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POLISH CONSTITUTIONAL COURT: TO CHANGE OR NOT TO CHANGE? (A few reflections on the new Constitutional Tribunal Bill)

Polish constitutional court, officially called the Constitutional Tribunal (hereinafter also the Tribunal or TK), is one of those institutions that enjoy extraordinary authority and public confidence. The paradox is that TK earned this good opinion in the period when the Polish political system was not democratic and other state institutions had lost theirs long before. The Tribunal was introduced to the Constitution of Poland[1] in 1982 in order to meet a part of the constitutional doctrine and some politicians' earlier demands[2]. However, despite the constitutional decision, the future of the Tribunal was uncertain: at first, it was anticipated that the bill would not be passed and then, that the Tribunal would turn out to be unable to act in the actual political circumstances[3]. The sceptics did not make a big mistake, especially as far as the first prediction is concerned. The Tribunal[4] was established and started adjudicating but no sooner than in 1986, because the Act on the Tribunal[5] had not been passed until 1985. The long delay in passing the Act that was essential for the real establishment of the Tribunal shows how reluctant the political authorities were to accept the

[1] At that time, the Constitution of the People's Republic of Poland of 22 July 1952, hereinafter the PRL Constitution.

[2] The proposals to establish a constitutional court in Poland were put forward in the period between the two World Wars but, like in other European countries, they were not approved. After World War II, they were firmly rejected because of political and ideological reasons. The idea started to revive in the circles of constitutional law specialists in the 60s. The Alliance of Democrats (one of the two "satellite" parties of the Polish United Workers' Party) also put forward such proposals. And so did Solidarność and parliamentary groups in the 80s.

[3] L. Garlicki, *Ewolucja ustrojowej roli i kompetencji polskiego Trybunału Konstytucyjnego* [Evolution of the role and competence of the Polish Constitutional Tribunal], [in:] *Księga XX-lecia orzecznictwa TK* [20 years of Constitutional Tribunal rulings], Wyd. TK, Warszawa 2006, p. 3.

[4] Act of 29 April 1985 on the Constitutional Tribunal, Journal of Laws No. 22 item 98, then amended several times; it entered into force on 1 January 1986. The Act is supplemented by Resolution of the Sejm on the proceeding of TK.

[5] At the same time, the State Tribunal was introduced to the Constitution but the appropriate Act was passed the same day because the authorities needed it. The State Tribunal adjudicated on state officials' accountability for a breach of Constitution or other acts.

opinions. The intention of the communist party, however, was not to delay the operation of the Tribunal but to limit its rulings' legal power and keep an eye on its members. To that end, the Constitution said that rulings on unconstitutionality of Acts were not ultimate decisions and were subject to reconsideration by the Sejm (thus, the Sejm could reject them[6]) and the members of the Constitutional Tribunal not awarded the attributes of a judge were chosen by the Sejm (from the candidates nominated by MPs or the Sejm Presidium). Briefly speaking, the Sejm was given full control over the Constitutional Tribunal, although one must remember that it was the time when the constitutional system rejected the separation of powers, which (theoretically) did not allow for any – except for the sovereign's (then "the working people's") – control over the Sejm or an Act as a "product" of its legislative power. The possibility to reject rulings of TK on non-compliance of statutory law with the Constitution, the Sejm's exclusiveness in selecting the Tribunal members and some legal limitations were the price the Tribunal had to pay for its establishment. Despite that price, it was not really welcome (there were even ideas for a moratorium on its launch) by the political authorities, which knew what to be afraid of.

That is why the "leading political authority", as the Constitution of 1952[7] described the communist party, did not want to give up its decisive influence on the first personal composition of the Tribunal (12 members, half of which were exchanged every 4 years and which had no right to serve one more term) and proposed the Sejm detailed party "quotas" (half of the members representing the communist party, 2–3 members – independent (non-party) ones) and a list of names[8]. The list, despite the earlier – as a witness of those manoeuvres recalls[9] – even provocative personal proposals, surprisingly, in general met the constitutional requirement for the candidates to have "outstanding legal knowledge". After some changes had been forced in the Sejm, especially as there was no constitutional law specialist in the former proposal, the Tribunal with the membership of some well-known professors was finally formed.

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[6] It required 2/3 of votes, i.e. the majority required to change the Constitution. It is, however, necessary to remember that when the principle was established, the majority was not difficult to obtain because the Sejm was unanimous then and there were seldom any opinions against bills to be passed on the political authorities' demand. However, if the Sejm had not rejected the ruling of TK and had found it justified, it would have amended or repealed the Act.

[7] Formally, since the amendment of 1976; earlier, the political doctrine had approved of the role of the communist party in the state, especially its consequences for the state governance.

[8] With a cynical justification that the candidates to such an important state organ should be nominated by the political decision-making body of the highest rank.

[9] Z. Czeszejko-Sochacki, professor, one of the authors of the Act on the Constitutional Tribunal: *W oczekiwaniu na pierwszy skład Trybunału Konstytucyjnego – 1985 rok (wspomnienia)* [Waiting for the first composition of the Constitutional Tribunal – 1985 (memoirs)] [in:] *Trybunał Konstytucyjny. Księga XV lecia* [Constitutional Tribunal – 15th anniversary jubilee book], (vol. XV series *Studia i Materiały*), Warszawa 2001, p. 27 and the following; Volumes: *Księga XV-lecia* [15th anniversary jubilee book], *op. cit.*, *Księga XX-lecia* [20th anniversary jubilee book] and *Księga XXV-lecia* [25th anniversary jubilee book] contain rich sources and a discussion of the history and rulings of TK.

