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CONSTITUTIONAL COURT AND THE CONSTITUTIONAL CRISIS IN POLAND

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Sumary. Poland, which along with Hungary, used to be regarded as the leading example of a successful transition to democracy, is now experiencing (along with Hungary) processes of the so-called "illiberal backsliding". As, unlike in Hungary, the new parliamentary majority is too weak to control constitutional amendments, the process of changes is developing "next" to the principles and rules of the 1997 Constitution of Poland. This paper is focused on the presentation of the consecutive stages of the political absorption of the Court in 2015-2016 (I). It further considers the situation of the "new" Court in its post-2016 form (II), the main streams of criticism of the reform (III), the changes in the situation of the remaining segments of the judicial branch (IV), the reactions of the CJEU and ECtHR (V), and ends with few concluding remarks (VI).

Keywords: Constitutional Court; "illiberal backsliding"; rule of law; Constitution of Poland.

Trybunał Konstytucyjny i kryzys konstytucyjny w Polsce. Polska, która wraz z Węgrami była kiedyś uważana za wzorowy przykład transformacji ustrojowej, przeżywa obecnie (wraz z Węgrami) procesy tzw. „nieliberalnego odstępstwa". W przeciwieństwie do Węgier, nowa większość parlamentarna jest zbyt słaba, aby wprowadzić zmiany konstytucyjne, z tego względu zmiany ustrojowe postępują „obok" obowiązujących

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zasad i przepisów Konstytucji RP z 1997 r. Niniejszy artykuł ma na celu prezentację kolejnych etapów absorpcji politycznej Trybunału Konstytucyjnego w latach 2015–2016 (I). Autorka poddaje ponadto analizie status „nowego” Trybunału po 2016 r. (II), wskazuje główne argumenty krytyków reformy (III), analizuje zmiany dotyczące pozostałych segmentów sądownictwa (IV) oraz reakcje TSUE i ETPC (V). Artykuł wieńczą uwagi końcowe(VI).

Keywords: Trybunał Konstytucyjny; „nieliberalne odstępstwo”; praworządność; Konstytucja RP.

1. Poland was one of the first Central-European countries which decided to establish a constitutional court. The Court, in its first version, was created still under the Communist rule and began its operation in 1986. Although, the Court commenced its activity in a not very promising political environment, the ensuing disintegration of the Communist system, left the Court with a sufficient space for an autonomous action. In effect, the Court managed to build some authority already in the initial period of its existence (1986-1989) [2]. The Round Table agreement of March 1989 and the parliamentary elections in June 1989 marked the beginning of the transition period, soon entrenched in the constitutional amendment of 1989. While the original limitations of jurisdiction and powers of the Court remained in place[3], the new political environment allowed the Court to operate in an independent manner. On top of it, the delays in the drafting of the new constitution created a complicated situation where the legislative reforms clashed with concepts and principles of the 1952 Constitution[4]. This prompted the Court to develop quite activist line of jurisprudence,

[2] See, among many other publications, L. Garlicki, Constitutional Court in Poland. 1986- 2009, [in:] The Political Origins of Constitutional Courts, P. Pasquino, F. Billi (eds.), Rome 2009, pp. 13-39; L. Garlicki, M. Derlatka, Constitutional Court of Poland – 1996-2018, Development of Constitutional Law trough constitutional justice: Landmark decisions and their impact on constitutional culture XXth International Congress on European and Comparative Constitutional Law, Gdańsk 20-23 September 2018, editors: R. Arnold, A. Rytel-Warzocha, A.Szmyt.

[3] In particular, Court's judgments declaring unconstitutionality of statutes of parliament could be overridden by the Sejm (the first chamber of the parliament) by a two-thirds majority (which equaled the majority required for adoption of constitutional amendments). See: L. Garlicki, Das Ver-fassungsgericht und das Parlament (die Zurückweisung von Entscheidungen des polnischen VfGH durch den Sejm), [in:] Kontinuität und Neubeginn. Staat und Recht in Europa zu begin des 21. Jahrhunderts (Festschrift für Georg Brunner), Baden-Baden 2001

[4] Constitutional amendments adopted in April and December 1989 and – later – in October 1992, introduced a new catalogue of the "general principles" (i.a. the principle of the Rechtstaat) and revised most of the institutional arrangements of the State machinery, but left intact most provisions on fundamental rights and on constitutional guarantees. This created a "constitutional patchwork" and enciuraged a very creative interpretation of the old constitutional provisions.

based – to a considerable extent – on the interpretation of the newly introduced "Rechtstaat-clause".

It was only under the new Constitution, adopted on 17 October 1997, when the Court was given full jurisdiction and power to annul unconstitutional legislative acts. Also in 1997, the new Constitutional Court Act came into force. The Court, in its organization and jurisdiction, followed the "classic" Kelsenian pattern and several new arrangements were inspired by the German and Spanish model of constitutional adjudication.

Under the terms of the Act of 1997, the Constitutional Court operated, quite successfully, until 2015, thus, for the greater part of its history. The Act of 1997 was replaced by the Act of June 25, 2015. This Act did not introduce/provided for modifications of a fundamental character and did not change the previous practice of the Constitutional Court.

The situation changed in the autumn of 2015, when - after a double success in the presidential and parliamentary elections – the Law and Justice Party (the "PiS") came to power. The PiS-supported candidate won the office of the President of the Republic of Poland and the Party managed to obtain, majority in both houses of the parliament (the Sejm and the Senate). This provided the PiS with independent control over the composition of the cabinet (the Council of Ministers). However, unlike in Hungary, the PiS did not manage to obtain the majority required for adopting constitutional amendments.

