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REMARKS ON THE DISPUTE OVER THE CONSTITUTIONAL TRIBUNAL IN POLAND

I

The Constitutional Tribunal plays a key role in the democratic state governed by the rule of law, where the authority of a parliamentary majority, legitimized by election, is constrained by the Constitution – which guarantees human rights, deriving from the human beings' dignity that is inherent, inalienable and independent of the outcome of parliamentary elections.

Where a system of constitutional judicial review is in place, the concept of democracy is understood as rejecting claims of an unlimited will of the sovereign as the source of state authority, and confining democracy to such manifestations of the majority will which enjoy Constitutional legitimacy – meaning that they are in compliance with the version of a human rights culture that has been inscribed in the Constitution and which is embraced by Constitutional judges when delivering their adjudication.

The fundamentals of the Polish system of governance – which include the principle of man's inherent dignity, the principle of sovereignty of the people and the principle of independence and sovereignty of the state¹ – will lose their Constitutional sense if they are interpreted without taking into account their axiological interdependence. But a historical opposition of Constitution vs. sovereignty of the People (Nation) will be overcome when the basic law is subjected to a holistic interpretation. Equipped with the experiences accumulated over many centuries, including countless crimes perpetrated in the name of the sovereignty of the people, race or class, we can understand that it is imperative for our times to make out the *axiological* meaning of modern Constitutions², which is that these Constitutions place constraints on the sovereign's power by adding a human rights caveat. According to the Constitutional Tribunal, this comes as the result

¹ Cf. L. Garlicki, *Polskie prawo konstytucyjne. Zarys wykładu*, Warszawa 2015, pp. 57 ff.

² Cf. H. Izdebski, *Konstytucjonalizm – legicentryzm – ustawowy nihilizm prawny. O powołaniu naszych czasów do nauki konstytucji*, "Państwo i Prawo" 2016, No. 6, p. 7.

of change in “the perception of sovereignty as supreme and unlimited authority, whether in the state’s internal or external relations”³. This change leads to replacing “the principle of monarchic sovereignty with the principle of the supremacy of the people, as constrained by human rights that derive from the inviolable human dignity”⁴. Thus, the notion of a sovereign should actually be applied to the values that are reflected in law. And among the “fundamental and imperative values are certainly: the dignity of the human person, respect for their inviolable and inalienable rights, and also recognition of ‘common good’ as the goal and the overriding criterion of political life”⁵. At the same time, though, “these values must not be founded on fleeting and fluctuating ‘majorities’ of public opinion”⁶. Sovereignty does not mean violating human rights, but rather observing these rights. A sovereign who does not respect this principle risks losing sovereignty to those who act on the sovereign’s behalf – usually leaders of political parties. Paraphrasing Cicero, one could say; “We are in bondage to the human rights in order that we may be free”. Thus the status of a sovereign requires legitimacy, coming from compliance with a Constitution that limits the sovereign’s authority and lays down guarantees of these limitations being respected. Where a sovereign, or a party citing the sovereign’s will, fails to respect human rights, their authority is unlawful. A sovereign is one who is not subordinate to anybody⁷. It is thus fair to say that, in actual fact, the designation “sovereign” should be accorded to values, as shaped by culture and linked to the perennial moral norms, which reflect perennial moral dilemmas.

It is these changes in the perception of national sovereignty, reflecting the latter’s human rights constraints, that greatly contribute to the legitimisation of the system of Constitutional judicial review, which becomes a guardian of the limits to sovereignty, understood as exercise of authority based on – and at the same time constrained by – the values referred to in the Preamble to the Polish Constitution. This redefinition of the notion of sovereignty has the effect of legitimizing the system of Constitutional judicial review, while at the same time – with sovereignty measured by the respect for human rights – making this legitimization contingent on the Constitutional Tribunal’s commitment to human rights observance⁸.

³ See the memorandum of explanation to Judgement K 32/09.

⁴ *Ibidem*.

⁵ See John Paul II, *Encyklika Evangelium Vitae*, Watykan 1995, p. 132.

⁶ *Ibidem*.

⁷ Cf. M. Troper, *Sovereignty*, (in:) M. Rosenfeld, A. Sajo (eds.), *The Oxford Handbook of Comparative Constitutional Law*, Oxford 2013, p. 362. Also cf. A. Waśkiewicz, *Paradoksy idei reprezentacji politycznej*, Warszawa 2012, pp. 276 ff.

