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How to capture a constitutional court in Europe?
A new authoritarians' manual

Judicial review constitutional rights regimes […] specifically contemplate judicial confrontations of majority preferences. Nevertheless, rights enforcing courts are likely to confront firm anti- rights majorities from time to time. Indeed that is what they are there for

M. Shapiro, The European Court of Justice: Of institutions and democracy[1]

I. Setting the scene. The Politics of Resentment

I. 1. The Concept

The Resentment is crucial for understanding the rise of illiberal narratives in Europe. Although the role of emotion in politics has traditionally been undertheorized as compared to reason and the rational side of human beings, there is no doubt that in contemporary politics, emotion has become equally, or indeed, more important. Emotions are not only driving force behind the political struggle, they are also a prize to be won. Crucially, emotions play a performative and constitutive function. They not only express but help bring subjects into being and constitute identities.[2] And one particularly potent combination of emotions has become salient in recent times—resentment. Populist leaders have tapped into a reservoir of anxiety about "the other," anger at the liberal establishment and the imposition of one correct world view, fear of exclusion,

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[1] 32 Israel Law Review (1998), 3-50, at 24.

[2] M. Holmes, Feeling beyond Rules, Politicizing the Sociology of Emotion and Anger in Feminist Politics, *European Journal of Social Theory* 7, no. 2 (2004): 212-13.

and uncertainty of one's place in the contemporary world. In short, resentment is driving many of the contemporary political developments.

To be sure, emotions are a legitimate part of the democratic process and anger and fear are not to be removed from the realm of political discourse as any such attempt would be counterfactual. When, however, populist politicians tap into resentment and create political movements that have distinct implications for the existing institutional order, they take emotion to another level. Resentment is no longer a *feeling* but is *utterance* and *performance*, and it is transformed into the "the politics of resentment." Resentment is anchored within mainstream politics and is articulated in the public sphere.[3]

The politics of resentment transform our traditional understanding of political conflict. While politicians and political parties in democracies routinely put forward competing visions for society and politics, they always stick to the language of probability in setting out their alternatives to the existing government. They are prepared to test their alternatives through procedures and elections and accept that the constitution is the stage that frames political contestation.[4] As liberal democrats, they share a commitment to the core values of freedom and equality and the formal acknowledgement that their political adversaries have as valid a claim to represent the people as they do. By contrast, resentment-driven populist politicians see their claims as settling most fundamental issues once and for all, and they do not allow room for dissent. Because of the moral dimension of resentment, they do not acknowledge that their claims can be judged as true or false. Rather, their claims are always the best, and not open to further contestation. The emotions of fear, anger, and rejection, all under the umbrella of resentment, do not allow for pluralism and the multiplicity of representation and undermine the normative and institutional framework through which populist leaders initially express and advance these sentiments. "The other" is no longer seen as a legitimate adversary. He becomes an enemy and, as a delegitimized political actor, is hounded and persecuted with the full strength of the law.

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[3] For general discussion, see S. Ahmed, *The Cultural Politics of Emotion,* 2nd ed. (Edinburgh: Edinburgh University Press, 2014).

[4] I draw here on Jan-Werner Müller, "Populist Constitutionalism: A Contradiction in Terms,?" Draft Paper, NYU Colloquium (on file with the author). See also His Populist Constitutions – A Contradiction in Terms? at https://verfassungsblog.de/populist-constitutions-a-contradiction-in-terms/

A core concept of the politics of resentment and populism is constitutional capture.[5] Gaining power does not soften populist animus. Quite the contrary, once elected, populist leaders are ready to deliver on their promises and they do so through a constitutional doctrine that competes with the dominant liberal constitutionalism.[6] This doctrine includes the following, often interrelated, elements: (i) a new understanding of the role of the constitution, no longer as protecting against the state, but as safeguarding the uniqueness of the state; (ii) the constitution ceases to be the supreme law of the land; (iii) the constitutional court is not only incapacitated but also "weaponized" to be used as a tool against political enemies; (iv) the political dominates the legal; (v) the rule of law is seen as an obstacle to protecting the collectivity; (vi) the rule of law is to facilitate the expression of the will of the people; (vii) political power is no longer subject to the checks and balances; (viii) supranational institutions are dismissed as enemies of the people; (ix) the collectivity is trumpeted above individual citizens; (x) human rights evolve from the dignitary conception to that of community.

I.2. Delivering on the Politics of Resentment: The Case of Poland

The Polish case illustrates the trajectory from resentment, to populism, to the politics of resentment. While resentment fuels populism, the politics of resentment translate populism into constitutional doctrine. While populism uses resentment as a rhetoric and might even (begrudgingly) tolerate the system, the transformation of resentment into the mode of governance signals a break with the *status quo* in favour of constitutional revolution. The case of Poland illuminates the vulnerabilities of democratic government, the rule of law, and constitutionalism when confronted with the sweeping politics of resentment and its new constitutional doctrine.[7] As so eloquently summarised by Kornel Morawiecki (Honorary Marshall of the Sejm and father of the Polish Prime Minister), this doctrine stipulates: "The will of the people is above the law. Law is

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[5] Core concept is defined as referring to the basic unit without which ideologies cannot exist; M. Freeden, *Ideologies and Political Theory: A Conceptual Approach* (New York: Oxford, 1996), 77-80.

[6] For important clarifications also P. Blokker, "Populist Constitutionalism," *Verfassungsblog*, May 4, 2017, http://verfassungsblog.de/populist-constitutionalism/.

[7] J.-W. Müller, "Defending Democracy within the EU," *Journal of Democracy* 24, no. 2 (2013): 138-49 and Jan-Werner Müller, "Should the EU Protect Democracy and the Rule of Law inside Member States,?" *European Law Journal* 21, no 2 (2015): 141-60.

to serve the people. If it does not it is no longer law."[8]

It all started with the destruction of the Polish Constitutional Tribunal in 2015-2017 (hereinafter to referred as the "Tribunal" or "the Court")[9]. After thirty years of building an impressive resume as one of the most influential and successful constitutional courts in Europe and living proof of the rule of law in action, the Court fell under the relentless attack of a right-wing populist government and succumbed. It was transformed into an enabler for the political majority.[10] The constitutional debacle in Poland must be but a starting point for more general analysis of the processes of the politics of resentment and constitutional capture that strike at the core European principles of the rule of law, separation of powers, and judicial independence.[11] With the benefit of hindsight, we now know that the destruction of the Polish Constitutional Court (and earlier, the Hungarian Constitutional Court) was an opening act in the total subjugation of all independent institutions of the state. With no independent constitutional court left to guarantee effective compliance with the national constitution, the Polish ruling party has been busy complet-

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[8] K. Morawiecki: 'Nad Prawem Jest Dobro Narodu! Prawo, Które nie Służy Narodowi to Bezprawie," *Kresy*, November 26, 2015, https://kresy.pl/wydarzenia/kornel-morawiecki-nad-prawem-jest-dobro-narodu-prawo-ktore-nie-sluzy-narodowi-to-bezprawie-video/. For constitutional ramifications of such a change see T. T. Koncewicz, "Understanding Polish Counter Revolution Two and a Half Years Later," *Verfassungsblog*, July 7, 2018, https://verfassungsblog.de/the-polish-counter-revolution-two-and-a-half-years-later-where-are-we-today/.

[9] On the constitutional crisis in Poland see in general A. Radwan, *Chess boxing around the rule of law. Polish constitutionalism at trial*, <www.verfassungsblog.de/chess-boxing-around-the-rule-of-law-polish-constitutionalism-at-trial/>; A. Śledzińska-Simon, *Poland's constitutional Tribunal under siege*, <www.verfassungsblog.de/en/polands-constitutional-tribunal-under-siege/>; M. Kiślowski, *Polish democracy is crumbling*, <www.politico.eu/article/polands-court-international-help-democracy-reform-rights-rule-of-law/>; T. T. Koncewicz, *Polish Constitutional Drama: Of Courts, Democracy, Constitutional Shenanigans and Constitutional Self-Defense*, <www.iconnectblog.com/2015/12/polish-constitutional-drama-of-courts-democracy-constitutional-shenanigans-and-constitutional-self-defense/>; Chadwick and Cienski, *Polish opposition challenges new law on constitutional court, A growing political crisis worsens*, <www.politico.eu/article/polish-opposition-challenges-new-law-on-constitutional-court/>; Ash, *The Pillars of Poland's democracy are crumbling*, <www.theguardian.com/commentisfree/2016/jan/07/polish-democracy-destroyed-constitution-media-poland>; I. Krastev, *Why Poland is turning away from the West*, <www.nytimes.com/2015/12/12/opinion/why-poland-is-turning-away-from-the-west.html?_r=0>; Lyman, *Head of Poland's Governing Party Leads a Shift Rightward*, <www.nytimes.com/2016/01/12/world/europe/head-of-polands-governing-party-leads-a-shift-rightward.html?_r=0>; Editorial *Poland Deviates from Democracy*, <www.nytimes.com/2016/01/13/opinion/poland-deviates-from-democracy.html>

[10] T. T. Koncewicz, "Existential Judicial Review" in Retrospect and 'Subversive Jurisprudence' in Prospect. The Polish Constitutional Court Then, Now and…Tomorrow," *Verfassungsblog*, October 7, 2018, https://verfassungsblog.de/existential-judicial-review-in-retrospect-subversive-jurisprudence-in-prospect-the-polish-constitutional-court-then-now-and-tomorrow/ and also analysis *infra*.

[11] L. Pech, K. L. Scheppele, "Illiberalism Within: Rule of Law Backsliding in the EU"; L. Pech, S. Platon, "Menace Systémique Envers l'Etat de Droit en Pologne: Entre Action et Procrastination," Fondation Robert Schuman, Question d'Europe no. 451, Novembre 13, 2017.

ing a multi-pronged takeover of the whole of the national judiciary to enable the executive and legislative branches of the government to systematically interfere in the structure, composition, and daily functioning of the judicial branch.[12] In its reasoned proposal under Article 7 of the Treaty on European Union,[13] the European Commission succinctly pointed out that Polish authorities have adopted over a period of two years no less than thirteen laws affecting the entire structure of the justice system in Poland, impacting the Constitutional Tribunal, Supreme Court, ordinary courts, National Council for the Judiciary, prosecution service and National School of Judiciary.[14] The capture of the state and its institutions goes on as this book goes to press.[15] The Polish government, as is typical of the politics of resentment, claims that it respects the rule of law and, consequently, that the criticism directed at it is not justified. But note that there are two important caveats: first, the Polish government insists that the rule of law should be interpreted differently from what was hitherto accepted; second, that there is no agreement on what the rule

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[12] For more detailed analysis consult: W. Sadurski, M. Steinbeis, "What is Going on in Poland is an Attack against Democracy?," *Verfassungsblog*, July 15, 2016, http://verfassungsblog.de/what-is-going-on-in-poland-is-an-attack-against-democracy/; Wojciech Sadurski, "How Democracy Dies (in Poland): A Case Study of Anti-Constitutional Populist Backsliding." Sydney Law School Research Paper 18/01, 2018. http://ssrn.com/abstract=3103491; Anna Śledzińska-Simon, "The Polish Revolution 2015 - 2017," *Iconnect* (blog), July 25, 2017, http://www.iconnectblog.com/2017/07/the-polish-revolution-2015-2017/; Tomasz T. Koncewicz, "Capture of the Polish Constitutional Tribunal and Beyond: Of institution(s), Fidelities and the Rule of Law in Flux," *Review of Central and East European Law* 43, no. 2 (2018): 116-73.

[13] For a detailed account of Article 7 TEU and the procedures that have been initiated so far, see K. L. Scheppele, D. Kelemen, Defending Democracy in the EU Member States, (forthcoming, on File with the Author).

[14] *Reasoned Proposal in Accordance with Article 7(1) of the Treaty on European Union regarding the Rule of Law in Poland, Proposal for a Council Decision on the Determination of a Clear Risk of a Serious Breach by the Republic of Poland of the Rule of Law*, COM (2017) 835 final (December 20, 2017). For insightful analysis see Jan-Werner Müller, "If You're Not a Democracy, You're Not European Anymore," *Foreign Policy*, December 22, 2017, http://foreignpolicy.com/2017/12/22/if-youre-not-a-democracy-youre-not-european-anymore/.

[15] W. Sadurski, "Judicial 'Reform' in Poland: The President's Bills are as Unconstitutional as the Ones he Vetoed," *Verfassungsblog*, November 28, 2017, http://verfassungsblog.de/judicial-reform-in-poland-the-presidents-bills-are-as-unconstitutional-as-the-ones-he-vetoed/. On the same day that Article 7 TEU was triggered, the European Commission decided to refer Poland to the Court of Justice arguing that the new law on ordinary courts violates the EU law.

of law entails in practice (application).[16] Those two caveats transform the rule of law—one of the paradigms of the post 1989 transition—from the rule *of* law to rule *by* law,[17] and underpin a new constitutional doctrine now on the rise in Poland.

This paper argues that Poland should be used as a cautionary tale. The belief that instututions will be able to defend themselves and protect the legal system proved to be over-idealistic. As important as institutions are for any constitutional system, they have a chance of survival only when their institutional pedigree and prestige are built on the popular support of civil society. There is a two-way synergy between the two. While civil society might contribute positively to the consolidation of democracy, it cannot unilaterally either bring about democracy, or sustain democratic institutions and practices once they are in place.[18] Even the strongest institutions will fall when lacking social capital. Are courts any different. Courts play a pivotal role in the process because of their supervisory functions and the embedded low-profile and arcane language of the law. There is always a *bona fide* assumption that law will speak louder than any transient urges of the powers that be and that in the end the law will enforce its primacy. That assumption might be correct in the best of times when everything goes according to plan. When it does not, courts look fragile and vulnerable, as the only protective tool they wield - 'the law' - is taken away from them by the sheer power of political sleight of hand. The question then arises as to whether political exigencies could bring about self-re-imagination on the part of the courts so as to make them protectors of constitutional essentials in such emergency situations. In other words, could capture of the state and institutions be countered by judicial recapture? The

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[16] Also Blokker, "Populist Constitutionalism"; James Traub, "The Party that Wants Make Poland Great Again," *New York Times Magazine*, November 2, 2016, https://www.nytimes.com/2016/11/06/magazine/the-party-that-wants-to-make-poland-great-again.html; Phillip S. Swallow, "Explaining the Rise of Populism in Poland: The Post-Communist Transition as a Critical Juncture and Origin of Political Decay in Poland," *Inquiries Journal* 10, no.7 (2018): 1; Slawomir Sierakowski, "The Five Lessons of Populist Rule," *Project Syndicate*, January 2, 2017, https://www.project-syndicate.org/commentary/lesson-of-populist-rule-in-poland-by-slawomir-sierakowski-2017-01?barrier=accesspaylog; Tomasz T. Koncewicz, "Understanding the Politics of Resentment," *Verfassungsblog*, September 28, 2017, https://verfassungsblog.de/understanding-the-politics-of-resentment/.

[17] Wojciech Sadurski, "Prof. Wojciech Sadurski: 300 lat temu Monteskiusz rozgryzł Obecną Sytuację w Polsce [Wykład Warszawski: Relacja]," *Archiwum Osiatynskiego*, October 3, 2018, https://archiwumosiatynskiego.pl/wpis-w-debacie/sadurski-monteskiusz-rozgryzl-obecna-sytuacje-w-polsce/.

[18] P. C. Schmitter, *Civil Society East and West*, in L. Diamond, M. F. Plattner, Y. Chu, H. Tien (eds.), *Consolidating the Third Wave Democracies. Themes and Perspectives* (The John Hopkins University Press, Baltimore, 1997), 239-262, at p. 240.

Polish example is instructive here and shows how existing mechanisms open important legal avenues to strike back at capture.

II. The Court as the enemy of true Polish people

II.1. The Polish Counter Revolution starts

The Polish elections of 26 October 2015 completely reshaped the political landscape, bringing back to power the right-wing conservative party Prawo i Sprawiedliwość (PiS, which means "Law and Justice") which was ousted from power in 2007.[19] The newly elected majority, acting in unison with the President of the Republic, took only one month to disarm the Tribunal by refusing to honour the election of the judges made by the old Parliament and to swear them in, and instead electing their own "good judges", by arrogating the power of constitutional review and by retroactively voiding the term of office of the current President and Vice-President of the Tribunal. In the process, most fundamental principles of the Polish constitutional order, the rule of law, legality, the separation of powers, the independence of the judiciary, the supremacy of the Constitution and constitutional review by the Tribunal, have been now *de facto* obliterated.[20]

II.2. *Drama Act 1: "Keep as much as you can for yourself"*

In order to appreciate fully the importance of the judgments under consideration, one must start with the legislative history behind the Law. The draft of the Law was submitted in 2013 by the former President of Poland, Mr Bronislaw Komorowski. Without going into detail, the presidential draft aimed to reform the procedure before the Tribunal and streamline the selection of the new judges to allow more input in the selection process from civil society (universities and representatives of legal professions). In the end though, after a protracted legislative process, the changes that were supposed to improve and depoliticize the selection

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[19] The PiS won decisively (235 of 460 mandates) with Civic Platform coming a distant second with 138 mandates.

[20] See my op-eds for two major Polish daily papers, Rzeczpospolita and Gazeta Wyborcza: *Atak na Trybunał and Gazeta [The Court under attack and what's next?]* in Rzeczpospolita, 27 Nov. 2015, p. 8, available at <www.rp.pl/Opinie/311279995-Atak-na-Trybunal-Konstytucyjny-co-dalej.html>; *Manipulacja nad Wisłą [Manipulation on the Vistula river]* in Gazeta Wyborcza, 30 Nov. 2015, p. 8 available at <www.wyborcza.pl/1,75968,19266446,manipulacja-nad-wisla.html>.

process, were dropped by the Lower House of Parliament (Sejm). The Sejm reserved the right to put forward candidature(s) for the Tribunal exclusively to 50-plus members of the Parliament. The appointments to the Tribunal required a simple majority of the Sejm.

