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ARTICLE

Populist Jurisprudence? Examining Selected Case Law of the Polish Constitutional Court After 2016

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Abstract

Since the parliamentary elections in 2015 and the subsequent change in the personal composition of the Polish Constitutional Court, this institution is in crisis. The Court, once one of the main guardians of the rule of law and a model for the constitutional judiciary in the region of Central and Eastern Europe, is criticized. Judges are accused of lack of proper appointment and party subordination. Court activities are perceived as part of illiberal democracy and populist constitutionalism, that is, introducing majority rule by "switching off" the checks and balances mechanisms by democratically elected parties and groups. However, what is often overlooked in this type of analysis is the more internal perspective of jurisprudence and legal reasoning. What kind of decisions does the "populist" constitutional court issue? How does it justify its decisions? The paper will discuss three cases of the Polish Constitutional Court. The first case is from 2017 and concerns the right of assembly in connection with the introduction of a special category of "cyclical assemblies". The second, of 2019, is the so-called "printer case", which concerned the possibility of refusing to provide a service for reasons of conscience (a refusal to print a poster because of opposition to "LGBT promotion"). The third case is the controversial ruling narrowing access to abortion from 2020. The aim of the analysis is to answer the question of whether the current jurisprudence of the Court is the breaking or continuation of the previously dominant liberal constitutionalism. I will be particularly interested in whether these decisions introduce any changes at the level of possible rights holders (legal subjects), the introduction of a new or changed scope of existing rights, and new ways of resolving conflicts between rights.

Keywords Constitutionalism · Populism · Case law · Legal argumentation

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1 Introduction: Populist Constitutional Court?

Since the parliamentary elections in 2015 and the subsequent change in the personal composition of the Polish Constitutional Court ("the Court"), this institution is in crisis. The Court, once one of the main guardians of the rule of law and a model for the constitutional judiciary in the region of Central and Eastern Europe, lost its prestige and symbolic position (Pech et al. 2021). In 2005, in a judgment on the constitutionality of Poland's EU accession treaty, the Court concluded that 'the Polish Constitution and EU law are based on the same set of common values defining the nature of a democratic rule of law state and a catalogue of fundamental rights' resulting in a 'co-application and mutually friendly interpretation of national and Community law.'[1] As commentators point out, in this ruling the Court made a *de facto* recognition of the superiority of EU law over national order (Pollicino 2010). While in a policy paper drawn up in 2022 on behalf of the European Parliament's Committee on Legal Affairs, we can read that 'the recent judgment of the Polish Constitutional Tribunal should not be seen as a real input into the European discussion on the primacy of European law.' In the view of authors of the brief, the Court's decisions should 'be perceived as producing no legal effects and, as a result, it should be of no consequences for the legal order of the Union, its institutional balance, and on the distribution of competences between EU and its Member State' (Zoll et al. 2022, p. 28). The period in between, especially from 2016 onwards, has been a time of rulings which, step by step, have excluded the Court from the community of European value-oriented institutions referred to in Article 2 TEU (Zoll and Wortham 2019).

This decline applies not only to international recognition but also to internal perception by citizens. Public confidence in the Court fell from 37% in 2016 to 22% in 2022 (CBOS 2016, 2022). The number of cases brought before the Court fell from 623 in 2015 to 213 in 2020 (Trybunał Konstytucyjny 2016, 2021). Adding to it critique by political parties and in the media, negative appraisal by domestic and international legal scholars, it all testifies to the ongoing delegitimization of this institution. The observed changes are most often described as part of the processes connected with illiberal democracy and populist constitutionalism, that is, introducing majority rule by "switching off" the checks and balances mechanisms by democratically elected parties and groups (Scheppele 2018; Blokker 2019; Drinóczi and Bień-Kacała 2019; Sadurski 2019; Walker 2019). The argument goes that populist power, once in power, takes over institutions such as the constitutional judiciary by staffing them with people loyal to populist leaders and ideologies. Consequently, these institutions lose their roles as systemic 'checks and balances'. With no sign of limiting power, these institutions become facade and delegitimised. However, what is often overlooked in this type of analysis is the more internal perspective of jurisprudence and legal reasoning. What kind of decisions does the 'populist packed'

[1] Decision of May 11, 2005, K 18/04.

court issue? How does it justify its decisions? How does it relate to the principles of liberal constitutionalism and the legal doctrine?

The transformative dimension of the constitutional reasoning has attracted the attention of scholars for some time (Van Huyssteen 2000; Bobek 2015; Barić 2016; Hailbronner 2017; Rai and Tripathi 2019). The power of such reasoning rests on the recognition of the epistemic authority of the constitutional judiciary and on the ontological scheme for the application of law. The first derives from the presumed legal knowledge of the members of the body. Judges undergo years of technical training that equips them with the tools to apply the constitution. The second links the power of the decision to the existence of a pre-existing, binding and established by some form of constituent power system of rules that are independent of the personal views of the members of the panel and determine its decision. Both factors condition the recognition and use of judgements by other social actors, such as general courts, citizens or parliaments. Transformative power of constitutional reasoning in particularly visible in the context of post-authoritarian societies in transition to liberal democracy, where constitutional courts can take advantage of the textual openness of constitutional provisions to introduce new or expand existing rules of the constitutional system. But can these reasonings also be used in the reverse process? Evidence from Polish populism in power proves that this is also possible which allows questions to be raised once again about the political role and legitimacy of this power.

