

Constitutional Reviews of Incomplete Regulations in Poland

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1. Introduction

The constitutional review of laws in Poland is centralised and is performed by a special court: the Constitutional Tribunal (CT). One of the major problems faced by that body in the exercise of its judicial functions is the relatively frequent need to evaluate the so-called incomplete regulations, which, from the viewpoint of constitutional norms, are defective; that is, their scope of application is too narrow, they do not take into account constitutionally significant content, nor have they been set at all.¹ This issue has not yet been satisfactorily resolved and constitutes a permanent source of discrepancies in CT judgments, which violates their internal coherence. In the literature, it is also described as the constitutional review of legislative omissions and oversights.²

The Polish model of the constitutional justice system provides for the separation of judicial review powers (associated with pronouncing judgments regarding the hierarchical compliance of normative acts) from legislative powers (aimed at supplementing the system of law with specific legal norms).³ The latter function, as a matter of principle, belongs exclusively to the area of activity of legislative bodies elected via general suffrage. The phenomenon of incomplete regulations highlights how, in practice, a constitutional court may be confronted with a situation whereby the failure to pass an appropriate regulation and the consequent legal gap turn out to be unacceptable from the viewpoint of constitutional standards, including

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- 1 The notion of 'incomplete regulations' is of a descriptive nature. It most comprehensively concerns the situations whereby a normative act arouses constitutional doubts owing to the scope of problems it embraces or the catalogue of subjects it is addressed to. In this sense, both 'oversights' as well as 'legislative omissions' could be considered as incomplete regulations. It is a collective category naming both of those cases. Most problematic in the jurisdiction of European constitutional courts, the achievements of which are referred to by the Polish CT, is the constitutional review of 'legislative omissions', which occur also as a result of purposeful legislative inertia. This problem will be discussed further on in this article, consideration being given to Polish systemic specificity. For more information on how the notions of 'oversight' and 'legislative omission' are understood and the criteria for their distinction adopted in this article, see Section 3.
- 2 See, for example, A.R. Brewer-Carías, *Constitutional Courts as Positive Legislators: A Comparative Law Study* (2011), pp. 125-171; M. de Visser, *Constitutional Review in Europe: A Comparative Analysis* (2015), pp. 127-128; K. Stern, *Das Staatsrecht der Bundesrepublik Deutschland Band III/1: Allgemeine Lehren der Grundrechte* (1988), pp. 1286 et seq.; K. Schlaich & S. Koriath, *Das Bundesverfassungsgericht. Stellung Verfahren Entscheidungen* (2010), pp. 257-258; E. Schumann, 'Die Problematik der Urteils-Verfassungsbeschwerde bei gesetzgeberischem Unterlassen', (1963) 88 *Archiv des öffentlichen Rechts*, no. 3, pp. 331-346; R. Schneider, 'Rechtsschutz gegen verfassungswidriges Unterlassen des Gesetzgebers', (1964) 89 *Archiv des öffentlichen Rechts*, no. 1, pp. 24-56; P. Tuleja, *Stosowanie Konstytucji RP w świetle zasady jej nadrzędności (wybrane problemy)* (2003), pp. 210-213; S. Wronkowska, 'Jednostka a władza prawodawcza. Przyczynę do dyskusji', in T. Jasudowicz et al. (eds.), *O prawach człowieka w podwójną rocznicę paktów. Księga pamiątkowa w hołdzie Profesor Annie Michalskiej* (1996), pp. 81-83. See also the National Reports submitted by several European constitutional courts to the XIVth Congress of the Conference of European Constitutional Courts held in Vilnius (Lithuania) in 2008, which dealt with the topic 'Problems of Legislative Omission in Constitutional Jurisprudence' (<<http://www.confueconstco.org/en/common/home.html>>, last visited 5 April 2019).
- 3 Pursuant to Art. 2 of the Constitution: 'The Republic of Poland shall be a democratic state ruled by law and implementing the principles of social justice.' Art. 10 of the Constitution specifies that: 'The system of government of the Republic of Poland shall be based on the separation of and balance between the legislative, executive and judicial powers. Legislative power shall be vested in the Sejm and the Senate, executive power shall be vested in the President of the Republic of Poland and the Council of Ministers, and the judicial power shall be vested in courts and tribunals.'

the guarantee of individual rights and liberties. In such cases, a question arises regarding whether the legislator's procrastination should be subject to judicial review and should be met with an adequate response by the entity safeguarding the supremacy of the constitution.⁴ There is no doubt that the imperative to apply constitutional standards and values in a democratic state ruled by law also binds the legislature, which should implement those values and standards by passing relevant normative acts.

This study is aimed at assessing the grounds for the prohibition against reviewing the constitutionality of legislative omissions in Poland. The analysis of the problem shall be based on the case law of the CT within the context of its systemic functions, powers and action measures. The thesis that a constitutional court should not go beyond the role of 'a negative legislator' and may not adjudicate on the inactivity of the legislative will be subject to a critical analysis. Therefore, the discussion will be partly descriptive (Sections 2-3) and partly normative in character (Sections 4-6). In terms of the normative dimension, it will be aimed at formulating a model solution that would potentially widen the present scope of activity of the Polish Constitutional Court, thus adding the control of legislative omissions (i.e., a specific form of incomplete regulations) to its material jurisdiction. The constitutional review system that exists in Poland requires only a slight adjustment in order to be capable of coping effectively with infringements of the Constitution engendered by the legislator's inactivity.

2. Systemic grounds for the prohibition against controlling for legislative omissions

The prohibition against controlling for legislative omissions in the Polish legal order is derived from the general systemic position of the Constitutional Court as the 'negative legislator' within the meaning given to that concept by Hans Kelsen.⁵ The CT itself perfunctorily notes that omissions have been excluded from its jurisdiction, which is based on the paradigm of controlling legal norms rather than actions, states of things or facts.⁶ Article 188 of the Polish Constitution enumerates the normative acts that are subject to adjudication by the Polish Constitutional Court. Those acts in the catalogue must not be broadly interpreted and the CT itself may not infer its powers. In an ideal situation, for the CT to control the constitutionality of a legislative omission, an additional subsection should therefore be added to Article 188 of the Constitution to directly vest it with such power.

