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ILLIBERAL JUDICIALIZATION OF POLITICS IN POLAND**

Abstract

The judiciary currently plays an important role in any political system or kind of constitutionalism, regardless of the adopted system of constitutional review (judicialization of politics). The most important purpose of the constitutional court seems to be the protection of human rights against the arbitrary interference of state authority in individual interest. The key incentive is the protection of an individual against the constitutionally unauthorised and arbitrary intervention of the parliamentary majority. In the context of democratic decay and the development of other than liberal constitutional democracy versions of constitutionalism (authoritarian, autocratic, populist, illiberal), the question arises: what is the role of constitutional courts within these so-called democracies with adjectives. Applying this question into Polish reality, since 2015, the Polish constitutional court is described as politicized. Against this wording, the Author claims that the court is not only politicized but that we can talk about the illiberal judicialization of politics as best describing the Polish situation.

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Keywords

judicialization of politics – constitutional court – politicization of judiciary – judicial activism

I. INTRODUCTION

Without any doubt, the judiciary currently plays an important role in any political system or kind of constitutionalism, regardless of the adopted system of constitutional review. In the US, basing itself on *Marbury v. Madison* and a Kelsenian or constitutional dialogue, the most important purpose of the constitutional court seems to be the protection of human rights against the arbitrary interference of state authority in individual interests. The key incentive is the protection of the individual against the constitutionally unauthorised and arbitrary intervention of the parliamentary majority. Therefore, the need of neutral control of the actions of public authorities (above all Parliaments) arises. The judiciary, and most notably constitutional courts, are perceived as such a neutral arbiter. Nevertheless, courts are expected to be independent and impartial and, thus, trustworthy. In consequence, we can note the meaningful transfer of power from Parliaments to courts. At the same time, there is the temptation among judges to adjudicate actively. This active approach differs in relation to the independence and impartiality of courts in certain systemic settings. In this area, the paper aims, as its contribution, to define the broad problem of the judicialization of politics and empowering courts.¹

In the context of democratic decay and the development of other than liberal constitutional democracy versions of constitutionalism (authoritarian, autocratic, populist, illiberal), the question arises: what is the role of constitutional courts within these so-called democracies with adjectives. Applying this question into Polish reality, since 2015,

¹ The problem has been noted and partly addressed by Armen Mazmanyan, *Judicialization of politics: The post-Soviet way*, 13 I-CON 1 (2015) or Daniel M. Brinks, Abby Blass, *Rethinking judicial empowerment: The new foundations of constitutional justice*, 15 I-CON 2 (2017).

and especially since 2017, when the capture of the CT was accomplished, the Polish constitutional court is described as politicized. Against this wording, I claim that the court is not only politicized, but that we can talk about the illiberal judicialization of politics as best describing the Polish situation. This article addresses this problem.

Firstly, the definition of illiberal democracy will be provided to give proper context to the functions of the CT in Poland (II). Then, the concept of the judicialization of politics and the growing need for neutral arbitration in the scope of political decision-making by Parliaments to prevent the constitutionally unauthorised intervention of the parliamentary majority in the status of individuals will be described (III). Acting as a neutral mediator, the constitutional court has to be independent and impartial. Thus, the position of the constitutional court in relation to political authority is strengthened. Courts (or judges) lacking the virtue of self-restraint may be tempted to take over political decision-making (regarding the whole community) from Parliament and, as a result, become politicised (IV). There is also another possible scenario, especially in non-consolidated or non-fully-fledged democracies, which involves the degradation and subordination of courts to a political body. Such a situation is described as a post-Soviet judicialization of politics (V). In the scope of illiberal democracy, another specific kind of judicialization of politics can be identified, which is similar to what happens in post-Soviet states. As a result of the struggle, a constitutional court becomes subordinated to the political will and authority so as to provide legal/constitutional justification for the decisions already taken or those to be taken in future at the exclusion of opposite views (VI). The distinctive characteristic of illiberal judicialization is the constraint of public power. Finally, I will conclude briefly my thoughts (VII).

