11 Whatever works

Constitutional interpretation in Poland in times of populism

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11.1 Introduction

The anatomy of constitutional populism is a matter of ultimate concern to so many public law scholars these days that even approaching this topic requires a great deal of boldness. With so many existing contributions on the democratic retrogression, how can one hope to shed a new light on the issue? Yet, when I was asked to prepare the Polish chapter to this volume on constitutional interpretation in times of populism, I thought to myself that the experience of Poland in this respect was, sadly but truly, unique and worth sharing.

The aim of this chapter is to find the answer to a classic Shakespearean question: is there a method in their madness? This time, however, the issue is not the political or legal technology of coming to power and holding on to it, so successfully deployed by the populist movements in Central Europe and elsewhere. In this respect, we know very well that there actually *is* a method in their madness – which, by the way, is not really madness after all, but rather a meticulous master plan – and that the populists tend to take pages from the same playbook, whoever may have written it first. They do indeed follow a very similar pattern when dealing with any constraints on state power and eliminating any checks upon the political branches of government, or limiting the rights of the political opposition and anyone who is not satisfied with the populist rule. We know this very well; in Poland, we know this all too well.

In fact, the question is much more demanding this time. Does constitutional populism bring any new quality, good or bad, to the art of legal interpretation? Has it developed any entirely new theories, doctrines or methods of interpretation which could be seen as a contribution to the legal science, or even as an alternative to the art of legal interpretation as we know it?

It is high time these questions received proper answers. For some time now, I could not help noticing the growing consternation among many Western scholars over their sense that they have failed to fully understand this phenomenon and have possibly missed something important from the recent developments in global constitutionalism. Such anxiety is only occasionally revealed in conference papers but is likely to spread rapidly in the

conversations de couloir. Let me voice these doubts: Is this some new emerging theory which has not yet received sufficient attention but is inevitably going to transform contemporary constitutionalism? Isn't it our responsibility to comprehend it at all cost, even if we do not like what we learn? And when we understand the true nature of it, will it be possible to tame populist constitutionalism, like a wild animal which may not know how to behave with people but ultimately shares the same basic needs and instincts? In other words, and less metaphorically, can the populist interpretation be understood, and should legal science come to terms with it? In academia, this is inevitably the right approach to any emerging issue. Many great minds have been making attempts at understanding the contribution that populism brings to constitutional studies.[1]

In this chapter, I will not seek any general explanations which would hold true for any populist regime. I am not even sure if such explanations actually exist. Instead, I intend to add the missing puzzle piece to help the readers see the bigger picture – my puzzle piece depicting the Polish experience against the bigger picture of illiberal constitutionalism, as far as constitutional interpretation is concerned. I will start with some preliminary comments regarding the methodology and the criteria for assessment in order to ensure a sounder footing for the study (Section 11.2). Subsequently, I will examine four aspects of recent constitutional practice which should be helpful in determining what is specific about constitutional interpretation in Poland in times of populism (Section 11.3). Then I will proceed to explore the potential reasons for adopting this specific approach (Section 11.4). In the last part, I will attempt to answer if populist constitutionalism can be seen as 'new constitutionalism' (Section 11.5).

11.2 Preliminaries

Before turning to the main argument, some preliminary comments need to be made.

First, in this study I will overlook the scholarly discussion on the nature of political populism, its definitions and empirical models, or the discontent that fuels it. Populism has often been described as a chameleonic concept, swiftly adjusting to popular demand but lacking any core values. For the purposes of this study, it suffices to resort to Bojan Bugarič's laconic observation that populism's distinctive features are 'the prioritization of popular sovereignty, direct democracy, and a strong emphasis on anti-elitism'.[2] Neither will I reflect on the question of whether the political regime installed in Poland in

1 For a critical analysis of these attempts, see Kriszta Kovács and Gábor Attila Tóth, 'The Age of Constitutional Barbarism' (*Verfassungsblog*, 7 September 2019) www.verfassungsblog.de/the-age-of-constitutional-barbarism accessed 14 April 2020 (citing Armin von Bogdandy and Mark Tushnet).

2 Bojan Bugarič, 'Central Europe's Descent into Autocracy: A Constitutional Analysis of Authoritarian Populism' (2019) 15 European Constitutional Law Review 597, 598.

2015 should be classified as populist. Instead, I will assume that it is such a regime, which to many, myself included, seems far from any doubt or dispute. I do not see any necessity to elaborate further on what has been so convincingly proven by other scholars.[3]

Second, it needs to be remembered that constitutional interpretation is not the exclusive domain of the constitutional courts, or of any courts at all, for that matter. It must not be reduced to judicial interpretation of the constitution. There is an established tendency to assume that it is the courts' understanding of national constitutions that reveals their ultimate meaning and that the intellectual process of reaching this understanding needs to be subjected to some consistent interpretive methodology, even if the boundaries between revealing the meaning and creating it are often unclear.[4] Yet, this is true only as long as the courts, and especially the constitutional court, have the last word in constitutional disputes. This is not necessarily the case with political regimes which question the rule of law and are drifting away from democracy, and certainly not the case of Poland.

It needs to be remembered that the populist revolution relied greatly on constitutional arguments and interpretations put forward by the political branches of government and by their committed supporters – interpretations which were proposed and enforced precisely against the judges and the courts. This is particularly evident with regard to the initial phase of the populist rule in Poland, when the independent institutions such as courts were trying to defend the established interpretive tradition from the populist attack. In this phase, they were typically neutralized and destroyed by means of non-judicial interpretation of the constitution promoted by the legislative and executive branches of government.[5] Only after the constitutional

3 See, notably, Wojciech Sadurski, *Poland's Constitutional Breakdown* (Oxford University Press 2019) 20–27. However, it has also been argued that most of the common characteristics of real populism are either not practiced in authoritarian populist regimes or, at best, they serve only as rhetoric; see Gábor Halmai, 'Populism, Authoritarianism and Constitutionalism' (2019) 20 German Law Journal 296, 313.

4 Jeffrey Goldsworthy, 'Constitutional Interpretation' in Michel Rosenfeld and András Sajó (eds.), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012) 690.

