The Constitutional Trap

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Abstract:
Beginning with the taking of political power by the Law and Justice party at the end of 2015, there has been a continuing process of destruction of both the Polish constitution and attempts to undermine the legal foundations of the European Union. The process of destroying the Polish constitutional order is taking place through the actions of the constitutional organs of the state: the parliament, the president, the government, the president of the Council of Ministers, the attorney general and the constitutional court. By staffing the Constitutional Court exclusively with dependents of ruling party members, control of the constitutionality of the law has been deactivated. This has allowed a hostile takeover of the constitutional order without amending the constitution, only through parliamentary laws. Of fundamental importance is the destruction of the judiciary as a result of the unconstitutional appointment of judges of common courts and the Supreme Court. The action of the European Union bodies, particularly the European Commission and the ECJ, is met with a response from the Polish Constitutional Court in the form of declaring the fundamental norms of the TEU and TFEU unconstitutional with the Polish Constitution. The restoration of constitutional order after a possible change of parliamentary majority will be confronted with a constitutionally hostile attitude of both the President and the Constitutional Court,

whose permanence of status and irremovability is guaranteed by the Constitution. The President will veto laws repairing an anti-constitutional legal order, the Constitutional Court will declare laws, which would restore constitutionality, unconstitutional. The Constitution may be a trap for attempts to restore constitutionality. A real dilemma will arise: whether it is possible, in order to restore constitutionality, to use methods that will be questionable from the perspective of their constitutionality. From another perspective: whether the constitution must be an irremovable obstacle to the restoration of its essence. Consequently: whether the political villainy that the destruction of the state's constitutional order by unconstitutional and anti-constitutional accomplished facts has become must remain permanent simply because the restoration of constitutionality could be linked to the use of those wicked methods that led to the collapse of the constitutional state.

Keywords: Constitution, Poland, Constitutional Tribunal, Rule of law, European values, Constitutional backsliding

I. Preliminary Remarks

The discussion below takes place within the framework of a broader problem entitled Transition 2.0: Addressing Systemic Deficiencies within the European Framework. To begin with, some preliminary assumptions.

First, the consideration will focus on the case of Poland as a member state of the European Union. The process of destroying European rules and values takes place mainly in two countries, namely Poland and Hungary. However, there is a sufficiently serious difference between Poland and Hungary, from the perspective of constitutional regulations, to make the aforementioned limitation.[1]

Second, the process of destroying constitutional and European values in Poland has reached such a level that we are dealing with systemic violations

1 On the constitutional developments in Poland after 2015, cf. in particular: Wojciech Sadurski, *Poland's Constitutional Breakdown* (Oxford: Oxford University Press 2019); Miroslaw Wyrzykowski, 'Experiencing the Unimaginable: the Collapse of the Rule of Law in Poland', Hague Journal on the Rule of Law 11 (2019), 417–422; Adam Bodnar. 'Polish Road Toward an Illiberal State: Methods and Resistance', Indiana Law Journal 96 (2021); Aleksandra Kustra-Rogatka, 'The Hypocrisy of Authoritarian Populism in Poland: Between the Facade Rhetoric of Political Constitutionalism and the Actual Abuse of Apex Courts', European Constitutional Law Review 19 (2023), 25–58; Adam Ploszka, 'Shrinking Space for Civil Society: A Case Study of Poland', European Public Law 26 (2020), 941–960.

of these values, in particular the rule of law and judicial independence.[2] The systemic nature of the violations has been confirmed by the rulings of European courts, that is, the ECJ and ECHR.[3]

Third, the mechanism for destroying the constitutional order in Poland has occurred gradually and consistently through the creation of unconstitutional or even anti-constitutional laws.[4] This process, initiated in the fall of 2015, involves all political constitutional bodies. First and foremost, the parliament, that is, the Sejm (the lower, but decisive chamber in the law-making process) and the Senate in 2015–2019 and the Sejm in 2019–2023. The Senate in 2019–2023, staffed by a small majority of the democratic opposition, opposed, unsuccessfully due to the scope of the powers of each chamber of parliament, the process of destruction of the constitutional state[5].

2 On the similarities and differences between the processes that took place in these countries, cf. in particular: Gábor Halmai, 'The making of "illiberal constitutionalism" with or without a new constitution: the case of Hungary and Poland' in: David Landau and Hanna Lerner (eds), *Comparative constitution making* (Cheltenham: Edward Elgar Publishing 2019), 302–323.; Tímea Drinóczi and Agnieszka Bień-Kacała, 'Illiberal constitutionalism: The case of Hungary and Poland', German Law Journal 20 (2019), 1140–1166.

3 A list of cases concerning the rule of law crisis in Poland, currently under examination, and those in which judgments have been delivered, both by the ECHR and the CJEU, can be read here. https://euruleoflaw.eu/rule-of-law/rule-of-law-dashboard-overview/polish-cases-cjeu-ecthr/. Cf. also: Katarzyna Gajda-Roszczynialska and Krystian Markiewicz. 'Disciplinary proceedings as an instrument for breaking the rule of law in Poland', Hague Journal on the Rule of Law 12 (2020), 451–483; Michał Krajewski and Michał Ziółkowski, 'A. Court of Justice: EU judicial independence decentralized: AK', Common Market Law Review 57 (2020), 1107–1138; Adam Ploszka '(In)Efficiency of the European Court of Human Rights Priority Policy. The Case of Applications Related to the Polish Rule of Law Crisis' in: Adam Bodnar and Jakub Urbanik (eds), *Περιμένοντας τους Βαρβάρους. Law in a Time of Constitutional Crisis* (München: Verlag C.H.Beck 2021), 539–554.

