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STATUTORY ANTI-CONSTITUTIONALISM

Maciej Bernatt and Michał Ziółkowski[†]

Abstract: The article aims at demonstrating that unconstitutional results, marking an illiberal transformation may be achieved by means of a series of statutory amendments outside the constitutional amendment procedure, when the guardian of the constitution is deactivated. In other words, the evasion of the constitution becomes a means of illiberal change of the legal system. This process is referred to as “statutory anti-constitutionalism.” The article offers a detailed analysis of the legal methods which are used to evade the constitution. These include excessive use of transitional and intertemporal provisions in the statutes, shortening *vacatio legis*, shortening of constitutionally-determined terms of public institutions and creation of “mirror competences” or “mirror bodies” via statute in order to circumvent the activity of the constitutional bodies. The article is based on the 2015-2018 Polish experience.

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I. INTRODUCTION

Liberal constitutionalism is one of biggest achievements of the post-World War II world. It came into being as a result of the combined efforts of citizens, politicians, and courts in many different countries. It is true that this type of constitutionalism, built on freedom as a basic value within a system of checks and balances, limitations on government, and effective judicial review, has never been universally or ideally implemented around the world. It may also be argued that liberal constitutionalism has not provided a sufficient response to growing economic inequalities.¹ Therefore, one should not discount the emergence of new forms of constitutionalism approaching the limitation of government powers and human rights protection from a different angle. However, for the moment, liberal constitutionalism continues to offer the best theoretical framework to protect human freedom, dignity, and equality.²

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¹ For more in the context of liberal constitutionalism turbulences, see Rosalind Dixon & Julie Suk, *Liberal Constitutionalism and Economic Inequality*, 85 U. CHI. L. REV. 369 (2018).

² For more about on modern constitutionalism’s triangle of values, see, Susanne Baer, *Dignity Liberty, Equality: A Fundamental Rights Triangle of Constitutionalism*, 59 U. TORONTO L.J. 417 (2009).

Today, liberal constitutionalism is under pressure in several areas around the globe.³ This is happening despite the twentieth century's progress in human rights protection and the growing convergence of national and international constitutional values. In particular, several countries in Central Europe face the most serious rule of law crises since the adoption of their post-transition democratic constitutions. In Hungary, the constitutional order has been subject to deep transformation. Both the Hungarian Constitutional Tribunal's competences and a number of fundamental constitutional rights were limited.⁴ In Poland, the constitutional order has been significantly changed outside the formal amendment procedure, just after the Polish Constitutional Court had been paralyzed.⁵

In 2017-2018, the European Union formally accused Poland of a serious breach of the rule of law principle.⁶ In particular, the European Commission opened proceedings under Article 7 of the Treaty on the European Union (TEU).⁷ In addition, it brought an infringement case against Poland to the Court of Justice of the European Union, accusing Poland of

³ See, e.g., Tom Ginsburg, Aziz Z. Huq & Mila Versteeg, *The Coming Demise of Liberal Constitutionalism?*, 85 U. CHI. L. REV. 239 (2018); David Landau, *Populist Constitutions*, 85 U. CHI. L. REV. 521 (2018); András László Pap & Anna Śledzińska-Simon, *The Rise of Illiberal Democracy and the Remedies of Multi-Level Constitutionalism* 1 (The Jean Monnet Center, Working Paper No. 12/17, 2017).

⁴ See, e.g., Bojan Bugarcic & Tom Ginsburg, *The Assault on Postcommunist Courts*, 27 J. DEMOCRACY 69 (2016); Gábor Halmai, *An Illiberal Constitutional System in the Middle of Europe*, 2014 EURO. Y.B. HUM. RTS. 497, 512-13 (2014).

⁵ See, e.g., WOJCIECH SADURSKI, POLAND'S CONSTITUTIONAL BREAKDOWN, at ch. 3, 4, 7 (2019); Lech Garlicki, *Die Ausschaltung des Verfassungsgerichtshofes in Polen? (Disabling the Constitutional Court in Poland?)*, in TRANSFORMATION OF LAW SYSTEMS IN CENTRAL, EASTERN AND SOUTH-EASTERN EUROPE IN 1989-2015 63-79 (Andrzej Szmyt & Boguslaw Banaszak eds., 2016); Wojciech Sadurski, *Polish Constitutional Tribunal Under PiS: From an Activist Court, to a Paralyzed Tribunal, to a Governmental Enabler*, HAGUE J. RULE L. (2018), <https://doi.org/10.1007/s40803-018-0078-1>.

⁶ Commission Regulation 2018/103 of Dec. 20, 2017, Regarding the Rule of Law in Poland 2018/103 complementary to Commission Recommendations (EU) 2016/1374, (EU) 2017/146, and (EU) 2017/1520, 2018 O.J. (L 17); Commission Recommendation 2017/1520 of July 26, 2017, Regarding the Rule of Law in Poland complementary to Commission Recommendations (EU) 2016/1374 and (EU) 2017/146, 2017 O.J. (L 228); Commission Regulation 2017/146 of Dec. 21, 2016, Regarding the Rule of Law in Poland complementary to Commission Recommendation (EU) 2016/1374, 2017 O.J. (L 22); Commission Recommendation 2016/1374 of July 27, 2016, Regarding the Rule of Law in Poland, 2016 O.J. (L 217).

⁷ *Proposal for Council Decision on the Determination of a Clear Risk of a Serious Breach by the Republic of Poland of the Rule of Law*, COM (2017) 835 final (Dec. 20, 2017); see, e.g., *Editorial Comments: Safeguarding EU Values in the Member States – Is Something Finally Happening?*, 52 COMMON MKT. L. REV. 619, 625-26 (2015); Christophe Hillion, *Overseeing the Rule of Law in the EU Legal Mandate and Means*, in REINFORCING RULE OF LAW OVERSIGHT IN THE EUROPEAN UNION 59-81 (Carlos Closa & Dimitry Kochenov eds., 2016); Kim Lane Scheppele, *Constitutional Coups in EU Law*, in CONSTITUTIONALISM AND THE RULE OF LAW BRIDGING IDEALISM AND REALISM 446, 468-78 (Maurice Adams, Anne Meuwese & Ernst Hirsch Ballin eds., 2017).

violating equal treatment of judges of ordinary courts,⁸ as well as violation of the independence of the Supreme Court.⁹ Hungary is about to face similar charges.¹⁰

The relationship between constitutionalism and “illiberal democracies”¹¹ or “illiberal changes” is subject to intense academic debate. Several concepts have been offered to explain the rule of law crisis: “populist constitutionalism,”¹² “abusive constitutionalism,”¹³ a “constitutional coup,”¹⁴

⁸ Case C-192/18, *Comm’n v. Republic of Poland*, 2018 OJ (C 182). In its action of March 15, 2018, the European Commission claimed firstly, that Poland violated the EU provision on equal opportunities and equal treatment of men and women in matters of employment and occupation (2006 O.J. (L 204) 23) and secondly, that Poland violated the right to an effective remedy (provided by the Article 47 of the Charter) and did not fulfil its treaty obligation to adopt remedies sufficient to ensure effective legal protection in the fields covered by Union law. According to the Commission’s opinion “by introducing, in . . . Law of 12 July 2017 amending the Law on the Organisation of Ordinary Courts . . . provisions distinguishing between the retirement age for men and women working as ordinary judges, Supreme Court judges, and prosecutors, and by lowering, by means of Article 13(1) of that law, the retirement age applicable to ordinary court judges, and at the same time granting the Minister of Justice the right to decide whether to extend the period of active service of judges pursuant to Article 1(26)(b) and (c) of that law, the Republic of Poland has failed to fulfil its obligations.”

⁹ See Case C-619/18, *Comm’n v. Republic of Poland* (2018). In its action of October 2, 2018, the European Commission claimed that Poland violated EU law by lowering the retirement age and applying that new retirement age to judges appointed to the Supreme Court. Moreover, the Commission recognised that granting the President of the Republic of Poland the discretion to extend the active judicial service of Supreme Court judges also violated the basic treaty principles. It is important to note that, according to the Commission’s motion, the Vice-President of the Court ordered Poland to immediately suspend the application of the provisions of national legislation relating to the lowering of the retirement age for Supreme Court judges. *Ordonnance De La Vice-Présidente de la Cour* 19 Octobre 2018, ECLI:EU:C:2018:852; see also Court of Justice of the European Union press release No 159/18, Luxembourg, October 19, 2018.

¹⁰ On September 12, 2018, by a vote of 448 to 197, the European Parliament recognized a clear risk of a serious breach of the EU founding values in Hungary. Therefore, the Parliament decided to activate Article 7 TEU and called on the Council of the EU to address recommendations to Hungary to counter the threat. The Parliament recalled that Hungary’s accession to the EU “was a voluntary act based on a sovereign decision, with a broad consensus across the political spectrum” and underlined that any Hungarian government has a duty to eliminate the risk of a serious breach of the EU’s values. Parliament was concerned about: the functioning of the constitutional and electoral system; the independence of the judiciary; corruption and conflicts of interest; privacy and data protection; and freedom of expression, academic freedom, freedom of religion, freedom of association, the right to equal treatment, the rights of persons belonging to minorities, including the Roma and Jews, the fundamental rights of migrants, asylum seekers and refugees, and economic and social rights.

¹¹ See, e.g., Fareed Zakaria, *The Rise of Illiberal Democracy*, 76 FOREIGN AFF. 22 (1997).

¹² Paul Blokker, *Populist Constitutionalism*, in ROUTLEDGE HANDBOOK OF GLOBAL POPULISM 113–29, 114–18 (Carlos de la Torre ed., 2018).

¹³ See David Landau, *Abusive Constitutionalism*, 47 U.C. DAVIS L. REV. 189 (2013).

¹⁴ Kim Lane Scheppele, *Constitutional Coups and Judicial Review: How Transnational Institutions Can Strengthen Peak Courts at Times of Crisis (With Special Reference to Hungary)*, 23 TRANSNAT’L L. & CONTEMP. PROBS. 51, 51–52 (2014).

“democratorship,”¹⁵ “bypassing the constitution,”¹⁶ “unconstitutional capture,”¹⁷ and “democratic backsliding.”¹⁸ Recently, the situation in Hungary and Poland was also described as a “constitutional retrogression,”¹⁹ which refers to the degradation of the constitutional liberal democracy without its complete collapse.²⁰ At the same time, some commentators have indicated that we are observing the emergence of a new type of undemocratic regime. “Constitutional markers of authoritarianism” was proposed to distinguish the authoritarian model from the democratic one.²¹

This article aims to fill in the gap in the current debate by demonstrating that unconstitutional results, marking an illiberal transformation may be achieved by means of a series of statutory amendments outside the constitutional amendment procedure, when the guardian of the constitution—i.e., the Constitutional Tribunal—is deactivated. In other words, the evasion of the constitution becomes a means of illiberal change of the legal system. We refer to this process as “statutory anti-constitutionalism.”

The article is structured as follows: The first part of the paper explains in more detail the notion of statutory anti-constitutionalism. In the second part, entitled “tools of statutory anti-constitutionalism,” the article focuses on the legal methods which are used to evade the constitution. First, we analyse an excessive use of transitional and intertemporal provisions in the statutes. Second, we discuss a statutory practice of shortening *vacatio legis* (the period between the publication of a legal act and its entry into force) to one day (or even the complete lack of it)—a practice that cannot be seen as fulfilment of the constitutional aim of *vacatio legis*, particularly in the context of the structural character of changes to the judiciary. Third, we analyse the practice under which the constitutionally-determined terms of public institutions are

¹⁵ Kim Lane Scheppele, *Worst Practices and the Transnational Legal Order (or How to Build a Constitutional ‘Democratorship’ in Plain Sight)* *4–5 (working paper 2016), archived at https://www.law.utoronto.ca/utfl_file/count/documents/events/wright-scheppele2016.pdf.

¹⁶ Mirosław Wyrzykowski, *Bypassing the Constitution or Changing the Constitutional Order Outside the Constitution*, in *TRANSFORMATION OF LAW SYSTEMS IN CENTRAL, EASTERN AND SOUTH-EASTERN EUROPE IN 1989–2015* 159–79 (Andrzej Szmyt & Bogusław Banaszak eds., 2016).

¹⁷ Tomasz Tadeusz Koncewicz, *The Capture of the Polish Constitutional Tribunal and Beyond: Of Institution(s), Fidelities and the Rule of Law in Flux*, 43 *REV. CENTR. & EAST EUR. L.* 2, 116–73 (2018).

¹⁸ Wojciech Sadurski, *How Democracy Dies (in Poland): A Case-Study of Anti-Constitutional Populist Backsliding* (Jan. 2018) (Unpublished research paper No. 18/01, Sydney Law School), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3103491.

¹⁹ Aziz Huq & Tom Ginsburg, *How to Lose a Constitutional Democracy*, 65 *UCLA L. REV.* 78 80, 94–95 (2018).

²⁰ *Id.* at 94.

²¹ Gábor Attila Tóth, *Constitutional Markers of Authoritarianism*, *H.J.R.L.*, 2018, <https://doi.org/10.1007/s40803-018-0081-6>.

shortened by means of statute. Fourth, we describe how “mirror competences” or even “mirror bodies” (i.e., a “person acting as a president of the court”) are introduced via statute in order to circumvent the activity of the constitutional bodies. At the end of the article, we offer conclusions and underline that the Polish experience is a lesson for countries facing the rise of illiberalism.