The new majority initiated a wide process of changes, among others striving to take control over other institutions, which – under the Constitution were meant to remain separated from the current parliamentary majority. It affected, in the first place, public radio and television, civil service, prosecutor office and, later, the judiciary. Since it was doubtful whether these legislative initiatives were compliant with the constitution, the government had to reckon with the possibility of their annulment by the Constitutional Court.

From the very beginning, a crisis emerged between the ruling party and the Constitutional Court, which was continuing throughout 2016 and developed in four subsequent phases[5].

In the first stage, the conflict was focused on the composition of the Constitutional Court. In November and December 2015, the term of office of 5 judges

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[5] See e.g. L. Garlicki, Constitutional Court and Politics. The Polish Crisis, [in:] Judicial Power. How Constitutional Courts Affect Political Transformations, Ch. Landfried (ed.), Cambridge 2019, p. 141-162 and M. Ziółkowski, Constitutional Moment and the Polish Constitutional Court 2015-2018 (a few Critical Remarks), Przeglad Konstytucyjny 2018, no. 4, p. 76-106 with further references

ended[6]. The Sejm of the retiring term, in the last weeks of its existence, elected all 5 judges despite the fact that the term of office of three of them expired on November 6, and the term of office of further two judges expired, respectively on December 2 and 8. Thus, the end of the term of office of the three judges of the Constitutional Court fell two days before the end of the term of the "old" Sejm, and the other two judges - during the term of "new" Sejm.

The new majority accused the outgoing Sejm of trying to "pack the Court". At the same time, however, actions were taken that were not in harmony with the constitutional provisions. In the first step, the President of the Republic of Poland refused to take an oath from all the newly elected judges, which made it impossible for them to take up their office. Although in parallel the admissibility of such a selection of judges was questioned before the Constitutional Court, the new Sejm did not wait for the decision, scheduled for December 3, 2015. The day before, the new Sejm adopted a resolution repealing the choice of previous five judges and elected five other judges, and the President of the Republic of Poland immediately took an oath from them.

In turn, the Constitutional Court, in a judgement of December 3, 2015, ruled that from judges of the Court should be elected by the Sejm of this term during which the post of judge of the Constitutional Court is vacated[7]. Thus, the election of a judge of the Constitutional Court can't be made in advance in relation to the judges' positions, which will be released only during the term of the next Sejm. This meant that there were no obstacles for the choice of two judges by the new parliament, at the same time, there was no legal basis to question the validity of the election of three judges by the previous parliament.

However, this judgment did not change the position of the new majority. This created a "personal crisis", because the status of only 12 judges became indisputable (ten elected before 2015 and two elected by the new Sejm), while there was a discrepancy in respect of other three positions posts of judges. The President of the Republic of Poland and parliament continued to recognize the validity of election of all five "new" judges. However, the President of the Constitutional Court decided that since the Sejm could select the judges for seats vacated before the end of his term, the President of the Republic of Poland was

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[6] It should be noted that the judges of the Polish Constitutional Court are elected by the Sejm, by an absolute majority of votes, for a nine-year term.

[7] See Judgement of December 3, 2015, K34/15, point 6.16. For the English translation, see: http://trybunal.gov.pl/en/hearings/judgments/art/8748-ustawa-o-trybunale-konstytucyjnym (05/12/2017). See also T. Koncewicz, Of institutions, democracy, constitutional self-defence and the rule of law. The judgments of the Polish Constitutional Court in cases K 34/15, K 35/15 and beyond, Common Market Law Review 2016, vol. 53, pp. 1753-1791.

required to take the oath from elected by the "old" Sejm. Thus, there is no reason to consider that the election of three judges by the new Sejm has resulted in a legal effect. Accordingly, the President of the Constitutional Court refused to allow these judges (colloquially known as "double judges") to adjudicate or participate in the General Assembly of the Constitutional Court. The result was that only 12 judges had an unchallenged status, which opened the field for the next stage of the crisis.

This stage consisted of attempts to change the Constitutional Court's procedure and organization. The Act of December 22, 2015 (the so-called December amendment)[8] introduced significant changes to the Constitutional Court Act of June 25, 2015. First of all, the list of matters where review of constitutionality had to be conducted by the plenary composition of the Constitutional Court review has been considerably extended[9]. At the same time, a requirement has been introduced that the full composition may adjudicate only in the presence of at least 13 judges), and the judgement requires a 2/3 majority of votes[10]. A novelty that was supposed to accelerate adjudication, and in fact extended the time limits for the proceedings was the requirement that cases had to be decided in the sequence of their receipt. The implementation of these changes in practice would paralyze the adjudicative capacity of the Court[11]. Since only 12 indisputable judges were members of the Constitutional Court, it would not be possible to rule in any of the cases which require the full composition of the Constitutional Court.

The constitutionality of the December amendment has been questioned before the Constitutional Court, but a preliminary procedural problem has arisen right away. Since the provisions of this amendment were immediately binding, it was pointed out that the Constitutional Court must apply them in the adjudication of this case. In practice, this meant that the Constitutional Court would not be able to hear the case unless three "double judges" were allowed to sit on this a case.

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[8] See. Act of December 22, 2015 amending the Constitutional Court Act (Dz.U. 2015, poz. 2217). The amendment came into force on the day of the announcement - without the period of vacatio legis.

[9] Polish procedure of constitutional review has always provided that less important cases were decided by compositions of five judges and only the most important cases had to be decided by the plenary composition with the participation of at least ten (out of fifteen) judges.

[10] On the voluntary nature of the composition of the Constitutional Court see M. Wyrzykowski, „Wrogie przejęcie" porządku konstytucyjnego, [in:] Wyzwania dla ochrony konkurencji i regulacji rynku. Księga jubileuszowa dedykowana Profesorowi Tadeuszowi Skocznemu, p. 838.

[11] See L. Garlicki, Constitutional Court and Politics..., p. 148.

