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CONSTITUTIONAL COURTS AND REPRESENTATIVE DEMOCRACY— A KELSENIAN PERSPECTIVE***

Abstract

In the presented article we develop the thesis that constitutional courts may be treated as one of the key elements guaranteeing the proper functioning of representative democracy if they secure the democratic “chain of delegation”. Following the theory of Hans Kelsen, we employ a normative concept giving the answer to how a constitutional court should act to fulfil such a role. According to Kelsen’s perspective, the main threat to representative democracy is the “alternative legislative procedure”, a non-constitutional form of legislation based solely on the political will and in consequence deconstructing the constitutional chain of delegation. The guarantee of constitutionality means the restoration of an equal representation in the legislative procedure based on the majority-minority rule. As the guardian of the democratic legislative procedure, the constitutional court should be a ground for the “virtual representation” of all the parties to a democratic dispute. In result it prevents the transformation of representative democracy into majority democracy.

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I. INTRODUCTION

Political changes taking place in recent years in the so-called Western and Central European democracies affect basic elements of their current constitutional identity. One of them is the role of the constitutional court in representative democracy. This problem is not new, especially on a theoretical level. In our article we shall advance the thesis that constitutional courts may be treated as an element guaranteeing the proper functioning of representative democracy if they secure the democratic “chain of delegation”. Following the theory of Hans Kelsen, we develop a normative concept that answers the question of how a constitutional court should act so that it actually fulfils such a role. The starting point of our considerations is the concept of representative democracy (Paragraph 2) and Kelsen’s models of constitutional guarantees (Paragraph 3). It follows from our deliberations that the model containing a centralized controlling body protects best against so-called alternative legislation (Paragraph 4). This solution cannot be considered entirely reliable, as is also reflected in the development of Polish constitutionalism (Paragraph 5). The sine qua non condition is the social legitimacy of the constitutional court, which would refer to the concept of democracy as a majority-minority system (Paragraph 6).

II. DELEGATION AND DEMOCRACY

From a theoretical point of view, the concept “democracy” expresses the idea of self-government of the people, while the adjective “representative” indicates that governing happens indirectly, namely through the involvement and actions of representatives¹. The idea of representative

¹ On the theory of representative democracy see e.g. R. A. Dahl, *On Democracy*,

democracy is implemented in a specific form of law making. Democratic legislation must be based on the will of the people and represent a contrast to the particular will. The principle that legislation comes from the common will “obligates every legislator to pass laws in such a way that they *would have been able* to arise from the united will of an entire people and to regard every subject, insofar as it wishes to be a citizen, as though it has given its assent to this will”². Legislative institutions should “represent the people”, i.e. act on its behalf and according to its will. The people are the superior (principle), and legislation is its representative (agent). H. Kelsen specifies the concept of representative democracy (in the form of parliamentarism) in such a way that it means “creation of the will of the state” “by a collegial organ democratically elected by the People based on universal, equal suffrage and the principle of the majority”³. “Creation of the will of the state” means the creation of a universally binding system of norms⁴ by the “body of the delegated” to which the creation of the will of the state is entrusted by the nation. It is assumed that there is a certain bond between the representatives and the represented, and that all delegates can participate in the elaboration of a “representative common will”. The legislative procedure expressed in a constitution of a democratic state would have to implement, even in an imperfect form, the aforementioned challenging idea.

According to K. Strøm, W. C. Müller, and T. Bergman a delegation under democratic politics is understood as a process of delegating. The process within a representative democracy creates a specific “chain of

New Haven-London: Yale University Press, 1998; B. Manin, *The principles of representative government*, Cambridge-New York-Melbourne: Cambridge University Press, 1997; A. Przeworski, *Democracy and the Limits of Self-Government*, New York: Cambridge University Press, 2010.

² I. Kant, *On the Common Saying: This May Be True in Theory, but It Does Not Hold in Practice*, [in:] I. Kant, *Toward Perpetual Peace and Other Writings on Politics, Peace, and History*, trans. D. L. Colclasure, New Haven-London: Yale University Press, 2006, p. 51.

³ H. Kelsen, *Das Problem der Parlamentarismus*, [in:] H. Kelsen, A. Merkl, A. Verdross, *Die Wiener rechtstheoretische Schule*, ed. H. R. Klecatsky, R. Marcic, H. Schambeck, Wien: Franz Steiner Verlag, 2010, p. 1361; H. Kelsen, *The Essence and Value of Democracy*, trans. B. Graf, Lanham-Boulder-New York-Toronto-Plymouth: Rowman and Littlefield Publishers, INC., 2013, p. 48.

⁴ H. Kelsen, *The Essence and Value of Democracy*, p. 52–53.

delegation” beginning with the delegation of powers from voters to their representatives⁵. In the model approach, the nation (all citizens) delegates its source legislative competence to representatives, who constitute the normative framework for the functioning of other authorities. In other words, democratic legislation takes the form of a special representative body – the Parliament. The nation is the first, and the Parliament – the second, element of the chain of delegation. Thus, the existence of the Parliament as a representative body is necessary for the proper functioning of the chain of delegation. Democratic law-making may only be considered as an element of “a chain of law-making delegations”. According to the theory of democracy, the original law-making competence ascribed to a nation (*demos* – people or citizens)⁶ is realized through a number of law-making acts – from general norms to the execution of an individual decision. The notion of representative democracy means that the sovereignty of the people is realized through its delegation onto political representatives (individual politicians or parties) with the citizens entrusting representatives with their original law-making competences. In this context, a democratic constitution can be interpreted as an act of particular legal force giving legal form to the delegation chain.

