

The Polish Constitutional Crisis 2015–16: A Figurational Perspective

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Abstract: *In this paper, a framework is laid out for an analysis of the Polish constitutional crisis, which started with the electoral victory of national-conservative party in Poland in Autumn 2015, in terms of Norbert Elias's sociological theory. A brief statement of the basic facts is followed by an application of the established-outsiders model, with particular focus on the institutional aspect of the crisis and on the symbolic operations used by the new government majority in order to challenge the validity of the legal order set forth by the Polish constitution of 1997.*

Keywords: *Norbert Elias, Polish constitutional crisis, democracy, nationalism, state of law*

Since 1989, it has seemed that Poland, once a leader of post-communist transformation in Central and Eastern Europe, has been becoming a less and less interesting country, and never more so than during the eight-year period of liberal-conservative government after 2007. As a result of the 2015 presidential and parliamentary elections, however, Poland hit the headlines in Europe and America again, and for good, or at least so it seems at the beginning of April 2016. The events sometimes collectively referred to as the 'constitutional crisis' have attracted much international attention. It seems that the whole figuration is in an uproar of which Poland became a part after 1989, when its previous dependence on Eastern Bloc connections was replaced by a predominantly Western-oriented connections. While an uproar, however, may foretell a figurational shift, it should not be mistaken for one: it is perfectly possible that Poland may continue to fill its place in the international setting notwithstanding the scope of its internal metamorphosis and bad press abroad.

The situation in domestic relations in Poland is very different from what happens in the international field. Here, the constitutional crisis, which is itself the result of a long series of figurational developments, has brought about a change that will most probably have a lasting effect on Polish society in the decades to come. The basis of integration of Polish society is questioned by the crisis which revealed not only the depth of social divide, but also the non-negotiability of its alternative symbolic representations. The constitutional crisis points not only to a deficit of institutionalisation of democracy in Poland, but also to a weakness of the symbolic resources created (or retrieved) by the democratic society for the over 25 years of its existence.

These two sides of the constitutional crisis: the institutional and the symbolic-communicational, are of particular interest to a researcher inspired by Norbert Elias's social theory. In this article, I offer an interpretation of each of them in turn, preceded by a short outline of the relevant facts of the case from the Polish presidential elections of 2015 until April 2016. I will discuss both the institutional and the symbolic aspects in terms of the established-outsiders model developed by Elias and John L. Scotson (see Elias & Scotson 2008), which I explored in my previous works on gender and immigrant exclusion (see Bucholc 2011; 2013). I will argue that the crisis engages the established-outsiders mechanism by institutional means inherent to the very design of the democratic state. Furthermore, the institutional conflict is expressed symbolically, by way of a reevaluation of community symbols. It is achieved through the complex reworking of

social memory resources. In the third part of this paper, I will demonstrate this work of memory on the example of the current governing majority propaganda in respect of the Polish constitution of 1997 and the principle of rule of law stated therein. My figurational analysis of the Polish constitutional crisis leads to a representation of this crisis as a product of democratic government, which is based on a relatively equal distribution of what I term ‘the right of correction’, operating on scarce symbolic fuel.

A few basic facts about the crisis

Contrary to many commentators on the constitutional crisis, I believe that the facts of the case may be represented impartially and in a relatively detached manner. I do not include the exact dates and I simplify the matters significantly, to make the material for my analysis accessible to those readers who do not find minute reports of too great an interest. Those desirous of a more detailed story may be referred not only to a huge variety of press articles, but also to a slowly growing body of academic works (see Bucholc & Komornik 2016; Łętowska & Wiewiórowska-Domagalska 2016). The facts which I find relevant for the analysis in this article are as follows:

In 1982 (seven years before the end of socialism in Poland), a Constitutional Tribunal (the –‘CT’) was established, and has been a part of Polish system of constitutional bodies ever since. Poland is a civil law country with a written constitution; the one currently in force was adopted in 1997. According to the constitution the CT is a court whose main activity is to control the constitutionality of laws, so the judicial control of the legislative (on constitutional courts in Poland and Central and Eastern Europe, see Bricker 2016). As in any other state body, in fulfilling its task, the CT depends on the co-operation of other parts of the system. The CT judges are elected by the parliament and sworn in by the president, the CT’s proceedings require a prior motion from a statutorily entitled person or persons (the CT cannot act of its own initiative), and in order to become generally binding, the CT’s sentences need to be published by the government administration. If the CT decides that a certain legal provision fails to comply with the constitution, the said provision is eliminated from the legal order (which in practice turned out to be quite problematic in some cases, especially those of material impact on either private or public finances). A complex tissue of relations between various state organs, resulting from the principle of the division of state power, has functioned more or less smoothly for the over 25 years of Polish democracy since 1989, although the current conflict is not the first case of political disagreement about the role of the CT.

However, in 2015, after the conservative-liberal coalition dominated by *Platforma Obywatelska* (Civic Platform, the ‘PO’) had been in power for two parliamentary terms, the oppositional national-conservative party *Prawo i Sprawiedliwość* (Law and Justice, ‘PiS’) managed first to win the presidential election and, a few months later, secure a parliamentary majority which allowed it to form a government without a coalition partner and to pass any law except an amendment to the constitution. This unprecedented political victory came after a long preparatory period, which was mostly dedicated to consolidating the right-wing electorate by the PiS leader, Jarosław Kaczyński.

