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On Persons "Not Authorized to Adjudicate" as Referred to in the 2024 Acts Concerning the Constitutional Tribunal

[O osobach „nieuprawnionych do orzekania", o których mowa w ustawach dotyczących Trybunału Konstytucyjnego z 2024 roku]

Abstract

On September 13, 2024, the *Sejm* of the Republic of Poland adopted two new acts regulating the status of the Polish constitutional court – the Constitutional Tribunal Act and the Act on Provisions Implementing the said Act. Neither of these acts entered into force because the President of the Republic of Poland, before signing them, referred the acts to the Constitutional Tribunal under the so-called preventive control procedure. One of the declared goals of the laws in question is to fix up the constitutional court, in particular to solve the problem of the so-called "persons not authorized to adjudicate" – people elected in December 2015 (including people who replaced them later) to fill the previously already filled positions. The Author analyzes the situation that led to the recognition of some Constitutional Tribunal judges as defectively appointed and comes to the conclusion that there do not exist grounds for qualifying them as such. However, the sharp political dispute that accompanies the current situation can only be resolved if a broad political consensus is reached, which requires making an amendment to the Constitution.

Keywords: Constitutional Tribunal, judges of the Constitutional Tribunal, persons not authorised to adjudicate.

I

On September 13, 2024 *Sejm* (the first chamber of the Parliament) of the Republic of Poland adopted two new acts providing for the status of the Polish constitutional court – the Constitutional Tribunal Act and the Act on Provi-

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sions Implementing the aforementioned one.[1] Neither of the acts entered into force since the President of the Republic of Poland, instead of signing them, referred the acts to the Constitutional Tribunal (TK), alleging inconsistency of a number of provisions contained therein with the Constitution. Substantive proceedings are currently underway to assess the allegations made by the President against both acts.[2] The purpose of this study is not to evaluate the motion made by the head of state, nor to provide a comprehensive analysis of the new schemes regarding the Constitutional Tribunal, adopted by the Parliament. The Author intends to focus only on one problem, important for the operation of the Tribunal, the proposed solution of which problem has been dealt with by the acts questioned by the President. It must be noted that the declared goal set by the political authorities for the new laws is to fix the constitutional court, being accused by some legal circles and certain political forces, of permanent dysfunctionality resulting from the fact that the Tribunal includes people not authorized to adjudicate. Consequently, judgments issued by this court with the participation of such persons are affected by a legal defect. This is tantamount to actual non-recognition of the Constitutional Tribunal by the political authorities, and results, *inter alia*, in the government not publishing tribunal judgments despite the legal obligation to do so, in the resignation from electing new judges to replace those whose terms have expired, and – recently – in cutting down financial resources earmarked for the judges' remuneration.

One of the corrective measures is therefore aimed at solving the problem of "persons not authorized to adjudicate", as sitting on the Constitutional Tribunal. Such purpose is believed to be achieved by the special regulations that directly apply to such persons. These are Articles 10 and 15 of the Act on Provisions Implementing the Constitutional Tribunal Act, which state that:

- judgments of the Constitutional Tribunal adopted by an adjudicating panel in which a person not authorized to adjudicate was sitting are invalid and do not have legal effects, including those specified in Art. 190 sections 1 and 3 of the Constitution.[3] Procedural activities performed under proceedings before the Tribunal, which were completed by such judgments, require repetition. However, court judgments and final administrative decisions, valid on the date of provisions implementing the Constitutional Tribunal Act entering into force, and issued in individual cases under the legal status formed by the judgments of the Tribunal that were declared invalid, remain in force. Within 1 month, the Court shall draw up and make public a list of invalid judgments

[1] Further on quoted as the „Provisions Implementing the Constitutional Tribunal Act".
[2] File reference number: Kp 3/24.
[3] The rules provide that judgments of the Constitutional Tribunal are ones of universally binding force, are final, and enter into force on the date of their announcement.

