The Polish democracy: a protracted crisis or on the brink of collapse?

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"The will of the people is above the law. Law is to serve the people. If it does not, it is no longer law."
(Cit. KORNEL MORAWIECKI, Honorary Marshal of the Sejm)

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1. Introduction

The story of the Polish democracy had represented one of the most well-known examples of successful political transition after the collapse of the Soviet Union. The very fact that the regime change was approached by elites, parties and social movements with a pioneering effort towards inclusive dialogue and openness to the Polish society should be considered a crucial trait in the political process of democratization. The positive start was maintained over years by modernizing the country with liberal policies and a new economic paradigm.[2]

Lastly, Poland has been solidly involved in the European integration process already before the accession to the EU in 2004. All these aspects led to the almost unanimous view not just on the definitive return of Poland to Europe, but on its unmistakable and irreversible transition to democracy. However, against the expectations that Poland could never "go back" and renounce to its democratic conquests, it is unambiguously clear that many reforms approved after the electoral victory of *Prawo i Sprawiedliwość (PiS)* or Law and Justice in 2015 have pushed backwards once again the entire institutional system.

Articulated explanations or inquiries on the causes of the current crisis of democracy in Poland could be tracked down in the Smolensk air crash, which is the great turning point for its political system. Indeed, as Adam Szostkiewicz wrote: it became the most divisive issue due to the policy adopted by the then opposition PiS party, which has contested all official government facts and data concerning the catastrophe.[3] In other words, it was not just the beginning of conspiracy theories and accuses of criminal negligence against the government of that time, rather the obstacles to uncover the truth on the responsibility of the air crash brought about a rift between the main political actors which cannot be healed.

These paragraphs will analyze the crisis of democracy in Poland, focusing on the complex and chaotic trajectory of the current political attack against democratic institutions. Under the leadership of the current President of the Republic Andrzej Duda and the shadow influence of Jarosław Kaczyński, who dominates over the majority as the powerful authoritative father of the party, the changes occurred in the country over the past years take shape as a plan directly inspired by the institutional disarmament that Viktor Orbán accomplished in Hungary. Nevertheless, despite many reasons that make these cases comparable, the two political systems find themselves yet on still divergent paths.

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[2] Grzegorz Ekiert and George Soroka, Poland, In Pathways to Freedom: Political and Economic Lessons From Democratic Transitions, New York: Council on Foreign Relations, 2013, pp. 77-104.

[3] Krzysztof Dzięciołowski, Is there a chance for non-partisan media in Poland? Reuters Institute Fellowship Paper, University of Oxford, 2016, p. 31.

2. The power of the majority within political institutions

Despite the first attempts of resistance of some key institutions - as in the case of the last months of 2015 for the controversial appointment of new judges of the Constitutional Tribunal and its subsequent reforms - their subsequent reaction to the strategy of political aggrandizement of the executive gave way to a substantial and dangerous inertia. In such a context, PiS has engaged the political and institutional system in an unprecedented confrontation which reduced the opposition to a powerless group within the parliament and transformed many independent institutions into unofficial governing-party organizations.