When the bill went to the Senate (higher chamber of parliament) for confirmation, the participation of the professional circles in the selection of the judges was restored, but only half-heartedly, since such participation was limited to the selection of judges replacing those judges whose term of office would come to an end after 1 January 2016. The logic of "keeping the Tribunal in check" by whichever majority rules at the time is nowhere better seen than in breaking with the tradition that new judges replacing those whose term of office comes to an end are chosen by the Sejm of the day. Under the Law adopted on 25 June 2015, the old Sejm selected all five judges replacing those whose term of office came to an end in 2015, even though the terms of office of two of these judges would only come to an end on 2 and 7 of December respectively, i.e. during the term of the newly elected parliament.[21] This was the crucial provision that sparked the backlash of the PiS against the constitutional overreaching by Civic Platform (the major party in the old Sejm). As a result the new Law was "business as usual": the Sejm would be the only player in the selection process of constitutional judges. On 21 July 2015, Mr Komorowski, the former President, promulgated the Law in the Journal of Laws and the outgoing Sejm, during its last sitting on 8 October 2015, selected all five replacement judges. This approach took a turn for the worse with the radical shift in the political scene with the parliamentary elections in October 2015.

II.3. *Drama Act II: "We manipulate now, because you manipulated first"*

The attempted election of two judges by Civic Platform to replace two judges whose 9-year terms would only expire in December 2015, backfired almost immediately after the parliamentary elections. This questionable constitutional overreaching was used by the PiS as a convenient justification for its claim to the moral high ground in reshaping the Tribunal's composition. The first sitting of the new Sejm was on 12 November 2015. Four days later, the

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[21] The Law of June 25 2015 contained a temporal provision (Art. 137) which gave the Sejm the power to elect all 5 judges at one stroke. On this, see more *infra*.

new government was formed and the constitutional revolution started.

II.4. *Drama. Act III: Down with the Old - Up with the New*

First, the new President of the Republic Andrzej Duda (elected in June 2015; took office in August 2015), himself a former member of PiS, refused to swear in all five new judges who had been selected by the old Sejm, even though the term of office of three of the five had already started to run. He argued that these judges were selected in contravention of the Constitution. However, in acting this way, he arrogated to himself the competence reserved to the Tribunal, which is the only body with the power to declare laws adopted by the Sejm unconstitutional. As long as the law is in force, there is a presumption of constitutionality and only the Tribunal can reverse this presumption. At the time of writing the newly elected judges have still not been sworn in by the President.

Second, the new majority decided to submit the Law of 25 June to the Tribunal for constitutional review. The PiS claimed that the selection of all five judges by the old Sejm contravened the prerogatives of the new Sejm. However, when the Tribunal set the date for the hearing for 25 November, the application was suddenly withdrawn. A few days later, Civic Platform submitted its own complaint to the Tribunal, questioning the constitutionality of the same law. It argued that, actions (or rather inaction) of President Duda left it no choice but to apply to the Tribunal. The judgment in this Case (K 34/15) was given on 3 December 2015.

Third, the Sejm passed resolutions (a nonbinding form of legal act) calling the election of the five judges by the old Sejm invalid. It argued that such a step was necessitated by the illegal elections made by the old Sejm. On 19 November, to make good on its promise of rectifying the overreaching by the old Parliament, the Sejm passed an amendment to the Law on the Constitutional Tribunal, annulling the election of the five judges and paving the way for the election of new judges. To make things even more serious, the Law of 19 November envisions a limited (3 years, today it is 9 years) term of the President and Vice-President of the Tribunal, applies this change to the current President and Vice-President, and voids their mandate as President and Vice-President respectively (they would sit on the Tribunal as judges). It further stipulates that the selection of judges whose term expires in 2015 is to take place within seven

days after the Law comes into force. It also makes the appointment conditional upon taking the oath before the President. The Senate voted in favour of the amendment on 20 November 2015 and President Duda signed it into law later that day. There has been no law post-1989 which was enacted so speedily, without necessary consultations etc. Indeed a constitutional blitzkrieg at its very best.

Fourth, constitutional challenges to the "old" Law (of 25 June) and amended (by the Law of 19 Nov.) kept popping up. On 23 November 2015, Civic Platform and the Polish Ombudsman challenged the amendments to the Law before the Tribunal, claiming that invalidating with retroactive effect the election of five judges is unconstitutional. The National Council of the Judiciary and Polish Bar Council joined the complaint. Finally, on 30 November 2015, the First President of the Supreme Court took advantage of her own prerogative to initiate constitutional cases before the Constitutional Tribunal and questioned the constitutionality of the law passed on 19 November. Yet despite all the constitutional doubts, on 2 December 2015, the Sejm went ahead and voted on the five new judges - instead of those elected by the previous Sejm - and the President took no time in swearing them in late in the night on the same day, after the information of the selection was made public in the Journal of Laws.

On 3 December 2015, the Tribunal decided on the complaint by Civic Platform to declare the law of 25 June 2015 unconstitutional as far as it allowed the old Sejm to select two new judges whose term of office was to come at an end in December 2015, after the end of term of the old Sejm. On 9 December the Tribunal dealt separately with the amendments passed by the Sejm on 19 November 2015 to the Law on the Constitutional Tribunal. With these two judgments, the battle lines were clearly drawn. First, the Court stepped in on 3 December 2015 with the unanimous judgment in Case K 34/15 on the constitutionality of the Law on the Polish Constitutional Tribunal adopted on 25 June 2015. Second, on 9 December 2015 the Tribunal followed through on the first judgment and also unanimously decided Case K 35/15, on amendments to that Law made in November 2015. What makes these judgments stand out is not so much the intricacy of the constitutional issues submitted for review, but rather the political context and the powerful language the Tribunal used to remind the political power of constitutional essentials and its readiness to stand up against political attack on the rule of law,

separation of powers and judicial independence. However, the most recent developments show that the Tribunal might be nearing its end, unable to fight back against the persistent political assault on its independence, effectiveness and place in the Polish system of governance.

III. Case K 34/15. The Tribunal takes a stand

Before ruling on the merits, the Tribunal resorted to an exceptional legal instrument - preventive ("conserving") injunction.[22] The injunction has the effect of final judgment and is binding on those to whom it is addressed. It preserves and conserves the state of the case at the moment it is issued. Its aim is to ensure that any future decision given in the case on merits will be enforceable and will not become devoid of purpose. It gives the Tribunal considerable discretion as to the choice of the specific measures to achieve this aim. On 30 November 2015, sitting as the full court (11 judges), the Tribunal issued an injunction ordering all public authorities to abstain from any actions which might undermine the effectiveness of the review of constitutionality of the Law. To justify resorting to an injunction, the Tribunal underscored the importance of the process of selecting the constitutional judges in a State governed by the rule of law. Importantly, it three times used the term "constitutional crisis" as a rationale for an injunction and spoke of the imperative to prevent such crisis. It emphasized that the selection of five new judges by the (new) Sejm before the Tribunal decides on the constitutionality of the Law "would be irreconcilable with the competences of the Courts as the only institution to rule of the constitutionality of the law. Should the Sejm proceed with the selection of the judges nonetheless, it would deprive the judgment in Case K 34/14 of all its effectiveness".[23] The order is now only of symbolic importance since the Sejm, at its sitting on 2 December, selected five new judges, in contravention of the Tribunal's order. Yet, the importance of the injunction goes beyond the case at hand as it builds the Tribunal's long-term constitutional narrative to be followed and relied on in future cases (see also *infra*).

It should be noted that the hearing in the main case was originally to be held before the

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[22] In Polish: "postanowienie zabezpieczające". The injunction is a special remedy, governed by Art. 755 of the Law on Civil Procedure, and applied by the Tribunal in accordance with Art. 74 of the Law on the Constitutional Tribunal which refers to the civil procedure.

[23] At p. 4 of the order of 30 Nov. 2015.

full court (at least 9 judges must be present). However, the constitutional blitzkrieg affected this as well. PiS claimed that two judges (President A. Rzepliński and Vice-President S. Biernat) should recuse themselves or be recused by the Tribunal as a result of their prior involvement in the drafting of the Law now under constitutional scrutiny. Accordingly, on 30 November the Tribunal composed of three judges, acting on the motion of President Andrzej Rzepliński, Vice-President Stansław Biernat and Judge Piotr Tuleja, decided to recuse these three judges from sitting on the case, and as a result, the Tribunal sitting as the full court, decided on 1 December to refer the case to a chamber of five judges (on 2 Dec. the term of Judge Zbigniew Cieślak came to an end), and thus the Tribunal was unable to decide the case sitting as the full court as originally planned.[24] In this way the constitutional blitzkrieg started to produce effects, as the Tribunal found itself on the brink of being unable to decide cases brought before it.

In the highly anticipated judgment in Case K 34/15, the Tribunal ruled that the selection of the three judges to replace those whose term of office came to an end during the term of the old Sejm was constitutional. On the other hand, the old Sejm acted unconstitutionally in selecting two judges for those whose term of office would come to an end only in December 2015. These two judges should have been selected by the new Parliament. According to the Tribunal, it follows from Article 194(1) of the Constitution that the Sejm has the obligation to select a judge of the Constitutional Tribunal during the parliamentary term in the course of which the vacancy in the Constitutional Tribunal occurs. A judge of the Constitutional Tribunal must not be selected prematurely - that is to say to fill a seat that will be vacated during the Sejm's next term. As a result of the Tribunal's ruling, in the case of the two judges of the Constitutional Tribunal whose terms of office ended on 2 December and 8 December 2015 respectively, the legal basis for selecting their successors is unconstitutional.

The Tribunal also left no doubt that the President has no role to play in the selection of the constitutional judges. The Constitution vests exclusive authority to shape the composition of the Tribunal with the legislative branch (the Sejm). Article 21(1) of the Law on the Constitutional Tribunal on the oath of office taken by a newly-selected judge of the Constitutional Tribunal in

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[24] See the order of 18 Nov. 2015 to refer the case to the full court and the order of Dec. 1 on the chamber composition. Both are available on <www.trybunal.gov.pl>.

the presence of the President of the Republic of Poland imposes an obligation on the President to accept the oath of office forthwith, and as a result it is the duty of the President to swear in the judges selected by the Sejm. Any other interpretations of the provision are unconstitutional. The Constitution does not provide for the President's involvement in finding candidates for judicial offices in the Constitutional Tribunal. Hence, the provisions of the Law may not be construed in such a way that they vest the Head of State with constitutive powers in that respect. The President may not take any action that would prevent a judge from commencing his (her) term of office in the Tribunal if the judge has been selected by the Sejm on the basis of Article 194(1) of the Constitution. The Tribunal stressed that the Constitution does not provide for a possibility that the Head of State may refuse to take the oath of office of a newly-selected judge of the Constitutional Tribunal, and any potential doubts that the Head of State may raise as to the constitutionality of legal provisions on the basis of which judges have been selected to the Tribunal may only be addressed by the Tribunal. Accepting the oath of office from newly-selected judges of the Tribunal is a statutory obligation of the President of Poland. Taking the said oath makes it possible for a judge selected by the Sejm to the Tribunal to commence performing his/her judicial duties, as well as preserving the continuity of the Tribunal's judicial activity. The lack of statutory provisions setting a time-limit for taking the oath of office must be construed in the way that the President of Poland is required to fulfil this obligation forthwith.

The Constitutional Tribunal deemed that the provisions of the Law that dealt with the procedure for appointing the President and the Vice-President of the Constitutional Tribunal by the President of the Republic of Poland are consistent with the Constitution. Within the meaning of Article 194(2) of the Constitution, the President is obliged to appoint the President and the Vice-President of the Constitutional Tribunal from among candidates proposed by the General Assembly of the Judges of the Constitutional Tribunal. The President of the Republic of Poland is not vested with full discretion as regards finding candidates for the offices of the President and the Vice-President of the Constitutional Tribunal. The Head of State is obliged to appoint to the said offices one of proposed candidates. The provision is clear and raises no interpretative doubts.

In the view of the Tribunal, the fact that the Law does not specify the length of the term

of office in the case of the President and the Vice-President does not violate the Constitution. The length of the said terms depends on the length of the term of office of a given judge of the Tribunal. This solution is clear and raises no interpretative doubts. The legislature may introduce a solution where judges of the Tribunal take turns in performing the duties of President and Vice-President of the Tribunal. However, should the legislature decide to introduce such a solution, it must comply with the rules arising from the principles of a democratic State ruled by law (Art. 2 of the Constitution).

The provision permitting the Tribunal to discontinue proceedings is also constitutional, if a given case does not concern a significant legal issue that needs to be determined by the Tribunal. The objective underlying that solution is to relieve the Tribunal from the burden of examining cases which are insignificant from the point of view of the legal system. What weighs in favour of that solution is the constitutional principle of the efficiency of public institutions. Indeed, the Tribunal is the only organ of the State (what is more, composed of very few persons) that is authorized to examine the constitutionality of law, resolve disputes over powers, adjudicate on the conformity with the Constitution of the objectives or activity of political parties, and determine the existence of any circumstances that temporarily prevent the President of the Republic of Poland from performing his/her duties. Thus, the Tribunal has vital duties pertaining to safeguarding the supremacy of the Constitution, protecting human rights and freedoms as well as preserving the rule of law and the tripartite division of powers. The Tribunal emphasized that similar solutions existed in other EU Member States, and also in proceedings before the European Court of Human Rights.

IV. The Tribunal defends the constitutional essentials

IV.1. Case K 35/15

On 9 December 2015, the Tribunal, composed of five judges, adjudicated on the constitutionality of the amendments of 19 November made by the new Sejm to the Law of 25 of June on the Constitutional Tribunal. The case was initiated by the Polish Ombudsman, First President of the Supreme Court, the National Council of the Judiciary and the minority members

of the parliament.[25] The amendments annulled the selection of the five judges made by the old Sejm and paved the way for the selection of new "good" judges on 2 December. Even more seriously, the Law of 19 of November 2015 envisions a limited (3 years, reduced from the current 9 years) term of the President and Vice-President of the Tribunal, applies this change to the current President and Vice-President and voids their terms of office.

In its judgment of 9 December 2015, the Tribunal unanimously declared most of the amendments unconstitutional. In the first place, the Tribunal addressed the allegation that the entire amending Law of 19 November 2015 was unconstitutional. Despite numerous defects in the legislative process caused by breaches of the Sejm's rules of procedure and of the Law on the National Council of the Judiciary of Poland, the Tribunal did not declare the entire Law to be unconstitutional. The Tribunal referred to its case law (7 Nov. 2013 K 31/12) that a breach of the Sejm's rules of procedure alone does not result in an infringement of the Constitution.

The Tribunal agreed with the allegations raised by the First President of the Supreme Tribunal with regard to Article 12(1), second sentence, of the Law on the Constitutional Tribunal, pursuant to which: "The same person may be appointed the President of the Tribunal twice". The Tribunal ruled unconstitutional the possibility of serving as the President and Vice-President of the Tribunal for two consecutive terms. It held that this creates a danger that the executive branch of the government would try to interfere with the Tribunal's internal functioning and as such call into question the impartiality of the judges and the independence of the Tribunal as a whole. It also undermines the principle of the independence of the Tribunal and affects the public perception of the constitutional judiciary. Taking the above into consideration, the Tribunal ruled that Article 12(1), second sentence, of the Law on the Constitutional Tribunal is inconsistent with Article 173 in conjunction with Article 10 (separation of powers) of the Constitution.[26]

The Tribunal ruled as unconstitutional the provision in the new Law whereby the newly elected judges were to take their oath before the President within 30 days of being elected. The

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[25] All procedural documents are available in Polish and English at <www.trybunal.gov.pl>.

[26] Art. 10(1) of the Constitution states that the system of government of the Republic of Poland shall be based on the separation of and balance between the legislative, executive and judicial powers and (2) that Legislative power shall be vested in the Sejm and the Senate, executive power shall be vested in the President of the Republic of Poland and the Council of Ministers, and the judicial power shall be vested in courts and tribunals.

Tribunal stressed that the judges should be able to take the oath immediately after their election and the President should make this possible. The Tribunal added that a 30 days period is unconstitutional because it allows the President to play an active role in the selection of the constitutional judges and as such flies in the face of Article 194(1) of the Constitution which says "The Constitutional Tribunal shall be composed of 15 judges chosen individually by the Sejm for a term of office of 9 years from amongst persons distinguished by their knowledge of the law. No person may be chosen for more than one term of office". In the view of the Tribunal, the introduction of the 30-day time-limit for taking the oath of office violates the principle that a judge of the Constitutional Tribunal selected by the Sejm should have the possibility of taking the oath of office forthwith after having been elected, i.e. voted in, by the Sejm. Such a possibility should be created by the President of Poland. By giving the President of Poland competence to participate in the procedure for appointing judges to the Constitutional Tribunal, the challenged provision infringes Article 194(1) of the Constitution, according to which judges of the Constitutional Tribunal are elected by the Sejm.

The Tribunal held it unconstitutional to condition the start of the term of office of the judges on the taking of an oath by the President. The Tribunal clarified that the 9-year term of office starts on the day on which the Sejm selects judges, and not on the day of the oath. The Tribunal argued that accepting the latter interpretation would again involve the President in the process of selection of constitutional judges, whereas the Constitution clearly vests the power of selecting the judges in the Sejm. As pointed out by the Tribunal, in accordance with well-established practice, all State authorities in Poland have so far assumed that the 9-year term of office commences on the day when a judge of the Tribunal has been selected by vote in the Sejm (possibly a later date if the selection process takes place before the vacancy occurs). But not on the day the judge takes the oath of office. If commencement of the term of office, as regards a judge of the Tribunal selected by the Sejm, were contingent on taking the oath of office, this would entail that term of office commencing after a certain delay, as well as meaning that the President of Poland would indirectly be involved in the procedure for selecting judges of the Constitutional Tribunal, even though the Constitution provides only for the Sejm's participation in that procedure. Therefore, the Tribunal ruled that Article 21(1a) of the Law on the

Constitutional Tribunal is inconsistent with Article 194(1) read with Article 10, Article 45(1), Article 173 as well as Article 180(1) and (2) of the Constitution.

