138/9/A/2009

JUDGMENT
of 28 October 2009
Ref. No. Kp 3/09*

In the Name of the Republic of Poland

The Constitutional Tribunal, in a bench composed of:

Janusz Niemcewicz – Presiding Judge
Stanisław Biernat
Zbigniew Cieślak
Mirosław Granat – Judge Rapporteur
Marian Grzybowski
Wojciech Hermeliński
Adam Jamróz
Marek Kotlinowski
Teresa Liszcz
Ewa Łętowska
Marek Mazurkiewicz
Mirosław Wyrzykowski,

Grażyna Szałygo – Recording Clerk,

having considered, at the hearing on 28 October 2009, in the presence of the applicant, the Sejm and the Public Prosecutor-General, an application by the President of the Republic of Poland, submitted pursuant to Article 122(3) of the Constitution of the Republic of Poland, to determine the conformity of:

1) Article 4 of 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, to the extent Article 3 amends the Act of 23 January 2004 on Elections to the European Parliament (Journal of Laws - Dz. U. No. 25, item 219, as amended), to Article 2 of the Constitution of the Republic of Poland,
2) Article 3(2) of the Act referred to in point 1 above, to the extent the introduction of two-day voting in elections to the European Parliament bypasses the regulations concerning election silence and the sanctions for breaching thereof, to Article 2 of the Constitution,

adjudicates as follows:

*The operative part of the judgment was published on 13 November 2009, in the Official Gazette - *Monitor Polski* (M. P.) No.72, item 917.

1. Article 4 in conjunction with Article 3 of 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 conforms to Article 2 of the Constitution of the Republic of Poland.

2. Article 3(2) of the Act referred to in point 1 above, to the extent it introduces two-day voting in elections to the European Parliament, conforms to Article 2 of the Constitution.

STATEMENT OF REASONS

I

1. In a letter of 5 March 2009, submitted as part of preventive review, the President of the Republic of Poland referred to the Tribunal for it to determine that Article 4 of 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 (hereinafter: the amending Act of 12 February 2009, the amending Act or the amendment), to the extent Article 3 amends the Act of 23 January 2004 on Elections to the European Parliament (Journal of Laws – Dz. U. No. 25, item 219, as amended; hereinafter: the Act on Elections to the EP), is inconsistent with Article 2 of the Constitution and that Article 3(2) of the amending Act, to the extent the introduction of two-day voting in elections to the European Parliament bypasses the regulations concerning election silence and the sanctions for breaching thereof, is inconsistent with Article 2 of the Constitution.

On 18 February 2009, the Marshal of the Sejm submitted the amending Act of 12 February 2009 for signature. The Act is the result of legislative work on a Deputies' bill (Sejm Paper No. 1391), which was lodged with the Sejm on 29 October 2008. On 17 November 2008, the bill was supplemented with an amendment by the said Deputies. The Sejm passed the bill on 12 February 2009, and the Senate passed a resolution on the adoption of the bill without any amendments on 18 February 2009. The Act was submitted to the President for signature on 18 February 2009, and the constitutional deadline for signing thereof was 12 March 2009. The President was to issue a decision to order elections to the European Parliament no later than on 9 March 2009.

1.1. The President of the Republic of Poland stated that he could not accept the adopted way of making electoral law for the European Parliament elections. A situation arose where the legislator had not considered the constitutional period allowed for the President of the Republic of Poland to make his decision with regard to signing an act. The entry into force of the amending Act would have taken place after the adoption of an election calendar. In the applicant's opinion, it is not permissible to change designated procedural activities pertaining to elections which arise from an election calendar. It is even more so, as the activities at stake are of significant importance to the elections, for instance the date of holding the elections and the way in which voters can exercise their right to choose their representatives to the European Parliament.

The applicant pointed out that the date of the elections to the European Parliament had been known as early as in 2008. Therefore, it was the legislator's duty to make amendments to electoral law (in the case where it was necessary to introduce them) in such a way that the amendments could be adopted and promulgated in the Journal of Laws at least a few months prior to conducting election activities. The President noted that the aforementioned issue had been raised in the course of legislative work. These reservations had been justified by the considerations arising from the jurisprudence of the Tribunal. The issue of the speed with which the work on the Act proceeded had also been known at the time of the Senate's debate.

Referring to the jurisprudence of the Constitutional Tribunal pertaining to the requirement to maintain adequate *vacatio legis* by the legislator with regard to amendments to electoral law, the President indicated that *minimum minimorum* should, in that respect, include adopting significant amendments to electoral law at least six months prior to the subsequent elections, which are understood not only as an act of casting votes but also as the entirety of activities included in an election calendar. The exceptions from that standard might only arise from exceptional circumstances being objective in character. The requirement to maintain a period of at least six months between the date of entry into force of significant amendments to electoral law and the date of carrying out the first activity related to holding elections constitutes, in principle, an inviolable normative element of Article 2 of the Constitution. The applicant referred to the conclusions of the European Commission for Democracy through Law (the Venice Commission), included in the guidelines for elections – the Code of Good Practice in Electoral Matters – adopted at the 52nd session on 18-19 October 2002. According to the President, amendments to electoral law, introduced during the period when the procedural activities related to holding elections need to be conducted, violate the requirement to maintain adequate *vacatio legis.* Such a period of *vacatio legis* is meant to protect the activities of, *inter alia*, the legislator himself, allowing for the elimination of mistakes in a given statute as well as any contradictions in the legal system related to the entry into force of that statute. Therefore, if the President had not exercised his right to refuse to sign the bill and lodge the application with the Tribunal, the legislator's action would have led to the situation where on the day of ordering elections to the European Parliament in the Republic of Poland, the terms on which the voters were to exercise their right to vote, arising from the Act, would not have been known.

1.2. The applicant indicated that, in Article 3(2) of the amending Act, the legislator had introduced an amendment by adding provisions to Article 10 of the Act on Elections to the EP; the provisions stipulate that the vote in the elections shall be carried out for 2 days, and the date for voting shall be set for a non-working day and the day preceding it (paragraphs 3and 4, as added to Article 10). By contrast, Article 10(2) specifies that the elections shall be held on a non-working day. Pursuant to Article 73(1) of the Act on Elections to the EP, an election campaign shall end 24 hours before an election day. According to the President, in the case of two-day voting, the election day is a non-working day. The election campaign would end at midnight on Friday, directly before the first day of voting. Thus, the regulation lacks adequate specificity and stability. The

principle of a democratic state ruled by law requires that the law be enacted in a logical and consistent way, so that new amendments will be in accordance with the other provisions. Unclear and imprecise wording of provisions results in the uncertainty of the addressees of the law as to the extent of its application. Therefore, it may be the case that the legislator will be replaced by authorities responsible for the application of law. The provisions of electoral law need to fulfil the requirement of adequate specificity; this requirement is not met by the challenged provision.

The applicant indicated that Article 38 of the Nationwide Referendum Act of 14 March 2004 (Journal of Laws - Dz. U. No.57, item 507, as amended; hereinafter: the Referendum Act) provides for a referendum to be held for two days. This provision corresponds to Article 73(1) of the Act on Elections to the EP. The Referendum Act sets out that a referendum campaign shall end 24 hours before the day of voting. Such a regulation is not provided for in Article 73(1) of the Act on Elections to the EP. In the President's opinion, the legislator failed to maintain coherence and a logical connection between various institutions of electoral law which were referred to in the statutes regulating the procedure for holding elections and referendums.

The applicant stated that the requirement of election silence was of great importance for the significance of elections and for guaranteeing voters a possibility of making independent decisions. There is a sanction for breaching election silence, pursuant to Articles 151 and 154 of the Act on Elections to the EP. In his opinion, the scope of application of these provisions, in the case of two-day voting which begins at 8.00 a.m., where election silence would begin on Friday at midnight, would be limited. Gatherings, demonstrations and other forms of election agitation could, as a matter of fact, take place until the day when, by the act of voting, the right to vote in elections to the European Parliament is exercised. Considering the importance of election silence for the proper course of the voting process, the applicant stated that the aforementioned incoherence and inconsistence caused by the legislator, with regard to the regulation directly related to the introduction of two-day voting, infringed on the principle of adequate specificity of law.

Consequently, the President of the Republic of Poland concludes that the vagueness and randomness of the introduced provisions breach the principle of appropriate legislation. The regulation concerning the end of election campaign does not correspond to the relevant and binding provisions of Polish electoral law. In the applicant's view, it was the legislator's obligation to address the issue of election silence with regard to adjusting it to the two-day voting period during elections. The President stated that not issuing the appropriate provision was a legislative omission.

Moreover, the applicant argued that Article 2 of the amending Act of 12 February 2009 amends the Nationwide Referendum Act as regards holding referendum voting on the same day as the elections to the European Parliament. Pursuant to Article 2(2) of the amending Act, in such cases which are not regulated by the Referendum Act, the provisions of the Act on Elections to the EP shall apply. The inconsistence of the legislator can be observed when juxtaposing the provisions on election silence with the above-mentioned acts. In the case of holding a nationwide referendum and an election to the European Parliament at the same time, the election silence in the referendum campaign would begin a day earlier than the election silence in the election campaign to the

European Parliament. This entails that Articles 84 and 85 of the Referendum Act and the corresponding Articles 151 and 154 of the Act on Elections to the European Parliament, despite having the same content, they would have a completely different scope of application. Activities forbidden by law in a referendum campaign would be permissible in an election campaign to the European Parliament, due to the inconsistency of the legislator.

1.3. The applicant indicated (p. 11 of the application) that the challenged Act introduced a significant amendment to electoral law, namely the possibility of proxy voting (Article 3(6) of the amending Act). In his opinion, this legal institution should, primarily, be confronted with the provisions of the European law, as it is impossible to cite an explicitly expressed higher-level norm for constitutional review. Nevertheless, since there are serious reservations as to the conformity of this rule to the requirement of direct suffrage, the introduction of such form of voting should be preceded by a thorough analysis and discussion in the course of legislative work. The applicant stated that the doctrine set out that the principle of direct suffrage consisted in voting in person and voting by roll-call. The requirement of voting in person arises from the strictly personal character of political rights, which, unlike ownership rights, may not be ceded to a proxy. Proxy voting contradicts the principle of direct suffrage, also in the juxtaposition with the principle of equal suffrage (a proxy would be entitled to at least two votes).

The President of the Republic of Poland noted that, in the course of legislative work, it had been recognised that there was a need to examine the issue of a possible clash between the legal institution of proxy voting and the principle of direct suffrage in elections to the European Parliament, as well as that a comparative law analysis was justified. Electoral law should be coherent and, in a unified way, specify the form in which the right to vote is exercised, in particular as regards the possibility of holding a nationwide referendum and elections to the European Parliament at the same time. In such a case, on the same day voters would be allowed to vote by proxy at the elections, whereas in the referendum they would be deprived of this right. According to the President, fundamental amendments to electoral law should be introduced in a harmonised way, where possible, and particular rights should have a uniform character.