(Art. 10). Nevertheless, in some cases, judgments issued by unauthorized persons actually remain in force. These are situations when proceedings before the Tribunal were discontinued for formal reasons and where a decision was taken under the so-called preliminary review of constitutional applications and complaints. If the decision to discontinue or refuse to accept the case concerned a constitutional complaint, the complainant may re-submit the constitutional complaint within 3 months from the date of entry into force of the provisions implementing the Constitutional Tribunal Act;[4]

- persons that are not authorized to adjudicate will not be able to exercise the right to leave the service early (i.e. to retire as judges). Provisions implementing the Constitutional Tribunal Act state, in their Art. 15, that a judge of the Tribunal whose term of office began before the date of their entry into force may, within one month, submit to the President of the Tribunal a declaration that due to the introduction of new rules for the performance of the duties of a judge of the Tribunal during his/her term of office, he or she is retiring. However, this provision does not apply to persons who are not authorized to adjudicate.

As can be seen, the problem of the status of persons considered unauthorised to adjudicate is becoming one of the main problems related to the functioning of the Constitutional Tribunal in its current shape, therefore further attention will be devoted to the issue of whom the legislator considers a "person not authorised to adjudicate" in the Constitutional Tribunal and where the idea of distinguishing such a conceptual category comes from.

II

The starting point must therefore be to clarify the concept of the "person not authorized to adjudicate." Pursuant to Art. 10 sec. 1 of the provisions implementing the Act on the Constitutional Tribunal, such a person is a person appointed to the position of a judge of the Tribunal in violation of the provisions of the Act of 25 June 2015 on the Constitutional Tribunal[5] and judgments of the Tribunal of December 3, 2015[6] and of December 9, 2015[7], and also a person elected to replace him or her. To understand the origins of this regulation,

[4] The proposals are discussed in detail by P. Uziębło, *Co dalej z Trybunałem Konstytucyjnym? Refleksje na gruncie projektu ustawy wprowadzającej ustawę o Trybunale Konstytucyjnym* [w:] *Ad quem*. Księga jubileuszowa z okazji 70. urodzin Profesora Jerzego Zajadło [What's Next for the Tribunal? Reflections on the draft act implementing the Constitutional Tribunal Act (in:) *Ad Quem*: A Jubilee Book to Commemorate the 70th Birthday of Professor Jerzy Zajadło], collective work, K. Zeidler, S. Sykuna i J. Kamień (eds), Gdańsk–Warszawa 2024, pp. 781ff.

[5] Journal of Laws of 2016, item 293 and of 2018, item 1077.

[6] K 34/15 with a gloss by M. Wiącek, „Przegląd Sejmowy" ['Parliamentary Review'] 2016, 2, pp. 124ff.

[7] K 35/15.

we must go back to the year 2015, i.e. the beginning of what is now referred to as the "Polish Constitutional Tribunal crisis."[8]

On June 25, 2015, the *Sejm* of the 7th term adopted a new Act on the Constitutional Tribunal. The draft of this act, developed by several former judges of the Constitutional Tribunal[9], was submitted to the *Sejm* in mid-2013, almost two years before its adoption.

Originally, the work was carried out very slowly, but it accelerated rapidly after the loss of the presidential elections in May 2015 by the then President of Poland being part of the political camp ruling the country at that time. It can therefore be said that the actual legislative process before both houses of the parliament was carried out at an express pace and was completed within a month. In its original version, the draft act on the Constitutional Tribunal took into account the demands of the legal community for the establishment of a new procedure of appointing judges of the constitutional court. The idea was to change the current system to allow nomination of candidates for judges by various legal bodies, e.g. university law faculties or a bar association, and not only – as before – by the Presidium of the *Sejm* or a group of 50 deputies to it; consequently, the procedure based entirely on the political mechanism was to be broadened to include elements of civic (social) participation. Instead, at the stage of the hastened legislative work, this idea was dropped, and a return to the previous scheme was undertaken, that of a purely political procedure for selecting judges.