The paper will discuss three cases of the Polish Constitutional Court. These cases are selected from the period after 2016 and thus the moment when the 'new' judges, elected by the parliament with a populist Law and Justice majority, became capable of determine the judgments and the everyday work of the Court. The first case is from 2017 and concerns the right of assembly in connection with the introduction of a special category of 'cyclical assemblies.' This judgment legitimised the restrictions on the ability of citizens to organise protests against populist power. The second, of 2019, is the so-called 'printer case,' which concerned the possibility of refusing to provide a service for reasons of conscience (a refusal to print a poster because of opposition to 'LGBT promotion'). The ruling has disabled an important legal mechanism for the protection of sexual minorities rights in the country. The third case is the ruling restricting the access to abortion from 2020. The outcome of these proceedings has basically excluded access to abortion. These three cases were selected for their hight stakes for the public sphere in the country and constitutional horizontal effect on the basis of the 'most similar logic' (Hirschl 2005); each of them introduces changes in the definition of fundamental subjective rights and the relationship between the individual and the political community. Each of the decisions in question has been associated with a diminution of the rights of representatives of marginalised or socially vulnerable groups (sexual minorities, women), or the democratic right to publicly express opposition to the government. The qualitative analysis will include highlighting the political and social context of each judgment and reconstructing its doctrinal content. The aim is to answer the question of whether the jurisprudence of the Court after the 2016 populist 'takeover' is a departure or continuation of the previously dominant liberal schemes of constitutional reasoning. I will be particularly interested in whether these decisions introduce

any changes at the level of possible rights holders (legal subjects), the introduction of a new or changed scope of existing rights, and new ways of resolving conflicts between rights.[2] The analysis carried out is intended to contribute to the discussion of the 'legal sophistication' (Halmai 2017) of populist constitutionalism and to show the role played by the principles of legal reasoning in the constitutional transformations introduced by it.

The considerations lead to the conclusion that the decisions issued by the Polish Constitutional Court in recent years have transformed Polish constitutionalism in terms of the relationship between the rights of the individual and the rights of the political community. A transformation that has taken place not through a formal amendment of the Constitution, but through subordinate acts and Court decisions. This happened slowly but systematically and pointwise, on a case-by-case basis, by using constitutional reasoning tools such as abstraction, proportionality test or case law. In the process, by maintaining its argumentative autonomy, the Court framed its transformative activity as a straightforward continuation of the previous liberal discourse and thereby granted legitimacy to the populist power's move.

2 Case I: Cyclical Assemblies (Judgment of 16 March 2017, Kp 1/17)

In December 2016, the Polish Parliament passed amendments to the law on assemblies. Previously, the rules allowed for two types of assembles—ordinary assemblies, which required notifications, and spontaneous ones, organised without this requirement. The amendment created a new category of 'cyclical assembly.' The introduced article 26a paragraph 1 of the amending act stated that if meetings are organised by the same organiser in the same place or on the same route at least 4 times a year according to a prepared schedule, or at least once a year on public and national holidays, and such events have taken place during the last 3 years, even if not in the form of meetings, and were aimed in particular at celebrating significant and important events in the history of the Republic of Poland, the organiser may apply to the voivode for consent to the cyclical organisation of such meetings. At the same time, a provision was introduced that the conflicting assemblies should be organised in distance at least 100 m apart and that the cyclical assemblies have priority to choose the place and time of those assemblies in case of such conflict. The decision to grant assembly status was handed over to voivode, the local body of state administration.

The introduced solutions were criticized by the political opposition, the Supreme Court, the Ombudsman, the OSCE, the Council of Europe as well as a number of trade unions and seventy-seven NGOs and constitutionalists (Górka 2020). The

[2] In the following analysis, I omit the question of the proper staffing and appointment of the so-called 'double judges,' that is judges who were appointed by the new parliament and the president to fill seats already filled by the previous parliament, raising doubts about their status. This issue is already sufficiently described (Zoll and Wortham 2019, pp. 893–894) and goes beyond the question of the constitutional reasoning by the 'populist constitutional court.'.

criticism concerned the possibility that the new regulations could be used instrumentally to petrify assemblies favourable to the Law and Justice government and suppress counter-manifestations and thus restrict the right of citizens to participate in public life. The introduction of the new law took place in the context of discussions on the so-called "Smolensk monthlies" and their counter-manifestations. The Smolensk monthlies were monthly gatherings, organized from May 2010 to April 2018 in front of the Presidential Palace in Warsaw, to commemorate the victims of the 'Smolensk catastrophe.' On 10 April 2010, the official Polish state's aircraft crashed near the Russian city of Smolensk, killing all 96 people on board. Among the victims were the president of Poland, Lech Kaczyński, brother of Law and Justice President Jarosław Kaczyński, who was a regular speaker at these meetings. In his speeches, he mobilised his supporters and demanded to undertake decisive actions in order to 'truly' explain the catastrophe.[3] He also pointed out that the catastrophe would only be explained when Law and Justice took power. These assemblies have become a specific cultural and political phenomenon that has been analysed in terms of 'crowd aesthetics"' (Sierbińska 2014) and 'the spectacle of power' (Paluchowski and Podemski 2019). The meetings were met with counter manifestations. In May 2017, the monthlies were registered as a cyclical assembly, which made it legally impossible to hold simultaneous counter demonstrations.

