

# WHEN LEGAL FUNDAMENTALISM MEETS POLITICAL JUSTICE: THE CASE OF POLAND

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To Professor Martin Shapiro,  
With friendship, gratitude, and admiration

*The ruling of 22 October 2020 concerning termination of pregnancy in Case K 1/20, handed down by the body once known as the Polish Constitutional Court, has devastated the legal and social landscape in Poland. The decision ruled as unconstitutional the provision that allowed medically assisted termination in cases where prenatal screening or other medical considerations indicated a high probability of a severe and irreversible abnormality or an incurable disease of the fetus. This analysis argues that the ruling is the most serious attempt to discredit and humiliate the Polish Constitution of 1997, and stands as the ultimate proof of weaponising judicial review. The argument will be made that if one wishes to understand the extent of the capture of independent institutions by the ruling majority, the ruling under consideration must be read and considered in the light of a more general context. Only by going beyond and contextualising it, can one grasp the extent to which the constitutional profile of a state has been altered by methods of unconstitutional capture. The analysis argues that once we contextualise the ruling and view it in a more systemic light, there are important systemic signposts that will help to explain how we arrived here and, more importantly, what is next. These signposts, in turn, contain a cautionary tale of the institutional fragility that is relevant for liberal democracies.*

**Keywords:** judicial review, constitutional abuse, political justice, constitution, politics of resentment

*The ghost of an authoritarian state stands at the door of your home.  
It will not knock on the door. It will come in uninvited.  
And it will stay a long time.  
Miroslaw Wyrzykowski<sup>1</sup>*

## 1. SETTING THE SCENE

Herman Schwartz argued that the rise of the independent constitutional courts in Eastern Europe was remarkable and that these courts were ready to challenge and overturn important statutes, bills and regulations. He concluded, ‘and most [of these courts] seem to have gotten away

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<sup>1</sup> ‘The Ghost of an Authoritarian State Stands at the Door of Your Home’, Speech delivered at the 48th European Presidents’ Conference of Lawyers 2020, Vienna (Austria), 26 February 2020, <https://verfassungsblog.de/the-ghost-of-an-authoritarian-state-stands-at-the-door-of-your-home>.

with it'.<sup>2</sup> Unfortunately, the last six years painfully show that on this occasion the Polish Constitutional Court (the Court) has not 'got away with it'. The Court, once a proud institution and an effective check on the will of the majority, is now a shell of its former self. It has become a dangerous and unhinged institution, which uses judicial review as a blunt sword both to punish opponents and to promote the illiberal agenda of the ruling majority.<sup>3</sup> The abortion ruling under consideration in the present analysis is the most dramatic illustration of this incremental subjugation.

The 'ruling'<sup>4</sup> of the 'fake constitutional court' (hereinafter 'fake court') of 22 October 2020 in Case K 1/20 has devastated the legal and social landscape in Poland.<sup>5</sup> The fake court has ruled as unconstitutional the provision that allowed medically assisted abortion in cases where prenatal screening or other medical considerations indicated a high probability of a severe and irreversible

<sup>2</sup> Herman Schwartz, *The Struggle for Constitutional Justice in Post-Communist Europe* (University of Chicago Press 2000) xi.

<sup>3</sup> For an incisive analysis, Lech Garlicki, 'Disabling the Constitutional Court in Poland?' in Andrzej Szmyt and Bogusław Banaszak (eds), *Transformation of Law Systems in Central, Eastern and Southeastern Europe in 1989–2015: Liber Amicorum in Honorem Prof dr dres H C Rainer Arnold* (Gdańsk University Press 2016) 63; Mirosław Wyrzykowski, 'Bypassing the Constitution or Changing the Constitutional Order Outside the Constitution' in Szmyt and Banaszak, *ibid* 159; Wojciech Sadurski and Maximilian Steinbeis, 'What Is Going on in Poland Is an Attack against Democracy?' *VerfBlog*, 15 July 2016, <http://verfassungsblog.de/what-is-going-on-in-poland-is-an-attack-against-democracy>; Tomasz Tadeusz Koncewicz, 'Polish Constitutional Drama: Of Courts, Democracy, Constitutional Shenanigans and Constitutional Self-Defense', *International Journal of Constitutional Law Blog*, 6 December 2015, [www.iconnectblog.com/2015/12/polish-constitutional-drama-of-courts-democracy-constitutional-shenanigans-and-constitutional-self-defense](http://www.iconnectblog.com/2015/12/polish-constitutional-drama-of-courts-democracy-constitutional-shenanigans-and-constitutional-self-defense); Tomasz Tadeusz Koncewicz, 'Farewell to the Polish Constitutional Court', *VerfBlog*, 9 July 2016, <http://verfassungsblog.de/farewell-to-the-polish-constitutional-court>; Tomasz Tadeusz Koncewicz, 'Statutory Tinkering: On the Senate's Changes to the Law on the Polish Constitutional Tribunal', *VerfBlog*, 25 July 2016, <http://verfassungsblog.de/statutory-tinkering-senate-polish-constitutional-tribunal>. For a useful and detailed recap, see also Małgorzata Szuleka, Marcin Wolny and Marcin Szwed, 'Report on the Constitutional Crisis in Poland 2015–2016', Helsinki Foundation for Human Rights, 2016, [http://www.hfhr.pl/wp-content/uploads/2016/09/HFHR\\_The-constitutional-crisis-in-Poland-2015-2016.pdf](http://www.hfhr.pl/wp-content/uploads/2016/09/HFHR_The-constitutional-crisis-in-Poland-2015-2016.pdf). More recently, see comprehensively Wojciech Sadurski, 'How Democracy Dies (in Poland): A Case Study of Anti-Constitutional Populist Backsliding', 18 January 2018, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3103491](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3103491). See also references at n 14.

<sup>4</sup> Case K 1/20, Ruling of 22 October 2020, OTK ZU A/2021/4. The ruling in K 1/20 is available (in Polish) at <https://ipo.trybunal.gov.pl/ipo/Sprawa?sprawa=22412&dokument=20359&cid=1>. The words matter more than ever here when we describe the devastation brought about by this ruling to the legal and social reality in Poland. To analyse the 'ruling' as if it were a legal judgment of a court would be tantamount to turning a blind eye to the constitutional abuse that this ruling represents and of which it represents, in a sense, an apex. Therefore, the qualification of 'ruling' is to underscore the unconstitutional status of what was decided on 22 October 2020 by 'a body' that is no longer an independent and legally constituted constitutional court. For discussion and terminology, Laurent Pech, 'Dealing with "Fake Judges" under EU Law: Poland as a Case Study in Light of the Court of Justice's Ruling of 26 March 2020 in *Simpson and HG*', May 2020, <https://reconnect-europe.eu/wp-content/uploads/2020/05/RECONNECT-WP8.pdf>.

<sup>5</sup> For first comments see 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' (2021) 17 *European Constitutional Law Review* 130; Magdalena Furgalska and Fiona de Londras, 'Rights, Lawfare and Reproduction: Reflections on the Polish Constitutional Tribunal's Abortion Decision' (2022) 55 *Israel Law Review* 285.

abnormality or an incurable disease of the fetus.<sup>6</sup> It has prompted mass protests on a scale unseen in Poland since 1989.<sup>7</sup> More recently, the cruelty of this ruling was on full display when a young pregnant woman died because doctors refused to perform a potentially life-saving termination even though her fetus lacked enough amniotic fluid to survive.<sup>8</sup> Instead of saving a pregnant woman, the doctors dragged their feet and did nothing.<sup>9</sup> Their fatal inaction was clearly affected by the ruling of the fake court which, effectively, has legalised an almost total ban on abortion in Poland and forced women to give birth at all costs.<sup>10</sup>

This ruling is perhaps the most serious attempt to discredit and humiliate the Polish Constitution of 1997. It puts forward a skewed, falsified and malicious reading of the document, while weaponising judicial review and putting it at the service of the resentful politics that has engulfed Poland since 2015.<sup>11</sup> These are all strong words. However, we are well beyond the point of sugar-coating and trying somehow to bend the unconstitutional world and reality to the Constitution. There is no more ‘business as usual’; we must be very clear about what we are dealing with here, and call it out as such.<sup>12</sup> No more half-measures or turning the gaze away when blatant anti-constitutional oppression is taking place. When constitutional essentials are on the line, we lawyers should adapt accordingly and overcome our traditional *non possumus*.

<sup>6</sup> For press coverage see Monika Pronczuk, ‘Poland Court Ruling Effectively Bans Legal Abortions’, *The New York Times*, 22 October 2020, A11, <https://www.nytimes.com/2020/10/22/world/europe/poland-tribunal-abortions.html>; Wojciech Kość, ‘Poland Looks to Toughen Already-Stringent Abortion Laws’, *Politico*, 23 September 2020, <https://www.politico.eu/article/poland-to-toughen-stringent-abortion-laws>; ‘Poland Abortion: Top Court Bans Almost All Terminations’, *BBC News*, 23 October 2020, <https://www.bbc.com/news/world-europe-54642108>; Antonia Mortensen, ‘Poland Puts New Restrictions on Abortion into Effect, Resulting in a Near-Total Ban on Terminations’, *CNN*, 28 January 2021, <https://edition.cnn.com/2021/01/28/europe/poland-abortion-restrictions-law-intl-hnk/index.html>; William Adkins, ‘Poland to Make Abortion Ban Binding’, *Politico*, 27 January 2021, <https://www.politico.eu/article/poland-ratifies-controversial-abortion-law>; Wojciech Kość, ‘Polish Women Look for “Gray Zone” Workarounds to Tough New Abortion Rules’, *Politico*, 9 March 2021, <https://www.politico.eu/article/polish-women-hunt-workarounds-amid-tough-new-abortion-rules-poland-pis>; Maïa de La Baume, ‘MEPs Condemn Poland’s Near-Total Abortion Ban’, *Politico*, 9 February 2021, <https://www.politico.eu/article/mep-condemn-poland-abortion-ban>.

<sup>7</sup> Isabella Kwai, Monika Pronczuk and Anatol Magdziarz, ‘Near-Total Abortion Ban Takes Effect in Poland, and Thousands Protest’, *The New York Times*, 27 January 2021, <https://www.nytimes.com/2021/01/27/world/europe/poland-abortion-law.html>; ‘Poland: Thousands Protest as Abortion Law Comes into Effect’, *Deutsche Welle*, 28 January 2021, <https://www.dw.com/en/poland-thousands-protest-as-abortion-law-comes-into-effect/a-56363990>; Maria Wilczek, ‘Farmers, Taxi Drivers and Miners Show Support for Abortion Protests in Poland’, *NFP*, 26 October 2020, <https://notesfrompoland.com/2020/10/26/farmers-taxi-drivers-and-miners-show-support-for-abortion-protests-in-poland>; Daniel Tilles, ‘Protests Return to Polish Streets as Anti-abortion Ruling Finally Goes into Force’, *NFP*, 27 January 2021, <https://notesfrompoland.com/2021/01/27/protests-return-to-polish-streets-as-anti-abortion-ruling-finally-goes-into-force>; Artur Osinski and Zahid Mahmood, ‘Hundreds Demonstrate in Warsaw after Poland’s Highest Court Imposes Near Total Ban on Abortion’, *CNN*, 24 October 2020, <https://edition.cnn.com/2020/10/24/europe/poland-protests-abortion-intl/index.html>.

<sup>8</sup> Pieter Haeck, ‘Polish Protests Erupt against Abortion Law after Woman’s Death’, *Politico*, 7 November 2021, <https://www.politico.eu/article/poland-protest-abortion-law-death-woman>.

<sup>9</sup> ‘Poland: Protests Erupt over Abortion Law after Woman Dies’, *Deutsche Welle*, 6 November 2021, <https://www.dw.com/en/poland-protests-erupt-over-abortion-law-after-woman-dies/a-59744178>.

<sup>10</sup> De la Baume (n 6). On the illusory character of the two remaining exceptions see the analysis below.

<sup>11</sup> See in depth Leszek Koczanowicz, ‘The Polish Case: Community and Democracy under the PIS’ (2016) 102 *New Left Review* 77.

<sup>12</sup> Tomasz Tadeusz Konciewicz, ‘No More Business as Usual’, *VerfBlog*, 24 October 2020, <https://verfassungsblog.de/no-more-business-as-usual>, and the analysis at Section 5.3.

As words matter here, three interrelated caveats are in order.

First, the primary objective of the analysis that follows is to contextualise and move beyond the ruling made by an illegal body that, for the last five years, has been busy weaponising judicial review. Such review has been turned into a blunt sword to punish political opponents and help to carry through the political agenda of its political masters.<sup>13</sup> The procedural irregularity of the bench, indeed, should have been enough to skip the substantive part of the reasoning. The latter is simply of no legal consequence given that the institution behind the substantive reasoning was not properly constituted in the first place and lacked the basic attributes of a court. This was confirmed most recently in the unprecedented judgment of the European Court of Human Rights (ECtHR) in *Xero Flor v Poland*.<sup>14</sup> In this case the ECtHR held that contraventions in the selection process of the three judges were unlawful given that there was no vacancy within the Constitutional Court back in 2015.<sup>15</sup> Moreover, these contraventions were objectively and

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<sup>13</sup> Importantly, this applies to the whole spectrum of issues and situations that are important for the political ruling majority. The political power sees the fake court as a useful ally in taking care of the business of the day. The fake court has readily complied and delivered by ruling more recently that, among others, the judgments of the Court of Justice on judicial independence are incompatible with the Polish Constitution and that Art 6 of the European Convention on Human Rights (ECHR) (n 19 below), as interpreted by the European Court of Human Rights (ECtHR) are similarly incompatible with the Constitution. On these most alarming, but not surprising developments, see in depth Ewa Łętowska and Stanisław Biernat, 'This Was Not Just Another Ultra Vires Judgment! Commentary to the Statement of Retired Judges of the Constitutional Tribunal', *VerfBlog*, 27 October 2021, <https://verfassungsblog.de/this-was-not-just-another-ultra-vires-judgment>; Oliver Garner and Rick Lawson, 'On a Road to Nowhere: The Polish Constitutional Tribunal Assesses the European Convention on Human Rights', *VerfBlog*, 23 November 2021, <https://verfassungsblog.de/on-a-road-to-nowhere>. As a result, POLEXIT is no longer an elegant metaphor, but rather a sober description of creeping reality; on this, Tomasz Tadeusz Koncewicz, 'Poland and Europe at a Critical Juncture: What Has Happened? What Is happening? What's Next?', *VerfBlog*, 16 August 2021, <https://verfassungsblog.de/poland-and-europe-at-a-critical-juncture-what-has-happened-what-is-happening-whats-next>; and the analysis at Section 4. When reading the abortion ruling one must take into account this more general context.

<sup>14</sup> ECtHR, *Xero Flor v Poland*, App no 4907/18, 7 May 2021. The ECtHR judgment provides a sobering account of the extent of the destruction of the rule of law in Poland. Reading it now, after six years of living under the captured body that used to be the Polish Constitutional Court, leaves one in disbelief that indeed such grave violations of the rule of law could have been perpetrated at the heart of the European Union (EU). For discussion see Jakub Jaraczewski, 'From Boars to Courts – The Landmark ECtHR Case *Xero Flor v. Poland*', *EU Law Live*, 11 May 2021, <https://eulawlive.com/op-ed-from-boars-to-courts-the-landmark-ecthr-case-xero-flor-v-poland-by-jakub-jaraczewski>; Marcin Szwed, 'What Should and What Will Happen after Xero Flor: The Judgement of the ECtHR on the Composition of the Polish Constitutional Tribunal', *VerfBlog*, 9 May 2021, <https://verfassungsblog.de/what-should-and-what-will-happen-after-xero-flor>.

<sup>15</sup> To cut a long story short here, the acrimony surrounding publication of the judgments of 3 and 9 December 2015, which found the selection of three government-backed judges to be unconstitutional, was only a prelude of things to come and set a dangerous precedent for the future. Formally, the 'December judgments' were published only after protracted wrangling back and forth between the President of the Court and government officials. Despite publication, to this very day they have not been implemented and respected as the President has been steadfast in refusing to swear in three judges elected constitutionally by the old Sejm. In the meantime, things went from bad to worse and the refusal by the government to publish the judgments of the Court became a daily weapon of the governing majority against the 'unwanted' jurisprudence of the Court; see references at n 3 as well as the analysis in Section 4. On this see also Tomasz Tadeusz Koncewicz, 'Of Institutions, Democracy, Constitutional Self-Defence and the Rule of Law: The Judgments of the Polish Constitutional Tribunal in Cases K 34/15, K 35/15 and Beyond' (2016) 53 *Common Market Law Review* 1753; Tomasz Tadeusz Koncewicz, 'The Capture of the Polish Constitutional Court and Beyond: Of Institution(s), Fidelities and the Rule of Law in Flux' (2018) 43 *Review of Central and East European Law* 116; Tomasz Tadeusz Koncewicz, 'Unconstitutional Capture and Constitutional Recapture:

genuinely identified by the 'old' Constitutional Court when it ruled these selections unconstitutional in December 2015. The ECtHR saw no reason to call into question the Constitutional Court's interpretation of the relevant provisions of domestic law and, in particular, those of constitutional rank. It therefore concluded that the contraventions at issue should be regarded as manifest breaches of domestic law for the purposes of the first step of the test.<sup>16</sup> The ECtHR thus found that, given the concerted attacks on the Constitutional Court, the repeated failures to abide by the judgments of the Court and the refusal to publish them:<sup>17</sup>

[the] actions of the legislature and the executive amounted to unlawful external influence on the Constitutional Court ... the breaches in the procedure for electing three judges, including Judge M.M., to the Constitutional Court on 2 December 2015 were of such gravity as to impair the legitimacy of the election process and undermine the very essence of the right to a 'tribunal established by law'.

Participation in proceedings before the Constitutional Court of a person whose election was vitiated by grave irregularities 'violated the very essence of the right to a tribunal established by law'.<sup>18</sup> As the right to 'a tribunal established by law' reflects the very principle of the rule of law and, as such, it plays an important role in upholding the separation of powers and the independence and legitimacy of the judiciary as required in a democratic society, the finding of the ECtHR is as devastating as it gets. The body called 'Constitutional Court' must not therefore be considered a court established by law within the meaning of Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).<sup>19</sup>

As a result, when analysing the motives of the abortion ruling despite all this, one needs to tread a fine line. On the one hand, doing so might give the veneer of legitimacy to an institution that has been discredited and consists of usurpers masquerading as judges. On the other hand, only by highlighting the errors and abuses of judicial reasoning can one truly see through the constitutional tragedy that this ruling unveils. This analysis attempts to chart such a fine line, while never overlooking the fundamental irregularity that undermines the very existence and the legitimacy of the fake court. Thus, the substantive part is of subsidiary importance as the procedural defects in the composition of the fake court render the ruling *non existens* on procedural grounds in the first place.

Secondly, the argument will be made that if one wants to understand the extent of the capture of the independent institutions and the incessant humiliation of the Polish Constitution of 1997

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Of the Rule of Law, Separation of Powers and Judicial Promises', NYU Jean Monnet Working Paper No 3/2017, March 2017, <https://jeanmonnetprogram.org/paper/unconstitutional-capture-and-constitutional-recapture-of-the-rule-of-law-separation-of-powers-and-judicial-promises>.

<sup>16</sup> *Xero Flor v Poland* (n 14) para 275, and the explanation of the context at n 13.

<sup>17</sup> *ibid* para 287.

<sup>18</sup> *ibid* para 290. For more detailed discussion see Szwed (n 14).

<sup>19</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms (entered into force 3 September 1953) 213 UNTS 222 (ECHR), art 6; the text of the Convention is available at [https://www.echr.coe.int/documents/convention\\_eng.pdf](https://www.echr.coe.int/documents/convention_eng.pdf). Now (as explained above (n 13)) the fake court has retaliated by ruling that Art 6 ECHR, as interpreted by the ECtHR, is incompatible with the Polish Constitution. The Minister of Justice has already announced further applications to the fake court to ensure that anti-democratic policies are shielded by the appearances of constitutionality.

by the ruling majority,<sup>20</sup> one must consider the ruling in a more general context. The ruling is the ultimate example of constitutional rot and abuse. Only by going beyond this tragic ruling and contextualising it, can one grasp the extent to which the constitutional profile of a state has been altered by means of unconstitutional trickery.

Thirdly, the analysis argues that once we contextualise the ruling and set it in a more systemic light, there are important systemic signposts that will help to explain how we got here and, more importantly, what is next. These signposts contain a cautionary tale of institutional fragility that is relevant beyond here and now.

The constitutional debacle in Poland must be the starting point for a more general analysis of the processes of the politics of resentment and constitutional capture that strike at the core of European principles of the rule of law, the separation of powers and judicial independence.<sup>21</sup> With the benefit of hindsight, we now know that the destruction of the Polish Constitutional Court (and earlier, the Hungarian Constitutional Court) was an opening act in the total subjugation of all independent institutions of the state. With no independent constitutional court left to guarantee effective compliance with the national constitution, the Polish ruling party has been busy completing a multi-pronged takeover of the whole of the national judiciary to enable the executive and legislative branches of government to interfere systematically in the structure, composition and daily functioning of the judicial branch.<sup>22</sup> In its reasoned proposal under Article 7 of the Treaty on European Union<sup>23</sup> the European Commission succinctly pointed out that over a period of two years Polish authorities have adopted no fewer than 13 laws affecting the entire structure of the justice system in Poland, with an impact on the Constitutional Court, the Supreme Court and the ordinary courts, the National Council for the Judiciary, the prosecution service and the National School of Judiciary.<sup>24</sup> The capture of the state and its institutions continues.<sup>25</sup>

<sup>20</sup> Constitution of the Republic of Poland of 2 April 1997, *Journal of Laws* 1997 No 78, item 483, <https://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm> (Constitution of Poland). For discussion see also Section 7.

<sup>21</sup> Laurent Pech and Kim Lane Scheppele, 'Illiberalism Within: Rule of Law Backsliding in the EU' (2017) 19 *Cambridge Yearbook of European Legal Studies* 3; Laurent Pech and Sébastien Platon, *Menace Systémique Envers l'Etat de Droit en Pologne: Entre Action et Procrastination*, Robert Schuman Foundation, Policy Paper, Question d'Europe No 451, 13 November 2017, <https://www.robert-schuman.eu/fr/doc/questions-d-europe/qe-451-fr.pdf>.