4 Cf. Maciej Bernatt and Michal Ziołkowski, 'Statutory Anti-Constitutionalism', Wash. Int'l LJ 28 (2019), 487–526.

5 Mirosław Wyrzykowski and Michał Ziołkowski, 'Illiberal Constitutionalism and the Judiciary' in: András Sajó, Renáta Uitz and Stephen Holmes (eds), *Routledge Handbook of Illiberalism* (London: Routledge 2022), 517–532.

II. The Constitutional Authorities Destroying the Constitutional Order

The Sejm has turned into a well-oiled mechanism for mechanically passing laws proposed by the parliamentary majority represented by the Law and Justice party and its ally the Solidarna Polska party.

The second organ of the process of destroying the constitutional order through laws is the state president, who obediently implements the legislative program of the parliamentary majority by promulgating unconstitutional laws.

Finally, the third organ of this closed mechanism is the Constitutional Court, the first victim of the 2015–2016 constitutional crisis.[6] After the statutory regulation of the Court was amended at the end of 2016 and the entire 15-member composition was filled with persons designated by the parliamentary majority, the Constitutional Court changed its constitutional role. From the role of guardian of the constitutional order, it became an important link in the mechanism of destruction of the constitutional state.[7]

The mechanism for creating laws that violate the constitutional order of the state has been closed: the parliament creates an unconstitutional law, which is accepted by the president (promulgation of the law) and confirmed, if necessary, by the Constitutional Court. At the same time, the Court has taken on the bizarre role of "guardian of the Constitution". This is expressed, for example, in declaring unconstitutional a law enacted before 2015 at the request of the parliamentary majority, which could change the challenged law without special difficulties.[8] Political opportunism, and often political cynicism, decides to refer the case to the Constitutional Court and shift political and constitutional responsibility to the Court.

6 Cf. Tomasz Tadeusz Koncewicz, 'The Capture of the Polish Constitutional Tribunal and Beyond: Of Institution(s), Fidelities and the Rule of Law in Flux', Review of Central and East European Law 43 (2018), 116–173.

7 Cf. Wojciech Sadurski, 'Polish Constitutional Tribunal Under PiS: From an Activist Court, to a Paralysed Tribunal, to a Governmental Enabler', Hague Journal on the Rule of Law 11 (2019), 63–84.

8 A good example of this is the Constitutional Tribunal judgment of 22 October 2020, ref. K 1/20 issued upon the motion of a group of Law and Justice MPs. In this judicial decision the Tribunal declared unconstitutional the provision of the Act on permitting the performance of abortion for embryopathological reasons. Cf. in more detail: Aleksandra Gliszczyńska-Grabias and Wojciech Sadurski, 'The judgment that wasn't (but which nearly brought Poland to a standstill): "Judgment" of the Polish Constitutional Tribunal of 22 October 2020, K1/20', European Constitutional Law Review 17 (2021), 130–153; Tomasz Tadeusz Koncewicz, 'When Legal Fundamentalism Meets Political Justice: The Case of Poland', Israel Law Review 55 (2022), 302–359.

Another example is the referral of motions to declare a law unconstitutional by the Attorney General, who is also the Minister of Justice and therefore a member of the government. Finally, the third example is motions to declare European law unconstitutional, primarily the Treaty on European Union, the Treaty on the Functioning of the European Union and the European Convention on Human Rights. These motions are filed by the Prime Minister, the Attorney General, or by Supreme Court judges appointed under a new procedure (as of 2018) deemed by the ECJ as not meeting the conditions of judicial independence. All of these requests have been taken into account by the Constitutional Court resulting in the constitution of the creation of legal prerequisites on the road to Polexit.

III. The Status of the President

So let's look behind the main systemic changes in the Polish constitutional order. They will only be named, without detailed analysis, but naming them seems necessary to get as complete a picture as possible of the consequences of the application of the technological sequence that is the indicated legislative procedure.

Therefore, let's consider the status of the President and the status of the Constitutional Court – at the level of constitutional regulations, but, above all, at the level of the formative political practice of the functioning of these constitutional organs of the state in recent years. Attention will be focused on the process of lawmaking and control of the constitutionality of laws.

Function of the President. Poland is a state of parliamentary democracy. The president performs constitutionally defined functions, in particular, in terms of relations with other organs of the state (government, parliament, judiciary), classical powers of the highest representative of the state in international relations, defense and security of the state and supremacy over the armed forces, lawmaking and appointment to certain positions and functions.

The issue of lawmaking, i.e. the president's participation in the legislative process, is crucial to restoring constitutional order. The President has the right to initiate legislation[9], but this is a competence rarely used in constitutional practice. Once a law is passed, it is presented for signature by

9 Article 118 of the Constitution of the Republic of Poland.

the President, whose signature (or refusal to sign), i.e. the execution of an official act, is an act not subject to the Prime Minister's countersignature. If the President approves the law, he should sign it within 21 days of receiving it and order its promulgation in the official (publication) gazette. However, the president may disapprove the law, and within the period of the aforementioned 21 days he then exercises one of two options for vetoing the law. In the case of constitutional objections, he refers a petition to the Constitutional Court indicating that the law's provisions violate the Constitution. This is a constitutional veto, which has the character of a so-called preventive control of the law's constitutionality. If the Constitutional Court does not share the president's position on the unconstitutionality of the law then the president is obliged to sign it immediately and order its publication. But another situation can also arise, where the president – despite his reservations about constitutionality – signs and promulgates the law and then directs a request for an examination of the law's constitutionality (the so-called follow-up control of the law's constitutionality).[10]

