Strasbourg, 19 February 2004

CDL-JU(2004)022
Or. Engl.

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

in co-operation with

THE CONSTITUTIONAL COURT OF THE RUSSIAN FEDERATION

and with the assistance of

THE INSTITUTE OF LAW AND PUBLIC POLICY

Conference on the

"ROLE OF THE CONSTITUTIONAL COURT IN THE MAINTENANCE OF THE STABILITY AND DEVELOPMENT OF THE CONSTITUTION"

Moscow, 27-28 February 2004

THE ROLE OF THE CONSTITUTIONAL TRIBUNAL IN CREATING THE PRINCIPLES OF A DEMOCRATIC STATE, RULED BY LAW, IN THE TRANSITION PROCESS

Report by

Mr Marek MAZURKIEWICZ
(Judge, Constitutional Tribunal, Poland)

I. Constitutional judicature in Poland dates back to year 1985. It was instituted on the grounds of the amendment to the binding Constitution of 22 July 1952 (Art. 33a) and on the grounds of the Act on the Constitutional Tribunal of 29 April 1985 (Journal of Laws No 22, item 98). The constitutional amendment already then stipulated, that the "Constitutional Tribunal adjudicates on the conformity to the Constitution of statutes and other normative acts of supreme and central state bodies, and also defines the generally binding interpretation of statutes" (art. 33a, item 1), and also set forth, that "judgements of the Constitutional Tribunal about the non-conformity of statutes to the Constitution, are liable to examination by the Sejm" (art. 33a, item 2).

The appointing of the Constitutional Tribunal – not without resistance of some political decision-makers – occurred, what should be emphasised, within the previously binding authoritative system, however a system already undergoing progressive erosion. The judicial review of administration decisions and staff autonomy were already functioning since the beginning of the 80-ies, and the Office of the Commissioner for Civil Rights Protection was to be appointed soon.

However there are no doubts, as pointed out in literature[1], that the appointing of the Constitutional Tribunal did not change the face of the system, did not yet mean a dramatic transformation of the system of state, did not set up a state of law. The establishing of the Constitutional Tribunal did however, introduce a new quality into the system, by way of nature limited the arbitrariness of authorities – similarly as when administration judicature was being set up. Today, it is indisputable, that with all political, legal and constitutional limitations the establishing of the Constitutional Tribunal allowed for a completely new insight into law and created a chance for the stepwise changing of the face of the system.

The first Act on the Constitutional Tribunal of 29 April 1985 still contained objective limitations of powers in the scope of constitutional control – to normative acts promulgated, adopted or approved the day after the Act coming into effect, i.e. after 1 January 1986. The control of earlier statutes could only concern these, which were introduced into the system after the day of implementing the Act on amending the Constitution of 26 March 1982. The control could only concern these normative acts, which were introduced not later than 5 years from the moment of submitting the application to institute the proceedings, what concerned all legal statutes, and also these introduced after the Act coming into effect. The Act also assumed the obligation of submitting judgements of non-conformity of acts to the Constitution to the Sejm and the possibility of overruling of such judgements by the Sejm by a 2/3 majority of votes, in the presence of at least half of all members of Sejm. These were supposed to be "safety hatches", but this could challenge the sense of existence of the constitutional court.

The above cited author justly emphasises the considerable contribution of the first term of the office of judges of the Constitutional Tribunal, who managed to set this institution into motion, irrespective of the political pressures or legal subordination of the CT. Also the 'inside common sense' of the institution itself was effective here – it simply demanded independence from politics and other authorities, as the function of the judge of the Constitutional Tribunal cannot be performed otherwise than independently – without falling into contradiction with the substance of this function or without questioning the meaning of own actions.

And so it should not be a surprise, that after the first judgement of the Polish Constitutional Tribunal, case U 1/86, passed on 28 May 1986, in which the regulation of the decree appealed by

[1] See M. Safjan, Dlaczego panowie tacy smutni. (Why are the gentlemen so sad), "zeczpospolita" of 18 XII 2000.

one of the City Councils was found non-constitutional, the leading Polish legal journalist wrote[2] "The judicial mechanism, which creates a completely new situation, still unimaginable in its effects, has been set into motion".

