

How the ruling party has subordinated the Constitutional Court and gained more power than it has through elections

The Constitutional Court is no longer an independent court but rather an institution that Law and Justice (PiS) has transformed so that it hands down rulings that are convenient to the ruling party.

- **PiS has subordinated the Constitutional Court by breaking the law, by changing the law and filling the panel of the Constitutional Court with judges of its choice.**
- **PiS needed the Constitutional Court to legalise other changes that it wanted to introduce in the country.**
- **Judgements of the Constitutional Court subordinated to PiS directly affect citizens, and important decisions have been made on their basis, such as denying the right to abortion.**
- **But they can be challenged and overturned in EU courts.**

The Constitutional Court rules on the compliance of acts of law with the Constitution or international agreements. Its panel consists of 15 judges selected by the Sejm. Its judgements are final and they cannot be appealed against. If an act of law is ruled as unconstitutional, it is removed from the legal system, meaning that the Constitutional Court can overturn Sejm's decisions. It is also possible for the Constitutional Court to rule that an act which seems to be unconstitutional is in fact compliant with the Constitution. Judges of the Constitutional Court should, of course, be independent and rule on the basis of law and not their own convictions. However, MPs who select candidates for the positions of judges take into account candidates' convictions and political affiliations. Under the Constitution, a Constitutional Court judge cannot be an active politician, but nowadays, they are able to become judges shortly after leaving formal politics. In order to avoid filling the Constitutional Court's posts by one ruling party only, their terms of office are longer than MPs' and do not all end at the same time. That is why, unless they are in power for a long time, one political party cannot select the whole panel of the Constitutional Court.

What has led to the crisis surrounding the Constitutional Court?

Immediately after the parliamentary elections of 2015, the term of five out of fifteen judges of the Constitutional Court was supposed to end. Before the elections, the MPs of the expiring 7th term of the Sejm, with a Civic Platform (PO) and Polish People's Party (PSL) majority, adopted a new Act on the Constitutional Court, so that they and not their successors could select all five new judges.

The amendment of the Act on the Constitutional Court had been planned for a long time and was not a result of a hasty political calculation. The draft law had been in the Sejm for two years and it had been presented by President Bronisław Komorowski. Under the draft, the candidacies for new judges were supposed to be presented 6 months before the end of the term of their predecessors. The changes were supposed to give proper weight to the rules and criteria of the selection of judges. The problem was that the Sejm did not handle the draft bill. Had they done so when they had received the draft, PiS would not have later been able to use the argument that PO had meddled with the Act to appoint their own judges to the Constitutional Court.

However, political calculation did come into play before the elections. When the Sejm started working on the draft, it was too late to select candidates for judges within the foreseen deadlines. The new draft stipulated that candidates should be put forward three months before the end of the term of current judges, but the terms were supposed to end earlier: for three judges - in November, for two judges - in December. And the new law entered into force on 30 August. Therefore, a transitional law was introduced - judges whose term ended in 2015 were to be selected within 30 days from the date of entry into force of the new act of law. It was long enough for all five new judges to be selected by the Sejm of 7th term with a PO majority. That would mean that for the next nine years, five judges selected by the Sejm with a PO-majority would sit in the Constitutional Court.

The selection of three out of the five judges is not controversial, because the Sejm with a PiS majority met for the first time on 12 November, that is six days after the judges' terms had expired. But two judges, whose term expired around three weeks after the inaugural session of the new Sejm, could be selected by the Sejm with the new majority. MPs of the 7th term wanted, however, to select all five judges. This fuelled political arguments of their opponents to undermine the selection of all five judges.

Under the Constitution, the President should immediately swear in the judges selected by the MPs of the 7th term, but President Andrzej Duda did not do so. The swearing-in should be but a ceremonial act, and legally it has no decision-making bearing. But with Duda's refusal, the act of swearing-in became a tool which blocked decisions based on the rule of law (and later on, making it possible to push through decisions not based on the rule of law). It has thus become the foundation of the constitutional crisis in Poland.

The Sejm amends the Act on the Constitutional Court

MPs from PiS lists won a majority of the parliamentary seats. The first activity that the new Sejm handled - the day after its establishment - was an amendment to the Act on the Constitutional Court. On 19 November 2015 it voted that candidates for the successors of judges whose term expired in 2015 should be put forward within 7 days. Had the previous Sejm not selected the judges, they could very well have been selected then. But the judges had already been selected.

