

WOJCIECH ŁĄCZKOWSKI

COMMENTS ON THE CURRENT DEVELOPMENTS CONCERNING THE POLISH CONSTITUTIONAL TRIBUNAL*

The ongoing discussion about the Constitutional Tribunal (CT) in recent weeks and the developments involving it show what an important position the CT has in Poland's political system. It breeds a temptation to bring the CT under the control of political forces or at least to diminish its ability to review legislation. For the most important task of the CT is to act as guardian so that norms arising from State organs be consistent with the Constitution. The very notion of guardianship in the maintenance of this consistency should be an unquestioned canon in any democratic State ruled by law despite the fact that it often hinders the work of the legislative and executive powers. As a rule, this causes their aversion to the CT. This aversion—however understandable—should not weaken the mechanism ensuring that no public authority changes into an 'autocracy'—an authoritarian regime threatening the rise of a dictatorship. It is better, therefore, not to treat such threats lightly, even if they initially appear unreal or non-existent. History, in this regard, supplies many tragic examples.

In democratic States, nobody questions as a rule the fact that constitutional courts are the institutions in which the sole power to review the constitutionality of laws is vested. In other States—in which history has taken a different course—this power rests with supreme courts (as in the United States of America). The importance of these institutions for the political system demands that considerable restraint be exercised when amending the laws that concern them. Any such changes should come as absolute exceptions and have very serious (and justifiable) motives behind them.

Three such motives can be named. First, the need for amendments could follow from the assumption that constitutional norms are so flawed that they do not deserve to be respected because they contravene the 'will of the People' and do not meet the standards of the democratic State ruled by law. Hence, such norms should not be upheld by the CT. In the Polish reality, this argument may seem outlandish, but allusions to the primacy of the 'good of the People' have appeared recently even in parliamentary speeches. Second, a motive for amendments could be derived from allegations that the CT improperly

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reviews laws. Third, any amendments to improve the work of the CT are always welcome. Any such amendments, however, must not undermine its position in the political system and autonomy, as well as independence of justices.

Against this background, it is worthwhile to examine in greater detail the amendments to the Constitutional Tribunal Act (CT Act) discussed now and, specifically, discern if they have been prompted by the motives mentioned above.

History knows many examples of entire systems of law, including constitutions, being deservedly referred to—in the words of Rudolf Stammeler—as ‘wicked law’, not deserving any respect. Those who had broken such law had later monuments erected and were treated as heroes. This is also true for Poland’s modern history. However, for over a quarter of a century, the situation has been radically different. The Polish 1997 Constitution, in spite of flaws in need of correction or even some regulations begging redrafting, meets all the fundamental standards of the democratic State ruled by law and deserves protection. Even its harshest critics do not call for its boycott. Hence, neither authoritative legal literature nor any responsible political force officially alleges that the CT protects a bad Constitution.

In this situation, it is opportune to discuss the second motive and ponder if the CT properly protects constitutional norms. The discussion of the recent amendments to the law concerning the CT (Act of 22 December 2015 to amend the CT Act) has centred on the manner of appointing justices. The author of these amendments argued that a majority of the current justices had been chosen during the term of political forces that had dominated and which subsequently had lost the last election. This is true. This is the law in force now and the current parliamentary majority does not gainsay its adherence either. Therefore, bringing this sort of argument is neither rational nor fair. For one cannot question the legitimacy of choosing justices by one parliamentary majority and at the same time consider the choice made by another majority as valid.

Neither is the argument persuading that the need of amendments follows from the breaking of the rule that deputies choose CT justices only to replace those justices whose terms of office end during the lifetime of the Sejm making the choice. This rule was broken by the legislation passed by the previous Sejm and the choice of two additional justices in advance (beyond the term of the existing parliament), despite the fact that they should have been chosen by the next Sejm. The CT not only did not participate in this, but quite on the contrary, held that in this respect the amendment to the statute was unconstitutional as was the choice of those two justices. Whereas, the choice of the three other justices was held to have been lawful—whereby the constitutional order was restored. It is, therefore, surprising that this situation is cited as one of the reasons making it absolutely necessary to ‘mend’ the way the CT works. Incidentally, what else makes one wonder is the allegations made against several justices that they took part in preparing unconstitutional amendments to the CT Act. If this had been true, the CT would not have held the amendments, which allegedly were co-authored by its justices,

unconstitutional. This is a clear case of confusing law-making with desirable consultations with entities which a new law is to affect.

