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ARTICLE

Legal mobilisation within the populist Supreme Court in Poland

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Abstract

Though the Polish rule of law crisis has been on the scholarly agenda since the Law and Justice Party (PiS) took power in 2015, the individual agents of legal disruption within the judiciary have been largely off the radar. This intervention aims to fill this gap. This article analyses the legal mobilisation practices of the Supreme Court (SC) judges appointed by the PiS party in a court-packing manner after 2017. It is argued that this is a specific type of legal mobilisation; because it is conducted from within the legal system by judges, it aims to challenge doctrinal views strategically and to legitimise the status of unlawfully elected judges, which consequently destabilises the legal system. Because the legal tools to solve the conflict appear to have been exhausted, new judges engage in public discourse to convince citizens that they have a right to sit on the bench. In the first part of this paper, I critically analyse this public discourse in order to explain the framing of the rule of law crisis. The analysis of this discourse is drawn from 106 texts produced by new SC judges between 2017 and 2023. It is argued that although the 'populist' group of SC judges is internally differentiated and does not exhibit clear ideological linkage with the PiS party, it strategically produces certain legal narratives in which their appointments and judicial practices at the SC conform to the Constitution and to relevant statutes and, as such, are legitimate in legal terms. The new judges' narratives are based on four populist dichotomies that distinguish them from old judges (legitimacy–lack of legitimacy, autonomy–political dependence, formal rule of law–legal anarchy and accountability–corporatism). In the second part, the article proceeds to analyse selected case law of the Supreme Court to explore whether and how court-packing makes it more responsive to the legal mobilisation of the conservative Christian organisation Ordo Iuris (OI) and helps the governing party maintain its power. It is argued that the judicial mobilisation inside the packed Supreme Court is mostly of a discursive nature, as there is limited evidence that newly appointed judges side ideologically with the government and right-wing organisations in recent case law.

Keywords: legal mobilisation; Supreme Court; judicial behaviour; Poland; sociology; populism

1. Introduction

Once upon a time, there was a rule of law crisis in Poland – this story has already been told too many times. Although the scholarly production on the topic of the rule of law crisis in the EU, particularly in Hungary and Poland, has become a cottage industry, surprisingly little attention has been paid to the conservative and coincidental alliance of diverse lawyers (especially individual

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judges) voluntarily participating in a so-called 'illiberal' turn (Krajewski 2023) and in legal mobilisation. The debate on this predicament tends to be overly legalistic and focused on a narrow array of problems, such as judicial independence. Studies often emphasise the responsibility of certain politicians (Bunikowski 2018) or officials to conduct or facilitate the contested legal change.[1] At other times, scholars analyse the individual agency of the judges who willingly joined PiS's transformation of the courts (Gajda-Roszczynialska and Markiewicz 2020). However, these contributions usually assume a hostile ideological linkage between the 'new' judges and the PiS party, which 'contaminated' the judicial field in Poland. Some contributors try to analyse the socio-legal aspects of the Polish rule of law breakdown (e.g. Blokker 2021; Claes 2023; Merdzanovic and Nicolaidis 2021) and of non-state actors' legal mobilisation (Kocemba 2023). However, little attention has been given to the populist legal mobilisation of the Polish legal elite inside the Supreme Court's right-wing mobilisation before the Supreme Court (SC).

In order to obtain a complete picture of this predicament, the close examination of the professional background and narratives produced by new judges on the SC is indispensable. It is not enough to study the legal structures; one must also consider the impact of personal agency upon these structures. This article shifts the focus from legal institutions to individual agents – the judges – who supported the process of legal transformation in Poland by joining the SC in a procedure hijacked by PiS nominees before the altered National Judiciary Council (NCJ or 'the Council') between late 2017 and 2023.[2] The SC's judges perform vital functions in the forms of making legal interpretations, in which they provide guidance to other courts, governmental institutions, and society as a whole, and of settling individual disputes and declaring the validity of elections and referendums. Each of thesefunctions is essential to the maintenance of social and political order, and the current conflict within the SC disrupts these functions.

The ultimate goal of this article is to analyse the specific types of mobilisation of new judges and their responsiveness to the non-state actors' legal mobilisation. Legal mobilisation is understood here as 'the use of law in an explicit, self-conscious way through the invocation of formal institutional mechanisms' (Lehoucq and Taylor 2020, 182) and is often accompanied by informal action. As suggested by Kocemba and Stambulski in this special issue, right-wing legal mobilisation is problematic because of 'the prior modification of the legal rules to gain a strategic advantage' (Kocemba and Stambulski 2024); the packing of the SC in Poland suggests that the Court might be more receptive to populist or ideological claims. Mobilisation by new judges is specialised because it is conducted by state actors who claim the right to be recognised as legitimate judges and because it is targeted at other domestic and international institutions as well as at the broader public. The formal and coordinated mechanisms that new judges apply include submitting motions before the Constitutional Tribunal (CT) and the European Court of Justice and challenging the SC's organisational practices. In contrast, informal and dispersed action lies in producing public discourse. This type of mobilisation is conducted from within the state institutions and maintains the state of rule of law disruption, so it is a form of negative legal mobilisation and is done allegedly in the name of democracy. However, new judges' practices cannot be regarded as 'lawfare' because they lack the elements of persecution and authority (Handmaker and Taekema 2023, 8). The mobilisation of law 'against legality' by new judges is much closer to 'antidemocratic legal mobilisation', because it is deployed by significant legal actors, proceeds through and outside of the SC and is conducted in coordination with media strategies, which ultimately leads to destabilisation of the legal system (Cummings 2024, 188–189).

[1]The focus was especially put on the Constitutional Tribunal president, Julia Przyłębska (eg. Ziółkowski 2019).

[2]Bill on the judiciary, 8 December 2017. The new judges were elected predominantly to the newly established Extraordinary Control Chamber of the Supreme Court (ECSC) and the DC. On 15 July 2022, the SC's DC ceased to exist and was replaced by the Chamber of Professional Responsibility, which still does not meet the independence criteria. To this Chamber, judges are allocated by a ballot from the pool of all the SC judges, including old SC judges.

The article scrutinises the legal discourse produced by new SC judges in order to legitimise their judicial status, which can be described as a form of judicial populism.[3] Although substantively refined, the judicial narratives exhibit populist features. Even if these are the courts and judges that typically fell victim to populist politicians (Arguelhes 2017), in this case these judges strategically defend themselves against the established judicial elite, media, academia and political discourse. Thus, they are mobilised to take a stance and enter the public sphere (the simple fact of frequent media appearances does not necessarily mean more democratic legitimacy, however). New judges – predominantly academics, thus people possessing epistemic privilege and robust technical knowledge – construct the narratives that operate within moral dichotomies (Muller 2016) and antagonistic differences (Sulikowski 2021, 4). They juxtapose the old, post-communist judicial establishment and the new democratically legitimised judges; the new, more democratic and representative judicial selection procedure and the morally corrupt and unverified judges elected under the communist regime;[4] the accountability of the new judges and the old elite's favoring of society as a type of corporation; and their adherence to the rule of law standards and the judicial elite's political activism. These arguments are structured and employed in pursuit of democratic legitimacy. However, they also tend to contradict themselves and not address the concerns of 'the other side'. The absence of academic consistency and the truth-seeking ideals that are typical of scholars suggests that these narratives are intentional efforts to justify an illegitimate power grab.[5] They attempt to legitimise the individual positions of new judges with a repertoire of legal arguments based on a formalised imaginary rule of law in Poland. The legitimising effect is based on 'the need to conceal instrumentalism towards political power' (Stambulski 2024, 14). This could be compared to a public media trial in which the new judges have to defend their chair on the SC bench using pragmatic legal argumentation. Thus, the functions of the strategic discourse production are threefold: to self-legitimise new judges, to discredit old judges, and to unmask the ultimately political character of law. However, the narrative strategies do not completely match the judicial behaviour on the bench: new judges do not always side with the PiS government, nor are they more receptive to the ideological claims put forward by the conservative legal think tank OI.

The article proceeds as follows: first, it offers an overview of the origins and legal developments of the conflict inside the SC. Second, it scrutinises the public narratives and various types of arguments that new judges mobilise to defend their positions on the SC. The public interventions of new judges are analysed as a laboratory of populist constitutionalism argumentation, which intends to juxtapose completely legitimate new judges with the old judicial elite, which lacks fundamental ethical features. Third, it discusses selected case law of the SC to challenge the idea of an alleged ideological coherence between new judges and various conservative actors (non-state actors, the PiS government and the Prosecutor General). The conclusion offers some insights into the post-election situation in the juridical field.

2. The populist Supreme Court

The legitimacy problem of new judges stems from the contested composition of the Council. However, even before the PiS party took power in 2015, the council model of the Polish judiciary was questioned not only by politicians but also by scholars and legal experts. One of the Council's main tasks is to select judicial candidates for all courts administrating justice, including SC

[3]This is understood as a strategy with the goal 'to gain popularity amongst ordinary people in order to strengthen the institutional position of courts in the field of politics' (Bencze 2022, 40).

[4]Stambulski observes that the existence of the 'double rule of law' (a narrative break with the previous system and a continuous adherence to unchanged legal principles) is a local Polish feature of populist constitutionalism (Stambulski 2022, 338).