The Sejm adopted the Act. The Senate did not propose any amendments and after discussions, in the middle of the night, the Sejm adopted the Act and the President signed it the next day. On the same day, the Act was published in the Journal of Laws.

The Sejm makes the selection of judges void and selects new ones

The next milestones of the constitutional crisis were Sejm's resolution stipulating that the selection of judges to the Constitutional Court by the previous Sejm was invalid, as well as the selection of five new judges to the posts already filled (Henryk Cioch, Leon Morawski, Mariusz Muszyński, Julia Przyłębska, Piotr Pszczółkowski).

On the night of 2 December 2015, the President swore in four of the newly appointed judges; Julia Przyłębska was waiting for the expiration of the term of the judge that she was supposed to replace.

The Sejm selected new judges although the Constitutional Court had asked it not to do so until it had ruled on the Act on the Constitutional Court and its amendment introduced by the Sejm of the 8th term (PiS).

Complaints were lodged by PO MPs, the Ombudsman, the National Judiciary Council, the First President of the Supreme Court.

Their arguments were that:

the judges had already been selected, so the Sejm could not select new ones, if the Sejm decided that the selection of the judges to the Constitutional Court had been invalid by force of an act of law, then the judges of the Court could not be seen as independent from the Sejm.

The Constitutional Court recognised three judges selected by PO

The Constitutional Court unanimously ruled that the selection of the three judges by the previous Sejm was compliant with the Constitution. But the selection of two judges was unconstitutional.

Consequently, the President was obliged to swear in the correctly selected judges

immediately. Under the Constitution, it is not possible to refuse swearing in. But Andrzej Duda refused it, which further exacerbated the problem.

The Constitutional Court's decision meant that three out of five judges selected by the new Sejm were selected for the already filled positions (this is why they are called "judge-doublers"). It also meant that the President swore in people who could not be judges. This has had profound consequences, because if rulings are handed down by people who are not judges, are the rulings valid at all? Time has shown that no.

The selection of judge-doublers is unconstitutional

The opposition appealed to the Constitution Court again, this time for an inspection of Sejm's resolutions which made the selection of judges by the previous Sejm invalid and of the resolutions which instituted new judges for their positions.

In the meantime, the term of the fifth judge of the Constitutional Court expired and the President swore in the remaining judge-doubler, Julia Przyłębska .

After that, the Constitution Court ruled on the Act on the Constitutional Court voted through by PiS. It ruled that the act was unconstitutional. It questioned, among others, the regulations which allowed the judge-doublers to be selected. It confirmed that the selection of the three judges by the Sejm with a PO-led majority was valid.

This ruling of the Constitutional Court remained ineffective, because, first of all, judge-doublers had already been sworn in and were in the Constitutional Court, and secondly, the Prime Minister did not publish this ruling (another formality which has become a tool of political fight and led to the rule of law crisis). The Prime Minister argued that it was not a ruling given by the Constitutional Court, but a decision of a group of judges, so she was not obliged to publish anything.

Beata Kempa, head of the Chancellery of the Council of Ministers, sent a letter to the President of the Constitutional Court, informing him that the ruling on the procedure of the selection of judges would not be published in the Journal of Laws, because it had been given by the Court with a faulty composition, and was thus invalid by force of law.

The Constitutional Court's President, Andrzej Rzepliński, told Prime Minister that publishing the Court's rulings was her constitutional duty and ordered her to do so again. But the Prime Minister replied that she would not publish it. She had no right not to publish the ruling. The obligation to publish the Constitutional Court's rulings arises directly from the Constitution and no one is competent to decide which rulings are correct and which not. Their publication is merely a technical obligation imposed on the Chancellery of the Prime Minister.

Therefore, practice and case-law start living parallel lives. The Constitutional Court declared more and more of the Sejm's decisions invalid, but they were still implemented.

“Legal Repair Acts” on the Constitutional Court

Between November 2015 and December 2016, six so called “Legal Repair Acts” on the Constitutional Court prepared by PiS were adopted. The Act described above, which made it possible to introduce judge-doublers to the Constitutional Court, was the first one.

The amendment of 22 December 2015 has paralysed the Constitutional Court.

Under the amendment, the Court is supposed to:

rule according to the order in which it receives cases (and not according to their importance),

- a full panel is supposed to rule on almost all the cases,
- a full panel is not 9 judges anymore, but 13,
- a 2/3 majority is needed to hand down a ruling, and no longer just a simple majority.

