QUIS CUSTODIET IPSOS CUSTODES – INTERPRETATIVE AND SCOPE JUDGMENTS AS AN ACTIVIST SUBSTITUTE FOR A UNIVERSALLY BINDING INTERPRETATION OF THE POLISH CONSTITUTIONAL TRIBUNAL

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ABSTRACT

The Constitutional Tribunal in Poland has a special position compared to other constitutional courts of this type. Although it is sometimes compared to a classic constitutional court that can interpret the provisions of the Constitution in a binding manner, it has lost this type of authority in the course of institutional evolution. Since 1997, the Constitutional Tribunal has lost the right to issue generally binding interpretations of law. However, as a politically active court, it has assumed that the specific form of judgment, interpretative judgments, will be used to de facto restore the competence taken away under the current Constitution. Judicial activism has become the reason for the politicisation of the Tribunal and its inclusion in the dispute over the judiciary in Poland. The article analyses the impact of activism on the constitutional crisis in Poland. It puts forward postulates concerning the so-called constitutional reset and the implementation of the idea of the enduring Constitution and the inactive court.

KEYWORDS

Constitutional Tribunal
Polish Constitution
constitutional crisis
universally binding interpretation
judicial activism
enduring constitution

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1. Introduction

Contemporary literature on the subject is rich in studies on the so-called interpretative and scope judgments issued by the Constitutional Tribunal[2]. At the same time, there has yet to be a consensus in the doctrine today regarding the status of such judgments issued by the Constitutional Tribunal. On the one hand, we have studies referring to the established line of jurisprudence of the Supreme Court, critical of the idea and power of the impact of interpretative and scope judgments. On the other hand, the constitutional court tries to prove its unquestionable authority in this matter.

The position of the Supreme Court comes down to a statement, consistent with the provisions of the Constitution (Article 239, paragraph 2), about the lack of possibility for the Constitutional Tribunal to issue universally binding interpretations (of the parliamentary acts) and thus the lack of any other than operative power of interpretations contained in interpretative and scope judgments.[3] The position of the Constitutional Tribunal comes down to the understanding of Article 190, paragraph 1 of the Constitution, which speaks of the finality and universal validity of judgments in such a way, that the interpretation is given when issuing an interpretative or scope judgment. Although it cannot be considered a legal interpretation, it is an element of the decision, final and universally binding. When comparing these positions, it is clear that the Supreme Court accuses the Constitutional Tribunal of acting *praeter legem*, and thus prompts lawyers in Poland to ask the question in the title: *Quis custodiet ipsos custodes* – Who will guard the guards?

A review of the literature on the subject and the positions of the highest state bodies indicates a huge disproportion in the scope of citing the positions of the Supreme Court and the Constitutional Tribunal. Constitutionalists discussing the issue of interpretative and scope judgments often ignore or significantly limit the arguments presented by the Supreme Court. At the same time, historical and theoretical analysis indicates the correctness of the arguments conducted by the Supreme Court, not the Constitutional Tribunal. The logic of the constitutional system introduced under the Constitution of 1997 excludes the possibility of functioning interpretative and scope judgments in the form postulated by the Polish constitutional court. As those judgements are *de facto* becoming a backdoor introduction of the universally binding interpretation of the acts of parliament. As this is the main focus, not *ad casum* interpretation that serves as a tool for keeping legal system coherent.

The presented paper is devoted to verifying the truth of the thesis that the Constitutional Tribunal, by issuing interpretative judgments, which are *de facto* identified in its case law with universally binding interpretation, being politically active, goes beyond the framework imposed on it by the Constitution. To verify the above-mentioned thesis,

2 | An overview of the publications can be found in the section on the substance of the dispute between the Supreme Court and the Constitutional Tribunal.

3 | A scope judgment is when the Constitutional Tribunal determines the conformity or non-conformity of a legal provision with the Constitution within a specific (subjective, temporal, or objective) scope of its application. An interpretative judgment is contained in a judgment whose conformity or non-conformity with the legal constitution is confirmed by the Constitutional Tribunal in its specified understanding (interpretation). More on the classification of the Constitutional Tribunal judgements: Dominowska, 2008. More on the interpretatitve and scope judgements: Woś, 2016; Kustra, 2011.

the analysis will be carried out on the historical premises of the political activism of the Constitutional Tribunal, subsequent constitutional regulations providing the framework for its functioning, theoretical and legal assumptions present in them, and case law. Additionally, the positions issued by the supreme state authorities in case SK 17/18 directly concern the provision of Article 401(1) of the Act of 17 November 1964 - the Code of Civil Procedure, which will provide extra analytical material. Article 401(1) has been of historically importance to the establishment of the Supreme Court's set of rulings opposing Constitutional Tribunal claims regarding both interpretative judgments, e.g., Resolution of the Seven Judges of the Supreme Court of 17 December 2009 (III PZP 2/09).

2. Constitutional court and the democratic principles

The emergence of the institution of a constitutional court in political systems (systems of government) has led to renewed questions about the essence of democracy, sovereignty, the division of powers, and their relationship with the concept of the rule of law (or the rule of law, as defined in the Constitution of the Republic of Poland). The experience of the emergence of constitutional courts, whether based on the American model or Kelsen's[4] indicates that the disruption of classical systems of the division of powers (both Rousseau's tripartite division and Constantine's quadrangular division of powers) is inevitable. The experience of various forms of constitutional courts, over several centuries, also indicates the inevitable occurrence of judicial activism. A phenomenon, about which there is a predominance of negative opinions on the western coast of the Atlantic[5] – is perceived as a destructive and undesirable element, and is perceived more inconsistently in Europe. The fact remains, however, that judicial activism is largely related to the guardians going beyond their assigned role and granting competencies that shape the legal and political system. Activist, precedent-setting, and groundbreaking judgments (landmark cases) became the basis of granting shaping competencies to both the Supreme Court in the USA[6] and the Court of Justice of the European Union.[7] The systemic position that the constitutional courts themselves have given themselves (and even the increase in the importance of the judiciary about the other separate branches of power) has led researchers to put forward the theoretical concept of judgeocracy[8].

