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THE METHOD OF APPOINTING JUDGES TO THE CONSTITUTIONAL TRIBUNAL*

One positive outcome of the crisis involving the Constitutional Tribunal, which has been ongoing since October 2015, is an undoubtedly enhanced interest in the function performed by this judicial body, as well as its significance in the protection of civil rights and freedoms embedded in the Constitution. Moreover, the awareness of the importance of the Constitution itself has risen as well. Just a few months ago no one in Poland could have imagined tens of thousands of people marching down the streets of Warsaw and other cities, demanding that the government observe the Constitution, specifically by refraining from actions potentially jeopardising the independence of the Constitutional Tribunal. However, one will only be able to consider the actual positive effects when the principle of the rule of law contained in Article 7 of the Constitution is respected, and when compliance with this principle by the legislature is subject to control by an independent judicial body, which the Constitutional Tribunal is and should remain as such. Putting aside the political motives of the forces which have led to the crisis around the Constitutional Tribunal,¹ it has to be borne in mind that the provocation of the crisis has been facilitated by an objective factor within the system of constitutional judicial review in Poland, which has been present since the very beginning of its existence. What I consider to be this factor is the method of appointing judges to the Constitutional Tribunal, which has remained virtually unaltered since the Constitutional Tribunal Act 1985 came into force.² This procedure for the appointment of judges to the Constitutional Tribunal, binding to this day, has been a source of continuous allegations concerning political ties that the judges supposedly had with the political parties which had nominated them for election in the lower house of the Polish parliament (the Sejm).³

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¹ The motives have never been clearly specified, apart from the pursuit of uncontrolled power by an independent organ.

² See Article 13 of the Act on the Constitutional Tribunal 1985, Journal of Laws of the Republic of Poland (JL RP) No. 22, item 98.

³ I know from my own experience that these allegations are to a large extent unfounded. Thanks to sound mechanisms safeguarding judicial independence, especially the inability to pursue re-election, judges follow their legal knowledge rather than instructions from political forces and their interest.

The method of appointing judges to the Constitutional Tribunal has to suit the legal character of this judicial organ and the competences that are connected to it. The legal character of the Polish Constitutional Tribunal is similar to that of constitutional courts in other European states; it is an organ of the judiciary (Articles 10 and 173 of the Polish Constitution). Hence, it is separate and independent from other powers. Its competences have been laid down in Articles 188 and 189 of the Constitution. The Constitutional Tribunal was established primarily to provide the assessment of the conformity of the statutory law and international treaties with the Constitution as well as with the international treaties ratified upon prior consent of both the Sejm and the Senate granted by statute. It also investigates the conformity of other normative acts with the Constitution and other normative acts of higher hierarchical position (Article 188 (1)–(3) of the Constitution). It is also within the Constitutional Tribunal's competences to hear a constitutional complaint, as stipulated in Article 79 of the Constitution. According to this provision, what may be challenged is the normative basis of a court ruling or an administrative act, and it is the conformity of that normative basis with the Constitution or an act of higher hierarchical position that is subject to review by the Tribunal. What is not subject to review is the conformity of the decision itself with the Constitution or the normative act which has been the basis for the ruling or decision in question. Thus, the Tribunal does not in fact investigate whether the application of law by a court or an administrative authority has stayed in conformity with the Constitution. Hence, unlike the Federal Constitutional Court of Germany, in this instance the Constitutional Tribunal does not act as a typical organ of the judiciary applying the law to the facts subject to investigation. Equally, when answering legal questions certified to the Constitutional Tribunal by a court hearing a particular case (Article 193 of the Constitution), the Tribunal retains its status as a tribunal of norm, as opposed to a tribunal of fact which applies specific legal norms to particular factual circumstances. Similar powers have been conferred upon the Tribunal in Article 189 of the Constitution, which regulates the issue of resolving competence disputes between central constitutional organs of state. It is somewhat different when the power to assess the conformity of the purposes or activities of political parties with the Constitution (conferred upon the Constitutional Tribunal in Article 188(4) of the Constitution) is in question. In this instance the Tribunal does not act as a tribunal of norm but as a tribunal of fact. In this very narrow sense the Polish Constitutional Tribunal has become more similar in its character to ordinary judicial organs, albeit without developing into an organ of administration of justice. This is because the legal consequences of the Constitutional Tribunal's ruling are to be drawn by the courts. Conferring the power to assess the conformity of the purposes or activities of political parties with the Constitution upon the Constitutional Tribunal is justified by the fact that for the purpose of such a decision it provides a universally binding interpretation of constitutional norms.