After the expert and media criticism of the proposed regulations, the president, Andrzej Duda, turned to the Constitutional Court for preventive (prior to the signing of the amending law) constitutional review (Prezydent.pl 2016). His doubts were raised by the institution of cyclical assemblies itself, their priority character, and the fact that the priority of cyclical assemblies also applies to meetings notified before the entry into force of the contested law. The President argued that the introduction of a new category of assembly may violate the constitutionally protected principle of equality before the law because the legislation 'differentiates the legal situation of similar subjects on the basis of a criterion that finds no constitutional justification.'[4]

In its ruling of 16 March 2017, the Court found that the introduced regulations are consistent with the Polish Constitution. The adjudicating panel consisted of 11 justices, including 8 who were selected on the recommendation of the Law and Justice party.[5] Furthermore, all three 'old' justices, and justice Pszczółkowski, notified dissenting opinions. The result of the vote was therefore seven to four. In this rather

[3] Selected Kaczyński speeches: https://www.youtube.com/watch?v=6_MBcUgTgO8, https://www.youtube.com/watch?v=WfwXVA-sq20, https://www.youtube.com/watch?v=Hxb0WwP5EJA.

[4] Information dated 29.12.2016, official website of the President Office: https://www.prezydent.pl/prawo/wnioski-do-tk/prezydent-andrzej-duda-skierowal-do-trybunalu-konstytucyjnego-ustawe-o-zmianie-ustawy--prawo-o-zgromadzeniach,25663.

[5] Three so-called "doubles" (Cioch, Morawski, Muszyński) were part of the bench. i.e., persons who were elected to the Constitutional Court for the positions already filled by the previous parliamentary term and whose election was questioned by the Court itself in its judgment of 3 December 2015 (K 34/15).

extensive ruling (42 pages), much attention was paid to the previous decisions of the Court[6] and case-law from the European Court of Human Rights.[7]

The scope of the constitutional examination by the Court was determined by articles 27 and 57 of the Polish Constitution. Article 27 of the Constitution states that everyone is equal before the law and that everyone has the right to equal treatment by public authorities, while article 57 states that everyone shall be free to organise and participate in peaceful assemblies but restrictions on this freedom may be laid down in law. The Court adopted a principle previously established in its case law according to which the Court evaluates only the provisions, without reference to how these provisions can or will be interpreted or applied. In other words, the Court should restrain itself and cannot a priori assume that the contested provisions will be applied unconstitutionally if a pro-constitutional interpretation is possible. This applies to preventive control, since 'the examination of the constitutionality of provisions challenged in this way may consist only in an assessment of the text of the provision since at such an early stage it is not possible to assess fully what shape the examined content will take in the process of its application.'[8]

The Court considered that freedom of assembly has a positive (the possibility of organising an assembly) and a negative (the absence of interference with the assembly) aspect. The Court also noted a public element of freedom of assembly, manifested in the fact that this freedom performs a stabilizing function in relation to the existing social and political order and, above all, in relation to the representative mechanism. It is a form of active participation of citizens in the life of the state and thus of concern for the common good. In the context of the role of this right, the Court noted that 'the right to peacefully assemble is not only one of the freedom rights of the individual in a democratic state governed by the rule of law but is one of those rights which are regarded as a condition for the existence of a democratic society.' This right is, however, not absolute. The exercise of this right shall be subject to the condition that it is exercised peacefully and within the requirements of public order and safety. As regarding the principle of equality, the Court pointed out that differentiation in itself does not constitute a breakdown of the principle. The criteria for differentiation are decisive. In this case, they are formal and potentially that any group of citizens has access to the possibility of organising periodic assemblies. Furthermore, the allegation of inequality must always be analysed in the context of specific rights, in this case, the right of assembly.

In assessing the institutions of the cyclical assembly, the Court stated that the introduction of this assembly is justified. The Preamble to the Constitution orders public authorities to pass on to future generations 'all that is valuable from our over one thousand years' heritage.' Cyclical assemblies are to be the fulfilment of that duty. 'In view of the fact that cyclical assemblies are supposed to take place, inter alia, at least once a year on national and state holidays or to commemorate, in particular, momentous and significant events in the history of Poland, they make it

[6] At least dozens of previous decisions of the Court are referred to in the justification of the judgment.

[7] The justification of the judgment contains a special section devoted to the analysis of 17 judgments of the European Court of Human Rights.

