Diffuse Constitutional Review in Light of Poland's Constitutional Court Crisis

Judgement of District Court in Gorzów Wielkopolski of 23 April 2021,
I C 1326/19

1. **In its adjudication the court could not take into advisement a "decision of the Constitutional Court" with a "double" in the panel because such a panel was defective, irregular, and could not be regarded as a tribunal established by law.**
2. **The court had a duty to carry out its own review of the Hunting Law Act versus the constitutional safeguards of property. The basis for the court's power to do so is found in art. 8(2) and 178 of the Constitution.**

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Commentary

1. In a judgment of 23 April 2021, the District Court in Gorzów Wielkopolski dismissed an action for hunting damages. According to the law, the proprietor of agricultural land whose property is situated within the confines of hunting grounds belonging to the Polish Hunters Association (hunters' self-governing body) is entitled to damages for crops destroyed by game animals. The dispute concerned the calculation of such damages. The farmer expected the assessment to include unrealized profits from the sale of agricultural produce. The hunters, on the contrary, assessed the damages at actual losses inflicted by the animals. The sum proposed by the hunters was too low to the claimant.

Assessing hunting damages has long been the subject of much controversy in legal practice. The legislation governing this matter reached the Constitutional Court, resulting, on May 8, 2019,[1] in a finding of unconstitutionality due to a violation of the

[1] Case K 45/16, OTK ZU A 2019, no. 22. It was the District Court's view that in the judgments in K 34/15, 3 December 2015, OTK ZU 2015, no. 11A, 185, and in K 35/15, 9 December 2015, OTK ZU

constitutional right to own property. The aforementioned Constitutional Court judgment should have been taken into advisement and followed in the case at hand. That, however, did not happen, because the court disputed its validity and refused to apply it.[2] The issue raised was that the Constitutional Court had been improperly empaneled by including in its composition a person who was not a judge. As the District Court expounded: "The panel included a 'double', M.M., who was irregularly seated in the place of a justice of the Constitutional Court duly and lawfully elected by the Sejm. In the act of appointment, the President of the Republic passed over the duly elected justice and appointed in his place the doubles elected by the governing coalition in the Sejm. Consequently, the District Court took it upon itself to evaluate the constitutionality of hunting legislation and found it to be in violation of the constitutional safeguards of the right to own property. Thus, the District Court arrived at the same conclusion as the Constitutional Court had done, but independently from it, in the exercise of so-called diffuse review.

As the legal basis for its own power to review the constitutionality of the statute governing the assessment of hunting damages, the District Court offered the principle of direct applicability of the Constitution[3] and the principle of judicial independence and subjection only to the Constitution and statutes.[4]

2. The District Court called for some commentary for two principal reasons.

Firstly, the rationale offered for embarking on the constitutional review of a binding statute is distinctive. In deciding to do so, the District Court had to find itself legitimately positioned to verify the constitutionality of the law enacted by the legislature. Furthermore, as noted above, the District Court linked diffuse review to the direct applicability of the Constitution and the rule that a judge is only bound by the Constitution and statutes.

Secondly, the motives for the District Court's decision are noteworthy. The District Court reviewed the constitutionality of a statute out of the conviction that the Constitutional Court's ruling was defective as it was issued by an irregular panel (featuring members elected to already occupied seats). In normal circumstances, the Constitu-

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2015, no. 11A, 186, the Constitutional Court had held that the President of the Republic was not free to refuse to accept the oaths of office from duly elected judges. That was subsequently reaffirmed by the European Court of Human Rights in *Xero Flor w Polsce sp. z o.o. v. Poland* (see *Xero Flor w Polsce sp. z o.o. v. Poland*, appl. no. 4907/18, decision of 7 May 2021). In *Xero Flor*, the ECtHR found Poland in violation of art. 6(1) of the European Convention of Human Rights due to the inclusion in Constitutional Court's panel of a person elected to an already occupied seat. Thus, the Constitutional Court was not a court established by law.

[2] For more on the legal status of the Constitutional Court's judgments handed down by irregular panels, see, e.g., P. Radziewicz, "On legal consequences of judgements of the Polish Constitutional Tribunal passed by an irregular panel", *Review of Comparative Law* 2017, vol. 4, issue 31, pp. 45–64.

