Hague J Rule Law (2019) 11:63–84
https://doi.org/10.1007/s40803-018-0078-1

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Polish Constitutional Tribunal Under PiS: From an Activist Court, to a Paralysed Tribunal, to a Governmental Enabler

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Published online: 13 June 2018
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Abstract After the electoral victories of 2015, PiS transformed the CT from an effective, counter-majoritarian device to scrutinise 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. Whatever else constitutional courts around the world are expected to do, there is no doubt that their first and primary function is to ensure adherence to a constitution and its protection against legislative majorities. In Poland, the Tribunal became a defender and protector of the legislative majority. This changed role, combined with general distrust of the CT and concerns about legitimacy of its judgments, explains also the extraordinary drop in the number of its judgments. For all practical purposes, the CT as a mechanism of constitutional review has ceased to exist: a reliable aide of the government and parliamentary majority has been born.

Keywords Poland · Constitutional tribunal · Constitutional review · Judicial review · Populism

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1 Introduction

Populist backsliding in Poland which occurred with breath-taking speed after the Law and Justice party [Polish acronym to be used here: PiS] was successful in presidential and then parliamentary elections in 2015 should be seen as *a system* in which particular aspects are mutually inter-connected and reinforce each other: a comprehensive assault upon liberal-democratic constitutionalism produces a cumulative effect, and the sum is greater than the totality of its parts. The disempowering of the Constitutional Tribunal—the subject-matter of this article—should therefore be seen not as a phenomenon in itself, but as importantly disabling constitutional review of liberal rights such as freedom of assembly, freedom of speech, rights to free and fair elections, or rights of non-governmental organisations. As a leading Polish constitutional scholar Tomasz Tadeusz Koncewicz noted: "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?"[1]

That is why the most immediate and spectacular anti-constitutional action by PiS was addressed against the Constitutional Tribunal [CT]. The Tribunal had established itself as a strong protector of democratic process and of limits upon legislative and executive powers. While many of its judgments were controversial, and according to some observers (including myself) lacked the required vigour,[2] nevertheless in the landscape of European constitutional review the Tribunal established itself as a leading judicial actor contributing to defense of human rights,[3] European integration,[4] and democratic governance.[5] 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

[1] Koncewicz (2017).

[2] See e.g. Sadurski (2014) 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); Sadurski (2012) at 120–126 (criticising the language and conceptual framework, though not the outcome, of the CT decision on EU accession); Gliszczyńska-Grabias and Sadurski (2015) (criticising a CT judgment allowing ritual slaughter).

[3] See inter alia the Constitutional Tribunal judgments of 19 July 2011, K 11/10 (on the unconstitutionality of a 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).

[4] 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).

[5] 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); etc.

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. The 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 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 anti-constitutional assault by PiS—showed that, perhaps contrary to initial attempts at destroying the CT as such, the rulers identified an important 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.[6] But PiS does not consider this possibility seriously, so at least this argument for judicial review does not apply to their calculations.

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

2 Stage One: Paralysing the Tribunal

2.1 Court Packing

Immediately after coming to power, PiS engaged in dynamic court-packing, which, after 1 year, resulted in gaining a majority on the Tribunal. Earlier, the PiS-appointed judges and quasi-judges had effectively paralysed the Tribunal, rendering it unable to subject new laws to constitutional scrutiny. 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.

[6] See Ginsburg (2003) at 22–33.

Shortly before the 2015 parliamentary elections, on 8 October 2015 (by the end of its 7th Term), the Parliament elected (based on the newly amended statute on the CT of 25 June 2015) five new judges, rather than only three, as it should have done, since only three positions were to become vacant under the former parliamentary term, while the other two were to become vacant at the start of the new term. Electing those two extra judges by the "old" Sejm [Lower House of Parliament] was clearly improper, as subsequently affirmed by the CT,[7] 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 according to which *all five* (including the three correctly elected) were alleged to have been elected on 8 October irregularly, and so the elections of all five were declared by the Sejm null and void, and on that basis it later (on 2 December 2015) elected five new judges.[8] 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.[9] Further, on 9 December, the CT found unconstitutionality in the provisions of the law of 19 November 2015 on the basis of which three judges were elected by the Sejm, replacing judges whose term ended on 6 November 2015.[10] The joint implications of these two judgments are that only the 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

[7] In its judgment of 3 December 2015, K 34/15, 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 "extra" 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.