2. In a letter of 2 July 2009, the Marshal of the Sejm submitted an application to determine that the provisions of the Act of 12 February 2009, which had been challenged by the President, conformed to Article 2 of the Constitution. The Marshal presented the reservations of the applicant and referred to the higher-level norm for review indicated in the application. He drew attention to the essence of the principle of a democratic state ruled by law and of other principles arising from Article 2 of the Constitution. He pointed out that the fundamental principles derived from the principle of a democratic state ruled by law were the principle of protection of citizens' trust in the state and its laws and the principle of appropriate legislation.

2.1. The Marshal discussed the essence of the principle of protection of citizens' trust in the state and its laws in the light of the jurisprudence of the Constitutional Tribunal. He indicated that the said principle implied enacting and applying the law in such a way

that it would not become a peculiar pitfall for citizens. Citizens should deal with their activities with confidence that they do not risk legal consequences which would be impossible to foresee at the moment of making decisions and that their activities are in accordance with the law in force and that they will also be recognised by the legal order in the future.

When addressing the claim that the requirement of adequate *vacatio legis* was breached, the Marshal stated that, in its jurisprudence up to that day, the Constitutional Tribunal, on a number of occasions, had emphasised the need to separate the day of proclamation of a normative act from the day of its entry into force with an appropriately long period. The assessment whether, in a given case, the length of *vacatio legis* is appropriate is contingent upon the entirety of circumstances, and in particular upon the object and subject-matter of given regulations set out in new provisions, including the fact how considerably they differ from the current regulations. "Adequacy" of the adjustment period, in principle, should be specified and assessed in relation to each particular normative act, and not according to universal and fixed rules.

The Marshal referred to the opinion of the Constitutional Tribunal presented in a judgment of 3 November 2006 (Ref. No. K 31/06, Official Collection of Constitutional Tribunal's Decisions - OTK ZU No. 10/A/2006, item 147), in which the Tribunal, in full bench, reviewing the constitutionality of the Act amending the Act on Elections to Local Self-Government Bodies, stated that important amendments to electoral law should take place at least six months prior to the subsequent elections, understood not only as an act of voting, but also as the entirety of activities included in an election calendar. The said opinion of the Constitutional Tribunal is not a one-time opinion, as it does not apply to only one particular constitutional problem analysed at a given time, but becomes an abstract judgment, passed on with the future in mind, constituting a harbinger of further jurisprudence in related cases. At the same time, the Marshal is aware of the fact that the requirement of adequate *vacatio legis* is not an absolute rule. Any exemption from this requirement is dependent on there being a serious public interest which may outweigh the individual's interest.

The Marshal stressed that, according to the applicant, of great significance are the following changes provided for in the amending Act of 12 February 2009: two-day voting in elections to the European Parliament, a modification of provisions for the forfeiture of profits gained by an election committee by breaching the law and the possibility of proxy voting. The Marshal disagreed with that opinion. In his view, the purpose of both amendments concerning the provisions which regulate voting, indicated by the President of the Republic of Poland, is to give the persons who have active electoral rights a better opportunity to participate in the elections. The amendments neither limit the rights granted to the voters earlier nor do they modify their legal status; also, they do not impose any obligations on other subjects participating in the elections. In the Marshal's opinion, in the case of the amending Act of 12 February 2009, the amendments introduced to electoral law for the European Parliament elections weighed in favour of a shorter period of *vacatio legis* than the one reconstructed by the Constitutional Tribunal in the judgment of 3 November 2006 (Ref. No. K 31/06). The only negative result of the late (with regard to the approaching elections to the European Parliament) enactment of the amending Act is the

effect its provisions would have on the dates for carrying out the activities related to preparing and holding elections which are set out in the Act on Elections to the EP. Set forth by the President of the Republic of Poland in the form of the so-called election calendar (after consulting the National Electoral Commission), these dates constitute an annex to the decision to order elections. It would be inadmissible to change them after ordering elections and issuing the decision. However, the Marshal argues that the date of passing and submitting the Act to the President of the Republic of Poland made it possible for the Act to be signed and published in the Journal of Laws in time for the election to be ordered within the required time-frame. The essence of the decision in this case is not the assessment if the changes provided for in the amending Act are "significant", nor is the answer whether "exceptional circumstances" justified the departure from the principle of maintaining a period of *vacatio legis* that would be adequate to electoral law. In order to determine if the amending Act meets the standards derived, by the Tribunal, from the principle of a democratic state ruled by law, a different perspective needs to be taken.

Firstly, in the context of the principle of protection of citizens' trust in the state and its laws, the derivative of which is the directive concerning the time-frame for amending electoral law, the six-month grace period for introducing significant amendments in electoral law, which was reconstructed by the Tribunal, is not immanently and solely related to *vacatio legis* (understood as the period between passing a normative act and its coming into force), but to an interval which separates the moment of amending electoral law and making it known to the public in an officially specified way from the first activity from the so-called election calendar.

Secondly, the way of setting the 14-day period of *vacatio legis* with regard to amendments to the Act on Elections to the EP might give rise to reservations in the case when the closest elections in respect of the date of enacting that amendment (12 February 2009) were to be held within the period shorter than six months (7 June 2009). Questioning the constitutionality before signing the amending Act by the President of the Republic of Poland as well as not examining of his application by the Tribunal before the elections to the European Parliament – these are the factors that, when combined, significantly changed the context of the assessment of the final provision. The prospects for applying new provisions were substantially delayed. At present the challenged regulation fulfils the requirements arising from the principle of protection of citizens' trust in the state and its laws.

If it is assumed (the Sejm does this only for the sake of this argument) that the unconstitutionality occurred at the moment when the President submitted his application to the Tribunal, then the series of events brought about a beneficial effect, leading to the reclaimed constitutionality of the challenged provision. The amending Act, after a possible adjudication of its conformity to the Constitution by the Tribunal, will enter into force after the lapse of 14 days from the day of its publication in the Journal of Laws; however, it may not be applied earlier than during the following elections to the European Parliament. The six-month period meant for familiarising with the new provisions and implementing them will be preserved.

2.2. The Marshal discussed a claim of unconstitutionality of Article 3(2) of the amending Act of 12 February 2009 with regard to the lack of specificity of law and the existence of legislative omission in the case of two-day elections.

Considering the fact that, on a number of occasions, the applicant stressed the lack of coherence between particular solutions in electoral law set forth in the acts which regulated ordering and holding elections and referendums, the Marshal noted that even at the level of the constitutional provisions there were differences between the rules for ordering and holding elections as well as determining their outcome. It is difficult to indicate constitutional norms and principles which may give rise to the legislator's obligation to make unified electoral law provisions which are applicable in the course of electing various state authorities. The differences among particular provisions of electoral laws cannot constitute a sufficient basis for challenging their constitutionality.

However, in the Sejm, work is being carried out to unify electoral law and develop an electoral code. In the Marshal's opinion, the demands set out by the President of the Republic of Poland in his application are congruous with the Deputies' legislative initiative; still, complete unification of the provisions concerning elections to various state authorities is not possible. By contrast, partial unification, even if it is desirable, may not be regarded as a constitutional requirement which would restrict the legislator's freedom.

Discussing the objection against a two-day election, the Marshal stated that the applicant rightly argued that the final wording of Article 10 of the Act on Elections to the EP was not fully correct in respect of its linguistic form. For there are some doubts if the term "election day" (scheduled for a non-working day), which also appears in numerous provisions of the amending Act, must always refer solely to the second day of voting. This is of significant importance, especially for setting the end date of an election campaign. However, the Marshal reminded that not every case of vagueness or lack of precision with regard to a provision resulted in infringing on the principle of adequate specificity of law. It follows from the Tribunal's jurisprudence that vagueness of a provision may justify the adjudication of its non-conformity to the Constitution, if it is so considerable that the arising discrepancies are impossible to be eliminated with the means aimed at counteracting discrepancies in the use of law.

According to the Marshal of the Sejm, the analysis of the whole Act on Elections to the EP, taking into consideration the wording and content of the amending Act of 12 February 2009, leads to a different interpretation of the challenged regulation than the interpretation assumed by the applicant. Indeed, the interpretation that the term "election day" only refers to the second day of voting leads to results which are impossible to accept. In the Marshal's opinion, a reasonable interpretation of the provisions of the Act on Elections to the EP, which indicates the dates for particular election activities by making reference to an election day, is the assumption that the dates pertaining to the activities preceding the "election day" need to be counted from the first day of voting, whereas the dates regarding the activities following the "election day" must be counted from the second day of voting. Election silence, as referred to in Article 73(1) and (3) of the Act on Elections to the EP in conjunction with Article 87 of the Act on Elections to the Sejm of the Republic of Poland and to the Senate of the Republic of Poland, would encompass a

24-hour period preceding the first day of voting in elections to the European Parliament. Therefore, the challenged Article 3(2) of the amending Act is not vague enough to be deemed as breaching the principle of adequate specificity of law. In the situation when it is possible to arrive at such an interpretation of the amending Act which conforms to the Constitution, a separate analysis of the legislative omission alleged by the applicant, as regards a lack of regulation in the amending Act pertaining to the issue of election silence and sanctions for breaching thereof, appears to be useless. Indeed, it should be assumed that election silence begins 24 hours before the first day of voting.

In case the Constitutional Tribunal did not share the Sejm's stance, the Marshal indicated that the allegation about legislative omission would not deserve being taken into consideration also for the following reasons:

a) the applicant's argument about the need to impose an identical time-frame on election silence in the case of all electoral laws which are binding in Poland is misguided. Despite the provision on the restrictions regarding the period of election silence, which applies both to elections to the national parliament and the European Parliament, the time-frame of election silence may and does vary;

b) the fact that some of the elements of the procedure for elections to the European Parliament are subject to national provisions of the Member States does not entail that the said procedure is to be analogical to the procedures for elections to national representative bodies. To prove the existence of such discrepancies, the Marshal of the Sejm gave examples of regulations from other Member States of the European Union (pp. 26-7 of the opinion);

c) at the Community level, there are no common binding guidelines concerning election silence.

Having considered all the above arguments, the Marshal of the Sejm concluded that the challenged regulation arising from Article 3(2) of the amending Act conformed to Article 2 of the Constitution.

2.3. The Marshal of the Sejm addressed the applicant's objections related to proxy voting (Article 3(6) of the amending Act). He stated that it does not fall within the scope of the challenge specified in the *petitum* of the application; however, the Marshal argued that the Constitutional Tribunal is the only authority which can reconstruct the normative sense of the constitutional principle of direct suffrage (opinions p.26-7). In the Marshal's view, proxy voting is not inconsistent with the Constitution. The purpose of such voting is to provide the persons entitled to vote with conditions allowing them to exercise that right and also to increase the voter turnout rate, thus enhancing the legitimisation of a given representative body. However, the Marshal went on to say that there was no provision that could constitute an adequate higher-level norm for review there. The Constitution does not regulate the preparations, the course of and the ways of determining the outcome of elections to the European Parliament.