At the same time, the President may have objections to a law submitted to him, only that they are not of a constitutional nature, but of a political nature. He may then return the bill to the Sejm, indicating his objections in the grounds. The Sejm is then obliged to reconsider the law and may reject the president's objections if the law is re-enacted by a 3/5 majority vote in the presence of at least half (i.e. 230) of the statutory number of deputies. After re-enactment of the law, this time by a qualified majority, the president is obliged to sign and promulgate the law.[11]

IV. The Status of the Constitutional Tribunal

The other key body in the legislative process is the Constitutional Court, which rules, among other things, on the constitutionality of laws and international agreements. A request for review of a law or international agreement may be submitted by the President, the Speaker of the Sejm, the Speaker of the Senate, the Prime Minister, 50 deputies, 30 senators, the First President of the Supreme Court, the President of the Supreme Administrative Court, the Prosecutor General, the President of the Supreme Audit Office and the Ombudsman. The review initiated by these entities

10 Article 122 of the Constitution of the Republic of Poland.
11 Ibid.

(subject to the President's constitutional preventive veto) has the character of an abstract follow-up review.[12] The Court's rulings have the character of universality and are final.[13]

One more competence of the Court should be signaled, namely the settlement of competence disputes between the central constitutional organs of the state.[14] The organs indicated in the preceding paragraph, requesting the task of determining the constitutionality of a law or international agreement, with the exception of a group of deputies and senators, the Prosecutor General and the Ombudsman, may apply for the resolution of a dispute. The signaling of this competence of the Court is a consequence of its abuse by political constitutional bodies (actually and realistically the dispute does not exist) to achieve their goals (e.g., attempting to deprive the Supreme Court of the right to interpret the law under the pretext that the interpretation made creates a new legal norm, and that only the parliament has the authority to legislate).[15]

V. The Mortal Sins of the Constitutional Tribunal

For many years, there has been a discussion in Poland about what methods would be required to restore the constitutional order of the state, particularly the rule of law and the independence of the judiciary as the two most damaged pillars of the constitutional state. In fact, the deliberations have been going on uninterruptedly since 2016, and each time a disclaimer is made that the proposals for repair relate to the legal state of affairs at the time and the Court's practice at the time. This means that the same caveat should be made at the time of drafting this text, i.e. the beginning of 2023.

So what is the summary of this element of the destruction of the constitutional state? In other words, what deadly legal sins are on the tribunal's conscience? To put it in the necessary nutshell, the following circumstances should be noted.[16]

12 Article 188 and 191 of the Constitution of the Republic of Poland.
13 Article 190.1 of the Constitution of the Republic of Poland.
14 Article 189 of the Constitution of the Republic of Poland.
15 Leszek Garlicki and Marta Derlatka, 'Constitutional Courts in the abusive constitutionalism' in: Pierre-Alain Collot (ed), *Le constitutionnalisme abusif en Europe* (Le Kremlin-Bicêtre: Mare and Martin 2023), 313–323.
16 Cf. in more detail: Mirosław Wyrzykowski, 'Antigone in Warsaw', in: Marek Zubik (ed), *Human rights in contemporary world. Essays in Honour of Professor Leszek Gar-*

First, the flaws in the staffing of the Tribunal. Since 2015, the Tribunal has been staffed by three persons who were elected to the seats of duly elected judges, from whom the president, in violation of the Constitution, did not take the oath of office. These persons (and their successors due to the death of the originally illegally elected ones), known as "understudies," are not judges not only from the perspective of the Polish Constitution (relevant Court rulings in 2015 and 2016) as in the sense of European law (ECHR Flor ruling[17]). This means at the same time that 1. the Court's rulings issued with the participation of persons who cannot be treated as judges are flawed, 2. the participation of these persons has caused, as stated by the Supreme Administrative Court, that the Court has been infected with lawlessness and "has therefore entirely lost, in a material sense, its ability to rule in accordance with the law."

The defects in the staffing also apply to the staffing of the position of President of the Court, who was appointed to the position by the President, but without the necessary condition of presenting the relevant resolution of the General Assembly of the Court. Without such a resolution, the act of appointment is defective. Also legally flawed is the situation in which the President of the Court, after the expiration of his six-year term, continues to believe that he will end his function as President on the day his term as a judge ends (i.e., two years longer than the statutorily prescribed term).

Second, surprisingly dramatic are the situations related to the functioning of the Court and the President's violations of its internal rules of operation. To give an example of just a few of these kinds of events, these include arbitrary changes in the panel of judges assigned to hear a case; arbitrary changes in the judge-rapporteur; failure to schedule preparatory hearings for many years to decide a case; failure to schedule a hearing for many years ("freezing" cases); scheduling a hearing without first discussing the decision and reasons at a preparatory hearing; unequal distribution of cases for individual judges; manipulation of the appointment of the panel of judges depending on the nature of the case; repetitive assignment of a particular type of case to selected judges; creating a situation in which more than a year passes between the announcement of the verdict and the

licki (Warsaw: Kancelaria Sejmu. Wydawnictwo Sejmowe Kancelaria Sejmu 2017), 372–437; Mirosław Wyrzykowski, 'The Vanishing Constitution', European Yearbook on Human Rights (2018), 3–46; Ewa Łętowska and Aneta Wiewiórowska-Domagalska, 'A "good" Change in the Polish Constitutional Tribunal?', OER Osteuropa Recht 62, (2016), 79–93.

