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Abstract

A dramatic change occurred in Polish constitutional politics in 2015: a combined presidential and parliamentary victory of the populist Law and Justice party [PiS] began a series of deep political and legal changes which turned the constitutional order on its head in many respects. In this paper, I provide a detailed account (in Part 3) of how comprehensive and momentous the legal changes are, in particular going so far as to dismantle institutional checks on the government (including paralysis the Constitutional Tribunal, and then conversion of it into an active supporter of the government) and to erode a number of individual and political rights, such as the right to assembly and privacy. This account is preceded by first outlining the general characteristics of Polish transformation since 2015 (in Part 1), and then explaining why the concept of "anti-constitutional populist backsliding" is the most appropriate way of characterising it (Part 2): it is "anti-constitutional" because it proceeds through statutory "amendments" and outright breaches of the Constitution; it is "populist" because the ruling elite is actively concerned to foment societal support and mobilisation, and it is "backsliding" because it should be seen against the baseline of high democratic standards already achieved in the recent past. After providing this account, I offer tentative explanations of the sources of PiS electoral success and then of its strong popularity in the society (Part 4), and in the Conclusions, I take a step back from the detailed account to offer more general observations about what the Polish case can teach us about the vexed question hotly debated in political sciences and constitutional theory these days, namely whether a "populist democracy" or "illiberal democracy" is still a democracy tout court.

* Challis Professor of Jurisprudence in the University of Sydney School of Law; Professor in the Centre for Europe, University of Warsaw. I thank Dr Michał Marek Ziółkowski for his excellent research. I am also grateful to Kirsty Gan for language corrections. Two small sections of the paper were presented in Amsterdam at a seminar of Access/Europe and the University of Amsterdam, and in Tel Aviv at a meeting of ICON-S, Israel branch. I am grateful to Professors Ronald Janse, Moshe Cohen-Eliya and Gila Stopler for convening and commenting at these meetings, and to all participants in the discussions, as well as to Adam Czarnota and Martin Krygier. The situation in Poland is very dynamic, and on the day a reader accesses this paper, some important new facts, laws and cases will have taken place, not covered here. The paper covers the legal status quo as up to 31 December 2017.

Contents

1. Introduction

A dramatic change in Polish politics occurred in 2015, in two major steps. The first was the presidential election won on 10 May marginally[1] and unexpectedly by a PiS [Polish acronym for the Law and Justice party] candidate Andrzej Duda – a virtually unknown, young political newcomer,[2] hand-picked by the PiS leader Jarosław Kaczyński who did not want to run because everyone expected a solid victory by the incumbent, Bronisław Komorowski, supported by Civic Platform [Polish acronym: PO]. The second step occurred soon after: the parliamentary elections of 27 October, in which with 37.5 percent of votes (and 18 percent of all those eligible to vote; voter turnout was only 50.9 %) PiS won an absolute majority of 5 seats, giving it the authority to govern

[1] In the second round, by 51.6 % versus 48.5 %.
[2] The only pre-presidential public offices of Duda were: Member of the European Parliament, deputy minister of justice, and minister for legal issues in the office of President Lech Kaczyński.

single-handedly. It ended a two-term, eight-year domination by the centrist-liberal PO, ruling in coalition with the politically moderate peasants' party PSL.

The scope of the change was as huge as it was unexpected.[3] It should be added that PiS had already experienced a previous episode of rule, in 2005-7, which to some extent prefigured the current regime. However, there were three major differences that characterised the 2005-7 episode compared to that commencing in 2015: (1) the shortness of the first episode, and the lack of any earlier experience of government (an experience which would teach PiS a lesson that it clearly relied upon in 2015, that once you come to power, you need to introduce all the radical projects right at the start of the term); (2) PiS in 2005-7 did not have an independent majority so it was constrained in its rule by coalition partners, such as Samoobrona and the League of Polish Families (Polish acronym: LPR) – a factor which exerted a gravitational pull upon PiS towards the centre of the political spectrum;[4] (3) Lech Kaczyński, Jarosław Kaczyński's twin brother, was the President at the time, and had a clearly moderating effect upon Jarosław.

No time was wasted in 2015. The end of the year witnessed the beginning of a fundamental transformation: abandonment of various dogmas of liberal democracy, constitutionalism and the rule of law, which so far had been taken for granted. And even if the practice, as usually is the case, of enforcing these principles was far from perfect before the PiS victory, there had been at least a widespread consensus that these values were standards to be pursued. With the suffocating command of Jarosław Kaczyński over all centres of political power, in 2015 these principles were abandoned, ostensibly in the name of a purely majoritarian democracy, and of the "sovereign" having a right to rule as it wishes. The "will of the sovereign" expressed allegedly through an electoral choice ("winner takes all") was declared a fundamental legitimation for a general transformation of the state (even if many of its aspects had not been announced in the electoral campaign) and as a reason to downplay checks and controls upon the executive and legislative. The campaign first against the Constitutional Tribunal [CT] and then against the regular courts have rested upon the idea that any restraints upon the political majority are by their nature anti-democratic.

Victor Orbán's Hungary was declared as a model to emulate, with Kaczyński promising "Budapest in Warsaw" as its goal, and the copycat effect is not to be underestimated; it is fair to describe PiS rule so far as "an accelerated and condensed version of what the ruling Fidesz party has accomplished in Hungary since 2010, when Viktor Orbán began his second stint as prime minister".[5] The sequence of the main "reforms" in Poland in many respects closely parallels that in Hungary a few years earlier: fast-tracking of legislative changes; attacks on NGOs; new media legislation; disempowering and capturing the Constitutional Court; removal of the "old" judges (of ordinary courts) by lowering the

[3] In an article published in the beginning of 2016, hence written in 2015, two British scholars opined that "Hungary's slide toward semi-authoritarianism is arguably an exceptional case reflecting a specific combination of a restrictive conservative-nationalist right wing, strongly majoritarian institutions, and economic recession", James Dawson & Seán Hanley, "The Fading Mirage of the 'Liberal Consensus', *J of Dem* 27/1 (2016): 20-34 at 20.

[4] Both Samoobrona and LPR were parties of the populist right so, with both coalition partners on its right, PiS in order to distinguish itself naturally gravitated towards the centre. Today there are no serious PiS's rivals on the right so there are no strategic disincentives for PiS against adopting radical right-wing positions.

[5] Arch Puddington & Tyler Roylance, "The Dual Threat of Populists and Autocrats", J of Dem 28/2 (2017): 105-119 at 112.

retirement age; an attack specifically on the Chief Justice of the SC;[6] restructuring of the National Judiciary Council through the politicisation of its selection;[7] altering the membership rules of the electoral commission with the effect of giving the ruling party control of the commission; identifying the EU as a foreign, hostile entity which illegitimately interferes in the internal affairs of its member state… This recent assessment by a leading Polish journalist is worth quoting:

> Orbán's state is Kaczyński's Poland as it will be in 5 years' time, because he ruled Hungary that much longer than PiS. In this period Orbán captured the supreme court and ordinary courts, got rid of the National Council for Judiciary, set up an Office of National Media, and devoted [state] budget money to finance a propagandist public TV. The last five independent newspapers were taken over by the Prime Minister's people in August 2017. Advertising campaigns targeting political rivals are financed from public money. NGOs went under state control, and electoral rules were changed. (…) And the society? Over 40 percent still support Orbán. The Prime Minister has effectively scared the Hungarians by an alleged threat of invasion by immigrants…[8]

However, there are also important differences between the two cases. Most importantly, there was a formal constitutional change in Hungary, which made it possible "to transform the constitutional order and slide into some form of authoritarianism entirely through legal means",[9] with no such change or amendment available to Kaczyński (this point will be elaborated below). There are also other differences: in Hungary political power is much more embedded than in Poland in economic powers of ultra-rich oligarchs (leading to the label of Hungary as a "mafia state");[10] Orbán is pro-Russian while PiS is ostentatiously anti-Russian; Orbán acts more pragmatically in EU fora than PiS; Polish centrist opposition is much stronger than the Hungarian opposition, and in Poland there is no strong party alternative any further to the right (like Jobbik in Hungary) which exerts right-wing pressure on the ruling party; the dominant Church has a strong political influence in Poland, but not in Hungary…

While particular, individual aspects of Polish backsliding may have each their counterpart in this or that democratic state, what makes this such a qualitatively different case is the *comprehensiveness and the cumulative effect* of the undoing of liberal democracy. A virus in a sick body reinforces pathologies in other parts of the body while a virus in a healthy organism is likely to be disabled from having a nefarious effect. A single non-liberal change does not provoke a major backlash if it takes place in the environment of a general liberal constitutional context. In Poland, however, it is a populist offensive *tous azimuts*: an all-out assault on liberal constitutionalism. And it is systemic: individual elements are functionally connected with the others (for instance, the paralysis of the Constitutional Tribunal was a prerequisite for the adoption of illiberal laws made immune from

[6] In Hungary, against Andras Baka (The "Curia" was established in order to extinguish the term of office of Baka); in Poland against Małgorzata Gersdorf (in a motion by PiS MPs in March 2017 to Constitutional Tribunal to question constitutionality of grounds of her election, see below).
[7] In Hungary, the Council was transformed into the National Judiciary Bureau with its chairman elected by 2/3 majority of the Assembly (earlier, Chief Justice of the Supreme Court was ex officio chairman of the Council).
[8] Jerzy Baczyński, "Niewygodne przesłanie" [Uncomfortable message], *Polityka* 7 Nov 2017, online edition.
[9] Grażyna Skąpska, "The Decline of Liberal Constitutionalism in East Central Europe", in Peeter Vihalemm, Anu Masso & Signe Opermann, eds, *The Routledge International Handbook of European Social Transformations* (Routledge: London 2018, forthcoming): 130-145 at 134.
[10] Balint Magyar, *Post-Communist Mafia State: The Case of Hungary* (CEU Press: Budapest 2016).

effective constitutional scrutiny, and these illiberal laws, for instance on the right to assembly, further make it difficult to protest against capture of the CT, etc.). In this way, the sum is more than its parts.[11] But the fact that some individual legal provisions may exist in isolation from other problematic arrangements and practices in some particular states which are unimpeachably democratic is a powerful rhetorical instrument for regimes such as in Poland, and also imposes constraints upon critics, including those abroad: foreign political actors may be loath to condemn democratic backsliding "if such practices enforce laws that exist in their own legal systems, lest they be criticized as hypocritical".[12]

It is also *incremental* even if the change occurs quickly. So it is difficult to identify a tipping point during the events: no single new law, decision or transformation seems sufficient to cry wolf; only ex-post do we realise that the line dividing liberal democracy from a fake one has been crossed: threshold moments are not seen as such when we live in them. As Aziz Huq and Tom Ginsburg note: "The precise point … at which the volume of democratic and constitutional backsliding amounts to constitutional retrogression will be unclear – both ex ante and [as] a contemporaneous matter".[13] And they add, using an unappetising metaphor: "Like the proverbial boiling frog, a democratic society in the midst of retrogression may not realize its predicament until matters are already beyond redress".[14] And then it is too late. This, as Huq and Ginsburg further observe, also makes any opposition to democratic backsliding less effective because there is usually no single event or governmental conduct which may mobilise the resistance by sending a clear signal "that democratic norms are imperilled".[15] In Poland, warnings about the fall of democracy have been often received with incredulity, or with objections of being hysterical and exaggerated; the language of democratic collapse has been seen by some as inflated, disproportionate, and counterproductively eroding the emotional content which may be warranted in some unspecified future. As Nancy Bermeo puts it well, "slow slides towards authoritarianism often lack both the bright spark that ignites an effective call to action and the opposition and movement leaders who can voice that clarion call".[16] But as the effect of these multiple "slow slides", rather than a clarion call, might render an obituary in order.

Many changes which are part of democratic backsliding occur *without a formal change* of institutions and procedures, so they are invisible to a purely legal account. As Gábor Attila Tóth remarks: "many such regimes ostensibly behave as if they were constitutional democracies, but, in fact, they are majoritarian rather than consensual, populist instead of elitist; nationalist as opposed to cosmopolitan; or religious rather than secular".[17] Institutions and procedures remain the same but their substance is radically changed by practice. For instance: parliamentary legislative

[11] See similarly Mark Tushnet who, describing Singapore's authoritarian constitutionalism, constructs a useful figure of "a fallacy of decomposition" where "the components *lack* a property but the aggregate might have it"; he also uses the concepts of "a 'slice and dice' or disaggregated approach" which, with regard to the analysis of Singapore's authoritarianism, "is almost certainly inappropriate", Mark Tushnet, "Authoritarian Constitutionalism", *Cornell Law Review* 100 (2015): 391-462 at 409-410 and 410 note 101.
[12] Ozan O. Varol, "Stealth Authoritarianism", *Iowa Law Review* 100 (2015): 1673-1742 at 1734.
[13] Aziz Huq & Tom Ginsburg, "How to Lose a Constitutional Democracy", manuscript 2017, on file with the author, at 35-36, footnote omitted (forthcoming California Law Review 2018).
[14] Id at 36.
[15] Huq and Ginsburg at 36, footnote omitted.
[16] Nancy Bermeo, "On Democratic Backsliding", *J of Dem* 27/1, 2016: 5-19 at 14.
[17] Gábor Attila Tóth, *The Authoritarian's New Clothes: Tendencies Away from Constitutional Democracy*, Policy Brief, The Foundation for Law, Justice and Society (2017), http://www.fljs.org/content/authoritarians-new-clothes-tendencies-away-constitutional-democracy at 2.

procedures remain, formally, the same as before. But by adopting a scheme whereby all important governmental initiatives are proposed as private members' bills, the requirements of consultations, expert opinions and impact audits are dispensed with. There *is* a discussion in the parliamentary legislative committee, but with PiS having an absolute majority, and where opposition MPs are given e.g. 1[18] or 2[19] minutes for their speeches, the discussion is turned into a sham (see below). In this way, the intended meaning of many procedures and institutions is eroded, and converted into façades only. The institutions become hollow.[20] *Toutes proportions gardées*, it is like in the state of "people's democracy": there were "elections", but without competition and choice; the "parliament", but no opposition and no open debate; the "President", but the supreme power was elsewhere. There was even (in Poland after 1985) a Constitutional Tribunal but it would not invalidate any law important for the ruling elite. As a result, for an external observer the radical shift in the meaning of institutions, procedures and roles may be invisible because they often remain, *legally speaking*, the same as before. As Martin Krygier observes, "One striking novelty of these new populisms is that, while like most populists they undermine constitutionalism, they do so with often striking attention to the forms of law".[21] Except that these "forms of law" are used, in practice, to undermine the underlying values of the rule of law, which are to constrain arbitrary use of unlimited power. Kaczyński is no Leninist: just like Orbán, he knows and skilfully uses the legitimating value of formal legality – except when the political costs of legality are found by him and his advisors to be too high (as in the cases of manifest breaches of the Constitution and statutes, see below).

This may be translated into a "Martian's test": would an intelligent and otherwise well-informed Martian, having for herself all the information culled only from the formal structures of government, and none of the practice, discern the non-democratic character of the regime? Probably not; she would ascertain all the institutions and procedures which she knows from the democratic toolbox available to her. Ozan Varol uses the concept of "stealth authoritarianism": a genre of authoritarianism which faithfully uses various democratic structures, for non-democratic purposes.[22] For instance, representatives of stealth authoritarianism "employ seemingly legitimate and neutral electoral laws, frequently enacted for the purported purpose of eliminating electoral fraud or promoting political stability, to create systemic advantages for themselves and raise the costs to the opposition of dethroning them".[23] Another example applicable to the Polish case is that stealth authoritarians "rely on judicial review, not as a check on their power, but to consolidate power".[24] As I will show below, this is precisely the use of judicial review that the PiS regime conferred upon the

[18] See e.g. the parliamentary discussion on the Supreme Court Act – Bulletin of the Justice and Human Rights Committee of Sejm No 94/2151/VIII of 19 July 2017, p. 7 (http://orka.sejm.gov.pl/Zapisy8.nsf/0/FD57E6B95B10AB16C125816F003ACDF4/$file/0215108.pdf).
[19] See e.g. the parliamentary discussion on the Constitutional Tribunal Act – Bulletin of the Legislative Committee of Sejm No 5/110/VIII of 21 December 2015, p. 114 (http://orka.sejm.gov.pl/Zapisy8.nsf/0/CBCDE2C33B340E53C1257F37004B0580/$file/0011008.pdf).
[20] For the concept of hollow institutions, see Dawson & Hanley, at 23.
[21] Martin Krygier, "Institutionalisation and Its Discontents: Constitutionalism versus (Anti-) Constitutional Populism in East Central Europe", lecture delivered to Transnational Legal Institute, King's College, London, Signature Lecture Series, November 17, 2017; on file with the author, at 4.
[22] Ozan O. Varol, "Stealth Authoritarianism", *Iowa Law Review* 100 (2015): 1673-1742 at 1684 ("Stealth authoritarianism refers to the use of legal mechanisms that exist in regimes with favorable democratic credentials for anti-democratic ends").
[23] Id at 1679.
[24] Id at 1679.

Constitutional Tribunal: rather than acting as a constraint upon the government, the Tribunal has become a constraint upon the opposition and an active helper of the government. But, formally speaking, judicial review *is there*, and unless one ascertains the actual substance and arguments of the decisions taken, as our Martian is unlikely to do, one will not see a difference between democracy and "stealth authoritarianism". As Varol puts it, "Stealth authoritarianism creates a significant discordance between appearance and reality by concealing anti-democratic practices under the mask of law"[25] – and this discordance is a predicament suffered both by a Martian and, more often, by well-meaning foreigners, often not knowing the language, the context, and the actual substance of practices which they observe from the outside.

The institutional changes discussed below are a part of a broader populist syndrome in which the key role is played by a catastrophic *drop of the norms of civility* of discourse, and an accompanying loss of trust. When the opponents of the government are treated as traitors and haters of their own Nation, it is only to be expected that they reciprocate with accusations of similar intensity. As a result, there are no shreds of mutual respect, of recognition that while the government and the opposition differ in their interpretation of the public good, they are equally sincere in the quest for common interest. The mutual self-restraint is missing, and the situation cannot be reached where (in the words of János Kis in the Hungarian context) "the party in opposition can safely expect the party in government to refrain from taking advantage of its majority in order to permanently exclude its rival from power, while the party in government can safely expect the party in opposition not to strive toward debilitating day-to-day governance".[26] No such mutual expectations, which are a key to democratic maintenance, exist now in Poland. Both sides deny legitimacy to each other: the opposition is seen by PiS as treacherous and non-patriotic, hence undeserving of ever returning to power, while PiS is viewed by its opponents as transgressing the minimal conditions of democratic legitimacy (based on respecting constitutional constraints). Jack Balkin's words written about the United States under President Trump also apply well to Poland: "People not only lose trust in government, but in other people who disagree with them. Political opponents appear less as fellow citizens devoted to the common good and more like internal threats to the nation".[27] Polish politics is polarised along lines so fundamental that loyal cooperation between the main parties for the higher good is unthinkable these days. As political scientists know all too well, a low level of interpersonal trust is a favourable background for antidemocratic backsliding.[28]

This mutual distrust between the parties and the electorates radiates upon (and partly, is reflective of) a more general societal distrust in politics and public institutions. Poland has one of the lowest numbers of party membership in Europe (only approx. 1 percent of the adult population, compared to 2.3 % in Germany and 3.8 % in Sweden); party loyalties by voters are extremely shallow and devoid of strong value meanings (e.g. 18 % of those who voted in 2011 for a left-wing SLD transferred their votes in 2015 to a right-wing PiS), and the dominant phenomenon of societal

[25] Id at 1685.
[26] János Kis, "Introduction: from the 1989 Constitution to the 2011 Fundamental Law", in Gábor Attila Tóth, ed., *Constitution for a Disunited Nation: On Hungary's 2011 Fundamental Law* (CEU Press: Budapest 2012): 1-21 at 15.
[27] Jack M. Balkin, "Constitutional Rot", in Cass Sunstein, ed., *Can It Happen Here? Authoritarianism in America*, forthcoming 2018, draft 1 November 2017, at 7-8.
[28] See Ellen Lust & David Waldner, *Unwelcome Change: Understanding, Evaluating and Extending Theories of Democratic Backsliding*, USAID 2015 http://pdf.usaid.gov/pdf_docs/PBAAD635.pdf (accessed 9 Nov 2017) at 21-22 (discussing theories which link democracy with civic culture).

mobilisation in recent years was about single-issue protests, which were often episodic and non-institutionalised (e.g. about ACTA or the anti-abortion legislative initiative). Such an overall *anomie* creates a favourable social ground for anti-constitutional populism: when institutions matter so little, no wonder that those institutions which *are* there turn out not to be resilient in the face of a resolute and energetic assault. And the generalised distrust towards politics gave rise to (what has been called in Polish political discourse) an attitude of "symmetrism" (what used to be called in the West, before the fall of communism, moral equivalence): PiS may be bad, but its predecessors in power were not much better, so why bother fighting for the replacement of one with the other? This is yet another powerful, even if only negative, source of PiS's persistently good ranking in opinion polls, and the unlikelihood of a "Polish Macron" (an idealised figure standing for a genuine pro-European, liberal-democratic saviour against the illiberal, populist and nationalistic forces) emerging in a foreseeable future.

2. How to name it?

There are different characterisations in contemporary constitutional theory and political science aimed at grasping the essence of developments similar to those studied in this article. Each of them captures an important aspect of Polish backsliding – though not necessarily its most significant characteristic. Some people talk about "constitutional rot" [29] or "democratic decay".[30] The former has been used to describe the US scene, the latter aims at including Poland, and also Hungary among others as its manifestations. However, both "rot" and "decay" have a connotation of a degradation which is slow and almost impersonal, occurring without a plan – a connotation certainly not giving justice to energy, enthusiasm and design that PiS has for Poland. The same can be said of "constitutional retrogression" – a concept that Aziz Huq and Tom Ginsburg contrast to "authoritarian reversal". [31] In turn, the concept of a democratic "backlash"[32] unhelpfully suggests a revenge or reaction against some excesses on the part of that against which backlash occurs.

The label of "illiberal democracy", made famous by Fareed Zakaria[33] and used by many more recent writers, including when describing PiS Poland,[34] is too charitable because it pre-empts that which needs to be shown, namely that illiberal backsliding maintains its essentially democratic character, and ignores the possibility that "illiberal democracy" is an oxymoron. After all, it may be claimed that "illiberal democracy" is by its nature a temporary phenomenon and must either evolve towards liberal democracy or degenerate into illiberal authoritarianism: the illiberal factors in democracy,

[29] Balkin, "Constitutional Rot", op. cit.
[30] Tom Daly, in a number of I-CONNECT blog posts and columns, including "Enough Complacency: Fighting Democratic Decay in 2017", I-CONNECT 11 January 2017, http://bit.ly/2uuLGXe (last accessed 9 January 2018). Daly defines democratic decay as "the incremental degradation of the structures and substance of liberal constitutional democracy", Tom Gerald Daly, *Diagnosing Democratic Decay*, paper presented at Comparative Constitutional Roundtable, UNSW Sydney 7 August 2017, at 2 (on file with the author).
[31] Applying it inter alia to Poland and Hungary, at 14.
[32] See e.g. Jacques Rupnik, "Is East-Central Europe Backsliding? From Democracy Fatigue to Populist Backlash", *J of Dem* 18/4 (2007): 17-25.
[33] Fareed Zakaria, "The Rise of Illiberal Democracy", *Foreign Affairs* November/December 1997, at 22-43.
[34] Bojan Bugaric & Tom Ginsburg, "Assault on Postcommunist Courts", *J of Dem* 27/3 (2016): 69-82 at 73-75.

including displacement of individual rights, must erode democracy at its core, i.e. the fairness of electoral process. As a matter of fact, this will be one of the propositions of this article.[35]

Some writers emphasise the authoritarian character of the developments and talk about "competitive authoritarianism"[36] or "new authoritarianism".[37] The use of the concept of "authoritarianism", without more, may imply the insensitivity of rulers to social support and reliance on brute force. And yet, populists such as Kaczyński or Orbán certainly care about social legitimacy, in the sense of actual popular support for their rule, and the label "authoritarianism" fails to distinguish between populist power and rule predominantly based on naked coercion and political violence. David Landau's concept of "abusive constitutionalism" [38] does not apply to Poland well because it takes in only those reductions in democratic qualities which are brought about by changes in the constitutional order (by constitutional amendments and replacements, as in Colombia, Venezuela and Hungary) while in Poland an important fraction of changes has been achieved by extra- and un-constitutional measures. Some political scientists use the awkward concept of "democratic deconsolidation" and explicitly apply this concept to Poland under PiS.[39] But there are two problems with this label: first, it may seem fanciful to some to imply that before PiS's ascent to power, Poland was a "consolidated" democracy: consolidation takes time. Second, for the authors of the conception of democratic deconsolidation, its main indicators are in the low and shallow support in public opinion for democratic rule;[40] the emphasis in this paper is on the structural institutional transformation away from democracy.

The notion of a "hybrid regime"[41] lacks any substantive informative value: it says that there is a mixture but does not tell, of what. Finally, the concept of a "constitutional coup d'état"[42] or merely "a constitutional coup"[43] may be helpful in conveying the sense of outrage at the displacement of a constitutional frame of political change but is not accurate to describe developments such as those in Poland because a coup d'état is normally targeted by one group against a *different* group currently in power rather than consolidating (through anti-constitutional means) its own power. The identity of rulers before and after the radical transformation of the regime renders the language of a "coup" misleading.[44]

My own formula lacks the crisp elegance of some of these labels but it expresses better, in my view, the essence of developments in Poland after 2015 elections. I call it "anti-constitutional populist backsliding", and all three ingredients are equally important.

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[35] See "Conclusions", below.
[36] S Levitsky & L.A., Way, Competitive Authoritarianism: Hybrid Regimes After the Cold War, CUP 2010.
[37] Toth, op. cit
[38] Dvid Landau, *Abusive Constitutionalism*, *UC Davis Law Review* 47 (2013) 189-260.
[39] Roberto Stefan Foa & Yascha Mounk, "The Signs of Deconsolidation", *J of Dem* 28/1 (2017): 5-15 at 11-12.
[40] Id at 5-8.
[41] See e.g. Larry Diamond, "Thinking about Hybrid Regimes", *J of Dem* 13/2 (2002): 21-35.
[42] With respect to Hungary, see Magyar at 113.
[43] See e.g. Kim Lane Scheppele, "Constitutional Coups and Judicial Review: How Transnational Institutions Can Strengthen Peak Courts at Times of Crisis (with Special Reference to Hungary", *Transnational Law & Contemporary Problems* 23 (2014) 51-117.
[44] But see Scheppele: she defends using the word "coup" because "the end result turns the prior constitutional order on its head without a legitimating process to confirm the changes", id at 50-51.

(1) Anti-constitutional

The anti-constitutional character of the current regime has many facets. First of all, the real centre of power is elsewhere than constitutionally decreed: it is centred in one person, Jarosław Kaczyński, who is commanding the country without constitutional responsibility and accountability,[45] which makes it a significantly different case from that of Orbán's Hungary. The constitutionally described central institutions of power are the President and Prime Minister. Occasional manifestations of a very limited "independence" of the President were generally considered by acolytes of Kaczyński as breaches of an unwritten compact and as irritating cases of disloyalty.

This situation was prefigured in the writings by Stanisław Ehrlich, an important legal theorist in Communist Poland, initially a Stalinist who became in his late years a disillusioned Marxist and self-avowed reformist, and who coined (without any negative or critical intention) the concept of a "centre for political command" (*centralny ośrodek dyspozycji politycznej*) which is a de facto ruling entity, not to be confused with any formal institutions designed by the Constitution, and issuing strategic directives for all state institutions. Ehrlich was Kaczyński's professor and doctoral supervisor, and both Kaczyński brothers participated in a "*privatissimo*" seminar of Ehrlich in the early and mid-1970s.[46] The irony of Kaczyński replicating such a pattern of power was not lost on some observers: "notwithstanding the anticommunist rhetoric of prominent members of the ruling Law and Justice party in Poland, this structure of power closely resembles that which was characteristic of the former, communist system, where the secretary of the communist party had the greatest power and prerogatives".[47]

The everyday politics of PiS Poland provides constant, multiple proofs of who wields the real power. When President Duda vetoed two of the three laws on the judiciary in July 2017 (see below),[48] to the surprise and irritation of Kaczyński, this mini-crisis within the ruling elite was followed by a series of face-to-face meetings between Kaczyński and Duda, aimed at forging a "compromise". In these meetings, neither the Prime Minister nor the Minister of Justice, who nominally drafted the laws, took part. In another striking episode, when the newly formed Council of National Media tried to fire the Chairman of Public TV, Jacek Kurski (whose rivalry with the head of the Council Krzysztof Czabański is well-known), the PiS members on the Council were urgently summoned to see Kaczyński and then immediately, and humiliatingly, cancelled the decision dismissing Kurski, who has remained the Chairman of TV up to now.