In the last three years, the majority could heighten its power as never before within the parliament and, unilaterally influence the extensive network of relationships and linkages of mutual controls between government and independent institutions. The current ruling party has used two basic tactics to silence the opposition and reduce its parliamentary functions. On the one hand, the intense abuses of minimum-procedures in order to shorten the parliamentary debates or avoid various forms of public consultation. There are many parliamentary voting mechanisms which can make decision-making processes of approval of a bill markedly less transparent and open to the debate. These rules maximize the influence of the majority and its own self-defined preferences, minimize the political costs of the confrontation with the opposition. As Peter Bachrach and Morton S. Baratz put it in the Sixties, commenting on the behavior of the actors of political decisions, different preferences and expressions of dissent can be "suffocated before they are voiced, or kept covert; or killed before they gain access to the relevant decision-making arena."[4] The majority can impose time limits to the debate and reduce the role of the opposition to simple silent observer, rather than participant to public discussion and final decisions. For example, the Paul Lendvai stresses this aspect of the so-called private member's Bills in Hungary. They are used by members of the majority to bypass the stage of public consultation required of all government bills. In Lendvai's words, they follow: "Fast-track procedures without any debate."[5] These procedural stratagems are considered alarming as well within this research on democracies where incumbents use the power to relegate the opposition in a substantial inactivity. On the other hand, the majority acted by introducing new power of impose penalties in the hands of the Presidium of the Sejm (the lower house of the Polish parliament) to control the parliamentary activity. As we would like to provide some evidence to these assumptions that over the last years parliamentary debates have moved towards an ever more unilateral model of decision-making, measuring the discrimination of the opposition within the parliament in terms of reduction of its functions and time to participate to parliamentary debates could be very helpful. The examination of how many times the opposition could have been in the condition to actually take part to debates allows us to monitor the first of these two aspects: the abuse of minimum-procedures within the Sejm. From an empirical standpoint, we rely on the only existing data currently available reporting the number of decisions approved by the Sejm and the type of procedures to adopt them. Although they are not related to entire terms of the Sejm, as most of these data have not yet been published, but just to the first year of each mandate since 2007, we consider them reliable as they allow us to observe about one fourth of the length of the legislature. Hence, the empirical evidence concerns just the 25% of the activity of the 6^{th} - 7^{th} - 8^{th} term of the Sejm. The results of this research clearly show the different approach of the last three majorities toward the parliamentary debates and their relationship with the opposition. From a comparison of data, we can clearly show an abuse of power against the opposition. Indeed, in the years 2007-2008, when the majority was *Platforma Obywatelska* (English name: (PO) Party Acronym for Civic Platform), the opposition was free from any procedural discrimination in 82.1% of the votes within the Sejm. This number has been substantially unvaried in the years 2011-2012, when the majority lead by Civic Platform did not use any procedural stratagem to keep the opposition out of the decision of the Sejm in 78.5 % of the votes. The

[4] Peter Bachrach and Morton S. Baratz, Power and poverty : theory and practice, New York Oxford University Press, 1970, p. 43.
[5] Paul Lendvai, Hungary's Strongman, Oxford University Press, 2018, p. 96.

difference with the approach chosen by the current majority of Prawo i Sprawiedliwość (English name: (PiS) Party Acronym for Law and Justice) is undeniable. Indeed, in the first year of the 2015-2016 current mandate of the Sejm, the majority party Law and Justice did allow the opposition to be part of the parliamentary debates only in 27.6 % of the times.[6] The beginning of the current term of the Sejm in November 2015 is a watershed in the recent history of the Polish democracy as the functions and power of the opposition bottomed out after the last elections. Contrary to the parliamentary activities of the 6th and 7th Sejm, where the majority fostered a collaborative attitude with open debates between incumbents and opposition, the current ruling party (PiS) has taken up a radically different line. As already done in Hungary by *Fidesz*, the party of Kaczyński and Duda switched promptly to a different route in order to affirm how their power could downgrade the Sejm to an uncritical and acquiescent institution. The ruling party allowed that new bills could be approved after an open debate with public consultation just in 27.6% of the cases. All the other decisions approved by the Sejm were discussed with minimum-debates or without any consultation. The extreme change almost exactly overturned the political praxis of the previous majority. In that case, that we can monitor from the data related to the period from November 2011 to November 2012, the ruling party had recurred to minimum-debate just in 27.5% of the cases. In short, after the elections of 2015, three bills out of four were adopted with procedures which limit the debate and the role of the opposition to be a silent spectator. As in the Hungarian case, the increase of the number of private member's bills represents the tendency of the incumbents to ignore the criteria required by the law in order to debate and approve new bills. More specifically, by avoiding to debate new bills in the form of "government bills", the incumbents refuse to comply with art. 21.2 and art. 24.4 of the Rules of the government.[7] For instance, both these articles establish that government bills require public consultations or opinions. There are other important provisions obliging the government while presenting a new bill to respect standards of public control that are much higher than those ones required in the case of private member's bills. Indeed, according to article 34 of the Standing Orders of the Sejm, government bills require an explanatory statement which states the purpose of the bill, the changes introduced in the existing accumulated legislation, as well as the estimated social, economic, financial and legal effects.[8] Moreover, the government needs public consultation to justify a new bill, while the conditions for a private member's bill are lower. In a few words, when the majority acts by approving laws in the form of private member's bills, the ruling party can avoid many occasions of political control. At the same time, the opposition is deprived of its function to amend or scrutinize. This new status of uncritical acceptance prevailing within the parliament is coherent with a vision of absolute political power as that one proposed by the current incumbents, who cannot accept having their hands tied under any circumstances.

