***The Interplay between the Judicial Actors of the EU Constitutional Regime***

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Constitutional pluralism represents one of most intriguing concepts of European constitutionalism, which came quite naturally since it has been the EU law that “posed most paradigm-pressing challenge test to what [one] might call constitutional monism”[[1]](#footnote-1). It was designed as a response (or, to be precise, one of the variants of a response[[2]](#footnote-2)) to disputes over the *Kompetenz-Kompetenz* (conflicts of authority[[3]](#footnote-3)) question and assumed that instead of engaging in never-ending debates on who shall ultimately rule on the delimitation of EU’s competence, different constitutional actors shall “engage in ongoing dialogue, self-restraint, and mutual accommodation”[[4]](#footnote-4). Constitutional pluralism allows for departing from disputes on supremacy (EU law vs national constitutions) and instead proposes “a conceptual heterarchy, where no one system is normatively superior to the other”[[5]](#footnote-5).

Constitutional pluralism is a complicated tool that requires restraint and that is likely to bring about deadly results if one oversimplifies or abuses it. That is because, indeed, constitutional pluralism is a form of capitulation in view of unresolved disputes and tensions between the need to protect national constitutional rules, on one hand, and the indispensable element of the EU’s constitution i.e. the supremacy of EU law.

The concept of constitutional pluralism emerged as a consequence of the *Maastricht urteil* of the German *Bundesverfassungsgericht[[6]](#footnote-6)* which “brought to the fore the risks of constitutional conflicts between EU law and national constitutions emerging from the claims of final authority embodied in the case law of the European Court of Justice and national constitutional courts”[[7]](#footnote-7). However, the essential element of the *Maastricht urteil* was that the German State in fact can participate in the *Staatenverbund* provided that “the legitimation and influence which derives from the people will be preserved” within that Union. Neil McCormick argued that the *Maastricht Utreil* showed that competence to rule on the limits of EU law was neither fully preserved in the hands of national courts not entirely transferred to the Court of Justice and instead we are dealing with a much more complicated system of interdependencies of multilevel constitutionalism[[8]](#footnote-8). And that is because “the lines between national and international law are becoming increasingly blurred”[[9]](#footnote-9). Therefore, although international courts such as the CJEU and the ECtHR are responsible for interpreting international law and national constitutional courts do the same in respect of national constitutions, nevertheless certain principles are common to both international (including EU) and national legal systems and that results in the creation of multi-element European constitutional space where different judicial actors mutually influence each other. Also, when some of them prove defective, other judicial actor substitute them by developing mechanisms compensating for their failures in protecting common principles. It can be compared to the medical description of post-traumatic neuroplasticity: it is possible for some structures of a brain to take over the functions of damaged or lost areas.

The democratic stability in Europe is thus safeguarded by both national (constitutional courts) and international (ECtHR and CJEU) judicial actors. Although framed by different jurisdictional settings and contexts in which they perform their functions, these actors orchestrate their pursuits when faced with major challenges such as the recent rule of law drawback in Eastern European states.

1. **Roles of Judicial Actors**

The roles of particular judicial actors performed by them on the European constitutional stage can be determined according to different criterions: both formal and informal. Formally speaking they role can be established according to rules governing their jurisdictions. But apart from that, they role can also be defined according to the general judicial policies they are bound (again: formally or not) to pursue, and the political contexts in which they operate.

* 1. **CJEU**

For the CJEU, its jurisdiction is defined in Article 19(1) TEU, which reads that the Court “shall ensure that in the interpretation and application of the Treaties the law is observed”. Thus, the CJEU’s jurisdiction extends generally to all fields of EU law. In the negative sense, it is limited by the principles of conferred jurisdiction: it exists only to the extend where EU law is applicable.

From a political perspective, historically, the Court of Justice “stepped in the political vacuums” and started a genuine “political revolution” when it delivered its landmark judgments in the 1960’s: the ECtHR was politically paralyzed due to the European governments’ unwillingness to recognize its jurisdiction and the Communities processes were adversely impacted by de Gaulle’s abuses of the rule of law and his animosity towards the integration[[10]](#footnote-10). In these circumstances the CJEC became the engine of integration and the guardian of the legal order not only in the Community as such, but also in the Member States. The Court developed the interpretation of Community law as a “new legal order of international law”[[11]](#footnote-11), then an “own legal system (contrasted with “ordinary international treaties”)[[12]](#footnote-12) and ultimately – “Community based on the rule of law […] with the basic constitutional charter – the Treaty”[[13]](#footnote-13). By developing this interpretation the Court avoided conflicts with national constitutions of the Member States, especially those being dualist in their reception of international law: it presented Community law as a self-standing normative phenomenon eluding the categories of monism-dualism and departing from (“ordinary”) international law. Consequently, the basic paradigm of the CJEC/CJEU, for several decades of its jurisprudence, remained the protection of the practical effectiveness (*effet utile*) of EC/EU law, while all other issues such as the rule of law as such or human rights were less important. When it comes to the latter, the protection of fundamental rights was afforded by the Court of Justice because “a Community-wide standard of protection administered by the ECJ was to replace – in relation to Community legislation – review by Member State courts based on Member State constitutional provisions”[[14]](#footnote-14). Therefore it was not the desire to protect human rights or the rule of law as such, but rather the need to protect supremacy and consistency of Community law that was decisive for the review of compatibility of the acts of institutions (and subsequently also acts of the Member States adopted in the area of application of EC/EU law) with fundamental rights and the rule of law.

Taking these circumstances into account one can understand that for the CJEU the protection of fundamental rights and the rule of law is only an instrument of policing the *effet utile* of EU law. As instrumental as it appears, it appears effective enough for the protection of the rule of law in the EU.

