MMA Fighters Will Not Restore the Rule of Law

The Value of a Compromise on Rebuilding the Constitutional Tribunal

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On 30 October 2026, Constitutional Tribunal judge, Anna Korwin-Piotrowska, decided to suspend the President and Vice-President of the Constitutional Tribunal. In a recent post on Verfassungsblog, Kim-Lane Scheppele, Laurent Pech and Maciej Kisilowski praised this move as lawful and necessary to restore the rule of law. In this post I present a different view. I argue that the legality of the order is doubtful and that to truly heal the Tribunal something else is needed – a rebuilding of its legitimacy, credibility and authority. This cannot be achieved by legal tricks, but only through political compromise over the re-establishing the Tribunal based on new rules which would protect it from capturing by one political group.

A Doubtful Legal Basis

Judge Korwin-Piotrowska cited Article 130(2) of the Act on the Structure of Ordinary Courts as the legal basis for her order. This provision grants the Minister of Justice and the president of a competent court the right to order an immediate break in the exercise of professional duties by a judge. Such an order can be issued "if a judge has been apprehended *in flagrante delicto* in the commission of an intentional offense or if required by the gravity of the act committed by the judge, the dignity of the court, or important interests of the service."

In 2009, the Constitutional Tribunal ruled that this provision does not violate the Constitution, so it remains in force. However, in my view, the constitutionality of this provision continuously raises doubts, given that the Constitution clearly stipulates that a judge may be suspended only by virtue of a court ruling. Moreover, when PiS was in power, this exact provision served as a legal basis for harassing independent judges.

The problem is, however, that judge Korwin-Piotrowska is not a Tribunal's President. Therefore, to justify her action, she relied on provisions stipulating that when the Tribunal President is unable to authorize another judge to exercise certain powers, they are substituted by the judge with the longest judicial service. However, this provision is not applicable here as the seat of the Tribunal's President is not vacant and the President was not unable to act – he became unable to act only after judge Korwin-Piotrowska issued her order.

Such an interpretation can be clearly abused in the future. Judge with the longest judicial service could suspend the Tribunal's leaders to gain the control over it. Even if such a move had no substantive justification, that judge could always claim that a disciplinary court must decide whether the order is justified and that, until then, the order remains in force.

The order will have to be reviewed within 30 days by the Tribunal's disciplinary court. However, one can expect that it will be difficult to assemble a panel of judges who satisfy the standard of impartiality in this case. Five judges who were prevented from adjudicating by Mr. Święczkowski are in a clear conflict of interest with him, while those elected before 2023 have already stated that Korwin-Piotrowska's order was unlawful. Therefore, the disciplinary court's ruling will most likely not resolve all doubts surrounding the legality of the order.

Scheppele, Pech and Kisilowski argue that, regardless of Korwin-Piotrowska's explanation, the leadership positions in the Tribunal were vacant because neither the President nor the Vice-President "was lawfully appointed to his leadership office, because the assemblies nominating them included people who were not judges." However, two important points must

be made here. First, Korwin-Piotrowska clearly assumed that Bogdan Święczkowski and Bartłomiej Sochański are the President and Vice-President of the Tribunal. Nowhere in the order is there a statement to the contrary. Second, there has been no formal ruling by any domestic or international body declaring the appointments of both men null and void. Applying the conclusions of the CJEU judgment regarding the appointment of Julia Przyłębska to Święczkowski and Sochański would not be straightforward, as there were procedural differences between their cases. In any event, this issue requires more than a single sentence in a blog post.

I admit that there are many legal experts in Poland who do not share my interpretation of law and who defend Judge Korwin-Piotrowska's order. However, my objections to this method of addressing the crisis around the Tribunal are not limited to legality.

What Is Going on in the Constitutional Tribunal?

