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### **Symposium: Public Law and the new Populism**

Tomasz Tadeusz Koncewicz

**Unconstitutional capture and constitutional recapture.  
Of the rule of law, separation of powers and judicial promises**

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***Unconstitutional capture and constitutional recapture.***

**Of the rule of law, separation of powers and judicial promises \***

**Abstract**

This paper argues the Polish case is much more than just an isolated example of yet another government going rogue. There is an important European dimension to what has transpired in Poland over the last 20 months. To understand what and why has happened in Poland, one has to take a longer view and revisit not only 2004 Accession, but also 1989 constitutional moment. The constitutional debacle in Poland must be but a starting point for more general analysis of processes of the politics of resentment and constitutional capture that strike at the core European principles of the rule of law, separation of power, and judicial independence. The question then arises as to whether political exigencies could bring about self re-imagination on the part of the courts so as to make them protectors of the constitutional essentials in such emergency situations. In other words, could the capture of the state and institutions be countered by judicial recapture? The Polish example is instructive here and shows how existing mechanisms open important legal avenues to strike back at the capture. Yet embarking on such a recapture must be linked not only to the *normative* and *technical* (the question here would be: “does the system contain enough to build a good legal case for

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\* This paper is work in progress during my time as 2017 - 2018 LAPA Fellow Princeton University. All comments are welcome at [tomaszk@princeton.edu](mailto:tomaszk@princeton.edu); I am very grateful to Katherine Elgin of the Woodrow Wilson School, Princeton University for her expert editing assistance with the paper. For more extensive analysis see my *The Capture of the Polish Constitutional Tribunal and Beyond: Of institution(s), Fidelity and the Rule of Law in Flux* to be published in (2018) Review of Central and East European Law (forthcoming). I acknowledge the stimulating discussions I had with the participants at the NYU Symposium on Populism, September 15-16, 2017. The analysis draws on my paper presented at the workshop on the authoritarianism organized by Princeton University October 13 – 14, 2017. I am grateful to all the participants of the workshop for their useful comments and insights. Usual disclaimer applies. Some of the arguments in the paper were also touched upon during my presentation “Rule of law and the separation of powers in flux?” on the panel “The European Union and the Rise of Populist Nationalism” during the Annual Meeting of the American Association of Law Schools in San Diego, 3-6 January, 2018.

exercising such powers?”), but also to the *mental* (with the uneasy question “are judges willing and ready to use these mechanisms to protect the democracy?”). I believe that even a symbolic act of resistance in the pursuit of a judicial promise is crucial here as it builds institutional memory and legacy that goes beyond a disappointment and failure “here and now.” For the system to regain its liberal credentials, the courts and the public must have something tangible to fall back on. I call this act of resistance a “symbolic jurisprudence,” as it reminds us that survival of the system must be anchored in a long-term fidelity that goes beyond and transcends the “here and now.”

*To Martin Shapiro,*

In this paper I want to move beyond the hitherto dominant perspective of “here and now” and lawyers’ fixation on the boat, and instead focus more on the journey and important lessons the journey might teach us and enhance the understanding of “our boats.” I will argue that the Polish case (“a boat”) is much more than just an isolated example of yet another government going rogue. There is an important European dimension to what has transpired in Poland over the last 20 months. To understand what and why has happened in Poland, one has to take a longer view and revisit not only 2004 Accession, but also 1989 constitutional moment. The constitutional debacle in Poland must be but a starting point for more general analysis of processes of the politics of resentment and constitutional capture that strike at the core European principles of the rule of law, separation of power, and judicial independence.

With the benefit of hindsight we know that the disbelief about the destruction of the Polish Constitutional Court (and earlier, the Hungarian Constitutional Court) should serve as an example of an over-idealistic belief that institutions will always be able to defend themselves. As important as institutions might be as focal points of the constitutional system, they have a chance of survival only when their institutional pedigree and prestige are built on the popular support of the civil society. There is a two-way synergy between the two as while the civil society might contribute positively to the

consolidation of democracy, it cannot unilaterally neither bring about democracy, nor sustain democratic institutions and practices once they are in place.<sup>1</sup> Even strongest institutions will fall when lacking social capital. Courts play a pivotal role in the process because of their supervisory functions and the embedded low-profile and arcane language of the law. There is always a *bona fide* assumption that law will speak louder than any transient urges of the powers that be and that in the end the law will enforce its primacy. The assumption might be correct in the best of times when everything goes according to the plan. When it does not, courts look fragile and vulnerable as the only protective tool they wield – “a law” – is taken away from them by sheer power of the political sleight of hand. The question then arises as to whether political exigencies could bring about self re-imagination on the part of the courts so as to make them protectors of the constitutional essentials in such emergency situations. In other words, could the capture of the state and institutions be countered by judicial recapture? The Polish example is instructive here and shows how existing mechanisms open important legal avenues to strike back at the capture. Yet embarking on such a recapture must be linked not only to the *normative* and *technical* (the question here would be: “does the system contain enough to build a good legal case for exercising such powers?”), but also to the *mental* (with the uneasy question “are judges willing and ready to use these mechanisms to protect the democracy?”). I believe that even a symbolic act of resistance in the pursuit of a judicial promise is crucial here as it builds institutional memory and legacy that goes beyond a disappointment and failure “here and now.” For the system to regain its liberal credentials, the courts and the public must have something tangible to fall back on. I call this act of resistance a “symbolic jurisprudence,” as it reminds us that survival of the system must be anchored in a long-term fidelity that goes beyond and transcends the “here and now.”

Having said that, I am aware that such advocated thinking creates a fuzzy picture, distorts the constitutional landscape, and upsets established doctrines. Yet, this paper’s argument does not address normal times when things go as planned and the political game is played with respect for pre-ordained rules and conventions. Rather, the paper

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<sup>1</sup> P. C. Schmitter, *Civil Society East and West*, in L. Diamond, M. F. Plattner, Y. Chu, H. Tien, *Consolidating the Third Wave Democracies. Themes and Perspectives*, (The John Hopkins University Press, 1997), at p. 240.

focuses on the journey in times of constitutional upheaval that is marked by attack on the rule of law and separation of powers (what we can call “*politics of resentment - driven capture*”). The reinterpretation (“*defend - the - constitution driven recapture*”) that might (or not) follow creates a new status quo that will factor into the mechanism and instruments that were used to rebuild the system. A new status quo emerges as the result of the interplay between these “capture – recapture” dynamics.

### **I. Setting the scene: Understanding *what* has happened and *how* (“*a boat*”) it affects us beyond the here and now (“*the journey*”)**

The ruthlessness with which the Polish Constitutional Court (hereinafter referred to as “the Court” or “the Tribunal”) has been emasculated by the majority, and the persistence with which it has been thwarting the unconstitutional attempts to pack it and disable it<sup>2</sup>, paints a disturbing story of democracy and institution in distress. The story reminds M. Shapiro’s argument about the consequences of the choice made by the constitution-makers to resort to a court as a conflict resolver. Such a choice entails the acceptance of “*the inherent characteristics, practices, strengths and weaknesses of that institution [...] and some law making by courts and a certain capacity for judicial self-defense of its law making activity. The issue of whether such law making and self-defense are somehow antidemocratic or anti-majoritarian is uninteresting. If the demos chooses the institution, it chooses the judicial law making and judicial self-*

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<sup>2</sup> See T. T. Koncewicz, M. Konopacka, M. Zubik, Poland in R. Albert, D. Landau, S. Drugda, R. Faraguna, (eds.), *Global Review of Constitutional Law*, (Iconnect, Boston College Law School, 2017). It is not my intention here to retell the story of how the Polish Constitutional Tribunal was first paralyzed, and then disabled. For a succinct and incisive analysis see L. Garlicki, *Disabling the Constitutional Court in Poland?* (pp. 63-69) and M. Wyrzykowski, *Bypassing the Constitution or changing the constitutional order outside the constitution*, (pp. 159 - 179) in A. Szmyt, B. Banaszak, (eds.), *Transformation of law systems in Central, Eastern and Southeastern Europe in 1989 - 2015. Liber Amicorum in Honorem Prof. dr. dres. H. C. Rainer Arnold*, (Gdańsk University Press, 2016); and W. Sadurski, *What is going on in Poland is an attack against democracy?* available at [verfassungsblog.de/what-is-going-on-in-poland-is-an-attack-against-democracy/](http://verfassungsblog.de/what-is-going-on-in-poland-is-an-attack-against-democracy/); T.T. Koncewicz, *Polish Constitutional Drama: Of Courts, Democracy, Constitutional Shenanigans and Constitutional Self-Defense* at [www.iconnectblog.com/2015/12/polish-constitutional-drama-of-courts-democracy-constitutional-shenanigans-and-constitutional-self-defense/](http://www.iconnectblog.com/2015/12/polish-constitutional-drama-of-courts-democracy-constitutional-shenanigans-and-constitutional-self-defense/); *Farewell to the Polish Constitutional Court* available at [verfassungsblog.de/farewell-to-the-polish-constitutional-court/](http://verfassungsblog.de/farewell-to-the-polish-constitutional-court/); *Statutory tinkering: on the Senate’s changes to the Law on the Polish Constitutional Tribunal* available at [verfassungsblog.de/statutory-tinkering-senate-polish-constitutional-tribunal/](http://verfassungsblog.de/statutory-tinkering-senate-polish-constitutional-tribunal/). For a useful and detailed recap, see also the report by the Helsinki Foundation for Human Rights, *The Constitutional Crisis in Poland 2015-2016*, available at [www.hfhr.pl/wp-content/uploads/2016/09/HFHR\\_The-constitutional-crisis-in-Poland-2015-2016.pdf](http://www.hfhr.pl/wp-content/uploads/2016/09/HFHR_The-constitutional-crisis-in-Poland-2015-2016.pdf)

*defense*".<sup>3</sup> In 2015 and 2016, the Tribunal defended itself against attacks by the political power on its institutional status and judicial independence. What started as "court-packing," though, soon transformed into an all-out attack on the judicial review and on checks and balances. This attack was unprecedented in scope, efficiency and intensity. It was never premised on a dissatisfaction with the overall *performance* or particular acts of the Tribunal, but rather struck at its very *existence*. Polish political power realizes all too well, that "*where there is nothing to counterbalance the power of the majority except the Constitutional Tribunal and where majoritarianism is mistakenly identified as democracy, the evolution of cabinet dictatorship is inevitable.*"<sup>4</sup> With the Court fighting back, the political majority resorted to a device unheard of in Europe: refusal to publish judgments delivered by the Tribunal. According to Article 190(2) of the Constitution, rulings of the Tribunal are to be immediately published in the official publication in which the original normative act was promulgated. The Tribunal's case law of 2016 confirmed that all judgments must be published, as required by the Constitution. Yet, the Government persistently refused to publish judgments rendered by the Tribunal in 2015 and 2016, claiming that they were vitiated by procedural errors and lacked legal basis. The unconditional publication of the Tribunal's judgments between 10 March 2016 and 30 June 2016 was also found by the Venice Commission to be the condition *sine qua non* for any viable constitutional settlement. The Venice Commission regarded the refusal to publish the judgment of 9 March 2016 (case K 47/15) as contrary to the principle of the rule of law. For the Commission, such refusal constitutes an unprecedented move that further deepens the constitutional crisis.<sup>5</sup> Separation of powers, judicial independence, and effective functioning of the constitutional court were again key words informing the analysis. The Tribunal built on its previous *unpublished* (Case K 47/15) and *unimplemented* (K 34/15 and K 35/15) judgments. The Tribunal reiterated that its judgments must be published immediately

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<sup>3</sup> M. Shapiro, *The European Court of Justice: Of Institutions and Democracy*, (1998) 32 Israel Law Review 3, at p. 24.

<sup>4</sup> A. Sajó, *Limiting Government. An Introduction to Constitutionalism* (Central European University Press, 1999), at p. 4.

<sup>5</sup> On 11 August 2016, the Tribunal decided on the constitutional challenges to the Law of 22 July 2016 (Case K 39/16). That Law was yet another attempt to tame the Tribunal and contained provisions found by the Tribunal earlier to be unconstitutional.

in the shortest possible time. Government authorities have no discretion, but must publish all rulings of the Tribunal. *A fortiori*, the Tribunal criticized in the strongest possible words the practice of singling out rulings that will be published in the Journal of Laws and those that will not. The Sejm had reviewed individual rulings and decided that the judges in these rulings had acted *ultra vires*, justifying – in its view – the refusal to publish them, thus making the future publication of the Tribunal’s rulings dependent on the consent of the legislative branch. The Tribunal found this to be an inadmissible encroachment by the executive on the competencies of the constitutional court, aiming at the stigmatization of the judges who decided these cases. Such practice runs foul of the standards of a State governed by the rule of law (*Rechtstaat*) and is alien to the legal culture to which Republic of Poland belongs. The Tribunal was clear: *all* rulings are unconditionally binding and must be published.

The recurrent themes that go beyond the cases at hand, and in which the judgments put great stock, are the rule of law, the separation of powers and exclusiveness of constitutional review vested with the Tribunal.<sup>6</sup> The judgments<sup>7</sup> make perfectly clear that the Tribunal was fully aware of the critical juncture at which it found itself deciding these cases and fully understood the dangers inherent in the belief that the political will of the new majority could replace decisions of the constitutional court with constitutional monopoly of adjudication. Under this belief, moral doubts of the parliamentary majority would suffice to set aside law that was validly adopted and upheld by the court. It would be sheer power that dominates, with constitutional considerations relegated to the margin. So, unsurprisingly, the Tribunal stressed that in case of constitutional doubts, other branches of government are not to act freely, but must submit these doubts to the Tribunal for an authoritative interpretation.

While the constitutional controversies “here and now” needed solving, the long-term importance of this judicial resistance merits particular attention. The Tribunal stood up for the “balanced constitution” in which separation of powers is more than a

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<sup>6</sup> T.T. Koncewicz, *Of institutions, democracy, constitutional self-defence and the rule of law: The judgments of the Polish Constitutional Tribunal in cases K 34/15, K 35/15 and beyond*, (2016) 53 Common Market Law Review 1753.

<sup>7</sup> The relevant part of the judgment in K 34/15 reads: “*The Tribunal has vital duties pertaining to safeguarding the supremacy of the Constitution, protecting human rights and freedoms as well as preserving the rule of law and the separation of powers.*”



mere fig leaf, and for limited government, both of which have a strong tradition in Polish constitutional thinking. “Courts that owe their existence to democratic institutional choice must act prudently, or the choice may be withdrawn,”<sup>8</sup> and the Polish Constitutional Tribunal is no exception. On balance, its jurisprudence of 30 years respected the choices made by the principal or, using Shapiro’s words, the Tribunal acted prudently and built up credibility and legitimacy incomparably greater than that of other Polish public institutions.<sup>9</sup> One may recall here the words of the U.S. Supreme Court Justice Charles Evans Hughes “We are under a Constitution, but the Constitution is what the judges say it is”<sup>10</sup>. The Polish version of this would be located on the other end of the spectrum and may be summed up: “We are all under the Constitution but the Constitution is what the Parliament says it is.” The Tribunal has been saying all year long a clear “no” to such redrawing of constitutional lines. At the end of the line, though, sheer political power has prevailed over constitutional essentials and the rule of law.

The change in constitutional narrative in Poland entails dramatic consequences in the form of emerging dualism of constitutionality. The ruling party lives in its own constitutional world in which manipulation, legal instrumentalization, and cynicism prevail. The end always justifies the means and no means are too pervert as long as they bring about desired political goods. All this begs the question: what now? Are we doomed to helplessly watching the new unconstitutional narrative take the reins? What about the separation of powers elevated to one of the foundations of Polish legal order (art. 10 of the Constitution)? Last but not least, what about the judges? With these questions and more, we raise some of the most fundamental constitutional issues. It remains to be seen whether Poland (and Hungary before it<sup>11</sup>) is an outlying case, or if it portends the future of Europe more generally. Whatever the case, Poland is important for more than just the Poles. The case illuminates salient features and fissures in the

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<sup>8</sup> M. Shapiro, *supra*, note 3, at p. 30.

