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„The Polish Constitutional Tribunal Crisis."

An Analysis of the Public Debate on Democracy in Reference to the Changes in the Operation of the Constitutional Tribunal in the Period between November 2015 and December 2016 in Poland

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LIST OF CONTENTS:

ABBREVIATIONS: **4**

GLOSSERY: **5**

ABSTRACT: **6**

PART I: INTRODUCTION **8**
1.1. Constitutional Tribunal Crisis 8
1.2. Democracy in Poland 8
1.3. The Scope and Scale of the Study 11
1.4. The Significance of the Subject 12

PART II: THE DEMOCRACY DEBATE **14**
2. The Debate on Democracy 14
2.1. The Procedural and Substantive Approaches to Democracy 16
2.2 Thin and Strong Democracy Concepts 19

PART III: JURIDICAL POWER **24**
3. The Role of Juridical Power in a Democratic State 24
3.1. The Doctrine of the Separation of Powers 24
3.1.1. The History of the Doctrine of the Separation of Powers 25
3.2 The Polish Judiciary System 30
3.2.1 The Formation of the Polish Constitutional Tribunal 30
3.2.2. The Constitutional Tribunal in the Third Republic of Poland 33
3.3. Timeline: The Reforms of The Constitutional Tribunal 41
3.3.1. The Constitutional Tribunal Crisis 44
3.3.2. The Venice Commission 57

PART IV: RESEARCH **59**
4.1. The Importance of the Democracy Debate In Poland 59
4.2. Research Material 60
4.2.1. The Rzeczpospolita 61
4.2.2. The Gazeta Wyborcza 62
4.2.3. Polityka 63
4.2.4. Wprost 63
4.3. Methodology 64
4.3.1. Quantitative Content Analysis 65
4.3.2. Thematic Analysis 65

V RESULTS **67**
5.1. The Rzeczpospolita 67
5.2. Gazeta Wyborcza 72
5.3. Comparison: Daily vs. Weeklies 76
5.4. The Reforms of the Constitutional Tribunal in the Polish Print Media 78
5.5. The Thematic Analysis 80

VI CONCLUSION **82**
Bibliography 85

Abbreviations:

III RP – Third Polish Republic

CT – Constitutional Tribunal

NATO – North Atlantic Treaty Organization

PiS – Law and Justice (PL: Prawo i Spawiedliwosc)

PO – Civic Platform (PL: Platforma Obywatelska)

RP – Republic of Poland (PL: Rzeczpospolita Polska)

SLD – Democratic Left Alliance (PL: Sojusz Lewicy Demokratycznej)

PSL – Polish People's Party (PL: Polskie Stronnictwo Ludowe)

KPN – The Confederation of Independent Poland (PL: Konfederacja Polski Niepodległej)

KOD – The Committee for the Defence of Democracy (PL: Komitet Obrony Demokracji)

UW – Freedom Union (PL: Unia Wolosci)

UP – Labour Union (PL: Unia Pracy)

OPZZ – All-Poland Alliance of Trade Unions (PL: Ogólnopolskie Porozumienie Związków Zawodowych)

PSL – The Polish People's Party (PL: Polskie Stronnictwo Ludowe)

PRL – The Polish People's Republic (PL: Polska Rzeczpospolita Ludowa)

PZPR – The Polish United Workers' Party (PL: Polska Zjednoczona Partia Robotnicza)

Glossery:

Journal of Laws (*Dziennik Ustaw)* – The official Journal of Laws of the Republic of Poland

Monitor Polski – the official Gazette of the Republic of Poland

Senate – the lower house of Polish Parliament

Sejm – the upper house of Polish Parliament

Solidaroność**-** Solidarity trade union

Jarosław Kaczyński – Polish politician and lawyer, the leader of the political party Law and Justice

Bronisław Maria Komorowski – Polish politician and historian, President of the Republic of Poland in the period between 2010-2015

Andrzej Duda - Polish politician, President of the Republic of Poland since 2015

Venice Commission - is an advisory body of the Council of Europe, composed of independent experts in the field of constitutional law.

Komitet Obrony Demokracji (the Committee for the Defence of Democracy)- is a grassroots civic movement founded in 2015 in Warsaw. Its goal is to protect the rule of law, democracy and human rights, defend European values and strengthen civil society.

Abstract:

English:

The reforms of the Constitutional Tribunal in Poland initiated a severe political dispute revolving around two different types of conflicts. While the first conflict engaged the government and its parliamentary opposition and revolved around different interests, ideas and concepts represented by the Polish political elite, the second one engaged the executive power and judiciary and revolved around the executive branch attempting to reduce the power of the judiciary for the purpose of a smoother implementation of the foreseen reforms.

The democratic crisis in Poland is to be seen in the context of the rise in global discontent with neo-liberalism as well as the crisis of political identity in Poland. The latter is a result of the generation change in Poland and is particularly visible among young citizens that are greatly attracted to the patriotic and conservative national values represented by conservative Polish parties.

My thesis presents the public debate on democracy evoked by the reforms of the CT that took place in the framework of the articles issued by the Gazeta Wyborcza, Polityka, Wprost and "Rzeczpospolita" of the Polish press. Because of its large scope and intensity, the medial debate has induced broad reflection upon the current philosophy of democracy and its practice in Poland.

Deutsch:

Die Reformen des polnischen Verfassungsgerichthofs lösten in Polen eine politische Krise aus, welche durch zwei Konflikte versursacht wurde. Der erste Konflikt bezieht sich auf die Auseinandersetzung zwischen der Regierung und ihrer Parlamentarischen Opposition und ist durch die unterschiedlichen Interessen, Ideen und Konzepte ausgelöst, die von der polnischen politischen Elite vertreten sind. Der zweite Konflikt fand zwischen der Exekutive und der Judikative statt und ist durch die Exekutive hervorgerufen, welche die Macht der Judikative zu reduzieren versuchte, um die neuen Reformen ungehindert umzusetzen.

Darüber hinaus ist die polnische Demokratiekrise im Kontext der Zunahme der globalen Unzufriedenheit mit dem Neoliberalismus als auch der Krise der politischen Identität in Polen zu sehen. Die letztere ergibt sich aus Generationswechseln, und ist insbesondere bei den jüngeren Teilen der Bevölkerung beobachtbar, die sich zunehmend von den nationalen und konservativen Parteien angesprochen fühlen.

Meine Masterarbeit stellt die öffentliche Demokratiedebatte dar, welche durch Reformen des Verfassungsgerichtshofs in Polen hervorgerufen wurde und umfasst die Analyse der vier

größten polnischen Printmedien (Gazeta Wyborcza, Polityka, Wprost and “Rzeczpospolita”). Durch ihren reichen Umfang steuerte die Debatte einen wichtigen Beitrag zu kritischen Überlegungen über die gegenwärtige Demokratiephilosophie und ihre Praxis in Polen bei.

PART I: Introduction

1.1. Constitutional Tribunal Crisis

The Constitutional Tribunal crisis in Poland began with the conflict surrounding the selection of the new judges to the Constitutional Tribunal. The dispute emerged when the Sejm of the 7th term elected five candidates for the vacant CT judge positions in 2015 on its last session on the 8th of October of the same year. The nominations were based on the new Constitutional Tribunal Act of the 25th of June 2016, which contained a transitional provision (Article 137) allowing the Sejm of the 7th term to appoint candidates for the CT judges that should be appointed by the Sejm of the next term.

From the beginning onward, the transitional provision raised a lot of controversies and concerns in regard to its constitutionality, nonetheless, the conflict did not escalate, not until the newly elected representatives of the governmental majority decided to remedy the mistake made in June and to change the Constitutional Tribunal Act.

Thereby, the legal dispute quickly instigated a long-lasting political conflict, which reflected different interests, ideas and principles represented by the Polish political elite. Moreover, because of its great importance to the Polish political system, the conflict received great media coverage, creating a broad framework for public discussions and for reflection on democracy in Poland.

My master's thesis analyses the debate on democracy that took place as a consequence of the reforms of the Constitutional Tribunal in Poland, scrutinizing its medial coverage, themes, frequency, and participants.

1.2. Democracy in Poland

The democratic regime in Poland was installed as a result of the negotiations that took place during the Round Table Talks. The Round Table meetings were held for the purpose of finding a social agreement for the future direction of the country of Poland that was facing serious economic problems. The poor economic situation coupled with large loses in the legitimacy of the communist system and government, forced the Polish authorities to search for compromises with the opposition during the second half of the 1980s. It was, however not until 1989 that the official process of democratization began. Thus, the transition in Poland is

to be viewed as a process, for which preparations were initiated around the year 1986[1], yet not formally set into motion before the beginning of the Round Table Talks.

With the official recognition of the Solidarity movement and the reforms of the economic policies as well as the introduction of the office of a President and the lower house of Parliament (that was agreed upon during the Round Table Talks), a democratic system was established that was based on political pluralism, participation, accountability, the rule of law, and national sovereignty.[2] The first reforms of the year 1989 set a domino effect in motion that led to changes in the political and economic and social life within only a few months, leading in the final instance to the democratization of the entire country.

The regime change in Poland was based on a compromise between the communists and the opposition. Thus, the communists initially did not intend to give up their power within the state administration but sought to maintain their overbearing influence upon the country's affairs. As a matter of fact, Poland's transition to a democratic state is referred to by Linz and Stepan as a prime example of what they have named a 'pacted transition'[3]. According to Linz et al. (1995), democracy in Poland "started with the old regime constitution, and with the old regime still retaining strong positions in the legislative and in the state apparatus"[4]. However, their efforts were futile since their position in the Parliament had weakened due to the first free election of the Senate on the 4th of June 1989. This day saw the victory of the Solidarity movement and the formation of the government lead by an independent oppositional leader, Tadeusz Mazowiecki.

The change in the power [5]relationship continuously progressed in favor of the opposition. This state of affairs made it possible for the necessary democratic institutions such as political parties, free elections, free press, independent free unions, interest groups and an independent judiciary to be introduced in a relatively short period of time (1989-1991). All new reforms were initially introduced into the communist constitution from the year 1952, and since the year 1992, into a short version of the Constitution, the so-called Small Constitution.

Nonetheless, despite the rapidly introduced democratic reforms of the country's political system, the process of the framing and writing of the constitution took many years and lasted

[1] The year of the announcment of Gorbachev's policy initiatives of the Restructuring (Russ: Perestroika) and the
[2] Gwiazda (2016), p.5
[3] Linz et al. (1996), as cited in Gwiazda, (2016), p.6
[4] Linz et al. (1995), p.117

up until the year 1997. The implementation of the new constitution is to be seen as a formal end of the process of political and economic transition in Poland.[6]

The long lasting period of systemic transformation and the lack of a proper constitutional framework were quite unfavorable for the III Republic and its democratic institutions. It is notable that the Polish Constitutional Tribunal (whose independence is often believed to be crucial for a democratic state) remained under the direct influence of the government for many years, as intended when the CT was initially introduced in the year 1987.
Up until 1997, the Polish Constitutional Tribunal was defined as a separate organ for the control of the constitutionality of the legal provision. Thereafter, the Tribunal used the juridical mechanism for its activities. It was however not formally regarded as a juridical organ rather as the organ of control, whose judgments were, until the year 1999, subject to the review of the Sejm. The new constitution changed the status of the CT, making it the juridical organ and granting the CT a formal independence, nonetheless the informal dependence of the Tribunal upon the Sejm had prevailed.

The lack of clear separation between the executive, the legislative and the juridical branch of power in Poland is an artifact of the communist past. The dependence of the judiciary on the ruling party was not entirely removed from the political practice of the Polish state up until the present, despite the fact that the separation of powers is one of the leading principles of the Polish Democratic Republic and as such is guaranteed by the Polish Constitution.
Especially, the law of the election of the judges to the Constitutional Tribunal stemming from the Communist period prearranged the dependence of the CT's judges upon the ruling party. Not only the nomination of the candidate for the office of the judge of the CT has been a sole task of the Sejm, but also the elections to the Constitutional Tribunal were, for many years, directly linked to the Parliamentary elections. It was therefore an unwritten tradition throughout the 1990s that the newly elected government appointed half of the bench of the judges of the Constitutional Tribunal. Moreover, during the 2000s, this pattern largely prevailed in the Polish system.

1.3. Overview on the Thesis and the Research

My master's thesis deals with the recent political developments in Poland, in particular with the reforms of the jurisdiction undertaken by the government of Jarosław Kaczyński. The

[6] Gwiazda (2016), p.6

general objective of my master's thesis is to examine the discussion on democracy within Polish print media that was carried out between November 2015 and December 2016. The focus lies therefore on the democracy debate that emerged as a reaction of the PiS reforms in the CT.
Because the existence of independent opinion is one of the main measurements of democracy, the independence of the media stands in the forefront. I believe that the analysis of the articles will also provide insight into the Polish print media landscape and the degree of their independence in the formulation of their standpoints.

The following thesis consists of six chapters. The first chapter gives a short overview on the subject and describes the framework of the study and the research question. The second chapter is concerned with the scientific discourse on democracy, placing the discussions on democracy in the broader democracy discourse. The third chapter deals with the judiciary power and its place and role in a democratic state. Moreover, this chapter delivers a brief history of the Polish judiciary and provides an overview of the Constitutional Tribunal crisis in Poland. The forth chapter presents the methodology applied in the research, which is followed by a presentation of the results of the study in chapter five. The last chapter summarizes the thesis, presents conclusion and answers the study questions.

1.3. The Scope and Scale of the Study

The parliamentary election of 2015 brought a shift in the political power in Poland. As a result of the elections, the PiS party came to power, forming a government that saw the pre-election promises of the fundamental changes in the country as a priority. A broad scope of reforms was set as the focus of the program of the new administration.

My study deals with the most prominent and controversial reforms, namely those of the Constitutional Tribunal, which aimed at changing the way the Constitutional Tribunal operates in Poland.
The main research question deals with the reaction of the media, the coverage of these reforms and the discussions on democracy that the reforms evoked in the four largest print media sources (Gazeta Wyborcza, Polityka, Wprost and "Rzeczpospolita") in the timeframe between the 1st of November, 2015 and the 31st of December, 2016.

The main research question seeks to answer the issue of how the four largest Polish print media delineated discussions on democracy taking place in the context of the Constitutional Tribunal Crisis, and who the participants in these discussions were.

To answer the main research question, I will apply content analysis and thematic analysis to securitize the debate. The following aspects of the relevant articles will be researched upon:

- 1. How often were the articles issued that debated on the aspects of Polish democracy in the context of the CT crisis
- 2. Who were the actors involved in the debate?
- 3. What were the differences between the daily and weekly papers in their coverage of the debate?
- 4. What aspects of Polish democracy were discussed in the major Polish print media in the context of the CT reforms?
- 5. How did the Polish print media present the CT reforms?

1.4. The Significance of the Subject

I regard the subject matter to be relevant to define the path on which Poland finds itself at the current time. Poland, as an important part of Central East Europe has for some time now been regarded as an area in which the transformation from the Communist to the Capitalist system has been sustainable. Many scholars use the term 'successful transformation' to refer to the political and economic transition of Poland. Moreover, because Poland is regarded as a prime example of such a successfully implemented transition to democracy and simultaneously to the capitalist system, it has served as a prime model for the states undergoing similar systemic reforms.

As it has broadly been perceived as a success, not many scholars have researched upon the sustainability of the democratic system in Poland. The latest political changes therefore came unexpected to many observers.

The visible shift in the political system that has occurred in the region of East-Central Europe initiated the debate on democracy in those countries. Not only the term of democracy but also the importance of the concept of the separation of powers and the principle of checks and balances are strongly involved in the current discussions. The debate that is presently taking place has activated many different visions, concepts and understandings of democracy.

The Constitutional Tribunal crisis in Poland is closely related to the debate on democracy as it has engaged not only two different political camps but also two principles of liberal democracy. On the one side, it expresses the nation's sovereign will for change pronounced by the PiS victory and its pre-election promises of reforms, and on the other side, the opposition (the minority) that struggles to prevent changes in the name of the a-temporality of the constitutional principles of a state of law, seeing the CT as a tool to suppress approaching reforms[7] and a source of political contestation.[8]

[7] Bela/Wielomski, „Tak jak jest jeden Bóg prawodawca, tak w państwie musi być jedno prawo. Konsekwencje zamieszania wokół TK analizują eksperci", Rzeczpospolita, 20.03.2016, accessible https://www.rp.pl/Rzecz-o-prawie/303209992-Konsekwencje-zamieszania-wokol-TK-analizuja-eksperci.html (10.04.2019)

[8] Already in the past, the Constitutional Tribunal prevented the adaptation of many policies of the PiS coalition government of the years 2005-2007 by deeming them as unconstitutional.

PART II: The Democracy Debate

The democracy crisis and the public discussions on democracy in Poland occurred in the context of the ongoing crisis of neo-liberalism and the crisis of political identity in Poland.
The Polish democracy crisis disclosed not only a necessity for reflection upon the current philosophy of democracy and democratic practice in Poland, but also its verification, showing that the law and the rule of law, that are often seen as the basis of a liberal democracy, do not guarantee the stability of the democratic system. Thus, as in the case of Poland (or Hungary), the crisis reveals that the control mechanisms of democratic states do not entirely protect the states from abuse by the ruling majority.

The chapter presented below places the medial debates on democracy that occurred in the context of the CT reforms in the broader scientific discourse on democracy.

2. The Debate on Democracy

The generative nature of democracy provides room for thorough discussions on principles, teachings, objectives and the conceptual development thereof. The examination of the plurality of the many definitions and concepts on democracy is therefore crucial since they convey different moral foundations, obligations and desirability.[9]
This chapter presents two different methods of classification, carried out within the debate on democracy. The first classification distinguishes between the procedural and the substantive definitions of democracy. While the procedural understanding explains democracy in terms of procedure, the substantive focuses on specific (regarded as democratic) practical results, thereby showing discrepancies between the normative theory of democracy and its actual outcome in the practice of a democratic state. Moreover, it allows differentiation between democratic states and scrutinizes the real outcome. The classification between the procedural and the substantive definitions of democracy is therefore of great importance to the democracy debate that took place in Poland during the CT crisis as it initiated broad reflection upon the current philosophy of democracy and its democratic practice: the procedure and substance in democracy.

[9] Shahramnia (2011), p.254

The second distinction may be regarded as an attempt to arrange different democratic theories. Benjamin Barber, an American political scientist, orders democratic theories by their fundamental assumptions. Barber's model is therefore of great significant since it takes up the two major developments of the history of political ideas: the liberal and the republican paradigm. While taking into consideration fundamental assumptions of particular models and the general history of political ideas, Benjamin Barber differentiates between thin and strong democracy concepts, which also remarkably resemble the division between the liberal-democratic model and the republican model of democracy in reference to the values and the norms represented by both approaches.

The concept of liberal and participatory democracy is therefore of great importance, as it explains the nature of Polish democracy. In the paper *Deliberative Democracy and Citizenship* (2006), Dorota Pierzych-Reeves explains that in the time of Poland's transformation, new political leaders decided to build Polish democracy on the concept of democratic elitism (liberal democratic model/thin democracy model), which required neither widespread participation nor a robust civil society for its wellbeing. The new party leaders regarded the participatory politics as an artifact of the past communist era, and this despite Poland's rich associational life at the beginning of the period of transition. The role of the public sphere and public discussion in forming democratic outcomes was therefore degraded, and citizens were discouraged to participate in the public debate.[10] These developments are reflected in the participation of citizens in Poland's political life, which has remained at a low level since the year 1989.[11] The citizen is rather discourage from actively take part in political life, not because the participation possibility is not provided but because citizens perceive their participation as having little or no impact on the political, social and economic occurrences.[12]

Also, Oltenau et al. (2017) point at the problem of political participation in Poland as a plausible explanation for the weakness of Polish democracy. Thereafter, during Poland's transition to a liberal democracy, the focus lay on the transformation or the establishment of liberal-democratic institutions, namely the constitution, free and fair elections, independent courts, independent media, and political pluralism. As a matter of fact, this formal fulfillment of the criteria ultimately did not to lead to the consolidation of the representative democracy.[13]

[10] Pierzych-Reeves (2006), p.61
[11] Low participation may be best observed in the voter turnout of elections in Poland that only seldom reach a level of 50%.
[12] Pierzych-Reeves (2006), p.61
[13] Oltenau et al. (2017) p.14

Barber's concept understands that political participation not only leads to a better representation of the citizens' interests but also serves to legitimize the entire political system. Barber views political participation as an important measure for the quality of democracy. Thus, recognizing the importance of democratic practice, Barber's concept shows that the problem of Poland's democracy lies in its elitist character that encourages neither citizen participation nor the growth of civic society.

