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ABUSIVE CONSTITUTIONALISM IN POLAND – ON THE SELF-DELEGITIMISATION OF THE JUDICIARY

"*Hoc volo, sic iubeo, sit pro ratione voluntas*"
Iuvenal, Satire VI, 23.

I. Introductory remarks

The concept of abusive constitutionalism became widespread in legal scholarship after David Landau's famous publication. The author defines abusive constitutionalism as *the use of constitutional amendment mechanisms to make a state significantly less democratic than it was before*[1]. He refers to actions that make a particular regime *significantly less democratic*[2]. The result, he points out, is to move away from democracy[3]. He pointed to 2013 as examples of this trend – Honduras, Venezuela or Hungary. *De-democratisation* of constitutional mechanisms is also, in my view, relevant from the perspective of the Polish experience, though viewed differently than usually presented in the political debates. It turns out that democratic mechanisms and their implementation are undermined by those judiciary representatives who, simultaneuosly, accuse the authorities introducing solutions in line with democratic principles of violating the rule of law.

David Landau, along with Rosalins Dixon in 2020 formulated another particularly interesting, significant related to this discussion concept of so-called ‚abusive judicial review'. Landau and Dixon define this as *intentional attacks on the core of electoral democracy*[4]. Again, the essence of the problem centers on attempts to deviate from democratic mechanisms, this time using the the judiciary. In the case of Poland, this issue was recognised by the these authors regarding the crisis involving the Constitutional Tribunal (TK; which began in 2015 with the overelection of of Constitutional Tribunal judges by the outgoing political power). Particularly, Landau and Dixon highlight that Poland represents an example of a so-called weak form of abuse of judicial review playing a significant role in the erosion of democracy[5]. The concept of abusive judicial review turns out, as it will be presented below, to be applicable to current jurisprudential trends in some Polish courts, notably the Supreme Court, which instrumentally utilizes in the jurisprudential output of the Court of Justice of the European Union (CJEU) in their judgments, while, in author's view, intentionally disgegarding the systemic foundations of the Polish Constitution.

These conclusions stem from the fact that the legal debate in Poland has, for at least several years, mirrored the polarised realms of politics and media. This results in a lack of detached, honest and factual debate that considers

various conflicting substantive arguments. It is hard not to perceive the one-sidedness of the presented argumentation is a product of the blatant politicisation and ideological bias, and, in the case of the courts, an aspiration to restore the principle of caste, wherein judiciary representatives exlusively decide on the personal composition of the Polish judiciary.

In recent discussion, following political changes in Poland's legislative and executive branches, shocking conclusions are being drawn in classical legal debates. High-ranking state officials, including those in the judiciary, and politically active members of the academic community, are undermining the legitimacy of constitutional authorities' functioning. Calls have been made for political authorities to take action against constitutional public institutions they do not recognise, such as ‚zeroing out' the Constitutional Tribunal (removal judges from office), declaring appointments invalid or ‚vetting' judges of common courts, the Supreme Court and the Supreme Administrative Court.

In March 2024, after prolonged behind-the-scenes political negotiations the Sejm of the Republic of Poland adopted a resolution not to recognise the judgments of this Tribunal (thus placing the controlled in the role of the controlling). According to the Sejm, the current body's inability to fulfill the tasks of the Constitutional Tribunal as outlined in Articles 188 and 189 of the Constitution of the Republic of Poland necessitated the re-creation (reestablishment) of the constitutional court[6].

In recent months the Government Legislation Centre has refused to publish ordonnances of judicial vacancies, the Minister of Justice has issued regulation that the Constitutional Tribunal found unconstitutional[7], mandating that judges appointed after 2017 be excluded from the court composition draws.

Initial steps have been taken to intimidate judges (threatening them with the need to return their emoluments due to the alleged illegality of their appointment, suing them for judgements issued as allegedly violating personal rights), court presidents appointed for a specific term of office are being removed *en masse* by the Minister of Justice. Constitutional Tribunal rulings are being ignored and not published in the relevant official gazette. A law was enacted – in an unconstitutional manner – terminating the mandates of judges elected to the National Council of the Judiciary (NCJ). At the same time, the Act assumes a return to the co-optation-corporate model of selecting the so-called judicial

part of its composition. In doing so, it contains a flagrant unconstitutional provision depriving the judges appointed after 2018 of active and passive electoral rights. All of this occurs despite criticism from legal authorities against the jurisprudence of the Constitutional Tribunal and the Supreme Court.

The effectiveness of the judgments of the Constitutional Tribunal is being negated by those who, just a few years earlier, asserted that these judgments were indisputable and valid regardless of the fulfilment of procedural requirements and regardless of whether they had been published in the relevant promulgation body. It is also argued that *the new government could also simply pass all the most important reforms through executive orders, which would then violate the existing laws and the constitution, but has the advantage that the president could not block them*[8] (the President may either veto a law or refer it to the Constitutional Tribunal for a review of its constitutionality before it is signed and thus before it enters into force).

The discussion of constitutional amendments without actually amending the Constitution is advancing in legal scholarship. Former President of the Constitutional Tribunal and former CJEU judge Prof. Marek Safjan emphasizes the need *to break out of the trap of legal formalism*[9]. He suggests that the most reasonable step at present would be to dismiss politically appointed judges to the NCJ, and he notes that the judgements of the NCJ are ‚non-existent[10]'. His sentiment is echoed by former ombudsman appointed back during the communist regime and former judge of the Supreme Administrative Court and the Constitutional Tribunal, Prof. Ewa Łętowska, who points out that the NCJ *can be dismissed by a resolution of the Sejm*, while *the neo-judges should once again face competitions before the new NCJ*[11]. Similar views are expressed by the former vice-president of the TK Prof. Stanisław Biernat[12]. Former president of the Constitutional Tribunal and former ombudsman Prof. Andrzej Zoll also speaks in a similar actions, stating that'the NCJ and the so-called doubles from the TK (non-recognised judges) should be dismissed by a resolution of the Sejm and, in addition, the appointments of judges appointed to the courts after 2017 should be revoked[13]. However, Prof. E. Łętowska pointed out only a few years earlier, in a different political reality, that if someone challenges a judgment of the Constitutional Tribunal ‚that it is not a judgment, it means

that he or she refuses to obey this act', which was to constitute a challenge to the constitutional order[14].

Finally, one of the most radical proponents advocating for the removal of the changes introduced between 2015 and 2023, and frequently cited in publications on the state of the rule of law in Poland during this period, Prof. Wojciech Sadurski, states that *the rule of law cannot consist in absolute adherence to the letter of the law*. In his opinion, *once democracy has returned, ruined political systems cannot be rebuilt by simple statutory steps, as this would mean restoring democracy on terms dictated by the fallen regime*[15].

These statements have elicited both applause and approval from some members of the public, as well as harsh criticism.

Similarly, politicians representing the legislature and executive branches as of late 2023 have expressed their views. They discuss the ‚removal' of TK judges whose election they do not recognise and the ‚cancellation' of judgments involving these judges. Prime Minister Donald Tusk himself became famous for stating that *everything will be according to the law as we understand it*.

At this juncture, it is crucial to note that resolutions of the Sejm of the Republic of Poland are not normative acts, they do not have universally binding force, and only bodies subordinate to the parliament can be bound by them. Thus, no constitutional body independent of the Sejm can be dismissed by means of a resolution of the Sejm, nor can the validity of its decisions or, still less, its constitutional status be determined with legal effect.

Concerning judges, their ‚vetting' or 'appointment annulment' supposedly relates to the allegedly unconstitutional procedure for the election the so-called judicial part of the NCJ. Such assertions are made despite the Constitutional Tribunal not confirming this thesis in a relevant ruling. Moreover, in 2019, the Constitutional Tribunal affirmed the constitutionality of the current method of selecting NCJ members, strengthening the presumption of constitutionality of the relevant provisions of the Act on the National Council of the Judiciary[16] and therefore the presumption of legality of the Council's decisions[17]. This pertains to the democratic model introduced in 2017 for the election of the judicial part of the Council (15 persons) by the Sejm with a majority of votes from candidates proposed by groups of judges. According to Article 9a(1) of the Act on NCJ, the Sejm elected from among the judges of the Supreme Court,

common courts, administrative courts and military courts fifteen members of the Council for a joint four-year term of office. This amendment was introduced following a 2017 Constitutional Tribunal rulinh that individually electing each judge-member of the NCJ was inadmissible. The Tribunal held that the Constitution requires all NCJ judges to be elected for a single, joint term of office[18].