At the same time, the then president-elect's appeal not to introduce any fundamental changes of a political nature before the parliamentary elections scheduled for October 2015, so as not to generate problems later on, was ignored. And since the amendment to the Act on the Constitutional Tribunal was undoubtedly an important political change, pushing the bill through in an accelerated way just before power being handed over violated a certain democratic standard. The situation could be compared to one when a manager leaving his position with a company grants himself some additional benefits. What was, however, of key importance for the ensuing political crisis was the setting, under a transitional rule (Article 137), a deadline of 30 days from the date of entry into force of the Act for submitting candidates to the positions of

[8] The issue has been discussed more broadly by, among others, A. Bień-Kacała, *Konstytucjonalizm nieliberalny w Polsce po 2015 roku* [w:] Sądownictwo konstytucyjne: teoria i praktyka [Non-Liberal Constitutionalism in Poland after 2015 (in:) Constitutional Judiciary: Theory and practice], vol. 3, collective work], M. Granat (ed.), Warszawa 2020, pp. 43ff, L Garlicki, *Die Ausschaltung des Verfassungsgerichtshofes in Polen*? [*Disabling the Constitutional Court in Poland*?] (in:) Transformation of Law Systems in Central, Eastern and Southeastern Europe in 1989–2015, ed. A. Szmyt, B. Banaszak, Gdańsk 2016, pp. 63ff, M. Muszyński, *Anatomia „spisku". Analiza prawna procesu wyboru sędziów Trybunału Konstytucyjnego jesienią 2015 roku* [The Anatomy of 'Conspiracy': A legal analysis of the process of election of Constitutional Tribunal judges in autumn 2015], „Przegląd Sejmowy" ['Parliamentary Review'] 2017, 2, pp. 75ff.

[9] M. Jackowski, *Shall Constitutional Crisis in Poland Influence Changes of the Judicial Review Paradigm*? [in:] Constitutional Justice and Politics, R. Arnold, A. Bröstl, G. Dobrovičová (eds), Košice 2020, p. 162.

those Constitutional Tribunal judges whose terms ended in 2015. The idea was thus to create a legal possibility for the *Sejm* ending its term to elect new judges.

The new Act on the Constitutional Tribunal was signed by the outgoing President despite appeals addressed to him not to do so but to verify whether the Act was consistent with the Constitution by submitting it to the Constitutional Tribunal (these concerns were – as it later turned out – justified, because in December 2015 the Constitutional Tribunal ruled that the law was, in fact, partially inconsistent with the Constitution). Needless to say, refusing to sign the Act would delay its entry into force, hence the President did not take advantage of these opportunities and signed the piece of legislation. It entered into force on August 30, 2015.

After the new Constitutional Tribunal Act entered into force on October 6, 2015, five new judges were elected to fill the seats made vacant on November 6, December 3 and 9 of that year. The new judges were nominated by the outgoing parliamentary majority, which lost the elections at the end of October. This meant violation of the Rules of Procedure of the *Sejm*, which – in accordance with the Constitution – determine the procedure for the work of the *Sejm*.[10] The Regulations state that candidates must be nominated 30 days before a judge's position becomes vacant. In the meantime, the provisions of the new Act, including its Art. 137, were appealed against to the Constitutional Tribunal, which passed the ruling on December 3, 2015 (case K34/15).

In accordance with the Constitution, new judges of the Tribunal are supposed to take an oath before the President of the Republic of Poland, which, however, was not taken.[11] After the convention of the *Sejm* of the 8th term, the new government coalition formed as a result of the October elections, "annulled" the election of five judges of October 6 by the resolution of November 25, 2015 , and appointed its candidates on December 2 of that year. On December 3, even before the start of the hearing scheduled for that day before the Constitutional Tribunal in case K 34/15, four of them were sworn in.

The political context of the situation was quite obvious – the outgoing government wanted to maintain a majority in the Tribunal for as long as possible[12], which the new authorities prevented. This is how the Constitutional Tribunal crisis began, lasting to this day and involving legal doubts as to the status of

[10] M. Muszyński, *Anatomia*..., p. 81.

[11] R. Balicki, *Odpowiedzialność konstytucyjna Prezydenta RP w związku z brakiem przyjęcia ślubowania od wybranych sędziów Trybunału Konstytucyjnego* [w:] Konstytucjonalizm polski: refleksje z okazji jubileuszu 70-lecia urodzin i 45-lecia pracy naukowej profesora Andrzeja Szmyta [Constitutional Liability of the President of the Republic of Poland in Connection with the Failure to Accept Oath of Selected Judges of the Constitutional Tribunal (in:) Polish Constitutionalism: Reflections on the occasion of the 70th anniversary of Professor Andrzej Szmyt birth and 45th anniversary of academic work], collective work, A. Gajda, K. Grajewski, A. Rytel-Warzocha, P. Uziębło and M. Wiszowaty (eds), Gdańsk 2020, pp. 945ff.