The above analysis indicates that the Constitutional Tribunal is substantially different in character from other organs of the judiciary: it is not

a justice administering power. This justifies the separate status of the Constitutional Tribunal judges as opposed to the judges of the Supreme Court, common courts, as well as administrative courts, or military courts. This special status has been confirmed in the ruling by the Constitutional Tribunal of 9 December 2015, in which the Tribunal recognised that the National Council of the Judiciary lacks authority to lodge an application concerning the protection of the independence of the Constitutional Tribunal judges and the independence of this judicial body itself.⁴ The distinction is also rightly reflected in different procedures for becoming a judge of the Constitutional Tribunal on the one hand and a judge of the Supreme Court, common court, administrative court, or military court on the other. Pursuant to Article 194 of the Constitution judges are appointed to the Constitutional Tribunal for a 9-year term, individually by the Sejm. Where other courts are concerned, judges are appointed by the President of the Republic of Poland on the motion of the National Council of the Judiciary (Article 179 of the Constitution). The President does not participate in the act of electing or appointing judges to the Constitutional Tribunal. The elected judges merely take an oath of office before the President⁵, which is a ceremonial act.

Lately some have expressed a view that the Constitutional Tribunal is virtually ‘the third house of parliament’, capable of hampering the reforms introduced by the parliament elected by universal suffrage⁶. Some have called the Constitutional Tribunal ‘a negative legislator’. Both terms are incorrect, albeit not equally. Putting aside the aforementioned provisions of the Constitution, under no circumstances may the Constitutional Tribunal be considered a part of the legislature. The status of the Constitutional Tribunal judges has to be inherently different from that of the members of parliament. Firstly, to even remotely regard the Constitutional Court as a third house of parliament is a complete misperception. In deciding on a legislative act (a statute, for example), the Court merely considers the conformity of the act (and more often the conformity of the norm encoded in a particular provision of the act) with the Constitution or an international treaty ratified upon prior consent of both the Sejm and the Senate granted by statute. Hence, from that perspective a decision by the Constitutional Tribunal is of a cassatory character⁷, as it will be limited to a review of the legality of a legislative act or a legal provision. What is not a subject to the Tribunal’s consideration are the crucial aspects of the legislative process, namely using the new regulation to pursue political objectives by the ruling majority. The political aim of an act, its rationality (for instance in the context of the economy), or the degree to which the political

⁴ See The decision by the Constitutional Tribunal of 9 December 2015, K 35/15, JL RP 2015, item 2147.

⁵ See Article 21(1) of the Act on the Constitutional Tribunal 2015, JL RP 2015, item 1064.

⁶ For example the interview with MP Jarosław Kaczyński in December 2015 on *Telewizja Republika*.

⁷ See O. Höffe, *Wer hütet die Verfassung vor ihren Hütern?*, in: M. Stolleis (ed.), *Herzkammern der Republik. Die deutschen und das Bundesverfassungsgericht*, Munich, 2011, 130.

aim is reflected in a legal text, remain beyond the Constitutional Tribunal's authority. Therefore, the Tribunal is not meant to be a political body, unlike both houses of parliament. It is absurd to call for securing proportionality between different political forces in the Constitutional Tribunal; it is absurd to call for the division of judges into 'ours' and 'yours'. Yet that demand has been officially put forward by Prime Minister Beata Szydło and presented for the consideration of the parliamentary groups. Fortunately, it has been rejected by the opposition. The question was not whether the proportion suggested by Prime Minister Szydło was appropriate but whether it was appropriate to regard the Constitutional Tribunal as a cake of which each political party should have a slice.