[8] 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 cognisance of the Tribunal. For criticism, see Mirosław Wyrzykowski, "Antigone in Warsaw", in Zubik (2017) at 376–77.

[9] Judgment K 34/15. In the same judgment, the CT held also that the President of Poland was under the obligation to accept their oath.

[10] 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.

up to now is that the election of three out of five judges of the CT "elected" on 2 December 2015 was, in light of CT case law, irregular because the seats were already filled by the three correctly elected judges in October 2015.[11]

However, almost 2 years later, on 24 October 2017 the CT handed down a judgment in which it "cleansed" the improperly elected judges by "reinterpreting" the K 34/15 judgment.[12] 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. 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. 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 (whatever it may mean). 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[13] 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 handed down this judgment, including one (Muszyński) as the President of the panel, thus blatantly breaching the fundamental principle *nemo iudex in causa sua*.[14]

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), including three "quasi-judges"[15] 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

[11] See also Śledzińska-Simon (2018).

[12] Case no. K 1/17.

[13] "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.

[14] 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.

[15] 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".

by the former term of Sejm were constitutional.[16] (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 a 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, especially since the Vice-President of the Tribunal was still in office, very much in good health 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. It should be added that, by refusing to swear in some elected judges the President of the Republic de facto changed the constitutional system of appointment of CT judges: it added to the parliamentary procedure a new stage, namely a presidential veto to the election of judges. This veto is invisible to the Constitution.

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, alongside Mr. Pszczółkowski). To start with, the competence of Ms. Przyłębska to convene the General Assembly qua an "Acting President" is highly questionable because that position is arguably unconstitutional, in view of the presence of a constitutionally-recognised Vice-President (Professor Stansiław Biernat). Further, Judge Przyłębska was nominated as a 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; the missing Judge Rymar, for all we know, could have given his vote to a third person, in which case there would be a tie between that third person and Muszyński). To make things worse, and contrary to Article 21 of the statute of 13 December 2016 on the CT, the thus constituted "General Assembly" of judges of the CT failed even to take a

[16] Judgment K 34/15.

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)[17]. 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 a lack of quorum. Despite all these irregularities, President Duda immediately (the following day) appointed Przyłębska as the new President of CT.

The uncertainties surrounding the election of Ms. Przyłębska had also its short and inconclusive reflection in the common courts. The Court of Appeal in Warsaw in February 2017 addressed, in an act of courage and judicial integrity, a "legal question" to the Supreme Court asking for a resolution of the problem of the status of Przyłębska qua the President of CT. As the Court argued, "An act issued by the President may fail to constitute an act of appointing a person to that position if a judge of Constitutional Tribunal indicated in that act was not presented by the General Assembly of Judges of the Tribunal as a candidate for the position [of President of the Tribunal]…"[18] In the justification for the decision the Court of Appeal listed a full litany of reasons for its legal question: there was no formal resolution by the General Assembly, persons deemed to be candidates have not gained the majority of votes of the General Assembly, not all judges of the Tribunal took part in the assembly, some persons did participate who had been elected to the already filled seats on the Tribunal, one of those persons was presented to the President of Republic as a second candidate for Presidency of the CT, the meeting of the General Assembly was not convened by the Vice-President of CT nor chaired by him, in the situation of vacancy of the position of the President… The implication was clear: Ms. Przyłębska may have been "presented" to the President in a procedure which does not amount to a requisite act by the General Assembly. However, the Supreme Court rather opportunistically avoided taking a stance on the issue, arguing that the Court of Appeal has not established "a real legal question" but rather that it was a purely abstract, moot issue. (The legal question, in reality, was whether the official letters signed by Julia Przyłębska in the trials before common courts may be recognised as the official letters by the President of CT, so arguably there was nothing "moot" about it). The Supreme Court abstained from saying whether,

[17] 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 then 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.

