



THE DISPUTE OVER THE CONSTITUTIONAL TRIBUNAL IN POLAND AND ITS IMPACT ON THE PROTECTION OF CONSTITUTIONAL RIGHTS AND FREEDOMS¹

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Received 30 December 2016; accepted 8 July 2017

Abstract. The article is devoted to the conflict over the Constitutional Tribunal in Poland that started in late 2015 and turned into a constitutional crisis in 2016. The article presents the causes and main aspects of the conflict, focusing on the government's refusal to publish the verdict of the Constitutional Tribunal and the consequences thereof for the effectiveness of the protection of constitutional rights.

Keywords: Constitutional Tribunal, constitutional complaint, judicial review, constitutional crises, human rights

Introduction

It is the standard in a democratic state ruled by law that the fundamental rights and freedoms of citizens and humans in general are set forth in the constitution as the supreme legislative act in the state. However, it is not the catalogue itself that is particularly important, but rather – the mechanisms that secure these rights and freedoms and allow for their effective implementation. One such institution in the Polish constitutional system is the Constitutional Tribunal, which possesses the competence to review constitutional complaints as well as to conduct abstract constitutional review of legal provisions concerning the rights and freedoms of citizens.

The Constitutional Tribunal was first established within the constitutional system of Poland in 1982 by an amendment to the Constitution of the Polish People's Republic of 1952. At that time, the communist regime was still in power in Poland; however, the introduction of the Constitutional Tribunal was one of the signs of changing forces by the impending democratic transformation of the state. Two other institutions were introduced to the Constitution at the same time – the State Tribunal and the Supreme Audit Office. All three were initially classified as authorities of state control. The legislative work on the statutory law regulating more specific issues concerning the process of establishing the Constitutional Tribunal, the method for its proceedings, as well as the execution of its constitutional competences took three years. The first Act on the Constitutional Tribunal was adopted in 1985, and one year later, in 1986, the judges were appointed to the Constitutional Tribunal and started to work. Thus, it has already been 30 years since the first judgment.² The establishment of the Constitutional Tribunal was an important step in the democratization process that took place in Poland in the late 1980s; nevertheless, its political position was not very substantial at first. The weakest point of the regulation was that the rulings of the Constitutional Tribunal were not final and could be examined and rejected by the parliamentary majority.

¹ The article was prepared within the framework of research project No 2014/13/D/HS5/03403, funded by the National Science Centre, Poland. The article is based on a speech made on 28 October 2016 at the "Protection of Constitutional Rights and Freedoms: Problems and Solutions" international conference organized by Mykolas Romeris University, the Seimas Committee on Legal Affairs, and the Lithuanian Bar Association.

² The first ruling of the Constitutional Tribunal was issued on 28 May 1986, case U 1/96.

1. The position of the Constitutional Tribunal in the Polish constitutional system

The current Polish Constitution of 2 April 1997 significantly strengthened the position of the Constitutional Tribunal within the Polish constitutional system. First of all, according to Article 10 of the Constitution, which establishes the principle of the division of power, the Constitutional Tribunal is recognized as a part of the judicial branch in Poland. The Constitution clearly establishes that together with the courts and the State Tribunal, the Constitutional Tribunal is vested with a separate power that is independent of other authorities; the judges of the Constitutional Tribunal are independent in the exercise of their office and are subject only to the Constitution (Article 195(1)). Second of all, the decisions of the Constitutional Tribunal were deemed as final.³

The main competence of the Constitutional Tribunal in Poland is to conduct abstract review of the constitutionality and legality of normative acts (Article 188(1–3)). However, the Constitution also grants it the right to review constitutional complaints (Article 188(5)), adjudicate on the conformity of the purposes or activities of political parties to the Constitution (Article 188(4)), settle disputes over authority between central constitutional organs of the State (Article 189), determine whether or not there exists an impediment to the exercise of the office by the President of the Republic (Article 131(1)), and answer questions of law referred to the Constitutional Tribunal by the courts (Article 193).

According to Article 194 of the Constitution, the Constitutional Tribunal is composed of 15 judges chosen individually by the Sejm for a term of office of nine years from among persons distinguished by their knowledge of law. No person may be chosen for more than one term of office, so re-election is not permitted (paragraph 1). The President and Vice-President of the Constitutional Tribunal are appointed by the President of the Republic from amongst candidates proposed by the General Assembly of the Judges of the Constitutional Tribunal (paragraph 2).