II. ILLIBERAL CONSTITUTIONALISM

Even though in most of the literature the term “illiberal constitutionalism” is not generally accepted: current comparative research² indicates that illiberal constitutionalism has been established and consolidated in

² Timea Drinóczi, Agnieszka Bień-Kacała, *Constitutions and constitutionalism captured:*

Hungary and Poland since 2010 and 2015 respectively. It seems that the transformation was not accidental. It had its basis, partly, in the emotional and historical trajectories of the Hungarian and Polish nations, some aspects of which, at a particular moment of economic and political crisis, have been successfully triggered by populist politicians.³ Nevertheless, the illiberal constitutional setting was formed on the basis of a constitutional democracy, and it still has its contours.

Illiberal constitutionalism is the result of a peaceful constitutional development in which the three pillars of constitutional democracy – the rule of law (promoting, at least, a limited government), democracy (promoting, at least, equal representation and public discourse on issues), and human rights (of individuals and groups) – are not respected in the same way as they were before, that is, in Hungary and Poland, during the 20 years following the period of transition. Another significant characteristic of illiberal constitutionalism is the selective and arbitrary application of the constitution, and the non-inclusive and abusive character of the constitution- and law-making processes. The dictatorship of the majority in decision-making and the connected sense of belonging to the same uniform “family”, which does not acknowledge minority views, are features of illiberal constitutional democracy too.

Illiberal constitutional democracy can be differentiated from other types of constitutionalism, especially those with “authoritarian” or “autocratic”⁴ references. The Hungarian and Polish settings seem to be different from both Tushnet’s authoritarian constitutionalism⁵ and Landau’s abusive constitutionalism.⁶ In authoritarian constitutionalism

shaping illiberal democracies in Hungary and Poland, “German Law Journal” (2019, under publication).

³ Timea Drinóczi, Agnieszka Bień-Kacata, *Extra-legal particularities and illiberal constitutionalism. The case of Hungary and Poland*, “The Acta Juridica Hungarica”, Vol. 59, No 4, 2018, pp. 338–354.

⁴ Kim Lane Scheppele, *Autocratic Legalism*, “The University of Chicago Law Review” 85/2018, pp. 545–583.

⁵ Mark Tushnet, *Authoritarian Constitutionalism*, “Cornell Law Review”, Vol. 100, Issue 2, January 2015.

⁶ David Landau, *Abusive Constitutionalism*, “University of California Davis Law Review”, Vol. 47/189, 2013, pp. 189–260.

(exemplified by Singapore, according to Tushnet), liberal freedoms are protected at an intermediate level, elections are reasonably free and fair, and there is 'a normative commitment to constraints on public power'.⁷ Such a 'normative commitment to constraints on public power', however, seems to be missing in Poland and Hungary on a constitutional level and in constitutional practice. Such constraints stem from European Union values and commitments. They are expected to be effective to a certain extent on political (art. 7 of the EU Treaty procedures) and legal (the CJEU competences) grounds. Political measures, however, have failed so far. David S. Law uses the term 'illiberal constitutional democracy' to describe Singapore.⁸ Nevertheless, the distinction we have made concerning the 'normative commitment to constrain public power' still applies. Abusive constitutionalism is apparently a manner in which a constitutional democracy is transformed into something else: in our case, illiberal constitutionalism. As far as populist constitutionalism is concerned, we would not consider it a legal concept, but mainly a sociological phenomenon.⁹ As such, it forms the sociological base for either an illiberal or an authoritarian system. The worldwide populist attitude of rulers is a tool towards gaining popular support for them to govern. Nevertheless, populists still need to transform the system towards illiberalism or authoritarianism through legal measures, such as by adopting a new constitution, and by introducing retrograde abusive amendments and clearly unconstitutional legislation. Without transformation, populism is only a shadow on politics in still liberal democratic settings.¹⁰

The illiberal democracies emerging in Eastern Europe seem to be, to a certain extent, constitutional democracies, which are being transformed peacefully by populist politicians from a more substantial form of constitutional democracy that prioritised liberal constitutional values.