II. Already, in its initial stage of activity, within the old authoritative system, including all thus appearing limitations, the defining of constitutional principles being control parameters, or the removing of discrepancies between them, was accomplished by the Tribunal by applying rules and techniques of law interpretation, elaborated by legal science and practice, with reference made to general standards of law obligatory in our culture and to the catalogue of rights and freedoms generally recognised in European countries[3].

At the same time the Tribunal, in the process of realising its judicial function, prepares an interpretation of provisions of the controlled normative acts, and of provisions of the Constitution, also specifies the normative standard of constitutional control, identifies the scope of constitutional control, and the scope of jurisdiction of the Tribunal with regard to preventive and consequent control, and to normative acts subject to Tribunal control.

The scope and praxiological assumptions of its actions, while defining the normative contents of the Constitution the Tribunal presented in its judgement of 5 November 1986 (U 5/86). There it was indicated, that not only the wording of its provisions but also their understanding (interpretation) by the doctrine and judicial decisions is considered, and that the purpose is to define the interpreted provisions in conformity to the axiology of the state and the legal system. When adjudicating on the conformity of an act to the Constitution or of any other normative act to the Constitution or the act, the Tribunal examines the contents of such an act and also the powers and compliance with statutory procedures to promulgate the statute.

The supremacy of the statutory matter for the control of citizens' rights is already clearly and precisely formulated in the jurisprudence of the Constitutional Tribunal. And similarly the attempt to define limits for the principle of equality, principle of proportionality and principle of social justice (judgement P 2/97), is outlined.

In the judgement of 30 November 1988 (K 1/88), when reviewing the conformity of the challenged provisions to the principle of social justice, the Tribunal expressed a more general opinion referring to constitutional principles being the grounds of legal control. In the opinion of the Tribunal "when reviewing the challenged provisions (...) all principles and standards of the Constitution binding the legislator in the area of relations controlled by these provisions of acts, should be considered. In this case, it was necessary to examine the conformity of challenged provisions of the statute to the constitutional principle of social justice (...) and the constitutional principle of equality of rights, i.e. Art. 67 para. 2 of the Constitution".

Since the earliest jurisprudence (judgement of 14 July 1986, K 1/86), the Tribunal indicated to the possibility of a conflict appearing between constitutional principles and basic rights. Many times, the Tribunal was faced with a conflict between the law and constitutional principles. For example, when adjudicating on (judgement of 30 November 1988, K.1/88) constitutional control in the case

[2] S. Podemski, „Polityka" No 19 of 1986.

[3] see J. Oniszczuk, Orzecznictwo Trybunału Konstytucyjnego w latach 1986-1996. (Jurisprudence of the Constitutional Tribunal between 1986-1996), Ed. Sejm, Warsaw 1998, p. 1 and thus cited literature.

of the retirement-pension insurance, basic rights were interpreted with reference made to general principles of the constitution, mainly the constitutional principle of social justice and principle of equality of rights[4]. The provision of Art. 70 of the hitherto binding Constitution was defined in the judgement as "laying down citizens' rights to social security and imposing development of rights to social security and the expansion of other forms of social assistance", and when defining this right the Tribunal, by way of "active interpretation of the Constitution" selected one of the values: out of the two possible, different interpretations of the constitutional right to social security (by work and by needs) selected the one, better corresponding to the contents of the more general principle of social justice[5].

Constitutional jurisprudence did not only outpace its time, but in consequence extended the scope of applying principles of correct legislation and by changing arbitrariness of authority, influenced democratisation of that law. The introduction, in 1989 after peaceful rejection of the totalitarian system in Poland, of the principle of a democratic state of law being the principle structural standard, into constitutional provisions of the previous Constitution by amending Art. 1, was mainly possible due to the attainment of the jurisprudence of the Constitutional Tribunal.

III. The jurisprudence of the Constitutional Tribunal had to play a special role in the process of the great structural changes in Poland after year 1989.

