Maciej Kozłowski
Jagiellonian University

**Methods of bypassing the Constitution using the example of the National Broadcasting Council, the National Electoral Commission and the National Council of the Judiciary in Poland**

Democratic states around the world are struggling with a new challenge in recent years - the wave of populism. Its rise threatens not only to erode public debate, weakened by the use of populist rhetoric, but also to undermine democratic institutions and the separation of powers as a result of populists taking control of successive state organs. One country experiencing such activity is Poland, which has been struggling in recent years with the takeover of state institutions, increasing centralisation and disruption of the separation of powers. The measures taken to achieve these goals by the ruling party, Law and Justice (PiS), are comparable to strategies adopted by populists in other countries. Consequently, they should be described in detail in order to enable their analysis and the development of counter-measures to enhance the independence of the institutions of democratic states around the world. The publication undertakes to describe the manner of taking over three important institutions of the Polish political system responsible respectively for media governance, the judiciary and the organisation of general elections - the National Broadcasting Council (KRRiT), the National Council of the Judiciary (KRS) and the National Electoral Commission (PKW). It is worth pointing out that the author does not undertake to describe the entirety of the state's political centralisation strategy, but provides a point-by-point account of the ways in which individual institutions are influenced. The text omits a description of the influence on the Constitutional Tribunal (TK) and the Supreme Court due to the fact that its inclusion would exceed the planned size of the publication.

The KRRiT is a body that has existed in the Polish system since 1992, replacing the Committee of Radio and Television. It was also included in the 1997 Constitution of the Republic of Poland, which is considered a rather unique solution.[[1]](#footnote-1) The KRRiT consists of 5 members elected by the Sejm, the Senate and the President for a 6-year term.[[2]](#footnote-2) The complex procedure of appointing the members of the Council, the long term of office and the requirements placed on them meant that the Council was never under direct political control. Nevertheless, having the power to appoint members to the management and supervisory boards of state-owned broadcasting companies made it an attractive 'political booty' and a target for frequent political influence. This state of affairs ended in 2016, when the newly elected PiS government decided to reform the public media with the aim of depoliticising it.[[3]](#footnote-3) The most important way of doing this was to take the power to appoint management and supervisory board members of state broadcasting companies out of the hands of the KRRiT and hand them over to the Minister of Culture. In this way, PiS changed, among others, the CEOs of Telewizja Polska S.A. and Polskie Radio S.A. However, this solution was deemed unconstitutional by the TK so despite not recognising the TK verdict, PiS decided to introduce a new body to staff and supervise state-owned companies - the National Media Council (RMN). The RMN is also composed of five members, but they are elected for a six-year term by the Sejm and the President of Poland.[[4]](#footnote-4) Two members are appointed by the President of the Republic of Poland from candidates nominated by the parliamentary opposition, but this does not ensure any real influence on the functioning of the body.[[5]](#footnote-5) The purpose of creating the RMN was also to depoliticise the state media, but this is contradicted by the election of active MPs to the RMN.[[6]](#footnote-6) The authors of the project themselves admitted that the work was being rushed.[[7]](#footnote-7) The public media reforms resulted in the creation of a twin body to the KRRiT, which took over some of the Council's competences and, being staffed by active politicians, served to take over the public media. An unpublished 2016 judgement of the Constitutional Tribunal[[8]](#footnote-8) indicates that the establishment of the RMN is inconsistent with the Constitution, which establishes the KRRiT as the guardian of media order in Poland.[[9]](#footnote-9) Creating a body that is competitive and takes away its most important competences limits the fulfilment of its constitutional mission.[[10]](#footnote-10) After PiS lost power, the new government changed the authorities of state-owned companies in a controversial manner, although the legal literature has yet to express an opinion on these actions.