The reform of the role of the Speaker of the main chamber of the parliament represents another distinctive feature of the devious tactic used by the ruling party. Unfortunately, the deterioration of the general conditions of democratic debates within the Sejm seems to continue and get worse. A dangerous decline which culminated with the adoption on February 28, 2018 of new types of penalties in the form of "disciplinary rules." Before the entrance into force of this reform, article 175 of the Rules of Procedure already allowed the Marshal to forbid a member of the Sejm who talks off topic from speaking. Alternatively, the Marshal could exclude the member of the Sejm from the meeting. The initial extent of power of the Marshal, the full details of which space does not permit, could be easily described by comparing article 101 of the Standing Orders of the Sejm which was subsequently replaced by the current article 23.

The main disciplinary measures provided by article 101 were:

- Warning for irrelevance (Art. 101.2)

[6] Source: Obywatelskie Forum Legislacji, Fundacja Batorego, Jakość stanowienia prawa w pierwszym roku rządów Prawa i Sprawiedliwości, January 30th 2017.
[7] Regulamin pracy Rady Ministrów, 28 October 2013, art. 21.2 and art. 24.4.
[8] Standing Orders of the Sejm of the Republic of Poland, Consolidated text of the Resolution of 30 July 1992, art. 34.

- Order to discontinue the speech (Art. 101.2)
- Call to order (Art. 101.3)
- Call to order recorded in the minutes (Art. 101.4)
- Order to leave the sitting and recess in the debate (Art. 101.5)

As clearly established by these provisions, the main justification that could allow the Marshal to enact one of these measures was the irrelevance of a speech within the framework of the issues of the debate. Under the new provisions, every member of the opposition could undergo a lot of limitations to a free participation to debates and other parliamentary activities in the name of the protection of the dignity of the Sejm. Indeed, the participation of members of parliament can be restricted as established by the first comma of the new article: "In the event that a Deputy has made it impossible for the Sejm or its organs to work, or a Deputy has violated with his behaviour in the Chamber dignity."[9] The article approved last February mentions also different types of penalties in cases of the violation of the dignity of the Chamber. Among them, a reduction to the member's salary.

Moreover, the current provisions of article 23 do not just tighten the discipline of members of the Sejm, but they also create worrisome room of abuse of power as it shifts some important prerogatives of impartial surveillance over the parliamentary activities from the Marshal to the *Prezydium Sejmu* or Presidium. In this way, the various forms of coercion aimed at intervening on the status of members of the Sejm are in the hands of a collegial organ which includes the Marshal and his Deputy Marshals. Currently, the Presidium consists of 6 members: the Marshal and five Deputy Marshals. Overall, the Marshal and two of his deputies are members of the ruling party. As set by Article 13 of the Standing Orders of the Sejm, the Presidium adopts resolutions by majority vote and the Marshal can use a casting vote. Hence, most of the times the ruling party has the power to monopolize the Presidium and use this organ against the freedom of the members of the Sejm. This is the end of the impartial guarantee over the Sejm. This hypothesis of a new method to obstacle free debates within the Sejm is not an unrealistic and biased perspective. Between March and June 2018 finance fines were imposed eleven times and just upon members of the opposition.[10] For example, Sławiomir Nitras (member of Civic Platform) has been repeatedly punished and fined four times. The Presidium did not just cut half the salary for several months, but he was also banned from going to the OSCE Parliamentary Assembly to Turkey. As justified by the Presidium of the Sejm, Nitras was guilty because he violated the dignity of the Sejm by loudly commenting on the parliamentary speech of the current prime minister.[11] Nitras recently declared: "They make it impossible to perform duties, they humiliate me."[12]

3. Reforms of independent institutions

Our analysis proceeds here with the assessment of the institutional vigilance. Variations of institutional features of independent authorities and reforms of their functions can satisfactory portrait the approach of the majority and the incumbents towards independent institutions. We can show their gradual weakening during the current crisis of democracy. Despite the accurate information provided in this article, we acknowledge that these paragraphs cannot easily depict the complex and fluid reality of the Polish case. For example, the reader will not find an account of the debate about the appointment of