A concept that distinguishes between “ordinary” law and the constitution, is described by Bruce Ackerman as dualistic⁷, distinguishing between “ordinary” and “higher” legislation. Political and state authorities are bound by a higher law, which should be interpreted as the will of the sovereign body (the people), and any change to this law requires special procedures. Constitutionalism is therefore connected with a certain legal regulation of the functioning of state bodies, thus limiting

⁵ See K. Strøm, W. C. Müller, T. Bergman, *Parliamentary Democracy: Promise and Problems*, [in:] K Strøm, W. C. Müller, T. Bergman (eds), *Delegation and Accountability in Parliamentary Democracies*, Oxford-New York: Oxford University Press, 2006, pp. 3–32.

⁶ The term ‘nation’ is used here to denote the most important subject of democratic legitimacy.

⁷ B. Ackerman distinguishes between so-called *higher lawmaking* and *normal lawmaking* – see B. Ackerman, *Constitutional Politics/Constitutional Law*, “The Yale Law Journal”, Vol. 99, No. 3, 1989, p. 461 et seq.; see. B. Ackerman, *We the People. Foundations*, Cambridge-London: The Belknap Press of Harvard University Press, 1995, p. 6 et seq.

the arbitrariness of their operation⁸. It also means the introduction of a hierarchy⁹: the constitution is a *lex superior* and its provisions are not subject to the chronological rule of conflict of laws *lex posterior derogat legi priori*¹⁰. Assuming that the role of the constitution within a representative democracy is to determine the proper functioning of the whole delegation chain, it is particularly important to ensure a system of institutions or procedures guaranteeing the proper functioning of each link in the chain. In general, the question of constitutional guarantees means “securing the legality of the state’s functions”¹¹, which can be clarified by the postulate that the law-making activity of state authorities is in line with the constitution. This applies in particular to the activities of the legislator.

III. THREE MODELS FOR CONSTITUTIONAL GUARANTEES¹²

The basic assumption of Kelsen’s theory is that there can be no conflict between higher and lower level norms, because the conformity between levels creates the legal order as a whole, i.e. it allows the assigning of certain norms to a given legal system¹³. Therefore, the application and observance of the constitution by the legislator is crucial for the identity

⁸ See G. Sartori, *Constitutionalism: A Preliminary Discussion*, “The American Political Science Review”, Vol. 56, No. 4, 1962, p. 860.

⁹ See D. Grimm, *The Achievement of Constitutionalism and its Prospects in a Changed World*, [in:] M. Loughlin, J. P. McCormick, N. Walker (eds.), *The Twilight of Constitutionalism?*, Oxford: Oxford University Press, 2012, p. 9.

¹⁰ See H. Dreier, *Gilt das Grundgesetz ewig? Fünf Kapitel zum modernen Verfassungsstaat*, München: Carl Friedrich von Siemens Stiftung, 2009, p. 25.

¹¹ H. Kelsen, *The Nature and Development of Constitutional Adjudication*, trans. L. Vinx, [in:] L. Vinx, *The Guardian of the Constitution. Hans Kelsen and Carl Schmitt on the Limits of Constitutional Law*, Cambridge: Cambridge University Press, 2015, p. 22.

¹² The considerations contained in the above and part of the next point are based on W. Włoch, *Problem gwarancji konstytucyjności legislacji w ujęciu czystej teorii prawa Hansa Kelsena*, „Przegląd Konstytucyjny”, No 1, 2018, p. 65–91.

¹³ H. Kelsen, *Pure Theory of Law*, trans M. Knight, Clark: The Lawbook Exchange, Ltd., 2005, p. 194–195. See O. Weinberger, *Normentheorie als Grundlage der Jurisprudenz und Ethik. Eine Auseinandersetzung mit Hans Kelsens Theorie der Normen*, Berlin: Duncker und Humblot, 1981, p. 130.

of this order, and so, it is expedient that constitutional guarantees exist. “Guarantees of the constitution are therefore [...] nothing but means for the prevention of unconstitutional statutes”¹⁴. Kelsen distinguishes three models of guaranteeing that statutes conform with the constitution¹⁵.

(1) *Model 1*: “if the constitution contains no provision concerning the question of who authorized the examination of the constitutionality of statutes, then the organs competent to apply statutes, that is, especially, the courts, have the power to perform this examination”¹⁶. Such bodies would have to answer the question as to whether certain acts called statutes correspond to the constitution, i.e. that ‘being a statute’ is the objective sense of a given act. “The law-applying organs cannot reasonably be authorized to apply as a statute everything that presents itself subjectively as such. A minimum of power to examine the constitutionality of the statutes to be applied must be granted to them”¹⁷. The ‘minimum of power’ concerns only formal issues (e.g. whether a given act was published in the promulgation journal) and concerns only the issue of the application of the statute in a given case. The ‘maximum of power’ in this case would mean the possibility of not applying a certain act considered as unconstitutional by the body applying the law, but it would not involve rescinding it¹⁸.

(2) *Model 2*: when the constitution does not specify the entity authorized to control the constitutionality of statutes, and also excludes

¹⁴ Kelsen, *supra* note 11 at p. 30.

¹⁵ We use the term “model” in the sense of M. Weber’s ideal type. “An ideal type is formed by the one-sided accentuation of one or more points of view and by the synthesis of a great many diffuse, discrete, more or less present and occasionally absent concrete individual phenomena, which are arranged according to those one-sidedly emphasized viewpoints into a unified analytical construct”, M. Weber, “Objectivity” in *Social Science and Social Policy* [in:] M. Weber, *The Methodology of the Social Sciences*, trans. E. A. Shils and H. A. Finch, Glencoe: The Free Press, 1949, p. 90. An ideal type is an intellectual construct. “It has the significance of a purely ideal limiting concept with which the real situation or action is compared and surveyed for the explication of certain of its significant components; such concepts are constructs in terms of which we formulate relationships by the application of the category of objective possibility. By means of this category, the adequacy of our imagination, oriented and disciplined by reality, is judged”, *ibidem*, p. 93.

