

Towards Populist Jurisprudence? Community and Rights in the Rulings of the Polish Constitutional Court 2017-2019

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'Populist' Poland 2015-2019

- 'populist constitutionalism' {Mueller:7pmqAEr, Blokker:2017tp, Sadurski:2018vy, Walker:2017uy}
- strategies: hijacking of institutions, cherry-picking of regulations, bypassing of institutions
- 'legally sophisticated authoritarianism' {Halmai:2017wb}
- focus of the analysis: legislative and political discourse

Populist Jurisprudence?

- power/knowledge
- populism: chameleon concept {Kaltwasser:2017vo}
- rights as ‘tools by which a society protects its citizens against unwarranted interference from the state or tyrannical majorities’ {Sullivan:2007ej p. 98-99}
- indicators: new possible rights holders, the introduction of new or changed scope of existing rights, new ways of resolving conflicts between rights
- focus of the analysis: justifications of the decisions

Constitutional Court (CC)

- founded in 1982, began to issue judgments in 1986
- 15 members, 9 year term, election by Sejm (parliament)
- played a legitimizing role during the transformation (legitimacy thesis)
- used of formal constructions in reasoning (formalist thesis)
- attempt of monopolization of constitutional review (antagonism thesis)
- crisis in 2015: new law regarding the constitutional court, election of five new judges, president's objection, election of judges by the new parliament, decisions by CC,
- December 2016: new president of the court



Case I. Cyclical assemblies
(judgment of 16 March 2017, Kp 1/17)

'Smolensk monthlies'

- monthly gatherings, organized from May 2010 to April 2018 in front of the Presidential Palace in Warsaw
- commemoration of the victims of the Smolensk catastrophe and demand for 'truth'
- promotion of the need for new leadership and distrust for the elites
- counter manifestations – clash of political aesthetics
- in May 2017 the monthlies were registered as a cyclical assembly

Cyclical assemblies

- 26a paragraph 1: if meetings are organised by the same organiser in the same place or on the same route at least 4 times a year according to a prepared schedule or at least once a year on public and national holidays, and such events have taken place during the last 3 years, even if not in the form of assemblies, and were aimed in particular at celebrating significant and important events in the history of the Republic of Poland, the organiser may apply to the voivode for consent to the cyclical organisation of such meetings
- conflicting assemblies should be organised in distance at least 100 m
- cyclical assemblies have priority to choose the place and time of the assemblies in case of conflict

Judgement of 16 March 2017

- 62 pages
- 11 justices, including 8 who were selected on the recommendation of the Law and Justice
- all of the “old” justices and Justice Pszczółkowski wrote dissenting opinions
- a lot of references to case-law of CC and ECHR
- scope of the constitutional examination: art. 27 (that everyone is equal before the law and that everyone has the right to equal treatment by public authorities) and art. 57 (everyone shall be free to organise and participate in peaceful assemblies) of the Polish Constitution

Abstract control

'(...) the specific nature of preventive control therefore does not so much consist in a particularly strong presumption of the constitutionality of the acts subject to such control, since, in fact, the strength of that presumption must be considered to be the same in all types of control, but in fact that the Court has the knowledge about the content of the disputed provisions. It lacks knowledge about how such provisions are or will be interpreted and applied.'

'Nor can the Court a priori assume that a law will be applied in a manner inconsistent with the Constitution when its pro-constitutional interpretation is possible.'

Freedom of assembly is fundamental for democracy

- The Court noted a public element of freedom of assembly, manifested in the fact that this freedom performs a stabilizing function in relation to the existing social and political order and, above all, in relation to the representative mechanism. It is a form of active participation of citizens in the life of the state and thus of concern for the common good.
- Freedom of assembly has positive (the possibility of organising an assembly) and negative (the absence of interference with the assembly) side.
- This freedom is, however, not absolute – proportionality test

'If the only common criterion distinguishing a group of people participating in a meeting is an intellectual relation between the participants of the group which integrates them, nothing would be better to form this bond than the repetition and regularity of the meeting. Moreover, it should be stressed that, as cyclical assemblies would be held at least once a year on public and national holidays, among other things or aimed, in particular, at commemorating events of great importance and importance for the history of Poland, they allow for the exposition of certain socially important values and make them a subject of public debate.

These values are to be protected by public authorities and citizens, which results from the Preamble to the Constitution (e.g. concern for the existence and future of the Homeland and the good of the Polish people, a shared commitment to pass on to future generations all that is valuable from more than the thousand-year-old achievements of the Republic of Poland, and a reference to the best traditions of the Republic of Poland).'

Common good

Giving priority to cyclical assemblies is supported by the goal of their organisation, which has an impact on shaping certain attitudes. In particular, it is worth supporting if the individualising premise is that values are particularly important from the perspective of the state as a common good. It is accepted in the literature that the content of the common good determines "the sum of the conditions of social life which enable individuals, families and other communities to attain their perfection more effectively and more easily; an essential element of the common good (the sum of the combined conditions of development) is respect for the inherent rights and obligations of the human person deriving from his or her dignity, so that there is no point in juxtaposing the common good with freedom and human rights". Since, according to Article 1 of the Constitution, the Republic of Poland is a common good of all citizens, they are, first of all, entities whose good is to be served by the Republic, but secondly, they are also entities which have the right to determine the shape of this common good, i.e. social conditions of development. Cyclical assemblies, due to their formula and subject matter, can certainly contribute to shaping social conditions for development, and this speaks in favour of their special legal position.'

