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LESSONS FROM THE PAST: THE IMPORTANCE OF JUDICIAL INDEPENDENCE AND THE RULE OF LAW THROUGH THE LENS OF HISTORICAL AND RECENT CONSTITUTIONAL CRISES IN THE UNITED STATES AND POLAND

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Summary. In the early days of the United States, the fledging U.S. Supreme Court was still defining and establishing its role in the newly created government. The events leading up to Marbury v. Madison have a number of parallels to the constitutional crisis in Poland beginning in 2015 and involving the Polish Constitutional Tribunal. Both the U.S. constitutional crisis of the early 1800s and its aftermath, as well as the more recent events in Poland illustrate the importance of judicial independence and the rule of law to the proper functioning of strong democratic legal systems.

Keywords: judicial independence, rule of law, U.S. Supreme Court, constitutional crisis, Poland.

Lekcje z przeszłości: Znaczenie niezawisłości sądów i rządów prawa z perspektywy historycznych i niedawnych kryzysów konstytucyjnych w Stanach Zjednoczonych i Polsce. We wczesnych latach istnienia Stanów Zjednoczonych, raczkujący Sąd Najwyższy USA wciąż definiował i ustanawiał swoją rolę w nowo tworzonym systemie rządów. Wydarzenia prowadzące do sprawy Marbury przeciwko Madison mają wiele podobieństw do kryzysu konstytucyjnego w Polsce, który rozpoczął się w 2015 r. i koncentrował się wokół zasad funkcjonowania polskiego Trybunału Konstytucyjnego. Zarówno amerykański kryzys konstytucyjny z początku XIX wieku i jego następstwa, jak i niedawne wydarzenia w Polsce ilustrują znaczenie niezawisłości sądów i rządów prawa dla prawidłowego funkcjonowania silnych demokratycznych systemów prawnych.

Słowa kluczowe: niezależność sądownictwa, rządy prawa, Sąd Najwyższy USA, kryzys konstytucyjny, Polska.

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1. Introduction

In the early days of the United States, the fledging U.S. Supreme Court was still defining and establishing its role in the newly created government. In the 1803 case of *Marbury v. Madison*, the U.S. Supreme Court seized the opportunity to confirm its co-equal status to the other branches of the federal government by acting as a check on the elected branches while simultaneously establishing its role as the final arbiter of the meaning of the U.S. Constitution (*Marbury*, 1803, 5 U.S. 137, pp. 137-180). At the same time, Chief Justice Marshall

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demonstrated significant political savvy by avoiding a constitutional showdown between the judicial branch and the other branches of government. The events leading up to *Marbury v. Madison* have a number of parallels to the constitutional crisis in Poland beginning in 2015 and involving the Polish Constitutional Tribunal. Both the U.S. constitutional crisis of the early 1800s and its aftermath, as well as the more recent events in Poland illustrate the importance of judicial independence and the rule of law to the proper functioning of strong democratic legal systems.

2. The Historical Background: *Marbury v. Madison*

Marbury v. Madison is the foundation of any study of U.S. constitutional law. By way of background, when the U.S. Constitution was adopted in 1787, the young country was largely divided between the Federalists, who supported a strong national government, and the Anti-Federalists, who preferred to keep more power for the individual states and for the people (Denning & Massey, 2019, p. 5). The first two presidents of the new United States, George Washington and John Adams, were both Federalists and they and their supporters spent much time building and strengthening national institutions, such as the Congress and the federal judiciary (*Ibid.*, p. 6).

In 1800, an Anti-Federalist, Thomas Jefferson, was elected as the third U.S. President unseating the Federalist President John Adams (*Ibid.*). Just five weeks before leaving office in March 1801, President Adams successfully appointed his Secretary of State John Marshall as the new Chief Justice of the U.S. Supreme Court (due to the retirement of the previous Chief Justice) (Dorf, 2009, pp. 14-15).

