

PRESIDENT AND THE CONSTITUTIONAL TRIBUNAL IN POLAND. LEGAL RELATIONSHIPS

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Abstract: *In the Polish legal system, the legal relations between president and the Constitutional Tribunal cover five areas: the president's participation in making up the CT, the president's initiation of the constitutional review of the law, the Constitutional Tribunal's resolution of competence disputes, the ruling, at the president's request, on the inconsistency of the goals of political parties with the law, and the Constitutional Tribunal's ruling on the president's temporary inability to perform his function. As regards the influence exerted on the electoral process, it should be stated that the Constitutional Tribunal has no powers in that field. The election results are announced by the National Electoral Commission, while the validity of the elections is determined by the Supreme Court. When it comes to removing the president from office, it is only the State Tribunal that has such powers, a special body acting to assess the legality of the actions of the most important persons in the state. A qualified majority of 2/3 of the votes of the statutory number of members of the National Assembly (both houses of parliament) is required to impeach the president.*

Keywords: *president; Constitutional Tribunal; State Tribunal; relations between president and the Constitutional Tribunal; presidential elections; impeachment.*

Introduction

Over the last months, the attention of the world's public opinion has been drawn to certain events related to the direct activity of constitutional

courts towards persons holding or applying for the position of the head of state (president). It is obvious that the political system of each state and the way in which its bodies are formed is a constitutional matter, and therefore does not directly translate into the practice of functioning of the same or similar bodies in other countries. However, it is also true that certain events of an extraordinary nature arouse justified interest of public opinion in other countries, and sometimes even all over the world. Many people wonder how similar issues are regulated elsewhere. And this is precisely the matter addressed in this presentation, which is supposed to present the mutual legal relations between president and the Constitutional Tribunal (CT) in Poland.

1. President in the political system of the Republic of Poland

According to the Constitution of the Republic of Poland, president is the highest representative of the Republic and guarantor of the continuity of state authority, ensures observance of the Constitution, guards the sovereignty and security of the state and the inviolability and integrity of its territory. The person is elected by the nation in universal, equal, direct elections, in a secret ballot. President's term of office lasts 5 years, and the re-election, if any, can take place only once. A Polish citizen who turns 35 no later than on the day of the elections and enjoys full electoral rights to the *Sejm* (the country's lower parliamentary chamber) may be elected President of the Republic of Poland. The candidate that has received more than half of the valid votes cast is elected president, and if none of the candidates has polled the required majority, a second round is held after two weeks, in which the two candidates who received the highest number of votes in the first ballot take part. The validity of the election of President of the Republic of Poland is confirmed by the Supreme Court.

Despite very strong electoral legitimacy, the powers of president as a public authority are not wide. Although the Constitution grants the person numerous rights, they are mostly of representative, formal and ceremonial nature. The actual executive power is exercised by the

government. While the body is established by president, in fact the role of the head of state is limited to appointing the representative of the party with the largest representation in parliament to the position of prime minister and appointing ministers at the request of the latter.

2. The Constitutional Tribunal in the political system of the Republic of Poland

As for the Constitutional Tribunal, it is a judicial authority that is separate and independent from other authorities. The Tribunal was established during the communist period, in 1982, when the then leadership of the state, in an attempt to ease the extremely tense political situation in the country, decided to create a kind of a substitute to the rule of law, by introducing into the Constitution two new state agencies - the State Tribunal, as a court to judge the highest state officials, and the Constitutional Tribunal, as the guardian of the legality of the law. While the State Tribunal has actually never functioned (to date, only two people have been convicted), the Constitutional Tribunal, established later, in 1986, has been operating to this day. It consists of 15 judges elected by the *Sejm* for a single 9-year term. The operation of the Tribunal is directed by its president, who is appointed by the head of the state from among the candidates presented to him by the assembly of judges of the Tribunal.

According to the Constitution, the Constitutional Tribunal adjudicates on matters of the so-called hierarchical control of legal norms. This involves examining the conformity of legal norms lower in rank with those placed higher in the hierarchical order, i.e. the conformity of laws and international agreements with the Constitution, the laws with ratified international agreements, as well as ordinances and regulations enacted by executive authorities with the Constitution, international agreements and laws. In addition to the hierarchical control of legal norms, the Constitutional Tribunal adjudicates on the conformity of the purposes or activities of political parties with the Constitution, resolves competence disputes between central constitutional state bodies,

and has also the right to declare the president temporarily unable to hold office.

The Constitutional Tribunal's rulings have universally binding force and are final. A ruling on the inconsistency of a given act or its part with an act higher in rank removes the challenged act (or its part) from the legal order. For this reason, the Constitutional Tribunal is often referred to as the “negative legislator”. If a court ruling or another individual act was issued under the removed legal norm, the Tribunal's ruling constitutes the basis for reopening the proceedings or repealing that act.

