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SPECIAL ISSUE ARTICLE

Constitutional deconstruction as a form of extra-systemic dissensus: the Polish case

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Abstract

The deconstruction of the Constitution is an expression of extra-systemic dissensus directed against the current political order and strongly antagonising political actors within the state and in relations with the EU. In the article, we argue that the political changes in Poland do not herald a new type of constitutionalism, but rather constitute its deconstruction. The main actor subject to deconstruction is the Constitutional Tribunal (CT). Consequently, the deconstructed CT became an important instrument for further deconstruction of the Constitution, notably evident in the dispute over the primacy of the Constitution over European law. The deconstruction of the Constitution has its roots in the lack of sociological legitimacy of the Polish Constitution and its portrayal by certain right-wing political parties as failing to establish a level playing field in the political game.

Keywords Deconstruction · Dissensus · Extra-systemic dissensus · Constitutionalism · Constitution · Legitimacy · Poland

Introduction

The primary political division in post-2015 Poland can be described as a dispute between supporters of the 1997 Constitution and political movements challenging the established constitutional framework. This dispute does not revolve around specific state policies but centres on differing interpretations of the Constitution and the proper functioning of state organs according to constitutional principles. A significant player in this political shift is the Constitutional Tribunal (CT). Scholars have conducted thorough analyses, using terms like ‘populist authoritarianism’ or

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'illiberal constitutionalism' (Sadurski 2019; Drinóczi and Bień-Kacała, 2022), to explain a political practice marked by hostility towards liberal values, resulting in an unconstitutional concentration of political power. This has led to a shift from liberal constitutionalism to a new political situation that is not yet fully authoritarian. Those aiming to consolidate power and transform the system into an authoritarian one can exploit constitutional tools to transform the democratic framework (Landau 2013). An authoritarian regime is characterised by important policy decisions made by actors not elected through competitive and fair elections and without any accountability for the public. Thus, it is important to recognise democracy and authoritarianism as existing on a spectrum rather than as a simple dichotomy, raising questions concerning the boundary where a regime ceases to be democratic (see Waller 2023). Landau identifies 'competitive authoritarianism' as a hybrid regime: 'Democracy, they posit, requires a relatively equal playing field; where the playing field is strongly tilted in favour of incumbents, the regime should not be considered democratic' (Landau 2022, 435; see Levitsky and Way 2010, 5–13). Between 2015 and 2023, major political actors did not reject the need to seek public support for their policies. Meanwhile, for extra-systemic actors, garnering majority support was deemed sufficient justification for their actions and policies. Using election results to legitimise deconstructive actions against the political system is a recurring practice among actors with authoritarian tendencies (see Scheppele 2018, 561–562). Elections are often invoked to justify actions that violate or contradict the constitutional status quo (see Landau 2018, 533). The consolidation of a hybrid regime would entail the establishment of a system in which periodic elections take place, albeit with slim chances for a change in power due to unfair rules of engagement. From this point of view, even if, between 2015 and 2023, those in power in Poland tried to transform constitutional democracy into a hybrid regime, the political change that occurred in 2023 suggests that this attempt may have failed.

The relevant question is whether the political change of 2015 has set in motion a political process that leads to a new form of constitutionalism (e.g. illiberal constitutionalism, populist constitutionalism, common good constitutionalism), or is it merely a deconstruction of constitutionalism in general (which may involve a rejection of the idea of constitutionalism itself)? Our interpretation seeks to explain why conservative policies that could have been enacted using constitutional methods and institutions were contrasted with constitutionalism as an idea that organises political rivalry through a 'higher law'. In our article, we attempt to present an interpretation that describes the position of the CT as a body subjected to a process of constitutional deconstruction. This process is largely negative, as it does not create a new model of constitutionalism but weakens the existing one. The CT, which has hitherto been the main actor safeguarding the Constitution, was first subjected to deconstruction to become a Constitution-deconstructing actor itself. To justify our interpretation, we begin with the reconstruction of a simple and substantial concept of constitutionalism. We regard constitutionalism as a specific regulative idea guiding political practice, with individual nations moving either closer or further away from it. Subsequently, we introduce the concepts of constitutional deconstruction and extra-systemic dissensus to explain the mechanisms of deep constitutional disagreements, regardless of the proclaimed ideology of political



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actors. Through this lens, we analyse the constitutional crisis in Poland spanning 2015–2023. We begin with the legitimacy of the Constitution as a potential source of constitutional dissensus and describe the process of deconstructing the CT, which has become an actor in 'ordinary' political competition. According to our interpretation, the deconstructed CT emerged (and remains) as one of the agents of dissensus not only among the principal political actors in Poland but also between the ruling majority of 2015–2023 and EU institutions. The article concludes with an attempt to answer the question of whether the Polish constitutional crisis can be considered an attempt to build a new constitutionalism or whether it represents a practice aimed at weakening constitutionalism while 'pretending' to meet all constitutional requirements and standards.

Constitutionalism and intra-systemic political dissensus

In general terms, the idea of constitutionalism ('constitutional government') is simple: Political power should be limited by law, while citizens should enjoy rights guaranteed by the organs of the state (Arendt 1990, 143). The guarantee function is the minimum requirement (Sartori 1962), which does not mean it completely exhausts the concept's meaning. Already in its philosophical source, in Locke, it becomes apparent that constitutional government should be effective (Barber 2018) in providing 'public goods' in addition to the separation of powers and the guaranteeing of rights. At the same time, these 'public goods' can never be an excuse for restricting and infringing upon fundamental rights and freedoms (Dworkin 1978). The primacy of guaranteeing rights over political efficiency aligns constitutionalism closely with political liberalism (Rawls 1996), albeit under which various types of policies conventionally called 'right' or 'left' may be pursued. The idea of guaranteeing rights and limiting power can be seen in both the critical and descriptive views of constitutionalism. According to Loughlin, constitutionalism is associated with the belief that political power should be subject to limitations imposed through a 'special text', so that fundamental issues regarding the exercise of political power are regulated in the Constitution as a fundamental document for the political system (Loughlin 2022, 1). The term 'Constitution' itself takes on evaluative characteristics and is closely associated with positive emotive values: freedom, justice and democracy (Loughlin 2022, 31). In a weaker version, as articulated by Tushnet and Bugarič ('thin constitutionalism'), the political aspect of constitutionalism entails that 'policy over a wide range of issues is determined by the preferences of a popular majority today' (Tushnet and Bugarič, 2021, 12). Mainstream political actors attempt to seek public support for their actions and policy programmes. The legal aspect of constitutionalism involves the entrenchment of issues constituting non-party consensus and the independence of the judiciary. Constitutionalism's uniqueness lies in excluding important issues from ordinary politics: 'Some policies cannot be changed by a simple majority of today's voters. These policies involve both rights and structures for making decisions (including structures for determining what unentrenched policies a contemporary majority prefers)' (Tushnet and Bugarič, 2021, 12). Drawing on Kelsen's interpretation



