18

Constitutional Drift

Exploring the Deeper Roots of Polish Constitutional Crisis

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18.1 INTRODUCTION

The goal of this chapter is to show the deeper roots of the so-called Polish *constitutional* or *rule of law crisis*. The crisis may be characterised as a period of constant conflict between the legislative and executive authorities on the one hand and the judiciary on the other, as well as the increasingly extensive subordination of the judiciary to the former. The structural imbalance within the separation of powers has led to the weakening of the constitutional checks and balances through a series of formal measures (changes in the law, disciplinary proceedings against judges) and informal measures (pressure on judges, chilling effects, etc.).[1] Despite the risks associated with the direction of these changes, their political authors have been winning several successive parliamentary and presidential elections, pointing at least to indifference towards changes constituting the constitutional crisis.[2]

In this chapter we argue that, while the constitutional crisis itself started in 2015, processes similar to those happening to the judiciary had started much earlier. The introduction of the rule of law principles in Poland following a period of political transformation in 1989 was a gradual process rather than a result of a distinct

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[1] Aleksandra Kustra, 'Poland's Constitutional Crisis: From Court-Packing Agenda to Denial of Constitutional Court's Judgments' (2016) 12 *Toruńskie Studia Polsko-Włoskie* 343; Anna Chmielarz-Grochal and Jarosław Sułkowski, 'Appointment of Judges to the Constitutional Tribunal in 2015 as the Trigger Point for a Deep Constitutional Crisis in Poland' (2018) (No 2) *Przegląd Konstytucyjny* 91.

[2] Jan Winczorek and Karol Muszyński, 'The Access to Justice Gap and the Rule of Law Crisis in Poland' (2022) 42 *Zeitschrift für Rechtssoziologie* 5; Grażyna Skąpska, 'Abuse of the Constitution as a Means of Political Change: Sociological Reflections on the Crisis of Constitutionalism in Poland' (2019) *Polish Sociological Review* 421.

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constitutional moment.[3] The 1997 Constitution created highly flexible provisions allowing for multiple types of interpretations of the possible constitutional arrangement but guaranteed the involvement into governance and the policy-making process of social actors such as civil society, trade unions, religious organisations, local and professional self-governments and organisations. In sum, we argue that the 1997 Constitution created ground for the functioning of competitive constitutional imaginaries that fertilised constitutional discourse immediately after its adoption. However, after the adoption of the 1997 Constitution and until 2015, the constitutional provisions were subject to the process which we refer to as *constitutional drift*, which involved marginalisation of the societal imaginary underpinned by the Constitution. During this period, more dominant liberal and communitarian imaginaries created grounds for a new paradigm of governance which strengthened the executive at the expense of the parliament, social partners and other social actors in general. This period includes Poland's integration to the European Union, with the formal accession on 1 May 2004 and the gradual Europeanisation of the Polish legal order. In this period, processes fundamental for the emergence of the current *constitutional crisis*, which began in 2015, were started. Our perspective aims to provide deeper, institutional perspective on how and why the constitutional crisis was possible – related to the adverse direction which Polish constitutionalism took after the adoption of the 1997 Constitution.

This makes us question the existing literature, which suggests a few possible explanations for the constitutional crisis.[4] First, some scholars see it as being caused by the actions of populist politicians aiming to dismantle the limits of power,[5] attacking the liberal principles of the system and the institutions that embody these principles while seeking broad popular support[6] through social transfers and the accompanying anti-elitist and anti-pluralist rhetoric aimed at excluding various minorities.[7] The second and similar group of explanations are cultural, which point to the lack of alignment between formal constitutional provisions and cultural conditions.[8] This led to a disenchantment of citizens with the Constitution, related to the lack of identification with liberal values and preference towards different

[3] Michał Ziółkowski, 'Constitutional Moment and the Polish Constitutional Crisis 2015–2018 (a Few Critical Remarks)' (2019) (No 4) *Przegląd Konstytucyjny* 76.

[4] For an excellent review, see Maciej Pichlak, 'Sytuacja autorytarna i rządy prawa: Socjologiczno-prawne wyjaśnienia kryzysu konstytucyjnego' (2021) 43 (No 1) *Studia nad Autorytaryzmem i Totalitaryzmem* 173.

[5] Pablo Castillo-Ortiz, 'The Illiberal Abuse of Constitutional Courts in Europe' (2019) 15 *European Constitutional Law Review* 48; Martin Krygier, 'The Challenge of Institutionalisation: Post-Communist "Transitions", Populism, and the Rule of Law' (2019) 15 *European Constitutional Law Review* 544.

[6] Wojciech Sadurski, *Poland's Constitutional Breakdown* (Oxford University Press, 2019).

[7] Ibid., 8–9 and 19–25.

[8] Skąpska, 'Abuse of the Constitution as a Means of Political Change'; Marta Bucholc, 'Commemorative Lawmaking: Memory Frames of the Democratic Backsliding in Poland After 2015' (2019) 11 *The Hague Journal on the Rule of Law* 85.

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model of community – a more ethnic one, often built on a sense of insecurity. Finally, antagonistic explanations claim that constitutional provisions were attacked because of its 'capture' by lawyers[9] or because, while they appeared neutral, they effectively secured neoliberal economic principles and interests of the narrow elite.[10]

Although these interpretations often start from the right premises, they do not capture the phenomena in question entirely and lead to erroneous generalisations. In our view, the approaches focusing on populism do not place it in the context of the existing constitutional practice. In particular, they fail to consider how the constitutional practices prior to 2015 reflected the existing constitutional model, while some scholars argue that the adherence to constitutional provisions was rather poor even before the crisis.[11] Focusing on populism can mostly demonstrate the rather obvious fact of its existence and describe the havoc it wreaks in the constitutional sphere but cannot show either its historical genesis or explain how such a vast constitutional space was created for its development.

