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# The rule of the majority vs. the rule of law: how Poland has become the new enfant terrible of the European Union

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## 1. Introduction

On 25 October 2015, the conservative and pro-Catholic party Law and Justice (*Prawo i Sprawiedliwość*) won the majority of the seats in both chambers of the Polish Parliament (*Sejm* and *Senat*). In doing so, it became the first party since the collapse of communism in 1989 to govern alone in Poland.<sup>1</sup> The party, under the leadership of Jarosław Kaczyński<sup>2</sup>, strongly emphasizes the value of sovereignty, and openly shows its scepticism towards the process of integration in the European Union or its neighbours. On 16 November 2015, the new Cabinet took over with Beata Szydło as the Prime Minister. The new establishment vigorously started implementing their planned reforms. There is no opponent in Parliament that can effectively oppose their actions, and the newly elected president Andrzej Duda is firmly supporting the new government and signing every piece of legislation they enact. Hence, Law and Justice can theoretically push through any legislative measure, except a bill amending the Constitution since such an act must be adopted by a majority of at least two-thirds of votes in Sejm.<sup>3</sup> Only one institution can stand in the way of the governing party. That is the Constitutional Tribunal, which has the power to conduct a judicial review of the constitutionality of norms. It is no surprise that the new establishment quickly concluded that something must be done about this ‘stumbling block’ and it has taken steps in that direction.

The steps were so radical that the whole situation has grown from a squabble about several Tribunal judges into a deep political and constitutional crisis, which has received much attention across Europe and beyond. Indeed, the controversial changes to the functioning of the Tribunal and other public institutions have triggered strong public outcry and objection as well as a critical response from within and outside the sixth-largest member state of the European Union (EU). Political and media voices

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<sup>1</sup> Law and Justice received 37.6% of the vote, which resulted in 235 of 460 seats in the Sejm. Civic Platform won 24.1% of the vote.

<sup>2</sup> The twin brother of president Lech Kaczyński, who died in a tragic plane crash in 2010.

<sup>3</sup> Art. 235 (4) of the Constitution of 1997.

claiming the death of the Polish democracy and the threat to the rule of law have become common.<sup>4</sup> The changes have caused so much concern that Poland has become the first member state of the EU to face an unprecedented inquiry into the rule of law (the mechanism called Rule of Law Framework), which was launched by the European Commission.<sup>5</sup> In addition, on the request of the Minister of Foreign Affairs, the Venice Commission—a consultative body to the Council of Europe on constitutional matters—conducted an investigation into alleged inconsistencies in the new amendments to the law governing the functioning of the Tribunal with the rule of law. Finally, the Tribunal itself declared the new law unconstitutional but the Polish prime minister refused to publish the concerned judgment. In the meantime, thousands of Poles, organized by a newly created Committee for the Defence of Democracy (*Komitet Obrony Demokracji*), went out on the streets to demonstrate against the actions of the new government and against the process of undermining the role of the Tribunal.<sup>6</sup>

This contribution aims to provide a critical overview of those changes and to place them in the broader context of the national constitutional and political landscape. In that respect, attention is mostly drawn to the amendments to the act concerning the functioning of the Tribunal, the opinion of the Venice Commission on the issue, and the judgment of the Constitutional Tribunal on this matter. This will be preceded by a brief outline of the role the Tribunal plays in the national constitutional framework and a chronological outline of the crisis. At this point, it should be mentioned that the changes to the functioning of the Tribunal constitute only a part of the (radical) political line of Law and Justice. The changes are accompanied by new but equally controversial laws regarding, for instance, the functioning of the public media or the public civil service. Those reforms will not be discussed in this contribution.