17 ECtHR, *Xero Flor v. Poland*, judgment of 7 May 2021, no. 4907/18.

announcement of the statement of reasons, when there is a 30-day deadline for the announcement of the statement of reasons.

Third, the tribunal not only fails to participate in the judicial dialogue, nationally and internationally, but has turned the dialogue into a duel. In the event of a ruling by the ECHR or ECJ that is inconvenient or unfavorable to a political power or to the court itself, a request is immediately made by one of the political entities entitled to initiate proceedings before the court on a particular European court ruling. For example: when the ECHR found that the presence of an "understudy" in the composition of the tribunal's adjudicators results in a violation of the rule of Article 6 of the European Convention, because such a composition of the court results in it not being a court due to a defect in the composition of the bench. Immediately, the Attorney General challenged this ECHR ruling, arguing that it is ultra vires, for the Court is not a court within the meaning of Article 6 of the Convention. The Court expressly granted the Prosecutor's request and – making a kind of coming out, despite the fact that public opinion had for a long time denied the Court the attribute of an independent and undue court – stated that the Court is not a court within the meaning of Article 6 of the Convention (K 6/21)[18].

The second example is the ruling, at the request of the prime minister of the government, on the incompatibility of the European Union's treaty basis with the provisions of the Polish constitution (K 3/21).[19] The judgment denies the principles of the primacy of EU law, enforcement of ECJ rulings and loyal cooperation. Moreover, the judgment is said to overrule the implementation of member state obligations under Article 19(1) of the TEU, in particular the state's obligations to uphold standards of judicial independence and independence of judges and their disciplinary responsibility. I point to this most famous and most curmudgeonly judgment of the court on European law, but after all, it is only the culmination of a

18 Polish Constitutional Tribunal judgment of 24 November 2021, delivered in case ref. K 6/21. On the circumstances of this judgment its causes and consequences cf. Adam Ploszka, 'It Never Rains but it Pours. The Polish Constitutional Tribunal Declares the European Convention on Human Rights Unconstitutional', Hague Journal on the Rule of Law 15 (2023), 51–74.

19 Polish Constitutional Tribunal judgment of 7 October 2021 delivered in case ref. K 3/21. Cf. more: Mirosław Wyrzykowski, 'Duel instead of duet. An unortodox judicial dialog' in: Claudia Seitz, Ralf Michael Straub and Robert Weyeneth (eds), *Rechtsschutz in Theorie und Praxis. Festschrift für Stephan Breitenmoser* (Basel: Helbig Lichtenhahn Verlag 2022), 161–179.

series of rulings (again, just by way of example, U 2/20[20], Kpt 1/20[21], P 7/20[22]) a line of jurisprudence contrary to the EU Treaties and the ECJ and ECHR rulings. To sum up, the tribunal has done such a suicidal job of total institutional and moral discredit so effectively that the European Commission initiated anti-violation proceedings in December 2021.[23] This is the first anti-violation proceeding against a member state's constitutional court.[24]

VI. The President as a Detractor of the Constitutional Order

The next constitutional body whose function is to uphold the constitution is the president. As in the case of the court, the president has also not only passively embezzled his constitutional duty to uphold the constitution, but is actively participating in the mechanism for the destruction of the constitutional state. The president's anti-constitutional actions and omissions are, unfortunately, many, and as before I will point out the most blatant examples: refusal to take the oath of office from three duly elected tribunal judges; taking the oath of office from three tribunal judges elected to seats already filled (understudies); legislative initiative to amend the law on the Supreme Court and the National Council of the Judiciary (2017) resulting in the ECJ and ECHR declaring these regulations in violation of the standards of union law; the pardon of two politicians, sentenced to absolute imprisonment for violations of the law, in a situation where the judicial proceedings have not been completed the effect of which is the "cessation" of the obstacle to the appointment of these politicians to the government after the 2015 elections., so much so that the president can only exercise the right of clemency against a person with a final conviction in judicial proceedings. Added to this is the participation in the creation of unconstitutional law in the form of signing and promulgation of dozens of laws that are blatantly unconstitutional.

20 Polish Constitutional Tribunal judgment of 20 April 2020 delivered in case ref. U 2/20.
21 Polish Constitutional Tribunal decision of 21 April 2020 delivered in case ref. Kpt 1/20.
22 Polish Constitutional Tribunal judgment of 14 July 2021 delivered in case ref. P 7/20.
23 Press release: Rule of Law: Commission launches infringement procedure against Poland for violations of EU law by its Constitutional Tribunal, available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_21_7070.
24 Detailed Wyrzykowskiand (n. 19), 167.

Outlining the status and operation of the designated two constitutional organs of the state was necessary as a framework for discussing a possible transition after a possible change in political configuration as a result of parliamentary elections in the fall of 2023.[25] The assumption of consideration is the assumption of political power by today's parliamentary opposition. The certainty in further considerations is the persistence of the president/constitutional order destroyer until the May 2025 elections, and the preservation of a majority in the composition of the tribunal's judges on the recommendation of the Law and Justice party until 2028.

VII. Scope of Destruction of the Constitution

1. Civil service

The fundamental question posed by legal circles, legal practitioners and theoreticians is the following: if Poland is a constitutionally failed state in 2023 (if it is not already a constitutionally failed state), then will it be possible to restore Poland as a constitutional state, and under what conditions? And the second question is whether it is possible to restore the constitutional state with the exclusive use of measures and mechanisms that correspond to the standards of the rule of law in a situation where the destruction of the constitutional state was followed by unconstitutional and anti-constitutional measures. In other words, would it be permissible to apply, even to some extent, those methods that we condemn, but whose application was, after all, a condition for the destruction of the constitutional order?[26]

For the scope of necessary changes to the Polish legal order will be very broad. Once again, only by way of example, it is necessary to point to those issues that have their anchoring in the Constitution and that have been "deconstitutionalized" as a result of the signalled actions of the constitutional state bodies.