Rejecting the thesis of purely populist sources of the crisis – without, however, denying the responsibility of the populists themselves and rejecting the thesis of the inability to overcome the errors of the transformation – we propose another way. It consists in noticing and highlighting the period of constitutional drift for shaping the constitutional practice. A series of processes took place in 1997–2015 that led to the rejection of an imaginary allowing interpretation of the Polish Constitution in the spirit of societal constitutionalism (which we call the 'societal imaginary'). At the same time, a new paradigm of governance favourable to the concentration of power was taking shape underpinned by different imaginaries. Noteworthy among these processes was the development of the ideology of strengthening the executive (i.e., the Prime Minister and the cabinet) at the expense of social actors and entrusting the former with the task of bringing about significant social changes, the technocratic Europeanisation of the legal order and the increasingly broader practical understanding of the Constitution as a carrier of values rather than a vehicle of social ontology.

The structure of the chapter will not be chronological. First, we will set the outset by discussing potential ways of interpreting the Polish 1997 Constitution in the context of competitive imaginaries which are present in it. Then, we will discuss the constitutional drift, that is, the institutional practice that contradicted the societal

[9] Adam Czarnota, 'Constitutional Correction as a Third Democratic Revolutionary Moment in Central Eastern Europe' (2019) 11 *The Hague Journal on the Rule of Law* 397; Michał Stambulski, 'Constitutional Populism and the Rule of Law in Poland' in Martin Krygier, Adam Czarnota and Wojciech Sadurski (eds.), *Anti-Constitutional Populism* (Cambridge University Press, 2022).

[10] Adam Sulikowski, 'Apolityczność w prawoznawstwie. Kryzys idei a zjawisko populizmu' (2018) (No 3) *Archiwum Filozofii Prawa i Filozofii Społecznej* 74.

[11] Winczorek and Muszyński, 'The Access to Justice Gap'; Joanna Kusiak, 'Rule of Law and Rules-Lawyering: Legal Corruption and "Reprivatization Business" in Warsaw' (2019) 43 *International Journal of Urban and Regional Research* 589.

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imaginary and led to a significant divergence with the potential of the functioning of a corporatist social model, showing how the executive strengthened itself at the cost of social partners, NGOs and professional self-government organisations citing democratic accountability and the necessity to integrate with the European Union. In Section 18.4, we discuss the transition from the constitutional drift to the constitutional crisis.

18.2 FORMING OF POLISH CONSTITUTIONAL MODEL AND COMPETITIVE IMAGINARIES OF THE POLISH CONSTITUTION

The debates over the enactment of the new constitution between 1989 and 1997 emphasised the need to avoid strongly political and ideological components and focus on its legal role. The 1997 Constitution was, therefore, a deliberate attempt to create a text which is juridical, focused on justiciable formal arrangements, the norms defining competences and rights. It was foreseen that the inclusion of various declarations on values could be a source of difficulties in the future constitutional practice[12] and would risk turning the text into a manifesto.[13]

Consequently, the systematic interpretation of the provisions of the Polish 1997 Constitution has been and still is a practical and theoretical challenge as it contains references to different sets of ideas and beliefs.[14] One can speak of a constant task to search for such a theoretical formula which, on the one hand, will not limit itself to stating that there are various conflicts of constitutional values which require balancing on the grounds of concrete cases and, on the other hand, will not reduce this task to the necessity to undertake unifying measures with regard to these values, achievable only at the cost of marginalising certain contents contained in the act in question. Such systematic interpretations can be understood as different as competitive constitutional imaginaries which function in the Polish constitutional discourse as alternative 'readings' of the constitution.[15] Such imaginaries refer to the fundamental principles or ideas contained in the given constitution, which explain their meaning in the context of a specific political philosophy or social theory. The role of an imaginary is to propose an understanding of the basic notions of a given constitution convergent with a given political philosophy or social theory while granting legitimacy to the particular rulemaking and governance processes on the grounds of that philosophy or theory. In other words, imaginaries

[12] Piotr Winczorek, 'Nowa Konstytucja Rzeczypospolitej Polskiej: Problem aksjologii' (1996) 4 (No 4) *Przegląd Sejmowy* 9.

[13] Piotr Winczorek, 'Konstytucja i Wartości', in Janusz Trzciński (ed.), *Charakter i struktura norm konstytucji* (Wydawnictwo Sejmowe, 1997), 55.

[14] Michał Stambulski and Adam Czarnota, 'The Janus Face of Constitutionalism' (2019) 11 (No 1) *Krytyka Prawa: Niezależne studia nad prawem* 18.

[15] Wojciech Ciszewski, 'Republikańskie odczytanie Konstytucji Rzeczypospolitej Polskiej' (2017) (No 4) *Przegląd Konstytucyjny* 4.

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help to 'motivate and justify the practice of the government and collective self-rule'[16] underpinning this process by references to coherent sets of ideas and beliefs. Practically speaking, imaginaries allow us to structure constitutional norms and their mutual relations and solve legal and political problems associated with complexities and paradoxes of democratic governance.

The discussions about the nature of the Polish 1997 Constitution have been predominantly conducted between most dominant liberal and communitarian constitutional imaginaries. Liberal imaginary assumed that the function of constitutional architecture is to limit power to protect individual rights and freedom understood negatively. This way of reading the constitution in principle understands every form of interference, including legal interference, as a limitation of individual freedom. On the other side lies the principle of the sovereignty of the people, associated with democracy, by dint of which citizens can express their political will through law that can, among other things, limit individual freedom. Freedom and the sovereignty are thus described as being in conflict and are additionally counterbalanced by antagonistic principles, such as the rule of law, the separation of powers, the independence of the judiciary or constitutional review. The status of constitutional norms as conflicting principles which need to be balanced allows for synergistic effects – a kind of optimum between individual freedom and the sovereignty of the people. This perspective of looking at the constitution was particularly present in the Constitutional Tribunal's case law.[17]

Alternative imaginary contributing to the discussions about the nature of the Polish constitutional project was a communitarian (republican) one that understood constitutional values such as freedom in a positive way, that is, as increasing capability of action/choice.[18] This capability is determined not only by the restrictions set by political power but also by the operations of political power which may actually increase these capabilities. The sovereignty of the people as well as the rule of law and other principles such as the separation of powers serve this purpose. All of them are to be interpreted as reducing the arbitrariness of governments and preventing a group from gaining unlimited power. Because of the teleological subordination of these principles, there is no antagonism between the principle of freedom and the sovereignty of the people and both principles can be fully realised – not one at the expense of the other, as in the liberal view.[19]

While we do not question that both liberal and communitarian imaginaries provide a coherent and possible interpretation of the 1997 Constitution, we believe

[16] Jan Komárek, 'European Constitutional Imaginaries: Utopias, Ideologies, and the Other', in Jan Komárek (ed.), *European Constitutional Imaginaries: Between Ideology and Utopia* (Oxford University Press, 2023), 2.