## 2. The place of the Constitutional Tribunal in the national legal framework

In accordance with the Polish Constitution (hereinafter Constitution 1997), which is the supreme law of the country<sup>7</sup>, the courts and tribunals constitute a separate power, are independent of other branches of power, and pronounce their judgments in the name of the Polish Republic.<sup>8</sup> The Polish judiciary consists of distinct branches, including ordinary courts of common jurisdiction, and administrative courts that are headed by the Supreme Court and the Administrative Supreme Court respectively. The Supreme Court also exercises control over military courts. Common

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4 Ash 2016; Washington Post 2015; Feldman 2015; New York Times 2016.

5 For more on the mechanism see Kochenov and Pech 2015; Kochenov and Pech 2016; Uitz 2016.

6 See <http://www.reuters.com/article/us-europe-poland-constitution-idUSKCN0WE0JK> (last accessed 22 March 2016).

7 See Art. 8 (1) of the Constitution 1997. For more on the matter see Garlicki 2005; Prokop 2011; Banaszak 2005.

8 See Art. 173 and 174 of the Constitution 1997.

courts do not have the competence to review the compliance of national primary or secondary legislation relating to the Constitution since this form of control is reserved for the Constitutional Tribunal. While judges of the ordinary courts are bound by the Constitution and statutes, the judges of the Constitutional Tribunal are bound by the Constitution alone.<sup>9</sup> In that sense, the Tribunal's position in the political system is characterized by the principle of independence and the institution constitutes a separate branch in the entire architecture of the national judiciary, performing very special tasks that are reserved for this court alone.<sup>10</sup> Although the Tribunal was established in 1982, it became operational only in 1986 and its role was strengthened after 1989. The place and role of the Tribunal is regulated in the Constitution and the Constitutional Tribunal Act (hereinafter CTA 2015). Article 194 of the Constitution states that the Tribunal shall be composed of 15 judges who are chosen individually by the Sejm for one term of nine years from amongst persons distinguished by their legal expertise. They are not allowed to belong to a political party or a trade union, or to perform public activities that are not compatible with the principle of independence.<sup>11</sup>

The primary function of the Tribunal is to control the hierarchical conformity of legal norms—i.e. it must decide on the conformity of the legal norms of lower rank to those which are superior, in particular the Constitution, and eliminate those norms that are inconsistent with the law. According to Article 188 of the Constitution, the Tribunal adjudicates with regard to the following matters: the conformity of statutes and international agreements to the Constitution; the conformity of statutes to ratified international agreements whose ratification required prior consent granted by statute; the conformity of legal provisions issued by central organs to the Constitution; ratified international agreements and statutes; disputes over the powers of central constitutional bodies and on the conformity to the Constitution of the purposes or activities of political parties; and individual complaints of citizens concerning constitutional infringements (constitutional complaints)<sup>12</sup>. Any national court may refer a legal question to the Tribunal regarding the compatibility of a normative act with the Constitution, ratified international agreements, and statutes.<sup>13</sup> The Tribunal also decides disputes over powers between central and state authorities<sup>14</sup>, and determines 'whether or not there exists an impediment to the exercise of the office by the President of the Republic of Poland'.<sup>15</sup> With everything considered, the tasks performed by the Tribunal are those of a negative legislator, whose role is to eliminate unconstitutional legal provisions from the system of law.<sup>16</sup> The judgments of the Tribunal are universally binding and final<sup>17</sup>, are made by the majority of the votes<sup>18</sup>, must be immediately published in the Official Gazette in

9 Art. 195(t) of the Constitution 1997.

10 Also the State Tribunal remains outside this framework. For the outline of the entire judicial system see Jaremba 2014, p. 114-127.

11 Art. 195 (3) of the Constitution 1997.

12 Art. 188 of the Constitution 1997.

13 Art. 193 of the Constitution 1997.

14 See art. 3 (5) CTA 2015.

15 See art. 3(6) CTA 2015.

16 Jaremba 2014, p. 125.

17 Art. 190 (t) of the Constitution 1997.

18 Art. 190(5) of the Constitution 1997.

which the challenged normative act was promulgated<sup>19</sup>, and take effect from the day of their publication<sup>20</sup>.