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of democracy, it can be argued that this system represents the most advanced realisation of the idea of self-determination (being subject to one's own will) in the sense that 'the social order shall be in concordance with as many subjects as possible and in discordance with as few as possible' (Kelsen 1955, 25). Representative democracy fulfils this requirement when political representatives are (to some extent) responsive to the attitudes and preferences of the electorate (see Pitkin 1972, 232–233). The opposite of democratic self-determination is a system that demands blind obedience from citizens and is unresponsive to their needs and views (see Lafont 2020). Another important feature is the independence of the judiciary, which, with the application of general norms, is free from political pressure and is 'subject only to the law'. Judicial independence epitomises the basic guarantee function of the Constitution. To diverge from the idea thus outlined is to break with the essence of the tradition of Western constitutionalism (negative aspect) and/or to attempt to develop an entirely new norm of constitutionalism (positive aspect).

One of the significant features of the constitutional state is the stabilisation of political power and the reduction of the costs associated with changing it. The Constitution regulates the manner and limits of the exercise of political power, while individual political actors can pursue various political agendas within its framework. Competition occurs within the framework of rules recognised by political actors, leading to the recognition of the legitimacy of the outcome of political competition (Habermas 1996). Political change is normal and does not fringe upon the constitutional level. This situation can certainly be facilitated by the programmatic proximity of the main political parties, whether centre-right or centre-left. Political disputes take place among opponents who mutually recognise the right to political participation. In such a context, excessive political stability can even be regarded as a threat to the viability of democracy. Too much stability can lead to stagnation, a lack of real debate, and a dearth of viable political alternatives (Mouffe 2000). The situation may change when the main actors start to see themselves as a real threat, and the scope of inter-party consensus begins to diminish radically. Political polarisation sharpens debate and leads to political choices that are not illusory; political actors want and pursue different policies, which gives citizens the feeling that the act of voting for one party is indeed a choice of a particular political vision. Constitutionalism assumes that such polarisation will not be deep, and thus political actors will be united in their acceptance of the Constitution and its underlying values: political pluralism, individual rights or the mechanisms of the rule of law (Rawls 2001). Political change can be significant under such conditions while remaining within constitutional bounds. From this perspective, constitutionalism allows for political disagreement and variability in the policies pursued by disparate political forces. It attempts to make political dissensus a politically dynamic and constructive factor. Only extreme political movements (e.g. those advocating violence and hatred) are excluded from the scope of 'normal' politics. Political swaps and sharp political differences are considered normal and even desirable. In other words, in a well-ordered constitutional state, **political dissensus is intra-systemic and does not cause constitutional crises**.

Intra-systemic dissensus is led by actors interested in reforming or stopping certain elements within the system, while extra-systemic dissensus can be seen



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as an activity directed against the political system (Włoch 2023). Constitutional deconstruction is an interpretative practice related to dissensus at the constitutional level. We understand deconstruction not in the sense given by Derrida (see Derrida 1992), but as 'a rearrangement of the components of some whole or its complete disintegration'. Deconstruction is a process that can result in the rearrangement and alteration of the meaning of the deconstructed object, as well as its destruction. Thus, in the context of a political system, deconstruction can either enhance its democratic nature (e.g. by altering interpretations and practices to make greater use of the democratic possibilities inherent in the Constitution) or transform it into a more authoritarian system (e.g. by annexing institutions by a particular political faction and making systemic political change more challenging). While the aims and effects of deconstruction may vary, they are united by an attempt to alter interpretations and practices relating to something existing at a particular point in time. Deconstruction does not create anything entirely new but rather transforms what already exists into something that can be improved or, in extreme cases, destroyed. It is a rearrangement of a composition, leading to a transformation of its previous meaning or even its negation. Through deconstruction, the latent senses of a given structure or text are revealed, and the potentialities (often hidden) contained in the text are exploited, altering its previous understanding. The deconstruction of a Constitution involves a thorough reinterpretation of the text and a change in political practice that represents both a break from previous practice and an emphasis on continuity. The political actor engaging in deconstruction presents their practice as 'constitutional', albeit different from existing practices, for example, by better reflecting the true values of the Constitution or its deeper meaning. The purpose of deconstruction can vary: (a) constructive, when it improves the functioning of institutions (institutional aspect) or expands individual rights and freedoms (social aspect); (b) destructive, when it leads to institutional dysfunctions (institutional aspect) or increases the freedom to exercise political power and/or reduces the standard of rights protection (social aspect). Thus, deconstruction can fall within the scope of (a) intra-systemic dissensus, when it aims to enhance the (however defined) positive potential of the Constitution in the institutional and/or social aspect, or (b) extra-systemic dissensus, when it aims to comprehensively change the existing interpretation of the Constitution or create a state of constitutional facade: transforming the sense of the operation of institutions and/or lowering the standard of protection of rights and freedoms.

Legitimacy and constitution as a threat

The political dissensus in Poland since 2015 has extended beyond the sub-constitutional level to encompass the Constitution itself. The deconstruction of the Constitution entails a departure from political practices largely aligned with constitutional benchmarks. However, it is premature to call this a coup d'état or the establishment of authoritarianism (Drinóczi and Bień-Kacała 2022). To explain this situation, one can use the analogy of Wittgenstein's language games (Wittgenstein 1953): A language game is a certain whole consisting of language and its associated



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activities. Language is a constitutive part of every practice, providing interpretative patterns for understanding the practice and appropriate means of expression for its participants. Constitutional democracy can be presented as a linguistic game whose basic vocabulary and rules are contained in the Constitution. Constitutional practice occurs through and within this linguistic framework, allowing actors to undertake effective communicative acts that stabilise interactions: Actors not only understand the utterances and activities of others, but can also anticipate their behaviour. Constitutional democracy gives the main political actors an equal opportunity to participate in the political game and provides a safe and transparent framework for playing the game. At the constitutional level, the rules of the game are relatively fixed. In contrast, at the level of ordinary politics and legislation, the game is more variable (depending on the political agenda of the ruling faction) and dynamic (depending on the challenges and needs determining political activity). A political actor may recognise that past political practice has not fully exploited the potential of the meanings and practices embodied in the Constitution and, through a change of interpretation, seeks to expand citizens' democratic participation or rights. In such a situation, constitutional dissensus would be constructive and intra-systemic, as it would not cast off the Constitution altogether, but change the temporal uses of the Constitution's vocabulary (Włoch 2023). Constitutional dissensus signifies a change in constitutional interpretation and practice that diminishes the regulatory power of the Constitution (its effect on political practice). In such cases, it becomes destructive and extra-systemic: The dominant political actor refuses to participate in the existing game. They deconstruct the basic institutions to make them instruments for their own politics. The deconstruction of the Constitution is a political practice that breaks with the constitutional language game: One does not change the Constitution but refuses to participate in the existing game. The Constitution ceases to play the role of a determinant of political practice but becomes the object of interpretative interventions that neutralise the constraining character of the Constitution.