The admissibility of challenging judges' appointments is supposed to stem from the illegality of the NCJ actions since 2018, as only adopting this method of challenging the constitutional body's status can justify the admissibility of the vetting of judges. Such action is supposedly first and foremost consistent with the principle that ‚no law is born out of lawlessness' (*ex iniuria ius non oritur*).

Remarkably, such conclusions were never previously articulated, despite numerous of Constitutional Tribunal judgments on the unconstitutionality of judicial appointment procedures before 2018 (the first such judgment was made as early as 2007)[19], and despite obvious political appointments during the communist regime.

Demands for the removal or vetting of judges appointed after 2017 persist despite the well-established jurisprudence of the Constitutional Tribunal and the Supreme Administrative Court on the inadmissibility of vetting or challenging the appointment to the office of a judge (*for in the current legal state, these acts are not subject to judicial review and are not revocable*[20])[21]. Indeed, the appointment by the President of the Republic is an irreversible act, not because, as some ironically want, it is supposed to be a supposedly monarchical *sanctifying act* (*le toucher royal*), but because there is no review or appeal procedure, including, above all, the one provided for in the Constitution, in which the act of appointment is granted to the President. Furthermore, according to the Constitution, judges are irremovable and can only be removed from office in appropriate proceedings for gross disciplinary misconduct (including the commission of a criminal offence, see Article 180(1) and (2)). Finally, the unquestionability of judicial appointments serves to realise the right to a court and not to restrict it, as it ensures the stability of the functioning of the judiciary and of jurisprudence. These conclusions also follow from the well-established jurisprudence of the Constitutional Tribunal[22]. In particular the Tribunal stresses that *A challenge to individual acts or the resumption of*

proceedings is not permissible if it would lead to unconstitutional effects. For these reasons, there are no constitutional grounds for the resumption of proceedings conducted in order to fill judicial positions. Persons whose candidacies have been rejected using the assessment criteria established on the basis of the contested statutory provision will have the opportunity to reapply for vacant judicial positions under the rules set out in the legislation to be established after the entry into force of the Constitutional Tribunal's judgment[23].

The above-mentioned examples of the actions of political power and the search for ways and justifications for such actions are due to the fact that institutions and principles that are the unquestioned foundations of the political system have become an obstacle to the alleged ‚restoration of the rule of law' (according to some, violated by the previous political authorities). In fact, fundamental institutional rules and systemic principles of constitutional rank prevent a simple and complete seizure of power, including mastery and control over the judiciary, including the politically crucial Constitutional Tribunal. In doing so, conclusions are formulated about the alleged populist and anti-democratic goals of those who recall the fundamental principles of the system, defenders of the constitutional foundations are accused of complicity in the assault on the values and principles of a democratic and liberal state, the meaning of which – as well as the formula of politicisation – are easily reversed or not specified in scope. An attentive observer will notice that these theses are not supported by any substantive argumentation; in a serious scientific discourse, such formulas (accusations) should be treated only as empty slogans without content, serving to reinforce the strength of the emotional and political message (depending on the addressee).

More importantly and sadly at the same time, it is crucial to demonstrate the one-sidedness and superficiality of the arguments, which reveal the motives of doctrinal and jurisprudential representatives who, by engaging in political debates, effectively diminish the value of legal discourse. They deliberately echo media *carbon copies,* strict political assessments, and insinuations, often alongside outright false information, theses, or misinterpretations presented as pseudo-scientific analysis. While constitutional law is inherently intertwined with politics, this should not excuse straying from meaningful debate.

II. Apparent conflict between constitutional and supranational order (of the European Union)

Constitutional identity is sometimes seen as a meta-assumption in debates on the relationship between European Union law and the laws of the Member States. It is intended to resolve conflicts between these legal orders. In practice, this refers to cases of rulings of the Court of Justice of the European Union, which are sometimes accused of exceeding the framework of the EU legal order, in particular because they exceed the limits of the so-called principle of conferral (from the perspective of Member State law) and attribution (from the perspective of the Treaty on European Union). The meta-assumption of constitutional identity becomes an argument in disputes about competences not delegated to the Union, and therefore action by the EU institutions, including the CJEU, in fact outside their own competences (ultra vires). Usually, the problems involved relate to the collision of norms of a constitutional nature (competences of the state authorities of the EU Member States), or the protection of individual rights (fundamental rights – constitutional on the one hand, on the other hand – rights and freedoms protected by the Charter of Fundamental Rights of the European Union and the European Convention for the Protection of Human Rights and Fundamental Freedoms respectively). Indeed, according to Article 53 of the EU Charter, nothing in the Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions.

The fundamental problems, however, which do not seem to be resolvable with an instrumentality ultimately referring to constitutional identity as a principle, are those concerning the conflict between constitutional competences on the one hand and fundamental rights on the other. Here, in fact, a collision between the constitutional order and principles derived from European Union law becomes apparent, but not so much because of the interpretation

by the CJEU itself, but rather by this Court opening the way for further interpretation and a certain degree of discretion in this regard by the national courts which refer questions to the CJEU for a preliminary ruling. Unfortunately, this path – consciously or not – has been opened by the CJEU itself, and has been eagerly exploited in the constitutional dispute in Poland.

Although the CJEU remained largely restrained in recognising the risk of interfering with constitutional foundations, in fact such a collision was created in the high-profile dispute over the assessment of the independence of the Polish judiciary and thus the due guarantee of protection in the light of the right to an independent court established by law (or *tribunal established in accordance with the law*, see Article 47 of the EU CFR, Article 6 of the ECHR). It is deliberate to use the word *made up*, as the public dispute tends to omit key arguments that clearly demonstrate its apparent nature. It is also no coincidence that this issue has not yet been the subject of in-depth analysis in the doctrine – not only under Polish law, but also under European Union law.

III. CJEU case-law and the method of election of the National Council of the Judiciary

The question of how to apply the CJEU's jurisprudence, and therefore the interpretation of European Union law, is primarily related to what is an acceptable way to appoint judges of Polish courts. In this respect, the CJEU has become, for some politicians and judges, the body that is supposed to replace the Polish Constitutional Tribunal, and this is due to the fact that the latter has spoken out in its jurisprudence against the thesis of the exclusive admissibility of one method of selecting candidates for judges. In the background of the dispute, of course, political motivations and the related conflict over the correctness of the staffing of the Polish constitutional court were also perceived.

Abuse of the CJEU jurisprudence consists in drawing conclusions from the theses contained in the Court's rulings as to the direction of interpretation of Polish law, which are, although not necessarily, blatantly contrary to the constitutional foundations resulting directly from the Constitution of the Republic of Poland. On this basis, a thesis is created about the alleged

constitutional and European standard, which is supposedly confirmed by the CJEU jurisprudence.

For example, it was left open to the questioning court's assessment by the CJEU in its judgment of 6 October 2021, W.Ż, C-487/21[24]. In that judgment, the CJEU indicated that a national court seised of an application for recusal as an adjunct to an action by which a judge holding office in a court that may be called upon to interpret and apply EU law challenges a decision to transfer him without his consent, must – where such a consequence is essential in view of the procedural situation at issue in order to ensure the primacy of EU law – declare to be null and void an order by which a court, ruling at last instance and comprising a single judge, has dismissed that action, if it follows from all the conditions and circumstances in which the process of the appointment of that single judge took place that (i) that appointment took place in clear breach of fundamental rules which form an integral part of the establishment and functioning of the judicial system concerned, and (ii) the integrity of the outcome of that procedure is undermined, giving rise to reasonable doubt in the minds of individuals as to the independence and impartiality of the judge concerned, with the result that that order may not be regarded as being made by an independent and impartial tribunal previously established by law, within the meaning of the second subparagraph of Article 19(1) TEU.

The Court also recalled, that the principle of the effective judicial protection of individuals' rights under EU law, referred to in the second subparagraph of Article 19(1) TEU, is a general principle of EU law stemming from the constitutional traditions common to the Member States, which has been enshrined in Articles 6 and 13 ECHR, and which is now reaffirmed by Article 47 of the Charter[25].

A similar approach was applied by the CJEU in its judgment in case C-824/18, A.B.[26], in which, in particular, it considered that the second subparagraph of Article 19(1) TEU must be interpreted as precluding such amendments where it is apparent – a matter which it is for the referring court to assess on the basis of all the relevant factors – that those amendments are capable of giving rise to legitimate doubts, in the minds of subjects of the law, as to the imperviousness of the judges appointed, by the President of the Republic of Poland, on the basis of those decisions of the Krajowa Rada Sądownictwa (National

Council of the Judiciary, NCJ), to external factors, in particular, to the direct or indirect influence of the legislature and the executive, and as to their neutrality with respect to the interests before them and, thus, may lead to those judges not being seen to be independent or impartial with the consequence of prejudicing the trust which justice in a democratic society governed by the rule of law must inspire in subjects of the law.