In anticipation of losing power, in February 1801, the outgoing Federalist-controlled Congress enacted the 1801 Judiciary Act and another statute, the Organic Act of the District of Columbia, which together authorized President Adams to appoint several new federal judges and new justices of the peace for the District of Columbia (*Ibid*., pp. 15-16). Because the Federalists were losing control of the presidency and the Congress, they wanted to ensure that the judicial branch was staffed by loyal Federalist judges who would prevent the new anti-Federalist administration from undoing all that they had accomplished (Denning & Massey, 2019, pp. 6-7).

The Organic Act of the District of Columbia was passed on Friday, Feb. 27, 1801 (Dorf, 2009, p. 16). President Adams submitted his judicial nominations to the Senate the following Monday and they were confirmed by the Senate on Tuesday (*Ibid*., pp. 16-17). One of Adams's appointments was William Marbury, a Georgetown banker and investor (*Ibid*.). President Adams signed the judicial commissions, including Marbury's, the same night as the confirmations were made, then left town (*Ibid*., p. 17). The signed commissions were immediately delivered to then Secretary of State John Marshall for affixing of the seal of the United States and delivery to the beneficiaries of the commissions (Denning & Massey, 2019, p. 7). Marshall immediately placed the U.S. seal on the signed judicial commissions (Dorf, 2009, p. 17). Some of the commissions were delivered, but Marbury's commission was not delivered before Marshall left office that night (*Ibid*., pp. 17-18).

President Jefferson took office the next day and his staff discovered the undelivered commissions (*Ibid*., 18). President Jefferson ordered his new Attorney General, Levi Lincoln, to withhold delivery (*Ibid*.). William Marbury subsequently sued James Madison, the new Secretary of State, seeking an order called a writ of mandamus to compel Secretary Madison to give Marbury his judicial commission (Denning & Massey, 2019, p. 7).

Marbury's lawsuit was filed in the U.S. Supreme Court now headed by the newly installed Chief Justice John Marshall (*Ibid*.). The Congress delayed the Supreme Court's ability to hear the case by suspending the Court's term for one year (Dorf, 2009, p. 21). When the Supreme Court resumed its work in 1803, it faced a dilemma. If the Court issued an order telling

President Jefferson that he must deliver the judicial commissions, they feared he would not comply, thereby undermining the authority and legitimacy of the nascent Supreme Court and setting a bad precedent for the future (*Ibid*., p. 28).

Ultimately, Chief Justice Marshall and his colleagues demonstrated their political acumen by writing a unanimous decision for the Court which held that while Marbury was entitled to his judicial commission, the Court lacked jurisdiction under the 1789 Judiciary Act to order the President to deliver the commission (*Ibid*., pp. 28-30). The Supreme Court found the relevant portion of the Judiciary Act to be unconstitutional, thereby establishing the role of the U.S. Supreme Court in reviewing and deciding the constitutionality of acts of Congress (Denning & Massey, 2019, p. 16). At the same time, the Court avoided a political showdown with the President (*Ibid*.). Ever since *Marbury v. Madison*, it has been accepted in U.S. law that the Supreme Court has the power of judicial review over the constitutionality of actions by the other branches of government (Chemerinsky, 2011, p.45). The ability of the highest court in the land to act as a check on the unconstitutional acts of the other branches of government is a key component of separation of powers that avoids tyranny and affirms the rule of law.

3. Comparisons to Poland's Constitutional Crisis

Turning now to the Constitutional Crisis in Poland beginning in 2015, that crisis has been called "the greatest constitutional dispute in the modern history of Poland" (Wiacek, 2021, p. 16). There are several similarities between Poland's recent constitutional crisis and what occurred in the early years of the American republic. The following description of the Polish Constitutional crisis is not intended to be a comprehensive summary of all the relevant events. Rather, it highlights those facts and actions that have parallels to the facts underlying *Marbury v. Madison*.