Another key moment was the issue of the first ruling. Although the authorities hoped that there would be no entity with the right to do so[10] that would file a motion to the Tribunal and the "evil" would be postponed this way, a local administrative organ in Wroclaw had the courage to bring a suit against one of the government regulations[11]. There was a lot of public interest in what the Tribunal was going to do: commend the authorities or oppose them. Let us have a look at the memoirs, in which we read: "We remember the tension that accompanied the first ruling. It was probably the most important moment for the future practice…" and then: "The Tribunal surprised the authorities in an unpleasant way, in its first ruling it proved to be a completely independent organ supporting the citizens (…). This was thanks to the first bench of judges who adjudicated"[12]. This way, the Polish Constitutional Tribunal started gaining public trust and law circles' esteem as well as the respect of state organs, which, since then, while creating law, had to take into account a potential possibility that a given Act would be discredited in the course of a constitutional process.

But the Tribunal did not have easy tasks to do, though. First of all, the Constitution itself was a problem. It was puffed up with declarative principles of a not really democratic origin, "non-juridical" ones and containing almost no formal (procedural) guarantees of citizens' rights. It had no value as a model for legal regulations. International law could not help either: it was excluded from the standard legal "turnover", especially from the possibility to be used in court. But soon, the democratic transformation succoured the Tribunal, because already in 1989 the Constitution declared that: "the Republic of Poland is a democratic rule of law state, implementing the principle of social justice"[13]. The Tribunal quickly decoded the contents of the principle stating that they constitute the element of the Polish Constitution and since then the rule of law state has been the main model for rulings on compliance of the law with the Constitution[14]. This helped

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[10] The act gave some central state organs, groups of MPs and other parliamentary bodies, some of the local administration organs, trade unions, cooperatives organizations etc. the right to appeal to TK if a given Act was related to the range of their operation. Since 1989, the catalogue of those entities has been changing with the course of democratic transformation and the establishment of new state institutions, e.g. the President or the Senate.

[11] The essence and the grounds for the ruling have been discussed many times, including L. Garlicki, *Pierwsze orzeczenie Trybunału Konstytucyjnego (refleksje w 15 lat później)* [First rulings of the Constitutional Tribunal (commentaries made 15 years after)] [in:] *Księga XV-lecia…* [15th anniversary…], *op. cit.*, p. 40; M. Kruk, *Zasada równości w orzecznictwie Trybunału Konstytucyjnego* [Principle of equality in the Constitutional Tribunal rulings] [in:] *Księga XX-lecia…* [20th anniversary…], *op. cit.*, p. 281.

[12] J. Zakrzewska, Professor, well-known oppositionist; she was appointed TK member in 1989. The statement was made at the Polish – Dutch colloquium in Warsaw in 1991. The citation by L. Garlicki, *Początki działalności…* [The beginning of operation…], *op. cit.*, p. 37.

[13] Act on the Amendment to the Constitution of 29 December 1989, which repealed the previous name of the Polish state and re-established the traditional one (as it did with the traditional Polish national emblem). Polish transformation started in June 1989 and the parliamentary election of June 1989 unequivocally decided on the democratic character of the political system reforms to come.

[14] M. Wyrzykowski, *Zasada demokratycznego państwa prawnego – kilka uwag* [Principle of a rule of law state – a few comments] [in:] *Księga XX-lecia…* [20th anniversary…], *op. cit.*, p. 233, in detail:

but did not eliminate all the difficulties. The principle of the rule of law state was like an isolated island on the sea of the previous legal system. Moreover, numerous incidental changes of legislature and the Constitution introduced a lot of internal discrepancies in the legal system. The rulings of the Tribunal "tidied" the legal system and developed the constitutional doctrine[15].

In the transformation period, there were no obstacles in fact to change the regulations limiting the Tribunal, but it was decided that its new status should be determined by the new Constitution. But this, because of many reasons, had to be awaited until 1997. And, although until then the general conception of the Tribunal had not changed, the political system democratization touched it, too. First of all, some oppositional judges became TK members and soon the "party limits and recommendations" for the TK members' selection imposed by the former authorities were totally eliminated, especially as the old party system ended, too. Now, the new parties gained the privilege to nominate the candidates and elect the Tribunal members. This way, a new problem appeared, but it will be discussed below. Moreover, some changes in the authorities structure also contributed to the new principles of the rulings' applicability. As, since 1989, the President has had the right to appeal against statutory law before signing it, it was considered that in the case of a preventive adjudication, the ruling must be treated as ultimate. Annoyed by the fact that its rulings on unconstitutionality of Acts are not dealt with by the Sejm, in 1993 the Tribunal passed a resolution, which was next included in the Act, stating that in the event the Sejm does not deal with the ruling within six months, it enters into force. Making use of the obtained right to interpret law, the Constitutional Tribunal adjusted law to the changed conditions in the democratic state[16]. The new competence, however, met with a negative opinion of the Supreme Court, which found it to be a threat to its right to interpret law, which was also important in the future.

Thus, although the constitutional conception of the Tribunal was not changed, it put roots in the democratic standards of the rule of law state and built its position of public authority. That is why – especially in relation to the Polish situation – it is erroneous to state, as it sometimes happens during international debates, that Eastern European countries' constitutional courts that came into

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E. Morawska, *Klauzula państwa prawnego w konstytucji RP na tle orzecznictwa Trybunału Konstytucyjnego* [Rule of law state clause in the Constitution of the Republic of Poland in the light of the Constitutional Tribunal rulings], Toruń 2003.

[15] See M. Kruk, *Progrés et limites de l'Etat de droit, La Pologne*, Pouvoires, No. 118 /2006, in particular pp. 76–78.