Experts from the Batory Foundation commented that the proposed changes would delay the works or even paralyse the Constitutional Court, which eventually happened.

On 9 March 2016, the Constitutional Court ruled that this Act was unconstitutional.

It questioned, among other things:

- the full panel of the Court of at least 13 judges;
 - the requirement of a 2/3 majority for its rulings;
 - the order to rule on cases according to the order in which the Court receives them;
- prolonged deadlines for the Court to rule on cases,
- possibility for the Sejm to terminate the mandate of the judge of the Constitutional Court,
- lack of the *vacatio legis* for the Act.

According to the judges of the Constitutional Court, the amendment had made it impossible for the Court to “act reliably and swiftly” and breached its independence.

The next Legal Repair Act on the Constitutional Court of 22 July 2016 made it possible to block and postpone rulings indefinitely. The rules of the order of hearing cases were changed, as well as those of the selection of the President of the Constitutional Court and disciplinary responsibility of judges. A so called “blocking mechanism” was introduced which made it possible for judges to block other judges from giving a ruling. Normally, the Constitutional Court gives a ruling after a closed meeting of the judges. Under the “blocking mechanism”, if the meeting hears a case for which the Court is supposed to rule as a full panel, and at least four judges oppose the ruling, the meeting is supposed to be postponed for three months.

On 11 August 2016, the Constitutional Court ruled that many provisions of the Act were unconstitutional (judge-doublers Piotr Pszczółkowski, Julia Przyłębska and Zbigniew Jędrzejewski disagreed), for the following reasons:

- the rule of examining cases in the order they are received,
- the blocking mechanism,

- obliging the President of the Constitutional Court to make it possible for three judge-doublers to adjudicate (Henryk Cioch, Lech Morawski and Mariusz Muszyński),
- exempting the ruling of the Constitutional Court of 9 March 2016 from the obligation to be published in the Journal of Laws,
- the decision that the President of the Constitutional Court is obliged to “request” the Prime Minister to announce the ruling.

On 30 November 2016, the Sejm adopted the next “Legal Repair Acts”. The changes were tailor-made for Julia Przyłębska. These were the Act on the Organisation and Proceedings before the Constitutional Court and the Act on the Status of the Constitutional Court’s Judges. Under the Acts, the selection of the three candidates for the position of the President of the Constitutional Court was invalid. If the new procedure was to be conducted again, the Court would be run by the judge entrusted with the task by the President of Poland. This would be the judge “with the longest work experience in common courts or central state administration in the positions of law application”. Only Julia Przyłębska met these conditions. In December, she became the acting President of the Constitutional Court. The very same day, Przyłębska allowed the three judge-doublers to adjudicate. The same day, she convened the General Assembly of the Judges of the Constitutional Court to select candidates for the position of the Court’s president. Only judges selected by PiS participated in the voting (with one exception), because the rest boycotted the Assembly, as it had been convened illegally (too quickly, and without the required composition). This flawed Assembly chose Julia Przyłębska as the candidate for the position of the president and on 21 December 2016 the President of Poland appointed her to the post.

The Constitutional Court becomes the Court of Julia Przyłębska

The presidency of Julia Przyłębska marked the new beginning of the Constitutional Court’s activities. Before her, the Court did not recognize the unconstitutional amendments to its way of functioning. President Andrzej Rzepliński did not allow judge-doublers to adjudicate, and did not implement the Legal Repair Acts that were supposed to prolong, hamper and block the Court’s proceedings. The Constitutional Court of Julia Przyłębska, however, implements the changes, judge-doublers adjudicate and it is presided over by a person who was selected in a flawed manner. We can thus distinguish between these two eras by referring to the Constitutional Court and to the Constitutional Court of Julia Przyłębska. Julia Przyłębska’s takeover of the Court has led to a radical slowdown of the pace of cases being heard, with some even taking a few years. On the other hand, there are cases that are ruled upon immediately; everything depends on whether a given ruling is politically needed. The Court is not the guardian of a political minority anymore. The opposition does not even request to examine the constitutionality of legal acts, because the decisions of the

Constitutional Court of Julia Przyłębska are politically known. Earlier rulings of the Court, which had ruled that the changes to the Court were unconstitutional, were not published immediately (which is a legal obligation). Citizens do not lodge constitutional complaints anymore, the Ombudsman does not initiate proceedings. The Constitutional Court has lost all credibility. The only requests are made by the representatives of the ruling party and its officials (such as the Prime Minister) who want to legalise their unconstitutional activities.

