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A REVOLUTION—CONSCIOUS OR UNCONSCIOUS*

From 25 October 2015 to the moment these words are written barely four months have passed, but casting one's mind back to the day of the last general election, one has the impression that centuries have elapsed since then. The sheer flood of events directly affecting public life and the pace of changes send one into a spin. The last quarter of a century, admittedly, has not spared us strong sensations and a lot of turbulence, but what we are currently experiencing differs considerably from everything we have become accustomed to after 4 June 1989. It is this date that marks the beginning of historic transformations, ushering in a completely new quality into our notion and practice of statehood.

This date will be returned to in the final part of this article. Here, one observation only is in order, namely that although many are willing to detract from the importance of the June 1989 election (because of an undemocratic electoral law in force then), it is an inescapable fact that on that very day the sovereign, that is, the nation, demonstrated its will abundantly clearly to introduce fundamental changes. The result of the electoral act sounded loudly for a historic change. To what extent this signal was correctly interpreted by politicians and all those who were then in a position to make decisions concerning public life is quite another matter, but the overall direction of the transformations set in motion then did not raise anybody's doubts: it was a direction back into the pale of western civilisation from which we had been dragged away in previous decades.

What is the state of affairs today? The results of 'a good change', so far, bear fruit in the self-adulation of its authors. The parliamentary majority follows its leader without the smallest doubt and it is clear that the ruling party will not content itself with what it has achieved so far, that it has a broader hidden agenda—one being implemented with steely determination. A quarterly publication certainly is not a medium for a deeper analysis of events taking place now; as it is the pace of changes takes us by surprise every day and at times it is hard to discern the direction in which the changes are taking us. In addition, a jurist can hardly attempt to outline the complete setting of events for reasons of his professional limitations. Yet, since 'a good change' has produced results mainly in the legislative field so far, let them serve as examples that need to be collected and systematised *ad minima*.

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I. WHY HAS THE TRIBUNAL FOUND ITSELF AT THE CENTRE OF A STORM?

In the political and media discourse, references are made almost without exception to the new Constitutional Tribunal Act (CT Act) passed on 25 June 2015. It is supposedly affected by a double, so to speak, original sin. First, it was drafted by CT justices and, second, it had unconstitutional provisions from the start, which was confirmed by the judgment of the Tribunal itself of 3 December 2015. It is certainly true that CT justices wrote a preliminary draft of already the third CT Act. The same procedure was followed in 1997 with the second CT Act and also in a sense in 1982–1985 when preparations were made for drafting the first act on this matter.

No doubt, the first act could not be drafted by CT justices because they were not yet there but certainly it is not a secret that one of the prime movers behind it was Mr Czeszejko-Sochacki, who began to sit on the Tribunal a few years later. For it is common practice in legislative work that political system acts concerning the judiciary are drafted by judges directly involved in the work of a given type of court. Thus acts concerning administrative courts and their procedures were drafted in the Supreme Administrative Court, while the successive versions of the law on the structure of law courts or of the Supreme Court were prepared in respective court circles. The structure of courts and judicial procedures requires of their designers specialist knowledge and, therefore, this practice has not been questioned so far. Preliminary drafts of legislation concerning the judiciary have traditionally been sent to the Chancellery of the President for many years. From there, after being re-worked and edited, they were sent to the Sejm by the President, exercising his power of legislative initiative. Ultimately, however, bills become acts in the Sejm and drafters can hardly be blamed for any specific provision, in particular when a given issue resolved in the act has never been mentioned in the bill.

This is exactly the case with the key Article 137, crucial for the question discussed here, of the act passed on 25 June 2015. The president's bill that reached the Sejm as early as July 2013 did not include it. Its Article 23(2) spoke of the entering of candidacies for justices two months prior to the end of the term of office of an incumbent justice. Finally, the Act passed by the Sejm provided for (Article 19(2)) entering candidacies not later than three months before the end of the term of office of an incumbent justice. Nobody, I believe, imagined then that the legislative work would take so long but already in the first half of 2015, this question, in the face of approaching parliamentary elections, ceased to be a secondary matter because in the second half of that year the terms of office of five justices elected in 2006 were to end. Hence, to the Act of 25 June 2015 was added an episodic provision (Article 137), which said that in the case of justices whose terms of office ended in 2015, the time limit for filing a petition concerning the election of a new justice was 30 days from the day the act came into force. The CT Act came into force on 30 August 2015, hence, the time limit for filing a petition expired on 30 September. As

the terms of office of three justices elected in 2006 ended on 6 November 2015 and those of two others on 2 and 8 December 2015, respectively, it would have been necessary to enter the first three candidacies by 6 August 2015 and the other two by 2 and 8 September 2015, respectively, had it not been for the episodic provision included in Article 137. Since the parliamentary election could be held in late October at the earliest (it was held on 25 October), it was obvious that the candidacies for new justices by no means could be entered after the election.