The second body described is the KRS, which since 1989 has been responsible for protecting the independence and impartiality of the Polish courts and, most importantly, for selecting judges who are appointed by the President of the Republic of Poland.[[11]](#footnote-11) It is composed of 25 members holding the most important state functions related to the judiciary and elected from among judges, MPs and senators. During its history, most of the controversies and changes concerned the practical dimension of the Council's competences, its functioning and their statutory regulation.[[12]](#footnote-12) This changed in 2017, when the TK ruled the KRS legislation unconstitutional[[13]](#footnote-13) and the Sejm passed a law expiring the term of office of all Council members.[[14]](#footnote-14) Critics of these actions point out that the Court's decision was conditioned by the political connections of the new President of the TK.[[15]](#footnote-15) This bill was vetoed by President Andrzej Duda[[16]](#footnote-16), but another bill was soon passed granting the Sejm the power to elect 21 of the 25 members of the Council instead of the former six.[[17]](#footnote-17) This solution also aroused controversy, based on the vagueness of the article of the Constitution regulating this issue.[[18]](#footnote-18) Point 2 of this provision indicates that the KRS shall consist of fifteen members elected from among judges of the Supreme Court and other courts in Poland, but does not indicate the body making this choice.[[19]](#footnote-19) Until 2017, this provision was interpreted *a contrario* to the next point, which stated that six members of the Council were elected by the Sejm and the Senate, while the 15 members specified in point 2 were elected by the General Assemblies and meetings of court representatives.[[20]](#footnote-20) This interpretation continues to be dominant in the literature, accompanying the indication that the transfer to the Sejm of the competence to elect the 15 members of the Council results in its politicisation.[[21]](#footnote-21) This issue has been the subject of conflicting judgments by the Constitutional Tribunal and the Court of Justice of the European Union,[[22]](#footnote-22) becoming an important element of other political and constitutional crises in Poland. The method of appointing members of the NCJ was not changed after the PiS lost power, but the new Minister of Justice Adam Bodnar announced work on a draft of a relevant bill.[[23]](#footnote-23)

The last body described is the PKW, which in its present form has been in charge of the organisation of general elections in Poland since 1991 but its history dates back as far as the 1920s.[[24]](#footnote-24) It is a body consisting of 9 judges elected for a 9-year term. The Commission's activities in the Third Republic generally escaped most political disputes. The exception was the November 2014 local elections, in which a failed attempt to implement a computer system resulted in a nearly week-long delay in the announcement of official voting results and more serious than usual errors in the election protocols.[[25]](#footnote-25) The situation ended with the immediate resignation of almost the entire membership of the PKW, and public confidence in the institution was restored after the correct organisation of elections in the following years. Despite this, a law was passed in 2018 changing the way the Commission was appointed, granting the Sejm the right to elect seven of them instead of the previous three.[[26]](#footnote-26) Although such an action may give rise to allegations of politicisation of the PKW, these have not surfaced in the public debate and public trust in the institution has been maintained.[[27]](#footnote-27)

The ways in which successive state institutions are politicised, as described in the text, are elements of PiS's activities resulting in accusations of threatening Polish democracy. Describing and understanding them may allow for a safer design of future state institutions and the preparation of a strategy for responding to the populists' actions. The publication may also serve as an introduction to research comparing the conduct of the PiS and other political parties around the world.

