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On the Strategic Reading of the Constitutional Document. Mapping out Frontiers of New Constitutional Research*

1. Prologue: Polish judicial system goes down and why should we care?

The paper asks when is a constitutional design of any (domestic, international, supranational) polity in error? On the most general level such critical juncture obtains when polity's founding document (treaty, convention, constitution) protects against the dangers that **no longer exist** or **does not protect** against the dangers that were not contemplated by the Founders.[1] Constitutions not only constitute but should also protect against

* I am forever grateful to Professor Martin Shapiro for his generosity in sharing with me his wisdom and expertise on the judicial politics, on how the politics affect courts and how courts interact with other political players. Likewise I appreciate very much all the discussions in real time on problems presented here with Professor Kim Lane Scheppele. Usual disclaimer applies. This is work in progress and part of my 2017–2018 Crane Fellowship at LAPA, Princeton University, < http://lapa.princeton.edu/content/politics-resentment-and-constitutional-capture-learning-constitutional-debacles-and-thinking >. The ideas presented here go back to the presentation at the International Symposium on "The Separation of Powers. A Global Constitutional Dialogue" in Milan, 22nd May 2017. The precursor of the paper was presented at the workshop on authoritarianism organized by Princeton University on 13th–14th October 2017 and at "Rule of law and the separation of powers in flux?" during the Annual Meeting of the American Association of Law Schools in San Diego, 3rd–6th January 2018. Parts of the analysis here also were presented at the "Indiana Journal of Global Legal Studies", 26th Annual Symposium "Globalization in Question: Populist Resistance and a New Politics of Law?", Indiana University, Maurer School of Law, 11th–13th April 2018.

1 For more extensive analysis see T.T. Koncewicz, *The Capture of the Polish Constitutional Tribunal and Beyond: Of Institution(s), Fidelities and the Rule of Law in Flux*, to be published in: "Review

deconstitution. When analysed together, the cases of Hungary and Poland, South America[2] and more recently United States[3] suggest a new worrying pattern of the erosion of constitutional democracies. One may even speak of a recipe for constitutional capture in one state after another that travels in space and in time.[4] The new autocrats know that the law might be used to kill off the law and institutions and engage in a different form of "repression by stealth"[5] or the deconstruction of democracy itself by using the legal means ("autocratic legalism").[6] This process tends to result in a systemic undermining of the key components of the rule of law such as human rights, independent and impartial courts, free media. It follows a well-organised script and tends to begin with disgruntled citizens voting to break the system by electing a leader who promises radical change, often referring to the "will of the people" while trashing the pre-existing constitutional framework with cleverly crafted legalistic blueprints borrowed from other "successful" autocrats. Examples of Poland, Hungary and other "legalistic counter revolutions" (Venezuela, Turkey) are not the sort of mass human rights violations that merit close scrutiny from international level. The world has already (and luckily so) developed a framework to deal with these.

The paper asks the question whether the capture of state institutions in Poland (and Hungary before it)[7] is an outlying case, or if it portends the future of Europe more generally. Whatever the case, Poland matters,

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of Central and East European Law" 2018, < http://www.brill.com/review-central-and-east-european-law >; and *Unconstitutional Capture and Constitutional Recapture. Of the Rule of Law, Separation of Powers and Judicial Promises*, "NYU Jean Monnet Working Paper" 2017, No. 3, < https://jeanmonnetprogram.org/papers >.

2 See D. Landau, *Abusive Constitutionalism*, "University of California Davis Law Review" 2013, No. 47 (189).

3 See D. Ziblatt, S. Levitzky, *How Democracies Die*, New York 2018.

4 K.L. Scheppele, L. Pech, *Illiberalism Within: Rule of Law Backsliding in the EU*, "Cambridge Yearbook of European Legal Studies" 2017, No. 1.

5 O. Varol, *Stealth Authoritarianism*, "Iowa Law Review" 2015, No. 100 (1673).

6 K.L. Scheppele, *Autocratic Legalism*, "University of Chicago Law Review" (forthcoming), where she argues: "When electoral mandates and constitutional/legal change are used in the service of an illiberal agenda, I call this phenomenon 'autocratic legalism.'"

