Polish Constitutional Tribunal goes down with dignity

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The Polish Constitutional Tribunal's last stand ?

On 11 of August 2016 the Polish Constitutional Tribunal ("Tribunal") decided case K 39/16 in which it disqualified, for the second time in the span of 5 months, court-packing provisions contained in the Law of 22 July, 2016 on the Constitutional Tribunal. Separation of powers, judicial independence and effective functioning of the constitutional court were again the keywords that informed the analysis. In K 39/16 the Tribunal built on its previous *unpublished* (case K 47/15) and *unimplemented* (K 34/15 and K 35/15) judgments in which it had already dealt with the court-packing. This case law reminds Martin Shapiro's argument about the consequences of the choice made by the constitution makers to resort to a court as a conflict resolver. Such choice entails the acceptance of "*the inherent characteristics, practices, strengths and weaknesses of that institution ... and some law making by courts and a certain capacity for judicial self-defense of its law making activity. The issue of whether such law making and self-defense are somehow antidemocratic or antimajoritarian is uninteresting. If the demos chooses the institution, it chooses the judicial law making and judicial self-defense*"[1]. After this most recent case, though, the clock is ticking on the Tribunal and this time the self-defense by way of courageous judicial pronouncements might not be enough to survive.

The order emphasized that most of the provisions in the new Law replicate these already found to be unconstitutional in the judgment of 9 of March 2016 (case K 47/15). Therefore, in view of the repetetive nature of most of the claims, the Tribunal felt strong enough to decide the case by way of a reasoned order, rather than a judgment. The Tribunal reiterated that its rulings must be published immediately in the shortest possible time given the circumstances of each case. Government authorities have no discretion but to publish *all* rulings of the Tribunal as required by the clear language of art. 190 of the Constitution. Accordingly, the Tribunal criticized in the strongest possible words practice of singling out its rulings that will be published in the Journal of Laws, and these that will not be, and the government's refusal to publish the judgments made by the Tribunal in the exercise of its constitutional powers. The Tribunal clearly saw through the intentions of the Sejm. The Sejm performed a review of individual rulings and concluded that judges behind these rulings acted *ultra vires*. Therefore, the refusal to publish these "negatively reviewed" rulings would be held to be justified and, as a result, make the future publication of the Tribunals' rulings dependent on the consent of the legislative branch. For the Tribunal this is inadmissible encroachment by the executive on the competences of a constitutional court and aims at the stigmatization of the judges who decided these cases. Such practice runs afoul of the standards of the state governed by the rule of law (*Rechtstaat*) and is alien to the legal culture to which Republic of Poland belongs. The Tribunal was clear: *all* rulings are unconditionally binding and must be published.

As for the vexing problem of the Tribunal's composition, the order simply refers to the constitutional interpretation already made in December 2015 judgments, and calls on the state authorities to bring to an end the situation of disrespect of the Tribunal's rulings. The Tribunal reminded the straightforward: legislator must not elect new judges when there is no vacancy as such was the case here. Forcing thus the President of the Tribunal to allow three judges elected by PiS to start adjudication, would be unconstitutional and "incompatible with the judgments of the Court which are binding on all state authorities, the Tribunal and its President included".

Besides *art. 89* and *90* of the Law (see analysis above), the Tribunal declared unconstitutional *art. 26*

para 1 point g of the Law (possibility for the three judges to request the case be heard by the full court); *art. 38 paras 3 – 6* (the principle whereby cases are ruled on in the order in which applications were lodged at the Registry); *art. 68 paras 5-7* (procedure allowing at least 4 judges of the Tribunal to raise during the deliberation an objection(s) related to a proposed judgment, every time important "institutional issues or issues on the public order are at stake"; *art. 80 para 4* (publication of the Tribunal's rulings dependent on the motion being lodged by the President of the Tribunal with the Prime Minister) and, last but not least, all temporal provisions (*art. 83 para 2* and *art. 84 – 87*). The latter gave the Tribunal no chance of adjusting to the provisions of the new Law. They would require the Tribunal to rule on the cases pending *prior to* the entry into force of the Law within one year from the date of entry into force of the Law. The Tribunal stressed that such requirement would put it into an impossible situation as the cases lodged at the Tribunal *after* the entry into force of the Law would have to wait and the Tribunal would have to shift its attention to all the cases already pending before the entry into force of the Law. For the Tribunal, setting down time limits for disposing of cases constitutes an inadmissible interference with the judicial branch and violates the principle of separation of powers.