⁷ Tushnet, *supra* note 6 at p. 438.

⁸ David S. Law, *Alternatives to Liberal Constitutional Democracy* (December 13, 2017), "Maryland Law Review", Vol. 77, 2017, p. 223 et seq.; Washington University in St. Louis Legal Studies Research Paper No. 17-10-02; University of Hong Kong Faculty of Law Research Paper No. 2018/004. Available at SSRN: <https://ssrn.com/abstract=3087244> [last accessed 1.09.2019].

⁹ Paul Blokker, *Populism as a constitutional project*, "International Journal of Constitutional Law", Vol. 17, Issue 2, April 2019, pp. 536-553.

¹⁰ Jan-Werner Muller, *What is populism?*, University of Pennsylvania Press 2016.

These states seem to be constitutional democracies in a formal sense. In an illiberal constitutional democracy, there is a written constitution, but the provisions on the rule of law, human rights, and democracy have been defectively worded, and are poorly implemented and enforced. Both the Polish and Hungarian constitutions formally maintain the rule of law and formal democracy in the majoritarian sense, but these states misuse the language of fundamental rights. Both constitutions still provide for the constitutional protection of fundamental rights, but they either offer a lower level of protection than previously (in Hungary, as regards family, the right to social security and the right to assembly, which can be restricted by the right to privacy, family life, and home) or contradict international and European human rights standards (in Hungary, regarding the right to religion, rules on migration, and the right to assembly; in Poland, regarding the right to privacy and the right to assembly – a preference for so-called ‘cyclical assemblies’ being exhibited). These issues, however, are politically important. Therefore, Hungarian and Polish events are described as a pretence of democracy and labelled as new authoritarianism.¹¹ Nevertheless, there is no, or considerably less, depletion of constitutional protection of those rights that have no or few political implications.

This systemic reality affects the functions of the Constitutional Tribunal and shifts them from the constitutional protection of the individual against the arbitrary decisions of authorities to the justification of the unconstitutional actions of those in power with constitutional means (using the powers of the CT).

III. JUDICIALIZATION OF POLITICS

The very broad term “judicialization of politics” is used to describe judicial involvement in politics. It is composed of three interrelated processes. According to Ran Hirschl,¹² at the most abstract level, judicialization refers to the spread of legal discourse, jargon, rules, and procedures

¹¹ Gabor Attila Tóth, *Constitutional Markers of Authoritarianism*, “Hague Journal of the Rule of Law”, September 2018, pp. 10-14.

¹² Ran Hirschl, *The Judicialization of Politics*, [in:] R. E. Goodin (ed.), *The Oxford*

into the political domain and policymaking fora and processes. A more concrete dimension of the judicialization of politics is the expansion of the jurisdiction in determining public policy outcomes (e.g. through administrative review). A third class of judicialization is the reliance on courts and judges for dealing with “mega-politics”: core political controversies that define entire polities (e.g. results of elections).

Such proliferation of judicial importance is based on essential features of courts and judges. The judiciary plays the role of independent and impartial arbiter, as theorised by Martin Shapiro.¹³ These features are interrelated: the more independent the court, the more impartial the judges.¹⁴ In order to fulfil this purpose properly, however, the judiciary has to be trustworthy. Trust constitutes an essential value for being a neutral arbiter.¹⁵ There must be trust that judges will deliver decisions based on the constitution and not in order to meet the demands of the governing party. From this point of view, the judiciary is not a political power, but it still plays a crucial role in the determination of important state policies and in the resolution of key controversies. For achieving such a position, the judiciary should be normatively framed by four major grounds of legitimation: separation of powers, the rule of law, independence, and impartiality of arbitration.