* 1. **ECtHR**

The jurisdiction of the ECtHR is defined in Article 32 ECHR providing that it extends “to all matters concerning the interpretation and application of the Convention and the Protocols thereto” and “in the event of dispute as to whether the Court has jurisdiction, the Court shall decide”. The procedures in the framework of which the ECtHR exercises its jurisdiction are currently: inter-state applications (Article 33 ECHR), individual applications (Article 34 ECHR), advisory opinions on the interpretation of the Convention requested by the Committee of Ministers (Article 47) and advisory opinions “on questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or the protocols thereto” requested by the highest national judicial bodies (Protocol 16). The ECtHR was designed as a tool of developing human rights instead of just safeguarding them: the preambular part of the Convention reads that the aim of the Council of Europe is to achieve greater unity among the member states and “one of the methods by which that aim is to be pursued is the maintenance and further realization of human rights and fundamental freedoms”[[15]](#footnote-15).

Unlike in case of the CJEU, for the ECtHR human rights and the rule of law (being an underlying and one of the fundamental principles of a democratic society, inherent in all the Articles of the Convention[[16]](#footnote-16)) are the systemic *raison d'être* and the central point of interest.

* 1. **National (constitutional) courts**

The jurisdictions of national constitutional courts varies in particular EU Member States. In Germany (*Bundesverfassungsgericht*), it extends to individual complaints alleging i.a. the violations of fundamental rights by public authorities (which encompasses also judicial violations by individual applications of law). The same power is vested with the Spanish *Tribunal Constitucional,* whereas in France the jurisdiction of the *Conseil Constitutionnel* does not extend to review of constitutionality of application of law (and even the individual constitutional complaint – the ex post constitutionality review – was introduced as late as in 2008), neither does it extend that far in Poland, and in Italy the jurisdiction of the *Corte Constituzionale* may only be triggered indirectly by ordinary courts requesting constitutionality review[[17]](#footnote-17).

The normative frameworks of constitutional courts vary, but also political contexts in which they function are different.

The German *Bundesverfassungsgericht* was built from the very beginning, in contrast to the Weimar *Staatsgerichthof,* as a powerful guardian of fundamental freedoms and the rule of law. It is characterized by judicial activism and applies the interpretation of the Basic Law as a “living instrument”, and at the same time the generally “friendly” approach to the European integration extending to construing the Germany’s duty to participate in the integration[[18]](#footnote-18).

The French constitution of the Fifth Republic has been amended already seven times in order to “authorise the process of European integration and to strengthen the control of the French Parliament over the activities of the European Union”[[19]](#footnote-19). Title XV of the Constitution specifically deals with the France’s participation in the European integration and reads (Article 88-1) that “The Republic shall participate in the European Union constituted by States which have freely chosen to exercise some of their powers in common”. Several decisions of the Constitutional Council held that particular revisions of the Founding Treaty “affected the essential conditions for the exercise of national sovereignty”[[20]](#footnote-20) resulting in the need of constitutional amendments in order to ratify these revisions[[21]](#footnote-21).

Although based on (a gradually nuanced) dualist approach to international law, the axiological soil on which the Italian constitution grew was anti-fascism and this is seen as the cause of its openness to European integration and, more generally, to international law[[22]](#footnote-22). This has been reflected by Article 11 of the Constitution reading that “Italy agrees, on conditions of equality with other States, to the limitations of sovereignty that may be necessary to a world order ensuring peace and justice among the Nations. Italy promotes and encourages international organisations furthering such ends”. Nevertheless, certain constitutional amendments turned out to be necessary and they were adopted in 2001 and 2012. Also, the famous interference with the supremacy of EU law occurred in the last decade – the *Taricco* saga[[23]](#footnote-23).

The 1978 Spanish constitution was based on the consensus defining the political stage after the death o Francisco Franco and “very much influenced by the German and Italian constitutions”[[24]](#footnote-24). Spaniards did not attempt to amend it because of the fear of opening the political “Pandora’s box”. The basis of transfer of powers to the EU is Article 93 of the Spanish basic law allowing for the transfer of competences to international organisations[[25]](#footnote-25). As interpreted by the Spanish constitutional court, this provisions assumes “implicit substantive limits to integration: the respect for state sovereignty, basic constitutional structures, and the system of values and fundamental principles enshrined in the Constitution, in particular fundamental rights”[[26]](#footnote-26).

Alongside these normative frameworks, certain historical and political contexts co-exist framing the constitutional roles of European constitutional courts. We can point out at some of them:

1. Historical background: totalitarian or authoritarian predecessor of present constitutional regimes in case of Germany, Italy, Spain or Poland as compared to the lack of such backgrounds in case of France;
2. Generally prevailing attitudes and sentiments of societies (e.g. conservative or liberal, pro-European or separationist etc.);
3. The necessity of reacting to policies of the political branches of the governments, including systemic collapses, such as the anti-democratic trend in Poland since the end of 2015, heavily impacting the functioning of the constitutional court in that state (practically, the constitutional court no longer performs its constitutional function and it is instead used for purely political purposes, thus resembling more of a political puppet than a genuine protector of the rule of law);
4. The existence of the “collision potential” of national constitutional provisions (or their interpretations) which may trigger either the “loyal” or “disloyal” opposition to the supremacy of EU law or the effectiveness of the European Convention.

These elements may influence the performance of normatively prescribed roles of judicial actors of the European constitutional space. For instance, the role of the German Constitutional Court extends far beyond protecting the rule of law in Germany itself and that is because of both the importance of this largest and the most (economically) powerful EU Member State for the integration process, and the significance of the *BvG*’s case-law[[27]](#footnote-27) for other constitutional courts in Europe.