By enacting the Law on Amendments to the Law on the Civil Service and Certain Other Laws on December 30, 2015, the parliament made

25 Mirosław Wyrzykowski, '"Wrogie przejęcie" porządku konstytucyjnego' in: Maciej Bernatt, Agata Jurkowska-Gomułka, Monika Namysłowska and Anna Piszcz (eds), *Wyzwania dla ochrony konkurencji i regulacji rynku. Księga jubileuszowa dedykowana Profesorowi Tadeuszowi Skocznemu* (Warsaw: C.H.Beck 2017), 831–853.

26 Mirosław Wyrzykowski, 'Experiencing the Unimaginable: The Collapse of the Rule of Law in Poland', Hague Journal on the Rule of Law 11 (2019), 417–422.

fundamental changes to the constitutional model of the civil service. The new civil service model, implemented within the express time of 30 days from the date of entry into force, is based on five basic principles, which are the sins of the constitutional system of forming the civil service corps. First, open and competitive recruitment for senior civil service positions has been replaced by appointment, which has the lowest level of protection against dismissal or change in conditions of employment. Second, qualification requirements for applicants for senior civil service positions were drastically reduced. The requirement for a minimum length of service, and the requirement for those appointed to senior positions in the civil service to have any work experience, have been abolished. Knowledge of any foreign language is not required in the foreign service. Thirdly, the competition procedure has been eliminated, which means there is no possibility of controlling access to the civil service on an equal basis. Thus, the mechanism for verifying the correctness of the constitutional requirement to fill senior positions in the civil service in a way that guarantees the professional, reliable, impartial and politically neutral performance of the state's tasks has been eliminated. Fourth, citizens have been deprived of the right to information about vacancies covered by the category of senior positions in the civil service has been eliminated. Information about vacant positions is now not public information and is available only to a very narrow group of politically trusted candidates. The fundamental principles of openness, transparency and equality for selection to the civil service have been violated. Fifth, a violation of the constitutional principle of legal certainty and the legal security of the individual is the regulation providing for the expiration of employment relations with all persons holding senior positions in the civil service after 30 days from the date of entry into force of the law, if new conditions of work or pay are not offered to them before that date.

The conclusion: the civil service has become a spoil of political power and has been turned into a party nomenklatura familiar from the socialist period.[27]

27 Detailed: Mirosław Wyrzykowski, 'Bypassing the Constitution or changing the constitutional order outside the constitution' in: Andrzej Szmyt and Bogusław Banaszak (eds), *Transformation of Law Systems in Central, Eastern and South-Eastern Europe in 1989–2015, Liber Amicorum in Honorem Prof. Dr. Dres. H.C. Rainer Arnold* (Gdansk: Gdańsk University Press 2016), 159–178.

2. Freedom of media

The media is increasingly subordinated to the Law and Justice party. In 2016, the National Media Council was established by law and delegated to it the powers of the constitutional body that is the National Broadcasting Council with regard to the right to appoint the heads of central and field radio and television units. The National Media Council is composed exclusively of PiS appointees. The practice of the existing public media has shown that they have become government-party media. What's more, the state-controlled oil and energy company Orlen has bought most of the local magazines and newspapers and access to more than 17 million users of Internet portals from a foreign investor operating in Poland.

3. Deformation of judiciary

Another element in the process of degradation of the constitutional state was the so-called reform, and indeed deformation of the judiciary. It took place on four levels. The first concerned the merger of the functions of the Minister of Justice and the Prosecutor General, which resulted in a dramatic change in the figure of the equilateral triangle: court – prosecutor – litigant. The prosecutor general was given unlimited influence over all prosecutors' decisions at both the pre-trial (investigation) and trial stages. The same person supervises the prosecutor's office and supervises the courts.[28] An example of the effect: the initiation of disciplinary proceedings against a judge who disregarded a prosecutor's procedural request.[29] The second level concerned the change in the status of the National Council of the Judiciary as an entity that gives opinions on candidates for judicial positions. The 25-member composition includes 15 incumbent judges elected by peers, i.e., judges of the courts of each judicial level. As of 2018, judges who are members of the Judicial Council are elected by the lower house of parliament, the Sejm. The politicization of the judiciary has reached another stage. The third tier is the changes to the Supreme Court, including

28 Cf. the critical and comprehensive opinion of the Venice Commission: Opinion no. 892/2017 on the Act on the public prosecutor's Office as amended adopted by the Venice Commission at its 113th Plenary Session (Venice, 8–9 December 2017).

29 On the scale of disciplinary proceedings initiated against judges, cf. in more detail: Jakub Kościerzyński (ed.), *Justice under pressure—repressions as a means of attempting to take control over the judiciary and the prosecution in Poland. Years 2015–2019* (Warsaw: Iusticia 2020).

the establishment from scratch of two chambers, the Disciplinary Chamber and the Public Affairs Chamber, entirely staffed by party nominees. The judges of these chambers, as confirmed by the ECHR and ECJ, do not meet the conditions of independence and independence, and thus both chambers cannot be recognized as courts under European law.