The enactment of the Constitution in 1997 marked the completion of the political change initiated by the partly free parliamentary elections of 1989. Despite the public will for political change, symbolised by the presidency of Lech Wałęsa in 1990, the process did not swiftly result in a Constitution. It can be said that the Constitution was not enacted during the constitutional moment (1989–1990),[1] but rather served as a summary of the transition away from authoritarianism and the adoption of new political principles. The point of reference for the Constitution's drafters was the Western liberal democratic states seen as models of unquestionable political and economic success (Krastev and Holmes 2020). The time of the Constitution's enactment was characterised by 'normal' politics, rather than the

[1] Ackerman (2019) interprets the Polish political transition as an example of a revolutionary transformation initiated by a grassroots and spontaneous social movement led by a charismatic leader. Bán (2023) argues against such a classification, contending that while the beginning of the transformation may have been revolutionary, it quickly took on the character of an elite mode of transformation. The argument for this interpretation is the negotiated nature of the political transition in 1989, as well as the adoption of the neoliberal economic model without broad democratic deliberation.



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exceptional euphoria associated with the restoration of democracy in Poland. In the constitutional referendum held on 25 May 1997, 42.86 per cent of eligible voters participated. Among those voting, 52.69 per cent supported it, which, taking into account referendum absenteeism, meant that only 22.58 per cent of eligible voters directly approved the Constitution in the referendum. This level of referendum participation and voting distribution indicated a significant social division over the new Constitution. The Constitution became a subject of intense political dispute (Garlicki and Garlicka 2010), although the intensity gradually waned after 1997. The CT, strengthened in 1997, could autonomously and effectively[2] resolve issues of hierarchical compliance with legal acts, particularly their constitutionality. Until 2015, political actors tried to present their policies and practices as constitutional during constitutional controversies. The Constitution derived legitimacy from liberal democratic rationales. The deficiencies in representative legitimacy (Harel and Shinar 2023) evident during the referendum remained politically 'disavowed': The legally binding effect of the constitutional referendum allowed for a narrative-based legitimacy rooted in the will of the people. This narrative of the 'will of the people as expressed in the referendum' also appeared in CT rulings on European integration: The CT referred to the democratic legitimacy of constitutional provisions allowing Poland's accession to the EU (rulings K 18/04 and K 32/09). However, for right-wing political groups, the Constitution did not represent the true essence of democratic Poland, as expressed in the political slogan of the 'Fourth Republic': a corruption-free republic devoid of ties to the communist system, fully democratic and in line with Polish tradition.[3] The Constitution thus possessed representative conventional legitimacy (referendum), although its representative naturalistic legitimacy (Harel and Shinar 2023) was undermined; that is, it was perceived to not fully represent the essence of Polish identity.

In normative terms, the legitimacy of a Constitution rests morally on commonly shared principles (e.g. democracy, dignity, rule of law) and legally on adherence to the procedure for its establishment. Normative legitimacy also derives from the equal opportunity for major political actors and groups to participate in the Constitution's creation process (see Sethi 2023), ensuring that no major political force is excluded

[2] This does not entail that the CT's rulings have always been uncontroversial and considered right, as exemplified by the rulings on 'ritual slaughter' (ruling K 52/13, 2014) or 'pension reform' (ruling K 1/14, 2015).

[3] The necessity for political change at the beginning of the twentieth century was proclaimed by such intellectuals as Paweł Śpiewak and Rafał Matyja. This call stemmed from disillusionment with systemic changes after 1989, expressed in the phenomena of clientelism, corruption, social inequalities and lack of equal opportunities. Another important element was the lack of accountability of authorities from the People's Republic of Poland. Advocates for change called for the construction of a strong and fair state rooted in the best Polish traditions and based on clear moral principles. The political exponents of the idea of the Fourth Republic included the Law and Justice Party and the Civic Platform (currently the primary rival of the Law and Justice Party). In an interview with the 'Polityka' weekly, Matyja did not agree with calling the policy pursued by the Law and Justice Party 'building the Fourth Republic'. In his view, the policies of the Law and Justice Party entail a combination of lofty rhetoric with the politicisation of state institutions (see 'Political scientist Rafał Matyja about what happened to the Fourth Republic').



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and that both opponents and supporters are free to express their views (see Garlicki and Garlicka 2010). The constitutional referendum did not provide strong social legitimacy. The negotiation-based process of Constitution building among political elites, coupled with weak social legitimacy, led to inherent fragility in the Polish constitutional system (Bán, 2023, 236). However, this fragility did not undermine its effectiveness, as state organs generally functioned in accordance with the letter of the Constitution, and none of the political actors openly disregarded it between 1997 and 2015. In contrast, the constitutional dispute that emerged between 2015 and 2023 did not result in a political division of 'violators of the Constitution *against the* people', but rather in a deep rift between 'the rulers and their electorate *against the* opposition and their electorate'. The dispute over the constitutionality of the post-2015 amendments became the subject of 'everyday' political competition.[4] The failure to enact the Constitution during the constitutional moment, coupled with low turnout in the referendum and the limited number of votes in favour of the Constitution, weakened its social legitimacy (see Fallon 2005; Sethi 2023). In this context, centre-right and left-wing groups accentuated their pro-constitutionality, while right-wing groups emphasised the need for substantial constitutional reform. It seems, however, that the source of deconstruction lies not so much in the 'reformist' attitude, but in the belief that the Constitution does not ensure equal security for all sides of political rivalry (see Dixon and Ginsburg 2018): The Constitution was seen as inhibiting non-liberal politics. Consequently, the CT ceased to be viewed as a guarantor of the constitutionality of the law but rather as an institution securing the political interests of competing factions.