[16] In April 1989, the Council of State (type of collegial head of state) was repealed and the office of the President was created. The President was given the right to refuse to sign an Act and to file a motion to TK to institute a preventive adjudication (or to send it back to the Sejm for re-reading as well as to dissolve the parliament). TK "inherited" the right to interpret statutory law from the Council of State. Then, the second Parliament Chamber, the Senate, was established. In 1992, the Constitution was passed and it regulated the relationship between the legislative, executive and judicial powers, but the changes were not made in other areas, including the Constitutional Tribunal.

being in the last years of the communist regime and at the beginning of transformation were forced to adjudicate based on the old law and this way they only strengthened its undemocratic contents.

Passed in 1997, the Constitution of the Republic of Poland[17] introduced the expected changes regarding the Tribunal at last. Firstly, it unambiguously defined TK as part of the judiciary power stating that "Courts and Tribunals are a separate power independent of the other powers", however, it differentiated them by not awarding the tribunals (the Constitutional Tribunal and the State Tribunal) the virtues of organs of administration of justice, which is often criticized in literature on this subject. But its members are formally called judges and treated as such. The number of judges was increased to 15 and they are individually elected for a 9-year term. The most important change, however, is the ultimate force of all the rulings that become commonly binding[18]. Moreover, international law was included into the Tribunal's cognition – the agreements that bind Poland become a model and a subject to adjudication. TK cognition was formulated as a hierarchic control of norms[19], adequately to the new system of sources of law specified in the Constitution, however, the Tribunal was not given competence in the field of the European Union law[20], which will pose a practical problem later. Moreover, the Tribunal was given other powers: to adjudicate the compliance of political parties' aims and activity with the Constitution and to solve jurisdiction disputes between the constitutional state organs[21]. However, it lost its competence to interpret law, which resulted from the above-mentioned dispute between TK and the Supreme Court. The loss of this power in a way influenced the development of the so-called interpretational rulings, which also arouse controversies.

The constitutional novelty that did not change the character of the Tribunal so much but did change the guarantees of human rights is the introduction of a common constitutional complaint. Everybody whose constitutional rights and freedoms were breached by a court ruling or an administrative decision can file a complaint. But the complaint can be filed not against the ruling or decision

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[17] The Constitution of 2 April 1997 was voted for in a referendum (Journal of Laws No. 78 item 483) and entered into force on 17 October 1997.

[18] Nevertheless, the trace of the former influence of the Sejm on the rulings on unconstitutionality of Acts remained in temporary regulations because it was decided that, in the period of two years from the date when the Constitution entered into force, the rulings on unconstitutionality of Acts that had been passed before would continue to be dealt with by the Sejm, which would also decide whether to repeal them or not. It did not apply only to rulings issued as a result of legal inquiries.

[19] Although, listing the detailed levels of that hierarchy, the Constitution does not contain such a general formulation of TK competence (see below).

[20] The Constitution of 1997 provides that the law [it] establishes is directly applicable as it has priority over other Acts in the event of their collision.

[21] Since there were no cases regarding political parties, TK solved the 2009 well-known dispute between the President and the Prime Minister (Government) on the conflict of powers of the two organs in connection with their participation in the European Council (Decision of 20 May 2009, ref. Kpt 2/08).

but against the legal basis, i.e. a normative act, that was the basis for the issue of the ruling or decision. This solution is criticised (see below). Despite that, the institution has been intensively used since the very beginning – by citizens and other entities: natural and juridical persons. The changed conception of the Tribunal, especially the guarantee in the form of a constitutional complaint, caused that the Act on the Constitutional Tribunal, whose passing was a condition for a "launch" of some new instruments of the protection of the Constitution, was passed before the end of the constitutional *vacatio legis*, so that it could come into force together with the Constitution[22].

But not all the elements of the former conception of TK were eliminated. The way in which the judges of the Tribunal are elected remains the same. The authors of the new Constitution did not decide to limit the Sejm's rights in this respect, so the Sejm is still responsible for the election of judges, while the Act – as before – charges a group of 50 MPs and the Presidium of the Sejm with the task of nominating candidates. As the Presidium has never tried to act as an all-party group in this respect, everything remains in the hands of the MPs of one Chamber, which is full of competing political groups. And although the review of the constitutions of other European states reflects a search for a differentiated system of electing constitutional court judges or prescribes an obligation to elect them by a 2/3-majority vote that goes beyond party divisions, Poland maintains the monopoly of one Chamber. And that is the one that dominates legislation[23]. Neither the Constitution, nor the Act introduced any obstacles in the way of MPs obtaining a position of a TK judge, which results in a necessary exception of a judge from the adjudicated case because "just before" the appeal, they were involved in the passing of the regulations appealed against. In addition, it elicits reflections on their political impartiality, so quickly acquired, as just before that, they had played a very definite political role and had been identified with a particular political party.

This, however, did not cause such public concerns as another phenomenon connected with the system of electing judges. While in 1985, as it was mentioned at the beginning, there was no agreement on the influence of the dominant political party on the composition of the Tribunal, now – in democratic conditions – the problem has revived in a different version. Every time a judge is elected for a vacancy (sometimes there are a few vacancies because individual terms finish at a different time), groups of 50 MPs representing their political

[22] Act of 1 August 1997 on the Constitutional Tribunal, Journal of Laws of 2000 No. 643 with amendments that followed.

[23] The Parliament is based on the principle of non-equality of the two Chambers; the legislative process always starts in the Sejm; the Senate has the right to take part in the process later through amendments or rejection, but these have to be accepted by the Sejm; thus, the final decision belongs to the Sejm (with the exception of the proceeding regarding the amendment to the Constitution and ratification of an international agreement that passes authority to an international organisation, when both Chambers must vote for).

party parliamentary fractions nominate "their" candidates[24]. Those who have the strongest support win (there is an absolute majority rule at the presence of half of the MPs) and, in practice, they are the candidates of the currently governing party (with very rare exceptions). This way, the above-mentioned monopoly of one Chamber also means the monopoly of a party or a majority coalition, which are not eager to support an opposition candidate or do this really seldom. The Sejm is not especially interested in the constitutional criterion of "outstanding legal qualifications" and the Sejm Committee interviewing candidates in general recommends them all. The criteria are just formal ones[25], and even if they were not, what qualification does the Sejm Committee have to assess the level of the candidates' legal expertise?