Such an interpretation did not find acceptance by the Constitutional Court[12], which - by a judgement of March 9, 2016 - considered that - even if the December amendment entered into force, it can't constitute grounds for ruling in this particular case. The Constitution does not allow the basis for ruling to be the same provisions as are subject to control in a given case[13]. This allowed the Constitutional Court to recognize the case directly on the basis of the provisions of the Constitution, omitting the provisions contained in the Act December Amendment.

When it comes to the merits, the judgement of March 9 stated the unconstitutionality of the December amendment. First of all, the Constitutional Court decided that the amendment was adopted in violation of constitutional provisions on the legislative procedure, thus it is procedurally inconsistent with the Constitution. Secondly, the Constitutional Court examined the content of the most important provisions of this amendment and found their non-compliance with the provisions of the constitution regarding the principle of division of powers, independence of the judicial authority and the judicial review procedure. Finally, regarding the effects of the Constitutional Court's judgement, the unconstitutional provisions immediately lose the presumption of constitutionality, all effects of the December amendment are canceled and the original version of the Constitutional Court Act of June 25, 2015 was restored. The Constitutional Court's judgment found its approval in the opinion of the Venice Commission published two days later and addressing the changes in the constitutional review in Poland[14].

In reaction to the judgment of the Constitutional Court, the Prime Minister refused to publish it in the Journal of Laws. It was argued that since the judgement was issued without the observation of procedural rules provided in the December amendment, it is devoided of legal effect. This position of the Prime Minister has opened another dimension of the crisis. In addition to the continuing conflict regarding the composition of the Constitutional Court, there was a conflict regarding the legal framework for adjudicating by the Constitutional

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[12] See Judgement of the Constitutional Court of March 9, 2016, K 35/15, OTK-A 2016, pos. 2. The judgment K 47/15 (as well as the later judgment K 39/16) was published only in the Official Collection of Judgments and Decisions compiled by the Constitutional Court. However, in spring of 2017, the new leadership of the Court decided, in a quite unprecedented manner, to remove both judgments from the Official Collection and to delete their English-language versions from the site of the Court. Nevertheless, the English version of both judgments is available on: http://konstytucyjny.pl/nieopublikowane-wyroki-tk-w-wersji-angielskiej.

[13] See P. Radziewicz, Pominięcie przez TK ustawy określającej tryb kontroli konstytucyjności prawa, Państwo i Prawo 2016, no. 10.

[14] Opinion on Amendments to the Act of June 2015 on the Constitutional Court, 11–12.03.2016 r., CDL-AD (2016)001).

Court, also in subsequent cases. The government (with the support of the parliamentary majority) believed that the December amendment was still in force, and the Constitutional Court believed that the procedure set out in the original provisions of the Act of June 2015 had been restored. Appropriately, subsequent cases were considered under the original Act of June 2015 and the Prime Minister refused to recognize and to publish these judgements.

This raised the question of the legal consequences of issuing a judgement stating that an act is incompliant with the Constitution and announced by the Constitutional Court but not subsequently published in the Journal of Laws. In particular, a problem occurred as to whether other courts could apply the Constitutional Court's judgments as of the moment of their announcement by the Constitutional Court, even though they were not published in the Journal of Laws[15]. The position of the doctrine and the judges was clearly in favor of possibility to apply the judgements from the moment they were announced by the Constitutional Court. It was considered that the moment of issuing the judgement on the unconstitutionality of a legal provision deprives this provision of the "presumption of constitutionality". This meant that the courts may refuse to apply the provisions deemed unconstitutional from the moment the judgment was issued by the Constitutional Court.

The third stage of the crisis started with a second attempt to reform the Constitutional Court procedure. The Act of July 22, 2016[16] repealed the Act of June 2015 and adopted a new regulation of all matters regarding the organization and procedure of the Constitutional Court. As it was easy to predict, the new law repeated the procedural considerations foreseen in the December amendment, adding new ones - such as excluding the possibility of holding a hearing without the General Prosecutor's participation, the possibility of referring each case to a full composition of the Constitutional Court upon request of a group of 3 or 4 judges, as well as new rules for the election of the president and vice-president of the Constitutional Court. All these changes would prevent independent adjudication.

By virtue of the judgement of August 11, 2016, the Constitutional Court stated the unconstitutionality of almost all of the examined provisions[17]. Similar-

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[15] See L. Garlicki, Przegląd orzecznictwa Trybunału Konstytucyjnego za 2015 r., Przegląd Sądowy 2016, no 7-8, pp. 189 and M. Florczak-Wątor, O skutkach prawnych nieopublikowanego orzeczenia Trybunału Konstytucyjnego. Rozważania na tle oczekującego na publikację wyroku z 9.03.2016 r., Przegląd Sądowy 2016 r., no. 10, see also The Resolution of the General Assembly of the Supreme Court of April 26, 2016 and The Resolution of the College of the Supreme Administrative Court of April 27, 2016.

[16] See Journal of Law pos. 1157 with amendments.

[17] See The Judgement of the Constitutional Court of August 11, 2016, K 39/16. The judge-

ly as before, the Prime Minister refused to publish the judgement in the Journal of Laws, arguing that it was issued without observing the applicable procedural provisions. Accordingly, the publication was also denied to all subsequent judgements issued on the basis of the Act of 2016, as amended by the Constitutional Court. Thus, uncertainties about the legal effects of the judgements of the Constitutional Court continued, which in practice seriously limited the possibilities of performing its constitutional functions.

