Sejm should be understood both as a new bill regulating an issue for the first time as well as a subsequent bill amending the already enacted statute. The distinction drawn between those two types of bills is of significance as regards the admissible scope of the Senate's amendments. In the Tribunal's ruling of 23 November 1993, Ref. No. K 5/93, in which the Tribunal examined that distinction for the first time, it stated that: "there are no problems with determining the scope of amendments when a new bill regulating an issue for the first time reaches the Senate or when the Senate deals with a subsequent bill regulating that issue, which repeals the entire existing statute and regulates the same issue in a new way. In such a case, the substantive scope of the Senate's amendments is practically unlimited. They may concern all the provisions of such a bill as well as include completely different regulations from the ones passed by the Sejm. A problem arises, however, when a bill merely amends another existing statute, and specifically when the extent of the amendments is small. In such a case, it is essential that the Senate limits its amendments only to the scope of the amending bill, i.e. to the text submitted to the Senate for consideration". The issue of amendments proposed to the bill which regulates given subject matter for the first time was again discussed by the Tribunal in its ruling of 22 September 1997, Ref. No. K 25/97, where it modified its previous stance with regard to the practically unlimited scope of such amendments. Then the Tribunal stated that: "in the course of proposing amendments to a bill passed by the Sejm, which is a «new» bill within the meaning set out above. The Senate is not authorised to replace the content of that bill with completely different content, as regards the substance and subject of the regulation, since this would mean bypassing provisions on the Senate's right to introduce legislation (...) as well as provisions on reading bills in the Sejm".

In its judgment of 22 September 1997, Ref. No. K 25/97, the Tribunal also presented vital conclusions concerning the character of amendments which may be proposed by the Senate to a bill passed by the Sejm. The Tribunal stated that if the Senate proposed

instruments and methods for regulating given matters, which were alternative (or at times even contrary) to those adopted by the Sejm, then it might not be said that such amendments concerned matters that had not been examined by the Sejm. The Tribunal elaborated on that view in its subsequent ruling - issued at the time when the current Constitution of 1997 was already in force - which regarded an amending bill to "the Warsaw Act" (see the judgment of 23 February 1999, Ref. No. K 25/98). Then the Tribunal stated that: "There are no reasons why amendments could not completely change the content of solutions contained in a bill, e.g. by proposing alternative or contrary solutions, assuming that a given issue has already been regulated in the bill, and the Senate proposes to assign changed content to the regulation. This means that the Senate's amendments do not go beyond the scope of matters which the Sejm has chosen to be the subject of the bill. However, it may not be ruled out that there will be an instance of going beyond the scope of the bill, especially when it comes to the improvement or modification thereof, within the limits that are fundamentally set by the aim and subject of the bill (...). However, if the scope of going beyond is considerable, and amendments entail introducing content into the bill which is not directly linked with the aim and subject of the bill, then it should be stated that those amendments go beyond the scope of the bill and acquire the character of autonomous legislative submissions. The Senate is authorised to make such submissions, but it may only do so by introducing legislation, and not by proposing an amendment". In another judgment, dated 24 June 2002, Ref. No. K 14/02, the Tribunal returned to the view that the Senate had greater freedom as regards proposing amendments to a new bill regulating an issue for the first time than to a subsequent bill amending the already enacted statute. At that time it stated that "when a new bill regulating an issue for the first time reaches the Senate or when the Senate deals with a subsequent bill regulating that issue, which repeals the entire existing statute and regulates the same issue in a new way, the Senate has a considerable freedom to modify the bill passed by the Sejm by way of introducing amendments. The amendments may concern all the provisions of the bill and may contain regulations which differ from those adopted by the Sejm". A similar view was presented by the Tribunal in the two subsequent judgments - the judgment of 20 July 2006, Ref. No. K 40/05 (OTK ZU No. 7/A/2006, item 82), and the judgment of 19 September 2008, Ref. No. K 5/07 - where the Tribunal stated that: "As regards the subject matter falling within the scope of the bill, the Senate's amendments may provide for alternative solutions (being contrary to the content adopted by the Sejm). However, the said alternative (contrary) solutions contained in an amendment proposed by the Senate must pertain solely to the text of the bill that was referred to the Senate".

Elaborating on that line of jurisprudence, it should be stated that the Senate's amendments proposed to a bill which repeals the entire existing statute and regulates the same issue in a new way may contain alternative solutions to those adopted in the bill referred to the Senate for consideration. The said alternative character implies the possibility of choosing other solutions concerning given matters than those which have been adopted in the bill passed by the Sejm. The range of alternative solutions is limited by the scope of statutory matters with regard to which amendments are put forward. Solutions proposed by the Senate as part of an amendment to the bill may also be identical to those which were previously considered by the Sejm but were eventually rejected during the third reading due to the adoption of an alternative solution. If all those solutions concerned the same issue, then it should be stated that they were alternative in character. The fact that the Sejm chose one of those solutions during the third reading does not rule out the possibility that the Senate may make the other solutions the subject of an amendment put forward in accordance with the procedure set out in Article 121(2) of the Constitution. If the Senate may propose a solution that is alternative in relation to the matters regulated in the bill, which have not been considered by the Sejm in the procedure of three readings, then, even more so, it may put

forward an alternative solution which has been considered by the Sejm but has been rejected. Analysing an amendment, the Sejm has again the possibility of considering the two alternative solutions (the one contained in the bill passed by the Sejm and the one included in the Senate's amendment) as well as the possibility of choosing one of them. The Senate's amendment does not go beyond the scope of matters regulated in the bill only because - in relation to the solutions adopted in the bill - it is alternative in character. And it is of no relevance to what extent the alternative solution included in the Senate's amendment departs from the solution adopted in the bill passed by the Sejm. Indeed, an alternative character, by its nature, concerns solutions that are mutually exclusive or are contradictory. The fact that they may not be implemented at the same time determines the necessity to pick one of them.

8.5. The Senate's amendments that introduce single-member constituencies have been proposed to be included into the Electoral Code - in other words, a bill repealing all the provisions which have hitherto been in force and containing a new regulation of those matters. It follows from the above-cited jurisprudence of the Constitutional Tribunal that the Senate has more freedom when it proposes amendments to a new bill, and less freedom when amendments concern a bill amending a statute in force. Indeed, an amending bill by its nature has a limited scope, and the aim thereof is changing particular provisions of the statute being amended. By contrast, the Electoral Code was passed by the Sejm as a statute that comprehensively regulated the issues related to elections to the Sejm and the Senate, presidential elections, elections to the European Parliament and local self-government elections. Due to a wide scope of matters regulated in that statute, the Senate had better possibilities as regards proposing amendments, as they could concern every institution regulated in the Electoral Code. The issues related to constituencies and the electoral system, in the context of elections to the Senate, were regulated in a bill referred to the Senate for consideration, hence it could make it the subject of proposed amendments. The Senate's amendments fell within the scope of matters that were regulated by statute, and the admissible "width" of those amendments was preserved.

The Senate's amendments consisted in proposing a solution which was an alternative to the one adopted by the Sejm during the third reading. The Sejm was for the introduction of multi-member constituencies in elections to the Senate, constructed in the same way as in the Act on Elections to the Sejm and the Senate. By contrast, the Senate proposed replacing multi-member constituencies with single-member constituencies. Thus, those amendments were alternative in character and concerned the matters which were regulated in a bill referred to the Senate for consideration. It follows from the previous jurisprudence of the Constitutional Tribunal that the Senate may propose amendments which are alternative in character in comparison with the solutions adopted in the bill passed by the Sejm. The fact that the solution introducing single-member constituencies was rejected by the Sejm during the third reading does not rule out making it the subject of an amendment proposed by the other House of the Polish Parliament.

The Senate's amendments concerning single-member constituencies actually repeated the content of provisions put forward by the Special Committee in its report prepared after the first reading, which were the subject of the work of the Sejm until the moment they were rejected during the third reading. The Special Committee and the Senate suggested the identical content of the solutions that were eventually included in Article 260, Article 261(1) (2), (3) and (4), Article 264(1) as well as Article 273(1) of the Electoral Code. The differences in the content of solutions proposed by the Special Committee and the Senate, which were later included in Article 268(1) and Article 272(3) of the Electoral Code, concerned either stylistics or the numbers of provisions, and thus they were merely technical in character. As regards substance, these solutions were indeed identical. The only difference in respect of

substance between the regulation put forward by the Special Committee and the one proposed by the Senate concerned Article 261(1)(1) of the Electoral Code. The Committee suggested that the size of a constituency should be reduced when the quotient resulting from dividing the number of residents by a uniform quota of representation was equal or greater than 1.5; whereas the Senate proposed that such changes should be introduced when the quotient was equal or greater than 2. The content added by the Senate, which was not proposed by the Special Committee (at present Article 261(2) and (5), Article 268(2) as well as Article 273(4) of the Electoral Code), was merely to add precision, and not to change the meaning of the regulation concerning single-member constituencies. The content of Annex 2 put forward by the Special Committee differed from what the Senate suggested, but it regulated technicalities (the boundaries of constituencies) and within that scope the Senate could propose correcting amendments. The Senate's amendments concerning single-member constituencies constituted merely a repetition, with slight modifications, of amendments put forward at the initial stage of legislative proceedings (after the first reading of the bill in the Sejm).

Therefore, it is inapt for the applicants to allege that the issue of single-member constituencies was not the subject of a parliamentary debate. The above-cited materials from the legislative work make it possible to formulate a thesis that the Sejm considered both alternative solutions, and the fact that it chose one of them does not imply that it did not analyse the other. The amendments introducing single-member constituencies were suggested during one of the sittings of the Sejm Special Committee, i.e. at the first possible stage of proposing amendments by someone else than the author of the bill. They were later included in the consolidated text of the draft Electoral Code prepared by the Committee. During the second reading, some Deputies suggested the return to multi-member constituencies, whereas others advocated new solutions. The Special Committee had the possibility of referring to that issue twice, i.e. after the first reading, when the amendments introducing single-member constituencies were put forward, as well as after the second reading, when the amendments restoring multi-member constituencies were proposed. The issue of electoral system for elections to the Sejm was again considered during the third reading when Deputies were to make a choice between two suggested alternative solutions, and a majority advocated the solution providing for multi-member constituencies in elections to the Senate. Therefore, one may not say that the Senate's amendments introduced solutions into the Electoral Code which were not the subject of the legislative work in the Sejm.

It should be noted that the applicants' allegation regards the amendments proposed at the stage of work conducted in the Senate, and not the amendments put forward at the stage when the work was carried out by the Sejm. However, since the applicants argue that the introduction of single-member constituencies in elections to the Senate did not fall within the scope of the intention of the authors of the Code, this issue should also be addressed. In the course of legislative proceedings in the Sejm, the amendment providing for single-member constituencies was proposed after the first reading. The initiators of the legislative proceedings (a group of Sejm Deputies) had the possibility of withdrawing the draft Code until the completion of the second reading if the changes that had been introduced therein could alter the Code in an unacceptable way. Yet, they did not use that possibility, although they put forward amendments at the stage of the second reading, proposing to keep the solutions contained in the original text of the draft Code. Finally, during the third reading, those amendments were favoured and multi-member constituencies were introduced in the case of elections to the Senate. Nevertheless, since the authors of the draft Code did not withdraw it when the amendments introducing single-member constituencies in elections to the Senate were proposed, it should be assumed that they at least agreed that such solutions should be adopted.

Taking the above into account, it should be stated that the Senate's amendments concerning single-member constituencies fell within the scope of amendments which are admissible in the light of the Constitution, and which the Senate may propose with regard to a bill passed by the Sejm. In other words, the provisions of the Electoral Code which those amendments referred to, i.e. Article 260, Article 261, Article 264(1), Article 268, Article 269, Article 272(3), Article 273(1) and (4) as well as Article 274 of the Electoral Code are consistent with Article 121(2) of the Constitution.

8.6. Another allegation raised in the application is that the institution of single-member constituencies in elections to the Senate is contrary to the principle of equal elections in its substantive aspect. In the opinion of the applicants, compliance with that principle required maintaining a uniform proportion between the number of residents of particular constituencies and the number of Senators elected there. The principle of substantive equality in elections to the Senate is derived by the applicants from Article 62(1) in conjunction with Article 32(1) of the Constitution. They claim that omitting the said principle in Article 97(2) of the Constitution stemmed from maintaining the configuration of constituencies in elections to the Senate, which had been determined in 1989 as a result of the Round Table Agreement, in the course of legislative work on the text of the Constitution. The applicants hold the view that: "the concept of electing Senators which arose at that time was determined by the circumstances and established a certain *status quo* which has also been taken into account by the constitution-maker in the Constitution of 1997 which is currently in force, overlooking the principle of equality in Article 97(2). The more the statutory regulation of elections to the Senate is moving away from the «round-table» model, the weaker is the justification of their substantive inequality. In the opinion of the applicants, the said issue requires fundamental verification, in particular when the legislator decides to introduce elections to the Senate in 100 constituencies" (p. 14 of the application).

Within the scope of the above allegation, the applicants challenged the whole of Chapter 2 in Part IV, Article 264(1), the whole of Chapter 6 in Part IV, Article 272(3), Article 273(1) and (4) as well as Article 274 of the Electoral Code, together with Annex 2 to the said Code. The analysis of the substantiation of the allegation allows to state that the scope of the allegation was specified too broadly in the *petitum* of the application. Only Article 260 and Article 261(1)-(3) of the Electoral Code as well as Annex 2 to the Code concern the issue of constituencies established for the purpose of holding elections to the Senate; the provisions set out the rules for constructing the constituencies, and Annex 2 contains the list of constituencies to the Senate. The proceedings concerning the other challenged provisions (i.e. Article 261(4)-(5), Article 264(1), Article 268, Article 269, Article 272(3), Article 273(1) and (4) as well as Article 274 of the Electoral Code) have therefore been discontinued on the grounds that issuing a judgment is inadmissible. In addition, it should be noted that the applicants have not justified the allegation of unconstitutionality with regard to the last-mentioned provisions, and in particular they have not indicated how the provisions allegedly infringed the principle of substantive equality in elections to the Senate. That circumstance additionally justifies the discontinuation of proceedings on the grounds that issuing a judgment is inadmissible.

The constitutional principle of equal elections determines the general shape and course of the process of electing the representatives of the Nation. The said principle was *expressis verbis* referred to elections to the Sejm (Article 96(2)), presidential elections (Article 127(1)) as well as elections to the constitutive organs of units of local self-government (Article 169(2), first sentence). Equality was not mentioned among the electoral adjectives in elections to the Senate (Article 97(2)).

In the doctrine of law, there are two aspects of the principle of equal elections. Equal elections in a formal aspect mean that every voter is granted the same number of votes (usually in accordance with the formula "one voter – one vote"), and in a substantive aspect – that strength (significance) of every vote is the same, i.e. in other words that every voter has the same impact on election results. In practice, the principle of substantive equality means that there should be the same number of voters for a given seat.

Equality in the formal aspect is a prerequisite for democratic elections. Dividing citizens into those who have a larger or smaller number of votes to cast in an electoral process, would be contrary to the principle of a democratic state ruled by law (Article 2 of the Constitution) and the principle of equal electoral rights (Article 62(1) in conjunction with Article 32 of the Constitution). It would be impossible to indicate the criterion for such a distinction which would be justified in the light of constitutional standards. Also, in the doctrine, there is the view that the formal aspect of the principle of equal elections is binding in all elections held by Polish authorities as the implication of the principles expressed in Articles 32 and 33 of the Constitution (cf. L. Garlicki, comment no. 14 concerning Article 97 [in:] *Konstytucja ...*). Thus, formal equality also refers to elections to the Senate, although Article 97(2) of the Constitution overlooks it in the catalogue of electoral adjectives. However, it may be decoded from other above-indicated constitutional provisions.

The implementation of the principle of equality in the substantive aspect in general elections is more problematic. As the Tribunal noted in the judgment in the case K 31/06, "the way of delineating the boundaries of constituencies deforms the principle of equality referring to competing candidates (the list of candidates). This leads to the situation that particular candidates win seats thanks to a different number of votes. This way some win a seat on the basis of a much smaller number of votes than other candidates, although the division into constituencies should be «fair», i.e. take into account the «substantive equality» of candidacies which are formally equal and the «substantively equal» strength of the vote of every voter". Also, the legally regulated choice of a method of allocating seats causes, to a lesser or larger extent, the deformation of substantive equality. As the Tribunal stated in the judgment in the case K 31/06: "However, unlike in the case of a division into constituencies which may more easily take into account the idea of the «substantive equality» in elections, adjusting the list of seats appropriately in a given constituency to the number of voters in that constituency, the implementation of «substantive equality» - by adopting a certain way of allocating seats which would take into account the above idea to a maximum degree – is not completely possible. The electoral system – especially by the legal regulation of allocation of seats – must take into account the fact that the function of elections is closely related with the purpose which the elections serve; The point is to elect a majority that may exercise constitutional and statutory powers". Substantive equality is a certain requirement which the legislator should try to meet, bearing in mind that it is impossible to meet it fully. Therefore, it may not be stated that substantive equality is a necessary element of democratic elections. It is possible to guarantee it merely to a certain extent and only by the appropriate construction of constituencies and the electoral system.

The consequences of the fact that the feature of equality is absent in Article 97(2) of the Constitution are consistently set out in the doctrine of law. In the opinion of L. Garlicki, "the electoral system concerning elections to the Senate does not have to assume the substantive aspect of the principle of equality, so it may loosen the connection between the number of voters and the number of seats which are assigned to that constituency" (L. Garlicki, commentary on Article 97 [in:] *Konstytucja ...*, p. 10). Similar views on that issue are presented by S. Gebethner, who notes that "in the case of elections to the Senate, the Constitution of 1997 does not require respecting the principle of equality" (S. Gebethner, *Wybory do Sejmu i Senatu. Komentarz do ustawy z dnia 12 kwietnia 2001 r. – Ordynacja*

wyborcza do Sejmu Rzeczypospolitej Polskiej i do Senatu Rzeczypospolitej Polskiej, Warszawa 2001, p. 279), and by P. Uziębło, who states that "the only conclusion arising from the constitutional regulation is the fact that the constitution-maker provides for a possibility that elections may not be equal in character" (P. Uziębło, "Glosa do wyroku TK z dnia 28 lutego 2005 r., K 17/03", *Gdańskie Studia Prawnicze – Przegląd Orzecznictwa* Issue No. 3/2005, p. 167).

The above views of the representatives of the doctrine of law, which the Tribunal shares, lead to the conclusion that, in the light of the constitutional regulation, elections to the Senate do not have to implement the principle of substantive equality. This matter remains within the scope of the regulatory freedom of the ordinary legislator, who may adopt a solution guaranteeing that an appropriate proportion will be maintained in the entire country between the number of residents of a given constituency and the number of seats in the Senate which are allocated to a given constituency. In the case of single-member constituencies, this would mean a necessity to establish constituencies in such a way that they would comprise an identical or similar number of residents.

The conscious omission of the principle of substantive equality in the context of elections to the Senate, in Article 97(2) of the Constitution, by the constitution-maker means that it is also impossible to reconstruct that principle from the content of other constitutional provisions. This also refers to Article 62(1) in conjunction with Article 32(1) of the Constitution, which has been indicated as a higher-level norm for the review.

Since the principle of substantive equality in elections to the Senate does not follow from Article 62(1) in conjunction with Article 32(1) of the Constitution, then - in the light of that principle - the said provisions constitute an inadequate higher-level norm for the review of the regulation introducing single-member constituencies in elections to the Senate. For this reason, the Tribunal has adjudicated that the challenged provisions are not inconsistent with Article 62(1) in conjunction with Article 32(1) of the Constitution.

8.7. The provisions concerning single-member constituencies have also been challenged by the applicants in the context of Article 2 of the Constitution and the principle of reliable elections which is derived therefrom. The applicants have pointed out a special aspect of that principle, namely the necessity to ensure an appropriate degree of representativeness in elections to a representative organ of public authority. However, in no way have they justified the thesis in accordance with which the Senate composed of Senators elected that way loses its representative character.

In the substantiation for the application, the applicants indicate different elements of elections which determine – in their opinion – the representative character of an organ of public authority, but they draw no conclusions that would be significant for the review of the challenged provisions.

Firstly, a representative character entails that it is required that representatives of various political factions compose a representative organ, including those which are supported by "significant voting minorities" (p. 7 of the application). They note that elections to the Senate "take place at the time of elections to the Sejm, after an electoral campaign which is party-centered and dominated by the Sejm-related topics. In the case of the possibility of indicating only one candidate to the Senate by a given voter, the advantage of a faction being in the lead in elections to the Sejm will be reflected in elections to the Senate" (p. 35 of the application). The allegation is completely unjustified. The electoral system based on single-member constituencies provides for a chance of winning a seat by a candidate who has no power base; hence, the allegation about party-centeredness is misguided.

Secondly, the infringement of the requirement of representativeness is linked by the applicants with the way of establishing constituencies. They argue that single-member

constituencies prove effective "where there are varied ideological and political preferences on the country scale, and the boundaries of constituencies are delineated in such a way that geographical, sociological, religious and other discrepancies are taken into account" (pp. 7-8 of the application). The applicants claim that what contradicts the standard of representativeness in elections is to establish single-member constituencies by means of the so-called gerrymandering, i.e. by delineating the boundaries of constituencies in disregard for geographical and historical determinants in order to deprive some voters of the possibility to elect their representatives to the representative organs of public authority. The applicants have presented no argument indicating that, in the Republic of Poland, there is no variation as regards ideological and political preferences or that the boundaries of single-member constituencies do not respect the existing geographical, sociological, religious and other differences. The applicants have given examples of constituencies which – in their opinion – are constructed inappropriately (constituencies no. 43, 44 and 61), but have not given any evidence to prove the thesis that the boundaries of those constituencies are set in a way which will affect the result of elections to the Senate. The assertions of the applicants, which are not supported by any sociological research, show "the geographical map of voters" in those constituencies, and do not constitute sufficient substantiation of the allegation of unconstitutionality.

Thirdly, what the applicants consider to be representative elections are elections in which representatives are elected by an absolute majority vote. In a single-member constituency, a Senate seat is won by a candidate who has received the highest number of votes. In the opinion of the applicants, in the case of considerable spread of votes in support of particular candidates, this may result in an election result which will not be representative. The applicants indicate that, as regards other elections held in single-member constituencies (presidential elections as well as the elections of mayors of villages, towns and cities), it is necessary to receive an absolute majority vote.

Bearing in mind the fact that the applicants have not justified, in a proper way, the alleged non-conformity of provisions on single-member constituencies in elections to the Senate to Article 2 of the Constitution and the principle of reliable elections, which is derived therefrom, the Tribunal has decided to discontinue the proceedings within that scope. Indeed, the application includes no substantiation of the allegation, supported with evidence, and therefore it does not meet the requirements arising from Article 32(1)(4) of the Constitutional Tribunal Act. Issuing a judgment in that regard is thus inadmissible.

9. The transitional regulation.

9.1. The applicants have requested the Tribunal to determine that Article 16(1) and Article 16(2), in conjunction with Article 1, of the Introductory Law to the Electoral Code, insofar as they provide for the application of the provisions of the Electoral Code, and not the current provisions, to elections to the Sejm and the Senate ordered in 2011 on the basis of Article 98(2) of the Constitution, are inconsistent with the Article 2 and Article 10 of the Constitution. At the hearing, a representative of the applicants tried to modify the scope of the allegation, requesting that the non-conformity to the Constitution be declared in the case of both Article 1 of the Introductory Law to the Electoral Code and Article 16(1) of the Introductory Law. However, such a modification is legally ineffective, as the applicants in this case are a group of Sejm Deputies and only they may decide about the scope of the allegation. The representative of the applicants is not himself authorised to specify the subject of the review himself differently that this has been done in the application by the group of Sejm Deputies. For this reason, the Tribunal has assumed that the subject of the review in the

present case comprises Article 16(1) and Article 16(2), in conjunction with Article 1, of the Introductory Law to the Electoral Code.

Challenged Article 16 of the Introductory Law to the Electoral Code states that the Electoral Code shall be applied to elections ordered after the Code's entry into force and to the terms of office commenced after those elections (paragraph 1), whereas as regards elections ordered before the Code's entry into force - the current provisions shall apply (paragraph 2). By contrast, in accordance with Article 1 of the Introductory Law to the Electoral Code, the Code is to enter into force after the lapse of six months from the day of its promulgation, i.e. on 1 August 2011. The juxtaposition of these two provisions leads to a conclusion that the application of a new set of electoral-law norms was made conditional not so much on the day of entry into force of the Electoral Code, but on the day of ordering elections after the entry into force of the Code. If elections were ordered before 1 August 2011, then the current electoral provisions would apply; by contrast, if the elections were ordered after that day, then they would be held pursuant to the provisions of the Electoral Code.

9.2. The applicants have raised three allegations with regard to challenged Article 16(1) and Article 16(2), in conjunction with Article 1, of the Introductory Law to the Electoral Code.

Firstly, they argue that "the legislator did not maintain a democratic standard which requires that at least six months before elections are ordered all essential rules of electoral law are known, in accordance with which elections are prepared and held" (p. 38 of the application). In the opinion of the applicants, the new electoral law could be applied to this year's parliamentary elections if the legislator had determined that clearly at least six months before ordering elections by the President. Since he did not do that, the said elections may only be held in accordance with the current provisions" (p. 6 of the application). A different regulation, adopted in Article 16(1) and Article 16(2) of the Introductory Law to the Electoral Code – in the opinion of the applicants – remains inconsistent with Article 2 of the Constitution.

Secondly, the applicants state that the above transitional regulation "does not distinguish in a way that leaves no doubt the period of application of new and old electoral law, with regard to this year's parliamentary elections" (p. 38 of the application). As a result, until the day of ordering parliamentary elections by the President, there is some uncertainty as to the set of electoral-law norms which will be applied to these elections. It follows from the Constitution that this year's parliamentary elections must be ordered no later than on 7 August 2011. However, if the elections are ordered before 1 August 2011, i.e. before the entry into force of the Electoral Code, then the current electoral provisions will apply thereto; by contrast, if they are ordered after that date, then the Electoral Code will be applied. Within the scope of that allegation, the applicants have indicated Article 2 of the Constitution as a higher-level norm for the review.

Thirdly, in the opinion of the applicants, making the application of the Electoral Code conditional on the day of ordering parliamentary elections by the President entails that the President has acquired "the power of the super-legislator on whose discretion it depends which of the two alternative sets of electoral-law norms will constitute the basis of electing representatives to the organs of the legislative branch of the government for the next 4 years" (p. 39 of the application). As the applicants claim, this way there has been an infringement of the principle of tri-division of powers, as the legislator has granted the executive authority the power to determine the set of electoral-law norms which will govern this year's parliamentary elections. In this context, the applicants consider Article 16(1) and Article 16(2), in

conjunction with Article 1, of the Introductory Law to the Electoral Code to be inconsistent with Article 10 of the Constitution.

9.3. Making reference to the first of those allegations, it should be noted that the applicants do not question the constitutionality of Article 1 of the Introductory Law to the Electoral Code, i.e. the provision which sets a six-month period when the Electoral Code is not applied after it was promulgated (*vacatio legis*). The applicants' allegation concerns the legislator's infringement of the six-month period of the so-called legislative silence, during which no significant amendments may be introduced into electoral law which pertain to elections ordered before the lapse of that period. The Constitutional Tribunal drew a clear distinction between those two institutions in the judgment of 28 October 2009, Ref. No. Kp 3/09, where it stated that: "The period of *vacatio legis* concerns the moment from which the law can be applied. It marks the moment of its entry into force. (...) However, the requirement of not introducing "significant amendments" to electoral law, in fact, concerns the latest moment of enacting the norms of electoral law in respect of the date of planned elections. Both requirements are based on the principle of a democratic state ruled by law and, at the same time, arise therefrom. The standard of maintaining adequate *vacatio legis* is deeply rooted in the jurisprudence of the Tribunal, dating before the date of the enactment of the Constitution. However, the requirement to exempt electoral law from introducing "significant amendments" thereto shortly before the date of holding elections follows from the jurisprudence of the Tribunal from the period after the year 2000, responding to the negligence with regard to amendments to electoral law made right before elections. It has recently been introduced in relation to the soft law of the Council of Europe, in order to prevent any amendments to electoral law from being made at the last minute and to respect the individual rights". Although maintaining adequate *vacatio legis* in the context of an election statute is not questioned in the present case, the Tribunal considers it desirable to recall the most important findings it has made within that scope in its jurisprudence. The findings are of significance for examining the allegation of the breach of six-month legislative silence by the legislator. Both of those institutions, although different, are interrelated with each other.

The Tribunal has on a number of occasions stated that the Constitution does not *expressis verbis* specify the optimal moment of the entry into force of an election statute (see the judgments in the cases K 31/06 and Kp 3/09). It is the task of the legislator to determine adequate *vacatio legis*; he should make it possible for all participants of a given electoral process to become familiar with new regulations and to adjust their activities to the changing legal system. Moreover, also in the jurisprudence of the Constitutional Tribunal, the standard of "non-application of a promulgated statute" in the context of electoral law has not so far been decoded precisely, which is clearly stressed in the above-mentioned judgments in the cases K 31/06 and Kp 3/09. When specifying the period of *vacatio legis* in the case of an election statute, the legislator should choose - as a reference point – a general rule contained in Article 4(1) of the Act of 20 July 2000 on Promulgation of Normative Acts and Some Other Legal Acts (Journal of Laws - Dz. U. of 2010 No. 17, item 95, as amended), from which it arises that, in principle, a statute shall come into force after 14 days following the day of its promulgation, unless the given statute provides for a longer period. In the case of statutes that introduce a significant amendment to electoral law, the period of *vacatio legis* is – in a sense – of secondary importance, for such statutes - regardless of the fact when they enter into force - may not be applied to elections ordered to be held before the lapse of six months from their promulgation. Hence, in the judgment in the case Kp 3/09, the Tribunal did not declare the unconstitutionality of the 14-day period for the entry into force of the Act amending the Act on Elections to the European Parliament, taking into account the fact that

the elections to the European Parliament were held before the pronouncement of the Tribunal's judgment, and the challenged amendments would apply to the subsequent elections ordered after the end of the term of office of the European Parliament. When assessing *vacatio legis* in the context of election statutes, the Tribunal must also take into consideration the effects of its ruling with regard to an electoral process that has already been commenced. For that reason, in the judgment in the case K 31/06, although the Tribunal negatively assessed the shortening of the period of *vacatio legis* to 6 days in the context of the Act amending the Act on Local Self-Government Elections, it did not declare the unconstitutionality of the amending Act, due to the legal consequences of eliminating the challenged provisions from the legal system.

9.4. One should distinguish the requirement to maintain adequate *vacatio legis* from the prohibition that the legislator may not violate the period of exempting electoral law from the introduction of amendments thereto, if they are classified in the light of constitutional jurisprudence as "significant amendments". A violation of that prohibition is pointed out by the applicants in the present case. What is important for the examination of that allegation is the definition of the term "significant amendment" in the context of electoral law. In the judgment in the case K 31/06, as regards "the most essential elements" of electoral law, the Tribunal indicated the way of delineating the boundaries of constituencies, adopted electoral thresholds as well as algorithms used to determine election results. The Tribunal stated that those were the factors that considerably affected the final outcome of elections. By contrast, in the judgment in the case Kp 3/09, the Tribunal stated that: "a «significant amendment» to electoral law is an amendment that considerably affects the course and outcome of voting, and thus requires notification of the addressees of the legal norm of its introduction. (...)Therefore, for the assessment of "significance of the amendments", it is of importance (...) to assess how significantly the new regulation interferes in the existing electoral system. The more a given change affects the course of voting, the longer should be the period of «adjustment» thereto, on the part of voters as well as the bodies holding the elections". In both judgments, the Tribunal stated that: "certain *minimum minimorum* should include enacting significant amendments to electoral law at least six months prior to subsequent elections, which are understood not only as an act of casting votes but also as the entirety of activities included in the so-called election calendar. Possible exceptions to such a time-frame restriction on amending electoral law could only result from exceptional circumstances being objective in character".

There is no doubt that the Electoral Code contains significant amendments to electoral law within the meaning indicated above. Therefore, it should not be applied to elections which would be ordered before the lapse of six months since its promulgation. Indeed, in the judgment in the case Kp 3/09, the Tribunal stated that the period of legislative silence should be "counted until the date of carrying out the first election activity, i.e. until issuance of a decision to order a given election". Making this more precise, it should be added that the said period should not be counted (backwards) from the day the President actually ordered a particular election, as – due to the lack of constitutional regulation indicating the initial date from which an election may be ordered – the Polish Parliament would never be sure whether the required period of legislative silence was maintained. The six-month period of legislative silence must be set with relation to the only date which is certain in the light of the Constitution, i.e. the last day when ordering elections is possible. In the case of this year's elections to the Sejm and the Senate, this date is 7 August 2011. Consequently, although the day of ordering the parliamentary elections of 2011 is not known to the Tribunal at the moment of adjudication, it should be stated that since the Electoral Code was published on 31 January 2011, the period of legislative silence required by the Constitutional Tribunal has

been maintained. This circumstance is not changed by the fact that so far the Electoral Code has been amended a number of times. The requirement to maintain legislative silence is referred to every amendment to electoral law separately, and hence in this case – to the Electoral Code and to every statute amending the Code. In the present case, the subject of the review was only the first statute amending the Electoral Code. The subsequent amending statutes have not been challenged by the applicants. Therefore, the Tribunal may not adjudicate whether the amendments introduced by those amending statutes constitute significant amendments to electoral law, and thus whether they fall within the scope of prohibition against introducing them within the period of six months before the day of ordering elections. For these reasons, in the context of the Electoral Code, the Constitutional Tribunal has found no breach of the six-month period of legislative silence.