[18] Decision [Postanowienie] of Court of Appeal in Warsaw of 8 February 2017, I ACz 52/17.

in *other* circumstances, common courts can scrutinise the legality of elections of the President of CT—something that the "new" CT strenuously denied. It should be added that administrative courts, including the Supreme Administrative Court, which according to some scholars would be the most natural courts to determine this matter, completely avoided dealing this issue, even though they were invited to do so several times by parties to administrative litigations (e.g., in response to official letters by Ms. Przyłębska acting as President of the CT who addressed questions by NGOs regarding the functioning of the Tribunal within the procedure of access to public information). Whenever administrative courts were seized to clarify the legal status of Ms. Przyłębska, they refused to admit that it was within their jurisdiction. This attracted an observation by a commentator that the "administrative courts bury their heads in the sand".[19]

The last aspect of court-packing already orchestrated under the chairmanship of Julia Przyłębska was the de facto removal of Vice-President of the CT, Professor Stanisław Biernat, from the Tribunal's panels from 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, which a judge may but does not have to take. Nevertheless, Ms. Przyłębska presented her decision as based on the protection of the CT budget (untaken holiday leave would have to be paid back to the Judge in cash at the time of his retirement) and decreed the compulsory holiday of Professor Biernat, thus removing a truly outstanding "older" judge from the Tribunal.

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 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 the effect of the judgment on KRS of March 2017, see below, when in their dissenting opinions, publicly broadcast on Tribunal streaming video, three out of four dissenting judges[20] 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".[21] The "*rubrum*" is a preliminary part of the judgment, which includes the name of the case and the

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[19] See Małgorzata Kryszkiewicz, "Administracyjne sądy chowają głowę w piasek", [Administrative courts bury their heads in the sand], *Dziennik Gazeta Prawna* 1 February 2018 at 5.

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

[21] 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. It is not clear how particular judges voted in respect of the Internal Rules as the only person who signed is Julia Przyłębska.

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.

2.2 Legislative Bombardment

So much for court-packing: as one can see, it was successful due to 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,[22] have so far behaved predictably, and voted in lockstep for the government position in all cases considered by the Tribunal. It was greatly assisted by the fact that Ms. Przyłębska thoroughly changed the composition of 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.[23] 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,[24] the Parliament adopted no less than six subsequent statutes on the CT, in addition to a number of drafts officially 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. The 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 control by the executive and legislature over the CT. The drafts and laws have produced a mosaic of interlocking 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.

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

[23] Since taking her office, Judge Przyłębska took 98 decisions on composition 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 judges-rapporteurs.

[24] 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, 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), and the statute of 22 December 2015 amending the Constitutional Tribunal statute, which contained many of the provisions to be repeated in the statutes in 2016 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.

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[25]; 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[26]; 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[27]; 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)[28] 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" for most of the new PiS laws, hence effectively immunising them from review.
2. *Provisions paralysing 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[29]; the minimum number of judges required for judgments initiated by abstract review increased from 9 to 13 out of 15 judges[30]; a requirement to set newly composed panels for cases already under consideration which effectively means consideration of the case from the beginning[31]; a requirement of judging in the full panel of 15 judges if three judges demand it,[32] etc.
3. *Provisions enhancing the powers of the executive and legislature 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

[25] Article 1(10) of the statute of 22 December 2015 (found unconstitutional as a whole by the CT on 9 March 2016, K 47/15); Article 38 (3-6) of the statute on the CT of 22 July 2016 (found partly unconstitutional on 11 August 2016, K 39/16).

[26] Art 1 (12) (A) of the statute of 22 December 2015.

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

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

[29] 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 always understood to mean a simple majority; whenever a special majority is required, the Constitution (and not a statute) says so explicitly.

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

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

[32] Article 26 (1) (1) (l) of the statute on the CT of 22 July 2016.

court consideration; the President or Minister of Justice may make a motion for a disciplinary process against a judge of the CT,[33] and the Sejm can decide about a disciplinary removal of a judge[34]; 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; 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[35] 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,[36] seemingly giving the Prime Minister a potential basis for denying publication.

