



LAW AND ADMINISTRATION IN POST-SOVIET EUROPE

Vol. I(VI)/2019: 46–58

DOI: 10.2478/lape-2019-0005

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CONSTITUTIONAL TRIBUNAL IN AN ARGUMENT WITH THE PRESIDENT, GOVERNMENT AND PARLIAMENT OF THE POLISH REPUBLIC IN 2015

Key words: Constitutional Tribunal of Poland, the President of Polish Republic, Sejm, the President's prerogative, the Supreme Court of the United States, *Marbury v. Madison*

Abstract

The judicial decision of the Constitutional Tribunal from 3rd December 2015 (K/34/15) is the subject of the analysis. In this case the Tribunal considered the matter of the constitutional character of the act on the Constitutional Tribunal from June 2015.

The authors focused on the question of justification of the Tribunal opinion regarding the regulations which were the basis for the appointment of five judges of the Constitutional Tribunal by the Sejm of VII term.

While discussing the justification of the Tribunal the authors emphasize that the Tribunal justified its opinion, according to which it acknowledged the constitutional basis for the appointment of three individuals and questioned the constitutional character of the same regulations in case of two others, in an entirely superficial manner.

The authors present as a significant element of their reasoning the circumstances of adopting by the American Supreme Court in 1803 the adjudication in the *Marbury v. Madison* case in order to emphasize in this context the weight of rational and thorough argumentation of the grave constitutional matters. Taking the above into account, it is even more clearly visible that in the discussed judicial decision the Constitutional Tribunal limited its reaction to the laconic set of arguments regarding this key matter.

In November 2015 victorious party PiS (Law and Justice) acquired over 50% of seats in both houses of the Parliament as a result of general election, which allowed it to form a majority government independently. It ought to be emphasized that in the history of free

Poland after 1989 such a situation happened for the first time and obviously must have been surprising for the major part of commentators. Most of all, however, the above situation was astonishing for the so far ruling party Platforma Obywatelska (Citizens Platform) and

its coalition partner Polskie Stronnictwo Ludowe (Polish People's Party), as well as the party that had emerged from the circles previously associated with Platforma, known as Nowoczesna (Modern).

We have no intention of analyzing tense political relations during this particular period, but we do intend to examine if the Constitutional Tribunal led by professor Andrzej Rzepliński had abandoned its apolitical position. Therefore, we need to outline the positions and standpoints taken throughout the period of several – month lasting fierce argument between the most significant parties.

Political background of the argument of the Constitutional Tribunal with the President of the Polish Republic and the Parliament

According to PiS, powers ruling Poland before the 2015 elections had made an attempt to introduce such regulations that would secure its elementary interests in case PiS won the Autumn 2015 general election. The leadership of PO supported by PSL assumed that President Komorowski would hold his post after the election which was to be held in the Summer of 2015. Yet, they took into account the possibility of losing majority in the parliament and their government. Assuming that PiS would aim at “spoiling the state” this group intended to strengthen the Constitutional Tribunal in order to make it the unmovable obstacle against changes in legislation that had been announced by the opposition.

This scenario occurred to be impossible to fulfill due to unexpected election failure of B. Komorowski, as well as more and more inevitable victory of PiS in the general election. When it was clear that PiS would have a significant supremacy (although the thought of such a massive victory had not been accepted yet) legislative changes had been conducted that aimed at guaranteeing the Tribunal the membership for the following four years of new Sejm term that would enable it to block effectively all the reforming activities of the new parliament and government.

Both PO and PSL denied having such intentions during their work concerning the new foundations of the Tribunal functioning. The sole objective declared by them was to put in order the aspects regulating the work of the Tribunal, which were not particularly clear. In case of the issue of changing the date of electing judges,

the point was to provide the Tribunal with the opportunity to act in full panel incessantly. It was claimed particularly, that due to the end of the term of five judges of the Tribunal that coincided with the end of parliamentary term there was the necessity of setting the rules concerning the election of the new judges to guarantee the Tribunal's undisturbed acting.

The initial point of our further pondering ought to be based on the analysis of the membership in the Tribunal at the end of term of the parliament elected in 2011. Five of the judges were appointed during the term of 2005–2007 parliament, i.e. in the period when the majority was held by PiS (although not the majority that allowed the independence in appointing judges). The following judges were recommended by this party: Maria Gintowt-Jankowicz, Wojciech Hermeliński, Zbigniew Cieślak and Teresa Liszcz. Till his appointment Marek Kotlinowski was connected with Liga Polskich Rodzin (the League of Polish Families). Whereas Mirosław Granat, appointed with the recommendation of PiS, after some time took the position closer to PO. The terms of the following six were coming to an end the soonest: M. Gintowt-Jankowicz, W. Hermeliński and M. Kotlinowski – on 6th November 2015, Zbigniew Cieślak on 2nd December 2015, Teresa Liszcz on 8th December 2016, and M. Granat on 27th April 2016.

As many as nine out of ten judges appointed between 2007 and 2012, namely when the parliament was dominated by PO, were recommended by this party. These were subsequently appointed: Andrzej Rzepliński, Stanisław Biernat, Sławomira Wronkowska – Jaśkiewicz, Stanisław Rymar, Piotr Tuleja, Marek Zubik, Małgorzata Pyziak – Szafnicka and Leon Kieres. One judge, Andrzej Wróbel, was appointed with the recommendation of Sojusz Lewicy Demokratycznej (the Alliance of Democratic Left Wing).

Summarising, the judges associated with PO prevailed in the Tribunal having 9 members, including the ones holding the functions of the president and vice president as well as being in good relations with the judge recommended by SLD, A. Wróbel, and judge M. Granat, who shifted into their political positions.

In the event of inevitable change of the parliamentary majority, between 2015 and 2019, the situation in the Tribunal would have changed significantly if all the vacant positions had been taken by judges recommended by PiS. In June 2018 at the latest as many as eight judges would have been appointed to the Tribunal

by the new (elected in 2015) parliament, which would have most probably meant the ones associated with PiS. This in turn would have resulted in the inability to block effectively legislative activities of the parliamentary majority taking advantage of the judicature of this organ. Additionally, due to the leaving of the President and the vice President it was clear that new President of Poland, A. Duda, would appoint for these key positions judges from amongst the newly appointed ones. What is of importance, is the fact that there was only one vacant position to be filled in May 2019 by the end of this parliamentary term.