In its jurisprudence, the CT has failed to carry out an in-depth analysis of the substantiation for the absence of grounds for a constitutional review of a legislative omission. Referring to systemic norms, the Polish Constitutional Court mentions the directives that arise from the principle of the 'separation of powers', the inadmissibility of interfering with the powers of the legislative branch, the role of the Constitutional Court which 'by any means must not lead to "supplementing" the legislation that is now in force with solutions that would be desirable from the viewpoint of the initiator of the proceedings', the prohibition against 'usurping the lawmaking powers' and against 'replacing the legislator in determining the positive law by the Tribunal'.⁷

On the other hand, an argument also appears in the jurisprudence concerning broadly conceived normative defects whereby extending the CT's competence to legislative oversights was motivated by the constitutional requirement of the completeness of the constitutional review system and the protection of fundamental rights, which, by its very nature, should be effective and should discharge its guarantee

4 All the more so given the fact that such powers are exercised by certain European courts whose systemic status and mode of operation inspired the Polish model of the constitutional justice system and which have developed this competence via the evolution of jurisprudential practice (e.g., *Bundesverfassungsgericht*). The possibility of controlling for legislative omissions is provided for in Art. 283 of the Portuguese Constitution of 1976. On the control of incomplete regulations in Belgium by the Constitutional Court see, for example, S. Verstraelen, 'Constitutional Dialogue in the Case of Legislative Omissions: Who Fills the Legislative Gap?', (2018) 14 *Utrecht Law Review*, no. 1, pp. 62-81. Prior to 2012 the Hungarian Constitutional Court was also allowed to control legislative omissions.

5 See, for example, H. Kelsen, 'La garantie juridictionnelle de la constitution (La justice constitutionnelle)', (1928) *Revue du droit public*, pp. 221-241; H. Kelsen, *General Theory of Law and State* (1945), pp. 268-269.

6 See, for example, the CT decisions of 11 May 2009, ref. no. SK 37/07, OTK ZU no. 5/A/2009, item 74; 9 July 2002, ref. no. K 1/02; 16 June 2009, ref. no. SK 12/07.

7 See, for example, the CT judgments of: 19 November 2001, ref. no. K 3/00, OTK ZU no. 8/2001, item 251; 23 June 2008, ref. no. P 18/06, OTK ZU no. 5/A/2008, item 83; 24 May 2006, ref. no. K 5/05, OTK ZU no. 5/A/2006, item 59; 12 July 2010, ref. no. P 4/10; 22 July 2008, ref. no. K 24/07.

function. This stance was a manifestation of an active approach taken by the Constitutional Court regarding the interpretation of the boundaries of its own jurisdiction. However, the CT limited itself in this respect to legislative oversights, in a principled way questioning the possibility of controlling for omissions. It is worth noting, however – somewhat in anticipation of what will come later in our discussion – that the argument of the completeness and effectiveness of the system of protection of fundamental rights is not only fitting for the institution of legislative oversights but also justifies the introduction of the constitutional review of legislative omissions. Differences between those concepts are fluid and their axiological bases are identical.

The prohibition against controlling for legislative omissions is accepted by the CT and a considerable number of Polish constitutional law scholars as a dogma. As has already been mentioned, this is due to the traditionally conceived systemic vision of the Constitutional Court merely as ‘a negative legislator’ occupying a particular position under the principle of the tri-partition of power. It is also underlined that the systemic functions and how they are implemented by the CT are tied to the character of its public law legitimacy. The CT is not a direct emanation of representative democracy or the principle of the sovereignty of a nation,⁸ which in turn excludes (providing the Constitution does not provide otherwise) its law-making powers in the area traditionally covered by the primacy of statutes; that is, the power to supplement the system of law with constitutionally desirable legal norms. The legislative function is an instrument for creating state policy, which is not a prerequisite of the judiciary, including the CT.

The values underlying the roots of the constitutional justice system are thus legible and boil down to – given such an approach – removing clashes between the legal norms in force in order to retain the hierarchical compliance of the system of law and the principle of the superiority of the constitution in the catalogue of the sources of law. Such a model only allows for accessory and incidental consideration of other CT responsibilities, which include, for example, active advocacy for the protection of fundamental rights or for the protection of the systemic principles of a democratic state of law (e.g., the principle of the rule of law).

It is also worth pondering whether the thus-perceived axiological bases of the constitutional justice system, which *a limine* exclude a constitutional review of legislative omissions, will remain topical and whether they might, given certain boundary conditions, appropriately refer also to the CT.

3. Legislative omissions and oversights in the case law of the CT

In the Polish legal order, the concept of a legislative omission is a specific legal institution that has been devised by the CT to meet the needs of the constitutional review procedures conducted before that body. In most cases, it is interrelated with another legal institution used by the CT, which also refers to incomplete regulations; that is, the so-called legislative oversight. Definitional differences between omissions and oversights are very subtle. In the case law, those concepts are reference points for each other, while their mutual relationship is manifested *inter alia* by the fact that the CT usually finds an omission where it excludes an oversight (and vice versa).

Both legislative omissions and oversights are components of a ‘normative defect’ in a legislative act that cannot be filled via the application of generally recognised interpretational measures. In particular, in such cases, the CT excludes the possibility of reasoning by analogy in order to reconstruct a complete legal norm, which would also cover the scope of application that is implicitly indicated in the legal text. This also concerns such seemingly obvious situations whereby the reconstruction of the missing elements of a legal norm is strongly justified axiologically in the intentions ascribed to the legislators and where it relates to fundamental constitutional issues such as, for example, the prohibition on discrimination. Therefore, a legislative omission may be compared to the consequences of adverse legal inference (*argumentum ex silentio*).⁹ Given the context of the matter at hand, the CT considers that the reviewed legal norm only

8 Pursuant to Art. 4 of the Constitution: ‘Supreme power in the Republic of Poland shall be vested in the Nation. The Nation shall exercise such power directly or through their representatives.’

9 See, for example, H. Jansen, ‘In View of an Express Regulation: Considering the Scope and Soundness of a *contrario* Reasoning’, (2008) 28 *Informal Logic*, no. 1, pp. 44-59; D. Canale & G. Tuzet, ‘What the Legislature Did Not Say: Legislative Intentions and Counterfactuals in Legal Argumentation’, (2016) 5 *Journal of Argumentation in Context*, no. 3, pp. 249-270.

concerns the entities, circumstances and acts specified therein, and does not concern (*a contrario*) any other entities, circumstances and acts. The jurisprudential problem of the Constitutional Court associated with such a finding is actually focused on the unregulated portion of a legal norm, which, because of its form, does not meet the constitutional requirements and therefore gives rise to a suspicion that it is uncompliant with the Constitution. A qualified example of this problem is the legislator's failure to pass a legal norm at all despite having a constitutional duty to do so.