[9] Standing Orders of the Sejm of the Republic of Poland, Resolution of 28 February 2018 (Monitor Polski, item 267), Article 23.
[10] "Zabierają pieniądze, poniżają mnie, obrażają". Kolejna kara dla Nitrasa (https://www.tvn24.pl/wiadomosci-z-kraju,3/kolejna-kara-dla-slawomira-nitras,843833.html), June 9, 2018.
[11] Ibidem.
[12] Ibidem.

five Constitutional Tribunal judges in 2015 nor of the additional reforms of other sectors of the Judiciary, since there is no space to go into these arguments here in details.[13]

We acknowledge that these arguments require further study and cannot be entirely examined here, due to the complexity of the new laws and policies approved to tame the various institutions of the Judiciary and convert them into loyal sectors of the state. That is why, we focus on one of these judicial institutions: namely, the Constitutional Tribunal. The changes related to the Constitutional Tribunal already show the great manipulation made by the incumbents in the last years.

We now want to explore empirically the impact of the decisions approved by the current ruling party, whether the success of the functions of vigilance exercised by these institutions depends on the degree to which they are still insulated from the political power and preserve an impartial composition. The Constitutional Tribunal was the first independent institutions to fail when it had been put on its mettle. The most direct observation of how the incumbents reshaped this institution is to monitor some of its key features of independence in order to conduct this assessment before and after the reforms of 2016.

The reforms approved in 2016 deleted many forms of institutional defense of the Constitutional Tribunal. Particularly noteworthy, the reforms abolished essential features of independence:

- Limited removal mechanisms;
- Protection of levels of remuneration;
- Integral jurisdiction.[14]

According to Marcin Matczak, the ruling party achieved a true executive take-over of the Constitutional Tribunal.[15] Indeed, these reforms show how shrewdly the majority can manipulate the system of counter-powers and other counter-majoritarian institutions. The Constitutional Tribunal finds itself changed into a weak institution under the control of a group of loyalists. Moreover, the reforms did not just undermine the capacity of the Tribunal to exercise its functions in an independent way, but they permanently damaged its structural guarantees of insulation from politics. Take a single but revealing example: the new rules gave to the majority full control over the appointment of the member of the Constitutional Tribunal. Hence, its members and composition will inevitably be in a condition of subjection to the government. Moreover, the ruling party increased the majority of Constitutional Tribunal's judges required to strike down legislation, and it imposed a minimum period of six months before a constitutional case could be decided. All these new rules block the function and free activity of the Constitutional Tribunal. This is a particularly shocking example of the strategy of Law and Justice to maintain its grip on the institutional system.

The vulnerabilities of the democratic defenses that the ruling party has exploited include also the structural weaknesses of other independent institutions. At the heart of this transformation of the vigilance system into a ring of protection of the incumbents is an increase of the leverage with three main institutions, which are among the most important defenses of every democratic regime. Namely, those ones in charge of the control over media and communication, protection of the rights, and the integrity of elections. Although it suffers of severe limitations, this selection provides a realistic picture on the crisis of democracy in Poland. Because of many recent reforms, independent institutions' vulnerability to governmental pressure has grown as never before.

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[13] For a detailed reconstruction of the constitutional crisis in Poland and the reform of the justice system, see: Committee on the Honoring of Obligations and Commitments by Member States of the Council of Europe, The functioning of democratic institutions in Poland. Information note by the co-rapporteurs on their fact-finding visit to Warsaw, 9 May 2017, pp. 1 - 5.

[14] The Constitution of the Republic of Poland, 2nd April 1997, Article 188 ss. Constitutional Tribunal Act, 17 October 1997. Journal of Laws of the Republic of Poland on 1 August 2016, Item 1157, The Constitutional Tribunal Act of 22 July 2016. Journal of Laws of the Republic of Poland on 19 December 2016, item 2073, The Act of 30 November 2016 on the Status of the Judges of the Constitutional Tribunal. Journal of Laws of the Republic of Poland on 19 December 2016, item 2072, The Act of 30 November 2016 on the Organization of the Constitutional Tribunal and the Mode of Proceedings Before the Constitutional Tribunal.

[15] Marcin Matczak, Who's next? On the Future of the Rule of Law in Poland, and why President Duda will not save it, VerfBlog, 19 July 2017.