This pattern has settled for good: "Nowogrodzka" (the Warsaw address of the PiS headquarters, where Kaczyński has his main office) became synonymous with the true locus of power. When ministers need a strategic decision to guide their action, they "go to Nowogrodzka Street". When they want to inform journalists that Kaczyński has not yet decided about this or that important issue within their portfolio, they use a proxy: "A political decision has not yet been made". Occasional

[45] His only state function is being a member of parliament.
[46] A personal declaration: so did I.
[47] Skąpska at 140.
[48] For more about the veto, see Marcin Matczak, "Is Poland's President Duda on the Road to Damascus?", VerfBlog, 2017/7/26 (http://verfassungsblog.de/is-polands-president-duda-on-the-road-to-damascus/ (last accessed 9 January 2018).

speeches by or interviews with Kaczyński (invariably, to the "friendly media" who never ask embarrassing or difficult questions) are treated as programmatic guidelines for state policies. All the major "reforms" (including those discussed below in this article) have been initially foreshadowed by Kaczyński in his public statements. Ministers obediently consider their role as that of turning Kaczyński's announcements into policies within their portfolio, and if they publicly come up with their own initiative, it is only if Kaczyński decided to leave them a specified scope of discretion in a given sphere. The paramount role of Kaczyński in the Polish political system, thought totally invisible to the constitutional design, has been accepted and recognised as such, also by foreign journalists or politicians, who seek meetings with him in precedence to meeting the Prime Minister or the President, knowing that this is where the true power resides.

The second dimension of the anti-constitutional character of PiS power is governance through multiple breaches of the Constitution. As will be evidenced below, the Constitution has been routinely violated in a number of ways. The takeover of the CT is one, though not the only, arena where breaches of the Constitution have been committed: the parliamentary resolution (voted with a PiS majority, of course) about removing "legal effects" of the election of judges at the end of previous parliamentary terms violates the Constitution because the Constitution provides for an exhaustive number of instances when a term of a judge can be extinguished, and the Parliament has no such power. The refusal by the President to swear in correctly elected judges violates the Constitution which does not give the President any such role in designing the composition of the CT. The governmental refusal to publish some of the CT judgments also is a usurpation by the government of powers that it does not have, etc. These are just a few examples related to the dismantling of the CT, and many more will be provided below.

The third dimension of the anti-constitutional character of PiS rule is a series of de facto "amendments" of the Constitution via statutes which significantly alter the constitutional dispensations. As Mirosław Wyrzykowski wrote about one particular example of such an "amendment" (namely the amendment of the law on CT of 22 December 2015):[49] "For the first time in the thirty-year history of Polish constitutional judiciary, the [Constitutional] Tribunal was confronted with a statutory regulation which changed the constitutional order of the state".[50] A distinction between this and the previous category (outright breaches of the Constitution) is of course blurred: "changing" the constitution through statutory means is in itself a breach of the Constitution. But I am separating this category from the previous one in order to focus on those statutory actions which were meant to circumvent the Constitution, and to highlight an important characteristic of the PiS regime, namely that it has engineered fundamental "constitutional" changes without having an electoral mandate to do so. In the absence of the super-majority necessary for a constitutional change, it proceeded by adopting statutes which in fact went against constitutional provisions. A setting up, by statute, of the Council of National Media, was a way of disempowering a constitutional body – the National Broadcasting Board – by endowing the former with much of the tasks of the latter.[51] A number of statutory provisions on the CT were meant to circumvent the

[49] Act of the 22 December 2015 amending the Act on the Constitutional Tribunal (Journal of Laws 2015, item 2217).

[50] Mirosław Wyrzykowski, "Antigone in Warsaw", in Marek Zubik, ed., *Human Rights in Contemporary World: Essays in Honour of Professor Leszek Garlicki* (Wydawnicgtwo Sejmowe: Warsaw 2017): 370-390 at 380.

[51] Act of the 22 June 2016 on the Council of National Media (Journal of Laws 2016, item 929). The National Media Council is charged with the control of national broadcasters (Polish Television, Polish Radio and Polish

constitutional provisions: for instance, in order to sideline Professor Stanisław Biernat, the then Vice-President of the CT (a constitutionally designated office), a statute of 13 December 2015[52] invented a position of "acting President" who performed the actions normally falling upon the Vice-President – with the difference that they fully met the expectations of PiS.[53] To give another example: a statute on the National Council of Judiciary (KRS)[54] introduced a number of unconstitutional provisions fundamentally changing the composition and structure of that body compared to its constitutional design: it "extinguished" the constitutionally-settled terms of office of judges-members of the KRS, and introduced, contrary to the Constitution, a system of electing judges-members of the KRS by the parliament rather than by their peers.[55]

Press Agency) having a competence to appoint or to dismiss presidents, members of supervisory boards and management boards as well as other members of public broadcaster's statutory bodies. The Council of National Media has also access to key broadcasters' documents and acts in a similar way to a supervisory board. Moreover, Council members have a right to participate in the general meetings of companies' statutory bodies. It shall be noted that during the first year of its activity, the National Media Council has been extraordinarily active: it adopted *inter alia* resolutions concerning removals of the President of the Management Board of Polish Television, the members of the Management Board of the Polish Press Agency, the President of the Board of Polish Radio, the members of the Board of Polish Radio as well as resolutions creating new advisory boards and new statues for public broadcasters (between 2 August 2016 and 4 January 2018 it has adopted no less than 107 resolutions; available in Polish at the Sejm website – http://www.sejm.gov.pl/Sejm8.nsf/page.xsp/rmn_uchwaly, last accessed 9 January 2018).

[52] Provisions on Introduction of the Act on the Organisation and Proceedings before the Constitutional Tribunal and the Judges of the Constitutional Tribunal Status Act (Journal of Laws 2016, item 2074). After Sejm had passed the statute and the Senate had not submitted amendments, the President signed the statute on the 19 of December 2016. The provisions on the position and competences of "acting President" entered into force immediately, without *vacatio legis*, one day after promulgation. It was important for the governing party to pass, sign and publish the statute before the end of the day of 19 December 2016. That was the last day of Professor Andrzej Rzepliński's office term as a President of the Tribunal. The next day Professor Stanisław Biernat should have started to exercise his constitutional and statutory competences as a Vice-President until the election of the new Tribunal President. However, in the early morning of 20 December 2016 President Andrzej Duda appointed Ms Julia Przyłębska to a newly created "acting President" position (Decision No. 1131.24.2016 of the President of the Republic of Poland of 20 December 2016 on the President of the Constitutional Tribunal duties delegation, Official Gazette of the Republic of Poland 2016, item 1229).

[53] One of the first decision of Julia Przyłębska as an "acting President" (the day after her appointment) was to allow the three "duplicate" Judges (those appointed to the already filled positions) to hold office, and to convene the General Assembly of the Judges of the Constitutional Tribunal in order to elect a candidate for a President of the Tribunal. Organised in hurry during the few next hours after the decision, and in the absence of one of the Judges, the "General Assembly" proposed Julia Przyłębska as a candidate for the position of the President of the Tribunal by a vote of 5 in favour. She was supported by three "duplicate" Judges, one of the Judges elected by the governing party (Professor Zbigniew Jędrzejewski) and herself. It should be noted that eight Judges (out of fifteen on the Tribunal), including one of the Judges elected by the governmental party (Piotr Pszczółkowski) declined to participate in voting and declared *votum separatum*. Four arguments were submitted for this dissent: the lack of legal basis in case of one the Judge's absence, violation of the statutory term for assembly notification, participation of the "duplicate" Judges in voting, and lack of quorum because 8 Judges refused to vote (see the Protocol of the General Assembly of the Judges of the Constitutional Tribunal of 20 December 2016, available in Polish at The Wiktor Osiatyński Archive website – https://archiwumosiatynskiego.pl/kategoria-dokumentu/wymiar-sprawiedliwosci/).

[54] Act of 8 December 2017 on the amendment of the Act on the National Council of the Judiciary and some other acts (Journal of Laws 2018, item 3); compare with the partly similar Act of the 12 July 2017 on the amendment of the Act on the National Council of the Judiciary and some other acts (vetoed by the President Andrzej Duda).

[55] See more: Marcin Matczak, President Duda is Destroying the Rule of Law instead of Fixing it, VerfBlog, 2017/9/29 (http://verfassungsblog.de/president-duda-is-destroying-the-rule-of-law-instead-of-fixing-it/ last

This process of "amending" the Constitution by statute marks, as has been already pointed out above, the main difference between Orbán's Hungary and Kaczyński's Poland: what Kaczyński occasioned by statutes, Orbán had brought about by a brand-new Constitution followed by a number of constitutional amendments. For instance, the fundamental change of the composition of the Constitutional Court in Hungary by increasing the number of judges from 11 to 15 and then prolonging the terms of office of already sitting judges from 9 to 12 years was achieved solely by constitutional changes. This immediately allowed the ruling coalition to reach a target of 8 out of 15 judges appointed by it. The removal of the compulsory retirement age for Constitutional Court judges entrenched the domination of Fidesz-appointed judges well into the future. As Grażyna Skąpska puts it: "The Hungarian case presents an example of an intelligent play with constitutional system as an instrument of political majority, and a hypocritical conformity with the requirements of constitutional democracy and civil rights protection – expressed in the constitution, but changed in the amendments to the constitution….".[56]

One may ponder over which of these two situations is "worse": worse, that is, from the point of view of standards of liberal constitutionalism. On the one hand, one may claim that the Hungarian style of illiberalism via constitutional changes is more damaging in the long term, because illiberal changes are being entrenched well into the future: a non-Fidesz government *in spe* may lack a constitutional majority and be straitjacketed in its conduct by the illiberal Fundamental Law. (The entrenchment also applies to a number of officials appointed for very long terms of office, who are likely to maintain their offices even under a non-Fidesz government). On the other hand, however, one may speculate that "constitutional amendments" via statutes and also simple breaches of the constitution, Polish-style, are more destructive of the principles of constitutionalism and the rule of law. In Hungary, the disempowering of the Constitutional Court was done *lege artis*; in Poland, it was more a demolition job than the restructuring of an institution, in full disregard of the constitutional provisions.

Finally, and to state the obvious, perhaps the most striking aspect of the unconstitutional character of the post-2015 developments in Poland is the fact that the changes have been preceded and facilitated by the incapacitation of the main device of constitutional maintenance in Poland after the fall of Communism, namely the Constitutional Tribunal. As David Law and Mila Versteeg in their pioneering work on "sham constitutions" note, "abusive governments can be expected to combine sham constitutions with sham judicial review. Government disrespect for a right will therefore translate into cramped judicial interpretation or enforcement of the right".[57] Disabling the CT as an effective and robust interpreter and enforcer of the Constitution must be seen as an *instrumental* step leading to a situation in which the Constitution, while formally valid, does not matter whenever it conflicts with the government's designs for rearranging the boundary between its own targets and the sphere protected by the constitutional principles and rights as interpreted so far. Sham judicial review supports the government in emasculating constitutional constraints upon its action. As a consequence, the Constitution stops being "self-executing" because it lacks an internal legal

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accessed 9 January 2018); Wojciech Sadurski, Judicial "Reform" in Poland: The President's Bills are as Unconstitutional as the ones he Vetoed, VerfBlog, 2017/11/28 (http://verfassungsblog.de/judicial-reform-in-poland-the-presidents-bills-are-as-unconstitutional-as-the-ones-he-vetoed/ last accessed 9 January 2018).

[56] Skąpska, "The Decline of Liberal Constitutionalism", op. cit., at at 134.

[57] David S. Law & Mila Versteeg, "Sham Constitutions", *California Law Review* 101 (2013): 863-952 at 877.

instrument of assuring its self-binding character; its domination is powered by a politically dominant force.

When PiS violates the Constitution, it does so not on behalf of some revolutionary goals which would trump constitutional provisions, but rather claiming that it does so on the basis of its own interpretation of the Constitution, an interpretation which is as good as, indeed better than, that of the opposition, the Supreme Court, the Ombudsman, numerous scholars, or the Venice Commission. The self-understanding of the transformation by PiS is legalistic;[58] legal provisions are strictly adhered to even if they are depleted of canonical or traditional or even plausible interpretations of their meanings. By doing so, PiS has undermined the conditions for a rough consensus regarding constitutional meanings which is a prerequisite of subjection of politics to the Constitution, and hence of constitutionalism itself. There are no longer settled meanings within the political class about what counts as a constitutional violation – and this is perhaps the main significance of the unconstitutional character of PiS rule in Poland post-2015.

(2) Populist

Populism is a vague and contested concept but, however understood, it is an important qualifier to my description of Polish democratic backsliding. The notion of "populism" emphasises that what is going on in Poland is not a simple "authoritarianism", without more, but that it is an illiberal move whereby the rulers care about popular support. The notion of authoritarianism per se may apply to regimes which are totally insensitive to the level of societal support to their rule, but this is not the case of Poland post-2015. We need a language to distinguish between authoritarianisms which rule by resort to bare force, and where a degree of societal support for the rule is not important for the rulers because they know that they can, and they do, rely on oppression and coercion, and, on the other hand, illiberal regimes which want to be liked or even loved, at least by a significant segment of the electorate. This does not necessarily render them democratic (once they begin dismantling separation of powers, constitutional checks and democratic rights, they undermine democracy itself) but it makes them qualitatively different from the regimes which are authoritarian, and where public opinion does not count.

The manifestations of populism, so understood, are multiple in Poland. First, the government has been actively seeking popular approval, aiming to increase its support of eligible voters' base beyond the 18 percent it obtained in the 2015 elections, in particular by setting in place various welfare policies, such as a spectacularly popular programme "500-plus" consisting in monthly payments of PLN 500 per each child in addition to the first one – a programme which benefitted over 2 million families, poor and wealthy alike. Second, and meeting the scholarly definitions of "populism" as anti-

[58] In public discourse, though, there were exceptions. At the beginning of the constitutional crisis in Poland, in November and December 2015, some Members of Parliament referred to the theory of the Sejm's supremacy over the Tribunal and other constitutional bodies. Their justifications were based directly on the concept of the primacy of the Nation's will over the law, see e.g. Konrad Morawiecki, in *Sprawozdanie Stenograficzne z 2. posiedzenia Sejmu Rzeczypospolitej Polskiej w dniu 25 listopada 2015 r.* [Minutes of the Meeting of Sejm of the Republic of Poland on 25 November 2015], at 78; Marek Ast, in *Sprawozdanie Stenograficzne z 3. posiedzenia Sejmu Rzeczypospolitej Polskiej w dniu 2 grudnia 2015 r.* [Minutes of the Meeting of Sejm of the Republic of Poland on 2 December 2015] at 14-15.

pluralism, the governmental propaganda has consistently applauded "unity" and "community" as paramount social values, and at the same time depicted the opposition as enemy, evil, illegitimate. The anti-elite and anti-establishment sentiments were skilfully deployed against minorities and the opposition. Ironically, even the most excluded and disadvantaged of all groups, that is the would-be asylum-seekers and refugees, have been depicted as part of a plan designed by the elites – the European and former Polish elites, to threaten the whole population of Poland, which has let virtually none of them inti the country.

Third, the political change has been managed through public propaganda campaigns, aimed at winning the support of the "ordinary people". "Elites" have been represented as the sole beneficiaries of the post-1989 transition, while the "ordinary people" were excluded from the benefits. The usual sequence in this management of change has followed a similar script: first, a campaign of hate against a particular target group (judges, journalists, civil service appointed by the former gov't; the military; ex-Communists) has been launched, usually by governmental media; some selectively chosen defects and pathologies taken from different eras (often, long overcome) have been presented in a *pars pro toto* manner; the promise of a large-scale "replacement of elites" and a "redistribution of prestige" have been made by the rulers; mass mobilisation of public resentment has been organised, followed by actual legal changes.[59] That is why capturing the media (to start with, the public broadcasting media, as having the largest coverage and impact) was the first and essential step in managing public sentiments, and in particular the negative emotions – of hatred, disaffection, and resentment.[60]

(3) Backsliding

The concept of "backsliding"[61] is also central in this context because the dynamic and path-dependence are essential. In Poland, just as in Hungary, in contrast say to Russia or Belarus, we deal with instances of a significant deterioration in democratic qualities already attained. In fact, it has been generally acknowledged that both Hungary and Poland were among the most successful post-transitional democracies in CEE, and indeed achieved the greatest successes in their entire respective histories:[62] never before have either of these countries attained a combination of democratic governance generated by free and fair elections, rapid growth of standards of living, and safe international environments secured by membership both in the EU and NATO. Without any

[59] For repeatability of this sequence, see Ewa Łętowska, "Zmierzch liberalnego państwa prawa w Polsce", *Kwartalnik o prawach człowieka* no. 1-2/2017: 5-19 at 11.

[60] A typical news service on public TV [the acronym TVP stands for TV Poland but its critics expand the acronym as TVPiS] these days is built on three elements, usually in this order: (1) the government and in particular the Leader have great successes and fulfil their promises of caring for the ordinary people, (2) the opposition is ignorant, treacherous and silly, as well as divided by personal ambitions but above all, has no program other than a return to a despicable status quo ante, (3) "Europe" is decadent and arrogant, and suicidal in allowing Islam to take over; that is why many reasonable people abroad praise Poland so much.

[61] For the use of the concept of backsliding with regard to CEE see for instance the symposium in Journal of Democracy, Issue 4 Vol 18 (October 2007) entitled "Is East-Central Europe Backsliding?"

[62] In an article of 2002, a prominent US political scientist listed Poland and Hungary in the category of "the leaders of the group" of countries which were "en route to becoming successful, well-functioning democracies" within a broader "transitional" category, Thomas Carothers, "The End of the Transition Paradigm", *J of Dem* 13/1 (2002) (1): 5-21 at 9.

exaggeration, one may say that both these countries never had it so good in their past, all the more in their recent past.

This fact is significant to understand the specificities of the situation, because the fact of backsliding has to be distinguished from the absence of democratic progress in countries which have not achieved a satisfactory level of democracy in the first place,[63] or even where the current status quo has emerged as a result of the relative democratisation or liberalisation of an oppressive regime. Path dependence matters a great deal, and we need a language to distinguish cases such as Poland and Hungary (with recent high democratic achievement fresh in the collective memory and in institutional legacies) from states which are "stuck somewhere on the assumed democratization sequence, usually at the start of the consolidation phase".[64] The trajectory in the form of a bell curve that Poland has traversed is completely different from a static plateau of Belarus, Moldova or Russia, and these differences produce salient political and constitutional phenomena. The states which have "backslided" from a superior position are held up to higher standards, by its citizens and by the outside word, because these higher standards had once been achieved or approximated. There are institutional legacies, such as constitutional interpretations in the case law or practices of good conduct by authorities, which exert normative pressure upon the current authorities.

The word "backsliding" accurately describes this process of reversal, and the fact that there is no rapid, immediate rupture, as in a coup. It also emphasises a *process* as opposed to a state of affairs. As two political scientists describe it: "Backsliding occurs through a series of discrete changes in the rules and informal procedures that shape elections, rights and accountability. These take place over time, separated by months or even years".[65] But at the same time, one should be warned that the use of the word "backsliding" should not connote (as the word *may* suggest to some) something impersonal, purposeless, almost haphazard…[66] There is energy, restlessness, zeal and purposefulness in Poland after 2015 – as will be evidenced below.

3. Cumulative and comprehensive legal transformations

As earlier mentioned, populist backsliding in Poland should be seen as a system in which particular aspects are mutually inter-connected, and reinforce each other. In contrast, when a problematic change is introduced to a by-and-large liberal-democratic system, its potentially anti-liberal function is cushioned by a larger constitutional environment, and the system produces protections for individual liberties and checks and balances. In Poland, however, the situation is the opposite: a comprehensive assault upon liberal-democratic constitutionalism produces a cumulative effect, and the sum is greater than the totality of its parts. For example, the disempowering of the Constitutional Tribunal should be seen not as a phenomenon in itself, but as an important disabling of constitutional review of liberal rights such as freedom of assembly.[67] As Tomasz Tadeusz

[63] See Steven Levitsky & Lucan Way, "The Myth of Democratic Recession" in *J of Dem* 26/1 (2015): 45-58 at 53-54.
[64] Carothers at 10.
[65] Lust & Waldner at 7.
[66] I owe this observation to Professor Martin Krygier.
[67] As Jarosław Kaczynski candidly said, the co-called "reforms" of the CT were needed to ensure there were no legal blocks on government policies, http://www.reuters.com/article/us-poland-politics-kaczynski-

Koncewicz noted correctly: "The Constitutional Court was targeted first because that would ensure that next phases would sail through without any scrutiny from its side. Who cares that the new legislation flies in the face of the constitution since there is no procedural and institutional avenue to enforce constitutional rules?"[68] Further, the change of modes for the composition of the National Council for Judiciary (KRS) is connected with the new structure of the Supreme Court: new, politically crucial chambers of the Court (including the one in charge of, inter alia, determining the validity of elections) will be peopled exclusively by the "new" KRS – the composition of which will be under full control of the ruling party. These are just two examples of the inter-connectedness of different aspects of the assault *tous azimuts* on liberal-democratic constitutionalism: considering just one dimension, in isolation, does not reflect the true meaning of the backsliding which is comprehensive and systemic.

The two main dimensions of PiS assault on liberal constitutionalism in Poland are (a) dismantling of constitutional checks on arbitrary power, and (b) statutory restrictions on constitutional rights and freedoms. These will be discussed in turn.

(1) Dismantling of constitutional checks on arbitrary power

a. Capture and transformation of Constitutional Tribunal

The most immediate and the most spectacular anti-constitutional action by PiS was addressed against the Constitutional Tribunal. The Tribunal has established itself as a strong protector of democratic process and of limits upon the legislative and executive powers. While many of its judgments were controversial, and according to some observers (including myself) lacked the required vigour,[69] nevertheless in the landscape of European constitutional review the Tribunal established itself as a leading judicial actor contributing to defense of human rights,[70] European

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democracy/polands-kaczynski-calls-eu-democracy-inquiry-an-absolute-comedy-idUSKBN14B1U5?utm_campaign=trueAnthem:+Trending+Content&utm_content=585c5c2204d30126992cd8d9&utm_medium=trueAnthem&utm_source=twitter (last accessed 7 Nov 2017).

[68] Tomasz Tadeusz Koncewicz, *Farewell to the Separation of Powers – On the Judicial Purge and the Capture in the Heart of Europe, VerfBlog,* 19 July 2017, http://verfassungsblog.de/farewell-to-the-separation-of-powers-on-the-judicial-purge-and-the-capture-in-the-heart-of-europe (last accessed 2 January 2018).

[69] See Wojciech Sadurski, *Rights before Courts: A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe*, Springer: Dordrecht 2014, 2nd ed. at 188-93 (criticising a string of CT judgments concerning state-Church relationship); at 178-79 (criticising a landmark CT decision on abortion); at 239-40 (criticising a CT decision upholding a broadcasting law which required broadcasters to respect Christian values); at 243-44 (criticising CT decisions regarding the law of defamation); at 318-20 (criticising a CT interpretive decision on the official language); Wojciech Sadurski, *Constitutionalism and the Enlargement of Europe* (OUP: Oxford 2012) at 120-126 (criticising the language and the conceptual framework, though not the outcome, of the CT decision on EU accession); Aleksandra Gliszczyńska-Grabias & Wojciech Sadurski, "Freedom of Religion versus Humane Treatment of Animals: Polish Constitutional Tribunal's Judgment on Permissibility of Religious Slaughter", *European Constitutional Law Review* 11 (2015): 596-608 (criticising a CT judgment allowing ritual slaughter).

[70] See inter alia the Constitutional Tribunal judgments of 19 July 2011, K 11/010 (on the unconstitutionality of the Penal Code provision that had extended criminal liability for producing, recording or importing, purchasing, storing, possessing, presenting, transporting or sending – for the purpose of dissemination – printed materials, recordings or other objects being carriers of fascist, communist or other totalitarian symbols); 30 September 2008, K 44/07 (on the unconstitutionality of a provision of the Aviation Law that gave the authorities the right to permit shooting down a passenger aircraft in the event of special risk for national security); 15 July 2008, P 15/08 (on the constitutional status of spontaneous assemblies); 7 March 2007, K 28/05 (on the unconstitutionality of a provision of the Civil Procedure Code that excluded the legally incapacitated person from the circle of subjects entitled to put forward a motion to revoke the declaration of, or change the scope

integration,[71] and democratic governance.[72] So there were good reasons for PiS to target the CT as its first and foremost enemy. The very existence of a body which may invalidate laws adopted by the majority seemed anathema to the design in which the "sovereign" embodied in the parliamentary majority can implement all its political wishes. This element of contingency, instability and revocability of "reforms" inherent in any robust system of judicial review, uncontrollable as it is by the executive and/or parliamentary majority, is something that an illiberal authority cannot tolerate.

The capture of the CT by the ruling party after 2015 had two main stages. The first stage may be called that of "paralysis", and consisted mainly in a number of actions aimed at rendering the CT powerless to curb arbitrary power. Once this aim was achieved by the end of 2016, the second stage has consisted of an actual positive use of the CT against the opposition and in support of the ruling party. In contrast to the traditional anti-majoritarian mission of constitutional courts, the Tribunal became an active helper of the parliamentary majority. While the first stage gave reasons for concern that the very existence of the CT was at stake, and that a purely façade body was all that PiS wanted, the second iteration of the Tribunal – as an active collaborator in the anti-constitutional assault by PiS – showed that, perhaps contrary to the initial attempts at destroying the CT as such, the rulers identified a function for the CT in their design for democratic backsliding. The fact that PiS does not really consider the prospect of party alternation in power as realistic, and hopes to govern for an indefinite period, explains additionally why it is not interested in having an independent CT; under Tom Ginsburg's "insurance theory" of judicial review, parties which are uncertain about their future rule may seek insurance against future electoral losses by empowering a constitutional court. But PiS does not consider this possibility seriously, so at least this argument for judicial review does not apply to their calculations.

These two stages of emasculation and transformation of the CT will be considered in turn.

- **Stage One: Paralysing the Tribunal**

Immediately after coming to power, PiS engaged in a dynamic court-packing, resulting after one year in gaining a majority on the Tribunal; earlier, the PiS-appointed judges and quasi-judges effectively paralysed the Tribunal, rendering it unable to subject new laws to constitutional scrutiny.

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of legal incapacitation); 18 January 2006, K 21/05 (on the unconstitutionality of a provision of the Road Traffic Act that had required a permission for a public road assembly); 18 May 2005, K 16/04 (on the broader concept of family in the context of supplements to family allowance for single parents).

[71] See inter alia the Constitutional Tribunal judgments of: 26 June 2013, K 33/12 (Fiscal Pact); 24 November 2010, K 32/09 (Treaty of Lisbon); 18 May 2005, K 18/04 (Accession Treaty); 27 April 2005, P 1/05 (European Arrest Warrant).

[72] See e.g. judgment K 8/99 of 14 April 1999 (clarifying relationships between the legislative and executive branches; elucidating the notion of the autonomy of the parliament, and the controlling functions of the parliament); K 3/99 of 28 April 1999 (limiting the role of Prime Minister in determining the composition of the Council of Civil Service, against a general discussion of the principle of separation of powers); W. 14/95 of 24 April 1996 (determining when courts may refuse to register a political party); K 12/95 of 21 November 1995 (identifying limits of rights of association); K 37/03 (determining details of the legislative initiative); K 3/98 (determining details of the duty of social consultation in the lawmaking process); K 5/93 and K 11/02 (determining the scope of amendments that the Senate can introduce to the statute already adopted by the Sejm); K 4/06 (determining that President has no prerogative to appoint or revoke the President of the National Broadcasting Board), etc.

The most important step by the new ruling majority was to fail to recognise three properly appointed judges, elected to this position by the end of the previous term of the Parliament, and to elect into those seats three new quasi-judges. The story of this step is quite complex, and will be described here in some detail.

Shortly before the 2015 parliamentary elections, on 8 October 2015 (by the end of its 7th Term), the Parliament elected (based on the amended statute on the CT of 25 June 2015)[73] five new judges, rather than only three, to positions which became vacant under the former parliamentary term. This was done deliberately in order to block a possibility by the new Parliament (of 8th Term) to elect also two new judges to positions to become vacant in December 2015, hence already in a new parliamentary term. Electing those two extra judges by the "old" Sejm [Lower House of Parliament] was clearly improper, as subsequently stated by the CT,[74] but electing the three judges was correct, because the vacancies fell on 6 November, while the first day of the new term of the Sejm (which is the day of the first session) was 12 November. The PiS-dominated new Parliament adopted an unusual and arguably unlawful resolution on 25 November 2015[75] according to which all five (including the 3 correctly elected) were elected on 8 October irregularly, and so the elections of all five are null and void, and on that basis it later (on 2 December 2015)[76] elected five new judges.[77] The Constitution does not recognise the possibility of such a resolution annulling an earlier election of judges, a resolution which effectively adds a new, extra-constitutional, method of extinguishing the judicial term of office.

In its judgment of 3 December 2015, the CT established that the law on the CT of 25 June 2015 was unconstitutional as far as it permitted to elect *two* judges (to seats becoming vacant in December) but constitutional as far as the election of *three* "November judges" is concerned.[78] Further, on 9 December, the CT found unconstitutionality in the provisions of the law of 19 November 2015 on the

[73] Journal of Laws 2015, item 1064.

