

LAW OF THE CONSTITUTIONAL TRIBUNAL OF THE REPUBLIC OF POLAND: CONCERNING REFORM AND PROBLEMS OF INDEPENDENCE

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Annotation. This article aims to analyze the development of the law of the Constitutional Tribunal of the Republic of Poland in terms of its constitutional and legislative status, as well as the problems associated with the constitutional crisis. Special attention is paid to legislative measures aimed at weakening the body of constitutional jurisdiction in Poland, in particular, a significant reduction in guarantees of the independence of the Constitutional Tribunal.

It was concluded that the law of December 22, 2015, the method of its adoption and entry into force demonstrates an attempt to remove it from the mechanisms of constitutional control (lack of time “distance” between official promulgation and entry into force). On the other hand, its content provides a set of means that encroach on the independence of the Tribunal, including: 1) a quorum of 13 out of 15 judges (there were 12 active judges); 2) the general condition for approval of decisions is at least two-thirds of votes; 3) minimum terms for the initiation of case consideration, which make the urgency of case consideration impossible; 4) giving the president and the minister of justice the right to initiate disciplinary proceedings against a judge; 5) participation of the Seimas in the termination of a judge’s powers. The above means, in combination with the means provided by the law of November 19, 2015 (which terminated the powers of the chairman and deputy chairman of the Constitutional Tribunal), indicate the use of the legal instrument outside the rule of law.

Regarding the directions of limiting the guarantees of independence of the Constitutional Tribunal, increasing its politicization through the use of the instrument of the law. The nature of such means revealed the intention of the legislator to take them beyond the limits of constitutional control and to sharply limit and complicate the work of the Constitutional Tribunal. This approach shows a potential threat from the parliamentary majority to use a special law on the constitutional court to narrow the effectiveness of the institution of constitutional control.

Key words: Republic of Poland, Constitutional Tribunal, independence of court, rule of law.

1. Formulation of the problem.

The direction and study of the content of legal reforms in post-socialist states is an urgent task for Ukraine. A certain direction of reform in the legal sphere - whether it is about changing the norms of the constitution or only laws – if the reform is taken literally, it consists in the deployment of basic constitutional principles, improvement of the relevant mechanisms of their implementation. The second argument for relevance is that such an attitude should often be emphasized when evaluating one or another reform in post-Soviet countries. However, the empirical array claims that the given thesis is relevant not only for the post-Soviet space, but also for some member states of the European Union. In 2012, the problem of “restructuring” of the Constitutional Court of Hungary arose. In this direction, attempts to change the institutional design of the Constitutional Tribunal of the Republic of Poland initially caused a political incident, which later turned into a constitutional crisis of the state. This is all the more surprising because Poland was one of the first in Eastern Europe to establish a body of constitutional jurisdiction (1985), and until 2015, legal reforms in this country were characterized by systematicity, consideration and compliance with legal continuity.

2. The relevance of the research topic is also established by its individual studies in Ukraine (K. Zakomornoï [1], O. Drachova [2], I. Maryniv [3; 4; 5]).

3. The purpose of this article is to analyze the development of the law of the Constitutional Tribunal of the Republic of Poland in terms of its constitutional and legislative status, as well as problems related to the constitutional crisis.

4. Presenting main material.

Regarding the legal status of the Constitutional Tribunal, it is determined by the Constitution of 1997 [6], Article 197 of which lays down the regulation of “the organization of the Constitutional Tribunal and the procedure for its proceedings”. However, it should be noted that outlining the framework powers and guarantees of the Tribunal’s activity, Article 194 of the Constitution also specifies that the Tribunal consists of 15 judges who are elected individually by the Seimas for a 9-year term from among persons distinguished by their knowledge of law, and the chairman and deputy the heads of the Tribunal are appointed by the President from among the candidates proposed by the general meeting of judges of the Tribunal. The organization and activity of the Constitutional Tribunal was first regulated by the law of 1985, and later by the law of 1997. In general, the Constitutional Tribunal was considered an influential institution among the authorities of Poland and authoritative among society.