Finally, it is unconstitutional to void the term of office of the current President and Vice-President of the Tribunal within 3 months of the entry into force of the Law under consideration. This breaches the Tribunal's independence and Article 173 of the Constitution, which reads "The courts and tribunals shall constitute a separate power and shall be independent of other branches of power". The Tribunal admitted that while it is conceivable for the legislature to change the length of the term of office of both President and Vice-President, the voiding of a term of office that already started to run impinges on the prerogative of the President to appoint the President and Vice-President of the Tribunal.[27]

Provisions on the status of the President and Vice-President of the Constitutional Tribunal, in particular as regards their terms of office, are closely linked with the principle of the independence of the Tribunal as such. The legislature may depart from the hitherto adopted solution, and may determine the length of the term of office in the case of the President or Vice-President of the Tribunal in a more fixed way. However, Article 2 of the amending Law constitutes interference in the scope of the constitutional competence to appoint the President and Vice-President of the Tribunal, which is vested in the President of the Republic of Poland. The Tribunal agreed with the view presented by the applicants that the legislature's termination of the terms of office of the incumbent President and Vice-President of the Tribunal violates the principle of the independence of those authorities, and thus infringes Article 10 in conjunction with Article 173 of the Constitution, Article 194(1) and (2) as well as Article 7 of the Constitution.

IV.2. Court-packing attempted (yet again) and … thwarted (yet again)

The later events only corroborated the bleak perspectives for judicial review in Poland. The Polish Parliament passed a new Law on the Constitutional Tribunal on 22 July 2016, leaving no doubt that the parliamentary majority is still determined to see its plan through and ensure that

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[27] According to Art. 194(2) of the Constitution: "The President and Vice-President of the Constitutional Tribunal shall be appointed by the President of the Republic from amongst candidates proposed by the General Assembly of the Judges of the Constitutional Tribunal".

the Tribunal is incapacitated. By means of a statute, the 1997 Constitution would be torn to shreds.[28] The Law of 22 July 2016 simply re-introduces the provisions that were already either disqualified by the Tribunal as unconstitutional (following the judgments in Case K 34/15 and Case K 35/15, and later in Case K 47/15) or criticized by the Venice Commission in its Opinion of 11 March 2016.[29] The Law shows that PiS is not concerned to implement the opinion of the Venice Commission, nor to follow clear constitutional commands as interpreted by the Tribunal. The Law makes the Tribunal toothless and vulnerable to outside pressure. Its themes revolve around making the Tribunal a constitutional figurehead and rubber-stamp for the majority and undermining the Tribunal's ability to function effectively.

The new Article 68(3)-(5) of the Law contains the essence of the latest "court-packing" plan. It sets out a procedure allowing at least four judges of the Tribunal to raise during the deliberation, an objection(s) related to a proposed judgment, every time important "institutional issues or issues on the public order are at stake". If this blocking minority materializes, the deliberation on a case is adjourned for at least three months (Art. 68(6)), and – if the blocking minority continues to uphold its objections - for further six months (Art. 68(7)). Adjournment is fixed and cannot be shortened - which ties the Tribunal's hands. Should judges of the blocking minority be willing to compromise or meet with other judges before the lapse of the 3-month period, they are debarred from doing so. Deliberations will be reopened only after the lapse of the 3-month period. The adverse affects of the blocking minority will not stop here, though, and might extend to other cases as well. Due to the obligation to set dates of hearings for the consideration of applications lodged at the Tribunal on the basis of the order in which the applications are lodged (Art. 38(3) of the Law), a delay would also occur in the consideration of

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[28] The statutory attack on the Tribunal has two dimensions: external and internal. *External* opens up the possibilities for the executive to unconstitutionally interfere with the Tribunal in a way that makes it dependent on outside forces. *Internal* deals with the provisions that tie the Tribunal's hands from the inside and cripple its ability to act in a timely and speedy fashion. What comes across most strongly is that an independent and efficient Tribunal ready to uphold the Constitution against the ruling party is the last thing PiS wants. For detailed analysis of the new Law see my *Farewell to the Polish Constitutional Court*, available at <verfassungsblog.de/farewell-to-the-polish-constitutional-court/>; *Statutory tinkering: on the Senate's changes to the Law on the Polish Constitutional Tribunal*, available at <verfassungsblog.de/statutory-tinkering-senate-polish-constitutional-tribunal/>; Sadurski, *What is going on in Poland is an attack against democracy?*, available at <verfassungsblog.de/what-is-going-on-in-poland-is-an-attack-against-democracy/>.

[29] No. 833/2015. English version of the opinion is available at <www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)001-e>.

applications other than the one with regard to which the judges have raised objections. The Tribunal would have first to resolve the case in which the judges have raised objections, and only then can it proceed to rule on other cases. The judgments in K 34/15 and K 47/15 laid down a clear principle whereby

> "in the context of the Tribunal's systemic position and the unique nature of its competence, it is particularly justified that proceedings before the Tribunal should be effective and would result – within a reasonable period of time – in issuing a final ruling, especially in cases that are of significance for the functioning of the organs of the state as well as for the exercise of rights and freedoms enshrined in the Constitution. This follows from the principle of efficiency in the work of public institutions, which arises from the Preamble to the Constitution.… Consequently, a statutory model of proceedings before the constitutional court needs, on the one hand, to take account of the unique nature of the Tribunal's systemic function and, on the other, ensure efficiency in the exercise of the Tribunal's powers."30

Furthermore, "the legislator may not lower the previous standard of diligence and efficiency in the work of an existing public institution".31 The procedure introduced in Article 68(3)-(5) will undoubtedly affect the speediness with which the Tribunal disposes of cases in which objections have been submitted by the blocking minority and will push the Tribunal to the brink of internal standstill.[32]

Article 84(2) of the Law imposes on the Tribunal the obligation to rule on the cases pending prior to the entry into force of the Law, within one year from the date of entry into force

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[32] Old Art. 69(2) of the draft Law stipulated that in the event of judges' objections to a draft of a judgment (Art. 68(5)-(7) of the Law), a two-thirds majority vote was required for determining a ruling on unconstitutionality. This was dropped and now Art. 69(1) simply provides that decisions of the Tribunal require simple majority. Dropping the requirement of two-thirds majority might be easily explained by the tactics of constitutional give-and-take and calculus of gains-and-losses. It was clearly unconstitutional and contravened the explicit wording of Art. 190(5) of the Constitution, and as such indefensible. Sometimes it makes sense to back down on non-essentials in order to move forward with essentials on other fronts, and PiS mastered this tactic, see also section 5.2. *infra*.

of the Law. Such a solution constitutes interference with the Tribunal's freedom to conduct its own business and interferes with the procedural discretion of the Tribunal. The Analysis by the Office of the Tribunal makes a reference to the view expressed by the Tribunal whereby "the legislator's task is to create optimal conditions, and not to interfere in the process of adjudication by specifying the moment when the Tribunal may consider a given case… only in exceptional and justified instances may the legislator specify the maximum time-limit for the consideration of a case by the Tribunal.… Indeed, the Tribunal's independence requires that the Tribunal be guaranteed discretion in adjudication, by excluding any impact of other authorities not only on the content of its rulings, but also on the process of issuing them". A side effect of Article 84(2) will be the Tribunal's inability to rule on any cases lodged at the Tribunal *after* the entry into force of the Law, as the Tribunal will have to shift its attention to the cases already pending before the entry into force of the Law.[33]

Finally, two steps in the narrative of court packing in the Tribunal directly bear on the December judgments, and strengthen the case made out above for emergency constitutional review.

First, the thorny issue of the "midnight judges" elected by PiS in contravention of the Constitution and the Tribunal's judgments of December 2015. The new Article 90 in conjunction with Article 6(7) of the Law addresses the effects of taking the oath of office by a judge of the Tribunal and does so in a way that is as far from a constitutional settlement as possible. The judgment in K 34/15 dispelled any doubts as to the constitutionality of the election of the three judges elected by the old Sejm. The Tribunal clearly ruled that the President is obliged by the Constitution to accept the oath of office from the three judges whose terms of office began on 7 November 2015. The necessity for the President to respect and implement the judgment in K 34/15 was also emphasized by the Venice Commission. Article 90 of the Law may not eliminate the effects of that judgment - and yet the three judges elected constitutionally by the old Sejm still await being sworn in by the President. The significance of this in the long-term plan of the majority is that Article 92 of the new Law deliberately leaves open a possibility that three judges

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[33] This is again an example of "copy-paste" of a rule that was already deemed unconstitutional by the Tribunal: see judgment of 9 March 2016, Case K 47/15, now confirmed on 11 Aug. 2016 in K 39/16.

elected by the old Sejm (then dominated by Civic Platform, now in opposition), and never sworn in by the President will never be able to assume their judicial duties. Article 90 will be used as an argument in favour of accepting all five of the judges elected by the new PiS-dominated Sejm in December 2015. These judges were immediately sworn in by the President, despite the fact that at the time - and in the light of the judgment in K 34/15 - the Tribunal did not have five vacancies. In this way three judges elected constitutionally by the old Sejm, and waiting in limbo to be sworn in by the President, will be passed over and PiS will get its coveted majority on the Tribunal.

Second, the more general question of publication of the judgments delivered by the Tribunal. The Tribunal's case law confirmed that all judgments must be published, as required by the Constitution. Yet the Government has persistently refused to publish judgments of the Tribunal, claiming that they were vitiated by the procedural errors and lacked legal basis.[34] The new Law addresses these issues in Article 89. It provides that the Tribunal's rulings "issued in breach of the provisions of the Law on the Constitutional Tribunal of 25 June 2015" between 10 March 2016 and 30 June 2016, are to be published in a relevant official publication within 30 days of the date of entry into force of the Law.[35] This regulation, however, again raises constitutional concerns. According to Article 190(2) of the Constitution, rulings of the Tribunal are to be immediately published in the official publication in which the original normative act was promulgated. There is thus a strong constitutional argument to support the proposition that constitutional concerns arise whenever *any* time-limit for immediate publication is set by statute.[36] This is, thus, another provision of the new Law that clearly flies in the face of the

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[34] We are not dealing here with a one-off situation. The number of judgments that have been awaiting publication point rather to an emerging systematic practice of refusing to publish judgments that are unfavourable (for whatever reason) to the parliamentary majority.

[35] As argued in the Analysis of the Office of the Tribunal, the wording "issued in breach of the provisions of the Law on the Constitutional Tribunal of 25 June 2015" also raises serious concerns, in light of the Tribunal's independence (Art. 173 of the Constitution) and the separation of and balance between powers (Art. 10 of the Constitution). The Constitution does not entrust any public authority with competence to evaluate the accuracy of the Tribunal's application of the provisions of the Law on the Constitutional Tribunal in the process of adjudication.

[36] The Analysis prepared by the Office of the Constitutional Tribunal further points out that the provision of a 30-day time-limit for the publication of rulings may erroneously suggest that the observance of the said time-limit suffices to fulfil the constitutional obligation to immediately publish the Tribunal's rulings. In fact, the immediacy of publication should be specified with regard to each ruling on a case-by-case basis.

rulings of the Tribunal: the immediacy of publishing a ruling of the Tribunal in a relevant official publication requires immediate action, without undue delay.[37] Such unconditional publication of the Tribunal's judgments between 10 March 2016 and 30 June 2016 was also found by the Venice Commission to be the condition *sine qua non* for any viable constitutional settlement.

Conspicuously absent from Article 89 of the Law is the question of the publication of the judgment of 9 March 2016 (Case K 47/15). The Venice Commission regarded the refusal to publish this judgment as contrary to the principle of the rule of law. For the Commission, such refusal constitutes an unprecedented move that further deepens the constitutional crisis. The publication of this judgment must be seen as a precondition for finding a way out of the crisis.

Likewise, the changes proposed by the Senate38 made no mention of the three judges constitutionally selected by the previous Sejm. The alleged good intentions of PiS ring hollow as long as these three judges are not sworn in by the President, thus bringing the composition of the Tribunal to the constitutionally mandated 15. The President's persistent refusal to discharge this obligations fuels the constitutional crisis. No amount of empty rhetoric (allegedly fixing the Tribunal, increasing its diversity etc.) by PiS can mask the real stakes of the constitutional foul play: to stifle the Tribunal as a viable element of the rule of law. The Senate's amendments corroborate the end-result pursued by PiS from the beginning: taking over the Tribunal by relentlessly pushing through the judges chosen by PiS in December 2015 and immediately sworn in by the President of the Republic. This silence is deliberate and not accidental,when seen in the light of Article 6(7) of the Law (not touched on by the Senate). This provision forces the President of the Tribunal to allow the new judges selected by PiS in December 2015 to take up their duties. This is in clear defiance of the Tribunal's judgment of 3 December 2015. From the rule of law perspective, there is simply no room for any compromise here. The Tribunal has clearly laid down the constitutional interpretation that vindicates the selection of three judges by the previous Sejm. Any other interpretation is *contra legem.* As of now, the Tribunal is composed of twelve judges with three judges waiting to be sworn in. The solution to the PiS-induced constitutional crisis is for the President to swear in the three judges selected by the old Sejm,

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[37] Judgment of 9 Dec. 2015 (Case K 35/15).

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rather than engaging in elaborate statutory revision(s) of the Constitution.

The Senate also avoided the question of the judgment of the Tribunal in Case K 47/15, in which the Tribunal declared unconstitutional the first draft of the Law on the Tribunal (of 22 Dec. 2015), now largely reproduced in the new version of the Law. This is the judgment the Government keeps refusing to publish officially, and whose publication – as mentioned above - the Venice Commission deems essential. Article 89 first sentence of the new Law now provides that "The decisions of the Tribunal adopted before 20 July 2016 in violation of the Law of 25 June 2015 on the Tribunal, are to be published within 30 days of the entry into force of the Law". As usual, the devil is in the details. The second sentence of the same article adds an important exception and states that the duty to publish will not apply to "the Tribunal's judgments on the normative acts which already lost binding force". In this case, the Polish legislature not only sidesteps the unwelcome December and March judgments of the Tribunal, but creates an ominous precedent for the future. The decision as to which judgments of the Tribunal will be published or not, is now to be taken by the Parliament by way of a statute. This flies in the face of Article 190 of the Constitution, which provides in clear terms that all *lege non distinguente* judgments of the Tribunal are to be published.

On 11 August 2016, the Tribunal decided on the constitutional challenges to the Law of 22 July 2016 (Case K 39/16).[39] For the second time in five months, the Tribunal defended its place and the constitutional integrity of the system and disqualified the court-packing provisions sketched above. Separation of powers, judicial independence and effective functioning of the constitutional court were the key words informing the analysis, The Tribunal built on its previous *unpublished* (Case K 47/15) and *unimplemented* (K 34/15 and K 35/15) judgments. In view of the repetitive nature of most of the claims and duplication of the subject-matter, the Tribunal felt strong enough to decide the case by way of a reasoned order, rather than a judgment. The Order emphasized that most of the provisions in the new Law replicate those the Tribunal had found in March 2016 to be unconstitutional. The Tribunal reiterated that its judgments must be published

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[39] Case K 39/16, and comment by Siedlecka, *Witajcie w Dniu Świstaka. Znów Trybunał odrzucił przepisy ustawy PiS i znów PiS szykuje kolejną ustawę, by go zablokować (Welcome to the Groundhog Day. The Tribunal rejects yet again the Law enacted by PiS, and PiS yet again starts to work on a New Law to block the Tribunal again,* available at <wyborcza.pl/1,75968,20532443,witajcie-w-dniu-swistaka-znow-trybunal-odrzucil-przepisy-ustawy.html>.

immediately in the shortest possible time. Government authorities have no discretion, but must publish all rulings of the Tribunal. *A fortiori*, the Tribunal criticized in the strongest possible words the practice of singling out rulings that will be published in the Journal of Laws and those that will not.

The Sejm had reviewed individual rulings and decided that the judges in these rulings had acted *ultra vires,* justifying – in its view - the refusal to publish them, thus making the future publication of the Tribunal's rulings dependent on the consent of the legislative branch. The Tribunal found this to be an inadmissible encroachment by the executive on the competences of the constitutional court, aiming at the stigmatization of the judges who decided these cases. Such practice runs foul of the standards of a State governed by the rule of law (*Rechtstaat*) and is alien to the legal culture to which Republic of Poland belongs. The Tribunal was clear: *all* rulings are unconditionally binding and must be published. As for the vexatious problem of the Tribunal's composition, the Order simply refers to the constitutional interpretation already given in the December 2015 judgments and calls on the State authorities to bring to an end the situation of disrespect of the Tribunal's rulings. The Tribunal recalled: the legislature must not elect new judges for whom there is no vacancy. Forcing the President of the Tribunal to allow three judges elected by PiS would be unconstitutional and "incompatible with the judgments of the Tribunal which are binding on all State authorities, the Tribunal and its President included".[40]

It seems we are back to drawing board,[41] this time with a new dimension to the practice of refusing to publish judgments. The Chairman of PiS, Jarosław Kaczynski, declared, even before the judgment was pronounced (!), that whatever the Tribunal decided on 11 August 2016,

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[40] My emphasis. This excerpt comes from the official Press release available on the Tribunal's website. See <trybunal.gov.pl/rozprawy/komunikaty-prasowe/komunikaty-po/art/9311-ustawa-o-trybunale-konstytucyjnym/>.