<sup>9</sup> For in-depth analysis see L. Garlicki, *The experience of the Polish Constitutional Court*, in W. Sadurski (ed.), *Constitutional Justice, East and West. Democratic Legitimacy and Constitutional Courts in Post-Communist Europe in a Comparative Perspective* (Kluwer Law International, 2002), at pp. 265-282.

<sup>10</sup> Speech before the Chamber of Commerce, Elmira, New York, May 3, 1907. *Addresses and Papers of Charles Evans Hughes, Governor of New York, 1906–1908*, (1908) at p. 139.

<sup>11</sup> K. L. Scheppele, *Constitutional coups and judicial review: How transnational institutions can strengthen peak courts at times of crisis (with special reference to Hungary)*, 23 (2014); *Transnational Law and Contemporary Problems* 51.

bases for democratic government, the rule of law and constitutionalism when confronted with sweeping politics of resentment.

## II. Polish case as a “European case”?

Resentment sweeps across Europe. Yet, the concept itself, its consequences and *modus operandi* are far from clear. We continue to lack a solid conceptual framework to understand it. We only scratch the surface by adopting intuitive understanding of the term and equate it with the politics of protest, contestation and revolt against mainstream politics. Yet contestation and conflict itself are part and parcel of a democratic process and open public sphere in why different world views compete for popular attention. In this traditional sense resentment is often analyzed together with the populism and the two are even used interchangeably. Just like populism, resentment is not only anti-elitist but also anti-pluralist, two features rightly identified by J. W. Müller in his insightful analysis as constitutive for populism.<sup>12</sup> Populism appeals to resentment by excluding others from “the people,” raising suspicion and uncertainty and thriving on conspiracy theories. Resentment never works on its own, though. It is always a function, and mixture, of culture, history and domestic politics. As a result of this “bifurcation,” resentment works differently in different environments and manifests itself in different guises: Brexit in the United Kingdom, more generally anti-European sentiments across the continent, the rise of the right-wing parties in Germany, Austria and France, the spread of hate speech and exclusion of the “the Other”, and, last but not least, more recently disabling constitutional checks and balances and taking over the state with looming POLEXIT in Poland.<sup>13</sup> The rationale behind resentment - distrust - plays out in each and every case just mentioned, yet it operates differently, with varying intensity, consequences and methods. Resentment transforms our traditional understanding of conflict. While democratic politicians compete with their own visions for society and politics and to this end make representative claims, they always stick to the language of “probability” for describing their alternatives to the *status quo*. They are

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<sup>12</sup> J. W. Müller, *What is populism* (University of Pennsylvania Press, Philadelphia, 2016).

<sup>13</sup> See my oped, *PIS takes its first step on the way toward POLEXIT* in *Gazeta Wyborcza* available at [wyborcza.pl/7,75968,22227617,w-puszczu-pis-robi-pierwszy-wielki-krok-do-polexitu.html?disableRedirects=true](http://wyborcza.pl/7,75968,22227617,w-puszczu-pis-robi-pierwszy-wielki-krok-do-polexitu.html?disableRedirects=true). On logging case see *infra* with further references.

ready to present these to the constitutional vetting through procedures and elections, and most importantly, they will be ready to accept failure and come back with better alternatives. The constitution provides political stage and frames this never-ending contestation and vying for political recognition. This is what makes democracy vibrant and dynamic. On the other hand, resentment-driven politicians see their claims as settling most fundamental issues once and for all and not allowing any room for critique and contestation. Their claims cannot be judged along the lines of “truth” or “falsehood” because of their moral dimension. Their claims are always the best and not open for further contestation.

However I would argue that transitioning from “*resentment*” as an emotion of rejection and critique of the unsatisfactory liberal *status quo* to the more formalized and institutionalized “*politics of resentment*” is crucial in our understanding of the ascent of illiberal narratives in Europe. It gives us a chance to harness resentment in more conceptual terms and schemes. Resentment alone is an emotion in need of constitutional doctrine and “politics of resentment” adds a crucial dimension to populism: a constitutional doctrine that competes with the dominant liberal constitutionalism<sup>14</sup> and delivers on the promise of populist narratives. “Politics of resentment” leads to a new conflict, away from party lines (*left v right*) and towards “*political elites v angry public.*”<sup>15</sup> Liberal narrative of the rule of law and embrace of the “*the Other*” are replaced with the apotheosis of local communities that are composed of individuals “just like us.” Doctrine of “politics of resentment” goes beyond mere constitutional bad faith<sup>16</sup> and adopts relentless *abuse*<sup>17</sup> of constitutional arrangements and flat-out *rejection* of a constitutional document. Critique (the constitution seen as a vestige of the old regime) is a unifying factor for both approaches. What distinguishes

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<sup>14</sup> For important clarifications see P. Blokker, *Populist constitutionalism*, at [verfassungsblog.de/populist-constitutionalism/](http://verfassungsblog.de/populist-constitutionalism/)

<sup>15</sup> See the special Volume no 18/2007 of the Journal of Democracy: *Is East-Central Europe Backsliding?* and in particular analysis by I. Krastev, *The strange death of the liberal consensus*, (2007) 18 Journal of Democracy no 4, p. 56.

<sup>16</sup> D. F. Posen, *Constitutional Bad Faith*, (2016) 129 Harvard Law Review 885.

<sup>17</sup> On the concept of abusive constitutionalism D. Landau, *Abusive Constitutionalism*, (2013) 47 University of California Davis Law Review 189. Also M. Tushnet, *Authoritarian Constitutionalism*, (2015) 100 Cornell Law Review 391.

one from the other is how deep and far the constitutional humiliation goes. In the *former* case, given the lack of constitutional majority, the constitution is dispensed with *per fas et nefas* by disregarding its clear provisions or adopting regulations that fly in the face of a constitution. With constitutional review in tatters, such unconstitutional practice becomes business as usual. In the *latter* case, the politics of resentment resort to the ultimate weapon and adopt a new constitution that reflects and entrenches new narratives. One of the tenets of the new doctrine of “the politics of resentment” is outright rejection of the liberal rule of law, which it claims distorts the communication processes between the representatives of the people and the people themselves. It is an unwanted technicality that at best protects the disgusting elites while oppressing the real people. As such it must be remodeled and harnessed so as to enable and protect decision-making that at long last will reflect the purified rule of the people.

Yet, to understand why the capture has happened in Hungary and then in Poland, one has to dial 25 years back.

### **III. Forgotten legacy of the 2004 Enlargement**

#### **III.1. From the politics of resentment to ...**

“Politics of resentment”<sup>18</sup> are felt differently in main<sup>19</sup> axes of divergence on the European continent between “*the West*” and “*the East*.” In the former case, EU law and Europeanization provoke well-known criticisms of remoteness of Brussels with the resultant civic indifference, turn against the mainstream politics and the nostalgic return to the nation state. In homogenous societies of *the East* “politics of resentment” did not have “the Other” to turn against<sup>20</sup> and, as a result, “politics of resentment” fed off the phenomenon that I call “alienating constitutionalism.” The latter provides fertile ground for sweeping “politics of resentment.” The incessant pressure of Europeanization and catching up with what was thought to be a superior

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<sup>18</sup> On the politics of resentment as a constitutional doctrine T. T. Koncewicz, *The Politics of resentment and the constitutional capture. Learning from the constitutional debacles and thinking counter strategies counter - narratives* at <http://lapa.princeton.edu/content/politics-resentment-and-constitutional-capture-learning-constitutional-debacles-and-thinking>

<sup>19</sup> In the context of my paper this is the axis that informs my analysis.

<sup>20</sup> This homogeneity and the fear of “the Other” (e.g. the resistance of Central and Eastern Europe countries to accept immigration quotas) stands in stark contrast to Eastern Europe’s past marked by the diversity that was unparalleled in the rest of Europe.

Western standard provoked a backlash against elite-driven and technocratic politics. Public discourse was dominated by strict legalism and a top-down approach.<sup>21</sup> The role of the people was relegated to the symbolic casting-the-vote moment. There was almost an aura of inevitability of mainstream politics: the choice at the polls could be against a person (party) but never against the policies seen as non-negotiable itinerary to follow. In the East, the politics of resentment find its expression in the constitutional capture that follows the demise of the “liberal consensus”<sup>22</sup> that has provided a dominant narrative post-1989. The period post-1989 has been characterized by the fear of mass politics. The liberal elites took over the democratic process and marginalized the public voice. I would argue that rise of politics of resentment is an outcome of the successes of post-communist liberalism. The revolt against elites now has been long in the making. The rise of politics of resentment marks, contrary to the common narrative, not the end of democracy, but rather the beginning of a sweeping revolt against the dominant politics of liberalism. Democracy undergoes transformations in response to changing political and social environment. Europe’s liberal democracies are transformed, and the politics of resentment have become a new condition of the political in Europe. A top-bottom approach to building constitutional institutions and structures fuels the current backlash against the mainstream liberal politics.

Drawing on the unfulfilled promise of the constitutional moment of the 2004 Accession, I will argue that “constitutional capture” is the legacy of the unfulfilled promises of post-1989, and yet should not be looked at as unique to Central and Eastern Europe. “Politics of resentment” of today must be seen through the prism of changing constitutional narratives: 1981 - freedom and rule of law, 1989 - freedom and the reintegration with Europe, 2004 - obsession with sovereignty and self-determination, and 2015/16 - economic stability, nationalism and historical uniqueness. Politics of resentment rewrote the narrative and changed the focus of the public debate from the rule of law to regaining control over the state that has been allegedly taken over by the elites and Euro-bureaucrats. Alienating constitutionalism dominated by strict legalism and a top-down approach has been replaced with the vindictive

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<sup>21</sup> See also excellent analysis by B. Bugarcic, *Lands-in-between*, (2015) 13 International Journal of Constitutional Law 219.

<sup>22</sup> I. Krastev, *The strange death of the liberal consensus*, (2007) 18 Journal of Democracy no 4, at p. 56.

constitutionalism marked by gut-politics, emotions and revolt against corrupt political elites. Old constitutions are seen as the vestige of old regimes that must go now. The predictable and stabilizing narrative of “*in rule of law we trust*” has been debunked by emotional and unpredictable brand of politics. The bifurcation of resentment as a culture, and history, is nowhere better seen than in Central and Eastern Europe. The 2004 Accession must be analyzed through the prism of the events in 1989 and the fall of the Iron Curtain. The 2004 Accession was both conditioned by, and inextricably linked to, the true Constitutional Moment of 1989 when the former Soviet satellites shook off the yoke of a totalitarian regime and the negotiated transformation ensued. As important as the 2004 Founding Moment was, it was limited in scope to the legal constitutionalism defined by the institutions, technocratic legalese, fundamental rights and the rule of law. A true culture of constitutionalism never had a chance to spring from these transformative institutional and systemic changes, and the constitutional moment was never translated into “*We the people*” and long-lasting societal mobilization. How then to create a constitutional culture that would truly underpin and entrench the change taking place at the level of a constitutional text? CEE elites never bothered to answer this question in any meaningful way. The sins of the past omissions are catching up with us now. With the benefit of hindsight one might argue that the prevalent top-down and live-in-the-moment approach coupled with extreme legalism that excludes popular participation are the reasons for weak popular attachment to the constitutional structures, procedures and mechanisms in CEE countries and explain fertile such ground for “politics of resentment.” The opposition of “*We, the good representatives of the good People*” v “*They, bad elites and bad people represented by elites*” gets traction because so many were excluded from the benefits of transformation that ensued post-1989.

Yet politics of resentment see this disillusioned segment of the society in a very instrumental way: bring us back to power and we will take care of you like never before. “Politics of resentment” exclude in the same way like past elites did. A vicious circle results. The downtrodden are given back their sense of belonging and relevance only for a split second: at the ballot box. Civic disenfranchisement and passivity followed and today they, rather than a short-lived feeling of public engagement, define the citizenry in CEE countries. When asked today, an average CEE citizen would re-

spond: “*the choices made back then were not mine, but rather result of elite-driven process.*” The tragic consequences of this “*alienating constitutionalism*” that prevailed post-1989 are now becoming more evident with the constitutional crises in the CEE. With the current dismantling of the Polish Constitutional Court (and earlier court-packing in Hungary and Romania), the civil society in Poland is all of a sudden asked, and expected, to rise up in arms and show its more engaged face. However, the name of the game is not the engagement, but cynicism. As long as the economy is fine, why should we care for the Constitutional Court. “Let’s stand up for the Court” hardly got any traction. The Polish example is reflective of this dramatic disconnect between the people and the elites. As much as the liberal elites are appalled by the ruthlessness of the attack on the Court and the Polish rule of law, they are the ones to be blamed for the civic passivity that continues to define post-transition societies in general.<sup>23</sup> The truly reformative potential of the 1989, and then 2004, moments was lost when elites neglected the importance of connecting with the “real” people beyond the magic of the big-bang moments of 1989 and 2004. The question that expresses this popular sentiment of disengagement recurs: “*Why should we die for ‘their’ (my emphasis) constitutional court?*”<sup>24</sup>

This “*alienating constitutionalism*” is one of the dark sides of 2004. “Politics of resentment” took advantage of the exclusion that defined alienating constitutionalism and transformed into vindictive constitutionalism marked by gut-politics, emotions, revolt against the corrupt political elites and institutions. “Constitutional capture” followed. The predictable and stabilizing liberal narrative of “*in rule of law we trust*” has been debunked by an emotional and unpredictable brand of politics. The picture would be one sided though, to stop here. Even the strongest institutions must fall when they do not enjoy popular support. When the rule of law and liberal values are not internalized, the system is vulnerable to authoritarian claims and populist

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<sup>23</sup> On this also B. Bugarcic, *The Populists at the Gates: Constitutional Democracy Under Siege?* (draft paper submitted for the workshop “Public Law and the New Populism”, NYU, September 15 - 17, 2017; (on file with the Author).

<sup>24</sup> The weak and dispersed citizenry is faced for the first time with a tall order of bottom-up and not top-down mobilization. Today nobody (at least in Poland) really knows how 25 years of dominant top-down transformation affected “the bottom” and whether “the bottom” is ready to organize itself and defend the structures and ideas which so far have been a distant and alien concepts.

narratives. In Eastern Europe the top-down approach of elitist constitutionalism never translated into the bottom-up constitutionalism that would help build and entrench constitutional culture, active citizenry and respect for the democratic process. As such Poland was a disaster waiting to happen, with strong institutions enjoying very weak popular support and no understanding as to why and how these institutions matter for an average citizen. When portrayed as corrupt and alien, there was simply no counter-narrative to debunk this one-sided vision, nor was there any citizen-driven defense of the institutions. Weak and disengaged citizenry simply did not care and let the right wing government act without question in the name of allegedly curing the rotten system. For most people the system built from the top was not good enough to fight for and, as a result, people were ready to listen to the resentment-driven narrative and to experiment. The process of capturing the state with the avowed objective to win the true state back for the people was met with acceptance as the democratic and liberal consensus proved to be extremely weak and fragile.

