

Mind the Gap: Polish Constitutional Tribunal's Perception Before and After 2015 Constitutional Crisis

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Abstract: The general public's attitude towards the Polish Constitutional Tribunal before 2015 had been characterized by (i) low awareness and (ii) high propensity to give it the benefit of doubt. As a consequence, it enjoyed very high ratio of positive to negative opinions, despite the fact that nearly half of the respondents failed to form any categorical opinion on its performance. In this profile it resembled other technocratic counter-majoritarian institutions like the Monetary Policy Council, Supreme Audit Office or Ombudsman. The constitutional crisis of 2015 substantially changed both characteristics. Unaware public shrunk, and goodwill evaporated – with negative opinions dominating positive ones. In this respect, post-2016 CT became similar to the purely partisan bodies, like parliament chambers. Paper employs representative surveys carried out by Public Opinion Research Center (CBOS) and Polish National Election Study (PNES) over 2002-2021, to document this shift.

Keywords: Polish Constitutional Crisis, Constitutional Tribunal, Institutional Trust, Legitimacy, Polarization, Democratic Backsliding, Illiberal Democracy

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This paper had been presented during *ICON.S Mundo 2021* conference, during panel *What's left after the right: Five Years of "new" Constitutional Tribunal in Poland (2016-2021)*. The author would like to thank for all comments received during and after the conference, and discussion that help improve the paper.

I. Introduction

V-Dem *Democracy Report 2021* denounced Poland the “*top autocratizing country*” over 2010-2020 period, with 0,34 drop in *Liberal Democracy Index* (from 0,83 to 0,49). Thereby, it outperformed Hungary (drop from 0,68 to 0,37) and Turkey (drop from 0,4 to 0,11). The alternative metric, *the Economist Intelligence Unit (2021) Democracy Index* indicated decline from 7,05 in 2010 to 6,85 in 2020 (Hungary declined from 7,21 to 6,56 and Turkey from 5,73 to 4,48). Over the same time, *World Press Freedom Index* recorded Poland slide from 32nd to 62th position (with score worsening from 8,88¹ to 28,65²).

All in all, Poland – once upon a time a poster child of civic society and successful negotiated transition to democracy and market economy – became paragon of the “*third wave of autocratization*” (Lührmann, Lindberg, 2019).

At least in the eyes of scientific community and liberal commentators. In May 2010, 54 percent of Poles asked by the Eurobarometer declared satisfaction with the way democracy works in their country. 39 percent declared dissatisfaction. In Nov. 2019 – before COVID-19 outbreak – the share of satisfied reached 61 percent and those dissatisfied shrunk to 34 percent.³ Pew Research Center (2019) found that in 2019, 71 percent of Poles declared that *voting gives people like them some say about how the government runs things* (26 percent answered the opposite). In 2009 respective figures stood at 47 and 49 percent. On the contrary, *Democracy Perception Index 2021*⁴ of the *Alliance of Democracies* offers different picture, stressing that 66 percent of Poles declare that there is “*not enough democracy*” in their country⁵. The 2018 edition of the DPI⁶, reported that 63 percent of Poles “*never*” or “*rarely*” feel that *the voice of people like them matters in politics*, and 68 percent “*never*” or “*rarely*” feel that *their government is acting in their interest*. Unfortunately, there is no comparable pre-2015 data.

¹ <https://rsf.org/en/world-press-freedom-index-2010>

² <https://rsf.org/en/ranking/2020>

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⁴ <https://www.allianceofdemocracies.org/initiatives/the-copenhagen-democracy-summit/dpi-2021/>

⁵ This view is supported by second question, Think about your country today. How democratic do you think it is? 0 - not at all democratic; 10 - very democratic – with answers 7-10 categorized as democratic (31 percent of Poles selected such answer).

⁶ <https://www.allianceofdemocracies.org/wp-content/uploads/2018/06/Democracy-Perception-Index-2018-1.pdf>

Whatever one's assessment of Poland under right-wing Law&Justice (thereafter L&J) rule⁷, there is no doubt that the conflict with Constitutional Tribunal (thereafter CT) had been its foundational moment. The goal of this paper is to describe - relying on representative nationwide opinion polls - the changes in the CT perception resulting from this conflict.

The history of conflict had been extensively described in Polish (see for example Radziejewicz, Tuleja, 2017) and English-language literature (see for example Wyrzykowski 2017 and Sadurski, 2019b). Thereby there is no need to repeat it in this paper. The same is true as far as international democratic community reaction is concerned (Pech, Scheppele, 2017). It seems enough to just remind Sadurski's (2019a) distinction of three periods of contemporary CT evolution, that illuminates interpretation of the empirical data.

First period was pre-2015 "activist court". Second, was the "paralysed tribunal" during the conflict itself. At this point it is useful to remind Wyrzykowski (2019) distinction between the genuine 2015 constitutional conflict over appointment of five CT judges⁸ and the subsequent all-out "*il-legal*" war against the Constitution of Poland carried on by the constitutional authorities: Parliament, the President and the government".

Finally, as "*war*" had been concluded with L&J loyalists taking over CT, the tribunal had been transformed from *counter-majoritarian device to scrutinise laws* into *supporter of the enhanced majoritarian powers ... a reliable aide of the government and parliamentary majority* (Sadurski, 2019a) The "governmental enabler" eager to help hollow-out other institutions like *National Council of Judiciary* (verdict of Jun. 20nd 2017 no. K 5/17) or pursue right-wing agenda like abortion ban (verdict of Oct. 22nd 2020 no. K 1/20).

The rest of this paper is organized as follows. Section II describes two characteristics of pre-2015 CT: (i) low awareness among the general public, and – despite that - (ii) high propensity to give CT the benefit of the doubt. Section III reports the public opinion on CT during the "*war with the constitution*" while section IV summarizes the changes in CT perception before and after 2015, using simple categorization exercise. Section V concludes and places the result in context of other hyper-polarized polities grappling with populist leaders attempting to free themselves from counter-majoritarian institutions.