In the light of the above presented reasons one may not accept as credible the assurances expressed by the circles focused around PO, claiming that the actions taken in order to accelerate the appointment of five new judges of the Tribunal before the beginning of the new parliament term were not related to the aim of maintaining the political control over the Tribunal until the end of this parliament's four years term.

Thus, the changes in the act on the Constitutional Tribunal¹ introduced by the previous parliament became the area of confrontation. On the basis of the act on 8th October 2015 five new judges were appointed: Ryszard Hauser, Krzysztof Ślęzak, Andrzej Jakubecki, Bronisław Sitek and Andrzej Sokala. The two last ones were recommended accordingly by PSL and SLD, whereas the first three ones by PO. This solution meant that by the end of the term of 2015 parliament the judges related to PO were to be prevailing significantly in the Constitutional Tribunal. This was also to assure control over the Tribunal in the PO recommended judges till the next general elections in 2019.

Due to essential doubts regarding the constitutional character of the imposed change in the act on Constitutional Tribunal, President Andrzej Duda did not accept the oath of five candidates for judges appointed on 8th October 2015. In consequence they did not assumed the positions in the Tribunal.

Simultaneously, on 25th November 2015 new Sejm adopted the resolution on the legal invalidity of October resolutions, on the basis of which the five judges had been appointed².

¹ The Act on the Constitutional Tribunal from 25th June 2015 (Dz. U. poz. 1064)

² The Resolutions of Sejm from 25th November 2015 on declaring the legal invalidity of the resolution of the Polish Republic Sejm from 8th October 2015 on the appointment of judges (M. P. poz. 1131, 1132, 1133, 1134 i 1135).

Then, on 2nd December 2015 Sejm appointed five following judges: Henryk Cioch, Mariusz Muszyński, Lecha Morawski, Piotr Pszczółkowski and Julia Przyłębska³, whose oath was accepted by President A. Duda and who assumed the posts of the Constitutional Tribunal judges.

The breach of constitutional prerogatives of VIII term Sejm

The filling of these positions had caused the first major argument between the Constitutional Tribunal on the one side and the parliament and the government on the other⁴. Its focal point was the judgement of the Tribunal from 3rd December 2015 (K34/15). This case resulted from the motion of a group of PiS MPs questioning a number of regulations of the act on the Constitutional Tribunal from 25th June 2015 (further on the act on CT), amongst which there were the ones that led to the appointment of the five judges by the old parliament on 8th October 2015.

We are intending to focus on this part of the judgement since its effects are still of significance.

The subject of the proceedings regarded the accordance with the regulations of:

Art. 112 and 197 of the Constitution with the regulations of art. 19 point 2 of the act on the CT saying that, "*The motion regarding the notification of a candidate for the post of a judge of the Tribunal is to be forwarded to the Speaker of Sejm within three months before the day the term of a Tribunal judge ends*", as well as

Art. 62 point 1, art. 112, art. 194 point 1 and art. 197 of the Constitution with the regulation of art. 137 of the act on CT saying that, "*In case of the Tribunal judges whose term ends in 2015 the time limit to deliver motion referred to in art. 19 point 2 is 30 days since the day the act came into force*".

³ M. P. poz. 1182, 1183, 1184, 1185 i 1186.

⁴ It is worth mentioning here a number of opinions and standpoints in which this issue has been assessed. The ones to be mentioned are: B. Banaszak, *Opinion from 24th November 2015 roku*, BAS-69/15A as well as his *Gloss to the Judgement of Constitutional Tribunal from 3rd December 2015*, Przegląd Sejmowy Nr 2(133)/2016; J. Szymanek, *Opinion from 23rd November 2015*, BAS-69/15A; M. Muszyński, *Anatomy of "a plot". Legal Analysis of the Process of Appointing the Constitutional Tribunal Judges in the Autumn 2015*, Przegląd Sejmowy Nr 2(139)/2017; or M. Wiącek, *Gloss to the Judgement of Constitutional Tribunal from 3rd December 2015*, Przegląd Sejmowy Nr 2(133)/2016.

It was this construction of the regulations in question that became the basis for appointing the judges by Sejm on 8th October 2015.

Let us settle first what such a construction of regulations meant in practice. When the amendment to the act on CT was adopted the date of general election had not been established yet. Furthermore, neither was known the exact date of the end of term of the parliament elected in 2011, which began its term on 8th November 2011. In accordance with the regulations of the Constitution, the election to the Sejm of the next (VIII) term were to be announced by 1st August 2015, and their date was to be selected out of three dates: 11th, 18th, and 25th October, since actually it was impossible to held the election on 1st November 2015⁵.

The final decision concerning the selection of the date was to be taken by the new President of Poland Andrzej Duda, who was the President-elect⁶ on the day the act was adopted. Therefore, it ought to be emphasized at this point, that by adopting the act on the CT on 25th June 2015, the parliamentary majority had no knowledge which Sejm would have the right to decide on the appointment of at least three CT judges whose term was due to end on 6th November 2015. It was entirely obvious, however, that the term of judges that was to end at the beginning of December 2015 would take place during the term of new Sejm. This issue is of fundamental significance while assessing the content of the analyzed judgement of CT.

While adopting the act on CT on 25th June 2015 the Sejm majority at that time, claimed that they aimed at specifying the issue of appointing the judges of CT, which so far had not been determined by any time limits. Such a solution was applied by the previous legislator by referring to detailed regulations in the Organizational Rules of Sejm assuming that the question of time limits

in which Sejm performs its constitutional prerogative to appoint the judges of CT is included in the range of its own disposal⁷.

It ought to be emphasized that according to the regulation valid before the adoption of the new act, judicature of CT in most significant cases, e.g. in so called "full panel" required the participation of 9 judges present in adjudicating panel⁸. The significance of this stemmed from the fact that even temporary vacancies on the five positions of judges in the Tribunal would in no way hinder its work, including the cases of larger gravity. What is important, also the new regulation from 2015 included in art. 44 point 3 the full panel was determined as consisting of nine judges.