### **III.2. To (un)constitutional capture. What's really in the name?**

What truly differentiates the “politics of resentment” from mere contestation and dissatisfaction with the *status quo* is the resort to “constitutional capture” as a tool to remodel the state and unseat the hitherto dominant (and allegedly failing) liberal narrative.<sup>25</sup> Constitutional capture is a generic and novel concept.<sup>26</sup> It connotes a systemic weakening of checks and balances and the entrenchment of power by making future changes in control difficult. Constitutional capture has an inherent spillover effect, and as such seemingly isolated constitutional capture in Poland and elsewhere risks the potential of adverse consequences throughout the entire continent. It travels in time and space. The connection between the captures in Turkey, Hungary, and Poland is a case in point and shows how new authoritarians learn from each other. As there is simply no place for a veto emanating from within the government other than from the

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<sup>25</sup> For the concept of constitutional capture see also J. W. Müller, *Rising to the challenge of constitutional capture*, available at [www.eurozine.com/articles/2014-03-21-muller-en.html](http://www.eurozine.com/articles/2014-03-21-muller-en.html)

<sup>26</sup> Interestingly American scholars are waking up now to their own version of constitutional capture, or retrogression as they call it. See T. Ginsburg, A. Huq, *How to Lose a Constitutional Democracy*, (forthcoming UCLA Law Review) available at [papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2901776](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2901776)



majoritarian parliaments, the “politics of resentment” target institutions that otherwise might be seen as a brake on the power of the people’s representatives. Institutions are only accepted as long as they are seen as ‘their’ institutions and translate only messages that the controlling parties believe deserve to be out in the public sphere. Such an understanding leads to an important tweak to the established narrative: institutions that have been *channeling* (for populists “*distorting*”) the rule of law must be dealt with as expeditiously as possible. With the extreme majoritarianism as one of the cornerstones of the new doctrine, disabling constitutional courts and judicial review is the first order of the day for constitutional capture. As a result, and with the benefit of hindsight, the Polish Constitutional Court never really stood a chance and its destruction was first on the Polish authoritarians’ to-do list. The very survival of the politics of resentment was on the line, and the independent court was its most deadly enemy. The actions taken towards the previously mentioned logging case pending now at the Court of Justice and the repeated denouncement by the Polish ruling party of any decision the Court will take in the case proves this anti-institutional trajectory and more. Poland’s paranoid reaction to the Court’s alleged meddling in its own affairs adds a crucial new dimension to the right’s “*exit in values*” - “*exit in legality*.”<sup>27</sup> No longer are they seeking to only remove themselves from liberal values and norms, but are now also seeking to separate themselves *legally* from these institutions. All institutions, domestic and supranational, are seen to be standing in the way and are not part of the new populist constitutionalist vision. This is no longer gentle constitutional tinkering. This is all-out constitutional *reconquest*.

Seen from this perspective, constitutional capture in Poland, both at the level of values and of legality, is much more than just an isolated example of yet another government going rogue. There is an important European dimension to what has transpired in Poland over the last 24 months. Past European crises galvanized European states toward further EU integration. Yet, past crises never questioned the overlapping European consensus that coalesced around a broadly shared political vision of Europe. *Resentment-driven constitutional capture* in Poland undermines the very idea of

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<sup>27</sup> I am grateful to Kim Lane Scheppelle for this distinction. On the existential jurisprudence of the Court of Justice faced with the politics of resentment and the exit in legality T. T. Konciewicz, *supra* note 18.

*Europe*, and the principles of liberalism, tolerance, “*living together*” and “*never again.*” It replaces these founding principles with zero-sum politics, a vision of “*us vs. them*” and a competing constitutional narrative of fundamental disagreement over values. It proclaims that “*We, the European peoples*” are not ready to live together in one pluralistic constitutional regime. It becomes clear that “the politics of resentment” backed up by capture not only challenges the standard origin story of the EU – that it was founded to bring peace and prosperity to Europe by ending the possibility of war and encouraging the common rebuilding of economies – but puts forward a new competing constitutional project and design. “Overlapping consensus” recognizes that the European polity is composed of distinct peoples and respects other peoples’ lives and ways. Yet, for the consensus to work at the same time, “We the European peoples” should acknowledge certain fundamentals that bind and discipline us, and brought us together. As J. H. H. Weiler has argued: “It is a remarkable instance of constitutional tolerance to accept to be bound by a decision not by ‘my people’ but by a majority among peoples which are precisely not mine - a people, if you wish, of ‘others.’ I compromise my self determination in this fashion as an expression of this kind of internal - towards myself and external - towards others – tolerance.”<sup>28</sup>

It is here that the “politics of resentment” deals a deadly blow to the whole of European project. Resentment-driven constitutional capture challenges European solidarity and mutual trust in a fundamental way. It proposes to reverse *an ever-closer union among the peoples of Europe* and signals a dark turn inward. By showing that liberalism and democracy no longer animate national constitutions and politics, and by revealing that illiberal states can now flourish within the EU, the Polish experience poses an existential challenge to the EU. Can the EU mount a response to the challenge? Is the EU still able to foster respect for principled commitments that initially brought the member states together? Does it have a safety valve by which it can deflate excessive nationalism and manifestly illiberal practices? Can it preserve the common values that launched the European project, supranationalism? More particularly, can domestic constitution-making be constrained from the outside? Thus far, these questions have

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<sup>28</sup> J. H.H. Weiler, *On the power of the word: Europe’s Constitutional Iconography*, (2005) 3 International Journal of Constitutional Law 173, at p. 188.

received deflating negative replies as the EU has been reduced to an idle bystander (see also analysis infra), extending deadlines and assurances of a dialogue while Polish authoritarians laughed at the EU's face and the capture marched on. EU leadership might even be unaware that it has already lost Poland.

These questions are vital as they force us to revisit the *raison d'être* of Europe.<sup>29</sup> They challenge the standard origin story of the EU: that it was founded to bring peace and prosperity to Europe by ending the possibility of war and encouraging the common rebuilding of economies. I argue that “politics of resentment” endanger the very basis of mutual trust between member states that has been defining the European project ever since its inception.<sup>30</sup> Mutual trust towards the other states and the community they had created together has been the cornerstone of the ethos of Europe.<sup>31</sup> The trust has been always built on the convergence between fundamental values of Member States and their legal orders on the one hand, and foundations of the Union's legal order on the other. Indeed, one of the founding fathers of European Treaties, P. Pescatore, emphasized that the existence of this supranationality has been predicated on the idea of “*an order determined by the existence of common values and interests.*”<sup>32</sup> My argument is that “politics of resentment” pose the ultimate challenge to the foundations behind EU integration and membership: a commonality of liberal and democratic values and interests, agreement that the Community is more than just the sum of its parts and loyalty to the community's legal order as binding on all components. Past European crises have been sources of galvanization, often pushing further EU integration. However, they never questioned the European consensus that brought together states in a constitutional regime through agreed-upon essentials. Overlapping consensus requires agreement on fundamental commitments of principle.<sup>33</sup> As a citizen, it is the recognition and respect of these essentials that permit me to defer to others' decisions about governance. There will not be perfect agreement of these essentials – persistent

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<sup>29</sup> For a thought - provoking analysis G. de Búrca, *Europe's raison d'être*, New York University School of Law Public Law and Legal Theory Research Paper Series Working Paper 9/13.

<sup>30</sup> *Editorial. Membership in times of crisis*, (2015) 51 Common Market Law Review 1.

<sup>31</sup> On ethos of Europe see A. Williams, *The ethos of Europe. Values, Law and Justice in the EU*, (2010).

<sup>32</sup> *The Law of Integration. Emergence of a new phenomenon in international relations based on the experience of the European Communities*, (Leiden, 1974).

<sup>33</sup> See J. Rawls, *Theory of Justice*, (1971); (1987) 7 *The idea of an overlapping consensus*, Oxford Journal of Legal Studies 1; *Political liberalism* (1993).

differences of citizens living together in a constitutional regime create disagreement over the final shape of these constitutional essentials. However, they agree that these disagreements will be ironed out and spelt out within the discursive framework. European overlapping consensus<sup>34</sup> has at its heart constitutional tolerance and an agreement on a fundamental commitment to principle or adherence to certain core (essence) principles, concepts that bind us together (rule of law and separation of powers being one of these, even though their final contours were defined by individual member states). “We” peoples of Europe agreed to respect others’ way of life, provided their lives and decisions respect mutually agreed-upon essentials and fundamental values. Constitutional tolerance subjected European peoples to the discipline of democracy even though the European polity is composed of distinct peoples. “Politics of resentment” call into question this narrative by putting forward a competing one, that of fundamental disagreements over values and the inability of today’s European Union to keep fostering mutual trust. Given the fundamental disagreements over values that the politics of resentment bring to the fore, the pressing question that has emerged is whether “We” exists at all. Overlapping consensus relies on the acknowledgment by the members of multiple societies with persistent differences that they need to understand and respect the essentials that bind them together, while simultaneously honoring the influence of others on the interpretation of shared commitments.

#### **IV. Capture in action: of institutions, rule of law and Europe’s vanishing act**

##### **IV. 1. Constitutional “catch me if you can”**

In March 2014, the EU Commission adopted a three-step mechanism for addressing systemic threats to the rule of law in the EU member states.<sup>35</sup> In the case of such a threat, the Commission will initiate a dialogue with the Member State concerned by sending a ‘Rule of Law Opinion’ and listing its concerns. This Phase I functions as a warning and puts the Member State concerned on notice. If the concerns are not

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<sup>34</sup> I draw here on Ch. F. Sabel, O. Gerstenberg, *Constitutionalising an Overlapping Consensus: The ECJ and the Emergence of a Coordinate Constitutional Order*, (2010) 16 *European Law Journal* 511.

<sup>35</sup> See also “*Editorial Comments: Safeguarding EU values in the Member States: Is something finally happening?*”, (2015) 52 *Common Market Law review* 619.

addressed satisfactorily, the Commission will issue a ‘Rule of Law Recommendation’ addressed to the Member State. The Commission there identifies the problems and recommends that the Member State solve them within a fixed time limit and inform the Commission of the steps taken to that effect (Phase II). Finally, in Phase III the Commission will monitor the remedying steps proposed by the Member State to the Recommendation. Only completion of this mechanism can trigger formal resort to Art. 7 EU Treaty procedure<sup>36</sup>. Even though the application of Art. 7 with regard to Poland is a long shot right now, the institution of the pre-warning mechanism by the EU Commission must not be taken too lightly.

The assault on the Tribunal and the persistent refusal to publish its judgments are at the heart of the Commission’s unprecedented decision to open an investigation into the observance by Poland of the rule of law, possibly making Poland the first Member State to be faced with Article 7 TEU.<sup>37</sup> On 13 January 2016, the College of Commissioners held its first meeting on the observance of the rule of law in Poland, which was followed by extensive written exchanges between the Commission and the

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<sup>36</sup> Article 7 of the Treaty on the European Union reads:

1. On a reasoned proposal by one third of the Member States, by the European Parliament or by the European Commission, the Council, acting by a majority of four fifths of its members after obtaining the consent of the European Parliament, may determine that there is a clear risk of a serious breach by a Member State of the values referred to in Article 2. Before making such a determination, the Council shall hear the Member State in question and may address recommendations to it, acting in accordance with the same procedure.

The Council shall regularly verify that the grounds on which such a determination was made continue to apply.

2. The European Council, acting by unanimity on a proposal by one third of the Member States or by the Commission and after obtaining the consent of the European Parliament, may determine the existence of a serious and persistent breach by a Member State of the values referred to in Article 2, after inviting the Member State in question to submit its observations.

3. Where a determination under paragraph 2 has been made, the Council, acting by a qualified majority, may decide to suspend certain of the rights deriving from the application of the Treaties to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council. In doing so, the Council shall take into account the possible consequences of such a suspension on the rights and obligations of natural and legal persons.

The obligations of the Member State in question under the Treaties shall in any case continue to be binding on that State.

4. The Council, acting by a qualified majority, may decide subsequently to vary or revoke measures taken under paragraph 3 in response to changes in the situation which led to their being imposed.

5. The voting arrangements applying to the European Parliament, the European Council and the Council for the purposes of this Article are laid down in Article 354 of the Treaty on the Functioning of the European Union.

<sup>37</sup> For a collection of incisive essays on the rule of law and the ways to move forward see C. Closa, D. Kochenov (Eds.), *Reinforcing Rule of Law Oversight in the European Union* (CUP, 2017).

Polish authorities. With the Polish Government's constitutional defiance on the rise and no willingness to find a compromise in sight, the Commission decided to move forward and on 1 June 2016 adopted a 'Rule of Law Opinion' on the situation in Poland.<sup>38</sup> The Commission's Opinion indicates three major areas of concern that go hand-in-hand with the judgments under review: i) the appointment of judges to the Tribunal and the non-implementation of the judgments of 3 and 9 December 2015; ii) the law of 22 December 2015 amending the Law on the Constitutional Tribunal and the implementation of the judgment of 9 March 2016 declaring this Law unconstitutional, as well as respect for judgments rendered since 9 March 2016; and iii) the effectiveness of constitutional review of new legislation adopted and enacted in 2016.<sup>39</sup> The Commission invited the Polish authorities to submit their observations on the Opinion, to no avail. Then, the situation worsened: the new Law on the Tribunal enacted on 22 July 2016 (later disqualified by the Tribunal in August 2016) threatened rule of law further. d, reproducing most of the provisions the Tribunal had already declared unconstitutional and the Venice Commission had criticized in its Opinion. The Commission had thus no choice but to press ahead to the second stage of its pre-Article 7 procedure and on 27 July 2016 issued a strongly-worded 'Recommendation on the Rule of Law.'<sup>40</sup> The new law directly conflicted with the Commission recommendation "that any reform of the Law on the Constitutional Tribunal respects the judgments of the Constitutional Tribunal, including the judgments of 3 and 9 of December 2015 and the judgment of 9 March 2016, and takes the Opinion of the Venice Commission fully into account; and ensures that the effectiveness of the Constitutional Tribunal as a guarantor of the Constitution is not undermined..."<sup>41</sup> Yet still, "the duality of legal systems" (as rightly characterized by the Commission in its Rule of Law Opinion) persists in Poland. The Polish legislature did its best to ensure that the Tribunal would be ineffective.

With this "bark without bite" approach from the Commission, Polish legislators only became more emboldened and continued their unconstitutional capture. With the

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<sup>38</sup> Available at [europa.eu/rapid/press-release\\_IP-16-2015\\_en.htm](http://europa.eu/rapid/press-release_IP-16-2015_en.htm).

<sup>39</sup> See comment by L. Pech, *Commission of 1 June 2016 regarding the Rule of Law in Poland*. Full text now available at [www.eulawanalysis.blogspot.be/2016/08/commission-opinion-of-1-june-2016.html](http://www.eulawanalysis.blogspot.be/2016/08/commission-opinion-of-1-june-2016.html).

<sup>40</sup> [europa.eu/rapid/press-release\\_IP-16-2015\\_en.htm](http://europa.eu/rapid/press-release_IP-16-2015_en.htm)

<sup>41</sup> Press Release IP/16/2643, *ibid*.

new Law signed by the President and the Tribunal effectively captured in December 2016,<sup>42</sup> implementing the third phase of the pre-Article 7 procedure (which consists of monitoring the Member State's follow-up to the Recommendation) seemed like all but a formality.<sup>43</sup> Yet in a bizarre about-face, the Commission aggravated the situation and further emboldened the government by staying put<sup>44</sup> and asking the Polish government for more information instead of activating Phase III.<sup>45</sup>

The constitutional “catch-me-if-you-can” cycle between the Polish government and the Commission has an underlying logic, which entails grave consequences for the rule of law and separation of powers. It clearly brings to mind how V. Orbán “tamed” the EU and followed through with his own plan to pack the Hungarian Constitutional Tribunal.<sup>46</sup> Orbán introduced a few changes in response to external criticism, claiming that the problem was fixed and that everything was back to normal. Yet these changes were only cosmetic. In reality, he entrenched the old system, while giving up on one or two of the most outrageous elements that he did not really need anyway. This strategy would stop the external criticism long enough for the EU to receive the translation,

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<sup>42</sup> On this my analysis *Constitutional Capture in Poland 2016 and Beyond: What is Next?* <http://verfassungsblog.de/constitutional-capture-in-poland-2016-and-beyond-what-is-next/>

<sup>43</sup> For the linking of persistent and systemic non-compliance with the suspension of EU funding and, on the respective roles of the ECJ and the Commission, see in depth K. L. Scheppele, *Enforcing the Basic Principles of EU Law Through Systemic Infringements* in C. Closa, D. Kochenov, (eds.), *The Rule of Law oversight in the European Union*, (Cambridge University Press, 2016), at pp. 127-131. See also J.-W. Müller, *The Problem with Poland*, available at [www.nybooks.com/daily/2016/02/11/kaczynski-eu-problem-with-poland/?printapage=true](http://www.nybooks.com/daily/2016/02/11/kaczynski-eu-problem-with-poland/?printapage=true), who puts it matter-of-factly: “One has to see what the PiS government will do with European money, but in any event the case for cutting EU funds does not have to be based on evidence of outright theft. The Union is founded on principles of mutual trust and, as Treaties put it ‘the duty of loyal cooperation’. Informal negotiations about the next big budget for the Union have already begun. *Why pay people who undermine the Union to keep themselves in power? Why buy broccoli for those who say they don’t like it anyway?*” (my emphasis).

