

Hostile Takeover: How Law and Justice Captured Poland's Courts

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Photo: Grzegorz Żukowski.

- Since Law and Justice came to power in Poland in 2015, it has waged a campaign to take control of the Polish judiciary in open defiance of the law, the constitution, and the courts. The changes to the judicial framework included among other amendments to laws on common courts, the National Council of the Judiciary, the Supreme Court; a refusal to publish and abide by Constitutional Tribunal rulings; and unconstitutional appointments to the Tribunal.
- As of May 2018, Poland's ruling party enjoys direct control over the Constitutional Tribunal and the National Council of the Judiciary (body that appoints Polish judges) and is set to take control of the Supreme Court. An ongoing European Commission sanctions process, the so-called Article 7 procedure, has achieved little so far. On the legal level, an Irish court decision on a European Arrest Warrant case and an upcoming European Court of Justice decision could be indicative of a Europe-wide backlash brewing over the reforms.
- Whatever the outcome of these procedures, a situation in which Poland's judicial arrangements are incompatible with the European Union's democratic values and legal framework might be manageable in the immediate term, but it is not sustainable indefinitely.

Introduction

Poland's ruling Law and Justice party (PiS) is often described as a "conservative" party committed to upholding "traditional values." Such labels miss the point: Law and Justice is first and foremost a political movement devoted to overturning Poland's existing constitutional order and the democratic principles that underpin it.

PiS leader Jaroslaw Kaczynski has built his political career on the assertion that Poland's democratic transition after 1989 led to a shadowy postcommunist "system" that controls Polish institutions, serves "post-communist elites" at the expense of ordinary Poles, and is upheld by the country's existing legal order.¹ All of Poland's woes, from the social to the economic, can be attributed to the activities of this so-called system.

Law and Justice claims to be the only legitimate representative of the people's interests, on the basis that they are the only ones fighting this so-called system and the constitutional order that they argue preserves its dominance. Kaczynski has long criticized what he describes as legal "impossibilism,"² the notion that it is impossible for a democratically elected Polish government to fulfill the "nation's will" because of the checks and balances imposed on it by the Polish constitution.³

The party does not, however, enjoy a constitutional majority in the Polish parliament. To break the hold of "postcommunist elites" (in practice, anyone who opposes Law and Justice), PiS claims the right to disregard the provisions of the constitution so as to assert its control over the judiciary, which, it argues, has no right interfering with the people's will.⁴ In the domestic arena, this argument is made explicitly: as Kaczynski told supporters in 2016 during a speech in which he described opposition to PiS as a "rebellion", in a "democratic state of law," not even the highest judicial authorities, such as the country's Constitutional Tribunal, should have the right to defy the executive:

"In a democracy, the sovereign is the people, their representative parliament and, in the Polish case, the elected president. If we are to have a democratic state of law, no state authority, including the Constitutional Tribunal, can disregard legislation."⁵

This briefing describes how Law and Justice put Kaczynski's theories into practice since assuming office in 2015, using extraconstitutional means to seize control of the judicial institutions of the post-1989 Third Republic – an incremental but systematic process described by one distinguished Polish law professor as amounting to a "constitutional coup d'état."⁶

Stop the presses: the death of Poland's Constitutional Tribunal

Law and Justice's campaign to capture Poland's Constitutional Tribunal was the central component of its wider push to seize control of the judicial institutions of the post-1989 republic and emblematic of the methods deployed by Poland's ruling party since it assumed office in November 2015.

The Tribunal is Poland's highest constitutional court, the final arbiter on the constitutionality of domestic and international law, and on actions taken by state bodies.⁷ Described by Jaroslaw Kaczynski as "the bastion of everything in Poland that is bad,"⁸ the Tribunal had thwarted Law and Justice in the past by striking down a series of measures taken by the previous PiS-led government 10 years ago—including a law on Poland's media regulator, a controversial "lustration" law, and a commission to investigate the banking sector. Therefore, it should have come as no surprise to anyone that the Tribunal was targeted upon the party's return to power.⁹

The ruling party's strategy played out in three parts: First, to deny opposition-appointed judges from taking their place on the court. Second, to pass laws designed to paralyze the court and prevent it from functioning

effectively. Third, to force through the appointment of judges loyal to the ruling party.¹⁰ All this was done in open defiance of the law, the constitution, and multiple rulings issued by the Tribunal itself.