1. **Common Principles v. Policies Pursued. The hard case of the rule of law**

As will be discussed in this chapter, although the Union is based on values common to the Member States (Article 2 TEU), among them “the rule of law and respect for human rights” which “have been elevated into true law”[[28]](#footnote-28), it is also true that “in the hands of the [CJEU], the rule of law has emerged as a crucial tool to reinforce the supremacy of EU law – a triumph of procedure over substance; power over justification”[[29]](#footnote-29). The emergence of the values-related principles in the case-law of the CJEU (but also, to a certain extent, of the ECtHR) is conditioned upon the policies pursued by international courts. Generally, they are oriented at protecting the effectiveness of treaties under which they operate – perhaps more than at the protection of the underlying value itself.

* 1. **Developing the rule of law principle**

Although each of the European judicial actors may pursue a more or less different judicial policy, they all, at least verbally, share the core of the same principles, being the rule of law and fundamental rights and freedoms.

Interestingly enough, while for the CJEU the protection of the rule of law and fundamental right has been historically only a “side effect” of assuring the *effet utile* of EU law, recently these paradigms have turned into a “core business” of this Court.

The “first significant reference”[[30]](#footnote-30) to the rule of law in the Court of Justice’s case law occurred in *Les Verts* but the context where the concept was employed was rather peculiar: the intention was to justify the Court’s jurisdiction under Article 173 EEC in the (then) absence of a specific procedural provision allowing for the review of legality of Parliament’s acts. Against this background the Court held that “the European Economic Community is a Community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty”*[[31]](#footnote-31)*. So, first of all, the action before the Court was directed against Community institution, and secondly, no substantive conclusions were drawn from that statement as it referred to a purely procedural question. Since the *Les Verts* ruling, the references to the rule of law have been quite regularly made in the context of resolving procedural questions pertaining to the completeness of the EC/EU system of judicial protection[[32]](#footnote-32). Again, no substantive conclusions regarding the Member States’ duties were drawn from the principle. It has been as late as in the *Portuguese judges* case that the Court has defined substantive content of the rule of law principle regarding the duties of the Member States by explaining that it presupposes that “individual parties have the right to challenge before the courts the legality of any decision or other national measure relating to the application to them of an EU act” and by virtue of Article 19 TEU also national courts are entrusted with “the responsibility for ensuring judicial review in the EU legal order” which necessarily requires the “existence of effective judicial review designed to ensure compliance with EU law” at the national level[[33]](#footnote-33). This ruling “convinced the Commission to take a broader view of the reach of EU law”[[34]](#footnote-34). It ultimately resulted in the more pro-active approach of the Commission relating to the protection of the rule of law.

Obviously, the references to the rule of law are traceable in the reasoning of the ECtHR and the European Commission of Human Rights from the beginning of the Strasbourg system. Already in 1958 (five years after the Convention’s entry into force) the Commission referred to the rule of law in its report on *Greece v. the United Kingdom[[35]](#footnote-35)* while explaining the foundations of Articles 5 and 6 ECHR. Yet it has been as late as in 1975 when the ECtHR has explained the relevance of the preambular reference to the rule of law in greater details: in *Golder v. the United Kingdom* the Court held that:

“The "selective" nature of the Convention cannot be put in question. It may also be accepted, as the Government have submitted, that the Preamble does not include the rule of law in the object and purpose of the Convention, but points to it as being one of the features of the common spiritual heritage of the member States of the Council of Europe. The Court however considers, like the Commission, that it would be a mistake to see in this reference a merely "more or less rhetorical reference", devoid of relevance for those interpreting the Convention. One reason why the signatory Governments decided to "take the first steps for the collective enforcement of certain of the Rights stated in the Universal Declaration" was their profound belief in the rule of law. It seems both natural and in conformity with the principle of good faith (Article 31 para. 1 of the Vienna Convention) to bear in mind this widely proclaimed consideration when interpreting the terms of Article 6 para. 1 (art. 6-1) according to their context and in the light of the object and purpose of the Convention.

This is all the more so since the Statute of the Council of Europe, an organisation of which each of the States Parties to the Convention is a Member (Article 66 of the Convention) (art. 66), refers in two places to the rule of law: first in the Preamble, where the signatory Governments affirm their devotion to this principle, and secondly in Article 3 (art. 3) which provides that "every Member of the Council of Europe must accept the principle of the rule of law ..."

And in civil matters one can scarcely conceive of the rule of law without there being a possibility of having access to the courts”[[36]](#footnote-36).

Later, the ECtHR (or the EComHR) referred to the rule of law as the “inspiration” of the whole Convention[[37]](#footnote-37), and held that it “implies that an interference by the authorities with an individual’s rights should be subject to effective control”[[38]](#footnote-38), or judicial control[[39]](#footnote-39), as well as “quality of the law” circumscribing the discretion of the executive[[40]](#footnote-40) and requiring the law aimed at limiting the fundamental rights to be accessible and foreseeable[[41]](#footnote-41). Generally, the references to the rule of law have become more frequent recently, being added a new value and relevance in the case law relating to the backsliding of democracies in Eastern Europe[[42]](#footnote-42). Again, the Strasbourg machinery reacted to the threats to the axiological foundations of the Convention and thus also to the undermining its effectiveness, by strengthening the values-related principle of the rule of law. The similarity of this tendency in the Strasbourg case-law to the approach of the CJEU is hard to oversee.

* 1. **The Empire Strikes Back. International (constitutional) courts’ response to the rule of law crisis**

The decline of the rule of law in Eastern Europe has many faces of different intensity of ugliness. Two most prominent examples are Hungary and Poland, both addressed by the Article 7 TEU toolkit. As rightly noted by Armin von Bogdandy:

“if the Union prevails over the combative Polish government, this would imply an enormous proof of power. Should it succeed in transforming the instruments that have widely been deemed rather ineffective into a kind of potent federal execution, the Union would significantly gain in stature vis-à-vis its Member States. Such a gain of power could be seen as ultra vires and cause a backlash from Member States, which might equally endanger the Union”[[43]](#footnote-43).