Deconstruction of the constitution in Poland

The seizure of power by the Law and Justice Party (PiS) and its coalition partners in 2015 was associated with a constitutional crisis. This can be interpreted, firstly, as an effect of deep polarisation, where at least one relevant political actor recognises that pursuing a different policy is not possible within the existing constitutional framework, and second, as an effort to neutralise factors limiting political power, with political–ideological justifications playing a secondary role (Coman 2022). The two interpretations are not necessarily mutually exclusive; initial ideological

[4] Skąpska (2019) and Krygier (2020) point out that liberal democratic values have not had a long history in Poland and have not been deeply institutionalised, unlike illiberal values to which populist actors may have appealed. From this perspective, it can be argued that the political shift of 2015 to 2023 was not sudden or unexpected, but rather took advantage of existing trends in Polish politics and brought them to the forefront (see Scheppele 2018, 569–570, 579). Another explanation for the sources of the constitutional crisis points to the marginalisation of citizens in Polish constitutional practice (see Skuczyński and Muszyński 2023). Since the establishment of the Constitution, citizens have not been provided with active political participation and effective mechanisms for articulating their needs. Similarly, the practice of law itself is perceived not as a mere tool for resolving disputes and promoting interests, but as a sphere far removed from the everyday affairs of ordinary citizens (see Winczorek and Muszyński 2022). For an extensive discussion of the various conceptions of the sources of the crisis in Poland (in Polish), see Kaleta et al. (2024).



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motivations may evolve into overtly authoritarian tendencies. In the case of post-2015 Poland, we may observe a process of deconstruction of constitutionalism, while it is impossible (at the current stage of political development) to state that we are dealing with an attempt to build some new form of constitutionalism in a positive and substantial sense, offering a new idea for legitimising and limiting political power beyond the liberal paradigm. The ruling party from 2015 to 2023 used the vocabulary of the current Constitution and partially applied its norms to, at least declaratively, realise the democratic aspirations initiated by the political changes of 1989. In fact, it pursued right-wing politics accompanied by the deconstruction of constitutional principles and institutions rather than the creation of new constitutional systems.

The political change in Poland in 2015 led neither to a formal amendment of the Constitution nor a complete breakdown of the state's institutional structure. The Constitution has remained formally the same since 1997, though its interpretation has evolved within the context of constitutional practice. This practice can be influenced by societal changes stemming from moral attitudes, citizen aspirations, and challenges related to the economy, technology, or security. This means that the values expressed in the constitutional text and their hierarchical importance may undergo new interpretations. Different political ideologies may emphasise certain values to varying degrees. This raises the obvious question of the extent of interpretative freedom. While avoiding this classic philosophical dilemma—which, at the political system level, is also evident in the dispute over who should resolve constitutional disputes—it can be argued that interpretations of constitutional values that undermine the regulatory effectiveness of the Constitution, leading to constitutional bodies failing to fulfil their basic functions, are inherently flawed.[5]

From a purely formal standpoint, the Constitutional text remains the same: Poland still has a standard liberal democratic Constitution. It implements the model of legal constitutionalism[6] by establishing a constitutional court (the CT) as the 'instance of last word' in constitutional matters. During the period of constitutional change (1989) until the adoption of the Constitution in 1997, the Tribunal played an important system-forming role, introducing, among other things, the standards of the constitutional state through its jurisprudence. After 1997, the CT's strong position and occasional adjudicatory activism faced criticism.[7] However, none of the main political actors questioned its constitutional competence or the legality of its judgments. After the Law and Justice Party and its coalition partners won a parliamentary majority in 2015, there ensued a so-called process of 'packing' the CT with people closely connected to the ruling party. This was done not only by

[5] We do not claim that the interpretation conditions the practice, but rather that it may coincide with it and potentially serve as its legitimisation. However, such legitimisation may also involve the abuse of a particular interpretation of the Constitution.

[6] It is difficult to observe a paradigm shift from legal constitutionalism to political constitutionalism (see Kustra-Rogatka 2023).

[7] For example, the 1997 abortion ruling, see Sadurski (2008, 96–104); for right-wing circles, the 2007 ruling declaring the unconstitutionality of a large part of the Lustration Act created a great distance from the CT.

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filling vacant seats but also by annulling the resolution of the First Chamber of the Polish Parliament on the election of five members of the CT.[8] Consequently, the composition of the CT changed rapidly, leading to considerable constitutional doubts regarding the appointment of the three judges. Despite this, the CT still holds a systemically high position and remains the 'court of last word' on constitutional issues. However, the Tribunal's jurisprudential activity significantly declined between 2015 and 2023, with rulings and their justifications often supporting the political agenda of the parliamentary majority.

The deconstruction of the CT, by linking its powers of judicial review of legislation to the political will of the ruling party, is particularly evident in matters of great political significance and those generating constitutional disputes, such as judicial reform and the competence of supranational institutions to assess the state of the rule of law in Poland. In its jurisprudence, the Tribunal emphasises the sovereign competence of the Polish state to regulate the judiciary system. At the same time, it considers the activities of the European Court of Justice and the European Court of Human Rights to exceed their mandates and engage in law-making beyond the treaties. The Polish constitutional court interprets its role as a guardian of sovereignty in the normative aspect and as a defender of the primacy of the Constitution in the Polish legal order (rulings P 7/20 and K 3/21, 2021; rulings K 7/21 and P 10/19, 2022). Thus far, the primacy of the Constitution has not been a controversial issue. The CT addressed this issue in 2005 and 2010, stating that European integration does not threaten the Constitution's supremacy in the Polish legal system (ruling K 18/04, 2005; ruling K 32/09, 2010). This stance was bolstered by the constitutional regulation of Poland's accession to the EU, which ensured the democratic legitimacy of integration and emphasised that Poland and the EU are linked by a shared 'identity of values and goals' (K 32/09). Sovereignty, democracy and the primacy of the Constitution were interpreted as principles allowing for friendly cooperation between states and nations. However, after 2015, the same principles acquired a different meaning: Sovereignty became more confrontational, democratic legitimacy provided unlimited powers to the parliamentary majority and individual rights gave way to the principle of the common good or the good of the nation, as defined by the majority. Currently, the narrative in the rulings of the CT puts emphasis on the sovereignty and stability of the legal system, which is perceived as under threat externally from supranational institutions and internally from challenges to the constitutional legitimacy of the actions of the ruling majority (K 7/21). The Tribunal strongly emphasises its role as the sole arbiter of constitutionality in the Polish legal system. However, contrary to this claim, the Tribunal's role has largely been limited to providing a 'legal cover' for the ruling majority's actions between 2015 and 2023. This was evident in cases such as the judicial reform and the dispute over its compatibility with the Constitution and European law, where the CT narrowed the debate to whether the European Court

[8] It should be noted that the invalidated resolution was indeed flawed, as two judges were appointed too early. However, this does not change the fact that three judges were correctly elected (see Kustra-Rogatka 2022).



