

## Convulsions in the Rule of Law<sup>12</sup>

### I. Introduction

A foreigner asked me a question, actually a series of questions. “How is it that suddenly, out of nowhere, Poland, the precocious child of transformation, seems to be returning to the culture of mono-power. A Parliamentary majority – elected by a minority – is changing the system. How could that have happened? Poland, a nation governed by the rule of law? The law is a sword, an expression of force, or perhaps a shield, for the defence against anarchy? How this happened, nobody now knows. Parliament and governments are pushing judges around, and society, which only yesterday was fighting for justice, does not seem to care. So what happened? After all, you met all the requirements of the rule of law when joining the European Union. That is... perhaps it only looked like that to us?”

What has happened? The most spectacular and perhaps the best known (also abroad) episode of this process was the elimination of the Constitutional Tribunal as an effective controller of the legislative branch,<sup>3</sup> and the paralysing of its functioning.<sup>4</sup> Between 2016 and 2017, the Venice Commission had dealt with Polish matters many times,<sup>5</sup> and in December 2017 the European Commission initiated the procedure of assessing the threat to the rule of law in Poland (A new Framework to Strengthen the Rule of Law, 2014), following three recommendations by the Commission in relation to the independence of the Constitutional Tribunal, effective control of constitutionality and weakening the independence of the courts and of the judges (of 27.7.2016, 21.12.2016 and 27.7.2017). *W. Sadurski* when describing changes in the Polish law, characterises it in the following way: “it is anti-constitutional” because it proceeds through statutory “amendments” and outright breaches of the Constitution; it is “po-

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1 I would like to thank *Ms Elżbieta Matynia* for her help with the translation of this article.

2 The article is partly based on the speech *The Rule of Law on the Peripheries of Europa*, The Transregional Center for Democratic Studies just completed its 26<sup>th</sup> annual Democracy & Diversity Institute in Wrocław, Poland, “Democracy Under Siege: An Effort in Understanding” on 21 July 2017.

3 *M. Wyrzykowski*, Bypassing the Constitution or changing the constitutional order outside the constitution, in: A. Szmyt, B. Banaszak (eds.): *Transformation of Law Systems in Central, Eastern and South-Eastern Europe in 1989-2015*, Liber Amicorum in Honorem Prof. Dr. Dres. H.C. Rainer Arnold, Gdańsk University Press, 2016; *M. Wyrzykowski*, *Antigone* in Warsaw, in: M. Zubik (ed.), *Human Rights in Contemporary World. Essays in Honor of Professor Leszek Garlicki*, Wydawnictwo Sejmowe 2017, p. 370-390.

4 *W. Sadurski*, *How Democracy Dies (in Poland): A Case Study of Anti-Constitutional Populist Backsliding*, Sydney Law School Legal Studies Research Paper No. 18/01, January 2018, p. 17-31.

5 See materials available at: [https://www.elsi.uni-osnabrueck.de/elsi\\_lehrstuehle/prof\\_dr\\_hans\\_schulte\\_noelke/materials\\_conference\\_the\\_crisis\\_of\\_the\\_rule\\_of\\_law.html](https://www.elsi.uni-osnabrueck.de/elsi_lehrstuehle/prof_dr_hans_schulte_noelke/materials_conference_the_crisis_of_the_rule_of_law.html).

pulist” because the ruling elite is actively concerned with fomenting societal support and mobilisation, and it is “backsliding” because it should be seen against the baseline of the high democratic standards already achieved in the recent past. (...) The Polish case can teach us about the vexed question hotly debated in political sciences and constitutional theory these days, namely whether a “populist democracy” or “illiberal democracy” is still a democracy tout court.”<sup>6</sup>

I will try to answer why it happened. My general conclusion is that we (i.e. the Poles) did not succeed in making the rule of law a viable social project, not only for the general public, but also for the legal community, which had the responsibility of popularising and supporting this project. We failed to realise that it is not simply enough to change a number of laws. What is imperative is systematic work on developing a legal culture based on legal precedence, and appealing to the hearts and minds of people. This is necessary in a country like Poland, which is haunted by the combination of both messianic and communist mentalities – two concepts that poisoned the capacity to act independently, to anticipate, to take note of the relationship between cause and effect. Unfortunately, Poland is one of those countries that never understood the role that both institutions and laws play in providing not only social glue, but foundations for the democratic agency of the individual.<sup>7</sup>

## II. Transformation bestowed and transformation integrated

### 1. Liberal democracy as a transplant

The history of the transformation that began in Poland in 1988 is a path leading from so-called “socialist democracy” toward the rule of law that was prevalent (at that time) in Europe. That meant that the final goal was “liberal democracy,” which, in the political mainstream of those times, was the unquestioned model. This model emerged out of readings and the way democracy was imagined to function in the stable and prosperous democracies of the West. It was more a stereotype than a reflection of actually existing reality. The context of that observation was provided by the relatively stable period of the 1970 s. For those who entered the path of transformation, the most important was the escape “from” being perceived as the western frontiers of the East. The aversion to the existing system of “socialist democracy”, politically dependent on the Soviet Union, which caused the idealisation of the imagined model of liberal democracy, while dismissing the various aspirations (economic, political and cultural) of its own society. The road to liberal democracy and to the rule of law, characterised by an open society, emphasised the aspirations of pro-democratic peripheries to get closer to the centre, located in western Europe. That, however, needed time.

6 *Sadurski*, fn. 4, p. 17.

7 *S. Hanley, J. Dawson*, Poland Was Never as Democratic as It Looked. The EU’s membership conditions only dressed up illiberal societies in democrats’ clothing. Now we’re seeing the fallout, “Foreign Policy”, 3.01.2017.