Definition of common good from the Catholic Social Teaching: encyclical *Mater et Magis* 1961, *Gaudium et spes* the Pastoral Constitution on the Church in the Modern World, (one of the four constitutions resulting from the Second Vatican Council) 1965

Dissenting Opinions

- ‘If we cannot identify the purpose for which the lawmaker intended to protect the freedom of assembly, we cannot rationally assess whether this restriction was the only, effective and proportional means to achieve the intended purpose.’ (Justice Pyziak-Szafnicka)
- ‘Establishment of the institution of cyclical meetings in the form adopted in the amending law may result in permanent deprivation of other entities of the right to exercise their freedom of assembly in a specific place and time. (...) It is obvious that in the case of parallel assemblies there is a conflict of liberty and the rights of different individuals. Legislator respecting the freedom of assembly has such situations duty provide relevant measures protections both to the congregations. Such a measure may not be a statutory restriction on the possibility of holding one of them.’ (Justice Wronkowska-Jaśkiewicz)



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**Case II. Printer case
(judgment of 26 of June 2019, K
16/17)**

Refusal of print

- 'I refuse. We are not contributing with our work to the promotion of LGBT movements.'
- Article 138 of the Contraventions Code: anyone is professionally engaged in the provision of services, demands and collects payment higher than the applicable or intentionally without a valid reason refuses to provide the service to which he is obliged, shall be subject to a fine.
- Regional Court, District Court – guilty but without penalty

Supreme Court decision of 14 June 2018 (case no. II KK 333/17)

to commit this offence it was not necessary to formally conclude a contract in accordance with the rules of contracts.

“valid reason” clause also include religious beliefs, which means that, where they are contrary to the characteristics and nature of the service, the supply of that service may be refused.

The printer actions were reconstructive and involved only technical activities. There was no involvement of sensitivity or moral norms between the activity (print) and the product of the service (roll-up). A different situation would be, for example, in a situation where a painter or sculptor was to perform a work of art.

Although the graphic design also included a colourful logotype of the foundation (colourful rainbow), its message was neutral and therefore it could not violate the religious beliefs of the defendant. The statutory objective of the foundation was to introduce the principle of equal treatment of LGBT people in the workplace. In line with the idea of diversity management, the foundation tried to convince companies operating in Poland of the importance of recognising diversity among employees and using it for the benefit of the company. Quoting the Catechism of the Catholic Church, the Supreme Court pointed out that these goals were not contrary to the teaching of the Church.

Public perception

- Zbigniew Ziobro stated that the Supreme Court “took the side of state violence in the service of the ideology of homosexual activists and against freedom, which is guaranteed in the Polish Constitution to every citizen regardless of his or her world view.”
- The LGBT activists, in turn, found that this judgment “is a great celebration of equality and a reason to rejoice for all those who believe in law, equality and justice. It is also a great reason to be proud - Poland has made a quantum leap towards equal rights for LGBT people with which it can boast to the whole world.”

General Prosecutor motion

- unconstitutionality of the provision: a) in the part in which it penalizes a refusal to provide a service without a justified reason, pursuant to Article 2 of the Constitution of the Republic of Poland (rule of law), b) understood in such a way that the principles of faith and conscience are not a justified reason for refusing to provide the service, under Article 53 paragraph 1 in conjunction with Article 31 paragraph 3 of the Constitution (freedom of religion and human freedom), (c) in so far as it concerns persons personally carrying out a business activity or acting on behalf of an entity carrying out such activity, under Article 20 in conjunction with Article 22, in conjunction with Article 31 paragraph 3 and in conjunction with the second sentence of Article 31 paragraph 2 of the Constitution (principle of social market economy).

Judgment of 26 June 2019

- lack of written justification
- from the 5 justices on the bench 4 were elected on the recommendation of the Law and Justice party
- two Justices (Kieres and Sych) made dissenting opinions

Rule of Law

The Court granted the prosecutor's motion only in the scope of the first charge – violation of Article 2 of the Polish Constitution, which states that the Republic of Poland shall be a democratic state ruled by law and implementing the principles of social justice.

Principle of proportionality: other means against discrimination (civil claim under protection of personality rights)

„solutions which are intended to restrict the freedom of private parties to conclude contracts and provide for penalties for refusal to provide such services undermine confidence in the State and the law, since they constitute an undue interference by the legislature with the freedom of the individual’

contested provision was introduced into the Polish system in the 1970s and that its ‘purpose was to protect consumers against refusal to provide services in an economy which, from an economic point of view, was an economy of short supply’. Only at the beginning of the 21st century did the anti-discrimination objective become one of the objectives of this regulation. But the objectives of one regulation cannot be transferred to another.

Public perception

- Zbigniew Zbiobro: 'I am pleased that my views and arguments have been shared by the Court, and I would like to say that freedom is for everyone and no one should use the apparatus of the state under the slogans of tolerance to force others to violate their own freedom.(...) Attempts were made to force a man - who had a very strong Christian identity, for whom certain values were fundamental and determined his identity and way of functioning - to engage in the promotion of content that would mean an obvious collision of conscience for him and would violate his freedom.'
- Mirosława Makuchowska: 'Poland is a country where the memory of the times when "Jews are forbidden to enter" plaques hanged on shops is still alive. Will they now be replaced by "Gays we don't serve" or "Persons in wheelchairs are not welcome" signs?'

Conclusion I. Question of Style

- formalistic and abstract argumentation
- comprehensive references to the previous case-law
- timid references to the idea of community
- no reference to the 'people vs elites'
- limited communication with public discourse

Conclusion II. Chameleon?

- deficit of authority
- fulfilling the needs of the political system, but on its own terms (argumentative autonomy)
- internal legitimacy
- ‘tempering’ effect (Rule of Law)
- ‘we might also say that it can legitimate it only because it constrains it’ {BoltanskiChiapello:2018th}

Thank You!

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