The Hypocrisy of Authoritarian Populism in Poland: Between the Facade Rhetoric of Political Constitutionalism and the Actual Abuse of Apex Courts

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A discernible rift between the rhetoric of political constitutionalism and the real policy of authoritarian populists – The rhetoric focused on political constitutionalism and popular sovereignty as a façade and a utilitarian argument justifying the introduction of counter-constitutional changes through statute laws – Captured apex courts turned into useful devices of power consolidation – The analysis of the Constitutional Tribunal and the Supreme Court – The Constitutional Tribunal as an 'inverted court' used increasingly often to actively shape the government's Eurosceptic policy – A double face of the Supreme Court – The new Chambers of the Supreme Court introduced to be politically abused by authoritarian populists – Systemic interactions between two captured apex courts have a synergy effect with regard to the process of the denormativisation of the constitution – The deepening politicisation of the apex courts creates a favourable environment for further rule of law deterioration.

Introduction

Emerging 'adjectival constitutionalisms'[1] specify changes in public law and its political environment.[2] One such noticeable shift is the recent resurgence of

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[1]M. Tushnet, 'Varieties of Constitutionalism (Editorial)', 14(1) *International Journal of Constitutional Law* (2016) s. 1-5.

[2]G. Frankenberg, 'Authoritarian Constitutionalism: Coming to Terms with Modernity Nightmares', in H.A. Garcia and G. Frankenberg (eds.), *Authoritarian Constitutionalism. Comparative Analysis and Critique* (Edward Elgar 2019) p. 1.

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populism, posing a serious challenge to modern constitutionalism. As Walker states, populism annexes space between authoritarian and popular constitutionalism, the latter drawing from fundamental assumptions of political constitutionalism.[3] Taking Walker's observation as the starting point, this article critically analyses populist constitutionalism in Poland, focusing on two apex courts: the Constitutional Tribunal and the Supreme Court. It claims that populist constitutionalism in Poland does not provide an internally coherent alternative to legal constitutionalism that could be characterised as political constitutionalism. Rather, populist constitutionalism abuses legal institutions and the traditional mechanisms of legal constitutionalism (such as constitutional review) when convenient for implementing political goals.

First, I argue that populist constitutionalism in Poland should be classified as false/bad populism, which abuses populist rhetoric to pursue authoritarian goals[4] despite maintaining democratic institutions.[5] Populist rhetoric is used at the constitutional level to institutionalise, through legal reforms, a new version of an illiberal regime, which is halfway between 'diminished democracy'[6] and 'competitive authoritarianism'[7] or 'plebisicitary autocracy'.[8]

Second, I claim that academic conceptualisations of populist constitutionalism in Poland that present it as a shift towards political constitutionalism are inaccurate. The critique of legal constitutionalism is merely a political strategy which helps populists stay in power, as evidenced by their approach towards the judiciary. Allegedly fighting against juristocracy, populists use court-packing and court-curbing strategies to capture the apex courts.[9] Subsequently, they put these courts at the centre of shaping state policy, forgetting their harsh criticism of legal constitutionalism. However, political constitutionalism emphasises the role of elected bodies (rather than courts) in implementing and protecting the constitution.

[3]N. Walker, 'Populism and Constitutional Tension', 17 *International Journal of Constitutional Law* (2019) p. 515.

[4]Following Juan José Linz's classical categories, authoritarianism is in between democratic and totalitarian political systems: *see* J.J. Linz, *Totalitarian and Authoritarian Regimes* (Lynne Rienner 2000).

[5]G. Halmai, 'Populism, Authoritarianism and Constitutionalism', 20 *German Law Journal* (2019) p. 296 at p. 298.

[6]D. Collier and S. Levitsky, 'Democracy with Adjectives: Conceptual Innovation in Comparative Research', 49 *World Politics* (1997) p. 430.

[7]S. Levitsky and L.A. Way, 'Elections without Democracy. The Rise of Competitive Authoritarianism', 13 *Journal of Democracy* (2002) p. 51.

[8]W. Sadurski, *Poland's Constitutional Breakdown* (Oxford University Press 2019) p. 242-243.

[9]M. Wyrzykowski and M. Ziółkowski, 'Illiberal Constitutionalism and the Judiciary in Poland', in A. Sajó and R. Uitz, *Routledge Handbook of Illiberalism* (Routledge 2021) p. 517.

Third, I argue that the Constitutional Tribunal and the Supreme Court operate differently under populist rule. The successfully captured Constitutional Tribunal has turned out to be a useful device in a 'denormativisation'[10] of the Constitution. At the same time, the Supreme Court is currently double-faced. Its old chambers still perform their functions independently, whereas the new ones (introduced by Law and Justice governments) implement a pro-governmental agenda, thereby acting as useful devices of power consolidation.

The article is structured as follows. The second section offers an overview of varieties of populist constitutionalism and discusses academic conceptualisations of the populist turn in Poland. The third section outlines the genesis of authoritarian populism in Poland. The fourth section examines the operation of the two apex courts under the populists' rule. The article concludes by grasping the essence of the authoritarian populists' approach towards apex courts.

Varieties of populist constitutionalism

Populist constitutionalism often refers to democratic self-determination, which is equally characteristic of political constitutionalism. Nevertheless, the self-determination of a political community should not be confused with allowing unlimited systemic changes that effectively reach beyond the constitutional framework in force. Political and popular constitutionalism presuppose consensual politics and see the constitution as a set of rules and institutions that allow for managing emerging conflicts.[11]

Populist claims about the need for systemic changes outside the constitutional framework are much more in line with Schmitt's political theory. Schmitt recognises the permanent conflict as necessary due to the political nature of the constitution. Exceptional constitutional violations paradoxically confirm the sovereign constituent power, which is the basis of the radically democratic foundations of all established political and legal institutions.[12] In contrast, political and popular constitutionalisms are based on a liberal and consensual approach to the political. They do not legitimise 'counter constitutional systemic changes and recognise them as simple violations of the constitution.[13] Therefore, as Corrias claims, by not accepting the authority of the law, populist constitutionalism rejects

[10]P. Castillo-Ortiz, 'The Illiberal Abuse of Constitutional Courts in Europe', 15 *EuConst* (2019) p. 48 at p. 67, 70.

[11]R. Bellamy, *Political Constitutionalism. A Republican Defence of the Constitutionality of Democracy* (Cambridge University Press 2009) p. 145.

[12]C. Schmitt, *The Concept of the Political* (University of Chicago Press 2007) p. 26-32.

[13]P. Minkkinen, 'Political Constitutionalism versus Political Constitutional Theory: Law, Power, and Politics', 11 *International Journal of Constitutional Law* (2013) p. 585.

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the dualism of law and politics, the common characteristic of both the American and French revolutions, and the German and British evolutionary approaches to constituent power.[14] It understands the popular will as the ultimate source of legitimacy, which needs to have primacy in the polity.[15] Populism highlights that the constituent power (understood as popular will) is primary to the constituted powers (understood as 'the constitutional system that is put in place by a constituent act').[16]

Populism is a reaction to imperfections of the liberal constitutional paradigm. The unstable balance between various constitutional goods (pluralism-unity, individualism-collectivism, universalism-particularism) deepens the defining tension of contemporary liberal constitutionalism and poses a challenge to all who support it.[17] However, while the populist critique of liberal constitutionalism provides an important insight into the structural problems of liberal democracy, populist constitutionalism[18] – at least right-wing populist constitutionalism in Poland – does not live up to its democratic promise. It adheres to the principles of democracy, but it draws extreme, one-sided conclusions. It violates critical dimensions of democratic constitutionalism, such as pluralism, social inclusion, and genuine civic commitment to constitutionalism.[19]

Although one of the characteristic features of populist constitutionalism is a focus on popular will and representation,[20] in the Polish case there is a discernible rift between the rhetoric hinting at basic tenets of political constitutionalism and the actual policy of authoritarian populists. The latter do not shy away from using courts whenever convenient. While Law and Justice [Pol: *Prawo i Sprawiedliwość* or PiS] proclaimed more democracy and a fight against 'juristocracy', it has been using courts to implement its goals. As Halmai points out, political constitutionalists, like Richard Bellamy, Jeremy Waldron, Akhil Amar, Sandy Levinson, and Mark Tushnet, who themselves differ from one another significantly, emphasise the role of elected bodies instead of courts in implementing and protecting the constitution. However, none of them reject the main principles of constitutional

[14]L. Corrias, 'Populism in Constitutional Key: Constituent Power, Popular Power, Popular Sovereignty and Constitutional Identity', 12(1) *EuConst* (2016) p. 16.

[15]P. Blokker, 'Populism, Constituent Power and Constitutional Imagination', in M. Belov (ed.), *Populist Constitutionalism and Illiberal Democracies. Between Constitutional Imagination, Normative Entrenchment and Political Reality* (Intersentia 2021) p. 155.

[16]J. Grant, 'Justifying Constituent Power in an Age of Populism', 52 *Polity* (2020) p. 3.

[17]Walker, *supra* n. 3.

[18]P. Blokker, 'Populism as Constitutional Project', 17(2) *International Journal of Constitutional Law* (2019) p. 535-536.

[19]Ibid., p. 535-536.

[20]Corrias, *supra* n. 14, p. 18-19.

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democracy.[21] The political constitutionalist defence of legislative over judicial supremacy is underpinned by concerns about the sustainability of the citizens' bond with their representative institutions.[22] Authoritarian populists in Poland, in contrast, forget about their harsh criticism of juristocracy with surprising alactity. Having taken over the courts, they turn them into devices of power consolidation.[23]

Therefore, attempts to conceptualise the recent systemic changes in Poland as a shift towards political constitutionalism[24] are inaccurate.[25] In particular, Stambulski[26] and Czarnota[27] see populist constitutionalism in Poland as, in fact, emerging political constitutionalism that offers resources to criticise hitherto hegemonic legal constitutionalism. However, the authoritarian nature of populist constitutionalism in Poland is not compatible with basic tenets of constitutional democracy, which is common both for legal and political constitutionalism.[28] As Blokker rightly points out, Polish populists do not search for an open and inclusive debate on values and rights. Instead, they impose a specific understanding of Polish history and tradition – rooted in conservative and religious ideas – claiming to represent the majoritarian view in Polish society.[29] The successful political capture of apex courts plays a crucial role in legitimising

[21]G. Halmai, 'Illiberal Constitutional Theories', 5 *Ius Politicum* (2020) p. 147.

[22]A. Cannilla, 'Political constitutionalism in the age of populism', 46 *Revus* (2022), ⟨https://journals.openedition.org/revus/8039#ftn84⟩, visited 24 January 2023.

[23]K.L. Scheppele, 'Autocratic Legalism', 85 *The University of Chicago Law Review* (2018) p. 545.