7 See K.L. Scheppele, *Constitutional Coups and Judicial Review: How Transnational Institutions Can Strengthen Peak Courts at Times of Crisis (with Special Reference to Hungary)*, "Transnational Law and Contemporary Problems" 2014, No. 23 (51), p. 51–119.

and more than for just the Poles. The case illuminates salient features and fissures in the bases for democratic government, the rule of law, and constitutionalism when confronted with the sweeping politics of resentment.[8] Most recently the Editorial Board of "The New York Times" saw it fit to comment on the Decision of the European Commission of 20th December 2017, to invoke against Poland Art. 7 of the Treaty on the European Union (for the first time in the history of European integration).[9] The Editors emphasized:

> An independent judiciary, however, is not only the bulwark of the democratic order to which Poland signed on when it joined the European Union, but a fundamental requirement for the functioning of a single market. Upholding the treaties on which the union is based is indisputably within the European Commission's purview. The European Commission was right to invoke Article 7. It must follow that up by sternly explaining to Mr. Kaczynski's followers and other nationalist forces across Europe that there are red lines they cannot cross — not because Brussels so wills, but for their own sake. An independent judiciary is chief among them.[10]

8 See J.W. Muller, *Defending Democracy within the EU*, "Journal of Democracy" 2013, No. 24 (138).

9 Article 7 of the Treaty on the European Union (TEU) provides for a sanctioning mechanism in the case when one of the member states does not respect the values enshrined in Art. 2 TEU. The latter provides: "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail."

10 *E.U. Reminds Poland how a Democracy Acts*, "The New York Times" 28th December 2017, < https://www.nytimes.com/2017/12/28/opinion/eu-poland-democracy-vote.html >; for American take on the European consequences of the Polish constitutional debacle see J. Traub, *The Party That Wants to Make Poland Great Again*, "The New York Times" 2nd November 2016, < https://www.nytimes.com/2016/11/06/magazine/the-party-that-wants-to-make-poland-great-again.html?_r=0 >; Ch.A. Kupchan, *The Battle Line for Western Values Runs through Poland*, "New York Times" 10th January 2018, < https://www.nytimes.com/2018/01/10/opinion/europe-western-values-poland.html >; and more recently: R. Cohen, *Awaken, Poland, before It's too Late*, "The New York Times" 16th February 2018, < https://www.nytimes.com/2018/02/16/opinion/awaken-poland-before-its-too-late.html?rref=collection%2Fcolumn%2Froger-cohen&action=click&contentCollection=opinion&region=stream&module=stream_unit&version=latest&contentPlacement=3&pgtype=collection >. For more detailed analysis see *infra*.

With this America has finally woke up[11] to the gravest of the constitutional crises that has been engulfing the European Union (hereinafter referred to as: "EU"): crisis of democracy and the rule of law within one of the member states that threaten the EU as a whole.[12] As important and devastating BREXIT and financial crisis are, they are after all crisis of governance and institutional structure. The argument presented here is that none of these crises strikes as deadly a blow to the European edifice as the crisis in which one member state tramples the values of democracy, rule of law and human rights; values said to be presumed to be common for the EU and its member states. With the rise of the politics of resentment we are not dealing with a yet another rogue government riding roughshod over its Treaty obligations (which is not such a rare occurrence after all). Rather we are facing a government that calls into question the very basis of European integration and undermines it from within. We are facing the crisis of the foundational value of the European integration and one of constitutional feature – liberal democracy.[13]

It all started with the destruction of the Polish Constitutional Court (hereinafter referred to as "the Court" or "the Tribunal") in 2015–2016.[14]

11 See S. Levitsky, D. Ziblatt, *Is Donald Trump a Threat to Democracy*, "The New York Times" 16th December 2016, < https://www.nytimes.com/2016/12/16/opinion/sunday/is-donald-trump-a-threat-to-democracy.html >. More recently see A. Huq, T. Ginsburg, *How to Lose a Constitutional Democracy*, "UCLA Law Review" 2018, No. 65 (forthcoming). Also S. Levitzky, D. Ziblatt, *How's Democracy Holding up after Trump's First Year?*, < https://www.theatlantic.com/international/archive/2018/01/trump-democracy-ziblatt-levitsky/550340 >; S. Levitzky, D. Ziblatt, *How a Democracy Dies*, < https://newrepublic.com/article/145916/democracy-dies-donald-trump-contempt-for-american-political-institutions >; *'How Democracies Die' Review – the Secret of Trump's Success*, < https://www.theguardian.com/books/2018/jan/08/how-democracies-die-by-steven-levitsky-and-daniel-ziblatt-review?CMP=share_btn_link >.

12 For a comprehensive treatment of the enforcement of values within the EU consult: *The Enforcement of EU Law and Values. Ensuring Member States' Compliance*, ed. D. Kochenov, A. Jakab, Cambridge 2017.