Only after setting the context one may comprehend the essence of changes introduced in June 2015 regarding the manner of appointing new judges of the Tribunal. Even more so if we analyze the route of forwarded motions in the dynamic environment of political proposals.

The primary version of the act's project (no. 1590/ /VII) suggested that the procedure of appointing the judges should be initiated 6 months before the end of term of the judge who is terminating his service (therefore in this particular case it meant the date at the beginning of May 2015). Eventually, the candidate was to be presented to the Speaker two months before the end of term, i.e. at the beginning of September 2015.

Such solution would deprive the newly elected parliament of any influence on the appointment of the judges whose terms were beginning during the term of this Sejm. Then, however, this idea was abandoned and for some time the general regulation described in the act on CT from 1997 was applied. Finally, though, in April 2015 the solution that regarded presenting candidates four months before the end of term at the latest was accepted, which during the further work on the act eventually determined the time limit date to three months. As a result the parliament decided that the ul-

⁵ 1st November is the All Saints Day. Due to the character of this Fest and the mass journeys of the Poles to the places of burial it was obvious that planning general election on this day was out of question.

⁶ The second round of the presidential election was held on 24th May 2015, while the office was taken by Andrzej Duda 6th August 2015. It ought to be pointed out here that there are discrepancies when it comes to the interpretation whether the president is entitled to *de facto* shorten the term of the previous Sejm while setting the date of the first assembly of the new one. On the other hand, there are no controversies regarding the situation that the term of the previous Sejm might be prolonged with the time necessary to set the first assembly of the newly elected Sejm.

⁷ The Organisational Rules of the Polish Republic Sejm from 30th July 1992 (M.P. Nr 26 poz. 185). Accordingly to the regulations of art. 30 of the Rules for many years there had been no problems in efficient filling of positions in the CT without any consequences for the effective way functioning of this body.

⁸ Art. 25 par. 2 of the act on the Constitutional Tribunal from 1st August 1997 (Dz. U. Nr. 102 poz. 643) stated: "Hearing a case in full panel requires the participation of at least nine judges of the Tribunal. A trial is presided by the president or vice president of the Tribunal, and in case of they are not able to preside, by the oldest judge of the Tribunal".

timate time limit for the presentation of the first three candidates for the posts of new judges would be on 6th August 2015. It seems that this solution had emerged in relation to the fact that on this very day the newly elected President, A. Duda, was to take his office.

Thus, the accepted provisions had excluded the authorization of the new parliament to appoint the judges of CT whose term was finishing with the beginning of the new parliamentary term. As it had been known since 17th July 2015, the general election would be held on 25th October 2015⁹. Such a date of the election implied, however, that the first assembly of Sejm could take place on the day before the term of CT judges ended, hence hypothetically, the new Sejm could provide the incessant functioning of the CT in its full panel consisting of fifteen judges¹⁰.

Taking the above into consideration, in no way can one acknowledge arguments accompanying the approval of the particular legal construction, even more so since while it was being adopted one could not have excluded the fact that the election would have been held, e.g. on the first possible day, i.e. 11th October. Then it would have guaranteed Sejm with almost a month to deal with the issue of appointing the first three of judges finishing their terms. There would have been no formal problems to fit in the time limits, provided the procedures of the act from 1997 had been in power.

Only in this context it is explicit that the real intentions of the ones who had introduced the changes were entirely different from the ones that were declaring.

The resolution of the Constitutional Tribunal from 3rd December 2015

The above presented arguments were not taken into account by the Constitutional Tribunal which was resolving the issue of the constitutional character of the presented regulations. Basing on false premises, sharing

the untrue motivation of the legislator, the Tribunal had constructed the reasoning which in no way could be accepted on the grounds of the rational rules of law.

In the first part of the reasoning included in point 16 of the justification to the judgement, the CT focused on the question of breaching so called the regulation “autonomy of Sejm” with the subject regulation. This accusation of breaching was forwarded by the claimant claiming that the issue of determining the time limits of performing by the chamber particular activities regarding the appointment of individuals to the state organs is the internal matter of Sejm.

The CT had conducted a fairly broad reasoning regarding this issue, yet in its key fragment it appeared to be highly concise. It stated namely (p.6.12) as follows, “*the question of the time limit of forwarding a motion regarding the submitting of a candidate for the position of the CT judge, apart from undoubtedly technical aspects and internal ones from the perspective of the work organization, also possesses the dimension that exceeds beyond the sphere of exclusively the regulatory matter of Sejm. As mentioned above, efficient and timely filling of the vacant position of a CT judge is the responsibility of the suitable state organs which cannot neglect it. (...) The legislator is obliged [underlined by authors] to regulate the matter of the time limit for the submitting of a candidate for the position of a CT judge in the manner that will guarantee the protection of the constitutional term of a Tribunal judge, the incessant course of assignments fulfilled by the constitutional courts, as well as the efficiency, transparency and diligence of the appointment process as a whole*”.

There is no point in returning for the third time to prove the obvious fact that in the situation at the turn of VII and VIII terms of Sejm there were no objective premises which would make the legislator assume in June 2015 that *the incessant course of assignments fulfilled by the constitutional courts, as well as the efficiency, transparency and diligence of the appointment process as a whole* could be jeopardized in any possible way. On the contrary, the regulations from 1997 in power so far had never led to any threat toward the functioning of the CT. Contrarily, the practice up to then had proved that even much more fragmentized Sejms were capable of achieving compromise regarding the appointment of the judges without much trouble. Additionally, as it has been implied, even hypothetical hazard towards the smoothness in appointment of the new judges due to the uncertain starting moment of the new parliamentary term could in no way influence the infinite capability

⁹ The Decision of the President of the Polish Republic from 17th July 2015

¹⁰ In the justification of the Tribunal’s judgement (p. 2020) there is an uncritical summary of these “intentions of the legislator” – these solutions were “motivated by pragmatism by the expected necessity to guarantee for the Tribunal ability to adjudicate in full panel in the transitory period”. Let us emphasize once again – this statement was untrue since “full panel” meant 9 judges on the grounds of regulations from 1997, which was in no way endangered with the end of the term of three judges on 6th November 2015.

of the CT to adjudicate, as since the beginning of December 2015 its 12-judge panel had been guaranteed. This panel was entirely sufficient to assure *the incessant course of fulfilling assignments* of the CT, including the adjudication of the most significant cases in, so called, *full panel*.