[74] In its judgment of 3 December 2015, (K 34/15, OTK ZU no. 11/A/2015, item 186) the CT found the law of 25 June 2015 amending the statute on the CT constitutional, except for the proviso which allowed the Sejm of 7th term to elect two judges to replace those whose terms of office expired already after the forming of the new parliament. The Tribunal pointed out that the newly-elected parliament had no power to invalidate the elections of previous Justices and was not authorised to elect Justices for the already occupied seats. The provision allowing the election of three judges to replace those whose terms expired in the 7th term was found constitutional.

[75] Official Gazette of the Republic of Poland 2015, item 1131–1135.

[76] Official Gazette of the Republic of Poland 2015, item 1182-1186.

[77] The CT considered constitutionality of this resolution, and in its decision U 8/15 of 7 January 2016 decided to terminate the proceedings asserting, controversially, that it is not a normative act, and thus not within the cognizance of the Tribunal, (official press release is available in English at: http://trybunal.gov.pl/en/news/press-releases/after-the-hearing/art/8836-uchwaly-sejmu-rp-w-sprawie-stwierdzenia-braku-mocy-prawnej-uchwal-sejmu-rp-z-dnia-8-pazdziernika/ last accessed 9 January 2018. For criticism, see Wyrzykowski, "Antigone", at 376-77.

[78] Judgment K 34/15. According to the official Tribunal release: "The Tribunal ruled that Article 137 of the Constitutional Tribunal Act is unconstitutional, insofar as the provision made it possible for the Sejm, during its previous parliamentary term (2011-2015), to elect two judges to the Constitutional Tribunal in place of the two judges whose terms of office were to end respectively on 2 and 8 December 2015. By contrast, the provisions regulating the procedure for electing three judges who had been chosen to assume offices after the judges whose terms of office ended on 6 November 2015 were ruled to be constitutional." (*see* English version at the CT website http://trybunal.gov.pl/en/news/press-releases/after-the-hearing/art/8749-ustawa-o-trybunale-konstytucyjnym/ (last accessed 9 January 2018). In the same judgment, the CT held also that the President of Poland was under the obligation to accept their oath.

basis of which three judges were elected by the Sejm, replacing judges whose term ended on 6 November 2015.[79] The joint implications of these two judgments are that only two judges elected by PiS majority on 2 December are properly elected (Julia Przyłębska and Piotr Pszczółkowski) while the elections of three other judges on the same day are invalid because the seats were already filled by the elections on 8 October 2015. Since CT judgments are immediately binding, the formal situation up to now is that the election of three out of five judges of the CT "elected" on 2 December 2015 was, in the light of CT case law, irregular because the seats were already filled by the three correctly elected judges in October 2015.[80]

However, on 24 October 2017[81] the CT handed down a judgment in which it "cleansed" the improperly elected judges by "reinterpreting" the K 34/15 judgment. Formally, the Tribunal ruled on (and affirmed) the constitutionality of the Introductory Provisions to the Act on the Organisation of the Constitutional Tribunal and the Mode of Proceedings Before the Constitutional Tribunal and to the Act on the Status of the Judges of the Tribunal as consistent with the Constitution[82]. In the same case a peculiar interpretation of the K 34/15 judgment was given in order to legitimise three unconstitutionally elected judges on 2 December 2015[83]. First, according to the Tribunal "a judge of the Tribunal who has been elected by the Sejm and who has taken the oath of office before the President may perform judicial duties, which means that s/he may be assigned to cases for adjudication". Secondly, the Tribunal pointed out that the K 34/15 judgment did not refer to the position or status of current Judges, because the subject-matter of that judgment concerned only a hierarchical inconsistency of norms, without any operative consequences. Third, the Tribunal did not agree with the argument that the Sejm in its 8th term elected three persons to seats already filled by the Sejm of the 7th term because the election of the previous judges was invalidated by the Sejm of the 8th term. Moreover, according to that judgment, and in contradiction to Art. 194(1) of the Constitution[84] and its well-established interpretation (that had been also applied by the K 34/15 judgment), the most important and constitutive moment for a CT Judge election is an oath before the President. Significantly, two of the improperly elected judges were part of the panel which

[79] Judgment K 35/15. In the same judgment, the CT also held that the period of 30 days set for the President to take the oath from the judges was unconstitutional; that the introduction of a 3-years tenure for the President and Vice-President of the Tribunal was constitutional but the possibility of their re-election was unconstitutional; and that the early termination by the statute of 19 November 2015 of the term of office of President and Vice-President of the CT was unconstitutional.

[80] See also Anna Śledzińska-Simon, Poland's Constitutional Tribunal under Siege, VerfBlog, 2015/12/04 (http://verfassungsblog.de/polands-constitutional-tribunal-under-siege/ last accessed 9 January 2018).

[81] Case no. K 1/17, OTK ZU no. A/2017 item 79.

[82] The Introductory Provisions to the Act on the Organisation of the Constitutional Tribunal and the Mode of Proceedings Before the Constitutional Tribunal and to the Act on the Status of the Judges of the Tribunal, Regarding the judgment, see press release in English at the CT website: http://trybunal.gov.pl/en/news/press-releases/after-the-hearing/art/9907-ustawy-o-trybunale-konstytucyjnym/ last accessed 9 January 2018.

[83] See also the other judgment that was delivered at the same day with the participation of "duplicate" Judges (K 3/17, OTK ZU no. A/2017 item 68). By its decision of 24 October 2017, the Constitutional Tribunal did not grant the request filed by the representative of the General Assembly of the Judges of the Supreme Court to exclude Mariusz Muszyński from the Tribunal's consideration of the case. See an English press release at: http://trybunal.gov.pl/en/news/press-releases/after-the-hearing/art/9904-ustawa-o-sadzie-najwyzszym-w-zakresie-dot-regulaminu-w-sprawie-wyboru-kandydatow-na-pierwszego-p/ last accessed 9 January 2018.

[84] "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". Note that the Constitution does not say anything about the oath before the President; it was a statutory addition.

handed down this judgment, including one (Muszyński) as the President of the panel, thus breaching the fundamental principle *nemo iudex in causa sua*.[85]

The gambit with "electing" three judges to the already filled seats, and not recognising the three judges properly elected before PiS gained a parliamentary majority, would not have succeeded except for the active collaboration of President Andrzej Duda in the scheme. The President swore in five PiS-elected judges in a matter of hours after the election (in the middle of the night),[86] including three "quasi-judges"[87] elected to already occupied judicial posts, and literally hours before the CT determined on the morning of 3 December that the grounds for election of three judges by the former term of Sejm were constitutional.[88] (Incidentally, there has been a discussion among experts about whether a swearing-in by President of the Republic is a constitutive act or merely a symbolic confirmation of the parliamentary election which carries the legal weight of commencing a judicial term; the majority view endorses the latter position, inter alia on the basis that the swearing in by the President is not even envisaged by the Constitution but established by a statute). The three quasi-judges, although assigned offices in the Tribunal building and put on the payroll immediately after swearing-in, were not included in the judging panels throughout 2016, until the retirement of Andrzej Rzepliński as the President of CT. One of the first actions of Julia Przyłębska in December 2016 as an "Acting President" (a position newly established by statute, not known to the Constitution and admittedly contrary to it,[89] especially since the Vice-President of the Tribunal was still in office and keen to perform the role) was to include the three "duplicate" judges in the panels, including in the General Assembly of Judges of the CT which elected her as President of the CT. The first "judgment" by a panel which included "quasi-judges" was the decision of 8 February 2017,[90] and since then, many other such "judgments" have been handed down, which may, in future, result in deeming invalid the judgments by panels in which any of them participate.

The election of Julia Przyłębska as the new President of the Tribunal on 21 December 2016, after Rzepliński stepped down at the end of his term, was also tainted by irregularities, although her status as a *judge* of the CT is uncontroversial (she was one of the two new judges elected in December 2015 to positions which were genuinely vacant). To start with, the competence of Ms Przyłębska to convene the General Assembly qua an "Acting President" is highly questionable because, as was just mentioned, that position is arguably unconstitutional, in view of the presence of a constitutionally-recognised Vice-President. Further, Judge Przyłębska was nominated as a

[85] The Tribunal refused the Ombudsman's request to exclude Henryk Cioch and Mariusz Muszyński (two "duplicate" judges) from the Tribunal's consideration of the case.
[86] See also Anna Śledzińska-Simon, Midnight Judges: Poland's Constitutional Tribunal Caught between Political Fronts, VerfBlog, 2015/11/23 (http://verfassungsblog.de/midnight-judges-polands-constitutional-tribunal-caught-between-political-fronts/ last accessed 9 January 2018).
[87] A term used in Polish journalistic language (by those who believe that the election of the three "judges" to the already filled places was improper) is "*dubler*" (which corresponds, roughly, to a "double", as in "body double" in a film, or to an understudy in a theatre production). I will be using here the words "quasi-judges" and "duplicate judges".
[88] Judgment K 34/15.
[89] This is the view of the group of legal experts of the Batory Foundation, see "Stanowisko Zespołu Ekspertów Prawnych przy Fundacji Batorego w sprawie ostatnich zmian prawnych i faktycznych dotyczących Trybunału Konstytucyjnego", Warszawa 26 January 2017 (unpublished document, on file with the author, at 1-2). Unconstitutionality is seen in the fact that the statutory "Acting President" sidesteps the constitutional position of Vice-President.
[90] Judgment P 44/015, OTK ZU no. A/2017, item 3.

candidate by the General Assembly of judges which (1) included three irregularly elected "duplicate" judges (Cioch, Morawski and Muszyński), (2) in the absence of one of the "old" judges (Judge Rymar) who was not given sufficient time to return to Warsaw from leave; (3) had no quorum because eight judges refused to vote. All these circumstances, combined, assured a bare majority of votes for Przyłębska (and since the vote of the General Assembly gave a second candidate, a quasi-judge Muszyński, only one vote, the absence of even one judge made all the difference because the law provides that the President of the Republic chooses the President of the CT from a list of two candidates submitted by the General Assembly of Judges of CT). To make things worse, and contrary to Article 21 of the statute of 13 December 2016 on CT, the thus constituted "General Assembly" even failed to take a formal resolution about the candidates presented to the President: Judge Przyłębska simply sent a letter to President Duda specifying the outcome of the vote. According to constitutional and statutory provisions, there had to be two votes and two resolutions of the General Assembly (first, concerning the election of the candidates and second, submitting candidates to the President of the Republic by General Assembly)[91]. However, in light of the minutes of the meeting on 20 December 2016, Judge Przyłębska decided to take one vote and signed one document only, which cannot be recognised as a resolution of the General Assembly (referred to in Art. 194(2) of the Constitution). The second stage of the proceedings was ignored by Judge Przyłębska probably because of the lack of quorum. Despite all these irregularities, President Duda immediately (the following day) appointed Przyłębska as a new President of CT.

This is not the end of the story of court-packing. By a shrewd manoeuvre, namely a collusion between the new President of the CT and the Minister of Justice (ex officio as well, Prosecutor General), three "old" judges have been de facto removed from judging for an indefinite period of time. Minister of Justice Zbigniew Ziobro, a leading politician of the ruling coalition, questioned in a formal motion of 11 January 2017 the regularity of election of three "old" judges: Rymar, Tuleja and Zubik back in 2010, on the basis that they were allegedly elected "*en bloc*" rather than separately (an evidently false allegation considering that the parliamentary minutes of their elections identify three widely differing numbers of votes obtained by each candidate). However, the mere fact of such a challenge was used to support a subsequent motion to depose all three judges from all panels because they may be prejudiced against the PG as an ex officio party to all proceedings before the CT, even if often his role is purely perfunctory when he is not the author of a constitutional challenge in a given case. A panel of three "new" (PiS-elected) judges endorsed this claim as an interim measure before the Minister's motion was considered on the merits (case U 1/17, currently pending) and how long it will be "pending" is entirely at the discretion of the President of the CT who clearly does not see any urgency in considering the status of three judges of her court. In itself it is scandalous because the matter should be fast-tracked and considered as most urgent because it concerns the very composition of the CT. In an extraordinary argument, the PG said that since he "questioned the legitimacy … of the judges to adjudicate, this may raise doubts as to the objectivity

[91] For more about the two-stage proceeding in accordance with the Art. 194(2) of the Constitution, see judgment of 7 November 2016, K 44/16 (unpublished in the Journal of Laws). It had been originally published in the Constitutional Tribunal Official Journal, but the K 44/16 judgment was removed from the journal and also from the CT official databases after Julia Przyłębska's election. It may be assumed that the real reason for that removal was motivated by an intention to avoid a charge of violating a constitutional provision by Przyłębska during the "General Assembly" on the 20 December 2016. The main thrust of the K 44/16 judgment was about the General Assembly's obligation to take two votes and two resolutions in order to submit candidates for the President of the Tribunal position.

of those judges in their assessment of opinions submitted by the Prosecutor General in particular matters considered by the Tribunal".[92] How disingenuous this trick is may be demonstrated by a simple thought experiment: if you have a right to participate as party to CT proceedings (for instance, because you are the Prosecutor General, who is by the nature of its office's merger with that of Minister of Justice an active politician of a ruling party) you can de facto exclude *any* judge from the CT by claiming that s/he was elected improperly (the soundness of the claim is immaterial), and then, on the basis of your very claim to argue that a judge may be prejudiced against you, as a party to CT proceedings, because you questioned his/her status, and so should be removed from judging. All it takes is an appropriately supportive President of the Tribunal.

The last aspect of court-packing orchestrated already under the chairmanship of Julia Przyłębska was the de facto removal of Vice-President of the CT, Professor Stanisław Biernat, from the CT as from the 1 April 2017 until the end of his judicial term of office, i.e. the end of June 2017. Biernat, the most vocal defender of the traditional functions and independence of the Tribunal after the stepping down of President Rzepliński, was told by the new President of the CT that he *must* use his holiday leave entitlement which, as it turned out, amounted at the time to several months. Biernat argued that the entitlement is precisely that, an entitlement, that a judge may but does not have to take. Nevertheless, Ms Przyłębska presented her decision as based on the protection of the CT budget (an untaken holiday leave would have to be paid back in cash to the Judge at the time of his retirement) and decreed the compulsory holiday of Professor Biernat, thus removing a truly outstanding "older" judge from the Tribunal.[93]

While still on the issue of the composition of the Tribunal, a truly extraordinary fact was that in the new internal rules of the Tribunal, adopted by a resolution on 27 July 2017, the Tribunal (by the votes of a new majority) had adopted an unusual gag rule, which prevents any dissenting judges from making any comments about an improperly constituted panel in their dissenting opinions. (It may be an effect of the judgment on KRS of March 2017, see below, when in their dissenting opinions, publicly broadcast on Tribunal streaming video, three of four dissenting judges[94] voiced strongly worded criticisms of the improperly, as they believed, constituted panel in this judgment, as it contained some persons who were not judges, legally speaking, and failed to include some judges who were entitled to be on the panel). The new rules, signed by Julia Przyłębska, provide that "the dissenting opinion may concern only the outcome and the justification (reasons) of the judgment. A dissenting opinion cannot apply to the rubrum of the judgment".[95] The "*rubrum*" is a preliminary

[92] Wniosek Prokuratora Generalnego z 7 marca 2017 o wyłączenie ze składu orzekającego w sprawie KP 1/17 (A motion by Prosecutor General for exclusion of judges from the panel in case Kp 1/17, 7 March 2017). Similar motions have been submitted in relations inter alia to case Kp 4/17.

[93] See Marek Domagalski & Tomasz Pietryga, Interview with Julia Przyłębska, *Rzeczpospolita* 14 January 2017 (http://www.rp.pl/Sedziowie-i-sady/301149987-Prezes-TK-Julia-Przylebska-o-Trybunale-Konstytucyjnym.html last accessed 9 January 2018); the Vice-President of the Constitutional Tribunal Stanisław Biernat's statement of 14 March 2017, https://www.tvn24.pl/wiadomosci-z-kraju,3/oswiadczenie-stanislawa-biernata-do-prezes-julii-przylebskiej,726397.html (last accessed 10 January 2018).

[94] Judges Kieres, Pyziak-Szafnicka and Wronkowska-Jaśkiewicz.

[95] Para 54 of the Constitutional Tribunal Internal Rules, Annex to the Resolution of the General Assembly of Judges of the Constitutional Tribunal of 27 July 2017 (Official Gazette of the Republic of Poland 2017, item 767; available in Polish at http://trybunal.gov.pl/fileadmin/content/dokumenty/Akty_normatywne/Regulamin_TK.pdf last accessed 8 January 2018. It is not clear how particular judges voted in respect of the Internal Rules as the only person who

part of the judgment, which includes the name of the case and the names of the judges sitting on the panel. From now on, judges are formally prevented from saying that some of the "judges" have been included improperly in the panel. The matter is perhaps marginal, but indicative of the "new broom" policies in the Tribunal.

So much for the court-packing: as one can see, it was successful due to a collusion between the parliamentary majority, the President, and the newly elected judges (including quasi-judges) supported by the PiS majority. And it achieved its purpose: all the new judges and quasi-judges elected by PiS parliamentary majority, with a single illustrious exception,[96] have so far behaved predictably, and voted in lockstep for the government positions in all cases considered by the Tribunal. It was greatly assisted by the fact that Ms Przyłębska thoroughly changed the compositions of the panels in pending cases, including the judges-rapporteurs, by removing "older" judges from the responsibilities of being rapporteurs in many panels in which they had already been working on a draft judgment.[97] But court-packing was not the only process employed by PiS in order to disable the Tribunal from scrutinising PiS legislation. Throughout the entirety of 2016,[98] the Parliament adopted no less than six subsequent statutes on the CT, [99] in addition to a number of drafts officially

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signed is Julia Przyłębska. See also Łukasz Woźnicki, "Sędziowie Trybunału Konstytucyjnego ocenzurowani", Gazeta Wyborcza, 10.8.2017, at 4.

[96] Judge Pszczółkowski. The reasons for his "defection" are unclear, and a hypothesis of personal integrity cannot be rejected outright.

[97] Since taking her office, Judge Przyłębska took 98 decisions on compositions of panels in pending cases. An analysis indicates that as a result of these changes: (a) quasi-judges have been included in numerous panels; (b) the panels are composed so as not to have them dominated by "older" judges; (c) many changes include also the identity of judges-rapporteurs.

[98] The saga of subsequent new laws on the CT in fact began in 2015, with the statute of 19 November 2015 amending the statute on the Constitutional Tribunal (Journal of Laws 2015, item 1928), which referred mainly to the terms of office of the President and Vice-President of the CT, and to the commencement of terms of office of judges of the CT (invalidated partly by the CT on 9 December 2015, K 35/15, OTK ZU no. 11/A/2015 item 186), and the statute of 22 December 2015 amending the Constitutional Tribunal statute (Journal of Laws 2015, item 2217), which contained many of the provisions to be repeated in the statutes in 2016 (invalidated by the CT on 9 March 2016, K 47/15, OTK ZU No. A/2016 item 2). After case no. K 47/15 the legislator adopted the new statute of 22 July 2016 on Constitutional Tribunal (Journal of Law 2016, item 1157) that implemented legal rules very similar to the provisions that have been assessed as unconstitutional in the earlier Tribunal case law or based on the reasons that have been recognised unconstitutional in the cases no. K 34/15, K 35/15 and K 47/15.

[99] Statutes of: i) 19 November 2015 (found partly unconstitutional by the CT in judgment K 35/15 of 9 December 2015); ii) 22 December of 2015 (found unconstitutional as a whole by the CT on 9 March 2016, K 47/15); iii) 22 July 2016 (found partly unconstitutional on 11 August 2016, K 39/16); iv and v) 30 November 2016 (on the Organisation of the Constitutional Tribunal and the Mode of Proceedings Before the Constitutional Tribunal, Journal of Laws 2016, item 2072; on the Status of the Judges of the Tribunal; Journal of Laws 2016, item 2073); vi) 13 December 2016 (the Introductory Provisions to the Act on the Organisation of the Constitutional Tribunal and the Mode of Proceedings Before the Constitutional Tribunal and to the Act on the Status of the Judges of the Tribunal; Journal of Laws 2016, item 2074). The last three statutes had been partly recognised as constitutional by the CT on 24 October 2017, K 1/17 (the judgment was delivered with the presence of quasi-judges in panel). Here are brief descriptions of the CT judgments on those laws: In the judgment K 35/15, the CT struck down a number of amendments to the Constitutional Tribunal Act: regarding the possibility of the re-election of the President of the CT (on the basis that it would give the executive scope for unlawful interference with the actions of the CT), the provision that a person elected to the position of a judge of the CT is to take the oath before the President of Poland within 30 days of the election (on the basis that it would postpone taking of the office by a newly elected judge), and the provision which would extinguish terms of office of the current President and Vice-President of the CT after 3 months of the amendment's entry into force (on the basis that it constitutes interference by the legislature with judicial functions, and also with

announced but eventually not submitted to a vote, when combined, they created a chilling effect upon the CT which was effectively bombarded by new drafts and compelled to deal mainly with laws about itself rather than substantive laws adopted at the same time.[100] This relentless production of new laws on the CT contained a large number of devices which may be grouped into three categories: (1) those which would effectively exempt the new laws just adopted by PiS from constitutional scrutiny by the CT, (2) those which would paralyse its decision-making, by making it more difficult, and often impossible, to hand down any judgment, and (3) those which would increase the control by the executive and the legislative over the CT. With the interventions by Venice Commission[101] and the European Commission,[102] and subsequent governmental responses to the Opinions of Venice Commission[103], those drafts and laws produced a mosaic of interlocking

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the powers of the President of Poland to appoint President and V-P of the CT). In the case no. K 47/15 the Tribunal ruled on the unconstitutionality of most of the changes and highlighted that: "The currently binding Constitution does not authorise the legislator to specify the jurisdiction and organisational structure of the Constitutional Tribunal, since the Constitution itself regulates those issues". In the judgment K 39/16 of 11 August 2016 (OTK ZU no. A/2016, item 71) the CT found unconstitutional a new statute on the CT of 22 July 2016 on the basis that most of the provisions of the new law repeated the provisions already found unconstitutional in its earlier judgments and reiterated that the government had no authority to decide which CT judgments it would publish and which it would not. Due to the violations of the principle of separation of powers, the constitutional requirement of cooperation between constitutional state authorities, the constitutional guarantee of the independence of courts and tribunals, as well as all the norms and principles which underlie the constitutional order of the state, the Tribunal ruled in the case no. K 39/16 on the unconstitutionality of the 22 July 2016 Constitutional Tribunal Act provisions that: a) enacted the requirement that a full bench of the Tribunal should adjudicate in situations where three judges of the Tribunal will file a relevant motion in this respect within 14 days from the date of receiving the certified copies of constitutional complaints, applications, or questions of law; b) made the consideration of a case contingent upon the attendance of the Public Prosecutor-General; c) regulated terms on which judges of the Tribunal may raise an objection to a proposed determination with regard to a case considered by a full bench of the Tribunal; d) imposed on the Tribunal the obligation to consider all cases commenced by a constitutional complaint or a question of law within one year from the date of entry into force of the 2016 Act.

[100] See Łętowska at 13.

[101] Opinion on Amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland, adopted by the Venice Commission at its 106th Plenary Session (Venice, 11-12 March 2016), Opinion no. 833/2015, CDL-AD(2016)001; Opinion on the Act on the Constitutional Tribunal, adopted by the Venice Commission at its 108th Plenary Session, (Venice, 14-15 October 2016), Opinion no. 860/2016, CDL-AD(2016)026. Interestingly, the first Opinion was actually solicited by the Polish Minister of Foreign Affairs Mr Witold Waszczykowski, in an act of political naiveté or bravado which cost his Deputy Minister in charge of legal affairs his job. After that, the Polish Minister knew better; the second Opinion was requested by the Secretary General of the Council of Europe, Mr Thorbjørn Jagland.

[102] The European Commission Opinion Concerning the Rule of Law in Poland (Brussels, 1 June 2016); The European Commission Rule of Law Recommendation on the situation in Poland (Brussels, 27 July 2016). See more: http://europa.eu/rapid/press-release_IP-16-4476_en.htm.

[103] See also in this context the expert report on issues regarding the Constitutional Tribunal commissioned by the Speaker of the Sejm, Marek Kuchciński, presented in July 2017 (available in English at: http://www.marekkuchcinski.pl/wp-content/uploads/2016/09/EN-Raport-Zespo%C5%82u-Ekspert%C3%B3w-do-spraw-problematyki-Trybuna%C5%82u-Konstytucyjnego-wersja-angielska-1.pdf, last accessed 10 January 2018). For criticism, see Marcin Matczak, Demokratyczne czy prawne? Uwagi na tle Raportu Zespołu Ekspertów do spraw problematyki Trybunału Konstytucyjnego [Democratic or legal? Comments on the background of the report on issues regarding the Constitutional Tribunal], Przegląd Konstytucyjny 2017(1) 92-110, p. 109 (available at http://www.przeglad.konstytucyjny.law.uj.edu.pl/wp-content/uploads/2017/07/PK1.2017-4Matczak.pdf, last accessed 10 January 2018. For a short polemic, see Wojciech Sadurski, "Pułapka dworskich ekspertów. Wokół Trybunału Konstytucyjnego" [A trap for expert-courtiers. On Constitutional Tribunal], Gazeta Wyborcza, 10 August 2016, online edition, available at

provisions, some of which were invalidated by CT, with some of these invalidating judgments remaining unpublished – ending up with a picture totally obscure and incomprehensible to the general public, which probably was just the purpose.

Here are some examples of provisions, enacted throughout 2016, and belonging to each of the three categories just listed (with a caveat that there is clearly an overlap between category (1) and (2). *(1) Provisions exempting recent PiS legislation from scrutiny:* a requirement of strictly respecting the sequence of judgments according to the time the motion reached CT;[104] a requirement of considering a motion no earlier than 3 months (and in the cases decided by full bench: 6 months) after notifying the participants of the proceedings about the date of the proceedings;[105] of a compulsory passage of time between the adoption of a statute and its constitutional review (30 days), but 4 judges may demand postponement of the deliberation by 3 months if they disapprove of the main lines of the proposed judgment, and they may make such a demand twice which extends the passage of time to 6 months;[106] a requirement to postpone the proceedings if the Prosecutor General does not attend, combined with a list of cases in which the presence of the PG is compulsory (including in all cases before a full bench)[107] even if he was properly notified, which gives the Minister of Justice/ Prosecutor General the power to prevent consideration of the case by simply staying away… – these provisions should be viewed in combination with there being no "vacatio legis" of most of new PiS laws, hence effectively immunising them from review.[108] *(2) Provisions paralysing the decision-making by the CT:* a requirement of a difficult-to-achieve qualified majority for the General Assembly of two-thirds for judgments of the CT;[109] the minimum number of judges required for judgments initiated by abstract review increased from 9 to 13 out of 15 judges;[110] a requirement to set a new composition of a panel for cases already under consideration which effectively means consideration of the case from the beginning;[111] a requirement of judging in the

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http://wyborcza.pl/1,75968,20523335,pulapka-dworskich-ekspertow-wokol-trybunalu-konstytucyjnego.html last accessed 10 January 2018.

[104] Article 1(10) of the statute of 22 December 2015; Article 38 (3-6) of the statute on the CT of 22 July 2016. Venice Commission lucidly recognised the true reason for the sequence rule: "constitutional courts have to be able to quickly decide urgent matters also in cases concerning the functioning of constitutional bodies, for instance when there is a danger of a blockage of the political system, as is the case now in Poland", Opinion on Amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland, adopted by the Venice Commission at its 106th Plenary Session (Venice, 11-12 March 2016), Opinion no. 833/2015, CDL-AD(2016)001 para 63.

[105] Art 1 (12) (A) of the statute of 22 December 2015. As the Venice Commission observed, "Mandating such long time lapses for hearings could deprive the Tribunal's measures of much of their effect, and in many cases even make them meaningless….", Opinion on Amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland, adopted by the Venice Commission at its 106th Plenary Session (Venice, 11-12 March 2016), Opinion no. 833/2015, CDL-AD(2016)001 para 87.

[106] Article 68 (5-7) of the statute on the CT of 22 July 2016.

[107] Article 66 (6) of the statute on the CT of 22 July 2016.

[108] Here is one significant example of the deliberate paralysis of the CT by the legislature through the failure to include *vacatio legis*: The Amendments of 22 December 2015 to the law on the CT provided for the immediate entry into force; they contained a required quorum of 13 judges; since the Tribunal at the time had only 12 sitting judges, it would not be able to sit if it were to apply the Amendment in reviewing the Amendment itself, as it did in its judgment K 47/15.

[109] Article 1(3) of the statute of 22 December 2015. Note that the Constitution provides that the CT takes decisions "by a majority of votes", Art 190(5), which was understood always to mean a simple majority; whenever a special majority is required, the Constitution (and not a statute) says so explicitly.

[110] Article 1(9) of the statute of 22 December 2015.