¹⁶ Kelsen, *supra* note 13 at p. 272.

¹⁷ *Ibidem*, p. 272.

¹⁸ See H. Kelsen, *Judicial Review of Legislation: A Comparative Study of the Austrian and the American Constitution*, “The Journal of Politics”, Vol. 4, No. 2, 1942, p. 185 et seq.

such a possibility in the case of bodies applying laws, “only the legislative organ itself is authorized to decide whether the statute passed by it is constitutional”¹⁹. In such a case, the act of passing the statute itself is an act confirming its constitutionality, i.e. everything that the legislative authority passes as a statute “has to be considered as a statute within the meaning of the constitution”²⁰. If the legislative authority itself decides on the validity of a legislative act, it may theoretically “establish” a legislative procedure other than that provided for in the constitution, and consider the acts established in accordance with that procedure as statutes. The constitution, which authorizes only the legislative authority to determine the constitutionality of statutes, introduces two possibilities for their adoption: (a) as contained in the constitution and (b) as recognised by the legislative body as a legislative procedure²¹. The consequence of not establishing a body controlling the constitutionality of statutes other than the legislative body is therefore the alternativity of ways of legislation. The method contained in the constitution would then be only one out of many possible. The alternativity described above does not result directly from the provisions of the constitution, nor does it need to occur in practice, but if a body that controls constitutionality is not established, the theoretical existence of an alternative legislative procedure is then possible.

(3) *Model 3*: “the constitution confers upon an organ different from the legislative organ the power to examine the constitutionality of statutes and authorizes this organ to repeal a statute considered as »unconstitutional«”²². Such a body may be empowered to repeal a statute declared “unconstitutional”, not only for the purposes of its application in a particular case, but in all the cases to which the statute refers, that is to say, repeal the statute as such. The statute shall remain in force until its invalidity has been declared by the competent authority. This means that the constitution, when establishing the bodies, the legislative procedure, and to some extent the content of future statutes, states that those acts which do not fully comply with the provisions of the constitution are to be regarded as binding as long as they are not declared unconstitutional

¹⁹ Kelsen, *supra* note 13 at p. 273.

²⁰ *Ibidem*, p. 273.

²¹ *Ibidem*.

²² *Ibidem*.

by the competent authority. "The so-called unconstitutional statutes are constitutional statutes which, however, may be rescinded in a special procedure"²³.

IV. DANGER OF ALTERNATIVE FORMS OF LEGISLATION

The guarantee of the constitutionality of statutes is intended to ensure that the legislature respects constitutional procedural and substantive standards. *Model 1* is limited to formal issues only, and does not address the issue of the validity of the law, but only its application. *Model 2*, in which the legislator itself states the constitutionality of laws, allows for the actual possibility of amending the constitution in terms of both the legislative procedure and the regulated matter, without changing its provisions. *Model 3*, which provides for a body examining the constitutionality of laws other than the legislator, "gives precedence" to the legislative procedure regulated in the constitution – it provides for the procedure of invalidating the so-called unconstitutional statute. The justification for establishing an "independent controlling body" does not consist in the fact that it would have to be "better" at recognizing and interpreting the constitution than the legislature, but that it has the right of veto over legislation that violates the norms of the constitution. Ultimately, the mechanisms of "constitutional guarantee" are to ensure the proper functioning of the entire delegation chain established by the constitution. And one of the most serious threats to it is the realization of the "alternative legislative form", because it is connected with the fact that it is not the constitution that determines the functioning of the delegation chain, but the legislative authority that does it on its own. In other words, in such a situation, it is the legislative authority as a representative body that will decide about "whether to" and "how to" represent the represented.

The materialization of "alternative legislation" (*model 2*) in fact means the primacy of political power over the constitution – the primacy of the authorities creating their "alternative legal order", not based on "higher law", but on political will. The lack of an "independent body examining

²³ Ibidem, p. 274.

constitutionality” facilitates the process of reducing the formal constitution to a “sheet of paper”²⁴. In a case when the political forces dominating in a given system subjugate the institutions of the constitutional state and have them at their disposal, at their own discretion, one can speak of the primacy of the real constitution (a real relationship of political forces existing in a given society)²⁵ over the legal one. The dualism of “higher law – ordinary law” is replaced by the primacy of political will over the law. The existence of an independent body in a sense “limits” the legislator²⁶, but this must be understood as limiting his political will, which could go beyond the constitutionally defined framework. However, it cannot be said in any way that it restricts the legislative functions of the legislator derived from the constitution.

Accepting the general definition of the constitutional state as a state whose fundamental institutions and bodies are constituted and bound by a positive “higher law”, it is also argued that any attempt at unconstitutional expansion of the scope of political power constitutes a step towards the abolition of that state. Thus, if the primary function of the constitutional guarantee is to safeguard the stability and coherence of a legal system based on a specific constitution, it also safeguards the political system based on it. Thus, it can be said that the body performing the guarantee function has not only a purely legal, but also a political justification, because it constitutes a security for the political and systemic identity of a given state. Thus, when the political lawmaker of the constitutional system establishes the democratic form of the state, the guarantee of the democratic legislative procedure would at the same time be the guarantee of the democratic nature of the system. Modern representative democracy is largely procedural in nature: it is a specific method of law making which ensures citizens’ participation in the law making procedure²⁷. The

²⁴ See F. Lassalle, *Über Verfassungswesen*, Berlin: Buchhandlung Vorwärts, 1907.

²⁵ *Ibidem*.