In the substantiation of its judgments, the CT rarely uses the notion of a gap in the law, which could fairly, precisely and communicatively elucidate the concept of a legislative omission from the theoretical perspective. It is in line with the general tendency of the CT not to refer openly in the motivations of its judgments to any concrete theoretical models or schools in the theory of law. Against this background, it is only noted that a legislative omission (which, following the German study of law, is also called a real or absolute omission), and a legislative oversight (which, referring to the same source, is called a comparative or relative omission) are manifestations of the same phenomenon; that is, the regulatory 'inactivity' of the lawmaker.¹⁰

Contrary to legislative oversights, which in the CT case law play various roles (among other things, also determining how the operative part of the judgment is formulated with respect to the object of derogations),¹¹ the function of legislative omissions is homogeneous. This concept finds its application in the systemic area demarcating, on the one hand, the scope of the Constitutional Court's competence, and on the other, the criterion for assessing the admissibility of resolving the issue on substantive grounds. In the latter case, it is primarily an independent, irreparable and, at the same time, sufficient prerequisite for the discontinuation of the proceedings before the CT due to the inadmissibility of passing a verdict.¹²

The first judgments in which the CT made a distinction between a legislative omission and an oversight and referred to their consequences date back to the early 1990s.¹³ The standard model of the statement of the grounds, which has remained in effect and is copied in the CT's jurisprudence, was also formed more or less at that time.¹⁴ The position of the CT on omissions has been stable with respect to the conclusions and relatively consistent as regards arguments. With time, individual statements or threads that surfaced in the course of considering successive cases have been subject to slight additions. Certain novelty was introduced only by the judgment of 6 November 2012,¹⁵ in which the CT made an attempt to define the concepts of a legislative omission and an oversight more precisely and somewhat modified the way in which their scopes were delimited. In that judgment, the CT stressed the normative obligation of the legislator bound by the constitutional legal norm and left out all those occasional definitional elements of the concept that were either too subjective and vague or were unpersuasive owing to irremovable argumentative difficulties. That attempt to put the issue of omissions and oversights in order was only partially successful. The stipulations made in the above-quoted judgment of 6 November 2012 have not always been respected in later decisions by the CT.

As a matter of principle, the CT understands a legislative omission as leaving certain problems out of a legal regulation. This involves the need to discontinue the proceedings because the Polish model of a

10 See, for example, Brewer-Carías, *supra* note 2, pp. 125-171.

11 As the subject of adjudication, the CT may adopt either a legal provision or a legal norm derived from that provision, issuing, as appropriate, a so-called simple judgment on hierarchical compliance or non-compliance, a limited judgment with respect to a given issue or aspect of the provision, or a so-called interpretational judgment, which refers to the constitutionality of a particular understanding of the challenged regulation. This phenomenon is described as modelling the CT decision by selecting the form of the operative part of the judgment.

12 The notion of a legislative omission devised for the needs of the proceedings before the CT refers to the problems that may be called, to put it simply, 'internal'. From the viewpoint of the CT, it is thus a notion-tool basically connected with the paradigm of the constitutional review prevailing in Poland. The non-procedural functions of a legislative omission and its consequences in the sphere of the application of law primarily concern the problems of a preliminary ruling, for example, when assessing the damages for 'legislative lawlessness'. However, this is a separate research issue and shall not be discussed in this study.

13 See, for example, the CT decisions of 23 February 1993, ref. no. K 10/92, OTK ZU 1993, item 5 and of 16 February 1993, ref. no. K 13/92, OTK ZU 1993, item 4. The CT also confirmed that its former findings prior to the 1997 Constitution had come into force and had remained topical (see, e.g., the CT judgment of 6 May 1998, ref. no. K 37/97, OTK ZU no. 3/1998, item 33 and the CT decision of 9 July 2002, ref. no. K 1/02, OTK ZU no. 4/A/2002, item 55).

14 This refers to the CT decision of 3 December 1996, ref. no. K 25/95, OTK ZU no. 6/1996, item 52.

15 Ref. no. K 21/11, OTK ZU no. 10/A/2012, item 119.

constitutional review does not foresee the possibility of adjudicating on omissions by the legislator, even if the obligation to issue such an act was provided for by the constitutional norms.¹⁶ As has already been mentioned, a legislative omission should be distinguished from a legislative oversight; that is, a situation in which the legislator has regulated an area of social relations fragmentarily, leaving some essential element out of the regulation, which also violates the constitutional standard but, unlike an omission, it may be subject to a review by the CT.¹⁷ In the opinion of the CT, the possibility of assessing legislative oversights is a part of the Constitutional Court's general power to perform a hierarchical review of the law. In practice, an oversight is treated as a special case of reviewing a statute that is in force and that is challenged because of a partial normative defect. This defect damages the completeness of the regulation.

At the same time, the CT uses another criterion for distinguishing legislative omissions and oversights, which functions together with the previously presented claim that there is a general prohibition against the CT examining norms that are 'totally' outside of the sphere of applicable law. This criterion is based on the assumption that there should be a connection in terms of the content between the CT's identified subject of review and the charge that there is some concrete provision missing in a statute. In other words, the charge needs to accommodate the substance of the challenged provision. Showing a connection regarding the content lends credence to the assumption that we are dealing with a legislative oversight subject to review by the Constitutional Court. As the CT itself explains:

the demarcation line dividing the situations of 'legislative omission' and 'fragmentary and incomplete regulation' is connected with an answer to the question as to whether in a given situation there is qualitative identity (or at least far-reaching similarity) between the subjects regulated in a given provision and those that have been left out.¹⁸

In the CT's case law there is also a thread referring to the assumed 'intentional action of the lawmaker (legislator)' who deliberately left some regulations out of a normative act, which precludes a legislative omission. In such a context, the CT sometimes also refers to the concept of a 'deliberate omission by the legislator'.¹⁹ This description, which attaches importance to something such as a 'plan', 'will' or 'intention' of the lawmaker as a factor deciding on the legal qualification of a defect in a normative act, functions in the CT case law (notwithstanding other criteria). Moreover, when substantiating an omission, the CT has combined this issue with the principle of the regulatory discretion of the legislator²⁰ and has identified it with various types of *de lege ferenda* conclusions and postulates formulated by the initiator of the proceedings.²¹

Attention is drawn in the legal literature and the CT case law to the fact that the distinction between a legislative omission and an oversight has no established doctrinal basis and there is no unequivocal criterion

16 See several that are representative of this line of CT jurisprudence – instead of many – for example, the CT judgment of 22 July 2008, ref. no. K 24/07, OTK ZU no. 6/A/2008, item 110 and the CT decision of 14 July 2009, ref. no. K 2/08, OTK ZU no. 7/A/2009, item 117.

