Constitutional Review as an Indispensable Element of the Rule of Law? Poland as the Divided State between Political and Legal Constitutionalism

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1. Poland AD 2017 - The Divided State: A Snapshot Of The Current Situation

It seems, that as in Poland *divide et impera* becomes the maxim of the ruling party, the Polish state develops a divided identity. There is the divided Constitutional Tribunal with three illegitimate judges whose decisions might be objected by ordinary courts as invalid, and the divided Parliament which proceeds without the presence of the opposition parties or notwithstanding their protests. There is a divided academia, on the one hand supporting the current government with opinions how to solve the crisis and carry out other institutional reforms monopolizing the power, on the other strongly criticizing the ongoing measures as being in breach of the Polish Constitution. Further, there is the division among ordinary judges who may encounter a loyalty problem – either follow new decisions of the Constitutional Tribunal or try to apply the Constitution directly. There is also the Ombudsman who tries to stay neutral and intervene in all cases of potential human rights violations, including the rights of the members of the majority. Finally, there is a politically divided society, including those who are uninterested in politics, or those, who uncritically follow the government-led propaganda in the public media, and who are satisfied with the new redistribution policies rather than give the situation a critical thought.

Once a *Musterkind* among the new Member States of the European Union, Poland led by the Law and Justice appears deaf to the call of the European Commission to respect the rule of law. It is right on its way to diverge from the core of European values and bury the myth of its own national solidarity. At the same time, it has become a divided state between political and legal constitutionalism, which shows particularly in the constitutional crisis over the Constitutional Tribunal.

2. Legal Versus Political Constitutionalism

According to the main tenet of liberal constitutionalism the rule of law, democracy, and human rights are indispensable elements of a modern state. Nevertheless, modern constitutionalism does not offer specific solutions as how to organize these principles in practice, as each of them imposes limitations on others – the rule of law and human rights restrain the majority rule, while democracy and human rights provide for substantive standards of the rule of law. Notwithstanding the global trend to envision the constitutional review in constitutions, the concept of constitutionalism does not per se mandate the establishment of constitutional courts. Instead, constitutionalism requires effective guarantees of access to a court and judicial independence as the primary conditions of the legal protection of individual rights. Is the establishment of constitutional courts just a political matter, given the fact that the scope of competences assigned to constitutional courts vary from country to country?

The events concerning the Constitutional Tribunal in Poland show that a political attack on the constitutional court marks the endemic conflict between political and legal constitutionalism. This is particularly exposed in the Expert Report commissioned by the Speaker of the Lower Chamber of Parliament in July 2016. In the report a group of constitutional experts proposed a novel interpretation of the Polish Constitu-

tion which emphasizes the supremacy of democracy over the abstract principle of rule of law and delivers a concept of separation of powers based on the supremacy of Parliament. It promotes the need to weaken the position of the Polish Constitutional Tribunal in order to prevent the expansion of "juristocracy" and "judicialization of politics." While this interpretation coincides with the government's plan to "reform" the constitutional review in Poland (proposed already during the first rule of the Law and Justice Party in 2005-2007), its implications reveal the fragility of fundamental assumptions of modern constitutionalism.

Despite its meanwhile very detailed chronology, the Polish conflict concerning the Constitutional Tribunal poses a general question about the scope of legislative interventions in the status and the organization of the constitutional court. After a set of amendments to the law on the Constitutional Tribunal addressing the composition of the Tribunal, the attendance quorum and the sequence of hearing cases, the most recent change regards the status of the judges and the appointment of the acting Chief Justice by the President of the Republic in case the office of the Chief Justice remains vacant.

From the viewpoint of the Venice Commission and the European Commission these changes had substantially limited the effective operation of the Tribunal. Even though the Constitutional Tribunal subsequently declared most of them to be unconstitutional, the government refused to publish these decisions in the Official Journal contrary to Art. 190 (2) of the Polish Constitution. The reason not to publish the judgments was based on allegations that the Tribunal, by not applying the Act on the Constitutional Tribunal subject to its review, violated the Constitution.

The lack of a compromise regarding the refusal to swear in the judges by the President of the Republic, and to publish the judgments of the Constitutional Tribunal, led the European Commission to initiate for the first time the new EU Framework procedure to strengthen the Rule of Law against Poland. Having found that there is a serious risk to the rule of law in Poland the Commission issued a recommendation to the Polish government. However, what is legally problematic in this recommendation is the criterion of „effectiveness" of the constitutional justice as there are, in fact, no common normative standards of the effectiveness of constitutional review within the EU.

The legal assessment of such effectiveness might therefore vary, in particular if comparing the availability and admissibility of constitutional complaint mechanisms, and be subject to many argumentative scenarios. For example the European Court of Human Rights considers the constitutional complaint in Poland as an effective remedy in individual cases only in specific circumstances (cp. *Szott-Medyńska v. Poland*, App. No. 47414/99, decision of 9 October 2003). Therefore, the EU Commission's concerns as to the rule of law in Poland needs to be more related to the currently binding Polish Constitution. In other words, a serious threat to the rule of law in Poland results in the first place from the fact that the President and the government violated the Constitution by inter alia ignoring a valid decision of the Constitutional Tribunal.