One thing, however, is the time limit for entering candidates, while their election is quite another. The CT Act does not require that the election of a new justice be held before the term of office of the justice who is stepping down expires. Nor does it say when the new justice is to be sworn into office. It would, of course, be best if the election and swearing into office always took place prior to the commencement of the term of office, but the practice in this respect left much to be desired earlier, too.

The year 2015 was special on account of complications following from the coincidence of the end of the lifetime of the Sejm elected in 2011 with the end of the terms of office of five CT justices elected nine years earlier, in 2006. It is common ground that the 2015 parliamentary election could be held on 1 November at the latest. Owing to the significance of this day for us, holding an election on it would have been ill-advised. The president, therefore, rightly decided to hold it on 25 October. The VIII Sejm sat for the first time on 12 November and it is from this date that the lifetime of the new Sejm should be counted. As the terms of office of three justices ended on 6 November and those of two others on 2 and 8 December, the terms of office of three justices ended during the lifetime of the VII Sejm, while those of the other two—during the 8th. In the opinion of the Constitutional Tribunal, hearing a case concerning among others this question on 3 December 2015,¹ the choice of new justices rests with the Sejm during whose lifetime the terms of office of justices end. One can hardly disagree with this interpretation of Article 194(1) of the Constitution. Since the new CT Act provided a legal ground for choosing in 2015 two justices to replace those whose terms of office ended after 12 November, that is already after the lifetime of the VIII Sejm had begun, the legal ground was deemed unconstitutional. The opinion to this judgment argued that even if the election had been held a week later, that is on 1 November, the new Sejm would have sat for the first time on 30 November at the latest (Article 109(2) of the Constitution of the Republic of Poland, which means before the end of the terms of office of the last two justices to be replaced by the five chosen on 8 October. Accordingly, the provision of a legal ground by the CT Act (Article 137) for choosing all five justices by the VII Sejm was an abuse of the Constitution. By the limited-scope judgment of 3 December, the CT held therefore that Article 137 provided a constitutional ground for the choice of only three justices.

¹ K 34/15.

Meanwhile, the VII Sejm, chose on 8 October not only the three justices who were to take office after 6 November, but also the other two who were to commence to discharge their duties on 3 and 9 December, that is, already during the lifetime of the next (VIII) Sejm. This had to draw a firm response from the Constitutional Tribunal whose judgment handed down on 3 December 2015 was quite predictable. It could not be, and was not, any different. Hence, it could be expected that, in agreement with the established practice, the president would administer the oath of office to at least three justices chosen to replace those whose terms of office ended on this date. The ceremony, however, did not materialise and it soon turned out that the president not only refused to administer the oath to any of them, but also joined the critics who claimed that the choice of all five justices made by the 7th Sejm on 8 October was not valid in law. Thus, the most serious constitutional crisis so far began and as this article is being written, there are no signs it can end any time soon.

This caused the serious concern of all the former CT presidents who resolved to give a joint statement, drawing attention to the failure to administer promptly the oath to at least three justices and its consequences.²

Soon, we all faced the events that started to form a menacing sequence of exceptionally unanimous decisions by the ruling majority taken in so uniform a manner, as if voting discipline were imposed on deputies before each vote. All this started with the passing of an act to amend the CT Act on 19 November. It provided for modifying the procedure of choosing the CT president and ending the terms of office of both the CT president and vice-president three months after the amendment came into force. In addition, the amending act provided for entering new candidacies for justices to

² They issued a joint statement already on 8 November which read:

‘On 6 November 2015, the terms of office of three CT justices ended. These are: Mr Marek Kotlinowski, Mr Wojciech Hermeliński and Mrs Maria Gintowt-Jankowicz.

The three new CT justices who were chosen to fill these posts by the resolutions of the Sejm on 8 October 2015, that is to say Mr Roman Hauser, Mr Andrzej Jakubecki and Mr Krzysztof Ślebzak, cannot commence to discharge their duties because until today they have not been given the opportunity to take the oath of office before the President of the Republic of Poland.

Hence, as of 7 November, the composition of the Constitutional Tribunal does not reflect the number of justices, namely fifteen, specifically provided for in the Constitution.

No circumstance can be adduced as a justification for the failure to allow justices lawfully chosen by the Sejm to take an oath of office. Filing a petition with the Constitutional Tribunal to have the constitutionality of the new CT Act reviewed is no such circumstance. For there is absolutely no doubt that any act, before it is ruled unconstitutional by the Constitutional Tribunal, enjoys the presumption of constitutionality and is a fully legal ground for choosing CT justices and taking an oath of office by them before the President.