### 3. The political crisis surrounding the Tribunal: How it all started

One would be wrong to assume that the situation regarding the Constitutional Tribunal started only in November 2015 after the new government took power. Therefore, it is necessary to look briefly at the situation prior to the general elections. On 25 June 2015, with the Civic Platform being the major party of the governing coalition, the Sejm adopted the already mentioned CTA 2015, which entered into force on 30 August 2015. Article 137 of CTA 2015, which was adopted by the outgoing Sejm, provided for the election of successors for all Tribunal judges whose mandate would elapse by the end of 2015. This also implied that those judges whose mandate would end after the general elections would still be chosen by the outgoing deputies. On 8 October, five new judges were chosen during the last session of the outgoing parliament. Three of them were to replace judges whose nine-year terms had already expired and the two remaining ones were to replace judges whose terms were going to expire after the general elections.<sup>21</sup> However, the president refused to swear these judges into office and a group of Law and Justice deputies appealed to the Constitutional Tribunal, challenging the constitutionality of the election of those five judges.<sup>22</sup> On 19 November, the new parliament passed an amendment to CTA 2015 (hereinafter November Amendments), by means of which it mandated the appointment of five new judges, set term limits for the president and vice president of the Tribunal, and provided term limits for two sitting judges. The following day, president Duda signed the amendments, but the act was challenged at the Constitutional Tribunal by various parties.<sup>23</sup> On 25 November 2015, the parliament adopted five resolutions invalidating the five resolutions of 8 October 2015 on the election of judges of the Tribunal.<sup>24</sup> On 30 November 2015, the Tribunal decided to take preventive measures requesting the parliament to abstain from electing new judges until the final verdict in case K 34/15 was delivered. However, on 2 December 2015, the Sejm proceeded with the election by adopting five resolutions.<sup>25</sup> The concerned judges were sworn into office by the Polish president overnight (four judges) and on 9 December (one judge). Andrzej Rzepliński—the president of the Tribunal—granted them the status of employees who do not perform judicial duties. As a result, five ‘October judges’ were elected but not sworn

19 Constitution 1997 art. 190 (2).

20 Constitution 1997 art. 190(3).

21 Three judges were to replace judges outgoing on 6 November 2015, two to replace those outgoing on 2 and 8 December respectively.

22 Case K 29/15. This appeal was withdrawn on 10 November 2015 and the Constitutional Tribunal discontinued the proceedings.

23 The amendment was challenged by a group of deputies (case K 35/15), the National Ombudsman (case K 37/15) and later by the National Council of the Judiciary and the Chief Justice of the Supreme Court (case K 38/15 and 40/15).

24 Official Gazette of the Republic of Poland (items 1131 – 1135).

25 Official Gazette of the Republic of Poland (items 1182 – 1186).

in, and five new ‘December judges’ were elected and sworn in but they could not perform judicial duties.

On 3 December 2015, the Tribunal ruled that the October election of three judges was valid but the appointment of the remaining two was unconstitutional. Even though the Tribunal clearly stated that the legal basis for the election of the three judges replacing those judges whose mandate expired before the end of the term of the outgoing parliament was valid and the Polish president was under the obligation to accept their oath<sup>26</sup>, the president refused to swear any of these judges into office. On 4 December, a group of deputies lodged a complaint at the Tribunal claiming the unconstitutionality of the resolutions adopted on 25 November as well as the resolutions on the election of five judges of the Tribunal, adopted on 2 December.<sup>27</sup> On 9 December, the Tribunal judged on the constitutionality of the November Amendments.<sup>28</sup> It held that breaches of procedural rules by the Sejm did not render the whole amendment unconstitutional.<sup>29</sup> However, the new Article 137a of the CTA was found unconstitutional to the extent that it provided for the election of the three judges by the new Sejm, replacing judges whose term ended on 6 November 2015.<sup>30</sup> The Tribunal also stated that the term of judges started with their election, not with the day on which they were sworn into office. The period of 30 days set to take the oath from the elected judges was found unconstitutional as well. Furthermore, the Tribunal held that the possibility of the re-election of judges violated the Constitution, since it might undermine judicial independence. Finally, the early termination of the term of office of the Tribunal’s president and vice president was found unconstitutional. After some initial doubts regarding the validity of the judgment, which were expressed by the prime minister’s office, the judgment was eventually published on 18 December.