[24]A. Czarnota, 'Constitutional Breakdown, Backsliding, or New Post-Conventional Constitutionalism?', in U. Belavusau and A. Gliszczyńska-Grabias (eds.), *Constitutionalism under Stress. Essays in Honour of Wojciech Sadurski* (Oxford University Press 2020) p. 48; M. Stambulski and A. Czarnota, 'Janusowe oblicze konstytucjonalizmu', 11 *Krytyka Prawa* (2019) p. 16; A. Czarnota, 'Constitutional Tribunal', *Verfassungsblog*, 3 June 2017, ⟨https://verfassungsblog.de/the-constitutional-tribunal/⟩, visited 24 January 2023.

[25]G. Halmai, 'Illiberal Constitutionalism in East-Central Europe', EUI Working Paper LAW 2019/05, p. 14-16, ⟨https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3486420⟩, visited 24 January 2023.

[26]M. Stambulski, 'Nowa gra w mieście. Polityczny konstytucjonalizm jako krytyka dogmatyki konstytucyjnej/New game in town. Political constitutionalism as a criticism of constitutional dogmatism', in *Jaki konstytucjonalizm? Refleksje nad 'New Democracies in Crisis?' Paula Blokkera* [*What Constitutionalism? Notes on Paul Blokker's 'New Democracies in Crisis?'*], *Politicon I*, ⟨https://www.repozytorium.uni.wroc.pl/dlibra/publication/98319/edition/92238?language=pl⟩, visited 24 January 2023.

[27]Czarnota (2020), *supra* n. 24.

[28]Halmai, *supra* n. 25.

[29]P. Blokker, 'From Legal to Political Constitutionalism?', *Verfassungsblog*, 4 June 2017 ⟨https://verfassungsblog.de/from-legal-to-political-constitutionalism/⟩, visited 24 January 2023.

counter-constitutional policies. The authoritarian populists in Poland abuse the legal constitutionalist toolbox.

Nevertheless, populism as a constitutional project also challenges and instrumentalises political constitutionalism. Hence, both competing theories of constitutionalism should draw appropriate conclusions from the rise of populist movements. Legal constitutionalists may argue for further strengthening the counter-majoritarian safeguards of liberal democracy – rather naively – or admit that previous mechanisms of legal constitutionalism must be supplemented through broader social participation in political decision-making processes (also at the constitutional level). At the same time, political constitutionalism should analyse normative advantages of the law to the outcomes of constitutional decision making and the dangers of leaving the rules of the democratic game in the hands of politicians.[30]

Populism also creates a new research agenda for comparative constitutionalism. A case-by-case assessment of populist constitutionalism should generate criteria for distinguishing between good/true and bad/false[31] populism in practice. This paper does not claim to be comprehensive in this regard. Rather, it focuses on revealing the discernible rift between the rhetoric of political constitutionalism and the actual policy of authoritarian populists in Poland.

Populist constitutionalism à la polonaise: between rhetoric and reality

A slightly broader political and social context should be outlined to fully explain the genesis of authoritarian populism in Poland that began in 2015. Law and Justice [Pol: *Prawo i Sprawiedliwość*] – the main political party forming part of the current ruling coalition – had already been in power in 2005–2007. However, the parliamentary crisis in 2007 led to an early parliamentary election in 2007, won by Civic Platform [Pol: *Platforma Obywatelska*], the second largest party on the Polish political scene. For two terms of the Sejm, Civic Platform formed a ruling coalition with the Polish People's Party [Pol: *Polskie Stronnictwo Ludowe*]. Back in 2005–2007, Law and Justice claimed to be building the 'Fourth Republic' (in contrast to the post-communist 'Third Republic'). They demanded fundamental changes in the Polish political system and criticised the constitutional foundations of the Third Republic established in the Constitution of 1997.[32] They also demanded a moral revival in public life based on national and

[30]Cannilla, *supra* n. 22.
[31]Halmai, *supra* n. 5, p. 297-298.
[32]The official name of the Polish state is the 'Republic of Poland'.

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democratic traditions, a recast of many laws and institutions, social solidarity (in opposition to economic neoliberalism) and the primacy of Polish constitutional law over international law. One of their main objectives was a reform of the judiciary, justified by an excessive duration of court proceedings and the communist past of some Polish judges.[33] As Tacik points out, at that time the Law and Justice party already displayed some populist features, such as fostering extreme political polarisation, scapegoating, using prosecution apparatus for political goals and attacking the judiciary.[34]

After winning the parliamentary elections in 2015,[35] Law and Justice began implementing their goals.[36] Fully aware that their broad political programme might require a constitutional amendment, they had already presented a new constitutional draft in 2010. The draft intended to replace the liberal regime with a more community-oriented nationalist state based on a presidential system.[37] Nevertheless, it was quickly removed from the website of the party as it prepared for the 2011 election (won by the centre-right collation).[38]

Although Law and Justice won the parliamentary elections in 2015 and 2019, it did not obtain a majority of seats sufficient to amend the constitution.[39] Therefore, it focused on implementing a wide-ranging vision of systemic changes through ordinary laws, even when these laws were contrary to well-established constitutional interpretations.[40] In this regard, Poland's legal path of implementing illiberalism differs from the Hungarian one.[41]

[33]A. Kustra-Rogatka, 'An Illiberal Turn or a Counter-Constitutional Revolution? About the Polish Constitutional Tribunal Before and After 2015', in M. Belov (ed.), *Courts and Judicial Activism under Crisis Conditions. Policy Making in a Time of Illiberalism and Emergency Constitutionalism* (Routledge 2022) p. 111.

[34]P. Tacik, 'Polish Constitutionalism under Populist Rule. Revolution without a Revolution', in Belov (ed.), *supra* n. 15, p. 288.

[35]An in-depth analysis of the reasons for the rise of populists to power is presented in I. Krastev and S. Holmes, *The Light that Failed. Why the West is Losing the Fight for Democracy* (Penguin Books 2019), J. Zielonka, *Counter-Revolution Liberal Europe in Retreat* (Oxford University Press 2018); P. Blokker, *New Democracies in Crisis? A Comparative Constitutional Study of the Czech Republic, Hungary, Poland, Romania and Slovakia*, (Routledge 2015).

[36]Andrzej Duda, elected to the office of President in May 2015 (and reelected in 2020), turned out to be a head of state who would accept the Law and Justice political scenario and signed most of the controversial laws enacted by the Sejm. The few decisions to veto a bill were all to create an illusion of independence.

[37]Tacik, *supra* n. 34, p. 288-291.

[38]Ibid., p. 288.

[39]The procedure for amending the Polish Basic Law is governed by Art. 235 of the Constitution.

[40]A comprehensive scholarly analysis of the process of the rule of law and constitutional backsliding in Poland is provided in Sadurski, *supra* n. 8.

[41]For more on both the differences and similarities between the illiberal constitutionalism in Poland and Hungary *see* T. Drinóczi and A. Bień-Kacała, *Illiberal Constitutionalism in Poland*

Kaczyński, the leader of the Law and Justice party, repeatedly stressed the importance of Article 4 of the Polish Constitution. This provision establishes the supreme power of the Polish nation. According to Article 4(2) 'the Nation shall exercise such power directly or through their representatives'. Crucially, Law and Justice emphasised representative democracy, equating parliamentary decisions with the will of the people. For instance, in 2017, Waszczykowski, then Minister of Foreign Affairs, claimed that Law and Justice wants a 'normal' democracy instead of 'adjectival democracy' and that every political party that wins the support of the society and the parliamentary elections 'has the right to implement this program'.[42]

In its rhetoric, Law and Justice treats the Sejm as the 'representative of the sovereign' that should not be overly limited by legal constitutional norms as enforced by judicial bodies. They claim that the political majority expresses the 'true will of the people'. This seems to be Law and Justice's idea of 'political constitutionalism'. At their 2018 Convention, Kaczyński – arguing that his party did not violate the rule of law – stated:

> We are implementing our promises. We have not violated democracy, we implement what is the essence of democracy, because it cannot rely on manipulation.[43]

During the Law and Justice Convention in Lublin in 2019, he stated that 'Only the nation-state can be democratic, it can be a democracy, and we want democracy! We want a simple democracy which means representative democracy'.[44]

These statements correspond to the criticism of legal constitutionalism that characterises Kaczynski's rhetoric. In 2016, he stated that:

> (. . .) the position of the Tribunal must change. It cannot be that a statute law may be repealed by a simple majority of a five-member bench. I confirm my position –

and Hungary. The Deterioration of Democracy, Misuse of Human Rights and Abuse of the Rule of Law (Routledge 2022).

[42]R. Jurszo, 'PiS chce "normalnej demokracji". Liberalna mu nie pasuje. Szczera do bólu wypowiedź Waszczykowskiego', ⟨https://oko.press/pis-chce-normalnej-demokracji-czyli-jakiej/⟩, visited 24 January 2023.

[43]P. Pacewicz, 'Na konwencji PiS Kaczyński zmienił nam ustrój: "Istotą demokracji jest realizowanie obietnic wyborczych"', ⟨https://oko.press/kaczynski-zmienia-w-polsce-ustroj-istota-demokracji-jest-realizowanie-obietnic-wyborczych/⟩, visited 24 January 2023.

[44]P. Pacewicz, 'Kaczyński: Jeden naród, jeden Kościół. "Demokracja skonstruowana prosto". "Każdy dobry Polak musi . . . "', ⟨https://oko.press/kaczynski-jeden-narod-jeden-kosciol-demokracja-skonstruowana-prosto-kazdy-dobry-polak-musi/⟩, visited 24 January 2023.

> one judge cannot decide whether the decision of the parliament elected by millions of citizens will go to the wastepaper basket.[45]

In August 2019, Kaczyński promised his supporters that '(. . .) a day will come when we will change the constitution to the necessary one. A constitution that will guarantee real democracy, real rule of law, real equality that is being violated today – this will be the constitution'. As he noted, the new constitution 'will be clear, distinct, formulated in such a way that it would be as difficult as possible to make various twisted interpretations';[46] Kaczyński's critical evaluation of legal constitutionalism in Poland corresponds to the views presented by Morawski – the prominent legal philosopher who supported Law and Justice reforms and later served as a 'quasi-judge' of the Constitutional Tribunal. In the written version of his controversial speech presented during an academic conference in Oxford he claimed that: 'The Polish government and parliament, in which "Law and Justice" has a majority, defend the doctrine of judicial restraint (judicial passivism or conservatism) (. . .)' whereas 'The opposition, gathered mainly around the "Civic Platform" party, contrary to what is officially claimed, in fact advocates the model of judicial activism (. . .)'.[47] He also added that:

> The Polish Constitution is extremely ambiguous and unclear. (. . .) It gives the Constitutional Tribunal enormous and uncontrolled power which can easily be abused. I think the ambiguity of our Constitution creates opportunities for its very different interpretations and, as a result, leads to continuous disputes and controversies concerning the competences of the Constitutional Tribunal and its place in the system of separation of powers.[48]

The inability to amend the Constitution, coupled with Kaczyński's determination to implement his vision of the state, meant that statutory law became the primary tool for introducing changes to the system – often in gross violation of the binding constitutional norms. At the same time, Law and Justice politicians wished to delegitimise judicial institutions. Constitutional judges, Supreme Court judges and ordinary courts judges were the targets of political attacks. In 2016, Kaczyński argued:

[45]'Kaczyński: Nie jestem reżyserem w teatrze kukiełek', ⟨https://www.rp.pl/polityka/art11135151-kaczynski-nie-jestem-rezyserem-w-teatrze-kukielek⟩, visited 24 January 2023.