The abuse is related to the intepretation of what shape the nomination process for the office of a judge should take in order for a court involving such a person to be recognised as an independent and impartial court (tribunal) and, moreover, established by law (the latter formula is taken from the ECHR). In Polish law, according to Article 179 of the Constitution, judges are appointed by the President of the Republic of Poland on the proposal of the NCJ. The Polish Constitution precludes the appointment of a judge other than a judge of the Constitutional Tribunal in a manner different from that provided for in its Article 179. Thus, the nomination procedure for a judge consists of two stages – the nomination of the candidate by the Council and his/her appointment to the office of judge by the President of the Republic of Poland. No one can be appointed to the office of judge without a proposal from the Council. In turn, the Council consists of 25 members, 15 of whom are elected from among the judges – Article 187(1)(3) of the Constitution (author's emphasis). Unlike the other members of the Council in the case of judges, the Constitution does not specify by whom the judges comprising the NCJ are to be elected. Moreover, it indicates that the manner of election is determined by a law – Article 187(4) of the Constitution of the Republic of Poland (it therefore contains a reference, which in German doctrine is referred to as *Gesetzesvorbehalt*). The reference to the law entails that the legislator has a relative freedom in shaping the manner of election of the members of the National Council of the Judiciary.

The instrumentalisation of the CJEU's jurisprudential output lies in the way it has been applied by the Polish Supreme Court (and some other courts) in formations, significantly, involving judges appointed in accordance with the so-called co-optation-corporation model that existed before 2018. Under this arrangement, the NCJ consisted mostly of judges elected by other judges in a detailed procedure described in the law. In addition, the votes of judges

holding positions in higher courts, including the Supreme Court, were more important. In the case of the latter, the mere nomination of a candidate for the office of judge required the consent of the General Assembly of Judges of the Supreme Court, and after the rejection of the candidate by the NCJ, the Council's decision was subject to evaluation by the same Supreme Court. Consequently, in the case of the Supreme Court, the formula of the constitutional body – the NCJ – was illusory, and each time the candidatures submitted to individual courts and their acceptance were in fact decided by the Supreme Court. Such a solution adopted in ordinary legislation and not stemming from the Constitution, blatantly disregarding the independent position of the NCJ, was obviously contrary to the Constitution, including the principle of equal access to the public service and the tasks of the NCJ specified in the Basic Law. As already mentioned, the TK has also repeatedly questioned the way the NCJ operated before 2018 and the secret procedures for selecting candidates for judges. All this leads to the conclusion that it is not the obsolete existing Council shaped according to the democratic model, but the NCJ as it existed before 2018 was not a constitutional body, but only a statutory one. As such, the Council was not capable of adopting valid resolutions on the presentation of candidates for judges to the President of Poland. This, however, in view of the aforementioned unanimously adopted unquestionability of the President's prerogatives, did not constitute grounds for questioning the acts of judicial appointments themselves. Even less did the correctness of the composition of the courts, their independence or the independence (impartiality) of the judges come into question.

In view of the manner in which the theses constituting the result of the interpretation of the provisions of European Union law are formulated by the CJEU, the norms of EU law are subsequently interpreted by courts in certain formations in such a manner as to undermine the admissibility under the Polish Constitution of the selection of candidates for judges according to the so-called democratic model. It consists in the fact that, as has already been indicated, the majority of judges to the NCJ indicating candidates for judges are elected by the Sejm, and therefore by the legislature. A theory is being advanced according to which it follows from both Union law and Polish law that it is only permissible to adopt the co-optation-corporate model. Although

the CJEU itself did not state that such a model (and thus the election of judges – members of the NCJ by a political body or even directly by the citizens) is contradictory to the law of the European Union, the CJEU's jurisprudence opening up the possibility of assessment by national courts on this issue has resulted in the theses rulings of the CJEU becoming a convenient tool for the implementation of attempts to undermine judicial appointments starting from 2018, when the democratic model was introduced in place of the cooptation-corporate model.

In the light of the provisions indicated, including Article 187, the Polish Constitution remains to some extent open to the possibility of shaping a statutory procedure for the election of members of the National Council of the Judiciary (i.e. the council selecting candidates for judges who are subsequently appointed by the President of Poland). However, as to what model of election of council members should be regarded as acceptable, it is necessary to interpret the provisions of the Constitution in the light of its entirety. In this context it must be stated that, firstly, the council – contrary to the views sometimes presented – is not shaped as an institution of judicial self-government. It is in fact, within the framework of the principle of the tripartite division of powers, an executive authority. In the jurisprudence of the Constitutional Tribunal the NCJ is sometimes regarded as a ‚hybrid' body, but the council has neither legislative nor adjudicatory powers). The Council is supposed to uphold the independence of the judiciary and the independence of judges, but this is its task, which is not determined by how the members of the council are selected. The Tribunal takes the view that the NCJ is a body structurally located between the authorities, which conditions the role of the NCJ as an organ constituting an instrument for the implementation of the constitutional principle of balance between the three authorities, as well as a forum for co-operation and balancing between the authorities[27].

In contrast, the democratic model is supported by two key fundamental principles of the Constitution arising from Articles 2 and 4 thereof. According to the first of these, the Republic of Poland is a democratic state governed by the rule of law. A constituent element of this principle is therefore the principle of a democratic state. In turn, according to Article 4 of the Constitution of the Republic of Poland, the supreme power in the Republic of Poland belongs

to the Nation (paragraph 1), and the Nation exercises power through its representatives or directly (paragraph 2). At the core of the democratic principle is the requirement of democratic legitimacy of state organs and public officials. Its key role as one of the principles of the Basic Law is emphasised in German case law and literature. It is expressed in Article 20 of the German Basic Law of 1949 (*Die Bundesrepublik Deutschland ist ein demokratischer und sozialer Bundesstaat*). There is no doubt that the key conclusions as to the scope and content of this principle also remain the same and valid under the Polish Constitution. This principle applies to all segments of public authority and therefore also to the courts, but in their case it is implemented in a special way, i.e. with regard to their separation and independence from other authorities.

One of the leading ones for the principle of democracy is attributed to Ernst-Wolfgang Böckenförde[28] the so-called unbroken chain of legitimacy theory (German: *die Legitimationskettentheorie*). According to it, public authorities must, at least indirectly, derive their mandate from the election of citizens[29].

This principle requires the existence of a chain of legitimacy for each organ at least indirectly from the decision of the general public in democratic elections. Contradictory to this principle is the system of corporate (co-optive, caste, german *Kastensystem*) selection in the judiciary and, consequently, the creation of institutions of constitutional power without democratic elections and without their influence on the shape of the constitutional organs of the state. Attempts to justify the correctness of the co-optation-corporate model in the judiciary, and even more so the thesis of its exclusive correctness, by invoking the alleged need to ensure the independence and distinctiveness of the judiciary, are almost a classic manifestation of ‚abusive constitutionalism' and, in the case of its formulation in jurisprudence, of ‚abusive constitutionality control' of a so-called diffuse nature. The selection of the organs of public authority of constitutional rank should be made in each case and with due regard to the principle of democracy, and not by a very weak mandate of the representatives of a specific professional group (judges).

In the light of the above principles, every constitutional body must have what is known as an appropriate, at least indirect democratic mandate. This also applies to the National Council of the Judiciary. The so-called personal democratic legitimacy of the judiciary is weak, as it is only indirect through

appointment by the President and, moreover, significantly reduced when sufficient democratic legitimacy is not available to the National Council of the Judiciary. On the other hand, a democratic legitimacy deficit can be said to exist when the election of the holders of one of the constitutional organs is not carried out by the citizens (even indirectly), but mostly only by representatives of a specific professional group. Democratic legitimacy is also very weak when a judge is appointed by the President of the Republic of Poland as a result of his nomination to the office of judge in the nomination procedure by the decisions of the National Council of the Judiciary, the majority of whose composition is made up of judges who do not themselves have a democratic mandate, but are elected by the so-called judicial community (i.e. in the co-optation-corporate model).

Stronger democratic indirect legitimacy is enjoyed by judges nominated in Poland after 2017. Their legitimacy stems from the decision of the President of Poland, who has a direct mandate from the voters, and the National Council of the Judiciary, elected by a democratic body. From the perspective of the ‚strength' of democratic legitimacy, even greater, although also indirect, are the judges of the Constitutional Tribunal (elected by the Parliament) and the so-called social judges, i.e. jurors (elected by the Councils of Municipalities). In contrast to the professional judges of the ordinary courts, administrative courts and the Supreme Court, the mandate of the social judges and the judges of the TK, due to the tenure of office, is temporary and therefore renewable. This gives them stronger democratic legitimacy and, moreover, dictates that, in the case of professional judges, procedures should be established to take into account the strongest possible legitimacy of the bodies that decide on their appointment[30]. Afterwards, judges are not subject to any vetting involving, even indirectly, the public[31].

