The Polish constitutional crisis and institutional self-defence

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Symposium contribution by:

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Let me begin by quoting Abraham Lincoln's *Gettysburg Address*, in which he stated that a "**democratic government should be government of the people, by the people and for the people"**. As you know the current government in Poland does not enjoy the support of the political and economic establishment or academic professors but it is supported by the majority of ordinary people. In his book *Is Democracy Possible Here?* R. Dworkin mentions two political camps in the USA: "the red camp" (people associated with rural areas, farmers and people attached to conservative values) and "the blue camp" (referring to residents of large cities, business people). If we substitute the term "the red camp" with the supporters of the "Law and Justice" party whereas the "the blue camp" with the supporters of the "Civic Platform" party, you will get an image of what is happening in Poland. Thus, similarly to the conflict in the USA, the conflict in Poland is a political conflict. Obviously, the political conflict between the government and the opposition impacts the shape of the legal system. It is hard to deny that the political conflict between the government and the opposition in Poland has significant legal consequences. One of them refers to the status of Constitutional Tribunal (further CT) , the second one to the way of interpreting the polish Constitution. Let us take a closer look at the these last issues.

Two different visions of the Constitutional Tribunal

The Polish government and parliament, in which “Law and Justice” has a majority, defend the doctrine of judicial restraint (judicial passivism or conservatism) based on the following principles:

a. The law should be as strict and precise as possible.
b. The Constitutional Tribunal may not create or change the law; it only decides on the constitutionality of statutes and international treaties (the Kelsen’s concept of a constitutional court as a negative legislator).
c. Judges should not engage in political activity.

The opposition, gathered mainly around “Civic Platform”, contrary to what is officially claimed, in fact advocates the model of judicial activism and raises the following arguments:

a. The law must be adapted or adjusted to changing circumstances, in particular to the requirements of the EU and the Council of Europe; the constitution must therefore be interpreted as "a living constitution".
b. For this reason, if necessary, the CT can correct the content of existing rules and even create new ones.
c. In constitutional matters, the CT has the final say and its decisions cannot be challenged.
d. Judges should not engage in political activity.

We need to complete this description with a brief comment. The Polish Constitution is extremely ambiguous and unclear. It is a typical constitution of a welfare state based on the model of the German Constitution of 1949. It gives the Constitutional Tribunal enormous and

uncontrolled power which can easily be abused. I think the ambiguity of our Constitution creates opportunities for its very different interpretations and, as a result, leads to continuous disputes and controversies concerning the competences of the Constitutional Tribunal and its place in the system of separation of powers.

Two different interpretations of the Polish Constitution and the law

The Polish parliament and government do not agree with the opposition as to how the Polish Constitution should be interpreted. Briefly speaking, the opposition defends a liberal way of interpreting the Polish constitution, whereas the current government favours the republican one. As you well know, the government is being constantly accused of violating basic standards of a liberal state. This accusation is simply ludicrous. Unfortunately, many people in my country and abroad believe it, so, in order to avoid any misunderstanding, I propose to distinguish two different meanings of the term 'democratic and liberal state'. The first meaning of this term embraces all states accepting most basic constitutional fundamentals such as separation of powers, basic human rights, the rule of law, and so on (see Art. 2 of the TEU). This definition of 'liberal state' applies to so different states as conservative, social-democratic, republican, and finally strictly liberal states and their different forms. In the second meaning, a term 'liberal state' refers to a strictly (pure or orthodox) liberal state which political system is based on the individualistic concept of rights as a trump cards against community (R. Dworkin) and the concept of economy entirely based on the Weberian criteria of economic rationality such as profit and economic efficiency (cf. "famous" L. Balcerowicz's reforms).

In my opinion, the dispute between the government and the opposition is a dispute between the supporters of the republican model of

the state and the adherents of the pure liberal state. So basically, the claim of the opposition that the government violates the standards of the liberal state means that it simply does not accept the model of pure or orthodox liberalism. Obviously, it does not mean that the government violates the basic constitutional fundamentals such as separation of powers, democracy, human rights, the rule of law, and the like.

