

# Pandering to peoples' emotions is no solution

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Marcin Matczak

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A political party wins an election after a long stint in opposition and wants to carry out necessary reforms. Unfortunately, several constitutional court judges, appointed by the previous government, consistently strike down all such attempts as unconstitutional. The frustrated victors want to circumvent or bend the law, and somehow get around the obstructionist judges.

Is this the scenario likely to play out in Poland after 2023? Actually, no. I am referring to the US in the 1930s. After Roosevelt (a Democrat) defeated Hoover (a Republican) in 1932, he found himself obstructed by the „Four Horsemen”. These were conservative SCOTUS judges who held that the remedial laws proposed by Roosevelt were unconstitutional. The frustrated politicians went on the offensive. As the number of Supreme Court judges is regulated by statute, not the Constitution, the government decided to increase it from 9 to 16, and then stack the Court so as to have a likeminded majority on the bench.

Despite overwhelming political support, the victorious politicians encountered resistance – an attack on the institution was considered an evil worse than its obstructionism. In the end, the court packing plan was withdrawn, and the Four Horsemen relaxed their opposition. The government did nothing. Roosevelt ruled for 12 years and legally appointed 8 more judges.

This story shows that letting go does not always mean losing and that subverting a constitutional institution is too high a price to pay for political expediency. This lesson seems lost on the Polish opposition and its supporters, who are calling for the Constitutional Tribunal (CT) to be abolished and certain constitutionally protected officials (e.g. the head of the central bank) to be removed in the event that they win the next election. I believe this is worse than a crime – it is a mistake.

After 7 years of criticizing the ruling PiS party for dismantling the rule of law, it should come as no surprise to find that I consider that most Constitutional Court judges appointed after 2015 are so lacking in legal qualifications or so dependent on the ruling party to be an insult to its authority. They are PiS functionaries, dispatched to the constitutional front. However, I care deeply about the fate of the institution, and the stability of the law, without which it cannot function, concerns me greatly.

Some lawyers advising the Polish opposition claim that the appointments of several judges and the head of the central bank are so legally defective that they can be declared nullities. Some academics, e.g. Wojciech Sadurski, believe that the Constitutional Court has been “contaminated” and therefore should be “extinguished”, as it is no longer able to perform its constitutionally mandated functions. Still others, e.g. Piotr Kardas and Maciej Gutowski, criticize me and others

like me, who oppose these measures and the rationales behind them, claiming that we are promoting injustice and preserving the institutional damage wreaked by PiS.

The fatal flaw in these analyses and recommendations is that Polish law meticulously and enumeratively regulates removal from public office. This impliedly proscribes removal for any unstipulated reason. Neither the Head of the Central Bank nor a CT judge can be removed except in clearly defined circumstances (including death, long-term illness, or conviction of a crime or a serious disciplinary transgression). There is no provision for removal in the case that a politician deems the official or judge to be unsuitable for their office or of bad character, or determines that the appointment was marred by legal error. Any legal opinion that confirms any or all of the above, no matter how unimpeachable, is therefore otiose.

In recent years, creating ad hoc grounds to challenge an appointment to a constitutionally protected post has been a strategy frequently resorted to by PiS operatives in their relentless quest to dismantle the rule of law. In 2017, Zbigniew Ziobro (Prosecutor General and Minister of Justice) challenged the 2010 election of three Constitutional Court judges on the ground that the Sejm had voted on a single sheet of paper, instead of three. Mariusz Muszynski, one of the pseudo-judges with whom PiS packed the Constitutional Court, claimed that the election of Judge Wronkowska in 2010 was flawed because she did not swear her oath of office to the president, who had recently perished in the Smolensk catastrophe, but to the deputy speaker of the Sejm who, according to the constitution, substituted for him. All three pseudo-judges on the Constitutional Court owe their places on the bench to this sort of legal skullduggery. The Sejm „invalidated“ the due election of previously appointed judges because their candidacies were allegedly defectively submitted (only by MPs, not jointly by MPs and the presidium of the Sejm).

