The Court is dead, long live the courts? On judicial review in Poland in 2017 and „judicial space" beyond

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What started in 2015 as "court packing", transformed in 2016 into an all-out attack on the judicial review and checks and balances, and ended with full-blown constitutional *coup d'état* and destruction of the independent constitutional review in Poland. The attack has been unprecedented in scope, efficiency and intensity. It has never been premised on a dissatisfaction with the overall performance, or particular acts of, the Polish Constitutional Court („the Court"), but rather struck at its very existence. The Court, once proud institution, and effective check on the will of the majority, entered 2017 as a shell of its former self, bruised and covered with constitutional scars.

What, and how, happened in 2016 has long-term effect, not only on the legitimacy of the institution, but also on the very constitutionality of the „decisions" rendered by the "new" court in 2017. Together these two concerns raise most fundamental question: *how the destruction of the Court impacts on the ordinary judges?*

2017 in retrospect

There are five lasting scars that transformed the institutional identity of the Court in 2017 and beyond. *First*, the Court is composed of judges that have been elected unconstitutionally and forced on the bench by the parliamentary majority per *fas et nefas*. At least three of the current judges should have never been sworn in the by the President since there was no vacancy on the bench at the time of their "appointment". Unfortunately, blunt political power prevailed over the law.

Second, despite the unconstitutionality of their mandate, these judges have not only been sitting on the cases decided by the Court in 2017, but they have also validated now *post facto* their own election to the Court. One of them became Vice-President of the Court.

Third, the new President of the Court – Judge J. Przyłębska – has been elected (or rather rushed in) to be President of the Court, and then sworn in by the President of the Republic, in clear violations of applicable rules.

Fourth, the intricate statutory schemes (on this, see here and here) adopted by the new majority in 2016 brought the Court to heel and paralyzed its day-to-day functioning. Cases are decided *in camera*. The assignment of cases to individual judges is opaque and depends on the whim and caprice of a fake President. She tailors the composition of the bench to the political importance of cases. The more important the case from the perspective of political majority, the more likely that it will be heard exclusively by judges selected by the new parliament. The Court decides less and less cases, as the cloud of unconstitutionality hangs over its decisions. Over the course of 2017 the new judges have repeatedly shown that they see themselves as an extension of the will of the Parliament.

Fifth, unwanted judgments of "pre-2017 Court" have been removed from the Court's website. Indeed, an Orwellian world in the middle of the EU. What was once unthinkable has happened and become the new normal of Polish quasi-constitutionalism.

From „existential" to „subversive" jurisprudence

There is a quality difference between 2015/2016 and 2017. 2015/2016 was constitutionally important with the Court fighting off the political assault and building important „existential jurisprudence" centered around the rule of law, independence of the judiciary and separation of powers. 2017 saw a new face of constitutional review. When the Court was finally taken over by

the ruling party, Polish politics of resentment entered into a new phase: consolidating the grip on the captured state: media, ordinary courts, Supreme Court, National Court of the Judiciary. The list goes on.

A fake Court with loyal judges in place, and led by a „fake President", was entrusted a crucial role in the process. Looking back on 2017, one can see, using Ziblatt's and Levitzky's evocative metaphor, how „capturing of the referees" entails three interconnected processes: i) weaponising the judicial review, and using it against the opposition; ii) instrumentalizing the constitutional review in the process of implementing the political agenda; and finally, iii) judicial rubber-stamping of all unconstitutional schemes placed before the Court by the ruling majority.

As a result, the „existential jurisprudence" (on the term see also here) of 2015-2016 has been transformed into „subversive jurisprudence". The latter is focused on sanctioning the destruction of the last remaining elements of the rule of law in Poland. The fake Court has been used in a legislative scheme to bring down a constitutional body – the National Council of the Judiciary Council – and replace it with government loyalists, to prepare ground for the hostile takeover of the Supreme Court, and, yes, to finally sanction the capture of the judicial review by deciding that three unconstitutional judges were constitutional after all. Of course the fake judges were sitting and deciding in their own case. In all these cases, the new Court has played its new role to perfection and delivered in accordance with the expectations of its political masters. Welcome to Polish version of the constitutional review A.D. 2017.

What about the judges, then ?

„Existential jurisprudence" of the Court still has a role to play, even if only symbolic. The latter is important because as T. Ginsburg has rightly argued: "*Only when there is agreement on what constitutes a violation and mutual expectations that citizens will in fact enforce the rules will democracy emerge and be sustained [...] in some limited conditions, court decisions can survive as focal points in helping citizens coordinate, and force the autocracy to liberalize [...] a court decision can provide clarity as to what constitutes a violation of the rules by the government. [...]*". As important as it is, symbolic jurisprudence is not enough, though.

The fascinating problem of judicial resistance has been in vogue recently. Yet resistance by judges takes on a special meaning when the discussion turns not simply around laws that are unjust, but rather 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" in a systemic sense. I agree with professor A. Barak that *„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*". We must also ask, then, what happens to judges facing laws that undermine the democratic credentials of the state? Here, A. Barak continues on more ominous note: "*[...] 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*".

How should then Polish judges respond, now that the Court is being used in the day-to-day politics, and keeps delivering goods for its political masters?

We have to be unequivocal here. Any future decisions taken by the „fake Court" with the "fake" judges sitting on the cases will be marred by invalidity. The

ordinary judges will have a valid claim not to follow these rulings. Should they decide to follow decisions made with the participation of, or made 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 the ruling party, will be prosecuted. These are all dramatic consequences entailed by the change in constitutional narrative in Poland. What Poland needs today is the constitutional jurisprudence of ordinary courts that counter the unconstitutional activities and existence of the fake constitutional court.