The Constitution also specifies that judgments of the Constitutional Tribunal are made by a majority of votes, and are universally binding and final. Judgments must immediately be published in the official publication in which the normative act in question was promulgated. As a rule, judgments of the Constitutional Tribunal take effect from the day of their publication; however, the Constitutional Tribunal may specify another date for the binding force of a normative act to expire, provided that said does not exceed 18 months for a statute or 12 months for any other normative act (Maćzyński and Podkowik, 2016, p. 1125–1316).

2. The constitutional complaint as a means for defending freedoms and rights

The most important instrument for protecting constitutional rights and freedoms in the context of constitutional justice is the constitutional complaint as established in Article 79 of the Polish Constitution. Proceedings before the Constitutional Tribunal in cases initiated by a constitutional complaint *de facto* intend to protect the rights of individuals. In the Polish doctrine of constitutional law, this instrument is defined as the claim of an individual in relation to the state for the protection of fundamental rights in specific proceedings before the constitutional court (Kraluk, 2016; Banaszak, 1997, p. 175; Wierzbowski, 1996, p. 210). Furthermore, it is commonly recognized in other countries that constitutional courts play a central role in protecting the rights of the first, second and third generation, both in stable democracies and those countries where democracy has been introduced relatively recently (Gentili, 2012, p. 161).

The constitutional complaint was first introduced into the Polish constitutional system in 1997 by the current Constitution. Article 79 provides that “in accordance with principles specified by statute, everyone whose constitutional freedoms or rights have been infringed, shall have the right to appeal to the Constitutional Tribunal for its judgment on the conformity to the Constitution of a statute or another normative act upon which basis a court or organ of public administration has made a final decision on his freedoms or rights or on his obligations specified in the Constitution.” The constitutional complaint in Poland is of a subsidiary nature, so all available legal remedies

³ However, Article 239 of the Constitution provided for a transitional period of two years, so the decisions of the Tribunal actually only became final as of 17 October 1999.

must first be used before lodging a complaint. The model of the constitutional complaint adopted in Poland assumes that the judgment of the Constitutional Tribunal resulting from consideration of the complaint does not produce direct effect in a particular case. In its judgment, the Constitutional Tribunal does not refer to the court judgment or administrative decision that formed the grounds for submitting the complaint. However, the declaration of unconstitutionality resulting in the repeal of the provision on the basis of which the judgment was issued allows the applicant to make a reopening application within three months of entry into force of the decision of the Constitutional Tribunal.

Although lodging a constitutional complaint in Poland depends on many substantive and formal requirements, statistics show that it is a prevalent means of protecting constitutional rights. In 2015, 408 constitutional complaints were submitted to the Constitutional Tribunal (66% of all applications); 375 constitutional complaints were submitted in 2014 (70% of all applications), 331 were submitted in 2013 (70%), 320 were submitted in 2012 (66%) and 358 were submitted in 2011 (74%). It should, however, also be noted that the vast majority of constitutional complaints submitted to the Constitutional Tribunal do not meet initial requirements. In 2015, only 48 of the 408 constitutional complaints submitted were accepted and were substantially revised by the Constitutional Tribunal; 44 out of 375 were accepted in 2014, 71 out of 331 in 2013, 67 out of 320 in 2012, and 30 out of 358 were accepted in 2011 (Constitutional Tribunal, 2016, p. 105–106). These figures cover the last five years, but in previous years the trend was similar. It must be emphasized that this is the case despite the fact that in order to submit a constitutional complaint in Poland, a person must be represented by an attorney or a solicitor.