Most of these provisions were found unconstitutional by the CT, 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 mainly consider laws on itself. 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. 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,[37] and that the only proper approach is to apply the Constitution directly. As Professor (and an ex-Judge of the CT) 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".[38] All these legislative attacks on the Tribunal only continued up to the point when PiS acquired a majority on the CT (8 out of 15)[39]—at which time all these innovations were miraculously forgotten because they had become unnecessary.

[33] Article 1(5) of the statute of 22 December 2015.

[34] Article 31 (3) of the statute of 22 December 2015.

[35] Article 16 of the statute of 22 July 2016.

[36] Article 80 of the statute of 22 July 2016.

[37] See more: Radziewicz (2017), http://www.kul.pl/files/35/rcl_1_2017/02_radziewicz.pdf (last accessed 10 January 2018).

[38] Wyrzykowski, "Antigone", at 381.

[39] 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 finished at the end of 2016 and 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).

The current law on the CT, based on two statutes of 30 November 2016[40] and one of 13 December 2016,[41] does not contain any of the 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 respect the sequence of cases. In fact, the law of November 2016 more or less replicates the 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. 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.

2.3 Refusal to Publish the Judgments

In addition to court-packing and paralysing the Tribunal by the subsequent new bills on the Tribunal itself, the government committed perhaps the most obviously unconstitutional act, by refusing to publish judgments of the CT which it deemed improperly handed down. According to the government they were taken irregularly because they contradicted 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 a PiS-appointed majority, the government simply refused to publish judgments in the official gazette. The first of the judgments deemed unworthy of immediate publication was the already mentioned K 34/15 of 3 December 2015, and the ground for its refusal to publish was that the verdict was reached by a five-judges panel rather than a full panel.[42] It was published after a delay—on 16 December 2015.[43] The second-mentioned judgment of 9 December 2015 was published after 9 days—on 18 December 2015.[44]

After the K 47/15 judgment of 9 March 2016 that 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

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

[41] 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.

[42] 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.

[43] Journal of Laws 2015, item 2129.

[44] Journal of Laws 2015, item 2147

that period the Tribunal reviewed the constitutionality of statutory provisions on: (a) electoral districts and decisions of the National Electoral Commission[45]; (b) customs officers returning to service[46]; (c) refund of VAT[47]; (d) the scope of parliamentary immunity,[48] (e) decisions on refundable treatment and rehabilitation[49]; (f) local referenda and an extraordinary procedure for the protection of personal rights during campaign[50]; (g) reimbursement for costs of court proceedings[51]; (h) limited access to public information[52]; (i) limitation of the right to a fair trial under a bankruptcy law[53]; (j) material obstacles for person with disabilities during a driving license exam[54]; (k) disciplinary dismissal of a police officer[55]; (l) appealing against a decision of a court of second instance[56]; (m) administrative enforcement costs[57]; (n) rights of fully incapacitated persons and standards for social care homes[58]; (o) appealing under the law on juvenile justice[59]; p) return of a rehabilitation allowance[60]; (r) scope of a right to sickness benefit[61]; (s) rights of prisoners in prisons and detention centres[62].

All the 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 in breach of the provisions of the Constitutional Tribunal Act of 25 June 2015".[63] Soon after, on 11 August 2016, the Tribunal issued 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

