CONSTITUTIONAL DESIGN: LESSONS FROM POLAND'S DEMOCRATIC BACKSLIDING

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ABSTRACT

This article begins with a reflection on whether there had been a proper constitutional "design" in the case of Poland, considering the path-dependence and contingencies of the current constitutional setup. It then provides an account of certain patterns of constitutional *breaches* that have been commonplace since 2015, and that render reflections on the resilience of constitutional design problematic. A case study of one institution follows, namely of the Constitutional Tribunal, and it demonstrates how the authorities managed to convert it (basically, with no formal changes in its institutional design) into an active and enthusiastic helper of the legislative majority and executive. More general observations are offered on the relationship between constitutional design and the "human factor" occasioned by Polish democratic backsliding, and on the possibility for "institutional self-defense" within democratic constitutional design. The article concludes that formal institutions must be underwritten by norms which are by-and-large shared, and by common understandings about what counts as a norm violation, even if formal legal rules are silent about it.

KEYWORDS: *constitutional design, constitutional theory, Poland, Constitutional Tribunal, unwritten norms*

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Concluding his masterful treatment of the various approaches taken in different legal systems to what he dubs "checking apex criminality," Aziz Huq observes that there are clear limits to what institutional design can achieve and that while institutions *may* of course shape political culture, their health depends on the "shared understandings and dispositions" of its participants (Huq 2018, 1530). In a passage worth citing at length, Huq concludes:

> Political culture—the network of dispositions and incentives that form the wellsprings of political action— . . . may rest on institutions, but the health of those institutions is a function not just of savvy design but also a persisting commitment to the exercise of good judgment. . . . However mediated and strengthened by institutional design democracy might be, this implies the robustness of democratic institutions under the rule of law cannot be disentangled from the character and motivations of those elected or appointed to high office. (Huq 2018, 1530)

Huq's conclusions are fully vindicated by the case study in this article, which considers the inability of otherwise reasonably well-designed institutions to arrest the erosion of democracy and the rule of law by strongly determined and widely popular autocrats. This case study examines Poland post-2015. Once a leader in postcommunist democratization, following double elections (presidential and parliamentary) held in 2015 Poland has been subjected to a comprehensive and largely successful assault on its fundamental constitutional institutions by the victorious party, Law and Justice (the Polish acronym PiS will be used here) and its strong leader, Jarosław Kaczyński.[2] Paralleling similar developments in Hungary initiated some five years earlier, under Kaczyński's rule PiS paralyzed the Constitutional Tribunal (CT); subjected the National Council of Judiciary (Krajowa Rada Sądownictwa, or KRS), responsible for all judicial appointments, to the will of the ruling party by making nearly all its members appointable by the parliament; greatly weakened the Supreme Court by restructuring it in ways that helped the ruling party elect a number of new judges (via the new KRS); redesigned electoral institutions in such ways as to make them controllable by administration—and more. All this occurred without any formal constitutional amendments even though the changes fundamentally altered Poland's constitutional design. This design was neither formally altered nor was it complied with by the new rulers when they encountered institutional obstacles to their ruthless consolidation of power. What was faulty was not institutional design—which of course could have been more resilient—but, to cite Huq, "the character and motivations of those elected or appointed to high office" (Huq 2018, 1530).

2. For a book-length account, see Sadurski (2019), on which many parts of this article are closely based.

These observations resonate largely with the conclusions of this article. I will begin with a short reflection on whether we can, in the first place, talk about constitutional design in the case of Poland, considering the path dependence and contingencies of the current constitutional setup (Part 1). I will then provide an account of certain patterns of constitutional *breaches* that have been commonplace since 2015 and that render reflections on the resilience of constitutional design problematic (Part 2). I will then discuss a case study of one institution I deem particularly important for Poland's constitutional system, namely, the Constitutional Tribunal, and explain how the authorities managed to convert it (basically, with no formal changes in its institutional design) into an active and enthusiastic helper of the legislative majority and executive (Part 3). I will then offer more general observations on the relationship between constitutional design and the "human factor" occasioned by Polish democratic backsliding (Part 4), and I will reflect on the possibility for "institutional self-defense" within democratic constitutional design (Part 5). Conclusions will follow.

1. WAS IT A DESIGN?

At the outset, a note is needed about the concept of constitutional design in Poland as provided for in the 1997 Constitution (currently in force). As many authors have noted, "constitutional design" implies a rationalist, constructivist enterprise wherein new institutions are imagined, with their pros and cons carefully considered, and the optimal design choices are made. This picture is unrealistic with regard to most, if not all, constitutions. The idea of a "single institutional designer" sitting down "in a single moment of synoptic rationality" (Gardbaum and Pildes 2018, 657) to create the perfect mix of institutions is obviously laughable. Distinguished constitutional scholar Sanford Levinson's significantly titled article "On the Inevitability of Constitutional Design" nevertheless argues against overestimating "the role of 'rationality' even in what might appear to be the most meticulous design process," because the reality of crafting the US Constitution involved compromises and "at least as much of hard-driving 'bargaining' and deal-making based far more on the rational assessment of threats issued by the parties" (Levinson 2016, 255).