However, the system of electing judges, especially the applied practice, have been criticised from two angles. Firstly, by the parties that lost, even if on another occasion they had won. The statements made after the election of judges in 2010 can illustrate that: "…the Civic Platform club, not having supported the [Democratic Left] Alliance candidate, …leads to politicising the Tribunal". Another loser (Law and Justice member) added that the Constitutional Tribunal "is a purely party-oriented institution"[26]. Although, in the practical activities of the Tribunal, the relationship between the judges and the parties that promoted them is not easy for an outsider to notice, the Sejm has in fact done nothing to weaken the impression of party competition and political labelling of judges. Even the Sejm Presidium's right to recommend candidates agreed upon is not used. The Act did not introduce any other procedure supporting the "all-party" attitude (e.g. in the form of a "designating" committee *sui generis* or a 2/3-majority vote obligation).

In this situation, the public opinion, especially legal circles, demanded that more attention is given to legal and ethical qualifications than a party label. Three well-known non-governmental organizations, i.e. the Polish Section of the International Commission of Jurists, the Stefan Batory Foundation and the Helsinki Committee for Human Rights, formed a coalition for the establishment of the Civic Monitoring of the Candidates of Judges (OMKS), declaring:

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[24] Bigger parliamentary groups, having more than 50 members, propose their candidates. There were situations when smaller groups were looking for MPs who would support their candidates and were unsuccessful because MPs from bigger parliamentary groups were bound by discipline and had to act according to their party line. See E. Siedlecka, *Trybunał Konstytucyjny: jest nowy sędzia i stare problem* [Constitutional tribunal: there is a new judge and old problems], Gazeta Wyborcza of 14 July 2012.

[25] Act on the Constitutional Tribunal defines them mainly by reference to qualifications for a judge of the Supreme Court or the Supreme Administrative Court; candidates who do not meet these formal criteria are not nominated for election. In the cases described by the press, when the candidates did not meet the criterion of "irreproachable character", the Commission did not call their candidacy into question and the circumstances were revealed in a different way (in one case, the resignation took place after the election).

[26] http://www.salon24pl/news/75079,pis-i-sid-po-prowadzi-do-upartyjnienia-tk, 26 November 2010.

"We want to involve the civic community in the process of electing judges"[27]. The monitoring was not fully satisfactory, however, a number of times, it was possible to interview some of the candidates at open community meetings (some candidates refused to take part in such interviews). But it contributed to the inculcation of a belief that the selection of TK judges should not be limited to the proceeding appropriated by political parties in one Chamber of the Parliament[28]. As a result, some changes in this respect have been proposed in the new Bill on the Constitutional Tribunal[29].

As it was already mentioned above, the Act on the Constitutional Tribunal passed in 1997 was amended many times because the conditions of the Tribunal's work changed, there was a need to respond to social signals, the law changed after the sources of Polish law had been enriched by the law of the European Union, and the court's experience and the methods of adjudicating matured. In such a situation, the initiator (the President of the Republic of Poland, whose main consultant and in fact the author of the bill was TK itself[30]) decided to present a project of a completely new Act instead of another amendment. The project proposes this new approach to the system of electing TK judges, inspired by this experience as well as the demands made by public opinion and legal circles.

What causes that the new Act can be treated only as partly successful is the fact that there was no decision to amend the Constitution at the same time. Most experts' opinions are that without amending the Constitution, the reform of the Tribunal will not have the desired effect[31]. And the changes in the Constitution would be necessary first of all in connection with the above-mentioned issue but also a few others.

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[27] www.monitoringsedziow.org.pl, also: Ł. Bojarski, *Obywatelski monitoring wyborów sędziów TK – nowa inicjatywa organizacji społecznych* [Civic monitoring of election of the Constitutional Tribunal judges – new social organizations' initiative] [in:] *Księga XXV-lecia Trybunału Konstytucyjnego. Ewolucja funkcji i zadań TK – założenia a ich praktyczna realizacja* [25th anniversary jubilee book of the Constitutional Tribunal – Evolution of roles and tasks of the CT – assumptions and their practical implementation], Wyd. TK, Warszawa 2010, p. 175.

[28] K. Wojtyczek, at present Judge of the European Court of Human Rights in Strasburg, writes in her book *Sądownictwo konstytucyjne w Polsce, Wybrane zagadnienia* [Constitutional Court System in Poland – selected issues], Wyd. TK, Warszawa 2013, p. 94: "It is obvious that public opinion is interested in the candidates' attitude to political and ethical issues, which are much more important for people than their opinions on legal matters".

[29] The Bill was filed by the President on 10 July 2013 (the Sejm paper No. 1590).

[30] Which provoked strong criticism from K. Pawłowicz, *Sędziowie we własnej sprawie* [Judges in their own case], Rzeczpospolita of 19 February 2014, p. A11 (also: rp.pl/opinie). The author accuses the Bill of proposing a series of unconstitutional solutions and calls for the exclusion of all non-parliamentary entities from participation in the TK candidates' electoral proceeding and for inadmissibility of a waiting period.

[31] For the opinions see: orka.sejm.gov.pl; and: www.obserwatorkonstytucyjny.pl/ustawa-o-tk/. The opinions were developed by: A. Herbet i M. Laskowska; B. Banaszak; D. Dudek; M. Chmaj; M. Wiącek; P. Czarny for the Bureau of Research of the Sejm.