Undoubtedly, the Constitutional Tribunal has been mired in a deep institutional crisis since late 2015. The crisis started with the unlawful election of three judges. Subsequent judges were elected formally lawfully, but some of them had clear links to the former ruling party. This also concerns the current Tribunal's President, Judge Święczkowski, who in the past was an undersecretary of State in the Ministry of Justice in the PiS government and ran in parliamentary elections on PiS lists. All in all, PiS turned the Tribunal into a tool in its hands, used instrumentally to achieve political gains. Before 2023, it was used to legitimise various PiS moves that violated the rule of law and to question EU law and the ECHR; after the change of power, it tried to block the new ruling coalition's attempts to reverse the PiS reforms and to hold PiS-appointed officials accountable.

The recent crisis around the oath-taking ceremony must be seen in this wider political and legal context. If judges elected by the current ruling majority were allowed to adjudicate, the Constitutional Tribunal's character would inevitably change, given that they already constitute the majority of its composition. Therefore, by taking unlawful steps to prevent them from assuming office, the President of the Republic *de facto* protects his political group's interests. The same conclusion applies to the motivations of the Tribunal President, who had clear political links with the former ruling party and, moreover, faces potential criminal liability, given that the prosecutor's office is seeking to lift his immunity.

However, this catastrophic state of the current Tribunal and hypocrisy of many of its defenders do not mean that all actions taken by the new government are justified and truly contribute to rebuilding the Tribunal's position.

Good Intentions?

Many Polish and some foreign commentators argue that a key difference between PiS's actions and those of the current government is that the former aimed to destroy the rule of law, while the latter wants to fix it. I agree that we cannot equate the actions of PiS and those of the current ruling coalition. There is no doubt that the chaos in the judiciary was created mostly by PiS. However, what I find problematic is the very strong presumption that the intentions of Prime Minister Tusk's government are pure.

How do we know that the current Government truly wants to build an independent Constitutional Tribunal? I do not think political declarations alone are sufficient. We have to consider the coalition's actions, and some of them were problematic.

In 2024 the Government adopted two laws reforming the Constitutional Tribunal. The drafts of these laws were prepared by an NGO, the Stefan Batory Foundation. The first of them contained many important provisions aimed at strengthening the independence and impartiality of this body, such as those concerning an increase in the majority necessary to elect judges, or the introduction of a cooling-off period between holding political office and being able to be elected as a judge. However, the second law was much more controversial – it provided for, among other things, declaration of invalidity of all judgments of the Constitutional Tribunal issued with participation of so-called double-judges. Given sheer number of such

rulings and various effects they produced over the years, the consequences of the entry into force of such a provision could be dangerous. Moreover, neither the Government nor the Sejm presented a comprehensive analysis of such possible consequences. It is therefore hard to assess if politicians were actually aware of the scale of possible problems.

Eventually the law was referred by the President to the Constitutional Tribunal which declared its unconstitutionality, preventing its entry into force. Subsequently, the ruling coalition adopted a strange strategy of boycotting Tribunal by not publishing its judgments and not electing new judges to vacant seats. Not only were these two actions criticised by the Venice Commission, but it was also hard to discern what the Government wanted to achieve.

It is worth noting that failure to adopt the laws reforming the Constitutional Tribunal did not have to lead to a complete resignation from attempts to change the law. Leaving aside the problem of constitutional compromise, which I will address below, the Sejm could have considered changing its own internal rules which regulate the details concerning election of the Constitutional Tribunal judges. In 2024 the Marshal of the Sejm asked several Polish NGOs and bar associations for their opinions about the desired changes in the regulation of the Sejm concerning the process of election of Tribunal judges. Many organisations responded that a key change would be to increase the transparency of the process and to introduce some form of pre-selection of candidates for judges with participation of non-political, expert bodies. Some suggested also the increase of the majority required for electing a judge. It must be underlined that changes in the Sejm's Regulation could not be blocked by a President, who does not have a right of veto as regards this type of internal laws.

However, ultimately the Sejm ignored the suggestions and did not make any changes in its regulations.