[5]With one exception; see part 3 of this article.

justices. Until 2017, the Council had a mixed composition, with a clear dominance of self-elected judges from higher courts, and, over time, these judges shared 'personal competence' regarding judicial selections (Śledzińska-Simon 2018, 49–50).[6] In the scholarship, the fact that the independent judiciary was organised as a corporate body insulated from any political or societal influence raised normative doubts regarding the efficiency and the quality of justice (Kosař 2016, 138) and also displayed its distrust of the idea of democracy (Kosař 2016, 130). Moreover, as an empirical analysis conducted before the reforms had shown, the proceedings before the Council lacked transparency and objectivity because the selection criteria for judicial candidates were unpredictable, non-intelligible and incoherent (Pilitowski et al 2017).

The Polish Constitution stipulates that the Council be composed of twenty-five members: the highest courts' Presidents, the Minister of Justice, the President's representative, fifteen judges, four MPs and two senators. The Constitution states that the Council's judges are to be elected from these fifteen judges (Article 187[1]), but it does specify the details of the election procedure – namely, by whom the judges should be elected. Since the establishment of the Council in 1989 and until 2017, the predominant doctrinal view was that the judges should be elected by their peers. However, the PiS government came up with a project to reform the institution on the grounds of an unequal representation of various subparts of the judiciary in the Council. This is the original sin of the SC's new judges' status: it derives from the reform of the organisation of and proceedings before the Council in 2017, which could be understood as a form of court-packing. According to one definition, court-packing is 'a change of the composition of the existing court, which is irregular, actively driven (non-random), and creates a new majority at the court or restricts the old one' (Kosař and Šipulová 2023, 82). The changes introduced by the PiS party to the SC are accurately described as a hardball political technique and a form of court-packing. But the influence of the Polish SC packing on judicial behaviour and case law has largely been unexplored.

In the spirit of 'autocratic legalism' (Scheppele 2018), the composition and organisation of the Council were challenged by the Prosecutor General before the irregularly composed (CT), the body equipped with the power to conduct theoretical constitutional review.[7] After the PiS reforms, the CT became the 'government enabler' (Sadurski 2019) because four types of problems – the conflict over the judicial appointments and the CT President's role, the government's refusal to publish selected CT judgments, the adoption of the CT reform and the manipulation of the judicial panels – precluded its effective and legitimate functioning.[8] Instrumentally referring the cases to the CT (since early 2018, the majority consisted of the PiS nominees), the government attempted to legitimise the actions intended to curb judicial independence.

Not surprisingly, the CT, siding with the Prosecutor General on all of his claims, held that the Act reforming the Council was unconstitutional with regard to the individual mandate of the judges.[9] The CT declared that the division of seats in the Council unduly differentiates the electoral rights of diverse types of judges, which consequently breaches the principles of equality and judicial independence. Moreover, it contended that the four-year term of office of elected Council members is not an individual but a group term of office. The CT decision encouraged the

[6]Note that the Constitution does not specify the mode of seat distribution within the Council; this question was resolved by a statue.

[7]On the appointment of the 'judges-double' to the Constitutional Tribunal and its subsequent packing, see Sadurski 2019, 53–95.

[8]UN Special Rapporteur on Judicial Independence, Report of the Special Rapporteur on the Independence of Judges and Lawyers on his Mission to Poland, UN DOC.A/HRC/38/38/Add.1 (5 April 2018, para 22). On the manipulation, see 'Manipulacje w Trybunale Konstytucyjnym', Łukasz Bojarski, 24 May 2018. https://www.inpris.pl/wazne/omx-monitoring/artykul/t/manipulacje-w-trybunale-konstytucyjnym/.

[9]Case K 5/17, 21 June 2017.

government to vest the authority to select judges in Parliament, which was challenged by various institutions as unconstitutional, but to no avail.[10] Thus, the decisive power to elect members of this judicial body was given to political actors[11] – twenty-one of twenty-five Council members are elected by the Parliament (Grabowska-Moroz and Szuleka, 2023). The candidates for all types of judges are proposed by the NCJ, elected by the Parliament and appointed by the President. The 2017 Council's term was prematurely terminated, and new members were elected based on the new rules. Although a new, complicated procedure attempted to give an appearance of cross-party compromise, in reality, the judges were elected by PiS politicians.

Moreover, the first elections to the modified Council were boycotted by most judges, whereas the few who decided to run did not manage to find enough peer support (Sokołowski 2023, 608–610). Thus, the legitimacy of new judges is questioned because of the politicisation of the election procedure and the non-conformity with the altered rules of election, which raises doubts about the legality of the Council's decisions. Furthermore, by the President's decree[12] and by the amended statute,[13] the number of the SC judicial positions has risen significantly, which has opened the door to appointing a vast group of new judges. It also provides an analytic opportunity to examine the discourse of a large number of judges.

From a socio-legal standpoint, the SC judges have never contested each other's status before different institutions on such a large scale and with such limited results. The chain of refusal or acceptance of authorities of several institutions within the Polish legal system created a predicament of a 'double rule of law' (Stambulski 2022), as well as prompted many judges, including the associations of judges, to mobilise against the political changes (Matthes 2022). This legal duality is exacerbated by the actions of new judges. Not only have pre-existing SC judges challenged the legitimacy of new judicial appointments, but the newly appointed judges have also used a broad repertoire of legal tools in response, with neither side possessing the legal or the political capacity to break the deadlock. Moreover, populist constitutionalist actors have been highly selective in their approach to constitutional principles (Kaidatzis 2018, 2), thereby creating antagonism between the discourse of new and old judges.

On the one hand, the legitimately appointed judges sought external resolution at the Court of Justice of the EU[14] and the European Court of Human Rights (ECtHR),[15] which ultimately questioned the irregular appointment procedure of new judges. For example, a panel of old judges submitted a preliminary question to the Court of Justice of the European Union (CJEU) regarding the status of the newly established DC, which consisted solely of new judges with robust disciplinary competences.[16] They also attempted to solve the question of the newcomers' status internally by declaring that a panel of SC judges is irregularly composed if one of the judges had been appointed by the new National Council of the Judiciary (NJC).[17] In a more dispersed action, old judges declared case-by-case their unwillingness to sit in a panel composed of new judges.

[10]See eg. the opinion of the Commissioner for Citizen's Rights. Opinion of the Commissioner for the Draft Amendment to the Act on the National Council of the Judiciary. RPO (2 February 2017). https://www.rpo.gov.pl/pl/content/opinia-rpo-do-projektu-nowelizacji-ustawy-o-krajowejradzie-s%C4%85downictwa.

[11]For the detailed overview of the new procedure, see Śledzińska-Simon 2019, 1854–-1855.<AU: Please add a hyperlink and a corresponding entry to the References.>

[12]Decree amending the SC's Statue, 6 June 2019.

[13]Act of 8 December 2017 on the SC, (Polish) Official Journal 2018, item 5. This amendment created two new chambers on the SC.

[14]Joined Cases C-585/18, C-624/18 and C-625/18, *A. K. and others v. Sąd Najwyższy*, Judgment of the Court of Justice (Grand Chamber) of 19 November 2019, EU:C:2019:982; on this extensively, see Krajewski, Ziółkowski, 2020.

[15]*Dolińska-Ficek and Ozimek v. Poland*, App no. 49868/19 and no. 57511/19, 8 November 2021; *Grzęda v. Poland*, App n. 43572/18, 15 March 2022. In *Dolińska-Ficek*, the European Convention on Human Rights (ECHR) ruling declared that the appointment procedure of the judges from the Extraordinary Control Chamber was a violation of the right to a fair trial; thus, there was a breach of Article 6§1 of the Convention.

[16]Ibid.

[17]BSA I-4110-1/20, 23 January 2020; I KZP 2/22, 2 June 2022.

On the other hand, as mentioned in the Introduction, new judges contested the above-mentioned external decisions of international courts before the captured CT that, as expected, declared the decisions unconstitutional.[18] In a motion put forward to the full SC panel, the populist judges questioned the status of the old SC judges on the basis of yet another decision of the CT.[19] Moreover, new judges, in an attempt to gain legitimacy before the CJEU, put forward preliminary questions on several occasions. In 2022, for example, the CJEU accepted a reference that emanated from the SC but that had been issued by a new judge,[20] and a year later, the CJEU dismissed a reference from the irregular SC Chamber of Extraordinary Control and Public Affairs.[21] On top of that, the SC internal documents have been mobilised by both new and old judges: for some, it was a tool for excluding oneself from the bench. For others, it was a way to communicate an unwillingness to adjudicate in panels consisting of a judge from an opposing group.[22] On a more general level, the formal legal mobilisation conducted by new judges was relatively unsuccessful, as it produced positive outcomes (the legitimisation) only from the side of the captured CT but did not manage to convince the peer SC judges, nor the CJEU.

This overview reaffirms how ineffectively legal tools are used to cope with the problem of judicial appointments since 2017. The majority of the aforementioned judgments of the high courts had only symbolic value, as they did not make new judges abstain from adjudicating or voiding their mandates, nor did the CT manage to preclude 'old' judges from referring to Three Chambers judgments. The overall coherence of the constitutional system is shaky, and legal certainty in this regard has evaporated. This is where the power of law ends and the social mobilisation begins. Clearly, new judges needed new legal narratives that would help them legitimise their appointments to the SC – narratives that would be anchored in the general preconceptions about the status and meaning of law in Poland.

3. Judicial Discourse – Legal Mobilisation Background

This section structures the arguments used by new judges appointed to the Supreme Court and explains the functions of these arguments. It is based on an exhaustive analysis of more than 100 texts (newspaper/television/radio interviews, newspaper articles, and academic articles) produced by this group in the period from 2017 to 2023.[23] I have not observed any variation in content relative to the context in which the judges spoke. Only one judge – the most prolific one – could be

[18]The CT decisions issued after 2016 are vastly ignored by old judges on the grounds of an irregular composition of the Tribunal.