## 2. To end one climb in order to begin a new one toward a different peak...

The ending of the period of real socialism meant a change of course, one that had been shared by the entire socialist camp with its centre located in the East. So, the peripheries wanted to change the course and sail along with the West; the West as they had known it from the period of prosperity of the 1970s. That entailed giving up on what was referred to as “socialist democracy” and to reconstruct the system and laws in order to reach a level that would allow them to become a part of the West and its structures, such as the Council of Europe and the European Union. It was not just about reaching the level that would make joining the European Union possible; the goal of European integration is not simply an economically motivated relationship that one enters into, it is a constantly evolving social and cultural project **always under construction**. It assumes not only the same goals and methods, but also their active implementation during and after the accession. Accession is not just about joining “something”; it is also a sense of obligation to work on behalf of a common life in that “something.” It is not just an integration based on shared cultural values – jointly defined, accepted and implemented – but what is most important and most difficult, is the **ongoing development of the community**. What is necessary here, looking into the future, is the capacity for active participation of the peripheries, in the shared shaping of future standards, though now for the whole of Europe. Without this caveat, accession would be identical to colonisation and/or imitation. In order to avoid this conundrum, integration has to be backed by democratic legitimisation within the accession country; it has to be approved by the country, in other words be based on a broad consensus. This gets to the heart of the problem of transformation. It was not enough to have legitimisation at the time of the transformation; the problem was how to sustain it. On the other hand, the European model itself, so to speak, did not stay in place; it evolved under the impact of its own economic and political crises that plagued the West at the turn of the XX and XXI millennium.

The states of Central and Eastern Europe had to first descend from the mountain that they had been climbing up since the end of the Second World War, only to start the ascent again, this time toward the correct peak. In the meantime, however, those already climbing the right mountain were constantly advancing higher and higher.<sup>8</sup>

## 3. Obstacles: recent and distant history

These transformations assumed, independently of political and legal changes, the necessity to gain and to sustain, in a durable way, support for the idea of an open society, which generally means the rule of law and liberal democracy. However, support was to be extended by the people who were brought up in a closed society, and who thought of freedom and freedoms as something that were granted based on the good will of the regime. That, of course, requires changes in the way people understand the relation between the individual and power, and the acceptance of the values of an

8 E. Łętowska, Human Rights and the Post-Communist Order the Case of Poland, in: E. Matynia (ed.), *Grappling with Democracy. Deliberations on Post-Communist Societies*, Prague 1996, pp. 112-114.

open society. However, it is not possible to decree changes in mentality, but requires working toward those changes gradually, all the time being aware of the existence of open society and consciously working on it.

#### a) Demobilising outcome of the messianic idiom

In Poland, we have one specific difficulty caused by our more recent and distant history. They both have one shared outcome – they keep society in a state of passivity, while waiting for initiatives that are to be taken by external actors. The legacy of bestowed privileges granted by merciful powers, captures the concept of a passive society that is steered from outside. From recent history, that of real socialism, we have inherited paternalistic demoralisation. But we inherited a second factor, which has favoured the passivity of society, from our more distant, 19<sup>th</sup> century history. Introduced by the Polish Poet-Prophet *Adam Mickiewicz* was the fantasy of Poland as a “Christ among Nations,” suffering on behalf of others. The messianic idea that exhibited a cult of suffering and the sanctification of victimhood, served to morally elevate the nation as a carrier of a particular *salvational mission*. This Polocentric cultural idiom constituted a dangerous element of the national consciousness, as it was providence itself that destined Poles to fight with the evil of history. Throughout the 19<sup>th</sup> century, when Poland – partitioned by the three neighbouring empires – had lost its statehood, Messianism provided a source of collective self-worth. However, the same Messianism played a demobilising and disarming role. It was not through one’s own daily efforts and labours, but through divine providence that Poland’s position among other states was to be established. Perhaps the belief in this persistent fantasy was not a decisive one, but it was certainly conducive in not paying attention to wobbly institutions and structures, a crucial toolbox for the functioning of a modern democratic state. If everything is in the hands of a divine power, it does not pay to deal with the nitty gritty of state governance. In the meantime, the poorly functioning structures of the modern state were in urgent need of repair, reinforcement and the mobilisation of resources. The phantom of the civilizational and messianic mission carries with it a variety of consequences in many different spheres of social life. It was and remains, as one can see in the most recent developments in Poland, fodder for populist demonstrations of national superiority, which cannot be reconciled with the vision of the state associated with broader European structures.

#### b) Feeble faith in civil society

The consequent weakness of civil society is then an outcome of the peripheral development dominating Polish history, especially in the 19<sup>th</sup> and 20<sup>th</sup> century. The combination of the legacy of the real socialism and historical Messianism, does not favour the development of a strong, mindful democracy in Poland. It does, however, promote the cause of populism motivated by tactical political cynicism. The current dismantling of the rule of law is not met by broad opposition in society. The party currently in power enjoys continuous support after introducing a broad social programme known as “500 Plus,” which provides a monthly subsidy equal to approximately 125 euros

granted for the second and every consecutive child in every family. Another factor is the sustained criticism of the former ruling liberal political formations, portrayed as the chief beneficiaries of a transformation guilty of economic and symbolic exclusion of the society at large.<sup>9</sup> Society in general does not understand the principles of the rule of law and does not see it working for the common good. As a result, the extinguishing of the rule of law is not met with appropriately strong resistance, while the populist demand to exchange elites is as always attractive for society.