⁷ And in the personal view of the author of this paper, "democratic backsliding" is quite appropriate assessment.

⁸ That could be lawfully resolved by adherence to the CT judgment of Dec 3rd 2015, no. K 34/15

II. CT's perception before 2015: low awareness & high goodwill equilibrium

The key concept underpinning the discussion on CT's perception among the general public is *legitimacy*, defined by Easton (1975) as *diffuse support* of the political institution or its '*reservoir of the goodwill*'. The term encompasses willingness to accept authority of the institution as legitimate, and thereby to conform to its decisions. It is contrasted with so called *specific support* - the approval of particular decisions (policies) pursued by the institution. What is particularly relevant in context of Polish experience, Gibson and Caldeira (1995) framed '*diffuse support*' in terms of institutional commitment - '*willingness to defend the institution against structural and functional alterations that would fundamentally alter the role of the institution in society*'.

This theory of *legitimacy* underpinned empirical approaches to its measurement. In particular, it illuminates problems with popular '*confidence question*' – asking respondents about their trust or approval of certain institution. Such wording blurs the distinction between *diffuse* and *specific* support (Gibson, Caldeira, Spence, 2003:364)⁹. Consequently, the researchers developed more sophisticated, multi-item scales. In case of supreme courts, they addressed (i) continuity of their existence¹⁰, (ii) scope of jurisdiction¹¹ and (iii) independence¹² (see, in the context of US Supreme Court: Gibson, Caldeira, 1992; other national Supreme Courts: Gibson, Caldeira, Baird, 1998; the Court of Justice in the European Union: Gibson, Caldeira, 1995).

Unfortunately, according to the author's best knowledge, the sort of survey data required to compile such legitimacy scale is not available for Poland over period relevant for this research¹³. As a consequence, the rest of this paper relies on data as

⁹ As they noted, '*confidence replies seem to reflect both short-term and long-term judgments about the Court, with the greater influence coming from satisfaction with how the Court is performing at the moment*'.

¹⁰ Respondents had been asked: *If [the court] started making a lot of decisions that most people disagree with, it might be better to do away with the court altogether?* – disagreement had been interpreted as indication of the diffuse support.

¹¹ Respondents had been asked: *The right of [the court] to decide certain types of controversial issues should be reduced* – disagreement had been interpreted as indication of the diffuse support.

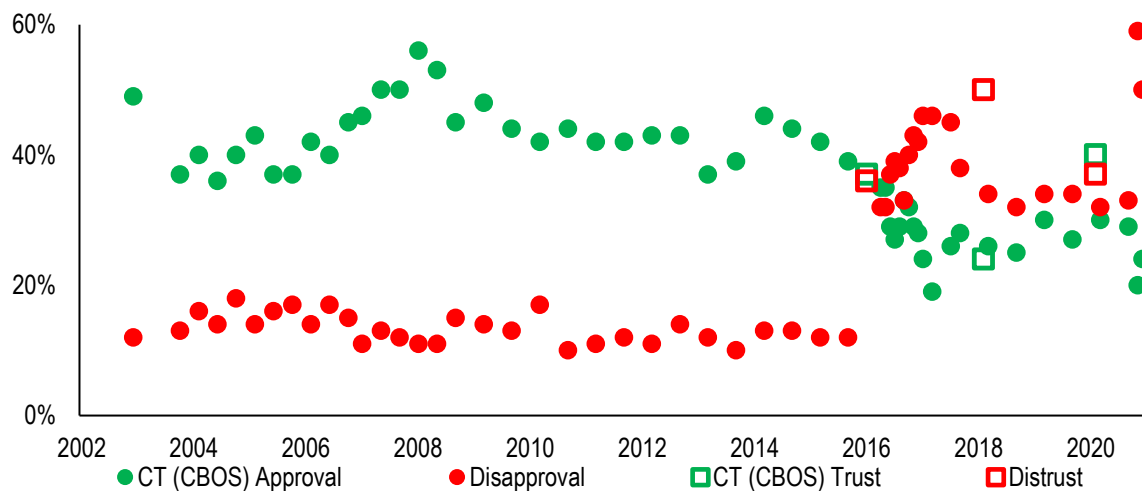
¹² Respondents had been asked: *The political independence of [the court] is essential. Therefore no other institution should be able to override its verdicts, even if it thinks they are harmful* – agreement had been interpreted as indication of the diffuse support. Cann and Yates (2016: 25-26) examined the legitimacy of the US State Courts, replacing the third one with simple (and focused rather on the court jurisprudence, not the respect showed by other institutions): *My state's highest court gets too mixed up in politics*.

¹³ The closest one can get is 2001 edition of Polish National Election Study (PNES), including block of CT legitimacy related questions (individual data can be accessed using Polish Social Data Archive <http://www.ads.org.pl/>): *how well aware of the role of CT; how good job does CT; if CT takes decision people disagree - down with CT; decisions of CT favor some groups more than others; CT gets too mixed up in politics; people should obey CT even when they disagree with its decisions*. Unfortunately, as this poll had been carried out just two decades ago, four years since the adoption of the Constitution of

it is available – implying that obtained results have to be interpreted with caution, through the lens of the findings reported in the literature.

Thereby, the natural departure point for examination of CT’s perception among Polish general public is the ‘*confidence question*’, asked by *Public Opinion Research Center* (thereafter *CBOS*)¹⁴ on routine basis since Dec 2002 (see fig. 1).