[19]II CSKP 176/22. Case is still pending.

[20]As the CJEU argued, 'In so far as a request for a preliminary ruling emanates from a national court or tribunal, it must be presumed that it satisfies those requirements, referred to in paragraph 66 above, irrespective of its actual composition,' Case C-132/20, 29 March 2022, ECLI:EU:C:2022:235, para 69.

[21]Case C-718/21, 21 December 2023, ECLI:EU:C:2023:1015.

[22]Declaration of 10 Oct 2022, 'Pilne. 30 legalnych sędziów SN odmawia orzekania z neo-sędziami: Chcemy wiernie służyć Rzeczpospolitej,' 17 October 2022, https://oko.press/pilne-30-legalnych-sedziow-sn-odmawia-orzekania-z-neo-sedziam. There are different strategies of coping with domestic and international judgments pertaining to the legality of appointments. Some new judges self-exclude from adjudicating on a case-by-case basis; others decided to leave the office (when the DC was dissolved); yet another group of judges petitions the Court to formally recognise the acts of some judges as grounds for resignation.

[23]This set of data includes almost all available pieces of text produced by this group. During the data collection process, the arguments started to repeat themselves, so it is a saturated dataset. Interestingly, two Polish newspapers were particularly open to publishing these pieces or conducting interviews with new judges, thus providing the newspapers with public legitimisation: *Rzeczpospolita* and *Gazeta Prawna*, both of which are conservative. Liberal outlets like *Gazeta Wyborcza* or *OkoPress* (the latter covering the legal crisis at length) published information about new judges only indirectly (with one exception of an interview with a new judge in *OkoPress*). Several judges talked to the media outlets financed by PiS (*Niezależna*, *wPolityce*, *TV Republika*).

regarded as genuinely believing in his own argumentation and providing self-legitimisation, as his academic research focused on similar topics.[24]

The mere participation in public discourse by SC judges cannot be understood as challenging the paradigm of the distanced, technically oriented judge who is irresponsive to the citizens. On the contrary, the substance of this discourse maintains this tradition. At the same time, it should be noted that average judges who spoke out against the PiS reforms were prosecuted for publicly expressing their opinions (Kościerzyński 2020). Only twenty-three out of sixty-two new judges had engaged in public discourse at least once – the majority (62.9%) did not talk to the media at all, nor did they write any academic articles on the legal crisis of which they are a part. After the exclusion of discursively inactive judges, the mode of the sample is 1, which suggests rather mediocre participation in the narrative production.

It is worthwhile noting the structuring effects of judges' professional backgrounds on their engagement in public discourse. The least publicly active are career judges, whereas the highest numbers of public interventions were delivered by academics with mixed practical backgrounds (including an outlier academic, whose newspaper articles make up 17,2% of the whole dataset). First, it shows that judges educated in the Polish system are rather reluctant to engage with public discourse and are not preoccupied with being responsive to civil society (Stambulski 2023). Second, the number of public interventions by academics suggests that some of them are interested in public visibility correlated with their social status, prestige and symbolic power to impose a particular outlook (Bourdieu 1993). Much more outspoken are former constitutional judges, also scholars, but this could be partially explained by formal constraints put on acting judges. Third, most new judges prefer to disengage from the public discourse, as this group largely denounces media appearances as a political activity unworthy of a judicial office.

To exert visible influence over discourse in Poland, it is not enough to possess a high academic title. Instead, a person's public status should be informally but widely confirmed by in-group members (Warczok and Zarycki 2014, 30). The narrative producers address their communicative offensive to other lawyers, seeking their acceptance and legitimacy. Thus, this discourse could be understood as a specific type of legal (judicial) mobilisation that aims to demonstrate the professional and epistemic capabilities of the judges. Their mobilisation strategy has targeted the disputed appointment procedure that taints their legitimacy. This mobilisation is not visible in the case law but appears only in areas outside of the courts (see Section 4). New judges use a highly specialist legal language, refer to the past constitutional or SC judgments, prove their acquaintance with the 'sophisticated body of knowledge' (Bourdieu 1987, 828) and refer to particular solutions as legal *doxa* that should be obvious to *educated* lawyers. The goal is relatively modest: they mobilise their capitals in order to be recognised as equal to 'old' SC judges. Nevertheless, and at the same time, the narratives draw on populist arguments to oppose old judges and to deny their democratic legitimacy.

Let me focus on the substantive part of the judicial narratives. The populist narratives are particularly interesting when they are constructed by judges against other judges. Typically, populists are politicians who are antagonistic towards the established, corrupted elites blamed for the social cleavages (Schedler 1996). In the case of the SC, new judges are in an ambiguous position: they assume the role of anti-elitist democratic representatives who denounce non-transparent mechanisms of judicial elites, but at the same time, they are themselves the elite who lack the social and procedural legitimacy to sit on the high court. On the most general level, the judicial narratives are anchored in a populist image that divides the agents of the legal crisis into 'good' judges ('us') and the 'bad' judicial elite ('them').[25] These narratives are founded on four structuring dichotomies: legitimacy–lack of legitimacy; autonomy of the juridical field–politicisation; formal rule of law–legal anarchy; and accountability–corporationism (see Table 1).

[24]The judge is Marek Dobrowolski. I am grateful to Michał Ziółkowski for drawing my attention to this fact.

[25]As aptly put by Blokker, this elite should be replaced *for* the people, not necessarily *by* the people (Blokker 2019, 540).

Table 1 Dichotomies in the judicial narratives

Area × Dichotomy	Judges Elected After 2017/New Judges ('us')	Judges Elected Until 2017/Old Judges ('them')
Legitimacy	Diverse types of legitimacy	Lack of legitimacy
	• Normalisation • Democratic legitimacy • Competences and expertise • Constitutional procedure • Procedural justice, effectiveness • Institutional acknowledgment	• No democratic legitimacy • No procedural legitimacy (no transitional justice) • No procedural transparency
Juridical Field	Autonomy/Independence	Dependence on Politics
	• 'Judges only apply law' • Neutrality of the judges • Independence as an individual 'mental disposition' of a judge • Individual verification of judges	• Judges acting like politicians • Judicial activism • Robust media presence
Rule of Law	Formal Rule of Law	Legal Anarchy
	• Legalism, dogmatism • The authority of the CT and the President, legal hierarchy • The need to preserve national sovereignty	• A break with the established rules • The activism of the old judges, creating new institutions • Ignorance of the legal norms and the CT judgments • The UE acts *ultra vires*.
Social Responsiveness	Accountability	Corporatism
	• Getting closer to the people, defending people • Judges are not above the law – disciplinary system • Discriminatory behaviour of the old judicial elite ('judicial apartheid')	• Judges are proud. • *the caste* – judges appointing judges • Judges are not interested in resolving people's problems.
Meta-Arguments	• Law is a technical, hierarchical, closed system	• Domestic law is malleable, responsive to other sources (EU law).

One could expect that the narratives constructed by judges elected in a process influenced by PiS politicians would visibly disregard legal standards, but the opposite is true: this discourse invokes a variety of arguments that are founded on a narrowly understood rule of law associated with legalism and dogmatism. Even though these narratives are pragmatic, reactionary and self-contradictory, they still operate within a particular legalist mindset. The meta-argument, relating to legal ontology, is that law is a technical, non-political tool; is organised hierarchically; and has a limited ability to accommodate foreign sources of law (especially the judgments of the CJEU).[26] In this positivistic vision, law is a technical tool that has the ultimate task of coordinating society; law is thus an external object that is understandable only to qualified lawyers (Czarnota et al 2018, 100). Thus, the new judges, accused of being political usurpers breaching juridical autonomy, defend their position by invoking the established Polish preconceptions about the law. Interestingly, there is a consensus among politicians and judges that the former should not in any way influence the outcome of the judicial process, which stresses the exceptionally autonomous position of the juridical field (Maranowski 2022, 149). In this sense, the Polish crisis of legal

[26]There is one significant exception to this view: as observed by a new judge, Czajkowski (who directly quotes Polish critical legal scholars), law is not objective, and constitutional law is just a tool of domination that realises the interests of the governing political power. No other judge refers to critical legal studies. See 'Czajkowski: trwa nagonka na nowych sędziów SN,' *Rzeczpospolita*, 30 November 2018, https://www.rp.pl/sady-i-trybunaly/art1612351-czajkowski-trwa-nagonka-na-nowych-sedziow-sn.

knowledge in the SC has not led to lawyers producing responses to problems like discretionary power or the relations between law and politics (Zomerski 2023, 28). Instead, the narratives mirror the other side's arguments but do not engage with them. It is noticeable that new judges discursively construct the opposition group – the judicial elite, the old judges – but at the same time, there is a limited sense of togetherness among the newcomers. The following subsections explain each structural dichotomy in more detail.

3.1. Legitimacy

The premise is that new judges were appointed to the SC not only legally but also democratically. According to the narrative, democratic legitimacy enables new judges to pursue discursive mobilisation. The reformed judicial appointment system is perceived to be a legal improvement that fits into many possible interpretations of the Constitution regarding the Council's composition.[27] Legal interpretations oftentimes legitimately diverge. Thus, there is no legal breach with the past or an 'original sin' that would justify the discriminatory behaviour towards new judges because every SC justice had to be professionally verified by the Council and then appointed by the President.[28] Moreover, new judges are shown to be equally competent to serve on the SC because they have the required professional background. Some have previously worked at the SC in their capacity as legal clerks or delegated judges, as teachers in the National School of Judiciary and Public Prosecution, or as members of legislative committees. They were educated in the same democratic system as their SC peers. Simply put, they present themselves as legal experts – and questioning their expertise is a political act.[29] Here, the commonalities between new judges and the established judicial elite end. The legitimacy narrative further normalises the 2017 changes by comparing them to other established institutions. There is nothing unsettling in electing judges to the Council by the Parliament: it is just like the parliamentarians who elect the Commissioner for Human Rights or the President of the National Bank. The 2017 solution is legitimate from the comparative perspective – the current Council model is based merely on the Spanish system, in which the Parliament elects the majority of judges to the NCJ. Therefore, no eyebrow should be raised regarding the 2017 legal package.