First, both constitutional crises occurred shortly after the adoption of a new constitution. The Polish constitutional crisis began in 2015, 17 years after the adoption of the new Polish Constitution in 1997 (Matczak, 2018, pp. 2, 5). A span of 16 years separated the U.S. Constitution of 1787 and the constitutional crisis resolved by *Marbury v. Madison* in 1803. Thus, both are early tests of the new constitutional order involving the highest constitutional court in the land.

Second, in October 2015 during the last session of the outgoing Polish Parliament, or Sejm, it elected five new judges for the Polish Constitutional Tribunal pursuant to a new Act on the Constitutional Tribunal adopted by the Sejm a few months earlier in June 2015 (Szuleka, Szwed, & Wolny, 2016, pp. 16-17). These actions occurred shortly before parliamentary elections in October 2015 and a looming change in political power in which the Law and Justice (PiS) party took control of the Sejm (*Ibid*., pp. 17, 19). Similarly, the outgoing Federalist-controlled U.S. Congress enacted a new law on the judiciary and confirmed the appointment of several new federal judges in the winter of 1801, just before the newly elected Anti-Federalist Jefferson administration was to take office (Dorf, 2009, pp. 15-16). Thus, in both cases, an outgoing political party attempted to appoint justices at the last minute who they believed would be sympathetic to that party's work.

Third, Polish President Duda, the PiS presidential candidate who was elected in the summer of 2015, refused to recognize the recently appointed constitutional judges and administer the oath of office (Wiacek, 2021, pp. 17-18). Similarly, the newly elected U.S. President Jefferson refused to deliver the judicial commissions to the judges appointed by the outgoing government (Dorf, 2009, p. 18).

Fourth, the newly elected Sejm declared the elections of the constitutional judges by the previous Sejm to be null and void due to procedural irregularities and then re-appointed new judges for the same vacancies on the Constitutional Tribunal in December 2015 (Wiacek, 2021, pp. 16, 18). Some of those judges were called upon to adjudicate the legality of the actions

taken by the government during this crisis (*Ibid.*, p. 20). In the case of *Marbury v. Madison*, John Marshall had been Secretary of State in the outgoing Adams administration but then became the Chief Justice of the U.S. Supreme Court during the new Jefferson Administration (Dorf, 2009, pp. 14-15). He was the Chief Justice when the U.S. Supreme Court was asked to rule on the legality of the judicial appointments in 1801 and to order President Jefferson to deliver the judicial commissions (*Ibid.*, p. 20). In both cases, some justices were called upon to demonstrate their commitment to the rule of law rather than political party affiliation.

The fifth observation contains both a similarity and a difference between these constitutional crises. In both cases, the highest constitutional court had to decide whether an executive act was merely ministerial and not legally operative or whether the refusal to perform the act had legal significance. In the case of Poland, the act was the publication of the Constitutional Tribunal's decision on the legality of the government's actions in the official Journal of Laws (Szuleka, Wolny, & Szwed, 2016, p. 25). In the United States, the act was the physical delivery of the signed judicial commissions to the beneficiaries of those appointments (Denning & Massey, 2019, p. 7). U.S. Supreme Court Chief Justice Marshall opined that the delivery of a signed and sealed commission was simply a ministerial act that had no legal significance and did not affect the validity of Marbury's appointment to the bench (*Marbury*, 1803, 5 U.S. 137, pp. 150-151). In the case of Poland, however, the refusal to publish the Tribunal's decision has more legal significance because Article 190 of the Polish Constitution requires the publication of the court's decisions in the official journal (The Constitution of the Republic of Poland, art. 190).

4. The Importance of Independent Judicial Review

The U.S. constitutional crisis of *Marbury v. Madison* was resolved through creative judicial interpretation of the Judiciary Act of 1789 to deprive the Supreme Court of the power to issue a writ of mandamus ordering the president to deliver the judicial commissions thereby avoiding a political confrontation between the president and the court (Denning & Massey, 2019, p. 16). In Poland, the crisis has yet to be fully resolved. As of the end of 2022, proceedings challenging some of the actions connected to the constitutional crisis in Poland continue and the PiS party remains in control of the Polish government. Regardless, both crises have lessons to teach about the importance of independent judicial review of potentially unconstitutional legislative and executive acts.