De lege ferenda, the Tribunal however wishes to note that the period of six months of exempting electoral law from the introduction of significant amendments thereto before elections is a minimal period, and the legislator should each time aim at maximising it. The European Commission for Democracy through Law (the Venice Commission), in its aforementioned Opinion no. 190/2002 of 5 July 2002, made the following recommendations to the Member States of the Council of Europe in point II.2.b: "The fundamental elements of electoral law, in particular the electoral system proper, membership of electoral commissions and the drawing of constituency boundaries, should not be open to amendment less than one year before an election, or should be written in the constitution or at a level higher than ordinary law". Although this act falls under the category of soft law and does not bind Poland as a ratified international agreement, the recommendations included in that act may not be overlooked in the process of enacting electoral law by the Member States of the Council of Europe.

9.5. When analysing the other allegation put forward by the applicants, namely that there is no clear distinction between the application of two sets of electoral-law norms, which results in uncertainty as to which one will be applied to parliamentary elections in 2011, one should, in the first place, make reference to the legislative work in the course of which the challenged transitional regulation was assigned with its present content.

In the draft Introductory Law to the Electoral Code (see the Sejm Paper No. 3586/6th term), which was lodged with the Marshal of the Sejm on 17 November 2010, it was proposed that the Electoral Code should enter into force on 1 February 2011 and would be applied to elections ordered after six months from the day of its entry into force as well as to the terms of office of the said organs of the state which will commence after the elections. As regards elections ordered before the lapse of six months from the day of entry into force of the Electoral Code, the current provisions were to be applied. In the end, the transitional regulation was shaped by the amendment of the Senate, which was put forward in the resolution of 17 December 2010 (see the Sejm Paper 3731/6th term) and which was not rejected by the Sejm at the sitting on 5 January 2011. In accordance with that amendment, the Electoral Code will enter into force not on 1 February 2011, but six months after its promulgation, as well as it will be applied not to elections ordered six months after the date of its entry into force, but to elections ordered directly after its entry into force. Justifying the amendment, the Senate indicated that, in Article 1 of the bill referred to it for consideration, "there was a formula which was assumed to guarantee that subsequent parliamentary elections would be held in accordance with the Electoral Code. The Senate concluded that Article 1 did not give such a guarantee. The terms of holding parliamentary elections will depend on the date the President will order elections" (p. 1 the substantiation for the resolution of the Senate of 17 December 2010 concerning the Introductory Law to the Electoral Code, the Sejm Paper No. 3731/6th term).

However, the above amendment put forward by the Senate did not eliminate the uncertainty as to the set of electoral-law norms to be applied to the elections ordered in 2011. The Introductory Law to the Electoral Code, in its present version shaped by the Senate's amendment, just as previously the introductory law in the version passed by the Sejm and submitted to the Senate, makes determining which set of electoral-law norms is to be applied conditional on the day of ordering elections. This is of particular importance, as regards the elections to the Sejm and the Senate, which due to the end of the Sejm's and Senate's term of office should be held in 2011, and the day of ordering those elections concurs with the day of entry into force of the Electoral Code. If the President orders the said elections before the entry into force of the Electoral Code, i.e. before 1 August 2011, then they will be held on the basis of the provisions of the Act on Elections to the Sejm and the Senate. However, if the parliamentary elections are ordered within the period from 1 August 2011 (the entry into force of the Electoral Code) to 7 August 2011 (the deadline for the President to order elections, in accordance with Article 98(2) of the Constitution), then the elections will be held on the basis of the provisions of the Electoral Code. Thus, the legislator has not, in a definite way, determined the moment from which the Electoral Code will be applied; indeed, he linked that moment with a certain future event (the action of ordering elections), the date of which is unknown. As a result, until the moment of ordering elections or – in the case of ordering no elections until 31 July 2011 – until the moment of entry into force of the Electoral Code, it is not possible to determine – on the basis of the transitional rules included in Article 16(1) and Article 16(2) of the Introductory Law to the Electoral Code – the set of legal norms on the basis of which the parliamentary elections will be held in 2011.

The said uncertainty arise from the fact that the transitional rule drafted by the legislator and included in Article 16(2) of the Introductory Law to the Electoral Code makes it possible to apply the Act on Elections to the Sejm and the Senate after the Act is repealed, provided that the parliamentary elections will be ordered before 1 August 2011. At the same time, the legislator has made the application of the rule of extended period of legal effect of the repealed Act on Elections to the Sejm and the Senate conditional on an event which may occur before the entry into force of a provision that establishes the said rule. Indeed, if there was no transitional rule set out in Article 16(2) of the Introductory Law to the Electoral Code and the parliamentary elections were ordered before the entry into force of the Electoral Code, then the elections which – as it arises from Article 98(2) of the Constitution – will be held in the autumn of 2011, would be governed by the provisions of the Electoral Code. The application of the new set of electoral-law norms would be determined by Article 1 of the Introductory Law to the Electoral Code, in accordance with which on 1 August 2011 the Electoral Code will enter into force, as well as by Article 10(3) of the Introductory Law to the Electoral Code, pursuant to which on 1 August 2011 the Act on Elections to the Sejm and the Senate will cease to have effect. The lack of transitional rule requiring the application of the last-mentioned statute to the elections scheduled after the repeal of that statute would mean that – in accordance with the rule that a new statute shall apply – the elections would be governed by the Electoral Code.

However, that certainty as to the set of electoral-law norms that will apply to this year's parliamentary elections has been undermined by the transitional rule set out in Article 16(2) of the Introductory Law to the Electoral Code by the legislator. It provides for the possibility of applying the repealed set of electoral-law norms to elections ordered before the repeal thereof. Also, it should be noted that, from the moment of its entry into force on 1 August 2011, the said transitional rule would, in a sense, "intercept" all possible elections ordered earlier which have not yet taken place. Therefore, it could be applied not only to the elections to the Sejm and the Senate ordered – in accordance with the procedure set out in Article 98(2) of the Constitution – before 1 August 2011, but also to parliamentary or

presidential elections ordered before the end of the term of office (which might be the case at the time of enacting the Electoral Code). The effect of the rule would be that the said elections, despite the entry into force of the Electoral Code, would take place on the basis of previous provisions (respectively: the Act on Elections to the Sejm and the Senate and the Act on the Election of the President of the Republic of Poland), regardless of the fact that the said provisions would cease to have effect on 1 August 2011.

What complements the transitional rule set out in Article 16(2) of the Introductory Law to the Electoral Code is another transitional rule set out in Article 16(1) of the Introductory Law to the Electoral Code. Pursuant to that rule, elections ordered after the entry into force of the Electoral Code and the terms of office commenced after those elections shall be regulated by the Electoral Code. That transitional rule makes the application of the new set of electoral-law norms conditional on ordering elections after the day of entry into force of the Electoral Code. Thus, it is constructed similarly to the previous transitional rule, which makes the application of the old set of electoral-law norms conditional on the ordering of elections before the entry into force of the Electoral Code. The transitional rule in Article 16(1) of the Introductory Law to the Electoral Code does not cause such a state of legal uncertainty as the transitional rule set out in Article 16(2) of the Introductory Law to the Electoral Code, for regardless of the date when the President orders elections within the period from 1 August 2011 to 7 August 2011, it is known that the elections will be governed by the provisions of the Electoral Code; nevertheless, on the day of ordering the elections, there is uncertainty as to whether the said rule will at all be applied. Indeed, if elections are ordered before 1 August 2011, then the set of electoral-law norms governing them will be determined by the transitional rule set out in Article 16(2) of the Introductory Law to the Electoral Code. In such a case, the transitional rule in Article 16(1) of the Introductory Law to the Electoral Code will only be applied to the subsequent parliamentary elections. However, if the parliamentary elections are not ordered until 31 July 2011, then the transitional rule arising from Article 16(1) of the Introductory Law to the Electoral Code will apply to them. Therefore, the construct of the last-mentioned transitional rule should also be assessed negatively. It has been constructed in the same way as the first transitional rule described above (arising from Article 16(2) of the Introductory Law to the Electoral Code), i.e. the application of the Electoral Code has been linked with a certain future event (the act of ordering elections), the date of which is unknown. Both transitional rules, expressed in Article 16(1) and Article 16(2) of the Introductory Law to the Electoral Code, comprise the legal regulation challenged by the applicants. Declaring the unconstitutionality of only the transitional rule set out in Article 16(2) of the Introductory Law to the Electoral Code would lead to a situation where the transitional rule expressed in Article 16(1) of the Introductory Law to the Electoral Code would lose its *raison d'etre*. Indeed, regardless of the fact when the parliamentary elections were ordered, in the event of the lack of Article 16(2) of the Introductory Law to the Electoral Code in the legal system, they would have to take place on the basis of the provisions of the Electoral Code. This way the transitional rule contained in Article 16(1) of the Introductory Law to the Electoral Code would be redundant, in accordance with which also elections ordered after the entry into force of the Electoral Code will be governed by that statute. For that reason, it should be stated that, both transitional rules are closely interrelated and the Tribunal's adjudication must concern the entire transitional regulation. The transitional regulation, established by the legislator in Article 16(1) and Article 16(2), in conjunction with Article 1, of the Introductory Law to the Electoral Code, has resulted in the emergence of uncertainty as to the set of legal provisions that will govern the parliamentary elections of 2011. The mechanism arising from the cited provisions has in practice eliminated legal security, guaranteed by the enactment of the Electoral Code at an appropriate time. This legal uncertainty, which has been caused by Article 16(1) and Article

16(2), in conjunction with Article 1, of the Introductory Law to the Electoral Code, determines the unconstitutionality of the challenged provisions. The Electoral Code introduces numerous significant changes in relation to the regulations contained in the Act on Elections to the Sejm and the Senate. The lack of certainty as to whether those changes will apply in the parliamentary elections of 2011 infringes the principle of protection of citizens' trust in the state and its laws. This, in turn, weighs in favour of the non-conformity of Article 16(1) and Article 16(2), in conjunction with Article 1, of the Introductory Law to the Electoral Code to Article 2 of the Constitution.

9.6. Although the Tribunal agrees with the allegation contained in the application submitted by the group of Sejm Deputies that the transitional solution arising from Article 16(1) and Article 16(2), in conjunction with Article 1, of the Introductory Law to the Electoral Code - destabilising the electoral system - is inconsistent with the Constitution, the Tribunal assesses the effects of that unconstitutionality differently than the applicants.

As it follows from the application and the substantiation thereof, in the view of the applicants, eliminating Article 16(1) and Article 16(2), in conjunction with Article 1, of the Introductory Law to the Electoral Code from the legal system will entail that the autumn parliamentary elections will be held on the basis of the Act on Elections to the Sejm and the Senate. However, the analysis of the Introductory Law to the Electoral Code leads to an opposite conclusion, which makes it impossible to accept the argumentation of the applicants. The Tribunal will commence this analysis with two irrefutable theses.

Firstly, the applicants have not challenged Article 10(3) of the Introductory Law to the Electoral Code, i.e. the provision which repeals the Act on Elections to the Sejm and the Senate as of 1 August 2011. In point 6 of *petitum* of the application, the applicants requested that the Act would be left in force insofar as it concerned elections to the Senate. The Tribunal could not *ex officio* review the constitutionality of Article 10(3) of the Introductory Law to the Electoral Code, let alone had any grounds to eliminate the effect of abrogation which the provision triggers. Consequently, the Act on Elections to the Sejm and the Senate will cease to have effect as of 1 August 2011 and may not be applied to any kind of general elections. For a repealed legal act to be applied to events which occur after the abrogation of the act (in this case to the parliamentary elections in 2011), there would have to be a transitional regulation in the legal system which would provide for that. There is no regulation allowing for the application of the Act on Elections to the Sejm and the Senate to elections ordered after 1 August 2011 in the Introductory Law to the Electoral Code; neither could it be created by a ruling of the Constitutional Tribunal. Indeed, the Tribunal is merely a negative law-maker that repeals provisions which do not meet constitutional standards, and may not enact new provisions for the legislator. For this reason, the Tribunal may not – acting within the scope of its powers – adjudicate in the way the applicants have requested, i.e. it may not maintain the said Act on Elections in force solely for the purpose of holding the autumn elections on the basis thereof.

Secondly, the Tribunal states that regarding the mechanism which arises from Article 16(1) and Article 16(2), in conjunction with Article 1, of the Introductory Law to the Electoral Code as unconstitutional does not entail eliminating Article 1 of the Introductory Law from the legal system. Mentioning Article 1 in conjunction with Article 16(1) and Article 16(2) of the Introductory Law to the Electoral Code is only of relevance as there is precise indication of a day until which it is possible to choose a set of electoral-law norms which will govern the autumn parliamentary elections. It should be added that, due to this year's election calendar that day is not irrelevant: if the Electoral Code entered into force e.g. on 10 August 2011, there would be no legal uncertainty. Hence, within the scope of the challenged mechanism, there is a need to mention Article 1 of the Introductory Law to the Electoral Code. However,

this does not mean that the said provision, separated from Article 16(1) and Article 16(2) of the Introductory Law to the Electoral Code, infringes Article 2 of the Constitution. On the contrary, the Tribunal has indicated above that the entry into force of the Electoral Code will occur in compliance with the established constitutional jurisprudence.

Consequently, the Tribunal states that – after eliminating challenged Article 16(1) and Article 16(2) from the Introductory Law to the Electoral Code – there remain two provisions which clearly determine the set of electoral-law norms which will govern the autumn elections: Article 1, specifying the day of entry into force of the new law (1 August 2011), and Article 10(3), rendering the current law legally invalid as of that day. In that case, the elections may be held solely on the basis of the new law, i.e. the Electoral Code.

9.7. The Tribunal has not recognised the applicants' allegations as to the non-conformity of Article 16(1) and Article 16(2), in conjunction with Article 1, of the Introductory Law to the Electoral Code to the principle of tri-division of powers. In the opinion of the applicants, pursuant to the challenged provisions: "the President, who within the meaning of Article 10(2) of the Constitution is an executive authority, gains a discretionary power of the super-legislator, on whose discretion it depends which of the two alternative sets of electoral-law norms will constitute the basis of electing representatives to the organs of the legislative branch of government for the next 4 years. Such a role of the head of state not only may not be reconciled with the role of an executive authority, but also with the essence of the principle expressed in Article 10(1) of the Constitution" (p. 39 of the application).

Parliamentary elections shall be ordered by the President of the Republic on the basis of Article 98(2) (or Article 98(5)) of the Constitution, and that very provision is the source of his/her power. The power is executive in character, and the exercise of that power is a form of the application of law, and not the enactment thereof. What does not follow from Article 16(1) and Article 16(2), in conjunction with Article 1, of the Introductory Law to the Electoral Code is a new power of the head of state.

At the same time, it should be noted that ordering elections is a prerogative of the President (Article 144(3)(1) of the Constitution), i.e. an official act which does not require to be countersigned by the Prime Minister to be valid. The legislator has granted considerable freedom to the President as regards exercising that power, indicating only the deadlines for ordering elections and for specifying the date of the day of elections. However, Article 98(2) and (5) of the Constitution does not determine from which moment the President may order parliamentary elections.

The power of the head of state, as far as ordering parliamentary elections is concerned, does not arise from Article 16(1) and Article 16(2), in conjunction with Article 1, of the Introductory Law to the Electoral Code, but from Article 98(2) and (5) of the Constitution. By contrast, what the applicants derive from the challenged regulation is a completely different power which they specify as "a discretionary power of the super-legislator". The said power appears to consist in granting the President the possibility of choosing the set of legal norms which will be applied to the parliamentary elections of 2011. In the opinion of the applicants, the power to choose the set of legal norms is a power restricted to the Parliament, which it conferred upon the head of state. However, the Tribunal does not share that view. It is not the President who, by ordering elections, will specify the set of legal norms which will be applied to those elections. It is the legislator who, in Article 16(1) and Article 16(2) of the Introductory Law to the Electoral Code, made determining which set of electoral-law norms is to be applied conditional on the day of ordering elections by the President. Indeed, he linked the set of electoral-law norms with a future event, such as the ordering of elections, the date of which is unknown. Thus, the said uncertainty follows from the way of constructing a statutory

regulation, and not from the freedom to choose the day of ordering parliamentary elections, which is constitutionally guaranteed to the President.

The transitional regulation, comprising Article 16(1) and Article 16(2) of the Introductory Law to the Electoral Code, does not grant the head of state any new powers, including powers concerning the choice of the set of legal norms which will govern elections. The President's freedom to set the date of parliamentary elections also does not follow from those provisions, but from Article 98(2) and (5) of the Constitution. Thus, Article 10 of the Constitution is an inadequate higher-level norm for the review of the legal regulation which is not the source of a new power of the President and does not cause any shifts of powers among the organs of the legislative and executive branches of government. For these reasons, the Tribunal has stated that Article 16(1) and Article 16(2), in conjunction with Article 1, of the Introductory Law to the Electoral Code are not inconsistent with Article 10 of the Constitution.

9.8. Declaring the unconstitutionality of Article 16(1) and Article 16(2), in conjunction with Article 1, of the Introductory Law to the Electoral Code, due to the fact that they make determining which set of electoral-law norms is to be applied conditional on the day of ordering elections, entails that on the day of delivery of that judgment Article 16(1) and Article 16(2) of the Introductory Law will cease to have effect. Article 1 of the Introductory Law to the Electoral Code will remain in force, for it has been cited in point 12 of the operative part of the judgment only as a provision that appears in conjunction with other provisions, and Article 16(1) and Article 16(2) of the Introductory Law have referred to it in their content. Indeed, it should be clearly emphasised, as it has already been mentioned above, that Article 1 of the Introductory Law to the Electoral Code has not been, as such, challenged by the applicants, and the Tribunal has not adjudicated on the unconstitutionality of the regulation contained therein, i.e. the six-month period of *vacatio legis* concerning the Electoral Code. Therefore, the judgment of the Tribunal does not repeal Article 1 of the Introductory Law to the Electoral Code, whereas the effect of derogation includes only Article 16(1) and Article 16(2) of the Introductory Law, together with the reference to Article 1 contained therein.

Declaring the unconstitutionality of the above transitional regulation means that, as of the day of delivery of the judgment in the present case, Article 16(1) and Article 16(2) of the Introductory Law to the Electoral Code, will be eliminated from the legal system, and as a consequence there will be certainty – arising from Article 1 and Article 10(3) of the Introductory Law to the Electoral Code – as to the set of electoral-law norms which will govern the autumn elections to the Sejm and the Senate. Instead of the challenged transitional regulation, what will be binding is the principle of direct effect of new law. Since the Electoral Code will enter into force on 1 August 2011, and this year's parliamentary elections will be held after that date, those provisions will apply to the elections.

For all these reasons, the Constitutional Tribunal has adjudicated as in the operative part of the judgment.

Dissenting Opinion
of Judge Zbigniew Cieślak
to the Judgment of the Constitutional Tribunal
of 20 July 2011, Ref. No. K 9/11

Pursuant to Article 68(3) of the Constitutional Tribunal Act of 1 August 1997 (Journal of Laws - Dz. U. No. 102, item 643, as amended; hereinafter: the Constitutional Tribunal Act) as well as § 46 of the Annex to the Resolution of the General Assembly of the Judges of the Tribunal on the Regulations of the Constitutional Tribunal, dated 3 October 2006 (Official Gazette – *Monitor Polski* (M. P.). No. 72, item 720), I submit my dissenting opinion to points 4 and 12 of the operative part of the judgment of the Constitutional Tribunal of 20 July 2011 in the case K 9/11.

1. In the judgment in the case K 9/11, the Constitutional Tribunal has stated that Article 16(1) and Article 16(2), in conjunction with Article 1, of the Act of 5 January 2011 - the Introductory Law to the Electoral Code (Journal of Laws – No. 21, item 113, as amended; hereinafter: the Introductory Law), due to the fact that they make determining which set of electoral-law norms is to be applied conditional on the day of ordering elections by the President, are inconsistent with Article 2 of the Constitution as well as are not inconsistent with Article 10 of the Constitution. In the opinion of the Tribunal, the consequence of the derogation of those transitional provisions is the application of the regulations of the Act of 5 January 2011 – the Electoral Code (Journal of Laws – No. 21, item 112, as amended; hereinafter: the Electoral Code) to the parliamentary elections of 2011, regardless of when the said elections are ordered.

Within the above scope, I disagree with the Tribunal's view concerning the inadequacy of the higher-level norm for the review arising from Article 10 of the Constitution as well as with its stance on the legal effects of declaring the unconstitutionality of Article 16(1) and Article 16(2), in conjunction with Article 1, of the Introductory Law.

1.1. Article 10 of the Constitution expresses the principle of separation of powers in respect of the scope ratione personae and ratione materiae. The principle means isolating different kinds of realms of the state's activity, such as enacting the law, applying it and delivering judicial decisions, to which three separate groups of organs of the state correspond. Thus, the principle of separation of powers requires separate existence of the organs of the legislative branch of government, the organs of the executive branch and the organs of the judiciary, appointed to carry out their own duties within the scope of state authority (see L. Garlicki, *Polskie prawo konstytucyjne*. *Zarys wykładu*, Warszawa 2006, p. 70). In particular, it should be noted that Article 10(2) of the Constitution precisely and exhaustively specifies the organs of the legislative branch, and hence no other organ of the state than the Sejm and the Senate has the power to enact legal acts equivalent to statutes (leaving aside the exception indicated in Article 234 of the Constitution). In conclusion, Article 10 of the Constitution may constitute a higher-level norm for review particularly as regards those provisions of lower-level normative acts which refer to the powers of particular branches of government.

Article 16(1) of the Introductory Law, which has been challenged in the present case, states that: the Electoral Code shall apply to elections ordered after the day of its entry into force (i.e. after 1 August 2011) as well as to the terms of office commenced after those

elections. By contrast, pursuant to Article 16(2) of the Introductory Law, with regard to elections ordered before the day of entry into force of the Electoral Code, the current provisions shall apply. A group of Sejm Deputies associated with the political party called the Law and Justice Party (hereinafter: the applicants) has challenged that regulation with regard to elections to the Sejm and the Senate which are to be held in 2011. The legal power to order the elections is vested, in the light of Article 98(2) of the Constitution, in the President of the Republic of Poland. The Tribunal rightly considers, in the statement of reasons in the case K 9/11, that this provision is the source of the powers of the head of state. Nevertheless, Article 16(1) and Article 16(2) of the Introductory Law also refer to the said powers, as they contain an element of the norm governing powers, addressed to the President of the Republic of Poland, which is undoubtedly a key element from the point of view of the scope of the allegation in the present case; namely, this element involves specifying the effect of exercising the power to order elections. Taking that effect into account is indispensible, in order to determine the legal form of action taken by the organ of public authority which falls within the scope of the norm governing powers. At the same time, it should be borne in mind that in the legal doctrine, the norm governing powers comprises the power of a particular organ of public authority to apply a given legal form of action, together with the indication of the scope ratione personae and ratione materiae as regards making use of that form (see B. Majchrzak, *Procedura zgłoszenia robót budowlanych*, Warszawa 2008, p. 170). What determines the form of the action is not the term used by the legislator, but the content and legal effects brought about by the action of the said organ. In my view, the findings presented hitherto provide grounds to declare the adequacy of Article 10 of the Constitution as a higher-level norm for the review of Article 16(1) and Article 16(2), in conjunction with Article 1, of the Introductory Law, which – in greater detail – specify the powers of the President (an executive authority).

In the light of legally binding provisions, the President of the Republic of Poland must order elections no later than on 7 August 2011. Consequently, Article 16(1) and Article 16(2) of the Introductory Law authorise the head of state to decide which provisions will govern this year's parliamentary elections. Indeed, if he orders them before 1 August 2011, the Act of 12 April 2001 on Elections to the Sejm of the Republic of Poland and to the Senate of the Republic of Poland (Journal of Laws - Dz. U. of 2007 No. 190, item 1360, as amended; hereinafter: the Act on Elections to the Sejm and the Senate) will apply. If the elections are ordered later, they will be held in compliance with the provisions of the Electoral Code. From the point of view of this *votum separatum*, the main issue is to determine the legal character of the President's power in the context of the elections of 2011.

Pursuant to Article 100(3) of the Constitution, the principles of and procedures for the nomination of candidates and the conduct of the elections, as well as the requirements for validity of the elections, shall be specified by statute. The said provision clearly indicates that the issues mentioned therein constitute the so-called statutory matters which are to be regulated – on the basis of Article 10 of the Constitution – solely by the Sejm and the Senate. In other words, it is the Polish Parliament that is authorised to create legal norms concerning this realm of social relations. Thus, it is authorised to enact provisions from which it is possible to decode basic elements concerning the conduct of individuals or entities in a given situation provided for by the legislator. These elements are as follows: the addressee of a given norm, the conditions for emergence of an obligation and the content of the obligation (required or prohibited, alternatively – admissible conduct). The said power of the Sejm and the Senate also comprises specifying – by means of relevant transitional and introductory provisions – a point in time as of a drafted norm of conduct will enter into force, i.e. it will bind its addressees. The last-mentioned issue, which concerns the aspect that a norm is legally binding in time, may in fact be regarded as one of the components of the norm that refers to

the scope (terms) of the application of the norm. Indeed, it supplements the content of the norm by indicating from which point in time one should act in a specified way (cf. S. Wronkowska, "Glosa do wyroku TK z 15 lutego 2005 r., sygn. K 48/04", *Państwo i Prawo* No. 4/2006, p. 124).

In the context of the above theoretical assumptions, the President's power as regards the elections of 2011 should be assessed – in the light of Article 10 of the Constitution – as inadmissible interference, by this executive authority, with the powers granted exclusively to the legislative branch (the Sejm and the Senate) under Article 100(3) of the Constitution. Indeed, only the Parliament is entrusted with powers to specify – by means of relevant (substantive, transitional, adjusting, repealing and introductory) provisions – the content of the norms of electoral law; the said content comprises, in particular, the scope ratione temporis of the application of a given norm. By contrast, Article 16(1) and Article 16(2) of the Introductory Law, which have been challenged in the present case, grant the President of the Republic of Poland powers to determine the content of legal norms which are to be applied to this year's parliamentary elections. In other words, the head of state, and not the legislator, has the right to decide whether legal norms are in force at a given point in time, i.e. which set of electoral-law norms will govern the elections of 2011. Although the President's choice is limited to selecting one of two complex sets of electoral-law norms (i.e. the Act on Elections to the Sejm and the Senate or the Electoral Code), this does not change the fact that, in the context of Article 16(1) and Article 16(2) of the Introductory Law, we deal with the interference of the executive authority with the role assigned to the Parliament by the legislator. Consequently, the challenged provisions are, within that scope, inconsistent with Article 10 of the Constitution.

One may not agree with the assessment presented by the Constitutional Tribunal, with regard to the higher-level norms for the review arising from Article 10 of the Constitution, also for another reason. Since the Tribunal has assumed that the power to order elections is executive in character and manifests the application of law (with which I disagree in the context of elections of 2011), then it should have declared Article 16(1) and Article 16(2) of the Introductory Law to be consistent with Article 10 of the Constitution. Indeed, the essence of that higher-level norm comprises, *inter alia*, distinguishing between the legislative powers of the Polish Parliament, the executive powers of the President and the Council of Ministers, as well as the judicial powers of courts and tribunals; the provisions challenged in the present case – as the Tribunal itself has stated – do concern presidential powers. By contrast, the use of the wording "is not inconsistent" should be limited to cases where the party requesting review proceedings indicates a higher-level norm for review which is not useful for the constitutional review of a given challenged provision (see M. Florczak, *Orzeczenia Trybunału Konstytucyjnego i ich skutki prawne*, Poznań 2006, p. 91). This includes a higher-level norm for review which is not substantively related to the provision under review, or one from which an applicant (a complainant or a court referring a question of law) derives a right, freedom or constitutional principle that actually arises from a different provision of the Constitution (see *ibidem*). However, such a situation is not the case in the context of Article 16(1) and Article 16(2) of the Introductory Law, when juxtaposed with Article 10 of the Constitution.

1.2. In the judgment in the case K 9/11, the Constitutional Tribunal has aptly stated that Article 16(1) and Article 16 (2), in conjunction with Article 1, of the Introductory Law are inconsistent with Article 2 of the Constitution, due to the fact that they make determining which set of electoral-law norms is to be applied conditional on the day of ordering elections. The applicants have proven the said non-conformity in the context of the elections of 2011, where it is particularly striking. The aptness of the Tribunal's view stems from the fact that

the legislator made a systemic mistake by failing to sufficiently specify the legal regulation which is to be applied to these elections (the indication in that regard is within the President's remit), which in turn has led to uncertainty as to the content of electoral law governing this year's elections to the Sejm and the Senate. Such a situation violates the standards of a democratic state ruled by law which concern electoral law. What follows from those standards is *inter alia* that amendments to electoral law should be introduced well in advance, which will enable the addressees not only to familiarise themselves with the content of legal norms, but also to adjust to the changing legal situation (cf. the judgment of the Constitutional Tribunal of 28 October 2009, Ref. No. Kp 3/09, OTK ZU No. 9/A/2009, item 138). This serves the purpose of enhancing the citizens' trust in the state and its laws. That goal may be achieved primarily by the introduction of adequate *vacatio legis*. Although the Constitution does not directly regulate matters regarding an adequate period when a statute passed by the Parliament is not yet applied, the Tribunal has however indicated in its jurisprudence specific requirements within that scope. In the judgment of 3 November 2006, in the case K 31/06 (OTK ZU No. 10/A/2006, item 147), the Tribunal stated that "certain *minimum minimorum* should include enacting significant amendments to electoral law at least six months prior to subsequent elections, which are understood not only as an act of casting votes but also as the entirety of activities included in the so-called election calendar (the view was maintained in the judgment in the case Kp 3/09). Such a long period is related to the significance of the matters regulated by electoral law. In a democratic state, elections constitute an indispensible institution of public life, allowing to elect representatives exercising power in the name of the sovereign (all citizens). There is no democracy without elections and open competition for power among social groups and political factions. (D. Nohlen, *Prawo wyborcze i system partyjny. O teorii systemów wyborczych*, Warszawa 2004, p. 26). Being an element of the essence of a contemporary democratic state, elections constitute the most important consequence of the concept of the nation's sovereignty and the principle of political representation, which are provided for in the Constitution (see G. Kryszeń, *Standardy prawne wolnych wyborów parlamentarnych*, Białystok 2007, p. 9).

It should be strongly emphasised that, in the context of the present case, the considerable systemic violations of public order in the Polish state stem not only, and not primarily, from the fact that the legislator has not maintained adequate *vacatio legis* a regards the Electoral Code – with the prospect of the parliamentary elections of 2011 – which results in significant amendments to that normative act, with the violation of a six-month period set by the Tribunal (see the Act of 15 April 2011 amending the Electoral Code and the Introductory Law to the Electoral Code; Journal of Laws - Dz. U. No. 102, item 588, published on 18 May 2011). Also, the infringements do not follow, in the first place, from irregularities that occurred in the legislative process and which involved changing the terms of elections to the Senate (replacing multi-member constituencies with single-member constituencies) by means of amendments put forward by the Senate, which should not be an instrument for introducing the normative novelties of that kind. In my view, the fundamental cause of systemic inconsistency between Article 16(1) and Article 16(2), in conjunction with Article 1, of the Introductory Law and Article 2 of the Constitution is the fact that – as a result of enacting the challenged regulations – since the publication of the Introductory Law in the Journal of Laws of the Republic of Poland until now there has been legal uncertainty as to which set of electoral-law norms will govern the parliamentary elections of 2011. The said uncertainty may not be accepted on the light of the standards of electoral law.

Therefore, I accept the Tribunal's adjudication on the non-conformity of Article 16(1) and Article 16(2), in conjunction with Article 1, of the Introductory Law to Article 2 of the Constitution. However, I assess the effects of such a ruling on the current legal system differently than this has been done by the Tribunal. The reason for this is recognising that

challenged Article 16(1) and Article 16(2) of the Introductory Law are inextricably linked with Article 1 of the Law. In the context indicated by the applicants, i.e. elections to the Sejm and the Senate in 2011, unconstitutionality is equally caused by the transitional provision and the introductory provision to the Electoral Code. If it had not been for the content of Article 1 of the Introductory Law, pursuant to which the Electoral Code shall enter into force after the lapse of six months from the day of its promulgation (i.e. 1 August 2011), the constitutional issue raised by the applicants would not have emerged. It is only the juxtaposition of the legal regulation arising from that provision with the one arising from Article 16(1) and Article 16(2) of the Introductory Law that results in a striking infringement of Article 2 of the Constitution. Therefore, I hold the view that, in the present case, bearing in mind the principle of *falsa demonstratio non nocet*, Article 1 of the Introductory Law – insofar as it refers to this year's elections – should be regarded as an autonomous subject of the review, and not as a provision that is taken into consideration in conjunction with other provisions. Regardless of that, in my opinion, the consequence of the assessment presented in point 12 of the operative part of the judgment in the case K 9/11 should be the conclusion that the Electoral Code will not enter into force with regard to the elections to be ordered in 2011. Then, a problem will arise what legal regulation will govern those elections, in particular in the context of Article 10(3) of the Introductory Law, which on the day of entry into force of the Law (1 August 2011) will repeal the Act on Elections to the Sejm and the Senate. However, the only reasonable solution is to continue to apply the Act on Elections to the Sejm and the Senate with regard to this year's parliamentary elections. What weighs in favour of such a solution is a number of systemic mistakes that occurred in the course of legislative work on the Electoral Code as well as the lack of implementing provisions to the Code. Moreover, it should be noted that Article 10(3) of the Introductory Law is formal in character in the sense that the inclusion thereof in the Introductory Law simply stems from the entry into force of the Electoral Code, and thus from the replacement of the "old" statute with the "new" one. The formal character also arises from the fact that the inclusion of Article 10(3) in the Introductory Law is not necessary in the light of the principle of *posterior derogat legi priori*. Thus, since - with regard to the elections of 2011 - the Electoral Code should not enter into force, then there will be no effects arising from the principle that a subsequent norm derogates the previous one. Therefore, one might ponder over the usefulness of issuing, for formal reasons, a ruling declaring partial unconstitutionality also with regard to Article 10(3) of the Introductory Law, which – in the light of the application submitted in the case K 9/11 – was within the scope of jurisdiction of the Constitutional Tribunal.

