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Judicial Change to the Law-in-Action of Constitutional Review of Statutes in Poland

ARTICLE

PIOTR RADZIEWICZ

Author affiliations can be found in the back matter of this article

ABSTRACT

One of the unexpected effects of the constitutional crisis in Poland that began at the turn of 2015 is the expansion of diffuse constitutional review of statutes. The Polish Constitution adopts a centralised model of constitutional review, but in the cases they hear common courts still independently disapply statutes that violate constitutional norms. Their stated grounds for doing so focus on the need to act in the place of the Constitutional Tribunal, which has lost its independence from the political power, as well as the necessity of continued effective preservation of the Constitution's primacy and of the fundamental rights and freedoms of individuals. This article takes a more detailed look at this new judicial practice, describes the rationale for its adoption and analyses its consequences from the legal perspective. The trend is capable of being described in theoretical terms, which is the reason for this article's research hypothesis that the courts' activities are changing the law-in-action of constitutional review in Poland, as a consequence of the formulation and activation of a defensive mechanism for constitutional democracy.

CORRESPONDING AUTHOR:

Piotr Radziewicz

Warsaw University of Technology, PL

piotradziewicz@gmail.com

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1. INTRODUCTION

The first symptoms of a constitutional review crisis in Poland emerged at the turn of 2015. Over a period of just under a year, the ruling majority established by the 2015 parliamentary election passed seven laws reorganising the Constitutional Tribunal and rewriting its procedural rules, thus destabilising its day-to-day operations. It made appointments to judicial posts that had already been properly filled. It also abolished the Tribunal's internal civil service, thus eliminating its capacity for institutional memory. The last focal points in the wave of changes were the appointment of a new President of the Constitutional Tribunal in major violation of the law and large-scale manipulation of bench compositions, for instance, by no longer allowing judges appointed prior to 2015 to adjudicate.[1] In practice, the Constitutional Tribunal then started regularly lending judicial legitimacy to the ruling majority's enactments of highly questionable constitutionality. That constitutionality was upheld by the Constitutional Tribunal, and yet its decisions deviated from years if not decades of prior settled practice. The number of cases brought to and decided by the Tribunal began to dwindle.[2]

An interesting trend then emerged, of a quality never before seen in Poland's legal system, which this article will analyse. The actions of parliament, the president and the government caused a major upheaval in the functioning of the Constitutional Tribunal. As a result, the common courts, along with the Supreme Court, began to examine the constitutionality of statutes applied in cases brought before them. This took various forms. Initially, the courts invoked previous decisions, which led to either applying the Constitution directly, or interpreting statutes so as to bring them in line with it.[3] A new practice, however, soon unfolded. Several common courts embarked on constitutional review of the statutory provisions they were supposed to apply in individual cases, thus taking over the duties of the debilitated Constitutional Tribunal. As there was no longer any proper, centralised review of statutes, the courts took it upon themselves to act in order to guarantee the primacy of the Constitution, the separation of powers and the protection of individual rights and freedoms. Legal scholars rallied behind the courts, reviving the classic debate on the role of the judiciary in a constitutional democracy, on the various models of constitutional review of ordinary statutes and on encroachments on the judicial branch.[4]

What is also noteworthy is the fact that the Polish legal system is a codified one, in which judges do not have the power to make the law and the law is not derived from precedents.[5] There is a closed list of sources of universally applicable law. The Constitution enumerates all types of permitted legislation and also all organs empowered to enact them.[6] Common and administrative courts are called to administer justice, while constitutional review of ordinary statutes falls within the remit of a specialist tribunal formulated in reference to the Kelsenian

1 See, for example, Wojciech Sadurski, 'Polish Constitutional Tribunal Under PiS: From an Activist Court, to a Paralysed Tribunal, to a Governmental Enabler' (2018) 10 Hague Journal on the Rule of Law 6; Mirosław Wyrzykowski, 'Bypassing the Constitution or Changing the Constitutional Order Outside the Constitution' in Andrzej Szmyt and Bogusław Banaszak (eds), *Transformation of Law Systems in Central, Eastern and Southwestern Europe in 1989–2015* (Wydawnictwo Uniwersytetu Gdańskiego 2016) 168; Wojciech Sadurski, *Poland's Constitutional Breakdown* (OUP 2019) 58; Leszek Garlicki, 'Disabling the Constitutional Court in Poland?' in Andrzej Szmyt and Bogusław Banaszak (eds), *Transformation of Law Systems in Central, Eastern and Southwestern Europe in 1989–2015* (Wydawnictwo Uniwersytetu Gdańskiego 2016) 63; Tadeusz Koncewicz, 'Of Institutions, Democracy, Constitutional Self-Defence and the Rule of Law: The Judgments of the Polish Constitutional Tribunal in Cases K 34/15, K 35/15 and Beyond' (2016) 53 CML Rev 1753; Wojciech Sadurski, 'How Democracy Dies (in Poland): A Case Study of Anti-Constitutional Populist Backsliding' (2018) 1 Sydney Law School Legal Studies Research Paper; Mirosław Wyrzykowski, 'The Vanishing Constitution' (2018) European Yearbook on Human Rights 3.