[17] Adam Sulikowski, 'Trybunał Konstytucyjny a Polityczność. O Konsekwencjach Upadku Pewnego Mitu' (2016) 71 *Państwo i Prawo* 4; see also Chapter 15, by Wojciech Zomerski.

[18] Ciszewski, 'Republikańskie odczytanie Konstytucji Rzeczypospolitej Polskiej'.

[19] Ibid., 18–24.

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that they have effectively contributed to the constitutional drift that we will discuss in Section 18.3. We will concentrate on highlighting the differences between our proposal of the societal reading of the constitution built upon the principles of societal constitutionalism rather than on the liberal and communitarian imaginaries. As a result, we suggest that 'societal' imaginary based upon societal constitutionalism is underpinned by the 1997 Constitution, played a role in the Polish constitutional discourse after 1997, and should be revitalised as a means of overcoming the constitutional crisis.

Societal constitutionalism, while not negating the status of freedom as a constitutional value, focuses on the safeguards of social diversity, the autonomy of existing social actors and the normative orders they produce, against the drift towards social authoritarianism and its transformation into political authoritarianism.[20]

The societal interpretation of the Polish Constitution that we put forward assumes that, on the grounds of liberal or communitarian imaginaries, the autonomy of social actors is too narrowly understood as threatening political expression. Societal constitutionalism highlights, however, that, in any social subsystem, individuals can be subject to dependencies limiting their freedom, whether it's the system of economy, health, the media or science. In any social subsystem, individuals can be coerced into theoretically voluntarily giving up their freedom and submitting to more or less formal social control measures. Notably, the mere safeguarding of political freedom with the increasing restriction of the individual's possibilities for social development will sooner or later[21] – due to the expansionism of social subsystems – lead to a restriction of the former.

We may recognise that the tension between individual rights and the people's sovereignty is a structural antagonism, as in the liberal imaginary. Also, we may see the possibility of resolving the conflict between the two, as in the communitarian imaginary. But there is a third element to this relationship, which transforms it into a triangle, and this element is a society and various forms of its self-organisation. Only in this way is it possible to constitutionally secure autonomy. Without securing autonomy of the society, only the following two scenarios are possible. First, political power's increasing influence on social life results in increased politicisation, bureaucratisation of society and communication overload.[22] Second, the extension of

[20] For a broader description of societal constitutionalism, see David Sciulli, *Theory of Societal Constitutionalism: Foundations of a Non-Marxist Critical Theory* (Cambridge University Press, 1992); Gunther Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization* (Oxford University Press, 2012); Chris Thornhill, 'The Citizen of Many Worlds: Societal Constitutionalism and the Antinomies of Democracy' (2018) 45 *Journal of Law and Society Journal of Law and Society* 73; Paweł Skuczyński and Karol Muszyński, *Rozwój i Kryzys Konstytucji Społecznej: Przypadek Samorządów Zawodowych* (Wydawnictwo CH Beck, 2020).

[21] Niklas Luhmann, 'Differentiation of Society' (1977) 2 *Canadian Journal of Sociology / Cahiers canadiens de sociologie* 29; Teubner, Constitutional Fragments.

[22] Niklas Luhmann, *Political Theory in the Welfare State* (De Gruyter, 1990).

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individual rights into social relations (e.g. as part of their horizontal effect) increases the juridification of social life.[23] The attempt to secure social freedom by means familiar to traditional juridical or democratic constitutionalism and the subsystems linked within it must therefore aim at an expansion of either politics or law – and thus ultimately at a reduction of social differentiation due to the loss of autonomy.

Of course, the inclusion of societal autonomy in the relationship in question must find a basis in the constitutional text. Such a basis exists in the Polish 1997 Constitution, which mentions many institutionalised social actors and forms of self-government. The different interpretations of the Constitution differ in their visions of how these entities are to fulfil their roles.

Within the liberal imaginary, civil society is first and foremost supposed to control the political power, thereby contributing to its limitation. At the same time, the role of politics is supposed to secure a legal framework protecting individual rights. The political power and the civil society are thus mutually balanced. Such an approach pre-supposes competition between social actors and state bodies. By necessity, it must drive strategic action, bureaucratisation, and social control. Thus, if it even contributes to securing political freedom, it sacrifices the autonomy of social entities. Within the communitarian imaginary, the people's sovereignty, individual rights, and social actors all interact to maximise the same value of positive freedom. Politics is tasked with unifying social subsystems with a common goal. This reading ignores the societal fragmentation into different subsystems such as economics, health and science, that act in the name of different and sometimes conflicting values.

Within the societal imaginary, the political and legal systems must be open to socially produced normativity. Instead of leaving these processes and their effects in the private sphere, the Constitution should consider them in a genuinely democratic process of law-making. This can take various forms but, in essence, social actors should be able to influence public policies and law-making, create their own norms and self-regulate as broadly as possible.