Therefore, the restrained approach of the political institutions of the Union is rather understandable. Also, political constraints make it unlikely to complete the procedures under Article 7 TEU.

Nevertheless, the Court of Justice and the ECtHR played their role in substituting both the noticeable lack of liveliness of political institutions of the EU in counteracting the rule of law crisis in Eastern Europe and the collapse of national constitutional courts. However, also their roles are different. For instance, the CJEU could not risk undermining the (almost) automaticity of the European Arrest Warrant by releasing the Member States’ courts from the duty to implement arrest decision of Polish courts suspected of undue political influence because the EAW constitutes an indispensable element filling up the mechanism composed of the free movement of EU citizens and the Schengen rules. Nevertheless, the CJEU delicately balanced the need to secure the right to a fair trial of suspects and the need to protect the coherence of the EAW mechanism in *L.M.* case[[44]](#footnote-44), while, as encouraged by Advocate General Tanchev[[45]](#footnote-45), abstaining in fact from establishing whether the right to a fair trial had been in fact breached by Poland.

* + 1. **The CJEU**

The essence of the problem of political invasion on the judiciary in Poland has been addressed by the CJEU for the first time in June 2019 in *Commission v. Poland* (Lowering of the retirement age of Supreme Court judges) where it expressed (delicately) “doubts that […] surround the true aims of the reform being challenged” and concluded that “the measure lowering the retirement age of the judges of the *Sąd Najwyższy* (Supreme Court) to the judges in post within that court is not justified by a legitimate objective”[[46]](#footnote-46). It did no, however, amount to declaring the general, systemic failure to observe the principle of the rule of law. Again, in November 2019, the CJEU found the violation of Article 19(1) TEU in *Commission v. Poland* (Lowering of the retirement age of judges of the ordinary Polish courts) in “granting […] the Minister for Justice (Poland) the right to decide whether or not to authorise judges of the ordinary Polish courts to continue to carry out their duties beyond the new retirement age of those judges”[[47]](#footnote-47). Finally, addressing explicitly the question *whether* the rule of law in Poland is systemically violated in respect of the independence of the judiciary because of the characteristics of the National Council of the Judiciary in Poland (constitutional organ playing pivotal role in the appointment of judges in Poland), the CJEU held in November 2019 in *A.K. and others* that:

“although one or other of the factors […] may be such as to escape criticism *per se* and may fall, in that case, within the competence of, and choices made by, the Member States, when taken together, in addition to the circumstances in which those choices were made, they may, by contrast, throw doubt on the independence of a body involved in the procedure for the appointment of judges, despite the fact that, when those factors are taken individually, that conclusion is not inevitable”[[48]](#footnote-48).

The CJEU further explained in July 2021 in *Commission v. Poland* (Disciplinary regime applicable to judges) that the observance of the rule of law is a precondition of the membership in the EU and “a condition for the enjoyment of all of the rights deriving from the application of the Treaties to that Member State” and therefore “a Member State cannot […] amend its legislation in such a way as to bring about a reduction in the protection of the value of the rule of law” and it is “required to ensure that, in the light of that value, any regression of [its] laws on the organisation of justice is prevented, by refraining from adopting rules which would undermine the independence of judges”[[49]](#footnote-49).

* + 1. **The ECtHR**

Soon after the CJEU, the ECtHR has dealt with the problem of the rule of law decline in Poland. Having decided (as the Frand Chamber) the *Ástráðsson v. Iceland* case in December 2020 and having thus developed the three-element test of assessment of whether the irregularities in a given judicial appointment procedure were of such gravity as to entail a violation of the right to a tribunal established by law as protected by Article 6 ECHR, the Strasbourg Court immediately applied that test in the first of the set of Polish cases brought after the political invasion on the Constitutional Tribunal and then also (via the National Council of the Judiciary) on the Supreme Court and common courts i.e. in the *Xero Flor v. Poland* case where it concluded that “the actions of the legislature and the executive amounted to unlawful external influence on the Constitutional Court” and that the “breaches in the procedure for electing three judges, including Judge M.M., to the Constitutional Court on 2 December 2015 were of such gravity as to impair the legitimacy of the election process and undermine the very essence of the right to a *tribunal established by law*”[[50]](#footnote-50).

One month after the *Xero Flor* ruling, the ECtHR found a violation of Article 6(1) ECHR also in *Broda and Bojara v. Poland* case concerning a premature and politically motivated dismissal of two vice-presidents of a regional court by the minister of justice which, according to national law, could not be challenged before and reviewed by an independent court. The Court held that “the dismissal of the applicants took place on the basis of a legislative provision whose compatibility with the requirements of the rule of law seems doubtful to the Court (…), and secondly, that this measure was not surrounded by any of the fundamental requirements of the procedural fairness” which amounted to arbitrariness implying the denial of the rule of law[[51]](#footnote-51).

Further, in July 2021 (i.e. a week after the CJEU’s ruling in C-791/19 which concerned the same problem) in *Reczkowicz v. Poland* case the ECtHR struck down the very functioning of the so-called Disciplinary Chamber of the Supreme Court in Poland and held that

“there was a manifest breach of the domestic law which adversely affected the fundamental rules of procedure for the appointment of judges to the Disciplinary Chamber of the Supreme Court, since the appointment was effected upon a recommendation of the [National Council of the Judiciary], established under the 2017 Amending Act, a body which no longer offered sufficient guarantees of independence from the legislative or executive powers. The irregularities in the appointment process compromised the legitimacy of the Disciplinary Chamber to the extent that, following an inherently deficient procedure for judicial appointments, it did lack and continues to lack the attributes of a “tribunal” which is “lawful” for the purposes of Article 6 § 1. The very essence of the right at issue has therefore been affected.  In the light of the foregoing, and having regard to its overall assessment under the three-step test set out above, the Court concludes that the Disciplinary Chamber of the Supreme Court, which examined the applicant’s case, was not a *tribunal established by law*”[[52]](#footnote-52).