<sup>22</sup> For more detailed analysis see Sadurski and Steinbeis (n 3); Sadurski (n 3); Wojciech Sadurski, *Poland's Constitutional Breakdown* (Oxford University Press 2019); Anna Śledzińska-Simon, 'The Polish Revolution: 2015–2017', *IsConnect*, 25 July 2017, <http://www.icconnectblog.com/2017/07/the-polish-revolution-2015-2017/>; Tomasz Tadeusz Koncewicz, 'Capture of the Polish Constitutional Tribunal and Beyond: Of institution(s), Fidelities and the Rule of Law in Flux' (2018) 43 *Review of Central and East European Law* 116.

<sup>23</sup> Treaty on European Union (entered into force 1 November 1993) [1992] OJ C 191/1. For a detailed account of Art 7 TEU and the procedures that have been initiated so far see Kim Lane Scheppele and R Daniel Kelemen, 'Defending Democracy in the EU Member States beyond Article 7 TEU' in Francesca Bignami (ed), *The EU in Populist Times: Crises and Prospects* (Cambridge University Press 2019) 413.

<sup>24</sup> European Commission, 'Reasoned Proposal in Accordance with Article 7(1) of the Treaty on European Union regarding the Rule of Law in Poland', 20 December 2017, COM(2017) 835 final. For insightful analysis see Jan-Werner Mueller, 'If You're Not a Democracy, You're Not European Anymore', *Foreign Policy*, 22 December 2017, <http://foreignpolicy.com/2017/12/22/if-youre-not-a-democracy-youre-not-european-anymore>.

<sup>25</sup> It is impossible to track in real time all the developments on the ground. For more recent recapitulation, Laurent Pech, Patryk Wachowiec and Dariusz Mazur, '1825 Days Later: The End of the Rule of Law in Poland (Part I)', *VerfBlog* 13 January 2021, <https://verfassungsblog.de/1825-days-later-the-end-of-the-rule-of-law-in-poland-part-i>,



The Polish government has countered by claiming that it respects the rule of law and, consequently, that the criticism directed at it is not justified. There are two important caveats here: first, the Polish government insists that the rule of law should be interpreted differently from what was hitherto accepted; second, there is no agreement on what the rule of law entails in practice (application).<sup>26</sup> Those two caveats transform the rule of law – one of the paradigms of the post-1989 transition – from the rule *of* law to rule *by* law.<sup>27</sup> They underpin a new constitutional doctrine now on the rise in Poland and push Poland closer to POLEXIT. The abortion ruling and its tragic consequences must be read in this systemic light. The ruling signals the ultimate victory and the culmination point of the warfare against the Constitution that has been raging in Poland since December 2015.

These introductory remarks inform the analysis that follows and determine its structure. It consists of four major building blocks and perspectives through which to approach the ruling and its broader ramifications. The *micro-perspective* (Section 3) looks at the ruling itself. For a moment it tries to engage with the substantive part of the reasoning, or rather its lack thereof. Despite the already flagged procedural reservations, this part is essential notwithstanding. It allows the reader to understand the meagre and nonsensical arguments resorted to by the usurpers, and to see through the unconstitutional interpretation on which the fake court relies in ruling on the unconstitutionality of the embryo-pathological exception. Section 4 of the analysis places the ruling in a more systemic context and explains how the ruling forms an integral part of political justice and serves the new regime: democracy on the periphery. This section also considers the potential for the increased role of the ordinary courts in enforcing the Constitution. The *macro-perspective* (Section 5), focusing on the ‘mega-politics’, argues in turn that Poland finds itself at the critical juncture of impending POLEXIT.<sup>28</sup> Certain paradigms that have driven

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and ‘1825 Days Later: The End of the Rule of Law in Poland’ (Part II), *VerfBlog*, 18 January 2021, <https://verfassungsblog.de/1825-days-later-the-end-of-the-rule-of-law-in-poland-part-ii>.

<sup>26</sup> See also Paul Blokker, ‘Populist Constitutionalism, Popular Engagement, and Constitutional Resistance’, *Reconnect*, 7 February 2019, <https://reconnect-europe.eu/blog/blokker-populist-constitutionalism>; James Traub, ‘The Party that Wants to Make Poland Great Again’, *New York Times Magazine*, 2 November 2016, <https://www.nytimes.com/2016/11/06/magazine/the-party-that-wants-to-make-poland-great-again.html>; Phillip S Swallow, ‘Explaining the Rise of Populism in Poland: The Post-Communist Transition as a Critical Juncture and Origin of Political Decay in Poland’ (2018) 10(7) *Inquiries Journal* 1; Sławomir Sierakowski, ‘The Five Lessons of Populist Rule’, *Project Syndicate*, 2 January 2017, <https://www.project-syndicate.org/commentary/lesson-of-populist-rule-in-poland-by-slawomir-sierakowski-2017-01?barrier=accesspaylog>; Tomasz Tadeusz Koncewicz, ‘Understanding the Politics of Resentment’, *VerfBlog*, 28 September 2017, <https://verfassungsblog.de/understanding-the-politics-of-resentment>.

<sup>27</sup> Wojciech Sadurski, ‘300 lat temu Monteskiusz rozgryzł Obecną Sytuację w Polsce’, *Archiwum Osiatyńskiego*, 3 October 2018, <https://archiwumosiatsynskiego.pl/wpis-w-debacie/sadurski-monteskiusz-rozgryzyl-obecna-sytuacje-w-polsce>.

<sup>28</sup> Constraints of space preclude any detailed analysis of POLEXIT here. Suffice it to say that the abortion ruling and the de facto prohibition of all legal abortions in Poland add a new element to the gradual whittling away of the last remaining legal and axiological bonds between Poland and the EU. The linkage between the abortion ruling and the self-imposed alienation of Poland in Europe must be appreciated. For those interested in the topic I refer here to my earlier iterations on POLEXIT: see Tomasz Tadeusz Koncewicz, ‘Capturing the State and “Polexiting” the Union – An Essay in Constitutional Pessimism, Part I: Meet the New (Un)constitutional Doctrine’, *Reconnect*, 14 May 2021, <https://reconnect-europe.eu/blog/polexit1> (‘Capturing the State, Part I’); ‘Capturing the State and “Polexiting” the Union – An Essay in Constitutional Pessimism Part II: Still Paddling Together?’, *Reconnect*,

the Polish democratic transition since 1989 have been undermined and the abortion ruling is interpreted here as the most dramatic manifestation to date of this undemocratic retrogression. The mega-politics perspective brings to the table fundamental challenges for us lawyers at times when the law itself is being instrumentalised and abused to cover up the unconstitutional *coup d'états*. Vigilance and conceptual awareness are needed to address these. Finally, Sections 6 and 7 bring together various strands of the ruling and, in this light, anticipate the most immediate and future challenges.

It is only by bringing together the micro- and macro-perspectives that we will be able to understand the journey, rather than simply and comfortably the method of getting there. The latter perspective all too often dominates our minds and leads us into intellectual malaise. It will be argued that the politics of resentment<sup>29</sup> of 2015 to 2021 and beyond has effectively nullified the fragile post-1989 social contract, of which the abortion compromise was a vital part. Only constitutional fidelity at the levels of institutions and, most importantly, citizenry holds out a promise. Building a narrative of a 'good constitution' around the Constitution of 1997 is, and will be, crucial.

## 2. PROLOGUE: THE BACKGROUND

The law providing for the illegality of abortion has been in force in Poland since 1993 (the 1993 Act).<sup>30</sup> The preamble to the 1993 Act recognised that 'life is a fundamental human good, and care for life and health are basic duties of the state, society and its citizens'. Article (1) states: '1. Every human being has an inherent right to life from the moment of conception. 2. The life and health of the child are protected by law from the moment of conception'.

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14 May 2021, <https://reconnect-europe.eu/blog/polexit2>; Tomasz Tadeusz Koncewicz, 'Capturing the State and "Polexiting" the Union – An Essay in Constitutional Pessimism: From POLEXIT to E(U)EXIT: A Rhetorical Figure or (Already) Creeping Reality? Part III', *Reconnect*, 14 May 2021, <https://reconnect-europe.eu/blog/polexit3>; Tomasz Tadeusz Koncewicz, 'W Puszczy PiS robi pierwszy wielki krok do polexitu', *Wyborcza*, 13 August 2017, <https://wyborcza.pl/7,75968,22227617,w-puszczy-pis-robi-pierwszy-wielki-krok-do-polexitu.html>; Tomasz Tadeusz Koncewicz, 'Polexit: Myth and Reality' (2021) *Czas Kultury* 80; Tomasz Tadeusz Koncewicz, 'Polexit – Quo vadis, Polonia?', *VerfBlog*, 3 August 2020, <https://verfassungsblog.de/polexit-quo-vadis-polonia>.

<sup>29</sup> On this concept see in detail Tomasz Tadeusz Koncewicz, 'Understanding the Politics of Resentment: Of the Principles, Institutions, Counter-Strategies, Normative Change and the Habits of Heart' (2019) 27 *Indiana Journal of Global Legal Studies* 501, with further references; see also the analysis at Section 5.1.

<sup>30</sup> Family Planning, Human Embryo Protection and Conditions of Permissibility of Abortion Act of 7 January 1993 (OJ 1993 No 17, item 78) (Poland) (1993 Act). For more detail in English of the abortion legislative framework in Poland, its history and dynamics see Françoise Girard and Wanda Nowicka, 'Clear and Compelling Evidence: The Polish Tribunal on Abortion Rights' (2002) 10 *Reproductive Health Matters* 22; Inga Koralewska and Katarzyna Zielińska, 'Defending the Unborn, "Protecting Women" and "Preserving Culture and Nation": Anti-Abortion Discourse in the Polish Right-Wing Press' [2021] *Culture, Health and Sexuality* 1; Alicia Czerwinski, 'Sex, Politics and Religion: The Clash between Poland and the European Union over Abortion' (2004) 32 *Denver Journal of International Law and Policy* 653.



The 1993 Act allowed abortions to be performed legally in three circumstances:<sup>31</sup>

- (1) where the pregnancy constitutes a threat to the life or health of the pregnant woman, and this threat is confirmed by a physician other than the one who is to perform the abortion; in this case the abortion must be performed in a public hospital, and is free of charge;
- (2) where prenatal screening or other medical evidence indicates that there is a high probability of severe and irreversible fetal defect or incurable illness or disease that threatens the fetus; in this case the probability must be confirmed by a physician other than the one who is to perform the abortion; the abortion must be performed in a public hospital, and is free of charge; and
- (3) where there are justified reasons to suspect that the pregnancy is the result of an unlawful act.

Abortion in Poland is not only prohibited, subject to the exceptions indicated, but also punishable (Article 152 of the Penal Code). In all cases, the written consent of the woman (aged 13 and over) must be obtained.<sup>32</sup> Where the woman is a minor, the Act also requires the written consent of her legal guardian. A court may also issue an order allowing termination if no legal guardian gives consent. Illegal termination of pregnancy before the fetus is viable ('viability' is not defined) carries a penalty of up to three years' imprisonment for the person who performs the abortion. Beyond viability, the penalty is a maximum of eight years' imprisonment. A person who helps a woman to obtain an abortion is subject to a similar penalty. A woman whose pregnancy has been terminated, however, is not punished.

An amendment to the 1993 Act came into force on 4 January 1997. Section 1(2) stated that 'the right to life, including the prenatal stage thereof, shall be protected to the extent laid down by

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<sup>31</sup> 1993 Act, *ibid.* For the sake of completeness Art 4a of the 1993 Act, as it stood before Case K 1/20 was initiated, read (in its relevant part):

'(1) An abortion can be carried out only by a physician where:

1. the pregnancy constitutes a threat to the life or health of the pregnant woman;
2. prenatal screening or other medical evidence indicates that there is a high probability of severe and irreversible fetal defect or incurable illness disease that threatens the fetus;
3. there are justified reasons to suspect that the pregnancy is the result of an unlawful act.

(2) In the cases listed above under sub-paragraph 2, an abortion can be performed until such time as the fetus is capable of surviving outside the mother's body; in cases listed under sub-paragraph 3 above, until the end of the twelfth week of pregnancy.

(3) In the cases listed under sub-paragraphs 1 and 2 above the abortion shall be carried out by a physician working in a hospital.

... (5) Circumstances in which abortion is permitted under subsection (1), sub-paragraphs 1 and 2, above shall be certified by a physician other than the one who is to perform the abortion, unless the pregnancy entails a direct threat to the woman's life'.

For the English text of the Act in the version predating the ruling in K 1/20 see <https://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/Polish%20abortion%20act-English%20translation.pdf>.

<sup>32</sup> The criminal circumstances must be confirmed by a prosecutor and the woman must be less than 12 weeks pregnant; the abortion may be performed free of charge in a public hospital, or for a fee in a private clinic. While the Act specifies only that a physician should perform these abortions, regulations under the Act require that they be performed by an obstetrician-gynaecologist.

law'. This amendment provided that pregnancy could also be terminated during the first 12 weeks where the mother either suffered from material hardship or was in a difficult personal situation. This amendment was declared unconstitutional by the Constitutional Court on 28 May 1997,<sup>33</sup> the Court holding that the provision legalising abortion on grounds of material or personal hardship was incompatible with the Constitution.

Now, a ruling of the fake court has declared that one of the three exceptions (the so-called embryo-pathological exception)<sup>34</sup> that permitted abortion is unconstitutional: namely, where 'prenatal screening or other medical evidence indicates that there is a high probability of severe and irreversible fetal defect or incurable illness or disease that threatens the fetus'. Consequently, following the ruling, abortion will continue to be permitted (theoretically at least – see the analysis that follows) in two remaining cases: (i) threat to a woman's life or health, and (ii) in the case of rape or incestuous pregnancy.

### 3. 'THE RULING' IN CASE K 1/20: MICRO-PERSPECTIVE

*The role of the human law is neither to command  
all good deeds nor forbid all bad deeds.*

Thomas Aquinas<sup>35</sup>

This article argues that the unconstitutionality of the composition of the Court has the potential to derail judicial review in Poland on a long-term basis as the ruling under consideration, as well as any future decisions taken by the fake judges, will be marred by invalidity.<sup>36</sup> Firstly, the composition of the bench in the case was fatally flawed from the outset. As red-flagged above, this begs the question of the correct categorisation of the 'ruling'. Secondly – and inconceivably to a foreign observer – one of the original applicants (Krystyna Pawłowicz), who signed the first application to the fake court to declare the unconstitutionality of the abortion exceptions, in the meantime became a judge and took part in the case under consideration. This factor alone is enough to show how profound the devastation of the Polish legal system is and the depths to which legal standards have fallen. Nothing like this has ever happened in the history of Polish

<sup>33</sup> Case K 26/96; Judgment of 28 May 1997, OTK ZU 1997/2/19. The Court repealed Article 4a.1(4) of the 1993 Act (n 30) which provided for this social exception to the prohibition of abortion; the Polish version is available at <https://sip.lex.pl/orzeczenia-i-pisma-urzedowe/orzeczenia-sadow/k-26-96-orzeczenie-trybunalu-konstytucyjnego-520122839>; the English version of the judgment is available at [https://www.law.utoronto.ca/utfl\\_file/count/documents/reprohealth/poland\\_1997\\_decision\\_english.pdf](https://www.law.utoronto.ca/utfl_file/count/documents/reprohealth/poland_1997_decision_english.pdf). See Section 3.1.3 of the present analysis.

<sup>34</sup> It is to be noted that the application and the reasoning of the ruling describe this exception incorrectly, stigmatising as 'eugenic'.

<sup>35</sup> *Summa Theologica* 1a 2 ae, qu.XCVI, Article II, III.

<sup>36</sup> The Polish Code on Civil Procedure – which, in the absence of more specific regulation, is applicable *mutatis mutandis* to the Constitutional Court – provides for the invalidity of proceedings when, among other things, the court was not properly constituted. The irregularities in the composition in this case belong to this category of *ex lege* grounds for invalidity.

constitutionalism since 1989, if ever.<sup>37</sup> Thirdly, the President of the fake court, Julia Przyłębska, was forced into her new role *per fas et nefas* and in violation of the Constitution.<sup>38</sup> These three elements bring to the fore the crucial problem of how to classify actions taken by the unconstitutional body and whether there exists an obligation to obey the ruling at all.

With the benefit of hindsight, we know that the reality proved to be more dramatic than any projection made at the time. The body that decided the case under consideration is not simply a paper tiger. Quite to the contrary, as the present case shows, it has important functions and powerful competence to impose its will on the citizenry within the captured state. The abortion ruling was probably the first tangible proof for the citizens of how dangerous it is to live in a state where political power is devoid of any checks and balances.

### 3.1. THE ERRONEOUS ASSUMPTIONS AND FINDINGS<sup>39</sup>

#### 3.1.1. LEGAL STATUS OF THE *NASCITURUS*

The fundamental premise that informed the entire reasoning of the fake court was establishing the legal status of the human fetus or, as it was put, ‘the legal status of a child in the prenatal phase of life’. The human fetus was placed on an equal footing with the ‘child’, even though the latter is not defined by Article 72 of the Constitution, which establishes the duty of the state to protect the

<sup>37</sup> Maciej Gutowski and Piotr Kardas, ‘Trybunał Konstytucyjny nie mógł rozstrzygnąć gorzej, czyli o dewastacji systemu jednym rozstrzygnięciem’ [10/2020] *The Palestra/Polish Bar Review*. It should be pointed out, though, that the authors should have been consistent and should have avoided using the noble ‘the Constitutional Court’ in the title of their analysis. Such a slapdash choice of wording regularises and tames the unconstitutionality and illegality, and invites both into our daily lives and language. On the dangers of regularising illegality by words see Section 5.3.

<sup>38</sup> When the fate of the old (pre-2015) Court was sealed in December 2016, the tempo of the capture was breathtaking. The Vice-President of the Court (a function that has its legal basis in the Constitution) was ridiculed and marginalised. In his place the temporary President (a function unknown to the Constitution), Julia Przyłębska, took over for a day and was then sworn in by the President of the Republic. Importantly, she was appointed by six PIS-backed judges sitting on the General Assembly. It must be remembered here that an uproar had been created in early December 2015, when the nine ‘old’ judges sent the candidates for the Presidency to the President of the Republic. This was rejected then as unconstitutional by the President because, the argument went, it was illegal as a quorum of ten judges had not been reached. More crucially, though, among six judges who voted for Przyłębska were three ‘fake’ judges who had been elected to the Court unconstitutionally in December 2015. These three judges were allowed on the bench by Przyłębska minutes after she was appointed temporary President of the Court. As a result, ‘the General Assembly of Six’ was vitiated by unconstitutionality as the three fake judges should have been debarred from taking any valid actions. The vote with their participation was simply non-existent. The fact that it has created legal effects (election of the President of the Court) had more to do with sheer political power behind the unconstitutional scheme rather than with the power of law; see references at nn 3 and 22.

<sup>39</sup> Case K 1/20 (n 4). The abortion ruling is composed of four parts: (1) Preliminary considerations; (2) Admissibility of abortion in the light of Article 4a(1)(2); (3) Legal protection of the child in the prenatal stage; (4) The conformity of Article 4a(1)(1) with Article 38 in conjunction with Article 30 in conjunction with Article 31(3) of the Constitution. While of direct relevance for this analysis are parts (3) and (4), which cover the normative aspects, it is not always easy to follow the reasoning in the ruling as a result of many repetitions, lack of internal discipline and coherence, as well as arbitrary overlaps between the parts. Sections 3.1.1 and 3.1.2 of the present analysis build on the legal opinion (of which the author is one of the signatories) prepared for the Marshal of the Polish Senate in 2020 by the Committee of Experts on the constitutionality of laws.

rights of the child. In this way the ruling goes against the jurisprudence of its constitutional predecessor, the Constitutional Court, which, in the judgment of 11 October 2011, held that the term ‘child’ refers to ‘natural persons from birth to the age of 18’.<sup>40</sup>

However, and most importantly, Article 38 of the Polish Constitution<sup>41</sup> does not extend the temporal boundaries of such protection to the prenatal period. Extending legal protection to the human fetus from the moment of conception in the ruling is grounded in Article 30 of the Polish Constitution<sup>42</sup> as a meta-principle of the legal order. The source of protection of the rights of the *nasciturus* is said to be ‘innate and inalienable dignity’, which ‘is ... inviolable, and its respect and protection is the duty of public authorities’. This is problematic as at no point did the constitution maker decide when a human being comes into existence and opted rather to leave open this philosophical question. A fundamental question thus arises as to the moment at which ‘human dignity’ can be assigned to a developing life. A person acquires dignity with the moment of becoming a human being.

Despite the constitutionally unresolved dispute as to the definition of the term ‘human being’, the ruling accepts ‘an unborn child as a human being who is entitled to inherent and inalienable dignity and who is the subject of the right to life’. The legal system must guarantee the proper protection of this central good, without which human subjectivity would be nullified. The ruling thus does not simply equate the fetus with the child, but treats the former as the bearer of a right to dignity which is to be protected. It might be doubted that a *nasciturus* has dignity because legally only a human being who has been born is entitled to subjective rights. It is suggested here that the conceived life should rather have been treated in terms of a constitutional value (good), especially in the context of Article 38 of the Constitution, and worthy of legal protection, together with other constitutional values, and, as such, subject to balancing against these other competing constitutional values. Therefore, recognition of the constitutional value of human life in the prenatal phase should not be tantamount to recognising the fetus as a human person endowed with the attribute of inherent human dignity as a right. On the other hand, the protection of fetal life is a necessary condition for the proper course of development of the *nasciturus*, leading to birth and dignity.<sup>43</sup>

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<sup>40</sup> Case K 16/10, Judgment of 11 October 2011, OTK-A 2011/8/80; English version is available at [https://trybunal.gov.pl/fileadmin/content/omowienia/K\\_16\\_10\\_en.pdf](https://trybunal.gov.pl/fileadmin/content/omowienia/K_16_10_en.pdf).

<sup>41</sup> Constitution of Poland (n 20) art 38 (‘The Republic of Poland ensures the legal protection of life to every human being’).

<sup>42</sup> *ibid* art 30 (‘The inherent and inalienable dignity of the person shall constitute a source of freedoms and rights of persons and citizens. It shall be inviolable. The respect and protection thereof shall be the obligation of public authorities’).

<sup>43</sup> The ruling in Case K 1/20 did not distinguish between the dual nature of human dignity: ‘This duality comes down to distinguishing human dignity as a constitutional value and, at the same time, as a legal norm. Human dignity under Article 30 of the Constitution is both a constitutional value and a law. It exists as the foundation of the legal order and as a law that is inviolable. It is both’. The acceptance that the human fetus is not endowed with personal dignity then allows for the conclusion that the constitutional value it represents is subject to divergent legal protection, while questioning the subjective right of the fetus; see Case K 1/20 (n 4) Part III.3.2 (Legal Personality of the Child in the Prenatal Phase).

