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REFUSAL OF THE POLISH CONSTITUTIONAL TRIBUNAL TO APPLY THE ACT STIPULATING THE CONSTITUTIONAL REVIEW PROCEDURE*

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ABSTRACT

One of the politically momentous and legally precedential constitutional problems of recent years which had to be faced by the Polish constitutional court has been the dispute whether it is possible to exclude the applicable statute defining the organization and procedure of the CT proceedings as a basis for adjudication.

An analysis of the judgment of the Tribunal addressing that issue proves that the Polish constitutional court excluded the possibility that the same regulation could serve simultaneously as the object of control and the basis for control proceedings. This results from the essence of constitutional control of the law which in such arrangement of its key elements would simply repeal itself, i.e. would lead to its own invalidation. Subordination of constitutional judges exclusively to the Constitution extends to all actions they perform in serving their office and other consubstantial manifestations of exercising the power to judge. This is a derivative of jurisprudential responsibilities of the Tribunal, which

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include both passing a final judgment as to compliance of challenged statutes, as well as other acts of application of law.

Art. 195 (1) *in fine* of the Polish Constitution lays down a competence norm for a CT judge to refuse, in specific circumstances, to abide by the CT Act. One of the analytical assumptions is recognition of the finality of CT judgments. The possibility to exclude a provision of the CT Act is an action in the area of application of law. Determination of the legal framework for passing judgments has nothing in common with constitutional control of challenged statutes. Those actions derive from totally different orders and their goals are different.

Key words: Constitutional Tribunal, constitutional review, interpretation of the Constitution, constitutional crisis in Poland, omission of a statute, CT Act

1. INTRODUCTION

In 2015 and 2016, within a few months, the Polish Constitutional Tribunal passed a series of verdicts on regulations concerning its organization and procedures. Those verdicts questioned successive legal solutions adopted by the legislator which – against the binding constitutional standards – made attempts to impose its own vision of the constitutional court system. The CT faced the most serious challenge in the case concerning the Act of 22 December 2015 on amendments to the Constitutional Tribunal Act[1] (hereafter: the Amending Act or the CT Act), which in legal journalism was somewhat ironically called "reparative". It provided for numerous modifications of the procedures to be followed by the CT, including the rules for the preparation of hearings and closed sessions, appointment of CT adjudicating panels, the order in which cases are considered, as well as the status of CT judges and the activity of the General Assembly of the Judges of the Constitutional Tribunal. Therefore, it was aimed at an all-round review of the existing model of CT functioning as a matter of fact without any period of adjustment and no *vacatio legis.*

With a view to this amendment the Tribunal also had to face an essentially precedential issue that it has never had encountered before, i.e.

[1] Journal of Laws, item 2217.

how to carry out a constitutional review of a law in a situation whereby its object and procedural provisions for adjudication are the same. Resolving this issue the CT constructed a legal mechanism which is quite original in the Polish judicial system and which allowed not only for successful adjudication in the case on hand[2], but also outlined a new institution of constitutional law. This article is dedicated to discussing this exact problem.

2. THE POSITION OF THE CONSTITUTIONAL TRIBUNAL

The constitutional review of the Amending Act was initiated in five motions addressed to the CT which were submitted by: the First President of the Supreme Court, two groups of parliamentarians (from opposition political parties), the Ombudsman and the National Council of the Judiciary. All of the initiators agreed that it was urgently necessary to resolve the matter directly on the basis of the Constitution, leaving aside those changes in the law which had been introduced by the amendment. They pointed out that adjudication could not be based on the same provisions which were to be reviewed before the CT. Moreover, the Tribunal should exercise its constitutional powers regardless of the legislative solutions which impede its efficient and reliable activity. Those arguments were supported by entities allowed to join the proceedings as *amici curiae*.

A different view of this issue were presented by other participants in the proceedings before the CT: the Sejm (lower house of the parliament) and the Prosecutor General. In their opinion adjudication should be absolutely based on the CT Act in its wording as per the Amending Act. Consequently, they refused to take any position as to the merits of the case and did not take part in the proceedings.