#### 4. Fertile ground for bestowed democracy

The extinguishing of the rule of law incapacitates society and undermines the pace and the ability to continue the gradual introduction of changes. If one violates the rules of fair play, one opens the way for a bestowed democracy or autocratic democratic rule. That is democracy, in which the current rules no longer count, and citizens' rights are determined not on a case-by-case basis by a court, but based on the views and decision-making power of individuals in given positions of authority.

### III. Time: zero hour and later

#### 1. Foundation of the Polish Constitution of 1997 (open society; individual freedoms; universal addressee; checks and balances)

The key assumption of the Polish Constitution of 1997 is the idea of an **open society**. It affirms a broad common denominator for diversity (present in the preamble of the Constitution) and recognises the freedom of an individual as a fundamental principle of the system. The authorities, as well as the state, must guarantee the protection of **individual freedoms** to the largest number of people living within the borders under the authority of the state.

This is why **the addressee of principles of the constitution are not only 'Polish citizens'**, not only 'Polish men and women'. The Constitution differentiates the addressees. At times, the Constitution addresses only citizens, as is the case when it considers freedoms *to something* (extradition, public service, participation in referenda, the establishing of political parties, the right to information, some social rights). However, often when it comes to freedoms *from something* – freedom from the interference of the authorities, the Constitution provides a broader protective umbrella. What follows, 'certain things serve everyone' (for example: the right to trial, the right to privacy) while 'certain things cannot be used against anybody' (for example: to use

9 W. Osiatyński, Gdy demokracja przegrywa z symbolami, "Gazeta Wyborcza", 25-26.2.1027. "The liberal elites resigned from creating community and forgot about the human need of dignity, understood in a way different than economic growth or participation in elections." Similar conclusions follow from a report of a team of sociologists, who prepared the book M. Gdula, Nowy Autorytaryzm – Cała Polska czyta o Miastku, Krytyka Polityczna, <http://krytykapolityczna.pl/kraj/cala-polska-czyta-o-miastku/> (accessed on 18.1.2018).

medical experimentation without consent). So, it is not only ethnic Poles who are the ‘receivers’ of the Constitution.

The **division of power** into three branches in the Polish Constitution is framed differently than in France, or as it was in the Polish People’s Republic. Poland took a more radical path, and today, similar to the **checks and balances** in the US Constitution, all three powers are equal, and mutually check each other. And although it is quite natural that the two other powers may not like it, it is exactly **the judiciary** that can and ought to be an appraiser or reviewer of the legislature, the administrative decisions, the outcomes of parliamentary work, and of the executive. It is not the courts’ usurpation of rights – as politicians sometimes declare<sup>10</sup> – but the implementation of an intended constitutional project. The Constitution of 1997 strongly emphasised the independence of the judiciary from political authorities. And it ordered the judges’ submission not only to parliamentary laws, but also to the Constitution. So, they can – while examining the cases – refuse to implement parliamentary bills that are, in their opinion, unconstitutional. Another question entirely is whether courts know how to and want to take advantage of the judicial review.

## 2. The rule of law? What kind of rule of law?

According to Article 2 of the Constitution, ‘Poland is a democratic state of law’, but at the same time it ought to be a state of law that **‘realises the principles of social justice’**. A liberal thread, when it talks about freedom, constitutes a unity with a social thread, when it talks about social justice. And this is where, over the last thirty years, a balance that would be accepted by the decisive majority of the population has not been reached.<sup>11</sup> As a result, ‘freedom’ as often in immature democracies – and whether we like or not, the Polish democracy is an immature democracy – turns out to be drastically underestimated.

Disappointment is expressed prosaically through public opinion polls, pie charts, and the results from voting booths. It is not only who we vote for, but whether we decided to go and vote at all. What was missing in Poland is a wise promotion of **democratic values**. And only if what the Constitution so easily guarantees **on paper would be in reality**, without major troubles for the beneficiaries; if only what was given to them on paper could be reachable without having to fight for it – then the faith in liberal, deliberative democracy, and the rule of law advantageous to all, would be more broadly disseminated and accepted in society.

10 Speech of Vice-minister of Justice (Mr Warchoł) during I Congress of Polish Lawyers in Katowice 20.3.2017, *Wiceminister lajał sędziów*. <http://www.dziennikzachodni.pl/wiadomosci/katowice/a/kongres-prawnikow-polskich-w-katowicach-wiceminister-lajal-sedziow-zdjecia,12095674/> (access on 10.6.2017 r.).

11 R. Piotrowski, Wartości i polityka. Refleksje o dysfunkcjonalnej praktyce Konstytucyjnej, *Zagadnienia Sądownictwa Konstytucyjnego*, Nr 1/2011, pp. 9-37.

### 3. Transition to liberal democracy – many were disappointed

Those who wanted only prosperity and security, but received freedom that required individual initiative without any guarantee of success were the disappointed ones. To those, the transformation brought too little, and too slowly. And, in addition, the goods they received, were not the goods they valued the most. Transformation is an evolution – an evolution of attitudes and mentalities, which takes time. To take advantage of it, one has to have approval, and not just political approval. Otherwise, one loses social legitimacy. There is a good reason why those in the grassroots are growing impatient. The impatience brought about by the long wait for changes threatens the withdrawal of trust, and, consequently the collapse of the transformation project. A lack of trust in general is a feature of Polish society, which is made up of islands without bridges. Sociologists point to a deficit of capacities for cooperation and lack social skills in collaborative engagements on behalf of the common good, while research indicates that there is a weak dynamic to overcome this state of affairs. The deficit of trust is linked to the lack of elasticity in the strategic flow of capital in the economy and the “molecularisation” of society, where trust exists only inside a group-molecule, making cooperation between groups difficult. The trust deficit is finally a symptom, and at the same time, an obstacle to expanding social capital, which is a pre-condition to social development.<sup>12</sup>

The process of the transformation also disappointed those genuinely engaged in the transformation, as they were discouraged by the futility of their efforts. Often it was the intellectuals, the thinkers and writers who were hopeful that words would turn into flesh. Increasingly, especially recently, nationalistic and xenophobic sentiments, along with the anxieties brought about by the refugee crisis, skilfully created and used to the benefit short-term political goals, complement this picture.