1. W. Sokolewicz, *Prasa i Konstytucja*, Warszawa 2011, p. 87. [↑](#footnote-ref-1)
2. Broadcasting Act of 29 December 1992 (*Dziennik Ustaw* of 2022 item 1722 with amendments), Art. 7. [↑](#footnote-ref-2)
3. Explanatory Memorandum to the parliamentary bill on the National Media Council and amendments to certain acts, parliamentary print, no. 592, p. 3. [↑](#footnote-ref-3)
4. Act of 22 June 2016 on National Media Council (*Dziennik Ustaw* of 2021 item 692), art. 3-4. [↑](#footnote-ref-4)
5. *Ibidem*, art. 11, par. 2. [↑](#footnote-ref-5)
6. *Positions and state functions held by persons elected or appointed by the Sejm, status at the end of the term* [*Stanowiska i funkcje państwowe pełnione przez osoby wybierane lub powoływane przez Sejm, stan na koniec kadencji*], Archival website of the Polish Sejm of the 8th term, <https://www.sejm.gov.pl/Sejm8.nsf/page.xsp/stanowiska_funkcje> [accessed: 21.02.2024]. [↑](#footnote-ref-6)
7. Explanatory Memorandum…, p. 1. [↑](#footnote-ref-7)
8. Judgment of the Constitutional Court of 13 December 2016, K 13/16, *Dziennik Ustaw* of 2016, item 2210. [↑](#footnote-ref-8)
9. The Constitution of the Republic of Poland of 2 April 1997 (*Dziennik Ustaw* No. 78, item 483 with amendments). [↑](#footnote-ref-9)
10. K. Todos, *Konstytucyjna pozycja Krajowej Rady Radiofonii i Telewizji a Rada Mediów Narodowych* [in:] *Konstytucyjne podstawy ochrony praw człowieka*, ed. R. Koper, Katowice 2017, p. 90. [↑](#footnote-ref-10)
11. The Constitution…, art. 186, Act of 12 May 2011 on the National Council of the Judiciary (*Dziennik Ustaw* of 2021, item 269 with amendments), Art. 3. [↑](#footnote-ref-11)
12. Judgment of the Constitutional Court of 19 November 2009, K 62/07, *Dziennik Ustaw* No. 202, item 1567. [↑](#footnote-ref-12)
13. Judgment of the Constitutional Court of 20 June 2017, K 5/17, *Dziennik Ustaw* of 2017, item 1183. [↑](#footnote-ref-13)
14. *Government bill amending the Act on the National Council of the Judiciary and certain other acts (parliamentary paper no. 1423)* [*Rządowy projekt ustawy o zmianie ustawy o Krajowej Radzie Sądownictwa oraz niektórych innych ustaw (druk nr 1423)*], Archival website of the Polish Sejm of the 8th term, <https://www.sejm.gov.pl/sejm8.nsf/PrzebiegProc.xsp?nr=1423>, [accessed: 21.02.2024]. [↑](#footnote-ref-14)
15. M. Radajewski, *Wybór członków Krajowej Rady Sądownictwa. Glosa do wyroku TK z dnia 20 czerwca 2017 r., K 5/17*, “Państwo i Prawo” 2018, no. 3, pp. 132-139. [↑](#footnote-ref-15)
16. *The President has returned the law on the NCJ to the Sejm for reconsideration* [*Prezydent przekazał Sejmowi do ponownego rozpatrzenia ustawę o KRS*], Archival website of the Polish President, [https://www.prezydent.pl/prawo/zawetowane/prezydent-przekazal-sejmowi-do-ponownego-rozpatrzenia-ustawe-o-krs,25656](https://www.prezydent.pl/prawo/zawetowane/prezydent-przekazal-sejmowi-do-ponownego-rozpatrzenia-ustawe-o-krs%2C25656) [accessed: 21.02.2024]. [↑](#footnote-ref-16)
17. Act of 8 December 2017 amending the Act on the National Council of the Judiciary and certain other acts (*Dziennik Ustaw* of 2018, item 3) [↑](#footnote-ref-17)
18. The Constitution…, art. 187, par. 1. [↑](#footnote-ref-18)
19. The Constitution…, art. 187, par. 1, point 2. [↑](#footnote-ref-19)
20. Act of 12 May 2011 on the National Council of the Judiciary (*Dziennik Ustaw* of 2016, item 976 with amendments) as at 20 June 2017; L. Garlicki, *Uwagi 3, 6 i 8 do art. 187*, [in:] , *Konstytucja Rzeczypospolitej Polskiej. Komentarz. T. IV*, ed. L. Garlicki, Warszawa 2005. [↑](#footnote-ref-20)
21. L. Garlicki, *Polskie prawo konstytucyjne. Zarys wykładu. Wyd. 5*, Warszawa 2018, p. 39; R. Piotrowski, *Konstytucyjne granice reformowania sądownictwa*, “Krajowa Rada Sądownictwa” 2017, no. 2, pp. 14-15. [↑](#footnote-ref-21)
22. Judgment of the Constitutional Court of 25 March 2019, K 12/18, *Dziennik Ustaw* of 2019, item 609; Judgment of the Court of Justice of the European Union of 19 November 2019, merged cases C-585/18, C-624/18 i C-625/18, ECLI:EU:C:2019:982. [↑](#footnote-ref-22)
23. *Draft amendment to the Act on the National Council of the Judiciary* [*Projekt nowelizacji ustawy o Krajowej Radzie Sądownictwa*], Ministry of Justice website, <https://www.gov.pl/web/sprawiedliwosc/projekt-nowelizacji-ustawy-o-krajowej-radzie-sadownictwa2> [accessed: 21.02.2024]. [↑](#footnote-ref-23)
24. K. W. Czaplicki *et al.*, *Kodeks wyborczy. Komentarz*, Warszawa 2014, p. 379; B. Michalak, A. Sokala, *Leksykon prawa wyborczego i systemów wyborczych*, Warszawa 2010, p. 97. [↑](#footnote-ref-24)
25. M. Feliksiak, *Opinie o działalności parlamentu, prezydenta i PKW*, Centre for Public Opinion Research (CBOS) no. 169/2014, Warszawa 2014, pp. 4-5. [↑](#footnote-ref-25)
26. M. Feliksiak, *Oceny działalności parlamentu, prezydenta, władz lokalnych i PKW*, CBOS no. 152/2018, Warszawa 2018, pp. 5-6. [↑](#footnote-ref-26)
27. K. Pankowski, *Listopadowe oceny działalności prezydenta, PKW oraz ustępującego parlamentu*, CBOS no. 140/2023, Warszawa 2023, pp. 7-8. [↑](#footnote-ref-27)