Article 188 of the Polish Constitution provides that the Constitutional Tribunal shall adjudicate the conformity of statutes and "legal provisions issued by central State organs" to the Constitution but does not expressly authorize the Constitutional Tribunal to rule on the conformity of other executive or legislative acts, such as the Sejm's resolution electing judges (Wiacek, 2021, p. 25). The U.S. Constitution is even less explicit about the role of the Supreme Court in this regard. The U.S. Constitution does not expressly give the Supreme Court the power to review and decide upon the constitutionality of *any* acts by the other branches of the federal government (Denning & Massey, 2019, p. 19-20). However, despite this silence, in the case of *Marbury v. Madison*, Chief Justice Marshall explained why judicial review of legislative acts is necessary, concluding that: *"It is emphatically the province and duty of the judicial department to say what the law is"* (*Marbury*, 1803, 5 U.S. 137, p. 177).

In the *Marbury v. Madison* opinion, Chief Judge Marshall reasoned that the Supreme Court must have the power of judicial review because:

1. A written constitution is meaningless if the other branches can ignore it at will (Denning & Massey, 2019, p. 17). It is necessary for the judicial branch to enforce the constitutional limits for the benefit of the people, in other words, to act as a check on the other branches (*Ibid.; Marbury,* 1803, 5 U.S. 137, p. 178). This system of checks and balances is crucial to maintaining the rule of law and preventing tyranny. Article 10 of the Polish

Constitution recognizes this essential fact when it provides that: "The system of government of the Republic of Poland shall be based on the separation of and balance between the legislative, executive, and judicial powers" (The Constitution of the Republic of Poland, art. 10). Accordingly, despite the lack of explicit constitutional language regarding judicial review of some governmental acts, it is necessary to give the Polish Constitutional Tribunal the power to review the constitutionality of the Sejm's actions in appointing judges to maintain this system of checks and balances in a democratic society based on the rule of law.

2. Article III of the U.S. Constitution states that "the judicial power of the United States shall be vested in one Supreme Court and in such inferior Courts as Congress may from time to time ordain and establish" and extends the judicial power to *all* cases, in law and equity, arising under the Constitution (The U.S. Constitution, art. III, §§ 1 and 2). Thus, the Supreme Court must be able to enforce all of the provisions of the Constitution, including the president's power to nominate and appoint justices with the advice and consent of the Senate and the separation of powers between branches (*Marbury*, 1803, 5 U.S. 137, p. 177). If the Supreme Court were only able to review the legality and constitutionality of some acts, it would not be vested with all the judicial power. A similar argument can be made about the Polish Constitution because Article 10 vests "the judicial power" in the "courts and tribunals" (The Constitution of the Republic of Poland, art. 10). Accordingly, the Polish Constitutional Tribunal also should have the power to rule on all legal and constitutional questions that may arise.

3. In some provisions, the U.S. Constitution specifically directs the Supreme Court to determine the constitutionality of certain acts, for example, as part of its original jurisdiction over cases affecting ambassadors and foreign consuls; thus it is clear that the framers intended the Court to have this power and the Court should be empowered to determine the constitutionality of other legislative and executive acts as well (Denning & Massey, 2019, p. 17). Article 188 of the Polish Constitution likewise specifically empowers the Constitutional Tribunal to examine statutes, international agreements and legal provisions issued by central state bodies for legality, i.e., normative legislative resolutions (The Constitution of the Republic of Poland, art. 188). Thus, it may be implied that the Constitutional Tribunal also should have the power to review other government acts as well, not just the acts explicitly listed in Article 188.