The lack of sensitivity arising from forcing the vision of a new human being, a self-made man who should take care of himself and who looks out for his own personal benefits, was particularly destructive for the social support of liberal transformation. This model of personal success did not take into account that not everyone can and knows how to fight for himself. As a consequence, assistance in providing for public needs, even those established in the Constitution, such as housing, health, education and culture was significantly reduced. There was a good reason why the disadvantaged groups felt excluded from the distribution of gains brought about by the economic transformation. The objection to the elites leading the transformation, whether economic, political or cultural, was also brought about by a primitive media message that those excluded – young people without work or working on the basis of ‘junk contracts’, larger families, the poor, the sick and people living in areas affected by structural unemployment – are guilty themselves, because they did not manage to adapt to the new conditions. Therefore, the social march to a better future was stretched; stragglers were abandoned, far behind those for whom the transformation turned out to be fortunate and profitable. The culture of managing human capital, which could alleviate the discomfort of economic disadvantage, was completely neglected. There is a reason why a certain term – *stosunki folwarczne* – has returned to the public dis-

12 P. Sztompka, *Kapitał społeczny. Teoria przestrzeni międzyludzkiej*, Kraków 2016, p. 11.

course and the media. The term, which could be translated as ‘feudal relations’, captures very well labour relations on estates run by the landed gentry. That term serves also as a perfect metaphor to characterise the current relationships on the labour market between employers and employees, or generally speaking between stronger and weaker parties.

Those who are rebellious were not able to experience and understand the meaning and the value of the Constitution. And this absence of knowledge and understanding implicates those whose responsibility was to teach, to explain and to promote, as they failed in that task. The Polish intelligentsia, whose vocation was to educate society, did not do so. The media, seduced by the promise of commercial success, slipped into *infotainment*, and did not do it. The courts did not do it as they overly trusted in the power to adjudicate *ratione imperii* (using the argument of force), while ignoring the *imperio rationis* (using the force of argument of persuasion).

#### 4. Changes of azimuth angle and the prompting of the constitutional crisis

What happened in Poland was a change in the direction of the march. At first the road slightly deviated from the original route of the transformation. With time, however, that distance began to grow. Characteristically, the changes did not affect the text of the Constitution itself. On the other hand, they did cover a wide range of ordinary legislation such as **rapidly changing standards in which the state functions, the systematic change of the ruling elites, limiting the transparency of state activities for possible critics, and the exclusion of traditional safeguards.**

##### a) From an Open to a Closed Society

Thus, a fundamental reversal is taking place, from **an open towards a closed, not inclusive society**. It is taking place both literally and culturally, as it includes a reluctance to accept strangers or new arrivals, as well as presenting the universal humanistic values to native historical traditions. The non-inclusive society is characterised by a lack of openness to minorities and a refusal to use a broad ‘common denominator’ for law and state policies that enable law and standards to be pluralistic on behalf of a pluralistic, diverse society. Instead of applying the ways of deliberative democracy, predicated on discussion and persuasion, other methods are put to use, such as divide and rule, exclude and differentiate, insinuate, or scare tactics by invoking enemies who must be destroyed on behalf of the common good. A final directive is to manage the doubts and the chilling effects in order to ensure that there will be no opposition and protest. Right-wing populists claim that they alone represent what they call ‘the real people’ or ‘the silent majority’. As a consequence, the defenders of openness and increasing pluralism must somehow be illegitimate.



- b) The individual and the minorities are to subjugate themselves to the majority

The individual and the minority should simply surrender to the majority. It is true that the constitutional preamble requires the parliamentary majority to be cautious when using the numerical advantage in order not to marginalise the minority. However, the current practice is quite different – institutions, mechanisms and ‘independent’ constitutional procedures are treated with mistrust. This concerns especially the Constitutional Tribunal and the Judiciary. A populist slogan **‘the will of the sovereign’ is considered sufficient to legitimise a single party parliamentary monopoly.**

- c) Majority as the only legitimate voice in a society

Thus, the ‘will of the sovereign’ invalidates the legitimacy of law based on other constitutional principles, such as subsidiarity, *checks and balances*, the autonomy of certain bodies and agencies from the executive branch or the activities on behalf of common interests with a more pluralistic dominator. The electoral victory and the formation of an absolute parliamentary majority means the absence of the inclination – even at a parliamentary level – to compromise, or even to carry out any discussion with the opposition. A good example here might be a completely empty hall during the parliamentary debate on 6 June 2017 concerning proposed changes in the law of the system of the general jurisdiction courts, which greatly weakened the independence of the judiciary from the executive branch. The refusal to even conduct hearings indicates that deliberative democracy is vanishing, and disrespect for the sovereign, except for those who are members of the ruling party, is on the rise.

The will of the sovereign, so understood, is supposed to be more important than the written law, also the Constitution.<sup>13</sup> The sovereign acts primarily through the organs of the executive branch at the central level (the government). The organs and the mechanisms, which are ‘independent’ according to the Constitution (in particular the Constitutional Tribunal, the court system and the local government) are treated with distrust. The sovereign, understood so narrowly, does not have any duty to protect the minority against the tyranny of the majority.