<sup>44</sup> RECOMMENDATION of 21.12.2016 (C(2016) 8950 final) regarding the rule of law in Poland complementary to Commission Recommendation (EU) 2016/1374 and L. Pech, K. Scheppele, *infra*, note 32.

<sup>45</sup> In detail K. L. Scheppele, L. Pech, *Illiberalism Within: Rule of Law Backsliding in the EU*, (2017) Cambridge Yearbook of European Legal Studies 1. For strong, and justified criticism of the Commission’s handling of the rule of law procedure in the Polish case, see L. Pech, K. L. Scheppele, *Poland and the European Commission, Part II: Hearing the Siren Song of the Rule of law*, available at <http://verfassungsblog.de/poland-and-the-european-commission-part-ii-hearing-the-siren-song-of-the-rule-of-law/> and *Poland and the European Commission, Part III: Requiem for the Rule of Law* <http://verfassungsblog.de/poland-and-the-european-commission-part-iii-requiem-for-the-rule-of-law/>;

<sup>46</sup> I owe the reconstruction of V. Orbán’s tactic to Kim Lane Scheppele. For more detailed analysis, see her *Constitutional coups and judicial review: How transnational institutions can strengthen peak courts at times of crisis (with special reference to Hungary)*, 23 (2014) *Transnational Law and Contemporary Problems* 51 - 118, in particular at 87-103 (for the response from the Council of Europe) and at 103-114 (for the response from the EU).

study it and realize that they had been fooled again. In the meantime, Orbán was given more time to consolidate his power. And then the cycle would all start again. After many rounds of this back-and-forth, the external critics whittled away a few small elements of the system, but in exchange Orbán got to keep his illiberal and autocratic constitutional reform. In short, very little changed as a result of external criticism, and in the end, critics gave up and pretended that everything had been addressed. As a result Hungary was let off the hook altogether.<sup>47</sup>

The same strategy has been adopted in Poland. The Laws on the Tribunal enacted by the Parliament, and twice rejected by the Tribunal, persist in reproducing unconstitutionality in the hope that in the end the external outcry will subside and critics will turn to other more pressing issues. The most recent Law was enacted with cynical assurances of good intentions and sincere concerns, allegedly to put things right and bring the self-induced constitutional crisis to an end. The most questionable and clearly unconstitutional provisions (e.g. a requirement of a two-thirds majority in the Tribunal) were dropped at the very last minute. The argument will now be that this dispels all constitutional doubts and that the Law is a result of the goodwill of the ruling party and a reasonable compromise. This in turn will shift the blame towards the opposition and the stubborn Tribunal, defending the elites and old regime. The Tribunal will be portrayed as a destructive, obstructive and anarchistic force, with the ruling party in the role of a knight in shining armor. Public opinion will be left with the conviction that it is indeed the case, and that there is nothing to worry about.

In the meantime the incremental capture will have redrawn the constitutional lines for good<sup>48</sup>.

## **IV.2. Is something finally happening?**

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<sup>47</sup> The inaction on the part of the EU with regard to Hungary entails important consequences for the handling of the Polish case now. For possible scenarios, see K. L. Scheppele, *EU can still block Hungary's veto on Polish sanctions*, available at [www.politico.eu/article/eu-can-still-block-hungarys-orban-veto-on-polish-pis-sanctions/](http://www.politico.eu/article/eu-can-still-block-hungarys-orban-veto-on-polish-pis-sanctions/)

<sup>48</sup> W. Sadurski, *How Democracy Dies (in Poland): A Case Study of Anti-Constitutional Populist Backsliding*, Sydney Law School Research Paper 18/01 at <http://ssrn.com/abstract=3103491>



*The law does not have to be on the bad guys' side*<sup>49</sup>

*Firstly*, the Commission has finally decided to take Poland to the Court of Justice following official publication of the new Polish Law on the Ordinary Courts Organization.<sup>50</sup> This time, though, there is an important shift in the Commission's approach. On the one hand, the Commission is following its traditional method of framing the action in terms of the core *acquis*, alleging that the new law breaches the prohibition of discrimination on the basis of gender due to introduction of a different retirement age for female judges (60 years) and male judges (65 years). However, the Commission seems to be finally learning from its past dealings with Viktor Orbán's regime<sup>51</sup> and the limited effect of sticking to the *acquis* when facing a new brand of smart authoritarians.<sup>52</sup> On the other hand, the Commission thus brings up the concern that the independence of the Polish courts will be undermined by the fact that the Minister of Justice has been given a discretionary power to prolong the mandate of judges who have reached retirement age and linked this concern with article 19(1) TEU in combination with Article 47 of the EU Charter of Fundamental Rights. Such a broadening of the benchmarks is crucial and gives the Commission and the Court for that matter much greater room for argumentative maneuver (e.g., how lack of judicial independence undermines the mutual trust of Member States in their legal systems)<sup>53</sup>.

*Secondly*, the European Parliament adopted a strong resolution in which it

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<sup>49</sup> C. Closa, D. Kochenov, (eds.), *Reinforcing rule of law oversight in the European Union*, (Cambridge University Press, 2016), at p. 3.

<sup>50</sup> *Editorial Comments. About Brexit negotiations and enforcement action against Poland: The EU's own song of ice and fire*, (2017) 54 *Common Market Law Review* 1309 at pp 1313–1316; and *Rule of Law: European Commission acts to defend judicial independence in Poland*, *Press release* (20 December 2017), available at <[http://europa.eu/rapid/press-release\\_IP-17-5367\\_en.htm](http://europa.eu/rapid/press-release_IP-17-5367_en.htm)>

<sup>51</sup> Case C-286/12, *Commission v. Hungary* [2012] ECR I - 687. On the case see U. Belavusau, *On Age Discrimination and Beating Dead Dogs: Commission v Hungary*, (2013) 50 *Common Market Law Review* 1145

<sup>52</sup> K. L. Scheppele, *supra* note 46, at pp. 109-110.

<sup>53</sup> In its reasoned proposal for a decision of the Council on the determination of a clear risk of a serious breach of the rule law by Poland, the Commission succinctly points out that Polish authorities have adopted over a period of two years no less than 13 laws affecting the entire structure of the justice system in Poland, impacting the Constitutional Tribunal, Supreme Court, ordinary courts, National Council for the Judiciary, prosecution service and National School of Judiciary. Finally, the Commission starts seeing the pattern of illegal behavior, rather than separate instances of infringement. See *supra* note.

stressed *inter alia* the fundamental importance of upholding the common European values listed in article 2 of the TEU and in the Polish Constitution. The resolution supports the Rule of Law Recommendations issued by the Commission and the infringement proceedings against Poland. It concludes that the current situation in Poland represents a clear risk of a serious breach of the values referred to in article 2<sup>54</sup>.

*Thirdly*, the Court of Justice sent an unequivocal signal that the EU rule of law must be taken seriously. On 20 November 2017, it decided that Poland must immediately cease its active forest management operations in the Białowieża Forest, apart from in exceptional cases where they are strictly necessary to ensure public safety<sup>55</sup>. However, and mindful of Poland's refusal to respect the provisional interim injunction of the Vice-President of the Court of 27 July 2017, the Court did not stop there. Effective application of EU law is inherent in the value of the rule of law on which the Union is founded.<sup>56</sup> Therefore, should Poland be found to have infringed the interim injunction order, the Court would order it to pay to the Commission a daily penalty payment of at least €100 000<sup>57</sup>.

*Fourthly*, and most crucially, after months of dragging its feet and

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<sup>54</sup> European Parliament, Resolution of 15 November 2017 on the situation of the rule of law and democracy in Poland (2017/2931(RSP)) (15 November 2017), available at <<http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P8-TA-2017-0442>>, points 1, 6, 16 respectively

<sup>55</sup> Case C-441/17 R, *Commission v. Poland* (20 November 2017) at <http://curia.europa.eu/juris/document/document.jsf?text=&docid=196944&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=259991> On the order, see Daniel Sarmiento, *Provisional (And Extraordinary) Measures in the Name of the Rule of Law*, at <http://verfassungsblog.de/provisional-and-extraordinary-measures-in-the-name-of-the-rule-of-law/> and M. Waelbroeck, Peter Oliver, *Enforcing the Rule of Law in the EU: What can be done about Hungary and Poland?*, part I at <https://blogdroiteuropeen.com/2018/01/31/enforcing-the-rule-of-law-in-the-eu-what-can-be-done-about-hungary-and-poland-par-michel-waelbroeck-et-peter-oliver/> and part II at <https://blogdroiteuropeen.com/2018/02/09/enforcing-the-rule-of-law-in-the-eu-what-can-be-done-about-hungary-and-poland-part-ii-michel-waelbroeck-and-peter-oliver/comment-page-1/>

<sup>56</sup> It is worth quoting here *in extenso* the French version of para 102: “[...] En effet, le fait de faire respecter par un État membre les mesures provisoires adoptées par le juge des référés, en prévoyant l'imposition d'une astreinte en cas de non-respect de celles-ci, vise à garantir l'application effective du droit de l'Union, laquelle *est inhérente à la valeur* de l'État de droit consacrée à l'article 2 TUE et sur laquelle l'Union est fondée” (Emphasis by the author).

<sup>57</sup> On the order as forming part of the existential jurisprudence and counter-strategies T. T. Konciewicz, *The Politics of resentment and the constitutional capture. Learning from the constitutional debacles and thinking counter strategies counter - narratives* at <http://lapa.princeton.edu/content/politics-resentment-and-constitutional-capture-learning-constitutional-debacles-and-thinking>. On the growing role of art. 19 and art. 2 TEU see also most recent judgment of the Grand Chamber of 27 February 2018 in C - 64/16, *Associação Sindical dos Juizes Portugeses v Tribunal de Contas* at <http://curia.europa.eu/juris/celex.jsf?celex=62016CJ0064&lang1=en&type=TXT&ancre=>

procrastination<sup>58</sup>, the Commission has finally decided to trigger the preventive mechanism of article 7 TEU by proposing to the Council to adopt a decision under article 7(1) TEU.<sup>59</sup> This is indeed a momentous step.<sup>60</sup>

These four developments taken together show that something is finally happening on the rule-of-law front. Indeed they corroborate the belief expressed by many<sup>61</sup> that much more could already have been done within the Treaty framework to stop rogue governments from undermining the very foundations of the legal systems of the Union. After all, the law does not have to be on the bad guys' side.<sup>62</sup> Inaction is not the only option left.

### IV.3. Capture: What about the rule of law?

Constraints of space preclude any detailed theoretical analysis of the rule of law (itself a highly contested concept<sup>63</sup>) here. Given the analysis and arguments above,

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<sup>58</sup> L. Pech, K. L. Scheppele, *Illiberalism Within: Rule of Law Backsliding in the EU*, 19 *Cambridge Yearbook of European Legal Studies* (2017), 3-47; L. Pech, S. Platon, *Menace systémique envers l'Etat de droit en Pologne: entre action et Procrastination*, Foundation Robert Schuman, Question d'Europe N°451 at <https://www.robert-schuman.eu/fr/questions-d-europe/0451-menace-systemique-envers-l-etat-de-droit-en-pologne-entre-action-et-procrastination>

<sup>59</sup> Reasoned proposal of 20 December 2018 in accordance with Article 7(1) of the Treaty on European Union regarding the rule of law in Poland 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 (Brussels, 20 December 2017), COM(2017) 835 final, 2017/0360 (APP). Full text of the proposal is available at [file:///C:/Users/tomaszk/Downloads/1\\_EN\\_ACT\\_part1\\_v33pdf\(1\).pdf](file:///C:/Users/tomaszk/Downloads/1_EN_ACT_part1_v33pdf(1).pdf)

<sup>60</sup> For first reactions: Charlemagne, *There are no good options for dealing with Poland's government*, *The Economist* (19 December, 2017) at <<https://www.economist.com/news/europe/21732832-when-eurocrats-urge-poland-respect-rule-law-polish-ruling-party-dismisses-them>> and *Edging toward the nuclear option. The European Commission takes a gamble on Poland*, *The Economist* (20 December 2017) at <<https://www.economist.com/news/europe/21732914-opening-proceedings-under-article-7-safeguard-countrys-judiciary-may-backfire-european>>; For further analysis see J. – W. Müller, *If You're Not a Democracy, You're Not European Anymore*, *Foreign Policy* (22 December 2017) at <<http://foreignpolicy.com/2017/12/22/if-youre-not-a-democracy-youre-not-european-anymore/>>; D. Keleman, *Europe's Authoritarian Equilibrium. Invoking Article 7 Against Poland Won't Be Enough*, *Foreign Policy* (22 December 2017), at <<https://www.foreignaffairs.com/articles/hungary/2017-12-22/europes-authoritarian-equilibrium?cid=int-lea&pgtype=hpg>>; D. Kochenov, L. Pech, K. L. Scheppele, *The European Commission's Activation of Article 7: Better Late than Never?*, *EU Law Analysis* (23 December 2017) at <<http://eulawanalysis.blogspot.co.uk/2017/12/the-european-commissions-activation-of.html?m=1>>.

<sup>61</sup> C. Closa, D. Kochenov, *supra*, note 49, and in particular Part II. See also T. T. Koncewicz, *The Polish Crisis as a European Crisis: A Letter to Mr Jean-Claude Juncker*, at <<http://verfassungsblog.de/the-polish-crisis-as-a-european-crisis-a-letter-to-mr-jean-claude-juncker/>>

<sup>62</sup> C. Closa, D. Kochenov, *supra* note 49 at p. 3.

<sup>63</sup> See in general R. H. Fallon, Jr., 'The Rule of Law' as a concept in *Constitutional Discourse*, (1997) 97 *Columbia Law Review* 1 and J. Waldron, *Is the rule of law an essentially contested concept?* (2002) 21 *Law and Philosophy* 137.

however, a few remarks are in order here. The Polish and Hungarian cases corroborate the old truth that no government is inclined to tie itself to the mast of legal rules and ensure that the rule of law is applicable to governed and governor alike.<sup>64</sup> Rule of law is a principle of good governance and the separation of powers is an instrument to preclude an arbitrary exercise of power. Rule of law is one of the foundational (meta-)principles of European law and one of the paradigms of modern constitutional law, yet the principle goes beyond the mere legal. Rule of law should be seen as part of an ethos of Europe. It undergirds its moral fabric and supranational constitution. Even though the national understandings of the rule of law might vary, the core of the concept might be identified.<sup>65</sup> For example, an independent judiciary is at the center of the rule of law. As powerfully argued by Allan, “When the idea of the rule of law is interpreted as a principle of constitutionalism, it assumes a division of governmental powers or functions that inhibits the exercise of arbitrary state power.” More crucially, “It envisages a fundamental separation of powers between legislator or law maker, on the one hand, and those who ‘execute’ or administer the laws, on the other.”<sup>66</sup> For the rule of law to be given flesh, it must be framed around a series of attributes that should make up good law – some very broad, some more concrete that define the content of applicable rules. A legal system is good only insofar as individuals and officials are ruled by law, not men, and their behavior lives up to the previously agreed-upon standards that define the rule of law. Then, the list of these standards and principles is open for debate.<sup>67</sup> A. V. Dicey, the most important objective of the rule of law is to discipline, frame and regulate official power. It must meet three basic requirements: the supremacy of law over arbitrary power (rule of law, not men); equality before the law of all; and constitutional law as fundamental law. Dicey’s preoccupation with circumscribing the discretion of officials was built on by theorists like L. L. Fuller and J. Raz. The former

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<sup>64</sup> T. Hobbes, *The Leviathan*, (edited with an Introduction and Notes by J. C. A. Gaskin (Oxford University Press, 2009).