2.1. The Procedural and Substantive Approaches to Democracy

The differentiation between the procedural and the substantive definitions of democracy is regarded as one of the essential divisions between the two different understandings of democracy and is coupled to the diverse methods of the evaluation of democratic regimes.

The procedural definition of democracy focuses on the (democratic) procedure and its rules. Thus, it revolves around the matter of the organization of the political system for the purpose of securing democratic values such as representation, accountability, and legitimacy.[14] The center of attention therefore lies on such structural aspects of a political system (procedural arrangements) that are essential for achieving a stable democracy. Hence, the focus lies on the procedures, modes, forms and rules that enable the carrying out of a system that is governed by the people. The approach is therefore primarily concerned with the questions revolving around the electoral procedure, the electoral system, suffrage, the nominations procedure, or the voting system.

One of the most significant representatives of the procedural approach to democracy is Joseph Schumpeter (1883-1950). Schumpeter describes democracy as a 'method of making decisions', stating as follows: "democratic method is that institutional arrangement for arriving at political decisions in which individuals acquire the power to decide by means of a competitive struggle for the people's vote."[15]

Therefore, the Schumpeterian concept conveys the understanding of democracy as being limited to the provision of the open competition for a free vote, thus, describing it as electoral democracy. Moreover, Schumpeter believes that citizens often lack sufficient knowledge to

[14] Gwiazda (2016), p.14
[15] Schumpeter, 2003 [1942], p.269

recognize long-term interests, therefore the participation in democracy should be restricted to the act of voting.[16]

Writing in the tradition of Schumpeter, Robert A. Dahl has further elaborated upon the aspect of mass participation and contestation in democratic states. While studying the history of democratic systems, Dahl noticed that the features of these states that are regarded as democratic have changed over time. Thus, he believes the most prominent shift took place in regard to the aspect of (inclusive) citizenship, as the right to fully engage in political life was strictly restrained to a minority of adults in the democratic states of the past.[17] As a consequence, Dahl recognizes the unique character of the democracies of today, pointing out the fact that the current political institutions have managed to constitute a new type of government along with a new kind of popular government as a response to the demand for inclusion and participation in political life.

Because of the afore-mentioned modification in the concept of citizenship, Dahl believes that it is necessary to differentiate between the modern (the polyarchal democracy) and old types of democracy. Dahl uses the notion of polyarchy in reference to any "democratic government on a large scale or notion-state or country".[18] Dahl's polyarchies (or also liberal democracies) are characterized by the existence of certain key political institutions. The list thereof incudes: elected officials (1); free, fair and frequent elections (2); inclusive suffrage (3); the right of all citizens to run for public office (4); freedom of expression (5); availability of alternative sources of information (6); and associational autonomy (7).[19]

Thus, Dahl's polyarchies have installed a system of competitive, multiparty elections for the purpose of casting officials for the national legislative and the chief executive. This contest is free, fair and frequent, and engages all citizens in voting participation. The right to run for public office is unrestricted, and allows all citizens to take part. Furthermore, the competition is defined by freedom of expression, the availability of alternative and independent sources of information, and associational autonomy.[20]

Joseph Schumpeter's and Robert A. Dahl's definitions are to be regarded as standing in the tradition of the procedural approach to democracy. Nonetheless, both approaches differ from each other as Schumpeter's concept is strictly narrowed down to the electoral democracy (a

[16] Schumpeter, 2003 [1942], p.257
[17] Dahl (2005) [1989], p.191
[18] Ibid p.192
[19] Ibid p.188-189
[20] Norris (2011), p.6

minimalist approach), yet that created by Dahl addresses further the dimensions of the system. Dahl's conceptualization is therefore called a thick procedural definition, which not only expands the range of civil liberties and political rights and stresses the importance of the provision of constitutional guarantees or controls on the exercise of executive power, but also includes the aspect of participation, accentuating the prominence of political and civil pluralism.[21]

Dahl's definition serves as a common basis for empirical measures used in the evaluations of the Polity IV or Freedom House. Nonetheless, such empirical measures are often challenged in regard to their sufficiency in determining democratic regimes. They draw criticism because of the application of minimal criteria and their negligence of real outcomes, among others. Moreover, because the procedural definition of democracy considers only the procedural standards, the practical issues of democratic states that are substantive in nature (as for example an equal participation of all groups in society or the level of corruption) are not taken into reflection.[22] This omission is therefore problematic as many democratic states ('old' democracies in the same way as newly established democratic states) are presently troubled by such practical issues.

The substantive approach to democracy focuses on output, and is concerned with the viability of an effective democratic system. This approach does not deliver any precise definition of democracy but rather deals with a set of components that contains among others, freedom of religion, individual freedom, equality and social justice. Moreover, the substantive theories deal intensely with the securing of civil liberties as well as addressing social and economic rights. Miguel Darcy de Oliveira writes that the definition of democracy conveyed by substantive understanding is embedded on society, nurtured and enhanced by a vibrant civil society and a civic culture of participation, responsibility and debate. Hence, democracy is always a work in progress, an unfinished journey, a process rooted in the history of any given society (…) it cannot be imposed from the outside and is never achieved once and for all.[23]
As a result, the substantive concepts evaluate democracy in terms of their specific results, by using both subjective and objective means, and because of their results-based approach, their standards do not take note on whether policies per se are democratic or not.[24, 25]

[21] Gwiazda (2016), p.14
[22] Knutsen (2010), p 113-115
[23] de Oliveira (2008), p.33
[24] By contrast, the procedural view on democracy only makes use of the objective evaluations and assesses democracies on the basis of procedure, by which the decision-making process takes place.

2.2 Thin and Strong Democracy Concepts

Barber refers to his first democracy concept as thin democracy and states that it is characterized by its remarkable deviation between its normative content and its application in practice.

Barber denotes 'thin democracy' as a system that on the one side grants autonomy to the citizen via the principle of self-governing, and on the other side as exercised in the form of the rule of the majority over the minority, and hence possibly also leading to the situation in which the minority may become oppressed by a democratically elected majority. To solve the aforementioned problem, thin democracies aim for a state constitution that prevents the overuse of power and defines the limits of the activities of political actors.[26]

The prime function of politics in a 'thin democracy' is to represent the interests and preferences of the citizen (a representative function). Thus, the system is based on the aspect of responsibility as it is measured by the extent of the interests and preferences of the citizen that are realized. Moreover, it is required to establish an institutional arrangement based on the system of checks and balances to prevent a situation where the particular interests are rendered too much power. The interaction between different political/economic/social interests is regulated by the hindering of the exploitation of a state and the oppression of minorities.

Lembcke et al. (2012) views Barber's concept of thin democracy as the prevailing model not only in the history of political ideas but also in practice. Furthermore, the model conveys alongside a specific institutional set-up a particular canon of values, which according to Barber, in the case of Western democracies has been framed over the last three hundred years and inspired by John Locke, Immanuel Kant and John Stuart Mill's contributions and is as of yet hegemonic.[27]

Barber classifies the political theory of liberal democracy as the 'thin theory of democracy'. He believes that the theory of liberal democracy is based on the premises that are genuinely liberal but not intrinsically democratic. Furthermore he argues that liberal democracy encompasses democratic values that are prudential, and thus provisional, optional and conditional, which he regards as the means to exclusively individualistic and private ends.[28] Barber regards these values as impossible for the stimulation of a rise of the theory of public

[25] Gwiazda (2016), p.17
[26] Lembcke et al. (2012), p.17
[27] Lembcke et al. (2012), p.18
[28] Barber (2003) [1984], p.4

good, public virtue, citizenship or participation, and therefore of any theory of political community. Barber recognizes that liberal democracies are complex and often paradoxical forms of governing as they are composed of three leading dispositions: 'anarchist'[29], 'realist'[30] and 'minimalist',[31] to be viewed as clusters of attitudes, inclinations or values.[32]
These dispositions are commonly seen as contradictory impulses that act within a single political tradition' but in an actual liberal democracy are often found as coexisting with each other.[33] To illustrate his conclusion, Barbar points at the USA as an example of a country in which these three dispositions are combined together in practice, as the United States are anarchist in values (e.g. individualism, liberty, property and right), realist in means (e.g. power, coercive mediation, law) and minimalist in political temper (e.g. tolerance, pluralism, institutionalization of the separation of powers and juridical review).[34]
Barbar views these three dispositions as originating from a conflict and as being a political response to the conflict, which he sees as the central requirement to all liberal democratic politics. Thus, Barber states that conflict (regardless of the different reasons of which the conflict underlay) is a focal point of human interaction and therefore the main concern of the politics of the states that are shaped by the liberal democratic system. The amelioration of conflict differs however evidently, depending on the disposition applied to its management. Thus, the methods encompass conflict-denying (in the case of anarchism)[35], conflict-repression (in the case of realism) and conflict-toleration (in the case of minimalism). In his comment on the methods of conflict amelioration, Barber states that "the first approach tries to wish the conflict away, the second extirpate it, and the third to live with it"[36]

Because of the aforementioned limitations of the first concept of democracy, Barber deems necessary the overcoming of 'thin democracy' and the strengthening of democratic practices and institutions. Thus, thin democracy' "yields neither the pleasure of participation nor the fellowship of civic association, neither the autonomy and self-governance of continuous

[29] Barber describes the anarchist disposition as an approach that assumes that free and autonomous beings are able to satisfy their need outside of a coercive civil community. Hence, politics should only take on a protective function.
[30] Barber describes that a realist disposition assumes that individuals pursue their private interests. In regard to the political realm, the realist approach introduces the instruments of powers as fear, manipulation, coercion, incentive and sanctions for the purpose of setting constrains to any disruptive impulses.
[31] Barber describes the minimalist approach as a viewpoint that promotes politics of toleration, wariness of government, and pluralism. Tolerance should also be the leading principle for reconciling inevitable conflict. The aim of politics is therefore to reshape institutions, customs and manners in the way that they enable the agents to live with conflict and dissonance.
[32] Chakrabarty (2005)
[33] Barber (2003) [1984], p.6
[34] Ibid p.5
[35] Conflict is created by political interaction rather than the condition that gives rise to politics.
[36] Barber (2003) [1984], p.6

political activity nor the enlarging mutuality of shared public goods – of mutual deliberation, decision, and work."[37] Because of this, he develops a foundation for his second type that he calls strong democracy, denoting it as a participatory approach for the new age.

The 'strong democracy' model is to be seen as a concept of direct democracy, which focuses on participation as a normative ideal for modern democratic societies. The central aspect of Barber's strong democracy is community. Barber believes that individuals grow lonely in modern times despite rapidly advancing collectivization. Bringing the social context into his explanation, he points out that individuals are currently permanently confronted with their social environment to which they continuously draw comparisons. As a result thereof, the process of the self-alienation of individuals (Selbstentfremdung) reinforced by the hindrance in the formation of community ultimately lead to the process of world alienation (Weltentfremdung).[38]

The essence of the concept lies in the assumption of positive liberty, which Barber regards as having priority over negative liberty. Moreover, liberty is no longer seen as a precondition for the democratic system in this approach (as it was in the case of 'thin democracy'). In reverse, the democratic system is a prerequisite for liberty. This is because participation in the strong democratic system is to be understood as a form of execution of liberty that ultimately facilitates an acting together and leads to self-realization. Barber views participation as an expression as well as an execution of liberty. [39]

Florian Weber (2012) states that Barber sees participation in the strong democracy concept as public activity, which is performed in the spirit of community. Thus, the power of judgment (Urteilskraft) is the central political activity as it demonstrates the ability to comprehend other perspectives and to reach a decision that is balanced and adjusted to the concrete situation.[40]

The intense political participation of citizens should therefore take place on the various levels of the political system, leading humans to become political animals (zoon politikom) that possess a genuine knowledge of politics. Moreover, intense participation is therefore also important because it transforms individuals into responsible citizen due to its educative function. Hence, Barber emphasizes the great importance of the participatory aspect to democracy, while simultaneously criticizing representative democracy due to its incompatibility with the creation of such values as freedom, social justice and equality.[41]

[37] Barber (2003) [1984], p.24
[38] Weber (2012), p.231
[39] Weber (2012), p.236
[40] Ibid p.237
[41] Barber (2003) [1984], p.145-46

In the concept of strong democracy, the democratic process of decision-making expands over others spheres of life including the field of economy or the family, and ultimately becomes a way of living. The scope of political participation should therefore not only be reduced to the participation in the legislation process as conveyed by a narrow understanding of participation, but rather it should involve a broad spectrum of engagement also including the level of common execution, implementation and common civic work and encompassing such involvement in local self-government or in a court of law.[42] In his text, Barber states that the concept of strong democracy "envisions politics not as a way of life but as a way of living—as, namely, the way that human beings with variable but malleable natures and with competing but overlapping interests can contrive to live together communally not only to their mutual advantage but also the advantage of their mutuality."[43]

Overall, Barbar's concept of 'strong democracy' refers to the idea of participatory democracy in which the notion of democracy was broadened in reference to two important aspects; firstly the scope of political participation has been widened to encompass new dimensions, and secondly the status of democracy that has therefore shifted from the understanding of itself as a from of government to the meaning of democracy as 'a way of living'. In effect, individual participation and educative function inherent in participation yield popular control.[44] Thus, democracy should be learned by means of individual participation, creating thereby a stable and durable basis for a strong democratic system. Furthermore, extensive civil participation should be realized in the spirit of community in which active members give up their isolated, separate and often hostile attitudes in the spirit of a group in action.[45]

The concept of strong democracy promotes the sense of public goods, the development of a consensus, civic education, responsibility sharing and participation. While referring to the community, Barber states that it "grows out of participation and at the same time makes participation possible; civic activity educates individuals on how to think publicly as citizens even when citizenship informs civic activity with the required sense of publicness and justice."[46] Hence, according to Barber, active participation grants the foundation for collective actions and contributes to the genesis of community-oriented citizens.

[42] Ibid p.
[43] Barber (2003) [1984], p.118
[44] Wolfe (1986), p.13
[45] Weber (2012), p. 238
[46] Barber (2003) [1984], p.152

Nonetheless, Barbar acknowledges the difficulties that are associated with the establishment of the strong democratic system in today's large-scale modern societies. He designs a constellation of institutions and policies that would help to bring about a strong democratic system including a national system of initiative and referendum, neighborhood assemblies, interactive television, civic education, and more equal access to information to name a few.[47] Barber's strong democracy not only recognizes the importance of democratic institutions but also of democratic practices. He argues that the understanding of democracy cannot only be limited to political democracy, but should also include social and economic democracies.[48] Barber promotes an approach that is focused on society, seeing a strong democracy as an active, self-governing community of citizens. Thus, he emphasizes the importance of community in the practice of democracy for the creation of common good and the sustainable development of democratic societies.

[47] Barber (2003) [1984], p. 267-278
[48] da Costa (2014), p.142

Part III: Juridical Power

3. The Role of Juridical Power in a Democratic State

Not only the term of democracy but also the way in which the three powers (the juridical, legislative and the executive) should be divided in a democratic state is the subject of dispute and it differs in the practice of many democratic states.

Part III of this thesis deals with the juridical power and its place and function within the democratic system. For this purpose I will depict the development of the doctrine of the separation of powers and the concept of checks and balances. Thereby, I aim to provide an understanding of why the reforms of the CT not only faced strong opposition, but also the reason of the political dispute and the debate on democracy in Poland.
This explanation will be followed by research on the formation and the structure of the Polish Constitutional Tribunal and a description of the latest crisis of the Constitutional Tribunal in Poland.

3.1. The Doctrine of the Separation of Powers

The emergence of the doctrine of the separation of powers in the Western world is closely related to the elaboration and promotion of the set of values that includes justice, liberty and equality. An intense and long-lasting discussion was launched on how these values, whose promotion is often perceived as standing in contradiction with one another, are to be realized in practice. Central to the debate is the concern about the articulation of the institutions of the political system and about the extent to which those should advance the aforementioned qualities. Eventually, the realization of the values practiced by the national state as well as their promotion and insurance was attached to restraints on government powers, which was believed to be best carried-out by means of the application of the doctrine of the separation of powers. [49] Nonetheless, vague assumptions and formulations of the pure doctrine of the separation of powers led to considerable confusion. Moreover, the doctrine, standing alone as the theory of government had failed to deliver a foundation for an effective and stable political system, and was ultimately complemented with different theories and concepts.[50]

[49] Vile (1998), p.1
[50] Vile (1998), p.2

3.1.1. The History of the Doctrine of the Separation of Powers

The origin of the idea of the separation of powers can be traced back to ancient civilizations. It was the Greek philosopher, Aristotle, who mentioned the concept of government for the first time and differentiated between three basic functions of government: 'deliberative', 'magisterial' and 'juridical'. The concept of the mixed government was also present in Ancient Rome, where the three divisions of the governmental system were introduced. Both ancient approaches to the separation of powers differed however from those of today, since a division of powers among different institutions or officials is not inherent in their conceptualization.[51]

With the fall of ancient civilizations, the idea of the division of governmental functions lost its significance in the world of the absolute power of monarchs and kings. Nonetheless, the ancient idea of the mixed government appeared once again in pre-modern England and led to the establishment of a system in which the power of a hereditary monarch was limited by legislative organs. Though the former English system of mixed government did not aim to split the functions among institutions, it rather wished to advance the idea of liberty. Therefore, for the purpose of preventing despotism, a protection mechanism was installed that would enable a blockade of a person or an entity that wished to dominate the government.[52]

Moreover, the English experience led to the rediscovery of the concept of the separation of powers in old, medieval writings. At first, the concept was used by the oppositional movement during the upheaval of the civil war, standing in contradiction to the idea of the concentration of power. The limitation of governmental power by means of its division among governmental functions was formerly used in the name of liberty, and thus, against the arbitrary power of the monarch. As a matter of fact, in the 17th and 18th centuries, the doctrine was linked to many important theories that dealt with state building, such as constitutional theories or the classical theories of government. Thereby, the position and significance of the doctrine to Western democracies has significantly grown.[53]

The refining of the foundation of the concept of the separation of powers is ascribed to the English political theorist John Locke. Locke recognized the importance of the doctrine due to its contribution and significance to the legitimation of governments. In his *Second Treatise of*

[51] Glassman (2016), p.3
[52] Glassman (2016), p.3
[53] Vile (1998), p.4

Government (1690), Locke creates a dualistic model differentiating between legislative and executive power.[54] Legislative power is, according to Locke, the authority that directs how "*the Force of the Commonwealth* shall be imploy'd for preserving the Community and the Members of it"[55] whereas the executive power is described as being responsible for enforcing the law in concrete cases.[56] While comparing both powers, Locke states that the executive powers must always be active in a society due to the fact that law enforcement is a day-to-day operation, while the activity of legislature is not perpetual and therefore should take place on the occasional basis. Nonetheless, he regards legislative power as supreme to executive power because, as he formulates it, the legislative makes laws 'for all the parts and for every Member of the Society, prescribing Rules to their actions, and giving power of Execution, where they are transgressed'.[57] Additionally, Locke's formulation of the doctrine of the separation of powers does not prohibit that a person exercises more than one power.