Before assessment of the Amending Acts on its merits the CT "set the appropriate framework of its jurisdiction." The situation was indeed extraordinary and deserved to be called a hard case. As it has been mentioned, the constitutional court potentially was to review the regulations which

[2] See: CT judgment of 9 March 2016, no. K 47/15, OTK ZU no. A/2016, item 2, still awaiting publication in the Journal of Laws.

at the same time were to provide grounds for self-control. The position assumed by the CT may be reconstructed as follows:

The Tribunal noted, first of all, that for the first time in its history it encountered a jurisprudential paradox of a kind. Its forthcoming verdict, regardless of the adopted direction as to its merits, concerned the provisions of the CT Act which were also to provide "a legal basis for adjudication activities of the Tribunal, including material procedural measures aimed at issuing (…) a judgment." Noticing this dilemma, the Tribunal stated that the situation whereby the object of a legal dispute before the Tribunal is identical with the systemic and procedural basis for resolving that dispute was unacceptable. A potential finding of the challenged regulations unconstitutional by the Tribunal would then lead to undermining the very process of adjudication (and in consequence the judgment) as conducted on an unconstitutional basis.

Therefore, the point of departure for the Tribunal was to propose a thesis that the same statute may not be simultaneously the object of control and the basis of control proceedings before the constitutional court.

In this context, the Tribunal also noted that the Polish constitutional system provides for legal institutions which allow for effectively avoiding the above mentioned paradox. The proper use of so-called preventive (*a priori*) constitutional control by the President[3] or providing for an appropriately long *vacatio legis* for a statute, which would allow for the preparation and submission of a motion for its review by the authorized entities constitute a sufficient protection of the system of law against introduction thereinto of a potentially defective CT act. The situation becomes complicated only when the provisions concerning the organization and *modus operandi* of the Tribunal are challenged under the ex-post (*a posteriori*) constitutional review procedure of a statute, that is when it has already come into force. That is why the ex-ante utilization of any of the above mentioned legal options with respect to the Amending Act would allow to come up with a binding and final pronouncement whether the new legal solutions provided therein are constitutional. However, the President failed to refer

[3] See: Art. 122 (3) in conjunction with Art. 126 (2) of the Constitution.

the act to the CT before signing it, and the legislator decided that it came into force as of the date of its publication, without any *vacatio legis*.

The Tribunal also developed a substantiation for the need to consider the case forthwith. Namely, the CT noted that it cannot not operate, and in particular adjudicate on the basis of the regulations which had been referred to it and thus are an object of the ongoing constitutional dispute (i.e. serious substantive and formally admissible charges of their unconstitutionality have been put forward). It would compromise the security of jurisdiction in cases that have been put before it, and thus would endanger, *inter alia*, legitimate interests and fundamental rights (constitutional rights and liberties) of citizens waiting for a constitutional complaint or legal query to be considered. It supported that position with arguments of the finality of its judgments and the systemic place of the constitutional court in the Polish legal order.

The Tribunal presented a legal mechanism of omitting the Amending Act provisions, that is it explained why and how it had eliminated some of them from the legal grounds for proceeding in case no. K 47/15 despite the fact that at the moment of adjudication they undoubtedly were a legitimate component of the system of law and were effective.

The CT focused its position on the consequences of Art. 195 (1) *in fine* of the Constitution, according to which the CT judges "in the exercise of their office, shall be independent and subject only to the Constitution", that is under certain circumstances – in the opinion of the Tribunal – they may refuse to apply a statute in force, which also includes the CT Act[4]. The Tribunal noted that "it is forced to make use of the possibility" afforded to it by that constitutional rule since other measures at the disposal of the executive authority (i.e. preventive constitutional review) and the legislative authority (i.e. setting of an appropriate *vacatio legis* which would make it possible to review the act before it comes into force) have not been employed. On the other hand, the situation of prolonged uncertainty as to the constitutionality of the basis for adjudication by the constitutional court was unacceptable.

