Extinguishing the Court

Why There Is No Salvation for the Current Polish Constitutional Tribunal

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Piero Calamandrei, great Italian legal scholar and politician, said on January 14, 1947: "If, during the period when fascism assaulted the Italian State, a rigid Constitution had been in force, fascism would have assaulted, rather than the legislative Chambers, the Constitutional Court".[1]

Today's Hungary and Poland are not fascist states. But the policies of the populist-authoritarian ruling elites running both countries these days confirm Calamandrei's prediction. A frontal assault on their constitutional courts was the first thing they did after they came to power to remove key checks on the executive, backed by legislative majorities. In Poland (the only country I will deal with in this text), this happened mainly by means of "legislative bombardment" plus blatant court packing, the most important aspect of which had been placing on the court of three persons improperly appointed to already occupied seats. All this has been described in legal scholarship in some detail, both by me and other scholars.

Currently, the Constitutional Tribunal is firmly in the hand of the governing PiS [Law and Justice] party, headed by a PiS favorita Ms Julia Przyłębska (improperly elected as the President of the Court though properly as a judge). Since July 2021, all judges and "quasi-judges" on the court owe their seats to PiS parliamentary majority. The Tribunal entirely ceased to perform – even pretend to perform – its function of scrutinizing statutes adopted by the legislators. To the contrary, it has become an enthusiastic and willing helper of the legislative majority and of the executive. It is not a mere façade but something much worse than that: an active aide in consolidating the authoritarian rule in Poland.

The calendar

Before reflecting upon what can and should be done about it (if anything), a word about the future, if the status quo is maintained. Suppose the parliamentary elections in 2023 are won by the democratic opposition (obviously, in any other case all our plans for "doing something" about the CT are pointless anyway, and will end up in a drawer for after subsequent elections). The persons who have occupied places that were already filled, will be removed from the Constitutional Tribunal; this is obvious. But the remaining PiS-appointed judges will stay. Therefore, at the beginning of 2024, 12 of the 15 Constitutional Tribunal judges will have been appointed by the PiS parliamentary majority. At the beginning of January 2025 the number will be 10, and at the beginning of January 2026 it will be 8. This arises from the schedule of the terms of office of the current judges.

PiS will have a majority in the Constitutional Tribunal until 28 June 2026, when Andrzej Zielonacki, the eighth of the judges appointed by PiS, will leave and, from then on, it will be possible for a majority of judges appointed by the new parliamentary majority to emerge (including three judges properly elected in 2015, who are still waiting for the President of the Republic to take their oath of office). Even if the repentant Judge Piotr Pszczółkowski, who was appointed by PiS in 2015 but is dissenting from many politically motivated judgments, would continue to vote honestly rather than as he is told by PiS, the change in the Tribunal's majority would arise on 20 December 2025, when Judge Michał Warciński leaves.

In summary, the review of the dates shows that a hypothetical new parliamentary majority elected in

[1] I am grateful to Professor Tania Groppi for pointing out this quotation to me

2023 will keep facing a PiS majority in the Constitutional Tribunal up to the end of December 2025. Therefore, it will be possible for a group of PiS MPs to overturn all statutes for at least two years, by submitting such requests to the Tribunal.

To be sure, some observers speculate that these judges who have been properly elected by PiS are so cynical and opportunistic that, when a new coalition comes to power, they will suddenly start to support it. But this speculation is just that: a speculation. I do not share these views. I believe, firstly, that these people are not necessarily opportunistic cynics, but rather fanatics. And secondly, they will have every incentive to remain in the service of PiS. Because if they switch to the democratic side they will not necessarily gain its trust, whereas PiS will begin hating them as traitors.

Therefore, if the democratic parties win the 2023 elections, there will be a strong veto factor against democratic laws. A veto by the president and the majority in the Constitutional Tribunal.

Illegitimacy

I am convinced that the Constitutional Tribunal needs to be extinguished. I have described my proposal, in some detail, in an interview conducted by Anna Wójcik (well-known to the readers of this publication) in Oko.press in Poland and, in a much more succinct way, in the daily newspaper Gazeta Wyborcza).

