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In (Our) Courts We Trust! Capturing the Dynamics of Trust and Distrust in the Constitutional Judiciary in Poland Under PiS Hybrid Rule

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Abstract

The year 2015 marked a profound turn in Poland's constitutional landscape. Under PiS rule, the country experienced the implementation of highly controversial reforms reorganising the Constitutional Tribunal, Supreme Court and, eventually, the judiciary as a whole. Despite domestic protests and international criticism, for several years the then-ruling party managed to maintain public support, most ostensibly reflected in the 2019 election's results. The situation radically changed in late 2020, when PiS experienced a 10-point drop in ratings and, importantly, never managed to regain their popularity levels. From that juncture, one could observe one more phenomenon – a rapid decrease in support and trust in the then-already-reorganised Constitutional Tribunal. These shifts in societal attitudes most vividly coincided with one significant event: the Tribunal's ruling on the termination of pregnancy on the ground of fatal foetal abnormality. Against this background, this article explores a relatively overlooked topic of trust dynamics within hybrid regimes. By using the Polish Tribunal as a testing ground, it reflects on the variability of public trust under PiS rule. By comparing two case studies – the capture of the Tribunal (2015-2016) and 2020 ruling on pregnancy termination grounds – we investigate how PiS tried to manipulate trust and distrust in judiciary in general and in the Tribunal in particular. In this vein, we apply McKnight and Chervany's conceptualisation. Secondly, we discuss how the public trust in the Tribunal actually shifted and the factors that might have influenced that change, contrary to the former rulers' wishes.

Keywords: trust, distrust, constitutional capture, abortion law, Poland.

1 Introduction

Between 2015 and 2023, Poland underwent a significant decline in the quality of democracy and the rule of law. The election-winning populist PiS party could govern alone, without coalition partners, leveraging what they interpreted as a clear and unquestioned mandate to implement sweeping changes. The country experienced the implementation of highly controversial reforms reorganising – at first and among others – the Constitutional Tribunal. The reforms, if they might be called as such,[1] were ostensibly framed as a way to rejuvenate the judiciary and make it more accountable. And while they were allegedly aimed at cultivating societal trust in a supposedly revitalised and fair system,[2] they established what could be called a hybrid regime[3] and promoted an ideology of securing the interests of ultimately a narrowly defined nation, the 'better sort' of Poles.[4]

PiS leader Jarosław Kaczyński has repeatedly contended that the democratic transition in Poland was incomplete, claiming too much influence remained entrenched within the *ancient regime* and, hence, the previous elites. For genuine reform and transformation to occur, Kaczyński believed that the legal system had to be dis-

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1 Some scholars refrain from using the term 'reforms', as it gives legitimacy to changes that are seen as threatening rule of law; see, e.g., W. Sadurski, 'Polish Constitutional Tribunal Under PiS: From an Activist Court, to a Paralysed Tribunal, to a Governmental Enabler', 11 *Hague Journal on the Rule of Law* 63 (2019); L. Pech and S. Platon, 'The Beginning of the End for Poland's So-Called "Judicial Reforms"? Some Thoughts on the ECJ Ruling in Commission v Poland (Independence of the Supreme Court case)' (2019); L. Pech, P. Wachowiec & D. Mazur, 'Poland's Rule of Law Breakdown: A Five-Year Assessment of EU's (In)Action', 13 *Hague Journal on the Rule of Law* 1 (2021).

2 See, e.g., The Draft Amendment to the Act on the Supreme Court of July 12, 2017, https://orka.sejm.gov.pl/Druki8ka.nsf/0/FB35352357349239C125815B00714AAA/%24File/1727.pdf (last visited 12 September 2024).

3 S. Levitsky and L.A. Way, *Competitive Authoritarianism: Hybrid Regimes after the Cold War* (2011).

4 In 2015, Kaczynski called politicians who 'snitch on Poland' abroad as a worst sort of Poles. See: https://wyborcza.pl/10,82983,19352505,czy-kaczynski-przeprosi-za-najgorszy-sort-polakow-niech.html (last visited 12 September 2024).

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mantled and rebuilt from scratch.[5] By aligning the judicial reform narrative with the concerns of disenfranchised groups who were generally frustrated with the inefficiency of a legal system unwilling to self-reform, PiS aimed to galvanise support among voters who felt ignored by previous governments.[6]

In this way, the governing party skilfully mitigated the negative repercussions of diminishing judicial independence resulting from the constitutional changes, ensuring that these effects were not perceived as a constitutional threat by their supporters, from which most of them have even derived certain level of satisfaction. For instance, data from the Polish Public Opinion Research Centre's (CBOS) report from April 2016 revealed that, despite a rise in negative opinions about the Constitutional Tribunal, citizens' attitude towards the Tribunal was strongly related to their political views.[7] Subsequent opinion polls further underscored this political divide. Despite opposition voters expressing increasingly negative views on the Tribunal, PiS supporters consistently registered more positive opinions regarding its performance.[8]

At this point, one should recall that the Constitutional Tribunal reform in Poland was two-staged. The initial stage was characterised by efforts to render the Tribunal ineffective in checking arbitrary power by packing it with new, loyal judges. Here, the PiS party managed to skilfully capitalise on pre-existing scepticism to seize control over the Court while maintaining an appearance of constitutional legitimacy. The discursive manipulation against the liberal order installed after 1989[9] turned out relatively successful. Despite the growing domestic protests and international criticism, the party managed to secure its voter base and even achieved a remarkable 43.59% of the electoral support[10] in the next 2019 elections and which at that time showed no signs of waning.

Once this objective was accomplished, the focus shifted to the second stage – actively utilising the Constitutional Tribunal as a device of power consolidation[11] to bolster the ruling party's agenda. The Tribunal was used to validate the appointments of its own new judges, approve amendments to its own operational rules[12] or confirm the validity of the reorganisation of the National Council of the Judiciary.[13] Now, the party appeared to leverage the public's (traditional) trust in a judicial institution to advance specific political agendas while maintaining the appearance of constitutional legitimacy.

However, this disarmament, capture and transformation of the Tribunal into a government ally were not straightforward.[14] The ruling party found itself navigating a complex landscape, where it had to cultivate both distrust and trust in the Constitutional Tribunal. Distrust was necessary to not only facilitate the initial capture of the institution, enabling the replacement of 'old judges' with PiS nominees, but also discredit the remaining minority of judges still adjudicating (alleged remnants of the former regime), and to justify on-going reforms. At the same time, leveraging the traditional public trust in the court as an authoritative and independent institution of constitutional democracy was necessary for the Tribunal – despite being captured – to credibly legitimise the ruling party's on-going reforms and specific political agendas. This came in addition to the general risk of losing constitutional legitimacy and public trust by making political capture too obvious.

Regarding the implementation of specific political agendas, as noted by Sadurski, a court perceived as fully dependent on the ruling party becomes ineffective in a strategic game which delegates contentious or unpopular decisions to it in order to shield the government from direct responsibility and the associated political fallout. Such a court fails in this role because it becomes evident that its decisions merely reflect the political objectives of the ruling party.[15]

Bearing in mind the growing support the PiS party was securing, reaching its peak between 2018 and 2019, the difficulties to credibly hide behind the Tribunal's back had not fully revealed themselves until after the Tribunal's judgement of October 2020 – which ruled that in cases where there are indications of irreversible impairments of a foetus or incurable life-threatening diseases, a right to abortion violates the Polish Constitution.

5 See, e.g., M. Hoffmann, '[PiS]sing Off the Courts: The PiS Party's Effect on Judicial Independence in Poland', 51 *Vanderbilt Law Review* 1153 (2021) analysing PiS rhetoric that identifies judges as an 'older generation of elites' associated with an old communist order; see, e.g., the quote of Justice Minister Zbigniew Ziobro on the so-called Muzzle law in 2019: 'This law protects the democratic rule of law against the "judiocracy" in "Poland approves bill aimed at aimed at punishing judges"', https://www.france24.com/en/20191220-poland-approves-bill-aimed-at-punishing-judges (last visited 12 September 2024).

6 M. Budyta-Budzyńska, 'Polskie banki gniewu. Podziały społeczne w Polsce w perspektywie teorii Petera Sloterdijka', 62(1) *Kultura I Społeczeństwo* 289 (2018). For explanatory overviews of the rise of parties such as PiS, see, e.g., I. Krastev and S. Holmes, *The Light That Failed. Why the West Is Losing the Fight for Democracy* (2019); J. Zielonka, *Counter-Revolution. Liberal Europe in Retreat* (2018); P. Blokker, *New Democracies in Crisis? A Comparative Constitutional Study of the Czech Republic, Hungary, Poland, Romania and Slovakia* (2015).

7 CBOS NR 43/2016, https://www.cbos.pl/SPISKOM.POL/2016/K_043_16.PDF (last visited 12 September 2024).

8 CBOS NR 32/2017, https://www.cbos.pl/SPISKOM.POL/2017/K_006_17.PDF (last visited 12 September 2024).

9 Zielonka, above n. 6.

10 https://sejmsenat2019.pkw.gov.pl/sejmsenat2019/en/wyniki/sejm/pl (last visited 12 September 2024).

11 A. Kustra-Rogatka, 'The Hypocrisy of Authoritarian Populism in Poland: Between the Facade Rhetoric of Political Constitutionalism and the Actual Abuse of Apex Courts', 19(1) *European Constitutional Law Review* 25 (2023).

12 Judgement of the Constitutional Tribunal of 24 October 2017, ref. no. K 1/17 (*Journal of Laws of 2017*, item 2001).

13 Judgement of the Constitutional Tribunal of 20 June 2017, ref. no. K 5/17 (*Journal of Laws of 2017*, item 175).

14 Sadurski, above n. 1.

15 This is not to deny that hiding behind, or delegating salient political issues to, court decisions is not a practice used more broadly in constitutional democracies.

doi: 10.5553/ELR.000272

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While there is no, and there never was, any consensus among Poles on the issue of abortion, several analyses have shown that the Tribunal's judgement resulted in a high level of agreement between people with different views with regards to the judgement itself: the majority of those surveyed perceived the judgement in any case as incorrect.[16] After its issuance, according to surveys, the dissatisfaction with the Tribunal's performance among Poles rose dramatically.[17]

The changes in societal opinions on the Tribunal starting from 2015 to 2016 and culminating in 2020 abortion verdict pose significant questions on a relatively overlooked field in legal scholarship on rule-of-law backsliding – the variability of public trust in the rise of illiberal practices. For example, to what extent and in what forms can the manipulation of trust play a role for populist leaders in establishing their hybrid regimes and exploiting the institutions of constitutional democracy to their advantage? Can ruling parties implement strategies to undermine the independence of the courts without jeopardising public trust in these institutions and how so? How might we approach the study of retaining or preserving trust in such contexts?

This article aims to fill this gap by contributing to a sociological perspective on rule-of-law backsliding studies. Relying on McKnight and Chervany's conceptualisation and data mainly from the Polish Public Opinion Research Centre (CBOS),[18] we highlight the presence and importance of public trust and distrust dynamics in the potential success (or lack of it) of politically captured courts in fulfilling their servile role in less-than-democratic contexts. The literature on trust is extensive.[19] We have chosen to discuss McKnight and Chervany because they coherently conceptualise and outline both trusting and distrusting beliefs, drawing on a broad range of literature across several disciplines. Their approach enables the application of a more nuanced perspective on trust in judicial contexts and hybrid regimes – where both distrust and trust play significant roles in a populist's playbook – while also facilitating communication across disciplines.

Our assumption is that public trust in courts is primarily driven by its perceived alignment with broader societal values and expectations, rather than by formal legal safeguards (de jure independence). Therefore, changes altering formal legal safeguards can be implemented with reduced risks to public trust, provided that these changes do not negatively impact the societal expectations and perceptions towards the courts. Based on the example of the Polish Constitutional Tribunal under PiS rule, we specifically analyse how trust manipulations applied by the former governing majority against the Court during 2015-2016 reform differed (also in their repercussions) from those applied once the party tried to implement the specific socially sensitive amendments further restricting the Polish abortion law. Ultimately, we demonstrate how means of manipulation for *acquiring and consolidating power* through traditionally democratic institutions differ from means of *using* these institutions to pursue specific political agendas and how the latter can cause unexpected effects.