The PiS reforms should also not be considered as a politicisation of the judicial appointment procedure. After 2017, Parliament elects fifteen judges to the Council, which guarantees democratic legitimacy. Moreover, the President – the institution with the most significant democratic mandate – appoints the judges, and his prerogative indirectly transfers democratic legitimacy to his appointees. It is argued that the new Council is much more representative than it was before 2018 – it comprises many more regional judges (the most numerous group of judges in Poland) than it used to. The appointment procedure before the Council is only now transparent and broadcast live. In this way, democratic legitimacy extends to individual judges and to their election in the Council: some of them claim to be elected with 100 percent positive votes, which included the votes of opposition parties' senators.

The new judges' legitimacy is founded on the informal and formal acknowledgement of 'uncontested' international and domestic institutions. First, none of the European courts questioned the judicial status of new judges. Moreover, the CJEU admitted a preliminary question submitted by the new judges, thus recognising the SC composition of new judges as a court in light

[27]As argued by one judge: "although legal interpretation is essentially based on the logical analysis of the formulations used by the legislator, it is not the only method of interpretation.' 'Czajkowski: trwa nagonka na nowych sędziów SN.' *Rzeczpospolita*. 30 November 2018. https://www.rp.pl/sady-i-trybunaly/art1612351-czajkowski-trwa-nagonka-na-nowych-sedziow-sn.

[28]The refusal of the judicial status is prohibited, especially regarding the judges elected to the ordinary courts before 2017.

[29]Rhetoric questions are posed to reaffirm their choice of candidate for an SC judge position after 2017: should the altered composition of the Council preclude competent candidates to compete for a position in the SC? Should the positions of the SC judges be vacant?

of EU law (Article 267, Treaty on the Functioning of the European Union [TFEU]). Apart from the legal and institutional legitimacy, the discourse invokes a social one: as claimed by one judge, she meets regularly with the Presidents of Member States' High Courts and feels 'absolutely no reluctance on their part'.[30] Second, it was the Commissioner for Human Rights who submitted the first complaint to the contested SC Chamber, implicitly acknowledging its legitimacy.

Finally, the pragmatic argument is evoked to convince contestants that granting new judges legitimacy is in everybody's interest. Too many judgments ('millions') have been issued by the new judges to merely annul them on the grounds of the new appointment procedure. Moreover, questioning the status of Extraordinary Control Chamber judges who declare the validity of the elections logically leads to the problem of declaring new MPs' mandates to be void. As a minor point that relates to the pragmatism and the legitimacy of new judges, they have played a role in the improvement of internal organisational practices. New judges have spurred technological and organisational changes, including the digitalisation of documents and providing the opportunity to work from home.

As the narrative's logic of the opposition has it, the old judicial elite lacks democratic legitimacy. First and foremost, there was no implementation of the transitional justice measures after 1989, so the verification of the Communist judges has not been conducted. It is argued that the support for the PiS reforms stems from an elite-driven post-Communist compromise that was reached against society's will. Consequently, within the Polish judiciary system, there is still a large group of judges who were appointed during Communist times and who issued flagrantly unfair judgments. As one new judge claims: 'judges who sentenced dissidents during the martial law, who were on the mercy of those in power, who reported on colleagues'[31] are not verified but are verifying – and this is unjust. In contrast to new judges, their legitimacy is not questioned. Equality before the law would mean that all or none of the judges is vetted.

In the narrative, the history of the Council is the story of a gradual democratisation that was achieved with the help of the CT. After 1989, the democratic mandate of the Council was almost non-existent, as its composition was dominated by judges.[32] Only gradually was the appointment procedure challenged before the CT.[33] The 2017 CT decision on the unconstitutionality of Council members' terms is invoked to legitimise the altered CT. This judgment gave PiS the green light to discontinue its works and to appoint new Council members. On this basis, a reverse argument is constructed. A few years had to pass before the Parliament amended unconstitutional norms – so the status of the judicial elite elected at that time might be easily questionable as well. Similarly, the legitimacy of the pre-reformed SC is questioned. Before 2017, the judicial appointment procedure to the SC was non-transparent and breached rule of law standards. The SC judges had a traditional non-legal privilege to co-opt new, preselected peers behind closed doors. Clearly, the appointment process was not merit-based. Moreover, there was no legal way to appeal such a resolution. Only the CT judgment of 2008 introduced such a possibility, but an appeal – concerning the

[30]"Małgorzata Manowska krytykuje zmiany w ustawie o SN: KPO potrzebne, ale nie za każdą cenę [WYWIAD].' 25 January 2023. https://serwisy.gazetaprawna.pl/orzeczenia/artykuly/8645211,malgorzata-manowska-nowelizacja-ustawy-o-sn-sedzio wie-test-bezstronnosci.html.

[31]Patryk Słowik, 'Bunt w Sądzie Najwyższym. Prof. Małgorzata Manowska: Nie jestem spakowana,' wiadomosci.wp.pl. 9 November 2023. https://wiadomosci.wp.pl/bunt-w-sadzie-najwyzszym-prof-malgorzata-manowska-nie-jestem-spakowana-6961017457707680a.

[32]Similarly, the Israeli government, once stating the goals of the judicial reform, claimed to 'restore the balance between the three branches of government' while limiting the authority of the Supreme Court (Roznai and Cohen 2023, 515). In fact, the deputy Minister of Justice admitted sharing with the Israeli government Polish 'experiences in this area to some extent' ('Israel isn't Poland," chant Tel Aviv protesters as Warsaw says Israel consulted on justice reform', *Notes from Poland*. 27 March 2023. https://notesfrompoland.com/2023/03/27/israel-isnt-poland-chant-tel-aviv-protesters-as-warsaw-says-israel-consulted-on-ju stice-reform).

[33]New judges liked to quote the CT series of judgments on the election process of the judges before the Council, in which the CT found the unclear selection criteria unconstitutional and which were announced in 2007 and 2009. Cases: SK 43/06, 29 November 2007; K 62/07, 19 November 2009.

appointment of an SC judge – was examined by the same SC. As argued by new judges, the appointment procedure to the SC before 2017 was partially unconstitutional.

3.2. Legal mobilisation in defence of a juridical field

Paradoxically, new judges, accused of being elected in a politicised procedure, fiercely defend the independence of the juridical field, especially against political influence. The personification of law is also denounced. In a legalist view, institutions should be respected because of the noble role they play in society. The current judicial conflict breaks with this assumption by assessing the judges on personal grounds – and the illusion of judicial neutrality disappears. This effect is attributed to the judicial elite, which habitually breaches the principle of separation of powers.[34] In fact, acting within assigned competences is the central idea of the autonomy narrative, according to which acts conducive and detrimental to the juridical field's independence are not permissible. It is expressed most succinctly by the SC President: 'Judges are there to apply, not create, law.'[35] Politicians should restrict themselves to politics, and the legislature, which has a democratic mandate, should have the exclusive power to decide on the organisation of the judiciary system. On the grounds of these convictions is built the claim that the only body competent to restore legal order in the Polish judicial system is Parliament, albeit with the advice of lawyers (and this claim is a manifestation of new judges' sense of professional epistemic privilege). At the same time, full independence should not entail full and arbitrary control over the judicial appointment procedure. Parliament's democratic control is thus a balancing element that introduces accountability.

Although systemic independence is stressed, the crux of judicial independence lies within each individual judge, who should personally and manifestly disengage with politics. The fundamental virtue of judges is their political neutrality. This principle encompasses three features: no public manifestation of political views, media appearances only in emergency cases, and adjudication only on the sole basis of the legal norms (what resembles a classic Montesquieu-an judge as *bouche de la loi*). As stated by one judge: 'Independence is the main feature of a judge. Independence is a state of mind.'[36] Judicial professional ethos arises: it is suggested that lawyers are professionals just like doctors, who 'perform a mission in the service of the state'[37] and who should not be divided over a political problem. Article 178(3) of the Polish Constitution, which explicitly prohibits a judge from any political engagement, is the guideline for describing desired judicial behaviour. Political beliefs are to be expressed silently at the ballot box: 'A judge should not participate in any demonstrations clearly associated with the views of only one side of the political dispute – neither the left nor the right.'[38] For some, such disengagement means no or minimal contact with the media because media appearances of judges are interpreted as pure political action. Moreover, those judges who do speak to the media are seen as acting irrationally because, in their public interventions, emotions override truth and common sense.

In response, new judges, conscious of accusations of hypocrisy, came up with a further condition that explains their media presence. Accordingly, in a legal crisis (like the one in the SC),

[34]Note also that the pre-2015 Tribunal was attached to the idea of the separation of powers. Many judgments defended the juridical autonomy vis-à-vis the political field; the Tribunal even enumerated the foundational elements for juridical autonomy, which include having its own budget and independent organizational structures. Case K 45/07, 15 January 2009.

[35]'Manowska dla DGP: Tu nie chodzi o żadną praworządność [WYWIAD],' 7 August 2022. https://serwisy.gazetaprawna.pl/orzeczenia/artykuly/8511366,manowska-ke-praworzadnosc-izba-dyscyplinarna-kary-sedziowie-sn.html.