The crisis began in late 2015 when President Duda refused to swear in five Tribunal judges appointed during the last sitting of the outgoing parliament (Sejm)—despite the fact that he had no legal authority to do so.¹¹

This was followed by a declaration in November 2015 by the new, PiS-controlled Sejm that all five appointments were void—again, a declaration the parliament had no authority to make. In response, the Tribunal issued a legally binding injunction ordering the Sejm not to appoint any new judges until it had assessed the situation. The new Sejm ignored the injunction, selecting five new judges on the night before the Tribunal’s ruling was due on December 3. Having been elected after sunset, four of the five were sworn in by Duda—again, in open defiance of the Tribunal—before dawn on the same night (the fifth was sworn in soon after). Incredibly, immediately after being sworn in the new judges were taken in governmental vehicles from the presidential palace to the Tribunal so as to participate in the December 3 ruling. At that point, the Tribunal’s president prevented them from doing so.¹²

The Tribunal’s December 3 ruling was unanimous: three of the appointments made by the outgoing Sejm had been constitutional, but two had not.¹³ This was followed by a ruling on December 9 striking down a series of other amendments passed by the Sejm in November.¹⁴ Taken together, the two December rulings made explicit that there were only two vacancies on the Tribunal for the PiS-controlled Sejm to fill, rendering three of PiS’s five appointments invalid.

The government, however, refused to recognize the rulings as legitimate, ordering state printing presses not to print them so as to prevent them from taking legal effect (by December 2016, the government had refused to print 17 rulings issued by the Tribunal).¹⁵ Instead, the Sejm passed a so-called “Repair Act” on the Tribunal, consisting of a series of measures designed to prevent the court from functioning properly and to give the unconstitutionally appointed progovernment judges the power of veto over key decisions.¹⁶

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The “Repair Act” was enacted with immediate effect, meaning that the government was demanding that the Tribunal assess the constitutionality of the Act in accordance with the rules as outlined in the Act itself—a trap likened by one legal expert to “a snake eating its own tail.”¹⁷

The Tribunal responded in a ruling issued on March 9, 2016 that the object of review cannot simultaneously provide the basis for the review itself if the constitution is to retain its supremacy over statutes issued by parliament, describing the Act’s provisions as amounting to a deliberate attempt to institute “a paralysis of the Court which violates in a decidedly arbitrary manner judicial independence, the separation of powers and the right of individuals to an expedient judicial process.”¹⁸

Again, the government refused to publish the ruling, arguing that it had violated the terms of the Act it was assessing. When the General Assembly of the Supreme Court issued a resolution declaring that the Tribunal’s rulings must be published, a PiS spokesperson described the Assembly as “a group of buddies preserving the status quo of the old regime.”¹⁹

The stalemate continued as long as judges insisting on the primacy of the constitution (and hence the rulings of the Tribunal) over regular law-making constituted a majority on the court.²⁰ Tribunal judges were put under intense pressure by ruling party politicians during this period, including public threats of prosecution.

In April 2016, Minister of Justice Zbigniew Ziobro—who also serves as prosecutor general after PiS merged the two offices in 2015—wrote a letter to court president Professor Andrzej Rzepliński stating that he “should adhere to the legislation or face a legal review;”²¹ soon after, prosecutors initiated an investigation into Rzepliński’s conduct.²² This followed comments by Witold Waszczykowski, then serving as foreign minister, saying that Rzepliński “increasingly reminds me of an Iranian ayatollah.” In Iran, said Waszczykowski,

“it’s not the law as determined by democratically elected parliaments, governments, presidents which is the dominating law, but the interpretation of that law through jurisprudence.”²³

With Rzepliński’s term due to run out in December 2016, however, the government was able to shift its attention towards engineering the outcome of the court’s ostensibly internal deliberations regarding Rzepliński’s successor.

This it did in three stages. First, the court’s three PiS-appointees all called in sick on the day that the nine other Tribunal judges gathered to vote for Rzepliński’s successor, with Duda refusing the nomination of Rzepliński’s deputy on the grounds that the meeting had been one vote short of being quorate.²⁴ Second, parliament passed a law designating criteria for an ‘interim president’ to be appointed, designed so that Julia Przyłębska, a relatively junior PiS appointee, would get the role.²⁵ Third, Przyłębska presided over a new vote consisting of just six judges, all appointed by PiS: the three judges that had been appointed legally, and the three “non-judges” whose appointments had consistently been ruled invalid. The six voted for Przyłębska, and she was promptly sworn in by President Duda (according to Duda’s logic, in other words, six judges was enough but nine was not).

One of Przyłębska’s first actions as president was to send Rzepliński’s deputy on indefinite leave; with another judge resigning, this gave PiS-appointees—including the “non-judges,” who were now allowed to participate—a majority on the Tribunal. The rulings from 2016 that had been so bitterly opposed by the government disappeared from the Tribunal’s website.²⁶

Whereas for the government’s opponents Przyłębska continues to serve as a symbol of the Tribunal’s subjugation to the will of the ruling party, to supporters she embodied the first step towards Poland’s “liberation” from the existing constitutional order. This point was made explicit by Sieci, a magazine with close ties to Law and Justice, which made her its “Person of the Year” for 2017, arguing that “the election of Julia Przyłębska to the position of President of the Constitutional Tribunal marked the beginning of the rebuilding of the justice system in Poland.” At a gala ceremony, she was presented with the award—and a big bunch of flowers—by Kaczynski himself.²⁷

Observers also noted a miraculous change in the government’s attitude towards the Tribunal: having publicly threatened judges with prosecution for insisting on the primacy of a legally constituted Tribunal, since Przyłębska’s appointment Minister Ziobro has publicly threatened prosecution against judges who do not recognize the primacy of the now illegally constituted Tribunal.²⁸

From the Constitutional Tribunal to the Supreme Court

Having taken control of the Constitutional Tribunal in December 2016, in January 2017 the government published its proposals for a radical restructuring of the Supreme Court and the National Council of the Judiciary (KRS). The timing of the proposals, in addition to the fact that they were drawn up without any public consultation, belies government claims that the proposals constituted a response to public demand, as opposed to the next logical step in a long-term plan to assume control of the judicial system as a whole.