The situation where one of the most important organs of the State cannot function in the composition specified in the Constitution must cause utmost concern as it undermines the position and authority of the highest organ of judicial review. The Constitutional Tribunal has played a major role in developing and upholding the democratic standards of the State ruled by law and as a guarantor of fundamental rights.

Marek Safjan—former President of the Constitutional Tribunal

Jerzy Stepień—former President of the Constitutional Tribunal

Bohdan Zdziennicki—former President of the Constitutional Tribunal

Andrzej Zoll—former President of the Constitutional Tribunal.

replace those stepping down in 2015 and stipulated that the term of office of justices began upon taking an oath of office.³ Earlier, it was assumed that it started upon their election.

To reiterate, the president refused to administer the oath to at least three justices chosen by the VII Sejm on 8 October absolutely lawfully—in the opinion of the CT and almost all experts. The amending act of 19 November was adopted by the VIII Sejm and the very next day, 20 November, the president signed the amending act into law. In reaction to this amending act adopted by the Sejm and above all, to the position taken by the president, Professor Andrzej Zoll, a former president of the Constitutional Tribunal, made the following comment in a dramatic press interview: ‘I am deeply moved and downcast. A quarter of a century of a democratic Poland has come to an end [...]. I do not exaggerate: we are revisiting the Polish People’s Republic. We will have a constitution that will be a mere, hollow political declaration. The 20 November 2015 is the day when Poland ceases to be a State ruled by law.’⁴

Hopes for administering an oath to any of those justices were dashed on 25 November, when the Sejm adopted five resolutions finding the Sejm resolutions of 8 October on the choice of CT justices null and void.⁵

These resolutions—according to the deputy-rapporteur—did not dismiss the justices chosen on 8 October but only ‘validated’ the invalid Sejm resolution of their election. This ignominious argument⁶ in favour of the resolutions was meant to hide their true effect, which was the dismissal of the justices whose terms of office—as in the case of the first three—had already begun. This also followed literally from the resolutions of their election. The CT, by its successive three decisions ruled these ‘dismissals’ void.⁷ They must be held as exceptionally gross instances of circumventing the Constitution which, vesting the power to choose CT justices in the Sejm, does not grant it any power to remove them from office. The ‘dismissal’ of justices following an *ad hoc* procedure was an exceptionally gross breach of the Constitution, Article 7, which states that organs of the State may operate only within the powers explicitly granted to them by law. Neither the Constitution nor the CT Act provides for dismissing a justice; the latter only enumerates situations when his or her mandate expires. This is the situation now and one that has always been.⁸

Several days later—on 2 December 2015—a day before the CT handed down a judgment on the constitutionality of the CT Act, the Sejm adopted

³ Journal of Laws of the Republic of Poland (JL RP) 2015, item 1928.

⁴ In an interview given by Andrzej Zoll to Agnieszka Kublik, *Gazeta Wyborcza*, 21 November 2015.

⁵ Monitor Polski. Official Journal of the Republic of Poland, item 1131–1135.

⁶ Validation is a means to save the effect of a partially ill-performed act in law by a later removal of the defect through another defect-free act in law, and is basically an institution of private law.

⁷ K 34/15; K 35/15; U 8/16.

⁸ Currently, in the CT Act, Article 36.

five separate resolutions appointing five justices,⁹ specifying in the case of two that they would replace those who would step down respectively on 2 and 8 December; no such specification was made in relation to the other three justices. On the very same day before midnight, or perhaps already after midnight, the swearing in of the four newly-elected justices took place; after several days, the president administered an oath to the fifth person. In effect, it might seem the case that at least eighteen justices sit now on the CT: ten whose terms of office began prior to 2015, three chosen on 8 October and commencing their terms on 7 November but not sworn in, and five chosen in December 2015 and sworn in by the president. At least eighteen, because one has to remember the two justices chosen on 8 October for the terms commencing in December 2015 who have not been administered an oath to, either. Let us emphasise once again that at least in their case, the CT ruled the legal grounds of their election unconstitutional.

On 3 December 2015, the CT considered and entered a judgment in the case brought by a group of deputies who had brought a complaint in respect to several provisions of the CT Act of 25 June 2015, in particular its episodic Article 137, affecting the choice of justices in 2015. The purport of this judgment has already been discussed earlier. Let us observe here that although initially the case was to be heard *en banc*, due to the president, vice-president and one of the justices who represented the CT in the legislative process in parliament, disqualifying themselves, the CT faced the possibility that it would not be able to hear the case because of the insufficient number of justices necessary to consider it *en banc* (nine). The justices chosen and sworn in on 2 December were not allowed to sit on this case by the CT president.