[41] For the sake of completeness: the Tribunal also declared unconstitutional (besides Arts. 89 and 90 of the Law, see analysis *supra*) among others: Art. 26(1) point g of the Law (possibility for the 3 judges to request the case be heard by the full court); Art. 38(3)-(6) (the principle whereby cases are ruled on in the order in which applications were lodged at the Registry); Art. 68(5)-(7) (procedure allowing at least 4 judges of the Tribunal to raise during the deliberation an objection(s) related to a proposed judgment, every time important "institutional issues or issues on the public order are at stake"); Art. 80(4) (publication of the Tribunal's rulings dependent on the motion being lodged by the President of the Tribunal with the Prime Minister); all temporal provisions (Art. 83(2) and Arts. 84-87) that, when adopted, would paralyse the Tribunal.

it would not be published.[42] The constitutional games start all over again, with no end in sight. In the aftermath of the most recent ruling by the Tribunal, PiS was quick to come up with assurances that a new Law on the Tribunal will be now drafted expeditiously and, this time, fully compliant with the Constitution.[43]

The persistent refusal by the executive to publish the judgments of the constitutional court is mind-boggling and unheard of in Europe. This possibility was never entertained by the Polish constitutional founding fathers, either. When the 1997 Constitution was drafted, it was thought that the authority of a judicial pronouncement and respect for the Constitution would carry enough clout to secure the universal observance of the Tribunal's judgments, and that the rule of law is rooted in the public consciousness to the point where no politician would dare to undermine judicial review. However, the new Law on the Tribunal of 22 July 2016 entrenched the "constitutional - unconstitutional" duality of the Polish legal system under PiS. What has been conventionally accepted as "constitutional" for years is now faced with a new understanding of constitutionality in accordance with the narrative of the ruling party. Traditional constitutionality and rule of law as understood post-1989 give way to the flouting of the constitutional document, and imposing a new understanding of the institutions and concepts that seemed to be rooted in Polish constitutionalism. The Tribunal and constitutional review were the first victims of this reversal in constitutional narrative. As argued above, if the Tribunals' judgments remain unpublished, constitutional review by the ordinary judges must at least be contemplated. The Constitution is supposed to have normative content as opposed to being merely declaratory. The President's refusal to swear in new judges, arrogating the power of constitutional review, refusing to publish the Tribunal's judgments and attempting to retroactively end the term of office of the current President and Vice-President of the Tribunal all undermine the foundations of the constitutional order. At critical systemic junctures no methods are too revolutionary if they serve the objective of saving the Constitution and as long as they are

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[42] Making it then 23 rulings that now await publication. One may wonder what his reaction would have been if the Tribunal in K 39/16 had approved of the new Law?

[43] The budget of the Tribunal has been already severely cut, to the point that this year's conference to commemorate the 30th Anniversary of the Tribunal has been cancelled. The follow-up to this is the most recent proposal that aims at divesting former and future judges of the retirement benefits in order to make the Tribunal "less byzantine" (sic!).

backed up by a credible interpretation. Emergency situations call for unorthodox interpretations. "Unorthodox" does not mean illegal, though, as my proposal is within the law. It calls for rethinking certain interpretative paradigms that have been almost taken for granted.

UPDATE WILL BE PROVIDED HERE to take into account the most recent developments !!!

V. Telling the story of judicial self - defence

> […] the core of incremental doctrine is respect for the status quo and movement from the status quo only in short, marginal steps carefully designed to allow for further modifications in the light of further developments […] Incrementalism is a theory of freedom *and* limitation
>
> M. Shapiro, *Stability and Change in Judicial Decision-Making: Incrementalism or stare decisis* (emphasis in the original)[44]

Despite enormous political pressure and personal attacks on the individual judges and the Tribunal's President, the Tribunal did not flinch. In both cases it stood up for the Constitution, pulled itself together, and delivered strong unanimous judgments. However, it was painfully clear that the old powerful, confident and esteemed court was already gone. The Tribunal we saw on 3 and 9 of December was alive, but severely wounded, and hardly able to discharge its constitutional duties. In order to reconstruct the Tribunal's message and its importance, one should adopt two perspectives: *short-term* focuses on the constitutional issues at hand, and *long-term* looks ahead and anticipates future developments and possible solutions to the constitutional stalemate.

V.1. Short-term perspective: Here and now

It is hard to imagine more devastating judgments for the majority of the day. Rule of law, separation of powers, judicial independence and the monopoly of constitutional review permeate

[44] (1965) Law in Transition Quarterly Vol. II No. 3 pp. 156-157.

the reasoning. The Tribunal's "no" against redrawing constitutional lines and making inroads into well-established constitutional concepts and practices, could not be clearer or louder, dispelling any lingering constitutional doubts. These pronouncements should be enough of a warning in a State governed by the rule of law. However, the problem is that the majority of the day has a completely different conception of the rule of law, which does not include respect for verdicts of the Constitutional Tribunal.

The judgment in K 34/15 rightly criticizes the overreaching by the old Sejm in electing five judges as impinging on the powers of the new Sejm. The old majority saw the election of five judges as an insurance mechanism against looming defeat in the elections[45] and the Tribunal clearly opposed such practices.[46] There is now no doubt as to the validity of the vote carried out by the old Sejm on the three new judges to replace the judges whose term of office came to an end on 6 November 2015. They were selected by the Sejm during the parliamentary term in the course of which the vacancy in the Constitutional Tribunal occurred. As a result of the judgments, the maths should be simple. Since the new Sejm also selected five new judges, the Tribunal, as of Thursday 3 December 2015, had two parallel compositions: one *constitutional* (13 judges – made up of 10 "old" judges plus 3 newly elected by the old Parliament[47]) and one *unconstitutional* (18 judges - 13 "old" judges plus those elected by the new Sejm on 2

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[45] Insurance (Ginsburg) and hegemonic preservation (Hirschl) theories explain how the ruling party/ies seek to entrench their influence and policies by shaping the composition of the constitutional court with the power to invalidate new policies incompatible with those of the old majority. The court then serves as an insurance for the elite's policies against the day when the elites lose their grip on power. Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (Cambridge University Press, 2003); more recently Ginsburg, "The global spread of constitutional review" in Whittington, Keleman, and Caldeira (Eds.), *The Oxford Handbook of Law and Politics* (OUP, 2008), at pp. 81-98 and Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Harvard University Press, 2004).

[46] The insurance theory could indeed explain the rationale behind the actions of the old Sejm. It should be noted here that this would be the first time post-1986 (the date of creation of the Tribunal) that the Polish political elites' attempted to entrench their policies by moulding the composition of the constitutional court and did so in such an unambiguous and blatant fashion. On the application of the insurance theory to previous changes in the composition of the Tribunal, see also Garlicki, "Constitutional Court of Poland" in Pasquino and Billi (Eds.), *The Political origins of Constitutional Courts. Italy, Germany, France, Poland, Canada, United Kingdom* (Fondazione Adriano Olivetti, 2009).

[47] The status of the judges selected by the Sejm, but not yet sworn in by the President, is this: they are judges of the Tribunal who were elected by Sejm (Art. 194 of the Constitution), but are not able to adjudicate until they are sworn in be the President. In the wake of the judgment it is clear that, important as the role of the President is, it is of technical significance. A person becomes a judge of the Tribunal with the election by the Sejm, the only constitutionally-mandated body in the election procedure.

December). It is here that two judgments should be read together. In Case K 35/15, the Tribunal ruled that the amendments to the Law on Polish Constitutional Tribunal cannot retroactively interfere with the valid selection of the three judges already made by the old Sejm to fill the three seats vacated by the judges whose term of office came to an end on 6 November. This finding is crucial and reinforces the judgment in K 34/15, in which the Tribunal held that the election of the three judges made by the old Sejm was constitutional, and left only two seats vacant. As a result, the new Sejm was empowered to elect two, not five, judges. Although the Tribunal did not touch on the issue directly, there is no doubt that the unconstitutionality of this amendment vitiates the election of five judges made on 2 December and, as a result, their swearing in by the President.

An important legal development directly followed in January 2016. On 11 January 2016, the Tribunal made an order (by 7 votes to 3) in Case U 8/15, concerning the constitutionality or otherwise of the Sejm resolutions on the selection of the judges on 8 October 2015,[48] and discontinued proceedings. It pointed out that the Sejm's resolutions are individual acts and as such do not come within the scope of the acts whose constitutionality could be questioned. As a result the Tribunal had no jurisdiction to adjudicate on their constitutionality. One can see how the order flows from, and is premised on, the judgments of 3 and 9 of December 2015. Five resolutions adopted on 25 November 2015 retroactively voided the selection of the judges made by the old Sejm. On 2 December 2015, the Sejm voted on five resolutions and selected five new judges (so-called "December judges"). The message is clear: it is the constitutional duty of the President to swear in the three judges selected (constitutionally) by the old Sejm in October 2015 to succeed the judges whose term of office came to an end during the parliamentary term of the old Sejm.[49] The new Sejm was empowered to fill two remaining vacancies on the bench to succeed two judges whose term of office came to an end in December during the parliamentary term of the new Sejm. Had the Tribunal not decided the cases on 3 and 9 December the way it did, the order might have been different and bolder in terms of constitutional line-drawing. However given the tenor of the December judgments, the Tribunal found it unnecessary to seek

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[48] The case was instigated on the application of members of the Sejm.

[49] The keys to resolving the constitutional stalemate lie with the President and yet he continues to be unequivocal in his refusal to swear in the three judges of the Tribunal elected by the old Sejm.

the limelight in adjudicating on the constitutionality of the resolutions. Rather, it could steer the middle ground and that is exactly what the order did.[50] The practical consequence of the order though, when read in conjunction with the December judgments, is that two of the new judges now sworn in by the President should be allowed to sit on the cases brought before the Tribunal. This is exactly what happened.[51]

Consequently, at the time of writing, the Tribunal consists of 12 validly selected judges,[52] with three judges selected constitutionally by the old Sejm still waiting to be sworn in by the President. The election of three judges by the new Sejm in November 2015 is a matter of *pure fact* and devoid of constitutional significance, as there are no vacancies on the Tribunal as *a matter of law* (the Constitution states that the "Tribunal consists of 15 judges"). The Tribunal strongly rejected the retroactive meddling in the composition of the constitutional bodies and held it inadmissible practice whereby the executive and/or legislature interferes with terms of office that already started running. Indeed, accepting what PiS attempted to do with the term of office of the current President and Vice-President of the Tribunal would make a mockery of the security of judicial tenure as one of the most important tenets of judicial independence.[53] It would open the way for unbridled interference with other bodies.

Finally, mention should be made of the fact that the Sejm then adopted amendments to the Law on the Constitutional Tribunal, on 22 December 2015, which aimed again at limiting its review functions. These amendments were challenged and on 9 March 2016 the Tribunal declared them unconstitutional, in Case K 47/ (update will be given here)

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[50] For the sake of completeness: judges Rzepliński, Zubik and A. Wróbel dissented and took more activist approach, arguing that the Tribunal has jurisdiction to rule on the constitutionality of the resolutions as they transcended the individual nature of resolutions and were in fact acts of general application.

[51] See statement by Rzepliński on 12 Jan. 2016 on the status of two new judges elected by the Sejm in Dec. 2015, *Włączyłęm do orzekania Przyłębską I Pszczółkowskiego* [*I decided to involve in the adjudication Mrs Przyłębska and Mr Pszczółkowski]]* <www.wyborcza.pl/1,91446,19466433,rzeplinski-wlaczylem-do-orzekania-przylebska-i-pszczolkowskiego.html>. When the Sejm voted on new judges in Nov. 2015, it made clear by name which judges stepping down from the Tribunal will be replaced by the new selected individual judge(s). As a result judges Pszczółkowski and Przyłębska were selected to replace judges Cieślak and Liszcz who stepped down in Dec. 2015.

[52] In the meantime, the PiS-dominated Sejm elected a third judge to fill a vacancy that arose on 27 Apr. 2016 and this third judge has since taken up his duties.

[53] Bokhary, "An Independent Judiciary" in Forsyth, Elliott, Jhaveri, Ramsden, and Scully-Hill (Eds.), *Effective Judicial Review* (OUP, 2010), at p. 181.

V.2. Looking beyond short-term: What's ahead?

While the constitutional controversies "here and now" need solving, the long-term importance of these two judgments merits particular attention. The Tribunal stood up for the "balanced constitution"[54] in which separation of powers is more than a mere figleaf, and for limited government, both of which have a strong tradition in Polish constitutional thinking.[55] "Courts that owe their existence to democratic institutional choice must act prudently, or the choice may be withdrawn"[56] and the Polish Constitutional Tribunal is no exception. On balance, its jurisprudence of 30 years respected the choices made by the principal or, using Shapiro's words, the Tribunal acted prudently and built up credibility and legitimacy incomparably greater than that of other Polish public institutions.[57] Yet, the current attack on the Tribunal is not premised on a dissatisfaction with the overall *performance* or particular acts of the Tribunal, but rather strikes at its very *existence*. We are not dealing with some hasty decisions of the majority, as a result of transient dissatisfaction with the Tribunal's case law. If this were the case, we would not have reason to sound the alarm: political tinkering with unwanted decisions by constitutional courts happens all the time and everywhere. This forms part of a larger and more sophisticated plan aimed at debilitating possible pockets of resistance and independence, curbing democracy, the rule of law and the division of powers.[58] The political power realizes all too well, that "where there is nothing to counterbalance the power of the majority except the Constitutional Tribunal and where majoritarianism is mistakenly identified as democracy, the

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54 Term used after Vile, *Constitutionalism and the separation of powers* (repr. Liberty Fund, 1998), at pp. 58-82.

55 See Wagner, "Introduction" in Wagner (Ed.), *Polish Law Throughout the Ages* (Hoover Institute Press, 1970), pp. 1-7.

56 Shapiro, op. cit. *supra* note 1, at 30.

57 For in-depth analysis see Garlicki, "The experience of the Polish Constitutional Court" in Sadurski (Ed.), *Constitutional Justice, East and West. Democratic Legitimacy and Constitutional Courts in Post-Communist Europe in a Comparative Perspective* (Kluwer Law International, 2002), pp. 265-282.

58 As was rightly noted, judicial independence is an essential institutional prerequisite for effective judicial review, see Shetreet, "Judicial independence and judicial review of government action: Necessary institutional characteristics and the appropriate scope of the judicial function" in Forsyth et al., op. cit. *supra* note 20 , p. 187.

evolution of cabinet dictatorship is inevitable".[59]

The recurrent themes that go beyond the cases at hand, and on which the judgments put great stock, are the rule of law, separation of powers and exclusiveness of constitutional review vested with the Tribunal. The judgments[60] make perfectly clear that the Tribunal was fully aware of the critical juncture at which it found itself deciding these cases and fully understood the dangers inherent in the belief that the political will of the new majority could replace decisions of the constitutional court with constitutional monopoly of adjudication. Under this belief, moral doubts of the parliamentary majority would suffice to set aside law which was validly adopted and upheld by the court. It would be sheer power that dominates, with constitutional considerations relegated to the margin. So, unsurprisingly, the Tribunal stressed that in case of constitutional doubts, other branches of government are not to act freely, but must submit these doubts to the Tribunal for an authoritative interpretation. This message comes through strongly with regard to the President's refusal to swear in new judges on the basis of his misgivings about the constitutionality of the selection of the three judges elected by the old Parliament. The President's refusal to swear in the judges selected by the old Sejm was accompanied, and justified, by the "grave breach of its competences by the old Parliament", and the Tribunal left no doubt that in a State governed by the rule of law constitutional doubts can only translate into unconstitutionality with a judgment of the Tribunal. One may recall here the words of the US Supreme Court Justice Charles Evans Hughes "We are under a Constitution, but the Constitution is what the judges say it is". The Polish version of this would be located on the other end of the spectrum and may be summed up: "We are all under the Constitution but the Constitution is what I, the Parliament, says it is". The Tribunal said a clear "no" to such redrawing of constitutional lines.

These two judgments are important pronouncements in the institutional history of the

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[59] Sajó, *Limiting Government. An Introduction to Constitutionalism* (Central European University Press, 1999), at p. 4.

[60] The relevant part of the judgment in K 34/15 reads: "The Tribunal has vital duties pertaining to safeguarding the supremacy of the Constitution, protecting human rights and freedoms as well as preserving the rule of law and the separation of powers".

Polish Constitutional Tribunal.[61] With these decisions, the Tribunal defended itself against attacks on its institutional status and judicial independence by the political power. Packing the Tribunal by selecting its own subservient judges, defying the authority of the Tribunal's judgments, and attacking the judges clearly shows that this is not just another dispute for legal aficionados. The attack on the Tribunal is unprecedented in scope, efficiency and intensity, and aims to paralyse and incapacitate the Tribunal. The problems the Tribunal had already encountered in case K 34/15 in finding enough judges to decide the case clearly show that this long-term plan is starting to work.[62] In 2012, Sadurski wrote: "The exalted position of the constitutional courts within domestic political systems is not particularly stable and cannot be taken for granted. At times for the right reasons (such as concern for the democratic legitimacy of essentially non-representative bodies), and at other times for the wrong reasons (such as the irritation felt by politicians at seeing their authoritarian tendencies curbed by independent constitutional courts), these courts have seen their position and independence occasionally reduced and challenged".[63] We should bear in mind that the only time the Tribunal faced political attack in the past going beyond a one-off warning, was during the first ruling period of the PiS between 2005 and 2007. In 2005, the PiS saw the Tribunal as a barrier to reforming the Polish State: the institution itself was under systemic attack, with the judges described as "disgusting, opportunistic cowards".[64]

To describe the methods used by the government at that time, Marek Safjan, former President of the Tribunal, spoke of "political mobbing".[65] He described mobbing as a "deformation of relations between the justice system and the world of politics", and clearly acknowledged the political impact on the constitutional courts. He argued that political mobbing

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[61] For a succinct analysis of the history of Polish constitutionalism see Brzezinski, *The Struggle for Constitutionalism in Poland* (MacMillan Press, 1998).

[62] Originally both cases were to be heard by the Full Court (a minimum of 9 judges must sit) but the Tribunal was unable to form it.

[63] Sadurski, *Constitutionalism and the Enlargement of Europe* (OUP, 2012), at p. 136.

[64] Quoted from Sadurski, "Constitutional courts and constitutional culture in Central and Eastern European countries" in Febbrajo and Sadurski (Eds.), *Central and Eastern Europe after Transition: Towards a New Socio-legal Semantic*, (Ashgate, 2010), at p. 111.

[65] Safjan, *Politics and Constitutional Courts: A Judge's Personal Perspective*, EUI Working Paper 2008/10.

is characterized by three elements. First, an indirect impact on the activity of constitutional court is exerted through either legal instruments or political means. Second, political mobbing is directed against the judges personally and takes place on two levels: that of individual psychology of the judges and at the level of public opinion. Third, the purpose of political mobbing is always to reach some political goals (to ensure positive constitutional judgments and eliminate the risk of unsuccessful legislative activity, to limit the scope of the constitutional review).