The Marshal indicated that directness as a principle of electoral law for elections to the European Parliament had been established at the level of Community legislation (Article 190(1) of the Treaty establishing the European Community; Journal of Laws - Dz. U. of 2004, No. 90, item 864/2, as amended). However, a unified and comprehensive electoral procedure has not yet been adopted. The regulation that has been

most informative so far is the Act concerning the election of the representatives of the European Parliament by direct universal suffrage (Journal of Laws - Dz. U. of 2004, No. 90, item 864/10, as amended; hereinafter: the Act on the Election of MEPs). From the point of view of the claims made by the applicant, the Marshal assigns significant importance to Article 1(3) of the aforementioned Act ("Elections shall be by direct universal suffrage and shall be free and secret.") and to Article 8 ("Subject to the provisions of this Act, the electoral procedure shall be governed in each Member State by its national provisions. These national provisions, which may if appropriate take account of the specific situation in the Member States, shall not affect the essentially proportional nature of the voting system.").

In the opinion of the Marshal of the Sejm, the application of the President of the Republic of Poland pertaining to proxy voting, in fact, leads to the review of compliance of the norms of national law (the provision of the amending Act which introduces proxy voting) with the norms of primary and secondary Community law. The applicant overlooked the fact that the core of the issue was the interpretation of the Treaty establishing the European Community and of the Act on the Election of MEPs.

According to the Marshal of the Sejm, the substantive resolution of the issue of a proxy for voting by the Constitutional Tribunal would result in interpreting the provisions of the Community law without taking into consideration the interpretative standards adopted in relation to all the EU Member States. Consequently, the Constitutional Tribunal is not in a position to examine the compliance of the provisions related to proxy voting with Community law. In addition, the Marshal pointed out that the normative sense of the principle of direct suffrage in the case of elections to the European Parliament is determined by the genesis of that principle. The Act concerning the election of the representatives of the Assembly by direct universal suffrage was adopted as late as 1976 (it came into force in 1978), i.e. prior to that representatives to the European Parliament (the institutions preceding it) had been designated by the parliaments of the Member States. The principle of direct suffrage in the case of elections to the EP needs to be understood in the context of aspirations to ensure the legitimisation of the European Communities.

To sum up, according to the Marshal of the Sejm, the introduction of proxy voting in the Act on Elections to the EP was, in the light of Community law, admissible.

In the opinion of the Marshal of the Sejm, the Constitutional Tribunal should not also consider, indicated by the applicant, alleged non-compliance of the provisions of the amending Act which introduce proxy voting with the principle of equality. Since the Constitution does not regulate electoral law for elections to the European Parliament, its provisions cannot be deemed as an adequate higher-level norm for review of the challenged extent of the amending Act. The principle of equal suffrage enshrined in the Constitution regards the elections to the Sejm (Article 96(2)), the elections of the President of the Republic of Poland (Article 127(1)) and the elections to the constitutive bodies of local self-government units (the first sentence of Article 196(2)). It was not referred to the elections to the Senate (Article 97(2)). Therefore, the principle of equality is not a general rule for universal elections held in Poland. Furthermore, the principle of equality has no application in Community law, as regards elections to the European Parliament. Consequently, the Marshal stated that the applicant's objections against regulating the

institution of proxy voting, referring to non-compliance with the principle of direct and equal suffrage, could not influence the assessment of constitutionality of the provisions challenged by the President of the Republic of Poland.

3. In a letter of 16 October 2009, the Public Prosecutor-General requested that it be determined that Article 3(2) of the amending Act of 12 February 2009 - to the extent the changes in Article 10 of the Act on Elections to the EP, which concern two-day voting in elections to the European Parliament, bypass the regulations concerning election silence and the sanctions for breaching thereof - conforms to Article 2 of the Constitution. In the remaining extent the proceedings are subject to discontinuation, pursuant to Article 39(1)(1) of the Constitutional Tribunal Act of 1 August 1997 (Journal of Laws - Dz. U. No. 102, item 643, as amended), as the pronouncement of a judicial decision is useless.

3.1. The Public Prosecutor-General stated that the changes in the Act on Elections to the EP, made by the challenged amendment, encompassed the introduction of two-day voting in elections to the European Parliament, a modification of provisions for the forfeiture of profits gained by an election committee by breaching the law and the introduction of the institution of a proxy for voting. The applicant negated the constitutionality of the first of the above-mentioned solutions. The applicant also had reservations about the regulations governing the institution of a proxy for voting. However, the reservations were not in a form of an allegation of unconstitutionality based on a specific higher-level norm for review. Moreover, the applicant argued that the requirement to maintain adequate *vacatio legis*, necessary in the context of electoral law, had not been met, i.e. the change had been made right before the elections to the EP (which had been scheduled for June 2007). Consequently, the Public Prosecutor-General formulated two constitutional issues, namely: admissibility of making amendments to the Act on Elections to the EP, shortly before elections to that parliament, and an internal clash of provisions of the amending Act, arising from the introduction of two-day voting. This clash, consisting in the breach of the principle of adequate specificity of law, and thus the principle of protection of citizens' trust in the state and its laws, is alleged to lead to inconsistencies in electoral law.

3.2. In the opinion of the Public Prosecutor-General, an act on elections is a tool for enabling citizens to really exercise their political rights. Therefore, the introduction of new provisions regarding the voting period in elections to a given body and a mechanism for the act of voting may have a direct influence on the exercise of those rights. Affecting the legal situation of citizens, the legislator may not "surprise" them by changing essential rules of electoral law (shortly before elections). In this context, the Public Prosecutor-General pointed out the significance of the Tribunal's judgment of 3 November 2006 (Ref. No. K 31/06) for the case at hand.

Specified in the Act of 20 July 2000 on Promulgation of Normative Acts and Certain Other Legal Acts (Journal of Laws - Dz. U. of 2007, No. 68, item 449, as amended), the 14-day period of *vacatio legis* is regarded in the doctrine as a standard

adjustment period. It is not always adequate to the specific situation of coming into force of a given provision. In the light of the above, the Public Prosecutor-General concluded that the claim of non-conformity of Article 4 of the amending Act, to the extent it pertained to changes in the Act on Elections to the EP, to Article 2 of the Constitution was justified. The changes which this provision introduces do not have the character that would suggest that in this case the prerequisite of "exceptional circumstances being objective in character" is relevant (it would justify exemption from the restriction on amending electoral law which was adopted in the judgment of 3 November 2006, Ref. No. K 31/06). None of the modifications of the Act on Elections to the EP is forced by such circumstances.

It follows from the aforementioned judgment of the Constitutional Tribunal in the case with the Ref. No. K 31/06 that the restriction on introducing "significant" amendments to electoral law no later than 6 months prior to elections does not encompass such amendments to electoral law which could be regarded as being of minor importance ("minor amendments"). Moreover, the restriction is not absolute ("exceptional circumstances being objective in character may justify exemption from the restriction). According to the Public Prosecutor-General, the introduction of the institution of proxy voting in elections to the European Parliament may be considered to be a significant modification of electoral law, constituting a departure from the rule which has so far been common, namely, voting in person. The applicant did not put forward a claim of unconstitutionality of the amendment; neither did he assert that a particular higher-level norm for review had been breached. In the opinion of the Public Prosecutor-General, an amendment of the provisions which regulate the time-frame and way of voting, the purpose for which is to provide better opportunities for participating in elections to people who have active electoral rights, not only does not limit the electoral rights of persons to whom they were granted, but also serves as a tool for implementing the principle of universal suffrage. Indeed, the said amendment involves facilitating the exercise of electoral rights by means of introducing the so-called alternative ways of voting. They should be regarded as admissible, provided that they are introduced with maintaining the standard (14-day) period of *vacatio legis*.

The Public Prosecutor-General agreed with the applicant's view that the entry into force of the amending Act, after the promulgation of the decision to order elections to the European Parliament, would necessitate a change of election calendar. It is so, because on the day of ordering elections to the European Parliament in the Republic of Poland by the President, the conditions of making use of the electoral institutions introduced by the amendment would not be known (some of them would be set forth in regulations issued pursuant to statute).

The Public Prosecutor-General shared the applicant's view that the purpose of *vacatio legis* is also to protect the legislator himself, allowing for the elimination of mistakes in a statute and inconsistencies in the legal system related to entry into force of an act. Possible recognition of inconsistency of two-day voting introduced by the amending Act with the institution of election silence and the sanctions for breaching thereof may be deleted before the subsequent elections to the EP. The Public Prosecutor-General stated that implementing acts would be promulgated before the subsequent elections; the

applicant had rightly signalled the lack of such acts in the application. The 14-day period of *vacatio legis* will be supplemented in the amending Act with the actual period of *vacatio legis* of the Act. This will allow the addressees of the Act to familiarise themselves with its provisions and prepare to apply it.

According to the Public Prosecutor-General, the adequacy the period of *vacatio legis* specified by the legislator is subject to evalution in the context of each regulation, i.e. *a casu ad casum.* Therefore, in this particular case it should be recognised that there is no need to determine the conformity of the regulation to the Constitution, when the deficiency of the regulation in respect of its constitutionality has become irrelevant, since *per facta concludentia* this deficiency is legitimised.

Due to the applicant's objections to the Act, submitted in the course of preventive review, the provisions challenged in the application did not enter into force before the elections to the European Parliament. In the Prosecutor's view, this fact leads to the observation that the review of constitutionality of *vacation legis* in the case of the amending Act, taking place after such elections, has no practical relevance.

3.3. Referring to the claim of legislative omission and the breach of the principle of adequate specificity of law when introducing two-day voting (in conjunction with the lack of regulation concerning the end date of election campaign in the case of European Parliament elections), the Prosecutor stated that the lack of this normative element might not be regarded as a basis for determining the non-conformity of Article 3(2) of the amending Act to the Constitution. He admitted that the applicant rightly pointed out the fact that the change in Article 2 introduces amendments to the Act on Referendum with regard to holding a referendum on the same day as elections to the European Parliament. In such a situation, pursuant to Article 2(2) of the challenged Act, in the cases not provided for in the Act on Referendum, the provisions of the Act on Elections to the EP shall apply.
Juxtaposition of the provisions concerning election silence from the two acts justifies the negative evaluation of the legislator's activities. However, not every inconsistency in law or deficiency in precision of a provision is tantamount to a breach of the principle of specificity of a legal norm. The said breach is constituted by such vagueness of a provision which renders it impossible to decode the normative content of the provision, despite the use of all available interpretative techniques.