Nowhere is this more evident than in Poland. All the main features of the constitutional compromise of 1997, including semi-presidentialism, bicameralism, and robust judicial review by a Kelsenian constitutional court have in fact been prefigured by the purely pragmatic, contingent, and context-sensitive political compromise of 1989, when communist rules and democratic opposition hammered out a bargain at the "Round Table". For instance, the Polish Senate—grandiosely presented later in 1997 as a "body of reflection" designed to mitigate the possible excesses of the Sejm

(a lower chamber)—in fact had its roots in the 1989 split between a semi-democratic parliamentary lower chamber (with only 35 percent of seats up for grabs) and a fully and freely elected higher chamber. The Senate had been deliberately established to test the real level of electoral support for the non-Communists and to satisfy the democratic opposition by giving it a weak veto over the Communist-dominated Sejm. Considering the way in which circumstances have changed since 1989, some scholars have suggested that the Senate was a redundant and unnecessary body in search of proper tasks and structure (see Bałaban 2011, 19). In a unitary and in many ways homogenous Poland, there are no rational reasons for bicameralism, other than path dependence. Similarly, consider the model of semi-presidentialism adopted in 1997. Was it chosen because it reflected a smart combination of a directly elected presidency, appreciated by Poles, and a strong parliament reflecting democratic pluralism? In fact, the semi-presidential model goes back to the 1989 pragmatic compromise, which guaranteed the Communists overall oversight through the presidency tailored for Communist leader Wojciech Jaruzelski, as well as a genuine political role for the democratic opposition. This compromise was subsequently modified by the addition of a directly elected president when Jaruzelski's tenure came to an end in late 1990 (as a matter not of institutional design but of political contingencies) and Lech Wałęsa's elevation to office was clearly in the cards. Finally, consider the robust judicial review exercised by the Constitutional Tribunal, which enjoyed a monopoly on constitutional adjudication. This was not set up as a wise combination of representative democracy and the primacy of the constitution, as normative theories of judicial review would have it. Rather, it was a continuation of the Tribunal existing from mid-1980s (hence, deep in the Communist era), set up by Communists as an anaemic institution and intended to conduct judicial review of low-level administrative acts. In 1989, it came to be seen by oppositional democrats as a useful instrument for curbing legislative excesses of a parliament dominated by Communists (with no clear time limits for such a domination discerned at the time). Therefore, any discussion of constitutional design in Poland must be freed from any rationalist and constructivist implications because the constitution itself was the product of a rather messy compromise (as constitutions usually are) that became petrified. It should not be viewed as a helpful framework allowing for a significant reduction of the political costs of day-to-day political transactions.

This is not to debunk the value of the 1997 compromise, which was a real achievement despite its limitations. It is important, however, to keep in mind that the 1997 Constitution was marked by path dependence and was embedded in the context of the 1989 transition to a much higher degree than some commentators are willing to admit.

2. CONSTITUTIONAL DESIGN AND CONSTITUTIONAL BREACHES

The main problem with attributing the relative success of authoritarian populists to a putatively faulty constitutional design is that many changes forming part of Poland's democratic backsliding occurred *without* a formal change of institutions and procedures, with a consequence that they are invisible to a purely legal account. As Gábor Attila Tóth remarks about contemporary populisms more generally, "[M]any such regimes ostensibly behave as if they were constitutional democracies, but, in fact, they are majoritarian rather than consensual, populist instead of elitist; nationalist as opposed to cosmopolitan; or religious rather than secular" (Tóth 2017, 2). Institutions and procedures remain the same, but their substance is radically changed by practice; they are "hollowed out." For instance, formally, parliamentary legislative procedures in Poland remain the same as before; but by adopting a scheme whereby all important governmental initiatives are proposed as private members' bills, formal requirements to hold consultations and obtain expert opinions and impact audits are dispensed with. There *is* a discussion in the parliamentary legislative committee, but it is effectively a sham because PiS holds an absolute majority and opposition MPs are given only one or two minutes for their speeches (occasionally just thirty seconds). In this way, the intended meanings of many procedures and institutions are eroded and the institutions converted into façades. Institutions become hollow (for the concept of hollow institutions, see Dawson and Hanley 2016, 23). As a result, to an external observer the radical shift in the meaning of institutions, procedures, and roles may be invisible because they often remain, *legally speaking*, the same as before. As Martin Krygier observes, "One striking novelty of these new populisms is that though like most populists they undermine constitutionalism, they do so with often striking attention to the forms of law" (Krygier 2017, 4). But these forms of law are used, in practice, to undermine the underlying values of the rule of law, which are to constrain arbitrary use of unlimited power. Kaczyński is no Leninist: just like Viktor Orbán, he knows and skillfully uses the legitimating value of formal legality, except when he or his advisors find the political costs of legality to be too high.