13 For detailed analysis and further references: K.L. Scheppele, L. Pech, *Illiberalism…*

14 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?* (p. 63–69), and M. Wyrzykowski, *Bypassing the Constitution or Changing the Constitutional Order outside the Constitution* (p. 159–179), in: *Transformation of Law Systems in Central, Eastern and Southeastern Europe in 1989–2015. Liber Amicorum in Honorem Prof. dr. dres. H. C. Rainer Arnold*, ed. A. Szmyt, B. Banaszak, Gdańsk 2016; and W. Sadurski, *What Is Going on in Poland Is an Attack against Democracy?*, "Verfassungsblog" 15th July 2016, < http://verfassungsblog.de/what-is-going-on-in-poland-is-an-attack-

After 30 years of building an impressive resume as one of the most influential and successful European constitutional courts and living proof of "the rule of law in action," the Court has fallen under the relentless attack of a rightwing populist government and succumbed to it. The time has come to move beyond what happened to the constitutional review in Poland, though and place it in the wider context. 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.' The argument will be made that the Polish case ("the boat") is much more than just an isolated example of yet another recalcitrant government. There is an important European dimension to what has transpired in Poland over the last two years. To understand what happened in Poland and why, one has to take a longer view and revisit not only the 2004 Accession, but also the 1989 constitutional moment and "negotiated transition" that followed. The constitutional debacle in Poland must be but a starting point for more general analysis of the processes of the politics of resentment and constitutional capture that strike at the core European principles of the rule of law, separation of powers, and judicial independence. With the benefit of hindsight, we now know that the disbelief about the destruction of the Polish Constitutional Court (and earlier, the Hungarian Constitutional Court) was an opening act to the total subjugation of all independent institutions of the state. With no independent constitutional court left to guarantee effective compliance

against-democracy >; T.T. Koncewicz, *Polish Constitutional Drama: Of Courts, Democracy, Constitutional Shenanigans and Constitutional Self-Defense*, "I-CONnect" 6th December 2015, < www.iconnectblog.com/2015/12/polish-constitutional-drama-of-courts-democracy-constitutional-shenanigans-and-constitutional-self-defense >; T.T. Koncewicz, *Farewell to the Polish Constitutional Court*, "Verfasungsblog" 9th July 2016, < http://verfassungsblog.de/farewell-to-the-polish-constitutional-court >; T.T. Koncewicz, *Statutory Tinkering: on the Senate's Changes to the Law on the Polish Constitutional Tribunal*, < http://verfassungsblog.de/statutory-tinkering-senate-polish-constitutional-tribunal >. For a useful and detailed recap, see also: the Helsinki Foundation for Human Rights, *The Constitutional Crisis in Poland 2015–2016*, Report (August 2016), < http://www.hfhr.pl/wp-content/uploads/2016/09/HFHR_The-constitutional-crisis-in-Poland-2015-2016.pdf >. More recently see comprehensively W. Sadurski, *How Democracy Dies (in Poland): A Case Study of Anti-Constitutional Populist Backsliding*, "Sydney Law School Research Paper" 2018, No. 1, < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3103491 >.

with the national constitution, Polish ruling party has engaged in a multi-pronged take – over of the whole of the national judiciary to enable the executive and legislative branches of the government to systematically interfere in the structure, composition and daily functioning of the judicial branch.[15] The law on the ordinary courts and on the Supreme Court have already entered into force and effectively brought the courts under the "tutelage" of the Ministry of Justice. The capture of the state and its institutions goes on…[16]

This paper argues that all this should be used as a cautionary tale. The belief that institutions will be able to defend themselves and protect the legal system proved to be over-idealistic. As important as institutions are for any constitutional system, they have a chance of survival only when their institutional pedigree and prestige are built on the popular support of civil society. There is a two-way synergy between the two. While civil society might contribute positively to the consolidation of democracy, it cannot unilaterally either bring about democracy, or sustain democratic institutions and practices once they are in place.[17] Even the strongest institutions will fall when lacking social capital. Are courts any different? 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

15 At the time of writing, the capture of the judiciary has been completed with the entry into force of the new Polish Law on ordinary courts organization. See W. Sadurski, *Judicial "Reform" in Poland: The President's Bills Are as Unconstitutional as the Ones He Vetoed*, "Verfassungsblog" 28th November 2017, < http://verfassungsblog.de/judicial-reform-in-poland-the-presidents-bills-are-as-unconstitutional-as-the-ones-he-vetoed >. On the same day that Art. 7 of the TEU was triggered, the European Commission has decided to refer Poland to the Court of Justice arguing that the new law on ordinary courts violates the EU law.