[111] Article 2 of the statute of 22 December 2015.

full panel of 15 judges if three judges demand it,[112] etc. *(3) Provisions enhancing the powers of the executive and the legislative towards the CT:* the President of the Republic or Prosecutor General (who is also the Minister of Justice) may characterise a case as "particularly complex" thus triggering a full court consideration; the President or Minister of Justice may make a motion for a disciplinary process against a judge of the CT,[113] and the Sejm can decide about a disciplinary removal of a judge;[114] the President must agree to extinguishing a judge's term of office on disciplinary grounds even if the CT-based disciplinary panel has so decided;[115] increasing the number of candidates for the position of President to be presented by the CT to the President of Poland from two to three[116] which, in combination with the method of voting (each judge having a single vote) means that a judge with very low support – possibly even his/her own only – may make it to the list); a provision that a judgment shall be published in the Journal of Laws upon "an application" by the President of the CT to the Prime Minister,[117] seemingly giving the Prime Minister a potential basis for denying the publication.[118] Most of these provisions were then found unconstitutional by the CT, and in particular by the judgments of 9 December 2015 (K 35/15), 9 March 2016 (K 47/15) and of 11 August 2016 (K 39/16) but in the process, the CT became effectively paralysed by having to consider mainly laws on itself ("existential jurisprudence").[119] The government tried to disable the Court from invalidating these laws by claiming that the procedure for scrutinising them must be based on the very laws under scrutiny (this, on the basis of a doctrine of presumption of constitutionality, and the principle that the law is immediately binding unless it contains a *vacatio legis* provision, which these laws as a rule did not), thus creating a Catch-22 situation for the CT.[120] The Tribunal refused to fall into this trap and found that it cannot, in its judgments, use the very provisions which it scrutinises for unconstitutionality,[121] and that the only proper approach is to apply the Constitution directly.[122]

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[112] Article 26 (1) (1) (l) of the statute on the CT of 22 July 2016.
[113] Article 1(5) of the statute of 22 December 2015.
[114] Article 31 (3) of the statute of 22 December 2015.
[115] As a think tank properly observed, "A requirement to obtain a consent of the President [of Poland] may in a particular case mean, that the executive will compel the CT to admit to adjudicating panels a judge who was deemed by the General Assembly of the CT not deserving to fulfil that function. In this way, the President of the Republic would become a super-umpire and an appellate body positioned above the top court in our country", "Stanowisko Zespołu Ekspertów przy Fundacji im. Stefana Batorego w sprawie projektu ustawy o Trybunale Konstytucyjnym" [Opinion by a Group of Experts of the Stefan Batory Foundation concerning the bill on CT], 5 July 2016, unpublished manuscript on file with the author, at 1.
[116] Article 16 of the statute of 22 July 2016.
[117] Article 80 of the statute of 22 July 2016.
[118] See Opinion on the Act on the Constitutional Tribunal, adopted by the Venice Commission at its 108th Plenary Session, (Venice, 14-15 October 2016), Opinion no. 860/2016, CDL-AD(2016)026 para 75.
[119] "Poland" in Global Review at 165.
[120] As Vice-President of the CT at the time, Professor Stanisław Biernat, observed in oral reasons for the judgment, one and the same law cannot be at the same time the basis and the subject-matter of a scrutiny.
[121] See more: Piotr Radziewicz, "Refusal of the Polish Constitutional Tribunal to Apply the Act Stipulating the Constitutional Review Procedure", *Review of Comparative Law* 2017 (1): 23-40, http://www.kul.pl/files/35/rcl_1_2017/02_radziewicz.pdf (last accessed 10 January 2018).
[122] There is a clear constitutional-textual basis for direct application of the Constitution in general (Art. 8(2): "The provisions of the Constitution shall apply directly, unless the Constitution provides otherwise"), and by the CT in particular: Art. 195 (1) provides that judges of the CT are subject only to the Constitution, significantly, omitting their subjection to statutes (in contrast to an equivalent provision regarding all other judges who are, according to Art. 178 (1), subject to the Constitution *and* statutes. About the context and legal basis of the K 44/17 judgment, see Tomasz Gizbert-Studnicki: "A state of constitutional necessity versus standard legal reasoning", VerfBlog, 3 June 2017 (http://verfassungsblog.de/a-state-of-constitutional-necessity-versus-standard-legal-reasoning/, last accessed 10 January 2018).

As Mirosław Wyrzykowski later opined, "The construction of the direct application of the Constitution was used in urgent circumstances, i.e. in an attempt to save the constitutional order. … As the supreme norm, the Constitution cannot be helpless when its most fundamental principles are violated".[123] All these legislative attacks on the Tribunal continued only up to the point when PiS acquired a majority on the CT (8 out of 15)[124] – at which time all these innovations were miraculously forgotten because they had become unnecessary.

The current law on the CT, based on two statutes of 30 November 2016[125] and one of 13 December 2016,[126] does not contain any of these inventions which PiS was trying hard to introduce throughout 2015 and 2016, and in particular: a) there is no full bench requirement for abstract review; b) no qualified majority in voting; c) no obligation to reopen the proceedings; d) no requirement of judging in the full panel of 15 judges if three judges demand it; e) no obligation to postpone the deliberation on demand of minority of judges; f) no requirement to strictly respecting the sequence of cases. In fact, the law of November 2016 more or less replicates older legal provisions of the CT statute of 22 July 2015 (adopted by the Sejm of 7th term, before the PiS won the election) and the CT statute of 1997 (adopted by the Sejm of 2th term just after the adoption of current Constitution). The earlier rules which seemed so defective to PiS when it did not have a majority on the Tribunal turned out to be perfectly satisfactory once it captured the majority.

To add insult to injury, in addition to court-packing and paralysing the Tribunal by subsequent new bills on the Tribunal itself, the government committed perhaps the most obviously unconstitutional act, namely the refusal to publish judgments of the CT which it deemed improperly handed down. According to the government they were taken irregularly because they were in contradiction to the very laws on the CT under scrutiny in these judgments. Still under the Presidency of Andrzej Rzepliński, and until the take-over of the Tribunal by PiS-appointed majority, the government simply refused to publish judgments in the official gazette. The first of the judgments which were deemed unworthy of immediate publication was the already mentioned K 34/15 of 3 December 2015,[127] and the ground for the refusal to publish was that the verdict was reached by a five-judges panel rather

[123] Wyrzykowski, "Antigone", at 381. See also Opinion on Amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland, adopted by the Venice Commission at its 106th Plenary Session (Venice, 11-12 March 2016), Opinion no. 833/2015, CDL-AD(2016)001, para 41 ("A simple legislative act, which threatens to disable constitutional control, must itself be evaluated for constitutionality before it can be applied by the court").

[124] Half a year after the election of Julia Przyłębska as the President of the Tribunal position, the process of creating a PiS majority on the Tribunal has been completed. The governing party elected 9 judges. Four of them were elected to properly vacant seats (Judges Zbigniew Jędrzejewski, Michał Warciński, Grzegorz Jędrejek, Andrzej Zielonacki). They replaced judges, whose terms of office were finished in the end of 2016 and in the first part of 2017. The other two judges were elected by the parliament in December 2015 (Judges Julia Przyłębska and Piotr Pszczółkowski). Three other persons were illegally elected by the Sejm of the 8th term to the already filled seats (Mariusz Muszyński, Lech Morawski, Henryk Cioch).

[125] The statute on the organisation of and proceedings before the CT, and the statute on the status of judges of the CT.

[126] This is an essentially transitional statute; its name is the provisions introducing the statute on the organisation of and proceedings before the CT, and the statute on the status of judges of the CT.

[127] Available in English at: http://trybunal.gov.pl/en/hearings/judgments/art/8748-ustawa-o-trybunale-konstytucyjnym/ last accessed 10 January 2018.

than a full panel.[128] It was published after a delay – on 16 December 2015[129]. The second-mentioned judgment of 9 December 2015 was published after 9 days – on 18 December 2015.[130]

After the K 47/15 judgment, that had invalidated the statute on the CT of 22 December 2015, the government argued that all CT judgments were delivered in violation of that statute and could not be published in the Journal of Laws. The grotesque character of the situation should not be missed: *the government refused to publish the judgments handed down in violation of a statute, which was invalidated in the very judgment which the government refused to publish…* In that period the Tribunal reviewed the constitutionality of statutory provisions on: a) electoral districts and decisions of the National Electoral Commission[131]; b) customs officers returning to service[132]; c) refund of VAT[133]; d) the scope of parliamentary immunity,[134] e) decisions on refundable treatment and rehabilitation[135]; f) local referenda and an extraordinary procedure for the protection of personal rights during campaign[136]; g) reimbursement for costs of court proceedings[137]; h) limited access to public information[138]; i) limitation of the right to a fair trial under a bankruptcy law[139]; j) material obstacles for person with disabilities during a driving license exam[140]; k) disciplinary dismissal of a police officer[141]; l) appealing against a decision of a court of second instance[142]; m) administrative enforcement costs[143]; n) rights of fully incapacitated persons and standards for social care homes[144]; o) appealing under the law on juvenile justice[145]; p) return of a rehabilitation allowance[146]; r) scope of a right to sickness benefit[147]; s) rights of prisoners in prisons and detention centres[148].

All judgments mentioned in the previous paragraph, except for K 47/15, were eventually published after the statute of 22 July 2016 entered into force. But there was a nasty bit: the statute divided the Tribunal's judgments into those that were to be published in the Journal of Laws and those that would not be published, and included a stigmatising statement about the Tribunal's rulings "issued

[128] This shift from a full panel to a 5-judges panel was necessitated by the situation created by the President and the Sejm regarding the composition of the CT. A full panel requires 9 judges, while at the time, when three judges elected by the end of 7th term were not sworn in, and three other judges had to recuse themselves because they had participated in the legislative work on the statute on the CT which was under scrutiny in that case, only 8 judges were available.
[129] Journal of Laws 2015, item 2129.
[130] Journal of Laws 2015, item 2147
[131] Judgment of 6 April 2016, P 5/14. Unpublished for 4 months (see Journal of Laws 2015, item 1232).
[132] Judgment of 6 April 2016, P 2/14. Unpublished for 4 months (see Journal of Laws 2015, item 1233).
[133] Judgment of 6 April 2016, SK 67/13. Unpublished for 4 months (see Journal of Laws 2015, item 1234).
[134] Judgment of 21 April 2016, K 2/14. Unpublished for 4 months (see Journal of Laws 2015, item 1235).
[135] Judgment of 26 April 2016, U 1/15. Unpublished for 4 months (see Journal of Laws 2015, item 1236).
[136] Judgment of 11 May 2016, U 1/15. Unpublished for 3 months (see Journal of Laws 2015, item 1237).
[137] Judgment of 17 May 2016, SK 37/14. Unpublished for 3 months (see Journal of Laws 2015, item 1238).
[138] Judgment of 7 June 2016, K 8/15. Unpublished for 2 months (see Journal of Laws 2015, item 1239).
[139] Judgment of 8 June 2016, P 62/14. Unpublished for 2 months (see Journal of Laws 2015, item 1240).
[140] Judgment of 8 June 2016, K 37/13. Unpublished for 2 months (see Journal of Laws 2015, item 1241).
[141] Judgment of 14 June 2016, SK 18/14. Unpublished for 2 months (see Journal of Laws 2015, item 1242).
[142] Judgment of 21 June 2016, SK 18/14. Unpublished for 2 months (see Journal of Laws 2015, item 1243).
[143] Judgment of 28 June 2016, SK 31/14. Unpublished for 1 month (see Journal of Laws 2015, item 1244).
[144] Judgment of 28 June 2016, K 31/15. Unpublished for 1 month (see Journal of Laws 2015, item 1245).
[145] Judgment of 29 June 2016, SK 24/15. Unpublished for 1 month (see Journal of Laws 2015, item 1246).
[146] Judgment of 5 July 2016, P 131/15. Unpublished for 1 month (see Journal of Laws 2015, item 1247).
[147] Judgment of 12 July 2016, SK 40/14. Unpublished for 1 month (see Journal of Laws 2015, item 1248).
[148] Judgment of 12 July 2016, K 28/15. Unpublished for 1 month (see Journal of Laws 2015, item 1249).

in breach of the provisions of the Constitutional Tribunal Act of 25 June 2015"[149]. Soon after, on 11 August 2016, the Tribunal issued a ruling K 39/16 in which it said about the statute: "Not only did the legislature exceed the scope of its systemic competence by making such a statement, it also failed to provide any factual or substantive grounds in support thereof. Such interference of the legislature with the realm of the judiciary … is inconsistent with the standards of a state ruled by law". [150] The judgment of the Tribunal did not impress the government which kept maintaining its position and decided to delay the publication of five more judgments.[151] Judgments K 47/15 of 9 March 2016,[152] K 39/16 of 11 August 2016[153] and K 44/16 of 11 November 2016[154] have been never published *up to now* in the Journal of Laws, and were removed from the Constitutional Tribunal Official Journal; the information about the very fact that these judgments were ever handed down was removed from CT websites and the judgments database as soon as Julia Przyłębska became the President of the CT.

The refusal to publish (incidentally, not even communicated with an explanation to the CT, which instead was informed by the media) was made against a clear and imperative constitutional requirement (Art. 190(2)) which demands that the government publish judgments "immediately", and which does not give the government any power of controlling the judgments submitted to it by the CT for publication: simply speaking, it is an absolute and unconditional obligation of the government. The government here plays the role of a printing press, nothing more. Usurpation of an authority to refuse to publish a verdict clearly put the government on a collision course with the CT, and with the Constitution for that matter. It was the first time in the history of the CT that another body (here, the executive) usurped the power to decide which judgments of the CT are properly taken and which constitute, according to the government, merely non-binding opinions. Much later, after the Prosecutor's office refused to undertake investigation regarding the government's dereliction of duty, arguing that the government's failure to publish the judgments was dictated by its unwillingness to include into the official circulation the judgments which are contrary to legal order,[155] an ex-President of the CT, Professor Marek Safjan, declared that it was the point at which the rule of law in Poland ended.[156]

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[149] Article 89 of the statute on the CT of 22 July 2016.
[150] Judgment of 11 August 2016, K 39/16.
[151] See judgments of: 27 November 2016, SK 11/14; 11 October 2016, K 24/15; 18 October 2016, P 123/15; 25 October 2016, SK 71/13; 11 October 2016, SK 28/15 (see Journal of Laws 2016, items 2196-2200).
[152] Published alternatively in English at: http://citizensobservatory.pl/wp-content/uploads/2016/03/TK_wyrok_09032016_ang.pdf .
[153] Published on an "alternative" website in English at: http://niezniknelo.pl/trybunal/en/news/press-releases/after-the-hearing/art/9311-ustawa-o-trybunale-konstytucyjnym/index.html last accessed 10 January 2018.
[154] Published on an "alternative" website in English at: http://niezniknelo.pl/trybunal/en/news/press-releases/after-the-hearing/art/9433-zasady-powolania-prezesa-i-wiceprezesa-trybunalu-konstytucyjnego/index.html, last accessed 10 January 2018.
[155] As Professor Wyrzykowski aptly observes, under the institutional system as from 6 March 2016 (the law on Prosecutor General's office, see below in this paper) the complaint was addressed to a person who reports to the official who is the target of the complaint: Prosecutor General, merged with the Minister of Justice, is subordinate to Prime Minister, Wyrzykowski, "Antigone" at 385.
[156] See Gazeta Wyborcza 22 February 2017, online edition.

- **Stage Two: Turning the CT into a positive aide to the government**

Paralysis and disempowerment of the CT achieved through the means just described brought about the fundamental effect aimed at by the elite ruling in Poland after 2015: extinguishing effective constitutional scrutiny of its laws. However, once the combination of court-packing, inclusion in the Tribunal of three improperly elected judges, and the natural attrition related to the end of terms of office of "old" judges (including the President and the Vice-President of the Court) produced a PiS majority on the Tribunal, these measures of paralysing the Tribunal turned out to be no longer necessary. Rather than a body incapable of taking any decisions at all, the Tribunal has become transformed into a positive, active aide of the government and the parliamentary majority. The government found it a useful means of legitimising its power, and at the same time legitimated the Tribunal by activating it with its own motions. As Martin Krygier put it well, "The government sends petitions to the Tribunal so that it can lend legal legitimacy to purely political inroads on the system of justice and the Constitution".[157] Moreover, the judgments of the CT, on their merits, produced very convenient legal circumstances which served as aids to the legislative and political agenda of PiS. Four examples will illustrate this new, "positive" role of the CT.

The first is a CT judgment of 20 June 2017[158] on the National Council of the Judiciary (Polish acronym: KRS). In this judgment, the "new" CT found the existing statute on KRS unconstitutional on the basis that it discriminates against judges of the lower courts by differentiating the procedures of appointment of judges-members of KRS depending on the level of courts they represent. But the Constitution does not mandate any particular methods of selection of judicial representatives on the KRS, and the specific design of elections was completely within legislative discretion. The CT also found unconstitutional a system of "individual" terms of office of particular judges-members of the KRS while it claimed that the Constitution requires a "joint/collective" term of office – even though the Constitution does not imply any such thing, and in any event, there is nothing about the statutory terms of office which renders it individual rather than collective. All in all, these constitutional objections were clearly pretextual, in order to pave the way for a new statute on KRS. How useful the judgment was became apparent when the parliamentary majority, and then the President (having vetoed the initial PiS bill) brought about their own bills on the KRS which included extinguishing the constitutionally guaranteed terms for the judicial members of KRS and also changing the mode of recruiting the judicial members from election by judges to parliamentary election, which gave majority politicians a decisive say in the composition of KRS. In defending the extinguishment of the KRS members' terms of office halfway through the term, notwithstanding the constitutional guarantee of a 4 year term, parliamentary majority spokespersons and the President pointed precisely at the CT judgment of 20 June 2017 which deemed the statute under which those judicial members were elected, unconstitutional.[159] The fact that there was no relationship between the alleged constitutional defects of the old statute (discrimination against some categories of judges due to differentiation between election of members of KRS by different levels of the judiciary; the allegedly "individual" terms of office) and the proposed changes in the mode of electing of judicial members of KRS (after all, a response to alleged discrimination in election modes by the judiciary cannot consist in removing the power of electing judicial members of KRS altogether)

[157] Krygier, Institutionalisation, at 5
[158] K 5/17, OTK ZU no. A/2017, item 48.
[159] Remarks by President Andrzej Duda in a TV interview (26 November 2017, at TVN24).

seemed not to bother the authors of new bills on KRS. In their view, the judgment of the CT gave them *carte blanche* to fundamentally alter the relationship between KRS and the parliament. (There will be more about the "reforms" of KRS below).

The second example is a pending case before the CT[160] regarding the President's prerogative of granting mercy. The background was that soon after coming to office, President Duda had conferred the benefit of mercy upon the former head of secret services Mariusz Kaminski who was punished in a non-final judgment (prior to the appellate proceedings which were underway) for criminal abuse of office. If the judgment were to stand, this would make it impossible for Kamiński, one of the closest collaborators of Jarosław Kaczyński, to serve on the government (in the same position, more or less, as the one the execution of which earned him a criminal punishment). The Supreme Court [SC], in considering an appeal of one of the parties to the same proceedings (an alleged victim of Kamiński's conduct), had to decide whether mercy regarding a non-final and non-binding judgment is legally effective, and it determined that it was not. PiS reacted with anger, and the Speaker of the Sejm lodged a motion to the CT on the basis of a so-called "contest of competencies" (*spór kompetencyjny*) between the CT and the President. This motion was supported by a group of PiS MPs along with the Minister of Justice/Prosecutor General. According to the submission, the SC had no power to pronounce on the circumstances and limits of the constitutional prerogative of President. But a startling aspect of this motion was that it was not a controversy regarding competencies at all: the SC did not claim any presidential competencies. It provided for a legal characterisation of the constitutional right of mercy because it was crucial for judicial proceedings pending before the SC. Whatever the judgment turns out to be (as of this writing, the case is pending), the case confirms a pattern of conduct of PiS vis-à-vis the CT in which the ruling party tries to use it as a vehicle for its own political plans, and in particular as a supporter in confrontation with other bodies, such as the Supreme Court.

The third example is provided by the CT judgment of 24 October 2017[161] on the statute on the Supreme Court[162] and the resolution of the General Assembly of Judges of the Supreme Court of 14 April 2003 on the regulations regarding the selection of candidates for the position of Chief Justice of the Supreme Court. The group of PiS MPs (supported by the Minister of Justice/Prosecutor General and the Speaker of the Sejm) claimed that the statutory provisions about the elections of candidates for the position of Chief Justice (the candidates to be presented to the President for his choice in nomination) were unconstitutional because they improperly delegated some details of the election to an internal act of the SC, namely an ordinance which is a sub-statutory act and as such which should not define any actions which concern external bodies (here, the President). The motion (concerning the law that was in operation, unchallenged, for 15 years, and under which also two predecessors of Chief Justice Małgorzata Gersdorf were elected) was absurd because all the important matters were actually determined by the *statute* (the matters such as the number of candidates to be presented to the President, the required quorum and majority of votes, as well as a requirement of secrecy of voting), while the SC internal regulations only concretised them with

[160] Case files no. Kpt 1/17 (see documents in Polish at http://ipo.trybunal.gov.pl/ipo/Sprawa?&pokaz=dokumenty&sygnatura=Kpt%201/17, last accessed 10 January 2018).
[161] K 3/17, OTK ZU no A/2017, item 68.
[162] Journal of Laws 2016 r. item 1254, 2103 and 2261; Journal of Laws 2017, item 38 and 1452.

regards to minor, technical details, such as the design of the ballot paper etc. But the CT gladly accepted the arguments of unconstitutionality, and only refrained from concluding that the election of CJ Gersdorf was ineffective, on the basis that the President's choice of her (it was President Komorowski at the time) somehow superseded the unconstitutionality of the first stage of the nomination/election process. The best explanation of this puzzling decision (how can a presidential decision following an allegedly unconstitutional procedure bring about a constitutionally proper outcome?) is that, by the time the judgment was handed down, it was already known that CJ Gersdorf would be a victim of the compulsory retirement age of 65, contemplated in the negotiations between Duda and PiS regarding the law on SC at the time, so there was no point in implicating the CT in such a shocking act as the removal of the CJ of the SC. But by pronouncing about the unconstitutionality of an important element of her election (namely, nomination by her peers on the SC) the CT significantly weakened, in the eyes of her opponents, her legitimacy. In delivering the oral argument for the judgment Vice-President of the CT Mariusz Muszyński (an improperly elected "quasi-judge") ominously alluded to a possibility of bringing the past President of the Republic, Bronisław Komorowski, before the Tribunal of State (a body charged with dispensing constitutional liability for violations of law by top officials), thus casting a shadow of doubt upon the legacy of an outspoken opponent of the PiS rule.

The fourth example is the CT judgment affirming a newly adopted statute on assemblies (the statute itself will be further discussed below). In the case KP 1/17[163], the applicant (who was, perhaps surprisingly, President Duda) raised an argument of constitutional principle on the violation of freedom of assembly by the statutory preference for the new type of public assemblies – called assemblies of a cyclical nature, which are meant "to celebrate events of high importance in Polish history". The motion argued – correctly, in the light of established case-law in Poland[164] and in the ECtHR[165] – that the degree of constitutional protection of assemblies cannot be made contingent upon the substantive purposes and messages conveyed. It should be emphasised that this kind of assembly had not been recognised by the Polish legal order so far. The new regulation has also excluded a constitutional right to appeal against the decisions by public authorities regarding prohibition of public assembly prohibition. One of the consequences of awarding the cyclical status to an assembly is its privileged position, including the exclusive right to take place in priority to other assemblies. As everyone in Poland knew, the real reason for this new law was to guarantee an absolute priority for monthly public rallies organised by the governing party and its supporting associations to commemorate the death of President Lech Kaczynski and 95 other passengers in the aircraft crash of 10 April 2010. One of the distinctive feature of these rallies, organised each 10th day of the month, is a prayer and expression of support for the government and party. The Tribunal (in a panel which consisted also of quasi-judges, and with a quasi-judge Muszyński as rapporteur) affirmed the constitutionality of the statutory provisions. According to its position, assemblies of a cyclical nature have a constitutionally legitimate aim connected with the protection of national values proclaimed in the Preamble of the Constitution. The Tribunal stressed that due to the connection with the Nation's values and history, precedence over the regular assemblies should be guaranteed for this new type of assembly. In the reasons provided orally by Mr Muszyński, it was claimed that the priority status of cyclical assemblies is properly "counter-balanced" by more

[163] Judgment of 16 March 2017, Kp 1/17, OTK ZU no. A/2017 item 28.
[164] Judgment of the CT of 18 January 2006, K 21/05.
[165] See, e.g., Bączkowski and Others v. Poland, judgment of 3 May 2007, Appl. No. 1543/06.

stringent conditions required of the organisers when applying for such a status. The judgment's justification also confirmed a broad discretion of the parliament in the area of freedom of assembly. The judgment has been strongly criticised by the "old" judges[166] and even by one of the judges elected in December 2015.[167] The dissenting opinions emphasised the unconstitutional composition of the Tribunal (three legally elected judges were not allowed to adjudicate; the judgment was delivered by a panel in which three persons were not legally elected judges). Substantively, the dissenting opinions pointed out that the differentiation of the status of assemblies has a discriminatory effect; that the law entrusts administrative authorities with deciding which assemblies "deserve" a higher status, that the law has improperly retrospective effects (because it makes recognition of an assembly as cyclical dependent upon past events), and as such, it violates the principle of public trust.[168] The law, fundamentally departing from the main canons of freedom of assembly established in Polish constitutionalism so far (such as non-discrimination because of content), had a clearly partisan purpose – and the CT's affirmation of this statute was just one more example of its enthusiastic collaboration with the ruling elite.

So far, I have been discussing the *judgments* of the CT. It should be added, however, that the new "leadership" of the CT is also actively supporting the government in their extra-curial pronouncements. This applies in particular to the President of the CT: Ms Julia Przyłębska has been an active supporter of the governmental legal drafts, regardless of a possible conflict of interests which she may encounter if those laws eventually come before the Tribunal. For instance in the middle of July 2017, when public controversy was at its apex regarding the judiciary bills, and on the eve of President Duda's decision concerning the veto, Ms Przyłębska pronounced confidently on a governmental TV that the bills "do not threaten the separation of powers" and that they "meet the expectations of the entire society".[169] In the same interview, she criticised the opposition for allegedly provoking "unjustified" views by foreign observers that the rule of law in Poland is endangered.[170]

As one can see, after the electoral victories of 2015, PiS transformed the CT from an effective, counter-majoritarian device of scrutinising laws for their unconstitutionality into a powerless institution paralysed by consecutive bills rendering it unable to review new PiS laws, and then into a positive supporter of the enhanced majoritarian powers. In a fundamental reversal of the traditional role of a constitutional court, it is now being used to protect the government from laws enacted long before PiS rule. This changed role, combined with general distrust of the CT and concerns about

[166] See the dissenting opinions of Judges: Leon Kieres, Małgorzata Pyziak-Szafnicka and Sławomira Wronkowska-Jaśkiewicz.
[167] See the dissenting opinions of Judge Piotr Pszczółkowski. His dissent was based, however, on the narrowest ground, namely on the absence of a means of reviewing an administrative decision about prohibition of an assembly.
[168] Oral remarks of Judges Małgorzata Pyziak-Szafnicka and Sławomira Wronkowska-Jaśkiewicz, 16 March 2017, personal notes of the author.
[169] "Julia Przyłębska: ustawy o sądach wychodzą w kierunku o którym mówi całe społeczeństwo", *Rzeczpospolita* 17 July 2017, onlin edition, http://www.rp.pl/Sadownictwo/170729671-Julia-Przylebska-Ustawy-o-sadach-wychodza-w-kierunku-o-ktorym-mowi-cale-spoleczenstwo.html (last accessed 7 January 2017).
[170] Id.

legitimacy of its judgments, explains an extraordinary drop in the number of its judgments.[171] The CT as a mechanism of constitutional review has ceased to exist: a reliable aide of the government and parliamentary majority was born.

A more general reflection may be in order. Constitutional designers of the "3rd Republic" (a term to design the post-Communist Poland) saw the Constitutional Tribunal as the centrepiece of the protection of the rule of law, and of the constitutional checks upon majoritarian politics. That was at a time when the Tribunal was largely peopled by liberal lawyers of the highest standards, and the judgments eventually created a canon of liberal constitutionalism in Poland. In contrast, the "dispersed" model of constitutional review was despised because "ordinary" judges (many tainted by their service in the previous regime) were not to be trusted with the protection of new values. Or such was the near-consensus among liberal constitutionalists.[172] But if one places all one's trust in a small, 15-person body, to carry such an enormous burden of the constitutional control of politics, one makes it easy for populists to quickly dismantle the system by hitting at its centrepiece.[173] And this is exactly what has happened: the incapacitation of the Constitutional Tribunal was one of the most spectacular and earliest actions by the populists. With hindsight, it would have been much more difficult for them to succeed if legal culture was generated under which all judges, low and high, could refuse to apply a statute they deemed unconstitutional. There is a textual basis for this "dispersed" control (Article 8 of the Constitution proclaims its "direct applicability") but there are no habits, culture and skills among the judges to act accordingly: the years of hubris by the Constitutional Tribunal and its acolytes (granted, often for the best of reasons) made the "regular judiciary" less constitutionally empowered.

b. The "Regular" judiciary

The second main target of the populist assault, after the CT, has been the "regular" judiciary. While it was relatively easy to handle a 15-person body like the CT, there are some 10 thousand judges in Poland, including 83 judges of the Supreme Court.[174] And while, under the "old" CT it has become a

[171] In the first three quarters of 2017, 261 motions (including constitutional complaints, concrete review initiated by courts, and abstract review) were lodged in the CT, while in 2013, 2014 and 2015, the annual numbers were, respectively, 480, 530, and 623. "Concrete" judicial review in the first three quarters of 2017 accounted for 18 "constitutional questions", compared to 2013, 2014 and 2015 for 58, 80 and 135 questions, respectively. In the first three quarters of 2017, the CT issued 57 decisions; in 2013, 2014, and 2015: 127, 119 and 173, see Małgorzata Kryszkiewicz, "Trybunał nie ma się czym pochwalić", *Dziennik Gazeta Prawna* 8 Nov 2017 at 5. There is a significant gap in the statistics for 2016: the CT has not published statistics for that year. The last three months of 2017 will not make a big difference: the CT website read on 10 November 2017 shows only five pending cases, see http://trybunal.gov.pl/ (last accessed 10 November2017).