[4] Otherwise than judges of common, administrative and military courts, including judges of the Supreme Court, as well of members of the Tribunal of State who are subject to the Constitution and the statutes (cf. Art. 178(1) and Art. 199 (3) of the Constitution).

In this connection, the Tribunal took up the issue of CT judges being "subject only to the Constitution by formulating three mutually complementary theorems. First, according to the Tribunal, subordination of a constitutional judge to the Basic Law extends to all deeds they perform in serving their office, i.e. exercising the power to judge. This is a derivative of jurisprudential responsibilities of the constitutional court, which include both passing a final judgment as to compliance of challenged statutes, as well as all other acts of application of law by the Tribunal, including procedural acts (e.g. appointment of the panel or setting the date of a hearing). Second, the possibility to exclude a provision of the CT Act is an action in the area of application of law. The Tribunal made it quite explicit that determination of the legal framework for passing judgments has nothing in common with constitutional control of challenged statutes. In the first place the legal grounds for adjudication should be determined, and only then, given this basis, the CT Act may be submitted to a constitutional review (hierarchical compatibility of laws may be assessed). Leaving out some of the provisions of the CT Act at the stage of the process, the Tribunal neither questioned their constitutionality, nor – all the more so – found them expired. Third, the Tribunal explained that the application of Art. 195 (1) *in fine* of the Constitution and pursuant thereto omitting those provisions of the CT Act which are at the same time challenged before the Tribunal in itself does not rebut the presumption of constitutionality of the challenged regulations. The presumption of constitutionality of the CT Act may be refuted only after a formalized review process has been carried out. The omitted provisions continue to be subject to constitutional control under the same proceedings.

In effect, the Tribunal assumed that the legal grounds for the constitutional review of the provisions challenged in case no. K 47/15 would include: directly applicable norms of the Constitution and the CT Act in its wording as per the Amending Act (i.e. the CT Act applicable as on the date of adjudication by the Tribunal) with the exclusion of certain provisions. Thus, it was the need to avoid a situation whereby the same regulations are simultaneously the basis of adjudication and subject of control the determined incidental non-application of the former. Therefore, from among the challenged regulations of the CT Act left out were those which concerned the rules of proceedings before the CT, and

thus were to be used for resolving case no. K 47/15. The resulting legal gaps were filled with the general norms of the same CT Act (its remaining regulations) and the constitutional norms. On this account the Tribunal could adjudicate at the hearing in a panel of 12 judges, by a simple majority of votes, disregarding the order in which cases are received, with the simultaneous obligation of the participants in the proceedings to produce their submissions within a shorter time-limit.

3. LEGAL ANALYSIS OF THE POSITION OF THE CONSTITUTIONAL TRIBUNAL

The CT verdict is by no means easy to describe. Without doubt, the constitutional court encountered an unprecedented situation, which it had to resolve despite non-existence of unequivocal rules for the proceedings. At the same time, the case concerned the problems which only on the surface could be treated as procedural or preliminary. In the background, there were fundamental questions as to the systemic place of the Tribunal and its relationship with the legislative authority which – although constitutionally restricted – was empowered to pass legislation determining the organization and modus operandi of the constitutional court. The verdict was also of enormous practical importance, and in institutional terms it should be construed, despite the three decades of the functioning of the Tribunal, as an argument in the discussion as to the need of existence and fundamental duties of independent constitutional judicature.

In this context, from among – it should be emphasized – few possibilities that could employed the Tribunal chose a moderate, individual variant, neutral as regards the tenor of the regulation and legalistic.