[46]'Kaczyński: Przyjdzie taki dzień, że zmienimy konstytucję', ⟨https://wiadomosci.dziennik.pl/polityka/artykuly/604263,kaczynski-konsytucja-zmiana-pis-wybory.html⟩, visited 24 January 2023.

[47]L. Morawski, 'A Critical Response', *Verfassungsblog*, 3 June 2017, ⟨https://verfassungsblog.de/a-critical-response/⟩, visited 24 January 2023.

[48]Ibid.

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> The present Constitutional Tribunal is to be a redoubt, a halfway point, of this system. It defends everything that has been bad and shameful over the past 26 years. And we want to change that, and that is why we have to change this Tribunal . . . Law and Justice wants a 'good Constitutional Tribunal' that 'will really keep the constitution . . .' This is not the Tribunal in its present composition.[49]

Similarly, in 2017, Kaczyński declared that 'The Polish judiciary is one gigantic scandal and this scandal must end'.[50] Beata Szydło, Prime Minister of Poland from 2015 to 2017, argued in 2017 that:

> We know that they [courts – A.K.R.] function wrong. (. . .) There is no democratic control over the judiciary corporation in Poland . . . Themis is said to be blind. Her blindfolded eyes symbolize equality before the law. Until now, Themis had only one eye covered in Poland. She rarely saw crimes committed by the strong. On the other hand, the weak could not always count on justice.[51]

Krystyna Pawłowicz, the former MP supporting Law and Justice and the current judge of the Constitutional Tribunal, argued that 'today, the juristocracy is fighting democracy, the Nation, the Sovereign, the Poles and Poland. Today, judges in Poland debunk the myths about judicial apoliticality, independence and independence of the judiciary'.[52]

After the 2015 elections, it quickly became apparent that the rhetoric hinting at some tenets of political constitutionalism and popular sovereignty (equated by the Law and Justice with the parliamentary majority) was only a façade and a utilitarian argument justifying the introduction of counter-constitutional changes through ordinary statute laws. Gradually, for several years, the ruling coalition focused on dismantling the constitutional check and balance system. The primary goal was to subordinate judicial power to the executive. First, Law and Justice intensified public criticism of a given institution, aimed at its social delegitimisation. Second, it aimed at temporarily paralysing the institution until it was packed

[49]'Kaczyński: Chcemy dobrego Trybunału. To nie jest Trybunał w obecnym składzie', ⟨https://tvn24.pl/polska/marsz-pis-w-warszawie-przemowienie-jaroslawa-kaczynskiego-ra602612-3320602⟩, visited 24 January 2023.

[50]'Kaczyński: Polskie sądownictwo to gigantyczny skandal, 10 February 2017', ⟨https://www.gazetaprawna.pl/wiadomosci/artykuly/1018803,polskie-sadownictwo-kaczynski-pis.html,komentarze-najnowsze,1⟩, visited 24 January 2023.

[51]'Orędzie Beaty Szydło ws. sądów. "Nad korporacją sędziowską nie ma kontroli"', ⟨https://businessinsider.com.pl/wiadomosci/oredzie-beaty-szydlo-ws-sadow-nad-korporacja-sedziowska-nie-ma-kontroli/zgl7zkz⟩, visited 24 January 2023.

[52]K. Pawłowicz, 'Sędziokracja walczy dziś z demokracją . . . Sędziowie sami obalają mity o swojej apolityczności, niezawisłości i niezależności sądów', ⟨https://wpolityce.pl/polityka/407108-prof-pawlowicz-sedziokracja-walczy-dzis-z-demokracja⟩, visited 24 January 2023.

with its loyal supporters. Third, it reactivated the institution and used it in its political games.[53]

For authoritarian populists in Poland, judicial institutions (apex courts, above others) are becoming a convenient tool for introducing policies, especially those that are not acccepted by a large part of society. However, the roles played by the Constitutional Tribunal and the Supreme Court somewhat differ from each other. The Constitutional Tribunal is fully captured, and it merely rubber-stamps political decisions. At the same time, the Supreme Court is internally divided into the previously existing chambers and new chambers introduced by Law and Justice (the Disciplinary Chamber – currently the Chamber of Professional Liability – and the Chamber for Extraordinary Review and Public Affairs[54]). Nonetheless, the operation of both courts demonstrates that Law and Justice's rhetoric hinting at political constitutionalism is only a façade. Having been politically captured, courts become instruments to circumvent constitutional constraints and substitute channels for rubber-stamping political decisions. These developments erode the normative force of the constitution, thereby undermining the very foundations of the rule of law.[55]

Apex courts in Poland under the rule of populists

In this part of the paper, I will focus on a more detailed analysis of the current position of two apex courts: the Constitutional Tribunal and the Supreme Court. Each plays a different role in the current political system, being at a different stage of gradual takeover by the authoritarian populists. Since 2015, the Constitutional Tribunal has come a long way from the victim of a brutal attack to a servant puppet in a political spectacle directed by Law and Justice. The Supreme Court is still only partially taken over by the ruling coalition, and the internal fight between the old and new chambers is still ongoing.[56] Nevertheless, the new First President of the Supreme Court, favourable to the government, ensured the operation of the new chambers.

Moreover, I will examine the case law of both apex courts, which prove that the operative parts of the rulings and the political context of the cases follow and

[53]This scheme of the gradual taking over of the counter-majoritarian body in relation to the Constitutional Tribunal is very aptly described in W. Sadurski, 'Polish Constitutional Tribunal under PiS: from an Activist Court, to a Paralysed Tribunal, to a Governmental Enabler', 11 *Hague Journal on the Rule of Law* (2019) p. 63.

[54]Hereinafter, the 'Chamber for Extraordinary Review'.

[55]With regard to constitutional courts *see* Castillo-Ortiz, *supra* n. 10, p. 51.

[56]*See also* M. Ziółkowski, 'Two Faces of the Polish Supreme Court after "Reforms" of the Judiciary System in Poland: The Question of Judicial Independence and Appointments', 5 *European Papers* (2020) p. 347.

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implement (though in various forms and to varying degrees) the populist politics of the government. I will also analyse the written motives of judicial decisions to potentially identify elements of populist rhetoric, such as the integration of law and politics or the friend-and-foe distinction. Contrary to expanding research regarding judicial populism,[57] I claim that the authoritarian twist of the Polish government's populist politics is usually not directly reflected in the argumentation presented by the politically captured apex courts. The populist rhetoric appears randomly and infrequently, mainly in the rulings of the Disciplinary Chamber and the recent 'Eurosceptic' rulings of the Constitutional Tribunal. However, in principle, courts continue the Polish tradition of legal formalism, one of the legal remnants of the communist past. This systemic absence of populist rhetoric proves that Polish populism is just a façade.

Finally, the analysis of both the operative parts of the rulings and the legal reasoning behind them allows three judicial strategies adopted by the Constitutional Tribunal and the new Chambers of the Supreme Court to be distinguished. The Constitutional Tribunal progressively escalates the radicalism of its decisions, as is evident in cases concerning the relationship between Polish and EU law as regards judicial independence. However, this radicalism is visible in the rulings' operative parts rather than the written motives. In contrast, the Disciplinary Chamber has adopted the strategy of de-escalation. On the one hand, it deprived independent judges of their immunity based on the 'muzzle law'. On the other hand, it visibly took a step back by not deciding to bring an accused judge to the disciplinary trial compulsorily. This de-escalation strategy might have been a reason for the parliamentary decision to dissolve the Disciplinary Chamber and replace it with the Professional Liability Chamber. Last but not least, the Chamber for Extraordinary Review adopted a neutralisation strategy. It avoided entering into political disputes, portraying itself as an independent court. Despite these efforts, its rulings display the pro-governmental agenda.

The Constitutional Tribunal

The Constitutional Tribunal turned out to be the first target of the authoritarian populists in Poland. After a long period of *de facto* paralysis, new judges elected by Law and Justice constituted the majority, and the Tribunal was reactivated. It ruled in a few controversial cases with a vital political context, which aroused controversy in public opinion and which were inconsistent with procedural standards.[58] These cases can be divided into three categories. The first category

[57]A. Bernstein and G. Staszewski, 'Judicial Populism', *Minnesota Law Review* (2021) p. 283, ⟨https://minnesotalawreview.org/article/judicial-populism/⟩, visited 24 January 2023.

[58]Sadurski, *supra* n. 53, p. 77.

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consists of rulings relating solely to domestic law and policy. The second category consists of judicial decisions that do not directly concern EU law and foreign (European) policy, but which indirectly affect the application of EU law in Poland and political decisions concerning Poland's membership in the EU. The third category consists of judgments directly challenging EU law and the ECHR.

The first category of cases will be illustrated by two judgments: of 25 March 2019 (case K 12/18) and of 20 October 2020 (K 1/20). Despite their common feature of referring to purely domestic issues, they differ significantly from each other. Case K 12/18 concerned an issue that did not directly affect the majority of society, i.e. the statute law regulating the composition of the National Council of the Judiciary. Case K 1/20, in turn, regarded one of the key issues relating to reproductive rights, namely the constitutionality of the abortion law in Poland. Therefore the base 'social loads' of those two cases were different.

Case K 12/18 should be presented in the broader context of judicial 'reforms' introduced by the Law and Justice government after winning the parliamentary elections in 2015. One of the first targets of the ruling coalition (apart from the then independent Constitutional Tribunal) was the National Council of Judiciary. As Śledzińska-Simon points out, the establishment of the National Council of the Judiciary in 1989 and the empowerment of the general assemblies of court judges gave rise to the idea of judicial self-government in Poland. It was regarded as a precondition of the separation of powers and judicial independence, neither of which existed under communist rule.[59] Law and Justice changed the method of appointing those members of the National Council of the Judiciary (15 out of a total of 25 members) who are to represent judges. Currently, these judicial members are elected by the Sejm, and not by the judges themselves as previously.[60] The terms of office of the previous judicial members of the National Council of the Judiciary were terminated.[61]

The first manifestation of the modified role of the Constitutional Tribunal was the fact that Case K 12/18 was initiated by the politically captured National Council of the Judiciary itself and the group of Law and Justice senators who supported the introduced changes during the legislative process. Therefore – as Bojarski aptly points out – the case was a politically motivated project hiding behind the mask of constitutional review. Both motions can be called 'fraudulent', because their real purpose – contrary to their content – was not to 'repeal' the unconstitutional provisions of the Act but to receive confirmation from

[59]A. Śledzińksa-Simon, 'The Rise and Fall of Judicial Self-Government in Poland: On Judicial Reform Reversing Democratic Transition', 19 *German Law Journal* (2019) p. 1839 at p. 1848-1851.