In response to this position, the Head of the Prime Minister's Chancellery (Beata Kempa) notified the CT president (by a letter of 10 December) that considering this case by the CT sitting in a division of five justices 'gives rise to serious doubts as to whether the judgment in question can be published in the Dziennik Ustaw RP [Journal of Laws of the Republic of Poland]', and demanded explanations of him.¹⁰ It was the first instance of a threatened possibility of a refusal to publish a CT judgment. Finally, however, the judgment was published in the Dziennik Ustaw. It is hard to tell, of course, whether the publication was in any way helped by the fact that the public prosecutor's office instituted proceedings in the matter of the refusal to publish it. Ultimately, the proceedings in this matter were discontinued by the public prosecutor's office.

⁹ The act of appointment was performed only pursuant to the standing orders of the Sejm; episodic Article 137 had expired—on the next day (3 December), it was ruled unconstitutional by the CT. Time limits for entering candidacies for justices, provided for in the CT Act of 25 June 2015, Article 19(2) & (3), were no longer relevant, either.

¹⁰ See documents attached to the files of case K 34/15.

II. CONSTITUTION PUT ON HOLD

The next act in the drama is the passing of another act to amend the CT Act by the Sejm on 22 December 2015.¹¹ The amending act:

— Made a rule that the CT sitting *en banc* was to number at least 13 justices (until then the full court could number only 9 justices) unless the act provided otherwise, with the regular CT division of 5 justices being enlarged to 7.

— Prescribed that dates for hearings and sittings in chambers be scheduled in accordance with the order cases are filed with the CT.

— Decided that a hearing may be held three months from notifying the participants about the date at the earliest and six months if the case is to be heard *en banc*.

— Prescribed that the decisions of the CT sitting *en banc* were to be rendered by a $\frac{2}{3}$ majority from then on.

Both amending acts have been subject to complaints brought before the CT, with the second, passed on 22 November 2015, still waiting to be considered by the CT as this article is going to print.

It is also necessary to have a closer look at the circumstances in which the Sejm adopted:

— Five resolutions on finding the Sejm resolutions of 8 October 2015 on the election of Constitutional Tribunal justices null and void on 25 November 2015, and

— Five resolutions on the election of another five justices on 2 December 2015.

These resolutions were examined by the CT on petition from a group of opposition deputies. The CT considered them *en banc* in chambers on 7 January 2016,¹² although initially a hearing was scheduled in this matter. Finally, the CT held that these resolutions did not have any normative (law-making) content and, therefore, the CT was barred from reviewing their constitutionality. The first group of five resolutions was categorised as acts exhibiting traits ‘in part of a statement and in part of a resolution’, that is, resolutions ‘not binding in law’, while the other group of resolutions on the election of justices on 2 December was—in the opinion of the CT—null and void from the outset. All these resolutions did not have any normative content and, for this fundamental reason, the CT was barred from reviewing their constitutionality. To the order discontinuing proceedings in this matter, issued in chambers, three CT justices, including the president, filed dissenting opinions.

The fact that the CT evaded considering both groups of Sejm resolutions and discontinued proceedings in this matter made the CT president change his position and admit to adjudication two justices chosen in December whose

¹¹ JL RP 2015, item 2217. The amending Act was published on 28 December 2015 without the application of any *vacatio legis*.

¹² In case U 8/15.

terms of office began on 3 December and 9 December 2015, respectively. It must be said here that immediately after their election and swearing into office on 2 December, these five justices were assigned offices in the CT building and paid salaries but were not expected to discharge any duties of a justice.

Not only in the opinion of this author, if all the provisions of the amending act of 22 November (more extensive and, above all, more deeply revising the procedures applied so far) are complied with, an almost complete paralysis of the CT will ensue. The main reason is that the amending act has made the CT sit *en banc* with 13 justices participating while only 12 justices sit on the CT as of 8 January 2016. Furthermore, the CT is required now to hear cases as they come to it. If this rule is applied, the hearing of the most important cases will be postponed until a distant future in the event the CT is purposely flooded with cases representing only apparent problems. It is not certain, either, if the government and subordinate agencies, and institutions will be willing to respect judgments entered by CT divisions, in the government opinion, wrongly composed and whether, in the first place, attempts will be repeated to decline to publish CT judgments.