The fourth stage of the crisis was the conflicts over the procedure to nominate candidates to the post of the president of the Constitutional Court[18]. On December 18, 2016 the term of office of the President of the Constitutional Court - Andrzej Rzepliński, ended. Based on the specially enacted Act of December 13, 2016 and against the interpretation of the constitution established in the judgement of the Constitutional Court of November 7, 2016, the two candidates were nominated (from among the judges elected by the new Sejm) and President of the Republic Poland appointed one of them [19]. The new President of the Consti-

ment was issued before the Act came into force (during the period of vacatio legis), which demonstrated the application of the Act of 2015. For the English version of this judgment see http://konstytucyjny.pl/niepublikowane-wyroki-tk-w-wersji-angielskiej.

[18] According to Article 194 section 2, The President and Vice-President of the Constitutional Court shall be appointed by the President of the Republic of Poland from among the candidates presented by the General Assembly of the Judges of the Constitutional Court.

[19] See The Judgement of the Constitutional Court of November 7, 2016, K 44/16, in which the Constitutional Court examined the regulations concerning the rules of conducting elections for the President and the Vice-President of the Constitutional Court. Pursuant to the provisions of the Constitution of 1997, the President of the Constitutional Court is appointed by the President of the Republic of Poland from among candidates nominated by the General Assembly of the Constitutional Court (i.e. the Assembly of all 15 judges). In practice, the Assembly nominated (by an absolute majority of votes) two candidates, whereby each judge able to vote for two candidates. This meant that the current majority of the Constitutional Court was able to control both appointments and did not leave the President of the Public of Poland too much freedom. In November 2015, the CCAkt 2015 was modified. The number of candidates was increased to three, and each judge could only vote for one candidate. As a result, this would mean that the „minority" of the Constitutional Court, if it is strong enough, is able to nominate „its" candidate. Therefore, the political decision-making of the President of the Republic of Poland would increase. In the judgment of December 9, 2015 (K 35/15), the Constitutional Court would consider this solution unconstitutional. The CCAct of July 22, 2016 provided similar solutions. In a judgment of August 11, 2016 (K 39/16), the Constitutional Court did not consider the case due to procedural reasons. The binding interpretation of the challenged provisions was established in the judgement of November 7, 2016 (K44 /16). The former president of the Constitutional Court convened the General Assembly to nominate candidates, but the „new" judges refused to participate, although two candidates were nominated. Then the President of the Republic of Poland refused to accept the validity of these nominations. The president of the Constitutional Court was elected after expiration of the mandate of the outgoing president. The assembly was convened by the acting president. This time, the „old" judges

tutional Court recognized the effectiveness of the choice of 3 so called "double judges" and allowed them to adjudicate. Because, at the same time, the term of two further judges of the Constitutional Court expired, the Constitutional Court saw a fundamental political shift. In addition, for a certain time, it was decided that 3 judges from the old composition of the Constitutional Court could not sit in some cases, because the Minister of Justice challenged the validity of their election, made by the Sejm in 2010.

Finally, the dispute over the Constitutional Court's cast ended with the take-over of control over the Constitutional Court by the current majority in power. However, this did not resolve the problem, because concerns are still being raised as to both the validity of the mandates of the three "doble judges" (as well as their successors) and the validity of judgments adopted with their participation[20].

2. The gradual "absorption" of the Constitutional Court resulted in adoption of new legislation on its organization and procedure. It was considered that due to changes in the composition of the Constitutional Court, it is no longer necessary to maintain regulations–paralyzing the decision-making capacities of the Constitutional Court's. Two new laws were passed in the end of November 2016: the act on organization and proceedings before the Constitutional Court, the act on the status of judges of the Constitutional Court[21]. The adopted acts allow the Constitutional Court to function, but in the new personnel context in which the Constitutional Court entered into 2017.

Throughout 2016, the Constitutional Court's activities weakened significantly. The Constitutional Court was able to resist attempts at an immediate "absorption" and continued to exercise its adjudicative function. Support from other courts, especially the Supreme Court and the Supreme Administrative Court, as well as support resulting from the instructions and assessments of the Council of Europe and the European Union (see, infra) was not without significance.

Nevertheless, the case-law of the Constitutional Court focused on examining the provisions on its own organization and procedure. However, it failed to

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refused to participate in the General Assembly. Two candidates were selected and submitted to the President of the Republic of Poland, from which the President appointed the judge Przyłębska as the president of the Constitutional Court. The correctness of this choice was questioned before common courts, however, in the judgment of 11 September 2017 (K 10/17), the Constitutional Court decided that such control was outside the jurisdiction of common courts.

[20] Two of them have their successors in the Constitutional Court, Judge Morawski was replaced by Judge Piskorski, and Judge Cioch was replaced by Judge Wyrembak.

[21] The Act on organization and proceedings before the Constitutional Court of November 11, 2016 and The Act on the status of judges of the Constitutional Court of November 30, 2016.

fully implement the basic task of controlling the constitutionality of other legal acts[22]. In this perspective, other legislative measures adopted by the new majority (apart from one judgment on the Radio and Television Act) has slipped out of the control of constitutionality.

By contrast, in 2017, the Constitutional Court was already under new management and a renewed personal composition. Therefore, the risk of the Constitutional Court questioning the constitutionality of the legislation adopted by the new Parliament became much less real.

This resulted, on the one hand, in a decrease in the number of cases decided by the Constitutional Court[23]. In 2017, the Constitutional Court issued 36 judg-ments, including one case decided by its plenary formation. In 2018, the Court adopted 34 judgments, including 4 cases were decided by the plenary formation. In 2019, the number of judgments increased to 24, including 4 cases decided by the plenary formation.

Although the Constitutional Court has always made very thorough checks at the initial stage, it may seem that these criteria have now become further tightened. At the same time, it seems that the "new" Constitutional Court is more in favor of the current legislative changes and shows some signs of a more friendly attitude toward the government than toward the opposition[24]. On several occasions, the ruling majority attempted to use the Constitutional Court for its political endeavors. One of the examples concerns the reform of the National Council of the Judiciary[25], another – the controversies concerning the pardoning powers of the President of the Republic[26].