The political mobbing that Safjan conceptualized is now taken to a new level of sophistication. Individual judges are targeted (the President and Vice-President of the Tribunal) but also the constitutional court as a whole, with the aim of paralysing and marginalizing the Tribunal, while elevating the Parliament (and government) to the status of supreme and uncontrollable institution. Political mobbing led to another term, coined by J. Kaczynski - "impossibilism" - to describe the allegedly destructive impact the Tribunal exerts on the democratic process when it thwarts the political plans of the new majority, by way of overly interventionist constitutional review, thus making impossible the realization of the signature political projects. In 2005, it was already apparent that PiS and its leader are strongly opposed to the narrative of the rule of law and constitutional review *in principle*. When confronted with a massive attack on its authority in 2005-2007, the Tribunal did not flinch: it hindered Poland backsliding towards illiberal government by handing down judgments which invalidated the laws that struck at the heart of Polish liberal democracy.[66] As a consequence, Poland's flirtation with the authoritarianism was prevented for a time. Yet, it was a warning that, in case of return to power, constitutional review and the Tribunal would figure prominently on the to-do list. The Tribunal was targeted *then* and it is attacked *now,* with the difference that today the majority is composed of one party only and as a result much more unified. Polish democracy faces a crisis that has more to do with the lack of *constitutional culture* rather than deficiencies of th*e*

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[66] The then intentions of the government and Sejm were made clear in the so-called "lustration case", on access to the archives of the former secret police. In that case, a warning shot was fired at the judges of the Tribunal when the representative of the Sejm used the archives selectively and secretly to blackmail the judges sitting on the bench in order to paralyse the Tribunal. Luckily it never came to pass and Poland was saved from the legal and moral revolution (as it was called back then) and new elections were held only two years later. The examples of cases are given by Sadurski, op. cit. *supra* note 32, at p. 112.

constitutional text. The former should underpin all constitutional commitments and guarantee their enforcement. Without constitutional culture and entrenched respect for these commitments, the constitution is not worth the paper it is written on and this is the situation in Poland: the constitutional text remains unenforced since the institution called on to enforce it is openly defied.[67] The present under-enforcement of the constitutional text and marginalization of the Tribunal poses important questions about the future and shape of constitutional review in Poland and possible role of the European institutions in the constitutional crisis in Poland.

V. 3. Farewell to the Tribunal and the rule of law? Or self-defence and emergency constitutional review?

The current political power in Poland is not responding to perceived imperfections by way of constitutional amendments (PiS does not have the required 2/3 majority to use the constitutional path and amend the Constitution). Rather, it has embarked on a constitutional revolution, under the cloak of statutory revision and piecemeal tinkering.[68] Schwartz has argued that the rise of the independent constitutional courts in Eastern Europe was remarkable and that these courts were ready to challenge and overturn important statutes, bills and regulations. He concluded that most of these courts "seem to have gotten away with it".[69]

The judgments in K 34/15 and K 35/15 recall Shapiro's argument about the consequences of the choice made by the constitution makers to resort to a court as a conflict resolver. Such a choice entails the acceptance of "the inherent characteristics, practices, strengths and weaknesses of that institution ... and some law making by courts and a certain capacity for judicial self-

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[67] See also comments by Radwan, op. cit. *supra* note 2, and my op-ed *Trybunał ma przeszkadzać. Dlaczego nie możemy zapomnieć o Trybunale Konstytucyjnym*, [*The Tribunal is there to make it difficult. Why must we never forget about the Constitutional Tribunal in the New Year]*, in Gazeta Wyborcza of 10 Jan. 2016, <wyborcza.pl/magazyn/1,149897,19445433,trybunal-ma-przeszkadzac.html>.

[68] Writing of 1989 constitutional transformations in Eastern Europe, Holmes and Levinson argued that the changes at that time were constitutional revolutions rather than incremental constitutional revisions: "A wholesale constitutional replacement was presented to domestic publics and the world at large as an act of constitutional tinkering"; Levinson (Ed.), *Responding to imperfection. The Theory and Practice of Constitutional Amendment* (Princeton University Press, 1995), at p. 285. Now the ruling majority is turning back the clock by undermining the liberal and democratic constitution by way of statutory rupture with the last 25 years.

[69] Schwartz, *The Struggle for Constitutional Justice in Post-Communist Europe* (University of Chicago Press, 2000), at p. XI.

defence of its law making activity. The issue of whether such law making and self-defence are somehow antidemocratic or antimajoritarian is uninteresting. If the demos chooses the institution, it chooses the judicial law making and judicial self-defence".[70] Shapiro's proposition may be applied to the Polish case. If the *demos* indeed chooses independent judges and courts as dispute resolvers, subject only to the Constitution and statutes (Arts. 173 and 178 of the Polish Constitution), the rule of law (Art. 2), elevates the Constitution to the status of the supreme law of the land (Art. 8), makes the separation of powers with checks and balances one of the cornerstones of the Republic of Poland (Art. 10) and the judgments of the Tribunal universally binding and final (Art. 190), and, last but not least, inserts direct application of the Constitution into the Constitution itself (Art. 8(2), the *demos* must then accept that courts will be ready to take these systemic features seriously and rule against the instrumental politics of the day. It is beyond dispute that a gradual constitutional *coup d'état* is taking place in Poland, whereby the Constitution is being modified by legislative sleight of hand. In these extraordinary constitutional circumstances, constitutional review by the ordinary courts (by "court", I mean the courts entrusted with the administration of justice and defined in Art. 175(2) of the Polish Constitution) is simply a necessary and urgent response to the relentless and no-holds-barred politics of the parliamentary majority of the day. The response must have at its core defence of the constitutional essentials mentioned above. Judges cannot simply stand by and watch the legal order torn apart in the name of "the people". They must defend the Republic and uphold the law. This is exactly what they are sworn to do. No more, no less.

Further acrimony arose when the Government initially refused to publish the judgments of 3 and 9 December 2015,[71] setting a dangerous precedent. The December judgments have now been formally published, after protracted wrangling between the President of the Tribunal and

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[70] Shapiro, op. cit. *supra* note 1, at 24.

[71] The Government's dissatisfaction with the judgment in K 34/15 translated into the refusal to publish it. The citizens' response was to publish the Tribunal's judgment on social media as part of the bottom-up initiative "Cała Polska niezwłocznie publikuje wyrok Trybunału Konstytucyjnego", which in English reads "All Poles publish immediately the judgment of the Tribunal"). As a result the judgment was first available at <www.facebook.com/inYourFaceKempa/photos/a.152095852156522.10737418 27.152094952489975 5/1520957378232303/> before it was officially published in the Journal of Laws. Government officials made it clear that unwanted judgments will not be published in the future and this threat was later carried out. For more on the refusal to publish see extensive analysis *infra*.

government officials. Despite publication, to this day they have not been implemented and respected; the President of the Republic is steadfast in refusing to swear in the three judges elected constitutionally by the old Sejm.[72] In the meantime, things deteriorated further, and government refusal to publish the Tribunal's judgments became a daily weapon of PiS against "unwanted" case law. Of those unpublished judgments, one stands out: that of 9 March 2016, mentioned above, in which the Tribunal declared unconstitutional the amendments adopted on 22 December 2015 to the Law on the Constitutional Tribunal. This judgment enraged the ruling majority and was referred to as *contra legem*, non-existent, and the private statement of few gentlemen. The judges were mocked by the Minister of Justice himself, who likened the deliberation on the case to a private meeting of no legal significance, and certainly not constituted to make universally binding judgments.[73]

The Government's persistent refusal to publish judgments brings to the fore a more general question: whether the constitutional integrity, rule of law and systemic coherence of the Polish legal order, might be secured through legal means other than centralized constitutional review? Does the Polish legal system contain safety-nets that could short-circuit the assault on the Tribunal and its review functions, so as to make sure that the Constitution remains the supreme law of the land despite the failure to publish the Tribunal's judgments?

THIS SECTION WILL BE UPDATED

V. 4. "Emergency constitutional review". Thinking the unthinkable?

Constitutional review exercised by the ordinary courts has been an option in the Polish legal order since the adoption of the 1997 Constitution. Proponents of the extension of review to ordinary courts were politely acknowledged, but their views were never taken seriously. It was widely accepted that only the Tribunal wields constitutional monopoly and the ordinary courts would follow its judgments, pursuant to the Constitution. Nobody ever contemplated a situation

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[72] With regard to these two judgments, the Rule of Law Opinion and Recommendation of the European Commission speak of an "implementation of the judgments" (Opinion of 1 June 2016) and duty to "fully implement and respect" (Recommendation of 27 July 2016). For more on the EU stance on the Polish constitutional crisis see section 5 *infra*.

[73] With regard to this judgment, the Commission's Rule of Law Recommendation is to "fully publish and implement the judgment of 9 March 2016, as well as all subsequent judgments of the Tribunal". See section 5 *infra*.

where the Tribunal would be unable to exercise its constitutional powers as a result of a political attacks and rewriting the Constitution by way of statutes. The idea was unthinkable; it is no longer so.

Views have been expressed in Polish legal doctrine and voiced in the case law of the Supreme Court on the possibility of constitutional review by ordinary courts checking the compatibility of the statutes with the Constitution. However, it has been the "centralization model" that prevails and dominates the mainstream discourse. Ordinary courts cannot refuse to apply a statute (presumption of constitutionality) and only the Tribunal is empowered to rule on the constitutionality of a statute. As long as a statute is in force, the courts are bound to apply it unless they ask the Tribunal question(s) of constitutionality and the Tribunal declares the statute unconstitutional. This line of argument flows from Article 178 of the Polish Constitution, according to which in the exercise of their duties, judges are subject to the Constitution and statutes. As a result, constitutional review as regards the statutes is centralized and exercised exclusively by the Tribunal. The direct application of the Constitution assumes co-application of the Constitution and statutes. At most, ordinary courts can apply a pro-constitutional interpretation. Although this strand of constitutional narrative has been predominant, there has also been a second strand. Subjecting courts to the Constitution and statutes could be read as allowing the courts a power to refuse to apply a statute that is incompatible with the Constitution. Direct application of the Constitution entails much more that mere interpretation in conformity with the Constitution and asking constitutional questions on the compatibility of the statutes. In case of a conflict, the courts must follow the act of higher rank (the Constitution as the supreme law of the land – Art. 8(1)) in accordance with *lex superior derogat legi inferiori)*. Two options would be possible. *On the one hand*, a court finding a statute unconstitutional could refuse to apply such a statute outright in a case it decides. Here, the court would act as a full-blown constitutional review institution, not only deciding on the constitutionality question, but also mandating the consequences of such a finding. *On the other hand*, there is an "intermediate" option. Should the court find the statute unconstitutional, it would be left with no discretion, but be obliged to refer the question to the Tribunal. In this scenario, the court would be debarred from applying the statute that it deems unconstitutional. The refusal by an ordinary court to apply

the statute would not necessarily infringe the review powers of the Tribunal, as a plausible argument could be made that a review exercised by an ordinary court is limited and deals only with the case at hand. In other words, it is *in concreto* review as opposed to *in abstracto* review by the Tribunal. The latter deals with the law with an *erga omnes* effect and removes the unconstitutional provision from "legal circulation", thus acting more in the spirit of a *quasi* chamber of the Parliament, whereas ordinary courts are in charge of the administration of justice in individual cases.

My argument falls somewhere in between these two lines of thinking. The system of government in Poland is based on the Tribunal's monopoly of constitutional review. In other words, constitutional review is centralized. However, the assumption that underpins the centralized model is that constitutional review by the Tribunal is operational and effective. What if that is not so? Depending on the circumstance of each and every case, direct application of the Constitution could range from *parallel application* of the statute and the Constitution to *self-standing application* of the Constitution. For the sake of argument, four situations should be discerned. *First*, the most common and uncontroversial is when a judicial decision is based *directly* on the statute, with the Constitution used as an ornament. *Second*, when the judicial decision is based on *both* the statute and the Constitution, the latter shedding light on the interpretation of the statute. *Third*, there is a more radical version of direct application which I call "*transformative application*". Here the court is aware of the incompatibility of the statute and feels ready to make it constitutional by (re)-interpreting it in the light of the Constitution. The Constitution is no longer a mere source of inspiration, but provides a normative tool for judicial modification of the statute which ensures its normative consistency with the Constitution. Beyond that third option there lies the "*emergency review*" with outright refusal to apply the statute, which is our *fourth* option. When constitutional review faces systemic and permanent dysfunction for whatever reasons, emergency review must be resorted to. Such review is defined by complementarity *vis-à-vis* the Tribunal's power of review. It accompanies, and runs in parallel with, the Tribunal's constitutional review, and does not replace it. Such review is instrumental to securing respect for the Constitution's status as the supreme law of the land. *Constitutional defiance* by the parliamentary majority must be countered by *intra-constitutional*

resilience and trigger self-defending mechanisms from within the Constitutional text. It is important to make clear here that my call for "*emergency constitutional review*" by the ordinary courts does not question the Tribunal's monopoly of constitutional review, but is in order to shield the constitutional order from being further weakened and disassembled.

My argument in favour of domestic "emergency constitutional review" by the ordinary courts is further reinforced by the system of decentralized enforcement as the linchpin of the EU system of judicial protection. European empowerment of the ordinary courts has already happened in Poland and undermined the Polish centralized model of constitutional review. Moreover, it was even accepted by the Tribunal when it held in Case P 37/05: "National courts shall not only be authorized, but also obliged to refuse to apply a domestic law norm, where such norm is in conflict with European law norms". EU law is based on the doctrines of direct effect[74] and supremacy[75] constructed by the ECJ, which constitute true building blocks of the new legal order to which EU law aspires. As for enforcement, EU law looks to a national court entrusted with overseeing the full effect of the provisions of EU law, if necessary refusing of its own motion to apply any conflicting provision of domestic legislation: "it is not necessary for the court to request or await the prior setting aside of such provision by legislative or other constitutional means".[76] National courts are called on to disregard *any* provision of domestic law (on the ECJ reading of supremacy, its scope is all-encompassing as it catches "any" provision of domestic law, be it constitutional, statutory, sub-statutory or administrative decisions) inconsistent with EU law and without waiting for the constitutional court to take a stand on the conflict. Each court of a Member State has the power of judicial review of national legislation in cases pending before it. Judicial review is limited to disapplication of conflicting domestic law *in concreto* in order to ensure the *effet utile* of EU law "here and now". The constitutional court retains the power to declare such legislation null and void *in abstracto* or the national parliaments to modify the legislation to make it compatible with relevant EU law. This judicial

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[74] Case 26/62, *Van Gend en Loos* v. *Netherlands Inland Revenue Administration*, EU:C:1963:1.

[75] Case 6/64, *Flaminio Costa* v. *E.N.E.L.*, EU:C:1964:66.

[76] Case 106/77, *Amministrazione delle Finanze dello Stato* v. *Simmenthal SpA.*, ECLI:EU:C:1978:49, para 24.

review is not exceptional, but rather forms the backbone of the EU legal system and is exercised by national courts on a daily basis. All of this has already recalibrated the role of European constitutional courts, and supremacy of EU law made inroads into their monopoly of constitutional review of statutes. Review of statutes for their compatibility with EU law is now within the powers of the ordinary courts. As a result, the system is decentralized, or, as one author argued, "Americanized".[77] It is important to bear the EU law mechanism in mind, as it strengthens my argument in favour of "emergency judicial review" exercised by Polish courts with regard to domestic law inconsistent with Poland's Constitution. "Emergency judicial review" would entail the loss by the Tribunal of its constitutional monopoly over statutes. In exceptional situations, the review of the statutes' constitutionality might be exercised by the ordinary courts. Such review would be an extension to national law of the decentralized enforcement already forming part of the EU mandate of Polish courts since 2004.

V. 5. The Constitution is not "a suicide pact"

In the U.S. case of *Terminiello* v. *City of Chicago,* Associate Justice Robert Jackson, writing for the majority, said: "The choice is not between order and liberty. It is between liberty with order and anarchy without either. There is danger that, if the court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact".[78] His warning must resonate in Poland today as the Constitution and its basic principles are faced with existential threats, calling for constitutional pragmatism, not rigid doctrinarism. Arguably, "emergency constitutional review" by ordinary courts can find a solid constitutional basis. The constitutional review expounded here is called "emergency" because it is triggered by the exceptional circumstances and the looming incapacitation of the Tribunal. It must be exercised with caution and restraint, and be limited to egregious breaches of constitutional standards and rights. Why and how does it all matter now? The governing majority in Poland should be aware that there are constitutional limits to their democratic mandate and it

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[77] Comella, *Constitutional Courts and Democratic values* (Yale University Press, 2009), at p. 126, (inverted commas in original).

[78] *Terminiello* v. *City of Chicago*, 337 U.S. 1 (1949) no 272, available at <caselaw.findlaw.com/us-supreme-court/337/1.html>.

is the courts' province to set down these limits and enforce them in a judicious manner. A clear signal must be sent to the Government and Parliament that democracy did not stop at the polls November 2015. Democracy has been shifting for some time from predominance of electoral process to citizens-inspired movements holding rulers accountable between elections. The proposed "emergency constitutional review" is part of what Pierre Rosanvallon has called "Counter-democracy"[79] to capture how democratic systems have been evolving from symbolic casting of a vote to exercising societal control between elections and irrespective of their results. Rosanvallon identified three methods whereby citizens can hold the elected to account: *oversight*, *prevention* and *judgment*. The first deals with monitoring the political process by citizens and/or their organizations and with making the behaviour of the elected more visible. The second refers to the capacity of the citizenry to mobilize and channel resistance to policies and decisions taken by the elected. Finally, the third, describes the juridification and trend of turning to courts so as to bring social change and/or enforce the limits put on the elected. "Emergency constitutional review" falls into the "judgment category" and must seen as a democratic constraint on the will of the majority, as the manifestation of constitutional self-defence. If, as it appears, the Polish Government and Parliament do not consider themselves bound by constitutional limits, those who oppose this trend must find ways to ensure that the Polish constitutional system is able to defend itself from within. "Emergency constitutional review" is a good start. Making the Constitution operational every time the Tribunal is denied its constitutional powers, is now a priority of the highest order, where "operational", means treating the Constitution by the courts as part of the law that they are bound to apply and on which they must build their decisions.