According to this study, the escalation of the constitutional crisis took place dynamically. On June 25, 2015, the Seimas adopted a new Law on the Constitutional Tribunal (entered into force on August 30, 2015). According to Article 137 of this Law, it was provided for the election of the successors of all judges whose term of office ended in 2015 (there were 5 such judges) by the Seimas of the 7th convocation in force at that time, within a period of no more than 30 days from the date of entry into force of this law [7]. The specifics of the situation already at that time were that the mandate of three judges expired within the powers of the Seimas of the 7th convocation (at the beginning of November 2015), and two more - within the powers of the Seimas of the 8th convocation (in December 2015), which was supposed to be formed as a result of the next parliamentary elections, started working on November 12, 2015.

According to this study, on October 8, 2015, at its last session, the Seimas elected all five judges (they were called “October judges”). Thus, the Seimas of the 7th convocation filled the vacancies of judges that were opened within the term of his authority (three positions), as well as those vacancies that were opened outside the term of his authority (two positions). According to the law, the judge was sworn in before the president, but the head of state refused to organize the corresponding ceremony.

After the election of a new member of the Seimas, which began its activities on November 12, 2015, it implemented measures regarding significant changes in the status of the institute of constitutional justice. First, a group of deputies (“Civic Platform” party) once again appealed to of the Constitutional Tribunal regarding the unconstitutionality of the provisions of the law “On the Constitutional Tribunal”, and on November 19, 2015, the Seimas made a number of changes to the said law (note that the draft law was submitted three days before, and already on November 20, 2015, the President signed it) [8]. Article 12 of the Law was amended and in its new version it was established that the chairman and deputy chairman of the Tribunal are appointed by the President for a 3-year term from among 3 candidates proposed by the general assembly of judges of the Constitutional Tribunal with the possibility of re-election. But the main purpose of this law was different: Article 2 of the amendment provided that “The term of office of the current Chairman and Deputy Chairman of the Constitutional Tribunal shall expire after three months from the date of entry into force of the law.”

The implementation of the legislative amendment on November 19, 2015 caused a reaction: from November 23 to November 30, 2015, appeals regarding its unconstitutionality were submitted to

the Constitutional Tribunal by: 1) a group of deputies of the Seimas; b) Defender of human rights; 2) National Council of Justice (constitutional body authorized to protect the independence of the judiciary); 3) heads of the Supreme Court.

The Seimas continued its activities in the chosen direction. On November 25, 2015, it adopted five resolutions declaring "invalid" the five resolutions of October 8, 2015 on the election of judges.

As an example, after opening proceedings to review the constitutionality of the law dated November 19, 2015, on November 30, 2015, the Constitutional Tribunal, according to the norms of the Civil Procedure Code (Articles 730 and 755) in conjunction with Article 74 of the Law "On the Constitutional Tribunal", took "preventive measures" and put before the Seimas a demand to refrain from electing new judges until a decision is made in this case. However, despite such measures taken by the Constitutional Tribunal, on December 2, 2015, the Seimas elected five new judges of the Constitutional Tribunal by five adopted resolutions. Already at night (December 3 at 1:30 in the morning), the president took the oath of 4 newly elected judges and on December 9, one more judge. However, the Chairman of the Constitutional Tribunal granted these judges the status of court employees who do not perform judicial functions [9]

On December 3, 2015, the Constitutional Tribunal issued a decision on the complaint dated November 17, 2015 (case K 34/15), in which it ruled that the legislative basis for the election of three judges to replace those judges whose mandate expired before the expiration of the previous Seimas, was valid and the President was obliged to take their oath. The legislative basis for the election of two other judges was, on the contrary, recognized as unconstitutional [10]. The uniqueness of the situation was that himself. The Constitutional Tribunal took an active part in solving the problem that affected the law regarding it and the procedures of its formation.