[60]Arts. 9a and 11a of the Act.

[61]Art. 6 of the Act.

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the Constitutional Tribunal that the amendment was in compliance with the Constitution.[62] Moreover, the applicants sought to block the judicial review of the Council's resolutions by the Supreme Administrative Court. In this regard, the motions were counter-constitutional as aimed at ensuring the effective political capture of the National Council of the Judiciary.

The Constitutional Tribunal did not disappoint the applicants. It declared that the challenged procedure of appointing judges to the Council was in compliance with the Constitution, and the Supreme Administrative Court was stripped of its competence to review the Council's resolutions. Apart from formal flaws common to all presented decisions of the captured Constitutional Tribunal,[63] the judgment in case K 12/18 poses clear a departure from an established constitutional interpretation according to which the judicial members of the Council are to be elected by judges themselves. This interpretation finds its origin in the Round Table Agreements of 1989 between the democratic opposition and the communist government, which gave rise to an independent Polish State after the collapse of the communist regime.[64] In this regard, the Constitutional Tribunal based its argumentation to a large extent on erroneous statements contained in an earlier judgment of 20 June 2017 (case K 5/17). The laconic argumentation regarding the declaration of unconstitutionality of the Supreme Administrative Court's competence – according to which the Council does not form part of public administration remaining within that Court's jurisdiction – was also purely instrumental to enabling the political capture. The judgment illustrates perfectly the phenomenon of Polish populists' approach to the constitutional interpretation that Brzozowski describes as instrumental cherry-picking.[65]

The judgment in Case K 1/20, concerning abortion, is another example of the abuse of a constitutional court. It is different in several respects from the previous one. Its addressee was not the opposition or the independent parts of the judiciary but society itself. The Constitutional Tribunal was involved in an ideological crusade to tighten the already very restrictive abortion law. Its judgment tried to do away with political responsibility for ideological radicalism by instrumentalising constitutional law. Radical right-wing circles had already tried several times to quash the very narrow exceptions to the abortion ban. However, Law

[62]J. Bojarski, 'Jak przywrócić państwo prawa? Krajowa Rada Sądownictwa', p. 8, ⟨https://www.batory.org.pl/publikacja/jak-przywrocic-panstwo-prawa-krajowa-rada-sadownictwa/⟩, visited 24 January 2023.

[63]These flaws result from the fact that persons who were unlawfully elected to the position of Constitutional Tribunal judge participated in deciding all presented cases.

[64]Śledzińska-Simon, *supra* n. 59, p. 1840.

[65]W. Brzozowski, 'Whatever Works. Constitutional Interpretation in Poland in Times of Populism', in F. Gárdos-Orosz and Z. Szente (eds.), *Populist Challenges to Constitutional Interpretation in Europe and Beyond* (Routledge 2021) p. 188.

and Justice lacked the political clout to pass such a bill. Also, the Constitutional Tribunal had already attempted to make the ruling on abortion, but due to the political turmoil the previous proceedings were discontinued. This time, the Constitutional Tribunal turned out to be a convenient tool for Law and Justice to implement their policy while keeping their 'hands clean'.[66]

The law outlawing abortion had been in force in Poland since 1993. It limited access to abortion to three cases: first, when the pregnancy threatens the life or health of the pregnant woman; second, when prenatal tests or other medical indications suggest a high probability of severe and irreversible foetal harm or an incurable life-threatening disease (the so-called embriopatological exception); third, when there is a reasonable suspicion that the pregnancy resulted from a criminal offence. In 1996 an attempt was made to liberalise this law. A new Act introduced the possibility of terminating a pregnancy when the woman was in difficult living circumstances or in a difficult personal situation. Nevertheless, in 1997, the Constitutional Tribunal ruled that this possibility was incompatible with the constitutional provisions which were in force in Poland at the time.[67] The remaining three exceptions of 1993 were often referred to as an 'abortion compromise'. Until 2020, this restrictive abortion law was being contested unsuccessfully by various social and political actors from both sides of the barricade (either supporters of liberalisation or further restriction).

Case K 1/20 was initiated in autumn 2019 by a group of 119 right-wing deputies. They challenged the constitutionality of the 'embriopathological exception', claiming that it violates the right to life guaranteed in Article 38 of the Constitution. The captured Constitutional Tribunal agreed with the applicants, even though records from the constitution-making process prove that the constitution makers deliberately did not include in Article 38 a clause 'on the protection of life from conception', as suggested by right-wing forces. As Marta Bucholc emphasises, the legal reasoning presented in the ruling is rather concise. At the same time, five dissenting opinions amount to 157 pages.[68] The Tribunal assumed that the challenged embriopathological exception was 'eugenic' in character. It performed a political assessment of this exception without strict reliance on the legal text or legal arguments, reflecting the populist entanglement of law and politics. It rendered this political assessment part of constitutional jurisprudence.[69]

[66]A. Gliszczyńska-Grabias and W. Sadurski, 'The Judgment That Wasn't (But Which Nearly Brought Poland to a Standstill). "Judgment" of the Polish Constitutional Tribunal of 22 October 2020, K1/20', 17(1) *EuConst* (2021) p. 130.

[67]For more about the historical context of the abortion law in Poland *see* Gliszczyńska-Grabias and Sadurski, ibid.

[68]M. Bucholc, 'Abortion Law and Human Rights in Poland: The Closing of the Jurisprudential Horizon', 14 *Hague Journal on the Rule of Law* (2022) p. 88.

[69]Ibid., p. 89.

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The judgment stirred up the largest protests in Poland since the political transition of 1989. Despite the Covid-19 pandemic, hundreds of thousands of people were marching on the streets. The scale of the protests caused political consternation. The written motives of the judgment were e-published as much as three months after the judgment was announced.[70] The surveys carried out after the judgment had been made clearly showed that society does not accept it. Paradoxically, it has even increased support for liberalising the abortion law.[71]

The second category of cases concerns the application of EU law in Poland. It will be discussed based on two rulings: the judgment of 20 April 2020 (U 2/20) and the decision of 21 April 2020 (Kpt 1/20). Both rulings concern 'reforms' of the Supreme Court. Both are indirectly related to the increasingly intense conflict between the Polish government and the EU with regard to the rule of law. They were the first symptom of the Eurosceptic turn in the case law of the Constitutional Tribunal. A closer analysis of these cases will be preceded by a general assessment of the previous case law of the Constitutional Tribunal concerning the constitutional aspects of EU membership. Before the constitutional crisis, the Constitutional Tribunal followed the 'course' set by the other constitutional courts across the EU. Although it was undoubtedly not as europhile as the Belgian Constitutional Court or the Austrian Federal Constitutional Tribunal,[72] its jurisprudence in EU-related matters could not have been called Eurosceptic. The Constitutional Tribunal repeatedly highlighted the primacy of the Polish Constitution[73] but, in practice, its rulings always ensured the effective application of EU law within the Polish legal order.[74] Therefore, the

[70]A. Kustra-Rogatka, 'Populist but not Popular. The Abortion Judgment of the Polish Constitutional Tribunal', *Verfassungsblog*, 3 November 2020, ⟨https://verfassungsblog.de/populist-but-not-popular/⟩, visited 3 February 2023.

[71]M. Chrzczonowicz, '66 proc. za prawem kobiety do przerwania ciąży do 12. tygodnia. Wśród młodych to aż 80 proc.', ⟨https://oko.press/66-proc-za-prawem-kobiety-do-przerwania-ciazy-do-12-tygodnia/⟩, visited 24 January 2023; P. Nowosielska et al., 'Co sądzimy o prawie do aborcji? Młodzi niemal jednomyślni [SONDAŻ]', ⟨https://www.gazetaprawna.pl/wiadomosci/kraj/artykuly/8291619,aborcja-w-polsce-sondaz-mlodzi-zlagodzenie-zaostrzenie.html⟩, visited 24 January 2023.

[72]Such an evaluation of the jurisprudence of the Belgian SK and Austrian SK is primarily due to the fact that these courts are the leaders in the number of questions referred for a preliminary ruling to the ECJ. Nevertheless, in recent years, certain decisions concerning the membership of said courts in the EU have raised a great deal of controversy. *Cf* P. Gérard and W. Verrijdt, 'Belgian Constitutional Court Adopts National Identity Discourse Belgian Constitutional Court no. 62/2016, 28 April 2016', 13(1) *EuConst* (2017) p. 182; A. Orator, 'The Decision of the Austrian Verfassungsgerichtshof on the EU Charter of Fundamental Rights: An Instrument of Leverage or Rearguard Action?', 16 *German Law Journal* (2016) p. 1429.

[73]K 18/04, P 1/05, SK 45/09, K 32/09.

[74]E.g. P 1/05, in which the Constitutional Tribunal obliged the parliament to amend the Constitution so as to ensure its compliance with the European Arrest Warrant and obliged the

judgment of 20 April 2020 and the decision of 21 April 2020 mark not only a breakthrough in the existing jurisprudence on purely domestic issues, but also an evident shift towards the Eurosceptic trait of illiberalism.[75]

Case U 2/20 was initiated by the Prime Minister. He challenged a resolution of the joint chambers of the Supreme Court of 23 January 2020. This resolution implemented the European Court of Justice judgment of 19 November 2019 in case *A.K.* v *Poland*, which concerned the 'reform' of the Supreme Court introduced by Law and Justice.[76] As an already proven 'governmental enabler', the Constitutional Tribunal judgment declared that the resolution violated the Constitution. The judgment is striking, first and foremost, as the Constitutional Tribunal does not have the competence to review judicial or administrative decisions, unless such an act were proven to lay down new legal norms, like a piece of parliamentary legislation. The style of reasoning presented by the Tribunal did not correspond to its immense legal and political effects. The argumentation is rather condensed and formalistic. It falsely (and without a careful examination of counter-argumentation) assumes that the resolution of the Supreme Court introduces new legal norms, whereas in fact it simply implements the European Court of Justice judgment. It avoids any populist claims. Nevertheless, the judgment is another proof of the new role of the Constitutional Tribunal. This former counter-majoritarian institution has been transformed into a body used in fierce political games, not only nationally, but also in relation to Poland's membership of the EU. The political idea behind case U 2/20 was to open the way for the controversial Disciplinary Chamber of the Supreme Court to resume judicial activity. Moreover, the judgment of the Constitutional Tribunal was issued shortly after the European Court of Justice decided to issue interim measures and suspend the activities of the Supreme Court Disciplinary Chamber.[77]

The decision in case Kpt 1/20 issued just one day after the ruling in case U 2/20 complements the Eurosceptic turn in the Constitutional Tribunal and (indirectly) challenges the Supreme Court resolution of 23 January 2020. The case was initiated by the Marshall of the Sejm. This decision of the Constitutional Tribunal formally resolves two 'disputes over authority between central constitutional organs of the State': one between the Sejm and the Supreme Court, and the other between the President and the Supreme Court. The first was thought to concern whether the Supreme Court had the power

courts to apply the Framework Decision on the EAW until the amendment to the Constitution entered into force.