On 23 December 2015, the crisis entered its most intense phase with the Sejm passing amendments to the CTA, thereby aiming to reorganize the Tribunal (hereinafter the December Amendments). The bill was approved after an overnight session by the Senate and signed by the president on 28 December 2015. Since the December Amendments have triggered a critical reaction and intensified the crisis, it will be discussed in a separate section.

#### **4. The act amending the functioning of the Constitutional Tribunal**

The December Amendments stipulate that the Tribunal will hear cases as a full bench with a composition of 13 out of 15 judges, although for some

26 Case no. K 34/15, point 8.5.

27 Case no. U 8/15.

28 Case no. K 35/15.

29 Case K 35/15, point 3.5.3.2.

30 Case K 35/15, point 7.

matters (individual complaints and preliminary requests from ordinary courts) the presence of seven judges will be sufficient.<sup>31</sup> Furthermore, the amendments require a two-third majority for taking decisions, instead of the simple majority stipulated in Article 190(5) of the Constitution.<sup>32</sup> In light of the new (higher) attendance quorum, this means that a judgment must be approved by at least nine judges, provided the Tribunal adjudicates as a full bench. Only if the Tribunal adjudicates in a panel of seven or three judges is a simple majority of votes required. Furthermore, according to the amended Article 87(2), '[t]he hearing may not take place earlier than after three months from the day the notification on the date of the hearing has been delivered to the participants of the proceedings, and for cases adjudicated in full bench—after six months and cases have to be heard according to the sequence in which they were filed.'<sup>33</sup> Next, Tribunal judges might be dismissed on request of the Sejm, the President of Poland or the Ministry of Justice. The early termination of a judge's mandate will no longer be declared by the General Assembly of the Tribunal. Instead, the Assembly will prepare a motion to the Sejm that will declare the termination of the mandate. The Amended Article 28a introduces the possibility for the Polish president and the Minister of Justice to launch disciplinary proceedings against a judge of the Tribunal, 'unless the President of the Tribunal decides that the application is unfounded.' Before the amendment, the executive branch was not entitled to institute disciplinary proceedings. Furthermore, the December Amendments remove certain provisions from the original CTA, such as Article 16 regarding the independence of judges, Article 17(1) regarding the composition of the Tribunal, Article 17(2) regarding the impossibility of a re-election to the Tribunal, and Chapter 10 regarding proceedings in cases where the president of the Tribunal is incapable of exercising office. Finally, the December Amendments provide for the immediate entry into force of the act—i.e. no *vacatio legis* for this measure is provided. The December Amendments have been challenged before the Tribunal in case no. K 47/15. This case resulted in a verdict on 9 March 2016, which will be discussed below.

## 5. The judgment of the Constitutional Tribunal

Before the December Amendments were subject to deliberations of the Tribunal, it was argued that the new rules could paralyze the functioning of the Tribunal, as they undermine judicial independence and impartiality, thus limiting the competence of the Tribunal to maintain checks on the legislator. The Supreme Court of Poland, the Polish Lawyer's

<sup>31</sup> See art. 1 (3) December Amendments.

<sup>32</sup> See art. 1 (3) December Amendments.

<sup>33</sup> See art. 2 (3) December Amendments.