- d) Limiting autonomy and independence by imposing control and making them conditional

Limiting autonomy and independence by imposing control and making them conditional – whether it is the local government, courts or even the non-governmental sec-

13 An enthusiastically received speech of MP *Kornel Morawiecki* at the inaugural session of the VIII. term of the Sejm in November 2015: “Law is an important thing, but law is not sanctity – the good of the Nation comes above it! If the law disrupts it, we cannot take it [the law] as something that we cannot disrupt and change. I say this, the law must serve us! Law that does not serve the Nation is lawlessness.” See also an interview with Deputy Prime Minister *Mateusz Morawiecki* for “Deutsche Welle,” 16.2.2017, <http://www.polityka.pl/tygodnikpolityka/kraj/1694538,1,mateusz-morawiecki-dla-deutsche-welle-kto-sie-nabierze-na-to-co-powiedzial.r> ead (accessed on 3.4.2017).

tor and independent media – is done not only directly, but also through personal appointments, and financial dependencies, such as the centralised distribution of grants and funds and the promotion of selected organisations.

e) Relocation of the decision-making centre outside the structures of state agencies

The centre of political decision-making is currently located outside the structure of the state bodies. Neither is the programme of Law and Justice (for example, the 2010 draft of the constitution promoted by the Law and Justice, removed from the party's website after the elections) the source of the implemented strategy for change. Its sources are programmatic statements by the leader of the ruling party, *Jarosław Kaczyński*. His statements (lectures, speeches, interviews) serve in the public discourse to set political and ideological directives, and, at any given moment, specific goals of reforms. The leader does not have any official state function, but *de facto*, he decides how to navigate the realm of the state. And this is also accepted by foreign guests in Poland's foreign relations.

f) The programme: re-Polonisation of the media and the economy; the concentration of power; an emphasis on the value of historical tradition

The statements of the leader promise the further re-Polonisation of the economy, the media and culture, to espouse national traditions, to concentrate power and its economic base in the form of state property. At the same time, the deep reform of the judiciary and the rights of free assembly have been curtailed. Such fundamental systemic reconstruction distances Poland from a liberal democracy, both in view of its goal, the subject and scope of the reform as well as how it is being implemented. All of these activities are violating the procedures of the *rule of law*, and they will be continued, even if, as was announced *expressis verbis*, they lead to a slowdown in economic growth.<sup>14</sup> At the same time, any efforts at curtailing these processes are automatically qualified as non-democratic. It is the use of this rhetoric that served to build a campaign, run over many months, against the Constitutional Tribunal.

The subsequent changes in the laws that regulate its functioning (in total five acts in 2016) led to the Constitutional Tribunal being paralysed and marginalised.<sup>15</sup> Its activity diminished in 2016 by one-third.<sup>16</sup> As a result, instead of protecting against arbitrary decision making, the Tribunal is legitimising it at the moment (for example, by

14 „When asked about the Polish economy, the *PiS* chairman said that he would be willing to accept a slowdown in economic growth, if that would be the price for successfully carrying out his vision for Poland”, in: Mocny wywiad. Kaczyński jest gotów na spowolnienie gospodarki, jeśli to będzie cena realizacji jego wizji ideologicznej, naTemat.pl, 23.12.2016, <http://natemat.pl/197539,mocny-wywiad-kaczynski-jest-gotow-na-spowolnienie-gospodarki-i-jesli-to-bedzie-cena-za-realizacje-jego-wizji-ideologicznej> (accessed 3.4.2017).

15 *Sadurski*, fn. 4, pp.18-35.

16 Information on important problems stemming from the actions and adjudications of the Constitutional Tribunal in 2016, p. 73. [http://trybunal.gov.pl/fileadmin/content/dokumenty/publikacje/informacje\\_o\\_problemach/Informacja2016.pdf](http://trybunal.gov.pl/fileadmin/content/dokumenty/publikacje/informacje_o_problemach/Informacja2016.pdf).

affirming the limitations of the right to assemble.<sup>17</sup> Filing a motion against the act that allows abortion in cases of incurable development defects of the foetus serves the same purpose (case K 13/17). The member of Parliament who initiated the case found the act to be too liberal. If the Constitutional Tribunal confirms the lack of constitutionality of the act, any liberalisation of the act in the future will not be possible through a normal legislative procedure, but will require a change in the Constitution.

The identical *modus procedendi* (manner of proceeding) was seen when preparing the reform of the judiciary.<sup>18</sup> The last two years were marked by an exceptionally aggressive campaign against the courts: a billboard campaign financed by public money that aimed at building the black PR of the judiciary, publications in the media containing groundless accusations, statements by high profile public officials that contained false information, for example that in the Supreme Court there were still judges from the martial law period, and that the Polish judiciary is like the Augean stable. This black PR was supposed to lay the foundations for reforms limiting the independence of the judiciary.<sup>19</sup>

### g) Chilling effect as a tool of change

The sequence of events is characteristic when it comes to reform, whether of the Constitutional Tribunal, the judiciary, local governments, or the third sector (institutions of civil society); the scenario is the same. First, there is a media campaign indicating various irregularities and dysfunctions. The information is often true, but it is cherry-picked from different periods, selected and juxtaposed and often exaggerated. At the same time, allegations suggest a thirst for power, corruption, personal interests, caste-like divisions and democratic deficits in the operation of institutions in need of reform.<sup>20</sup>

17 Statute of 13.12. 2016 Journal of Laws 2017, item 597. The new regulation is to ensure a privileged position for assemblies, “cyclical” manifestations and demonstration devoted to patriotic, religious and historic events.