[3] Article 8(2) of the Constitution: The provisions of the Constitution shall apply directly, unless the Constitution provides otherwise.

[4] Article 178(1) of the Constitution: Judges, within the exercise of their office, shall be independent and subject only to the Constitution and statutes.

tional Court examines the constitutionality of statutes and for the common court to refer questions to the Constitutional Court.[5] Here, by contrast, the District Court appears to suggest that entering on the path of diffuse review was a necessity in the current situation. Since the Constitutional Court embroiled in a crisis could not guarantee impartiality; it also undermined the confidence placed in the state and in the law.[6] In order to protect individual constitutional freedoms, the District Court, as it were, assumed the duties of the Constitutional Court, taking it upon itself to examine the constitutionality of the statute.

Both of these problems will be analyzed further in this gloss.

3. Diffuse constitutional review of ordinary statutes is one of the review models characteristic of modern constitutional democracies. Its classic form originated in the United States and, with time, became widespread in other legal systems, including some European jurisdictions.[7] As a matter of certain simplification, diffuse review consists in that the court itself, without referring to any other organ of the state, exercises the constitutional review of a statute within the court's proceedings. The effects of the disapplication of a statute (or some of its provisions) are thus limited to the case at bar. If this belief in the unconstitutionality of a given statute subsequently spreads across the judiciary and the rest of the legal system, it will do so either on the strength of its own merits or on the basis of the formal binding force of judicial precedent. Following the court's finding that the statute at hand is unconstitutional, it is irrelevant whether the case goes on to be decided on the basis of other statutory provisions relying on the direct applicability of constitutional norms, or whether a legal rule is created by the court itself for this purpose (where a given jurisdiction's taxonomy of sources of law allows this). The essence of diffuse review is, therefore, the very possibility that a duly enacted statutory rule will be disapplied (following the incidental finding that the rule lacks binding force) on constitutional grounds.

Diffuse review of the constitutionality of legislation is normally an alternative to centralized review exercised by a specialized constitutional court. There are, however, some countries in which both systems coexist and complement each other. The relationship between the constitutional court and common courts is regulated by constitutional provisions defining in particular the demarcation of powers, the consequences of the rulings, and the methods of resolving conflicts between them. An example of

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[5] Article 8(193) of the Constitution: Any court may refer a question of law to the Constitutional [Court] as to the conformity of a normative act to the Constitution, ratified international agreements or statute, if the answer to such question of law will determine an issue currently before such court.

[6] More extensively about the Constitutional Court crisis in Poland see, e.g., W. Sadurski, *Poland's Constitutional Breakdown*, Oxford 2019, p. 58 ff.; *Konstytucyjny spór o granice zmian organizacji i zasad działania Trybunału Konstytucyjnego (czerwiec 2015 – marzec 2016)*, P. Radziewicz, P. Tuleja (eds), Warszawa 2017, *passim*.

[7] See, e.g., A.R. Brewer-Carías, *Judicial Review in Comparative Law*, Cambridge 1989, pp. 127–182, 263–324; P. Mikuli, *Zdekoncentrowana sądowa kontrola konstytucyjności prawa. Stany Zjednoczone i państwa europejskie*, Kraków 2007, p. 19 ff.

a country with a hybrid (mixed) system of constitutional review of ordinary statutes is Portugal.[8] Poland's legal system is not a hybrid system in this sense.[9]

Diffuse constitutional review belongs to the branch of law defining the system of governance. The main role of this type of review is to protect the supremacy of the constitution and of human rights. What must be remembered, however, is that it also affects the partition of power in the state and especially the relationship between the legislative branch and the executive branch. It is only natural that the taking up of diffuse review by the courts leads to questions about its constitutional basis and legitimacy. This holds especially true in Poland's legal order, which expressly establishes a centralized system of constitutional review and a specific institution to exercise it – the Constitutional Court – and does not include judicial precedent among the recognized sources of generally applicable law. In other words, what the Constitution stipulates is not the ideal of constitutional review capable of implementation by an array of legal instruments depending on need and circumstance but a concrete institution, as opposed to the many other possibilities that were not chosen.