Ozan Varol coined the concept of stealth authoritarianism, that is, a genre of authoritarianism which faithfully uses various democratic structures for nondemocratic purposes: he says, "Stealth authoritarianism refers to the use of legal mechanisms that exist in regimes with favorable democratic credentials for antidemocratic ends" (Varol 2015, 1684). For instance, representatives of stealth authoritarianism "employ seemingly legitimate and neutral electoral laws, frequently enacted for the purported purpose of eliminating electoral fraud or promoting political stability, to create systemic advantages for themselves and raise the costs to the opposition of dethroning them" (Varol 2015, 1679). Another example applicable to the Polish case

is that stealth authoritarians "rely on judicial review, not as a check on their power, but to consolidate power" (Varol 2015, 1679). This is precisely the use of judicial review conferred on the Constitutional Tribunal by the PiS regime: rather than acting as a constraint on the government, the Tribunal has become a constraint on the opposition and an active helper of the government. But formally, judicial review *does* exist. Unless one ascertains the actual substance of the decisions taken and their underlying arguments, however, one sees no difference between democracy and stealth authoritarianism (though the CT was taken over without apparent stealth).

But the main reason why it is difficult to consider the impact of nonresilient constitutional design on the rise of populism in Poland is that PiS continued to govern through multiple *breaches* of the Constitution. When a constitution is violated with seeming impunity, it is difficult to blame the Constitution itself for the capacity of rulers to overcome constitutional checks and balances. Speculation about alternative designs that may arguably be thought to be more capable of withstanding the populist rise is rendered, well, speculative, simply because constitution itself is breached. For how do we know that a smarter constitutional design would not have been as easily discarded by determined authoritarians? A simple answer is, we do not know.

As I have evidenced elsewhere at length (Sadurski 2019), the Polish Constitution has routinely been violated in a number of ways. The takeover of the CT through a complex process of court-packing is one, though not the only, arena in which breaches of the Constitution have been committed. The parliamentary resolution of November 25, 2015, (taken with a PiS majority, of course) removing the "legal effects" of the election of judges at the end of the previous parliamentary term violated the Constitution because the Constitution provides for an exhaustive number of instances in which the term of a judge can be extinguished, and the parliament has no such power. The president's refusal to swear in correctly elected judges violated the Constitution, which gives the president no such role in designing the composition of the CT. The president also unilaterally changed the constitutional system for appointing CT judges; it assumes that the president has the prerogative to refuse to swear in some judges—a prerogative unknown to the Constitution—and hence to veto the parliamentary election. The government's refusal to publish some of the CT judgments was another usurpation of powers the government does not have. These are just a few examples related to the dismantlement of the CT. Put together, they confirm that an authoritarian regime faces no constraints on its authority and can disregard courts and constitutions when such disregard is in the regime's interest. That is precisely what has been going on in Poland. The regime's use of the Polish Constitution is highly selective and colored by its general distaste of the liberal checks and balances it enshrines. It is not that

the Constitution does not count at all; rather, it can easily be trumped by whatever is considered an important regime goal. The costs incurred—and they were real—were not considered particularly high in the overall calculation of costs and benefits.

Another dimension of the anti-constitutional character of PiS rule is the series of de facto amendments to the Constitution via statutes that significantly alter constitutional dispensations. Considering one particular example of such an amendment, former Constitutional Tribunal judge Mirosław Wyrzykowski wrote,[3] "For the first time in the thirty-year history of Polish constitutional judiciary, the [Constitutional] Tribunal was confronted with a statutory regulation which changed the constitutional order of the state" (Wyrzykowski 2017, 380). In the absence of the supermajority necessary for a constitutional change, PiS proceeded by adopting statutes that in fact contravened constitutional provisions. Setting up the Council of National Media by statute was a way of disempowering a constitutional body, the National Broadcasting Board, by endowing the former with many of the latter's tasks (mainly, supervision of public media, a task transferred in full to the new Council).[4] Several statutory provisions concerning the CT were meant to circumvent other constitutional provisions. For instance, to silence Prof. Stanisław Biernat, then CT vice president (a constitutionally designated office), PiS adopted the statute of December 13, 2015,[5] by which it invented the position of acting president. The acting president was to perform the functions normally falling to the vice president, the only difference being that whoever performed the role was to fully meet the expectations of PiS. Another example is the statute on the KRS,[6] which introduced a number of unconstitutional provisions fundamentally changing the composition and structure of that body compared to its constitutional design. It extinguished the constitutionally settled terms of office of KRS member judges and, contrary to the Constitution, introduced a system of electing KRS member judges by the parliament rather than by their peers. In a similar way, a statute on the Polish Supreme Court extinguished

3. Act of December 22, 2015, amending the Act on the Constitutional Tribunal.

4. The Act of June 22, 2016, gives the Council of National Media control of national broadcasters (Polish Television, Polish Radio, and the Polish Press Agency) and charges them to appoint or dismiss presidents, members of supervisory boards, and management boards, as well as other members of the public broadcasters' statutory bodies.

5. Provisions on Introduction of the Act on the Organisation and Proceedings before the Constitutional Tribunal and the Judges of the Constitutional Tribunal Status Act. (After Sejm, the lower parliamentary chamber, had passed the statute and the Senate had not submitted amendments, the president signed the statute on December 19, 2016.)

6. Act of December 8, 2017, on the amendment of the Act on the National Council of the Judiciary and some other acts.

the explicit constitutional term of office of the chief justice of the Supreme Court by lowering the retirement age of Supreme Court judges from seventy to sixty-five. This was meant to affect Chief Justice Małgorzata Gersdorf, notwithstanding that her term of six years is conferred by the Constitution and ends in only April 2020.