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of Human Rights and the Court of Justice of the European Union have the authority to assess the legality of the Polish judiciary. The Tribunal stresses that this issue falls within the sovereign competence of the Polish legislator and that the possible assessment of legality rests solely with the CT. It employs various interpretative means to argue that, at the very least, the controversial reform of the judiciary is democratically legitimate (as the ruling majority won the elections), constitutional (the Constitution is not perfect and changes in its interpretation are possible), and executed by an appropriate body (the parliament possesses the sovereign right and duty to elaborate on and develop constitutional provisions through legislation).

Thus, the CT embodies the essence of constitutional deconstruction: The Tribunal has been deconstructed to facilitate deconstruction. Formally, the Tribunal remains a strong constitutional court with a monopoly on constitutional review. However, in reality—owing to its close ties to the ruling majority from 2015 to 2023—it serves as a 'legal cover' for political actions. The deconstructed constitutional body becomes an important actor in the further deconstruction of the Constitution. In essence, the CT's adjudicatory activity depends on current political needs and is tailored to them (between 2015 and 2023, it depended on the ruling PiS, while from December 2023 onward, it may be influenced by PiS in opposition). The deconstruction of the Tribunal does not entail a 'conservative' interpretation of the Constitution, but rather an interpretation shaped by political needs and is therefore non-autonomous. It thus represents an 'inverted' judicialisation of politics (see Hirschl 2004): The constitutional court resolves critical constitutional disputes dependent on the will of the dominant political actor. This can be seen in the glaring downgrading of women's reproductive rights standards. The deconstructed Tribunal could, without the merest difficulty, have referred back to an activist ruling in 1997, which declared unconstitutional the possibility of aborting a pregnancy due to 'hard life circumstances or difficult personal circumstances'. However, in 2020 (ruling K 1/20, 2020), the Tribunal declared it unconstitutional to terminate a pregnancy when 'prenatal tests or other medical indications point to a high probability of severe and irreversible impairment of the foetus or an incurable disease threatening its life'. The reasoning centred on the provision supposedly allowing for liberal eugenics, although this legal discourse held little relevance in this case. The political context was important, as the tightening of abortion laws was one of the election promises of Law and Justice Party. It can be argued that the Tribunal effectively fulfilled this promise.

Between 2015 and 2023, the CT's activity aimed to provide a 'legitimation effect' to constitutionally questionable laws, constituting what has been termed 'weak abusive judicial review' (Dixon and Landau 2021, 942–95). However, when the CT offered a constitutional narrative that weakened constitutional institutions (e.g. the National Judicial Council), it bore the hallmarks of 'strong abusive judicial review', involving active judicial actions that weaken the democratic system (Dixon and Landau 2021, 97–98). The change in power in 2023 altered the role of the deconstructed CT: It transitioned from legitimising the actions of the ruling majority to politically supporting the opposition (PiS). In this new political situation, the CT became a counter-majority body, not because of its constitutional function but due to its political connections. Following the political change in the autumn of 2023,



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the deconstructed CT evolved into a counter-majority institution, acting as a veto point to block the actions of the ruling majority. These actions may not always be motivated by questions of the constitutionality of the law but rather by a distinct political agenda. Examples of the CT's politically significant activities include implementing the safeguard provisions intended to prevent change in the public media sector or obstructing the possibility of dismissing court presidents appointed by a previous government minister.

Deconstruction of the third level of the political

The deconstruction of the Constitution does not lead to the conclusion that the political order based on the Constitution has been completely rejected. The political change in 2015 extended beyond the sub-constitutional level, manifesting in the deconstruction of the role of the CT, the weakening of judicial independence and the lowering of standards for minority rights protection. However, political practice post-2015 partially aligns with constitutionalism, as the ruling majority often refers to the sovereignty of the people: Political discourse emphasises not only the importance of majority opinion but also the realisation of the vital interests and needs of the nation. The ruling majority actively sought public support for its actions, leveraging extensive media campaigns to influence public opinion. Yet, their departure from constitutionalism became apparent in their refusal to recognise certain constitutional issues as 'excluded from' ordinary (sub-constitutional) politics, particularly in their challenges to the separation of political and judicial powers. Political dissensus extends to the constitutional level, undermining the role of the Constitution as a common point of reference for political groups. The interpretation of the Constitution and the functioning of the courts become integral to the governance process, reducing their role as a mere medium of political will.

The political agenda of the majority in power from 2015 to 2023 was distinctly right-wing, oriented towards the well-being of the national community, emphasising the need for state redistribution and interventionism and, in this sense, exhibiting non-liberal tendencies. However, this does not mean that it pursued any project of new constitutionalism. The ruling majority's discourse included populist rhetoric, claiming to represent the 'real' people. Not all forms of populism are inherently authoritarian (see Tushnet and Bugarič, 2021; Bellamy 2023; Kaidatzis 2024). However, they typically involve a stark distinction between 'the people' and 'the elite' and claim that politics should reflect the will of the people (see Mudde 2017), a claim argued by populist actors to represent 'the people' (in some cases, this means exclusive representation; see Müller 2017). Furthermore, as different populist movements and ideologies define 'the people' in varied ways, ranging from exclusive and exclusionary to inclusive (see Bellamy 2023, 10–12), their attitudes towards constitutionalism also vary. Kaidatzis argues that populism as such does not prescribe a specific vision of constitutionalism; instead, its attitude towards constitutional principles depends on its ability to achieve the goals of the movement and/or ideology in question, referred to as 'constitutional opportunism' (Kaidatzis 2024, 226–227; see Rosenfeld 2024, 17 ff.). The political practice during 2015–2023



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can be seen as an attempt to go beyond the constraints imposed by constitutionalism while verbally professing allegiance to the Constitution. It involved deconstructing constitutional institutions while emphasising the supremacy of the Constitution and 'legitimising' actions through authorisation from these deconstructed institutions. The practice combined opportunism and deconstructionism: conforming to the Constitution when 'convenient' for political actors while deconstructing 'inconvenient' elements. The ideology propounded by the ruling party emphasised a nationalist understanding of the nation and pitted it against a corrupt (at least morally) elite.[9] The anti-liberalism of Polish right-wing conservatism, on the one hand, rejects individualism and multiculturalism, while, on the other hand, it emphasises national identity and tradition (see Blokker 2020). This exclusive understanding of the 'nation' aligns with a populist discourse claiming exclusive representation. Such right-wing populism, as outlined by Bellamy, is incompatible with constitutionalism (understood as both limited government and non-arbitrary rule), as it seeks to constitutionalise arbitrary rule through legal mechanisms (Bellamy 2023, 13). Ultimately, the deconstruction of the Constitution does not lead to the creation of institutional mechanisms that better reflect the will of the people or a reinterpretation of constitutional principles; instead, it leads to the consolidation of power and obstructs its horizontal control by other bodies (see Landau 2013, 229; Landau 2018).