²⁶ As M. Eberl puts it, a ‘controlling body’ can interfere in a political process with the help of substantive guidelines, while other supreme state bodies cannot deprive it of its control competences. See M. Eberl, *Verfassung und Richterspruch. Rechtsphilosophische Grundlagen zur Souveränität, Justiziabilität und Legitimität der Verfassungsgerichtsbarkeit*, Berlin: De Gruyter, 2006, p. 4.

²⁷ H. Kelsen, *Foundations of Democracy*, “Ethics”, Vol. 66, No. 1, 1955, p. 4 et seq.

controlling body, being a guardian of the legislative procedure, secures democracy²⁸.

In this context, two meanings of the political can be distinguished. The first meaning would be about striving to realize ideals and to fulfil objectives of political actors, by using all the available means of political power, which often conflict with the ideals and objectives of others²⁹. The second meaning of the political would imply adopting the basic systemic principles of a given country as a determinant of conduct and interaction between political actors³⁰. In a constitutional democracy, the first type of the political is limited by the political principles of the second type, which are expressed in the constitution³¹. Therefore, the implementation of specific ideals and political aspirations in the form of universally binding legislation (that is the first meaning of the political) must take place in the form provided for in the constitution. It establishes such rules of political rivalry so that all the actors may view the course and outcome of a democratic procedure as fair and just (that is the second meaning of the political). The role of the controlling body, i.e. a constitutional court, would be to guarantee compliance with the principles and rules of the political of the second meaning. However, one could not become an active political actor as far as the first meaning of the political is concerned.

From Kelsen's perspective, this type of body would limit the activity of political actors in order to guarantee constitutional norms, that is the political in the second meaning. Therefore, if the activity of the controlling body was within such a framework, this activity would fulfil a political role which could be legitimized within representative democracy. However, the very existence of such a body does not determine whether the guarantee of the constitution (the political in the second meaning) will be effective, or whether such a body will not be involved in a political dispute defined in the first meaning.

²⁸ Kelsen, *supra* note 11 at p. 71–72.

²⁹ See the concept of the political in Ch. Mouffe, *The Democratic Paradox*, London-New York: Verso, 2000.

³⁰ See the concepts of political values and political conception in J. Rawls, *Political Liberalism*, New York: Columbia University Press, 1993.

³¹ See W. Włoch, *Pomiędzy czystym prawem a ideą polityczną. Pojęcie konstytucji w doktrynach Hansa Kelsena i Johna Rawlsa*, Toruń: Wydawnictwo Uniwersytetu Mikołaja Kopernika, 2018, pp. 133–137.

V. GUARANTEE OF CONSTITUTIONALITY IN POLISH CONSTITUTIONALISM

Against the background of the presented theory, one can refer to two practical problems related to the lack of real guarantee over the constitutionality of legislation. Such a lack occurs both when it is the result of a conscious decision of the lawmaker of the constitutional system, as well as when by virtue of political will there is a neutralization or instrumental use of the body established for this purpose.

Both of these situations can be found in the history of Polish constitutionalism. In the interwar period, during the legislative work on the Constitution of 1921, Edward Dubanowicz, who was a deputy, stated that the American model of controlling constitutionality could be acceptable on the other side of the Atlantic, but not on the continent³². In the discussion there were also opinions voiced that a separate tribunal would become the “most effective brake” on the dynamic legislative activity of the parliament³³. One of the drafts, signed by Kazimierz Lutostański, a priest and a deputy of the Popular National Union (ZLN), which provided for the possibility for second instance courts to apply to the Supreme Court for recognition of the statute as unconstitutional, was rejected³⁴. Ultimately, Article 81 was added to the constitution³⁵, which reads as follows: “Courts have no right to examine the validity of statutes duly promulgated”, while Article 38 introduced the principle that no statute may be in conflict with the constitution or violate its provisions. The first cited provision made of the second a *lex imperfecta*, a norm that was not subject to sanction. This solution was replicated, among others in the provision of Article 1(3) of the Act on the Supreme

³² R. Jastrzębski, *Konstytucyjność aktów ustawodawczych w judykaturze II Rzeczypospolitej*, „Przegląd Sejmowy”, 2 (97) 2010, p. 78.

³³ A. Gwiżdż, *O Trybunale Konstytucyjnym w Drugiej Rzeczypospolitej* [in:] J. Trzcziński, A. Jankiewicz (eds.), *Konstytucja i gwarancje jej przestrzegania. Księga pamiątkowa ku czci prof. Janiny Zakrzewskiej*, Warszawa: Wydawnictwa Trybunału Konstytucyjnego, 1996, s. 63.

³⁴ Jastrzębski, *supra* note 32 at p. 78.

³⁵ The Constitutional Act of 17 March 1921 (Journal of Laws of the Republic of Poland no. 44, item 267).

Administrative Court³⁶, excluding “the examination of the validity of acts duly promulgated” from its jurisdiction. An isolated case was the voices of some representatives of the doctrine, the outstanding criminal law expert Waclaw Makowski among them, who all allowed the constitutionality of laws to be examined by the courts. They believed that the constitution could not be just perceived as a set of programme norms³⁷.

On the occasion of the amendment to the Constitution of 1926³⁸, the draft statute on the Constitutional Tribunal was rejected. It is pointed out that the drafts unanimously removed legislative acts of the president from the jurisdiction of the constitutional court. On the one hand, the president was seen as a special guardian of the constitution; on the other hand, it was pragmatically assumed that if the president had issued a decree that contradicted the constitution, the conflict would have moved ‘into the political field, where the lawyer is helpless’, so stated W.L. Jaworski. He also stated that the idea of a tribunal is denied by those whose opinion is of “the view that Parliament is called upon to control, but that it cannot be controlled itself”³⁹.