Nevertheless, one cannot ignore possible threats arising from the Constitutional Tribunal rulings being 'politicised'. After all, the Court adjudicates on cases which in the majority of instances have intense political overtones. The question is to ensure that the criteria used by the Constitutional Tribunal judges are not meant to defend any political interests. This also has to apply when it is necessary to weigh up the relative weight of opposing principles expressed in the Constitution, while assessing the conformity of a legislative act or its particular provision with the constitutional standard of review. In such cases, the risk of a judge being accused of employing political criteria is particularly high. The allegations are of lesser significance when a judge possesses outstanding legal knowledge and is of impeccable character, and aware of his or her independence. Only such a person should be appointed a judge of the Constitutional Tribunal.

Therefore, appropriate regulation of the procedure of appointing judges to the Constitutional Tribunal is necessary. By appropriate I mean one which would prevent electors from employing political criteria leading to filling vacancies with 'loyal' justices; one which would safeguard the optimal selection of persons of outstanding legal knowledge, combined with impeccable character, and a sense of independence. The position in the political system of the body responsible for electing judges should correspond to the high position of the Constitutional Tribunal and its judges in that system.

In particular, one has to answer the following questions: who shall appoint the judges? Who shall be eligible to offer themselves for appointment. Who shall have the power to nominate the candidates? What should be the manner of electing the Constitutional Tribunal's judges?

In Poland the election is conducted by the Sejm voting by absolute majority in the presence of at least half of the statutory number of MPs.⁸ There is a variety of methods for selecting judges to constitutional courts in other European States. I am using the term 'selecting' as not in all these States the judges are elected by either one of the houses of parliament, or both of them. In some States the judges are appointed, and by different organs of state.

In Germany, the procedure for electing the judges by both houses of parliament (Bundestag and Bundesrat) is very complex. The Federal Constitutional

⁸ Article 17(2) of the Act on the Constitutional Tribunal.

Court comprises sixteen judges; each house of the parliament appoints half of them by a two-thirds majority, while the Bundestag elects eight judges directly, the election in the Bundesrat is two-tier. The Federal Constitutional Court itself has been granted significant competence to fill a vacancy whenever the parliament fails to do so within two months.⁹

There is no election to the Constitutional Council (*Le Conseil Constitutionnel*) in France. The Constitutional Council consists of nine members, of whom three are appointed by the President of the Republic, the President of the National Assembly, and the President of the Senate respectively. The nominees have to be accepted by an appropriate commission in both houses of parliament.

In Italy, which has a mixed system, the Constitutional Court of the Italian Republic (*La Corte Costituzionale*) comprises fifteen judges, of whom: five are appointed by the President of the Republic; five are elected by both houses of parliament by a two-thirds majority in the first three rounds or a three-fifths majority in subsequent rounds; three are appointed by the Supreme Court of Cassation; one is appointed by the Council of State; and one by the Court of Audit (*La Corte dei Conti*).

These three examples alone demonstrate the variety of methods of selecting judges to constitutional courts. The question is always how to prevent the constitutional court vacancies from being filled predominantly by one political faction. It is a reflection of the fear that a constitutional court may become a facade meant to support the policies of the ruling political force of the day. In some cases, particularly in the case of Italy, the lawmakers doubtlessly aimed to reflect the position of the constitutional court as an organ standing outside the structure of the separation of powers.

I believe we should not seek to minimise the degree of politicisation of constitutional court decisions through reshaping the system of electing or appointing judges to constitutional courts. The current system of electing judges to the Polish Constitutional Tribunal should be deemed appropriate. The significance of the function of a constitutional judge is indeed emphasised in the act of electing. The Sejm, alone or together with the Senate, nominates candidates for the highest State offices. The office of a Constitutional Tribunal judge is of exactly that rank. Introducing a two-thirds majority is not recommended, as it would obstruct the possibility of filling a vacancy in the Court promptly. If the Sejm indeed decided to introduce that solution, it would be necessary to follow the German example and set a time limit, by which the authority to appoint a judge would transfer to the Constitutional Tribunal.