17 As the CT notes: '[I]n case a partial regulation of an incomplete nature has been adopted it is possible to question its scope ... Therefore, it lies within the powers of the Constitutional Tribunal to assess constitutionality also in respect as to whether it lacks the provisions without which, in connection with the nature of the regulation covered by the act, it may arouse doubts as to its constitutionality' (CT judgment of 22 July 2008, K 24/07, *ibid*).

18 See *ibid*. Similarly, the CT judgments of 13 June 2011, ref. no. K 41/09, OTK ZU no. 5/A/2011, item 40 and 12 July 2010, ref. no. P 4/10, OTK ZU no. 6/A/2010, item 58; and the CT decisions of 1 March 2010, ref. no. K 29/08, OTK ZU no. 3/A/2010, item 29; 13 October 2010, ref. no. P 19/09, OTK ZU no. 8/A/2010, item 92; 11 December 2002, ref. no. K 17/02, OTK ZU no. 7/A/2002, item 98.

19 For example, in its judgment of 24 October 2001, ref. no. SK 22/01, the CT found that: 'The starting point ... is to distinguish the situation of legislative omission from the situation of adopting an incomplete (omissive) regulation. The former situation consists in the fact that the legislator deliberately left a certain issue totally out of the legal regulation. Since the Polish approach to the cognition of the Constitutional Tribunal does not envisage adjudicating on the legislator's omission, it is not possible to bring in such cases to the Tribunal ... A legislative omission should be distinguished from a situation whereby the legislator has regulated an area of social relations incompletely, fragmentarily. A conviction has long been established in the jurisprudence of the Constitutional Tribunal that in case a partial regulation of an incomplete nature has been adopted it is possible to question its scope ... While the parliament enjoys a very wide field for deciding what matters are to be selected for regulation by way of statutes it passes, when such a decision has already been made the matter has to be regulated with respect for the constitutional requirements.' See also, for example, the CT judgment of 24 October 2000, ref. no. K 7/00, OTK ZU no. 7/2000, item 256 and the CT decision of 16 June 2009, ref. no. K 12/07, OTK ZU no. 6/A/2009, item 95.

20 CT judgment of 23 April 2009, ref. no. K 65/07, OTK ZU no. 4/A/2009, item 53.

21 CT judgments of 16 March 2010, ref. no. K 17/09, OTK ZU no. 3/A/2010, item 21 and 13 November 2007, ref. no. P 42/06, OTK ZU no. 10/A/2007, item 123; and the CT decisions of 16 June 2009, ref. no. SK 12/07; 13 April 2010, ref. no. P 35/09, OTK ZU no. 4/A/2010, item 39; 12 November 2011, ref. no. K 2/11, OTK ZU no. 8/A/2011, item 90.

that would make it possible to differentiate between those two situations.²² Individual decisions are passed with account being taken of the circumstances of a given case: *a casu ad casum*.

To date, the CT has considered the problem of incomplete regulations mostly in the context of the principle of equality before the law. These cases that were challenged involved discriminatory oversights or arbitrary privileges given to a particular group of entities. The CT emphasised that where the legislator sets a closed catalogue of situations or entities that a law is to apply to, this excludes its application in all other situations. Such a decision was then subject to a review from the viewpoint of the respect for the principle of equality before the law, which requires that similar situations and entities having the same characteristics are treated in a similar manner.

An example of such a CT decision concerned the case of the child-support allowance. The regulations provided that the children for whom child support had been adjudged but who, in practice, did not receive it and therefore found themselves in a financial predicament, could apply for a special allowance from the State budget. However, the children were entitled to this allowance only when raised by a single parent. Children raised in two-parent households where their guardian had married again were not entitled to receive it. The constitutional problem to be resolved by the CT required an answer to the following question: Had the legislator correctly specified the group of people entitled to receive the child-support allowance? The CT concluded that only granting financial support to children raised by a single parent and excluding children raised in two-parent households was an infringement of the principle of equality before the law. Child-support allowance should be available to all children in financial hardship; other criteria differentiating their situation were impermissible. Thus, the legislator unjustifiably excluded a group of persons who should have had the right to the allowance. Consequently, the CT acknowledged its competence in this case and found the challenged provision unconstitutional as a result of a legislative oversight.²³

In turn, in a case concerning the overpayment of excise duty, the proceedings were discontinued because the CT established the occurrence of a legislative omission. The entire chapter of the Taxation Law was challenged relating to the return of overpayments in excise duty which – in the opinion of the complainant – should have been based on assumptions other than those adopted by the legislator and were modelled on undue benefits in civil law. The CT found that the expectation of the complainant was a postulate to introduce a totally new legal regulation that would have to be implemented via an in-depth amendment of the taxation law by the legislator. That is why no provisions were left out, but they were developed in a way that differed from the complainant's position. At the same time, the CT did not exclude that the law in force (i.e., the adopted model for tax overpayment) may arouse constitutional doubts. However, this topic could not be considered because the Constitutional Court is prohibited from encroaching upon the area reserved for the executive.²⁴

Incomplete regulations also relatively frequently appeared in the jurisprudential practice of the CT as regards poorly drafted intertemporal provisions, which, in relation to some entities, infringed on their legitimately acquired rights or interests in progress, as well as on the provisions laying down the right to trial.