In this context, it is worth citing an astute observation by Hans Kelsen, the author of the European model of constitutional courts, dating back to the late 1920s that: [...] only an organ separated from the legislator, independent of it and of any other holder of state authority, may be called upon to declare unconstitutional acts by the legislator null and void. This is the idea behind a constitutional court. [...] Unless a constitution knows the above-named guarantee of finding any norms contravening it null and void, from the point of view of a legal technique, it is not a fully binding act. Even if this fact is not fully realised, if only in a general outline—because the realisation is blocked by a politically entangled legal doctrine—a constitution that does not provide for finding any acts, in particular statutes, contravening it null and void is, from the point of view of the legal technique, little more than a non-binding wish.¹³

III. DO WE KNOW WHERE WE ARE GOING?

Little more than a wish, that is, a sham normative act. Let us take this thought to its logical end: if the provisions of a constitution become a non-binding wish, they are no longer a normative act. Consequently, a constitution ceases to be a constitution. The paralysis of a constitutional court is tantamount to the paralysis of a constitution. At this juncture, the role of a jurist actually ends as does his or her usability for explaining social phenomena. However, if one would like to try to come to an understanding of the essence of the sequence of events taking place in recent months, it is necessary to go beyond the struggle for the

¹³ H. Kelsen, *Istota i rozwój sądownictwa konstytucyjnego*, trans. B. Banaszkiwicz, *Studia i Materiały Trybunału Konstytucyjnego*, Warsaw, 2009, 38 and 63.

CT and all particular legislative activities by the parliament and government, and try to grasp the entire process of changes and their context. It is certainly difficult to sift out facts so that the most important elements of the changing reality are picked out. Nevertheless, one must not limit oneself to a dry analysis of individual—so to speak—legal artefacts, because then we would have to make do with ascertaining that some action breaches the constitution or not. This kind of approach would not take us any closer to the understanding of the *Zeitgeist* and some ‘signs of the times’ it does leave. The very title of the respected Poznań journal—*Ruch Prawniczy, Ekonomiczny i Socjologiczny*—encourages us to reach beyond the narrow juristic approach when analysing legislative processes and their effects. If only to check whether the universally felt anxieties of one part of society, and a considerable one too, are justified or whether—as those in power maintain—there are no reasons to worry.

The reflections below are doomed to be subjective for many reasons. One of them is the lack of a necessary distance to the discussed events and phenomena—in both a temporal and spatial sense, so to speak. To what end does one need a full and deep knowledge of the import of on-going events after some time, as history, being after all a teacher of life, keeps encountering successive generations of obtuse students?...

Let us therefore try to sort out the events of recent months and ask if they form a sequence helping us to comprehend their deeper significance.

In that case, the decision of the president to pardon Mariusz Kamiński must not go unnoticed. He used to be Head of the Central Anticorruption Bureau (CBA) who was sentenced to three years of imprisonment, pending appeal, in March 2015, together with three associates, for acts perpetrated in the past when they all worked in the CBA in 2006–2007. Mariusz Kamiński was about to be appointed coordinator of secret services in Beata Szydło’s cabinet and a conviction pending appeal might block his appointment. The decision to grant a pardon was taken by the president on 16 November—on the very day when Beata Szydło’s cabinet took office. In this case, however, we ought not to speak of a pardon in the strict constitutional sense; the president himself used a much more adequate phrase by explaining that his aim was to ‘relieve the administration of justice of this case’, as—in his opinion—‘any judgment in this case, whether a conviction or acquittal, would have been interpreted as political and this, in turn, would necessarily have an adverse impact on the independence of the judiciary.’

Jurists disagree as to whether such an act of pardon is possible in the first place. For instance, Professor Ewa Łętowska believes that the pardoning of Mariusz Kamiński is now merely an anticipation of a proper pardon which will take place once his conviction becomes final and absolute, while Professor Piotr Kruszyński considers such an act an allowable ‘individual abolition’.¹⁴ A vast majority of jurists, however, especially those specialising in constitutional law, are of one mind about a pardon failing with respect to

¹⁴ See <<http://telewizjarepublika.pl/prezydent-duda-mogl-ulaskawic-mariusza-kaminskiego-to-precedens-ale-zgodny-z-prawem,26302.html>>.

a person whose conviction is pending appeal.¹⁵ At any rate, the thesis that a pardon is allowable with respect to a person who has been convicted but awaits appeal does not appear in any handbook of constitutional law or in any commentary to the Constitution I know of. The institution of abolition concerns unexposed and undetected offences or untried ones, and has always been applied in the form of a statute or an equivalent act so far. In the light of the Constitution (Article 7) it could not be used in the form of an individual act as there is no ground for it in our law. Abolition, no doubt, is a different legal institution from a pardon which is mentioned in the Article 139 of the Constitution. This article explicitly bars the president from extending the power of pardon to a person convicted by the Tribunal of State. Would it be possible—following the line of reasoning of jurists supporting the conception of individual abolition—to ‘pardon’ individuals convicted by the Tribunal of State pending appeal? Or even not convicted yet by this organ?