These actions were completely unwarranted and destabilized our institutions to the point of dysfunctionality. And now the opposition announces that it intends to do the same – on the basis of a legal opinion claiming that the appointments of constitutional judges and other constitutionally protected officers were marred by formal errors, it wants to pass a parliamentary resolution to the effect that the Constitutional Court is “contaminated” and declare these appointments invalid. This is tantamount to curing the plague with cholera. And setting precedents like this will eventually rebound. Do they think they will rule forever? If this behavior becomes the norm, then any government will be able to dismiss anyone it wants. All it will take is to order a few legal opinions from compliant lawyers and to reassess a few hundred ballots. If the opposition mimics the actions of Ziobro, Kaczynski or Muszynski, it will confirm that they are not committed to the rule of law, but to their own unbridled power, and that they are essentially no different from PiS.

What should be done, then?

In 2019, a team of legal experts at the Batory Foundation (in which I am honored to be a member) held a conference on how to legally fix the rule of law in Poland. The keynote speaker was Samuel Issacharoff from NYU Law School who studies “fragile democracies” around the world. He strongly warned against legal revanchism, convincingly demonstrating how dangerous it is for a democracy to swing the

pendulum of aggression and illegality to the opposite extreme and to bend the law in the name of justice.

After the conference, the team produced a report that made recommendations for repairing each of Polish crucial institutions (like the Constitutional Tribunal, Supreme Court, The National Judiciary Council, and the Public Prosecutor's Office).

The Team proposed a set of comprehensive legislative proposals for the Constitutional Court, not limited to „restoring“ the 2015 status and functionality of the Court. Proceedings before the Court were fraught with shortcomings and did not always meet the needs of the citizenry even prior to 2015. The proposed provisions are therefore intended to reform the operation of this body. As a result, we have proposed an entirely new CT statute, together with enabling regulations, which aims to restore the rule of law and improve the work of the Court.

This legislative proposal was put forward only after intensive consultations with organizations dedicated to protecting the rule of law and with leading experts on constitutional law and court procedure. We were keen to build public support for the proposed reform. The draft law on the CT is civic and apolitical. The desiderata of political parties and factions were not considered. The goal that guided the Team in its preparation was to restore reliable and independent control of the constitutionality of Polish law, so as to ensure that civil rights and freedoms would be genuinely protected.

We presented the draft legislation to the public, including non-governmental and academic circles and political groups in the hope that it would generate a substantive discussion, free from demagoguery and calls for revanchism. We were hoping that the civic and non-partisan nature of these two projects, combined with their substantive value – confirmed by legal opinions produced by highly respected authorities – would suffice to convince political organizations of all persuasions to support them. However, a common response we have been encountering is „This will take too long. People need decisive action.“ Now this pernicious need is clearly visible. „No mercy after these eight years!“ is being shouted at us, even by those who considered a benign Polish transformation after more than 40 years of communist rule as proof of our wisdom.

## **A plan to repair the Constitutional Court**

Our plan to repair the Constitutional Court included a proposal that persons with whom PiS packed the Court and who are ineligible to adjudicate (i.e. the „doubles“ and their successors) would be barred from participating in adjudicatory activities and that their place would be taken by duly elected Constitutional Court judges. This would be completely legal and could be executed by politicians, as it is supported by Polish Constitutional Tribunal judgments (cases K 34/15 and K 35/15) handed down before PiS launched its assault on that institution, and on ECHR decisions (e.g. the Xero Flor case). There is no other legal justification, confirmed by an independent judiciary, for removing the other CT members, no matter how compelling the evidence of abuse of office.

A CT judge can only be removed following an independent disciplinary proceeding. We therefore proposed that the composition of the disciplinary court for the CT judges be appointed by lot by the President of the Court from among the judges of the Court and – additionally – retired Court judges. This change would make the disciplinary procedure more transparent, as the disciplinary court would not be the preserve of PiS-appointed judges, but previously appointed judges, not directly involved in current issues, would sit as well. The draft legislation also expands the list of office holders legally empowered to file a motion to initiate disciplinary proceedings. At present, this is restricted to a CT judge or the President of the Republic at the request of the Prosecutor General, after consultation with the First President of the Supreme Court. The draft proposes that a motion to initiate disciplinary proceedings could be filed by the President of the Republic, the Prosecutor General, a judge of the Court, and a retired Court judge.