The article is structured as follows. Section 2 presents the broader context of conceptualising trust and, symmetrically, distrust, providing a foundational understanding of these concepts. It also unravels the intricate nexus between trust and the phenomenon of rule-of-law backsliding and the role of trust in the rise of hybrid regimes. Having laid these conceptual foundations, in Section 3, we turn to the Polish situation and our first case study. We delineate the role of trust and distrust manipulation in the PiS discourse on the judiciary and Constitutional Tribunal before and during the constitutional capture. In addition, we reflect on the effectiveness of such manipulation using CBOS data. Section 4 undertakes an analysis of our second case study – how the party endeavoured to leverage trust in the (captured) Constitutional Tribunal to advance their political agenda concerning pregnancy termination grounds into law. This includes a comparison of CBOS data on public trust preceding and after the verdict, scrutinising the ramifications of the decision and the ensuing societal reactions. Lastly, in Section 5, we report our key findings.

2 Theoretical Background

2.1 What Is Trust?

Any effort to measure or evaluate the dynamics of a particular phenomenon requires a consensus on its definition, which must be sufficiently robust to distinguish it

16 M. Makowska, R. Boguszewski & K. Sacharczuk, 'A Study of Opinions about the Polish Constitutional Tribunal's Judgement Strengthening Polish Abortion Laws', 27(1) *The European Journal of Contraception & Reproductive Health Care* 39 (2021).

17 CBOS NR 150/2020, https://www.cbos.pl/SPISKOM.POL/2020/K_150_20.PDF (last visited 12 September 2024).

18 CBOS is a Polish opinion polling institute, established in 1982, operating as a non-profit public foundation created by a legal act: The Act of 20 February 1997 on the Foundation – Public Opinion Research Centre.

19 See, e.g., research in context of schools, businesses, police and courts – M.N.K. Saunders, D. Skinner, G. Dietz & N. Gillespie, *Organizational Trust: A Cultural Perspective* (2010); M. Tschannen-Moran and W.K. Hoy, 'A Multidisciplinary Analysis of the Nature, Meaning, and Measurement of Trust', 70 *Review of Educational Research* 547 (2000); T.R. Tyler and Y.J. Huo, *Encouraging Public Cooperation with the Police and Courts* (2002); or see trust research cited in a new research agenda of trust in a multilevel judicial system in specific, P. Popelier, M. Glavina, F. Baldan & E. van Zimmeren, 'A Research Agenda for Trust and Distrust in a Multilevel Judicial System', 29(3) *Maastricht Journal of European and Comparative Law* 351 (2022); P. Popelier, G. Gentile & E. van Zimmeren, 'Bridging the Gap between Facts and Norms: Mutual Trust, the European Arrest Warrant and the Rule of Law in an Interdisciplinary Context', 27(3) *European Law Journal* 167 (2022); or see the OECD surveys on trust and judicial independence perceptions, OECD, 'Trust in the Courts and Legal System Is Positively Associated with Perceptions of Independence of the Courts: Share of Respondents Who Believe a Court in Their Country Would Make a Decision Free from Political Influence (Y-Axis) and Share of Respondents Who Trust the Courts and Legal System (X-Axis), 2021', in *Building Trust to Reinforce Democracy: Main Findings from the 2021 OECD Survey on Drivers of Trust in Public Institutions* (2021), https://doi.org/10.1787/b9033fb7-en.

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from other related phenomena. Trust as well as its functional component – distrust – are not easily categorised into just cognitive (reason, thinking), affective (emotional, moral) or behavioural (doing, voluntary conscious acts) categories.[20] They are complex social experiences wherein the above three components are intertwined.

The cognitive aspect involves what we believe and understand about another person or agency. According to McKnight and Chervany, trusting and distrusting beliefs[21] can be synthesised into four main categories. These categories relate to the extent to which one believes that the trustee possesses (or lacks) the following characteristics that are important for a trustee relationship: *Benevolence* (caring and being motivated to act in one's interest rather than opportunistically); *Integrity* (making good faith agreements, telling the truth and fulfilling promises); *Competence* (having the ability, skill or power); and *Predictability* (the actions [good or bad] are consistent enough to be forecasted in a given situation). In this sense, trust is characterised by positive expectations about desired outcomes, while distrust involves positive expectations about feared outcomes.[22]

The affective aspect involves the emotional response or connection we experience with someone when we trust or distrust them. It is often associated with a sense (or lack) of security, comfort or love. Trust as an affective attitude operates as a filter: it determines how we perceive and interpret situations and other people involved in them.[23] Positive experiences and consistent behaviour that align with expectations strengthen the trust filter, reinforcing positive perceptions. Conversely, breaches of trust, even minor ones, can taint this filter, leading to a more critical and less forgiving view of the other party's actions.

Lastly, the behavioural aspect relates to the tangible actions or choices we make based on trust or distrust, or the conscious acts of entrusting or placing trust in someone to execute a certain task. This dimension goes beyond mere thoughts or feelings and manifests in concrete behaviours that reflect a person's willingness to rely on another party.

These three aspects are deeply interconnected in the 'experience' of trust or distrust. For example, trust experience can involve a cognitive judgement about the reliability of a person, an emotional response that includes feelings of safety or anxiety, and behaviours that reflect these attitudes, such as openness or caution. These three dimensions can also overlap and influence each other; therefore, trust cannot always be easily categorised into distinct, mutually exclusive components. What is more: trust and distrust themselves can – and often do – coexist. Low level of trust does not equate to high distrust, and low distrust is not the same as high trust. Although strong feelings of trust can reduce feelings of distrust, and vice versa, individuals in a relationship can often experience both trust and distrust towards each other simultaneously.[24] As such, trust (and distrust) is not just a psychological reality confined within individuals; nor is it necessarily a consciously chosen aspect;[25] it is an intersubjective or systemic social reality.[26]

2.2 Trust in Institutions

The notion of (intersubjective) trust and distrust can be applied to institutions, including entities like courts.[27] Trust and institutions are closely connected, as state institutions can only function effectively when they are trusted.[28] This trust relationship is, however, not necessarily contingent upon prior personal interactions[29] or the comprehensive functioning of the entire institution. Rather, it is predicated on some perceived controls or representative performances,[30] such as institutional safeguards. The individuals, or the collective, invest belief in the institution, due to the presence of these safeguards. McKnight and Chervancy also point to institution-based trust; a belief that favourable conditions and protective structures are in place that are conducive to situational success.[31] Simultaneously, the institutional actor references these safeguards as a justification for its position or action.[32] This dynamic reflects a mutual agreement on the significance of specific safeguards in fostering and justifying trust, thereby making the institutional actions legitimate.

When applied to courts, it pertains to the legally recognised institutional safeguards: judicial independence and impartiality. These terms are closely connected: in-

20 A. Baier, 'What Is Trust?', in D. Archard, M. Deveaux, N. Manson & D. Weinstock (eds.), *Reading Onora O'Neill* (2013) 177; A. Baier, *Moral Prejudices: Essays on Ethics* (1994), at 13; J.D. Lewis and A. Weigert, 'Trust as a Social Reality', 63 *Social Forces* 967, at 969-70 (1985).

21 On the basis of a wide literature scan across several disciplines. D. McKnight and N. Chervany, 'Trust and Distrust Definitions: One Bite at a Time', in R. Falcone, M. Singh & Y.H. Tan (eds.), *Trust in Cyber-societies: Integrating the Human and Artificial Perspectives* (2001) 27, at 30-36, 41-45.

22 J. Roy Lewicki, D.J. McAllister & R.J. Bies, 'Trust and Distrust: New Relationships and Realities', 23 *The Academy of Management Review* 439 (1998).

23 B. Lahno, 'Three Aspects of Interpersonal Trust', 26 *Analyse & Kritik* 30, at 39 (2004).

24 C. Hill and E. O'Hara O'Connor, 'A Cognitive Theory of Trust', 84 *Washington University Law Review* 1717 (2006).

25 R. Hardin, *Trust* (2006), at 17.

26 Lewis and Weigert, above n. 20, at 967. See also J.L. Slosser, B. Aasa & H.P. Olsen, 'Trustworthy AI: A Cooperative APPROACH', 2023 *Technology and Regulation* 58 (2023), at 62

27 The literature acknowledges the presence of abstract, systemic or institutional trust; Slosser, Aasa & Olsen, above n. 26, at 63.

28 W. Mishler and R. Rose, 'Trust, Distrust and Skepticism: Popular Evaluations of Civil and Political Institutions in Post-Communist Societies', 59 *The Journal of Politics* 418 (1997): 'for government to operate effectively it must enjoy a minimum of public confidence'; G. Möllering, *Trust: Reason, Routine, Reflexivity* (2006), at 74.

29 R. Bachmann and A.C. Inkpen, 'Understanding Institutional Based Trust Building Processes in Inter-Organizational Relationships', 32 *Organization Studies* 281, at 282 (2011).

30 G. Möllering, 'Trust, Institutions, Agency: Towards a Neoinstitutional Theory of Trust', in B. Reinhard and Z. Akbar (eds.), *Handbook of Trust Research* (2006), at 365.

31 McKnight and Chervancy, above n. 21, at 37-38.

32 Bachmann and Inkpen, above n. 29.

doi: 10.5553/ELR.000272

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dependence refers to a general state of mind as well as to institutional frameworks, while impartiality focuses specifically on the mind-set of the court (or judge) concerning the issues and parties in a case.[33] There is a broad consensus, backed by empirical evidence, that judicial independence is essential for earning society's confidence in courts.[34] A high level of public trust, in turn, strengthens the judiciary's legitimacy and its authority to operate.[35] In fact, perceptions of judicial independence are correlated with trust in the judiciary to such an extent that *trust in the judiciary* can actually be seen as *trust in the independence of the judiciary*.[36] The Court of Justice of the EU itself, for example, also views independence and impartiality as key factors in building public confidence in the courts: 'The rules … must … preclude … a lack of appearance of independence or impartiality on their part, likely to prejudice the trust, which justice in a democratic society, governed by the rule of law, must inspire in individuals.'[37] In other words, the objective safeguards of judicial independence ultimately serve the ideal of the public having trust in courts – a notion that in socio-reality encompasses the combined aspects of cognitive, affective and behavioural trust.

Nevertheless, if the ultimate ideal result is that sociological trust, then the objective rules of law might be downplayed as of secondary importance. Bühlmann and Kunz's study[38] on the confidence of citizens in the justice system reveals that societal perceptions of judicial independence are more influenced by imaginaries of actual (de facto) independence rather than the formal rules and safeguards (de jure independence) that are meant to protect the judiciary. This refers to the real-world application and manifestation of judicial independence. In essence, trust in courts is then understood as the degree to which these institutions are perceived to fulfil their expected roles adequately.[39] In this context, the question emerges: can states implement strategies to undermine the courts' independence without jeopardising public trust in the overall judicial system?

2.3 Contours of Hybrid Regimes and the Role of Trust

This is where the concept of hybrid regimes comes into play. Traditionally, a hybrid regime is understood as a type of system that exhibits a combination of democratic and authoritarian features, where the elements of both coexist to varying degrees.[40] The term 'hybrid' is not the only universally accepted one – these systems have been given a variety of names in scholarship, including 'illiberal democracies', 'semi-democracies', 'electoral democracies', 'pseudo democracies', 'imperfect democracies', 'semi-authoritarianism', 'competitive authoritarianism'. To navigate the complexity and avoid overly rigid classifications, many scholars opt for using more descriptive terms of processes taking place, i.e., 'democratic breakdown'[41] or 'illiberal or hybrid practices' rather than labelling different stages of democratic regression as any type of 'regime'.

For the purpose of this article, instead of coining new terms, we employ the term 'hybrid' to denote systems in which a systemic deterioration of democratic features occurs as well as a decline in the quality of democracy as a whole through a discontinuous series of actions.[42]

We choose this term for several reasons. Firstly, we want to avoid the pitfalls of a binary evaluative approach, which might lead to an undue focus on either the democratic shortcomings or the authoritarian traits present in these systems. As will be explained further below, hybrid regimes are and should be treated as alternative types of political systems – even though they are difficult to distinguish and classify (especially in the recent years, where democratic backsliding is a striking global phenomenon). We acknowledge that no political system perfectly embodies its ideal form. Influenced by historical forces and various path dependencies, all political systems, including democracies, in a sense exist as hybrid versions of their formal definitions.[43] However, when talking about 'hybrid regimes' we do not mean systems that are simply 'flawed' in fulfilling the democratic standards but nevertheless (in some ways) struggle towards improvement. Quite the contrary, hybrid regimes are characterised by the skilful construction of a facade of democratic and rule-of-law standards. This facade is not incidental but rather a strategic choice. In that sense, labels including the word 'democracy' do not – in our opinion – sufficiently encapsulate the defining trait of these systems, namely, their *intentional* nature to create facades. These systems are intentionally structured to portray themselves as democracies while concurrently perpetuating de facto authoritarian characteristics.[44] We also avoid using the terms that include 'au-

33 OHCHR, 'Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers' (2003).

34 D.M. Cann and J. Yates, 'Homegrown Institutional Legitimacy; Assessing Citizens' Diffuse Support for State Courts', 36(2) *American Politics Research* 297 (2008).