The principal function of the KRS, which had been designed to give judges a majority so as to safeguard judicial independence, is to make judicial appointments;²⁹ the Supreme Court is the highest court of appeal for all criminal and civil cases in Poland and is also charged with ruling on the validity of elections, as well as approving the annual financial reports of political parties and adjudicating upon disciplinary proceedings against judges.

The government also published a major proposal on the functioning of ordinary courts, which gave the minister of justice the power to dismiss and appoint court presidents, who enjoy substantial formal powers and informal influence over the allocation of individual cases.³⁰

The initial proposals on the KRS and Supreme Court were eventually passed in the Sejm but vetoed by Presi-

dent Duda in July 2017, in the face of mass protests and concerns and divisions within the ruling camp (the amendments to the law on the ordinary courts he signed).³¹

The vetoes marked not a change of heart, but a tactical retreat. Duda and Kaczynski retired to negotiate behind closed doors; meanwhile, the government used public funds earmarked for promoting Poland abroad to wage a domestic propaganda campaign, describing judges as a “privileged caste” and drawing attention to high-profile miscarriages of justice and instances of judges caught drink-driving, shoplifting, and starting bar fights.³²

When the revised proposals were announced by President Duda in September 2017, they confirmed suspicions that they had been designed principally to reflect a reconfiguration of power between figures within the ruling camp, rather than to address substantive concerns over the assertion of control by the ruling party.

First, Duda’s proposals paved the way for PiS to assume control of the KRS by terminating the term of office of the existing members and giving the parliamentary majority the right to nominate a majority of their replacements.³³ This means that the parliamentary majority now enjoys unmediated power of appointment to the body that appoints all Polish judges.

Second, the Supreme Court legislation forced all Supreme Court justices over the age of 65 to retire, unless their terms are extended with presidential approval.³⁴ Combined with control of the KRS, this has given the government effective power of appointment to 40 percent of the Supreme Court.³⁵

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Third, Duda introduced a mechanism of “extraordinary appeal,” whereby during the next three years almost any legally binding final judgment dating back to the introduction of the constitution in 1997 can be reopened, and heard again by Supreme Court judges appointed by the ruling party via its control of the KRS. “Lay judges”—members of the public appointed for renewable four-year terms by the (PiS-majority) Senate—will also sit in on cases in the new Extraordinary Chamber, which will also consider disciplinary charges brought against Polish judges and cases concerning Polish elections. The inclusion of lay members at such high levels is extremely rare, serving as a demonstration of the ruling party’s intention to supplement formal legal justice with its own understanding of “social justice” in certain cases.³⁶

Duda also granted himself considerable powers over the internal functioning of the Supreme Court, including not only the right to appoint the president of the court, but also the discretion to re-appoint the court president for a second term. As a result, Poland’s ruling party now not only holds the power to appoint Supreme Court judges, but also the power to appoint those who decide which Supreme Court judges (and which lay judges) hear which cases.³⁷ A detailed analysis by the Council of Europe’s Venice Commission arrived at the conclusion that “the two Draft Acts put the judiciary under direct control of the parliamentary majority and of the President of the Republic.”³⁸

The government claims that it is motivated by a desire to purge the Polish judicial system of the influence of former communists.³⁹ But even allowing for the ruling party’s gross exaggeration of the presence and influence of former communist judges in the Polish judicial system (the average Polish judge is in their early 40s),⁴⁰ this does not explain why the government should enjoy the power to oversee the appointment, promotion, discipline and financial incentives of all Polish judges, indefinitely. Gallingly for the government’s critics, the reforms were steered through the parliament’s justice committee by PiS MP Stanislaw Piotrowicz, a decorated former communist prosecutor who helped prepare indictments against dissidents arrested during the imposition of Martial Law.

Both Acts were passed by the Polish parliament and signed into law by Duda in December 2017.