[172] For a description and critique, see Wojciech Sadurski, Rights Before Courts (Springer: Dordrecht 2014, 2nd ed.), at 40-43.

[173] Bojan Bugaric writes correctly about "the institutional fragility of constitutional courts when they are targeted by illiberal forces", Bojan Bugaric, Populists at the Gates: Constitutional Democracy Under Siege? (21 September 2017), ResearchGate, available at https://www.researchgate.net/publication/319955332_The_Populists_at_the_Gates_Constitutional_Democracy_Under_Siege last accessed 1 January 2018, at 17.

[174] Information about the Supreme Court in 2016, Sejm files No 1539, p. 15 (http://orka.sejm.gov.pl/Druki8ka.nsf/0/37A3BE6219F9B632C125811C004076C1/%24File/1539.pdf).

generally accepted that the CT has a near-monopoly on constitutional adjudication,[175] the elimination of the CT as a device of constitutional review triggered a debate about a dispersed, or decentralized, constitutional review, performed by all courts, US-style. This debate was prefigured by some jurisprudential discussions in Poland right after the fall of Communism, but a conventional wisdom prevailed under which the conditions of transition necessitated a centralized system of abstract review performed by a robust and activist constitutional court. But when the latter has been dismantled and turned into an aide of the government, judges and scholars returned to the idea of a decentralized and concrete review.

There are some constitutional grounds for such a practice. For one thing, the Constitution proclaims direct application of the Constitution (Art. 8) – which means that if in the view of a judge a sub-constitutional provision clashes with the Constitution, the former should be disregarded and the latter applied directly. For another thing, the Constitution states that judges are "subordinate to the Constitution and statutes (Art. 178 (1)) which clearly abandons an anachronistic view that only statutes are directly binding upon the judiciary. Further, the established and popular practice of "concrete" review by the CT – conducted at the bequest of a judge who had doubts as to the constitutionality of a statute and stays the proceedings until the CT provides an authoritative response to the question – means that judges are conversant with the idea that responsibility for applying only those statutory provisions which are consistent with the Constitution rests with them. And in recent years there have been some examples of a judicial set-aside of a statutory provision under constitutional provisions and values. On the basis of the principle of direct application of the Constitution, the Court of Appeal in Wroclaw determined that the use of the "evidence from a poisoned tree", as permitted by the code of criminal procedure, shall be unconstitutional due to the violation of the constitutional principles of dignity and privacy. According to the Court, statutory regulation on "poisoned tree" evidence was not binding in this particular case, and so defendants might be finally acquitted.[176]

More ominously for the PiS elite, more and more scholars and judges expressed in non-judicial contexts their admiration for the idea of decentralized review, as compatible with the Constitution and necessitated by the disempowerment of the CT. The spectre of regular judges conducting, in the process of concrete adjudication, review of PiS laws, provided a special incentive for PiS to fundamentally transform the common courts, including the SC. But this was not the only reason. Regular courts were shown to be recalcitrant and not amenable to handing down "correct" judgments in politically sensitive matters, such as regarding the sentencing of the already mentioned Mariusz Kamiński for his abuse of duties as minister in charge of special services or ordering the

[175] See Wojciech Sadurski, Rights before Courts: A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe (Springer: Dordrecht 2014, 2nd ed.) at 40-43.

[176] See the Court of Appeal in Wroclaw judgement of 25 April 2017, case no II AKa 213/16 (see the judgement in Polish at: http://orzeczenia.wroclaw.sa.gov.pl/content.pdffile/$002fneurocourt$002fpublished$002f15$002f500000$002f0001006$002fAKa$002f2016$002f000213$002f155000000001006_II_AKa_000213_2016_Uz_2017-04-27_002-publ.xml?t:ac=$N/155000000001006_II_AKa_000213_2016_Uz_2017-04-27_002).

prosecutor to re-open the case of alleged violation of rules of parliamentary procedure by the PIS majority during the Sejm voting on the annual budget Act in 2016.[177]

In addition, the Supreme Court and many lower courts openly sided with the "old" CT during the crisis of 2016; for instance on 27 April 2016 the General Assembly of the Supreme Court adopted a resolution stating that the judgments of the CT are binding even if they are not published. (Taking its cue from the SC's stand, several local self-government units also declared that they would apply unpublished judgments of the Tribunal). All in all, the PiS ruling elite concluded that the courts may become – or already are – a countervailing power which may check and control the legislation and politics of the hegemon. Hence, a comprehensive package of judicial "reforms".

The legislative proposals had been preceded, in a sequence of events characteristic of other reforms as well, by a well-orchestrated propaganda campaign against judges. All of a sudden, pro-PiS media and in particular public TV began publicizing particular cases of corruption or petty offences committed by judges (in one of the famous instances, a judge was shown to have stolen a sausage from a grocery store: subsequently it turned out that the judge in question had been long removed from the profession and that she suffered nervous disability at the time of committing the theft). This was followed by a government-funded smear campaign against judges (big billboards in public spaces), accompanied by top politicians attacking the judiciary: PM Beata Szydło referring to the judiciary as a "judicial guild" (or caste) and saying that "everyone knows someone who was hurt by the judiciary system",[178] the Minister of Justice saying that case law of the SC is directly linked to the communist times[179] etc. This was a prelude to the legislative package.

As will become apparent from a brief survey of the package, none of the "reforms" were addressed against the main failure of the judicial system which was depicted by PiS propaganda as the main reason for reforms: delays in the proceedings, often raising a sense of unfairness. Literally none of the devices proposed by PiS has a relationship to the promptness of the judicial process, and *au contraire*, some of them definitely will lengthen the proceedings and inflict upon the courts hundreds of thousands, if not millions, of new cases (this is the case of the so-called extraordinary complaint). All these "reforms" have a simple common denominator: they are made to change the cadres of the judicial system, and establish stronger control by the political branches – the ministry of justice and both PiS-dominated chambers of parliament – over the personnel of the system of justice. This is consistent with the dominant idea of Jarosław Kaczyński that all the wrongness of the old system related to the people who served in it: replace the people with the better ones and you will change the system. And "better" means more controllable by the dominant party, more loyal, more in tune with the program of PiS. This logic led to the three statutes which together make up a legislative package on the judiciary. One of these laws was adopted by the Parliament immediately (the statute on common courts), while the other two (on KRS and on SC), only after President Duda

[177] District Court in Warsaw decision of 18 December 2017, VIII Kp 1335/17 (see full justification in Polish at: http://n-2-2.dcs.redcdn.pl/file/o2/tvn/web-content/m/p1/f/cd14821dab219ea06e2fd1a2df2e3582/d89a4961-1128-411a-bb8d-682818f56380.pdf).

[178] CCJE (2017) Prov5, "Report on judicial independence and impartiality in the Council of Europe member States in 2017", Strasbourg 3 November 2017 para 324,

[179] CCJE (2017) Prov5, "Report on judicial independence and impartiality in the Council of Europe member States in 2017", Strasbourg 3 November 2017 para 326,

vetoed[180] initial bills on 25 July 2017 and collaborated in the preparation of the final bills, eventually adopted by the PiS-dominated legislature.

- **The law on the National Council of Judiciary (KRS)**

The first of the three laws concerned the National Council of Judiciary (Polish acronym: KRS), a constitutionally designated body with the key role in all judicial nominations because it has the power to nominate all the candidates for judicial position in the nation, and propose them to the President of the Republic (Art. 179 of the Constitution).[181] It also has some additional powers regarding the judiciary, namely to: safeguard the independence of courts and judges;[182] apply to the Constitutional Tribunal regarding the constitutionality of normative acts on courts and judges;[183] adopt a code of ethics governing the judicial profession; express an opinion on drafts of normative acts concerning the judiciary; select a disciplinary prosecutor for judges; express an opinion in the case of dismissal of president of the court.[184] PiS from the very beginning of its campaign against the judiciary considered the judicial component of the KRS to be the main obstacle to its reform. According to the Constitution the KRS consists of 15 judges; the remaining members are: Chief Justices of the SC and Supreme Administrative Court, Minister of Justice, representative of the President, 4 MPs "elected by the Sejm" and 2 senators "elected by the Senate". The Constitution does not provide explicitly that the judges on KRS are elected by judiciary: it only says that 15 members are "chosen from amongst the judges" (Art 187) but so far it has always been understood that they are elected by the judiciary itself, and accordingly the statute on KRS established a complex mode of elections within different branches and types of the judiciary. Importantly, the "new" CT's judgment of 20 June 2017 (in which some quasi-judges participated) which found the statute unconstitutional did not object to the very principle that the judges are elected by judges but only objected to different methods of those inter-judiciary elections at different levels of courts (see above).

[180] *See* the President of the Republic veto and a request for reconsideration of the statute by Sejm of 31 July 2017, Sejm doc No 1789 (http://orka.sejm.gov.pl/Druki8ka.nsf/0/C62F3C799EFE5A3DC1258191003FCC06/%24File/1789.pdf).

[181] It is a matter of controversy under the constitutional law whether the President may reject the KRS nominations. Since the Constitution entered into force, Presidents accepted KRS proposals under the Art. 179 of the Constitution and they did not claim any competence to influence or reject the KRS motions. However the year 2008 brought a new practice, when President Lech Kaczyński for the first time rejected, without a legal basis and for political reasons, the KRS nominations (*see* decision of the President of the Republic of Poland of 3 January 2008, Official Gazette of the Republic of Poland 2008, No 4, item 38). This case had established a precedent and started a long judicial saga that *inter alia* involved the CT's and the Supreme Administrative Court's decisions on a lack of judicial competence to control the prerogatives of President (*see* the Constitutional Tribunal decision of 19 June 2012, SK 37/08, OTK ZU No 6/A/2012, item 69; the National Administrative Court decision of 9 October 2012, I OSK 1891/12; for criticism and broader context see Michał Ziółkowski, Prerogatywa Prezydenta RP do powoływania sędziów (uwagi o art. 144 ust. 3 pkt 17 i art. 179 Konstytucji) [Prerogative of the President of the Republic of Poland to appoint judges (comments on article 144, para. 3, subpara. 17 and article 179 of the Constitution)], Przegląd Sejmowy 2013(1): 59-76 at 66-76).

[182] Art. 186(1) of the Constitution.

[183] Art. 186(2) of the Constitution.

[184] Art. 3 of statute of 12 May 2011 on the National Council of the Judiciary (Journal of Laws 2016, item 976).

The principle that the judicial component of the KRS is a representative of the judiciary and therefore must be elected by judges has not been challenged until now. As the Consultative Council of European Judges (CCJE), a body affiliated with Council of Europe, said in its recent Report, "the Committee of Ministers of the Council of Europe took the position that not less than half the members of Councils for the Judiciary should be judges chosen by their peers from all levels of the judiciary and with respect for pluralism inside the judiciary".[185] The same was emphasized by the Venice Commission which has adopted the view that "a substantial element or a majority of the members of the Judicial Council should be elected by the Judiciary itself".[186] In addition to the principled argument for maintaining the constitutional custom of letting the judges elect the judicial component of the KRS, there was also a textual argument: with regard to MPs sitting on the KRS, the Constitution explicitly provides that they are "elected by the Sejm" (and, similarly, with regard to the Senators that they are "elected by the Senate"), so if the constitution makers wanted to allow or mandate the election of judges-members of the KRS by the Sejm, they would have said it openly.

This principle has been questioned by PiS in its bill on KRS, and also by President Duda in his own bill proposed after his veto to the PiS bill. Both PiS and Duda wanted the 15 judges on KRS to be elected by the legislature rather than by judges themselves as is currently the case. The only disagreement was about the majority needed for their election (PiS proposed a simple majority; Duda: 3/5 majority, on the basis of the argument that it would let the opposition have some influence upon the composition of the KRS). In the end, the law voted on by Sejm on 8 December 2017 and the Senate on 15 December 2017, and signed by the President on 20 December 2017, envisaged that the 15 judges in KRS will be elected by the Sejm[187]. The candidates may be proposed by groups of citizens (minimum 2000) or groups of 25 judges (in practice it means that the political parties nominating their candidates will not have to take into account candidates supported by judges, and the support by 2000 citizens will be easily arranged by local offices of MPs); then on that basis each of the parliamentary party caucuses will be able to nominate up to 9 candidates, after which a parliamentary committee will select 15 candidates to be presented to the Sejm. The Sejm will elect the KRS members by a 3/5 majority but if this mode will not result in a full list of 15, the remaining members will be elected by a simple majority. This gives the ruling party a decisive say in the composition of the KRS, and indirectly, in the nominations of judges; in effect, it is a return to the proposals initially vetoed by the President. A remark by the Venice Commission, addressed to an earlier draft, applies well to the law eventually adopted: the mechanism of assuring compromise in

[185] The Opinion of the CCJE Bureau of 12 October 2017 on the draft legislation on the Polish National Council of the Judiciary presented by the President of Poland (CCJE-BU(2017)9Rev), para 14, p. 4 (https://rm.coe.int/opinion-of-the-bureau-of-the-ccje-on-the-draft-act-of-september-2017-p/168075ddf0). *See also* the OSCE Office for Democratic Institutions and Human Rights final opinion on draft amendments to the act on the national council of the judiciary and certain other acts of Poland, No JUD-POL/305/2017-Final, Warsaw, 5 May 2017 (http://www.osce.org/odihr/315946?download=true).

[186] Report of the Judicial Appointments and the Report on the Independence of the Judicial System, quoted in the opinion on the draft act amending the act on the national council of the judiciary, on the draft act amending the act on the Supreme Court, proposed by the president of poland, and on the act on the organisation of ordinary courts No. 904/2017, adopted by the Venice Commission at its 113th Plenary Session (8-9 December 2017), para 17, p. 6 (http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2017)031-e).

[187] The Act of 8 December 2017 amending the Act on the National Council of the Judiciary and certain other acts (Journal of Laws 2018, item 3).

the vote for members "would not be effective if in the second round candidates supported only by the ruling party may be elected by a simple majority of votes".[188]

The law also envisages a pre-term removal of all the judges currently sitting as members of the Council despite a constitutionally guaranteed term of office (of 4 years). The unconstitutional extinguishment of the constitutional term of office was never even questioned by Duda when he vetoed the initial bill, and this arrangement has been maintained in the statute. In the original PiS version, adopted by the Parliament on 12 July 2017 but vetoed by the President;[189] the KRS was to be divided into two chambers: a "judicial" and a "political" one, and there was a requirement of consensus by both chambers for any binding decision – this would give the politicians an extra power of veto against KRS decisions on judicial nominations etc. But even with the abandonment of this idea, the ruling party's politicians and judges elected by PiS will together have certainly a comfortable majority on the KRS. The Venice Commission's opinion stated the obvious: a combination of a new, parliamentary method of election of judges in KRS with the termination of terms of office of all currently serving members "is going to weaken the independence of the Council with regard to the majority in Parliament".[190] In fact, it is an understatement. In conjunction with the new act on the SC and on ordinary courts it amounts to the full capture of the judiciary by the ruling party.

- **The law on the Supreme Court**

The initial bill by PiS envisaged a scorched-earth tactic regarding the SC: extinguishment *ex lege* of terms of office of all judges, with the Minister of Justice having a right but no duty to reappoint particular judges upon their request, and appointment of all the remaining judges by a "new" KRS. This seemingly outraged the President who vetoed the bill. Whether the outrage was a propaganda trick or a true expression of a sense of humiliation by the President, the Presidential bill transferred the power of consent to continue in a judicial position from the Minister to the President himself; further, only those who reached the newly lowered retirement age of 65 would have to step down or request a right to continue. This solution was adopted in the law eventually enacted. The new retirement age (formerly: 70) means that about 40 percent of judges of the SC, and of course this includes the most experienced ones, will find themselves in the retirement zone, or compelled to make a demeaning request to the President, who maintains discretionary power on the matter. In itself, reducing the age of retirement and effectively shortening the term of office during the term may be considered unconstitutional, as was found with regard to the same approach in Hungary by the Hungarian Constitutional Court[191] and the Court of Justice of the EU.[192] This applies also to Chief Justice Małgorzata Gersdorf, notwithstanding the fact that her term of office as Chief Justice is

[188] Opinion 904/2017 para 22.
[189] See the President of the Republic veto and the request for reconsideration a statute by Sejm of 31 July 2017, Sejm doc No 1792 (http://orka.sejm.gov.pl/Druki8ka.nsf/0/DB68E664E1215734C1258191003FCBFB/%24File/1792.pdf).
[190] Opinion 904/2017 para 31. *See also* the European Commission recommendation of 20 December 2017 regarding the rule of law in Poland complementary to Commission Recommendations (EU) 2016/1374, (EU) 2017/146 and (EU) 2017/1520, Brussels, 20 December 2017, C(2017) 9050 final.
[191] Judgment of 16 July 2012.
[192] Case C-286/12, European Commission v Hungary.

constitutionally described as 6 years – Art. 183(3). As President Duda explained in a TV interview, the retirement age (brought about by a statute) takes precedence over the constitutional term of office.[193] (When asked by the journalist conducting the interview whether he should not worry that, if the opposition party comes to power they may want to use the precedent and shorten his own term of office, Duda responded that he has a long way to go before reaching 65 years, clearly failing to grasp the nature of the problem). This is one of the most striking instances of changing the constitution by a statute.

There is one other significant change compared to the status quo: under the new statute, President of the Republic will choose the Chief Justice of the SC from five candidates (currently: two) presented by the General Assembly of the SC. This obviously increases the control of the President over the SC, reduces the impact of the SC upon election of its own Chief Justice, and opens up a possibility that a judge chosen by the President will enjoy only minimal support by judges of SC.[194]

In addition, the law envisages a huge increase in the number of judges on the SC (from 82 to 120). Combined with the forced stepping down of a large number of judges over 65, this, according to conservative assessments, creates vacancies of about 60 percent of all judges on the SC, to be filled of course by a "new" KRS. In this ingenious way, the law produces a brand new composition of the top court, peopled largely by judges selected by the parliamentary majority.

So much for the cadres of the SC. Structurally, the law brings about some important innovations, and in particular creation of two new chambers, peopled by new judges (hence, appointed through the newly politicized procedure), including a chamber on "extraordinary control and public affairs" tasked *inter alia* with determining the legality of election results (note the connection between a ruling party having the dominant say in the composition of this chamber, via a "new" KRS, and its interest in adjudicating on electoral disputes). As the Venice Commissions observes, the result of this design will be that "judges appointed by a [KRS] dominated by the current political majority would decide on issues of particular importance, including the regularity of elections, which is to be decided by the Extraordinary Chamber".[195] The second new chamber dealing with disciplinary proceedings against judges (and other legal professions) is a device to focus public opinion on judicial accountability. It has been widely publicized that the budget of the Court would envisage a 40-percent bonus to judges serving on that chamber. In addition, both new chambers would have panels including lay judges, elected by the Senate; the only eligibility criterion would be high school graduation. This mode of recruitment of lay judges assures, again, the dominant influence of PiS (which has a comfortable majority in the Senate). There is no other explanation for including, the first time in its history, lay judges into the SC, which is inconsistent with the role of SC as a court "of law" and not "of facts".

Another clearly populist innovation, proposed by the President and incorporated into the final act, is the new appellate instrument: an "extraordinary complaint", in addition to three stages of appellate measures already existing in Polish law. The complaint will be able to be lodged against every *final* judgment over the last twenty years (with very few exceptions, such as judgments concerning divorce) during the transitional period, and over the previous five years after the transitional period.

[193] Remarks by President Andrzej Duda in a TV interview (26 November 2017, at TVN24).
[194] See, similarly Venice Commission Opinion 904/2017 paras 73-77.
[195] Opinion 904/2017, para 43, footnote omitted.

Critics note that, in addition to being redundant (there are already some instruments of special appeals in Polish law, such as cassation), the new procedure will deluge courts possibly with millions of cases, resulting in delays in judicial proceedings much worse than the current ones, which figure in the governmental propaganda as the main rationale for the "reforms". The new instrument was presented by the President as meeting the popular sense of justice but in reality will greatly undermine the sense of judicial stability, *res judicata*, and in consequence, the rule of law.

The law on KRS and that on the SC have to be considered jointly: their cumulative effect will be that the judges elected by judges-members of the KRS elected by the politicians will occupy a large number of seats on the SC (perhaps around 60 percent), including majority or totality of seats on new special super-chambers of the SC. This gives the parliamentary majority and the President (who will obtain great discretionary powers over the composition of the SC, an enhanced power over the selection of the Chief Justice, and a power of adopting the rules of procedure of the SC) great new controls over the apex court of Polish judicial system.

All this – in addition to the enhanced executive powers over "common courts", as determined in the statute which the President had not even initially vetoed but signed on 24 July 2017.

- **The law on the Organization of Common Courts**

This statute, signed by the President on 24 July 2017 without vetoing it or without sending it to the CT for preliminary review, gave the Minister of Justice/Prosecutor General [MJ/PG] additional great powers regarding the national judicial system in addition to already expansive powers that the Minister enjoyed (already before that law, the Minister had the powers to assign new judges to individual courts, to establish divisions and branch divisions of courts, and establish or abolish courts and determine territorial competency areas, authorize transferrals of judges to other courts or secondment s to other state institutions, request disciplinary proceedings against a judge, as well as lodge an appeal against decisions of a disciplinary court, etc). The new law put the court system under effective control of the Minister of Justice to an even higher degree, in particular by giving the MJ/PG a power of appointing and dismissing the presidents of all courts within 6 months of the law's entry into force, extinguishing their previously set terms, without need to give any reasons and without having to take into account the opinion of the general assembly of judges of the affected court (under the law so far, the MJ had to obtain approval of the general assembly of judges of the relevant court, or in the case when such approval was denied, of the KRS).[196] After a transitional period of 6 months, the MJ will maintain a power of dismissal of court presidents under vague standards of "serious or persistent failure to comply with the official duties" or "other reasons which

[196] Minister of Justice Mr Zbigniew Ziobro has enthusiastically made use of this new opportunity, dismissing some 2 Presidents of courts of appeal, 17 Presidents of regional courts and 15 Presidents of district courts within the first 4 months of the law's operation (see Ministry of Justice information of 19 December 2017, 17 October 2017, 21 September 2017 and 14 September 2017, published at the website: https://www.ms.gov.pl/pl/). Some dismissals were clearly motivated by personal animus: in the best known case, he dismissed the President of the Cracow Regional Court, the very court where his own civil suit against doctors allegedly guilty of breaching medical art in treatment of his father has been going on for a number of years.

render remaining in office incompatible with the sound dispensation of justice": grounds easily manipulable to suit the Minister's wish.

This is a very important power if one considers that in Poland, court presidents have vast control over judges in their courts (in particular, they assign judges to the divisions and set out their duties which gives them the power to make sure that "unreliable" judges will not deal with politically sensitive issues, e.g. in criminal law; they assign and replace judges hearing a case, and may alter the composition of a judging panel), and play an important role in the case-management process. The new law also lowers the retirement age from 67 to 65 (men) and 60 (women) but the MJ has acquired a power of extending the term of office beyond retirement age, with the law not specifying the length of time for which such extension may be granted (thus allowing for a discretionary power of refusing the extension or extending for a very short time, creating a vulnerability of the judge to pressure).[197] After the entry of the new law in force, there have been several known cases of the MJ refusing judges' application for renewal beyond the new retirement age, without giving any reasons.[198]

The lowered retirement age created a high number of vacancies to be filled by the newly politicized KRS. Over the last years before proposing a new law, MJ failed to propose new judges to the KRS under its current institutional design, as a result of which some 600-700 judicial positions became vacant; when added to several hundred judges currently working in the Ministry of Justice, this amounts to about 1000 judicial positions (10 percent of all the judges) waiting to be appointed when the executive gains effective control over the KRS. Also the judicial career path was made even more dependent on the MJ: the National School of Judiciary producing candidates for judgeship is fully dependent on the MJ; and its graduates, turned into apprentice-judges for 4 years, will be able to be promoted to a full judgeship only if well evaluated by MJ.

The new law has also introduced a new disciplinary hierarchy among court presidents, with the MJ on the top. Each higher court's president may issue a critical notice about the president of a court lower in the rank in his/her area, with the Minister having the power of upholding or dismissing such a "notice"; furthermore, the MJ himself can issue such critical remarks; in both cases, the MJ has the power of reducing allowance for the post of president. Furthermore, all presidents of courts of appeal must submit to the MJ annual reports, with the Minister entrusted with "grading" those reports, and depending on the grade, reducing or increasing allowance for the court president. As Venice Commission observes, as a result "all court presidents become a part of a pyramid, with the [MJ] on the top of it. The Minister performs the function of a highest disciplinary authority in the 'chain of command' composed of court presidents".[199] The Minister's power to interfere with the courts presidents' salaries based on his evaluation of their work, without any participation of the judiciary in the process, is a blatant interference with judicial independence.

As one can see, the three judiciary-related statutes enacted by the PiS majority (including the two with the active collaboration of the President triggered by his initial vetoes) contain a large number of very questionable features, listed above, but their truly nefarious effect is produced by the

[197] See similarly Venice Commission Opinion 904/2017 para 109.
[198] See Agata Łukaszewicz, "Minister często mówi sedziom 'nie'" [The Minister often says "no" to judges], *Rzeczpospolita* 10 January 2018 at 15.
[199] Opinion 904/2017 para 114.

accumulation of different provisions of various acts. They should be seen as a system in which the threat to independence of the judiciary in one provision is amplified by another provision of another statute (for instance: the lowering of the age of retirement in the statute on the SC combined with the new composition of KRS allows for a large influx of politically dependent and vulnerable judges to the SC; creation of two new chambers of the SC entrusted with politically highly sensitive matters is compounded by the participation of lay judges in those cases, elected by a simple majority of the Senate, etc.) or, minimally, a possible measure of control of the executive in one act is disarmed by a measure in another act (e.g., the power of KRS to control the ministerial dismissal of a court's president is weakened by athepolitical composition of KRS and a requirement of 2/3rd majority of votes for such a decision, which is highly unlikely to be obtained). The "positive reinforcement" effect is even stronger if one considers the interactions of these laws with the other statutes, not belonging to the "judicial package": blatant instances of unconstitutionality of the statutes, observed above, are rendered unreviewable by the transformation of the CT.

A cumulative effect obtains also from the interaction of the judicial package with another statute, namely the law of early 2016 on Public's Prosecutor's Office. This act will be discussed briefly now.

c. The law on the Public Prosecutor's Office

The major function of the new law of 28 January 2016[200] was to merge the hitherto separate positions of Minister of Justice and Prosecutor General, and to endow the newly merged position with enhanced, large prerogatives. The 2016 law put an end to the principle of independence of prosecutors which was the declared aim of the earlier law of 2009;[201] in contrast, the new law tailored specifically to the ambitions of Minister of Justice Zbigniew Ziobro was defended on the basis of a need for effective management and a centralised subordination within an overall system of public prosecution. The system became incorporated into the executive branch and explicitly politicized, with its head being a member of the government. The new competences of the PG/MJ mean that now he can intervene in prosecutorial investigation at any stage, and *give orders regarding specific cases, c*an transfer cases from one prosecutor to another, can change and revoke a decision of any subordinate public prosecutor, can inspect the materials collected in the course of any preparatory proceedings, can reveal details of non-final investigations to public authorities and to "other persons" (including media), etc.

This is a degree of interference by the Minister of Justice unknown to any other European system; as the Venice Commission observes, "Even if there are a few systems [in Europe] where the Minister of Justice can give instructions, the Polish system stands out because of the competence of the Public

[200] Journal of Laws 2016, item 177. Adopted by the Sejm on 28 January 2016, by the Senate on 30 January 2016, signed by the President 12 February 2016, and entered into force on 4 March 2016.