The amendments, in 1989 of previously binding constitutional provisions based on other axiological assumptions referring to principles of the political and economic system and the adoption in Art. 1 of the Constitution, that the "Republic of Poland is a democratic state of law bringing into effect principles of social justice", leaving valid the not fully adjusted to the new reality regulation on basic rights and duties of citizens, have given rise to a phenomenon of characteristic "constitutional deficit". In effect, till the bringing into effect of the new Constitution in 1997, which fully formalised constitutional standards, the Tribunal was compelled to "argue" many detailed categories as constitutional standards, from the general principle of a "democratic state of law bringing into effect principles of social justice" (Art. 1 of constitutional provisions), "discovering" these categories in the general principles – in the context with other valid or partially amended constitutional provisions[6]. This problem was only partially resolved by the adoption on 17 October 1992 of the Constitutional Act on mutual relations between the legislative and executive authority of the Republic of Poland and on local autonomy (Journal of Laws No 84, item 426) further called the Small Constitution, limited in its regulations to the substance defined in its title.

In effect, in this period of "constitutional interim" the Constitutional Tribunal was forced not only to reconstruct constitutional standards directly from the binding constitutional provisions, but also to "construct" them in the process of judicial interpretation, utilising its own jurisprudence, the constitutional law doctrine on the democratic state of law and rights of human beings, and international experience in this scope[7].

---

[4] See K. Działocha, Wewnętrzna hierarcha norm Konstytucji w orzecznictwie Trybunału Konstytucyjnego /w:/ „Państwo, ustrój, Konstytucjia – Studia. (Internal hierarchy of standards of the Constitution in jurisprudence of the Constitutional Tribunal– Studies), Lublin, 1991, p. 49.

[5] ibidem, p. 48

[6] see J. Galster, Gloss to the ruling of the Constitutional Tribunal case K 41/02, "Sejm Review" No 2/ 2003, p. 123 and n.

[7] ibidem p. 124.

Continuing and expanding the jurisprudence line started in 1986, the Constitutional Tribunal adjudicating between 1989-1997 on the conformity to the Constitution of statutes and other normative acts of supreme and central state organs, referring to the general standard of the principle of state of law, supervised the investigated provisions also in light of thus formulated detailed principles derived from the term of a democratic state of law:

- principles of: protection of citizens' trust in the state and its laws, protection of justly vested rights, the non retroactive application of law and observance of *vacatio legis*, proportionality and prohibition of excessive interference of the legislator,
- principles of: parliamentary autonomy and separation of powers of constitutional organs while performing their tasks,
- principles of: constitutional requirement of decent and proper procedure, correctness of legislative technique, observing the "statutory procedure" of adopting statutes, definiteness of law, exclusiveness of the statute in the scope of rights and freedom of citizens and conformity of regulations to the Constitution and statutes,
- principles of: exclusiveness of the legislator in defining revenues and expenditures of the state, scope of implementing amendments into the tax law during the tax year and the constitutional work procedure on the budget act.

Constitutional examination of statutes with regard to the protection of citizens' rights and freedoms, the Constitutional Tribunal conducted in relation to standards defined in detailed constitutional provisions, and the general principle of "a democratic state of law realising the principle of social justice" (Art. 1 of these provisions).

In the Tribunal's jurisprudence the problem of the administration of justice by courts, the right to judgement and the right to defence, and also the problem of constitutional protection of the reactivated in 1990 territorial autonomy in light of the settled, in the Small Constitution, guarantees of its independence, participation in exercising public ruling, protection of its property and income, and scope of supervision over its actions, was widely discussed. And also here, besides other detailed constitutional standards the Tribunal, while performing constitutional control of provisions, made references to the principle of a democratic state of law.

The Constitutional Tribunal strengthened the democratic legal order between 1990-1996 by exercising the right to define the generally binding interpretation of statutes. The Tribunal was awarded these powers in 1989 and by the end of 1996 adopted 79 interpretations referring to legal institutions of different areas of law. Although this was not connected with the process of examining the constitutionalisation of standards, the purpose of performing this function by the Tribunal was to improve the definiteness of law, ensuring proper application of interpreted provisions.

IV. Since the beginning (1989) of the great structural changes in Poland, attempts– including two unsuccessful – in effect of shortening the term of office of the Seyms, initiating them – were made to elaborate and adopt the new Constitution of the Republic of Poland, which would reflect the accomplished transformations, and at the same time contain legal guarantees of their irreversibility[8].