⁸ Cf. R. Piotrowski, *Uwagi o ustrojowym znaczeniu sądownictwa konstytucyjnego*, (in:) K. Budziło (ed.), *Księga XXV-lecia Trybunału Konstytucyjnego. Ewolucja funkcji i zadań Trybunału Konstytucyjnego – założenia a ich praktyczna realizacja*, Warszawa 2010, p. 325.

In contemporary states that are regarded as democratic, the importance of the judiciary has been on the rise and is sometimes referred to, with a certain exaggeration, as the “rule of the judges”. This reflects in particular the judges’ growing influence on the settlement of conflicts between rivalling politicians; it also reflects an interpenetration of the legal cultures of statute law and case law, linked with the process of European integration, the consequences of globalization, and also a polycentric nature of the system of law that is increasingly turning multinational⁹.

Thus the growing weight of the judiciary reflects, on the one hand, the premises of Constitutional democracy, where the authority of the sovereign is constrained by human rights, and on the other hand it reflects the consequences of European integration, which include changes in the system of sources of law and changes in the notion of sovereignty.

Almost any public question may find itself in the purview of the judiciary, and the sentences passed, especially by the Constitutional Tribunal, are not without importance for the legislative and executive branches of government. Nonpartisan judges and justices hand down rulings which may potentially impact election results¹⁰. In this way, the system of Constitutional judicial review may strengthen the role of the parliamentary opposition, who are authorised to refer cases to the Constitutional Tribunal.

It is because of the considerable role that the judiciary plays in the system of governance that the executive branch has for many years sought to exert and augment its influence on the judiciary, thus destabilising the latter and posing a threat to the judges’ Constitutional status and, consequently, also to the rights and freedoms of the individual. What could be seen in the past several months, however, is a qualitatively new development, where the Constitutional Tribunal’s role in the system of governance has been restricted without changing the Polish Constitution, by means of amendments to the Constitutional Tribunal Act – even though an electoral victory that comes short of a majority required to amend the Constitution is by no means a sufficient ground to ignore the Constitution.

II

1. The dispute about the Constitutional Tribunal that has been going on in Poland during the past months is, in fact, a dispute about that body’s role in state governance. The actual questions at stake are these: Can a democratic state func-

⁹ Cf. E. Łętowska, *Dialog i metody. Interpretacja w multicentrycznym systemie prawa. Parts I and II*, “Europejski Przegląd Sądowy” 2008, No. 11 and 12.

¹⁰ Cf. R. Piotrowski, *O znaczeniu prawa sędziowskiego w polskim ustroju państwowym*, (in:) T. Giaro (ed.), *Rola orzecznictwa w systemie prawa*, Warszawa 2016, pp. 39 ff.

tion without non-political, judicial review of the constitutionality of legislation? Is such review feasible? Do the constitutional checks on the sovereignty of the people have the effect of constraining the sovereign, through the fundamental human rights and the separation of powers? In its essence, the Polish constitutional crisis comes down to an argument over the meaning of democracy and the consequences of the electoral outcome. It is also, to some extent, an argument over the constitutional judges' non-electoral legitimacy, as stemming from the idea of *non rex sed lex regnat* (the law rules, not the king). And finally, the crisis also reflects a dispute among the elites – political and judicial – about the roles they play in state governance.

For many years, politics has triumphed over law in our country, with each ruling majority interpreting the Constitution in a way which suits their political interests. In the past eight years – that is, prior to the presidential elections of May 24, 2015, won by a Law and Justice candidate, and prior to the Law and Justice's parliamentary victory of October 25, 2015 – those in power did not hesitate to reform the judiciary in a manner restricting judicial independence, to turn down citizens' request for a referendum on retirement age, and to renege on the obligation to implement Constitutional Tribunal rulings (for example, on privacy-threatening wiretapping).

It is possible under constitutional rule that a parliamentary election may produce an absolute majority in both houses of parliament for the erstwhile opposition – even if previously they were derided by the majority who predicted their dinosaur-like extinction. It may also happen that that a representative of yesterday's opposition (and today's ruling party) wins the presidential election. This is precisely what happened in Poland last year. But in such circumstances, the Polish parliamentary system – which involves the separation of powers – begins to operate as a presidential system. Actually, it may also happen that the formally separate legislative and executive branches of government will act as if they formed a single branch, reflecting their political fusion. The Sejm, the Senate, the Cabinet and the President would then be in the hands of a single centre of political power. Given the independence of judges, only courts would then stay outside the reach of the actual legislative/executive authority. It must be noted here that Law and Justice won 5,711,687 votes (37.58%), translating into some 20% of the eligible electorate of 30,629,150,000.