Moreover, the attention should be drawn to the reasoning of the CT in which it was claimed that the constitutional power of Sejm means its *obligation*. The above is of particular significance since this manner of reasoning will also be present in different circumstances regarding judgement.

It is worth remarking, however, that this reasoning stems from unjustified assumption that the *efficiency, transparency and diligence of appointment process as a whole* were conditioned by the introduction of such a mandatory time limit for submission of candidates for the position of the CT judges which would exclude the possibility of conducting this procedure by Sejm of the following term, during which the terms of the five judges were due to end.

What is more, in order to be absolutely positive that the new President would astonish the majority with too prompt date of election, which could actually paralyze the appointment of the judges, the stipulation of art. 19 point 2 was introduced that was directed explicitly at the appointment of the judges in 2015. In this case, the fact of setting the date of submitting candidatures regardless of the time limits concerning the terms of the judges as well as the parliamentary term, proves unambiguously the falseness of this laconic reasoning of the Tribunal. It is fairly possible that this obvious falseness of the presented arguments made the CT judges incapable of doing better than the above presented concise remarks.

However, there is another element that was entirely neglected in the justification, and yet of a fundamental significance. Both this laconic justification and the statements made by professor A. Rzepliński or other judges and the leaders of PO, PSL or Nowoczesna, were persistently focusing on the justification claiming that the regulations adopted in June 2015 did not aim at playing against the future governing majority. They were to serve the permanent regulation of these procedures and guaranteeing the efficiency of CT activities.

Also in this case the arguments are false and it is not difficult to prove that they could have led to the opposite results. It is so since Sejm conducts the appointment of the judges with the absolute majority at the presence

of at least the half of the overall number of the MPs (art. 17 point 2 of the act on CT). Therefore, as this procedure is of democratic character, it is indisputable that the full-filling all the positions in the Tribunal could be guaranteed in the ultimate way by taking advantage of the regulations included in the act on CT. It is not impossible to imagine the situation when Sejm has no majority sufficient for the appointment of a judge.

Nota bene, assuming the above mentioned situation the legislator had determined in art 20 the procedure of the repetition of the voting 14 days later. Hence, it means that while in 2015 the legislator had allowed the possibility of failure in case of a candidate submitted three months before the end of the term of a CT judge and had provided the suitable regulation shortening the time limit to submit the subsequent one, in case of 2015 election no such problems were assumed since the time limit of submitting a candidate was set entirely regardless of objective factors (the term of a judge or parliamentary term). Additionally, it confirms that both in case of the statutory regulation from June 2015 as well as in case of the CT adjudication from December 2015 we have the situation of: the effect oriented legislation and the effect oriented jurisprudence.

The Tribunal was even more laconic in its reasoning regarding the constitutional issue of breaching the competences of the Sejm of VIII term by the Sejm of VII term, which were crucial from the constitutional perspective.

Therefore, first the CT (p. 6. 16) stated that, "*at the moment of its [act's] announcement, it had not been clear yet when the President would set the election, and moreover when he would set the date of the first assembly of the VIII term Sejm*". While consenting with this view, which we have done above, it ought to be emphasized the further suggested manner of reasoning by the CT includes but one possibility. The Tribunal stated that since the last date in which the election could be held was on 1st November 2015 (which for obvious reasons was excluded) the term of VII term Sejm could last till 30th November 2015 due to the fact that in these circumstance 1st December 2015 was the last day for the new Sejm to assemble.

Deciding on the constitutional character of the regulation based on such hypothesis is in itself discreditable for the CT. Firstly, since several other hypotheses regarding the possible course of events that could have happened are equally justified. Like the argument that the election might have been held on 11th October

2015, and the first assembly of VIII term Sejm already on 14th October 2015¹¹. It would have meant the end of the VII term Sejm on 13th October 2015. The sole fact that the CT had neglected this circumstance entirely, but also the fact that between the extreme ones there had been several other possibilities and in no way had it made any attempt to construct the argument for selecting exclusively one option, proves that the accepted solution was of a completely instrumental character.

Secondly, as it has been pointed at already, due to the fact that there were no premises to claim that the efficiency of the Tribunal in the midterm may experience the slightest threat. Hence, in each situation the CT preserved the capability of adjudicating cases, including the ones requiring the full panel. Therefore, there were no objective circumstances that would justify the intrusion of the VII term Sejm into the unquestionable competences of the VIII term Sejm.

By creating certain grounds on the basis of false premises the Tribunal had in consequence made the interpretation (p. 6.17) in which it reasoned that the regulation of the Constitution that mandated the right to appoint a judge belongs to Sejm, *“whose time range of action overlaps the day of the expiry or the end of the term of a Tribunal judge”*. Only when the *“significant factual circumstances come into existence”*, *“the obligation to appoint a judge of the Tribunal is transferred in the natural way to the subsequent Sejm”*.

We must admit that taking into account the depth of political argument as well as the constitutional matters that emerged in the Autumn of 2015, and particularly the temperature of the political debate, the basis of resolving the constitutional complaint in the presented range must seem highly disappointing. In this case the CT had not acted like a constitutional court whose obligation lay in balancing all the potential variants of the situation that might have appeared hypothetically. Only and exclusively basing on such an analysis could the CT make an attempt to establish its standpoint introducing the potential argumentation by the elimination of other possibilities. Such a solution, even though not lacking polemical and controversial elements, would anyway possess the value of thoroughness and perspicacity. The line of reasoning applied by the CT cannot be perceived

as thorough and perspicacious, and at the same time logical, hence it is of little value.