Our paper is based on the Polish experience. In the last three years, the ruling majority changed the statutes and composition of the Constitutional Tribunal, the Supreme Court, the National Judiciary Council, and the common courts. Moreover, a new media law, an amendment to the electoral code, a new Public Prosecutor’s Office law, and an amendment to the Code of Criminal Procedure were introduced. These changes took place even though many institutions—including the Venice Commission,²² the European Commission,²³ the Polish Ombudsman,²⁴ NGOs²⁵ and renowned legal scholars²⁶—argued that the new statutes are undemocratic and violate the rule

²² See the opinion on amendments to the act of 25 June 2015 on the Constitutional Tribunal of Poland adopted by the Venice Commission at its 106th plenary session (Venice, 11-12 March 2016), Venice, 11 March 2016, opinion no. 833/2015, cdl-ad(2016)001; Opinion on the act of 15 January 2016 amending the police act and certain other acts adopted by the Venice Commission at its 107th plenary session (Venice, 10-11 June 2016), Strasbourg, 13 June 2016, opinion no. 839/2016, cdl-ad(2016)012; Opinion on the act on the public prosecutor’s office as amended adopted by the Venice Commission at its 113th plenary session (Venice, 8-9 December 2017), Strasbourg, 11 December 2017, opinion 892 / 2017, cdl-ad (2017) 028; Opinion on the draft act amending the act on the National Council of the Judiciary, on the draft act amending the act on the Supreme Court, proposed by the President of Poland, and on the act on the organisation of ordinary courts adopted by the Venice Commission at its 113th plenary session (8-9 December 2017), Strasbourg, 11 December 2017, opinion no. 904 / 2017, cdl-ad (2017) 031.

²³ See recommendation regarding the rule of law in Poland 2018/103 complementary to Commission Opinion 833/2015 of 11 March Recommendations (EU) 2016, On Amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland (L 17/50);/1374, (EU) 2017/146 and (EU) 2017/1520, Official Journal of the European Union L 17/50; Proposal for a Council Decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law, COM/2017/0835 final - 2017/0360 (NLE).

²⁴ See e.g., Adam Bodnar, *Europe Can Save Poland from darkness*, POLITICO (Apr. 9, 2018), <https://www.politico.eu/article/poland-judiciary-rule-of-law-europe-must-intervene/>; Adam Bodnar, *Protection of Human Rights in Poland After the Constitutional Crisis: Domestic and International Perspectives*, INTERNATIONAL PERSPECTIVES, BRITISH LAW CENTER (Nov. 13, 2017), <https://uw.britishlawcentre.co.uk/dr-adam-bodnar-protection-of-human-rights-in-poland-after-the-constitutional-crisis/> (video lecture given on Nov. 13, 2017, for the invitation of the BRITISH LAW CENTRE).

²⁵ See e.g., MAŁGORZATA SZULEKA ET AL., HELSINKI FOUNDATION FOR HUMAN RIGHTS IN WARSAW, THE CONSTITUTIONAL CRISIS IN POLAND 2015–2016 (2016), https://www.hfhr.pl/wp-content/uploads/2016/09/HFHR_The-constitutional-crisis-in-Poland-2015-2016.pdf; Helsinki Foundation for Human Rights in Warsaw, *Statement on the Draft Acts on the Supreme Court, the Constitutional Tribunal and the System of Ordinary Courts Adopted by the Parliament*, HELSINKI FOUNDATION FOR HUMAN RIGHTS (Apr. 16, 2018), http://citizensobservatory.pl/wp-content/uploads/2018/04/hfpc_stanowisko_16042018_EN.pdf.

²⁶ See THE COMMITTEE FOR LEGAL SCIENCES, RESOLUTION NO. 1/2015 OF THE COMMITTEE FOR LEGAL SCIENCES OF THE POLISH ACADEMY OF SCIENCES ADOPTED ON 26 NOVEMBER 2015 (Nov. 26, 2015), http://www.knp.pan.pl/images/stories/KNP_PAN/KNP_Resolution_ang.pdf. For more information, see also the resolutions No 1/2017, 2/2017 and 3/2017 of the Committee for Legal Sciences of the Polish Academy

of law. In particular, the reforms of the judiciary were subject to strong criticism. This paper covers the period between November 12, 2015 (the beginning of the functioning of the Sejm, the representative assembly of the Polish Parliament, of the 8th term), and the end of October 2018.

II. STATUTORY ANTI-CONSTITUTIONALISM

Normally, changes to the constitutional order are achieved through methods detailed in the current constitution or through the adoption of a new constitution. However, counterintuitively—an unconstitutional result marking an illiberal transformation may also be achieved by means of a series of statutory amendments outside the constitutional amendment procedure.²⁷ In other words, a change of the constitutional order may be achieved by way of

of Sciences (available only in Polish at official website of the Committee). *Also see* SADURSKI, *supra* note 5, at ch. 3–7.

²⁷ In the case of Poland outside the procedure provided in Article 235 of the Polish Constitution: “1. According to this provision: ‘1. A bill to amend the Constitution may be submitted by the following: at least one-fifth of the statutory number of Deputies; the Senate; or the President of the Republic. 2. Amendments to the Constitution shall be made by means of a statute adopted by the Sejm and, thereafter, adopted in the same wording by the Senate within a period of 60 days. 3. The first reading of a bill to amend the Constitution may take place no sooner than 30 days after the submission of the bill to the Sejm. 4. A bill to amend the Constitution shall be adopted by the Sejm by a majority of at least two-thirds of votes in the presence of at least half of the statutory number of Deputies, and by the Senate by an absolute majority of votes in the presence of at least half of the statutory number of Senators. 5. The adoption by the Sejm of a bill amending the provisions of Chapters I, II or XII of the Constitution shall take place no sooner than 60 days after the first reading of the bill. 6. If a bill to amend the Constitution relates to the provisions of Chapters I, II or XII, the subjects specified in para. 1 above may require, within 45 days of the adoption of the bill by the Senate, the holding of a confirmatory referendum. Such subjects shall make application in the matter to the Marshal of the Sejm, who shall order the holding of a referendum within 60 days of the day of receipt of the application. The amendment to the Constitution shall be deemed accepted if the majority of those voting express support for such amendment. 7. After conclusion of the procedures specified in paras 4 and 6 above, the Marshal of the Sejm shall submit the adopted statute to the President of the Republic for signature. The President of the Republic shall sign the statute within 21 days of its submission and order its promulgation in the Journal of Laws of the Republic of Poland.’” Rozdział XII, Konstytucja Rzeczypospolitej Polskiej. This provision effectively means that in cases when multi-partisan consensus in support of the amendment is lacking, the parliamentary ruling majority needs to have at least two-third of seats in the Sejm in order to pass the amendment. This is not the case of ruling majority of the Sejm of 8th term. The majority has 235 out of 460 seats what is well-below the two-third requirement. Note that Polish Constitution does not directly contain eternity clause or unchangeable constitutional provisions; *see also*, Lech Garlicki, *Normy konstytucyjne relatywnie niezmienniane in* CHARAKTER I STRUKTURA NORM KONSTYTUCYJNYCH (Janusz Trzciniński ed., Warsaw 1997); Wojciech Sokolewicz, *2 KONSTYTUCJA RZECZYPOSPOLITEJ POLSKIEJ. KOMENTARZ. 6* (Lech. Garlicki ed., Warsaw 2001). However, the implied constitutional limitations to amend the Constitution are increasingly recognized. *See* Mikołaj Hermann, Sławomira Wronowska, *PROBLEMATYKA INTERTEMPORALNA W PRAWIE. ZAGADNIENIA PODSTAWOWE. ROZSTRZYGNIECIA INTERTEMPORALNE. GENEZA, FUNKCJE, AKSJOLOGIA* 197 (Jarosław Mikołajewicz ed., Warsaw 2015); Mirosław Granat, *Rozumienie zmiany Konstytucji RP a tożsamość konstytucyjna, in* PROBLEMY ZMIANY KONSTYTUCJI 227 (Ryszard Chruściak ed., Warsaw 2017); Ryszard Piotrowski, *PREAMBUŁA KONSTYTUCJI RZECZYPOSPOLITEJ POLSKIEJ* 140–41 (Krzysztof Budziło ed., Warsaw 2009). *See also* Judgment of the Constitutional Tribunal of 24 November 2010, K 32/09, OTK ZU 2010, series A, No. 9, item 108.

statute.²⁸ This process of achieving an unconstitutional result via statute can be described as “statutory anti-constitutionalism.” In particular, by means of ordinary statutes the ruling majority tries to take control over guardianship of the constitutional order (i.e., the Constitutional Tribunal) and the ordinary judiciary. Once this is achieved, the government can adopt laws that are unconstitutional or act beyond the limits imposed by law, endangering the rule of law and fundamental rights.

A. *Stages of Statutory Anti-Constitutionalism*

Three stages of statutory anti-constitutionalism can be distinguished: capture of the Constitutional Tribunal (leading to a lack of effective centralized constitutional review); erosion of the judiciary (securing protection against judicial review); and substantive changes of the legal system (securing protection against pluralism and criticism and ensuring the irreversibility of changes). All stages are exemplified in the recent Polish experience.

The first stage of statutory anti-constitutionalism in Poland (capture of the Constitutional Tribunal) began in December 2015 and was concluded one year later. The Parliament: a) invalidated the election of Tribunal judges performed during the previous term of Parliament; b) elected “parallel judges” to the seats already filled; c) modified the procedural rules before the Tribunal (i.e., by changing the number of Judges required to hear a case); d) raised the *quorum*, enabling the Tribunal to act as a plenary body; e) imposed an obligation to hear most of the cases in plenary sessions of the Tribunal, and; f) empowered the reopening of all proceedings already concluded before the Tribunal. During the space of one year, the Constitutional Tribunal statute was amended twice and finally replaced by subsequent and completely new statutes in July 2016 and in November to December 2016. All these changes were aimed at limiting the Tribunal’s activity to prevent efficient and effective judicial review, as well as including three persons elected as judges to seats already filled by the parliament of the previous term. These acts and statutes were recognized as unconstitutional by the Ombudsman, the President of the Supreme Court, and members of the opposition.²⁹ Therefore, they were questioned before the Tribunal and recognised as unconstitutional in 2015 and

²⁸ See Wyrzykowski, *supra* note 16, at 159.

²⁹ See more about arguments on KONSTYTUCYJNY SPÓR O GRANICE ZMIAN ORGANIZACJI I ZASAD DZIAŁANIA TRYBUNAŁU KONSTYTUCYJNEGO, CZERWIEC 2015 – MARZEC 2016 29-36, 39, 50-62, 71-112, 132-135, 150-156, 162-169, 177-187, 201-208, 224-230, 248-257, 269-299426-435 (Piotr Radziewicz, Piotr Tuleja eds., Warsaw 2017).

2016. Taking into account that the Parliament is bound by the Constitution and referring to the principles of separation of powers, the rule of law, and independence of judiciary, the Tribunal handed down five important judgments on the unconstitutionality of the statutes adopted by the Parliament in 2015 and 2016.³⁰ The Tribunal strongly opposed the efforts of the parliamentary majority to regulate areas reserved for constitution by means of ordinary statutes.³¹ It also declared that the Parliament shall not have a supreme position in the Polish constitutional system and underlined that the “supremacy of Nation” principle does not authorize the Parliament to assume the powers of other constitutional bodies in the name of the Nation.³² All the above-mentioned judgments were adopted without the presence of the “parallel judges.”³³ As a result, the decisions of the Tribunal were strongly criticized by the Members of Parliament and the Government. The Prime Minister refused to publish the judgments, and as mentioned above, the Sejm adopted new acts on the Tribunal’s status and proceedings by the end of 2016. As of June 2018, the Constitutional Tribunal was effectively taken over.³⁴ A new President and Vice-President of the Tribunal were chosen.³⁵ The government party elected a majority of Judges. Three persons sitting on the Tribunal were elected to the vacant seats that had been previously legally filled. Accordingly, three of the “old judges”—elected in previous terms of Parliament—were removed from their duties by the new President of the Tribunal pending the resolution in the case brought by the Minister of Justice, who raised procedural violations during their elections.

The second stage of statutory anti-constitutionalism in Poland started in the middle of 2017, when the parliamentary majority passed three new acts concerning the judiciary. The first act extended the Minister of Justice’s administrative supervision over courts and authorized him to dismiss the

³⁰ Constitutional Tribunal judgments of: Dec. 3, 2015, case No. K 34/15, OTK ZU 2015, No 11, item 186; Dec. 9, 2015, case No. K 35/15; Mar. 9, 2016, case No. K 47/15, OTK ZU 2016, item 2; Aug. 11, 2016, case No. K 39/16, OTK ZU 2016, item 71; Nov. 7, 2016, case No. K 44/16 (unpublished judgment).

³¹ K 47/15 of Mar. 9, 2016 of the Constitutional Tribunal; K 39/16 of Aug. 11, 2016 of the Constitutional Tribunal; K 44/16 of Nov. 7, 2016 of the Constitutional Tribunal.

³² K 35/15 of Dec. 9, 2015 of the Constitutional Tribunal.

³³ Kp 1/17 of Mar. 16, 2017 of the Constitutional Tribunal.

³⁴ See e.g., Tomasz Tadeusz Koncewicz, *Living Under the Unconstitutional Capture and Hoping for the Constitutional Recapture*, VERFASSUNGBLOG (Jan. 3, 2017), <http://verfassungsblog.de/living-under-the-unconstitutional-capture-and-hoping-for-the-constitutional-recapture/>.

³⁵ See generally Marcin Matczak, *Poland’s Constitutional Tribunal Under PiS Control Descends into Legal Chaos*, VERFASSUNGBLOG (Jan. 11, 2017), <http://verfassungsblog.de/polands-constitutional-tribunal-under-pis-control-descends-into-legal-chaos/>.

presidents of the common courts.³⁶ The second act provided for the retirement of all Supreme Court judges after its entry into force and guaranteed an exclusive authority for the Minister of Justice to nominate candidates for new judges.³⁷ It also created a new disciplinary proceeding for the Supreme Court judges, which gave significant power to the Minister of Justice.³⁸ The third statute proclaimed an *ipso jure* expiration of the National Council of the Judiciary members' mandates and introduced completely new rules for the election of new members.³⁹ It also provided the Parliament with the competence to elect all members. The acts on the Supreme Court and the National Council of the Judiciary were vetoed by the President. The presidential proposals for new Supreme Court and the National Council of the Judiciary acts were submitted on September 25, 2017,⁴⁰ and adopted at the end of 2017.⁴¹ However, these statutes are largely similar in scope to the earlier vetoed ones. In particular, they shortened the terms of members of the National Council of Judiciary⁴² and forced Supreme Court judges into early retirement.⁴³

The third stage of statutory anti-constitutionalism in Poland was parallel in nature to the second one. The Parliament adopted numerous constitutionally controversial laws that allowed the ruling party to both monopolize power in state institutions and to restrict fundamental rights. For example, new laws or important amendments concerning the Prosecutor's Office, Civil Service, Police, public media data retention, and freedom of assembly were adopted.⁴⁴

The fourth stage, capture of the judiciary, began in the middle of 2018, after the Act on the Supreme Court entered into force. The statute lowered the

³⁶ Act of July 12, 2017, amending the Act on Common Courts System and other Acts (Journal of Laws 2017, item 1452).