2 Prior to the constitutional crisis, approximately 500–600 cases were submitted per year (in 2014, 530 cases and in 2015, 623 cases). In 2016, 360 cases were submitted, which is a drop of almost one half on the previous year. In 2017, 282 cases were submitted, in 2018, 64 cases, in 2019, 155 cases, in 2020, 189 cases, while in 2021, there were 105 cases. The number of adjudications given by the Constitutional Tribunal has also gone down considerably compared with the period prior to the constitutional crisis. From 2014–2015, the number of rulings given was 125 (2014) and 188 (2015). In 2016, the Constitutional Tribunal issued 105 rulings, in 2017, 94, in 2018, 72, in 2019, 70, in 2020, 70, and in 2021, 62.

3 See Section 2.3 below.

4 See Section 2.5 below.

5 See, for example, Friedrich Möller, 'Observations on the Role of Precedent in Modern Continental European Law from the Perspective of Structuring Legal Theory' (2000) 11 Stellenbosch Law Review 426.

6 Article 87(1) of the 1997 Constitution: 'The sources of universally binding law of the Republic of Poland shall be: the Constitution, statutes, ratified international agreements, and regulations.' Source: Parliamentary translation (*https://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm*).

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model.[7] The Constitutional Court's judgment is final and of universal application, which means that there is no appellate instance from it and the provisions adjudged to be unconstitutional are repealed with *erga omnes* effect upon the publication of the judgment in the Journal of Laws.[8] If a common court conceives a doubt as to the constitutionality of a statute applicable to the case coming up before it for ruling, it can refer a legal question to the Constitutional Court (Article 193 of the 1997 Constitution). The Constitutional Court's reply is binding on the common court. All of this was not conducive to diffuse constitutional review, and – in the new political reality – it put courts on course for a direct clash with the executive and legislative powers, which, naturally, took a strict position on the Constitutional Tribunal's powers the moment it was 'taken over' through the new appointments.

This article takes a more detailed look at this new judicial practice and provides a legal analysis of the consequences of its adoption, including potential ramifications for the further evolution of Polish constitutional law. The diffuse constitutional review adopted by courts in response to the constitutional crisis caused by the dispute over the Constitutional Tribunal has shaped the mechanism for the defence of Poland's constitutional democracy and this new mechanism marks a change from how the country's constitutional dispensation has operated so far in this regard. This change cannot be explained using previously familiar terms and categories because it was not a change to the interpretation of any particular provision in the Constitution, nor the result of a specific norm being inferred from more general constitutional norms. This change was entirely inventive, and it has led to a new quality in the state's constitutional design, with consequences analogous to those of a constitutional amendment, though without it and without needing it, either.

There has been a systemic change to how constitutional review works in Poland, as demonstrated by the relationship between the constitutional crisis that broke out at the end of 2015 and the constitutional review of statutes that the judiciary began to perform in lieu of the Constitutional Tribunal. This shift sheds more light on contemporary Polish constitutionalism and helps in understanding the role of the judiciary in the state system, as well as its relationship to the legislative and executive branches. It relates to issues that are crucial to the future of Poland's constitutional democracy.

Section 2 of this article deals with the issue of the diffuse constitutional review of ordinary statutes in Poland, along with its particularities. This institution is one of the last remaining means of defending the constitutional system of the state. Section 3 discusses the possible consequences of changes being made to constitutional norms without formal amendment along with the formation of a hybrid (mixed) system of constitutional review. Concluding the article is a brief summary of key issues (Section 4 'Closing remarks').