The proposition of a societal imaginary is ultimately linked to a classic corporate social model characteristic for continental Europe, opposed primarily to the American pluralist one and focused on resolving social conflicts – mainly in the economic sphere, but not exclusively – through negotiations and compromises between social partners.[24] The premises for the functioning of a corporate social model are: (1) self-organisation of the society in various forms (from civil society organisations, through trade unions and employers' organisations to professional and territorial self-government), (2) consensual agreement-making modes (from informal dialogue mechanisms through bipartite and tripartite social dialogue to the co-

[23] Gunther Teubner (ed.), *Juridification of Social Spheres: A Comparative Analysis in the Areas of Labor, Corporate, Antitrust and Social Welfare Law* (De Gruyter, 2012).

[24] Georg Nolte, *European and US Constitutionalism* (Cambridge University Press, 2005).

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governance by social partners) and (3) mechanisms of inclusion of social norms formed bottom-up (from effective forms of consultation and opinion-forming, through social participation in the creation of public policies, to self-regulatory regimes).

The societal imaginary of the Polish 1997 Constitution is underpinned legally, politically and historically by four arguments.

The first argument concerns the material scope of the Constitution. The Constitution provides regulations in several areas which do not need to (as rights and freedoms of citizens and to structure the operations of public administration) – but can – be regulated at the constitutional level.[25] Such 'possible but not necessary' norms provided in the Constitution protect and regulate various forms of self-organising such as: (1) self-government (local and professional), (2) civil society (foundations, association etc.), (3) social partnership (trade unions and employers' organisations) and (4) religious entities (churches and religious associations).

The second argument underpinning societal imaginary relates to the position of social actors in the act who are mentioned in the very first chapter which sets down rules for the functioning of the socio-political system. It is assumed that their inclusion in the first chapter implies a duty to ensure autonomy of their operations and that the constitutional regulation of social actors is declaratory rather than constitutive in nature, and that, as a rule, civil society subjects exist prior to their establishment in a legal sense.[26] The duties of the public authorities should here be understood not only as related to guaranteeing the freedom of association but also 'to increase and diversify the possibilities of their activity, opening the way for the growth of these possibilities'.[27] Thus, the point is to create pro-developmental conditions both in the sense of increasing the pluralism of social actors and their opportunities for action. The latter should also include increasing their influence on public policies. It is because civil society is a political actor and citizens become political agents also through institutions that self-organise and produce their own social orders.

The third argument under-pinning societal imaginary concerns the historical formation of the regulation of social actors and the constitutional identity. In the Polish constitutionalism, the autonomy of civil society is understood in a Hegelian tradition as being in opposition to the State, which heavily influenced the Polish constitutional discourse in the 1980s and 1990s.[28]

[25] Christopher J. Thornhill, *A Sociology of Constitutions: Constitutions and State Legitimacy in Historical-Sociological Perspective* (Cambridge University Press, 2013).

[26] Paweł Sarnecki, 'Organizacja Społeczeństwa Obywatelskiego', in M. Zubik (ed.), *Księga XX-lecia orzecznictwa Trybunału Konstytucyjnego* (Wydawnictwo Trybunału Konstytucyjnego, 2006).

[27] Ibid., 598.

[28] Jacek Kuron, *Kuron: [pisma polityczne]* (Wydawnictwo Krytyki Politycznej, 2009); Jacek Luszniewicz, *Solidarność, Samorząd Pracowniczy, Transformacja Systemu: O Programie*

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The fourth and final argument underpinning societal imaginary refers to the historical process of drafting of the Constitution where principles linked to societal constitutionalism were explicitly included due to pressures from civil society.[29]

The above argumentation indicates that the Constitution aimed at the institution alisation of the social model and that the societal imaginary provides a coherent alternative to the liberal and communitarian one based on the constitutional text. In our view, it was only in the subsequent period that the range of potential interpretations was significantly narrowed down, whereas the corporatist-like social model was gradually excluded from the constitutional practice, the power was consolidated in the hands of the executive and a space for populism was created.

18.3 CONSTITUTIONAL DRIFT

We argue that the constitutional order has been subject to a phenomenon that could be described as constitutional drift which we understand as a process of marginalisation of the societal imaginary by the developments underpinned by liberal and communitarian imaginaries. Here, we refer to Sciulli's concept of drift resulting from the increase of competition among social actors in the context of rising societal differentiation.[30] Social actors, operating in different societal subsystems and unable to influence them to the extent that they would have envisaged, increasingly adopt strategic, bureaucratised methods of operation to increase the efficiency of their actions. These actions result in the rise of social authoritarianism – in our case, located in the political system – relying on various forms of social control which are not counteracted. Moreover, Sciulli points to the fact that instruments traditionally designed to prevent the rise of social authoritarianism further exacerbate the problem. For instance, replacing market forces with administrative governance creates a *de facto* parallel market utilising bureaucratic instead of market logic. A second example are social movements that naively aim at liberation from pervasive social control, which are very often so unstructured and spontaneous that they are vulnerable to various forms of strategic action by other players.

These conceptualisations are a good starting point for the analysis of the drift that took place after the adoption of the Polish 1997 Constitution. We track constitutional drift in three areas – social dialogue (relationships with trade unions and employers' organisations), civil society (relationships with NGOs) and professional self-government organisations (relationship with associations of professions of public

Gospodarczym Sieci Organizacji Zakładowych NSZZ 'Solidarność' Wiodących Zakładów Pracy, Rok 1981 (Szkoła Główna Handlowa w Warszawie, 2008).

[29] Stanisław Gebethner, 'Rzeczpospolita w Świetle Postanowień Rozdziału Pierwszego Konstytucji z 1997 roku', in E. Zwierzchowski (ed.), *Podstawowe pojęcia pierwszego rozdziału Konstytucji RP* (Wydawnictwo Uniwersytetu Śląskiego, 2000), 13.

[30] Sciulli, *Theory of Societal Constitutionalism*.