³⁷ Articles 87–89 of the Act on the Supreme Court of 20 July 2017 (subsequently vetoed on July 31, 2017, by the President of the Republic).

³⁸ Articles 54 and 57(2) of the Act on the Supreme Court of July 20, 2017.

³⁹ Article 5(1) of the Act of July 12, 2017, Amending the Act on the National Judiciary Council (vetoed on July 31, 2017, by the President of the Republic).

⁴⁰ For criticism of the scope of the acts submitted by the President, see Marcin Matczak, *President Duda is Destroying the Rule of Law Instead of Fixing it*, VERFASSUNGSBLOG (Aug. 29, 2017), <https://verfassungsblog.de/president-duda-is-destroying-the-rule-of-law-instead-of-fixing-it/>.

⁴¹ Act on the Supreme Court of Dec. 8, 2017 (Journal of Laws 2018, item 5); Act of Dec. 8, 2017 amending the Act on National Judiciary Council and other acts (Journal of Laws 2018, item 3).

⁴² Article 6 of the Act of Dec. 8, 2017 amending the Act on National Judiciary Council and other Acts.

⁴³ Article 111 of the Act on the Supreme Court of Dec. 8, 2017.

⁴⁴ Sadurski, *supra* note 18, at 4; SADURSKI, *supra* note 5, at ch. 5–6.

retirement age for Supreme Court judges from seventy to sixty-five.⁴⁵ It was directly applicable to acting judges of the court, without leaving them the right to decide whether or not to exercise the lower retirement age.⁴⁶ The new provision imposed on acting judges of the Supreme Court who were sixty-five or older an obligation to obtain the consent of the President of the Republic to exercise their judges' offices after the statutory provisions entered into force.⁴⁷ Moreover, the act created new positions in the Supreme Court by adding two new chambers, a Disciplinary Chamber and a Chamber of Extraordinary Control and Public Affairs, to the Court's structure.⁴⁸

When the new law entered into force, twenty-seven Supreme Court judges were over sixty-five years of age, including the First President of the Supreme Court. Eleven of them were retired automatically due to their lack of will to serve in the new legal circumstances until the age of seventy. Sixteen of the judges over sixty-five declared their will to remain, but they did through different legal bases and in different contexts, which led to different legal paths and consequences with respect to their decisions. However, the Polish Supreme Court judges generally referred to the constitutional provisions directly.⁴⁹ They claimed that the principle of judicial independence and the provisions on status of the Supreme Court judges allowed them to serve on the Court under the conditions provided by the previously binding law.⁵⁰ The new law was generally recognised as a violation of their constitutional guarantees.⁵¹ In this context, it is important to note that the First President of

⁴⁵ Article 37(1) of the Act on the Supreme Court of Dec. 8, 2017.

⁴⁶ Article 111 of the Act on the Supreme Court of Dec. 8, 2017.

⁴⁷ *Id.*

⁴⁸ Article 27 of the Act on the Supreme Court of Dec. 8, 2017.

⁴⁹ Nine judges submitted a declaration in accordance with the new provisions in order to obtain the President's consent for longer service on the Court. They submitted the declarations and opinions on their good health conditions in accordance with the new Article 37(1) of the Supreme Court Act. Then the newly elected (by the Sejm of the 8th term) members of the National Judiciary Council began their assessment of the judges' declarations in order to recommend them for the President of the Republic.

⁵⁰ Some of these judges were informed on September 12, 2018 of the status of their retirement by the President of the Republic. However, the President did not act either in accordance with the constitutional provisions nor with the new statutory provisions on the Supreme Court. It has to be underlined that according to the Constitution the President shall adopt a formal decision countersigned by the Prime Minister. Instead, the President sent a private letter to the judges. Therefore, the Supreme Court judges declared that they still had power to serve as Supreme Court Judges in accordance with both the constitutional provisions as well as directly applicable European Union provisions.

⁵¹ In this context it is worth noting the case of Judge Krzysztof Rączka. After the new law on the Supreme Court entered into force, on July 12, 2018, Judge Rączka submitted a special declaration due to his extraordinary legal situation that was created by the Supreme Court Act. *Prima facie* the judge was obliged to obtain the consent of the President of the Republic in order to continue exercising his judge's office. However, this was legally impossible, as according to the new law such a request should be submitted by a judge no later than 6 months and no earlier than 12 months before the date of reaching age 65. In the case of

the Supreme Court, Małgorzata Gersdorf, did not submit any declaration and did not ask the President for consent to remain at her office. The President of the Republic thus sent a letter to President Gersdorf and informed her that she was retired *ex lege*, and, as a consequence, her term as First President of the Supreme Court had expired. In her reply on July 19, 2018, President Gersdorf asserted that her term was granted directly by a constitutional provision and could not be either directly or indirectly shortened by statutory provisions.⁵²

At the same time, the new National Judiciary Council, elected by the Sejm of the 8th term in 2018,⁵³ commenced a procedure to elect new Supreme Court judges. During extraordinary sessions at the end of August 2018, following quick and short interviews of candidates for the positions of Supreme Court judge, the Council recommended forty persons for appointment by the President of the Republic.⁵⁴ During the next two months, the President of the Republic appointed thirty-seven candidates to positions as new Supreme Court judges.⁵⁵

Judge Rączka the period for submitting a request expired on January 28, 2018—before the new law entered into force. Therefore, there was no legal basis for such request. The judge submitted a declaration that he is still authorized to serve on the Supreme Court regardless of the fact that new law lowered the retirement age of Supreme Court Judges. It was based on the directly applicable constitutional provisions of independence of the judicial branch and the non-removability of judges. After Judge Rączka made his declaration, the Parliament amended the Supreme Court law and adopted a special provision that extended the period for submission by a judge of the Supreme Court a request for the consent of the President of the Republic. Having regard to the fact that there were no other judges of the Supreme Court to which the new extended period pertained, we may call this amendment *lex Rączka*. It was obviously aimed at forcing Judge Rączka to obtain the President's consent or to leave the Supreme Court (see the Act of July 20, 2018, amending the act on the common courts system as well as other laws, Journal of Laws 2018, item 1443).

⁵² See Letter from Małgorzata Gersdorf, the First President of the Supreme Court of the Republic of Poland, to Andrzej Duda, the President of the Republic of Poland (July 19, 2018), <http://www.sn.pl/aktualnosci/SiteAssets/Lists/Wydarzenia/EditForm/2018.07.19%20-%20List%20PPSN%20do%20Prezydenta%20RP%20-%20EN.pdf>.

⁵³ See, e.g., CHRISTIAN DAVIS, *HOSTILE TAKEOVER: HOW LAW AND JUSTICE CAPTURED POLAND'S COURTS*, FREEDOM HOUSE (May 2018), <https://freedomhouse.org/report/special-reports/hostile-takeover-how-law-and-justice-captured-poland-s-courts>.

⁵⁴ See *Two Lists of Candidates for the Position of Supreme Court Judge*, NATIONAL JUDICIARY COUNCIL (Aug. 23, 2018), <http://www.krs.pl/bip/files/2018-08-23-28/lista%20kandydatow%20powolanych%20do%20sadu%20najwyzszego.pdf>; See also LIST OF PERSONS IN RELATION TO WHOM THE NATIONAL COUNCIL OF THE JUDICIARY, AT ITS MEETING ON AUGUST 28, 2018, ADOPTED RESOLUTIONS CONTAINING MOTIONS FOR APPOINTING THEM TO THE OFFICE OF A JUDGE OF THE SUPREME COURT, NATIONAL JUDICIARY COUNCIL (Aug. 28, 2018), <http://krs.pl/bip/files/2018-08-23-28/lista%20do%20bip%20%20gl.%20z%2028%20sierpnia.pdf>.

⁵⁵ See *The President Appointed New Judges of the Supreme Court*, PREZYDENT.PL (Oct. 10, 2018), <http://www.prezydent.pl/aktualnosci/nominacje/art,96,prezydent-powolal-nowych-sedziow-sadu-najwyzszego.html>; see also *The President Handed the Judges' Appointments*, PREZYDENT.PL (Sept. 20, 2018), <http://www.prezydent.pl/aktualnosci/nominacje/art,93,prezydent-rp-wreczyl-nominacje-sedziowskie.html>. See also WEBSITE OF THE PRESIDENT OF THE REPUBLIC OF POLAND,

However, the judicial branch decided not to stand and idly watch as the President and the National Judiciary Council transformed the personnel structure of the Supreme Court. First, parts of the Council's resolutions were questioned before the Supreme Administrative Court, which suspended their implementation.⁵⁶ Accordingly, both the National Judiciary Council and the President of the Republic must refrain from all actions before the final decision of the Supreme Administrative Court in order to avoid further and permanent violation of parties' rights. In particular, the President must wait with the appointments. Secondly, the Supreme Court, sitting in a panel of "old judges," submitted five preliminary questions⁵⁷ to the Court of Justice of European Union⁵⁸ regarding the 2017-2018 judiciary reforms and changes contained in the Supreme Court Act.⁵⁹

In addition, several ordinary courts in Poland submitted preliminary questions to the Court of Justice of the European Union. The Court was asked whether the new model of disciplinary proceedings for judges, wherein a

<http://www.prezydent.pl/aktualnosci/nominacje/art,96,prezydent-powolal-nowych-sedziow-sadu-najwyzszego.html> (last visited Feb. 23, 2019).

⁵⁶ II GW 22/18 of Sept. 25, 2018, of the Supreme Administrative Court; II GW 23/18 of Sept. 27, 2018, of the Supreme Administrative Court; II GW 31/18 of Oct. 8, 2018, of the Supreme Administrative Court.

⁵⁷ III PO 6/18 of Aug. 1, 2018 of the Supreme Court; III UZP 4/18 of Aug. 2, 2018 of the Supreme Court; III PO 7/18 of Aug. 30 2018 of the Supreme Court; III PO 8/18 of Sept. 19, 2018 of the Supreme Court; III PO9/18 of Sept. 19, 2018 of the Supreme Court; II PK 153/17 of Oct. 3, 2018 of the Supreme Court.

⁵⁸ See Case C-537/18, *Krajowa Rada Sadownictwa*, 2018 E.C.R.; see also Case C-522/18, *Zaklad Ubezpieczen Spolecznych*, 2018 E.C.R.; see also Case C-585/18, *Krajowa Rada Sadownictwa*, 2018 E.C.R.

⁵⁹ In all these mentioned cases, the Supreme Court referred to the Polish statutory provisions on the Supreme Court and asked the Court of Justice whether EU primary law allowed for the adoption of national legislation on lowering the retirement age of judges of a court of last instance age from 70 to 65, a provision that is applicable to acting judges of that court, without leaving them the right to decide whether or not to exercise a lower retirement age. The Supreme Court asked whether a national provision that imposed an obligation on acting judges of the Supreme Court 65 years old or older to obtain the consent of the President of the Republic for exercising their judges' offices after the statutory provisions entered into force are consistent with the provisions of the Treaty and the Charter. The Supreme Court also asked whether the situation created by aforementioned statutory provisions might be classified as discrimination on the grounds of age, prohibited by EU secondary law. Moreover, in the event of a finding of discrimination and violation of EU law by the national statutory provisions, the European Court of Justice was asked whether the Supreme Court may decline to apply that national legislation on lowering the retirement age of judges and sit in a panel with the discriminated judges in order to provide effective judicial protection of EU law. The Supreme Court also asked whether, acting as a European court, it has the power to suspend the application of all national provisions that violate guarantees of the tenure of judges in all cases of Supreme Court judges affected by the new law on lowering the retirement age of judges. The Supreme Court suggested that the newly adopted Polish statutory provisions may violate: the treaty obligation of the Member State to provide sufficient and effective judicial protection in the fields covered by Union law; the principle of sincere cooperation in the context of the rule of law guarantees; the right to an effective remedy and to a fair trial; as well as the non-discrimination rules expressed in Directive 2000/78, art. 13, 2000 O.J. (L303) 21 (EC).

significant role is provided for the Minister of Justice and which does not provide any guaranties of objectivity and independence for disciplinary courts, is consistent with E.U. standards.⁶⁰

B. *The “Nations’ Will” Argument and Legal Formalism*

Statutory anti-constitutionalism is based on the populist usage of the “Nations’ will” argument. For example, in late 2015, several members of the Polish Parliament⁶¹ and participants in public debates referred to the theory of the supremacy of the *parliament* over other constitutional bodies. Their justifications were based directly on the concept of the Nation’s will.⁶² A similar justification was given in 2017 by the group of experts appointed by the Speaker of the Sejm who were working on the report in response to the

⁶⁰ See Case C-563/18, Prokuratura Okregowa w Plocku, 2018 E.C.R.; see also Case C-558/18, Miasto Lowicz, 2018 E.C.R.

⁶¹ See, *inter alia*, Kornel Morawiecki, *posiedzenia Sejmu Rzeczypospolitej Polskiej w dniu*, in 2 SPRAWOZDANIE STENOGRAFICZNE 78 (Nov. 25, 2015); MAREK AST, *posiedzenia Sejmu Rzeczypospolitej Polskiej*, in 3 SPRAWOZDANIE STENOGRAFICZNE 14–15 (Dec. 2, 2015).