The position of the CT may be described as moderate in a sense that it rejected the principled thesis as to the lack of the binding force of the challenged Amending Act and the need to issue a verdict exclusively on the basis of constitutional norms. Adoption of the Constitution as a standalone direct basis for the proceedings in place of the CT Act would require the Tribunal to create the elements of the review procedure actually

on its own, only with the support of unidirectional directives on the functioning of judicial authorities in a democratic state ruled by law and general constitutional standards dedicated to internal organization of the Tribunal. Therefore, it would mean explicit orientation towards so-called judge-made law aimed at, *inter alia*, filling normative gaps in the system of law. The Tribunal warded off dangers and charges connected with such understanding of the systemic position, function and modus operandi of the constitutional court under the Constitution in force. Proponents of a more creative and activistic approach of the Tribunal may, of course, feel unsatisfied in this respect, perhaps discerning the wasted potential for a Polish version of the juridical breakthrough in the spirit of the decision of the US Supreme Court in *Marbury v. Madison*[5], nonetheless it should also be noted that thanks to such an attitude the Tribunal managed to keep its judgment within the framework of systemic argumentation which, despite everything, was possible to be reconciled with fundamental concepts in the area of constitutional control here and now.

At the same time, the Tribunal decidedly dissociated itself from the view that omitting certain provisions of the CT Act entails rebutting presumption of their constitutionality. What is more, from the perspective of the stage in the proceedings at which the legal framework of adjudication in case no. K 47/15 was determined, presumption of constitutionality of the CT Act played no role at all. The entire operation of omitting took place in the area of application of law, beyond the process of constitutional review *sensu stricto*, and referred to the statute in force without any preconception as to the assessment of its merits.

The individual character of the CT judgment consisted in that the scope of application of the mechanism delimiting the legal framework for adjudication was practically restricted to the circumstances of case no. K 47/15. Obviously, it may be imagined that in the future a new CT Act (its amendment) will become subject to ex-post control and then the normative structure of the object of control and the basis for adjudication will be reconstructed, nevertheless also in such an event provisions of the CT Act in force would be omitted incidentally. From this viewpoint, the position of the Tribunal should not be universalized as a means of

[5] 5 U.S. 137 (1803).

operation of the constitutional court; neither it is excluded that it may be extrapolated to other cases in which the object of the challenge does not concern – simplifying things – CT issues. In other words, statutory regulations in force may be excluded from the legal basis for the procedural acts of the constitutional court only when all of the following conditions are fulfilled: (i) the object of control and the basis of adjudication with respect to that object are ideally identical, that is omission may apply exclusively to the CT Act or any other statute regulating the organization and procedures of the Tribunal[6]; (ii) it concerns those from among the challenged provisions of the CT Act or any other statute regulating the organization and procedures of the Tribunal which make up the basis for the procedural actions of the constitutional court under the constitutional review – they underlie the acts of application of law by the Tribunal, including passing the judgment itself, in the so-called official situation[7].

The decision to leave out some of the provisions of the CT Act was not motivated by the evaluation of their contents. The decision of the Tribunal remained free from that type of considerations and in principle should be the same in any other case, that is regardless of the merits of the challenged regulation. The reason for the omission was a kind of the adjudicative vicious circle understood by the Tribunal as endangering the entire control process and in consequence also the judgment which ends the procedure. The manner of operation of the CT was determined by the specific relationship between the challenged provisions and regulations specifying the procedures for their verification, as well as the fear of falling into a logical contradiction. Therefore, the reasons for refusal to apply the Act was as a matter of fact "formal" and referred to the rudiments of correct reasoning, independent of and primary to the dispute concerning constitutionality of the 2015 CT Act.

Perception of the threat to the legality of judgment outlined – as it seems – two fundamental ways of response for the Tribunal. The first

[6] As a result, the prerequisite for omission of the CT Act would not occur if the proceedings concerning its constitutionality were not initiated before the Tribunal by any of the authorized entities. The Tribunal could not act *ex officio* with respect to that issue.

