Przegląd Prawa Konstytucyjnego
ISSN 2082-1212, https://czasopisma.marszalek.com.pl/10-15804/ppk

https://doi.org/10.15804/ppk.2023.06.25
2023, no. 6 (76), pp. 12

Acceptance date: 14.10.2023
Publication date: 27.12.2023

Citation

CHICAGO: K. Strzępek, *Constitutional Review in Poland. On the 220th Anniversary of Marbury v. Madison,* „Przegląd Prawa Konstytucyjnego" 2023, no. 6, pp. 353–364, https://doi.org/10.15804/ppk.2023.06.25

APA: Strzępek, K. (2023), *Constitutional Review in Poland. On the 220th Anniversary of Marbury v. Madison,* „Przegląd Prawa Konstytucyjnego" no. 6, pp. 353–364, https://doi.org/10.15804/ppk.2023.06.25

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Constitutional Review in Poland. On the 220th Anniversary of the Case of Marbury v. Madison

Keywords: Poland, Constitution, Hans Kelsen, Constitutional review, Marbury v. Madison
Słowa kluczowe: Polska, Konstytucja, Hans Kelsen, Kontrola konstytucyjności, Marbury p. Madison

Abstract

In 1803, the Supreme Court of the U.S. gave a judgment in the case of Marbury v. Madison. The 220th anniversary of this event is a good occastion to describe the Polish model of constitutional review in the context of the American-style model. Although most countries have written constitutions, their constitutional review models can vary significantly. This research study was conducted to illustrate similarities and differences between the American and European models of constitutional review. In the study, the model of constitutional review in the United States and Poland was analysed. The author's result of analyses of respective provisions of constitution and case-law in these countries presented that there are significant differences between the discussed models with regard to their organisation and functioning.

Streszczenie

Kontrola konstytucyjności w Polsce.
W 220. rocznicę sprawy Marbury p. Madison

W 1803 r. Sąd Najwyższy Stanów Zjednoczonych wydał orzeczenie w sprawie Marbury p. Madison. 220. rocznica tego wydarzenia jest dobrą okazją do opisania polskiego modelu kontroli konstytucyjności prawa w kontekście modelu amerykańskiego. Chociaż większość państw ma spisane konstytucje, modele kontroli konstytucyjności w nich zawarte mogą znacznie się od siebie różnić. Niniejsze badania zostały przeprowadzone w celu przedstawienia podobieństw i różnic między amerykańskim a europejskim modelem kontroli konstytucyjności. W opracowaniu analizie poddano model kontroli konstytucyjności w Stanach Zjednoczonych oraz w Polsce. Autorskie wyniki analiz poszczególnych przepisów i orzecznictwa w tych państwach pokazały, że między omawianymi modelami istnieją istotne różnice w zakresie ich organizacji i funkcjonowania.

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I. Introduction and method

This paper concerns models of constitutional review with special regard to the American and European models. The main purpose of the paper was to describe the model of constitutional review in Poland in light of the model of constitutional review in the U.S. There were several reasons for this kind of approach: 1. The fact that the model of constitutional review in the U.S. is the best example of the American model of constitutional review as well as the model of constitutional review in Poland may be recognised as an example of the European model of constitutional review. 2. The fact that the Constitution of the U.S. is the first constitution in the world and the world's longest-surviving constitution (to this day). 3. The fact that the first constitution in Europe was written in Poland. 4. The fact that it has been the 220th anniversary of the Marbury v. Madison case, which had a great impact on the development of constitutional review not only in the U.S. 5. The fact that as regards the European model of constitutional review, the literature on the subject described mainly the examples of Austria and Germany. At the same time,

there are no references (or are much less frequent) to the constitutional law of other European countries.

The research problem was formulated as a question: what the political and legal conditions for the emergence of constitutional review in the countries in question were. The author believes that this text will be a good starting point for presenting this problem from a cognitive point of view.

The method of the conducted research was an analysis of legal texts in force (mainly) in the U.S. and Poland, and references were made to the literature and the case law of particular importance on the matter. The formal requirements of publication limit the considerations.

II. Constitutions

The United States Constitution of 1789 (written in 1787 and ratified in 1788) is the world's longest-running written government charter. As a general rule, American-style constitutions are relatively short. They typically establish only the basic governance parameters, and the rights people relinquish to the government. Five objectives have been outlined in the 52-word paragraph of the Preamble, and the first of them is "establish Justice". Apart from the Preamble, the Constitution of the U.S. contains only seven articles. It can be said that the American-style constitutions do not try to do more than establish the basics of the playing field and typically enumerate government powers rather than citizens' rights. "These documents are typically binding, short, and straightforward"[1].