As far as the facts of the crisis are concerned, the (almost) first move of the newly-elected PiS President was to offer a novel interpretation of his prerogative to take an oath from the newly elected CT judges. The PO-coalition, before its anticipated electoral failure, managed to elect five new judges, under a newly passed law on the CT, which gave the PO the opportunity to elect the successors of those CT judges whose terms would foreseeably end only after the new parliamentary majority had taken power. According to the old law these judges should, therefore, be elected by the new parliament. This precipitation on the part of the PO could hardly be seen as anything but an attempt to secure its hold over the CT by extending its influence beyond the

time limit of its parliamentary rule. As it turned out in the end, the problem of premature choice applied to two out of the five judges elected by the PO-coalition. Motions for the control of the constitutionality of the new law forged by the PO to justify its action were immediately filed with the CT and the law was, in due course, found to be unconstitutional.

However, the President, while refusing to take an oath from all five judges elected by the PO, did not wait for the CT's decision regarding the constitutionality of their choice. He refused to swear any of them in, thereby transforming his right to act as a receiver of an oath into a controller's capacity. Instead, he did take an oath from five new candidates elected by the new parliament, dominated by the PiS. As a result, massive misgivings arose as to the composition of the CT: who is and who is not a judge in such a situation? In the meantime, the PiS passed two subsequent amendments to the law on the CT, radically changing the legal framework of its operations in a way that must have led to a total jamming of the court. Both these laws were, naturally, also challenged before the CT, and both of them were found to be unconstitutional. The self-reference paradox inherent in the matter was striking, for the CT was actually opining on the laws regulating the CT organisation and jurisdiction. As a result, the government officials responsible for publication of the CT's sentences refused to comply and the judgments remained unpublished, which caused another series of misgivings, this time regarding the legal effect of a CT sentence which has not been published according to the law, even though its tenor has been announced orally and was made publicly available by the parties to the proceedings. The affair has thus reached a legal impasse: the CT's sentences are ignored by the government, while the CT refuses to operate based on the laws which it has declared unconstitutional, passed by the new parliamentary majority, which the government side in turn chooses to invoke as an argument against the legality of the CT actions. A protest measure consisting in projecting the text of the unpublished CT sentences (available on the Web) in huge letters onto the building of the Prime Minister's office stressed an unintended comical facet of the situation.

In the meantime, the Venice Commission of the Council of Europe officially criticised the actions of Polish parliamentary majority vis à vis the constitutional court, and expressed its concern about the state of Polish democracy. At the beginning of April 2016, the European Parliament also expressed its concern in a special resolution, widely criticised by the Polish government and the media supporting it. Voices of concern were seconded from many places abroad, and foreign reactions were repeatedly referred to in the domestic media, both pro- and the anti-government. What seemed to be an internal problem has evolved into an international embarrassment, to say the least.

Why risk all this embarrassment, and, more importantly, why mobilise the potential of the liberal opposition in the country? It would be a mistake to follow either of the two models that still seem to determine both lay and scientific explanations, which might be called individualistic and structural, respectively. Neither a reasoning focusing on the personality of actors involved in this somewhat operatic scenario, especially that of the PiS leader Kaczyński, nor an abstract, static structural interpretation of current Polish society offer a satisfactory answer. A truly sociological explanation must combine an analysis of social organisation as a historically developing setting with due attention to individual actions shaped not only by structural necessity and individual desires, but also by cultural conditions. This 'relative powerlessness of humans (see Merz-Benz 1996: 41), which Elias demonstrated in his case studies of Drake and Doughty or Mozart (see Elias 2008; 2010a), is key to understanding the Polish constitutional crisis.

Institutional aspect of the constitutional crisis

One aspect of the relative powerlessness of Polish political actors is related to the institutional organisation of politics in Poland. After more than 50 post-war years of socialism Poland moved to a new period in opting for democracy in 1989–1990. It was a peaceful and conciliatory systemic transformation, at least from the political point of view. While the social side of the shift from central planning to a free-market economy was frequently judged rather harshly due to the large social costs of the transformation and their unequal distribution in the economy and society, the purely political takeover of power by the anti-Communist forces was often represented as an exemplary compromise. The Round Table spared Poland not only the violence of the Romanian transformation, but also the mirage of superficial consensus over democratic values which resulted in rapid de-democratisation in many post-socialist and post-Soviet countries, including the Balkans, Russia, Belarus and Ukraine. Transformation was – and justly – represented and analysed as a traumatic experience (see Sztompka 2004), but mostly due to reasons related to social security and economic welfare, with much less stress on the potentially traumatic effect of democratic politics.

Nevertheless, the criticisms of the transformation, which have been raised from time to time ever since 1989 and whose most vociferous advocate the PiS has been at least since 2002, seem to indicate that the potential for trauma was involved in the very design of Polish democracy, or, rather, that the experience of democracy as such has been traumatising for some political forces in Poland, the PiS included. In order to understand this apparent paradox we need to focus for a moment on the basics of democracy as the rule of law, as depicted by Elias in one of his less well-known passages in the introduction to *Quest for Excitement* (see Elias & Dunning 2008).