Intertemporal issues were deliberated (e.g., against the background of the Act amending the rules regarding the functioning of the Bar Association). The Act set new terms for Office of Association bodies without resolving whether the existing bodies were to continue in office until the end of their then-current term (based on the old law) or if their term should be shortened as of the date of entry of the Act into force and elections needed to be held (based on the new law). The absence of a regulation for resolving these intertemporal issues was raised as a constitutional plea. The complainant argued that this was a constitutional oversight that violated the principles of the certainty of the law and public trust in the State. He believed a solution providing for the continued operation of the old Act would be justified. However, the

22 See, for example, the CT judgments of 8 September 2005, ref. no. P 17/04, OTK ZU no. 8/A/2005, item 90, and 6 November 2012, ref. no. K 21/11 and the CT decision of 29 November 2010, ref. no. P 45/09, OTK ZU no. 9/A/2010, item 125. See also P. Tuleja, *Zaniechanie ustawodawcze*, in J. Czajowski (ed.), *Ustroje, doktryny, instytucje polityczne. Księga jubileuszowa Profesora zw. dra hab. Mariana Grzybowskięgo*, Kraków 2007, pp. 397-398.

23 See CT judgment of 23 April 2008, ref. no. P 18/06, OTK ZU no. 5/A/2008, item 83.

24 See CT decision of 29 November 2010, ref. no. P 45/09, OTK ZU no. 9/A/2010, item 125.

CT did not find it had been a legislative oversight but an omission, which remained outside of its competence. The CT stated that it was not the so-called negative legislator and therefore could not fill in any gaps in a statute. This should be done by courts and other authorities that apply the law, based on the intertemporal rule and principles of the interpretation of law developed in the Polish legal culture.²⁵

A similar verdict was passed as regards the judicial review of decisions in student disciplinary cases. The CT found the provision restricting such a review only to students' cases initiated after the date of entry into force of the Act introducing the right to apply to the courts unconstitutional because it failed to account for those cases which at that time were pending in the disciplinary commissions of universities. In the CT's view, the intertemporal regulation contained a legislative oversight consisting in exclusion therefrom of situations which should have been accommodated for by the legislator with a view to the constitutional guarantees of the right to a trial.²⁶

The list of constitutional models for reviewing incomplete regulations, including legislative omissions, is open-ended. Ever-newer cases of regulations are being considered under the CT's jurisdiction that, from the constitutional perspective, are not exhaustive.

4. Arguments in favour of controlling for legislative omissions

The first proposition of this paper boils down to stating that the arguments against controlling for legislative omissions by the CT have either lost their validity, have ceased to be important or they may be balanced by opposing arguments; that is, at least they may be weakened.

First, a legislative omission should not be perceived as a manifestation of the autonomous law-making policy embraced by the discretion of the legislative body that may or may not regulate a given matter in a normative act. On the contrary, it should be perceived as a failure to perform a legal obligation imposed on the legislative body by the constitution. Therefore, the constitution may be violated both by an action by the legislator (e.g., by passing a statute, the contents of which are defective) and by a failure to act (e.g., by failing to pass a statute). This means that an omission is an illegal state that violates the constitutional norms. Assuming that we accept this conclusion, the only problem should lie in the way to 'enforce' this legal obligation against the legislator rather than in the very existence of the obligation.

Second, the 'regulatory discretion' of the legislator does not annul the principle of the subordination of this authority to the constitution and the imperative to abide by and comply with its standards. What is perhaps disputable may be, of course, the limits of such 'regulatory discretion', but not the complete subordination of the legislator to the law, both with respect to its powers and procedures as well as its content; that is, binding the legislator via the multifaceted bonds of the constitution.²⁷ This conclusion is additionally supported by the principle of the direct application of the constitution and its fully normative character, which today is indisputable and does not require to be separately evidenced.²⁸ In other words, invoking the law-making 'discretion' and deliberate legislative choices of the lawmaker who declares that 'something' has been intended to be regulated and 'something other' has not and, therefore, the state of law reflects its current law-making policy, in no way justifies legislative omissions.

Third, however one evaluates it from the broader perspective of the universal transformations in the public law institutions within the European cultural setting, the systemic function of continental constitutional courts is evolving and to an ever-greater degree they are becoming – as is sometimes described in the literature – 'guardians of the constitution' and guarantors of the fundamental rights of the individual, including the rights of various types of minorities.²⁹ These are roles that significantly exceed the tasks of a

25 See CT judgment of 8 November 2006, ref. no. K 30/06, OTK ZU no. 10/A/2006, item 149.

26 See CT judgment of 10 May 2004, ref. no. K 39/03, OTK ZU no. 5/A/2004, item 40.

27 See, for example, D. Grimm, *Constitutionalism. Past, Present, and Future* (2016), pp. 215 et seq.

28 Pursuant to Art. 8 of the Constitution: 'The Constitution shall be the supreme law of the Republic of Poland. The provisions of the Constitution shall apply directly, unless the Constitution provides otherwise.'

29 See, for example: A. Stone Sweet, *Governing with judges: Constitutional politics in Europe* (2000), pp. 127-150; W. Sadurski, *Rights Before Courts: A Study of Constitutional courts in Postcommunist States of Central and Eastern Europe* (2008), pp. 27-62; Brewer-Carías, *supra* note 2, pp. 31-40; de Visser, *supra* note 2, pp. 93-155.

‘negative legislator’.³⁰ Moreover, this evolution is taking place under the systemic conditions of states (i.e., under the specified local regimes of powers and procedures), which means that in some countries this process is faster, and in others with a less favourable ‘normative environment’, it is slower and encounters more controversies. The Polish model of constitutional review is relatively conservative in this respect and does not specially support such transformations (an assessment of this situation should be left aside), frequently exposing CT judges to – more or less justified – charges of excessive activism, and sometimes even of acting *ultra vires*.³¹ Those tendencies are also a consequence of general changes in the axiology of the constitutional justice system and the conception of individual rights and freedoms, and more precisely of how they affect the entire system of law-making and application already at the level of the Constitution. From this point of view, the CT’s control of legislative omissions is perceived as additional protection for fundamental rights with a common-sense justification that if the Constitution stipulates specific individual rights, individuals should then have at their disposal appropriate measures to exercise them in practice. The real character of constitutional rights cannot be made futile by a legislator’s procrastination or by his or her failure to initiate the legislative process. Therefore, there must be such legal guarantees that would allow an individual to oppose any unconstitutional inactivity by the legislator and thus would render the system of constitutional rights and freedoms more effective.