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[22] See L. Garlicki, Przegląd orzecznictwa Trybunału Konstytucyjnego za 2016 r., Przegląd Sądowy 2017 r., no. 7- 8, p. 176.

[23] In 2014, the Court adopted 71 judgments on the merits, in 2015- 63, and, in 2016 – 40.

[24] See L. Garlicki, Constitutional Court and Politics…, p. 153-156. See also T. Koncewicz, The Court is dead, long live the court? On judicial review in Poland in 2017 and "judicial space" beyond, Verfassungsblog.de (8 March 2018).

[25] First, in the judgment of June 20, 2016 (K 5/17) the Court, acting on the motions of the Prosecutor General (who, in Poland, holds also the position of the Minister of Justice) ruled on unconstitutionality of several provisions of the "old" Act on the National Council of the Judiciary, concerning the procedure of election of judges to the Council. The ruling was later used as one of the arguments justifying the overall reform of the NCJ (see FN 38, infra). The new legislation politicized the procedure of appointing judges to the NCJ by giving this power to the Sejm and ended the term of office of the sitting members. In the judgment of 25 March 2019 (K 12/18), the Constitutional Court, acting upon the motion of the "new" NCJ supported by a group of members of the Senate, confirmed the constitutionality of the new scheme. It should be noted that the reform of the NCJ is now subject of examination before the CJEU.

[26] In the Summer of 2015, the newly elected President of the Republic of Poland granted a pardon to a prominent politician who had been convicted in a trial court, but the conviction had

The other aspect of the crisis is related (although in a "politically inversed" form[27]) to the personal composition of the Court. There is still a pending controversy concerning the validity of the election of three judges[28], additionally, some challenges have been raised regarding the procedure for the selection of the new president of the Constitutional Court[29].

3. The reform of the Constitutional Court has provoked strong criticism not only at the national level but also at the European level. The Venice Commission of the Council of Europe[30] issued two opinions negatively assessing the changes concerning the Constitutional Court and recommending modification of the Constitutional Court Act according to the standards of the constitutional state. Similarly, in the European Union, its Commission initiated proceedings against Poland under Article 7 of the Treaty on European Union (see, infra).

At the national level, criticism and protest have been (and – still continue to be) visible on practically all levels: in the case-law of other judicial bodies as

not been appealed within the courts system. It gave rise to the controversy whether the pardoning power may extend to convictions which are not yet final. The Supreme Court, in a resolution of 31.05.2017 (I KZP 4/17) ruled that „the pardoning power (...) can only be applied to persons who have been found guilty by a final court sentence". In response, the President of the Sejm, decided that the ruling of the Supreme Court affected negatively the competences of the President of the republic and lodged an "Organ-streit" motion to the Constitutional Court. The case (marked as Kpt 1/17) remains pending before the Constitutional Court. Paralelly, the Prosecutor See the decision of the Supreme Court of 1.08.2017, II KK 313/16 - and M. Radajewski, Przegląd Sądowy 2018/2. General challenged the constitutionality of the Penal Code provision which supported the Supreme Court's interpretation of the pardoning power of the President of the Republic. The Constitutional Court, its judgment of 17.07.2018 (K 9/17), ruled on the unconstitutionality of the examined provision and confirmed a broad understanding of the presidential powers. One year later, in the next judgment of 26/06/2019 (K 8/17), the Constitutional Court added another precision on discontinuation of the proceedings due to the application of the pardoning powers. Other examples concerned the new legislation on the Constitutional Court (K 10/17) and the old legislation on the Supreme Court (K 3/17) - See: L. Garlicki, Constitutional Court and Politics…, p. 35.

[27] See L. Garlicki, Sądy po zmianach, Gdańskie Studia Prawnicze 2018, vol. XL, p. 580.

[28] Although the judgment of the Constitutional Court of October 24, 2017 (K 1/17) confirmed the actual composition of the Court, the problem is that was issued by a formation of five judges (by a 4:1 majority), in which two of the "contested" judged has seated.

[29] These issues had been raised in the proceedings before the courts. The Constitutional Court, however, in the judgment of September 11, 2017 (K 10/17), ruled that ordinary courts had no jurisdiction on the matter (see L. Garlicki, M. Derlatka, Constitutional Court…).

[30] It should be noted that the Venice Commission has been operating, for almost 30 years, in the structure of the Council of Europe and is a specialized advisory body preparing information and opinions on constitutional law regulations in the countries associated in the Council of Europe - European Commission for Democracy through Law (Venice Commission), Opinion 860/2016 and 83/2015.

well as in the positions taken by lawyers' associations, legal doctrine and the civil society. The nature of these reactions varies to the considerable extent depending of the nature and competences of the authors. For example, the Ombudsman, who expressed its criticism not only in statements addressed to the parliament but also by decision to withdraw several of his motions pending before the Constitutional Court. It was read as a message on non-confidence addressed to the "new" Court and prompted strong criticism of some "new" judges[31]. A similar "withdrawal action" was taken by the "old" National Council of Judiciary in the begin-ning of 2017[32]. There was also a visible decline in the number of "legal ques-tions" which, in the procedure of the "konkrete Normenkontrolle" are referred to the Constitutional Court by other courts.

On the part of the doctrine there is a developing a number of publications pointing to the unconstitutionality of the introduced changes, as well as elaborating on the political dangers resulting from them[33]. Law Faculties of the several Polish Universities adopted resolutions expressing the necessity to respect the constitutional order. A similar resolution was also adopted by the Legal Sciences Committee of the Polish Academy of Sciences[34]. The Extraordinary Congress of Polish Judges[35] as well as several professional bodies and associations joined the same line[36].