⁶² It should be emphasized that such a concept has no constitutional basis in Poland. According to well-established interpretations of constitutional provisions, the Nations’ will cannot justify the supremacy of the legislative power over the Constitution or other branches of power. In a case concerning the constitutionality of the provisions regulating the election of justices of the Constitutional Tribunal, the Tribunal pointed out that “[t]he obligation to observe the Constitution is particularly important with regard to persons in power. This is manifested, *inter alia*, by the oath of office that must be taken before assuming the office by Sejm Deputies, Senators, the President, members of the Council of Ministers, as well as other officials. What safeguards the principle of the supremacy of the Constitution, and ultimately also the rights and freedoms of the individual, is, *inter alia*, the judicial review of the constitutionality of norms, conducted by an independent authority which is separate from the legislature and the executive. Since their origins, constitutional courts in European legal culture have been conceived of as ‘safeguards for individuals against the tyranny of a majority’ and guarantors of the precedence of law over power. After the experience of totalitarian regimes, there is no doubt that even a democratically-elected parliament has no competence to issue determinations that would be contrary to the Constitution, even if they were justified by ‘the good of the Nation’, where the term is understood in an abstract way. Thus, the constitution-maker has delineated substantive and procedural limits for public authorities, within which all their determinations must fall in every case.” (K 34/15 of December 3, 2015 of The Constitutional Tribunal). The Tribunal also underlined that, it “is not only the guarantor of the supremacy of the Constitution, but it also safeguards the tri-partite division of powers. Any regulations concerning the Tribunal may not lead to a situation where it would lose its capacity to carry out its activity.” (K 34/15 of December 9, 2015 of the Constitutional Tribunal). For the Tribunal there was no doubt that one of the most important aims of the Articles 8 and 10 of the Constitution is to protect against the concentration of powers and competences in one office. Referring to the previous case-law, the Tribunal stated that the Parliament should not have a supreme position in the Polish constitutional system, and highlighted that the supremacy of nation principle, Article 4 Rozdział I, Konstytucja Rzeczypospolitej Polskiej, did not authorize the Parliament to assume other constitutional bodies’ competences in the name of the nation (U 4/06 of Sept. 22, 2006, of The Constitutional Tribunal). Article 4 of the Constitution means, in particular, a prohibition against the legislative, as well as the executive or judiciary, replacing or opposing the Constitution (enacted in accordance with a special procedure by the National Assembly and approved in a referendum by the Nation), or acting in in the name of the nation in breach of the constitutional law.

Venice Commission's opinion on the constitutional crisis in Poland.⁶³ As it was later observed:

This novel vision of the Polish constitutional law emphasized the supremacy of democracy over the abstract principle of rule of law; the concept of separation of powers based the supremacy of Parliament; and the need to weaken the position of the Polish Constitutional Tribunal and prevent the expansion of “juristocracy” and the “judicialization of politics.”⁶⁴

An important feature of statutory anti-constitutionalism is an almost obsessive attention to legalism in the narrow (formal) sense,⁶⁵ which makes the formal conformity of the legislative process probably the most important value. It may be recognized as the main source of legitimation, since the parliament is claimed to have the last word in a constitutional interpretation. In this context, the internal procedural rules of the parliament play a primary role and may be changed according to the needs of the parliamentary majority.

The special role of formal legalism is also visible in the scope of statutes. It has become normal for the parliament to create a direct legal basis for the government or other authorities to act in an unconstitutional way. In other words, in the event of a substantive nonconformity with constitutional provisions, there are always statutory provisions that allow an authority to act and declare publicly that such act shall be deemed legal. For example, the Sejm adopted twice the statutory provisions that allowed the President of the Republic not to appoint judges legally elected by the previous parliament.⁶⁶ A

⁶³ ARKADIUSZ ADAMCZYK ET AL., EXPERT REPORT ON ISSUES RELATING TO THE CONSTITUTIONAL TRIBUNAL (2016).

⁶⁴ Anna Śledzińska-Simon & Michał Ziółkowski, Constitutional Identity of Poland: Is the Emperor Putting on the Old Clothes of Sovereignty? 14–15 (July 5, 2017) (unpublished manuscript) (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2997407).

⁶⁵ There is no question that the rule of law principle has various meanings and interpretations depending on the constitutional subject, tradition, history, or legal culture. From either a pluralistic constitutional position or a comparative one it may be hard to find one answer to the question of the substantive relationship between democracy and the rule of law. It should, however, be underlined that the distinction between the procedural rule of law concept and the substantive one has been widely accepted. The first (narrow) rule of law definition emphasizes the procedural framework for public authorities' decisions only, while the (wide) substantive theory goes beyond this and looks for the underlying fairness, justice or equality components under the rule of law. The principle of judicial independence is also included by scholars in the latter-mentioned scope.

⁶⁶ See Article 90 of the Act on the Constitutional Tribunal of July 22, 2016; Article 1(1) of the Act of Nov. 19, 2015, amending the Act of the Constitutional Tribunal of June 25, 2015; see also consequences of Article 18(2) and Article 21(2) of the statute of Dec. 13, 2016 – Provisions on introduction of the Act on the

similar situation can be observed in the case of the statute shortening the terms of constitutional authorities,⁶⁷ despite the fact that there are well-established constitutional prohibitions against such a practice.

Under statutory anti-constitutionalism, it is a common practice for members of parliament or government to refer to the constitutional principle of legalism in order to draw attention away from the substantive unconstitutionality of their statutes. At the same time, they underscore the general and vague nature of the constitutional provisions in issue and their openness to interpretation—an interpretation made in the end by the parliament as the voice of the Nation’s will. In the end, this leads to a phenomenon that had been recently described as a “constitution-hostile interpretation.” According to Jerzy Zajadło:

[A c]onstitution-hostile interpretation is a political strategy accompanied by a specific perverse political rhetoric of a quite primitive, populist character. The authors of this strategy usually demonstrate the will or even acknowledge the obligation to observe the constitution, but at the same time they call the constitution “internally contradictory and conflictogenic,” “postcommunist,” “a constitution for the elites, not for ordinary people,” *etc.* . . . [T]he phenomenon of *interpretatio constitutionis hostilis* is an example of extreme instrumentalization of the process of interpretation for the needs of current politics, ergo an example of recognizing the primacy of politics over law, even at the level of the basic law. . . . In the case of a constitution-hostile interpretation . . . the aim is mostly to forcibly include in the legal system even those normative solutions which are clearly unconstitutional, but which the authors wish to become the valid law. . . . *Interpretatio constitutionis hostilis* does not recognize any commonly accepted paradigms of jurisprudence; it creates its own, new paradigms which nobody knew before.⁶⁸

Organization and Proceedings before the Constitutional Tribunal and the Judges of the Constitutional Tribunal Status Act (Journal of Laws 2016, item 2074).

⁶⁷ See, e.g., Article 6 of the Act of Dec. 8, 2017, amending the Act on National Judiciary Council and other acts; Articles 111 and 111(a) of the Act on the Supreme Court of Dec. 8, 2017.

⁶⁸ Jerzy Zajadło, *Constitution-Hostile Interpretation*, 2 PRZEGLĄD KONSTYTUCYJNY 5, 8–13 (2018).

C. *Statutory Anti-Constitutionalism and Other Existing Concepts*

Statutory anti-constitutionalism may be distinguished from other existing concepts. It is different from the idea of “abusive constitutionalism,”⁶⁹ which according to David Landau refers to the “use of mechanisms of constitutional change to erode the democratic order.”⁷⁰ In statutory anti-constitutionalism, a new constitutional amendment procedure is not introduced, nor are new constitutions or constitutional amendments enacted. The winner of an election does not have sufficient public support or enough seats in the parliament to change constitutional provisions.

Statutory anti-constitutionalism needs to also be distinguished from “higher law-making.”⁷¹ According to Ackerman, the higher law-making process consists of several phases: “signaling” (when representatives get extraordinary support for their initiative for revision of the higher law in the country)⁷²; a “proposal” (when a popular movement translates into calls for a revision in an operational proposal)⁷³; “mobilized deliberation” (consisting of the following sub-phases: “constitutional impasse,” “decisive electoral mandate,” “unconventional assault,” “switch in time,” and a “consolidating election”)⁷⁴; and “legal codification” (when the Supreme Court translates the constitutional reform into constitutional doctrine).⁷⁵ In the case of rapid evasion of the constitution via statute, there are no “signaling,” “proposal,” or “mobilized deliberation” phases. All legal changes are invented by politicians without specific public support for even public deliberations. They are applied as soon as possible from on high by the parliamentary majority and quickly sanctioned by the government. The phenomenon is also different from the concept of “dualist democracy.”⁷⁶ There is no popular movement for constitutional change. Actors in the process of statutory anti-constitutionalism are limited to the central constitutional authorities only (Parliament, the President, or Government).⁷⁷

⁶⁹ David Landau, *Abusive Constitutionalism*, 47, U. CAL. DAVIS L. REV. 189, 189 (2013).

⁷⁰ *Id.*

⁷¹ BRUCE ACKERMAN, *WE THE PEOPLE*, VOL. 1: FOUNDATIONS 272 (1993).

⁷² *Id.*

⁷³ *Id.* at 280.

⁷⁴ *Id.* at 285.

⁷⁵ *Id.* at 288.

⁷⁶ *Id.* at 3.

⁷⁷ See also, Michał Ziółkowski, *Constitutional Moment and the Polish Constitutional Crisis 2015–2018 (a few Critical Remarks)*, 4 PRZEGLĄD KONSTYTUCYJNY 86 (2018).

The evasion of the constitution by means of statute may sometimes be linked to a radical version of “political constitutionalism,” which is usually confronted with “legal constitutionalism” (based on institutional legitimacy, the primacy of law over politics, and the recognition and protection of human rights).⁷⁸ For instance, such an interpretation of the Polish experience was given by Adam Czarnota, who suggested that:

Legal constitutionalism which leads to the judicialisation of politics is criticised by political constitutionalism, which is based on the position that the constitution only provides the framework for democratic disagreement and framework itself can be an object of re-negotiation. Political constitutionalism stresses the greater legitimacy of parliaments as opposed to constitutional tribunals in law making. Constitutional review is based on a zero-sum game principle. Political constitutionalism presents parliament as a place of dialogue. The concept of political constitutionalism criticises legal constitutionalism for its monopolisation of the constitution, which belongs to the whole nation and which citizens should have the opportunity to interpret and use in their everyday activities. Democratic political constitutionalism suggests that it is necessary to rethink the ontological basis of legal constitutionalism. The constitution is not an act but a never-ending dialogue and postulates a greater participation of citizens. . . . I interpret the present constitutional crisis in Poland and some other countries in Central-Eastern Europe as an attempt to take the constitution seriously and return it to the citizens.⁷⁹

However, considering the republican virtues and origins of R. Bellamy’s “political constitutionalism” concept and the link to the theory of a democratic state, we are of the opinion that statutory anti-constitutionalism differs from the idea of political constitutionalism. In statutory anti-constitutionalism, there is no process of broad deliberation or citizen involvement. Paul Blokker underlines that:

[A] key dimension of political constitutionalism is the observation that specific constitutional norms and rights are

⁷⁸ See also RICHARD BELLAMY, *POLITICAL CONSTITUTIONALISM A REPUBLICAN DEFENCE OF THE CONSTITUTIONALITY OF DEMOCRACY* 145 (2007) (discussing political constitutionalism).

⁷⁹ Aadam Czarnota, *The Constitutional Tribunal*, VERFASSUNGBLOG (June 3, 2017), <https://verfassungsblog.de/the-constitutional-tribunal/>.

ultimately “essentially contestable,” as reasonable disagreement is an intrinsic part of democracy. Therefore, the understanding and interpretation of such norms and rights ought to remain part of an on-going political debate, rather than being one-sidedly interpreted by the judiciary. Such an open and inclusionary political debate ought to take place within the limits of the constitution as a basic framework for resolving disagreements.⁸⁰

The concept of statutory anti-constitutionalism fits into the growing populism literature, where populism is associated with the confrontational approach to institutions of liberal democracies and the negation of constitutional or liberal democracy.⁸¹ Indeed, statutory anti-constitutionalism may be seen as one of the methods used by populists to introduce changes by bypassing the classic constitutional legal framework and institutions of liberal democracy⁸²—such as courts⁸³—and by doing so allegedly in response to the popular will of the majority.⁸⁴ According to Paul Blokker:

The populist understanding of constitutionalism hinges on the revolutionary tradition, but with a specific twist. Populism captures the popular will and claims it its own, against other social forces, in or outside of society. Populists tend to define the people in strong contrast to significant Others (elites, non-natives, foreign forces), and by doing so turn their (idealized)

⁸⁰ Paul Blokker, *From Legal to Political Constitutionalism?*, VERFASSUNGBLOG (June 4, 2017), <https://verfassungsblog.de/from-legal-to-political-constitutionalism/>.

⁸¹ See Paul Blokker, *Populist Constitutionalism*, ROUTLEDGE HANDBOOK OF GLOBAL POPULISM, (Carlos de la Torre ed., 2019) (Underlines that populists do not reject democracy as such, but they play on edges of the “constitutional” aspect of democracy; they claim to be defending a pure form of rule by the people, while having difficulties with the first ingredient, constitutionalism.); see also Marc Santora & Helen Bienvenu, *Secure in Hungary, Orban Readies for Battle with Brussels*, N.Y. TIMES (May 11, 2018), <https://www.nytimes.com/2018/05/11/world/europe/hungary-victor-orban-immigration-europe.html> (discussing specific and particular rejection of liberal democracy from the speech of V. Orban, the prime minister of Hungary, who in inaugurating his third term in office in May 2018 observed that: “We need to say it out loud because you can’t reform a nation in secrecy: ‘The era of *liberal democracy* is over,’ and then added ‘Rather than try to fix a *liberal democracy* that has run aground, we will build a 21st-century *Christian democracy*.’”). See also Maciej Bernatt, *Illiberal Populism: Competition Law at Risk?* (Jan. 24, 2019) (unpublished manuscript), <https://ssrn.com/abstract=3321719>.

⁸² Populists tend to reject procedures of liberal democracy and to contest them as being cumbersome and artificial, placing constraints on the true political will of the people.