[8] see M. Mazurkiewicz, "Posłowie /w:/ Projekty Konstytucji 1993-1997", (Epilogue /in:/ Drafts of the Constitution 1993-1997), ed. R. Chruściak, Sejm Ed. Warsaw 1997, p. 441-443.

As explained above, no constitutional gap existed at the time. The Sejm and the Senate conducted a number of significant constitutional reforms. Initially, these involved repeated amendments to the Constitution of 22 July 1952, and then the adopting of the Small Constitution, which did however prejudge about leaving valid numerous of provisions of thus revocated Constitution of 1952, originating from the previous era,.

The existing complex, incoherent, legally imperfect, and in some fragments anachronic state of regulations of constitutional rank, did however clearly impede the effective functioning of structural institutions and insufficiently ensured protection of freedom and rights of humans and citizens. This state was generally acknowledged as being difficult to account for and to further maintain, what inclined all political forces to continue works commenced in the previous years and to aim at their final completion.

The elected in 1993 Seym and Senate considered the elaboration and adoption of the Constitution as their main goal. At the same time they fostered the democratism of the work procedure on the new Constitution. The amended constitutional statute of 1992, by-laws of the National Assembly, and also the by-laws of the Constitutional Committee created prerequisites to conduct constitutional works in a pluralistic mode, above political and coalition divisions. The principle, that drafts of the Constitution also submitted during the previous term of office and the draft submitted by the citizens' initiative, being equally valid and subject to examination by the National Assembly, was binding.

Works of the Constitutional Committee took place with the participation of a large group of experts and with the participation of numerous representatives of state and autonomous institutions, social organisations and churches, and also religious unions. The participation of representatives (Presidents) of the Constitutional Tribunal in these works was very significant. Profound substantial discussions, supported by numerous expertise of the attainments of achievements of Polish constitutionalism, including jurisprudence and comments of the Constitutional Tribunal, and in the scope of legal-comparative studies of constitutional systems in modern countries, have lead to the adoption of a uniform draft of the Constitution, which constituted the grounds for the second and third reading during the National Assembly.

On 2 April 1997 The National Assembly in the third reading, after including the proposition of the President of RP following the constitutional procedure, adopted the Constitution of the Republic of Poland, and the Nation in the common voting approved this Constitution on 25 May 1997.

An important stage of ordering the system of law was closed. The Constitution formed the grounds, being the starting point for further legislative regulations and a standard, which must consider internal law and contracted international agreements. The citizens' legal status in the state became stable, as the scope of freedoms, rights and duties of the individual was precisely defined, not only by their clear normalisation. With regard to the citizen, not least important are provisions about direct application of the Constitution, which enable vindication of own rights without referring to the normal statute, among others by way of a constitutional complaint. The adopting of structural regulations contained in the Constitution also means the determining of more precise, than so far, principles of actions and scope of responsibility of public authorities – state and autonomous – and of the effective mechanism of social control in this scope.

The Constitution, being the result of a political and ideological compromise is strongly based on European standards of a democratic state of law, observing principles of social justice,

parliamentary democracy creating systemic conditions for the functioning of market economy, with simultaneous guarantees of social security of the citizens and the opening to the pending process of economic and political integration in the world[9].

V. The coming into effect of the Constitution of the Republic of Poland on 2 April 1997, a qualitatively new situation, also for the Constitutional Tribunal. Not only in the scope of finality of generally binding judgements of the CT (Art. 190 para. 1 of the Constitution) and the deletion from the catalogue of its powers of the generally binding interpretation of law or the granting – within the constitutional means of protection of rights and freedoms – to everyone, whose constitutional freedoms and rights have been violated the right to submit a complaint to the Constitutional Tribunal on the conformity to the Constitution of the statute or any other normative act, with reference to which the court or public administration authority passed a final statement about his freedoms and rights or about his duties defined in the Constitution (Art. 79 para. 1).