[8] Decision of 16 March 2017, Kp 1/17.

possible to highlight certain socially important values and to make them the subject of public opinion.'[9] The transfer of powers to a voivode, who is a representative of the government in the local government, to make a decision on such an assembly, is justified, in the opinion of the Court, by greater interference of such an assembly on the public sphere. 'Raising the requirements for the exercise of freedom of assembly in such a way that it is necessary to obtain permission to hold a certain type of assembly (in this case cyclical) creates a higher standard of guarantee and, in fact, serves to protect other assemblies (based on notification). The necessity to obtain the consent based on an assessment of the fulfilment of statutory requirements by the applicant eliminates or at least limits the possibility of abuse by organizers of cyclic assemblies.'[10]

The priority of cyclical meetings is justified both by the limited access to them (a decision of the local administration is required) and by their value for the common good. Cyclical assemblies have a pedagogical function of shaping attitudes that are important from the perspective of the common good. The Court has defined the common good with reference to unidentified (probably scientific) 'literature' as 'the sum of the conditions of social life which enable individuals, families and other communities to attain their perfection more effectively and more easily; an essential element of the common good (the sum of the combined conditions of development) is respect for the inherent rights and obligations of the human person deriving from his or her dignity so that there is no point in opposing the common good to freedoms and human rights'.[11] Therefore, although the prioritization of these assemblies is a limitation of the right of assembly, it is a proportionate limitation in view of the nature of the common good that these assemblies promote.

The analysed decision is characterised by three argumentative moves: abstraction, proportionality test and approving references to previous case law. First, the Court approached the case as an abstract conflict between two values. It deliberately did not refer to the current context and the social conflicts in the context of the current demonstrations. This was despite the fact that these current conflicts were the real cause of the regulation. Next, the Court examined the proportionality of the two values (the general interest and the individual right of assembly). The rationale for this step was that both values were considered important in the light of the previous case law of both the Court itself and the European Court of Human Rights. As a result, the ruling did not differ from previous jurisprudence at the rhetorical level (types of arguments used), and encapsulated the examined regulations with additional constitutional legitimacy.

[9] Decision of 16 March 2017, Kp 1/17.

[10] Decision of 16 March 2017, Kp 1/17.

[11] Decision of 16 March 2017, Kp 1/17. This definition refers directly to Catholic social teaching and especially to the Pontifical Pastoral Constitution on the Church in the Modern World *Gaudium et spes*.

3 Case II: A Printer from Łódź (Judgment of 26 June 2019, K 16/17)

In May 2015, a printer from the city of Łódź refused to print a poster for the foundation L., whose statutory task is to promote the principle of equal treatment of LGBT people in the workplace. The graphic design for the roll-up included a logo in rainbow colours and the words 'LGBT Business Forum.' In a message sent to the organisation, the printer said, 'I refuse. We are not contributing with our work to the promotion of LGBT movements.' The incident was reported to the police. Article 138 of the Polish Contraventions Code states that if anyone professionally engaged in the provision of services, demands and collects for the provision of [services a] payment higher than the applicable [rate] or intentionally without a valid reason refuses to provide the service to which he is obliged, shall be subject to a fine. Using that provision, in March 2017, the Regional Court in Łódź found the printer guilty of the fact that on 27 May 2015, while professionally providing services, he deliberately refused to provide the foundation, to which he was obliged, without justifiable reason. Even though prosecutor in this case was in favour of acquittal the Regional Court found the printer guilty but did not impose a penalty because the degree of social harmfulness of the act committed was not significant (Radio Łódź 2018). Three appeals were filed against the sentence (by affected foundation, prosecutor, and defence counsel). The District Court has upheld the verdict.

The case later went before the Supreme Court. The Prosecutor General, whose function through the reforms of Law and Justice government has been merged with that of Minister of Justice, filed a cassation alleging that the District Court had committed a gross violation of procedural law, which had a significant impact on the content of the ruling, and thus failed to duly consider the objections and arguments raised in favour of the printer by the prosecutor and the defence counsel in the appeals filed in favour of the printer. The Prosecutor General reiterated the arguments in which it indicated that no contract had been concluded in this case (the printer refused before the formal conclusion of the contract), so there are no grounds for applying Article 138. He also indicated that the refusal of the printer resulted from his religious beliefs, so it was valid.

In the decision of 14 June 2018 (case no. II KK 333/17), the Supreme Court rejected the General Prosecutor's cassation. The Supreme Court decided that to commit this offence it was not necessary to formally conclude a contract in accordance with the rules of contracts. The Supreme Court also held that the 'valid reason' clause includes religious beliefs, which means that, where they are contrary to the characteristics and nature of the service, the supply of that service may be refused. However, the Supreme Court decided that this was not the case. The printer's actions involved only technical activities. There was no involvement of his sensitivity or imagination. The Court found that there is no moral relation between the activity (print) and the product of the service (poster). A different situation would be, for example, in a situation where a painter or sculptor was to perform a work of art, which would require more effort and commitment. Moreover, the content of the project indicated that the roll-up only informed about the

existence of the foundation by publishing its name and internet address. Although the graphic design also included a colourful logotype of the foundation (colours of the rainbow), its message was neutral and, therefore, it could not violate the religious beliefs of the defendant. The statutory objective of the foundation was to introduce the principle of equal treatment of LGBT people in the workplace. In line with the idea of diversity management, the foundation tried to convince companies operating in Poland of the importance of recognising diversity among employees and using it for the benefit of the company. Quoting the Catechism of the Catholic Church, the Supreme Court pointed out that these goals were not contrary to the teaching of the Church.