Four months later the ECtHR did the same in reference to another chamber of the Polish Supreme Court – the so-called Chamber of Extraordinary Review and Public Affairs – while holding that, again, “there was a manifest breach of the domestic law which adversely affected the fundamental rules of procedure for the appointment of judges to” that chamber[[53]](#footnote-53), and finally, in February 2022, to the Civil Chamber in respect of the judges appointed following the “reformed” nomination procedure in *Advance Pharma v. Poland[[54]](#footnote-54).* Further, in March 2022, the ECtHR (sitting, after the relinquishment of jurisdiction, as the Grand Chamber) held in *Grzęda v. Poland* that the lack of judicial review of premature termination *ex lege*, after legislative “reform”, of serving the Supreme Administrative Court judge’s term of office as member of National Council of the Judiciary resulted in the  impairment of the very essence of the applicant’s right of access to a court[[55]](#footnote-55), and it did the same in June 2022 in *Żurek v. Poland* while holding in addition that the multiple criminal and disciplinary actions taken by political powers against the applicant, a regional court judge, a former member of the (prematurely dismissed) National Council of the Judiciary and an activist of an association of judges, “could be characterised as a strategy aimed at intimidating (or even silencing) the applicant in connection with the views that he had expressed in defence of the rule of law and judicial independence”[[56]](#footnote-56). And finally, in *Juszczyszyn v. Poland* in October 2022 the ECtHR found a violation of Article 6 ECHR in  grave irregularities in appointment of judges to newly established Supreme Court’s Disciplinary Chamber, that suspended judge from duties for verifying independence of another judge appointed upon recommendation of “reformed” National Council of the Judiciary, but also Article 18 in conjunction with Article 8 ECHR in (among others) disregarding the rulings of the CJEU and the Polish Supreme Court, which made fundamental findings as to the lack of independence of the “reformed” National Council of the Judiciary and the status of judges appointed upon its recommendations[[57]](#footnote-57).

* + 1. **The Polish Constitutional Court’s “reply” to the emerging standard and the subsequent response of the judiciary**

Polish Constitutional Court (*Trybunał Konstytucyjny*) delivered already a whole series of rulings concerning both the implementation of judgments of the ECtHR and of the CJEU, as well as the judgments of these international courts themselves. Thus, it held in April 2020 that the resolution of joint Chambers of the Supreme Court[[58]](#footnote-58) (interpreting the procedural provisions as regards the implementation of the ruling of the CJEU C-585/18 and others *A.K.*) is incompatible with a number of provisions of the Polish Constitution and with Article 2 and Article 4(3) TEU as well as with Article 6(1) ECHR[[59]](#footnote-59). Still referring to the same resolution of the Supreme Court, the Constitutional Court held that “the Supreme Court – also in connection with the ruling of the international court – does not have the power to make a law-making interpretation of the law, leading to a change in the normative state in the sphere of the system and organization of the judiciary” and that “the appointment of a judge is the exclusive competence of the president […], which he exercises at the request of the National Council of the Judiciary personally, definitively, without the participation and interference of the Supreme Court”, and that the Supreme Court is not competent to supervise the exercise of the said competence of the president[[60]](#footnote-60). In July 2021 the Constitutional Court “diseffectuated” the provisional measure imposed under Article 279 TFEU by the CJEU in C-791/19R[[61]](#footnote-61) (on the suspension of the application of the provisions on the jurisdiction of the Disciplinary Chamber of the Supreme Court in disciplinary cases against judges) as allegedly *ultra vires[[62]](#footnote-62)*. In October 2021 the Constitutional Court held that Polish courts cannot its rulings in order to assure *effet utile* of EU law and, more specifically, that they cannot review the legality of appointment of a judge violating EU law[[63]](#footnote-63). Also, the Constitutional Court declared in November 2021 that it does not constitute a “court” in the meaning of Article 6(1) ECHR and thus the ECtHR was not competent to review the legality of appointment of judges of the Constitutional Court (which the ECtHR did in *Xero Flor v. Poland*)[[64]](#footnote-64).

All these rulings of the Constitutional Court violate international obligations of Poland and its own Constitution, as well as they are *ultra vires* in that they violate rules on the competence of the Constitutional Court[[65]](#footnote-65). They were politically motivated and controlled.

Although there are already some 4,000 judges (out of 10,000 in total) appointed under the provisions found to violate Poland’s international obligations, which may (and probably sadly will have) impact on their perception of politically inspired *ultra vires* rulings of the Constitutional Court, some courts still show resistance to the violation of the rule of law and, at the same time, adherence to the principles. Instead of many, let us quote just one example of a ruling of a District Court in Elbląg (2023) where the court held that:

“The legal situation created by the Constitutional Court in the its judgments […] is a breach in the previous case-law of the Constitutional Court which took into account both the supremacy of the Constitution and the principle of the effectiveness of EU law, and is inconsistent with the Constitution of the Republic of Poland and EU law. The Constitutional Court did not have the power to assess the constitutionality of acts of application of law […] as well as the constitutionality of EU law, which means that judgments issued in this respect should not be taken into account when assessing the applicable law. The Constitutional Court’s attempt to limit the statutory prerogatives of the Supreme Court […] is irreconcilable with both the provisions of the Constitution of the Republic of Poland and the European Convention on Human Rights, and the attribution to the resolution of 23 January 2020 of the status of a legal norm, although it is a typical act of application of law, constituted the creation of competence to assess and "cancel" it in a manner inconsistent with […] the Constitution […]. Thus, the Constitutional Tribunal went beyond the scope of its jurisdiction […] and interfered in the judicial competence of [common] courts, while also attempting to stop the execution of the judgment of the Court of Justice of the European Union of November 19, 2019. In addition, in cases U 2/20, P 7/20 and K 3/21 the Constitutional Tribunal adjudicated with the participation of judges appointed in violation of constitutional norms”[[66]](#footnote-66).