3. Controversies over the election of constitutional judges and the beginning of the constitutional crisis

The organization of the Constitutional Tribunal and the mode of proceedings before it are specified by statute (Article 197). After the transitional period, the first law on the Constitutional Tribunal was adopted on 1 August 1997. It remained in force for 18 years (during which it was amended eight times) until the adoption of the new Act on the Constitutional Tribunal of 25 June 2015 (Act on the Constitutional Tribunal, 25 June 2015). The new law did not introduce any fundamental changes with regard to the Constitutional Tribunal and was not controversial in general, apart from one provision – Article 137, which *de facto* was the reason of the constitutional crisis in Poland that began in late 2015 and dominated Polish political life in 2016. According to that provision, the candidates to replace the Constitutional Tribunal judges whose terms of office was up in 2015 could be nominated within 30 days of the law entering into force on 30 August 2015. The candidates were therefore nominated in September, and the Sejm, at its last plenary session on 8 October 2015, elected five new judges to the Constitutional Tribunal. The problem was that two new judges were elected to replace judges whose terms were due to expire a month later, i.e. under the next parliament.

On 25 October 2015, parliamentary elections were held in which the opposition party, Peace and Justice, obtained an absolute majority of seats in the Sejm and the Senate, thus completely changing the political scene. The President of the Republic, who is also from the ruling Peace and Justice party, refused to swear in the newly elected Constitutional Tribunal judges, so they were unable to start performing their duties. On 25 November 2015, the Sejm adopted five resolutions invalidating the five resolutions of 8 October 2015 on the election of judges to the Constitutional Tribunal that were passed by the 7th Sejm (*Monitor Polski*, 2015, 1131–1135). On 30 November 2015, on the basis of Article 755(1) and Article 730(2) of the Civil Procedure Code and in accordance with Article 74 of the Act on the Constitutional Tribunal, the Constitutional Tribunal decided to take preventive measures by requesting that the Sejm abstain from electing new judges until the final verdict was delivered in the case. However, in spite of these preventive measures, the Sejm proceeded with the election of five new judges on 2 December 2015. These judges were immediately sworn into office by the President of the Republic.⁴ By doing so, the new parliament did not respect the opinion of the Constitutional Tribunal, which one day later rendered a decision in which it held that the legal basis for the election of the three judges replacing the judges whose mandate expired before the end of the term of the previous Sejm was valid, and that the President of the Republic was obligated to swear them in. However, the legal

⁴ On the very next day, 3 December 2016: four judges were sworn in at 1:30 a.m., and the fifth judge – in the morning.

basis for the election of the other two judges was, on the contrary, found to be unconstitutional. In accordance with this decision, the new Sejm should therefore elect two new Constitutional Tribunal judges instead of five.

As a result, there are currently 18 judges formally appointed to the Constitutional Tribunal by the previous and current Sejm, despite the fact that the Constitution only provides for 15 Constitutional Tribunal judges. Nevertheless, three of them cannot adjudicate because the President of the Republic has refused to swear them in and three other judges elected in December 2015 by Peace and Justice could not perform their judicial duties until mid-December 2016 because President of the Constitutional Tribunal Andrzej Rzepliński did not allow them to rule, as he considered their election illegal. As a result, only 12 judges were able to adjudicate for over a year. On 19 December 2016, President Rzepliński's term of office expired. According to law, the General Meeting of Constitutional Tribunal Judges should propose three candidates for the position of Constitutional Tribunal President to the President of the Republic; however, obstruction by three judges made this impossible. Therefore, the President of the Republic appointed one of the judges (Julia Przyłębska, elected in December 2015) as acting President of the Tribunal.⁵ Judge Przyłębska, performing the duties of the President of the Tribunal, immediately allowed the three judges elected in December 2015 to rule.

4. Amendments to the 2015 Act on the Constitutional Tribunal and deepening of the constitutional crisis

On 19 November 2015 and 22 December 2015, the new parliament adopted two amendments to the Act on the Constitutional Tribunal of 2015 which introduced significant changes. The ruling party claimed that they were necessary in order to improve the current statutory regulation. However, the opposition pointed out that their only aim was to limit the activities of the Constitutional Tribunal. Both amendments were referred to the Constitutional Tribunal for constitutional review by a group of opposition deputies, the Polish Ombudsman, the National Council of the Judiciary and the First President of the Supreme Court. In December 2015, the Constitutional Tribunal decided on several cases. First of all, on 3 December 2015 it reviewed the Act on the Constitutional Tribunal of July 2015 and ruled that Article 137 thereof was unconstitutional, insofar as it allowed the previous parliament to elect judges to the Constitutional Tribunal to replace judges whose terms of office were due to expire after the parliamentary elections (Judgment of the Constitutional Tribunal K 34/15). On 12 January 2016, the President of the Tribunal consequently allowed two judges (out of five) elected by the new parliament on 2 December 2015 to assume their judicial duties. The Constitutional Tribunal also held that Article 21(1) of the Act on the Constitutional Tribunal of June 2015, which concerns the oath of office taken by a judge in the presence of the President of the Republic, obliged the head of state to immediately accept the oath. Any other interpretations of the provision would be unconstitutional, as the President of the Republic may not block the exercise of official functions by a Constitutional Tribunal judge elected by the Sejm under Article 194(1) of the Constitution.