Thus, with no assumption to amend the Constitution, the Bill proposes that, within the existing constitutional formula with regard to the election of TK judges by the Sejm, a new element is introduced to the procedure, i.e. designating "nominee candidates" by – apart from 15-member MP groups – authorized entities involved in legal practice, e.g. some courts, academic Law Faculty Boards, legal profession associations and scientific organizations, etc. From the nominee candidates selected in such proceeding, 50-member groups of MPs or the Sejm Presidium, as before, would select "final" nominees for the election of judges. It is evident that this does not change much but it makes public opinion involved in an unprecedented way. Moreover, it lets us not only assume that designating candidates by legal circles is a step to meet the constitutional professional qualifications requirement (not only formal ones but also of the outstanding character), but also believe that it is a form of verification of their personality, ethical attitude and "irreproachable character"[32]. In connection with this issue, some other regulatory solutions were proposed in the Bill, e.g. with regard to a waiting period in the case when a senator or an MP mandate is changed for a judge mandate, the definition of deadlines in the judge election proceeding with the allocation of time necessary for consultations on the candidates, who – at present – are often nominated in the last moment. Independent of whether the particular elements of the proposed proceeding of electing judges are good or not (the catalogue of entities authorized to designate nominee-candidates, the rules of public consultations etc.), there was criticism – although not commonly expressed – of its unconstitutionality; and it was expressed by the parliamentarians[33].

The Bill as a whole is in general well assessed; it introduces many novelty proposals that, although deal with important issues, do not determine any essential changes of the conception of the Tribunal or a specific aspect of its work. It is almost impossible because at the very beginning, it was decided not to amend the Constitution. This way, any substantial changes, some of which are really necessary, arouse doubts whether they are in compliance with the Constitution. While the former Constitution was very sparing in connection with the Tribunal, the binding one treats some aspects in a way that does not allow for the legisla-

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[32] The Bill on TK, with no reference to the Act on the Supreme Court, formulates the requirements, including the "irreproachable character". In addition, the requirements are as follows: Polish citizenship, legal capacity, no limitation of civic rights, completion of legal studies (MA degree), good health, 10-year experience in specified legal professions or a higher doctoral degree or a professorship and at least 40 years of age.

[33] The author quoted in footnote No. 30 is an MP and she was nominated but not elected a TK judge several times. As she strongly criticizes the fact that the Bill was prepared by TK and not by the Sejm, the involvement of non-parliamentary entities in the judges' electoral proceeding and the introduction of a waiting period between the MP's term and starting the judge term, one can perversely state that according to her it is really bad that the Tribunal creates law for itself, but it is good that MPs elect themselves TK judges. Some legislation experts of the Bureau of Research of the Sejm, M. Laskowska i A. Herbet, also express critical opinions on judges electoral proceeding and the waiting period (see the opinions cited in footnote No. 31).

tor's freedom. This does not mean that no ambitious attempts have been made; the best example is the above-discussed one.

The proposal to establish the role of the Constitutional Tribunal in a universal way is one of such attempts. The Constitution defines it as part of the judiciary but while it gives courts the powers of institutions of administration of law, in the case of the Constitutional Tribunal, it only lists the areas of its competence without specifying its role and position in the political system[34]. Thus, the Bill shows that "TK is an organ of the executive that is to guard the constitutional order of the Republic of Poland" (Article 1); in addition, it "rules on the hierarchical compliance of norms, and fulfils other tasks specified in the Constitution" (Article 2). Although many experts see advantages of this "court of law" position, there are also drawbacks: there are also other organs that guard the constitutional order and they guard it in different ways. Thus, experts propose to combine the cited articles and to highlight that TK guards this order through a hierarchical supervision of law…[35]. Because one can find a difference between stating (by listing areas of competence) that TK adjudicates on non-compliance of some norms with the other ones and defining that it guards the constitutional order as a whole, guards it in a complex aspect, also in the aspect of rulings execution, signalling deficiencies of law (see below) and solving other issues. But also here, it is believed that it would be better if the Constitution specified the general role of the Constitutional Tribunal in public life.

One of the worries of the Polish public life is the dilatory execution of the rulings of the Tribunal[36] and rather poor response to information on oversights and loopholes that the Constitutional Tribunal sends to legislative organs (these are reports on problems resulting from rulings passed to the two Chambers of the Parliament and comments on oversights and loopholes sent to the legislative bodies because their elimination is indispensable). The Bill strengthens the importance of this information addressed to the Sejm and other judiciary organs giving them a signalling character, but in addition – and this gives some hope for improvement – letting the Tribunal ask the signal recipient to inform the Tribunal what the addressee's stand in the signalled case is. It is an idea aimed at disciplining addressees, who have not responded to the Tribunal's comments energetically so far. The problem of execution, or rather non-execution, of the rulings of the Tribunal has triggered discussions on possible resolution actions for years. The Senate has undertaken one such "action", issuing its own resolu-

[34] In addition, the literature highlights that it lists them in a rather chaotic way, K. Wojtyczek, *Sądownictwo…* [Court system…], *op. cit.*, p. 115; Since most opinions state that the change is good, although probably not well formulated, B. Banaszak is of the opinion that it is useless because TK position results from the Constitution.