The influence and practice of constitutional courts on democracy and parliamentarianism has been analysed by lawyers and political scientists for years. Although in Poland the discussion on the status of the Constitutional Tribunal flared up with a new force in the so-called mainstream (both academic and common) only after 2015, such considerations have a long history outside the country[9]. An example of this type of analysis is

4 | Kelsen, 2009.
5 | See: Grover, 2020; 2006.
6 | *Marbury v. Madison*, 5 U.S. 137.
7 | *Van Gend en Loos*, 26/62.
8 | See: Pokol and Teglasi, 2019.
9 | Debates on the position of the Constitutional Tribunal and the need to eliminate universally binding interpretation as a tool of the Polish constitutional court were part of the debate in the Sejm in the 1990s when a new constitution was drafted. Some remarks on that will be given later in this article.

the argument of Dian Schefold[10] concerning the German case, translated into Polish. The author points out that in the German tradition, it was only the fall of the monarchy (and the authority of the monarch – understood as the legitimacy to exercise power) that opened up the examination of statutes by courts and, subsequently, allowed for the interpretation of the fundamental law. Before World War II, in the author's opinion, the activity of constitutional judges (as a conservative element) was aimed at the democratic devices introduced by the constitution of the so-called Weimar Republic. After the war, the special role of judicial review of statutes was no longer a subject of controversy at all. The Constitutional Tribunal, however, remains 'a kind of counterweight to the sovereignty of the people, a 'surrogate sovereign out of necessity'.'[11]

In Poland, although discussions on the assumptions and forms of constitutional control were held already in the interwar period,[12] the decades of the Polish People's Republic, and in particular the time of what can be called, following the example of the 'long nineteenth century', the 'long period of transformation' significantly changed, not only the way of conducting debates, but also their context. The introduction, together with the amendment of the Constitution of the Polish People's Republic in 1982,[13] of a body of provisions establishing the Constitutional Tribunal, the debate on the drafts (fifteen)[14] of the act on the Constitutional Tribunal and the adoption of one of them in 1985,[15] and finally the commencement of adjudicatory activity in 1986, were part of the broader context of social, political and economic changes in Poland. Ignoring these conditions may result in omitting the *ratio* of consent to an active attitude,[16] which is still presented despite the disappearance of these circumstances,[17] as is the case with other constitutional courts.

3. Universally binding interpretation in Poland

The original legal basis did not give the Constitutional Tribunal the authority to issue a universally binding interpretation of the Constitution (generally binding). The authority in this respect under the Constitution of the Polish People's Republic, until the amendment of 1989[18] and the accompanying Act of 29 May 1989 on the transfer of the previous competencies of the Council of State to the President of the Polish People's Republic and

10 | Schefold, 1986.
11 | Schefold, 1986, p. 114.
12 | Alberski, 2010, p. 93.
13 | Journal of Laws 1982 r. no. 11, item 83.
14 | Alberski, 2010, p. 112.
15 | Journal of Laws 1985 r. no. 22, item 98.
16 | See more: Smolak, 2005.
17 | The American and European courts already cited owe their position to activism, which was initially perceived as an element of a broader set of actions aimed at creating a new social, political and economic order. In the case of the USA, it was a federation that de facto replaced the union of free states operating on the basis of a treaty such as the Articles of Confederation and perpetual union. In the European case, it was the idea of communities, and then the European Union, which required the content of treaties accepted by sovereign countries - reluctant to renounce directly, i.e. in the letter of the law, the attributes of their sovereignty.
18 | Journal of Laws 1989 no. 75 item 444.

other state bodies[19], was held by the Council of State. Thus, it was the Council that could freely shape the normative content of the provisions of the constitution – reading in particular from the general clauses – such norms that would correspond to the ideological assumptions of the political system at that time. However, the Council of State only used these competencies in an incident in the 1950s. It should be pointed out that this did not result from respect for the idea of the separation of power, but rather the logic of functioning in an undemocratic regime, where such interpretations of the constitution were not necessary to achieve the intended effect on the scale of the political or legal system.

Granting competence to issue universally binding interpretations[20] strengthened the Constitutional Tribunal's already existing ability to create lines of case law that change the legal reality. Lines concerned such fundamental issues for political and legal systems as the principle of a democratic state of law, equality before the law, or even the lack of retroactivity. It is worth noting that the legal changes of 1989 did not abolish the possibility of rejecting a resolution on the unconstitutionality of an act by the Sejm. It could reject the resolution of the Constitutional Tribunal by a qualified majority of two thirds. Although the origins of this regulation were pre-transformation, it should be noted that from the point of view of the concept of the separation of powers, such a solution is desirable. Classical tasks set before judicial bodies – i.e. tasks that were set before them when the concepts of Rousseau or Constant were put forward - did not contain any elements of constitutional justice. Leaving (although a qualified majority) the last word on the justification for introducing a given solution into the legal system and expressing an opinion on its potential conflict with the constitution is an expression of protection of the competencies of the legislative authority. Ultimately – especially in the Polish conditions after 1992[21] – the Sejm (for a brief time) was the constituent (the body adopting and preparing the constitution) and the legislator in the legislative process. Thus, having the right to reject the resolution of the Constitutional Tribunal, it exercised, in a way, the competence to issue (in this negative way) an authentic interpretation.[22]

Following the case law of the 1980s, the foundations for the future socio-economic transformation were laid in the political and legal sphere by the Constitutional Court. This special role played by the Constitutional Tribunal in the critical period for the Polish state became – in the author's opinion – the reason why judicial activism was tolerated immediately after the transformation period.[23]

19 | Journal of Laws 1989 no. 34 item 178.

20 | According to Article 5 of the amended Act, the Constitutional Tribunal established a universally binding interpretation of statutes. In the analyzed legal situation, such interpretation was therefore limited to the basic type of generally applicable law.

21 | When the Small Constitution of 1992 was adopted.

22 | The main accusation against active constitutional courts is that they shape legal reality through their rulings. Although they are not legislators par excellence, i.e. they do not issue normative acts and, consequently, regulations, they do introduce previously unknown norms into the legal system through their rulings. See the comments on the Roe v. Wade and Planned Parenthood v. Casey rulings.

23 | Tolerance turned into instrumentalization only with the maturation of the Polish political class, which inevitably recognized the active Constitutional Tribunal as a key institution of the Polish political system. The culmination of this maturation and awareness process was the years 2005-2007, when the judgments of the constitutional court managed to stop some reforms of the then parliamentary majority. These events were not without significance for the nominations of 2015, which led to the political crisis around the Constitutional Tribunal.