The literature notes that judicialization is an unavoidable and constantly expanding process. As Tomasz Tadeusz Koncewicz observes, courts interpret increasingly more laws to meet the growing expectations of the parties involved.¹⁶ This process applies in particular to constitutional courts operating under the centralised system of constitutional review,

Handbook of Political Science, pp. 4–6. Online Publication Date: Sep 2013 DOI: 10.1093/oxfordhb/9780199604456.013.0013 [last accessed 1.09.2019].

¹³ Martin Shapiro, *Courts: A Comparative and Political Analysis*, University of Chicago Press, 1981.

¹⁴ Daniel M. Brinks and Abby Blass, *Rethinking judicial empowerment: the new foundations of constitutional justice*, 15 I-CON 2 (2017), p. 308.

¹⁵ D. Smilov, *Judiciary: The Least Dangerous Branch?*, [in:] M. Rosenfeld, A. Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law*, Oxford 2012, pp. 869–871.

¹⁶ Tomasz T. Koncewicz, “Mechanical jurisprudence” under strain? *Eastern Europe judiciary under the European influence*, [in:] M. Zubik (ed.), *Human rights in the contemporary world*, Warszawa 2017, p. 113.

such as exists in Poland. This way, a politically neutral, independent and impartial organ is expected to assess the activity of the political body. The assessment is made from the perspective of conformity with the constitution that mainly aims at checking whether political actions are arbitrary or not. What is important is that the activity of courts is based on trust and that its decisions are politically neutral.

Nevertheless, judicial involvement may lead, in Ran Hirschl's words, to 'juristocracy'.¹⁷ According to Hirschl, every political system has witnessed a profound transfer of power from representative institutions to judiciaries. Moreover, the transformation of courts and tribunals worldwide into major political decision-making loci has been perceived as an important trend. The transformation is supported by judges actively employing their competences and by politicians seeking to adjudicate conflicts. Judicial activism, however, is rarely welcome because it may undermine trust in the decisions taken by the judiciary.

Several types of activism may be distinguished. First, legal/constitutional activism is connected to expanding the competences of the courts (juristocracy).¹⁸ Second, ideological activism (politicization)¹⁹ and third, servile activism (post-Soviet and illiberal judicialization) are also distinguished. The first and second kinds of activism are connected to the independence of the courts and the impartiality of judges. The features allow judges to be active. Legal and ideological activism can be described as positive because is connected to the exceeding of competences.²⁰ The

¹⁷ Hirschl, *supra* note 13 at p. 19.

¹⁸ E.g. the Polish CT derived from the rule of democratic state ruled by law more than twenty other rules, among others: separation of powers. More on this: Iwona Wróblewska, *Zasada państwa prawnego w orzecznictwie Trybunału Konstytucyjnego RP*, Toruń 2010, pp. 201-242.

¹⁹ E.g. the Polish CT (decision of 29 May 1997, K 26/96) adjudicated in relation to the Act of 30 August 1996 r. on the amendment to the Act on family planning, protection of the human foetus and conditions for the admissibility of termination of pregnancy, and on the amendment of certain other acts (Dz. U. Nr 139, poz. 646).

²⁰ Wojciech Włoch, Agnieszka Bień-Kacała, *Cnotliwi sędziowie: kilka słów o powściągliwości sędziów Trybunału Konstytucyjnego [Virtuous judges: a few words about the self-restraint of judges of the Constitutional Tribunal]*, [in:] M. Serowaniec, A. Bień-Kacała, A. Kustra-Rogatka (eds.), *Potentia non est nisi ad bonum: księga jubileuszowa dedykowana profesorowi Zbigniewowi Witkowskiemu*, Toruń 2018.

courts do more than just what could be derived from the essence of judging. Servile activism occurs in a situation of the limited independence and impartiality of the judiciary and is characterized by deficits in the exercise of the judicial functions. This issue will be discussed below. The distinction between types of activism indicates the different nature of the active behaviour of judges depending on their personal attributes and the current political system.