[35] As e.g. in the opinions of M. Laskowska and A. Herbet, D. Dudek, P. Czarny cited in footnote No. 32

[36] In order to improve the situation, the Senate, which has the legislative initiative power, undertook a mission of developing bills and analysing the oversights in law reported by TK.

tion pledging to get involved in this specific mission. It analyses the rulings of the Tribunal and, using its right to legislative initiative, proposes adequate changes in law, which to some extent has improved the situation in the legislature. However, this has not solved the problem and that is why the Bill on the Constitutional Tribunal has become an occasion for a typically theoretical discussion: Which organ of the state authority should be deemed responsible in this sphere? On the one hand, a number of circumstances point at the government as an organ responsible for the state policy and managing the state administration and thus having all the instruments necessary to execute the rulings, both by filing bills and by influencing other legislative organs that are in general connected with administration[37]. On the other hand, the role of the President is pointed out as the Constitution entrusts "guarding the compliance with the Constitution" to the President. The supporters of that solution highlight that the President also has some defined superior authority. But it seems to be mainly inspiring in character. Independent of these doctrinal considerations, it seems already evident that further normative decisions are inevitable, but they are not included in the Bill. Probably, a new constitutional regulation would also be necessary here?

In the Constitutional Tribunal ruling practice over years, many types of different rulings have been issued. They have been classified in doctrinal commentaries in different ways, as e.g. "scope of law" rulings (a regulation, in a certain scope, complies/does not comply with …), "interpretational" rulings (a regulation understood in a certain way complies/does not comply with…), rulings "stating omission", not to say "legislative omission", etc. In addition, there are some complications regarding legal consequences of the rulings, especially temporary ones (*ex tunc* or *ex nunc*), or e.g. the problem with the so-called "revival of law" (whether and in what circumstances a repealed regulation can "revive", i.e. "return" the former regulation) as well as other consequences and their diversity depending on the character (mode) of ruling. There are such and many other problems, especially as – according to opinions expressed in discussions and by experts – "the Tribunal was neither consistent in using individual ruling formulas or in the way it defined the consequences of the rulings"[38]. There were demands to regulate these issues but as the Constitution does not formulate any rules in this respect, the Act was the only solution (that was probably one of the reasons to entrust the task of developing the Bill to the Tribunal). But the Bill has not introduced anything new in this respect.

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[37] An example is sometimes given that shows that after the Constitution entered into force, the Government (the Council of Ministers) was made responsible for "providing the Sejm with the bills necessary to implement the provisions of the Constitution within the time limit of two years" (Article 236 of the temporary and final regulations), which meant that the duty to undertake adequate steps to adjust law to the new Constitution was assigned to this executive organ.

[38] Cited opinion expressed by M. Laskowska and A. Herbet.

There are some other issues that the Bill does not solve. The problem is that, in fact, they cannot be regulated in an Act without the amendment of the Constitution. These issues, often discussed in the Polish study of constitutional law, include e.g. a dilemma resulting from an exception made in the Constitution to the rule regarding the time when the ruling enters into force[39]; the problem is that the Tribunal can postpone the date when a normative act expires (an Act even by 18 months and another regulation by 12 months). Although the reasons for that are understandable (most often these are the consequences for the budget or other serious consequences for the legal system[40]), the fact that regulations that do not comply with the Constitution remain in force arouses a lot of doubts. At the same time, no unique, consolidated way of dealing with such norms has been developed (e.g. the rule of non-application) but what is more, the legal consequences of non-constitutionality of a regulation have not been recognised.

Another issue that originated from one of the rulings of the Tribunal is its attitude towards the Law of the European Union, especially the secondary legislation[41]. The Constitution says that this law "is applicable directly and has priority over other acts". This way, the Constitution confirmed the European Union principle of the EU law priority over the member states' national laws but with "understatement" concerning its interaction with the national constitution. Not including adjudication of the constitutionality of this law in the catalogue of the Tribunal competence, the Constitution satisfied the European doctrine. It is an effect of the fact that TK cognition in general refers to (Article 188) legal acts passed by the central organs of the state. This means: not local law (which is adjudicated by the Supreme Administrative Court) and not the EU secondary legislation. But a way out has been found. As the right to a constitutional complaint relates to "an Act or another normative regulation" and dealing with the complaint is independent TK competence, the Tribunal decided that "another regulation" does not have to belong to the category of acts issued by the central organs of the state and this way it created an opportunity for adjudication – in the course of complaint proceeding – of the secondary EU legislation. In a certain particular case, it proved to be in compliance with the Constitution, but now

[39] According to the Constitution, TK rulings are subject to prompt announcement and enter into force on the day when they are announced.

[40] An example situation may be the introduction of "the European warrant of arrest", which was in conflict with the constitutional ban on extradition of a Polish citizen (a Polish citizen filed a constitutional complaint against the provision of the Criminal Proceeding Code, which adopted "the European warrant of arrest") and TK issued a ruling on non-compliance, which resulted in the necessity to amend the Constitution (Article 55) and obliged the legislator to do this in 18 months time.

[41] As far as the primary law, i.e. treaties, is concerned, it is assumed (not without opinions that put this attitude in question) that they are subject to the same regime as ratified international agreements, whose compliance with the Constitution can be adjudicated. With reference to the EU secondary legislation, see Article 91 item 3 of the Constitution of the Republic of Poland.

the question is: What consequences would non-compliance cause? There is no good answer. The Bill does not help to find it and the decision not to amend the Constitution is not creating a chance to solve the problem[42].

There are some other problems that cannot be solved by the Act, e.g. the concept of a constitutional complaint, which has attracted criticism for a long time. It relates to the conception of a constitutional complaint so only an amendment to the Constitution would satisfy the demands. The essence of a constitutional complaint was discussed above (the right to appeal against a normative act constituting grounds for a valid court ruling or administrative decision). In a sense, such a narrow frame results from a concern that a complaint proceeding could change into another court instance letting the Tribunal "verify" court of law rulings (another area for dispute with the Supreme Court). The abundant literature and discussions on the issue of a complaint, although all its advantages are emphasised, criticize this narrow character. Speaking about the dispute between the Courts, one author expressed the weakness of a complaint in the most concise way: "…the reached compromise led to a radical limitation of the scope of a constitutional complaint, which – being an instrument of assessment of individual solutions' constitutionality – changed into an individual motion to adjudicate the constitutionality of abstract and general legal norms"[43]. And a TK ruling, even if it adjudicates unconstitutionality of an act, will not repeal the former ruling but will refer the complainant "…back to the appropriate court procedures…"[44]. But, of course, this general issue of the conception of a constitutional complaint does not exhaust a series of other related interpretational and procedural problems, which started to appear and grow in the course of practice and which are discussed in the literature.