### 3.1.2. THE *NASCITURUS* AND THE RIGHT TO LIFE: ON THE CONSTITUTIONAL HUMILIATION AND EXCLUSION OF WOMEN

The ruling assumes the link between Articles 30 and 38 of the Constitution. Yet, while such a link is natural in the case of living human beings, it is less obvious in the prenatal stage of life for three reasons.

First, the basic question that should have been tackled by the ruling is why the makers of the Constitution did not include explicitly in the instrument the protection of life from the moment of conception. The analysis of the preparatory work on the draft Constitution shows that its authors chose not to regulate unequivocally this issue to avoid opening the gate to the complete prohibition of abortion.<sup>44</sup>

The laconic nature of this provision is the result of the discrepancies that accompanied the discussions on the model of the legal protection of life under the provisions of the Constitution. They led to the adoption of a solution that does not ultimately determine the limits of the protection of life in Poland.<sup>45</sup>

Second, the ruling misconstrues the judgment of the Constitutional Court in Case K 26/96. In the latter case the Court held that abortion on social grounds is unconstitutional.<sup>46</sup> Crucially, while the Court in Case K 26/96 spoke against differentiating between the protection of human life depending on the stage of prenatal development (embryo, fetus), at the same time it embraced the balancing exercise even with such a broadly construed right to protection of human life, something which the ruling in Case K 1/20 conveniently sidesteps.<sup>47</sup>

Third, as already mentioned, Article 30 of the Constitution imposes an obligation on public authorities to provide ‘every human being with the legal protection of life’. This was confirmed by the Court in its judgment of 30 September 2008 in Case K 44/07.<sup>48</sup> There, the Court argued that any other point of view would lead to ‘depersonalisation (reification)’. Human life would be left at the mercy of those deciding whether to shoot down a plane or not. This finding has important consequences for the discussion of the ruling in K 1/20. The ruling’s elevation of the unborn to the status of human life endowed with the right to dignity puts it at the same level as the dignity of living human beings. This in turn leads to the depersonalisation of women. Women are

<sup>44</sup> Tomasz Sroka, ‘Art. 38 [Right to Life]’ in Marek Safjan and Leszek Bosek (eds), *Konstytucja RP Tom. Komentarz do Art 1–86* [Constitution of the Republic of Poland, vol I Commentary to Arts 1–86] (CH Beck 2016) 924, 929–30.

<sup>45</sup> Radosław Grabowski, *Right to Protection of Life in Polish Constitutional Law* (Wydawnictwo Uniwersytetu Rzeszowskiego 2006) 177–83.

<sup>46</sup> English version available at [https://www.law.utoronto.ca/utf1\\_file/count/documents/reprohealth/poland\\_1997\\_decision\\_english.pdf](https://www.law.utoronto.ca/utf1_file/count/documents/reprohealth/poland_1997_decision_english.pdf).

<sup>47</sup> The recognition of an ‘unborn child’ as a human being, expressed in the judgment in K 1/20 (n 4), leads to the conclusion that the attribute of inherent and inalienable dignity is also attributed to an embryo and a human fetus to the same extent as to a living person.

<sup>48</sup> Case K 44/07, Judgment of 30 September 2008, OTK ZU 126/7/A/2008 (concerning the passengers and crew of the aircraft who would be shot down in the event of suspected use for the purposes of a terrorist act); English version available at [https://trybunal.gov.pl/fileadmin/content/omowienia/K\\_44\\_07\\_GB.pdf](https://trybunal.gov.pl/fileadmin/content/omowienia/K_44_07_GB.pdf).

reduced to the status of an incubator and forced by the state to give birth to a child. As a result, their personal dignity, and the positive obligation (on this also see below) of the state to protect women in their capacity as mothers, are violated. This finding reveals the greatest evil behind the ruling's high rhetoric of human dignity for all. Such an exclusionary logic stands also in stark contrast with the judgment in Case K 26/96.<sup>49</sup>

Despite finding the social grounds exception from the prohibition of abortion to be unconstitutional, the Court in K 26/96 made the following observation:

The protection of human life cannot be understood only as the protection of the minimum biological functions necessary for existence, but rather as a guarantee of proper development, as well as obtaining and maintaining a normal psychophysical condition, appropriate for a given developmental age (stage of life).

The protection of the value of life as a constitutional value does not mean that the intensity of such protection must be identical in each phase of life and in every circumstance. As such, it will be subject to various limitations in the light of other competing constitutional values.<sup>50</sup>

The ruling in K 1/20 changes tack rather dramatically. Its unequivocal recognition of life in the prenatal phase as a human being and endowing it with a legal protection higher than that accorded to mothers stands for an interpretation that cannot be supported either by the wording or by the axiology of the Constitution. It violates the equal status of the right to legal protection enjoyed by all human beings without properly weighing the value to be protected against the value to be sacrificed. Indeed, accepting this line of reductive reasoning makes women as bearers of constitutionally protected rights invisible. The ruling instead subjugates women to the will of the state, which makes decisions for them in the most sensitive areas without even attempting to pretend that the mother's voice should be heard. Protection of the fetus is only one side of the constitutional equation, or, as put by Judge Garlicki in his dissenting opinion in K 26/96, only one point of departure. The rights of the mother must constitute the second point of departure.<sup>51</sup> The ruling does not even pretend that such a second point of departure exists at all. Rather, by excluding women as holders of rights and of vested interests worthy of constitutional protection, it is based on a hostile interpretation of the Constitution that defeats the very axiological

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<sup>49</sup> For discussion of the judgment in Case K 26/96 (n 33) see Section 3.1.3. For excerpts in English and discussion see Norman Dorsen and others (eds), *Comparative Constitutionalism: Cases and Materials* (2nd edn, West 2010) 552–57; also at [https://www.law.utoronto.ca/utfl\\_file/count/documents/reprohealth/poland\\_1997\\_decision\\_english.pdf](https://www.law.utoronto.ca/utfl_file/count/documents/reprohealth/poland_1997_decision_english.pdf).

<sup>50</sup> On the importance of the 'circumstances' see also Case K 26/96 (n 33) dissenting opinion of Judge Lech Garlicki, section 6, available in Polish at <https://monitorkonstytucyjny.eu/archiwa/15781>.

<sup>51</sup> *ibid* section 7: 'Since the fetus remains in particular, organic and inextricably linked with the body of the mother, the second point of departure must be protection of the mother who is a self-standing subject of various constitutional rights. In particular, the mother is a subject of the right to dignity'. At section 8 he adds: 'It flows from the very essence of the human dignity that it is impossible to demand of a woman sacrifices that would manifestly go beyond the normal obligations related to the pregnancy, birth and the upbringing of a child'.



basis of the Constitution: equality.<sup>52</sup> In a democratic state ruled by law (Article 2 of the Constitution) the human fetus does not belong to the state. Legal protection of life during the prenatal phase must not exclude the personal dignity of a woman (the mother). Rather, the legal protection accorded to the fetus must be correlated and closely related to the protection of a woman (the mother).

From this perspective it thus becomes clear that the fatal flaw of the ruling comes down to the failure to distinguish between the legal protection of the fetus on the one hand (Article 38 of the Constitution) and the legal category of a subjective right on the other. The ruling holds that ‘an unborn child is a human being entitled to innate and inalienable dignity and as such is an entity having the right to life’. This is a clear misconstruction of the relevant provisions of the Constitution and goes beyond mere semantic omission. The assumption that a fetus enjoys an identical status to a human being, and consequently that all doubts as to the moral and legal status of the fetus should be interpreted in its favour, might be defended on ethical grounds but becomes indefensible from the angle of a legal system. Such an assumption, when turned into a legal principle, would be contrary to the internal coherence of the legal system and would call on a major reshuffling of almost all branches of law in Poland which do not recognise the full legal status of a fetus.<sup>53</sup> Under Article 38 of the Constitution of the Republic of Poland, each person has the ‘right to legal protection of life’ and not the ‘right to life’. The Constitution does not create a *nasciturus* subjective right to life. Rather, it establishes the state’s legal obligation to protect human life and allows for the differentiation of such protection, which is a function of various values, rights and interests protected by the Constitution. It is the balancing of these that will decide in the end how these will relate to one another to ensure that the axiology of the Constitution remains intact. There is a fundamental difference between the legal obligation to protect life and the subjective right to life. Any other interpretation flies in the face of the wording of the Constitution (Article 38); it is this unconstitutional interpretation that was adopted by the ruling in question.

Ewa Łętowska has rightly argued that the radicalism of the scope of the judgment is best seen in the scope and absolutism of the interpretation of Article 38 of the Constitution. It is worth quoting *in extenso* her arguments, as she clearly focuses on the crucial ‘what’s next’ rather than simply the ‘here and now’. She says: ‘According to article 38 the Republic of Poland shall ensure legal protection of life for every human being’. This provision does not contain any indication that this is about life from conception. The ‘right to life’ is also not the same as the gradual ‘right to the protection of life’ (Article 38 of the Constitution). In the K 1/20 case, the court adopted a broad interpretation of this provision, which is not covered by its

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<sup>52</sup> On the hostile interpretation of the Constitution see Jerzy Zajadło, ‘Constitution – Hostile Interpretation’ (2018) 2 *Przegląd Konstytucyjny* 5.

<sup>53</sup> See the excellent and balanced analysis by Tomasz Kaczmarek, ‘Prawo karne wobec moralności (Spory wokół moralnego i prawnego statusu płodu ludzkiego)’ in Krzysztof Krajewski (ed), *Nauki penalne wobec problemów współczesnej przestępczości* (Wydawnictwo Zakamycze 2007). available also on *Monitor Konstytucyjny*, 2 December 2020, <https://monitorkonstytucyjny.eu/archiwa/16388>. The author adds presciently that ‘any postulate of the absolute protection of any value, including human life, is practically infeasible’.

content. Only auxiliary reference was made to human dignity (Article 30 of the Constitution). In this way a path was opened for the prohibition and penalisation of another of the remaining two exceptions to permissible abortion: a case where pregnancy is the result of a crime (incest or rape). Article 30 could open the way to weighing the balance of the dignity of two entities on the scales: not only the dignity of the unborn child (*nasciturus*), as is the case with the ruling, but also the dignity of the mother, who is forced to give birth, and the dignity of the *moriturus* (an unborn child about to die). That would be the weighing of two dignities.

Meanwhile, reference to Article 38 (and this is included as the right to life, not the right to protect it) justifies only one abortion exception motivated by the threat to the life of the mother.<sup>54</sup> In other words, the ruling rejects the weighing of dignities: that of the fetus and that of the mother. Rather, clear emphasis is placed on the dignity of the fetus, and this will clearly trump the health considerations of women as in the ruling dignity and health do not belong to the same category in terms of constitutional hierarchy. Only the threat to the life of the mother, and not to her health or dignity, could trigger the remaining exception to the ban on abortion. The balancing exercise thus will be narrowed down to extreme situations where the life of the fetus is to be pitted against the life of the mother. As Łętowska has rightly concluded, the health of the mother could not be a factor, because life would be weighed, on the one hand, and health on the other – and life would always outweigh health.

### 3.1.3. VANISHING BALANCING ACT

If there is one substantive flaw that dooms the ruling in Case K 1/20 it is its abdication in performing a proper balancing test – one that would consider all relevant values, interests and arguments, which would then help in finding an acceptable compromise. On the one hand is the necessity of legally protecting the fetus; on the other hand is ensuring respect for the rights of women. As we have seen, the ruling in K 1/20 is based on the highly questionable finding that the human fetus, endowed with the right to life and dignity, should be the dominant subject of protection. Reaching this conclusion, the ruling instrumentalises and cherry-picks from the often-mentioned Case K 26/96,<sup>55</sup> and silently passes the pre-2015 rich jurisprudence of the Court on the methods of resolving constitutional conflicts and reconciling constitutional rights within the constitutional scheme.

The conflict between constitutionally protected values in the form of the *rights of the fetus* and the *rights of a women* should have been made part and parcel of a balanced approach to the Constitution that listens to all voices and tries to reconcile them. This discursive and conciliatory approach allowed the Court in Case K 26/96 not to question the embryopathological exception to the prohibition of abortion.<sup>56</sup>

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<sup>54</sup> Ewa Łętowska, 'A Tragic Constitutional Court Judgment on Abortion', *VerfBlog*, 12 November 2020, <https://verfassungsblog.de/a-tragic-constitutional-court-judgment-on-abortion>.

<sup>55</sup> For the relevant text see Dorsen and others (n 49).

<sup>56</sup> Also, discussion in Kaczmarek (n 53).

The Court's starting point in Case K 26/96 was dramatically different<sup>57</sup> from that adopted in the ruling under consideration: the equal protection of the fetus and women. The Court in K 26/96 was clearly aware of the need to read the Constitution in a holistic and pluralist fashion. While it did not distinguish between prenatal and postnatal life, it did not rule out the limitations on prenatal life at the same time.<sup>58</sup> On the contrary, the Court in Case K 26/96 allowed the limitation of the legal protection of life if it is necessary for the realisation and implementation of other constitutional values, rights and freedoms:

An acknowledgment of the constitutional value of human life – including its pre-natal phase – does not prejudice that, in some exceptional situations, the protection of this value may be limited or even cancelled due to the need to protect or realize other constitutional values, rights or freedoms.

As a result, the constitutional assessment of abortion regulation must oscillate around the conflict of competing values and their reconciliation. The Court then went on to identify the general criteria that may justify the legalisation of deprivation of life: (a) whether the good, the violation of which is legalised by the legislator, represents a constitutional value; (b) whether the legalisation of infringements of a right is justified on the basis of constitutional values; (c) whether the legislator complied with the constitutional criteria for resolving such a conflict, in particular whether it complied with the requirement of proportionality. However, these criteria become relevant and helpful only once the legal status of the fetus and the degree of its protection have been properly established.

The constitutional criteria and conditions for limiting the right to legal protection of life, even though Article 38 of the Constitution does not contain a limitation clause, should be reconstructed in the light of Article 31(3) of the Constitution, as well as taking into account international agreements in the field of human rights that are binding on Poland. Article 31(3) of the Constitution reads:

Any limitation upon the exercise of constitutional freedoms and rights may be imposed only by statute, and only when necessary, in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. Such limitations shall not violate the essence of freedoms and rights.

This means that while the limitations placed on the right to legal protection of life are permissible within constitutional constraints, its elimination from the system is not permissible as it would affect the very essence (existence) of the right. The wording of Article 31(3) of the Constitution of Poland unequivocally confirms the existence of a limited right to abortion in the Polish legal system as fully compatible with the provisions of the Constitution.

Taking all this into account, the Court, in the most fundamental paragraph of Case K 26/96, held that:

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<sup>57</sup> On this see also Case K 26/96, dissenting opinion of Judge Lech Garlicki (n 50).

<sup>58</sup> *ibid* section 8.

[f]inding that human life in every phase of its development constitutes a constitutionally protected value does not mean that the intensity of such protection in every phase of life and in all circumstances is to be identical ... The intensity of legal protection and the form it takes are not merely a consequence of the value accorded to the constitutionally protected good. In addition, this intensity must be influenced by several other diverse factors to be considered by the legislator when deciding on the type of legal protection and its intensity. However, such protection should always be sufficient from the point of view of the protected good.

Framing abortion in such constitutional terms has led to the interpretation of the Constitution that allows for the differentiated legal protection of life in the prenatal phase, one that takes into account competing constitutional values, such as the rights of women. The task of determining the degree of intensity of legal protection of the fetus has been left to the legislator, who enjoys a margin of legislative discretion. The Court accepted that:

[t]he legislator has the power ... to define possible exceptions, where – due to the collision of goods constituting constitutional values, rights or constitutional freedoms – it is necessary to sacrifice one of the conflicting goods. The consent of the legislator to sacrifice one of the conflicting goods resulting from the collision of a constitutional good with another good, right or constitutional freedom, does not deprive it of the attribute of a constitutional good worthy of protection.

The discursive openness in K 26/96 has been crucial because it has paved the way for balancing where interests other than the mother's life could be used to justify the constitutionality of abortion. As human life is held not to constitute the absolute value, a clear distinction should be made between the right to life (recognised by the Court with the above-mentioned caveats) and the right to protect life. As much as the illegal ruling in K 1/20 and the judgment in K 26/96 converge on the result, which narrows down the permissible exceptions to lawful abortion, this is where the similarities end. While undoubtedly the Court in K 26/96 stepped heavily in favour of the constitutionally protected good of human life, including life in the prenatal stage, it also welcomed the balancing exercise that would take meaningful account of other competing constitutional values and rights. Ultimately it is this dichotomy of 'discursive closure *versus* argumentative opening' which explains that, where the ruling in K 1/20 has erred and committed the ultimate sin of constitutional absolutism, the judgment in K 26/96 embraced the 'culture of justification',<sup>59</sup> and attached crucial importance to the proportionality test as the integral element of the constitutional construction of the right to life.

The ruling in K 1/20 has repeated the finding of no distinction between two forms of life made in K 26/96, but has conveniently turned a blind eye to the balancing exercise that formed part of this dictum in the K 26/96 judgment.<sup>60</sup> With the ruling of 20 October 2020, the

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<sup>59</sup> For a systemic discussion see Moshe Cohen Eliya and Iddo Porat, 'Proportionality and the Culture of Justification' (2011) 59 *American Journal of Comparative Law* 463.

<sup>60</sup> For this highly selective approach to Case K 26/96 see Part III.3.3.1 of the ruling in K 1/20 (n 4). On the balancing of competing values in the constitutional reconstruction of the abortion regulation and the need to take into

constitutional landscape is being redrawn in a dramatic fashion and women are faced with tragic choices. It is striking how the ruling in K 1/20 even refused to entertain the constitutional balancing exercise to find the right equilibrium between competing rights, values and interests. The premise of the ruling in K 1/20 that the legal protection of the *nasciturus* is absolute is not supported by the Constitution, nor is it consistent with the jurisprudence of the pre-2015 Court. Unborn life features as an independent legal asset/good (in Polish ‘*dobro prawne*’, which is difficult to translate into English) which enjoys constitutional protection. The ruling diminishes to zero a ‘mother’ as a subject of constitutional rights;<sup>61</sup> it does not even consider the protection of the life and health of a woman as a competing constitutional value. In its formal reasoning, it pointed out that the endangerment of a woman’s life or health constitutes a separate exception to the prohibition of abortion in Article 4a(1)(1) of the 1993 Act on, inter alia, protection of the human fetus and conditions for the admissibility of termination of pregnancy. The problem here is that if the ruling had performed a fair weighing of constitutional values, it would have been able to correctly identify the competing value that is worthy of protection, or at least have taken it into account in the balancing exercise. Moreover, the competing value that is conspicuous by its absence in the ruling is the dignity of women. While ‘dignity is also a right not to be turned into an object for someone else’s use’,<sup>62</sup> this is exactly what this ruling does to women and their sphere of autonomy. As a result of one-sided and arbitrary findings, women will be forced to give birth to severely and irreversibly damaged children or children with an incurable and life-threatening disease.

The ruling follows extreme reductionism and radicalism by excluding a mother’s legal sphere from the balancing process.<sup>63</sup> Instead, the rights of only one subject (‘an unborn’) are considered. The dignity of the mother is not to be treated as an argument in favour of the termination; it is taken out of the constitutional equation altogether. Dignity (Article 30 of the Constitution) and the overarching constitutional command of proportionality (Article 31(3)) are pushed out of the Constitution. The general scheme and the spirit of the Polish Constitution would militate in favour of an interpretation that sees the rights of the unborn to be balanced against

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account certain extraordinary circumstances that might tilt the balance in favour of the rights of women, see also point 8 of Judge Garlicki’s dissenting opinion (n 50).

<sup>61</sup> By proceeding in this way the ruling obfuscates the essence of the problem and kills the very ratio behind constitutional balancing. It contradicts the requirements of the proportionality test and fair court proceedings in which the findings are to be made after a comprehensive, objective examination of all competing arguments. Only after stating that ‘the termination of pregnancy is at the same time depriving the child of his life’, the ruling establishes the second competing constitutional value. It states laconically that ‘[g]iven the essence of abortion, such an analogous good can only be located in the child’s mother’. However, at no point does the ruling weigh the competing goods – protected and sacrificed – simply stating, arbitrarily and fallaciously, that ‘the very fact of a handicap or incurable disease of a child in the pre-natal phase, connected with eugenic reasons and with the possible discomfort of a sick child’s life, cannot on its own determine the question of the admissibility of terminating the pregnancy’.

<sup>62</sup> Dorsen and others (n 49) 557 and the discussion of the approach adopted by the German Constitutional Court.

<sup>63</sup> The rights and dignity of mothers are reduced almost to an afterthought: see Part III.4.1 of the ruling in K 1/20 (n 4).

countervailing constitutionally protected rights and interests – not simply the mother’s life, but also her health, physical and mental integrity.

### 3.2. THE TRAGIC CONSEQUENCES

No state should have the right to demand of women sacrifices that exceed the ordinary hardship and effort connected with pregnancy, childbirth and the upbringing of a child. Yet this is exactly what the state will have a right to demand of women after this devastating ruling. The protection of the life of the unborn trumps all possible counter-arguments and values. Constitutional absolutism follows. The removal of access to abortion on embryo-pathological grounds from the Polish legal system is tantamount to the introduction of punishment for this procedure or for any assistance to a pregnant woman in terminating her pregnancy (Article 152 of the Polish Criminal Code); as such, it will violate human rights and freedoms, including those rights and freedoms under the ECHR. The case of the young woman who died despite the clear defects of the fetus shows the tragic extent of the marginalisation of women and the disturbed scale of values. The ruling under consideration is responsible for this and is now used as a convenient shield by doctors who could have and should have acted to save this woman.<sup>64</sup> The elimination of the embryo-pathological exception from the 1993 law relating to family planning imposes on women a mental and physical suffering that is not simply disproportionate but amounts to cruel and inhuman treatment. This is contrary to Article 40 of the Polish Constitution (prohibition of torture, cruel, inhuman or degrading treatment and punishment).