[45] Judgment of 6 April 2016, P 5/14. Unpublished for 4 months (see Journal of Laws 2016, item 1232).
[46] Judgment of 6 April 2016, P 2/14. Unpublished for 4 months (see Journal of Laws 2016, item 1233).
[47] Judgment of 6 April 2016, SK 67/13. Unpublished for 4 months (see Journal of Laws 2016, item 1234).
[48] Judgment of 21 April 2016, K 2/14. Unpublished for 4 months (see Journal of Laws 2016, item 1235).
[49] Judgment of 26 April 2016, U 1/15. Unpublished for 4 months (see Journal of Laws 2016, item 1236).
[50] Judgment of 11 May 2016, U 1/15. Unpublished for 3 months (see Journal of Laws 2016, item 1237).
[51] Judgment of 17 May 2016, SK 37/14. Unpublished for 3 months (see Journal of Laws 2016, item 1238).
[52] Judgment of 7 June 2016, K 8/15. Unpublished for 2 months (see Journal of Laws 2016, item 1239).
[53] Judgment of 8 June 2016, P 62/14. Unpublished for 2 months (see Journal of Laws 2016, item 1240).
[54] Judgment of 8 June 2016, K 37/13. Unpublished for 2 months (see Journal of Laws 2016, item 1241).
[55] Judgment of 14 June 2016, SK 18/14. Unpublished for 2 months (see Journal of Laws 2016, item 1242).
[56] Judgment of 21 June 2016, SK 18/14. Unpublished for 2 months (see Journal of Laws 2016, item 1243).
[57] Judgment of 28 June 2016, SK 31/14. Unpublished for 1 month (see Journal of Laws 2016, item 1244).
[58] Judgment of 28 June 2016, K 31/15. Unpublished for 1 month (see Journal of Laws 2016, item 1245).
[59] Judgment of 29 June 2016, SK 24/15. Unpublished for 1 month (see Journal of Laws 2016, item 1246).
[60] Judgment of 5 July 2016, P 131/15. Unpublished for 1 month (see Journal of Laws 2016, item 1247).
[61] Judgment of 12 July 2016, SK 40/14. Unpublished for 1 month (see Journal of Laws 2016, item 1248).
[62] Judgment of 12 July 2016, K 28/15. Unpublished for 1 month (see Journal of Laws 2016, item 1249).
[63] Article 89 of the statute on the CT of 22 July 2016.

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".[64] 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.[65] Judgments K 47/15 of 9 March 2016 which invalidated the law on CT of December 2015[66] K 39/16 of 11 August 2016 which invalidated the statute on CT of 22 July 2016[67] and K 44/16 of 7 November 2016 which invalidated the rules regarding the election of the President and Vice-President of CT contained in the statute of 22 July 2016[68] *have been not published as of writing this article* (early May 2018) and were removed from the Constitutional Tribunal Official Journal; 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. As journalists established much later, the prohibition on publishing these three judgments was issued personally by the Prime Minister, Beata Szydło.[69]

The refusal to publish (incidentally, not even communicated with an explanation to the CT, which instead was informed about it 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 to control 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. 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.

The issue of (non-)publication of CT judgments had its Post Scriptum in 2018. After the formation of the new government of Mateusz Morawiecki, presented by governmental propaganda as a pragmatist and moderate, clearly distancing himself from the harsh image of his predecessor Ms. Szydło, there was some hope in the opposition that one of the conciliatory moves of the new government would be to publish the three judgments, of 9 March 2016 (K 47/15), of 11 August 2016 (K 39/16), and of 7 November 2016 (K 44/16). To be sure, it was more a matter of principle and symbolism rather than of real legal status because the laws partially invalidated by these judgments (of December 2015 and of July 2016) have largely

[64] Judgment of 11 August 2016, K 39/16.

[65] See judgments of: 27 September 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.

[66] Published on an "alternative" website in English at: http://citizensobservatory.pl/wp-content/uploads/2016/03/TK_wyrok_09032016_ang.pdf.

[67] 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.

[68] 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.

[69] Ewa Ivanova, "Premier Szydło: Nie publikować wyroku Trybunału!" [„Prime Minister Szydło: Do not publish the judgment of the Tribunal!"], *Gazeta Wyborcza* 30 November 2017, online edition.