35 F. Van Dijk, *Perceptions of the Independence of Judges in Europe: Congruence of Society and Judiciary* (2021), at 14.

36 *Ibid*., at 4.

37 For example, judgement of 18 May 2021, *Asociaţia 'Forumul Judecătorilor din România' and Others*, Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, ECLI:EU:C:2021:393, para. 197.

38 M. Bühlmann and R. Kunz, 'Confidence in the Judiciary: Comparing the Independence and Legitimacy of Judicial Systems', 34 *West European Politics* 317 (2011).

39 B. Rothstein, *Social Traps and the Problem of Trust* (2005); J. Hudson, 'Institutional Trust and Subjective Well-Being across the EU', 59(1) *KYKLOS* 43 (2006).

40 Levitsky and Way, above n. 3; A. Schedler, *The Politics of Uncertainty: Sustaining and Subverting Electoral Authoritarianism*, *Democratization* (2013).

41 J.J. Linz and A. Stepan, *The Breakdown of Democratic Regimes* (1978).

42 S. Levitsky and D. Ziblatt, *How Democracies Die* (2018).

43 K.M. Osland, M.T.E. Mathilde & M. Bøås, 'Democracy and Trust, Hybrid Regimes and Resilience', *Working Paper* 2024.

44 T. Carothers (2000). 'Struggling with Semi-Authoritarians', in P. Burnell (ed.), *Democracy Assistance: International Cooperation for Democratization*

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tocracy' and 'authoritarian' labels because their meanings can vary significantly. In particular, some interpretations equate these terms with 'dictatorship', which, in our view, does not accurately describe these 'in-between' systems.

As alluded, hybrid regimes' defining feature revolves around creating an appearance of constitutional and democratic legitimacy. They do so in order to maintain a certain level of public trust and consent in the eyes of both international, but mostly domestic, audiences – as the longevity of those regimes heavily relies on the tacit acceptance of the regime by citizens.[45] As Landau and Dixon[46] highlight, these systems are based on a legalistic approach, coined by Scheppele as 'autocratic legalism':[47] instead of resorting to extralegal methods like military coups, hybrid leaders strategically utilise both formal and informal constitutional changes, along with ordinary legal processes, to restructure the constitutional order in a way that tilts the electoral playing field to their advantage. As stressed by Diamond, multiparty electoral competition is used in order to 'mask (often in part to legitimate) the reality of somewhat authoritarian domination'.[48] Electoral success of early-stage hybrid leaders is the core foundation that helps establishing the democratic credentials of those regimes. Consecutively, securing a large parliamentary majority through free, regular and – at least to some extent – competitive, but not necessarily fair, elections provides the firm basis for further institutional changes that (gradually) erode pluralism and competition, all the while remaining within the constitutional framework.[49]

Populism plays a central role in this dynamic. In fact, according to Peruzzotti,[50] it is populism's dependence on electoral legitimacy that prevents the regime from descending into outright authoritarianism. Populism arises in already democratised contexts where openly dictatorial appeals would not be viable for different reasons (potential backlash from the public, international pressure etc.). As a result, political struggles shift from debating alternative regime options to a definitional conflict over the meaning of democracy[51] and the will of 'the people'.

In their attempts to capture the will of 'the people', populist leaders tend to imagine and present societies as somewhat homogenous communities[52] regardless of the individual cultural, ethnic or other features.[53] In this vein, they contrast the ambiguous 'ordinary people' (seen as moral and good) with 'the elites' (seen as corrupt and self-serving), asserting that politics should reflect the general 'will' of ordinary people.[54] Populists have a strong tendency not only to align themselves with 'the people' but also to position themselves as the sole legitimate representative, claiming to be the only true political authority.[55] By portraying themselves as the embodiment of the people's will, they argue that their actions (no matter how undemocratic they may seem) are legitimate because they are supported by popular (majoritarian) mandate.

And here we turn to the linkage between populism, hybrid regime and trust and the question on whether rulers can undermine judicial independence without or with reduced risks to public trust. As mentioned, in early-forming-hybrid regimes populists capitalise on citizens' discontent with democracy and political institutions,[56] or actively fuel political distrust[57] in rule-of-law institutions – most notably in the judiciary. Populists' actions against the judiciary are frequently framed under Carl Schmitt's concept of the political reducible to the existential distinction between friend and enemy.[58] In this framing, judges are presented as 'domestic enemies'. The distrust in them is utilised to gain public support in defying or taking control of the judiciary under the guise of democratic ideals. Most notably, the strategy of delegitimisation is based on the rhetoric that unelected bodies cannot control the will of the ruling majority legitimised by popular vote.[59] In this narrative, distrust is not only sowed but actively cultivated as a means to delegitimise external checks on executive power.

Manipulation of cognitive elements of trust and distrust is crucial here, since, as already mentioned, for the public to trust the judiciary, they need to believe that it is competent in fulfilling its expected role. Hence, populists' rhetoric on the need to stop unelected courts from interfering with the will of the majority[60] is compounded

(2000) 210.

45 M.B. Olcott and M. Ottaway, 'Challenge of Semi-Authoritarianism', *Carnegie Working Papers* 1999.

46 D. Landau and R. Dixon, 'Abusive Judicial Review: Courts against Democracy', 53(3) *UC Davis Law Review* 1315 (2020).

47 K.L. Scheppele, 'Autocratic Legalism', 85(2) *The University of Chicago Law Review* 545 (2018).

48 L. Diamond, *Developing Democracy: Toward Consolidation* (1999).

49 D. Huber and B. Pisciotta, 'From Democracy to Hybrid Regime. Democratic Backsliding and Populism in Hungary and Tunisia', 29(3) *Contemporary Politics* 357 (2022), https://doi.org/10.1080/13569775.2022.2162210.

50 E. Peruzzotti, 'Populism as Democratization's Nemesis: The Politics of Regime Hybridization', 2 *Chinese Political Science Review* 314 (2017), https://doi.org/10.1007/s41111-017-0070-2.

51 *Ibid.*

52 O. Wysocka, 'Populism in Poland: In/visible Exclusion', in L. Freeman (ed.), XXVI *IWM Junior Visiting Fellows' Conference Proceedings In/visibility: Perspectives on Inclusion and Exclusion* at 1-2 (2009).

53 K. Kovács, 'The Rise of an Ethnocultural Constitutional Identity in the Jurisprudence of the East Central European Courts', 18(7) *German Law Journal* 1703 (2017).

54 C. Mudde, 'The Populist Zeitgeist', 39 *Government and Opposition* 541 (2004).

55 D. Landau, 'The Myth of the Illiberal Democratic Constitution', in A. Sajó, R. Uitz & S. Holmes (eds.), *Routledge Handbook of Illiberalism*, at 425 (2021).

56 S. Hajdinjak, 'Populism as a Political Trust Booster? Populist Support and Degrees of Political Power in Central Europe', 38(3) *East European Politics* 400, at 400-3 (2022), citing the relevant literature.

57 *Ibid.*, at 400-3, citing the relevant literature.

58 M. Wyrzykowski and M. Ziółkowski, 'Illiberal Constitutionalism and the Judiciary', in A. Sajó, R. Uitz & S. Holmes (eds.), *Routledge Handbook of Illiberalism* at 521 (2021)

59 P. Blokker, 'Constitutional Politics and Populist Conservatism: The Contrasting Cases of Poland and Romania', 24(1) *European Politics and Society* 132 (2023).

60 Wyrzykowski and Ziółkowski, above n. 58, at 520.

doi: 10.5553/ELR.000272

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by questioning their competence, reliability or integrity. The judiciary's competence is called into question by portraying it as ineffective, sluggish or unable to tackle the issues that truly concern the public. Such narrative focuses on pointing to delayed rulings, controversial decisions or perceived leniency towards certain groups. In order to undermine judiciary's reliability and integrity, on the other hand, populists resort to portraying it as biased or corrupt, often accusing judges of being out of touch with the people's needs or being influenced by external, often foreign, actors. Ultimately, they manipulate cognitive trust by presenting themselves as the only trustworthy, competent and reliable actors who can fix the 'flawed' judicial system. Hence, cognitive trust of the populace is redirected from institutions (courts) to the populist leaders themselves. In this sense, some scholars suggest that in cases of rule-of-law backsliding populist parties might enhance *political* trust as citizens might feel one way or another more represented.[61] At the same time, it could be argued that, despite a link between a decline in the independence of the judiciary and the trust in that same judiciary,[62] a significant amount of people may not be overly troubled by the potential risk of a weakening of the rule of law, given the foregoing reasons.

Indeed, emerging literature suggests that threats to judicial independence and court-curbing policies are not universally opposed; in fact, certain segments of the public may even welcome such measures.[63] Recent research indicates that making courts subservient to political agendas yields different outcomes depending on individuals' existing political inclinations.[64] Hence, different government strategies to curb courts may also elicit varying public reactions,[65] challenging simplistic models that assume a uniformly negative response from voters.[66] Alterations that are aimed to restrict court's independence could be more accepted by specific individuals if they are advocated by the parties they support.[67] As a result, trust in the judiciary is then likely influenced not only by potential procedural changes but also by the adherence of courts' composition and their rulings with citizens' ideological and political preferences.[68]

Citizens may also show less concern about systemic rule-of-law backsliding due to a lack of comprehension, while focusing with a greater attention on specific judicial decisions.[69] Moreover, akin to the scenario of newly empowered courts in emerging democracies, where judicial trust is built unevenly over time, the dynamics of trust in cases of disempowerment within hybrid regimes follow irregular patterns. In these regimes, governments' attempts to control the judiciary can impact public trust, but this impact is neither straightforward nor always predictable. Therefore, the effect of governments' specific efforts to undermine judicial independence on the level of public trust in the judiciary is not linear. It can vary greatly depending on the specific circumstances and the interplay of multiple influences.[70]

2.4 Constitutional Courts and Trust

To further analyse how the process of taming the judicial space can impact citizens' trust in the courts, one should pay specific attention to constitutional courts, which, when present, often serve as the initial target in hybrid regimes. These courts are valuable for national hybrid leaders in mitigating the likelihood of judicial challenges to their legal reforms,[71] deflecting external criticism, preventing legal intervention and providing a semblance of legality to government policies aimed at subduing potential counter-powers.[72] In their rhetorical attempts justifying Constitutional Court's capture, hybrid leaders often rely on the imaginaries of constitutional courts prevalent in a given context.

Traditionally, the Constitutional Court serves as a 'fourth power',[73] independently safeguarding the constitution, individual rights and the separation of powers. It plays a dual role: counter-majoritarian,[74] preventing violations of fundamental rights and intervening in legislative and executive policies, and as a guardian of communal consensus, protecting democratic values.[75] Despite being a judicial institution, it seeks democratic legitimacy, evident in increased political involvement in the judicial appointments compared to the ordinary judiciary.[76]

61 Hajdinjak, above n. 56.

62 Empirical studies confirm the connection between independence and confidence; see, e.g., Van Dijk, above n. 35, at 17 under the section 'Empirical Relationship between Independence and Trust'.

63 A. Driscoll and M. Nelson, 'The Costs of Court Curbing: Evidence from the United States', 85 *The Journal of Politics* 609 (2022).

64 P.C. Magalhães and N. Garoupa, 'Populist Governments, Judicial Independence, and Public Trust in the Courts', 31(9) *Journal of European Public Policy* 2748 (2023).

65 A. Aydin-Cakir, 'The Varying Effect of Court-Curbing: Evidence from Hungary and Poland', 31(5) *Journal of European Public Policy* 1179 (2024).