A third proposal is a re-election of the President of the Constitutional Court – the duties of the President of the Constitutional Court will be performed by the judge with the longest judicial service in the Constitutional Court. Within 3 months of the entry into force of the law, the Assembly of the CT judges would present candidates for the positions of President and Vice President of the Court to the President.

These proposals are not ideal, and they have been criticized for several reasons. They have understandably provoked the ire of politicians. A more surprising source of criticism, however, has been lawyers and academics, including none other than Prof. Wojciech Sadurski.

## High-level criticism

Before proceeding, I would like to point out that nobody has done more to defend the rule of law in Poland than Prof. Wojciech Sadurski, and he has paid a high price for doing so in the form of personal attacks, and vexatious and time-consuming prosecutions and lawsuits. The esteem in which Prof. Sadurski is held by many Polish lawyers, myself included, is precisely what induced us to challenge his counter proposal. After all, nobody better understands the adage *amicus Plato, sed magis amica veritas* than him.

Prof. Sadurski criticized the Batory Foundation proposal as impractical, naïve and unworldly, and presented his own proposal to repair the rule of law in Poland. This proposal is based on the “contamination” thesis. The Constitutional Court, as a collegial body, is not 3/15 illegitimate (a reference to the three “doubles” or pseudo-judges), but in its entirety. As such, it cannot be permitted to continue functioning in the event that PiS loses power in 2023. Dismissing the doubles and their successors (our position) would not go far enough; the Court would have to be extinguished and recreated with 15 new judges.

The above proposal raises many questions:

- Is the “contamination” thesis not too vague to justify the drastic measure of removing several validly appointed CT judges? Some of appointments were

perfectly legal and some of the judges so appointed have been irreproachable. Their only sin is to have sat in the same court with the doubles.

- If, as Prof. Sadurski states, the institutional contamination of the Constitutional Court began at the beginning of 2017, when Court President Julia Przybicka allowed the doubles to adjudicate, were the judges then sitting in the Court, but elected by the previous government, affected by this contamination? Did the entire Court, including such judges as Slawomira Wronkowska, Piotr Tuleja, Marek Zubik, or Leon Kieres, who officially opposed the decision to allow the doubles to adjudicate, become instantaneously illegal? If the contamination began in 2017, it affected everyone. If later, when? With the departure of the last judge appointed by the previous government? If so, then the alleged contamination was probably not caused by having the doubles adjudicating, but simply having judges appointed by PiS. Is this sufficient justification for removing a CT judge? Could this not legitimately be perceived as political vigilantism?
- If a judge appointed prior to PiS coming to power was still on the bench in 2023, would he/she have to be removed from the Court due to contamination? If so, then how is he/she contaminated? If not, then how could this not vitiate the “contamination” thesis? Perhaps, the contamination should be understood as individual rather than institutional. Prof. Sadurski writes that the contamination of the CT was manifested in having the doubles adjudicate. In this regard, the judges appointed prior to PiS coming to power behaved with dignity in that they filed dissenting opinions. But wouldn’t this be an argument for the principle of personal responsibility, rather than institutional responsibility, as proposed by Prof. Sadurski? Moreover, can every judge appointed by PiS be assumed (as opposed to being proven by a competent tribunal) to have been equally malfeasant?
- How would the dismissal of the entire Court and the appointment of a new one work in practice? Would the Sejm simply pass a resolution to that effect? This would be a repeat of what PiS did in 2015, except that PiS only invalidated the election of 5 judges, not the whole 15. Would this not set a precedent where the ABBA syndrome (the winner takes it all) becomes the norm?

Honest answers to the above questions compel the conclusion that Prof. Sadurski’s proposal is not only dangerous in terms of its far-reaching consequences for the stability of the rule of law in Poland; it is antithetical to the rule of law in that it is predicated on collective responsibility. We believe that CT judges, like everyone else, can only legitimately be held responsible for their own actions, and we emphatically repudiate any notion of collective responsibility or guilt by association. For this reason, we contend that revised disciplinary proceedings involving retired CT judges (as proposed by the Batory Foundation) would be more coherent, and better grounded in legal principles, in determining whether a CT judge has behaved improperly, and if so, what action to take, than the expedient postulated by the contamination thesis.