Also, the Baron de Montesquieu, a French politician, reflects upon the idea of the division of government. In his text *The Spirit of the Laws* (published in 1748), he formulates a triad of powers of government. The purpose is to decentralize political power by means of separating it among legislature, executive, and judiciary and handing them over to different entities/persons. Thus, a governmental structure based on the isolation of its three prime functions: making laws, executing laws and interpreting laws, is viewed by Montesquieu as a system that prevents a state of tyranny.[58]

Looking at the doctrine of the separation of powers as a requirement for the securing of individuals' liberty, he states:

"When the legislative and executive power are united in the same person, or in the same body of magistrates, there can be no liberty, because apprehensions may arise, lest the monarch or Senate should enact tyrannical laws, to execute them in a tyrannical manner. Again there is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would then be the legislator. Were it joined to the executive power, the

[54] In his text, Locke mentions a third power, a federative power, which is an executive power in regard to external affairs. Locke sees it as having a right to act internationally according to the law of nature, as countries stand in the state of nature in regard to each other.
[55] Locke (1965) [1689], p.316
[56] Locke (1965) [1689], p.316
[57] Ibid
[58] Fairlie (1923), p.396-397

judge might behave with violence and oppression."[59]

In Montesquieu's writing, the doctrine of the separation of powers was associated with the reduction and elimination of the arbitrary power of unchecked rulers. Hence, he relates the doctrine with the concept of checks and balances, whose basis he also developed in his writings. Montesquieu complements the formulation of the doctrine of the separation of powers with the aspects of the theory of checks and balances between the legislative and the executive. Thereafter, on the one hand, the executive branch restrains the legislative by the right to veto over legislation; on the other hand, the legislative restrains the executive via the annual power of the purse.[60] Montesquieu precludes that if one of the divisions of power becomes too powerful and despotic, a risk exists that the most powerful branch might use its advantage to destroy all the other powers. In order to avoid this state of affairs, Montesquieu believes that it is necessary to introduce such a governmental structure that is based on divisions that mutually impose restrictions on each other, ultimately creating a balance between them. Notwithstanding, in regard to the judiciary, he did not grant it any powers in regard to other branches believing that the judiciary's independence should be absolute and should not be subject to any control.[61]

Overall, with the onset of the period of Enlightenment, the doctrine of the separation of powers had become subject of much discussion. The shift in the perception on government, its structure and its function coupled with the dispersion of the idea of sovereignty and liberty had provided a vivid background for the further development of the doctrine. The engagement in the refinement of the idea was wide-ranging and intense, thus the definition of the doctrine is very vague not only because its central idea of 'function' that proved to raise much confusion was also due to its direct attachment to the term of 'power'.[62]

The doctrine of the division of political power was developed to impede misuse and to protect the people from the tyranny of a single and omnipotent source of power and secure the liberty of that people. Nonetheless, the doctrine of the separation of powers in its 'pure' form[63] is

[59] Montesquieu (1748)
[60] Glassman (2016), p.4
[61] Vile (1998), p.94-95
[62] Vile (1998), p.13-14
[63] The division of government is separated into three branches: legislative, executive and judiciary, to whom there exists a corresponding identifiable function of government: legislative, executive, judicial, and the activity of each of the branches' is limited to the exertion of its own function. Neither an intervention in the function of the other branches is permitted, nor a membership in more than one branch at the same time.

very difficult to implement in practice. It represents more of a benchmark against which different variations and ramifications can be measured.[64]

The growing importance of the British Empire contributed to the spread of the idea of mixed government and the concept of the separation of powers around the globe. In their colonies around the world, the British built systems whose structures of government resembled the one found in England.

Also, the U.S. experience with mixed governmental systems under British rule was transmitted into the U.S. Constitution that describes a system of government strongly based on the doctrine of the division of powers. The U.S. Constitution declares the doctrine of the separation of powers as the fundamental constitutional principle of the political system. The U.S. Constitutional Act very accurately follows Montesquieu's prescription of the separation of the three powers of government, as it was believed at that time that only via this procedure, a stable political system that promotes the values of liberty and justice, might be achieved. The U.S. Constitution places each of the powers in different hands; legislative power with Congress, executive power in the person of President and judicial power in the Supreme Court and other (federal) courts. Moreover, it prohibits an active participation in more then one branch at a time.[65] Nonetheless, the branches themselves are not clearly separated from each other, as for instance in the case of the president who has the right to some legislative powers by holding the right to approve or reject all bills presented by congress. Thus, the doctrine of the separation of powers was combined with the concept of checks and balances (each of the branches stands as a check against the others, thereby creating a balance in their operations) to avoid the misuse of power by one of the branches. Nonetheless, the most strictly implemented doctrine of the separation of powers often invites a conflict among the divisions as it creates overlapping spaces, thereby leading to an inter-branch contestation.[66]

History shows that the doctrine of the separation of powers underwent complex development over the centuries. At the same time, the belief in the doctrine has fluctuated enormously. Notwithstanding, the doctrine still plays an important role in the political system of today's democratic states. It not only holds a significant role in the discussions on government but also many of the practical problems of today are attributed to the issues with which the doctrine deals.[67] Moreover, due to its strong interaction with the values of liberty and justice,

[64] Vile (1998), p.14
[65] Fairlie (1923), p.397-398
[66] Fairlie (1923), p.415
[67] Vile (1998), p.11

the doctrine is often thought of as a benchmark that distinguishes between the institutional structures of free and unfree societies.[68]

The doctrine of the separation of powers is of great significance for the foundation of democratic states. Nonetheless, since it does not work in its pure form (separation of functions, agencies and persons), the doctrine has become a subject of review and in effect one of only partial implementation. The manner how it is implemented in the practice of democratic countries depends on the historical developments of the countries' political structure.[69] Upon analysis, we can determine the different manners in which a state's constitution deals with this concept. For instance, we can differentiate between the U.S. system (which most faithfully follows the prescription of Montesquieu) and the Westminster system (in which the manner of the executive function is very complex). It is the relationship between the executive and legislative that varies between these two models. Nonetheless, it is commonly agreed that the complete separation of the judiciary should be considered as the minimum separation of power in a democratic state. The judiciary should stay independent and beyond political interference from legislative or executive powers. It is commonly believed that only by the complete separation of the judicial function, laws are likely to be applied more objectively and impartially.[70]

[68] Ibid p.10
[69] Fairlie (1923), p.398, 426
[70] Wells (2006), p.106

3.2 The Polish Judiciary System

The reforms of the judiciary in Poland had begun 9 years before Poland's systemic transition. Thus, the reforms of the juridical branch of power reach back to the year 1980, when the Supreme Administrative Court was established in the Polish People's Republic. Two years after this event, the Constitutional Tribunal and the Impeachment Court were written into the Constitution of 1952.

During the Round Table Talks, the Polish judiciary system was one of the most intensively discussed themes. Adam Bodner (2010) reports that the discussions were followed by a series of constitutional reforms along with laws passed on the 20th December, 1989, that derogated various legal institutions that were used for political control over the judiciary, as for instance the supreme supervision of the Minister of Justice over the courts. Moreover, the National Council of the Judiciary was founded. The reform targeted the establishment of the independent and self-governing judicial branch of power of the democratic state ruled by the law.[71]

3.2.1 The Formation of the Polish Constitutional Tribunal

The origin of the Polish Constitutional Tribunal can be traced back to the Communist era. In the early 1980s, the communist system of the country slowly began to erode. The emergence of the Solidarność movement in 1980 and the introduction of Martial Law in 1981 were the significant indicators of the instability of the regime in Poland at that time. In this political context, the Constitutional Tribunal along with the Impeachment Court were introduced on the 26th of March, 1982 on the grounds of the amendments to the binding Constitution of the 29th of April, 1952. The introduction of the Constitutional Tribunal and Impeachment Court into the PRL's Constitution, was followed by three years of intense discussions over the final architecture of the Constitutional Tribunal. Ultimately, it was agreed to give the Constitutional Tribunal 'specific' characteristics resulting from the former political situation of Poland. The particularity of the newly establish Polish CT referred to the precedence of the Sejm in relation to the Court, the terms and principles of procedure as well as the entities

[71] Bodnar (2010), p.32

authorized to initiate legal proceedings within the Constitutional Tribunal.[72] Nonetheless, the form of the Polish CT was largely based on the Austrian/German Model.

The final arrangement of the PRL's Constitutional Tribunal was inscribed into the Act on the Constitutional Tribunal issued on the 29th of April, 1985. The acts defined that the main task of the Polish Constitutional Tribunal was to examine the constitutionality of legislative measures (statutes and decrees) and of normative acts enacted by the central state authorities.[73]

Nonetheless, the Act of 1985 also transmitted several limitations to the powers of the CT. The first limitations referred to its scope of control of the legal provision, which was restrained to normative acts promulgated, adopted and approved after the 1st of January, 1986. In regard to early statutes, the CT was given the power to control only those that were introduced after the implementation of the amendment of the constitution of the 26th of March, 1982.[74] Moreover, control was restricted in all cases to the normative acts that were announced or approved no later than five years from the moment of the submission of their application to the Constitutional Tribunal.[75]

Furthermore, the Sejm set restraints on the authority of the Polish Constitutional Tribunal by maintaining the right to review all of the CT's judgments[76], and ultimately also to reject, with a two-thirds majority of votes in the presence of at least half of all members of the Sejm, those judgments.[77]

Originally, the Act of 1985 specified not only the procedure but also the structure of the Polish Constitutional Tribunal. During the communist regime, the Constitutional Tribunal consisted of 12 members; including a president and vice president of the court and 10 judges. All members were appointed and recalled by the Polish Sejm. The president and the vice president of the Constitutional Tribunal not only held the judicial offices, but also were

[72] Garlicki (2002), p.265

[73] Ustaw Polskiej Rzeczpospolitej Ludowej, Ustawa 98, Rozdział I Art.1

[74] Mazurkiewicz (2004), p.2

[75] Dziennik Ustaw Polskiej Rzeczpospolitej Ludowej, Ustawa 98, Rozdział 6, Art. 21

[76] During the communist period, the Sejm never made use of its power to reject. This is because previous to the systemic transformation of Poland merely two laws were declared as not conform to the Polish Constitution. As reported by Garlicki (2001; 2002) in the period between 1989-1999, the Sejm overruled eleven judgments of the CT. 10 of these rejections date back to the period after 1993, as until then, the Polish Parliament was marked by short-lived multiparty governments, and made the achievement of a 2/3 majority of votes in the Sejm (necessary for the rejection of the CT's decisions) impossible.
The political situation changed after the Parliamentary Election of 1993, which led to the coalition between the Democratic Left Alliance and the Polish People's Party in the Sejm, also making the requirement of a 2/3 vote easier to fulfill. Furthermore, the year 1993 marked an important change in Poland's Political System as a new interpretation of the constitutional law placed a limit on the Sejm's power of rejection, reducing it to a period of 6 months after the official announcement of the CT's judgment. This state of affairs lasted until October 1999.

[77] Dziennik Ustaw Polskiej Rzeczpospolitej Ludowej, Ustawa 98, Rozdział 1, Art. 6

required to fulfill a broad scope of administrative and organizational tasks.[78] Their duties included the preparation of the court hearings and the provision of the information beneficial for the legal system as well as the enforcement of the decisions made by the Tribunal. The members of the Constitutional Tribunal were appointed for an 8-year-period, and the Act foresaw that every 4 years, half of the members would be exchanged.[79] The judges of the CT were asked to take an oath in the presence of the Marshal of the Sejm, which read as following:

"I do solemnly swear that in discharging the duties which have been vested in me as a judge of the Constitutional Tribunal, I shall be faithful to the Constitution of the Polish People's Republic and to the therefrom resulting political and socio-economic rules of the socialist state, rule of law and social justice. I shall protect the interest of the state and the legitimate interests of citizens, safeguard the legal order and dignity of the authority entrusted upon me, and respect the duty of professional and state secrecy" [80]

Moreover, in regard to the post of a judge of the Constitutional Tribunal, the Act defined that it could be held by a person that fulfilled two main criteria, namely those of having the qualifications for holding an office in the Supreme Court of Poland [81] or the Supreme Administrative Court.[82,83] Moreover it was required from judges of the Constitutional Tribunal not to combine their office with any other post in the parliament, or any other public organ of power, as well as with any occupation that could negatively influence their performance in the Constitutional Tribunal or that might undermine confidence in the neutrality of his/her judgments.[84] The judges of the Tribunal Court were not subject to criminal liability, however they could be subjected to disciplinary punishment in accordance to the provision applied in the case of the judges of the Supreme Court.[85]

In regard to the field of activities, the Constitutional Tribunal was obligated to examine all of the legal provisions issued by the central organs of the state on their conformity to the Constitution in regard to its content as well as to the power and observance of the procedure

[78] Dziennik Ustaw Polskiej Rzeczpospolitej Ludowej, Ustawa 98, Rozdział V, Art. 17
[79] Dziennik Ustaw Polskiej Rzeczpospolitej Ludowej, Ustawa 98, Rozdział V, Art. 13, para 4
[80] Translation from Polish
[81] The criteria required for the holding of office in the Supreme Court were defined in the Act from the 20.09.1984, Art. 30, and included among others the specification to the status of the person (polish citizen that enjoys full rights as a citizen) and to the qualification of that person (holding a title of a Magister of Law degree, having outstanding knowledge of the legal system, and 10 years of working experience in this juridical field).
[82] The criteria regarding the office in the Supreme Administrative Court are found in the Act from the 31.01.1980, and include among others, specifications on age (min. of 35 years), and qualifications (broad knowledge in the field of public administration).
[83] Dziennik Ustaw Polskiej Rzeczpospolitej Ludowej, Ustawa 98, Rozdział V, Art. 13(3)
[84] Dziennik Ustaw Polskiej Rzeczpospolitej Ludowej, Ustawa 98, Rozdział V, Art. 13(5)
[85] Dziennik Ustaw Polskiej Rzeczpospolitej Ludowej, Ustawa 98, Rozdział V, Art. 15, 16

required by the provisions of the law to promulgate the act. The CT was able to exercise control over the constitutionality of an act *ex officio.*[86]

The proceedings in the CT were instituted on the basis of an application or question of law concerning constitutional infringements. The Constitutional Tribunal had a right to refuse an application if it was evidently groundless, or it did not meet all of the legal requirements needed for further action.[87]

In November of 1985, the first bench of the Constitutional Tribunal was appointed, leading the organ to take up its duties soon thereafter. In January 1986, the Constitutional Tribunal received its first application. The introduction of the Constitutional Tribunal set into motion the process of structural change in Poland. It is reported that in the first year of its existence, the CT had set clear limits to the freedom of the legislative activity of the executive powers due to a specific case law that it had developed, which focused on the relations between statutes and legal acts by the executive.[88] Nonetheless, in the first years of its operation the CT received a small number of applications. Between 1986-1989, only 60 applications were filed to the CT, in 31 of all these cases, the CT decided to discontinue the proceedings. Before the transformation, the cases that were examined by the CT mainly addressed social issues such as retirement pensions, insurance, the insurance of farmers and their families, and the rights of the labor unions, among others.[89]

3.2.2. The Constitutional Tribunal in the Third Republic of Poland

The position of the CT had changed with the introduction of the democratic system. The CT started to play a crucial role in the new political context. Already at the beginning, it was the Constitutional Tribunal that allowed the introduction of the principles of a democratic state into the former constitutional provision by means of the novelization of the Constitution of 1952. The amendment of the 'old' Constitution was done in the aftermath of the Polish Round Table Agreement in April (April Novelization), and in December of the year 1989. The April Novelization installed the office of the President and the Senate of Poland (the upper house of the Polish parliament), and the amendment of December, which changed the name of the state from the Polish People's Republic into the Republic of Poland and removed any references to

[86] Dziennik Ustaw Polskiej Rzeczpospolitej Ludowej, Ustawa 98, Rozdział I, Art. 2
[87] Dziennik Ustaw Polskiej Rzeczpospolitej Ludowej, Ustawa 98, Rozdział VI, Art 20 (3)
[88] Garlicki (2002), p.266
[89] All cases are listed on: http://ipo.trybunal.gov.pl/ipo/Szukaj?cid=3

the previous socialist state. Moreover, the Amendment of December tied Poland to a new political and economic system. Article 1 of the former Constitution was changed to make reference to the new political situation of the Polish State (*The Republic of Poland shall be a democratic state ruled by law and implementing the principles of social justice*)[90], and the Articles 6 and 7 referred to the new economic context and included the guarantee of freedom to exercise an economic activity, of property rights and personal ownership. The constitution of 1952, valid until the year 1992, created a situation in which the old rules (including those of civil duties or basic rights) were not entirely adjusted to the new political and socio-economic realities of Poland. This resulted in the so-called 'constitutional deficit'. Under such conditions of deficit, the Polish Constitutional Tribunal was often compelled to use Article 1, which conveyed the general principles of a democratic state as a base for its judgments in many detailed matters of the new state.[91] The CT's jurisprudence had to fill the prevailing ambiguity by independently modifying regulations and via the establishment of new principles and rules of the constitutional rank.[92] It is worth mentioning that the state of 'constitutional deficit' plagued Poland for 9 years. Despite the fact that the Small Constitution of 1992 delivered a partial solution, the issue was not solved until 1997.

In reference to the operation of the CT under these new circumstances, the Act on the CT of 1985 was amended several times for the purpose of the removal of several limitations in regard to the CT's powers and jurisdiction. For example, this was achieved by the enlarging of the group of entities authorized to file an application such as Senate commissions and a group of 30 senators, or via the establishment of a specific relation between the CT and the newly introduced office of the president of Poland.[93]

Moreover, the CT received the power for the preventative control of the acts of Parliament, which might be initiated at any stage of law adaptation, and in the case when uncertainty appears in regard to the conformity of a particular provision to the Constitution.[94]

Overall, in the time period between 1989-1996, the Constitutional Tribunal played a crucial role in the stabilization of the new order following the initiation of the transformation process. This is also because the CT was given the right (between 1989 and 1997) to determine the universally binding, abstract interpretation of any legal provision.[95]

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[90] Rzeczpospolita Polska jest demokratycznym państwem prawnym, urzeczywistniającym zasady sprawiedliwości społecznej

[91] Mazurkiewicz (2004), p.4

[92] Garlicki (2002), p.266

[93] The President has the power to refuse to sign an act and file an application to the CT.

[94] Mańko (2006)

[95] Journal of Laws No 109, item 470

In this time (1989-1996) the CT adopted 79 interpretations to legal institutions of the different areas of law, aiming thereby to improve the clarity and definiteness of the law and to ensure the proper application of the interpreted provisions.[96] When examining those judgments, it may be stated that the CT voiced its opinion on many important post-transformation issues in regard to the nature of state building including the relation of the President to other branches of power, the electoral system, abortion, lustration, religion as a subject of instruction in public schools, the relationship of the state to the church, freedom of thought, conscience and religion, and the status of electronic media, among others.[97]

Ultimately, a new constitution was adopted on the 2nd of April 1997. The Constitution brought more consistency into the operation of the democratic Republic of Poland and its democratic institutions. It also marked an important turning point in the history of Poland as the actors had arrived at a consensus on the final architecture of the state after many years of dispute. At this time, the compromise on the Constitution was made between the post-communist parliamentary majority (SLD, PSL) and the central-left minority (KPN, UW, UP).

The Constitution of 1997 has defined the Republic of Poland as a state based on the principle of the separation of powers. The legislative power is vested in the Sejm and Senat, while the executive is vested in the president of the Republic of Poland and the Council of Ministers. The judiciary powers shall be vested in the courts and in the tribunal.[98] Thereafter, the status of the Polish Constitutional Tribunal was defined as a separate and independent judicative organ. The Polish Constitutional Tribunal is not only separated from the other organs of the state but also remains independent from the other organs of jurisdiction.