2. Following the recent parliamentary and presidential elections, the political significance of the Constitutional Tribunal has increased enormously. Only the Constitutional Tribunal is capable of preventing the centre of political power (which governs over the legislative and executive branches) from pursuing its plans – should the Constitutional Tribunal choose to interpret the Constitution in the way the present opposition does. The Constitutional Tribunal wields powers of great political significance, but its members are not chosen in a general election. Each judge is chosen by the Sejm – by an absolute majority of its members –

for a specific nine-year term assigned to himself or herself. In practice, the judges of the Constitutional Tribunal – mandated by the Constitution to be non-political – come from among lawyers previously serving as politicians, or other members of the legal profession whom politicians consider to be least neutral, or at least not posing threats to the party which recommends them for this position.

As fate would have it, the end of the previous Sejm's term coincided with the end of the terms of three Constitutional Tribunal judges previously recommended by Law and Justice; and two other Law and Justice-recommended judges had their respective terms expiring at the beginning of the Sejm's new term, that is after the election. Without them, the Constitutional Tribunal would comprise ten judges, including nine recommended by the Civic Platform (the party which led the previous government). But among those ten there were four judges who in the selection process had also been backed by Law and Justice MPs.

Thus, if the Civic Platform had managed to arrange that the five Constitutional Tribunal positions were filled with persons it trusted, the Tribunal would include 14 judges recommended by that party – and could block changes in the state proposed by Law and Justice, which holds sway over the legislative and executive branch. The Civic Platform went through with that plan, thus provoking a reaction from the new majority in the form of amendments to the Constitutional Tribunal Act (originally passed in the previous term) and changes in the Constitutional Tribunal's make-up, which have, in effect, restricted the Tribunal's capacity to function.

3. Back in 2013, on the initiative of the then President who was tied to the party then in power (the Civic Platform), the Sejm began processing a draft bill on the Constitutional Tribunal, intended to streamline the Tribunal's proceedings. The bill was being drafted from 2011 on, by former Constitutional Tribunal judges. Initially the Sejm process was developing at a very slow pace. Sessions of the relevant Sejm sub-committee were regularly attended by the President and a Vice-President of the Constitutional Tribunal and also by other judges. In the aftermath of the Law and Justice candidate's victory in the presidential election, the processing of the Constitutional Tribunal bill picked up speed. On June 25, 2015, the Sejm passed a new Constitutional Tribunal Act, which allowed the Sejm to select Constitutional Tribunal judges not only for the three slots made vacant during the ongoing term, but also for the two seats to be vacated early in the term of a new Sejm, to be elected on October 25, 2015. Consequently, on October 8, 2015, the Sejm of the 7th term – ignoring the new President's warning issued in a speech of May 29, 2015 – named five new Constitutional Tribunal judges, citing the Act of June 25, 2015. The ruling Civic Platform party assigned for itself the three seats that were "certain" (because the outgoing Sejm of the 7th term had the right to name judges to positions made vacant in the course of its term). The two seats that remained "uncertain" – because the selection process should have been left to the next Sejm of the 8th term, and there should be no selection

“in advance” – were offered to the junior coalition partner (Polish Farmers Party) and to an opposition party (Democratic Left Alliance).

Law and Justice lodged an appeal against the new law to the Constitutional Tribunal, which however was withdrawn following the party’s parliamentary success. But the appeal stayed in the Constitutional Tribunal, upheld by a group of MPs from Civic Platform, now itself a part of the parliamentary opposition.

On November 19, the Sejm passed a legislative amendment to the Constitutional Tribunal Act of June 25, 2015, which said that the term of a Constitutional Tribunal judge begins only after he or she takes an oath of office before the president. It also opened the way for a renewed process of presenting candidates for judges to replace those whose terms expired during the course of 2015.

On November 25, 2015 the Sejm’s majority legislated that the previous parliament’s resolutions selecting the five judges of the Constitutional Tribunal were invalid.

Meanwhile the Constitutional Tribunal announced December 3, 2015 as the date of its ruling on the constitutionality of the Constitutional Tribunal Act of June 25, 2015, and it further stated that the Sejm must not choose Constitutional Tribunal judges pending that forthcoming ruling.

