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# Political Process, Crisis and Legitimacy in Poland

**Abstract:** The paper examines the conflict over the control of the integration of Poland's Constitutional Tribunal (CT) that evolved into a constitutional crisis in October 2015 – and has extended for more than two years. It identifies issues that help understand how the Polish Democracy does not impede the erosion of constitutional democracy as the conflict has undermined the CT and the function of judicial review (JR). The article examines issues of legitimacy that emerge from the crisis; it also examines the extent to which the institutional settings condition the operation of the JR function; in particular, it looks at the role of executive actors (the Government and the President), and the role of the political/parliamentary party in bridging the separation of powers.

**Keywords:** *constitutional democracy, judicial review, political process, legitimacy, Constitutional Tribunal, Poland*

## 1. Introduction

This article examines an instance of judicial review (JR) as an instance of political process; it touches on the counter-majoritarian debate that surrounds constitutional justice. Using a qualitative methodology, this paper draws from political sociology, constitutionalism and political science, to critically examine the debate on the legitimacy of judicial review. The study is centered on the case of Poland's crisis that started in October 2015 – and has extended for the next three years – as a struggle over the control of the integration of the Constitutional Tribunal (CT). The constitutional and political conflict that ensued, together with the protests that took place throughout 2016–7, signaled concerns over the rule of law, checks and balances and judicial independence in Poland (Koncewicz, 2016; Skąpska, 2018). Data for this paper comes from official documents.

The electoral content of the crisis (Table 1) is given by the outcome of the 2015 elections. The presidential election (10 May) brought the victory of Andrzej Duda, a candidate supported by the conservative Law and Justice (Prawo i Sprawiedliwość, PiS) party. He

won over the incumbent president Bronisław Komorowski. Later, in 25 October 2015, the parliamentary elections brought the victory of PiS over the governing liberal Civic Platform (Platforma Obywatelska) – that had been in power since 2007 in a coalition with the Polish Peasant Party (Polskie Stronnictwo Ludowe, PSL). Beata Szydło became PM (6 November 2015) as PiS was able to form a government on its own. Its majorities in the Sejm and the Senate mark the first time a party alone has been able to win a majority in both chambers since 1989. Immediately after assuming office, the new governing party, the conservative Law and Justice party (Prawo i Sprawiedliwość, PiS) reacted on some of the last votes of the 7<sup>th</sup> Sejm. Such a decision triggered the constitutional crisis: a swift succession of events resulted in violations of the Polish constitution – and European core principles – that were interpreted as serious threats on the continuation of democracy in Poland (Skąpska, 2018).

**Table 1.** Sejm Integration

Parliamentary Party	7 <sup>th</sup> Sejm	8 <sup>th</sup> Sejm
Civic Platform (Platforma Obywatelska, PO)	207	138
Law and Justice (Prawo i Sprawiedliwość, PiS)	157	235
Palikot's Movement (Ruch Palikota, RP)	40	--
Polish People's Party (Polskie Stronnictwo Ludowe, PSL)	28	16
Democratic Left Alliance (Sojusz Lewicy Demokratycznej, SLD)	27	--
Poland Comes First (Polska Jest Najważniejsza, PJN)	—	--
Polish Labour Party (Polish Labour Party (Sierpień 80), PPP-S'80)	—	--
German Minority (Mniejszość Niemiecka)	1	1
Independent	--	--
Kukiz'15 (K'15)	--	42
Modern (Nowoczesna)	--	28
<b>Total</b>	<b>460</b>	<b>460</b>

Source: National Electoral Commission with data from [<http://wybory2011.pkw.gov.pl/wsw/en/000000.html>]; <http://wybory2011.pkw.gov.pl/wsw/en/000000.html#tabs-2>]; Wybory do Sejmu i Senatu, Rzeczypospolitej Polskiej 2015 [([http://parlament2015.pkw.gov.pl/349\\_Wyniki\\_Sejm](http://parlament2015.pkw.gov.pl/349_Wyniki_Sejm); [http://parlament2015.pkw.gov.pl/351\\_Wyniki\\_Senat](http://parlament2015.pkw.gov.pl/351_Wyniki_Senat))]

## 2. Legitimacy as a Problem for Judicial Review

Constitutional justice (i.e. judicial review) is a mechanism established to confirm the limits of constitutional action of political institutions; the crisis revives a theoretically salient issues regarding judicial review (JR): First, a problem of legitimacy regarding the function: how to explain a power whose members are unaccountable to the people yet have the power to overturn popular representative's decisions? This problem is rooted on the power of declaring the nullity of legislation passed by elected representatives yet not having a direct relation with "the people". The function of JR examines (i.e. opposes or confirm) the popular will (either of voters or their elected representatives). Second, the legitimacy of the

individuals performing the function of JR is also controversial. The controversy is about the authority granted to “non-elected judges” to declare unconstitutional laws passed by the legislature. Thus, the individuals responsible for constitutional justice may be questioned on the grounds of the source of their legitimacy. While lacking a direct connection to “the people”, a non-elected corps of judges, wield considerable power. These theoretically salient issues regarding JR constitute a frame to question constitutional justice, the institutions and individuals that enforce it: Constitutional Tribunals. In this debate, the limitations of a critic grounded on legitimacy deserve attention. Legitimacy, in a Constitutional Democracy, is not only a perennial problem – a problem consubstantial to it – but also the problem that, in a political system, every institution potentially lacks democratic legitimacy. Attention paid to legitimacy needs to understand more on its characteristics. Legitimacy is not, by far, the only foundation of a Constitutional Democracy. The latter, built on principles like the will of the majority, has other fundamental. One of them are the principles aimed at controlling the exercise of political power. Research needs to explore the extent to which the system of government creates constraints or potential for constitutional justice, as the final voice in constitutional matters and its effectiveness as a mechanism established to confirm the limits of constitutional action conducted by political institutions.

### ***2.1. The 1997 Constitution***

In Poland, the function of Judicial Review (JR), as a constitutional mechanism that ensure the supremacy of the constitution, has been entrusted to a Constitutional Tribunal (CT). The 1997 Constitution has been an icon of peaceful political change for two decades and has been a comprehensive compromise built on broad support by a plurality of positions – ranging from liberal-democrats, to social-democrats and Christian-democrats, nationalists and pro-statist forces (Winczorek, 1999). In Poland, the Constitution is “the supreme law of the Republic of Poland” (Article 8). Although the supreme power is vested in the Polish nation which would be exercised either directly or through their representatives (Article 4), the Constitution established a democratic state ruled by law (Articles 2 and 7) and introduces the principle of separation and balance of powers (Article 10) (Winczorek, 1999; Sarnecki, 1999).