been superseded by the laws of November–December 2016. Nevertheless, the symbolism had a real importance here because at issue was a fundamental matter of principle: can the government effectively usurp to itself a power to assess which CT judgments measure up to (what the government deems) the criteria of properly issued judgments? The hopes, however, were cruelly quelled. A Civic Platform [Polish acronym: PO] member of Parliament Mr. Artur Dunin raised in December 2017 a formal interpellation to the Prime Minister, inquiring whether and when the government will publish the judgments. The response, not provided by the PM himself but, with the PM's authorisation by a low-level governmental official (Mr. Tomasz Dobrowolski, Deputy Head of the Governmental Centre of Legislation, or RCL in Polish acronym) basically repeated previous justifications for non-publication, stating that the "competence of the Prime Minister to publish the Journal of Laws" is "an independent competence which compels the Prime Minister to establish whether an act supplied for publication is a document issued by a proper or properly composed institution".[70] Significantly, however, an additional argument was provided in the response to the MP: the judgments were absent from an online collection of judgments administered by CT. In this way, the Orwellian actions of Ms. Przyłębska of erasing the embarrassing (to her, and to the ruling elite) past judgments of the CT became an extra reason for the government never to publish them.

3 Stage Two: Turning the CT into the Government's Enabler

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 the terms of office of "old" judges (including the President and the Vice-President of the Court) produced a PiS majority on the Tribunal, the measures for paralysing the Tribunal turned out to be no longer necessary. Rather than a body incapable of taking any decisions at all, the Tribunal has transformed into a positive, active and seemingly enthusiastic aide of the government and the parliamentary majority. The government has found it a useful means of legitimising its power, and at the same time has 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".[71] Moreover, the judgments of the CT, on their merits, produced very convenient legal circumstances which serve to aid the legislative and political agenda of PiS. Four examples will illustrate this new, "positive" role of the CT as the government's enabler.

[70] *Gazeta Wyborcza* 20 January 2018, online edition.

[71] 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 5.

The first is a CT judgment of 20 June 2017[72] 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 for appointing the judges-members of KRS depending on the level of courts they represent. But the Constitution does not mandate any particular method of selecting judicial representatives on the KRS, and the specific design of elections was completely within legislative discretion. The Tribunal's majority opinion was therefore a post-hoc rationalisation, and without any rational basis. The CT also found a system of "individual" terms of office for particular judges-members of the KRS unconstitutional, where 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 the 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 judicial members, from election by judges to parliamentary election, giving majority politicians a decisive say in the composition of the 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.[73] 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 judicial members of the KRS (after all, a response to alleged discrimination in election modes by the judiciary cannot consist of removing the power of electing judicial members of the KRS altogether) seemed not to bother the authors of the new bills on the KRS. In their view, the judgment of the CT gave them *carte blanche* to fundamentally alter the relationship between the KRS and the parliament.

The second example is a pending case before the CT[74] regarding the President's prerogative of granting pardon. The background was that soon after coming to office, President Duda conferred the benefit of pardon 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

[72] K 5/17.

[73] Remarks by President Andrzej Duda in a TV interview (26 November 2017, at TVN24).

[74] Case file no. Kpt 1/17.

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 an act of pardon 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 pardon 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[75] on the statute on the Supreme Court 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 who filed their own, concurrent submissions) claimed that the statutory provisions on the election 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 a 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* (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 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 for 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

[75] K 3/17.

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 on 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 the 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 of 16 March 2017[76] affirming a newly adopted statute on assemblies. The applicant (who was, somewhat surprisingly, President Duda) raised an argument 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[77] and in the ECtHR[78]—that the level of constitutional protection of assemblies cannot be made contingent upon the substantive purposes and messages conveyed. The new regulation also excludes a constitutional right to appeal against the decisions by public authorities regarding prohibition of public assembly. One of the consequences of granting 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 knows, 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 features of these rallies, organised each 10th day of the month, is a prayer and expression of support for the PiS 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

[76] Case KP 1/17.

[77] Judgment of the CT of 18 January 2006, K 21/05.

[78] See, e.g., Bączkowski and Others v. Poland, judgment of 3 May 2007, Appl. No. 1543/06.

"counter-balanced" by more 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[79] and even by one of the judges elected in December 2015.[80] 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.[81] 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 leaders of the CT are 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 governmental legal drafts, regardless of a possible conflict of interest 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 governmental TV that the bills "do not threaten the separation of powers" and that they "meet the expectations of the entire society".[82] 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.[83]

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[79] See the dissenting opinions of Judges: Leon Kieres, Małgorzata Pyziak-Szafnicka and Sławomira Wronkowska-Jaśkiewicz.