5 Sadurski (n 3) 61–79. On the technique of 'neutralization' or 'disablement' of the constitutional court, see Lech Garlicki, 'Constitutional Court and Politics: The Polish Crisis' in Christine Landfried (ed.), *Judicial Power: How Constitutional Courts Affect Political Transformations* (Cambridge University Press 2019) 159. See also Marcin Stębelski, 'Parliament versus Constitutional Court – Selected Issues Pertaining to the Constitutional Dispute in Poland' in Marcel Szabó, Petra Lea Láncos, and Réka Varga (eds.), *Hungarian Yearbook of International Law and European Law 2016* (Eleven International Publishing 2017); Mirosław Granat, 'Constitutional Judiciary in Crisis: The Case of Poland' in Zoltán Szente and Fruzsina Gárdos-Orosz (eds.), *New Challenges to Constitutional Adjudication in Europe: A Comparative Perspective* (Routledge 2018); Adam Krzywoń, 'La crisis constitucional en Polonia (2015–2017): como cuestionar el sistema del equilibrio constitucional en dos años' (2018) 41 Teoría y Realidad Constitucional 359.

court had been taken over, did it start speaking the populist language.[6] In brief, both constitutional adjudication and constitutional practice should be considered when exploring the populist contribution to constitutional theory.

Third, when asking whether new tools and methods have been developed, one should always confront rhetoric with real life. Admittedly, studying the speeches of the populist leaders, such as Viktor Orbán's widely commented panegyric on illiberal democracy,[7] can be a great help in demystifying political intentions and guessing what the future may bring, but declared political intentions do not need to be reflected in the adopted legal measures. While speeches are supposed to be politically attractive, legal measures are meant to be effective, and it is not always easy to reconcile these two qualities.[8] This is why I will not limit myself to the official populist agenda, which usually stresses the need to bring the law back to the people, to restore national sovereignty or to eliminate foreign influence from the decision-making process. In the end, it is the hidden agenda and the legal arguments that matter, not the oratory skills which paved the way for the populists to take power.

Last, I will rely on three criteria in assessing whether the populist approach to constitutional interpretation opens a new chapter in constitutional theory, and these are: novelty, consistency and theoretical soundness.

By novelty I mean that an approach should be genuinely fresh and unique. Any doctrine (or a method or tool) which proposes only minor corrections to the pre-existing doctrines (methods, tools) is not new within this sense; neither is any doctrine which rejects the previous constitutional rules simply because they were allegedly being applied by morally corrupt people who acted in bad will or served foreign masters, or cared only for their private interests.

The consistency of the approach means that actions required or justified by such an approach should demonstrate commitment to some coherent abstract principles. These principles should not just serve some one-time strategy but ought to remain relatively stable over time; this condition should not be exceedingly difficult to meet, as populist regimes have emerged recently and have not had much time to evolve.

6 Sadurski (n 3) 79–84; Wojciech Brzozowski, 'Can the Constitutional Court Accelerate Democratic Backsliding? Lessons from the Polish Experience' in Martin Belov (ed.), *The Role of Courts in Contemporary Legal Orders* (Eleven International Publishing 2019).

7 Prime Minister Viktor Orbán's Speech at the 25th Bálványos Summer Free University and Student Camp, 26 July 2014, www.kormany.hu/en/the-prime-minister/the-prime-minister-s-speeches/prime-minister-viktor-orban-s-speech-a-the-25th-balvanyos-summer-free-university-and-student-camp accessed 14 April 2020.

8 It would seem that there was a reason behind Jan-Werner Müller dedicating separate chapters of his brilliant tractate on populism to 'What populists say' and 'What populists do, or populism in power'; Jan-Werner Müller, *What Is Populism?* (University of Pennsylvania Press 2016).

Finally, theoretical soundness implies that the approach should demonstrate a considerable level of cogency, seriousness and completeness, and be amenable to academic description.

11.3 Change or continuity?

Since 2015, which marks the beginning of the constitutional crisis, the struggle over the rule of law in Poland has reached a level of complexity which makes it virtually impossible to do justice to the course of events in a book chapter. Most of them have been captured and explored elsewhere, notably in Wojciech Sadurski's excellent book,[9] but it should be borne in mind that every month brings new developments: the story continues and the decay advances. Or, as the old Polish proverb says, the deeper one goes into the forest, the more trees there are.

This is why I will focus only on four aspects which I consider to be essential for the assessment of how constitutional interpretation works in times of populism in Poland. These four aspects are: (1) the approach to the limits of judicial power, which appears to be the key problem; (2) the preferred methods of constitutional interpretation; (3) the approach to the pre-existing *acquis constitutionnel* (encompassing both earlier findings of the constitutional court and earlier practice) and (4) the approach to international law, and to EU law in particular.

11.3.1 The limits of judicial power

The cornerstone of the populist critique of liberal democracy is the profound distrust of the elites and the judiciary. Anyone who plans to study the history of populism needs to be prepared to go through endless tirades on the excessive power of the courts and about the need to bring the power back to people, which obviously implies taking it away from those who stole it to those who should own it. It comes as no surprise that the role of the villain in this casting has been assigned to independent professional bodies such as the courts, which are repeatedly accused of being undemocratic and exempt from any social control. The righteous owners, from whom the power had been stolen, are of course the ordinary people. This is not to say that these mythical ordinary people can now expect to be suddenly empowered by means of direct democracy, for populist constitutionalism has very little to do with popular constitutionalism.[10] Luckily, the will of the people happens to be embodied in

9 Sadurski (n 3).

10 Ana Micaela Alterio, 'El constitucionalismo popular y el populismo constitucional como categorías constitucionales' in Roberto Gargarella and Roberto Niembro Ortega (eds.), *Constitucionalismo progresista: Retos y perspectivas: Un homenaje a Mark Tushnet* (Universidad Nacional Autónoma de México 2016); Jan-Werner Müller, 'Populism and Constitutionalism' in Cristóbal Rovira Kaltwasser, Paul Taggart, Paulina Ochoa Espejo, and Pierre Ostiguy (eds.), *The Oxford Handbook of Populism* (Oxford University Press 2017).

parliament's vote! And that suggests – if irony is to be abandoned from this moment – that what we are really dealing with here is a power conflict between the political branches of government and the judiciary.