<sup>65</sup> As expertly shown by L. Pech, *The Rule of law as a constitutional Principle of the European Union*, Jean Money Working Paper 04/09.

<sup>66</sup> T.R.S. Allan, *Constitutional justice. A liberal theory of the rule of law*, (Oxford University Press, 2001), p. 31.

<sup>67</sup> L. L. Fuller, *The Morality of Law*, (1969), in particular Chapter 2.

built his inner morality of law on the qualities of a good law,<sup>68</sup> while the latter, agreeing in principle with Fuller, added important institutional guarantees and principles (e.g. independent judiciary and judicial review) designed to ensure that the legal machinery charged with enforcing the law is able to supervise conformity to the rule of law and provide effective remedies in cases of deviation from it.<sup>69</sup> For the sake of my argument, understanding the rule of law should be dualistic: procedural and substantive. The main objective of the rule of law in a legal system aspiring to “goodness” is to constrain governmental power. This rationale might be carried out by enlisting procedural means (judicial review and remedies) and by settling on substance. “Procedural-substantive” methods work in close synergy as a legal system might be substantively good (at least at the declaratory level of text), yet abused and/or rendered useless at the enforcement level, with government officials left complete discretion. The separation of powers has a special place in the system as it safeguards the rule of law<sup>70</sup> by precluding the exercise of arbitrary power.<sup>71</sup> It has a common trait with the judicial review: both aim at ensuring that boundaries of competences of individual institutions go always hand in hand with the limits set by the rule of law.

## **V. Constitutional Recapture and the New Emergency Separation of Powers?**

### **V.1. “*Constitutional Recapture*”: What’s in a name?**

Separation of powers stresses the importance of keeping balance of power within governmental settings. We tend to assume that everything goes right. For the sake of my argument, the main rationale of separation of powers is to constrain and enforce the spirit of limited government. In an ideal world, separation of powers would keep rogue tendencies in check. Occasional setbacks and imperfections would be corrected from within the system. My main concern and starting point is different. The question here is not what happens when separation of powers functions, but rather what happens when

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<sup>68</sup> *Introduction to the study of the law of the Constitution*, (1959, 2nd edition).

<sup>69</sup> J. Raz, *The Authority of Law*, (Oxford, Clarendon Press, 1979), pp. 216 - 218.

<sup>70</sup> M. J. C. Vile, *Constitutionalism and the separation of powers*, (1967).

<sup>71</sup> It should be added at once that the focus on obviating the exercise of arbitrary powers and keeping the governmental discretion in check was not the only one. For a historical perspective see classic W. B. Gwyn, *The Meaning of the Separation of Powers: an analysis of the doctrine from its origin to the adoption of the United States Constitution*, (Tulane, 1965) and more recently P. R. Verkuil, *Separation of Powers, The Rule of Law and the Idea of Independence*, (1989) 30 *William and Mary Law Review* 301.

its operation is systematically undermined? We often assume that things go in accordance with the plan, but sometimes they don't and an uneasy question looms large: "What then?" However, when something goes wrong, the separation of powers can no longer be taken for granted. To be brought back into constitutional cycle it must be fought for - or, recaptured.

"*Constitutional recapture*" is the antithesis of "*unconstitutional capture*." It is a generic term resorted to in order to win back the respect for constitutional essentials and to ensure the integrity of the constitutional document. "*Constitutional recapture*" as understood here is a necessary response to the relentless and no-holds-barred politics of the parliamentary majority keen on redrawing the constitutional lines and instrumentalizing the basic principles of constitutional order. It responds also to the malaise of the European decision-making process. "Constitutional recapture" demonstrates the resilience of the constitutional document to fight back and reestablish the constitutional equilibrium as best exemplified by checks and balances and separation of powers. My "*constitutional recapture*" is firmly rooted in the Constitution itself and its basic principles. The *demos* have chosen independent judges and courts as dispute resolvers, subject only to the Constitution and statutes (Arts. 173 and 178 of the Polish Constitution), the rule of law serving as a meta-principle of the legal order and the state (Art. 2). The *demos* have also elevated the Constitution to the status of the supreme law of the land (Art. 8), made the separation of powers with checks and balances one of the cornerstones of the Republic of Poland (Art. 10), and decreed the judgments of the Tribunal universally binding and final (Art. 190). Last but not least, the *demos* has recognized the direct application of the Constitution (Art. 8(2)). Having done all that, the *demos* must then accept that courts will be ready to take these systemic features seriously and rule against the instrumental politics of the day. Their response must have at its core defense of the constitutional essentials mentioned above. Judges cannot simply stand by and watch the legal order torn apart in the name of "the people." They must defend the Republic and uphold the law. This is exactly what they are sworn to do. No more, no less. The question remains, however: "How is this to be done?"

## **V.2. "*In judges we trust*"?**

Constitutional review exercised by the ordinary courts has been an option in the Polish legal order since the adoption of the 1997 Constitution. Proponents of the extension of review to ordinary courts were politely acknowledged, but their views were never taken seriously. It was widely accepted that only the Tribunal wielded constitutional monopoly and the ordinary courts would follow its judgments, pursuant to the Constitution. Nobody ever contemplated a situation in which the Tribunal would be unable to exercise its constitutional powers as a result of political attacks and a rewriting the Constitution by way of statutes. The idea was unthinkable. It is no longer so.

Views have been expressed in Polish legal doctrine and voiced in the Supreme Court's case law on the possibility of constitutional review by ordinary courts. However, the "centralization model" dominates the mainstream discourse. Ordinary courts cannot refuse to apply a statute (thus at least implicitly presuming constitutionality) and only the Tribunal is empowered to rule on the constitutionality of a statute. As long as a statute is in force, the courts are bound to apply it unless they ask the Tribunal question(s) of constitutionality and the Tribunal declares the statute unconstitutional. This line of argument flows from Article 178 of the Polish Constitution, according to which in the exercise of their duties, judges are subject to the Constitution and statutes. As a result, constitutional review of statutes is centralized and exercised exclusively by the Tribunal. The direct application of the Constitution assumes co-application of the Constitution and statutes. At present, ordinary courts can only apply a pro-constitutional interpretation; they do not have an option to do otherwise without sending questions of constitutionality to the Tribunal.

Although this strand of constitutional narrative has been predominant, there has also been a second: Subjecting courts to the Constitution and statutes could be read as allowing the courts a power to refuse to apply a statute that is incompatible with the Constitution. Direct application of the Constitution entails much more than mere interpretation in conformity with the Constitution, and sending questions on the compatibility of the statutes with the Constitution to the Tribunal. In case of conflict, the courts must follow the act of higher rank (the Constitution as the supreme law of the land – Art. 8(1)) in accordance with *lex superior derogat legi inferiori*). Two options would be possible: *On the one hand*, a court finding a statute unconstitutional could refuse to apply such a statute outright in a case it decides. Here, the court would act as a full-blown

constitutional review institution, not only deciding on the constitutionality question, but also mandating the consequences of such a finding. *On the other hand*, there is an “intermediate” option. Should the court find the statute unconstitutional, it would be left with no discretion itself, but be obliged to refer the question to the Tribunal. In this scenario, the court would be debarred from applying the statute that it deems unconstitutional. The refusal by an ordinary court to apply the statute would not necessarily infringe upon the review powers of the Tribunal, as a plausible argument could be made that a review exercised by an ordinary court is limited and deals only with the case at hand. In other words, it is *in concreto* review as opposed to *in abstracto* review by the Tribunal. The latter deals with the law with an *erga omnes* effect and removes the unconstitutional provision from “legal circulation,” thus acting more in the spirit of a *quasi* chamber of the Parliament, whereas ordinary courts are in charge of the administration of justice in individual cases.

My argument falls somewhere in between these two lines of thinking. The system of government in Poland is based on the Tribunal’s monopoly of constitutional review. In other words, constitutional review is centralized. However, the assumption that underpins the centralized model is that constitutional review by the Tribunal is operational and effective. What if that is not so? Depending on the circumstance of each and every case, direct application of the Constitution could range from *parallel application* of the statute and the Constitution to *self-standing application* of the Constitution. For the sake of argument, four situations should be discerned. *First*, the most common and uncontroversial is when a judicial decision is based *directly* on the statute, with the Constitution used as an ornament. *Second*, when the judicial decision is based on *both* the statute and the Constitution, the latter shedding light on the interpretation of the statute. *Third*, there is a more radical version of direct application that I call “*transformative application*.” Here the court is aware of the incompatibility of the statute and feels ready to make it constitutional by (re)-interpreting it in the light of the Constitution. The Constitution is no longer a mere source of inspiration, but provides a normative tool for judicial modification of the statute that ensures the statute’s normative consistency with the Constitution. Beyond that third option there lies the “*emergency review*” with outright refusal to apply the statute, which is our *fourth* option. When constitutional review faces systemic and permanent dysfunction



for whatever reasons, emergency review must be resorted to. Such review is defined by complementarity *vis-à-vis* the Tribunal's power of review. It accompanies, and runs in parallel with, the Tribunal's constitutional review, and does not replace it. Such review is instrumental to securing respect for the Constitution's status as the supreme law of the land. *Constitutional defiance* by the parliamentary majority must be countered by *intra-constitutional resilience* and trigger self-defending mechanisms from within the Constitutional text. It is important to make clear here that my call for "*emergency constitutional review*" by the ordinary courts does not question the Tribunal's monopoly of constitutional review, but is in order to shield the constitutional order from being further weakened and disassembled.

My argument in favor of domestic "emergency constitutional review" by the ordinary courts is further reinforced by the system of decentralized enforcement as the linchpin of the EU system of judicial protection. The European community has already empowered the ordinary courts in Poland to check the compatibility of Polish law with the EU law, undermining the Polish centralized model of constitutional review. Moreover, this empowerment of ordinary courts in the name of European principles was even accepted by the Tribunal when it held in Case P 37/05: "National courts shall not only be authorized, but also obliged to refuse to apply a domestic law norm, where such norm is in conflict with European law norms." EU law is based on the doctrines of direct effect<sup>72</sup> and supremacy<sup>73</sup> constructed by the ECJ, which constitute true building blocks of the new legal order to which EU law aspires. As for enforcement, EU law looks to a national court entrusted with overseeing the full effect of the provisions of EU law, if necessary refusing its own motion to apply any conflicting provision of domestic legislation: "It is not necessary for the court to request or await the prior setting aside of such provision by legislative or other constitutional means."<sup>74</sup> National courts are called on to disregard *any* provision of domestic law<sup>75</sup> inconsistent with EU law, without waiting for the constitutional court to take a stand on the conflict. Each court of a

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<sup>72</sup> Case 26/62, *Van Gend en Loos v. Netherlands Inland Revenue Administration*, EU:C:1963:1.

<sup>73</sup> Case 6/64, *Flaminio Costa v. E.N.E.L.*, EU:C:1964:66.

<sup>74</sup> Case 106/77, *Amministrazione delle Finanze dello Stato v. Simmenthal SpA.*, ECLI:EU:C:1978:49, para 24.

<sup>75</sup> On the reading of the supremacy by the Court of Justice, its scope is all-encompassing as it catches "any" provision of domestic law, be it constitutional, statutory, sub-statutory or administrative decisions.

Member State has the power of judicial review of national legislation in cases pending before it. Judicial review is limited to disapplication of conflicting domestic law *in concreto* in order to ensure the *effet utile* of EU law “here and now.” The constitutional court retains the power to declare such legislation null and void *in abstracto* and to require the national parliaments to modify the legislation to make it compatible with relevant EU law. This judicial review is not exceptional, but rather forms the backbone of the EU legal system and is exercised by national courts on a daily basis. All of this has already recalibrated the role of European constitutional courts, and the supremacy of EU law has made inroads into the monopoly of constitutional review of statutes. Review of statutes for their compatibility with EU law is now within the powers of the ordinary courts. As a result, the system is decentralized, or, as one author argued, “Americanized.”<sup>76</sup> It is important to bear the EU law mechanism in mind, as it strengthens my argument in favor of “emergency judicial review” exercised by Polish courts with regard to domestic law inconsistent with Poland’s constitution. “Emergency judicial review” would entail the loss by the Tribunal of its constitutional monopoly over statutes. In exceptional situations, the review of the statutes’ constitutionality might be exercised by the ordinary courts. Such review would be an extension to national law of the decentralized enforcement already forming part of the EU mandate of Polish courts since 2004.

This EU-based decentralized review must take on even greater importance now. With the Tribunal gone and the Constitution being short-circuited at every turn, it is time for the Charter of Fundamental Rights to play more prominent role as important adjudicatory benchmark<sup>77</sup>. The Charter could be seen as a compensatory legal

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<sup>76</sup> V. F. Comella, *Constitutional Courts and Democratic values* (Yale University Press, 2009), at p. 126, (inverted commas in original).

<sup>77</sup> The argument to internalize the Charter by allowing the national judges to refer to the Charter in purely domestic cases and assess the national measures falling within the scope of EU law against the benchmarks provided for in the Charter has been made by A. von Bogdandy, M. Kottmann, M. Antpohler, C. Dickschen, S. Hentrei, *Reverse Solange. Protecting the essence of Fundamental rights against EU Member States*, (2012) 49 *Common Market Law Review* 489 and more recently by A. Jakab, *The EU Charter of Fundamental Rights as the Most Promising Way of Enforcing the Rule of Law against EU Member States*, in C. Closa, D. Kochenov, (eds.), *Reinforcing Rule of Law*, *supra* note 49. This argument is interesting and merits closer attention especially in connection with the emergency review argument that this paper supports. Charter would be interpreted as a shield for citizens subject to backsliding and institutions faced with the capture. The more offensive interpretation of the Charter would be used to defend EU law and values rather than extend competences of the EU, the latter being used as a counter argument

instrument and pick up where the Constitution left off. With the permanent incapacitation of the Tribunal, Polish courts could use more vigorously Art. 267 of the Treaty on the Functioning of the European Union and send more references for preliminary rulings to the Court of Justice<sup>78</sup>. These are all challenges that “*constitutional recapture*” brings about.

### **V.3. “Constitutional recapture” and looking beyond the polls**

This concept of “emergency constitutional review” is called “emergency” because it is triggered by exceptional circumstances, particularly when “the exceptional” becomes a— as it is in Poland currently. The review should be exercised with caution and restraint, and be limited to egregious breaches of constitutional standards and rights. Democracy has been shifting for some time from predominance of electoral processes to citizens-inspired movements holding rulers accountable between elections. The proposed “emergency constitutional review” is part of what P. Rosanvallon has called “counter-democracy”<sup>79</sup> to capture how democratic systems have been evolving from the symbolic casting of a vote to exercising societal control between elections irrespective of their results. Rosanvallon identified three methods whereby citizens can hold the elected accountable: *oversight*, *prevention* and *judgment*. The first deals with citizens and/or their non-governmental organizations monitoring the political process and with making the behavior of the elected more visible. The second refers to the capacity of the citizenry to mobilize and channel resistance to policies and decisions taken by the elected. Finally, the third describes the juridification and trend of turning to courts so as to bring social change and/or enforce the limits put on the elected. Constitutional recapture backed up by the “emergency constitutional review” falls into the “judgment category” and must be seen as a democratic constraint on the will of the majority, as the manifestation of constitutional self-defense.

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against such an interpretation of the Charter. For discussion of these proposals M. Blauberger, D. Keleman, *Can Courts rescue national democracy? Judicial safeguards against democratic backsliding in the EU*, (2016) 24 *Journal of European Public Policy* 321, at. pp. 330 - 332.