Rule of law (the ‘democratic rule of law state’) was declared as a basis of the new Polish regime on the very eve of democratic transformation, and forms one of the founding principles of the 1997 Constitution. One crucial aspect of the rule of law is the law making performed primarily by parliamentary organs, acting as representatives of the society at large. And it is precisely parliamentary law making, which Elias observes to be a process setting very high demands on its participants’ in terms of civilisation and pacification. It requires a deep and lasting pacification of all society (Elias & Dunning 2008: 11): no reliable rule can be made by means of words and debates, if physical violence remains an open option. This Hobbesian point seems very pertinent if we consider what a breakthrough must be accomplished in human attitudes in order to convince anyone not to use all means available in order to achieve his or her desire, to voluntarily limit the potential available for bringing it about and risk failure. This is exactly what happens in any democratic parliamentary life: people fight with words, money and images instead of sticks and stones, and some of them must lose; something Adam Przeworski raises to a definitional property of this form of government, saying that democracy is a system in which parties lose elections (Przeworski 1991: 119).

None other definition of democracy has been evoked as often in Poland as that one right after the 2015 parliamentary victory of the PiS. However, this definition indicates the source of weakness inherent in every democracy: people lose in debates and they lose elections, but it is not the probability (or certainty) of a loss that is constituent of democracy, but the disposition to accept it in the spirit which Elias himself finds akin to that of a sportsman/sportswoman. My interpretation of Elias’s view of law in democracy (see Bucholtz 2015: 106ff) is that it needs to be perceived in a manner similar to rules in sport, this most civilised form of entertainment. This is an alternative view to the Hobbesian apology for absolutism as the only form of government in which law is certain, because it is sanctioned with fear and lifted beyond the sphere of ordinary communication into the domain of Leviathan’s sovereign and exceptional power (see Schmitt 2008). Law in democracy need not be divine or unchangeable, it need not be feared either – it just must be taken seriously, as the rules of games are taken seriously by the children inventing them.

But surprisingly often, children (especially those small, young or inexperienced) withdraw from the game and run away crying, because the rules of the game are such as to prevent their ever winning. Withdrawal is

preferable to violence (also common amongst children), but it is not sporting behaviour – it is a sign of undue and unrestrained suffering, a thing in itself almost as threatening to civilisation as hitting the winner hard on the head. If such suffering lasts long enough, it may become a source of a trauma. If, under democratic rule, a group of people feel they can never win according to the rules, they may experience a collective trauma according to the scenario which Jeffrey J. Alexander developed to account, among other things, for anti-democratic social movements (see Alexander 2004). For if some political force or other manages to present a plausible explanation to the traumatising fact and offer a solution, a scenario may be launched which Elias foretells in a following passage:

[T]esting of social power relations in physical struggles to which people in less interdependent societies are always inclined is replaced by a long-enduring readiness to abide by the existing law. Only when upheavals and tensions within a society have become extraordinarily great, when interest in the preservation of the existing law has become uncertain in large parts of a society, only then, often after intervals lasting centuries, do groups in a society begin to test in physical struggles whether the established law corresponds to actual social power relationships (Elias 2012: 585).

It is, undoubtedly, a pre-war German intellectual speaking here, an heir to a philosophical culture which until our times tends to reify and over-rationalise the law, and to overstate its effect on the habitus of legal subjects (for a contemporary example of a similar optic; see Gutmann 2015). Elias himself was free from these sins against sociological imagination, but he still seems to underestimate the readiness to cease playing by the law in social groups which, at least in their own perception, have nothing to gain by following the rules. One other thing Elias underestimates is the range of what may happen between full law-abiding on the one hand and sheer violence on the other.

The Polish constitutional crisis is one example of the many solutions to the cultural trauma which takes the form of testing the strength of the law beyond any sporting limits without actually (thus far, as of April 2016) recurring to physical violence. What the PiS proposes may well be a revolution (see Mazur 2016), but it is primarily a symbolic one. From the point of view of democratic institutionalisation, the PiS majority has performed but two actions of significance. First, it has challenged the laws describing the rules of the game between various state organs (an infringement to the essentially sporting principle of the division of state powers), thus putting the figuration of these organs out of shaky yet lasting balance so typical of democratic government. Second, it has attacked an organ whose particular competence was to correct the legislative power by opining on its products, and, by the refusal to publish its sentences, it has attempted to practically deprive it of any competence to correct and counterbalance the legislature. By making the composition of the CT uncertain, refusing to publish its sentences and following their tenor the new governing majority reduced the impact of judicature, the only branch of state power which had not found itself in its control immediately after the parliamentary elections, due to its limited political involvement.

This outbalancing of the figuration was a political action insofar as it served the (openly declared) goal of increasing the power and freedom to act available to the parliament. However, the main effect of this operation was a factual shift from a multicentric figuration of the main state organs towards a monocentric structure. The state executive, comprising the president, the prime minister, all the ministers and the respective administrative bodies, all belong to the PiS sphere of influence [1],[#N1]. The legislature is dominated by the PiS, therefore the executive and legislative power play together without any conflict equilibrium which might result from a *cohabitation*, or at least a coalition arrangement. Within the judiciary, of which the CT is usually considered a part, political influence is indirect and delayed in time due to very limited terminability

of judicial nominations (even though not equal to zero). The existence of certain non-classical public authorities, like the ombudsman or the Broadcasting Council, does not change the overall picture of Polish democracy, which has suddenly become black and white. The division of state powers has lost its importance as a principle of institutionalisation in the political sphere.