If termination of pregnancy on the ground of irreversible impairment of the fetus was considered contrary to the Constitution and unacceptable as being detrimental to the absolutely protected constitutional good of the fetus, the argument might be made – and certainly will be made by

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<sup>64</sup> Let us note here that by failing to acknowledge the need to protect the inherent and inalienable dignity of women, this ruling also violates the prohibition of cruel treatment and torture, the right to protection of private life and the right to health. The ruling is not just in breach of the Polish Constitution (specifically Articles 30, 40, 47, 68 thereof) and fails to provide the protection granted to women in these provisions, but also contravenes the 1984 UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ((entered into force 26 June 1987) 1465 UNTS 85), the 1966 International Covenant on Civil and Political Rights ((entered into force 23 March 1976) 999 UNTS 171), and the ECHR (n 19). Poland is party to the said Conventions, and it is unacceptable that any standards of protection for human rights expressed in these instruments be lowered by means of conflicting national legislation. Clearly this opens litigation possibilities in the ECtHR which, given the lack of effective protection at the constitutional level, will surely be resorted to by women. This line of argument is not pursued here. For the Strasbourg perspective see Stephen Breitenmosser and Oliver Schmieid, ‘The Right to Abortion in the European Convention of Human Rights’ in Adam Bodnar and Jakub Urbanik (eds), *Περιμένοντας τους Βαρβάρους [Law in a Time of Constitutional Crisis: Studies Offered to Miroslaw Wyrzykowski]* (CH Beck 2021) 105. The abortion ruling sidesteps these international concerns by a very selective recap of the international instruments (Part III.3.3.4 of the ruling (n 4)). Suffice to say here that the ruling does not even mention the case law of the ECtHR, which found Poland and its practice with regard to access to abortion and women’s concomitant procedural rights to be in breach of its Convention obligations. The ruling is equally silent on the fact that, to date, Poland has not even tried to implement the abortion-related judgments of the ECtHR. As a result, the title of Part III.3.3.4 of the ruling, ‘Systemic Approach to the Standards of Legal Protection of Human Life’, is a hyperbole, as there is nothing systemic in the analysis contained in the ruling.



ultra-right proponents of the total prohibition of abortion – that there is simply not enough justification for the other two exceptions to its prohibition.<sup>65</sup> The question arises how to justify the possibility of terminating a pregnancy that results from a prohibited act? Would a fetus conceived as the result of such an act deserve less protection than an irreversibly handicapped fetus? The finding of the absolute nature of the protection of the fetus opens the door for arguing that abortion in those two remaining cases must also be considered contrary to the Constitution. As a result of the ruling's blindness and legal fundamentalism it is only a question of time before the last two remaining exceptions in the 1993 Act on family planning will come under scrutiny. While the differentiation in the degree of legal protection of the fetus makes permissible termination of a pregnancy that results from a prohibited act, the ruling's rejection of such differentiation and balancing points towards a dramatically different scenario: a total ban on abortion. As a result, make no mistake, we now have a clash of totally opposing constitutional worldviews here and this is where the gravest dangers and the harmful potential of this ruling reside.

The implementation of the ruling in Case K 1/20 has resulted in restricting the right of women patients to information about the health of the fetus.<sup>66</sup> Since the possibility of terminating a pregnancy on the ground of severe defects of the fetus is eliminated, prenatal diagnostic tests will be relegated to the margins and, in practice, rendered useless.

The ruling in case K 1/20 is tantamount to extending the scope of criminal liability for the crime of termination of pregnancy, pursuant to Article 152 of the Penal Code. As such, we have a situation where the criminality of an offence is introduced by way of a personal fiat and not through the legislative process. As such, it is incompatible with the fundamental principle of *nullum crimen sine lege*, which is part and parcel of the meta-principle of the democratic state ruled by law (Article 2 of the Constitution). The *nullum crimen sine lege* principle means that only a democratically legitimate legislator is competent to define crimes and impose penalties. The ruling and the fake court assume the mantle of a powerful 'positive legislator'. The Court (only 'when legally constituted', which given the circumstances of the Polish rule of law debacle is a qualification of utmost importance) may remove criminal norms from the legal system, if required by the Constitution, but it may not introduce new norms into this system where the introduction of such norms has not been ordered by the legislator.<sup>67</sup>

What we got in the end was not simply an instance of illegal pseudo-judicial power going rampant, but of a power that has been turned into the realisation of personal fears and complexes of those deciding the case. Fifteen angry persons delivered the political goods at the request of their political masters. They have brought about a fundamental change in the legal landscape,

<sup>65</sup> Also, Łętowska, (n 54).

<sup>66</sup> The Patients' Rights and the Patients Ombudsman Act of 6 November 2008 (in Polish). This right results from art 9(2) of this Act, as well as access to prenatal examinations under art 2a of the 1993 Act (n 30) ('Government administration and local government bodies, within the scope of their competences specified in special provisions, are obliged to provide free access to information and prenatal tests, especially when there is an increased risk or suspicion of a genetic or developmental defect of the fetus or an incurable disease that threatens the life of the fetus').

<sup>67</sup> This was also the sentiment expressed by Judge Garlicki in his dissenting opinion in Case K 26/96 (n 50).

endangering the lives and health of thousands of already desperate women, and showing their disdain for them. This is a combustible package in the end, and no wonder this arrogance has met with popular resistance unheard of in post-1989 Poland.<sup>68</sup>

While there were many instruments at the disposal of those deciding the case (for example, *vacatio legis* and calling on the Parliament to prepare a legislative framework in the case of unconstitutionality), this analysis must not commit the mistake against which it warned in the introductory part. Proceeding as if nothing has happened would mean that we indeed continue to have a constitutional court that merely erred in the individual case and will have a chance to do better next time. Moving against the traditional legal paths of analysing any decision is warranted in this instance. All courts err and a legal discourse should then find the faults and argue for change, all in good faith shared by all the actors making up a legal community. However, and again, this is not the situation in Poland. This is not a court; there is no place for assuming good faith or readiness to correct the errors in the future. This is ideological warfare where law and the Constitution are relegated to the margins and only used (instrumentally) when convenient to further the political objectives of the majority. Such a checkerboard enforcement of the constitutional document by those who reject the very same document and its axiology must be called out and rejected openly. This is where the biggest challenge of truth telling is placed with the academics. There is simply no way around the constitutional humiliation and abuse.

#### 4. THE ABORTION RULING AS THE INSTANTIATION OF POLITICAL JUSTICE

##### 4.1. POLITICAL JUSTICE, OR HOW COURTS MATTER TO AUTHORITARIAN REGIMES?

In order to appreciate the long-term consequences of the ruling in Case K 1/20, it must be analysed a more systemic context. The story behind the emasculation of the Polish Constitutional Court emphasises the importance of a novel concept of constitutional capture.<sup>69</sup> Constitutional capture is a generic and novel concept. It connotes a systemic weakening of checks and balances and the entrenchment of power by making future changes in mechanisms of control difficult. Constitutional capture has an inherent spillover effect; as such, the seemingly isolated constitutional capture in Poland and elsewhere risks the potential of adverse consequences throughout the entire continent.<sup>70</sup> It travels in time and space, and, just like the politics of resentment, it has its own trajectory. As there is simply no place for a veto emanating other than from the majoritarian

<sup>68</sup> Maximilian Steinbeis, 'Livid in Warsaw', *VerfBlog*, 30 October 2020, <https://verfassungsblog.de/livid-in-warsaw>; 'Poland: Thousands Protest as Abortion Law Comes into Effect' (n 7).

<sup>69</sup> On this see Koncewicz (n 29); and Tomasz Tadeusz Koncewicz, 'On the Politics of Resentment, Mis-memory, and Constitutional Fidelity: The Demise of the Polish Overlapping Consensus?' in Uladzislau Belavusau and Aleksandra Gliszczyńska-Grabias (eds), *Law and Memory: Towards Legal Governance of History* (Cambridge University Press 2018) 263.

<sup>70</sup> On this see also Tomasz Tadeusz Koncewicz, 'The Politics of Resentment and First Principles in the European Court of Justice' in Francesca Bignami (ed), *The EU in Populist Times: Crises and Prospects* (Cambridge University Press 2019) 457.

parliaments, the ‘politics of resentment’ target institutions that otherwise might be seen as a brake on the power of the people’s representatives. Institutions are accepted only for as long as they are seen as ‘their’ institutions and only translate messages that the controlling parties believe deserve to be in the public sphere. Such an understanding leads to an important tweak to the established narrative: institutions that have been channelling (for populists ‘distorting’) the rule of law must be dealt with as expeditiously as possible.

With extreme majoritarianism as one of the cornerstones of the new doctrine, disabling constitutional courts and judicial review was the first order of the day for constitutional capture. All institutions, domestic or supranational, stand in the way and are not part of the new populist constitutionalism. Gaining power thus does not soften the populist *animus*. Quite the contrary, once elected, populist leaders are ready to deliver on their promises and they do so through a constitutional doctrine that competes with the dominant liberal constitutionalism.<sup>71</sup> The abortion ruling in Case K 1/20 delivers on the most important tenets of the new doctrine that is based on the following, often interrelated, elements:<sup>72</sup>

- (a) a new understanding of the role of the Constitution, no longer as protecting against the state, but as safeguarding the uniqueness of the state;
- (b) the Constitution ceases to be the supreme law of the land;
- (c) the Constitutional Court is not only incapacitated but also ‘weaponised’ to be used as a tool against political enemies;
- (d) the political dominates the legal;
- (e) the rule of law is seen as an obstacle to protecting the collectivity;
- (f) the rule of law is to facilitate the expression of the will of the people;
- (g) political power is no longer subject to checks and balances;
- (h) supranational institutions are dismissed as enemies of the people;
- (i) the collectivity is placed above individual citizens;
- (j) human rights evolve from the dignitary conception to that of the community.

The scars of the capture had transformed the constitutional identity of what was once known as the Polish Constitutional Court in three crucial registers: (i) *unconstitutional composition*, both at the level of the judges and the President and Vice President; (ii) the participation of ‘irregular judges’ in cases heard by the Court and the *ex post facto* validation by the very judges of their own unconstitutional appointment to the Court; (iii) the day-to-day functioning is determined by the statutory scheme of intricate legislative provisions adopted by the majority in 2016–17.

<sup>71</sup> For further references see Lise Rye, Tomasz Tadeusz Koncewicz and Cristina Fasone, ‘Ideas of Democracy and the Rule of Law Across Time and Space: Developments in the EU, Poland and Italy’, *Reconnect*, 30 October 2019, <https://reconnect-europe.eu/wp-content/uploads/2019/12/D4.1.pdf>.

<sup>72</sup> For the elements of the new anti-constitutional doctrine see also Tomasz Tadeusz Koncewicz, ‘10 Anti-Constitutional Commandments: Taking Stock of 2015–2019 and Beyond’, *VerfBlog*, 12 October 2019, <https://verfassungsblog.de/10-anti-constitutional-commandments>.

The combined effect of the changes introduced in 2015–16, the management of the Court's workload by the (unlawful) President of the Court, Julia Przyłębska, and continued adjudication by 'irregular judges' marginalised the significance of the Court's jurisprudence in the Polish legal order. The overall institutional efficiency of the Court took a hit.<sup>73</sup> The Court lacks staff, proceedings last longer and there is a problem with the execution of judgments. The number of cases filed with the Court, as well as those decided by the Court, decreased significantly. Before the constitutional crisis the Court accepted about 500 to 600 cases annually. This number decreased to 360 cases in 2016; in 2017 it was down to 282 cases. The Court, once known for its efficiency (in 2014 alone it rendered 119 judgments, and 173 in 2015) has become a slow-motion institution.<sup>74</sup> In 2016 and 2017 the Court issued 99 and 89 judgments, respectively; in 2018 the number dropped to an all-time low of 65 decisions (36 judgments and 29 orders). In 2018 the bench, consisting of unconstitutionally elected judges, decided 28 out of 65 cases.<sup>75</sup>

In addition, the composition of the judicial panels has been anything but predictable. In January and February 2017, for example, the President of the Court changed the composition of the panels in an unprecedented number of 49 cases (53 orders). To make things worse, the President acted *contra legem*: in all of these 49 cases there was no statutory legal basis for making changes to the adjudicating panel. Decisions were made in 21 cases without providing any grounds. In one case one of the irregular judges indicated that it is possible to change the composition of the panels by, for example, 'changing the rapporteur for the case as a result of the lack of acceptance of the composition of the presented draft judgment'.<sup>76</sup> The effect of all this is that the Court is being steered from within to minimise the uncertainty of an outcome and to deliver on the expectations of the powers that be. Clearly, the judges rushed onto the bench by the ruling party receive preferential treatment. Hearings in sensitive cases are adjourned arbitrarily and without notice.

What Neil Walker had called the second lock of the control of the political system – the independence of the Constitutional Court – has been irreparably broken.<sup>77</sup> The Court has accepted its new role of acting as an extension of the will of Parliament and a government enabler. It legitimates and shields the majority against challenges from the opposition. The only rationale for its existence is to minimise uncertainty and deliver decisions that are swift and predictable from the perspective of the political majority. The extent to which fake 'President J Przyłębska' is ready to

<sup>73</sup> Dominika Długosz, 'Tak PiS sparaliżował Trybunał Konstytucyjny', *Newsweek*, 13 February 2019, <https://www.newsweek.pl/polska/tak-pis-sparalizowal-trybunal-konstytucyjny/xf4shpr>.

<sup>74</sup> See also the damning statistics compiled by the Report of the Helsinki Foundation of Human Rights, 'Pracuje Tak, Jak Powinien? Trybunał Kontytucyjny w 2017 Roku', March 2018, <https://www.hfhr.pl/wp-content/uploads/2018/03/HFPC-Pracuje-tak-jak-powinien-raport-TK-2017.pdf>. For the most recent statistics and the equally sober report see 'Narzędzie w rękach władzy: Funkcjonowanie Trybunału Konstytucyjnego w latach 2016–2021' ['The Tool in the Hands of the Political Power: The Functioning of the Constitutional Tribunal 2016–2021'], 28 August 2021, 56–58, <https://www.hfhr.pl/wp-content/uploads/2021/08/TK-narzedzie-w-rekach-wladzy-FIN.pdf>.

<sup>75</sup> The practice of hand-picking members of the adjudicating panels and configuring their composition to minimise the element of surprise when it comes to the result raises another set of very serious concerns.

<sup>76</sup> Case K 9/16, Judgment of 22 March 2018, OTK-A 2018/23.

<sup>77</sup> Neil Walker, 'Populism and Constitutional Tension', Jean Monnet Working Paper 15/17, 2017, <https://jeanmonnetprogram.org/wp-content/uploads/JMWP-15-Neil-Walker.pdf>.

serve the political majority by using judicial review as an instrument of oppression is simply breathtaking, even for the most ardent supporters of the majority.

Clearly, all this paints a picture of an institution in decline.<sup>78</sup> It also sets the abortion ruling in a broader institutional perspective. The radical ruling corroborates that judicial review has become a blunt political sword wielded by a dangerous and unhinged institution. It evokes the dark legacies of what Otto Kirchheimer once called ‘political justice’. The aim of political justice is to ‘enlarge the area of political action by enlisting the services of courts on behalf of political goals’.<sup>79</sup> Yet, this is only half true. Courts apply laws without carefully crafted legislative schemes; the courts would be like craftsmen without tools. Laws must be adapted to enable the judges to mete out political justice. The correct law both circumscribes and empowers judges in their mission. On the other hand, the law that traces its roots to, and espouses ideologies of the old regime cannot be trusted. As the political always prevails over the legal, law must always reflect the political, not the other way around. It is no longer the politics that adapt to the law (*politae legibus, non leges politiis adaptandae*) but rather the law is forced to adapt to the politics of the day.<sup>80</sup> As a result, one of the foundational blocs of the post-war European settlement is thrown out the window.

The manipulative resort to court might thus be merely a technical device for disposing of a vanquished rebel. It may signify a concerted effort to rid the community of its stock of political foes, or it may be directed towards creating effective political images.<sup>81</sup> It is important to emphasise that institutional persistence pays off in the long run. The institution *qua* institution might be destroyed, but what matters in the long term is the kind of legacy it leaves behind. This symbolic jurisprudence plays an anchoring function and caters to what Kirchheimer called ‘judicial space’. For as long as the institution persists, the ‘judicial space’, though it may be reduced, cannot be completely abolished.<sup>82</sup> Political justice is the domain of populist constitutionalism and chimes well with the avowed objective of the constitutional capture that is taking over the institutions and making them our institutions. Political justice is intuitive and plays on emotions and fleeting grievances along the lines of ‘we the righteous’ elites will go after the corrupt and rotten minorities that have been oppressing the silent majority. The normal course of proceedings and following the rules is derided as a ritual, devoid of essence and stripping the popular sense of justice of its essence. People neither understand nor care; what matters is the visual: the guilty must be found and punished, and it must be in the public eye. Again, planned justice<sup>83</sup> is not up to the task, just as failing elections, judicial review, and all other *liber* technicalities. The contact

<sup>78</sup> Maria Pankowska, “‘Pałac Nowosilcowa’: TK Julii Przyłębskiej leniuchuje i lansuje elity PiS. Dwa lata Trybunału”, *OKO Press*, 12 December 2018, <https://oko.press/palac-nowosilcowa-tk-julii-przylebskiej-oddalanie-od-obywateli-i-lansuje-elity-pis-dwa-lata-trybunalu>.

<sup>79</sup> Otto Kirchheimer, *Political Justice: The Use of Legal Procedures for Political Ends* (Princeton University Press 1961) 419.

<sup>80</sup> On the adage see Jerzy Zajadło, ‘Ius, Lex i Trybunał Konstytucyjny’ [*Ius, Lex and the Constitutional Court*] in Jerzy Zajadło (eds), *Łacińska Terminologia Prawnicza* (3rd edn, 2020) 81.

<sup>81</sup> Kirchheimer (n 79) 423.

<sup>82</sup> *ibid* 425.

<sup>83</sup> *ibid* 426.

between the political power and the people must be direct, immediate and instantaneous. Planned justice in the sense of following the rules is tainted by its uncertainty and slowness, both of which are held in low esteem by the politics of resentment.

The fake court and its abortion ruling are prime examples of how courts matter to authoritarian regimes.<sup>84</sup> The new trend is dictated by not only using but abusing the increasing consequentialism of courts in wielding powers of judicial review.<sup>85</sup> The ruling party does not need an independent Court because it clearly does not contemplate becoming a minority any time soon. Yet, it would be wrong to paint the Court as just a façade institution. Rather, it has been entrusted with a crucial role in the overall scheme of the captured state: that of guarantor of the unconstitutional status quo and chief architect of the effective political images.<sup>86</sup> This latter lesson is important as it debunks the widely held view that populist authoritarians are *ex definitione* against the institutions of the state. Quite the contrary, they need institutions, but such that are subservient, compromised, and ready to deliver political justice.

#### 4.2. POLITICAL JUSTICE 2015–22 *v* CONSTITUTIONAL REVIEW 1989–2015

Is all hope really lost and all we are left with is the infamous abortion ruling?

To answer this question one needs to put the abortion ruling in the light of historic perspective provided by the post-1989 liberal trajectory; only then can one appreciate how awry things became in Poland after 2015. It should be recalled that the rule of law featured prominently in 1989 as one of the organisational paradigms of the reborn Poland. Poles looked at the rule of law as a gentle civiliser of the lawlessness and a check on unlimited state power, both hallmarks of the communist rule. Yet, the process of absorbing rule of law standards was anything but straightforward given the lack of liberal foundations to fall back on. The Polish Constitutional Court played a special role in bringing rule of law standards to the surface and holding the state authorities accountable. The 30-year jurisprudence of the Court helped to build it into one of the most respected constitutional courts in Europe and a living example of successful democratic transformation. Before 2015 it respected the choices made by the principal or, in Martin Shapiro's words, it acted prudently and built credibility and legitimacy incomparably greater than that of other Polish public institutions.<sup>87</sup>

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<sup>84</sup> Tom Ginsburg and Tamir Moustafa, 'Introduction: The Functions of Courts in Authoritarian Politics' in Tom Ginsburg and Tamir Moustafa (eds), *Rule by Law: The Politics of Courts in Authoritarian Regimes* (Cambridge University Press 2008) 1.

<sup>85</sup> For general analysis see Diana Kapiszewski, Gordon Silverstein and Robert A. Kagan (eds), *Consequential Courts: Judicial Roles in Global Perspective* (Cambridge University Press 2013).

<sup>86</sup> For unsettling examples of the abuse of judicial review see the comprehensive report 'Narzędzie w rękach władzy: Funkcjonowanie Trybunału Konstytucyjnego w latach 2016–2021' (n 74). For analysis see also Tomasz Tadeusz Koncewicz, 'From Constitutional to Political Justice: The Tragic Trajectories of the Polish Constitutional Court', *Verfblog*, 27 February 2019, <https://verfassungsblog.de/from-constitutional-to-political-justice-the-tragic-trajectories-of-the-polish-constitutional-court>.

<sup>87</sup> Martin Shapiro, 'The European Court of Justice: Of Institutions and Democracy' (1998) 32 *Israel Law Review* 1.



According to Article 2 of the Polish Constitution of 1997, 'Poland is a democratic state ruled by law and realizing the principles of social justice'. According to the leading treatise on Polish constitutional law, the rule of law is essentially equivalent to the sum of the principles of a modern democratic state. Among these principles one can find the separation of powers, supremacy of the constitution and independence of the judiciary. Lech Garlicki points out that the formal aspect of the rule of law is linked to Article 7 of the Constitution, which mandates that all state authorities are to act within the bounds of the law.<sup>88</sup> Whereas for the citizens all is allowed unless it is forbidden, for the state its authorities are allowed only what has been entrusted to them within their competence. This joint interpretation of Articles 2 and 7 has met with the approval of the Court, which held that the competence of a state organ must never be presumed, but must have a basis in a valid legal norm; otherwise, it does not exist.<sup>89</sup> This formal aspect of the rule of law has never been questioned and came to be understood as one of the paradigmatic foundations of the liberal Poland after 1989.

What became more controversial was the substantive content of the clause 'state governed by the rule of law'. The period from 1989 to 1997 is rightly considered to be the most activist in the history of the Polish Constitutional Court. Faced with normative silence, the Court accepted that the rule of law is the source of, and foundation for human rights to be protected. Among those rights were the right of access to a court,<sup>90</sup> the right to life<sup>91</sup> and the right to privacy.<sup>92</sup> Then, with the adoption of the long-awaited Constitution of 1997, Article 2 was to serve as the axiological basis for the catalogue of fundamental rights and freedoms guaranteed by the Constitution. The Constitution that was finally adopted in 1997 incorporated this case law, and the Court has accepted that pre-1997 jurisprudence must continue after 1997 and that the rule of law clause will be interpreted in the same way.<sup>93</sup>

Importantly, Article 2 continued to serve as the measuring stick for action by the legislative branch. A great number of principles of good legislation have been found to be reflected in Article 2. The majoritarian Parliament must not act in such a way as to undermine citizens' trust in the state and its laws by arbitrary changes to legislation or by setting legal traps. Good law must contribute to legal security felt across the board by all citizens and, as such, engineer their trust in the state.<sup>94</sup> As a result, good legislation must obey a catalogue of legal principles such as the protection of legitimate expectations, citizens' trust in the state, state loyalty towards citizens, prohibition of *lex retro no agit*,<sup>95</sup> *vacatio legis*,<sup>96</sup> and the protection of legitimate expectations and vested rights.<sup>97</sup>

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<sup>88</sup> Leszek Garlicki, *Polskie Prawo Konstytucyjne: Zarys Wykładu* (Wolters Kluwer 2021) 76–82.