Apart from deconstructing the current Constitution, there has neither emerged a new idea of institutional organisation nor a new axiology specified in the Constitution. Rather, there has been a practice of interpreting values or principles close to right-wing ideology and dismantling existing institutions (Granat 2023). For the ruling majority, the question of legal limitations on political power—important for constitutionalism—has appeared mainly in a somewhat ironic context concerning supranational bodies. The aforementioned rulings of the CT from 2021 and 2022 emphasised the need for inter- and supranational bodies to respect legal limits, whereas, in relation to national bodies, the CT emphasises the political right of the ruling majority to determine and define state policy according to its will.

The political practice of the ruling majority during 2015–2023 can be characterised as a **destructive deconstruction**: It neither improved the functioning of institutions nor enhanced the emancipatory potential of rights and freedoms. Referring to the notion of thin constitutionalism, one can say that the political practice during this period preserved its political aspect (majority rule and public support for government policies).[10] In contrast, the legal-institutional aspect

[9] According to Rosenfeld, a characteristic feature of Polish (and Hungarian) populist illiberalism is an exclusionary nationalism that defines 'the people' based on ethnic and religious characteristics (Rosenfeld 2024, 10 ff.). It can be argued that the essence of nationalist ideology is incompatible with the simple notion of constitutionalism, since constitutionalism dictates that every citizen should be entitled to the same set of rights and obligations regardless of their incidental characteristics (e.g. ethnicity or religion).

[10] It does not imply a recognition of fair play, as the ruling majority will strive to establish an institutional advantage that ensures support for government policy, for example, through public television propaganda and the activities of state-owned companies.



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(entrenchment of issues constituting non-party consensus and independence of the judiciary) was systematically weakened. This can be interpreted as a manifestation of a simplistic Schmittian understanding of the political (Bunikowski 2018), viewing politics as an existential conflict and political actors striving to impose their will on others. From this perspective, institutions of the state are seen as tools in the hands of the dominant actor, and political effectiveness is measured by the extent to which a political actor has the greatest possible pool of institutions at his or her disposal. Any independent institution is perceived as a potential or actual resource of competing political power and is thus treated as an adversary. Using Loughlin's terminology, the deconstruction of the Constitution can be seen as moving Polish politics to the second level of the political. In simple terms, the first level of the political involves conflict, the second level involves the establishment of institutions authorised to impose a unified will on a given territory, and the third level focuses on the establishment of laws regulating and limiting the exercise of political power (Loughlin 2004). Constitutionalism belongs to the third level of the political, setting boundaries and institutional structures for political conduct. Political actors compete within the constitutional framework and constraints, with the stakes being the exercise of power, not its acquisition and appropriation. One such institutional constraint is an independent judiciary and judicial review of legislation. Politics operates within a systemic framework at the third level of the political system. This means that there is no single point or actor that determines the entire form and content of political actions; instead, these are shaped by the actions and/or interactions of various institutions within their operating environment. Constitutionalism was designed to engage actors in a game whose outcome is, to some extent, acceptable to everyone, making it a nonzero-sum game. After 2015, while the general form of legal constitutionalism has been preserved, the actual execution of political actions resembles a personalised politicisation of actors playing a zero-sum game. Politics becomes personalised and centralised at the second level of the political, as the content and form of political activities are determined by the dominant political actor who, by seizing power, 'appropriates' the most important institutions.

Using a populist discourse, the actor engaged in deconstruction does not propose a new project but aims to 'reverse' the existing one: 'The hierarchy of the legal-constitutional order is not to be replaced by an inclusive, more universalistic order but rather by a return to, or realisation of, the past, that is, of a traditional order, based on 'natural' hierarchies related to ethnicity, family, and tradition' (Blokker 2019, 540, see also 544). This form of destructive deconstruction blurs the line between 'ordinary' politics and adherence to the constitutional rules of the political game, as the actor expressing extra-systemic dissensus not only seeks policy change but also undermines the existing consensus on interpreting and upholding constitutional rules. Constitutional procedures and institutions cease to be perceived as 'neutral' and become tools for consolidating power and strengthening the actor expressing the dissensus. In the Polish case, a key element of this destructive deconstruction was the integration of the CT into current politics, transforming it into a second-level political actor. As an essential element of the third level, the Constitution ceased to function as an 'independent' medium regulating politics, serving instead



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as a means of engaging in politics and achieving partisan goals. In this sense, the specificity of the third level of the political has been lost, shifting from the political regulated by a 'higher law' to the political as a competition over who gets to impose a 'unified' political will. The destructive deconstruction of the Constitution may lead to a shift from the third level of the political to the second level (depending on whether the shift is conscious or not), resulting in a political landscape where a single actor decides the political form and content of the operation of the most important institutions of the state. Adopting this interpretation, it is apparent that Poland has not seen the emergence of a new form of constitutionalism since 2015, but rather that the political practice of its deconstruction has continued (at least until the 2023 elections).[11]

In a well-functioning democracy, competing political groupings use the Constitution as a resource to legitimise their different policies (see Lazar 2023). This resource is broad enough (from tradition to effectiveness to individual rights) to serve as a reference point for various political agendas. However, in situations of deconstruction, at least one actor recognises that the Constitution 'is not mine/for me, and so until I can establish my own, I must take over the existing one'. This mindset aligns with Schmitt's (2007) logic: The hitherto constitutional language game of rivals is transformed into a game of enemies when one of the actors recognises that they have to take over all political resources to win the game. In this sense, the deconstruction of the CT is a political and constitutional action, since it entails both a change in the relationship between 'constitution-ordinary politics' (the negation of the primacy of the Constitution over the political will) and the understanding of democracy (the primacy of the will of the majority over the legal constraints protecting minorities) and sovereignty (confrontational sovereignty prevails over cooperative sovereignty). Deconstruction in this form implies a negation of the negation: Classical negative constitutionalism, the essence of which is the legal limitation of power (see Barber 2018), is neutralised without formal constitutional change. In such a situation, the object of political dissensus is the very existence, or correct functioning, of the third level of the political: constitutionalism. The deconstruction of the CT has made it possible to instrumentalise the Constitution, allowing its norms to be manipulated to optimise the benefits of one side of a political dispute while 'neutralising' norms and institutions that might constrain the actions of the ruling majority.