3. President and the Constitutional Tribunal

When it comes to the relations between president and the Constitutional Tribunal, it should be pointed out that the Constitution of the Republic of Poland entrusts both the authorities with the role of its guardian. However, each of them performs the role in a different way, which results primarily from the different legitimacy of each of the agencies to act and their different empowerment in the system of state bodies. Without going into a detailed analysis of the issue, the problem discussed here can be reduced to the nature of the function performed as the above said “guardian of the Constitution”. The aim of the CT is to restore constitutionality, i.e. to remove defective norms from the legal system because they violate higher-order norms, while the president does not have powers that directly lead to a similar effect, his role consisting in initiation of the mechanisms that can cause such an effect. This means initiating procedures before other state bodies (e.g. the Supreme Audit Chamber or the Constitutional Tribunal) (Brzozowski, 2010, p. 15). Such distribution of powers is a consequence of the location of the president and the CT in different segments of the state power – the president being part of the executive power, the Tribunal – of the judicial power. In accordance with the principle of the separation of powers, which is one of the fundamental principles of the political system of the Republic of Poland, all segments of power are independent and autonomous, and

therefore exercise competences that by their nature belong to a given type of power. The above does not mean complete separation and lack of connections between the different types of state bodies – the individual segments of power are composed of. Such connections are more than natural. When it comes to the relations between the president and the CT, the Polish Constitution allows to distinguish five fields in which they are implemented: the president's participation in shaping the composition of the CT, the president's initiation of the review of the constitutionality of the law, the Constitutional Tribunal's resolution of competence disputes, ruling at the president's request on the conflict of political parties' goals with the law, and the Constitutional Tribunal's ruling on the president's temporary inability to perform his function.

4. The president's participation in shaping the composition of the Constitutional Tribunal

The Constitutional Tribunal judges are elected by the *Sejm*, the first house of the Polish parliament, from among people distinguished by their legal knowledge. Candidates for the position of the CT judges are nominated by the Presidium of the *Sejm* or at least 50 members of parliament. After being elected, the Constitutional Tribunal judge takes an oath before the President and begins a 9-year term of office. It is thus a strictly political mechanism that is set in motion at the time, but after taking office, a CT judge is autonomous and independent, being subject only to the Constitution, and any political activity is prohibited from him. In particular, the CT judges must not belong to a political party, a trade union or conduct public activities that are incompatible with the principles of the autonomy of courts and the independence of judges during their term of office.

As can be seen from the above, the President's role in shaping the makeup of the Constitutional Tribunal is not a prominent one; it is actually limited to administering the oath to the new judge of the Tribunal. In the past, it would happen that President delayed accepting the oath from a person elected as a judge of the CT, therefore in one of its

rulings the Tribunal stated that the president should meet this obligation immediately (CT judgment of 3 December, 2015., K 34/15).

The Constitution entrusts President with a more prominent role in the deciding on the composition of the management bodies within the Constitutional Tribunal. It states that the president and vice-president of the CT are appointed by President of the Republic from among candidates presented by the General Assembly of Judges of the Constitutional Tribunal. It is worth noting at that occasion that appointing the president and vice-president of the CT is one of the so-called prerogatives of the president, i.e. the acts that do not require the countersignature of the prime minister.

5. Initiation of the control of constitutionality of laws by the president

Ruling on the hierarchical conformity of legal norms is one of the most important competences of the Constitutional Tribunal. The CT does not act *ex officio*, and the proceedings before it may be initiated only by authorized entities. Polish law provides for two types of such review - abstract and specific. In cases of so-called abstract review, i.e. the review of a provision unrelated to an individual case, the eligible entities are limited to the most important bodies of various branches of the state machinery, as well as other entities performing specific social tasks (e.g. trade unions or churches and religious associations). On the other hand, in cases of so-called specific review, i.e. review of a provision that was or may be the basis for an individual decision, the entities authorized to initiate proceedings before the Tribunal include only two groups of those:

- courts, which may ask a so-called legal question regarding the legality of a provision that is to be applied in a specific case. After asking a question, the court suspends the proceedings pending before it and waits for the Tribunal's decision;

- citizens or private legal persons that may file a constitutional complaint with the Tribunal against a legal provision that was the basis for the decision in their case, if they believe that the provision is inconsistent

with the Constitution and their rights or freedoms specified in the Constitution have been violated as a result.