In the opinion of the Prosecutor, the claims made by the applicant, concerning Article 3(2) of the amending Act, arise from the premise that the legislator assigned a different meaning to the two terms: "election day" and "day of voting". On the one hand, they were not specified with legal definitions, but, on the other hand, they do not belong to imprecise phrases or general clauses. Voting is a way of making a special decision in an assembly in such a way that every member of the assembly casts their vote (by secret ballot or otherwise), then the votes are counted and constitute the basis for that decision.
Thus, voting constitutes a basic procedure for making a decision as regards selecting a certain group of persons. In other words, voting is a way of electing. These terms are usually synonyms, both in colloquial language and journalism. Also, assigning a different normative meaning to them does not follow from the context in which they were used in the Act on Elections to the EP. To sum up, the analysis of the provisions of the Act on

Elections to the EP (juxtaposed with the challenged regulations of the amending Act) allows for a correct interpretation thereof, which is not merely based on a linguistic analysis. The only rational (and functional) way of interpreting the provisions of the Act on Elections to the EP is to recognise the two days of voting as election days. The activities preceding the "election day" should be counted in respect of the first "day of voting", whereas the dates of the activities following the "election day" should be counted from the second "day of voting". Election silence would encompass the 24-hour period preceding the first day of voting in elections to the European Parliament.

II

At the hearing, the parties to the proceedings maintained their stances. The representative of the applicant explained that the institution of proxy voting is not subject to challenge. The object of review in this case may not be the issue of proxy voting. The President does not oppose the new way of voting and the idea of facilitating the exercise of the individual's right to vote. He addressed the institution of proxy voting in his substantiation in order to signal the need for a deeper discussion on *ratio legis* of such solutions. There was no thorough discussion at the time of the appointment of a proxy for voting. The decision was made hastily. The reservations about proxy voting also stem from the inconsistency of the legislator's actions.

The Representative of the Public Prosecutor-General indicated that the prerequisites for a possible discontinuation of the proceedings by the Constitutional Tribunal with regard to the examination of *vacatio legis* are practical considerations. After holding the elections to the European Parliament on 7 June 2009, the constitutional problem related to Article 4 of the amending Act ceased to exist. For practical reasons, the pronouncement of a judicial decision by the Tribunal, in this extent, is useless. In fact, the Prosecutor stressed that if the Tribunal had been in a position to adjudicate prior to 7 June 2009, then he would have submitted a motion to determine that Article 4 in conjunction with Article 3 of the amending Act did not conform to the Constitution.

The parties to the proceedings admitted that, in the case of examining the conformity of a legal norm to the Constitution, the state of law from the day the judgment was pronounced was appropriate.

III

The Constitutional Tribunal considered the following:

1. The formal requirements for the evaluation of the application submitted by the President of the Republic of Poland, as part of preventive review.

On 5 March 2009, pursuant to Article 122(3) of the Constitution, the President of the Republic of Poland referred 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 (hereinafter: the amending Act of

12 February 2009, the amending Act or the amendment) for adjudication upon its conformity to the Constitution.

The Constitutional Tribunal emphasises that the President of the Republic has sole power to initiate preventive review of statutes, as the President's obligation is to supervise adherence to the Constitution (cf. Article 126(2) of the Constitution). Specificity of a given course of review is revealed in the object of and in the higher-level norms for such review. Preventive review solely concerns statutes and international agreements. The higher-level norms for substantive review here may only be constitutional norms. Considering the unique character of preventive review (in relation to the course of subsequent review), the Tribunal shall assign literal meaning to Article 122 , i.e., in this case, it remains beyond the competence of the Constitutional Tribunal to examine the conforminity of statutes to other norms, such as provisions of international agreements or normative acts of international organisations.

Referring the above-mentioned criteria for review to the case at hand, the Constitutional Tribunal states that the application meets the requirements for admissibility of examination of the challenged provisions in the course of preventive review. The Act was passed by the Sejm and the Senate. Next it was submitted to the President of the Republic for signature on 18 February 2009, and the application was received by the Constitutional Tribunal on 5 March 2009. The Act is not classified as urgent, within the meaning of Article 123(1) of the Constitution. Therefore, the seven-day period for signing it by the President of the Republic of Poland is not applicable here (Article 123(3)). In conclusion, the requirements arising from Article 122 of the Constitution, which concern the competence of the President with regard to the legislative procedure, were met. Thus, the Tribunal states that it is admissible to examine this application in respect of its subject matter.

2.The object of the challenge and the constitutional problems.

2.1. In this case, the President of the Republic formulated two objections with regard to the amendment to the Act on Elections to the European Parliament.

Firstly, the President asserts that Article 4 of the amending Act of 12 February 2009 provides for a period of *vacatio legis* which is too short with regard to introducing the changes set out in Article 3 of the amending Act, which concern the Act of 23 January 2004 on Elections to the European Parliament (Journal of Laws – Dz. U. No. 25, item 219, as amended; hereinafter: the Act on Elections to the EP), and thus it infringes on an election calendar in elections to the said parliament. According to Article 4, "the Act shall enter into force after 14 days from its promulgation".

Secondly, the President argues that Article 3(2) of the amending Act, to the extent the introduction of two-day voting during elections to the European Parliament infringes on the principle of adequate specificity of law, bypasses the regulations pertaining to election silence and the sanctions for breaching thereof. The said provision in Article 10 of the Act on Elections to the EP adds the paragraphs 3 and 4 in the following wording:

"3. The voting in the elections shall be conducted for two days.

4. The day of voting shall be scheduled for a non-working day and the day preceding it".

In the opinion of the President of the Republic of Poland, such a regulation infringes on the principle of adequate specificity of law, as unclear and imprecise wording of the provision leads to uncertainty on the part of its addresses. The legislator did not regulate the institution of election silence in the case of two-day voting, and hence – in the applicant's view – this has resulted in legislative omission. In this way, in the opinion of the President of the Republic of Poland, coherence and a logical connection between particular institutions of electoral law were violated.

The President foresees problems as regards regulating the institution of a proxy for voting (Article 3(6) of the amending Act). However, the Constitutional Tribunal emphasises that the claim alleging the non-conformity of the said regulation was not included in the *petitum* of the application, and the representative of the applicant stated at the hearing that such a claim was not being made. Consequently, in this case, the examination of the constitutionality of the institution of proxy voting will not be conducted.

2.2. It follows from the jurisprudence of the Constitutional Tribunal up to this day that the purpose of preventive review is to prevent the conclusion of the legislative procedure, due to a risk of infringing upon the Constitution. Such a purpose of preventive review justifies the fact that, in the course of such review, the Tribunal limits its examination only to procedural matters and this suffices for the possible adjudication of unconstitutionality of a statute. In the case of preventive review, the adjudication of unconstitutionality of a statute in respect of the course of its enactment renders the statute ineffective. An ineffective normative act which bears only formal resemblance to a statute may not result in a change in the system of sources of law. As a result of this, the statute is still binding in the version that was to be changed by the ineffective amendment (cf. the judgment of 28 November 2007, Ref. No. K 39/07, OTK ZU No. 10/A/2007, item 129).

The preventive review of constitutionality of legislation is carried out in the situation where it is not yet known how the challenged provision will be applied in practice. Hence, the Constitutional Tribunal holds the view that such review, as it breaks the "stronger" presumption of constitutionality, should be used sparingly during the substantive review. On the other hand, for the analysis of unconstitutionality for reasons concerning substantive matters, together with procedural reasons, it is relevant if the applicant makes claims concerning both the course of enactment of a given provision as well as its content. The Tribunal's rule to act within the scope of an application allows for hearing a case within the extent a participant to the proceedings wishes to make it a subject of review. The substantive review facilitates a more effective influence of the jurisprudence of the Tribunal on the process of enacting the law. It is of significance particularly in the cases where the claims pertaining to substantive matters regard the fundamental constitutional issues or particularly important interests and values protected by the Constitution.

2.3. In this case, the President of the Republic of Poland did not challenge the course of enactment of the amending Act of 12 February 2009. However, he undermined the relevant *vacatio legis* with regard to the amendments to the Act on Elections to the EP, which has effect on when a normative act becomes binding (Article 4 of the Act, to the extent Article 3 amends the Act on Elections to the EP). According to the Tribunal, the constitutional problem in this case, apart from the claim of not maintaining adequate *vacatio legis*, also consists in the legislator's breach of the period when it is not permissible to amend electoral law, which, in constitutional jurisprudence qualifies as "significant amendments". The Tribunal wishes to point out that in the judgment of 3 November 2006, Ref. No. K 31/06 (OTK ZU No. 10/A/2006, item 147), it reconstructed the application of the grace period (a period before the day when elections are held), during which important amendments should not be made by the legislator, due to respect for the principle of a democratic state ruled by law, as well as for the individual rights of voters.
It should be noted, with regard to the applicant's stance, that the requirement to respect that period may not be considered tantamount to the legal institution of *vacatio legis* itself. The difference is aptly pointed out by the Marshal of the Sejm (p.10 of the opinion). The period lasts for at least six months before elections understood not only as the act of voting, but also as the entirety of activities included in an election calendar. The period is counted until the date of carrying out the first election activity, i.e. until issuance of a decision to order a given election. The Tribunal states that, with regard to amendments to the Act on Elections to the EP, this border date was the date of 9 March 2009.

The Tribunal wishes to point out that both of the said requirements refer to different periods. The adequate *vacatio legis* refers to the provisions which have already been passed (and promulgated), which are waiting to come into force. This follows from the essence of *vacatio legis*. 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, one can speak of entry into force only with regard to an already binding norm, i.e. one that has already been promulgated. In the same context the adequacy of the period of *vacatio legis* should be evaluated (cf. S. Wronkowska *Podstawowe pojęcia prawa i prawoznawstwa*, Poznań 2003, pp. 48-49). 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 enactment of the Constitution. However, the requirement to exempt electoral law from introducing "significant amendments" right 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 (cf. disapproval of the Constitutional Tribunal of such practice, already expressed in the statement of reasons to the judgment of 3 November 2006, Ref. No. K 31/06). It should be stressed that, according to the Venice

Commission, changes with regard to the "fundamental elements" of electoral law "should not be open to amendment less than one year before an election".

Consequently, in this case the Tribunal will analyse the course of the legislative procedure, to the extent the parties to the case raise the issue that, adequately to the jurisprudence of the Constitutional Tribunal, significant amendments made to electoral law should be introduced at a specific point before an election date. This requires, from the Tribunal, the evaluation and qualification of the amendments introduced, with regard to the criterion of "significance of amendments".

Another problem indicated by the President of the Republic of Poland pertains to the claim about vagueness and incoherence of the provisions concerning the introduction of two-day voting in elections to the European Parliament (Article 3(2) of the amending Act), due to the fact that this regulation had not yet been adjusted to the binding provisions about election silence. According to the applicant, this infringes on the principle of protection of citizens' trust in the state and its laws. Moreover, the applicant challenges this regulation on account of legislative omission.