Moreover, the government and its supporters argue, and rightly so, that the strictly liberal model is incompatible with the Polish tradition and constitutional identity. It should be strongly emphasized that Polish constitutionalism from the very beginning – starting with the Constitution of the 3rd of May 1791 and ending with the current constitution of 1997 - has not been based on strictly liberal values, but on republican ones. As opposed to the parliament and the vast majority of citizens, the supporters of pure liberalism do not want to accept the republican way of interpreting our Constitution.

In this context, we should discuss the accusations made by the EU, the Council of Europe and members of the Venice Commission that the Polish government violates the European and international standards of democracy, human rights and the rule of law. In my opinion, the Venice Commission and other institutions clearly misinterpret the standards of the rule of law which result from the European Convention on Human Rights and the EU Treaties. In particular, they misinterpret **Art. 4.2 of the TEU** according to which the European Union shall respect the national identity of its member states and their basic political and constitutional structures. The attitude of EU leaders contradicts the fundamental principle of the EU and its motto: "united in diversity".

Obviously, the republican tradition in Poland has nothing to do with nationalist populism and there is no authoritarian leader running the country, as the opposition and EU leaders claim. It is also obvious that the republican tradition is present not only in Poland or Hungary, but also in

many other countries, e.g. in the USA and Great Britain (see, for example, writings by Michael Sandel, Philip Pettit or Quentin Skinner[1]), and it takes different forms in different countries. The European Union should respect it. Let us notice that even great contemporary liberal philosophers like John Rawls or Jürgen Habermas agree that liberal institutions require republican correction[2]. It should be emphasized that the republican tradition does not reject all liberal values. What brings these traditions together is a deep respect for democracy, human rights and freedoms. But apart from this, Polish republicanism strongly emphasises the attachment to values such as: patriotism, solidarity, a strong state as a guardian of human rights, the role of the Catholic Church and religion in public life. In political reality it means that Polish republicans defend traditional family model and strongly oppose abortion and so on whereas liberals simply reject these values. Anyway, it is absurd to claim that republicanism is a totalitarian tradition, hostile to democracy, the rights and freedoms of citizens.

Besides, it should be emphasized that the dispute between the government and the opposition fulfils the criteria of a democratic debate, since all political parties can freely express themselves and present their points of view. All kinds of media are allowed to present this debate and citizens express their convictions in numerous demonstrations and protests. Accusing the government of violating democracy is in my opinion totally absurd

Finally, I want to draw your attention to three important facts that can help you understand better what is happening in my country.

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[1] M. Sandel, *Democracy's Discontent* (Harvard University Press 1996); M. Sandel, 'Die Gerechtigkeit und das Gute' (in:) B. Van den Brink, W. Van Reijen (ed.) *Bürgergesellschaft, Recht und Demokratie*, Suhrkamp Verlag, Frankfurt am Main 1995; Q. Skinner, *The Paradoxes of Political Liberty: The Tanner Lectures on Human Values*, Harvard 1984; Q. Skinner, *Wolność przed liberalizmem*, Toruń 2013; P. Pettit, *Republicanism. A Theory of Freedom and Government*, Oxford 1997.

[2] J. Rawls, *The Law of Peoples*, University of Chicago Law Review 1997; J. Habermas, *Die Einbeziehung des Anderen* Frankfurt am Main 1999.

Three Disputable Facts about the Polish Tribunal and Society

The opposition claims that, according to Article 190 sec. 1 of the Polish Constitution of 1997, judgments of the CT shall be universally binding and final. For this reason, everyone is obliged to respect them. However, our opponents have forgotten that the Polish Constitution abolished the universally binding interpretation of the Constitution and other normative acts, and that the CT is not allowed to include any interpretative guidelines in the operative parts of its judgements. Such guidelines can only be included in statements of reasons, and therefore do not have binding force; they bind only *imperio rationis* and not *ratione imperii*. The Polish Constitution authorizes the Tribunal only to review the compliance of statutes and other normative acts with the Constitution, but not to give interpretative guidelines to courts and other state bodies in operative parts of its decisions (so-called interpretive judgements). By means of interpretative judgements, the Tribunal creates constantly new rules or modifies the content of existing rules. Someone ironically said that there are two Constitutions in Poland – one created by the parliament and the other one created by the Tribunal. In this context, Professor Béla Pokol, a judge of the Constitutional Court of Hungary, rightly pointed out that in many countries a new form of government has been created, which he called a juristocratic system[3] and which I would call **the tribunal system**. This system in many countries, including Poland, replaces the traditional forms of government like the presidential and parliamentary system. In the tribunal system, a few judges, sometimes by a majority of only one vote, can invalidate any statute before it enters into force. Let us recall that J. Gray, O. W. Holmes and others noticed similar developments in the USA about 100 years ago and later (see J.