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trust). The cooperation between social actors (i.e., trade unions and employers' organisations, NGOs, and professional self-government organisations) and policy-makers (including the executive and political parties) in the area of law- and policy-making has been tightening in the early years after 1989. However, due to overlooking of the possibilities stemming from societal interpretation of the Constitution, the relationships between the executive and society developed in a way contributing and accelerating the drift. While various policy actions, including reforms to the social dialogue explained in Section 18.3.1, have been undertaken to stop the process, the requirements of social coordination resulted in subordination of social actors to the bureaucratic expectations of the political power. On the level of constitutional discourse this was fuelled by the liberal and communitarian interpretations of the Constitution, aiming to construct a maximally functional architecture of public administration and the government, while voices from self-organising society were treated as undermining public interest.

A new political paradigm emerged transforming the practice of the constitutional framework. In this paradigm, interferences in the activities of social actors were justified with liberal (protection of individual rights, free market, etc.) or communitarian arguments (protection of the common good). Social actors were publicly accused of particularism. Consequently, the policies against their influence on public policies and law-making were carried out, which we describe in Sections 18.3.1–18.3.4. Ironically, these political developments accelerated and boosted particularistic orientation among social actors and contributed to the growing disenchantment with the institutional framework, which further accelerated the drift.

18.3.1 *Social Dialogue*

As we have described, social partners (trade unions and employers' organisations) have been given a particularly strong role in the Constitution. Trade unions have been traditionally involved in the political process after 1989 and have been even described as 'one of the pillars of Polish party politics'[31] due to their active involvement and intersections with political parties (both on the left and on the right side of the political spectrum). However, after the adoption of the 1997 Constitution, the ties between trade unions and political parties have been significantly loosened. This stemmed from various factors, including a serious political failure of the right-wing electoral coalition built by the Christian democratic trade union Solidarity that had previously won the 1997 election.

In the late 1990s, trade unions were slowly distancing themselves from party politics while focusing on building their own capacities rather than commodifying

[31] Bogusław Jagusiak, *OPZZ i NSZZ Solidarność w Systemie Politycznym Polski w Latach 1989–2001* (CEE, 2004).

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various political opportunities.[32] This pathway was formalised around 2001–2002, when a new system of social dialogue was constructed which assumed an active role of social partners in economic governance, with developed, formalised and relatively wide consultation rights. However, over time and particularly since 2005, a gap between the executive and particularly trade unions has been widening. The executive had very little trust towards social partners, suspecting them of rent-seeking behaviours and, in fact, questioning their role as the legitimate representatives of workers. These actions were underpinned by liberal imaginary that intended to downgrade a 'special' channel of relationships with social partners to a typical liberal way of policy-making aimed at communication between the government and equally treated external actors, as well as communitarian imaginary which was sceptical towards supposedly rent-seeking behaviour by the social partners.

This system has evolved into what J. Gardawski called 'consultative etatism'[33] – with the role of social partners reduced to a function of 'expressing'[34] the interests of narrow groups of workers, given the low trade union and employers' organisation density. This development was particularly visible during the economic crisis of 2009, when social partners have made a substantial effort to sign a social pact suggesting a new, more solidaristic way of dealing with the crisis. This attempt was ignored by the executive convinced that it is the sole actor able to represent the public interest.[35] A similar situation happened in 2013, when the retirement age was prolonged despite the largest protests by the trade unions since 1989, as well as in 2017 when the education reform was implemented against a desperate opposition of the strongest trade union of teachers.

In all these circumstances, social partners were unable to win any concessions from the executive. Secondly, social partners, confronted with a low level of trust from the executive, have aligned themselves with party politics to at least partially regain power. This interaction increased competition and strategic cooperation between and across social partners and policy-makers, in fact forcing trade unions and employers' organisations into repeated alignment with political parties. This development has been visible from 2015 onwards, where Christian democratic trade union Solidarity expressed vocal support in both presidential and parliamentary elections for the right-wing party Law and Justice in exchange for reversal of some of the policies that had been introduced against its will under the previous liberal

[32] Juliusz Gardawski, *Dialog Społeczny w Polsce: Teoria, Historia, Praktyka* (Ministerstwo Pracy i Polityki Społecznej. Katedra Socjologii Ekonomicznej SGH, 2009).

[33] Ibid.

[34] Franz Traxler, 'Corporatism(s) and Pacts: Changing Functions and Structures under Rising Economic Liberalism and Declining Liberal Democracy' (2010), After the Euro and enlargement: social pacts in the EU, Brussels: European Trade Union Institute (ETUI) and Observatoire social européen (OSE).

[35] Karol Muszyński, *Polityka regulacji zatrudnienia w Polsce: kryzys ekonomiczny a destandaryzacja stosunków pracy* (Wydawnictwo Naukowe Scholar, 2019).

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government.[36] In this way, the autonomy of social partners was further reduced as they were able to win an influence over the policy-making only by paying for it with political concessions.

18.3.2 *Civil Society*

The second example is provided by the developments in the sphere of relationships between the executive and the civil society. The policy-makers after 1989 assumed that the involvement of civil society in public sphere should not include economic interests and conversely focus on the neutral, non-partisan and particularly non-economic activities within the society.[37] This resulted in a discursive segmentation of civil society into 'real' NGOs and lobbying organisations.[38] While – from the side of policy-makers and politicians – the former represented the 'genuine' public interest and mostly focused on non-partisan activity directed at excluded and marginalised groups, the latter were perceived as fostering shady interests and thus treated suspiciously.[39]

At the same time, the organised part of the civil society was actively reshaped by the public governance paradigm underpinned by both liberal and communitarian imaginaries which resulted in an influx of funds directed at public services provision via NGOs, also in the context of an influx of EU funds. This development resulted in the bottom-up depoliticization of NGO sphere, since 'suspicious', interest-driven NGOs have been marginalised while 'non-partisan' NGOs have been increasingly reliant upon public funding,[40] which required them to become more professional, bureaucratic and similar to administrative agencies.[41] This can be summarised as a paradoxical development, where NGOs have been expected to abandon their own agenda and partisanship while becoming more dependent upon political power, particularly due to scarcity of private funds,[42] and started to increasingly perform functions in fact outsourced by the state while being supervised by public administration. Thus, the executive was strategically forcing civil society into a subordinate

[36] Wiesława Kozek, *NSZZ 'Solidarność' Wobec Nowych Wyzwań Od Roku 1989* (Wydawnictwo Naukowe Scholar, 2020).