18 J. Kaczyński: “The Courts in Poland are loaded with powerful pathology. Those who protect the status quo claim that for the rule of law and democracy in Poland pathology in courts is needed. This is either an absurd opinion, or related to certain interests.”, in wPolityce.pl, 6.02.2017, <http://wpolityce.pl/polityka/326340-kaczynski-o-reformie-wymiaru-sprawiedliwosci-sady-w-polsce-sa-obciazone-potezna-patologia-nie-cofniemy-sie> (accessed on 3.4.2017).

19 So claimed Prime Minister *Mateusz Morawiecki*, <http://www.rp.pl/Sedziowie-i-sady/312099989-Morawiecki-wymiar-sprawiedliwosci-to-stajnia-Augiasza-ktora-nalezy-oczyszcic.htm> 1. In reality, 86 judges of the Supreme Court were nominated in 2000, seven earlier on, but after 1990, when President Lech Wałęsa exchanged the entire composition of the Supreme Courts. From among these seven, only one still adjudicates.

20 Prime Minister *Mateusz Morawiecki*: Why my government is reforming Poland's judiciary, The Washington Examiner, 2.1.2018: “In the 1989 Roundtable Talks between Poland's Communists and the democratic opposition, then-president General *Wojciech Jaruzelski* – the man who ran Poland's martial law government for the Soviets – was allowed to nominate an entirely new bench of Communist-era judges to staff the post-communist courts. These judges dominated our judiciary for the next quarter century. Some remain in place. ... judges are assigned to cases by their close peers with no public oversight. Favours go to friends.

#### h) Purges to favour younger cadres

The campaign highlights the blocking of promotions of young cadres by pathetic old elites with inappropriate (post-communist) pedigrees. These stigmatisations are part of the tactics to garner the support of “young Turks” – youths who are promised promotions once the old elite are eliminated. The planned replacements of elites are one of the universally applied reform measures. It is done using many instruments – through the shortening of tenures, the exchange of managerial staff, such as civil servants, prosecutors or the army.<sup>21</sup> While in many cases, the social diagnoses that accompany the reform are correct, the choice of corrective measures and the manner in which they are used, are objectionable.

The new Act on the Supreme Court<sup>22</sup> as well as the amendments of the Act on the General Jurisdiction Courts<sup>23</sup> serve to facilitate the exchange of cadres. They provide for shortening the retirement age of the judges to 60 years (women) and 65 years (men). Extending this limit to 70 years of age (the age limit at present) will require the consent of the President (in the case of the Supreme Court) and the Minister of Justice (in case of other courts). The Act on the Supreme Court ends the term of the first President of the Supreme Court (the length of the term is in this case established in Article 183 section 3 of the Constitution). The Act on the General Jurisdiction Courts gave the Minister of Justice a six-month period in which to decide at discretion about exchanging the presidents of the general courts. As of the middle of January 2018, 84 individuals had been exchanged, and it is expected that further changes will follow.

#### i) Paying lip service to democratic reform

Reforms are always conducted in the name of a verbally preached defence of democracy from its appropriation by the elites, or to protect the reforms from the retaliation by the elites that are pushed away from power. The political opponents are painted as having ill intentions and being incapable of being motivated by the common good.

#### j) Appropriation of language

Rhetorical shifts in the language of official political declarations are also characteristic for the new type of public debate. The rulers speak more readily to ‘Polish women and men’ than to ‘citizens’. We are witnessing a well-known *Orwellian* observa-

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Vengeance is wreaked on rivals. Bribes are demanded in some of the most lucrative-looking cases. Proceedings have sometimes been dragged out interminably in the service of wealthy and influential defendants.”.

21 Dziennik Gazeta Prawna, 13.6.2017, p. 1 In public administration: 1 500 people were exchanged, in prosecutors’ offices 391 people left, 108 were transferred to lower positions; 50 percent of tax office directors were exchanged; the army: 30 generals and 200 colonels left; the police 6,000 policemen were fired.

22 Statute of 8.12.2017, Journal of Laws 2018, item 5.

23 Statute of 12.7.2017, Journal of Laws 2017, item 1452.

tion on manipulating language. Since words, whether in the Constitution or law in general, are able to change their meaning, they can also be manipulated. A word can change its role and instead of providing explanation, communication, or even misinformation, it can become a tool of control and oppression. The language of the debate is currently both brutalised and personalised. The opposition, whether parliamentary, or simply citizens who are exercising the right to protest, are called by the ruling politicians as ill-intentioned, a ‘worse sort of citizens’, ‘communists and thieves’, ‘people in need of special care’ (or attention), or ‘people with blood on their hands’, who should be isolated and re-socialized.<sup>24</sup>

#### IV. The re-conquest of the system – or in other words – ‘hostile takeover’ of the system takes place without changing the Constitution

The political, social and legal consequences of the reforms that have taken place in 2016 and 2016 exceed the consequences of the ordinary change that follows elections.<sup>25</sup> What is happening at the moment is an unannounced in the political agenda, but *de facto* implemented resignation from the liberal democracy of the Western Europe. This process violates (so far undisputed) the rule of law principles, as well as the 1997 Constitution. Instead of deliberative democracy (discuss and convince), the ruling party is applying methods of divide and rule, exclude and differentiate, insinuate and threaten, pointing out the enemy who jeopardises the common good, managing doubts and having a freezing effect<sup>26</sup> that guarantees no opposition and protests. Proceedings by police and prosecutors in relation to an alleged disturbance of the public order are initiated against the protestors,<sup>27</sup> but very often do not stand up in court.