At the early stage of the Polish constitutional crisis, the foundations of the populist legal philosophy were probably best explained by the late Lech Morawski, one of the quasi-judges of the Polish Constitutional Tribunal.[11] His views on the ongoing conflict were presented at a conference held at the University of Oxford,[12] where they sparked a major controversy. In his presentation, Morawski quoted Béla Pokol, a Hungarian constitutional judge, who had been warning about the dangers of the 'juristocratic' system of government.[13] One of Morawski's points was that such a system actually existed in Poland, and having replaced the traditional forms of government, it allowed judges, sometimes by a narrow majority, to decide on legislation and exercise supreme legislative power. The irony of the situation should not escape our attention: someone who considered himself to be a member of a constitutional court, then under attack from an anti-judicial political movement, complained about judges being too powerful when compared with the political branches of government. In the end, Morawski declared: 'the opposition acts as if the Tribunal were the owner of the Constitution and had the exclusive right to decide about its meaning. I strongly reject such a position'.

This bizarre lecture was not a one-time show. Morawski's argument has been recently repeated by Jarosław Kaczyński, the leader of the Polish populists, who claimed that the power of the courts had nothing to do with democracy and that it was a system of government that best served oligarchy.[14] It can be assumed that this is the official doctrine of the ruling party. If taken seriously, this approach should lead to at least three conclusions with regard to constitutional interpretation: (1) that judicial activism is essentially wrong, and judicial restraint is the only right conduct for a judge; (2) that there is no need to develop any new or extraordinary tools for constitutional adjudication; and (3) that the constitutional court must not have the final word in constitutional disputes.

11 The term 'quasi-judges', used interchangeably with 'duplicate judges', is typically used when referring to persons elected to seats in the Polish Constitutional Tribunal which were not vacant at the moment of election. The exact timeline can be found in the Opinion on Amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland, adopted by the Venice Commission at its 106th Plenary Session (Venice, 11–12 March 2016), CDL-AD(2016)001; or, in a more thrilling convention, in Sadurski (n 3) 61–70.

12 Lech Morawski, 'The Polish Constitutional Crisis and Institutional Self-Defence', www.trybunal.gov.pl/fileadmin/content/uroczystosci_spotkania_wizyty/2017/2017_05_09_Oxford/Wystapienie_prof._L.Morawskiego_w_Oxfordzie.pdf accessed 14 April 2020.

13 Surprisingly, no reference was made to another famous, and much older, book on judicial empowerment, which proposed the same term: Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Harvard University Press 2007).

14 'Prezes PiS: Władza sądów nie ma nic wspólnego z demokracją', www.wgospodarce.pl/informacje/68088-prezes-pis-wladza-sadow-nie-ma-nic-wspolnego-z-demokracja accessed 14 April 2020.

Ironically, the new Constitutional Tribunal, now entirely deferential to the legislation proposed by the populist government, does not seem to be as restrained in its powers as one could have expected after listening to Morawski's and Kaczyński's speeches.

One of the judicial tools particularly distrusted by the populists was the concept of an interpretative judgment, that is, a judgment in which the Constitutional Tribunal does not invalidate the challenged provision in its entirety but quashes only one of its possible interpretations. The basis for suspicion was that this technique might effectively obscure the difference between constitutional review and constitutional interpretation. Morawski warned during his Oxford speech that

> [t]he Polish Constitution authorizes the Tribunal only to review the compliance of statutes and other normative acts with the Constitution, but not to give interpretative guidelines to courts and other state bodies in the operative parts of its decisions … By means of interpretative judgements, the Tribunal creates constantly new rules or modifies the content of existing rules.[15]

But if anyone had thought that the new judges would no longer resort to this technique, they could not have been more wrong. It has been pushed to the extreme, because now the Constitutional Court does not simply provide the courts with guidelines for interpretation – it may now give an interpretation so detailed that it replaces the courts in deciding a case.

How is this possible? Obviously, such surprising outbursts of judicial activism may be reserved only for special occasions, such as when the validity of appointments to the Constitutional Court was being questioned before the Supreme Court. Technically, the Supreme Court is not entitled to review parliamentary decisions in personal matters, but in the course of civil proceedings, e.g. in a labour dispute, it can verify whether the person who acts in the name of a legal person, or a state body, has the right to represent it. This happened when the new president of the Constitutional Tribunal submitted her written position to the Supreme Court in an individual case. As the votes of the wrongfully appointed judges affected the appointment of the Tribunal's new president, this gave the Supreme Court a unique opportunity to question the validity of all these appointments.

The populist Constitutional Tribunal instantly realized that it needed to defend itself, and it did so by declaring that the opening provision of the Civil Procedure Code, which merely defines the notion of 'civil matters', was unconstitutional 'insofar as it pertains to evaluating the correctness of the process of electing a judge of the Constitutional Tribunal'.[16] The application which enabled the Tribunal to perform this peculiar review had been conveniently lodged right on time by a group of deputies of the ruling party,

15 Morawski (n 12).

16 CT judgment of 24 October 2017, K 10/17.

and it is noteworthy that it was heard within two months and one week, at an unusual speed. This emergency protocol most likely would not have been approved by Morawski, who had criticized the Tribunal harshly for departing from the chronological order of considering cases.

Another special occasion of this kind arose when the Constitutional Tribunal was expected by the populist party to save one of its leaders from criminal liability for abuse of power. It seemed problematic, and anything but obvious, to find a role for a constitutional court to play so that such a final result could be achieved. Yet, special needs apparently deserve special treatment.

The convict, now back in the political arena, had been sentenced to three years' imprisonment, but before his appeal could be heard, he was pardoned by the President of the Republic. This led to a fundamental question of whether the President can grant pardons at any time, even before the final sentence of the criminal court. This question could have been answered by the Supreme Court, which was about to assess the validity of the pardon. However, shortly before that, the Constitutional Tribunal interfered and found that the provisions of the Criminal Procedure Code, the Code of Procedure Concerning Misdemeanours and the Executive Penal Code 'insofar as they do not render amnesty granted in individual cases as a negative premise for conducting, respectively, criminal proceedings, proceedings on misdemeanours or criminal enforcement proceedings' were unconstitutional.[17] Needless to say, nobody could doubt that this judgment was tailored to one very special figure.