But I would like to emphasize: The veto threat is not the factor on which my idea of extinguishing the Constitutional Tribunal is based. I would be prepared to agree, perhaps reluctantly and with some regret, with the orthodox supporters of the rule of law understood as obedience to the letter of the law and not necessarily to the spirit of the law, that we still will have to suffer, to grit our teeth and remain virtuous for these 2–3 years. Nor is the basis of my proposal my totally negative assessment of the functioning and the whole of the case law of the present tribunal, or the scandalous behaviour of individual members of the tribunal, including Julia Przyłębska, their secret dealings with the authorities, the rigging of benches, the manipulation of the schedule of judgments and various outrageous conducts. None of these are the bases of my proposition.

In my view – and this is the basis of my proposal – the tribunal stopped being legitimate on 8 February 2017 in the sense in which the Constitution defines it. That was the day when the first ruling involving a "stand-in" (or a quasi-judge) was handed down. Three quasi-judges had formally been in the Constitutional Tribunal earlier, but President of the Tribunal Andrzej Rzepliński did not assign them to any bench throughout the entire year of 2016. This changed at the beginning of 2017, after he stepped down and was replaced by Ms Przyłębska.

The involvement of quasi-judges in the work of the Constitutional Tribunal is poisoning the whole of the Constitutional Tribunal, and not only the judgments in which they have participated. The Tribunal is not illegitimate in 3/15 (three quasi-judges out of 15 judicial positions) but in 15/15. This is for two reasons.

Contamination

Firstly, by agreeing to participate in benches which also include quasi-judges, properly elected judges have violated their duties and tarnished the dignity of a judge. This applies to all the correctly elected judges who are members today because, after all, several rulings were issued by the full bench of the Constitutional Tribunal, and therefore with quasi-judges, and all the judges present agreed to that. They did not protest, so they betrayed the dignity of a judge. Nobody can be a judge if they so drastically tolerate blatant lawlessness in their institution and play out a certain game as if nothing had happened.

Secondly, even more important than the presence of the quasi-judges is the absence from the Constitutional Tribunal of three properly elected judges: Judges Roman Hauser, Andrzej Jakubecki and Krzysztof Ślebzak, all elected by the Parliament in 2015. The fact that they were lawfully elected and then illegally and persistently ignored by the President of Poland who refused to take their oath of office, means that the Court President who assigns judges to particular panels was deprived of the ability to appoint proper judges who could perhaps, through voting, delibera-

tion, etc., have changed the course of judgment. We do not know this, of course, but this unconstitutional lack of three judges contaminates the whole of the Tribunal with illegitimacy.

I therefore believe that, for these two reasons, the 'individual' disciplinary misconduct of all the current judges, and the more 'collective' contamination of the whole institution, make the whole of the current Constitutional Tribunal, in this membership, illegitimate.

One-hundred percent illegality

The quasi-judges in the Constitutional Tribunal are like a spoonful of tar in a barrel of honey: they contaminate the whole of the Tribunal. That is why the whole of the Constitutional Tribunal should be replaced, except for the three judges who were elected properly, namely Judges Hauser, Jakubecki and Ślebzak. They are waiting and should be immediately included in the Tribunal. After which, the remaining 12 judges should be elected in accordance with the constitutionally prescribed procedure.

All judgments that have been passed, regardless of whether it was a full bench, a five-judge bench with or without quasi-judges, are invalid because of the unlawful distortion of the pool of judges that can be drawn upon to fill the benches.

We can, of course, make some compromises here to protect citizens, such as the one proposed recently by the Batory Foundation's think-tank, stating that the validity of judgments issued as a result of citizens' complaints or legal questions by "ordinary" judges that have already decided certain administrative or judicial decisions in favour of citizens should be maintained.

I would endorse such a compromise because my proposal is not fundamentalist or radical, and has the objective of protecting citizens' rights, including the right to an independent court. It is rule-of-law based and legalistic, although it goes further than the Batory Foundation's proposal just mentioned. Those experts would remove only three quasi-judges while I believe that the present Constitutional Tribunal is contaminated as a whole because of the presence of the quasi-judges – it is this presence and the absence of properly elected judges that infects the whole of the court with illegality.

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