16 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 pointed 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 and analysis: D. Kochenov, L. Pech, K.L. Scheppele, *The European Commission's Activation of Article 7: Better Late than Never?*, < https://verfassungsblog.de/the-european-commissions-activation-of-article-7-better-late-than-never >.

17 See P.C. Schmitter, *Civil Society East and West*, in: *Consolidating the Third Wave Democracies. Themes and Perspectives*, ed. L. Diamond, M.F. Plattner, Y. Chu, H. Tien, Baltimore 1997, p. 239–262, especially p. 240.

any transient urges of the powers that be and that in the end the law will enforce its primacy. That assumption might be correct in the best of times when everything goes according to plan. When it does not, courts look fragile and vulnerable, as the only protective tool they wield – 'the law' – is taken away from them by the sheer power of 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 constitutional essentials in such emergency situations. In other words, could 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 capture. Yet embarking on any such recapture must be linked not only to the **normative** and **technical** (here the question would be: "Does the system contain enough to build a good legal case for exercising such powers?"), but also to the **mental** (here we would ask the uneasy question "Are judges willing and ready to use these mechanisms to protect democracy?"). The paper will argue that even a symbolic act of resistance in pursuit of a judicial promise is crucial. It builds institutional memory and a legacy that goes beyond 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' because it reminds us that survival of the system must be anchored in a long-term fidelity, which goes beyond and transcends the present day.

This symbolic jurisprudence has also European dimension as there is an important role to be played by the Court of Justice of the EU.[18] Having said that, I am aware that such advocated thinking creates a fuzzy picture (two levels of governance of self-defense), distorts the constitutional landscape (leaning on the outside institution to tame the domestic political power) and upsets established doctrines (separation of powers). These concerns are justified in the normal times. However, the paper

18 On this European dimension see T.T. Koncewicz, *The Consensus Fights back: European First Principles against the Rule of Law Crisis*, < https://verfassungsblog.de/the-consensus-fights-back-european-first-principles-against-the-rule-of-law-crisis-part-1 >; and part II, < https://verfassungsblog.de/the-consensus-fights-back-european-first-principles-against-the-rule-of-law-crisis-part-2 >.

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 focuses on the journey in times of constitutional upheavals and attacks on the rule of law and separation of powers (process called below: "politics-of-resentment-driven capture"). The reinterpretation (process called "defend-the-constitution-driven recapture") that might (or not) follow the capture creates a new *status quo* that will factor in 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.[19]

2. Constitutional Recapture. What's in a name?

Separation of powers stresses the importance of keeping the 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 its operation is systematically undermined? We often assume that things go in accordance with plan, but sometimes they do not and an uneasy question looms large: "What happens then to the separation of powers?" 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 respect for constitutional essentials

19 While the literature on the populism has been growing beyond imagination, the question of how (institutionally and procedurally) to deal with the rise of populist politics, received only scant attention. For rare analysis see C.R. Kaltwasser, *Populism and the Question of how to Respond to It*, in: *The Oxford Handbook of Populism*, ed. C. Rovira Kaltwasser, P. Taggart, P. Och Espejo, P. Ostiguy, Oxford 2017, p. 490; for political science perspective consult S. Rummens, K. Abts, *Defending Democracy: The Concentric Containment of Political Extremism*, "Political Studies" 2010, No. 58 (649) and more recently G. Badano, A. Nuti, *Under Pressure: Political Liberalism, the Rise of Unreasonableness, and the Complexity of Containment*, "The Journal of Political Philosophy" 2017, No. 1.

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 of the day keen on redrawing constitutional lines and instrumentalizing the basic principles of constitutional order. The notion of constitutional recapture also responds to the malaise of the European decision-making process. Constitutional recapture demonstrates the resilience of the constitutional document to fight back and reestablish constitutional equilibrium, as best exemplified by checks and balances and separation of powers. My idea of constitutional recapture is firmly rooted in the Polish 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[20]), with 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 the 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 the 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?"

3. Emergency judicial review

Constitutional review exercised by the ordinary courts has been an option in the Polish legal order since the adoption of the 1997 Constitution.

20 The Constitution of the Republic of Poland of 2nd April 1997, Dziennik Ustaw (Official Journal of Laws of the Republic of Poland) 1997, No. 78, item 483, as amended; hereinafter referred to as: "Constitution." English version is available at: < http://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm >.