The Polish Constitution includes a separate paragraph on the Constitutional Tribunal, in which (in a more or less precise manner) the status, activity and structure of the Polish Constitutional Tribunal are defined. Nonetheless, the precise determination of the Tribunal is delivered in the Constitutional Tribunal Act (1997) which defines the CT as an organ of court authority, appointed to examine the conformity of normative acts and international agreements to the Constitution and to implement other objectives specified in the Constitution.[99]

The new legal provision finally gives the CT powers comparable to those of the German/Austrian model, whose structure was taken as a reference during the period in which

[96] Mazurkiewicz (2004), p.5
[97] All cases are listed on: http://ipo.trybunal.gov.pl/ipo/Szukaj?cid=3
[98] The Constitution of the Republic of Poland of the 2nd April, 1997 Chapter I, Art. 10
[99] The Constitutional Tribunal Act (1997): Chapter 1, Art. 1

the CT was created. The most important change was in reference to the removal of parliamentary supremacy, which was marked for expiration on the 17th of October 1999. Since the 17th of October 1999, the judgments of the Constitutional Court were final and their application universally binding.

The Constitutional Tribunal's scope of control includes 4 fields: the review of norms[100]; the settling of disputes over authority between the central constitutional organs of the state; deciding on the constitutional conformity of the purposes and/or activities of political parties; and determining whether or not an impediment exists in the execution of the office of the President of the Republic.[101] Moreover, the CT obtained the jurisdiction to review the conformity of the international agreements to the Constitution as well as of the statutes to the ratified international agreements. The control of normative acts and ratified agreements should take place in the examination of three aspects: the substantial, the procedural and in regard to the powers (competences). Jamróz (2014) explains the substantial control as an examination of a legal regulation with the regulation of the superior rank, the procedural control as a question of meeting requirements for an issue of a specified legal act, and finally the control of the competence of powers in examining organs' jurisdiction to issue a normative act or to ratify an international agreement.[102]

Furthermore, the mechanism of the institution of proceedings was widened by the encompassing motions and questions of laws as well as by constitutional complaint.

The Constitutional complaint gives the right to anyone whose constitutional freedoms or rights have been infringed upon to submit a complaint to the Constitutional Tribunal, requesting the TC's judgment on the conformity to the Constitution of a statute or another normative act upon which basis a court or organ of public administration has made a final decision. Also, the right to file motions to the Constitutional Tribunal was extended, including a wide range of actors from different domains of life and including the President of the Republic, the Marshal of the Sejm, the Marshal of the Senate, the Prime Minister, 50 Deputies, 30 Senators, the First President of the Supreme Court, the President of the Supreme Administrative Court, the Public Prosecutor-General, the President of the Supreme Chamber of Control and the Commissioner for Citizens' Rights; the constitutive organs of units of local

[100] This competence is regarded as the fundamental one, and explained as adjudicating on the hierarchical (vertical) conformity of normative acts of lower rank to the normative acts (legal norms) of higher rank and eliminating provisions adjudicated as unconstitutional from the system of law that is in force.

[101] The Constitutional Tribunal's scope of jurisdiction: information available under: http://trybunal.gov.pl/en/about-the-tribunal/constitutional-tribunal/the-constitutional-tribunals-scope-of-jurisdiction/

[102] Jamróz (2014), p.48

government; the national organs of trade unions as well as the national authorities of employers' organizations and occupational organizations; churches and religious organizations, among others.[103]

The procedure of nomination for the office of the CT judge involves only the Sejm. The candidates were to be nominated by at least 50 deputies or the Presidium of the Sejm. The next step, namely the candidate's appointment requires the absolute majority of votes in the presence of at least half of the total number of deputies of the Sejm. The judges of the CT should have a 'distinguished knowledge of law' and the qualifications required of a judge of the Supreme Court or the Chief Administrative Court. The number of judges was increased to 15 in total, and their terms of office prolonged to 9 years that are treated individually. The re-election of judges was prohibited.

Among all the CT judges, the president and the vice-president of the CT were to be chosen in the procedure that engages the President of the Republic of Poland, who, from among the candidates nominated by the General Assembly of Judges, selected two of the CT's judges, each for one of the offices.[104]

All judges were asked to take an oath, whereby the content has remained unchanged since the transformation. In comparison to the old socialist version, the new text contains no reference to the political system of any kind, stating as follows:

"I do solemnly swear that in discharging the duties which have been vested in me as a judge of the Constitutional Tribunal, I shall faithfully serve the Polish Nation, safeguard the Constitution and perform all such duties impartially and with the utmost diligence."[105]

Additionally, the new constitution requires that the judges follow the oath with the sentence *„So help me God"* (pl: Tak mi dopomóż Bóg), thereby including a religious reference.

Furthermore, the installation of a disciplinary punishment against the CT's judges was permitted but only in the case of any infringements on the provisions of the laws, behavior in a way that is inconsistent of her/his office, or unethical conduct that might negatively influence the confidence in this person (the list of the tools of disciplinary punishment includes a warning, or reprimand or removal from office). Nonetheless, deprivation of liberty or criminal punishment of the CT judges was only allowed with the consent of the General Assembly of Judges.[106]

[103] The Constitution of the Republic of Poland of 2nd April, 1997
[104] The General Assembly consists of the Judges of the Tribunal
[105] The Constitutional Tribunal Act of 17th October, 1997
[106] Ibid

Overall, the Constitutional Tribunal with the introduction of the new Constitution and the new act on the Constitutional Tribunal in the year 1997, lost its right to determine the universally binding abstract interpretation of any legal provision on the one hand, but on the other, its decisions were no longer subject to parliamentary review.[107] Nonetheless, the CT was given the right to postpone the entry of its judgments into force in the case of statutes, whose postponement should not exceed a maximum of 18 months. In the case of other normative acts, a 12-month-period was assigned.[108] The detailed reasons to be considered by the Constitutional Tribunal while making decisions to delay the deadline of the binding force of normative acts, were however not defined.

Table I: An overview of the most important features of the Polish Constitutional Tribunal in the years before and after the constitution of 1997. (Changes between 1985 and 2015)

Constitutional Tribunal		
Period	1985-1997	1997 -2015
STATUS	Until 1992: - is a separate state organ in charge of the control of the constitutionality of the legal provision and law enforcement 1992-1997 -is a separate organ of control of the constitutionality of the legal provision, making use of the juridical mechanism in its operation[109]	Is a separate, independent juridical organ
Time of office	8 years	9 years
No. of judges	12 judges, changing intervals, every 4 years half of the judges of the bench were to be replaced -re-election prohibited	15 judges, the terms of office are treated individually re-election prohibited
Election of the Judges	Elected by the Sejm, by an absolute majority of votes with no less than half of the deputies of the Sejm,	Elected by the Sejm, by an absolute majority of votes with no less than half of the deputies of the Sejm

[107] Mańko (2006)
[108] The Constitutional Tribunal Act of 17th October, 1997, Art. 190 (3)
[109] Deryng (2014) p.103

Qualification	Necessary qualifications to hold the office of a judge of the Supreme Court or the Chief Administrative Court	Necessary qualifications to hold the office of a judge of the Supreme Court or the Chief Administrative Court
Institution of proceedings	Applications and questions of law filed by a subject entitled thereto	-motions for ruling on compliance of a normative act with a norm of a higher rank (ex post facto control); -questions of law (raised ex officio), -complaints concerning constitutional infringement filed by a subject entitled thereto
Subject	-the constitutionality of legislative measures (statutes and decrees) - the constitutionality and legality of sub-legislative normative measures enacted by the central state authorities	- the conformity of statutes and international agreements to the Constitution; - the conformity of a statute to ratified international agreements whose ratification required prior consent granted by a statute; - the conformity of legal provisions issued by central state organs to the Constitution, ratified international agreements and statutes; -the conformity to the Constitution of the purposes or activities of political parties; -complaints concerning constitutional infringements,
Judgments of the CT		-Judgments are made by the majority of votes in the CT

	-Judgments are subject to review by the Sejm	-Judgments are independent and subject only to the Constitution -Tribunal is given the powers to postpone the entry of the judgments into force. -Judgments are final (the exception are legal questions) -Decisions are issued in the name of the Republic of Poland

Source:
The Constitutional Tribunal Act of 29th of April, 1985
The Constitutional Amendement Act of of 29th of December, 1989,
The Constitution of the Republic of Poland of 2nd April, 1997
The Constitutional Tribunal Act of 17th October, 1997

3.3. Timeline: The Reforms of The Constitutional Tribunal

Timetable[110]

11.07.2013 – Bronisław Komorowski submits a draft on the Act on the Constitutional Tribunal.

29.08.2013 – The Sejm begins to work on the draft Act on the Constitutional Tribunal . The Extraordinary Subcommittee works almost two years on the draft Act on the Constitutional Tribunal

12.05.2015 – The presentation of the proposal on the transitional provision occurs

27.5.2015 – The Sejm adopts the Act on the Constitutional Tribunal

25.6.2015 – The Senate initiates its work on the Act on the Constitutional Tribunal

21.07.2015 - Bronisław Komorowski signs the Act on the Constitutional Tribunal

06.08.2015 – Andrzej Duda takes the office of the President of the Republic of Poland

30. 08.2015 - The Act on the Constitutional Tribunal enters into force.

8.10.2015 – The Sejm of the 7th legislative period chooses 5 new judges

23.10.2015 - A group of PiS members file the motion to the CT in regard to the Act on the Constitutional Tribunal of June 2015 and the transitional provision (the motion is withdrawn on the 10.11.2015)

12.11.2015 – The formal beginnings of the 8th legislative period of the Sejm

13.11.2015 – The first draft Act amending the Act on the Constitutional Tribunal of June 2015 is submitted to the Sejm

17.11. 2015 - The first reading of the first draft Act amending the Act on the Constitutional Tribunal of June 2015 takes place

17.11. 2015 – A group of PO members file a motion to the CT similar in content to that filed by the PiS on the 23.10.2015

19.11.2015 - The Senate initiates the work on the Act on the Constitutional Tribunal

20.11.2015 - Andrzej Duda signs the Act on the Constitutional Tribunal. It is published on the same day (the Implementation was scheduled for the 5.12.2015)

23.11.2015 - The motion is filed to the Constitutional Tribunal in regard to the amendment of the Act of the Constitutional Tribunal from November 2015 by a group of deputies and the

[110] The table is primarily based on information delivered by: the Helsinki Foundation for Human Rights and Redakcja naukowa Piotr Radziewicz, Piotr Tuleja

First President of the Supreme Court, the Commissioner for Human Rights and the National Council of the Judiciary of Poland.

2.12.2015 - The Sejm chooses five new judges

3.12.2015 - Constitutional Tribunal issues its judgment upon the motion filed on the 17.11.2015 by PO members in regard to the Act of the Constitutional Tribunal from June 2015

05.12.2015 - The amendment of the Act of the Constitutional Tribunal enters into force

9.12.2015 - The Constitutional Tribunal delivers judgment in regard to the motion filed on the 23.November, 2015

15.12.2015 – The second draft Act amending the Act on the Constitutional Tribunal of June 2015 is submitted to the Sejm

17.12.2015 - The first reading of the second draft Act amending the Act on the Constitutional Tribunal of June 2015 takes place

22.12.2015 - The second draft Act is adopted by the Sejm

24.12.2015 – The Senate adopts the second draft Act

28.12.2015 – The President signs the second amending Act

29.12.2015 - The first President of the Supreme Court files a motion to the Constitutional Tribunal to review the constitutionality of the Act of December 2015. This motion is followed by others. The list of applicants includes the Commissioner for Human Rights and the National Council of the Judiciary of Poland and two groups of deputies.

7.01.2016 – The Tribunal decides to discontinue the proceedings in regard to the resolutions passed by the Sejm in November and December of 2015

14.4.2016 - The Sejm chooses Zbigniew Jedrzejewski for the post of the judge of the CT

29.04.2016 - A group of PO members submits a draft on the Act on the Constitutional Tribunal

3.06.201 6- The Sejm initiates work on the draft on the Act on the Constitutional Tribunal

22.07.2016 - The Sejm adopts the Act on the Constitutional Tribunal

22.07.2016 – The Senate adopts the Act on the Constitutional Tribunal

30.07.2016 – The President signs the Act on the Constitutional Tribunal

1.08.2016 - The new Act on the Constitutional Tribunal is published in the Journal of Laws (item, 1157)

2.08.2016 - A motion is filed to the Constitutional Tribunal concerning the new Act on the Constitutional Tribunal from the 22.07.2016

11.08.2016 - The Constitutional Tribunal issues its judgment upon the motions filed on the 2nd of August, 2016

18.08.2016 – One of the December judges initiates criminal proceedings against the President of the Tribunal, Andrzej Rzepliński, because the President is preventing the December judges from working as such

30.09.2016 - Members of the PiS party submit a draft on the act on the legal status of the CT's judges to the Sejm, (Sejm adopts the act on the 4.11.2016)

26.10.2016 - Members of the PiS party submit a draft on the act on the organization and proceedings of the CT to the Sejm, (Sejm adopts the act on the 30.11.2016)

24.11.2016 - Members of the PiS party submit a draft on the act that introduces the act on the organization and proceedings of the CT and the act on the legal status of the CT's judges, (Sejm adopts the act on the 13.12.2016)

19.12.2016 – The President signs three new acts that are concerned with the organization and proceedings of the CT, the legal status of the CT's judges and the introduction of the two aforementioned laws

19.12.2016 - Rzepliński stepps down from the office of the President of the CT and Julia Przylębska takes the position of acting President of the Constitutional Tribunal

19.12.2016 Several provisions of the acts on organization and proceedings of the CT, the legal status of the CT's judges and the introduction of the two aforementioned laws, come into force

20.12.2016 - Julia Przyłębska admits the "December judges" (the three judges nominated by the 8th term of the Sejm without a valid legal basis) to take up their functions in the Tribunal

21.12.2016 - The President of the Republic of Poland appoints Julia Przyłębska to the post of President of the Constitutional Tribunal

29.11.2016 - all of the CT's judgments hitherto denied publication, with exception of the judgment passed on the 7th November 2016, are published in the Journal of Law

3.3.1. The Constitutional Tribunal Crisis

The crisis of the Constitutional Tribunal in Poland started with the conflict surrounding the selection of the new judges to the Constitutional Tribunal in the year 2015. The system of juridical appointments has been a field of conflict for many years in Poland as the selection of the judges to the Constitutional Tribunal in Poland has remained the sole responsibility of the Polish Sejm because it has always been regarded as being of great political importance.

It is necessary to look back at the previous decades to understand the substance of which the conflict is made. In the time when the Polish Constitutional Tribunal took up its operation (1.1.1986), the communist government established a control mechanism that allowed them to influence the operation of the Polish CT. Therefore, they created several limitations on the CT's activity and established direct control via the Sejm's right to overrule all the CT's judgements and the Sejm's sole right to choose the judges of the CT.

Though the Sejm's right to overrule CT judgment was removed in the year 1999, the sole competence of the Sejm to choose the judges to the CT has remained. After the year 1989, this competence was bound to the Parliamentary elections, allowing the wining party (or the new governmental coalition) to choose 6 out of 12 judges.

This pattern is clearly visible in the period before 1997, when the term of office of half of the bench of judges of the Constitutional Tribunal had ended at the same time as the legislative period of the Sejm. Garlicki (2002) reports that in the time between 1989-2002, 22 judges out of 29 were elected in the aftermath of the parliamentary election: 6 in November 1989, 6 in November 1993, and 6 in November 1997, and 4 in 2001 after the election of November 2000.[111]

The new constitution of 1997 aimed to change the CT's dependence on the term of the office of the Sejm by introducing an individual term of office in 1997, making the term of the office of the CT judges more independent from the term of the office of the parliamentary officers. The dependence of the CT on the executive branches of power was therefore reduced, but not entirely severed.

[111] Garlicki (2002), p.268

Therefore, in the year 2013, the former president of the Republic Poland, Bronisław Komorowski, submitted a draft on the Act on the Constitutional Tribunal that aimed to further enhance the independence of the Constitutional Tribunal.[112]

The proposed act was then directed to the Extraordinary Subcommittee on the Draft Act on the Constitutional Tribunal, becoming subject to further development. The draft had foreseen changes in the procedure of the selection of the candidates, specified the competence of the candidates and increased the group of the entitled entities for the submission of a candidate for the post in the Constitutional Tribunal. It also defined the deadline for the submission of the nomination of a candidate for the position of the judge in the Constitutional Tribunal to a maximum of 3 months before the expiration of the judge's term of office.[113]

In May of 2015, the Extraordinary Subcommittee on the Draft Act proposed a rule defining the proceedings in the so-called 'transitional period'. It was intended that the transitional provision should apply to the nomination of the candidates for the position of the CT judge in the year 2015. The new rule specified the date for the nomination of candidates in the 'transitional period' as not to exceed a phase of 30 days after the new Act on the Constitutional Tribunal had entered into force.[114] In effect, the proposed rule, the so called 'transitional provision', is to be regarded in the context of the parliamentary elections of late October 2015 and the prospect of the formerly governing coalition (composed of PO and PSL) loosing in the then upcoming election.[115]

Altogether, the transitional provision referred to five judges of the Constitutional Tribunal, whose term of office expired in the year 2015; for three of them (referred to as November judges) the end was scheduled for the 6th November, in the time after the election, but still before the formal beginning of the 8th legislative period; for the other two the terms of office were to end at the start of December 2015 (December judges).[116]

On the basis of the transitional provision, the Sejm was empowered to select five new candidates for the posts of judges of the CT as early as the 8th of October 2015,[117] yet before

[112] Kustra (2016), p.345
[113] Ibid p.344-346
[114] The new Act on the Constitutional Tribunal was adopted on the 27th of May 2015 and entered into force on the 30th of August 2015.
[115] Kustra (2016), p.345
[116] The names of the judges and their precise terms of office : (1) 6 XI 2006 - 6 XI 2015 – Dr. hab. Maria Gintowt-Jankowicz (2) 6 XI 2006 - 6 XI 2015 - Wojciech Hermeliński (3) 6 XI 2006 - 6 XI 2015 - Marek Kotlinowski (4) 2 XII 2006 -2 XII 2015 – Dr. hab. Zbigniew Cieślak (5) 8 XII 2006 -8 XII 2015 – Dr. hab. Teresa Liszcz
[117] The list of candidates that were chosen on the 8th October 2015 included; Roman Hauser, Andrzej Jakubecki, Krzysztof Ślebzak, Andrzej Jan Sokal, Bronisław Sitek

the parliamentary election of 2015.[118] Thus, the transitional provision allowed the Sejm of the previous legislative period to choose not only 3 but also an additional 2 judges in advance. The selection of five judges on the 8th of October 2015 marked the formal beginning of the constitutional tribunal crisis that caused the democracy crisis in Poland.

October of 2015 brought about much resistance to the afore-presented course of action from the former parliamentary opposition. A group of members of the PiS party filed a motion to the Constitutional Tribunal to examine the conformity of the transitional provision (Article 137) to the Constitution, which was however withdrawn after the Parliamentary election.

On the 13th of November during the first session of the Sejm of the 8th legislative period, in which the PiS party held the largest number of seats, a new draft act amending the Act on the Constitutional Tribunal was proposed. The work on the draft act was initiated on the same day and lasted for only 8 days. The amendment was adapted on the 20th of November and scheduled to enter into force on the 5th of December.

The November amendment changed the initiation of the term of the office of the CT judges, which was fixed to the day when the judges are to take an oath and which was to take place within 30 days after their selection.

Moreover, the president of the CT was to be appointed by the President of the Republic of Poland for the period of 3 years (with the possibility of a one-time prolongation) from the list of at least 3 candidates chosen by the General Assembly of Judges. The amendment also specified the date of the end of the tenure of the former president and the vice-president that was scheduled to take place 3 months after the implementation of the amendment.