<sup>89</sup> Case W 7/94, Resolution of 10 May 1994, OTK ZU 1994/1/23.

<sup>90</sup> Case K 8/91, Decision of 7 January 1992, OTK 1992/1/5.

<sup>91</sup> Case K 26/96 (n 33) discussed at Section 3.1.3.

<sup>92</sup> Case K 21/97, Order of 24 June 1997, OTK ZU 1997/2.

<sup>93</sup> Case K 26/97, Judgment of 25 November 1997, OTK 1997/5-6/64.

<sup>94</sup> See, eg, the fundamental judgment of 25 June 2002 in Case K 45/01, OTK-A 2002/4/46.

<sup>95</sup> Case K 2/08, Judgment of 19 November 2008, OTK ZU n9/A/2008/157.

<sup>96</sup> Case K 10/97, Judgment of 8 April 1998, OTK 1998/3/29.

<sup>97</sup> Case K 4/99, Judgment of 20 December 1999, OTK 1999/7/165.

The Court went on to define the requirements for the procedural content of legislation. Legal provisions that are not sufficiently clear for their addressees to foresee the legal consequences of their actions fly in the face of the state governed by law, as expressed in Article 2 of the Constitution.<sup>98</sup> Of special importance is the impact of the rule of law on the sources of law and their ordaining. Here, again, the Court was instrumental in spelling out some of the most paradigmatic principles that underpin the legal system of Poland after 1989. Three systemic principles have always played a special role. The first is the principle of the preponderance of the Constitution ('constitution as the supreme law of the land') and judicial review exercised by the Court as a necessary procedural safeguard of this principle. The second is the exclusivity of the statute in regulating and defining the status of an individual, which is a direct response to prevalent practice under the communist regime where citizens' rights and obligations were left to the discretion of executive decree. Third, all governmental action must remain executive in character and aimed at implementing statutes.

In this way the Court laid the legal foundations. Following the abyss at which judicial review in Poland finds itself right now, these dormant foundations should serve as the axiological anchor and the symbolic point of reference in the days to come. Let us remember that this jurisprudence has never been cancelled out and must be seen as part of the institutional memory and tradition to fall back on in these days of constitutional oppression. Following the abortion ruling, this is an important story to be told and shared as part of the difficult process of recapturing the rule of law in Poland. However, for a successful recapture much more is needed.

#### 4.3. COUNTERACTING POLITICAL JUSTICE: ON THE ENFORCEMENT OF THE CONSTITUTION IN THE COURTS

*It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases must, of necessity, expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each ... if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the Constitution; or conformably to the Constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.*

Chief Justice John Marshall<sup>99</sup>

##### 4.3.1. TO THE CONSTITUTIONAL RESCUE

This analysis has argued that the removal from the Polish legal system of access to abortion on embryo-pathological grounds is tantamount to the introduction of punishment for this procedure

<sup>98</sup> Case SK 11/00, Judgment of 14 September 2001, OTK 2001/6/166.

<sup>99</sup> *Marbury v Madison* 5 US (1 Cranch) 137 (1803); on *Marbury* see, among others, Lawrence Goldstone, *The Activist: John Marshall, Marbury v Madison, and the Myth of Judicial Review* (Walker 2008).

or for any assistance to a pregnant woman. It violates the Constitution as the right to a restricted abortion is clearly not forbidden by it. The question to be considered in the dire circumstances of constitutional abuse and manipulation is whether something can be done to protect the constitutional document and the rights of women from complete marginalisation.

The analysis suggests that the ordinary courts, now equipped with the ECtHR ruling in the *Xero Flor* case,<sup>100</sup> must be ready to consider the legal impact of non-judges having been involved in the abortion ruling or any other future decision rendered by the unconstitutional composition. The ordinary courts should assess whether the application of the law, especially criminal sanctions, could violate constitutional principles, standards or values that have been disregarded or ignored by the fake court. In short, faced with the humiliation of the Constitution, they themselves must take on the challenge of rehabilitating the very downtrodden constitutional document. However, before this actually happens, the road will be bumpy and the end result uncertain.

Martin Shapiro has famously argued about the consequences of the choice made by the constitution makers to resort to a court as a resolver of conflicts;<sup>101</sup> such a choice entails:

[the acceptance of] the inherent characteristics, practices, strengths and weaknesses of that institution ... and some law making by courts and a certain capacity for judicial self-defense of its law making activity. The issue of whether such law making and self-defense are somehow antidemocratic or antimajoritarian is uninteresting. If the *demos* chooses the institution, it chooses the judicial law making and judicial self-defense.

I wish to take Shapiro's proposition further and apply it to the 'Polish case'. If the *demos* does indeed:

- choose independent judges and courts as dispute resolvers and subjects them only to the Constitution and statutes,<sup>102</sup> and the rule of law,<sup>103</sup>
- elevate the Constitution to the status of the supreme law of the land,<sup>104</sup>
- make the separation of powers with checks and balances one of the cornerstones of the Republic of Poland,<sup>105</sup> and the judgments of the Court are recognised as universally binding and final,<sup>106</sup> and, last but not least,
- insert direct application of the constitution into the Constitution itself,<sup>107</sup>

the *demos* must then accept that the courts will be ready to take these systemic features seriously and rule against whimsical and instrumental politics of the day. It is now beyond dispute that there is a gradual constitutional *coup d'état* in Poland whereby the Constitution is being modified through legislative sleight of hand. In these extraordinary circumstances, constitutional review by

<sup>100</sup> See n 14.

<sup>101</sup> Shapiro (n 87) 24.

<sup>102</sup> Constitution of Poland (n 20) arts 173, 178.

<sup>103</sup> *ibid* art 2.

<sup>104</sup> *ibid* art 8.

<sup>105</sup> *ibid* art 10.

<sup>106</sup> *ibid* art 190.

<sup>107</sup> *ibid* art 8(2).

the ordinary courts is simply a necessary and urgent response to the relentless and no-holds-barred politics of the parliamentary majority of the day.<sup>108</sup> The response must have at its core self-defence of the constitutional essentials mentioned above. Judges cannot simply stand by and watch the legal order torn apart in the name of ‘the people’. They must defend the Republic and uphold the law. This is exactly what they are sworn to do – nothing less, nothing more.

The government’s persistent refusal to publish judgments in the past<sup>109</sup> has already brought to the fore a more general question of whether constitutional integrity, the rule of law and systemic coherence of the Polish legal order might be secured through legal means other than centralised constitutional review.<sup>110</sup> The abortion ruling entails the following pressing question: Does the Polish legal system contain safety nets that would short-circuit the assault on the Court and its review functions so as to ensure that the Constitution and not the political will remains the supreme law of the land?

#### 4.3.2. ‘EMERGENCY CONSTITUTIONAL REVIEW’: WHAT’S IN A NAME?

Constitutional review exercised by the ordinary judges has been an option in the Polish legal order since the adoption of the 1997 Constitution; proponents of extending this type of review to ordinary judges were kindly acknowledged, but their views were never taken seriously. It was widely accepted that only the Court wields constitutional monopoly, and the ordinary courts would follow judgments made by it pursuant to the Constitution. Nobody ever contemplated the situation whereby the Court would be unable to exercise its constitutional powers as a result of a political onslaught and the rewriting of the Constitution by way of statutes. The mere thought of this was unthinkable; it is no longer so, today.<sup>111</sup>

Views have been expressed in Polish legal doctrine and voiced in the case law of the Supreme Court on the possibility of constitutional review by ordinary courts in checking the compatibility of statutes with the Constitution.<sup>112</sup> However, it has been the ‘centralisation model’ that prevails and dominates the mainstream discourse. The ordinary courts cannot refuse to apply a statute

<sup>108</sup> When I use the term ‘court’ I mean courts entrusted with the administration of justice and defined in Art 175(2) of the Polish Constitution.

<sup>109</sup> See references at nn 3 and 22.

<sup>110</sup> It is to be noted that for many weeks the government, clearly frightened by the scale of mass protests and driven by opportunistic considerations, stalled publication of the ruling. There were then serious voices coming from the world of constitutional doctrine, arguing for non-publication as a result of the many irreversible constitutional irregularities that vitiated the ruling. It has been a classic Catch-22 situation with no clear winners, only one loser – the Constitution and its integrity.

<sup>111</sup> Tomasz Tadeusz Koncewicz, “‘The Symbolic Jurisprudence’: Theorizing Constitutional (Re)capture, Testing the Limits of Separation of Powers and Reimagining the Judicial Review’ in Antonia Baraggia, Cristina Fasone and Luca Pietro Vanoni (eds), *New Challenges to the Separation of Powers: Dividing Power* (Edward Elgar 2020) 180.

<sup>112</sup> For a comprehensive survey in Polish of the relevant case law see Monica Florczak-Wątor, ‘Względny czy bezwzględny obowiązek stosowania niekonstytucyjnej normy prawnej w okresie odroczenia?’ in Maciej Bernatt, Jakub Królikowski and Michał Ziółkowski (eds), *Skutki wyroków Trybunału Konstytucyjnego w sferze stosowania prawa* (Trybunału Konstytucyjnego 2013) 113.

(presumption of constitutionality) and only the Court is empowered to rule on the constitutionality of a statute. As long as a statute is in force, judges are bound to apply it unless they raise question(s) of constitutionality with the Court and the Court declares the statute to be unconstitutional. This line of argument flows from Article 178 of the Polish Constitution according to which, in the exercise of their duties, judges are subject to the Constitution and statutes. As a result, constitutional review of statutes is centralised and exercised exclusively by the Court. The direct application of the Constitution assumes co-application of the Constitution and statutes. At most, the ordinary courts may proceed to apply pro-constitutional interpretation in pending cases, and no more. As predominant as this strand of constitutional narrative has been, there has been a second line of thought. Subjecting judges to the Constitution and statutes could be read as allowing judges power to refuse to apply a statute that is incompatible with the Constitution. Direct application of the Constitution entails much more than simply interpreting in conformity with the Constitution and asking constitutional questions on the compatibility of statutes. In the case of conflict, judges must follow the act of the higher ranking (the Constitution as the supreme law of the land: Article 8(1)) in accordance with *the lex superior derogat legi inferiori*. Depending on the decision of the court that is deciding the case, two options would be possible. On the one hand, a court finding the statute to be unconstitutional could refuse to apply the statute outright in a case it decides. Here, the court would act as a full-blown constitutional review institution, not only deciding the constitutionality question but also mandating the consequences of such a finding.

On the other hand, there is an option that I call 'intermediate'. Should the court find the statute to be unconstitutional and yet decide to apply it nonetheless, it would be left with no discretion, but be obliged to refer the questions to the Court. In this scenario the court would be debarred from applying the statute that it deems unconstitutional. The refusal by an ordinary court to apply the statute would not necessarily infringe the review powers of the Court, as a plausible argument could be made that review exercised by an ordinary court is limited and addresses only the case at hand. It is *in concreto* review as opposed to *in abstracto* review by the Court. The latter deals with the law with an *erga omnes* effect and removes the unconstitutional provision from 'legal circulation', thus acting more in the spirit of a quasi-chamber of the Parliament, whereas ordinary courts are in charge of the administration of justice in individual cases.

My argument falls somewhere between these two lines of thinking. The system of government in Poland is based on the monopoly of constitutional review by the Court. In other words, constitutional review is centralised. However, the assumption that underpins the centralised model is that constitutional review by the Court is operational and effective. What if it is not? Depending on the circumstances of each case, direct application of the Constitution could range from *parallel application* of the statute and the Constitution to *self-standing application* of the Constitution. For the sake of argument, four situations should be discerned. The first, the most common and uncontroversial, exists when a judicial decision is based *directly* on the statute, with the Constitution used as an ornament. The second is when the judicial decision is based on *both* the statute and the Constitution, the latter shedding light on the interpretation of

the statute. Third, there is a more radical version of direct application, which I call ‘transformative application’. Here, the court is aware of the incompatibility of the statute and feels ready to make it constitutional by (re)interpreting it in the light of the Constitution. The Constitution is no longer a mere source of inspiration but provides a normative tool for judicial modification of the statute, which ensures its normative consistency with the Constitution.

Beyond that third option there lies ‘emergency review’ with outright refusal to apply the statute, which is our fourth option. When constitutional review faces systemic and permanent dysfunction for whatever reasons, emergency review must be resorted to. Such a review is defined by complementarity vis-à-vis the Court’s power of review. It accompanies, and runs in parallel with, constitutional review of the Court, and does not replace it. Such review is instrumental in securing respect for the Constitution’s status as the supreme law of the land. *Constitutional defiance* by the parliamentary majority must be countered by *intra-constitutional resilience* and trigger self-defending mechanisms from within the Constitutional text. It is important to make clear here that my call for ‘emergency constitutional review’ by the ordinary judges does not question the monopoly of constitutional review by the Court. Rather, I am advocating for this review to shield the constitutional order and constitutional rights from being further weakened and disassembled.<sup>113</sup> The abortion ruling shows the urgency of such rethinking of the role and fidelities of ordinary courts vis-à-vis the Constitution.

My argument in favour of domestic ‘emergency constitutional review’ by the ordinary judges is further reinforced by the system of decentralised enforcement as the linchpin of the European system of judicial protection. European empowerment of the ordinary courts has already happened in Poland and undermined the Polish centralised model of constitutional review. Moreover, it was even accepted by the Court when it held in Case P 37/05 that ‘national courts shall not only be authorized, but also obliged to refuse to apply a domestic law norm, where such norm remains in conflict with European law norms’.<sup>114</sup> European Union (EU) law is based on the European Court of Justice doctrines of direct effect (*Van Gend en Loos*)<sup>115</sup> and supremacy (*Costa v ENEL*),<sup>116</sup> which constitute true building blocks of the new legal order to which EU law aspires. As for enforcement, EU law looks to a national judge who is entrusted with overseeing the full effect of the provisions of EU law, if necessary, refusing of its own motion to apply any conflicting provision of domestic legislation. The belief underlying this decentralised system of judicial review is that ‘it is not necessary for the court to request or await the prior setting aside of such provision by legislative or other constitutional means’.<sup>117</sup> National judges are called upon to disregard any provision of domestic law (at least on the European Court of Justice reading of

<sup>113</sup> Tomasz Tadeusz Konciewicz, ‘The Court is Dead, Long Live the Courts? On Judicial Review in Poland in 2017 and “Judicial Space” Beyond’, *VerfBlog*, 8 March 2018, <https://verfassungsblog.de/the-court-is-dead-long-live-the-courts-on-judicial-review-in-poland-in-2017-and-judicial-space-beyond>.

<sup>114</sup> Case P 37/05, Order of 19 December 2006, OTK ZU 11A/2006/177, point 4.2 of the order.

<sup>115</sup> CJEU, Case C-26/62 *NV Algemene Transport-en Expeditie Onderneming van Gend & Loos v Nederlandse Administratie der Belastingen*, Judgment, 5 February 1963, ECLI:EU:C:1963:1.

<sup>116</sup> CJEU, Case C-6/64 *Flaminio Costa v ENEL*, Judgment, 15 July 1964, ECLI:EU:C:1964:66.

<sup>117</sup> CJEU, Case C-106/77 *Amministrazione dello Finanze della Stato v Simmenthal SpA*, Judgment, 9 March 1978, ECLI:EU:C:1978:49, para 24.

supremacy, its scope is all-encompassing as it catches ‘any’ provision of domestic law, be it a constitutional, statutory, sub-statutory or administrative decision) that is inconsistent with EU law and without waiting for the constitutional court to take a stand on the conflict. Each court of a Member State has the power of judicial review of national legislation in cases pending before it. Judicial review is limited to disapplication of conflicting domestic law *in concreto* to ensure the *effet utile* of EU law ‘here and now’. The constitutional courts retain the power to declare such legislation null and void *in abstracto* or the national parliaments modify the legislation to make it compatible with relevant EU law.

Such dispersed judicial review is not an exception, but rather forms the backbone of the EU legal system and is exercised by national judges daily. All of this has already recalibrated the role of European constitutional courts, and the supremacy of EU law has made inroads into their monopoly of constitutional review over statutes. Review of statutes for their compatibility with EU law is now within the powers of the ordinary courts. As a result, the system is decentralised or, as one of the authors has argued, ‘Americanized’.<sup>118</sup>

It is important to bear in mind the EU law mechanism because it strengthens my argument in favour of the ‘emergency judicial review’ exercised by Polish judges with regard to domestic law that is inconsistent with the Polish Constitution. ‘Emergency judicial review’ would entail the loss by the Court of its constitutional monopoly over statutes. In exceptional situations the review of the constitutionality of statutes might be exercised by the ordinary courts. Such review would be an extension of the national law of the decentralised enforcement already forming part of the EU mandate of Polish courts since 2004.

Why, and how, does it all matter now after the abortion ruling?

#### 4.3.3. THE CONSTITUTION IS NOT A ‘SUICIDE PACT’

I have been arguing here in favour of ‘emergency constitutional review’ by ordinary judges in direct response to the constitutional abuse by a body that in normal constitutional times would be acting as protector of the Constitution and its values. The constitutional review expounded here has been called ‘*emergency*’ because it is triggered by the exceptional circumstances and the looming incapacitation of the Court. It must be exercised with caution and restraint, and be limited to egregious breaches of constitutional standards and rights.

The governing majority in Poland should be aware that there are constitutional limits to their democratic mandate. It is the judges’ province to set down these limits and enforce them in a judicious manner. The ‘emergency constitutional review’ is part of what Pierre Rosanvallon called ‘counter democracy’<sup>119</sup> to capture how democratic systems have been evolving from the symbolic casting of a vote to exercising societal control between elections and irrespective of their results. Rosanvallon identified three methods whereby citizens can hold the elected to

<sup>118</sup> Víctor Ferreres Comella, *Constitutional Courts and Democratic Values* (Yale University Press 2009) 126.

<sup>119</sup> Pierre Rosanvallon, *La contre-démocratie, La politique à l’âge de la défiance* (Seuil 2014); English edn, Pierre Rosanvallon, *Counter-Democracy: Politics in the Age of Distrust* (Cambridge University Press 2008).



account: (i) oversight, (ii) prevention, and (iii) judgment. The first deals with the monitoring of the political process by the citizens and/or their organisations and with making the behaviour of the elected more visible. The second takes on the capacity of the citizenry to mobilise and channel resistance to policies and decisions taken by the elected. Finally, the third describes the juridification and trend for turning to the courts for bringing social change and/or to enforce the limits put on the elected.

‘Constitutional emergency review’ falls within the ‘judgment category’ and must be seen as democratic constraint on the will of the majority and the manifestation of constitutional self-defence. The battle lines have been clearly drawn and it should be clear that the Polish government and Parliament will stop at nothing. All those who oppose it must now concentrate on finding ways to ensure that the Polish constitutional system is able to defend itself from within. ‘Emergency constitutional review’ is a good start to do just that. Making the Constitution operational every time the Court is denied its constitutional powers is the priority of the highest order now. By ‘operational’ I mean treating the Constitution by the judges as part of the law that they are bound to apply and on which they must build their decisions.

#### 4.3.4. ‘MARBURY MOMENT’ IN POLAND: ARE THE JUDGES READY?

All this takes on special importance today when the Constitution has been humiliated beyond repair by those who should stand up for it. The abortion ruling brings to the fore the question of what happens when the constraining function of centralised constitutional review is harnessed by the political power. Emergency review, as reconstructed here, offers one possible avenue for recapturing the rule of law. However, one should be aware of the challenges that such an extension of judicial review to ordinary judges entails.

To understand the enormity of the task at hand, one should understand the historical baggage of the Polish judiciary (this goes also for other Central and Eastern Europe (CEE) judges).<sup>120</sup> The bureaucratic model of the judiciary in CEE countries sees judges as well-paid civil servants. While in Western Europe the model evolved towards more independence of the judiciary, in Poland (and Eastern European countries in general) the trend was the opposite. Judges post-1945 were expected to be the vanguard of the socialist change and functioned as part of the unitary state machinery. The principle of democratic centralism prevalent in the former communist states stood for a system based on the centralised authority. The Communist Party held all the power, and the obligation of lower bodies was to obey the directives of those at the higher levels.<sup>121</sup> The Constitution was relegated to, and thought of as a purely declaratory document

<sup>120</sup> For more on this see Tomasz Tadeusz Koncewicz, “‘Mechanical Jurisprudence’ under Strain? Eastern Europe Judiciary under the European Influence’ in Marek Zubik (ed), *Human Rights in Contemporary World: Essays in Honour of Professor Leszek Garlicki* (Wydawnictwo Sejmowe 2017) 113; and Tomasz Tadeusz Koncewicz, ‘Polish Judiciary in Times of Constitutional Reckoning: Of Fidelities, Doubts, Boats and ... a Journey’, *Gdańskie Studia Prawnicze* XXXVIII/2017, 291, [https://prawo.ug.edu.pl/sites/default/files/\\_nodes/strona-pia/33461/files/38koncewicz.pdf](https://prawo.ug.edu.pl/sites/default/files/_nodes/strona-pia/33461/files/38koncewicz.pdf).

<sup>121</sup> Mark Brzezinski, *The Struggle for Constitutionalism in Poland* (MacMillan 1998).

with no normative content and no role to play in the judicial resolution of disputes. Judges were viewed as part of the unitary governmental structure, engaged in furthering the cause of building a classless society. The independence of the judiciary and the direct application of the constitutional document as a source of individual rights was not part of the communist playbook. The ideal judge was subservient, passive and an uncritical enforcer of a statute. Judging was a purely mechanical exercise in syllogism, free of value choices and critical thinking. Judges were unwilling to look at the legal provision in its systemic context and accepted positive law as equivalent to the law. As a result, statutes and the law were one and the same.