<sup>78</sup> D. Edward, *The National Courts - The Powerhouse of Community Law*, (2002) 5 *Cambridge Yearbook of European Legal Studies* 1.

<sup>79</sup> P. Rosanvallon, *La contre-democratie: La politique à l'âge de la défiance* (Seuil, 2006), and English edition *Counter – Democracy: Politics in the age of distrust* (Cambridge University Press, 2008).

If, as it appears, the Polish Government and Parliament do not consider themselves bound by constitutional limits, those who oppose this trend must find ways to ensure that the Polish constitutional system is able to defend itself from within. “Emergency constitutional review” is a good start. Making the Constitution operational every time the Tribunal is denied its constitutional powers is now a priority of the highest order, wherein “operational” means that the constitutional decisions made by the courts are treated as part of the law that they are bound to apply and on which they must build their decisions. Even before the final demise of the Tribunal, there have been signs that a rendering of the Constitution and constitutional review inoperable had been already taking place. On 17 March 2016, the Polish Supreme Court delivered a judgment in which it declared unconstitutional one of the provisions of the Tax Code.<sup>80</sup> Crucially, the Supreme Court found it unnecessary to send questions to the Tribunal and proceeded with its own constitutional review of the provision in question. In the clearly circumscribed reasoning, it pointed to the judgment of the Tribunal from 2013, which already declared to be unconstitutional a provision in the Code that was identical to the provision under consideration in the case at hand. The Supreme Court acknowledged that formally speaking the Tribunal should be also given an opportunity to declare this new provision of the Code to be unconstitutional, because ruling on the compatibility of statutes with the Constitution is within the exclusive competence of the Tribunal. However, the Supreme Court referred directly to the unclear situation surrounding the Tribunal and concluded: “Formalism cannot get the better of the common sense. Bearing in mind the current exceptional situation, referring questions to the Tribunal now would be incomprehensible to the interested parties.” This is “emergency constitutional review” at its most clear. This groundbreaking decision might provide the tools to usher in a new era of constitutional empowerment. Importantly, the Supreme Court took pains to delimit precisely and condition its emergency constitutional review. It made clear that its review does not exclude the Tribunal’s competence: the Tribunal continues to be the guardian of constitutionality in Poland. On the other hand, the Supreme Court was well aware of the attempts to undermine the Tribunal and its

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<sup>80</sup> Case V CSK 377/15 (judgment of 17 March 2016). More on the case at [www.lex.pl/czytaj/-/artykul/sad-narcoses-stwierdzil-niekonstytucyjnosc-przepisu-bo-tk-w-kryzysie](http://www.lex.pl/czytaj/-/artykul/sad-narcoses-stwierdzil-niekonstytucyjnosc-przepisu-bo-tk-w-kryzysie)

powers. The 2016 refusal to publish the Tribunal's judgments may have been the last straw in prompting the Supreme Court to stand up and side with the rule of law. Importantly, the Supreme Administrative Court followed the Supreme Court in this regard. In one of its most recent judgments, it quashed a judgment of the lower court and instructed it to take into account the unpublished judgment of the Constitutional Tribunal of 28 June 2016 in Case SK 31/14.

Defensive aspect aside, emergency judicial review also plays an important mobilizing role. It can act as a catalyst function for pro-democracy initiatives, bringing a sense of vindication and recognition to those who oppose the mainstream anti-democratic politics and who demand a return to respecting democratic values. "Calling a spade a spade" by the judiciary would provide a crucial focal point of societal resistance. Judicial pronouncement in defense of the constitutional order would transform into a symbolic point of reference as a source of loyalty to the oppressed constitutional values.<sup>81</sup> Clarity about the constitutional state of play and constitutional interpretation will focalize the resistance and move it forward. As a result, the relevant question today is no longer whether such review is warranted, but rather whether ordinary judges would be willing to accept their new role and whether the judicial empowerment will trickle down to the lower courts. If there is one lesson to be learned from the landmark US Supreme Court case *Marbury*, it is the "principle [that is] supposed to be essential to all written constitutions, that a law repugnant to the Constitution is void and it is the duty of the judges to say what the law is." If Polish courts embrace and internalize this message, "constitutional recapture" of the rule of law will at least be given a chance as it hangs on how judges will respond. As of this writing nobody really knows this. Only time will tell. One fact, however, is beyond doubt: Polish judges are faced with the most fundamental challenge they have seen in the post-1989<sup>82</sup>: survival of the constitutional

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<sup>81</sup> T. Ginsburg, *The Politics of Courts in Democratization. Four Junctures in Asia*, in D. Kapiszewski, G. Silverstein, R. A. Kagan, (eds.), *Consequential Courts. Judicial Roles in Global Perspective*, (Cambridge University Press, 2013), p. 48 "only when there is agreement on what constitutes a violation and mutual expectations that citizens will in fact enforce the rules will democracy emerge and be sustained [...] in some limited conditions, court decisions can survive as focal points in helping citizens coordinate, and force the autocracy to liberalize [...]"

<sup>82</sup> I am well aware that my plea for the emergency judicial review hangs in the balance with the now pending case in the Court of Justice. In the case the Commission alleges that the capture of the judiciary in Poland calls into question whether the requirement of the independence is satisfied with regard to the whole

legal order and their own judicial legitimacy<sup>83</sup>.

## **VI. Constitutional Fidelity and the judicial promises**

### **VI. 1. How and why does Constitutional Fidelity (or lack thereof) matter in times of constitutional debacles?**

An uneasy question looms large: How to explain the relative ease with which the unconstitutional capture took root and succeeded to spread so quickly? Its “success” has more to do with the lack of *constitutional culture* rather than deficiencies of the *constitutional text*. The former is understood as beliefs and values of non-judicial actors about the Constitution<sup>84</sup> should underpin all constitutional commitments and guarantee their enforcement. Without constitutional culture and entrenched respect for these commitments, the constitution is not worth the paper it is written on, which is the situation in Poland: the constitutional text remains unenforced since the institution called on to enforce it is being openly defied. The present under-enforcement of the constitutional text and marginalization of the Polish Constitutional Tribunal together with the innate capability of capture to travel pose important questions about the future and shape of the rule of law and separation of powers in Poland<sup>85</sup>.

Lack of constitutional culture is in turn tied to the absence of constitutional fidelity. Presence of the latter should provide the conceptual framework for thinking of the separation of powers, appreciating it, and in the end defending it. Constitutional fidelity offers the axiological basis for emergency judicial review. Constitutional fidelity is more

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of the judiciary. The unprecedented capture of the courts might indeed lead the Court to set aside the principle of mutual trust and stop recognizing Polish courts as courts within the meaning of EU law. See D. Kochenov, L. Pech, K. L. Scheppele, *The European Commission’s Activation of Article 7: Better Late than Never?* at <https://verfassungsblog.de/the-european-commissions-activation-of-article-7-better-late-than-never/> On the other hand, one might argue that the Court should proceed with extreme caution here and that the analysis should be made on a case - by - case basis, rather than *in abstracto*.

<sup>83</sup> For other doubts see T. T. Koncewicz, *In Judges we Trust? A long overdue Paradigm Shift within the Polish Judiciary, (Part I)* at <https://verfassungsblog.de/in-judges-we-trust-a-long-overdue-paradigm-shift-within-the-polish-judiciary-part-i/> and *Part II* at <https://verfassungsblog.de/in-judges-we-trust-a-long-overdue-paradigm-shift-within-the-polish-judiciary-part-ii/>

<sup>84</sup> R. C. Post, *The Supreme Court, 2002 Term – Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, (2003) 117 Harvard Law Review 4, at. p. 8

<sup>85</sup> For general analysis see also Bojan Bugarcic, Tom Ginsburg, *The Assault on Postcommunist Courts*, (2016) 27 The Journal of Democracy 69.

than a duty and an obligation to observe the text. It should be construed as much more. I agree with J. Balkin that:

*Fidelity is not simply a matter of correspondence between an idea and a text, or a set of correct procedures for interpretation. It is not simply a matter of proper translation or proper synthesis or even proper political philosophy. Fidelity is not a relationship between a thing and an interpretation of that thing. Fidelity is not about texts; it is about selves. Fidelity is an orientation of a self towards something else, a relationship which is mediated through and often disguised by talk of texts, translations, correspondences and political philosophy. Fidelity is an attitude that we have towards something we attempt to understand; it is a discipline of self that is related to the discipline of a larger set of selves in a society. Fidelity is ontological and existential; it shapes us, affects us, has power over us, ennobles us, enslaves us. Fidelity is a form of power exercised over the self by the self and by the social forces that help make the self what it is. As such, fidelity is an equivocal concept, full of both good and bad, mixed inextricably together. Fidelity is the home of commitment, sacrifice, self-identification and patriotism, as well as the home of legitimation, servitude, self-deception and idolatry<sup>86</sup>*

This raises important questions for my own understanding of the fidelity to the Polish Constitution. Fidelity must not be simply a matter of text and of following the letter of the law. Being faithful to the document and the institutions it creates is more a state of mind, not mere practice. As such, constitutional fidelity has a lot in common with constitutionalism, an idea that is not only about the document, but also about the state of mind, a commitment to limited government and a culture of restraint. Fidelity can refer to the original meaning of the constitutional document, to its fundamental core or to the text as such. It should speak to the principles and concepts that are embedded

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<sup>86</sup> *Agreements with hell and other objects of our faith*, (1997) 65 Fordham Law Review 1703.

in the Polish constitutional structure and tradition, principles that make up our constitutional identity. Fidelity and its object thus have the potential of explicating who we are, where we came from and where we are headed and finally, to grasp in the best possible way who we are today. Each constitutional document has its past, present and future and these three temporal dimensions are linked by the rationale of the underlying principles of values. Principles and values that make up constitutional identity must be interpreted so as to ensure both the continuity of the messages contained therein and their durability. What is needed is the compromise and equilibrium between necessary change that embraces *The New* and the stability that caters to *The Tradition*. The latter enables us to move forward and set our gaze on the future while not forgetting about the past and about the places from which we come. In other words, constitutional interpretation must be conservative (preserving the values) and reformative (reading these in the light of ever-changing circumstances). Future emerges at the intersection of both dimensions: looking back and staying in the present. Again as argued by Balkin:

*“Fidelity is a sort of servitude, a servitude that we gladly enter into in order to understand the Constitution. To become the faithful servants of the Constitution we must talk and think in terms of it; we must think constitutional thoughts, we must speak a constitutional language. The Constitution becomes the focus of our attention, the prism of our perspective. Our efforts are directed to understanding it-and many other things in society as well-in terms of its clauses, its concepts, its traditions. Through this discipline, this focus, we achieve a sort of tunnel vision: a closing off to other possibilities that would speak in a different language and think in a different way, a closing off to worlds in which the Constitution is only one document among many, worlds in which the Constitution is no great thing, but only a first draft of something much greater and more noble. And to think and talk, and focus our attention on the Constitution, to be faithful to it, and not to some other thing, we must bolt the doors, shut out the lights, block the entrances. Fidelity is servitude indeed. But this servi-*



*tude is not so much something the Constitution does to us as something we do to ourselves in order to be faithful to it*<sup>87</sup>.

Such an understanding of fidelity underscores the aspirational function of the constitutional document. It aspires to reflect “us” in the best, though not perfect, way. It aspires to capture this reflection, and yet it will never fully and definitively achieve this goal since “we” change and evolve along with the document. The preamble to the Polish Constitution shows the commitments to which the Polish nation aspires, commitments that are anchored in the past, developed and refined in the present and carried over into the future. This suggests that the Constitution’s commitments have not been yet met. This never-ending meandering between the past with its backward regard and the future with its forward regard is a matter of constitutional reflection and politics. Such negotiating must be undertaken by each generation, each with its own distinctive role to play in spelling out what the constitutional pact mandates today.

Constitutional fidelity underpins this process and arises at the intersections of practice, text, interpretation and culture. That the promise of the Constitution has not been fully realized (an argument often repeated by the political majority in favor of rejecting the Constitution) must not detract from our Fidelity. Quite to the contrary. It should fuel it and make us try even harder to make these commitments a reality. It is in this sense that constitutional fidelity is about generational reading of the document. It is not about uncritical iconoclasm. It is about pragmatic recognition that our constitutional allegiances are shaped, reshaped, and reexamined as we move forward and as the world around the constitution changes and fluctuates. There is no place for fear of failure, because failure is the part of the fidelity as no constitution is perfect. Fidelity is about the journey and the process, rather than the boat and its final destination.

The past must be a key to the future, it is not the only key. After all, constitutions that are meant to last must be understood as documents made for people of fundamentally different views, as Justice Oliver Wendell Holmes rightfully said. Again, the American constitutional tradition of looking to the past in a constructive way might be used

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<sup>87</sup> J. M. Balkin, *Agreements with hell and other objects of our faith*, (1996-1997) 65 Fordham Law Review 1703.

here: “We turn to the past not because the past contains within it all of the answers to our questions, but because it is the repository of our common struggles and common commitments; it offers us invaluable resources as we debate the most important questions of political life, which cannot fully and finally be settled.”<sup>88</sup> Each generation should build on the best of the past and move forward with this knowledge. After all, this is exactly what the Preamble to the Polish Constitution mandates. This is the kind of fidelity I am describing, and the one that should inform the understanding of the constitutional commitments the judges should owe to the Constitution of 1997 and the separation of powers. Balance entails cooperation, control and dialogue between the branches. Balancing assumes checking power by power, and at the same time collaboration between the branches.<sup>89</sup> Within the system of separation of powers, “separation” means “isolation” in one instance only.<sup>90</sup> Administration of justice remains the exclusive province of courts and other branches must not neither interfere nor participate in it. The isolation of the judiciary is premised on the independence of the judiciary and sets apart the judiciary from other branches of the government. In the Polish context this is based directly on Art. 173 of the Constitution<sup>91</sup> and this provision (rather than Art. 10) remains central for building a case in favor of the emergency judicial review by ordinary judges.

## **VI. 2. When things go really wrong: On the Judicial Self-Defense**

The Constitution separates different branches of government. The rigidity of this separation varies, of course, but this does not call into question this more general function of the constitutional document. The application only varies in practice not in theory, and the practice is a function of history, society, and legal tradition. The respect for the rule of law and its most important procedural safeguard (separation of powers) figures prominently and is one of the benchmarks to assess the candidate member states’ readiness not only to join, but also to remain in, the liberal (European) club. With dem-

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<sup>88</sup> J. M. Balkin, R. B. Siegel, *Introduction*, in J. M. Balkin, R. B. Siegel, (eds.), *The Constitution in 2020*, (Oxford University Press, 2009), at p. 4.

<sup>89</sup> Polish Constitutional Tribunal in case K 45/07, available [www.trybunal.gov.pl](http://www.trybunal.gov.pl)

<sup>90</sup> L. Garlicki, *Polskie Prawo Konstytucyjne*, (*Polish Constitutional Law*), (Warsaw, 2009), at p. 73.

<sup>91</sup> Polish Constitutional Tribunal in case K 6/94 available [www.trybunal.gov.pl](http://www.trybunal.gov.pl)

ocratic backsliding and constitutional capture in full swing, one might wonder whether constitutional capture was too hastily dismissed as unthinkable.