On the question of the stability of the *polis* Constitution, Aristotle states that 'a general point must be grasped about all of them, namely, that the part of a city-state that wishes the constitution to continue must be stronger than any part that does not' (Aristotle 1998, 1296 b). A Constitution is stable when citizens, particularly the office-bearers of the state, have good reasons to obey it and do so. However, when the Constitution is seen as a potential threat and lacks strong sociological legitimacy, this may give rise to the temptation to test—if the Constitution cannot simply be

[11] For this reason, it is difficult for constitutional theorists to conceptualise post-2015 political change, as they attempt to describe political practice from the second level of the political in terms of the third-level categories.



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changed—the extent to which it can be deconstructed, that is, the most sensitive institutions are linked to the ruling party and interpretations of the Constitution subordinated to its politics are pushed through. At such a point, the language game of the democratic Constitution comes to an end because the Constitution is no longer a common linguistic resource for communication between rivals and the legitimation of diverse policies.

Deconstruction as an anti-constitutionalist practice

The post-2015 political shift was not an attempt to create a new kind of constitutionalism if one takes the 'simple' substantive notion of constitutionalism as a reference point. While we acknowledge that the political practice during this period had populist characteristics and could be interpreted by both the political opposition (its supporters and institutionalised representatives) and researchers as moving towards authoritarianism,[12] It is important to note that the ruling majority from 2015 to 2023 neither concretised a new and positive model of constitutionalism nor made a serious attempt to build one. At the constitutional level, that is, involving the fundamental institutions of a democratic state (see Rawls 2001, 10), the practice of the ruling majority was focused on deconstructing existing institutions (in this sense, it was anti-constitutional, see Sadurski 2019), while creating an illusion of constitutionality (see Scheppele 2018). This destructive deconstruction of the Constitution did not lead to the creation of a new project or a positive standard for constitutionalism, but rather resulted in a 'pretended constitutionalism'. The deconstruction of the constitutional court, for instance, aimed to provide a semblance of constitutional legitimacy that met previous standards (see Landau 2018, 537; Scheppele 2018): The ruling majority made legislative decisions, which in turn were or could be subjected to checks by the CT, thus ostensibly fulfilling the requirement of horizontal checks and balances. The effectiveness of this 'pretended constitutionality review' depends on the perception of the constitutional court being somewhat independent of political power and acting based on legal rationale (see Dixon and Landau 2021, 113). However, the staffing and functioning of the CT between 2015 and 2023 faced criticism both internally (e.g. from legal scholars and the political opposition) and externally (e.g. from the Venice Commission). Thus, it can be assumed that the effectiveness of this 'pretended constitutionality check' was limited, primarily appealing to voters (current or potential) supporting those in power. Moreover, although the flaws in the functioning of the CT were evident, the body operated under a 'presumption of constitutionality' (neither the body itself nor its rulings on constitutional grounds could be invalidated by a unilateral act of another body) and legitimised the actions of those in power at the time (see Scheppele 2018; Landau 2018).

[12] Tushnet and Bugarič argue that, while not always contradictory to constitutionalism, populism in post-2015 Poland shows authoritarian tendencies (2021, 86–96).



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In a narrow (so-called thin) sense, constitutionalism entails that 'government officials do not act arbitrarily; or, seen from the other side, constitutionalism requires that officials act pursuant to some general principle' (Tushnet 2017, 370). In such a system, citizens enjoy individual rights and freedoms, while political actors orient themselves to the preferences of citizens or at least maintain a bond with the actual or potential electorate. A political system departs from constitutionalism when the actions of public authorities are characterised by systematic arbitrariness (Tushnet 2017, 1376). In such a scenario, there are no higher-order rules or principles regulating and legitimising the actions of political actors, leading to the legitimisation of such actions being solely at the will of the political actor. The case of Poland from 2015 to 2023 can hardly be described as a system of purely arbitrary power. However, was it an embodiment of a new form of illiberal constitutionalism beyond the European tradition? In Tushnet's terms, constitutionalism is liberal when it gives all citizens equal rights and freedoms. In contrast, illiberal constitutionalism would be a system in which 'one group of citizens receives substantial liberal rights, and another receives rule-of-law and thin constitutional protection against arbitrary treatment but nothing more' (Tushnet 2017, 1383–1384). Such a system is potentially unstable, as emancipatory and equalitarian aspirations from both first- and second-class citizens could prompt political actors to restrict the rights of the first group while failing to provide adequate rule-of-law protection to the second group. This would result in a shift from constitutionalism to unconstitutional illiberalism. The constitutional dissensus in Poland between 2015 and 2023 appears less about redefining the philosophy of human rights upon which the 1997 Constitution was based and more about weakening its regulatory power through the political instrumentalisation of constitutional institutions. On the one hand, the deconstruction of the CT served to neutralise potential veto points, while on the other hand, it provided constitutional legitimacy to the actions of the ruling authorities. This fusion of political arbitrariness with formal legalisation can be seen as a process in which constitutional mechanisms ensuring constitutional legality, and thus the rule of law, were weakened, and the standard of individual rights was lowered, for instance, in areas like reproductive rights or gender identity. The practice of lowering the standards of human rights, the rule of law and democracy aligns with the 'negative' notion of illiberal constitutionalism (see Drinóczi and Bień-Kacała, 2023).[13] Hence, one could argue that it constitutes an anti-constitutional political practice (see Sadurski 2019), as it involves weakening the 'three pillars' of constitutionalism. Until a new constitutionalism project emerges that links the legal regulation of political practice to non-liberal constitutional goals and values,[14] such illiberal political practices remain fundamentally anti-constitutional.

[13] The authors furthermore emphasise the emergence of illiberal ideology as a condition. However, notably, not every illiberal political ideology leads to an anti-constitutional political practice (see Rosenfeld 2024).

[14] This entails relying not on specific policies, such as economic or social, but rather on values and goals related to the basic institutional structure of the state.



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According to Landau's perspective, an illiberal democratic Constitution 'affirms the centrality of elections while excluding those institutions—rights, courts, and other institutions such as ombudspersons and human rights commissions—that are designed to check majority will' (Landau 2022, 428). The political practice from 2015 to 2023 involved deconstructing existing institutions to consolidate and stabilise power, making potential political change more difficult but not impossible. The deconstruction of the CT ensures that, once power is lost, the actor behind the deconstruction will continue to influence (negatively) legislation, while portraying the activities of the CT as a form of judicial scrutiny in line with legal constitutionalism. Landau points out that illiberalism does not exist as a concrete constitutional project: New constitutions created by actors described as illiberal/populist address issues such as separation of powers, a system of rights and freedoms and judicial review of majority decisions. Illiberalism manifests not as a different constitutional design but as a political practice that undermines and abuses the constitutional mechanisms of the exercise of political power (Landau 2022, 428 ff.). The major political actors in Poland from 2015 to 2023 weakened and exploited the institutions of legitimate constitutionalism, without completely dismantling them or offering something new.[15] Instead, it operated under the guise of 'pretended constitutionalism', amidst deep constitutional dissensus, where at least one actor challenged the constitutional status quo and sought to reconfigure it. In the case of the Polish constitutional court, this reconfiguring involved personal changes that aligned the CT's jurisprudence with the objectives of political power. Consequently, the deconstruction weakened the authority of this institution (see 'Oceny działalności instytucji publicznych w marcu', 2023) and led to a significant decrease in the number of judgements issued (see 'Trybunał Konstytucyjny "nie przepracowywuje się"?', 2023). Despite this, the deconstruction maintained the formal capacity of the constitutional body to legitimise key issues for the ruling power.