The process of amending the Constitution by statute is the main difference between Orbán's Hungary and Kaczyński's Poland: what Kaczyński occasioned by statutes, Orbán brought about by way of a brand-new Constitution followed by a number of constitutional amendments. For instance, the fundamental change in the composition of Hungary's Constitutional Court by increasing the number of judges from eleven to fifteen and prolonging the terms of office of already sitting judges from nine to twelve years was achieved solely by constitutional changes. This approach allowed the ruling coalition to immediately reach a target of appointing eight out of fifteen judges. The removal of the compulsory retirement age for Constitutional Court judges entrenched the domination of Fidesz-appointed judges into the future.

One may ponder which of these two situations is worse—worse, that is, from the point of view of the standards of liberal constitutionalism. On the one hand, one may claim that the Hungarian style of illiberalism via constitutional changes is more damaging in the long term because illiberal changes are being entrenched well into the future; thus a future non-Fidesz government may lack a constitutional majority and be straitjacketed in its conduct by the illiberal Fundamental Law of Hungary. By changing not only the Constitution but also the electoral law, Fidesz has managed to lock in its advantage. This entrenchment also applies to a number of officials appointed for very long terms of office and who are likely to maintain their offices even under a non-Fidesz government. For instance, members of the Media Council are appointed for nine years, as is the chief prosecutor (previously six years). On the other hand, one may speculate that constitutional amendments via statutes and simple breaches of the constitution, Polish-style, are more destructive of the principles of constitutionalism and the rule of law. In Hungary, the disempowerment of the Constitutional Court was accomplished *lege artis*; in Poland, it was more a demolition job than the restructuring of an institution, fully disregarding the constitutional provisions.

3. THE USES OF AN INCAPACITATED TRIBUNAL

After the electoral victories of 2015, PiS transformed the CT from an effective, counter-majoritarian device designed to scrutinize laws for their unconstitutionality into a powerless institution paralyzed by consecutive bills that rendered it unable to review new PiS laws, and then into a positive supporter of enhanced majoritarian

powers. In a fundamental reversal of the traditional role of a constitutional court, it is now being used to protect the government from laws enacted long before PiS rule. Whatever else constitutional courts around the world are expected to do, there is no doubt that their first and primary function is "to ensure adherence to a . . . constitution and its protection against legislative majorities" (Harding et al. 2008, 4). In Poland, the Tribunal became a defender and protector of the legislative majority. This changed role, combined with a general distrust of the CT and concerns about the legitimacy of its judgments, explains the extraordinary drop in the number of judgments handed down.[7] For all practical purposes, the CT as a mechanism of constitutional review has ceased to exist; a reliable aide of the government and parliamentary majority has been born.

The difference between the way the Polish and Hungarian cases deal with the constitutional court may be instructive. In Hungary, the change operated more deeply: in addition to pack the court, the constitution-making majority introduced important restrictions on the constitutional court's sphere of competences and modes of decision-making. Most important, the powers of the court were restricted on fiscal matters, the *actio popularis* was abolished, the scrutiny of constitutional amendments was allowed only for procedural defects, and the Constitutional Court of Hungary was prevented from referring to any of its precedents based on the pre-Fidesz constitution. No such changes were introduced in Poland, although knowing the modus operandi of PiS in parliament, the government could easily have introduced any such, or similar, restrictions in a statutory mode. The officials just did not consider them useful. Having captured the majority on the Tribunal, they were confident that the Tribunal would be an obedient servant of the executive branch and would not dare decide contrary to political expectations. Restricting its powers could even have been seen as counterproductive (though this is only speculation, as I know of no statements to that effect), because it may have impeded the Tribunal's role of legitimating new statutes and delegitimizing the old ones.

But this is not to say that the disarmament, capture, and transformation of the CT into the government's ally is an unqualified benefit to authoritarian rulers. Quite apart from all other political costs, domestic and international, a fully dependent court is no use to the government in a blame game, a function that constitutional courts may otherwise perform to the benefit of the executive or the party controlling the parliamentary majority. Governments often find it useful to dump certain

7. In 2017, 284 motions (including constitutional complaints, concrete reviews initiated by courts, and abstract reviews) were lodged in the CT, whereas in 2014, 2015, and 2016, the annual numbers were, respectively, 530, 623, and 360. In 2017, the CT handed down 36 judgments, whereas in 2014, 2015, and 2016, it handed down 71, 63, and 39, respectively.

decisions on courts: for example, when a decision by the government one way or another is costly, the constitutional court may perform the decision-making role while absorbing the political costs. This function is occasionally played by constitutional courts in both democratic and authoritarian systems. But in the latter, the plausibility of that effect is contingent on *the general belief that a court is at least relatively independent* of the government. If not, the blame game does not work because everyone knows that whatever the court decides reflects the political decisions of the rulers. As Tamir Moustafa and Tom Ginsburg put it, using somewhat different terminology and considering a scenario in which an authoritarian government wishes to abandon some of its policies, which though popular are considered too costly, "The strategy of 'delegation by authoritarian institutions' will not divert blame for the abrogation of populist policies unless the courts striking down populist legislation are seen to be independent from the regime" (Moustafa and Ginsburg 2008, 13).