66 Driscoll and Nelson, above n. 63.

67 H. Mazepus and D. Toshkov, 'Standing up for Democracy? Explaining Citizens' Support for Democratic Checks and Balances', 55(8) *Comparative Political Studies* 1271 (2022), https://doi.org/10.1177/00104140211060285.

68 S.D. Ansolabehere and A. White, 'Policy, Politics, and Public Attitudes toward the Supreme Court', 48(3) *American Politics Research* 365 (2020), https://doi.org/10.1177/1532673X18765189.

69 Popelier, Glavina, Baldan & van Zimmeren, above n. 19.

70 R.A. Sanchez Urribarri, 'Courts between Democracy and Hybrid Authoritarianism: Evidence from the Venezuelan Supreme Court', 36(4) *Law & Social Inquiry* 854 (2011), https://doi.org/10.1111/j.1747-4469.2011.01253.x.

71 F. de Sa e Silva, 'Law and Illiberalism: A Sociolegal Review and Research Road Map', 18(1) *Annual Review of Law and Social Science* 193 (2022), https://doi.org/10.1146/annurev-lawsocsci-110921-105921.

72 P. Bard and L. Pech, 'How to Build and Consolidate a Partly Free Pseudo Democracy by Constitutional Means in Three Steps: The "Hungarian Model"', *Reconnect Working Paper No.4* 2019:24.

73 Complementing the legislative, executive and judiciary branches, operating separately from the ordinary judiciary.

74 See, e.g., the seminal work, A.M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (1962).

75 See, e.g., E. Klingsberg, 'Judicial Review and Hungary's Transition from Communism to Democracy: The Constitutional Court, the Continuity of Law, and the Redefinition of Property Rights', 1 *BYU Law Review* 43, at 45 (1992) referencing the 'communal consensus school'.

76 While Constitutional Court judges must possess, like ordinary judges, both qualifications and independence, the Venice Commission of the Council of Europe, e.g., still makes a distinction in the judicial appointment mod-

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Some scholars concede that the counter-majoritarian function of judicial review goes partially beyond democratic republican theory. They argue that the perceived authority or aura, its commitment to a 'higher law', and other qualities of an apex court can lead individuals to place quasi-religious trust in its opinions. In this view, a constitutional court operates in a manner akin to the command-obedience relationship seen at Mt. Sinai, where God handed down the Ten Commandments to Moses for the Jewish people.[77] In Central and Eastern Europe, particularly in the early 1990s, the depicted imagery could resonate. Constitutional architects of the post-authoritarian era envisioned constitutional courts as cornerstones for safeguarding the rule of law and providing checks on majoritarian politics.[78] During this period, the constitutional courts played a crucial role in navigating the transition from communism to democracy by addressing legislative and constitutional gaps amid political impasses. Trust was placed in the Constitutional Court to deliver a 'higher truth', bypassing the need for direct democratic consent or foundations.[79] Indeed, Dębska highlights how foundational and legitimising narratives of almost religious tone surrounded the Polish Constitutional Tribunal. The transition from the realm of evil (profanum, represented by state socialism) to the realm of good (sacrum, symbolised by the democratic order established in Poland after 1989) emerged as one of the key pillars underpinning the legitimacy of the Tribunal.[80] The fact that the court had begun its work under the socialist regime was used to depict it as an active participant in the creation of a new institutional order based on the sacred principle of the democratic rule of law, overcoming the opposing communist system.[81]

Within the framework of democratic republicanism, the imagery of 'higher law' is seen as a violation. The 'communal consensus' school asserts that a constitutional court (should) operate(s) differently, directly responding to manifestations of the communal consensus, such as the constitution's text and significant historical trends.[82] In this context, trust relationship between the Constitutional Court and citizens relies on confidence in its democratic representativeness. In other words, trust in the Constitutional Court is built on the belief that the court acts as a *genuine* representative of the people's collective will. This trust is both cognitive – grounded in the rational assessment of the court's adherence to democratic principles – and affective – stemming from the emotional connection that citizens feel towards the court as a protector of their communal values. In this view, people may form diverse trust relationships with the court based on how it upholds or deviates from various constitutional images, such as the ideals of justice, equality or liberty. These images influence how citizens interpret the Court's specific actions and the extent to which they believe it embodies the communal consensus. In other words, trust in the constitutional courts can be more contingent not only on its either de jure or perceived (de facto) independence and competence but also on its alignment with the broader societal values and expectations.

In hybrid contexts, both imaginaries might be rhetorically exploited. For example, hybrid leaders who intend to capture the apex courts can resort to the positive exploitation of the republican theory portraying courts as too activist or as mere obstacles to the popular will. Once the courts are captured and aligned with the ruling party's agenda, hybrid leaders might shift to exploiting the 'higher law' imaginary. To illustrate, they can delegate contentious or socially sensitive matters to the apex courts, effectively using them to legitimise decisions that might be unpopular or politically risky.[83] By doing so, they seek to present the courts' judgements in such matters as grounded in higher moral or legal principles, thus positioning the court as an arbiter of ultimate truth that transcends ordinary democratic processes. This tactic is meant to allow the government to avoid direct responsibility for unpopular decisions, claiming that the court's ruling is based on fundamental principles that the government must respect, even if the decision is controversial. However, such manipulation can ultimately backfire as it risks being perceived, in republican understanding, as overstepping democratic boundaries.

2.5 Assumptions and Analytical Approach

Based on the above considerations, we formulate the following assumption that will be tested in the following sections: trust in the judiciary is a multifaceted construct that can be strategically influenced by targeting its specific subcomponents, which are shaped by the interplay between institutional safeguards and public perceptions of these safeguards as well as societal expectations prevalent in a given context. Legal reforms that alter formal safeguards can be introduced with reduced risks to overall public trust in courts, as long as these changes align with or do not undermine the public's societal expectations or perceptions about the courts.

To test our assumption, we use two case studies of PiS' rule. The first is the Constitutional Court capture (2015-2016). Here, we outline the trust and distrust manipulation tactics employed by the former ruling party to justify and facilitate the Court's takeover and reflect on their success. For the second case study, we analyse the trust and distrust manipulation tactics employed by PiS

els and rules. See, e.g., European Commission for Democracy through Law (Venice Commission), European standards on the independence of the judiciary a systematic overview, no. 494/2008, at 3.

77 Klingsberg, above n. 75, at 43-44.

78 Sadurski, above n. 1.

79 See G. Halmai, 'The Hungarian Approach of Constitutional Review', in W. Sadurski (ed.), *Constitutional Justice: East and West* 226, at 230-249 (2002).

80 H. Debska and T. Warczok, 'Sakralizacja i profanacja. Trybunał Konstytucyjny jako struktura mityczna', 5 *Państwo i Prawo* 63 (2018), at 65.

81 *Ibid*., at 65. And not as later done by PiS, as a sign of post-communist corruption.

82 Klingsberg, above n. 75, at 45.

83 Sadurski, above n. 1.

doi: 10.5553/ELR.000272

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to 'use' the same Court for the abortion ruling. We use McKnight and Chervancy's theoretical concepts to pinpoint the mechanisms of manipulation applied to the Constitutional Court by PiS in the given periods. We investigate how the methods of trust manipulation differed and also discuss how they achieved different results.

Secondly, the basis for our evaluation of the 'effectiveness' of trust manipulation between these two points is the comparison of CBOS polls on trust and distrust conducted between 2015-2016 (constitutional capture) and 2020 (abortion verdict). The CBOS polls we are using focus on measuring changes in either trust, distrust or support in the Tribunal in representative samples, alongside, depending on the year of the report, a variety of other institutions and political figures. We also incidentally use IBRIS and Gazeta Wyborcza surveys to corroborate some findings. This section of the article is guided by the available data on generalised 'trust' and 'distrust' rather than adhering strictly to McKnight and Chervancy's conceptual categorisations. Hence, several disclaimers apply. Existing CBOS data on trust and distrust show inconsistencies over the surveyed years and lack differentiation between various types of trust and distrust. Moreover, some CBOS polls conducted in the period of our analysis concentrate more on measuring people's 'satisfaction' or 'support' for specific institutions. While trust and support are distinct concepts, they are also related concepts.[84] Thus, considering the lack of available data, we treat them as closely related indicators of public sentiment to allow us to capture some understanding of public attitudes towards the Polish Constitutional Court during the period under review. Finally, due to the lack of panel data (i.e. data that would allow for the analysis of changes in the opinions and attitudes of the same individuals), any conclusions must naturally be treated with caution.

We now turn to the analysis of our case studies in the next section.

3 In (Our) Courts We Trust! Polish Pathway to Successful Judicial Overhaul

3.1 Poland as Hybrid Regime

After the fall of communism in 1989, Poland was initially celebrated as a model of successful transformation. It was the first to embark on democratisation through the Round Table agreements, which paved the way for free elections and political competition. Alongside Hungary, Poland was regarded as one of the most stable democracies in the region, characterised by independent and active judiciaries, vibrant civic engagement and strong political competition.[85] However, after more than twenty years of democratic governance, the country began to experience a gradual shift in its political regime under the leadership of the PiS party.

Known for its promise to eradicate the remnants of communism, once in power, PiS relied on a divisive, polarising discourse against the liberal order that had been installed after 1989,[86] disparaging the democratic transition and EU accession. The envisioned ideal was a 'Justice-based idea of a democratic state', aiming to expunge what they perceived as 'post-communism'. Translating this populist ideal into practice, however, required constitutional changes through formal amendments of a two-third majority in the Sejm and an absolute majority in the Senate – a threshold that PiS, despite convincingly winning the parliamentary elections in 2015, did not reach.[87] Nevertheless, the limitations of the existing constitutional order actually intensified the party's commitment for institutional reforms meant to 'heal the country'[88] while indications of legal limitations were perceived as corrupt 'legal impossibilism'.[89]

Unable to achieve the necessary constitutional amendments through constitutional means, PiS shifted its strategy to work within the existing framework while seeking ways to circumvent the legal and institutional barriers to their objectives. And that is precisely why the true nature of Poland's regime between 2015 and 2023 cannot be grasped by examining its constitutional framework.[90] The PiS party, as extensively described by Wyrzykowski and Ziółkowski,[91] focused on formal legality of its desired reforms and practices, while denying that they were substantively violating the Constitution. Hence, it is in the execution and manipulation of legal acts and structures that the unconstitutional hybrid nature of PiS' rule becomes evident. To mention a few: PiS' refusal to recognise legally appointed Tribunal judges from the previous government and installing their own appointees; the creation of a legal basis for not publishing Tribunal's decisions; overhauling the judicial system along with the rules governing the Prosecutor General (including its merger with the role of Minister of Justice); lowering of the retirement age for Supreme

84 While trust generally reflects a deeper, more stable belief in the integrity or reliability of an institution, support can indicate a more immediate or pragmatic approval of its actions or policies.

85 M. Piatkowski, *Europe's Growth Champion: Insights from the Economic Rise of Poland* at 159-204 (2018); W. Sadurski, *Poland's Constitutional Breakdown* (2019): Even though there was criticism, as claimed by Sadurski, '[i]n a non-ideal world, the 1997 Polish Constitution was born of a process that ticked many of the boxes of the deliberative democratic ideal.'

86 Zielonka, above n. 6.

87 The procedure for amending the Polish Basic Law is governed by Art. 235 of the Constitution.

88 http://pis.org.pl/media/download/528ca7b35234fd7dba8c1e567fe729741baaaf33.pdf (last visited 12 September 2024), at 37.

89 J. Kaczyński, 'Musi się skończyć czas folwarku. "Wychodzimy z imposybilizmu ostatnich 25 lat"', *WPolityce.pl* (2016).

90 A. Jakab, 'How to Return from a Hybrid Regime into a Constitutional Democracy. Hypothetical Constitutional Scenarios for Hungary and a Few Potential Lessons for Poland', in M. Bobek, A. Bodnar, A. von Bogdandy & P. Sonnevend (eds.), *Transition 2.0. Re-establishing Constitutional Democracy in EU Member States* (2023) 145.

91 Wyrzykowski and Ziółkowski, above n. 60.

doi: 10.5553/ELR.000272

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Court judges; reforming the National Council of the Judiciary and the process of judicial appointments; and so on.[92] All of these changes were introduced with the 1997 Constitution still in force and untouched, while maintaining a facade of formal legalism.