V. 6. Are the courts ready?

All this takes on special importance today when the Constitution is under systemic attack. At the same time, one should be aware of the challenges that this proposition entails. To understand the enormity of the task at hand, one should understand the historical baggage of the

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[79] Rosanvallon, *La contre-democratie: La politique á l'age de la defiance* (Seuil, 2006), and English edition *Counter – Democracy: Politics in the age of distrust* (CUP, 2008).

Polish judiciary (this goes also for other Central and Eastern Europe courts). The bureaucratic model of the judiciary in the CEE countries sees judges as well-paid civil servants. Whereas, in Western Europe the model evolved towards more independence of the judiciary, in Poland (and Eastern Europe countries in general) the trend was the opposite. The judges post-1945 were expected to be the vanguard of the socialist change and functioned as part of the unitary State machinery. The principle of democratic centralism prevalent in the former communist States stood for a system based on centralized authority. The Communist Party held all power, and the obligation of lower bodies was to obey the directives of the higher ones. The constitution was relegated to being a purely declaratory document with no normative content and no role to play in the judicial resolution of disputes. Judges were seen as part of the unitary government structure, engaged in furthering the cause of building a classless society. Independence of the judiciary and the direct application of the constitutional document as a source of individual rights was not part of the communist scenario. The ideal judge was subservient, passive and an uncritical enforcer of a statute, unable to glean from the text anything beyond literal interpretation, no matter how unjust the results of such an interpretation. Heavy political and educational indoctrination and a simplistic vision of the judicial function and the legal system simply left no space for an independent and critical judiciary. Judging was a purely mechanical exercise in syllogism, free of value choices and critical thinking. Judges did not look at a legal provision in its systemic context, but accepted positive law as equivalent to the law. As a result, the statutes and the law were one and the same. The ideology of bound judicial decision-making as developed by the leading Eastern legal theoretician and legal philosopher Jerzy Wróblewski has held Polish judges captive for decades.[80] As a result, Polish judges were perfect examples of "textual judges", impervious to the context in which the legal text operates. Their role was simply reconstructing the pre-existing standards enacted and changed, when necessary, by the legislature. The so-called presumption of "rationality of the legislature" assumed that the legislature can do no wrong, providing *ex ante* for all possible circumstances in which law will be applied in the future. Should the extant law prove insufficient, it is not the business of the

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[80] See English version of his most famous treatise *The Judicial Application of Law* (Kluwer Academic Publishers, 1992), translated by Bankowski and MacCormick.

court to override the clear textual meaning, but for the legislature to amend accordingly.

Arguably, 25 years after transformation, the approach marked by the mechanical approach to law and by textual positivism is still one of the most long-lasting legacies of communism. The fear of being creative and critical is omnipresent; every attempt by a judge to interpret a statute beyond the text is seen as an example of judicial overreaching and dismissed with scorn as inadmissible judicial imperialism. What follows is the self-imposed image of a judge, who, in the words of one commentator, resembles "an anonymous grey mouse, hidden behind piles of files and papers, unknown to the outside world …", who is not used to "stand by his opinion and defend them in the public";[81] which results in structural judicial independence, but without mentally independent judges. As a leading textbook succinctly put it: "The courts [of Eastern Europe] try to follow the letter of the law, however problematic and absurd the results may be which this course produces".[82]

V. 7. "Marbury moment" in Poland: In judges we trust

The legal world of an average Polish judge is dominated by Montesquieu, formalism and unflinching faith in the rationality of the law-maker. As a result, when a case breaks the mould and calls for more than just textual reconstruction, a judge turns to the legislature for more text. The legislature acquiesces and enacts new text, which is only good until a new controversy arises and the courts come knocking on the door again. It is a (vicious) circle. This clouds my ambitious vision of "emergency constitutional review" with uncertainty and lingering doubts as to its practical feasibility. After all, "emergency constitutional review" is based on the rejection of the unwavering belief that any case can be decided by relying on textual statutory arguments. It takes ordinary judges out of their comfort zone in a dramatic fashion, as it makes the Constitution part and parcel of the judicial decision-making process. It calls on the judges to evaluate statutes critically and empowers them to fully embrace their forgotten role of being judges of the "Constitution *and* statutes", not only judges applying and interpreting statutes.

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81 Bobek, "The fortress of judicial independence and the mental transitions of the Central European judiciaries", <papers.ssrn.com/sol3/papers.cfm?abstract_id=995220>.

82 Kühn, *The Judiciary in Central and Eastern Europe. Mechanical Jurisprudence in Transformation?* (Brill Nijhoff, 2011), at p. 201.

Having said that, what is needed today is a vote of confidence and trust in the Polish judiciary. At present, Polish judges have their own constitutional promises to keep, concerning nothing less than the Polish rule of law and democracy. The courts cannot be idle and watch helplessly as the constitutional edifice crumbles.

There are some first signs that such a development is taking place, and that the idea of "emergency judicial review" is being embraced by the courts. On 17 March 2016, the Polish Supreme Court delivered a judgment in which it declared unconstitutional one of the provisions of the Tax Code.[83] Crucially, the Supreme Court found it unnecessary to send questions to the Tribunal and proceeded with its own constitutional review of the provision in question. In the clearly circumscribed reasoning, it pointed to the judgment of the Tribunal from 2013, which already declared to be unconstitutional a provision in the Code which was identical to the provision under consideration in the case at hand. The Supreme Court acknowledged that formally speaking the Tribunal should be also given an opportunity to declare this new provision of the Code to be unconstitutional, because ruling on the compatibility of statutes with the Constitution is within the exclusive competence of the Tribunal. However, the Supreme Court referred directly to the unclear situation surrounding the Tribunal right now and concluded: "Formalism cannot get the better of the common sense. Bearing in mind current exceptional situation, referring now questions to the Tribunal would be incomprehensible to the interested parties". This is "emergency constitutional review" at its best. This ground-breaking decision might usher in a new era of constitutional empowerment.[84] Importantly, the Supreme Court took pains to delimit precisely and condition its emergency constitutional review. It made clear that its review does not exclude the Tribunal's competence: the Tribunal continues to be the guardian of constitutionality in Poland. On the other hand, the Supreme Court was well aware of the attempts to undermine the Tribunal and its powers. The refusal to publish the Tribunal's judgments,

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[83] Case V CSK 377/15 (judgment of 17 March 2016). I am grateful to Ewa Łętowska for bringing my attention to this case. More on the case at <www.lex.pl/czytaj/-/artykul/sad-narcoses-stwierdzil-niekonstytucyjnosc-przepisu-bo-tk-w-kryzysie>.

[84] The Supreme Administrative Court follows the Supreme Court in this regard. In one of its most recent judgments, it quashed a judgment of the lower court and instructed it to take into account the unpublished judgment of the Constitutional Tribunal of 28 June 2016 in Case SK 31/14. See <www.lex.pl/czytaj/-/artykul/nsa-wyrokuje-w-oparciu-o-niepublikowane-wyroki-tk?refererPlid=5227804>

discussed above, may have been the last straw in prompting the Supreme Court to stand up and side with the rule of law. Should the constitutional crisis and the inability of the Tribunal to discharge its constitutional powers continue, the Supreme Court might well build on this precedent. The big question is whether this empowerment will trickle down to the lower courts? If there is one lesson to be learnt from the landmark US Supreme Court case *Marbury*, it is the "principle supposed to be essential to all written constitutions, that a law repugnant to the Constitution is void and it is the duty of the judges to say what the law is". If Polish courts embrace and internalize this message, the rule of law and the Constitution will be given a new lease of life.

VI. Connecting the dots: The Strategies of the Capture

The constitutional "catch-me-if-you-can" cycle set out above has an underlying logic; it clearly brings to mind how Orbán "tamed" the EU and followed through with his own plan to pack the Hungarian Constitutional Tribunal.[85] Orbán introduced some changes in response to external criticism and claimed that the problem was fixed and everything was back to normal. He entrenched the old system, while giving up on one or two of the most outrageous elements that he did not really need anyway. This strategy would stop the external criticism long enough for the EU to receive the translation, study it and realize that they had been fooled again - but in the meantime, this would give Orbán more time to consolidate his power. And then it would all start again. After many rounds of this back-and-forth, the external critics whittled away a few small elements of the system, but in exchange Orbán got to keep his illiberal and autocratic constitutional reform. In short, nothing really happened as a result of external criticism, and in the end, critics gave up and pretended that everything had been addressed. As a result Hungary was let off the hook altogether.[86]

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[85] I owe the reconstruction of Orbán's tactic to Scheppele. For more detailed analysis see her "Constitutional coups and judicial review: How transnational institutions can strengthen peak courts at times of crisis (with special reference to Hungary)", 23 *Transnational Law and Contemporary Problems* (2014), 51-118, in particular at 87-103 (for the response from the Council of Europe) and at 103-114 (for the response from the EU).

[86] The inaction on the part of the EU with regard to Hungary entails important consequences for the handling of the Polish case now. For possible scenarios, see Scheppele, *EU can still block Hungary's veto on Polish sanctions*, available at <www.politico.eu/article/eu-can-still-block-hungarys-orban-veto-on-polish-pis-sanctions/>.

The same strategy is adopted in Poland. The Laws on the Tribunal enacted by the Parliament, and twice rejected by the Tribunal, persist in reproducing unconstitutionality in the hope that in the end the external outcry will subside and critics will turn to other more pressing issues. The most recent Law was enacted with cynical assurances of good intentions and sincere concerns, allegedly to put things right and bring the self-induced constitutional crisis to an end. The most questionable and clearly unconstitutional provisions (e.g. a requirement of a two-thirds majority in the Tribunal) were dropped at the very last minute. The argument will now be that this dispels all constitutional doubts and that the Law is a result of the goodwill of the ruling party and a reasonable compromise. This in turn will shift the blame towards the opposition and the stubborn Tribunal, defending the elites and old regime. The Tribunal will be portrayed as a destructive, obstructive and anarchistic force, with the ruling party in the role of a knight in shining armour. Public opinion will be left with the conviction that it is indeed the case, and that there is nothing to worry about.

The chapter on the strategies will be updated

VIII. Living with the constitutional court.

VIII.1. Legacy of the capture

The ruthlessness with which the Polish Constitutional Court has been emasculated by the majority, and the persistence with which it has been thwarting the unconstitutional attempts to pack it and disable it, paints a disturbing story of democracy and institution in distress. 2016 went down in history as fundamental in the institutional history of Polish constitutionalism. What started as the "court-packing" soon transformed into an all-out attack on the judicial review and checks and balances, and ended with full-blown constitutional *coup d'etat* and destruction of the independent constitutional review in Poland[87]. This attack has been unprecedented in scope, efficiency and intensity. It has never been premised on a dissatisfaction with the overall performance, or particular acts of, the Court, but rather struck at its very *existence*. The Court, once

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[87] A. Śledzińska - Simon, *The Polish Revolution 2015 - 2017,* at http://www.iconnectblog.com/2017/07/the-polish-revolution-2015-2017/

proud institution, and an effective check on the will of the majority, entered the 2017 as a shell of its former self with constitutional scars. The latter affect, not only the legitimacy of the institution, but also the very constitutionality of the "decisions" rendered by the new court in 2017.

Five lasting scars transformed the institutional identity of the Court in 2017. First, the Court is composed of judges that have been elected unconstitutionally and rushed on the bench by the parliamentary majority *per fas et nefas*. At least three of the current judges should have never been sworn in the by the President since there was no vacancy on the bench at the time of their appointment. Sheer and blunt political power prevailed over law. These are "irregular judges" (one of them became Vice-President of the Court since then …). Second, despite the unconstitutionality of their mandate, they have not only been only sitting on the cases heard by the Court in 2017, (see *infra*), but they have also validated now *ex post facto* their own selection to the Court. Third, the President of the Court – Judge J. Przyłębska – has been elected President of the Court, and sworn in by the President of the Republic in clear violations of applicable rules[88]. Fourth, the statutory scheme of intricate legislative provisions adopted by the new majority in 2016 brought the Court to heel and paralysed its day-to-day functioning[89]. Cases are decided in camera, and the assignment of cases to individual judges is opaque and depends on the whim and caprice of unconstitutionally elected President. She tailors the composition of the bench to the political importance of cases. The more important the case from the perspective of political majority, the more likely it will be heard exclusively by judges selected by the new Parliament. The Court decides less and less cases, as the cloud of unconstitutionality hangs over its decisions. These judges have repeatedly shown over the course of 2017 that they see themselves as an ex-

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[88] For the unconstitutional scheme to rush J. Przyłębska in as the President of the Court see T. T. Koncewicz, *Constitutional Capture in Poland 2016 and Beyond: What is Next?* at https://verfassungsblog.de/constitutional-capture-in-poland-2016-and-beyond-what-is-next/

[89] W. Sadurski, *What is going on in Poland is an attack against democracy?* available at http://verfassungsblog.de/what-is-going-on-in-poland-is-an-attack-against-democracy/; *How Democracy Dies (in Poland): A Case Study of Anti-Constitutional Populist Backsliding,* Sydney Law School Research Paper 18/01 at http://ssrn.com/abstract=3103491; T. T. Koncewicz, *Farewell to the Polish Constitutional Court,* at http://verfassungsblog.de/farewell-to-the-polish-constitutional-court/;

tension of the will of the Parliament. And finally, fifth, unwanted judgments of "pre-2017 Court" has been removed from the Court's website[90].

What was once unthinkable happened, and became the new normal[91]. All this must have an impact on our analysis. We must not pretend that the judicial review in Poland is still in place, and proceed to legalistic analysis of the judgments rendered in 2017 by a court as if nothing had happened[92]. There is a quality difference between 2015/2016 and 2017 that bears on our selection of cases and their treatment. 2015/2016 was constitutionally important with the Court thwarting off the political assault, and building important "existential jurisprudence" centered around the rule of law, independence of the judiciary and separation of powers. 2017 saw a new face of constitutional review. When the Court was finally taken over by the ruling party, Polish politics of resentment entered into a new phase: consolidating the grip on the captured state: media, ordinary courts, Supreme Court, National Court of the Judiciary. The list goes on. The Court's composition was tailored to fulfil a crucial role in the process. Looking back on 2017, one can see how capturing of the referees, and having them firmly on the government's side[93], entails three interconnected processes: i) *weaponizing* the judicial review, and using it against the opposition; ii) *instrumentalizing* the constitutional review in the process of implementing the political agenda; and finally iii) judicial *rubber-stamping* of all unconstitutional schemes placed

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[90] D. Kochenov, L. Pech, K. L. Scheppele, *The European Commission's Activation of Article 7: Better Late than Never?* at https://verfassungsblog.de/the-european-commissions-activation-of-article-7-better-late-than-never/

[91] It must be remembered, that after months of dragging its feet and procrastination, on December, 20, 2017, the European Commission has finally decided to trigger the preventive mechanism of article 7 TEU by proposing to the Council to adopt a decision under article 7(1) TEU. Restoring the independence and legitimacy of the Constitutional Court by ensuring that its judges, President and Vice-President are lawfully elected and by ensuring that all the judgments of the Court are published and fully implemented, figures prominently in the Commission's proposal.

[92] However, we acknowledge the following „routine" cases. In case Case SK 13/15 the Court (in correct composition) ruled (judgment on 12 December 2017) ruled that subjecting the applicants (spouses, one of whom is an entrepreneur) to property tax at the rate provided for land associated with running a business, although the land they had acquired was never used for business purposes, is unconstitutional. The judgment is beneficial not only to co-owners, but also to entrepreneurs who do not use their real estate for business purposes. The higher rate will be applied only when the real estate is related to economic activity. In another highly technical case *(SK 48/15)*, the Court (again seating in the constitutional composition) acknowledged that in tax cases doubts should be interpreted in favour of tax payers.

[93] For various practices see S. Levitsky, D. Ziblatt, *How Democracies Die,* (Crown, New York, 2018), at pp. 78 - 81.

before it by the ruling majority. As a result, the "*existential"* and "symbolic *jurisprudence*"[94] of 2015-2016 has been transformed into "*subversive jurisprudence*" focused on sanctioning the destruction of the last remaining elements of the rule of law in Poland.

VIII.2. Living with the captured court in a captured state. Manifestations

Prior control of the amendment of the Law on assemblies was initiated by the President of the Republic Poland with respect to a provision on the so-called periodical assemblies[95] (*Kp 1/17*). "Incidentally", monthly commemorations of the tragic crash of the presidential plane in Smolensk with 89 members of the official delegation and 7 crew members on 10 April 2010 fell within the scope of this very precise definition[96]. They are co-hosted by Jarosław Kaczyński – brother of the late President and head of the ruling party – and used to mobilize his supporters. According to the new provision, the President of local government (pl. "wojewoda") may issue consents for 3 consecutive years of exclusive organization of such gatherings, in a given place, or on a given route, on predetermined dates. The privileging of such assemblies in relation to other public gatherings consists in the fact that the organizers of the former enjoy priority in choosing the time and venue, even in relation to assemblies previously notified. In addition, local authorities are required to issue a decision prohibiting another meeting to take place, also when the first does not violate the law or threaten life or health of people or large size property. Once the wojewoda consents to hold cyclical assemblies, local authority is obliged to prohibit, within

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[94] I agree with T. Ginsburg's argument that: "Only when there is agreement on what constitutes a violation and mutual expectations that citizens will in fact enforce the rules will democracy emerge and be sustained […] in some limited conditions, court decisions can survive as focal points in helping citizens coordinate, and force the autocracy to liberalize […] a court decision can provide clarity as to what constitutes a violation of the rules by the government. […]"; *The Politics of Courts in Democratization. Four Junctures in Asia*, in D. Kapiszewski, G. Silverstein, R. A. Kagan, (eds.), *Consequential Courts. Judicial Roles in Global Perspective*, (Cambridge University Press, 2013), at p. 48.

[95] The term covers "events organized by the same organizer in the same place or on the same route at least four times a year according to the schedule or at least once a year on national and national holidays, if such events have been taking place in the last 3 years, even if not in the form of assemblies, and were intended in particular to celebrate the momentous and important occasions in the history of the Republic of Poland".

[96] It looks like a new emerging legislative pattern: law is written to cover precise events. We have seen this already when new rules on the election of the President of the Constitutional Court have been drafted in such a way that only one candidate - J. Przyłębska - could fulfil the requisite conditions.