[75]Kustra-Rogatka, *supra* n. 33, p. 121.

[76]For more on the ECJ judgment in case *A.K.* v *Poland see* M. Krajewski and M. Ziółkowski, 'Court of Justice EU Judicial Independence Decentralized: A.K', 57 *Common Market Law Review* (2020) p. 1107.

[77]ECJ 8 April 2020, Case C-791/19.

to issue the resolution of 23 January 2020. The second involved whether the Supreme Court could assess the legality of the act of appointing a judge issued by the President of Poland. Nevertheless, according to the established case law, neither one nor the other should be qualified as such a dispute because all the abovementioned bodies exercised distinct types of authority. The Sejm was engaged in law-making concerning the organisation of the judiciary, the President in judicial appointments, the Supreme Court in judicial review. Despite this, the Constitutional Tribunal decided to resolve both false 'disputes over authority' and declared that the Supreme Court did not have the power to adopt the resolution of 23 January 2020 and to review the effectiveness of the judicial appointments. According to the Tribunal, the Supreme Court encroached upon the law-making authority of the Sejm and the judicial appointment authority of the President. The argumentation presented in the written motives of the resolution contains a few indirect references to populist rhetoric. For instance, the Constitutional Tribunal stated that:

> The Supreme Court ignored the provisions of the Constitution and the binding jurisprudence of the Constitutional Tribunal, adopting content that was obviously contradictory to them.[78]

Further, the Constitutional Tribunal held that:

> The Supreme Court interpreted the provisions of law, leading to a change in the normative state in the sphere of the system and organization of the judiciary, for which it was not competent.[79]

Both quoted passages show a downright hostile attitude towards the old Chambers of the Supreme Court, which are presented as enemies of the Constitution.

The third category of cases will be illustrated by four unprecedented judgments in which the Constitutional Tribunal went one step further in its Eurosceptic turn and directly challenged EU primary law and the European Convention on Human Rights. These are: the ruling of 14 July 2020 in case P 7/20, the judgment of 7 October 2021 in case K 3/21, the ruling of 24 October 2021 in case K 6/21 and the judgment of 10 March 2022 in case K 7/21. The first two concern the constitutionality of the EU's primary law. The other two put in question the constitutionality of a part of Article 6 ECHR.

Case P 7/20 opens the catalogue of these disputable decisions. It was brought by the Disciplinary Chamber, which asked quite directly if the European Court of

[78]Para 2.6 of the part III of the justification.
[79]Para 2.8 of the part III of the justification.

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Justice interim orders with regard to the judiciary in Poland are compatible with the Polish Constitution.[80] The case was initiated shortly after the Vice-President of the European Court of Justice, Rosario Silva de Lapuerta, had issued two interim orders in Case C-204/21 obliging the Polish authorities to freeze the activities of the Disciplinary Chamber and to suspend the effects of its resolutions authorising the prosecution or detention of judges. On the same day, the Polish Constitutional Tribunal issued its judgment in the Case P 7/20, finding that the challenged provisions of the EU Treaties are unconstitutional 'to the extent that they allow the CJEU to order interim measures relating to the functioning of the judiciary in Poland'. The reasoning presented by the Constitutional Tribunal contrasts with the radical outcome of the ruling. It is rather formalistic and extensively draws from former judgments of the Constitutional Tribunal regarding Poland's membership in the EU – above others from the Lisbon Treaty judgment (case K 32/09) and Accession Treaty judgment (case K 18/04) regarding the importance of the principle of the EU acting within the limits of conferred powers and the supremacy of the Constitution. However, the argumentation presented in those rulings was taken out of context and instrumentalised to say that the EU has no power over the organisation of national judiciaries and mechanisms concerning domestic judicial independence. The *ultra vires* claim presented in the operative part appears somewhat softened in the final part of the reasoning where the Constitutional Tribunal held that:

> The Tribunal fully appreciates the place and role of the CJEU as a court solely authorized to adjudicate on the interpretation of European Union law (...).

However:

> With the best will of a pro-European interpretation of the Constitution, it is impossible to interpret the powers of the bodies, institutions and other organizational units of the European Union to suspend Polish laws on the system and jurisdiction of Polish courts (...).[81]

One day later, the European Court of Justice delivered a judgment in Case C-791/19, in which it stated that the system of disciplinary liability of judges in Poland is inconsistent with EU law and, in particular, that the Disciplinary Chamber does not fully guarantee independence and impartiality from the legislative and executive authorities. It also held that the legal regime for the

[80]J. Jaraczewski, 'Polexit or Judicial Dialogue? CJEU and Polish Constitutional Tribunal in July 2021', *Verfassungsblog*, 19 July 2021, ⟨https://verfassungsblog.de/polexit-or-judicial-dialogue/⟩, visited 24 January 2023.

[81]Para 8 of the part III of the reasoning.

disciplinary liability of judges can be used for the political control of court decisions or pressure on judges to influence their decisions.[82] The analysed ruling is yet another proof of the new role of the Constitutional Tribunal, which legitimises violations of EU law.

The second case which illustrates open challenge to the foundations of EU law was brought by the Prime Minister. In a 129-page application he challenged the interpretation of selected provisions of the TEU established in European Court of Justice case law. The obvious background of this politically controversial case was the escalating conflict between Poland and the EU over the duty to ensure effective judicial protection in areas covered by EU law. On 7 October 2021, the Constitutional Tribunal ruled that the challenged EU law provisions within the meaning given to them by the European Court of Justice violated the Constitution.[83] The judgment in case K 3/21 shows that the captured Constitutional Tribunal adopted a strategy of openly attacking the foundations of the EU legal system. The written motives have still not been published, which is unprecedented, given that the standard deadline for the written motives is one month from announcing the judgment. The arguments presented in the oral grounds and the press release, similarly to case P 7/20, disclose the 'whatever works' approach to constitutional interpretation and comparative argumentation (including abusive constitutional borrowings of *ultra vires* review and constitutional identity concepts).[84] The unprecedented scale of undermining the fundamental principles of EU law triggered public discussion on the far-reaching effects of the Eurosceptic turn of the captured constitutional court, including Polexit (not only in terms of values).[85] For the government, the judgment serves as a convenient excuse for not complying with the European Court of Justice rulings.

[82]For more about the political and legal context of the aforementioned cases before the European Court of Justice and the Polish Constitutional Tribunal *see* Jaraczewski, *supra* n. 80; L. Pech, 'Protecting Polish Judges from Political Control. A Brief Analysis of the ECJ's Infringement Ruling in Case C-791/19 (Disciplinary Regime for Judges) and Order in Case C-204/21 R (Muzzle Law)', *Verfassungsblog*, 20 July 2021, ⟨https://verfassungsblog.de/protecting-polish-judges-from-political-control/⟩, visited 24 January 2023.

[83]So called 'partial judgments' (Pol: *wyroki zakresowe*) are judgments in which the Constitutional Tribunal states that a legal provision is compliant or non-compliant with the Constitution in a specific (subjective, objective or temporal) scope of its application.

[84]Brzozowski, *supra* n. 65.

[85]Jaraczewski, *supra* n. 80; T.T. Koncewicz, 'Poland and Europe at a Critical Juncture. What has Happened? What is Happening? What's Next?', *Verfassungsblog*, 16 August 2021, ⟨https://verfassungsblog.de/poland-and-europe-at-a-critical-juncture-what-has-happened-what-is-happening-whats-next/⟩, visited 24 January 2023; M. Nettesheim, 'Exclusion from the EU is Possible as a Last Resort', *Verfassungsblog*, 3 November 2021, ⟨https://verfassungsblog.de/exclusion-from-the-eu-is-possible-as-a-last-resort/⟩, visited 24 January 2023, H.C.H. Hofmann, 'Sealed, Stamped and Delivered. The Publication of the Polish Constitutional Court's Judgment on EU Law Primacy

Another two cases in the discussed category prove that the 'Eurosceptic' turn of the Tribunal goes beyond EU law and refers to the case law of the Council of Europe and the European Court of Human Rights as well. Both cases concern challenges to Article 6 of the Convention within the meaning given to it by the European Court of Human Rights. Both cases were initiated by the Prosecutor General Zbigniew Ziobro (leader of the radical right wing, Eurosceptic party *Solidarna Polska*).

Case K 6/21 was lodged in response to the judgment of the European Court of Human Rights of 7 May 2021, 4907/18 *Xero Flor* v *Poland*, referring to the earlier *Guðmundur Andri Ástráðsson* standard.[86] The European Court of Human Rights held that the Constitutional Tribunal may violate Article 6 ECHR because of the unlawful appointment of some of its members.[87] In the judgment of 24 November 2021, the Constitutional Tribunal declared Article 6 of the ECHR to be unconstitutional: 'to the extent that the term "court" includes the Constitutional Tribunal' and 'insofar as it confers competence on the European Court of Human Rights to review the legality of the election of judges to the Constitutional Tribunal'.[88] It is ironic that the Judge Rapporteur in the case was Mariusz Muszyński, the same quasi-judge to which the European Court of Human Rights judgment in *Xero Flor* was referred.[89] Judgment K 6/21 serves to argue that the judgment of the European Court of Human Rights in *Xero Flor* was delivered *ultra vires* and is not binding on the Polish authorities. The reasoning – similarly to Case P 7/20 – is rather formalistic and based on a narrow interpretation of the Constitutional provisions regarding the Constitutional Tribunal and the judicial system. Judgment K 6/21 serves to justify the Polish authorities' discretion in their obligation to obey judgments of the European Court of Human Rights. In this regard, Poland chose the course set by Russia, which

as Notification of Intent to Withdraw under Art. 50 TEU?', *Verfassungsblog*, 13 October 2021, ⟨https://verfassungsblog.de/sealed-stamped-and-delivered/⟩, visited 24 January 2023; M. Rasmussen, 'A More Complex Union. How Will the EU React to the Polish Challenge? A Historical Perspective', *Verfassungsblog*, 4 November 2021, ⟨https://verfassungsblog.de/a-more-complex-union/⟩, visited 24 January 2023.

[86]ECtHR 1 December 2020, No. 26374/18.

[87]*See further* M. Szwed, 'What Should and What Will Happen After Xero Flor', *Verfassungsblog*, 9 May 2021, ⟨https://verfassungsblog.de/what-should-and-what-will-happen-after-xero-flor/⟩, visited 24 January 2023.