We can monitor the impact of the reforms of the incumbent on the following institutions:
- The National Council of radio broadcasting and television, transformed in 2016 into the National Media Council;
- the Commissioner for Citizens' Rights, radically reformed in 2017;
- the National Electoral Commission, changed into the National Electoral Committee in 2018. In the first case, the public media reform launched by the ruling party in 2016 with the provisional media law act abolished the diversified appointment procedures of its governing board. This reform is an example of the bills approved without public consultations neither a regular debate within the parliament.[16] The first draft of this bill was submitted to the Sejm on June 7, 2016 and it entered into force on July 7, 2016. An extremely short period for the debate and adoption of a law which reforms such a crucial aspect of the fairness of the contextual conditions of every democratic system, where political competition between parties depends on the impartiality of public information. It is worth mentioning that this is even more dangerous as it touched one of the functions that were conferred by the Constitution to an independent institution. As the majority could not change that part of the constitutions easily and quickly, the incumbents indirectly undermined the existing constitutional body of the National Broadcasting Council (*Krajowa Rada Radiofonii i Telewizji,* KRRiT), by taking away key functions from it and giving them to the National Media Council (*Rada Mediów Narodowych*), a new institution which controls the public media without any requirements of impartiality from the power of the government.[17] On 12 December 2016, the Constitutional Tribunal ruled that this transfer of powers was unconstitutional, but the government disregarded the judgment.[18]

The National Media Council has the power to appoint (and dismiss) the heads and boards at public media authorities and companies. Among the public media companies there are: *Telewizja Polska S.A.* (TVP S.A. or Polish Television), which is the largest Polish television network, *Polskie Radio* and *Polska Agencja Prasowa* (Polish Press Agency). For example, under the new regulation the Minister of Treasury directly controls political appointments in public media management. Moreover, there is not any rule in the new law which prohibits the National Media Council members from parliamentary or party membership. Although Stanisław Mocek is right when said that public TV has always been a political prey[19] in Poland, this assault against free and independent public information is different as the structures overseeing the media system have gone through a drastic change. This new governmental structure will not just bypass the constitutional body that the ruling party could not manipulate. Indeed, it will decide the fate of the free press for decades. Finally, the establishment of new parallel shadow institutions represents a viable tactic to deprive constitutional rules of their true meaning and purpose. If the ruling party cannot immediately change the constitution, it can create shadow institutions which will loyalty perform "independent" functions. The National Media Council as an ad hoc shadow institution works in alternative to the existing one. Perhaps, the next parliament will adopt a constitutional amendment to disband the old National Broadcasting Council and definitively replace it. For a *Polityka* weekly columnist Adam Szostkiewicz: "This is a time of a regime change in which pro-government media is collaborating with it; while the non-Law and Justice friendly or the Law and Justice controlled media is trying to defend it."[20] The seriousness of the situation becomes clear as Krzysztof Dzięciołowski elaborates the point: "Since the Law and Justice party came to power, the state media have reached the

16 Source: Broadcasting Act of December 29, 1992. - The Constitution of the Republic of Poland, 2nd April 1997, Article 213 ss. - The Act on the National Media Council, 22nd June 2016.
17 Freedom House, Nations in Transit 2017 - Poland, 3 April 2017.
18 A. Kublik, E. Siedlecka, "Dla Rady Mediów Narodowych wyrok Trybunału nie istnieje. Czabański: TK dokonał nadinterpretacji konstytucji" [For the National Media Council the CTs judgment does not exist. Czabański: TK over-interpretated the constitution], Wyborcza.pl, 5 January 2017, http://wyborcza.pl/7,75248,21207320,dla-rady-mediow-narodowych-wyrok-trybunalu-nie-istnieje-czabanski.html.
19 Krzysztof Dzięciołowski, Is there a chance for non-partisan media in Poland?, Reuters Institute Fellowship Paper, University of Oxford, 2016, p. 28.
20 Ivi, p. 37.

highest degree of partisan involvement as the government is now directly associated with the running of *TVP* and *Radio Polskie* via ownership and direct appointments of the management and editorial boards."[21]