In March 2018, the terms of the 15 judicial members of the KRS were terminated, and the Sejm appointed their replacements. The appointment process was boycotted by the overwhelming majority of Polish judg-

es—out of approximately 10,000 only 18 consented to stand as candidates, while the names of those who had nominated them have been kept secret.⁴¹ The majority of appointees either had close links to the Ministry of Justice, or had been recently appointed by Minister Ziobro as court presidents shortly before (one of the appointees was the spouse of a recently appointed court president).⁴² The appointees also included two judges with records of poor performance that would normally have excluded them from the office, including one who had faced over 50 disciplinary charges; the identities of those who nominated the new appointees have not been made public.⁴³

The Ministry of Justice has also replaced 149 court presidents and vice presidents since amendments to the law on ordinary courts was passed in July 2017.⁴⁴ According to a recent report by the Warsaw-based Helsinki Foundation for Human Rights, “the process of appointing new presidents and vice presidents was conducted in a non-transparent way and based on irrelevant criteria,” including “through private friendships.” It argues that the amendments “do not address the most important problems of the justice system,” “will not improve court proceedings,” “broadened the opportunities for politicians to influence courts,” and “may violate the right to a fair trial.”⁴⁵

With ruling party nominees in control of the KRS and set to take over the Supreme Court in July 2018, and the government protected by a tame Constitutional Tribunal, there will soon no longer exist an independent institution capable of checking how the government wields the power it has acquired. The destruction of the rule of law in Poland needs to be seen not as some worrying future prospect but a near fait accompli that the European Union, the international community, and above all, Polish society itself has failed to prevent.

From prevarication to retreat? The EU’s dilemma

If 2016 was spent taking control of the Constitutional Tribunal, and 2017 spent laying the foundations to take control of the KRS and the Supreme Court, in 2018 the challenge for Law and Justice has been to withstand pressure from the European authorities to reverse the reforms.

Although the Polish situation is frequently compared to that in Hungary, there is an important difference. In Hungary, a government with a constitutional majority is constructing an authoritarian order that may contravene democratic principles, but which is broadly within the parameters of Hungarian law. In Poland, a government without a constitutional majority has simply dismantled the existing constitutional order through a sustained attack on the law itself.

In December 2017, after two years of “dialogue” with the Polish authorities, the European Commission recommended the initiation of a sanctions procedure under Article 7 of the European treaties, arguing that the “common pattern” of over 13 laws adopted since 2015 is that “the executive and legislative branches have been systematically enabled to politically interfere in the composition, powers, administration and functioning of the judicial branch.”⁴⁶

Up until now, Law and Justice’s strategy has been to humor the European Commission and fellow member states with expressions of willingness to engage in dialogue, or to make unconvincing offers of “compromise,” even as it establishes facts on the ground that will prove extremely difficult to reverse.

The Commission has made a series of demands, including the repeal of the laws described in this report, and asked the government to “restore the independence and legitimacy of the Constitutional Tribunal, by ensuring that its judges, President and Vice President are lawfully elected and by ensuring that all its judgements are published and fully implemented.”⁴⁷

Unsurprisingly, the Polish government has done no such thing, instead publishing in February 2018 a 94-page “White Paper” defending its position.⁴⁸ Described in an official response by the Polish Supreme Court as “unreasonably and tendentiously argued,” and containing “distorted,” “untrue,” “unfounded,” “contradictory,” and “methodologically inconsistent” assertions,⁴⁹ the document was riddled with factual inaccuracies,

misrepresentation of statistics, and spurious international comparisons, and rejected by the Commission as “not the answer to the Commission’s recommendations.”⁵⁰

Instead, the government has floated so-called concessions that amount to little. For example, it has offered to consult the (new) KRS on the dismissal and appointment of court presidents. But since the KRS has already been filled with ruling party appointments, and 149 court presidents and vice presidents have already been replaced, such a move will not remedy the situation. Neither does an offer to “print” three disputed Constitutional Tribunal rulings, but only after passing a law declaring them to have no legal force. Additionally, a “concession” on the extraordinary appeal mechanism, proposed in the first week of May, will still allow the minister of justice/prosecutor general to reopen old cases with the new judges.⁵¹

It appears unlikely, however, that the Article 7 procedure will result in concrete action against the Polish government, given the reticence of a number of EU members, particularly in Central and Eastern Europe, to set a precedent by which an EU member is sanctioned by fellow member states for its internal judicial arrangements. More likely is that member states seen to be in breach of their rule of law commitments will be penalized in the upcoming EU budget process.⁵²

How effective the prospect of a reduction in EU funds may be remains to be seen. In March this year, however, a development in Ireland raised the possibility that the situation could be taken out of the hands of the Commission and the Member States altogether, when Irish High Court judge Aileen Donnelly refused to extradite a suspected drugs trafficker to Poland on the grounds that changes to the Polish judicial system had been “so immense” that Ireland’s high court had been forced to conclude that the rule of law in Poland had been “systematically damaged,” undermining the “mutual trust” that underpins the European Arrest Warrant process.⁵³

The key point is that Poland’s present judicial arrangements are incompatible with the conditions of membership of the European Union.