It was, however, basing on these premises that the CT, on the foundation of these two sentences decided that the Sejm of VII term was authorized to appoint three judges (so called November ones), whereas the appointment of two judges (so called December ones) meant breaching the Constitution. Still this reasoning is the basis for a hazardous situation not only in the area of a public debate that is present in Poland. Influential groups of lawyers formulate their opinions on its basis, questioning the rightfulness of adjudicating by the present panel of the CT. Furthermore, international institutions have been involved in the protection of these two sentences from the CT judicature, which formulate far-fetched accusations claiming that these “arguments” decide on the condition of both Polish democracy and Polish state of law.

On no account can we refer this constitutional crisis to the situation which had become the initial point for the establishing of the modern institution of the judicial control of constitutional character. Comparing these two situations, even though seemingly conditioned in an entirely different manner, proves however how serious constitutional crises might account for either building up the grand role of constitutional court (as it was in the case of American Supreme Court) or to ruining its position and dignity (as it has happened in the case of the Polish Constitutional Tribunal)¹².

The *Marbury v. Madison*¹³ from 1803

The Supreme Court of the United States, which initiated its activity in 1790, had not managed to ensure itself the position in the emerging system of American Union that could be serious enough to place it, as the Constitution claimed, as equal with the other two branches of the federal power, namely Congress and President, until John Marshall became its Chief Justice.

This situation had not even been changed by the fact that one of the heroes of the Independence War, a close co-worker of George Washington's, John Jay, was appointed its first Chief Justice. Since Jay was reluctant to take this position and kept distance towards this func-

¹¹ Traditionally National Electoral Commission announces the outcome of general election on a Tuesday after the election Sunday. Therefore, hypothetically the assembly of the new-term Sejm can be held even on Wednesday.

¹² These issues are the subject of broader studies in the work: G. Górski, *Supreme Court of the United States by 1930*, Lublin 2006.

¹³ Cranch (5 U.S.) 137 (1803).

tion while performing it. Neither was he interested in strengthening the position of the Court. He resigned without any regrets to overtake much less prestigious function¹⁴.

Another evidence of the little significance the Supreme Court was perceived with is the fact that after federal offices had been removed to the new capital, the Federal District of Columbia with Washington, it appeared that amongst the erected buildings there was not the one that could be its seat. Thus, the Supreme Court had to be placed for some time, actually illegally, in the rooms of parliamentary commissions provided to it by the Congress.

John Marshall took his office in 1801 in peculiar circumstances and as a man of significance. The United States had been the arena of a huge political conflict for several years, which was to be of fundamental meaning for the future of the state.

The conflict was escalating after President G. Washington, the historic leader of the nation, had left his office in 1797. It was the struggle of two grandest individuals on the American political stage, beside Washington. Yet, most of all two opposing visions of the further evolution of the system that USA was to apply. The visions were represented by two, paradoxically closest co-workers of Washington: Alexander Hamilton and Thomas Jefferson.

Hamilton was in favor of deepening the federation of the American states along with strengthening the competences of federal authorities. His political supporters created the party of federalists.

On the other hand, Jefferson opposed the deepening of the union, and expanding the competences of federal authorities. At the same time, he was the guardian of the sovereignty of the states creating the union. Politicians around him created the anti-federal party of republicans¹⁵.

As a result of disagreement in the federalist camp, it was not the unquestioned leader of the party, Hamilton, who succeeded Washington as the president, but his party colleague John Adams¹⁶. The further conflicts

amongst the federalists that emerged during his term eventually led to the victory of republicans in the elections to both houses of the Congress in 1800, which was a shock for the federalists. Yet, it ought to be pointed out that Jefferson had become the president thanks to... Hamilton. It was the votes of federalists that tipped the balance to his favour. Having the alternative of supporting either his rival Jefferson or another republican, a swindler Burr, Hamilton chose the first option¹⁷.

T. Jefferson was to take the office of the President of the United States, and the predominance of republicans in Congress made his situation convenient. There had emerged the perspective of untroubled fulfillment of the election program, which was actually aiming at the dismantling of the federal institutions that had been constructed with much effort. Hence, there was about to take place the essential return towards the concept that had lain at the foundation of the United States as the loose confederation of independent states.

At the same time, the federalists shaken with the failure were searching for opportunities to survive in politics. It was this search that initiated the concept of taking advantage of the institution of federal judicial branch in order to retain the influence on the public life.

The system functioning so far on the basis of *Judiciary Act* from 1789¹⁸, was clearly faulty and inefficient. There was, then, the objective need of introducing changes which would improve the efficiency of both Supreme Court as well as the district courts of appeal. Henceforth, on 13th February 1801, i.e. the last days of the term-finishing Congress a new *Judiciary Act* was adopted. However, apart from the necessary amendments that diminished the workload of the Supreme Court judges in courts of appeal, there were also included regulations multiplying the posts of judges in the federal judiciary (e.g. 6 new district courts were established).

However, there was little time, since there were only

was appointed the vice President, partially thanks to the votes of federalists.

¹⁷ In the Electoral College that elected the president, Jefferson had 73 supporters while Burr, also a republican, the same number of electors. Burr did not quit the fight for the office, and here the decision was in hands of federalist electors: Adams – 65 and Pinckney – 64 and Jay – 1. The latter ones were the candidates of the Hamilton part of the party, however his attitude also had influence on the behaviour of a large part of Adams supporters. Anyhow, it was Adams and Hamilton who decided whether Jefferson or Burr would become the president.

¹⁸ U.S. Statutes at Large 1 (1789): 73.

¹⁴ Let us remind here that after being elected to the office of the New York state governor Jay resigned from the post of the Supreme Court Chief Justice.

¹⁵ Jefferson's republicans had nothing in common with the Republican Party that was established several decades later and still exists. Jefferson's party was closer to the Democratic Party.

¹⁶ Paweł Zaremba, *The History of the United States*, London 1968, p. 107–108. Paradoxically, due to the contemporary form of the electoral law the greatest rival of Hamilton's, Jefferson

three weeks left, to fill new positions, or as the newspapers connected with Jefferson would have probably referred to as “sinecures”. Adams was to pass his office on 4th March 1801. Yet, the president had managed to deal with this serious matter. The nominations that he had accomplished on 2nd March, were confirmed by Senate according to the requirements of the act. Throughout the following several dozen hours it was necessary to prepare the nomination acts and hand them in to numerous nominees¹⁹. The work was on progress still on the night of 3rd to 4th March. However, despite the involvement of many people, the nomination acts had not been delivered to all the nominees.