Moving our analysis to the other independent institutions, the ruling party adopted many reforms in order to re-organize both structure and function of the Commissioner for Citizens' Rights and of the National Electoral Commission. On the one hand, despite the reform approved in 2017, the key features of independence of the Commissioner for Citizens' Rights from the political power are left substantially unchanged. On the other hand, the current situation of the National Electoral Commission is much more complex. Indeed, the ruling party approved a law in 2017 to reform the function of the National Electoral Commission and the new rules will enter into force in 2019, one day after the new parliament will take office. After this period of *vacatio legis*, the next majority within the parliament will have the power to appoint seven out of nine members of the new National Election Committee. This exorbitant power in the hand of the majority to select the members of the National Election Committee will undermine the independence of this institution right after the elections. Namely, in the future every majority will appoint its own loyalists within the National Election Committee. Moreover, the amendment adopted this year to change the Electoral Code (article 158.5) affirms: "The President of the Republic can remove one member on a motivated proposal by the institution appointing them."[22] In other words, the majority will have the power to dismiss the members of the National Election Committee without any problem. According to the former Judge of the Constitutional Tribunal, Wojciech Hermelinski, this new bill will "incapacitate" the National Election Committee.[23]

In sum, the incumbent advantage increased as never before in Poland. As the analysis of the reforms of these four key institutions shows, the ruling party achieved almost a complete politicization of the judiciary and other institutions of vigilance. With the only exception of the Commissioner for Citizens' Rights (2017), Law and Justice accomplished the expansion of its political power over non-political institutions and forced them to change into loyal or empty parts of the states. As the analysis shows, the strategy of attack to democratic defenses in Poland gradually builds to an unbelievable condition of weakness for the institutions. In the last three years as ruling party, oppression of the opposition and manipulation of the vigilance system of independent institutions have been the clear trademark of the incumbents.

4. The constitutional architecture

This strategy made it possible for the government to threat the viability and the very persistence of the democratic system. However, the last defense of the current principles and future chances for democracy in Poland has not yet been torn down. We refer to its constitution. Still in the vein of monitoring the strength of the Polish democracy and its variation in the last years of crisis, the analysis that we carry out in these paragraphs considers also the constitutional entrenchment, with the aim to assess the limit on the ruling parties to change the constitutional structure. The constitutional architecture codifies the political identity of a regime. Hence, we would suggest speaking of the political identity of the regime. Samuel P. Huntington used the word "identity" in order to describe the institutional core which distinguishes democratic and authoritarian regimes.[24] Notably, well before Aristotle posed a crucial question about this debate, when asked: "On what principles ought we to say that a state has retained its identity, or, conversely, that it has lost its identity and become a different State?"[25]

21 Ivi, p. 45.

22 Amendment published on Dziennik Ustaw 2018 No. 130, Election Code, January 5, 2011, Art. 158.5.

23 Reuters, Poland's electoral commission head denounces changes to electoral code, December 15, 2017.

[24] Samuel P. Huntington, The Third Wave: Democratization in the Late 20th Century, University of Oklahoma Press, 1991, p. 109.

[25] Aristotle, The politics of Aristotle, Ernest Barker Trans., Oxford University Press, 1962, p. 98.

In this study, our claim is that the political identity of democracy consists of the constitutional principles establishing a system of checks and balances and the rule of law guaranteeing political rights of the people as well as procedures of democratic participation.[26]

It is indeed crucial to monitor some key traits of the constitution. Although, the codification of a system of checks and balances can be seen as the most important feature of a constitutional democracy, because, as the Italian political scientist Giovanni Sartori suggested, they prevent that the discretionary power of unscrupulous politicians can become an arbitrary power when the time of trial comes.[27] It is essential to make clear that the strength of a democracy is not simply read back from its checks and balances. If we would like to pinpoint the most effective defenses of democracy within many western constitutional orders, we can consider some constitutional rules preserved by a formal unamendability, as the so-called eternity clauses. In Carl Schmitt's words, they are the "Unalterable core."[28] These can properly be considered, the self-defenses of democracy as they do not require any enforcement by political actors or other. Some democratic constitutions are better defended than others and this difference is based on their level of entrenchment. Some important insights have been recently offered by Tom Ginsburg, who carried out a project of study on constitutional endurance, and the question of comparability of different constitutional designs, mechanisms and rules. A noteworthy piece of research that he wrote with Zachary Elkins and James Melton, shows how constitutional endurance depends on the design factors of constitutions.[29] The existence of some eternity clauses is not just based on formal provisions within the constitutional design, but it can be the result of the informal constitutional evolution as well. According to Yaniv Roznai, formal unamendability was established just in less than 20 percent of all constitutions until 1944, while these written provisions appeared in almost 25 percent of constitutions until 1988. Finally, in 2013 over 50 percent of constitutions present unamendable parts.[30]