Regardless of the disputes about the effectiveness of this form of pardon,¹⁶ unknown not only to Polish law, the most important aspect of this case is its combination with the decision of the president to discontinue proceedings in this case.¹⁷ The president, of course, may discontinue any proceeding, but only that which is in progress in the office he controls; in this case, however, he assumed the role of a trial organ or, to put it plainly, of a judge, breaking thus the principle of the division of powers, following from the Article 10 of the Constitution.¹⁸

And again, the role of a jurist in assessing this act, or rather a non-act, by the president must end here. However, one can hardly help trying to explain what actually this presidential act is and, above all, what its public reception is.

In my opinion, it is this ‘pardon’ of one of the high officers of Beata Szydło’s cabinet, announced almost at the same time as the appointment of this cabinet, that was a clear signal that the present government and all the agencies it controls would be specially shielded by the office of the president, which would not hesitate to use any instrument it has to ensure the government maximum security in this regard. Even if its conduct is unlawful. The purport of the signal is: in applying the law, at the same time, we are above it.

¹⁵ See <http://polska.newsweek.pl/ulaskawienie-kaminskiego-letowska-to-blad-warsztatowy_film,374575.html>.

¹⁶ See <<http://www.prezydent.pl/aktualnosci/wydarzenia/art,69,postanowilem-uwolnic-wymiar-sprawiedliwosci-od-sprawy-m-kaminskiego.html>>. ‘This case was incredibly destructive to the administration of justice and if we are to build a positive image of the administration of justice in Poland, and I would like this to be so, I resolved to relieve, in a peculiar way, the administration of justice of this case, in which somebody could always say that the courts acted at political behest, and cut this problem short, determine this dispute on my responsibility as president. This was the reasoning behind my decision,’ President Duda said.

¹⁷ See <<http://www.tvn24.pl/wiadomosci-z-kraju,3/akt-laski-z-umorzaniem-sprawy-wplynal-doadu,595551.html>>.

¹⁸ See <<http://wyborcza.pl/1,75478,19218093,letowska-prezydent-nie-moze-wyreczac-sadow-grozi-nam-kryzys.html>>.

IV. WITH REVOLUTIONARY FERVOUR

Only in this context, should one view the refusal to administer an oath to the CT justices whose terms of office began on 8 November and all the successive steps taken to paralyse the Polish constitutional court. The first act to amend the CT Act was passed as early as on 19 November and in the ensuing weeks we witnessed unprecedented activity by the Sejm which voted into law, frequently late at night and in haste¹⁹—unheard of earlier—a number of acts of fundamental significance for law and order. These are two acts to amend the CT Act, an act to amend the Radio and Television Act, amendments to the Police Act and the Civil Service Act. The first batch of this kind of statutes is made complete by the new Public Prosecution Act whose Article 137(2) says: ‘Any action or omission by a public prosecutor with the aim of serving exclusively the public interest shall not be deemed misconduct.’²⁰ This provision very strongly corresponds to the act of a ‘pardon’ of sorts extended to Mariusz Kamiński and his associates on the day Beata Szydło’s cabinet took office.

The amending of the Civil Service Act actually dashes the idea of a professional, impartial, diligent and politically neutral (Article 153 of the Constitution), corps of civil servants reporting to the Prime Minister by abolishing competition for higher posts in government administration. As a result, even the highest ministerial posts are part of a spoils system. The staffing of the public electronic media is controlled by the Minister of Treasury, the police was given power to tap phones without the prior consent of a court, while the highly hierarchical public prosecution apparatus will be closely supervised by the Minister of Justice.

It is hard to tell what the coming days, weeks and months will bring but already today it can be said without doubt that the ruling majority has not hesitated to position itself above the constitutional system already on many occasions. This opinion is borne out by numerous statements issued by the law faculties of Polish universities in the face of these violent changes. At the Jagiellonian University in Kraków, at the Faculty of Law, the president’s research supervisor expressed the opinion that his student had breached the Constitution at least on three occasions.²¹

The paralysis of the Constitutional Tribunal prevents any effective review of current legislation. Keeping in mind that many of these laws have been passed in great haste, one can safely claim that a considerable portion of them contravene the Constitution.

This author is often asked if there are any legal instruments or guarantees which could bring the people in power (PIS), the Law and Justice Party,

¹⁹ Between 19 November 2015 and 12 February 2016 the Sejm adopted 35 Acts without any the Senate amendments; in total, 45 Acts were passed.

²⁰ Act of 28 January 2016—Law on Public Prosecution, *JL RP 2016*, item 177.