Now I will attempt to answer the second question, which concerns the qualities a candidate to the Constitutional Tribunal judge should possess.

In the Polish legal system a candidate judge is expected to have outstanding legal knowledge (Article 194(1) of the Constitution). The phrasing of this condition is not exceptionally precise. It nevertheless enables the assessment of a nominee's knowledge and previous achievements. The criteria set by the

⁹ If one would consider the revision of the current Constitution, this German model could serve as a sample for the future Polish solution.

statutory regulation of the Supreme Court and the Supreme Administrative Court are much more detailed. Pursuant to Article 18 of the Act on the Constitutional Tribunal,¹⁰ a judge of the Constitutional Tribunal shall meet requirements sufficient to hold the office of a judge of the Supreme Court or the Supreme Administrative Court. Pursuant to Article 22 of the Supreme Court Act,¹¹ a candidate judge of the Supreme Court has to be a Polish citizen and enjoy full or civic and public rights, be of impeccable character, and must have completed legal studies with a Master's degree or an equivalent degree earned abroad and recognised in Poland. The context indicates that in the latter case the lawmakers also meant a degree in Law. The provision repeats the condition set in Article 194 of the Constitution, which is an outstanding level of legal knowledge. The law requires a minimum of ten-years' working experience as a judge, a prosecutor, the Attorney General of the Treasury, the deputy Attorney General of the Treasury, a senior legal counsel of the Treasury, a legal counsel of the Treasury, or of work in Poland as an advocate, legal advisor or a notary. The ten-year working experience condition does not apply to persons employed at Polish schools of higher education, the Polish Academy of Sciences, research institutes, or holding either the title of Professor of Law or a degree of Doctor of Law with 'habilitation'. Pursuant to Article 7 in relation to Article 6 of the Act—Law on the System of Administrative Courts¹² the same requirements have to be met by a nominee to the Supreme Administrative Court, albeit the list of legal professions has been extended. The Act on the Supreme Court does not state the minimum age for a candidate judge. Such a threshold has been set in respect of judges of the Supreme Administrative Court, who have to be at least forty years old.¹³

In European legal systems the requirements that have to be met by constitutional court nominees vary significantly. Yet, the emphasis on outstanding legal knowledge prevails. An interesting condition has been set in the German law. In each of the two senates of the Federal Constitutional Court there have to be at least three persons with a minimum of three years' experience in sitting in the highest instances of the judiciary.

Where a nomination to the Constitutional Tribunal in Poland is concerned, there is only one negative condition: a candidate judge may not have already been a Constitutional Tribunal judge. This condition is incredibly important from the point of view of safeguarding judicial independence and has been rightly laid down in the Constitution (Article 194).

I believe that, in order to minimise the risk of Constitutional Tribunal judges having any political ties, additional negative conditions need to be introduced. An extremely unfavourable yet common electoral practice has been

¹⁰ The Act on the Constitutional Tribunal 2015, JL RP, item 1064.

¹¹ The Act on the Supreme Court 2002, consolidated version: JL RP 2013, item 499.

¹² The Act of 25 November 2002—Law on the System of Administrative Courts, consolidated version: JL RP 2014, item 1647.

¹³ See Article 7(1) of the Law on the System of Administrative Courts. Pursuant to this provision an exception shall be granted as far as a person who has worked as a judge in a regional administrative court for at least three years is concerned. In such a case the age threshold is 38 years (see Article 6(5)).

to appoint judges holding offices of an obviously political character even at the time of the nomination. MPs, senators, a deputy Marshal (speaker) of the Sejm, ministers of the government, and secretaries of state in the ministries have run for the office of Constitutional Tribunal judge. A minimum four-year waiting period should be introduced for a candidate, who in the four years prior to the vacancy in the Constitutional Tribunal arising has been a member of parliament or a senator, or held any political post as: a minister, a secretary of state in a ministry, or an under-secretary of state at the Chancellery of the President; a member of the Council of Ministers, whether a minister of the government, a secretary of state in a ministry, or an under-secretary of state. On top of that my opinion is that at the moment of nomination a candidate judge must not be a member of any political party.