The first November amendment was followed by five new resolutions that were adopted by the Sejm on November 25th. The resolutions aimed to annul the previous resolutions on which foundation, five constitutional judges had been appointed. Moreover, they also requested that the President refrain from taking the oath of office from the candidates nominated by the Sejm of the 7th legislative term.[119]

This event marked an unprecedented situation in the 16-year history of the Polish democratic state, since such a situation had never occurred before and in which the Sejm invalidated resolutions adopted by the Sejm of a previous legislative period. In addition, these new resolutions were released in the publication of the *Monitor Polski* without having fulfilled the official legal requirements for such an announcement.[120]

[118] The election held on the 25th of October resulted in the victory of PiS which accumulated 36,58% of the votes. In effect, the members of the party took up 235 (out of 460) seats in the Sejm of the 8th legislative period that was scheduled to begin on the 12.11.2015.
[119] Kustra (2016), p.348
[120] Szuleka et al. (2016), p.21

Additionally on the 25th of November, the changes to the rules of the Sejm (1992) were introduced. These modified not only the registration of the candidates for the Constitutional Tribunal (previously specified to a maximum period of 30 days before the expiration of the judge's term of office), but also the rules by adding an extra paragraph, paragraph 5, to the existing article 30(3), thereby permitting the speaker of the Sejm to set a deadline for the presentation of the candidates for the CT judges under certain circumstances.

These new rules, in practice, allowed the Marshal of the Sejm to set a new deadline for the selection of the candidates. As a result, the Sejm chose five new judges on the 2nd of December on the basis of the provision that was scheduled to come into force two days later, on the 4th of December. The selection of the judges therefore lacked the required legal basis at that time.[121]

On the 15th of December 2015, another draft Act amending the Act on the Constitutional Tribunal was submitted to the Sejm. This time the draft involved far-reaching changes to the CT. The alterations referred to all of the operations of the Tribunal, including changes in the terms of the passing of judgments, the repealing of the provision that recognized Warsaw as the seat of the CT, and the revoking of a number of further provisions in regard to the independent status of judges and the election procedure.

On the 17th of December, the first reading of the draft act took place in the Sejm and was thereafter submitted to further elaboration by the legislative committee. After the adaptation of the committee's reports on the 22nd of December, the amendment (also referred to as the December amendment) was adopted by the Sejm and signed by the President of Poland on the 28th of the month.

These new changes faced strong opposition. Shortly after the adaptation, the first President of the Supreme Court, the Commissioner for Human Rights, and the National Council of the Judiciary of Poland as well as two groups of the Sejm's deputies filed a separate motion to review the constitutionality of the December amendment of the Act on the Constitutional Tribunal of June 2015.[122]

Since December of 2015 and up until March of 2016, several important CT judgments addressing the crisis were announced. On the 3rd of December, 2015, the Constitutional Tribunal issued its judgment upon the transitional provision that allowed the selection of all five judges in October of 2015, announcing it as partially unconstitutional. Thereafter, the appointment of three of the judges whose tenures in office expired in November 2015 was

[121] Szuleka et al. (2016), p.22
[122] Szuleka et al. (2016), p.27-30

viewed as conform to the constitution, but not the selection of the judges whose term of office ended in December 2015. While referring to the presidential duty of taking an oath from the judges, the Tribunal noted that the president is obliged to take the oath from the nominated candidates without delay. The postponement thereof for any possible reason is inacceptable because, as argued, the nomination of the CT judges is not subject to presidential review.
The CT's judgments passed on these affairs were however questioned by the governmental majority in regard to the procedure of the decision-making process applied by the Constitutional Tribunal regarding this issue and consequently withheld from publication for two weeks. Because the judgments of the Constitutional Tribunal are final according to the law of the Polish Constitution, such matters awoke further controversies.

In regard to the judgment upon the November amendment of the Act of the Tribunal Constitution, the Tribunal stated on the 23rd of December 2015, that the legislative proceedings involved in passing the aforementioned amendment were not conform with the Constitution because they failed to involve the opinion of the National Council of the Judiciary of Poland on the matter of the amendment of the Act.
In reference to the December Amendment, the Constitutional Tribunal pronounced it as entirely unconstitutional for numerous reasons on the 9th of March, 2016. The Tribunal criticized the hasty procedure in which the Act was adopted. Thereafter, this procedure was not compliant with the Constitution because it did not leave a space for actual reflection on the draft act. Also, the day of the publication (and the date of its implementation) was pronounced as unconstitutional because it left too little time for such far-reaching adjustments.
Moreover, the CT pointed out that the December Act had violated the principle of the separation of powers due to the fact that it entitled the Minister of Justice to file a motion for the installation of the disciplinary proceedings in regard to the CT's judges and the Sejm to discharge a judge from his/her office upon the motion of the General Assembly of Judges.[123]
The decision of the Constitutional Tribunal in regard to the amending acts was not welcomed by the Polish government (or rather the governing majority) and consequently was refused inclusion in the official publication. The government justified this practice by stating that not all of the CT's judgments were necessarily subject to a written announcement.
Furthermore, the proceedings of the review of the constitutionality of the resolutions passed by the Sejm in November and December of 2015 and handled in the Tribunal as recently as

[123] Szuleka et al. (2016), p.29

January 2016, were decided to be discontinued on the 7th of January, 2016. This decision was based on the argument that the resolutions were not normative acts and therefore were not subject to the review of the CT.

In spring of 2016, attempts were once again made to calm the situation. For this reason three draft Acts on the Constitutional Tribunal were submitted to the Sejm. The first draft was submitted by a group of members of the PiS party, the others by the members of the PSL and the citizen initiative. As a result, a subcommittee was arranged and assigned with the purpose of selecting one leading document among the three drafts. Eventually, the subcommittee decided upon the draft proposed by the PiS party. However, the chosen document had evoked much controversy from the very beginning. The draft was accused of subordinating the Constitutional Tribunal to the executive branch of power because the draft act had increased the executive power's competences towards the Tribunal as it conditioned the expiration of the constitutional judge's term of office on the assent of the President of Poland and granted the competence to the President of Poland and the Prosecutor General to decide when the CT should consider the cases in the full bench[124]. Moreover, the new draft act obliged the President of the Constitutional Tribunal to assign cases to judges elected by the Sejm of the 8th term and set the requirement of a bench of 7 judges for assessing the compliance of the acts with the Constitution.[125] Moreover, an intense discussion arose in regard to: the relatively long period of delay of up to 120 days[126] before the initiation of the hearing; the defer of the trial (in the full bench) in the case of an absence of the properly notified Prosecutor General or his/her representative;[127] the alternation in the practice of the publication of the CT's judgment which should take place upon a motion of the President of the Constitutional Tribunal, and must be subject to the application of the Prime Minister;[128] a more selective publication of judgment; the exclusion of the Commissioner for Human Rights from a great part of the proceedings;[129] the obligation imposed on the CT to complete all the cases in a the period no more than a year since the act's entry into force;[130] and the suspension, for a year

[124] This competence of the President and Prosecutor General was cancelled during the II reading in the Sejm. Instead, the competence was vested in a group of three judges of the CT
[125] It was reduced to 5 judges in the final version- Art. 26 (2)
[126] It has been changed in the final act to the minimum lasting a period of 30 days between the initiation of proceedings and the date of the filing of the motion: Art. 61 (1)
[127] In the final version covered in the Art. 61(6)
[128] In the final version covered in Art. 80(2)
[129] It was modified by the Senate in the final version of the final draft of the act. The Commissioner for Human Rights has been empowered to take part in all proceedings of the CT
[130] In the final version covered in Art. 83(2)

and six-month-period of these proceedings which do not meet the requirements transmitted by the new act.[131]

Ultimately, many of the aforementioned controversial parts of the draft were changed during the procedure of legislation. It is important to mention that it was the Polish Senate who played a crucial role in the determination of the final version of the new Act on the Constitutional Tribunal. The Senate introduced many adjustments that clarified or eliminated the problematic formulations of the initial draft act, as for instance those referring to the strong involvement of the President of Poland or the limited engagement of the Commissioner for Human Rights in the proceedings before the Constitutional Tribunal. Moreover, the Senate granted the authority to the President of the Constitutional Tribunal to decide upon the suspension of the sequence of cases, should this be justified by the protection of freedom or civic rights, national security or constitutional order.[132]

After rush discussions, the new act was eventually adopted on the 22nd of July, 2016. The President signed the act on the 30th of July, 2016 and it was published in the official gazette on the 1st of August, 2016. The period of only 14 days was prescribed between the promulgation of the act (1.08.2016) and the time when it took legal effect (16.08.2016). The final act excluded the judgement of the CT passed on the 9th of March from being published, by setting up a new rule of publication in article 89 stating that '*The Tribunal's rulings issued in breach of the provisions of the Constitutional Tribunal Act of the 25th June 2015 before the 20th of July 2016 shall be published within 30 days from the entry into force of this Act, with the exception of rulings concerning normative acts that have ceased to have effect'*.[133] For the first time in the history of the III RP, the binding judgment of the CT was not only called 'a communiqué' but also its publication was abandoned by the new legal act on the Constitutional Tribunal by article 89 of the new act.

The most significant change to the operation on the CT brought about by the new act, referred to the 'blocking mechanism'. The act permits a group of at least four CT judges to object to the content of a proposed determination during the deliberation of the CT's full bench, if the judges view the matter to be of great importance to the constitutional or public order. In this case the objection adjourns deliberations for three months. When after this period the objection is brought up once again, the process is to be postponed by another 3 months (thus,

[131] In the final version covered in Art. 84 (1)
[132] Szuleka et al. (2016), p.35f
[133] Ibid p.35-36

the period of the blockade could last up to six months), raising the requirements for the adaptation of the resolution to a two-thirds majority vote of the sitting judges.[134, 135]

The day after the official announcement of the new Act on the Constitutional Tribunal, (2.08.2016) two groups of Parliament members (from the parties Nowoczesna and PO) as well as the Commissioner for Human Rights and the First President of the Supreme Court filed the motion to the CT in regard to the new Act. The motions requested that the act be declared as entirely not conform to the Constitution, additionally pointing out that its individual provisions were unconstitutional. In its judgement issued on the 11th of August, and 5 days before the new act was scheduled to take legal effect, the Constitutional Tribunal declared the act as partially unconstitutional (and not entirely as requested). This judgment was also denied publication in the official gazette, causing the conflict to grow more acute.[136] In August, the public was informed about the launch of a criminal investigation against the former President of the Constitutional Tribunal, Andrzej Rzepliński, as one of the December judges had initiated criminal proceedings against Rzepliński because he had refused to include the three December judges in the work of the Tribunal up until then.

The conflict surrounding the Constitutional Tribunal continued to exist in its full intensity throughout the second half of 2016. Once again, after the summer break of 2016, the government continued with the rearrangements of the CT. In the fall, three new draft acts were submitted to the Sejm. The first of them was a "Law on the Status of the Judges of the Constitutional Tribunal". This redefined the rights and obligations of a post-holder as well as the rules for the termination of an office and immunity status. Moreover, it included several arrangements in regard to personal integrity and disciplinary liability. The new law has facilitated the pressing of criminal charges against the judges and eased the process of waiving the immunity of judges, committed judges to submit declaration of assets and a statement of the economic activity of their partners prior to assuming the judgeship and when a partner intends to change the nature of their activity, and obligates the judges to provide a medical certificate regarding their physical capability to carry out their functions 6 months before turning 70 years old. Furthermore, it imposed the duty on the President of the CT to

[134] This blocking mechanism was revoked in the later Act of the 30th of November 2016, on the Organization of the Constitutional Tribunal and the Mode of Proceedings Before the Constitutional Tribunal.
[135] Kustra (2016), p.361
[136] Kustra (2016), p.362

assign cases to all judges that were sworn in by the President of the RP, meaning that it indirectly commanded the involvement of all judges appointed in December 2015.[137]

The second act ("Law on the organization and the procedure before the Constitutional Tribunal") aimed to rearrange the organization and the procedure before the Constitutional Tribunal. The law reassures the inclusion of the 'December judges' in the description of the General Assembly of judges. Furthermore, it includes new regulations on the organization and proceedings before the CT as well as ordering a new system of elections for the offices of the President and the Vice-President of the Tribunal. Moreover, the Act prescribes a new rule in regard to the Tribunal's adjudication in the full bench requiring a minimum of 11 judges and a two-third majority of votes.[138]

Finally, the third act ("Law on introducing the Law on the status of the judges and on the organization and procedure before the Tribunal") was concerned with the introduction of the two aforementioned acts; the act on the organization and the procedure before the Constitutional Tribunal, and the act on the status of the judges of the Constitutional Tribunal.[139]

Several provisions of the aforementioned three acts came into force on the 19th of December, 2015. The remaining parts were scheduled to come into force 14 days after the President's signature, meaning that they have been in legal effect since the 3rd of January, 2017.

The new acts are to be analyzed in the context of the election of the new President of the Tribunal. Thus, the change in the procedure of the election of the President of the CT was of great advantage to the PiS government, insuring that 'its party's candidate' followed Rzepliński who stepped down from office on the 19th of December, 2016.

The position of an active President of the Constitutional Tribunal was assigned to Julia Przyłębska, who also allowed the three controversial 'December judges' to take up their functions in the Constitutional Tribunal on the 20th of December, 2016.

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[137] Law on the Status of the Judges of the Constitutional Tribunal(Ustawa z dnia 30 listopada 2016 r. o statusie sędziów Trybunału Konstytucyjnego) Accessed: http://trybunal.gov.pl/fileadmin/content/dokumenty/Akty_normatywne/ustawa_o_statusie_sedziow_Trybunalu_Konstytucyjnego.pdf

[138] Law on the organization and the procedure before the Constitutional Tribunal (Ustawa z dnia 30 listopada 2016 r. o organizacji i trybie postępowania przed Trybunałem Konstytucyjnym) Accessed: http://trybunal.gov.pl/fileadmin/content/dokumenty/Akty_normatywne/ustawa_o_organizacji_i_trybie_postepowania_przed_Trybunalem_Konstytucyjnym.pdf

[139] Law on introducing the Law on the status of the judges and on the organization and procedure before the Tribunal (Ustawa z dnia 13 grudnia 2016 r. Przepisy wprowadzające ustawę o organizacji i trybie postępowania przed Trybunałem Konstytucyjnym oraz ustawę o statusie sędziów Trybunału Konstytucyjnego) Accessed: http://trybunal.gov.pl/fileadmin/content/dokumenty/Akty_normatywne/ustawa_przepisy_wprowadzajace.pdf

The change in the election process of the President of the CT and the election of the President of the Constitutional Tribunal in December 2016 has raised public debate on the separation of powers and the independence of the judiciary as rights grounded in the Polish Constitution. Finally, on the 29th of December, 2016, all the CT's judgments hitherto denied publication (with exception of the judgment passed on the 7th November 2016 on the motion filed on 12.09.2016 by a group of members of PO and Nowoczesna in regard to the new procedure of the election of the President and the Vice President of the CT) were published in the Journal of Law.

Table II:
Table of the most notable changes brought about by the Acts of the 30th of November 2016, presented in contrast to their previous arrangements.[140]

	The Constitutional Tribunal Act (1st of August, 1997)	The Constitutional Tribunal Act (1st of August, 1997)	The Constitutional Tribunal Act (22nd of July, 2016)	The Acts of the 30th of November, 2016
Constitutional Tribunal	- an organ of court authority, appointed to examine the conformity of normative acts and international agreements to the Constitution and implementation of other objectives specified in the Constitution	- an organ of court authority, appointed to examine the conformity of normative acts and international agreements to the Constitution and the implementation of other objectives specified in the Constitution	- an organ of the judiciary, established to examine the conformity of normative acts to the Constitution, as well as to carry out other tasks laid down in the Constitution	- an organ of the judiciary, established to examine the conformity of normative acts to the Constitution, as well as to carry out other tasks laid down in the Constitution
Organization of Work within the Polish Constitutional Tribunal	- organizational and administrative conditions of the work of the Tribunal are secured by the President of the CT and the office of the Tribunal subordinate to him/her	- organizational and administrative conditions of the work of the Tribunal are secured by the President of the CT and the office of the Tribunal subordinate to him/her	-organizational and administrative conditions of the work of the Tribunal are secured by the President of the CT and the office of the Tribunal subordinate to him/her	since January 2018 - >The organizational units within the Tribunal are 1) the Chancellery of the Tribunal (in charge of organizational and administrative conditions of the work of the Tribunal) 2) the Office of the Legal Service of the Tribunal
The status of the Candidates for the CT judges	- holding qualifications necessary for the office of a judge of the Supreme Court or the Chief Administrative Court	In 2017 it was once again changed to the holding of qualifications necessary for the office of a judge of the Supreme Court or the Chief Administrative Court- holding qualifications necessary for the office of a judge of the Supreme Court or the Chief Administrative Court	- holding qualifications necessary for the office of a judge of the Supreme Court or the Chief Administrative Court	-distinguished by knowledge of the law -holding qualifications necessary for the office of a judge of the Supreme court[141]

[140] Source: The Constitutional Tribunal Act (1st of August, 1997); The Constitutional Tribunal Act (1st of August, 1997);The Constitutional Tribunal Act (22nd of July, 2016); The Acts of the 30th of November, 2016

[141] In 2017, once again changed to the possesion of qualifications necessary for the office of a judge of the Supreme Court or the Chief Administrative Court.

	The Constitutional Tribunal Act (1st of August, 1997)	The Constitutional Tribunal Act (1st of August, 1997)	The Constitutional Tribunal Act (22nd of July, 2016)	The Acts of the 30th of November, 2016
President and Vice President of the Constitutional Tribunal	- are appointed by the President of the Republic of Poland from among the candidates nominated for each of the offices by the General Assembly, for a term of office lasting until the expiration of the mandate of a Judge of the Tribunal - the candidates are elected by the General Assembly from amongst the judges of the Tribunal who, in secret voting, have received successively the highest number of votes -The election is to be held no later than 3 months prior to the expiration of the term of office of the President or Vice President currently in office	- are appointed by the President of the Republic of Poland from among two candidates proposed for each of the offices by the General Assembly, for a term of office lasting until the expiration of the mandate of a Judge of the Tribunal - the candidates are selected by the General Assembly, no later than 3 months prior to the end of the said President's term of office, from among the judges of the Tribunal who have received the largest number of votes. After the November and December Amendments: - are appointed by the President of the Republic of Poland for the period of three years, from among at least three candidates proposed by the General Assembly, the candidates are selected by the General Assembly in the last month of the said President's term of office, from among the judges of the Tribunal who have received the largest number of votes	-are appointed by the President of the Republic of Poland from among the candidates proposed for each of the offices by the General Assembly -the candidates are elected by the General Assembly from amongst the judges of the Tribunal who, in secret voting, have received successively the highest number of votes - the election is to be held in the period of 15-30 days prior to the expiration of the term of office of the President or Vice President currently in office	- are appointed by the President of the Republic of Poland from among the candidates proposed for each of the offices by the General Assembly for the period of six years - the candidates are judges of the Tribunal who have received at least 5 votes each in the voting process

	The Constitutional Tribunal Act (1st of August, 1997)	The Constitutional Tribunal Act (1st of August, 1997)	The Constitutional Tribunal Act (22nd of July, 2016)	The Acts of the 30th of November, 2016
General Assembly of the Judges of the Constitutional Tribunal	- consists of the judges of the Constitutional Tribunal - adopts resolutions by a simple majority vote if at least two-thirds of the total number of judges of the Tribunal, including the President and Vice President, take part therein.	including the President or Vice-President of the Tribunal	- consists of all judges of the Constitutional Tribunal - adopts resolutions by a simple majority vote, in the presence of at least 10 judges of the Tribunal,	- consist of the incumbent judges of the Tribunal who have taken the oath of office before the President of the Republic of Poland -adopts resolutions by an absolute majority vote, in the presence of at least two-thirds of the total number of the judges of the Tribunal
Full Bench of the Constitutional Tribunal	-requires participation of at least 9 judges of the Tribunal -A ruling determined by a majority vote	- composed of at least 9 judges -A ruling determined by a majority vote December Amendment: - requires participation of at least 13 judges of the Tribunal. -The tribunal adjudicates sitting as a full bench - Full bench rulings require a two-thirds majority vote	- requires participation of at least 11 judges of the Tribunal - A ruling determined by a simple majority vote - The necessity to defer hearing in the full bench in the case of the absence of the Prosecutor General	- requires participation of at least 12 judges of the Tribunal - A ruling determined by a simple majority vote
Disciplinary penalties	1) warning 2) reprimand 3) recall of the office	1) warning 2) reprimand 3) recall of the office	1) warning 2)reprimand 3) recall of the office	1)warning 2) reprimand 3) recall of the office -decrease in the remuneration of a judge of the Tribunal in the amount ranging from 10% to 20% for the period of 2 years

3.3.2. The Venice Commission

International actors closely observed the democracy crisis in Poland. Already at the beginning of December, a group of nine organizations[142] addressed a letter to the European Commission for Democracy through Law in regard to the constitutional issues. This group, the so-called Venice Commission is an independent consultative body of the European Council on the issues of constitutional law in Europe.