The ideology of bound judicial decision making as developed by the leading Eastern legal theoretician and philosopher of law, Jerzy Wróblewski, has been keeping Polish judges captive for decades now.<sup>122</sup> This ideology rests on textual positivism and formalism and stands for the limited law and limited sources of law, with the role of judges reduced to the mechanical application of the legal text. Judges acted exclusively on the plain meaning of a statutory text and framed their decisions as the inevitable and the only correct deduction from the text in any case. As a result, Polish judges have been rightly described as perfect examples of ‘textual judges’ and impervious to the context in which the legal text operates. Their interpretation was, and still is, invariably code-bound, which means that a judge’s role consists of simply reconstructing the pre-existing standards enacted and changed, when necessary, by the legislator. The so-called presumption of the ‘rationality of the legislator’ assumed that the legislator is reasonable and ready to self-correct. This presumption entailed rather disturbing consequences as it provided an *ex ante* excuse for judges to do nothing when confronted with legislation that is clearly unreasonable, unfair or arbitrary. Should the existing law prove to be deficient for whatever reason, it is not the business of the judge to override the clear meaning of the text, but rather for the legislator to amend it accordingly. What followed has been the self-imposed image of a judge who, in the words of one commentator, resembles ‘an anonymous grey mouse, hidden behind piles of files and papers, unknown to the outside world’, who is not used to ‘stand[ing] by his opinions and defend[ing] them in the public’, which then results in structural judicial independence, but no mentally independent judges.<sup>123</sup> As one leading textbook on the subject succinctly put it: ‘*The courts (of Eastern Europe) try to follow the letter of the law, however problematic and absurd the results may be which this course produces*’.<sup>124</sup>

#### 4.3.5. ‘IN JUDGES WE TRUST’

The legal world of the average Polish judge has been dominated by Montesquieu, formalism and unflinching faith in the rationality of the lawmaker. This judge is a true believer in what Lord

<sup>122</sup> English version of his most famous treatise: Jerzy Wróblewski, *The Judicial Application of Law* (Zenon Bankowski and Neil MacCormick (eds), Law and Philosophy Library, vol 15, 1991).

<sup>123</sup> Michal Bobek, ‘The Fortress of Judicial Independence and the Mental Transitions of the Central European Judiciaries’ (2008) 14 *European Public Law* 99.

<sup>124</sup> Zdenek Kühn, *The Judiciary in Central and Eastern Europe: Mechanical Jurisprudence in Transformation?* (Martinus Nijhoff 2011) 201 (emphasis added).

Reid ridiculed 40 years ago as a fairy tale.<sup>125</sup> As a result, when a case breaks the mould and calls for more than just textual reconstruction, a judge is awe-stricken and defenceless and turns his or her eyes towards the legislator pleading for ... more text. The legislator acquiesces and enacts new text, which is only good until new controversy arises and a judge comes knocking on the door yet again.

This clouds my ambitious vision of ‘emergency constitutional review’ with uncertainty and lingering doubts as to its feasibility in practice. After all, ‘emergency constitutional review’ is based on the rejection of the unwavering belief among judges that any case can be decided by relying on textual statutory arguments. It takes ordinary judges out of their comfort zone in a dramatic fashion as it makes the Constitution part and parcel of the judicial decision-making process. It calls on judges to evaluate critically the statutes and it empowers them to embrace fully their forgotten role of being judges over the ‘Constitution *and* statutes’, not simply judges applying and interpreting statutes. Having said that, what is needed today is a vote of confidence and trust in the Polish judiciary. Today, Polish judges have their own constitutional promises to keep, and these are no less than the Polish rule of law and democracy. They must not be idle and watch helplessly as the constitutional edifice crumbles.

When the Constitution of 1997 was drafted, it was thought that the authority of a judicial pronouncement and respect for the Constitution would carry enough clout to secure the universal observance of judgments issued by the Court, and that the rule of law is rooted in the public consciousness to the point where no politicians would ever dare to undermine judicial review. If there is one lesson to be learnt from the ‘*Marbury* precedent’, it is the ‘principle supposed to be essential to all written constitutions, that a law repugnant to the Constitution is void and it is the duty of the judges to say what the law is’.<sup>126</sup>

At the very moment when Polish judges embrace and internalise this crucial message and take true ownership of the constitutional essentials, the Polish rule of law and Constitution will be given a new lease of life. Following the abortion ruling, the call for emergency review as sketched here has taken on existential importance. The ordinary courts must now consider the impact of the usurping judges on the functioning of the body called ‘the constitutional court’ and on the legality of its rulings.<sup>127</sup> The courts must apply the Constitution directly to protect women’s rights, as well as enforce international law binding on Poland. EU law, with its Charter of Fundamental Rights<sup>128</sup> and catalogue of general principles of law, offers important exit strategies from the current regime. All this is underpinned by the remedial framework of the European treaties and, in particular, the preliminary rulings under Article 267 of the

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<sup>125</sup> Lord Reid, ‘The Judge as Law Maker’ (1972) 12 *Journal of the Society of Public Teachers of Law* 22, 22.

<sup>126</sup> *Marbury v Madison* (n 90) 180, Chief Justice John Marshall.

<sup>127</sup> In a similar vein also Stefan Batory Foundation, ‘Statement by the Experts Group of the Stefan Batory Foundation on the Constitutional Tribunal Ruling on Abortion’, 28 October 2020, <https://www.batory.org.pl/en/oswiadczenie/statement-by-the-legal-experts-group-of-the-stefan-batory-foundation-on-the-constitutional-tribunal-ruling-on-abortion>.

<sup>128</sup> Charter of Fundamental Rights of the European Union (entered into force 1 December 2009) [2012] OJ C 326/391.

Treaty on the Functioning of the European Union.<sup>129</sup> It must be used to protect whatever constitutional essentials are still left to be protected.<sup>130</sup>

## 5. THE ABORTION RULING FOR THE PERIPHERAL DEMOCRACY: MACRO-PERSPECTIVE

### 5.1. CHANGING PARADIGMS

As indicated in the introductory section, the abortion ruling must be read against the background dynamics and developments that have shaped the new narrative in Poland since 2015 and laid the groundwork for the dramatic shift in how judicial review is exercised and justified. As I have argued, since 2015 the post-1989 narrative has been rewritten and has changed its focus from the rule *of* law to rule *by* law, regaining more control over the state that allegedly had been taken over by the liberal elites. We have witnessed an internal dynamic and change in constitutional themes and programmes: 1981 – the Solidarity movement, freedom and the rule of law; 1989 – freedom and reintegration with Europe; 2004 – accession to the European Union, emphasis on sovereignty and self-determination; 2015 onwards – economic stability and security, nationalism and historical uniqueness. In the east, the politics of resentment found expression in the constitutional capture that followed the demise of the ‘liberal consensus’.<sup>131</sup> The latter has provided the dominant narrative since 1989, characterised by the fear of mass politics. The liberal elites took over the democratic process and marginalised the public voice.

Paradoxically, the rise of the populist and national narrative might be seen as the result of the successes of post-communist liberalism. Liberal constitutionalism was marked by a top-down approach to institution building and now has been replaced by a vindictive constitutionalism marked by gut politics, emotions, and revolt against corrupt political elites. Old constitutions are seen as the vestige of old regimes and elites that must go. Yet, this current revolt against elites and the liberal status quo has been long in the making. The rise of the politics of resentment marks, contrary to the common narrative, not the end but rather the beginning of a sweeping revolt against the dominant politics of liberalism.<sup>132</sup> Democracy is undergoing transformations in response to a changing political and social environment.<sup>133</sup> Europe’s liberal democracies are

<sup>129</sup> Consolidated Version of the Treaty on the Functioning of the European Union (entered into force 13 December 2007) [2008] OJ C 115/47.

<sup>130</sup> For a survey of the possible exit strategies, the case law of the Court of Justice of the EU and the ways in which Polish judges have been using the Treaty framework as a shield against the regime, see Dmitry Kochenov and Laurent Pech, ‘Respect for the Rule of Law in the Case Law of the European Court of Justice: A Casebook Overview of Key Judgments since the Portuguese Judges Case’, Swedish Institute for European Policy Studies, Report No. 3, September 2021, <https://www.sieps.se/en/publications/2021/respect-for-the-rule-of-law-in-the-case-law-of-the-european-court-of-justice>.

<sup>131</sup> Ivan Krastev, ‘The Strange Death of the Liberal Consensus’ (2007) 18(4) *Journal of Democracy* 56. On the conceptualisation of the politics of resentment see Koncewicz (n 29).

<sup>132</sup> *ibid.*

<sup>133</sup> For trends on democracy and democratic change around the world see Arch Puddington, ‘Special Report 2017 – Breaking Down Democracy: Goals, Strategies and Methods of Modern Authoritarians’, *Freedom House*, June 2017,

being transformed and the politics of resentment have become a new condition of the political in Europe. A top-bottom approach to building constitutional institutions and structures fuels the current backlash against mainstream liberal politics.

Liberal democracies know well that even the strongest institutions must fall when they do not enjoy popular support. When the rule of law and liberal values are not internalised, the system is vulnerable to authoritarian claims and populist narratives. How, then, to create a constitutional culture that would truly underpin and entrench the change taking place at the level of a constitutional text in the post-communist countries? The CEE elites have never bothered to answer this question in any meaningful way. The sins of past omissions are catching up with us now. With the benefit of hindsight, one might argue that the prevalent top-down and live-in-the-moment approaches, coupled with an extreme legalism that excludes popular participation, are the reasons for weak popular attachment to constitutional structures, procedures and mechanisms in CEE countries, and explain why such ground is fertile for the politics of resentment. The opposition of ‘We, the good representatives of the good People’ *versus* ‘They, the bad elites and bad people represented by elites’ is gaining traction because so many were excluded from the benefits of transformation that ensued after 1989. Yet, the politics of resentment see this disillusioned segment of society in a very instrumental way: ‘Bring us back to power and we will take care of you like never before’. The politics of resentment exclude in the same way as past elites did. A vicious circle results. The downtrodden are given back their sense of belonging and relevance only for a split second: at the ballot box.

As argued by Jacques Rupnik, the new elites thrived by consolidating the democracy without participation and forming a policy consensus at the expense of politics. Civil society’s short-lived constitutional moment was soon replaced by the mundane reality of institutional and economic catching-up. The absence of social acts and social passivity favoured the transition to a market economy. The latter enjoyed the strong social legitimacy of the freedom-starved citizenry, with the democracy being reduced to electoral ritual on election day with relentless pressure for more between the electoral cycles. Democratic rules of the game going beyond the ballot box were never truly internalised. Again, Rupnik is right when he says that ‘people became used to markets much more readily than they came to embrace democracy’.<sup>134</sup> The politics of resentment knew this and realised that nobody would die for a constitutional court or courts in general. The liberal institutions finally came against the illiberal narratives; the latter never really disappeared.<sup>135</sup>

The liberalism of the liberal consensus ... was an elite project driven by small groups at the apex of politics, business, academia and officialdom ... this narrow economic, technocratic variant of liberalism

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<https://freedomhouse.org/report/special-report/2017/breaking-down-democracy>. For an overview see Larry Diamond and Marc F Plattner (eds), *Democracy in Decline?* (Johns Hopkins University Press 2015). Most recently, Steven Levitsky and Daniel Ziblatt, *How Democracies Die* (Crown 2018).

<sup>134</sup> Jacques Rupnik, ‘From Democracy Fatigue to Populist Backlash’ (2007) 18(4) *Journal of Democracy* 17.

<sup>135</sup> James Dawson and Seán Hanley, ‘The Fading Mirage of the “Liberal Consensus”’ (2016) 27(1) *Journal of Democracy* 20, 21.

merged with existing illiberal narratives and interests which pro-European elites generally opted to accommodate rather than oppose.

Most importantly, as a result of the elitist project, liberal, progressive, and rule-of-law-perfect institutions sailed in the sea of illiberal narratives and were only superficially embedded in the public consciousness. James Dawson and Sean Hanley are correct in arguing:<sup>136</sup>

Despite appearances in East-Central Europe there is an absence of genuinely liberal platforms – by which we mean a range of mainstream ideologies of both the left and right, based on shared commitments to the norms of political equality, individual liberty, civic tolerance, and the rule of law. As a result, citizens were left unexposed to the philosophical rationales behind liberal-democratic institutions.

Democracy was never consolidated as there were not enough democratic citizens. As such, democracy on the way towards consolidation was always vulnerable to disloyal and non-democratic practices.<sup>137</sup> If anything, illiberalism is being consolidated right now, not liberal democracy.

The tragic consequences of the ‘alienating constitutionalism’ that prevailed after 1989 are now becoming more evident with the constitutional crises in the CEE.<sup>138</sup> With the current dismantling of the Polish Constitutional Court (and earlier court-packing in Hungary and Romania), civil society in Poland is suddenly being asked, and expected, to rise up in arms and show its more engaged face. However, the name of the game is not engagement, but cynicism: ‘As long as the economy is fine, why should we care for the Constitutional Court’; but ‘Let’s stand up for the Court’ hardly obtained any traction. The Polish example is reflective of this dramatic disconnect between the people and the elites. As much as the liberal elites are appalled by the ruthlessness of the attack on the Court and Polish rule of law, they are the ones to be blamed for a civic passivity that continues to define post-transition societies in general.<sup>139</sup> The truly reformative potential of 1989, and then 2004, was lost when the elites neglected the importance of connecting with the ‘real’ people beyond the magic of the ‘big bang’ moments of 1989 and 2004. The recurring question expressing this popular sentiment of disengagement asks: ‘Why should we die for “their” constitutional court?’<sup>140</sup> This ‘alienating constitutionalism’ is one of the dark sides of 2004. The politics of resentment took advantage of

<sup>136</sup> *ibid.*

<sup>137</sup> See also Ivan Krastev, ‘Liberalism’s Failure to Deliver’ (2016) 27(1) *Journal of Democracy* 35, 36.

<sup>138</sup> Ivan Krastev, ‘The Unraveling of the Post-1989 Order’ (2016) 27(4) *Journal of Democracy* 88.

<sup>139</sup> On this also Bojan Bugarić, ‘The Populists at the Gates: Constitutional Democracy under Siege?’, Draft paper submitted for the workshop ‘Public Law and the New Populism’, New York University School of Law, 15–17 September 2017, [https://www.researchgate.net/profile/Bojan-Bugaric/publication/319955332\\_The\\_Populists\\_at\\_the\\_Gates\\_Constitutional\\_Democracy\\_Under\\_Siege/links/59c38100aca272295a1310a1/The-Populists-at-the-Gates-Constitutional-Democracy-Under-Siege.pdf](https://www.researchgate.net/profile/Bojan-Bugaric/publication/319955332_The_Populists_at_the_Gates_Constitutional_Democracy_Under_Siege/links/59c38100aca272295a1310a1/The-Populists-at-the-Gates-Constitutional-Democracy-Under-Siege.pdf).

<sup>140</sup> Emphasis added. A weak and dispersed citizenry is faced for the first time with the tall order of bottom-up and not top-down mobilisation. Today, nobody (at least in Poland) really knows how 25 years of dominant top-down transformation affected ‘the bottom’ and whether ‘the bottom’ is ready to organise itself and defend structures and ideas which so far have been distant and alien concepts.

the exclusion behind the alienating constitutionalism and transformed it into a vindictive constitutionalism marked by gut politics, emotions and revolt against corrupt political elites and institutions. Demand side (resentment as an umbrella term for disillusionment, anger and distrust – see above) had to meet supply factors in the forms of right narratives and the salience of political leadership behind these narratives. As argued by Dani Rodrick:<sup>141</sup>

Populist movements supply the narrative required for *political mobilisation* around common concerns. They present a story that is meant to resonate with their base, the demand side: here is what is happening, this is why, and these are people who are doing this to you.

If one adds to this that the liberal constraints never met broad political consensus about democracy and lack of credible liberal platforms, the demand factors have been strengthened and acted as enablers for the populist authoritarianism to take the reins and implement the politics of resentment. With the migration crisis and growing uncertainty on top of these historical peculiarities, one ends up with a recipe for combustible resentment.

In Poland the antagonistic narrative of winning back the state and politics of resentment was never too far away from the mainstream. Common sense and self-survival might have triumphed in 1989 with ‘the thick red line’ drawn between the past and present for the sake of the future but this has never been the only face of Polish politics since 1989. Corruption, virulent nationalism, ever-present anti-German sentiment and anti-Semitism were put on hold only temporarily. They resurfaced with the right circumstances: internal (electoral fatigue with the eight years of the centrist Civic Platform; relentless narrative of us *versus* them; agents everywhere; conspiracy theories; a string of corruption scandals; institutions working for the elites and not for you), and external (heightened uncertainties associated with the financial and migration crisis; playing off the German card; and martyrology). Internal met external and created a perfect breeding ground for resentment born out of fear, disgust and uncertainty.<sup>142</sup> What was needed was the supply side, and this is where the politics of resentment provided much needed clarity and a sense of direction.

The decisive transition from ‘resentment in the opposition’ to ‘resentment in power’ happened,<sup>143</sup> and the ghosts and omissions of 1989 and 2004 resurfaced with full force. The disempowered and excluded now felt empowered by the promise of the politics of resentment, and empowered yet disgruntled and bored spectators – beneficiaries of 1989 – were ready to gamble their imaginary resentment in the search for more benefits and wealth. While, for the former, the rule of law worked against them, for the latter it never worked well enough. Both groups, for different reasons, were ready to see what happens when the existing legal system with liberal narratives crumbles and we will start anew. The politics of resentment added to this crucial legal

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<sup>141</sup> Dani Rodrick, ‘Populism and the Economics of Globalization’ (2018) 1 *Journal of International Business Policy* 12, 24.

<sup>142</sup> Krastev (nn 131, 138).

<sup>143</sup> For this distinction see Koncewicz (n 29).



dimension – constitutional capture. The predictable and stabilising liberal narrative of ‘in rule of law we trust’ has been debunked by an emotional and unpredictable brand of politics.

While on its face all this might have only an indirect connection with the subject matter of the present analysis, the argument is made here that the macro-perspective, as sketched out above, sets out the crucial background against which to analyse the abortion ruling and understand its long-term consequences. Poland was a disaster waiting to happen, with institutions enjoying very weak popular support and no understanding of why and how these institutions matter for the average citizen. When portrayed as corrupt and alien, no counter-narrative was available to debunk this one-sided vision; nor was there any citizen-driven defence of institutions. Weak and disengaged citizenry simply did not care and let the right-wing government act without question in the name of allegedly curing a rotten liberal system. For most people the system built from the top was not good enough to fight for and, as a result, people were ready to listen to a resentment-driven narrative and to experiment.

The tenets of post-1989 constitutionalism have been undermined and ultimately rejected. To date, the abortion ruling is the most dramatic evidence of the dangers of living in the type of state that Poland has become: a state of unchecked political power backed by weaponised judicial review. It is also the first time that the citizenry started to pay attention to the capture of independent institutions and its impact on their daily lives. The process of capturing the state with the avowed objective of winning back the true state for the people was met with acceptance as democratic and liberal consensus proved to be extremely weak and fragile. The stage was set for constructing a new regime: ‘a democracy on the periphery’.

## 5.2. DEMOCRACY ON THE PERIPHERY

The ascent of a peripheral democracy, as both the new state regime and constitutional narrative, marks the end of the post-1989 politics of transformation.<sup>144</sup> The paradigm of Europeanisation no longer serves as an effective deterrent against illiberal tendencies. Consolidation through Europeanisation works best with the would-be candidates who are expected to share the commitment to the same values (value – community perspective) and exhibit readiness to be part of a viable internal market (market – effectiveness perspective). Once in the club, pressure to stay up to the task is gone, and the ugly face of transformation unfinished comes to the fore.

The peripheral democracy is based on five major claims and themes: (i) the transformation was not only politically but also morally flawed; (ii) the system as conceived in 1989 with the overarching rationale of the rule of law served only the few, while leaving behind the many; and, interconnected, (iii) institutional design favoured the powerful (‘Wall Street’) while disadvantaging the ‘Main Street’; (iv) dominance of the political over the legal; and finally and crucially (v) a new system of governance and novel constitutional design are needed, thus the

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<sup>144</sup> Ewa Łętowska, ‘The Rule of Law on the Peripheries of Europe: On Poland’s Transformation – 1988-2017’, *Konstytucyjny.Pl*, 31 July 2017, <https://konstytucyjny.pl/the-rule-of-law-on-the-peripheries-of-europe-on-polands-transformation-1988-2017>.

concept of the capture of the ‘bad’ state in order to create a new state with the constitution of fear as crowning the project. The end result of this constitutional capture is a new state: ‘a captured state’ with the ‘captive citizenry’ all underpinned by ‘democracy on the periphery’.

Once the incentive of joining Europe was gone, the gene of illiberalism and failures of transition resurfaced. Consolidation seemed to be fragile. All of a sudden, the limits of top-down legal constitutionalism were brought to the fore. The lack at the behavioural level that was underpinning this legal change exposed the empty shell and incompleteness of consolidation through institution building and the EU-driven implementation process. Peripheral democracy is the child of incomplete democratic consolidation. It is characterised by a lack of engagement and participation of ordinary citizens. This is where the hollowing out of the democratic consolidation becomes apparent. At its core, post-communist democracy was superficial and lacked a civic element. People chose not to participate as they never internalised the democracy as the only game in town and, as such, they never learnt the skills necessary to join and shape the public discourse. For their part, the elites were very happy with this passivity as they relished the discretion of building a new democratic state – from above. That, in turn, entailed most dramatic consequences in the form of low trust for public institutions and weakly embedded attitudes of support for these when attacked by illiberal forces. Civic passivity bred indifference and created an environment in which fully fledged democracy found it difficult to thrive and endure.

This leads us to an important point. The ‘democracy on the periphery’ hijacks the form of democracy. The face is presented as democratic while the substance is deeply undemocratic, resulting in a strange mix of diminished democracy and competitive authoritarianism. Peripheral democracy exhibits strong elements of illiberalism; it shows that national and social conservatism never went away during the period of liberal consensus and that Eastern Europe lives in the illiberal shadow. There are no genuine liberal platforms which could build respect for the institutions and embed civic culture that would go beyond the symbolic moment of casting a vote. This explains the relative ease with which the Polish version of peripheral democracy has been installed. Peripheral democracy captures liberal democracy both at the level of *values* (only ‘my values’ matter) and *legality* (only ‘my law’ matters). It is a regime of extreme majoritarianism and electoral authoritarianism. The ballot box reigns supreme. Legal instrumentalism is coupled with the formalistic understanding of the rule of law as applied by the courts. People are seen as components of the ethno-cultural community first, and citizens second. The state is allowed much discretion in choosing what the good life means for its people. Citizenship is indeed reduced to the periphery. Sounds familiar? This is exactly one of the basic elements of the constitutional narrative behind the politics of resentment. Competition and representation are understood differently: in a liberal democracy they are encouraged; on the periphery they are discouraged and waved off as there is an exclusive claim to representation and voice.