Although the political pressure on the judiciary in Poland is still very strong, disciplinary proceedings against judges questioning the legality of politically influenced judicial appointments have been discontinued, the resistance against political interventions in the judiciary remains significant, and the pressure from international constitutional courts resulted in the reaction of political institutions of the Union.

1. **Conclusions. The “Checks and Balances” of the Judicial Machinery: constitutional pluralism à rebours**

The series of ruling of two international courts presented above proves the need to revisit and revive the concept of constitutional pluralism. We may call it the “constitutional pluralism à rebours”.

Initially the idea of constitutional pluralism was understood as a concept of constitutional heterogeneity in the EU which allowed for softening the jurisdictional clashes between national and international courts regarding the limits of EU competence. The decline of the rule of law in some of the Eastern European states (as exemplified by Poland) shows another facet of this doctrine: constitutional pluralism extends as well to “neuroplasticity” of European constitutional adjudication allowing for international (constitutional) courts to take over the functions of damaged constitutional organs. In that way international constitutional courts (ECtHR and CJEU) provide for specifically understood “check and balances” stopping national courts (when they are politically invaded and thus dysfunctional in terms of the protection they afford to traditionally understood “checks and balances”) from damaging further the rule of law. At the same time international constitutional courts provide for remedies which are no longer available at the national level.

There is one more consequence of this take-over of the constitutional role: it provides for a new legitimacy for international constitutional courts and it shows a new constitutional role of some remedies and procedures. If anyone ever questioned the legitimacy and – simply – usefulness of the CJEU and ECtHR (and indeed one was questioning them by criticizing their limited effectiveness, especially in reference to the ECtHR, or the lengthy proceedings), the answer is: look at Poland. And if anyone was doubting the profound constitutional dimension of the CJEU’s coercive actions (Articles 258-260 TFEU) and preliminary reference procedure, the answer is the same. When domestic constitutional safeguards are “switched off”, international constitutional courts turn into the only available guardians of constitutional principles.