For this reason, diffuse constitutional review is not the same thing as the interpretation of the law. In particular, it cannot be identified with the use of diverse techniques of co-application of the Constitution with ordinary statutes in order to adapt the statutory framework to constitutional standards.[10] Diffuse constitutional review cannot be reduced to the direct application of the Constitution in lieu of ordinary statutes.[11] Nor is it a rule of conflict such as *lex superior derogat legi inferiori*.[12] The outcome will usually be a finding that the statute lacks force in the realities of a given case. The material result of such a finding will be the official – done in the state's name – disapplication of a binding statute in favor of a different legal solution deemed by the court to apply.

In the context of the judgment at hand, the remarks above show that the District Court somewhat prematurely identified diffuse review with the principle of the direct applicability of the Constitution. This is because the principle of direct applicability does not create or give rise to any power to engage in the judicial review of the constitutionality of statutes. It is self-evident that the direct applicability of the constitution requires the courts to pay regard to constitutional provisions in the process of

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[8] See art. 280 of the Portuguese Constitution of 1976. Also see e.g. C. Blanco de Morais, *Justica Constitutional II*, Coimbra 2011, p. 595 ff.

[9] For the opposite view see, e.g., M. Gutowski, P. Kardas, *Wykładnia i stosowanie prawa w procesie opartym na Konstytucji*, Warszawa 2017, p. 567 ff.

[10] See, for example, M. de Visser, *Constitutional Review in Europe. A Comparative Analysis*, London 2015, p. 291 ff.

[11] See, e.g., L. Garlicki, "Bezpośrednie stosowanie konstytucji" [in:] *Konferencja naukowa: Konstytucja RP w praktyce*, Warszawa 1999, pp. 23–25.

[12] In the decisions of the Constitutional Court this problem has featured in the context of the direct derogative effect of the coming into force of the Polish Constitution of 1997 on earlier statutes containing regulation directly conflicting with the new constitutional norms (see, e.g., the Constitutional Court's judgment in *SK 19/99*, 8 December 1999, OTK ZU 1999, no. 7, item 161; cf. also L. Garlicki, "Konstytucja a ustawy przedkonstytucyjne" [in:] *Wejście w życie nowej Konstytucji Rzeczypospolitej Polskiej. XXXIX Ogólnopolska Konferencja Katedr Prawa Konstytucyjnego*, Z. Witkowski (ed.), Toruń 1998, p. 29 ff.

the application of the law. In practice, this can lead to the sympathetic interpretation of statutes and, in the right circumstances, even the application of a vertical rule of conflict with a derogative result. All this, however, does not mean that by engaging in legal interpretation and the direct application of the Constitution the court exercises constitutional review. The coincidence of the respective effects is adventitious.

Here, the question to ask is why the District Court invoked diffuse constitutional review at all while trying an action for hunting damages, what led to this decision, and what its deeper motives were. This is the subject of the next part of this gloss.

4. Already in the verbal layer of its rationale, the District Court expressed a negative view of the Constitutional Court's ruling of 8 May 2019. It referred to the Constitutional Court's decision and panel using quotation marks and to the persons elected to the Court's occupied seats not as judges but as "doubles" (with quotation marks). Leaving aside the dilemmas of *decorum* in the actions of public authority, the doubtful status of the Constitutional Court's ruling can in this case be regarded as a noteworthy stated ground for engaging in diffuse review.

Cases of common courts undertaking diffuse constitutional review in reaction to the governance crisis triggered by dispute surrounding the Constitutional Court are more frequent.[13] Their common feature is the courts' intention, i.e., the desire to maintain effective human-rights remedies in the legal system. Existing safeguards realized by the Constitutional Court have been weakened. The Constitutional Court has lost the character of impartiality and its credibility as an arbitrator of disputes. The innovation in the courts' conduct, therefore, consists in how they attempt to fill the gap opened in the legal system by the Constitutional Court crisis. The courts have taken over the Constitutional Court's responsibilities and begun to exercise them in a diffuse-review model.