As such, democracy on the periphery is counterfactual in that it disregards the fact of deep division in societies and glides over it with dramatic consequences for the state and citizenry: suppression and a flattened vision of a society. Captured democracy on the periphery entrenches the political project of only one segment of the political scene. Instead of negotiating conflict and disagreement, it elevates this unique project to the status of new constitutional truth. The

Constitution ceases to reach out; rather, it decides in the most authoritarian way what is right, what is the good life, and for everyone chooses the one and only world view. The Constitution takes backstage to the political process; it is reduced to a vehicle for good change, rather than a tool for managing diversity. As a result, space for contestation is significantly reduced: acceptable arguments are predetermined rather than worked out in the discursive framework and process; actors and public are exposed to a one-sided version of the political. All 'Others' are no longer objective opponents to be respected and disagreed with; they become partisan adversaries, enemies of the new state and its constitution.

The 'democracy on the periphery' has its own understanding of the Constitution, an element that permeates the abortion ruling. The liberal democracy presupposes constitutional conflict (within the parameters of a legal system) over the values and vision of a state; the constitution of a peripheral state closes off space for dissent and different voices. Peripheral democracy is defined by a 'constitution of fear'. While resentment helped in gaining power, resentment and fear are used to entrench that power. Fearful resentment is the *leitmotif* of the constitution-making process, shaped by suspicion and exclusion, with a drive for retribution and settling scores. As such, it reflects the main tenets of populist constitutionalism: distrust of institutions and rejection of the liberal status quo and culture of self-constraint.

As argued by Frederick Schauer in the context of the American Constitution, a constitution of fear fails to protect from new types of harm not contemplated by the Founders or to protect us from harm that no longer exists.<sup>145</sup> To these two imperfections, one might add in the Polish context a zealous push to protect against fake harm, dangers and imperfections that exist only in the paranoid minds of today's Polish constitution makers. A constitution of fear is not a one-off occurrence. Quite the contrary: it crowns the politics of resentment; it becomes its manifesto. A constitution of fear is partisan as it speaks only to those whom it accepts as real people and who share the new 'ideals'; all others are excluded and unwelcome. A constitution of fear is inward-looking. It protects national uniqueness and is read in direct opposition to the outside and always hostile world that is portrayed as a source of uncertainty at best, and decadence and fear at worst.

A 'constitution of fear' is used as a defensive tool against all this. A constitution of fear has a new role to play in society: it elevates the community to centre stage and pushes the individual into the shadow of the state. Liberal constitutions put a premium on conflict management, inclusion, evolutionary (incremental) change that is both open to and accommodates diversity as a social and normative fact, and trust that is built over time among different components of the polity. A constitution of fear thrives on disengagement and distrust, as well as a revolutionary tradition that builds on the avowed objective of a clean slate, starting from zero and a drive to settle fundamental questions once and for all. A constitution of fear reflects a unified vision of the people and a monolithic state. The people are defined by sameness rather than difference, and they consent to follow. Importantly, fear is given competing understandings depending on

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<sup>145</sup> Fredrick Schauer, 'The Constitution of Fear' (1995) 12 *Constitutional Commentary* 203, 203–06.

the perspective. The safeguards typical of the constitutional liberal state (separation of powers, checks and balances, judicial independence) are a mere afterthought and are seen as an unwanted and unnecessary distortion of the smooth communication between the sovereign and its representatives. Procedures and safeguards only slow things down, making the process opaque and misunderstood by the people; as such, we must do away with these liberal technicalities and inventions.

Exclusivity and instrumentalism are the new names of this constitutional game. It is the mono-ethnic and mono-cultural purified people first, collectivity rather than individualism. Open and participatory citizenship are concepts that are alien to the constitutional language of the new elites. A constitution of fear is no longer a tool to protect against the state; rather, it becomes a tool to entrench power and exclude dissent, to create a flattened and barren public sphere. Competition among possible constitutional ideologies and visions of the most desirable models of the state will be excluded. The rule of law is transformed from one of the cornerstones of a legal system to being used and abused. The constitution is a political manifesto of power, not a safeguard against arbitrary power. For populists liberal constitutions with their openness and inclusion are unnecessary inventions of elitist minorities and only distort communication between the representatives of the people and the people themselves. As such, the constitution must be remodelled and harnessed so as to enable and protect decision making, which at long last reflects the purified rule of the people. As ‘eloquently’ put by the Honorary Marshal of the Polish Sejm, the late Kornel Morawiecki (and father of the Polish Prime Minister ...), and since then elevated to the status of one of the truths of the ‘new constitutionalism’: ‘It is the will of the people, not the law, that counts. *When the law does not serve the interests of the people, it is always the latter that will prevail*’.<sup>146</sup> This understanding leads to an important tweak to the established narrative: institutions (such as the Constitutional Court) that have been channelling (for populists ‘distorting’) the rule of law must be dealt with as expeditiously as possible.

The constitution of fear wants to transform citizens into anonymous, ethnic and pure people; individualism takes backstage to the communal. The constitution of fear must be seen as a culmination of constitutional capture, not a mere instrument of the process. It stands as a document that crowns the paranoid style of politics, entrenches it and elevates distrust and exclusion to the level of constitutional truths. This is exactly where Poland finds itself right now: building a groundwork for constitutional design around distrust, exclusion, retribution and anti-individualism. These are the contours for a new constitutional document in the making: ‘a constitution of fear for a peripheral democracy’.

The constitution of fear entrenches unconstitutional capture and then ‘democracy on the periphery’. The element of periphery not only adds important insights into understanding how democratic regimes are captured, but also enables this very capture.<sup>147</sup> The periphery is *enabling* and

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<sup>146</sup> Quoted here from Tomasz Tadeusz Koncewicz, ‘The Polish Counter-Revolution Two and a Half Years Later: Where Are We Today?’, 7 July 2018, <https://verfassungsblog.de/the-polish-counter-revolution-two-and-a-half-years-later-where-are-we-today>.

<sup>147</sup> Łętowska (n 144).

*explicatory* for the capture. As such, ‘democracy on the periphery’ is an important rupture in the hitherto dominant narrative of three-step linearity: (i) democratic transition (democratisation); (ii) liberalisation; (iii) democratic consolidation (Europeanisation), with each step determining the next. This linearity is predicated on the assumption that having moved on to another stage, there is no coming back. One can only progress, never regress.<sup>148</sup> At the same time, though, the retrogression itself is not a one-dimensional phenomenon. Rather, it is a result of the convergence of various factors: institutional, societal, economic and, last but not least, historical. The democracy on the periphery puts forward a new narrative that competes with the prevailing narrative of liberalism and constitutionalism. It undermines this linearity and questions critically the assumption of irreversibility of democratic consolidation. As suggested above, the constitutional moment and civic engagement of 1989 were soon taken over by elitist politics bent on reforming the institutional system and putting the new entrants back on the map of ‘normal’ liberal Europe.<sup>149</sup>

This provides the conceptual background through which one must read the abortion ruling and see it as an important element in the grand narrative of the current political majority, rather than simply an accidental incident. Indeed, the abortion ruling must be viewed as the jewel in the crown of the peripheral democracy and the most ominous reflection of the constitution of fear. The latter is both expressed and entrenched by the abortion ruling.

### 5.3. THE PERSPECTIVE OF MEGA-POLITICS: OF CONSTITUTIONAL FIDELITY – INSTITUTIONAL AND CIVIC

Some of the arguments that follow have been made in the past. Yet, the repetition has its purpose here: it is utilised to save from oblivion constitutional review and the institutional memory of the old Constitutional Court and its legacy. The pace of our daily life is relentless, and the news cycle never stops. We are being bombarded with ever-outrageous headlines (ordinary courts brought to heel; disciplinary proceedings against judges decided under the cover of night; the unconstitutional Disciplinary Chamber of the Supreme Court being thrown out the window by decisions of the Court of Justice – the list goes on)<sup>150</sup> to the point where these individual news items become almost part of the new normal. The regularity of what in normal times would count as egregious violations of the rule of law makes the public immune and numb to these numerous developments. At the same time the news and media channels read ‘the Constitutional Court has decided’ or that ‘according to the President Julia Przyłębska’, and so on. As a result of this masquerade, the brazen unconstitutionality and illegality of the coup that has taken place in Poland becomes almost an afterthought and passes as the new normal.

<sup>148</sup> Rupnik (n 134).

<sup>149</sup> At the same time, this top-down approach of elitist constitutionalism (soon to become ‘alienating constitutionalism’) never translated into bottom-up constitutionalism that would help to build and entrench constitutional culture, an active citizenry, and respect for the democratic process.

<sup>150</sup> The tempo of the events is sometimes too overwhelming to follow; see Kochenov and Pech (n 130).

The hopelessness and creeping public indifference regularise and endow it with a veneer of legitimacy. In the end nobody remembers how all this happened, who is a legal judge, what is wrong with the Disciplinary Chamber of the Supreme Court, and so on. The danger of short-time horizons of the public comes to the fore. This is exactly where an engaged storyteller is faced with the Herculean task of never stopping repeating like a mantra, and reminding those who still listen, that we are not living in a normal state. Going about one's life in the shadows of the constitutional debacle indeed marks the final phase of the successful capture. The rejection of the comfortable and alluring, in its simplistic 'life goes on as usual', assumes fundamental importance. The symbols matter more than ever. When media – some driven by tribal conviction, others by inexcusable editorial sloppiness and laziness – continue to refer to Przyłębska as 'Mrs President', this is how unconstitutionality and illegality become entrenched, go by unnoticed, and silently become part of our daily life.

All this must go hand in hand with the larger narrative that must be told, retold and be present in the public discourse. For as long as the mechanism of constitutional oppression persists, the rule of law in Poland has no chance. The choice is crystal clear: either we retain the memory of normal constitutional times and keep talking to the citizens in the spirit of these times *or* we will allow the ever-stronger illegal narrative and smart appearances of constitutionality ('Mrs President Przyłębska') to drown out constitutional fidelity and the sense of propriety. Should the latter prevail, the scales would be tipped forever in favour of the new unconstitutional normal.

In this battle, every engaged voice, every act of truth telling, of remembering the foundational case law and of calling things by their proper names counts. They do count, just as much as does every indifferent shrug or speech act that refers to the gentlemen sitting on the fake court as the 'Judges of the Court'. The constitutional imagery and appearances of legality are seared into the minds of the citizenry as the daily habit becomes second nature. In the end, playing the game of appearances will become the new way of social life and will take on the semblance of normality.

## 6. AN EPILOGUE OR ...

If there is a lesson to be learnt from the constitutional debacle of 2015–21, of which the abortion ruling is the most dramatic illustration to date, it is the fact that sustaining democracies over the long term depends less on the institutions but rather on the intrinsic qualities of the citizenry and vitality of an open state, on political leadership, constitutional culture, civic loyalties, and popular resistance. Ultimately, the combination of these factors will provide a bulwark against would-be authoritarians. Even the strongest institutions must fall when they are not able to garner public support.

Where does that leave us today? What is the most important takeaway from the ruling, and how do we chart a path forward where everything constitutional that was dear to us post-1989 lawyers is crumbling down? These are important questions that do not lend themselves to definite answers.

If one truly wishes to understand the constitutional evil and read through the constitutional tragedy hidden in the abortion ruling, one must move beyond a tedious paragraph-by-paragraph interpretation of what the fake court said and how it framed its 'arguments'. We need a much

longer temporal perspective, which combines the past and present and investigates the future. Make no mistake; the ruling, no matter how malicious and devastating its message is, forms only a part of the systemic, sophisticated and relentless warfare against the Constitution and all the values that this Constitution represents. What is on the line is tolerance, openness, liberty and a culture of constraint. The ruling imposes an absolutist vision of a society ruled by one correct set of pre-ordained virtues while excluding all others. It rejects a balancing of competing visions of the good life – a concept that has been inherent in the scheme and the spirit of the still current 1997 Constitution.

The ruling stands for the ultimate abuse of judicial power. It is, at the same time, tantamount to the dereliction of the most fundamental judicial virtues of integrity, modesty and institutional self-awareness. With one stroke of the pen, it has destroyed the delicate status quo on abortion that had been in operation since 1997. It has further divided and antagonised society. Martin Shapiro has argued that the core of incremental doctrine is respect for the status quo and movement from the status quo only in short, marginal steps, carefully designed to allow for further modifications in the light of further developments. Incrementalism is a theory of freedom and limitation.<sup>151</sup> For him:<sup>152</sup>

Successful constitutional courts turn constitutions into constitutional law; that is they convert a text enacted at a given historical moment into a continuous, collective stream of case law. In this way they turn general political discourse into specifically one in which judges and their fellow lawyers are the most authoritative speakers. Where we observe a court clothed in constitutional law that it continues to stitch as it moves along, we know that we are watching a successful constitutional court.

The ruling does the opposite. It is an example of legalised cruelty where the Constitution is turned into a blunt sword wielded by unhinged zealots dressed in gowns; as such, it is extremely dangerous. In a normal world, views like those professed by the persons sitting on the bench and deciding the case at best would be brushed aside as populist charlatanism lacking in basic virtues of decency, honesty and professionalism: another set of slick metaphors to steer and channel the emotions of all those who protect life at all costs. However, such an approach has no place in the court that decides the fates and lives of thousands who are subject to its power. It is dangerous because it transforms painful yet innocuous utterances into commands of law, backed by the power of the court and dressed in all its judicial paraphernalia.

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<sup>151</sup> Martin Shapiro, 'Stability and Change in Judicial Decision-Making: Incrementalism or Stare Decisis' (1965) 2 *Law in Transition Quarterly* 134, 156–57. For Shapiro a system of incremental policymaking is characterised by many small, and therefore low, visibility decisions, by adherence to the status quo until a strong need for change is demonstrated, and by small changes when change occurs at all, followed by further small changes informed by feedback from previous changes. The combination of a very limited, immediate and practical impact on a few parties with doctrinal pronouncements of long-term precedential significance allows judicial review courts to introduce big long-term policy changes through a series of low-visibility events. Judicial review courts can nearly always choose the time and tempo of their case-by-case policy interventions so as at least to partially avoid finesse and obfuscate policy conflict with other politically powerful actors; see Martin Shapiro, 'European Court of Justice' in Paul Craig and Gráinne de Búrca (eds), *The Evolution of EU Law* (Oxford University Press 1998) 324.

<sup>152</sup> Shapiro 1998 (n 151) 326.



The legal fundamentalism that this ruling propounds and anchors is clearly visible in reversing the dominant European discourse on abortion. Even though abortion remains an exception and the right to life is the rule, the balancing of competing rights and values must always be present and remove the edges from the prohibition. The open question thus is not whether to balance, but rather what weight is to be attached to various rights and values in the process. The life of the unborn is at one end of the scale, and the legal sphere of the mother is placed at the other. The mother's sphere will depend on context and might range from life (here, the balancing would pit life against life) to dignity, health and other interests worthy of protection in the national-specific context. The life of the *nasciturus* trumps all other weighty constitutional rights, without even pretending that they matter in some way.

The ruling leaves women alone in facing dramatic situations and choices, often left at the mercy of doctors hiding behind faceless procedures. While the state expects women to be heroines, it does nothing to alleviate the unspeakable burdens that this ruling imposes on them. The ruling shows no respect for the suffering and alienation entailed by not allowing abortion in a case where 'prenatal tests or other medical premises indicate a high probability of a serious and irreversible impairment of the fetus or an incurable life-threatening illness of the fetus'.<sup>153</sup> In the case of an insoluble conflict of rights and values behind the embryo-pathological exception, the ruling is steeped in the partisan black-and-white world of 15 angry persons whose personal views are the driving force behind the ruling and its choices. Instead of framing and constraining the decision-making process, the constitutional provisions are mere decorum, and remain backstage. Constitutional benchmarks have been misconstrued and instrumentalised. As argued above, Article 38 in conjunction with Article 30 of the Constitution is not only inadequate for reviewing the embryo-pathological exception; it is also insufficient to describe the many shades of grey that the decision to abort in these extreme situations entails for women.

As a result, the ruling has annihilated the in-built axiology of the Constitution of 1997 anchored in tolerance, openness and inclusiveness.<sup>154</sup> In its place the ruling imposes an axiology that is alien to the text, the scheme and the spirit of the Constitution. The content is forcefully written into the text and the general spirit of the document. Even though the text and the spirit do not support such a transgression, there is little that can be done when the process of overriding the text and the spirit occurs with the direct and shameless backing of an organ that, in normal times, would be out there to guard the integrity of the constitutional document. As a result, the duality of the state is anchored in the duality of the Constitution and the duality of values, where the liberal values (*text* and *the spirit* of the document) are pitted against the illiberal values imposed by the sleight of unconstitutional hand and rubberstamping instead of judicial review. This, in turn, fits well into the ongoing humiliation of the 1997 Constitution that was rejected

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<sup>153</sup> As already noted, this embryo-pathological exception has even been misconstrued by the application and the motifs of the ruling, as both use the incorrect and stigmatising wording 'eugenic' (see point III.2.3 of the ruling (n 20)).

<sup>154</sup> See the excellent reconstruction offered by Ewa Łętowska in 'Peripheries of Europe' at n 144. For my own take see Tomasz Tadeusz Koncewicz, 'Understanding Polish Pacted (R)evolution(s) of 1989 and the Politics of Resentment of 2015–2018 and Beyond' (2019) 17(2) *International Journal of Constitutional Law* 1.

programmatically by the right-wing government.<sup>155</sup> As the ruling party was unable to muster a constitutional majority to amend the unwanted and non-Polish (as they claim) Constitution, it has been in the constant process of sidestepping the constitutional text, rejecting it or simply ignoring it altogether.<sup>156</sup>

This ruling clearly announces that, in Poland 2021 AD and beyond, we are well past the rule of crisis. Rather, we are dealing with unrelenting warfare against the Constitution.<sup>157</sup> The fake body masquerading as a court is playing a pivotal role in entrenching the new narrative that goes against everything that the 1997 Constitution holds dear. It has become guardian of the new anti-constitutional order and chief architect of the peripheral democracy as understood in this analysis. As a result, we have been watching a process of becoming an anti-constitution within the body of the Constitution. An anti-constitution under the watchful eye of the fake judges has an advantage: as sheer and unbound political power trumps the law, the latter has no choice but to succumb. The Constitution is defenceless, as those who are supposed to uphold it are *ex definitione* against it and do not treat it as their own. I am well aware of the paradox that results as the fake body, at least theoretically speaking, is functioning under the very Constitution it keeps humiliating and rejecting; the argument must be made, and questions must be asked whether this fake body betrayed the Constitution and is functioning *contra legem*.

The Constitution is being humiliated by an organ called upon to protect the very same document.<sup>158</sup> This is not hyperbole. All the limits and constraints have been breached and overstepped. Anything goes. This is what happens when political power is set free. The once inconceivable happens and becomes a new routine. With the relentless passage of time, this new unconstitutional life becomes our daily reality. The citizenry, living daily with the transgressions of the Constitution, becomes immune and insensitive. The destructive element of ‘taken for granted’ creeps in. Then it becomes apparent that this is the end of liberal democracy as we used to know it.

Finally, the abortion ruling under consideration, with all its evils and shortcomings, provides an opportune moment to revisit the perennial question of what makes a judge a good judge? Fidelity to the law, independence and impartiality all come to mind, of course, but our focus here should go beyond these basic attributes of judicial power, and this tragic ruling invites us to go one step further in this discussion.

<sup>155</sup> Also Wojciech Sadurski, ‘What makes Kaczyński Tick’, *IsCONnect*, 14 January 2016, <http://www.icconnectblog.com/2016/01/what-makes-kaczynski-tick>.

<sup>156</sup> Mirosław Wyrzykowski, ‘Antigone in Warsaw’ in Zubik (n 120) 370.

<sup>157</sup> Katarzyna Skrzydłowska-Kalukin, ‘Trwa wojna przeciw konstytucji’ [The War against the Constitution Rages On: Interview with Prof. Mirosław Wyrzykowski], *Kultura Liberalna*, 2 March 2021, <https://kulturaliberalna.pl/2021/03/02/trwa-wojna-przeciw-konstytucji>; Mirosław Wyrzykowski and Katarzyna Skrzydłowska-Kalukin, ‘W 2021 Konstytucja leży podarta na strzępy’ [In 2021 the Constitution Lies Down Shredded into Pieces], *Kultura Liberalna*, 9 March 2021, <https://kulturaliberalna.pl/2021/03/09/w-2021-konstytucja-lezy-podarta-na-strzepy>; Karolina Lewestam, ‘Mirosław Wyrzykowski: To nie kryzys, to wojna’, [It is not a Crisis: It is a War], <https://magazynpismo.pl/idee/rozmowa/miroslaw-wyrzykowski-to-nie-kryzys-to-wojna/?seo=pw>.

<sup>158</sup> For another instantiation of the abdication by the fake court of the duty to protect the Constitution see Łętowska and Biernat (n 13).

First, judges must always be aware of the political context in which they operate and which in the end will have an impact on how the jurisprudence will operate. The jurisprudence that misconstrues the context and fails to tailor its message to the environment will be short-lived. Again, as Martin Shapiro has rightly argued, '[i]n the realm of judicial behaviour, what judges say, what rules they announce and/or threaten to announce is often a more significant aspect of their behaviour than how they vote'.<sup>159</sup> The margin for error in highly sensitive and constitutional cases is thin. It takes a judicial diplomat indeed to draw the line judiciously, by which I mean without alienating the political environment.

Second, as argued above, judges must never stray too far from the consequences of their decisions. Given the ever-growing shadow of case law, this consideration is of the utmost importance. The consequentialist element in their reasoning must not only be determined by the here and now but, to an even more increasing extent, by what next. Good judges and their incremental policy-making must anticipate the future consequences of their rulings and the possible constellations in which they will be applied. This is not an easy task; it requires a combination of judicial diplomacy,<sup>160</sup> institutional awareness, political finesse and judicial self-restraint.