3. The origins and aims of the amending Act of 12 February 2009.

3.1. The main assumptions of the bill of the amending Act of 12 February 2009

The amending Act of 12 February 2009 was passed on the basis of a Deputies' bill 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. The bill was received by the Sejm on 29 October 2008 (Sejm Paper No. 1391/6th term of office of the Sejm). The said Deputies filed an amendment to the bill on 17 November 2008.

In the substantiation for the bill, it was indicated that it concerned changing the rules for financing election campaigns and "tightening up" the system of financing election committees. Its object was, *inter alia*, to abolish the legal entity of committees of candidates for the office of the President of the Republic of Poland, to revoke the right to raise funding by collecting contributions from the public as well as to revoke the right to make cash deposits into bank accounts of given election committees.

The amendments to the Act on Elections to the European Parliament concerned the introduction of two-day voting, proxy voting, and the changes pertaining to the forfeiture of profits gained by election committees by breaching statutory provisions to the State Treasury. According to the Deputies who drafted the bill, the introduction of two-day voting in elections to the European Parliament was aimed at meeting the demands of various social groups and institutions. Such a regulation aims at increasing an election turnout rate and achieving a higher level of legitimisation of the Members of the European Parliament. Likewise, the institution of a proxy for voting is to increase an election turnout rate and the effectiveness of the exercise of the right to vote. The institution is to facilitate the exercise of the active electoral rights of a sufficiently large number of people.

3.2. The course of the legislative procedure.

The bill of the amending Act was referred for first reading at the sitting of the Sejm of 27 November 2008. The first reading took place on 4 December, and then the bill was referred to the Committee on the European Union and the Legislative Committee.

During the session of the Committee on the European Union (session No. 88) and the session of the Legislative Committee (session No. 58) on 21 January 2009, the Secretary of the National Electoral Commission stressed that, in accordance with the judgment of the Constitutional Tribunal of 3 November 2006 (Ref. No. K 31/06, OTK ZU No 10/A/2006, item 147), significant amendments to electoral law should be introduced no later than six months before the date of elections, understood as the day when an election calendar begins. Therefore, in the opinion of the National Electoral Commission, the only amendment that would not raise doubts as to its constitutionality is the amendment in Article 3(1) of the Act on Elections to the EP, which specifies the number of MEPs elected in the Republic of Poland. Also, the Deputies pointed out that all the deadlines allowing for amendments to the Act on Elections to the EP had been crossed, if one wished to proceed in accordance with the rules indicated by the Constitutional Tribunal (see Bulletin No. 1774, 6th term of office of the Sejm).

The bill of the amending Act was the subject of the session of the Committee on the European Union (No. 91) and of the Legislative Committee (No. 60) on 10 February 2009. At that time the Deputies also underlined that the provisions which were being drawn up would introduce significant amendments to electoral law and, due to being introduced too promptly into the legal system, might prove to be unconstitutional. However, the Deputies asserted that what constituted a significant amendment could only be determined by the Constitutional Tribunal (see Bulletin No. 1821, 6th term of office of the Sejm)

With regard to the issue of proxy voting, the Deputies indicated that, on the one hand, this institution was to facilitate the exercise of active electoral rights, and on the other hand it might infringe on the secrecy of the ballot (see Bulletin No. 1821, 6th term of office of the Sejm).

In a report of 10 February 2009, the Committee on the European Union and the Legislative Committee petitioned for enacting the bill of the amending Act.

On 11 February 2009, the second reading of the bill took place, after which the bill was again referred to the committees in order to present the report on the bill. On 12 February 2009, the committees petitioned for adopting some of the amendments (see Bulletin No. 1851, 6th term of office of the Sejm).

On 12 February 2009, the amending Act was passed. During the vote, 277 Deputies were for passing the bill and 144 were against. One person abstained from voting. On 16 February 2009 the Act was lodged with the Marshal of the Senate. By resolution of 18 February 2009, the Senate adopted the bill of the amending Act without amendments.

On 18 February 2009, the President of the Republic received the adopted bill for signing, and on 5 March 2009, in the course of preventive review, he referred it to the Constitutional Tribunal.

3.3. Scope of allegations.

The amending Act of 12 February 2009 amends the three statutes:

the Act of 27 September 1990 on the Election of the President of the Republic of Poland (Journal of Laws - Dz. U. of 2000 No. 47, item 544, as amended), the Nationwide Referendum Act of 14 March 2003 (Journal of Laws - Dz. U. No. 57, item 507, as amended; hereinafter: the Referendum Act) and the Act on Elections to the EP. The applicant's objections only concern the issues related to the amendments to the Act on Elections to the EP. Therefore, the Constitutional Tribunal will assess the conformity of the challenged amending Act to the Constitution, only within the scope of objections.

4. An election calendar in elections to the European Parliament.

With regard to the applicant's claim that the period of *vacatio legis* is not adequate, the Constitutional Tribunal will make references to the legal basis for elections to the European Parliament as well as to main points of an election calendar in the said elections.

Elections to the European Parliament are regulated by legal acts of different rank. This is the Treaty establishing the European Community (Journal of Laws - Dz. U. of 2004 No. 90, item 864/2, as amended; hereinafter: the EC Treaty) and other legal acts of the European Union. These regulations give the EU Member States considerable freedom with regard to regulating their electoral laws.

Article 19 of the EC Treaty gives rise to the obligation to extend the individual electoral right in the case of elections to the European Parliament. These common rules are the consequence of the introduction of EU citizenship and the ban on discrimination on the grounds of nationality. In accordance with the EU provisions, elections to the European Parliament are to be held every five years.

The organisation of the elections is regulated by the Act concerning the election of the representatives of the European Parliament by direct universal suffrage (Journal Laws - Dz. U. of 2004, No. 90, item 864/10, as amended) and the Council Directive 93/109/EC of 6 December 1993 laying down detailed arrangements for the exercise of the right to vote and stand as a candidate in elections to the European Parliament for citizens of the Union residing in a Member State of which they are not nationals (OJ L 329 of 30.12.1993, p. 34).

In accordance with Article 10(2) of the Act on Elections to the EP, the elections of members of the European Parliament are called in the Republic of Poland by the President of the Republic of Poland, in a form of a decision, no later than 90 days before the elections, setting the date for a non-working day falling within the election period specified in the provisions of the EU law. If the elections to the EP were to be held by 7 June 2009, then it was the obligation of the President of the Republic of Poland to issue a decision to order elections to the European Parliament no later than on 9 March 2009. Therefore, the Constitutional Tribunal states that 9 March constitutes a border date for introducing amendments to the Act on Elections to the EP, for ordering elections is the first election activity. The requirements concerning the legislative procedure and adequate *vacatio legis* do not refer to 7 June 2009 – that is the polling day, but to the day when the election calendar begins. In the light of the above, assessing the conformity of the challenged regulation to the Constitution, the Constitutional Tribunal, as a starting point of considerations, will take the day of 9 March 2009 into account (the day of ordering elections by the President of the Republic of Poland).

5. The claim that the principle of adequate *vacatio legis* was infringed upon (Article 4 in conjunction with Article 3 of the amending Act) and the claim that Article 2 of the Constitution was infringed upon with regard to the introduction of significant amendments to electoral law, at the latest, 6 months before the elections.

The Constitutional Tribunal stresses that the normative acts containing legal norms that are binding within a given time-frame should have a specified date of entry into force. For that reason, if a date of entry into force is not set out in a statute itself, it is usually included in separate provisions which regulate the entry into force of a legal act. Entry into force means that a given normative act becomes legally binding. The provision on entry into force has a special character, as it is a norm by means of which one can identify the beginning of the period when a normative act is binding. Thus, there is a moment in time when a given norm becomes an element of the legal system. Such a moment, marking the beginning of the period when a normative act is binding, is denoted by carrying out the last of the series of conventional activities constituting the enactment process, i.e. its promulgation.

The promulgation entails that a given legal act becomes valid, that is it constitutes an element of the legal system. The norm which has not been enacted cannot bring about any legal effects, including those related to the onset of the running of the period of *vacatio legis*. As it has been indicated above, the period of *vacatio legis* is related to the moment when a regulation becomes applicable. This is related to the moment of entry into force. However, one can speak of entry into force only with regard to the norm which is already binding, i.e. which has already been promulgated.

The correctness of establishing the period of *vacatio legis* should be determined with regard to the moment of promulgation of a normative act (it may not be assessed in an abstract way). In this case, the President of the Republic of Poland challenged a norm arising from the provision on entry into force of the amending Act, i.e. Article 4, within the scope of the amendments to the Act on Elections to the EP. The norm challenged by the President stipulates that the amendments to the Act on Elections to the EP shall come into force within 14 days from the day of their promulgation.

Setting the date of entry into force of a statute, in each case, is at the legislator's discretion. However, when making a decision about the date of entry into force of a normative act, the legislator does not have complete freedom. Setting the date, the legislator cannot act arbitrarily; moreover, the legislator has the obligation to show all due diligence in indicating an adequate, in respect of the regulated issue, interim period when a statute has already been promulgated but has not yet entered into force (*vacatio legis*). When determining the length of a period of *vacatio legis*, the legislator should take into account the following circumstances: how effectively a given statute will achieve its aim, how harmonised the legal system is, to which the given statute will be included, and to what extent the statute will comply with the requirement of not making any decisions that would surprise addressees (see S. Wronkowska, M. Zieliński, *Komentarz do zasad techniki prawodawczej*, Warszawa 2004, p. 111). While assessing whether the date of entry into force of a statute was set correctly, the Constitutional Tribunal, being a court of law that takes into account the aforementioned circumstances which are relevant for the assessment

of adequacy of *vacatio legis*, may not disregard the character of the regulated matter. The moment a statute enters into force and the related issue of adequate *vacatio legis* are set in a concrete time-frame which requires referring to legal situations which are relevant to the character of the regulated matter. In the case of electoral law, this time-frame is set forth by the calendar of procedural activities related to holding elections (election calendar). In his application, the President of the Republic of Poland refers to this particular circumstance, asserting that amendments to electoral law were being introduced during the period when procedural activities related to holding elections were being carried out, which infringes on the requirement to maintain adequate *vacatio legis*.