Publication and non-publication of rulings

In total, the government of Beata Szydło failed to publish 26 rulings of the Constitutional Court on time, despite demands from the institutions of the European Union dealing with the rule of law in Poland. The President of the Constitutional Court, Andrzej Rzepliński, reminded Prime Minister Beata Szydło about the obligation to publish rulings without delay. It was underlined that despite the government not publishing the rulings, they were still binding, because they were issued by the Constitutional Court and the government had no right to influence them by refusing to publish them. But to no avail; the government still did not publish them.

Finally, they did, in 2018. To some extent, this happened thanks to pressure from the institutions of the European Union, but the publication did not change the actual situation and unconstitutional changes were not withdrawn. As a result, the chaotic nature of situation was only exacerbated.

According to the law, it is not the Prime Minister that decides that the ruling is binding by publishing the ruling, but rather it is the Constitutional Court that makes it binding, by giving it. Therefore, some Polish institutions have applied the rulings that were given, but not published. For example, the Supreme Administrative Court made a decision on the basis of an unpublished ruling.

Legal dualism

The constitutional crisis has led to the arbitrary application of law. The Prime Minister at the time, at her own discretion, either published or did not publish the rulings, and decided herself which law she would obey: the one ruled upon by the Constitutional Court or the one decided upon by the Sejm, i.e. PiS.

But the decisions of the Constitutional Court of Julia Przyłębska have consequences as other courts and institutions follow them and adjudicate on their basis. Any actions taken on the basis of an unconstitutional law are also flawed and can be declared invalid.

It is also not clear whether doubtful rulings should be applied, for example the one on the Abortion Act. The Constitutional Court of Julia Przyłębska decided that the provision which

allowed women to terminate a pregnancy due to irrevocable foetal defect was unconstitutional. Judge-doublers sat on the adjudicating panel, so the ruling should be invalid. Doctors who perform abortions applying the law from before the ruling, however, can face imprisonment because the Prosecution Office and courts can consider the ruling valid and thus the abortion illegal.

However, other courts are already questioning the judgments made by judge-doublers, for instance the Criminal Chamber of the Supreme Court, which decided that the ruling of the Constitutional Court of Julia Przyłębska from April 2020 can be omitted and not applied. Although the Constitution states that judgements of the Constitutional Court are final and universally binding, judge-doublers were selected breaching the constitutional rules of the selection of the Court's judges.

The same could be said for any doctor who performs an abortion due to a foetal defect and is indicted by the Prosecution Office. The criminal court could decide that the ruling of the Constitutional Court of Julia Przyłębska, which makes the abortion in such a situation illegal, should be omitted and could free the doctor from charges.

Consequently, the Polish legislation has been devastated by the desire for more power than foreseen by the Constitution.

Examples of rulings of the Constitutional Court of Julia Przyłębska

The Act on Gatherings is compliant with the Constitution. According to many Polish and foreign institutions, such as the Supreme Court and the Council of Europe, this Act restricts civic freedoms and the right to demonstrations. After PiS seized power, mass demonstrations against PiS politics have become an almost everyday reality in Poland. The Constitutional Court of Julia Przyłębska ruled that the provision on the selection of Neo-KRS (National Council of the Judiciary Subordinated to politicians and called "neo-KRS") members was constitutional. It declared unconstitutional the resolution of the joined chambers of the Supreme Court - Civil, Criminal and Labour and Social Security Chambers - stating that the judges appointed by neo-KRS should not adjudicate. This is why the Disciplinary Chamber of the Supreme Court, which was supposed to terrorise judges who are disobedient to the ruling party, has obtained the legitimatisation to act. By the way, this particular judgement was questioned by the Supreme Court, as described above. The Supreme Court decided that the resolution of the joint Chambers of the Supreme Court was valid, and that the ruling of the Constitutional Court of Julia Przyłębska should be ignored because of the presence of judge-doublers on the panel and of it exceeding its competences - the Constitution does not give the Constitutional Court the right to control other courts' rulings.