This applies to the Constitutional Tribunal in PiS's Poland. As an example, having enacted a speech-restrictive Holocaust law in great haste in March 2018, the government realized after the fact how costly this law was internationally for the regime. At the same time, not wanting to alienate its hard-line electorate, it initially chose the strategy of engaging the CT. (Under pressure from abroad, the government eventually changed its strategy and removed the most problematic aspects of the law, rendering the CT challenge moot.) Whatever the Tribunal may have decided, however, no one in Poland or abroad would have blamed *the Tribunal* for the outcome because the majority judges' full dependence on the ruling party rendered a blame game ineffective; it is general knowledge that actual decisions are being taken elsewhere and that the CT is just a spokesperson for the ruling elite. The inability to benefit from shifting even part of the blame on the Tribunal, as a result of its dependence on the regime, is a real cost to the regime, but a cost that PiS has consciously accepted to pay.

A more general reflection may be in order. The constitutional designers of the Third Republic (a term designating postcommunist Poland) saw the enhanced Constitutional Tribunal as the centerpiece for the protection of the rule of law and for constitutional checks on majoritarian politics. That was when the Tribunal was largely peopled by civil-libertarian lawyers of the highest standards. Their judgments eventually created a canon of liberal constitutionalism in Poland. In contrast, constitutional designers in Poland disliked the "dispersed" model of constitutional review because "ordinary" judges, many tainted by their service in the previous regime, were not to be trusted with the protection of new values. Or such was the near-consensus among liberal constitutionalists (Sadurski 2014, 40–43). But by placing all one's trust in a fifteen-person body, a body too small to

carry the enormous burden of the constitutional control of politics, one makes it easy for populists to quickly dismantle the system by hitting at its centerpiece. Slovenian constitutional scholar Bojan Bugaric writes correctly about "the institutional fragility of constitutional courts when they are targeted by illiberal forces" (Bugaric 2017, 17).

Would a differently designed CT render it less vulnerable to capture by the ruling party? It is, of course, a counterfactual that is very difficult to demonstrate, but one may consider a line of reasoning such as that offered on the eve of the Polish transformation, not that long ago, by Steven Gardbaum. He suggests that the adoption of "weak judicial review," that is, review that stops short of a constitutional court categorically invalidating a law, is a better design for new, nonconsolidated democracies because it minimizes these courts' clashes with political branches and thus reduces the likelihood of effective assaults on judicial independence (Gardbaum 2015). The independence of judges is the paramount value, Gardbaum asserts, and it is more immune to being undermined when courts exercise only weak review, which is, for instance, overridable by the legislature (as in Canada, or Poland pre-1997) or is limited to findings of incompatibility (as in the United Kingdom). As Gardbaum claims, "[A]s far as courts are concerned, the most important, basic, and essential goal for new democracies in their transition to becoming stable ones is *not* establishing the power of one or more courts to invalidate legislation, but establishing and maintaining the overall independence of the judiciary" (Gardbaum 2015, 303, emphasis in original).

It is difficult to speculate whether such a design would have prevented the undoing of the Polish Constitutional Tribunal. Perhaps when considering Gardbaum's conception, the point at which to begin is by contesting his confident view that judicial independence is a paramount value, whereas robust judicial review is merely a contingent measure that may or may not be needed. In my opinion, judicial independence is more of an instrumental measure than a valuable tool in itself; judicial independence, combined with judicial impotence (for the sake of argument) is of no great benefit to society. A totally independent judge whose judgments are not complied with makes no contribution to the rule of law. In this sense, Gardbaum may be guilty of what is sometimes called "goal displacement," which occurs when means are substituted for ends. So if one presupposes, as Gardbaum does, that judicial independence is indeed a paramount and inherent value, recommending the adoption of weak review may be logical. But the presupposition is questionable. To understand why, consider a scenario raised by Martin Krygier: "One difficulty [with judicial independence as a key to the rule of law] is that measures designed to enhance institutional autonomy [of courts and judge], or at least

justified in those terms, might well shield incompetence, political affiliations, and corruption" (Krygier 2006, 144).

It is, after all, not a coincidence that new, transitional democracies usually opt for a robust constitutional court, with the power of binding and nonoverridable review, whereas *all* the examples of weak review (the Commonwealth model; see Gardbaum 2013) are of consolidated strong democracies. The empirical data therefore seem to contradict Gardbaum's recommendation. But putting this observation to one side, one may suggest that weak review qua a method of avoiding head-on clashes between the constitutional judiciary and political branches, and thus treated as a device to protect judicial independence, may apply to situations in which the tension between the court and the executive (and/or the legislative) is set at a relatively low level of intensity. When political branches are *moderately* hostile to constitutional review and insist on having the last word on constitutional disputes, conferral on courts of weak competencies—for instance, making merely nonbinding findings of the law's incompatibility with the given constitution—may make a good sense. In such circumstances, the scenario envisaged by Gardbaum may indeed be realistic:

> It may be better that the political institutions have a lawful outlet for their disagreements with specific judicial decisions on (some or all) constitutional issues rather than leaving them with only the blunter instruments of general tampering with judicial powers, jurisdictional grounds, composition, or routine constitutional amendment. (Gardbaum 2015, 312)