Justice Donnelly’s referral of the case to the European Court of Justice is especially important when seen in the context of a recent ruling by the ECJ concerning a pay dispute in Portugal that had ramifications for the independence of the Portuguese judiciary. In its ruling, the ECJ declared itself competent to evaluate the independence of national judges charged with applying and interpreting EU law, given their key role in upholding the EU’s system of legal protection.⁵⁴ Taken together, the rulings raise the prospect of dramatic consequences were the ECJ to rule that the Polish judicial system was in contravention of European standards.⁵⁵

However things progress on either the political or the legal front, it is impossible to overstate the gravity of the present situation, and its potential consequences. The key point is that Poland’s present judicial arrangements are incompatible with the conditions of membership of the European Union. That situation might be manageable in the immediate term, but it is not sustainable indefinitely.

From the European perspective, Brussels is caught between the immediate risk of confrontation exacerbating existing political fissures across the continent, and the long-term risk of the European legal order disintegrating as more and more members, emboldened by Law and Justice’s example, see fit to violate the basic democratic standards and legal framework that holds the union together.

From the perspective of Law and Justice, it has succeeded in its leader’s central mission—to establish control of the Polish judiciary and release itself from the checks and balances that thwarted it in the past. Even if it wanted to retreat, the sheer breadth and depth of measures already taken in recent years means that only total capitulation and proactive measures to repeal legislation and reverse hundreds of decisions and appointments made over recent years could truly restore judicial independence and the rule of law. Given that the Polish authorities have not shown the slightest inclination to embark on such a process, the time may come when Polish citizens will be forced to choose whether their future still lies at the heart of Europe.

¹ See “The conspiracy theorists who have taken over Poland,” The Guardian, <https://www.theguardian.com/world/2016/feb/16/conspiracy-theorists-who-have-taken-over-poland>

² Jarosław Kaczyński: Musi się skończyć czas folwarku. “Wychodzimy z imposybilizmu ostatnich 25 lat,” WPolityce.pl, <https://wpolityce.pl/polityka/287863-jaroslaw-kaczynski-musi-sie-skonczyz-czas-folwarku-wychodzimy-z-imposybilizmu-ostatnich-25-lat>

³ It should be noted that Poland’s present constitutional order is not, as is sometimes assumed, a product of the roundtable talks in 1989 between Solidarity representatives and the Polish communists. The Constitution of the Republic of Poland of 2nd April 1997 was approved by a freely-elected parliament, by a directly-elected president, and by the electorate itself in a referendum. See <http://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm>

⁴ “Piotrowicz o sędziach: Nie kierują się wolą narodu, tylko bronią własnych interesów,” Dziennik.pl, <http://wiadomosci.dziennik.pl/wydarzenia/artykuly/549884,piotrowicz-o-sedziach-nie-kieruja-sie-wola-narodu-tylko-bronia-wlasnych-interesow.html>

⁵ “Kaczyński: mamy do czynienia z buntem, mamy rebelię,” TVN24, <https://www.tvn24.pl/wiadomosci-z-kraju,3/zjazd-okregowy-pis-w-warszawie-przemowienie-jaroslaw-kaczynskiego,649572.html>. Kaczyński’s logic echoed a speech made in November 2015 by MP Kornel Morawiecki, the father of Polish Prime Minister Mateusz Morawiecki, during which he argued that “The good of the nation is above the law,” receiving a standing ovation from Law and Justice deputies, see “Kornel Morawiecki w Sejmie: Nad prawem jest dobro Narodu! ‘Prawo, które nie służy narodowi to bezprawie!’ Reakcja? Owacja na stojąco,” WPolityce, <https://wpolityce.pl/polityka/273101-kornel-morawiecki-w-sejmie-nad-prawem-jest-dobro-narodu-prawo-ktore-nie-sluz-narodowi-to-bezprawie-reakcja-owacja-na-stojaco-wideo>

⁶ “A de-facto change to the constitution without following the amendment procedure but through sub-constitutional laws is what I call a constitutional coup d’etat. The principle of supremacy of the constitution is that you cannot change the constitution by simple statutes. Constitution controls statutes, not the other way around.” See “What is Going on in Poland is an Attack against Democracy, Verfassungsblog, <https://verfassungsblog.de/what-is-going-on-in-poland-is-an-attack-against-democracy/>

⁷ The Tribunal’s powers, responsibilities and means of operation are outlined in Articles 188-197 of the Constitution. ‘The Constitutional Tribunal shall settle disputes over authority between central constitutional organs of the State’ (Article 189); ‘Judgments of the Constitutional Tribunal shall be of universally binding application and shall be final’ (Article 190.1)

⁸ “Poland’s constitutional crisis goes international,” Politico Europe, <https://www.politico.eu/article/poland-constitution-crisis-kaczynski-duda/>

⁹ As one academic observer noted, ‘While public protest was the most visible source of opposition to the coalition [of 2005-7], the Constitutional Tribunal proved the most damaging to its ambitions’ see Ben Stanley (2016) Confrontation by default and confrontation by design: strategic and institutional responses to Poland’s populist coalition government, *Democratization*, 23:2, 263-282, DOI: 10.1080/13510347.2015.1058782