Fourth, referring to the preceding point, concrete manifestations of legislative omissions and how they affect fundamental rights are instructive. In somewhat simplifying this aspect, it could be said that numerous constitutional norms must be ‘developed’ in a statute because of their content: the adopted method of regulation. Article 77.1 of the Constitution,³² which concerns the liability of the state for damages in cases of unlawful actions by a public authority, seems to be emblematic in this respect. Under Polish conditions, the exercise of this right has been wholly entrusted to Common Courts, including the need to prove a legislative omission as one of the prerequisites to adjudicate damages (also for so-called legislative lawlessness; i.e., the legislator’s failure to pass regulations).³³ As a result, it is the Common Court that must decide on legislative omissions with respect to a narrow range of cases (i.e., liability of officials for damages), whereas a more adequate measure would be, without a doubt, a CT decision issued according to the stable rules on the basis of uniform methodological arrangements with an *erga omnes* effect.

Fifth, the need to include legislative omissions in the competence of the constitutional court corresponds with a formal requirement of the completeness of a system of law, and – what is more – may be treated as an outcome of this assumption. A correctly constructed system of law – notwithstanding the nuances and differences characteristic of individual approaches and schools in the theory of law – should include indispensable statutory norms emanating from inner systemic bonds with respect to powers and content. How the formal features of a system of law are described, whether the emphasis is on its dynamic and static bonds, the relations between substantive norms and the standards of its norm-giving power, or if they simply refer to the rules of inference providing for norms logically or instrumentally arising from norms is of secondary importance here.³⁴ Ultimately, the normative nature of the constitution and its supreme position in the hierarchy of the sources of law ‘force’ the lawmaker to undertake certain measures with respect to the content of the legislation. The Polish study of constitutional law traditionally distinguishes a negative and positive aspect of implementing constitutional norms. The negative aspect is the prohibition against passing

30 One may risk saying that, at present, the objective pursued by the constitutional court is the general protection of fundamental constitutional values, primarily human rights, as well as safeguarding the principles of a democratic state of law, while a constitutional review is merely a legal means to realise those objectives.

31 Despite numerous opportunities, in the course of its more than 30 years of operation, the Polish CT has not issued any judgment which would concern the control of constitutionality of legislative omissions. The CT has always been of the opinion that no constitutional provision provides it with such competence. On the other hand, establishment of a judicial precedent has been considered by the CT as excessively interfering with the principle of separation of powers and against the Polish system of the sources of law which does not accept judicial law-making.

32 Pursuant to Art. 77.1 of the Constitution: ‘Everyone shall have the right to compensation for any harm done to him by any action of an organ of public authority contrary to law.’

33 See, for example, M. Safjan & K.J. Matuszyk, *Odpowiedzialność odszkodowawcza władzy publicznej* (2009), pp. 73 et seq.; L. Bosek, *Bezprawie legislacyjne* (2007), pp. 228 et seq.

34 See, for example, H. Kelsen, *Introduction to the Problems of Legal Theory* (1996), pp. 55 et seq.; J. Wróblewski, *Zagadnienia teorii wykładni prawa ludowego* (1959), pp. 298 et seq.; Z. Ziemiński, *Problemy podstawowe prawoznawstwa* (1980), pp. 213 et seq.

any statutes that are against the Constitution. On the other hand, the positive aspect consists in observing the procedure for passing a statute and realising all of the constitutional norms appropriately in terms of their content and the legal duties they explicitly or implicitly provide for. This means that the legislator should adequately shape the substance of statutes and always undertake legislative actions (a legislative function) when it is required by the constitutional norms. This duty involves something more than merely refraining from adopting statutes that are out of compliance with the Constitution and passing statutes with definite content under explicit constitutional delegations.³⁵ On the other hand, the Constitutional Court should evaluate the need for passing such statutes and respond by finding a legislative omission in cases where a statute (statutory norm) that is necessary for the implementation of constitutional norms is inapplicable.

Sixth, the conviction that the principle of the separation of powers and its inherent discipline exclude a constitutional review of legislative omissions needs to be reassessed.³⁶ It would seem that this point is the relatively weakest link in the defence of the status quo and this is not only because the principle of the separation of powers is not of an absolute nature and its immanent mechanism is a system of restraints, checking and mutual control of individual separate branches of that power. The very possibility of a judicial body investigating the constitutionality of statutes and the derogative effect of this process undermine this principle and introduce a considerable breach. Hence, a potential polemic should be aimed not so much at the admissibility of controlling for legislative omissions but at the existence of the constitutional judiciary as such.³⁷ When put in this manner, the problem does not contribute much to the matter, which makes it necessary to consider a slightly different question: Whether extending the CT's control to legislative omissions does not interfere with the identity (sometimes called the 'core competence') of the legislative power. Is it not excessive, out of proportion, too intensive from the viewpoint of the separation of powers? The answer is that out of all the previously mentioned arguments, it is this one, which would *prima facie* seem to be the least important, that should be accepted. If the principle of the separation of powers is to be real rather than merely a façade, there must be a non-negotiable framework of authority for each of its individual segments. Thus – without a relevant amendment to the Constitution – the admissibility of transferring the tasks that make up the systemic (public law) nature of the legislative power (in this case consisting in the function of passing generally applicable laws) to other authorities should be excluded.³⁸ However, this conclusion is by no means tantamount to rejecting the idea of extending the CT's competence to legislative omissions, but induces a more precise definition of the notion of omission which could and should be subject to a constitutional review.

5. Positive duties of the legislator and their judicial control

A starting point for further analysis is an assumption that without unequivocal constitutional foundations, no authority of the CT must infringe on the core powers of the legislative power, or, in other words, replace

35 See, still topical, although expressed under the previous political conditions of the authoritarian state of the Polish People's Republic: S. Rozmaryn, *Konstytucja jako ustawa zasadnicza PRL* (1967), pp. 159-166. See also P. Radziewicz, 'Pojęcie horyzontalnego skutku norm konstytucyjnych – uwagi wprowadzające z perspektywy prawa konstytucyjnego', in A. Młynarska-Sobaczewska et al. (eds.), *Horizontalne oddziaływanie Konstytucji Rzeczypospolitej Polskiej oraz Konwencji o Ochronie Praw Człowieka i Podstawowych Wolności* (2015), pp. 25-60.