[7] These are situations where the actions of CT judges are covered by the constitutional notion of "exercising an office" (cf. Art. 195 (1) of the Constitution).

one was aimed at a frontal questioning of the Amending Act as *a limine* unconstitutional, unjust and unsustainable under any circumstances in the standards of a democratic state ruled by law. If that approach were taken the Tribunal should from the very beginning actually deny the act the of a law, or at least refuse to be bound by presumption of its constitutionality and in consequence pass its adoption over in silence, seeking the legal framework for adjudication in other sources. The need for such action would have originated from the supremacy of the Constitution and its direct application, as well as the imperative for the constitutional court to prevent obstruction of its work regardless of legal measures it has been equipped with. Therefore, the Tribunal would have to use the ad hoc created instruments, guided by the supreme idea of a state ruled by law, which, however – taking, of course, into account any obvious and serious differences – would unavoidably direct it towards a time adjusted Radbruch formula. The Tribunal did not take up this challenge and – justifiably – chose the solution which was perhaps less spectacular, not without defects, but instead more strongly rooted in the constitutional system of the state, harmonized with its systemic position, and also not undermining presumption of constitutionality of the CT Act and leaving evaluation of its compliance with the Constitution to the relevant review procedure. That is why, the latter manner of response of the Tribunal, which ultimately became incorporated into the decision in case no. K 47/15, given the earlier outlined reservations and point of reference, may be called legalistic.

4. A VICIOUS CIRCLE

The concept to leave of certain provisions of the Amending Act is based on the antinomy of self-reference called by the Tribunal "jurisprudential paradox". The above issue should be considered in two variants: theoretical and dogmatic.

In the former, one may be certain the subjecting the provisions of the CT Act to a constitutional review according to the rules specified by that statute would result in self-destruction of a CT judgment. The basis of

adjudication should not be at the same time an object of legal evaluation by the constitutional court. In that way the Tribunal would invalidate not only the review process, but as a result would also undermine legality of a verdict. If the provisions of the CT Act were found unconstitutional, their application to issuing a verdict would mean that the Tribunal post factum declared an absence of a basis for its decision. This conclusion is independent of the substance of the CT Act (object of control) since the relationship between the controlled norm and the norm specifying the conditions for review by the constitutional court is of utmost importance.

With such an approach, omission of certain provisions of the Amending Act, as the CT did, would not only be advisable, but actually inevitable. It was underlay by logical necessity and the duty of the constitutional court to choose such interpretational variant of the procedural law which would guarantee formal safety of its judgments, in particular would not lead to self-destruction of official acts.

Less obvious conclusions may be drawn from the other approach, i.e. relativisation of the "jurisprudential paradox" to dogmatics of the constitutional law, especially the Polish regulation of the consequences of CT verdicts finding a statute unconstitutional. Taking into account the conditions of a constitutional state, that is passing from the realm of theory to the area of the law in force, shows that – given certain boundary conditions – the antinomy of self-reference raised by the identification of the object of control and the basis of adjudication about that object under the constitutional review of the CT Act may be apparent or – from a somewhat different perspective – may not have any legal significance. It undoubtedly occurs in theoretical models and in the idealizing conviction of invalidity as a universal consequence of defects of normative acts in public law, though limitation of the discussion to specific legal institutions, in force *hic et nunc*, eliminates the main jurisprudential dangers referred to by the Tribunal in case no. K 47/15. Therefore, one may venture a thesis that the Polish constitutional system, without reaching out to the doctrine of leaving out a statute, would be able to minimize significantly, if not eliminate negative effects of the "jurisprudential paradox".

One of the unquestionable elements of the constitutional regulation of effects of CT judgments on hierarchical compatibility of laws is their absolute finality. *De constitutione lata* – which was emphasized also in case

no. K 47/15 – there is no room for divagating in this respect, whether by constructing the procedures for verifying the tenor of constitutional court verdicts or controlling their formal conditions. Specificity of CT judgments is reflected primarily by their relation to the area of effectiveness of the law, which radically distinguishes them from the decision of those courts which are focused exclusively on the area of application of the law. The certainty of the act of a normative change as a result of a CT judgment requires indication of a precise and irreversible point of time at which such a change takes place. Therefore, should there be any procedure for controlling constitutional court decisions, it should have – like the object and legal effects of a CT judgment – at least a direct normative outline in the Constitution (at least as regards its jurisdictional framework). Its existence must not be conjectured or proved by systemic necessity. All the more so, it must not be constructed *per analogiam*, e.g. as a copy of instance mechanisms of the system of common or administrative courts. This is by no means excessive formalism. Under the Constitution currently in force the category of defective, invalid or non-existent judgments of the Tribunal has no raison d'être. It should be noted that negating finality of the Tribunal's judgments is hard to maintain also in theory. A system of law must always refer to the institutions which bindingly and officially shape legal relations and definitively resolve disputes, including disputes concerning constitutionality of law. Finality of judgments blocks unending recourses, which stabilizes the legal order and guarantees its predictability.