4. The crisis of the Constitutional Court created a significant gap in the review of constitutionality in Poland. Before 2015, both the doctrine and the case-

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[31] See, the dissenting opinion of judge Muszynski to the decision of the Constitutional Court of 22.03.2018 (K 9/16)

[32] It has to be, however, kept in mind that the subsequent legislation "reformed" the Council and its entirely new composition was appointed (mostly by the Parliament) in 2018.

[33] See, most recently, W. Sadurski, Polish Constitutional Breakdown, OUP 2019 and L. Garlicki, M. Derlatka, Constitutional Court…, as well as several other publications of T. Koncewicz, M. Matczak, M. Wyrzykowski, J. Zajadlo, M. Ziólkowski.

[34] See detailed references to individual resolutions M. Wyrzykowski, „Wrogie przejęcie"..., p. 851.

[35] See. The Resolution no. 1 and 2 of the Extraordinary Congress of Polish Judges of September 3, 2016.

[36] See The resolution of the presidium of the National Bar Council, no. 105/2015 for respect for the authority of the Constitutional Court of March 9, 2016; The resolution of the presidium of the National Bar Council, no. 61/2016 on the publication of the judgement of the Constitutional Court of March 9, 2016; The resolution of the National Bar Council, no. 53/2016 expressing concern about changes in the political system, including those concerning the Constitutional Court; resolution of the National Congress of the Bar No. 16 on respecting the constitutional order; The National Council of Legal Advisors took position on March 12, 2016 expressing concern about disregarding the Constitutional Court.

law of most of the courts recognized that all courts have a power (obligation) to refer to constitutional provisions in the process of application and interpretation of ordinary legislation. If, however, there was a justified doubt as to the conformity of a statute with the constitution, then the matter should be submitted to the decision of the Constitutional Court. The present situation may have discouraged the courts in seeking the assistance of the Constitutional Court and may prompt the courts (in particular, the Supreme Court and the Supreme Administrative Court) to exercise an autonomous review of constitutionality of statutes[37]. This may lead to further conflicts and ambiguities, especially that courts are also subjected to reforms limiting their independence.

It should be noted that the absorption of the Constitutional Court was only the first stage of a much broader program of reform. Once the problem of the Constitutional Court has been "solved", the new majority, in the beginning of 2017, launched several legislative initiatives concerning, changes in the organization of courts and in the status of judges. There included modifications to the Act on the Ordinary Courts[38] on the National Council of the Judiciary[39] and the

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[37] See L. Garlicki, M. Derlatka, Constitutional Court of Poland…

[38] The Act of 2017 on common courts significantly limited the independence of the judiciary and the independence of judges. At the same time, the Minister of Justice, who was also the General Prosecutor, has gained full power in the field of the management of managerial positions in courts of all levels. The changes introduced led to personnel changes in the judges' positions, this was done by lowering the age of the judge's retirement. The Minister of Justice was granted a discretionary power to extend the period of serving as the judge. New disciplinary rules for judges have been introduced. Personal changes were made on the positions of court presidents. Pursuant to the Act, the Minister of Justice could, within 6 months, dismiss the presidents of courts and appoint new ones without consulting them. This allowed the exchange of 150 presidents and vice presidents of courts.See also A. Bodnar, Europe can save from darkness.

[39] The National Council of the Judiciary is a constitutional body safeguarding the independence of the courts and the independence of the judges. The National Council of the Judiciary is a collective body, consists of 25 members. It consists of: the First President of the Supreme Court, the President of the Supreme Administrative Court, a person appointed by the President of the Republic of Poland, the Minister of Justice, four deputies, two senators, ten judges who are representatives of common courts, two judges of the Supreme Court, two judges of administrative courts and a judge of a military court. As in most other European countries, the composition of the Polish National Council of the Judiciary is mixed, with judges being the majority. The judges to the National Council of the Judiciary were elected by the judges' milieu. As a result of the amendment to the Act, the choice by the judges was replaced by a parliamentary election, at the same time the process of nominating candidates was opened. Thus, the decisions regarding the composition of the National Council of the Judiciary were politicized, which completely destroyed the principle of the Council's independence from the political authorities. As a consequence, the Council will no longer be represented by representatives of all courts, and such representation in accordance with Article 187 section. 1 of the Constitution is required. This undermines the constitutionality of the election of the new Council in February 2018.

adoption of a new Supreme Court Act[40]. Some further changes affected the Supreme Administrative Court. Thus, the new regulations have already covered the whole of the judiciary. Although they raise fundamental constitutional concerns[41], the question remains as to the ability of the "new" Constitutional Court to adjudicate on these matters. Once again, it should be emphasized that without a fundamental reform (absorption) of the Constitutional Court, such overall changes in the system of the judiciary would be impossible. That is why the Constitutional Court has become the first and most important "target" of the new government.

There is a real danger today that the constitutional crisis will extend to all judicial power at all levels of the court structure[42]. The key to resolve this situation lies with the Constitutional Court. The Act of November 30, 2016 restored the Constitutional Court 's ability to adjudicate and granted it sufficient procedural mechanisms. The only question is whether the Constitutional Court will be able to maintain the objectivity, independence and anti-political character of its decisions. The Constitutional Court should keep in mind that its task is to act as a brake in relation to other authorities. If the Constitutional Court gives a silent consent to all activities of the legislative authority, it must reckon with the loss of its authority and with the marginalization of its role in the process of judicial review. This may activate, today or in the future, other forms of constitutional