Doubts as to whether there exists in the common courts the power to exercise diffuse review have already been expressed and remain a valid concern.[14] Regardless, it will be expedient to take a closer look on the courts' motives, which are momentous and deserving of moderate approval. One cannot but concur that the adjudicatory functions of the subverted Constitutional Court should be sustained by other procedures and legal means still enjoying social confidence. It would be unacceptable for constitutional human rights to be left without (as much as an attempt at) institutional protection. The selection of the alternative means by which to achieve this purpose, however, brings out the limitation inherent in this mode of thinking. And that is not something to ignore when one claims to represent a governed by the rule of law. The pursuit of the goal should not leverage just about any arbitrary instruments conceivable, especially ones that cannot be persuasively argued for under the existing constitutional dispensation. Any analogies or borrowings from foreign systems or theoreti-

[13] For other examples of such decisions see, e.g., P. Radziewicz, "Judicial Change to the Law-in-Action of Constitutional Review of Statutes in Poland", *Utrecht Law Review* 2022, vol. 1, pp. 29–44.

[14] See point 3.

cal models can only be transplanted *mutatis mutandis*. Hence the reservations, already highlighted in the preceding part of this gloss, concerning the courts' power to engage in the diffuse constitutional review of ordinary statutes and acceptance for the courts' disapplication of statutory provisions on the grounds of, for example, vertical rules of conflict referred to constitutional provisions in their direct application. The consequence of such an approach is that the courts will sometimes be unable to eliminate a doubtful statutory provision in the process of deciding a case that has come up before them for ruling. Canons of legal interpretation will not allow such a result.[15] Thus, the outcome can be unsatisfactory and the approach itself exposed to the charge of excessive conservatism. Such is, however, in a way, the price of living up to the ideal of the rule of law and especially the consequent adherence to the prohibition against presumptions of competence. It seems to be a price worth paying.

5. In summary, at least three charges can be levied against the exercise of diffuse constitutional review in Polish constitutional circumstances. The first charge is the formal error of false analogy. Diffuse review is not identical with the direct application of the Constitution, subjection of the judge to the Constitution and statutes, or use of *lex superior derogat legi inferiori* as a rule of conflict. While recourse is made to all of the above institutions in diffuse review, they do not exhaust its definition. The second charge is *error in substantia*. For diffuse review is not only a means by which to protect important legal interests; it is first and foremost an element of a state's constitutional order, linked to the principle of popular sovereignty and to the separation of powers. Diffuse review cannot arise occasionally or out of situational expediency. Its political-legal legitimacy is the fundamental question. The question of the admissibility of diffuse review is simultaneously a question of the state's constitutional dispensation and of who is entitled to shape the latter. These are problems of completely different categorial status than the reasons considered by the District Court. The third charge is the error of "from ends to means" instrumental thinking in a sphere dealing with legal consequences and not with the phenomena of nature that are based on cause-and-effect chains. From the fact that there exists a need to protect human rights and from the supremacy of the constitution there does not arise a power for the court to exercise the constitutional review of ordinary legislation. No such argument is sustainable especially where its consequence would be to create, *ex nihilo*, a complex legal institution with far-reaching consequences for the powers of other organs of the state and its entire political organization.

Moreover, it is reasonable to doubt the propriety and expediency of writing a gloss on the decision of a court this far down the hierarchical structure of the judiciary. Perhaps the position taken by the court is not representative of a lasting trend and will fade with time. For a district court, of all courts, to challenge the legitimacy of the

[15] More extensively on validation rules and canons of legal interpretation see, e.g., Z. Ziembiński, *Problemy podstawowe prawoznawstwa*, Warszawa 1980, p. 244 ff.

Constitutional Court and embark on its own review of the constitutionality of a statute, appears, however, to be a fact of quite some significance.

For some time we have witnessed a peculiar phenomenon emerging and developing in a time of constitutional crisis. This phenomenon is the courts taking it upon themselves to exercise the constitutional review of legislation due to the weakening of the authority commanded by the Constitutional Court's as an adjudicator.[16] It is difficult to predict the ultimate fate of this practice. Already now, however, we can conclude that it has become a staple in the collective consciousness of the judiciary, including inferior courts, with judges attempting to protect the supremacy of the Constitution, the fundamental rights of individuals, and constitutional democracy as a form of political organization. This judgment from the District Court in Gorzów Wielkopolski also contributes to reaffirming the above conclusion.