Among the ones who did not receive their nominations was one of the most prominent federalists in Maryland, William Marbury, who was nominated for the position of the judge in the Federal District of Columbia.

Jefferson’s republicans were observing this situation with helpless rage. Yet, the moment he took the office, Jefferson ordered his newly nominated Secretary of State, James Madison, not to deliver the remaining nomination acts. This is the decision that resulted in the trial we are interested in.

It is justified at this place to draw attention to the particular role played in this situation by John Marshall, the Secretary of State in the cabinet of the outgoing president. It was him, who conducted the whole undertaking from the technical side, and due to the excess of work was not able to deliver all documents. To highlight the entire situation we need to emphasize that he was appointed for the position of the Supreme Court Chief Justice, which means he was acting in double role. Soon, he was about to become the arbiter in the case in which existence and shape he was deeply involved²⁰.

Taking into account the context outlined above it is one can hardly be surprised that one of the first initiatives taken by the republicans after they had overtaken the power was to change Judiciary Act.

The act was called by them disdainfully “*Midnight Judges Bill*”, which expresses their attitude to the work co-worked on by J. Marshall.

On 29th April 1802 Congress adopted the act over-turned the law from 1801 and re-establishing the state

from 1789²¹. As a result of this regulation all the “*midnight judges*” were dismissed.

It is worth remarking at this place that *Judiciary Act* from 1801 had also become the subject of the court trial adjudicated by the Supreme Court under the leadership of J. Marshall. In his short opinion on *Stuart v. Laird* case he merely stated that Congress was authorized by the Constitution to determine the form of lower tribunals and to transform them from one form into another. The court pointed out that there were no words in the Constitution that would limit or restrain the rights of the legislative branch in this respect.

This judgement was of great significance since it made yet another element in the power test of both sides in the massive political conflict. Marshall, one of the Federalist leaders, had probably considered that at this very moment it would be hard to succeed in the confrontation with the Republicans, treating this case as the source of insult, on the basis of fairly frail arguments of his party colleagues. Therefore, he had actually passed a sentence on his party colleagues in this brief opinion. The Republican achieved what they were aiming at.

The verdict announced a few days after the adjudication in the *Marbury v. Madison* case, was their factual success and a compensation of a kind for the outcome of that case which was anyway controversial for them. Moreover, they cleared of the humiliation, got rid of rivals for convenient and influential sinecures. They also must have greeted with joy the content of the opinion in this case. Having the majority in Congress they could practically have nearly unlimited perspectives of fulfilling their legislative program.

Nearly, since by referring in his opinion to the Constitution, Marshall had in practice determined clear limits of this freedom. He understood well at this point that in the future the interpretation of the Constitution which would put to a halt any attempts to dismantle the union by the Republicans would depend on his decision. This reasoning was distinctly strengthened by

¹⁹ Apart from positions of judges, the federalists filled in this manner also dozens of posts in the state administration.

²⁰ It comes as no surprise, then, that Jefferson made efforts to invalidate Marshall’s nomination.

²¹ The introduction of this amendment had caused a temporary paralysis of the federal judiciary since there were doubts regarding how the panels were to be formed (i.e. how many judges of the Supreme Court were to sit in them) Marshall’s view was determined and along with the majority of the Court panel he did not recognize the necessity to accept amendments introduced by republicans to enable the work of the courts. However, the referred to issues had influence also the work of the Court, which resulted in some delays in hearing cases, e.g. the complaint of Marbury.

the content of the adjudication in Marbury case. The future proved that the briefness of this opinion was far from coincidental.

William Marbury, the great estate owner and banker from Maryland, was a representative of one of the most influential families in the state and one of the leading activists of federalists in this area. He acquired the nomination for the newly-established position of a judge in the capital Federal District of Columbia from the outgoing Adams.

However, he was one of those who had not received nomination from Marshall during the last hours of Federalists in office. When despite his insistence the act of nomination was not handed to him by the new secretary of state J. Madison, feeling wronged Marbury applied for the writ to hand over the act of nomination. Acting on the grounds of section 13 of *Judiciary Act* from 1789 he forwarded his motion directly to the Supreme Court. The regulation he referred to stated that in cases regarding the writ against federal officials, like for instance the secretary of state, the Supreme Court was the appropriate one.

This motion created for J. Marshall a huge problem of political character at the very beginning of his term of office, since he had to adjudicate in the case in which he had great interest for various reasons. It was Marshall who had actually caused his part colleague's problems, but also he was the main co-author of the whole "*midnight judges*" affair. The attention and expectations of party colleagues, who had skeptically accepted his nomination to the Chief Justice of the Supreme Court, were directed at him. On the other hand, there was the huge pressure of the political opponents, with president Jefferson at its head. They were explicitly expressing their intention to make "the order" in the federalists dominated Supreme Court the moment it made an attempt to disturb the realization of their program.

Seemingly, Marshall had but two options. If he had wanted to pacify republicans and wait out the most difficult time, he could have acknowledged that the Supreme Court had no such authority over the Executive branch to order it. In this case he would have had to dismiss Marbury's motion. Such a decision would have caused not only the problems in his party, but would also have been the confirmation of the marginal position of the Court in the system of constitutional authorities. Additionally, it would have opened for Jefferson all the opportunities to realize the anti-federalists program undisturbed.

On the other hand, by complying with the demand, he would have risked the fierce confrontation with the Republicans, in return for the loyalty towards the party. Yet, in this case as well the benefits might have been illusory since the Supreme Court did not possess any means to enforce the writ. Henceforth, in this case alike there was no guarantee that the case would conclude as he wished, and there was the risk of a similar outcome, namely the loss of the remaining prestige by the Supreme Court.