¹⁰ To take one example, in May 2017 an unconstitutionally-appointed Tribunal “non-judge,” Lech Morawski, openly endorsed the government and its political program at a seminar at Oxford University. See <https://www.law.ox.ac.uk/news/2017-05-11-oxford-symposium-polish-constitutional-crisis-sparks-public-debate>

¹¹ Duda argued that a law on the Tribunal signed into law by his predecessor had been unconstitutional, rendering all five appointments invalid. However, it is for the Constitutional Tribunal, not the President, to decide up on the constitutionality of laws. By refusing to swear in the judges on the basis of his own assertion that all five appointments were unconstitutional, Duda was abrogating for himself the constitutional authority not only of the Tribunal, but also that of the parliament, which has the sole power of appointment of Tribunal judges.

¹² See “Poland’s ‘overnight court’ breaks all the rules,” Politico Europe, <https://www.politico.eu/article/law-vs-justice-poland-constitution-judges/>

¹³ Case K 34/14. The Tribunal ruled that the appointments that were made to replace judges whose terms ended before the start of the term of the incoming Sejm were valid, whereas the replacing judges whose terms ended after the start of the term of the incoming Sejm were not. It also struck down a series of other unconstitutional amendments passed by the Sejm in November 2015, including an attempt to cut short by statute the terms of the president and vice-president of the Tribunal, and ruled that it had been the President’s duty to swear in constitutionally appointed judges “immediately,” and had no authority to prevaricate.

¹⁴ Case K35/15. The amendments that were struck down included the attempt to annul by statute the appointment of all five judges appointed by the outgoing Sejm, and an attempt to cut short by statute the terms of the president and vice-president of the Tribunal.

¹⁵ The constitution states that ‘Judgments of the Constitutional Tribunal regarding matters specified in Article 188, shall be required to be immediately published in the official publication in which the original normative act was promulgated. If a normative act has not been promulgated, then the judgment shall be published in the Official Gazette of the Republic of Poland, Monitor Polski (Article 190.2).

¹⁶ Provisions included a requirement for all judgments to be made sitting in Full Court; a requirement for all constitutional reviews of laws to have a two-thirds majority (in contravention of the constitution); a provision for re-examining old rulings in accordance with the new rules; and a requirement for the rules to be applicable for all cases – more than a hundred – that had already begun being examined.

¹⁷ “The Constitutional Court of Poland: The Battle for Judicial Independence,” Mikolaj Pietrzak, <http://www.fijs.org/content/constitutional-court-poland-battle-judicial-independence>

¹⁸ Case K47/15. See <https://verfassungsblog.de/the-power-of-the-rule-of-law-the-polish-constitutional-tribunals-forceful-reaction/>

¹⁹ See “Polish Judiciary and Constitutional Fidelity: beyond the institutional “Great Yes”?,” Verfassungsblog, <https://verfassungsblog.de/polish-judiciary-and-constitutional-fidelity-beyond-the-institutional-great-yes/>

²⁰ Rzepliński did not allow the three ‘non-judges’ sworn in by President Duda to participate in the Tribunal’s proceedings.

²¹ “Justice Minister threatens Poland’s Constitutional Tribunal judges with legal action,” Deutsche Welle, <http://www.dw.com/en/justice-minister-threatens-polands-constitutional-tribunal-judges-with-legal-action/a-19167885>

²² “Polish prosecutors open investigation into top court chief justice,” Deutsche Welle, <http://www.dw.com/en/polish-prosecutors-open-investigation-into-top-court-chief-justice/a-19486068>

²³ “Poland’s PiS tells top court to stuff it,” Politico Europe, <https://www.politico.eu/article/poland-constitution-tribunal-democracy-kaczynski-rule-of-law-pis/>

²⁴ The constitution stipulates that the Tribunal president is to be selected from amongst their number by the justices sitting in a ‘General Assembly’, which requires a minimum of ten judges to be quorate; ‘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’ (Article 194.2)

²⁵ Until that point, the Tribunal’s practice had been to appoint one of its judges as a commissioner to oversee the process of appointing the Tribunal president, who would be nominated on the basis of seniority. But in November, the Sejm passed a law redefining ‘seniority’ as being based on not on time of service on the court, but including time served in ‘public administration’, whether in the judiciary or not. This gave seniority – in the eyes of the new law – not to Rzepliński’s deputy, Professor Stanislaw Biernat, but to Przylebska instead.

²⁶ Not only has the ‘Przylebska Tribunal’ since coordinated its actions closely with those of the government as it set its sights on the rest of the judiciary, but its invalid composition calls into question every decision it has taken since December 2016, including its approval of deeply controversial laws limiting the right to protest and extending government surveillance powers. This has led to confusion – bordering on anarchy - in the Polish legal system, with the authority of the post-2016 Tribunal and its rulings recognised in

some courts, and in some parts of the country, but not in others.