Yet, the crisis over the Constitutional Tribunal could also be viewed as a consequence of a number of structural and institutional problems that made the "court packing" a politically viable strategy. Over the years they have led to a staggering detachment of the Constitutional Tribunal from the people who viewed the Constitutional Tribunal as yet another state institution predominantly involved in ensuring a hierarchical control of legal norms, rather than a human rights court with a direct impact on their lives. In fact though, given the limitations of the Polish model of constitutional complaint regarding its scope and the form of redress it provides, the effectiveness of constitutional review with regard to individual cases in Poland could be generally doubted. This could be one of many reasons that made it easier for the political majority to attack the constitutional court.

3. Constitutional Review and the Rule of Law in Germany

Such a political court packing strategy appears to be unthinkable for example in Germany with the possibly strongest constitutional court worldwide, whose posi-

tion is owed not only to historical reasons related with the adoption of the Basic Law in 1949, but to other factors such as a very confident exercise of constitutional review and the constant popularity of the individual constitutional complaint. Despite the fact that until 2015 only 2,3% of individual complaints have been actually successful, they led to landmark decisions with a perceivable socio-political impact. It is remarkable though that the competence of review individual constitutional complaints has developed as a product of historical experiences and political decisions rather than the doctrinal evolution of the concept of the rule of law.

While in Poland the legislative changes regarding the organization and procedure before the Constitutional Tribunal have been introduced without a constitutional amendment, one could ask whether similar amendments would be permissible, under the Basic Law. The German Federal Constitutional Court's position as a constitutional organ, with a wide range of autonomy that comes with it, on top of judicial independency, is legally and politically recognised. The Court's role as a "political actor", has, however, been also subject to academic and political debates, some even suggesting to alter the Court's competences with regard to the individual constitutional complaints, owed, however, in part to the high application numbers and the low success quotas, being considered to be blocking the Court's capacities (cp. Entlastung des Bundesverfassungsgerichts. Bericht der Kommission der Bundesministeriums der Justiz (Report), Bonn, 1997).

In the first place, the German constitution allows the legislature to design the constitutional court's organisation and procedure in a legislative act (cp. Art. 94 (2) of the Basic Law). In fact, the Federal Constitutional Court Act (Bundesverfassungsgerichtsgesetz) of 12 March 1951 has been subject to legislative modification throughout the years. It is not obvious, however, in how far the legislature's constitutional margin of organisation is capped by the principle of the rule of law. Clearly, changes of the Court's competences laid down in the constitution (Art. 93 of the Basic Law) would require a constitutional amendment. According to the "eternity clause" of the Art. 79(3) of the Basic Law, the inviolable guarantee of human dignity and the binding of public authority to the basic rights (Art. 1 Basic Law), as well as the principles enumerated in Article 20 of the Basic Law – such as the republican form of the government, democracy or welfare state – are unamendable. Yet, neither the rule of law nor the right to constitutional justice are explicitly referred to in Art. 79 (3) of the Basic Law. Furthermore, since the principle of the rule of law itself is not explicitly mentioned in Art. 20 of the Basic Law, the Federal Constitutional Court had once detected that the *Rechtsstaatsprinzip* itself is actually not included in the eternity clause of Art. 79 (3) (Judgement of 15 December 1970, BVerfGE 30, 1 (24, 28). Even if, generally, the right to effective legal remedies has been considered an essential part of the principle of the rule of law, it remains open, as to whether it includes the revision by a constitutional court. Rather crucial in this context is the guarantee of an independent control by a court. Although, one could moreover read the constitutional commitment of all organs of public authority to fundamental rights (Art. 1 (3) of the Basic Law) in favour of an independent control mechanism, yet again, it is not expressly stated that the guarantee of the commitment to fundamental rights requires a constitutional court as a safeguard against fundamental rights' infringements. Therefore, the suggestion that the constitutional review is per se a necessary element of the rule of law and even unamendable is legally less solid than it occurs at the first glance

4. Conclusion

It appears that a monopoly over the constitutional review by constitutional courts is not a mandatory component of the legal concept of a democratic state governed by the rule of law. Even in the context of the Basic Law, a constitutional framework that has created a very strong constitutional jurisdiction, a clear argumentation in favour of constitutional review as a tangible element of the rule of law, and therefore an indispensable element of constitutionality, is rather blurred. In fact, the power of constitutional courts appears to be a political matter which depends on the

political majority and public support notwithstanding their desirability in certain political contexts, in particular in countries with relatively young democratic traditions and authoritarian pasts. This might not be the best news for modern constitutionalism but one we need to be aware of, in particular in times of the recent re-rise of populist movements, illiberal disenchantment, and anti-establishment rhetoric – not only in Poland.

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