2. DIFFUSE CONSTITUTIONAL REVIEW OF A STATUTE

The constitutional crisis centred around the Constitutional Tribunal proved to be a catalyst for a new phase in the diffuse constitutional review of statutes taken up by the Polish judiciary from 2016 onwards. There is a clear link between this turning point and the express reasons given by adjudicating panels for disregarding statutes that were in force when the cases were heard. Those reasons focused on the weakened or disqualified role of the Constitutional Tribunal within the constitutional system, the questioning of its impartiality and independence, the crisis surrounding the rule of law triggered by the legislative and executive branches, and the need for judicial bodies to find effective legal means to guarantee the primacy of the Constitution in the legal system and defend individuals' rights and freedoms. As a result of the constitutional crisis, the courts began, with some necessary modifications, to act as a substitute for the Constitutional Tribunal. They did so by formulating new grounds for their actions, grounds not having surfaced before in any similar form to any extent in previous adjudications, or at least not with such intensity.[9] Up to that point, disagreements over the permissibility of incidental constitutional review of statutes and acceptable forms of constitutional enforcement by

7 See, for example, Hans Kelsen, 'La garantie jurisdictionnelle de la constitution (La justice constitutionelle)' (1928) 35 Revue de Droit Public et de la Science Politique en France et à l'étranger 221.

8 Article 190(1–4) of the 1997 Constitution.

9 See Section 2.4 below.

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courts had been a matter of dispute within the judiciary itself (with the Supreme Court and Supreme Administrative Court taking one position and the Constitutional Tribunal taking the exact opposite position). As the crisis unfolded, the dispute now came to be about the relationship between the judiciary on the one hand and the legislative and executive powers (that is, the strictly political powers) on the other hand.[10] Thus, there was a shift in emphasis, and the interpretation of the principle of the separation of powers was contested. While the issues of the grounds for and scope of possible refusal on the part of the judiciary to enforce a statute had previously dominated the public debate, and may, in fact, have continued in the background, fundamental questions on the structure of the constitutional system now came to the fore. The main question has now become whether the system of government and the current version of the principle of constitutionality will continue to be valid.

2.1. DEFINING DIFFUSE CONSTITUTIONAL REVIEW

First of all, the notion of diffuse review has to be clarified. This term is used for one of two principal models of constitutional review of ordinary laws, with the opposite being concentrated review. Diffuse review evolved into its classic form in the United States, to become, over time, widely adopted in other legal systems, including some European countries.[11] In somewhat simpler terms, this is court adjudication with an element of refusal, in whole or in part, to enforce a statute that is currently in force and supplies the basis for the adjudication of the case at hand. This occurs when a court independently assesses the constitutionality of that statute, regardless of whether the same court will subsequently apply the constitution itself or a different inferior statute directly in lieu of the disregarded statute, and regardless of the implications of that action for the legal system (*erga omnes* or *inter partes*). Diffuse constitutional review is not a means of interpretation of the law and especially it cannot be regarded on a par with the various methods of combined enforcement of the constitution and statutes to bring an imperfect statutory solution into line with constitutional requirements.[12] It cannot be reduced to a form of direct enforcement of the constitution, nor is it a rule for resolving conflicts between laws, equal to a finding of *lex superior derogat legi inferiori*.[13] It will usually result in the invalidation (disregard) of a statute in the circumstances of the individual case. A different legal solution is instead adopted by the court, in an authoritative manner, based on such provisions as the court considers to be applicable in default of the provisions it has disregarded.[14] The court's practice is effective, because it is authorised and protected by other provisions of law, and ultimately it can be enforced in fact, using the state's methods of enforcement.

10 The perception by the legislative and executive branch of the diffuse constitutional review of statutes as an attempt at an unacceptable revision of the principle of the separation of powers and an attempt by the judiciary to encroach into territory reserved for the Constitutional Tribunal, and, consequently, of interference with the exercise of legislative power, is demonstrated by the measures taken against the judges who disputed, during the judicial application of law, the constitutionality of statutes and subsequently disregarded them (disciplinary action) and attempts even to enact special legislation on those issues (see the bill of 12 December 2019 amending the Law on the Common Court System, the Act on the Supreme Court, and certain other acts, Sejm docket 69/IX, especially article 1(33)).