²⁷ “Relacja z gali Człowiek Wolności 2017 tygodnika „Sieci”. Prezes TK: Nagrodę dedykuję pamięci wybitnego męża stanu, śp. Lecha Kaczyńskiego,” WPolityce, <https://wpolityce.pl/media/381173-relacja-z-gali-czlowiek-wolnosci-2017-tygodnika-sieci-prezes-tk-nagrode-dedykuje-pamieci-wybitnego-meza-stanu-sp-lecha-kaczynskiego-wideo>

²⁸ See “Living under the unconstitutional capture and hoping for the constitutional recapture,” Verfassungsblog, <https://verfassungsblog.de/living-under-the-the-unconstitutional-capture-and-hoping-for-the-constitutional-recapture/>

²⁹ The constitution states that ‘The National Council of the Judiciary shall be composed as follows: the First President of the Supreme Court, the Minister of Justice, the President of the Supreme Administrative Court and an individual appointed by the President of the Republic; 15 judges chosen from amongst the judges of the Supreme Court, common courts, administrative courts and military courts; 4 members chosen by the Sejm from amongst its Deputies and 2 members chosen by the Senate from amongst its Senators’ (Article 187.1).

³⁰ “Ustrój sądów powszechnych: w sobotę 12 sierpnia 2017 r. wchodzi w życie nowela ustawy,” Rzeczpospolita, <http://www.rp.pl/Sedziowie-i-sady/308119977-Ustroj-sadow-powszechnych-w-sobote-12-sierpnia-2017-r-wchodzi-w-zycie-nowela-ustawy.html>

³¹ See “Why suspicion remains over Polish president’s veto of contentious laws,” The Guardian, <https://www.theguardian.com/world/2017/jul/25/why-suspicion-remains-over-polish-presidents-veto-of-contentious-laws>

³² “Poland Starts Ad Campaign to Back Court Overhaul Disputed in EU,” Bloomberg, <https://www.bloomberg.com/news/articles/2017-09-08/poland-starts-ad-campaign-to-back-court-overhaul-disputed-in-eu>

³³ Aside from the obvious violation of constitutional guarantees of the separation of and balance between the legislative, executive and judicial powers (Article 10), by terminating the terms of KRS members with immediate effect, both the July and September proposals violated their constitutionally-mandated four-year terms (Article 187.3). Although some government supporters cite Article 187.4 – ‘The organizational structure, the scope of activity and procedures for work of the National Council of the Judiciary, as well as the manner of choosing its members, shall be specified by statute’ – this does not constitute license to pass statute in violation of the relevant constitutional provisions.

³⁴ “Draft Act on the Supreme Court tabled by the President of Poland,” Citizen Observatory, <http://citizensobservatory.pl/ustawa/draft-act-on-the-supreme-court-tabled-by-the-president-of-poland/>

³⁵ Approximately 40% of Supreme Court judges at the time the legislation was proposed were over 65.

³⁶ An analysis by the Council of Europe’s ‘Venice Commission’ of legal experts notes that ‘Introduction of lay members was at the heart of the judicial reform decreed by the Bolshevik government immediately after Bolsheviks seized the power in Russia [in 1917] ... the Bolshevik government declared that the newly created tribunals should be guided by the “revolutionary legal conscience”, which was supposed to replace the laws of the ancient regime. The Memorandum prepared by [Duda’s] Administration starts from the same assumption; it states that “the involvement of lay judges in benches ruling on extraordinary appeals will introduce a very important element of social control to cases in which basic elements of the principle of social justice may have been breached.” Thus, instead of applying the laws, lay members will be applying “the principle of social justice” and this is the reason for their participation in the proceedings.’ (Opinion No. 904/2017, p15)

³⁷ See p18, para. 86, p18 of Venice Commission Opinion No. 904/2017 - [http://www.venice.coe.int/webforms/documents/?pdf=C-DL-AD\(2017\)031-e](http://www.venice.coe.int/webforms/documents/?pdf=C-DL-AD(2017)031-e)

³⁸ Ibid.

³⁹ “Polish courts marred by communist-era holdovers: PM,” TheNews.pl, http://thenews.pl/10/Artykul/340276_Polish-courts-marred-by-communistera-holdovers-PM

⁴⁰ See “THE ARGUMENTS OF POLISH JUDGES ASSOCIATION IUSTITIA RELATED TO THE PM MATEUSZ MORAWIECKI STATEMENTS AT THE MEETING WITH FOREIGN JOURNALISTS ON JANUARY 10TH, 2018.,” Iustitia.pl, <https://www.iustitia.pl/in-english/2066-the-arguments-of-polish-judges-association-iustitia-related-to-the-pm-mateusz-morawiecki-statements-at-the-meeting-with-foreign-journalists-on-january-10th-2018>

⁴¹ When a Polish NGO submitted a freedom of information request to the Ministry of Justice asking for the names of those who nominated the new KRS members, they received a list of numbers with the names blanked out (<http://wyborcza.pl/7,75398,23263461,resort-ziobry-ujawnil-listy-sedziow-ktorzy-poparli-kandydatow.html>). The lack of transparency surrounding the nomination process has led some observers to question the legality of the appointments (see <https://verfassungsblog.de/bad-response-to-a-tragic-choice-the-case-of-polish-council-of-the-judiciary/>)