Thus, at the highest level of political integration within the intra-state society, a duality emerged, accompanied by hostility and, very soon, open conflict. It would be premature to state that this bipolarisation of state institutions reflects an equally deep and uncomplicated divide within Polish society as a whole. In Polish democracy, indifference still seems more potent than commitment, despite a large mobilisation of pro- and anti-government forces. It has frequently been mentioned that due to a small turnout (50.92 per cent) and a relatively large percentage of votes having gone to parties which did not reach the minimum required to make it into the parliament, the PiS parliamentary majority was effectively elected by less than 20 per cent of the electorate. The PiS was in fact chosen by the abstainers. It would, therefore, be a mistake to identify the developments in politics and the relations among political institutions as a sign of larger social processes. What happens at the level of state organs has a self-standing dynamic: it is a part of an outsiders–established scenario, which reflects the state of nation-level social figuration in its entirety, but certainly not in its particulars.

Late Post-Communist Outsiders

The established-outsiderness figuration is rightly perceived by the PiS, the new establishment), as one extending beyond the national boundaries. The old establishment, the non-PiS [2][#N2] [3][#N3]. Another factor enhancing the symbolic exclusion of both these outsider-groups from the national community is the problem of European identity. Instead of an inclusive project which does not oppose the national identities of EU members, according to well-wishes of many European politicians and intellectuals, PiS styles European identity as either superfluous or hostile to the national one. Thereby, all the groups which declare or demonstrate their self-perception as Europeans, are at the same time declared anti-national. become, as Kaczyński once expressed it, ‘groups with European connections’, whose interests are contrary to those of Poland, because they engage in non-Polish interdependence networks (see *Nie chcę większości* 2016). PiS offers an alternative: a confrontation instead of connection, sovereignty instead of interdependence.

Justifications for this variant of sovereignty are surprisingly commonsense, even though their concreteness leaves to be desired. As Kaczyński had put it in a following manner:

Only under the conditions of sovereignty we can proceed towards a situation in which we may compete with our Western neighbours as far as state efficiency and income per head are concerned. [...] The answer to our geopolitical situation should be, simply, a very strong Poland. Wealthy, well-governed and well-armed, it will be taken seriously (*Nie chcę większości* 2016).

The point about Poland ‘being taken seriously’ is an appeal to the sense that interdependence diminishes the significance of an actor: only the one who does not need to look up to others deserves serious treatment. This belief is frequently expressed by PiS politicians with a metaphor of Poland ‘rising from its knees’ or refusing to ‘kneel down’ before whoever is criticising it. The expression ‘on their knees’ (*‘na klęczkach’* or *‘na kolanach’*) is a frequent derogatory description of insufficiently self-asserting politics of liberal and leftist governments. Strength, also manifest in military terms, is necessary to secure a sovereign position. Another feature of Kaczyński’s message deserves attention: the factors of sovereignty (always understood as freedom to act

independently), such as the army, economic health, good governance, are presented by him as its products. We need to become sovereign first, so the message goes, and only then can we be what we want, i.e. wealthy, strong and respected. This reduces sovereignty and the measures of achieving it to the purely symbolic domain: a task in the realm of the spiritual to be performed before the claims of mundane politics are addressed, according to the traditions of Polish Romanticism, which, contrary to that of the West, focused strongly on national independence. Ratings, coefficients and international comparisons are hereby replaced with spiritual values, a shift allegorised by a widely commented on decision of the Prime Minister nominated by the PiS, Beata Szydło, who immediately after moving into her new office decided to replace the clock hanging in the conference room there with a crucifix (see photographic documentation *Zamiast zegara – krzyż* 2015). A Weberian combination of the clock and the crucifix, of the time of the church and time of a merchant (see Le Goff 1988), did not seem an option.

The notion of sovereignty, transposed from the interstate into the intra-state domain, also explains one other aspect of the PiS refutation of interdependence, namely the possibility, that there might be a significant social bond between the nation and the outsiders excluded from the nation. A quotation from the words of the Polish romantic poet, Cyprian Kamil Norwid, does not seem amiss in this context: ‘Poles are a magnificent nation, but no society at all’. In the PiS’s symbolic operations, this became true: all the bonds between post-communists and the beneficiaries of the post-communist transformation are rendered null and void by a fundamental lack of axiological unity and common habitus. The institutional effects of PiS politics may also, if they last long enough, cause an annihilation of certain bonds by way of the exclusion of the outsiders not only from political life, but also from public artistic expression, scientific activity, and, possibly, certain civic rights and economic freedoms, depending on the level of control which the state is able to overtake in the heretofore relatively under-regulated spheres of social life. This tendency is common to all populist regimes (see Müller 2016a; 2016b). Of course, the exclusion applicable to post-communists and transformation beneficiaries extends to all people who are not Poles in any sense (even the weakest, formal-legal one), which explains the reactions of the PiS government to European initiatives regarding the refugee crisis. Any bonds made to such people are axiologically futile.