The recognition by the Constitutional Tribunal of the above-indicated consequences of declaring the unconstitutionality of Article 16(1) and Article 16(2), in conjunction with Article 1, of the Introductory Law in no way could be regarded as the court's interference with the tasks of the legislator, by creating norms concerning the set of electoral-law norms that will govern this year's parliamentary elections. Moreover, in the light of the circumstances related to the enactment of the Electoral Code in its present version, such a solution would be optimal.

2. In point 4 of the operative part of the judgment, the Constitutional Tribunal has stated that Article 51(1) of the Electoral Code, in the part which includes the wording "his/her proxy", as well as Article 38(1) in conjunction with the provisions of Chapter 7 in Part I of the Electoral Code are consistent with Article 62(1) in conjunction with Article 32(1) of the Constitution.

In my opinion, the above adjudication should not be approved for the following reasons:

2.1. The personal character of the right to vote requires voters to appear at a given polling station in person and cast their votes in elections.

This is related to the principle of direct elections. What follows from that principle is, as it has been proposed in the statement of reasons for the judgment, the requirement to construct the electoral system in such a way that a voter could cast a vote for a particular candidate. At the same time, this may not be understood as a prohibition against the application of the so-called system of closed lists, but as a guarantee that votes granted to voters will be cast in accordance with their will. The principle of direct elections should be construed as entailing one-stage elections as well as voting in person. By contrast, proxy voting, to some extent, alludes to the indirect character of elections, with the proviso that transferring a voting decision is an individual act, and not a collective one. Appointing a proxy for voting is optional in character, and not obligatory (see Z. Jarosz, S. Zawadzki, *Prawo konstytucyjne*, Warszawa 1980, p. 307). Moreover, the requirement to vote in person constitutes the essence of political rights, which is stressed e.g. by B. Banaszak, *Prawo wyborcze obywateli*, Warszawa 1996, p. 17; L. Garlicki, *Polskie prawo konstytucyjne*. *Zarys wykładu*, Warszawa 2003, p. 165.

Introducing the solution which involves proxy voting infringes the principle of equal elections, arising from Article 62(1) in conjunction with Article 32(1) of the Constitution. In a formal sense, equality entails that every person who is entitled to the right to vote, has the same number of votes as others and participates in elections in accordance with the same rules. By contrast, granting a proxy vote means that a proxy has his/her own vote and also a vote of the person granting the proxy vote. The Electoral Code provides for the possibility where a person accepts being appointed a proxy by two other persons (cf. Article 55(3) of the Electoral Code), which means that the proxy may have as many as three votes: his/her own and the two received as a result of being granted a proxy vote.

The presented argumentation concerning the non-conformity to the Constitution is enhanced by the fact that the enacted provisions include provisions which are procedural in character, but there are no measures aimed at protecting persons who grant proxy votes. Contrary to what has been stated in the statement of reasons for the judgment, solutions pertaining to the regulation which limits the group of persons who may grant proxy votes and the group of persons who may become a proxy, or regulations that restrict the number of polling districts where proxy voting may be exercised, as well as provisions concerning the procedure for granting a proxy vote, do not fulfil the role of a guarantee. Indeed, they give no guarantee that, first of all, a given voter will cast a vote in compliance with the obligation assumed as a proxy for voting, and secondly that the vote will be cast in accordance with the will of the person who has granted the proxy vote. What ought to be emphasised is the fact that granting a proxy vote is not a typical power of attorney that is known from civil law or administrative law, in accordance with which – in principle – any action taken by a proxy may be controlled and, more importantly, corrected by the person granting the proxy vote; hence, enacting provisions which provide for proxy voting requires particular attention and adopting measures which are aimed at devising solutions that could provide guarantees in that regard. In the case of proxy voting, a person granting a proxy vote is deprived of the possibility of verifying which candidate the proxy has cast the vote for, and to a large extent there is no possibility of verifying whether the proxy has cast the vote at all.

It is the lack of a possibility of verifying the vote that is cast by the proxy which determines that - although the proxy does not vote on his/her behalf, but on behalf of the voter who has granted the proxy vote – it is the proxy that ultimately decides who the vote is cast for. As it has been aptly emphasised in the statement of reasons for the judgment, the vote of the person granting a proxy vote is not formally transferred onto the proxy, and granting the proxy vote does not deprive the voter of his/her electoral rights. However, for the principle of

equal electoral rights to be violated, it is not necessary to grant more than one vote by statute e.g. to a certain group of voters, but it suffices to adopt such a legal solution which, in fact, provides for a possibility of disposing of the votes of other persons. Since the solution included in the Electoral Code, which is subject to the review, creates such a possibility, it infringes the principle of equal electoral rights.

2.2. An argument which supports the view presented in the dissenting opinion is the lack of implementing regulations to the Electoral Code which refer to the detailed procedure for issuing a proxy vote certificate, which makes the regulation concerning a proxy for voting merely fragmentary. In addition, such a situation makes it more difficult to determine its conformity to the Constitution.

For the reasons mentioned in the dissenting opinion, the adoption and application of solutions proposed in the Electoral Code which concern proxy voting may undermine the reliability of election results. The idea of creating solutions aimed at increasing election turnout is positively evaluated, but attempts to increase it at all costs may not be in isolation from the Constitution, and any solutions adopted in that regard must remain consistent with the Constitution.

For the above reasons, I feel obliged to submit my dissenting opinion to the judgment of the Constitutional Tribunal of 20 July 2011 in the case K 9/11.

Dissenting Opinion
of Judge Maria Gintowt-Jankowicz
to the Judgment of the Constitutional Tribunal
of 20 July 2011, Ref. No. K 9/11

Pursuant to Article 68(3) of the Constitutional Tribunal Act of 1 August 1997 (Journal of Laws - Dz. U. No. 102, item 643, as amended), I submit my dissenting opinion to the judgment of the Constitutional Tribunal in the case K 9/11, in the part where the Tribunal has declared the conformity to the Constitution of:

- the application of the Act of 5 January 2011 – the Electoral Code (Journal of Laws - Dz. U. No. 21, item 112 as amended; hereinafter: the Electoral Code) to the parliamentary elections of 2011 as well as the term of office of the Sejm and the Senate which will commence after those elections – point 12 of the operative part of the judgment;

as well as:

- the model of proxy voting that is provided for in the Electoral Code – point 4 of the operative part of the judgment;

1. As regards the first issue – in my view – the Tribunal had grounds and should have declared the unconstitutionality of the challenged provisions of the Act of 5 January 2011 - the Introductory Law to the Electoral Code (Journal of Laws - Dz. U. No. 21, item 113 as amended; hereinafter: the Introductory Law), which allow for the application of the Electoral Code to the parliamentary elections of 2011 – in accordance with point 7 of *petitum* of the application by the group of Deputies.

Electoral law constitutes one of the fundamental elements underlying the democratic system of government, and in particular a democratic state ruled by law, as referred to in Article 2 of the Constitution. It may not be forgotten that supreme power in the Republic of Poland shall be vested in the Nation, who shall exercise such power directly or through their representatives, as stated in Article 4 of the Constitution. Shaping electoral procedures in a proper way should be subject to special diligence on the part of the legislator. The review of the constitutionality of the entire allegation and its particular elements should therefore take into account the special character and functions of the normative act under review; indeed, this is a legal regulation on preparing and holding elections, as well as on determining election results, in elections to legislative bodies.

In a democratic world, the detailed regulation of electoral law must comply with the basic canons of free elections. The Constitution of the Republic of Poland renders them in the form of the basic principles of electoral law: universal elections, equal elections, direct elections and secret ballot. Those principles must be the premisses of shaping particular solutions of electoral law and at the same time they constitute the criteria for assessing the democratic character of both the said law and the actual course of elections in a given state. Those special constitutional requirements are justified by the function of that legal regulation. It is to create conditions for the full implementation of the fundamental political right enjoyed by citizens, i.e. the subjective right to vote.

In my opinion, the essence of the Act under review was not taken into account in a sufficient way in the context of most issues declared by the Tribunal to be consistent with the Constitution.

In that regard, there are two groups of arguments that justify my view.

Firstly, in the Polish legal tradition, the acts of electoral law have had a specific character – they have regulated elections to particular organs of public authority, in the form of election statutes, and during the period of almost 90 years kept being replaced with subsequent legal acts of that kind (the first such statutes concerning elections to the Sejm and the Senate were enacted on 22 July 1922; Journal of Laws - Dz. U. No. 66, item 590 and 591). Hence, the codification of electoral law carried out in 2011 is, as such, a vital change, for it comprises all types of elections within its scope (five procedures in total), whereas the complicated internal structure of the codification *per se* imposes requirements, on every addressee of that regulation, which are more stringent than those imposed by the previous specific statutes.

In its ruling of 18 October 1994, in the case K 2/94 (OTK No. 2/1994, item 36), the Constitutional Tribunal drew attention to the significance of the codification in the system of law: "... codes are granted a special place in the system of legislative law. The essence of a code is the creation of coherent and – where possible – full and durable regulation in a given branch of law (...), codes are prepared and enacted in accordance with a separate and more complex procedure than "ordinary" statutes; the essence of a code is to codify a given branch of law. (...) It is unquestionable that both axiology and the rules on legal drafting refer to codes in a special way".

Therefore, the codification of a given branch of law requires well-developed institutions and solutions; by contrast, in the case of the Electoral Code, the legislator has decided to introduce numerous normative "novelties" related to the very course of voting, *inter alia*, two-day voting, proxy voting and postal voting. Such a fundamental change of the legal situation requires special preparation from the addressees of that norm, and in many cases undertaking organisational and technical actions, etc. This concerns all citizens who have the right to vote as well as political parties, public administration obliged to hold elections and tens of thousands of people who are members of electoral commissions.

Secondly, the assessment of the constitutionality of the Code conducted by the Tribunal took place at a specific time and in certain circumstances. In two weeks' time from the end of the hearing before the Tribunal (14 July 2011), i.e. on 1 August 2011, the Electoral Code will enter into force. However, pursuant to the Constitution (Article 98(2)), the deadline for ordering elections by the President of the Republic of Poland is as early as 7 August 2011.

Free elections should be held in accordance with rules which are reliable and which have been known as legally binding appropriately in advance. At present, the state of legal uncertainty is a fact. This is obviously neither the issue of promulgating the law, nor the lack of a possibility of familiarising oneself with new provisions. The jurisprudence of the Constitutional Tribunal clearly specifies that, when implementing the principle of protection of citizens' trust in the state and its laws, the legislator is supposed to allow the addressees not only to familiarise themselves with new regulations, but also to adjust to the changing law (cf. the judgment of the Constitutional Tribunal of 28 October 2009, in the case Kp 3/09, OTK ZU No. 9/A/2009, item 138 and the jurisprudence cited therein). From that perspective, the state of uncertainty of law is obvious. Despite the publication of the Electoral Code in the Journal of Laws of 31 January 2011, the legislator has made determining which set of electoral-law norms will be applied to this year's elections to the Sejm and the Senate conditional on the day of ordering elections. Only this judgment of the Tribunal determines that the elections will be governed by the Electoral Code. This means that the rules for coordinating and holding elections were determined as late as over ten days before the ordering of parliamentary elections. The legislator has not ensured any conditions for the appropriate adjustment to the changed legal situation before ordering the parliamentary elections.

In accordance with the principles contained in Article 2 of the Constitution, the reliable legislator should make a proviso that the new Electoral Code is not applicable to this year's parliamentary elections. Since this was not done by the legislator, and the mechanism which made the application of the new Code to the parliamentary elections of 2011 was challenged before the Tribunal – this should have been done by the Constitutional Tribunal. At the hearing on 14 July 2011, the applicants in a clear way, both in an initial presentation as well as in final conclusions, indicated that the most crucial element of the allegation was the mechanism specified in the Introductory Law which would make it possible to carry out parliamentary elections in the autumn of 2011 on the basis of the Electoral Code.

In particular – and these are other arguments to substantiate my dissenting opinion – the Tribunal (full bench), in the rulings issued in the last few years, formulated the view that significant amendments to electoral law should not be introduced later than six months before the day of ordering elections (those were the judgments of: 3 November 2006 in the case K 31/06, OTK ZU No. 10/A/2006, item 147 as well as 28 October 2009 in the case Kp 3/09).

The standard of a six-month prohibition on introducing amendments to electoral law constitutes certain *minimum minimorum*, which was pointed out in the judgment of the Constitutional Tribunal in the case K 31/06: "(...) the necessity to maintain a period of at least six months between the entry into force of significant amendments in electoral law and the first action in the election calendar is, in principle, an undeletable element of the content of Article 2 of the Constitution".

With regard to electoral law, from the point of view of the principle of a democratic state of law, one should mention the principle of "legislative silence". This means that at least six months before taking actions related to holding elections (i.e. ordering elections by the competent authority), the rules for holding elections should be known and kept unchanged. By contrast, it is this judgment that dispels doubts as to which provisions will govern the parliamentary elections of 2011 (by adjudicating in point 12 of the operative part of the judgment that Article 16(1) and Article 16(2), in conjunction with Article 1, of the Introductory Law are unconstitutional).

I find no constitutionally justified reasons why, in the judgment in the present case, the Tribunal has departed from its legal view which was decisively formulated and was well-established. The reliability of views formulated in *acquis constitutionnel* is an obvious value. This allows the participants of the law-making processes to adjust to constitutional standards and, in a longer term perspective, this facilitates the uniform understanding of legal institutions, their functions and mutual dependencies in a democratic system.

It is worth making reference here to the Code of Good Practice in Electoral Matters (Opinion no. 190/2002 of 5 July 2002 of the European Commission for Democracy through Law), approved by Resolution of the Parliamentary Assembly of the Council of Europe of 23 May 2003. The recommendation included in point II.2.b indicates that if amendments are introduced to electoral law, an old system is to be applied to elections in the coming year, whereas new law will be applied in subsequent elections. This means that electoral law should not be open to amendment less than one year before an election. The principle of "legislative silence", which has been adopted in the previous jurisprudence of the Constitutional Tribunal, comprises a period which is shorter by half, and thus it should be respected unconditionally. Even this restricted requirement has not been met in the case of entry into force of the Electoral Code. Although the Code of Good Practice in Electoral Matters has no character of an international agreement, it still belongs to the soft law of the Council of Europe, and therefore it should be respected by all the Member States of the Council, including Poland. It comprises general rules which are indispensible for ensuring reliable and free elections, which allow citizens to exercise their basic political right. The recommendations formulated by the Council of Europe indicate certain standards of conduct and are of relevance for the

assessment of reliability of the legislator, and thus the conformity to Article 2 of the Constitution.

For the assessment of the possibility of applying the Electoral Code to this year's parliamentary elections, the following facts are of significance, which comprise another layer of assessing the state of uncertainty of law.

During the "legislative silence", as many as four statutes amending the Electoral Code were passed and entered into force: the Act of 3 February 2011 (Journal of Laws - Dz. U. No. 26, item 134); the Act of 1 April 2011 (Journal of Laws - Dz. U. No. 94, item 550); the Act of 15 April 2011 (Journal of Laws - Dz. U. No. 102, item 588) as well as the Act of 26 May 2001 (Journal of Laws - Dz. U. No. 134, item 777). At the same time, the Act of 15 April 2011 also includes amendments to the Introductory Law. Moreover, the Act of 27 May 2011 amending the Electoral Code and the Introductory Law is currently during the period of *vacatio legis*, and will enter into force on 30 July 2011 (Journal of Laws - Dz. U. No. 147, item 881). That Act changes the rules of electoral law in a particularly significant way, as it modifies the procedure for postal voting, which has just been introduced by the Electoral Code, this way allowing also the disabled persons living in Poland to cast their votes in that manner.

Apart from that, a considerable part of implementing provisions to the Electoral Code is non-existent (including *inter alia* regulations by the minister who is competent as regards public administration, which would specify a procedure for issuing proxy vote certificates or the terms of cooperation between the regional organs of government administration with the National Electoral Office). However, implementing legal acts to the Electoral Code that are crucial for holding parliamentary elections were adopted in the form of resolutions of the National Electoral Commission (e.g. concerning postal voting) as late as on 6 June 2011.

The above elements - each one separately, and even more so all of them together - indicate that rules for holding parliamentary elections in 2011 are not quite determined three weeks before the deadline for ordering those elections, not to mention maintaining six-month period of "legislative silence". This is contrary to the standards of a democratic state ruled by law.

The Tribunal's judgment, in point 12 of the operative part, overlooks the scope of the allegation indicated in point 7 of the *petitum* of the application by the group of Sejm Deputies. Article 16(1) and Article 16(2), in conjunction with Article 1, of the Introductory Law were challenged insofar as they allowed for the application of the Electoral Code to elections to the Sejm and the Senate ordered in 2011; whereas the Tribunal adjudicated only that it was unconstitutional to make determining which set of electoral-law norms is to be applied conditional on the day of ordering elections (the current Act on Elections to the Sejm and the Senate or the new Electoral Code), depending on the date of ordering elections. This means that the application of the group of Sejm Deputies, contained in point 7 of the *petitum*, to a considerable extent, was not taken into account.

2. Sharing the Tribunal's adjudication in points where it is declared as unconstitutional to hold voting over two days, restrict the ways of running electoral campaigns as well as make determining which set of electoral-law norms is to be applied to this year's parliamentary elections conditional on the day of ordering elections – I hold the view, in the light of the above remarks, that the Tribunal should also have declared the unconstitutionality of the model for proxy voting adopted in the Electoral Code.

3. What is overlooked in point 4 of the operative part of the judgment concerning proxy voting is Article 2 of the Constitution, which - in my opinion - is an essential criterion for the assessment of constitutionality of the challenged provisions.

The applicants have argued that the regulation of proxy voting in the Electoral Code infringes the principle of protection of citizens' trust in the organs of the state by not including norms guaranteeing that proxy votes are cast in accordance with the will of persons granting those votes. Moreover, no proper guarantee was introduced against inappropriate way of granting a proxy vote, as no criminal sanction was provided for a person offering a financial or personal gain in exchange for being granted a proxy vote. In that situation I may not agree with the Tribunal's assessment that the substantiation of the application within the above scope was insufficient and could result in the discontinuation of the proceedings. The scope of the examination of a case by the Tribunal is set primarily by the subject thereof and relevant higher-level norms for constitutional review, and not by the subjective assessment of allegations and presented argumentation. Therefore, I believe that it is admissible to carry out a substantive assessment of the conformity of the challenged provisions on proxy voting to Article 2 of the Constitution.

Electoral law is, by its nature, personal in character. This was stated *expressis verbis* in Article 12 of the Constitution of the Republic of Poland of 17 March 1921 (Journal of Laws - Dz. U. No. 44, item 267, as amended). *De lege lata*, the fact that there is no clear indication in the Constitution that the right to vote is personal in character does not entail that this principle is no longer binding. In particular, this is not confirmed by the content of Article 62(1) of the Constitution, which expresses the subjective right to vote. The constitution-maker has specified the group of individuals who are entitled to that right (a Polish citizen who has attained 18 years of age) as well as the scope of that right (what types of elections it concerns). The right to vote is political in character and should be exercised in person, which follows from the constitutional canons of electoral law, such as direct elections and secret ballot. In the doctrine of constitutional law, it is indicated that the principle of direct elections comprises two basic aspects: voting in person and one-stage voting (cf. e.g. B. Banaszak, *Prawa wyborcze obywateli*, Warszawa 1996, p. 16; G. Kryszeń, *Standardy prawne wolnych wyborów parlamentarnych*, Białystok 2007, p. 222). The following view presented in the expert opinion provided by the Bureau of Research of the Chancellery of the Sejm should be regarded as authoritative: "... that what is more consistent with the Constitution (including the principle that the Nation shall exercise power through representatives) is the understanding of the principle of direct elections which assumes that voters attend polling stations and vote in person" (J. Mordwiłko, "W sprawie ustanowienia w polskim prawie wyborczym instytucji pełnomocnika wyborcy oraz możliwości głosowania droga pocztową «głosowania korespondencyjnego»"*, Biuletyn, Ekspertyzy i opinie prawne*, 5(41)00 p. 46).

The possibility of departing from the principle of voting in person also raises doubts in the doctrine of law (cf. A. Rakowska, "Głosowanie przez pełnomocnika «uwagi krytyczne»", *Studia Wyborcze* Issue No. 4 of 2007, p. 65). Thus, specific statutory solutions, even more so, have to be consistent with the above-indicated fundamental principles of electoral law, which at the same time constitute the criteria for assessment whether the legislator actually guarantees the exercise of the basic political right i.e. the possibility of participating in elections. In my opinion, the construct introduced into the Electoral Code is closer to transferring a given vote to another voter than to ensuring the possibility of expressing political preferences by the disabled and the elderly. Article 54(1) of the Electoral Code does not introduce the requirement to cast a proxy vote in accordance with the will of a person granting the proxy vote, but merely allows to take part in voting on that person's behalf. In the construct introduced into the Electoral Code, a given proxy has freedom as to the content of the vote cast on behalf the person granting the proxy vote; thus, the proxy may use the vote in a way which would be inconsistent with the will of the person granting the proxy vote.

The adopted solution only seemingly improves the terms of voting, as it contains no guarantees not only as to whether the vote will be cast in accordance with the will of the

person granting the proxy vote but also as to whether the proxy will at all take part in voting. Therefore, I disagree with the argument indicated in the substantiation for the draft Electoral Code that the introduction of proxy voting in the present form serves the purpose of facilitating the active participation of the disabled in public life.

The doubts as to compliance with the fundamental principles of electoral law ought to be an indication for the legislator to restrict the possibility of proxy voting only to situations where this is indispensible. Hence, I consider the premiss of exercising a proxy vote to be formulated too broadly, i.e. when a voter attains the age of 75, without any reference to his/her health (Article 54(3) of the Electoral Code). For the assessment of that regulation, various civilisation phenomena should be taken into account, such as the increase in the average length of a human life or the improvement in health of the population, including the elderly.

At this point, it is worth mentioning the Code of Good Practice in Electoral Matters again, which recommends that the institution of proxy voting should be cautiously applied and properly regulated so that any potential fraud could be prevented. This should be achieved, *inter alia*, by limiting the number of proxy votes which may be granted to one voter. Also for that reason, the challenged provisions of the Electoral Code (Article 55(2) and (3)) lead to the infringement of the principle of substantive equality. Indeed, a given voter may be a proxy of two other persons if one of the persons belongs to an immediate family of the proxy, or who is in the proxy's custody or for whom the proxy is a legal guardian. Taking into account that fact that the proxy is not bound by the will of the person granting the proxy vote, such a person may have two or three votes, which constitutes a privilege infringing the principle that electoral rights are formally equal. Thus, the legislator should allow the voter to accept only one proxy vote.

The procedure for appointing a proxy is so complicated that following the procedure may constitute a greater difficulty for eligible voters than voting in person. Indeed, it is necessary to first obtain a form to apply for the issue of a proxy vote certificate, then submit it to the office of a given commune, and then to prepare the proxy vote certificate with the participation of a mayor of the commune or an employee of the office of the commune who is competent in that regard.

Voters who are authorised to vote by proxy are persons who have been recognised as being to a large extent or to some extent disabled, and hence it is even more necessary to provide appropriate period to allow them to familiarise themselves with the functioning of that electoral-law institution. By contrast, three months before the planned deadline for parliamentary elections, there are still no implementing provisions that are to specify the essential elements of the procedure for granting proxy votes as well as templates of relevant forms.

In my view, the Tribunal's argumentation concerning the constitutionality of the provisions of the Electoral Code on proxy voting lacks consistency. On the one hand, the Tribunal indicates that the lack of practice as regards the application of the challenged provisions does not allow for assessing whether they contain appropriate guarantees that prevent any irregularities. On the other hand, the Tribunal states that the procedure for appointing a proxy for voting sufficiently secures the interests of the person granting the proxy vote in a situation where at the end of the hearing, or even at the end of deliberation, no significant implementing provisions have been adopted or published that would specify the procedure for granting a proxy vote in detail.

Introducing the institution of proxy voting in the present form, for the purpose of increasing election turnout - which the participants in the proceedings incorrectly regard as tantamount to enhancing the implementation of the principle of universal elections – the legislator in fact excludes the disabled and the elderly from taking part in public life.

The task of the Tribunal is neither to assess the rationality of the adopted legal regulations nor to draft optimal solutions; nevertheless, it would be possible to provide persons who are eligible to grant proxy votes with appropriate measures that facilitate attending a polling station in person and casting one's vote. It is worth pointing out that the assistance of another person in the very act of voting has been admissible for years in the light of the electoral law that has been in force so far: Article 69 of the Act of 12 April 2001 on Elections to the Sejm of the Republic of Poland and to the Senate of the Republic of Poland (Journal of Laws - Dz. U. of 2007 No. 190, item 1360, as amended), Article 54 of the Act of 27 September 1990 on the Election of the President of the Republic of Poland (Journal of Laws - Dz. U. of 2010 No. 72, item 467, as amended) as well as Article 46 of the Act of 16 July 1998 on Elections to Communal Councils, Poviat Councils and Voivodeship Assemblies (Journal of Laws - Dz. U. of 2010 No. 176, item 1190, as amended), as well as was positively assessed in the doctrine (cf. K Skotnicki, *Zasada powszechności w prawie wyborczym. Zagadnienia teorii i praktyki*, Łódź 2000, p. 277 and the subsequent pages).

Due to the above-mentioned circumstances, I have decided to submit this dissenting opinion to the judgment.

Dissenting Opinion
of Judge Mirosław Granat
to the Judgment of the Constitutional Tribunal
of 20 July 2011, Ref. No. K 9/11

Pursuant to Article 68(3) of the Constitutional Tribunal Act of 1 August 1997 (Journal of Laws - Dz. U. No. 102, item 643, as amended), I submit my dissenting opinion to point 12 of the operative part of the judgment.

1. I consider that point 12 of the operative part of the judgment defectively reconstructs the allegation, contains adjudication *ultra petita* as well as is internally inconsistent.

1.1. The Tribunal has adjudicated on a different norm than what follows from the application and the hearing. It clearly follows from the application and the argumentation presented by the applicants at the hearing that the subject of the application is only the excerpt from legal regulations introducing the Electoral Code which provides for applying the Code to elections held in 2011. The applicants have questioned the introduction of the amendment to the legal system. The Tribunal has examined the way the amendment was introduced into the legal system, but in another aspect of that regulation.

The consequence of the norm challenged by the applicants is the lack of certainty as to legal rules in accordance with which elections to the Sejm and the Senate are to be carried out in 2011. Article 16(1) and Article 16(2) of the Act of 5 January 2011 - the Introductory Law to the Electoral Code (Journal of Laws - Dz. U. No. 21, item 113; the Introductory Law to the Electoral Code), have seemingly solved that problem. The said regulations indicate that if the President orders elections after 1 August 2011 (after the date of the entry into force of the Electoral Code), the parliamentary elections will be governed by the Electoral Code. If the ordering of the elections takes place earlier, the Act on Elections to the Sejm and the Senate will apply. Therefore, until the President does not issue a decision to order elections (possibly until 1 August 2011), it is not clear which provisions will govern the elections to the Sejm and the Senate. Thus, even the six-month period of *vacatio legis* does not fulfil its function, as until taking the first action related to holding elections, the rules of electoral law are not known. In the opinion of the applicants, in that context, the time interval has not been maintained, in accordance with which significant amendments may be introduced to electoral law no later than six months before the first action related to holding elections (pp. 38-39 of the application). Therefore, the application was filed to challenge a set of norms which comprises two basic elements: a) a norm derogating the Act on Elections to the Sejm and the Senate in the context of the elections ordered in 2011, b) a norm requiring the application of the Electoral Code to those elections. The former of the mentioned norms has been expressed in Article 10(3) and Article 17 of the Introductory Law to the Electoral Code. The latter has been expressed in Article 1, Article 16 and Article 17 of the Introductory Law. However, the application does not challenge – as it has been reconstructed by the Tribunal – only "the legal regulation" rendered in Article 16(1) and Article 16(2) and the transitional provisions which arise therefrom. With regard to Article 10(3) of the Introductory Law to the Electoral Code, contrary to the statement stressed by the Tribunal that the applicants have not challenged the provision, it should be stated that the said provision does not have an autonomous normative meaning, but constitutes part of a larger normative whole. The applicants have challenged the possibility of applying the provisions of the Electoral Code to the elections of 2011, claiming

that in the light of the present Constitution, it is admissible only to apply the current provisions in that regard. Although the applicants aimed for examining the constitutionality of a norm concerning the application of the Code to the parliamentary elections of 2011, the Tribunal declared the unconstitutionality of the norm concerning the application of the Act on Elections to the Sejm and the Senate, by which it has ruled out the possibility of applying the Act on Elections from the moment of delivering the judgment. It should be noted that, when mentioning Article 16(2) of the Introductory Law as the subject of the review, the applicants did not challenge any normative content included in that provision. To sum up, by adjudicating on the unconstitutionality of the norm which requires that the provisions of the Act on Elections to the Sejm and the Senate be applied to elections ordered before the entry into force of the Introductory Law to the Electoral Code, the Tribunal has adjudicated contrary to the request of the group of Sejm Deputies; at the same time, by declaring the unconstitutionality of Article 16(1) in conjunction with Article 1 of the Introductory Law, the Tribunal has raised doubts as to whether the Electoral Code has entered into force (for more see point 2).

1.2. The provisions indicated in point 12 of the operative part of the judgment are inadequate with regard to the legal norm which the Tribunal wants to eliminate from the legal system. Article 16(1) and Article 16(2) of the Introductory Law to the Electoral Code contain two norms: the first one requires that the Code be applied to elections ordered after the entry into force of the Code and to the terms of office commenced after those elections (paragraph 1); and the second one requires that elections ordered before the entry into force of the Code should be governed by the current provisions (paragraph 2).

In the context of the application under examination, a problem has arisen – incorrectly resolved by the Tribunal – to clearly specify the content of the challenged statutory norms and to indicate the statutory provisions from which the said norms have been derived. Therefore, it should be noted that what constitutes the subject of the Tribunal's review is norms, and not legal provisions. The subject of the Tribunal's review frequently includes complex and unclear meta-normative regulations concerning the entry into force of a normative act. In such a situation, linking certain norms with particular provisions is of significance for a review that is being conducted. This is the situation in the present case, where the legislator has drawn a distinction between a statute being in force and the obligation to apply the statute. The said distinction has been introduced due to the fact that elections constitute a process extended in time, which raises questions about the meaning of the formulation "entry into force of a statute" with regard to a lengthy electoral process. In that context, the wording used in Article 16 "shall apply" is aimed at modifying the scope ratione temporis of the legal effect of the statute – both the new statute and the current one. The Electoral Code begins to be applicable in a special way, specified in the introductory provisions to the Code, starting with first elections ordered on the basis thereof. By contrast, electoral processes which existed before the new statute are continued in the context of the current provisions, which means extending the scope ratione temporis of the current provisions within a clearly specified scope ratione materiae. Therefore, Article 10 of the Introductory Law to the Electoral Code does not indicate one date when the provisions contained therein cease to have effect. In order to determine that date, one should juxtapose Article 1, Article 10, Article 16 and Article 17 of the Introductory Law to the Electoral Code. At the same time, it ought to be noted that Article 1, Article 17, Article 10 and Article 16(1) express a general principle, whereas Article 16(2), Article 16(3) and Article 16(4) contain exceptions which require that the old provisions should be applied in certain situations specified therein (in particular, the continuation of the electoral procedure for parliamentary elections that began to be applied before 1 August 2011). There would be doubts without Article 16(2) of the Introductory Law

as to the set of electoral-law norms that should be applied to the elections ordered before 1 August 2011. By contrast, Article 16(1) repeats only what arises from combining the content of Article 1, Article 10 and Article 17 of the Introductory Law to the Electoral Code.

In the context of the reconstructed provisions of the statute, it should be assumed that the application of the group of Sejm Deputies is aimed against the norm derogating the Act on Elections to the Sejm and the Senate with regard to elections ordered in 2011, and also against the norm which requires that the Electoral Code be applied to these elections. As a result of the allegation and the principle that review proceedings are instituted upon application, the adjudication should have concerned – in accordance with the application –the norm derogating the Act on Elections to the Sejm and the Senate, insofar as it would be applicable to elections due to the end of the term of office of the Sejm, and the norm requiring the application of the Code to elections ordered after 31 July 2011.