⁴² For an interactive map of the new appointments and their connections to the Ministry of Justice, see <https://for.org.pl/pl/a/5775.nowa-krs-zalezna-od-ministra-sprawiedliwosci-mapa-powiazan>

⁴³ “The Rule of Law in Poland: A Sorry Spectacle,” Verfassungsblog, <https://verfassungsblog.de/the-rule-of-law-in-poland-a-sorry-spectacle/>

⁴⁴ “RESPONSE TO THE WHITE PAPER COMPENDIUM ON THE REFORMS OF THE POLISH JUSTICE SYSTEM, PRESENTED BY THE GOVERNMENT OF THE REPUBLIC OF POLAND TO THE EUROPEAN COMMISSION,” Iustitia.pl, <https://www.iustitia.pl/informacje/2172-response-to-the-white-paper-compedium-on-the-reforms-of-the-polish-justice-system-presented-by-the-government-of-the-republic-of-poland-to-the-european-commission>

⁴⁵ “It Starts with the Personnel,” HFHR, <http://www.hfhr.pl/wp-content/uploads/2018/04/It-starts-with-the-personnel.pdf>

⁴⁶ “Rule of Law: European Commission acts to defend judicial independence in Poland,” Press Release http://europa.eu/rapid/press-release_IP-17-5367_en.htm

⁴⁷ Ibid.

⁴⁸ “White Paper on the Reform of the Polish Judiciary,” Chancellery of the Prime Minister, https://www.premier.gov.pl/files/files/white_paper_en_full.pdf

⁴⁹ “Opinion on the White Paper on the Reform of the Polish Judiciary,” Supreme Court, <http://www.sn.pl/aktualnosci/SiteAssets/Lists/Wydarzenia/EditForm/Supreme%20Court%20-%20Opinion%20on%20the%20white%20paper%20on%20the%20Reform%20of%20the%20Polish%20Judiciary.pdf>

⁵⁰ Even calling the document a ‘White Paper’ is misleading. White Papers are published by governments as consultative documents outlining plans for legislation that has not yet been enacted, yet the Polish government’s ‘White Paper’ was published after the legislation had already been enacted (without a public consultation process). Readers can judge for themselves whether they find the White Paper convincing by comparing it with the responses issued by the Supreme Court and Iustitia, an association of Polish judges: <https://www.iustitia.pl/informacje/2172-response-to-the-white-paper-compedium-on-the-reforms-of-the-polish-justice-system-presented-by-the-government-of-the-republic-of-poland-to-the-european-commission>

⁵¹ See “Poland offers fresh concession to EU over legal reforms,” Financial Times, <https://www.ft.com/content/8311fe36-4eda-11e8-a7a9-37318e776bab>

⁵² “Long-Term EU Budget Plan Would Punish ‘Rule Of Law Deficiencies,’” RFE RL <https://www.rferl.org/a/eu-long-term-budget-plan-would-punish-rule-of-law-deficiencies/29204662.html>

⁵³ See “Ireland refuses extradition over concern at Polish justice reforms,” The Guardian, <https://www.theguardian.com/world/2018/mar/13/ireland-refuses-artur-celmer-extradition-poland-justice-reforms-ecj>; for more on the mutual trust principle, see “Mutual Trust Before the Court of Justice of the European Union,” Sacha Prechal, <http://www.europeanpapers.eu/it/e-journal/mutual-trust-before-the-court-justice-of-the-european-union>

⁵⁴ Case C-64-16. The judgement stated that ‘The very existence of effective judicial review designed to ensure compliance with

EU law is of the essence of the rule of law ... It follows that every Member State must ensure that the bodies which, as 'courts or tribunals' within the meaning of EU law, come within its judicial system in the fields covered by that law, meet the requirements of effective judicial protection. ... In order for that protection to be ensured, maintaining [a national] court or tribunal's independence is essential.' See <http://eulawanalysis.blogspot.com/2018/03/rule-of-law-backsliding-in-eu-court-of.html>

⁵⁵ See "Extraditions to Poland may be suspended EU-wide, lawyers say," The Irish Times, <https://www.irishtimes.com/news/crime-and-law/extraditions-to-poland-may-be-suspended-eu-wide-lawyers-say-1.3425284>. The case provoked a furious reaction in Poland, with some pro-government media commentators insinuating that as a homosexual, and therefore a 'progressive judge', Ms Justice Donnelly was motivated by bias against a government that stood for 'traditional values'. In response, the Association of Irish Judges issued a statement 'to deprecate in the strongest terms the personalized attacks and invective directed at our member, Ms Justice Aileen Donnelly reportedly emanating from some sections of the Polish media' – a sign that legal professionals across Europe are waking up to the treatment endured by Polish judges in recent years.

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