International isolation may be one result of a self-image conceived along these lines, as demonstrated by Kaczyński’s reserve towards ‘various Polish groups which have European contacts’ (*Nie chcę większości* 2016). However, another result, for the time being much more tangible from the domestic point of view, is the fact that such a representation of society inevitably means that the PiS does not negate the current state of social relations, but also offers a new beginning, thus offending one more sociological truth crucial for Elias: there is no zero point in being a society.

Finding a zero point is a constitutive feature of the kind of mentality which Karl Mannheim defined as utopian (see Mannheim 2002). He distinguished four kinds of utopian mentality, depending on the temporal orientation of their proponents: some would seek the zero point in the immediate future, almost now; some in a somewhat procrastinated one; and some would prefer to return to the past. The latter style Mannheim describes as ‘conservative utopia’, whose potential for social change lies in a judicious use of memories of the past as building blocks for the vision of a brave new world. However, the zero point in this style of thinking must be well chosen, in order to provide a good reference point for a political project in the present. Anyone familiar with Polish history will immediately appreciate the difficulty of finding such a point in the past without a lot of intellectual gymnastics. In the case of the PiS, the effort results in a hybrid vision of future, composed of elements coming from three different layers of collective memory, referring to, respectively, the transformation period after 1989, the socialist period of 1945–1989, and the largely forgotten interwar period of 1918–1939.

How can this eclectic utopia serve the goal of outsiders' exclusion in the present? First and foremost, it allows one to construe a continuity between the post-communists of 1989, the communists of 1945–1989 and the anti-national forces before 1939, or even earlier, as the frequent references to Targowica might indicate, an arrangement of the Russia-sponsored coalition of Polish magnates of 1792 (just before the second partition of Poland), a universal synonym of national treason. It is an utterly black-and-white, largely anachronistic construction, supported by the remembrance of Polish wartime heroism, epitomised by the Warsaw Uprising of 1944, an event around which the PiS has mobilised its supporters for almost two decades now by means of rituals such as marches and communal singing, enhanced by the existence of a shrine to this cult in the form of the Warsaw Uprising Museum in Warsaw (see Żychlińska 2009; Żychlińska & Fontana 2016). This unyielding memory politics conveys the vision of the nation as a historical constant endowed with its own subsistence, of a longer and more reliable standing than political regimes which come and go, but which are usually hostile to the nation. The metaphor of nation on its knees encapsulated in this vision can be employed to many different purposes. [4],[#N4]

The vision must, however, deal with one obstacle: in the interwar period, Poland was a free country, both formally and in reality, after more than 100 years of partitions during which formerly Polish territories were divided between Germany, Austria and Russia. In order to draw on this short but politically significant period for fuel, any memory politics must seek a useful resource there. Clearly, it cannot be found in discrimination against national, ethnic and religious minorities, anti-Semitism, the poverty of the Great Crisis, the militarisation of social life, the blatant exploitation of the lower classes, the aggressive foreign policy and other facets of interwar Poland which could challenge its heroic image. However, apart from certain undoubted military successes, including an unexpected victory against the Red Army near Warsaw in 1920, there is at least one more thing in the interwar period attractive to proponents of national sovereignty, understood as the unhindered freedom to act without respecting the institutional division of labour. It is the overtly anti-democratic discourse on the part of the ruling elite of the time, which quickly pushed the country from a largely inefficient parliamentary democracy to autocratic military rule. One of the PiS's particular heroes was Józef Piłsudski, who played a key role in the restitution of Poland in 1918. He was a leader of a faction called *Sanacja* (literally, 'Healing'), composed mostly of army and ex-army people, which ruled Poland from 1926 until 1939. Its political programme was to counteract the weakness of parliamentary rule by going around it or against it, putting the personal charisma of the leader in place of institutional charisma of any public office. It was to heal Poland from the deficiency of parliamentary democracy, and the main goal of *Sanacja* was to give the land a new, more adequate constitution, which would not condemn it to weakness. The goal was realised in 1935, against all rules, preceded by a decade of anti-constitution propaganda, put in words too strong for most contemporary ears.

These two elements: the continuous existence of a heroic nation in a hostile political environment, and a ready-made example of anti-democratic rhetoric coming from the celebrated figure of one of the authors of Poland's independence after 1918, make for a powerful resource. Some part of it are referred to directly, and some only emerge in the form of topical analogies and rhetorical affinities, particularly noticeable in the public speeches of Kaczyński, a great personal admirer of Piłsudski (Staniszki 2016: 107; Wigura 2016: 115). The main target of all the energy to be drawn from these resources was used against the constitution of 1997.

Constitution and the rule of law: dispensable

It is not antidemocratic to be displeased with the laws of one's country, even the basic ones. However, a democracy can hardly persist if its legal order is challenged as a whole. Even though the Polish constitution does not have comparable status to that of many other written constitutions, such as those of Germany or the

United States, from the juridical point of view it remains the basis of legal system and the source of validity for all laws and, as a consequence, indirectly for all acts of public authorities, which need to have a legal basis according to so-called ‘principle of legalism’. The Polish constitution of 1997 was not a product of popular enthusiasm: it was adopted at the time when the governing majority was of a leftist and, largely, post-communist origin, as was the president of the day, Aleksander Kwaśniewski. The final text of the constitution was a product of a political compromise, which – in the usual way of compromises – did not fully satisfy anyone, in particular in relation to the problem of *invocatio Dei* in the preamble: in the end, it is and it is not there at the same time [5].