⁸³ See Zoltán Fleck, *Judges under Attack in Hungary*, VERFASSUNGBLOG (May 14, 2018), <https://verfassungsblog.de/judges-under-attack-in-hungary> (stating populists often consider courts and judges as their opponents).

⁸⁴ JAN-WERNER MÜLLER, *WHAT IS POPULISM?* 68 (2016); NADIA URBINATI, *DEMOCRACY DISFIGURED* 129 (2014).

construction of the people into the only acceptable, non-corrupted one. The people are in this way equated with a self-constructed populist majority, understood in contrast to minorities. The rule of law and constitutionalism cannot, according to populists, override the “real” popular will. Constitutionalism as such becomes a device in the populist project of rebuilding the state.⁸⁵

Thus, the statutory anti-constitutionalism has more in common with the concept of populist constitutionalism than political constitutionalism *per se*.

III. THE TOOLS OF STATUTORY ANTI-CONSTITUTIONALISM

Various legal methods may be used to evade the constitution through statute. Their closer study helps understand the ways in which systemic unconstitutional transformation may be achieved without changing the constitution.

A. *The “Parallel” Public Institutions*

One distinctive feature of statutory anti-constitutionalism in Poland is the creation of “parallel” institutions and public bodies by the Sejm of the 8th term. By trying to act legally in the formal sense, the Sejm could neither directly dismiss the members of public authorities before the end of their terms nor dissolve institutions explicitly named and protected under the constitutional provisions, including the President of the Tribunal and the National Judiciary Council. In order to avoid such a clear violation of the Constitution, while assuming that constitutional provisions do not directly limit legislative power, the Sejm decided to create new public authorities with similar or competing competences to those in existence.

As a consequence, from 2015 to 2018, the parliamentary majority invented and introduced equivalents of Judges of the Constitutional Tribunal, Vice-President of the Constitutional Tribunal, National Broadcasting Council, and President of the Supreme Court. All these “parallel” authorities received specific powers and tasks in order to implement or maintain the reforms adopted by the Sejm of the 8th term. The election of “parallel” judges was aimed at blocking the appointment of three judges duly elected by the Sejm

⁸⁵ Paul Blokker, *Populist Constitutionalism*, VERFASSUNGBLOG <https://verfassungsblog.de/populist-constitutionalism>.

(May 4, 2017),

of the previous term. Moreover, they were expected to counterbalance the “old” members of the Constitutional Tribunal and to restrain judges from ruling on the (un)constitutionality of the new reforms. A “parallel” Vice-President of the Tribunal was responsible for organization of the election of the new President of the Tribunal and implementing the reforms in the organization of the Tribunal. The “parallel” National Broadcasting Council became responsible for reform of the public media. The “parallel” President of the Supreme Court was originally thought to lead the court during the reform of the judiciary, instead of the court’s acting First President.

Regardless of the different and specified singular statutory tasks, the “parallel” institutions have a common aim. On one hand, they are aimed at undermining the legitimacy of the “old” institutions or public authorities that had been elected before. On the other hand, they help justify further reforms.

1. “Parallel Judges” of the Tribunal

The best example of such parallel institutions is the election by the Sejm of the 8th term of three persons to seats on the Constitutional Tribunal; seats which had been already filled by the judges duly elected by the Sejm of the 7th term. In other words, the Sejm of the 8th term created three “parallel judges” in the Constitutional Tribunal, sometimes dubbed by Polish scholars as “fake judges,”⁸⁶ “duplicate judges,”⁸⁷ or “anti-judges.”⁸⁸ The acts of the Sejm were unconstitutional because at the beginning of the 8th term of parliament there were fifteen judges legally elected to the Constitutional Tribunal.⁸⁹ Twelve of them had been elected by the Sejm of the 5th term (three

⁸⁶ Tomasz Tadeusz Koncewicz, *Living under the unconstitutional capture and hoping for the constitutional recapture*, VERFASSUNGSBLOG (Jan. 3, 2017), <https://verfassungsblog.de/living-under-the-unconstitutional-capture-and-hoping-for-the-constitutional-recapture>.

⁸⁷ Sadurski, *supra* note 18, at 21.

⁸⁸ Marcin Matczak, *Poland’s Constitutional Tribunal under PiS control descends into legal chaos*, VERFASSUNGSBLOG (Jan. 11, 2017), <https://verfassungsblog.de/polands-constitutional-tribunal-under-pis-control-descends-into-legal-chaos/>.

⁸⁹ The Constitution of Poland contains wide regulation of the Constitutional Tribunal’s status, powers, and composition. According to the Article 194: “1. The Constitutional Tribunal shall be composed of 15 judges chosen individually by the Sejm for a term of office of 9 years from amongst persons distinguished by their knowledge of the law. No person may be chosen for more than one term of office. 2. The President and Vice-President of the Constitutional Tribunal shall be appointed by the President of the Republic from amongst candidates proposed by the General Assembly of the Judges of the Constitutional Tribunal.” Rozdział VIII, Konstytucja Rzeczypospolitej Polskiej. Constitutional provisions also guarantee: a) Judges’ independence and the Tribunal’s separation from other branches of power, *id.* at art. 195; b) the Tribunal’s competence to control different normative, *id.* at art. 188; c) the Parliament’s competence to establish the Tribunal’s organization and rules of procedure in a specific statute, *id.* at art. 197. It is worth noticing that Polish Constitutional Tribunal Judges shall be subject only to the Constitution, *id.* at art. 195, which may be

judges), 6th term (eight judges), and 7th term (one judge), and all were appointed by the President of the Republic. Three other judges, legally elected in October 2015 by the Sejm of the 7th term, were waiting to be sworn in before the President. Therefore, there were no vacancies in the Constitutional Tribunal, and the Sejm of the 8th term had no power to act.

In order to offer a sufficient explanation for the above situation⁹⁰ and the concept of “parallel judges,” we have to go back to June 2015, when a new statute on the Constitutional Tribunal was adopted by the Sejm of the 7th term.⁹¹ The original draft law was submitted in 2013 by the President of the Republic. Its aim was to fine-tune existing law, in particular when it comes to procedural provisions.⁹² The draft was based on well-developed constitutional case-law. Therefore, its provisions were not controversial. However, at the end of a legislative proceeding, an infamous Article 137 was added to the statute and the story of “parallel judges” began. According to that provision, the Sejm of the 7th term was given an extraordinary power to elect the Constitutional Tribunal judges for all vacancies in 2015. Taking into account the constitutional judges’ calendar of terms, the Sejm of the 7th term reserved the right to elect judges for three vacancies, one of which was to arise on the 7th of November and two on the 2nd and 8th of December 2015. From a constitutional point of view, there would have been nothing controversial about such a regulation, if it had been applied to judges’ vacancies opened before the end of the Sejm of the 7th term. However, 2015 was a parliamentary election year in Poland and during the adoption of Article 137, there was a high probability that two judges of the Constitutional Tribunal would be elected by Sejm of the next term.⁹³ Therefore, the real aim of Article 137 was to have five judges elected by the Sejm of the 7th term instead of three.⁹⁴

directly applied by the Tribunal and other courts, *id.* at art. 8, Rozdział I). According to the Constitution, the Tribunal judgments shall be universally binding, final, and immediately published in the Journal of Laws, *id.* at art. 190, Rozdział VIII.

⁹⁰ See Małgorzata Szuleka, Marcin Szwed, & Marcin Wolny, *The Constitutional Crisis In Poland 2015–2016*, HELSINKI FOUNDATION FOR HUMAN RIGHTS (April 2016), http://www.hfhr.pl/wp-content/uploads/2016/09/HFHR_The-constitutional-crisis-in-Poland-2015-2016.pdf.

⁹¹ Act on the Constitutional Tribunal of July 22, 2015 (Journal of Laws 2015, item 1064).

⁹² Act on the Constitutional Tribunal of Aug. 1, 1997 (Journal of Laws 1997, No. 102, item 643).

⁹³ In conformity with the constitutional regulation, on July 17, 2015, the President had ordered the general election, which took place on October 23, 2015. The first session of the newly elected Sejm was on November 12, 2015. See art. 98, Rozdział IV, Konstytucja Rzeczypospolitej Polskiej.

⁹⁴ See Anna Chmielarz-Grochal & Jarosław Sułkowski, *Appointment of Judges to the Constitutional Tribunal in 2015 as the Trigger Point for a Deep Constitutional Crisis in Poland*, 2 PRZEGLĄD KONSTYTUCYJNY 93–99 (2018), http://www.przeglad.konstytucyjny.law.uj.edu.pl/wp-content/uploads/2018/05/PKonst_2_2018_91-119.pdf. It should be noted that this aim was clearly worded during the parliamentary discussion.

October 8, 2015, was the first time in Polish constitutional history when the constitutional provisions governing the election of the Constitutional Tribunal's judges were violated by the Sejm. The election of five judges by the Sejm of the 7th term was questioned by the opposition party (PiS—Law and Justice) before the Constitutional Tribunal in October 2015. However, after winning the general election the party withdrew its application to the Constitutional Tribunal and began working on amendment of the Constitutional Tribunal Act of 2015. Therefore, there was no basis for the Tribunal to adjudicate this case.⁹⁵ At the same time, members of the new opposition (PO—Civic Platform and PSL—Polish People's Party⁹⁶) submitted a new application to the Constitutional Tribunal and argued, *inter alia*, that the Sejm of the 7th term violated the Constitution by the election of two judges for Tribunal vacancies opened during the Sejm of the 8th term.

The case, No. K 34/15, was heard by the Tribunal on December 3, 2015, with the significant and intentional absence of the Sejm's representative and in an atmosphere of political pressure put on the Tribunal judges.⁹⁷ On the same day, the Tribunal delivered its final judgment on the partial unconstitutionality of Article 137.⁹⁸ The reasoning was based on three constitutional arguments and one empirical one.⁹⁹ Firstly, according to the wording and rationale of Article 194(1) of the Constitution, the Sejm is the only authority constitutionally empowered to elect the Tribunal judges. Therefore, a person specified in an appropriate Sejm resolution shall be recognized as a judge. Once chosen for a Tribunal judge seat, such person cannot be dismissed by the Sejm, which has no constitutional power to invalidate a judge's election. Secondly, while the President of the Republic's decision on the appointment of the Constitutional Tribunal judges, as required by constitutional provisions, has an important legal and ceremonial character. This does not mean, however, that such a decision is constitutive in effect. Following the election by the Sejm, the person that stands and swears in before the President of the Republic is a judge. Third, according to the interpretation of the constitutional provisions the Sejm may elect Tribunal judges for a vacancy open before the end of a parliamentary term. It is unconstitutional to elect judges in advance (i.e., as was done in 2015). The descriptive argument

⁹⁵ See K 35/15 of Dec. 9, 2015 of the Constitutional Tribunal.

⁹⁶ Both were governmental parties before the 2015 election and responsible for the adoption of the infamous Article 137 of the Act on the Constitutional Tribunal of July 22, 2015.

⁹⁷ See Mirosław Wyrzykowski, *Antigone in Warsaw*, in HUMAN RIGHTS IN CONTEMPORARY WORLD. ESSAYS IN HONOUR OF PROFESSOR LESZEK GARLICKI 372–75 (Marek Zubik ed., 2017).

⁹⁸ K 35/15 of Dec. 9, 2015 of the Constitutional Tribunal.

⁹⁹ See Chmielarz-Grochal & Sułkowski, *supra* note 94, at 103–07.

given by the Tribunal was that the Sejm of the 7th term could elect only three judges considering the election calendar in 2015. With regard to the fact that two vacancies opened after the general election in December 2015, the Sejm of the 8th term had the power to elect two judges.

From the constitutional point of view, the above-mentioned judgment confirmed the power of the Sejm of the 7th term to elect only three judges and invalidated the legal basis for the election of the two additional judges which took place in October 2015.¹⁰⁰ Therefore, the Tribunal confirmed the competence of the Sejm of the 8th term to elect two judges in December 2015.¹⁰¹ This was the only possible legal solution to restore constitutionality following the violation of the constitutional provisions by the Sejm of the 7th term.

Unfortunately, the parliamentary ruling majority decided not to wait for the Tribunal's judgment.¹⁰² During a night session on December 2, 2015, the Sejm voted to invalidate the election by the Sejm of the 7th term of all five judges, and then elected five persons.¹⁰³ Three of them were elected for the seats already filled by the judges legally elected by the Sejm of the 7th term. Two persons were elected for the vacancies that opened on the 2nd and 8th of December 2015. All mentioned persons had been appointed by the President of the Republic early in the morning on the day the Tribunal started to hear case No. K 34/15. Thus, the constitutional provisions had been violated again by the Sejm. However, this time the violation had a different substance and different consequences, and it was made by both the Sejm of the 8th term and the President of the Republic.¹⁰⁴ Firstly, the Sejm of the 8th term had no power to elect three persons due to the lack of vacancies on the Tribunal. On December 2, 2015, the Tribunal consisted of fifteen judges (the maximum allowed by the constitutional rule). Secondly, the President had no power to appoint three persons elected by the Sejm of the 8th term, because three judges legally elected in October 2015 were waiting (indefinitely) to be sworn in by the President.

¹⁰⁰ See Anna Śledzińska-Simon, *Midnight Judges: Poland's Constitutional Tribunal Caught Between Political Fronts*, VERFASSUNGSBLOG (Nov. 23, 2015), <https://verfassungsblog.de/midnight-judges-polands-constitutional-tribunal-caught-between-political-fronts/>.

¹⁰¹ K 34/15 of Dec. 3, 2015 of the Constitutional Tribunal.

¹⁰² See Ewa Łętowska & Aneta Wiewiórowska-Domagalska, *A 'Good' Change in the Polish Constitutional Tribunal?*, 1 OSTEUROPA RECHT 79 (2016).

¹⁰³ See Anna Śledzińska-Simon, *Poland's Constitutional Tribunal under Siege*, VERFASSUNGSBLOG (Dec. 4, 2015), <https://verfassungsblog.de/polands-constitutional-tribunal-under-siege>.