As the Bill on TK – as it was already mentioned – proposes a series of other necessary organizational changes, after the parliamentary work on it, it will probably be passed[45]. And, undoubtedly, it will be for the benefit of its everyday operation. Thus, the Shakespearean question in the title of the article does not make sense and most opinions accept the demand to change the Act. But isn't

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[42] This way, an opportunity to adjudicate the constitutionality of territorial law with the use of a constitutional complaint procedure was created.

[43] W. Wróbel, *Skarga konstytucyjna – problemy do rozwiązania, Księga XX-lecia*… [Constitutional complaint – problems to be solved, 20th anniversary jubilee book], *op. cit.*, p. 55.

[44] See M. Safjan, *Ewolucja funkcji i zadań Trybunału Konstytucyjnego – próba spojrzenia w przyszłość* [Evolution of functions and tasks of the Constitutional Tribunal – an attempt to look ahead] [in:] *Księga XXV-lecia*... [25th anniversary…], *op. cit.*, p. 26.

[45] It is after the so-called first reading in the Sejm (debate on general principles) and now is being worked on in the Commission. There will be the second reading soon (plenary discussion on detailed issues based on the Commission's report), followed by the third reading (voting), after which – if it is passed (there are opponents of the project) – the Bill will be sent to the Senate. Potential amendments reported by this Chamber will be passed or rejected by the Sejm and this way the Act will be finally passed. Then the President will sign it unless he sends it back to the Sejm for re-reading or to the Constitutional Tribunal for a preventive adjudication of its constitutionality. What will the Tribunal do then?

this going to make the need of radical changes "lie dormant" for another long period?

Thus, the question about the change of the legal regulation on the Polish constitutional court makes sense in a broader dimension and many debaters highlight that. It has been almost 30 years since the Constitutional Tribunal was established, and 17 years since a new conception of the Polish constitutional court together with the democratic Constitution of 1997 entered into force. The Tribunal has become well established and gained experience but also faced many problems. Some of them pose a threat to the capital of public trust collected so far; others expose the court ruling system to inconsistency and inability to properly fulfil the function to protect rights and freedoms. Thus, perhaps we should accept the opinions of many experts and the public and also amend the Constitution? Appreciating all the achievements of the Polish constitutional court over the period of decades, we should not give up better solutions for the future. Because, as Marek Safjan, former President of the Tribunal, said: "everything that is good can be even better"[46], and Jerzy Stępień, also former President, echoed his idea saying: "what is better is not always the enemy of what is good"[47].

POLISH CONSTITUTIONAL COURT: TO CHANGE OR NOT TO CHANGE? (A FEW REFLECTIONS ON THE NEW CONSTITUTIONAL TRIBUNAL BILL)

Summary

Since mid-2013, the Sejm has been working on the Bill on the Constitutional Tribunal. Expert opinions on that project highlight that, at the same time, it would be better to amend the Constitution of the Republic of Poland of 1997 with respect to the regulations defining the conception, electoral proceeding and the competence of this "court of law". However, such a solution has not been taken into account. In such a situation a question arises: To what extend can we expect the new Act to meet all the demands to reform the Constitutional Tribunal? How will the desired changes be accommodated within the scope of the Constitution?

The article is an attempt to confront the Bill with the demands with regard to the constitutional conception of the Tribunal expressed in the legal-constitutional literature and experts' opinions as well as by the legal circles and the public. In that

[46] *Op. cit.*, p. 40.

[47] J. Stępień, *Lepsze nie zawsze wrogiem dobrego*, in: *Księga XXV-lecia*... [What is better is not always the enemy of what is good], *op. cit.*, p. 131.

context, the article discusses essential problems that have not been solved so far, especially the way of electing judges (only by the Sejm, only after the designation by the MPs, by absolute majority vote). The article presents a thesis that this solution strengthens the old system originating from the 80s, i.e. the period when the dominating party ensured its influence on the Tribunal by appointing its judges. And although other TK limitations were removed in the democratic system, this one remains. What is worse, in the new democratic conditions, it creates favourable circumstances for political parties' competition in the parliament in order to win seats for "their" judges and, as a result, lets the Tribunal be accused of being involved in politics. The Bill, inspired by non-governmental organizations' opinions, proposes some changes but they meet with objections that they will be unconstitutional. This is another reason why changes should not be limited to the Act.