On December 2, 2015, however, following a stormy session, the Sejm chose five Constitutional Tribunal judges, and four of them were sworn in by the President on that very night.

Under the Constitutional Tribunal Act, a judge of the Tribunal assumes his or her office after taking an oath of office before the President. This means that a judge who has not been sworn in may not adjudicate.

On December 3, 2015 the Constitutional Tribunal ruled that two judges had not been chosen lawfully because the Sejm of the previous term had arrogated to itself the prerogatives of the successive Sejm. But three judges were chosen properly. The Constitutional Tribunal stated that swearing in those three judges was the duty of the President of the Republic. The Constitutional Tribunal President said that he would not give adjudication assignments to the judges sworn in by the President, and that he expected the latter to swear in the three properly chosen judges.

On December 4, 2015, a group of Civic Platform deputies appealed to the Constitutional Tribunal against (i) the Sejm’s resolutions invalidating the previous Sejm’s resolutions on judges’ selection, and against (ii) the resolution of December 2, 2015 on the selection of five judges. The Constitutional Tribunal stated that it had no powers to review the constitutionality of these resolutions, because parliamentary resolutions are not normative acts but application-of-law acts, and the practice of application of law is outside the purview of the Constitutional Tribunal.

On December 9, 2015 the Constitutional Tribunal ruled that the Act of November 19, 2015 is partly unconstitutional, especially because it links the beginning

of a judge's term to his or her being sworn in before the President (which should take place within 30 days of the day on which the judge was chosen by the Sejm).

On December 22, 2015, amidst tempestuous debates, the Sejm passed yet another legislative amendment to the Constitutional Tribunal Act of June 25, 2015 – promptly approved without changes by the Senate in the early hours of December 24, 2015. It introduced changes restricting the efficacy of Constitutional Tribunal activity; in particular, Tribunal rulings on the constitutionality of statutes must be passed by a two-thirds majority of a panel comprising at least 13 judges, and cases must be adjudicated upon in the same sequence in which they have come into the Tribunal. Furthermore, the amended legislation took effect on the day of promulgation (with no *vacation legis*), which means that the Tribunal may review the constitutionality of that particular amendment only in accordance with the provisions of that amendment – in other words, no such review will ever be possible in practice. Among other provisions, a disciplinary procedure towards a Constitutional Tribunal judge may be initiated by the President or the Minister of Justice; and the Sejm, acting on a request from the General Assembly of Constitutional Tribunal Judges, may dismiss a Constitutional Tribunal judge.

This amended legislation was appealed to the Constitutional Tribunal by a group of the opposition Civic Platform party, and also by the First President of the Supreme Tribunal, who asked the Constitutional Tribunal that the constitutionality review of the amended legislation be based on the pre-amendment text of the Constitutional Tribunal Act.

The Constitutional Tribunal President has allowed two of the judges chosen by the current-term Sejm and sworn in by the President to perform their adjudicating duties.

But three of the judges selected by the present Sejm and sworn in by the President are still waiting to be allowed to adjudicate.

On December 15, 2015, deputies from the Kukiz15 party and from Law and Justice moved to amend the Constitution. The bill they promote provides that Constitutional Tribunal judges will be chosen by a two-thirds majority, that the Constitutional Tribunal will comprise 18 judges (instead of the present 15) and that the term of the current judges of the Constitutional Tribunal will expire 60 days after the Constitutional amendment takes effect.

The Prime Minister proposed an arrangement whereby eight Constitutional Tribunal judges would be chosen on the opposition's recommendation, and seven on the recommendation of the ruling party.

On the other hand, the Constitutional Tribunal President proposed that the President of the Republic swear in the three judges lawfully selected by the Sejm of the previous term. In that case, in step with the Constitutional Tribunal positions being gradually vacated, those in the group of six judges would be given the go-ahead from the Constitutional Tribunal President for their adjudication duties.

The President of the Republic said he would be prepared to consent to the proposal of the Constitutional Tribunal President – that is to swear in one of the three judges who were named by the previous Sejm, and whose selection was found to be constitutional by the Constitutional Tribunal, in order to replace the judge whose term expires in April. But the President said that the Sejm would first have to appoint that judge again, by means of a special resolution.

