Long-Term Repair Through Inevitable Compromise

Scholarly or Political Discussion?

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20.11.2026 doi: 10.59704/273968722a8e9eb6

Kim Lane Scheppele, Laurent Pech and Maciej Kisilowski retorted Marcin Szwed's response to their original blogpost on the controversy over restoring the legality of Poland's Constitutional Tribunal (CT). Unfortunately, the retort dismisses serious legal and social concerns regarding the CT and the need to find a long-term cross-party and cross-institutional compromise. While the authors rightly blame the PiS government for inflicting the systemic rule-of-law crisis, they overlook serious concerns regarding the incumbent government's actions and non-actions presented by Szwed. Finally, the retort unfairly associates Szwed's position to political criticism voiced by some unlawfully appointed Polish neo-judges and the European far right.

The problem with this combination is twofold: Szwed's critique is professional and admittedly "well-intentioned" one, while the others are interested in prolonging the captured judiciary. The latter are obviously not real addresses of the article in a constitutional law forum. Their inclusion in the critique may therefore, intentionally or unintentionally, cast their professional discussion partner in an unfavourable light. By suggesting that Szwed "joins the fray", the commented blog post might give the impression that his stance is far-right.

This seems all the more unnecessary since Szwed agrees with the trio that "the chaos in the judiciary was mostly created by PiS", and that President Nawrocki unlawfully obstructed the newly elected judges by refusing to receive their oaths protecting his political camp's interest. Also, Szwed intends to restore the rule of law, although ideally through a constitutional compromise. The trio raises the question of why PiS and Nawrocki would accept a "constitutional reset" now, while the existing arrangement remains heavily skewed in their favour. But they seem to overlook the fact that, following Judge Korwin-Piotrowska's intervention, judges elected by the current parliamentary majority now form a majority on the Tribunal. Moreover, on 17 November 2026, the General Assembly (GA) of CT Judges ordered Swieczkowski's suspension from official duties in connection with the criminal proceedings for which it had lifted his immunity (the same applies to Sochański). PiS can therefore no longer count on the expiry of the initial one-month suspension to bring about his return. Its remaining hope is to win next year's election and restore the unconstitutional situation. But of course, they cannot be sure of this, which can be a reason for them to accept a compromise. Currently, rather, the governing coalition seems to be in the position of not being willing to compromise, but an unlikely loss in the election may force them to aim for it as well. At the same time, as we explain later, the social pressure to find a constitutional compromise is on the rise. As recently as 16 November 2026, President Nawrocki, who had previously refused to swear in five judges, organised a cross-party roundtable to discuss potential solutions to the constitutional crisis. The discussions have continued for several days. The governing party and some of its coalition partners, however, have not attended these meetings.

Legal Basis, Legal Certainty and Missing Authority

While the trio and Szwed all want to restore the rule of law and repair the captured CT, they disagree on the legal basis on which this can be achieved. Scheppele, Pech and Kisilowski state that regardless of Korwin-Piotrowska's explanation, the leadership positions in the Tribunal were vacant. Instead, Szwed argues that Korwin-Piotrowska could not have assumed the posi-

tion of the CT President as the longest-serving judge and subsequently suspend the CT President and Vice-president, because the President position was not vacant.

The trio bases this conclusion primarily on the interpretation of European law and, to some extent, of the Polish Constitution. They cite CJEU case law requiring Polish courts, in certain circumstances, to treat judgments issued by unlawful courts as null and void. However, the scope of those rulings matters. First, they concerned judgments delivered with the participation of neo-judges of the Supreme Court (SC). "Neo-judges" here refers to individuals irregularly appointed as judges of ordinary, administrative, and apex courts by the captured National Council of the Judiciary. Differently, the trio explain in their post that they refer to these individuals as "pseudo-judges". Second, the CJEU links the obligation to treat a judgment as null and void to the particular procedural situation at issue and the need to ensure the primacy of EU law (see: *W.Ż.*), so the cited case law itself does not establish a general rule that all acts of an unlawfully composed body are null and void. A further question is how far this reasoning can extend to CT judgments delivered with the "double judges", namely judges elected by the PiS-dominated Sejm to three already occupied seats on the CT, whose participation in adjudication violates Convention standards and EU law. The trio argues that the CJEU and ECtHR case law allows judgments and leadership decisions involving irregularly appointed judges to be set aside. Here, they also, intentionally or otherwise, extend the term "pseudo-judges" to double judges in the CT. However, this creates a certain terminological inconsistency, since the captured National Council of the Judiciary played no role in the election of the CT double judges (as only the Sejm appoints CT judges).