Constitutional justice is a mechanism that ensures the supremacy of the 1997 Constitution. Poland’s Constitution contains a counter-majoritarian principle: “Judgments of the CT shall be of universally binding application and shall be final” (Article 190). For instance, on matters of Division of Powers, the CT settles disputes over authority between central constitutional organs of the State (Article 189) as it did in 2010, in a conflict between the competences of the President and the PM. Poland’s Constitutional Tribunal (CT) adjudicates “regarding the conformity of statutes and legal provisions to the Constitution, as well as complaints concerning constitutional infringements” (Article 188); it can review the constitutionality of legislation passed by the legislature. The CT is composed by 15 judges chosen

individually by the Sejm for a term of office of 9 years; its President and Vice-President are appointed by the President of the Republic of Poland (PRP) from amongst candidates proposed by the CT's General Assembly of Judges. The rulings of the Tribunal are passed by majority of votes. Constitutional justice provides a safeguard for rights and procedures essential to democracy; it is also a common feature of European political systems. JR has been classified as strong (when it grants judges the power to strike down legislation, and these judicial determinations that can only be overridden by the legislature through the formal amending process) and weak JR (when it grants judges the power to strike down legislation or, if it does, it allows an ordinary legislative majority to override the relevant judicial determination without formally amending the constitution. In this regard, the interaction between the reviewing court and the legislature entails the chances of the latter overturning a court's ruling (i.e. changing the constitution, recomposing the courts to get a new ruling) and reflects the effective level of autonomy a court exercises in judicial review (Ferejohn et al., 2007).

### 3. The Political Process

Poland's Constitutional Democracy touches on issues of theoretical importance: whether certain institutions are more likely to promote democracy than others, and whether the type of regime matters for governability and policy output (Samuels, 2007) are issues that come together with an analysis of contemporary constitutional justice. The CT works within institutional settings that set conditions on its operation. A critical principle is that of the separation and balance of powers (Article 10). The Polish system of government is based on the separation of and balance between the legislative, the executive and the judiciary. The Judiciary is an independent power composed by courts and tribunals (Article 173). The legislative is vested in a bicameral parliament whilst the executive power is vested in two separate institutions: The President of the Republic of Poland (PRP), and the Council of Ministers (i.e. Government). Unlike presidential systems, where there is a univocal correspondence between the three powers (legislative, executive and judiciary) with the institutions that embody them, in Poland's system the three powers are understood as "spheres of" action. Cooperation is essential to ensure the system's operation, for instance, for the election of the government: The Council of Ministers is elected by the Sejm. In the Polish constitution, the National Assembly, formed by a bicameral parliament, is a legislative organ whilst the Cabinet Council is an executive organ.

#### 3.1. *Parliament is the Seat of the Legislative Power*

Judicial review is a process that takes place within the institutional settings that frame its operation. The Sejm is part of a historical tradition of bicameral legislatures in Poland (Masternak-Kubiak and Trzciński, 1999; Zwierzchowski, 1996). Asymmetric bicameralism,

a common feature of Parliaments, has in Poland a Sejm that is preeminent over a Senate. The justifications for asymmetry vary: a response to the “aversion to a strong executive” or a reaffirmation of the nation’s representation (Masternak-Kubiak and Trzciński, 1999). On the other side, the Sejm’s broad powers have been criticized as having the potential to undermine the principle of separation of powers, particularly with regards to the Executive (Masternak-Kubiak and Trzciński, 1999).

The Sejm is composed of 460 Deputies (Article 96) and the Senate is composed of 100 Senators (Article 97). Parliamentarians serve 4-year terms (Article 98). The Sejm passes bills by a simple majority vote, in the presence of at least half of the statutory number of Deputies, unless the Constitution provides for another majority. Same procedure applies to the Sejm in adoption of resolutions (Article 120). The lower chamber concentrates critical parliamentary functions. The Senate was limited to partake in the legislative process and in the appointment of some bodies (Sarnecki, 1999); its term of office depends on that of the Sejm’s. The Senate has a reviewing chamber function – except perhaps with regards to the amendment of the constitution or the ratification of international treaties that imply a transfer of competencies to an international body (Article 91), which are areas where its consent is necessary. However, the Sejm and the Senate have an equal standing on the ratification of treaties on the European Union (EU), for instance. The asymmetric feature of Polish Parliament may be observed in the Sejm’s functions; it entails legislative, electoral (“creative”), and those of control. For instance, on appointments, the Sejm takes part in the integration of several bodies. The Sejm elects the constitutional judges (Article 194.1). Moreover, in the legislative function only the Sejm can consider bills returned by the President to the Sejm (Article 122.5). The Sejm has the authority to appoint an investigative committee to examine concrete issues (Article 111).

Perhaps the most important role the Sejm performs is that of electing a Council of Ministers (i.e. Government). The lower chamber has control over the Government since the latter is politically responsible to the former; it is both, collective and individually responsible to the Sejm. The Sejm not just supports the Government by providing general confidence, but it also appoints ministers; it does not have the right to dissolve the parliament, thus the withdrawal of support only results in the necessity of the Government to submit its resignation. This is the beginning of a process of forming a new Council of Ministers – if the process is not successful, however, the President could dissolve the Sejm. The lower chamber can express an individual vote of no confidence that would result in the removal of a minister from office; the Sejm has no right in choosing a successor, however. Only the President – on application of the PM – can do it (Sarnecki, 1999).

### ***3.2. The Executive Power***

Judicial review is a political process that occurs within an institutional arrangement that frames its operation. In the separation of and balance between the legislative, executive and

judicial powers, the system of government of Poland has established an Executive power vested in two bodies: The President of the Republic of Poland (PRP) and the Council of Ministers (i.e. Government).