Marshall had circumvented this unfortunate dilemma in an extraordinary manner. He considered that the regulation that Marbury's motion was based on was unconstitutional. In his opinion, he pointed out that the Constitution clearly determined the range of competences that the Supreme Court possessed. According to him, *Judiciary Act* had stepped beyond the constitutional regulation in the subjective regulation. The Constitution did not allow the extension of competence of the main authorities by the means of an act. Thus, this act in no way could provide the Court with the right to express the order to the executive branch. By recognizing that there was no legal basis, he could in consequence dismiss the Marbury's motion, in this way omitting the unsolvable dilemma.

This opinion, however, did not mean the capitulation of the Court, as it might have seemed. On the contrary, it strongly emphasized that the Executive could not be above law, and in fact had clearly outlined the range of the law making activity of the Congress. The Republican dominated Congress had received a mighty signal that the Supreme Court was entitled to protect the conformity of acts, or more precisely as Marshall stated "ordinary acts", with the constitution, in the same procedure as in the situation of the subjective case.

Republicans only seemingly could be satisfied with the outcome of the confrontation. The Marbury's motion fell through and the federalists had to swallow an insult. Since it was the man from their (i.e. federalists) political camp that dealt them this painful stroke. However, in fact Marshall was presenting his power sending the signal that he would simply verify the legislative activity of federalists who had dominated both chambers.

They could in no way counteract the fact that it was the Supreme Court and most of all Marshall personally would from then on act as the guardians of the constitution, and actually of the union itself. They would have had to attack him for the decision that was considered by less perspicacious observers to be a success. Hence-

forth, it was a truly Pyrrhic victory proving the real genius of Marshall's.

Indeed, Marshall had ended the situation as a victor and new arbiter in issues regarding the application of the Constitution. His judgement was the political act of grandmaster in the breakthrough moment, and at the same time a truly Judgment of Solomon in an extremely complex situation. Therefore, it was commonly considered that *Marbury v. Madison* case had become a milestone in the history of American constitutionalism, as well as establishment of the balance between three branches of the United States Government – Congress, President and the Supreme Court²².

So what conclusions stem from this case for the political confrontation of the Polish Constitutional Tribunal with the Legislative and Executive of AD 2015? President Rzepliński and the majority in the CT could take advantage of the argument in order to set the system position of this organ ultimately. From the rational perspective, the case of breaching not only the Constitution but also the rules of the democratic state of law b usurpation of the VII term Sejm was so obvious that the confirmation of this was actually a necessary act. President Rzepliński and his supporters in the Tribunal would have acknowledged that their political camp would soon lose the full control over the organ had they invalidated the explicitly contrary to the Constitution appointment of the all October five judges. Yet, at the same time they would have established the unquestioned authority of the Tribunal for decades proving that it was able to achieve the level in reliable assessment of the Constitution violation despite its political liking. Selecting the other way, however, it provoked the conflict which in consequence resulted in ruining the dignity of this body.

Amending of the Constitution of Poland by the judicial decisions of the Constitutional Tribunal

One of the elements of this particularly controversial judicial decision of the Tribunal ought to be paid attention to. In p. 4. 3 and p. 8. 5 of the justification the Tribunal had made the first step in a kind of revision of the

manner that the Polish President's prerogatives are to be interpreted. It corresponds with the straightforward usurpation of the right by the Tribunal, which is neither expressed in the Constitution nor consistent with the most elementary principles of the system.

In p. 1. 1 of the justification the Tribunal introduced the following statement while pondering over its independence, "*The Constitutional Tribunal does not only guarantee the supremacy of the Constitution but also guards the tri-division of the authorities*". This statement was necessary for the Tribunal to accomplish extreme relativity of the nature of the Polish President's prerogative in the above mentioned points. Additionally, the Tribunal in its further pondering and on the grounds of the following decisions, took advantage of this basis to accomplish far-fetching relativization of the rights of emanation of the constitutional sovereign, i.e. the parliament, to constitute law.

The Tribunal usurps for itself the right to be "*the guarantor of the Constitution supremacy*" basing on the competence that is expressed in the regulation of art. 188 p.1 of this Constitution to adjudicate in cases, "*of compliance of acts (...) with the Constitution*". There is no doubt that such an usurpation was made in the context of the entire revealing the weaknesses of the contents of art. 126 point 1 and 2 of the Constitution. The first of them states that the President of the Polish Republic is, "*the supreme (...) guarantor of the continuity of state authority*". Whereas, the latter one states explicitly that it is the President of the Polish Republic, "*who watches the obedience towards the Constitution*".

In previous years, on the basis of the significant content of stipulation from point 2 of the regulation, the Tribunal had applied the standpoint that the regulation does not determine President's competences but rather his obligations. A particular attention ought to be paid the views expressed by R. Mojak, who has made several attempts to specify the essence of these obligations of the President. He pointed at the President as a specific political arbiter, whose role should be accomplished in the situation of endangered fundamental constitutional values, disruption of the state functioning as well as the mechanisms of public authorities²³. In another place the author acknowledged that in the situation of particular jeopardy towards the state the regulations of art. 126

²² More on the case *Marbury v. Madison* in: G. Górski, *The case Marbury v. Madison from 1803 and the Shaping of the Constitutional Judicature Rules*, Czasopismo Prawno-Historyczne, Poznań 2000, Vol.LI

²³ R. Mojak, *Model of Presidency in the Constitution of Polish Republic from 2nd April 1997* [in:] *System of Government in the Republic of Poland. The Constitutional Premises and the System Practice*, ed. M. Grzybowski, Warszawa 2006, p. 37.

could become the source of competence for the “*organ of reserve authority*”²⁴ of a sort.

On the other hand, P. Winczorek remarked that the activity of the Polish Republic President may involve actions that are difficult to be determined in legal categories, yet of significance in a particular situation²⁵. Whereas, P. Sarnecki emphasized that, “*watching the obedience towards of the Constitution*” means the care for the state, “*in which [regulations of the Constitution] were not violated by anybody [which means any other organ of the state]*”. In his opinion it proves that the functioning of the President is about representing not any Polish statehood, but the particular one, constructed by the Constitution of 2nd April 1997²⁶.

There is no doubt, that by comparing the content of art. 126 and 188 p. 1 of the Constitution the constitutional legislator granted the supreme role in guarding the obedience towards the Constitution to the President of Poland. It is not surprising, since such a system decision stemmed from the fact that it is the President who receives the strongest mandate from the national sovereign. The institution of President is created in the direct elections and he is appointed to perform the most significant obligations in the state by the disposer of the “supreme authority”, i.e. the sovereign Nation (art. 4 point 1).