[88]For more on this ruling *see* E. Łętowska, 'The Honest (though Embarrassing) Coming-out of the Polish Constitutional Tribunal', *Verfassungsblog*, 29 November 2021 ⟨https://verfassungsblog.de/the-honest-though-embarrassing-coming-out-of-the-polish-constitutional-tribunal/⟩, visited 24 January 2023.

[89]A. Ploszka, 'It Never Rains but it Pours. The Polish Constitutional Tribunal Declares the European Convention on Human Rights Unconstitutional', *Hague Journal on the Rule of Law* (2022), ⟨https://link.springer.com/article/10.1007/s40803-022-00174-w⟩, visited 24 January 2023.

in 2013 refused to implement a judgment of the European Court of Human Rights. The ruling is also another instrument of pressure on judges not to question the rulings by the Constitutional Tribunal involving unlawfully appointed judges.

Case K 7/21, in turn, should be read in the context of a case brought to the European Court of Human Rights by the Supreme Administrative Court judge Grzęda. He questioned the compliance of changes in the functioning of the National Council of the Judiciary of 2017 and the earlier termination of his mandate as a member of that Council at the time, claiming violations of Article 6 ECHR. The application by the Prosecutor General was intended to counter the already anticipated decision of the European Court of Human Rights in that case. In the judgment of 10 March 2022 the Constitutional Tribunal excluded the possibility of challenging the appointments of judges, shortening their term of office in the National Council of the Judiciary or questioning any other element of the Law and Justice judiciary 'reform' by Polish courts on the grounds of their non-compliance with Article 6 of the Convention. The reasoning presented by the Constitutional Tribunal, again, carefully avoids references to political arguments and tries to appear as an neutral judicial decision. The written motives are based on arguments presented in the previous cases such as K 6/21 and the cherry-picking of instrumental constitutional interpretation. The bittersweet epilogue of this case is the ruling of the Grand Chamber of the ECHR issued 5 days later in the case *Grzęda*, in which the violation of Article 6 ECHR by Poland was declared loud and clear.

The Supreme Court

Assessing the current role of the Supreme Court in political games played by authoritarian populists is definitely more difficult than it is to assess the role of the Constitutional Tribunal. It has been taken over by Law and Justice only partially. Originally, Law and Justice hoped that, by amending the statutory regulation on the retirement age of Supreme Court judges, it would eliminate many politically independent and experienced judges from the so-called 'old' Chambers of the Court. However, after the European Court of Justice's verdict of 24 June 2019 in *European Commission* v *Poland* (C-619/18), Law and Justice withdrew from this idea. Nonetheless, the current ruling coalition has successfully introduced two new chambers – the Disciplinary Chamber and the Chamber of Extraordinary Review. Both consist solely of new judges-members who were chosen by the politicised National Council of the Judiciary. The Disciplinary Chamber is the most controversial, as its main task is to adjudicate disciplinary cases against judges (including Supreme Court judges), attorneys, legal counsel, prosecutors and bailiffs. The Chamber of Extraordinary Review decides on the validity of elections (parliamentary, Presidential, to European Parliament) and

referendums (general and Constitutional), examining the election protests, adjudicating on extraordinary complaints (an extraordinary appellate measure introduced in 2018), examining cases concerning protection of competition, control of energetics, telecommunication and railway transport.

Both Chambers were denied the status of an independent court by supranational courts. The status of the Disciplinary Chamber was challenged by the European Court of Justice in rulings issued in *A.K. and others* v *Sąd Najwyższy* (Cases C-585/18, C-624/18 and C-625/18) and *Commission* v *Poland* (Case C-791/19) and by the European Court of Human Rights in *Reczkowicz* v *Poland*. Also, the Strasbourg Court in *Dolińska-Ficek and Ozimek* v *Poland* (Nos. 49868/19 and 57511/19) decided that the Chamber of Extraordinary Review was not an 'independent and impartial tribunal established by law' within the meaning of Article 6 of the Convention.

The Disciplinary Chamber continued to adjudicate (with the exception of a few short periods when it was partially frozen by the First President of the Supreme Court) despite the Luxembourg Court judgments in cases *A.K. and others* v *Sąd Najwyższy* and *Commision* v *Poland* (Case C-791/19), the resolution of joint Chambers of the Supreme Court of 23 January 2020, the aforementioned interim orders and – last but not least – the order of the Vice-President of the European Court of Justice of 27 November 2021 (Case C-204/21 *Commission* v *Poland*) ordering Poland to pay €1,000,000 per day for non-compliance with earlier interim orders regarding freezing the activities of the Disciplinary Chamber. Nevertheless, the growing supranational conflict about the rule of law, the blocking of the National Recovery Fund and the increasing costs of non-implementation of the Court of Justice judgments made populists consider certain compromises with regard to the Supreme Court. In late July 2021, Prime Minister Mateusz Morawiecki stated that 'today we are in a situation where the operation of the Disciplinary Chamber of the Supreme Court can and should be reviewed. This is because this Chamber has certainly not lived up to all expectations'.[90] This was the first signal that populists were ready to sacrifice the Disciplinary Chamber on the altar of EU funds (much needed to ensure victory in the next elections). In February 2022 President Duda submitted a bill providing for the shutting down of the Disciplinary Chamber. On 9 June 2022, that bill was passed by the Sejm and it entered into force on 15 July 2022.[91] However, shutting down the Chamber did not solve the problem, as the Disciplinary Chamber was relaced by a new body: the Chamber of Professional

[90] *See* ⟨https://www.gazetaprawna.pl/wiadomosci/kraj/artykuly/8214557,morawiecki-izba-dyscyplinarna-sn-tsue-tk-manowska.html⟩, visited 24 January 2023.

[91] Ustawa z dnia 9 czerwca 2022 r. o zmianie ustawy o Sądzie Najwyższym oraz niektórych innych ustaw, Dz. U. 2022, poz. 1259.

Liability, which is still partially composed of judges who were appointed with the participation of the politically captured National Council of the Judiciary.[92]

The Chamber of Extraordinary Review initially took a more respectful approach to the decisions of supranational (and domestic) bodies challenging its status of an independent court. When the three old Chambers of the Supreme Court took the resolution of 23 January 2020 which implemented the Luxembourg Court judgment in case *A.K. and others* v *Sąd Najwyższy*, judges of the Extraordinary Review Chamber respected the resolution and abstained from adjudicating. From 23 January 2020, sessions and hearings of the Chamber of Extraordinary Review were suspended. Officially, this abstention was unrelated to the resolution, but in cases forwarded to the Chamber and requiring rapid resolution because of statutory time limits, judges from the Criminal Chamber ruled. The President of the Chamber of Extraordinary Review, Joanna Lemańska, filed such a motion to the then still First President of the Supreme Court, Małgorzata Gersdorf.[93] Nevertheless, in April 2020 this approach changed and the Chamber started adjudicating again. As a formal justification of such a shift, Article 29 § 3 of the law on the Supreme Court was presented. It stipulates that it is unacceptable to establish or assess by the Supreme Court or any another authority the legality of the appointment of a judge or the power to adjudicate resulting from the appointment.[94] The provision was introduced to the so-called 'muzzle law',[95] which aimed to increase the political control of the judiciary. Still, a few unofficial factors affecting the Chamber's return to adjudication can be identified: the presidential elections scheduled for May 2020 that the Chamber was to validate, cases pending before the Constitutional Tribunal regarding the constitutionality of the Supreme Court's resolution of 23 January 2020 (decided on 20 and 21 April 2020) and finally the upcoming end of the term of office of its First President, Małgorzata Gersdorf. As in the case of the Constitutional Tribunal, filling this office with

[92]At the time of writing this paper, the temporary composition of Chamber of Professional responsibility is made up of five judges (including three appointed with the participation of the politically captured National Council of the Judiciary). Candidates for the Chamber of Professional Accountability were drawn by the First President of the Supreme Court, Małgorzata Manowska. From among them, President Andrzej Duda is to appoint the judges who will make up the final composition of the Chamber.

[93]D. Sitnicka, 'Extraordinary Control and Public Affairs Chamber to Euthanise the Supreme Court's Own Resolution', ⟨https://ruleoflaw.pl/extraordinary-control-and-public-affairs-chamber-to-euthanise-the-supreme-courts-own-resolution/⟩, visited 24 January 2023.

[94]K. Żaczkiewicz-Zborska, 'Izba Kontroli Nadzwyczajnej wróciła do orzekania. Teraz skargi wyborcze', ⟨https://www.prawo.pl/prawnicy-sady/izba-kontroli-nadzwyczajnej-sn-wrocila-do-orzekania,499394.html⟩, visited 24 January 2023.

[95]Ustawa z dnia 20 grudnia 2019 r. o zmianie ustawy – Prawo o ustroju sądów powszechnych, ustawy o Sądzie Najwyższym oraz niektórych innych ustaw, Dz.U.2020, poz. 190.

a person favourable to the current parliamentary majority was considered one of the key elements of the gradual process of taking over this judicial body. The legal status of the current First President of the Supreme Court, Małgorzata Manowska, is questionable.[96]

The increasing number of supranational courts' decisions regarding the Polish reform of the judiciary proves that the Supreme Court is currently a double-faced body. While its old face (the three old Chambers) meets the constitutional and supranational standards of judicial independence, the two new faces (the Disciplinary Chamber and the Chamber of Extraordinary Review) are the result of an effective court-packing strategy and play an increasingly important role in the political games. Nevertheless, the more detailed assessment of the new Chambers must take into account a few salient differences between them. Those dissimilarities result from the specific competences of each Chamber as well as from a different intensity of their pro-government agendas.

As regards the Disciplinary Chamber, its assessment must take into account the wider systemic context resulting from the introduction of the muzzle law, which amended, *inter alia*, the law on the system of common courts.[97] The 'muzzle law' has introduced new types of disciplinary torts for judges, such as the liability of a judge for 'actions questioning the existence of the professional relation of the judge, the effectiveness of the appointment of the judge', 'or the empowerment of the constitutional body of the Republic of Poland' as well as 'engaging in a public activity which cannot be reconciled with the principles of the independence of the courts and the sovereignty of judges'.[98] From the very beginning, the *ratio legis* of this controversial legislation was to bar judges from questioning judicial appointments made by the President (at the request of the 'reformed' National Council of the Judiciary), to forbid them from engaging in political activity and last but not least to restrain them from applying the Constitution and EU law directly. However, the muzzle law was just another, yet very radical element of a gradual destruction of judicial independence. As early as June 2019, when the Disciplinary Chamber had not yet started to operate, the Minister of Justice appointed the Disciplinary Commissioner of the ordinary court judges and two of his deputies. They were called to investigate potential disciplinary offences committed by judges. In addition to their activities, the minister himself was also vested with the right to initiate disciplinary proceedings.