4. Scope of deformation of judiciary

And there is another aspect of the judicial drama. It concerns the appointment in the last five years of some 3,000 new judges (or promotions of judges previously appointed), whose appointment involved the National Judicial Council shaped by the 2018 law. This law is unconstitutional and inconsistent with the standards of European law and, as such, disqualified as a properly formed element of the mechanism for appointing judges. The appointment of judges in a procedure involving the National Council of the Judiciary is so seriously flawed that judicial participants and judges appointed before 2018 are increasingly effectively challenging their status as judges. In parallel, there is a growing wave of questioning of these persons' fulfillment of the condition of independence and independence, resulting in their exclusion from the bench.

VIII. The Real Risk of a Constitutional Clinch

Crucial to the mechanism of the juridical transit from an authoritarian state, as Poland has become, to a constitutional state again, will be the behavior of the two organs of constitutional bodies, namely the president and the tribunal. So let's look at the "day after..." i.e. a hypothetical situation in which the incumbent opposition wins a majority in both houses of parliament and begins the process of repairing the state. But we should add a fundamental caveat – although the parliament is the first body in the law-making process and its activity is a prerequisite for the start of the legislative procedure, but there are two more bodies involved in this procedure. These are the president, a representative of the political option that is destroying the constitutional state, whose term expires in the spring of 2025, and the Constitutional Court, in which those appointed by the current political power will have a majority until 2028

This means that a constitutional clinch is to be expected, as the transition will involve restoring the constitutional essence of the institutions, mechan-

isms and ideas that were destroyed with the active participation of the president and the court. So, as some would like, can we hope that after the change of political alignment these two organs of state will "convert" to the Constitution? To do so, they would have to recognize their past practice as harming the fundamental interests of their own state through behavior that is in the nature of a constitutional tort. However, the determination to destroy, the scale of the mockery of constitutional values and the offense to the majesty of the state is so great that it would be naive to expect a change in the behavior of the president and the court. This means that the next premise of this analysis is that the president and the tribunal should be so active that the goal and effect will be to prevent changes that restore constitutional order in Poland.

This is a key assumption because at the level of legislative (statutory) changes in most situations, the restoration of constitutionality will be a relatively easy task. Of course, it is not a matter of applying the construction of actus contrarius, but of systemic regulation of the destroyed institutions and procedures, including appropriate compensation for those harmed by the consequences of unconstitutional law. However, the restoration of the public character of the media (radio and television) or the restoration of the essence of the civil service will be facilitated insofar as there are no – apart from the expected behaviour of the president and the tribunal – constitutional constraints on the legislature at the starting point.

IX. Irremovability of the Judges

However, the situation regarding the judiciary is different, including in particular the situation of judges appointed since 2018 in a manner that is both constitutionally flawed and defective by European law standards. The Constitution provides for irremovability as a guarantee of their independence. Article 180 para 1 of the Polish Constitution provides that "judges shall not be removable," while "recall of the judge from the office, suspension from the office, transfer to another bench or position against his will, may only occur by virtue of a court judgment and only in those instances prescribed in a statute." The question then arises how to restore the state of affairs in accordance with the Constitution without violating the constitutional guarantee of the irremovability of judges?

This issue has two aspects. First, the need to create a mechanism that would lead to the rectification of defects in the appointment of a judge.

Second, it is expedient to differentiate the situation of three groups of judges appointed after 2018. The first issue is relatively easy to resolve. The "Iustitia" judges' association, in preparing a project to repair the judiciary, proposed that all judges appointed from 2018 onward and thus under the opinion and application procedure of the unconstitutional National Council of the Judiciary should be re-evaluated by the council and reappointed by the president. The opinion would be of a substantive nature, also taking into account the correctness of the performance of the functions of a judge since the first flawed appointment. If this concept were adopted then there would remain an organizational problem to be solved: the creation of such an opinion mechanism that would lead to the healing of this fragment of the judiciary in a relatively short period of time.

X. Three Types of Unconstitutional Judicial Appointments

At the same time, two more caveats are necessary. The first concerns the two categories of judges who would be subject to this mechanism of re-evaluation and appointment. This is because it would apply to judges first appointed to the courts of first instance and judges who have been promoted to higher court positions. The former, having completed their law studies and studies and practice as part of their four-year studies at the National School of the Judiciary and Public Prosecution, had, in fact, no other opportunity to begin practicing as judges.

The second group are judges who, knowing that the procedure was flawed, decided to seek promotion to a higher court. In this group there are various judges, both those whose promotion does not raise any doubts due to their professional and moral qualifications. But there are also those who, under normal circumstances, would not have received a positive opinion from the Council and would not have been appointed as a judge. In this entire group of judges, the substantive evaluation of their professional achievements after 2018 will be of particular importance.

The third group is made up of judges appointed for the first time as judges, so much so that they are immediately appointed to the Supreme Court or the Supreme Administrative Court. This includes both judges appointed to the two new Supreme Court chambers created in 2018. (the Disciplinary Chamber and the Chamber for Public Affairs and Extraordinary Complaints) as well as judges appointed to previously existing Supreme Court chambers. All of these individuals were not judges until

their appointment. They are either former prosecutors (who enjoy full political trust due to their past professional stance) or law faculty professors. These individuals should return to their previous positions, without the possibility of reapplying for the position of Supreme Court judge. Their participation in an unconstitutional procedure, due to the stature of the Supreme Court/Supreme Administrative Court and the expectations of the legal and moral qualifications of Supreme Court judges clearly eliminate them from the possibility of practising as Supreme Court judges.

XI. A Final Caveat

1. General remarks

In view of the constitutional value of legal security and stability of legal relations, despite the defective staffing of the court resulting from the procedure used to appoint judges after 2018, rulings made by or with the participation of these judges remain in force. They enjoy a presumption of legality and legitimacy. The resumption of proceedings in cases terminated by a final judgment issued under the circumstances indicated could only take place in special cases, provided for by the relevant regulations of civil procedure and criminal procedure.