Proponents of extending review to the ordinary courts were politely acknowledged, but their views were never taken seriously. It was widely accepted that only the Tribunal wielded a 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 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 checking the compatibility of statutes with the Constitution. However, the "centralization model" dominated the mainstream legal discourse. Ordinary courts cannot refuse to apply a statute (statutes are presumed to be constitutional until their invalidation by the Tribunal). Only the Tribunal is empowered to rule on the unconstitutionality 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. Direct application of the Constitution assumes co-application of the Constitution and statutes. At present, all ordinary courts can do is to apply a pro-constitutional interpretation. Although this strand of constitutional narrative has been predominant, there has also been a second strand. Subjecting courts to the Constitution and statutes could be read as allowing the courts the 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 question on the compatibility of statutes to the Tribunal. In the case of a 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 issue of constitutionality but also mandating the consequences of such a finding. On the other hand, an 'intermediate' option is available. Should the court find a statute unconstitutional, it would be left with no discretion but would be obliged to refer the question to the Tribunal. In this scenario, the court would be debarred from applying a statute that it deems unconstitutional. The refusal by an ordinary court to apply a statute would not necessarily infringe upon the review powers of the Tribunal, since 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 an 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. But what if that is not so? Depending on the circumstances 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 a statute, with the Constitution used as an ornament. Second, when a judicial decision is based on both a statute and the Constitution, the latter shedding light on 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 its normative consistency with the Constitution. Beyond that third option lies '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. Emergency 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, but does not replace it. Emergency review is instrumental to securing respect for the status of the Constitution 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. European empowerment of the ordinary courts has already happened in Poland and undermined the Polish centralized model of constitutional review. Moreover, this empowerment of ordinary courts in the name of the full effectiveness of the EU law was even accepted by the Tribunal when it held in case P 37/05:[21] "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[22] and supremacy[23] constructed by the European Court of Justice, which constitute the 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 of its own motion to apply a conflicting provision of domestic legislation: "It is not necessary for the court

21 Order (in Polish) available at: < http://trybunal.gov.pl/fileadmin/content/omowienia/P_37_05_PL.pdf >.

22 Judgment of the European Court of Justice of 5th February 1963, case C-26/62, *Van Gend en Loos* v. *Netherlands Inland Revenue Administration*, EU:C:1963:1.

23 Judgment of the European Court of Justice of 15th July 1964, case C-6/64, *Costa* v. *E.N.E.L.*, EU:C:1964:66.

to request or await the prior setting aside of such provision by legislative or other constitutional means."[24] National courts are called on to disregard any provision of domestic law (on the the European Court of Justice reading of supremacy, its scope is all-encompassing as it catches 'any' provision of domestic law, be it constitutional, statutory, sub-statutory or administrative decisions) that is inconsistent with EU law and without waiting for the constitutional court to take a stand on the conflict. Each court of each Member State has the power of judicial review over 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 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 their 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.'[25] 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 loss by the Tribunal of its constitutional monopoly over statutes. In exceptional situations, review of the constitutionality of a statute 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. Last but not least, 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 a more

24 Judgment of the European Court of Justice of 9th March 1978, case C-106/77, *Amministrazione delle Finanze dello Stato* v. *Simmenthal SpA*, ECLI:EU:C:1978:49, § 24.

25 See V.F. Comella, *Constitutional Courts and Democratic Values*, New Haven 2009, p. 126 (inverted commas in original).

prominent role as an important adjudicatory benchmark. The Charter could be seen as a compensatory legal instrument and pick up where the Constitution left off. With permanent incapacitation of the Tribunal, the Polish courts could use more vigorously Article 267 of the Treaty on the Functioning of the European Union[26] and send more references for preliminary rulings to the Court of Justice. These are all challenges that constitutional recapture brings about.[27]

4. "Constitutional Recapture" and looking beyond the polls

The concept "emergency constitutional review" is called "emergency" because it is triggered by exceptional circumstances, particularly when the "the exceptional" becomes – as it is now in Poland currently – a norm. 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 the electoral processes to citizen-inspired movements holding rulers accountable between elections. The concept of the "emergency constitutional review" is part of what Pierre Rosanvallon has called "counter-democracy"[28] to capture how democratic systems have been evolving from the symbolic casting of a vote to exercising societal control between elections and irrespective of their results. Rosanvallon identified three methods whereby citizens can hold the elected to account: oversight, prevention, and judgment. The first deals with citizens and/

26 Art. 267 of the Treaty on the Functioning of the EU gives each court of the member state a power (in certain "constellations" it imposes a duty) to refer questions to the Court of Justice on the interpretation and/or validity of the EU norms. This procedure has been long hailed as one the success stories of the EU law. See D. Edward, *The National Courts – The Powerhouse of Community Law*, "Cambridge Yearbook of European Legal Studies" 2002, No. 5 (1). On various procedural "constellations" in using Art. 267 and the switch from "a discretion to refer" to "a duty," consult K. Lenaerts, I. Maselis, K. Gutmann, *EU Procedural Level*, Oxford 2015. See also analysis *infra*.