²¹ See <<http://wpolityce.pl/polityka/273945-nie-do-wiary-prof-zimmermann-ubolewam-ze-andrzej-duda-jest-absolwentem-uj-prof-nowak-to-pokazuje-mentalnosc-ludzi-ktorzy-uwazaja-sie-za-wlascieli-iii-rp>>.

back within the limits of the State ruled by law. The answer must be in the negative. The institutions of a State ruled by law can function as long as they are respected by the people in power. The moment they place themselves above the law, the State ruled by law becomes only an unrealised idea, while the law, or rather legislation, becomes a tool for enforcing the will of the people in power—pure power in action which at all times, at any time of day or night, may lay down the rules of the game or change them at will.

The President of the European Parliament Martin Schulz initially likened the situation in Poland to a *coup d'état*,²² causing first dismay and then a wave of protests—above all from those in power. The sharpness of his statement can, however, be excused. The State ruled by law is not about a freedom to enact statutes and other laws—even in the countries where the rule of law is respected, it so happens that public officials break the law. The contemporary democratic State ruled by law is a procedural democracy, within which there are institutional guarantees of respect for the law, including human and citizen rights. The strongest guarantee that these rights will be observed is the fully separate and independent judiciary with independent judges, including constitutional courts. There are various ways of ensuring the review of law understood as *lex*, that is enacted law, in contemporary political systems. Regardless, however, of the form taken by reviewing institutions, the review must be real. A constitutional tribunal is not the third chamber of parliament but rather a court where law is tried, while constitutional justices have as their benchmarks not party manifestoes, but above all constitutions and acts of international law, constituting a summary of everything that European civilisation has produced in the sphere of legislation.

Constitutional justices have, of course, their political views, as any moderately intelligent adult person does, but it is naive to think that these views agree in each individual case with the programmes and goals of a specific political party, either a ruling or an opposition one. The choice of a justice by a given parliamentary majority does not mean that he or she is forever bound to a party forming the majority. Such ties are usually loose and disappear altogether with time, especially as the terms of office of constitutional justices purposely do not coincide with the lives of parliaments. This makes the CT differ from the Tribunal of State in Poland, for instance. Most importantly, any assessment of the current constitutional crisis and above all its magnitude must acknowledge that the Republic of Poland constitutionally declares and should respect the division of public authority into three powers (Article 10 of the Constitution). The president's encroachment of the territory reserved for the courts ('pardoning' of a person enjoying the presumption of innocence), and the parliament's continual efforts to paralyse the Constitutional Tribunal and public declarations that from a certain moment on, indicated therein, CT decisions are not judgments but merely personal opinions of justices. These are a direct attack on one of the branches of the divided State authority—the

²² See <<http://wiadomosci.dziennik.pl/swiat/artykuly/508115,martin-schulz-porownal-sytuacje-w-polsce-do-zamachu-stanu.html>>.

judiciary, being the pillar of the State ruled by law. One can hardly fail to notice some elements of a selective, visibly directed attack, taking on the form of a *coup d'état*.

Actually, what we are faced with here is much more dangerous. *Coups d'état* usually end in a certain group taking over power without changing the legal system. The 1926 *coup d'état* in Poland did not usher in such violent changes of the legal system as we witness today. The 'good change', as imposed by the current ruling majority, has taken on a violent character and the government has refused to be bothered by the constitutional system and the accumulated decisions of the Constitutional Tribunal. It shall suffice to cite in this context the significance of the principle of *vacatio legis*, which has stopped being applied by the parliament altogether recently.

The events of recent months show that we face a revolution in the full meaning of this word.²³ Let us remember that revolutions take place in parliaments, unless a country does not have one—in that case, remember the iconic attack of street rabble on the Winter Palace. In the countries which had parliaments (England in the seventeenth century, France in the eighteenth century or Germany in 1933), revolutions took advantage of them from beginning to end. Revolutions use lofty slogans and play on the hopes of people who are excluded or, even more often, feel excluded, but their poorly disguised goal is always the so-called exchange of elites or, rather, groups wielding power. In a revolution those in government always blame everything on those who have sought help abroad. Their actions always end in chaos to a greater or smaller extent and wear down society so much that ultimately it is ready to call in a strong-arm government. Is Poland threatened by such a scenario? This cannot be ruled out, but the traditional Polish dislike for revolutionary changes and acts of terror towards fellow Poles may gain the upper hand. Even the Solidarity movement, proclaimed a revolution far and wide, actually was not one. Has anyone ever seen a revolution that would first register with a court of law?...