The chief problem follows, however, from the explicitly formulated suggestion that justices chosen on the recommendation of the previous parliamentary majority do not guarantee impartiality: may be guided by party loyalty when giving their opinions. With the current system of choosing justices, similar allegations could be made against the justices who have sat on all the adjudicating benches until now. The justices recommended by the political faction making this kind of allegation would not be spared. Of course, it cannot be ruled out that a justice will compromise his or her professional integrity and obediently meet the expectations of the party that has recommended him. This would be a very serious allegation, disqualifying to a justice, which would need to be proven and verified in a disciplinary procedure provided for such situations. Whereas, making such unfounded and generalising allegations is unacceptable not only because of political culture, but also in terms of common decency and ethical requirements. This is, of course, not to preclude a discussion of other ways of choosing CT justices.

The above reflections are based on personal experience. I was appointed a justice of the CT soon after Poland regained her freedom in 1989. The CT was comprised then of 12 justices appointed by both the old regime and the new authorities. I was afraid of a political confrontation and clash of outlook among them. Indeed, heated discussions did take place. However, they concerned points of law. Everyone tried to stay within the bounds of a civilised dialogue. The confidentiality of bench deliberations prevents me from disclosing any details or even much less, divulging any names. The main criterion of evaluation of our work after all should be the quality of CT decisions, which do not give rise as a rule to any serious censure in the authoritative legal literature. The decisions of the Polish CT were closely followed from the beginning in other democratic States ruled by law. As a result, it quickly joined the prestigious club of German, French, Italian or Spanish constitutional courts. This could be seen in many direct contacts between these courts from various States, but does not mean, however, that all its judgments are faultless and may not be criticised. Nonetheless, there are no grounds whatsoever for making blanket allegations of partiality.

In the period I am writing about, most justices were aware of the historically exceptional times they worked in. For the most part, old law was still in force, while the Constitution—albeit slightly modified—dated back to 1952. In the Polish People's Republic, law was treated as an instrument for protecting the then political system. Meanwhile, the CT was meant as a guarantor of the democratic system. This contradiction gave rise to highly complex legal situations. One of them was the notorious crisis provoked by the oath formula which several newly elected justices were unwilling to take. Most importantly, however, the CT, despite varied political views and differences in outlook, was able to unravel many extremely complex cases *in jure*. This is particularly true of fundamental axiological cases, which brought out strong emotions and aroused fierce controversies. In this context, suffice to mention decisions

concerning the return of teaching religion at schools, displaying crosses in public places, several decisions concerning the protection of human life and others concerning property, following from old decisions nationalising private property. A review of all successive CT decisions would not produce any evidence that justices have not been impartial. Every decision in its essence affects some vested political interests. Sometimes it pleases a parliamentary majority and on other occasions it may prove very painful. The latter situation arises when the CT rules a piece of legislation originally sponsored by the parliamentary majority unconstitutional. Usually, opposition factions receive such rulings with opposite feelings. It can be easily shown that it has never been the case that CT decisions were always favourable to one faction and unfavourable to another. Hence, an allegation of partiality in regard to CT justices is unfounded even more so as these are mostly outstanding jurists (who have their political convictions and outlook) but when they take their seats on the CT, they try to stay objective and act honestly so that their standing with their colleagues and peers does not suffer. Moreover, since a justice can serve only one term on the bench, there is no temptation to bow down to the expectations of the political forces that recommended the justice to a seat on the CT.

So the spurious and ungrounded argument of partiality is to make it supposedly necessary to amend the CT Act. Furthermore, it is unfounded or downright ridiculous to claim that the CT in its current composition will block any reforms attempted by the new authorities who, after all, will successively get their chance to appoint new justices. Hence, there is no need—at least for this reason—to introduce any violent, revolutionary amendments to the CT Act.

Finally, a thought ought to be given to the need to improve the work of the CT in a way provided for in the recent act to amend the CT Act of 22 December 2015 (the third potential motive to introduce amendments mentioned in the beginning). Only organisational matters and proceedings before the CT can be meant as it is only these domains that the Constitution in its Article 197 leaves to be regulated by statute. This clause of the Constitution bars the legislature from encroaching on the territory reserved for the CT's judicial activity and restricting its ability to adjudicate (Article 188 of the Constitution).

No one has any doubts that the latest act to amend the CT Act may be subjected—as any other act—to judicial review by the CT. The Constitution does not provide for any exceptions in this respect. Leaving aside what the decision of the CT in this case will be, in particular what judgment will be entered, it is worthwhile to scrutinise several provisions of the amending act, which are marked by a curious paradox. They include a rule that the CT should sit in a division of 13 justices and hear cases in the order of their submission. Another objection that the amending act gives rise to is its failure to provide for a *vacatio legis*. Paradoxically, these three provisions not only do not improve the organisation of work of, and proceedings before, the CT, but—if they were applied—paralyse its adjudicating activity. This means that—contrary to appearances—the December amending act encroaches on the powers of the CT for the only and direct source of these powers should be the Constitution.