[36]'Zbigniew Kapiński, nowy prezes Izby Karnej Sądu Najwyższego: niezawisłość to stan umysłu.' *Rzeczpospolita*. 21 May 2023. https://www.rp.pl/sady-i-trybunaly/art38501491-nowy-prezes-izby-karnej-sadu-najwyzszego-niezawislosc-to-stan-umyslu.

[37]'Gruba Kreska Zaszkodziła Sądom. Sędzia Demendecki o Grupie Iwulskiego i Politykach w Todze.' 20 November 2022. https://niezalezna.pl/polska/gazeta-polska/gruba-kreska-zaszkodzila-sadom-sedzia-demendecki-o-grupie-iwulskiego-i-politykach-w-todze/465498.

[38]'Czajkowski: trwa nagonka na nowych sędziów SN.' *Rzeczpospolita*. 30 November 2018. https://www.rp.pl/sady-i-trybunaly/art1612351-czajkowski-trwa-nagonka-na-nowych-sedziow-sn.

a judge should take a stance publicly and openly, even if this belief opposes the convictions of the judicial elite. Thus, judicial independence means being resilient to pressures not only from the legislature and government but also from the established judicial elite. Moreover, any suggestion that the decisions of new judges are commissioned by politicians has been dismissed on the basis that there is no proof of such political judgments.

The individual approach towards judicial independence means that each judge should be evaluated individually on their merits; however, this independence cannot be presumed on the basis of the form of appointment. As argued by one judge in an academic paper, 'independence is not intrinsically linked to the manner in which a judge is appointed and should never be examined *ex ante* and *in gremio*, i.e. before the act of appointment of the judge by the President of the Republic of Poland has taken place, and regarding all judges as a whole' (Niczyporuk 2023, 228). Therefore, whenever any type of verification should happen (such a possibility is admitted by several new justices), it ought to concern the professional behaviour of an individual judge as well as the substance of their judgments. Interestingly, the individual approach towards judicial independence cannot be squared with the concept of the 'appearance of independence' analysed by AG Tanchev in his opinion,[39] which was strongly and sarcastically denounced as a too-subjective method. Such criticism of the idea of sociological sensitivity is a manifestation of the legalistic mindset of both new judges and the judicial elite: the importance of following the letter of the law. As a potential and more objective way of proving the independence of new judges, the analysis of the government-deference dimension of judicial decision-making is proposed. Another suggestion for verifying judicial independence is to read the media discourse that allegedly grants new judges public accountability: 'Journalistic titles of individual texts strongly emphasise the independence of the decisions of this court.'[40]

Conversely, the judicial elite engages in judicial and political activism. First, the judicial elite abuses its knowledge and power of interpretation by imposing its will in judgments: rather, judges should instead not attempt to reconstruct the legislator's will or even neglect the wording of the statutes; thus, the judicial elite acts *contra legem* and against democratic choice. Furthermore, the principle of separation of powers is breached by absorbing competences. As claimed by a judge who self-labelled as a legalist, the SC, by 'usurping the functions of other constitutional state bodies, is contesting the existing legal and social reality'.[41] In this sense, any review of the compliance of national or European law with the Constitution is a competence breach and a judicial activism that is 'the bane of the modern justice system'.[42] The calls to verify new judges is an attempt to exert influence over judges and a 'pathological situation that should not occur at the SC'.[43] As argued by such a judge, justices who exclude themselves from adjudication merely engage in a form of unethical activism – such an act cannot be seen as securing the citizen's right to a fair trial bylegally established court. Second, judges that contest 2017 reforms are simply following a political agenda, perhaps inspired by unspecified foreign actors, and are motivated by bad will. Those that contest the legitimacy of the new judges are linked to the opposition party

[39]Opinion of Advocate General Tanchev, delivered on 27 June 2019; Joined Cases C-585/18, C-624/18 and C-625/18.

[40]'Sędzia SN: zarzuty dot. sędziów SN nie znajdują oparcia w rzeczywistości.' *Rzeczpospolita*. 5 August 2019. https://www.rp.pl/sady-i-trybunaly/art9254901-sedzia-sn-zarzuty-dot-sedziow-sn-nie-znajduja-oparcia-w-rzeczywistosci.

[41]'Konrad Wytrykowski: odpowiedzialność sędziego za działalność orzeczniczą.' *Rzeczpospolita*. 5 January 2022. https://www.rp.pl/sady-i-prokuratura/art19254641-konrad-wytrykowski-odpowiedzialnosc-sedziego-za-dzialalnosc-orzecznicza.

[42]'Małgorzata Manowska: wewnątrz Sądu Najwyższego istnieją grupy bardzo ekstremalne.' *Rzeczpospolita*. 21 October 2020. https://www.rp.pl/sady-i-trybunaly/art465421-malgorzata-manowska-wewnatrz-sadu-najwyzszego-istnieja-grupy-bardzo-ekstremalne.

[43]'Aleksander Stępkowski: patologie w Sądzie Najwyższym, prezes szuka rozwiązania.' *Rzeczpospolita*. 30 September 2022. https://www.rp.pl/sady-i-trybunaly/art37525191-aleksander-stepkowski-patologie-w-sadzie-najwyzszym-prezes-szuka-rozwiazania.

because they are pursuing an "openly political activism."[44] At other times, they are presented as members of associations that, in reality, act like trade unions. It is also argued that a small minority of old judges attempt to impose their perspective on all legal professionals.

3.3. Legal Mobilisation Towards the Rule of Law and the EU

The rule of law narrative constructs a vision of law as a hierarchical and closed system of norms that clearly divides competences between constitutional institutions. The acknowledged sources of law are constitutionally limited. They include statutes passed by Sejm that have a democratic mandate, but they do not include SC resolutions, oral motives or decrees. This is stated in the narrative's *doxa*: 'these facts are obvious for any lawyer, but they seem to be ignored.'[45] Accordingly, the CT and the CJEU do not possess the competence to create law. The CT is a classic Kelsenian constitutional court whose main task is to eliminate rules inconsistent with the highest norm – the national Constitution. It can also refuse to abide by laws promulgated outside the nation-state legal system (for example, by EU institutions) on the grounds of unconstitutionality. In the eyes of new judges, the CT did not lose its legitimacy because of its irregular composition; rather, new judges cite the CT judgments issued after 2016 as if it were a perfectly legitimate institution, as well as make selective references to previous CT decisions.[46] Conversely, the fact that the judicial elite ignores the post-2016 CT judgments translates into the lack of respect towards the Constitution itself.

Similarly, questioning the President's competence to appoint a judge are 'judicial frolics'.[47] As it is argued legalistically, the CT and the Supreme Administrative Court, 'more than tens of times', declared that it is not possible to review the President's prerogatives before the court, which should end any legal doubts. It has not been forgotten that under the liberal government, the Prime Minister's prerogative to appoint a governmental agency's director was not questioned, so *a minore ad maius*, the President's prerogative should also not be reviewed.[48] In fact, actions like questioning the President's prerogative, the validity of the CT's judgments or the verification of new judges or referring to the SC resolutions of old judges are examples of legal anarchy or even amount to a 'coup d'état'.[49]

The competence breach is most pronounced in the actions of EU institutions. Interestingly, the discourse refers to the CT's judgments as the prime source of knowledge about the relation between the Polish legal system and European law. No academic work or specific scholar is quoted. This relation is founded only on a very limited conferral of competences to the EU that does not include competences within the organisation of a justice system. Any EU act that attempts to question Polish constitutional values is *ultra vires* — the principle of primacy is

[44]'Majchrowski: manowska powinna zrezygnować z urzędu sędziego albo chociaż z funkcji Prezesa SN.' *Rzeczpospolita*. 14 April, https://www.rp.pl/sady-i-trybunaly/art36083131-majchrowski-manowska-powinna-zrezygnowac-z-urzedu-sedziego-albo-chociaz-z-funkcji-prezesa-sn.

[45]'Tomczyński: czy w Sądzie Najwyższym rządzi prawo?' *Gazeta Prawna*. 19 December 2019. https://prawo.gazetaprawna.pl/artykuly/1445361,tomczynski-czy-w-sadzie-najwyzszym-rzadzi-prawo.html.

[46]The instrumental reference to the CT is especially striking in the case of one new SC judge, who quotes post-2016 CT with no hesitation. Regarding the CT judgment on the unconstitutionality of the PiS reform, this judge argued that not every decision of the CT is valid and final. 'Orzeczenia TK nie zawsze są ostateczne.' *Rzeczpospolita*. 19 April. https://www.rp.pl/wydarzenia/art3745491-orzeczenia-tk-nie-zawsze-sa-ostateczne.

[47]'Sędzia ID, który przeszedł w stan spoczynku: nam się nie dano w żaden sposób wykazać [WYWIAD].' *Gazeta Prawna*. 1 August 2022. https://serwisy.gazetaprawna.pl/orzeczenia/artykuly/8502620,izba-dyscyplinarna-sn-stan-spoczynku-sedzia-wytrykowski.html.

[48]'Manowska dla DGP: tu nie chodzi o żadną praworządność [WYWIAD].' 7 August 2022. https://serwisy.gazetaprawna.pl/orzeczenia/artykuly/8511366,manowska-ke-praworzadnosc-izba-dyscyplinarna-kary-sedziowie-sn.html.