The change of the political regime and the adoption of the so-called Small Constitution in 1992[24] opened a new chapter in the history of the development of the Polish political and legal system and the Constitutional Tribunal. Although the formal scope of competencies – especially when we talk about the most important for this work, the competencies to issue interpretations and adjudicate on the unconstitutionality of normative acts – did not change much, the Tribunal actually became an element of the system of deepening political and economic transformation. The Polish constitutional court also became an institution reforming the democratic political system in *statu nascendi*. Already in 1993, it adopted a resolution that influenced relations between itself and the Sejm, as well as the adjudicative practice itself. By the resolution of 20th October 1993 on the interpretation of Article 7 Section 2 of the Act of 29th April 1985 on the Constitutional Tribunal[25] specified that 'the Sejm is obliged to consider the ruling of the Constitutional Tribunal on the non-conformity of the act to the Constitution no later than within six months from the date of presentation of the ruling to the Sejm by the President of the Constitutional Tribunal'. This resulted from the linguistic interpretation of the analysed provision, however, from the moment of adopting the resolution, it was no longer possible to apply other interpretations.[26] Moreover, in the event that the ruling of the Constitutional Tribunal was deemed justified, the Sejm should make appropriate changes to the act covered by the ruling or repeal it in part or in whole within the period specified in Article 7 Section 2 of the Act on the Constitutional Tribunal. Finally, the failure of the Sejm to adopt the relevant resolution within six months was treated as an expression of tacit consent as to the content of the ruling. Although this last point significantly streamlined the process and did not allow for maintaining a specific state of suspension and uncertainty as to the constitutionality of the provisions, it was nevertheless a clear example of an expansive interpretation and judicial activism.

It should be clearly emphasised here (which will also be important for the perception of interpretational judgments after 1997) that contrary to the above-presented concept of the institution of the Sejm's review of a judgment on unconstitutionality as a form of expressing an authentic interpretation, which may dismiss a legal one, but issued by a body outside the circle of the institution of legislative power, the Constitutional Tribunal limited the Sejm's activity to only influencing the legal effects of the judgment. Thus, from the point of view of the concept presented by the Tribunal, the Sejm did not make a specific interpretation and stood guard over the normative system created by itself, but suspended the legal effects of the judgment, which could not be changed or derogated in any way. In the justification for the cited act, we read in extenso that:

24 | Journal of Laws 1992 no. 84 item 426.

25 | Constitutional Tribunal decision ref. No. W 6/93.

26 | A similar issue was raised in judgment K 34/15 concerning the obligation of the President of the Republic of Poland to accept an oath from a judge of the Tribunal elected by the Sejm. It is worth citing the content of this judgment, however, which clearly differs (due to the lack of authority to issue a legal interpretation by the Constitutional Tribunal) from the content of the resolution of 1993. In judgment K 34/15 we read: 'Article 21 section 1 of the Act referred to in point 1, understood in a way other than that providing for the obligation of the President of the Republic of Poland to immediately accept an oath from a judge of the Tribunal elected by the Sejm, is inconsistent with Article 194 section 1 of the Constitution'.
This is therefore a classic example of an interpretative judgment, which de facto is to replace the lost competence to issue abstract legal interpretations in the form of acts.

> 'The establishment in Article 33a Section 2 of the Constitution of the Republic of Poland of the condition for the Sejm to consider judgments of the Constitutional Tribunal on the non-conformity of an act to the Constitution does not mean that they do not have binding legal force until they are considered (and accepted) by the Sejm, and also - as discussed below - in the event of their failure to be considered by the Sejm within a specified period. According to Article 33a Section 1 of the Constitution of the Republic of Poland, the judgment of the Constitutional Tribunal is the basis for determining the conformity or non-conformity of an act to the Constitution ('The Constitutional Tribunal shall rule on the conformity of acts to the Constitution...'). The binding judgment, and not its projection, is subject to consideration by the Sejm (Article 33a Section 2 of the Constitution). In accordance with Article 7 Section 1 of the Act on the Constitutional Tribunal, the President of the Constitutional Tribunal submits to the Sejm a 'judgment determining the non-conformity of a legislative act to the Constitution'.'

Therefore, according to the clear wording of the Constitutional Tribunal Act, judgments are final (Article 30, Section 1 of the Constitutional Tribunal Act), and judgments establishing the inconsistency of statutes with the Constitution cannot be challenged – unlike judgments concerning other acts – in the procedure of reconsideration of the case (Article 30, Sections 2-3 of the Constitutional Tribunal Act). The consideration of the judgment and its acceptance or rejection by the Sejm has legal significance, however, when it comes to the legal effects of the judgment on the applicable law. Until then, the effects of the judgment establishing the inconsistency of the statute with the Constitution remain under a legal condition (*conditio iuris*) and in this sense depend on the resolution of the Sejm, if – as discussed below – it was adopted within the period specified by the statute'.

The above-outlined legal status and competencies of the Constitutional Tribunal remained in force until 1997 when the Constitution of the Republic of Poland came into force. The adoption of the 'full constitution' meant not only the introduction of a new legal regime, but also the closing of a certain stage of development of the political and legal system, which was expressed, in particular in the wording of the final and transitional provisions to the new fundamental law.

4. Formation of the post-1997 Constitutional Tribunal

The 1997 Constitution can be seen as the culmination of systemic transformation. All devices of both a temporal and extraordinary nature were not only derogated by it but also lost their raison d'être from a doctrinal point of view. This qualitative leap is particularly visible in the body of regulations concerning the functioning of the Constitutional Tribunal.

The provisions concerning the constitutional court,[27] although they can also be found in earlier chapters – when it comes to the legislative procedure, have been gathered primarily in Chapter VIII – Courts and Tribunals. However, equally important, from the point of view of the analysis conducted and the dispute between the Constitutional Tribunal and the Supreme Court, are the transitional and final provisions of the Polish constitution.

27 | The Act on the Constitutional Tribunal will not be analysed because its provisions are not the subject of controversy between the Supreme Court and the Constitutional Tribunal.

There we find regulations concerning the legal interpretation – the universally binding interpretation of law, which could be issued until the entry into force of the Constitution of the Republic of Poland of 1997.

The current fundamental law has significantly limited the scope of the Tribunal's activity. Article 188 of the Constitution introduced an enumeration of cases in which the constitutional court may adjudicate, i.e.: the conformity of acts and international agreements with the Constitution; the conformity of acts with ratified international agreements, the ratification of which required prior consent expressed in the act; the conformity of legal provisions issued by central state bodies with the Constitution, ratified international agreements and acts; the conformity of the purposes or activities of political parties with the Constitution; and the constitutional complaint referred to in Article 79, paragraph 1. The five-point catalogue has been supplemented with the competence contained in the provisions of Article 189, which recognizes the constitutional court as a court of competence.