Poland's PRP is elected in universal, direct and secret suffrage (Article 127) for five-year terms. The PRP can be re-elected only once. If cabinet-parliamentary systems encourage coordination (Samuels, 2007), PRP was not exception as he was aligned politically with the legislative majority and the Government. PRP has several functions (Article 122; 126–145) some of which are exercised in coordination with other branches of power. Specifically, PRP has been able to take part in the CT's crisis through the administration of oath to Sejm's appointments – the constitutionality of the action is disputable as, it is argued, oath-taking is a procedure not regulated by the Constitution, but by an ordinary law. Lacking a constitutional foundation and claims that political motivations led to the blocking of the appointment of constitutional judges, have been argued to question the constitutionality of Presidential actions. Moreover, Poland's constitution has a constitutionality prevention mechanism. The PRP has a role in this mechanism (Article 122): it means that the conformity of a law passed by Parliament conforms to the Constitution. Furthermore, constitutional control requires the publication of the law before it is reviewed by the CT. PRP activates the preventive mechanisms when placed before legislation passed by Parliament; he has three courses of action: return the legislation to the Sejm for reconsideration (veto), sign it or, third, submit it to the CT for a review before its signing. Only one procedure can be chosen. The President cannot refuse to sign a bill that has been judged by the CT as in agreement with the Constitution – although he can refuse to sign a bill that the CT ruled unconstitutional, under no circumstances he can sign it. The extent to which PRP has used its powers to contest the CT is part of the political crisis that is being examined here.

The Government is a collective body accountable to one chamber of the bicameral legislature: the Sejm. Council members are collectively responsible to the Sejm for the activities of the Council (Article 157); they are also individually responsible “for those matters falling within their competence or assigned to them by the Prime Minister (Article 157)”. The Government, vested in a Council of Ministers, is also part of the Polish executive power. It is composed of the President of the Council of Ministers (Prime Minister) and ministers (Article 147). The Prime Minister (PM) represents the Council of Ministers and manages the work of the Council. The Council of Ministers manages the Government as it conducts the domestic and foreign affairs (Article 146). The duties of the Council are to ensure the implementation of statutes, and to issue regulations (Article 146). The PM coordinates and control the work of members of the Council (Article 148).

The extent to which the relations between the Sejm and the Council of Ministers are permeated by political and electoral outcomes is not only a novel area of research in Democratic Poland, but a new political reality for the country. The crisis that started in 2015 appears to present evidence the relation being influenced by political party and electoral

outcomes. The dynamic of those relations would be extensive to several other aspects of the political system: influence in the existence of a strong party-leader and a weak Government. Notably, the 2015 crisis highlights the party (electorally and parliamentary) exercising power over the realm of constitutional justice: the function, the body, and the officials conducting it. As the political/parliamentary party has a role in bridging the separation of powers and it is the actor that unites the legislative and executive powers, according to Poland's constitution, the analysis of the problem of electoral dynamics impinging on the political system does not rest alone on the formal institutions (i.e. the institutional setting). It is within both, the formal institutions and political dynamics within which the judicial review operates.

#### 4. Legislative Action and Judicial Review

In the Judicial review process, decisions passed by the Sejm are examined by the CT. The section looks at Sejm's decisions that have been subjected to this form of review; it also looks at the CT's rulings issued with regards to the Sejm. In these two instances, the section identifies legitimacy as an issue of concern in the judicial review process.

##### 4.1. *The Sejm*

The Sejm is at the center of the legitimacy of the Polish political system. It is almost an intuitive assumption that legislation enacted by people's representatives in Parliament is democratically legitimate. In that assumption, the ultimate source of legitimate law-making powers is held, in a Constitutional Democracy, by the will of a majority (i.e. elected representatives). Two legitimacy-based critiques posed to the function of JR are grounded on this notion. For instance, the centrality of the Sejm in the Polish political system can be seen with regards to the Act on the Constitutional Tribunal (ACT<sup>1</sup> of 25 June 2015; it entered into force on 30 August 2015); on this law, the Sejm engaged in the passing of new legislation, amendments to existing legislation, and the appointments of constitutional judges. The ACT was passed by the outgoing 7<sup>th</sup> Sejm replacing a homonymous law enacted in 1997 (ACT<sup>97</sup>). Similarly, the 8<sup>th</sup> Sejm also engaged in the passing of legislation: on July 2016 the Sejm adopted in second reading a completely new ACT (ACT-plus), based on the original ACT<sup>97</sup> that was in force before the ACT of June 2015. The Act on the Constitutional Tribunal (ACT-plus) entered into force on 16 August 2016, even though it was declared

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<sup>1</sup> In 2013, the PoP Komorowski submitted (11 July 2013) the Constitutional Tribunal Bill to the *Sejm* (*Sejm Paper No. 1590*); the proposal was prepared as an initiative of a group that included former and acting judges of the CT. This was the law on which the 7<sup>th</sup> Sejm based its decision to appoint five constitutional judges. The 7<sup>th</sup> Sejm worked on the proposal for the 2013–15 period on the Act on the Constitutional Tribunal (ACT).

unconstitutional (K 39/16) (Table 9). Thus the 8<sup>th</sup> Sejm was changing a law its predecessor has recently change itself.

Furthermore, the Sejm also passed amendments to ACT, in two occasions. The first one was ACT-A1. The Sejm adopted reforms (Amendments 19 November); the amendment was submitted to the Sejm on 16 November and was signed by PRP days later; it introduced a three-year term for the CT's PRP renewable once; it ceased the term of the incumbent President and Vice-President and established that a constitutional judge's term started from the moment of taking the oath before PRP (Venice Commission CDL-AD 2016.001: 5). The second amendments to ACT (ACT-bis, 22 December 2015), called the "Correction Law" was a projected new law on the CT. Proposed by PiS, the project was rushed through Parliament: the Sejm passed it (22 December 2015), then the Senate (24 December 2015), and the PRP signed it (28 December 2015). The amendment to the ACT (ACT-bis) stipulated procedural rules: the CT would hear cases as a full bench in a composition of 13 out of 15 judges, although some matters would only require the presence of seven judges. The full bench decisions would introduce a whole new dynamic of operation of the CT. It also introduced measures on the order in which motions should be consider by the Tribunal. More controversially, ACT-bis introduced the right for the PRP and the Minister of Justice to launch disciplinary proceedings against constitutional judges. It was a law that introduced provisions dealing with the independence of judges, the composition of the Tribunal, amongst others. ACT-bis was immediately published without allowing for *vacatio legis*. The "correction law" was widely protested by prominent lawyers and institutions and motions were made review its constitutional validity (Case K 47/15). The CT ruled (9 March 2016) it "constitutionally invalid"; the ruling's reasoning emphasized the unconstitutionality of this law and its effects: "the paralyzing of the Constitutional Tribunal activity and, in consequence, the destruction of the checks and balances principle and the constitutional review of law-making" (Skąpska, 2018, p. 136). Conversely, the Government consider that "this verdict is not a verdict at all, but only an opinion expressed by some judges at their informal meeting", consequently, "it need not be published" (Skąpska, 2018, p. 136).