For the actions taken within the CT and Święczkowski's status, however, the key issue is whether the case law on SC neo-judges can be applied to resolutions of the CT General Assembly. According to the trio, the mere participation of a double judge invalidates a GA resolution. Under Article 194(2) of the Polish Constitution, the GA proposes candidates for the office of CT President to the President of the Republic. The trio appears to argue that the GA could not validly propose candidates with double judges participating, because, in that composition, it was not the body referred to in that provision. Moreover, they rely on the CJEU judgment concerning Święczkowski's predecessor, Julia Przyłębska, as CT President. In Szwed's view, however, this conclusion cannot be straightforwardly extended to Święczkowski's selection, given the procedural differences between the two cases.

The issue deserves fuller consideration than a few sentences in a blog post, but we would like to highlight only one crucial difference. Just six judges, including three double judges, participated in the December 2016 vote to select candidates for the CT President, as addressed in the CJEU judgment. Przyłębska received five votes. As the CJEU explains in paragraph 288, she therefore cannot be regarded as having lawfully obtained the required support, since double judges must also have voted for her. By contrast, thirteen judges, including two double judges, participated in Święczkowski's selection procedure. According to media reports, Sochański received six votes and Święczkowski four. The secret ballot leaves open the possibility that all four votes for Święczkowski came from lawfully elected judges.

The trio, however, rejects reasoning based solely on arithmetic. In their view, the mere participation of double judges in the GA makes the nomination resolution *prima facie* invalid, regardless of whether their votes were decisive. As they argue: "members of a deliberative body do not simply vote. They influence nominations, participate in discussions, persuade colleagues, and shape the available choices."

In our view, treating GA resolutions as *a priori* invalid solely because double judges participated raises doubts. First, neither the CJEU nor the ECtHR case law expressly establishes that an unauthorised person's participation in the GA invariably invalidates the appointment of the CT President. The CJEU judgment concerns Poland's failure to meet the requirement of an independent tribunal stemming from Art. 19(1) TEU. It does not, however, determine who validly

assumed the office of CT President or whether an appointment can be declared invalid in general and abstract terms.

Święczkowski's appointment may well have been defective. Nevertheless, in our view, those relying on this judgment to conclude that he never assumed office need to explain why the participation of two unauthorised persons is sufficient to render the nomination ineffective, regardless of the conduct of votes, and, more importantly, who has the authority to draw from that defect the consequence that the office is vacant. Under both domestic and European law, we see no alternative to such a determination being made by an independent and impartial national court in the particular procedural situation at issue, or by an international tribunal.

Moreover, one may consider how far the authors' argument about the composition of the GA extends. Does it apply only to the GA's nomination of candidates for the CT presidency, as in the cases of Przyłębska and Święczkowski? Or is every resolution adopted with the participation of double judges *prima facie* invalid, regardless of its subject matter or the circumstances of its adoption?

Consider the case of Krystyna Pawłowicz, a former PiS MP elected to the CT. She applied to the GA for early retirement on medical grounds. The GA granted her request and set 5 December 2025 as the date on which her judicial term would end. If the participation of double judges in the adoption of the GA resolution concerning her retirement is confirmed, one must ask whether the trio would also regard that resolution as *prima facie* invalid. If so, did Pawłowicz's seat become vacant on that date, and was the current Sejm entitled to fill it? The answer could in turn affect the composition of the GA convened by Judge Korwin-Piotrowska. There may be good reasons to distinguish the GA's constitutional role in nominating candidates for the CT presidency from its statutory role in deciding a judge's request for retirement on medical grounds. What needs explaining is why a defect in the GA's composition would have different legal consequences in the two cases.

Finally, when assessing the position adopted by Korwin-Piotrowska, it is significant that she treats Święczkowski as CT President in her orders. As the two of us have shown earlier, the reasoning behind those orders does not rest on the categorical premise that Święczkowski's appointment was ineffective and the office remained vacant. This, itself, does not settle the question of the validity of his appointment, but it matters for the analysis of the legal bases and internal consistency of Korwin-Piotrowska's actions.

Therefore, we disagree with the trio's statement that Szwed – with his legal concerns – recognizes unlawful officeholders and their decisions. When he warns of the potentially dangerous consequences of the government's 2024 legislative proposal to invalidate by law all Tribunal decisions issued with the participation of double judges, without case-by-case judicial review, he rightly refers to the danger of violating legal certainty. What's more, the Venice Commission itself raised similar concerns. We are convinced that legal certainty is a basic element of both national and European rule of law, the principle of which can only be violated in an exceptional, temporary and proportional manner serving the restoration of the rule of law.