[12] The actions that were taken to that end, i.e. the accelerated legislative procedure and the election of judges in advance, are sometimes referred to as the "original sin" that triggered the constitutional crisis (L. Garlicki, *Die Ausschaltung*..., p. 65).

some judges. Since the Constitution provides for a fifteen-member composition of the Tribunal, according to some lawyers, after the election of judges on October 6, 2015, that very situation was achieved, and therefore persons elected on December 2 of that year by the *Sejm* of the 8th term became surplus judges, elected illegally. After the judgment of the Constitutional Tribunal of December 3, 2015 (K 34/15), a view became widespread that the *Sejm* of the 7th term had excessively elected only two judges who were to take up their positions in December 2015, and that the Tribunal was composed of three people who were not authorized to adjudicate since they occupied previously properly filled seats (they are contemptuously dubbed "judges-doubles" by some). In the years that followed, two of the judges died, yet the new judges elected to replace them are also considered to be ones "unauthorized to adjudicate." In such a way, three judges were recognized as such persons, and from December 3, 2024 – after the expiry of the term of office of one of them – two judges.

III

However, the concept of "persons not authorized to adjudicate", as adopted under the provisions implementing the Constitutional Tribunal Act is not undisputed. Considering the context of the discussed problem, the axis of the dispute runs primarily along the lines of political divisions. From the point of view of these considerations, however, the legal context is of key importance, and this seems to indicate the need to consider two issues of capital importance for the discussed problem.

IV

The first is related to the legal basis for recognizing some judges of the Constitutional Tribunal as persons not authorized to adjudicate. The above-mentioned judgment of the Constitutional Tribunal of December 3, 2015 (K 34/15) cannot be viewed as such authorisation The Tribunal then ruled, among other things, which way of understanding the provisions on the appointment of judges at the turn of the parliamentary term was consistent with the Constitution, and in particular, the *Sejm* of which term was entitled under the Constitution to elect new judges of the Constitutional Tribunal. It follows from this judgment that new judges of the Tribunal may be elected by the *Sejm* of the term during which the vacancy has occurred (or the *Sejm* of the next term, never the preceding one). Although the judgment concerns specific transi-

tional provisions, and therefore specific facts of the case, the constitutional principle derived by the Tribunal is actually one of a general value. In the specific situation of autumn 2015, the terms of office of three judges expired on November 6 of that year, and the new term of office of the *Sejm* began on November 12, as for that very day the first meeting of the parliament elected on October 25 was convened. And thus, according to the judgment K 34/15, three judges could be elected to the seats vacated in November by the *Sejm* of the 7th term, which is from where the concept of the "three doubles" derives its "legitimacy".

The problem, however, is that the judgment in question could not refer to the analyzed situation, and even less could it state who was and who was not a judge of the Constitutional Tribunal. Apart from the fact that the Tribunal made the competence of the *Sejm* to elect judges of the Constitutional Tribunal dependent on an event that is moveable, because it is connected with the President's decision (the term of office of the new *Sejm* could begin between October 26 and November 26, 2015), it should be noted that that the Constitutional Tribunal's judgments: firstly, have the *ex nunc* force, i.e. are valid for the future (we know now how to proceed in similar situations henceforward), secondly – they do not concern individual cases, so they do not verify activities of individual and specific nature (this was confirmed by the Tribunal itself in its decision of January 7, 2016).[13] The above said leads us to the conclusion that either all persons elected to the Constitutional Tribunal by the outgoing *Sejm* were appointed correctly (which means that there were five unauthorized persons in the Constitutional Tribunal),[14] or all these people were elected illegally (as it was interpreted at that time), so there have never been (nor currently are) members of the Constitutional Tribunal unauthorized to adjudicate. Of course, the very act of appointing persons to the Constitutional Tribunal by the *Sejm* of the 7 term in October 2015 cannot be questioned, but a problem may arise regarding the effectiveness of that election. After the judgment K 34/15, we are aware that a resolution on the election of a judge to the Constitutional Tribunal may be invalid, as it was assumed that the election by the *Sejm* of a specific term of persons to the Constitutional Tribunal to fill seats vacated in the next term of Parliament may be invalidated. However, before December 3, 2015, the situation was different, the new parliamentary majority found that the election of all judges made on October 6, 2015 was invalid because it simply interpreted the provisions differently than the Constitutional Tribunal did in the judgment K 34/15. Thus the problem can be essentially reduced to the issue of the validity of the resolutions of the *Sejm* of October 6, 2015, in which the *Sejm* of the outgoing term elected judges to the positions vacant on November 6, December 3 and December 9, 2015.

