Living under the unconstitutional capture and hoping for the constitutional recapture

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A new "unconstitutional order" takes shape in Poland. The ritual dance to placate the public and create an impression that finally the judges of the old regime have been taken care of, continues. The message is clear: The last 25 years, according to the Law and Justice Party (PIS), have been nothing but petrification of the status quo and finally things will get back to normal, we are giving you back a true court that will defend the oppressed and forgotten. This is the rhetoric in a nutshell. It has been informing every step taken by the ruling party in its quest to cripple the constitutional review and tame the constitutional court.

In the wake of December "taking over" of the Constitutional Tribunal, PIS has now 7 judges. However, with the abrupt resignation of judge Andrzej Wróbel and his decision to move back to the Supreme Court, PIS will get another opportunity to elect a judge. That will bring the total to 8 and will give the ruling party a majority on the bench (5 + 3 "fake" judges). The current Vice-President (a function that has its legal basis in the Constitution) has been marginalised when the temporary President (a function unknown to the Constitution) J. Przyłębska took over for a day and then was sworn in by the President of the Republic. Importantly, she was appointed by the 6 PIS-backed judges sitting on the General Assembly. It is to be remembered here that an uproar has been created early in December last year, when the 9 "old" judges had sent the candidates for the Presidency to the President of the Republic. This was rejected then as unconstitutional by the President of the Republic because, the argument went, it was illegal as the quorum of 10 judges has not been reached. What a difference a day makes, one might say. 9 judges were not enough yesterday, 6 judges suffice today! Double standards at their best.

More crucially though, among the 6 judges that voted for Przyłębska, were 3 "fake" judges who had been elected to the Tribunal unconstitutionally in December 2015. These three judges have been allowed on the bench by Przyłebska minutes after she has been anointed as the temporary President of the Tribunal. As a result "the General Assembly of 6" was vitiated by unconstitutionality: the"fake" judges should be debarred from taking any valid actions. The vote with their participation is simply non-existent. The fact that it has created legal effects (election of the President) had more to do with the sheer political power behind the unconstitutional scheme, rather than with the power of law.

This situation has the potential of derailing the judicial review in Poland long-term as any future decisions taken by the Tribunal with the "fake" judges sitting on the cases will be marred by invalidity. Polish law (Code on Civil Procedure which is applicable mutatis mutandis to the Constitutional Tribunal in the absence of more specific regulation) provides for the invalidity of the proceedings when, among other things, the court is not properly constituted. This is the case here. Regular judges will now have a valid claim not to abide by such decisions. Should they decide to follow decisions made with the participation of, or by, "fake" judges, their own proceedings will be vitiated by invalidity ... The Minister of Justice did not waste time and threatened that ordinary judges who refuse to follow the rulings of the "new" constitutional court staffed by judges loyal to PIS, will be prosecuted. Welcome to Poland A.D. 2017.

These are all dramatic consequences entailed by the change in constitutional narrative in Poland and

the emerging dualism of constitutionality. PIS lives in its own constitutional world in which manipulation and legal instrumentalisation prevail. The end always justifies the means and no means are too pervert as long as they bring about desired political goods. All this begs the question: What now? Are we doomed to helplessly watching the new unconstitutional narrative take the reins?

"Constitutional Recapture": What's in a name ?

I have already argued in favour of the emergency review by ordinary courts1 and the Supreme Court, exercised in order to uphold the Constitution in their day-to-day adjudication2. With the constitutional review in tatters, the Tribunal staffed with subservient judges and presided over by a person whose constitutional credentials are, to say the least, constitutionally suspicious, such review takes on even more urgency. It must become part of the "constitutional recapture".

"Constitutional recapture" is the antithesis of "unconstitutional capture". It is a generic term resorted to in order to win back the respect for constitutional essentials and to ensure the integrity of the constitutional document. "Constitutional recapture" as understood here is a necessary response to the relentless and no-holds-barred politics of the parliamentary majority of the day.

My "constitutional recapture" is firmly rooted in Polish 1997 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 Constitution), the rule of law 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 the judgments of the Tribunal universally binding and final (Art. 190). Last but not least, the demos has recognised the direct application of the Constitution (Art. 8(2)). Having done all that, the demos must then accept that courts will be ready to take these systemic features seriously and rule against the instrumental politics of the day. Their response must have at its core defence 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 what they are sworn to do. No more, no less. The question remains: how?

The assumption that underpins the centralised model of constitutional review is that review exercised by the Tribunal is operational and effective. What if that is not so? There is a strong argument to be made that the refusal by an ordinary court to apply the statute would not necessarily infringe the review powers of the Tribunal. One could argue plausibly a review exercised by an ordinary court is limited and deals only with the case at hand. In other words, it is in concreto review as opposed to in abstracto review by the Tribunal. The latter deals with the law with an erga omnes effect and removes the unconstitutional provision from "legal circulation", thus acting more in the spirit of a quasi chamber of the Parliament, whereas ordinary courts are in charge of the administration of justice in individual cases. Depending on the circumstance of each and every case, direct application of the Constitution could range from parallel application of the statute and the Constitution to self-standing application of the Constitution. When constitutional review faces systemic and permanent dysfunction for whatever reasons, emergency review must be resorted to. Such review is defined by complementarity vis-à-vis the Tribunal's power of review. It accompanies, and runs in parallel with, the Tribunal's constitutional review, and does not replace it. Such review is instrumental to securing respect for the Constitution's status as the supreme law of the land. Constitutional defiance by the parliamentary majority must be countered by intra-constitutional resilience and trigger self-defending mechanisms from within the Constitutional text. It is important to make clear here that my call for "emergency constitutional review" by the ordinary courts does not question the Tribunal's monopoly of constitutional review, but is in order to shield the constitutional order from being further weakened and disassembled.