[49]'Prof. Majchrowski: nie Ma Neosędziów i neoKRS. To Jest Zgodne z Konstytucją, Ale Nie z Interesem Politycznym | Niezalezna.Pl.' 2 November 2023. https://niezalezna.pl/polityka/tusk-chce-cofac-prawo-uchwalami-prof-majchrowski-to-jest-sciezka-zamachu-stanu/502501.

applicable only to the areas conferred to the EU. From a comparative point of view, placing the national Constitution above EU law is just the usual action taken by other Member States' constitutional courts – which is not surprising, given the lack of democratic legitimacy of EU law, as argued by new judges. Thus, the CT is competent in reviewing the list of competences conferred on the EU.

It is argued that the principle of respect towards national constitutional identity has been breached by CJEU judgments on judicial independence. In fact, the CJEU uses the Polish case as an opportunity to widen its competences outside the Treaties to the detriment of Polish domestic institutions – and Poland cannot lose sovereignty when fulfilling EU obligations. Such a possibility is reviled as a purposeful anti-democratic act of the EU: 'tThe European Union wants to create a domino effect in Poland. After the liquidation of the Disciplinary Chamber, annihilate the Control Chamber, then the National Council of the Judiciary and so on.'[50] To remedy the further loss of sovereignty, a peculiar proposal is put forward: the enactment of a new Polish Constitution that would clearly define the kernel of Polish constitutional identity. It is believed that such construction would preclude a conferral of new competences when ratifying any future European treaty.[51]

The EU is deemed hypocritical: if the EU respects rule of law standards, then it should not demand a review of judicial appointments by the SC. Against the background of the plurality of Member States' constitutional systems, it is argued that other States' solutions in the area of judicial appointments are more politicised, but these countries are not accused of breaching the rule of law standards. From a pragmatic point of view, it is not possible to question the judicial appointment process in any EU Member State — to be consistent, the CJEU ought to review every domestic system. Moreover, the CJEU judges themselves were appointed in a highly politicised procedure, contrary to the more democratic new appointment system in Poland. Nevertheless, no argument addresses the fact that the 2017 reform was explicitly executed to confer more political control on the ruling party.

New judges have serious reservations regarding a preliminary ruling procedure stipulated in Article 267 TFEU. First, the judges who send preliminary questions to the CJEU act in bad faith because they seek a legal basis that would allow them to breach the Polish Constitution when attempting to remove legally elected judges from office. Thus, the SC positions itself as 'the CJEU's branch centre in Poland',[52] which also suggests excessive foreign influence on the domestic constitutional system. The EU is perceived as an actor clearly engaged on 'their' side by allowing the Polish courts to review the courts' independence, not granting a right to be listened to by new judges. Instead, the SC should submit a legal question to the CT to prevent internal conflicts. Second, the preliminary procedure is not pragmatic, as it unnecessarily extends an already drawn-out procedure. The procedure is also exclusionary because new judges first learn about preliminary questions only from the press, which precludes them from submitting procedural requests.

3.4. Social responsiveness

Finally, the accountability of new judges and the exclusiveness of the judicial elite are juxtaposed. First, new judges are not afraid of the disciplinary responsibility exercised by the SC: it was a much-needed amendment to the Polish legal system. Before the 2017 changes, the disciplinary

[50]'Zmasowana Akcja Przeciwko Wolnemu Wyborowi. Sędzia Czubik Dla Niezależna.Pl o Liście Reyndersa | Niezalezna.Pl.' 21 August 2023. https://niezalezna.pl/swiat/unia-europejska/zmasowana-akcja-przeciwko-wolnemu-wyborowi-sedzia-czubik-dla-niezalezna-pl-o-liscie-reyndersa/495077.

[51]'Dobrowolski: pora doprecyzować granice integracji z UE.' *Gazeta Prawna*. 21 December 2017. https://prawo.gazetaprawna.pl/artykuly/1093562,dobrowolski-pora-doprecyzowac-granice-integracji-z-ue.html.

[52]'Sędzia Witkowski: nie ma podstaw do wstrzymania postępowań.' wPolityce.pl. 30 January 2020. https://wpolityce.pl/polityka/484758-sedzia-witkowski-nie-ma-podstaw-do-wstrzymania-postepowan.

system simply did not work: judges and prosecutors who breached the law were not held accountable. The disciplinary procedure was established to 'thoroughly cleanse the justice system of the deposits of injustice that have accumulated among the judiciary for decades'.[53] In this sense, disciplinary innovation is positively associated with prestige-building: it builds morale and the authority of the courts. Another normalising argument is found on comparative grounds: democratic states founded on rule of law principles are familiar with prosecuting judges not only because of their professional activity but also because of the substance of their judgments. As one of the judges claimed, 'It is not true that judges cannot be held responsible for their professional activities. Formulating such theses may indicate gaps in the education of their authors, as well as the need to ensure a sense of uniqueness.'[54]

On the other hand, the old judicial elite is described predominantly in opposition to new judges: they are treated as impostors at the SC. However, it should be noted that the following critique of old judicial elites is conducted by well-educated new elites. The paternalistic approach does not reflect the qualities of new judges but rather unmasks the true face of the old judicial elite. The judiciary structure is denounced as being internally 'feudal' and very hermetic. Up until 2017, becoming a judge meant 'breaking their spine and indoctrination in order to determine their position within it or design their professional career path'.[55] As mentioned before, elections to the SC were based on a co-optation. Discriminatory and degrading behaviour such as not shaking hands or not responding to greetings of new judges is just another manifestation of non-inclusiveness and the lack of professional ethics. In a few interventions, lawyers mentioned that the division between judges gives an 'ambience of apartheid'[56] or even resembles a 'kind of ghetto, analogous to the so-called bench ghetto introduced at Polish universities in the 1930s'.[57] The lack of equal treatment is commonplace. As put by another judge: 'The Supreme Court is not some gentlemen's club, a mutual admiration society to which people invite you and whose gates are guarded by judges who have been adjudicating there for almost thirty years.'[58] This judicial mobbing spills over into academia, and what is reported with indignation is that none of the judges appointed after 2017 has been awarded faculty prizes at one of the leading Polish universities. Moreover, old judges use the forms of public participation that are characteristic of dissidents of the Communist times: they sign public petitions that denounce new judges in the name of defending the rule of law.

Clearly, the actions of the contestants are disturbing for new judges – from a sociological perspective, even taking a high public office cannot guarantee becoming a member of the (judicial) elite if one is not acknowledged by this elite. The SC predicament is disturbing not only because of the personal distress it inflicts on new judges but also because of the damage to the public prestige this discriminatory behaviour brings about. Thus, new judges have had to come up with a public counter-narrative. Their media discourse is full of denigrating arguments against those who

[53]'Majchrowski: manowska powinna zrezygnować z urzędu sędziego albo chociaż z funkcji Prezesa SN.' *Rzeczpospolita*. 14 April 2022. https://www.rp.pl/sady-i-trybunaly/art36083131-majchrowski-manowska-powinna-zrezygnowac-z-urzedu-sedziego-albo-chociaz-z-funkcji-prezesa-sn.

[54]'Konrad Wytrykowski: odpowiedzialność sędziego za działalność orzeczniczą.' *Rzeczpospolita*. 5 January 2022. https://www.rp.pl/sady-i-prokuratura/art19254641-konrad-wytrykowski-odpowiedzialnosc-sedziego-za-dzialalnosc-orzecznicza.

[55]'Gruba Kreska Zaszkodziła Sądom. Sędzia Demendecki o Grupie Iwulskiego i Politykach w Todze | Niezalezna.Pl.' 20 November 2022. https://niezalezna.pl/polska/gazeta-polska/gruba-kreska-zaszkodzila-sadom-sedzia-demendecki-o-grupie-iwulskiego-i-politykach-w-todze/465498.

[56]Eg: "Sędzia ID, który przeszedł w stan spoczynku: Nam się nie dano w żaden sposób wykazać [WYWIAD]," Gazeta Prawna, 1.08.2022, https://serwisy.gazetaprawna.pl/orzeczenia/artykuly/8502620,izba-dyscyplinarna-sn-stan-spoczynku-sedzia-wytrykowski.html.

[57]"SN: Sędzia Duś przejdzie do Izby Karnej, ale żąda dymisji prezesa," Prawo.pl, 19.07.2022, https://www.prawo.pl/prawnicy-sady/zadanie-ustapienia-przesa-izby-karnej,516273.html.

[58]"Powiadomiłem o segregacji w Sądzie Najwyższym - wywiad z Antonim Bojańczykiem," Rzeczpospolita, 17.10.2019, https://www.rp.pl/sady-i-trybunaly/art9169851-powiadomilem-o-segregacji-w-sadzie-najwyzszym-wywiad-z-antonim-bojanczykiem.

contest their status, with the aim of stripping away prestige from the SC judicial elite and, inadvertently, from the SC as an institution. It is claimed that publicly labelling newcomers as 'neo-judges' adversely influences judicial independence and maintains the conflict in the SC. The refusal to adjudicate with new judges is a manifestation of 'juristocracy' and has nothing to do with the rule of law. Some new judges refrain from adjudicating, which is perceived as immoral (i.e. being paid for refraining from work). The constant decline of the social legitimacy of the courts (i.e. low trust) is associated with the actions of the judicial elite. Hence, as new judges argue, the authority of the judicial elite is false, and because the leading lawyers of the past were morally corrupted, their pupils are similar.