From the President's point of view, the situation is crystal clear:

The Sejm has pronounced the previous Sejm's resolutions on selection of five Constitutional Tribunal judges to be invalid, and the Constitutional Tribunal stated that it is not competent to rule on these Sejm resolutions. Consequently, these are binding resolutions – and the President may not swear in the three judges, as demanded by the Constitutional Tribunal, because that would represent a violation of a Sejm law; in these circumstances, the President expects that the Constitutional Tribunal President will give his go-ahead for adjudicating duties not only in respect of two out of the five judges whom he has sworn in, but also in respect of the remaining three.

From the standpoint of the Constitutional Tribunal President, the judges sworn in by the President of the Republic are all of the same status. But the Constitutional Tribunal President proposes a compromise to the President, whereby the latter would also swear in the three lawfully appointed judges – and then the Constitutional Tribunal's membership would be gradually filled in a one-at-a-time manner, drawing from the group of six available judges.

It is true that six judges sit on the waiting bench, but three of them have been selected under the previous Sejm's resolutions, which the present Sejm considers to be invalid. As for the other three judges, they have yet to be given the go-ahead from the Constitutional Tribunal President to engage in adjudicating work.

Let us then wait a see how the situation develops, and this will be influenced by both the Constitutional Tribunal President and the President of the Republic. The ruling party is not strong enough to amend the Constitution (which requires a two-thirds majority vote in the presence of at least half of the statutory number of the MPs).

4. However, from the point of view of the ruling party to be able to govern they had to bring order to the Constitutional Tribunal, which functioned based on an unconstitutional law, drafted – at least in part – by the leaders of the Constitutional Tribunal. The Tribunal was used – at least to a certain extent – for purely political purposes and in order to change Poland and fulfil commitments to the electorate, the ruling party had to see to it that the Tribunal's make-up is pluralistic. Otherwise, all their efforts would be exposed to destruction by the Constitutional Tribunal. This way of thinking, though, implies that the Constitutional Tribunal can be changed in such a way as to render it incapable of opposing the ruling majority. This in turn requires a constitutional amendment – because it means a change of the concept of state governance, away from liberal democracy

(also referred to as constitutional democracy) where majority rule is constrained by human rights and where the boundaries of authority are drawn by an autonomous Constitutional Tribunal comprising independent judges. As our experience of the recent changes in the Constitutional Tribunal Act indicates, the primacy of politics over law poses an existential threat to constitutional democracy.

The push to reform the Constitutional Tribunal has brought so much confusion to the legal landscape and the accompanying political disputes as to allow the describing of the situation as being a political crisis. Here are its main points:

1) on June 25, 2015, the Sejm of the 7th term passed a Constitutional Tribunal Act which authorised it to choose five new judges of the Constitutional Tribunal, including two judges who should have been selected only by the next Sejm, about to be elected;

2) the newly elected President did not swear in any of those five judges;

3) the Constitutional Tribunal found the provision which permitted the selection “in advance” of two judges to be unconstitutional, and stated that the President should swear in three judges – a requirement with which the President has not complied; for the Constitution to be respected the following should be done: a) the President should swear in the three judges; b) the Sejm should appoint two new judges in place of those who may not take an oath of office because they were selected in an unconstitutional manner (regular judge-selection proceedings should have been instituted – but that was not the case);

4) the newly elected Sejm of the 8th term passed a law authorising it to choose anew five judges of the Constitutional Tribunal; the Constitutional Tribunal found this law to be partly unconstitutional;

5) the Sejm of the 8th term said in its resolutions that the previous selection of five judges by the Sejm of the 7th term was unlawful;

6) the Sejm of the 8th term selected five new Constitutional Tribunal judges and the President swore them in; the selection took place on 2nd December, that is, prior to the Constitutional Tribunal’s ruling of December 3, 2015 on the then-in-force text of the Constitutional Tribunal Act – thus, it was only on 3rd December that the Tribunal provided grounds for concluding that two seats on the Constitutional Tribunal were vacated. On 2nd December, when the Sejm appointed the five new judges, there were no vacated seats on the Tribunal – because at that time the nine-year term of the judges selected by the 7th-term Sejm was running on the strength of regulations which the 8th-term Sejm later found unlawful; it is thus crucially important how the legal status of these regulations is judged;