[80] 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.

[81] Oral remarks of Judges Małgorzata Pyziak-Szafnicka and Sławomira Wronkowska-Jaśkiewicz, 16 March 2017.

[82] "Julia Przyłębska: ustawy o sądach wychodzą w kierunku o którym mówi całe społeczeństwo" ["Julia Przyłębska: the statutes go in the directions about which the whole socjety talks"], *Rzeczpospolita* 17 July 2017, online 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.

[83] Id.

4 Conclusions

After the electoral victories of 2015, PiS transformed the CT from an effective, counter-majoritarian device to scrutinise 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. Whatever else constitutional courts around the world are expected to do, there is no doubt that their first and primary function is "to ensure adherence to a … constitution and its protection against legislative majorities".[84] In Poland, the Tribunal became a defender and protector of the legislative majority. This changed role, combined with general distrust of the CT and concerns about legitimacy of its judgments, explains the extraordinary drop in the number of its judgments.[85] For all practical purposes, the CT as a mechanism of constitutional review has ceased to exist: a reliable aide of the government and parliamentary majority has been born.

The difference between the Polish and Hungarian cases of dealing with the constitutional court may be instructive. In Hungary, the change penetrated deeper: in addition to court-packing, the constitution-making majority introduced important restrictions to the sphere of competences and the modes of decision-making by the constitutional court. Most importantly, the powers of the court were restricted on fiscal matters, the *actio popularis* has been abolished, scrutiny of constitutional amendments was allowed only for procedural defects, and in addition, the Court was prevented from referring to any of its precedents based on the pre-Fidesz constitution. No such changes were introduced in Poland although, knowing the modus operandi of PiS politicians, they could have easily introduced any such, or similar, restrictions in a statutory mode. They just did not consider them useful. Having captured the majority on the Tribunal, they were confident that the Tribunal would be an obedient servant of the executive branch, and would not dare decide contrary to political expectations. Restricting its powers could have even been seen as counter-productive (though this is only speculation as no statements to that effect are known to me) because it may impede the new role the Tribunal is performing, namely that of legitimating the new statutes and delegitimising the old ones.

But this is not to say that the disarmament, capture, and transformation of the CT into the government's ally is an unqualified benefit to authoritarian rule. Quite apart

[84] Harding et al. (2008) at 4.

[85] In 2017, 284 motions (including constitutional complaints, concrete review initiated by courts, and abstract review) were lodged in the CT, while in 2014, 2015 and 2016, the annual numbers were, respectively, 530, 623 and 360. In 2017, the CT handed down 36 judgments while in 2014, 2015 and 2016, 71, 63 and 39, respectively. See Dominika Wielowieyska, "Układ Julii Przyłębskiej" [„The establishment of Julia Przyłębska"], *Gazeta Wyborcza* 14 February 2018 at 12. In other words, in 2016, the first full year of the process of capturing the Tribunal, the Tribunal received 42% fewer motions than in the previous year (2015), while in 2017, 22% fewer than in 2016 which already had noted the record decline. In comparison with 2015, the number of motions in 2017 fell by 55%.

from all other political costs, domestic and international, a fully dependent court is of no use for the government in a blame game—a function that otherwise constitutional courts may perform, with benefit to the executive or party controlling the parliamentary majority. Governments may often find it useful to dump certain decisions on courts: when a decision by the government one way or another is costly, the constitutional court may perform the decision-making role without being concerned about political costs to itself. This function is occasionally performed by constitutional courts, both in democratic and in authoritarian systems. But in the latter ones, the plausibility of that effect is contingent upon the general belief that a court is at least relatively independent of the government. If it is not, the blame game does not work because everyone knows that whatever the court decides is a reflection of the political decision by the rulers. As Tamir Moustafa and Tom Ginsburg put it, using somewhat different vocabulary, and considering a scenario whereby an authoritarian government wishes to abandon some of its policies which are popular but which it considers too costly, "The strategy of 'delegation by authoritarian institutions' will not divert blame for the abrogation of populist policies unless the courts striking down populist legislation are seen to be independent from the regime".[86] This is the case of CT in PiS' Poland. An inability to benefit from shifting even part of the blame on the Tribunal if the Tribunal is so dependent on the regime is a real cost to the regime—but the cost that PiS has consciously accepted to pay.