When the conflict is intense, however, as when the executive is determined to disregard all constitutional restraints on its powers and is strongly committed to dismantling all checks and balances, including but not limited to, constitutional courts, no amount of weakness in the process of constitutional review will save the court. This is the case for Poland. Even if the Tribunal's judgments were overridable by a stronger parliamentary majority, the ruling party would fight the court if it did not control the requisite qualified majority of votes in the parliament, or it would happily override any judgments if it did. Judicial independence, so lauded by Gardbaum, would perhaps remain intact, but at the cost of rendering the court totally irrelevant as a device for policing constitutional constraints on the government. But even this hypothesis with regard to rescuing judicial independence is unrealistic; as empirical evidence shows, newly formed courts (e.g., constitutional courts in transitional systems) are viewed by antidemocratic forces as posing a fundamental challenge to its rule and are unlikely to persist as independent and robust institutions (see Gibler and Randazzo 2011).

4. INSTITUTIONAL DESIGN AND THE HUMAN FACTOR

No institution is *absolutely* resilient, and to what extent constitutional design can make a difference in protecting a system against an authoritarian threat, especially when that threat comes from elected populists, is a matter that is fundamentally context dependent. Much depends on the course of action taken by the elected rulers themselves. If they feel free to break constitutional rules and customs whenever they find them inconvenient, not that much can be done by designing checks on the political branches. This is the case in Poland, and to what degree the relative unimportance of constitutional design may be generalized to other countries is beyond the scope of this article. But some general observations may be offered.

As Aziz Huq and Tom Ginsburg say in relation to the United States,

> The decisions of party leaders and activists on both sides to prioritize the continuance of democracy as an ongoing concern, and their willingness to allow transient policy triumphs to offset concerns about antidemocratic behavior, will be of dispositive importance. . . . Constitutions are, after all, just pieces of paper that take their force from the intersubjective understandings of elites and citizens. (Huq and Ginsburg 2018, 167)

But the human factor is all the more significant in new, transitional democracies, where there is simply less time for people to have the opportunity to become convinced about the advantages of democracy; democracy is stable when its citizens believe that it is "the only game in town" and that nondemocratic alternatives are illegitimate (Linz and Stepan 1996). The newness of institutions works against the electorate because there is simply an insufficient reservoir of customs, conventions, established patterns of conduct, and collective memory as to the proper way of acting within these institutions.

This is not to suggest that the shape and design of institutions does not matter: there are ways of promoting and ways of minimizing the need for interparty dialogue and compromise through institutional design. As Jeremy Waldron notes, with regard to the United States, "The constitutional structure—bicameralism, the president's veto, advise-and-consent, and perhaps also judicial review—means that any party 'in power' has to coordinate and usually compromise with leaders of other persuasions" (Waldron 2016, 109, endnote omitted). These and other factors of institutional design (notably, federalism) constitute jointly what Samuel Issacharoff calls "the structural dimensions of democratic stability" (Issacharoff 2015, 22), such as districted elections and presidential rather than parliamentary

governance (Issacharoff 2015, 23–26). Steven Calabresi helpfully points out that certain peculiarities of US constitutional design, such as the midterm elections (when the party in opposition to the president usually wins) and a "vigorous congressional system of oversight" render the president "very strong in foreign and military affairs, but fairly weak with respect to domestic power" (Calabresi 2015, 599); in effect, these peculiarities "prevent[] presidents from becoming dictators" (Calabresi 2015, 597). However, most elements of election-related design and presidentialism constitute buffers against marginal extremist parties rather than against an authoritarian movement coming to power with support of the majority or large plurality of the electorate.

The institutional design of constitutional review may be made more or less conducive to manipulation and paralysis by the executive. For instance, a system of electing constitutional court judges may be made better or worse. The Polish and Hungarian system is bad because the parliamentary winner can appoint judges to all the vacancies that open up during the parliamentary term, so the compromise-oriented election of judges depends largely on the political culture and goodwill of the ruling party or parties rather than being compelled by institutions, as is the case, for example, in Germany. More generally, centralized Kelsenian review, with a single constitutional court enjoying a monopoly on the constitutional scrutiny of statutes, for all its benefits, has one major weakness. As already observed in this article, it is much more susceptible to being captured and disarmed than a decentralized, diffuse system of review where every judge in the nation has a right to set aside a statute he or she considers unconstitutional. Just as it is easier to attack and neutralize a staff composed of ten or fifteen generals than an entire army, so it is easier to disable a small constitutional court and turn it into an autocrat's ally. Some constitutional courts were set up precisely for that reason: to make them easy to control by the executive (e.g., see the case of the 1982 Turkish Constitution, which adopted, as dictated by the military, centralized judicial review).

Nevertheless, no matter how well designed a system is, it will not protect itself against a dishonest president appointing improperly elected judges, nor against the executive refusing to comply with judgments. To quote Huq and Ginsburg again, "[C]onstitutional enforcement requires the kind of intersubjective agreement on violations that is difficult to obtain, especially under mutative and precarious political conditions" (Huq and Ginsburg 2018, 168). The test for the resilience of institutions is whether powerful officials back down when those institutions issue decisions officials dislike or even abhor, as was the case of President Richard Nixon having to hand over audiotapes in connection with the Watergate scandal as ordered by the Supreme Court, or President Trump having to comply with the US District Court in the state of Washington regarding proposed travel bans, and more generally, federal

courts that struck down his administration's immigration policies or sanctuary cities, or when the UK Supreme Court told the Theresa May government it could not appeal the Brexit referendum to sidestep parliamentary mechanisms for unwinding Britain's membership in the European Union.