The same pattern was followed in the middle of the political storm which accompanied the attempts to remove the President of the Supreme Court, whose term of office was not about to expire as quickly as the populist party had expected. The Constitutional Tribunal came in handy again, this time setting the ground for political action by declaring that a provision of the Act on the Supreme Court 'insofar as it concerns the rules of procedure for selecting candidates for the position of the First President of the Supreme Court' was unconstitutional.[18] The 'insofar formula' is nothing new to the Tribunal's practice, but the use made of it by the populist judges is truly unusual, as it disguises individual decisions as constitutional review. Now, the Tribunal is abandoning even such a thin disguise: it has recently moved as far as to review the constitutionality of a Supreme Court's judgment, under the pretext that it was in fact a normative act.[19] This has been, arguably, the most flagrant abuse of power in the short history of the populist Tribunal.

It is also a great surprise how open the 'new' judges of the Supreme Court – which is still being packed at the time of writing of this chapter – are to the idea of freezing orders. When such interim measures were being adopted by the 'old' Constitutional Tribunal, in a helpless act of self-defence against the new legislation aimed at paralyzing the constitutional review, the very idea of a

17 CT judgment of 17 July 2018, K 9/17.
18 CT judgment of 24 October 2017, K 3/17.
19 CT judgment of 20 April 2020, U 2/20.

freezing order was bluntly rejected by the populists. Neither the parliament nor the President of the Republic respected the orders, announcing that the Constitutional Tribunal had manipulated the legal order and that it had no right to suspend duly enacted legislation. But it did not take long to see how the interim measures were being used to speed up the packing of the Supreme Court and to cripple the implementation of the recent judgment of the European Court of Justice,[20] which could effectively undermine the populist plan of taking over the judiciary. Freezing orders, originally taken from the civil procedure, now suddenly became part of the populist constitutional toolkit.

One more example: the 'old' Constitutional Tribunal used to be accused of excessive judicial activism, which allegedly amounted to depriving parliament of its power, and of knitting a tight net of constraints which left parliament helpless and unable to make decisions. The populists even invented a name for this: 'impossibilism', meaning that the law, and the constitution in particular, became an obstacle in achieving political goals and carrying out the desired reforms.[21] (In passing, it is hard not to note that this is exactly what the constitution is supposed to be: an obstacle to promoting antidemocratic agendas.) But now that the Constitutional Tribunal has been taken over by the populists, it is being openly used by the political branches of government as a rubber stamp.[22] It is expected to pronounce the constitutionality of measures which are obviously unconstitutional – precisely in order to avoid questioning them and taking them back in future. This clear abuse of the *res judicata* principle is yet another example of how the populist views on the judiciary change depending on the situation.

It is also fascinating to see how deeply convinced the populists have now become that the institution which should have the final word in the constitutional disputes is the Constitutional Tribunal. Whenever the new antidemocratic legislation on the Supreme Court is being criticized and dismissed

20 Joined cases C-585/18, C-624/18 and C-625/18 *AK and Others v Sąd Najwyższy* ECLI:EU:C:2019:982. In this judgment, the ECJ was confronted with the question whether the newly created Disciplinary Chamber of the Supreme Court, whose members had been appointed under circumstances raising legitimate doubts as to the independence and impartiality of the Chamber, offered sufficient guarantees of a fair trial. The ECJ did not answer that question openly but decided that a domestic court which had doubts about another court being independent should assess the matter itself. See Barbara Grabowska-Moroz and Jakub Jaraczewski, 'High Expectations: The CJEU Decision about the Independence of Polish Courts' (*Verfassungsblog*, 19 November 2019) www.verfassungsblog.de/high-expectations accessed 14 April 2020; Michał Krajewski and Michał Ziółkowski, 'The Power of "Appearances"' (*Verfassungsblog*, 26 November 2019) www.verfassungsblog.de/the-power-of-appearances accessed 14 April 2020. Shortly afterwards, one of the 'new' judges at the Supreme Court issued a freezing order aimed at preventing the remaining chambers of the Supreme Court from making such an assessment (SC, decision of 20 January 2020, V CSK 347/19).

21 Sadurski (n 3) 172–173.

22 Tomasz Tadeusz Koncewicz, 'Farewell to the Polish Constitutional Court' (*Verfassungsblog*, 9 July 2016) www.verfassungsblog.de/farewell-to-the-polish-constitutional-court accessed 14 April 2020.

as unconstitutional by legal scholars, the instant reaction of the populists is that until the Constitutional Tribunal has its word and the judgment is passed, any legislation is entitled to the presumption of constitutionality. The populists would have never said this before, when they questioned the legitimacy of the previous Act on the Constitutional Tribunal before its takeover. Apparently, the roles have changed – and a beggar who sits on the throne now speaks like the king.

11.3.2 The preferred methods of constitutional interpretation

It should be expected that the populist approach to legal interpretation, and most of all constitutional interpretation, would be hostile to the idea of departing from the literal meaning of the law. Any such divergence would automatically raise suspicions as to the intention of the interpreter: the plain meaning can be understood by anyone, while considering the purpose or the context of a legal norm introduces an element of uncertainty and requires professional skills. In his Oxford speech, Morawski argued that the law should be as precise as possible and that the constitution must not be interpreted as a living instrument, for it is not the role of the Constitutional Court to create or to change the law.[23]

Rendering the law easily understandable to 'ordinary folks' clearly belongs in the populist basket of slogans, but arguably, there is more to it than mere rhetoric: this praise of literal interpretation is consistent with the more general approach of disregard for the constitution. As Paul Blokker puts it, the populists tend to collapse the distinction between ordinary and constitutional politics and to downplay the constitution's status as a rigid, higher law.[24] Blurring this distinction implies the rejection of the distinctiveness of constitutional interpretation, which by its very nature relies greatly on the judge's reading and requires striking a fair balance between competing principles more often than happens with ordinary legislation. The alternative for the constitutional interpreter is to engage in a technical examination of isolated words and phrases, at the same time neglecting the existing case law and ultimately failing to see the bigger picture.[25]

23 Morawski (n 12).

24 Paul Blokker, 'Populism as a Constitutional Project' (2019) 17 International Journal of Constitutional Law 535, 545.

25 This new approach, of course, does not result from sheer ignorance. It is deliberately aimed at loosening the constitutional constraints, leaving more space for statutory regulation and in this way promoting what has been wittily called 'statutory anti-constitutionalism', i.e. a theoretical legal framework within which an unconstitutional result can be achieved by means of a series of statutory amendments; see Maciej Bernatt and Michał Ziółkowski, 'Statutory Anti-Constitutionalism' (2019) 28 Washington International Law Journal 487. In a much similar vein, Rosalind Dixon and David Landau describe the Polish populist strategy as 'as a combination of subconstitutional legislation and aggressive reinterpretations of the constitution'. See Rosalind Dixon and David Landau, '1989–2019: From Democratic to Abusive Constitutional Borrowing' (2019) 17 International Journal of Constitutional Law 489, 492.