The most important change was to deprive the Tribunal of the authority to issue an interpretation of the universally binding law. Although, in accordance with the principle of legalism (Article 7 of the Constitution), each organ of public authority, and courts and tribunals, being a separate authority, are nothing more than a branch of public authority, must act within the limits and on the basis of the law, the issue of the lack of authority to issue a legal interpretation was more broadly specified in the final provisions.

The key to the matter under analysis is Article 239 of the Constitution.[28] It states in paragraph 1 that within 2 years from the date of entry into force of the Constitution, rulings of the Constitutional Tribunal on the inconsistency with the Constitution of statutes adopted before the date of its entry into force are not final and are subject to review by the Sejm, which may reject the ruling of the Constitutional Tribunal by a majority of two thirds of the votes, in the presence of at least half of the statutory number of Deputies. This does not apply to rulings issued as a result of legal questions submitted to the Constitutional Tribunal. This indicates a certain period of adaptation to the new, post-transformation legal reality. On the other hand, paragraph 2 states that proceedings in cases on determining the universally binding interpretation of statutes by the Constitutional Tribunal, initiated before the entry into force of the Constitution, are subject to discontinuation. Thus, a certain chapter of the functioning of the constitutional court is definitively closed. Moreover, paragraph 3 clarifies that on the date of entry into force

28 | Commentaries on the Constitution stress that Constitutional Tribunal was strip of the right to formulated universally binding interpretations. It is also important to indicate that different scholars provide different approach to the relationship between universally binding interpretation and interpretational judgements. Piotr Tuleja indicates that 'The elimination of interpretative resolutions by the Constitutional Tribunal was cited as an argument against the Tribunal's issuing interpretative judgments. This argument is invalid because interpretative judgments are not intended to provide a generally binding interpretation of provisions but to specify the conditions under which a provision may remain in the legal system and do not require repeal on the grounds of unconstitutionality.'
Monika Haczykowska, Wiesław Skrzydło, and Piotr Winczorek do not make such remarks in their comments. Moreover, Piotr Tuleja issued his comment in 2023, that is after a new iteration of the dispute over the scope of competencies and position of the Constitutional Tribunal. Thus, his judgment – going against the suggestions arising from the Supreme Court's case law – may (although it does not necessarily have to) have an ideological tinge.

of the Constitution, resolutions of the Constitutional Tribunal in matters concerning the interpretation of statutes lose their universally binding force. Final court judgments and other final decisions of public authorities made by taking into account the meaning of provisions established by the Constitutional Tribunal through a universally binding interpretation of statutes, remain in force.

The cited provisions, although *clara non sunt interpretanda*, are the basis for conducting the dispute between the Supreme Court and the Constitutional Tribunal on whether, in the light of the regulation stating that the judgments of the Constitutional Tribunal have universally binding force and are final (Article 190 of the Constitution), the interpretational judgments have *de facto* the value of a universally binding interpretation of the law. It is also worth pointing out here the attitude towards presenting not only a linguistic interpretation but also an authentic one, giving the floor to the members of the Constitutional Committee of the National Assembly and its experts, who have repeatedly raised the issue of the possibility of making a universally binding interpretation of both laws and the constitution itself.

'Kazimierz Działocha: The universally binding interpretation of the provisions of the Constitution, made by the Constitutional Tribunal, which 'lives' the Constitution and whose entire legal existence is based primarily on the fact that it is to protect the Constitution, should not constitute the competence of the Constitutional Tribunal. Otherwise, the Constitutional Tribunal would be the only one to interpret the provisions of the Constitution in an official, official manner.

Prof. P. Winczorek rightly suggests to me that the Constitutional Tribunal would then become a permanent constituent assembly. This would be – without accusing the Tribunal of anything – exalting this body too much above the proper constituent assembly, i.e. the body authorized to establish the provisions of the Constitution. Besides, the Constitutional Tribunal interprets the provisions of the Constitution anyway, it just does so incidentally on the occasion of specific decisions on the conformity of law with the Constitution.

In this case, the Constitutional Tribunal enhances and sometimes even supplements the constitutional provisions. However, this is a completely different situation. The Constitutional Tribunal only occasionally interprets the provisions of the Constitution when it must decide on a specific case of compliance or otherwise of legal provisions with the Constitution. The Tribunal does not interpret the Constitution in a universally binding manner. This would be too much, considering the place of the Constitutional Tribunal among the constitutional organs of the state'[29]

29 | Biuletyn. Komisja Konstytucyjna Zgromadzenia Narodowego, 1995, no. 25, issue 33.

The creators of the Constitution, or in the future authors of commentaries on it such as Prof. Działocha[30] and Prof. Winczorek, pointed out the flaws of the solution consisting of assigning the Constitutional Tribunal the right to issue a legal interpretation. Although in the cited, clearly conducted lecture against the powers to which the Polish constitutional court has claimed the right since 1997, the interpretation of the Constitution was mentioned, the content of the Constitution already deprived the Tribunal of the right to issue a universal interpretation of ordinary laws. The cited fragment of the debate of the Constitutional Committee and the drafting of the Constitution means that such an authentic, purposive, functional interpretation – apart from the linguistic one, limited above to a short sentence – goes in a direction unfavourable for the Tribunal in the dispute with the Supreme Court outlined below.

The above-mentioned summary of the history of the development of regulations concerning the functioning of the Constitutional Tribunal, the doctrinal assumptions underlying subsequent regulations, and the context of transformation, are only the proper canvas on which it is possible to resolve a (practical) dispute between courts. Omitting any of these elements and attempting to abstract the adjudicatory practice from the doctrine and purposefulness of the introduced regulations is however, a part of the dispute that has been going on for years.

5. In activist search of substitute of universally binding interpretation

The literature on the subject is rich in studies on interpretational (and scope) judgments.[31] However, the problem of most studies is the acceptance of the perception or doctrine developed by the Constitutional Tribunal itself. A body which, from the point of view of the provisions of the Constitution, has the same strong authority to interpret it as any other (because there is nobody authorised to issue a legal interpretation). Moreover, a body that, in the words suggested by Professor Winczorek and quoted above, has the authority to issue a universally binding interpretation of the Constitution should not have, because this violates the idea of the separation of powers and would place the Tribunal

30 | It is worth noting that Prof. Kazimierz Działocha was a judge of the Constitutional Tribunal in the years 1985-1993. His statements from 1995 are therefore doubly important. Firstly, because they were made by a member of the Constitutional Commission, and secondly, as a former judge of the constitutional court – giving understanding for the need for self-restraint of the guards, who are no longer controlled by anyone, and a deep concern for the implementation of the principle of separation of powers.