[3] Béla Pokol, *The Juristocratic Form of Government and its Structural Issues*, Pázmány Law Working Papers 2016/9, Pázmány Péter Catholic University Budapest (available at: http://www.plwp.jak.ppke.hu/).

Frank). The legislative activity of the CT significantly distorts the principle of separation and balance of powers, since in practice it means that the supreme legislative power is exercised not by the parliament and the government but by the constitutional court.

Secondly, I would like to draw attention to one important fact. Who does not take this fact into account cannot understand why the majority of Poles supports government actions and considers them to be morally justified. The reforms implemented by the Polish government are aimed at fighting corruption. To be specific, at corruption which influential politicians, businessmen and academics are engaged in. This is the main reason why the government won the last elections (presidential and parliamentary ones).

Thirdly, we need to stress the unreliability of the EU institutions and the Council of Europe in assessing the situation in Poland. Let us only mention the opinions of the Venice Commission. The opinions of this Commission are blatantly biased. Let us only mention the fact that the former President of the Tribunal, Professor Andrzej Rzepliński, admitted that he was a close friend of many members of the Venice Commission and in particular of its President. How is it possible that the Commission, which consists of more than a hundred experts, delegates to Warsaw just Prof. Rzeplinski's friends? This violates Art. 2 of the Statute of the Venice Commission (the impartiality of the Commission) and international standards for research expertise (conflict of interests – the European Code of Conduct for Research Integrity, 2002). As a result the opinions of the Venice Commission entirely reflect Mr A. Rzepliński's views. In my view, it is a scandal.

Finally, I would like to comment briefly on Professor N. Barber's theory[4]. I have the impression that Professor N. Barber is baffled by the same problem which was mentioned by R. Dworkin – whether in extraordinary situations, state bodies have the right to act independently of legal

[4] N. W. Barber, *Self-Defence for Institutions*, Cambridge Law Journal 558/2013, p. 72.

constraints. Let us give an example. R. Dworkin refers to the Bush administration that claimed to have the right to torture prisoners in order to prevent terrorist attacks or to secretly tap phone calls with no judicial warrant[5]. In Poland the Tribunal has formulated the concept of legislative omission, which allows the Tribunal to omit any provision of the Constitutional Tribunal Act and other statutes that disturb, according to the judges, the functioning of the Tribunal, e.g. to depart from the chronological order of considering cases or to issue rulings by an adjudicating bench sitting in composition contrary to the Constitutional Tribunal Act. However, I think that the analogy between N. Barber's concept of institutional self-defence, R. Dworkin's theory and the situation in Poland is not justified. Let us notice that both Dworkin and Barber ask for moral justification of acts of departing from the law. I agree, of course, that there are situations that justify departing from the law (for example civil disobedience, and even public officials' departures from legal rules[6]) when important moral reasons justify it. I am however deeply convinced that the sword and shield used by the Tribunal under the leadership of President Rzepliński is not a sword and shield defending a just cause. That is why I claim that Professor Rzepliński's actions were not morally justified

The government defends the right of Poles to preserve their national identity and political and economic sovereignty, and it declares a war on widespread corruption. The opposition is willing to sacrifice our national identity and sovereignty for the sake of closer integration with the EU and maintain the status quo in economic affairs but contrary to Dworkin, I do not see any possibility of reaching a consensus. Finally, in my opinion, the main problem in Poland is that the opposition acts as if the Tribunal was the owner of the Constitution and had the exclusive right to decide about its meaning. I strongly reject such a position.

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[5] R. Dworkin, *Is Democracy Possible Here?*, Princeton University Press 2006, p. 157.

[6] See, e.g., M. Kadish and S. Kadish, *Discretion to Disobey. A Study of Lawful Departures from Legal Rules*, Stanford 1973. J. Locke, in his *Two Treatises of Government*, said that the public officials may act for the public good beyond the provisions of the law when it is demanded by the people (Polish edition, Warsaw 1992), p. 278.