The President also now has the power of pardon before the pardoned person is finally

convicted. Thanks to this ruling, the President could pardon PiS's deputy president, Mariusz Kamiński. Kamiński, head of the Central Anticorruption Bureau (CBA) in 2006-2009, who was convicted of exceeding his powers and illegal operational activities, aimed at compromising PiS's political opponents by provoking them to act illegally. The judgement concerning Kamiński exceeding his powers, however, was not final, and once PiS took over in 2015, Kamiński was supposed to become the coordinator of secret service. PiS wanted to clear him of all the charges as quickly as possible, and the ruling of the Constitutional Court of Julia Przyłębska made this possible.

The Constitutional Court of Julia Przyłębska also ruled that the provision allowing termination of a pregnancy due to severe and irreversible foetal defects was unconstitutional. Since then, abortion has been illegal in Poland, something that the extreme right had been fighting for years, criticising PiS for their inertness when it comes to the introduction of a complete ban on pregnancy terminations.

The Constitutional Court of Julia Przyłębska ruled that the provision which orders the Ombudsperson to remain in their position after the termination of their term until their successor was selected was unconstitutional. The Ombudsperson then was Adam Bodnar, who criticised the breaches of the rule of law in Poland, and who was supposed to remain in power for three months after the ruling, even if the Sejm did not select his successor during that time.

The Constitutional Court of Julia Przyłębska also adjudicated on the compliance of EU regulations with the Constitution. Indeed, this happened every time the regulations were related to the changes in the judiciary system, i.e., when the Court of Justice of the European Union gave rulings questioning the changes.

The Constitutional Court of Julia Przyłębska also declared unconstitutional the provision of the EU treaty on the basis of which Poland was supposed to obey the CJEU ruling and suspend the Disciplinary Chamber of the Supreme Court. This ruling Przyłębska's Court was supposed to be the basis for the Disciplinary Chamber to continue its proceedings against the judges who did not accept the changes in the judiciary after 2015.

The most recent "EU" ruling of the Constitutional Court of Julia Przyłębska of 7 October 2021 has been called "legal Poxxit", when it ruled that the Polish Constitution was superior to some provisions of the Treaty of the EU. These were the provisions on the basis of which CJEU gave rulings on the changes in the Polish judiciary system. The Constitutional Court of Julia Przyłębska ruled they were unconstitutional and Przyłębska argued that without such a ruling of the Constitutional Court Poland could not function as a sovereign state and the Constitution would not be the supreme law in Poland. Consequently, the problem of legal dualism in Poland has deepened. Some judges will apply CJEU rulings and will, for example, refuse to adjudicate with incorrectly selected judges. Meanwhile, other judges will follow the changes introduced in courts by the ruling party.

Changes in the Constitutional Court and its presidency have also had a profound impact on its caselaw. The President of the Court can include and exclude certain judges, and block the initiation or continuation of proceedings, depending on the political will. Consequently, the number of questions referred to it by courts dropped to 21 (in 2015 it was 135). In March 2017, the National Council of the Judiciary (KRS) withdrew all the previously submitted requests to Julia Przyłębska's Court, as it did not agree with the fact that judge-doublers were allowed to adjudicate. Courts no longer send questions either, as they apply the Constitution themselves.

Reaction of EU institutions

EU institutions have been monitoring the rule of law crisis in Poland from the very beginning, as well as engaging in its resolution.

The Venice Commission, an advisory body of the Council of Europe, which consists of constitutional legal experts, said that the changes in the Act on the Constitutional Court introduced by PiS are a threat to the rule of law and the democratic system, and that they have deprived the Constitutional Court of the role as an arbiter in constitutional matters. The European Commission has published recommendations on the systemic threat to the rule of law in Poland.

The changes introduced in Poland have also been criticised by the Council of Europe and the European Parliament. The ruling of the European Court of Human Rights on the case settled in the presence of judge-doubler Mariusz Muszyński, was a breakthrough, with the court ruling that the judgement was invalid because the judge-doubler had no right to adjudicate.

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Sources:

I used: "Raport 2000 dni bezprawia" (2000 Days Without Law Report) prepared by the lawyers of the Free Courts Initiative, the Osiatyński Archives, the timetable of the destruction of the rule of law developed by Sylwia Szołucha and MamPrawoWiedziec.pl, an analysis of the case-law of the Constitutional Court in the years 2014-2017 written by legal

experts from the Batory Foundation, the book “Konstytucyjny spór o granice zmian organizacji i zasady działania Trybunału Konstytucyjnego” (Constitutional dispute about the changes to the organisation and rules of functioning of the Constitutional Court) under the scientific supervision of Piotr Radzewicz and Piotr Tuleya.