[201] That is true that before 2009, and based on the previous law on public prosecutor's office of 1985, both offices were merged, in that sense, the period of 2009-2016 may be seen as a non-typical episode. However, it would be ironic for a strongly anti-communist leadership to refer as a model to the law originating under Communism; further, the merger was at the time when the PG's competences were much narrower than under the law of 2016, regarding for instance instructions which OPG can issue to every prosecutor on any particular case.

prosecutor General to act personally in each individual case of prosecution….".[202] And in connection with the law on common courts, already discussed, and in particular in the light of the Minister of Justice's increased powers over court presidents (themselves having a strong influence on the composition of panels in their courts), the merger of offices means that a party to the proceedings (*qua* the Prosecutor General) will at the same time have huge control over the judges (*qua* the Minister). Further, having obtained in the new law on SC a right to initiate a procedure of "extraordinary control" (*qua* the Prosecutor General), the same person will have a strong say over who sits in the new, super-chamber of the SC which will consider these complaints (*qua* the Minister, member of the ruling coalition who will have a decisive say about the composition of the new SC chamber).[203]

Incidentally, to an outside observer, a clause that the PG may present operational information to public authorities *and other persons* may sound puzzling – who are "the other persons" whom the PG may inform on cases processed by public prosecutors? The puzzle disappears if one takes note that Zbigniew Ziobro, who was Minister of Justice also under the first PiS government, in 2005-2007 was alleged to have discussed specific cases with the leader of PiS, Jarosław Kaczyński, who had no right at the time to be informed about ongoing investigations[204]. Now this right has been acknowledged in the statute, and private discussions between the Prosecutor General and his political superior will no longer carry the stigma of illegality.

The merger of the offices of PG and MJ also is in direct contravention of the Constitution, which forbids public prosecutors (inter alia) to be MPs, the reason being an attempt to prevent overt politicization of the office. But the Prosecutor General, *qua* MJ, *is* a political official and an MP. Defenders of the law claim that Prosecutor General is not a prosecutor in the meaning of Art. 103(2) of the Constitution[205] but it is a disingenuous defence: for one thing, the new law refers occasionally to the PG as a public prosecutor (e.g., in Art. 13(1)); for another, the whole point of the merger was to assure a better efficiency of the prosecutor's office by including it in the executive branch. If the PG is not a prosecutor, the rationale for the merger largely collapses.

d. Parliament: effective silencing and delegitimation of the opposition

The opposition in any democracy is an important element of checks and balances, and the treatment of the opposition by the ruling parties is a test of how seriously they take the idea that alternation in power is a crucial criterion of democratic governance. In Poland under PiS the opposition parties, with the exception of a "friendly" opposition by a populist party "Kukiz-15" have been treated as an alien body in politics, and in particular in the parliament. In addition to a number of slurs and insults that have been inflicted on the three main opposition parties: Civic Platform (PO) and "Nowoczesna" and the Peasant Party (PSL), the main manner in which the opposition has been denied a meaningful political role has been the legislative process which was turned into a voting machine by PiS, and the

[202] VC Opinion 892/2017 para 42 footnote omitted. The footnote refers only to the Austrian system "where all instructions have to be submitted to an 'Instruction Council'".
[203] *See*, similarly, VC Opinion 892/2017 para 22.
[204] *See* Initial application 19 November 2012 in case of Zbigniew Ziobro constitutional liability before the Tribunal of State (http://www.sejm.gov.pl/Sejm7.nsf/files/RRSS-96UCF5/$File/wniosek_ts_4.pdf).
[205] See VC Opinion 892/2017 para 31.

opposition parties have been reduced to a marginal role, as irritants treated with open hostility rather than vehicles of possibly helpful amendments to legislative drafts.

This has been mainly achieved by the ingenious device of legislative fast-tracking, and proposing some of the most significant items of PiS legislative changes as private members' bills rather than governmental initiatives, even if de facto they were very much elaborated and put forward by the government. In the first full year of the rule by PiS, 2016, over 40 percent (76 out of 181) of PiS legislative proposals were submitted as private members' bills (in the two previous parliamentary terms, the percentages were respectively 15 and 13 percent). The mere statistics do not fully reflect the change: this method was adopted to push through some of the most important pieces of legislation, including about common courts (which, as we have seen, conferred huge new powers upon the Minister of Justice) and about the SC (initially vetoed by the President). In addition, with regard to those bills which did go through the procedure of consultations, expert opinion and impact statements, the requirement to publish on the parliamentary website all the opinions was dropped, so the general public has no way of knowing whether any negative opinions were supplied.[206] As one example of fast-tracking consider the law on the Public Prosecutor's office, discussed above. Even though de facto it was prepared by the Ministry of Justice, it was formally presented as a private members' bill. Notwithstanding that a number of entities produced opinions about the bill, including the SC and the KRS, they were effectively disregarded during the legislative process.[207]

The frantic pace with which some of the most important legislative acts have been pushed through the parliamentary commissions and in plenary debates of Sejm and Senate resulted in a virtual silencing of the opposition through devices such as using gag rules during the "deliberations", placing new items on the agenda without any notice and speeding the deliberation, often late into the night or early morning, ignoring critical expert opinions, etc. – the speed not being justified by any substantive urgency of the proposals. The NGO called "Civic Legislative Forum"[208] lists the following examples of reducing the voice of the opposition in the Sejm: limiting speeches to one minute, vote *en bloc* on the amendments, with bundling of all the amendments together not on the basis of their subject matter but on the basis of which party proposed them; failure to provide enough time to read some proposed amendments; working late into the night, failure to respond to observations of legislative mistakes in the bills, etc.[209] In addition, opposition MPs occasionally have become excluded from the parliamentary floor on disciplinary grounds; also procedural tricks were used to sidestep the opposition, for instance the 2017 budget was adopted not in the Sejm assembly hall, but transferred to a smaller room where the so-called parliamentary session was held immediately as a follow-up to the meeting of the parliamentary caucus of PiS, where no reliable counting of votes was possible, and with many allegations that the opposition MPs were not allowed in.

[206] See Piotr Szymaniak, "Coraz gorsze standardy tworzenia prawa", Dziennik Gazeta Prawna 16 Nov 2017, p. 6
[207] See VC Opinion 892/2017 para 24
[208] See http://www.batory.org.pl/en/operational_programs/anti_corruption/civic_legislative_forum.
[209] Obywatelskie Forum Legislacji – Fundacja im. Stefana Batorego, „Jakość stanowienia prawa w drugim roku rządów Prawa i Sprawiedliwości: X Komunikat Obywatelskiego Forum Legislacji o jakości procesu legislacyjnego na podstawie obserwacji w okresie of 16 listopada 2016 do 15 listopada 2017 roku" (2017) at 2 and 11.

e. Media

As already mentioned, public media have been transformed into a governmental propaganda machine, with no attempt to pretend that the opposition views are presented objectively and neutrally. Immediately after PiS came to power, some 200 journalists were purged from public TV and radio, and replaced mainly with journalists coming from fringe right-wing media, mainly belonging to the "media empire" of Fr Tadeusz Rydzyk, founder of the fundamentalist Catholic Radio Maryja and TV Trwam.

The 5-member Council of National Media elected by the President has three representatives of PiS, and as was demonstrated at least once, takes instructions directly from Jarosław Kaczyński.[210] In addition, the National Broadcasting Board, which is a constitutional body tasked with oversight of all TV and radio, public and private, has been staffed exclusively with members supported by PiS (in contrast to a tradition established up to 2015 that the opposition also elects its members, though in minority). The Board has made it known that it will treat private media severely, and one example of it was the hefty financial penalty imposed upon a major news and current affairs private TV, called TVN-24, for reporting the demonstrations around the Parliament in December 2016. While the penalty has been eventually annulled,[211] it sent a chilling message to private broadcasters that even mere reporting of expressions of anti-government views may be penalized.

Even more ominously, the government announced that it will propose legislation aimed to "repolonize" and "deconcentrate" private media. What specifically it may mean is at present anyone's guess but no doubt PiS will attempt to find ways of reducing the influence of the very vibrant private media, both electronic and press, in Poland.

f. Civil society

The last aspect of checks and balances not directly controlled by PiS is a richly-textured civil society in Poland: a large network of NGOs, think tanks, social organizations ranging from foreign policy to free soups for the homeless, from rights of refugees to protection over historical cemeteries… It took PiS 2 years to come up with legislation which helps subordinate civil society to the political hegemon. Negative assessment of the new bill that had been made *inter alia* by non-governmental organisations[212] and the Ombudsman Office[213], did not stop the governmental majority. Moreover

[210] See above, in the Introduction, for an account of Kaczyński prevailing over members of the Council to un-dismiss the Chairman of TVP (public TV).
[211] The decision of the National Broadcasting Board of 10 January 2018.
[212] See *inter alia* the Organization for Security and Cooperation in Europe Office for Democratic Institutions and Human Rights opinion of 22 August 2017 (file:///C:/Users/Micha%C5%82/Downloads/303_NGO_POL_22Aug2017_pl.pdf).
[213] *See* Opinion of 13 of July 2017 (https://www.rpo.gov.pl/sites/default/files/Do%20Marsza%C5%82ka%20Sejmu%20w%20sprawie%20projektu%20o%20Narodowym%20Instytucie%20Centrum%20Rozwoju%20Spo%C5%82ecze%C5%84stwa%20Obywatelskiego%2013.07.2017.pdf).

all motions and proposals that had been submitted in the legislative process by members of the opposition or NGOs' representatives, were rejected by PiS.[214]

The reform was based on two acts: amendment of the statute of 23 April 2003 on activity for the public good and voluntary service[215] and introduction of the statute of 13 October 2017 on the National Institute of Freedom: Centre for the Development of Civil Society.[216] Two new institution were created: the Committee for Public Benefit, and an institution with an Orwellian title "The National Institute of Freedom: Centre for the Development of Civil Society" in order to centralize state control over government funds for NGOs.[217]

The former institution is composed mostly of members of the government (the President of the Committee, who is also a member of the Council of Ministers,[218] Secretary of State in the Chancellery of Prime Minister, ministers, and Director of the National Institute of Freedom).[219] As one of the government administration bodies, the Committee is responsible for coordination of cooperation between NGOs and public administration.[220] Statutory competences and membership render the Committee (on which no NGOs representatives sit) the highest political body on all matters concerning the financing, controlling and development of civil society by the government. The leading role is centralized in the office of the President of the Committee, who: a) has financial and management oversight of the Fund for Supporting the Development of Civil Society[221]; b) exercises statutory supervision over public benefit organizations[222]; c) has a right to appoint and dismiss the director as well as deputy director of the National Institute of Freedom[223]; d) conducts supervision of the National Institute of Freedom[224]; e) has a right to appoint and dismiss members of the Public Benefit Council[225] (made up of local government and NGOs representatives with a consultative involvement in the Committee's activity).

The general objective of the second of the above mentioned institutions ("The National Institute of Freedom") is to support financing and development of civil society in accordance with governmental guidelines.[226] Within a long list of the Institute's statutory tasks it is important to stress a normative preference for supporting or financing projects concerning the Christian heritage of national and local tradition.[227] The statute unfortunately does not guarantee a sufficient level of pluralism, legal

[214] *See* the Sejm of the 8th term doc No 1713 and legislative process history (http://www.sejm.gov.pl/Sejm8.nsf/PrzebiegProc.xsp?id=EF8C5C158112FB86C12581560025263F).
[215] *See* the statute before amendment – Journal of Laws 2016, item 1817.
[216] Journal of Laws 2017, item 1909.
[217] Previously, decisions on allocation of funds was shared between different ministries, and this facilitated distribution to multiple beneficiaries.
[218] On 11 December 2017 the Minister of Culture (Piotr Gliński) was appointed as Chairman of the Committee for Public Benefit by President Duda (*see* Official Gazette of the Republic of Poland 2017, item 1152). Minister Gliński, who is also Deputy Prime Minister, is known for his numerous restrictive actions against (what he sees as) left-liberal and non-patriotic trends in theatre, cinema, and museums.
[219] Article 34a of the statute of 23 April 2003 as amended.
[220] Article. 1a and article 34a of the 23 April 2003 as amended.
[221] Article 27ab-27c of the statute of 23 April 2003 as amended.
[222] Article 28(1) of the statute of 23 April 2003 as amended.
[223] Article 5-7 and article 10-11 of the statute of 13 October 2017.
[224] Article 8 (5-8) and article 13(2), article 26 of the statute of 13 October 2017.
[225] Article 35(2) of the statute of 23 April 2003 as amended.
[226] Article 1(2) of the statute of 13 October 2017.
[227] Article 24(3) subpar 4 and the Preamble of the statute of 13 October 2017.

certainty or lack of arbitrariness. First, the Institute is charged with implementation of tasks defined on a case-by-case basis by the President of the Committee – giving this person (a member of the government) and the Prime Minister (to whom s/he reports) enormous power over dispensing grants to NGOs. Second, the governance model of the Institute is fully subordinate to the government: the majority of members of the Institute's Council are appointed by the governmental Committee for Public Benefit, and so indirectly by the Prime Minister. Although there are to be some NGO representatives on the Council, they are in a minority (5 out of 11), and in any event the Council has only an advisory role.[228] To make things worse, the "NGO representatives" are appointed by the President of the Committee (let us recall, a member of the government) who has full discretion over whom to appoint from among candidates proposed by NGOs. Considering great pluralism within Polish civil society, there is no obstacle towards appointing only or mainly representatives of right-wing or Christian organizations. Third, there is no statutory obligation for the Institute always to call for applications concerning programs of civil society. It is a choice for the Institute to make whether to perform statutory tasks by itself or to organize an open competition.[229] The statutory criteria for bidding for grants in a competition are very vague, and do not provide anti-discrimination clause or any other guarantees for equal access by different subjects of civil society to public finances.[230]

Importantly, a preamble to the new law mentions "Christian values" which may indicate a built-in bias in the system towards faith-based NGOs. But even before the new law, there was a clear shift in priorities: those with a Christian, conservative agenda have been privileged in reallocation of funds while those with more "liberal" or "left" agendas have been disfavored. For instance, various women's rights organizations, e.g. the Women's Rights Centre concerned with domestic violence, have been denied funds, on the basis that their programs discriminate against male victims of domestic violence. Also NGOs concerned with asylum seekers and refugees have been denied funds. The centralization of all state grants for NGOs by the setting up of the Committee and the Institute structured in a way as to make them fully subordinate to the Prime Minister will make it possible to consolidate even further this trend of favoring the "good" NGOs and starving "bad" NGOs of funds.

(2) Assault on individual rights

a. Right of assembly

A new statute of 13 December 2016[231] (amending the Peaceful Assembly Statute of 24 July 2015[232]) has established a priority for so-called "cyclical" manifestations and demonstrations (see above, discussion on the CT "judgment" of 16 March 2017 affirming this statute; the "judgment" was handed down with the participation of improperly elected "quasi-judges"). An assembly is recognised as cyclical when (a) it has the same organiser, and occurs at least four times a year; b) has its own history (i.e. it has taken place for three years); and c) is aimed to celebrate events of a high

[228] For a criticism of this regulation, see Helsinki Foundation of Human Rights, "HFHR Opinion on National freedom Institute Bill", 18 August 2017, available at http://www.hfhr.pl/en/hfhr-opinion-on-national-freedom-institute-bill/ last accessed 10 January 2018.
[229] Article 24(5) of the statute of 13 October 2017.
[230] Article 30 of the statute of 13 October 2017
[231] Journal of Laws 2017, item 597.
[232] Journal of Laws 2015, item 1485.

importance in Polish history. The statute of 13 December 2016 created a hierarchy of assemblies, and sets up priority for preferred ones. It is now legally impossible to organise a demonstration in the same location where a cyclical assembly organised by public authorities or churches is to take place. To make it clear, the amendment prohibits counter-demonstrations to periodic assemblies.

The effect of this new regulation is to ensure a privileged position for assemblies devoted to patriotic, religious and historic events, which in specific Polish circumstances single out in particular governmental or government-supported assemblies, such as monthly events held to commemorate the Smoleńsk aircraft crash of 10 April 2010. These monthly manifestations, held in the centre of Warsaw and culminating always with speeches by Jarosław Kaczyński in front of the Presidential Palace, have become a sort of hate rally against the opposition, and in time, have provoked peaceful counter-assemblies. The new law has, as its effect, made it illegal for counter-assemblies to take place in the direct vicinity of these PiS monthly assemblies. Similarly, though of lesser importance, is the priority given to the annual Independence Marches on 11 November (Polish Independence Day) which have become de facto appropriated by radical, extreme right-wing movements.

This hierarchy of assemblies formally endorsed by the new law is in direct contradiction to the established, strongly libertarian regime of the law of assembly in Poland, based mainly on the CT judgment of 18 January 2006[233] (on the unconstitutionality of a provision of the Road Traffic Act that had required permission for a public road assembly[234]) and judgment of 15 July 2008[235] (on the constitutional status of spontaneous assemblies[236]). According to these CT judgments as well as the Guidelines on Freedom of Peaceful Assembly issued by the OSCE[237] and the Venice Commission[238],

[233] K 21/05, OTK ZU No 1/A/2006, item 4.

[234] The Commissioner for Citizens' Rights challenged the provisions of the Road Traffic Act 1997 before the Constitutional Tribunal, insofar as they conditioned the organisation of an assembly which could create hindrances or changes in road traffic, upon obtaining permission. Application was submitted during the time when local authorities, a few times, refused to grant permission to hold assemblies due to the failure to fulfil the requirements derived from the challenged regulation (this, for example, concerned the "Equality Parade" in Warsaw). The Constitutional Tribunal ruled on unconstitutionality of such regulations, for a discussion see Sadurski, Rights Before Courts, at 220-21. The judgment relied on three main premises: first, a right to "counter-demonstration" cannot go as far as to undermine the citizens' rights to peaceful assembly; second, public authorities are obliged to ensure protection of peaceful assemblies regardless of the substance of messages of these assemblies (as long as they are not illegal); third, "public morality" as a constitutional basis for restricting a right to assembly must not be equated with the moral beliefs of public officials.

[235] P 15/08, OTK ZU No 6/A/2008, item 105.

[236] The application was submitted by District Court in connection with the fine which had been imposed on the organiser of a spontaneous assembly in Warsaw. The punished person had held the assembly in order to attract the attention of the general public and the President of European Commission to an ecological problem that had been current and important for public debate in Poland (environmental protection in the Rospuda river area). There was no doubt that the organiser did not fulfil a requirement of prior notification. At the end of the peaceful assembly, the Police imposed a fine on the organisers. The Constitutional Tribunal decided on the constitutionality of the questioned provision on the basis that a notification rule could not be seen as a formal registration, that creating an exception for spontaneous assemblies would undermine the efficiency of freedom of assemblies guarantees, and that a lack of notification did not imply the illegal character of assembly and should not be automatically be understood as a basis for prohibition or dispersion.

[237] See OSCE Office for Democratic Institutions and Human Rights, Guidelines on Freedom of Peaceful Assembly, 2nd edition, p. 17 (https://www.osce.org/odihr/73405?download=true).

[238] See Compilation of Venice Commission opinions concerning freedom of assembly (revised July 2014), CDL-PI(2014)0003, Strasbourg, 1 July 2014, p. 8, 20-23 (http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-PI(2014)003-e).

counter-demonstrations "are a particular form of simultaneous assembly in which the participants wish to express their disagreement with the views expressed at another assembly. In such situations, the unity of time and place of two assemblies is an important element of the message that is to be delivered during both demonstrations".[239] There is a need for a restrictive interpretation of limitations of the right to assemble freely and peacefully, including for counter-demonstrations.[240]

After the entry into force of the new law, participants of counter-manifestations (relegated by the new law to the status of inferior assemblies) became subjected to increasingly harsh persecutions, with hundreds of persons interrogated by police, and often treated quite brutally by the police and voluntary security teams of the PiS-sponsored assemblies. So it is not only the contents of the law but also its actual enforcement which breach the right of assembly. For instance, in the so-called Independence March of 11 November 2017, police protected the organisers and activists of the principal march (even though several participants carried banners with clearly racist and neo-fascist slogans, directly banned under Polish law) while persecuting counter-manifestations, and also turning a blind eye to aggressive actions of the marchers towards passive, peaceful protesters,under the pretext of avoiding clashes,[241]

b. Freedom of speech

The capture of the public media has already been described above. There have also been attempts at silencing independent journalists and writers, and to produce a strong chilling effect by threatening them with legal action, often disproportionate to alleged "offences". Perhaps the best known was the case of a journalist and writer Tomasz Piątek, who published a book[242] which is a product of his investigation regarding the allegedly suspicious contacts and relationships of the then Minister of Defence Antoni Macierewicz[243] – a top leader in PiS (a Vice-President of the party, considered generally a leader of its hard-line faction). In response to the book, Mr Macierewicz instructed the military prosecution office (reporting directly to him) to launch an investigation under the Penal Code for an alleged offence of the "use of violence or unlawful threat against a public official in order to take up or give up official duties" and "insulting a public official".

In a separate development, the Minister of Justice has prepared a draft law[244] which would amend the Law on the Institute of National Remembrance, and which establish an offence, punishable by up to 3 years in jail, of attributing publicly and falsely responsibility to the Polish nation or the state for crimes against humanity committed by the Nazis during the Second World War.[245] The same law would also provide civil sanctions for statements violating the reputation of Poland or the Polish

[239] See OSCE Office for Democratic Institutions and Human Rights, Guidelines on Freedom of Peaceful Assembly, 2nd edition, p. 17

[240] European Court of Human Rights judgment *Öllinger v. Austria* (2006), paras. 43-51.

[241] For example, a group of 12 women sitting at the sidewalk with a banner "Fascism Stop!" were beaten up by some marchers – to no reaction from the police.

[242] Tomasz Piątek, *Macierewicz i jego tajemnice* [Macierewicz and His Secrets], Arbitror: Warsaw 2017.

[243] Macierewicz ceased to be Minister as a result of a governmental reshuffle of 8 January 2018 but maintained his position as Vice-President of PiS.

[244] *See more* the Sejm 8th term doc No 806 (http://orka.sejm.gov.pl/Druki8ka.nsf/0/EA4AD50371FF6D17C12580250039936A/%24File/806.pdf) .

[245] See Article 1(5) of the draft law (the Sejm 8th term doc No 806).

nation. According to the draft law, the Institute of National Remembrance as well as selected NGOs would be empowered to bring civil law actions in order to protect the good name of the Republic of Poland or the Polish Nation. In the case of a judgment on violation, the State Treasury shall be entitled to compensation[246]. The chilling effect of such penal and civil laws upon scholarly or journalistic debates regarding the darker sides of Polish history is obvious, and the laws clearly resonate with a highly nationalistic governmental rhetoric, under which Polish history is comprised invariably of heroic acts and undeserved victimhood, never of criminal actions. The proposed law is sometimes referred to as "lex Gross", referring to Professor Jan T. Gross whose books and articles depicting Polish crimes against Jews on German-occupied territories during the World War II have provoked heated public debates in Poland over recent decades.

c. Counter-terrorism measures and Police Act

Two laws adopted in 2016 strongly increased the discretionary powers of special services and police: the statute of 10 June 2016 on counter-terrorist activities [247] and the statute of 15 January 2016 on police[248].

The former law established a vast and vaguely defined scope of powers for the Internal Security Agency in order to protect the state against terrorism, as well as to control citizens and collect personal data without following "regular" statutory procedures. The constitutionality of a significant part of the statute was questioned by the Commissioner of Human Rights before the Constitutional Tribunal just after the statute entered into force,[249] and before assumption of her function as President of the CT by Julia Przyłębska.[250] The motion of unconstitutionality is supported by the following arguments. First, there is no clear definition of the term "terrorist act", which under the new law has become one of the most important statutory criteria for action by the anti-terrorist services. This term is also a part of another crucial statutory definition: "anti-terrorist activities".[251] Second, a new database shall be created by the Internal Security Agency in order to control persons associated with terrorist acts. However, there is no clear statutory purpose, principles or limits for such a database. The provisions do not guarantee any efficient judicial control over the database, nor do they allow an interested party to demand, correct and delete false or incomplete data. Third, the Internal Security Agency may demand and shall have an open (and in fact unlimited) access to data and information collected by all public agencies or bodies at the central as well as local level.[252]

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[246] *See* Article 1(4) of the draft law (the Sejm 8th term doc No 806).
[247] The statute of 10 June 2016 on counter-terrorist activities (Journal od Laws 2016, item 904).
[248] The statute of 15 January 2016 on amending the Police Act and other acts (Journal od Laws 2016, item 147).
[249] See more at:
https://www.rpo.gov.pl/sites/default/files/Wniosek%20do%20TK%20w%20sprawie%20ustawy%20antyterrorystycznej%2011%20lipca%202016.pdf
[250] See the pending case no K 35/16. Julia Przyłębska, acting as the new President of the Tribunal, acted swiftly to change the judge rapporteur as well as the composition of the panel. In order to marginalise "old judges", she decided the case would be heard by a 5-judge panel composed *inter alia* of 3 judges elected by the PIS majority. Mariusz Muszyński, one of the "quasi-judges", who was in 2016 and 2017 accused by a journal Gazeta Wyborcza and by an opposition MP of collaboration with the secret services, was designated as the new judge rapporteur (*see* the President of the Constitutional Tribunal decision of 25 January 2017).
[251] Article 2(1) of the statute of 10 June 2016.
[252] Article 11 of the statute of 10 June 2016.

Fourth, a risk or an attempt to commit a terrorist act shall be a sufficient premise to apply for pre-trial detention.[253] Moreover, under the new statutory provisions the Internal Security Agency may order internet services to be blocked in order to prevent – undefined – terrorist acts.[254] The court's jurisdiction over Agency acts is strictly limited.

The second of the two laws (amending the Police Act) gives police and its agencies access to Internet data, including the communication's content, under court orders (up to 3 months but without a requirement of necessity or proportionality)[255] or to metadata without the need for court orders.[256] The latter provision especially is a cause for serious concern: metadata may be obtained without prior consent of a court, and the only requirement is for ex-post court review of a *generalised* (i.e. basically limited to statistics, without considering the merits of particular cases) report by police on metadata collection. While metadata theoretically is not content-related, a combined analysis of the various types of metadata (something which is not excluded by the law), collected secretly by law enforcement agencies and which may be used against a person unaware of the fact of collection of those data, may be very intrusive of a person's privacy and give insight into intimate aspects of a person's private life. As the Venice Commission noted, the law regarding collection of this information contains no "probability test" (no need for the police to have specific reason to believe that a criminal activity is going on or being prepared), and no "subsidiarity test" (a requirement that metadata collection be a subsidiary means of obtaining information).[257] In combination with no effective oversight of such activities, the law allows a very deep intrusion into a person's private life, without him or her even being aware of such surveillance.

d. Electoral law

It is well-known that manipulating an electoral competition mechanism, aimed at entrenching the hegemony of the ruling party and denying fair chances to the opposition[258] may prevent the alternation in power which is the main definitional criterion of democracy: as many theorists of democracy like to say, a true test of democracy is not the first but the second election.[259] Already, in the elections of 2015, the disproportion between the number of raw votes obtained by PiS (37.6 percent, with an electoral turnout just under 51 percent) and the number of parliamentary seats (235 out of 460)[260] suggested to many observers that PiS will attempt to consolidate its control over the electoral process for its own advantage. Following in the footsteps of its role-model, Orban's Hungary,[261] PiS at the end of 2017 proposed a massive change to the electoral law, introducing

[253] Article 26(2) of the statute of 10 June 2016.
[254] Article 32c of the statute of 10 June 2016.
[255] Article 19 of the statute of 6 April 1990 on the Police as amended (Journal of Laws 2017, item 2067).
[256] Article 20c of the statute of 6 April 1990 on the Police as amended
[257] VC Opinion 839/2016 paras 55-59.
[258] See Tóth, at 4-5.
[259] See Issacharoff, Fragile Democracies, at 129.
[260] Similarly, in Hungary in 2010, a 53 percent majority of voters translated into 68 percent of seats for the coalition Fidesz/KDNP. In 2014: 45 percent of voters helped achieve only 1 percent fewer seats.
[261] In Hungary between 2010 and 2014, election boundaries of electoral districts were deeply changed (gerrymandering) plus a number of other changes favourable to Fidesz, e.g. a ban on paid campaign advertisements in private media produced a concentration of campaigns in public media, strongly controlled by the government.

enhanced control by the parliamentary majority and by the executive over the mechanism for conducting elections, "de-judicialisation" of the electoral institutions, and also entrusting the new-model "commissioners" (no longer judges) with full authority (albeit as from elections after the next) for redrawing electoral boundaries.

What was suspicious was the frenzy accompanying the enactment of the new law; in fact, no serious explanation has ever been produced by PiS for the need to change the electoral law in the first place. Despite a hard-line PiS propaganda machine claiming that in various previous elections (in which PiS kept losing), some allegedly monstrous irregularities had been committed, nothing of the sorts has ever been demonstrated. Indeed, the only (and a rather marginal) incident happened back in 2005,[262] and apart from that, no electoral protests had been found by courts as having a serious character which would have an impact on the electoral process.