The charge that Prof. Sadurski’s proposal has strong elements of collective political responsibility is confirmed by his response to another publication of mine, promoting the Batory Foundation rule-of-law fixing plan. Commenting on the idea to reform the

disciplinary proceedings by expanding the disciplinary court to include retired judges, he says:

“But what makes you believe that this will lead to the removal of PiS members of the Court? (...) Retired judges of the Constitutional Court (and I know several) are a diverse group – people of their time, sometimes eccentric and stubborn. The idea that they would want to automatically exclude all PiS judges seems unrealistic to me. So, let’s stop, at least for a while, with the legalistic beauties.”

If I interpret this correctly, Prof. Sadurski claims to have identified a flaw in the Batory Foundation’s proposal to fix the Constitutional Court, viz. that there is no guarantee that these disciplinary proceedings would remove all PiS appointees from the CT. My answer would be: This is not a bug; it’s a feature. A political decision applies collective responsibility. A court differentiates responsibility. We proposed a judicial, not a political solution to the problem for precisely this reason.

## Two scenarios for the future

From the foregoing misgivings, it would seem that the strongest argument that lawyers and politicians can raise against the legalistic proposal of the Batory Foundation’s Team is its impracticality. Any law to change the rules of disciplinary proceedings would obviously be subject to a CT appeal and could be struck down. But this is no less true of any law to extinguish the Court. The only difference is that, in the former case, public odium would fall on the Court, which would escape accountability by being a judge in its own cause (thereby violating the first principle of justice), while in the latter case, it would fall on the government, which would be following in the footsteps of PiS.

There are two possible scenarios here. The first is the “blitzkrieg” scenario. Here, the opposition wins the 2023 parliamentary election, (albeit without the supermajority required to amend the constitution), brushes aside the “legal wimps” in its ranks, and sets about „extinguishing“ the Court. How would it proceed? Legislation would be required in the form of a statute or a Sejm resolution. This done, the entire Court could be dismissed on the grounds that it had become „contaminated“, and 15 new judges could be appointed. Job done.

Would the Court be extinguished? Not necessarily. Any statute would have to be signed by President Duda (supported by PiS), and any resolution would have to be sent to the PiS-dominated CT. The President would refuse to sign any such bill into law, and the CT would strike it down. The result would be a painful stalemate. Some judges, appointed perfectly legally, e.g. Judge Pszczołowski, could appeal to international courts, and embarrass the government, which had promised to restore the rule of law when it was in opposition. 12 of the 15 newly appointed judges would immediately become “doubles” – legal Schrödinger’s cats if you like. As an aside, I wish the opposition luck in filling these 12 positions; qualified and experienced candidates would be effacing their achievements and putting their careers at risk to become foot soldiers in a political offensive against the rule of law.

What could the incoming government do in this situation? Dispatch the army to the CT? Dismiss the President on the ground that his last election was ratified by a legally questionable Supreme Court chamber? What other scenarios of legal and political Armageddon can be considered here? The most likely scenario is this: The alleged Blitzkrieg would lead to a stalemate within two weeks, thus maintaining the status quo. A dangerous legal precedent would have been set for nothing.

The second scenario is the “chess game” scenario. Instead of starting with the Constitutional Court, which is constitutionally protected, the incoming government could open by reforming the prosecutor’s office and the public media. An independent prosecutor’s office is necessary to prosecute probable judicial scams in the CT (e.g. Pres. Przyłębska’s changing judicial panels, contrary to regulations, or judges meeting in camera with politicians). Independent public media are necessary to expose these scams instead of ignoring them or covering them up. Focus on examining whether PiS appointees have broken the law. This needs to be investigated, and if found to have occurred, shown to the public. Let them continue in their positions in the face of these allegations and let the sovereign pressure them to step down – not the politicians. Let everyone see that they are not judges, but selfish people clinging to their well-paid positions; people who are completely indifferent to Poland’s interests and who are sabotaging change in furtherance of their own.