Second of all, the Constitutional Tribunal delivered a judgment on 9 December 2015 regarding the above-mentioned amendment of 19 November 2015 (Judgment of the Constitutional Tribunal K 35/15). The Tribunal declared several provisions unconstitutional including provisions concerning: 1) sentence 2 of Article 12(1) – the possibility of applying for re-election to the positions of President and Vice-President of the Constitutional Tribunal, since it might undermine the independence of the judge by providing the President of the Republic (the executive branch) with an opportunity to employ unauthorized influence on the functioning of the Constitutional Tribunal; 2) Article 2 – reducing the terms of office of the President and Vice-President of the Constitutional Tribunal, as said constitutes unauthorized interference of the legislative branch in the sphere of the judiciary, and undermines the principle of the independence of the Constitutional Tribunal; 3) Article 21(1) and (1a) – the introduction of a time limit for Constitutional Tribunal judges to take their oath of office and the rule that the beginning of their term of office depended on being sworn in by the President of the Republic, since this would be granting the President the competence to participate in the procedure of forming the composition of the Tribunal (the Constitutional Tribunal held that the term of office of Constitutional Tribunal judges commences with their election rather than the day on

⁵ The appointment of an acting President of the Constitutional Tribunal was widely criticized as raising serious concerns regarding the principles of the separation of powers and the independence of the judiciary. It has been pointed out that the Polish constitution does not provide for the function of an acting President of the Tribunal. This solution also negates the function of the Vice-President of the Constitutional Tribunal, which is recognized by the Constitution.

which they take their oath); 4) the right of the new Sejm to elect three judges in order to replace judges whose term of office ended on 6 November 2015.

On 9 March 2016, the Constitutional Tribunal reviewed the questioned provisions of the 22 December 2015 amendment to the Act on the Constitutional Tribunal of June 2015 (Judgment of the Constitutional Tribunal K 47/15), which introduced fundamental changes concerning the functioning of the Constitutional Tribunal, the status of judges of the Constitutional Tribunal, and the mode of proceedings before the Constitutional Tribunal. In reference to the status of the Constitutional Tribunal and its judges, the amendment of 22 December 2015: 1) introduced a rule that resolutions of the General Assembly of Judges shall be adopted by a two-thirds majority vote in the presence of at least 13 judges, 2) regulated the procedure for nominating and voting for candidates for the positions of President and Vice-President of the Constitutional Tribunal, 3) allowed the President of the Republic and the Minister of Justice to submit a claim in order to initiate disciplinary proceedings against a judge of the Constitutional Tribunal, 4) removed the recall of a judge of the Constitutional Tribunal from office from the catalogue of disciplinary sanctions, 5) granted the Sejm the power to recall a judge from office upon application by the General Assembly of Judges of the Constitutional Tribunal, 6) removed a regulation concerning the disciplinary responsibility of Constitutional Tribunal judges for their actions before taking office, 7) deprived the General Assembly of Judges and the President of the Constitutional Tribunal of the competence to revoke the mandate of a judge and granted that competence to the Sejm, 8) removed provisions concerning the nomination of, and voting for, candidates to the Constitutional Tribunal, effectively leaving this matter to be regulated in the Standing Orders of the Sejm, 9) removed the chapter of the law which regulated the procedure for confirming the existence of obstacles to the exercise of office by the President of the Republic.