24 Statement of a member of the Parliament during parliamentary commission session during which the reform of the court system was discussed. <http://www.newsweek.pl/polska/polityka/pawlowicz-wysyla-sedziow-na-reedukacje-w-obozach-jak-w-korei-polnocnej,artykuly,410689,1>. Address of the Polish President 31.1.2017: “I want to say one thing: this programme will be carried on with an iron consistency. It will not be stopped by **any clamour or any demonstrations** (emphasis – *E.L.*). And if needed, I hope you will come, or you will get together and you will show that this is the policy that you want.”: <http://www.prezydent.pl/aktualnosci/wypowiedzi-prezydenta-rp/wystapienia/art,155,wystapienie-prezydenta-podczas-spotkania-z-mieszkancami-zagania.html> (accessed 3.4.2017 r).

25 E. Łętowska/A. Wiewiórowska-Domagalska, A “good” Change in the Polish Constitutional Tribunal?, *Osteuropa-Recht* 1/2016, pp. 79-93.

26 See the annual report of Amnesty International on management through divisions and fear, 22.2.2017, <https://amnesty.org.pl/polityka-demonizowania-mnozy-podzialy-i-strach/> (accessed 3.4.2017).

27 Among the reservations as to lowering the standards of the freedom of gathering one can point out: the publication by the police of pictures of people protesting in Sejm on 16.12.206, the amendment to the Act on Public Gatherings, which introduces a hierarchy of gatherings, by (among other things) creating the institution of cyclic gatherings, which have priority over the organisation of protests; setting up a disciplinary commission for women who took part in the black protest against tightening the abortion law (the protest consisted of wearing black clothes and posting a group photograph of women in black on FB), qualifying handing out leaflets as littering or interfering with the work of media, and so on.

The speedy change of the law that has already taken place has induced an instant fundamental change of the standards in the functioning of the state. One can already see that, with regards to ensuring constitutionality, controlling the prosecution and police, limiting access to information, questioning the independence of the judiciary and its function in the division of power, the exchange of the civil service,<sup>28</sup> as well as changing the legal status and the powers of the prosecutor office,<sup>29</sup> and exercising influence over the media.<sup>30</sup> Especially the latter two of these mentioned changes have had a crucial meaning for the course of events. They have provided 'reproduction mechanisms' that allow opponents to be removed from the public space. The General Prosecutor (the office held by the Minister of Justice, i.e. a member of the government), is keen on exercising these new entitlements.<sup>31</sup> The widely publicised preferences and suggestions to increase punishments or regarding the choice of goals for the judiciary constitute consciously chosen instruments to trigger the chilling effect in relation to the judiciary system.

The quality standard of the Parliamentary work has decreased substantially. The proceedings in the lower chamber of the Parliament (Sejm) have been substantially simplified: the rule of three readings is not being followed, the work is being conducted through committees and not in the plenary sessions, deadlines for considering legislative proposals are being violated, sudden changes in Parliamentary agendas are being introduced, public consultations are very limited (if held at all). There is also no effective debate on the proposals in the higher chamber of the Parliament (the Senate). Legislation at the moment resembles 'blind shots', the accuracy of which must be constantly corrected. Legislative proposals introduced by the government are not accompanied by opinions of the stakeholders; critical analyses are ignored. The participation of the opposition in parliamentary discourse is restricted or even eliminated (no time given for presentations, questions being rejected, discussions blocked and decisions not to vote on amendments introduced by the opposition). Parliamentary sessions are liable to be called suddenly, and the order of proceedings is changed without notice, often during the night. Discussion is limited and shortened, the opposition is prevented from speaking during the debate (there are even cases of the opposition being excluded).

28 Łętowska, *Wiewiórowska-Domagalska*, fn. 25. pp. 79-81.

29 Act of 18. 1. 2016, J.L. 2016 item 177.

30 See: joint report on the situation in public media in Poland prepared by the organisation Article 19 i Helsińską Fundację Praw Człowieka of 8.02.2017, <http://www.hfhr.pl/article-19-i-hfhr-publikują-wspólny-raport-o-mediach-publicznych-w-polsce/> (access on 3.4.2017).

31 In a criminal process that regarding the liability of the doctor for the death of a patient who died from a heart attack (spiced up by the fact that the patient was also the father of the Minister of Justice and the General Prosecutor) the prosecution initiated proceedings against the judge in relation to an alleged crime committed by the judge. See: Pressure and repression of Polish judges and prosecutors, Warsaw, February 2019, <https://ruleoflaw.pl/a-country-that-punishes-pressure-and-repression-of-polish-judges-and-prosecutors-kos-raport/> (accessed on 19.04.2019)

## V. Reform of the judiciary: independence and legitimisation

The Constitution of 1997 established the judiciary as the third power in Poland and Polish courts at the moment are paying the political price for that. The courts decide about the interpretation of law and have a final say in certain disputes. The judiciary branch holds power over establishing the meaning of law. This clearly is a competition and threat to the politicians and the executive branch. While the Constitutional Tribunal has indeed used its powers, and therefore could have appeared as a threat, the general jurisdiction courts have never been pro-active in this respect. Therefore, from a political point of view, the reform of the judiciary system that aims to restrict the independence of judges has a rather preventive character than a retaliation. It is feared (and is a real fear given the background of the text of the Constitution and the crisis of the Constitutional Tribunal) that judgments will be subject to judicial review, with a refusal to apply laws because they go against the Constitution.