Association, the National Council of the Judiciary, and many other parties criticized the December Amendments as a breach of Article 190 of the Constitution. On 12 January 2016, the president of the Tribunal decided that two of the 'December judges' should be allowed to join the bench and adjudicate. On 14 January, the Tribunal decided to consider case no. K 47/15 on the basis of the Constitution without applying the December Amendments in this case since those directly concern the functioning of the Tribunal. The two newly elected judges provided dissenting opinions, insisting that the December Amendments had already entered into force and they had to be applied in the case that was considering the same amendments. However, if the Tribunal were to apply the December Amendments in this case, it would not be able to sit, because at that moment in time it had only 12 sitting judges, whereby it would not reach the required by the amendments' quorum of 13 judges. Already, before the announcement of the judgment, the prime minister declared that she would not recognize it because, in her opinion, it would merely amount to a statement delivered by several Tribunal judges, which would not be a verdict in the legal sense.<sup>34</sup>

On 9 March, the Tribunal pronounced its verdict.<sup>35</sup> The Tribunal clearly ruled that the December Amendments are unconstitutional in their entirety. It was held that the legislative procedure applied during the enactment of the December Amendments was unconstitutional. In the view of the Tribunal, the hasty procedure prevented a review of the draft of the act despite various concerns concerning its possible unconstitutionality. In the words of the Tribunal, the new rules included in the December Amendments are inconsistent with the Constitution, as they make it impossible for the Tribunal to carry out its activity diligently and efficiently. Moreover, the Tribunal held that the attendance quorum in the full bench will lead to delays of proceedings, and that the new rules will undermine the independence and separateness of the Tribunal from other branches of government, thus causing an infringement of the rule of law.<sup>36</sup> Finally, the Tribunal repeated that according to Article 190(1) of the Constitution, the rulings of the Tribunal are universally binding and final, and the Constitution does not provide for any review procedure or for any possibility of revoking the Tribunal's rulings.<sup>37</sup>

The government quickly refused to publish the judgment as required under Article 190 para. 2, 3 of the Constitution in the Journal of Laws, which is a precondition for the annulment of the provisions that are declared unconstitutional by the Tribunal. Prime Minister *Szydło* and the Minister of Justice *Ziobro* regarded the judgment as non-binding since, in their eyes, the Tribunal disrespected the procedural requirements established by the December Amendments. In anticipation of this move, the

34 <https://euobserver.com/political/132633> (last accessed 22 March 2016).

35 Dissenting opinions were submitted by Judge Przyłębska and Pszczółkowski.

36 See paras 7, 12, 13, 14 and 16 of case no. K 47/15.

37 See press release after the hearing, para XXII (4), to be found at <http://trybunal.gov.pl/en/news/press-releases/after-the-hearing/art/8860-nowelizacja-ustawy-o-trybunale-konstytucyjnym/> (last accessed 24 March 2016).

Tribunal clearly emphasized in its judgment the finality and binding nature of the judgment after its announcement and the lack of any other bodies competent to question it. The Tribunal underscored that courts are not allowed to bypass the judgments of the Tribunal and are obliged not to apply the annulled rules.<sup>38</sup>

## 6. Opinion of the Venice Commission

As a response to the public criticism of the changes to the functioning of the Tribunal, the Minister of Foreign Affairs requested an opinion of the Venice Commission at the Council of Europe on this issue. On 8–9 February 2016, the delegation consisting of five members, including the President of the Commission, met with representatives of various public institutions in Poland. The opinion (hereinafter Venice Opinion 2016) was prepared and adopted by the plenary session of the Commission, which took place on 11 and 12 March 2016 in Venice. The extensive and thoroughly drafted document is critical of all the changes introduced by the December Amendments and the actions of the previous and present government, but a few points are worth looking at closely.