In December 2015, the minister of Foreign Affairs, Witold Właszczykowski, requested an independent opinion from the Venice Commission on the amending act, which was adopted on the 22nd of December and promulgated on the 28th of December, 2015. The delegation of the Venice Commission visited Warsaw in February 2016. During its stay, the delegation met with a wide range of actors, including representatives of the Sejm, Senate, Ministry of Justice and non-governmental organizations as well as the Ombudsman, and the President and Vice-President of the Constitutional Tribunal, among others. In March 2016, the Commission issued its opinion in regard to the amendments of the Constitutional Tribunal Act of December 2015. The opinion referred to the principle of checks and balances and its important role for the functioning of a constitutional democracy. The recommendation of the Venice Commission from the 11th of March 2016 was therefore to ensure the principle of checks and balances in the near future[143]. Moreover, the note stresses the importance of an independent constitutional court as a guarantee for the supremacy of the Constitution particularly "in the times of strong political majority".[144] In accordance to the opinion issued by the Venice Commission, the inefficiently working Constitutional Tribunal endangered not only the rule of law and human rights, but also democracy because of the absence of the central element of checks and balances.[145] The Venice Commission recommended that Polish authorities search for a permanent solution by amending the Constitution. The recommendation was to "introduce a qualified majority for the election of the Constitutional Tribunal judges by the Sejm, combined with an effective anti-deadlock mechanism" or "a system by which a third of the judges of the Constitutional Tribunal are each appointed/elected by three State powers – the President of Poland, the Parliament and the Judiciary."[146]

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[142] HFHR, Polish Bar Council, INPRIS – Institute for Law and Society, Centre for Civic Education, Institute of Public Affairs, Panoptykon Foundation, Stefan Batory Foundation, Civic Development Forum, Citizens Network, Watchdog Poland

[143] Venice Commission, Opinion no. 833/2015, p.24

[144] Ibid

[145] Ibid p.16

[146] Venice Commission, Opinion no. 833/2015, p.25

Moreover, the Venice Commission stressed that it would be in conflict with democratic principle if the Parliament could choose public officials within the term of office of the subsequent term of Parliament and if the subsequent Parliament did not respect the decision of the former Parliament in regard to the appointment of the public officials.[147] In reference to the situation of Polish democracy after the election of 2015, the Commission declared that democracy should not be perceived as a rule of majority. Furthermore, according to the commission, the rule of majority is to be limited to the purpose of safeguarding the interests of minorities in democratic states. This should take place via the Constitution and other laws. Nonetheless the commission acknowledged the importance of the majority rule in steering the country during a legislative period but at the same time it stressed the obligation of the majority to respect those who had lost the previous elections.[148]
In its statement the Venice Commission describes democracy not as a rule of the majority but as a state of law in which interests of minorities are also safeguarded. Moreover, it regards the system of checks and balances as of essential value to democracy as it limits the powers of a singular branch of government, thereby ensuring the balance of powers.

The Venice Commission was once again requested its opinion in mid-2016 in regard to the new Constitutional Tribunal Act adopted on the 22nd of July, 2016. This time it was the Secretary General of the Council of Europe, Thorbjørn Jagland, who issued the latter in which he asked for an examination of the draft act on the 12th of July, 2016. The Commission issued its opinion on the 14th of October, 2016, stating that the new act undermines the independence of the CT through excessive legislative and executive control over its functions. It also criticizes numerous provisions of the adopted Act pointing out that they would considerably delay and obstruct the work of the Tribunal.[149] Moreover, the Venice Commission critically reviewed the activity of the Sejm, stating that by adopting the Act of the 22nd of July and the Amendments of 22nd of December, 2015, the Polish Parliament assumed powers of constitutional revision which it does not have when it acts as the ordinary legislature, without the requisite majority for constitutional amendments.[150]

[147] Venice Commission, Opinion no. 833/2015, p.20
[148] Ibid p.22
[149] Venice Commission, Opinion 860/2016, p.24
[150] Venice Commission, Opinion 860/2016, p.24

PART IV: Research

4.1. The Importance of the Democracy Debate In Poland

The reforms in the Polish CT stand in close connection to the reflection on Polish democracy and the future of the democratic state. With the escalation of the CT conflict, a legal dispute quickly became a major political battle. Unlike the legal issue, the political conflict became more difficult to solve as involved the contestation of interests and ideas represented by the political elite.

The crisis initiated discussions and reflections upon the democratic structure of Poland. The transition process also stood at the center of attention, which was until then regarded as a great success, and therefore not much in public discussion. The process of reflection and reckoning with the past was initiated as the Constitutional Tribunal crisis revealed the weaknesses of the Polish democratic system and pointed at the pathologies created as a consequence of the systemic transformation in Poland. This is especially visible in regard to the Polish Constitutional Tribunal, which has never entirely been free of the Sejm's influence and its political games. Over the last three decades the ruling parties in the Sejm endured the influence over the CT by appointing candidates for the office of the CT judge. This high level of partisanship of the CT judges was the cause of the political conflict in Poland.

Beside the CT crisis in Poland, several international as well as other domestic political events of 2015 and 2016 were favorable to the public discussions on democracy. In reference to the international events, it was the victory of Donald Trump in the USA and that of Norbert Hofer in the first round of Austria's Presidential Election in 2016 that caught the attention of Poland. Furthermore, the parliamentary election of 2015 changed the Polish political scene, resulting not only in the victory of PiS but also the great loss of the PO party and the Democratic Left Alliance (SLD). The latter party, the previous protagonist of the transformation process, did not manage to win any seats in the Polish parliament for the first time since the transformation. This event points at the generation change in Poland as well as the SLD's inability to appeal to the younger generation of voters.

In addition to the changes on the Polish political scene, the image of 'the hero' of the Polish systemic transition was greatly damaged in 2016 as a consequence of the release of documents that depicted Lech Wałęsa with the nickname 'Bolek', as a collaborator with the Polish Security Service (Służba Bezpieczeństwa). This event has not only greatly affected

Lech Wałęsa but also the public image of Polish democracy.
All these afore-mentioned events encouraged the Polish Print media to take an active part in the discussions, by issuing a vast number of articles in which journalists, experts and political activists critically reflected upon the Polish democratic system, with vivid debates on various aspects of the democratic system.

4.2. Research Material

The research data is derived from four large print media in Poland, encompassing articles published in the dailies the Gazeta Wyborcza and the "Rzeczpospolita" as well as the weekly broadcasted Polityka and Wprost newsmagazines in the time between November 2015 and December 2016.
The readership of all four print media consists predominantly of a well-educated middle class audience. Moreover, these media are considered to have great potential for opinion forming within Polish society, despite the fact that the number of distributed copies has dropped in the last years.[151]

The quantitative content analysis and thematic analysis are applied to investigate the articles issued in the afore-presented Polish print media that deal with the reforms of the Polish Constitutional Tribunal and the democracy debate that took place in Poland as a consequence thereof.
The selected newspapers and newsmagazines are the representatives of different political standpoints and thus, their articles show the diversity in their approaches and judgment of the undergoing events.
None of the newspapers stand in any formal relations to the Polish political parties. Nonetheless, because of their conservative/right-wing political ideas, "Rzeczpospolita" and Wprost are considered to stand closer to the Kaczynski government, while Gazeta Wyborcza and Polityka representing center-left values, are regarded as the voice of Kaczynski's opposition.[152]
Anaszewicz and Dobek-Ostrowska, in their historical case study of the Polish print media, reported upon a high level of partisanship in the two largest Polish dailies, Gazeta Wyborcza and "Rzeczpospolita". While the Gazeta Wyborcza shares left-wing political ideas and rather

[151] In recent years the "Rzeczpospolita" as well as the Gazeta Wyborcza saw an extensive drop in the number of daily circulating examples, amounting for more than 60% since 2007.
[152] Anaszewicz/ Dobek-Ostrowska (2013), p.157

supports individual politicians, "Rzeczpospolita" represents conservative liberal values. Anaszewicz and Dobek-Ostrowska also state that the "Rzeczpospolita", up until 2006, was not aligned to any party, however, in the period between the year 2006 and 2011, the daily had become instrumentalized by the PiS government.[153]

4.2.1. The Rzeczpospolita

The "Rzeczpospolita" is a nation-wide Polish newspaper. The newspaper is currently issued on a daily basis, with the exception of Sunday.

The name of the newspaper is identical with the traditional name of the Polish State originating from the 16th century, which denotes from the English term of 'Commonwealth' and may loosely be used as a synonym for the word 'Republic'. In the year 1920, the newspaper was issued for the first time and stood under the supervision of the conservative Christian Party at its initial stage. The list of the first founders includes well-known Polish intelligentsia of that time, such as Ignacy Paderewski or Wojciech Korfanty. The newspaper appeared regularly until the year 1931, however since the year 1929 as a medium of the right wing, standing under the authority of the Catholic Church.[154]

The publication of the "Rzeczpospolita" was restored after the Second World War. Shortly thereafter it was withdrawn due to unfavorable conditions for independent media that were linked to the communist regime in Poland. After the decades of the stringent communist approach in regard to the media landscape in Poland, the 1980s brought changes in the system. Thus, the deterioration of the strength of the regime and the continuous questioning thereof made the re-launch (in 1982 at the time of martial law) of the "Rzeczpospolita" possible. "Rzeczpospolita" coexisted with the party's formal newspaper the People's Tribune.[155]

After the fall of the regime in the year 1989, the "Rzeczpospolita" became an independent newspaper. Thereafter, the ownership of the "Rzeczpospolita" has changed numerous times, shifting between national and international owners. Since 2011, the "Rzeczpospolita" has belonged to Gremi Media SA, which is owned by the Polish entrepreneur Grzegorz Hajdarowicz.

[153] Anaszewicz/Dobek-Ostrowska (2013), p.157
[154] Encyklopedia PWN
[155] Encyklopedia PWN

4.2.2. The Gazeta Wyborcza

The Gazeta Wyborcza is the biggest Polish quality newspaper that covers various daily national and international themes, news and issues. The history of the Gazeta Wyborcza is not as long as that of the "Rzeczpospolita" but undoubtedly of large significance. The permission for the publication of the Gazeta Wyborcza was included in the outcome of the Round Table Agreement of the year 1989. In this year, the Gazeta Wyborcza was founded by a Polish group of activists and journalists of the democratic opposition, including such Polish prominence as Andrzej Wajda or Aleksander Paszyński. The paper was primarily used as an alternative platform for opinions, becoming a voice for the Solidarity movement in the semi-free election of the year 1989. Moreover, it is important to mention that this paper was the first legal newspaper that was not controlled by the communist government or the party since the late 1940s in Poland. Thus, the original and catchy motto of the Gazeta Wyborcza[156] pointed at its commitment to democracy as well as its affiliation to the Solidarity movement. After the semi-free election of 1989 and the split in the Solidarity camp in the early 1990s, the Gazeta Wyborcza had to redefine its purpose and disposition. This is reflected in the 'conditional' support that the Gazeta Wyborcza gave to particular politicians during the 1990s. Anaszewicz/Dobek-Ostrowska (2013) have pointed at the evidence of such behavior during the presidential elections. They noticed that in the year 1990, the Gazeta Wyborcza gave its support to Tadeusz Mazowiecki, who competed against Lech Wałęsa, nonetheless five years later, in 1995, it was Lech Wałęsa who it supported in the presidential run against Aleksander Kwaśniewski. This however changed once again in the year 2000 when Aleksander Kwaśniewski once more competed against Wałęsa, receiving positive comments by the Gazeta Wyborcza.[157]

While looking at the development of the Gazeta Wyborcza of the last decades, it may be stated that the daily has grown from a small newspaper in 1989 to the biggest Polish quality newspaper within a relatively short period of time, reaching its peak in daily circulation in the mid 2000s with more than 600,000 copies in average circulation.[158]

[156] Nie ma wolności bez Solidarności (EN: There's no freedom without Solidarity)
[157] Anaszewicz/ Dobek-Ostrowska (2013), p.156-157
[158] Report available under: http://www.zkdp.pl/images/Komunikat2007.pdf

4.2.3. Polityka

Established in the year 1957, Polityka is one of the largest circulating opinion weeklies with a long tradition of socio-liberal thought.[159] At its origin, Polityka was closely affiliated to the Polish communist state and its government. With the rise in its popularity in the 1960s, the magazine however started not only to address more critical topics but also to represent a neutral position, supporting neither the communist government nor the oppositionist movement Solidarnosc.

In the year 1990, Polityka left the state-owned publisher RSW Prasa-Ksiazka-Ruch and established an independent cooperative named „Polityka" – Spółdzielnia Pracy. The cooperative ceased to existence in the year 2012, when it was decided to create a limited joint-stock partnership Polityka with the shares covered by only 20 key employees of the cooperative who thereby gained crucial influence over Polityka's editorial policy. Since the year 1994, Jerzy Baczyński remains the editor-in-chief of the weekly.

4.2.4. Wprost

The Wprost magazine was launched in 1982 and existed until 1989 as a regional weekly in Greater Poland. In the time of the political changes, the weekly was transformed into a nationwide magazine. The Wprost is generally associated with liberal-conservative and traditional values. The publisher of the Wprost magazine is the Agencja Wydawniczo-Reklamowa Wprost, which since the year 2010 is 80% under the ownership of the Platforma Mediowa Point Group S.A. At present, the editor-in-chief of the weekly is Jacek Pochłopień.

[159] Wilinska/Cedersund (2010), p.336

4.3. Methodology

The methods applied in the following study are that of the quantitative content analysis and the thematic analysis.

The research scrutinizes the democracy debate in the Polish print media within the context of the reforms of the Constitution Tribunal in Poland in time between November 2015 and December 2016.

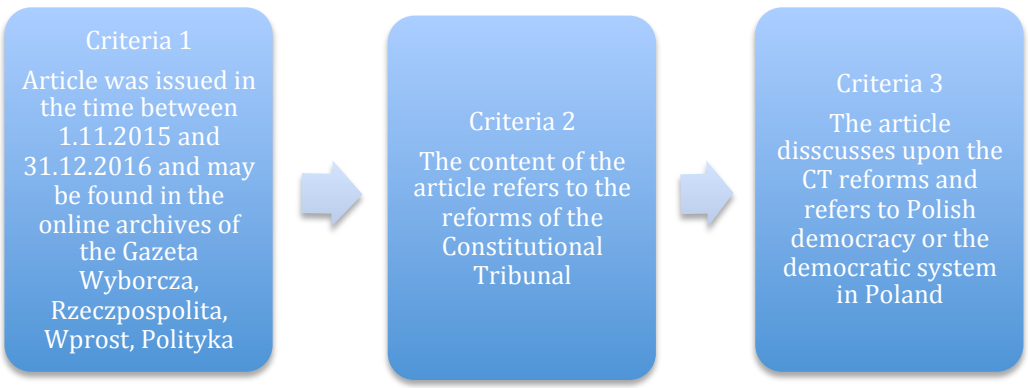
The democracy debate is to be understood as the discussions that were initiated by the CT reforms and which dealt with and aspects of Poland's democratic system.

The research encompasses the analysis of data that has been retrieved from the articles issued in the four nationwide Polish print media: Wyborcza, "Rzeczpospolita", Polityka, and Wprost in the time of the most burning discussions and of the chief CT reforms.

The following method was applied for stringing together the search terms to identify articles:

The below-presented chart shows the criteria in the selection of the articles:

Graph I: Criteria Applied in Selecting the Articles in the Rzeczpospolita, the Gazeta Wyborcza, Polityka and Wprost.



4.3.1. Quantitative Content Analysis

The content analysis is to be understood as "any research technique for making inferences by systematically and objectively identifying specified characteristics within a text".[160]
In the following study, the quantitative content analysis will be applied to record:
-The frequency of the article debating on the aspects of democracies in the context of the CT crisis;
-Who participated in the debate, and how large was the involvement of women in the discussions in the print media;
- How did the Polish print media present the CT reforms.

4.3.2. Thematic Analysis

Thematic analysis is the qualitative data analysis method used for identification of emergent patterns and themes across the dataset.
While aiming to identify themes in the democracy debate that took place in the context of the CT reforms in the four Polish print media, the thematic analysis follows six steps described by Braun and Clarke (2006):
Step 1. Familiarization with data (gaining a comprehensive understanding of the data)
Step 2. Generation of initial coding (identification of preliminary codes)
Step 3. Searching for themes (interpretative analysis of the generated codes and sorting the data extracted according to overarching themes)
Step 4. Reviewing themes (an in-depth review of the themes)
Step 5. Defining and naming themes (defining theme names and potential sub-themes)
Step 6. Producing the report[161]

The Example of the Application of the Thematic Analysis:

Date of Issue	Name of magazine	Section	Author	Title of the Article
18.11.2015	Rzeczpospolita	'Legal Affairs' (Rzecz o Prawie)	Aneta Łazarska (Jurist)	Słaba esencja niezależności" (The Week Essence of Independence)

[160]Stone et al. (1966), p.5
[161]Braun/Clarke (2006), p.16-23

Text Extraction	Initial coding	Sub-Sub Theme	Sub-theme	Theme
„(...)Prezydent wciąż nie odebrał ślubowania od wybranych sędziów. PiS chce zmiany ustawy o Trybunale Konstytucyjnym, tak aby Sejm miał wybrać następców tylko tych sędziów TK, których kadencja wygasa w trakcie aktualnej kadencji izby. (...)“ „ (...)Środowiska sędziowskie wielokrotnie przestrzegały również przed Trybunałem Konstytucyjnym, że relacje władzy sądowniczej i wykonawczej nie mogą być pozostawione jedynie dobrej praktyce.(...)“ „(...)Ostatnie wydarzenia potwierdzają jednak tezę, że władza sądownicza nie jest w pełni równorzędna i niezależna od pozostałych władz, mimo deklaracji konstytucyjnych. Wynika to z faktu, że zasada niezależności sądów i trybunałów w Polsce ma jedynie papierkowy wymiar. (...)“ „(...)W Polsce po 1989 r. zabrakło, niestety, szerszej refleksji nad realnym znaczeniem nie tylko niezawisłości funkcjonalnej, ale ustrojowej oraz instytucjonalno-organizacyjnej niezależności sądów. Nie podjęto nawet wysiłku zastanowienia się nad instytucjonalno-organizacyjną niezależnością sądów oraz nad znaczeniem zasady niezależności sądów w nowym zmienionym porządku ustrojowym. Przejęto jedynie poprzednio obowiązujące w większości rozwiązania ustawowe statusu sądów, nierzadko mające swe korzenie jeszcze w instytucjach zaborczych, które sprowadzały sędziego do roli urzędnika.(...)“	-President rejects taking the oath from the CT judges appointed by the previous government -Relationship between the executive and the judiciary branches of power in Poland - The status of the Polish judiciary given it the Constitution and the practice - The absence of a reflection upon the independence of the judiciary in Poland since 1989	The separation of powers installed during the transformation process in Poland and the status of the Polish Judiciary given it by the Polish Constitution	The transformation process and decisions made while building the democratic system	**Discussion on Historical Issues**

V Results

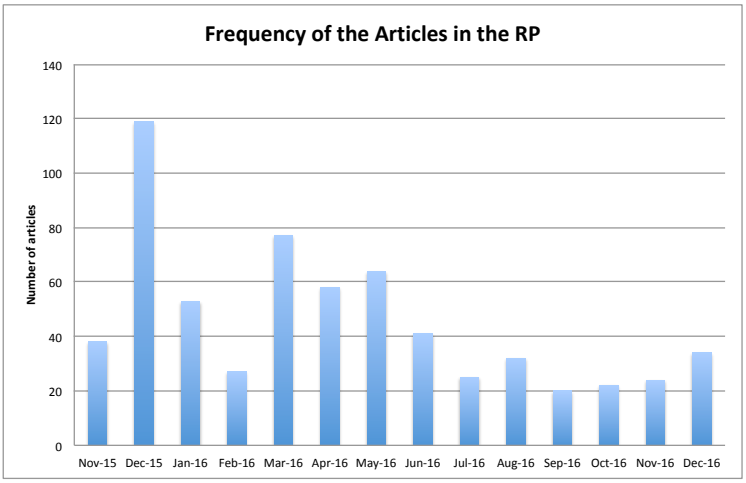
5.1. The "Rzeczpospolita"

The "Rzeczpospolita" issued a vast number of the articles that dealt with the CT crisis and its influence on Polish democracy. In the time of November 2015 until December of 2016, the matter related to the CT crisis appeared 61 times on the front page of the "Rzeczpospolita", covering several issues that include not only the distribution of political disputes on the CT reforms in Poland but also the international debate in the US, the EU Parliament and the Venice Commission on Polish democracy.