31 | See: Woś, 2016; Dąbrowski, 2017; Tuleja, 2009; Białogłowski, 2013; Janas, 2016; Hermann, 2015.

itself as a super-constituent assembly[32] that never ends its deliberations. However, in a place where issues of dispute between the Tribunal and the Supreme Court are raised, citing primarily the studies of the former and the doctrine developed by it, and then academically adjudicating on the correctness of the views is a specific offense against the principle of *nemo iudex in causa sua*. It is becoming the case that the basis for resolving a dispute is the positions developed by one of the parties.

The first interpretational judgment was issued in case U 12/92 concluded with a judgment of 20th April 1993.[33] This case concerned an implementing act – a regulation. The first interpretational judgment concerning an act was issued on 18th October 1994.[34] The history of interpretational judgments therefore precedes the regulations of the Constitution of 1997, which limited the possibility of issuing a universal interpretation of provisions by the Tribunal. Nevertheless, it was already under the rule of the current Constitution, and more precisely in 2009, that the Supreme Court, adopting a resolution in case file reference III PZP 2/09, questioned the authority and practice of the Tribunal. From that moment on, the escalation of the conflict between the Court and the Tribunal resulted in a transition to the phase of a dispute over competencies. It seems, however, that the date of 2015, which has not been noticed in the literature on the subject, is a turning point for the ongoing dispute. Namely, after the interpretative (and scope) judgments that had a negative impact on the dynamics of the dispute over the Constitutional Tribunal and led (as an element of a chain of events) to a state crisis, the Supreme Court did not take the opportunity to indicate the correctness of its own previous position and even adopted a silent attitude towards the practice of the Polish constitutional court.

The dispute between the Supreme Court and the Constitutional Tribunal is focused on three issues. First, the possibility of issuing interpretational judgments. Second, the binding force of interpretational judgments. Third, interpretational judgments as grounds

32 | Returning to the comparative legal analysis conducted 'on the margin', it should be pointed out that the problem of violating the separation of powers and the encroachment of the constitutional court as a kind of permanent constituent and at the same time an undemocratic legislator (although acting at the level of norms and not regulations) is the subject of attention not only of Polish constitutionalists. The issue of boundaries for individual branches of power was the subject of a lecture delivered by the US Supreme Court when it justified its ruling in the case of *Dobbs v. Jackson Women's Health Organization*, No. 19-1392, 597 U.S. It states that 'without any grounding in the constitutional text, history, or precedent, Roe imposed on the entire country a detailed set of rules.' The scheme Roe produced looked like legislation, and the Court provided the sort of explanation that might be expected from a legislative body. Finally, 'The Constitution does not prohibit the citizens of each State from regulating or prohibiting abortion. Roe and Casey arrogated that authority. The Court overrules those decisions and returns that authority to the people and their elected representatives.' A comparison of the arguments and fragments of the Supreme Court judgment with the practice and manner of issuing judgments by the Constitutional Tribunal (while maintaining proportions resulting from the differences in legal systems) indicates far-reaching similarities in torts aimed at the idea of separation of powers and manifested by activism. Scope and interpretation judgments, which are useful in the nature of introducing a universally binding interpretation, are in fact an attempt to take over the competences of the legislative authority – although at the level of norms, not regulations. The justifications for the judgments issued in these cases, similarly to the American practice – exposed by the Supreme Court itself – have more similarities to legislation than to the process of applying the law and adjudicatory practice.

33 | Constitutional Tribunal decision ref. No. OTK ZU 1993, item 9.

34 | Court decision ref. No. K 2/94; Court decision ref. No. OTK ZU 1994, item 36.

for reopening court and administrative proceedings under Article 190 section 4 of the Constitution.[35] The last of the fields of dispute, in the context of the presented analysis, should be treated as a formal reason for issuing a number of opinions by the Supreme Court and secondary to the issue of the possibility of issuing such judgments and, in the event of their issuance, their binding force. In the literature on the subject, there is a view that the dispute – due to the weight of the arguments of both parties – cannot be unequivocally resolved.[36] This chapter, which can be concluded from the manner of the analysis conducted so far, is a voice supporting the opponents of the Tribunal's activity. This voice is heard using the above-mentioned historical and legal analyses (which allow for the search for an authentic interpretation of the Constitution) and those resulting directly from the theory of the separation of powers. Additionally, they are supplemented by an analysis of the effects of interpretational judgments at the level not of the implementation of procedural law provisions (which is the subject of analyses in the literature indicated above), but of the level of the legal and political system.

The institution of interpretative judgments (and then broad judgments) borrowed from the German system is de facto a way for the Constitutional Tribunal to circumvent the lack of authority to issue a universally binding interpretation. Transferring the interpretation to the extended operative part of the judgment is to ensure that it will enjoy the status specified in Article 190 Section 1 of the Constitution, i.e. it will be universally binding and final. This is also the position of the Tribunal. Each time it issues a broad or interpretative judgment, it maintains the position that although it does not have the authority to issue a legal interpretation, its interpretation of the provisions and the norms extracted from it should gain universally binding value – just like the judgment itself in whose operative part they were indicated. The purpose of issuing interpretative and broad judgments is to ensure the stability of the case law and the normative system. The Tribunal and its case law[37] follow the principle of interpreting statutes in accordance with the Constitution[38]. This type of action is also supposed to be an expression of judicial restraint[39] in a perspective where all interpretative judgments are treated as affirmative (i.e. indicating compliance with the Constitution). It seems, however, that the scale of the negative consequences for the legal and political system (leaving aside the complete lack of a legal basis, which violates the principle of legalism and the operation of *praeter legem* to achieve competences and actions clearly undesirable by the Constituent Assembly) speaks in favour of rejecting this creative concept.

Before entering into a lasting dispute with the Constitutional Tribunal, the Supreme Court had an inconsistent judicial practice in the field of interpretative judgments. An example of early judgments supporting the position of the Tribunal is the judgment of 22 November 2002,[40] in which the Supreme Court directly spoke of being bound by interpretation. Moreover, before 2009, there were also a number of judgments that supported the thesis on the possibility of reopening civil proceedings on the basis of an

35 | Dąbrowski, 2017, p. 29.
36 | Morawski, 2010, p. 40; Dąbrowski, 2017, p. 32.
37 | Constitutional Tribunal decision from 24 February 1997 r., court decision ref. no K 19/96; Court decision ref. No. OTK ZU no 1/1997, item 6.
38 | This method once again becomes a reason for referring to American jurisprudence, from which it originates. See: Ziński, 2016.
39 | Garlicki, 1987.
40 | Court decision ref. no. IV CKN 1497/00.

issued interpretative judgment[41]. The opposite position indicating that 'due to insufficient authorization in the provisions of the Constitution [interpretative judgments - from the author] cannot, however, have the desired effect in court practice' was expressed in the resolution of 3rd July 2003[42]. What is interesting for this early phase of relations between the Supreme Court and the Constitutional Tribunal is the statement that 'the interpretation of legal provisions made by the Constitutional Tribunal is not binding on the courts, but in a specific case there are no reasonable grounds to question its accuracy', contained in the judgment of 21st May 2003[43].