A more general reflection may be in order. The constitutional designers of the "3rd Republic" (a term designating post-Communist Poland) saw the Constitutional Tribunal as the centrepiece for the protection of the rule of law and constitutional checks upon majoritarian politics. That was when the Tribunal was largely peopled by civil-libertarian lawyers of the highest standard. Their judgments eventually created a canon of liberal constitutionalism in Poland. In contrast, constitutional designers in Poland despised the "dispersed" model of constitutional review 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.[87] But if one places all one's trust in a small, 15-person body, to carry the enormous burden of the constitutional control of politics, one makes it easy for populists to quickly dismantle the system by hitting at its centrepiece.[88] Slovenian constitutional scholar Bojan Bugaric writes correctly about "the institutional fragility of constitutional courts when they are targeted by illiberal forces".[89] This is exactly what has happened in Poland. The incapacitation of the Constitutional Tribunal was one of the most

[86] Moustafa and Ginsburg (2008) at 13.
[87] For a description and critique, see Sadurski (2014) at 40–43.
[88] See, similarly, Moustafa & Ginsburg, "Introduction" at 19.
[89] Bugaric (2017) at 17.

spectacular and earliest actions by the PiS in power. With hindsight, it would have been much more difficult for them to succeed had a legal culture been generated under which all judges, low and high, could refuse to apply a statute they deemed unconstitutional. There is a textual basis for "dispersed" control of constitutionality of statutes: Article 8 of the Constitution proclaims its "direct applicability", but there were no habits, culture or 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.

Acknowledgements I am very grateful to Dr. Michał Marek Ziólkowski for his excellent research, and to Bojan Bugaric, Adam Czarnota and Martin Krygier for their very helpful comments on the manuscript.

References

Bugaric B (2017) Populists at the gates: constitutional democracy under siege? (21 September 2017). https://www.researchgate.net/publication/319955332_The_Populists_at_the_Gates_Constitutional_Democracy_Under_Siege. Accessed 4 May 2018

Ginsburg T (2003) Judicial review in new democracies. Cambridge University Press, Cambridge

Gliszczyńska-Grabias A, Sadurski W (2015) Freedom of religion versus humane treatment of animals: Polish Constitutional Tribunal's Judgment on Permissibility of Religious Slaughter. Eur Const Law Rev 11:596–608

Harding A, Leyland P, Groppi T (2008) Constitutional Courts: forms, functions and practice in comparative perspective. J Comp Law 3(2):1–21

Koncewicz TT (2017) 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. Accessed 4 May 2018

Moustafa T, Ginsburg T (2008) Introduction: the functions of Courts in Authoritarian Politics. In: Ginsburg T, Moustafa T (eds) Rule by law: the politics of Courts in Authoritarian Regimes. Cambridge UP, Cambridge, pp 1–22

Radziewicz P (2017) Refusal of the Polish constitutional tribunal to apply the act stipulating the Constitutional Review Procedure. Rev Comp Law 1:23–40

Sadurski W (2012) Constitutionalism and the enlargement of Europe. Oxford University Press, Oxford

Sadurski W (2014) Rights before Courts: a study of Constitutional Courts in Postcommunist States of Central and Eastern Europe, 2nd edn. Springer, Dordrecht

Śledzińska-Simon A (2018) Poland's Constitutional Tribunal under Siege. VerfBlog, 2015/12/04. http://verfassungsblog.de/polands-constitutional-tribunal-under-siege/. Accessed 4 May 2018

Zubik M (2017) Human rights in contemporary world: essays in honour of Professor Leszek Garlicki. Wydawnictwo Sejmowe, Warsaw, pp 370–390