As a result, the PiS declared that the constitution should be changed, because it is a relic of the communist past. Kaczyński put it in following terms: ‘Coming into force in 1997, it [i.e. the constitution] petrified pure post-communism. The Polish state apparatus was not built from scratch, it is a mutation of the communist apparatus’ (see *Biznes* 2013). In these words, not only are the main motifs of the legal culture promoted by the PiS to be found, but also the programme of transitional justice which the PiS has adhered to with utmost consistency since the beginning of its existence in 2001. All lustration procedures heretofore applied in Poland are challenged as insufficient, and the key to the new reality was changing the constitution, which entailed starting from scratch, finding a zero point in reality which would move the zero point in society into the time before 1945, when Poland was neither a communist nor a post-communist country. The goal is, in this case, much less problematic than its rationale, which clearly shows yet another utopian trait, that of refusing to take into account the limitations standing in the way of the utopia.

Among these key limitations, international interdependence is probably the most important. Since 1989, Poland has been working out legal standards and practices in public policy making and governance. However, these standards have been created within an international network, the interconnectivity of countries operating as a trigger to domestic developments and, though rather less often, the other way round. These legal and governance changes were accompanied by social processes which resulted in Poland moving from being an industrial nation with a strong presence of small-scale family agriculture to being a post-industrial state. Members of this society enjoyed many freedoms unknown to their parents and grandparents, including the freedom to move around in the common European space for work, education and leisure. Technological change and the rapid rise of diverse mass media after 1989 were also significant factors, contributing to a growth of social networks and third-sector institutions, modifying patterns of communication and increasing the number of cognitive challenges with which individuals must deal.

From the figurational perspective, a fact as important as all these new developments is the pace at which they took place in Poland (and the other post-communist countries). What had been spread over many post-war decades in the West, in the East happened in 25 years. This suddenness of change caused adaptation difficulties for a large part of society, but more importantly for the conclusions of this section, it showed that symbolic resources which could be employed to address the situation were scarce. Poles was left somewhere in a chasm between the neo-liberal, technocratic modernisation discourses imported from the West and the domestically forged conservative utopian constructs designed to counteract them.

The result is, among other things, the relatively low status of the rule of law as a principle of social and political life. The legal culture promoted by Polish conservative utopists is a combination of legalism usually associated with legal positivism, a philosophy which still dominates legal education in Poland and many other continental countries, and the law of nature philosophical heritage, both in its religious and secular variants. On the one hand, the law is important (which is why the constitution must be changed), but on the other hand, the law is but an epiphenomenon of the sovereign’s will, the will of the nation, and may not be placed above the nation’s will in the case of any discrepancy between the two. The law is there and is to be obeyed, but always depending on the nation’s approval. That is why, although the law has never been discussed in

Poland more than it is today, if need be specific legal norms are pushed aside as easily as if they were not there at all.

Kaczyński summarised the tenets of this legal culture in 2010 in a lecture at the Jagiellonian University in Cracow, with the title ‘Is Poland a state of law?’ He said:

There are no conditions in Poland for a state of law and a law-governed state to exist in Poland. Let us now reflect on the consequences brought about by the application of rules derived from the concept of ‘state of law’ in our country. In Poland, during the last twenty years, some elements of a state of law have been built. These elements, however, lead to some rather specific consequences, which can be connected to the consequences of the absence of law. By the 1980s the process of ‘juridification’ of the communist system had already begun. Many things were regulated which had not been regulated before. Certain institutions were established, including the Constitutional Tribunal, the ombudsman, the administrative courts. This process was very far-reaching. A situation came about, in which no decision could be taken without a legal basis. This limited the rational freedom of decision-making by the persons who hold various public offices (Kaczyński 2011: 227).

In this address Kaczyński does not negate the value of the state of law. Quite the contrary, he suggests that the rule of law cannot be introduced in Poland because the necessary conditions have not been fulfilled, which is why all the elements of rule of law that are already in place are dysfunctional: they could only function well in an appropriate context. One crucial element of this context is the freedom to act on the part of the authorities, which may not be ‘irrationally’ limited by the law. A conclusion of this reasoning might well be that the law has its place as a regulatory framework of social action, but state power may not be subjected to the law: the authorities must have more freedom than the citizen. Thereby, the very core of the principle of the rule of law is rendered null and void, for it is exactly the point of the rule of law to make sure that state power, which prevails over individuals in so many respects, is limited more than those individuals in order to counterbalance the imparity between them.