The position of the Supreme Court expressed in the aforementioned resolution of 17th December 2009 and adopted at the request of the Commissioner for Citizens' Rights was aimed at eliminating previous discrepancies in the judgments of the Supreme Court and common courts. The Supreme Court stated in the resolution that

> 'a judgment of the Constitutional Tribunal stating in the verdict the inconsistency of a specific interpretation of a normative act, which does not result in the loss of the binding force of the provision, does not constitute a basis for reopening the proceedings on the basis provided for in Article 401(1) of the Code of Civil Procedure'.

However, what is most important for the presentation of the position of the Supreme Court was found not in the verdict (Article 401(1) of the Code of Civil Procedure – it can be treated as a pretext for the lecture), but in the justification. There you can read, in extenso:

> 'The issue of the constitutionality or unconstitutionality of a given provision should not be resolved on the basis of the criterion of its interpretation shaped in relation to the interpreted provision in the practice of the Supreme Court or the practice of common courts. This position is confirmed by the deprivation of the Constitutional Tribunal of the competence to establish a universally binding interpretation of statutes as of the date of entry into force of the Constitution of the Republic of Poland of 1997. Although the Constitutional Tribunal no longer establishes a universally binding interpretation of statutes, it still issues interpretative judgments containing in their operative parts an interpretation of the provisions of law subject to review in terms of their conformity with the Constitution. Meanwhile, since, in accordance with Article 239, section 3 of the Constitution, resolutions of the Constitutional Tribunal on establishing the interpretation of statutes have lost their universally binding force, therefore, in the current legal situation, it should be assumed that interpretative judgments establishing a universally binding interpretation of statutes should be treated identically to any other form of non-binding interpretation. Consequently, the interpretation of legal provisions contained in the operative parts of such judgments does not have a universally binding value, because it goes beyond the content of Article 188 point 1 in connection with Article 190 Section 1 of the Constitution (resolution of 6 May 2003, I CO 7/03, not published).'

41 | Court decision ref. No. III UO 6/08, III UO 10/08, III UO 12/08. Decision was not publicly publish, quoted accordingly to Dąbrowski, 2017, p. 38.
42 | Court decision ref. no. III CZP 45/03; Court decision ref. no. ONSC 2004, no. 9 item 136.
43 | Court decision ref. no. IV CKN 178/01; Court decision ref. no. ONSC 2004, no 7-8, issue 123.

In its resolution, the Supreme Court used the ratio behind the current constitutional regulations, reconstructed in a different way above in this chapter. Although it did not cite a quasi-authentic interpretation, which can be issued based on the minutes of the Constitutional Committee of the National Assembly, it followed the indications present in them. However, the Supreme Court did not address the issue of the lack of legal basis and did not directly indicate the action of the Tribunal *praeter legem*, which would essentially mean entering not into a dispute of competencies, but an objection to the legality of the action of the Polish constitutional court.

The dispute concerning the possibility or non-application of Article 401(1) of the Code of Civil Procedure in connection with the issued interpretative judgment may find another stage in the proceedings before the Constitutional Tribunal. On the basis of the constitutional complaint filed on 20 May 2018, the complainant requests an examination of the constitutionality of Article 401(1) of the Code of Civil Procedure, understood in such a way that it excludes the possibility of reopening the proceedings in the event that the Constitutional Tribunal issues an interpretative judgment stating in its operative part that a specific interpretation of a normative act is inconsistent with the Constitution. The complainant therefore directly requests an interpretative judgment to be issued regarding the provision that became the basis for the Supreme Court to issue a resolution (having the force of a legal principle) indicating the unjustification for issuing interpretative judgments in general, or at least questioning their validity. These proceedings, file reference number SK 17/18, have been effectively suspended for over four years. The positions on the matter were presented by the Sejm of the Republic of Poland, the Commissioner for Human Rights, and the Prosecutor General[44]. The positions submitted indicate that the suggested solution to the problem is to dismiss the case. Nevertheless, for several years now, the Constitutional Tribunal has been facing an opportunity to act in this case, following the example of the 'conservative ruling' of the US Supreme Court, in which it would reject its own activist practice to date. However, such a solution seems unlikely, because the clothes tailored for the Constitutional Tribunal by the Constituent Assembly are clearly too tight, and the activist attitude allows for the exercise of unlimited influence, as the Constitutional Court is the last of the guardians, on the shape of the legal and political system of Poland.

6. Another brick in the wall of 2015 constitutional crisis

The literature on the subject is focused primarily on the problem of the influence of interpretational (and scope) judgments on the functioning of common and administrative courts.[45] Less attention is paid to the influence of interpretational judgments on the overall functioning of the legal (constitutional) and political systems. They also include the problem of the position of the Constitutional Tribunal itself and its politicisation through an activist attitude. Comments on this were made by Bogusław Banaszak, who

44 | Letter of the Prosecutor General dated 7.11.2019 r, ref. no. PK VIII TK 53.2018; Letter of the Commissioner for Human Rights dated 8.08.2018, ref. no. V.51 0.112.20 18.KM/GH; Letter of the Speaker of the Sejm dated 3.07.2019, ref. no. BAS-WAKU-1877/18.