1.3. The Tribunal states that, in the opinion of the applicants, the elimination of Article 16(1) and Article 16(2), in conjunction with Article 1, of the Introductory Law to the Electoral Code from the legal system would result in a situation where parliamentary elections would be governed by the Act on Elections to the Sejm and the Senate. I am absolutely convinced that such an assessment of the application is groundless. The applicants' view is completely different: the application of the current electoral provisions would result from a ruling declaring partial non-conformity to the Constitution. This is an essential difference. The Tribunal states that, as a result of the operative part of the judgment in point 12, as of 1 August 2011, the Act on Elections to the Sejm and the Senate will cease to have effect and may not be applied to any other elections. For a repealed legal act to be applied to events occurring after the repeal thereof – the Tribunal goes on to state – there would have to be a transitional regulation in the legal system that would allow for that. There is no such norm and a ruling of the Constitutional Tribunal could not create it. I do not agree with the Tribunal's *obiter dicta.* Also, as regards the role of a constitutional court as the so-called negative law-maker, I understand it differently than this is stated in the statement of reasons for the judgment. The task of the Tribunal in the present case is only the examination of hierarchical conformity of norms (adjudicating about the constitutionality of the challenged norms). As a result of that process, the Tribunal may delete normative content (also the content which derogates previous regulations), but it may not introduce new content. By contrast, in the statement of reasons for the judgment, the role of the constitutional court as the so-called negative legislator appears to be mistaken with a potential power of such an organ of the state to "make a choice" between the current and new electoral law (to indicate the statute regulating electoral law). I agree with the view that the Tribunal has no right to make such a choice, as it is reserved for the legislator. In the case of the norms under examination, it should be repeated that the point of concern is not at all the replacement of the legislator and the "powers" of the Constitutional Tribunal in that regard. Analysing Article 16(1) and Article 16(2), in conjunction with Article 1, of the Introductory Law to the Electoral Code, the Tribunal may, adequately to the application, issue a ruling in which it will declare that certain normative content from the provisions under examination will cease to have effect. Adjudicating on non-conformity within a certain scope (issuing a judgment declaring partial non-conformity to the Constitution) falls within the scope of the powers of the Tribunal, and it has nothing in common with creating a transitional regulation which "allows" for a choice between different sets of electoral-law norms, as provided for in the statement of reasons.

2. Due to a defective reconstruction of the allegation, eliminating the connection between a norm on the one hand and legal provisions and adjudication *ultra petita* on the

other, the operative part of the judgment in point 12 causes uncertainty as to provisions which are to be applied to the elections that are to be ordered due to the end of the current term of office of the Sejm and the Senate.

2.1. It unclear whether, in the context of declaring Article 16(1) of the Introductory Law to the Electoral Code to be unconstitutional, the Electoral Code will enter into force, and if it enters into force, then – due to the lack of a transitional regulation – from what date it will be applicable. In the statement of reasons for the judgment, the Tribunal refers to "the principle of direct effect of new law". What will apply in the place of the challenged transitional regulation from Article 16(1) and Article 16(2) is "the principle of direct effect of new law". It states, *inter alia*, that if the Introductory Law did not contain Article 16(2), then elections ordered before 1 August 2011 would be governed by the Electoral Code, in accordance with "the principle of direct effect of new law". I disagree with that statement. If, for any reasons, elections were to be ordered earlier (e.g. due to the shortening of the term of office of the Sejm), and the electoral procedure would be already in the course of application on 1 August 2011, then "the direct effect of new law" would result in a situation where it would be impossible to hold elections.

The application of the Code to the elections of 2011, in the case where there is no clear statutory distinction between two sets of electoral-law norms, on the basis of "the general principles of law" which seem to belong to the principles of legal culture, and not to the strict rules of the legal system, is largely unconvincing. It definitely contradicts the thesis which has been cited by the Tribunal on numerous occasions that the principle of a state ruled by law implies the law-maker's obligation to enact appropriate transitional regulations which ensure transition from an old regulation to a new one (cf. e.g. the judgment of 8 November 2006, Ref. No. K 30/06, OTK ZU No. 10/A/2006, item 149; the judgment of 19 March 2007, Ref. No. K 47/05, OTK ZU 3/A/2007, item 27). Therefore, the Tribunal should adjudicate in a such a way that it would not create a state of uncertainty as to which legal regulations are to be applied as a result of the issue of a ruling concerning the unconstitutionality of provisions.

2.2. The Tribunal has included Article 16(1) of the Introductory Law to the Electoral Code in the operative part of the judgment. It justifies adjudicating on a transitional rule by the fact that adjudicating merely on paragraph 2 would lead to a situation that the rule contained in paragraph 1 of Article 16 "would lose its *raison d'être*". The Tribunal appears to consider it necessary to adjudicate on the challenged rule as a whole. "Indeed, regardless of the fact when the parliamentary elections were ordered, in the event of the lack of Article 16(2) of the Introductory Law to the Electoral Code in the legal system, they would have to take place on the basis of the provisions of the Electoral Code. This way the transitional rule contained in Article 16(1) of the Introductory Law to the Electoral Code would be redundant". In my opinion, that fact of possible statutory *superfluum* may not be an argument that justifies the formulation of the operative part of the judgment, and in particular it may not justify adjudication *ultra petita* by the Constitutional Tribunal. Including a provision that does not express normative content challenged by an applicant and which, for that reason, may not constitute the subject of adjudication within the scope of the Tribunal's judgment directly leads to a state of legal uncertainty after the issue of that judgment.

The provision expressed in Article 16(1) of the Introductory Law to the Electoral Code requires that the statute referred to in Article 1 of the Introductory Law, i.e. the Electoral Code, be applied "to elections ordered after the date of entry into force of the Code and to the terms of office commenced after those elections". The said provision makes it possible to apply the Code to this year's elections; hence, deeming it unconstitutional and derogating it raises doubts as to the effect of that judgment. The Tribunal advocates the view that the

Electoral Code should be applied to this year's elections; however, it declares the provision that provides for such application of the act to be unconstitutional in its entirety.

Paragraph 1 of Article 16 is not, in itself, unconstitutional. It constitutes an element of a larger normative construct. It appears that, in accordance with the logic adopted in the ruling, the said paragraph could be challenged only insofar as it would give grounds for drawing conclusions *a contrario*, i.e. for assuming that "with regard to the elections ordered before the day of entry into force of the Electoral Code, the current provisions shall apply". In the light of the presented arguments, including Article 16(1) in the operative part of the judgment, although corresponds to the content of the *petitum* of the application under examination, leads to greater doubts as to the meaning of the issued ruling.

2.3. The sense of point 12 of the operative part of the judgment is not clear with regard to Article 1 of the Introductory Law referred to therein in conjunction with Article 16(1) and Article 16(2) of the Introductory Law to the Electoral Code. I agree with the remark from the statement of reasons that the applicants have not challenged the said provision, as it does not include autonomous normative content. However, it should be noted again that it is an element constituting the basis of decoding a norm expressed in Article 16 and Article 17 of the Introductory Law to the Electoral Code. The Tribunal claims (and I disagree with that view) that the provision does not constitute an element of the "legal regulation" challenged by the applicants, but at the same time the Tribunal adjudicates on the said provision. The fact that the provision has been cited as a provision that appears in conjunction with other provisions has been explained by the Tribunal in a totally unconvincing way, and at some point in a way that is contradictory to what the Tribunal stated elsewhere. Firstly, it mentioned "the usefulness of citing it" within the scope of the challenged mechanism. The "usefulness" of the examination of that provision is obviously an insufficient circumstance for carrying out the review (such constitutional review would have to be indispensable). Secondly, as the Constitutional Tribunal states, after the elimination of Article 16(1) and Article 16(2) of the Introductory Law to the Electoral Code as unconstitutional, Article 1 proves to be "a provision that clearly determines the set of electoral-law norms which will govern the autumn elections", as it specifies the day of entry into force of the new law. Article 1 of the Introductory Law to the Electoral Code either does not contain autonomous normative content or is "a provision that clearly determines the set of electoral-law norms which will govern the autumn elections". *Tertium non datur*. In the statement of reasons, the Tribunal has taken the stance that the judgment does not render the said provision legally ineffective, and "the effect of derogation encompasses only Article 16(1) and Article 16(2) of the Introductory Law to the Electoral Code together with reference to Article 1 of the Introductory Law to the Electoral Code". Despite declaring the unconstitutionality of Article 1 of the Introductory Law to the Electoral Code in conjunction with other provisions, what is to follow from that provision is "certainty as to the set of electoral-law norms for the autumn elections to the Sejm and the Senate". The contradiction of that stance gives the right to state that citing Article 1 in the operative part of the judgment was redundant. Also, the form in which it has been cited is incorrect.

Moreover, Article 1 of the Introductory Law to the Electoral Code is in interrelated with Article 17 of the Introductory Law (in order for Article 1 to enter into force, Article 17 of the Introductory Law must also enter into force). The issue of a relation between those provisions which shape a certain norm is explained neither by the operative part of the judgment nor by the statement of reasons for the judgment.

2.4. To sum up, point 12 of the operative part of the judgment is incomprehensible. In fact, a judgment of the Constitutional Tribunal concerning electoral law should be

unambiguous. It must precisely specify the norms that are the subject of adjudication, regardless of the fact whether – as in this case – it advocates the application of the Electoral Code or would advocate further application of the Act on Elections to the Sejm and the Senate. It must therefore remain adequate to the norms which are the subject of adjudication and the provisions indicated in the operative part of the judgment, especially that the Introductory Law to the Electoral Code contain complex meta-normative regulations.

Adjudicating on the unconstitutionality of provisions, the Tribunal must take into account the effects of its ruling, i.e. whether issuing a ruling on the unconstitutionality of certain provisions will lead to a situation guaranteeing the implementation of certain constitutional norms and values to a larger extent than this is currently done. The purpose of reviewing norms is to implement constitutional principles and values. The elimination of unconstitutional legal norms from the legal system is merely a means to the achievement of the indicated basic purpose. The constitutional and statutory regulations concerning the powers of the Tribunal should be interpreted, taking into account a given purpose of reviewing norms. In particular, a ruling of the Tribunal should correspond to the standard of specificity and reliability of law. As regards point 12 of the operative part of this ruling, this is not the case.

3. In point 12 of the operative part of the judgment, the Constitutional Tribunal has relativised the significance of the previous jurisprudence concerning the essence and role of the so-called time interval, i.e. the period between the entry into force of significant amendments to electoral law (the publication thereof) and the first action related to holding elections included in the so-called election calendar. In accordance with the thought introduced in the judgment in the case K 31/06 of 3 November 2006, certain *minimum minimorum* should be the enactment of significant amendments to electoral law, at least six months before the next elections, understood not only as the mere act of voting but as the entirety of actions included in the so-called election calendar. Possible exceptions to the specified time-limit could only arise from the extraordinary circumstances which are objective in character. The Tribunal has formulated it more precisely that the necessity to maintain the indicated period from the entry into force of significant amendments to electoral law until the ordering of elections "is a normative element of the content of Article 2 of the Constitution which may not, in principle, be eliminated" (OTK ZU No. 10/A/2006, item 147, p. 1541). The said thesis is elaborated on in the ruling of 28 October 2009 in the case Kp 3/09 (OTK ZU No. 9/A/2009, item 138).

What is apt in the context of the indicated stance of the Constitutional Tribunal, as regards failure to maintain legislative silence by the legislator, is the applicants' stance: the new electoral law could be applied to this year's parliamentary elections if the legislator had determined that clearly at least six months before ordering elections by the President. Since he did not do that, the said elections may only be held pursuant to the current provisions" (p. 6 of the application). In my opinion, the applicants have rightly assumed that if an amendment to electoral law is unconstitutional, then the current provisions should remain legally binding.

3.1. The legislator overtly violated the standard which had been established in the jurisprudence of the Tribunal (and which had also been enhanced by certain documents of the organs of the European Council), namely that at least six months before ordering elections all rules of electoral law should be known. Justifying the lack of the violation of the interval, the Tribunal states that the 6-month period of legislative silence is to be set with regard to the date of the last day when ordering elections in the light of the provision of the Constitution is possible. In the statement of reasons, on the one hand, the Tribunal states that the Electoral Code contains "significant amendments" to electoral law (within the meaning specified in the

judgment of 28 October 2009, Ref. No. Kp 3/09), and thus it should not be applied to elections which were ordered before the lapse of six months from the day of its promulgation; on the other hand, the Tribunal does not state the violation of that time-limit, as it is counted "in relation to the only date which is certain in the light of the Constitution, i.e. the last day when the ordering of elections is possible".

Without going into details how the interval should be counted (in its previous ruling, the Tribunal did not determine that, as there was no such need), I wish to emphasise that the function which this pause is to play is crucial here. If six months constitute *minimum minimorum* as regards "significant amendments" to electoral regulations, then - by introducing a legal act as complex as the Electoral Code into the legal system, the said period should be extended (even if I recognise that a code, to a large extent, constitutes formal codification). The period of six months constitutes the *minimum minimorum* for "significant amendments", but which are partial in character. The more significant the amendments introduced by the legislator, the more appropriate for the period of legislative silence is to exceed *minimum minimorum*. It appears that, in the context of the previous jurisprudence of the Tribunal, such an interpretation of the function of legislative silence is justified.

By contrast, supplementing the argumentation of the Constitutional Tribunal on the difference between *vacatio legis* and an interval in electoral law (the Tribunal clearly distinguishes between these two institutions in the judgment in the case Kp 3/09), it should be underlined that – in particular in that branch of law, formally understood *vacatio legis* is of little significance; it is not important when an election statute becomes part of the legal system, but the moment is important from when the statute may be applied.

3.2. The Constitutional Tribunal holds the view that the assessment whether legislative silence is maintained or not is not affected by the amendments to the Code. The requirement to maintain that pause is to be referred to every amendment to electoral law separately, and therefore to the Code and each of the statutes amending the Code. In the present case, the subject of the review has only been the Act of 3 February 2011 amending the Electoral Code (the subsequent ones were not challenged by the applicants). Hence, the Tribunal may not adjudicate whether the introduced amendments significantly change electoral law, and thus whether they fall within the scope of prohibition against introducing them six months before the day of ordering elections.

The Code was amended after it was enacted (the fourth amending statute was signed by the President on 15 July 2011), whereas the fifth one was read for the second time in the Sejm on 13 July 2011. The said amendments are not at all merely technical in character.

They all introduced "significant amendments" to electoral law, within the meaning defined by the Constitutional Tribunal in the judgment in the case Kp 3/09.

The amending Act of 3 February 2011 (included in the scope of the application) modified "the rules of the game" as regards carrying out electoral campaign (the ban on broadcasting election radio and TV ads). The amending Act of 1 April 2011 concerned the way of establishing constituencies. The amending Act of 15 April 2011 (the so-called cleanup amendment) comprised *inter alia* provisions on postal voting, electoral campaign and constituencies in elections to the Senate. The amendment of 27 May 2011 concerned the provisions on postal voting (the extension of the possibility of such voting to include the disabled). All the amendments were enacted during the period of the said interval (regardless of the fact what "starting point" is set for counting that period). In addition, it is impossible to determine the occurrence of "extraordinary circumstances that are objective in character" which would justify the absolute admissibility of those amendments (cf. K 31/06 and Kp 3/09).

The said amendments constitute an essential element of the normative context of the challenged regulations; therefore, they had to be taken into account by the Constitutional Tribunal in the course of adjudicating on the Code. Indeed, the Tribunal had to determine whether those were "significant amendments" for the need to assess the constitutionality of the Introductory Law. Without such determination, the assessment of the constitutionality of the Introductory Law is not possible. For instance, the amending Act of 27 May 2011 extended the scope of postal voting to include certain disabled persons. The institution of such voting, by enlarging the group of persons eligible to vote this way, has gained a new form (one could say about "paving the way" for transforming postal voting into an alternative form of participation in elections). The text of the Code, which is to enter into force as set out in the Introductory Law to the Electoral Code differs from the Act of 31 January 2011, which was originally passed and published in the Journal of Laws No. 21, which constitutes a breach of legislative silence and which undermines the principle of a democratic state ruled by law. The said amendments violate the time interval, by shortening it considerably.

3.3. To sum up, the Tribunal agrees to depart from the period established in the Tribunal's jurisprudence during which amendments to electoral law are prohibited. At the same time it notes that the period is minimal, and proposes that the legislator should each time strive to maximise it. The Tribunal declares that a given period is a value that may not be overlooked in the process of enacting electoral law, and at the same time it accepts the violation of that period. To sum up, the Tribunal has discontinued efforts, undertaken in previous rulings, to devise a mechanism for "postponing" the application of amendments to electoral law which are introduced right before elections.

4. In the view of the Tribunal, Article 10 of the Constitution, which expresses the principle of separation of and balance between powers constitutes an inadequate higher-level norm for the review. The norms arising from Article 16(1) and Article 16(2), in conjunction with Article 1, of the Introductory Law to the Electoral Code, challenged by the applicants, are clearly inconsistent with the given higher-level norm for the review. The choice of the set of statutory norms to be applied to parliamentary elections constitutes an element of the core of legislative powers. The infringement of Article 10 of the Constitution, due to the interference of the executive branch with the realm of the legislative branch, is here obvious and has a systemic character.

4.1. In the light of Article 10 of the Constitution, the legislative branch consists of the Sejm and the Senate. The legislative function of the Parliament definitely includes enacting legal norms which are equivalent to statutes, both substantive norms as well as those which specify the rules of entry into force of substantive norms and norms departing from other legislative norms (substantive ones and others). It is the sole power of the legislator to set out the rules of entry into force of norms equivalent to statutes. It may not grant powers in that regard to any other organ of the state. It may not make the entry into force of statutory norms conditional on a legal act issued by another organ of the state, thus leaving the application of the current or new statutory provisions at the discretion of the latter organ.

4.2. In the present case, the date of derogation of the norms of the Act on Elections to the Sejm and the Senate as well as the entry into force of the Code depends on the issue of a relevant decision by the President. The President's decision to order elections interferes with constitutional matters which are reserved for the legislative branch. It is the head of state that chooses statutory norms which will be applied to parliamentary elections. The infringement of Article 10 of the Constitution is considerable as the choice of the set of electoral-law norms

concerning elections to the organs of the legislative branch, to be carried out due to the end of the term of office of the Sejm and the Senate, is made conditional on a decision taken by the executive authority. One may not accept the argument by the Tribunal that "no new power of the head of state" follows from Article 16(1) and Article 16(2), in conjunction with Article 1, of the Introductory Law to the Electoral Code. It is quite the opposite. The choice between two normative regulations which are so significant is a law-making choice - not a form of applying the law but creating it. The applicants' allegation concerning the challenged provisions that the President has gained a discretionary legislative power, and it is at his discretion which of the two alternative sets of electoral-law norms will constitute the basis for holding elections to the organs of the legislative branch.

Analysing constitutional standards for enacting election statutes (part III point 2), the Tribunal stresses that it is a constitutional standard that "electoral law must be enacted by the Parliament, and not by the organ of the executive branch". The solution adopted by the Tribunal departs from that thesis.

It is of no significance for my evaluation of the Tribunal's ruling that Article 16(1) and Article 16(2) of the Introductory Law to the Electoral Code, in advance, determine the scope of application of the current election statute and the new one, and that they make the application thereof conditional on the date of ordering elections (a future event). What is relevant here is the fact of linking the derogation and entry into force of certain statutory norms with a discretionary legal act of an executive authority.

4.3. With regard to the argument about the infringement of Article 10 of the Constitution by the challenged regulation, it has been argued that the legislator was forced (in 2011) to make determining whether the Act on Elections to the Sejm and the Senate or the Electoral Code would be applied conditional on the date of ordering elections by the President ("there was, objectively, no other solution"), since neither the Constitution nor ordinary legislation specifies the initial moment from when it is possible to order elections to the Sejm and Senate by the President. The said stance is completely groundless. The legislator could have specified the terms of entry into force of the Electoral Code in many ways and could have linked the beginning of the application of those provisions with legal events which are not conditional on a decision of the executive authority (e.g. requiring that the Sejm and the Senate could order parliamentary elections for the term of office in the years 2015-2019 on the basis of the Electoral Code).

4.4. In the statement of reasons for the judgment, the Tribunal is inconsistent. On the one hand, it states that, while ordering elections, the President does not specify the set of electoral-law norms (as, in this case, he is supposed to be merely an authority applying the law); on the other hand, it argues that "it was the legislator who, in Article 16(1) and Article 16(2) of the Introductory Law to the Electoral Code, made determining which set of electoral-law norms is to be applied conditional on the day of ordering elections by the President".

5. The argument against issuing a judgment by the Tribunal which would arise from the scope of the allegation and which would not be adjudication *ultra petita* solution is the that the Constitution itself does not contain a norm in accordance with which amendments in electoral law should be applied to subsequent (following) elections. Due to the lack of such a norm in the Constitution and the lack of jurisdiction of the constitutional court to review the constitutionality of electoral law provisions which would result in the "choice" of electoral law (which as I have pointed out is an incorrect indication of what matters such a court deals with), the following remarks ought to be made.

5.1. The constitutions of other European states (except for Turkey and Malta) do not contain such a norm as “postponing” the application of electoral law, after amendments have been introduced thereto, until subsequent elections. Pursuant to the Constitution of Malta of 1964, amendments to electoral law adopted by the Parliament shall enter into force after the end of the term of office of the Parliament following the one which adopted them. In accordance with the Constitution of Turkey of 1982, amendments that enter into force later than one year before the day of elections are applied to subsequent elections. At this point, it is impossible to consider the introduction of such a regulation into the Constitution of the Republic of Poland. However, certainly, the lack of such a solution in the Polish Constitution may not be regarded as an argument supporting the statement that the Tribunal has no right to adjudicate on the non-application of the Code to this year's elections to the Sejm and the Senate.

5.2. Some constitutions provide for other guarantees against introducing amendments to electoral law right before elections. For example, the Constitution of Macedonia of 1991 requires a two-thirds majority vote in order to enact electoral law, whereas the Constitution of Albania of 1998 requires a three-fifths majority vote. The Constitutions of France, Spain, Moldavia and Georgia require that the matters of electoral law be regulated in the form of a special statute which overrules ordinary statutes. In some cases, this is also linked with the requirement of an *a priori* review conducted by the constitutional court. Also, one may indicate here the Constitution of the Republic of Poland of 1992, which gives equal powers to the House of Representatives and the Senate as regards enacting electoral law (this is one of instances indicated in the Constitution where these two houses are equal). This poses a considerable difficulty as the two houses in the Czech Republic are elected for different terms of office and in a different way.

5.3. With regard to enacting electoral law provisions, the constitutions that do not provide for special procedures, a qualified majority or a time interval often contain detailed principles of electoral law. They considerably restrict the legislator’s freedom as regards specifying the shape of the law. In such cases, the constitutions specify the division of a given country into constituencies or determine the terms of such a division (e.g. Austria, Belgium, Denmark, Finland, Ireland, Norway, Portugal and Italy), the way of counting votes and reflecting this in the allocation of seats (e.g. Austria, Norway, Portugal and Sweden), explicit permission to apply electoral thresholds or prohibition against them (Albania, Belgium, Norway, Portugal and Sweden) or parity (France and Serbia). By contrast, in Austria, Estonia, Lithuania and Latvia, the constitutions clearly set the date of elections (e.g. indicate a specific day).

5.4. I mention the provisions and solutions from the constitutions of other countries in order to show that, in comparison with the above-mentioned, the Polish Constitution contains few electoral law provisions. Moreover, it does not mention any formal guarantees against amendments introduced to electoral law right before elections, just as this is the case in some other constitutions. Therefore, due to the fact that the matters of electoral law are regulated in the Polish Constitution to a very limited extent, taking into account the considerable instability of the law (7 election statutes were passed within the period of 21 years), great significance should be assigned to the jurisprudence of the Constitutional Tribunal in electoral matters, as it made the law more stable. The role of a constitutional court, if not its mission, in a state ruled by law, within the scope of its jurisdiction, should be to enhance the stability of law. This would be manifested by not departing from the previous jurisprudence

in electoral matters, adopted by the Tribunal in full bench (Ref. No. K 31/06 of 2006, and Ref. No. Kp 3/09 of 2009) as well as by preventing the application of "significantly amended" electoral law to the elections which are held directly after the introduction of the amendments. The reason for the Tribunal's departure from the protection of values underlying the stability of the principles of electoral law has not been explained in this judgment. The legal situation where three weeks before the President of the Republic of Poland orders elections to the Sejm and the Senate it is still unclear what will be the legal basis of the elections - should not be approved of.

6. The sum up, making the choice of the set of electoral-law norms conditional on the date of ordering elections by the President undoubtedly – as it is stated in point 12 of the operative part of the judgment – infringes the principle of a democratic state ruled by law (Article 2 of the Constitution). However, this is the statement of the Tribunal which refers to the normative content which was not challenged by the applicants. Adjudicating *ultra petita* is not admissible. The Tribunal is bound by the scope of an application, a question of law or a compliant. Being bound means that the Tribunal may conduct a review only with regard to the normative content which falls within the scope of the application (cf. e.g. the judgment of 1 December 2010, Ref. No. K 41/07, OTK ZU No. 10/A/2010, item 127). If the Tribunal believed that the presented allegation was not valid then it had an obligation to determine the conformity of the given regulation to the Constitution, but it might not adjudicate on the normative content which had not been included in the application. It is only the Tribunal's adjudication on the norm challenged by the applicants that would fulfil the goal of the constitutional review in the present case.

Dissenting Opinion
of Judge Wojciech Hermeliński
to the Judgment of the Constitutional Tribunal
of 20 July 2011, Ref. No. K 9/11

Pursuant to Article 68(3) of the Constitutional Tribunal Act of 1 August 1997 (Journal of Laws - Dz. U. No. 102, item 643, as amended), I submit my dissenting opinion to points 7 and 12 of the operative part of the judgment of the Constitutional Tribunal, dated 20 July 2011, in the case K 9/11. In my opinion, the adjudication should have been as follows:

- Article 66 of the Act of 5 January 2011 – the Electoral Code (Journal of Laws - Dz. U. No. 21, item 112, as amended; hereinafter: the Electoral Code), insofar as it mentions filling in ballot papers before the day of elections as an element of the procedure for postal voting in the context of parliamentary and presidential elections, is inconsistent (respectively) with Article 98(2) and (5) as well as Article 128(2) of the Constitution;
- Article 16(1) and Article 16(2), in conjunction with Article 1, of the Act of 5 January 2011 – the Introductory Law to the Electoral Code (Journal of Laws - Dz. U. No. 21, item 113, as amended; hereinafter: the Introductory Law) insofar as they make determining which set of electoral-law norms is to be applied conditional on the day of ordering elections by the President of the Republic of Poland, are inconsistent with Article 10 of the Constitution;
- Article 16(1) in conjunction with Article 1 of the Introductory Law, insofar as it allows for the application of the Electoral Code to the elections of 2011 as well as to the term of office of the Sejm and the Senate commenced after the elections, is inconsistent with Article 2 of the Constitution;
- Article 16(2) in conjunction with Article 1 of the Introductory Law, insofar as it determines the application of the Act of 12 April 2001 on Elections to the Sejm of the Republic of Poland and to the Senate of the Republic of Poland (Journal of Laws - Dz. U. of 2007 No. 190, item 1360, as amended; hereinafter: the Act on Elections to the Sejm and the Senate) with regard to elections ordered after 1 August 2011 and held in 2011 as well as the term of office of the Sejm and the Senate commenced after carrying out those elections, is inconsistent with Article 2 of the Constitution.

I substantiate my dissenting opinion in the following way:

1. The assessment of constitutionality of Article 66 of the Electoral Code (postal voting).

1.1. The Constitutional Tribunal adjudicated that Article 66 of the Electoral Code, insofar as it mentions filling in ballot papers before the day of elections as an element of the procedure for postal voting in the context of elections to the Sejm and the Senate, is consistent with Article 98(2) and (5) of the Constitution, and with regard to presidential elections - is consistent with Article 128(2) of the Constitution. As it follows from the statement of reasons for the judgment (cf. Part III, point 6.6), the main premiss of that ruling is the assumption that, in the case of postal voting, the act of voting is fulfilled only when ballot papers sent by voters are placed in a ballot box by an electoral commission (cf. Article 66(3) of the Electoral Code as well as paragraph 7 of the Annex to the Resolution of the National Electoral Commission of 6 June 2011 r. on technical conditions for postal voting in polling districts established abroad, Official Gazette – *Monitor Polski* No. 47, item 541; hereinafter: the Resolution of the National Electoral Commission on Postal Voting).

In my opinion, the operative part of the judgment, within the scope indicated above is substantively incorrect and, moreover, it is inconsistent with the other elements of the ruling.

1.2. Above all, the ruling of the Constitutional Tribunal disregards the obvious fact that for the effective participation in elections (i.e. casting a vote for a specific candidate effectively), it is necessary to carry out several kinds of actions in a clearly specified sequence. For the purpose of this ruling, it may be assumed in a simplified form that:

- first of all, a voter should make a decision concerning his/her political preferences, which must be externalised and recorded by her/him or – in exceptional cases – by third persons (for instance by writing one or a few "X" marks on a ballot paper);
- secondly, a written vote manifesting a single voter's will must be added to the total number of votes taken into account when determining election results (in elections carried out in a traditional way, this is done by placing a ballot paper in a sealed ballot box; cf. e.g. A. Bień-Kacała, "Osobisty udział w procesie wyborczym (zagadnienia wybrane)", [in:] *Alternatywne sposoby głosowania a aktywizacja elektoratu. Międzynarodowa konferencja naukowa*, Rzeszów 26-27 March 2007, S. Grabowska, R. Grabowski (eds.), Rzeszów 2007, p. 229).

It should be explicitly noted that there is a clear correlation between the above stages of exercising of the right to vote. A ballot paper filled in accordance with the voter's will which has not been placed in a ballot box is not at all counted as a vote cast in elections, regardless of the reasons for the "non-completion" of the act of voting. Casting a ballot paper that has not been filled in (or has been filled in incorrectly) is of limited relevance – although it affects election turnout and the way of legitimising selected organs public authority (casting votes which are invalid, similarly to voter abstention, may manifest general disapproval for a given electoral process or for candidates standing for election), but it does not fulfil the basic function of elections (does not affect which of the candidates will be elected for a given office) and, in that regard, it is illusory.

In my opinion, in the light of Article 98(2) and (5) as well as Article 128(2) of the Constitution, filling in a ballot paper as well as placing it in a ballot box should occur on the voting day. By contrast, the Electoral Code provides for considerable intervals between particular actions related to casting votes in postal voting, which – in my view – is unacceptable.

The earliest possible moment for filling in a ballot paper in postal voting is not precisely set out in the Electoral Code, but - to a large extent – it depends on the efficiency of electoral administration. Its determinants are the earliest statutory dates and the statutory deadlines for carrying out particular actions related to the coordination of elections, such as:

- preparing ballot packages and providing a consul who is competent in that regard with the packages (containing *inter alia* ballot papers – cf. Article 65(1) of the Electoral Code), which is possible no earlier than after: closing the lists of candidates (until midnight on the 40th day before the day of elections – cf. Article 211(1) of the Electoral Code), registering the candidates (Article 215 of the Electoral Code) and assigning numbers to them (no later than on the 25th or the 30th day before the day of elections – cf. Article 218(1) and Article 219(1) of the Electoral Code);
- issuing notification by the consul as regards the possibility of postal voting (no later than on the 21st day before the day of elections – cf. Article 62 in conjunction with Article 16(3) of the Electoral Code);
- sending ballot packages to voters by the consul ("forthwith after receiving ballot papers from a competent electoral commission, however no later than until the 10th day before the day of elections – cf. Article 65(1) of the Electoral Code).

Assuming that numbers for the lists of candidates will be drawn on the last day when this is admissible (cf. the hitherto practice - www.pkw.gov.pl), and printing out, putting together and sending ballot packages take up 10 days, then it may be presumed that first voters casting their votes in postal voting will have a chance to fill in ballot papers maybe even as early as 15 days before the day of elections. The situation of particular voters will vary within the same constituencies, depending on non-legal factors (e.g. the efficiency of the central and local electoral organs as well as of the postal service processing electoral mail in Poland and abroad).

However, the Electoral Code does not clearly specify the moment when casting votes in the context of postal voting needs to end. In the light of Article 66(2) of the Electoral Code, the consul has the obligation to transfer the postal-ballot return envelops s/he has received to a competent district electoral commission no later than on the 3rd day before the day of elections, which leads to a conclusion that voters should send them at least a day prior to that. In the light of the Electoral code, it may not however be ruled out that a return envelop will be delivered to the electoral commission by a voter him/herself, provided that this will take place before the close of poll (*a contrario* from Article 66(4) of the Electoral Code, such a possibility is also provided for by paragraph 6 of the template of voting instructions, which constitutes Annex 4 to the Resolution of the National Electoral Commission of 6 June 2011 in on specifying the template and size of a return envelope, an envelope for a ballot paper, a statement about voting in person and in secret as well as voting instructions, which are used in postal voting in polling districts established abroad, the Official Gazette - M. P No. 47, item 540; hereinafter: the Resolution of the National Electoral Commission on Return Envelopes). In the case of such "hybrid" procedure for voting (a combination of postal voting and voting in person), the latest moment of casting a vote by a voter who casts his/her vote on a ballot paper received in a ballot package would be the same as the moment of casting a vote by a voter at a polling station. However, this does not mean that both categories of voters would be in the same situation: voters who intended to vote in person from the very beginning would have a chance to familiarise themselves with ballot papers only at a polling station, whereas voters initially intending to opt for postal voting could do so after they received ballot packages (i.e. even more than ten days earlier).

The extension of the process of voting, on the basis of Article 66 of the Electoral Code (in particular making it possible to fill in ballot papers even more than ten days before the date of elections) constitutes – in my opinion – an evident infringement of the requirement to hold voting on a single day in parliamentary and presidential elections, arising from Article 98(2) and (5) as well as Article 128(2) of the Constitution.