#### ***4.2. On the Appointment of Constitutional Judges***

The legitimacy of the individuals conducting the function of judicial review – understood as a counter-majoritarian mechanism, was not directly raised. Constitutional judges are able to nullify legislation enacted in accordance with the majority by the representatives of the nation, even though they are not electorally accountable to the people. As most constitutional judges, those of Poland have democratic legitimacy that emanates from their indirect election conducted by the Sejm. If the counter-majoritarian argument has not been an issue, the political control of the CT what concerns politicians.

Political control over the CT has arisen as an issue. A struggle to control constitutional justice would ultimately might be illustrated by three processes: (1) the approval or five



constitutional judges (CJ) by the 7<sup>th</sup> Sejm, (2) the invalidation of the appointments by the 8<sup>th</sup> Sejm and (3) the appointment of five CJ (8<sup>th</sup> legislature). The struggle over the appointment of five judges for the CT: the 7<sup>th</sup> and 8<sup>th</sup> Sejm, both with a different commanding majority sought the way to appoint five constitutional judges, both made unconstitutional decisions, as the CT would later rule. The role of the Sejm in judicial appointments: the adoption of three resolutions on the appointments of CJ, in a scope of two months, made by two different legislatures.

The 7<sup>th</sup> Sejm appointed five “October Judges” (8 October 2015) and the 8<sup>th</sup> legislature passed 5 resolutions invalidating their appointments (25 November 2015). Subsequently, the 8<sup>th</sup> Sejm made five judicial appointments (2 December 2015). The CT took up the review of the issue. Particularly, as the 7<sup>th</sup> Sejm majority approved the appointment of five constitutional judges (Table 2), the newly elected PRP refused to administer the oath necessary for them to hold judicial office (see ACT article 21.1 Act of 25 June 2015). Those appointments were later invalidated by the incoming legislature. In case K 34/15 (17 November 2015), on the election of the 5 constitutional judges (October Judges) by the 7<sup>th</sup> Sejm, the CT – in a chamber of five judges – ruled (3 December 2015) that the legal basis for the election of the three judges replacing those judges whose mandate expired before the end of the 7<sup>th</sup> Sejm, was valid. Therefore, PRP was under the obligation to take sworn them in. On the contrary, on the election of two remaining October judges the 7<sup>th</sup> Sejm made an unconstitutional appointment. Later, in January 2017, the Government would try to remove the three sitting judges from the CT: the prosecutor general – and minister of justice – made a motion to the CT questioning the constitutionality of appointing three judges elected in 2010 (HRW 2017 15).

Subsequently, one of the 8<sup>th</sup> Sejm’s first decisions were the invalidation of five appointments of the October Judges made by the 7<sup>th</sup> legislature on 8 October 2015. It did it by passing five resolutions invalidating the five appointments (25 November 2015). (Table 3). Furthermore, the 8<sup>th</sup> Sejm appointed five new constitutional judges (2 December 2015) by adopting five resolutions despite the preventive measures adopted by the CT (Table 4). The outcome of the conflict was that three Sejm appointed judges could not take office because as the PRP refused to administer the oath. Therefore, by the end of 2016, the CT was practically blocked. The situation left clear the extent to which the process of appointing Constitutional Judges requires the PRP’s participation: for a year (9 December 2015–22 December 2016), he refused to swear three legally elected judges by the 7<sup>th</sup> legislature. The CT annulled the law on which two constitutional judges (out of 5) were elected by the 7<sup>th</sup> legislature. If judges have the power to strike down legislation, their rulings may only be overridden by the legislature through the formal amending process. A legislature can achieve by means of appointing constitutional judges (Colón-Ríos, 2014) although JR gives the judiciary the final voice in the interpretation of a constitution. Legislatures, however, can find ways to reverse or avoid judicial decisions that nullify legislation (Tremblay, 2005).

**Table 2.** 7<sup>th</sup> Sejm. Voting on the election of judges of the Constitutional Tribunal (8 October 2015)

Name	Votes	Coalition pro	Coalition No	Abst	No votes
Roman Hauser	413	274 (PO, PSL, SLD, niez., ZP RP, BC)	137 (PiS, niez., ZP)	2	47
Krzysztof Ślebzak	420	268 (PO, PSL, SLD, niez., RP, BC)	149 (PiS, niez., ZP)	3	40
Andrzej Jakubeckiego	419	272 (PO, PSL, SLD, niez., ZP, RP, BC)	146 (PiS, niez., ZP)	1	41
Bronisław Sitka	418	244 (PO, PSL, SLD, niez.)	167 (PiS, SLD, niez., ZP, RP, BC)	7	42
Andrzej Jan Sokali	418	264 (PO, PiS, PSL, SLD, niez., RP, BC)	151 (PiS, niez., ZP, RP)	3	42

Source: The author with data from: [www.sejm.gov.pl/sejm7.nsf/agent.xsp?symbol=UCHWALYALL&NrKadencji=7&NrPosiedzenia=102](http://www.sejm.gov.pl/sejm7.nsf/agent.xsp?symbol=UCHWALYALL&NrKadencji=7&NrPosiedzenia=102)

Note: 8<sup>th</sup> Sejm. Voting regarding the determination of the lack of legal force of the resolution of the Sejm of the Republic of Poland of 8 October 2015, regarding the election of a judge of the Constitutional Tribunal published in the Monitor Polski of October 23, 2015, item 1038, 1039, 1040, 1041, 1042.

**Table 3.** Is this the cancellation of the October Judges? 25 November 2015

Name	Votes	Coalition pro	Coalition No	Abst	No votes
M.P. 2015 poz. 1038	311	270 (PiS, Kukiz15, niez.)	40 (PO, N, PSL, niez.)	1	149 (PO)
M.P. 2015 poz. 1039	317	273 (PiS, Kukiz15, niez.)	43 (PO, N, PSL, niez.)	1	143 (PO, Kukiz15, PSL)
M.P. 2015 poz. 1040	316	272 (PiS, Kukiz15, niez.)	42 (PO, N, PSL)	1	144 (PO, Kukiz15, PSL, niez.)
M.P. 2015 poz. 1041	316	273 (PiS, Kukiz15, niez.)	42 (PO, N, PSL)	1	144 (PO, Kukiz15, PSL, niez.)
M.P. 2015 poz. 1042	315	272 (PiS, Kukiz15, niez.)	42 (PO, N, PSL)	1	145 (Pis, PO, Kukiz15, PSL, niez.)