Literature

Brewer-Carías A.R., *Judicial Review in Comparative Law*, Cambridge 1989.

de Morais C.B., *Justica Constitutional II*, Coimbra 2011.

de Visser M., *Constitutional Review in Europe. A Comparative Analysis*, London 2015.

Garlicki L., "Bezpośrednie stosowanie konstytucji" [in:] *Konferencja naukowa: Konstytucja RP w praktyce*, Warszawa 1999.

Garlicki L., "Konstytucja a ustawy przedkonstytucyjne" [in:] *Wejście w życie nowej Konstytucji Rzeczypospolitej Polskiej. XXXIX Ogólnopolska Konferencja Katedr Prawa Konstytucyjnego*, Z. Witkowski (ed.), Toruń 1998.

Gutowski M., Kardas P., *Wykładnia i stosowanie prawa w procesie opartym na Konstytucji*, Warszawa 2017.

Mikuli P., *Zdekoncentrowana sądowa kontrola konstytucyjności prawa. Stany Zjednoczone i państwa europejskie*, Kraków 2007.

Radziewicz P., "Judicial Change to the Law-in-Action of Constitutional Review of Statutes in Poland", *Utrecht Law Review* 2022, vol. 1.

Radziewicz P., "On legal consequences of judgements of the Polish Constitutional Tribunal passed by an irregular panel", *Review of Comparative Law* 2017, vol. 4, issue 31.

Radziewicz P., Tuleja P. (eds), *Konstytucyjny spór o granice zmian organizacji i zasad działania Trybunału Konstytucyjnego (czerwiec 2015 – marzec 2016)*, Warszawa 2017.

Sadurski W., *Poland's Constitutional Breakdown*, Oxford 2019.

Ziembiński Z., *Problemy podstawowe prawoznawstwa*, Warszawa 1980.

[16] The activity is engaged in by numerous common courts throughout Poland. Examples are provided in the article cited above: P. Radziewicz, *Judicial Change*…, pp. 29–44.

Summary

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Diffuse Constitutional Review in the Light of Poland's Constitutional Court Crisis

This gloss comments on the judgment of a common court disapplying a duly enacted statute as incompatible with the Constitution. The court also decided to disapply the Constitutional Court's judgment on the same subject because of the participation of a person elected to an already occupied seat. The District Court's intention was to substitute itself for a Constitutional Court stripped of independence and impartiality. The intention was to protect the supremacy of the Constitution, human rights, and the rule of law. The purpose of this gloss is to examine more closely this new practice from the courts and the circumstances surrounding it. The actions taken by the courts lead to the propagation of the diffuse constitutional review of ordinary statutes as a sort of protective mechanism within a constitutional democracy.

Keywords: constitution; Constitutional Court; diffuse review; constitutional crisis; constitutional law.

Streszczenie

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Rozproszona kontrola konstytucyjności ustawy wobec kryzysu Trybunału Konstytucyjnego

Glosa dotyczy orzeczenia, w którym sąd powszechny odmówił zastosowania obowiązującej ustawy ze względu na jej niezgodność z Konstytucją. Zdecydował także, że nie uwzględni wyroku Trybunału Konstytucyjnego na ten sam temat, gdyż w składzie Trybunału zasiadała osoba, która została wybrana na zajęte stanowisko sędziowskie. Intencją sądu było orzeczenie o konstytucyjności ustawy w miejsce Trybunału Konstytucyjnego, który stracił przymiot niezależności i bezstronności. Postępując w ten sposób, sąd chciał chronić nadrzędność Konstytucji, prawa człowieka oraz rządy prawa. Celem glosy jest przybliżenie nowej praktyki sądów oraz opis jej przyczyn i warunków. Wskutek działalności sądów dochodzi do upowszechnienia się kontroli rozproszonej ustaw jako swego rodzaju mechanizmu obronnego demokracji konstytucyjnej.

Słowa kluczowe: konstytucja; Trybunał Konstytucyjny; kontrola rozproszona; kryzys konstytucyjny; prawo konstytucyjne.