Fig 1. CT’s assessment (‘*confidence question*’) over Dec. 2002 – Mar. 2021, CBOS



Source: CBOS research reports, available at <https://www.cbos.pl/PL/publikacje/raporty.php>

With all criticism regarding its reliability and influence of short-term factors (Gibson, Caldeira, Spence, 2003) one can reasonably conclude that public perception of the ‘*activist court*’ (2002-2015) and the ‘*governmental enabler*’ markedly differed.

While the former was characterized by low and stable share of negative assessments, and relatively high (albeit more volatile) share of positive ones – the second period was much more dynamic (episodes of “*war against the constitution*” of 2015-2016 and abortion ban verdict of 2020 are particularly visible) and dominated by the negative assessments. The hypothesis that legitimacy of the CT – understood in terms of *diffuse support* – declined markedly seems warranted.

However, what is less visible in the fig. 1, is the share of respondents unable or unwilling to form categorical assessment of the CT (those picking ‘*don’t know*’ answer). Over the examined period it varied from one fifth to one half of the

1997 and under different political landscape (division between ex-dissidents and ex-communists), its results seems largely irrelevant in the context of this paper.

¹⁴ CBOS, established in 1982, defined itself as ‘a publicly funded independent research centre’ that ‘conducts research to satisfy the needs of Polish public administration bodies and societies at large, as well as various other interested institutions’ [https://www.cbos.pl/EN/about_us/about_us.php One cannot rule out possibility that the ordering is meaningful]. However, CBOS is not the ordinary think-tank or private enterprise – it is regulated by specific law of Feb 20th 1997 on CBOS [Journal of Laws reference 1997.30.163] and supervised by the Prime Minister.

nationwide representative sample – indicating substantial deficits of CT awareness among Polish general public.

As this observation have profound practical implication – uninformed public is likely to apply flawed heuristics (like following partisan leader’s guidance or crowd of similarly-looking individuals on social media) – it requires in-depth scrutiny.

Unfortunately, according to the author’s best knowledge, the most recent poll data addressing the issue of CT awareness in representative sample dates back as far as 2007 – when first L&J government embarked confrontation with CT (see Safjan, 2008).

During 2007 edition of *Polish National Election Study* (thereafter PNES)¹⁵ respondents had been confronted with few basic questions regarding political life, including question on ‘*the institution tasked with determining conformity of laws with basic law*’¹⁶. All in all, 47 percent of respondents managed to provide the correct answer. 34 percent admitted lack of knowledge (*‘don’t know’*) while another 18 percent picked one of the incorrect answers¹⁷.

These figures corresponded with CBOS 2007¹⁸ question on self-assessment of CT awareness. 45 percent of the respondents declared ‘*having heard about CT, and being more or less aware of its role*’. 36 percent declared that they ‘*having heard, but don’t know precisely its role*’ while 19 percent ‘*haven’t heard of CT*’.

Throughout 2007, the share of respondents unable or unwilling to provide answer to the CBOS ‘*confidence question*’ (see fig. 1) amounted to 37-43 percent.

As 2007 parliamentary elections marked the emergence of current duopoly in Polish political landscape¹⁹, it is useful to examine CT awareness among supporters of key parties (fig. 2).

¹⁵ Research project coordinated by Professor R. Markowski, individual data can be accessed using Polish Social Data Archive <http://www.ads.org.pl/>

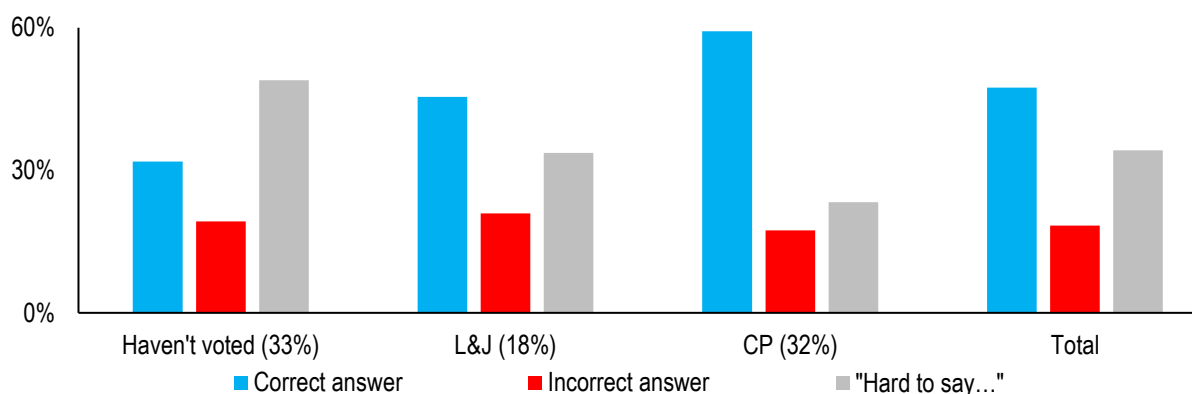
¹⁶ The applied wording – reference to the basic law [*Jaka instytucja orzeka w Polsce o zgodności ustaw z Ustawą Zasadniczą?*] seems somewhat tricky. The term is generally used interchangeably with Constitution – perhaps asking about “*conformity with Constitution*” with “*Constitutional Tribunal*” among offered answers would look too trivial for the researchers designing the questionnaire.

¹⁷ Supreme Court, Tribunal of State, Supreme Administrative Court, Office of Prosecutor General, Minister of Justice.

¹⁸ Question asked during „Aktualne problemy i wydarzenia” poll no 203, carried out between March 30th April 2nd 2007 and summarized in CBOS (2007) *Opinie Polaków o Trybunale Konstytucyjnym*, available in Polish at <https://www.cbos.pl/PL/publikacje/raporty.php>

¹⁹ Various incarnations of Civic Platform of D. Tusk and L&J of Kaczynski brothers – two parties established at the turn of the centuries by younger cohort of anticommunist leaders. Their rivalry replaced nineties conflict of ex-dissidents and ex-communists of Democratic Left Alliance.