Moreover, as noted by Sadurski, while fundamental rights may not have been under massive attack during PiS governance (as one might observe in fully authoritarian systems), the stability of the legal environment – crucial for the protection of these rights – was significantly and intentionally eroded.[93] Upholding fundamental rights became in practice (for certain groups) uncertain as well.[94]

Crucially, while the political opposition was seemingly able to function and compete for power during PiS' term (and ultimately succeeded in doing so), media propaganda through state-funded networks and state institutions, as noted by OSCE, detracted from the competitive process.[95] Furthermore, intimidation of candidates, gerrymandering before the 2018 local elections and the 2019 European Parliament elections,[96] and even changing the electoral code before the 2023 elections, demonstrate PiS' unwillingness to embrace democracy as 'institutionalized uncertainty' with stable rules of the electoral game and unpredictable results.[97]

Altogether, the legal alterations and informal tactics employed by PiS cannot be deemed as attributes of a democratic or a 'flawed' democratic regime. These were not incidental transgressions; it was a systemic orchestration of building a distinctive political system. For all of the foregoing reasons, we believe that Poland under PiS rule, alongside Hungary, despite the differences between the two,[98] serves as a compelling example of the political system of a once-stable liberal democracy turning into a hybrid regime.

3.2 Playing with Trust and Distrust

As already mentioned, to secure public support for their illiberal agendas and ultimately maintain their rule, hybrid leaders must strategically shape the perceptions of the societal segments they operate within. The case of PiS was no different. To push through its flagrant reforms – targeting the judiciary and the Constitutional Court – the party relied on popular grievances present within Polish society. In this context, trust and distrust played essential roles.

Although the Kaczyński brothers themselves participated in the Roundtable talks that negotiated Poland's transition to democracy, they viewed the outcome as a 'rotten compromise'.[99] Similarly, the consequent 1997 Constitution was seen by them as an expression of this compromise, cementing a self-perpetuating 'mono-power' within the political-institutional system.[100] From the early 2000s, Jarosław Kaczyński and his political party, along with related conservative circles, aspired to establish a so-called Fourth Republic aimed at 'breaking apart the system that was directing Poland's political, economic, and, to a certain extent, social life'.[101] With these slogans in hand, PiS launched its anti-judiciary campaign. The main message appeared simple: we're rooting out (post-) communists and anyone who is to oppose proposed reforms is defending the status quo of a 'post-communist establishment', which included a 'juristocracy'. It was aimed at prosecuting a presumed judicial elite believed to have originated from the communist nomenklatura; if not communist officials themselves, then from a next-generation 'trickled-down' caste. At the same time, a variety of rhetoric was used,[102] not always being consistent, which catered to diverse categories of trust and distrust among (potential) supporters.

First of all, exploiting affective distrust appears to have played a key role in the rhetoric of establishing a 'Fourth Republic'. The system created in Poland after 1989, ac-

92 See, e.g., VENICE COMM'N, Opinion No. 860/2016, 16 (14-15 October 2016); A. Bień-Kacała, 'Informal Constitutional Change. The Case of Poland', 6 *Przegląd Prawa Konstytucyjnego* 199 (2017).

93 W. Sadurski, 'Populism and Human Rights in Poland', in G.L. Neuman (ed.), *Human Rights in a Time of Populism: Challenges and Responses* 60 (2020).

94 See, e.g., Council of Europe Commissioner for Human Rights, 'Memorandum on the Stigmatisation of LGBTI People in Poland' (3 December 2020), https://rm.coe.int/memorandum-on-the-stigmatisation-of-lgbti-people-in-poland/1680a08b8e (last visited 12 September 2024); Human Rights Watch, 'The Breath of the Government on My Back': Attacks on Women's Rights in Poland' (6 February 2019), https://www.hrw.org/report/2019/02/06/breath-government-my-back/attacks-womens-rights-poland (last visited 12 September 2024); M. Bucholc, 'The Anti-LGBTIQ Campaign in Poland: The Established, the Outsiders, and the Legal Performance of Exclusion', 44(1) *Law & Policy* 4-22 (2022), https://doi.org/10.1111/lapo.12183; A. Bodnar and A. Gliszczyńska-Grabias, 'Strategic Lawsuits against Public Participation (SLAPPs), the Governance of Historical Memory in the Rule of Law Crisis, and the EU Anti-SLAPP Directive', 19(4) *European Constitutional Law Review* 642 (2023), https://doi.org/10.1017/S1574019624000063.

95 OSCE, 'Poland, Parliamentary Elections, 13 October 2019: Statement of Preliminary Findings and Conclusions', https://www.osce.org/odihr/elections/poland/435932 (last visited 12 September 2024); OSCE, 'Poland, Parliamentary Elections, 15 October 2023: Statement of Preliminary Findings and Conclusions', https://www.osce.org/odihr/elections/poland/555048 last visited 12 September 2024).

96 R. Markowski, 'Creating Authoritarian Clientelism: Poland after 2015', 11 *Hague Journal on the Rule of Law* 111 (2019), https://doi.org/10.1007/s40803-018-0082-5.

97 A. Przeworski, 'Democracy as an Equilibrium', 123(3-4) *Public Choice* 253 (2005).

98 See, e.g., A. Bozóki and D. Hegedűs, 'An Externally Constrained Hybrid Regime: Hungary in the European Union', 25(7) *Democratization* 1173 (2018), https://doi.org/10.1080/13510347.2018.1455664.

99 T.T. Koncewicz, 'The Capture of the Polish Constitutional Tribunal and Beyond: Of Institution(s), Fidelities and the Rule of Law in Flux', 43(2) *Review of Central and East European Law* 116-73 (2018).

100 S. Bill and B. Stanley, 'Whose Poland Is It to Be? PiS and the Struggle between Monism and Pluralism', 36(3) *East European Politics* 378 (2020), https://doi.org/10.1080/21599165.2020.1787161.

101 M. Karnowski and P. Zaremba, *O dwóch takich. ALFABET braci Kaczyńskich* (2006).

102 See, e.g., A. Wójcik, 'Six Arguments PiS Uses to Justify Poland's Judicial Overhaul – and Why They Are Wrong', https://notesfrompoland.com/2020/01/20/six-arguments-pis-uses-to-justify-polands-judicial-overhaul-and-why-they-are-wrong/ (last visited 12 September 2024); D. Tilles, '"There Is a Problem with the Rule of Law in Poland," Says Ruling Party Chief', https://notesfrompoland.com/2020/09/09/there-is-a-problem-with-the-rule-of-law-in-poland-says-ruling-party-chief/ (last visited 12 September 2024).

doi: 10.5553/ELR.000272

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cording to PiS' leader, was unjust not only because of presumed remnants of communist rule but also, in another, more important sense, 'it created a large group of people in society without opportunities, people who were largely excluded, and sometimes completely marginalized … In that system, the state served *the strong*, and therefore, it was a theoretical state.'[103] This way, the PiS' leader aimed to leverage still-existing grievances among Poles, many of whom felt that the benefits of Poland's post-1989 transformation had not been evenly distributed, or some of them believed that certain elites had been unfairly insulated from accountability (of whom judges could be a prominent example). By appealing to this affective distrust in a post-communist judiciary, the PiS sought to galvanise support by framing itself as the first reformer dedicated to addressing these systemic imbalances.

Such manipulation can be seen as a classic example of redirecting cognitive trust from the institution (courts) to the ruling party, aiming to convince citizens that PiS, rather than the current constitutional order, including the courts, was better positioned to safeguard their interests and deliver justice. And Kaczyński had reasons to believe that such strategy would be successful. CBOS poll from May 2014 showed that according to respondent Poles, ones of the most serious mistakes or omissions of the democratic transformation were[104] the insufficient vetting of collaborators of the communist-era special services (29%) and the lack of accountability for individuals from the previous system (24%).[105]

While the Constitutional Tribunal was specifically criticised as a corrupt political body – primarily due to its origins in the communist era – it is worth noting that this criticism increasingly focused on its president, Andrzej Rzepliński. The President was framed as a villain who caused the institution to function improperly and whose public rule-of-law defending actions were coined as subordination to the previous government. In fact, as Dębska and Warczok stated, in terms of religious sociology, they were viewed as a contamination of a 'sacred space'.[106] Hence, the Court was presented to fall short of maintaining the 'higher law' ideal it was expected to embody.

Simultaneously, on-going criticism targeted systemic inefficiencies within the whole court system, specifically addressing issues such as lengthy proceedings and a lack of organisational structure – as reform attempts had failed a few years prior. Many Poles were indeed frustrated with the inefficiency of the courts in general – a 2013 CBOS poll revealed that 51% of respondents identified the protracted nature of legal proceedings as the main issue troubling the judiciary.[107] Therefore, such discourse could fell on fertile ground and targeted the cognitive trust in the competence of courts, including the Tribunal.[108]

Tapping into present public dissatisfaction in the existing judiciary, the PiS' goal was to discredit not only the judicial system as a whole but also the judges themselves. 'Dikastophobia' – manufactured or encouraged fear or distrust of judges – can be particularly effective in subsequent erosion of public trust in the judiciary as a whole, as it boils down to circular rhetoric: the system is bad because it has bad judges, and the judges are bad because they belong to a bad system. Predominantly utilised by the former Polish Minister of Justice, such narrative emphasised that the true issues plaguing the Polish justice system were miscarriages of justice and the misconducts of individual judges.[109] This appears to have targeted mainly the cognitive trust in the benevolence of judges.

As such, people's cognitive trust beliefs they might have had in the general professionalism of the judiciary and judges – such as their competence and predictability – could be transformed into negative perceptions amidst the stimulation of cognitive beliefs about a lack of benevolence by judges. Kaczyński's infamous 'legal impossibilism' and former Prime Minister Mateusz Morawiecki's calls to end 'a positivist approach' to law appear to fit this narrative; judges might have been competent in applying the law, but this was ultimately seen as a negative trait rather than a benevolent one.[110] For instance, Kaczyński portrayed constitutional checks and balances, most vividly the Constitutional Court, as an overly formalistic approach by a liberal state, constraining 'the rational freedom of decision-making by officials' or 'the popular will of the Polish nation'.[111] He publicly described the Constitutional Tribunal as 'the bastion of everything in Poland that is bad'.[112] And Morawiecki exclaimed: 'Of course the law is not the most important. The life of people and security is. The positivist approach to law has to end at some point';

103 https://www.prawo.pl/prawo/program-pis-kaczynski-zapowiada-zmiany-ustrojowe,479969.html (last visited 12 September 2024).

104 After excessively far-reaching privatisation (36%) and tolerating corruption in politics (31%).

105 CBOS NR 63/2014, https://www.cbos.pl/SPISKOM.POL/2014/K_063_14.PDF (last visited 12 September 2024).

106 Debska and Warczok, above n. 80, at 70.

107 CBOS, BS/5/2013, https://www.cbos.pl/SPISKOM.POL/2013/K_005_13.PDF (last visited 12 September 2024).

108 See, e.g., Paweł Mucha, Duda's Deputy Chief of Staff, pledged to continue judicial reforms, stating, 'because we need to decrease the length of proceedings', in Wójcik, above n. 102.

109 See, e.g., B. Grabowska-Moroz and O. Śniadach, 'The Role of Civil Society in Protecting Judicial Independence in Times of Rule of Law Backsliding in Poland', 17(2) *Utrecht Law Review* 56, at 59 (2021), https://doi.org/10.36633/ulr.673.

110 Criticism that Polish judges are 'textual judges' is a critique that is, by the way, also more widespread and recurrent; see, e.g., T.T. Koncewicz, 'In Judges We Trust? A Long Overdue Paradigm Shift within the Polish Judiciary', https://verfassungsblog.de/in-judges-we-trust-a-long-overdue-paradigm-shift-within-the-polish-judiciary-part-i/ (last visited 12 September 2024).

111 K. Krzyzanowska, 'Legal Impossibilsim versus the Rule of Law', https://revdem.ceu.edu/2021/06/29/legal-impossibilism-versus-the-rule-of-law/ (last visited 12 September 2024).

112 https://www.politico.eu/article/poland-constitution-crisis-kaczynski-duda/ (last visited 12 September 2024).

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'Law and justice. Not only law.'[113] In this framing, liberal democracy, the rule of law or Polish constitutional practices were linked with injustice.