In the scope of our interest, the president does not have the authority to initiate specific control, but plays an important role in relation to abstract control. He can initiate such control in relation to the applicable law or a law before it enters into force. As for the first case, according to the Constitution, the president is the entity authorized to submit applications to the Constitutional Tribunal to initiate proceedings on the abstract review of the constitutionality of any applicable legal act or part thereof. The president often uses this authority, and in the event of submitting the application in question, he is a participant in the proceedings before the CT. However, the Constitution also provides for the possibility of the president applying to the Constitutional Tribunal during the legislative process, i.e. before the act enters into force. The legislative process in Poland includes three stages - first, the *Sejm* (the first chamber of parliament) passes the act, then it is sent to the Senate (the second chamber). The Senate may make amendments to the adopted act. If such is the case, the act with amendments is returned to the *Sejm*, which may accept or reject them. If the Senate has not tabled any amendments or if the *Sejm* has considered the Senate's amendments (positively or negatively), the bill goes to the president, who then has 21 days to sign it and the president's signature is a condition for the law to come into force. After the bill is signed, it is published in the Journal of Laws of the Republic of Poland.

If the president's doubts about the bill submitted to him are so serious that he does not want to sign it, then he has two options. First, he can file a motion with the Constitutional Tribunal regarding the conformity of this bill with the Constitution. In such a case, the so-called preventive control is talked of, the one before the entry into force of a given bill. If the CT has found the bill to be in conformity with the Constitution, the president cannot refuse signing it. On the other hand, if the Constitutional Tribunal has found the bill to be inconsistent with the Constitution, the president refuses to sign it. However, if the inconsistency with the Constitution concerns individual provisions of the

bill, and the CT does not rule that they are inextricably linked to the entire bill, the president, after seeking the opinion of the Marshal of the *Sejm*, signs the bill leaving out the provisions found to be inconsistent with the Constitution or returns the bill to the *Sejm* to remove the inconsistency. It is worth noting here that only the president can initiate preventive control as part of the described legislative process (Naleziński, 2006, p. 93). No other state body may request the Constitutional Tribunal to review the legality of an act or part thereof before this process is completed.

Secondly, instead of referring the act for preventive control the president may veto it. The president's veto of the act consists in submitting a reasoned motion to the *Sejm* to reconsider it. The rejection of the president's veto occurs if the *Sejm* passes the act again by a qualified majority of 3/5 votes in the presence of at least half of the statutory number of the deputies. In such a case, the president signs the act and orders its publication in the Journal of Laws of the Republic of Poland. If the veto is rejected, the president does not have the right to apply to the Constitutional Tribunal for preventive control. If the *Sejm* does not reject the president's veto, the act does not enter into force. The president decides quite freely which of the above moves (preventive control before the CT or veto) to choose. From the praxiological point of view, the veto has one fundamental flaw - unlike preventive control, it is not selective and is directed against the entire act. The president's motion to the Constitutional Tribunal may cover only certain parts of a given legal act (Dudek, 2023, p. 71).

Slightly different rules apply to the procedure for adopting the state budget. Firstly, the president has only 7 days to sign the budget act, and secondly, he cannot veto it. However, he may refer it to the Constitutional Tribunal for preventive control. The Tribunal shall rule on the matter no later than within 2 months from the date of filing the application with the CT.

It should be added that after signing the act, the president may refer it to the Constitutional Tribunal following the general principles. If this happens immediately after signing the act, a so-called subsequent control

is talked of. In such a case, the Constitutional Tribunal examines the act (or part of it) as part of the ordinary procedure for abstract control of applicable law. The practice of the legislative process reveals quite often instances of the president using this possibility. The president does not always decide to veto or conduct preventive control for political reasons. Referring the act to the Constitutional Tribunal immediately after signing it is therefore a "soft" form of the president distancing himself from the act submitted to him for signature.

Finally, it should be mentioned that the President may, before ratifying an international agreement, submit to the Constitutional Tribunal an application regarding verification of its conformity with the Constitution.

6. The Constitutional Tribunal resolving competence disputes at the request of or with the participation of the president

The president is one of the entities that may apply to the Constitutional Tribunal to resolve a competence dispute. Apart from him, only the Marshal of the *Sejm*, Marshal of the Senate, Prime Minister, First President of the Supreme Court, President of the Supreme Administrative Court and President of the Supreme Audit Chamber may exercise such authority.

The Constitutional Tribunal resolves competence disputes in the event that at least two central constitutional state bodies consider themselves competent to resolve the same case or have issued decisions in it (positive dispute) or at least two central constitutional state bodies consider themselves incompetent to resolve a specific case (negative dispute).

7. Ruling on the inconsistency of the goals of political parties with the law, at the request of the President

The President – like other key state authorities – has the right to submit to the Constitutional Tribunal a motion to examine the conformity

of the goals of a political party, specified in the statute or program or the activities of a political party with the Constitution.

8. The Constitutional Tribunal adjudicating on the temporary inability of the president to perform his duties

As a rule, the Constitutional Tribunal is a court of law, and therefore its adjudicative powers are limited to the hierarchical control of legal acts or parts thereof. The only competence of the CT that goes beyond examining the legality of law is adjudicating on the temporary inability of the president to perform the person's duties.