[96]*See* M. Krajewski, M. Ziółkowski, 'Can an Unlawful Judge be the First President of the Supreme Court?', *Verfassungsblog*, 25 May 2020 ⟨https://verfassungsblog.de/can-an-unlawful-judge-be-the-first-president-of-the-supreme-court/⟩, visited 24 January 2023.

[97]Ustawa z dnia 27 lipca 2001 r. Prawo o ustroju sądów powszechnych, Dz. U. z 2020 r. poz. 2072, 2021 r. poz. 1080, 1236.

[98]K. Gajda-Roszczynialska and K. Markiewicz, 'Disciplinary Proceedings as an Instrument for Breaking the Rule of Law in Poland', 12 *Hague Journal on the Rule of Law* (2020) p. 465.

Shortly after their appointment, the Disciplinary Commissioner and his deputies started initial investigations. At first, 'disobedient' (in other words, independent) judges were intimidated by the Disciplinary Commissioners, by being accused of some trivial oversights committed in their past. Nevertheless, over time, the political (ab)use of the new disciplinary regime as an intimidation tool, became increasingly bare faced (*inter alia*, suspension for refusal to adjudicate in a bench with a judge promoted by the new, politically captured National Council of the Judiciary or preliminary reference to the European Court of Justice).

The Disciplinary Chamber plays a crucial role in this multi-element disciplinary regime, as it has exclusive power to waive a judge's immunity and to accuse judges of committing a crime.[99] The cases of Judge Juszczyszyn, Judge Tuleya and Judge Włodzimierz Wróbel illustrate the repressive potential of the Chamber and its visible, yet not escalating, pro-government agenda. In all three cases, the Disciplinary Chamber did not cross the (final) line. Although the decisions may at first appear to be a manifestation of the gradual development of autonomy *vis-à-vis* the executive, in the broader political context they are rather evidence of entering the stage of nuancing the Disciplinary Chamber's political decisions and adapting them to the current social and political situation.

Paweł Juszczyszyn was the first Polish judge to take responsibility for the implementation of the European Court of Justice judgment of 19 November 2019. He decided to examine the legal status of the judge who had issued the ruling in the first instance. To this end, he asked the Head of the Chancellery of the Sejm to present applications submitted to the Chancellery of the Sejm of candidates and lists of citizens and lists of judges supporting the candidates subsequently elected to the National Council of the Judiciary. In late December 2019, Adam Roch – a former prosecutor with a controversial past who was, however, considered a 'mild (non-) judge' in the Disciplinary Chamber – overruled the decision of the regional court to suspend Juszczyszyn. However, the decision was challenged by the Deputy Disciplinary Prosecutor of Judges of Common Courts, Judge Przemysław Radzik. On 4 February 2020, the second instance of the Disciplinary Chamber decided to change the decision of the first instance and suspended Justice Paweł Juszczyszyn from his post and reduced his remuneration by 40%.[100] The Disciplinary Chamber held that:

> The CJEU judgment does not provide any grounds for encroaching on the prerogatives of the head of state and for judges to decide who is a judge and who is not. In view of the extremely professional nature of the judicial service, even a possible

[99]Ibid., p. 465.
[100]Ibid., p. 469.

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> error in the interpretation of the legal effects of the CJEU judgment does not justify the defendant's behavior. Moreover, his readiness to act ad hoc (as evidenced by his reaction only a day after the ruling of the CJEU), without further rethinking the meaning and effects of the CJEU ruling, weakens faith in the rationality of the judge's decisions.[101]

Igor Tuleya – the judge of the District Court in Warsaw – criticised the judicial 'reforms' introduced by the government and asked the Luxembourg Court for a preliminary ruling on the compliance of these systemic changes with EU law standards of effective legal protection. On 18 November 2020 the Disciplinary Chamber decided that he had lost his judge's immunity following breach of official duties and abuse of powers.[102] In the full written motives of the decision there are a few striking passages. In the first one the Disciplinary Chamber:

> (. . .) drew attention to the behavior of judge I.T., who first ended the oral motives of the ruling, removed the chain, and then asked the parties to return to their places, reattached the chain and continued his speech, this time extensively disclosing the materials of the preparatory proceedings. This clearly indicates the awareness of judge I.T. that his action was unlawful and that he was not fully determined whether to go that far to gain media fame.[103]

In the second one the Court held that:

> (. . .) the Supreme Court adjudicating in this case met with unprecedented pressure and attempts to influence the decision both from some media and a significant number of judges of Polish courts. Suffice it to mention the demonstrations organized in front of the Supreme Court building, the insults of judges of the Supreme Court by members of judges' associations, including judge I.T. one of the Polish political parties), or about supporting actions for him organized in courts all over Poland . . . Regretting that nowadays the role of the 'purring crowd'[104] was played by some Polish judges organizing 'hate rallies' to the judges adjudicating in this case, the Supreme Court made every effort not to adjudicate in this case 'to the public,' but 'most honestly' according to

[101]Case II DO 1/20; Part 5.4. of the justification.

[102]Case II DO 74/20.

[103]Disciplinary Chamber judgment of 18 November 2020, Case II DO 74/20, p. 11.

[104]It is ironic that at this point the Supreme Court referred to the previously quoted paper of the first Polish Ombudsman and retired judge of the Constitutional Tribunal, Professor Ewa Łętowska, titled 'The Decalogue of a Good Judge', 1(30) *Krajowa Rada Sądownictwa. Kwartalnik* (March 2016) p. 6. In the quoted text Łętowska warned judges against 'listening to the murmurs of the streets and newspapers', which could be be identified with judicial populism.

> conscience . . . in accordance with the law and principles of equity, impartially . . . following the principles of dignity and honesty.[105]

On 24 February 2021, the Court of Appeal in Warsaw announced that 'Igor Tuleya is continuously a judge of the common court of the Republic of Poland with the immunity assigned to this office', and 'the waiver of immunity may take place on the basis of a final judgment of an independent, impartial and independent court in the course of a fair and open the case'. Nevertheless, the president of the District Court in Warsaw refused to execute the judgment as, in his opinion, it was illegal. The prosecutor's office requested the Supreme Court to bring Tuleya to the court for questioning. However, on 22 April 2021, after a session exceeding 20 hours, Adam Roch (again), did not agree to bring Tuleya to the prosecutor's office, which intended to charge him with criminal charges. According to the Disciplinary Chamber, the suspicion against Tuleya was insufficiently substantiated to consent to the detention.[106] In this decision the Disciplinary Chamber stated that:

> (. . .) in accordance with the principle of proportionality, required when applying a coercive measure in the form of detention, at the present stage of the proceedings, there is no sufficiently justified suspicion that he has committed an offense under Art. 241 § 1 of the criminal code. As a consequence, this must result in recognition of the lack of sufficient grounds for the planned detention. The factual and legal status assumed for the purposes of immunity proceedings does not indicate a real need to interfere with the freedom of an individual.[107]

Włodzimierz Wróbel is the Supreme Court judge sitting in the Criminal Chamber and a professor of criminal law at Jagiellonian University. The internal affairs department of the National Prosecutor's Office (set up by Law and Justice to prosecute judges and prosecutors) has requested consent to lift the immunity of Judge Wróbel of the Criminal Chamber of the Supreme Court due to an unfounded criminal charge against him (and two other Supreme Court judges) regarding one of the cases he was adjudicating.[108] The case of Judge Wróbel is the first in which the National Prosecutor's Office has requested permission to prosecute a Supreme Court judge for his judicial activities. In the first

[105]Disciplinary Chamber judgment of 18 November 2020, case II DO 74/20, p. 21-22.

[106]Disciplinary Chamber resolution of 22 April 2021, case II DO 74/20.

[107]Ibid., p. 44

[108]M. Jałoszewski, 'After Tuleya, the Disciplinary Chamber is taking on Prof. Wróbel from the Supreme Court', ⟨https://ruleoflaw.pl/after-tuleya-the-disciplinary-chamber-is-taking-on-prof-wrobel-from-the-supreme-court/⟩, visited 24 January 2023.

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instance the Disciplinary Chamber refused to lift judge Wróbel's immunity.[109] The National Public Prosecutor's Office appealed against this decision. Nevertheless, before the case was decided by the Disciplinary Chamber in the second instance, the European Court of Human Rights decided to indicate an interim measure in the case *Wróbel* v *Poland* (No. 6904/22). The original hearing scheduled for 10 February 2022 was postponed. On 8 February 2022, the European Court of Human Rights decided to indicate an interim measure in *Wróbel* v *Poland*. The Court asked the Government to ensure that the proceedings concerning the lifting of Judge Wróbel's judicial immunity comply with the requirements of a 'fair trial', in particular the requirement of an 'independent and impartial tribunal established by law', and that no decision in respect of his immunity be taken by the Disciplinary Chamber of the Supreme Court until the final determination of his complaints by the European Court of Human Rights. On 9 August 2022, the European Court of Human Rights decided to amend the wording of the interim measure previously granted on 8 February 2022, which now covers any body competent under the domestic law to deal with the applicant's case. The European Court of Human Rights took this decision in the light of the recent developments, namely that the Disciplinary Chamber referred to in the previous interim measure has been replaced by the Chamber of Professional Responsibility. Such a decision suggests that the new Chamber may also be declared illegal by the European Court of Human Rights.

The Extraordinary Review Chamber's pro-governmental agenda could already be observed in resolution of 8 January 2020 rendered with regard to the implementation of the European Court of Justice judgment in *AK* v *Poland*. This resolution limited the enforcement of the Luxembourg Court judgment by using a very particular (and pro-governmental) interpretation of the constitutional provisions. According to the resolution, the appointment of judges may not be questioned before any court or any authority in Poland and is a 'personal' power (the prerogative of the President of the Republic).[110] The resolution of 8 January 2020 presented a different approach to the one adopted by the Labour Law and Social Security Chamber in resolution of 5 December 2019, which in turn led to the resolution of three joined chambers of 23 January 2020. On the other hand, as mentioned earlier, the Chamber of Extraordinary Review respected the resolution and abstained from adjudicating for the next few months. The situation changed in April 2020, when the Presidential elections scheduled for May 2020 were approaching. Without doubt, adjudicating on the validity of elections and referendums is the competence of the Chamber of Extraordinary Review that most

[109]Disciplinary Chamber Resolution of 31 May 2021, case I DI 19/21.
[110]*See further* Ziółkowski, *supra* n. 56, p. 359.

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directly affects the political sphere.[111] In April 2020 it became increasingly apparent that scheduled elections during the ongoing Covid-19 pandemic would be problematic, to say the least. The Chamber of Extraordinary Review played (albeit with some obstacles) the role dictated for it by populists in the political tragifarce of the 2020 presidential elections.