On 9 December 2015, the Constitutional Court ruled on the constitutionality of the amendments of 19 November 2015 to the Law on the Constitutional Court (Case K 35/15), in which it ruled that Article 137a was unconstitutional on the basis that it allowed for the election of three judges under the new rules of the Seimas to replace judges whose term ended on November 6, 2015. The tribunal also ruled that the term of judges begins from the moment they are elected, and not from the day they took the oath. Hence, the 30-day deadline set for the president to take the oath of office from a judge elected by the Sejm was also found to be unconstitutional. In addition, the Tribunal ruled that the introduction of a three-year term of office for the Chairman and Deputy Chairman of the Tribunal was constitutional, but the possibility of their re-election violated the Constitution, as it could undermine the independence of the judge. Finally, it was found that early termination of the term of office of the Chairman of the Tribunal, as well as his deputy, is unconstitutional [11].

For the legal position of the right of the Constitutional Tribunal from the given decision, it recognized as unconstitutional: 1) the practice of abusing the ceremonial of taking the judge's oath as a condition for taking office; 2) the practice of creating "grounds" by law for the dismissal of the head of the Tribunal and his deputy within the limits of the term of office; 3) the very possibility of holding an administrative position in the Constitutional Tribunal for more than one term.

The constitutional standoff continued on December 22, 2015, when the Sejm adopted a new amendment to the Law on the Constitutional Tribunal (approved by the Senate on December 24, 2015, published on December 28, 2015 and entered into force "on the day of promulgation"). The entry into force of the law "on the day of promulgation" was designed to avoid preventive constitutional control over its content.

The changes therefore provided that the tribunal would generally hear cases as a "full panel" of 13 out of 15 judges, although some matters (individual complaints and preliminary inquiries) would require the presence of 7 judges. Decisions by the "full composition" of the court require two-thirds of votes earlier - a simple majority of votes; the tribunal must consider cases in the sequence in which they were submitted (without the right to determine their "priority"), moreover, it was established in the new version of Article 87 of the Law that "the trial cannot take place earlier than three months after the date of service to the participants of the process of notification about the time and on the issues declared in full force - after 6 months." premature termination of powers of judges will no

longer be announced general meetings of the Constitutional Tribunal. Instead, the assembly should prepare an appeal to the Seimas, in which they will ask for the announcement of the “emergence” of the mandate, and the Seimas will make such a statement;

Article 16 was repealed, which stipulated: “Judges of the Tribunal are independent and subject only to the Constitution during the performance of their functions.” Article 17 was also abolished, which not only stated that “the Tribunal consists of 15 judges”, but also that judges are elected by the Seimas and that “re-election to the Tribunal is not allowed” [12].

With the specified law, the Diet made the situation even more complicated. Two groups of deputies of the Seimas, the Chairman of the Supreme Court, the Defender of Human Rights, and some other organizations filed a motion on the unconstitutionality of the law of December 22, 2015. On January 14, 2016, the full Constitutional Tribunal decided to consider case K 47/15 - regarding the constitutionality of the legislative amendments of December 22, 2015 – on the basis of the Constitution only and without applying the changes provided for by them, because they directly related to the functioning of the Tribunal (of course, two newly elected judges expressed separate opinions, insisting that the amendments of December 22, 2015 had already entered into force and should have been applied in the case when the same amendments were considered for constitutionality). Among other things, on January 30, 2016, the Seimas approved the State Budget for 2016, reducing the Tribunal's budget by 10 percent.

Studying the case, the tribunal found itself faced with a dilemma whether to apply the legislative amendments of December 22, 2015, since the quorum of “full composition” of 13 judges provided for by them was impossible to fulfill, because 12 judges held the positions of judges in the Tribunal at that time. Therefore, in its decision dated January 14, 2016, accepting the petition for review of the amendments, the Tribunal ruled that it could consider the amendments directly on the basis of the Constitution. The Tribunal assumed that while judges of ordinary courts are bound by the Constitution and laws (Article 178 of the Constitution), judges of the Constitutional Tribunal are bound only by the Constitution (Article 195 (1) of the Constitution).