"Constitutional-catch-me-if-you-can"

To believe, though, that this ruling will change anything would be to underestimate the resolve and determination of the ruling party in its quest to annihilate the Court. It even looks that in the aftermath of this ruling, the majority will harden its position even more. The leader of the ruling party, Jarosław Kaczynski, has not only ruled out the publication of this decision, but he also promised to go back to the old and more radical version of the court-packing plan that had been already declared unconstitutional in March 2016. It looks like we are back to drawing board. This time though, the President of PiS, Kaczynski, added novel dimension to the practice of refusal to publish the Tribunal's judgments. He declared, even before the judgment was pronounced (!), that whatever the Tribunal decides on 11 of August 2016, it will not be published. After the order in case K 39/16, the "constitutional catch-me-if-you-can" starts all over again, with no end in sight. Vicious circle results as, in the aftermath of this most recent ruling by the Tribunal, PiS was quick to come up with assurances that new Law on the Tribunal will be now drafted expeditiously and, by all means, this time, fully compliant with the Constitution[2]. Constitutional games to continue then.

Constitutional narrative(s) in flux

The persistent refusal by the executive to publish the judgments of the constitutional court is indeed mind – boggling and unheard of in Europe. It was never entertained by the Polish founding fathers, either. When the Constitution of 1997 has been drafted, it was thought that the authority of a judicial pronouncement and the respect for the Constitution will carry enough clout to secure the universal observance of the judgments issued by the Tribunal and that the rule of law is rooted in the public consciousness to the point where no politicians would ever dare to undermine the judicial review. However, the new Law on the Tribunal of 22 July 2016 entrenched the "constitutional-unconstitutional" duality of the Polish legal system under PiS. What has been conventionally accepted as "constitutional" for years, has now taken on new understanding of constitutionality in accordance with the narrative of the ruling party. Traditional constitutionality and rule of law as understood post-1989 give way to the flouting of the constitutional document and imposing new understanding on the constitutional institutions and concepts that seemed to be rooted in Polish constitutionalism. The Tribunal and constitutional review fell first victim of this reversal in constitutional narrative.

Moving forward and waiting for constitutional vindication

H. Schwartz has argued that the rise of the independent constitutional courts in Eastern Europe was remarkable and that these courts were ready to challenge and overturn important statutes, bills and regulations. He concludes "*and most* (of these courts – T.T.K.) *seem to have gotten away with it*"[3]. For the very

first time since its birth back in 1986 the very survival of the Tribunal has been on the line. Today the time has finally come to admit that the Polish Constitutional Tribunal did not manage "*to get away with it this time*". Its self-defense was not enough, and the constellation of lucky events that allowed it to survive in the past, came to an end[4]. The Tribunal we used to know is gone, but at least it never faltered and backed down when trying to stave off the constitutional assault[5]. The precious jurisprudence it has managed to build over the last year in response to the attack on its independence and the rule of law, is something we must be looking up to and fall back on. This case law read together is as a reflection of the best constitutional traditions Poland has to offer. That is a lot moving forward, while waiting for better constitutional times. Make no mistake, they will eventually come, and with them, full vindication of the Polish Constitutional Tribunal.

[1] M. Shapiro, *The European Court of Justice. Of Institutions and Democracy,* 32 *Israel Law Review (1998) 1.*

[2] The budget of the Tribunal has been already severely undercut to the point that this years conference to commemorate the 30th Anniversary of the Tribunal has been canceled. The follow-up to this is the most recent proposal that aims at divesting former and future judges of the retirement benefits, all under the pretense of making the Tribunal "less byzantine" (sic!).

[3] H. Schwartz, *The Struggle for Constitutional Justice in Post-Communist Europe*, (University of Chicago Press, 2000), at p. XI.

[4] See brilliant historical account by L. Garlicki, *Constitutional Court of Poland*, in P. Pasquino, F. Billi, (eds.), *The Political origins of Constitutional Courts. Italy, Germany, France, Poland, Canada, United Kingdom*, (Fondazione Adriano Olivetti, 2009).

[5] Bear in mind, though, that in all the cases in which the Tribunal defended the Constitution, three PiS-nominated judges dissented and sided uncritically with the parliamentary majority. They clearly see their role on the bench as an extension of the nominating party. In the process Constitution becomes an afterthought.

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