IV. POLITICIZATION OF JUDICIARY

Since the capture of the Constitutional Tribunal in 2017, when the President of the CT was replaced having reached their end of term, the CT has been described as a politicized court. This description, however, may be misleading. The idea of a politicized court is, in my view, connected to an independent and impartial court that extends its position according to a certain ideology. As noticed in the literature, politicization means making decisions according to ideological rather than legal factors.²¹ Politicization also refers to a phenomenon in which a judiciary increasingly resembles other inherently political bodies, namely the legislative and executive branches.²² The judiciary acts in a partisan manner concerning policy. Independence and impartiality allow a court to become an active political actor. Lacking the virtue of self-restraint, judges may be tempted towards politiciaization by taking, to some extent, political (community-wide) decisions away from parliament. We can then identify political activism in adjudication. In such a situation, the judges are politically involved by presenting their own worldview in the decisions made. As such, from a constitutional point of view, certain views may be excluded or duly considered. This situation may result in lack of trust in the neutrality of court decisions.

The most important element here is that politicization is a mode of behaviour of an independent court and impartial judges who adjudicate

²¹ David L. Weiden, *Judicial Politicization, Ideology, and Activism at the High Courts of the United States, Canada, and Australia*, "Political Research Quarterly" XX(X) 2010, pp. 1-13.

²² David Russell, *Politicization In The Federal Judiciary And Its Effect On The Federal Judicial Function*, "N.Y.U. Journal of Legislation and Public Policy Quorum", Vol. 19, 2018.

using their own ideological views or political ambitions. The Polish case shows that it is not like that. The CT acts as an agent of a certain political party without forcing a certain ideology.

There is only one understanding of politicization of the judiciary that might fit into the Polish reality. Politicization can also describe an outcome whereby parties “capture” the state by party patronage. Party patronage is defined as ‘the allocation of jobs in the public and semi-public sectors at the discretion of political parties’.²³ In illiberal constitutionalism such “capture” is connected to the CT and the CT judges and, further, the judiciary. Courts, however, have not yet been captured in Poland. In relation to the CT, partisan adjudication is visible in certain decisions of the Polish constitutional court. Nevertheless, the Tribunal does not act as an independent organ, but employs the partisan agenda of the ruling party and justifies its political actions. The CT has become façade body and not a strong political player. Therefore, the CT cannot be recognised as politicized. Even more, the CT is not just a façade institution, but, rather, plays a crucial role in the overall scheme of the captured state. It is used by the ruling party as one of the most important guarantors of the illiberal system. It is a tool rather than a partner in politics. Therefore, I claim that a more precise and accurate description of this behaviour of the Polish Constitutional Tribunal operating within an illiberal system is: illiberal judicialization of politics.

V. THE POST-SOVIET WAY OF JUDICIALIZATION OF POLITICS

Before explaining the illiberal judicialization of politics, I would like to refer to Armen Mazmanyan’s findings based on the post-Soviet countries.²⁴ He noted that research on judicialization is built on the observation that there is substantial transfer of political power from democratically

²³ Ingrid van Biezen and Petr Kopecký, *The cartel party and the state: Party-state linkages in European democracies*, “Party Politics”, Vol. 20, Issue 2, 2014, p. 7.

²⁴ A. Mazmanyan, *Judicialization of politics: The post-Soviet way*, 13 I-CON 1 (2015), pp. 200–218.

accountable decision-makers to empowered courts and judges. Countries of the post-Soviet region, however, range from fragile democracies to outright authoritarian states. As A. Mazmanyan argues, none of them has emerged as a consolidated democracy.²⁵ Consequently, courts are not fully independent and impartial, and these features seem to be essential for the political empowerment of the judiciary.