In March 2026 the Sejm elected six new judges to the Constitutional Tribunal. Refraining from filling vacancies in the Tribunal for two years only to elect all judges on the same session violates the spirit of the Constitution and can be abused in the future to artificially "prolong" the terms of new judges. What was also problematic was that, while the election was legal, it was made in a hasty manner, without any meaningful consultations: there were only three days to nominate candidates, and the entire process took only three days.

The election of one judge in September 2026 raised even more controversies. A new judge, Maciej Berek, served as Minister in Donald Tusk Government just until August this year and the Prime Minister called him his right hand. It is hard not to see Berek's election as a form of hypocrisy, given that just two years earlier the ruling coalition wanted to introduce provision which would block the election of politicians to the Tribunal. However, the coalition explained that this election was necessary to fix the Tribunal, with one of its politicians comparing Berek to a "MMA (mixed martial arts) fighter" and a sheriff.

Therefore, I argue that some of the actions discussed above contradict the declared goal of the rule of law restoration – rather than rebuilding the legitimacy and credibility of the Constitutional Tribunal, they strengthen its perception as a political tool. Unfortunately, this discrepancy between declared goals of the ruling coalition and its actions is not limited to the Constitutional Tribunal alone.

This leads me to an important point: the reality is far more complex than the simplistic narrative spread by the current government about good liberals doing their best to fix the crisis while being thwarted by "bad guys".

What do we want to achieve?

Scheppele, Pech and Kisilowski argue that Korwin-Piotrowska's order is "an important – and necessary – step towards restoring the rule of law." I do not share this optimistic conclusion – not only because I have serious doubts about the legality of the order, but also because I do not believe that actions such as those can truly heal the Tribunal effectively and permanently. However, this issue is connected to another important problem, namely defining what is necessary to restore the rule of law.

The discussion about restoring the rule of law in Poland concentrates, in my opinion, excessively on whether it is permissible to break the law to restore the rule of law, and on how to use international and EU law creatively to reverse the negative effects of the harmful changes implemented by populists. In this regard, it is sometimes framed as a dispute between formalists who insist on compliance with a letter of law disregarding its spirit and non-formalists who advocate for a more creative interpretation of law. However, in my view, this distinction is based on an oversimplification.

The experience of the last three years in Poland proves that there are limits to what can be achieved through legal interpretation alone, even when leveraging EU and international law. While legal interpretation can help protect individual rights in specific cases, restoring entire institutions requires systemic action.

If we want to truly heal judicial institutions, our ultimate goal should not merely be their recapture, but rather rebuilding their legitimacy. This conclusion is valid also in the context of the Constitutional Tribunal, which, as an institution, can function properly only if its legitimacy is universally accepted. How can the Constitutional Tribunal safeguard the Constitution if only half of the society accepts its legality and believes in its independence and impartiality?

For this reason, I do not believe that Anna Korwin-Piotrowska can truly solve the crisis around the Constitutional Tribunal. Certainly, the Government will accept functioning of the "new" Tribunal, but the President, the opposition and large parts of the society will not. We cannot ignore the fact that both the order's questionable legality and the context in which it was issued do not positively affect the perception of the Tribunal's credibility. Moreover, following a future change of power, a new government would likely remove these judges and recapture the Tribunal – once again framing it as a necessary step to restore the rule of law.

The Value of the Compromise

Therefore, in my view, only a political compromise can create conditions in which the Constitutional Tribunal could finally be accepted by all actors in the domestic political scene and could start functioning normally. The state of internal war over judicial institutions in Poland must be stopped as soon as possible, because its continuation threatens the very foundations of the constitutional structure of the state.

I have to underline that by such a compromise I do not mean a political deal under which seats in the Tribunal will be divided between various political groups. A compromise solution, also known as "constitutional reset", envisages termination of terms of the incumbent judges and electing their successors in a new procedure, as proposed recently by Stefan Batory Foundation. This would ensure more pluralistic composition of the Tribunal and protect it against another instance of political capture.