In my view, postal voting in parliamentary and presidential elections – regardless of its benefits from the point of view of enhancing the universality of elections – is not admissible without amending the Constitution. The requirement that voting is to be held on a single day, which follows from Article 98(2) and (5) as well as Article 128(2) of the Constitution, in practice rules out the possibility of postal voting (as this would require the exchange of electoral correspondence between the consul, a given voter and a relevant electoral commission within a single day). As a side remark, it is worth noting that similar doubts do not arise in the context of another form of "long-distance" elections – voting via the Internet, which is technically possible to be carried out within the time-limit set by the Constitution and should be taken into account by the legislator as an alternative to postal voting.

1.3. Regardless of the above, the construct of postal voting set out in the challenged Act also raises my doubts even with the assumption accepted by a majority of the bench of the

Tribunal adjudicating in the present case that casting votes occurs at the moment of placing envelops with votes in ballot boxes.

Indeed, it should be pointed out that Electoral Code does not specify a date for placing received envelopes with ballots in appropriate ballot boxes, which have been prepared for that purpose (cf. Article 66(3) in conjunction with Article 45(2) of the Electoral Code). Statutory regulations in that regard are fragmentary and incomplete. On the one hand, the consul has the obligation to transfer return envelopes that have been sent to him/her no later than on the 3rd day before the day of elections (Article 66(2) of the Electoral Code). However, it seems that this does not automatically entail that the said envelopes are forthwith placed in ballot boxes. Ballot boxes must be checked "before voting begins", i.e. most likely on the day of elections (although this is not obvious cf. Article 42(1) of the Electoral Code), and then they should probably be empty.

The gaps in the statutory regulation have been filled in by implementing legal acts. In accordance with the above-mentioned Resolution of the National Electoral Commission on Return Envelopes, envelopes with postal votes should be placed in ballot boxes on the voting day, and if voting is held over two days – on the first day of voting and, where possible, before it [probably voting, rather than the day?] begins", and then the ballot box ought to be sealed (paragraph 7 of the indicated Annex to the Resolution of the National Electoral Commission on Postal Voting). "While voting is in progress", the ballot box may only be opened when the consul delivers other packages received from voters who voted by post or when a given voter delivers a return envelope in person (paragraph 10 of the said resolution).

As a result, placing votes cast by post or in person in ballot boxes would take place on the day of elections, but – usually – at different times. Voters casting their votes in person would have to do this during the opening hours of polling stations (and thus – in the case of elections held over a single day – in principle between 7.00 a.m.-9.00 p.m. – cf. Article 39 of the Electoral Code). By contrast, postal votes transferred by the consul within the time-limit set out in Article 66(2) of the Electoral Code should be placed in ballot boxes by electoral commissions before polling stations are opened (i.e. between 00.01 a.m.-06.59 a.m.), unless due to organisational reasons (e.g. later delivery of envelopes by the consul or voters) – this would have to take place between 7.00 a.m.-9.00 p.m.

In my opinion, the said solution respects the principle that voting is held on a single day in parliamentary and presidential elections, which has been derived from Article 98(2) and (5) as well as Article 128(2) of the Constitution; however, it raises other reservations which are substantive (placing votes in ballot boxes outside the opening hours of polling stations) and formal (the autonomous regulation of that issue in an implementing legal act to the Electoral Code). A broader analysis of that issue does not however fall within the scope of adjudication by the Constitutional Tribunal in the present case and at this point it is merely touched upon.

1.4. In the conclusion of this part of the discussion, I wish to point out that the statement about the constitutionality of Article 66 of the Electoral Code within the indicated scope undermines the cohesion of the entire judgment of the Constitutional Tribunal.

Firstly, the statement is inconsistent with the Tribunal's adjudication that two-day voting is inadmissible in parliamentary and presidential elections (cf. points 1 and 3 of the operative part of the judgment). Indeed, the challenged solution makes it possible to cast votes during a much longer period, in extreme cases even more than ten days before the day of elections.

Secondly, declaring the constitutionality of Article 66 of the Electoral Code is also inconsistent with the assumption adopted during the assessment of admissibility of proxy voting from the point of view of the principle of equality – namely that technical activities

which together comprise a voting process (marking a given voter's choice on a ballot paper and placing the paper in a ballot box) may not be regarded as granting an additional vote to a proxy (cf. point 4(a) of the operative part of the judgment).

I believe that the internal contradiction in the ruling by the Constitutional Tribunal, within the above-mentioned scope, is clear and may have a negative impact on the implementation of the ruling.

2. The assessment of the constitutionality of Article 16(1) and Article 16(2) of the Introductory Law (transitional provisions).

2.1. The Constitutional Tribunal has adjudicated that Article 16(1) and Article 16(2), in conjunction with Article 1, of the Introductory Law, due to the fact that they make determining which set of electoral-law norms is to be applied conditional on the day of ordering elections, are inconsistent with Article 2 of the Constitution as well as are not inconsistent with Article 10 of the Constitution. As it has been explained in the statement of reasons for the judgment (Part III point 9.8), the result of such adjudication is the removal of legal uncertainty by the elimination of the hitherto transitional principles and the application of the principle of direct effect of new law (the Electoral Code) from the day of its entry into force (i.e. from 1 August 2011).

In my opinion, the above ruling raises two kinds of reservations.

2.2. First of all, in my view, the Constitutional Tribunal has not recognised that the arguments put forward by the applicants and the Public Prosecutor-General were apt, as regards the adequacy of Article 10 of the Constitution as a higher-level norm for the review (cf. Part III, point 9.7. of the statement of reasons).

In my view, the allegations put forward in the context of that provision are clearly systemic in character and do not refer directly to the realm of subjective rights, in which the usefulness of the indicated higher-level norm for the review is limited (cf. the judgment of 19 October 2010, Ref. No. P 10/10, OTK ZU No. 8/A/2010, item 78). Although Article 16(1) and Article 16(2) of the Introductory Law are formulated in a typical way for transitional provisions (*inter alia* do not mention the addressee of the norms formulated therein), it is obvious that they will be applied primarily by the organs of the executive branch of government, which are responsible for particular stages of an electoral process. The applicants' allegations concern relations between the Parliament, the President and the Prime Minister which have been shaped in the light of those provisions, and thus they directly refer to the content of Article 10 of the Constitution. The thesis about the inadequacy of that higher-level norm for the review is obviously fallacious, for the realm of regulation rendered in Article 16(1) and Article 16(2) of the Introductory Law may and must be assessed in the light of the principle of separation of powers. The ruling of the Constitutional Tribunal should refer to the essence of the allegations raised by the applicants. This was the case in the statement of reasons for the judgment (cf. Part III point 9.7.), in which the majority of the bench concluded that the challenged provisions granted no new powers to the President at the expense of the legislative branch of government, and thus the majority carried out a substantive assessment and explicitly declared their conformity to Article 10 of the Constitution. However, this has not been appropriately manifested in the operative part of the judgment, which contains the conclusion about the inadequacy of the indicated higher-level norm for the review. Therefore, in the ruling of the Constitutional Tribunal under analysis, there is an internal contradiction in that regard.

In my opinion, Article 16(1) and Article 16(2), in conjunction with Article 1, of the Introductory Law, insofar as they make determining which set of electoral-law norms is to be

applied conditional on the day of ordering elections by the President of the Republic of Poland, are inconsistent with Article 10 of the Constitution. I share the applicant's standpoint that the challenged regulations, considered in the context of the powers of the President as an authority ordering parliamentary elections and the Prime Minister (as the publisher of the Journal of Laws), lead to a serious breach of the principle of separation of powers. The decision as to whether the elections to the Sejm and the Senate in 2011 will be held on the basis of the Act on Elections to the Sejm and the Senate or on the basis of the Electoral Code – in my opinion – falls within the scope of matters exclusively reserved for the legislator, and pursuant to the challenged solutions it has been assigned to the President (that result has been challenged neither by the participants in the proceedings nor by the Constitutional Tribunal). This has occurred by the clear infringement of Article 98(2) of the Constitution, in accordance with which the President has the right to choose – within the scope delineated by that provision – only a date for an election, and not the set of electoral-law norms that will govern the election. With reference to the parliamentary elections provided for in 2011, this is not a merely technical (or – as the Marshal of the Sejm put it – "executive") issue, but a solution which has important consequences for voters (e.g. as regards the admissibility of postal voting or proxy voting), as well as for candidates or election committees (e.g. as regards the admissible forms of electoral campaigns or the number of seats allocated to constituencies in the context of elections to the Senate).

The solution under analysis should be assessed in a critical way, in particular that it has not been justified in any way during the course of legislative work or during the review proceedings before the Constitutional Tribunal. Therefore, there is no possibility of considering whether the said infringement of the principle of separation of powers should be accepted due to other significant constitutional values. This convinces me that the solution is inconsistent with Article 10 of the Constitution.

In conclusion of this part of the discussion, I wish to point out that this is not by chance that the adjudication I propose within the scope of the non-conformity of Article 16(1) and Article 16(2), in conjunction with Article 1, of the Introductory Law to Article 10 of the Constitution renders that unconstitutionality as partial (unlike this has been adopted in the operative part of the judgment, in which the wording "due to the fact that..." has been used). In my opinion, this is necessary for proper shaping of the effects of the ruling, namely maintaining in force those elements of the challenged provisions which provide for applying the current Act on Elections to the Sejm and the Senate to the parliamentary elections of 2011 (cf. more details below).

2.3. Secondly, I also disagree with the view presented by the Constitutional Tribunal with regard to the non-conformity of Article 16(1) and Article 16(2), in conjunction with Article 1, of the Introductory Law to Article 2 of the Constitution. The formulation adopted in the operative part for the judgment allows for the application of the Electoral Code to the parliamentary elections of 2011, which in my view is absolutely inadmissible, due to the fact that the said act was amended several times during the period when it was necessary to maintain "legislative silence". The following legal acts should be enumerated here:

- the Act of 27 May 2011 amending the Electoral Code and the Introductory Law to the Electoral Code, promulgated on 15 July 2011 (Journal of Laws - Dz. U. No. 147, item 881);
- the Act of 26 May 2011 amending the Act on Commune Self-Government and certain other acts, promulgated on 29 June 2011 (Journal of Laws - Dz. U. No. 134, item 777);
- the Act of 15 April 2011 amending the Electoral Code and the Introductory Law to the Electoral Code, promulgated on 18 May 2011 (Journal of Laws - Dz. U. No. 102, item 588);

- the Act of 1 April 2011 amending the Act on Elections to the Sejm of the Republic of Poland and to the Senate of the Republic of Poland as well as the Electoral Code, promulgated on 10 May 2011 (Journal of Laws - Dz. U. No. 94, item 550);
- the Act of 3 February 2011 amending the Electoral Code, promulgated on 7 February 2011 (Journal of Laws - Dz. U. No. 26, item 134).

On the day when the hearing was held in the Tribunal, a bill amending the Electoral Code and the Introductory Law to the Electoral Code (the Sejm Paper No. 4227/6th term, submitted to the Sejm for consideration on 13 May 2011), which had been proposed by a group of Sejm Deputies, was being discussed in the Polish Parliament. At least some of the enumerated statutes contained amendments that went much beyond correcting obvious minor mistakes or adding purely technical regulations, devoid of any significant impact on the situation of the participants of elections and concerned parliamentary elections. This refers, in particular, to the above-mentioned amending Act of 1 April 2011, which changed the number of seats in the Sejm that were allocated in eight constituencies.

In my view, Article 16(1) and Article 16(2), in conjunction with Article 1, of the Introductory Law are inconsistent with Article 2 of the Constitution, insofar as they allow for the application of the Electoral Code to the elections ordered in 2011 and the term of office of the Sejm and the Senate following the said elections (and at the same time they rule out the possibility of applying the current Act of 2001 on Elections to the Sejm and the Senate if elections are ordered after 1 August 2011).

The effects of the operative part formulated as I have proposed would naturally be limited by the fact that the Constitutional Tribunal, as the so-called negative legislator, has no right to create completely new legal norms on its own, but it may only change the content of the already existing norms by eliminating parts which are inconsistent with the Constitution. It should clearly be stated that, in the case under analysis, there are no legal or practical possibilities to extend, solely on the basis of a ruling by the Constitutional Tribunal, the period of applicability of the current Act of 2001 on Elections to the Sejm and the Senate in order to encompass a period after 1 August 2011, if the said elections are ordered after that date.

In that respect, the proposed adjudication on Article 16(2) in conjunction with Article 1 of the Introductory Law (unconstitutionality, insofar as the provision rules out the possibility of applying the Act on Elections to the Sejm and the Senate to elections ordered after 1 August 2011 and held in 2011 as well as to the term of office that will commence after the elections) would not self-implement. The direct effects of such adjudication would be limited to the declaration of unconstitutionality of the solutions under examination. Even if my proposal was to be taken into account by the majority of the bench, the only basis of applying the Act on Elections to the Sejm and the Senate would be Article 16(2) of the Introductory Law. "Value added" by such a judgment of the Constitutional Tribunal would be such an interpretation of that provision (indicated in the operative part of the judgment) that the Act of 2001 on Elections to the Sejm and the Senate should be applied not only to the elections ordered in 2011, but also to events which will occur during the term of office commenced after the elections. Such modification is necessary to guarantee the uniformity of actions undertaken by selected organs of public authority, as well as to avoid a situation where during one term of office different Members of the Polish Parliament will be subject to different sets of electoral-law norms. This is particularly important with regard to the Senate, as the current Act of 2001 on Elections to the Sejm and the Senate provides for electing Senators in multi-member constituencies (cf. Article 191(2) of the Act on Elections to the Sejm and the Senate), whereas the Electoral Code introduces the principle that they shall be elected in single-member constituencies (cf. Article 260(1) of the Electoral Code).

In the light of the above, what should have been done was to look for a solution that would fall within the scope of the Constitutional Tribunal, and at the same time it would make it possible to achieve the goal set by the group of Sejm Deputies (i.e. it would eliminate the possibility of applying the Electoral Code to this year's parliamentary elections). It seems to me that the formulation of the operative part of the judgment that I have proposed – although it may not be optimal - fulfils those assumptions. Indeed, it follows from such formulation that the elections to the Sejm and the Senate in 2011 as well as the term of office commenced after those elections should entirely be regulated by the Act of 2001 on Elections to the Sejm and the Senate.

A noticeable negative effect of that solution is insignificant limitation of the period granted to the President for ordering elections. Pursuant to Article 98(2) of the Constitution, the President shall order elections to the Sejm and the Senate no later than 90 days before the expiry of the 4 year period beginning with the commencement of the Sejm's and Senate's term of office, which - in the case of the current elections – means the period until 7 August 2011. The implementation of the judgment of the Constitutional Tribunal in the version I have proposed would require the President to exercise his right no later than on 31 July 2011. As it has been mentioned, only in that case, there would be legal grounds for the application of the Act on Elections to the Sejm and the Senate after the entry into force of the Electoral Code. This would mean that the time-limit provided for the President to order elections would be shorter by seven days.

Taking into account all the circumstances of the case, I consider it to be an admissible, and the lowest possible, "price" for the guarantee that this year's elections will be held on a legal basis which conforms to the Constitution. Indeed, in the situation under analysis there is a partial conflict between constitutional requirements concerning the standards of electoral law (Article 2 of the Constitution) and the President's freedom to exercise his constitutional powers (Article 98(2) of the Constitution). In my opinion, in such a situation, what should be appropriately applied is the view, well-established in the jurisprudence of the Constitutional Tribunal, that there is a need to seek a compromise which would make it possible to implement both of the above-mentioned provisions of the Constitution to the maximum extent, without infringing the essence of the provisions and by respecting the principles of proportionality. The Constitution should be applied in an integral way – its provisions are equal in respect of their legal effect, and the implementation of one of them may not entirely exclude the legal effect or application of the others (cf. the judgments of: 18 February 2004, Ref. No. P 21/02, OTK ZU No. 2/A/2004, item 9 and 19 October 2010, Ref. No. P 10/10, OTK ZU No. 8/A/2010, item 98).

Due to the fact that Article 98(2) of the Constitution provides the President with considerable room for manoeuvre when it comes to a date for ordering elections (as it merely sets the admissible deadline for taking that action), and therefore in that area one should seek the above-mentioned compromise. Shortening that period by a few days does not appear to be excessive limitation imposed on the President with regard to the exercise of his constitutional powers, considering that he would still be able to order elections to be scheduled for the same date that he would choose in the case of ordering elections after 1 August 2011. An additional argument for the adoption of that solution may also be the fact that the President did not exercise his right to refer to the Constitutional Tribunal for it to conduct a preventive review (*a priori* review*)* of the Electoral Code, in accordance with the procedure set out in Article 122(3) of the Constitution. Indeed, it should be noted that the President must have taken into account the consequences of a potential subsequent review (*a posteriori* review) of that Code, also as regards the restriction of his powers.

For the above reasons, I have found it necessary to submit this dissenting opinion.

Dissenting Opinion
of Judge Marek Kotlinowski
to the Judgment of the Constitutional Tribunal
of 20 July 2011, Ref. No. K 9/11

Pursuant to Article 68(3) of the Constitutional Tribunal Act of 1 August 1997 (Journal of Laws - Dz. U. No. 102, item 643, as amended), I submit my dissenting opinion to point 1 of the operative part of the judgment of the Constitutional Tribunal, dated 20 July 2011, in the case K 9/11, as well as to the statement of reasons in the part concerning the arguments for the non-conformity of the Act of 3 February 2011 amending the Electoral Code (Journal of Laws - Dz. U. No. 26, item 134; hereinafter: the amending Act of 3 February 2011) to Article 2 of the Constitution.

In my view, in the light of the Constitution, two-day voting is admissible not only in the context of elections to the European Parliament and local self-government elections, but also elections to the Sejm and the Senate as well as presidential elections. For that reason, I disagree with the Tribunal's adjudication that the provisions of the Electoral Code which regulate that matter are inconsistent with Article 98(2) and (5) as well as Article 128(2) of the Constitution.

In my opinion, the pace of the legislative proceedings may not be an argument for the non-conformity of the Act under review in the present case to Article 2 of the Constitution. Also, I do not share the view of the majority of the bench that the amending Act of 3 February 2011 was introduced into the legal system in breach of the six-month period of legislative silence, and thus is inconsistent with Article 2 of the Constitution. For these reasons, I disagree with the way of substantiating the non-conformity of the said Act to Article 2 of the Constitution.

1. I hold the view that two-day voting is admissible both in the light of the axiological assumptions of the Constitution, the implementation of which is an obligation of the organs of public authority, as well as in the light of the literal wording of constitutional provisions.

High turnout in free and democratic elections represents a vital constitutional value. It enhances the legitimacy of representative organs of public authority which are elected in universal elections. It is also an expression of citizens' sense of responsibility for the fate of the state as well as evidence of their actual participation in a decision-making process concerning public affairs. The organs of the state are obliged to undertake actions aimed at preserving that vital constitutional value. What is primarily meant here is the creation of legal regulations facilitating citizens' participation in universal election. The lack of convenient voting procedures for voters leads to the phenomenon of forced voter abstention. This is a situation where citizens want to take part in elections, but may not for reasons beyond their control.

In my opinion, the introduction of two-day voting would constitute the implementation of the constitutional value, i.e. high election turnout, by the legislator. For many years such a solution has been advocated by the representatives of the doctrine and the National Electoral Commission. Since 2003 two-day voting has been admissible in nationwide referenda, and it proved feasible in practice in respect of organisational matters during the referendum on Poland's accession to the EU. It is worth noting that the introduction of that institution into the Electoral Code was passed by a unanimous vote, which is very rare in the Polish Parliament.

2. Two-day voting in parliamentary and presidential elections does not remain inconsistent with the literal wording of the constitutional provisions either.

The Constitution contains two parallel terms: "the day of the elections" and "the day of vote". The last term occurs in Article 62 of the Constitution, pursuant to which a Polish citizen shall have the right to vote "if, no later than on the day of vote, he has attained 18 years of age". Moreover, Article 127(5) contains the term "the date of [...] ballot" (If one of the two such candidates withdraws his/her consent to candidacy, forfeits his/her electoral rights or dies, s/he shall be replaced in the repeat ballot by the candidate who received the next highest consecutive number of votes in the first ballot. "In such case, the date of the repeat ballot shall be extended by a further 14 days").

The phrase "the day of the elections" occurs in: Article 99(1) and (2) (the right to stand for election to the Sejm and the Senate is vested in a Polish citizen who "no later than on the day of the elections", has attained a certain age), Article 105(3) (Criminal proceedings instituted against a person before the day of his election as Deputy, shall be suspended at the request of the Sejm […]"), Article 109(2) (The first sitting of the Sejm and Senate shall be summoned by the President of the Republic to be held "on a day within 30 days following the day of the elections"), Article 127(3) (a Polish citizen who, "no later than the day of the elections, has attained 35 years of age" may be elected President of the Republic), and Article 238(2) and (3) (the indication of the term of office with regard to the organs of public authority, in the event that provisions valid prior to the entry into force of the Constitution do not specify any such term of office, and "from the election" or appointment there has expired a period longer than that specified in the Constitution).

At the same time, it should be noted that the Tribunal reconstructed the term "the day of the elections" on the basis of provisions which lack that phrase, but contain words "day" and "elections" (Article 98(2) – "shall order such elections to be held on a non-working day", Article 98(5) – "The President of the Republic [...] shall simultaneously order elections [...] and shall order them to be held on a day falling no later than within the 45 day period from the day of the official announcement of Presidential order on the shortening of the Sejm's term of office. The President [...] shall summon the first sitting of the newly elected Sejm no later than the 15th day after the day on which the elections were held", Article 128(2) – "The election of the President of the Republic shall be ordered by the Marshal of the Sejm to be held on a day no sooner than 100 days and no later than 75 days before expiry of the term of office [...] specifying the date of the election which shall be on a non-working day [...]").

The provisions which are the higher-level norms for the review lack the term "the day of the elections", which the Tribunal cites in the statement of reasons for the judgment. They contain terms such as "the date of the election" and "the day on which the elections were held". In order to determine whether these terms are identical with "the date of vote", one needs to establish a relation between "elections" and the term "voting". The judgment to which I submit the dissenting opinion lacks such analysis.

3. The term "elections" in the light of the Constitution has a double meaning.

On the one hand, this is a multi-stage electoral process aimed at electing persons who will compose representative organs of public authority or will hold certain offices. The said process takes some time and begins with ordering elections and ends with the announcement of results. Within the scope of that process, voting is one of many actions that take place. In that sense, elections are carried out in an open manner, whereas voting is the stage of elections which is secret in character. Election results and voting results are determined separately. The subject of electoral protest may be an infringement of provisions on determining both voting results and election results. In the announcement published in the Journal of Laws by the National Electoral Commission, only election results are provided.

Also, the Supreme Court adjudicates only on the validity of elections, where voting is merely one of the stages. Declaring the invalidity of voting in a district or a constituency does not always entail declaring the invalidity of elections.

On the other hand, the election of persons who are to be members of representative organs of public authority or who will hold certain offices is done by an act of casting votes and, in that respect, the term "electing" may be tantamount to "voting". Voting consists in externalising voters' decisions as regards the choice of a candidate (candidates) to hold a certain office. Therefore, on the voting day a choice is made as to which person will hold a certain office or perform a certain public function. In that sense, voting is identical with an individual and collective act of electing representatives.

The above-discussed meaning of the term "elections" and the relation of that term to the term "voting" can be found in the Constitution. What alludes to the concept of elections as a multi-stage process, within the scope of which voting is only one of the elements, is Article 127(1) of the Constitution, pursuant to which the President shall be elected by the Nation "in [...] elections, conducted by secret ballot". By contrast, the concept of elections carried out by means of an act of voting is alluded to by Article 96(2) and Article 97(2) of the Constitution ("Elections [...] shall be conducted by secret ballot").

4. Taking the above into account, it should be considered in what sense the term "elections" occurs in the provisions indicated by the applicants as higher-level norms for the review, i.e. Article 98(2) and (5) as well as Article 128(2) of the Constitution. The subject of the regulation in those provisions is determining the time-frame for the two activities, i.e. ordering elections and setting the date for elections. Ordering elections is to take place within a certain time-limit, the end of which is specified in those provisions, whereas elections are to be scheduled for a certain date. Both ordering elections as well as setting a date for elections are certain actions falling within the scope of an electoral process that takes some time, which leads to the conclusion that the term "elections" occurs in those provisions as a synonym of an electoral process, rather than an act of voting. Thus, the fact that elections are scheduled for a certain date does not denote that on that very day the entire electoral process will take place, but merely that this is "the day of the elections" which – in the light of the aforementioned constitutional provisions – is of significance for the assessment of certain facts and the running of certain time-limits. "The day of elections" set by the authority ordering elections allows for evaluation whether a person applying for a parliamentary seat or a presidential office has the right to stand for election (pursuant to Article 99(1) and (2) as well as Article 127(3) of the Constitution, a given candidate must "no later than the day of the elections" attain a certain age). "The day of the elections" is also of significance as regards criminal proceedings that are pending against a given member of the Parliament, since in accordance with Article 105(3) of the Constitution: "Criminal proceedings instituted against a person before the day of his election as Deputy, shall be suspended at the request of the Sejm […]"). "The day of the elections" is a point in time from which date of summoning the first sitting of the Sejm and the Senate by the President. Namely, pursuant to Article 109(2) of the Constitution, it should be summoned "within 30 days following the day of the elections". Also, in the case of the transitional regulation contained in Article 238(2) and (3) of the Constitution, "the day of the elections" was significant for determining the end of the term of office with regard to the organs of public authority for which provisions valid before to the entry into force of the Constitution did not specify any such term of office, and "from the day of election" or appointment there has expired a period shorter than that specified in the Constitution. As in all those constitutional provisions, "the day of the elections" is to constitute a point of reference for the assessment of certain circumstances or the running of certain time-limits, it is necessary to precisely indicate the day of the elections by the

authority ordering elections, which has been provided for in Article 98(2) and (5) as well as Article 128(2) of the Constitution.

However, no constitutional provision links "the day of the elections" with the act of voting, and hence one may not find substantiation for the thesis that voting must begin and end on "the day of the elections", and thus it may not be held over two days. What is more, it should be noted that within the scope of one and the same election, voting in the light of the present Constitution may occur twice. If, in the first round of presidential elections, none of the candidates have received the required majority of votes, then Article 127 of the Constitution requires that a repeat ballot be held "on the 14th day after the first vote". In that case, the voting day is clearly counted from the close of poll, and not from "the day of elections".

Taking the above into consideration, it should be stated that the aim of the Constitution requiring the authority ordering elections to indicate "the day of elections" was not to determine that voting may be held on a single day, but to uniformly specify the day with regard to which certain circumstances will be assessed (e.g. the right to stand for election) as well as certain dates will be counted (e.g. the first sitting of the Sejm and the Senate). Voting as the climax of elections must be held on "the day of elections" which is determined in that way. However, this does not mean that it may not be held additionally on the day preceding the said day or on the day following it.

5. What weighs in favour of the above interpretation of Article 98(2) and Article 128(2) of the Constitution, as well as the interpretation of the term "the day of the elections", derived from the content of those provisions, is the principle of universal parliamentary and presidential elections, which implies the requirement to coordinate an electoral process in such a way that persons who enjoy active electoral rights could have the most possibilities to participate in voting. For that reason, the constitution-maker has determined that the date of elections carried out in accordance of an ordinary procedure must be set for a non-working day, which should be understood in the way that at least one of voting days must be a non-working day. A narrow interpretation of Article 98(2) and Article 128(2) of the Constitution, which emphasises the word "day" as an argument for the inadmissibility of two-day voting contradicts the principle of universal elections. Although the second day of elections could not generally be a non-working day, but it would still provide an additional possibility to participate in elections for persons who could not vote on the non-working day. Therefore, two-day voting extends the guarantee of the exercise of active electoral rights, and the ensuing higher election turnout merely confirms that fact. At the same time, one should note that the term "a non-working day", which is used in Article 98(2) and Article 128(2) of the Constitution, lacks sufficient specificity. According to the principle of autonomous interpretation of constitutional terms, what determines the interpretation of the term is not its meaning, assigned to it by the Act of 18 January 1951 on Non-Working Days (Journal of Laws – Dz. U. No. 4, item 28, as amended). Thus, one may not rule out an interpretation that a non-working day, within the meaning of Article 98(2) and Article 128(2) of the Constitution, will be not only a statutory non-working day, but also a customary non-working day i.e. a Saturday.

Also, one should note that two-day voting is not a novelty that has never occurred in Polish electoral law. The current binding regulations provide for a possibility of extending the duration of voting or even adjourning voting until the following day if, as a result of extraordinary events, voting proved temporarily impossible (Article 64 of the Act of 12 April 2001 on Elections to the Sejm of the Republic of Poland and to the Senate of the Republic of Poland; Journal of Laws - Dz. U. of 2007 No. 190, item 1360, as amended as well as Article 59 of the Act of 27 September 1990 on the Election of the President of the Republic

of Poland; Journal of Laws - Dz. U. of 2010 No. 72, item 467, as amended). The said regulations, providing for the extension of the duration of voting up to even two days, confirm that the legislator has not hitherto interpreted Article 98(2) and (5) as well as Article 128(2) of the Constitution as provisions which rule out the possibility of two-day voting.

Also, the possibility of extending the duration of voting to two days is not ruled out by Article 62(1) of the Constitution, which is the only provision with the term "the day of vote" (used in the singular). Pursuant to that provision, a Polish citizen shall have the right to vote "if, no later than on the day of vote, he [she] has attained 18 years of age" It is obvious that attaining the age of 18 takes place on a particular (one) day, and hence the provision mentions "the day of vote". However, on the basis of that provision, one may not formulate a more general thesis that voting in elections may also be held only on a single day. On the contrary, the fact that Article 62(1) of the Constitution lacks reference to "the day of the elections", indicated by the authority ordering elections, but contains reference to "the day of vote", means that the active electoral right will be assessed on the day a voter casts his/her vote, regardless of the fact whether s/he will vote on the first or second day of elections.

To sum up, it should be concluded that the Constitution does not rule out the possibility of two-day voting in parliamentary and presidential elections. Therefore, I hold the view that there are no grounds to declare the unconstitutionality of Article 4(2) and (3), Article 26(3), Article 39(2) in the part which includes the wording "if voting is held on a single day", Article 39(3), Article 39(7), second sentence, in the part beginning with the wording "and if voting is held over two days", Article 43 and Article 69(2) of the Act of 5 January 2011 - the Electoral Code (Journal of Laws - Dz. U. No. 21, item 112, as amended; hereinafter: the Electoral Code), insofar as the provisions concern elections to the Sejm and the Senate as well as presidential elections.

6. The applicants' allegation that there is a risk of electoral fraud during the night after the first day of voting and of the manipulation of voters during elections – in my opinion – can be considered by the Tribunal only within the scope of a normative realm, and not an actual one. The Tribunal does not examine the realm of the application of law; it merely examines whether, in the realm of enacting the law, guarantees have been established which prevent the occurrence of any irregularities, which could potentially emerge within the realm of the application of law. Such guarantees are provided for in Article 43 of the Electoral Code. The applicants *a priori* assume that those guarantees are insufficient; however, they do not indicate which elements are missing from that regulation. In its judgment of 15 October 2008, Ref. No. K 26/08 (OTK ZU No. 9/A/2009, item 135), the Tribunal stated that: "Only proving that the scale of irregularities, mistakes and abuse results in the permanent distortion of the challenged norm could lead to taking into account that state of affairs in the assessment of the constitutionality of the norm itself". In the case of legal acts which have just been introduced into the legal system and have not yet been applied (e.g. the Electoral Code), the Tribunal has no possibility of assessing provisions on the basis of the practice of the application thereof, as there is not such practice. Thus, before the entry into force of the Electoral Code, it is impossible to determine whether the irregularities, mistakes and abuse mentioned by the applicants will at all occur as well as whether their scale will result in permanent distortion of the challenged provisions. Therefore, in my opinion, the applicants' concern could not affect the assessment of the constitutionality of the said provisions.

It should be noted that similar allegations about the risk of electoral fraud were raised by the applicants in the case K 11/03, in the context of a two-day referendum. In that case, the applicants argued that the non-conformity of Article 4(2) and Article 32(6) of the Act of 14 March 2003 on Nationwide Referendum (OTK ZU No. 5/A/2003, item 43) to Article 2 of the Constitution consisted in the lack of exhaustive description of protective measures

provided for polling stations on an election night. In the judgment of 27 May 2003, which determined the case K 11/03 (OTK ZU No. 5/A/2003, item 43), the Tribunal stated that: the applicants' allegation is not justified enough to regard it as valid". The Tribunal stated that: "the issue of «exhaustive description of protective measures provided for polling stations on an election night» is not a matter that needs to be regulated by statute. Detailed organisational measures concerning the protection of polling stations fall within the scope of implementing provisions".

For these reasons, in my view, also in this context there was no possibility of considering the allegations presented in the application with regard to potential irregularities which in the course of two-day voting may occur.

7. As a side remark, one should add that the instability of Polish electoral law is a problem that the Constitutional Tribunal has been drawing attention to for years. I agree entirely with the analysis included in the statement of reasons for the judgment, as regards the need for a certain period preceding elections in which there should be no significant amendments made to electoral law which are to be applied to these elections. In my opinion, what would be the most desirable is a situation where a significant amendment to electoral law would not be applied to elections ordered after the end of the term of office of the Parliament that enacted it. This would guarantee that this kind of amendments would not be introduced for the sake of short-term political goals of the ruling parliamentary majority.