New judges imply that the judicial elite lacks competence or expertise by suggesting that their high position was earned thanks to extra-legal factors. It was argued that the SC resolution (Three Chambers) was based on merely one scholarly reference to an article written by one of the judge-rapporteurs. Moreover, this decision lacked legitimacy because new judges, 'due to procedural violence',[59] were not admitted to adjudicate in this case. It is argued that those who contest the new judges are the more privileged actors because their resolutions are treated as part of the legal discourse. At the same time, these old judges do not serve the people. They also lack modesty in the trials (as stated by one newcomer, 'As a judge, I cannot feel as God that decides cases. I have to go down to the people'),[60] as well as in the work environment: the judicial elite does not care about the SC administrative employees. The old judges use people's problems in the court as an opportunity to legally denounce their colleagues. It is repeatedly argued that many judges do not fulfil their obligations to decide people's cases but engage in an internal conflict or 'shine in the media' instead.[61] The refusal to adjudicate cases is a refusal to serve the citizens.[62] Judges are urged to sit at the bench and finally deliver their judgments in much-awaited trials, and this call is also addressed to the new judges who exclude themselves from adjudication. However, apart from rebranding judging as serving the people, no guidelines on how to serve properly are delivered; new judges do not approach judging differently than did their colleagues who were appointed before 2017. Thus, the invocation of judicial service is rather a populist claim with no content.

3.5. Contradictions and silences

The narratives presented are sometimes contradictory, and the actors who employ these arguments lack integrity.[63] Typically, the discourse consists of inherent tensions. For example, an accusation of seeking a political solution to the SC conflict does not match the explicit argument of some new judges that the power to solve this problem should be vested in the Parliament. These inconsistencies are even more blatant when discussing the status of the pre-2017 Council. For some new judges, their legitimacy as ordinary Court judges is derived from the appointment before the pre-2017 Council; for others, only the altered Council can guarantee a democratic and legal election. There is yet another elephant in the room: some judges demand that old SC judges

[59]'Bunt w Sądzie Najwyższym. Prof. Małgorzata Manowska: nie jestem spakowana.' wiadomosci.wp.pl. 9 November 2023. https://wiadomosci.wp.pl/bunt-w-sadzie-najwyzszym-prof-malgorzata-manowska-nie-jestem-spakowana-6961017457707680a.

[60]'Sędzia Izby Dyscyplinarnej SN: sędziom brakuje pokory.' wPolityce.pl. 12 December 2019. https://wpolityce.pl/polityka/477476-sedzia-izby-dyscyplinarnej-sn-sedziom-brakuje-pokory.

[61]'Bunt w Sądzie Najwyższym. Prof. Małgorzata Manowska: nie jestem spakowana.' wiadomosci.wp.pl. 9 November 2023. https://wiadomosci.wp.pl/bunt-w-sadzie-najwyzszym-prof-malgorzata-manowska-nie-jestem-spakowana-6961017457707680a.

[62]'Małgorzata Manowska krytykuje zmiany w ustawie o SN: KPO potrzebne, ale nie za każdą cenę [WYWIAD].' 25 January 2023. https://serwisy.gazetaprawna.pl/orzeczenia/artykuly/8645211,malgorzata-manowska-nowelizacja-ustawy-o-sn-sedzio wie-test-bezstronnosci.html.

[63]For example, a judge that criticizes the lack of professional ethics among the old judges is a partner of the Council's President, who elected him to the SC. 'Dyrektor z MS w Izbie Cywilnej Sądu Najwyższego.' Prawo.pl. 16 January 2023. https://www.prawo.pl/prawnicy-sady/nominacja-do-sn-sedziego-dariusza-pawlyszcze,519307.html.

abstain from media appearances, but others themselves make use of their privilege to write or talk to media outlets.

At the same time, the legal concerns of the 'other side' are not addressed. Even though a new judge calls for an 'argument duel',[64] there is no discursive interaction between the two sides of the SC conflict. New judges simply ignore legal criticism as well as references to the first and non-transparent elections of the Council's members, the unconstitutional termination of the previous Council's term, and its former unrepresentative composition (members elected only by the PiS politicians). New judges visibly dodge the problem of the irregular composition of the CT, as there is no discussion of its evident politicisation.[65] The EU actions and the CJEU judgments are presented one-sidedly as a breach of conferred competences and a political attack on Polish sovereignty.

Interestingly, the arguments raised in the narratives do not match the goals of the judicial reforms stated by the PiS government. The White Paper on the Reform of the Polish Judiciary, prepared by PiS as a response to the European Commission, adopted a citizen's view on the judicial system. It criticised the lack of judicial responsiveness to citizens' needs, the exclusivity of the courts' spaces, the incomprehensibility and difficulty of procedures, and the legal formalism that outweighs the right to a fair trial.[66] The judicial narratives do not refer to these points; in fact, the judges remain bound by the exact legalist mindset that the PiS politicians criticised. These narratives lack a truly democratic focus: citizens are envisioned as clients, while the justice system is envisioned as a factory that should provide a judgment as quickly as possible.

4. Legal mobilisation inside the Supreme Court

The discursive strategies of legitimisation by new judges create a framework that may facilitate the legal mobilisation of 'moral entrepreneurs of litigation and jurisprudence' (Cliquennois et al 2024). This section illustrates the ideological responsiveness of the SC to the arguments of the main Polish conservative Christian NGO, OI (on the organisation itself, see e.g. Curanović 2021). OI has made third-party interventions before international and domestic courts that aim to strategically litigate for pro-Christian and clearly anti-liberal values (promoting anti-abortion, anti-LGBTQ+ or pro-family legal solutions in *amicus curiae* briefs before the ECtHR; see Blokker 2024). This section also considers what this framework reveals about new judges' approaches to other public affairs (including judgments on the new judicial appointment system).

It would seem that court-packing leads to at least short-term benefits for the party instigating the process or makes it more responsive to ideologically motivated claims, but the evidence from the Polish Supreme Court suggests that the picture is more complex. Legal mobilisation by non-state actors before the packed SC has succeeded only to some extent, and sometimes judges appointed via the legitimate procedure have been receptive to the conservative claims raised by OI. Similarly, new judges adopt diverse legal strategies regarding judicial appointment cases and other public affairs, not always siding with the government.

The role of non-state actors before the packed SC has largely been unexplored. However, there is some evidence of OI's attempts to influence SC case law, especially in criminal cases. Let me focus here on successful and unsuccessful cases in which OI' lawyers represented conservative claimants. First, conservative lawyers successfully led a series of cases that considered the public display of banners depicting the consequences of abortion, which were submitted to the SC. As a

[64]'Sędzia Demendecki Rzuca Wyzwanie! Wyzywam Na Pojedynek Na Argumenty Wszystkich, Którzy Podważają Orzeczenie TK.' 11 October 2021. https://tvrepublika.pl/Sedzia-Demendecki-rzuca-wyzwanie-Wyzywam-na-pojedynek-na-argumenty-wszystkich-ktorzy-podwazaja-orzeczenie-TK,128770.html.

[65]An exception is an op-ed written by a future new judge in 2015, where he deemed that the PiS elected two constitutional judges in a similarly unconstitutional manner as the outgoing Parliament. 'Granie Trybunałem | Tygodnik Powszechny.' 30 November 2015. https://www.tygodnikpowszechny.pl/granie-trybunalem-31475.

[66]White Paper on the Reform of the Polish Judiciary 19 (2018).

result, OI prides itself on establishing a favourable line of jurisprudence.[67] In two of these cases, the defendants were accused of causing mischief in a public place[68] or of indecent behaviour.[69] Interestingly, the acquittal of defendants in both cases did not depend on the composition of the judicial panel, as both new and old SC judges sided with the defenders and invoked similar arguments, thus proving that institutional packing does not necessarily change judicial behaviour in a generally conservatively oriented court.[70] In both instances, the SC ignored the social impact of the displayed banners: the negative emotions experienced by the claimants were the basis of the defendant's conviction by ordinary courts and relied on the literal interpretation of the words 'mischief' and 'indecent' provided by the dictionaries. Moreover, the judgments invoked European standards of protection on free speech and used overly moralistic language. New Judge Marek Siwek, approvingly quoting the judgment delivered by old judges, argued that the defendant's action was undertaken 'for the purpose of protecting life and was related to exposing its value. It is impossible to find a moral norm with a universal scope that would condemn the protection of life.' The same line of argumentation was provided by a panel of old judges[71] and then by one new judge[72] in judgments that acquitted a defendant in two similar cases.[73] Thus, old and new judges alike not only base their reasoning on strict legalism and dogmatism but also are sometimes receptive to the conservative arguments raised by the Prosecutor General who is supported by OI in the cases relating to the protection of pro-life activists.

Second, the success of legal mobilisation conducted by OI before the SC in other cases does not depend on the composition of a judicial panel; in fact, new and old judges alike are receptive to conservative soliciting. Cases successfully defended by OI include defamation of the parents of six children by state officials, which was decided by old judges,[74] and the obstruction of a Catholic Mass by the husband of a leftist politician during the pro-abortion protests, which was decided by mostly new judges.[75] On the other hand, OI's argumentation at times did not appeal to the SC. In a notable case tossed among various courts, the SC panel of old judges dismissed the cassation filed by the Prosecutor General and supported by OI lawyers in the case of an entrepreneur from Łódź who refused to print a roll-up advertising an LGBTQ+ foundation.[76] In the ruling, the SC laid out that freedom of conscience and religious beliefs may constitute a justified refusal to provide services, but at the same time, that the conflict of values should be assessed in the context and realities of a specific case. In the discussed case, the accused entrepreneur did not have a justifiable reason to refuse to provide services because of his beliefs. His service, which he agreed to provide in the manner stipulated by law, had a reproductive, not a creative, character and involved the performance of purely technical activities. The SC declared that "'the refusal to provide the service cannot be justified by the individual characteristics of the persons [e.g. religious denomination, manifested views or sexual preferences] for whom a given entity is obliged to provide this service'. However, while the case was decided by the SC, the Prosecutor General and OI submitted a motion to the packed CT to examine the compliance of the provision with the

[67]'Wyrok Sądu Najwyższego sprzeczny z linią orzeczniczą w sprawach działaczy pro life.' 16 February 2023. https://ordoiuris.pl/ochrona-zycia/wyrok-sadu-najwyzszego-sprzeczny-z-linia-orzecznicza-w-sprawach-dzialaczy-pro-life.