Diffusion of the right of correction

In a state of law, in which division of state power is an operating principle and no one is above the law, one important effect is achieved, which I term an equal distribution of the right of correction. I used this term in my book *A Global Community of Self-Defense* (2015) to describe the basic mechanism according to which actors adapt their behaviour to the rules, make the rules and break them. The notion of correction is based on my reading of Ludwig Wittgenstein’s concept of following a rule in *Philosophical Investigations*, which I will not report here in full (Bucholc 2015: 83ff), which was inspired by precious remarks contained in Stephen Mennell’s introduction to Elias’s sociology (Mennell 1989). The essence of Wittgenstein’s interpretation of rule-governed behaviour is that it is learned by training, and the core of training is correcting the mistakes and ‘doing the same’ as the trainer (Winch 2008: 23), who in turn also ‘does the same thing’ all the time. However, as Elias’s examples of transferring the knowledge of rules to the ignorant show (see discussion in Bucholc 2015: 94ff), the thing done is not always the same, and corrections are not limited to the initiation of new players in the game. In fact, such an idea would make the game rules something static and abstract, contrary to what both Wittgenstein and Elias believe to be the case. Correction is present in every social game and is a basic mechanism not only of inducing conformism, but also, and more importantly, of making up the rules as we go along, changing them and adapting them to our needs and interests.

Being able to correct other players is, therefore, an aspect of social strength in Elias's view, and it may be suspected that the correctors will usually be found at the top of the social structure, in powerful positions in the figuration. The right of correction, which consists in a justified expectation that others will accept the correction and adapt their behaviour to it, is a prerogative of the powerful, whose impact on rule-making is greater than that of their subordinates. However, there is more than one way for this right to be distributed in a society.

The right of correction could, hypothetically, be concentrated in one powerful ruler, such as Louis XIV, an arbiter in every rule-governed sphere of life, from politics, the military and the economy, through art, love, religion and fashion, whose presence was symbolically ubiquitous (see Elias 2010b). It would not be an absolute concentration, for interdependence makes such unbalanced social settings unrealisable, but it would leave very little space for other social actors to exercise the right of correction. On the other hand, a diversification of the spheres of life and the increasing complexity of the figuration may also result in a different distribution, a more equal one, in which various individuals would be entitled to correct others in various spheres on various bases, while at the same time being subject to correction by others [6].

Parliamentary democracy is based on this principle, as far as politics goes, and the division of state powers serves the goal of preventing monopoly by any social force represented in the political bodies. An inevitable effect of this is, of course, a broad field for mutual readjustment, which takes the form of political conflict: the more equal the actors are in their social strength, the more likely conflict between them. Therefore, democracy also usually provides a method to stop the conflict by assigning to various actors the right to correct others with a final effect of ending the correction process. The Polish CT is one such actor: it is endowed with the right to stop mutual corrections by various state bodies by pronouncing a binding interpretation of rules, a sort of final correction which itself is not subject to any further correcting moves. However, this finality itself draws its force from a rule, which may be set out in writing by the constitution, but which is not different from any other social rule: it may be changed as we go along, not according to the rules for changing the constitution, but by the force of the facts of social life.

This is the core of PiS actions: they constitute an attempt to change the rules according to Wittgenstein's model, without maintaining the fiction of support for any limitations to changing them other than factual ones, resulting from relative power levels. A good illustration of this attempt to redefine the rules are the words of president Andrzej Duda of 3 December 2015:

To end an unwanted discord undermining the authority of the supreme institutions of the Polish state, as a guardian of the constitution and of the continuity of state power, I decided to take an oath from the judges elected yesterday [by the PiS]. I followed the will of the new Sejm [the lower chamber of the Parliament], in which the Poles put their utmost hope for reparation of the Republic ('Podjąłem tę decyzję' 2015).

The words 'I decided' (if we disregard the fact that the president's political independence from his former party leadership is illusory) indicate that a new structure of justification has appeared in public discourse, a justification evoking the individual opinion of a holder of a position of power as a direct source of legitimation of his or her decision, with the will of the Parliament as an indirect source, the Parliament being an manifestation of the sovereign nation. The authority of the law does not have legitimising potential in itself – the rule of law is subject to free interpretation and to an amendment by the president, a standpoint which inevitably caused some commentators to associate PiS ideology with Carl Schmitt's decisionism (see *Rzqd nie uzna* 2016). As a result, the CT loses its status of an ultimate arbiter in the case of a conflict between state powers.

This structure of justification reiterates, to mention just the grounds the president gave for his decision to pardon a PiS politician, Mariusz Kamiński, before the criminal court had pronounced the final sentence in his case. The president then said that he wanted to ‘free the court from this matter [and] cut this problem, decide it as the president, taking the responsibility for it himself’ (‘Postanowiłem uwolnić’ 2015). The fact that there is no presidential legal prerogative to solve criminal cases is not mentioned here, for – as might be assumed – it is yet another rule which the president has re-made by the facts of his action. This decisionist reasoning is also repeated at lower levels of the executive, notably by the government administration responsible for the publication of the CT’s judgments. Declarations of opinion by individual persons, who based their refusal to follow the norm prescribing deadlines for publication on their own assessment of the situation, are evoked there as a final rationale for their actions [7]. The prime minister and her staff, refusing to publish the CT judgment, took over the right of correction which was not previously theirs, for no legal rule gave any of them the right to control the legality of CT decisions.

Conclusion: a new wave of engagement?