With regard to proceedings before the Constitutional Tribunal, the amendment of December 2015: 1) introduced a rule – with only certain exceptions – that the Constitutional Tribunal shall adjudicate by a full bench, which would require the participation of at least 13 judges, 2) introduced a rule for delivering judgments at plenary sessions by a two-thirds majority vote, 3) introduced a rule that dates for hearing cases should be set at closed hearings according to the date of their submission to the Constitutional Tribunal, wherein the rule was also to be applied to cases already pending before the Tribunal, 4) extended the period between notifying the participants in the proceedings about the date of the hearing and the trial itself to six months for cases heard in plenary sessions, and to three months for other cases (with the option to cut these time limits in half in certain cases), 5) ordered the President of the Tribunal to appoint a judge-rapporteur in accordance with the alphabetical list of judges and to appoint two-month deadline to present positions by the parties.

The main problem that emerged concerned the procedural issues, as the ruling party claimed that the new procedural rules introduced by the Act of 22 December 2015 should be applied by the Constitutional Tribunal from the moment of its entry into force, which took place on the day of its publication (i.e. without any *vacatio legis*). On the other hand, the Constitutional Tribunal pointed out that it would be unacceptable and even paradoxical if the provisions setting procedural rules were simultaneously the subject of constitutional review and the legal basis for settling the dispute.

The Constitutional Tribunal also emphasized that it was extremely important to assess the above amendment and determine whether the new procedural solutions posed a threat to adjudication by the Constitutional Tribunal in other proceedings pending before it. All constitutional doubts concerning the legal bases of its ruling had to be explained before the application of the questioned provisions. As a consequence, the Constitutional Tribunal, referring to Article 195(1) of the Constitution, assumed that the judges of the Constitutional Tribunal may, in certain circumstances, refuse to apply statutory law, since “in the exercise of their office, they shall be independent and subject only to the Constitution.” Therefore, the Constitutional Tribunal accepted the directly applied provisions of the Constitution as a basis for its ruling. The Constitutional Tribunal decided on the unconstitutionality of the entire Act of 22 December 2015, emphasizing violation of the rule of law, according to which the organs of public authority (including the parliament) shall function on the basis of, and within the limits of, the law (Article 7 of the Constitution), as well as the principles of the separation of powers and the independence of the Constitutional Tribunal. The Constitutional Tribunal expressed the opinion that the new solutions adopted by the parliament were intended to paralyze the

functioning of the Constitutional Tribunal, and would deprive the Constitutional Tribunal of its ability to conduct constitutional review.

5. The opinions of the Venice Commission and the European Parliament, and the response from Polish authorities

On 11 March 2016, the European Commission for Democracy through Law (Venice Commission) issued an opinion in which it evaluated the amendments to the Act on the Constitutional Tribunal negatively. The Commission stressed that crippling the Constitutional Tribunal's effectiveness was inadmissible, as this violated the basic constitutional principles: democracy – because this would mean the absence of a central part of checks and balances; fundamental human rights – because the access of individuals to the Constitutional Tribunal could be slowed down to a level resulting in the denial of justice; and the rule of law – because the Constitutional Tribunal would become ineffective (Venice Commission Opinion No. 833, 2016). The above recommendations were later repeated in an opinion adopted by the Venice Commission on 14 October 2016 (Venice Commission Opinion No. 860, 2016). This point of view was supported by the European Parliament, which adopted a resolution in March 2016 on the situation in Poland (2016 Resolution 3031(RSP)) and called upon Polish authorities to fully implement the recommendations of the Venice Commission concerning the Constitutional Tribunal's ability to fulfill its role as the guardian of the Constitution, including the immediate publication and implementation of the Tribunal's judgments. In September 2016, the European Parliament issued a second critical opinion in which it expressed regret for the lack of a compromise in the dispute over the Constitutional Tribunal and the failure of Polish authorities to implement the opinion of the Venice Commission (2016 Resolution 2774(RSP)).

However, the ruling majority presented quite an opposite opinion. The Marshal of the Sejm announced that the Constitutional Tribunal had violated the rights of the Sejm and pointed out that under Article 197 of the Constitution, it was unacceptable that the Constitutional Tribunal did not apply the law that had been adopted by the parliament, officially published and entered into force. Furthermore, the government did not honor the Tribunal's judgment and decided not to publish it in the Official Journal of Laws because of "the lack of the possibility of publishing the positions of some of the judges of the Constitutional Tribunal, which is not based on the law."

