Paradoxes of Constitutionalisation: Lessons from Poland

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This comment aims to explain a number of paradoxes of constitutionalization on the example of the current constitutional crisis in Poland. It attempts to demonstrate that this crisis is not only political in its nature, but structural as it results from the inherent tension between the concept of rule of law, democracy and human rights. It is also argued that the success of constitutionalization as a global project depends on strong social endorsement of constitutional institutions and practices, including judicial review.

Mediating between the rule of law, democracy and human rights

The paradoxes of constitutionalization follow from the inherent tensions between the logic, medium and language of three foundational concepts of rule of law, democracy and human rights. The logic of rule of law rests in legal rules and legal reasoning. It is communicated via courts but carries the risk of incomprehensiveness and alienation. The logic of democracy rests in deliberation about public goods by the people and their representatives but it carries the risk of reducing deliberation to symbolic speech and democratic decision-making to a vote by acclamation. As dangers of "authoritarianism" inhere both in the rule of law and the rule by the people, mediation between the rule of law and democracy means that the people need to be constrained by the law, but the law needs to be comprehended by the people in order to be recognized as legitimate.

The logic of human rights rests on moral universalism which implies the recognition of the universal value of human dignity, liberty and equality. Yet, in practice, the virtue of human rights is reduced to *prima facie* claims that may be outbalanced by important public interest. Moreover, human rights bills curb negative emotions since they proscribe cruelty, oppression, hate, racial bias, and prescribe emotional restraint[1] without providing alternative channels of airing them. In turn, the dogmatic of human rights instilled the culture of political correctness and produced the "correctness bubble" – something both left and right wing populist leaders pierce with cheers and applause of the crowds.

Knowing these tensions and paradoxes any crisis of constitutionalization may be related to alienation of courts, emotionalism and reductionism of the democratic process and social disillusionment with human rights. To overcome these problems proponents of constitutionalism need to find ways how to translate legal reasons presented in courts and parliaments in emotions and symbols readable to the general public, while ensuring that the society endorses the concept of the rule of law and the power of courts as independent arbiters.

Last but not least, constitutionalism faces a problem with the realization of separation of powers in the era of galloping specialization and expert knowledge-dependency of all branches of government, including courts. In the end of the day, many conflicts of rights and conflict of rights and public interest depend not only on practical reason, but on evidence-based fact-finding (see i.e. debates about mandatory vaccinations and the pertinent question about the providence of experts, their specialization, and the profile of organizations who founded their research). While the process of decision-making often requires assessment of evidence by those who lack expert knowledge, it often turns out that both public policies and judicial decisions are likely to be driven by ideological arguments. [2] Importantly, both sides of the ideological struggle are highly professionalized and use similar tools and

methods, which include transnational advocacy and litigation strategies.[3] Yet another paradox of today's world is that the (far) right forces are frequently the leaders of critical social theory and movements.[4]

The origin and consequences of the constitutional crisis in Poland

The current constitutional crisis in Poland originated in the conflict surrounding the appointment of judges of the Constitutional Tribunal. On its face, there is nothing specific about the problem because judicial appointments have always been a stake in the contest of power between political parties. As the recent nomination of Merrick Garland to the US Supreme Court shows the power of judicial appointment is the competence the majority of the present day wishes to keep to itself. It should therefore come as no surprise that the ruling majority aims to secure appointments of candidates whose worldviews warrant that the majority in the court would remain favorable to the government and when necessary defer to the executive acting under the pressure of political urgency.

More surprising is however the reaction of the executive trying to paralyze the Tribunal's work notwithstanding the risk of losing credibility in the international and domestic forum. Yet again, the history of constitutionalism knows several examples of conflicts over judicial appointments and the courts' struggle for independence which led to the de-establishment of judicial review or court packing plans (Austria (1933-34), United States (1937), Peru (1996-2000), Ecuador (2004-2006), Russian Federation (1996), Belarus (1996)). In post-Communist countries in Central and Eastern Europe conflicts over the composition and competence of constitutional courts remain a key element of recent constitutional reforms (in Hungary (since 2010), Moldavia (since 2013) and Romania (2012-2015)).[5]

In Poland the attack on the Constitutional Tribunal was a direct reaction to the midnight appointments by the outgoing parliament[6] but it belongs to a more ambitious plan to subordinate all domains of power (media, civil service, public prosecution, communication data) to the ruling majority and the will of its leader in the name of a "good change."[7] The conflict over the Constitutional Tribunal has not ended with the decision declaring that the amendments to the Act on the Constitutional Tribunal are unconstitutional[8] because the government persistently refuses to publish the judgment. The official reason for denying the judgment legal force is that the Tribunal decided this case in pursuance of the Act on the Constitutional Tribunal of 25 June 2015 without taking into account the procedural changes introduced by the amendments. The official communication stating that the Constitutional Tribunal acted in the breach of the law was followed by the comment by the Minister of Justice threatening judges of the Constitutional Tribunal with sanctions. In this way, the government remained unimpressed by the opinion of the Venice Commission critical of the amendments.[9]