45 | See: Majer, 2020; Bernatt, Królikowski and Ziółkowski, 2013; Trzaskowski, 2003.

wrote directly that the Tribunal 'does not play the role of a <negative legislator>, but transforms into a positive, <substitute legislator[46] Adam Sulikowski wrote more broadly about the issue of law-making activity and its democratic nature.[47]

Sławomir Tkacz[48] conducted a broad review of the literature on the Constitutional Tribunal as a guardian – which is also the subject of this chapter. He pointed out, following Adam Sulikowski, that 'the claim about the indispensability and thus legitimacy of activist adjudicatory techniques of constitutional courts has generally been accepted, which include, for example, discovering extra-textual principles or values in constitutions. It was not noticed or was attempted to be kept silent that such 'discovered' norms are often intended to simply provide a systemic camouflage to mask the message that a given act is, in the opinion of judges, irrational or that its introduction would be inappropriate.'[49] He also emphasised, with which one can agree, that until the crisis surrounding the Constitutional Tribunal, none of the subsequent parliamentary majorities, no party, whether opposition or government, had denied the activist competencies of the Polish constitutional court. Moreover, it should be noted that it was this consensus of the political scene regarding the activist attitude, and consequently, the political activity of the Constitutional Tribunal, that became the reason for the crisis of 2015, which extended into the following years. The case and the judgment of 3rd December 2015[50] can serve as an example of the influence of activism on the legal and political system. However, it should once again be emphasised that the original source of the problem was in the activity of the constitutional court itself, about which Lech Morawski wrote as early as 1994:

> 'On the level of official declarations, the Constitutional Tribunal assumes the pose of an almost saint who never sins against the indications of legal texts. On the level of what it actually does, however, the matter is not so obvious.'[51]

The 2015 crisis was directly related to the consensus of the political class regarding the tacit consent to the Constitutional Tribunal going beyond the framework assigned to it by the Constitution, which incidentally, the Supreme Court has been emphasising since at least 2009. The claim about the tacit consent and consensus of the political class on the activist actions of the Constitutional Tribunal results from the analysis of available statements of political leaders of the leading Polish political parties. In particular, statements that would concern strong criticism of judicial activism by the Supreme Court when it spoke about the interpretative judgments of the Constitutional Tribunal. In this respect, it should be noted that there were no such statements. The political class silently passed over suggestions concerning the Tribunal's activist position. The Tribunal allowed for solving political (or economic and political) problems that were inconvenient for politicians held accountable in a democratic process, which does not include a meritocratic element.

46 | Banaszak, 2009.
47 | Sulikowski, 2005, pp. 19–36.
48 | Tkacz, 2018.
49 | Tkacz, 2018, p. 11. Compare with: Sulikowski, 2016, p. 255.
50 | Court decision ref. no. K 34/15.
51 | Morawski, 1994, pp. 11–12.

Logical reasoning can also be supplemented by the use of legal reasoning and the *qui bono* principle. Consensus and consent to judicial activism, particularly the issuance of interpretative (or scope) judgments, creates the possibility of control of the legal system. Control utilising politically active judges appointed in the political decision-making process. Although this thesis carries an emotional charge in the conditions of Polish science, especially due to the still fresh issue of the dispute over the Constitutional Tribunal and the rule of law - also for constitutionalists - it is nothing new in world science. In this context, it is worth mentioning Sonja Gover with her book 'Judicial Activism and Democratic Rule of Law,' Anton Scalia with his extensive writing on originalism and activism, and Christopher Wofle with his analytical book entitled 'Judicial Activism.'

An example of the resolution of an important economic issue by an activistic Tribunal is the case of the judgment of 8th November 2000 (SK 18/99), in which the Tribunal recognised the constant practice of public universities in Poland, which – contrary to the literal interpretation of the constitution guaranteeing free studies (Article 70 of the Constitution) – charged tuition fees for evening and part-time studies. A student raised the issue of constitutionality. It is worth emphasising that evening and full-time students, in extreme cases, e.g., law studies studied together, but some people in the lecture hall had to pay for the lecture, and some did not. The judgment of the Tribunal sanctioned this practice.

An example of a judgment that contained elements of a scope and interpretation judgment and which simultaneously pursued specific political goals was the Judgment of the Constitutional Tribunal of 11 May 2007 (K 2/07). This judgment concerned an act that introduced an obligation to disclose (a lustration element) collaborators of the communist security service by persons in prominent positions such as directors, deans, and rectors of universities or representatives of professions of public trust. The Tribunal found that disclosing collaborators of the security service in a system that violates fundamental rights, freedoms, and human dignity would be inconsistent with the Constitution to a certain extent or consistent, but only in the appropriate sense. The constitutional point of reference in this judgment was primarily Article 2, stating 'The Republic of Poland is a democratic state of law, realizing the principles of social justice', and Article 30, 'The inherent and inalienable dignity of the human being is the source of freedom and rights of the human being and the citizen. It is inviolable, and its respect and protection is the obligation of public authorities' and Article 31.3.

> 'Restrictions on the exercise of constitutional freedoms and rights may be established only by statute and only when they are necessary in a democratic state for its security or public order, or for the protection of the environment, health and public morality, or the freedoms and rights of other persons. These restrictions may not violate the essence of freedoms and rights.'

A review of the cited articles of the Constitution shows that the Tribunal based its judgment primarily on general clauses. However, the judgment blocked a political reform that was important for the government, which de facto benefited the opposition. In the short term, the judgment became one of the reasons for early elections and a change of government.

Recalling the qui bono principle again, it can be justified that politicians find it convenient to have 'their' ideological majority in the Tribunal, which actively circumvents the ban on issuing a universally binding interpretation of the law. This allows us to understand

better the essence of the dispute over the Constitutional Tribunal from 2015, where both sides wanted to secure the majority by prematurely filling vacancies that did not yet exist or by not recognising the earlier filling of vacancies to appoint a new majority in the Tribunal. These actions, analysed together, indicate that the political class not only tacitly accepted the activist nature of the Polish constitutional court but also openly acted (and still acts) to dominate it by ideologically close judges for purely utilitarian purposes.

The crisis situation of 2015/2016 was related to the period of transition of power after the 2015 elections, which resulted in the emergence of a new parliamentary majority with a different ideological profile than the previous one. Moreover, the coalition that was to resign from the offices of the executive power (as well as the new coalition that was to form the government) remembered the experience of 2007, in which the lustration process, which was to include, among others, higher education, was stopped only by the judgment of the Constitutional Tribunal of 11th May 2007.[52] A judgment that could only be issued thanks to the composition of the composition of the constitutional court. However, 2015 was supposed to be a breakthrough year in the history of Polish politics and constitutional justice, as for the first time in history, general elections and the transition of power coincided with the expiry of the term of office of 5 out of 15 judges of the Constitutional Tribunal. What is more, the beginning term was supposed to be the one in which a new majority in the Constitutional Tribunal would be elected in the first 2 years. Thus, the predictions of Jerzy Zajadło from 2009 came true, writing: 'If one of the dominant political forces in Poland gained full power, which we cannot rule out, [...] it would be able to construct the composition of the Tribunal in such a way as to make it a body de facto politically subordinate to the parties controlling the legislative and executive power.'[53] The third condition *sine qua non* for this action had to be (apart from political dominance in the two branches of power) the end of the term of office of many judges, which is precisely what happened in the years 2015-2017.