An immanent attribute of the concept of finality is also the unconditional prohibition to reopen the proceedings before the Tribunal[8] it is this very feature, combine with the temporal scope of the consequences of the constitutional court judgment that may *prima facie* substantiate the previously proposed thesis that in case no. K 47/15 it was not necessary to leave out certain provisions of the CT Act, and the risk of circular reasoning (so-called jurisprudential paradox) was apparent.

The point is, first of all, that the Polish system of consequences of CT judgments – to put it simply – was based on the concept of rebuttal of the

[8] This is a permanent view of the Tribunal (e.g. CT decisions: of 18 December 2003, no. SK 20/01, OTK ZU no. 9/A/2003, item 105; of 17 July 2003, no. K 13/02, OTK ZU no. 6/A/2003, item 72.

statute questioned by the constitutional court. This means that the existing statute is declared void *pro futuro* and it does not refer to the situation from before the CT judgment. The consequences of a judgment in the area of application of law is something different. This issue has been resolved by making it possible to reopen some of the individual proceedings and in this regards we may refer to the retroactive effect of a CT judgment[9]. On the other hand, in the area of lawmaking the legislator has not adopted the concept of invalidity of unconstitutional normative acts, that is has not accepted that their application may be undermined *ex tunc*. This effect appeared only in the jurisprudential practice of the Tribunal with respect to the statutes which had been passed with gross procedural defects or in violation of the standards of legislative competence[10].

Therefore, if it were to be assumed that the decision of the Tribunal that the CT Act was unconstitutional, issued on the basis thereof, is – first – final and cannot be challenged in any circumstance, and – second – it refers only to the future and does not concern the situations from before the CT judgment, than the risk of finding the judgment, whatever it was, invalid would be practically non-existent. Although this view may be in conflict with common intuitions or even be against some theoretical

[9] See: Art. 190 (4) of the Constitution.

[10] The power of the Tribunal to find a legislative process invalid with *ex tunc* effect with a view to qualified defects of that process is problematic on the grounds of the current Constitution and may be an object of argument. The position negating the existence of such an effect of a CT judgment is based on the assumption – to put it simply – that there are no legal grounds for such a far reaching interference of the constitutional court into the nature of legislative powers of the Sejm, in fact shifting the limits of the division of powers in the state by an act of lawmaking by the Tribunal. It is also noted that the constitutional system of legal effects of CT judgments is categorially homogenous, does not differentiate between the consequence of procedural and material incompliance and does not decree the Tribunal's rights to create new derogative effects of its judgments. And, although those objections remain topical (they are shared also by the author of this article), at the moment they are professed by the minority and lie on the antipodes of the main current of the CT practice. An example of a judgment with which the Tribunal invalidated a statute because of irregularities in the course of its enactment by the Sejm is also the commented judgment in case no. K 47/15. Thus, it should be assumed that the re-reference to the consequence of invalidity when examining constitutionality of the CT Act, although – as has been mentioned – dogmatically controversial, totally matched the hitherto jurisprudential line of the Tribunal.

findings, in the light of the Polish constitutional solutions it is nothing extraordinary that – conventionally – unconstitutionality of a regulation affects the system of law only after it has been stated by the Tribunal, with the exclusion of retroaction. Therefore, also such a judgment of the Tribunal would be final, and any possible charges as to its contents or absence of the legitimizing function of the procedure of its passing should be treated as arguments in a scientific debate or a journalistic commentary, but surely not as raising doubts as to its legality.