As a citizen, I can assure the opposition that, instead of watching Andrzej Duda thundering at a press conference about the unconstitutionality of its proposed actions (which would be unarguable), I would much rather watch a press conference where the new Prosecutor General unveils the details of the conversations between Przyłębska and a government minister, and the content of the debates between politicians and judges, which took place over dinner in a certain house near Warsaw (there is circumstantial evidence for this).

Instead of helplessness in the face of the CT striking down an obviously unconstitutional piece of legislation drafted by a government that had stood for election on a platform of defending the Constitution, I would much rather watch a cold, calculated criminal investigation into the manipulation of judicial panels in the CT, and see how quickly spineless functionaries switch loyalties to save their skins. The example of Mariusz Muszynski, one of the doubles, is a foretaste of what to expect. After several years of supporting PiS’s policies, he suddenly woke up screaming that he had been subjected to unlawful influence. This perturbing revelation only came to him when Przyłębska’s secret meetings with politicians came to light.

The strategy here would be to publicly expose the moral rot of PiS and their appointees, along with the sellout nature of pseudo-judges. Instead of strengthening them, instead of becoming an object of justifiable criticism, instead of destroying the rule of law in Poland for years to come, let the whole structure fall apart. Any action against the CT at the level of statute or parliamentary resolution would be easy to block, but neither the CT nor the President of the Republic could block prosecutorial or media actions. It makes more sense to start where the opposition can win, not where it is doomed to failure. The problem of Constitutional sabotage will then be much easier to solve.

Another criticism levelled at the Batory Foundation proposal came from renowned Polish law professors and attorneys, Piotr Kardas and Maciej Gutowski. They cited one of my weekly columns in Poland's largest circulation daily in which I decried treating the plague with cholera, i.e. using the same illegal methods that are the stock in trade of PiS. In particular, I opposed the dismissal of constitutionally protected judges and officials on the basis of formal errors in their appointments. As I said above, this would open a Pandora's box; it would set a precedent for future politicians and inexorably lead to the complete destabilization of our judicial institutions.

Kardas and Gutowski objected on three grounds: (i) a newspaper column is not the place to make judgments (in their view, hasty) about the legality of the opposition's proposals; (ii) my example of Roosevelt's dispute with the U.S. Supreme Court (see the beginning of this piece) is not relevant to our situation; and (iii) nothing can reasonably be expected of judges „with rubber spines “ (my phrase).

The first objection can be boiled down to the metaphor used by the Authors: „One of the key principles of a lawyer in situations like this is caution and restraint in proposing solutions. Galloping does not make this easy.“ It is unclear whether these words refer to the Batory Foundation analysis or to the opposition lawyers who support the proposals to extinguish the CT. As I've already said, the Batory Foundation's position is based on a lengthy legal analysis, presented in a 250-page study titled „How to restore the rule of law“ (2019). I hope that Kardas and Gutowski recognize these proposals as (to use their own words about a proper approach to this legal problem) „legal solutions of a systemic nature that offer a chance to improve the trashed system“, which they seem to find lacking.

These extensive analyses show that the new government can legally dismiss only three doubles and that other CT judges can only be dismissed following disciplinary proceedings. We propose to reform this procedure by barring sitting CT judges from being *judices in propria causa*. To this end, we propose to expand the disciplinary court to include retired CT judges. Perhaps this will allow Pres. Przybyska's behavior to be judged by someone whose impartiality is less questionable than that of former PiS MPs such as Krystyna Pawłowicz and Stanisław Piotrowicz.

I don't know whether Professors Kardas and Gutowski have alternative analyses. I suspect not, because they write about the need for analyses in the future tense, although the elections are only a year away. However, their conclusion „First legal analyses, then conclusions. Never the other way around“ is *a fortiori* applicable to the opposition, which is irresponsibly proposing measures that directly violate the Polish Constitution in the apparent conviction that the end justifies the means. I also do not think that, in light of such a long-standing analysis within the Batory Foundation, my position merits the following comment: „Simplifications are not part of a lawyer's role.“ After all, if anyone is simplifying anything here, it is rather those making irresponsible promises to repair the rule of law with a sledgehammer.