In the "Rzeczpospolita", the reporting on the Polish democracy crisis varied in quantity over the months. During the first months, when the conflict was more dynamic, the "Rzeczpospolita" abundantly notified its readers about the events, creating a vast framework for the discussions on Polish democracy.

December of 2015 was the month when the articles appeared most frequently, as in this time the conflict grew to political dimensions. Following December 2015, the months of March May, April and January of 2016 have seen a great number of articles published. Nonetheless, the amount of articles issued in May (the second most frequent month) is almost one-half the number of the articles issued in the "Rzeczpospolita" in December 2015.

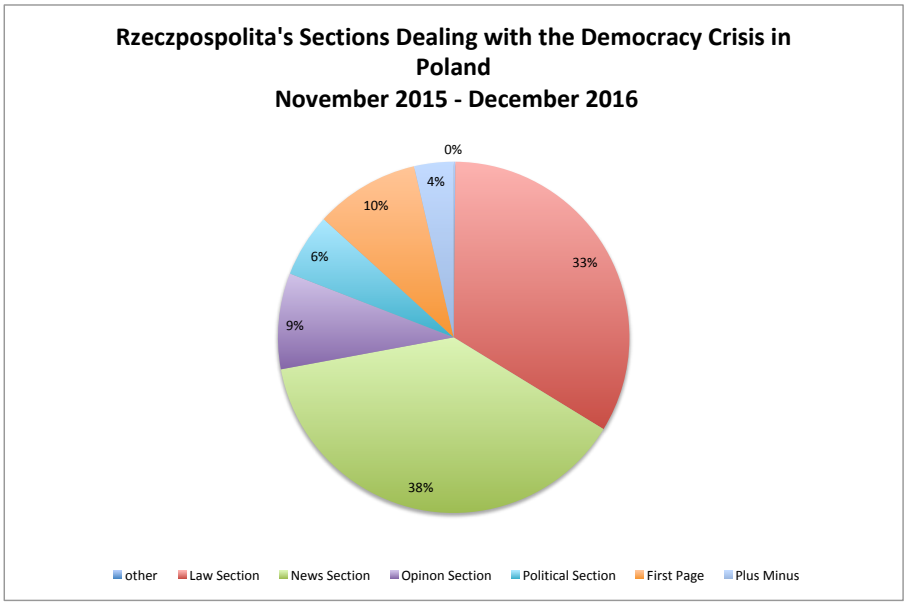
Graph II: Frequency of the Articles in the "Rzeczpospolita



Source: "Rzeczpospolita"

The “Rzeczpospolita” reported on the democratic crisis initiated by the CT reforms in mainly six different sections: the First Page (Pierwsza Strona), the News Sections composed of the Second Page (pl. Druga Strona) and in State news (pl. Kraj), the Political Section which consists of Politics (pl. Polityka) and the Political Affair Unit (pl. Rzecz o Polityce), the Section of Opinion (pl. Opinie), and the Law Section; consisting of Law (pl. Prawo) and Legal Affairs (Rzecz o Prawie) units, as well as in the Saturday edition of the Plus Minus.

Graph III: The Coverage of the Democracy Crisis in the “Rzeczpospolita“



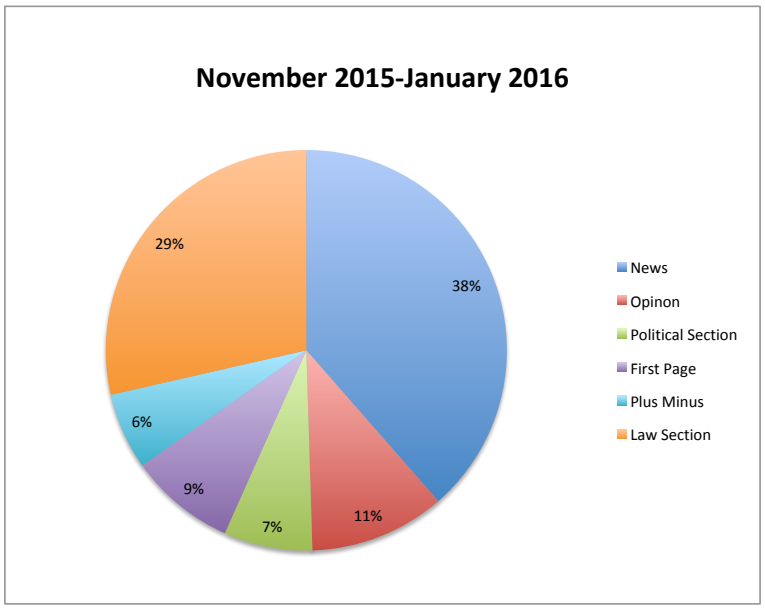
Source: „Rzeczpospolita“

The graph shows that the “Rzeczpospolita” reported on the CT reforms and the democratic crisis primarily in the sections of News and Law. Nonetheless, the share of the particular sections used for democracy discussions has changed over time.

The graphs presented below show the shares of the sections that were used in the “Rzeczpospolita” for reporting on the CT and the democracy crisis between (1) November 2015 and January 2016, and (2) November until December 2016.

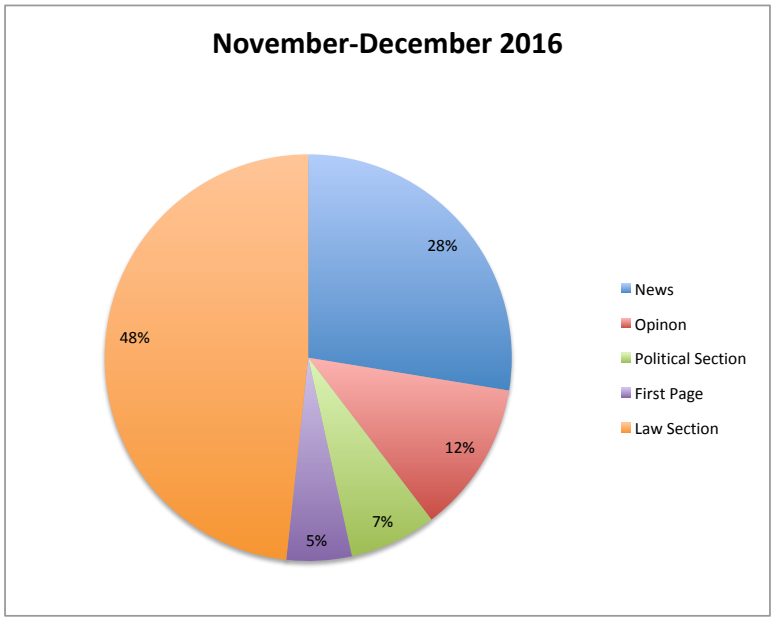
It is noticeable that the share of the law section increased in the later months, as the political conflict gradually flattened out.

Graph IV: The Coverage of the Democracy Crisis in the „Rzeczpospolita“



Source: “Rzeczpospolita“

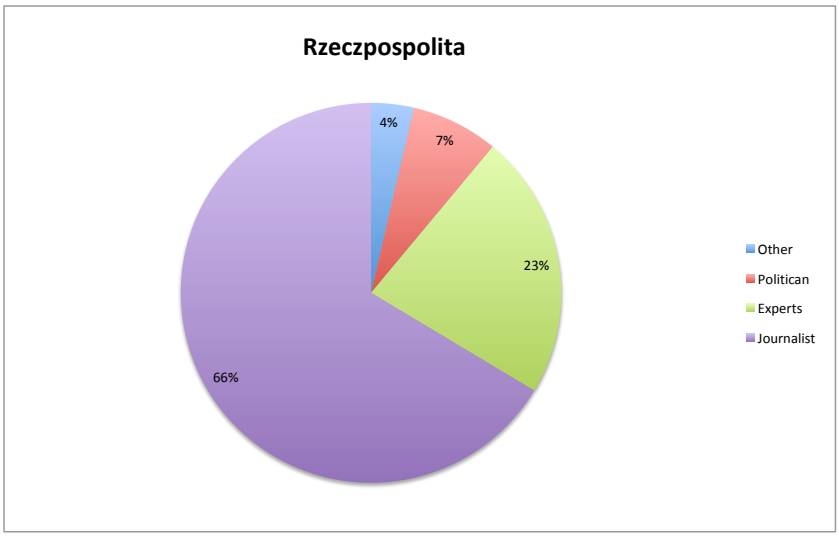
Graph V: The Coverage of the Democracy Crisis in the “Rzeczpospolita“



Source: “Rzeczpospolita“

The debate on democracy in the context of the CT reforms in the "Rzeczpospolita" involves a vast numbers of actors. The graph below shows a list of different groups of participants (Journalists, Politicians, Experts, and Other) and indicates their share in the overall debate.

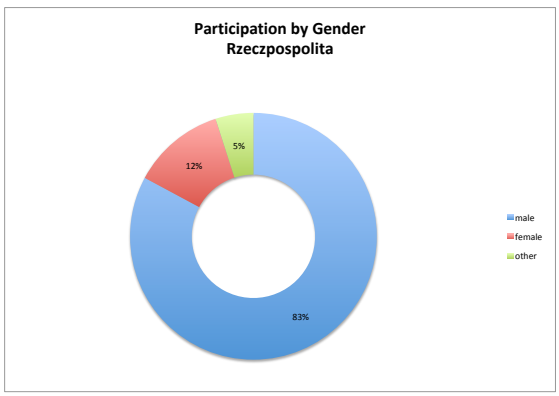
Graph VI: Participants of the Democracy Debate in the "Rzeczpospolita" (by profession)



Source: "Rzeczpospolita"

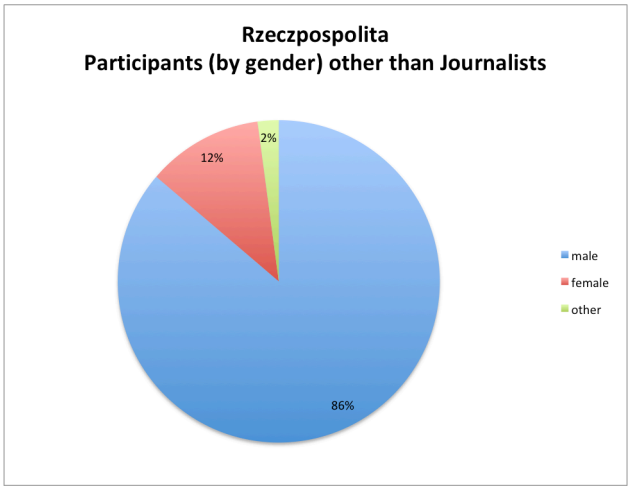
Moreover, the involvement of women and men was greatly uneven. The participation of women in the debate in the "Rzeczpospolita" remained quite low. This trend is especially visible in the political section and the opinion section, where male involvement accounted for a share higher than 90%.

Graph VII: Participants of the Democracy Debate in the "Rzeczpospolita" (by gender)



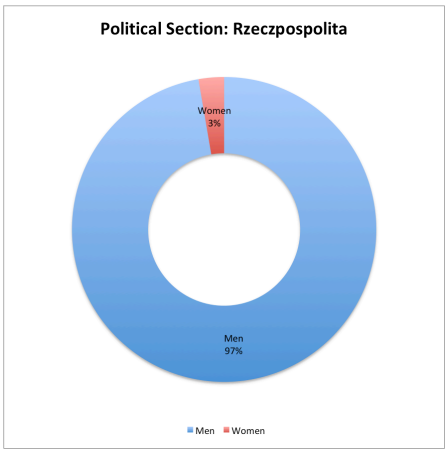
Source: "Rzeczpospolita"

Graph VIII: Participants of the Democracy Debate in the "Rzeczpospolita"



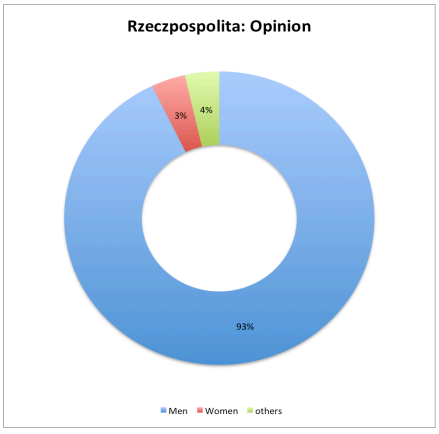
Source: "Rzeczpospolita"

Graph IX: Participants of the Democracy Debate in the "Rzeczpospolita": The Political Section (by gender)



Source: "Rzeczpospolita"

Graph X: Participants of the Democracy Debate in the "Rzeczpospolita": The Opinion Section (by gender)



Source: "Rzeczpospolita"

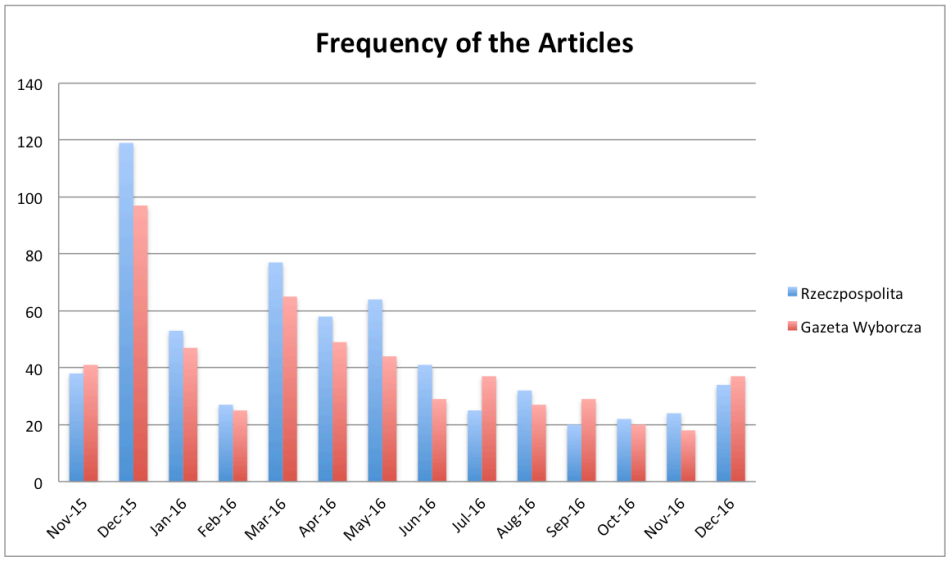
5.2. Gazeta Wyborcza

The democracy debate initiated by the CT reforms in Poland took place in the Gazeta Wyborcza in the section titled 'Country' (Kraj), thus differing from the various presentations found in the "Rzeczpospolita".

In period between the 1st of November of 2015 to the 31st of December 2016, the Gazeta Wyborcza released 565 articles revolving around the CT reforms and the democracy debate.

The frequency of the articles issued by the Gazeta Wyborcza is similar to the trend found in the "Rzeczpospolita": December 2015 is recorded as the month of the most intense debate and is followed by the months of March, April, January and May of 2016.

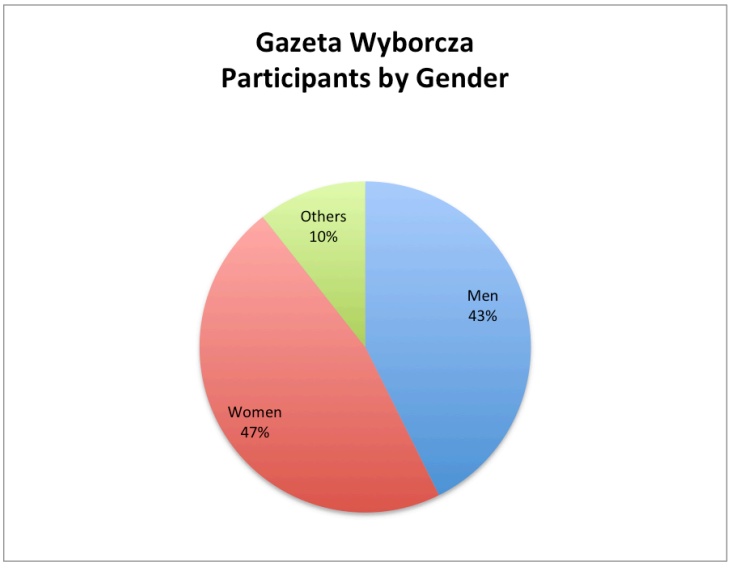
Graph XI: The Frequency of the Articles on the CT crisis in the "Rzeczpospolita" vs. the Gazeta Wyborcza



Source: "Rzeczpospolita"; Gazeta Wyborcza

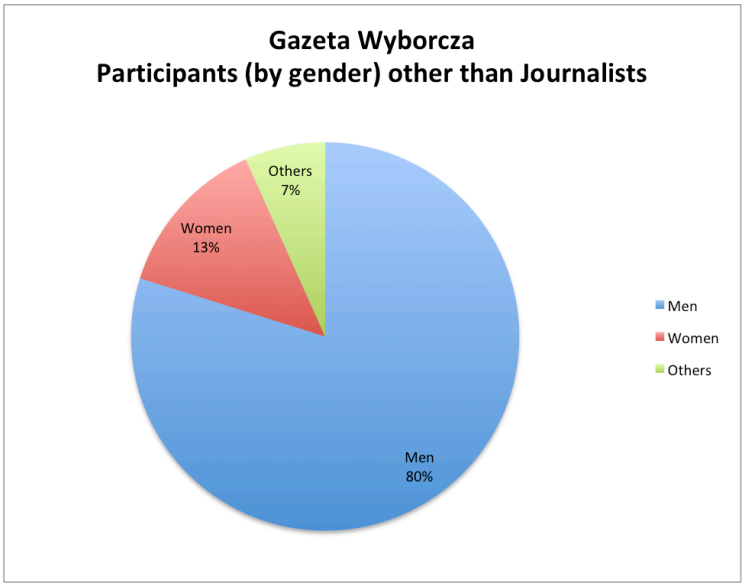
The participation in the debate in the Gazata Wyborcza was almost equal for men (43%) and woman (47%) indicating that woman's involvement was significantly higher than found in the "Rzeczpospolita". Nonetheless, analyzing the group of participants other than journalists, it is visible that the involvement of woman in this cluster reached only 13%, thereby resembling the low level discovered in the "Rzeczpospolita".