27 For important words of caution and limits to the decentralized ("private") enforcement through national courts see M. Blauberger, D. Kelemen, *Can Courts Rescue National Democracy? Judicial Safeguards against Democratic Backsliding in the EU*, "Journal of European Public Policy" 2016, No. 24 (321), p. 326–329.

28 P. Rosanvallon, *La contre-democratie: La politique à l'âge de la défiance*, Paris 2006; for the English-language edition, see P. Rosanvallon, *Counter – Democracy: Politics in the Age of Distrust*, Cambridge 2008.

or their non-governmental organizations monitoring the political process by citizens and/or making the behaviour of the elected more visible. The second refers to the capacity of citizenry to mobilize and channel resistance to policies and decisions taken by the elected. Finally, the third describes juridification and the trend of turning to courts so as to bring about social change and/or enforce the limits put on the elected. Constitutional recapture backed up by emergency constitutional review falls into the 'judgment' category and must be seen as a democratic constraint on the will of the majority, as a manifestation of constitutional self-defense. 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 ordinary courts treat the Constitution 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 shielding the Constitution through the case law of ordinary courts had already been taking place. On 17th March 2016, the Polish Supreme Court delivered a judgment in which it declared unconstitutional one of the provisions of the Tax Code.[29] 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 clearly circumscribed reasoning, it pointed to a judgment of the Tribunal from 2013 which had already declared unconstitutional a provision in the Code that was identical to the provision under consideration in the before the Supreme Court. 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

29 Judgment of the Supreme Court of Poland of 17th March 2016, V CSK 377/15, < http://www.sn.pl/sites/orzecznictwo/Orzeczenia3/V%20CSK%20377-15-1.pdf >. For more on the case see K. Żaczkiewicz-Zborska, *Sąd Najwyższy stwierdził niekonstytucyjność przepisu, bo TK w kryzysie*, < www.lex.pl/czytaj/-/artykul/sad-najwyzszy-stwierdzil-niekonstytucyjnosc-przepisu-bo-tk-w-kryzysie >.

on the compatibility of statutes with the Constitution falls within the exclusive competence of the Tribunal. However, the Supreme Court referred directly to the unclear situation currently surrounding the Tribunal and concluded: "Formalism cannot get the better of 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 usher in a new era of constitutional empowerment. Importantly, the Supreme Court took pains to precisely delimit and condition its emergency constitutional review. It made clear that its review does not exclude the Tribunal's competence: the Tribunal (when independent) continues to be the guardian of constitutionality in Poland. On the other hand, the Supreme Court was well aware of attempts to undermine the Tribunal and its powers. The 2016 refusal by the government 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 28th June 2016 in case SK 31/14.[30]

The defensive aspect aside, emergency judicial review also plays an important mobilizing role. It can act as a catalyst for pro-democracy initiatives, bringing a sense of vindication and recognition to those who oppose mainstream anti-democratic politics of resentment, and who demand a return to respecting democratic values. "Calling a spade a spade" by the judiciary would provide a crucial focal point for societal resistance. A judicial pronouncement in defense of the constitutional order would transform into a symbolic point of reference as a source of loyalty to oppressed constitutional values.[31] Clarity about the institutional state

30 The Judgment (in Polish) is available at: < https://www.senat.gov.pl/gfx/senat/userfiles/_public/k9/dokumenty/trybunal/2017/sk_31_14.pdf >.

31 See T. Ginsburg, *The Politics of Courts in Democratization. Four Junctures in Asia*, in: *Consequential Courts: Judicial Roles in Global Perspective*, ed. D. Kapiszewski, G. Silverstein, R.A. Kagan, Cambridge 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

of play and constitutional interpretation will focus resistance and move it forward. As a result, the relevant question today is no longer whether such a review is warranted, but rather whether ordinary judges are willing to accept their new role and whether judicial empowerment will trickle down to the lower courts. If there is one lesson to be learned from the landmark US Supreme Court case of *Marbury*,[32] 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, then 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:[33] survival of the constitutional legal order and their own judicial legitimacy.[34]

5. Emergency judicial review and judicial self – defense

Law has two faces: textual and contextual. The former is built and developed through various mechanisms at the level of regulation (law on books), while the former is more flimsy and difficult to pinpoint. It is about culture

and be sustained […] in some limited conditions, court decisions can survive as focal points in helping citizens coordinate, and force the autocracy to liberalize […] a court decision can provide clarity as to what constitutes a violation of the rules by the government. Lacking an authoritative pronouncement, regime opponents might disagree about whether a violation occurred and may thus fail to coordinate to enforce the rules […]." See also text at note 41, *infra*.