The Constitution of the Republic of Poland provides that if the president is temporarily unable to perform his duties, he shall notify the Speaker of the *Sejm* about the same, which Speaker shall then temporarily take over his duties. The Constitution does not limit possible reasons for the inability to perform President's duties to health issues, and they may be issues of a different nature (e.g. family situation, inability to return to the country due to a natural disaster, warfare or an act of terrorism) (Radajewski, 2016, p. 14). Where the president is unable to notify the Speaker of the *Sejm* of the inability to perform his duties, the Constitutional Tribunal rules on the existence of an obstacle to the performance of the office by the President of the Republic of Poland at the request of the Marshal of the *Sejm*. In the event that the President is temporarily unable to perform his duties, the Constitutional Tribunal shall entrust the Marshal of the *Sejm* with the temporary performance of the duties of the President of the Republic. Should the Marshal of the *Sejm* prove unable to perform the duties of the President of the Republic, the duties shall be assumed by the Marshal of the Senate.

The Constitutional Tribunal shall consider the application of the Marshal of the *Sejm* to confirm an obstacle to the performance of the office by the President of the Republic of Poland and to entrust the Marshal of the *Sejm* with the temporary performance of the duties of the President of the Republic of Poland immediately, but no later than within 24 hours of its submission. If, during the consideration of the case,

doubts arise regarding the circumstances justifying the determination of the inability to perform the functions by the President, the Tribunal may order the Prosecutor General to perform specific activities within a specified period and adjourn the hearing. The adjournment of the hearing may not last longer than 24 hours.

The Tribunal shall issue a decision to confirm an obstacle to the performance of the office by the President of the Republic of Poland and to entrust the Marshal of the *Sejm*, for no longer than 3 months, with the temporary performance of the duties of the President of the Republic of Poland. In the event that after the expiry of the period for which the Tribunal entrusted the Marshal of the *Sejm* with the temporary performance of the duties of the President of the Republic of Poland, the circumstances that temporarily prevent the President of the Republic of Poland from exercising his office have not ceased, the Marshal of the *Sejm* may once again submit a motion to the Tribunal to establish an obstacle to the performance of the office by the President of the Republic of Poland and to entrust the Marshal of the *Sejm* with the temporary performance of the duties of the President of the Republic of Poland.

So far, the Constitutional Tribunal has never addressed the issue of determining the temporary inability of the president to perform his duties.

Conclusions

As it results from the above, the Constitutional Tribunal of Poland does not wield any powers related to the assessment of the course of any elections. Tasks in this scope are performed primarily by the National Electoral Commission, which is the permanent highest electoral body competent in matters of conducting elections and referenda. It consists of one judge of the Constitutional Tribunal, appointed by the president of this Tribunal, one judge of the Supreme Administrative Court, appointed by the president of this court, and 7 persons qualified to hold the position of judge, appointed by the *Sejm*.

When it comes to presidential elections, their results are determined, based on the results established in the voting protocol, by the

National Electoral Commission. Electoral protests against the election of the president may be filed with the Supreme Court. It decides on the validity of the elections basing on the report of the National Electoral Commission and after considering the protests within 30 days from the date of the announcement of the election results by the National Electoral Commission. If the Supreme Court adopts a resolution declaring the election of the President of the Republic of Poland invalid, new elections are held. Until a new president is elected, his duties are performed by the Speaker of the *Sejm*.

As can be seen, there exists in Polish law a possibility to invalidate the presidential elections. However, this can only happen after they have been fully conducted, i.e. after the second round of those (if it was held). The decision is made by the Supreme Court, not the Constitutional Tribunal.

In relation to the issue of removing the president from office, the Constitutional Tribunal has no authority in this matter. The President may be deprived of his function by the State Tribunal. This is a special judicial body before which persons holding the most important state functions are held accountable for violating the Constitution or the law in connection with the position they hold or within the scope of their office.

Of course, the President of the Republic of Poland is among the people who may be held accountable before the State Tribunal. The right to impeach the President is vested exclusively in the National Assembly, i.e. both parliamentary chambers combined – the *Sejm* and the Senate. The National Assembly has a total of 560 members (460 members of the *Sejm* and 100 senators). An initial motion to impeach the President may be submitted to the Speaker of the *Sejm* by at least 140 members of the National Assembly. Impeachment of the President may occur by a resolution of the National Assembly, adopted by a majority of at least 2/3 of the votes of the statutory number of members of the National Assembly. If the State Tribunal finds that there has been even an unintentional violation of the Constitution, the Tribunal rules that the President be removed from office. However, due to the insignificant degree of social harm caused by the act or if there exist special

circumstances of the case, the State Tribunal may limit itself to finding the accused guilty (without imposing a penalty). For acts constituting a crime, the State Tribunal imposes penalties or penal measures provided for in the provisions of criminal law.

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