8. Also, I disagree with the way the Constitutional Tribunal has substantiated the non-conformity of the first amending Act to the Electoral Code, i.e. the amending Act of 3 February 2011, to Article 2 of the Constitution. In my view, the pace of the legislative proceedings may not be negatively assessed, in particular when it regards a statute containing only a few provisions and, in fact, concerning only one issue, i.e. the ban on broadcasting paid election radio and TV ads. The fact is that the Sejm worked on the amending Act of 3 February 2011 for three days, and the Senate examined it for one day. However, as during the legislative proceedings no amendments were proposed, which would justify prolonging the proceedings, there are no grounds to negatively assess the pace of proceedings in the Parliament. Certainly, such negative assessment should not be carried out by the Tribunal in its statement of reasons for the judgment. Therefore, I do not share the view presented in the statement of reasons for the judgment that the pace of work on the amending Act of 3 February 2011 was one of the irregularities that led to declaring that Act to be inconsistent with the principle of a democratic state ruled by law, expressed in Article 2 of the Constitution.

Also, I do not share the view, expressed by the majority of the bench in the statement of reasons for the judgment, that the amending Act of 3 February 2011 has been enacted in breach of the six-month period of legislative silence, which is also supposed to confirm its non-conformity to Article 2 of the Constitution. The said Act was enacted on 3 February 2011, whereas it was published in the Journal of Laws on 7 February 2011. The six-month period of legislative silence should be maintained between the day of publishing the Act and the day indicated in the Constitution as the last day when ordering elections is possible. In the case of parliamentary elections that last day is the only certain date indicated in Article 98(2) of the Constitution ("no later than 90 days before the expiry of the 4 year period beginning with the commencement of the Sejm's and Senate's term of office"). The parliamentary elections of 2011 could be ordered no later than on 7 August 2011, and since the amending Act of 3 February 2011 was promulgated on 7 February 2011, then the six-month period of legislative silence was maintained. For that reason I disagree with the view that the breach of legislative silence in that case is one of the circumstances weighing in

favour of the non-conformity of the amending Act of 3 February 2011 to the principle of a democratic state ruled by law, expressed in Article 2 of the Constitution.

For the above reasons, I have found it necessary to submit this dissenting opinion.

Dissenting Opinion
of Judge Teresa Liszcz
to the Judgment of the Constitutional Tribunal
of 20 July 2011, Ref. No. K 9/11

Pursuant to Article 68(3) of the Constitutional Tribunal Act of 1 August 1997 (Journal of Laws - Dz. U. No. 102, item 643, as amended), I submit my dissenting opinion to the above-mentioned judgment of the Constitutional Tribunal, as regards its point 4 (proxy voting) as well as point 12 (the application of the Electoral Code to parliamentary elections in 2011).

I hold the view that in both of those cases the Constitutional Tribunal should have declared the non-conformity to the Constitution of certain provisions of the Act of 5 January 2011 – the Electoral Code (Journal of Laws - Dz. U. No. 21, item 112, as amended; hereinafter: the Electoral Code) as well as the Act of 5 January 2011 - the Introductory Law to the Electoral Code (Journal of Laws - Dz. U. No. 21, item 113, as amended; hereinafter: the Introductory Law).

STATEMENT OF REASONS

1. Electoral law which is relevant to the parliamentary elections of 2011.

1.1. I will begin with a fundamental matter which – in my opinion – is the application of the Electoral Code to the parliamentary elections which are to be held this year due to the end of the term of office of the Sejm and the Senate.

It is regulated in the following provisions: Article 1, Article 10(3) as well as Article 16(1) and Article 16(2) of the Introductory Law to the Electoral Code. The first one provides for the entry into force of the Code after the lapse of the six-month period of *vacatio legis*, i.e. on 1 August 2011. The second one (Article 10(3)) states that on the same day the Act of 12 April 2001 on Elections to the Sejm of the Republic of Poland and to the Senate of the Republic of Poland (Journal of Laws - Dz. U. of 2007 No. 190, item 1360, as amended; hereinafter: the Act on Elections to the Sejm and the Senate) shall cease to have effect.

Apart from these two provisions – being necessary and obvious in the situation of enacting a completely new legal act concerning matters previously regulated in a statute – the legislator has included an unusual provision in the Introductory Law, which he considered to be necessary due to the fact that new electoral law was enacted and was being entered into force in the year when elections to the Sejm and the Senate needed to take place, due to the end of their term of office. Additional factors which, in a sense, forced the legislator to include that provision were as follows: the fact that, as a result of considerably long – six-month - *vacatio legis*, the Electoral Code is to enter into force before a date which is a deadline set by the Constitution as regards ordering elections (7 August 2011); at the same time, the President of the Republic of Poland, as an authority that is competent to order elections, may order them at an earlier date, before the entry into force of the Code. It is obvious (and Article 16(1) of the Introductory Law, which has no legal effect until 31 July 2011, is of no significance in that context) that, before 1 August 2011, the President could order elections only on the basis of the Act on Elections to the Sejm and the Senate. Indeed, the meaning of Article 16(1) and Article 16(2) is that, after ordering the elections on the basis of the Act on Elections to the Sejm and the Senate, during the implementation of the

election calendar, there must be no amendments to the electoral law provisions in accordance with which those elections will be carried out, when during the elections (on 1 August 2011) the Electoral Code enters into force.

Actually it is not the case, as some have claimed, that the legislator had no other choice in those circumstances and had to complicate the legal situation in this particular way. A better solution would have been the one contained in "the Sejm's version" of the Introductory Law (i.e. the version before the amendments of the Senate). Pursuant to Article 1 of "the Sejm's bill", the Electoral Code was to enter into force on 1 February 2011 and was to be applied to elections ordered after the lapse of six months from the day of its entry into force. The legislator could also have decided that the Electoral Code would not be applied to the parliamentary elections of 2011.

It appears *prima facie* that the legislator, with due diligence, tried to comply with the principle formulated in the jurisprudence of the Constitutional Tribunal that, during the period of six months before ordering elections, no significant amendments should be introduced to electoral law (see the judgment of the Constitutional Tribunal of 3 November 2006, Ref. No. K 31/06, OTK ZU No. 10/A/2006, item 147), and also to ensure the application of one set of electoral-law norms, in the event of entry into force of the new electoral law after ordering elections.

In reality, in my opinion, the legislator misunderstood the stance of the Tribunal, which is not so much about at least six-month *vacatio legis*, but about refraining to introduce significant amendments to electoral law during the period of six months, counted backwards from the date of the first action marked in the election calendar. In the judgment in the case K 31/06, the Tribunal stated that: "the necessity to maintain a period of at least six months between the entry into force of significant amendments to electoral law and the carrying out of the first action from the election calendar is, in principle, an undeletable normative element of the content of Article 2 of the Constitution. This means that all amendments to electoral law will be juxtaposed in the future by the Constitutional Tribunal with the constitutional requirement understood this way, which arises from the principle of a democratic state ruled by law".

An action regarded as the first one in the election calendar is ordering elections. In a situation such as the present one, where only a deadline is specified for ordering parliamentary elections due to the end of the term of office of the Sejm and the Senate, the period of six-month "legislative silence" should be counted backwards from that date. As a side remark, I wish to add that it is desirable that the Constitution should also specify the earliest possible date for ordering elections – not only so as to make it possible to precisely set out the period of the said "silence", counted backwards from that date, but also due to the fact that an excessively long electoral campaign results in a considerable disruption of the performance of the tasks of the state.

The aim of establishing that electoral standard which the Tribunal considers to be certain *minimum minimorum* within that scope is that, at the latest within that period, all participants of the electoral process could be familiar with the rules of the electoral game and regard them as reliable, and adjust their electoral strategy to those rules. A stricter approach in that regard is presented by the Venice Commission (the European Commission for Democracy through Law), which in its guidelines adopted in October 2002 (the so-called Code of Good Practice in Electoral Matters), states that the fundamental elements of electoral law "should not be open to amendment less than one year before an election", as electoral law should be characterised by stability and any amendments to its fundamental elements should be made appropriately in advance.

By contrast, regardless of good – I reckon – intentions of the legislator, what has resulted from the enactment of the challenged regulations of the Introductory Law to the Electoral Code is a legal situation where, less than two weeks before the deadline for ordering elections, no-one (except for the President and persons whom the President wishes to inform about his intentions as to the date when he orders elections) knows which electoral law – the new one, i.e. the Electoral Code, or the "old one", i.e. the Act on Elections to the Sejm and the Senate – will constitute the basis for ordering this year's parliamentary elections. If the President orders the elections before 31 July 2011, the said basis will be the Act on Elections to the Sejm and the Senate; if, however, he orders them after that date, then they will be held in accordance with the Electoral Code.

That state of uncertainty as to the choice of the set of electoral-law norms which will govern the coming elections, caused by the challenged legal provisions, is the subject of the main allegation raised by the applicants as to the way of enacting the Electoral Code and causing the Act on Elections to the Sejm and the Senate to cease to have effect.

In my view, the applicants have aptly argued that the said state of uncertainty as to the rules of the game which will be binding in these elections contradicts the principle of legislative silence, established by the Tribunal. They have challenged a legal mechanism (a legal norm) the main elements of which comprise Article 16(1) and Article 16(2) as well as Article 1 of the Introductory Law. What follows from the argumentation presented at the hearing by the applicants' attorney is that the indication of the subject of the allegation – "Article 16(1) and Article 16(2), in conjunction with Article 1, of the Act of 5 January 2011" – does not mean that the proper or main subject of the allegation is Article 16(1) and Article 16(2), whereas Article 1 is merely a provision considered "in conjunction with other provisions". The phrase "in conjunction with" has been used between the above challenged provisions, since each of them read separately is not unconstitutional, but together they constitute a legal mechanism which is inconsistent with Article 2 of the Constitution – the principle of a democratic state ruled by law, as it infringes the requirements of at least six-month legislative silence and of the reliability of the rules of the electoral game, which are derived therefrom. As regards specifying the subject of the allegation, moving Article 16(1) and Article 16(2), and not Article 1, of the Introductory Law to the foreground should – in my opinion – have been regarded as *falsa demonstratio,* due to the clear indication of the goal of the allegation.

It should be added that six-month legislative silence before elections was additionally infringed in a somewhat classic way – by means of four statutes amending the Electoral Code during the period of *vacatio legis* (the fifth amending statute is at the stage of the Sejm's work - at the moment of adjudicating by the Tribunal in the present case).

The other allegation that the applicants have raised with regard to the provisions is the allegation of the infringement of Article 10 of the Constitution, concerning the separation of powers, by the fact that the application of the "old" or "new" electoral law to this year's elections is contingent upon the decision of the President of the Republic of Poland, at whose discretion it is to choose a date for ordering elections. Thus, being an executing authority, the President has been entrusted with a legislative power.

1.2. In point 12 of the operative part of the judgment, the Tribunal has adjudicated outside of the scope of the allegation. In point 7 of the application, the indicated provisions of the Introductory Law to the Electoral Code were challenged, insofar as they allowed for the application of the Electoral Code, and not the current provisions, to the elections to the Sejm and the Senate ordered in 2011. The Tribunal has not addressed that allegation in the operative part of the judgment. However, it has referred to the second allegation which was

formulated not in the *petitum* of the application, but in the substantiation thereof; the allegation stated that it was at the discretion of the authority ordering elections which set of electoral-law norms would govern the coming parliamentary elections. The Tribunal has concluded that the said solution is not inconsistent with Article 10 of the Constitution – the principle of separation of powers, whereas – in my opinion – the infringement of that principle is evident; the President – an executive authority has been granted a legislative power to determine which set of electoral-law norms will govern this year's parliamentary elections.

Taking the above into consideration, I hold the view that point 12 of the operative part of the judgment should have, roughly speaking, the following wording:

"Article 16(1) in conjunction with Article 1 of the Act of 5 January 2011 – the Introductory Law to the Electoral Code (Journal of Laws - Dz. U. No. 21, item 113 and No. 102, item 588):

a) insofar as it provides for the application of the Electoral Code to the elections to the Sejm and the Senate ordered in 2011, due to the end of the Sejm's and the Senate's terms of office, is inconsistent with Article 2 of the Constitution,

b) insofar as it makes determining which set of electoral-law norms is to be applied conditional on the day of ordering elections, is inconsistent with Articles 2 and 10 of the Constitution".

I disagree with the thesis that such a judgment by the Tribunal would result in a gap – as the Act on Elections to the Sejm and the Senate would cease to have effect and, simultaneously, the Electoral Code would not be allowed to enter into force on 1 August 2011 – and thus would make this year's parliamentary elections impossible to be held within the constitutional time-limit.

Firstly, the President of the Republic of Poland could still order elections before 1 August 2011 on the basis of the Act on Elections to the Sejm and the Senate (obviously, the President could not be forced to do so).

Secondly, as of 1 August 2011, there would be no gap in the legal system, as – in my view – the effects of "my" judgment within the scope of point 12 of the operative part of the judgment would be as follows: due to declaring Article 1 of the Introductory Law to be unconstitutional, the Electoral Code would not enter into force on 1 August 2011; and a new date of its entry into force would have to be specified by the legislator by means of a statute amending the said provisions. In that case, elections ordered after 31 July 2011 would also be ordered "before the day of entry into force of the statute mentioned in Article 1" and - pursuant to Article 16(2) of the Introductory Law – they should be ordered on the basis of "the current provisions", i.e. the Act on Elections to the Sejm and the Senate.

I disagree with the argument that, supposedly, by means of such a judgment the Tribunal would not restore the proper standards of electoral law, but would create even greater legal "disorder". Indeed, the Act on Elections to the Sejm and the Senate – which, in my opinion should, be the legal basis of this year's elections – has been in force for 10 years, is well-known, has been thoroughly tested in practice and, during the entire period of *vacatio legis* concerning the Electoral Code, it was regarded as an alternative to the Code in the context of this year's elections.

In my view, what is detrimental to democracy in Poland is the fact that, in subsequent judgments, the Constitutional Tribunal determines and mentions electoral-law standards, but at the same time it does not take any appropriate measures against the legislator for infringing them, so as not to create an impediment to holding another, coming, election. As a result, the legislator does not, and will not, treat the standards seriously and comply with them (see more

on that issue in the dissenting opinions by E. Łętowska and M. Safjan, submitted to the judgment in the case K 31/06).

2. Proxy voting.

2.1. The Tribunal has stated that the institution of proxy voting, regulated in the provisions of Chapter 7 and some other provisions of the Electoral Code with regard to all types of elections, is consistent with the Constitution.

In the opinion of the applicant, proxy voting infringes the principle of direct elections, the principle of the secret ballot and the principle of equality, as it does not in essence imply authorisation, but replacement as regards carrying out the act of voting, which gives a given proxy an additional vote or even two additional votes, and it, in fact, deprives a person granting a proxy vote of his/her vote.

2.2. I have no doubt that the authors of the Electoral Code had an honest intention to make it easier for the elderly and the disabled to take part in elections. However, what constitutes the subject of the Tribunal's assessment is not the intention of the legislator, but the result of its work in the form of the challenged legal provisions and, unlike the Tribunal, I consider those to be inconsistent with the Constitution, with the principle of direct elections, the principle of equal elections as well as the principle of the secret ballot.

The principle of direct elections is rendered *expressis verbis* in the following provisions of the Constitution: Article 96(2) (concerning elections to the Sejm); Article 97(2) (concerning elections to the Senate); Article 127(1) (concerning presidential elections); Article 169(2) (concerning elections to the constitutive organs of units of local self-government). The principle of direct elections primarily entails that voters cast their votes directly for a candidate or candidates, having indirect impact on the composition of a representative organ of public authority or the election of a particular person to hold a public office (one-stage elections). Although there is no agreement in the doctrine as to whether the principle of direct elections implies the requirement to vote in person, or whether this principle is binding only at the level of an ordinary statute (see L. Garlicki*, Prawo konstytucyjne. Zarys wykładu,* 14th Edition, Warszawa 2010, pp. 160-161). However, some experts on the Constitution incline to agree with the view that the requirement of casting a vote in person by a voter is an element of the principle of direct elections, due to the strictly personal character of political rights (see e.g. Z. Jarosz, *Prawo konstytucyjne*, Warszawa 1987, p. 326).

I share that view and hold the opinion that the principle of proxy voting infringes the constitutional principle of direct elections.

The same provisions of the Constitution which introduce the principle of direct elections also introduce the principle of the secret ballot. The said principle means that the content of the voting decision taken by a person who is eligible to cast his/her vote may not be made known to any other person. At the same time, despite the Tribunal's statement, secret ballot is not merely the right or privilege of a voter, which s/he may not exercise. As L. Garlicki aptly states (*Prawo konstytucyjne…,* p. 161), "one should assign an absolute character to the principle of the secret ballot, i.e. it should be regarded as an obligation, and not merely as the right of a voter. The issue should be reflected upon with the hindsight of experience from the period of the People's Republic of Poland. Then it was claimed that the exercise of the principle of the secret ballot (i.e. entering a polling booth) remained within the scope of voters' rights, if they wished so they might vote without any secrecy".

Proxy voting is inextricably linked with infringing the principle of the secret ballot, as persons granting a proxy vote must communicate their voting decisions to their proxies who should carry the decisions through. One of experts on the Constitution assesses proxy voting as follows: "a proxy vote granted by a voter to a proxy for voting is defective in character, due to the principle of the secret ballot; in fact, this is not authorisation, but replacement of the voter. This defective form of that authorisation, which consists in taking over the voter's right entirely by «the proxy», requires considerable caution when introducing and applying that institution" (J. Mordwiłko, "W sprawie ustanowienia w polskim prawie wyborczym instytucji pełnomocnika wyborcy oraz możliwości głosowania drogą pocztową (glosowania korespondencyjnego)", *Przegląd Sejmowy* Issue No. 1/2001, p. 71).

The proxy entirely on his/her own fills in a ballot paper and – thanks to the binding principle of the secret ballot – neither the person granting the proxy vote, nor anyone else, is able to verify whether the proxy voted in accordance with the will of the person granting the vote. This is only a matter of the proxy's honesty and loyalty towards the person authorising the proxy to vote in his/her name.

Therefore, the proxy in fact has – apart from his/her own vote – one or even two more votes (if the proxy's relationship with one of the persons granting the vote is based on either close blood relations, adoption or marriage, or *de facto* marital cohabitation), which undoubtedly infringes the principle of equality in a formal sense, which is expressed in the rule: "one voter – one vote" (see L. Garlicki, *op. cit*., p. 158).

The above-mentioned defects of proxy voting entail that – despite the noble intentions of the legislator – the said institution may in practice frequently result not so much in making it possible or easier for the elderly and the disabled to participate in elections as in using their votes against their will.

Thus, other ways of facilitating the exercise of the right to vote should be applied as regards those persons – ways which do not pose such a risk, e.g. providing transportation to take those persons to polling stations or making it possible for them to vote via the Internet, so that they could cast their votes in person.

For the above reasons, I have submitted the dissenting opinion.

Dissenting Opinion
of Judge Andrzej Rzepliński
to the Judgment of the Constitutional Tribunal
of 20 July 2011, Ref. No. K 9/11

Pursuant to Article 68(3) of the Constitutional Tribunal Act of 1 August 1997 (Journal of Laws - Dz. U. No. 102, item 643, as amended), I submit my dissenting opinion to the judgment of the Constitutional Tribunal of 20 July 2011, in the case K 9/11.

1. I disagree with the adjudication in point 1 of the operative part of the judgment that Article 4(2) and (3), Article 26(3), Article 39(2) in the part which includes the wording "if voting is held on a single day", Article 39(3), Article 39(7), second sentence, in the part beginning with the wording "and if voting is held over two days", Article 43 and Article 69(2) of the Act of 5 January 2011 - the Electoral Code (Journal of Laws - Dz. U. No. 21, item 112, as amended)
a) insofar as they concern elections to the Sejm of the Republic of Poland and to the Senate of the Republic of Poland, are inconsistent with Article 98(2) and (5) of the Constitution,
b) insofar as they concern presidential elections, are inconsistent with Article 128(2) of the Constitution.

2. I hold the view that Article 4(2) and (3), Article 26(3), Article 39(2), (3) and (7) as well as Article 43 and Article 69(2) of the Electoral Code, which provide for two-day voting in elections, are consistent with the higher-level norms for the review, indicated in the Constitution.

3. The Constitutional Tribunal has assumed that, since Article 98(2) of the Constitution stipulates that the President of the Republic shall order elections to the Sejm and the Senate to be held on a non-working day, and in paragraph 5 - regulating the ordering of such elections after the shortening of the Sejm's term of office - that the President of the Republic shall order the elections to be held "on a day falling (...)", as well as that, since Article 128(2) of the Constitution stipulates that the Marshal of the Sejm sets the date for presidential elections for a non-working day, then "the Constitution determines the fact that elections to the Sejm and the Senate as well as presidential elections must be held on a single day". I disagree with such adjudication.

4. The analysis of the statement of reasons for the Tribunal's judgment, in part III point 3, indicates that the Tribunal has based its reasoning on a historical and linguistic interpretation. In my opinion, in both cases, the reasoning is incorrect.

5. One should begin with the historical interpretation, to which the Tribunal seems to assign special significance. In the context of voting held on a single day during elections, the Tribunal refers three times to the traditions arising from Polish election statutes regulating elections to the Polish Parliament. The basis of the reasoning of the Tribunal is the interpretation of the tradition of the Polish electoral law in the part concerning the day on which election statutes required voting to be held.

6. What is "tradition"? Does it mean the consistency of the rules of conduct over decades? Can a subsequent generation, without undermining tradition, introduce changes within the scope of established rules of conduct in a particular realm, e.g. family or public life? Can a subsequent generation, while referring to the existing rule of conduct, complement it with its own experience, adjusting it to new permanent circumstances? Does tradition - which "aims" at being carried on by another generation and, at the same time, at being consistent - overlook

the challenges of the epoch? May it deprive the new domestic models of social life, or the well-established good practice from other nations belonging to the same civilisation circle, of their abilities to assimilate into electoral law? Thus, is tradition unchangeable? Does such an "inflexible" tradition stand at all a chance of becoming tradition?

7. One might think that this is a rhetorical question. However, it should be answered in the context of constitutional review of the challenged provisions which were to introduce the institution of two-day voting in elections to the Sejm and the Senate.

8. What is the tradition of Polish electoral law? I think that the tradition of Polish electoral law originated with the first legal act after the rebirth of the Polish state. This was the Decree of 28 November 1918 on Elections to the Legislative Sejm (Journal of Laws - Dz. U. No. 18, item 46). The Decree stated in its paragraph 1 that: "A voter in elections to the Sejm is every citizen of the state, regardless of gender, who attained the age of 21 before the day of ordering elections", and in its paragraph 7 that: "All (male and female) citizens who have the right to vote, including military men, may stand for election to the Sejm, regardless of their place of residence". This way, the Decree led Polish electoral law - with the boldness of a reborn state emerging from the parts of the formerly partitioned Polish state - to the group of legislative regulations of countries which welcomed the rules of political democracy, which respects the values of modern society in a given epoch. Poland – in one of its first legislative acts, and as one of the first states in the world – guaranteed the right to vote and the right to stand for election to every Polish female citizen, regardless of any attributes, and on equal terms with every Polish male citizen. Indeed, what became the central characteristic of the tradition of Polish electoral law was citizen-friendly regulation, granting every citizen equal rights to vote and to stand for election in democratic parliamentary elections. Thus, Polish electoral law served the need of the Polish Parliament to directly obtain (and in the case of the other constitutional organs of public authority, which do not emerge from universal elections – to indirectly obtain) democratic legitimisation from the largest possible number of citizens.

9. Changes that occurred in Polish living conditions and customs, arising first from the transformation of the political system and then from Poland's accession to the European Union, are permanent and fundamental in character. Those changes made within the life-span of one generation facilitated Poles' mobility as regards pursuing an optimal workplace, course of studies or life, both within the borders of Poland as well as in other countries, in particular the EU Member States. To a large extent, the Electoral Code facilitates that further by introducing the institution of postal voting. However, taking into account the circumstances indicated here, and the fact that there are voters who want to reach their places of residence and cast their votes in their "own" constituency, and also that – as the results of academic research prove (see M. Cześnik, *Partycypacja wyborcza Polaków*, Warszawa 2011, *passim*) – Poland has the lowest election turnout, in every aspect, when juxtaposed with other countries in this part of Europe and other countries which in the past 25 years have undergone transformation from dictatorship to parliamentary democracy, it should be indicated that the institution of two-day voting in parliamentary elections would serve well the following two constitutional values: 1) maintaining direct ties and a sense of responsibility for the Republic of Poland by a vast number of citizens residing too far from their constituency to get there for one election day, as well as 2) facilitating the maximum election turnout, comparable to an average from other countries representing parliamentary democracies, which gives very strong democratic legitimisation to the organs of state authority.

10. The tradition of Polish electoral law outlined in the Decree of 28 November 1918 on Elections to the Legislative Sejm, which consisted in ensuring that every Polish citizen would have an actual right to vote in parliamentary elections, was favoured in Polish law before the

Electoral Code. The Act of 12 February 2009 (Journal of Laws - Dz. U. No. 202, item 1547), which amended *inter alia* the Act of 23 January 2004 on Elections to the European Parliament (Journal of Laws - Dz. U. No. 25, item 219), added paragraph 3 to Article 10 of the Act on Elections with the following wording: "Voting in elections shall be held over two days", as well as paragraph 4 to the same Article, which read as follows: "the date of voting shall be set on a non-working day and the day preceding it". Six years earlier, the legislator permitted voting over two days in the Act of 14 March 2003 on Nationwide Referendum (Journal of Laws - Dz. U. No. 57, item 507), stating in paragraph 2 of Article 4 that "voting in referendum may be held on a single day or over two days", as well as stipulating in paragraph 3 that "if voting in a referendum is held over two days, then the date of voting is set on a non-working day and the day preceding it".

11. The obligation to create law which is actually advantageous to every voter, taking into account his/her life circumstances as regards participating in universal elections, is imposed by Article 62(1) in conjunction with Article 4 of the Constitution. This was aptly pointed out by the Sejm in its argumentation submitted in the case under examination (p. 23).

12. Within the scope of the constitutional principle of universal elections, electoral law must favour the pluralistic structure of Polish society. This requires that the legislator should take into consideration the fact that some voters, staying outside their constituency, wish to cast their votes in that constituency during parliamentary elections. Postal voting does not resolve the problem for persons who work, study or - for other reasons - reside abroad, and wish to arrive in Poland, or who stay in Poland but in a place which is remote from their place of residence, and wish to have enough time to have a real possibility to get to their constituency during those elections.

13. The constitutional universality of parliamentary elections (Article 96(2) and Article 97(2) of the Constitution) also implies their accessibility to every voter. This is to be guaranteed by a reasonable division of the country into constituencies and polling districts, but also the accessibility of polling stations to the disabled voters, as well as temporal accessibility which allows voters – regardless of their professional or personal commitments in a place of residence which is remote from the district electoral commission of the place of residence – to arrive at the relevant polling station. Such accessibility is definitely enhanced by the possibility of casting votes over two days: on a non-working day or the day preceding it. In such a situation, the legislator, in a better way, protects every citizen's right to equal access to taking a voting decision.

14. In the judgment in the present case, the Constitutional Tribunal differently perceives the tradition of Polish electoral law. The Tribunal limits it to the custom that voting was held on a single day. At first, the Tribunal states that: "Adopting such an interpretation of the term «elections», which is novel and inconsistent with the Polish tradition, would result in regarding only the last day of voting as the day of elections, which could theoretically follow an infinite number of the preceding days of voting, which would not necessarily be non-working days; indeed, only a proper election day would have to meet that requirement. This is obviously inadmissible". Then it states that "one-day elections (voting) have been a long-standing tradition in Poland, continuing since 1918", and finally that: "the principle of one-day voting is related to the requirement that the voting day should be a non-working day, which is a tradition in Polish electoral law".

15. To provide evidence for this, the Tribunal cites appropriate excerpts from the provisions of election statutes from the following years: 1918-1935, 1946-1985, 1989 as well as 1991-2001.

16. Regardless of the fact that I define the electoral tradition within the scope of Polish legislation differently than the Tribunal has done in the present case, I consider it incorrect to refer to the tradition of legislation regulating statutes on elections to the Sejm during the period of the People's Republic of Poland, in particular that the said part of the statement of reasons approves, and aptly cites, a thesis from the judgment in the case K 7/09 that the constitutive characteristics of a democratic state include "free and fair elections". It is obvious that when elections are not free and fair, they are no elections, and they do not give democratic legitimisation to the members of parliaments who are elected in this way. None of the ten elections to the Sejm carried out within the years 1947-1986 were held on the basis of a statute guaranteeing free elections, and the elections were additionally falsified, including the use of methods of terror (as in 1947). And thus it is obvious that, with reference to such legislation, the legislator recalls, in the preamble to the Constitution, solely "the best traditions of the First and the Second Republic".

17. It is essential to point out here that the electoral tradition in the People's Republic of Poland was based on hostility towards the freedom of electing representatives to the Parliament, in other words towards undermining the basic arrangements concerning post-war Poland, which were contained in the agreement concluded by three superpowers in Yalta on 11 February 1945: "the Polish Temporary Government of National Unity should be sworn in order to carry out free and unrestrained elections within the shortest time-limit, on the basis of electoral law and by secret ballot" (quoted after: Jan Karski, *Wielkie mocarstwa wobec Polski 1919-1945. Od Wersalu do Jałty*, Lublin 1998, p. 446). This is proven by the provisions of the Act of 22 September 1946 on Elections to the Legislative Sejm (Journal of Laws - Dz. U. No. 48, item 274), which in Article 2(2) read as follows: "Persons cooperating with underground fascist organisations or gangs aiming at overturning the democratic system of government in the State shall be excluded from taking part in elections". Article 3(3) read as follows: "Persons staying abroad on the day when elections are ordered have the right to vote, if they remain there due to the order or with permission of competent authorities"; and Article 3(4) stipulated that: "By decision of the National Electoral Commission, the right to vote may be revoked in the case of persons who, during the years of the war occupation, by holding offices in the country or abroad, counteracted armed operations against the invaders. The decision of the National Electoral Commission may be appealed to the Presidium of the National State Council, which provides the final determination. An application to revoke the right to vote should, in the case of every person, be filed by the district electoral commission or be filed by the National Electoral Commission itself".

18. Thirty years later, during the period of the developed systemic concept of the so-called real socialism, in the Act of 17 January 1976 on Elections to the Sejm of the People's Republic of Poland and to National Councils (Journal of Laws - Dz. U. No. 2, item 15), in Article 1, the legislator decided that: Elections to the Sejm of the People's Republic of Poland and to National Councils shall be held on the basis of the programme of the Front of the Nation's Unity, which manifests joined patriotic attitude of all aware and active citizens as regards the fundamental interests of the nation and the socialist state. The central pillar of the Front of the Nation's Unity was the Polish United Workers' Party, and the political basis thereof – cooperation between the Polish United Workers' Party and the United People's Party and the Democratic Party as well as cooperation between all social organisations of the working people of cities and the countryside".

19. The elections carried out on the basis of the Act of 7 April 1989 on Elections to the Sejm of the People's Republic of Poland – the 10th term of office for the years 1989-1993 (Journal of Laws - Dz. U. No. 19, item 102), were not regarded by the community of the so-called old

democracies as truly free elections. Poland was accepted as a Member State of the Council of Europe later than two other states from our region (Hungary – 6 November 1990, the Czech Republic – 21 February 1991), since they had held free elections earlier, as required by Article 3 of Protocol 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms. In the case of Poland, although holding parliamentary elections on 4 June 1989 was vital for carrying out the transformation of the political system, the fulfilment of the premisses of free elections only occurred after holding the parliamentary elections on 27 October 1991, on the basis of the Act of 28 June 1991 on Elections to the Sejm of the Republic of Poland (Journal of Laws - Dz. U. No. 59, item 252), where Article 1 guaranteed that the elections of Deputies shall be *inter alia* free. Poland became a Member State of the Council of Europe on 26 November 1991.

20. The freedom of elections is therefore a *sine qua non* requirement, if one is at all to talk about the procedure for electing parliament. Other aspects are crucial, but of secondary importance. Therefore, an election statute may provide for one-day or two-day voting, but after the fulfilment of the basic requirement, where both political parties and voters may act and express themselves in an unrestrained manner, exercising their fundamental freedoms, including the freedom of speech, the freedom of activity as regards political parties as well as periodic holding of universal elections. In a dictatorial state, it is of no constitutional significance which procedure for carrying out of elections will be passed by the legislator. It is not voters who, after electoral campaigns, decide about the outcome of voting, regardless of the length and intensity of a given electoral campaign, an regardless of the fact whether voting will be held on one day and whether polling stations will be open for 16 and 10 hours, or whether voting will be held over two or more days. Voting results are determined by the dictatorship.

21. My protest against including the electoral law of the People's Republic of Poland in the Polish tradition of electoral law is, therefore, caused by the nature of the law of the socialist regime. Just as it would be difficult to include, in the legal tradition of free and democratic Poland, the regulations of legislative acts of criminal law from the years of Stalin's regime or the regulations of nationalist acts, or the regulations of the decrees of 13 December 1981 on martial law. The Tribunal has been adjudicating on the constitutional consequences to freedom and democracy (all extremely negative) of those legislative acts for over 20 years.

22. In the case under examination, the Tribunal emphasises, in the conclusion of relatively laconic linguistic interpretation, that the higher-level norms for the constitutional review – Article 98(2) and (5) as well as Article 128(2) of the Constitution – contain the phrase "the day of the elections" (where the word "day" is always in singular). In the opinion of the Tribunal, this means that: "it was the constitution-maker's intention that voting in elections should be held on a single day, and that, in principle, it should be a non-working day. The said provisions are unambiguous and the interpretation thereof based on the grammar rules of Polish neither raises doubts nor leads to results which would be unacceptable for some reasons. Therefore, there are no grounds to look for other meanings of the provisions than those expressed straightforwardly therein". The Tribunal does note that the common manner of editing provisions which contain norms being general and abstract in character is to use a singular form with reference to designata. However, it then concludes that the said argument is undermined in the present case by a historical interpretation.