At the same time, the solution indicated above assumes that an adequate legal basis will be created for the procedure for reviewing and re-evaluating and appointing defectively appointed judges. Here, however, serious obstacles are to be expected. The first is the attitude of the president, without whose signature and promulgation of the law, the mechanism cannot function. We are talking not about the status of the president, but about his political attitude of eight years in office. It is difficult to imagine a situation in which laws amending fundamentally unconstitutional laws previously signed by the president will, under changed circumstances, receive his approval. It is possible to imagine a situation in which today's democratic opposition obtains a 2/3 majority of seats which would make it possible to reject the president's political veto. The president is then obliged to sign the bill. But the way is then still open for the president to apply to the Constitutional Court to examine, by way of follow-up control, the constitutionality of the signed law. Just as there always remains the possibility for the president, without signing the law, to refer the law to the tribunal in the mode of preventive control. And yet, the practice of the tribunal's

operation proves that then such a law would wait a very long time to assess its constitutionality.

Thus, we arrive at another constitutional trap, which is the permanence of the Constitutional Tribunal's staffing, with the majority of judges (until 2028) appointed by the Law and Justice party. I make the assumption, based on observation of the views of the tribunal's judges as expressed in the most important rulings related to the Polish constitutional order, including their understanding of the place and role of international law in Poland (the previously indicated tribunal rulings), that there is no basis for expecting that in the event of a change in the political situation in Poland, these judges will activate that part of their "critical mind" that would allow them to understand their past mistakes and juridical and moral incompetence, expiate and promise to improve. This is a naive assumption in the context of the damage done to the constitutional order by this court and its judges. In this context, it is more likely to assume that they will defend with all the more determination and persistence the lost cause that is their current behavior as judges, and thus as reasonable citizens.

Since the assumption has been made that the president and the tribunal in its current composition, which has a legitimacy in the constitution, will be fundamental obstacles to creating a legal basis for the restoration of the constitutional state, it is necessary to consider possible scenarios for resolving this dilemma. Putting the problem differently, the question of whether constitutional norms are an insurmountable obstacle to restoring the essence of the constitution should be answered.

Let us therefore consider the problems that arise from the constitutional guarantees of the non-removability of judges, a principle that also applies to tribunal judges[30]. The first issue is the status of understudy judges, i.e., judges who were elected sworn in when parliament duly elected three judges, but the president refused to take the oath of office from them. It seems that the solution to this problem is easier than the next, since these persons were not judges. This follows from both the rulings of the Polish Constitutional Court and the Xero-Flor v. Poland ruling issued by the ECHR. In such a situation, the President is authorized and obliged to accept the oath of office from duly elected judges. If any of the judges there

30 Marcin Matczak, 'Ktoś, kto nie odróżnia Adolfa od Donalda, może nie widzieć różnicy między puczem monachijskim a rtęciowym', Gazeta Wyborcza, 26.08.2022,https://wyborcza.pl/magazyn/7,124059,28827386,ktos-kto-nie-odroznia-adolfa-od-donalda-moze-nie-widziec-roznicy.html.

were not interested, after waiting more than 8 years to be sworn in (age, health or other personal reasons), then the Sejm is obliged to elect three judges. Those who have not been duly elected are not entitled to the status of either a judge or a retired judge. They have the right to return to their previously held position (all of them are law professors) and continue their career path.

The remaining judges, 12 out of 15, were duly elected. The behavior of some of them drastically violated the standards of judicial ethics, and in such a situation it would be appropriate to assess their conduct under the disciplinary liability procedure. However, the disciplinary procedure for tribunal judges assumes that both the disciplinary ombudsman and the disciplinary court are composed exclusively of tribunal judges, and the disciplinary court applies the provisions of the Code of Criminal Procedure. The problem, however, is that in its response to the ECHR's ruling in Xero-Flor v. Poland, the tribunal stated that it is not a court within the meaning of Article 6 of the European Convention.[31] If the tribunal is not a court, then – consequently, even more so – it cannot be recognized as a court of disciplinary composition. It will have no legal effect in a situation where, for example, it ruled on the punishment of the judge's removal from office.

2. Disciplinary responsibility of the judges of the Constitutional Tribunal?

One proposal is that the panel of judges would be composed of drawn retired tribunal judges, but this concept would first have to become law, which neither the president nor the tribunal itself, as a result of a review of the constitutionality of such a law, would certainly not allow.

The idea that all the tribunal's judges violated the law in such a way that they knowingly sat on a panel of understudy judges, and thus participated in the issuance of a ruling by a panel that was not a tribunal, and thus violated the law applicable to them[32], is under consideration.

This is a political strategy adopted by the tribunal's judges, the features of which are 1. The recognition of the primacy of politics over the law, including the constitution; 2. It is carried out deliberately and intentionally,

31 See supra n. 16.

32 Jerzy Zajadło and Tomasz T. Koncewicz, 'Wykładnia wroga Konstytucji. Odbudowa polskiego Trybunału Konstytucyjnego jako przestroga I wierność wartościom Konstytucji', https://monitorkonstytucyjny.eu/archiwa/24606.

to satisfy the political power's expectation that any violation of the constitution should be subsequently accepted and confirmed by the tribunal as a constitutional action; 3. The rejection of all previous rules of law interpretation and the use of interpretive tricks that create the appearance of rationality and interpretive correctness.