¹⁰⁴ See Chmielarz-Grochal & Sułkowski, *supra* note 94, at 107–14.

The decision of the Sejm of the 8th term to invalidate the election of three judges by the Sejm of the 7th term and then to elect “parallel judges,” as well as the decision of the President of the Republic to swear-in the “parallel judges” violated the constitutional principle of judicial independence and Article 194(1) of the Constitution. First, under both constitutional regulation and well-established custom, each judge is elected for an individual nine-year term, which implies the election of a new judge shall be held just before the end of the term of the outgoing judge.¹⁰⁵ The Sejm has the competence to elect judges only for a vacant position on the Tribunal. Second, under the Polish constitutional system, there is neither a direct nor indirect legal basis for the invalidation of the election of previous judges. To do this, the Sejm used a proceeding that had been designed for political resolutions with no legal effect.¹⁰⁶ Therefore such a resolution could not “re-open” the Constitutional Tribunal judges’ elections that had been carried out during the previous parliamentary term. Otherwise there would be no legal certainty and it would always be possible to change the decisions of previous parliaments. Third, the Tribunal, as well as other constitutional authorities, were faced with a *fait accompli* by the Sejm of the 8th term. One year following their election, the “parallel judges” were included into the composition of the Tribunal and allowed to adjudicate.¹⁰⁷ During this period the Sejm of the 8th term elected four more judges (this time in conformity with the calendar of Tribunal vacancies). This means that as of the middle of 2018 nine members of the Tribunal were elected by the same parliamentary majority. Before the end of the Sejm’s 8th term, the same majority will be able to elect one more judge, which means that two-thirds of the Tribunal members will be elected during the 8th term of the parliament. Under such circumstances, the idea of pluralism of the Tribunal members and the mechanism of election of individual judges by Sejms of different terms, introduced into the Constitution in 1997, is becoming illusory.

The “parallel judges” have played an important role in the newly composed Constitutional Tribunal. First, they blocked the nine “old judges” from designating candidates from among themselves for the positions of the

¹⁰⁵ See generally Andrzej Mączyński & Jan Podkowik, in KONSTITUCJA RP. TOM II. KOMENTARZ DO ART. 87–243 1280–82, (Marek Safjan & Leszek Bosek eds., 2016).

¹⁰⁶ See U 8/15 of Jan. 7, 2016 of the Constitutional Tribunal.

¹⁰⁷ See Article 18(2), Act of Dec. 13, 2016 – Provisions on Introduction of the Act on the Organization and Proceedings before the Constitutional Tribunal and the Judges of the Constitutional Tribunal Status Act. See also *id.* at art. 21(2).

President and Vice-President of the Tribunal.¹⁰⁸ Second, the “parallel judges” supported Julia Przyłębska (elected by the Sejm of the 8th term) to become the President of the Tribunal.¹⁰⁹ Third, the “parallel judges,” supported by other persons elected by the Sejm of the 8th term, designated from among themselves the candidate for the Vice-President of the Tribunal.¹¹⁰ Fourth, the “parallel judges” have been members of the Tribunal’s panel in the vast majority of cases, which seems to be of particular importance to the governmental party.¹¹¹ Fifth, one of the “parallel judges” publicly supported the governmental majority and its political reforms,¹¹² which had been

¹⁰⁸ See Protocol of the General Assembly of the Judges of the Constitutional Tribunal, Dec. 20, 2016.

¹⁰⁹ See *id.*

¹¹⁰ See Protocol of the General Assembly of the Judges of the Constitutional Tribunal, July 5, 2017.

¹¹¹ A good example of their influence may be the Constitutional Tribunal judgment of March 16, 2017, Kp 1/17 of Mar. 16, 2017, of the Constitutional Tribunal. In this case, the applicant raised the argument that the constitutional principle of freedom of assembly had been violated by the statutory preference for a new type of public assemblies—called assemblies of a cyclical nature. “It should be emphasized that this kind of assembly has not been recognized so far in the Polish legal order. The new regulation also excluded the constitutional right to appeal a decision by public authorities prohibiting a public assembly.” Sadurski, *supra* note 18, at 33. According to the questioned law, an assembly may be recognized as a cyclical in its nature when: a) has the same organizer, tour, and takes place at least four times a year; b) has its own history (i.e., took place for three years before it was reported); and c) is aimed to celebrate events of high importance in Polish history. One of the consequences of awarding an assembly a cyclical status is its privileged position, including an exclusive right to take place before other assemblies. The unconstitutionally composed Tribunal declared the constitutionality of these statutory provisions. According to its position, “assemblies of a cyclical nature have a constitutionally legitimate aim and shall be recognized as events of great importance for the protection of the national values proclaimed in the Preamble of the Constitution. The Tribunal stressed that due to the connection with a Nations’ values and the history of the Homeland, the precedence given such assemblies over other assemblies shall be guaranteed for this new type of assembly.” *Id.* at 34. The judgment’s justification also confirmed the broad margin of discretion given to the parliament in the area of freedom of assembly. The Tribunal also underlined its lack of competence to assess the constitutionality of the rationale or aim of parliamentary acts. This judgment has been strongly criticized by the legally elected judges and one of the judges elected in December 2015. The dissenting opinions underlined the unconstitutionality of the Tribunal’s composition (three legally elected judges were not allowed to adjudicate; and the judgment was delivered in the presence of three persons who were not judges). Moreover, it was also pointed out that national and historical values, abstractly understood, should not be recognized as a constitutionally legitimate justification for the absolute priority of assemblies de facto of a governmental character. The judgment gives a clear signal of the change in the Tribunal’s case law. First, the core of the justification was based on national values of high importance to the Homeland and its history. Second, the Tribunal did not carry out the full proportionality and equality tests. Third, the Tribunal accepted the absolute priority of the only one type of assembly and automatically excluded the right to counter-demonstrate. Article 57 of the Constitution does not authorize the parliament to specify an abstract hierarchy of assemblies due to their national or historical aims. Rozdział II, Konstytucja Rzeczypospolitej Polskiej. For more criticism of the judgment, see Monika Florczak-Wątor, *Commentary on the Polish Constitutional Tribunal’s Judgment of 16th March 2017, Case No. Kp 1/17*, 2 PRZEGLĄD KONSTYTUCYJNY 120 (2018), http://www.przeglad.konstytucyjny.law.uj.edu.pl/wp-content/uploads/2018/05/PKonst_2_2018_120-147.pdf.

¹¹² See Lech Morawski, *A Critical Response*, VERFASSUNGSBLOG (June 3, 2017) <https://verfassungsblog.de/a-critical-response>.

questioned by the opposition parties and thousands of people on the streets,¹¹³ as well as many scholars.¹¹⁴ Another “parallel judge” strongly supported the governmental party’s criticism of the Ombudsman’s efforts on behalf of human rights’ protection and publicly called for the Sejm to dismiss the Ombudsman.¹¹⁵ Recently, the same “parallel judge” also argued that one of the “old judges” of the Tribunal, legally elected in 2010 by the Sejm of 6th term, should not be a judge because she was appointed by the Speaker of the Sejm (acting as a President of the Republic in accordance with the Article 131 of the Constitution) instead of being sworn in personally before the President of the Republic.¹¹⁶ Finally, the “parallel judges” were designated by Julia Przyłębska to assess the constitutionality of the legal basis of three of the “old judges” election (case No. U 1/17 has been submitted by the Prosecutor General and is still pending). It should also be noted that the prosecutor’s application based on assumptions which interfere with the wording of legal provisions and well-established parliamentary custom in judges’ election proceedings. Acceptance of the Prosecutor’s arguments by the panel of “parallel judges” may open up the possibility to remove the three “old judges” from the Tribunal and would give Sejm of the 8th term the opportunity to elect yet three more members of the Tribunal.

2. “Parallel Vice-President” of the Tribunal

Another example of a parallel institution created by the Sejm of the 8th term in order to circumvent the Constitution is the office of a judge “acting as a President of the Constitutional Tribunal” instead of the Vice-President of the Tribunal.¹¹⁷ From a theoretical point of view, there is nothing controversial when one of the constitutional court judges acts in the absence of the chairperson or vice-chairperson of the court (i.e., until the next election of the

¹¹³ See Rick Lyman, *In Poland, an Assault on the Courts Provokes Outrage*, N.Y. TIMES (July 19, 2017), <https://www.nytimes.com/2017/07/19/world/europe/poland-courts-law-and-justice-party.html>; Rick Lyman & Joanna Berendt, *Poland’s Court Crisis Cools Off, but It’s Far From Over*, NEW YORK TIMES (July 19, 2017), <https://www.nytimes.com/2017/07/29/world/europe/poland-court-protests-andrzej-duda.html>.

¹¹⁴ See Wojciech Sadurski & Martin Steinbeis, *What is Going on in Poland is an Attack against Democracy*, VERFASSUNGSBLOG (July 15, 2016), <https://verfassungsblog.de/what-is-going-on-in-poland-is-an-attack-against-democracy>. See also *Statement by the former Presidents of the Constitutional Tribunal: Marek Safjan, Jerzy Stepień, Bohdan Zdziennicki, and Andrzej Zoll*, EUROPEAN UNIVERSITY INSTITUTE CONSTITUTIONALISM POLITICS WORKING GROUP (Nov. 29, 2016), <https://blogs.eui.eu/constitutionalism-politics-working-group/2016/11/29/statement-former-presidents-constitutional-tribunal-marek-safjan-jerzy-stepien-bohdan-zdziennicki-andrzej-zoll>.

¹¹⁵ See K 9/16 of Mar. 22, 2018, of the Constitutional Tribunal (Mariusz Muszyński, dissenting).

¹¹⁶ See U 1/16 of May 10, 2018, of the Constitutional Tribunal (Mariusz Muszyński, dissenting).

¹¹⁷ See Provisions on Introduction of the Act on the Organization and Proceedings before the Constitutional Tribunal and the Judges of the Constitutional Tribunal Status Act, *supra* note 66, at item 2074.

(vice) chairperson). However, this is not so in the Polish case. The real aim of creating the position of “judge acting as a President” was to prevent the then-Vice-President of the Tribunal from exercising his constitutional and statutory competences until the election of a new President.¹¹⁸ Moreover, the statutory conditions for the position of “judge acting as a President” were designed by the Sejm in such a way that they *de facto* had only one person qualified for the position.¹¹⁹

Once again, to provide sufficient background information, we have to go back to November 2016 and recall the relevant provisions and facts. One month before the end of the term of the then-President of the Tribunal Andrzej Rzepliński, transitional statutory provisions on the Constitutional Tribunal were adopted by the Sejm in order to create a special legal basis for the election of the next President of the Tribunal.¹²⁰ They were aimed to replace the existing constitutional¹²¹ and statutory rules.¹²² The old rules empowered the Vice-President of the Tribunal to order the election. However, Stanisław Biernat, then Vice-President of the Tribunal, adjudicated the unconstitutionality of all statutes on the Tribunal which had been adopted in 2015 and 2016, and strongly opposed the “parallel judges.”¹²³ Being aware of it, the Sejm of the 8th term decided to create a special position in the Tribunal for Julia Przyłębska, whose acceptance of the “parallel judges” and other acts of the Sejm was evidenced by her dissenting opinion to the judgment delivered by the Tribunal in 2016.¹²⁴ Later she was appointed for the position of “judge acting as a President” by the President of the Republic on December 20, 2016.¹²⁵

The provisions concerning the “judge acting as a President,” as well as the nomination by the President of the Republic of Julia Przyłębska for the position, violated the constitutional principle of judicial independence and Article 194(2) of the Constitution. First, in contrast to the statutory provision for the institution of “judge acting as a President,” the Vice-President of the

¹¹⁸ *Id.* at art. 17(1). *See also id.* at art. 18.

¹¹⁹ *Id.* at art. 17(2).

¹²⁰ *Id.* at art. 21.

¹²¹ Art. 194(2), Rozdział VIII, Konstytucja Rzeczypospolitej Polskiej; *see also* K 44/16 of Nov. 7, 2016 of the Constitutional Tribunal (unpublished opinion).

¹²² *See* Act of July 22, 2016, on the Constitutional Tribunal (Journal of Laws 2016, item 1157).

¹²³ *See* K 47/15 of Mar. 9, 2016, of the Constitutional Tribunal.

¹²⁴ *See* SK 2/15 of June 21, 2016, of the Constitutional Tribunal (Julia Przyłębska, dissenting).

¹²⁵ Decision No. 1131.24.2016 of the President of the Republic of Poland of Dec. 20, 2016, on the delegation of the President of the Constitutional Tribunal’s duties (Monitor Polski 2016, item 1229).

Tribunal is directly mentioned in the constitutional provisions. According to a well-established interpretation and custom,¹²⁶ his or her obligation is to act in absence of the President of the Tribunal. Second, in accordance with the statutory provisions the “judge acting as a President” was nominated by the President of the Republic, which violated the constitutional principle of separation of powers. It should be underlined that the Constitution provides a comprehensive list of situations where the head of the state may—or may not—have an impact on the Tribunal.¹²⁷ Third, the statutory provisions on “judge acting as a President” unconstitutionally involve governmental interference in the Tribunal’s internal matters. It should again be underlined that Julia Przyłębska’s nomination was validated by the countersigning of the Prime Minister,¹²⁸ whereas under the Constitution the government is unconditionally excluded from all matters related to the Tribunal’s internal organisation.¹²⁹ The fourth reason given is that the criteria for the position of “judge acting as a President” are clearly of a discriminatory character. As has been mentioned, there was only one person in the Tribunal that fulfilled all the criteria.