[37] Joanna Dzwonczyk, 'The Barriers for the Development of Civic Society in Poland after 1989' (2003) 32 *Polish Poitical Science Yearbook* 117.

[38] Piotr Gliński, *Style Działań Organizacji Pozarządowych w Polsce: Grupy Interesu Czy Pożytku Publicznego?* (Wydawnictwo IFiS PAN, 2006).

[39] Kerstin Jacobsson and Elżbieta Korolczuk, 'Introduction: Rethinking Polish Civil Society', in Kerstin Jacobsson and Elżbieta Korolczuk (eds.), *Civil Society Revisted: Lessons from Poland* (Berghahn Books, 2017).

[40] Stanisław Mazur and Agnieszka Pacut, *System Finansowania Organizacji Pozarządowych w Polsce* (Małopolska Szkoła Administracji Publicznej Uniwersytetu Ekonomicznego 2015).

[41] Ewa Cierniak-Szóstak, 'Kultura Organizacyjna NGO Wobec Wymagań Funduszy Strukturalnych' (2011) *Ekonomia Społeczna* 41.

[42] Grzegorz Makowski, 'Rozwój Sektora Organizacji Pozarządowych w Polsce Po 1989 r.' (2015) *Studia BAS* 57.

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position, while civil society (namely: NGOs) have been adapting to this to pursue their own financial interests. As a result, Polish civil society has been characterised as largely 'made from above'.[43]

18.3.3 *Professional Self-Government Organisations*

The third and final example comes from the interactions between policy-makers and professional self-government organisations, that is, compulsory, corporatist-like associations of professions of public trust including legal (attorneys-at-law, legal advisors, bailiffs, etc.), healthcare (physicians, dentists, nurses, etc.) and engineering professionals (engineers, architects). As we have already discussed, professional self-government organisations have been given an important role in the Constitution and have been relatively widely used to consult and organise social subsystems directly after the adoption of the Constitution.[44] In our book,[45] we show that, while policy-makers have been becoming more hostile towards professional self-governments, the latter were increasingly using informal ways of influencing policy-making to circumvent this attitude. As a result, a self-propelling mechanism was created. The executive was slowly restricting the autonomy of the professional self-government organisations, reducing their competences to merely bureaucratic functions and crowding out autonomous competences with political control, citing the 'shady' involvement of self-government in lobbying for their supposedly particularistic interests. This development has been manifested by several changes adopted by the government to undermine and lower the autonomy of professional self-government organisations in the area of: the access to professions (right to regulate access to professions was severely restricted against their will and citing free market principles); the disciplinary proceedings (largely unified accordingly to political requirements to put professionals under political scrutiny citing democratic accountability); and the rules pertaining to the provision of their services (which narrowed and bureaucratised their competences in the name again of securing political control).

To pursue this agenda and in the context of formal competences of self-governments stipulated in the law and rooted in the Constitution, the executive has adopted three practices.[46] First, the executive engaged in 'sham' consultations giving self-governments a very short time to consult the drafts while the outcomes of these consultations were eventually ignored in the legislative process, draining these self-governments' resources and incentivising them to operate in self-interest.

[43] Jacobsson and Korolczuk, 'Introduction'.

[44] Karol Muszyński and Paweł Skuczyński, 'Changing Legal and Social Role of Professional Self-Governments during Systemic Transformation in Poland' (2020) 12 *Krytyka Prawa. Niezależne studia nad prawem* 149.

[45] Skuczyński and Muszyński, *Rozwój i Kryzys Konstytucji Społecznej*, 363.

[46] Ibid., 248–254.

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Secondly, the executive used a 'bypass' strategy consisting of pushing legislative drafts created in fact by the executive through a less restrictive route of parliamentary initiatives. This route did not include obligatory consultations with self-governments, limiting their ability to formally influence the drafts. Thirdly, a strategy which we call 'ordo ab chao' involved maximally broad consultations, covering as many stakeholders as possible, with the intention to create an illusion of the absence of any consistent voice from the 'society'. This allowed the executive to unilaterally pursue the previously determined goals. All three strategies allowed in fact the circumvention not only of self-governments voices, but to implement drafts that were not significantly changed in the legislative process at all, treating all formally involved parties (the Sejm – the lower chamber of the Polish parliament; the Senate – the upper chamber; other consulted bodies such as Supreme Court and NGOs, etc.) as an element of the pipeline. All these strategies effectively restricted professional self-government organisations influence not only in the area of their vital interests, but also where they were pointing to the technical problems in the consulted drafts.

In the context of the government using informality or – conversely – excessive formality to limit professional self-governments' voice, the latter were seeking informal lobbying, unofficial contacts, and political protection among politicians and administration as a way of coping with pressure from the policy-makers, while increasingly focusing on the protection of its own interests instead of the common good. We describe these strategies in detail in our book,[47] but they involved attempts to influence the legislative drafts informally at an early stage (before they were formally announced), seeking political protection, trying to stimulate political conflicts within the government (between the policy-makers in the cabinet and between the executive and legislative branches of power) or acting outside the realm of politics in the wider metapolitical and public discourse. Again, these interactions resulted in the rise of strategic orientation of both professional self-government organisations and the policy-makers.

18.3.4 *Governance Structure and European Integration*

The aforementioned events need to be put into the context of wider political developments that effectively isolated the executive from most external influences. In the early 2000s, and particularly when J. Hausner was the vice-prime minister (2003–2005), a substantial attempt was made to create co-governance, corporatist-like structures expressing the ideas associated with societal imaginary. J. Hausner sought to strengthen the executive, while at the same time securing wide consultation and the co-governance rights of social actors, in particular trade unions, employers' organisations and professional self-government organisations. The latter

[47] Ibid., 262–279.