As Armen Mazmanyan explains further, in the post-Soviet world, courts make politically important decisions acting as agents of politicians who exploit them for different strategic purposes. The captured and packed courts refuse to act as impartial arbiters, but confirm the political actions of the day. Consequently, judicial involvement in politics is often a product of direct political instruction or manipulation, especially when deciding on politically sensitive cases. This implies that the meaningful transfer of power from politicians to judges cannot be detected.

What is more, the judiciary cannot be trustworthy. It is not politically neutral. It does not have the attribute of independence. In such a case, the judiciary makes decisions mainly to strengthen the supreme authority.²⁶ In the context of the post-Soviet region and in relation to constitutional courts, this is usually the head of state (president)²⁷. In this way, the decisions made reflect the views of the autocratical power, and are aimed at the constitutional justification of the actions taken. The authority here is not limited by internal (constitutional) and external (supranational or international) commitments, and does not even pretend to be fully democratic. Under these conditions, the judiciary is not politically involved, in the sense that it does not base its decisions on ideological grounds. The worldview of individual judges is indifferent. Their loyalty to those in power, however, is significant.

²⁵ *Ibidem*, p. 207.

²⁶ Jacek Zaleśny, *Sądownictwo konstytucyjne w państwach poradzieckich. Analiza porównawcza. Część II* [Constitutional justice in post-Soviet countries. Comparative Analysis. Part II], "Przegląd Prawa Konstytucyjnego" Vol. 49, No 3, 2019, pp. 34–35.

²⁷ *Ibidem*, pp. 149–160.

VI. THE POLISH WAY OF JUDICIALIZATION OF POLITICS

Under illiberal democracy, we can identify a specific type of judicialization of politics that is similar to the situation in post-Soviet states. The court is subordinated to those in power to justify the actions of the legislator already undertaken or to be taken in future, and in need to exclude certain views. At the same time, the court must balance itself between a approach suitable for the ruling party, and the values or laws of the supranational community (the European Union). The European values and laws may be understood here as a certain constraint on public power. Consequently, the CT pretends to deliver independent decisions based on impartial constitutional interpretation. The gap between the constitutional functions of the CT and its day-to-day practice is clearly visible.

What is important in the case of Poland is that the constitutional characteristics of the CT have not changed, even if we take into consideration the informal constitutional change of many statutes concerning the Constitutional Tribunal.²⁸ Formally then, the CT is still meaningfully empowered and could be perceived as one of the most powerful constitutional courts in Central and Eastern Europe. What has changed is the personal selection of judges. The main prerequisite of selection is personal loyalty to the party and its leader. In consequence, the CT acts as a partisan agent providing legal and constitutional justification for unconstitutional political actions. As Tomasz Tadeusz Koncewicz observes, the Polish constitutional court ceases to fulfil the functions of constraint of political power and the protection of individuals' rights. The CT adjudicates fewer cases than previously and it is described as a supplement to Parliament confirming its unlimited power.²⁹ Limits on

²⁸ Agnieszka Bień-Kacała, *Polish Constitutional Tribunal: a systemic reform or a hasty political change*, 1 DPCE online (2016), Agnieszka Bień-Kacała, *Informal constitutional change. The case of Poland*, "Przegląd Prawa Konstytucyjnego" Vol. 6, 2017, pp. 199–218.

²⁹ Tomasz T. Koncewicz, *From Constitutional to Political Justice: The Tragic Trajectories of the Polish Constitutional Court*, "VerfBlog", 2019/2/27, <https://verfassungsblog.de/from-constitutional-to-political-justice-the-tragic-trajectories-of-the-polish-constitutional-court/>, DOI: <https://doi.org/10.17176/20190324-205438-0> [last accessed 19.08.2019].

public power, however, can be found in the European Union values, law and practice.

In another paper, the cases of the constitutionally questionable behaviour of the CT have been described and systematized.³⁰ Three different decisions have been selected to explain how the illiberal judicialization of politics functions in Poland. At the same time, these three cases show three different patterns of servility. All of the cases are politically sensitive as they refer to core illiberal concerns: freedom of assembly, judicial independence, and state-individual relations. The first is connected to the selection of loyal judges to sit in the bench (adjudication panel). The other two provide a new reading of the constitutional provisions: *ex ante* and *ex post* political decisions.