In the decision of March 9, 2016, published on the official website, the Tribunal motivated it primarily by violating the principle of independence of the Constitutional Tribunal and the independence of its judges [13].

First of all, the Tribunal took into account the arguments of the applicants, in particular, that they all emphasized the urgent need to consider this case directly in accordance with the Constitution and without the provisions contained in the amendments to the Act. In their opinion, it is unacceptable that the same rules, which are subject to verification in this case, are the basis for making a decision. The applicants noted that the parliament has no right to limit the constitutionally certain jurisdiction of the Tribunal by means of laws. The tribunal is obliged to exercise its constitutional powers, regardless of any legislative provisions that prevent its effective and reliable work. Therefore, in paragraph 1.3, the Tribunal came to the conclusion that the future decision refers to the provisions of the Law on the Constitutional Tribunal, which acted at the same time as the legal basis for the actions of the Court's jurisprudence, including significant procedural actions aimed at this decision. A situation in which the subject of a legal dispute before the Tribunal are provisions that systematically and procedurally are the basis for resolving the dispute cannot be acceptable. In the opinion of the Tribunal, the subordination of the judges of the Tribunal only to the Constitution, first of all, is derived from the tasks of the constitutional court's jurisdiction, which include control over existing laws (author's emphasis) (paragraph 1.6 of the decision).

In this regard, the tribunal noted that (contrary to the applicants' demands) the Law on the Constitutional Tribunal as amended cannot be used in this proceeding. As long as the Constitutional Tribunal did not consider the compatibility of the law on amendments with the Constitution, the presumption of its constitutionality applies.

The tribunal agreed that the democratic law-making process is not limited to the formal aspects of the legislative process, as it must guarantee consideration of various reasons and arguments, create the possibility for the legislature to make a rational decision. In this regard, the Constitutional Tribunal

expressed doubts about the “high speed of the legislative procedure”, which was characteristic for the approval of the law of December 22, 2015 (paragraph 3.2). The tribunal also noted that the hasty consideration of the draft law and the rejection of measures and procedures of the Seimas, which allow for a full explanation and critical assessment of legal decisions, do not contribute to the quality of legislation or the material legitimacy of the legislative process (clause 3.4 of the decision). The autonomy of the Seimas (Article 112 of the Constitution) does not mean complete freedom and freedom to form individual elements of the legislative process and the practice of their application. Therefore, the Tribunal recognized the law on amendments and additions of December 22, 2015 as unconstitutional, based on: a) violation of the procedure for its adoption; b) incompatibility of some of its provisions with the content of the Constitution. The tribunal separately assessed the possible (at that time) refusal of the government to officially publish the decision of the Constitutional Tribunal: “Delaying the moment of official publication of the decision of the Tribunal means the preservation of a legal system in which provisions devoid of the presumption of constitutionality are applied... Such a situation poses a threat to the rights and freedoms of citizens and violates their trust in the state and its laws, as well as generally undermines legal certainty.” On 11 March 2016, the European Commission for Democracy through the Rule of Law (Venice Commission) adopted an Opinion in which it found the amendments of 22 December 2015 incompatible with the requirements of the rule of law, stating: “...Even without such a constitutional basis, such control can be justified by the special nature of constitutional justice itself. It is about the constituent power, and not the ordinary legislator, which entrusts the Constitutional Court with the competence to ensure the supremacy of the Constitution. The legislation on the Constitutional Court must remain within the framework of the Constitution, and this legal framework must also be governed by the Court. A mere legislative enactment that threatens to abrogate constitutional control must itself be evaluated for constitutionality before it can be enforced by a court. Otherwise, a common law that simply states that “thereby, constitutional review is revoked - this law takes effect immediately” may be the sad end of constitutional justice. The very idea of the supremacy of the Constitution means that such a law, which allegedly endangers constitutional justice, must be controlled - and, if necessary, annulled - by the Constitutional Court before it enters into force” (paragraphs 40-41 of the Conclusion) [14, p. 7]