The position of the “parallel Vice-President” (“judge acting as a President”) was invented by the Sejm of the 8th term to organize the election for the position of President of the Tribunal in December 2016 and to allow “parallel judges” to join the bench at the same time. Julia Przyłębska, in her role of the acting President of the Tribunal, a day after her nomination hurriedly organized a General Assembly of Constitutional Tribunal Judges, which elected her as candidate for the position of President of the Tribunal. She received five votes in favour from the “parallel judges,” one of the judges elected by the Sejm of the 8th term, and one from herself. It should be noted that eight of the legally-elected judges refused to join the voting and submitted a dissenting opinion. They argued that the two legally elected judges and three “parallel judges” had no legitimacy to designate a candidate for the President of the Tribunal. In addition, there was no *quorum* to decide on such a matter. Moreover, the Assembly was called only a few hours in advance, in violation

¹²⁶ See KRZYSZTOF WOJTYCZEK, *SĄDOWNICTWO KONSTITUCYJNE W POLSCE. WYBRANE ZAGADNIENIA* 99 (2013); MAĆZYŃSKI & PODKOWIK, *supra* note 105, at 1287.

¹²⁷ See art. 194(2), Rozdział VIII, Konstytucja Rzeczypospolitej Polskiej. See also 144 (3), Rozdział V, Konstytucja Rzeczypospolitej Polskiej.

¹²⁸ According to Article 144(2) of the Constitution: “Official Acts of the President shall require, for their validity, the signature of the Prime Minister who, by such signature, accepts responsibility therefor to the Sejm.” Rozdział V, Konstytucja Rzeczypospolitej Polskiej.

¹²⁹ See art. 188–197, Rozdział VIII, Konstytucja Rzeczypospolitej Polskiej. See also art. 144 (2–3), Rozdział V, Konstytucja Rzeczypospolitej Polskiej.

of the statutory terms for reflection and notification of the potential candidates.¹³⁰

3. “Parallel” President of the Supreme Court

In a similar fashion as in the case of the Constitutional Tribunal, the statutory concept of “judge acting as a President” instead of the Vice-President was also used by the Sejm of the 8th term during the reform of the Supreme Court.¹³¹ The position of “judge acting as a First President of the Supreme Court” was introduced for the first time into the Polish legal system.

In order to explain the rationale of such a parallel institution, we have to recall that, according to the new law on the Supreme Court, all judges sixty-five years old or older shall be retired unless the President of the Republic gives them his or her consent for an extended public service after the statute enters into force. This provision shall be applied to the First President of the Supreme Court (who opposed the partially unconstitutional reform of the judiciary made by the Sejm of the 8th term). Normally, after her resignation or the end of her term, the judicial business and administration of the Supreme Court shall be directed by the one of Presidents of the Court (one of the heads of the Supreme Court’s Chambers). However, such a “normal” solution would not give the President of the Republic full control over the reform of the Supreme Court. Therefore, the position of “judge acting as a First President of the Supreme Court” was introduced.¹³² No statutory conditions for a candidate were provided. A “Judge acting as a President of the Supreme Court” may be nominated from the group of Supreme Court judges at the unlimited discretion of the President of the Republic.¹³³

The above-mentioned regulations may be applied not only in the case where the First President of the Court retires, but also to all Presidents of the Supreme Court. This means that President of the Republic is granted unfettered discretion to decide who shall direct the Chambers of the Court.

¹³⁰ See Protocol of the General Assembly of the Judges of the Constitutional Tribunal of Dec. 20, 2016, *supra* note 108.

¹³¹ Act on the Supreme Court of Dec. 8, 2017.

¹³² *Id.* at art. 111a.

¹³³ *Id.* at art. 111(4).

4. “Parallel” National Council of Radio Broadcasting and Television

The fourth example of a parallel institution is The National Media Council, which was created by a special statute¹³⁴ in order to disempower the constitutional body—the National Council of Radio Broadcasting and Television—by endowing the former with many of the tasks of the latter.¹³⁵ According to Article 213(1) of the Constitution, “The National Council of Radio Broadcasting and Television shall safeguard the freedom of speech, the right to information as well as safeguard the public interest regarding radio broadcasting and television.” The National Media Council is also empowered to control national broadcasters (Polish Television, Polish Radio and the Polish Press Agency) by means of its competence to appoint or dismiss presidents, members of supervisory boards and management boards, as well as other members of the public broadcasters’ statutory bodies. The National Media Council also has access to “key broadcasters’ documents and acts in a similar way to the supervisory board. Council members also have the right to participate in general meetings of companies’ statutory bodies.”¹³⁶ It should be noted that during the first year of its activity the National Media Council adopted, *inter alia*, resolutions dismissing: the President of the Management Board of Polish Television, the members of the Management Board of the Polish Press Agency, the President of the Board of Polish Radio, the members of the Board of Polish Radio, as well as passed resolutions creating new advisory boards and new statutes for public broadcasters.¹³⁷

B. *The Instrumental Use of Vacatio Legis*

There are two constitutional provisions which determine the entry into force of statutes. First, according to Article 88(1) of the Constitution,¹³⁸ the promulgation of a statute is a condition for its entry into force. Second, taking into account that it is the President’s obligation to order the promulgation of

¹³⁴ Art. 1, Act on the National Media Council of June 22, 2016 (Journal of Laws 2016, item 929).

¹³⁵ Sadurski, *supra* note 18, at 11.

¹³⁶ *Id.* at 12.

¹³⁷ *Id.*

¹³⁸ Article 88 of the Constitution: “1. The condition precedent for the coming into force of statutes, regulations and enactments of local law shall be the promulgation thereof. 2. The principles of and procedures for promulgation of normative acts shall be specified by statute. 3. International agreements ratified with prior consent granted by statute shall be promulgated in accordance with the procedures required for statutes. The principles of promulgation of other international agreements shall be specified by statute.” Rozdział III, Konstytucja Rzeczypospolitej Polskiej.

all statutes submitted by the Speaker after their adoption by the Sejm (Article 122 of the Constitution¹³⁹), the constitutional provisions guarantee that statutes do not enter into force before their official promulgation, and especially on the day of their adoption by the Sejm. Therefore, just like in many other countries, statutes may enter into force either on the day of promulgation or on a subsequent date.

There is no doubt that it is an authority or a right of the legislative branch to decide on the moment when statutes enter into force. However, according to the well-established constitutional case-law, such a competence is substantially limited by the interpretation and development of the constitutional principle of a democratic state ruled by law. In the words of the Constitutional Tribunal, the period between a statute's promulgation and its entry into force (*vacatio legis*) shall always be "reasonable and adequate to the scope of a new regulation."¹⁴⁰ The legislators should especially take into account the complexity of a new regulation, its differences from the previous one(s), and the real-life ability to adapt to its entry into force by persons to whom the regulation is directed.¹⁴¹ Constitutional case-law has confirmed that the shortening of the *vacatio legis* period can be justified only by the direct necessity of implementation of a constitutional principle,¹⁴² especially in order to: a) protect the budgetary balance of the State;¹⁴³ b) repeal provisions recognised as unconstitutional by the Ombudsman or other constitutional bodies;¹⁴⁴ c) execute a Constitutional Tribunal judgment and restore a condition of constitutionality;¹⁴⁵ or d) develop a social insurance system. It is a principle of the applicable case-law that statutes imposing limitations on human rights and freedoms shall not enter into force before fourteen days after their promulgation, or before thirty days in the case of statutes concerning annual taxes. Moreover, the competence of the legislative power to decide on the moment when statutes enter into force is also restricted by the statutory principles referred in Article 88(2) of the Constitution.¹⁴⁶ According to these provisions, a statute shall enter into force within fourteen days after its

¹³⁹ Article 122 (1-2) of the Constitution: "1. After the completion of the procedure specified in Article 121, the Marshal of the Sejm shall submit an adopted bill to the President of the Republic for signature. 2. The President of the Republic shall sign a bill within 21 days of its submission and shall order its promulgation in the Journal of Laws of the Republic of Poland (Dziennik Ustaw)." Rozdział IV, Konstytucja Rzeczypospolitej Polskiej.

¹⁴⁰ Kp 6/09 of Jan. 20, 2010, of the Constitutional Tribunal.

¹⁴¹ *Id.*

¹⁴² K 14/07 of June 30, 2009, of the Constitutional Tribunal.

¹⁴³ P 4/98 of June 16, 1999, of the Constitutional Tribunal.

¹⁴⁴ K 14/07 of June 30, 2009, of the Constitutional Tribunal.

¹⁴⁵ Kp 1/13 of July 24, 2013, of the Constitutional Tribunal.

¹⁴⁶ Article 122 (1-2), Rozdział IV, Konstytucja Rzeczypospolitej Polskiej.

promulgation. In an extraordinary situation, the Sejm may decide on an earlier or later date when a statute will enter into force (for example within seven or eight days after the promulgation). A statute may also enter into force on the day of promulgation when it is absolutely necessary to protect the interest of the State and does not violate the rule of law principle.

Considering the above, we will now examine the situation that took place after the 2015 election in Poland, when the Sejm of the 8th term adopted several important statutes with either no or a very short *vacatio legis* period. We posit that all the Sejm's efforts in this regard were aimed at bringing about a permanent and irreversible unconstitutional change in the status of legal institutions.

1. *Lack of Vacatio Legis During the Reforms of the Constitutional Tribunal*

The first example is the amendment of December 22, 2015, of the statute of the Constitutional Tribunal,¹⁴⁷ which entered into force the next day after its publication in the Journal of Laws. This amendment introduced several highly important changes in the Tribunal's proceedings and modified the election rules with respect to the President of the Tribunal, as well as provided new conditions for the dismissal of a judge on the Tribunal. The first group of changes included: a) an obligation to hear a case by a full panel of the Tribunal;¹⁴⁸ b) a requirement of a thirteen-judge *quorum* to hear a case, and a ten-judge *quorum* to issue a judgment by the full panel of the Tribunal;¹⁴⁹ c) a six-month period between a notification of a hearing and its date.¹⁵⁰ The second group of new provisions limited the right of a Tribunal judge to nominate a "candidate for a candidate" for the position of President of the Tribunal.¹⁵¹ Finally, the amendment gave the Sejm a competence to dismiss a judge ("in the most blatant cases"),¹⁵² as well as authorized the President of the Republic and Prosecutor General to submit a motion for disciplinary proceedings against a judge of the Tribunal.¹⁵³

¹⁴⁷ Act of Dec. 22, 2015, amending the Constitutional Tribunal Act (2015 r. Dz. U., poz. 2217).

¹⁴⁸ *Id.* at art. 1(9).

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at art. 1(12).

¹⁵¹ *Id.* at art. 1(4).

¹⁵² *Id.* at art. 1(7).

¹⁵³ *Id.* at art. 1(5).

The fact that the above-mentioned provisions were adopted just after the Sejm of the 8th term had elected three “parallel judges” suggests that the lack of *vacatio legis* was intentionally introduced to force (under the threat of sanctions) the Tribunal to involve the “parallel judges” immediately after the amendment entered into force. It should be noted that they were not allowed to join the panel at that time due to the constitutionally-justified objections raised by then-President of the Tribunal.¹⁵⁴ According to the new provisions, hearing a case without them might be recognized as a “most blatant case” by the Sejm and authorize the President and/or the Prosecutor General to submit a motion for disciplinary proceedings both against the then-President of the Tribunal and all judges of the panel.

A similar example of the adoption of an instrumental approach to *vacatio legis* may be found in the statute of December 13, 2016,¹⁵⁵ on the implementation of the statute on the Tribunal proceedings and the statute on the status of Tribunal judges. Formally, a fourteen-day *vacatio legis* period had been directly introduced by the law. However, the Sejm of the 8th term provided exceptions for more than half of the provisions of the statute of December 13, 2016, which entered into force the following day after their publication in the Journal of Laws.

The statute of December 13, 2016, was part of the Sejm’s reform of the Tribunal. The provisions that entered into effect immediately after promulgation referred to the appointment of a “parallel” Vice-President of the Tribunal and his or her competences, and to the new election rules for the position of President of the Tribunal.¹⁵⁶ They were directly aimed at: allowing the “parallel judges” to adjudicate;¹⁵⁷ excluding the Vice-President of the Tribunal;¹⁵⁸ and to help one of the persons elected by the Sejm of the 8th term to win an election for the new President of the Tribunal.¹⁵⁹ The special provisions on annulment of the acts of the General Assembly of Constitutional Tribunal Judges, which had been adopted in order to elect the President of the Tribunal, also entered into force with no *vacatio legis*.

¹⁵⁴ See K 34/15 of Dec. 3, 2015, of the Constitutional Tribunal.

¹⁵⁵ Act of Dec. 13, 2016—Provisions on Introduction of the Act on the Organization and Proceedings before the Constitutional Tribunal and the Judges of the Constitutional Tribunal Status Act.

¹⁵⁶ *Id.* at art. 1. See also *id.* at arts. 22–23.

¹⁵⁷ *Id.* at art. 21.

¹⁵⁸ *Id.* at arts. 16–18.

¹⁵⁹ *Id.* at arts. 20–21.

A careful reading of the above-mentioned provisions in their historical context makes it possible to argue that the lack of *vacatio legis* was particularly aimed at interrupting the election of the President of the Tribunal, a process which had been started by the General Assembly of Tribunal Judges in November 2016. It should be noted that Sejm of the 8th term attempted, already in the middle of 2016, to change the statutory provisions on election rules for the President of the Tribunal position in order to prevent judges elected by the previous terms of parliament from becoming the next President of the Tribunal.¹⁶⁰ This attempt was questioned before the Tribunal by the parliamentary opposition parties. Formally, the Tribunal ruled on the constitutionality of the questioned provisions in case No. K 44/16,¹⁶¹ but substantively it gave a pro-constitutional interpretation of the statutory provisions in an operative part of its judgment. It allowed the General Assembly of Tribunal Judges to organize the election for the President of the Tribunal position after the end of judge Andrzej Rzepliński's term.¹⁶² Although the government (unconstitutionally) refused to publish the judgment, the General Assembly of Tribunal Judges elected candidates for the position of President of the Tribunal,¹⁶³ acting directly within the framework of existing constitutional and statutory provisions. Therefore, to prevent one of the "old judges" from becoming the President of the Tribunal, the Sejm of the 8th term decided on a statutory annulment of this election. In addition to the fact the statute substantively violated the principle of judicial independence, it is hard to argue that the lack of *vacatio legis* was constitutionally justified. It was directly aimed at introducing the "parallel" institutions and at changing the acts of the General Assembly of the Tribunal Judges. Such a motive cannot be recognized as a necessity in the interest of protection of the State.