The analysis of the judgment of 3rd December 2015 completely disregards the issue of political culture and the incomprehensible (also for the Constitutional Tribunal) decision to elect two judges as a kind of 'promotion' by the outgoing Sejm of the seventh term. The individual provisions of the judgment are of both an interpretational and scope-related nature, which in a rather paradoxical way clasps together the cause and effect of the crisis. It grew out of activism and ended with an activist judgment.

The Tribunal ruled that Article 21 section 1 of the Act referred to in point 1 of the ruling,[54] understood in a way other than that provided for the obligation of the President of the Republic of Poland to immediately accept the oath of office from a judge of the Tribunal elected by the Sejm, is inconsistent with Article 194 section 1 of the Constitution. By trying to introduce an interpretation of the provision into the ruling once again, it tried to give it a universally binding force and a final character.

It further ruled that Article 137 of the Act referred to in point 1 of the verdict, in the scope in which it concerns judges of the Tribunal whose term of office expires on 6 November 2015, is consistent with Article 194 section 1 of the Constitution, and in the scope in which it concerns judges of the Tribunal whose term of office expires on 2nd and

52 | Court decision ref. no. K 2/07.
53 | Zajadło, 2009, p. 134.
54 | Article 3 of the Act of 25 June 2015 on the Constitutional Tribunal (Journal of Laws, item 1064) with Article 2 and Article 197 of the Constitution of the Republic of Poland.

8th December 2015, respectively, is inconsistent with Article 194 section 1 of the Constitution. The judgment in the part in which it can be considered as broad was to have a somewhat 'Solomon-like' character, nevertheless, it was an attempt to mitigate the effects of broad activism through further activist action.

Significantly, the 2015 bench did not use the wisdom of its own institution's experience. A similar situation, i.e. the coincidence of determining the content of the applicable law with an attempt to resolve a dispute over the interpretation of the law, had already occurred in the past. This case was reported in the following way during the session of the Constitutional Committee of the National Assembly, which was to decide on the competencies of the Tribunal, by its then president Andrzej Zoll:

> 'I am very sorry to refer to one of the cases, but this case very well illustrates the doubt expressed by MP W. Cimoszewicz[55]. I am referring to the interpretation made by the Constitutional Tribunal in the scope of the provisions of the Broadcasting Act. The problem arose whether the provision stating the president's right to appoint the chairman of the National Broadcasting Council gives the president the competence to dismiss the chairman of the Council. The interpretation that we established, stating that the president does not have such competence on the basis of the relevant provision, could not be transferred to a specific decision. The Constitutional Tribunal could not state in the interpretation made that the dismissal of a specific person was invalid from the point of view of law. The Tribunal is not allowed to do this. Therefore, we are dealing with two different planes. Determining the content of the law through interpretation means one thing, and resolving a specific dispute on the basis of the interpretation of a provision means another.'[56]

The result of the practice of issuing scope and interpretational judgments and presenting them – contrary to the position of the Supreme Court as equal legal interpretations – was the 'attack on the Constitutional Tribunal' announced in the media, which in the light of the presented analyses was not an attack, but a consequence of the actions of this body. It should be emphasised once again that this was a consequence predicted by constitutionalists – in the cited articles – years before the events of 2015.[57]

7. Summary and de lege ferenda

One should agree with the position of the Supreme Court on the lack of authorisation of the Constitutional Tribunal to issue a legal interpretation under the guise of issuing

55 | Włodzimierz Cimoszewicz asked a question regarding disputes regarding competences, whether it is possible to resolve them by issuing an interpretation of generally applicable law. He asked whether if such an interpretation dispelled all doubts regarding competences, then maybe there would be no need to grant the Tribunal the powers of a court of competence, and only leave the power to issue a legal interpretation.

56 | Biuletyn. Komisja Konstytucyjna Zgromadzenia Narodowego, 1995, no. 25, p. 34.

57 | This fact became the reason why the author of this text suggested that in 2015 there was not an 'attack on the Tribunal', but an 'attack by the Tribunal' - or more precisely its finale. See: Szczepański: *Zamach na trybunał? Nie, raczej zamach Trybunału* (interview conducted by Anna Wittenberg), 'Gazeta Prawna' 22.04.2016.

scope and interpretative rulings. It should also be emphasised – which results from the content of the provisions of the Constitution and is echoed in the debates held within the Constitutional Committee of the National Assembly – that the role of the Tribunal was meant to be, and has been defined very narrowly. The catalogue of competencies deliberately excluded the possibility of issuing a universally binding interpretation of both statutes and the Constitution itself. One should also agree with Marcin Dąbrowski that the wording of Article 188 of the Constitution means that 'as a rule, the process of reviewing the constitutionality of law should take on a binary character'[58]. Moreover, although in the process of applying the law, an operative interpretation and reconstruction of the norm from the provision must inevitably be made, the wording of point 3 in Article 188 of the Constitution, which speaks of the control of regulations, indicates the obligation of far-reaching restraint of the judges of the constitutional court when they make interpretations. Moreover, when the regulation is to be subject to control, and not one of its interpretations (reconstructed norm), then Marcin Dąbrowski's position becomes the only one consistent with the content of the Constitution. Thus, interpretational and scope judgments should not take place at all.

Since the politicisation of the Constitutional Tribunal through its activist rulings became the cause of the 2015 crisis, which ultimately went beyond the Polish political and legal system, the *de lege feredna* postulate should be the introduction of a regulation protecting Poland from such actions in the future. The postulated change would have to mean the implementation at the level of the provisions of the Constitution of the prohibition of issuing scope and interpretational judgments by the Constitutional Tribunal. Moreover, following the model regulation, i.e. the one contained in Article 239 of the Constitution, the provision should also cover previously issued scope and interpretational judgments. The lack of binding them should be confirmed (they cannot be considered non-binding, because according to the position of the Supreme Court they have never been binding). The introduction of such regulations would be revolutionary in terms of both practice and doctrine. The Polish legal community would also have to find a new path for shaping the doctrine of constitutional law, which largely stems from the body of interpretational and scope judgments. In the new legal reality, their power of influence would be very limited.

However, the most important change resulting from the proposed amendment would be the depoliticisation of the Constitutional Tribunal. Limiting activist attempts that led – with the participation of the Polish political class – to a state crisis also seems to be in line with the principle of a democratic state of law, which must ensure respect for the Constitution, the separation of powers, and the legality of the actions of bodies (regardless of which branch of government they represent).

58 | Dąbrowski, 2017, p. 33.

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