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were also expected to bear the responsibility for the governing process which required social partners and professional self-governments to limit expectations, political actions and lobbying. Hausner's policy was somewhat effective, creating a short-lived period of more intensive involvement of social partners and professional self-government organisations in the governing structures.

From 2005, the paradigm of governance began to evolve as new political leaders, including Jarosław Kaczyński of the right-wing Law and Justice (chairman of the ruling party in years 2005–2007 and from 2015 onwards) and Donald Tusk of the liberal Civic Platform (chairman of the ruling party and the Prime Minister in years 2007–2014) decided to pursue a different political path, where social partners, NGOs and professional self-governments were put under more intense pressure due to allegedly fostering their own interest at the detriment of the public. On the one hand, the executive attempted to transform itself into a body representing the public, competing not only against obvious social actors such as social partners, NGOs, and professional self-government organisations, but also against political parties that formed the executive itself, as well as the parliament that formally elected it. This paradoxical development relied upon the fact that party leaders, Donald Tusk and Jarosław Kaczyński, were largely suspicious towards their own political parties and maintained a high level of control over them, contributing to the actual dominance of the executive over its political background. At the same time, new leaders were highly suspicious of parliamentary politics that was seen as particularistic, pluralist, chaotic and rather shady, which incentivised a reduction of the role of the parliament to a 'voting machine'.[48] These developments, which where back by liberal and communitarian imaginaries focusing on the dominant role of the executive, stressed the importance of a central body – the Council of Ministers – independently absorbing input from the outside in the form of consultations and expert analyses. Interest-driven actions of social actors were expected to be limited by the executive capable of imposing solutions fostering public interest. In fact, however, it effectively reduced the role of broader discussions and co-governance structures provided in the Constitution, creating a governance structure heavily centred and dominated by the executive, further alienating both the parliament and social actors, as exemplified by the cases of social partners, NGOs and professional self-government organisations.

Noteworthy, such tendencies were strengthened by the process of accession and integration with the EU. The governing structure was largely reorganised to increase the efficiency of absorbing European funds to build infrastructure, ignoring the possibilities to adopt a more corporatist social model assuming a strengthened role of social actors in co-governance. The corporatist social model embedded within societal imaginary was unattractive for two reasons. Firstly, it contradicted the

[48] Agnieszka Dudzińska, '"Voting Machine": Legitimization of Government Decisions as the Main Function Parliament' (2016) 20 *Białostockie Studia Prawnicze* 129.

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objectives of the political movements described in Section 18.2, which aimed at weakening the participation of social actors citing their alleged particularism. Secondly, the co-governance was treated as an element of a problem related to the democratic deficit existing at the EU-level. The legal and communitarian imaginaries focused on the necessity of having a strong central executive deriving legitimacy directly from the 'people'. It made it possible to conclude that stronger executive mitigated problems associated with the EU democratic deficit.

Further, from the point of view of the law-making, the necessity to implement the European *acquis communautaire* and participate in the European project has become another argument for strengthening the top-down and instrumental approach to law-making as backed by liberal and communitarian imaginaries. The executive was seen as a vehicle for the modernisation of Polish law that had to reform the institutional framework and assure compliance with basic European standards.

Thus, putting restrictions on the executive in terms of law-making (e.g., in the form of elaborated and lengthy consultations) was seen as hindering the European integration process. The social partners, civil society and professional self-government organisations were treated as competitors wanting to foster their own interests threatening the integration with the EU.[49] This narrative was aligned with the political agenda of strengthening the executive shared by political parties across the political spectrum, legislators, policy-makers and experts. The requirement of the European integration was used on numerous occasions as an argument for strengthening the executive to assure that it can coordinate divergent interests in a way that would be compliant with the European law. Such arguments were given for instance in the discussions on the Hausner plan, and in the largely influential 2005 program put forward by Jan Rokita and Stefan Kawalec as a roadmap for the planned cabinet formed by Civic Platform and Law and Justice,[50] as well as in the discussions on the creation of Government Legislation Centre and the reform of the legislative process which centralised law-making in Poland and reduced the role of other social actors, citing the necessity for more coordination.[51]

The second problem revolved around transposition and compliance. Poland has one of the worst transposition rates in the whole EU. Quite interestingly, when Gerda Falkner and Oliver Treib published their influential book arguing that Central Europe is a 'land of dead letters', where European law was formally transposed but not observed, there was one exception in their data, which was Poland.[52] Poland was a country where not only European law was not properly implemented, but also where

[49] Radosław Zubek, *Core Executive and Europeanization in Central Europe* (Palgrave Macmillan, 2008).

[50] Jan Maria Rokita, Stefan Kawalec and Maciej Jankowski, *Państwo Dla Obywateli: Plan Rządzenia 2005–2009* (Instytut Państwa i Administracji, 2005).

[51] Skuczyński and Muszyński, *Rozwój i Kryzys Konstytucji Społecznej*.

[52] Gerda Falkner and Oliver Treib, 'Three Worlds of Compliance or Four? The EU-15 Compared to New Member States' (2008) 46 *Journal of Common Market Studies* 293.

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it was not observed when implemented. This problem is analysed in the literature on two levels: the transposition deficit referring to the percentage of directives which are not transposed at all in national framework, and compliance deficit which refers to the number of directives that are incorrectly transposed. Poland, next to Italy, is the biggest laggard in both categories in the entire EU. This issue became even more severe during the Civic Platform and Law and Justice governments (from 2005 onwards).[53]

Most importantly, it has been shown that EU law transposition in Poland suffers precisely because of the executive's actions, namely, formulating legislative propositions implementing EU directives in a way that does not give other stakeholders enough time to proceed on the draft.[54] In most cases, when there are transposition problems, the executive drafts a legislative proposal very late and then expects the parliament and social partners to accept it without significant changes, arguing that there is no time to review the draft. In the case of European law, the executive's actions are even more visible and detrimental to the parliament and social partners as there is a threat of infringement procedure by the Commission. It is necessary to stress that social dialogue is a fundamental component of the European social model. Among other things, the transposition of the directives should consider national context through the lenses of social actors that should be involved in decision-making and implementation of the EU law (151–156 TFEU). In fact, assuming such involvement of the social partners can be seen as a pathway to create a common European demos[55] and also intends to legitimise EU law. However, a formalistic and instrumental approach backed by the liberal and communitarian imaginaries assumed by the executive in fact reverses this effect, rather contributing to the alienation between the EU bodies and Polish citizens.