[68]Case IV KK 247/21, 22 October 2021.

[69]Case V KK 690/21, 28 October 2022.

[70]On the persistence of the conservative line of judicial argumentation in the case of the Polish CT, see Kocemba K and Stambulski M. Divine decision-making: Right-wing constitutionalism in Poland. VerfBlog. 11 September 2020. https://verfassungsblog.de/divine-decision-making/.

[71]Case II KK 116/22, 30 June 2022.

[72]Case I KK 419/22, 4 January 2023.

[73]It should be noted, however, that another panel of old judges broke off with this line of jurisprudence and did not admit the Prosecutor's General cassation supported by Ordo Iuris. Case I KK 471/22, 16 February 2023.

[74]Case IV KK 365/18, 11 September 2019.

[75]Case V KK 432/22, 27 October 2023.

[76]Case II KK 333/17, 14 June 2018.

Constitution that became the basis for prosecuting the entrepreneur.[77] As expected, the CT declared the provision unconstitutional, which subsequently led to the resumption of proceedings before the ordinary court, which, in the end, discontinued the process.[78] The decision to discontinue was appealed before the SC again (before a panel of old judges), but the SC declared that there was no procedural basis to challenge the decision. At the same time, the SC claimed that the CT had not conducted a genuine constitutional review but. Rather, had 'assessed the constitutionality of Article 138 through the prism of only this one case involving the accused', ultimately proving that old judges do not respect the legitimacy of the CT.

Finally, new judges also do not side with OI's lawyers in ideological cases. For instance, the panel of three new judges dismissed cassations demanding that the acquittal of an IKEA manager be annulled.[79] The manager was accused of discriminating against an employee who had published on the company's internal network some threatening posts with quotations from the Bible referring to people from the LGBTQ+ community. The defendant was acquitted before two ordinary courts, so the SC only held the decision. However, because the SC dismissed the motions on procedural rather than material grounds and because no justification was drafted, the judgment did not provide guidelines in cases of ideologically motivated behaviour in the workplace.

Just as new judges' receptiveness to ideologically motivated claims is irregular, also irregular is their jurisprudence in public affairs. Judicial mobilisation among new SC judges is thus less coherent in jurisprudence than in public discourse, proving that court-packing does not necessarily aid the political party. Although the legitimacy narrative (elaborated in Section 3) guides judgments on the inadmissibility of new judges on judicial panels, there is less ideological coherence in cases relating to the NJC's decisions or in strictly political cases. Additionally, it should be noted that the SC's DC, consisting entirely of new judges with a background in criminal law, proved to be indispensable in the implementation of the new politicised disciplinary system introduced by the PiS party (Gajda-Roszczynialska and Markiewicz 2020). Until the Chamber's dissolution in July 2022, many judges have been prosecuted, or their immunity was waived on the Prosecutor General's motions. In this sense, the creation of an entirely new body in the SC packed with judges connected to PiS aided the politicians to maintain short-term gains.

However, the overall picture of the SC gets complicated when we look at other new judges' actions. First, new judges review the legality of their peers' appointments to the SC. In an exemplary case, new Judge Marek Motuk dismissed a request to exclude another new judge from adjudicating on the sole basis of the mode of the other judge's appointment to the SC.[80] Mobilising arguments from the legitimacy narrative, Judge Motuk invoked the aforementioned CT judgment on the inadmissibility of excluding a judge from a panel on the basis of his appointment and claimed that the request to bar a new judge from adjudicating is inadmissible under the act on the SC. Second, new judges not only publicly discuss the verification of the old SC judges but also review the pre-2017 appointment processes in their adjudication. For example, a new judge delivered a ruling revoking the decision issued by one of the old SC judges on the grounds that his appointment procedure was entirely political (as he was appointed by Communist-controlled institutions).[81] This judgment instrumentally applied the CJEU test of judicial independence to prove the illegitimacy of the appointment process. These two examples showcase the alliance between the government and the new judges it has appointed; nevertheless, this cooperation in adjudication is limited to the legitimacy of new judges. In other cases, judges tend to diverge from the party's needs. For example, in two cases, new judges, elected by the new NJC, repealed its

[77]Case K 16/17, 26 June 2019.
[78]Case II KA 1/20, 8 December 2020.
[79]Case III KK 249/23, 11 October 2023.
[80]Case V KK 286/23, 11 October 2023.
[81]Case II KZ 46/21, 13 December 2021.

resolution that recommended judges to the appellate court on the grounds of failure to present satisfactory justification.[82] Moreover, the SC Chamber of Extraordinary Control and Public Affairs, composed entirely of new judges and endowed with the power to confirm the validity of elections, was expected to deliver a judgment invalidating the October 2023 elections, in which the PiS party lost to the liberal coalition. However, contrary to this prediction, the Parliamentary elections were deemed valid,[83] again proving a mismatch between the party expectations and judicial behaviour.

5. Conclusion

The new judges' narratives depict the deficiencies of a populist rhetoric. They deploy a repertoire of tools characteristic of liberal democracy – by engaging in public discourse and legal actions – not to alter it entirely but to find the public's support and legitimacy. This framing does not revolutionise the legal preconceptions about law nor the substantive ontological preconceptions about legal practice. The analysed actors are the product of the same legal education as the judicial elite they denounce, just as one new judge stressed.[84] Both groups share a similar outlook on law that is perceived as external to them, hierarchical and closed, with little social responsiveness. The ontological difference between new and old SC judges lies in the mode of election to the court, which is a very complicated legal matter that is either ignored by new judges (and PiS politicians) or constantly highlighted by old judges (and liberal–left politicians). This difference motivates new judges' narratives that seek to exaggerate the divergences between both groups to make new judges look more fitting to the judicial ideal than the other group. Thus, they stressed the principle of separation of powers and the primacy of the Polish Constitution over EU law (especially over the CJEU judgments), and they praised the disengaged model of a judge by denouncing old judges' actions as political activism. In the populist Zeitgeist that usually targets judges, new judges welcomed the altered judicial disciplinary system to finally equalise the position of judges before the law. At the same time, the narratives are very defensive: as was shown, they were sometimes self-contradictory, and they do not offer any proposals regarding their judicial service to citizens. As a tool of legal mobilisation, the narratives aimed at legitimising the new judges' status were unsuccessful, even if they deployed rule of law language. The mobilisation analysed in this article shows how some lawyers became the active enablers of backsliding by seeking to legitimise the legal consequences of PiS judicial reforms (Cummings 2024, 118).

The analysis of the case law produced by both the new and the old SC judges suggests that both of these groups are equally receptive to the legal mobilisation conducted by right-wing organisation OI, which aims to embody Christian values in the interpretation of the law. New and old judges alike in similar numbers tend to side with the OI arguments in the cases of anti-abortion activists or those relating to family values. On the other hand, there is no evidence that old judges are less likely to be influenced by OI than are new judges. There are cases in which panels of both types of judges rejected the arguments raised by the conservative organisation. In this sense, the packed SC does not necessarily transform into an ideological vehicle supporting the governing party. This thesis is supported by the evidence from other cases in public affairs. While new judges, in line with their legitimacy narrative, always reject motions to exclude their peers on the basis of the appointment mode (which is deemed to be legitimate), they do not always support the new National Council of the Judiciary or the PiS party. Thus, judicial mobilisation is mostly restricted to the discursive practices of some of the new judges and to the adjudication strategies in cases relating to new judges' status and legitimacy.

[82]Case I NO 3/19, 27 March 2019; Case I NO 10/19, 26 March 2019.

[83]Case I NSW 1237/23, 12 January 2024.

[84]'Dariusz Czajkowski: czy sądy rzeczywiście wracają do PRL?' *Rzeczpospolita*. 20 May 2018. https://www.rp.pl/opinie-prawne/art1948171-dariusz-czajkowski-czy-sady-rzeczywiscie-wracaja-do-prl.

However, in the spirit of the corrective functions of populism, the arguments of the new judicial elite should not be completely disregarded (Czarnota 2019). Some of them directly point out the lack of democratic legitimacy of the judges in general or refer to the EU's inaction with regard to political influence in the judicial appointment systems of Member States other than Poland. However, the judicial populist narratives denounce old judges – not based on their social functions and structural deficiencies of liberal constitutionalism but on grounds of morality. In this sense, the narratives do not offer serious legal solutions apart from simply suggesting the reformed election system to the Council and legitimising new judges' positions at the SC. At the same time, indirectly, the narratives depict more significant problems with legal education, which is indicated in other academic works (Czarnota et al 2018): the vision of a legalist judge who uses all kinds of legal arguments to defend their position and status. The challenges posed by the anti–rule of law mobilisation exercised by new judges should not be overcome by simply restoring the pre-2015 legal order but rather by creating an opportunity to reorganise the Polish legal image. The strategy of invoking law and the Constitution is applied by PiS politicians who lost the 2023 Parliamentary elections. The outgoing Minister of Justice, Zbigniew Ziobro, who is responsible for most of the legal chaos that occurred in the judicial system after 2017, warned the liberal politicians that their announcement of the rule of law restoration is inconsistent with the Constitution.[85] It seems that populist constitutionalism will be present in Polish public discourse for some time.

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