As for the second objection, we shall have to agree to disagree on whether Roosevelt's dispute with the U.S. Supreme Court has any relevance to Poland. I see this analogy: the opposition candidate wins an election, wants to repair a



damaged country, but is frustrated in his efforts by judges appointed by the previous administration. There was a threat to instrumentalize the law, but this was avoided because the disputants took a step back. The example of Roosevelt was intended to show that bending the law is not the only effective way of doing politics, and that respect for it is not necessarily political naiveté.

As for the third objective, I never said that I expected anything from judges with “rubber spines”. I merely wished to point out that their behavior is predictable. If I expect anything, I expect such people to change their position with the shifting political winds. In my view, by fearing sabotage from suchlike, the opposition is overestimating their intestinal fortitude. And I write this in genuine contempt, as I find such a lack of courage and principle unworthy of a judge. – In fact, I only raise this argument because the threat of sabotage is presented as a justification for forcibly removing them.

Perhaps Professors Kardas and Gutowski have some objective measure of the flexibility of a judge’s spine, and can identify the point beyond which a politician can remove its owner from office in violation of the Constitution. The Batory Foundation Team of Experts are adamant that the only justification for removal are fair disciplinary proceedings such as those we propose in our study. And we have neither proposed building a Polish judiciary with spineless. We are not defending them, because they do not deserve it, but rather the principle that a CT judge cannot be removed by a non-judicial branch of government. This principle that has been severely and repeatedly violated the actions of PiS, and now the opposition has signaled that it intends to follow suit.

## **Pandering to peoples’ emotions is no solution**

Finally, I take issue with the following comment by Kardas and Gutowski: „Simplistic prescriptions can be read by politicians as an invitation to use the formula, glorified in politics, of ‘compromise’, and to ignore violations in the name of increasing their own political comfort and avoiding unnecessary tensions.“ There are worse things in politics than compromise – the destruction of the rule of law by those who pledged to defend it, to enumerate one. And the role of a lawyer is not to discourage legal activity, even if it leads to compromises, but to pour a bucket of cold water on the heated heads of people who, instead of fixing the state, want to destroy it. I, at least, see my role that way.

And I feel justified in my decision when I read the comments of the laypeople who follow our discussion, try to decide who is right – Matczak, Sadurski, Kardas or Gutowski – and cannot help but think “Hundert Professoren und das Vaterland is verloren”. Here are some examples:

“The doubles should be treated as thieves, the legally elected judges who agreed to adjudicate with the doubles should be treated as accessories after the fact. All of them should be removed from the CT as soon as possible. There is also the Putin way. This is more radical but also more beneficial for the state budget – send them to the high mountains.””

“PiS needs to be cleaned out top to bottom, more effectively than the fascists at Nuremberg, where, unfortunately, many escaped justice and continued to live peacefully with government jobs.”

“Most CT judges are pimples on the face of Themis. Pimples are squeezed, not powdered.”

“Removing PiS from power should be treated as a kind of (hopefully) bloodless revolution. And this one has its own laws, which normally seem brutal”

“I’m a little afraid of treating the PiS soldiers as they deserve, because they deserve to be lynched and hanged. On the other hand, it would be unacceptable to pretend that someone like Piotrowicz is a CT judge and should be respected, and not beaten on his bare red ass.”

Politics brings out these sorts of heated emotions. It induces the dehumanization of rivals, and leads to polarization that cries out for revenge. The purpose of the law is to calm these emotions. Therefore, our aim should be to promote the position that can be found in this comment:

“If we trample the law in the name of saving the law then what next? After four years, the right-wing party will return to power and say that they are not bound by ANY of the previous government’s laws ... because they simply are not, because it is necessary to save democracy, etc. etc. This is not about some satisfying entertainment – the structures of the state have to be rebuilt in accordance with the law. Because once we decide that we don’t give a damn about the law then we are allowing every government to do the same thing. Let’s all finally learn something: there will be another election. Let’s stop thinking in a four-year perspective”

This last comment was only liked by one person. The previous, dehumanizing ones by dozens. Have the people spoken? In some sense yes. Is it the role of a lawyer to pander to their emotions? I do not think so.