The Commission supports the judgment of the Tribunal discussed above by observing that the Tribunal can review the December Amendments directly on the basis of the Constitution.<sup>39</sup> However, it adds that even without the constitutional basis

‘such a review could be justified by the special nature of constitutional justice itself. It is the Constituent Power, not the ordinary legislator, which entrusts the Constitutional Tribunal with the competence to ensure the supremacy of the Constitution.’<sup>40</sup>

In view of the Commission, European and international standards require that the decision of the Tribunal be respected.<sup>41</sup> The very idea of the supremacy of the Constitution implies that laws (such as the December Amendments in question) which threaten to disable judicial review of the constitutionality of legal acts and endanger constitutional justice, must be controlled and, if necessary, annulled by the Tribunal before they come into force.<sup>42</sup>

Furthermore, the Commission observes that the requirement for the participation of at least 13 judges when adjudicating as a full bench is too strict a requirement and implies the risk of blocking decision-making in the Tribunal and renders it ineffective. This, in turn, makes it impossible for the Tribunal to fulfil the key task of ensuring the constitutionality of legislation.<sup>43</sup> Moreover, a decision quorum of two thirds makes it

38 Ibid.

39 Venice Opinion 2016, point 39.

40 Venice Opinion 2016, point 40.

41 Venice Opinion 2016, point 43.

42 Venice Opinion 2016, point 41.

43 Venice Opinion 2016, point 71.

impossible for the Tribunal to fulfil its core task.<sup>44</sup> The Commission disagrees with the Polish government, which claimed that the absence of the word ‘simple’ in Article 190(5) of the Constitution allows for the introduction of a qualified majority, as it seems to go against constitutional practice and the prevailing opinion among Polish constitutional lawyers that this provision requires a simple majority.<sup>45</sup> In the view of the Commission, this practice can only be changed by a constitutional amendment requiring a qualified majority.<sup>46</sup>

Subsequently, the Commission considers that requiring long periods for hearings could deprive the Tribunal’s measures of much of their effect or even make them meaningless. In urgent situations, the Tribunal does not have the competence to reduce these deadlines. This, in the view of the Commission, contradicts Article 6 of the European Convention on Human Rights.<sup>47</sup> When it comes to the ‘sequence rule’, the Commission observes that an obligation to hold a hearing and to decide in a strict chronological order risks non-compliance with European standards such as Article 6 ECHR and 47 of the Charter of Fundamental Rights of the EU. The Commission argues that there must be room for the Tribunal to proceed with and judge certain types of cases earlier than others.<sup>48</sup>

Furthermore, the Commission is worried that the combined effect of the procedural changes to the functioning of the Tribunal seriously hampers the effectiveness of the institution by rendering decision-making extremely difficult and slowing down the proceedings. This, in turn, makes the Tribunal ineffective as a guarantor of the Constitution.<sup>49</sup> Overall, the requirement of a two-thirds majority, combined with the presence quorum and the sequence rule, has severe consequences on the proper functioning of the Tribunal, endangering the rule of law, the functioning of the democratic system, and human rights.<sup>50</sup>

The Commission then proceeds to the issue of judicial independence by observing that the new provisions on dismissing the judges are highly questionable, now that a judge’s mandate can be terminated by Parliament and that, in any case, such provisions cannot be introduced without an explicit constitutional basis.<sup>51</sup> Addressing the problem of the October judges who the president refused to swear into office, the Commission concluded that taking the oath could not be seen as a requirement for validating the election of judges, as it has a primarily ceremonial function.<sup>52</sup> The Commission also calls for respecting the judgment of the Tribunal of 9 December 2015 as, under the Polish Constitution, the Tribunal—and not the president—has the final say in cases involving the interpretation of the Constitution.<sup>53</sup> The president and other state authorities have to ensure the implementation of the Tribunal’s judgments.<sup>54</sup>

44 Venice Opinion 2016, point 79.

45 Venice Opinion 2016, point 81.

46 Venice Opinion 2016, point 82.

47 Venice Opinion 2016, point 87.

48 Venice Opinion 2016, point 65.

49 Venice Opinion 2016, point 88.

50 Venice Opinion 2016, point 88 and 90.

51 Venice Opinion 2016, point 94.

52 Venice Opinion 2016, point 108.

53 Venice Opinion 2016, point 109.

54 Venice Opinion 2016, point 109.

The Commission calls on all the parties for a solution to the conflict but it underscores that any such solution must be based on the obligation to respect and fully implement the judgments of the Tribunal.<sup>55</sup> After the Commission adopted its opinion, Polish officials described it as controversial<sup>56</sup> and sent the report to the speaker of the Sejm for further deliberation. So far, however, the Polish government has not published the judgment of the Tribunal and the president has not sworn in the three October judges.<sup>57</sup>