Source: the author based on ISAP – Internetowy System Aktów Prawnych (<http://prawo.sejm.gov.pl/isap.nsf/home.xsp>); 8<sup>th</sup> Legislature. Adopted resolutions ([www.sejm.gov.pl/Sejm8.nsf/agent.xsp?symbol=UCHWALYALL&NrKadencji=8&NrPosiedzenia=58](http://www.sejm.gov.pl/Sejm8.nsf/agent.xsp?symbol=UCHWALYALL&NrKadencji=8&NrPosiedzenia=58)).

Note: PO voted no; although one or two members of PiS and Kukiz15 also voted along. The solid support came from PiS and Kukiz15 to pass the motions.

**Table 4.** 8<sup>th</sup> Sejm. List of candidates for judges of the Constitutional Tribunal

Name	Votes	Coalition pro	Coalition No	Abst	Did Not vote
Henryk Cioch	409	236 (PiS, Kukiz1, niez).	167 (PO, Kukiz15, N, PSL, niez).	6	48 (PO, Kukiz15, N, PSL)
Lech Morawski	392	228 (PiS, Kukiz,15, niez).	156 (PO, Kukiz15, N, PSL, niez).	4	65 (PiS, PO, Kukiz15, N, PSL)
Mariusz Roman Muszyński	410	236 (PiS, Kukiz15, niez):	170 (PO, N, PSL, niez).	4	47 (PiS, PO, Kukiz15, PSL)
Julia Anna Przyłębska	407	234 (PiS, Kukiz15, niez)	166 (PO, Kukiz15, N, PSL niez).	7	50 (PiS, PO, Kukiz15, N, PSL)
Piotra Pszczółkowskiego	407	233 (PiS, Kukiz15, niez.)	166 (PiS, PO, N, PSL, niez).	8	50

**Source:** the author based on ISAP – Internetowy System Aktów Prawnych (<http://prawo.sejm.gov.pl/isap.nsf/home.xsp>); 8<sup>th</sup> Legislature. Adopted resolutions ([www.sejm.gov.pl/Sejm8.nsf/agent.xsp?symbol=UCHWALYA LL&NrKadencji=8&NrPosiedzenia=58](http://www.sejm.gov.pl/Sejm8.nsf/agent.xsp?symbol=UCHWALYA LL&NrKadencji=8&NrPosiedzenia=58)).

### 4.3. *The Constitutional Tribunal's Reviews (Act, Act-bis, Act-plus)*

The CT reviewed ACT on three occasions: case no. K 35/15 (ACT amendments of 19 November 2015), case no. K 47/15 (ACT amendments of 22 December 2015 (ACT-bis), and case no. K 39/16 (ACT-plus). The most controversial part of the new legislation was article 137 which provided for the election by the outgoing 7<sup>th</sup> Sejm of constitutional judges; those judges would succeed those whose mandate ended in 2015 – including those whose mandate would end after the end of the 7<sup>th</sup> Sejm. In reviewing case K 34/15, the CT established that the PRP has the obligation to take the oath. It is worth noting that Article 137a, a consequence of ruling K 34/15 was found unconstitutional to the extent that it provided for the election of the three judges by the incoming 8<sup>th</sup> Sejm, replacing judges whose term ended on 6 November 2015. The ruling held that the provision to replace a judge whose term of office expired on 6 November 2015, was incompatible with the constitutional regulation concerning the selection of judges of the CT, and the principle of legality (Article 7 of the Constitution). It also held that breaches of the Sejm's rules of procedure alone did not render the whole amendment unconstitutional. The CT also held that the term of constitutional judges started with their election, not on the day on which they took their oath. The period of 30 days set for the PRP to take the oath from the judges elected by the Sejm was found unconstitutional as well. Thus, ruling K 34/15 established that the PRP has the obligation to take the oath. Moreover, ACT has been at the center of the conflict. As the CT has exercised its powers to review legislation regarding the Act on the Constitutional Tribunal (ACT). The original ACT was enacted in 1997 (ACT-97) and later replaced by the Act on the Constitutional Tribunal of 25 June 2015.

The CT has reviewed ACT three times (Table 5) in cases K 35/15; K 47/15, and K 39/16. First of all, the case K 35/15 on the Amendments of the Act on the Constitutional Tribunal (ACT 19 November 2015). On the constitutionality of this case, the CT ruled (9 December 2015) that the provisions concerning the nomination of candidates and the selection of judges, whose terms began in 2015 (Article 137a) were unconstitutional (Article 137a, a consequence of ruling K 34/15 was found unconstitutional to the extent that it provided for the election of the three judges by the incoming 8<sup>th</sup> Sejm, replacing judges whose term ended on 6 November 2015). In sentence K 35/15, the CT states the obligation of the PRP to immediately take the oath from the judge of the CT elected by the Sejm; further, the CT held that the introduction of a three-year tenure for the CT's President and Vice-President was constitutional although the possibility of their re-election violated the Constitution, since it could undermine the judges' independence. Finally, the early termination of the term of office of the Tribunal's President and the Vice-President's was found to be unconstitutional. It was added that the correctness of the selection of judges was not assessed, but it was acknowledged that enforcing article 137a would lead (based on the legal status of judgment of 3 December) to appointment of judges in a number greater than constitutionally provided.