It could be assumed then that the populist approach to constitutional interpretation would be based on textual canons and grammatical interpretation, while, as the Bible says, 'anything else comes from the devil'. With regard to Poland, this intuition has proven to be right on many occasions. Indeed, the populist government quite often appeared to be very principled about holding on to the literal meaning of the constitution, especially when the party launched its assault on the independence of the judiciary.

It suffices to recall two examples from constitutional practice. One of the legal tricks invented by the Polish parliament to facilitate the packing of the Constitutional Tribunal was the introduction of a two-thirds majority requirement for adopting decisions on the unconstitutionality of laws, combined with two more requirements: that of sitting as a full bench for abstract cases and that of a quorum of 13 out of 15 judges. This was obviously supposed to force the Tribunal's president to recognize three persons elected to seats which were not vacant at the moment of the election as legitimate judges. The argument of the government was that the Polish constitution stipulated that the judgments of the Constitutional Tribunal would be made 'by a majority of votes',[26] thus allowing parliament to decide freely, by means of ordinary legislation, whether it should be a simple or qualified majority.[27] A similar attachment to literal interpretation of the constitution was demonstrated as soon as the populist government proceeded to pack the Supreme Court. Justifying the proposed amendment to the Act on the Supreme Court, it was argued that if the constitution stipulated that a statute shall 'establish an age limit beyond which a judge shall proceed to retirement'[28] and no particular age limit was mentioned, it was entirely up to parliament to decide on this matter. Those who insisted that this paragraph needed to be read in light of the principle of judicial independence – and so by no means would the paragraph allow parliament to simply sack all the sitting judges with one vote, by lowering the age of retirement – would be dismissed as legal swindlers. Textual interpretation, entirely oblivious to the constitutional context and to the established interpretive practice, prevailed. The case became widely known as it was brought before the European Court of Justice – and, unsurprisingly, was lost by the Polish government.[29]

Ironically, sometimes textual interpretation stands in your way and impedes your agenda. This may happen when you discover that the President of the Supreme Courts was appointed for a six-year term of office[30] and cannot be simply removed together with other judges. This is where you

26 Cf. Art. 190(5) of the Polish Constitution.

27 The Venice Commission was right to note that the established reading which assumed that this provision required a simple majority had become part of constitutional practice and thus could not be altered by the ordinary legislator; see 'Opinion on Amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland, adopted by the Venice Commission at its 106th Plenary Session (Venice, 11–12 March 2016)' paras 81–82.

28 Cf. Art. 180(4) of the Polish Constitution.

29 Case C-192/18 *Commission v Poland* ECLI:EU:C:2019:924.

30 Cf. Art. 183(3) of the Polish Constitution.

start speculating that maybe a six-year term is not really a term but a time limit and that it means 'a maximum of six years', so in fact it can be cut short by parliament if necessary.[31] Or let us take a look at the issue of the publication of the Constitutional Tribunal's judgments by the government. They are required to be immediately published in the official journal,[32] an obligation which was never questioned in the past. Still, when the Tribunal did not conform to the new legislative measures adopted by the populist parliament and declared them unconstitutional, the government refused to publish the judgment on the grounds that it had been issued in breach of the law and that the obligation to publish judgments needed to be seen in light of the Tribunal's constitutional position, thus giving the government the right to assess the procedural compliance of the judgment.[33]

As this shows, the preferred methods of constitutional interpretation change over time, depending on what the populists want to achieve. If a fixed rule turns out to be their ball and chain, they just cut it off. There is hardly any consistency in this approach: rules can be invented, dismissed or reinvented if this is supposed to help achieve the desired interpretive result.

11.3.3 The approach to earlier findings

This should be the real acid test for the 'new' Constitutional Tribunal. If the reason for the populists to come to power was genuinely the treason of the elites, and the constitutional interpretation before 2015 had been corrupt, then the populist rule should open an entirely new chapter in Polish constitutional history. Demonstrating continuity should not even be considered. Why continue something which is illegitimate and morally bankrupt?

The truth appears to be much more complicated. If we remember that the Constitutional Tribunal was taken over by the populist nominees, including those elected to seats already filled at the moment of election, in the last days of December 2016, then it can be assumed that the new era in constitutional adjudication was launched in 2017. Over the years 2017, 2018 and 2019, the Tribunal issued, respectively, 94, 72 and 70 judgments,[34] which constitutes a vast amount of research material. While a small number of these judgments touch upon issues of great importance for the constitutional system,

31 This interpretation was promoted by Jarosław Kaczyński, www.rp.pl/Prawnicy/307279961-Konstytucja-wedlug-prezesa-Kaczynskiego---komentuje-Wojciech-Tumidalski.html accessed 14 April 2020.

32 Cf. Art. 190(2) of the Polish Constitution.

33 See 'Poland – Opinion on the Act on the Constitutional Tribunal, adopted by the Venice Commission at its 108th Plenary Session (Venice, 14–15 October 2016)'.

34 These figures demonstrate a sharp decrease as compared to the previous years, in which the number of judgments always exceeded 100, reaching as high as 188 in 2015 (statistics available at www.ipo.trybunal.gov.pl/ipo accessed 14 April 2020). The reasons are twofold: the apparent rise of distrust in the Tribunal, mirrored in the declining number of submitted motions, and the lack of commitment of the Tribunal itself, which is now deciding fewer cases and holding fewer public hearings than before.

the majority rather belong to the 'business as usual' section in the Tribunal's practice. The change, though, should be visible in the approach both to the landmark cases and to everyday-life cases, for the latter were supposed to be more important for ordinary people.