[13] U 8/15.

[14] Such a position is represented by, *inter alia*, P. Uziębło, *Co dalej*..., p. 782.

The key question is how many of these resolutions were valid. In fact, three different interpretations conflicting with one another may be proposed: a) all the resolutions were valid, which means that as of December 2015 there were as many as five people in the Tribunal who were not authorized to adjudicate, b) the resolutions regarding the filling of positions vacated in November 2015 were valid, which means that since December 2015, three people not authorized to adjudicate sat on the Tribunal, c) all those resolutions were invalid, meaning that since December 2015, there have been no persons in the Tribunal that would be not authorized to adjudicate, so all judges of the Constitutional Tribunal are appointed in accordance with the law.

As observed above, the view assuming the existence of three unauthorized persons has become widespread, which was also confirmed in the case law of the European Court of Human Rights. The basis for such a view is, of course, the already cited judgment of the Constitutional Tribunal of December 3, 2015 (ref. number K 34/15). However, for reasons quoted above, this judgment does not apply to the case in question, and law does not provide for any procedure to verify actions taken by the *Sejm* in respect of the election of judges. In such a situation, nothing else but reference to the practice followed at that time should be done, including the stance taken by various entities involved in the electoral procedure (the *Sejm* and the President of the Republic of Poland). Since on December 2, 2015, the *Sejm* elected new judges who were then sworn in by the President of the Republic of Poland, took up judicial duties and were included in the Constitutional Tribunal, it should be considered, despite some doubts, that they have obtained the status of full-fledged judges of the Constitutional Tribunal. And *vice versa* – if the President had not changed in 2015 or the existing government had prolonged its parliamentary and governmental mandate, all the people elected on October 6, 2015 – even though some of them "as spare ones" – would have taken up their duties in the Constitutional Tribunal, with nobody questioning it.

For these reasons, I believe that there are no persons in the Constitutional Tribunal who are not authorized to adjudicate, so it is unnecessary to regulate their status in the provisions implementing the Constitutional Tribunal Act. This does not mean, however, that the case should be considered definitively closed. On the one hand, a sharp political dispute actually precludes the adoption of a solution that would gain universal approval. On the other hand, the personal context must not be ignored, i.e. the situation of people who were elected to the Tribunal on October 6, 2015, and whose election was subsequently invalidated. In my opinion, solutions should be proposed that will somehow compensate for the harm those people have suffered.[15]

[15] A proposal taking into consideration that aspect of the discussed problem has been presented by me in the paper *Kryzys wokół Trybunału Konstytucyjnego – politycy zepsuli, politycy powinni naprawić* [The Constitutional Court Crisis: Once caused by politicians, it should be also fixed by them], www.rp.pl.

V

The other of the two issues mentioned above raised concerns about the status of persons considered unauthorized to adjudicate in the Constitutional Tribunal. The provisions that implement the Constitutional Tribunal Act do not provide a clear answer in this respect. On the one hand, their judicial status is questioned because these people were appointed to the Tribunal illegally. Therefore, as one might assume, if they are not authorized to adjudicate, they are not judges, either. On the other hand, the legislator expressly excluded their right to leave service under extraordinary procedure pursuant to Art. 15 provisions introducing the Constitutional Tribunal Act. If the right to leave (under the judge retirement scheme) applies only to judges, it means that people who do not have such a status cannot take advantage of the right. Then why were "persons not authorized to adjudicate" expressly deprived of the right to retire as judges, unless only because they are judges after all! It is really difficult to understand that inconsistency of the legislator. In this way, we come to the conclusion that the provisions introducing the Constitutional Tribunal Act created – unknown to the Constitution – a group intermediate between full judges of the Constitutional Tribunal and non-judges (i.e. all other people). That group includes judges who are deprived of the right to perform judicial functions. I guess it has little to do with logic.