Only in passing is it worth pointing out that the participation of non-professional judges is possible due to the general formula of the Constitution. According to its Article 182, the participation of citizens in the administration of justice is determined by law. Therefore, it has not been determined whether the participation of jurors, or juries, or other persons who are not professional lawyers meeting the requirements for the office of judge and who have undergone the nomination procedure provided for in

Article 179 of the Constitution is permissible in the Polish legal system. It can be considered that the Constitution of the Republic of Poland is to a large extent open to the participation of non-professional judges in the process of administering justice, but in each case with the participation of a professional judge as a person who has the appropriate professional training.

The principle of caste selection (i.e. co-option through a decision of judges) was considered inappropriate in German doctrine as early as the first half of the 1950s. Such a solution is clearly inappropriate, given that the judiciary is one of the three state authorities which, in a democratic state system, must rely on legitimacy derived from the citizens. Otherwise, the judiciary as a key authority in the rule of law would be, as it were, abstracted, isolated and indeed excluded from democratic control and oversight from the outset (by design, as it were). This would be because not only the manner of exercising power, but even the appointment of the judge itself would be outside any (effective) influence of society. In the Polish case, the factor democratising the nomination procedure is the act of appointment itself, which is performed by the President, but his choice is indeed limited, since he is always bound by the ruling of the NCJ as the body that decides on the presentation of judicial candidates to the President. It is therefore clear that if the majority of the NCJ's members are elected by a professional group of judges, the democratic legitimacy of this body is further significantly weakened, and is in fact represented primarily by the representative of the President himself, and the members of the Sejm and Senate elected to the Council. These, however, collectively do not have a majority in the NCJ.

IV. *Forgotten* foundations of the state constitutional system

1) Challenging the competences of the Constitutional Tribunal

The status of the Constitutional Court has been increasingly challenged in case law, first of all by questioning some of its judges in its composition, and furthermore some of its competences have been questioned. The ECtHR stated that, due to the election of certain judges of the Constitutional Tribunal by the Sejm in 2015, this body is not an independent court established by law in accordance with Article 6 of the ECHR.

However, the debate in the Polish doctrine and, what is worse, the court decisions, including those of the Supreme Court and the ECHR, which in their motivations refer to the state of Polish legislation, in terms of assessing changes in the judiciary and the legitimacy of the Constitutional Tribunal, practically completely disregard three fundamental principles of constitutional law. These are: the already mentioned principle of democracy (Articles 2 and 4 of the Constitution), the principle of the presumption of constitutionality and the principle of legalism, i.e. the rule of law in the proper sense (Article 7 of the Constitution).

It is not appropriate to ignore the role and consequences of the application of these fundamental constitutional principles in particular in adjudicatory activity and, consequently, to make arbitrary rulings based on falsifiable rules of law. Such rulings are arbitrary and as such inadmissible. On the other hand, taking into account the aforementioned constitutional principles of the political system significantly alters the perspective of assessment and conclusions in the debate on the competence of the Constitutional Tribunal, the binding nature of its rulings, as well as the model of selection of candidates for judges, the effects of appointment to the office of judge and the framework of admissibility of possible ‚verification' of judicial appointments.

What is no less important, the decisions of courts and tribunals disregarding the aforementioned constitutional principles and the resulting conclusions should be assessed in cases of ignoring the effects of the so-called negatory judgements of the Constitutional Tribunal as ostensible. Their ostensibility, and thus the lack of the attribute of binding force (formal and material

validity) results from their apparent contradiction with the judgments of the Constitutional Tribunal, which, irrespective of the presented views, directly by virtue of the Constitution enjoy the attribute of universally binding force (Article 190(1) of the Constitution of Poland). *Universal binding force* means and results in the fact that any legal act – an act of lawmaking or law application (including a judgment or other court ruling) – that is directly contrary to a judgment of the Constitutional Tribunal is, by virtue of the Constitution itself, *rendered ineffective*. This is the case when a Polish court makes the basis of its decision a legal norm that has been declared unconstitutional by the Constitutional Tribunal. Unfortunately, such norms are still applied in the jurisprudential practice of the Supreme Court. Moreover, this is done as a result of blatant disregard for the judgments of the Constitutional Tribunal.

2) Principle of presumption of constitutionality

The principle of the presumption of constitutionality should be regarded as well established in the jurisprudence of the Polish Constitutional Tribunal and unquestioned until recent years. It presupposes that a properly formally enacted statutory legal norm (as well as a statute as a normative act in its entirety) is deemed to be consistent with the Constitution and is subject to application by all addressees. Its application is obligatory until the Act is repealed, some of its provisions are replaced by new ones, or the so-called negatory decision of the Constitutional Tribunal is issued (i.e. on the inconsistency of the hierarchical content of the norms of the Act and the Constitution). Apart from the effect of a judgement of the Constitutional Tribunal in the form of the so-called derogation of a norm from the legal system, such a judgement, and only such a judgement, is constitutive in nature. This means that in systems of the so-called centralised control of constitutionality, the constitutional court is the only body appointed to ascertain such inconsistency, and therefore only its ruling may cause the elimination of the unconstitutional provision from the system of law. In systems based on the principles of the so-called centralised constitutional review, which is the Polish system, there is no possibility to refuse to apply a law as long as it is in force.

This means that in a system of centralised control, other courts have no jurisdiction to review the constitutionality of laws.

According to the Polish Constitution, judges in the exercise of their office are bound by both the Constitution and laws. This is stated in Article 178(1) of the Constitution. This provision uses a coordinate – paratactic – conjunction ‚and', which means that a judge cannot be deemed to be bound by the Constitution and possibly, optionally, by statutes, and consequently perform so-called dispersed constitutionality control. This means that the Polish constitutional system precludes solutions in the form of the so-called judicial review, in which each court may assess the compliance of a statute with the Constitution and possibly refuse to apply the former when it finds that the statute is contrary to the constitutional norm. No court has an independent competence to assess the validity of a law, and it is to apply it as long as it has not been derogated from the legal order in an appropriate manner, and consequently the court may not refuse to apply the law under the pretext of its own assessment of its constitutionality. A different interpretative direction may not only lead to far-reaching perturbations in collision with a subsequent positive decision of the Constitutional Tribunal (which, for the same reasons when making its assessment, may rule on the constitutionality of a norm, which the court had earlier refused to apply), but would also make the institution of legal questions of courts to the Constitutional Tribunal, provided for in the Constitution, superfluous.

The court's independent assessment of the constitutionality and refusal to apply the law, bypassing the Constitutional Court, leads to a violation not only of Article 7 of the Polish Constitution (the principle of legalism), but also of the principle of the tripartite division of power (Article 10(2) of the Constitution). This does not mean, of course, that the judge is to be exclusively a kind of ‚subsumption machine'[32]. However, it cannot put itself in the role of legislator. The court does not have the power to legislate, and therefore also to repeal the law. Moreover, it does not have the democratic legitimacy as strong as the legislator (even in the case of the realisation of the so-called democratic model of judicial appointments described above).

The position on the prohibition of the application of the so-called diffuse control of constitutionality does not imply the impossibility of a pro-constitutional interpretation or of the direct application of the Basic Law by the courts[33], but in any case this cannot lead to an encroachment into the framework of constitutional competences reserved in this respect for the TK itself.

For the same reasons, it should be deemed unacceptable for a court to use as a legal basis for adjudication a norm previously deemed unconstitutional by the Constitutional Tribunal and consequently eliminated from legal circulation. Such a practice was not even dreamt of by the constitutional legislator, and yet it takes place under the pretext of undermining the competence of the Constitutional Tribunal to rule on certain acts. Such practice cannot be condoned, and all acts of law application ignoring the fact of the so-called tribunal's derogation of a specific legal norm (i.e. the Court's finding that an unconstitutional norm has lost its validity) should be deemed non-acts (lat. *sententia non existens*, i.e. acts of an ostensible nature, which as such do not produce the intended legal effects. This follows, as already mentioned, from Article 190(1) of the Constitution of the Republic of Poland, which indicates the universally binding force of decisions of the Constitutional Tribunal, which means, inter alia, that this force results in the exclusion, on the basis of this provision of the Constitution, of the possibility to recognise such abusive acts of law application as binding.