Second, case no. K 47/15 (8–9 March 2016) examined the constitutionality of the Amendments to ACT (ACT-bis) dated 22 December 2015. These amendments were found to be entirely unconstitutional by a full bench. The judgment held that this law was completely unconstitutional due to violation of constitutional and statutory procedural rules; the hasty adoption of the law, it is argued, violated the principle of the rule of law (Młynarska, 2017, p. 497). Two newly elected judges provided dissenting opinions, insisting that ACT-bis had already entered into force and had to be applied in the case that was considering these same amendments. Now, the case's ruling (9 March 2016) on the constitutional invalidity of the "correction law" is one of the unpublished rulings (K 47/15, K 39/16 and K 44/16). Consequently, ACT-bis is "constitutionally invalid and has a paralyzing effect on constitutional review" (Skąpska, 2018, p. 136), but the Government disputed this: the PM stated that "this verdict is not a verdict at all, but only an opinion expressed by some judges at their informal meeting. Therefore, it need not be published" (Skąpska, 2018, p. 136). The Venice Commission summoned the Government "to publish" the CT verdict of 9 March 2016, on the constitutional invalidity of the "correction law" "as the unquestionable constitutional obligation of the government, as well as to take the oath from the three constitutional judges legally chosen by the former Parliament" (Skąpska, 2018, p. 136). "According to the Venice Commission opinion, fulfilment of both requirements presents the undisputable condition of the restoration of the rule of law and constitutionalism in Poland" (Skąpska, 2018, p. 136). However, PM Szydło, considered that the Commission's opinion is not binding. Consequently, from that moment on there has been a danger of creating parallel legal orders: one based on the "correction law", that, in light of the CT verdict of 9 March 2016 is invalid, and another one, based on the law proclaimed on 25 August 2015, which constitutional validity was

confirmed by CT (3 December 2015). Consequently, some courts and institutions regarded the unpublished verdicts as binding sources of law, while others did not.

Third, case K 39/16 declared ACT-plus (22 July 2016) unconstitutional. This entered into force a month later (16 August 2016), despite the declaration of partial unconstitutionality as the CT annulled several of its provisions (11 August 2016). The Government refused to publish the judgment. However, CT's judgments should be immediately published in the official publication in which the original normative act was promulgated; if a normative act has not been promulgated, then the judgment should be published in the Official Gazette of the Republic of Poland, *Monitor Polski* (Article 190). A CT's judgment takes effect from the day of its publication unless otherwise specified. These rulings show that the problem the CT faced as it exercised JR was not one of legitimacy. Instead, it faced contestation from the legislature (by trying to influence the CT's composition by filling it up with their own judges) and the Executive (Government and the PRP). Rather than legitimacy, what appear to be at stake is the issue of how constitutional justice can be challenged from within the political process. The crisis shows how the control of political power is an equally important principle of Constitutional Democracy. As such, JR does not only prompt question on legitimacy, implying that it should be a foundational center of constitutional democracy.

**Table 5.** Judicial Review of Legislature's decisions

Case	Date	Legislation	Ruling
K 34/15	3 December 2015 17 November 2015	7 <sup>th</sup> Sejm: Appointment of 5 constitutional judges (October Judges)	Partially unconstitutional
K 35/15	9 December 2015	Amendment to the Act on the CT 19 November 2015	Unconstitutional
K 47/15	8–9 March 2016	ACT-bis (Amendments) 22 December 2015	Total unconstitutional
K 39/16	11 August 2016	ACT-plus 22 July 2016	Partially unconstitutional

**Source:** The author based on <http://trybunal.gov.pl>; <http://trybunal.gov.pl/s/k-3415/>; <http://trybunal.gov.pl/s/k-3515/>; <http://trybunal.gov.pl/s/k-4715/>; <http://trybunal.gov.pl/postepowanie-i-orzeczenia/komunikaty-prasowe/komunikaty-przed/art/9143-ustawa-o-trybunale-konstytucyjnym/>

#### 4.4. *The legitimacy of Judicial Review*

Reduced to its essential premises, the debate on judicial review as a counter-majoritarian mechanism assumes that the ultimate source of democratic legitimacy is held by the will of a majority. If the ultimate source of legitimate law-making in a democracy is held by the will of a majority (either the people or their elected representatives), then legislation enacted by a majority in Parliament would be democratically legitimate. Also, the legitimacy of the individuals conducting the function of JR (i.e. constitutional judges) are able

to nullify legislation democratically enacted in accordance with the will of the majority despite having a democratic (i.e. electoral) form of accountability to the people. The fact that constitutional judges have an indirect democratic legitimacy should not be disregarded, but the argument is discussed elsewhere. Consequently, if an institution is empowered with the function to review and ultimately strike down legislation passed by the institution that represents the will of the majority, would inevitably face questions on the sources of its legitimacy. There are, however, problem with legitimacy. Consider the logic of an anti-elitist argument crafted to question the legitimacy of constitutional justice: if the legitimation of all political processes requires the incorporation of a wide range of social opinions and interests. Such a premise is in line with the claim that all affected people by a policy decision should take part in the decision-making process (Gargarella, 1996). In the logic of the counter-majoritarian debate, the calls for the inclusion of all possibly affected people by a public decision mean that a wide range of interests and opinions should take part in decision-making processes. This argument could be deployed against processes where only judges, selected individuals, exercise the highly specialized function of judicially reviewing decisions adopted by representative institutions. The argument can only be exacerbated in the face of technocratic pretensions premised on the assumption that citizens do not need to be consulted extensively if correct (just, impartial) decisions are to be taken. Legitimacy shows further problems when signaling political institutions with differentiated degrees of legitimacy; in such an argument, a constitutional tribunal would appear as a political institution with “lesser democratic legitimacy”, that imposes its authority over representative institutions. Additionally, in questioning the connection of the counter-majoritarian argument with representation, Rational Choice research has argued that the basis to claim that “the political process can or does achieve majoritarian results” is weak. Thus, “[i]f the political process does not reflect the will of the people, why should the judiciary defer to it?” (Elhauge, 1991). Apparently, if this is correct, then the premise that JR interferes with “the will of the majority” can be called into question (Friedman, 1998).

The problems a legitimacy-based critique of judicial review face become visible if confronted with arguments showing that lack of legitimacy is a constitutive part of a Constitutional Democracy and if realized that legitimacy grounded on representation and majority decisions are not the only constitutive parts of contemporary political systems. First, the perennial argument states that lack of legitimacy is a constitutive part of any Constitutional Democracy. The counter-majoritarian debate is in tune with the notion that with a proper theory of the State or a proper theory of legitimacy (i.e. well-drafted Constitution) makes possible cancelling the chances of illegitimacy or lack of legitimacy in the political system (Burgos, 2017). If political authority rests on the articulation of the common interest of a community, it can then be argued that the ultimate source of legitimacy is certainly not located in the legislature alone – or in its lower chamber. Similarly, if the foundation of legitimacy rests on the articulation of the common interest of a community, this notion is precarious since the common interest is dynamic; it changes in time, substance and place.