Fig 2. 'Institution tasked with determining conformity of laws with basic law', 2007 PNES



Source: Own analysis using PNES 2007 data, individual data can be accessed using Polish Social Data Archive <http://www.ads.org.pl/>

Perhaps not surprisingly, politically disengaged respondents (those who haven't participated in 2007 parliamentary election) were also the most ignorant about the CT role in Polish legal and political system. Civic Platform voters turned out the most sophisticated while L&J voters fell in-between. However, even among CP voters 23 percent of respondents admitted lack of knowledge, and further 17 percent provided incorrect answer. Perhaps surprisingly, the share of voters providing incorrect answers was roughly the same across three subgroups (nearly one-fifth).

As could be reasonably expected, such ignorance is likely to have direct effect on the CT's assessment and even *legitimacy*, understood as *diffuse support*. Unfortunately, both 2007 polls failed to produce data required to test this hypothesis.²⁰ To do this, one must go back as far as to 2004, when CBOS carried out earlier poll on CT²¹.

Two observations stood out. First, there is visible link between self-described awareness of the CT and its positive assessment (and the more general scope of the assessment, the higher share of positive answers²²).

Second, the share of respondents with bad assessment of the CT is very low across all groups. In other words, back in 2004, even Poles declaring that they '*haven't heard*

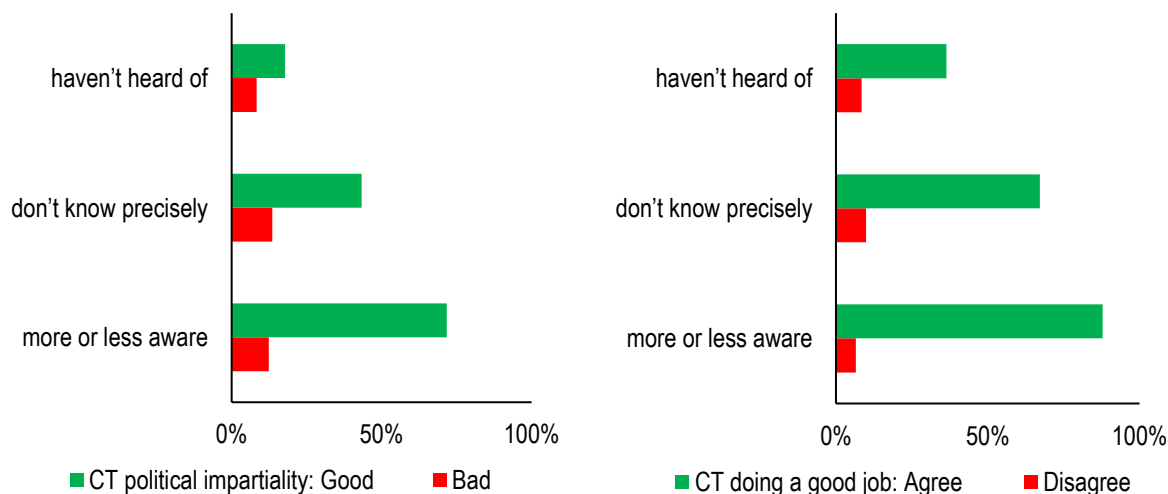
²⁰ 2007 PNES have not explored CT subject further, while CBOS 2007 poll applied CT awareness as a filtering question, thereby dropping respondents declaring that they *haven't heard* on CT.

²¹ Question asked during „Aktualne problemy i wydarzenia” poll no 169, carried out between June 18th and 21st 2004 and summarized in CBOS (2004) Polacy o działalności Trybunału Konstytucyjnego, available in Polish at <https://www.cbos.pl/PL/publikacje/raporty.php>. In this poll identically worded awareness question had been asked without any filtering role, thereby even respondents declaring lack of awareness could answer subsequent questions about assessment of CT performance in various dimensions.

²² As left panel of fig. 3. summarizes answers on the question about CT's political impartiality assessment, while right panel refers to the question: overall, CT is doing good job in the country.

of CT were much more likely to claim that CT is doing good job and remains impartial – quite noticeable ‘reservoir of the goodwill’ to use Easton phrase.

Fig 3. CT’s awareness and assessment, CBOS, 2004



Source: Own analysis using individual data purchased from the CBOS

Taken together, (i) 2004-2015 responses to the ‘confidence question’ (including ‘don’t know’ responses), (ii) 2007 data on CT awareness and (iii) 2004 data suggesting links between awareness and assessment - seem to justify claim that CT’s perception during its ‘activist court’ period (pre-2015) had been characterized by (i) low awareness and (ii) high propensity to give it the benefit of the doubt.

III. CT at War: populist leader, followers and resistance

It seems likely that when Gibson and Caldeira (1995) framed ‘diffuse support’ in terms of ‘willingness to defend the institution’ they haven’t envisioned its measurement via field experiment. However that is essentially what happened in 2015-2016 Poland.

CBOS 2016 poll carried out in the apogee of the “war against the constitution”²³ offers glimpse into the general public perception of the CT and the “war” itself.