32 Full text is available at: < https://www.law.cornell.edu/supremecourt/text/5/137 >.

33 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 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…* 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*.

34 For other doubts see T.T. Koncewicz, *In Judges We Trust? A Long Overdue Paradigm Shift within the Polish Judiciary*, part I: < https://verfassungsblog.de/in-judges-we-trust-a-long-overdue-paradigm-shift-within-the-polish-judiciary-part-i >; part II: < https://verfassungsblog.de/in-judges-we-trust-a-long-overdue-paradigm-shift-within-the-polish-judiciary-part-ii >.

and fidelity to the values that underpin law on the books. The former might be changed overnight, while the latter is based on a long-term vision, not only to build a state governed by laws, but more importantly to sustain it long-term. Importantly, both faces form 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 to make a constitutional document resistant to the changing fortunes of law on the books. Fears of conflict between ordinary judges and constitutional courts[35] are premised on a well-functioning system of judicial review in which the constitutional court, as mandated by the Constitution, effectively wields its power of judicial review. This changes when 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 judicial review and the marginalization of the constitution.[36] In extraordinary times of unconstitutional capture, beggars cannot be choosers. The institution is given a shield to protect against the attentions of another body, or is given a sword it can use to repel or deter an attack.[37] 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 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 concerted attack by the government on the integrity of the legal system and existing checks 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

35 See N. Dorsen, M. Rosenfeld, S. Baer, A. Sajo, *Comparative Constitutionalism. Cases and Materials*, St. Paul 2003, p. 381.

36 On this see M. Wyrzykowski (*Bypassing…*, p. 175), who, in the case of Poland, rightly speaks of "changing the constitutional order outside the constitution."

37 See N.W. Barber, *Self-Defence for the Institutions*, "Cambridge Law Journal" 2013, No. 72, p. 558–577.

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."[38] 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.[39]

This is exactly the case for 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 and/or 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 implicit empowerments contained in the constitutional text that never closed the door definitively on the competence of the ordinary courts to exercise such review powers. The granting of exceptional powers based on a 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. 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 disintegration. 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 wields the powers of self-defense mechanism and the end result is that "where one institution acts against another, the whole constitution works less smoothly."[40] Yet the situation is different with emergency judicial review

38 N.W. Barber, *Self-Defence*…, p. 559.

39 N.W. Barber, *Self-Defence*…, p. 560.

40 N.W. Barber, *Self-Defence*…, p. 563–564.

as an instance of the self-defense mechanism. The Constitution and its ordinary mechanisms had already stopped working under the pressure of incessant unconstitutional capture. Self-defense by the courts now aims at restoring some equilibrium. The price that comes with resorting to self-defense is endangerment of the judicial branch as a whole, as the risk is that the parliamentary majority behind 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, survival of the constitution as the supreme law of the land. One branch of government (the courts) not only protects itself against the executive and legislative, but in so doing it restores constitutional integrity. With 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 (a '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 capture completed by the two remaining branches (the executive and the legislature) behind the capture. Importantly, though, a court wielding emergency judicial review sends important signals 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.[41]

It is unclear whether the drafters of the constitution 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 even not 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 the ordinary courts. What matters is, first, whether the constitutional text contains enough arguments to make a plausible case for such a review, and second, what function the review would serve.

6. The next step: What about judges?

The fascinating problem of judicial resistance has been in vogue recently.[42] Yet resistance by 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 a democratic state governed by the rule of law. These are laws whose very democratic pedigree could be questioned. Such laws are "wicked"[43] 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 government are nothing extraordinary. Quite the contrary: they make the system move forward. As argued by A. 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

41 T. Ginsburg, *The Politics…*, p. 48.

42 See D.E. Edlin, *Judges and Unjust Laws. Common Law Constitutionalism and the Foundations of Judicial Review*, Ann Arbor 2010; H.P. Graver, *Judges against Justice: On Judges when the Rule of Law Is under Attack*, Berlin, Heidelberg 2015.

43 See T.R.S. Allan, *Justice and Integrity: The Paradox of Wicked Laws*, "Oxford Journal of Legal Studies" 2009, No. 29, p. 705–728.

> 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 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.[44]

Emergency constitutional review does not respond simply to legal change[45] 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, the executive implements, judges apply the law). Should we agree with this 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.