Therefore, legitimacy would be in constant need of renewal. A dynamic understanding of legitimacy would render the notion of a “complete legitimacy” as unattainable; the implication would be that procedures, actors, institutions lacking legitimacy cannot be fully eradicated from the political system. The second argument against a solely legitimacy-based critique of JR claims that a political system has several forms of legitimation beyond representation and majority-based decisions. Those aspects are placed in different institutional settings rather than exclusively in the legislature. The ubiquitous argument claims that the centers of legitimacy or lack thereof will change in time, space and substance. This dynamic feature means that the claims of lack legitimacy can be extended to virtually every institution of the political system: political parties, the legislature, the electoral system, the territorial structure of the state, the subnational structures, and so on. Therefore, these the perennial and the ubiquitous arguments suggest that the attention on JR should be shifted to emerging issues. These issues appear to be that constitutional justice can be challenged from within the political process. The crisis shows how the control of political power is an equally important principle of Constitutional Democracy. As such, JR does not only prompt question on legitimacy, implying that it should be a foundational center of constitutional democracy.

Furthermore, legitimacy-based critiques of judicial review face the problem of providing incomplete solutions to the very challenges it claims to expose. Counter-majoritarian critiques on judicial review can be questioned by more radical calls for the legitimation of political processes that would emphasize social direct action – and even revolution – as tools to legitimize the political system. The problem with the arguments of legitimacy, grounded on the level of responsiveness to the popular will is that they tend to ignore that legitimacy might be reintroduced into the political system by means of reform (either constitutional or legislative). Furthermore, legitimacy might be reintroduced into the system by means of social mobilization. As social movements often question the legitimacy of the political systems, their success addressing lack-of-legitimacy claims should be more clearly regarded. Indeed, legitimacy as a wider problem of a political system has called for its renewal through protest, resistance and social mobilizations. Therefore, as lack of legitimacy serves as a premise of political change, then revolution should not be disregarded as the final mechanism societies have to re-establish the legitimacy of a system. Thus, the problem with the counter-majoritarian argument is that while it highlights the lack of legitimacy of a very specific function and the indirectly elected officials responsible for its operation, it ignores the real problems associated with the legitimacy of a constitutional democracy.

Thus, whilst the counter-majoritarian debate stresses that legitimacy is the main challenge constitutional justice faces, it fails to openly acknowledge that legitimacy is permanently incomplete; it also fails to recognize that legitimacy is only one of several constitutive features of a contemporary constitutional democracy. This means that constitutional justice reveals the fallibility of majoritarian decisions adopted by representative institutions whilst the counter-majoritarian arguments highlights the shortcomings of judicial review: a judicial ruling can eject a decision, approved by the will of the majority,

from the constitutional system, and the individuals conducting the function of judicial review lack a direct democratic mandate.

Constitutional democracies have mechanisms to respond to majoritarian excesses; mechanisms aimed at ensuring the protection from different expressions of majoritarian interests (either parliamentary or electorally). The main problem, however, is not to be distracted from a meaningful function JR plays in a system: the control of political power and the prevention of its abuse. The Polish crisis is presenting evidence of another type of problem constitutional justices is facing in a country recently democratized. Attempts to politically influence a supreme court of constitutional tribunal are not a new topic of constitutional democracies as the issue of the motivations and interest behind judicial nominations are appointments has been long discussed. In Poland, however, the expression of these issues is broadening up both the scope of empirical problems.

## 5. Judicial Review and the Executive Power

The possibility to coordinate action across the branches of power and the role of the Executive (the Government and the President) are part of the political process in which judicial review operates as a mechanism for the control of political power:

### 5.1. *The Government in Coordination with the Sejm*

The dynamics of the Polish system of government shows that the Government relies on support provided by a parliamentary majority. Thus, with an absolute majority in the Sejm (235/460 seats), PiS formed a government on its own. The role of the Government with regards judicial review cannot be separated from the relationship the legislature has with it. The actions of the Government are consistent with the Sejm's majority. Whether power in the Polish political system rest on the PM or in the parliamentary party is an issue that exceeds the limits of this analysis.

In Poland, the Government exercised political pressure on the CT when the former responded to latter's rulings; it did in three ways: by using its legal powers, by questioning the rulings, and by reducing the Tribunal's budget. In the first way, the Government has used its powers in different means towards the CT. For instance, it reduced the CT's budget in 10% when the Sejm passed 2016 State Budget Bill (30 January 2016); it stated opinions on the CT's rulings, and it expressed opinions on the way in which judicial review was being conducted. The PM's Chancellery questioned (10 December 2015) whether the CT had been correctly composed in the ruling of case K 34/15 (3 December 2015), and if in that case the ruling could be published (Młynarska, 2017, p. 502). Apparently, the PM refused the publication of the sentence, denying the status of the CT decision in connection with, as the government decided, violation of rules of procedure, according to ACT (22 December



2015). To this refusal, the CT replied that its judgments must be published according to the Constitution [Article 190(1) and (2)] (Młynarska, 2017).

Furthermore, the Government questioned the CT's rulings by refusing their publication. The use of the official publications of the Polish state turned to be controversial. The Government refused to publish two rulings from 2016: first, the judgment of 9 March 2016 (case 47/15), the CT adopted 21 judgments which the Government originally refused to publish arguing they were not adopted according to the amendments to ACT of 22 December 2015 – although they were later published. Two judges elected in December 2015 who were assigned cases participated in these cases. In general, CT rulings are published in the Journal of Laws of the Republic of Poland (*Dziennik Ustaw Rzeczypospolitej Polskiej* or *Dz. U.*) as it is the only official source of law for promulgation of Polish laws. The journal is managed by the PM. CT's decisions apply from the date of publication. (Constitution Art. 190.4). The refusal to publish the judgement of 9 March, corresponding to case 47/15 escalated the conflict further.

The second ruling (11 August 2016) reviewed ACT-plus. The CT found unconstitutional a provision: Article 89 of the Act of 22 July 2016 provides that the Tribunal's rulings "*issued in breach of the provisions of the Constitutional Tribunal Act of 25 June 2015 before 20 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*". The PM refused the publication of the judgment, denying the status of the CT judgment in connection with. The government argued that there were "violation of rules of proceeding, as provided for in the act of 22 December 2015"; for similar reasons no further judgments were published until August 2016 (Młynarska, 2017 p. 502).

Thus, when the Government refused to publish CT's rulings, it was preventing their formal incorporation into the legal system. As judgments had to be published according (Article 190.1 and 190.2), the Supreme Court's General Assembly adopted a resolution (27 April 2016) stating that the CT's judgments are binding even if they are not published – in line with this, several local governments declared they would apply unpublished judgments of the CT. There has been potential creation of a parallel legal decisions. Protests emerged in the streets and reactions were heard internationally.