11 See, for example, Allan Brewer Carías, *Judicial Review in Comparative Law* (CUP 1989) 127–82, 263–324. Diffuse constitutional review of legislation is usually the alternative to centralised review by a specialised constitutional court. There are, however, countries in which both forms appear and are mutually compatible. The constitutions of those countries define and regulate the relationship between the constitutional court and the common courts, notably the allocation of cases between them, the effects of their decisions and the methods for conflict resolution. One of the examples of such countries employing a hybrid (mixed) model of constitutional review is Portugal (see Article 280 of the Portuguese Constitution of 1976). Also see Carlos Blanco de Morais, *Justica Constitutional II* (Coimbra 2011) 595.

12 See, for example, Maartje de Visser, *Constitutional Review in Europe: A Comparative Analysis* (Hart Publishing 2015) 291.

13 There are quite stringent requirements for the applicability of the *lex superior derogat legi inferiori* rule. A conflicting constitutional norm and statutory norm must be of the same nature (for example, norms concerning powers or substantive norms), and the scope of the norms must at least partly overlap (the norms must be 'content-symmetric'). In practice, such situations will rarely arise, and it is easier to imagine this based on the example of constitutional norms concerning the administrative structure or procedures rather than the regulation of an individual's rights and freedoms. Nevertheless, the application of conflict rules is a question of interpretation and not adjudication on the hierarchical compliance of norms (validation), and this should also be applied to the diffuse model of review of this kind. It is generally assumed in legal systems that conflict-of-laws rules can be applied even when they do not provide for the existence of a conventional constitutional judiciary. Therefore, the conflict-of-laws legal mechanism should not be identified with the law constitutionality review procedure, because it only has the appearance of applying to the same theoretical premises.

14 According to the principle of the decision-making completeness of the legal system, a court cannot refuse to adjudicate a case even if it encounters major obstacles of a factual or legal nature.

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Diffuse review of the constitutionality of legislation is a topic belonging to that branch of constitutional law which deals with the organization of the structure of authority. While the main role of this type of review is to protect the freedoms and rights of individuals, one must still remember that it also affects the balance among the powers, especially between the legislative power and the executive power. Thus, when the courts take it on themselves to exercise diffuse review, questions naturally arise about the constitutional basis for and legitimacy of such review. This is especially true in Poland's legal system, which has formally established a centralised model of constitutional review and named a specific court to conduct it – the Constitutional Court.

2.2. BEFORE THE ENTRY INTO FORCE OF THE 1997 CONSTITUTION

In this context, there are very few recorded instances of diffuse review in Polish constitutional tradition. In the interwar period (1918–1939) in Poland, a judicial system for the constitutional review of statutes was not developed, due, among other things, to the adoption of the French constitutional doctrine, which stressed parliament's power to express the will of the people. Two consecutive Constitutions during this period, the 'March' Constitution of 1921 and the 'April' Constitution of 1935, stated that the courts could not examine the constitutionality of 'duly enacted statutes',[15] and the courts of the highest instance at that time – the Supreme Court and the Supreme Administrative Tribunal – observed that rule.[16] There were, however, differences in the interpretation of the Constitution in the literature, in which Maciej Starzewski, among others – while still being in the significant minority – proposed that courts should refuse to enforce statues that violated constitutional norms, because such statutes had not been duly enacted. Starzewski argued that the judicial review of statutes was a crucial condition of the legal primacy of the Constitution, and a 'manifestation of measures undertaken to realise the concept of a state governed by the rule of law'. Thus, by not respecting the constitutional constraints on its powers, the legislature had 'acted unlawfully' and no longer had a legal mandate to enact laws.[17]

During the time of the Polish People's Republic (1945–1989), there was no constitutional judiciary, as this was claimed to be contrary to the foundations of the political system based on the doctrine of uniform state power, in which the Sejm of the Polish People's Republic was the 'supreme body'. This problem was explored to the greatest extent by Stefan Rozmaryn, who stated that in a 'people's democracy' the legislature could not be subject to review in any form by a body standing apart from or above the parliament, because that would be a violation of the principle of the supreme authority of the people. The principle of the supreme authority of the people could only be realised in political institutions 'that organise true power on the part of the people, and act according to the people's will, which means in democratic institutions'.[18] Courts are not counted among these institutions.