Taking this into account, the Constitutional Tribunal as created by only one of the parliamentary chambers, in which the appointment of a judge is the emanation of a parliamentary majority that varies in time²⁷, can in no way equal the power of the President’s democratic mandate. It is exactly for these reasons that the constitutional legislator adopted such an authorization and mandated the President with such a responsible obligation. At the same time this construction entirely ignores the dependence the President on any relation with the Constitutional Tribunal while performing this “obligation”. It results from the fact that within this sys-

tem construction the competence of the Tribunal has been determined very precisely, and at the same time, narrowly. It is limited exclusively to the examination of compliance of acts with the Constitution.

From this description of the Tribunal’s competence one may not conclude its right to be “the guarantor of the Constitution supremacy”. Therefore, it must be acknowledged that this *passus* is clearly in opposition to the literal content of the Constitution. Henceforth, since all the commentators agree that the much more precisely expressed competence from art. 126 par. 2 constructs the “obligation” of the President, the Tribunal has no right to conclude its role as “the guarantor of the Constitution supremacy” from art. 188 p. 1.

While this usurpation provides the grounds for some reasoning, the statement that the Tribunal “also guards the tri-division of authorities” extends beyond any constitutional foundations. Even the most “creative” attempts of interpreting the content of art. 10 of the Constitution do not provide any opportunity for the rational justification of this usurpation.

However, the usurpation was necessary on the grounds of subjective decision in order to reinterpret entirely the nature of personal competences of the President, i.e. so called prerogatives. In opposition to the strong perception regarding the essence of this institution, present not only in Polish doctrine, the CT formulates the opinion according to which, “*granting the president’s prerogatives the character of acts that entitle the head of the state to undertake certain decisions in an entirely autonomous manner, depending solely on the President’s discretion, stays-seemingly-in opposition with the fundamental premises of the state system which bases on the division and balance of authorities*” (p. 4. 3. 166).

The above led to the statement according to which, “*accepting the oath of the Tribunal judges*²⁸ cannot be perceived as depending on the head’s of the state discretion. The President is obliged to accept the oath from the judges appointed by Sejm” (p. 8. 5. 283). And further on, insisting on these arguments the Tribunal untruly stated that, “*refraining from the acceptance of the oath from a Tribunal judge might in some cases result in making it impossible for the Tribunal to adjudicate in the full panel*” (p. 8. 5. 1. 285).

²⁴ R. Mojak, *Parliament and Government in the System of the Third Republic of Poland*, Lublin 2007, p. 119.

²⁵ P. Winczorek, *Comments to the Constitution of Polish Republic from 2nd April 1997*, Warszawa 2000, p. 169.

²⁶ P. Sarnecki, *Comments to selected regulations of the Constitution of Polish Republic [in:] The President of Polish Republic. The Comment*, Kraków 2000. Art. 126

²⁷ One ought to keep in mind that regardless from the fact in which tour the President is elected he must acquire the absolute majority of votes of the Nation, whereas the parliamentary majority for the appointment of judges may be constructed *ad hoc*, basing on political parties that have much less support.

²⁸ This statement was untrue since the President accepts the oath of “an individual appointed for the position of a judge”, and not from the Constitutional Tribunal judges.

The argument on the alleged threat towards the Tribunal's capability of recognizing cases in full panel due to the refusal to accept the oath from an individual appointed by Sejm, referred to yet once again, does not stand to the criticism. As proved above, such a situation did not take place even in the difficult time of the turn of VII and VIII terms of Sejm. One may assume that there is no need to fear a similar situation in the future.

Eventually, one more argument of significance ought to be referred to²⁹. According to the new Constitution adopted in 1997 the number of the Constitutional Tribunal members increased from 12 to 15. Due to this there appeared the necessity to fill three new positions in the Tribunal. The political calendar of that time set the general election for 21st September 1997, whereas the Constitution was to come into force on 20th October 1997. It was likely, then, that the new Sejm would not manage to appoint three judges before the new Constitution came into force. Therefore, it was justified for the old Sejm to appoint the judges. However, the Sejm ending its term, even though its composition differed in a radical way from the one of the new one, refrained from making appointments granting this right to the new chamber. The appointment was held on 6th November 1997, and in this way the Tribunal acquired the panel consisting of fifteen judges as determined in the Constitution.

Undoubtedly, this situation had created extremely mighty constitutional precedent, which play a key part in the constitutional practice. Unfortunately, in the reality of Autumn 2015 the parliamentary majority had entirely neglected this precedent. Even worse, in the discussed judgement the Tribunal did not refer at all to this fundamental issue.

Concluding, it ought to be acknowledged that the December 2015 judicial decision of the Tribunal aimed at establishing, on the one hand, legal premises to continue the conflict around filling the vacant positions in November and December 2015. On the other hand, being aware that the constitutional conflict would not end after accepting the content of this decision, the Tribunal established for itself the basis for unjustified exceed beyond its competences, assigned to it by the Constitution. Soon the Tribunal was to take advantage of it ruthlessly in order to escalate the tension and constitutional crisis.

Unfortunately, such an attitude resulted in ruining the authority and dignity of this organ, which was proved by the radical decrease of the social trust towards it. Political involvement of the majority of Tribunal judges during the subsequent confrontations lasting since 2016 lowered this social trust to the limits that could threaten the authority of the Polish state. Sadly it must be admitted that neither professor A. Rzepliński, nor the majority of Tribunal judges supporting him at that time had done anything to simulate the minimum of political distance towards all the confronting political powers. Led by professor A. Rzepliński, the Tribunal had not only become a distinct side of the confrontation but also even overtook the role of the most important centre of political opposition towards the parliament and president elected in 2015 by the national sovereign. Thus, the deterioration of the authority of this body could have been the only, obvious and inevitable consequence of such an attitude.

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²⁹ B. Banaszak drew our attention to it in the above mentioned *Gloss* to the judgement of the Constitutional Tribunal.