After the judgment, the Prosecutor General (and the Minister of Justice) Zbigniew Ziobro stated that the Supreme Court 'took the side of state violence in the service of the ideology of homosexual activists and against freedom, which is guaranteed in the Polish Constitution to every citizen regardless of his or her world view'.[12] He also added that the judgment violated the principle of economic freedom. The LGBT rights activists, in turn, found that this judgment 'is a great celebration of equality and a reason to rejoice for all those who believe in law, equality, and justice. It is also a great reason to be proud—Poland has made a quantum leap towards equal rights for LGBT people with which it can boast to the whole world'.[13]

During the proceedings before the Supreme Court, the General Prosecutor submitted a request to the Constitutional Court to examine the compatibility of Article 138 with the Polish Constitution. The Prosecutor indicated the unconstitutionality of the provision on the basis that: (a) it penalizes a refusal to provide a service without a justified reason, pursuant to Article 2 of the Constitution of the Republic of Poland (rule of law principle), (b) it is understood in such a way that the freedom of faith and conscience are not a justified reason for refusing to provide the service, under Article 53 paragraph 1 in conjunction with Article 31 paragraph 3 of the Constitution (freedom of religion), and (c) disproportionately restricts freedom of economic activity and therefore infringes Article 20 in conjunction with Article 22, in conjunction with Article 31 paragraph 3 and in conjunction with the second sentence of Article 31 paragraph 2 of the Constitution (principle of social market economy).

The Constitutional Court decision was made on 26 June 2019. Of the 5 justices on the bench, 4 were elected on the recommendation of the Law and Justice party, and two Justices, Leon Kieres and Wojciech Sych, notified dissenting opinions.

The Court in this case again adopted an abstract, textualist approach without addressing the possible real consequences of the examined regulations. The majority of justices stated that the Court 'decides on the compatibility of certain normative acts or parts thereof with acts of a higher order. This means that it compares the content of the contested norm with the control standards indicated in the application. The Court does not examine the facts, nor does it rule on the cases of individual

[12] Drukarz winny, ale bez kary, Radio Łódź, 14.06.2018, https://www.radiolodz.pl/posts/45063-drukarz-z-lodzi-winny-ale-bez-kary.

[13] Fragment of the statement by the NGO Campaign Against Homophobia, TOK FM, 14.06.2018, http://www.tokfm.pl/Tokfm/7,103094,23542075,sad-najwyzszy-drukarz-z-lodzi-nie-mial-prawa-odmowic-organizacji.html.

entities. (…) Factual states and the application of the law may not, however, be subject to control in proceedings concerning hierarchical compliance of the law. The Constitutional Court may not become another instance in judicial or administrative proceedings'.[14]

The Court granted the prosecutor's motion only in the scope of the first charge—violation of Article 2 of the Polish Constitution, which states that the Republic of Poland shall be a democratic state ruled by law and implementing the principles of social justice. The Court held that this was the most far-reaching complaint so that there was no justification for examining the question of religious freedom. Article 2 of the Constitution contains the principle of the rule of law which, in the case-law of the Court, concerns not only freedoms and rights but also the principles governing the exercise of state power. One such principle is the principle of proportionality. Using this principle, the Court found that the contested regulation is unconstitutional.

For its analysis, the Court turned to the historical context of the impugned provision and noted that it was introduced in 1972 and remains unchanged. This provision was introduced to the legal system in a different social and economic reality, related to the command economy, in which a central authority controls not only production but also sales. Its purpose was to guarantee, under penalty of law, that persons professionally providing services would do so at official prices. The purpose of the regulation was to protect consumers against the refusal to provide services in an economy that was, from an economic perspective, an economy of scarcity. Currently, 'the object of protection of Article 138 of the CC is the interests of consumers related to access to services provided professionally by others. In modern economic reality, the purpose of Article 138 of the Civil Code focuses primarily on the protection of consumers' non-material interests, including protection against humiliation and harassment. At the beginning of the twenty-first century, one more objective was added to the objectives of Article 138 of the Criminal Code—the anti-discrimination objective. (…) It is intended to combat incidents of denial of service motivated by prejudice against certain characteristics of the person interested in obtaining the service or by malice and harassment of a particular group of customers in this way.'[15]

According to the Court, all these objectives can be achieved by other, less restrictive methods. To strengthen this argument the Court made several references to the jurisprudence of the Court of Justice of the European Union. From the perspective of consumers, who care about access to services, this provision contains a sanction and, therefore, does not directly force service providers to provide services to those consumers. The Court also found that 'the contested provision does not sufficiently compensate for the violation linked to discrimination. In order to compensate for damage to the personal interests of a person who has suffered discrimination, it is necessary to activate other legal remedies (in particular, those relating to compensation and reparation).'[16] The Court noted here that the penalties imposed on service

[14] Decision of 26 of June 2019, K 16/17.
[15] Decision of 26 of June 2019, K 16/17.
[16] Decision of 26 of June 2019, K 16/17.

providers are low and do not at all enforce anti-discrimination action. The Justices also considered it unnecessary to adjudicate on the second and third pleas of the Prosecutor's motion since the judgment on the unconstitutionality of the entire disputed norm from the perspective of Article 2 of the Constitution made further proceedings pointless.