23. As regards the historical interpretation adopted by the Tribunal, I have presented my views above. Let us consider whether a rational constitution-maker requires the legislator to rigidly stick to either singular or plural form of the same nouns used in the provisions of the Constitution, or whether he leaves a certain margin of freedom to the legislator. When we

read in Article 22 of the Constitution that: "Limitations upon the freedom of economic activity may be imposed only by means of statute...", then it is natural, and it arises from life experience, that this will usually be a number of statutes where such limitation may be regulated – although one may imagine an ambitious attempt at enacting a separate statute that would regulate that issue. By contrast, when we read that: "The relations between the Republic of Poland and other churches and religious organizations shall be determined by statutes..." (Article 25(5) of the Constitution) - then it means that relations with every church and every religious organisation will be regulated in a separate statute; but, at the same time, this does not rule out that, with regard to some of those churches and religious organisations, there will be more statutes concerning them, and it may also be the case that one statute will regulate matters which are common to several churches/religious organisations. Likewise, it is difficult to assume that the legislator would require, by means of Article 51(5): "Principles and procedures for collection of and access to information shall be specified by statute", that all legal instruments for providing information will be included in one statute. And one more example from a related field; since Article 61(4) of the Constitution determines that "the procedure for the provision of information, referred to in paras. 1 and 2 above [on the activities of organs of public authority as well as persons discharging public functions] shall be specified by statute...", then this does not entail that the legislator has no margin of freedom to regulate the issue in a one statute.

24. The higher-level norms for the review indicated by the applicants (Article 98(2) and (5) as well as Article 128(2) of the Constitution) do not *expressis verbis* require in electoral law that voting will be carried out in elections on a single day. The Constitution determines that one of those days must be a non-working day. In practice, this means that this must be a Sunday. Both higher-level norms for the review leave the margin of freedom to the legislator, whose aim is to enact an electoral law which will take into account such values as ensuring that every voter will have a real possibility to participate in elections in their own constituency, that election turnout will be the largest possible, as well as that the established social and economic relations, and the costs of two-day elections will be considered.

25. The legislator's intention to hold parliamentary and/or presidential elections over two days means that the first day of voting will be a Saturday. Additionally, Saturday is usually a non-working day. Certainly, more voters tend to work on Saturday than on Sunday, and this is still definitely fewer than on the other days of the week. Although constitutional terms are defined autonomously, it is worth noting on the margin that in two statutes Saturday is considered to be a non-working day. In accordance with Article 12(5) of the Tax Act of 27 August 1997 (Journal of Laws - Dz. U. of 2005 No. 8 item 60, as amended): "If the last day of a given time-limit falls on a Saturday or a statutory non-working day, then the last day of the time-limit is the day following the non-working day or days". Likewise, pursuant to Article 83(2) of the Act of 30 August 2002 – Law on Proceedings Before Administrative Courts (Journal of Laws - Dz. U. No. 153, item 1270, as amended), "If the last day of a given time-limit falls on a Saturday or a statutory non-working day, then the last day of the time-limit is the day following the non-working day or days". In the context of the present case, one should also take into consideration changes in labour law. Working time specified in the Labour Code of 26 June 1974 (Journal of Laws - Dz. U. No. 24, item 141), as 46 hours a week was gradually shortened by the legislator to: 42 hours (Article 1(124) of the Act of 2 February 1996 amending the Labour Code and certain other acts; Journal of Laws - Dz. U. No. 24, item 110) and to 40 hours (Article 1(2) of the Act of 1 March 2001 amending the Labour Code; Journal of Laws - Dz. U. No. 28, item 301). This means that, since 1 May 2001, employment relationships concern a five-day working week. In a vast majority of cases a Saturday, aside from Sunday, is the second non-working day and marks the beginning of two-day weekend.

26. However, a Saturday is a statutory non-working day – the issue whether it is a non-working day or a day equivalent to a non-working day has been debated in jurisprudence and the literature on the subject. In the context of the discrepancies, the Polish Ombudsman referred the following issue in an application of 14 January 2011 (RPO-664875-V-ll/ST[1]) to be resolved by the Supreme Administrative Court, namely: is Saturday a day equivalent to a non-working day, within the meaning of Article 57(4) of the Code of Administrative Procedure? The Supreme Administrative Court (the bench of 7 Justices) answered in the affirmative (the resolution of 15 June 2011, I OPS 1/11[2]). The Supreme Administrative Court indicated that, for many years, a Saturday had, in practice, ceased to be regarded as «a weekday», and had become a non-working day for most employees, as well as a day when courts, the offices of the organs of public administration, and a vast majority of post offices are closed. Meeting a deadline which falls on a Saturday, by submitting given documents before the lapse of the time-limit in the offices of the organs of public administration, post offices and Polish consular offices, may actually occur on the day preceding Saturday – usually on Friday (unless it is a statutory non-working day within the meaning of the Act of 18 January 1951)". In that case, the Supreme Administrative Court "definitely" advocated the interpretation of the effects of deadlines that fall on a Saturday, as in the resolution of 25 June 2001, adopted also by the bench of 7 Justices (FPS 7/00), in which the Court stated that: "there are currently two categories of non-working days: those that arise from (...) the Act of 18 January 1951 on Non-Working Days, and those that arise from the statutory principle of five-day working week. It ought to be stressed that the five-day working week has a statutory and universal character, and in practice a non-working day set in working time schedules is usually a Saturday". In the context of the case I OPS 1/11, in its resolution of 15 June 2011, the Supreme Administrative Court stated that: "Since the adoption of the resolution of 25 June 2001, there have been no such changes in the law that could undermine the stance adopted in that resolution". In the case I OPS 1/11, when making reference to the constitutional principles equality before the law, protection of citizens' trust in the state and its laws as well as reliability of law, the Supreme Administrative Court stated there: "One may not agree with the view that the provision of Article 57(4) of the Code of Administrative Procedure is clear in the sense that it unambiguously follows therefrom that a Saturday may not be regarded, within the meaning of that provision, as a non-working day". In the conclusion of the resolution in the case I OPS 1/11, the Supreme Administrative Court assumed that, within the five-day working week specified in a statutory way in the Labour Code and the provisions of Article 83(2) of the Law on Proceedings Before Administrative Courts and Article 12(5) of the Tax Act, "a Saturday is equivalent to a statutory non-working day within the meaning of Article 57(4) of the Code of Administrative Procedure". I agree with this adjudication and the premisses thereof.

27. Thus, the legislator rationally specified in Article 4(3) of the Electoral Code, taking into consideration also values mentioned in points 25-26 of this dissenting opinion, that "if voting is held over two days, the date of voting is set for a non-working day and the day preceding it". The said preceding day will be in our context a Saturday.

28. During the third reading, the Sejm unanimously passed – in the actual presence of the constitutional number of Sejm Deputies – the Electoral Code, providing for two-day voting in parliamentary and presidential elections. In a statute which is so fundamental to parliamentary democracy, the said fact does not determine the result of the constitutional review, but it may

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[1] http://www.sprawy-generalne.brpo.gov.pl/pdf/2011/01/664875/1540063.pdf.

[2] http://orzeczenia.nsa.gov.pl/doc/83AB1A8892.

not be overlooked, let alone ignored, in the course of the review, whereas this is what the Tribunal did in that part of the statement of reasons.

29. I do not understand the Tribunal's view that the understanding of the term "elections" which is novel and inconsistent with the Polish tradition would lead to a conclusion that the day of elections should always be only the last day of voting, which could theoretically be preceded by an unlimited number of days of voting. Certainly, such a number would never be unlimited. This also follows directly from Article 98(2) and (5) as well as Article 128(2) of the Constitution, which specify the election calendar. In this case, the Tribunal has reviewed a specific provision of the Electoral Code, which provides for two-day elections, and not any other elections. The supposition of the Tribunal that in the future the legislator will act in an irrational way is redundant and unjustified.

30. In my opinion, the use of the term "day" in the indicated higher-level norms for the review does not mean that the constitution-maker has determined that voting in parliamentary and presidential elections may only be held on a single day. The goal of the constitution-maker is to consistently specify a day in the context of which the organs of public authority qualify certain circumstances in an electoral process (e.g. the right to stand for election) or set certain deadlines (e.g. the summoning of the first sitting of the Sejm and the Senate).

31. The right to vote for the President of the Republic of Poland, and for representatives to the Sejm, the Senate and the organs of local self-government, as well as the right to participate in a referendum are the subjective rights of every citizen of the Republic of Poland, if - no later than on the day of vote - s/he has attained 18 years of age, and provided that, by a final judgment of a court, s/he has not been subjected to legal incapacitation or deprived of public or electoral rights (Article 62(1) and (2) of the Constitution). This means that the legislator has taken into consideration the above-mentioned values and such shaping of the procedure for democratic electoral law which will not reduce the said subjective right to a privilege of a certain category of voters that want to take part in voting.

32. The above-mentioned requirement is addressed to the legislator in a democratic and free constitutional order; as in the case of shaping all constitutionally protected subjective rights, it concerns the examination of every necessary circumstance from the point of view of creating real conditions for the exercise of the right, by the legislator in the course of legislative process. This has also been defined in that way by the European Court of Human Rights, in the interesting evolution of the Strasbourg jurisprudence in the context of Article 3 of the Protocol 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms, which stipulates that: "The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature". At first, the European Commission of Human Rights perceived that provision solely as an obligation of the Member States to hold elections to a statutory representative body elected at reasonable intervals. The existence of such a body is the basis of democratic society (see the *Greek Case*, Report of 5 November 1969, concerning the applications nos 3321/67, 3322/67, 3323/67, 3344/67, *Yearbook of the European Convention of Human Rights*. Nijhoff Publishers, p. 179) After 18 years, the European Court of Human Rights noted that the said provision specifies not only the obligation of the States, but also a subjective right (see the judgment in the case *Mathieu-Mohin and Clerfayt v. Belgium* of 2 March 1987, Application No. 9267/81, § 22, 48-54 and then *inter alia* the judgment in the case *Hirst v. the United Kingdom* of 6 October 2005, Application No. 74025/01, § 40-85). This is a good example of singling out the content from the norm set out by the Convention by the court of that rank; the content may be decoded only in the light of new, essential and permanent circumstances. Such is the view of the constitutional court.

33. The Tribunal has not presented any constitutional value which would be violated if parliamentary and/or presidential elections involved two-day voting. This means that the legislator had constitutional grounds for shaping the electoral system in such a way that would enhance the accessibility of elections for every voter within the scope of subjective right to vote in universal elections this way guaranteeing equal opportunity for every citizen to participate in elections.

34. Therefore, bearing in mind the content of the higher-level norms for the constitutional review, the subjective character of the right of every voter to take part in parliamentary and presidential elections as well as the pro-constitutional reference made by the legislator in challenged Article 4(2) and (3), Article 26(3), Article 39(2), (3) and (4) as well as Article 69(2) of the Electoral Code to the tradition of Polish electoral law as well as constitutional values - I have decided to submit this dissenting opinion.

Dissenting Opinion
of Judge Sławomira Wronkowska-Jaśkiewicz
to the Judgment of the Constitutional Tribunal
of 20 July 2011, Ref. No. K 9/11

Pursuant to Article 68(3) of the Constitutional Tribunal Act of 1 August 1997 (Journal of Laws - Dz. U. No. 102, item 643, as amended), I submit my dissenting opinion to point 1 of the judgment of the Constitutional Tribunal of 20 July 2011 in the case K 9/11, in which the Tribunal has declared the non-conformity of the provisions of the Act of 5 January 2011 – the Electoral Code (Journal of Laws - Dz. U. No. 21, item 112, as amended; hereinafter: the Electoral Code), which provide for the possibility of two-day voting in:

1) elections to the Sejm of the Republic of Poland and the Senate of the Republic of Poland, to Article 98(2) and (5) of the Constitution,
2) presidential elections, to Article 128(2) of the Constitution,

as the indicated adjudication is based on an erroneous interpretation of the said provisions of the Constitution.

STATEMENT OF REASONS

1. Declaring the unconstitutionality of a number of provisions of the Electoral Code, which provide for the possibility of two-day voting in elections to the Sejm and the Senate as well as in presidential elections, stems in my view from a fallacious interpretation of Article 98(2) and (5) as well as Article 128(2) of the Constitution. The said fallacy concerns the following: a) the method of interpreting the cited provisions of the Constitution, applied by the Constitutional Tribunal, b) the result of the assumed interpretation, which the Tribunal made the basis of its adjudication.

The Constitutional Tribunal has not indicated the rules of interpretation which it applied while interpreting the content of legal provisions which constitute higher-level norms for the review in the present case. Therefore, one may only presume that, within the said scope, the Tribunal must have accepted the concept of the so-called direct interpretation of the legal text, assuming that the word "day" appearing in the following phrases: "Elections to the Sejm and the Senate shall be ordered by the President of the Republic (...) and he shall order such elections to be held on a (...) day" (Article 98(2) of the Constitution), "The President of the Republic (...) shall simultaneously order elections to the Sejm and the Senate, and shall order them to be held on a day (...)" (Article 98(5) of the Constitution) as well as "The election of the President of the Republic shall be ordered by the Marshal of the Sejm to be held on a day (...), specifying the date of the election which shall be on a (...) day (Article 128(2) of the Constitution) – true that occurring only in the singular – should be regarded as perfectly clear. Probably relying on the proverb *clara non sunt interpretanda*, including the meaning thereof which is nowadays almost universally rejected, the Constitutional Tribunal did not even carry out a linguistic interpretation of the legal provisions being the higher-level norms for the review; the Tribunal limited itself only to drawing a conclusion that elections to the Sejm and the Senate as well as presidential elections may only be held on a single day.

At the same time, it should be noted that if the Tribunal's intention had been to apply one of rules of linguistic interpretation which is widely known in the Polish legal culture, which states that, without justified reasons, phrases under interpretation should not be assigned a different meaning than the one they have in general language (see T. Gizbert-Studnicki, "Dyrektywy wykładni drugiego stopnia", [in:] *W poszukiwaniu dobra wspólnego.*

Księga jubileuszowa Profesora Macieja Zielińskiego, A. Choduń and S. Czepita (eds.), Szczecin 2010, p. 55), then it would have had to indicate that, in the case under examination, there were no such justified reasons; however, it did not do so. Neither did the Constitutional Tribunal clearly advocate the extremely contextualised concept of interpretation which permitted the application of no other interpretative criteria than linguistic ones. At the same time, the Tribunal did not apply such criteria in order to confirm or undermine the result of the linguistic interpretation, which would have let the Tribunal verify the correctness of its interpretative conclusion. The latter method of interpreting, for many years, has frequently been applied in the jurisprudence of courts, in particular by the Polish Supreme Court. Regrettably, as it has already been mentioned, the Tribunal limited itself to the statement that the provisions of the Constitution "(...) unambiguous and the interpretation thereof based on the grammar rules of Polish neither raises doubts (...)".

2. I reject the term of the so-called direct understanding of legal provisions, which is justified not only in the views presented in the contemporary theory of law, but also in legal practice, on the basis of which those views have been formulated. In other words, I hold the view that every legal provision should be subject to interpretation, even if it seems to be understandable *prima facie*, and the interpretation thereof ultimately proves to be very straightforward (cf. M. Zieliński, *Wykładnia prawa. Zasady. Reguły. Wskazówki*, Warszawa 2002, pp. 52-55, 218-219, 294-295).

In addition, it should be stressed that, in the case under examination, we do not deal with an unambiguous regulation, the interpretation of which does not cause any difficulties. In order to prove this, it should be noted that – in accordance with the adopted rules for formulating legal provisions – when indicating the addressees of the legal norms contained therein, prescribed or prohibited conduct, as well as circumstances in which such norms are to be applied, singular forms are used. Legal provisions are addressed to the citizen, the student, the Sejm Deputy or the government minister, although despite the rules of the Polish language, and in accordance with the rules for interpreting a legal text, norms derived on such basis are addressed to everyone who is a citizen, a student, a Sejm Deputy or a government minister respectively. There is a similar situation as regards indicating other elements of the content of a legal norm. The phrase "during a period of introduction of extraordinary measures" simply denotes that "whenever extraordinary measures are introduced", and the phrase "a bill passed by the Sejm" is interpreted as "every single bill passed by the Sejm".

Still, one may not overlook that, when regulating legal provisions, the legislator is at times inconsistent; he sometimes departs from the adopted rules for the formulation thereof. In Article 156(1) of the Constitution, one may read that: "the members of the Council of Ministers shall be accountable to the Tribunal of State (...)"; and Article 144(2) thereof stipulates that: "Official Acts of the President shall require, for their validity, the signature of the Prime Minister (...)". In compliance with the adopted rules of linguistic interpretation, the above means respectively: "every single member of the Council of Ministers shall be accountable to the Tribunal of State (...)" and "every single Official Act of the President shall require, for its validity, the signature of the Prime Minister (...)".

A simple and well-known example illustrating how the application of the semantic rules of the general language, including rules assigning meaning to words used in the singular or plural, is frequently unreliable, when it comes to interpreting legal provisions, may be found in jurisprudence. In its resolution of 21 November 2001, Ref. No. I KZP 26/01, OSNK No. 1-2/2002, item 4, the Supreme Court - when interpreting the provision of hunting law beginning with the following words:
"Whoever breeds or keeps - without a permit - purebred or crossbred hounds shall be subject to a penalty..." - concludes that a statement which is concurrent with the rules of the general

language, namely that what shall be punishable is keeping - without a permit - at least two hounds, is absurd. In the view of the Supreme Court, such a result of the linguistic interpretation would simply be ridiculous. On the other hand, it should be noted that if the said provision was formulated with the use of the singular form: "Whoever breeds or keeps - without a permit – a purebred or crossbreed hound (...) shall be subject to a penalty (...)", no-one would doubt that what shall be punishable is also keeping more than one hound.

One may mention numerous other examples of situations where the singular and plural forms are used by the legislator. This shows that rules in accordance with which legal provisions are drafted are not sufficiently precise, and frequently are applied inconsistently. This leads to a conclusion that the rules of linguistic interpretation may not be regarded as absolutely reliable, and the application thereof does not always result in a correct interpretation. For those reasons, the Tribunal's conclusion that the use of the word "day" unambiguously determines that voting (i.e. an election) may not be held over two days is hasty and unjustified.

3. The disputable word "day" occurs in the Constitution in a number of complex phrases, including the phrase "a non-working day". At the same time, we come across situations where the linguistic context dispels any doubts arising with regard to that word, which is exemplified by paragraphs 1 and 2 of Article 99 of the Constitution, stating that "Every citizen having the right to vote, who, no later than on the day of the elections, has attained the age of 21 years (30 years), shall be eligible to be elected to the Sejm (the Senate)". The day on which a given person attains the age of 21 or 30 occurs, naturally, only once. In the case of the phrase "a non-working day", there is no situation like the one above. The semantic emphasis is placed here not on a single day, but on the feature of the day – it is supposed to be non-working, as for such a day the President or the Marshal of the Sejm is obliged to order elections.

Linguistic arguments for holding elections (voting) on a single day prove weak. In the event of any linguistic doubts as to interpreting a given phrase, one should resort to extra-linguistic rules of interpretation, i.e. systemic and functional rules. The application thereof leads to the following findings:

The constitutional phrases "(...) shall order such elections to be held on a non-working day (…)" as well as "(…) shall order them to be held on a day falling no later than (...)" are not included in provisions establishing crucial political rights such as electoral rights. They have been included in provisions that authorise and oblige the President to order elections to the Sejm and the Senate (Article 98(2) and (5) of the Constitution). There is an analogical situation as regards the phrase contained in Article 128(2) of the Constitution: "The election of the President of the Republic shall be ordered by the Marshal of the Sejm to be held on a day no sooner than (...), specifying the date of the election which shall be on a non-working day (...)". The cited provisions are clearly ancillary in character with regard to electoral rights granted to citizens. The do not indicate when and in what manner the subjects of electoral rights are to cast their votes, but they oblige the President and the Marshal of the Sejm to order elections to be scheduled on a day which bears certain characteristics. Further requirements specified in those provisions are subordinate to such values as the efficient functioning of the state and a reasonable time-span for an electoral campaign.

Pursuant to Article 96(2), Article 97(2) and Article 127(1) of the Constitution, parliamentary and presidential elections are universal in character. The universal character of the elections, which is directly connected with the recognition of the Nation as a sovereign, requires that electoral rights should be guaranteed to as many citizens as possible, and that the citizens should be provided with the best possible conditions to exercise those rights (see e.g.: *Prawo konstytucyjne RP*, P. Sarneckiego (ed.), Warszawa 2008, p. 188 and the subsequent

pages; L. Garlicki, *Polskie prawo konstytucyjne. Zarys wykładu*, Warszawa 2008, pp. 150-153). The obligation to order elections to be held on a non-working day, and not on any other day, seems a necessary, although probably insufficient, requirement to ensure universal participation in elections, thus constituting a guarantee that electoral rights will not be illusory in character, but there will be a real opportunity to exercise them, i.e. the opportunity for citizens' participation in an important decision-taking process concerning the state, which is desirable in a democracy.

Elections which take on the form of voting constitute an act, by means of which the Nation as a sovereign elects its representatives, determining the composition of the organs of the state and making them legitimate. What ought to be emphasised is the circumstance that there is no constitutional argument that would suggest that the sovereign must carry this out throughout a single day, and the Tribunal has not indicated such argument, merely stating that the solution put forward by the Polish constitution-maker relies on "(...) certain axiology". Two-day voting has no impact on the performative function of elections; however, by creating more convenient conditions, it may have a positive impact on electoral turnout, enhancing the legitimate character of elective organs of public authority. Also, there is no constitutional value that would be infringed by the fact that voting is held over two days. The applicants argue that two-day elections significantly hinder safeguarding the voting process against the risk of fraud, and thus they infringe the principle of reliable elections in a democratic state ruled by law, as derived from Article 2 of the Constitution. However, as the Tribunal has aptly noted, no arguments were presented to substantiate such an allegation, and two-day elections as such do not infringe the above-mentioned principle.

To sum up, I conclude that the Code's elaboration on the regulations of the Constitution, by providing for the possibility of two-day voting, is strongly justified by constitutional values, which – in the context of linguistic ambiguity of Article 98(2) and (5) as well as Article 128(2) of the Constitution – allows to reject such an interpretative variant of the provisions of the Constitution that voting (elections) may only be held on a single day.

4. At the same time, I notice a problem that may arise from the interpretation of the said higher-level norms for the review, which I have proposed. The assumption that parliamentary and presidential elections may be held over two days creates a difficulty, since – as it follows from the previous findings – these days would have to share a certain characteristic; namely, they would have to be non-working days, which in Poland are only Sundays and public holidays specified by statute. (Additional non-working days, which were guaranteed in the past, were often in practice the so-called non-working Saturdays. They have been "incorporated" into a standard working time schedule which, on average, provides for a five-day working week in the reference period. As a result, there are currently no other days that could be classified as non-working days within the meaning of the Constitution). Indeed, there is no doubt that, by providing for the possibility of two-day voting in parliamentary and presidential elections, the Electoral Code does not guarantee that these two days should be non-working days. If we overlook the possibility of one of the days of elections being a statutory public holiday, then in the case of two-day elections, only the second day of voting would be a non-working day (Sunday), whereas the first one would be a working day (Saturday). However, in my view, this does not entail that the challenged provisions of the Electoral Code have infringed the Constitution, although they have infringed it in other respects than those indicated by the Constitutional Tribunal.

Indeed, one should bear in mind the circumstance that the provisions of the Constitution establishing the rights and freedoms of persons and citizens should not be considered as unconditionally binding (as imperative provisions), but only as provisions which are unilaterally binding (semi-imperative provisions). This means that they merely

indicate the basic content of the rights and freedoms as well as provide for minimal standards of protection thereof. Thus, although the Constitution – except for instances specified therein – rules out the possibility that a statute could impose restrictions on constitutional rights and freedoms of the individual, there are no obstacles for ordinary legislation – pursuant to the recommendation expressed in the Preamble to the Constitution that they should be enhanced - to provide optimal, or increasingly improved, conditions to exercise them, unless, in a given case, the constitution-maker explicitly rules out such a possibility, this would infringe constitutional principles and values or would be contrary to the essence of a given right or freedom.

One cannot fail but notice in this context that the legislator's solution providing for the possibility of two-day elections, where one of the days would be – as required by the Constitution – a non-working day, does not constitute interference with citizens' political rights, as it does not restrict them or undermine the guarantees thereof. It merely provides all interested parties, on equal terms, with an extended and more convenient possibility of exercising the said rights. Therefore, it is an unconvincing argument that regarding the constitutional provisions as semi-imperative deprives them of their guarantee character. The unilaterally binding character of the regulations makes it possible to depart from solutions which are directly provided in the Constitution, exclusively in one aspect, and namely the aspect of extending the scope of the rights and freedoms of the individual, increasing the possibility of making use of them and raising the standards of their protection. Consequently, I share the opinion presented by the representatives of the Sejm that two-day voting is "pro-citizen expansion of the constitutional principles and norms".

5. It is a fact that, in the Polish tradition, elections were held on a single day, being a non-working day, which might suggest that the intention of the constitution-maker, who assigned certain meaning to Article 98(2) and (5) as well as Article 128(2) of the Constitution, was actually to preserve *status quo*. However, the interpretation of constitutional provisions always takes into account their historical context. A significant change of social conditions and social expectations, enhancement in the realm of civic rights by extending the catalogue thereof and improving guarantees safeguarding them, a change of customs and employment arrangements, as well as greater social mobility are reasons to change the said tradition, since this is not contrary to constitutional principles. In addition, I wish to mention that it goes without saying when one has a look at labour law provisions which regulate the admissibility of performing work on Sundays and public holidays, that a traditional way of understanding a non-working day changed a long time ago.

For these reasons, I have felt obliged to submit this dissenting opinion.

Dissenting Opinion
of Judge Marek Zubik
to the Judgment of the Constitutional Tribunal
of 20 July 2011, Ref. No. K 9/11

Pursuant to Article 68(3) of the Constitutional Tribunal Act of 1 August 1997 (Journal of Laws - Dz. U. No. 102, item 643, as amended), I submit my dissenting opinion to the judgment of the Constitutional Tribunal of 20 July 2011 in the case K 9/11.

I submit my dissenting opinion to the part of the judgment of the Constitutional Tribunal and to the statement of reasons thereof which concern the assessment of the constitutionality of the entry into force of the Act of 5 January 2011 – the Electoral Code (Journal of Laws – Dz U. No. 21, item 112, as amended; hereinafter: the Electoral Code), on the basis of the Act of 5 January 2011 – the Introductory Law to the Electoral Code (Journal of Laws - Dz. U. No. 21, item 113, as amended; hereinafter: the Introductory Law).

I substantiate my dissenting opinion in the following way:

I

1. The enactment of the Electoral Code and amendments thereto.

The final version of the text of the Electoral Code, which took into account the stance of the Senate, was determined by the Sejm at its 82nd sitting on 5 January 2011. On 10 January 2011, the bill passed by the Sejm was lodged with the President of the Republic of Poland, who signed it on 19 January 2011. Next it was published in the Journal of Laws (No. 21, item 112) of 31 January 2011.

The date of the entry into force of the Electoral Code was not specified within the scope of the normative act. The legislator decided to do this by means of a separate statute. As a result, the date of the entry into force of the Electoral Code was set to fall after the lapse of six months from the date of the promulgation thereof (1 August 2011), as follows from Article 1 of the Introductory Law.

From the moment of promulgation to the moment of adjudication by the Constitutional Tribunal, the Electoral Code was amended four times. The first amending statute occurred within a very short period after the publication of the Electoral Code, was introduced by the Act of 3 February 2011 amending the Electoral Code (Journal of Laws - Dz. U. No. 26, item 134; hereinafter: the amending Act of 3 February 2011), which, as a whole, became the subject of the allegation in the case under examination. Then the Electoral Code was amended by the following: the Act of 1 April 2011 amending the Act on Elections to the Sejm of the Republic of Poland and to the Senate of the Republic of Poland as well as the Electoral Code (Journal of Laws - Dz. U. No. 94, item 550); the Act of 15 April 2011 amending the Electoral Code and the Introductory Law to the Electoral Code (Journal of Laws - Dz. U. No. 102, item 588); the Act of 26 May 2011 amending the Act on Commune Self-Government and certain other acts (Journal of Laws - Dz. U. No. 134, item 777), as well as the Act of 27 May 2011 amending the Electoral Code and the Introductory Law to the Electoral Code (Journal of Laws - Dz. U. No. 147, item 881). It should be emphasised that the last one of the parliamentary acts amending the Electoral Code, providing for *inter alia* the introduction of two new chapters into the Code (Chapter 5a and Chapter 7a), was signed by the President one day after the hearing, during which the Tribunal considered the application in the case K 9/11. The said Act was published in the Journal of Laws of 15 July 2011.

It is worth adding that during the above-indicated period, the Introductory Law was amended twice.

2. When enacting the Electoral Code, the legislator knew that the coming elections would be in 2011. He was aware of the time-limit within which voting should take place, and at the same time he knew – which should be particularly stressed – the admissible deadline for ordering elections by the President, due to the end of the four-year term of office of the Polish Parliament (7 August 2011). The said time context outlines a crucial background for the assessment of legislative measures in the case under examination. The manner adopted by the legislator as regards shaping the Introductory Law to the Electoral Code has led to the situation where some of the actions related to elections which are to take place in 2011 can be undertaken either before the entry into force of the Electoral Code or after that, at the same time falling within the time-limit set for the ordering of parliamentary elections.

The awareness of the legislator as to the circumstances of the entry into force of the Electoral Code, in the context of actions planned on the part of the President as regards ordering elections, is manifested in Article 16(1) and Article 16(2) of the Introductory Law. The Introductory Law indeed concerns both possible circumstances which are contingent upon the President's decision, i.e. a situation related to the ordering of elections before the entry into force of the Electoral Code as well as after that date. Creating such a transitional norm should – in itself – be assessed positively, as manifestation of prudence of the legislator. At the same time, creating such a norm confirms efforts to correlate the ordering of parliamentary elections in 2011 with the planned date of the entry into force of the Electoral Code.

3. With regard to the circumstances of adjudication by the Constitutional Tribunal in the case under examination, three factors should be taken into account: firstly, circumstances which are objective in character, related to the need to carry out parliamentary elections, due to the end of four-year term of office of the Sejm and the Senate; secondly, circumstances arising from the legislator's choice of a point in time for the entry into force of the Electoral Code, seen in the light of the regulations of the Constitution pertaining to the admissible deadline for ordering elections; thirdly, the character of the constitutional review conducted in the case under examination in accordance with the procedure for *a posteriori* reviews.

In that respect, it should be emphasised that regrettably the Constitutional Tribunal had no possibility to express its views as to the constitutionality of the Electoral Code, the acts amending the Electoral Code or the Introductory Law, in the course of an *a priori* review, commenced by way of application submitted by the President. Therefore, the Tribunal could not shape the effects of its ruling in a way that would have been possible if the adjudication had taken place on the basis of Article 122(4) of the Constitution.

II

1. Article 2 of the Constitution as a higher-level norm for the review of the Electoral Code and the Introductory Law.

The examination of conformity of Article 16(1) and Article 16(2), in conjunction with Article 1, of the Introductory Law to Article 2 of the Constitution should take into account the entirety of requirements which the indicated provision of the Constitution provides for, with regard to enacting law in a democratic state. What is *inter alia* meant here is the requirement to promulgate a normative act (specified in more detail in Article 88(1) of the Constitution), the requirement to set appropriately long *vacatio legis*, which enables all addressees of new provisions to familiarise themselves with the solutions introduced into the

system of law, as well as the necessity to set an indispensable period for the new rules to become stable. The third of the mentioned requirements is of special, and thus peculiar, significance, with regard to electoral law. Indeed, it expresses a requirement arising from a democratic state ruled by law that the rules of "electoral game" should be stable, and that no changes may be made in electoral law during the period before the beginning as well as in the course of the electoral procedure.

The main function of the said requirement that the rules of "electoral game" should be well-established is the protection of the exercise of rights by all participants of the broadly understood electoral process. It should clearly be stressed that the requirement concerns the exercise of the active and passive electoral rights. As regards the second aspect, what is meant here is the passive electoral right enjoyed by voters as well as by other entities – political parties represented in the Parliament and being active outside it, and groups of citizens who are interested in announcing and promoting candidates in elections. The stability of the rules of the electoral game is to guarantee the consistency of the rules and procedure for holding elections, and thus to enable participants to undertake actions on the basis of legal solutions which, from a certain moment, will not be subject to modifications for the purpose of specific elections.

At the same time, it should be pointed out that the above-mentioned requirement goes beyond the requirement to guarantee an appropriate period of *vacatio legis*. This is indeed linked with setting an adequately remote time-frame, within the scope of which the norms of electoral law, previously introduced into the legal system, will not be subject – for the purpose of a specific electoral procedure – to any modifications (the so-called legislative silence), cf. the judgment of the Constitutional Tribunal of 28 October 2009, Ref. No. Kp 3/09, OTK ZU No. 9/A/2009, item 138, point 2.3 of the statement of reasons. At the same time, the goal here is to rule out the possibility of amending electoral law, as seen from the perspective of all participants of an electoral process. In that respect, lifting the requirement to respect legislative silence within the scope of the rules of the electoral game may not be justified solely by actions aimed at fully implementing the rights of citizens to make a choice, and thus by actions aimed at the implementation of the principle of universal elections, considered only in the context of the active electoral right. The need for the stability of the rules of electoral law is also significant to those subjects that undertake actions related to standing for election on the basis of the passive electoral right which they are entitled to. Maintaining the same rules within the scope of a broadly understood electoral game constitutes a universal guarantee of respect for both the active and passive electoral rights of all subjects involved in an electoral process, i.e. not only voters but also candidates trying to gain their support. Therefore, it may not be treated in a selective way – solely from the perspective of citizens voting in elections.