4. The Supremacy Clause in Article VI of the U.S. Constitution provides that the U.S. Constitution is the Supreme Law of the Land, and that legislators, executive officials, and judges shall be bound thereby (The U.S. Constitution, art. VI.). Article 8 of Poland's Constitution also makes it the supreme law of the land and the Polish Constitutional Tribunal is the body charged with ensuring all government acts comply with the Constitution (The Constitution of the Republic of Poland, art. 8; Szuleka, Wolny, & Szwed, 2016, p. 7). Separation of powers requires that the highest constitutional courts maintain the supremacy of the constitution by acting as a check on the other branches of government, ensuring that their actions also comply with the constitution (Denning & Massey, 2019, pp. 17-18).

5. Article VI requires judges to take an oath supporting the U.S. Constitution (The U.S. Constitution, art. VI; Denning & Massey, 2019, p. 18). Judges would violate this oath by upholding any unconstitutional laws (*Ibid*.). In Poland, this oath is required by statute rather than by the Constitution, but the underlying principle is the same (The Constitutional Tribunal Act of 25 June 2015, art. 21).

5. Implications for the Rule of Law

The decision in *Marbury v. Madison* has been criticized by some as judicial overreach that led to the growth of the federal government and concentration of power at a national level at the expense of states (Lubbock Avalanche-Journal, 2016). Following the decision, President Jefferson stated his view that the Supreme Court should not be able to exercise such unchecked

and therefore dangerous power (*Ibid*.). Critics have also pointed out that Chief Justice Marshall was wrong not to recuse himself from the case (Eastman, 2005, p. 714-15).

In hindsight, however, most legal scholars accept that the Supreme Court should have the power of judicial review (*See e.g*., Chemerinsky, 2011, p. 45). Chief Justice Marshall's position that the courts should review the constitutionality of legislative acts was not new. U.S. law was derived from English law, which contained precedent for judicial review in the writings of William Blackstone and from Lord Coke in *Bonham's* case (Denning & Massey, 2019, p. 18). In addition, state courts had been reviewing and striking down state government actions under state constitutions for some time (*Ibid*.). Having judicial review of the other branches of government is a check on their actions, ensures government compliance with the Constitution, and prevents tyranny of the majority at the expense of a vulnerable minority.

In the case of Poland, the actions of the Polish government during this constitutional crisis have undermined the perception of independence and legitimacy of the judicial branch and the system of constitutional checks and balances because some of the justices are perceived as being illegitimately appointed and too closely connected to politics. As the authors of the 2021 book on "Legislative and executive powers in Poland" state, the government's actions since 2015 "paralyse the Court and significantly diminish its role as a body capable of exercising real control over the constitutionality of the activities of the Parliament" (Witkowski, et al., 2021, pp. 114-15). Politicizing the judiciary is contrary to the Polish Constitution, which provides in article 195 that judges of the Constitutional Tribunal must be independent and must not belong to any political parties or engage in political activities during their term in office (The Constitution of the Republic of Poland, art. 195).

Maintaining respect for the rule of law and judicial independence in Poland has at least one major advantage that the United States government does not have, however. Poland is part of the European Union (EU) and has EU law and institutions to assist it in maintaining adherence to the rule of law and judicial independence in times of crisis.

In October 2015, the Minister of Foreign Affairs for Poland, Mr. Witold Waszczykowski, sent a letter to the European Commission for Democracy Through Law (also known as the Venice Commission) requesting the Venice Commission's opinion on the constitutionality of the 2015 Act to amend Poland's Constitutional Tribunal (*Opinion on Amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland*, 2016, CDL-AD(2016)001, ¶ 1). The Venice Commission appointed rapporteurs and a delegation from the Commission visited Warsaw to consult with representatives of the different branches of the Polish government. (*Ibid*. at ¶¶ 2 – 3). The Venice Commission then issued its first Opinion in March 2016. In that Opinion, the Commission stated that as long as the constitutional crisis relating to the Constitutional Tribunal of Poland remains unresolved, the rule of law, democracy, and human rights are in danger (*Ibid.* at ¶ 135). The Commission recommended a number of actions to the Polish government, including a principled and balanced debate regarding the Tribunal's procedures and organization and possible constitutional amendments (*Ibid.* at ¶¶ 139-141).