Actually, the three provisions form a triple obstacle, preventing the CT from properly performing its functions.

The requirement that the CT sit in a division of 13 justices totally blocks adjudication on the constitutionality of statutes, including of course the new CT Act, because there are currently fewer justices on the CT capable of adjudication. This matter constitutes a separate constitutional issue that was determined in the binding CT judgment of 3 December 2015. If, therefore, the CT considered itself bound by this provision, it would have to cease adjudicating. If, however, the CT president additionally admitted three justices out of those sworn into office by the president, he would defy the CT judgment of 3 December 2015. This is so because these three justices were chosen despite the fact that—as the CT held in the above-named judgment—their seats had already been lawfully filled by the previous Sejm. The legislature has thus brought about an absurd situation that places in jeopardy the functioning of the CT.

In turn, the provision making the CT hear cases in order of their submission poses another obstacle to reviewing, within a reasonable time, the constitutionality of the new CT Act. The CT would not be able to adjudicate on this matter even if it were possible to solve the quorum problem. As the matter concerns a piece of legislation dated 22 December 2015, it would have to wait to be heard until proceedings in all earlier cases have ended. When this would happen is hard to tell. A Catch-22 situation could develop where all CT judgments rendered in this time would be tainted by unconstitutionality if it turned out later that the act, pursuant to which they were entered, was unconstitutional. Therefore, in agreement with logic, petitions to have the constitutionality of the CT Act reviewed should be considered first. Another question is the irrationality of imposing the order of hearing cases by statute.

The failure to provide a *vacatio legis* for the act amending the CT Act is the third element ‘protecting’ it against being reviewed by the CT within a reasonable period of time. Publishing the amending act forthwith (within hours from its signing by the president) made the first two obstacles—paralysing the work of the CT—come into force without delay. It looks as if the authors of the amending act were afraid that the CT could consider the question of its constitutionality during a *vacatio legis*.

We do not know the real, far-reaching motives of such rash amendments to the CT Act passed in a manner that is not generally practised in democratic States. One can only guess. The matter is not helped by the reasons for these moves given by the authors of the amendments. For instance, nothing is explained by their answers to frequent inquiries by both domestic and important foreign institutions or organisations. In most cases, their answers are nothing but indications of pathological phenomena taking place when their predecessors were in power or historical events, going as far back as the period of the Partitions or the Second World War. Occasionally, there is also advice as to what the inquirer should busy himself with instead. Furthermore, allegations are made, known from not so distant a past, of a ‘conspiracy of hostile forces’ or corporate interests being upset and the like. Another claim which can be heard is that the new authorities elected in a democratic election represent

the ‘will of the People’, while the same characteristic is denied to other political forces assuming government in previous elections. Such explanations not only clarify little, but also raise even more doubts and give the impression of a desire to hide the true intentions of those wielding power.

Meanwhile, the recent developments involving the CT may engender serious concern as to the future of the democratic State ruled by law. These concerns are exacerbated by the context of events in many other areas, which call for separate analyses. It is no accident that the situation under discussion has attracted attention and criticism from many serious law centres in Poland and many major foreign opinion-forming media and international political institutions. It is highly improbable that all expressing such concern are wrong, ill-intentioned or involved in non-existent, imaginary situations. In Poland’s true interest, the matter must not be treated lightly. It may be resolved with the help of the CT. For this to happen, the CT must be allowed to perform its principal functions even if this were to hinder the achievement of particular aims of some political factions in power. For there is no guarantee that these aims are, or will be, identical with the true common good.

Wojciech Łączkowski

*Professor Emeritus at the Adam Mickiewicz University in Poznań
and the John Paul II Catholic University of Lublin*

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S u m m a r y

The Amendment to the Act on the Constitutional Tribunal passed on 22 December 2015 has raised serious doubts in Polish and foreign academic and political institutions and the media. Of particular concern is the fact that the amendment does not correspond to the limitations of Article 197 of the Constitution of the Republic of Poland. Contrary to appearances the amendment exceeds organisational and procedural questions. The amendment imposing a rule that 13 judges must rule on cases in the chronological order of their submission and the lack of *vacatio legis* makes it impossible for the Constitutional Tribunal to continue in practice its normal judicial function. In particular it makes it impossible for the Constitutional Tribunal to decide on the constitutional legality of the Amendment of 22 December 2015 within a reasonable time scale which in itself could result in dangerous and absurd legal situations. This could be tantamount to an interference in the judicial competences of the Constitutional Tribunal guaranteed by Article 188 of the Constitution of the Republic of Poland. It is the Constitutional Tribunal itself that should rule on all dilemmas concerning this amendment.