3) Principle of legalism

The presumption of constitutionality is linked to the principle of legalism, i.e. the determination of which public authority is competent for the hierarchical control of norms. The presumption of constitutionality leads in each case to the necessity of respecting the presumption of legality of the action of other organs of public authority, which act within the framework of statutory regulation and thus on the basis and within the limits of the laws in force. In accordance with this principle, as is well known, organs of public authority act on the basis of Article 7 of the Constitution of the Republic of Poland[34].

According to this provision, public authorities act on the basis and within the limits of the law. This means that every organ of public authority, including – which is particularly important in the context under consideration – every court, may only exercise such competences and take decisions of an authoritative character to the extent that this follows directly from legal provisions of constitutional or statutory rank. This also means that any action going beyond this framework constitutes a gross violation of the law and a breach of the rule of law.

Although legalism presupposes the existence of a certain amount of discretionary power (discretion), this power must always be exercised within the framework of a generally designated competence. Therefore, the scope of power cannot be extended when the legislator grants a certain general scope of possibility to act to a certain body, taking into account the sphere of discretion, but excluding its omnipotence. Contrary to popular belief, therefore, the courts too cannot rule *on everything*; they cannot, in particular, consider the correctness of the filling of constitutional bodies and the validity of their election, or the effectiveness of appointments to the office of judge.

4) Disregard of the above principles in jurisprudential practice

In apparent contradiction to the principle of legalism is the view that the judicial authorities are to have the competence to formulate judgments on the alleged unconstitutionality of certain norms, from which various – court-determined – legal consequences are to flow. The case law of the Supreme Court indicates that if a court in an individual case considers that: 1) the provision of a statute, which was to constitute the basis or premise of the adjudication, cannot be reconciled (through the application of a pro-constitutional interpretation) with a constitutional norm or principle, 2) the Constitutional Tribunal has not pronounced on the case, 3) the conditions for obtaining a decision of the Constitutional Tribunal do not exist, then the court has the competence to refuse to apply (omit) that provision when issuing the adjudication[35].

Some judgments also point out that the permissibility of the courts to refuse to apply laws which they consider unconstitutional derives from the principle of supremacy of the Constitution expressed in Article 8(1) and the injunction to apply it directly expressed in Article 8(2) of the Polish Constitution. This view is not new, but in recent years it has been presented to a greater extent than before. Its proponents, however, seem to overlook the already mentioned fact that it is an absolute principle of the Polish Constitution that a judge in exercising the administration of justice is bound not only by the Constitution, but also by statutes. It has also been repeatedly emphasised that the above view leads to undermining the constitutional role of the Constitutional Tribunal as an organ appointed by the Constitution to control the hierarchical compliance of norms. Consequently, a court having at least some doubts

as to the compliance of a statute with the Constitution should apply to the Constitutional Tribunal in the appropriate manner for their resolution (by way of a legal question). The latter instrument, if the concept of distributed control of constitutionality is adopted, not only becomes an unnecessary decorum in the adjudicative activity of courts, but may also lead to dangerous in its consequences different decisions of courts and the Constitutional Tribunal (the so-called ‚divergence' of assessments and consequences of different decisions).

Less doubtful, although also not obvious, is the thesis that if the Constitutional Court has found a specific provision of a law to be unconstitutional, the court may refuse to apply an identically worded provision of another law in the case under consideration[36].

Regardless of the awareness of the lack of formal competence in this respect, the adjudicating panels of the Supreme Court, referring to the alleged constitutional standard supported by the interpretation resulting from the EU law, as well as the ECHR, take on the role of bodies assessing the constitutionality of the norms of internal (state) law. The European Court of Human Rights in its jurisprudence concerning the independence of the Polish Constitutional Tribunal and the Supreme Court refers to judicial decisions or opinions of various institutions. However, it does so not only selectively, granting itself, as it were, the role of an arbiter, but also disregards neither the principle of the presumption of constitutionality, nor the effects of the decisions of the Constitutional Tribunal, nor the validity of the model of centralised control of constitutionality. In this way, a system is created in which international tribunals perform a kind of substitute function of the constitutional court, although formally the basis for their decisions are convention or treaty norms. These, in turn, as is known, in the hierarchy of internal sources of law, cannot be contradictory to the Constitution. The ECHR, the CJEU and some formations of the Supreme Court mutually refer to the acquis of the other of these courts. However, it is worth noting that the source of a particular jurisprudential direction ignoring the principles described here and questioning the so-called democratic mandate of the National Council of the Judiciary and the courts with judges elected after 2017 are exclusively theses formulated by the Supreme Court formations. What needs to be emphasised here is that the judges so ruling are in fact ruling *in causam suam*.

Firstly, the recognition of a system of electing judges based on the so-called democratic mandate would make it necessary to verify the regularity of the appointment process of judges with a so-called democratic mandate deficit. It is therefore precisely those judges who are challenging the appointments according to the democratic model.

Secondly, the appointment procedures and the composition of the National Judicial Council have been challenged several times by the Constitutional Tribunal before 2018, which also gives rise to the thesis that the judges challenging the new arrangements are in fact seeking to undermine the conclusion that their own appointments are flawed.

Thirdly and finally, some Supreme Court formations involving these judges are ruling on the basis of a resolution of the Supreme Court of the combined Chambers – Civil, Criminal and Labour, of 23 January 2020[37], in which the same judges recognised the lack of independence of the Supreme Court involving judges appointed according to the democratic model. In the opinion of the panel of judges appointed before 2018, those judges who took office under the new legislation cannot form an independent court and, therefore, judicial proceedings involving them are vitiated by a defect of nullity. It is worth noting that judges of the Supreme Court appointed after 2017 were not allowed to adopt the above resolution.

The 2020 resolution of the Supreme Court was in turn declared unconstitutional by the Constitutional Tribunal[38], yet it is still recognised by some formations as a basis for rulings. These formations include the judges who issued this resolution. These persons primarily question the competence of the TK to assess the constitutionality of an abstract resolution as a normative act (although the TK has issued such rulings on numerous occasions in the past[39]).

The resolution applies a different solution to judges of the Supreme Court than to judges of other courts. As regards these judges, the resolution introduced a kind of irrebuttable presumption of non-independence. This solution is unknown to any legal system so far and does not result from any legal regulation in Poland. It was pointed out in the resolution, that undue manning of the Court always occurs in the case of the former, so to speak ‚automatically', and this is due to the lack of an avenue of appeal against the decisions of the Supreme Court. It was held that it is therefore not possible

to examine individually the status of a judge, i.e. the circumstances of his or her appointment, his or her post-appointment behaviour and any possible influence on that person by the legislative or executive power. Such a ruling, providing for the ‚automatism' of recognising the lack of judicial independence, is not only grossly contrary to the principle of the irremovability of judges (as it leads to a kind of state of ‚freezing' of the judge, who cannot in fact undertake jurisdictional activities at all). It is also contrary to the direction of the jurisprudence of the CJEU. This one has never ruled on the possibility of *automatically* questioning the status of judges as a group solely on the basis that they were nominated in a certain way. This solution, however, shows that the aim was not to apply individualised rules of assessment (which can, nota bene, be applied to any judge regardless of his or her model of appointment), but to eliminate Supreme Court judges appointed after 2017. It must not be lost sight of the fact that, according to the CJEU's case law, the mere fact that the legislative or executive authorities are involved in the process of appointing a judge cannot lead to the judge's dependence on those authorities or raise doubts as to his or her impartiality if, once appointed, the person concerned is not subject to any pressure and does not receive instructions in the performance of his or her duties[40].

Leaving aside here the issues of substantive assessment, which require a separate broad analysis, these judges are, for the same reasons as described above, ruling on their own case. Moreover, in a manner grossly contrary to the foundations of the law, they are assessing the correctness and validity of an act in the issuance of which they themselves participated. Meanwhile, the adjudication of a judge in such circumstances is inadmissible under Polish law. It constitutes a violation of the principle of *nemo iudex in causa sua* and leads to the invalidity of the proceedings in a civil trial (Article 48 § 1, point 5 of the Code of Civil Procedure), and also constitutes the so-called absolute cause of appeal in a criminal trial (Article 40 of the Code of Criminal Procedure) and grounds for the resumption of proceedings.

Much more dangerous, however, is the emerging attempt to ‚disarm' the system of polity by formulating the thesis that the principle of the presumption of constitutionality is supposedly not valid. However, not only is it not supposed to be in force, but, presumably because of a specific choice concerning

the majority of political power, it should be replaced by the opposite formula – the ‚presumption of unconstitutionality'.