Such „emergency constitutional review" does not respond simply to legal change, or to tension between the branches. It staves off a systemic revolution brought about by an unconstitutional capture of institutions. 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 as part of the classical separation of powers (parliament legislates, the executive implements, judges apply the law).

Should we agree with this narrative, we would be in fact allowing the enemies of democracy to dictate their skewed understanding of the separation of powers. When constitutional review faces systemic and permanent dysfunction for whatever reasons, emergency review by ordinary judges must be resorted to. Such review is defined by complementarity vis-a-vis the Court's power of review. It accompanies, and runs in parallel with, the Court'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 our call for "emergency constitutional review" by the ordinary courts does not question the Court's monopoly of constitutional review, but rather aims at shielding the constitutional order from being further weakened and disassembled. Emergency judicial review plays an important mobilizing role. It can act as a catalyst function for pro-democracy initiatives, bringing a sense of vindication and recognition to those who oppose the mainstream anti-democratic politics and who demand a return to respecting democratic values. "Calling a spade a spade" by the judiciary would provide a crucial focal point of societal resistance and act as a source of constitutional fidelity. Judicial pronouncement in defense of the constitutional order would transform into a symbolic point of reference as a source of loyalty to the oppressed constitutional values. Clarity about the constitutional state of play and constitutional interpretation would help us moving forward.

„Judicial space". Is there some left ?

As a result, the relevant question today is no longer whether emergency review (for the full argument see here) is warranted, but rather whether ordinary judges would be willing to accept their new role. The judges are faced with the most dramatic choice and dilemma here: either to fall in line and bury their heads in the sand by applying the rulings of the „new" Court that are vitiated by unconstitutionality, or face up to their own mandate of being bound only „by the statute and the Constitution", and apply directly the constitution (not the suspicious decisions of the "new" Court) instead.

What about the cases in which a decision was taken by the fake constitutional judges, but is in favor of an individual? An example of such a situation is provided by a rare „routine" cases 37/15 decided by the Court on December, 20, 2017. Even though, the Court's came down in favour of the constitutional right to a fair trial and and access to court, the case was decided with the participation of unconstitutional judges. The administrative judges will thus now face a choice:

follow the judgment, knowing that it might risk the validity of their own proceedings, or, follow constitutional principles, and derive protection for the entrepreneurs directly from the text of the Constitution, rather than from a constitutionally doubtful judgment (For bringing this case to my attention, I am grateful to D. Dominik-Ogińska, Judge of the Regional Administrative Court in Wrocław). Should an ordinary judge follow such a decision and protect individual rights? Framing its decision in terms of the Constitution could, at least, create an impression that a judge follows the Constitution, not the decision itself. At times it might be difficult to discern where the Constitution starts, and the invalid decision stops, and vice versa.

These concerns and challenges go beyond the normative. They raise fundamental questions of judicial ethos. There is no ready-to-use formula to address them *in abstracto* for each and every case. Each judge in his own consciousness will have to decide how to decide, have courage to defend the humiliated Constitution, and, most importantly, be ready to face the consequences.

Polish judges might not even fully realise that right now they face the most fundamental challenge post-1989. The legislation might have been already passed to bring the judiciary to heel. The National Council for the Judiciary had been captured. We know all this. My argument here is different. At the end of the day institutions are about people sitting on them, not the other way around. I repeat after O. Kirchheimer who in his classic 1961 book „Political Justice" argued: *„As long as the institution persists, the ‚judicial space', though it may be reduced, cannot be completely abolished*". Judicial space survives the institutions as long as there will be judges willing to deliver justice according to the law, rather then political exigency. Judges who believe that judging is not just a profession, but rather a way of life. Judges who swear their allegiance to the Constitution, and not to any transient political power. Judges who put aside short-term calculations and who understand that the importance of independent adjudication transcends the moment and fleeting expectations of „here and now". Judges who understand that one day, they will be asked: How did you decide when things had not been going as planned? Did you have the courage and strength to say ‚no' when everybody around said ‚yes'?

Without a robust and vibrant judicial space, even the strongest institutions must perish. While politicians might take away institutional paraphernalia and capture the institutions, they will never succeed in taking ownership of „the judicial space" of a true judge. This is so because judicial space belongs to each, and every judge. He is the master of his own space, and the court room is his kingdom, no matter what political masters say and do at any given moment.

However, in order to deliver on the promise of the ethos, a judge must never forget, that his judicial space will only last as long as he feels a strong commitment to the constitutional document, to the law he is bound to apply, and to the people he is obligated to protect. Every time he is ready to stand up for his judicial space and protect it, he passes the most difficult of exams – an exam of decency. If there is one thing authoritarians are afraid of, this is it: a „judicial space", a true reservoir of judicial independence, courage and constitutional fidelity.

No matter how hard authoritarians try, they will never capture this innermost and most cherished aspect of the judicial craft. What does the future hold, then? It will be marked either by emergency constitutional review by ordinary judges and growing judicial space of independent judging against all odds, or … (let's hope not) their abdication in the face of constitutional emergency. In the latter case, there will nothing left to write about in 2017, except for new episodes in the constitutional debacle, and the fake Court's shameful role in the process. In Poland today, the „body" of the institutions has been already taken over by the political. The fates of the „soul" and the „judicial space" remain yet unknown. Time can only tell what happens to them… This is a question every judge must keep asking himself right now.

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