²³ Questions asked during „Aktualne problemy i wydarzenia” poll no 311, carried out between March 31st - April 7th 2016 and summarized in CBOS (2016) *Opinie o Trybunale Konstytucyjnym* and CBOS (2016) *Opinia publiczna o sporze wokół Trybunału Konstytucyjnego*, available in Polish at <https://www.cbos.pl/PL/publikacje/raporty.php>

To begin with, CBOS asked battery of questions regarding respondents views on the motives of the enemies.²⁴

Tab. 1. Perception of the motives behind the “war” – aggregate responses

	Strongly agree	Agree	Disagree	Strongly disagree	Don't know
L&J wants to paralyze the CT and govern without any control	26%	23%	20%	14%	17%
L&J wants to increase the effectiveness of government	12%	28%	26%	16%	18%
CT places itself above the law and wants to paralyze the activities of the authorities	9%	17%	32%	20%	22%
CT performs its duties correctly and guards democracy and the rule of law in Poland	17%	34%	15%	9%	25%
The opposition [political protest & social movement] wants to abolish the legally elected authorities with the help of the CT	11%	22%	27%	15%	25%
The opposition [political parties & protest movement] is motivated by the concern about democracy and the rule of law	10%	29%	24%	14%	23%
EU, its politicians and institutions are motivated by the concern about democracy and the rule of law	11%	36%	23%	11%	19%
EU, its politicians and institutions have a negative attitude to L&J and support the opposition	14%	31%	23%	8%	24%
Venice Commission is motivated by the concern about democracy and the rule of law	13%	34%	16%	7%	30%
Venice Commission lacks full knowledge and understanding of the situation in Poland	12%	31%	22%	11%	24%

Source: CBOS (2016) *Opinia publiczna o sporze wokół Trybunału Konstytucyjnego*

As presented in the tab. 1, respondents varied substantially in their assessment of the motives behind the “war” waged against the CT – with higher propensity to trust the integrity of the Tribunal than L&J government. Such perception is also reflected in the ultimate question asked by CBOS - *which side do you support in the conflict around the CT?* From alternatives provided, 45 percent of respondents selected “*CT and groups and parties in opposition to L&J*”, while 29 percent “*Governing party and current authorities*”. In other words, it seems that the *legitimacy* – the *diffuse support* – for the CT still dominated. Remaining 26 percent picked “*don't know*” answer, echoing findings on low awareness of the CT.

Another set of questions addressed respondent’s views on the dynamics of the crisis, and appropriate behavior of its actors. Given the “field experiment” unfolding, such

²⁴ As metaphor of war is quite tempting, it is worth to remind that at the end of the day it is a story of the constitutional institution attacked by populist politicians.

questions provided unique guidance into the CT’s *legitimacy* as understood by Gibson and Caldeira (1995).

First question regarded PM B. Szydło’s decision to refuse publishing in the Journal of Laws CT decision invalidating L&J inspired law “restructuring” the CT.²⁵ Respondents were asked whether *unpublished CT verdict is just the opinion issued against the law* (22 percent of respondents) or *the verdict is nevertheless valid and binding* (45 percent). Once again, one-third of the respondents picked “*hard to say*” answer.

Second question addressed the issue of the CT’s near-future. According to the 59 percent of the respondents the *CT ought to continue working as usual*. Only 21 percent agreed with proposal, that *CT ought freeze until the compromise is reached* – with remaining 20 percent picking “*hard to say*”.

Once again, results suggest substantial goodwill towards the CT – or its high legitimacy – as well as substantial gap in CT awareness. The finding seems even stronger, given the fact that that contrary to the most polls aimed at gauging court’s legitimacy, analyzed questions were not abstract – they directly described ongoing events.

At this point, it is useful to examine in role of political polarization and partisanship in the process of CT-related opinion formation. Given personalist character of L&J, the trust to its leader, J. Kaczyński, as expressed on the feeling thermometer, had been applied (overall, at that time 36 percent of the respondents trusted Kaczyński, while 48 percent distrusted him).

Tab. 2. Trust to J. Kaczyński and position on the “*war*” with CT

	Trusting Kaczyński	Distrusting Kaczyński
Which side do you support in the conflict: Governing party and current authorities	62%	6%
Which side do you support: CT and groups and parties in opposition to L&J	12%	73%
L&J wants to paralyze the CT and govern without any control	22%	75%
CT places itself above the law and wants to paralyze the activities of the authorities	44%	14%
CT verdict [K 47/15] is just the opinion issued against the law	34%	15%
The verdict [K 47/15] is nevertheless valid and binding	27%	62%
CT ought freeze until the compromise is reached	31%	14%
CT ought to continue working as usual	46%	74%

Source: Own analysis using individual data purchased from the CBOS

²⁵ Verdict of March 9th 2016, no. K 47/15

Data presented in the tab. 2 illustrates, that personal attitude to Kaczynski is clearly linked to the views on the “*war against the constitution*”. However, even among those trusting him, substantial fraction provided answers indicating goodwill towards the CT – conviction that unpublished verdict is nevertheless binding and that CT ought to continue its activities. Freezing the CT was supported by just 31 percent of those trusting Kaczynski.

Given prominent role of partisanship in the perception of “*war against the constitution*” it is revealing to trace changes in the CT assessment (*‘confidence question’*) broken down along partisan preferences. Fig. 4 compares it across respondents intending to vote L&J, parties that can be generalized as anti-L&J²⁶ and those disengaged politically (declaring no intention to vote).

Among L&J voters, the initial assessment of the CT had been visibly more pessimistic than in remaining groups. Nevertheless, the general assessment was positive, and the share of L&J voters approving CT activities exceeded approval among no-voting population (bottom-left panel of fig. 4). All in all, before 2015 positive assessments dominated across the party spectrum – despite already high political polarization (see Tworzecki 2019).