However, in practice, in the argumentation aimed at undermining the constitutional position and competences of constitutional authorities (and this is sometimes done directly in the judicature), these aspects of the dimension of the principle of legalism are overlooked. This principle binds all organs of public authority, and therefore also the courts, and in several aspects and dimensions. All too often we seem to forget that the courts are not extraterritorial and supra-state institutions, but are organs of public authority which, like the others in terms of their role in the structure of the constitutional system, remain addressees of the principles indicated. Already in 1997, the TK emphasised that the principle of legalism is a ‚general assumption of a democratic state of law'. In the jurisprudence of the Court to date, this principle has most often been associated with the prohibition of the presumption of competence of public authorities.

The ‚self-contained' meaning of Article 7 of the Constitution implies the necessity to ‚interpret the rules of competence in a strict manner and with a rejection, with regard to public authorities, of the principle: what is not prohibited, is permitted'[41]. The tendency to use the institution of the right to court by attempts to redefine its material scope should be assessed as a kind of attempt to circumvent this principle. Meanwhile, the right to court as a fundamental (constitutional) right may by no means constitute an instrument for undermining rules and institutional solutions of a systemic nature.

In the current constitutional order, in particular, the general principle of the judicial route may not be extended to the competence of courts to assess the competence, correctness of composition or manner of creation of constitutional bodies, whose constitutional position in this respect has been directly standardised in the Constitution. Thus, in order for a court to assess whether a specific constitutional organ is properly staffed, and such an organ is both the NCJ and the Supreme Court, properly exercises constitutionally specified competences, or whether such competences may be ignored by the court due to a peculiar collision with its statutory competences concerning the administration of justice, the court would have to have the relevant competence directly expressed in the constitutional law – and not in an ordinary

law, but in the Constitution. Indeed, the undermining of specific constitutional competences would require the relevant competence norms also expressed, and therefore arising directly from the Constitution.

Of course, there are exceptions to the principle of unquestionability of the regularity of the action of constitutional bodies arising either explicitly or implicitly from the Constitution itself. These exceptions are in fact an affirmation of the principle itself. These exceptions include, first and foremost, the admissibility of the Supreme Court adjudicating on the validity of democratic elections (Article 101 of the Constitution), the validity of a referendum (Article 125(4)) or the possibility for the Constitutional Tribunal to assess the correctness of the legislative process due to the need to adhere to the constitutional requirements of the procedure of enacting a law (e.g. three readings, stages of tabling amendments, obligatory consultation of specific bodies). Since the Tribunal is to assess, in accordance with its basic hierarchical competence, the compliance of a statute with the Constitution, then it must assess *ex officio*, as if on a preliminary basis, whether the act under review has been enacted correctly, and thus whether it has *come into effect* as a statute at all. The Tribunal recognises that allegations of unconstitutionality due to procedural and competence criteria are also raised by the Tribunal *ex officio*, irrespective of the content of the application (complaint)[42]. Since Article 188 of the Constitution makes the object of constitutionality control a *statute*, i.e. a normative act, the object of constitutional control. i.e. a normative act that has come into effect as a result of the exercise of normative competence and as a result of the fulfilment of constitutional procedural requirements. Undertaking the examination of constitutionality in this respect *ex officio* results from the necessity to fulfil the hypothesis of Article 188 of the Constitution, concerning the competences of the Constitutional Tribunal. It is worth pointing out that the TK recognises that *unconstitutionality due to the mode results in the failure of a law passed in that mode to come into effect. Indeed, an ineffective act, assuming only the external characteristics of a law, cannot lead to changes in the system of sources of law, and thus (if the unconstitutionality due to procedural deficiencies concerns an amending law) the consequence is the continued validity of the law in the version that the ineffective amendment was intended to change*[43].

An exception, so to speak extra-normative, and in my opinion doubtful in view of the principles mentioned above, is the recognition by the Constitutional Tribunal in its judgment of 27 May 2008, SK 57/06, of the admissibility of the Supreme Court's verification of the legality of decisions of the National Council of the Judiciary in individual cases concerning the selection of candidates for judges. The Constitutional Tribunal held that this competence arises from Article 60 of the Constitution of the Republic of Poland, which provides that Polish citizens enjoying full public rights have the right of access to the public service on equal terms.

Therefore, the competence to verify the status of other constitutional organs by the courts cannot be derived from the generally constitutional position and competence of the judiciary. This applies to presidential prerogatives (including the prerogative of appointment to judicial office) and the manner of shaping the composition of constitutional organs arising from the Constitution (with exceptions, such as the aforementioned verification of the validity of democratic elections, which, however, follows directly from the Constitution).

On the other hand, to a certain extent the admissibility of verification by the courts of the actions of such ultra vires bodies cannot be ruled out, i.e. verification whether in the light of the Constitution and the laws that concretise it a formally specified action of a body falls within its competence, to the extent that such action goes beyond the criteria specified in the Constitution or the law that concretises it. Paradoxically, however, this applies primarily to the verification of the exercise of competences by the courts, and it results from the fact that the competences of the courts, and first of all of the Supreme Court, are shaped directly by statutes on the basis of a reference (the so-called reservation of a statute), and not in the Constitution of the Republic of Poland. However, even in this case the verification of competences or the composition of the court results, as a rule, from specific statutory norms (e.g. by introducing norms providing for the control of decisions in an instance mode or through extraordinary means of appeal, the possibility to assess the correctness of the composition of the court on the basis of Article 379(4) of the Code of Civil Procedure or Article 439 § 1(1) of the Code of Criminal Procedure, while these norms do not prejudge the admissibility of assessing, as it were indirectly, the status of a judge who was appointed to this office by the President of the Republic of Poland).

The assessment of whether the President correctly and effectively exercised his own competence to appoint a judge, thus directly applying the norm of Article 179 of the Constitution of Poland, finds no constitutional grounds and goes beyond the framework set by its Article 7. The same applies to the assessment of the effectiveness of the Constitutional Tribunal's rulings, provided that only the formal procedure of their issuance, as stipulated by law, was observed (which concerns the procedure itself, not the assessment of the manner in which a judge was selected, as this too constitutes a constitutional, and not a statutory, matter).

V. Summary

It may be that the absence of such solutions in provisions of constitutional rank is a mistake and should be the subject of *de constitutione ferenda* demands, but its remedy cannot consist in the creation of a ‚self-competence' norm by any court. Such activity is a usurpation of competence. What reverberates particularly strongly from the end of 2023, the constitutional system and system cannot be repaired by unconstitutional methods, regardless of whether we approve of the chosen goals and question the correctness of the solutions that, in our opinion, should be eliminated. The Constitution is not defenceless in cases of obvious violations of the Constitution, and any ‚shortcut' solutions lead to further negative consequences.

The principle of legalism, explicitly formulated in Article 7 of the Constitution of the Republic of Poland, excludes the possibility of any public authority acting outside the framework of competences directly ascribed to it. This classically understood formula of the rule of law stipulates that an authority may only do as much as directly follows from a clear competence norm. Meanwhile, there is no norm in the Polish constitutional order which would allow for questioning with legal effect the correctness of the appointment of judges by the President of the Republic of Poland or the selection of judges of the Constitutional Tribunal, or the shape of a collegial body such as the National Council of the Judiciary. It is no coincidence that the only body that could lead to the formulation of assessments in this respect is the

Constitutional Tribunal. This is because the latter has the exclusive competence to assess the norms that concretise the Constitution – Article 179, Article 187. A judgement of the Constitutional Tribunal may, albeit only indirectly and – as indicated by numerous judgements of the Constitutional Tribunal – to a limited extent and in compliance with other constitutional principles, be the basis for further corrective measures, i.e. those aimed at restoring the constitutionality of the legal system.

The principle of legalism must also indirectly influence the assessment of the rulings of international tribunals in the above regard. This applies above all to the grossly arbitrary judgments of the ECHR. For since no public authority in Poland possesses certain competences, all the more so can they not be ascribed to international bodies. For the Republic of Poland may not cede or consent to the action of an international body to the extent that it would constitute an undermining of competence norms of constitutional rank. This is all the more so when this inadmissibility follows from and is confirmed by the jurisprudence of the Constitutional Tribunal[44].

Consequently, challenging the method of nominating judges, the composition of the Constitutional Tribunal or any court due to a constitutionally defined nomination procedure, even indirectly by referring to the standard of an independent court established by law (Article 6 ECHR, Article 47 CFREU), or the order to provide an appeal route within the scope referred to in Article 19 TEU, should be deemed an unacceptable transgression of the competences of these bodies. It should also be mentioned, as it has already been signalled, that the ECHR and CJEU judgments would not be possible without the application of a peculiar ‚encirclement' mechanism by the Polish courts, i.e. linking the theses presented by these courts (arbitrarily) and referring subsequently by the said European Courts to the views of the jurisprudence of the Polish courts, which – as indicated – do not have such competences. Their creation with legal effect, i.e. the possibility of deciding on the status of judges or constitutional organs of the state, would require not only their statutory grant, but even an amendment to the Constitution.