Often, whether law is effectively enforced against the top executive is based on the likelihood of legal sanctions for recalcitrance. For instance, in Nixon's case, it was clear to almost everyone that if he defied the judicial order in the tapes case, "impeachment and conviction almost surely would have followed" (Fallon 2007, 22). In other cases, the sanction may be expressed in terms of political costs. Adrian Vermeule, discussing the hypothetical scenario of a president breaching the unwritten norms of the independence of agencies (such as the President's Office of Legal Counsel, or OLC), says the professional norms of objectivity and detachment of OLC lawyers may support the relevant convention "either by making such lawyers relatively resistant to pressure from the White House, or in the extreme case causing them to resign (or credibly threaten to resign) in a visible and politically damaging fashion" (Vermeule 2013, 1210). But the force of such predictions, of the likelihood of either impeachment or mass resignation by officials to protest the president's breaches, is a contingent matter. Constitutional review increases the political costs of noncompliance, and in some systems these costs are viewed as prohibitively high for politicians to bear. But in others, they are low enough for determined executives to view them as just minor irritants that may be set aside for political aims. Politicians such as Orbán or Kaczyński either dismantle or hollow out the institutions that offer resistance to their plans. Constitutional constraints on rulers are reduced to "parchment barriers," to use James Madison's memorable words.[8]

5. DESIGNING FOR INSTITUTIONAL SELF-DEFENSE?

In a democracy, institutional systems are often unable to deal with determined efforts to hollow out democratic institutions. Strong instruments of militant democracy are viewed often, and with good reason, as suspect because the cure may be worse than the disease, and in the process, mechanisms may become more militant than democratic. Furthermore, there may be occasional (with emphasis on this adjective) cases of justified executive noncompliance with law, as for instance when, in the run-up to the Civil War in 1861, Abraham Lincoln suspended the capacity of courts to issue writs of habeas corpus and defied the chief justice's decision based on a (reasonable) understanding of the US Constitution that only the

8. Federalist No. 48, 305.

Congress, not the president, could suspend habeas corpus in emergencies.[9] If such executive defiance can be judged illegal but morally legitimate (Fallon 2007, 20) or based on good underlying reasons behind the existing constitutional provisions—reasons "which remain, and we sometimes need to consult them to decide whether, in particular circumstances, they are so extraordinarily powerful or important that the law's trump should not prevail" (Dworkin 2002, 1672)—it is because it may be convincingly viewed as designed to preserve the constitutional system as a whole, and as an extremely rare exception to the general norm of executive compliance with the law, as interpreted by courts.

One approach, flagged by David Strauss, would be to treat "a systematic effort to undermine liberal democracy norms as a kind of emergency, in the way that, say, a natural disaster or a terrorist attack is an emergency" (Strauss 2018, 367). But as Strauss observes himself, there are two disanalogies. First, a determined effort to erode liberal democracy is a "slow-motion emergency," in which the erosion is gradual, with each step being perhaps objectionable, but not alarming. Second, unlike familiar types of emergency, a slow-motion erosion does not require granting *more* power to government officials but rather the opposite: limiting their powers. "Slow-motion emergency" is therefore an unhelpful metaphor, and it is not useful when all governmental institutions, including courts, have *already* been captured or disabled, as is the case in Poland, with a few exceptions (some individual Polish Supreme Court judges and the ombudsman).

When some institutions have not been captured in this way, however, perhaps the notion of institutional self-defense may be more fittingly invoked. This concept was used and interestingly elaborated recently by Nicholas Barber, who distinguished between institutions using "shields" or "swords" against other state bodies to protect themselves from other institutions (Barber 2013). Occasionally, Barber notes, an action by an institution "runs contrary to the constitution," even if an institution can get away with it (e.g., a US president who refuses to abide by a decision of the US Supreme Court) (Barber 2013, 563). But this is the situation underplayed by Barber: his main interest is in calculated friction between constitutional institutions designed to track a certain "valuable division of moral labour" (Barber 2013, 572). Barber connects this idea with the invisible hand theory of constitutionalism: "Each [institution] fights for their own bit of the common good and, out of this conflict, the totality of the common good is achieved" (Barber 2013, 573).

But once articulated in this way, institutional self-defense is not easily applicable when an institution is existentially threatened, as was the case with the

9. *Ex parte Merryman* 17 F Cas 144 (CCD Md 1861) (No 9487).