[40] Constitutionally doubtful changes were also introduced in the Supreme Court. The age of the judge's retirement has been reduced, and at the same time the President of the Republic of Poland has been granted a discretionary power to consent to the continuation of office. This is a clear dependence of the judiciary on the executive. The number of the Supreme Court judges has been increased, which may give the new authority the option of „packing the SC" with new judges - and the National Council of the Judiciary, as it was indicated above, has lost its chances of acting as a buffer before political appointments, as was written above. The organization of the Supreme Court Chambers was also changed, and the Disciplinary Chamber was established. Report of the team of legal experts at the Foundation named Stefan Batory on the consequences of legislative activities within the judiciary in Poland in 2015-2018. In response to the reforms concerning the National Council of the Judiciary and the Supreme Court, on December 8-9, 2017, the Venice Commission issued critical opinions, which indicated that the adopted laws undermine the independence of all segments of the Polish judiciary. Opinions in the English version are available at http://monitorkonstytucyjny.eu/archiwa/2206. See Report of the team of legal experts at the Foundation named Stefan Batory on the consequences of legislative activities within the judiciary in Poland in 2015-2018. See also: M. Nalepa Poland's in crisis again. Here's what you should know about the far right's latest power-grab**,** The Washington Post 28 November 2017.

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[42] As indicated by A. Bodnar, Europe can save from darkness: Poland is entering a period of darkness when it comes to legal guarantees, the role of constitutions and EU treaties. It remains to be hoped that - deprived of institutional guarantees of independence - individual judges will be strong enough to secure their independence in the court decision-making process.

review. However, even assuming that such process would take place, the jurisprudence of other courts on constitutional issues would never be able to fill the gap. Consequently, it may lead to weakening of the role of the constitution and it may disable the system of "checks and balances" and leave more room for the discretionary actions of the parliament, dominated by the ruling party[43].

5. The conflict around the Constitutional Court (as well as the ongoing process of the judicial reform) has caused various reactions on the European level.

In the perspective of the European Union, it must first be recalled that the Treaty on European Union now provides for political response mechanisms in the event of violations of the rule of law by its Member States. As we know, "warning proceeding" may first be conducted against such a country (Article 7 (1) of the Treaty on European Union), and - as a last resort - sanctions may be applied based on Article 7 par. 2-5 of the Treaty on European Union. In the case of Poland, the crisis in the Constitutional Court turned out to be so deep in its perspective that led to the initiation of the first stage of EU proceedings under Article 7 of the Treaty on European Union. The result was issuing four recommendations by the EU Commission[44]. The Polish government theoretically took up the discussion, but in fact the recommendations were not followed as the Government maintained that there was a violation of the principle of national sovereignty[45].

In parallel, the Commission initiated proceedings pursuant to Article 258 of the Treaty on the Functioning of the European Union (so-called infringement proceedings) relating to the independence of the Polish courts. The Commission underlined that observance of the rule of law is a condition for independent and effective judicial review[46]. Referring to the position of the Court of Justice, the Commission recalled that independent and effective judicial control required compliance with the principle of the separation of powers[47]. Furthermore, re-

[43] See M. Zubik, O „grzechach społecznych" przeciwko ustawie zasadniczej, PiP 2018, no. 1, pp. 3. (Pol.).

[44] See The Recommendation of July 27, 2016, C/2016/5703; The Recommendation of December 21, 2016, 2017/146; The Recommendation of July 26, 2017, C/2017/5320], The Recommendation of December 20, 2017, C/2017/9050.

[45] See P. Bogdanowicz, M. Taborowski, Brak niezależności sądów krajowych jako uchybienie zobowiązania w rozumieniu art. 258 TFUE, Europejski Przegląd Sądowy 2018, no. 1

[46] Komunikat w sprawie praworządności , „Załącznik I: Praworządność jako podstawowa zasada Unii", p. 2

[47] It should be noted that, in the past, the EU scholars were not was not convinced about the possibility of a simultaneous application of mechanisms established by Article 7 of the Treaty on European Union and Article 258 of the Treaty on the Functioning of the European Union in case

gardless of the specific means of responding to violations of the rule of law, the threat to independence of the judiciary may also have other consequences in the functioning of the EU. This system assumes that EU law is implemented primarily by national courts. The activities of the courts are based on the principle of mutual trust and loyal cooperation between Member States. Such cooperation may be effective only as long as, national courts provide guarantees of impartial and independent adjudication[48]. If basic values, including independence of courts, are not respected in one of the Member States, this is a threat to the functioning of the European Union and its internal order[49].

The infringement procedure allowed the CJEU to step into the game. The Luxembourg judges were quite aware of the political sensitivity of the Polish situation. That was why they choose to decide first a less problematic case from Portugal. The judgment of 27 February 2018[50] allowed the Court to elaborate its position on the inclusion of the requirement of independence of national courts into the scope of EU law. As it was easy to guess, the ASJP holding encourage several courts to request preliminary rulings under Article 267 TFEU. The first request arrived from the High Court of Ireland in a case concerning implementation of a European Arrest Warrant issued by the Polish authorities. The Irish court pointed out, in particular, that the current reforms of the Polish judiciary call into question the independence of the judges and, therefore, it is necessary to determine by the CJEU whether Poland guarantees a fair trial in the a case in question. The CJEU, in the judgment of 28 July 2018[51], reiterated its position that – under EU law – national courts are required to maintain a high degree of independence and that the EU courts have jurisdiction to assess the compatibility of national arrangements on the matter. Although the CJEU did not exclude the

of violation of the rule of law. Current developments confirmed, however, the admissibility of such practice.

[48] P. Bogdanowicz, M. Taborowski,op.cit.

[49] More on the example of Poland and Hungary wrote K. L. Scheppele, L. Pech, Liberalism within: Rule of Law Backsliding in the EU Cambridge Yearbook of European Legal Studies, 19 (2017), pp. 4.

[50] Associação Sindical dos Juizes Portugueses (ASJP), C-64/16 – the Court held that freeze on indexation of judicial salaries imposed as a measure to restore the budgetary balance had not been in collision with any EU requirements. At the same time, the Court recognized its jurisdiction to decide on matters of judicial independence in the Member States and this was the most important point of the judgment.