On the one hand, by dealing with the rules in such a way, PiS has rendered an important service to society: people may learn how fragile the rules are and how delicate the basis for their binding power actually is. All democratic government, just like a game of football or chess, is based on the fiction of common agreement to certain rules. However, this truth is learned at a great cost. We very seldom appreciate the insubstantiality of democratic government, which may only last as long as all state powers play along. A showdown, when it comes, demonstrates that the rules are strictly connected to the social structure, and the political force which successfully applies the established–outsiders mechanism in politics may also draw legal benefits from it.

All these operations on legal rules describing the distribution of the right of correction in a political system have one additional consequence: the right of correction, once the decisionist approach has freed it from legal limitations, tends to free-float in the system. The fact that virtually all key positions in the Polish state are, at the moment, occupied by adherents of the same political party, makes it less conspicuous, but not less significant. If every person in a position of power strives to exercise the right of correction in respect of any other actor with whom he or she is in conflict, and there is no super-arbiter above them all, whose correction is agreed to be final, then there is a fair chance that the results of corrections become unpredictable and unreliable, and their rule-making effects volatile and transient. This means instability and insecurity, not to mention the devaluation of law as an instrument of conflict resolution. It is hard to judge whether a law that is not taken seriously by anyone is better or worse than no law at all, but personally I would be inclined to believe the latter. Of course, statutory law is not the only way to limit the right of correction and prescribe for its distribution, but it is, probably, the only democratic one.

Support for this democratic measures as opposed to their PiS-sponsored revision is large enough to inspire in some circles the belief that we are facing a new wave of civic engagement of people who have heretofore stayed off politics, taking democratic achievements of post-transformation era for granted. In Eliasian terms, this engagement would be motored by involvement in democracy, by redefining it as something on which a group of people may build their collective identity, a pivot of their “we”-orientation (see Elias 2007, Mennell 1989, p. 16off). Democratic symbols, which were moved into the realm of the detached by the apparent routine of the long liberal-conservative rule, are now gaining intense emotional hueing, symmetrical to the one assigned to symbols such as “sovereignty” or “Nation” in right-winged discourse. It may be civic activism reborn after almost 30 years of political disinterest, but it may also be a signal that disagreement, mistrust and hostility are raising in the binary setup of established and outsiders, much along the lines described by Elias in *Humana conditio* (Elias 2010c). The antagonism is petrified by regular demonstrations, mutual accusations of inaccuracy and manipulation, hectic media campaigns, and innumerable Facebook

breakdowns of friends set apart by differences which had seemed irrelevant until 2015. An ever deepening communicational gap is extending throughout Polish society, cutting it in two and leaving the midfield empty.

Endnotes

1. The nominated civil servants in Poland are but a small fraction of the administration and, in addition, in 2015 the PiS majority amended their status so as to make the civil service more open to political pressure. ♣.[#N1-ptr1]
2. ‘As though the world had to proceed automatically in one direction only, according to the Marxist scheme, toward a mix of cultures and races, a world of bikers and vegetarians, who insist on renewable energy sources and fight every form of religion. It does not have anything to do with traditional Polish values’. ♣.[#N2-ptr1]
3. To mention just Leder 2014; Śpiewak 2012; Gross 2002; Zaremba 2012 and the movies ‘Ida’ and ‘Pokłosie’. ♣.[#N3-ptr1]
4. Another good example of the persistence of the vision of a nation enslaved is the differentiation of the textual variant of a Catholic hymn *Boże, coś Polskę* (God, Thou Hast Poland). The last line of the chorus of this song, dating back to early nineteenth century, sung at the end of a Catholic mass on particularly festive national holidays, to a slow and solemn melody in a major scale, usually by the congregation upstanding, has two versions. In partitioned Poland before 1918, the last line of the chorus sung by Polish patriots was: ‘*Ojczyznę wolną racz nam wrócić, Panie!*’ (‘Return, o Lord, our free homeland to us!’). After 1918, when Poland was restituted as a state, the wording changed ito: ‘*Ojczyznę wolną pobłogosław, Panie!*’ (‘Bless, o Lord, our free homeland!’), but the older version came back, first under Nazi occupation and, of course, after 1945 under Communist rule. In 1989, the free homeland may have been restored by some, but not by everyone. Therefore, the text variant chosen by a person could sometimes be quite a reliable sign of his or her political views: those, who chose to pray that the free homeland be returned to them, clearly did not believe that the transformation had brought Poland freedom. ♣.[#N4-ptr1]
5. The part of the preamble is as follows: ‘We, the Polish Nation – all citizens of the Republic, both those who believe in God as the source of truth, justice, good and beauty, as well as those not sharing such faith but respecting those universal values as arising from other sources’. Quotation after https://en.wikipedia.org/wiki/Constitution_of_Poland [https://en.wikipedia.org/wiki/Constitution_of_Poland]. ♣.[#N5-ptr1]
6. I discuss a hypothetical example of such distribution in Bucholc 2015: 101ff. ♣.[#N6-ptr1]
7. See the statement by Prime Minister Szydło of 14December 2015 (*Szydło: publikujemy akty prawne 2015*), as well as by the Chief of the Prime Minister’s Office, Beata Kempa, of 10December 2015 (*KPRM do TK 2015*). ♣.[#N7-ptr1]

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