I believe that it is necessary to introduce an age requirement in the Act on the Constitutional Tribunal. At the time of the election, a candidate judge should be no younger than forty years and no older than sixty-seven years. It has to be borne in mind that the term amounts to nine years, thus it may run until a judge reaches the age of seventy-six.

Finally, I will attempt to answer the last question, concerning the entities authorised to nominate candidates. In the current legal framework the authority to nominate judges to the Constitutional Tribunal has been conferred upon the Presidium of the Sejm or a group of fifty MPs.¹⁴ This element of the procedure of appointing judges to the Constitutional Tribunal must be amended in the first place in order to minimise the risk of the Constitutional Tribunal being politicised. Both the Presidium of the Sejm and the group of fifty MPs are entities of a strictly political character, which inevitably impacts on the assessment of the political involvement of a nominee. It is an urgent necessity to change this situation through rethinking the list of entities authorised to nominate Constitutional Tribunal judges. They must be entities outside the political arena. Such a list should include: the General Assembly of Justices of the Supreme Court, the General Assembly of Justices of the Supreme Administrative Court, the National Council of the Judiciary, the Polish Bar Council, the National Council of Legal Advisors, the National Council of Notaries, and Law Faculty councils authorised to award a degree of Doctor in Law with habilitation.¹⁵

To achieve the optimal effect, it is essential to determine a procedure for nominating judges. I believe this should work as follows: six months before the term of a Constitutional Tribunal judge expires, the Marshal of the Sejm should demand the authorised entities to present a candidate within a month, together with the necessary data, and the candidate's statement of consent and declaration of eligibility. Upon receiving the nominations, the Marshal of

¹⁴ See Article 30(1) of the resolution of the Sejm of 30 July 1992 Rules of Procedure of the Sejm.

¹⁵ The proposal is based on a bill drafted by a group of judges and retired judges of the Constitutional Tribunal. The bill was presented to the Chancellery of the President in 2011. The bill in the form presented to the Sejm by President Komorowski did not include the suggested method of nominating judges.

the Sejm should publicly announce the names of the candidates. Two months before the term of the retiring judge expires, the Marshal of the Sejm should call a convention comprising one delegate of each of the parliamentary groups. Having interviewed all the nominees, the convention shall shortlist three of them to fill the vacancy in the Constitutional Tribunal. It is crucial that no parliamentary group has a majority so all the groups are compelled to reach an agreement. The three shortlisted candidates shall be presented to the Sejm, which shall elect the judge. Should none of the nominees win an absolute majority of votes, the second round of voting shall only include the two with the greatest number of votes. In the event of a seat being vacated in mid-term, the time frame shall be reduced accordingly without altering the essential features of the procedure.

Once adopted, these rules should be applied for electing judges to fill subsequent vacancies in the Constitutional Tribunal.

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THE METHOD OF APPOINTING JUDGES TO THE CONSTITUTIONAL TRIBUNAL

Summary

It is shown in the paper that the method of appointing judges to the Constitutional Tribunal depends on the character of the Tribunal ascribed to it by a specific legal order. And yet, care is always taken to ensure that the composition of the Constitutional Tribunal is not influenced by any political power. Treating the Constitutional Tribunal as a political organ (or a third chamber of the parliament, a negative legislator) is flawed. The Constitutional Tribunal can by its decisions strike down certain laws. When examining the compliance of a normative act with the Constitution the court takes no account of the rationality or fitness for purpose of the solutions adopted. In this paper, a new way of selecting candidates for the office of judge of the Polish Constitutional Tribunal is proposed with a view to ensuring that a judge of the Constitutional Tribunal is distinguished by outstanding legal knowledge and impeccable character as well as being aware of judicial independence.