Firstly, the decision delivered on 16 March 2017 (Kp 1/17, cyclical assemblies) was described.³¹ This case is politically important for the sake of the substantive argumentation of the constitutional court dealing with “cyclical assemblies”. This kind of assemblies was created by Parliament to grant „monthenaries” to the “Smoleńsk catastrophe” (plane crash in 2010), which prevailed over other events. At the time of adjudication, the CT was not fully captured, as there were persons selected before 2015 among the judges. Therefore, the crucial concern was the selection of loyal judges to the adjudication panel, who would authorize the unconstitutional legislation. On the motion of the Prosecutor General (PG), judges who joined the CT in 2010 were excluded from the adjudication due to flaws in their selection. At the same time, another judge (selected in 2017) was not excluded despite his own motion, in which he expressed concerns connected to his impartiality. Under these circumstances, it is clear that the guiding idea of adjudication was the political loyalty of the judges. Therefore, one may assume that the judgment (Kp 1/17) is a mere acceptance of the political agenda of the majority in power. This assumption has been confirmed by the substantive decision of the Tribunal.

On 20 April 2017 (K 5/17), the CT delivered a legal basis for the reform of the National Council of the Judiciary (NCJ). What is important is that

³⁰ Agnieszka Bień-Kacała, *Constitutional court within illiberal constitutionalism. Polish experience*, (under publication).

³¹ See also Agnieszka Bień-Kacała, *Gloss to the judgment of Constitutional Tribunal of 16 March 2017 (Kp 1/17)*, “Przegląd Prawa Konstytucyjnego” Vol. 4, 2017, pp. 255–262.

the new interpretation was needed before the reform started.³² Therefore, the political will justification *ex ante* can be identified as a pattern of adjudication. The reform had been criticized by various bodies, including the Ombudsperson. The concern was the politicization of the Council and, thus, the judiciary as a whole branch of government. Therefore, it was important to gain a judgment of the CT that would close the disagreement in favour of the parliamentary majority. In consequence of the CT's reasoning, the new National Council of the Judiciary was selected by the political body in a politicized procedure. The case launched a massive reaction from the European Commission³³ and the European Network of Councils for the Judiciary.³⁴

The Constitutional Tribunal, in its third, relevant here, judgment delivered on 17 July 2018 (K 9/17), created the new interpretation of the Constitution and explained why a presidential pardon regarding the cases closed without a final judgment is in conformity with the Constitution. The decision was essential to justify political action *ex post*. The clue here is that the CT selectively employed constitutional provisions to justify the action of the Polish President and set aside previous understandings of the pardon based on the 1997 Constitution. The point of concern here is that the pardon was granted to one of the most prominent politicians of the ruling party. The grantee then became a member of government. Therefore, the CT judgment was crucial to assuring that the President acted in conformity to the Constitution.

This recent case is important not because of the judgment of 26 June 2019 (K 16/17) itself, but because of its background. The circumstances of the case involve the freedom of religion and conscientious objection, as the situation was described by the Minister of Justice in his motion.

³² Marcin Matczak, *How to Demolish an Independent Judiciary with the Help of a Constitutional Court*, "VerfBlog", 2017/6/23, <http://verfassungsblog.de/how-to-demolish-an-independent-judiciary-with-the-help-of-a-constitutional-court/>, DOI: <https://dx.doi.org/10.17176/20170623-103309> [last accessed 11.08.2019].

³³ Art. 7 procedure against Poland, https://europa.eu/rapid/press-release_IP-17-5367_en.htm [last accessed 11.08.2019].

³⁴ Krajowa Rada Sądownictwa (the National Council of the Judiciary) is suspended by decision of the ENCJ General Assembly of 17/9/2018.