VI

The considerations made so far lead to the conclusion that the concept of "persons not authorized to adjudicate" in the Constitutional Tribunal raises a number of doubts, both from the point of view of its legal basis and logic. Therefore, it does not seem that the solutions proposed in that respect by the provisions implementing the Constitutional Tribunal Act could contribute to solving the crisis around the Polish constitutional court. They are likely to find the listening ear only with part of the legal and – even more importantly – political circles. As I attempted to present it above, this crisis was based on political reasons, hence it can only be alleviated by a broad political consensus on the Constitutional Tribunal. And this would require changing the Constitution, which is currently impossible,[16] all the more that the conflict is bound to escalate in the near future. As announced by the Marshal (Speaker) of the *Sejm*, the judicial positions vacant since the end of 2024 will not be filled with new people until the autumn of 2025 when, with the change of the President, the political environment will also change to become – as some believe – one

[16] J. Stelina, *Kryzys...*, *ibid.*

that will favour the current parliamentary majority. and its ideas concerning the Constitutional Tribunal. It should thus be emphasized that any legal solution proposed to put an end to the Constitutional Tribunal crisis must be consistent with the constitutional order. Otherwise, the solutions adopted are bound to be only temporary and will not stand the test of time during subsequent changes within the structure of the political power. And we need solid institutions, including a constitutional court that will guard the values and standards arising from the Constitution. A stable constitutional court is needed, not one changing from election to election, from one reset to another. The Venice Commission goes even further, and in its opinion of December 2024, it strongly opposed the idea of the so-called constitutional reset in the case of Poland's constitutional court. It should be noted, however, that in the case of the so-called persons not authorized to adjudicate, the Commission adopted a position – contrary to what the Author tried to present in this study – that such persons are currently members of the Constitutional Tribunal and that they can be removed from it without changing the Constitution, i.e. by means of ordinary legislative changes.[17]

O osobach „nieuprawnionych do orzekania", o których mowa w ustawach dotyczących Trybunału Konstytucyjnego z 2024 roku

Abstrakt

W dniu 13 września 2024 r. *Sejm* Rzeczypospolitej Polskiej przyjął dwie nowe ustawy regulujące status polskiego sądu konstytucyjnego: ustawę o Trybunale Konstytucyjnym oraz ustawę Przepisy wprowadzające ustawę o Trybunale Konstytucyjnym. Żadna z tych ustaw nie weszła w życie, ponieważ Prezydent RP przed ich podpisaniem skierował je do Trybunału Konstytucyjnego w trybie tzw. kontroli prewencyjnej. Jednym z deklarowanych celów przedmiotowych ustaw jest naprawa Trybunału Konstytucyjnego, w szczególności rozwiązanie problemu tzw. „osób nieuprawnionych do orzekania" – osób wybranych w grudniu 2015 r. (w tym osób, które je później zastąpiły) na obsadzone wcześniej stanowiska. Autor analizuje sytuację, która doprowadziła do uznania niektórych sędziów Trybunału Konstytucyjnego za wadliwie powołanych – i dochodzi do wniosku, że nie ma podstaw do zakwalifikowania ich w ten sposób. Ostry spór polityczny towarzyszący obecnej sytuacji może być jednak rozwiązany jedynie w przypadku osiągnięcia szerokiego konsensusu politycznego, co wymaga dokonania zmiany Konstytucji.

Słowa kluczowe: Trybunał Konstytucyjny, sędziowie Trybunału Konstytucyjnego, osoby nieuprawnione do orzekania.

[17] Opinion on the draft constitutional amendments concerning the Constitutional Tribunal and two draft laws on the Constitutional Tribunal, adopted by the Venice Commission at its 141st Plenary Session (Venice, 6–7 December 2024), thesis 70 (https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD[2024]035-e).

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