Landau asks a pertinent question: Why do illiberal political actors opt to maintain a semblance of constitutionalism? He suggests that one obvious reason is the potential 'constraints imposed by regional or international communities, which may in various ways sanction openly illiberal or undemocratic constitutional models' (Landau 2022, 433). In the case of Poland, this would entail not only a negative reaction from the EU but also the relative unpopularity of Euroscepticism within Polish society. Moreover, it is uncertain whether an overtly anti-democratic political turn would have garnered lasting support for the ruling majority or expedited

[15] In the case of Poland, the political majority in power between 2015 and 2023 did not command sufficient public support to enact a constitutional change legalising the consolidation of illiberal or populist political power. However, the deconstruction of the CT made it possible to maintain political influence even after the Law and Justice Party lost power. Following the October 2023 elections, which resulted in the party losing power, CT activity increased and its jurisprudence continued along the previous political line. For example, it emphasised the primacy of the Constitution over EU law and asserted its role as a guardian of sovereignty (see rulings Kp 1/23 and K 8/21 of 11 December 2023). The CT's activity served to neutralise the EU's efforts to incentivise those in power to restore the standards of the rule of law in Poland.



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political change.[16] Not considering that the Law and Justice Party lacked the majority to amend the Constitution, Polish society is diverse in terms of worldviews, and an illiberal constitutional project could have faced strong social resistance, but it could also have integrated the political opposition and compelled coordination in its functioning.[17] The situation thus appears paradoxical: While the social legitimacy of the Constitution might not be robust, society largely upholds democratic values and supports European integration. This has enabled an actor expressing extra-systemic dissensus to deconstruct constitutional institutions while simultaneously imposing limits on political change and necessitating at least the appearance of constitutionality. Landau also points out that if the institutions of constitutionalism are prone to abuse, a politically authoritarian actor does not need to construct a new constitutionalism if they can 'prey' on its existing form (Landau 2022, 434). From this, one can infer that constitutionalism, in its simplest form, will function stably and effectively under the conditions of intra-systemic and constructive dissensus.

The emergence of an extra-systemic actor causes great instability in the system, and the assumption of political power by such an actor often signifies a crisis. However, a situation in which an extra-systemic actor exercises power within the state need not be equated with a paradigm shift in constitutionalism. When adopting a substantive and simple notion of constitutionalism, not every policy change at the constitutional level qualifies as 'constitutionalism'. Thus, if illiberalism entails a destructive deconstruction of the basic institutions of constitutionalism, it represents an anti-constitutionalist movement and, in this sense, can be termed as 'il-constitutionalism'. In the case of Poland, political changes in the constitutional dimension[18] had predominantly negative implications. The situation surrounding the CT is a good example of this tendency. While the functional conception of the role of the CT within the Polish constitutional system remains unchanged, as it still serves as the court of the 'last word' on constitutional issues, its authority as more or less independent from current politics has been weakened, along with its efficacy in addressing appeals and applications. The CT 'pretends' to fulfil its former constitutional role, while in reality, it adapts its jurisprudence to the requirements of current political dynamics.

[16] In social surveys, support for democracy in Poland is reported to be very high (see 'Stosunek do demokracji i ocena jej funkcjonowania', 2023).

[17] The tightening of the anti-abortion law alone triggered mass protests and led to a permanent loss of support for the party, which was interpreted as one of the reasons for its defeat in 2023. Additionally, an attempt by President Andrzej Duda (previously a member of Law and Justice) to reform the constitution was blocked in 2018 by the Senate, where Law and Justice had a majority.

[18] We do not refer to individual policies, such as social or infrastructure policies, which can be evaluated differently but do not address systemic issues, such as the competences of state bodies and their legitimate functioning.



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Conclusion: rejection of the logic of overlapping consensus

The text of the Polish Constitution was prepared in a consciously ideologically eclectic manner so that as many political worldviews as possible could find in it values important to them and thus be able to consider the Constitution legitimised (see Winczorek 1997). Viewed from the perspective of Rawls' political liberalism, one could argue that constitutional principles were intended to form the basis of an overlapping consensus (Rawls 1996). Adhering to different views, both 'ordinary' citizens and political actors were to affirm constitutional principles as particular political values important for the functioning of democracy. The stability of the political system, in such a context, would rely on the internalisation of its basic principles by the main political forces. For this reason, the constitutional system of principles should be as inclusive and open as possible. Extra-systemic **dissensus at the constitutional level is a situation in which one or more actors either (a) place themselves outside the constitutional system (an actor acting 'against the system') or (b) interpret their position in this way (an actor being 'left behind or discriminated against by the system').** In a well-functioning constitutional democracy, constitutional dissensus should evolve into an overlapping consensus: Either the out-of-system actor should be able to find their way within the system of constitutional principles or, if possible and/or necessary, the constitutional principles should undergo a reinterpretation extended by new (hitherto ignored or discriminated against) perspectives. In contrast, the destructive deconstruction of the Constitution represents a rejection of the logic of overlapping consensus in favour of a logic of conflict, which links rivalry at the level of ordinary politics (concerning distinct policies) with constitutional disputes (concerning the state system). The political rivalry in Poland, where one side (describing itself as 'democratic') presents itself as a pro-constitutional force and the other side (describing itself as 'patriotic') as pro-Polish, the distinction between dissidence at the constitutional and sub-constitutional levels no longer corresponds to reality, as main political parties link policy proposals to their respective visions of the political system. The deconstructed CT, during the period between 2015 and 2023, functioned as an intra-state legal safeguard (legalising the actions of the ruling majority) and opposed 'external' attempts to subject these actions to legal review. In this way, intra-state dissensus transforms into dissensus within the EU: An actor deconstructing its systemic order reinterprets the logic of integration, part of which includes cooperation between states and the primacy of EU law.

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