The role of the Polish Government in the JR process points at efforts to politically pressure the CT: when the Government's decisions are in line with those of the Sejm. When the latter passed a new law on CT (Act of Constitutional Tribunal, 22 July 2016) it was published in the Journal of Laws (*Dz.U.* 2016/1157) even when it was ruled unconstitutional by the CT (case K 39/16 of 11 August 2016 referring to ACT-plus) (See Table 5). The Government published 21 'illegally adopted' judgments of CT pursuant to the new Act (16 August 2016).

Finally, the parliamentary party needs to be given a prominent position when analyzing the counter-majoritarian debate, which places emphasis on the will of a majority. Supporting the decisions of the Government and the Sejm's majority or vetoing them signals the importance the parliamentary party has in JR. Neglecting the parliamentary party, particularly

in cabinet-parliamentary systems, risks not paying attention to all the actors that take part in the political process where JR is exercised. In cabinet-parliamentary systems, the party might play a role in the institutional settings in which JR operates.

Not only the Government was consistent with the Sejm's majority, but also, the Government reacted to CT's rulings that were supported by the Sejm: it struck down legislation, either completely or partially, that created a crisis with Europe, and undermined the premise that constitutional justice was the final word on Constitutional matters in Poland.

## 5.2. *The President*

In the judicial review process, the President (PRP) has played a role. In the Polish crisis, he was able to obstruct legislative appointments by discretionally administering the oath to appointees. In the election of the five October Judges: the CT ruled that the 7<sup>th</sup> Sejm's had authority to elect three judges, and that the incoming 8<sup>th</sup> legislature, had powers to elect two more. In this battle, the PRP only took the oath to judges elected by the 8<sup>th</sup> legislature (Table 5); in contrast, he refused to take the oath of three appointees of the 7<sup>th</sup> Sejm for over a year (9 December 2015 to 22 December 2016). Subsequently, PRP took the oath to four judges on 3 December at 1:30 a.m. and on 9. Also, PRP took the oath of one more judge (9 December 2015) – and another one in 28 April 2016 despite CT's rulings. In total, the President accepted the oath of five judges made by the 8<sup>th</sup> Sejm: 4 judges (3 December 2015) – despite the preventive measures adopted by the CT, the Sejm proceeded with the election of five new judges (2 December 2015). The Tribunal's president granted these five appointees the status of employees without judicial duties. The situation suggests that PRP's powers can be something else than procedural duties. In using his powers in a political struggle between two legislatures, and action against the rulings of the CT, the President was able to refuse to take the oath of three constitutional judges legally appointed by the Sejm using his powers beyond a procedural task. On this issue, some constitutionalists, stress that taking the oath to a Sejm appointee is not a constitutional function; but a function that derives from ordinary legislation. Thus, such an exercise of powers is, the argument goes, "unconstitutional". The political effect, however, has that the President has roles to play in the judicial review process. In effect, the President exercised a veto<sup>2</sup>-like power over Sejm's appointments. He was able to block Sejm's appointment and, therefore, he could interfere in the integration of the CT. He also disregarded CT's rulings.

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<sup>2</sup> The most powerful tool a president has is the veto. The PRP would only exercise his veto power in the summer of 2017 on two laws (see HRW 2017).

### **5.3. Recapitulation**

In the analysis of contemporary challenges faced by JR, biased appointments and the blocking of a CT are part of those. Attempts to control the membership of the CT has a direct impact on the Tribunal's performance: its composition has an effect on the formation of majorities and minorities within the chamber; it also effects quorum and votes (Epstein, 2005). There appears to be an incentive for challenging the neutrality of the institution and its members if parliamentary parties assume that the CT's composition is something that could work in their favor. The Government can politically deploy its constitutional and legal powers to refuse the publish of CT's rulings reviewing the legislation passed by the Sejm and can also adopt actions to pressure and criticize the CT's rulings. Equally, the PRP, in the judicial review process, is able to exercise its constitutional authority (i.e. the administration of the oath to legislative appointments, the vetoing of legislation).

In Poland, a competition over the appointments of constitutional judges highlights the politics of appointments; it also highlights the conditions institutional settings establish to the political process. There are two issues that can be analyzed from here: The extent to which the principle of division of powers can be bridged. If the Legislature (Sejm) and the Executive (Government and PRP) are able to act in a coordinated fashion for a common political purpose. The Polish crisis shows that there is a political way to overturn judicially review legislation – and that at some point, political leaders engage in that course of action. The legitimacy problem for the CT is not so much in the line of the counter-majoritarian debate. It is not even in terms of the independence of constitutional justice. The problem lies on the chances for concerted action the Sejm (its majority) and the Government (dependent on a parliamentary majority) together with the President have to undermine a mechanism introduced to control the exercise of political power. The meaningful role the parliamentary party plays in a constitutional democracy is the topic. In Poland, the PiS majority has been a key factor in bridging the separation of powers and making the coordinated action against a tribunal and its rulings possible.

## **6. Conclusions**

In analyzing a political process concerned with the appointment of constitutional judges, Poland's 2015 case presents two important elements. The role of European institutions and street protests are not examined here. First of all, there were three sub-processes: the appointment of five constitutional judges by different legislatures, the overruling of decisions made by one legislature by the other, the appointment of five judges by the next legislature. Second, the process involves four institutions: the Sejm, the Constitutional Tribunal, the Government, and the Presidency. Thus, Judicial review is a political process involving the three powers of the state: The Legislative (Parliament), the Executive (Government

and the President), and the Judiciary (CT). The parliamentary majority plays a role in this process: it is a vehicle to bridge the separation of powers.

Judicial review has been criticized, regarding its function as well as the individuals conducting it from the angle of legitimacy. A critique on judicial review, centered on legitimacy, however, may dismiss the fact that legitimacy is always imperfect. Legitimacy alone provides a weak foundation for democracy. Social movements, mobilizations and protests are also responses to lack of legitimacy. The counter-majoritarian critiques to judicial review mildly addresses a major problem of democracy, however. Once this limitation of JR is exposed, it then becomes clearer that constitutional justice is a mechanism aiming at the control of political power. Finally, judicial review raises questions that future research need to address: the extent to which institutional arrangement facilitates the emergence of crisis, the interaction among the branches of power specific to a cabinet-parliamentary system, and the role the parliamentary party plays in the system.

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