24 hours of receiving this information, the organization of meetings previously notified, planned at the same time and place. If such a decision is not taken, the wojewoda immediately prohibits coinciding gatherings.

The Court gave a short shrift to all the constitutional concerns raised by the President (no appeal against the decision of the wojewoda, retroactivity). The Court approvingly spoke of the legislator's correct response to "new social circumstances", which required addressing and ordering and classifying "new facts" in the context of the need to ascertain "safety to persons and entities as well as an order". While the judgment lacks logic and force, the most important constitutional take-away is that it changes in a dramatic fashion relationship between the individual and the state that prevailed in the judgements of the Court until 2015. The new interpretation starts from the subordination of the individual to the state, and accepts a radical limitation of individual's autonomy against the encroachments by the majority. The dignitary concept of the rights takes backstage to communal reading of the rights. Community comes first, individual rights second[97]. The avowed objective of the government to capture the ordinary courts and the Supreme Court (SC), provide a background for the case decided on October 24, 2017 (*case K 3/17*). The Constitutional Court passed a majority decision in which it stated that the resolution on the regulations for the selection of candidates for the post of First President of the SC modifies the law on the SC and the Constitution of the Republic of Poland in an unacceptable manner. It pointed out that the Chairman of the General Assembly of Supreme Court Judges as the appointing authority, and not – as required by the Constitution – the General Assembly of SC Judges. The Court found unconstitutional part of the provisions governing the procedure. The Court, despite considering the applicant's allegations, did not state that legal acts adopted on the basis of unconstitutional regulations are ineffective. The decision in turn opened the door to "reforming" the allegedly defective SC[98]. Another *case K 5/17* merits special attention as an example of sophisticated scheme to bring down the National Council of the Judiciary (NCJ) under the

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[97] The Case was decided with the unconstitutional judges sitting on the case. The doubts as to the composition of the Court were again raised in Case *K 32/*16 on the reform of the ordinary courts (proceedings were discontinued as a result of the National Council of the Judiciary withdrawing its application for review).

[98] Again, irregular judges sat on this case.

pretense of legality. Instrumentalization and rubber-stamping reigned supreme again[99]. The Constitution stipulates that the term of office lasts four years. The Minister of Justice (and President Duda before him) questioned the selection procedure as regards appointees to the Council. They are elected by judicial self-government from among the "elected representatives". According to the Ministry of Justice this violated the principle of equality and limited the powers of ordinary judges in the elections. He also challenged the possibility for the term of office of NCJ judges to begin on date different from that of parliamentarians elected to the Council. The Court ruled that the members of the Council are to be elected as a body, and the four-year term applies to the institution as such, rather than to individual members of the NCJ. The Court also found that the judges' right to vote for their representatives on the NCJ has been violated as well as they can not vote directly on the members of the NCJ. This is absurd ruling. Firstly, all judges do have a right to choose their candidates. Every judge has a power to select the electors, and they in turn will choose from their midst the candidates to the Council. Secondly, as for the NCJ's term of office, the reasoning is highly questionable: The Constitution nowhere stipulates that the term of office applies to the Council as a body. However, the logic and legal arguments were of the least of concerns to the judges. Read between the lines: the case lodged at the Court with the sole purpose of providing "a justification" for a political capture of the NCJ. The political plan was to use the courtroom to rubber-stamp the Minister's claims that NCJ is unconstitutional and, as such, needs reform. As a result the Ministry of Justice, now emboldened by the fabricated unconstitutionality, followed through its promise and the new Council has been appointed exclusively by the political branch which itself flies in the face of the Constitution. The Court was used in a legislative scheme to bring down another constitution body - the Council. And it delivered[100].

The credibility of constitutional review in Poland has been dealt a deadly blow, and the Constitution reduced to mere fig-leaf. Any future decisions taken by the unconstitutional court with the unconstitutional judges sitting on the cases will be marred by invalidity. The ordinary

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[99] All judges deciding the case were carefully handpicked by J. Przyłębska from the judges elected by the new Parliament. Among the judges sitting on the cases were two unconstitutional judges.

[100] Also on October, 24, 2017, "the court" decided that three unconstitutional judges were … constitutional after all. Of course, the fake judges were sitting, and thus deciding "in their own case". In this way the capture of the Court has been now officially sanctioned and completed.

judges will have a valid claim not to follow these rulings. Should they decide to follow decisions made with the participation of, or by, "fake" judges, their own proceedings will be vitiated by invalidity. The Minister of Justice did not waste time and threatened that ordinary judges who refuse to follow the rulings of the "new" constitutional court staffed by judges loyal to the ruling party, will be prosecuted.

These are all dramatic consequences entailed by the change in constitutional narrative in Poland. What Poland needs today is the constitutional jurisprudence of ordinary courts that counter the unconstitutional activities and existence of the fake constitutional court. Such "emergency constitutional review" would not simply respond to legal change or to tension between the branches. It would stave off systemic revolution brought about by unconstitutional capture of institutions and concepts[101]. When constitutional review faces systemic and permanent dysfunction for whatever reasons, emergency review by ordinary judges must be resorted to. Such review is defined by complementarity *vis-a-vis* the Court's power of review. It accompanies, and runs in parallel with, the Court's constitutional review, and does not replace it. Such review is instrumental to securing respect for the Constitution's status as the supreme law of the land. Constitutional defiance by the parliamentary majority must be countered by intra-constitutional resilience and trigger self-defending mechanisms from within the Constitutional text. It is important to make clear here that our call for "emergency constitutional review" by the ordinary courts does not question the Court's monopoly of constitutional review, but rather aims at shielding the constitutional order from being further weakened and disassembled. Emergency judicial review plays an important mobilizing role. It can act as a catalyst function for pro-democracy initiatives, bringing a sense of vindication and recognition to those who oppose the mainstream anti-democratic politics and who demand a return to respecting democratic values. "Calling a spade a spade" by the judiciary would provide a crucial focal point of societal resistance. Judicial pronouncement in defense of the constitutional order would transform into a symbolic point of reference as a source of loyalty to the oppressed constitutional values. Clarity about the constitu-

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[101] For analysis see T. T. Koncewicz, *Capture of the Polish Constitutional Tribunal and Beyond: Of institution(s), Fidelities and the Rule of Law in Flux,* (2018) Review of Central and East European Law (forthcoming).

tional state of play and constitutional interpretation would focalize the resistance, and move it forward.

The fascinating problem of judicial resistance has been in vogue recently[102]. Yet resistance by judges takes on a special meaning when the discussion turns not simply on laws that are unjust, but rather on laws that strike at the very core of a democratic state governed by the rule of law. These are laws whose very democratic pedigree could be questioned. Such laws are "wicked"[103] in a systemic sense. A question must be asked, then, what happens to judges faced with laws that undermine the democratic credentials of the state? Here, we agree with A. Barak: „*[...] when the criticism is transformed into an unbridled attack public confidence in the courts may be harmed, and the checks and balances that characterize the separation of powers may be undermined. When such attacks affect the composition or jurisdiction of the court, the crisis point is reached. This condition may signal the beginning of the end of democracy. What should judges do when they find themselves in this tension? Not much. They must remain faithful to their judicial approach; they should realize their outlook on the judicial role. They must be aware of this tension but not give in to it. Indeed, every judge learns, over the years, to live with this tension"*[104]. As a result, the relevant question today is no longer whether emergency review is warranted, but rather whether ordinary judges would be willing to accept their new role. The judges are faced with the most dramatic choice, and dilemma here: either to fall in line, and bury their heads in the sand by applying the rulings of the "new court" that are vitiated by unconstitutionality, or face up to their own mandate of being bound only "by the statute and the Constitution", and apply directly the constitution (not the suspicious decisions of "the new court") instead. What about the cases in which a decision was taken by the unconstitutional

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[102] See Douglas E. Edlin, *Judges and Unjust laws. Common Law Constitutionalism and the Foundations of Judicial Review* (University of Michigan Press, Ann Arbor, 2010).

[103] T. R. S. Allan, *Justice and Integrity: The Paradox of Wicked Laws*, 29 (2009) *Oxford Journal of Legal Studies* 705.

[104] A. Barak, *The Judge in a Democracy* (Princeton University Press, Princeton, 2006), at pp. 216-217.

judges, but is in favor of an individual?[105] Should an ordinary judge follow such a decision and protect individual rights? Framing its decision in terms of the Constitution could, at least, create an impression that a judge follows the Constitution, not the decision itself. At times, it might be difficult to discern where the Constitution starts, and the invalid decision stops, and *vice versa*. These concerns and challenges go beyond the normative, though. They raise fundamental questions of judicial ethos, and there is no ready-to-use abstract formula here. Each judge in his own consciousness will have to decide how to decide, and be ready to face the consequences.

IX. Going Beyond "How" Question and Trying to Understand "Why"

IX.1. Forgotten Legacy of the 1989 Constitutional Moment and 2004 EU Enlargement

The politics of resentment (see *supra*) are felt differently in the main[106] axes of divergence on the European continent between "the West" and "the East"[107]. In the former case, EU law and Europeanization provoke well-known criticisms of the remoteness of Brussels with resultant civic indifference, a turn against mainstream politics and a nostalgic return to the nation state. In the homogenous societies of the East, the politics of resentment did not have 'the Other' to turn against[108] and, as a result, the politics of resentment fed off the phenomenon that I call 'alienating constitutionalism'. The latter provides fertile ground for a sweeping politics of resentment. The incessant pressure of Europeanization and catching up with what was thought to be a superior Western standard, provoked a backlash against elite-

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[105] For one such example see c*ase 37/15* decided by the Court on December, 20, 2017. Even though, the Court's decision is in favour of constitutional right to a fair trial and and access to court, the case was decided with the participation of « irregular » judges. The administrative judges will thus now face a choice: follow the judgment, knowing that it might risk the validity of their own proceedings, *or*, follow constitutional principles, and derive protection for the entrepreneurs directly from the text of the Constitution, rather than from a constitutionally doubtful judgment.

[106] This is the axis that informs my analysis.

[107] T. Berend, *What is Central Europe?* (2005) 8 European Journal of Social Theory 401

[108] This homogeneity and fear of 'the Other' (e.g., resistance by Central and Eastern European countries to acceptance of immigration quotas) stands in stark contrast to Eastern Europe's past marked by a diversity that was unparalleled in the rest of Europe. I. Krastev pointed out that diversity must be understood through the historical experiences of Eastern Europe. For Poles pleas for a return to the ethnic diversity suggest a return to the troubled interwar period; *The Unraveling of the Post-1989 Order*, (2016) 27 Journal of Democracy 88, at p. 93.

driven and technocratic politics. Public discourse was dominated by a strict legalism and a top-down approach.[109] The role of the people was relegated to the symbolic casting-the-vote moment. There was almost an aura of inevitability about mainstream politics: the choice at the polls could be against a person (party) but never against policies seen as a non-negotiable itinerary to follow.

The bifurcation of resentment as culture- and history- determined is nowhere better seen than in Central and Eastern Europe. The 2004 EU Accession must be analyzed through the prism of the events of 1989 and the fall of the Iron Curtain. The 2004 Accession was both conditioned by, and inextricably linked to, the true Constitutional Moment of 1989, when the former Soviet satellites shook off the yoke of a totalitarian regime and a negotiated transformation ensued. As important as the 2004 Founding Moment was, it was limited in scope to legal constitutionalism defined by institutions, technocratic legalese, fundamental rights and the rule of law. A true culture of constitutionalism never had a chance to spring from these transformative institutional and systemic changes and the constitutional moment was never translated into 'We the people' and long-lasting societal mobilization. Rather civic disenfranchisement and passivity followed and today these, rather than a short-lived feeling of public engagement, define the citizenry in CEE countries. When asked today, an average CEE citizen would respond: "The choices made back then were not mine, but rather the result of an elite-driven process".

The politics of resentment have rewritten the narrative and changed the focus of public debate *from* the rule of law *to* regaining more control over the state that has been allegedly taken over by elites and Euro-bureaucrats. We have thus seen an internal dynamic and change in constitutional themes and programs: 1981 - freedom and rule of law; 1989 - freedom and reintegration with Europe; 2004 - obsession with sovereignty and self-determination, and 2015/16 (economic stability and security, nationalism and historical uniqueness). In the East, the politics of resentment find expression in the constitutional capture that follows the demise

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109 See also the excellent analysis by B. Bugaric, "*A Crisis of Constitutional Democracy in Post-Communist Europe: 'Lands In-Between' Democracy and Authoritarianism"*, 13(1) *International Journal of Constitutional Law* (2015), 219-245.

of the 'liberal consensus'[110]. The latter has provided the dominant narrative post-1989. This period has been characterized by the fear of mass politics. The liberal elites took over the democratic process and marginalized the public voice. Paradoxically, the rise of the politics of resentment might be seen as a result of the successes of post-communist liberalism. Alienating a constitutionalism fueled by a strict legalism and a top-down approach has been replaced by a vindictive constitutionalism marked by gut-politics, emotions and revolt against corrupt political elites. Old constitutions are seen as the vestige of old regimes and elites that must now go. The current revolt against elites has been long in the making. The rise of the politics of resentment marks, contrary to the common narrative, not the end, but, rather the beginning of a sweeping revolt against the dominant politics of liberalism[111]. Democracy undergoes transformations in response to a changing political and social environment[112]. Europe's liberal democracies are being transformed and the politics of resentment have become a new condition of the political in Europe. A top-bottom approach to building constitutional institutions and structures fuels the current backlash against mainstream liberal politics.

Liberal democracies know well that even the strongest institutions must fall when they do not enjoy popular support. When the rule of law and liberal values are not internalized, the system is vulnerable to authoritarian claims and populist narratives. How, then, to create a constitutional culture that would truly underpin and entrench the change taking place at the level of a constitutional text in the post-communist countries? The Central and East European (CEE) elites have never bothered to answer this question in any meaningful way. The sins of past omissions are catching up with us now. With the benefit of hindsight, one might argue that the prevalent top-down and live-in-the-moment approach coupled with an extreme legalism that excludes popular participation, are the reasons for weak popular attachment to consti-

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110 I. Krastev, *The strange death of the liberal consensus*, (2007) 18 Journal of Democracy 4.

111 *Id*.

112 For trends on democracy and democratic change around the world *Breaking Down Democracy: Goals, Strategies and Methods of Modern Authoritarians* available at https://freedomhouse.org/report/special-reports/breaking-down-democracy-goals-strategies-and-methods-modern-authoritarians For an overview Larry Diamond, Marc F. Plattner, (eds.,) *Democracy in Decline?*, (John Hopkins University Press, 2015). Most recently Steven Levitsky, Daniel Ziblatt, *How Democracies die*, (Crown, 2018).

tutional structures, procedures and mechanisms in CEE countries and explain such ground as fertile for the politics of resentment. The opposition of "We, the good representatives of the good People" *versus* "They, the bad elites and bad people represented by elites" is gaining traction because so many were excluded from the benefits of transformation that has ensued post-1989. Yet the politics of resentment see this disillusioned segment of society in a very instrumental way: 'bring us back to power and we will take care of you like never before'. The politics of resentment exclude in the same way as past elites did. A vicious circle results. The downtrodden are given back their sense of belonging and relevance only for a split second: at the ballot box.

As argued by J. Rupnik the new elites thrived by consolidating the democracy without participation and forming a policy consensus at the expense of politics. Civil society's short - lived constitutional moment was soon replaced by the mundane reality of institutional and economic catching-up. Absence of the social acts and the social passivity favoured the transition to market economy. The latter enjoyed the strong social legitimacy of the freedom-starved citizenry, with the democracy being reduced to electoral ritual on the election day with relentless pressure for more in-between the electoral cycles. Democratic rules of the game going beyond the ballot - box were never truly internalized. Again Rupnik is right when he says that people became used to markets much more readily than they came to embrace democracy[113]. The Politics of resentment knew this and realised that nobody would die for a constitutional court or courts in general. The liberal institutions finally came against the illiberal narratives. The latter never never really disappeared: „The liberalism of the liberal consensus […] was an elite project driven by small groups at the apex of politics, business, academia and officialdom […] this narrow economic, technocratic variant of liberalism merged with existing illiberal narratives and interests which pro-European elites generally opted to accommodate rather than oppose"[114]. Most importantly, as a result of the elitist project liberal, progressive and rule-of-law-perfect institutions sailed in the sea of illiberal narratives and were only superficially em-

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[113] *Id*. p. 20.

[114] J. Dawson, S. Hanley, *The Fading Mirage of the „Liberal Consensus"*, (2016) 27 Journal of Democracy 20 at p. 21.

bedded in the public consciousness. Dawson and Hanley got it right when they argued: „despite appearances in East -Central Europe there is an absence of genuinely liberal platforms - by which we mean a range of mainstream ideologies of both the left and right, based on shared commitments to the norms of political equality, individual liberty, civic tolerance, and the rule of law. As a result, citizens were left unexposed to the philosophical rationales behind liberal-democratic institutions"[115]. Democracy was never consolidated as there were not enough democratic citizens. As such democracy on the way towards consolidation was always vulnerable to disloyal and non-democratic practices[116]. If anything, the illiberalism is being consolidated right now, not the liberal democracy.

Catching – up with the European standard was driven by the imitation (constitutional, economic, social). At some point it produced fatigue and resentment. I call it „resentment threshold" - a point when emotions take best over rationality and dictate our choices. Resentment is so strong that even those who in the best of circumstances should be wary of it feel compelled to follow the call of resentment. Once the urge for distinctiveness is activated after years of imitating politics, demand side is created and provides fertile ground for these who resent and those who channel the resentment and turn it into politics of resentment. With the distinctiveness comes the opposition against the other, world, elites, in general everyone that is not just like us. Politics of resentment feed off the differences (real or imaginary) as the difference is what sets us apart from the rest of the world. We have had enough flattening across - the - board narrative. The new politics will be built by the rejection of following others or striving for commonalities. We built around our identity on the uniqueness of our own world, history, myths that sets us apart from dangerous others. The latter's attempt to talk reason to resenters and build bridges around what might bring us together. Difference (diversity) is important here as well but is not constructed as not an obstacle to building a consensus. This is a crucial point of discord between the presenters and others. Our claim to diversity is no longer accommodating the other, but rather becomes weaponised and turns into antagonistic and identity - building tool. It is no longer „us distinct and diversified" *and* „them" with both par-

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115 *Id.*

116 See also I. Krastev, *Liberalism's failure to deliver*, (2016) 27 Journal of Democracy 35, at p. 36.

ties willing to seek accommodation and common ground. Rather it is our differences and diversity *against* them. This is a democracy of rejection[117].