Kelsen-style constitutions are typically much longer than American constitutions. "They are usually exhaustive documents that incorporate political philosophy, founding principles, modes of governance, fastidious rules of procedure, and meticulous definitions of the citizens' rights granted by the constitution"[2]. Poland's Constitution of 1997 contains 243 articles, and it is divided into 13 chapters. It starts with the Preamble. The Constitution of Poland describes the main principles and philosophies and establishes

[1] N.G. Wenzel, *Judicial Review and Constitutional Maintenance*: *John Marshall, Hans Kelsen, and the Popular Will*, "Political Science & Politics" 2013, vol. 46, no. 2, p. 593.

[2] *Ibidem*.

the governance structure. It also describes formal institutions that maintain constitutional order and contains freedoms, rights and obligations of humans and citizens.

In addition to the American and the European model of constitutional control, the so-called Commonwealth model (Westminster/British) can be distinguished, which is completely opposite to the models mentioned above. In the latter, the Parliament, as the expression of the will of the people, enjoys complete sovereignty[3]. Regarding the constitutionalist parameters of the American and Kelsen-style constitutions, the Commonwealth "constitutional systems" are not "a constitution"[4]. For example, in the United Kingdom, the birthplace of parliamentary sovereignty, "no single" document stands above the will of the people, as expressed by the legislator[5]. The United Kingdom Constitution comprises the laws and rules "[…] that create the institutions of the state, regulate the relationships between those institutions, or regulate the relationship between the state and the individual"[6].

III. The Power of Judicial Review in the U.S. Constitution

There was no extensive discussion of the power of judicial review at the Constitutional Convention of 1787[7]. The main problem facing the delegates in Philadelphia during the summer of 1787 was "[…] how to prevent incursions upon national power by the state governments. Thus, to the extent that the subject of judicial review was discussed, it was raised in the context of federalism and not in the context of separation of powers"[8]. The Constitution established a national government, allocating power among the executive, judicial, and legislative branches. It also sketches the relationship between the federal and state governments. It can be described as a federalist system,

[3] *Ibidem*.

[4] *Ibidem*.

[5] *Ibidem*.

[6] The UK Parliament, *The UK Constitution. A summary with options for reform*, accessed July 9, 2023, https://committees.parliament.uk (19.07.2023).

[7] M.P. Harrington, *Saying What the Law Is*: *Marbury v. Madison's Expansion of the Idea of Judicial Review*, "Judicial Review" 2011, vol. 16, no. 2, p. 145.

[8] *Ibidem*.

meaning that two kinds of governments – national and state – have jurisdiction over the same territory[9].

"Under the American system of constitutional review, the judiciary stands as an independent branch with a constitutionally mandated power of review of laws to ensure conformity with the Constitution. In sum, at the American founding, the idea was that «the Constitution worked to limit government because the public had a healthy distrust of government power»"[10]. The system is present in the U.S. and most countries of Latin America.

In order to characterise the American model of constitutional judicial review, it is worth mentioning that the doctrine of judicial review is not expressed in the Constitution of the U.S. It was established by the Supreme Court of the U.S. in the case of Marbury v. Madison[11].

The 1800 United States presidential election was held from October 31 to December 3, 1800. The Democratic-Republican Party candidate, Vice President Thomas Jefferson, defeated the Federalist Party candidate, incumbent President John Adams. The Federalist-controlled Congress passed the Judiciary Act of 1801 and the Organic Act for the District of Columbia. The laws, among other things, had allowed President John Adams to reduce the size of the Supreme Court from six to five judges, to appoint 16 new circuit court judges and 42 new justices of the peace. On March 2, 1801, just two days before his presidential term ended, outgoing President John Adams had nominated William Marbury as a justice of the peace (for the county of Washington, in the district of Columbia)[12]. On March 3, 1801, the Senate of the U.S. approved President John Adam's nominations *en masse*. The appointees' commissions were immediately written out, then signed by President John Adams and sealed by Secretary of State John Marshall. On March 4, 1801, Thomas Jefferson was sworn in and became the third President of the U.S. The New Secretary of State, James Madison, on President Thomas Jefferson's express instruction, withheld the undelivered commissions. William Marbury then sued to obtain it. William Marbury claimed that the Judiciary Act of 1789 authorised the Supreme Court to grant mandamus in a proceeding filed initially in the Supreme Court.

