Populist but not Popular

The abortion judgment of the Polish Constitutional Tribunal

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For more than a week, the largest mass protests have been taking place in Poland since the political transition in 1989. Despite the ongoing COVID-19 pandemic, hundreds of thousands of people are protesting against the ruling of the PiS-controlled Constitutional Tribunal, stating the unconstitutionality of embryopathological grounds for the admissibility of abortion.The rage of thousands of citizens, manifested, among others, by the use of popular profanity as one of the main slogans of the protest, caused consternation not only among the politicians of the ruling coalition, but also some of the opposition. The sharp drop in support for PiS in the latest polls makes the ruling camp try panically to minimize the political losses it has suffered. One symptom of that panic is the fact that the judgment of the Constitutional Tribunal has not yet been published. Another is draft law submitted by the PiS-aligned President Duda slightly alleviating the effects of the judgment of the Constitutional Tribunal. All this proves how deep the crisis of the rule of law and how blurred the border between law and politics in Poland have become.

PiS had based its election rhetoric on the slogan of listening to the voice of the people. In practice, however, the party began to implement an ideological crusade with the help of captured counter-majoritarian bodies, most of all the Constitutional Tribunal. In this respect, the recent abortion judgment of the CT, apart from serious flaws that undermine its constitutional legitimacy (both procedural and content-related), is also a sad illustration of the hypocrisy of populist constitutionalism in Poland.

Populist constitutionalism

Populist constitutionalism is one of many so-called adjectival constitutionalisms), whose common feature is the conscious transgression beyond the framework oflegal constitutionalism. Its main components are taken as: the written (formal) constitution, the principle of supremacy of the constitution, and sometimes also the judicial control of the constitutionality of the law. Critics of legal constitutionalism claim that assigning these components excessive importance in the dogma of constitutional law and systemic practice has led to the identification of the constitution with the constitutional text, excessive formalism in the interpretation of the constitutional text, the artificial separation of law (and the constitution) from the political sphere and the overbearing role of the courts, including first and foremost constitutional courts in determining the content of constitutional norms. At the same time, legal constitutionalism is linked with liberal constitutionalism, most often with both concepts identified with liberal democracy. Social disapproval of legal formalism, technocratic rule, and neoliberal capitalism are seen as the main causes of social and political change aimed at making or at least strengthening the idea of political constitutionalism.

The resurgence of populism today poses a serious challenge to constitutional law and the deeper tradition of contemporary constitutionalism. Populist constitutionalism, as opposed to legal constitutionalism, primarily adopts a different, broader definition of the constitution, pointing to its political nature. As stated by N. Walker, the distinctiveness of the constitutional orientation of populism is based on the annexation of the space between authoritarian and popular constitutionalism (*de facto* drawing from the fundamental assumptions of political constitutionalism). Populism thus situated is a reaction to the imperfections of the liberal constitutional paradigm. Nevertheless, while populist critique of liberal constitutional-

ism provides an important insight into the structural problems of liberal democracy, populist constitutionalism ultimately fails to deliver on its democratic promise. Populism adheres to the principles of democracy, but by drawing extreme, one-sided conclusions from them, it violates key dimensions of democratic constitutionalism, such as pluralism, social inclusion, and a genuine civic commitment to constitutionalism.

The ruling of the Polish Constitutional Tribunal of 22 October 2020 proves these observations right. Populist constitutionalism argues for the supreme nature of the sovereign will of the nation, expressed in laws passed by parliament, merely as a rhetorical trick and only when it comes in handy for the implementation of its own political and ideological program. Counter-majoritarian bodies, having been captured by populists, become convenient puppets in a political show under their direction. J. W. Müller is right to state that "(...) populists are not generally 'against institutions', and they are not designed to self-destruct once in power. They only oppose those institutions that, in their view, fail to produce the morally (as opposed to empirically) correct political outcomes. And that happens only when they are in opposition. Populists in power are fine with institutions – which is to say, their institutions."

Since 2015, acts of legislation have been the best (and only) tool for the gradual subordination of the executive power of courts (including the Constitutional Tribunal). However, since 2019, the only formally counter-majoritarian Constitutional Tribunal began to issue rulings which were a hardly disguised political show of power directedmainly at the opposition and the EU. Such a role played the judgment of 25 March 2019 confirming the constitutionality of the reform of the National Council of the Judiciary, the judgment of 20 April2020 on the national implementation of the judgment of the CJEU of 19 November 2019, and the decision of 21 April 2020 regarding the alleged dispute over jurisdiction power between the Supreme Court on the one hand and the Sejm and the President on the other, which in real terms blocked the execution of the CJEU ruling.)

In the case of such a socially controversial problem as abortion, the use of the Constitutional Tribunal had a different purpose. This was an attempt to shift the responsibility for the ideological radicalism of this decision to constitutional law. This time the adressee of this show of power was not the opposition nor the EU: it was the public.

All this begs the question: why did PiS decide to make this move? There is no easy answer to this question. Radical right-wing circles have already tried several times to have the already very narrow exceptions to the abortion ban cut down further. PiS, however, lacked the political clout to pass such a bill. The last of these legislative attempts still lurks in the so-called parliamentary freezer, so work on it has been at a standstill for a long time. Moreover, it took two attempts for this ruling to be issued by the Constitutional Tribunal, because during the previous term of the Sejm a similar motion was also submitted to the Constitutional Tribunal, but its President Julia Przyłębska chose not to announce a hearing and the case was never adjudicated. (Applications submitted by MPs lose their formal legitimacy at the end of the legislative term). Kaczyński giving the green light for the Constitutional Tribunal's ruling on abortion may also be interpreted as a strategically brilliant distraction from the ever more obvious ineffectiveness of the Polish government in the fight against the COVID-19 pandemic, as well as the reckless decision of a politician whose star is waning and who strives to enforce his vision of the state at all costs.

One thing is certain. Right-wing populist constitutionalism in Poland – defined as a descriptive approach to changing the role of the constitution – has nothing to do with popular constitutionalism. Criticism of PiS against the judicial review in Polandhas beendirected solely at the 'former' liberal juristocracy. Having been taken over, the Constitutional Tribunal has become a convenient tool for PiS to implement their policy while keeping their "hands clean". The ongoing mass social protests against the judgment of the Constitutional Tribunal are, among others, a form of rebellion against this hypocrisy.

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