Graph XII: Participants of the Democracy Debate in the Gazeta Wyborcza (by gender)



Source: Gazeta Wyborcza

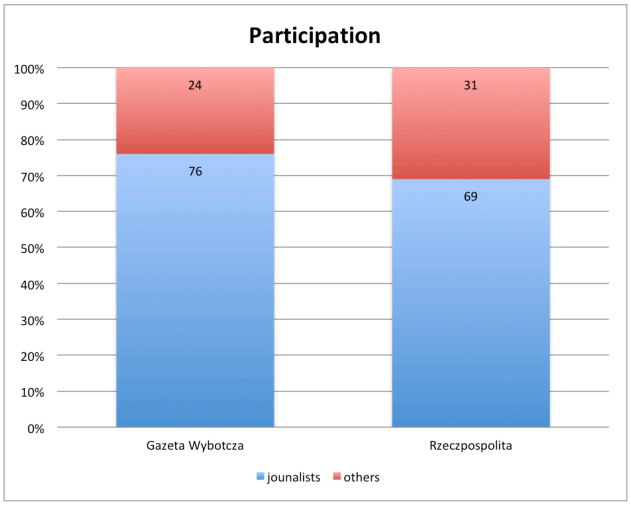
Graph XIII: Participants of the Democracy Debate in the Gazeta Wyborcza (by gender)



Source: Gazeta Wyborcza

The graph below shows the participants of the debate. Thereafter, the journalists were the most visible group engaged in the discussions in both dailies, with a share amounting for 76% in the Gazeta Wyborcza and 69% in the "Rzeczpospolita".

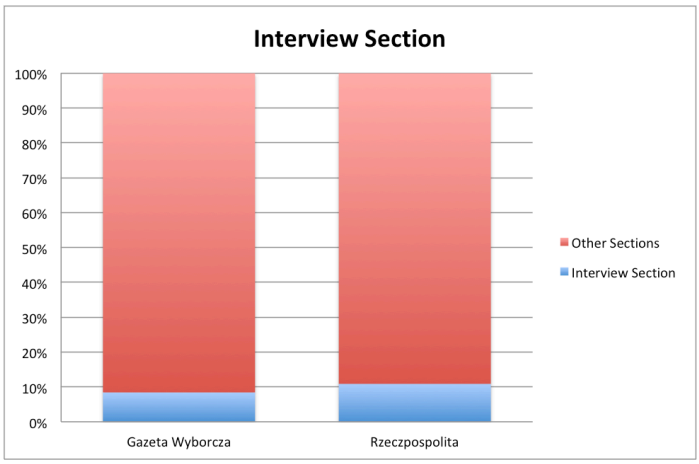
Graph XIV: Participants of the Democracy Debate in the Gazeta Wyborcza and the "Rzeczpospolita" (by profession)



Source: "Rzeczpospolita"; Gazeta Wyborcza

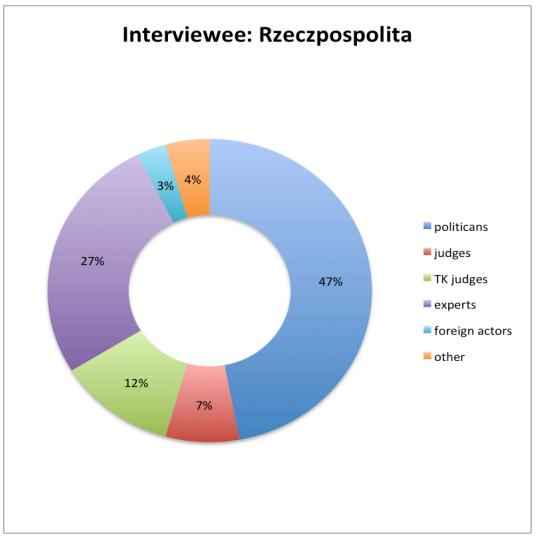
The Gazeta Wyborcza and the "Rzeczpospolita" used three different formats for the articles, namely Opinion, News and Interviews. The authors of the 'commentary' were predominately journalists along with a small group from the field of politics, law experts, judges etc. Furthermore, in the section of interviews, the Gazeta Wyborcza and the "Rzeczpospolita" display few differences as the "Rzeczpospolita" most frequently interviewed politicians (47%), experts (27%), judges and TK judges (19%), whereas the Gazeta Wyborcza concentrated its interviews on experts (50%) and politicians (31%). Nonetheless, both dailies show similarities in the share of interviews in the overall reporting as well as in the share of the interviewed women, which was very minor.

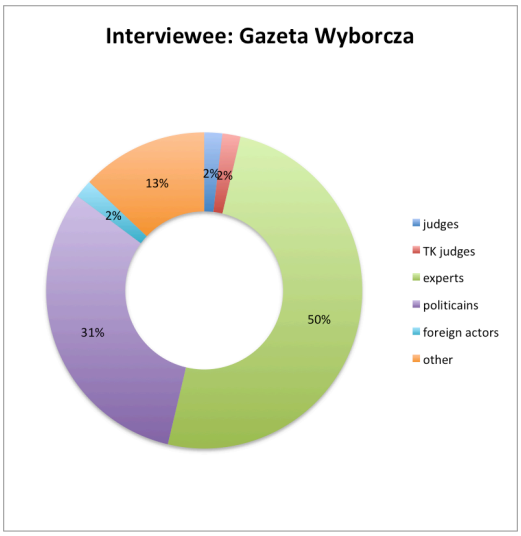
Graph XV: The Share of Interviews in the Democracy Debate: "Rzeczpospolita" vs. Wyborcza



Source: "Rzeczpospolita"; Gazeta Wyborcza

Graph XVI; Graph XVII: Individuals Interviewed in the Gazeta Wyborcza and the "Rzeczpospolita" in the Framework of the Democracy Debate (by profession)





Source: "Rzeczpospolita"; Gazeta Wyborcza

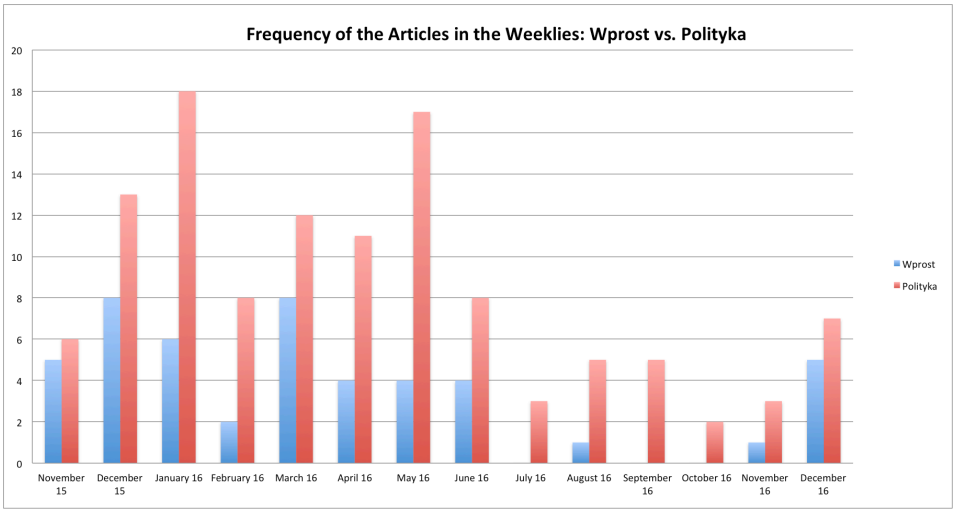
5.3. Comparison: Daily vs. Weeklies

Daily newspapers abundantly informed their readership about the current status of the changes in the working procedures of the CT, simultaneously discussing their impact on Polish democracy. These discussions primarily took place in the form of commentaries, in which journalists vividly commented on a particular event, giving their explanations to which extent a particular event impacted the democratic system in Poland.
Furthermore, the coverage of the dailies included a vast range of interviews and opinions. The "Rzeczpospolita" and the Gazeta Wyborcza differed in this regard as the "Rzeczpospolita" adopted a broader approach, featuring a large spectrum of different opinions including not only the members and enthusiasts of the governmental party but also oppositional standpoints. In the case of the Gazeta Wyborcza, the newspaper represented the voice of the governmental opposition, and therefore was greatly focused on featuring the views of members and activists of the oppositional camp, as for example those of the KOD or Platforma Obywatelska.
Standing in the contrast to the dailies, the coverage of the events by weekly magazines was less prominent. They adopted a wider perspective, reporting and commenting on the democracy crisis in Poland as a part of the commentaries anchored in a broader context.

Furthermore, Polityka reported more often about the proceedings than Wprost, giving the themes more prominence in its issues. On the contrary, Wprost (especially in the year 2016) discussed the CT reforms and changes in the democratic system of Poland in more general reports and comments that dealt with domestic and international politics in general. Out of the four print media analyzed in the thesis, Wprost was also the least critical of the reforms and also the least involved in the debate.

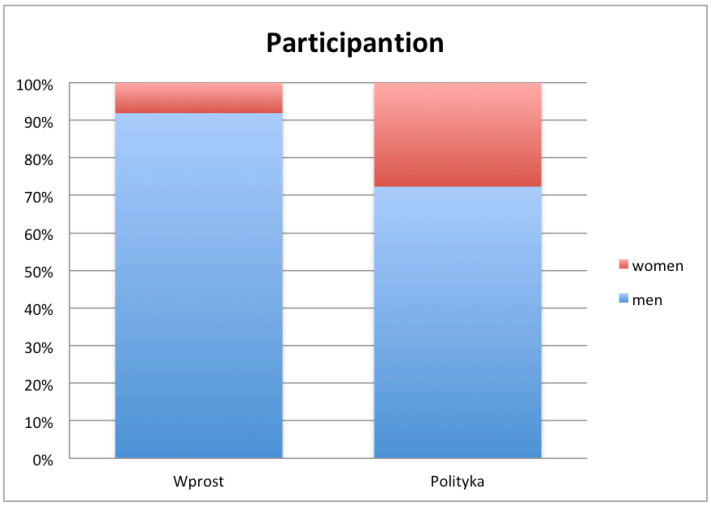
The graphs presented below show the frequency of the articles in both the weeklies and the involvement of women in the debate, which is just as low as in the two afore- presented dailies. Wprost and Polityka repeat the trend found in the "Rzeczpospolita" and the Gazeta Wyborcza in regard to the underrepresentation of women in the debate.

Graph XVIII : The Frequency of the Articles on the CT Crisis in the Weeklies: Wprost vs. Polityka



Source: Wprost vs Polityka

Graph XIX : Participants of the Democracy Debate in the Weeklies: Wprost vs. Polityka (by gender)



Source: Wprost vs Polityka

5.4. The Reforms of the Constitutional Tribunal in the Polish Print Media

The reforms of the Polish Constitutional Tribunal initiated legal and political disputes in Poland that were not welcome by the majority of the Polish print media. In the medial discussions, several alternative phases and expressions were often used to negatively describe not only the events but also the actions of government and their impact on the democratic structure of Poland.

Polish print media expressed their critical sentiments to the reforms by using several different phrases and expressions.

The following expressions were often used in the Polish Print media to describe the changes in the workings of the CT:

- An attack on the Constitution Tribunal (zamach na trybunał)
- A game for the Constitution Tribunal (gra o trybunał)
- A stalemate with the Constitution Tribunal (pat o trybunał)
- A battle for the Constitution Tribunal (wojana o trybunał)
- An affray around the Constitution Tribunal (awantura o trybunał)
- A jump on the Constitution Tribunal (skok na trybunał)
- A dispute on the Constitution Tribunal (spór o trybunał)
- An attempt on the Constitution Tribunal (zamach na trybunał)
- Blitzkrieg (wojana błyskawiczna)
- A clinch with the Constitution Tribunal (klincz wokołc trybunału)
-A crisis surrounding the Constitution Tribunal (kryzys wokół trybunału konstytucyjnego)
- A fight for the Constitution Tribunal (batalia o trybunału)
- An argument on the Constitution Tribunal (kłótnia o trybunał)
- A conflict for the Constitution Tribunal (konflikt o trybunał)
- A systemic conflict for the Constitution Tribunal (konflikt ustojowy o TK)

Many of these alternative expressions point at force and aggression. The Polish print media frequently used expressions such as ‘battle’ ‘attack’, ‘fight’, ‘attempt’, ‘jump’ ‘clinch’ ‘stalemate’ ‘blitzkrieg’ for the purpose of articulating the difficulty, gravity, ferocity, and rapidity of the undergoing political events. Other expressions such as ‘dispute’, ‘argument’,

‘affray’, ‘conflict’ were used for the purpose of articulating the intense contestation of different views and beliefs involved in the CT crisis.

In referring to the actions of the government, the Polish print media used the following expressions:

- Extinguishing of the Constitution Tribunal (wygaszenie trybunału)
- Cancelling of the Constitution Tribunal (kasowanie trybunału)
- Damaging of the Constitution Tribunal (psucie trybunału)
- Cutting down of the Constitution Tribunal (zredukowanie trybunału)
- Devastating the Constitution Tribunal (dewastacja trybunału)
- Paralyzing the Constitution Tribunal (paraliz trybunału)
- Raping the Constitution Tribunal (gwałt na trybunale)
- Breaking down the Constitution Tribunal (rozbicie trybunału)
- Tinkering with the Constitution Tribunal (majstrowanie przy trybunale)
- Politicizing of the Constitution Tribunal (upolitycnienie trybunału)

The above-presented expressions make use of several negatively connotated words, which not only stress the harmful impact of the PiS reforms on the institution of the Constitutional Tribunal but also simultaneously imply the final result of the reforms, (devastation the Constitution Tribunal, paralyzing of the Constitution Tribunal or cancellation of the Constitution Tribunal etc.)

In reference to the effect of the CT reforms on the democratic structure of Poland, Polish print media used the following expressions;

- A battle for the state (wojna o państwo)
- Politicizing of the state (upolitycznienie państwa)
- Coup d’etat (zamach stanu)
- Devastation of the Polish State (dewastacja państwa polskiego)
- An attempt on the state of law (zamach na państwo prawa)
- Dismantling of democracy (rozmonowywanie demokracji)
- Damaging of the democracy (psucie demokracji)
- Constitutional crisis (kryzys konstytucyjny)
- Systemic Crisis (kryzys ustrojwy)

These expressions commonly used in the print media denote a state of disruption, disorder and political struggle, that has been chiefly acknowledge to have an overall negative effect on the Polish democracy and the Polish state. The terms such as 'attempt' 'battle' 'coup' indicate the ferocious and disruptive character of the events.

5.5. The Thematic Analysis

The discussion on democracy enjoyed great medial coverage and resulted in numerous articles, deliberating upon many different aspects of the democratic state and the democratic structure of Poland.
The list presented below shows the outcome of the thematic analysis:

The following two main themes of the debates were identified: the Historical Issues and the Present Issues.

Theme 1. The Discussions on the Historical Issues
Discussions deliberating on past events in the history of democracy in Poland, trying to involve the past in the current political events.

Sub-themes:

1) *The transformation process and decisions made while building the democratic system;*
- The foundation of democracy in Poland
- The separation of powers installed during the transformation process in Poland and the status of the Polish Judiciary given it by the Polish Constitution (the relationship between the Polish CT to the president and the Polish Parliament and its international comparisons)
- The installment and the formation and the role of the CT in Poland (the status of the CT's judges in Poland and the place given to them by the Polish Constitution of 1997).

2) *The reflection on the political elite and the parties and their roles in the history of the political system in Poland.*
3) *The role of the church in the context of the political conflict;*
- Reflection on the role of the church as the mediator during the transformation process

in Poland and its possible role as a mediator in the current political crisis.

Theme 2: The Discussion on the Present Issues

Discussions that deliberated on the present issues and their impact on Poland's democratic system.

Sub-themes:

1) The Constitutional Tribunal crisis and the democracy crisis

- *Political and legal themes*
    - The reforms of the Constitutional Tribunal and their impact on Poland
    - The role of the opposition in the context of the reforms
    - Contemplation on the settlement of the crisis
    - An overall assessment of the governmental reforms
    - The international reactions to the reforms and the democracy crisis (the reports of the Venice Commission, the debates on Polish democracy in the EU Parliament and the US's and NATO reaction to the reforms)

- *Social and ethical themes*
    - The attitude and the reaction of Polish citizens towards the dispute and the perception of the citizens of the harmfulness of the reforms on Polish democracy.
    - Defining 'good' and 'bad' change

VI Conclusion

Having an electoral program revolving around major reforms, the PiS party came to power as a result of the parliamentary election of November 2015. From the beginning on, the changes (primarily, the reforms of the Polish judiciary, social and educational systems as well as the media law) were set as the focus of the new governmental program, developed and put into force by the governing majority, all in a very short period of time.

The four largest polish Print media consistently reported and commented on the ongoing political events that were perceived as majorly important for the Polish democratic state. The focus lay on the CT reforms, which not only involved stretching the law of both the previous and present governments but also two different types of conflicts. While the first conflict engaged the government and its parliamentary opposition and revolved around different interests, ideas and concepts represented by the Polish political elite, the second one engaged the executive power and judiciary and revolved around the executive branch attempting to reduce the power of the judiciary for the purpose of a smoother implementation of the foreseen reforms.

In the print media, the democracy debate was concerned with present and past issues, involving critical reflection on the changes in the workings of the Polish CT as well as the transformation process, as the crisis revealed the weaknesses of the Polish democratic system and pointed at the pathologies created as a consequence of the systemic changes.

The democracy debate was present throughout the determined time, differing between weeklies and dailies in its intensity and approaches. The coverage of the events by the two largest dailies was very prominent and dynamic, encompassing political, ethical, social and legal discussions. The weekly magazines adopted a wider perspective, commenting on the democracy crisis in Poland as a part of a broader commentary anchored in the context of other ongoing political events.

The medial debate reached its peak in December 2016, when the legal argument resulted in political dispute, encompassing a plentitude of emotions and resentment. The debate however differed in its monthly frequency, rising when the intensity of the political dispute grew.

The democracy debate in the “Rzeczpospolita”, Gazeta Wyborcza, Wprost, and Polityka was marked by the underrepresentation of woman, which occurs particularly often and is greatly apparent while analyzing the commentaries of participants other than journalists and the interview sections which indicate that male opinions and judgments were clearly favored.

Furthermore, “Rzeczpospolita” and the Gazeta Wyborcza were negatively positioned towards the CT reforms. To underline their approach, the press frequently used several negatively connotated phrases and expressions while referring to the events. These phrases articulated not only the gravity of the changes to the entire democratic system but also stressed the ferocity and rapidity with which the reforms of the CT were implemented.
In the democracy debate, the Gazeta Wyborcza and Polityka represented the voices of the governmental opposition, and therefore were greatly focused on featuring the views of members and activists of the oppositional camp. “Rzeczpospolita” created a framework for the debate that depicted both standpoints, those of the supporters of the government as well as of their opposition. In contrast, Wprost approached the events the least critically, giving the theme lesser gravity, as the coverage of the debate was only occasional.

The democracy crisis in Poland disclosed a necessity for reflection upon the current philosophy of democracy and democratic practice in Poland as well as its verification, and shows that the law and the rule of law, that are often seen as the basis of a liberal democracy, do not guarantee the stability of the democratic system.
Barber’s concept of thin and strong democracy provides a plausible explanation for the democratic crisis in Poland, showing that the problem of ‘Polish democracy’ lies in its elitist character.
Built upon the idea of democratic elitism, democracy in Poland requires neither widespread participation nor a robust civil society for its wellbeing. Moreover, Polish citizens have been discouraged to actively participate in the public debate as the role of the public sphere and public discussion in forming democratic outcomes has been degraded.
Because of deficient citizens’ participation in political life, democracy in Poland has been reduced to political (procedural) democracy, thus, lacking important substantive elements that could ensure a more stable democratic rule.

The democratic crisis in Poland initiated more active citizen participation, which resulted in the building of a vast civic movement in defense of Polish democracy (the Committee for the Defense of Democracy) that encouraged many thousands of citizens to take an active role in political life. Moreover, an intense public debate on democracy and democratic practice taking place as a result of the crisis, made a positive contribution to the critical reflection on the future direction of the country as well as served for educative purposes, informing Polish

citizens about democratic institutions, particularly about the role of the Constitution Tribunal in the democratic system.

Overall, the political dispute in Poland proved to be very destructive for Polish democracy, as it questioned the credibility of the Constitutional Tribunal and its judgments, depicting one of the key democratic institutions as politically dependent, and serving the interests of the political elite. Thus, following the crisis, much time will be needed for trust in the judiciary and in the CT to be resorted in Poland.

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