In his dissenting opinion, Justice Kieres pointed out that removing this splinter would weaken the already imperfect system of protection against discrimination. The Justice stated that the reference to the protection of personal rights means in this context that discrimination is considered to be a private matter. In his separate opinion, Justice Sych added that the decision of the Court would have the effect of enabling the resumption of proceedings that did not concern gender issues.

In this case we can also see the mention above three argumentative moves: abstraction, proportionality test and approving references to previous case law. Relying only on the abstract text allowed the Court to ignore current social conflicts (the situation of sexual minorities in the country). The abstract values (consumer protection and economic freedom) were then subjected to a proportionality test. Also, the entire argumentation was accompanied by approving references to previous case law.

4 Case III: Abortion Ruling (Judgment of 22 October 2020, K 1/20)

On 19 November 2019, a group of Members of Parliament asked the Court to examine the constitutionality of the provisions of the Act of 7 January 1993 on family planning, protection of the human fetus, and conditions for the permissibility of abortion. Until now, the law allowed for the termination of pregnancy only in three cases: when the pregnancy posed a threat to the woman's life and health, when there was a reasonable suspicion that the pregnancy was the result of a prohibited act, and when there was a high probability of a severe and irreversible impairment of the fetus or an incurable disease threatening its life. The applicants questioned the last exception.

A previous attempt to change the law by parliamentary means had failed; on 14 March 2016, the 'Stop Abortion' committee submitted a civic project to parliament to ban abortion (Kocemba 2023[17]). This project envisaged a total ban on abortion and provided for prison sentences for women terminating pregnancies. The project was supported by the National Centre for the Pastoral Care of Families, one of the institutions of the Catholic Church in Poland (Banasiuk and Stępkowski 2017, p. 180). The proceedings on the project led to public protests and in April, the 'Save the Women' initiative submitted a civil counter-proposal to extend the right to terminate a pregnancy. The rejection of this project and the continuation of the 'Stop abortion' procedure increased social unrest and protests. In October, protests began in 150 cities across Poland. Along with this social development, in the same month, the project to tighten the law was rejected (Graff and Korolczuk 2021, pp. 144–147).

[17] https://cadmus.eui.eu/handle/1814/76124.

The petition to the court was therefore an attempt to bypass the parliamentary path of changing the law, which aroused so much social resistance. In its ruling of 22 October 2020, ref. K 1/20, the Court declared as unconstitutional the statutory provision allowing termination of pregnancy in the case where 'prenatal tests or other medical indications point to a high probability of severe and irreversible fetal impairment or an incurable life-threatening disease'.[18]

According to the bench of Justices headed by President of the Court Julia Przyłębska, the provision is contrary to the constitutional principles of the protection of life and human dignity – 'human life is subject to legal protection, including at the prenatal stage, and the legal subjectivity of a child is inextricably linked with its dignity'.[19] The Court stated that the contested provision is disproportionate as it is not "absolutely necessary" since it is not possible to identify "an analogous good in other persons". The Court argued, first of all, that a fetus is merely the medical/biological name for a child and, therefore, equated the meaning of the term fetus and the term child. In the text of the judgment itself, the latter term appears almost twice as often as the former—the word child was used in the justification 93 times and the word fetus 49 times. In their reasoning, the judges—apart from two dissenting opinions—focused exclusively on the perspective of the fetus, devoting little space to the welfare of women, who were reduced to 'other persons.' The word woman appears only five times in the judgment. In contrast, the words mother and pregnant woman appear a total of 42 times (mother 22 times, pregnant woman 20 times). Moreover, the Court stated that the legislator erroneously uses the term 'fetus' and should replace it with the term 'child,' while with regard to women it should use the term 'mother of the child' and not the pregnant woman, so as to emphasise 'the legal subjectivity of the child in the prenatal period of life.' It also stated that 'the protection of maternity cannot mean solely the protection of the interests of the pregnant woman and the mother,' so the female perspective was marginalised.

The effect of the elimination of this provision is a practical ban on abortion in Poland—according to the Federation of Women and Family Planning, in Polish hospitals in 2019, 1110 terminations of pregnancy were performed, including 1074 for embryopathological reasons, which means that "as many as 98% of terminations of pregnancy are performed in connection with the identification of severe and irreversible defects of the fetus." The argumentation used in this judgment also seems to fit with the statement of the unconstitutionality of another permissible premise of termination of pregnancy, i.e., Article 4a (1) (3), which states that termination of a pregnancy is permissible when "there is a justified suspicion that the pregnancy resulted from a prohibited act". Actions aimed at abolishing this premise have already been announced by anti-choice organisations.

