**The importance of the Tribunal of State**

**for the protection of the rule of law in Poland**

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The significance of the Tribunal of State for the protection of the rule of law in Poland can be discussed especially in the context of the crisis that occurred a few years ago[[1]](#footnote-1).

It seems that one of the steps to restoring the rule of law is to bring to justice those who caused this crisis with their violation of the Constitution. This is also important to prevent similar crises in the future[[2]](#footnote-2).

The law should be created in such a way that the government is aware that there   
is a penalty for violating the Constitution. And it is the Tribunal of State that should deter the most important people in the country from breaking the law[[3]](#footnote-3).

The Tribunal adjudicates on constitutional responsibility which means responsibility   
for committing a constitutional tort. In this text, I focus mainly on this type of responsibility before the State Tribunal.

A constitutional tort is an act (action or omission), culpable, committed within the scope of office or in connection with the position held, committed by a person occupying a specific position, which is not a crime[[4]](#footnote-4). It is controversial whether the regulations on the State Tribunal provide for a material criterion for committing a constitutional tort. The material criterion   
is understood as the characteristic of an act that causes damage to the public interest or creates   
a risk of such damage. The Statute on the Tribunal of State, of course, distinguishes a formal criterion, referring to the very fact of violation of the Constitution or the Statute by specific entities. However, establishing a material criterion under the Statute is more difficult[[5]](#footnote-5).

The concept of constitutional tort adopted in Polish law, which refers only to the formal criterion while rejecting substantive definitions, has been criticized in the doctrine. The main objection was raised that when creating the structure in question, the legislator did not take into account the material consequences of violating the law, such as causing significant damage   
to the interests of the state or creating a threat to them, thus enabling the enforcement   
of constitutional liability also against perpetrators of light or even trivial acts[[6]](#footnote-6).

Every constitutional responsibility is a form of individual responsibility. This can   
be explained using the example of the responsibility of members of the Council of Ministers. In the case of constitutional liability of members of the Council of Ministers, they will not be held jointly and severally liable (this is a difference from political responsibility, an example   
of which is expressing a vote of no confidence in all members of the Council of Ministers at the same time, without the need to individually assess the activities of individual members). Even if the Council of Ministers collectively undertakes activities that violate the Constitution, in the event of being held constitutionally liable, individual members of the Council   
of Ministers will be individually liable for a constitutional tort[[7]](#footnote-7).

In recent years, many situations have occurred in Poland that may be treated   
as constitutional torts. Much of it concerned the violation of the independence of the judiciary. Examples of constitutional tort can be attempts by the Minister of Justice to influence court decisions in violation of judicial independence[[8]](#footnote-8); signing of unconstitutional statutes by the President or appointment of judges by the President to positions that are already filled.

Constitutional responsibility theoretically should be a legal responsibility. However,   
a big part (eight out of nineteen) of the composition of the Tribunal of State is not required to have judicial competences. This may raise doubts regarding its strictly legal nature.

Constitutional responsibility is supposed to be not a political responsibility. In practice, however, it will have political connotations. It is initiated at the request of the National Assembly or the Sejm – these institutions are political in nature. It is difficult to expect that parliamentarians will not be motivated by political issues during referring a case to the State Tribunal. In addition, there may be a problem as to whether people without judicial competences will insure a fair trial.

When talking about the effectiveness of a sanction, the two main issues are the inevitability of punishment and the severity of punishment.

When it comes to the severity of the penalty, it seems that the catalog of penalties that the State Tribunal may impose might seem only symbolic. It is loss of electoral rights, disqualification from holding positions or managerial functions involving special responsibility in the state or social organizations or loss of orders and honorary titles. What’s more, such penalties may be sentenced for a maximum of 10 years. It is worth considering whether the Polish legal system needs more burdensome penalties that would actually deter people from committing a constitutional tort. However, the Constitution allows such penalties to be increased at the level of statute.

It is necessary to consider the probability that a person committing a constitutional tort will be brought to justice. It seems low. To refer a case to the State Tribunal, it must have   
an absolute or qualified majority of votes (difficult to obtain) and it must do so within the prescribed time - a maximum of 10 years from the date of committing the constitutional tort. The most difficult thing is to impeach the President. A majority of 2/3 of the votes of the constitutional number of the National Assembly must be obtained. It is also difficult to hold members of the Council of Ministers accountable - 3/5 of the constitutional number of members of the Sejm is required. Other entities are least difficult to impeach - an absolute majority of the constitutional number of members of the Sejm is enough. The conclusion is that it is not difficult (especially in the case of the President and members of the Council of Ministers) to block   
an attempt to bring someone to the State Tribunal if there are enough members in the Sejm who can block it. Parliamentarians may block the use of the State Tribunal solely for political reasons, without taking into account legal criteria. This may raise doubts as to the legal nature of the State Tribunal. This brings to mind the view that the State Tribunal is in fact   
a parliamentary court. The importance of the will of the Sejm for the State Tribunal is much higher than in the case of other courts in Poland.

Another problem is that in the current legal situation, only the listed persons can be brought before the State Tribunal. Some of the people who might be responsible for the current crisis of the rule of law are not under the jurisdiction of the State Tribunal – for example some members of parliament or improperly appointed judges to the Constitutional Tribunal. The truth is that members of parliament may be brought to justice before the State Tribunal, but only in cases related to violation of the norms regarding the prohibition of obtaining benefits from the State Treasury. Therefore, this kind of responsibility is significantly restricted compared to the responsibility of members of the Council of Ministers or the President. Moreover, judges of the Constitutional Tribunal cannot, of course, be held accountable to the State Tribunal. The Polish Constitution did not foresee the problem of improperly appointed judges, which has emerged in recent years[[9]](#footnote-9).

It is also worth noting that the State Tribunal in Poland is very seldom used. Only two people were sentenced by the State Tribunal in Poland. In the 1990s, Dominik Jastrzębski and Jerzy Ćwiek were convicted of illegal alcohol trade. Their punishment was a ban on running   
in elections and holding managerial positions for 5 years. It is true that there were other attempts to bring people to justice before the Tribunal, but only two people were convicted[[10]](#footnote-10). On the other hand, it is worth bearing in mind that Poland has never experienced such a serious constitutional crisis as the one in recent years. There may be an opinion that for many years there was no need to use the State Tribunal in Poland.

It may be unintuitive to treat a constitutional tort and a crime separately. It may seem that since a constitutional tort is a significant violation of statutory law, it may constitute   
a crime. An interesting view is presented by prof. Marcin Matczak. He claims that in everyday language, in relation to a constitutional tort, we can talk about a "constitutional crime" in order to draw attention to the high social harmfulness of a constitutional tort. According to the professor, the use of the phrase "tort", which is typical for the traditional terminology of constitutional law, may be misunderstood by most people and lead to downplaying such acts. According to the professor, this is because the word "tort" in the Polish language can be associated only with a minor offense[[11]](#footnote-11).

To sum up, it may seem necessary to strengthen the position of the State Tribunal   
in such a way that the most important people in the country will know that responsibility may be real. It seems that the Tribunal of State has not powerful enough position in the Polish system.

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