7) the Constitutional Tribunal found itself incompetent to review the constitutionality of (i) the appealed Sejm resolutions which declared as unlawful the resolutions of the 7th-term Sejm on the selection of five judges, and (ii) the 8th-term Sejm resolutions on the selection of five judges. Consequently these resolutions remain in force, which means that: a) the appointment of the judges by the previous-term Sejm is unlawful, and b) the appointment of five judges by the pres-

ent-term Sejm is lawful. In these circumstances, the three judges selected by the previous-term Sejm in a proper legal process cannot assume their offices, because the present-term Sejm considers as unlawful the resolutions passed by the previous-term Sejm, and the President refrains from swearing in those judges;

8) but the Constitutional Tribunal President gave his go-ahead for adjudication by two judges appointed by the present-term Sejm (to replace two judges, whose terms expired in December 2015); the remaining three judges who have been appointed by the present Sejm and sworn in by the President are waiting to receive from the Constitutional Tribunal President the go-ahead to adjudicate;

9) towards the end of February the Constitutional Tribunal is expected to review the constitutionality of amendments to the Constitutional Tribunal Act which were made on December 22, 2015 and which restrict the efficacy of the Tribunal's activity. But when complying with these amendments (as is required under the amendments), the Tribunal could not review their constitutionality because: a) that would require a panel of 13 judges, while at present there are 12 adjudicating judges, b) the Tribunal should set the date of the reviewing session in accordance with the sequence of in-flowing cases, c) the reviewing session must not be held within six months of the day on which parties to the proceedings were served notices of the session date;

10) thus, if the Constitutional Tribunal applied the provisions of the amendment law of December 22, 2015 to its review of the constitutionality of that very law, it would not be capable of ruling on that law. But it applied the provisions of the Constitution and of the Constitutional Tribunal Act in the wording which precedes the amendment of December 22, 2015, though its ruling remains unpublished in the *Dziennik Ustaw* registry of statutes (which is the prerogative of the government). The amendment law of December 22, 2015, just as the law of November 19, 2015, was passed in a hurry, without consulting the public and experts, and against opposition from the legal profession (critical opinions on the bill were presented by the First President of the Supreme Tribunal, the Attorney-General, the National Council of the Judiciary. The National Bar Association, the National Council of Legal Counsels, and the Helsinki Foundation for Human Rights).

5. On July 22, 2016, the Sejm passed the Constitutional Tribunal Act, regulating the Tribunal's organisation and functioning. Later on, though, the parliamentary majority came to the conclusion that the legal basis for the functioning of the Constitutional Tribunal should be provided – along with the Constitution – by three statutory laws: 1) the Act for organisation of and rules of procedure before the Constitutional Tribunal; 2) the Act for the status of Constitutional Tribunal judges; and 3) the Act regulating the introduction of the Act for the organisation of and rules of procedure before the Constitutional Tribunal and the Act for the status of Constitutional Tribunal judges.

The law in force was the Constitutional Tribunal Act of July 22, 2016 (promulgated in: *Dziennik Ustaw* [Journal of Laws] of 2016, item 1157). Thus, soon

after this Act was passed and judged by the Constitutional Tribunal – in judgement K 39/16 (unpublished) – the legislative branch was once again proceeding to regulate the operation of the Constitutional Tribunal, this time in three different statutory laws.

Following the passage of three laws concerning the Constitutional Tribunal and the consequent annulment of the Constitutional Tribunal Act of July 22, 2016, it can be concluded that – beginning with the Act of June 25, 2015 – the makeup and operations of the Constitutional Tribunal have been regulated by seven different laws. An assumption underlying those three recently passed laws is that the Constitutional Tribunal's back-up apparatus must be created anew, in separation from its legacy and from the existing arrangements and experiences – and this is something that raises serious Constitutional doubts.

The doubts are about whether the changes introduced on the basis of this assumption are in compliance with the principle of diligence and efficiency in the work of public bodies, formulated in the preamble to the Polish Constitution. These changes are going to result in the breaking of continuity of a public body, thus violating, both, the principle of a democratic state ruled by law (art. 2 of the Constitution) and the principle of the Constitutional Tribunal's being independent of, and separate from, the other branches of government (art. 173 of the Constitution). With the Constitutional Tribunal's present organizational infrastructure removed – meaning that its operational continuity (or a prerequisite for the Tribunal's capacity to function) has been broken in a repression-like manner – there emerges the risk of dysfunctionality. The essence of this risk is that, following the liquidation of organisational arrangements that have evolved in the course of to-date development, a public institution – i.e. the Constitutional Tribunal – has been given a shape that prevents the “diligence and efficiency in [its] work”.