Constitutional Tribunal in Poland. Consider one example of what could be considered institutional self-defense undertaken by the CT, which was compelled to act in a way that was problematic from a constitutional point of view. The case 34/15 decided on December 3, 2015, was a response to a series of actions undertaken by the new parliamentary majority to pack the Tribunal with pro-PiS judges, in particular to the parliament and president's unconstitutional action to ex post invalidate the election of three judges at the end of the previous parliamentary term, an invalidation made easier by an earlier silly gambit by Civic Platform [PO], which had attempted to elect five rather than three judges. In its judgment, the Tribunal upheld the constitutionality of the law under which those three judges were elected, thus rendering PiS's subsequent "election" of three judges to the filled positions unconstitutional. At the time, the matter was of utmost existential importance for the Tribunal, for without sorting out the status of the newly elected judges the Tribunal would become paralyzed. But this judgment was handed down only because the president of the Tribunal, Andrzej Rzepliński, decided halfway through deliberation that the decision would be taken by a five-judge panel, rather than by a full panel, as was initially considered (full panels are convened when the matter is deemed to be particularly important). The downgrading of the panel when the proceedings were already underway transpired for a very simple reason: a full panel required nine judges, whereas at the time only eight judges were available. This shortfall occurred because three judges elected at the end of the previous parliamentary term were not yet sworn in by the president, and the other three judges had to recuse themselves (in an old-fashioned act of honesty and decency) because they had been consulted in the legislative work on the statute under scrutiny in that cases. The alternative would have been to fail to consider the matter altogether and thus let PiS pack the court irregularly.

The choice the president of the Tribunal made may be seen as an ultimately unsuccessful attempt at institutional self-defense *à la polonaise*. One institution (the CT) acted at the edges of constitutionality in order to protect itself from an assault by another institution (the legislature, supported by the executive). In this sense, it was existential self-defense, not a constructive friction designed to maximize the common good, as in Barber's description. The latter is designed to describe an interinstitutional tension in *normal* times, not at times when the very existence of an independent institution is at stake.

So ultimately it is a matter of culture and ethics: when they are missing, even the best-designed institutions are rendered hollow; in contrast, when they are strongly ingrained in professionals staffing institutions, they are likely to prevail

over determined populists. Consider this hypothetical a US legal scholar has posed about a possible attack by President Trump on freedom of speech and the press in order to silence his critics:

> A frontal assault on the [Supreme] Court's First Amendment jurisprudence would fail for the time being. Justices on the left and right are committed to strong protections for political speech; Trump would need to replace at least five of them, securing the Senate's consent in each case, and *it would be hard, perhaps impossible, for him to find even a single qualified, mainstream jurist* who would supply the vote he needs. (Posner 2018, 3, emphasis added)

The confidence with which Eric Posner makes this assessment seems justified, but a similarly confident judgment could not have been made with respect to Poland when its ruling elite went after the CT and the judiciary. PiS *did* find a sufficient number of jurists (though, happily, not a very large group) who were willing to occupy positions in the subjugated CT, Council of Judiciary (KRS), Supreme Court, presidencies of common courts, and more, even though the unconstitutionality of these appointments and institutional deformations was obvious for all to see. On the positive side, there was a strong sense of opprobrium targeted against those individuals. On the negative side, it was not strong enough to prevent these individuals from volunteering or accepting these positions and, in the process, actively participating in the dismantlement of the rule of law.

Similarly, the ethics and culture of members of parliament are crucial to determining whether they thoughtlessly respect their party leaders' discipline imposed in the face of unconstitutional proposals or they put up resistance, as was the case when the US Congress failed to be convinced by Franklin D. Roosevelt's efforts to enhance his influence on the Supreme Court by packing it. In contrast, court-packing in Poland was made possible through the unquestioning complicity of the parliamentary majority, government, and president. The weakness of institutions in Poland reflected the moral and political weaknesses of its officials, including the judiciary. Institutional design could have done very little to have made a real difference (except for the model of constitutional review, as discussed, and perhaps the absence of federalism, which was never considered in any constitutional debates in Poland as a real option).

6. CONCLUSION

Institutions must be underwritten by norms that are by and large shared and by common understanding of what counts as a norm violation, even if formal legal

rules are silent about these norms. No institution can survive without a reasonable consensus about norms. Institutions without a degree of consensus as to what counts as norms transgressions become hollow, eroded of their potential to serve the purposes for which they were originally set up, because the norms that engender the rules of behavior cannot be captured by written rules constitutive of these institutions. They oil the wheels of the governing arrangements of any state. They are often taken for granted, but this is just another way of saying that there is a degree of consensus, within a country's governing elite, about their meaning and weight. Such consensus collapsed in Poland.

As Bojan Bugarič convincingly observes,

> Ultimately, democratic political parties and social movements with credible political ideas and programs offer the best hope for the survival of constitutional democracy. The role of law and constitutional checks and balances is less of an essential bulwark against democratic backsliding than is traditionally presumed in the legal literature. (Bugaric 2018–2019, 6)

To those who say the institutions designed by the Polish Constitution were weak and vulnerable to capture, an answer may be that it took PiS *no less than* two years to complete its colonization of key institutions rather than saying it took *only* two years. This proposition belongs to an "Is the glass half empty or half full?" argument. During these two years, which saw constant conflict at both a domestic and an international level, arguments about constitutionality or lack thereof played the main role in controversies surrounding the capture of institutions. That the Polish Constitution supplied such argumentative assets to its defenders shows its relative resilience. Unfortunately, it proved insufficiently entrenched in political culture and attitudes to protect itself against enthusiastic colonizers.

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