It is, therefore, surprising to me that Scheppele, Pech and Kisilowski completely neglect the value of such a compromise. They even claim that by advocating for a compromise-based solution, the Helsinki Foundation "fails to give sufficient weight to the European judgments requiring the restoration of a lawfully constituted and independent Tribunal, something that would not be fulfilled by a political compromise." I cannot agree with this statement; quite the contrary – I believe that to implement European standards fully, we have to make necessary constitutional changes. In this regard, it is worth recalling that both the Council of Europe Committee of Ministers and the Venice Commission have emphasized the need to introduce measures "to prevent external undue influence on the appointment of judges".

The current model of election of the Constitutional Tribunal judges is deeply flawed. All judges are elected by the Sejm by a majority of votes. Therefore, the election process is more prone to politicization than, for example, election of Ombudsperson, where two organs, the Sejm and the Senate, have to reach a consensus. The sub-constitutional norms do not improve the situation. The Regulation of the Sejm provides that candidates for judges are nominated by the Sejm's Presidium or groups of 50 deputies. There is no transparent preselection process, no open competition, no involvement of the National Council of the

Judiciary etc. Ultimately, the decision of who should be nominated and elected can be made by a party leader. Given that terms of judges are nine years, if one party stays in power for two terms, it can usually elect all judges and, if it is guided by bad faith, capture the whole institution.

Political Reality

It is often argued that the scenario of a "constitutional reset" is just an illusion, a fantasy for the naïve, given that there are no realistic chances of its implementation. While I admit that the chances are slim, I have certain problems with such an approach.

If we assume *a priori* that compromise is impossible, we make it so. The basic precondition of a compromise is to enter into a dialogue with the other side, and if we assume that there is no sense in engaging in a dialogue, there will be no compromise. I could accept the conclusion that there are truly no chances at all for any meaningful constitutional compromise regarding the Constitutional Tribunal if there were some attempts of reaching it and all of them would fail. However, there were none.

Admittedly, in 2024, a group of senators of the ruling coalition submitted to the Senate a draft constitutional amendment envisaging termination of mandates of the incumbent judges, but this proposal definitely required further refinement and, at the moment, the legislative works over it are stalled. The draft was also critically assessed by the Venice Commission, however, as I explained elsewhere, not every form of "constitutional reset" must be inconsistent with international standards.

Moreover, currently the idea of a constitutional compromise is accepted by many NGOs and by some political groups. Just recently, eighteen organisations, representing various sectors and worldviews, signed an appeal calling for a reset of the Constitutional Tribunal. Some politicians also expressed their support for the idea. I do not think that it is fair to say that all of them are naïve or delusional.

However, one may ask what would happen if the compromise proved impossible. In this situation, the war over the Constitutional Tribunal would likely continue. We can expect that under Anna Korwin-Piotrowska's leadership the Tribunal will function better than under Bogdan Święczkowski. For instance, I believe cases will be allocated to judges more transparently, and the Tribunal will stop questioning EU law and the ECHR. Hopefully, it will also resist being used merely as a tool to bypass the President and focus on protecting human rights. However, as already mentioned, its legality and independence will remain to be questioned, and I do not believe that after the possible change of power it will be able to act as a check against the new government. The same tricks that were used to block its actions and recapture it from PiS-appointees could be used effectively to capture it again. In this situation, the Tribunal will become just a part of the system of spoils.

Concluding Remarks

The discussion of Judge Anna Korwin-Piotrowska's order is part of a longer debate over the rule-of-law restoration process in Poland. In 2026, three years after the current government's appointment and one year before the next parliamentary election, it is fair to conclude that this process has so far been largly unsuccessful, mainly because of political deadlock. In my view, this deadlock can be broken only through some form of political compromise, not through questionable actions that would contribute to a perpetual cycle of capturing and re-capturing state institutions.

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