When determining if given provisions conform to the Constitution, the Constitutional Tribunal adjudicates on the basis of up-to-date legal and actual context, related to the regulation under review. Strictly speaking, it follows from the jurisprudence of the Constitutional Tribunal up to this day that for the assessment of constitutionality of "the content of a legal norm it is appropriate to refer to the constitutional provisions from the day of adjudication, whereas when it comes to the assessment of legislative competence to issue a given provision under review and the course of its enactment – the constitutional provisions from the day of the enactment of the that provision should be considered" (judgment of 25 November 1997, Ref. No. U 6/97, OTK ZU No. 5-6/1997, item 65, and the judgment of 8 December 1998, Ref. No. U 7/98, OTK ZU No. 7/1998, item 118 and the decision of 12 October 1999, Ref. No. Ts 138/99, OTK ZU No. 1/2000, item 39). Since, in this case, the Constitutional Tribunal adjudicates about the norm set out in Article 4, to the extent Article 3 of the amending Act introduces amendments to the Act on Elections to the EP (it does not analyse the legislative competence of the legislator to draft such a provision nor does it examine the way it was enacted), it is the assessment of this provision that needs to be carried out in relation to the constitutional provisions from the day of adjudication.

In the context of this case, it should be stressed that, since the time the President submitted his application to determine the constitutionality of the relevant provisions of the Act on Elections to the EP, the actual context of the case has changed considerably. On 7 June 2009 the election to the European Parliament was held. By resolution of 26 August 2009, the Polish Supreme Court recognised the election as valid. The provisions challenged by the applicant may possibly be applicable to a future election procedure. Consequently, the applicant's claim that amendments are introduced to electoral law during the period when procedural activities, arising from an election calendar, are carried out, has become outdated. Indeed, those activities from the election calendar were carried out. Therefore, there are no grounds to assume that Article 4 in conjunction with Article 3 of the amending Act of 12 February 2009 infringes on Article 2 of the Constitution.

5.1. The analysis of the issue of adequate *vacatio legis* in electoral law in the light of the jurisprudence of the Constitutional Tribunal.

The Constitutional Tribunal maintains its view, expressed on numerous occasions with regard to Article 2 of the Constitution, that the requirement of adequate *vacatio legis* constitutes a separate constitutional principle of law. This principle is an element of a

democratic state ruled by law. It is also based on the principle of protection of citizens' trust in the state and its laws. Observing this rule is meant to enhance this trust (cf. the judgment of 9 April 2002, Ref. No. K 21/01, OTK ZU No 2/A/2002, item 17). At the same time the principle of adequate *vacatio legis* is one of the directives of appropriate legislation, the use of which is the legislator's obligation (see the judgment of the Constitutional Tribunal of 15 February 2005, Ref. No. K 48/04, OTK ZU No. 2/A/2005, item 15).

At the beginning of the 1990s, the Tribunal assumed that the length of the period of *vacatio legis* was to allow the addressees to familiarise themselves with the content of legal norms (cf. decisions of 11 February 1992, Ref. No. K 14/91, OTK ZU of 1992 r., Vol. I, item 7 and of 29 January 1992, Ref. No. K 15/91, OTK ZU of 1992, Vol. I, item 8). Next the Tribunal elaborated on this, stating that, in accordance with the principle of protection of citizens' trust in the state and its laws, the legislator was supposed to allow the addressees not only to familiarise themselves with new regulations, but also to adjust to the changing law. Such a stance of the Constitutional Tribunal entails that the adequacy of *vacatio legis* is determined by the degree of the legislator's interference in the current legal situation of the addressees and the consideration that the addressees need to have a possibility of familiarising themselves with the new regulation (cf. the decisions of 1 June 1993, Ref. No. P 2/92, OTK of 1993, Part II, item 20 and of 30 November 1993, Ref. No. K 18/92, OTK of 1993, Part II, item 41).

The Constitutional Tribunal emphasises that the adequacy of at least 14-day period of *vacatio legis* is subject to review in the context of each particular regulation. Determining whether, in a given case, the period of *vacatio legis* is adequate depends on the entirety of circumstances, and in particular on the object and content of the newly enacted norms as well as on the outcome of the analysis on how different these norms are from the previous regulations. The limitation of that period is admissible only as an exceptional measure which is an exception justified by important public interest (cf. the judgment of the Constitutional Tribunal of 20 December 1999, Ref. No. K. 4/99, OTK ZU No. 7/1999, item 165).

The Constitution neither sets out a specific period of *vacatio legis* nor directly regulates that issue. However, the minimal period arises from the Act of 20 July 2000 on Promulgation of Normative Acts and Certain Other Legal Acts (Journal of Laws - Dz. U. 2007 r. No. 68, item 449, as amended; hereinafter: the Act of 20 July 2000), although in certain cases, provided for in the provisions of this Act, it may be shorter, and in exceptional circumstances a given statute may even enter into force without a period of *vacatio legis*, if this is necessary and "the principles of a democratic state ruled by law do not forbid that" (Article 4(2) of the Act of 20 July 2000). The Tribunal, still on the basis of the former Constitution, indicated a possibility of departing from *vacatio legis*, provided a given statute does not impose obligations on citizens or other subjects that are not subordinate to state authorities, and its prompt entry into force is justified by important public interest (see the decision of 2 March 1993, Ref. No. K. 9/92, Constitutional Tribunal's Decisions - OTK of 1993, Part I, item 6).

It follows from the jurisprudence of the Constitutional Tribunal up to this day that, in principle, there is no universal rule for determining if the period of *vacatio legis* is

adequate. The Tribunal indicated specific time requirements with regard to the period of *vacatio legis*, linking them to the function of a given statute in the legal system and its character as well as to the kind of social relations it regulated. The specified time-frame was to be "adequate" on the basis of Article 2 of the Constitution.

However, the Constitutional Tribunal indicated a minimal period of *vacatio legis* in the context of amendments to the tax system (the promulgation of a statute shall take place at least a month prior to the end of a given tax year). As regards amending the provisions of tax law, the jurisprudence of the Tribunal is so consistent that one can speak of existence of a specific constitutional standard.

5.2. The analysis of the claim that the legislator infringed on Article 2 of the Constitution with regard to introducing significant amendments to electoral law no later than six months before elections.

According to the Constitutional Tribunal, apart from the claim about not maintaining adequate *vacatio legis*, the constitutional problem in this case, indirectly associated by the applicant with an adequate period of *vacatio legis* after a statute's enactment and promulgation, is the issue of the legislator's breach of the period during which electoral law is exempted from certain amendments introduced thereto shortly before elections.

As it has already been mentioned, it follows from the guidelines of the Venice Commission from 2002 (Code of Good Practice in Electoral Matters) that generally it is inappropriate to amend electoral law shortly before elections. Nevertheless, the rules set out in the Code of Good Practice in Electoral Matters may not, by itself, constitute a higher-level norm for review of the challenged Act. For the Code is not an international agreement which is binding for Poland. However, in the aforementioned judgment of 3 November 2006 (Ref. No. K 31/06), the Constitutional Tribunal indicated that in the case of electoral law, 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. The Tribunal points out that in the case of the amendments to the Act on Elections to the EP which are being reviewed, such circumstances did not occur.

In this case, the Constitutional Tribunal fully maintains its view presented in the judgment of 3 November 2006 (Ref. No. K 31/06). Juxtaposing it with the assessment of the amendments to the Act on Elections to the EP, the Tribunal states that the legislator did not observe the given interval, as the amendments to electoral law, which may be qualified as significant, were introduced to electoral law less than six months before the elections.
The necessity to maintain a period of no less than six months, during which no significant amendments are made to electoral law (in relation to the first activity from an election calendar) is, in principle, an indispensible normative element of Article 2 of the Constitution. These entails that subsequent amendments to electoral law should be confronted, by the Tribunal, with the constitutional standard understood in this way, which arises from the principle of a democratic state ruled by law.

5.3. The assessment of constitutionality of Article 4 in conjunction with Article 3 of the amending Act of 12 February 2009 and the assessment of constitutionality of the claim that Article 2 of the Constitution was infringed upon with regard to the introduction of significant amendments to electoral law no later than six months before elections.

The assessment of constitutionality of Article 4 of the amending Act of 12 February 2009 and the assessment of the claim that Article 2 of the Constitution was infringed upon with regard to the introduction of significant amendments to electoral law no later than six months before elections must be preceded by the assessment of the changes which were introduced by the said amendment to the Act on Elections to the EP, and in particular their classification from the perspective of "significant amendments" to electoral law.

In the Tribunal's opinion, already presented in the Judgment of 3 November 2006 (Ref. No. K 31/06), the issue of "significance of amendments" to the provisions of electoral law needs to be assessed with reference to the specific amendments of these provisions. The Tribunal fully maintains that stance in this case. 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. In the aforementioned judgment of 3 November 2006 (Ref. No. K 31/06), as "the most essential elements" of electoral law for elections to local self-government authorities, the Tribunal regarded the way of delineating constituencies, the adopted electoral thresholds as well as the algorithms used to determine the outcome of elections. Therefore, for the assessment of "significance of the amendments", it is of importance whether the newly adopted provision affects, for instance, the rules for casting votes, the procedure for determining the outcome of voting, the way of distributing seats or the requirements for becoming a member of an electoral commission. What is vital here is 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 the doctrine of law and in practice, various terms are used for the above-mentioned regulations of electoral law, such as *electoral system sensu stricto* (as a synonym for the procedure for determining the outcome of voting), *basic changes of electoral law* or *fundamental elements of electoral law* (the category from the Code of Good Practice in Electoral Matters by the Council of Europe). The task of the Constitutional Tribunal in the said case is not to systematise the terminology of electoral law, which has been in use in Polish and foreign literature on the subject for many years. For the analysis of the issue of "significant amendments" to electoral law, it is of importance to indicate a method of constitutional review of amendments to electoral law, presented by the Tribunal in the judgment of 3 November 2006 (Ref. No. K 31/06). The extent of amendments to electoral law must be reflected in an adequately long period of adjustment to them, which also includes the requirements for their earlier enactment before elections (the interval), as well as the requirements for maintaining adequate *vacatio legis* for the entry into force of the adopted provisions.

In the Tribunal's view, two-day voting in elections to the European Parliament constitutes, in the light of the analysed provisions, a "significant amendment". This

regulation is of significance as regards not only the course of voting but also its outcome, and requires certain conditions for its implementation (the introduction of this change is not possible without certain material and technical efforts). Since the given amendment to the Act on Elections to the EP has the attributes of a "significant amendment", the thesis of the Tribunal is fully applicable here that there is a need to pass such regulations no later than six months before elections, understood as the entirety of activities included in an election calendar, and to ensure adequate *vacatio legis* for their entry into force

The Tribunal does not find arguments that would support the view of the Marshal of the Sejm that it was necessary to introduce these amendments directly before the first election activity in the elections to the European Parliament in 2009. In the Tribunal's opinion, it could only be justified to introduce the amendment set out in Article 3(1) of the amending Act, pursuant to which the number of Members of the European Parliament elected in the Republic of Poland is the number specified in the provisions of EU law. In the present regulatory environment, Article 3(1) of the Act on Elections to the EP provides for the election of 54 MEPs, which is contrary to the current regulations of the primary law of the European Union. This clash was resolved by the bodies applying electoral law on the basis of Article 91(2) of the Constitution, pursuant to which an international agreement ratified upon prior consent granted by statute (including the primary law of the European Union) shall have precedence over statutes if such an agreement cannot be reconciled with the provisions of such statutes. Ordering elections to the European Parliament by the decision of 9 March 2009 to order elections to the European Parliament (Journal of Laws – Dz. U. No. 37, item 287), the President of the Republic of Poland specified in § 2 that in the Republic of Poland 50 MEPs are elected. This way he applied the norm concerning a conflict of laws arising from Article 91(2) of the Constitution. Therefore, on the basis of Article 190(2) of the EC Treaty, Poland has had 50 Members in the European Parliament since the beginning of the parliamentary term 2009-2014. The current wording of Article 190(2) of the EC Treaty was specified in Article 9(2) of the Act concerning the conditions of accession of the Republic of Bulgaria and Romania and the adjustments to the Treaties on which the European Union is founded (OJ L 157 of 21.06.2005, p. 203).