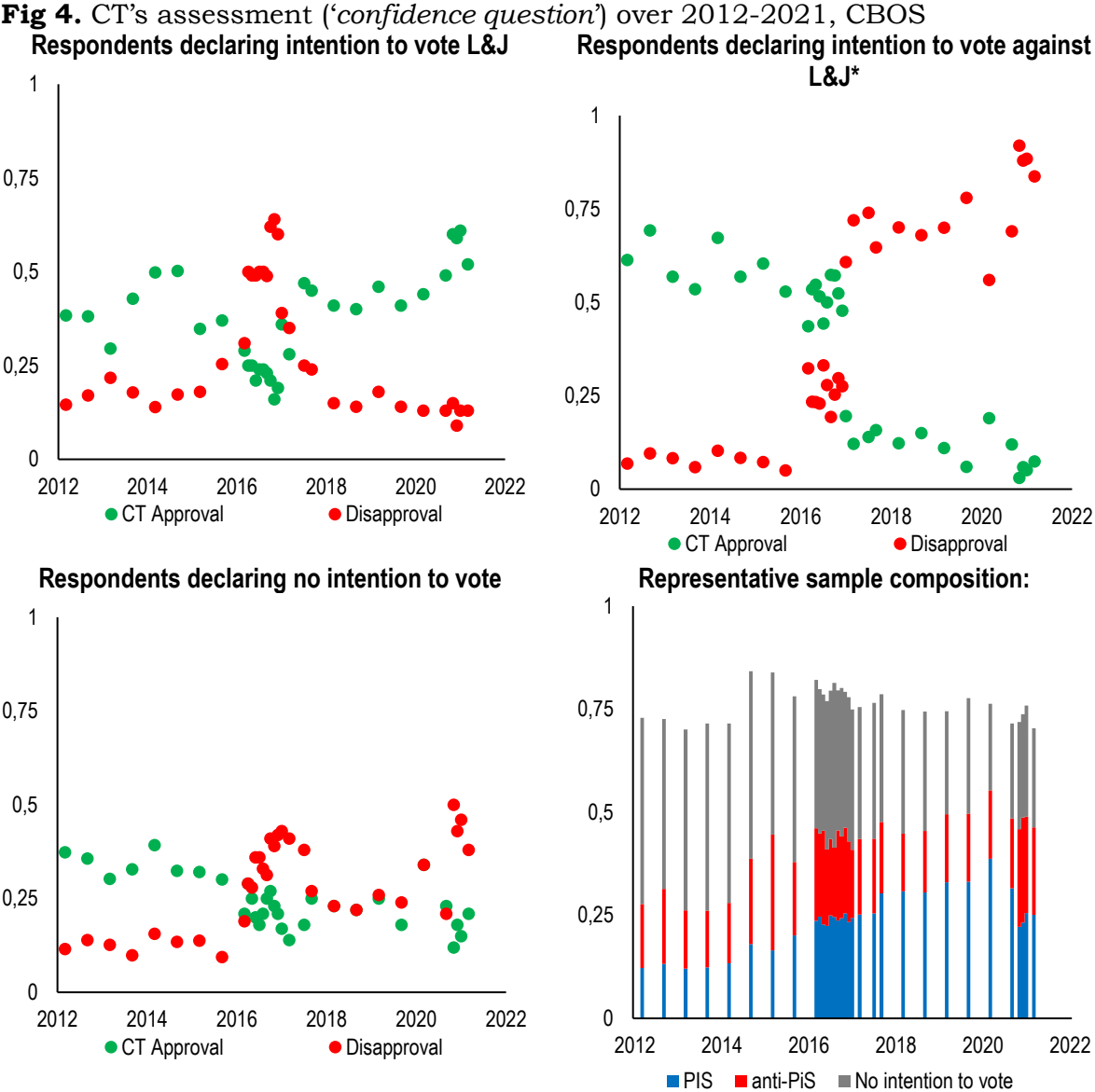
That in turn implies, that the “*war against the constitution*” initiated by the L&J in 2015 had not been driven by underlying sentiments of the voter base. Instead, it was top-down enterprise initiated by party leaders.

The spike of CT’s disapproval at the height of the “*war against the constitution*” and subsequent improvement in approval of “*a governmental enabler*” – “CT” controlled by L&J appointees – suggests that it was upon charismatic, populist leadership to denounce the CT as an enemy of the people. As the proclamation had been made, disapproval of the CT became new article of faith among leader’s followers. Finally, as institution had been taken over and hollowed out, it was proclaimed the defender of the people. The dynamics among L&J opponents took different, but equally predictable path.²⁷

²⁶ During various periods, this group includes: Civic Platform (PO), Modern (N.), Civic Coalition (KO) and Poland 2050 (PL2050).

²⁷ Noteworthy, the share of unaware public (selecting ‘don’t know’ answer) among anti-L&J shrunk substantially, while remained noticeable among L&J voters. The interpretation of this fact would require qualitative research. Two hypothesis seems valid: (i) perception of the CT among L&J voters ‘normalized’ to the pre-2015 levels, or (ii) ‘don’t know’ answer serves as a behavioral tool to maintain group loyalty without explicitly admitting concerns.

Perhaps the most interesting – and the biggest – group of respondents are those disengaged politically (declaring no intention to vote). As could be expected, the share of “hard to say” answers in this group is particularly high. Nevertheless, before 2015 they were substantially more likely to give CT benefit of doubt – which changed after 2016 takeover.



*- weighted average of voters declaring intention to vote on Civic Platform (PO, KO), Modern (N.) and Poland 2050 (PL2050)
 Source: Source: CBOS research reports and data purchased from the CBOS

In all groups except L&J voters, winter of 2020 (the abortion ban²⁸ and subsequent street protests) substantially degraded already poor approval of the “CT”. Although

²⁸ Verdict of Oct. 22nd 2020 no. K 1/20

early polls suggests that the anger became to evaporate - and assessments are gradually returning to their pre-2020 levels - it is too early to draw conclusions on the persistence of the abortion ban effects.