36 The principle of separation and the balance of the legislative, executive and judicial powers is understood in the Polish legal order in a traditional way typical of European parliamentary democracies referring to Montesquieu's doctrine. On the complexity, sources and development of that idea, dating back to the thought of ancient philosophers, see, for example: G. Marshall, *Constitutional Theory* (1971), pp. 97-124; M.P. Sharp, 'The Classical American Doctrine of "The Separation of Powers"', (1935) 2 *University of Chicago Law Review*, no. 3, pp. 385-436; P.R. Verkuil, 'Separation of Powers, the Rule of Law and the Idea of Independence', (1989) 30 *William and Mary Law Review*, no. 2, pp. 301-341; J. Raz, 'The Rule of Law and Its Virtue', (1977) 93 *Law Quarterly Review*, pp. 195-211; P.P. Craig, 'Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework', (1997) *Public Law*, pp. 467-487; R. Bellamy, 'The Political Form of the Constitution: The Separation of Powers, Rights and Representative Democracy', (1996) 44 *Political Studies*, pp. 436-445; N.W. Barber, 'Self-Defence for Institutions', (2013) 72 *The Cambridge Law Journal*, no. 3, pp. 558-577. See also Ch. Möllers, *The Three Branches. A Comparative Model of Separation of Powers* (2013), pp. 126 et seq.

37 On difficulties connected with the balancing of systemic relations between the constitutional court and the legislature, as well as legitimisation of the constitutional review of statutes by courts, see e.g. de Visser, supra note 2, pp. 329 et seq.; A. Meuwese & M. Snel, "'Constitutional Dialogue": An Overview', (2013) 9 *Utrecht Law Review*, no. 2, pp. 128-130, 134-138 and literature quoted therein.

38 Similarly, the replacement of the legislative power by other constitutional authorities that are classified as *sui generis* entities from outside of the system of the tri-partition of power – assuming that such a classification may be reasonably and non-arbitrarily justified at all.

the legislator in the implementation of tasks that build its identity.³⁹ In the Polish system of law, this stems from the fact that the systemic issues of the CT have been categorised as a constitutional matter. Therefore, as long as the Constitutional Court retains the cassation powers and acts upon motions, the model is not controversial. However, granting the law-making authorities to the CT, that is the possibility to add new legal norms to the system of law, would constitute an exception. It is immaterial what measures the CT would use to implement this objective, whether it would be the appropriate structuring of the operative part of judgments; addressing directives (orders) to the authorities that apply the law; or, for example, creating a new type of judgment. In this context, potentially the best intentions or preventing even more profound unconstitutionality, or other justifications invoking public interest, that could be used as a possible justification of *sua sponte* CT activity, remain also irrelevant. In the Polish system of law, any and all of such activities need explicit constitutional ‘authorisation’.

Here, a second proposition from this study should be put forward; namely, that the legislative omission, which should be included in the material jurisdiction of the CT, is ‘a normative defect’ consisting in that a statute is not in force (has not been adopted) or a specific legislative matter has not been regulated – in both cases, against the obligation arising from the Constitution. In the former case, it is the constitutional norm of the legislative power imposing the obligation to pass a statute on the legislator (who failed to do so) that will be applicable. In the latter case, it will be possible to deduce the duty to pass a statute in order to regulate a given area of matters (a delegation to pass a statute is not necessary in this case) from the content of the constitutional norm. It seems that the duty to pass a statute should be perceived in a relatively deformalised manner. It has long been accepted in the Polish study of constitutional law that the norms of the Constitution should be developed in statutes regardless of the formal bounds of power. If such an authorisation does not exist, it does not mean that a statute cannot be passed. The system of ties between a constitution and a statute is not similar to the relation between a statute and a regulation (an executive act), if only because, unlike a regulation, a statute is an autonomous act.⁴⁰

The obligations to act by the legislator may potentially be deduced from each constitutional norm. This includes not only the norms laid down directly in the text of the constitution, but also the norms that have been derived from them as a result of correct legal reasoning.

Moreover, it should be emphasised that having found an omission, the CT would not declare any specific desirable statutory content or foresee the merits of a future statute unless such a possibility were to explicitly arise from the constitutional norms. It would not lay down any specific regulatory obligations that the legislator would only implement in its law-making effort. The CT’s judgments would serve the purpose of finding that a statute (statutory norm) is inapplicable or a statutory matter has not been regulated for, and then confronting that with the obligations arising from the constitutional norms. In this sense, not every ‘normative defect’ would also be *a priori* tantamount to a breach of the Constitution. The fact that a legislative omission has been found would have to be proved in the course of the proceedings before the CT (the burden of proof would rest on the initiator of the proceedings), which in this case would consist primarily in interpreting the constitutional norms and, on this basis, confirming that a legislative duty has not been performed. Therefore, the charge of omission would be dismissed if a failure to pass a statute turns out to be in compliance with the Constitution, which may happen, for example, when the constitutional statutory delegation is formulated facultatively or it has been found that the suggested ‘defect’ is a constitutionally indifferent situation (free from legal orders or prohibitions). Similar conclusions could be reached, for example, upon the appropriate application of the principle of the direct application of the Constitution (the court acts or issues a decision directly on the basis of the constitutional norms without the so-called intermediary function of a statute) or adequate techniques of the exegesis of a legal

39 Examples of a different approach in foreign legal systems which accept the competence of constitutional courts and measures aimed at its implementation based only on the jurisprudential practice are given, for example, by Brewer-Carías, *supra* note 2, pp. 79-94 and 125-171; L. Garlicki, *Sądownictwo konstytucyjne w Europie Zachodniej* (1987), p. 240.

40 Pursuant to Art. 92 of the Constitution: ‘Regulations shall be issued on the basis of specific authorization contained in, and for the purpose of implementation of, statutes by the organs specified in the Constitution. The authorization shall specify the organ appropriate to issue a regulation and the scope of matters to be regulated as well as guidelines concerning the provisions of such an act. An organ authorized to issue a regulation shall not delegate its competence, referred to in para. 1 above, to another organ.’

text, including its interpretation in conformity with the Constitution, in order to reconstruct the statutory norm with the use of various interpretational methods (e.g., *analogia legis* or the application of the general provisions of a statute). In other words, only the legislator's breach of the constitutional obligation to pass a statute or regulate a constitutional matter, confirmed as a result of proceedings before the CT, could be treated as a legislative omission *per se*.

6. Procedure for controlling for legislative omissions by the CT

The legal construction of a legislative omission subject to a review by a constitutional court should determine the shape of at least three basic elements: the object of the review, the review procedure and the legal form of adjudication in the case.