As with everything that PiS addressed in its "reforms", the main focus of the changes in the electoral law are the cadres. Under the new law, adopted by the Sejm on 14 December 2017, the main body in charge of elections, the National Electoral Commission (Polish Acronym: PKW) will be completely restructured. It should be added that the importance of the PKW goes well beyond the election itself and also includes allocation of funds to political parties – a huge source of income for parties who make it to the parliament. Rather than, as is the case now, being composed of 9 judges, appointed in equal numbers by three Presidents of the top courts: the CT, the SC and the Supreme Administrative Court (from among the judges of those courts), the new PKW will be composed only of two judges of the CT and SAC, accompanied by 7 members *appointed by the Sejm*. The head of the National Electoral *Bureau* (not to be confused with the Commission), which is an executive arm of the Commission, will be appointed by the new PKW from among three candidates submitted by the Minister of Interior;[263] he or she will be also able to be revoked by PKW with consent of the Minister of the Interior. Until now, this main official responsible for the actual nuts and bolts of the elections, was appointed by the PKW, at the motion of the Chairperson of PKW. It had its logic: the Head of the Bureau was responsible before the Commission which, itself, has no resources, bureaucracy, budget or capacities to actually run the elections – all that is done by the Bureau. Now, losing the power of full control over the appointment of the head of the Bureau, the Committee's supervisory role becomes illusory, and the head of the Bureau will owe his/her appointment directly to the Minister. Finally, the responsibility in local electoral districts will fall upon 100 "commissioners" who will be appointed by PKW,[264] but again, from the candidates proposed by the Minister of Interior (with the additional proviso that if the PKW fails to appoint them within 100 days after the entry of the law in force, they will be appointed directly by the Minister). By their pedigree, those commissioners will therefore be representatives of the Minister rather than of the PKW, in their districts. Most importantly, these commissioners, as well as chairpersons of the electoral commissions at the district level, will not need to be judges (as they currently have to be). Hence, the judicial penetration of the electoral administration, starting at the top with the PKW, and all the way down, which has been a strong fixture and achievement of the Polish electoral system since 1991, has now been terminated by the new law. The commissioners will have the authority to redraw the

[262] The Supreme Court found the elections to Senate in one district invalid. See the resolution of the Chamber of Labour, Social Security and Public Matters of the SC of 15 December 2005, III SW 199-200/05.
[263] See article 5 para 70 of the statute of 14 December 2017.
[264] See article 5 para 56 of the statute of 14 December 2017.

boundaries of local electoral districts (although only after the next elections) which, of course, raises a spectre of gerrymandering: after all, these will be officials appointed from the lists supplied by the Minister.

At the same time, it should be kept in mind that electoral disputes will be considered by a new chamber of the SC, composed exclusively of judges appointed by a "new" KRS, with the majority of members elected by the parliamentary majority. All this shows is that the electoral process will be fully controllable by the ruling party, either by the parliamentary majority or by the Minister of Interior who is a member of a narrow party leadership.

In addition, there is a new, rather ominous change, regarding the technicalities of ballots which, according to some critics, is a cause for concern.[265] Up to now, a ballot is valid only if there is a symbol "x" placed next to the name of a candidate chosen by the voter, and any other signs, symbols, additional notes etc. render the ballot card invalid. It was a guarantee against a third person placing a sign "x" next to another name and erasing or changing the original "x". Under the new law of December 2017, this guarantee is now gone, and a ballot with one sign crossed out and another added may be considered valid, with the local electoral commission having discretion in evaluating such ballots, thus opening up a space for arbitrariness and even electoral deceptive practices.

Most importantly, however, a de facto subordination of electoral personnel to the politicians of the ruling party (namely, to the Minister for Interior) combined with the elimination of judges both in PKW and as commissioners in the electoral districts, completely erodes the process of its integrity. In addition, and taking into account some politically sensitive functions of the PKW even outside the elections themselves, namely the supervision of the spending of state subsidies by parliamentary parties (with the sanctions in the form of refusing public funds to parties with regard to which financial irregularities have been found; in the extreme, the PKW can initiate the procedure for banning a party), entrusting these functions to representatives of politicians may be catastrophic for the freedom of political parties and for the democratic process generally. As the (old) National Council of Judiciary (KRS) stated in its opinion on the draft electoral law, "With the new composition of the National Electoral Commission, large parliamentary parties will be able to hinder the day-to-day functioning of their political opponents, which constitutes a real threat to the functioning of democratic system in Poland".[266]

4. Sources of PiS victory and of its continued popularity

[265] See Wojciech Hermeliński, "Sędziom przy wyborach już dziękujemy" [Judges can be farewelled, as far as elections are concerned"], Rzeczpospolita 9 January 2018. It should be added that the author has been the Chairman of the National Election Committee; formerly a judge of the Constitutional Tribunal.

[266] "Opinia Krajowej Rady Sądownictwa z dnia 7 grudnia 2017 w przedmiocie poselskiego projektu ustawy o zmianie niektórych ustaw w celu zwiększenia udziału obywateli w procesie wybierania, funkcjonowania i kontrolowania niektórych organów publicznych", unpublished document, 7 December 2017, on file with the author.

The Polish case (and the Hungarian case, for that matter) presents a puzzle regarding conventional wisdom on the sources of an anti-constitutional populist backlash. There is a large body of literature in political science offering various explanations about what renders democratisation unlikely, and once it happens, non-resilient. The best short summary of the *communis opinio* is well articulated in this passage by Steven Levitsky and Lucan Way:

> According to a substantial body of research, stable democratization is unlikely in very poor countries with weak states (e.g., much of sub-Saharan Africa), dynastic monarchies with oil and Western support (e.g., the Persian Gulf states), and single-party regimes with strong states and high growth rates (China, Vietnam, Malaysia, Singapore). Our own research suggests that democratization is less likely in countries with very low linkage to the West (e.g., Central Asia, much of Africa) and in regimes born of violent revolutions (China, Ethiopia, Eritrea, Vietnam, Cuba, Iran, Laos, North Korea) … While the recent stagnation on the overall number of democracies in the world may be normatively displeasing, it is entirely consistent with existing theory.[267]

As one can see, Poland does not fit any of these syndromes: it is not a very poor country with a weak state, not a single-party regime with impressive growth rate, has high linkage to the West, is not a regime born out of violent revolution, not a dynastic monarchy and, alas, no oil. These "structuralist" explanations do not apply to the Polish case. So how to explain the unconstitutional populist backsliding?

In July 2017, soon after the government of Poland submitted to the parliament a legislative package aimed at full political control over the judiciary, Rafał Matyja, a conservative political scientist and public intellectual known for his independence of judgment observed: "The changes which are being introduced in the judiciary are part of a (…) logic which constitutes a serious danger for the state: a logic of total distrust towards institutional rules and willingness to replace them by mechanisms based on personal trust. At first sight, such logic may seem innocuous but in practice it means the creation of a model in which all important functions are filled by persons obedient to the will of the Chairman or at least those who are incapable of resisting him".[268]

Matyja's observations can be extended to all legal and state-related matters, not just those related to the political control over the judiciary. Poland offers a strong vindication of the explanatory power of the "agentic" theories which emphasise the significance of the "human factor" as a source of illiberal transformations. Quite apart from deeper societal sources (which I will mention below), much of the animus driving the erosion of liberal-constitutional checks upon arbitrary power can be explained by the relentless will and obsession of one person and his closest allies who are deeply distrustful of any independent social powers, whether they are the judiciary, media, local self-government, NGOs, non-partisan military, or a neutral civil service (not yet the clergy, though the time may come), and who present a democratic mandate given to their party through the electoral choice of 2015 as a basis for extending personal control over all social powers.

In his article, Matyja continued by drawing an analogy between this ambition of Kaczyński and the PRL [Polish People's Republic] system, and went on: "The evil of the PRL did not consist only in the

[267] Steven Levitsky and Lucan Way, "The Myth of Democratic recession", *J of Dem* 26/1 (2015): 45-58 at 54.
[268] Rafał Matyja, „Wrogowie ludu", *Tygodnik Powszechny* 30 July 2017 (no. 31/2017) at p. 20.

fact that communists ruled. Much more important was the fact that they ruled within a system infused with paranoia". The mention of "paranoia" indicates an important trope helping the analysis of Kaczyński's understanding of politics, and much of the famous essay by Richard Hofstadter of 1964[269] (though not mentioned by Matyja) applies presciently to Poland 2017.[270] Kaczyński indeed perceives the world as composed of largely hostile forces, plotting against the forces of the good, the latter personified in the Leader who knows well that any compromises with the enemy are a sign of weakness (or worse, betrayal) which must lead to a catastrophe. Polish politics and Polish state-controlled propaganda are based on the Manichean antinomy of Good and Evil, and a conviction that the Good will not triumph if forces of Evil are allowed to keep strongholds in the judiciary, media or NGOs. The opponents are simultaneously pathetically weak (because they are not in tune with the real society) and distressingly powerful (which justifies constant mobilisation against them); the evil they represent is apocalyptic yet capable of being prevented; hence the need of constant vigilance and struggle.[271] Grotesque exaggerations, deep suspicion and absurd conspiracy theories[272] – all aspects Hofstadter had detected in the paranoid political style – are abundantly present in Poland today.[273] Dismantlement of constitutional checks and balances is a consequence of the paranoid style in Polish politics, and of the perception (so reminiscent of Stalin's late paranoia) that the more crushed the enemy is (and crushed he *is* – otherwise the struggle launched by the Leader would turn out to be tragically misplaced, which is unthinkable), the more vicious and desperate, hence dangerous, he becomes.[274] And if the enemy is dangerous, constitutional checks and balances render the struggle against him ineffective. All these obsessions, fears and concerns by Kaczyński himself resonate with an important segment of the Polish electorate.

As one can see, this explanation places a high explanatory burden on human agency: on the will and behaviour of political leadership which is *relatively* contingent and *relatively* unconstrained by systemic factors, in the sense that it could have been otherwise (and indeed, *was* otherwise under

[269] Richard Hofstadter, "The Paranoid Style in American Politics", *Harper's* November 1964: 77-86.

[270] On the presence of paranoia in Polish politics, see also Skąpska at 135. A recent invocation of Hofstadter's paranoia theory in a contemporary context was made by Tom Ginsburg with regard to the politics of Donald Trump, see Tom Ginsburg, *2016 Book Recommendations–Hofstadter on American Politics, Lanni on Ancient Athens*, Int'l J. Const. L. Blog, Dec. 27, 2016, at: http://www.iconnectblog.com/2016/12/2016-book-recommendations-tom-ginsburgs-choices (last accessed 31 December 2017).

[271] This recent characterisation of PiS opponents by Jarosław Kaczyński is typical: „Nasi przeciwnicy, nasi wrogowie nie spoczną. Oni chcą zniszczyć nasze życie, doprowadzić nasz kraj do ciężkiego kryzysu" [„Our adversaries, our enemies, will not rest. They want to destroy our life, to bring about a deep crisis in our country"] .Kaczyński's speech on 10 December 2017, to commemorate the 10 April 2010 air crash, http://wyborcza.pl/7,75398,22764709,92-miesiecznica-katastrofy-smolenskiej-jest-mateusz-morawiecki.html (last accessed 11 January 2018).

[272] The most extreme and durable manifestation was a frequently repeated allegation by Kaczyński and his acolytes (especially, by Minister of Defence Antoni Macierewicz) that the former Prime Minister Donald Tusk plotted with Russian leaders to kill Lech Kaczyński in an airline crash near Smoleńsk in 2010; in a more moderate version, that he conspired with Russians to render the investigation about causes of the accident impossible. The agreement by a former PM Ewa Kopacz (Tusk's successor) to accept a limited number of refugees was presented as part of a plot to undermine Christianity in Poland, etc.

[273] As should be clear, I am not attributing to Kaczyński "paranoia" in a clinical sense of the word but am borrowing it, just like Hofstadter did, for a political analysis. And I may repeat after Hofstadter, "I have neither the competence nor the desire to classify any figures of the past or present as certifiable lunatics", id at 77.

[274] As Jarosław Kaczyński recently diagnosed: „w naszym życiu pojawiło się wiele zła, coraz bardziej bezczelnego, coraz bardziej agresywnego, coraz bardziej bezkarnego" ["in our life a lot of evil appeared, the evil which is more and more insolent, more and more aggressive, and enjoying more and more impunity"], Kaczyński's speech on 10 December 2017, to commemorate the 10 April 2010 air crash, see above.

by-and-large the same conditions).[275] This is not to say that one should endorse "excessive voluntarism" and deny any role to structural determinants,[276] but rather that these structural factors under-determine political phenomena, and the scope left by this under-determination is filled by the active role of political leaders. This explanation belongs to what some political scientists call "agentic theory" (defined in contrast to structural theories): "In these theories, we lift the structural constraint so that political actors have a high degree of freedom of choice. We explain the outcome by reference to this relatively unconstrained choice or action; by calling an action or choice contingent, we assume that it could feasibly have been otherwise, given the sum total of external conditions".[277] As political scientists Ellen Lust and David Waldner explain, agentic theories focusing on the role of political leadership "imply causal interventions that are short term, directed at the supply side, and institutional", i.e. where (1) changes occur almost immediately rather than in the long term, (2) refer to causes which are connected with the leadership "supplying" political reforms (rather than to citizens demanding reforms), and (3) where interventions directly shape political institutions (rather than operating via background factors, such as the economy or the cultural system).[278] With the proviso that all three distinctions allow judgments of degree rather than either/or alternatives, this "supply-side" account applies well to the political leadership of Jarosław Kaczyński as an explanatory factor of anti-constitutional populist backsliding in Poland.[279] The combination of a radical normative vision with a low commitment to constitutional democracy produces leadership which initiates and then perpetuates anti-constitutional backsliding.

But surely, to secure popular support for his paranoid politics, Kaczyński must have identified some real societal expectations, anxieties and concerns? In any comprehensive account, there is a room for the supply side and for the demand side. Effective populism – i.e. populism that attained power, as in Poland and Hungary, rather than populism still only striving for power, as is the case of Marine Le Pen in France or Geert Wilders in the Netherlands – owes its success to the fact that it managed to combine at least two, sometimes more, of the following items on the checklist of contemporary populism's sources of appeal, and managed to seduce a large number of people into believing that those elements cohere into a complete package, capable of being articulated in very simple, attractive catch-phrases: (1) the sense of economic insecurity with a resultant loss of social cohesion; (2) xenophobic attitudes toward "Others", in particular migrants and refugees; (3) resentment towards globalisation, internationalism, and a renewed support of nationalism (economic and other); (4) cultural and religious resentment, expressed in a distrust of "political correctness" and

[275] Lust & Waldner discuss and assess inter alia a hypothesis, attributed to Scott Mainwaring and Annibal Pérez-Liñán (generated by a statistical analysis of Latin American democracies) that democracy survives when political leaders seek moderate policies and have a normative preference for democracy, Ellen Lust & David Waldner, "Unwelcome Change: Understanding, Evaluating and Extending Theories of Democratic Backsliding", USAID 2015 http://pdf.usaid.gov/pdf_docs/PBAAD635.pdf (last accessed 9 November 2017) at 20. Lust and Waldner observe, however, that this hypothesis does not "account for the sources of elite preference", id at 20. This, in my view, does not detract from the attractiveness of this theory, and to its negative implication: democracy falls when a strong and dynamic leadership supplies a radical vision, and has no or low commitment to democratic principles.

[276] For such a warning see Levitsky & Way "The Myth" at 54-55.

[277] Ellen Lust & David Waldner, "Unwelcome Change: Understanding, Evaluating and Extending Theories of Democratic Backsliding", USAID 2015 http://pdf.usaid.gov/pdf_docs/PBAAD635.pdf (accessed 9 Nov 2017) at 9.

[278] Lust & Waldner at 9-10.

[279] For emphasis on the weakness of commitment by Polish mainstream political forces to liberal-democratic norms, see Dawson & Hanley at 29-30.

multicultural tolerance; (5) disenchantment with current political elites and with the "establishment", combined with the perception that the establishment is arrogant, remote and insensitive to the needs of "real people", (6) impatience with liberal constraints upon government, with checks and balances viewed as an institutional obstacle to "getting things done" and to the expression of the will of the People.

Varieties of contemporary populisms may be viewed as resulting from different combinations of two or more of those sources of anti-liberal resentment. In Poland, all six have been salient in public culture to a degree but Kaczyński's success is due to an effective combination of (2), (5) and (6) in particular (with also a significant presence of (4), and only residual amounts of (1)[280] and (3)[281]. Xenophobic attitudes (factor # 2) were skilfully stimulated by PiS in the wake of the refugee crisis in Europe: the influx of migrants and refugees from Africa and the Middle East in 2015 was a God-given gift for Kaczyński who could stir anti-migrant (often racist) attitudes in an ethnically and religiously homogenous Poland.[282] How the inhumane resistance to accepting even some children and women from a war-stricken Syria could have been squared with Christian benevolence and love in a nation where over 90 percent identify themselves as Christians is an intriguing question, which is outside the bounds of this paper. But it worked. Anti-establishment sentiments (factor # 5) were facilitated by a certain fatigue displayed by PO by the end of its second term, by some embarrassing though not too odious corruption or quasi-corruption scandals, by PO's ecumenical approach to ideology (stretching from left liberalism to traditionalist conservatism) which was at the beginning its strength, but eventually came to be seen (correctly) as unprincipled pragmatism, and by a particularly inept and arrogant electoral campaign (or rather the lack of it) by President Komorowski in 2015.[283] Illiberal impatience (factor # 6) has been best reflected in a notion of legal or constitutional "impossibilism", a term coined by PiS leaders (mainly Jarosław Kaczyński) meant to signify obstacles and barriers that law erects, disingenuously, in order to render it impossible to

[280] In the first decade of 21st century, party divisions have become more and more correlated with class and strata divisions. This is clear with educational status (an important class indicator in Poland): only 9 percent of PO voters finished their schooling at the level of elementary education and 38 percent have higher (university) education; in case of PiS, 25 percent of voters have only an elementary education and 20 percent have higher education. Another dividing factor is urban/country residence: 35 percent of PO electorate live in large cities, while only 19 percent of PiS electorate are big-city dwellers. PiS has the largest percentage of low-income earners: 60 percent of PiS voters have the lowest income (1000 zl or EUR 240 per month per capita). 60 percent of entrepreneurs declare a fear/concern that PiS will continue in government, and none in this group (zero percent) declares any fear related to a hypothetical return of PO to power. These divisions tend to increase so it is fair to say that the main party cleavage in Poland now overlaps with class divisions (all data from Sławomir Sierakowski, "Rachunki krzywd", *Polityka* 7 November 2017, online edition). However, from that fact it does not necessarily follow that the electoral victory of PiS was largely due to the sense of economic insecurity; for instance, a large number of PiS voters were peasants (which also correlates with the variables of non-city dwellers and lower educational status, just mentioned), and yet this social group is not plagued by a sense of economic insecurity, partly thanks to EU agricultural subsidies.

[281] Poland is consistently among the most EU-enthusiastic societies in the EU though pollsters claim that this enthusiasm is quite shallow and superficial, and quickly recedes when a person polled is challenged on e.g. questions of refugees. In a recent poll, an alarmingly high number of persons answered that they would be prepared to see Poland leave the EU if admission of some refugees were a price to be paid for remaining in the Union.

[282] For emphasis on this factor as decisive for PiS victory, see Jacques Rupnik, "Surging Illiberalism in the East", *J of Dem* 27/4 (1916): 77-87 at 82.

[283] Two Polish political scientists, otherwise critical of PiS, write about "Komorowski's 'emotional-intelligence gap' and indifference to voter sentiments", Joanna Fomina & Jacek Kucharczyk, "Populism and Protest in Poland", *J of Dem* 27/4 (2016): 58-68 at 60.

carry out necessary and desirable reforms.[284] Explaining how xenophobia, anti-establishmentarism and illiberalism could have come together in a single package (for they do not necessarily imply one another) is key to a compelling story about the sources of Kaczyński's seduction of a significant segment of the Polish electorate.[285] After all, it *may* seem difficult to raise the spectre of Islam when there are no Muslims, to attack the establishment if you have been part of it for the entire history of the democratic Poland, and to assault the very constitution which brought you to power. And yet PiS's appeal to so many voters hinged upon successfully (in the eyes of many voters, though not necessarily under some ideal standards of coherence) combining the three into a single story which offered both an identification of the sources of legitimate anxiety and the ways out.

The last point about the sources of the electoral success of PiS is the simplest: it has to do with the distorting effect of the Polish electoral system. As already observed, Kaczyński's party won an absolute parliamentary majority allowing it an independent formation of government, with only 38 percent of those voting – this is a substantial plurality but not a majority of voters. Whatever alternatives there are, and each has its defects, this fact speaks to the imperfections of the parliamentary/party/electoral system. Due to the inability of smaller parties (mainly on the left) to come to terms with the need to form effective and persuasive coalitions or party mergers, some 15 percent of all the voters saw their votes "wasted" – their preferred parties did not make it to the parliament. This 15% segment of "wasted votes" was decisive for the success of Kaczyński who benefited greatly from the absence of the Left in the parliament. If at least a part of those 15% votes translated into parliamentary parties (and with a 5 percent threshold for a party there is no reason why they could not), these parties would be natural coalition partners for the Civic Platform and other non-PiS parties (Nowoczesna, the peasant party PSL, etc.).

The sources of populist *victory* in Poland have to be distinguished from the sources of PiS's *continuing popularity* among the electorate. After all, the anti-establishmentarian, anti-elitist engine can last only so long; populists in power become part of the "establishment" and the "elite", and an over-use of this tool may turn out to be counter-productive to them. Also, other negative motives – xenophobia and distrust towards liberal checks and balances – have a limited benefit for the populist ruling party. Xenophobia's appeal is reduced by the fact that the government, true to its promises,

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[284] Jerzy Zajadło notes an anachronistic character to the concept because it is an "attempt … to undermine a progressive process of challenging an idea of legislative omnipotence….", "Pojęcie 'imposybilizm prawny' a polityczność prawa i prawoznawstwa" [A Concept of "Legal Impossibilism" and Political Nature of Law and Jurisprudence], *Państwo i Prawo* 3/2017: 17-30 at 21. Paul Blokker describes this trait of populism as "legal skepticism" which means that "populists are wary of the institutions of and limits of liberal constitutionalism", Paul Blokker, "Populist Constitutionalism", ResearchGate (20 September 2017), available at *https://www.researchgate.net/publication/319938853_Populist_Constitutionalism* (last accessed 1 January 2018) at 2. Note that not all contemporary movements described as "populist" necessarily espouse that form of legal scepticism; for instance, the pro-Brexit movement in the UK was not, by and large, critical of constitutional checks and balances, see Gráinne de Búrca, "How British was the Brexit vote?" in Benjamin Martill & Uta Staiger, eds*., Brexit and Beyond: Rethinking the Futures of Europe* (UCL Press: London, forthcoming 2018).

[285] Consider this account by a US journalist of the sources of Trump's success: "Donald Trump's campaign was massively fuelled by racism and xenophobia. But racism and hatred and fear of foreigners were not irreconcilable with hatred of the arrogant establishment that controlled major-party politics. Many voters out there hated both, and some hated those latter folks with the heat of a thousand suns", Matt Taibbi, *Insane Clown President: Dispatching from the 2016 Circus* (Spiegel & Grau: New York 2017) at xx. Substitute Donald Trump for Jarosław Kaczyński, remove "major party politics" with "ruling coalition parties", and concretise "racism" as 'anti-Islamism" – and you get a good account of PiS's social sources of victory.

resists admitting any refugees, even a token number, so they stop figuring high in the public imagination; liberal checks and balances are no longer seen as an obstacle to effective governance as they become progressively dismantled or used by the ruling party by staffing institutions with its own cadres. This is not to say that these factors do not play any role – they do, and they have been skilfully upheld by governmental propaganda. But their usefulness is limited, and they have to be replaced or accompanied by other sources of appeal for the maintenance of public support for populists in power.

The main sources of persistent support (which after the elections and up to the time of writing this article, in the end of 2017, has vacillated around 40 percent) are:

First, the delivery of new welfare benefits. The program "500+" (providing each family a monthly stipend of PLN 500, or EUR 120, per month for each child over and above the first one) with 2 million families as its beneficiaries was ingenious in its simplicity. This is a typical instance of pork-barrel politics, employed with great shrewdness by PiS. While various benefits "in kind" may be economically much more rational (free preschool facilities; improvement of public schools; public transport and infrastructure aimed at disadvantaged regions, and in particular improvement in health services), their effects are delayed in time and less tangible. In contrast, giving cash to every family with more than 1 child, immediately and with no conditions attached, is instantly attractive; e.g. in a low-income family of 3 children or more, it may translate into a doubling of the family income. For many poorer families, it is a very significant injection of cash, and the prospect that PiS's electoral defeat may mean the end to this influx of money gives PiS a huge edge over the opposition (especially since the promises by PO to maintain and even increase the program do not sound credible). These big social transfers are presented by PiS, and seen by its supporters, as a huge act of social justice and as a recognition of the legitimate claims of people who felt harmed and humiliated by the transformation – either in reality, or as an effect of skilful PiS anti-elite propaganda. The early criticisms of the programme by the opposition and the liberal media who represented it as a massive bribe only helped to strengthen the perception that it is only PiS that understands, empathises with, and helps the ordinary people.

Second, PiS in power is viewed, partly rightly, as a party which fulfils its promises, and in the social sphere, it indeed does: "500+", the lowering of the retirement age (thus undoing a major and politically costly PO reform); energetic and spectacular actions to protect tenants in the recently "reprivatised" buildings; a legislative action aimed at a ban on Sunday trading presented by governmental propaganda less as religiously driven and more as a protection for underpaid personnel in the commerce industry – these and similar actions show the electorate that PiS is on the side of "ordinary people". Even if some "reforms" are clearly misplaced and hugely controversial (the education reform, or health service changes) – they all support an image of PiS as a "can do" party, the perception of which is facilitated by a general economic boom so far. Much of the malaise in the society under the former ruling elite was not about the democratic qualities of the state (which largely matched the European standards) but rather about its relative inefficiency in delivering important public goods, such as affordable housing, public health and quality public schools. That is why the positioning by PiS to address these problems, even if in the long term wasteful and economically irrational, in the short-term positively contrasts with the record of PO in

these fields,[286] all the more so since it is rationalised by the government and its propagandists in "dignitarian" terms. The accompanying assault on institutional checks and balances, and in particular on the CT and the judiciary, is seen as an abstract issue, one that does not affect individuals directly, especially if the ostensible targets of the assaults are often viewed with scepticism and distrust.[287] "The institutions of a healthy democracy … feel remote and false, geared for the benefit of those who run them".[288] Propaganda depicts anti-PiS protesters as beneficiaries of the former ruling system, frustrated by the loss of undeserved advantages.[289] Additionally, but probably most importantly in the background, there is a dominance in Polish legal culture of an approach to law that Leszek Garlicki calls "pragmatist-nihilist",[290] whereby law is not seen as a constraint on power but has value only insofar as it facilitates efficiency of governance.

The third factor is the effectiveness of relentless propaganda, especially public TV which in some areas has no competition due to its superior territorial coverage. The propaganda, of course, further alienates the opponents of PiS but that does not matter: its function is to consolidate its supporters, and to enhance their hatred towards PiS opponents. As long as that hatred is stronger and more widespread than the dislike of PiS by its opponents, the propaganda performs its function: PiS faithfuls cling to Kaczyński because they are confident that his critics are much worse.[291] And it is not a mere hatred but also a fear: the propaganda machine presents the opposition not only as evil but also as extremely dangerous (claiming that they would bring millions of Islamists into Poland; they are capable of masterminding an airplane clash; they conspire with Poland's enemies in order to keep it subordinate and impoverished, etc.). There have not been, to my knowledge, any credible sociological studies of the actual effectiveness of governmental propaganda yet but anecdotal evidence suggests that it has some effect, especially in consolidating the support for PiS among those undecided or only weakly predisposed to support PiS.

Fourth, and connected to the previous point, PiS unscrupulously appeals to negative emotions in the collective social psyche: fear (of "Others"), envy (of the "elites"), resentment (based on a sense that

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[286] For an argument that legitimacy of states, especially of new democracies, depends less on their democratic qualities and more on their ability to deliver good quality governance, see Francis Fukuyama, "Why Is Democracy Performing So Poorly?", *J of Dem* 26 (2015): 11-20. See also Samuel Issacharoff, "Democracy's Deficits" (September 1, 2017), NYU School of Law, Public Law Research Paper No. 17-34; available at SSRN: *https://ssrn.com/abstract=3040163* at 27-30; (University of Chicago Law Review, forthcoming).

[287] Ewa Łętowska demonstrates that the principles of democratic rule of law have never been deeply internalized in Polish society, Łętowska at 19.

[288] This is a quote from George Packer, "Hillary Clinton and the Populist Revolt", New Yorker 31 October 2016; available at https://www.newyorker.com/magazine/2016/10/31/hillary-clinton-and-the-populist-revolt (last accessed 27 December 2017) at 9. Packer describes a perception by various members of white working class whom he interviewed for the article during the US presidential campaign in 2016, but they fit the PiS electorate well.

[289] As Jarosław Kaczyński said, signalling this line of argument: "In short, we are seeing a revolt against the fact that we are simply taking away the money that the elites had looted and divided up somehow," *http://www.reuters.com/article/us-poland-politics-kaczynski-democracy/polands-kaczynski-calls-eu-democracy-inquiry-an-absolute-comedy-idUSKBN14B1U5?utm_campaign=trueAnthem:+Trending+Content&utm_content=585c5c2204d30126992cd8d9&utm_medium=trueAnthem&utm_source=twitter* (last accessed 7 Nov 2017).

[290] Leszek Garlicki, "Trybunał Konstytucyjny jako współtwórca polskiej kultury prawnej" [Constitutional Tribunal as a Contributor to Polish Legal Culture], *Przegląd Konstytucyjny* nr 1/2017, 7-24.