2. *Lack of Vacatio Legis During the Supreme Court Reform*

AnotherAnother example of taking an instrumental approach to *vacatio legis* concerns the amendment of April 12, 2018, of the Supreme Court statute,¹⁶⁴ which entered into force the following day after its publication in the Journal of Laws. The amendment introduced the institution of a "parallel"

¹⁶⁰ Act of July 22, 2016, on the Constitutional Tribunal.

¹⁶¹ K 44/16 of Nov. 7, 2016, of the Constitutional Tribunal.

¹⁶² See Press Release, Constitutional Tribunal, Rules for appointing the President and Vice-President of the Constitutional Tribunal (Nov. 8, 2016).

¹⁶³ See Art. 16, Act of July 22, 2016, on the Constitutional Tribunal (Journal of Laws 2016, item 1157).

¹⁶⁴ Act of Apr. 12, 2018, amending the Act on the Supreme Court (Journal of Laws 2018, item. 847).

President of the Supreme Court.¹⁶⁵ It also safeguarded financing for a new Disciplinary Panel of the Supreme Court, which had been ordered to rule in cases of disciplinary proceedings of Supreme Court judges.¹⁶⁶ Moreover, the amendment directly annulled the election of the First President of the Supreme Court and the Presidents of the Court which had taken place before the amendment entered into force.¹⁶⁷

As was the case with respect to the Constitutional Tribunal, the Sejm of the 8th term directly violated the constitutional principle of judicial independence by its statutory annulment of the election of the President of the Supreme Court and shortened the *vacatio legis* with no constitutional justification.

3. *Lack of Vacatio Legis During the Reform of the National Media*

Another example is the amendment of December 30, 2015, of the radio and television statute,¹⁶⁸ which also entered into force the following day after its publication in the Journal of Laws. The amendment shortened *ex lege* all terms of the public media management and supervisory boards. Moreover, the new provisions changed the rules governing the appointment and dismissal of persons in the highest positions in public media companies.

The amendment was part of the public media reform launched by the parliamentary majority after the election in 2015.¹⁶⁹ It was expected to prepare the terrain for a statute on the National Media Council and a new statute on the National Media.¹⁷⁰ In regards to the first statute,¹⁷¹ the Sejm decided to shorten the *vacatio legis* period and allow National Media Council to act (i.e., to appoint or to dismiss presidents, members of supervisory boards and management boards as well as other members of public broadcaster's statutory bodies) seven days after promulgation of the statute.

¹⁶⁵ *Id.* at art. 1.

¹⁶⁶ *Id.* at art. 4.

¹⁶⁷ *Id.* at art. 2.

¹⁶⁸ Act of Dec. 30, 2015, amending the Act on Radio and Television (Journal of Laws 2016, item 25).

¹⁶⁹ As Wojciech Sadurski observed, "public media have been transferred into governmental propaganda machine, with no attempt to pretend that the opposition views are presented objectively and neutrally. Immediately after PiS came to power, some 200 journalists were purged from public TV and radio, and replaced mainly with journalists coming from fringe right-wing media." Sadurski, *supra* note 18 at 47.

¹⁷⁰ See Law on National Media (Draft), <http://orka.sejm.gov.pl/Druki8ka.nsf/0/BE8E7FB04FB3B43EC1257FA0003E170E/%24File/442.pdf>.

¹⁷¹ Art. 1, Act on the National Media Council of June 22, 2016 (Journal of Laws 2016, item 929).

A careful reading of the amendment of December 30, 2015 and the statute on the National Media Council in the context of the draft law on National Media makes it feasible to argue that the lack of *vacatio legis* (in the case of the amendment) and the shortening of it (in case of the second-mentioned statute) were introduced in order to terminate the employment of all members of the management boards. Considering the scope of the provisions, it is difficult to argue that the immediate entry into force of the statute was justified by the necessity to protect the State's interest. There were no constitutionally legitimate reasons to shorten the *vacatio legis* period.

C. *The Instrumental Approach to Transitional Provisions*

There is no direct constitutional regulation referring to the standards of transitional provisions in Poland. However, it is a part of the Polish legal culture and a consequence of well-established interpretation of the *Rechtsstaat* principle (Article 2 of the Constitution) that legislative power acts in conformity with the Polish "Principles of Legislative Technique."¹⁷² In this light, transitional provisions produce effects on new statutes relating to facts or legal relationships that had been established under previous statutes. The transitional provisions shall particularly specify: a) how to finish pending cases that started before the amendment or enactment of a statute; b) whether to maintain legal institutions that were abolished by a new law; c) in what manner and to what extent previous competences or acts shall still be in force. The general aim of transitional provisions is to avoid legal chaos in cases of amendment of a statute or enactment of a new statute, as well as ensure the efficiency of public bodies.

1. *Provisions on the President and Vice-President of the Constitutional Tribunal*

As our first example of the instrumental approach to transitional provisions, we note the amendment of November 19, 2015, of the Constitutional Tribunal statute, which provided that the terms of the then-President and Vice-President of the Constitutional Tribunal (Judges Andrzej Rzepliński and Stanisław Biernat), would end three months after the statute

¹⁷² Ordinance of the Prime Minister of June 20, 2002, Concerning the Principles of Legislative Technique (Journal of Laws 2002, item 908).

entered into force. This provision was adopted by the Sejm of the 8th term just after the general election, at the beginning of the constitutional crisis.¹⁷³

It was questioned by the parliamentary opposition before the Tribunal, which then ruled on the constitutionality of the statutory early dismissal of a constitutional authority.¹⁷⁴ According to the Tribunal's judgment:

[T]he period of holding the position [of President or Vice-President of the Tribunal] was directly determined by the provisions of the Constitution as well as by an individual and specific act of the President of Poland, by means of which s/he appointed, to those positions, candidates selected by the General Assembly of the Judges of the Tribunal. The period of holding the said positions which is determined in the said way is subject to constitutional protection in a similar way in which the term of office of incumbent officials is protected. Thus, from the moment of appointment by the President of Poland until the loss of the status of a judge of the Tribunal, a person holding the said office is subject to protection, the scope of which comprises, *inter alia*, a guarantee of the stability of exercising the office to which the said person was appointed. . . . In its previous jurisprudence, the Tribunal also indicated that "possible changes in the length of the term of office should have pro futuro effects, i.e. with regard to authorities that will be elected in the future." . . . From that point of view, the challenged Article 2 of the Act of 19 November 2015 also constitutes the legislator's interference into the constitutional competence of the President of Poland to appoint the President and Vice-President of the Tribunal. . . . since at the constitutional level, the constitution-maker determined that the course of filling vacancies in said positions is based on the division of powers between the General Assembly of the Judges of the Constitutional Tribunal (the exclusive power to take the initiative in this respect) and the President of Poland (the exclusive power to take decisions), thus the legislator may not, by means of a normative act, eliminate the effects of the exercise of the said powers and, in a sense, in a retroactive way interfere in the act of appointment carried out by the President of Poland. . . . Taking into account the fact that—on the one hand—the

¹⁷³ See also Chmielarz-Grochal & Sułkowski, *supra* note 94, *passim*.

¹⁷⁴ K 35/15 of Dec. 9, 2015, of the Constitutional Tribunal.

length of the period in every case is possible to be reconstructed and—on the other hand—that the guarantee of stability in the performance of duties by the President and Vice-President of the Tribunal constitutes a significant guarantee of the independence of the constitutional court, the Tribunal agrees with the applicants' stance.¹⁷⁵

Therefore, the above-mentioned transitional provisions, when read in the context explained in the case no K 35/15, did not comply with the rationale of such types of provisions.

2. *Provisions on the Proceedings Before the Constitutional Tribunal*

Another example of the instrumental approach to a transitional provision is contained in the statute of July 22, 2016, on the Constitutional Tribunal.¹⁷⁶ It introduced completely new proceedings before the Tribunal, with a fourteen-day *vacatio legis* for its proper implementation. It should be underlined that part of statutory provisions provided for new legal institutions such as: a) the requirement that a full bench of the Tribunal should adjudicate in cases where three judges of the Tribunal file a relevant motion;¹⁷⁷ b) the obligation to hear a case only upon the attendance of the Prosecutor-General;¹⁷⁸ c) terms for judges of the Tribunal to raise an objection to a draft-

¹⁷⁵ *Id.* at ¶ 8.7.3.

¹⁷⁶ Act of July 22, 2016, on the Constitutional Tribunal (Journal of Laws 2016, item 1157).

¹⁷⁷ The Tribunal found this provision unconstitutional in case No. K 39/16. *See* K 39/16 of Aug. 11, 2016, of the Constitutional Tribunal. The assessment, based on three arguments, referred to the constitutional principle of the efficiency of public office (Preamble to the Constitution). Firstly, the legislator violated the requirement of efficiency in the work of a public institution. A motion for adjudication by the full bench had an immediate *ex lege* effect and did not have to be justified in a substantive way, nor was it subject to evaluation by the President of the Tribunal. Secondly, the Tribunal found a violation of the requirement of diligence in the work of the public institution. The legislator turned an exception, i.e. the consideration of a case by a full bench of the Tribunal, into a general rule. Thirdly, there was an infringement of the requirement of effectiveness in the work of a public institution. The assessed provisions provided for a situation where all cases would be referred for consideration by a full bench of the Tribunal. Also see the press release after the hearing before the Constitutional Tribunal in case No. K 39/16.

¹⁷⁸ The Tribunal found this provision unconstitutional in case No. K 39/16. *See* K 39/16 of Aug. 11, 2016, of the Constitutional Tribunal. The main argument of the Tribunal was that in the event of the absence of the Public Prosecutor-General, the Tribunal could only adjourn the hearing and set a new date for the hearing. Thus, the correlation between the Tribunal's capacity to review the constitutionality of law with the actions taken by the Public Prosecutor-General might make it impossible for the Tribunal to issue a ruling in a case considered by a full bench of the Tribunal. The legislator does not place a time-limit on the effect of the absence of the Public Prosecutor-General, or his/her representative, at a hearing when said persons have been notified in a proper way, and so the consideration of a case might be suspended for an indefinite period. Also see the press release after the hearing before the Constitutional Tribunal in case No. K 39/16.

judgment, which implies an obligation to hear the case by a full bench of the Tribunal.¹⁷⁹

The transitional provisions of the statute of July 22, 2016: a) imposed an obligation to hear all pending cases by the Tribunal within one year from the date of entry into force of the 2016 statute;¹⁸⁰ b) imposed an obligation to hear all cases according to the new rules; c) ordered the President of the Tribunal to include “parallel judges” into the panel of the Tribunal; d) ordered the Tribunal to suspend the proceedings for six months in all cases submitted by the Ombudsman and parliamentary opposition; and e) divided the Tribunal’s judgments into those that were to be published in the official journal and those that would not be published.

It is clearly visible that the scope of the above-mentioned transitional provisions, read in the context of the deep substantive changes in Tribunal’s proceedings and the short *vacatio legis*, was designed by the Sejm of the 8th term in order to disturb the regular work of the Tribunal and to prevent it from ruling on the constitutionality of the new statute before it entered into force. Also, having regard to the fact that the Sejm again tried to force the Tribunal to include “parallel judges” into the adjudicating panel, it is difficult to argue that it was not an abuse to use the transitional provisions in order to achieve the ruling majority’s goals.

¹⁷⁹ The Tribunal ruled this provision unconstitutional in case No. K 39/16. See K 39/16 of Aug. 11, 2016, of the Constitutional Tribunal. The assessment, based on three arguments, referred to the constitutional principle of public office efficiency. Firstly, the legislator did not specify *ratione personae, materiae* and *temporis* restrictions applicable to an objection to a proposed determination with regard to a case considered by a full bench of the Tribunal. Secondly, the said objection did not have to be justified. Thirdly, application of the challenged provision would make it impossible to issue rulings forthwith in cases in which no objections were raised. Also see the press release after the hearing in case No. K 39/16.

¹⁸⁰ The Tribunal found this provision unconstitutional in case No. K 39/16. See K 39/16 of Aug. 11, 2016, of the Constitutional Tribunal. In the Tribunal’s opinion, the short time-limit would make it impossible for the Tribunal to consider a case diligently, as is required by the Constitution. Indeed, on the one hand the legislator introduced the requirement that all the aforementioned cases should be considered within a year, but on the other hand he also introduced solutions that would prevent the Tribunal from issuing a ruling within the same one-year time-limit for reasons that would be beyond the Tribunal’s control. It is possible to specify in the provisions of the Constitution a maximum period for considering a case by the Tribunal; so far, the only example of such solution has been in Article 224(2) of the Constitution. Rozdział X, Konstytucja Rzeczypospolitej Polskiej. An exception to this rule may not be introduced by statute. The prohibition against specifying the said maximum period by statute arises from the principle of the tri-partite division of powers, as such action would be a form of interference on the part of the legislature with a core activity of the judiciary. Also see the press release after the hearing in case No. K 39/16.

IV. CONCLUSION

The 2015-2018 period will be long remembered in the history of Polish constitutionalism. It brought about numerous reinterpretations of basic constitutional principles, in particular with regard to the separation of powers, national sovereignty, and the principle of the final and universally binding character of judgments of the Constitutional Tribunal. These reinterpretations broke with the well-established jurisprudence of the Constitutional Tribunal and constitutional law theories. The durability of these reinterpretations will be tested in the future. However, the 2015-2018 period should be interesting for anyone—including persons outside Poland—who wishes to familiarize him or herself with the types of legal techniques that can be used by a ruling parliamentary majority to undermine the system of liberal democracy without recourse to the constitutional amendment procedure. The Polish experience is worth studying since it offers examples of techniques which are capable of application in other countries. To exclude the possibility of the emergence of the process which we call statutory anti-constitutionalism, one must make sure that both the legal culture and the independence of judiciary have strong basis in his or her country. Both aspects are likely to fade today if illiberal movements gain strength in old Western democracies.