POLSKI SĄD KONSTYTUCYJNY – ZMIENIAĆ CZY NIE ZMIENIAĆ? (KILKA REFLEKSJI NA TLE PROJEKTU NOWEJ USTAWY O TRYBUNALE KONSTYTUCYJNYM)

Streszczenie

Od połowy 2013 roku w Sejmie trwają prace nad projektem nowej ustawy o Trybunale Konstytucyjnym. W ekspertyzach wobec tego projektu zwraca się uwagę, iż korzystniejsza byłaby równoczesna lub uprzednia zmiana niektórych przepisów Konstytucji RP z 1997 r., określających koncepcję, sposób wyboru i kompetencje tego „sądu prawa". Jednak takiej zmiany nie przewidziano. W tej sytuacji powstaje pytanie, na ile można się spodziewać, że nowa ustawa sprosta wszystkim postulatom reformy Trybunału Konstytucyjnego? Na ile pożądane zmiany będą się mieścić w ramach konstytucji? Artykuł jest próbą krótkiej konfrontacji projektu z propozycjami wysuwanymi pod adresem konstytucyjnej koncepcji Trybunału nie tylko w literaturze prawno-konstytucyjnej i opiniach ekspertów, ale także w środowisku prawników i w opinii publicznej. W tym kontekście porusza istotne nierozwiązane dotychczas problemy, jak zwłaszcza sposób wyboru sędziów (tylko przez Sejm, tylko na wniosek posłów, bezwzględną większością). W artykule wysuwa się tezę, że ten sposób petryfikuje stary system, wywodzący się z lat 80., czyli z okresu, kiedy także poprzez wybór sędziów partia hegemoniczna zapewniała sobie wpływ na Trybunał. I choć inne ograniczenia TK zostały w systemie demokratycznym usunięte, to jedno pozostało bez zmian. Co gorsza – w nowych warunkach demokratycznych sprzyja konkurencyjnej walce partii politycznych w parlamencie o miejsca dla „swoich" sędziów i w efekcie pozwala na zarzut upartyjnienia sądu. Projekt ustawy, inspirowany opinią organizacji pozarządowych, proponuje w tym zakresie pewne zmiany, ale spotyka je zarzut niekonstytucyjności. To kolejny powód, aby nie ograniczać zmian tylko do ustawy.

LA COUR CONSTITUTIONNELLE POLONAISE – CHANGER OU NE PAS CHANGER? (QUELQUES RÉFLEXIONS CONCERNANT LE PROJET DU NOUVEAU DROIT DU TRIBUNAL CONSTITUTIONNEL)

Résumé

Depuis la moitie de 2013 dans notre Diète on continue les travaux sur le projet du nouveau droit sur le Tribunal constitutionnel. Dans les expertises concernant ce projet on souligne que le changement simultané ou antérieur de plusieurs articles de la Constitution de la République polonaise de 1997 serait plus profitable surtout pour définir la conception, le moyen du choix et compétences de cette «cour du droit». Pourtant on n'a pas prévu ce changement. Dans cette situation une nouvelle question apparait: jusqu'à quel point peut-on espérer que le nouveau droit remplit toutes les demandes de la reforme du tribunal constitutionnel? Jusqu'à quel point les changements demandés seront compris dans le cadre da la Constitution? L'article forme un essai de la courte confrontation du projet et des propositions présentées auprès de la conception constitutionnelle du Tribunal non seulement dans la littérature juridique et constitutionnelle ainsi que dans les opinions des experts mais aussi dans le milieu des juristes et de l'opinion publique. Dans ce contexte l'article parle de quelques problèmes importants non résolus jusqu'à présent comme par exemple le choix des juges (par la Diète, seulement à la demande des députés, par la majorité absolue). Dans l'article il y a une thèse qui établit l'ancien système d'origine des années 80, c'est-à-dire de cette période où le parti dirigeant a aussi influencé sur le Tribunal par le choix des juges. Et malgré l'effacement de toutes les autres limites du Tribunal constitutionnel, c'est un élément qui reste sans changement. Et ce qui est pire encore, dans ces nouvelles conditions démocratiques cet élément favorise la lutte compétitive des partis politiques afin d'avoir des places pour «ses propres» juges ce qui en effet permet de formuler un reproche de partialité de cour. Le projet du droit inspiré par l'opinion des organisations non gouvernementales propose certains changements dans ce cadre mais il rencontre aussi ce reproche d'être contre la constitution. Et c'est une raison suivante de ne pas se limiter seulement à ce droit.

ПОЛЬСКИЙ КОНСТИТУЦИОННЫЙ СУД – ИЗМЕНЯТЬ ИЛИ НЕ ИЗМЕНЯТЬ? (НЕСКОЛЬКО РАЗМЫШЛЕНИЙ ПО ПОВОДУ НОВОГО ЗАКОНОПРОЕКТА О КОНСТИТУЦИОННОМ СУДЕ)

Резюме

С середины 2013 года в Сейме продолжается работа над проектом нового закона о Конституционном суде. В экспертизах, касающихся этого проекта, обращается внимание на то, что более выгодным было бы одновременное либо предварительное изменение некоторых положений Конституции РП 1997 года, определяющих концепцию, форму выборов и компетенции этого «суда над правом». Однако такое изменение не предусматривается. В этой ситуации возникает вопрос, насколько вероятно, что новый закон будет отвечать всем требованиям реформы Конституционного суда? Каким образом желанные изменения будут умещаться в рамках Конституции? Статья является попыткой краткого противостояния между проектом и предложениями, выдвигаемыми в адрес конституционной концепции суда не только в конституционно-правовой литературе и заключениях экспертов, но и среди юристов и в общественном мнении. В этом контексте затронуты существенные и нерешённые до сих пор проблемы, такие, как, в частности, форма избрания судей (только в Сейме, только по предложению депутатов, абсолютным большинством). В статье выдвигается тезис, что эту форму удерживает старая система, сохранившаяся с 80-х годов, представляющих период, когда через избрание судей правящая партия обеспечивала себе влияние на Конституционный суд. И, хотя другие ограничения полномочий КС были устранены – упомянутое выше осталось без изменений. Кроме того, это ограничение в новых демократических условиях влечёт за собой конкурентную борьбу политических партий в парламенте за места для «своих» судей и в итоге позволяет упрекнуть суды в партийной пристрастности. Законопроект, инспирированный взглядами внеправительственных организаций, предлагает в этой сфере определённые изменения, однако встречает на своём пути упрёк в неконституционности. Это служит очередным поводом к тому, чтобы не ограничиваться изменениями только в законе.