The discussion on the appointment of a tribunal, being very lively in the face of the renewal of the process of amending the constitution in the early 1930s, also failed to reach a consensus on that matter. The group which opposed the idea of a tribunal in particular was the Sanation that had come to power as a result of the May 1926 “Coup d’État” and was afraid of eroding the newly formed, strong legislative position of the president⁴⁰. National Democracy (ND) and other conservative circles supported the appointment of a tribunal. The Constitution of 1935⁴¹, which expressed authoritarian trends and rejected the separation of powers

³⁶ The Law on the Supreme Administrative Tribunal of 3 August 1922 (Journal of Laws of the Republic of Poland no. 67 item 600).

³⁷ M. Pietrzak, *Państwo prawne w Konstytucji z 17 marca 1921*, „Czasopismo Prawno-Historyczne”, Vol. XXXIX, 2, 1987, p. 115.

³⁸ Journal of Laws of the Republic of Poland no. 78, item 442.

³⁹ W. L. Jaworski, *Projekt konstytucji*, Kraków: Skład Główny w Księgarni Leona Frommera, 1928, p. 181, 179 (There is also a text of the aforementioned draft on p. 182–184).

⁴⁰ Kazimierz Świtalski presented, among others the possibility of the “guillotining” of the president’s decrees by the Tribunal owing to its political composition or “due to exaggerated legal puritanism”, as cited in Jastrzębski, *supra* note 32 at p. 83–84.

⁴¹ Journal of Laws of the Republic of Poland. no. 30, item 227.

which was key to the systemic role of the president, maintained the ban on examining the constitutionality of statutes as well as presidential decrees equivalent with them. At the same time, the lack of a constitutional court was so important in practice that there were cases of decisions on unconstitutionality issued by the Supreme Court and the Supreme Administrative Court, despite the prohibition expressed in the constitution and in the aforementioned Act on the Supreme Administrative Court⁴².

After 1976 in the communist period, the task of ensuring compliance with the constitution was formally entrusted to the Council of State⁴³. The separate controlling body, i.e. the Constitutional Tribunal, was established at the end of the communist era in 1985⁴⁴. It began to play a special role after the political changes of 1989. The amendment to the constitution of the Polish People's Republic, introducing the principle that "the Republic of Poland is a democratic legal state implementing the principles of social justice"⁴⁵, in fact established a system different from authoritarianism which is based on the hegemony of one party. The above-mentioned clause constituted the basis for the Constitutional Tribunal to introduce a number of norms characteristic for contemporary representative democracy⁴⁶. The legislative procedure

⁴² Cf. D. Malec, *Najwyższy Trybunał Administracyjny 1922–1939 w świetle własnego orzecznictwa*, Warszawa-Kraków: Wydawnictwo Naukowe PWN, 1999, p. 93–96; Jastrzębski, supra note 32 at p. 86–91.

⁴³ Art. 30, para 1, point 3) of the Constitution of the Polish People's Republic after the amending of 10 February 1976 (unified text of Constitution published Journal of Law{s?} 1976 no 7, item 36). Cf. Z. Witkowski, *Zagadnienie zgodności aktów Sejmu z Konstytucją PRL w świetle doktryny*, „Ruch prawniczy, ekonomiczny i socjologiczny”, Year XLIII, 1, 181, pp. 37–49; S. Bożyk, *Pozycja ustrojowa Rady Państwa w konstytucji PRL z 22 lipca 1952 r.*, „Miscellanea Historico-Juridica”, VIII, 2009, pp. 161–174.

⁴⁴ Law on the Constitutional Tribunal of 29 April 1985 (Journal of Laws no. 22, item 98).

⁴⁵ Act of 29 December 1989 amending the Constitution of the Polish People's Republic (Journal of Law{s?} no. 75, item 444).

⁴⁶ The activity of the Constitutional Tribunal, especially in the period until the establishment of the new Constitution of the Republic of Poland in 1997, was criticized for being too activist. Cf. e.g. B. Banaszak, *Aktywizm orzecznicy Trybunału Konstytucyjnego*, „Przegląd Sejmowy”, No 4, 2009, pp. 75–91; L. Morawski, *Zasada trójpodziału władzy. Trybunał Konstytucyjny i aktywizm sędziowski*, „Przegląd Sejmowy”, No 4, 2009, pp. 59–74; I. Wróblewska, *Zasada państwa prawnego w orzecznictwie Trybunału Konstytucyjnego RP*,

provided for in the constitution was of special importance for the Tribunal⁴⁷.

As it is worded in one of the rulings, “The Constitutional Tribunal is of the opinion that the need to respect the constitutional principles of the legislative procedure is completely independent from the substantive content of the adopted statute. Compliance with these principles is to protect the basic values of the system based on the principles of constitutionalism and democracy. In its Ruling of 23 November 1993, the Constitutional Tribunal emphasized the significance of the function of each stage and activity of the legislative process determined by the parliamentary law. The Tribunal put emphasis on the fact that the legislative power of the Parliament, that is its chambers, and the related powers of other entities, are all implemented by the means of formalised legislative law consisting of separate stages (phases) in which every participant in this process has the right to take specific actions that affect the content or form of the statute. In the course of the legislative process, each of these actions (activities) has a specific purpose, and its use brings certain legal consequences. The misuse of any action, or the action used in the wrong phase of the legislative process, may also destroy basic values integral to the parliamentary way of creating law (The Ruling of the Constitutional Tribunal of 1993, K. 5/93, Part II, p. 389)”⁴⁸. A violation of the legislative procedure is a serious case of great importance because it also means a violation of the basic principles of democracy (the political in the second meaning). Regardless of what matter a given statute concerns or to what extent it is or is not right and rational, non-compliance with the legislative procedure means a violation of the democratic way of creating the “representative common will”. It strikes at the very heart

Toruń: TNOiK, 2010, pp. 213 et seq; Z. Witkowski, M. Serowaniec, *Wykładnia zasady demokratycznego państwa prawnego a problem (nad)aktywizmu sędziowskiego*, (in print).