The present internal organisation of the Constitutional Tribunal and its back-up apparatus have developed in longstanding practice that led to the emergence of a group of specialists who assist the Constitutional Tribunal not only in handing out its judgements but also in contributing to the development of a Constitutional culture by means of educational activity, both at home and internationally. The arrangements proposed by sponsors of the bill ignore this legacy, breaking the continuity of operation by the Constitutional Tribunal, as an institution contributing to the Polish legal culture.

According to the new statutory regulation, now in force, a judge of the Constitutional Tribunal whose term of office began prior to entry into force of the Act for Status of Constitutional Tribunal Judges may issue a statement, within a month of this Act entering into force, to the effect that they go into retirement “in connection with the introduction in the course of their term of office of new rules governing the performance of Tribunal judge duties”. This provision does not comply with art. 194.1 of the Polish Constitution, according to which Constitutional Tribunal judges are chosen individually for a term of office of 9 years.

The law now in force, however, provides for a mechanism which makes possible an individualized shortening of a term of office in connection with the imposition in its duration of new rules governing the performance of Tribunal judge duties. In a democratic state ruled by law, a proper arrangement would be for the regulations introducing the law to recognise that the new rules apply to judges whose term of office begins after entry into force of the law in which these rules are spelled out.

The new regulation (Act for regulations introducing the Act for organisation of and proceedings before the Constitutional Tribunal, and Act for status of Constitutional Tribunal judges) introduces a previously unknown institution of a judge who is vested by the President of the Republic of Poland (in a decision co-signed by the Prime Minister) with temporary performance of the duties of Constitutional Tribunal President. This arrangement does not comply with art. 194.2 of the Polish Constitution, introducing the offices of President and Vice President of the Constitutional Tribunal, to be filled in a manner specified in the Constitution, i.e., through cooperation of the President of the Republic of Poland and the General Assembly of Constitutional Tribunal Judges. The Constitution rules out a situation where the Constitutional Tribunal is headed by a person appointed without such cooperation. A role for the Prime Minister as contributor to the Constitutional Tribunal appointment process has no basis in the Constitution, because the power of appointment of the President and Vice President of the Constitutional Tribunal is vested with the President of the Republic. This means that the supreme law precludes an arrangement where the Constitutional Tribunal is headed by a person who performs this duty on the strength of a co-signed act, for which the Prime Minister is responsible to the Sejm.

6. Regarding the ongoing Constitutional crisis over the Constitutional Tribunal, a scenario involving the observance of the basic law does not appear to be a likely one – unless such a scenario leads to the expectation, however mistaken, that political gains can thus be scored and that the operation of the Constitutional Tribunal will no longer pose a threat to plans of the parliamentary majority. One therefore finds it hard to propose arrangements that would be acceptable to, both, the majority leaders and to the opposition – remembering that statute law for Tribunals and tribunals, i.e., institutions which the Constitution requires to be apolitical, should be designed in such a way as to produce arrangements that meet with approval across the political spectrum and reflect reasonable concern for the common good.

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Summary

Where a system of constitutional judicial review is in place, the concept of democracy is understood as rejecting claims about an unlimited will of the sovereign as the source of state authority, and confining democracy to such manifestations of the majority will which enjoy Constitutional legitimacy – meaning that they are in compliance with the version of a human rights culture that has been inscribed in the Constitution and which is embraced by Constitutional judges when delivering their adjudication.

Following the recent parliamentary and presidential elections, the political significance of the Constitutional Tribunal has increased enormously. Only the Constitutional Tribunal is capable of preventing the centre of political power (which governs over the legislative and executive branches) from pursuing its plans. According to parliamentary majority in order to change Poland and fulfil commitments to the electorate, the ruling party had to see to it that the Tribunal's make-up is pluralistic. Otherwise, all their efforts would be exposed to destruction by the Constitutional Tribunal. This way of thinking, though, implies that the Constitutional Tribunal can be changed in an ordinary law in such a way as to render it incapable of opposing the ruling majority. Regarding the ongoing Constitutional crisis over the Constitutional Tribunal, a scenario involving the observance of the basic law does not appear to be a likely one – unless such scenario leads to the expectation, however mistaken, that political gains can thus be scored and that the operation of the Constitutional Tribunal will no longer pose a threat to plans of the parliamentary majority.

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Constitution, democratic state ruled by law, Constitutional Tribunal

SŁOWA KLUCZOWE

Konstytucja, demokratyczne państwo prawne, Trybunał Konstytucyjny