But such a qualification of their behavior would have to be expressed in a decision of the disciplinary court and an order of removal from office. The position of both legal analysts and the recent justification of the Supreme Administrative Court's ruling that, through the participation of the understudies, "the tribunal has been infected with lawlessness, and has entirely lost its ability to rule in accordance with the law"[33] is convincing, but from this accurate observation neither the invalidity of the tribunal's rulings nor, naturally, the automatic liability of the judges leading to their removal from office. We return to disciplinary proceedings with all the baggage of the objections mentioned.

The conclusion is rather grim: the mechanism of disciplinary responsibility for the accountability of judges currently serving on the tribunal is an illusory hope for solving the problem of their continuance on the tribunal.

3. State-organized corruption

In the case of the liquidation of the unconstitutional Disciplinary Chamber of the Supreme Court and its transformation into the equally unconstitutional Chamber of Professional Responsibility, the mechanism used was no longer that of a golden but a platinum umbrella. Well, the judges of the liquidated Disciplinary Chamber, an instrument of harassment of independent judges, were offered either the opportunity to continue working in another chamber of the Supreme Court, or to retire. The platinum umbrella consists in the fact that those who decide to retire (5 of the 11 decided to be retired) receive 100 % of the salary of a Supreme Court judge until the age of 65, and after the age of 65 75 % of the salary, i.e. an "ordinary" judicial pension. This solution is wrong from every point of view, violates the principles of social justice and is immoral. A reward for obedience to political power and for the harm done to both individual judges and the administration of justice. The old Roman principle of *ex iniuria ius non oritur* has been forgotten.

33 Supreme Administrative Court judgment of 16 November 2022, delivered in case ref. III OSK 2528/21.

But since such a step has already been taken, it cannot be ruled out that a similar proposal may also be formulated for the tribunal's judges: resignation from the continuation of the status of active judge and retirement. The lesser of two evils?

So let's look at the second concept of solving the problem which is the constitutional court as an obstacle to the restoration of the constitutional state. This is the radical concept of "zeroing out" or otherwise extinguishing the current composition of the tribunal.[34]

Before I present the details of this concept, I would like to point out what the two concepts have in common – as a starting point: the first is the dismissal of understudies and a change in the rules of disciplinary proceedings against the tribunal's judges, and the second is precisely the zeroing out/extinguishing of the tribunal. This is an assessment of the situation, which is the starting point for the concept of rectifying the existing state of affairs. For the constitutional court has turned from a guardian of the constitution into an instrument for the implementation of political ideas that are – in the sphere of systemic issues – unconstitutional and anti-constitutional in nature. The Court in its current composition, so organized and providing numerous examples of unconstitutional and politically instrumentalized jurisprudence, is an insult to the rule of law (KZ). There has been a contamination of the entire tribunal and the entire jurisprudence, as understudies or non-judges have participated in the panels.

4. Excessive radicalism?

At the same time, the concept of zeroing out is based on additional arguments. It does not accept the likelihood that judges will adapt to the new constitutional order and change their juridical and moral bones. It also treats as unlikely the possibility that they will be held disciplinarily liable, both from the point of view of the possibility of qualifying their conduct as a disciplinary tort, and the participation of retired tribunal judges in the panels of the disciplinary court.

Zeroing out the tribunal is an attractive concept, as it removes the most serious obstacle to restoring constitutionality. At the same time, it is a risky concept, because it is associated with a violation of the existing principles

34 Wojciech Sadurski, 'Zerwijmy z prawniczym pięknoduchostwem. Polemika z Marcinem Matczakiem', Gazeta Wyborcza, 29.08.2022, https://wyborcza.pl/7,75968,28843876,zerwijmy-z-prawniczym-pieknoduchostwem-polemika-z-marcinem.html.

of the judiciary, including the tenure of court judges and the irremovability of judges. Admittedly, the destroyers of the constitutional state have violated many other constitutional norms and values, but they will always be able to argue: look, those who say they are restoring the constitutional state are doing so by violating the Constitution. This is part of the political discourse. At the same time, there is no doubt that this argument will be used by those who have built a mechanism to protect them from accountability. This is also the trap, this time concerning the legitimacy of pro-constitutional actions.

XII. The Higher Loyalty

I have tried to show the state of constitutional affairs in Poland in 2023 from the perspective of a possible change in the political alignment after the elections. However, it is necessary to add a few caveats. The first is related to the experience of recent years, namely, the description of the situation made at a given moment will in all likelihood not correspond to the reality at the time when the ordering of the state would take place. Second, the situation created in recent years is an extraordinary situation, and all indications are that ordinary legal instruments will not be effective in achieving the intended goal. An extraordinary situation requires extraordinary measures. In full knowledge that they will be precedent-setting and will be associated with high costs in all dimensions. It should be recognized that we are dealing with an extraordinary unconstitutional state, and an extraordinary state requires extraordinary measures. The higher loyalty of loyalty to the Constitution is an argument that legitimizes extraordinary measures, including when their legality may be in dispute. This dispute will continue uninterrupted. And it will take place within the framework set by the dogma of the various legal disciplines. The end result, however, will be the creation of a new dogmatics, part of which will be the assumption that one must choose between lesser and greater evils. There are no free lunches. This is especially true when the ghost of an authoritarian state stands at the door of your home.[35]

35 Mirosław Wyrzykowski, 'The Ghost of an Authoritarian State Stands at the Door of Your Home', VerfBlog, *26.02.2020,* https://verfassungsblog.de/the-ghost-of-an-authoritarian-state-stands-at-the-door-of-your-home/, DOI: 10.17176/20200226–105246–0.