⁴⁷ For more detailed information on the case-law of the Constitutional Tribunal regarding the legislative procedure, see *Proces prawotwórczy w świetle orzecznictwa Trybunału Konstytucyjnego. Wypowiedzi Trybunału Konstytucyjnego dotyczące zagadnień związanych z procesem legislacyjnym*, opracowanie Biura Trybunału Konstytucyjnego, Warszawa: Wydawnictwa TK, 2015; J. Szymanek, *Wpływ orzecznictwa Trybunału Konstytucyjnego na kształtowanie się prawa parlamentarnego*, “Przegląd Sejmowy”, No 4, 2009, pp. 145–175.

⁴⁸ The Ruling of the Constitutional Tribunal, K 14/02.

of representative democracy. Therefore, “The Constitutional Tribunal considers it justified to first consider [...] the procedural allegations. If they lead to the conclusion that this law came into effect in breach of the provisions of the procedure, then it will be sufficient grounds for the recognition of its unconstitutionality and there will be no grounds for adjudicating on any substantive content”⁴⁹. In the course of its work, the rulings of the Tribunal referred to political issues in the sense of the first meaning of the political, for instance abortion, vetting, the pension system, or ritual slaughter. In all of these fields the rulings could arouse political criticism and provide a basis for a critical reflection on the legitimacy of the Tribunal⁵⁰.

The Constitutional Tribunal seemed to be permanently inscribed in the standards of the rule of law that were expected from Poland after the transformation. It was anchored in the Constitution of 1997⁵¹, and yet its role was minimized after the elections in 2015 when the President refused to swear in five judges elected by the outgoing Parliament. The Constitutional Tribunal ruled that the law enabling the earlier election of two of them was unconstitutional⁵², while the President’s decision on the three others was fully arbitrary. The new parliamentary majority adopted a number of regulations concerning the Tribunal and chose judges to replace the three judges mentioned, whom the critics called “judge-doubles” in turn, the Tribunal, which still had a majority of judges elected in previous terms, considered some of the new regulations unconstitutional. The Prime Minister refused to promulgate these judgments, which ultimately happened under pressure

⁴⁹ The Ruling of the Constitutional Tribunal, K 3/98.

⁵⁰ See e.g. L. Garlicki, *Niekonstytucyjność: formy, skutki, procedury*, „Państwo i Prawo”, No 9, 2016, pp. 3–20; W. Gromski, *Legitymizacja sądów konstytucyjnych wobec władzy ustawodawczej*, „Przegląd Sejmowy”, No 4, 2009, pp. 11–23; R. Małajny, *Trybunał Konstytucyjny jako strażnik Konstytucji*, „Państwo i Prawo”, No 10, 2016, pp. 5–22; K. Kaleta, *Legitymizacja sądownictwa konstytucyjnego w świetle teorii demokracji*, „Państwo i Prawo”, No 5, 2018, pp. 3–21; A. Sulikowski, *Trybunał Konstytucyjny a polityczność. O konsekwencjach upadku pewnego mitu*, „Państwo i Prawo”, No 4, 2016, pp. 3–14; J. Zajadło, *Wewnętrzna legitymizacja sądu konstytucyjnego*, „Przegląd Sejmowy”, No 4, 2009, pp. 129–144.

⁵¹ Journal of Laws no. 78, item 483.

⁵² The Ruling of the Constitutional Tribunal of 3 December 2015 (K34/15, Journal of Laws 2015, item 2129).

from international bodies. The published judgments were accompanied by a bizarre clause which refused them the nature of a binding decision⁵³. Also, the new president of the Constitutional Tribunal, who has recently been found to have had close social relations with the leader of the ruling party, was elected in breach of procedural rules. These circumstances have caused the authority of the Tribunal to collapse, and authorized bodies rarely file motions to the Tribunal, fearing that the decisions will be in favour of the ruling majority⁵⁴. The effectiveness of the Tribunal's work has significantly decreased, with only a little more than ten rulings recorded in the first half of 2019, while by 2016 the rule had been to issue between 100 and 190 rulings per year. Ultimately, therefore, the Tribunal has become a facade body that legitimises controversial laws. We are unanimous in our assessment that the state has indeed been deprived of a key supervisory body, the guarantor of the constitution.

VI. THE NEED FOR DEMOCRATIC LEGITIMACY

The case of Polish constitutionalism indicates that just as the lack of a constitutional court can be interpreted as facilitation on the way towards authoritarianism, the existence of such a court does not fully protect against this threat. The risk that the constitutional legislative procedure may be replaced by an "alternative procedure" does not eliminate the mere fact of the existence of a controlling body. The events that took place after 2015, resulting in the weakening of the Constitutional Tribunal

⁵³ The Ruling of the Constitutional Tribunal of 9 March 2016 (K 47/15), 11 August 2016 (K 39/16) and 7 November 2016 (K 44/16), published in *Journal of Laws* 2018, items 1077, 1078, 1079, with the explanation that "The decision issued **in violation of the provisions** of the Act of 25 June 2015 on the Constitutional Tribunal concerned a normative act that has lost its binding force".