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[9] E. Berger, *Law School for Everyone*: *Constitutional Law*. The Great Courses, 2019, p. 13.

[10] N.G. Wenzel, *op.cit.*, p. 592.

[11] Marbury v. Madison, S U.S. (1 Cranch) 137 (1803).

[12] E. Berger, *op.cit.*, p. 13.

The Supreme Court held that the act to establish the judicial courts of the U.S. authorises the Supreme Court "to issue writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States[13]". It held that the authority given to the Supreme Court by the act establishing the judicial courts of the U.S. to issue writs of mandamus to public officers appears not to be warranted by the Constitution, and it becomes necessary to inquire whether a jurisdiction so conferred can be exercised.

The Supreme Court held that the Congress of the U.S. could not increase the Supreme Court's original jurisdiction as it was set down in the Constitution, and it, therefore, held that the relevant portion of Section 13 of the Judiciary Act violated Article III of the Constitution of the U.S[14].

As Erwin Chemerinsky observed: "Marbury v. Madison is the single most important decision in American constitutional law. It established the authority for the judiciary to review the constitutionality of executive and legislative acts. Although the Constitution is silent about whether federal courts have this authority, the power has existed since Marbury"[15]. Two other cases, *i.e.*, Martin v. Hunter's Lessee[16] and Cohens v. Virginia[17], were key in establishing the Supreme Court's authority to review state court decisions[18].

A few characteristic features of the American judicial review model result from Article III of the U.S. Constitution.

Firstly, the model can be characterised as "universal". The provisions make the Constitution ordinary law to be applied in federal and state courts[19], although supreme over other forms of ordinary law[20]. It is about all matters that may arise under the Constitution. "The United States is virtually unique in having judicial review if judicial review means a system in which ordinary judges can review and strike down legislation. Other countries that have adopt-

[13] Marbury v. Madison, *op.cit.*

[14] *Ibidem*.

[15] E. Chemerinsky, *Constitutional Law Principles and Policies*, New York 2019, p. 39.

[16] Martin v. Hunter's Lessee 14 U.S. (1 Wheat) 264 (1816).

[17] Cohens v. Virginia 19 U.S. (6 Wheat) 264 (1821).

[18] E. Chemerinsky, *op.cit.*, p. 48.

[19] S.B. Prakash, J.C. Yoo, *The Origins of Judicial Review*, "The University of Chicago Law Review" 2003, vol. 70, no. 3, p. 981.

[20] Marbury v. Madison, *op.cit.*

ed constitutional review have taken great pains to exclude ordinary judges from participating in it"[21].

Secondly, the model can be characterised as "decentralised" (in other words, dispersed) so that the control of norms is exercised by the Supreme Court as well as by inferior courts. Within the exercise of their jurisdiction, state courts are also entitled to examine the compliance of normative acts and the legitimacy of actions of state authorities with the Constitution, subject to discretionary control exercised by the Supreme Court.

Thirdly, the control is "multi-instance", as the Supreme Court may challenge the decision issued by the inferior court, and the issue of constitutionality is decided in the course of proceedings in a particular case before the inferior court and/or the Supreme Court. Hans Kelsen observed: "According to the Constitution of the United States, judicial review of legislation is possible only in the course of a process, the chief aim of which is not the establishment of the unconstitutionality or constitutionality of a statute. This question can only arise incidentally when a party maintains that applying a statute in a concrete case violates its interests because it is unconstitutional. Hence it is, in principle, only the violation of a party interest which puts the judicial review of legislation procedure in motion. However, the interest in the constitutionality of legislation is a public one that does not necessarily coincide with the private interest of the parties concerned. It is a public interest which deserves protection by a special procedure in conformity with its special character"[22].

Fourthly, the court decides a constitutional question simultaneously with the merits of a particular case in a very concrete form. The sense of the judgment consists in the refusal to apply a legal norm, in a specific case, as inconsistent with the Constitution. Such a judgment, as a rule, produces legal effects for the parties to one specific case. The judicial review comes in what is conventionally called concrete form[23]. However, other branches usually feel

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[21] J.E. Ferejohn, *Constitutional Review in the Global Context,* "New York University Journal of Legislation and Public Policy" 2002, vol. 49, no. 6, p. 49.