Every body of constitutional authority, and this also applies to the NCJ, should have democratic legitimacy and therefore its composition should be shaped either directly or indirectly taking into account democratic elections – elections

by the citizens and not only by a specific professional group. This principle has been applied and has so far raised no major objections with regard to so-called non-professional judges, i.e. jurors. By contrast, it is unjustifiably questioned, or perhaps rather silenced, in discussions on the procedure for selecting the body which is to nominate candidates for judges to the head of state. Meanwhile, such a model is not compatible with the principle of democracy, in which the majority of the composition of the NCJ does not have even indirect democratic legitimacy, and its undermining is manipulatively pursued in the public debate through the use of the term ‚politicisation'.

In the case of constitutional authorities, of which the National Council of the Judiciary is one, this principle prescribes, to the fullest extent possible, the realisation of the citizens' influence on the staffing of this body. Consequently, this approach not only affects the scope of freedom of the legislator in shaping the model for the election of the so-called judicial part of the Council (which is also covered by this principle), but explicitly excludes the model existing before 2018, under which the election of this part of the NCJ was limited only to the category of public functionaries, which are judges. As such, they do not have a social mandate within the meaning of the principle of democracy, and thus this model remained contrary to Articles 2 and 4 of the Polish Constitution. It is a misunderstanding to juxtapose it with the principle of the separateness of the judiciary, as the NCJ does not belong to this segment of the judiciary, but is in fact a hybrid body, whose fundamental constitutional task is the selection of candidates for judges. Adoption of a model consistent with the assumptions of the principle of democracy allows not only for the attribution to that body of the features required in the light of the aforementioned provisions of the Constitution, but also fulfils the assumption of democratic legitimacy of the judges themselves (following, of course, the completion of the nomination procedure, i.e. appointment by the President of the Republic).

An analysis in this respect requires a proper, separate in-depth, factual and – it should be emphasised – reliable and impartial (*sine ira et studio*) analysis, which is unfortunately lacking so far. If, however, this argumentation is each time accompanied by ignoring fundamental constitutional principles, this is precisely what, in my view, is a glaring manifestation of so-called abusive constitutionalism.

By ignoring the foundations of the state, activity that violates the principles indicated as key to the correct direction of interpretation constitutes a denial of the prohibition of arbitrariness with regard to the acts of public authorities, which must also be regarded as a guidepost for their action – above all in the adjudication of citizens' rights and duties. For arbitrariness leads directly to the rejection of legalism by the courts. Of course, it also implies a gross violation of the law, which, however, requires a separate analysis due to the significant distortion of the mechanisms of accountability of judges for their judgments.

Moreover, arbitrariness is a negation of the binding principles of democratic and equitable authority for all authorities (Article 2 of the Constitution). The fundamental principles of a democratic state of law, including the presumption of constitutionality and legalism, are and should be respected absolutely, and tolerating the tendencies described above will sooner rather than later lead to counterproductive effects. The undermining of these principles, and with them of the constitutional position and competences of the organs of public authority, including courts and judges, by other courts and judges, leads to the paralysis of the state, in which some wait for politicians to act, others aim to ‚turn off the fuses', while the circle of those who are mindful of maintaining the conditions of trust in the state and the laws it makes becomes smaller and smaller. Approval of such a state by the organs of public authority is – and this is not an opinion presented only here by me in relation to the functioning of state organs in the Polish reality – tantamount to resignation from one's own statehood, as it leads to self-delegitimisation of state institutions.

Endnotes

[1] *D. Landau*, Abusive Constitutionalism, 47 U.C. Davis L. Rev. 189 (2013).
[2] *D. Landau*, Abusive Constitutionalism, p. 195.
[3] *D. Landau*, Abusive Constitutionalism, p. 191.
[4] *D. Landau, R. Dixon*, Abusive Judicial Review: Courts Against Democracy, 53 U.C. Davis L. Rev. (2020).
[5] *D. Landau, R. Dixon*, Abusive Judicial Review: Courts Against Democracy, p. 1348.
[6] Resolution of the Sejm of the Republic of Poland of 6 March 2024 on removing the effects of the constitutional crisis of 2015-2023 in the context of the activity of the Constitutional Tribunal (M. P. pos. 198). In the judgment of the Constitutional Tribunal of 28 May 2024, U 5/24, this resolution was found to be incompatible with Article 7 in connection with Article 87(1), Article 10 in connection with Article 173 and Article 190(1) of the Constitution of the Republic of Poland.
[7] Regulation of the Minister of Justice of 6 February 2024 amending the Regulation - Rules of Procedure of Common Courts (Journal of Laws, item 149). This ordinance was declared unconstitutional and incompatible with the mandate under the Act by virtue of the judgment of the Constitutional Tribunal of 16 May 2024, U 1/24.
[8] *Do Rzeczy* z 10 grudnia 2023 r.: *Berliner Zeitung: Tusk może wprowadzić stan wyjątkowy i zdelegalizować PiS*. [the statement quoted is from Klaus Bachmann].
[9] M. Safjan, *Państwo prawa bez zwłoki. Trzeba wyrwać się z pułapki prawniczego formalizmu*, Gazeta Wyborcza 28-11-2023, [https://wyborcza.pl/7,75968,30449535,panstwo-prawa-bez-zwloki-trzeba-wyrwac-sie-z-pulapki-prawniczego.html] [entry: 30-06-2024]
[10] In an interview with TVN24: Rząd wyłonił kandydatkę na sędzię TSUE. Safjan: to rzeczywiście możliwie najgorszy moment, 11-11-2023, [https://tvn24.pl/polska/rzad-wylonil-kandydatke-na-sedzie-tsue-marek-safjan-to-rzeczywiscie-mozliwie-najgorszy-moment-st7432298][entry: 30-06-2024]
[11] Prof. Łętowska: Neo-KRS może odwołać Sejm. Neosędziowie do nowych konkursów, ulżyć kobietom, Gazeta Wyborcza z 15-11-2023, [https://wyborcza.pl/7,162657,30406662,prof-letowska-neo-krs-moze-odwolac-sejm-neosedziowie-do-nowych.html][entry: 30-06-2024]
[12] Prof. Biernat: *TK upadł, Przyłębska nie jest prezesem. Ignorować go, nie publikować wyroków*, Oko-Press z 8-12-2023, [https://oko.press/prof-biernat-tk-upadl-przylebska-nie-jest-prezesem-ignorowac-go-nie-publikowac-wyrokow#][entry: 30-06-2024]
[13] Prof. Zoll: *Uchwałą Sejmu odwołać neo-KRS i dublerów z TK. Cofnąć nominacje neo-sędziów*, Oko-Press z 20-11-2023, [https://oko.press/prof-zoll-naprawa-sady] [entry: 30-06-2024]
[14] Prof. Łętowska: Mamy do czynienia z kwestionowaniem porządku konstytucyjnego. Kropka, Radio Tokfm, wywiad z 11-03-2016, [https://www.tokfm.pl/Tokfm/7,103454,19750320,prof-letowska-mamy-do-czynienia-z-kwestionowaniem-porzadku.html][entry: 30-06-2024]

[15] Wojciech Sadurski: PiS używa konstytucji jako pułapki na demokratów, *Gazeta Wyborcza* [https://wyborcza.pl/7,75968,30553768,pis-uzywa-konstytucji-jako-pulapki-na-demokratow.html z 1-01-2024][entry: 30-06-2024]

[16] Ustawa z dnia 12 maja 2011 r. o Krajowej Radzie Sądownictwa, Dz. U. z 2021 r., poz. 269.

[17] Judgment of the TK of 25 March 2019, K 12/18, OTK ZU No. 17/A/2019.

[18] Judgment of the TK of 20 June 2017, K 5/17, OTK ZU 48/A/2017.

[19] *Imprimis* Judgments of the TK of 29 November 2007, SK 43/06 (OTK ZU No 10/A/2007, item 130), of 27 May 2008, SK 57/06 (OTK ZU No 4/A/2008, item 63), of 19 November 2009, K 62/07 (OTK ZU No 10/A/2009, item 149), of 20 June 2017, K 5/17 (OTK ZU No A/2017, item 48).

[20] E.g. Order of the Supreme Administrative Court of 13 December 2021, I OSK 3024/18.