44 A. Barak, *The Judge in a Democracy*, Princeton 2006, p. 216–217.

45 M. Tokson, *Judicial Resistance and Legal Change*, "The University of Chicago Law Review" 2015, No. 82 (2), p. 901–973.

Aharon Barak adds:

> […] 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, 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.[46]

We have seen all this and more unravel in Poland. What has not been seen so far is a 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' commitment to the legal order 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 is going according to the script and red lines are being 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 the 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

46 A. Barak, *The Judge*…, p. 239–241.

> image is that of a civil servant who performs important but essentially uncreative functions.[47]

However, when our constitutional world comes crashing down, this comfortable *non-possumus* must be rejected out of hand.[48] Instead, the argument built here aimed at making a case for a more engaged judiciary, one that is ready to leave the comfort zone of a rule-book conception of the rule of law,[49] respond to 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:

> [H]e (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.[50]

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.[51] It provides the ultimate logic behind judicial resistance and constitutional recapture, a logic that fundamentally transforms the separation

47 J.H. Merryman, *The Civil Law Tradition. An Introduction to the Legal Systems of Western Europe and Latin America*, Stanford 1969, p. 38.

48 T.T. Koncewicz, *The Court Is Dead, Long Live the Courts? On Judicial Review in Poland in 2017 and "Judicial Space" beyond*, < https://verfassungsblog.de/the-court-is-dead-long-live-the-courts-on-judicial-review-in-poland-in-2017-and-judicial-space-beyond >.

49 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*, London 1980; R. Dworkin, *A Matter of Principle*, Cambridge 1985, p. 11–12.

50 A. Barak, *The Judge…*, p. 240.

51 See A. Garapon, *Le Gardien des promesses Justice et démocratie*, Paris 1996.

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.

7. Challenge of going beyond lawyers' heads

Finally. What about us, lawyers, and the academia?

There is more general lesson to be learnt from the Polish constitutional debacle. With constitutional essentials of our respective legal systems on the line, lawyers (not only constitutionalists) must change and adapt their vocabulary and conceptual arsenal in order to better prepare for constitutional times when, more often than not, things do not go according to the script. There is important work to be done in the civic sphere and every one of us has his own role to play. We must start translating a constitution for our fellow citizens in the spirit of greater inclusion so as to make it their constitution.[52] We must help building constitutional culture that will strengthen the constitutional law and individual fidelities to the founding document. Sometimes stopping by and taking issue with the popular paranoid slogans of how the mythical "they" steal from us, how my misfortunes are the result of world-wide conspiracies, how Germans plot against Poland *etc*., will provide the critical voice and counter-narrative of common sense, reason and honest defence that our liberal democracy needs today. Saying nothing equals throwing in the towel and invites all these paranoias in our public discourse.

Summary

The paper asks when is a constitutional design of any (domestic, international, supranational) polity in error? On the most general level such critical juncture obtains when polity's founding document (treaty, convention, constitution) protects against the dangers that no longer exist or does not protect

52 See T.T. Koncewicz, *"A Good Constitution" and the Habits of Heart*, "Verfassungsblog" 30th December 2017, < http://verfassungsblog.de/a-good-constitution-and-the-habits-of-heart >.

against the dangers that were not contemplated by the Founders. The paper asks the question whether whether the capture of state institutions in Poland (and Hungary before it) is an outlying case, or if it portends the future of Europe more generally. Whatever the case, Poland matters, and more than for just the Poles. The case illuminates salient features and fissures in the bases for democratic government, the rule of law, and constitutionalism when confronted with the sweeping politics of resentment. 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. That assumption might be correct in the best of times when everything goes according to plan. When it does not, courts look fragile and vulnerable, as the only protective tool they wield – 'the law' – is taken away from them by the sheer power of 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 constitutional essentials in such emergency situations. In other words, could 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 capture. Yet embarking on any such recapture must be linked not only to the normative and technical (here the question would be: "Does the system contain enough to build a good legal case for exercising such powers?"), but also to the mental (here we would ask the uneasy question "Are judges willing and ready to use these mechanisms to protect democracy?"). The paper will argue that even a symbolic act of resistance in pursuit of a judicial promise is crucial. It builds institutional memory and a legacy that goes beyond 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. Such act of resistance serves as an example of 'symbolic jurisprudence' because it reminds us that survival of the system must be anchored in a long-term fidelity, which goes beyond and transcends the events of here and now.

Keywords: courts, judicial review, politics of resentment, constitutional capture and recapture, institutional self, defence, constitutional essentials, judicial resistance, constitutional fidelity

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