Furthermore, against the backdrop of the formal legalism enacted by PiS, those judges who attempted to protect constitutional principles could be accused of not only using bad law competently to 'protect their self-interest' (vide Rzepliński) but also of exceeding the law, including laws established by the democratically elected ruling party. According to PiS leader, thanks to the courts, all actions of the *democratically* appointed government 'could be questioned for whatever reason'.[114] On a similar note, Kaczyński stated: 'In a democracy, the sovereign is the people, their representative parliament and, in the Polish case, the elected president.' 'If we are to have a democratic state of law, no state authority, including the constitutional tribunal, can disregard legislation.'[115] Lech Morawski, one of the illegal judges elected to the Polish Constitutional Tribunal, also noted: the Tribunal in Poland was unconstrained and became too activist, so there was a need for a 'republican' reaction to restore the democratic powers of the Parliament.[116] Sociologist Adam Czarnota implies that the actions against the Constitutional Tribunal could be considered as a reply to the unconstrained activism of the Tribunal that took the Constitution away from the citizens.[117] Hence, we can also observe a republican imaginary that the Court is alleged to have failed to uphold, with allegations of using the law in an activist rather than a benevolent manner.

In addition, defenders of the rule of law and judicial independence in Poland were systematically framed as hostile, corrupt post-communist elites who prioritised self-interest or lacked benevolence towards the people. Hence, they were accused of cunningly using the law to their benefit. They were also depicted as orchestrating malicious political attacks against the country, particularly on emotional affective issues like identity and migration, and portrayed as a threat to the preservation of Polish authenticity. Rule-of-law proponents were associated with German interests, Brussels, or cosmopolitan, un-Polish elites.[118] Judges invoking EU law to protect their independence were viewed as undermining Polish constitutional identity, with a strategy aimed at eroding the sincerity of and trust in their legal arguments. Claiming that the primacy of 'our constitution(al identity)', 'sovereignty'[119] or 'tradition'[120] is at stake evokes potentially stronger affective reactions, which can overshadow the impact of specific legal arguments. Supported by a biased state media, Kaczyński's portrayal painted domestic critics as undemocratic and the 'worst sort of Poles' and 'traitors' who complained about Poland to Brussels.[121]

Once captured, interestingly, the Tribunal seem to have picked up one of the ruling's party manipulation of cognitive trust beliefs in judges in its reasonings: in one case, it explicitly pointed out that Supreme Court judges might have used the law procedurally in a correct manner (competence) but that the use of law did not always mean it was 'ethical' to do so or served justice (benevolence, integrity).[122] The Tribunal not only relied on strictly legal arguments but also insinuated that Polish judges who refer to the CJEU to contest the Tribunal are not supportive of the Polish cause and are not loyal. This was highlighted by pointing out that Polish judges wear a Polish eagle on their robe, not an EU flag.[123]

3.3 Relative Success

By employing the above tactics, the governing party presumably aimed to mitigate the negative repercussions of diminished judicial independence resulting from the legal changes. They sought to ensure that these effects were not perceived as a constitutional threat by their supporters, and, as a result, some may have even derived a certain level of satisfaction from them.

For instance, despite a reported drop in trust, with a 16% increase in negative opinions and an 8% decrease in positive opinions about the Constitutional Tribunal in comparison to the period preceding the reforms implemented by PiS, the data from CBOS in April 2016[124] emphasised that citizens' attitude towards the Tribunal was strongly related to their political views. Subsequent

113 https://www.dw.com/en/mateusz-morawiecki-eu-completely-misunderstood-the-situation/a-37547967 (last visited 12 September 2024).

114 Above n. 113.

115 https://tvn24.pl/polska/zjazd-okregowy-pis-w-warszawie-przemowienie-jaroslawa-kaczynskiego-ra649572-ls3186955 (last visited 12 September 2024).

116 As referred by Wyrzykowski and Ziółkowski, above n. 60, at 520.

117 As referred *ibid.*, at 520. See also https://forsal.pl/artykuly/1049655,czarnota-po-1989-roku-sedziowie-uzyskali-nieslychane-przywileje-i-oderwali-sie-od-spoleczenstwa-wywiad.html (last visited 12 September 2024).

118 Kaczyński, e.g., maintained that criticism against the judicial reform was 'to a large extent international' and alluded to 'external interference' in Polish affairs. See, e.g. http://wyborcza.pl/7,75398,22159981,jaroslaw-kaczynski-w-tv-trwam.html (last visited 12 September 2024).

119 Judges who invoke EU law violate the Polish Constitution and sovereignty: PAP, '"Some Judges Manipulate CJEU Ruling," Polish PM says', https://www.pap.pl/en/news/news%2C549294%2Csome-judges-manipulate-cjeu-ruling-polish-pm-says.html (last visited 12 September 2024).

120 L. Morawski, 'A Critical Response', https://verfassungsblog.de/a-critical-response/ (last visited 12 September 2024). Morawski claimed that the liberal constitutional model is incompatible with the Polish tradition and constitutional identity; the Polish government argued that reforms were justified by the Polish constitutional identity and that also by EU law legal traditions of the Member States need to be respected, https://www.premier.gov.pl/files/files/white_paper_en_full.pdf (last visited 12 September 2024); https://prawo.gazetaprawna.pl/artykuly/1439606,morawiecki-wyrok-tsue-dzialanie-krs-wywiad.html (last visited 12 September 2024).

121 R. Csehi and E. Zgut, 'We Won't Let Brussels Dictate Us': Eurosceptic Populism in Hungary and Poland', 22(1) *European Politics and Society* 53, at 61 (2021).

122 Constitutional Tribunal Decision of 21 April 2020, ref. no. Kpt 1/20, at 80 stating: 'The issue of abuse of competence is related to a long-recognised paradox, when even a procedurally correct action of an authorised entity is generally considered as improper or immoral.'

123 *Ibid.*, at 74: 'By its resolution, the Supreme Court also ignored the fact that judges in the Republic of Poland pass their sentences as Polish judges on behalf of the Republic of Poland and with its symbol on their chests, i.e., with the image of the Polish eagle, and not as "EU judges" bearing the emblem of the European Union.'

124 CBOS NR 43/2016, https://www.cbos.pl/SPISKOM.POL/2016/K_043_16.PDF (last visited 12 September 2024).

doi: 10.5553/ELR.000272

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opinion polls conducted in 2017, following the appointment of Julia Przyłębska, a PiS appointee, as the new President of the Tribunal, underscore this political divide. Despite opposition voters expressing increasingly negative views on the Tribunal, PiS supporters consistently registered more positive opinions regarding the Tribunal's performance.[125] This trend highlights the deepening ideological chasm between the government and its critics, with attitudes towards the Tribunal serving as a microcosm of broader political divisions. As the ideological gap between those critical of the ruling majority and the government widens, the perception of an erosion of judicial independence becomes more evident and exerts a greater influence on the public's trust in the legal system.

Notably, data from CBOS' report in March 2018 confirmed the extent of this polarisation, as half of the respondents declared that they do not trust the Constitutional Tribunal, marking a 14% increase in distrust compared to 2016.[126] Similar conclusions can be drawn by comparing the report[127] specifically focused on the 'assessment of the activities of the Constitutional Tribunal'. Comparing the changes between September 2018 and March 2019, one can observe an increase of 2 percentage points among respondents who assess it as 'bad', but also, importantly, an increase of 5 percentage points among those who assess the activities of the Constitutional Tribunal as 'good'.

Finally, in the national elections of 2019, PiS secured a greater number of votes and a larger percentage share in the Sejm, even though it faced losses in the Senate. This electoral outcome highlighted the enduring political strength and support for PiS, despite deteriorating judicial independence and growing international criticism. Importantly, in the 2019 CBOS rankings, in both pre- and post-election rankings of trust in politicians, PiS politicians secured much higher individual scores than their counterparts in the opposition.[128] It is noteworthy that President Duda enjoyed the most trust; a figurehead who had been instrumental in allowing PiS to pack the Tribunal with its own judges while claiming to be independent himself and guarding Polish constitutionality.[129]

125 CBOS NR 32/2017, https://www.cbos.pl/SPISKOM.POL/2017/K_006_17.PDF (last visited 12 September 2024).

126 CBOS NR 35/2018, https://www.cbos.pl/SPISKOM.POL/2018/K_035_18.PDF (last visited 12 September 2024).

127 CBOS NR 44/2019, https://www.cbos.pl/SPISKOM.POL/2019/K_044_19.PDF (last visited 12 September 2024).

128 With President Andrzej Duda and Prime Minister Mateusz Morawiecki on top of the list.

129 See https://www.prezydent.pl/aktualnosci/wypowiedzi-prezydenta-rp/wywiady/zaprzysiezenie-trzech-kolejnych-sedziow-byloby-lamaniem-konstytucji-,4583 (last visited 12 September 2024); T.T. Koncewicz, 'Constitutional Capture in Poland 2016 and Beyond: What Is Next?' *Verfassungsblog* (2016), https://verfassungsblog.de/constitutional-capture-in-poland-2016-and-beyond-what-is-next/ (last visited 12 September 2024); https://www.president.pl/news/julia-przylebska-appointed-new-constitutional-tribunal-chair-in-poland,36291 (last visited 12 September 2024).

4 Polish Abortion Ruling: The Captured Court Loses 'Trust'?

4.1 Background

The abortion issue in Poland has been subject to constant flux since democratisation. While 4 June 1989 marked the end of Communism in Poland, since then, those favouring women's right of choice in Poland have faced a paradox.[130] The very political changes that were expected to expand individual freedoms and protect human rights have, in reality, led to putting women's reproductive rights in a battleground for broader cultural and moral debates. In the 1990s, many members of the anti-communist opposition actively joined the anti-abortion campaign, including the National Congress of the Solidarity ('Solidarność'[131]) which – against the position of its female members – adopted a resolution on the protection of conceived life.[132] In the parliament, supporters of a stricter abortion policy, representing mainly the Christian-nationalist political fractions, motivated the urge to amend the abortion law by the necessity to reject the communist past and to renew the traditional Polish values identified with Catholicism. In turn, supporters of liberalisation pointed out that that the actual topic of debate was not just the abortion law but the entire sphere of future relations between the Church and the democratic state.

In March 1992, on the initiative of deputies from the Christian National Union party, a draft law on the legal protection of the conceived child was submitted to the parliament. Renamed during the legislative process, the draft served as the basis for the so-called abortion compromise, materialised by the adoption of the Act of 7 January 1993 on Family Planning, the Protection of Foetuses, and Grounds Permitting the Termination of a Pregnancy. According to 1993 Act, abortion was allowed if one of the following conditions was met: (1) the pregnancy constituted a threat to the life or health of the mother; (2) prenatal tests indicated severe and irreversible damage to the foetus; and (3) there was a justified suspicion confirmed by the prosecutor's certificate that the pregnancy resulted from a prohibited act. As early as in 1996, significant steps towards liberalisation were taken: specifically, on 30 August 1996, the Act amending the 1993 Anti-Abortion Act was passed. The most noteworthy alteration was the return to the so-called social reasons as one of the indications for the termination of pregnancy. However, also the story of 1996 Amending

130 A. Kulczycki, 'Abortion Policy in Postcommunist Europe: The Conflict in Poland', 21(3) *Population and Development Review* 471 (1995), https://doi.org/10.2307/2137747.

131 Solidarity (Polish: 'Solidarność') founded in August 1980 was a Polish biggest and most famous anti-authoritarian social movement and trade union using methods of civil resistance to advance the causes of workers' rights and social change.

132 https://www.solidarnosc.org.pl/dok/wp-content/uploads/2012/09/Scan0314.pdf (last visited 12 September 2024).

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Act was short-lived. Shortly after it came into force, a group of senators submitted a motion to the Constitutional Tribunal to examine its compatibility with the then-binding Constitutional Act of 17 October 1992.[133]

Ultimately, on 8 May 1997, the Constitutional Tribunal overturned an amendment to a compromise law of 1993. The amendment that allowed for abortion due to difficult personal situation of the women was struck down. From that moment on, the Tribunal's judgement of 1997 became the status quo. Several attempts to amend the abortion legislation[134] had failed, with no consensus reached on any of the new proposals. Policymakers could not find common ground to address the issue due to strong reactions on both sides of the dispute – those supporting liberalisation and those who defended the anti-abortion policy. Hence, despite cases brought to the ECtHR by Polish women since 2007,[135] the abortion debate was not significantly revived in the parliament until 2016 amidst the PiS government's tenure.