[21] As to the nature of the appointment as a prerogative of the President (an exclusive act and not subject to administrative and judicial administrative review) see Order of the Constitutional Court of 23 June 2008, Kpt 1/08, OTK-A 2008/5/97, legal reasoning, point 3, Judgment of the Constitutional Court of 5 June 2012, K 18/09, OTK-A 2012/6/63; Orders of the Supreme Administrative Court: of 9 October 2012: I OSK 1872/12, I OSK 1873/12; I OSK 1874/12; I OSK 1875/12, I OSK 1882/12, I OSK 1883/12; I OSK 1890/12, I OSK 1891/12, order of the NSA of 16 October 2012, I OSK 1870/12, I OSK 1871/12, I OSK 1878/12, I OSK 1879/12, I OSK 1880/12, I OSK 1881/12, I OSK 1885/12, I OSK 1886/12, I OSK 1887/12, I OSK 1888/12, decisions of the SAC of 17 October 2012: I OSK 1876/12, I OSK 1877/12, I OSK 1889/12; order of the SAC of 20 March 2013, I OSK 3129/12; order of the SAC of 7 December 2017, I OSK 858/17; judgment of the Supreme Court of 10 June 2009, III KRS 9/08, OSNP 2011/7-8/114

[22] Judgments of the TK of 29 November 2007, SK 43/06 (OTK ZU No 10/A/2007, item 130) and of 27 May 2008, SK 57/06 (OTK ZU No 4/A/2008, item 63)

[23] Judgment of the TK of 29 November 2007, SK 43/06.

[24] ECLI:EU:C:2021:798.

[25] See also judgments of 18 May 2021, Asociația 'Forumul Judecătorilor Din România' and Others, C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, EU:C:2021:393, paragraph 190; of 20 April 2021, Repubblika, C-896/19, EU:C:2021:311, paragraph 45.

[26] ECLI:EU:C:2021:153.

[27] Cf. the judgment of the Constitutional Tribunal of 20 June 2017, ref. K 5/17, OTK ZU No. A/2017, item 48.

[28] See E.-*W. Böckenförde*, Demokratie als Verfassungsprinzip (§ 24), Rn 11-25, (in:) *J. Isensee, P. Kirchhof* (ed.), Handbuch des Staatsrechts der Bundesrepublik Deutschland, Bd. II, 3. ed., Heidelberg 2004.

[29] Decision of the Second Senate of the Federal Constitutional Court of 24 May 1995, 2 BvF 1/92, BVerfGE 93, 37.

[30] See on the legitimacy of judges and the comparison with their status and guarantees of independence e.g. *A. Voßkuhle, G. Sydow,* Die demokratische Legitimation des Richters, Juristenzeitung 2002, no. 14, p. 677 et al.

[31] Cf. *C.D. Classen*, Gesetzesvorbehalt und Dritte Gewalt, Juristenzeitung 2003, no. 14.

[32] A. Voßkuhle, G. Sydow, Die demokratische Legitimation des Richters, p. 677.

[33] See, for example, the judgment of the Constitutional Tribunal of 7 November 2005, P 20/04, OTK ZU No. 10/A/2005, item 111.

[34] Judgment of the Constitutional Tribunal of 21 October 1998, K 24/98, OTK 1998/6/97.

[35] Judgments of the Supreme Court: of 9 June 2022, III USKP 145/21, OSNP 2022 No 11, item 113; of 15 February 2023, II PSKP 37/22; of 7 February 2024, II USKP 126/22; resolution of the Supreme Court of 17 November 2022, III PZP 2/21, OSNP 2023 No 3, item 25; decision of the Supreme Court of 18 May 2023, II USK 384/22.

[36] Judgments of the Supreme Court: of 27 November 2019, II CSK 493/18; of 20 February 2018, V CSK 230/17, OSNC-ZD 2018, No 4, item 69; of 17 March 2016, V CSK 377/15, OSNC 2016, No 12, item 148; judgment of the Supreme Administrative Court of 9 February 2017, II FSK 3236/16.

[37] BSA I-4110-1/20, OSNKW 2020, z. 2, poz. 7.

[38] Resolution of the combined Chambers of the Supreme Court of 23 January 2020. Chambers: Civil, Criminal and Labour and Social Insurance Chambers of the Supreme Court, as a normative act, has ceased to be valid pursuant to the judgment of the Constitutional Court of 20 April 2020, U 2/20 (OTK ZU No. A/2020, item 61).

[39] The Constitutional Tribunal treats as a key premise for the qualification of a legal act as a normative act its content (cf. in particular the decisions of the Constitutional Tribunal of: 7 June 1989, U 15/88, OTK in 1989, item 10; 19 June 1992, U 6/92, OTK in 1992, Part I, item 13; 28 June 1994, K 6/93, OTK in 1994, Part I, item 14; 6 December 1994, U 5/94, OTK w 1994, Part II, item 41; 15 July 1996, U 3/96, OTK ZU No 4/1996, item 31; 6 May 1997, U 2/96, OTK ZU No 2/1997, item 17; 14 December 1999, U 7/99, OTK ZU No 7/1999, item 170; 12 July 2001, SK 1/01, OTK ZU No 5/2001, item 127; 22 September 2006, U 4/06, OTK ZU No 8/A/2006, item 109; 23 April 2008, SK 16/07, OTK ZU No 3/A/2008, item 45; 26 November 2008, U 1/08, OTK ZU No 9/A/2008, item 160; 27 October 2010, K 10/08, OTK ZU No 8/A/2010, item 81; 4 December 2012, U 3/11, OTK ZU No 11/A/2012, item 131). The normative content of an act, including one that is a resolution, may be subject to assessment by the Constitutional Tribunal. The jurisprudence of the Constitutional Tribunal indicates that the recognition of an act as normative is determined primarily by the nature of the norms of conduct contained therein: if, by way of interpretation, norms of a general and abstract nature could be reconstructed from its content, it was treated as normative. The Court recognises that its jurisdiction does not extend to individual-specific acts; its competence therefore does not extend to those acts of state bodies which are addressed to an individual

subject, which concern a specific case or situation, or whose application is of a *one-off* nature (cf. in particular the judgments of the TK of: 6 December 1994, ref. U 5/94, OTK 1994, part II, item 41; 5 June 2001, ref. K 18/00, OTK ZU No 5/2001, item 118. Thus, not every resolution is subject to the cognition of the TK, but only those which contain legal norms in the above sense.

[40] Judgments of 19 November 2019, A.K. et al. (Independence of the Disciplinary Chamber of the Supreme Court), C-585/18, C-624/18 and C-625/18, EU:C:2019:982, paragraph 133 and the case law cited therein; of 9 July 2020, Land Hessen, C-272/19, ECLI:EU:C:2020:535, paragraph 54.

[41] Judgment of the CT 27 May 2002, K 20/01, OTK-A 2002/3/34.

[42] See, e.g. judgment of the Constitutional Tribunal of 24 June 1998, K. 3/98, OTK ZU No 4/1998, item 52.

[43] Judgment of the Constitutional Tribunal of 28 November 2007, K 39/07, OTK ZU No 129/10A/2007.

[44] In a judgment of 24 November 2021, K 6/21 (OTK ZU 9/A/2022), the TK ruled that Article 6(1) of the ECHR, to the extent that the concept of court used in this provision includes the Constitutional Court, is incompatible with Article 173 in connection with Article 10(2), Article 175(1) and Article 8 para. 1 of the Constitution of the Republic of Poland and, moreover, insofar as it confers on the European Court of Human Rights the competence to assess the legality of the election of judges of the Constitutional Court, it is incompatible with Article 194(1) in conjunction with Article 8(1) of the Constitution. In turn, in its judgment of 10 March 2022, K 7/21 (OTK ZU 24/A/2022), the Court held, inter alia, that Article 6(1), first sentence, of the ECHR, to the extent that, in assessing the fulfilment of the condition of a *court established by law*: a) allows the European Court of Human Rights or national courts to disregard the provisions of the Constitution, laws and judgments of the Polish Constitutional Court, b) allows the independent creation of norms concerning the nomination procedure of national court judges by the ECHR or national courts in the process of interpreting the Convention, is incompatible with Art. 89(1), para. 2, Art. 176(2), Article 179 in conjunction with Article 187(1) in conjunction with Article 187(4) and with Article 190(1) of the Constitution, and insofar as it empowers the ECtHR or national courts to assess the compatibility with the Constitution and the Convention of laws concerning the organisation of the judiciary, the jurisdiction of courts and the law defining the organisation, scope of activities, procedure of work and method of election of members of the National Council of the Judiciary, it is inconsistent with Article 188(1) and (2) and with Article 190(1) of the Constitution.