6. The constitutional crisis and its consequences for the protection of human rights

As already mentioned, the judgments of the Constitutional Tribunal are final and universally binding. A legal provision deemed by the Constitutional Tribunal as unconstitutional loses its binding force at the moment that the judgment of the Constitutional Tribunal is published in the Official Journal of Laws. As the Constitutional Tribunal's judgments were not published, the situation became very complicated. The ruling party did not honor the Constitutional Tribunal's decisions, and the government continually refused to publish them. Meanwhile, the Constitutional Tribunal was still working and publishing its judgments on its official website. In the conflict that emerged, the Constitutional Tribunal was supported by the highest courts in Poland – the Supreme Court and the Supreme Administrative Court. However, lower courts and other authorities applying laws were left to decide on their own path.

As a result, a very dangerous uncertainty emerged concerning what the binding law was that could reflect the situation of an average citizen, his/her rights and freedoms. As already mentioned, a judgment of the Constitutional Tribunal on nonconformity with the Constitution, an international agreement or a statute of a normative act, on the basis of which a legally effective court judgment, final administrative decision or other settlement was issued, may be a basis for reopening proceedings, or for quashing the decision or other settlement in a manner and on the principles specified in the provisions applicable to the given proceedings.

From March to August 2016, a total of 23 judgments were not published in the Official Journal of Laws, so it was not clear if they should take effect or not. In practice, it was the decision of each lower court to either apply a particular law according to the text officially published in the journal of laws and on the official parliamentary website, or to

respect the Constitutional Tribunal's ruling on its unconstitutionality; this caused great uncertainty regarding what was binding law.

The practical scale of the problem can be illustrated by the example of the law amending the act of 2011 on the profession of a doctor and a dentist (2016). The amendment provided that candidates who wanted to take the state exam to become doctors could not see the tests and questions from previous years. On 7 June 2016, the Constitutional Tribunal decided that this was unconstitutional, but the government refused to publish the judgment. Nevertheless, the President of the Supreme Medical Council asked the Director of the Center of Medical Exams to share the exams from previous years. The director refused, saying that the Tribunal's judgment was not published and therefore not effective.

Conclusions

On 22 July 2016, the parliament adopted a new Law on the Constitutional Tribunal that entered into force on 18 August 2016, but it did not solve the problem. Article 89 of the law provided that the Tribunal's rulings "issued in breach of the provisions of the Constitutional Tribunal Act of 25 June 2015 before 20 July 2016 shall be published within 30 days from the entry into force of this Act, with the exception of rulings concerning normative acts that have ceased to have effect." As a consequence, the government published the rulings, except for the two most controversial ones concerning the Act on the Constitutional Tribunal of 2015. Some provisions of the new law were referred to the Constitutional Tribunal, which ruled them unconstitutional on 11 August 2016 (Judgment of the Constitutional Tribunal K 39/16). The judgment, however, was not honored by the ruling party and the government refused to publish it in the Official Journal of Laws. Furthermore, the government refused to publish 15 other judgments issued by the Constitutional Tribunal in autumn 2016. Among them was a judgment stating the unconstitutionality of a police officer's obligation to confiscate a driver's license if the driver was exceeding the speed limit by more than 50 km/h in an urban area, with no option for justifying circumstances. As the judgment was not published, it might be difficult to defend a driver's rights if there were indeed justifying circumstances.

The constitutional crisis in Poland is still in progress. In late 2016, the Polish parliament adopted three new laws concerning the Constitutional Tribunal, so the Act of 22 July 2016 lost its binding force. An act on the status of Constitutional Tribunal judges (Act on the Constitutional Tribunal, 30 November 2016) and an act on the organization and proceedings before the Constitutional Tribunal (Act before the Constitutional Tribunal, 30 November 2016) were adopted on 30 November 2016, and an act on the implementation of these provisions (Act before the Constitutional Tribunal, 13 December 2016) was adopted on 13 December 2016. According to the new regulation, the judgments issued between 27 September and 13 December 2016 were finally published on 29 December 2016. Nevertheless, the Constitutional Tribunal crisis in Poland illustrates the importance of a well-functioning constitutional judicial authority for the protection of constitutional rights and freedoms.

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