²³ See <<http://wyboreza.pl/magazyn/1,150174,19519576,marcin-krol-demokracja-musi-byc-goraca.html>>. Marcin Król: 'This is a revolution. Law and Justice has its ideology—socially conservative, national—in which traditional meanings of words are reversed. It also announces a new beginning, this is what the so-called change for the good is all about. Under the new regime, the authorities would like to have their own Constitutional Tribunal or a new constitution for that matter, a new system of education and a new judiciary, a new health care system and all these new organisations are to be staffed with new people, because society is generally to be given a new mental-spiritual construction. As during any revolution, we have terror as well. Of course, this is not the terror of the French or Bolshevik revolutions, but the use of coercion is clearly visible, for instance towards the public media, or in plans to expand the surveillance powers of the police and secret services. This revolution cannot get into full swing, because Poland is a member of the European Union and NATO and because people do not want it, as all they want is to live a prosperous life. This whole plan will break down—perhaps in half a year or a year or during the next election. For a revolution without a revolutionary situation cannot succeed.' See also <<http://www.newsweek.pl/rewolucja-pis-czemu-miala-sluzyc-dobra-zmiana-,artykuly,378636,1,z.html>>.

V. A POLE YET AGAIN IS WISE AFTER THE EVENT

Finally, one more comment. No one in Poland or abroad questions the fact that the current ruling majority has come to power legally. However, it must be remembered that the victorious party received votes of just under 6,000,000 citizens, which translated into 37.58 per cent of all votes cast. Those entitled to vote numbered 30,600,000 while 15,200,000 valid votes were cast, putting the turnout figure at almost 51 per cent.²⁴

This percentage of votes would not have given the victorious party the absolute majority of seats in the Sejm (235), had it not been for the electoral law which provided for an eight-per-cent electoral threshold for coalitions. In the last election, only one coalition took part (United Left) and won 7.55 per cent of the vote. Had this electoral list been registered as an electoral committee, the distribution of seats would have been different and the victorious party would not enjoy an absolute majority in the Sejm. The United Left made the same mistake as did the Coalition of Electoral Committees *Ojczyzna* in 1993, which won then 6.7 per cent of the vote. This result did not give it a single seat; this, however, does not mean that the failure to enter the Sejm caused the constituency to disappear. It is they who are the most important element in any democratic country and elections are held for them after all, are they not? Elections to the Sejm, under our Constitution should be proportional (Article 96). This means that the number of seats should be proportional to the number of votes received. The two examples of obvious disproportionality, resulting from the 1993 Sejm electoral law, suggest that it is necessary to verify if the existing electoral thresholds ought to be kept, in particular in respect of coalitions but not only. The electoral law, instead of punishing parties for failing to prepare for an election, in fact deprives voters of their right of representation. In short, the thrust of this repression, so to speak, is misdirected in this case and the unfair distribution of seats encourages its beneficiaries to ignore the rights of the opposition.

This is, however, not the only problem that will have to be dealt with after a return to normality. The guarantees of legality in the III Republic have not been properly fitted into the workings of the state as a constitutional framework. Hence, the entire machinery in this context needs to be redesigned. This task, however, goes far beyond this preliminary draft and mostly a spontaneous summing up of experiences gathered after 25 October 2015.

At the beginning of this article, a promise was made to refer to a certain aspect of the June 1989 election. Then, the distribution of seats in the Sejm was determined in advance, regardless of the number of votes received by particular factions. The purpose was to ensure an absolute majority of seats to the incumbent government for the next four years. The real election results (at a turnout of 62 per cent, the Solidarity camp won 65 per cent of the vote)

²⁴ See <http://parlament2015.pkw.gov.pl/349_Wyniki_Sejm>.

brought about a total meltdown of the existing political line-up several weeks later and already on 12 September 1989, a representative of this camp headed a new historic cabinet. This is one of the many pieces of evidence that it is illusory to read the true public feeling from the election and not the voting results.

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REVOLUTION—CONSCIOUS OR UNCONSCIOUS

S u m m a r y

The undermining of the political position of the Constitutional Tribunal by the ruling majority seen since 25 October 2015 is one of a sequence of events, of largely legislative character, which in fact put an end to the status of the Republic of Poland as a state governed by the rule of law. The government, as well as president, is, by taking numerous measures or omitting to take others, putting itself above the Constitution. The manner as well as the speed at which the Sejm passes resolutions concerning major spheres of public life such as legislative acts with respect to the police, electronic media, the civil service, or the prosecutor's office, which are being adopted without public consultation and in an atmosphere in which the rights of the opposition are ignored, is a blight on procedural democracy, stirring deep concerns about the goals that the current government is setting itself. The accompanying movement of personnel in high official positions in the state administration, the police, government agencies, companies with State Treasury participation and public media would seem to escape full control and the intensity with which it is forced through may lead to chaos in public life and result in a temptation to impose authoritarian rule.