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2
Kommentare von PAULINA STARSKI

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Right before Christmas the governing right-wing party Prawo i Sprawiedliwość (PiS – which paradoxically translates “Law and Justice”) wrote another chapter in the tragic Polish saga on the disempowerment of the

Constitutional Tribunal and the devaluation of the holy grail of modern democracies – the principle of separation of powers – by adopting another amendment statute to the rules governing the Tribunal ([Dz.U. 2015 poz. 2217](#)). The current developments are highly dangerous and alarming from the perspective of constitutional law. The Polish constitution faces an existential challenge. But this phase might also mark the beginning of a process of a true constitutional maturation of the Polish state...

What happened?

On 22nd Dec 2015 the Polish parliament (“Sejm”) adopted further legislation amending the Statute on the Constitutional Tribunal (original statute in its version of 1997 can be found [here](#) in English). The bill got the second chamber’s (“Senate’s”) approval the day after and came into

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Befragung statt Urwahl

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force on 28th Dec 2015 after signature by the President *Andrzej Duda* and promulgation in the law gazette. In a nutshell it brings about following major changes:

1. In general, the Tribunal decides in full bench (“General Assembly”) (with some minor exceptions). It is only competent to adjudicate if 13 out of 15 judges - amongst them the President or Vice-President of the Tribunal - are present (until now 9 out of 15 sufficed). Judgments require a majority of two-thirds.
2. The term of an appointed judge expires *inter alia* by decision of the Sejm upon application of the General Assembly.
3. Disciplinary proceedings against a judge can also be initiated by the President or the Minister of Justice.
4. Dates of court hearings are to be set in the order of the submitted applications.
5. The amended procedure applies to all cases in which the President of the Tribunal has not informed the parties that an application has been filed on the day the amendment statute entered into force. The new rules on the composition of the court, however, apply in all cases.
6. And last but not least the statute provides that the amendments enter into force on the day of the publication of the statute and the so-called *vacatio legis* does not apply.

What do these changes mean practically?

The obvious result of these amendments will be a severe paralysis of the Tribunal. It is a well-known fact that constitutional courts suffer under an immense work load. The same applies to the Polish Constitutional Tribunal which faced 530 applications in 2014 ([see statistical report](#)). The only way to uphold constitutional efficiency is to divide labour and to prioritize crucial cases ([see also article by Dieter Grimm](#)). The German Federal Constitutional Court is only able to deal with the mass of submitted cases by working in chambers. In 2014 out of 6208 cases only 21 have been decided by one of the two senates sitting in full bench ([see annual statistic](#)). Furthermore, the Federal Constitutional Court stated that proceedings with specific

constitutional urgency can be given priority in the adjudicative process (see decision of 1st Oct. 2012 – 1 BvR 170/06 – Vz 1/12). Taking a look over the Atlantic one finds that the US Supreme Court is highly selective (due to the so-called *a certiorari* procedure): During the 2014 term only 75 cases out of 7033 filings were argued before it (see [2015 Year-End Report of Federal Judiciary](#)). Such a division of work capacity and prioritization of constitutionally crucial cases is rendered impossible by the adopted amendment now. Until today, however, the efficiency of the Constitutional Tribunal depended on it. In 2014 the Tribunal issued six judgments in full bench, 56 in benches of five, and nine judgments in benches of three judges (see [statistical report](#)). The provisions regarding the termination of office and the initiation of disciplinary proceedings which attribute the Sejm a crucial role question judicial independence. But the most problematic elements of this potential legislative epitaph on the Tribunal are points 3. to 6. – especially in their combination. Since the Tribunal will have to handle cases in chronological order any legislation adopted by the PiS reigned Sejm seems to be factually protected from prompt judicial review: The Tribunal will be occupied by hearings and court sessions regarding earlier registered cases. With regard to the amendment statute of 22nd Dec this means that the Tribunal is *de facto* deprived of the power to adjudicate on its constitutionality in due time. The key question is hence whether the review of the constitutionality of the amendment statute itself has to obey the “new procedures” which seems to be implied by the bill. Should this be the case, we would have the absurd result that the amendment statute became supreme over the constitution.

What do these developments say about the Polish constitutional order?

These current developments are only another act in a sequence of attacks on the Constitutional Tribunal which started with the refusal of President *Andrzej Duda* to take the oath of five judges that had been elected by the old Sejm (excellently discussed by [Anna Śledzińska-Simon](#), [Arkadiusz Radwan Tomasz](#) and [Tadeusz Koncewicz](#)). However, the problem of the Polish constitutional state goes much deeper. It tends to be forgotten that the dispute about the election of judges started with an amendment adopted by the Sejm under the reign of the Civil Platform (PO) which *contra constitutione* – as later also confirmed by

the Constitutional Tribunal (see only judgment [K 34/15 of 3rd Dec 2015](#)) – elected successors of two judges whose term expired after the general elections which was the prerogative of the newly formed Sejm. PO seemed to be keen on securing its influence within the Tribunal even after a change of government. Whilst PiS is beyond any doubt a dangerous nationalist and anti-EU party with totalitarian aspirations it would be ill-guided to locate the roots of the current crisis solely in it. One of the reasons PiS received so much support by the Polish people in 2015 was also their immense dissatisfaction with the arrogant and elitist attitude of PO. Many PiS voters intended to protest against a net of cliques allegedly holding important strings of power within the Polish state. These cliques are also the declared enemy of PiS which regards them as a continuation of the old Polish communist state. PiS' central aim is to abolish the political influence of these networks by – and this is the tragic point – putting their own “elite” into power even using unconstitutional means if necessary. This impression has been recently reinforced by the unprecedented attack on the freedom of the media just before New Year's Eve: The Sejm passed a [statute](#) which allows the government to determine who holds the central positions within public broadcasting corporations. In the political universe of PiS the constitutional state appears as a mere façade, a playing ball to be tossed around. But also the former government under the leadership of PO lacked necessary constitutional sensitivity in their political agenda at times.

Are there any silver linings visible?

The marginalization of the constitution is, however, neither the only nor the predominant narrative to be found in Polish society. The Polish people went to the streets right after the first moves of the new PiS government against the Tribunal. The Polish civil society became active. The Polish legal academia is in outrage. The President of the Polish Supreme Court (“Sąd Najwyższy”) – Prof. Dr. Małgorzata Gersdorf – made an application on 29th of Dec to the Tribunal to find the statute of 22nd Dec unconstitutional. Her application has been published on the website of the Supreme Court ([Wniosek Pierwszego Prezesa Sądu Najwyższego z dnia 29 grudnia 2015 r.](#)). In particular, she argues that the Constitutional Tribunal should rule on the statute adopted on 22nd Dec based on the unamended procedural provisions since their amendment constituted a

clear circumvention of the constitution. Further applications were submitted by members of parliament – both from representatives of PO as well as the party “Nowoczesna” (“Modern Party”) (see [K 48/15](#)). The Constitutional Tribunal decided to rule on these applications jointly under the signature [K 47/15](#) in full bench, however, leaving the five judges whose appointment is in dispute out. A date for the oral proceedings has yet to be set, but it is clear that the Tribunal is willing to fight back. The current constitutional crisis might also be a phase in which the Polish constitutional state matures and constitutional values become truly internalized by the Polish people. In this process of maturation, the Polish civil society sensitively follows the signals coming from outside, especially the EU which might become a crucial actor... To be continued.

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23

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