The requirement of stability of the rules of the electoral game is also linked with the necessity for the legislator to respect the political neutrality of regulations he himself enacts. In that context, obviously the legislator may not completely disregard the objective determinants related to the way of perceiving amendments he himself introduces to electoral law. Social evaluation of the introduced modification of the rules of the electoral game is evolving as the date of elections is approaching. It is independent of the subjective impressions of the participants of the legislative process. As a result, the closer it is to elections, the more this evaluation inclines towards the perception of any amendments to electoral law as an effect of a political game carried out by the legislator. This evokes a suspicion that the true goal of introducing amendments is the adjustment thereof to the needs of particular participants of an electoral process. This mechanism of evaluation of the legislator's actions, which exists objectively, additionally confirms the need for setting an

appropriately long period during which existing solutions related to principles and procedures for holding elections may become stable.

In its previous jurisprudence, the Constitutional Tribunal stressed that it was necessary for the legislator to respect the period of exclusion of electoral law from introducing certain amendments to it shortly before elections. In that context, the Tribunal indicated that, in the case of electoral law, certain non-negotiable minimum should entail enacting amendments to electoral law at least six months before next elections, understood not only as the act of voting itself, but also as the entirety of actions included in the so-called election calendar. Possible exceptions to observing the set period of refraining from introducing amendments to electoral law could only ensue from extraordinary circumstances which would be objective in character (cf. the judgment of 3 November 2006, Ref. No. K 31/06, OTK ZU No. 10/A/2006, item 147 and the judgment cited in the case Kp 3/09).

Attention should be drawn to two important issues in this case. Firstly, respecting the principle of the stability of the rules of the game is made conditional on the appropriate setting of the moment from which the six-month period of refraining from further significant amendments to electoral law is to be counted. The said period should always be counted from the day of publication of an election statute in the Journal of Laws. Only then may one speak of the completion of the procedure related to establishing the final wording, and at the same time one may require that the statute setting out the final rules of the electoral game should not be subject to further modifications with the prospect of undertaking actions connected with the coming elections. Secondly, the prohibition against introducing changes into the rules of the electoral game during the period which directly precedes the ordering of elections as well as during carrying out electoral procedures which have been commenced and are ongoing, in principle, means a prohibition against any amendments to electoral law during that period. The said prohibition seen in the light of the concept of refraining from further significant amendments to electoral law, signalled by the Constitutional Tribunal, may not be understood as permission for the introduction of modifications into electoral law which are insignificant in character in relation to the content of the binding regulations. The attribute of "significance" of the introduced measures is relevant for the assessment of the constitutionality of the change. In particular, is an infringement of the prohibition against amendments to the rules of the electoral game aimed at the implementation of another value or constitutional right? Thus, may it be regarded in given circumstances as necessary and justified as well as does the scope of that interference with electoral rights (also as regards the scope ratione personae) pass the test of proportionality? The mere assessment of "significance" of single amendments, understood solely in the context of what mechanisms of electoral law these amendments concern (qualitative amendments) does not include the significance of numerous, though minor, modifications which together may change the rules of electoral rivalry (quantitative amendments). Such an approach would pose a risk of separating the test of "significance" from the guarantee it serves.

When assessing the constitutionality of Article 16(1) and Article 16(2), in conjunction with Article 1, of the Introductory Law, the Constitutional Tribunal is obliged to assess the legal situation on the day of adjudicating. Therefore, the Tribunal should have taken into account all the circumstances which are of relevance for the case under examination. Having declared in point 9 of the operative part of the judgment the non-conformity of the entire amending Act of 3 February 2011 to Article 2 of the Constitution, the Tribunal should not have overlooked – when assessing the constitutionality of Article 16(1) and Article 16(2), in conjunction with Article 1, of the Introductory Law – the fact that the legislator subsequently amended the Electoral Code and the Introductory Law three times, in particular that the last one of the amending statutes (published on 15 July 2011) will enter into force within a period shorter than three months before the day of voting and no earlier than

two weeks before the deadline for ordering parliamentary elections in 2011. The assessment of conformity of the norms implementing the Electoral Code to Article 2 of the Constitution should have taken into account, during the assessment of the constitutionality of the transitional provisions (Article 16(1) and Article 16(2)) as well as the provision stating the entry into force of the Electoral Code (Article 1 of the Introductory Law) that the content of the Electoral Code was shaped by four statutes amending the Code. Only in that context, it was possible to assess whether the legislator specified an appropriately long period of *vacatio legis* for the Code and whether he adhered to the requirement of stability of the rules of the electoral game.

When implementing the Electoral Code with regard to the parliamentary elections of 2011, the legislator did not meet the standard arising from the principles of a democratic state ruled by law and the ensuing obligation to specify the appropriate period of *vacatio legis*. While reviewing the Introductory Law, the Constitutional Tribunal did not shape the effects of its adjudication in such a way that would prevent the Code from entering into force as well as being applied to this year's elections. As a result, point 12 of the operative part of the Tribunal's judgment in the present case (Ref. No. K 9/11) indicates the non-conformity of Article 16(1) and Article 16(2), in conjunction with Article 1, of the Introductory Law to Article 2 of the Constitution, but overlooks the aspects of assessment of the constitutionality of the provisions under examination which arise from the said higher-level norm for the review. What is primarily meant here is the lack of the legislator's respect for the principle of stability of the rules of the electoral game during the period which directly precedes the moment of ordering the elections in 2011, which in the context of Article 2 of the Constitution should rule out the possibility of applying the Electoral Code to those elections.

2. The legal character of Article 16 of the Introductory Law.

When assessing the constitutionality of Article 16 of the Introductory Law, separate legal significance of the two paragraphs of the provision ought to be emphasised. Despite the statement by the Constitutional Tribunal, one may not regard Article 16(1) and Article 16(2) of the Introductory Law in the same way, i.e. as two interrelated transitional rules the application of which result in legal uncertainty as to the set of electoral-law norms that will govern the parliamentary elections of 2011.

In the first place, it should have been noted that Article 16(1) does not express an autonomous legal norm. In its essence, it repeats the normative meaning of Article 17 in conjunction with Article 1 of the Introductory Law, making reference solely to the entry into force of the Electoral Code. Indeed, there is no doubt that – regardless of placing Article 16(1) in the Introductory Law – from the moment of the entry into force of the Electoral Code, ordering elections by the President could only take place on the basis of the new electoral law. By contrast, the normative content of Article 16(2) of the Introductory Law should be assessed differently. The said provision constitutes the legislative basis of the principle arising from the principles of a democratic state ruled by law, in accordance with which no changes may be introduced into rules during ongoing processes set by a certain time-limit, including the rules of the electoral game (rivalry). The challenged provision constitutes the indispensable guarantee of respecting that principle in a situation where the ordering of elections by the President would occur before the entry into force of the Electoral Code. In those circumstances, Article 16(2) of the Introductory Law is a provision which not only does not introduce uncertainty as to the set of electoral-law norms to be applied, but on the contrary – it expresses the principle which is to guarantee that certainty. Indeed, it weighs in favour of completing the procedure set by a certain time-limit, in accordance with the assumptions and

on the basis of those provisions which were binding at the moment when the procedure was commenced.

I do not share the assessment of the Constitutional Tribunal as to the non-conformity of Article 16(2) of the Introductory Law to Article 2 of the Constitution. I hold the view that the provisions of the Constitution set a time-limit for actions undertaken in relation to elections, and the transitional rule expressed in Article 16(2) of the Introductory Law was an example of the principle indicating the inadmissibility of introducing amendments to a set of electoral-law norms during commenced and ongoing procedures determined by such a time-limit. The choice of the set of electoral-law norms, which was to govern the parliamentary elections of 2011, does not arise from Article 16(2) of the Introductory Law, but from the way the legislator enacted the Electoral Code in 2011. This happened at the moment directly preceding the deadline for ordering the parliamentary elections of 2011 by the President. The decision of the legislator concerning the date of the entry into force of the Electoral Code (1 August 2011), set to fall on a date a few days before the deadline for ordering the elections (7 August 2011), actually left the President with the problem to determine which set of electoral-law norms was to govern the said elections. As a result of the described action of the legislator, the President – apart from being assigned with the task of setting a date for elections, within the time-limit specified in Article 98(2) of the Constitution –has, at the same time, become authorised to decide about the principles and procedures for holding the parliamentary elections of 2011, which falls within the scope of powers of the legislator (cf. Article 100(3) of the Constitution).

Also, I consider the view of the Constitutional Tribunal concerning the effects of the issued ruling as inapt. The Tribunal has agreed that ordering elections before the entry into force of the Act on Elections to the Sejm and the Senate will mean the necessity to apply the said Act to the actions related to elections which are undertaken prior to the entry into force of the Electoral Code, and after that day – the provisions of the new Code should be applied to further actions related to elections. In my opinion, it is impossible to derive such a transitional norm, which still remains consistent with the Constitution, for the electoral procedures from the entirety of the rules of the legal system of a democratic state. The Constitutional Tribunal has therefore decided not to grant protection to the principle of preserving the rules of the electoral game (rivalry) after the game begins. However, it has not indicated whether departing from that principle solely concerns the situation under examination, the entirety of electoral law, or whether it is to refer also to other legislative measures.

Declaring the unconstitutionality of Article 16(2) of the Introductory Law, and thus repealing the transitional norm expressed therein, may in practice make it impossible to achieve the legal effect provided for, by the Constitutional Tribunal, in point 12 of the operative part of this judgment. The Tribunal has stated therein that it is unconstitutional to make the choice of the set of electoral-law norms conditional on the date of ordering elections by the head of state. However, the Tribunal has not ruled out the possibility that the President would actually choose the set of electoral-law norms if he ordered the elections before 1 August 2011. Indeed, the ordering of elections within that period will be carried out on the basis of the current provisions of electoral law and will determine the set of electoral-law norms regardless of the fact that at the moment of the entry into force of the Electoral Code – with the simultaneous elimination of the transitional norm arising from Article 16(2) of the Introductory Law – the said set of electoral-law norms will be changed. Leaving aside the issue of admissibility of that change, it should be stated that the mere declaration of the unconstitutionality of the transitional norm, derived by the Tribunal from the challenged regulations of the Introductory Law, does not rule out such an effect in practice. The only justification for such lack of consistency in the ruling may be the fact that the Tribunal adjudicated shortly before the date of 1 August 2011 and from the conviction related thereto

that ordering the parliamentary elections before that date was, in fact, unrealistic. The assessment of the constitutionality of norms which is, in its essence, abstract in character may not put forward this argument as a dominant one.

3. Article 10 of the Constitution as a higher-level norm for the review of the Introductory Law.

The way of shaping Article 16(1) and Article 16(2), in conjunction with Article 1, of the Introductory Law, seen in the context of the date for ordering the parliamentary elections of 2011, leads to the shaping of a norm which not only grants the President the power to set a date for holding these elections, but which also enables him to determine the set of electoral-law norms. This ensues from the fact that the legislator specified the date of entry into force of the Electoral Code to fall within the period directly preceding the deadline for ordering this year's elections by the President. Consequently, the decision as to which electoral law is to be applied with regard to the elections of 2011 does not follow from the solution adopted by the legislator, but has been reserved to be taken by the President, who on his own chooses the moment for setting the date of elections. In that regard, I have taken a stance which is – in principle – concurrent with the view of the Constitutional Tribunal, which in the same way interprets the meaning of the legal norm arising from the indicated provisions of the Introductory Law, being subject to review in the present case. However, I disagree with the Tribunal's assessment of those provisions in the context of the indicated higher-level norm for the review, i.e. Article 2 of the Constitution. Indeed, when declaring the unconstitutionality of the fact that the President was granted powers which went beyond the scope of competence provided for that authority as regards setting a date for parliamentary elections, the provision assumed as a higher-level norm for the review should be Article 10(2) of the Constitution. This leads to the conclusion, in accordance with which the indicated provision of the Constitution may not be regarded as inadequate for the assessment of Article 16(1) and Article 16(2), in conjunction with Article 1, of the Introductory Law. This is not only an adequate higher-level norm for the review, but also one which weighs in favour of the unconstitutionality of the legal norm arising from the indicated provisions of the challenged Act.

III

1. The term "code".

The effect of the judgment by the Tribunal in the case K 9/11 refers o the Act labelled as "code". It should be emphasised that the term code has a well-established meaning in the European continental legal culture, and concerns an act which in a complex way regulates the separate realm of social life, aiming at stabilising the legal situation. The Electoral Code, despite its name, does not meet that criterion. Indeed, it constitutes an actual – and in many places, unfortunately, not very successful – sum of previous provisions of electoral law, which does not lead to the unification of that branch of law, and at the same time raises serious doubts as regards interpretation.

The confirmation of that stance is the lack of solutions making it possible to determine the outcome of elections to the Senate in a situation where the only candidate to stand for election has not gained the required majority of valid votes (Article 273(4) of the Electoral Code). The Code contains a large number of repetitive regulations concerning similar issues (e.g. premisses of the expiry of membership in electoral commission – Article 171(1), Article 179(1) and Article 184(1) of the Electoral Code). There are instances where it regulates the same issues a few provisions (e.g. the prohibition against being both the financial attorney of an election committee and a candidate for the office of the president of

the Republic of Poland – Article 90(4) as well as Article 127(2)(1) of the Electoral Code). It clearly provides for measures which are considerably worse, from a legislative point of view, than the current ones (the premisses concerning the expiry of the membership in the National Electoral Commission – Article 158(1)(4) of the Electoral Code).

The Electoral Code introduced numerous new measures which may be regarded as useful and which would modernise Polish electoral system. Nevertheless, the way they were formulated in the legislation often raises serious doubts. In my opinion, the Constitutional Tribunal, adjudicating on the allegation concerning the transitional norms, had an opportunity to maintain the current provisions of electoral law in force. This way, the Tribunal could give the legislator an opportunity to correct obvious defects of the Electoral Code. Facing the dilemma whether to postpone the entry into force of that normative act, at the same time advocating the requirement of the stability of electoral law – especially in the context of over 22 years of systemic transformation – the Tribunal opted for such an interpretation of the effects of its ruling which has considerably undermined its previous line of jurisprudence. In addition, the Tribunal has allowed the entry into force of a statute which – although pertains to an important aspect of social and political life – does not stand out as an example of fine legislation.

Dissenting Opinion
of Judge Stanisław Biernat
to the Statement of Reasons for the Judgment of the Constitutional Tribunal
of 20 July 2011, Ref. No. K 9/11

Pursuant to Article 68(3), second sentence, of the Constitutional Tribunal Act of 1 August 1997 (Journal of Laws - Dz. U. No. 102, item 643, as amended), I submit my dissenting opinion to the statement of reasons for the above judgment concerning various provisions of the Electoral Code.

My reservations pertain to two issues: 1) the substantiation of the non-conformity to the Constitution of statutory regulations which introduce the possibility of two-day voting; 2) the ban on the use of paid election radio and TV ads by election committees.

I. As regards point III. 3 of the statement of reasons: the possibility of ordering two-day elections.

I consider the argumentation presented in part III point 3.3 - which concerns the term "non-working day" (non-working days) - to be inapt. The term used in Article 98(2) of the Constitution may not be regarded as identical to the term used in Article 66(2) of the Constitution; the latter provision mentions "statutorily specified days free from work". The more precise phrasing that specifying non-working days must be done by statute is justified by the fact that Article 66(2) of the Constitution establishes employees' rights (apart from paid holidays and the maximum permissible hours of work). The introduction of the requirement of the statutory form arises from the guarantee character of the indicated constitutional norm. The point is that an employee, as a weaker party to an employment agreement, would not be dependent on the employer (the stronger party) as to the scope of his/her rights. By contrast, the requirement that elections (voting) are carried out on a non-working day serves a different purpose. Namely, the goal is to eliminate obstacles preventing citizens from exercising their active electoral right. In that situation, I see no reasons (in that aspect) against ordering elections to be held over two days: Saturday and Sunday. Saturday is not a statutory non-working day, but in reality it is a non-working day for a vast majority of employees. At the same time, it is obvious that no day is a day off for literally all citizens; this also refers to Sundays and other statutory non-working days.

Therefore, I find it inappropriate to support arguments concerning the term "a non-working day" with the provisions of the Labour Code, as the said provisions concern other issues. It is also misleading to rely on the jurisprudence of the Supreme Court which refers to the term "non-working days" in yet another context; namely, the way of determining deadlines for carrying out actions in civil law.

II. As regards point III. 7 of the statement of reasons: the ban on using large-format election posters or on broadcasting paid election radio or TV ads.

1. I agree with the Tribunal's determination that Article 110(4) in conjunction with Article 495(1)(4), which introduces the above-indicated prohibitions, is inconsistent with Article 54(1) in conjunction with Article 31(3) of the Constitution; however, I disagree with the argumentation presented in the statement of reasons. I believe that the unconstitutionality concerns only the part of the norm contained in Article 54(1) of the Constitution, namely: the part concerning the freedom to obtain information by voters. The freedom to express opinions and the freedom to disseminate information by the election committees of political parties are

not merely expressed in Article 54(1), but they also require taking into account Article 11 of the Constitution.

One may agree with the view expressed in part III point 7.3 of the statement of reasons that the freedom specified in Article 54(1) of the Constitution may be enjoyed by both individuals and legal entities, or as this is put in the statement of reasons – "collective entities". It should be added to that thesis that the rights and freedoms set out in Chapter II of the Constitution may be exercised by private parties; the Tribunal has expressed such a viewpoint on numerous occasions.

A political party is an entity of a complex character. The Constitutional Tribunal has emphasised that a special position of political parties is related to their dual constitutional-law status specified in Article 11 of the Constitution. Indeed, they are both a form of exercising the freedom of association, and a form of a political organisation that has an impact on the exercise of power by its ability to affect the shaping of the state's policy (cf. e.g. the judgment of 20 January 2010, Ref. No. Kp 6/09, OTK ZU No. 1/A/2010, item 3 and the previous jurisprudence and the doctrine cited therein).

In the statement of reasons, the Tribunal indirectly refers to the issue of the peculiar status of political parties, stating that the freedom of speech is of a "«mixed» character" – comprising personal freedom in the realm of private life and political freedom in the realm of public life (part III point 7.2). In my opinion, it should be clearly stated in the statement of reasons that the exercise of the freedom of speech by the election committees of political parties during electoral campaigns is determined by the goal of the parties, specified in Article 11(1) of the Constitution, which is: "to influence the formulation of the policy of the State by democratic means". Therefore, restrictions imposed on the forms of carrying out electoral campaigns must take into account not only Article 54(1) in conjunction with Article 31(3), but also Article 11(1) of the Constitution. With such a formulation, the legislator is authorised to impose further restrictions as regards the use of billboards as well as election TV and radio ads than this would be justified with the catalogue of personal interests as set out in Article 31(3) of the Constitution.

2. I have reservations as to the way of substantiating the determination (part III point 7.6) that the entire Act of 3 February 2011 amending the Electoral Code (hereinafter: the February Act) is inconsistent with Article 2 of the Constitution. Indeed, the argumentation presented in that point, which concerns the prohibition against introducing significant amendments to electoral law during the period of six months before ordering elections, is not convincing.

Firstly, such a prohibition follow from a norm which is not expressed directly in legislation, but which has been derived from the Constitution, by means of interpretation, by the Tribunal. When examining the conformity of statutory regulations to the said norm, the Tribunal should take into account whether there are no arguments in favour of departure from the requirement of six-month legislative silence, in particular if that departure is insignificant; in the case under discussion – this departure amounts to several days. But I do not find such a convincing test of weighing arguments (values) in that point of the statement of reasons.

Secondly, it has not been proved in a convincing way that the amendment to the Electoral Code which arose from the February Act constituted a significant amendment. The characteristics and examples of electoral law that are regarded as significant may be found in the previous jurisprudence of the Tribunal, e.g. in the judgment of 28 October 2009, Kp 3/09, OTK ZU No. 9/A/2009, item 138. In that light, such an amendment to electoral law as the one introduced by the February Act would not fall within the category of significant amendments.

Explicit and consistent statements by the Tribunal with regard to criteria for the admissibility of amendments to electoral law during the period of legislative silence seem to me to be indispensable, *inter alia*, in the context of further amendments to the Electoral Code

in 2011, which were not the subject of adjudication in the present judgment. There are no grounds to interpret the attribute of "significance" of legislative amendments in an excessively broad way. The point here is not that an amendment to electoral law may have an impact on the outcome of elections, but whether that impact may be predicted in advance with considerable likelihood as beneficial for some election committees and disadvantageous for others.

3. I also raise doubts as to the excerpt of part III point 7.6 of the statement of reasons concerning the course of work done on the February Act.

What is meant here is the following wording: "The exceptional pace of work on the Act, which concerns *inter alia* an essential personal and political freedom, i.e. the freedom of speech, is not justified by any extraordinary circumstances of the case. The enactment of the Act in such a hurry does not facilitate consideration and reflection, *inter alia*, as regards the conformity of the enacted law to the Constitution. Also, the President had no time to evaluate the Act in that regard, since he signed the Act on the same day that it was ultimately adopted by the Sejm".

The question which should have been answered by the Tribunal is whether the way of enacting the Act was consistent with the Constitution, statutes as well as the rules of procedure of the Sejm and the Senate. In the statement of reasons, there is no proof of the infringement of procedural provisions during the course of the enactment of the February Act. Due to failure to prove that the amendments to the Electoral Code were significant or that the way of enacting the Act was unconstitutional, I may not agree with the ending of point 7 of the statement of reasons either: "In conclusion, the Constitutional Tribunal states that, during the course of enacting the challenged Act, there were such irregularities which jointly result in declaring it to be inconsistent with the principle of a democratic state ruled by law, as expressed in Article 2 of the Constitution". It would be undesirable if such a view, presented in the statement of reasons for the judgment issued by the Tribunal (full bench), could in the future be used to adjudicate on the non-conformity of statutes to the Constitution because they were enacted too quickly. Indeed, the Tribunal is not authorised to assess whether the pace of work on a statute was "ordinary" or "extraordinary", whether the said pace is "justified by the extraordinary circumstances of the case", whether the statute was enacted in a hurry which "does not facilitate consideration and reflection", and whether the President had "time to evaluate the Act in that regard".

Dissenting Opinion
of Judge Piotr Tuleja
to the Statement of Reasons for the Judgment of the Constitutional Tribunal
of 20 July 2011, Ref. No. K 9/11

Pursuant to Article 68(3) of the Constitutional Tribunal Act of 1 August 1997 (Journal of Laws - Dz. U. No. 102, item 643, as amended), I submit my dissenting opinion to the statement of reasons for the judgment of the Constitutional Tribunal of 20 July 2011 in the case K 9/11.

I submit the dissenting opinion to point 7 of the statement of reasons, where the Constitutional Tribunal considers the unconstitutionality of the Act of 3 February 2011 amending the Electoral Code (Journal of Laws - Dz. No. 26, item 134) to be caused by excessive hurry during the enactment thereof and specifies the effects of the declared unconstitutionality. In particular, I do not agree with the statement, according to which "during the course of enacting the challenged Act, there were such irregularities which jointly result in declaring it to be inconsistent with the principle of a democratic state ruled by law, as expressed in Article 2 of the Constitution. The ruling by the Constitutional Tribunal that the Act of 3 February 2011, as an amending Act, is in its entirety inconsistent with the Constitution means that the process of changing the Act to be amended, in other words the Electoral Code, was not successfully carried out by the legislator, i.e. the substantive provisions contained in the amending Act did not become part of the Electoral Code".

In the opinion of the Constitutional Tribunal, the infringement of the legislative procedure results from the introduction of significant amendments to electoral law during the period of *vacatio legis* as well as the unusual hurry in enacting the Act, which means an infringement of the legislative procedure.

I may not agree with the last statement. With regard to none of the indicated stages of the legislative process, the Constitutional Tribunal confirmed the infringement of the provisions of the Constitution, or the rules of procedure of the Sejm or of the Senate. Neither did the Constitutional Tribunal specify the nature of that individual infringement. In particular, the Constitutional Tribunal did not indicate the infringement of Article 44(3) or Article 51 of the rules of procedure of the Sejm. I find it inapt to allege that it was inappropriate for the President to sign the Act on the first day it was submitted for signature. Such action is admissible in the light of Article 121(2) of the Constitution. The Constitutional Tribunal may not put forward the allegation about the infringement of the legislative procedure and support that allegation by indicating the action of the President which is explicitly provided for in the Constitution. No individual action by the Sejm, the Senate and the President of the Republic of Poland was categorised as inconsistent with the law, therefore a question arises: in what way does the sum of those actions lead to the infringement of Article 2 of the Constitution?

The Constitutional Tribunal emphasises the unusual hurry during the enactment of the statute regulating important constitutional matters. However, the hurry itself does not justify the infringement of the Constitution. It may be a basis for the formulation of political or journalistic assessment, but not legal one. For legal assessment to be formulated, it is necessary to indicate particular infringements of provisions specifying the legislative procedure and such infringements which justify the unconstitutionality of the statute. In its previous jurisprudence, the Constitutional Tribunal has assumed that not every infringement of provisions regulating the legislative procedure constitute an infringement of the Constitution. The Constitutional Tribunal distinguishes regulations concerning vital elements of the legislative procedure, e.g. not subjecting the text to mandatory consultation, ensuing

from the Constitution. On the other hand, there are regulations which are of lesser substantive significance. The infringement of vital elements of the legislative procedure constitutes the basis of declaring the unconstitutionality of a normative act under examination; whereas the infringement of a regulation concerning issues which are of minor importance for the legislative process may not constitute such a basis. At the same time, the Tribunal has indicated that the review of conformity of the legislative procedure to the parliamentary rules of procedure acquires a limited character. The Tribunal has assessed the application of the norms set out in the rules of procedure within the scope it affects the implementation of the constitutional terms of the legislative process and therefore "not every infringement of the rules of procedure may be regarded as an infringement of the Constitution". One may talk about such an infringement when breaches of the rules of procedure lead to an infringement of the constitutional elements of the legislative procedure or occur in such intensity that they make it impossible for Deputies to express their views on particular provisions and a statute as a whole, in the course of the legislative work and plenary sittings (see the judgment of the Constitutional Tribunal of 13 July 2011, Ref. No. K 10/09 and the jurisprudence cited therein). None of the above-indicated criteria were mentioned in relation to the examination of constitutionality of the procedure for the enactment of the amending Act of 3 February 2011. Even if the subject matter of the Act is constitutionally vital, the quick enactment of the Act does not automatically results in the infringement of the Constitution.

Taking into account the fact that particular infringements of the legislative procedure have not been indicated, the effects which the Constitutional Tribunal links with the adjudication of the unconstitutionality of the amending Act of 3 February 2011 should be regarded as unjustified. The Constitutional Tribunal has *ex post* assumed that the Act will not bring about any normative effects, in other words – that the act of amending the said statute was not carried out properly. However, the Constitutional Tribunal does not explain, on the basis of what theoretical or dogmatic construct, or a construct adopted in its earlier rulings, it has arrived at such a conclusion. The statement that a statute has failed to have effect could be considered on the basis of the concept of the so-called non-act, in accordance with which if, during the legislative process, there are particularly serious infringements of the rules for enacting acts, e.g. a statute, is not enacted effectively. The said infringements would have to cause a situation that it would be obvious to the addressees of norms that we do not deal with a statute. For instance, the statute was enacted without the participation of the Senate. Such a situation is not the case here. In its previous jurisprudence, the Constitutional Tribunal linked the problem of the lack of a normative change primarily with the declaration of the unconstitutionality of a given amending provision. Although it is difficult to refer to it as a consistent line of jurisprudence, it is possible to indicate rulings in which the Constitutional Tribunal has assumed that the unconstitutionality of the amending provision may also lead to declaring the unconstitutionality of the amended provision. As a result, the system of law retains the provision in its original version (cf. e.g. the judgments of the Constitutional Tribunal of: 28 November 2007, Ref. No. K 39/07, OTK ZU No. 10/A/2007, item 129, 24 March 2009, Ref. No. K 53/07, OTK ZU No. 3/A/2009, item 27*)*. The recognition of the binding force of provisions which were originally in force was, in principle, done by the Constitutional Tribunal when the following two conditions were met: firstly, the subject of a given review was an amending provision, and secondly the elimination of the said provision from the legal system, and consequently the relevant amended provision, could result in even more far-reaching unconstitutionality. No such condition occurs in the present case. Indicating the reasons for the unconstitutionality of the amending Act of 3 February 2011, the Constitutional Tribunal concentrated on the substantive non-conformity of the norms of the Act to the norms of the Constitution. The infringement of the procedure was stated sort of by the way and without providing detailed substantiation. Therefore, we deal here with an

opposite situation than in the above-mentioned judgments of the Constitutional Tribunal. In those judgments, the Tribunal mainly examined the procedure for the enactment of a given amending provision, and - in a way as a result of that examination - it declared the unconstitutionality of the corresponding amended provisions. And only on that basis, it considered the validity of adjudicating that the norms which were originally in force would remain in the legal system. Even if it were assumed that, in the present case, there was an infringement of the legislative procedure when enacting the amending Act of 3 February 2011, there would be no grounds for stating that the said Act did not effectively amend the Electoral Code.

I hold the view that the declaration of "ineffectiveness" of a statute enacted by the Sejm with the participation of the Senate, signed by the President and promulgated in the Journal of Laws, may only take place in exceptional cases. There are theoretical and legal concepts which make it possible to justify the binding force of norms in their original versions, after it is stated that the act of amending the norms was unsuccessful in character; however, the application thereof in the light of the Polish Constitution encounters numerous obstacles. Firstly, it should be remembered that the hierarchical review of norms in the continental rendering from the very beginning is based on the necessity to resolve the conflict between the principle of the primacy of the Constitution and the principle of trust. Imposing a restriction on the principle of the primacy of the Constitution due to the principle of trust entails *inter alia* that the effects of the unconstitutionality of normative acts may not be rectified. The concept of the invalidity of unconstitutional normative acts may not be adopted consistently and without any exceptions. Such a way of adjudicating constitutes the basis of Article 190(4) of the Constitution. What follows therefrom is that a normative act – primarily a statute – is binding from the moment of its promulgation until the moment of overruling the presumption of its constitutionality, as a result of a judgment by the Constitutional Tribunal. Secondly, neither in the theory of law nor in the light of constitutional law there has been success so far as regards devising a catalogue of defects and criteria that would allow to categorise those defects in such a way that normative acts could be divided into those which only seemingly amend other acts and those which are unconstitutional but actually amend other acts. Without devising such a catalogue, the use of phrases "an illusory amending act" or "an ineffective amending act" in the jurisprudence of the Constitutional Tribunal is, in my opinion, unjustified. With the exception of the above-mentioned situations where the defects of the legislative process are so serious that it is obvious to all the participants of the legal system that we do not deal with a statute here. Thirdly, the above phrases create a state of legal uncertainty in a situation where the addressees of the provisions promulgated in the Journal of Laws regard them as binding, as being part of the legal system, and then the Constitutional Tribunal deems them ineffective. The state of legal uncertainty aggravates when – on the basis of provisions deemed as ineffective – measures were undertaken which were specific and individual in character. One may not speak of ineffectiveness of the provisions regarded by the addressees thereof as functioning in the legal system. Fourthly, stating that the provisions of a statute in their original version become part of the system again or that they have never ceased to be part thereof leads to the infringement of Article 10 of the Constitution. Indeed, the said provisions "are revived" in a different normative context than the one existing at the moment of their enactment by the Sejm. Their normative content may be incompatible with the intention expressed during the enactment of those provisions. They may also be inconsistent with or contradictory to the provisions of other statutes. Consequently, the original content of the provisions may be incompatible with the will of the legislator, arising from Article 4(2) of the Constitution. Thus, a question arises as to what legitimises such provisions in the legal system.

Although the declaration by the Constitutional Tribunal that the amending Act of 3 February 2011 is inconsistent with the Constitution is – pursuant to Article 190(1) of the Constitution – binding in its character, the result of such statement is conditional not so much on the content of the judgment of the Constitutional Tribunal as on the existence of validating and interpretative rules in the Polish legal system. The indication of that result by the Constitutional Tribunal does not exempt the addressees of the norms contained in the Electoral Code from making arrangements in that regard. In particular, the addressees of the norms contained in the Electoral Code should – assuming that the amending Act of 3 February 2011 is unconstitutional – determine which provisions of the law are binding. In the light of the above considerations, in my view, the effects of the judgment of the Constitutional Tribunal are as follows: Article 116, Article 119, Article 120, and Article 495 of the Electoral Code have been amended as a result of the enactment of the amending Act of 3 February 2011, which entered into force on 22 February 2011. That Act was in turn repealed as a result of the judgment issued by the Constitutional Tribunal, which has resulted in the repeal of provisions contained therein, but has not resulted in restoring the original wording of the provisions of the Electoral Code. Consequently, a gap has emerged, which the Tribunal, in one of its previous rulings, referred to as legislative void (the judgment of 22 May 2007, Ref. No. K 42/05, OTK ZU No. 6/A/2007, item 49). The said gap does not result in an infringement of the Constitution, but it requires an appropriate intervention by the legislator.