As is known, however, in case no. K 47/15 from the very beginning the charges raised by the initiators of the proceedings before the Tribunal included the issue of the correctness of the legislative procedure for passing the Amending Act. The potential consequences of the CT judgment would be in this situation farther reaching and would actually be tantamount to – in accordance with the view of the Tribunal – invalidation of the entire legislative process, that is repeal of the unconstitutional statute *ab ovo*. This, in turn, otherwise than in the previous event discussed, would also bring back the problem of the "jurisprudential paradox" since the repeal of the CT Act with retroactive effect would also invalidate the basis of adjudication in case no. K 47/15. The finality of the CT judgment would this time be in favour of the decision to omit the CT Act. Given such an approach, the antinomy of self-reference would be actually based on real grounds and the constitutional court could not miss this issue. However, taking into account the binding constitutional framework for the operation of the Tribunal it should be added that apart from the previously mentioned prerequisites and restrictions for omission of the CT Act, there is an additional precondition for this concept, namely the existence of a proper criterion for a constitutional review. Should the Tribunal examine the challenged provisions from the viewpoint of competence for or procedure of their issue, the antinomy of self-reference would occur not only theoretically, but it could be confirmed also as a problem of the prevailing dogmatics of the constitutional law. A tacit assumption for such an approach is recognition that the CT may pass judgments with an *ex tunc* effect, that is find legislative proceedings and its product – a statute – invalid.

Finally, it is necessary to consider a position assuming an absence of any relationship between the basis of adjudication by the Tribunal in

a specific case and defectiveness of its judgment. It may argued that finality of CT judgments and the consequent absolute ban on reopening the proceedings at least weaken peremptoriness of charges invoking negative consequence of procedural irregularities (regardless of their nature and causes). In this sense, finality of a judgment will always, as if automatically, adjust irregularities arisen in the course of a constitutional review, more precisely – it will level off their weight for the existence and validity of a CT judgment. That, in turn, means that finality of a judgment maybe used to justify *post factum* actually any irregularity in the work of the constitutional court[11]. That is why it seems that omission of the CT Act should not be linked with the issue of the consequences of a CT judgment passed in such circumstances and their temporal scope of impact. This concerns likewise the arguments of those who are in favour of omission of the CT Act because they fear that the entire process of its review will be invalidated, and the opponents of such an approach who believe that the consequences of CT judgments are future-oriented and carry no such threats. The consequences of a CT judgment not only may not *ex ante* determine procedural actions of the Tribunal in the application of law area (e.g. defining procedural framework for adjudication), but also are not able to undermine *ex post* the principles of finality of a judgment which – even if they would seem lame in a common or journalistic view – in legal categories is a rightful and irrefutable act of the judicial authority.

Should, therefore, the thesis that procedural oversights of the Tribunal are of incidental significance since Art. 190 (1) of the Constitution ultimately prejudges that a CT judgment – regardless of those oversights – is nonetheless legitimized by its finality be defended? It seems that the above statement, though formally correct, is, however, overly simplified. First of all, finality of a judgment does not relieve the Tribunal of the duty to apply the law in force correctly, taking into account specificity of individual stages of the review process (i.e. determination of the adjudication framework, and then performance of a constitutional review *sensu stricto*). It is not altered by the fact that legal norms addressed to

[11] Reducing the matter to absurdity, it may be said that also a judgment passed by the CT without application of any CT Act (a statute defining the organization of and procedures for the CT) will be final.

the constitutional court are , *lex imperfecta* (which is nothing unusual in the constitutional law) and – as has been mentioned – do not affect the legal force and consequences of a judgement. From this viewpoint it is, however, understandable that when at the initial phase of considering case no. K 47/15 faced the problem of identity of the object of control and the basis of adjudication it had to address and evaluate it. It was by no means relieved of that duty by the attribute of finality of a judgment stipulated by law in Art. 190 (1) of the Constitution, which materialized upon conclusion of the entire review proceedings[12].