According to the Tribunal, the normative act being the subject of the review may not simultaneously be the legal basis of the review, even more so if the review concerns procedural aspects of the law such as the size of the adjudicating panel or the required majority. Otherwise, a ruling finding the challenged provisions unconstitutional would undermine the adjudication process (if it had been conducted in pursuance to the unconstitutional provisions) and consequently, the judgement as the outcome of this process.

In practice, the decision finding the amendment of the Act on the Constitutional Tribunal unconstitutional means that the entire amendment is null and void and the amended provisions come in place of the unconstitutional amending provisions. Thus, all future proceedings of the Tribunal should be held in pursuance of the old law in the version adopted prior to the amendment. It is however expected that the decisions of the Constitutional Tribunal would not be universally respected and some courts will not recognize legal authority of decisions which are not published in the Official Journal. This situation can lead to *de facto* establishment of a defused model of constitutional review in Poland and the elimination of the monopoly of the Constitutional Tribunal to declare the law unconstitutional. Yet, this situation is unacceptable under the Constitution of 1997.

The disastrous effects of the current crisis is the situation in which both sides of the conflict – the Tribunal supported by the majority of constitutional law experts and networks of legal professionals, and the ruling party allegedly supported by eight constitutional law experts – claim to act in accordance to the law. Paradoxically, both sides waive the flag of the rule of law but apply very different standards of interpretation. The situation may not stabilize without a compromise as long as there is always a counterargument based on the same legal norm subject to interpretation. Yet, one should emphasize that only some interpretations are in line with the tenets of constitutionalism as a prescriptive concept. Clearly, the unconstrained rule by the people is in essence the antithesis of constitutionalism.

As result, we are in the as-if rule-of-law regime – with as-if judges appointed by the present majority in the Sejm and sworn by the President who took offices in the building of the Constitutional Tribunal but are not invited to adjudicate and as-if judges appointed by the previous majority of the Sejm but not sworn by the President notwithstanding the decision of the Tribunal finding the legal basis of these appointments constitutional.[10] There are also as-if decisions of the Constitutional Tribunal which the government refuses to recognize, as well the as-if opinion of the Venice Commission, the as-if monitoring procedure initiated by the European Commission – they exist, but are treated as if they would not.

What is obvious in this struggle is that all persons who lack expert knowledge about the functioning of judicial review in Poland, the case-law of the Constitutional Tribunal, the effects of Tribunal's decisions finding the law unconstitutional – putting it simply, the commoners – are not in position to rationally assess "legal" arguments presented by two sides of the conflict. Similarly, they are not in position to assess the level of politicization of the Constitutional Tribunal, not to mention the impact on everyday life of a citizen of any of the Tribunal's decisions.

Towards stronger constitutional endorsement

For comparative constitutional scholars, the Polish government's plan to subordinate the Tribunal to the ruling majority could be perhaps viewed as the strategy to limit the power of juristocracy. Yet, any follower of the case law of the Constitutional Tribunal could notice that the Polish court was anything but activist except the early phase of its existence between 1986 and 1997 when it acted upon the amended Constitution of 1951 with a very limited catalogue of rights and freedoms and the rule of law clause. Over three decades of constitutional jurisprudence prove that the Tribunal tried to avoid even the suspicion of politicization and averted any decisions that would be contrary to the will of the society (paying much less respect to the will of the government of the day).

There is no other way to explain why there is no single decision of the Tribunal that would be disadvantageous to the Catholic Church or religion. In a country where the vast majority of citizens are regular Church-goers or members of the Catholic community, the Tribunal never dared to stand against fundamental values respected in the society such as the sanctity of life, the place for religious teaching in public schools, protection of conscience and religious objects. Still, the society seems not to know or endorse this Tribunal's practice.

Paradoxically, the Tribunal's strategy to avoid even the mere suspicion of political engagement has also recently failed as the Tribunal faced the charge of being not only political, but politicized. What is truly worrying however is that the evasion of ideological conflicts led the Tribunal to adopt strictly formalist approach to law which resulted in its social alienation and incomprehensiveness. This approach is part of the legal culture in post-Communist countries where legal formalism was used as a remedy against the political dictate of Communist rules.[11] The same problem concerns ordinary courts loosing ties with the society which does not understand the meaning of judicial pronouncements or does not believe in their objectivity. While the escape of courts in legal formalism was intended to strengthen judicial independence it

became the cause of weak constitutional endorsement of judicial review and distrust towards the judiciary.