[22] H. Kelsen, *Judicial Review of Legislation: A Comparative Study of the Austrian and the American Constitution,* "The Journal of Politics" 1942, vol. 4, no. 2, p. 193.

[23] M.V. Tushnet, *Marbury v. Madison Around the World,* "Tennessee Law Review" 2004, no. 71, p. 254.

obliged to adapt their actions to the constitutional interpretations proposed by the courts, even if these entities were not directly parties to a specific court proceeding[24].

Regarding the effect of the Supreme Court decisions, "[…] the decisions of the Supreme Court are binding upon all other courts. Since the American courts consider themselves bound by the judgments of the Supreme Court, a decision of that Court refusing to apply a statute in a concrete case because of unconstitutionality has practically almost the same effect as a general annulment of the statute. However, the stare decisis rule is not an absolute principle. It is not very clear to what extent it is recognised as valid. Above all, it is assumed that it is not valid in the case of an interpretation of the Constitution"[25].

IV. The Power of Constitutional Review in the Constitution of Poland

The current Constitution of Poland was enacted on April 2, 1997 (entered into force on October 17, 1997)[26] and is formally known as the Constitution of the Republic of Poland. The provisions of the Constitution of Poland clearly indicate that the Polish legislator distinguishes two separate divisions of the judiciary: courts, and tribunals and assigns them different roles[27]. This approach was confirmed by the Constitutional Tribunal, which explained that the legislator distinguishes between courts and tribunals and enumerates the bodies that are courts. They include the Supreme Court, common courts of law, administrative courts, military courts and extraordinary court or summary procedures[28]. This means that the Constitutional Tribunal is not a court within the meaning of Art. 175 of the Constitution, even though it is an organ of

[24] *Ibidem*.

[25] H. Kelsen, *op.cit.*, p. 189.

[26] Dz.U. No. 78 item 483 as amen.

[27] Art. 173 of the Constitution reads as follows: "The courts and tribunals shall constitute a separate power and shall be independent of other branches of power".

[28] Art. 175 of the Constitution reads as follows: "1. The administration of justice in the Republic of Poland shall be implemented by the Supreme Court, the common courts, administrative courts, and military courts. 2. Extraordinary courts or summary procedures may be established only during a time of war".

the judiciary, a separate and independent authority from other authorities[29]. The bodies above-mentioned (courts) primarily resolve "traditional" legal disputes, *i.e.*, cases examined in civil, criminal and administrative proceedings before these courts. The Constitutional Tribunal does not administer justice as the courts do but exercises the powers entrusted to it by the legislator, the most important of which is an adjudication on the conformity of legal acts (the legal norms contained in these acts) with legal acts that are placed higher in the hierarchy (the legal norms contained in these acts)[30]. The nature of the control of norms differs from the administration of justice in individual cases because a possible dispute concerns the relationship between legal norms[31].

The Constitution defines the subjects that may initiate the review of legal norms in proceedings before the Constitutional Tribunal. These entities include state authorities (*e.g.*, the President of the state) and individuals who have a legal instrument at their disposal, which is a constitutional complaint (however, certain additional conditions must be met to initiate this type of proceedings).

In addition, the Constitutional Tribunal settles disputes over authority between central constitutional organs of the State, adjudicates the conformity to the Constitution of the purposes or activities of political parties, and adjudicates on finding an obstacle to the exercise of the office by the President of the Republic.

There are other general differences between the Constitutional Tribunal and the courts: 1. the status of the Constitutional Tribunal is regulated in detail in the Constitution (constitutional status); 2. The procedure for electing members of the Constitutional Tribunal is different; 3. Terms of office bind members of the Constitutional Tribunal; 4. Proceedings before the Constitutional Tribunal are of a single instance; 5. The Constitutional Tribunal is not subject to supervision by the Supreme Court (courts are subject to such supervision, with the exception of administrative courts)[32].

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[29] Judgment of the CT of Poland of December 9, 2015, file ref. no. K 35/15, OTK ZU no. 11/A/2015, item 186; judgment of the CT of Poland of November 24, 2021, file ref. no. K 6/21, OTK ZU A/2022, item 9.

[30] A. Syryt, *Trybunał Konstytucyjny – czy tylko sąd prawa*? [in:] *Sądownictwo konstytucyjne: teoria i praktyka*, ed. M. Granat, Warszawa 2019, p. 311.

[31] K. Wojtyczek, *Sądownictwo Konstytucyjne w Polsce*, Warszawa 2013, p. 89.