## 7. Conclusions

Judicial control of the conformity of law to the constitution is one of the basic guarantees of the observance of the constitution, as well as a key component of checks and balances, and the principle of separation of powers in a constitutional democracy. Article 10 of the Polish Constitution clearly states that the system of national government is based on the separation of and balance between the legislative, executive, and judicial powers. In times of such a strong political majority in the national parliament, as can be observed in Poland, an independent constitutional court, which acts as a guarantor of the Constitution, is one of the central elements for ensuring checks and balances.

The foregoing analysis does not leave much room for doubt. The December Amendments are incompatible with the Polish Constitution; they undermine democratic standards and are an example of poor legislative practice. Judge Stanislaw Biernat, who announced the ruling of 9 March, observed that the Act ‘thoroughly contravenes Poland’s (political) system and cannot be tolerated’. However, not only the legal act concerned, which hampers efficient and independent functioning of the Tribunal, but also the (drastic) actions of the Polish legislator, the government, and the president prior to and following the December Amendments show a lack of respect for the Tribunal and the basic principles of a democratic state governed by the rule of law and separation of powers. One cannot help but agree with the strong words of Tadeusz Konciewicz, who claims that the action surrounding the Tribunal ‘strikes at its very existence and forms part of a larger and sophisticated plan aimed at debilitating possible pockets of resistance and independence’.<sup>58</sup>

It should be underscored that the whole crisis, which has quickly grown into a serious constitutional drama, started with actions of the previous government, which chose two Tribunal judges in a way that contravened the Constitution. However, the crisis could have been staved off easily if only the governing Law and Justice (together with the president) was

55 Venice Opinion 2016, point 136.

56 <http://www.thenews.pl/1/10/Artykul/244296,Venice-Commission-adopts-%E2%80%98controversial%E2%80%99-report-on-Poland>

57 Situation as of 22 May 2016.

58 Konciewicz 2016.

willing to observe the Constitution and adhere to democratic standards. The president should have sworn the three October judges into office who would later be joined by two December judges who were chosen by Law and Justice. Such a solution was apparently unsatisfactory. Unfortunately, it seems that the governing party is a proponent of the dangerous idea that the simple majority is allowed to do whatever it wants to do simply because it is the majority. This, in the words of the Venice Commission, is ‘(...) obviously a misconception of democracy. Democracy cannot be reduced to the rule of the majority; majority rule is limited by the Constitution and by law, primarily in order to safeguard the interests of minorities’.<sup>59</sup> So far, Law and Justice has been acting as if it has a constitutional majority that allows them to push any legal act through, as the December Amendments in fact change the Constitution by means of an ordinary legislative act. Despite the public outcry and increasing international pressure, the Polish government does not seem or want to listen. It is hard to foresee how this story will end, as several scenarios are possible but the prospects are somewhat bleak for Poland.<sup>60</sup> Undoubtedly, the crisis surrounding the Tribunal and other anti-democratic reforms launched by Law and Justice have given the EU yet another headache as the Polish government acts in breach of Article 2 of the Treaty on European Union<sup>61</sup>, stating that the EU is founded on values common to all member states, *inter alia*, freedom, democracy, equality, the rule of law, and respect for human rights. In the meantime, the European Commission decided to proceed with the dialogue with the Polish authorities under the Rule of Law Framework.<sup>62</sup> The time will show whether the mechanism has the capacity to pressurize the Union’s new *enfant terrible* to comply with the basic democratic standards.

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61 Kochenov and Pech 2016, p. 8.

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