This gives to the executive an interesting yet dangerous tool, as it creates a self-fulfilling prophecy that can be used to play on the anti-EU sentiments. The government is a laggard in terms of EU law transposition and implementation, which hinders the European social model ideal of involvement of social actors in the co-governance structures assumed by the societal imaginary. This again means that social actors' role in the transposition process is rather limited, if at all present. In this way, the process that was meant to increase the agency of social actors in fact can contribute to their distrust towards EU law.

In the Polish case, the directives around green transition provide good examples.[56] While the directives were ambitious and set out many goals difficult

[53] European Commission, *Single Market Scoreboard*, available: https://single-market-scoreboard.ec.europa.eu/countries/poland_en.

[54] Jacek K. Sokołowski and Dariusz Stolicki, 'Przyczyny opóźnień w transpozycji dyrektyw europejskich do polskiego porządku prawnego w świetle analizy ilościowej krajowego procesu legislacyjnego' (2017) *Przegląd Politologiczny* 40.

[55] Sandra Kröger, 'Creating a European Demos? The Representativeness of European Umbrella Organisations' (2013) 35 *Journal of European Integration* 583.

[56] Renewable energy directive (2009/28/EC), Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources.

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to reach for Poland, they assumed an extensive cooperation between the executive and social partners in reaching these goals. However, the transposition of the directives was largely faulty and social partners were alienated and even ignored during the process. We see that, currently, Law and Justice government is using the green transition to build up distrust towards the EU institutions during its various battles with the EU, primarily on the judicial level.[57] Interestingly, this approach is intended to marginalise two competitors for power – both EU and social partners.

18.4 CONCLUSION: FROM CONSTITUTIONAL DRIFT TO CONSTITUTIONAL CRISIS

Marginalising societal imaginary widened the gap between the policy-makers, politicians and social actors. By interfering in their functioning, the policies towards social actors in 1997–2015 created grounds for the power creep and, eventually, the constitutional crisis. Common explanations claiming that the absence of an active resistance against this crisis from the civil society results from its disinterest in civil involvement are inaccurate. Social actors have become passive or rather channelled their activity through informal avenues as a result of many years of hostile public policies, constitutionally empowered by liberal or communitarian imaginaries. These actors had no choice but to develop various alternative and informal strategies to participate in the policy-making.

In this sense, the events that are described as Polish 'constitutional' or 'rule of law crisis', which come down to the limitation of judicial independence, do not come as a surprise. The same processes had already been occurring vis-à-vis trade unions and employers' organisations, NGOs and professional self-government organisations. The same narrative is currently employed by the executive against the judges, while the same liberal and communitarian arguments allegedly protecting the freedom of individuals or the public interest are now repeated and again contrasted with 'particularistic' rent-seeking by judges accused of attempting to build 'juristocracy'.[58]

The authoritarian tendencies also continue in the fields which we invoked to illustrate the constitutional drift. During the constitutional crisis, the social dialogue has been unprecedently politicised and marginalised.[59] The NGOs found themselves under even more pressure, with the Law and Justice cabinet centralising and taking control over their funding, making a distinction between 'genuine' and

[57] Sylwia Mrozowska, Jan A. Wendt and Krzysztof Tomaszewski, 'The Challenges of Poland's Energy Transition' (2021) 14 *Energies* 8165.

[58] Ramona Coman, 'Antagonistic Understandings of Sovereignty in the 2015 Polish Constitutional Crisis' (2022) 20 *Comparative European Politics* 275.

[59] Krzysztof Jasiecki, '"Conservative Modernization" and the Rise of Law and Justice in Poland', in Katharina Bluhm and Mihai Varga (eds.) *New Conservatives in Russia and East Central Europe* (Routlege, 2018), 130.

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'insincere' civil society.[60] Finally, professional self-government organisations have been further marginalised and brought under political scrutiny.[61] This marks an effective 'loss' of the societal imaginary that does not find its effective defenders who abandoned previous attempts to build a corporatist social model and subordinated to the principles of liberal and communitarian imaginaries.

All these processes should be seen as a continuation of the 1997–2015 trends. They do not bring a substantial qualitative change but rather an acceleration. Moreover, they were rather propelled by formal liberal and communitarian constitutional imaginaries, whereas these interpretations are now presented as means to overcome the crisis.

Our understanding suggests a different route. The constitutional crisis should be seen as enabled precisely by the liberal and communitarian imaginaries against the societal imaginary that would underpin protection of the social model. Marginalising societal imaginary unleashed the possibility of power struggles contributing to the constitutional drift and the crisis in the relationships between the political power and society. Resolving such tension should thus involve revitalising societal imaginary where social actors might find a transparent and effective way of participating in public policy-making. Such a way of interpreting the 1997 Constitution would also promise a more solidaristic form of European integration that would actually involve the society in co-governance structure and not simply use transposition requirements to increase the power of the executive and/or spread distrust against the European institutions.

[60] Stanley Bill, 'Counter-Elite Populism and Civil Society in Poland: PiS's Strategies of Elite Replacement' (2022) 36 *East European Politics and Societies and Cultures* 118.

[61] Paweł Skuczyński, *Dialog Społeczny, Państwo Prawa i Polityczny Populizm: Porozumienie Samorządów Zawodowych i Stowarzyszeń Prawniczych–Doświadczenia i Perspektywy 2016–2017* (Palestra, 2017), 19–29.

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