The conclusion also noted: “Constitutional democracies require checks and balances. In this regard, where a constitutional court has been established, one of the central elements for ensuring checks and balances is an independent constitutional court, whose role is particularly important in periods of strong political majorities. Thus, the Venice Commission welcomes the fact that all interlocutors with whom its delegation met in Warsaw expressed their commitment to the Constitutional Tribunal as the guarantor of the supremacy of the Constitution in Poland. However, as long as the constitutional crisis situation regarding the Constitutional Tribunal remains unresolved and as long as the Constitutional Tribunal cannot effectively carry out its activities, not only the rule of law is in danger, but also democracy and human rights. A solution must be found to resolve the current conflict over the composition of the Constitutional Tribunal, which arose as a result of the actions of the former Seimas. The Venice Commission calls on both the majority and the minority to do everything possible to find a solution to this situation. In a State based on the rule of law, any decision must be based on the obligation to respect and fully apply the decision of the Constitutional Tribunal. Therefore, the Venice Commission calls on all state bodies, and in particular, the Seimas, to fully respect and implement the Tribunal's decision. Provisions of the Amendments of December 22, 2015 affecting the effectiveness of the Constitutional tribunal, would jeopardize not only the rule of law, but also the functioning of the democratic system, as outlined above. They cannot be justified as measures to correct the situation regarding the lack of “pluralism” in the composition of the Tribunal. Instead of speeding up the Tribunal's work, these amendments, especially taken together, could lead to a serious slowdown of the Tribunal's activity and could make it ineffective as a guarantor of the Constitution” (paragraphs 135-137) [14].

The constitutional crisis in the Republic of Poland, which became a member of the EU on May 1, 2004, attracted the attention of EU institutions already in November 2015, and since January 13, 2016, the situation has been actively discussed between the leadership of the European Commission and the Government of Poland.

On April 13, 2016, the European Parliament approved a resolution in which it expressed its concern at “the de facto paralysis of the Constitutional Court of Poland, which threatens democracy, human

rights and the rule of law” and called on the Polish government to “respect, publish and implement fully and without delay the decision of the Constitutional Court of March 9 2016 and implement the decisions of December 3 and 9, 2015.” In addition, the European Parliament called for “full compliance with the recommendations of the Venice Commission.”

At the same time, EU institutions assumed that the rule of law is one of the common values on which the European Union is based, which is enshrined in Article 2 of the Treaty on European Union. The European Commission, together with the European Parliament and the Council, is responsible for ensuring compliance with the principle of the rule of law as a fundamental value of the EU. The European Commission, in particular, focused attention on the following problems:

appointment of judges of the Constitutional Tribunal and implementation of decisions of the Constitutional Tribunal on December 3 and 9, 2015, related issues;

Law of December 22, 2015 on amendments to the Law on the Constitutional Tribunal, decision of the Constitutional Tribunal of March 9, 2016 related to this law.

5. Conclusions.

The constitutional crisis in Poland, which was later expanded due to the adoption of amendments to the laws “On Public Television” and “On the Police”, confirmed the non-linearity of the development of constitutionalism in the EU member states, the potential for their ambiguous understanding of the mechanisms of the rule of law and, in particular, the role of the Constitutional Court as the guarantor of the constitution. Its essence lies in the effort of the parliamentary-government system to use the law to expand prerogatives through use the law as a means of reducing the guarantees of the independence of constitutional justice and its effectiveness.

The right to a constitutional situation in the Republic of Poland must be considered in the following aspects.

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