But as one reads these judgments, it becomes clear that there has been no revolutionary shift with regard to adjudication techniques. The Tribunal still refers to its earlier jurisprudence, and it does so openly; it follows the established patterns concerning the admissibility of applications; it uses the same methods for adjudication, even if sometimes it stretches them to the extreme, as with the case of the 'insofar formula'. It almost gives the impression that this new institution mimics the 'old' Tribunal, so that nobody would realize that the political circumstances and the legal reality are so different now.

However, sometimes upholding the previously established interpretation could jeopardize the plans of the government. Notably, it would have made it impossible for quasi-judges to sit on panels, because the 'old' Constitutional Tribunal refused to recognize them as properly elected ones.[35] It would also have blocked the plan to recast the National Council of the Judiciary, which was to be dissolved in order to be packed with political nominees, for the 'old' Tribunal did not allow such constitutional trickery.[36]

Now this is no longer an obstacle. If the earlier case law stands in its way, the Constitutional Tribunal feels free to simply dismiss it and officially change its views on a particular matter.[37] Should the applicant insist, highlighting inconsistencies in the Court's reasoning, the judges will declare that *they* are the Court now and they know better what the Court meant.[38] Control over constitutional interpretation is indeed a powerful weapon.

11.3.4 The approach to international law and EU law

It is widely known that the populist governments are usually reluctant to accept constraints resulting from international law standards. This is above all simply because constraints are constraints, and the populists do not like them. Another important reason is that the international legal framework has been elaborated and accepted elsewhere, so it is hardly within the populist reach; it may be relatively easy to pack the constitutional court, but not the European Court of Justice. To voice their anger and distrust, the populists 'denounce international law as an undemocratic, elitist project',[39] and whoever stands up for international law standards, such as judicial independence, is at risk of being accused of serving foreign interests.

35 CT judgment of 3 December 2015, K 34/15.

36 CT judgment of 18 July 2007, K 25/07.

37 CT judgment of 20 June 2017, K 5/17. This judgment openly rejected the views expressed in the case K 25/07 (ibid.).

38 CT judgment of 24 October 2017, K 1/17. This judgment modified the argument provided in the case K 34/15 (n 35).

39 Tamara Hostovsky Brandes, 'International Law in Domestic Courts in an Era of Populism' (2019) 17 International Journal of Constitutional Law 576, 580.

This short description, no matter how simplified it may appear, is very true for Poland.[40] One of the excellent examples is the report of the team of experts in constitutional law, some of them self-proclaimed, who were summoned by the speaker of the populist-dominated parliament and asked to deliberate on the constitutional crisis. However, the name of the report, which makes an unclear reference to 'the issues related to the Constitutional Tribunal', is slightly misleading. The document is mostly a polemic with the Venice Commission, which had been very critical of the new Polish legislation regarding the Constitutional Tribunal, and it should be recommended to anyone wishing to understand the populist intellectual framing of the constitutional crisis.[41] The Venice Commission was, inter alia, reproached for 'adopting a paternalistic supervisory attitude' in its dialogue with Poland.[42] The parliamentary experts also asserted that the concept of 'European and international standards' did not imply 'the abolition of respect for constitutional heritage and solutions characteristic for individual Member States',[43] which might suggest that they were attempting to refer to the concept of constitutional identity, but ultimately this was not mentioned in the document. It is right to read this report not really as a reply to the Venice Commission, but rather as a message to the domestic reader, an attempt to depict an international institution that endorses this liberal neutrality of law as a myth.[44]

Needless to say, in the view of the populists, the European Union cannot be trusted either. The preliminary references to the European Court of Justice, especially in matters related to judicial independence, are always treated with suspicion, as they tend to undermine national sovereignty. Any judge making a preliminary reference under Article 267 TFEU risks being prosecuted and subject to disciplinary measures.[45] And who said that Article 267 TFEU was even compatible with the Polish Constitution?[46]

40 As regards the Constitutional Tribunal, not many references to international standards can be found in its case law, as the Tribunal resorts to these standards rather sparingly; this is not a major change, though, as compared with the previous periods.

41 'Report of the Team of Experts on the Issues Related to the Constitutional Tribunal of 15 July 2016', www.sejm.gov.pl/media8.nsf/files/ASEA-ADRKC8/%24File/Report%20of%20the%20Team%20of%20Experts%20on%20the%20Issues%20Related%20to%20the%20Constitutional%20Tribunal.pdf accessed 14 April 2020.

42 Ibid. 22.

43 Ibid. 25.

44 Blokker (n 24) 535.

45 At the time of writing of this chapter, this has been noted by the ECJ, which ordered Poland to immediately suspend the application of the national provisions on the powers of the Disciplinary Chamber of the Supreme Court with regard to disciplinary cases concerning judges. One of the grounds was that, according to the Commission, the new disciplinary regime allowed the right of courts to refer questions for a preliminary ruling to the ECJ to be limited by the possibility of the initiation of disciplinary proceedings (Order of the Court in Case C-791/19 R, 8 April 2020, *Commission v Poland*).

46 The motion challenging the institution of preliminary reference as unconstitutional was filed by the Prosecutor General in 2018 (case no K 7/18). As of end of April 2020, the case has not been examined by the Constitutional Tribunal.

What matters most, though, is that the Polish populists, being hostile to EU bodies and generally distrustful of foreign institutions, have not invented or adopted any clear new doctrine concerning international law. The fact that they disregard certain institutions, such as the Venice Commission, or show little respect for some international treaties, such as the Istanbul Convention,[47] has not translated into any effort aimed at theory-building. The populist response to Europe and the world may be described as different from before, but it is certainly not an alternative to the international legal order as we know it.

11.4 Why cherry picking?

It should be abundantly clear at this point that the populist constitutionalism in Poland may be a new quality, but there is no clear method or doctrine behind it, unless one likes to think that having no theory is a theory in itself – but chaos in theory is not the same as chaos theory. What we are really dealing with is an entirely new *approach* to law, which should not be confused with *theory*.

In my view, this new approach is best described as the cherry-picking model, with the only guiding principle being to use whatever works, whatever promises to help achieve the aims pursued, even at the cost of consistency. If the good old liberal democratic way of thinking happens to justify the constitutional interpretation expected by the political branches of government, the interpreter will most likely resort to the old methods, proudly demonstrating their commitment to legal tradition. Nonetheless, if the desired outcome is unachievable within the pre-established order, they will not hesitate to abandon it.