Law has two faces: textual and contextual. The former is built and developed through various mechanisms at the level of the regulation (law in the books), while the latter is more flimsy and difficult to pinpoint. It is about culture and fidelity to the values that underpin law in books. The former might be changed over night, while the latter is based on long-term vision, not only to build a state governed the laws, but more importantly to sustain it long-term. Importantly both faces are part of the same narrative: rule of law and our trust in the transformative power of the law. For our faith to be rooted beyond the “here and now” and to make a constitutional document resistant to the changing fortunes of law in the books, though, law must never stray too far away from culture and fidelity. Fears of conflicts between the ordinary judges and constitutional courts<sup>92</sup> are premised on the well-functioning system of judicial review in which the constitutional court is, as mandated by the Constitution, effectively wielding its power of judicial review. This changes when the review is debilitated and the court emasculated. This is an important caveat in my analysis, as emergency judicial review is always the second-best scenario in light of the disablement of the judicial review and the marginalization of the constitution.<sup>93</sup> In extraordinary times of unconstitutional capture beggars can’t be choosers. The institution is given a shield to protect against the attacks of another body, or is given a sword it can use to repel or deter an assault.<sup>94</sup> Self-defense mechanisms are created in order to protect the institution, but that is not their only purpose. While being used against another body, they might also contribute to the betterment of the constitutional system. That is, they are not only reactionary but also productive.

Emergency judicial review is indeed a self-defense mechanism against the concerted attack by the government on the integrity of the legal system and existing checks

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<sup>92</sup> N. Dorsen, M. Rosenfeld, S. Baer, A. Sajo, (est.), *Comparative Constitutionalism. Cases and Materials*, (West, 2003), at p. 381.

<sup>93</sup> On this see M. Wyrzykowski, who, in case of Poland, rightly speaks of “changing the constitutional order outside the constitution”; *supra* note 2, at p. 175.

<sup>94</sup> N. W. Barber, *Self - defence for the institutions*, (2013) 72 *The Cambridge Law Journal* 558.

and balances. Some argue that ordinary courts do not have the competence to wield constitutional review and that such competence has not been conferred onto them by the drafters of the foundational legal document. However as Barber argues:

*“If the capacity it confers is attractive, the mechanism may be said to have this (protective - T. T. K.) function, even if it may not have been created for this purpose.”<sup>95</sup> He goes on to say: “[...] whilst the conferral of the capacity was not a psychological reason for the mechanism’s creation - it was not a reason in the mind of the creators - it remains a justificatory reason that supports the existence of the mechanism - a reason for us to want the mechanism to remain part of the constitutional order.”<sup>96</sup>*

This is exactly the case of emergency judicial review I am espousing here.

The purpose of emergency judicial review is to defend the separation of powers, and more broadly, the integrity of the constitutional system. It is attractive because it might be effective when all other mechanisms have failed or/and have been disabled by the majority as part of the unconstitutional capture. With emergency review the courts do not use capacities that run contrary to the Constitution. Rather, they take advantage of the implicit empowerments contained in the constitutional text that never closed the door definitively on the ability of the ordinary courts to exercise such review powers. The granting of exceptional powers based on the reading of implicit empowerments in the constitutional document is informed by the self - defense rationale. The latter provides justificatory reason for such a reading of the constitution. Self-defense becomes part of the judicial mandate. The resort to self-defense is not predicated on the self-aggrandizement of courts (even though it might lead incidentally to growth of judicial power across the board), but first and foremost aims at preventing the constitutional system from being disintegrated. Barber argues that there is always a cost for the body against which the powers of self-defense are exercised, but also a cost for the body that

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<sup>95</sup> *Id.* at p. 559.

<sup>96</sup> *Id.* at p. 560

wields powers of a self-defense mechanism. The end result is that “where one institution acts against another, the whole constitution works less smoothly.”<sup>97</sup>

Yet, the situation is different with the emergency judicial review as an instance of self-defense. The Constitution and its ordinary mechanisms had already stopped working under the pressure of incessant unconstitutional capture. The self-defense by courts aims now at restoring some equilibrium. The price that comes with resorting to self-defense is the endangerment of the judicial branch as a whole, as the parliamentary majority behind the unconstitutional capture might feel threatened and may decide to strike back and intensify its attempts at total capture. The Constitution read as a whole produces a self-defense mechanism in the form of emergency judicial review to save those constitutional essentials that are yet to be captured. Emergency judicial review as a self-defense mechanism is instrumental in that it is reconstructed with one aim and one aim only: to protect the separation of powers from falling into oblivion and to maintain the minimum effectiveness of the Constitution. Emergency review as a self-defense mechanism is not meant to inhibit the functioning of the constitution, quite the contrary.

Emergency judicial review is employed at the service of the separation of powers, and more broadly constitutional survival as the supreme law of the land. One branch of the government (the courts) not only protects itself against the executive and legislative, but in so doing it restores constitutional integrity. With the emergency judicial review in operation, the constitutional landscape and the separation of powers themselves are reshuffled and will never be the same. The courts will either survive, strengthened by newly-claimed judicial review (“new” separation of powers will emerge), or fall in the process together with the separation of powers and the Constitution they set out to defend. In either case, the contours of the separation of powers will shift considerably as one branch (the courts) might be vindicated *or* marginalized and swept aside by the capture completed by two remaining branches (executive and legislative) behind the capture. Importantly, though, a court wielding emergency judicial review sends important sig-

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<sup>97</sup> *Id.* at pp. 563 - 564.

nals to the public as “(judicial) decision can frame the issue and crystallize it in the public imagination, as well as provide persuasive evidence for agreement among citizens. By creating common knowledge that a violation of the rules has in fact occurred, a court decision can help citizens overcome the collective- action problem.”<sup>98</sup> It is unclear whether the constitution drafters designed the system with an emergency review in mind. Certainly, unconstitutional capture of the kind that has been engulfing the Polish constitutional system was not their main concern. They might not even have anticipated that things might get out of hand so badly and so quickly. Yet, their state of mind at the time of drafting must not be conclusive in our attempt to build a case for judicial review by ordinary courts. What matters is, first, whether the constitutional text contains enough arguments to make a plausible case for such a review to be defended, and, second, what function the review would serve.

Constitutional capture and the piecemeal undermining of the liberal democratic state pose new challenges for the rule of law and external constraints imposed on the domestic *pouvoir constituant*.<sup>99</sup> It is not so much a question of substance, but rather enforcement.<sup>100</sup> As forcefully argued by K. L. Scheppele and L. Pech, “consolidation of

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<sup>98</sup> T. Ginsburg, *The Politics of Courts in Democratization. Four Junctures in Asia*, in D. Kapiszewski, G. Silverstein, R. A. Kagan, (eds.), *Consequential Courts. Judicial Roles in Global Perspective*, (Cambridge University Press, 2013), p. 48.

<sup>99</sup> C. Dupre, *The Unconstitutional Constitution: A Timely Concept*, in A. Von Bogdandy, P. Sonnevend, (eds.), *Constitutional Crisis in the European Constitutional Area. Theory, Law and Politics in Hungary and Romania*, (Oxford/Portland, Hart Publishing, 2015); K. L. Scheppele, *Unconstitutional constituent power*, available at [www.sas.upenn.edu/dcc/sites/www.sas.upenn.edu.dcc/files/uploads/Scheppele\\_unconstitutional%20constituent%20power.pdf](http://www.sas.upenn.edu/dcc/sites/www.sas.upenn.edu.dcc/files/uploads/Scheppele_unconstitutional%20constituent%20power.pdf); A. Barak, *Unconstitutional constitutional amendments*, (2011) 44 *Israel Law Review* 321; R. Albert, *The Theory and Doctrine of Unconstitutional Constitutional Amendment in Canada*, available at [lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=1984&context=lsfp](http://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=1984&context=lsfp); R. Albert, *Four Unconstitutional Constitutions and their Democratic Foundations*, [https://papers.ssrn.com/sol3/Papers.cfm?abstract\\_id=2860442](https://papers.ssrn.com/sol3/Papers.cfm?abstract_id=2860442). For EU perspective see R. Passchier, M. Stremler, *Unconstitutional Constitutional Amendments in European Union Law: Considering the Existence of Substantive Constraints on Treaty Revision* [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2561209](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2561209)

<sup>100</sup> It was eloquently argued by C. Closa, D. Kochenov and J.H.H. Weiler that two sets of situations must be distinguished. On the one hand, there are what they call “problems amounting to nothing else but careless use of the law or abuses of political power - something that can and will be corrected with time through the functioning of the relevant Member States’ own democracies.” On the other hand, “There are problems of such a profound and fundamental nature, that the Member States’s own legal and political systems are overwhelmingly unlikely to be in the position to right the wrongs concerned in the near - to long -term future.” It is the latter group that calls for serious reconsideration of the existing framework and enforcement mechanisms. When national democracies fail to secure the essence of the rule of law,

majoritarian autocracies [...] represents more of an existential threat to the EU's existence and functioning than the exit of any of its Member States."<sup>101</sup> Constitutional capture plays a pivotal role in disabling checks and balances. Constitutional capture makes a sham out of a constitutional document as it strips it of its limiting and constraining function.<sup>102</sup> Separation of powers becomes illusory and opens the gate to unchecked arbitrariness.

Yet, constitutional capture is not an one-off aberration. It is a novel threat to the rule of law as it is not limited to one moment in time. It is a process of incrementally taking over independent institutions and ultimately the liberal state. Hungary is a prototype of a "captured state," and one would be right in assuming that the Commission had learned from its passivity and acquiescence to V. Orban's tactics of capturing the state.<sup>103</sup> The lesson was loud and clear. Yet, that the lesson was not fully grasped by the Commission, as the Polish case shows: the only way to derail constitutional capture, or to "constitutionally recapture the unconstitutional capture," is to act preemptively, before the capture is complete.<sup>104</sup> Waiting on the sidelines, talking to the perpetrators and hoping for a change of heart, only emboldens and entrenches the regime. Only recently, the Commission seem to be finally learning from its past mistakes.

Constitutional capture as a process needs time, so it is the factor of time that plays a pivotal role in striking back at the capture. To thwart capture in the process, counter action is necessary at the very beginning, and not later. The regime knows that time on its side and will do anything to buy more time to entrench the capture and make

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Europe should step in and reestablish the respect for commonly shared principles (eg. rule of law). See C. Closa, D. Kochenov, J.H.H. Weiler, *Reinforcing the rule of law oversight in the European Union*, Robert Schuman Centre for Advanced Studies Working Paper 2014/25, at p. 4. See also D. Kochenov, L. Pech, *Upholding the rule of law in the EU: On the Commission's 'Pre-article 7 Procedure' as a timid step in the right direction*, Robert Schuman Centre for Advanced Studies Working Paper 2015/24

<sup>101</sup> L. Pech, K. L. Scheppele, *Poland and the European Commission, Part I: A Dialogue of the Deaf?* p. 2 available at <http://verfassungsblog.de/poland-and-the-european-commission-part-i-a-dialogue-of-the-deaf/>

<sup>102</sup> "Sham" (sometimes also called "facade") constitutions fail to constrain or even describe the powers of the state. On the concept, see D. S. Law, M. Versteeg, *Sham Constitutions*, (2013) 101 California Law Review 863.

<sup>103</sup> M. Bankuti, G. Halmai, K. L. Scheppele, *Hungary's Illiberal Turn: Disabling the Constitution*, (2012) 23 The Journal of Democracy 138; I. Pogany, *The Crisis of Democracy in East Central Europe: The 'New Constitutionalism' in Europe*, (2013) European Public Law 341.

<sup>104</sup> L. Pech, K. L. Scheppele, *supra* note 101.

the recapture increasingly unlikely. Poland and Hungary are prime examples of this. In both cases, the EU extended time limits and engaged in ultimately futile dialogue, allowing the constitutional capture to become more and more entrenched and difficult to roll back.<sup>105</sup> Constitutional capture not only calls into question the commonality of values but entails once startling proposition that constitutions today might be unconstitutional within the EU.

So, where does it all leave us today?

## **VII. Epilogue or ... ?**

*It is the institutions that help us preserve decency. They need our help as well. Do not speak of “our institutions” unless you make them yours by acting on their behalf. Institutions do not protect themselves. They fall one after the other unless each is defended from the beginning. So choose an institution you care about - a court, a newspaper, a law, a labor union - and take its side.*<sup>106</sup>

As it is engulfed by the “politics of resentment” and growing fears of spreading constitutional capture, Europe needs a discursive framework for articulating and accommodating the practical meaning of its overlapping consensus. My argument is that such a framework should be centered around basic challenges which can be presented as a combination of the *past*, the *present* and *the future*. “Politics of resentment” challenge us to revisit forgotten founding narratives of European integration<sup>107</sup> (the *past*), rethink Europe’s vocation today (the *present*) and finally, open up for, and embrace, new vistas (the *future*). Resentment-driven constitutional capture poses an existential threat to post-1945 Europe and its founding narratives of “living

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<sup>105</sup> On the EU Commission’s inability to learn from the Hungarian debacle and Polish government ability to learn from the Orban’s tactics, see in depth L. Pech, K. L. Scheppele, *Poland and the European Commission, Part II: Hearing the Siren Song of the rule of law*, available at <http://verfassungsblog.de/poland-and-the-european-commission-part-ii-hearing-the-siren-song-of-the-rule-of-law/> at pp. 4 - 8.

<sup>106</sup> T. Snyder, *On Tyranny. Twenty lessons from the twentieth century*, (The Bodley Head London, 2017), at p. 22.

<sup>107</sup> Or what Sir D. Edward perspicuously calls “an appeal to first principles” (unpublished manuscript on file with the Author).



together” and “*never again* constitutionalism” that have animated Europe’s founding fathers. “Europe is not Europe in the sense that Germany is Germany, or France is France. Europe is all about Doing Europe which aims for the effective and unsentimental [...] Doing Europe transforms bad history into good future and better life for everyone irrespective of race, language or religion [...] Doing Europe embodies Never Again.”<sup>108</sup> Politics of resentment forcefully show that “doing Europe” with overlapping consensus and tolerance has ceased to be the unquestionably dominant European narrative. Instead, “politics of resentment” and “constitutional capture” push Europe into a standstill and an identity crisis.

Europe is falling short of a novel challenge that comes along with the “politics of resentment”: moving *beyond* its traditional mandate of making sure that the member states behave in a certain way (through, for example, implementing EU law and removing obstacles to free trade) and on *towards* preventing these same states from endangering and hijacking Europe’s common values and principles. The rethinking of external constraints and limitations imposed on the domestic *pouvoir constituant* in response to constitutional capture of liberal constitutions loom large.<sup>109</sup> As we try to move forward, the question is this: are “we, the European peoples” ready to continue living together in a constitutional regime, internally divergent, and always ready to respond to the exigencies and demands of new realities? The challenge behind this question has been eloquently summarized by *J. Tully’s* “canoe metaphor: “Perhaps the great constitutional struggles and failures around the world today are groping towards the third way of constitutional change, symbolized by the ability of the members of the canoe to discuss and reform their constitutional arrangements in response to the demands for recognition as they paddle. A constitution can be both the foundation of democracy and, at the same time, subject to democratic discussion and change in practice.”<sup>110</sup>

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<sup>108</sup> U. Beck, E. Grande, *Das kosmopolitische Europa. Gesellschaft und Politik in der Zweiten Moderne*, (2007) (my translation).

<sup>109</sup> For the incisive outline of the argument see K. L. Scheppele, *Unconstitutional constituent power*, in R. Smith, S. Macaulay, (eds.), *Constitution making*, (2015).

<sup>110</sup> J. Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity*, (Cambridge University Press, 1995), at p. 29.

With the “politics of resentment” fueling European disintegration, with the exclusion of “*the Other*” and with “constitutional capture” elevated to the status of new modes of governance, the challenge of “*paddling together*” has never been more acute, nor more dramatic. Supranational Europe must be thought of as a safety valve against the excesses of national states, an additional level of oversight over the member states. As much as the Court might preach “mutual trust” as one of the paradigms of EU law, it was rather distrust that initially drove the founding fathers in their push of integration agenda. Mutual trust only followed as the edifice started to take shape. In light of new phenomena on the rise like abusive constitutionalism,<sup>111</sup> democracy mutations,<sup>112</sup> and backsliding in Central and Eastern Europe<sup>113</sup> and resurrection of resentment in other parts of Europe, this promise of being a check on the world of unfettered freedom of nation states is even more important.