Although the justification for the K 1/20 abortion ruling does not mention or examine its real social consequences, we can presume that the judges were aware of them. After the judgment, Judge Mariusz Muszyński wrote an opinion in which he denied the accusations of exposing women to torture that appear in legal discourse

[18] Judgment of the Constitutional Court of 22 October 2020. (K 1/20).
[19] Judgment of the Constitutional Court of 22 October 2020. (K 1/20).

by invoking the necessity of applying textualist argumentation: 'The Court did not negate the suffering of women or children who may find themselves in this situation. The Court was merely deciding questions of law and in the abstract, in the context of hierarchical control. And in the content of the examined and derogated provision, there is no confrontation between the good of the mother and the child (Muszyński 2021).'[20]

Five dissenting opinions were submitted to the judgment. In their dissenting opinions, judges Zbigniew Jędrzejewski, Mariusz Muszyński and Jarosław Wyrembak agreed with the verdict itself, rather their objections concerned procedural issues and justifications. Judges Piotr Pszczółkowski and Leon Kieres disagreed with the verdict. Both argued that the Tribunal should not have considered the case, as the decision could have been made in parliament and at that time work on the matter was in progress. Therefore, the proceedings should be discontinued. Justice Kieres noted that there is no social acceptance for the tightening of abortion and that abortion regulations in Poland are among the strictest in Europe. According to a 2019 poll, as many as 58% of respondents say that women in Poland should have the right to abortion on demand until the 12th week of pregnancy, 35% are against, and 7% have no opinion. The judges, in their separate votes, also referred to the real consequences of the ruling, which the Court did not do. According to Justice Kieres, continuing a pregnancy against a woman's will, in situations where there is a high probability that the fetus will die shortly after birth or will be terminally ill, may be considered cruel and inhumane and a source of additional suffering. Women cannot, therefore, be forced to be heroic, all the more so since there is insufficient support for families with disabled children. This view is also shared by Judge Pszczółkowski, who described as heroic the obligation on a woman, irrespective of the degree of pathology of the fetus, and the consequences for life: "sacrifices and hardships far beyond the ordinary measure of limitations associated with pregnancy, childbirth, and childrearing". By doing so, the Court radically and arbitrarily took away women's freedom of choice, even in the most dramatic circumstances. He also stressed that the welfare of women, including their constitutional rights and freedoms, had been treated completely marginally—their perspective had not been taken into account. Women were treated instrumentally as a means of realising the procreative function of the family. The Court considered only one perspective on the protection of life in the prenatal phase and adopted the perspective of a radical pro-life view. Judge Pszczółkowski also cited statistics indicating that the ruling would eliminate the legal basis for 98% of legally performed abortions. In connection with this, he expressed concern that some cases would feed the so-called abortion underworld and abortion tourism. He emphasised that it is the Polish public authorities that have a constitutional obligation to provide special health care to pregnant women. Moreover, one of the goals of the contested provision was to protect women against the risks associated with abortions in the so-called grey zone. Pszczółkowski also drew attention to the language of the justification—in the judgment, an evaluative

[20] M. Muszyński, O skutku wyroku Trybunału w sprawie aborcji, https://www.rp.pl/Opinie/302039901-Mariusz-Muszynski-O-skutku-wyroku-Trybunalu-w-sprawie-aborcji.html.

quantifier with negative connotations was used—e.g., 'eugenic premise' was written about, and actions taken on its basis were called 'liberal eugenics.'

The abortion decision shows similarity in the use of constitutional reasoning's to the previously discussed decisions. Abstraction, proportionality test and approving references to previous case law also heavily presence here. By abstracting from the complex social situation of the two subjects and considering them as full legal entities ('child' and 'mother') allowed the Court to make a proportionate distribution of rights. In turn, the references to Polish and European jurisprudence found in the judgment itself allow the decision to be presented as a simple continuation of previous human rights discourse and constitutionalism.

5 Projecting Continuity and Depoliticisation

The three cases discussed above allow for some generalizations about the use of constitutional argumentation in 'populist jurisprudence.' Poland's populist constitutional court is issuing decisions in line with the policy of the party that elected the judges. This gives the policies of this political camp additional legitimisation based on 'constitutionality.' At the same time, the language and structure of the reasons for the Court's decisions is based on argumentative autonomy. In its justifications the Court refers to existing legal values such as the rule of law or the principle of human dignity and does not repeat the arguments raised by the populist applicants. Argumentative autonomy implies the absence of explicit semantic links between the language of justifying judgements and the everyday discourse of populist politics. Court justifications are formulated in the language of law and rights, without reference to social or political populist imaginarium based on the moral distinction between corrupt elites vs good masses (Müller 2016). The decisions also contain significant references to the language of liberal constitutionalism. However, argumentative autonomy is accompanied by instrumentalism. These decisions have the effect of limiting individual rights and protecting minorities, which is in line with populist intentions of creating a new vison of the political community. The legitimising effect, which sits on the need to conceal instrumentalism towards political power, is based on rhetorical techniques of abstraction, the application of the proportionality test and approving reference to previous case law. These techniques are aimed at projecting a sense of continuity with liberal constitutionalism and depoliticising the cases decided.