1. Neil Walker, *The Idea of Constitutional Pluralism*, EUI Working Paper Law, No. 2002/1, p. 27. [↑](#footnote-ref-1)
2. See e.g. Ingolf Pernice, *Multilevel Constitutionalism in the European Union,* Walter Hallsetin-Institut Paper 5/02, where the Author proposed five basic elements of the European multilevel constitutionalism. [↑](#footnote-ref-2)
3. Miguel Poiares Maduro, *Three Claims of Constitutional Pluralism* (in) M. Avbelj, J. Komárek (eds.0, *Constitutional pluralism in the European Union and beyond*, Hart Publishing 2012, 67-84, p. 68. [↑](#footnote-ref-3)
4. Daniel Kelemen, Laurent Pech, *The Uses and Abuses of Constitutional Pluralism: Undermining the Rule of Law in the Name of Constitutional Identity in Hungary and Poland*, Cambridge Yearbook of European Legal Studies, 21, 59-74. doi:10.1017/cel.2019.11, p. 60. [↑](#footnote-ref-4)
5. Tom Flynn, *Constitutional pluralism and loyal opposition*, I•CON (2021), Vol. 19 No. 1, 241–268, at p. 241. [↑](#footnote-ref-5)
6. Decision of the German Federal Constitutional Court of October 12, 1993 In Re *Maastricht Treaty*, Cases 2 BvR 2134/92, 2 BvR 2159/92. [↑](#footnote-ref-6)
7. Miguel Poiares Maduro, *Three Claims,* ibidem. [↑](#footnote-ref-7)
8. Neil McCormick, *The Maastricht-Urteil: Sovereignty Now*, European Law Journal 1995, vol. 1, No. 3, pp. 259-266. [↑](#footnote-ref-8)
9. Ana Bobić, *Constitutional Pluralism Is Not Dead: An Analysis of Interactions Between Constitutional Courts of Member States and the European Court of Justice*, German Law Journal 2017, vol. 18, No. 6, p. 1396. [↑](#footnote-ref-9)
10. Karen J. Alter, Daniel Kelemen, *Understanding the European Court’s Political Power* (in) Hubert Zimmermann, Andreas Dür (eds.), *Key Controversies in European Integration*, Bloomsbury Academic, London-New York-Dublin 2021, pp. 52-53. [↑](#footnote-ref-10)
11. CJEC, 26/62 *Van Gend en Loos,*  [↑](#footnote-ref-11)
12. CJEC, 6/43 *Costa v. ENEL.*  [↑](#footnote-ref-12)
13. CJEC, 294/83 *Les Verts,* at 23. [↑](#footnote-ref-13)
14. Joseph H.H. Weiler, *Eurocacy and Distrust:* *Some Questions Concerning the Role of the European Court of Justice in the Protection of Fundamental Human Rights Within the Legal Order of the European Communities*, Washington Law Review 1986, vol. 61, no. 3, p. 1106. [↑](#footnote-ref-14)
15. It is even more transparent in another equally authentic language of the Convention i.e. French, where the relevant recital of the preamble reads that “le but du Conseil de l’Europe est de réaliser une union plus étroite entre ses membres, et […] l’un des moyens d’atteindre ce but est la sauvegarde et le développement des droits de l’homme et des libertés fondamentales”. [↑](#footnote-ref-15)
16. ECtHR, GC, *Grzęda v. Poland,* 15.03.2022, appl. no. 43572/18, at 339. [↑](#footnote-ref-16)
17. Tania Groppi, *The Italian Constitutional Court: Towards a ‘Multilevel System’ of Constitutional Review?*, 2 J. COMP. L. 100 (2008); p. 102-103.  [↑](#footnote-ref-17)
18. Rudolf Streinz, *The Role of the German Federal Constitutional Court Law and Politics*, Ritsumeikan Law Review 2014, no. 3, pp. 95-118, *passim.*  [↑](#footnote-ref-18)
19. Sophie Boyron, *The Constitution of France. A contextual analysis*, Hart, Oxford, 2013, p. 220. [↑](#footnote-ref-19)
20. E.g. Constitutional Council, 31 December 1997, Traité d’Amsterdam modifiant le Traité sur l’Union européenne, les Traités instituant les Communautés européennes et certains actes connexes, Decision No. 97-394 DC. [↑](#footnote-ref-20)
21. See Laurence Burgorgue-Larsen, Pierre-Vincent Astresses and Véronique Bruck, *The Constitution of France in the Context of EU and Transnational Law: An Ongoing Adjustment and Dialogue to Be Improved* (in) Anneli Albi, Samo Bardutzky (eds.), *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law. National Reports*, Springer, the Hague, 2019, p. 1186-1188. [↑](#footnote-ref-21)
22. Giuseppe Martinico, Barbara Guastaferro and Oreste Pollicino, *The Constitution of Italy: Axiological Continuity Between the Domestic and International Levels of Governance?* (in) Anneli Albi, Samo Bardutzky (eds.), *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law. National Reports*, Springer, the Hague, 2019, p. 494-495. [↑](#footnote-ref-22)
23. See Tom Flynn, *Constitutional pluralism, op. cit.,* pp. 247-250. [↑](#footnote-ref-23)
24. Joan Solanes Mullor and Aida Torres Pérez, *The Constitution of Spain: The Challenges for the Constitutional Order Under European and Global Governance* (in) Anneli Albi, Samo Bardutzky (eds.), *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law. National Reports*, Springer, the Hague, 2019, p. 544. [↑](#footnote-ref-24)
25. Ibidem, p. 548. [↑](#footnote-ref-25)
26. Ibidem, p. 549 and 6 Declaration of the Spanish Constitutional Court No. 1/2004, of 13 December, para. 2 [↑](#footnote-ref-26)
27. See the key cases referred to in Dieter Grimm, Mattias Wendel and Tobias Reinbacher, *European Constitutionalism and the German Basic Law* (in) Anneli Albi, Samo Bardutzky (eds.), *National Constitutions in European and Global Governance, op. cit.,* p. 414-415. [↑](#footnote-ref-27)
28. Dimitry Kochenov, *EU Rule of Law Today: Limiting, Excusing, or Abusing Power?*, Forthcoming in ‘*The Rule of Law in the Era of Crises*’ (SIEPS, Stockholm, 2023), p. 2. [↑](#footnote-ref-28)
29. Ibidem, p. 5. [↑](#footnote-ref-29)
30. Laurent Pech, *The Rule of Law as a Well‑Established and Well‑Defined Principle of EU Law*, Hague Journal on the Rule of Law (2022) 14:107–138, p. 110. [↑](#footnote-ref-30)
31. CJEC, 294/83 *Les Verts,* at 23. [↑](#footnote-ref-31)
32. See e.g. 314/85 *Foto-Frost* [1987] ECR 4199, at 16, C-2/88 *Imm. Zwartfeld and Others* [1990] ECR I-3365, t 16, and Opinion 1/91 [1991] ECR I-6079, at 21. [↑](#footnote-ref-32)
33. CJEU, C-64/16, *Associação Sindical dos Juízes Portugueses* [2018]*,* at 31-32 and 36. [↑](#footnote-ref-33)