The judges' independence is limited primarily by giving the politicians influence over the selection of the court members. This is also the foundation of the conflict over the National Judiciary Council – a body composed of 25 people who decides on the courts' personnel. The new act<sup>32</sup> not only terminated the constitutional term of the present council, but also changed the process of selecting council members. Previously they were selected by judiciary bodies, while at the moment the selection (still from among judges) is made by Parliament.

Propaganda is another measure used to put pressure on the judges and courts. The aim is to inflict auto-censorship upon the judges and discourage any activity when it comes to the constitutional judicial review. The media skilfully plays on the fact that the Polish judiciary – irrespectively of the accurate accusations relating to lingering pace of the proceedings and lack of efficiency,<sup>33</sup> does not know how to formulate a clear and transparent message addressed to society that would explain its position. Moreover, the judiciary does not respond quickly and in a consistent manner to criticism, even if it is well grounded. In other words, the courts do not address it, and – due to a very formalistic construction – do not know how to deal with it.<sup>34</sup> The formalism characteristic of Polish judges is indeed their historical heritage. Excessive attachment to the letter of the law and literal interpretations can be explained by the traumatic experiences of Stalinist times, when politically-driven interpretations of law led to deviations in the application of law by courts. Honest judges, in those times, were looking for a safe harbour that would protect them from the politicians. Formalism allowed them a little bit of professional autonomy in an autocratic state. However, what was a virtue in the historical context, becomes a ballast in a democratic state. The judges, raised in the spirit of formalism, cannot properly apply EU law (practicality is an alien concept) and are not able to reject the formalistic linguistic interpretation, which should be replaced by a systematic analysis of law. It is also true that

32 Statute of 8.12.2017, Journal of Laws 2018, item 3.

33 The period of expectancy for a first instance judgement (for 2017) is 5.4 months (in 2016 4.7). This could be seen as an average time for the EU.

34 Which is characteristic for judges from post-communist countries: Z. Kühn, *The Judiciary in Central and Eastern Europe: Mechanical Jurisprudence in Transformation?*, Law in Eastern Europe, No. 61. Leiden 2011, p. 151-163.

the judges do not know how to effectively use an interpretation that is in accordance with the Constitution. The conservative education of lawyers lies at the foundation of this situation, which was observed already by *Gustav Radbruch*, who pointed out the negative consequences of the fondness of formalism, presented by German lawyers.<sup>35</sup> Polish judges, fond of formalism and a literary and contextual interpretation, are not modern and cannot address society.<sup>36</sup> They do not know how to justify their position, which in fact is the position of law. They do not know how to convince others that they can indeed understand the law in relations and in mechanisms, and not as separate fragments of texts. They cannot convince society that when they apply the law, they also serve justice. This is why they are losing the fight for their own legitimacy with populist politicians. The citizens learn about law through the way the courts apply it. The tardiness of the courts, their callousness or extensive formalism, the lack of receptivity when it comes to the need to legitimise their own actions through transparency strains the reliance on courts and on law as a whole. The courts are not very sensitive in this regard. They do not understand and clearly underestimate the social legitimisation. As a result, the courts cannot resist the populist manipulation, which shows the judiciary as an authority that disdains 'the man on the street'. Those dissatisfied and disappointed by the courts now have very powerful support in the form of the internet. Various forums that gather stakeholders disappointed by the courts are very active in criticising the courts. They gather those who have lost in court, i.e. roughly half of the people that have come into contact with the courts. And it has always been like this: half of the court's clients will be dissatisfied. Today, however, due to the possibilities provided by the internet, they are better able to organise themselves and become a real social player. Irrespectively of whether or not they are right, partly right or not right at all, they form pressure groups. The courts should be aware of their existence and should react to the message that these pressure groups send. The courts should be able to legitimise their actions also in the eyes of these groups. Polish courts do not know how to do that. This is the reason why they have bad press and insufficient societal support, and have become the victims of populist justification of constitutionally dubious reforms.

## VI. Coda

In 2011, a Polish sociologist based in Krakow published a book *The Phantom Body of the King: Peripheral Struggles with Modern Form*. The author of this fascinating book, *Jan Sowa*, describes a failed artistic experiment conducted in 1996 in Stockholm's *Fabriken* Gallery. The exhibit, entitled 'Interpol', produced jointly by Swedes and Russian, was to promote, at the end of the 20<sup>th</sup> century, intercultural dialogue between the East and the West. Yet the exhibit ended in fiasco. The two sides could in no way agree on the terms and space of cooperation. Not only was there a 'fundamen-

35 *G. Radbruch*, Gesetzliches Unrecht und übergesetzliches Recht, *Süddeutsche Juristen-Zeitung*, Nr. 1/1946, p. 106.

36 *H. Dębska*, *Władza*. Symbol. Prawo. Społeczne tworzenie Trybunału Konstytucyjnego, Warszawa 2015, chapter IV.



tal lack of compatibility between East and West' resulting from the cultural stereotypes and prejudices on each side. But worse, both sides demonstrated a robotic readiness to enter their roles assigned by these stereotypes. So, the East turned out to be, according to the ascribed stereotypical expectations, wild, rude, authoritarian and forcing through their own solutions. The West, unaware of the trap, happily took advantage of this stereotype, sinfully repeating its own prejudices. The bleak example was used by the author as a background for reflection on the situation of lands and societies belonging neither to the East or the West, unable to establish a dialogue, with no common 'identity – religious, ethnic, lingual, cultural or any other'. And it is this 'any other' that is of interest to me. It is here that legal identity, revealed through the fate of post-1988 transformations, is situated.