The primary issue is the object of the review; that is, defining more precisely what a legislative omission should be from the viewpoint of the constitutional justice system. As is known, the Polish CT adjudicates on the hierarchical compliance of legal norms and eliminates conflicts between them, which assumes that there must be a concrete subject of adjudication indicated by the initiator of the review. Such an approach made it possible for the CT to review some incomplete regulations; that is, legislative oversights. Meanwhile, in the case of omissions, the thus-conceived subject in fact does not exist because the review concerns an incomplete regulation that has not been expressed in any editorial unit of a legal text, which means that it involves the assessment of a matter that the legislator completely omitted to regulate for. Therefore, in discussing omissions, the CT will also indirectly comment on the completeness of the system of law, and this opinion will be expressed in the situation whereby the confirmation of the need for a given law or a specific statutory matter to be in force will only be a systemic and abstract postulation – a result of reasoning referring to the requirements arising from the hierarchical structure of the system of law and the principle of the legal supremacy of the Constitution.

Given the above remarks, it should be said that the subject of a review with respect to a legislative omission should be the determination of the constitutional norm-giving duty of the legislator. The proceedings before the CT would be aimed at reconstructing the constitutional basis of the duties of the legislative power and specifying its content using the merits of the relevant constitutional norm as the point of reference (normative model). Thereby, the CT review process, unlike normal proceedings before the CT, would consist not in applying legal inference and the rules of the interpretation of law in order to determine a hierarchical contradiction in the system of law and eliminate it, but rather in using this inference and rules in order to reconstruct the constitutional duties of the legislator. What is not without significance is also the fact that such an approach to the powers of the CT would facilitate its self-control and refrain it from formulating extensive statements that go too far into the issues of the law-making policy and, in consequence, potentially violate the division and balance of powers.

Assuming that the subject of review in the case of legislative omissions should be the determination of the constitutional regulatory duties of the legislator, it becomes obvious that this objective cannot be realised using the constitutional review procedures for statutes that are currently applicable in the Polish legal order. Therefore, a developed concept of legislative omissions should also provide for a special procedure that would make it possible to adjudicate in the absence of the traditionally conceived subject of control, which in this case would be an incomplete regulation.⁴¹

A major issue is, finally, the legal form of operation of the CT; that is, the type of judgment through which legislative omissions would be determined. In the literature – in line with the German doctrine of law – such verdicts are called declarative judgments;⁴² that is, judgments confirming the charge of an omission that has

41 A manifestation of this procedural deficit is – as has been mentioned earlier – the institution of a legislative oversight constructed *inter alia* in order to embrace with the CT's cognition those from among legislative omissions that, owing to the substrate of control that is applicable in their case (fragmentary regulation: of an incomplete scope of application or regulation), may be assessed within the existing model of hierarchical compliance. Therefore, legislative oversights (relative omissions) would continue to be investigated under the review of norms, since in such cases the CT would simply adjudicate on the applicable legal norm that has been incorrectly formulated.

42 See Brewer-Carías, *supra* note 2, pp. 180-181; M. Florczak-Wątor, *Orzeczenia Trybunału Konstytucyjnego i ich skutki prawne* (2006), pp. 152-155.

been posed by the initiator of the proceedings before the CT. Their characteristic feature is that they exclude the derogating effect, sometimes also referred to as the dispositive effect (in fact there is no matter that could be derogated from when an omission is confirmed). The study of law also uses, in this case, the formula of 'appellative judgments', which is used to render the nature of this verdict, as addressed to the legislator, who – on the basis of the CT decision (generally applicable and final) – is then obliged to implement this judgment by appropriately adjusting (complementing) the system of law. The legislator has not provided for the possibility of declarative judgments in the Polish constitutional order.⁴³ Each CT judgment as to the unconstitutionality of a statute, which has been issued as a result of an ex-post review, permanently and *ex iure* eliminates unconstitutional provisions (legal norms) therefrom. There is no constitutional basis for mitigating this effect. Notwithstanding, the Polish CT has sometimes used the form of a declarative judgment, or, more precisely, has declared that some of its decisions are of such a character.⁴⁴ This is noted with criticism both in the literature as well as in the jurisprudence of Common Courts and Supreme Court.⁴⁵

7. Conclusion

There are three indispensable elements to submit legislative omissions effectively to CT control: the subject of the review, the review procedure and the legal form of judgment. In the Polish legal order, all those elements are constitutional matters and should be ultimately provided for in the Constitution. Also, changes in the axiological basis of the constitutional justice system could also be rationally proved, which in turn should lay grounds for starting a discussion as to the need for and possible extension of the CT's competence. Since if the view is warranted that the Constitutional Court should nowadays more broadly control the completeness of the system of law, both from the point of view of form (power) and matter (content), and effectively guarantee the realisation of constitutional fundamental rights, then the control of legislative omissions by the CT should be treated as a priority of such an agenda.

The possibility of the Constitutional Court investigating legislative omissions requires an amendment of the Polish Constitution and the explicit vesting of the relevant authority to the CT and, consequently, should also specify the procedure for their control and the grounds for directive (appellative) judgments. What is important is that a judgment on a legislative omission may not lead to adding any new, even desirable constitutional normative content to the system of law; that is, directly providing the CT with legislative functions or any other means of activity which are in fact a substitute for legislation. The choice of a proper way to implement constitutional decisions lies within the sphere of the policy of law and escapes juridical assessments made by CT judges.

There will be borderline situations in practice, so-called hard cases, giving rise to sensible disputes as to the existence of the constitutional obligation of the legislator in the circumstances of the specific case. Hence, deciding on legislative omissions requires the Constitutional Court to exercise special circumspection and respect for the systemic position of other public constitutional authorities; that is, the non-infringement of their autonomy as regards their powers. ■

43 The possibility of finding a normative act unconstitutional by a constitutional court without simultaneous annulment is available in several European countries. Such practice is applied, for instance, by constitutional courts in Spain, Italy, Germany (see de Visser, *supra* note 2, pp. 320-324 and the jurisprudence quoted therein).

44 See, for example, the CT judgments of 25 June 2002, ref. no. K 45/01, OTK ZU no. 4/A/2002, item 46; 13 June 2011, ref. no. SK 41/09; 23 October 2007, ref. no. P 10/07, OTK ZU no. 9/A/2007, item 107; 29 May 2007, ref. no. P 20/06, OTK ZU no. 6/A/2007, item 52.

45 See, for example, P. Radziejewicz, 'Glosa do postanowienia SN z dnia 29 kwietnia 2010 r. (sygn. akt IV CO 37/09)', (2011) *Przełąd Sejmowy*, no. 2, pp. 179-193 and the jurisprudence quoted therein.