Subsequently, Poland adopted a new Act on the Constitutional Tribunal of 22 July 2016. The Secretary General of the Council of Europe, Mr. Thorbjørn Jagland, requested a rapid examination as to whether this new Act on the Constitutional Tribunal of Poland of 2016 is in line with the Commission's March 2016 Opinion (*Opinion on the Act on the Constitutional Tribunal*, 2016, CDL-AD(2016)026-e, ¶ 1). In its second Opinion on this matter issued in October 2016, the Venice Commission stated that the 2016 Act contained some improvements, but the effect of the improvements was "very limited" because the Act operated in a manner to delay and obstruct the work of the Constitutional Tribunal and to undermine its independence (*Opinion on the Act on the Constitutional Tribunal*, 2016, CDL-AD(2016)026-e, ¶¶ 121-123). The Commission concluded that by prolonging the constitutional crisis, the Polish Parliament

and the Government have "obstructed the Constitutional Tribunal, which cannot play its constitutional role as guardian of democracy, the rule of law and human rights" (*Ibid*., ¶ 128).

In both these opinions, the Venice Commission identified several fundamental principles with respect to the rule of law, including first and most importantly, that "legislation and actions of the executive must conform to the Constitution" (*Opinion on the Act on the Constitutional Tribunal*, 2016, CDL-AD(2016)026-e, ¶ 10). The Commission stated that a refusal to publish the Constitutional Tribunal's judgments would be contrary to the rule of law (*Opinion on Amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland*, 2016, CDL-AD(2016)001, at ¶ 143). It also stated that legislative and executive action "should be effectively reviewable for its constitutionality and legality by an independent and impartial judiciary" (*Ibid*.). According to the Commission, "'Independent' means free from external pressure and not subject to political influence or manipulation" (*Ibid*.).

When the Polish Government continued its refusal to resolve this crisis in a way that demonstrated respect for the rule of law and an independent judiciary, the European Commission requested the Council of the European Union to launch a procedure against Poland to protect the rule of law pursuant to Article 7 of the Treaty on the European Union (Witkowski, et al., 2021, pp. 114). The European Commission initiated an Article 7 procedure in December 2017 in response to risks to the rule of law and EU values in Poland (Rule of Law in Hungary and Poland: plenary debate and resolution, 2022). However, as of the end of 2022, the EU Member States have not yet voted on whether there is "a clear risk of a serious breach" of the EU's common values, the next step in the Article 7 procedure (*Ibid*.). In the meantime, the European Court of Justice ruled in February 2022 that the EU may withhold funds from Poland if it breaches rule of law principles (*Poland v. Parliament and Council of the European Union*, 2022, C-157/21) and the EU has, in fact, withheld some funding (Bodoni, 2022; Schmitz, 2022). Desire to access EU funds for infrastructure and other needed projects may be a sufficient incentive for the Polish government to take further steps to ensure respect for the rule of law and judicial independence. As of the end of 2022, however, the constitutional crisis in Poland remains unresolved. Ultimately, it may take new elections and education of the polity regarding the importance of judicial independence and the rule of law to fully resolve this constitutional crisis and restore confidence in the judiciary.

6. Conclusion

The U.S. constitutional system survived its early crisis and became one of the most respected judicial systems in the world. It certainly has experienced subsequent crises, but the United States has overcome these constitutional crises and often has been strengthened by them. Poland is at a distinct advantage in its position as a Member State of the EU and with a modern-day constitution that incorporates many of the constitutional teachings of history. Poland also has a well-educated bench and bar who have been trained in EU law, human rights, and political theory and who will be instrumental in educating the public and ensuring respect for the rule of law and judicial independence. For these reasons, we may be hopeful that the famous saying of the late Dr. Martin Luther King Jr. will prove true: "The arc of the moral universe is long, but it bends towards justice."

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