4.2 Navigating Trust: PiS' Strategic Manipulation in Abortion Restriction

During the 2015 electoral campaign, as explained in Section 3, PiS strategically positioned itself as a reformist force, zeroing in on systemic issues within Poland's institutions, particularly the judiciary – as emblematic of broader societal inefficiencies and institutional stagnation. However, Jarosław Kaczyński also understood that winning elections in Poland required more than just a platform of institutional reform. The party needed to secure the unwavering support of its core conservative base – a significant portion of the electorate that viewed traditional Catholic values as non-negotiable pillars of Polish identity. Hence, references to those values featured prominently in the party's pre-election programme, notably addressing the right to life, i.e., the scope of the abortion legislation.[136]

Following their electoral victory, in line with their campaign promises, PiS started to actively pursue more stringent abortion regulations. This push was partially driven by petitions submitted in 2016 from both conservative and liberal NGOs advocating either for the restriction[137] or liberalisation[138] of existing abortion laws. While the PiS-dominated parliament dismissed the petition supporting liberalisation, they approved the conservative one for parliamentary consideration. This decision ignited widespread protests across the country, culminating in large-scale national protest in October 2016 bringing together 100,000 protesters who marched in 143 villages, towns and cities in Poland.[139] The intensity of the civic opposition caught the ruling party off guard, instilling a sense of fear as they realised the depth of public sentiment on the issue. Given that PiS was still early in its term, the backlash led to the draft law being abandoned, with many elected representatives distancing themselves from the initiative entirely.[140] PiS seemed to fail to anticipate both the significance of the issue to Polish society and the scale of the ideological divide on the matter, including within their own voter base. Recognising their misstep, the party realised that their strategy needed recalibration to effectively manage both the legal and social dimensions of abortion reform and avoid exacerbating public dissent.

And, for that matter, they decided to leverage the then-already-captured Constitutional Tribunal as a key instrument. In 2017, a group of deputies from PiS and Konfederacja filed the motion to the Tribunal appealing for scrutinising the compatibility of the grounds for abortion in cases of 'fatal foetal anomaly' with the Polish Constitution. The captured Tribunal, however, did not adjudicate on the case immediately. Although several complaints from the deputies were filed, the Tribunal consistently maintained that they had a caseload to complete, until the 2017 motion was eventually dismissed on formal grounds.[141] In 2019, another group of MPs re-launched a proposal similar in content to the one from 2017. And this motion, too, had not been ruled upon until the end of parliamentary term. In hindsight, such postponements already suggested a strategic 'waiting game'. The upcoming 2019 election period, when social stability was crucial for maintaining electoral support, was clearly not the most opportune moment to pursue a socially sensitive matter. However, in 2020, with the onset of the COVID-19 pandemic, an opportune moment unfolded precipitously and in the open.[142] The Tribunal could then issue rulings without the need for parliamentary or societal debate and seemingly also without the fear of societal protests, as all gatherings were prohibited.[143] And the use of that moment for issuing the judgement should not come as a surprise. As noted by Levitsky and Ziblatt, would-be au-

133 The Constitutional Act of 17 October 1992: on the mutual relations between the legislative and executive institutions of the Republic of Poland and on local self-government (*Journal of Laws of the Republic of Poland* of 23 November 1992, no. 84, item 426).

134 M. Fuszara, 'Legal Regulation of Abortion in Poland', 17 *Signs* 117 (1991).

135 *Tysiąc* v. *Poland*, ECHR (2007); *R.R.* v. *Poland*, ECHR (2011); *P. and S.* v. *Poland*, ECHR (2012).

136 http://pis.org.pl/media/download/528ca7b35234fd7dba8c1e567fe729741baaaf33.pdf (last visited 12 September 2024), at 7.

137 Motion of the Committee, 'Stop Abortion', https://orka.sejm.gov.pl/Druki8ka.nsf/0/CDB8B631C2EFE830C1258014002A4E47/%24File/784.pdf (last visited 12 September 2024).

138 Motion of the Committee, 'Save the Women', https://orka.sejm.gov.pl/Druki8ka.nsf/0/3C2A10A649B1C39EC12580290048DCD3/%24File/830.pdf (last visited 12 September 2024).

139 A. Cocotas, 'How Poland's Far-Right Government Is Pushing Abortion Underground', https://www.theguardian.com/news/2017/nov/30/how-polands-far-right-government-is-pushing-abortion-underground (last visited 12 September 2024).

140 E. Korolczuk, 'Explaining Mass Protests against Abortion Ban in Poland: The Power of Connective Action', 7 *Zoon Politikon* 91 at 93 (2016).

141 Decision of the Constitutional Tribunal of 1 March 2018, ref. no. K 13/17, https://orka.sejm.gov.pl/stanowiskaTK.nsf/nazwa/Stanowisko_K_13_17/$file/Stanowisko_K_13_17.pdf (last visited 12 September 2024).

142 A. Mica, M. Pawlak & P. Kubicki, 'Failure Privilege in Policymaking: Exploitation, (In)visibilization, and Future Projection in Abortion Policy in Poland', 38(1) *East European Politics and Societies* 148 (2024).

143 M. Giryn- Boudy, 'Hate Speech in Public Dialogue on the Example of: "Women's Strike 2020" – PiS government', 19 *Cywilizacja i Polityka* 254 (2021).

doi: 10.5553/ELR.000272

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tocrats often use economic crises, natural disasters and especially security threats – wars, armed insurgencies or terrorist attacks – to justify antidemocratic measures[144] or – as in this case – to bypass democratic scrutiny. Similarly, the decision to unfreeze the abortion issue in the Court in 2020 could be seen as PiS repaying a debt to its right-wing Catholic base following its re-election the previous year.[145]

On 22 October 2020, the Constitutional Tribunal ruled that the legislation that permitted abortion in cases of 'fatal foetal anomaly' was an unconstitutional interference with the right to life of the foetus as enshrined in the Constitution.[146] As a result, PiS de facto turned its desired political agenda into law, while simultaneously attempting to manipulate public trust in the Tribunal, in much the same way as it had done during the earlier capture of the Constitutional Court. Crucially, the use of the Constitutional Tribunal for abortion restriction was pivotal for the PiS' strategy of deflecting responsibility and managing public perception through a 'blaming game'. However, the approaches by PiS to maintain constitutional legitimacy tapped into the paradox of playing with different imaginaries of the Constitutional Court.

On the one hand, PiS engaged with the republican school imaginary, claiming that the ruling which had to be respected followed from a clear societal need – an issue that allegedly arose organically from society and many individual representatives in Parliament petitioning the Court. In addition, PiS claimed the verdict to be reflecting the 'will of the people' and that they were simply carrying out the majority's wishes, reminiscent of their stance during the judiciary reforms.[147]

On the other hand, by presenting the Tribunal's ruling as a legal obligation, PiS sought to invoke the 'higher law' imaginary of the Tribunal. It encouraged cognitive trust in the Tribunal's role as a neutral, lawful and competent protector of higher principles. Particularly, in justifying the legislative follow-up of the 2020 verdict, members of the then-ruling party drew parallels to the aforementioned pivotal 1997 K 26/96 ruling, where the Tribunal overturned the amendment allowing abortion in cases of difficult living conditions. The 1997 judgement was supposed to serve as an alibi for the 2020 decision, even though, as aptly underscored by Garlicki,[148] PiS selectively extracted from it what suited their narrative. By invoking the 1997 judgement, the ruling party sought to present the recent verdict as a natural progression aligned with established legal precedent, serving as a cognitive trust-building tactic. By associating the current decision with a past judgement, PiS sought to instil a sense of legitimacy (competence), reliability (integrity) and consistency (predictability) in the Tribunal's and their own approach to abortion-related matters. This calculated move – even though in contradiction with their previous criticisms of the same Tribunal when justifying its constitutional reform in 2015[149] – was aimed to persuade the public that the party's stance was not an abrupt departure but rather a continuation of a well-established legal trajectory.

4.2.1 The Arguments of the Tribunal Judges

Several observations can be made about the arguments of the PiS tribunal judges themselves too. Firstly, the Tribunal stated that the essence of the constitutional problem submitted to its assessment exists in specifying 'constitutional guarantees of legal protection of the life of a child in the prenatal period in the event of a collision of goods'. Therefore, it was tasked to first determine the legal status of the foetus, its human personhood and, secondly, the admissibility and limits of termination of pregnancy, i.e., the way of resolving the conflict of values (goods). The Tribunal pointed out that the solution to the first of these issues will have a fundamental impact on the second issue. To that end, the Tribunal stressed that 'the question of the legal status of a child in the prenatal phase is one of the most difficult issues which may be faced by constitutional courts.' Yet the very formulation of the legal problem by the Court suggests that the Court addresses it from an ethical rather than a legal perspective, since in the question itself it employs a term 'a child in the prenatal phase', rather than 'a foetus' as referred to in the contested provision. As Piotrowski points out,[150] such terminological modification reflects the tendency to lean towards the (Catholic) worldview-motivated change in the meaning of words, although the Court assured that it 'bases its conclusions on purely normative [legal] premises'. This is not entirely novel; Kocemba and Stambulski argue that a right-wing constitutionalism already existed in Poland, where 'it presents religious worldviews as textual consequences of the constitution without taking into account the voice of citizens.' Arguably, the PiS judges, by 'presenting religious metaphysical decisions as obvious from the content of the constitution, depoliticized it'[151] and claimed and relied on the Court's authority of knowing 'higher law' to instil trust.

Secondly, and in support of that argument, the Court in its verdict also concluded that the intention of the constitutional legislator was to leave the determination of the meaning of 'human being' on the grounds of Arti-

144 Levitsky and Ziblatt, above n. 42, at 92-93.

145 M. Bucholc and M. Komornik, 'Abortion ban on Demand', https://www.eurozine.com/abortion-ban-on-demand/ (last visited 12 September 2024).

146 Judgement of the Constitutional Tribunal of 22 October 2020, ref. no. K 1/20 (*Journal of Laws of 2021*, item 175).

147 A. Filipczak-Białkowska, 'Ideological Objects in Parliamentary Discourse', 48(2) *Acta Universitatis Lodziensis Folia Litteraria Polonica* 101 (2018).

148 M. Chrzczonowicz, 'Trybunał Zolla jako alibi Przyłębskiej-Kaczyńskiego. Trochę prawdy, dużo fałszu i demagogii' (interview with judge Garlicki) (2020).

149 *Ibid.*

150 R. Piotrowski, 'Nowa regulacja przerywania ciąży w świetle Konstytucji', 8 *PiP* 62 (2021).

151 K. Kocemba and M. Stambulski, 'Divine Decision-Making', https://verfassungsblog.de/divine-decision-making/ (last visited 12 September 2024).

doi: 10.5553/ELR.000272

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cle 38 of the Constitution[152] to the Tribunal itself – in the absence of any indication *expressis verbis* in the constitution of the temporal limits of human life and its legal protection, or the exclusion of the Court's cognition in this respect. Hence, even a democratic mandate existed for the Court to decide about these matters with its 'higher wisdom'.

Finally, the Tribunal tried to reinforce the legitimacy of the ruling by repeatedly referring to the 1997 judgement (K26/96) in its justifications and linking it to the present ruling (K 1/20). As such, it aimed for the same effects as intended by the arguments by PiS politicians, which is explained in Section 4.2.

In reality, fundamental legal criticism can be levelled against the ruling. Firstly, it should be highlighted that the coined concept of a 'child in the prenatal phase' by the Tribunal is not known to the Constitution. Secondly, an analysis of the Constitutional Committee's work on the normative content of Article 38 on 'human being' proves that the constitutional legislator did not leave it to the Tribunal. The legislator kept the content of Article 38 at a high level of generality to make it a programmatic norm addressed to lawmakers and to avoid prejudging socially sensitive issues concerning the conditions of pregnancy termination.[153] Finally, the K 1/20 judgement is not in alignment, but in fundamental contradiction with, the judgement delivered by the Court in 1997. Firstly, the Court omitted that the 1997 verdict concerned the weighing of two goods – the social welfare of the woman versus the protection of the life of the foetus. Unlike in 2020 case, the 1997 adjudicating panel did not evaluate the situation in which the foetus does not have the capacity to survive outside the woman's body and how to relate such situation to the premise allowing the woman to make a choice on the termination of pregnancy. Consequently, whereas the 1997 judgement declared the equivalence of protection between the foetus and the mother, in the latest judgement the Court assumed that the human foetus should be the predominant object of legal protection.