IV. From professional technocrats to partisan mud-wrestlers

Perhaps the best summary of the shift in Polish CT's perception is offered by simple classification exercise, carried out using CBOS data on various institutions assessment (*'confidence question'*). Specifically, 10 public institutions had been selected, including: the President, the cabinet, the lower chamber of the parliament (*Sejm*), the higher chamber (*Senat*), the police, the military, the National Bank of Poland (central bank), the Supreme Audit Office, the Ombudsman – and the Constitutional Tribunal. For all these institutions, available data points on CBOS *'confidence question'* from Sep. 2011 – Mar. 2021 period had been collected (see summary in the Appendix 1).²⁹

Data points had been plotted along two dimensions:

The horizontal axis represents the goodwill towards the institution, as expressed by share of positive assessment divided by the share of negative assessments. In other words, value 9 means that respondent is nine times more likely to approve than disapprove given institution, while 0,1 the other way around. For clarity of the picture, log scale was applied.

The vertical axis represents the awareness of the institution, as expressed by the share of respondents unable or unwilling to form categorical assessment (i.e. picking “hard to say” answer). The axis was reversed, so institutions with categorical assessments from the most respondents are placed at the top.

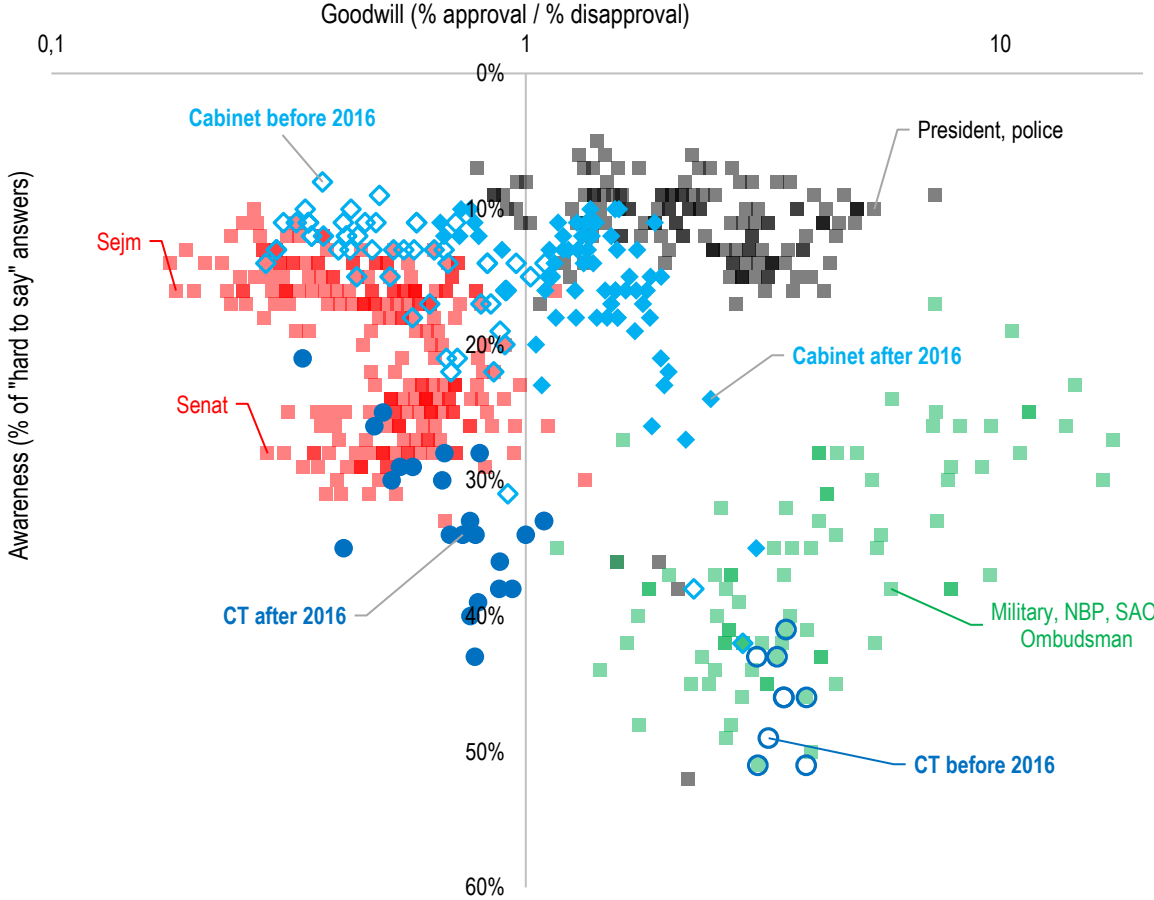
The results are plotted on fig. 5. Perhaps surprisingly, data points representing eight out of ten institutions clustered among three coherent groups. First included both chambers of the parliament – clearly disapproved and with relatively low share of “hard to say” answers (marked red on the fig. 5).

²⁹ The frequency varied across the time and among the institutions. While assessment of the political institutions – President, cabinet, Sejm and Senat – was routinely measured monthly, assessment of the army was carried out twice a year. Changes in the frequency of measurement – reflecting changing political priorities, are also visible on the fig. 1.

Second, included the President of the republic and the police – clearly approved and with low share of “hard to say” answers (marked gray on the fig. 5).

Third, included the military, central bank, Supreme Audit Office and the Ombudsman – clearly approved, but with relatively high share of “hard to say” answers (marked green on the fig. 5) – quite understandable characteristic given technocratic nature of these institutions.

Fig 5. Classification exercise: 10 institutions over Sep. 2011 – Mar. 2021, CBOS



Source: CBOS research reports, available at <https://www.cbos.pl/PL/publikacje/raporty.php>

Noteworthy, this period covers two presidents (B. Komorowski of Civic Platform and A., Duda of L&J), two parliamentary majorities and two governors of the central bank (M. Belka and L&J appointed A. Glapinski) – with no apparent impact on the clustering.