This new approach to constitutional interpretation is therefore purely instrumental, just like the practical populist approach to constitutional politics as a whole;[48] it is also deeply cynical, considering the political declarations. This strategy may not be pleasingly neat to describe in scholarly terms, and it will most likely leave no trace in the theory of constitutional interpretation, but for those who practice it, it has two major advantages. First, it is highly effective, as it ignores any constraints. Second, it leaves opponents completely helpless, for it is virtually impossible to keep up with somebody who tends to change the rules of the game all the time, or to mix various rules taken from different games.

The reasons to adopt such an approach seem to be fourfold, and I will now proceed to discuss each of them briefly.

47 Council of Europe Convention on preventing and combating violence against women and domestic violence, Istanbul, 11 May 2011. See Katarzyna Sękowska-Kozłowska, 'The Istanbul Convention in Poland: Between the "War on Gender" and Legal Reform' in Johanna Niemi, Lourdes Peroni, and Vladislava Stoyanova (eds.), *International Law and Violence Against Women: Europe and the Istanbul Convention* (Routledge 2020).

48 Blokker (n 24) 552.

11.4.1 Pragmatism

Populism implies pathological pragmatism – every legal mechanism, including constitutional adjudication, is expected to help implement the political agenda. Constitutional interpretation is merely a handy tool for achieving this aim and justifying it in official terms. Populism is sceptical about rules and procedures because these may bring about unexpected results. Accepting rules and following procedures would constitute an act of self-restraint, which is precisely what the populists wish to avoid.

It does not take much to realize that in order to escape this problem, the populists may choose between three paths. First, they may decide to break the rules openly, which, however, is not a popular option, as they care a great deal about the appearances of legality (see Section 11.4.3). Second, they may choose to accept only a minimum set of rules, but if they do, they will still be bound by them. Third, they may accept many rules, some of them contradictory, and just use them as they please, depending on the present need – and this is exactly what they do. Juggling with interpretive methodologies obviously shields the populists from the negative consequences of the constitutional interpretation they promoted the day before, but more importantly, it helps them use the constitution, by means of twisted and corrupted constitutional review, against those who truly defend it. In less pleasant but straightforward terms, if the constitution were a dog, the populists are no longer afraid of being bitten; now they turn the dog on their opponents.

11.4.2 Ideology

It is hard to say whether populist projects around the world are actually driven by any particular ideology, and even harder to determine whether there is one populism or in fact a variety of populisms. As far as Poland is concerned, the ideological motivation does still matter, but in the age of populism it seems to be secondary to the purely political game. In its simplified version, the populist ideology focuses on the fight against many-faced evil – elites, minorities, migrants, foreign influence – and its heralds are reluctant to waste time on abstract discussions on the nature of law. Admittedly, attempts at theoretical insights are being offered, such as Morawski's Oxford speech or the works of Ryszard Legutko, a conservative intellectual and an MEP of the ruling party,[49] but at the end of the day, who reads academic books and conference papers?

Nevertheless, should we wish to dig deeper, interesting explanations can be found. One of these explanations is the unexpected comeback of Carl Schmitt's theory. The thought of Carl Schmitt has been enjoying a revival among public law scholars since they realized that it had quite a lot to say

49 For a summary of Legutko's ideas which served as bases for conservative populism, see Paul Blokker, 'Populist Counter-Constitutionalism, Conservatism, and Legal Fundamentalism' (2019) 15 European Constitutional Law Review 519, 524–30.

that could be applied to the current political reality. There are some who believe that the recent developments in the region, and especially in Poland, can be best described by adopting Schmitt's theoretical framework.[50] Without elaborating on this, it is hard not to note that ruling in the state of exception, decisions emanating from a particular authority, rejecting the idea of negotiation – this is all from Schmitt's political imaginarium.

Has Kaczyński been reading Schmitt, then? Maybe, but there is truth in the common belief that many people who read the right books owe that to their mentors who encouraged them to do so. If we turn to Kaczyński's personal tutors, many would claim that it was one of his academic teachers who shaped his views on law and politics: Stanisław Ehrlich, a committed Marxist and an influential lawyer in the communist era.[51] Indeed, there is a striking resemblance between the political philosophy of Ehrlich and the political agenda of Kaczyński. Rejecting the law as a source of the legitimacy of power; seeing democracy as a battlefield where war is aged between groups with conflicting interests; accepting illegal changes to the system in order to (allegedly) support marginalized groups; calling for establishing a single 'centre of political decision' which would rule the country – it is morbidly fascinating to read how it all came true.

If re-reading Ehrlich is the key to understanding Kaczyński, it becomes even clearer than before that constitutional interpretation cannot be *ars pro arte* and that it should serve the political agenda directly. In the end, it is the social and political context that matters, not abstract principles.

11.4.3 Reputation

As already mentioned, the Polish populists would never admit that they are breaking the law. Their project may be revolutionary in legal terms, but appearances of legality cannot be abandoned. For this reason, the populists need to justify their actions with a 'proper' interpretation of the constitution, and the best way to achieve this is to use the old methods and old techniques, but to twist them to the extreme and possibly adding some new elements. This is how continuity of the legal order can be demonstrated, in a way which is convincing and appealing to so many: by mixing the new with the old. The need to demonstrate continuity shown by true revolutionaries may be surprising at first, yet it cannot be denied: the judgments of the 'new' Constitutional Tribunal resemble the old ones, its earlier case law is still being cited, and the pre-2015 concepts are being used to justify the new order.

The reasons for this are not hard to identify. If the populist project were openly illegal, it would in fact be more vulnerable. At the early stage, such

50 Wojciech Engelking, 'The Political Character of the Judiciary: Schmitt, Kelsen and the Polish Constitutional Tribunal' in Belov (n 6).