Beyond Blanket Invalidation: Missing Proceedings

The second problem goes beyond mere legal certainty and the need to ensure primacy of EU law. It regards the legal and social effects of declaring all the "irregular" CT judgments null and void. The CT composed of double judges rendered decisions that were obviously advancing social rights of some people. Moreover, even though these decisions were not published, ordinary courts did use the CT judgments to grant rights to citizens. First, the CT ruled that the statutory exclusion of the right to care payments for those receiving a disability pension who simultaneously provide care for a disabled person was unconstitutional. Second, the CT determined that paying attorneys-in-law and legal advisors differently for their legal help was unlawful. Lastly, the CT determined that the statute's preservation of citizens' faith in the state was violated by a pension scheme that would significantly reduce the

pensioners' payments if they retired early. Many regular courts indirectly relied on this last CT ruling to grant the individual pensioners the right to compensation, even though the decision was not promulgated by the Prime Minister in the Journal of Laws. Therefore, voiding the CT decisions needs to be carefully balanced with securing the legal effects of these exemplary decisions, for instance by implementing appopriate statutes regulating the issues. Precisely to preserve both legal certainty and the (positive) effects of the "irregularly" issued CT judgments, some actors, including the Helsinki Foundation and the Polish Ombudsman, called for a different reassessment of the "irregular" CT decisions. Instead of declaring them all null and void, the possibility of reopening a proceeding before the regularly composed CT is suggested. This would, however, require a change of the procedure before the CT, as currently such a remedy does not exist under Polish law.

Good Intentions

The academic debate over the Polish CT raises a broader question about the role of academics in commenting on current events. Marcin Szwed, who has been accused of "false symmetry", identifies decisions by Donald Tusk's government and the current parliamentary majority that raise serious legal concerns. Crucially, he does not equate PiS's actions with those of the current governing coalition. We also consider the scale of the damage inflicted on the judiciary and the rule of law under PiS to have been unparalleled. Yet, almost three years after PiS lost power, the academics committed to restoring the rule of law must not uncritically accept the current government's actions.

As Szwed notes, the government has halted publication of CT judgments. Refusing to publish judgments does not solve problems related to the social consequences, as explained above. Then Prime Minister Beata Szydło's refusal to publish CT judgments was itself part of the crisis. That refusal was unlawful because the executive had no authority to assess the validity of the Tribunal's judgments. PiS acted in bad faith, and the then Prime Minister's refusal to publish judgments served to accelerate the capture of the institution. The current majority's objective is to restore the rule of law in Poland. But we believe that it cannot be credited with good intentions categorically in every instance.

The current majority left CT seats vacant as individual terms expired and then filled them all at once in March 2026. As Szwed notes, the election of seven judges took just three days. This runs counter to the constitutional logic of individual terms of office and makes it easier for a majority to "capture" the Tribunal within a single parliamentary term. The Sejm also rejected amendments to its own internal rules that would have made the CT judges' election procedure more transparent and provide institutional balance between different appointing bodies. The Sejm retrieved renumeration of all the sitting judges appointed under PiS but maintained the salaries of the retired CT judges. Finally, Maciej Berek, the eighth constitutional judge appointed in September 2026, was one of the governmental ministers closest to Donald Tusk. This appointment has been criticized even by the former Minister of Justice in the Tusk government, Adam Bodnar.

Szwed is thus right to question how far the majority's actions can be reconciled with its declared intentions. Its record on migration and asylum raises similar concerns. Tusk signed an unprecedented letter calling on the ECtHR to revise its case law in this area. He also publicly raised the need to amend the Convention and the possibility of Poland's withdrawal. The parliamentary majority adopted legislation allowing the government to temporarily suspend the right to lodge asylum applications. Critics argue that this measure flagrantly contravenes international law and European standards.

Feasible Compromise

Finally, the trio dismisses Szwed's mention of the appeal of 18 NGOs from diverse ideological strands that calls for a viable constitutional reset. An owner of one of the biggest football clubs invited socially engaged citizens to join him in the proposal for the CT restoration. In this context, it is difficult to accept the

statement that "lawful action need not obstruct compromise and may actually help create its preconditions" and that actions that increase polarization may constitute a basis for the future compromise. According to Maria Skóra, a poll conducted in an immediate aftermath of the 30 October events shows that vast majority of Poles (61%) does not trust the CT – the very same percentage as in 2024. Therefore, the retaking of the CT would be a poor basis for building a stable institution for the long term.

Szwed poses the right question: "How can the Constitutional Tribunal safeguard the Constitution if only half of the society accepts its legality and believes in its independence and impartiality?" We should think of rebuilding the CT for the generations, not until the next elections. "The rule of law is not a right of its violators to remain in control of the institutions they captured," says the trio. But in our view, it is neither a right to force a solution that further polarizes the society.

We are convinced that all participants in the debate on the Polish Constitutional Tribunal on Verfassungsblog genuinely share the aim of contributing to the restoration of the rule of law. And indeed, as the trio has pointed out, Korwin-Piotrowska's actions created the preconditions for a compromise. Now is the time to call for one.

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SUGGESTED CITATION

Halmai, Gábor; Krzyżanowska, Katarzyna; Schultz, Andrzej: Long-Term Repair Through Inevitable Compromise: Scholarly or Political Discussion?, Verfassungsblog, 20.11.2026, doi: 10.59704/273968722a8e9eb6.

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