34. Monica Claes, *Safeguarding the European Union’s Values Beyond the Rule of Law* (in) Anna Södersten, Edwin Hercock (eds.), *The Rule of Law in the EU: Crisis and Solutions*, Stockholm 2023, p. 67. [↑](#footnote-ref-34)
35. EComHR, *Greece v. the United Kingdom,* report, vol. II, 26 September 1958, appl. no. 176/56, pp. 329 and 344. [↑](#footnote-ref-35)
36. ECtHR (plenary), *Golder v. the United Kingdom,* 21 February 1975, appl. no. 4451/70, at 34. The Court was actually criticised for this standing in the separate opinion of judge Fitzmaurice for “exaggerating” the “importance attributed to the factor of the rule of law" because “That element, weighty though it is, is mentioned only incidentally in the Preamble to the Convention. What chiefly actuated the contracting States was not concern for the rule of law but humanitarian considerations”. [↑](#footnote-ref-36)
37. ECtHR (plenary), *Engel and others v. the Netherlands,* 8 June 1976, appl. nos. 5100/71; 5101/71; 5102/71; 5354/72 and [5370/72](https://hudoc.echr.coe.int/eng#{%22appno%22:[%225370/72%22]}), at 69. [↑](#footnote-ref-37)
38. ECtHR, *Silver and others v. the United Kingdom,* 25 March 1983, appl. nos. 5947/72; 6205/73; 7052/75; 7061/75; 7107/75; 7113/75; [7136/75](https://hudoc.echr.coe.int/eng#{%22appno%22:[%227136/75%22]}), at 90. [↑](#footnote-ref-38)
39. ECtHR (plenary), *Brogan and others v. the United Kingdom,* 29 November 1988, appl. nos. [11209/84](https://hudoc.echr.coe.int/eng#{%22appno%22:[%2211209/84%22]}); 11234/84; 11266/84; [11386/85](https://hudoc.echr.coe.int/eng#{%22appno%22:[%2211386/85%22]}), at 58. [↑](#footnote-ref-39)
40. ECtHR (plenary), *Malone v. the United Kingdom,* 2 August 1984, appl. no. 8691/79, at 67-68. [↑](#footnote-ref-40)
41. EComHR, *Leander v. Sweden,* report, 17 May 1985, appl. no. 9248/81, at 60. [↑](#footnote-ref-41)
42. See e.g. ECtHR, *Juszczyszyn v. Poland,* 6 October 2022, appl. no. 35599/20, *passim,* an the authorities referred to therein. [↑](#footnote-ref-42)
43. Armin von Bogdandy, *Principles of a systemic deficiencies doctrine: How to protect checks and balances in the Member States*, CMLRev. 2020, no. 3, pp. 705-740. [↑](#footnote-ref-43)
44. C-216/18 PPU, *L.M.* [2018[. The Court held that the 2002/584/JHA Decision must be interpreted as meaning that “where the executing judicial authority […] has material, such as that set out in a reasoned proposal of the European Commission adopted pursuant to Article 7(1) TEU, indicating that there is a real risk of breach of the fundamental right to a fair trial […] on account of systemic or generalised deficiencies […] that authority must determine, specifically and precisely, whether, having regard to his personal situation, as well as to the nature of the offence for which he is being prosecuted and the factual context that form the basis of the European arrest warrant, and in the light of the information provided by the issuing Member State […] there are substantial grounds for believing that that person will run such a risk if he is surrendered to that State”. [↑](#footnote-ref-44)
45. C-216/18 PPU, opinion of AG Tanchev, at 35-36. [↑](#footnote-ref-45)
46. C-619/18, *Commission v. Poland,* at 87 and 96. [↑](#footnote-ref-46)
47. C-192/18, *Commission v. Poland,* at 136. [↑](#footnote-ref-47)
48. C‑585/18, C‑624/18 and C‑625/18, *A.K. v. Krajowa Rada Sądownictwa and others* [2019], at 142. [↑](#footnote-ref-48)
49. C-791/19, *Commission v. Poland,* at 50 and 51. [↑](#footnote-ref-49)
50. ECtHR, *Xero Flor w Polsce sp. z o.o. v. Poland,* 7 May 2021, appl. no. 4907/18, at 287. [↑](#footnote-ref-50)
51. ECtHR, *Broda and Bojara v. Poland,* 29 June 2021, appl. nos. [26691/18](https://hudoc.echr.coe.int/eng#{%22appno%22:[%2226691/18%22]}) and [27367/18](https://hudoc.echr.coe.int/eng#{%22appno%22:[%2227367/18%22]}), at 145 and 146. [↑](#footnote-ref-51)
52. ECtHR, *Reczkowicz v. Poland,* 22 July 2021, appl. no. 43447/19, at 280-281. [↑](#footnote-ref-52)
53. ECtHR, *Dolińska-Ficek and Ozimek v. Poland,* 8 November 2021, appl. nos. [49868/19](https://hudoc.echr.coe.int/eng#{%22appno%22:[%2249868/19%22]}) and [57511/19](https://hudoc.echr.coe.int/eng#{%22appno%22:[%2257511/19%22]}), at 353. [↑](#footnote-ref-53)
54. ECtHR, *Advance Pharma sp. z o.o. v. Poland,* 3 February 2022, appl. no. 1469/20. [↑](#footnote-ref-54)
55. ECtHR (GC), *Grzęda v. Poland,* 15 March 2022, appl. no. 43572/18, at 349. [↑](#footnote-ref-55)
56. ECtHR, *Żurek v. Poland,* 16 June 2022, appl. no. 39650/18, at 227. [↑](#footnote-ref-56)
57. ECtHR, *Juszczyszyn v. Poland,* 6 October 2022, appl. no. 35599/20. [↑](#footnote-ref-57)
58. Resolution of the Joint Chambers of the Supreme Court of 23 January 2020, BSA I 4110 1/20. [↑](#footnote-ref-58)
59. Judgment of the Constitutional Court of 20 April 2020, case U 2/20. [↑](#footnote-ref-59)
60. Order of the Constitutional Court of 21 April 2020, case Kpt 1/20. [↑](#footnote-ref-60)
61. C-791/19 R (order), *Commission v. Poland.*  [↑](#footnote-ref-61)
62. Judgment of the Constitutional Court of 14 July 2021, case P 7/20. [↑](#footnote-ref-62)
63. Judgment of the Constitutional Court of 7 October 2021, case K 3/21. [↑](#footnote-ref-63)
64. Judgment of the Constitutional Court of 24 November 2021, case K 6/21. [↑](#footnote-ref-64)
65. See e.g. Anna Wyrozumska, *Wyroki Trybunału Konstytucyjnego w sprawach K 3/21 oraz K 6/21 w świetle prawa międzynarodowego,* Europejski Przegląd Sądowy 2021, vol. 12, pp. 27-38; Anna Wyrozumska, *Wyrok Trybunału Konstytucyjnego (K 6/21) dotyczący orzeczenia Europejskiego Trybunału Praw Człowieka w sprawie Xero Flor, które rzekomo "nie istnieje",* Europejski Przegląd Sądowy 2023, vol. 2, pp. 4-15. [↑](#footnote-ref-65)
66. Order of the District Court in Elbląg, 5 January 2023, case VI Kz 442/21. [↑](#footnote-ref-66)