The literature recalls, that in the past the Tribunal derived numerous detailed categories from the principles of a democratic state of law. But the Tribunal "discovered" these categories in the period of constitutional interim (in conditions of the structural changes 1989-1997), when old constitutional provisions and the "constitutional deficit", were binding. Should the coming into effect of the new "full" Constitution constitute a turning point in the substantial understanding of the paradigm of constitutionality? It has already been formalised. Today, the directly proclaimed principles, regulations adopted by the constitutional legislator and the unnamed principles, interfered from the text and context of the principle statute adopted and accepted in the jurisprudence of the Constitutional Tribunal compose that standard. The author asks the fundamental question: is the constitutional standard today solely reconstructed from constitutional provisions, or can it be reconstructed by the Constitutional Tribunal in the course of interpreting the principle statute and whether the juridical argumentation of judges of the CT may be a control measure of constitutional standards? Is there still space for creating further principles? Should caution be taken here?[10]

VI. Art. 10 of the Constitution states, that the "system of the government of the Republic of Poland shall be based on the separation and balance between the legislative, executive and judicial powers" (para. 1), and the "legislative power is vested in the Seym and the Senate, the executive power is vested in the President of the Republic of Poland and the Council of Ministers, and the judicial power shall be vested in the courts and tribunals (para. 2).

The principle of legalism contained in Art. 7 of the Constitution imposes on organs of authority, actions based on and within the limits of law. In compliance with Art. 7 of the Constitution powers of public authority organs cannot be presumed nor can they be intensively interpreted (judgement of 19 June 2002 K.11/02 and of 24 June 2002 K.14/020.

The Tribunal, frequently in its jurisprudence, explained the understanding of the principle of separation of powers and its purpose[11], defined the relations between the legislative body, executive

[9] M. Mazurkiewicz, Nowa Konstytucja Rzeczypospolitej Polskiej – etap w procesie transformacji ustrojowej. (The New Constitution of the Republic of Poland– stage in the process of structural changes), Warsaw 1997.

[10] See J. Galster, gloss..., op. cit.

[11] See Mr Mazurkiewicz, The Constitutional Tribunal and its role in assessing of constitutionality of activities performed by legislative bodies in Poland – Sixth International Forum on Constitutional Justice, Moscow 2003.

body and the administration of justice in general, and in the specific case, also made the prohibition to interfere into the essence of the given power very specific. The principle of separation of powers assumes, according to the Tribunal, a detailed mode of defining relations between the administration of justice and the remaining powers. In relations between the legislative power and executive power various forms of mutual interaction and co-operation are possible, also an area, in which the competence of organs of both powers intersect or overlap, is allowed. Relations between the administration of justice and the remaining powers must be based on the principle of "separation" (judgement K.6/94). A necessary element of the principle of separation of powers, is the independence of courts and of judges (judgement of 22 November 1995 K.19/95; other judgements e.g. of 9 November 1993 K.11/93, of 21 November 1994 K.6/94, of 14 March 1995 K.13/94, of 11 September 1995 P.1/95).

When judging on constitutionality of the law-making process, the Constitutional Tribunal is always guided by the principle of presumed conformity of the statute with the Constitution and the postulate of restraint and judicious discernment. The presumption of constitutionality speaks in favour of all controlled statutes, whereas the entity initiating the control must prove non-conformity to the Constitution of the alleged standard (judgement of 7 February 2001 K.27/00 and of 25 April 2001 K.13/01).

VII. And finally two comments:

First - the progressive constitutionalisation of the whole system of law, standardisation of the Constitution and the even stronger belief that democracy does not mean unlimited arbitrariness in law-making, even by a democratically authorised legislator – these are very important, almost repeatable features of changes in young democracies. Countries in our part of Europe have made constitutional jurisprudence an effective and important – perhaps most important – tool to overcome the past in the functioning and making of law. Exchange of experience in the area of constitutional jurisprudence is especially useful today.

And second – Many of us are approaching the moment of integration with the European Union. The problem of the community law, its contact with the national legal order (including constitutional standards) is constantly present in the way of thinking of judges of the Constitutional Tribunal. When defining the meaning, contents of constitutional laws and freedoms we frequently reach to the Luxembourg jurisprudence, as we have done in the past (and still do) with regard to ETPCz jurisprudence in Strasbourg. We are fully aware, that these issues will appear more frequently this year and in the following years. We consider this very important and is worth discussing also in the context of constitutional standards.