The Polish government decided not to announce one of three constitutionally regulated emergency states – a state of natural disaster. Although a comparative analysis of individual countries' responses to the pandemic reveals that there is no single template for proper conduct, the Polish government's resistance to using constitutional regulations was clearly related to the political will to hold the presidential elections planned before the pandemic for 10 May 2020. Announcing a state of natural disaster would mean 'freezing' the electoral procedure for the duration of the state of emergency and 90 days after its termination. The resistance of the ruling coalition towards announcing a state of natural disaster and therefore the postponement of elections resulted from opinion polls that ran in favour of the incumbent President Duda.

Approximately one month before the planned elections, the Sejm adopted a controversial bill that introduced changes to the electoral code and enabled general postal voting. Important reservations as to the realistic possibility of holding the presidential election on 10 May 2020 ignited a dispute within the ruling camp that had thus far been fairly united. On 6 May, just a few days before the scheduled presidential elections, the leaders of the two parties forming the ruling coalition – Jarosław Kaczyński and Jarosław Gowin – issued a joint statement that they would not be held on 10 May, that the Supreme Court would subsequently annul them and new elections would be announced. However, judge Joanna Lemańska – the President of the Chamber of Extraordinary Review appointed on the recommendation of the Law and Justice – made a public statement that, 'with great surprise', she had received the information about the *a priori* adopted assumption regarding the future ruling of the Supreme Court regarding the annulment of the presidential election of 10 May. Furthermore, she reiterated that judges were independent and the content of judicial decisions was to be determined by the judicial bench.

Finally, in the resolution adopted on 10 May, the National Electoral Commission stated that 'in the elections of the President of the Republic of Poland ordered on 10 May 2020, there was no possibility of voting for the candidates', which was one of the legal grounds for their invalidity.[112] Therefore, on

[111]Until the Law and Justice judiciary 'reform', the then Labour Law, Social Security and Public Affairs Chamber decided in this respect.

[112]The most controversial element of the National Electoral Commission's resolution was the statement that this fact 'is equivalent in effect to the impossibility to vote due to lack of candidates,

11 May, the day after the cancelled elections, the ruling coalition presented a special bill, rapidly passed by the Sejm despite the efforts of the opposition-controlled Senate. The special law on presidential elections adopted on 2 June 2020 enabled the postponed presidential election but it raised many reservations as to its compliance with the constitution. The presidential elections in Poland were finally held on 28 June 2020 (first round) and on 12 July 2020 (second round). Incumbent President Andrzej Duda narrowly defeated challenger Rafał Trzaskowski and won 51.2% of the votes in the second round. On 3 August 2020, the Chamber of Extraordinary Review adopted a resolution stating that the presidential elections held on 28 June and 12 July were valid. Earlier, it considered nearly 6,000 election protests. In 92 cases, the Chamber considered the allegations contained therein (in whole or in part) to be justified, but – in its opinion – they had not affected the election results. Most of the protests (including those submitted by the representative of the committee, Rafał Trzaskowski), were left without further action.

The analysis of the activities of the 'new face' of the Supreme Court to date proves that the political role of the two new chambers differs significantly. The Disciplinary Chamber in conjunction with the 'muzzle law' was intended to be a convenient tool for removing the most rebellious (i.e. independent) judges from office. The show trials of several judges considered key figures in judicial protests, in turn, are to have a chilling effect on the rest. The cases of Judge Juszczyszyn, Judge Tuleya and Judge Wróbel prove that the Disciplinary Chamber realised the basic political goal of the new regime regarding the disciplinary and criminal liability of judges. However, taking into account the political profit and loss balance sheet, it showed a certain self-restraint. In the case of Judge Juszczyszyn it did not waive the judge's immunity. In the case of Judge Tuleya, it did not grant the prosecutor's requests for detention in a situation where a judge refused to appear in the prosecutor's office. Finally, in the case of Judge Wróbel, it did not conduct the hearing following the interim measure imposed by the European Court of Human Rights. The Chamber of Extraordinary Review, on the other hand, has tried to create an impression of independence. It is noticeable both in the public statements of its President and in the justification of the resolution of 3 August 2020 on the validity of the Presidential elections, in which, among others, it used such phrases as 'a neutral approach of public authorities to the election campaign should be a good practice relating to the election process' or 'apart from 'extraordinary circumstances of an objective nature', it is unacceptable to introduce significant changes to the election law during the six-month

provided for in Article 293 (3) of the Electoral Code', in which case the Marshal of the Sejm shall re-order elections within 14 days of the announcement of the resolution. The new election date should be within 60 days of the day when the Marshal of the Sejm decides.

"legislative silence" before the elections'.[113] However, its pro-governmental agenda is still visible.[114]

Conclusions: the political abuse of the Constitutional Tribunal and the Supreme Court compared

The comparative analysis of the two captured apex courts in Poland – the Constitutional Tribunal and the Supreme Court – leads to the conclusion that behind the façade of rhetoric of political constitutionalism, there is a deliberate abuse of judicial power aimed to achieve political goals. Therefore, as Pablo Castillo-Ortiz aptly points out, any attempt to justify illiberal reforms of apex courts as a new form of political constitutionalism is misguided and misinterprets the central tenets of that constitutional tradition.[115] While political constitutionalism favours parliamentary rule and weak judicial review, authoritarian populists in Poland place politically captured apex courts at the very centre of shaping the state's policy. Nevertheless, a comparison of the Constitutional Tribunal and the Supreme Court in this regard shows significant differences between them.

The hostile takeover of the Constitutional Tribunal turned out to be a complete success. It no longer fits into the postwar Kelsenian paradigm of a constitutional court. The current function of this former counter-majoritarian body is to apparently legitimise the counter-constitutional decisions of the parliamentary majority and the government. Recent years have shown that the Constitutional Tribunal is also used increasingly often to actively shape the government's Eurosceptic policy. It has become an 'inverted court' because, instead of exercising constitutional checks on political actors, it serves as a device used by populists to rid themselves of constitutional checks in the context of hybrid regimes. This disregard for constitutional constraints has dramatic consequences for the idea of the normativity of the constitution. The Constitutional Tribunal has become government's sweetheart and a useful device of the de-normativisation of the constitution.[116]

The Supreme Court, in turn, has a double face. The process of its political takeover turned out to be only partially successful (mainly due to the step back of the Polish government with regard to the lowered retirement age of the

[113]Sygn. akt I NSW 5890/20.

[114]M. Pronczuk, citing M. Wawrykiewicz (a lawyer from the Free Courts Initiative) words: *see* M. Pronczuk, 'Poland's Supreme Court Declares Presidential Election Valid', *New York Times*, ⟨https://www.nytimes.com/2020/08/03/world/europe/poland-court-presidential-election.html⟩, visited 24 January 2023.

[115]With regard to constitutional courts *see* Castillo-Ortiz, *supra* n. 10, p. 63.

[116]Castillo-Ortiz, *supra* n. 10, p. 67.

Supreme Court judges). The old Chambers of the Supreme Court properly perform their systemic functions. They are also trying to actively counteract further deterioration in the rule of law as, *inter alia*, illustrated in the resolution of 23 January 2020. Nevertheless, the old Chambers are not fully immune to the 'reform'. Moreover, recently a few 'new' judges appointed in the procedure involving the politically captured National Council of the Judiciary were transferred or appointed to old Chambers. The official justification for the transfer was the need to strengthen the personnel of the Civil Chamber and Penal Chambers due to the number of cases and the increasing court backlog. However, the transfer has been already (ab)used to affect the appointment of the new President of the Civil Chamber who decided (without any merit) to change the adjudicating panel in the case concerning implementation of the Luxembourg Court judgment in case C-487/19. Consequently, the new judges will be determining their own status.

With regard to the 'new' Chambers of the Supreme Court, it should be pointed out that both of them have been declared by supranational courts (the Luxembourg Court and the Strasbourg Court) to be bodies violating the standard of effective legal protection/the right to a fail trial. Both of them were introduced to be politically abused by authoritarian populists. Whereas with regard to the Disciplinary Chamber this goal has been achieved (as the Chamber played a key role in the new disciplinary regime for judges), with regard to the Chamber of Extraordinary Review the overall assessment of its systemic role should be more nuanced (at least if one takes into account the test of appearances established by the Luxembourg Court[117]). Nevertheless, the Strasbourg Court declared that the Chamber of the Extraordinary Review also does not meet the standard of the 'independent and impartial tribunal established by law' within the meaning of the Article 6 of the Convention. This means that the formal defect (the participation of the politically captured National Council of the Judiciary in the procedure of appointing all the judges of this Chamber) is so significant that it determines the status of the entire Chamber.

Legal questions to the Constitutional Tribunal submitted by the new Chambers of the Supreme Court[118] also show that the systemic interactions between two captured apex courts have a synergy effect with regard to the process of the denormativisation of the constitution. This process is part of the broader conceptual phenomenon which is the authoritarian legalism. As Scheppele notes:

[117]M. Krajewski and M. Ziółkowski, 'The Power of "Appearances"', *Verfassungsblog*, 26 November 2019, ⟨https://verfassungsblog.de/the-power-of-appearances/⟩, visited 24 January 2023.

[118]Legal questions brought by the Disciplinary Chamber Case: Case P 22/19 (Constitutional Tribunal judgment of 4 March 2020), P 7/20 (Constitutional Tribunal judgment of 14 July 2021), Case P 2/20 and Case P 3/20 (still waiting to be decided). Legal questions brought by the Chamber of Extraordinary Review: Case P 10/19 (still awaiting adjudication).

> the autocrats who hijack constitutions seek to benefit from the superficial appearance of both democracy and legality within their states. They use their democratic mandates to launch legal reforms that remove the checks on executive power, limit the challenges to their rule, and undermine the crucial accountability institutions of a democratic state.[119]

Captured apex courts are not marginalised by the autocratic populists in Poland – on the contrary, they are placed at the centre of the political scene and serve as an apparent legitimisation of the executive's and the legislature's decisions. Autocratic legalism is identified with the 'use, abuse and non-use … of law' in order to consolidate political power and sideline competitors.[120] With regard to Poland, the political capture of apex courts was first characterised mostly by the overt ignoring of constitutional norms (selective non-use of the constitution) and using the statute law as the basic instrument of counter-constitutional systemic reforms of the judiciary. Along with the deepening politicisation of the apex courts, the abusive reinterpretation of constitutional norms became more and more pronounced. Currently, all three aspects of authoritarian (false) legalism collectively create a favourable environment for further rule of law deterioration. Captured apex courts are abused to consolidate power and apparently legitimise political decisions, even those made evidently against the will of the majority of society. Therefore, populist constitutionalism in Poland is grounded on hypocrisy. Behind the facade of rhetoric hinting at some fundamental tenets of political constitutionalism, one can see selective (authoritarian) legalism and the blatant abuse of apex courts.

[119]Scheppele, *supra* n. 23, p. 547.
[120]J. Corrales, 'Autocratic Legalism in Venezuela', 26 *Journal of Democracy* (2015) p. 38.

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