Finding a reasonable compromise and speaking to all those affected define a good judge.<sup>161</sup> A good judge listens, calibrates and contextualises. A good judge minimises possible adverse consequences of the ruling by trying to peel the sharpest edges off it. Instead, the abortion ruling offers a one-sided reconstruction of the constitutional benchmark against which it assesses the embryo-pathological exception. Instead of reconstructing constitutional norms on the basis of a systemic and holistic reading of all relevant constitutional provisions that should be considered in building the constitutional standard for assessing the constitutionality of the said exception, the ruling has opted in favour of a simplistic direct literal understanding of the textual provisions. Such an understanding was used as a vehicle to impose on the text the personal convictions of those deciding the case.<sup>162</sup>

For these reasons this ruling has posed, and continues to pose day in and day out, a challenge of calling things as they are, leaving a trace of academic decency in times of opportunism and easy truths, and explaining to the citizens where we are, how we arrived here and, possibly, pointing towards a way out. In the end, this might be the most important and long-lasting lesson to be drawn from the devastation of the Polish rule of law, one that might yield civic habits of the heart in the days to come. Not only do words matter, but so do our actions in response to constitutional oppression and humiliation. This is where the true challenge of using the abortion ruling as the focal point of resistance against the government comes to the fore.

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<sup>159</sup> Martin Shapiro, 'Can Judges Deliberate?', 29 April 2003, 3 (unpublished, on file with the author).

<sup>160</sup> Term adopted after Jean-Louis Delvolle, *Le pouvoir judiciaire et le Traité de Rome ou la diplomatie des juges* (1968) I *Juris-Classeur Périodique* 2184.

<sup>161</sup> Aharon Barak, *The Judge in a Democracy* (Princeton University Press 2006).

<sup>162</sup> Karolina Kocemba and Michał Stambulski, 'Divine Decision-Making: Right-Wing Constitutionalism in Poland', *VerfBlog*, 9 November 2020, <https://verfassungsblog.de/divine-decision-making>.

## 7. A NEW PROLOGUE? MOVING FORWARD

*If this is your land, where are your stories?*

J Edward Chamberlin<sup>163</sup>

While the crucial conceptual work of lawyers in defending the Constitution must continue, it is no longer sufficient in times like these. Much more is needed; no less a constitutional temperament and engagement on the ground that place us and our work in a more general context and explain what we do, and how, at the behavioural level. Looking through the prism of temperament invites questions about the necessary virtues that go beyond academic excellence. Such a behavioural aspect is clearly palpable in the evocative concept of constitutional fidelity, which is more than a duty and an obligation to observe the text. Fidelity should be painted with broader attitudinal brushes, as propounded by Jack Balkin. For him:<sup>164</sup>

Fidelity is not simply a matter of correspondence between an idea and a text, or a set of correct procedures for interpretation. Fidelity is not about texts; it is about selves. Fidelity is an orientation of a self towards something else, a relationship which is mediated through and often disguised by talk of texts, translations, correspondences and political philosophy. Fidelity is an attitude that we have towards something we attempt to understand; it is a discipline of self that is related to the discipline of a larger set of selves in a society.

How does it affect lawyers then, and academia in general? With the constitutional essentials of our respective legal systems on the line, lawyers (not only constitutionalists) must change and adapt their vocabulary and conceptual arsenal to better prepare for constitutional times when things do not go accordingly. There is important work to be done in the civic sphere, and everyone has a role to play. We must start translating a constitution for fellow citizens in the spirit of greater inclusion so as to make it *their* constitution. We must help to build a constitutional culture that will strengthen constitutional law and individual beliefs in the founding document. Sometimes, taking issue with the popular paranoid slogans of how the mythical ‘they’ steal from citizens, how those misfortunes are the result of worldwide conspiracies, how the elitist institutions plot against you and so on, will provide the critical voice and counter-narrative of common sense, reason and honest defence that our liberal democracy needs today. Saying nothing equals throwing in the towel and invites all these unchecked paranoias into the public discourse. We must stay vigilant and understand that each and every voice can ultimately bring about a change for better because, as Ovid put it, ‘the drop drills the rock not by force but by frequent falling’.<sup>165</sup>

<sup>163</sup> *If This Is Your Land, Where Are Your Stories? Finding Common Ground* (Vintage Canada 2010).

<sup>164</sup> Jack M Balkin, ‘Agreements with Hell and Other Objects of Our Faith’ (1997) 65 *Fordham Law Review* 1703, 1726.

<sup>165</sup> Ovid, *Epistulae ex Ponto IV*, 10, 5–6 (‘*Gutta cavat lapidem non vi, sed saepe cadendo*’).

The abortion ruling, in a sense, is the saddest and to date most dangerous manifestation of the incremental subjugation of judicial review. The last six years have been a real shock for those who believed that Polish democracy is a consolidated democracy, and that Poles are full citizens. If there is one thing that populist-authoritarian governments are afraid of, it is the ‘civic NO’. Lawyers have a special role to play here. If we truly want to give the rule of law a chance, we need to supplement the thus far dominant institutional thinking with the tedious and less spectacular process of building attachment to the state ruled by law that works for me and for its institutions, and nourishing respect for the *law with the human face* that first of all protects citizens. Shaping hearts is the greatest challenge of any democratic system and it must be treated as such in Poland. If the rebuild of the rule of law is to be effective this time, it must be carried out on more solid civic foundations. The problem, however, is that building habits of the heart is much harder than creating more institutions. It requires patience and lasts infinitely longer than a parliamentary night session, or the establishment of yet another anonymous and ‘perfect’ institution. As a result, if we are to talk about the beginning of something good, let us start ‘at the bottom’, from ourselves, here and now. Only then the good change anchored in citizen’s hearts will follow.<sup>166</sup>

Times for cosy writing, academic hair splitting, and comfortable lecturing and preaching to the converted have long passed. We should wake up to this new reality and change our ways of doing things and explaining the world. We must understand that all too often the law of the twenty-first century not only *protects* and is used in the service of good causes; law is also prone to *abuse* and *manipulation*. It masks and legitimises anti-constitutional practices and hides the true malicious intents that drive the minds of smart legalistic autocrats.<sup>167</sup> Law in their hands creates a veneer of legitimacy. We must be able to see through this, alert our fellow citizens to the new dangers, and educate them. We must show solidarity and practise active empathy towards our colleagues who are persecuted. Saying nothing when something should be said is tantamount to tacit consent. Such a symbolic resistance by speaking up is crucial for building a societal agreement on what constitutes a violation and for explaining to the citizens what *the law*, rather than the skewed interpretation imposed on the public discourse by the new authoritarians, really mandates. It will leave a trail of symbolic resistance that will serve as a signpost to look for and guide us in better constitutional days. Nobody will do it for us, and silence will always equal giving up. *Non possumus* is simply no longer an option and looking the other way only emboldens the other side.

Again, the concept of fidelity perfectly captures these behavioural challenges and should define our frame of reference as:<sup>168</sup>

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<sup>166</sup> On this painstaking process and its vital importance see in detail Tomasz Tadeusz Koncewicz, ‘Polish Counter-Revolution 2015–2019 and Beyond: Of Constitutional Designs, Regime Trajectories, Institutions and Constitutional Fidelities’ in Oliver Lepsius and others (eds), *Jahrbuch des öffentlichen Rechts der Gegenwart*, vol 68 (Mohr Siebeck 2020) 641.

<sup>167</sup> Balkin (n 164).

<sup>168</sup> *ibid.*

Fidelity is a sort of servitude, a servitude that we gladly enter into in order to understand the Constitution. To become the faithful servants of the Constitution we must talk and think in terms of it; we must think constitutional thoughts, we must speak a constitutional language. And to think and talk, and focus our attention on the Constitution, to be faithful to it, and not to some other thing, we must bolt the doors, shut out the lights, block the entrances. Fidelity is servitude indeed. But this servitude is not so much something the Constitution does to us as something we do to ourselves in order to be faithful to it.

Finally, for all the bleak assessment that this analysis has presented, a hint of optimism is in place here as we try to chart our way forward in the social reality devastated by the unconstitutional capture and its most prominent manifestation – the abortion ruling.

### 7.1. A GOOD CONSTITUTION AND THE HABITS OF THE HEART

Constitutionalism is about limited government, limiting and controlling state power by legal means. A good constitution not only empowers, but also delimits and sets down the boundaries within which power is to be exercised – all underpinned by the most crucial assumption of a higher law to which all other laws must conform. This is the formal element, which then translates into the substantive aspect defined, in turn, by human rights, minority rights and judicial independence. While *democracy* tells the story of how to gain political power and implement the political agenda, *constitutionalism* puts a premium on learning how to govern in the culture of limited government, restraint, and responsibility for the common good.

Yet, to become a democratic state based on the rule of law, it is not enough to adopt a modern constitution and establish strong institutions. Strong liberal narratives must be fostered at the same time, and habits of the heart built in step with the growth of the institutional design. A good constitution tells the story of the people, provides a generational bridge between the past, the present and the future, and ultimately builds adherence to a constitution as the supreme law of the land (normative level) and, most importantly, in people's deeds and minds.

Polish society is a case in point here. Sixty years of communism and, before that, 123 years of partition and living without the independent state have left an indelible scar on our public consciousness: painfully disengaged, passive, and with a very low political and constitutional culture. What is thus needed this time is building the context in which the Constitution should be applied and allowed to thrive. This context would rely on getting citizens on board the bottom-up constitutional design, showing them how the institutions work, explaining the importance of the independence of the judiciary and the rule of law, how the Constitution matters in their daily lives, explaining the importance of civic activity and engagement in defending constitutional essentials. This is crucial because even the strongest institutions must crumble when they are not backed by popular support and understanding why they matter in the first place. Only then will we be able to stave off future attempts to capture the state and the top-down imposition on citizens of the one and only correct vision of the good life. Citizenry that is informed and

active will scuttle such attempts. With the abortion ruling and the massive mobilisation and resistance that we have seen, we might now be witnessing the slow awakening of the Polish citizenry.

## 7.2. THE CONSTITUTION AS AN ASPIRATION

The commitments we owe to a constitutional document are anchored in the past, developed and refined in the present, and carried over into the future. This is so because a constitutional document has its past, present and future. These three temporal dimensions are linked by the rationale of the underlying principles of values. Principles and values that make up the constitutional identity must be interpreted so as to ensure both the continuity of the messages contained therein and their durability. What is needed is compromise and equilibrium between necessary change that embraces *the New* and the stability that caters for *the Tradition*. The latter enables us to move forward and set our gaze on the future while not forgetting about the past and about the places we come from. In other words, constitutional interpretation must strive both for the conservative (preserving the values) and the reformative (reading these in the light of ever-changing circumstances). The future will then emerge at the intersection of both dimensions: looking back and staying in the present. Temporal understanding underscores the aspirational function of a constitutional document. It aspires to reflect ‘us’ in the best, and not perfect, way. It aspires to capture this reflection; yet it will never achieve this goal in a definite and final way, as ‘we’ not only change and evolve along with the document, but also are always constrained by the baggage of the past.

## 7.3. THE CONSTITUTION AS PACTING

Never-ending meandering between the past and the backward-looking, and the future with its forward looking, is a matter of constitutional reflection and politics. Such pacting must be undertaken by each generation, which has its own distinctive role to play in spelling out what the constitutional pact mandates today. Constitutional fidelity underpins this process and arises at the interstices between practice, text, interpretation and culture. It is in this sense that constitutional fidelity is about generational reading of the document. It is not about uncritical iconoclasm; it is about pragmatic recognition that our constitutional allegiances are shaped, reshaped and re-examined as we move forward, and as the world around the constitution changes and fluctuates. There is no place for fear of failure because failure is part of fidelity, as no constitution is perfect. Fidelity is about the journey and the process, rather than the means of transport and the destination. The past must be the key to the future, but not only that. Each generation should build on the best of the past and move forward with this baggage. The constitutional pacting is at its best when people (not only lawyers!) see themselves as part of the process that the Constitution embodies from nation building through nation discovery to nation sustaining and growth. Fidelity is not about logic, but first of all is about a sense of belonging, emotions, tradition and history. Only a combination of these factors is able to define the contours and, finally,



the durability of our fidelity to the Constitution, and provide an opportunity to move forward as a nation of all, and not simply the chosen ones.

True constitutional fidelity never comes down as a blessing from the powers that be, but is born and thrives always in peoples' hearts. Our fidelity to the Constitution should be an expression of loyalty to the great moments of our history and the past, which is marked by a plurality of voices and respect for the Other in the best Polish tradition of openness and tolerance. The 1997 Constitution is only part of this tradition. The rule of law, democracy, freedoms and rights, a functioning system of judicial protection, a constitutional court with a strong record of human rights protection and rule of law, are all built on the tradition of limited government, separation of powers, centrality of the individual and respect for the self-imposed rules that had been a staple of Polish constitutional narrative and on which the Polish Constitution now builds. Constitutions need constitutional and political culture to thrive.<sup>169</sup>

#### 7.4. THE CONSTITUTION AS CONTEXT

A good constitution not only engages with pacting and aspiration; it must also be present via constitutional context. A good constitution obtains when it helps to build a constitutional context; when the document is applied and able to enforce its primacy against the whimsical politics of the day; when people see that their rights and freedoms are real and effective (context), and not merely illusory (text). Then and only then will people be able to stand up and defend such an instrument and the institutions that help to translate it into their daily lives. The Constitution becomes internalised in the hearts and minds of the citizenry and with such internalisation receives its best safeguard against transient governments and parliaments. When the constitutional order comes crashing down, popular support could provide a critical emergency mechanism to prevent the destruction of the order: popular support as a constitution becomes 'my Constitution', and an institution becomes 'my institution'.

Democracy thrives on many voices and a constitution is a reflection of this multiplicity. Civic society is not there yet. The strongest institutions must fall when the citizenry does not understand why the institutions are important in the first place. As important as studying regimes is, it needs to go hand in hand with the study of the attitudes of those who are subject to a democratic rule: their habits of the heart.<sup>170</sup> How do they respond to democracy? How do they define it? How do they internalise democratic values? These are only a few questions that merit close attention. There is no democracy without democrats, and democracy on the periphery provides an example of a regime in which the hybridity of the regime is reinforced by the ambivalent incoherence of the individuals who struggle to internalise the rules of a democratic game (inclusion, tolerance, respect for the 'Other' constitutional culture). All these define the weaknesses of post-

<sup>169</sup> Tomasz Tadeusz Koncewicz, '22 Years of Polish Constitution: Of Lessons not Learnt, Opportunities Missed, and Challenges still to be Met', *VerfBlog*, 19 April 2019, <https://verfassungsblog.de/22-years-of-polish-constitution-of-lessons-not-learnt-opportunities-missed-and-challenges-still-to-be-met>.

<sup>170</sup> Tomasz Tadeusz Koncewicz, "'A Good Constitution" and the Habits of Heart', *VerfBlog*, 30 December 2017, <https://verfassungsblog.de/a-good-constitution-and-the-habits-of-heart>.

communist civil society and, in turn, affect the very essence of democratic rule. Constitutions could create democracies after a non-democratic period and the quality of that democracy indeed depends on the quality of its law. However, the law alone is not sufficient to build a stable democracy; faith in the law is shaken when democracy can no longer deliver economic and material prosperity, and the rule of law and democracy as culture and behaviour are never internalised at the behavioural level.

A dominant theme of this analysis was to argue that the abortion ruling must be read against the background circumstances which shaped the political and legal reality in Poland after 2015. This ruling poses the uneasy question of ‘what’s next’, one that goes beyond the here and now. Should we give in to the most immediate temptation and go after those who have destroyed the rule of law or, rather, should we be gracious and show the noble face of the law? I have no doubt that it is the latter, as the former would make us no better than those whom we criticise. The ends do not justify the means. It is the law that limits what we can do, and it is always the law and the Constitution that must frame our response. Yet, we must not be over-indulgent when it comes to the measures intended to rebuild the institutions and the rule of law. We must build a momentum for the second constitutional moment that will help to improve constitutional safeguards against the excesses of any majority. Such a constitutional and bipartisan compromise is essential, yet insufficient.

What is needed this time is to build the context in which the Constitution should be applied and able to thrive. This context would rely on involving citizens with the bottom-up constitutional design and showing them how the institutions work, explaining the importance of the independence of the judiciary and the rule of law, how the Constitution affects their daily lives, and the importance of civic activity and engagement in defending constitutional essentials. When text helps to build the context, when the document is applied and able to enforce its primacy against the whimsical politics of the day, when people see that their rights and freedoms are real and effective (context) and not merely illusory (text), then and only then will they be able to stand up and defend such an instrument and the institutions that help to translate it into their daily lives. The Constitution becomes internalised in the hearts and minds of the citizenry and with such internalisation receives its best safeguard against transient governments and parliaments.

The Constitution is well designed to ensure stable democracy when the elites project meets and is enforced by what Steven Levitsky and Daniel Ziblatt<sup>171</sup> call ‘strong informal norms’ and practices that prevent democracies from self-destructing. A constitution is good for citizens not because it promises the moon or engages with an unlimited social give-away strategy (this, by the way, was an underlying assumption of communist paper constitutions that promised much yet never delivered). A good constitution protects citizens against the arbitrariness of the authorities and guarantees respect for human rights. A constitution is good when it is applied by ordinary courts in individual cases and is successful in enforcing its superiority. As Joseph Raz reminds

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<sup>171</sup> Levitsky and Ziblatt (n 133).

us, '[g]overnments are denied authority either to act in order to promote any conception of good life, or to act in a way that promotes one version of the good life more than other'.<sup>172</sup>

### 7.5. 'KONS-TY-TUC-JA': 'TY I JA' / 'YOU AND ME'

The evocative poster that became a symbol of mass protest in Poland in July 2017 in defence of the independent judiciary, and was then adopted as the pro-constitutional manifesto in the mass protests, read 'KONS-TY-TUC-JA' where 'TY' stands in Polish for 'YOU' and 'JA' for 'ME'.<sup>173</sup> The poster conveys a crucial message, which both puts the abortion ruling in its broader constitutional context and helps in better understanding the challenges ahead.

This analysis has argued that in the trajectory of constitutional developments in Poland, the abortion ruling must be seen as much more than just about a specific case. Rather, this one case has focused on the snowballing abuse of judicial review and connected all the dots of the anti-constitutional capture. The fake institution has accepted its new role to act as an extension of the will of Parliament. The only rationale for its existence is to minimise uncertainty and deliver decisions that are swift and predictable from the perspective of the political majority, irrespective of the social consequences. The fake court, in tandem with the Ministry of Justice and zealous and compliant members of Parliament, has become the chief architect of the effective political image. The most ominous constitutional lesson from Poland is that judicial institutions do indeed become increasingly relevant to political life in authoritarian politics. The ruling party does not need an independent court because it clearly does not contemplate becoming a minority in the near future. Yet, it is not just a facade institution but rather plays a crucial role in the overall scheme of the captured state. It has become its most important guarantor. This is the most enduring legacy of this ruling.

The abortion ruling shows that the fake court is now gripped by and fully at the service of political justice.<sup>174</sup> It is the chief guardian of the entrenchment of political power. Also, with the currently pending constitutional challenge against the constitutional essentials of the EU legal system, 2022 is already shaping to become a continuation of these dark dynamics and processes.<sup>175</sup> When all is said and done, though, one thing is beyond doubt. In order to restore the rule of law,<sup>176</sup> Poland will need a new constitutional court built from scratch. With the arrival (hopefully) of better constitutional days, it must be the first order of the new constitutional design

<sup>172</sup> Joseph Raz, *The Authority of Law* (Oxford University Press 1979) 216–18.

<sup>173</sup> For a graphic presentation of the poster see 'W warszawskim metrze pojawiły się ogromne napisy "konstytucja": "Zhakowaliśmy metro"', *Metro Warszawa*, 23 July 2017, <https://metrowarszawa.gazeta.pl/metrowarszawa/7,141637,22136667,w-warszawskim-metrze-pojawily-sie-ogromne-napisy-konstytucja.html>.

<sup>174</sup> See analysis at Section 4 and, more recently, Tomasz Tadeusz Koncewicz, 'De la Justice Constitutionnelle à la Justice Politique' (2020) 79 *Revue des droits et libertes fondamentaux*, No 79, <http://www.revuedlf.com/droit-fondamental/dossier/de-la-justice-constitutionnelle-a-la-justice-politique-quest-ce-que-les-polonais-ont-perdu-en-2015-et-quant-ils-obtenu-en-retour>.

<sup>175</sup> On this see Koncewicz, 'Capturing the State, Part I' (n 28).

<sup>176</sup> For the road map see the contributions in Tomasz Zalaśiński (ed), 'Jak przywrócić państwo prawa?' ['How to Restore the Rule of Law?'], Fundacja im Stefana Batorego, Forum Idei, 2019, [https://www.batory.org.pl/wp-content/uploads/2020/02/Jak-przywrocic-panstwo-prawa\\_Interaktywna.pdf](https://www.batory.org.pl/wp-content/uploads/2020/02/Jak-przywrocic-panstwo-prawa_Interaktywna.pdf).

for Poland. This is the most important constitutional and civic takeaway from the abortion ruling as well as a signpost for the future.

Shapiro's words keep reverberating: 'When constitutional courts enjoy great success, their success rubs off on all lawyers and all courts. When they are under attack, all courts and lawyers are under attack'.<sup>177</sup> The rights courts are there to tell the majority that 'sometimes, at least, it cannot have what it wants'.<sup>178</sup> In these dark days we must always remember the old Polish Constitutional Court and the liberal foundations that it had laid for almost 30 years of its existence. More crucially, accepting the current constitutional oppression will carry the risk of losing the rule of law in Poland for good. We must always speak up for the Constitution of 1997. Despite the many attempts to humiliate the constitutional document, it is still a constitution of open society. It gives voice to everyone and manages the omnipresent conflict that defines divided societies like the Polish. It has survived because it is based on a compromise among competing world views and invites all to join in the journey. As with all human creatures, it is not flawless and should never aspire to be such. Maybe it is even better than we Poles and applies a certain idealism to the description. Yet, despite this over-idealistic narrative, one should always side with the instrument of hope and inclusiveness, and not the document of fear,<sup>179</sup> exclusion and distrust. As such, it deserves to be defended and explained to the citizenry as we move forward. It is simply a good constitution. 'We, the citizens' *must never* let the majority of the day tell us that it is any different. Whether there are strong enough citizens in 'We' remains an open question.

Indeed, the survival of our 1997 Constitution of hope now depends exclusively on 'ME' and 'YOU'. For those of us who care about constitutions, culture of limitations, good and decent government, and are ready to speak up in defence of these constitutional virtues, the days of true constitutional reckoning have indeed arrived.

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<sup>177</sup> Shapiro (n 87) 21.

<sup>178</sup> *ibid* 24.

<sup>179</sup> Tomasz Tadeusz Koncewicz, 'A Constitution of Fear', *VerfBlog*, 16 November 2017, <https://verfassungsblog.de/a-constitution-of-fear>