The two institutions that escaped abovementioned clusters were the cabinet (light-blue diamonds on the fig. 5) – located between the first and second group³⁰ and the Constitutional Tribunal, that moved from third to the first cluster (navy-blue dots on the fig. 5).

In other words, CT traveled from the cluster of technocratic institutions (high goodwill and difficulties with assessment), towards the partisan entity resembling the third chamber parliament (low goodwill and easier assessment).

V. Conclusions

This paper attempted to describe - relying on representative nationwide opinion polls - changes in the CT perception, resulting from the “*war against the Constitution*” waged by L&J politicians in 2015-2016.

Perhaps the best summary of such change is offered by simple classification exercise, involving 607 data-points on respondents’ assessment of ten Polish institutions over 2011-2021 period (fig. 5). It portrayed shift of the CT’s perception from technocratic institution, towards partisan entity resembling another chamber of the parliament.

This perception undoubtedly reflected the reality on the ground, summarized by Sadurski (2019b) as a journey from *counter-majoritarian device to scrutinise laws into ... a reliable aide of the government and parliamentary majority*.

However, the finding that the general public – respondents in the nationwide, representative polls – is on average correct in identifying this reality, leaves puzzles. First, what drives firm believers in the “CT” in its current form (see fig. 4). Second, how – despite substantial goodwill towards the CT, L&J managed to win the “*war against the Constitution*” on the ground. And third – perhaps most important – how L&J nevertheless managed to retain hearts and minds, as proved by subsequent elections.³¹

It seems that low awareness of the CT could serve as a useful departure point. Uninformed public, unable to form assessment of the institution on its own, is likely

³⁰ Civic Platform cabinets were located closer to the lower chamber of the Parliament, while L&J cabinets moved closer to the President – perhaps due to the successful implementation of popular economic policies like introduction of the 500+ child benefit and increases in minimum wage.

³¹ 2019 European Parliament elections had been won by L&J with 6,19 million votes, compared to 2,25 million in 2014. 2019 Parliamentary elections with 8,05 million votes, compared to 5,71 million in 2015. 2020 presidential elections had been won by L&J incumbent with 8,45 million votes in first vote (and won run-off), compared to 5,18 million in 2015 first vote.

to be prone to shortcuts – adopting views of charismatic leader, or following the supposedly like-minded crowd (particularly dangerous feature in the age of algorithms amplifying polarization and creating echo-chamber bubbles – let alone orchestrated disinformation campaigns). That creates easily exploitable vulnerability.

The partisanship seems another powerful factor. Assessment of the CT among L&J voters (top-left panel fig. 4) indicates that they were not particularly determined to bring this institution to its knees. On the contrary, the goodwill seemed to dominate, implying that the “war” had been top-down project of the party leadership.

This finding is reinforced by the experience of first L&J government during 2005-2007. Back then CT faced what its retired president M. Safjan (2008) called “*political mobbing*” - “*specific phenomenon of political pressure exerted on the constitutional justice through indirect influence*”. It is likely that only fragility of that-time majority (leading to the snap election of 2007, lost by L&J) saved CT from 2015-like “war”.³²

The spike of CT’s disapproval at the height of the “war” and subsequent sanguine view of the “new CT” among L&J voters suggests specific, cult-like dynamics. It starts with charismatic leader, facing institutional constraint. To free himself, he denounces the institution as ‘*the enemy of the people*’, and introduces its condemnation as yet another article of populist faith. This view is then adopted by the followers – until the “war” is won, and “new” and “purified” institution can finally be accepted.

This mechanism seems quite universal. For example, 2020 electoral defeat prompted president D.J. Trump to question the integrity of US electoral process – turning it immediately into the hottest partisan issue. That in turn resulted in ousting hardline conservative congresswoman L. Cheney³³, whose voting record indicated more allegiance with Trump administration than that of her likely replacement.³⁴ Nevertheless, her unwillingness to reiterate new article of faith – the “stolen election” story – made GOP’s base eager to get rid of her.³⁵

As partisan commitments overweight ‘*institutional commitment*’ and goodwill – even sincerely held, the prospects of constitutionalism looks increasingly gloomy.

³² Noteworthy, L&J undertook two attempts to change procedure of CT president appointment, with likely goal of installing its nominee on the post. Respective documents can be found in Sejm archives from 5th Sejm term, under draft no., 765 [Projekt ustawy o zmianie ustawy o Trybunale Konstytucyjnym] and 2030 [Poselski projekt ustawy o zmianie ustawy o Trybunale Konstytucyjnym].

³³ <https://www.bbc.com/news/world-us-canada-57090202>

³⁴ <https://www.forbes.com/sites/jackbrewster/2021/05/06/whos-more-loyal-cheney-voted-more-with-trump-than-possible-successor-stefanik/>

³⁵ <https://www.economist.com/graphic-detail/2021/05/12/republican-voters-approve-of-their-partys-sacking-of-liz-cheney>

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APPENDIX 1: Summary of the data used in the classification exercise

Fig A.1. Descriptive statistics for CBOS data points used in classification exercise (fig. 5).

		N	Av. Goodwill (% approval / % disapproval)	Av. Awareness (% of "hard to say" answers)
The Constitutional Tribunal	Total	32	1,5	36%
	Before 2016	9	3,5	46%
	After 2017	23	0,7	33%
The Cabinet	Total	119	1,1	15%
	Before 2016	56	0,7	15%
	After 2017	63	1,4	15%
The President		117	2,3	12%

The police	23	3,7	11%
The lower chamber of the parliament (Sejm)	116	0,4	15%
The higher chamber (Senat)	116	0,6	26%
The military	20	9,7	27%
The National Bank of Poland (central bank)	23	4,3	34%
The Supreme Audit Office	20	2,7	41%
The Ombudsman	21	3,1	44%

Source: CBOS research reports, available at <https://www.cbos.pl/PL/publikacje/raporty.php>