The tragic consequences of the "alienating constitutionalism" that prevailed post-1989 are now becoming more evident with the constitutional crises in the CEE[118]. With the dismantling of the Polish Constitutional Court (and earlier court-packing in Hungary and Romania), civil society in Poland is all of a sudden being asked, and expected, to rise up in arms and show its more engaged face. However, the name of the game is not engagement, but cynicism: "As long as the economy is fine, why should we care for the Constitutional Court*"*. But "Let's stand up for the Court" hardly got any traction. The Polish example is reflective of this dramatic disconnect between the people and the elites[119]. As much as the liberal elites are appalled by the ruthlessness of the attack on the Court and Polish rule of law, they are the ones to be blamed for a civic passivity that continues to define post-transition societies in general.[120] The truly reformative potential of 1989, and then 2004, was lost when the elites neglected the importance of connecting with the 'real' people beyond the magic of the big-bang moments of 1989 and 2004. The recurring question expressing this popular sentiment of disengagement asks: "Why should we die for *'their'* (my emphasis) constitutional court?".[121] This 'alienating constitutionalism' is one of the dark sides of 2004. The politics of resentment took advantage of the exclusion behind the alienating constitutionalism and transformed it into a vindictive constitutionalism marked by gut-politics, emotions, and revolt against cor-

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[117] D. Runciman, *The Confidence trap. A history of democracy*, (Princeton University Press, 2002).

[118] I. Krastev, *The Unraveling of the Post-1989 Order*, (2016) 27 Journal of Democracy 88.

[119] On the importance of the civic engagement and habits of the heart see T. T. Koncewicz, *Understanding the politics of Resentment. Of the Principles, Institutions, Counter Strategies, Normative Change and … the Habits of Heart*, Indiana Journal of Global Legal Studies (*forthcoming*).

[120] On this also B. Bugaric, *The Populists at the Gates: Constitutional Democracy Under Siege*?, (Draft paper submitted for the workshop "Public Law and the New Populism", New York University School of Law, 15-17 September 2017, available at https://www.researchgate.net/profile/Bojan_Bugaric/publication/319955332_The_Populists_at_the_Gates_Constitutional_Democracy_Under_Siege/links/59c38100aca272295a1310a1/The-Populists-at-the-Gates-Constitutional-Democracy-Under-Siege.pdf

[121] A weak and dispersed citizenry is faced for the first time with the tall order of bottom-up and not top-down mobilization. Today nobody (at least in Poland) really knows how 25 years of dominant top-down transformation affected "the bottom" and whether "the bottom" is ready to organize itself and defend structures and ideas which have so far been distant and alien concepts.

rupt political elites and institutions. Demand - side (resentment as an umbrella term for dissilusionment, anger and distrust; see *supra*) had to meet supply factors in the forms of right narratives and the salience of political leadership behind these narratives. As argued by D. Rodrick „*Populist movements supply the narrative required for political mobilisation around common concerns. They present a story that is meant to resonate with their base, the demand side: here is what is happening, this is why, and these are people who are doing this to you*"[122]. If one adds to this that liberal constraints never met broad political consensus about democracy and lack of credible liberal platforms, the demand factors have been strengthened acted as enablers for the populist authoritarianism to take rein and implement the politics of resentment. With the migration crisis and growing uncertainty on top of all these historical perculiairities one ends up with a recipe for combustible resentment.

In Poland the antagonistic narrative of winning back the state and politics of resentment were never too far away from the mainstream. Common sense and the self - survival might have triumphed in 1989 with „the red thick line" drawn between the past and present for the sake of future but this has never been the only face of Polish politics post - 1989. Corruption, virulent nationalism, ever -present anti German sentiments, anti-semitism were put on hold only temporarily. They resurfaced with the right circumstances - internal (electoral fatigue with the 8-year long of centre Civic Platform; relentless narrative us v them; agents everywhere, conspiracy theories, string of corruption scandals, institutions working for the elites not for you) and external (hightened uncertainties associated with the financial and migration crisis; playing off the German card and martyrology). Internal met external and created a perfect breeding ground for the resentment born out of fear, disgust, uncertainty[123]. What was needed was the supply - side and this is where the politics of resentment provided much needed clarity and sense of direction. The decisive transition from the "*resentment in the opposition*" to "*resentment in power*" happened[124] and ghosts and omissions of the 1989 and

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[122] D. Rodrick, *Populism and the Economics of Globalization*, at https://drodrik.scholar.harvard.edu/files/dani-rodrik/files/populism_and_the_economics_of_globalization.pdf

[123] Also I. Krastev, *Liberalism's Failure to Deliver,* (2016) 27 Journal of Democracy 35, at 36.

[124] For this distinction see analysis *supra*.

2004 resurfaced with full force. The disempowered and excluded felt now empowered by the promise of the politics of resentment, and empowered yet disgruntled and bored spectators - beneficiaries of 1989 were ready to gamble their imaginary resentment in the search of more benefits and wealth. While for the former the rule of law worked against them, for the latter it never worked well enough. Both groups, yet for different reasons, were ready to see what happens when the exisiting legal system with liberal narratives crumbles and we will start anew. The politics of resentment added to all this crucial legal dimension - constitutional capture. The predictable and stabilizing liberal narrative of « in rule of law we trust » has been debunked by an emotional and unpredictable brand of politics.

Poland was a disaster waiting to happen, with strong institutions enjoying very weak popular support and no understanding as to why and how these institutions matter for an average citizen. When portrayed as corrupt and alien, no counter-narrative was available to debunk this one-sided vision, nor was there any citizen-driven defense of institutions. Weak and disengaged citizenry simply did not care and let the right-wing government act without question in the name of allegedly curing a rotten system. For most people the system built from the top was not good enough to fight for and, as a result, people were ready to listen to a resentment-driven narrative and to experiment. The process of capturing the state with the avowed objective of winning back the true state for the people was met with acceptance as democratic and liberal consensus proved to be extremely weak and fragile. The stage was set for constructing a new regime - "a democracy on the periphery"

IX.2. From *The Politics of Resentment* to a "*Democracy on the periphery*"

„Democracy on the periphery" responds to, and crowns, new the politics of resentment as a constitutional doctrine driven by out-right rejection of the *status quo* and the mainstream constitutional narrative. It looks up to the the "politics of resentment - doctrine" for guidelines and contours for a new constitutional design. Both has to be abolished in pursuit of a better constitutional design, that allegedly only, the presenters of the status quo know how to attain. Politics of resentment are inherently revolutionary in that it attempts to institutionalise and entrench a political revolution. Then the element of periphery not only adds important insights

into understanding how democratic regimes is captured, but also enables this very capture. Periphery is an *enabling* and *explicatory* for the capture. As such „democracy on the periphery" is an important rupture in hitherto dominant narrative of three-step linearity: democratic transition (democratization) - liberalization - democratic consolidation (Europeanisation), with each step determining the next one. The linearity is predicated on the assumption that once you go on to another stage, there is no coming back. You can only progress, never regress[125]. At the same time, though, the retrogression itself is not a one-dimensional phenomenon. Rather it is a result of convergence of various factors: institutional, societal, economic and, last but not least historical. The democracy on the periphery puts forward a new narrative that competes with the prevailing narrative of liberalism and constitutionalism. It undermines this linearity and questions critically the assumption of irreversibility of democratic consolidation. As already suggested above constitutional moment and the civic engagement of 1989 were soon taken over by the elitist politics bent on reforming the institutional system and putting the new entrants back on the map of „normal" liberal Europe[126].

The ascent of a peripheral democracy as both the new state regime and constitutional narrative, marks the end of the post - 1989 politics of transformation as the paradigms of peripheral democracy are deviating from the constitutional democracy that reigned in the post-1989 world. The paradigm of Europeanization no longer serves as an effective deterrent against illiberal tendencies. Consolidation through Europeanization works best with the would-be candidates who are expected to share the commitment to the same values (value - community perspective) and exhibit readiness to be part of a viable internal market (market - effectiveness perspective). Once in the club, pressure to stay up to the task is gone, and the ugly face of transformation unfinished comes to the fore.

The Peripheral democracy represents a new incarnation of democracy. It is based on five major claims and themes that: (1) transformation was not only politically, but also morally flawed; (2) that the system as conceived in 1989 with the overarching rationale of rule of law

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[125] J. Rupnik, *From Democracy Fatigue to Populist Backlash*, (2007) 18 Journal of Democracy 17, at p. 19.

[126] At the same time, this top-down approach of elitist constitutionalism (soon to become "alienating constitutionalism") never translated into bottom-up constitutionalism that would help build and entrench constitutional culture, an active citizenry and respect for the democratic process.

served only the few, while leaving behind the many and, interconnected, (3) institutional design favored the powerful („Wall street") while disadvantaging the „Main Street", (4) dominance of the political over the legal, and finally and crucially, (5) new system of governance and novel constitutional design are needed, thus the concept of capture of the „bad" state in order to create new one with the constitution of fear as crowning the project. The end - result of this constitutional capture is a new state - „a captured state" with the „captive citizenry", all underpinned by „democracy on the periphery". Once the incentive of joining Europe was gone, the gene of illiberalism and failures of transition resurfaced. Consolidation seemed to be fragile. All of a sudden limits of top-down legal constitutionalism were brought to the fore. The lack of behavioral level underpinning the legal change exposed the empty shell and incompleteness of consolidation through institution - building and EU – driven implementation process. Peripheral democracy is the child of incomplete democratic consolidation. It is characterized by the lack of engagement and participation by ordinary citizens. This is where the hollowing out of the democratic consolidation becomes apparent. At its core post-communist democracy was superficial and lacking a civic element. People choose not to participate as they never internalised the democracy as the only game in town and as such they never learn the skills necessary to join and shape the public discourse. For their part elites were very happy with this passivity as they relished the discretion of building a new democratic state … from above. That in turn entailed most dramatic consequences in the form of a low trust for the public institutions and weakly embedded attitudes of support for these when attacked by the illiberal forces. Civic passivity bred indifference and created an environment in which fully-fledged democracy found it difficult to thrive and endure. This brings me to an important point. "The democracy on the periphery" hijacks the form of democracy. The face is presented as democratic while the substance is deeply undemocratic resulting in a strange cross of diminished democracy and competitive authoritarianism. Peripheral democracy exhibits strong elements of illiberalism and shows that national and social conservatism has never gone away during the period of liberal consensus and that Eastern Europe lives in the illiberal shadow. There are no genuine liberal platforms which could built respect for the institutions and embed civic culture that would go beyond the symbolic moment of casting a vote. This explains the relative easiness with which

Polish version of peripheral democracy has been installed. Peripheral democracy captures liberal democracy at both at level of *values* (only „my values" matter) and *legality* (only "my law" matters). It is a regime of extreme majoritarianism and electoral authoritarianism. Ballot box reigns supreme. One could even go further and claim that indeed the democracy on the periphery is defined by distrust of citizens toward themselves and toward the state. Democracies on the periphery start from a different assumption: dislike of the other who does not look like me. Political prevails over the legal and legal instrumentalism is rampant: as rule of law distorts and hides bad deeds of the elites, it must accordingly must be harnessed to uncover what „the bad guys did" and start building a new better and virtuous state. This legal instrumentalism is coupled with the formalistic understanding of the rule of law as applied by the courts. People are seen as components of the ethno-cultural community first, and citizens second. State is allowed big discretion in choosing what good life means for its people. Citizenship is reduced to the periphery indeed. Sounds familiar? This is exactly one of the basic elements of the constitutional narrative behind the politics of resentment. The competition and representation are understood differently: in the liberal democracy they are encouraged, on the periphery they are discouraged and waved off as there is an exclusive claim to representation and voice. As such democracy on the periphery is counterfactual as it disregards the fact of deep division in societies and glided over it with dramatic consequences for the state and citizenry: suppression and flattened vision of a society. Captured democracy on the periphery entrenches political project of only one segment of the political scene. Instead of negotiating the conflict and disagreement, it elevates this unique project to the status of new constitutional truth. The Constitution ceases to reach out, rather it decides in most authoritarian way what is right, what is good life and chooses for everyone one and only world view. Constitution takes back stage to the political process. It is reduced to a vehicle for good change, rather than a tool for managing the diversity. As a result space for contestation is significantly reduced: acceptable arguments are predetermined, rather than worked out in the discursive framework and process, actors and public are exposed to one-sided version of the political. All „Others" are no longer objective opponents to be respected and disagree with, they become partisan adversaries, enemies of the new state and its constitution.

"The democracy on periphery" has its own understanding of the constitution. The liberal

democracy presupposes constitutional conflict (within the parameters of a legal system) over the values and vision of a state, constitution of a peripheral state closes off space for dissent and different voices. The former is based on the political, while the latter focuses on the partisan. Peripheral democracy is defined by a "constitution of fear". While resentment helped gained power, resentment and fear are used to entrench the power. Fearful resentment is the *leitmotif* of the constitution-making process, shaped by suspicion, exclusion, with a drive for retribution and settling scores. As such, it reflects the main tenets of populist constitutionalism: distrust in institutions and rejection of the liberal *status quo* and culture of self-constraint. As argued by Frederick Schauer in the context of the American Constitution, a constitution of fear fails to protect from new harms not contemplated by the Founders or protects us from harms that no longer exist[127]. To these two imperfections, one might add in the Polish context a zealous push to protect against fake harms, dangers and imperfections that exist only in the paranoid minds of today's Polish constitution-makers. A constitution of fear is not a one-off occurrence. Quite the contrary: it crowns the politics of resentment. It becomes its manifesto. A constitution of fear is partisan as it only speaks to those whom it accepts as real people and who share the new 'ideals'. All others are excluded and unwelcome. A constitution of fear is inward-looking. It protects national uniqueness and is read in direct opposition to the outside and always hostile world that is portrayed as a source of uncertainty at best, and decadence and … fear, at worst. A 'constitution of fear' is used as a defensive tool against all this. A constitution of fear has a new role to play in society. Instead of protecting the individual against the state, it elevates the community to center stage and pushes the individual into the shadow of the state. While liberal constitutions put a premium on conflict management, inclusion, evolutionary (incremental) change that would be both open to and accommodate diversity as a social and normative fact, trust that is built over time among different components of the polity, a constitution of fear thrives on dis-engagement and distrust and a revolutionary tradition that builds on the avowed objective of a clean slate and starting from zero and a drive to settle fundamental questions once and for all. A constitution of fear reflects a unified vision of the people and a monolithic state.

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[127] Frederick Schauer, *The Constitution of Fear*, 12(203) *Constitutional Commentary* (1995), 203-206, available at <https://conservancy.umn.edu/bitstream/handle/11299/167228/12_02_Symposium_Schauer.pdf?sequence=1>.

The people are defined by sameness, not difference, and consent to follow. Importantly, fear is given competing understandings depending on the perspective. The safeguards typical of the constitutional liberal state (separation of powers and checks and balances, judicial independence) are a mere afterthought and seen as an unwanted and unnecessary distortion of the smooth communication between the sovereign and its representatives. Procedures and safeguards only slow things down, making the process opaque and misunderstood by the people and as such we must do away with all these liberal technicalities and inventions. Exclusivity and instrumentalism are the new names of this constitutional game. If there is one common denominator, this is it: the political takes over the legal, with the latter harnessed to serve the former, while the people are treated as a legal subject in its own right and with its own voice. It is the mono ethnic and mono cultural purified people first, collectivity rather than individualism. Open and participatory citizenship are concepts alien to the constitutional language of the new elites. Thus, not surprisingly, the title of the conference in Gdansk that launched the project for a new constitution: 'people just like me, not citizens'. It is the former who are to be the most important benefactors of the new constitution. A constitution of fear is no longer a tool to protect against the state, rather it becomes a tool to entrench power and exclude dissent, to create a flattened and barren public sphere. Competition among possible constitutional ideologies and visions of the most desirable models of the state will be excluded. Rule of law is transformed from one of the cornerstones of a legal system to being used and abused. The constitution is a political manifesto of power, not a safeguard against arbitrary power. For populists, liberal constitutions with their openness and inclusion are unnecessary inventions of elitist minorities and only distort communication between the representatives of the people and the people themselves. As such the constitution must be remodeled and harnessed so as to enable and protect the decision making that at long last reflects the purified rule of the people.

This understanding leads to an important tweak to the established narrative: institutions (e.g., the Constitutional Tribunal) that have been channeling (for populists distorting) the rule of law must be dealt with as expeditiously as possible. With the benefit of hindsight, we understand why the Court was first institution to fall and that it never had a chance. Yet, while remembering the fallen institution and thinking about the possible recapture of the rule of law, one must never

forget one thing. Polish Constitutional Court might have been but one element in the overarching politics of resentment and in building a new regime, its capture was the *sine qua non* condition for ensuring the long lasting success in the paradigmatic shift in the constitutional narrative in Poland.

Martin Shapiro has argued that „*in the realm of judicial behaviour, what judges say, what rules they announce and/or threaten to announce is often a more significant aspect of their behaviour than how they vote*"[128]. This final remark is crucial. The legacy of the capture should not only reside in the devilish strategies and political cynicism at the service of new constitutional doctrine. There is something precious and positive to be learnt from this process as well and be carried over into the future. It is no less than the words said and rules upheld by the "old" Court in its its loosing and enobling effort of defending the integrity of the Constitutional document. The "old Court" might have lost and succumbed for now, but make no mistake: it has won long term and left the constitutional essentials vindicated. That is a lot to fall back on as we try to move forward and think of rebuilding the rule of law and judicial review in Poland.

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[128] M. Shapiro, *Can Judges Deliberate?,* Third Annual Walter W. Murphy Lecture in American Constitutionalism, Princeton University, 29 April 2003, p. 3 (paper on file with the Author).