All things considered, the Constitutional Tribunal holds the view that the first election activity in the context of the elections to the European Parliament was ordering the elections on 9 March 2009. Therefore, the requirement of a six-month period when no significant amendments are introduced to electoral law should be related to that date. Hence, significant amendments to the Act on Elections to the EP should have been enacted six months prior to the date of ordering elections. The Act should have been adopted by 9 October 2008, in order to maintain the six-month period when no significant amendments were introduced to electoral law. However, the bill of the amending Act was adopted on 12 February 2009 and submitted to the President of the Republic of Poland for signature on 18 February 2009. The deadline set for signing the bill was 5 March 2009. Taking into account the obligation to promulgate the bill and the 14-day period of *vacatio legis*, the amended provisions might have entered into force already after the activities of the election calendar began. Therefore, the Constitutional Tribunal shares the opinion of the President of the Republic of Poland, presented in the application of 5 March 2009, that the challenged regulation, with regard to its amendments to the Act on Elections to the EP,

introduced inadequate *vacatio legis* in the situation where the elections took place on 7 June 2009, and notes at the same time that the significant amendments were introduced without observing the aforementioned six-month period (which would have excluded that kind of amendments). The accumulated effects of the legislator's two inappropriate actions caused the legislator to infringe on the constitutional deadline meant to allow the President to make a decision with regard to signing the bill, and to deprive the President of the possibility of adopting the election calendar in a proper way.

The Constitutional Tribunal stresses that, since the elections to the European Parliament were held on 7 June 2009, the circumstances in which the Tribunal is to assess the adequacy of *vacatio legis* have changed, as well as the moment in which the legislator introduced the amendments to electoral law. From a formal point of view, the *vacatio legis* of the Act remains the same, but the possibility of applying the new provisions has changed. It will be possible to apply these provisions only to the subsequent elections to the European Parliament (according to the current regulations they should be held in five years' time). Therefore, the period for familiarising oneself with these regulations and adjusting to them constitutes a completely different time-frame.

5.4. Conclusions.

To sum up the above arguments, the Constitutional Tribunal holds the view that Article 4 in conjunction with Article 3 of the amending Act of 12 February 2009 conforms to Article 2 of the Constitution. Due to the change of the time context of the assessment of constitutionality, the Tribunal decides that the applicant's claim that inadequate *vacatio legis* had been set before the day when the election calendar activities began, as a result of which the amended provisions could only enter into force after the activities of the election calendar had begun, lost its relevance after 7 June 2009, when the elections to the European Parliament were held.

The same conclusion needs to be drawn with regard to the moment when the legislator decided to introduce the amendments to electoral law, which the Tribunal recognised as significant amendments.

Since the Act on Elections to the EP will be applied to the elections which, in principle, will be held in five years' time, there is no need to introduce a different period of *vacatio legis*. The entry into force of the amending Act of 12 February 2009, after the Constitutional Tribunal's judgment and after the singing of the Act by the President of the Republic of Poland, with the *vacatio legis* specified therein, does not constitute a pitfall for the citizens nor does it undermine the citizens' trust in the state and its laws.

6. The claims about the infringement on the principle of adequate specificity of law and about legal omission.

The President of the Republic of Poland challenged Article 3(2) of the amending Act, apart from inadequate *vacatio legis*, due to the infringement on the principle of adequate specificity of law. Article 3(2) has introduced two-day voting in elections to the European Parliament. Pursuant to this provision, the date for voting is set for a non-working day and the day preceding it. In the opinion of the President of the Republic of Poland, this regulation is inconsistent with Article 73(1) of the Act on Elections to the EP,

which stipulates that an election campaign shall end 24 hours before an election day. In accordance with the definition set out in the Act on Elections to the EP, the election day is a non-working day. In the applicant's view, in the case of two-day voting, the election campaign would end directly before the first day of voting, that is on Friday at midnight. The President believes that in the case of the legal institution of two-day voting, conceived in that way, one can speak of legal omission. It entails inconsistence and imprecision of the regulation. Thus, in the applicant's view, this leads to the situation where it may be the case that the legislator will be replaced by the authorities responsible for the application of law.

With reference to this claim, the Constitutional Tribunal will analyse whether in this case there was legal omission, which has an impact on the principle of adequate specificity of law.

6.1. The significance of the requirement of adequate specificity of law in the light of the principle of a democratic state ruled by law.

In the jurisprudence of the Constitutional Tribunal up to this day, the term of specificity of law has been referred to many times. In this judgment, the Tribunal has decided to recapitulate on its previous stances, systematising the terms used and the relations between them.

The term "specificity of law" derives its origins from the German doctrine and is an element of the concept of a state of law (*Rechtsstaat*). In a narrow sense, specificity refers to the content of a legal provision and is understood as imperative for precision, i.e. the possibility of deriving from it an unambiguous legal norm. In a broad sense, "specificity of law" means both the precision of a provision and the clarity of law, which is meant to be comprehensible and communicative to a group of subjects as large as possible. (see T. Spyra, "Zasada określoności regulacji prawnej na tle orzecznictwa Trybunału Konstytucyjnego i niemieckiego Sądu Konstytucyjnego*", Transformacje Prawa Prywatnego* Issue No. 3/2003, p. 59; T. Zalasiński, *Zasada prawidłowej legislacji w poglądach Trybunału Konstytucyjnego*, Warszawa 2008, pp. 183-185). The Constitutional Tribunal uses the term "specificity of law" in a broad sense, in which the requirement of clarity is one of the elements of specificity.

The requirement for adequate specificity of a legal regulation has its constitutional basis in the principle of a democratic state ruled by law. It refers to all regulations (directly or indirectly) which shape the legal position of the citizen. Indeed, the principle of adequate specificity of law is one of the directives of appropriate legislation. It also constitutes an element of the principle of protection of citizens' trust in the state and its laws, which arises from Article 2 of the Constitution (see e.g. judgments of: 15 September 1999, Ref. No. K 11/99, OTK ZU No. 6/1999, item 116; 11 January 2000, Ref. No. K 7/99, OTK ZU No. 1/2000, item 2; 21 March 2001, Ref. No. K 24/00, OTK ZU No. 3/2001, item 51; 30 October 2001 r., Ref. No. K 33/00, OTK ZU No. 7/2001, item 217; 22 May 2002, Ref. No. K 6/02, OTK ZU No. 3/A/2002, item 33; 20 November 2002, Ref. No. K 41/02, OTK ZU No. 6/A/2002, item 83; 3 December 2002, Ref. No. P 13/02, OTK ZU No. 7/A/2002, item 90; 29 October 2003 r., Ref. No. K 53/02, OTK ZU No. 8/A/2003, item 83; 9 October 2007, Ref. No. SK 70/06, OTK ZU

No. 9/A/2007, item 103). It is also functionally related to the principles of legal confidence and security.

6.2. The elements constituting the principle of adequate specificity of law.

As it has been indicated above, the requirement to maintain adequate specificity of a legal regulation has a character of a directive applicable to the whole system, although it is particularly aimed at the regulations shaping the position of a person and a citizen. The broad application of the aforementioned requirement corresponds to the complex structure of the principle of adequate specificity of law.

The constitutional norm imposing the adherence to the principle of adequate specificity of legal regulations is a legal principle. This imposes on the legislator the obligation to optimise in the law-making process. The legislator should strive for the complete fulfilment of the requirements constituting this principle. Therefore, the degree of specificity of particular regulations is subject to relativisation, on a case-to-case basis, with regard to the actual and legal circumstances which concern the regulation being made. This relativisation is a natural consequence of vagueness of the language in which legal texts are drawn up as well as of the variety of matters that are subject to regulation.

For the above reasons, the legislator is obliged to make legal provisions which would be as specific as it is possible in a given case, in respect of both the content as well as the form. The two dimensions of specificity of law comprise criteria which were pointed out on numerous occasions in the jurisprudence of the Constitutional Tribunal, namely: precision of a legal regulation, clarity of a provision and its legislative correctness. These criteria constitute the so-called test of specificity of law, which should be applied to every examined regulation.

Precision of a legal regulation should be understood as a possibility of decoding unambiguous legal norms (as well as their consequences) from provisions, by means of interpretative rules applied in a given legal culture. In other words, the requirement of specificity of legal provisions should be understood as a requirement to formulate the provisions in such a way that they would ensure a sufficient degree of precision when it comes to determining their meaning and legal effects (see, in particular, the Constitutional Tribunal's decisions of: 19 June 1992, Ref. No. U 6/92, OTK of 1992, Part I, item 13; 1 March 1994, Ref. No. U 7/93, OTK of 1994, Part I, item 5; 26 April 1995, Ref. No K 11/94, OTK of 1995, Part I, item 12; decision of 24 February 2003, Ref. No. K 28/02, OTK ZU No. 2/A/2003, item 18, and the judgments of: 17 October 2000, Ref. No. SK 5/99, OTK ZU No. 7/2000, item 254 and of 28 June 2005, Ref. No. SK 56/04, OTK ZU No. 6/A/2005, item 67). Precision of a provision shows in the specificity of regulations concerning rights and obligations, when their content is unambiguous and allows for the exercise thereof. This is possible on the condition that the legislator creates precise legal norms.

Clarity of a provision is to guarantee its communicativeness to its addressees. In other words, this is about comprehensibility of a provision on the basis of general language. The requirement of clarity means an imperative to create provisions which are comprehensible to their addressees who have the right to expect, from a reasonable legislator, that the norms enacted will not raise doubts as to the obligations they impose

and the rights they grant. Vagueness of a provision in practice entails uncertainty of the legal situation of the addressee of a given norm as well as means that specifying that situation is left to the bodies applying the law (cf. the judgments with Ref. No. K 24/00 and K /02, and the judgment of 27 November 2007, Ref. No. SK 39/06, Official Collection of Constitutional Tribunal's Decisions - OTK ZU No. 10/A/2007, item 127). In accordance with the established jurisprudence of the Constitutional Tribunal, enacting vague and ambiguous provisions which do not let citizens to foresee the legal consequences of their actions is an infringement on the Constitution (cf. the judgments with Ref. No. K 6/02 and K 41/02).