Importantly, some of the Tribunal's judges themselves contested directly the verdict, its justification and PiS' narratives in dissenting opinions.[154] Two carry particular significance: the ones submitted by Judge Piotr Pszczółkowski and Judge Leon Kieres.[155] Importantly, only the latter was the last one of the 'old' judges appointed to the Tribunal before PiS came to power. Piotr Pszczółkowski had been a member of PiS since 2015, and, in December of that year, he was elected by the Polish Sejm to the Tribunal. Both judges questioned not only the legitimacy of the judgement but also contended that the Tribunal should not have entertained the case, underlining instead that such decisions should fall within the purview of democratic parliamentarism.[156]

To make this case, Judge Pszczółkowski highlighted the circumstances under which this case came before the Tribunal, specifically:

> the initiators of this proceeding before the Tribunal were a group of deputies. They represented political groups with a parliamentary majority sufficient to undertake work in the Sejm on a potential amendment to the Family Planning Act and to enact a revision deemed necessary by them in this regard.... During the legislative process, any proposed changes to the Family Planning Act could have been subjected to public consultations and expert analysis. However, instead of using their parliamentary mandate to independently decide on the repeal of what they considered unconstitutional provisions in Article 4a § 1 point 2 of the Family Planning Act, the initiating deputies chose to invoke Article 191 § 1 point 1 of the Constitution to shift the burden of deciding on abortion legislation onto the Constitutional Tribunal. In my opinion, proceedings before a constitutional court may eventually conclude the law-making process, but they should never replace it.[157]

By questioning the Tribunal's jurisdiction to adjudicate on the abortion issue, Pszczółkowski effectively challenged the imaginary that the Tribunal should serve as the 'ultimate authority' in resolving highly contentious and politically charged disputes.

Furthermore, Judge Kieres undermined the 'will of the people' rhetoric in particular. He emphasised the societal actual opposition to stricter abortion regulations, underscoring that Poland's abortion laws rank among the most stringent in Europe. Indeed, surveys conducted in 2019 indicated that 58% of respondents supported women in Poland having the right to abortion on request up to the 12th week of pregnancy while a minority of 35% did not.[158] Furthermore, support for further restricting abortion beyond the 1993 compromise, which was upheld by the 1997 judgement, has never surpassed 30%. Hence, the democratic credibility of the ruling was also disputed.

152 Art. 38 of Polish Constitution: The Republic of Poland shall ensure the legal protection of the life of every human being.

153 T. Sroka, 'Komentarz do art. 38 Konstytucji', in M. Safjan and L. Bosek (eds.), *Konstytucja RP. Tom. I. Komentarz do art. 1–86* (2016).

154 The ruling was successfully executed by the Tribunal but comprised in total five dissenting opinions.

155 Judges Zbigniew Jędrzejewski, Mariusz Muszyński and Jarosław Wyrembak, in their dissenting opinions, concurred with the judgement itself, directing their objections only towards procedural matters and reasoning.

156 K. Kocemba and M. Stambulski, 'Gotowanie żaby. Prawicowy konstytucjonalizm a prawa kobiet w Polsce', in M. Grzyb, K. Sękowska-Kozłowska (eds.), *Kobieta - ciąża - zarodek -dziecko. Prawne aspekty przerywania ciąży* at 13 (2023).

157 Judgement of the Constitutional Tribunal of 22 October 2020, ref. no. K 1/20 (*Journal of Laws of 2021*, item 175).

158 https://www.newsweek.pl/polska/spoleczenstwo/sondaz-rosnie-poparcie-dla-aborcji-na-zadanie-do-12-tygodnia-ciazy/bf2lwy (last visited 12 September 2024).

doi: 10.5553/ELR.000272

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4.3 Constitutional Tribunal Ruling Side-Effects and the Rise of Distrust

The Courts' judgement was announced in October 2020 but was only officially published on 27 January 2021 – this is an unjustifiable delay. According to Polish law, a Constitutional Tribunal ruling takes effect upon publication, and such publication must occur 'immediately'. There are no legal grounds for the government – acting merely as the entity responsible for publication – to postpone the release of the judgement. Representatives from the government as well as Judge Przyłębska claimed that the delay was due to late submissions of some dissenting opinions. However, as the publication of the judgements should occur independently and precede the release of written reasons or separate opinions,[159] it can again be seen rather as a strategic 'waiting game' move – and for good reasons.

The verdict triggered an unprecedented wave of protests across the country, with hundreds of thousands of demonstrators taking to the streets despite pandemic restrictions. By postponing its publication, PiS' leaders could, however, still pretend that they are open for discussion and listening to the sovereign (even if the verdict de facto determined the matter). Some of them vividly distanced themselves from the judgement, with the President submitting his own draft on abortion regulation.[160]

Significantly, at this juncture, a discernible shift in public perception of the Constitutional Court had already occurred. According to a survey conducted by the Centre for Public Opinion Research between September and November 2020,[161] dissatisfaction with the Tribunal's performance rose dramatically to 59%, marking a 26-percentage-point increase. Conversely, favourable opinions decreased to 20%, a drop of 9%. Compared to the September 2020 assessment, there was a noteworthy decrease in individuals without a clearly defined opinion on the institution's functioning, falling from 38% to 21%. In comparison, a 2015 CBOS survey indicated that 42% of respondents viewed the Court positively, 12% negatively and 46% were unable to express an opinion. While above surveys focused on opinions about the Court's activities without explicitly mentioning 'trust', their outcomes align with those of an IBRIS poll conducted on 27 November 2020. In this survey, participants were directly asked about their trust in various institutions, and the Constitutional Tribunal found itself at the bottom of the ranking.[162]

These findings carry even greater significance when considered alongside a survey evaluating the opinions on the Constitutional Tribunal's ruling itself, which was conducted by Gazeta Wyborcza[163] in 2021. According to the survey, 67% of respondents did not accept the ruling and only 24% were in favour. Regarding the legalisation of abortion in Poland, 55% supported it under specific circumstances, while 29% favoured access up to the 12th week of pregnancy, and 8% advocated for a complete ban. Most notably, 64% of PiS voters declared support for abortion under certain conditions, marking a significant increase compared to the 52% the previous year. Conversely, the percentage of PiS' supporters advocating for a total abortion ban decreased from 28% to 16% while the proportion of those endorsing abortion on demand also rose slightly from 10% to 13%. In each of these scenarios, Poles had become more likely to accept abortion compared to a year earlier.

The survey results not only demonstrate a significant shift in public attitudes towards reproductive rights but also reveal a steady decline in trust in the Constitutional Tribunal among Poles following the abortion verdict. Unlike the situation after the judiciary reforms, where the ruling party managed to secure support from their electoral base, some of whom viewed the reforms positively, the outcome was different this time. The failure of PiS in manipulating trust during the abortion law restrictions may be attributed to a crucial difference in public perception compared to the judiciary and constitutional reform rhetoric. When PiS introduced judicial reforms, they were able to present a narrative of addressing systemic issues, portraying it as a necessary and constitutionally valid measure to combat corruption and inefficiencies in the judiciary. While this might not have been universally accepted, it could resonate, as reports indicated that, before the 2015 elections, most Poles held ambivalent views on the Tribunal's functioning.[164]

However, when it came to the abortion law restrictions, PiS faced a distinct challenge. The issue directly impacted individuals on a personal level, particularly women and their reproductive rights. The attempt to restrict abortion, coupled with the use of emotionally and affective loaded terms like '*pigułka śmierci*' (death pill) and '*przesłanka eugeniczna*' (eugenic premise) in political discourse led to a backlash and widespread public dissent. This rhetoric not only polarised the public but also contributed to a negative emotional response, diminish-

159 A. Gliszczyńska-Grabias and W. Sadurski, 'The Judgment That Wasn't (but Which Nearly Brought Poland to a Standstill): "Judgment of the Polish Constitutional Tribunal of 22 October 2020, K 1/20"', 17(1) *European Constitutional Law Review* 130 (2021), https://doi.org/10.1017/S1574019621000067.

160 https://www.prezydent.pl/prawo/wniesione-do-sejmu/prezydencki-projekt-zmiany-ustawy-o-planowaniu-rodziny,25646 (last visited 12 September 2024).

161 CBOS NR 150/2020, https://www.cbos.pl/SPISKOM.POL/2020/K_150_20.PDF.

162 https://wiadomosci.onet.pl/tylko-w-onecie/sondaz-ktorym-instytucjom-ufaja-polacy-pytamy-o-policje-kosciol-ue-tk-rzad-i-sady/swnt7mn (last visited 12 September 2024).

163 *Gazeta Wyborcza* is a Polish nationwide socio-political newspaper, https://wyborcza.pl/7,75398,27831348,kantar-dla-wyborczej-pis-przez-rok-nie-przekonal-wiekszosci.html (last visited 12 September 2024).

164 CBOS NR 171/2016, https://www.cbos.pl/SPISKOM.POL/2016/K_171_16.PDF (last visited 12 September 2024).

doi: 10.5553/ELR.000272

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ing the effectiveness of PiS' attempt to frame the constitutional narrative cognitively in their favour. Different from abstract judicial reforms, the abortion debate resonated with a broader population, reaching those less engaged in political and legal matters, because, unlike the perceived indirect impact of judiciary reforms, abortion restrictions directly affected a significant portion of the population. In an emotional discourse, PiS' attempts to hide behind the Tribunal's ruling backfired; references to republican and 'higher law' imaginaries lost their persuasive powers and their trust-building or trust-retaining capabilities. Trust erosion occurred both in the government and the Constitutional Tribunal, perceived as compromised in its impartiality due to involvement in a highly politicised decision. Morawiecki's and other PiS politicians admissions[165] regarding the impact of the abortion issue on the electoral outcome in 2023 underscored the significant repercussions of PiS' handling of the matter.

5 Conclusion

This article has addressed a relatively overlooked area in legal scholarship on rule-of-law backsliding – the variability of public trust in the rise of illiberal practices. It aimed to contribute to a sociological perspective on rule-of-law backsliding by engaging in theoretical discussions about trust, populism, (constitutional) courts, and hybrid regimes and their interlinkages, while applying McKnight and Chervany's conceptualisation of trust and distrust to Polish case studies.

Trust relationships, whether at the individual level or institutional level, involve complex dynamics encompassing cognitive, affective and behavioural aspects. Institutional safeguards, crucial for trust and task delegation, are subject to diverse perceptions. When applied to courts, these institutional safeguards primarily relate to perceptions of judicial independence. Additionally, trust in a constitutional court's authority may stem from an image of quasi-divine wisdom or, alternatively, from a democratic promise. Populist hybrid rulers, aiming for political success and the consolidation of their regime, engage with and manipulate these trust dynamics, altering the significance of trust components for specific audiences and situations.

This article analysed how the PiS party strategically manipulated trust relationships to rationalise the judicial reforms it has enacted since 2015 to uphold its regime. This involved portraying the existing system of checks and balances as unreliable in delivering justice. Defenders of the rule of law were depicted as disingenuous, while the ruling party positioned itself as the custodian of the 'true' constitutional values, deserving of trust to enact the people's will. These narratives appear to have enabled the ruling party to achieve relative success in manipulating trust dynamics across various situations and audiences during the capture of the Constitutional Court and its use to legitimise reforms.

This article has also analysed how the ruling party, PiS, strategically employed the captured Constitutional Tribunal in 2020 to further its political agenda on abortion. Here, the manipulation involved a dual narrative, on the one hand depicting the Constitutional Tribunal as a revered institution offering 'higher wisdom' and possessing consistency in contentious political debates, and, on the other, portraying it as a representative of the democratic will. However, this approach backfired, sparking public outrage and widespread protests. The Court's involvement in what was perceived as a highly controversial political decision undermined its perceived (remaining) trust in its authority, leading to a significant decline in public trust in the institution also among PiS voters.

This case underscores the significance of public sentiment on issues directly impacting individuals' lives, rendering them somehow more vigilant to manipulation attempts by populist governments. It highlights that strategies successful in one policy area may not seamlessly translate into another, particularly with emotionally charged topics. It also reinforces the correlation between the degradation of judicial independence in specific decisions and the erosion of trust in judicial institutions, particularly as the ideological gap widens between citizens and the government.

165 https://wydarzenia.interia.pl/tylko-w-interii/news-mateusz-morawiecki-nie-jestem-spakowany-licze-na-przekonanie,nId,7128747 (last visited 12 September 2024).

 doi: 10.5553/ELR.000272