Abstraction allows the Court to disregard current political and social conflicts when justifying decisions. It also means taking a textualist position and assessing only the text of the contested regulations and not their potential application practice. In this way, the social conflict is recognised as a conflict of two abstract values that can be resolved by appropriate analysis. This depoliticises the case and deprives specific groups (protesting citizens, NGOs promoting rights, women) of the opportunity to influence the trajectory of the settlement. This is because these subjects are not recognised as constitutionally relevant. The next step in this line of reasoning, the proportionality test has been a constant tool for justifying the Court's decisions practically since its creation (Śledzińska-Simon 2020, pp. 385–386). Using the proportionality test allows the

Court to further depoliticize judicial decisions by presenting moral and political value judgements as the result of objective reasoning techniques (Webber 2010, p. 191). The transformation of the constitutional order takes place in a form that is similar to liberal constitutionalism with an extensive and approving references to the previous case law of the Court and other European international courts. Extensive use of the Court's earlier decisions gives the impression that the decisions handed down are a simple continuation of previous case law and thus serve the same values.

We can distinguish two concrete argumentative strategies here. The first relates to the framing of the cases. Through semantic changes ("child" instead of "fetus" or "consumers" instead of "LGBTQ minority"') an issue can be presented as politically uncontroversial and far removed from current social conflicts. This allows the court to avoid considering the facts giving rise to the case and to present its decision as a technical and legal one, based only on a textual analysis using tools previously developed in case law. The second strategy relates to a quasi-syllogistic form of justifications based on the proportionality test. The larger premise remains the same as in previous decisions (e.g., the constitutive role of assemblies for democracy, the consumer's right to the service, the principle of women's autonomy,) while emphasizing the lack of an absolute statute of general constitutional values. This allows to introduce other values (e.g. shaping the public good by special assemblies, freedom of the service provider, the dignity of the fetus) as conflicting and constituting the boundaries of the former. It only remains to move the boundaries between what, in the event of such a conflict, falls under legally protected behavior. A general constitutional value remains valid but the scope of what falls under that value changes.

The language and argumentative tools of liberal constitutionalism combined with the control of framing and the quasi-syllogistic style of justification allow populist constitutionalism to make structural changes while maintaining the surface of continuity. Such overt rejection of more revolutionary rhetoric and the appearance of a lack of explicit radicalism seems to stem from a need for legitimacy. On the example of Polish Constitutional Court we can observe that the relationship between populist power and the constitutional court is one of subordination and instrumental exploitation. Changes that could cause public resistance are introduced by court decisions and not by legislative changes. On the one hand, this helps to dissipate the responsibility for these decisions. Those in power point to the lack of their own agency in making these decisions. The Court presents its decision as guided only by the text of the constitution and previous case law. Such a court is guided by the constitution and its rules rather than by public emotion and should not be influenced by contemporary political conflicts.

6 Conclusion: Constitutional Chameleon

Populism is sometimes referred to as a chameleon concept (Taggart 2000, p. 5). The chameleon changes colour, adapting to its current environment. Likewise, so does populism: although it exists in various forms, they are always determined by the institutional background in which the populism operates. Nowadays, populism is set against a background of liberal (or legal) constitutionalism. In the case of the

'populist constitutional court,' this means the instrumental use of the language of liberal constitutionalism to carry out restrictions on citizens' rights. Jurisprudence, i.e., the language of justification for the decisions of such a court, is not just a simple repetition of populist rhetoric but is based on argumentative autonomy while being subordinate to the will of the populist government. Thus, the constitutional reasonings toolbox remains the same, only the distribution of legal protection of individual groups changes.

Such a strategy has its limits. Too much servicing of political will by the Court results in its delegitimization. As recent years have shown, this happens through a withdrawal of recognition by international and national judiciary, citizens, and legal scholarship. The European Court of Human Rights and the Court of Justice are developing tools to diminish the validity of decisions taken by the Court (Pech and Kochenov 2021). The consequence of this is also the increasing constitutional review by ordinary courts on a case-to-case basis within the framework of dispersed constitutional control (Radziewicz 2020). Polish citizens also have less and less confidence in the impartiality and non-partisanship of this body, which translates into a significant drop in individual complaints (Wolny and Szuleka 2021). Finally, national legal scholarship has moved beyond the positivist role of systematizing and generalizing the Court's decisions (Dębska 2015: pp. 34–40) to a more critical appraisal pointing to political instrumentalism in the use of constitutional categories and judicial decisions.

The populist jurisprudence presents constitutionalism with the problem of developing more precise theoretical tools that will allow for a deeper critique of constitutional reasoning, considering their transformative consequences and political significance. Without it, liberal constitutionalism will not be able to spot and adequately address the populist chameleon.

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