Certain institutions and rules are entrenched against easy change. Indeed, all constitutions contain, explicitly or implicitly, a rule setting the requirements for changing their own content.[31] These rules vary constitution by constitution between two extremes: very low and very high limits to constitutional change. For example, some provisions are entrenched unamendable for different purposes (which might be preservative, transformative or reconciliatory)[32] in order to "last forever and to serve as an eternal constraint on the state and its citizens."[33] They establish limits to the constitution-amending power as essential principles of protection for democracy. The strongest provisions for the defense of democracy are the constitutional principles which cannot be amended and the rules on the constitutional amendment. One of the first definition of constitutional amendment that we can find in the legal doctrine appeared in 1894, when the Supreme Court of California described an amendment "such an addition or change within the lines of the original instrument as will affect an improvement, or better carry out the purpose for which it was framed."[34]

If observed worldwide, the list of these constitutional principles, which remain untarnished throughout the entire story and evolution of many democracies, gathers the most disparate group of provisions. The first examples of this kind of clause appeared in the Constitution of the Helvetic Republic of 1798, which

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26 Guillermo O'Donnell, Why the Rule of Law Matters, Journal of Democracy, vol. 15 no. 4, 2004, pp. 32-46.

27 Giovanni Sartori, Constitutionalism: A Preliminary Discussion, The American Political Science Review, Vol. 56, No. 4, 1962, p. 864.

28 Carl Schmitt, Legalität und Legitimität, reprinted in Carl Schmitt, Verfassungsrecht- Liche Aufsätze 263, 1958.

29 Zachary Elkins, Tom Ginsburg, James Melton, The Endurance of National Constitutions, Cambridge University Press, 2009, p. 94.

30 Yaniv Roznai, Unconstitutional Constitutional Amendments: A Study of the Nature and Limits of Constitutional Amendment Powers, Oxford University Press, 2017, Chapter 1.

31 Ernest A. Young, The Constitutive and Entrenchment Functions of Constitutions: A Research Agenda, 10 U. Pa. J. Const. L. 399, 2008.

32 Richard Albert, Constitutional Handcuffs, 42 Ariz. St. L.J. 663, 2010, pp. 678-98.

33 Ivi, p. 666.

34 Livermore vs. Waite, 102 Cal 113, 118-19, 1894.

declared the representative democracy as "unchangeable" form of government, and in the French constitutional statute of 14 August 1884, which declared unchangeable the republican form of government.[35] As clearly stated by William L. Marbury almost one century ago, the authority to amend the constitution needs some bounds, which can avoid that this function is used in order to eliminate the constitution itself.[36] These limits, which result to be insurmountable for political power as well as the raw will of the people, are traditional features of many democratic constitutions. In Italy and France, for instance, the republican form of state may not be changed by way of constitutional amendment.[37] Without these limits, using Carl Schmitt's expressions, attempts of constitutional annihilation can easily be accepted instead as constitutional changes.[38]

In a few words, the strongest defenses of democracy are in its rules and institutions which can protect the integrity of the Constitution by limiting and regulating the constitution-amendment powers. Schmitt explained that constitutional rules can be changed, but just if these changes do not offend the spirit or the principles of the constitution itself.[39]

A last point needs to be mentioned here: the current constitution of Poland has more defenses than those ones of many central and eastern European states (for example, the previous Hungarian one).

For a complete appraisal of the Polish constitution, we highlight the existence of three relevant characteristics: (1) the bicameral structure of the Polish Parliament constitutes a double level of control and possible barrier to any attempt by the ruling party to unilaterally amend the constitution; (2) a confirmatory referendum[40] is required to amend Chapters I, II or XII of the Constitution; (3) a two-thirds supermajority vote in order to approve the amendments.[41]

These three characteristics offer a fundamental protection to the hard core of the constitutional values of the Polish democracy.