The criteria for correctness of legal provisions are relatively the easiest to diagnose. Correctness means that a provision meets the requirements of appropriate legislation, which are set out in the Rules on Legal Drafting. These are requirements pertaining to the technical aspect of legal drafting and are of secondary character in relation to the first two criteria, i.e. the requirement of correctness is to guarantee such wording of legal norms which will ensure their precision and clarity.

As the Tribunal indicated in the judgment of 21 March 2001 (Ref. No. K 24/00), the Rules on Legal Drafting constitute a praxeological canon which should be respected by the legislator of a democratic state ruled by law.

6.3. The application of the principle of specificity of law in the process of reviewing the constitutionality of law (test of adequate specificity of law).

6.3.1. The test of adequate specificity of law comprises the aforementioned criteria, described in the jurisprudence of the Constitutional Tribunal, which refer to the assessment of a given provision; however, none of them independently determines the constitutionality of the regulation under review. The role of particular criteria in the assessment of constitutionality depends on the factors such as the kind of the regulated matters, the group of addressees at whom the provisions are aimed, and, above all, the degree of interference of proposed regulations in the constitutional rights and freedoms.

In order to regard a regulation as unconstitutional, when an applicant challenges its specificity, it is not sufficient to state abstractly that the wording of the law is vague. Not in every case, imprecise wording and vague content of a provision justify eliminating it from the legal system, by decision of the Constitutional Tribunal. In the opinion of the Tribunal, it may be justified to rule the provision lacking in clarity and precision as unconstitutional as long as its deficiencies are so considerable that the discrepancies arising from them may not be eliminated by means of ordinary measures, aimed at eliminating inconsistencies in the application of law.

Rendering a provision invalid, due to the fact that it lacks in clarity and precision, should be regarded as a last-resort measure, applied when other methods of ruling out doubts as to the content of the provision, in particular by interpreting it, will prove insufficient (see the Constitutional Tribunal's decision of 27 April 2004, Ref. No. P 16/03, Official Collection of Constitutional Tribunal's Decisions – OTK ZU No. 4/A/2004, item 36, and the judgments of: 16 December 2003, Ref. No. SK 34/03, OTK ZU No. 9/A/2003, item 102; 28 June 2005, Ref. No. SK 56/04; 15 January 2009, Ref. No. K 45/07, OTK ZU No. 1/A/2009, item 3).

The assessment of the constitutionality of a normative act always has to have a complex character. In the case of specificity, the complexity of that process is observed at two levels. Firstly, with reference to the analysis of specificity alone, the aforementioned aspects of the test of adequate specificity of law (precision, clarity, appropriateness) need to be taken into account in the first place, and then, in the right proportion, they should be referred to the character of the regulation under review. The other level is the axiological context, in which the constitutional review of norms is conducted. This context comprises the interpretation of the entirety of constitutional rules, principles and values, with which the norm under review needs to be confronted; the interpretation of the norm has been derived from the provision which was previously subject to formal review (in respect of specificity).
In the same way, an infringement on the principle of adequate specificity of law may not be automatically identified as a form of unconstitutionality of a provision. As it is noted in the literature on that topic, failure to achieve the required level of specificity may not be regarded as a sufficient condition for recognising the unconstitutionality of the provision (see T. Spyra, *op. cit.*, pp. 72-74).

All things considered, the Constitutional Tribunal holds the view that not every linguistically imprecise, unclear and illogical provision or a group of provisions may be automatically regarded as unconstitutional.

6.3.2. Applying the above considerations to the analysis of Article 3(2) of the amending Act, the Tribunal notes that the dominant criterion for the analysis of the provision is, in this case, its precision. Indeed, the applicant's argumentation suggests that, as he asserts that the incoherence and inconsistence on the part of the legislator lead to the infringement of the principle of adequate specificity. However, in this context, the Constitutional Tribunal has proved that the doubts as to the content of the provisions concerning two-day voting in elections to the European Parliament may be dismissed, by interpreting the provisions in accordance with the Constitution.

The Act on Elections to the EP sets forth the dates for carrying out particular election activities, with reference to the election day. The Tribunal holds the view that the dates of the activities preceding the "election day" must be counted from the first day of voting, whereas the dates concerning the activities to be carried out after the "election day" must be counted from the second day of voting. Election silence, as referred to in Article 73(1) and (3) of the Act on Elections to the EP in conjunction with Article 87 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), encompasses the 24-hour period preceding the first day of voting in elections to the European Parliament.

Therefore, it becomes possible to reconstruct precise legal norms on the basis of the said provision, by means of generally accepted rules of interpretation. The circumstance that has an effect on such assessment of a given provision is the fact that in the first place it is aimed at state bodies, as well as subjects dealing with electoral laws as part of their professional activity, and from them one can expect expertise both in the electoral matters and in the rules of interpretation conducted in conformity to the Constitution. Also, for these reasons, one may not speak that the requirement for clarity with regard to a regulation has been significantly infringed upon.

The aforementioned vertical discrepancy is definitely far from the canons of correctness, which is also one of the elements of the test of adequate specificity of law. However, in the situation where, as the Tribunal has presented above, it is possible to reconstruct precise legal norms on the basis of appropriate interpretation of provisions, there is no basis for recognition of their unconstitutionality merely on the grounds of breaching the rules on legal drafting.

At the same time the Constitutional Tribunal wishes to emphasise that, in the course of legislative work, the legislator should act with due diligence and avoid the situations where new provisions would lead to similar incoherence.

Therefore, the Constitutional Tribunal states that the challenged provisions are consistent with the constitutional principle of a democratic state ruled by law. For there was no contravention of the extent beyond which the challenged regulation would have to be regarded as infringing on the principle of adequate specificity of law. Therefore, there is no necessity to regard the provisions as unconstitutional.

6.4. Legislative omission in the jurisprudence of the Constitutional Tribunal.

6.4.1. The applicant asserted that in Article 3(2) of the amending Act there was a case of legislative omission. The Constitutional Tribunal did not share the opinion of the applicant. Therefore, there is no justification in carrying out a separate analysis on the issue of legislative omission.

However, referring to its scope of competence, the Tribunal emphasises that it may examine whether the provisions under review do not lack certain normative elements, the inclusion of which is necessary from the point of view of a higher-level norm for constitutional review of a given regulation (cf. in particular the decision of 3 December 1996, Ref. No. K 25/95, OTK ZU No. 6/1996, item 52 and the judgments of: 6 May 1998, Ref. No. K 37/97, OTK ZU No. 3/1998, item 33, being consistent with that line of jurisprudence after the enactment of the Constitution of 1997; 9 October 200, Ref. No. SK 8/00, OTK ZU No. 7/2001, item 211; 16 November 2004, Ref. No. P 19/03, OTK ZU No. 10/A/2004, item 106). Thus, in the case of a regulation which is incomplete, it is possible to question its scope (see, *inter alia*, the decision with Ref. No. K 25/95, as well as numerous subsequent decisions, including e.g. the judgments of: 6 May 1998, Ref. No. K 37/97; 30 May 2000, Ref. No. K 37/98, OTK ZU No. 4/2000, item 112; 24 October 2000, Ref. No. SK 7/00, OTK ZU No. 7/2000, item 256, and 24 October 2001, Ref. No. SK 22/01, OTK ZU No. 7/2001, item 216). Consequently, the Tribunal is competent to review the constitutionality of law as to whether a given provision under review does not lack any regulations without which - due to the nature of the regulated subject matter - it may raise doubts as regards its constitutionality. The claim about unconstitutionality may, therefore, concern what the legislator regulated in a given act as well what the legislator omitted, although observing the Constitution, it should have regulated.

The Parliament is entitled to a broad decision margin when it comes to the choice of the subject matter to be regulated by its statutes. However, once such a decision is made, the regulation of the subject matter must be carried out in accordance with the constitutional requirements.

To sum up, possible review of legislative omission by the Tribunal on no account may result in "supplementing" the current legal regulations with solutions which would be desirable from the point of view of the initiator of these proceedings, or deliberate for other reasons. This would infringe on the principle of separation and balance of powers, and as a result it would mean that the Tribunal would go beyond its constitutional role of the so-called negative legislator (cf. in particular the judgments of: 19 November 2001, Ref. No. K 3/00, OTK ZU No. 8/2001, item 251; 13 November 2007, Ref. No. P 42/06, OTK ZU No. 10/A/2007, item 123; 10 March 2009, Ref. No. P 80/08, OTK ZU No. 3/A/2009, item 26).

6.4.2. Taking into consideration the conclusions drawn from the analysis of the concept of legislative omission and the principle of adequate specificity of law, the Constitutional Tribunal holds the view that in this case there are no grounds to state there is legislative omission. From Article 3(2) of the amending Act, it is possible to derive a legal norm concerning election silence in two-day elections to the European Parliament. In the opinion of the Tribunal, it is hard to argue that two-day voting in elections to the European Parliament is an incomplete regulation. The discrepancy of the new provisions with the regulations concerning election silence is horizontal. It is outside the competence of the Constitutional Tribunal to review mutual compliance of provisions of the same rank. Hence, it may not assess the legislator's inconsistency with regard to different regulations of similar situations in different statutes. The mere inconsistency of the provisions related to the inadequate length of the period of election silence before two-day voting does not render this regulation unconstitutional. Thus, this is not the case of legislative omission.

The Constitutional Tribunal may adjudicate non-conformity to the Constitution in the case of such a regulation, only if other methods of eliminating imprecision and unclarity of the content of a provision would prove to be insufficient. The provisions pertaining to two-day voting and election silence are sufficiently clear to allow for derivation of appropriate norms by means of standard methods of interpretation. However, not having the competence to judge the intentions of the legislator, the Tribunal may not voice any opinions as to why the legislator did not amend the provisions concerning election silence in the case of two-day elections.

The Tribunal notes that the applicant considers the "election day" to be merely the second day of voting. The Constitutional Tribunal regards this interpretation as wrong. In the Tribunal's opinion, the provisions of the Act on Elections to the EP, pertaining to the dates for particular election activities, should be interpreted differently. For it should be assumed that the dates for the activities preceding the "election day" must be counted from the first day of voting, whereas the dates concerning the activities to be carried out after the "election day" must be counted from the second day of voting. In the case of two-day voting, the election day shall be both the first and the second day of voting. Consequently, the Tribunal states that in the case of two-day voting, it should be assumed that election silence begins 24 hours before the first day of voting. This is the only correct interpretation of that regulation.

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