⁵⁴ On the subject of changes after 2015 see e.g. H. Dębska, T. Warczok, *Sakralizacja i profanacja. Trybunał Konstytucyjny jako struktura mityczna*, „Państwo i Prawo”, No 5, 2018, pp. 63–74; A. Kustra, *Poland's Constitutional Crisis. From Court-Packing Agenda to Denial of Constitutional Court's Judgments*, "Studi Polacco-Italiani do Toruń", No XII, 2016, pp. 343–366; W. Sadurski, *Poland's Constitutional Breakdown*, Oxford: Oxford University Press, 2019; M. Zubik, A.D. 2015/2016. *Anni horribili of the Constitutional Tribunal in Poland*, "Przegląd Konstytucyjny", No 2, 2018, pp. 46–57.

as a guarantor of constitutionality, did not meet with social opposition strong enough to limit the activities of the political power. It can be argued that the weakening of the Tribunal is related to negative tendencies regarding compliance with the legislative procedure⁵⁵, yet it does not involve any political consequences that could hinder the re-election of the ruling majority. It can be assumed that one of the factors of the lack of a strong and broad social response is the lack of democratic legitimacy of the Tribunal, however, not on a purely theoretical level, but on the basis of the perception of its role by all the citizens. This would mean that the Tribunal's role as a guarantor of the "chain of delegation" provided for in the constitution, the chain which should undoubtedly result in appropriate law making by the representatives of all the citizens, is invisible. If we want to subject the state principles to specific guarantees, the problem of securing the "chain of delegation" seems to be of particular importance. The political in the second meaning that we distinguished earlier would have to prevail over the political in the first meaning, both in civic attitudes and in political solutions.

The problem of perceiving the importance of the political in the second meaning is related to the very understanding of representative democracy and the normative theory related to it on how a controlling body should function. Representative democracy should work in accordance with the majority-minority principle: "By dividing the entire body of subjects into essentially two large groups, this principle has already furnished the possibility for compromise in government, since the final integration into a majority, as well as a minority, itself necessitates compromise"⁵⁶. The law-making procedure should ensure that a dispute and a dialogue between opponents can be conducted, and it should not remain a tool for dominance. Therefore, the procedure must be designed so that it does not exclude any minority. Otherwise, some citizens would not be represented

⁵⁵ See A. Bień-Kacała, A. Tarnowska, W. Włoch, *The Sejm as delegated power – still a representative body?* (in print).

⁵⁶ Kelsen, *supra* note 11 at p. 70. On the relationship between the pure theory of law and theory of democracy see S. Baume, *Hans Kelsen and the Case for Democracy*, trans. J. Zvesper, Colchester: ECPR Press, 2012, H. Dreier, *Rechtslehre, Staatssoziologie und Demokratietheorie bei Hans Kelsen*, Baden-Baden: Nomos Verlagsgesellschaft, 1986; Włoch, *supra* note 31 at p. 189–211.

in the legislative body. In this approach, the chain of delegation would amount to the delegation of a majority only.

The existence of the guarantee of constitutionality of laws would ensure the majority-minority nature of representative democracy. "Insofar as it makes sure that statutes come into existence in conformity with the constitution, and in particular also that their content is constitutional, constitutional adjudication serves the function of an effective protection of the minority against assaults on the part of the majority, whose rule becomes tolerable only by virtue of the fact that it is exercised in legal form. The specific form of constitution which typically consists in the fact that a constitutional amendment is tied to the requirement of a heightened majority, ensures that certain fundamental questions can be resolved only with the participation of the minority. [...] The mere threat of making an appeal to the constitutional court may well turn out to be a sufficient instrument in the hands of the minority to prevent unconstitutional violations of its interests on the part of the majority, and thus, in effect, to prevent a dictatorship of the majority that is no less dangerous to social peace than the dictatorship of a minority"⁵⁷. Maintaining the constitutionality of the legislative procedure is to provide the minority with guarantees of their political subjectivity and autonomy. It protects them against becoming only the subject of the majority's decision without taking into account the minority's interests⁵⁸. Democracy

⁵⁷ Kelsen, *supra* note 11 at pp. 71-72.

⁵⁸ W. Sadurski criticizes the strategy of defending the legitimacy of constitutional courts by presenting them as defenders of minority rights since it is difficult to indicate that a constitutional court is of a priori pro-minority nature, and similarly it is difficult to show that the majority is always particular and does not follow any concept of justice, see W. Sadurski, *Rights Before Courts. A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe*, Dordrecht: Springer, 2008, p. 58 et seq. However, Sadurski points out that "the argument that, in a democratic system, there must be a protector of minority rights against majoritarian abuse, and that constitutional courts are well suited to perform such a role, *might* be a good legitimating argument to support the existence of strong constitutional courts - but [...] it fails to perform that role satisfactorily in the discourse on the legitimacy of judicial constitutional review", *ibidem.*, p. 62. The role of a constitutional court or a similar controlling body mentioned by us earlier is a normative thesis, i.e. it answers the question of how such a body should operate in the theory of representative democracy.

thus becomes a system representing the whole complex society, not just its dominant part.

A normative concept of the role of a constitutional court resulting from representative democracy perceived in this way would be a “representation-reinforcing approach to judicial review”, according to which (a) a constitution contains certain procedural conditions for developing its provisions in the political process of law-making, (b) a court or courts, depending on the model, guarantee the basic assumptions of representative democracy by focusing on procedural issues in their activities, (c) limiting their actions mainly to these issues, they make use of specific legal competences⁵⁹. Then, the constitutional court would avoid getting involved in legislative disputes at the level of the political in the first meaning, while it would guarantee that legislative disputes