[51] LM Case (C-216/18). While the Court rejected the “maximalistic approach” and held that the initiation of the proceedings under Article 7 TEU against Poland does not, by itself, excluded that Polish courts may preserve independence in deciding particular cases, it also specify the institutional requirements which must be met by the Member States in regulating the process of appointment and dismissal of judges.

enforceability of the warrant in question[52], it became quite clear that the Court would not avoid examination of the Polish judicial reform in future cases. This found full confirmation in the judgment of 24 June 2019, Commission v. Poland[53], where the Court shared the Commission's position that changes in the composition of the Supreme Court constituted an infringement of EU law. In the meantime, several Polish courts submitted requests for preliminary rulings in cases addressing other aspects of the judicial reform.

The CJEU adopted, intentionally or accidentally, an interesting strategy. After having established a new general rule in a case of limited political significance (AJSP) and having confirmed and elaborated that rule in another case of a clearly individual nature (LM), it used the accumulated capital of precedents in a frontal criticism of the Polish reform of the Supreme Court (Commission v. Poland).

The European Court of Human Rights may be tempted to take the same route. For some time, it seemed that the Court is not ready to intervene into the Polish crisis. The only significant case decided on the merits dealt with the so-called Smolensk exhumations[54]. At the same time, several other applications, some of them dealing with different aspects of the judicial reform, were still awaiting the initial classification.

In early 2019, the ECtHR decided a case from Iceland in which one of the main problems was that a domestic case had been decided by a judge who was appointed to the court in violation of the domestic law. The ECtHR held that, in such situation, the applicant was deprived of a "judge established by law" and, therefore, there had been a violation of Article 6.1 of the Convention. It seems obvious that the Polish controversy concerning the validity of appointment of three judges of the "new" Constitutional Court (now extended to several appointments of regular judges on the proposal of the "new" National Council of Judiciary) falls not very far from the above-mentioned case. It is hard to predict whether the ECtHR would follow the example of the CJEU, should any of Polish

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[52] The Irish court was invited to analyze all circumstances of the particular case according to the "two-stage-pattern" of review established in the judgment of 5 April 2016 (Aranyosi and Căldăraru).

[53] C-619/18.

[54] Judgment of 20 August 2018 Solska and Rybicka v. Poland (304911/17 and 31083/17. The Court held that there had been a violation of the Convention by lack of judicial remedy against Public prosecutor decision to exhumate, against protests of the families) bodies of some victims of the crash of the Polish presidential plane in 2010. At the same time, however, the Court choose not to address the question whether, taking account to the situation of the Constitutional Court, the ECtHR requirement to exhaust the domestic remedies still includes the procedure of the constitutional complaint.

applications raise the problem of constitutionality of the new judicial appointments. In any case, the ECtHR decided recently to communicate to the Polish government the first case concerning the judicial reform[55].

6. The developments in Poland and Hungary (as well as in some other "populist" countries) are quite interesting in many aspects. While it is true that legislation and political practice has, on many occasions, called into question the understanding of basic European values, it should be noted that in both countries, populist parties came to power as a result of democratic elections. What is more, the strong support of the electorate does not disappear when these parties began to implement their program. It may raise questions as to the limits of legitimacy not only in relation to the decision of the parliament or government, but also in relation to decisions taken by the "people". In other words, it may be necessary to determine to what extent the principle of constitutionalism must prevail over the principle of democracy in its traditional sense.

As regards the Constitutional Court, it seems that the problem has been already settled and the "new" Court is in place. The experience of the gradual elimination and absorption of the Court may, however, be quite important when the political context would change. As regards the very concept of judicial review, a question may then arise, whether the choice of the centralized model should be maintained. The same question had been raised thirty five years ago when the present Constitutional Court was established. In the subsequent years, the Court was able to prove its independence and its ability to re-create the Polish constitutional system. It allowed the Court to acquire a substantial degree of recognition. This was in harmony with doctrinal concepts of judicial review in post-authoritarian systems. It was maintained that entrusting control of constitutionality to a separate court is a right choice, because the brand-new constitutional court is easier to fit into the context of the democratic transformation. What's more, as indicated by, among others T. Ginsburg[56], it was easier for the separate constitutional court to act within the so-called insurance model. This was confirmed by the successful development of constitutional judiciary in many new democracies, also in Poland and Hungary.

At the same time, however, the experience of the Polish constitutional crisis has shown that the guarantee function has its limits. A constitutional court may not be able to stop the abuse of power by the political branches of government

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[55] Grzeda v. Poland, 43572/18, communicated on 17 July 2019.

[56] See T. Ginsburg, Judicial Review in New Democracies: Constitutional Courts in Asian Cases, Cambridge 2003, p. 22ff.

and, in the end, its independence may be limited or, even, destroyed. Such elimination of a constitutional court may even be faster and easier than the absorption of the entire judicial branch. If, therefore, it would be demonstrated that constitutional courts may be relatively easily, transformed into institutions ensuring the freedom of action of the new ruling majority, it may have far-reaching consequences in the future. After changing the political context, a question may arise as to whether granting a judicial review to the regular courts (the Supreme Court)would not provide a guarantee of a more durable (more difficult to destroy) nature for the protection of the existing constitutional order.

These issues must be considered at a much higher level of abstraction. As observed by Tom Ginsburg:

"Only when there is agreement on what constitutes a violation and mutual expectations that citizens will actually enforce the rules, democracy will emerge and be maintained [...] under certain limited circumstances, judicial decisions can survive as central points, helping to the citizens to coordinate and force the autocracy to liberalize [...] the decision of the court can ensure unity as to what constitutes a violation of the rules by the government [...] ".

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