[291] A similar mechanism with regard to the US is described by Balkin: "Trump doesn't care if his opponents hate him, as long as his base hates and fears his political opponents more", "Constitutional Rot" at 9.

democratic and market transformation resulted in disregard for the net losers, i.e. the relatively deprived groups) and anger (that PiS's political rivals are treacherous, anti-Polish, non-patriotic, and even murderous).[292] These emotions are much stronger than positive emotions. That is why the opposition also feels compelled to appeal to negative emotions (being "anti-PiS" as the only unifying ideology of the opposition) and in effect a downward spiral ensues in the political culture of public debate. But in this race to the bottom, PiS wins hands down: liberals and the Left are much less effective in using negative emotions that the right-wing populists are.

The fifth factor is the weakness and precariousness of institutions, unreliable "veto points" (such as bicameralism, semi-presidentialism, judicial review and decentralisation)[293] and the lack of some veto points altogether (federalism). Part of the weakness is the mere newness of institutions: "political scientists have found that the sheer amount of time that a democracy has existed is positively related to its chances for survival".[294] The younger a democratic system is, the more likely it is to collapse or backslide. This is natural: institutions, whether parliaments, constitutional courts, central banks or political parties, take time to shape their roles and responsibilities, to develop habits and conventions, to win societal support and legitimacy for itself, to establish "institutional memories", to overcome volatility by showing positive trends in a "*longue durée*", in a word – to consolidate. Here, the human factor turns out to be crucial: when there are not enough people sufficiently committed to defending and respecting the institutions, no institutional design is immune to attack, however pluralistic and equipped with veto points and defences. This is clear in consolidated democracies as well: no institution is absolutely resilient; as Huq and Ginsburg say with regard to the United States, "Whether [American liberal democracy] survives depends less on the robustness of our formal, institutional defenses – which, we conclude – are not particularly strong – but on the decisions of discrete political elites, and the contingent and elusive dynamics of popular and elite mobilization for and against the conventions and norms that render democratic life feasible".[295] But the human factor is all the more significant in new, transitional democracies, where there was simply a shorter time during which the people have had the opportunity to become convinced about the advantages of democracy; democracy is stable when its citizens believe that it is "the only game in town" and that non-democratic alternatives are illegitimate.[296]

This is not to suggest that the shape of institutions does not matter: e.g. a system of electing CT judges may be made better or worse, and the Polish/Hungarian system is bad because the parliamentary winner can appoint all the judges to vacancies which become open during the parliamentary term, so the "compromise-oriented" election of judges depends largely on the political culture and the good will of the ruling party/parties rather than being compelled by

[292] The last invective refers to an alleged responsibility of the former PO elite for the death of 96 passengers (including President Lech Kaczyński and his wife) in the airplane crash near Smoleńsk on 10 April 2010.
[293] None of the four potential "veto points" turned to be effective. Senate, as a "chamber of reflection" meant to put a brake on the laws produced by the lower chamber, when dominated by the same party as the Sejm, became a rubber stamp; semi-presidentialism contributed very few meaningful vetos to the legislative production; judicial review was easily dismantled as evidenced earlier in the article; and decentralisation, lacking a strong constitutional entrenchment and a political will to support local authorities, fell victim to centralisation tendencies, mainly in the fiscal field.
[294] Ethan B. Kapstein & Nathan Converse, "Why Democracies Fail", *J of Dem* 19/4 (2008): 57-68 at 58.
[295] Huq and Ginsburg at 77-78.
[296] This is an upshot of theory of Linz and Stepan, see Juan J. Linz & Alfred Stepan, "Toward Consolidated Democracies", *J of Dem* 7 (1996) (April): 14-33.

institutions, as is the case e.g. of Germany. There are ways of inducing and ways of minimising the need for inter-party dialogue and compromise through institutional design. As Jeremy Waldron notes, with regard to the United States, "The constitutional structure – bicameralism, the president's veto, advice-and-consent, and perhaps also judicial review – means that any party 'in power' has to coordinate and usually compromise with leaders of other persuasions".[297] Nevertheless, no matter how well-designed the system is, it will not protect itself against a dishonest President "appointing" improperly elected "judges", and the executive refusing to comply with judgments: "constitutional enforcement requires the kind of intersubjective agreement on violations that is difficult to obtain, especially under mutative and precarious political conditions".[298] The test for the resilience of institutions is whether powerful officials back down when those institutions issue decisions which officials dislike or even abhor, as was the case of President Nixon having to hand over audiotapes in connection with the Watergate scandal, as ordered by the Supreme Court, or President Trump having to comply with the US District Court in the state of Washington regarding proposed travel bans, or when the UK Supreme Court told the government of Theresa May that it could not appeal to the Brexit referendum to sidestep parliamentary mechanisms of unwinding Britain's membership in the EU.

Institutions are not "robust" or "resilient" per se, without the actual will and determination of people both staffing those institutions and stakeholders in society at large, to defend and maintain them. As Bojan Bugaric convincingly observes: "Ultimately, democratic political parties and social movements with credible political ideas and programs offer the best hope for the survival of constitutional democracy. The role of law and constitutional checks and balances is less of an essential bulwark against democratic backsliding than is traditionally presumed in the legal literature".[299]

Conclusions

Over twenty years ago, Guillermo A. O'Donnell published an article which became influential, in which he put forward a concept of "Delegative Democracy" (DD): a post-authoritarian system under which "whoever wins election to the presidency is thereby entitled to govern as he or she sees fit, constrained only by the hard facts of existing power relations and by a constitutionally limited term of office".[300] While O'Donnell's discussion is modelled on Latin American post-authoritarian presidential systems, it can be adapted, mutatis mutandis, to Polish semi-presidentialism, with the leader of the winning party performing a function similar to that of a Latin American president. O'Donnell does not use the concept of populism (the word populism is mentioned only once throughout the article, and without any emphasis on the concept),[301] and yet many observations are strikingly adequate to describe Polish constitutionalism under PiS. DD – just like a PiS version of democracy – is strongly majoritarian: "It consists in constituting, through clean elections, a majority that empowers someone to become, for a given number of years, the embodiment of the high

[297] Jeremy Waldron, *Political Political Theory* (Cambridge Mass.: Harvard UP 2016) at 109, endnote omitted.
[298] Huq & Ginsburg at 77.
[299] Bugaric, "The Populists at the Gates": at 4.
[300] Guillermo O'Donnell, "Delegative Democracy", *J of Dem* 5/1 (1994): 55-69 at 59.
[301] "Delegative Democracy" at 62.

interests of the nation".[302] PiS uses a majority-based legitimacy as the basis of its title to represent the "high interests of the nation" as a whole, and those who are not captured by the interests represented by PiS, do not count. Further, under DD, "[t]his majority must be created to support the myth of legitimate delegation".[303] The legitimacy claimed by PiS is merely a "myth", if one considers the fact that the power was delegated to it by 18 percent of the eligible voters – but a myth that is constantly reasserted and renewed. DD "is strongly individualistic …. The leader has to heal the nation by uniting its dispersed fragments into a harmonious whole".[304] Accordingly, Kaczyński is referred to by its hardest proponents as the Nation's saviour, and the dominant narrative post-victory was full of references to the re-established "community".

What DD is missing, in contrast to a true *representative* democracy, is accountability during the term, and especially what O'Donnell calls "horizontal accountability", exercised through "a network of relatively autonomous powers (i.e., other institutions) that can call into question, and eventually punish, improper ways of discharging the responsibilities of a given official. … [S]ince the institutions that make horizontal accountability effective are seen by delegative presidents as unnecessary encumbrances to their 'mission,' they make strenuous efforts to hamper the development of such institutions".[305] Again, if we replace "delegative presidents" with "a leader of the ruling party", this is a good account of Poland under PiS. As this article has documented, the main fire of the parliamentary majority, the government and the President – all coordinated skilfully by the leader of the ruling party – was addressed against various institutions of "horizontal accountability" in Poland, including the constitutional court, ordinary courts, parliamentary opposition, NGOs and the media.

The point of divergence between Polish anti-constitutional populist backlash and "delegative democracy" concerns, well, how "democratic" it is. As O'Donnell put it, "Delegative democracy … is more democratic, but less liberal, than representative democracy".[306] Whether Poland under PiS will remain democratic at its core – in the moment when the electoral "delegation" is being decided by the electorate – remains to be seen at the next elections. As David Landau observes, the notion of DD "at least assumes a fair shot to periodically oust incumbents from office"[307] – and we simply do not know whether the opposition parties in the forthcoming elections in Poland will have such a fair shot. What we already know, though, is that PiS's assaults upon some par excellence democratic rights and procedures imply that "illiberal democracy", Polish-style, has a strong anti-democratic tendency built into it. Samuel Issacharoff notes, "Elections are the shorthand for other factors that we think characterize democratic life…."[308] – and these "other factors" stand for a broad range of rights, practices, and institutions which, together, structure, facilitate and render fairer political competition for the hearts and minds of voters.[309] "Democracy" minus the equal rights to free

[302] "Delegative Democracy" at 60.
[303] "Delegative Democracy" at 60.
[304] "Delegative Democracy" at 60.
[305] "Delegative Democracy" at 61-62.
[306] "Delegative Democracy" at 60.
[307] Landau, Abusive Constitutionalism, at 199 n. 23.
[308] Issacharoff, Fragile at 5.
[309] Issacharoff puts it well elsewhere in his book: "In reality, democracy is a more complex form of political organization than simply a fact of holding periodic elections for government. Behind the image of the voter at the polls stands a conception of civil liberties that allows political organization and speech, and a series of institutional actors who provide the structure for political competition, most notably political parties", Fragile at 243.

assembly, free media, constitutional courts, independent electoral commissions and other checks on the arbitrary power degenerates into autocracy. While in the first electoral cycle, "illiberal democracy" may carry some genuine meaning (the free and fair elections give the illiberal leaders of the winning party a mandate to act within their electoral promises even if we dislike them), in the longer term it becomes an oxymoron because the very liberal rights which are part of the irreducible guarantees of democracy become eroded of substance and dispensed with. More specifically, the institutions charged with the task of protecting democracy against distortions by a current majority, such as constitutional courts and regular courts – become disabled and then are enlisted in service of the majority; as a result, democracy loses some important guarantees of self-protection and self-correction.[310] Democracy becomes "merely formal", to use a popular vernacular, in that it lacks substance while maintaining the forms resembling or identical to those in truly democratic states. David Landau put it well characterising "abusive constitutionalism": "it is fairly easy to construct a regime that looks democratic, but in actuality is not fully democratic, at least along two important dimensions: vertical and horizontal checks on elected leaders and rights protection for disempowered groups".[311]

As two veteran political scientists put it, for a political order to be democratic it is not sufficient that the authorities emerge from free and fair elections, i.e. that they are democratic in their pedigree, but also that they actually behave within the bounds of the democratic rules of the game as defined by the constitution and other laws: "[N]o regime should be called a democracy unless its rulers govern democratically. If freely elected executives (no matter what the magnitude of their majority) infringe the constitution, violate the rights of individuals and minorities, impinge upon the legitimate functions of the legislature, and thus fail to rule within the bounds of a state of law, their regimes are not democracies".[312] All three instances of "failing to rule within the bounds of law" listed by Linz and Stepan have occurred in Poland. As evidenced throughout this paper, the authorities – both formal and informal, such as the de facto leader – infringed the Constitution on several occasions; the rights of individuals and minorities have been trampled upon (for instance, through a politically discriminatory law on assemblies and through the law on police infringing privacy rights, both facts occurring in the situation of disabling constitutional review of these laws), and the "legitimate functions of the legislature" have been breached by a political capture of the parliament by a political majority which, for all practical purposes, gagged the opposition and prevented a normal deliberation on the proposed bills.

For this reason, it is difficult to adopt, at least with regard to Poland, Cas Mudde's formula that "In essence, the populist surge is an illiberal democratic response to decades of undemocratic liberal policies".[313] For one thing, Mudde traces the populist appeal to a reaction against transfers of authority to supranational entities (such as the EU and IMF) and also unelected national bodies such as central banks and courts – but neglects the fact that these transfers themselves often had democratic support. For another thing, the "democratic" ingredient of populist movements has

[310] For an analysis on how the Constitutional Tribunal in Poland protected democratic process by invalidating the lustration law in 2007, see Issacharoff, Fragile at 209-211.
[311] Landau, "Abusive Constitutionalism", at 200.
[312] Linz & Stepan, "Towards Consolidated Democracies", at 15.
[313] Cas Mudde, "Europe's Populist Surge", *Foreign Affairs* 95 (Nov/Dec 2016): 25-30 at 30.

always been thin.[314] Often, populists target instruments of the electoral process, including institutions (electoral commissions, courts in charge of electoral disputes) and electoral rules (the boundaries of districts, limits on terms of office, etc.) to make it more difficult for the opposition to dislodge populist incumbents,[315] thus undermining democracy in its thinnest meaning, as securing an alternation in power. For this reason alone, as David Landau observes, "populist constitutional projects cannot simply be read as pitting 'democracy' against 'liberalism'.[316] More generally, by rejecting effective checks and balances, populists undermine the subjection of democratic politics to the constitutional rules of the game, and by denying equal moral status to members of groups they despise, whether recent migrants, Islamists, atheists, or simply political rivals, they strike at the value of political equality which is at the core of democracy. Majority rule derives its weight precisely from the value of political equality it serves, and insofar as it is inconsistent with that value, it loses its normative bearings.[317] The widespread tendency to characterise contemporary populisms as fundamentally democratic, or at least as not non-democratic,[318] is therefore highly questionable, and assumes an arithmetical, purely majoritarian concept of democracy. It also ignores the right-wing populists' distaste for *representative* democracy, and their claim to communicate with the people as a whole, over the heads of representative institutions. They favour simple solutions, where alternatives are reduced to black-and-white stories, and quick solution, as the frenzied pace of pushing through the main pieces of legislation in Poland under PiS exemplifies, but "simplicity and haste are the obverse of responsible legislative decision-making, precluding, as they do, the time and space for thought and speech – and, within the realm of speech, for successive rounds of proposal, reply, amendment, and reconsideration that genuine engagement with legislative issues requires".[319]

Another strikingly non-democratic characteristic of the right-wing populism is its inherently exclusionary nature: exclusionary not only vis-à-vis the non-citizens (potential immigrants) but also those citizens who are not seen as "real" Poles, Hungarians etc. (or, in a memorable phrase of Jarosław Kaczyński, those who make an "inferior sort" of citizen), and who do not deserve to belong to the nation by virtue of their identity, views or conduct.[320] (PiS' tendency towards delegitimising

[314] For an analysis of parties such as Front National in France, Golden Dawn in Greece, Jobbik in Hungary and the Vlaams Blok in Belgium as fundamentally antidemocratic, see Takis Pappas, "Distinguishing Liberal Democracy's Challengers", *J of Dem* 27/4 (2016): 22-36 at 25-26. But note that Pappas himself defines populism as illiberal but democratic, hence he does not classify those parties as populist, see id at 29. For him, PiS is populist in his sense of the word, see id at 30.

[315] See David Landau, *Populist Constitutions*, manuscript (2017) on file with the author, at 8, forthcoming in *Chicago Law Review* (2018). I am grateful to Professor Landau for his kind permission to cite and quote his draft, unpublished at the time of the writing.

[316] Id at 8.

[317] See Wojciech Sadurski, "Legitimacy, Political Equality, and Majority Rule", *Ratio Juris* 21 (2008): 39-65; Ronald Dworkin, *Sovereign Virtue* (Harvard UP: Cambridge Mass, 2000) at 363; Waldron, *Political* at 164; Jeremy Waldron, *God, Locke, and Equality* (Cambridge UP: Cambridge 2002) at 130-31.

[318] See e.g. Sheri Berman, "Populism Is Not Fascism", *Foreign Affairs* 95 (Nov/Dec 2016): 39-45 at 43 (stating that current right-wing extremisms, which she dubs populisms, "are certainly illiberal, but they are not antidemocratic").

[319] Waldron, *Political*, at 141, endnote omitted.

[320] A recent, explicit statement of this exclusionary approach was well made by a sociologist Andrzej Zybertowicz who is very well placed in the PiS establishment (and currently a presidential advisor on security issues, formerly a PiS candidate in the elections to the European Parliament). As he said at a public forum organised by TVN24 station on 12 November 2017, the Polish nation consists of all those who meet "a patriotic minimum" made up of three conditions: first, one must believe that "Poland and Poles need their own,

the opposition, as evidenced above, is a case in point). The exclusionary character of populism is not something merely contingent but is inherent to populism as such:[321] if it claims to speak for the entire nation (as it does), it must resolve the necessary clash between this claim and the visible presence of those who do not identify with the populists' programme, by relegating them beyond the pale of the community. As political scientist Robert Mayer observed, "It is here that the politics of identity becomes important in authoritarian ideology, for the dimension of standing is the domain of authenticity and inauthenticity, in which 'real' members are distinguished from 'false' ones on the basis of ascriptive status".[322] Consequently, populists are anti-pluralist, not just in their political philosophy but also in their approach to institutions which must distinguish between the 'real' and 'false' Poles (Hungarians, Czechs, etc.); only the interests, preferences and identities of the 'real' ones matter (or, under a weaker version of the "unequal standing" theory, they matter more). As Foa and Mounk observe: "The core of the populist appeal thus sets populists in opposition to a pluralist vision of democracy in which groups holding disparate views and opinions must resolve their differences through channels of democratic dialogue and compromise";[323] in an anti-pluralist paradigm, "dialogue and "compromise" are replaced by the winner who "takes all" because the winner better personifies the unitary interest of the People.

Illiberal, anti-representative, exclusionary, anti-egalitarian and anti-pluralist – one wonders how much and what sort of "democracy", compatible with the circumstances of the modern world (marked as it is by important pluralism and diversity, and growing claims for inclusion), is left after all of populism's characteristics are taken into account. To be blunt: what is "democratic" about an illiberal, exclusionary and anti-pluralist "democracy"? One may recall that Zakaria, in his classical article, when drawing a difference between democracy *tout court* and "liberal democracy", attached a caveat to a description of classical, merely electoral democracy: "Of course elections must be open and fair, and this requires *some* protections for freedom of speech and assembly"[324] – huge work is done by the word "some". Protections for freedom of speech and assembly extend to some other freedoms, indispensable in the democratic process, such as freedom of religion and the rights of privacy; degrees in the protection of those freedoms matter; so do the independence of courts and robustness of constitutional review in maintaining the implementation of those rights consistent with the established constitutional meanings. To be sure, we need a language to preserve a distinction between an autocracy that cares about and pursues popular support and an autocracy which relies upon naked power and oppression. The characteristic of "populism" does the job of striking this difference.

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independent and effective state", second, "regardless of whether one is a religious believer or not, one must not neglect the role of Catholic Church", and third, "Polish history may be criticized but one must not turn one's back on it or falsify it". Whoever fails to meet any of these threshold conditions, Dr Zybertowicz added, "signs off on Polishness" ("wypisuje się z polskości"), "'Plemię to za łagodne określenie. Plemiona mogą współistnieć'. 'Arena Idei w TVN24'" (12 November 2017) accessible at https://www.tvn24.pl/wiadomosci-z-kraju,3/arena-idei-czy-polacy-to-jeden-narod-a-dwa-plemiona,789533.html (last accessed 29 December 2017).

[321] For a different view, see Blokker, "Populist Constitutionalism", at 6-7. But the only examples of an "inclusionary" populism he gives are left-wing movements, such as Podemos or Syriza; perhaps the regularity noted in the main text applies to right-wing populisms only. Blokker agrees that populist movements in Hungary and Poland are exclusionary in their outlook, id at 6.

[322] Robert Mayer, "Strategies of Justification in Authoritarian Ideology", *Journal of Political Ideologies* 61 (2001): 147-168 at 158.

[323] Foa & Mounk at 13.

[324] Zakaria at 25, emphasis added.

Perhaps the concept of "plebiscitary autocracy" is more adequate: there are by-and-large free and regular elections though not necessarily fair, due to some restraints upon democratic rights, such as regarding the assembly and media, and due to various ways of delegitimising the opposition and politicising the institutions which manage the electoral process.[325] With the government controlling all the levers of government, and suffocating the opposition and pluralism in the media, the election day is a plebiscite in favour or against the ruling elite.[326] However, there is no accountability and no subjection of the government to effective constitutional constraints *between* the elections (which renders the system non-democratic, except for the brief electoral episodes); the plebiscites are about whether the electorate approves of the governmental disregard for the constitution in the period between elections. By providing generous welfare provisions, as well as an elaborate system of patronage and spoils, and a sense of pride based on nationalistic rhetoric and a sense of protection based on fear of immigrants, the government posits to the voters a Faustian bargain for the net benefit of confirming the government in power despite its constitutional non-compliance. Part of the bargain is about dispensing with strong and independent courts, because such courts are not vital for a party which confidently controls all the branches of government, and does not anticipate an imminent defeat in which case such courts would be helpful to it; this confirms Samuel Issacharoff's rule that "Courts are at their strongest when there is uncertainty among rivals for political power, and at their most precarious when all the other institutional levers are under the unitary control of a single dominant party".[327] This is the direction in which the Polish system is quickly evolving – one may say, degenerating – these days.[328]

Such a diagnosis, though, is made more difficult by the fact, as already noted briefly in the Introduction, that the Polish transformation operates without any revolutionary rhetoric and without an outright destruction of the institutions.[329] There is no revolutionary rhetoric employed by the winners: no overarching Utopia but instead, a systematic capturing of one institution after another by cadres loyal to PiS and in particular to its leader. We do not know what the *finalité* of this movement is – or at least, we are not being told. Perhaps there is none, perhaps all that matters is the mere fact of unrestrained power, or perhaps there are many *finalités* pursued by different factions within the ruling elite. But other than some banalities about restoring dignity to hard-working people, there is no grand design which would alert us to a revolutionary (or counter-revolutionary, if you prefer) zeal of PiS. And regarding institutions, literally speaking they are not being "dismantled" or "destroyed" but rather "hollowed out", eroded and emptied: their sense and

[325] As a result, this account by Larry Diamond who referred to "electoral authoritarianism" in hybrid regimes, may soon apply to Poland: "While an opposition victory is not impossible …, it requires a level of opposition mobilization, unity, skill, and heroism far beyond what would normally be required for victory in a democracy", Diamond, "Hybrid" at 24.

[326] As Samuel Issacharoff says, "Elections under a completely controlling party, even if untainted by rampant fraud and violence, are in substance no different from the plebiscite", *Fragile* at 272.

[327] *Fragile* at 273.

[328] Some democracy scholars classify Poland under PiS as a case of "electoral democracy": lower in the rank than a "liberal democracy" (because it is deficient in the field of the rights-securing rule of law and effective judicial constraints on executive power) but better than "electoral autocracy" (which displays significant irregularities regarding democratic standards concerning party competition etc.), see Valeriya Mechkova, Anna Lührmann & Staffan I. Lindberg, "How Much Democratic Backsliding?", *J of Dem* 28/4 (2017): 162-169 at 165. The other countries which slipped in the same ranking between 2016 and 2017 from the category of "liberal democracy" to that of "electoral democracy" are Brazil, Panama and Suriname.

[329] For a similar observation, see also Rafał Kalukin, "Wielka normalizacja" (A Great Normalization), *Polityka* 26 December 2017, online edition.

meaning are drained out of them, but their shells are maintained. For a spectator, this creates an illusion of business as usual.

Consider again, as just one example, a sequence of actions regarding the "reform" of the judiciary, and in particular of the National Council of the Judiciary (KRS), as described earlier in this paper. A stylised but correct account may go like this: the Parliament – the Sejm and the Senate – debates on the presidential bills in December 2017. No matter that the opposition is given only 1 or 2 minutes for their speeches; formally speaking, it is permissible. And the opposition's input is dispensable anyway because the parliamentary arithmetic renders any discussion pointless. The same applies to an obligation of the legislature to subject important bills to public consultation: no such consultation was organised, but the duty is not imperative; in any event KRS representatives were allowed to attend the parliamentary committee's meeting (even though the Chairman now and again switched off the microphone to the main KRS spokesman, brave but helpless judge Waldemar Żurek – but what difference would he make if he were allowed to speak at his leisure?). The President eventually signed the amended bills, which were after all a result of a compromise, even though only a compromise between a PiS President and the PiS parliamentary majority. The issue of the constitutionality of the signed statutes will not arise as a problem because the newly reconstituted CT will not invalidate these laws. In any event, it was the same new CT which back in June 2017 had found the previous KRS act to be unconstitutional thus opening up a road to a new KRS statute. So strictly speaking, the legislature had no choice but to change the law on the KRS, and so it just used this occasion to replace the entire judicial composition of the KRS. Going back to the June judgment of the CT regarding KRS, it was handed down by a five judge panel, which included inter alia Ms Przyłębska (as chairperson of the panel, as her elevated position dictated) and two quasi-judges (including one serving as judge-rapporteur). But Ms Przyłębska became the President of the CT, notwithstanding irregularities of her election, only thanks to the generosity of the President who looked the other way, and the quasi-judges made it to the CT only thanks to a choice by President Duda who had sworn *them* in rather than the three judges properly elected under a previous political dispensation. In this way, he had aided and abetted in creating a CT as an institution laundering unconstitutional laws enacted by PiS and invalidating old laws adopted in pre-PiS times – so what would be the point now for him to send a motion to *such* a CT to review the constitutionality of the laws adopted by PiS? Especially since Ms Przyłębska even prior to the adoption of the judiciary laws in their first, more radical version in July 2017, had declared on governmental TV that they were perfectly compatible with constitutional separation of powers…

This account demands a lot from an external observer: a lot of knowledge and a lot of understanding. The account is encrusted with small details, often hidden under the surface, often of uncertain relevance, which jointly render the picture diametrically different from that mandated by the constitution. We now see the same sequences of events in the Supreme Court and regular courts, in the prosecutor's office and in the government's dealings with civil society. Old procedures and institutions are, with some notable exceptions (such as the Constitution itself) complied with. But the overall system has been radically transformed from within – without the language of radicalism, and without many formal changes of institutions. If the system is evil (and admittedly to many Poles it is *not*), it is, with apologies to Hannah Arendt, the evil of banality: a façade of "normal" democracy hides a set of interconnecting arrangements cohering into an overall pattern of a thorough authoritarianism (even if it is a plebiscitary one) radically contrary to democratic values.

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The picture drawn in this paper is gloomy. But there is no inevitability in further backsliding for Polish democracy: as of the time of writing, no political movement in the history of human society carried with it inevitable outcomes. PiS is hopefully no exception. Poland has the strong societal and political resources necessary to arrest and reverse the trends described above, and then unravel all the nefarious institutional changes brought about by PiS rule. For one thing, there is still a vibrant and resilient civil society, there are strong if rather episodic social protest movements, there is an independent body of commercial media, both electronic and print, and there are passionate debates in social media. Universities are free, and the only censorship, when it occurs in the academia, is self-imposed. Cultural institutions – theatres, film industry, museums – represent a rich picture of political views, and although the state makes occasional and rather awkward attempts at controls, both administrative and financial, they maintain an independent spirit. The opposition parties, while divided along many lines, have a combined electorate not far below the electorate of PiS. There are a number of iconic personalities with great historical credentials and impeccable liberal-democratic outlooks who constitute the symbolic capital that PiS lacks: Lech Wałęsa, Adam Michnik, Władysław Frasyniuk etc. There is a courageous and intelligent Commissioner for Human Rights (Ombudsman) Dr Adam Bodnar who enjoys a degree of constitutional protection against dismissal, even though PiS media and individual politicians occasionally flag the issue of revoking his tenure prior to the end of his term. For another thing, populisms, such as PiS's, often carry a seed of self-destruction: they are, in the long run, ineffective and counter-productive, in relying upon the knowledge (imperfect) and charisma (doubtful) of a single person. With its paranoid excesses and narrow epistemic base, populism has low capacity for effective governance, and by disconnecting the real centre of political power from constitutionally established institutions and procedures, the regime reduces the likelihood of self-correction facilitated by inter-institutional accountability. The main legitimating ground of populism – that it effectively delivers the goods to its electorate – seems to have a long-term tendency to decline.

There is also a factor which has lately been subject to lively debate: the role of the external environment in which Poland is embedded, and in particular of its EU membership. Ironically (or shrewdly – only time will tell), on the day when the EU Commission announced formally that it would open an Article 7 procedure against Poland, President Duda signed the very two laws which figured at the top of reasons for initiating the Article 7 procedure in the first place. But whether the EU, with its assortment of different measures of "naming and shaming" (Article 7.1. TEU), sanctions (Article 7.3 TEU) and legal infringement actions, as well as a newly crafted "rule of law framework", can be effective in reversing the anti-democratic trends in one of its largest member states is a topic for a different paper.[330]

[330] I have recently sketched my opinion in Wojciech Sadurski, "That *Other* Anniversary (Guest Editorial)", *European Constitutional Law Review* 13 (2017): 417-427 at 421-427. For a more extended analysis of Article 7 and its potential use in policing democratic practices in EU member states, see Wojciech Sadurski, "Adding Bite to a Bark: The Story of Article 7, E.U. Enlargement, and Jörg Haider", *Columbia Journal of European Law* 16 (2010): 385-426.