A Polish printer refused to make posters for an LGBT foundation because of his religious beliefs. In consequence, he was sentenced by a penal court due to refusal of service without justifying that the reason was based on discrimination. Courts, including the Supreme Court, applied binding legal provisions. In the opinion of the Minister of Justice, the printer should not have been convicted because workers have a right to act according to their conscience. The CT's decision, however, does not involve the freedom of religion and discrimination issues when adjudicating. The Tribunal narrowed its concerns only to the freedom of economic activity and the penalty connected to the refusal of service without justifying the underlying reason. In the opinion of the CT, such penalty limits the freedom of economic activity to such an extent that cannot be accepted as conforming with the Constitution. What is important here is that the individual case of the printer was concluded and he could use his right to lodge a constitutional complaint. The printer, however, decided not to refer it to the CT.

In this case, the courts' decisions were not politically welcome. Therefore, the Minister of Justice referred the case to the CT with a legislative justification. The main arguments involved freedom of religion and conscientious objection. In such an ideological disagreement dividing society,³⁵ it is the parliament who should act instead of the constitutional court. In this case, the CT closed the disagreement without deliberation, but with the exclusion of opinions different to the governmental ones. The undisclosed intention is to produce such legal justification as will allow the intentions of those in power to be put into practice (exclusion of the LGBTQ community as a useful tool during election campaigns). This is possible thanks to the instrumentalist use of the function of protecting the Constitution as a superior act in a hierarchically constructed system of sources of law by the CT. The Tribunal's arguments are consistent with the wording of selectively chosen provisions of the constitution (freedom of economic activity) and previous rulings, but at the same time these arguments contradict other constitutional principles and values (e.g. protection of minorities and prohibition of discrimination). Basically, we deal with the justification of partisan actions. In fact, the CT acts as

³⁵ Similar cases were adjudicated in the USA and the UK.

a partisan court. While the Tribunal is formally independent, there are doubts in relation to the impartiality of judges selected in violation of the constitution. As a result, it is difficult to trust in the neutrality of the decisions taken by loyal judges.

Distrust in judicial neutrality, and doubt in relation to the independence and impartiality of the Constitutional Tribunal in Poland are closely associated with the post-Soviet way of judicialization of politics. Why is it illiberal then? It is so, because judges in Poland operate under the paradigm of illiberal constitutionalism, which means that both the actions of the rulers and the constitutional court are not entirely arbitrary. They must be taken within the acceptable scope of compliance with European values, laws, and from the point of view of EU procedures. For example, in the case of the printer and the LGBT foundation, it is relevant that the prohibition of discrimination is an EU value and, consequently, the CT judgment potentially justifying discrimination against minorities on religious grounds could be reasonably questioned. This is one of the motives why the Constitutional Tribunal's reasoning was placed outside the scope of equality, non-discrimination, and religious freedom. The Tribunal adjudicated only in the scope of the less controversial economic activity freedom. Such a behaviour of the CT shows at the same time that the EU can be perceived as a kind of constraint on public power in the scope of illiberal constitutionalism.

VII. CONCLUSION

This paper contributes to our better understanding of the judicialization of politics within an illiberal democracy. The Polish Constitutional Tribunal can be described as a non-trustworthy body whose independence and impartiality may be questioned. Rulings since 2017 in politically sensitive cases show that the court acts as an agent of the political will of the ruling party. Such behaviour can be recognized as servile activism. It allows the development of illiberal transformation and is a stabilising factor for the illiberal constitutional system.

Finally, it is worth asking about the future of this political transformation taking place in Poland. One may see at least two scenarios: a pessimistic and an optimistic one. According to the pessimistic, the path

to the authoritarian system will become open if the constraints on public power disappear when the EU realises art. 7 of the EU Treaty or when Poland formally exits the EU. The optimistic solution, in turn, requires a change in the Poles' value system and the grounding of the system on the virtue of self-constraint in the scope of political activity.