My argument in favour of domestic "emergency constitutional review" by the ordinary courts is further reinforced by the system of decentralised 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 centralised model of constitutional review. Moreover, it was even accepted by the Tribunal when it held in Case P 37/05: "National courts shall not only be authorised, 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 effect3 and supremacy4 constructed by the ECJ, which constitute true building blocks of the new legal order to which EU law aspires. As for enforcement, EU law looks to a national court entrusted with overseeing the full effect of the provisions of EU law, if necessary refusing of its own motion to apply any conflicting provision of domestic legislation: "it is not necessary for the court to request or await the prior setting aside of such provision by legislative or other constitutional means".5 National courts are called on to disregard any provision of domestic law (on the ECJ reading of supremacy, its scope is all-encompassing as it catches "any" provision of domestic law, be it constitutional, statutory, substatutory or administrative decisions) inconsistent with EU law and without waiting for the constitutional court to take a stand on the conflict. Each court of a Member State has the power of judicial review of national legislation in cases pending before it. Judicial review is limited to disapplication of conflicting domestic law in concreto in order to ensure the effet utile of EU law "here and now". The constitutional court retains the power to declare such legislation null and void in abstracto or the national parliaments to modify the legislation to make it compatible with relevant EU law.

This judicial review is not exceptional, but rather forms the backbone of the EU legal system and is exercised by national courts on a daily basis. All of this has already recalibrated the role of European constitutional courts, and supremacy of EU law 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 decentralised, or, as one author argued, "americanised".6 It is important to bear the EU law mechanism in mind, as it strengthens my argument in favour of "emergency judicial review" exercised by Polish courts with regard to domestic law inconsistent with Poland's Constitution. "Emergency judicial review" would entail the loss by the Tribunal of its constitutional monopoly over statutes. In exceptional situations, the review of the statutes' constitutionality might be exercised by the ordinary courts. Such review would be an extension to national law of the decentralised enforcement already forming part of the EU mandate of Polish courts since 2004. Last but not least, this EU-based decentralised review must take on even greater importance now. With the Tribunal gone and the Constitution being short-circuited at every turn, it is also time for the Charter of Fundamental Rights to play more prominent role as important adjudicatory benchmark. The Charter could be seen as a compensatory legal instrument and pick up where the Constitution left off. With the permanent incapacitation of the Tribunal, Polish courts could use more vigorously art. 267 of the Treaty on the Functioning of the European Union and send more references for preliminary rulings to the Court of Justice. These are all challenges that "constitutional recapture" brings about.

"Constitutional recapture". Myth, dream or … necessity?

Why and how does it all matter now? The constitutional review has been called "emergency" because it should be triggered by the exceptional circumstances and yet "the exceptional" becomes a norm in Poland these days. Such review must be exercised with caution and restraint, and be limited to egregious breaches of constitutional standards and rights. The governing majority in Poland should be aware that there are constitutional limits to their democratic mandate and it is the courts' province to set down these limits and enforce them in a judicious manner. Constitutional recapture backed up by the "emergency constitutional

review" falls into the "judgment category" and must seen as a democratic constraint on the will of the majority, as the manifestation of constitutional self-defence. 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, is now a priority of the highest order, where "operational", means treating the Constitution by the courts as part of the law that they are bound to apply and on which they must build their decisions7.

Today the question is no longer whether such review is warranted, but rather whether ordinary judges would be willing, and able, to accept their new role, and, whether the judicial empowerment will trickle down to the lower courts? If there is one lesson to be learnt from the landmark US Supreme Court case *Marbury*, it is the "principle 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 internalise this message, "constitutional recapture" of the rule of law will at least be given a chance. For such "recapture" to succeed, judges must respond. As of this writing nobody really knows this. Only time will tell. One is beyond doubt: Polish judges are faced with the most fundamental challenge post-1989. Are they ready to be constitutional judges in times of constitutional emergency?

1 By "court" I mean the courts entrusted with the administration of justice and defined in Art. 175(2) of the Polish Constitution.

2 For full exposition of the argument see my Of institutions, democracy, constitutional self-defence and the rule of law: The judgments of the Polish Constitutional Tribunal in Cases K 34/15, K 35/15 and beyond, (2016) 53 Common Market Law Review 1753.

3 Case 26/62, Van Gend en Loos v. Netherlands Inland Revenue Administration, [1963] ECR 1.

4 Case 6/64, Flaminio Costa v. E.N.E.L., [1964] ECR 66.

5 Case 106/77, Amministrazione delle Finanze dello Stato v. Simmenthal SpA., [1978] ECR 49, para 24.

6 V. F. Comella, Constitutional Courts and Democratic values (Yale University Press, 2009), at p. 126, (inverted commas in original).

7 Even before the final demise of the Tribunal, there have been signs that such a development had been already taking place. On 17 March 2016, the Polish Supreme Court delivered a judgment in which it declared unconstitutional one of the provisions of the Tax Code. Case V CSK 377/15 (judgment of 17 March 2016). More on the case at <www.lex.pl/czytaj/-/artykul/sad-narcoses-stwierdzil-niekonstytucyjnosc-przepisu-bo-tk-w-kryzysie>. Importantly, the Supreme Administrative Court followed the Supreme Court in this regard. In one of its most recent judgments, it quashed a judgment of the lower court and instructed it to take into account the unpublished judgment of the Constitutional Tribunal of 28 June 2016 in Case SK 31/14.

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