One should not lose out of sight other social and economic causes of the constitutional crisis in Poland or other post-Communist countries. There is a grain of truth in the argument that constitutionalisation in Central and Eastern Europe did not bring a real change of power but provided legal grounds for privatization and neoliberal reforms which imposed costs on the entire society, while providing benefits only to a small group of people. The fact that the jurisprudence of the Constitutional Tribunal has always been dominated by three types of challenges concerning freedom of economic activity, protection of property and equality manifests that constitutionalization in Poland brought legislative changes that led to serious interferences with constitutional rights which were relevant to neoliberal reforms. However, the most frequent constitutional problem in Poland concerns the right to a fair trial, including the right to be heard that according to some authors are the essence of all human rights.[12]

Hence, the structural (systemic) problem with access to courts and the right to adequate proceedings, to a judicial decision in a reasonable time, and to appeal coupled with the social distrust towards the judiciary seems to be the real obstacle to democratic transformation through human rights in Poland. In such circumstances the counter-majoritarian argument used against the Constitutional Tribunal by political leaders seeking to eliminate all constraints of the executive and legislative power gains more support than the argument suggesting that courts must counteract "ambition" of the government.[13]

In sum, in transitional democracies, on the one hand, weak constitutional endorsement results from the absence of sufficiently lengthy statist tradition of rule of law that predated democratic constitutions in Western Europe. On the other hand, weak constitutional endorsement follows from social disillusionment with political elites and distrust towards the judiciary.[14] As the Polish example shows, the success of constitutionalism depends on developing not only foundations for substantive constitutionalism through democratic process, civic engagement and local initiatives, but also robust formal (legal) constitutionalism based on the genuine belief that courts settle legal disputes with reasons. It is thus in the institutional interests of courts, including the Constitutional Tribunal, to make their decisions comprehensible and readable to the general public, while constitutionalization as a process requires undergoing civic education about the content of law and reasons why law matters.

[1] András Sajó: Emotions in Constitutional Design, Int J Constitutional Law *(2010) 8 (3): 354-384.*

[2] Raanan Sulitzeanu-Kenan, Mordechai Kremnitzer and Sharon Alon: Facts, Preferences and Doctrine: An Empirical Analysis of Proportionality Judgement (2014)

[3] Christopher McCrudden: Transnational Culture Wars, Public Law and Legal Theory, Research Paper Series, Paper No. 447, April 2015

[4] I borrow this thought from Adam Sulikowski. University of Wroclaw and Adam Czarnota, University of South Wales.

[5] See a brilliant comparative analysis of court packing plans and legislation paralyzing the functioning of constitutional courts in Amicus curiae on the Act amending the Act on the Constitutional Tribunal of 22 December 2015 in case no. K 4/15 submitted on behalf of the Helsinki Foundation of Human Rights to the Constitutional Tribunal.

[6] See also Anna Śledzińska-Simon: Midnight Judges: Poland's Constitutional Tribunal Caught Between Political Fronts, VerfBlog, 2015/11/23, .

[7] According to Wojciecb Sadurski "[t]he ultimate *mot d'ordre* of Kaczyński is the full 'consolidation of power'. In reality, it means a systematic and relentless annihilation of all independent powers which may check the will of the ultimate leader." Wojciech Sadurski, What Makes Kaczyński Tick?, Int'l J. Const. L. Blog, Jan. 14, 2016.

[8] Judgment of 9.03.2016, Case no. K 47/15 (Amendment of the Act on the Constitutional Tribunal).

[9] Opinion on Amendments to the Act of 25 June 2015 on the Constitutional Tribunal, Opinion no. 833/2015. In the opinion it is noted that a refusal to

publish the judgment would not only be contrary to the rule of law, but unprecedented.

[10] Judgement of 9.12.2015, Case no. K 35/15 (Amendments to the Act on the Constitutional Tribunal).

[11] Zdenek Kühn, *The Judiciary in Central and Eastern Europe: Mechanical Jurisprudence in Transformation?, Martinus Nijhoff Publishers 2011.*

[12] Alon Harel, Why Law Matters, Oxford Legal Philosophy 2014, 205.

[13] The Federalist No. 51 (1788).

[14] See Małgorzata Kryszkiewicz, Społeczeństwo surowo ocenia trzecią władzę [Society critically evaluates the third power], Dziennik Gazeta Prawna (08.03.2016).

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