5. Democracy in Poland: *terra incognita*

Despite relevant differences between the Polish crisis and the Hungarian one, both these cases present interesting similarities. Indeed, the strategies used by the incumbents are almost identical as well as the targets of their attacks. Quite plainly, the sequence of events in both countries followed a particular model of political attack. Namely, political decisions of the ruling party aimed to limit the role of opposition, jeopardize the conditions of insulation of independent institutions, and violate the integrity of both structures and principles of the constitution. The main differences in this strategy of attack between Hungary and Poland lie in the extent of the political threat and the level of constitutional entrenchment. On the one hand, the current ruling party in Poland is not as strong as *Fidesz* was when its long domination started over Hungary eight years ago. Although *Prawo i Sprawiedliwość* was the outright winner of the last elections in October 2015, and for the first time in the history of the Third Polish Republic it achieved an absolute majority, it does not have a constitutional majority within the Sejm. Whereas when *Fidesz* started to govern in 2010, it had the power to easily manipulate the institutions in Hungary and attain without obstacles the goal of the total institutional disarmament of the defenses of the Hungarian democracy. As reported in the previous section of this article, the reckless consolidation of power in Hungary was finally achieved with the adoption of a new Fundamental Law.

35 See. Art. 2 French constitutional statute (14 August 1884): "La forme républicaine du Gouvernement ne peut faire l'objet d'une proposition de revision."

36 William L. Marbury, The limitation upon the amending Power, in Harvard Law Review 33, 1919/20, p. 223 ff.

37 Constitution of the Italian Republic, Article 139, 1948; Constitution of France, Art. 89, 1958.

38 Carl Schmitt, Constitutional theory, Duke University Press, (first edition 1928) 2008, p. 150.

39 Ibidem.

40 The Constitution of the Republic of Poland, 2nd April 1997, Article 235.

41 Ibidem.

On the other hand, and this is the aspect we would like to give more emphasis to, the Polish democracy is not completely vulnerable as the Hungarian one was already in 2010. It is also worth mentioning that the constitutional principles of the state are better defended in Poland now than they were in Hungary at that time. In either way, to change the constitution would be not so easy even for a stronger and wider majority. The Polish constitutional engineering provides more defenses to the integrity of its democratic provisions than the previous Hungarian one did. Hence, the chances that PiS will be able to change the constitution with legal procedures are less than those ones which existed in Hungary at the dawn of revolution of the ballot boxes. These two essential conditions keep the Polish democracy on the edge, between tragedy and hope, in an unfinished transition where the new regime is already and not yet. That is why, even though the incumbents have attacked its institutions with new reforms from very early on, the Polish democracy is still not completely defenseless or irretrievably subverted.

As far as we can note by taking into account the political reforms in Poland up to the end of June 2018, these regimes find themselves on two diverging paths. Whereas the attack in Hungary left that democracy defenseless and it will remain at the mercy of the absolute power of *Fidesz* and its leader, the attempts to undermine the Polish democracy as still in progress. Further research is definitely needed, but the evidences here presented can already help us in answering these last questions: How long this democracy can resist before the final collapse? How it could resist (if it will)? It seems wildly plausible that Law and Justice will attempt the total institutional rupture before the elections. With the expression "institutional rupture" we mean the decision of the ruling party to unilaterally attempt and succeed in changing the constitution without respecting the amendment rules or using the popular consensus with ad hoc referendum. However, at the end of 2019, the Polish democracy will face its moment of truth in the immediate post-elections. Depending upon how the parties will compete and which party will gain more votes during the electoral campaign, at least two alternative scenarios are possible. On the one hand, there might be the democratic revenge, if PiS will be defeated and the new government will show a clear discontinuity from the politics of the previous incumbents. On the other hand, if PiS will obtain a constitutional majority, there might be the final assault: the party would complete its strategy of irreversible change of the institutions in order to leave the Polish democracy defenseless and any other power in competition with that of the incumbents as definitively defeated. Notwithstanding the dramatic weakness of almost all its key institutions, perhaps it will be impossible for PiS to bend the democratic identity of Poland with legal means before the next elections in 2019. For these reasons, as our analysis shows, its institutions find themselves on the brink of collapse, in a status of unlimited compliance to the ruling party. It seems that the Polish democracy has entered in *terra incognita*, in a grey interregnum of uncertainty, where the attack against its defensed cannot be stopped as continuous reforms are reshaping laws and institutions on an everyday basis, but at the same time this strategy cannot end with a "legal" *coup de grâce*.

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