[32] *Ibidem*, p. 90.

The courts and tribunals in Poland are a separate and independent authority. An important guarantee of the independence of the Constitutional Tribunal is its budgetary autonomy. The judges of the Constitutional Tribunal are independent and subject only to the Constitution. An important statutory guarantee of the independence of the judges of the Constitutional Tribunal is to ensure their retirement after the end of their term of office.

Legal acts given by the legislature determine the organisation and functioning of the Constitutional Tribunal. In this regard, it can be said that the relationship between the Constitutional Tribunal (as a part of Judiciary Power) and the legislature is a relationship where both parties depend on one another's acts and decisions in different respects. On the one hand, the organisation and functioning of the Constitutional Tribunal, which are specified in the act given by the legislature, have an impact on the Constitutional Tribunal. On the other hand, the Constitutional Tribunal may be empowered to supervise the quality of the acts as mentioned above. Now, it is the legislature that depends on the Constitutional Tribunal[33].

Neither the constitution framers nor the legislator has included the types of judgments concerning the law's constitutionality in a closed catalogue[34]. In this regard, the Constitutional Tribunal has a margin of discretion. In practice, the Tribunal uses various expressions in the operative part of its judgments (*i.e.*, in the sentence). The scheme of the sentence takes a logical form, which can be represented most often by the terms: "is compatible" or "is incompatible" (with the Constitution). A feature of all judgments of the Constitutional Tribunal is their finality.

By granting the Constitutional Tribunal a given competence, the constitution framers adopted a centralised model of reviewing a law's constitutionality. Therefore, all issues related to ensuring the supremacy of the Constitution in Poland should be analysed in this context. The Constitutional Tribunal is independent of the legislative and executive authorities. Legislative and executive authorities may be participants in the procedure of reviewing the legal norms they established.

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[33] D. Kyritsis, *Where Our Protection Lies. Separation of Powers and Constitutional Review*, New York 2017, p. 80.

[34] M. Florczak-Wątor, *Orzeczenia Trybunału Konstytucyjnego i ich skutki prawne*, Poznań 2006, p. 49.

V. Conclusion

Three main models of constitutional review can be distinguished: 1) the American model, 2) the European model, and 3) the Commonwealth model. With the exception of the latter, where no single constitutional document can restrain the legislative or executive powers from acting, the first two models have a written constitution. In the American and European models, there are authorities whose task is to control the law and the actions of the legislative and executive powers from the point of view of their compliance with the constitution, which is also an expression of the checks and balances principle. An example of the American model can be the model operating in the U.S. An example of the European model can be the model operating in Poland. Although they perform similar functions, these models differ significantly from each other. Several significant differences can be listed.

The first difference concerns the constitutional act itself, which defines the powers of the authorities in both countries. In Poland, the constitution contains 243 articles, while in the U.S. only 7. On the one hand, this fact alone may suggest that more importance is attached to applying the law in the U.S. than in Poland. On the other hand, the fact that the authorities' activities are regulated in more detail in the Constitution of Poland may contribute to greater legal certainty.

Secondly, indeed, it can be said that the practice of applying the law in the U.S. is of great importance when we consider that the very concept of constitutional review of the law was created in the jurisprudence of the Supreme Court, *i.e.*, in the case of Marbury v. Madison. In Poland, the jurisdiction of the Constitutional Tribunal is defined in detail in the Constitution. In addition, statutes regulate in detail the organisation and functioning of the Constitutional Tribunal.

Thirdly, the system of constitutional review in the U.S. can be called dispersed, while in Poland, it is centralised. In the U.S., both the Supreme Court and inferior courts can review the constitutionality of legislation in the sense that they can review and strike down legislation. In Poland, this is the task of the Constitutional Tribunal only. This does not mean, however, that inferior courts in Poland cannot refer to the constitution. They can but do not have the jurisdiction to strike down legislation.

Fourthly, while the Supreme Court in the U.S. is a court and administers justice, the Constitutional Tribunal in Poland is not defined in the constitution as a court and does not administer justice. Proceedings before the Constitutional Tribunal are of a single-instance nature; the Tribunal *per se*, as a rule, does not adjudicate individual civil, criminal or administrative cases.

Regarding the above, it can be said that in Poland, it is the Constitutional Tribunal mainly from the circle of judicial authorities, that is, the authority that participates in implementing the principle of checks and balances.

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