Rule of law, separation of powers and judicial review are instrumental institutions necessary to implement the rule of law and enforce the constitutional text

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<sup>111</sup> D. Landau, *Abusive constitutionalism*, (2013) 47 University of California Davis Law Review 189, defining “abusive constitutionalism” as the use of mechanisms of constitutional change in order to make a state significantly less democratic than it was before.

<sup>112</sup> See in general S. Levitzky, L.A. Way, *Competitive authoritarianism. Hybrid regimes after the cold war*, (2010); O. Varol, *Stealth authoritarianism*, (2015) 100 Iowa Law Review 1673.

<sup>113</sup> The doctrine is clearly aware of the dangers as attested by the growing number of important voices on the subject. See J.-W. Müller, *On the side of democracy*, <http://www.eurozine.com/on-the-side-of-democracy/>; J.-W. Müller, *Should the EU Protect Democracy and the Rule of Law Inside Member States?* <https://www.princeton.edu/~jmueller/ELJ-Democracy%20Protection-JWMueller-pdf.pdf>; J.-W. Müller, *Rising to the challenge of constitutional capture. Protecting the rule of law within EU member states*, available at <http://www.eurozine.com/rising-to-the-challenge-of-constitutional-capture/>; J.-W. Müller, *The failure of European intellectuals?* available at <http://www.eurozine.com/the-failure-of-european-intellecutuals/>; J.-W. Müller, *What, if anything, is wrong with a Copenhagen Commission?*, (2013) Transatlantic Academy Working Paper, 24 July; *Special edition of the Journal of Democracy* October 2007, Volume 18, Number 4 *Is East-Central Europe Backsliding?*; *Special Volume of the Journal of Democracy*, January 2016, *What’s Wrong with East-Central Europe?* and contributions by J. Dawson, S. Hanley, I. Krastev, *What’s Wrong with East-Central Europe?*, Ch. Walker Lucan Way, *The Authoritarian Threat*, *The Journal of Democracy*; A. Von Bogdandy, P. Sonnevend, (eds.), *Constitutional Crisis in the European Constitutional Area. Theory, Law and Politics in Hungary and Romania*, (Oxford/Portland, Hart Publishing, 2015).

against the governors. As J. Raz puts it, “The courts should have review powers over the implementation of other principles.”<sup>114</sup> Judicial review<sup>115</sup> helps keep the governors in check and ensures the supremacy of the constitution against the strategies of short-circuiting it for the benefit of ever-changing politics of the day.<sup>116</sup> As famously argued in the Federalist „Ambition must be made counteracted by ambition. The interest of man must be connected with constitutional rights. It may be a reflection on human nature, that such devices should be necessary to control the abuses of the government. But what is government itself, but the greatest of all reflections on human nature [...]. In framing a government that is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and subsequently to oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.”<sup>117</sup> The separation of powers offers us the best example of auxiliary precautions referred to by J. Madison. A “Marbury moment”<sup>118</sup> might be just round the

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<sup>114</sup> J. Raz, *supra* note 69, at p. 217.

<sup>115</sup> Voices of skepticism are duly noted here, yet such an academic critique and parsing of pros and cons of the judicial review is a privilege left for normal times of constitutional routine. It has no place in systems where the very survival of constitutional order is on the line. For an exemplary overview see L. D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review*, (2004); M. Tushnet, *Taking the Constitution away from the Courts*, (1999); J. Waldron, *The Core of the Case Against Judicial Review*, (2006) 115 *Yale Law Journal* 1346; R. H. Fallon, Jr., *The Core of an uneasy Case for Judicial Review*, (2008) 121 *Harvard Law Review* 1693.

<sup>116</sup> See the argument of the former President of the Polish Constitutional Court, M. Safjan, *Politics and Constitutional Courts. A Judge’s Personal Perspective*, EUI Working Paper 2008/10.

<sup>117</sup> *The Federalist Papers* (No. 51), selected and edited by R. P. Fairfield, (The Johns Hopkins University, 1961), p. 160.

<sup>118</sup> In my understanding “*Marbury moment*” stands for more than a seminal case decided by any particular jurisdiction, although such a decision might act (and often does) as a catalyst. For me “*Marbury moment*” signifies a strategic process of planning and executing whereby courts fully realize their mandate and judicial function to defend the constitution and its values. To this might be added a moment at which courts claim powers to control elected officials. This last element is taken from S. A. Koch, *Marbury Moments*, (2005) 54 *Columbia Journal of Transnational Law* 116, p. 120 with further references. In the context of my emergency judicial review a “*Marbury moment*” would transcend one particular decision and

corner. As we move forward and enter the uncharted territory of separation of powers and rule of law in distress, the most important issue should indeed be, as powerfully espoused by M. Shapiro many years ago, not how institutions shape politics, but how politics shape institutions.<sup>119</sup> When the rule of law and separation of powers are systematically undermined by majoritarian politics disguised as democracy, courts must not pretend that this is of no concern to them and to continue with “business as usual.” Politics can shape courts’ responses, and the example of emergency judicial review is one of the instances in which politics plays a substantial role. With this idea, separation of powers will never be the same and this in itself is a huge challenge for constitutionalists: to move away from cozy world of sacrosanct and time - honoured concepts that always work to fuzzy and unpredictable world of “new authoritarians” who only rarely make themselves clear as wolves.<sup>120</sup> These “authoritarian sheep” reshuffle our safe world and test constitutional concepts to their limits.

## **VIII. A new prologue?**

### **VIII. 1. Captured Europe? Dealing with the politics of resentment: A challenge of new opening**

Moving forward is predicated on our ability to reposition<sup>121</sup> ourselves vis-à-vis the sacrosanct narrative of “an ever closing union among the peoples of Europe” and abandon the comforting conviction that we can take our governance for granted and that that somehow Europe will find a way in the end. The challenge is to build a conceptual framework for dealing with the “politics of resentment.” My argument is that

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involve sustained practice of ordinary courts upholding, in the absence of effective Constitutional Court, the Constitution by reviewing constitutionally suspect regulation(s) adopted by the majority.

<sup>119</sup> See his classic treatise *Courts. A Comparative and Political Analysis*, (University of Chicago Press, 1981).

<sup>120</sup> This apt metaphor comes from O. O. Varol, *supra*, note 112, at p. 1677.

<sup>121</sup> I borrow the term from A. von Bogdandy, *European Law Beyond Ever Closer Union. Repositioning the concept, its thrust and the ECJ's Methodology*, (2016) 22 *European Law Journal* 519.

such conceptual framework should be centered around basic challenges which would be presented here as a mixture of the *past*, *present* and *the future*. It calls on the re-visiting forgotten founding narratives of European integration (dimension of the PAST), rethinking Europe's vocation today (dimension of the PRESENT) and finally, opening up for, and embracing, new vistas (dimension of the FUTURE and language we use when talking today about the European Union<sup>122</sup>. I propose to group the challenges in four categories: the challenge of “*We, the peoples*”; the challenge of inclusion; the challenge of constitutional culture and fidelity (“bottom - up” constitutionalism); the challenge of dialogue and public discourse; the challenge of pluralism and tolerance; the challenge of building constitutional fidelity; the challenge of rethinking the “membership in crisis” and interrelated to that the challenge of credible commitments backed up by viable enforcement mechanisms; and finally the challenge of belonging and embracing “the Other” as part of European pluralist constitutionalism.

“Politics of resentment” strike at the very basis of social fabric, which is *trust*. They alienate, exclude, and destroy the old world and narratives without offering new alternatives except exclusion and distrust. Crucially, in the end they capture the state, the institutions and the constitutional and historic narratives, and seal off the space for free exchange of ideas and world views. As we try to move forward, the question is this: Are we ready to continue living together in a constitutional regime, internally divergent, yet always able to respond to the exigencies and demands of new realities? With the “politics of resentment” at the heart of European disintegration, with deafening passivity and a lack of political leadership and constitutional imagination of the European elites, and with the “constitutional capture” being elevated now to the status of new constitutional doctrine, the challenge of “Doing Europe” with overlapping consensus and tolerance for “*the Other*” has never been more acute or dramatic.

When seen against the background of the politics of resentment and constitutional capture, the disablement of the Tribunal and the capture by the majority of independent institutions have a profound effect on the very premises of European integration (commonality of values) and forces us to look differently at what was

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<sup>122</sup> See L. Besselink, *Editorial. Talking about European Democracy*, (2017) 13 *European Journal of Constitutional Law* 207.

thought as an unassailable tenet of European integration: trust in law and its transformative potential in bringing about the democratic change. As emerging constitutional capture demonstrates it has the capability to travel across borders and the potential of being borrowed by others, it entails pressing questions for Europe and for our understanding of separation of powers and the rule of law. The tenets of European constitutionalism and supranationality are in flux as constitutional capture claims new victims (Hungary before, and now Poland, with Slovenia next?) and throws into sharp relief EU's inability to shield, and enforce, Member States' adherence to rule of law, checks and balances and judicial review.

## **VIII.2. Judicial Resistance in the name of the rule of law**

The fascinating problem of judicial resistance has been in vogue recently.<sup>123</sup> Yet the resistance by the judges described in this paper takes on a special meaning when the discussion turns not simply on laws that are unjust, but rather on laws that strike at the very core of the democratic state governed by the rule of law. These are laws whose very democratic pedigree could be questioned. Such laws are “wicked”<sup>124</sup> in a systemic sense. We must also ask, then, what happens to judges faced with laws that undermine the democratic credentials of the state?

Disagreement between the branches of the government is nothing extraordinary. Quite the contrary. They make the system move forward. As argued by Barak “Tension between the courts and the other branches is natural and [...] also desirable [...]. The legislative viewpoint is political; the judicial viewpoint is a legal one. Other branches seek to attain efficiency; the courts seek to attain legality. The different viewpoints, the need to give explanations to the court and the existing danger - which at times is realized – that an executive action is not proper, and the courts will determine is as such, create a constant tension between the courts and the other branches.” He

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<sup>123</sup> See D. E. Edlin, *Judges and unjust laws. Common Law Constitutionalism and the Foundations of Judicial Review*, (University Michigan Press, 2010); H. P. Graver, *Judges Against Justice: On Judges When the Rule of Law is under Attack*, (Springer, 2015).

<sup>124</sup> T.R.S. Allan, *Justice and Integrity: The Paradox of Wicked Laws*, (2009) 29 Oxford Journal of Legal Studies 705.

continues, on a more somber note: “Matters begin to deteriorate, however, when the criticism is transformed into an unbridled attack. Public confidence in the courts may be harmed, and the checks and balances that characterize the separation of powers may be undermined. When such attacks affect the composition or jurisdiction of the court, the crisis point is reached. This condition may signal the beginning of the end of democracy. What should judges do when they find themselves in this tension? Not much. They must remain faithful to their judicial approach; they should realize their outlook on the judicial role. They must be aware of this tension but not give in to it. Indeed, every judge learns, over the years, to live with this tension.”<sup>125</sup> Emergency constitutional review does not respond simply to legal change<sup>126</sup> or to tension between the branches. It staves off systemic revolution brought about by unconstitutional capture of institutions and concepts. As such it is an instance of judicial meta-resistance. The defense of constitutional integrity and values is more important than the protection of separation of powers. The latter should be understood as instrumental for the realization of the former, and when necessary, adapted to the exigencies of the times. Otherwise, separation of powers would be flouted at will by the majority with the argument that such actions are justified within the classical separation of powers (parliament legislates, executive implements, judges apply laws). Should we agree with such a narrative, we would in fact be allowing the enemies of democracy to dictate their skewed understanding of the separation of powers. This doctrine has always had at its core prevention of unfettered discretion, and to this end it must be as much about separation, as it is about checks and balances.

*“[...] The response to an incorrect judgment is not to abandon communication and break the rules of the game but to use the existing relationship to create a situation in which the result of the mistake will be corrected. Breaking the rules of the game crosses the red line, and is likely to take on many forms: wild and unrestrained criticism of the judgment, attacks on the very legitimacy of the judicial decision,*

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<sup>125</sup> A. Barak, *The Judge in a Democracy*, (Princeton University Press, 2006), at pp. 216 - 217.

<sup>126</sup> M. Tokson, *Judicial Resistance and Legal Change*, (2015) 82 *The University of Chicago Law Review* 901.

*recommendations [...] to narrow the scope of the courts' jurisdiction, threats to create new courts in order to overcome undesirable judgments, attempts to increase the political influence on judicial appointments and promotions, calling for prosecution of judges [...], demands to terminate judicial appointments [...] All these lead, in the end, to the breakdown of the relationship. This is the beginning of the end of democracy.*"<sup>127</sup>

We have seen all this and more unravel in Poland. What has not been seen so far is the judicial response to this onslaught, one that would be in line with the judicial oath to uphold the law and defend the Constitution. Emergency judicial review and constitutional recapture are but expressions of judicial faithfulness to the constitutional document and translate judges' ordinary judicial approach into daily controversies. Through emergency judicial review that shields the constitutional legal system against disintegration, judges express their loyalty to the values and principles underlying the constitutional document. As such, emergency judicial review is not contrary to or outside of the separation of powers. Rather, it must be seen as forming part and parcel of the separation of powers and should inform judges' actions in times when not everything goes according to the script and red lines are crossed as a matter of routine.

Again, as we try to move on, where are the judges in all this? Two options are possible here. On the one hand, a judge may always continue business as usual and keep to his traditional role of "an operator of a machine designed and built by legislators. His function [would be] a mechanical one [...] the civil law judge is not a culture hero or a father figure, as he often is with us. His image is that of a civil servant who performs important but essentially uncreative functions."<sup>128</sup> However, when our constitutional world comes crashing down, this comfortable *non-possumus* must be rejected out of hand. Instead, the argument built here is aimed at building a case for more engaged judiciary, one that is ready to leave the comfort zone of a rule-book conception of the

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<sup>127</sup> A. Barak, *supra* note 125, pp. 239 - 241.

<sup>128</sup> J. H. Merryman, *The Civil Law Tradition. An Introduction to the Legal Systems of Western Europe and Latin America*, (Stanford University Press, 1969), at p. 38.



rule of law,<sup>129</sup> respond to the constitutional exigency and fight back in the name of the constitutional document. When the constitution is disregarded and the court responsible for overseeing the separation of powers is ridiculed and destroyed, judges face their ultimate test of belonging and fidelity, or, as A. Barak points out:

*“He (the judge) should remain loyal to the democratic system and to society, continue to honour the legislative branch, and work toward the realization of the judicial role. The judge must guard the part of the relationship that remains. The judge must be aware of what is going on around him. The judge must not surrender to the ill winds. [...] At the foundation of this approach is the basic view that the court does not fight for its own power. The efforts of the court should be directed toward protecting the constitution and its values.”*<sup>130</sup>

Judges face all of this while always staying within the four corners of the separation of powers and democracy, and in defense of it. The elegant and lofty “protecting the constitution and its values” from Barak is the key phrase for our analysis and defines the gist of the judicial promise.<sup>131</sup> It provides the ultimate logic behind judicial resistance and constitutional recapture, logic that fundamentally transforms the separation of powers and its contours in times when new authoritarians would love to see separation of powers disappear altogether. For the doctrine itself and its survival, the stakes could not be higher: either rely on the self-defense mechanisms of the legal system and hope for its capacity to persevere, evolve and strike back *or* give in and risk total constitutional oblivion.

When constitutional essentials are on the line, We, Lawyers, (not only constitutionalists), must change and adapt our vocabulary and conceptual arsenal as

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<sup>129</sup> For the formal “rule-book” and more justice-driven “rights” conceptions of the rule of law, see R. Dworkin, *Political judges and the rule of law*, in *A Master of Principle*, (Cambridge, Harvard University Press, 1985), at pp. 11-12.

<sup>130</sup> A. Barak, *supra*, note 125, p 240.

<sup>131</sup> A. Garapon, *Le Gardien des promesses Justice et démocratie*, (Odile Jacob, 1996).

well, so as to better prepare for constitutional times when, more often than not, things do not go as planned.

A tall order indeed.