⁵⁹ J. H. Ely, *Democracy and Distrust. A Theory of Judicial Review*, Cambridge-London: Harvard University Press, 1980, pp. 87–88. The procedural legitimacy means recognizing the validity of a specific decision taking into consideration the legitimacy of the procedure. As J. Waldron points out, the theory of legitimacy is to answer the questions of “who” makes decisions and “what arguments prevail”. The democratic legislative procedure is legitimized by the principle of equality: everyone has a formal equal right to participate in a democratic procedure. Regarding a constitutional court, the question of “who makes decisions” can be answered that the persons elected by a representative body, the question of “what arguments prevail” can be answered that this is resolved by the majority principle. Why, however, would the decision of several judges outweigh the legislative decision? In the view of Waldron, the legitimacy of constitutional courts in relation to the principles of democracy is not strong: they do not directly implement the democratic principle of equality (because not everyone has a formal equal right to participate in the judicial procedure), and the principle of majority weakens the perception of constitutional courts as the embodiment of the public reason (since the “best” arguments do not necessarily prevail). See J. Waldron, *The Core of the Case against Judicial Review*, “The Yale Law Journal”, Vol. 115, No. 6, 2006, pp. 1386–1393. However, in the view of R. H. Fallon, with respect to the protection of fundamental rights, the legitimacy of constitutional courts is not that it would have a “better” way to recognize and interpret rights than the legislature, but that it has the right of veto over legislation which violates these rights. It does not assume a qualitative advantage of the constitutional judiciary over the legislature, but only establishes an additional safeguarding institution, R. H. Fallon Jr., *The Core of an Uneasy Case for Judicial Review*, „Harvard Law Review”, Vol. 121, No. 7, 2008, p. 1695 et seq. Similarly, in the case of an audit for the legislative procedure, the controlling body would be a “point of veto” enabling the correction of “errors” of the democratic process.

would be resolved in the manner expressed by the procedure defined in the context of the political in the second meaning⁶⁰. The legislative procedure is not simply a procedure: "...procedural democracy does not mean simply voting computation or institutional correctness, but also using free speech and freedom of the press and of association in order to make the informal or extra-institutional domain an important component of political liberty. Democracy is a combination of decisions and judgement on decisions: devising proposals and deciding on them (or those who are going to carry them out) according to majority rule. [...] Democratic proceduralism is in the service of equal political liberty since it presumes and claims the equal right and opportunity that citizens have to participate in the formation of the majority view with their individual votes and their opinions; it is what qualifies democracy as a form of government whose citizens obey the laws they contribute to making, directly or indirectly"⁶¹. In other words, the values and principles fundamental to democracy are reflected in the legislative procedure. As a guardian of procedures, a constitutional court would also be the guardian of the values on which these procedures are based.

In the case of a violation of the legislative procedure by a majority, a minority may restore the constitutional state by the means of a complaint to a constitutional court. It then functions in the form of "virtual representation", that is the consideration of the matter by a controlling body, which will take into account the arguments of all the parties, even those not participating in the actual legislative process⁶². The existence of

⁶⁰ Referring to R. H. Fallon, it can be stated that a controlling body may have general political legitimacy in a constitutional regime "insofar as it helps to minimize fundamental rights violations, even if it lacks democratic legitimacy", see Fallon, *supra* note 59 at p. 1716. If the legitimacy of the democratic procedure is associated with the result to which it is to lead, that is lawmaking in accordance with the majority-minority rule, it is possible to indicate the general political legitimacy of a specific institution, which allows the achieving of all the goals and preserves all the values desired in a democratic constitutional regime. Therefore, not every institution of the constitutional democratic regime must have this direct democratic legitimacy if the results of these institutions have a positive impact on the functioning of the democratic system or are considered as such.

⁶¹ N. Urbinati, *Democracy Disfigured. Opinion, Truth, and the People*, Cambridge-London: Harvard University Press, 2014, pp. 18–19.

⁶² Ely, *supra* note 59 at p. 84–88.

a constitutional court⁶³ within the framework of representative democracy would constitute an element of restoring equality disturbed in the legislative process, i.e. maintaining its majority-minority character. The question arises whether this form of a constitutional guarantee would be particularly resistant to the designs that the political power has. It seems that it would require a widespread recognition by both political and social majorities of the value of majority-minority democracy which would limit the tendency to transform itself into majority democracy. It would be particularly important to have social support for the institutions of representative democracy, which would limit the tendencies of the political power willing to subject democracy to be ruled only by the majority. Citizens would have to be aware of the significance of the constitutional court for representative democracy, while the court would have to prove this importance.

VII. CONCLUSIONS

By adopting a specific understanding of the concept of democracy, we may get a certain normative concept of the role of “controlling bodies”. From the perspective of Kelsen’s theory, the main threat to representative democracy is the “alternative legislative procedure”, that is a non-constitutional form of legislation based solely on the political will. The effect of this mode would be to deconstruct the chain of delegation provided for in the constitution. In such a case, we would be dealing with the majority delegation in the absence of the minority delegation. On a smaller scale, the chain of delegation is disturbed by violations of the constitutional legislative procedure.

In both cases the guarantee of constitutionality means the restoration of an equal representation in the legislative procedure based on the majority-minority rule. Pursuant to this principle, the minority has the right to participate effectively in the legislative process and to express their position in the forum of the legislative body. As the guardian of the democratic legislative procedure, the constitutional court should be

⁶³ In model 1 this would be a distributed control system with its maximum competence.

a ground for the “virtual representation” of all the parties of a democratic dispute, and as a result, it should prevent the transformation of representative democracy into majority democracy. The constitutional court which acts in this way becomes a political body as far as the second meaning of the political is concerned, guaranteeing that the real political practice will occur in a form consistent with the principles of representative democracy⁶⁴.

⁶⁴ We are not suggesting that it might be the only role that a constitutional court should play, but that it is a fundamental role from the point of view of the theory of representative democracy. What is more, we are not suggesting that only the issues of the legislative procedure should be subject to an audit, but that from our perspective they are particularly important.