A consequence of rejecting a dogmatic thesis that application of the challenged provisions of the CT Act to examination of constitutionality of those provisions may cause invalidity of the entire proceedings before the Tribunal must also be an observation that the sole argument of the Tribunal which could justify omission of the CT Act as the basis of adjudication in case no. K 47/15 was materialization of the so-called jurisprudential paradox. Whether that paradox occurred should not be disputed since the finding of a given relationship of regulations in the realities of those proceedings is a fact[13]. However, it should be re-considered whether the so-called jurisprudential paradox could play an important role in the constitutional review process, in particular whether it justified omission of selected provisions of the CT Act by the Tribunal.

The concept of judicial review of the constitutionality of a statute boils down to a correlation of three elements: model of control, object of control and basis for adjudication. The first element is a point of reference determining the standard of correctness (compliance) of the examined statute. The second element, i.e. the object of control, is a normative act (or a part thereof) of a lower-ranking legal force than the model, whose contents, competence for issuing or manner of passing are verified by way of special procedure before the constitutional court. That procedure is the last component – it determines the basis for adjudication as to hierarchical compatibility of legal norms; it should be noted at this point

[12] Finality is an attribute of a CT judgment (i.e. a product of the constitutional review process after it has been officially initiated), not of the review proceedings.

[13] As is known, the same statute was to be simultaneously the object of control and the basis of control proceedings before the Tribunal.

that it is not only an instrument used to determine the relationship of compatibility or non-compatibility between the model of control and the object of a challenge, but also realizes its own autonomous values which are a permanent acquis of modern democratic states rules by law. Each of the constitutional review elements refers to a different regulation. There is no doubt that the model of control must not be identical with the object of control, and this requirement is not linked only with the hierarchical relationship that should prevail between the two. Similarly, distinction between the object of control and the basis of adjudication should be treated as compulsory. Potential identity of those regulations takes away one of the indispensable components of the concept of constitutional review.

The concept of constitutional control of a statute refers to the original assumptions of the system of law, which are not defined by the "written law" (positive law). They are accepted and used for ordering and clarifying the function of the constitutional court in acknowledgment of a non-alternative nature of the mechanism constructed around the above-mentioned three elements. Distinction and separation of the model of control, object of control and basis for adjudication are, therefore, conceptually indispensable so as to allow for a hierarchical review of statutes within the paradigm of the constitutional judicature prescribed by the Polish Constitution. That is why, distortion of those relations or reduction of some of their planes or elements may lead to the "jurisprudential paradox", which is of significance for the proper functioning of the CT as the court for the law.

5. FINAL COMMENTS

Regardless of the assessment of the CT judgment on its merits and the underlying arguments, omission of certain provisions of the CT Act in case no. K 47/15 makes it evident that ex-post control of constitutionality of a statute describing the organization and procedures of the Tribunal is a serious systemic challenge. In the future, it would be advisable to consider a constitutional solution which would restrict the risk of adjudicating on

constitutionality of the regulation of the CT Act on the basis of those very regulations. The existing procedures are satisfactory, which also refers to preventive constitutional control. First, such control does not exclude the option that upon its coming into force the CT Act could be again referred to the Tribunal, which updates the problem of the framework of adjudication; and, second, in Poland preventive control is restricted by the principle adversarial procedure and, therefore, the main constitutional problems may – by the will of the initiator – remain unnoted.

Also the Tribunal's concept of leaving out the CT Act because of the so-called jurisprudential paradox has its shortcomings. It would suffice that all provisions of the CT Act concerning the basis of adjudication are contested and the Tribunal would face a serious difficulty in reconstructing the norms of proceeding that would bind it. Given the fact that all provisions of the CT Act in force are left out because of the identity of the object of control and the basis for adjudication, it seems that the Tribunal will be forced to apply the Constitutional directly and in order to resolve the case on hand extensively employ the so-called judge-made law. However, this model is poorly rooted in the tradition of the Polish system.