51 Dawid Bunikowski, 'The Constitutional Crisis in Poland, Schmittian Questions and Kaczyński's Political and Legal Philosophy' (2018) 26 Journal of Contemporary European Studies 285, 294–296.

conduct would have enabled dedicated state agencies to step in and adopt measures which would end with the dissolution of the political party. Later, the populists would have had difficulty finding followers and supporters in academia and among lawyers, whose support was crucial for some parts of the plan, notably packing the courts, to become reality. The appearance of legality was also useful for the purposes of foreign policy, especially for the game played with the Court of Justice. This is why populists need to have their own lawyers, their own judges, their own parliamentary experts, even their own legal journals. It has been a truly long run. Paul Blokker is right to observe that 'conservative intellectuals and civil society groups have been gathering strength since the early 1990s, have increasingly radicalised and have become significant political forces which mobilise society and provide intellectual support, expertise, and legitimacy to populist projects'.[52] Today, corrupting some of the elites with financial incentives and by promoting them to prestigious offices is the next step and an essential part of this strategy.

Another important factor is the question of future accountability. If the populists are ever removed from power, having a record of blatantly illegal actions would pose a great threat to their personal safety. Yet, with contradictory legal opinions on the conformity of their actions with the constitution, today's major controversy is likely to be reduced in future to a mere dispute between lawyers. Opening the doors to various legal interpretations is, in fact, a method to ensure immunity to the interpreter, and the art of reading the constitution once again appears to be instrumental to political goals.

11.4.4 Rhetoric

One final factor needs to be mentioned: the nature of the populist persuasion and how it affects constitutional interpretation. Referring to the earlier developments and highlighting the alleged similarities has an important rhetorical component which should not be missed – it legitimizes the political narrative about the populist government not exceeding the previously established limits of democratic power.

Psychology lies beyond the scope of this chapter and even more beyond my area of expertise. Still, it is impossible to overlook the fact that this you-did-it-first approach is something very characteristic of the Polish populists, who have a genuine talent for exploiting and abusing the previously applied methods and techniques of constitutional adjudication, or even weaponizing the dogmas of constitutional democracy. This has already happened multiple times with the presumption of the constitutionality of legislation, even if it is deliberately unconstitutional, or with the final effect of judgments of the Constitutional Tribunal, even if the panel was composed of wrongfully appointed judges. How easily these concepts have now been turned against the constitution!

52 Blokker (n 49) 521.

Zooming out further, this is part of another subtle but crucial issue. It has been recently argued that the wave of populism could be seen as a health check for constitutional democracy.[53] The disturbing ease with which populist leaders and their obedient state institutions have been using traditional tools and methods of constitutional interpretation should immediately alert all those who still believe in the constitution to its weaknesses. Kim Lane Scheppele hits the nail on the head when she argues that

> populism has become the obsessive focus of many of us academics precisely because the criticisms of liberal constitutionalism made by the populists hit us where we live. Populists expose the vulnerabilities in the theories that our profession has taken for granted.[54]

The experience of the populist rule highlights the risk of the traditional principles of constitutional interpretation being used to justify blatantly unconstitutional ideas. Some of these principles, such as the unconditional presumption of constitutionality, may need to be revisited.

11.5 Conclusions

This chapter has explored the developments in constitutional interpretation in Poland under populist rule and aimed to provide a convincing conceptual framework for the observed tendencies. I have sought to demonstrate that *populist* constitutionalism is not *new* constitutionalism. It does not propose any new theory or doctrine regarding constitutional interpretation, nor has it developed any new methods of constitutional adjudication. The pre-established methods and tools are still in use, sometimes slightly refashioned, sometimes badly abused, but apparently without any intention of replacing them. So was the dismantling of the constitutional order simply a method to question the credentials of the previous government? It transpires that the only problem with the alleged one-sidedness of constitutional interpretation before the populist era was not the lack of impartiality; quite simply, the side was wrong.

I argue that constitutional interpretation in Poland in times of populism does not have much to do with any theory. It does not make any valuable contribution to global constitutionalism that would need to be studied before it could be accepted as its new current. It is not new, much less consistent, and it could hardly be framed in any academic model or serve to build a new one – even though it certainly deserves to be studied if the myths surrounding it are to be laid to rest!

Instead, what we are dealing with is merely a new approach to constitutional interpretation, based on an interplay between the established tools

53 Oran Doyle, Erik Longo and Andrea Pin, 'Populism: A Health Check for Constitutional Democracy?' (2019) 20 German Law Journal 401.

54 Kim Lane Scheppele, 'The Opportunism of Populists and the Defense of Constitutional Liberalism' (2019) 20 German Law Journal 314, 315.

and methods and new ones. This hybrid approach is purely instrumental and result-oriented: it is all about winning, so if some interpretations are likely to make the player lose the game, why not flip the chess board and change the rules of interpretation? This brutality is not supposed to be an intellectual alternative to democracy – it is a statement per se. Optimistically, it does not necessarily mean that the populist approach to the art of reading the constitution is totally unpredictable. As a matter of fact, it is the exact opposite, for these days most of the rulings of the Constitutional Tribunal can be easily guessed before they are officially announced. All it takes to make the right guess is to know the expectations of the political branches of government.

So in the end, there is a method in their madness. This abusive constitutional interpretation in the Polish populist regime reveals the same pattern as the populist approach to the idea of constitutional borrowing. When Rosalind Dixon and David Landau argue that many Eastern European states have been importing the Western doctrines, designs and concepts 'in superficial, shallow, acontextual, or anti-purposive ways',[55] they could just as well be describing how the Polish Constitution is being read now.

In the opening remarks, I asserted that in this chapter I would refrain from making general statements which would hold true for any populist regimes. Despite many similarities, which are always tempting for those undertaking comparative legal studies, the populist regimes differ in terms of national history and legal culture. It has even been suggested that some of them have been so successful due to specific features of national identity, or even certain widespread psychological tendencies,[56] a bitter interpretation which I find overly fatalistic. The populist regimes also differ with regard to how strong the parliamentary opposition is and who the populist leaders are. As Martin Krygier observed, '[s]ome of these are cynics, some fanatics, some clowns, some perhaps none (or all) of the above'.[57] Here is the Polish puzzle piece, then – let us see how it fits with the other ones.

55 Dixon and Landau (n 25) 489.

56 Tímea Drinóczi and Agnieszka Bień-Kacała, 'Extra-Legal Particularities and Illiberal Constitutionalism – the Case of Hungary and Poland' (2018) 59 Hungarian Journal of Legal Studies 338, 346–50.

57 Martin Krygier, 'The Challenge of Institutionalisation: Post-Communist "Transitions", Populism, and the Rule of Law' (2019) 15 European Constitutional Law Review 544, 562.