2.3. DIFFUSE REVIEW UNDER THE 1997 CONSTITUTION

The standpoint adopted in the legal literature and court decisions, formulated under the Constitution of the Republic of Poland of 2 April 1997, is more trustworthy with regard to the current political landscape.[19] An analysis of materials produced by the National Assembly Constitution Committee leaves no doubt that the architects of the constitutional system intended to retain a centralised model of judicial review, created in 1982,[20] which continued to

15 See Article 81 of the Polish Constitution of 17 March 1921 (Polish Journal of Laws – Dz.U.1921.44.267, as amended) and Article 64(5) of the Constitution of 23 April 1935 r. (Dz.U.1935.30.227). The Constitutions in force at the time also stated: 'No statute may be contrary to this Constitution or breach a provision within it' (Article 38 of the March Constitution and Article 49(2) of the April Constitution, respectively).

16 See, for example, the Supreme Court's judgment of 16 February 1924 (Z. S. 69/23); Supreme Administrative Tribunal's judgment of 6 March 1923 in 644/22 (Orzecznictwo 1923/421) and of 24 February 1923 in 646/22 (Orzecznictwo 1923/602).

17 See Maciej Starzewski, Środki zabezpieczenia prawnego konstytucyjności ustaw (*Legal measures for protection of the constitutionality of laws*) (Wydawnictwo Sejmowe 1928) 49.

18 See Stefan Rozmaryn, 'Kontrola konstytucyjności ustawy' ('Review of the constitutionality of statute') (1948) 12 Państwo i Prawo 17.

19 Journal of Laws of 1997, No. 78, item 483, as amended.

20 Act of 26 March 1982 amending the Constitution of the Polish People's Republic (Dz.U.1982.11.83).

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operate successfully under subsequent constitutional dispensations. During National Assembly Constitution Committee sessions and plenary sessions, the Kelsenian concept of a constitutional tribunal was not contested.[21] Discussions among experts and members of parliament were more focused on the internal relationship between the constitutional judiciary and the justice system, such as the Constitutional Tribunal's power to establish a universally applicable interpretation of statutes. As a result, in the 1997 Constitution, a classic concentrated constitutional review model was adopted. In this model, there was a particular kind of institutional bridge between the Constitutional Tribunal and the courts in the form of a constitutional reference.[22] In the legal literature and case law, this was also an almost universally held conviction. Years later, Leszek Garlicki wrote:

> The Constitution, whether in the text of the Constitution, or the intention of the architects of the Constitution, allows, in a universal manner, constitutional review of statutes, and establishes a link between that review and a concentrated (Kelsenian) model, affording the Constitutional Tribunal a central role. There was no doubt in the light of Polish constitutional rules that the Tribunal's rulings were final, published promptly in the *Journal of Laws* or other appropriate medium, and that their publication was a prerequisite for the perfection of the derogation effect of the judgment.[23]

The powers of courts and tribunals were kept separate both with regard to their roles within the constitutional system and with regard to their legal means of action and the effects of their rulings. However, over time, there were increasing indications that constitutional regulation was not always infallible and consistent.[24] This was particularly visible – as the following sections of this article will highlight – in the recurrent practice of some courts, including courts of the highest instance, which disregarded statutes from time to time in their cases, citing various constitutional arguments, and did so without referring to the Constitutional Tribunal. The latter occurred on an incidental basis and was deeply entwined in the situational (and thus temporal) institutional and legal context (for example, it was interwoven into a dispute over recognition by the Supreme Court of interpretational judgments given by the Constitutional Tribunal). Nevertheless, as a rule, this practice had a significant impact on legal thinking due, in part, to a high level of interest and activity on the part of scholars.

Subsequent stages in the introduction of diffuse constitutional review of statutes by courts *a casu ad casum* can be assessed in the same vein, despite the Constitutional Tribunal functioning at the same time and the language of the Constitution remaining unchanged. Regardless of the period, reference is usually made to the duty of pro-constitutional interpretation of the law, and the consistency of the principle of the primacy of the Constitution and the direct application of the constitutional norms (Article 8 of the Constitution).[25] In some cases courts have regarded the option to disregard a statute as a legal consequence of the principle of the primacy of the Constitution, or even as a constituent element of that principle. It has also been stated that there are grounds for a court to disregard a statute when it is 'evidently unconstitutional' or 'repeatedly unconstitutional' (defined in various ways). These notions were intended as justification for the courts' refusal to apply statutes for which sufficient information had already existed to confirm their unconstitutionality (for example, previous judgments of

21 See, for example, statements made by Paweł Sarnecki, Adam Zieliński, Kazimierz Działocha and Janusz Trzciński at a session of the National Assembly Constitution Committee on 5 September 1995 (*National Assembly Constitution Committee Bulletin XXIV* (Warsaw 1996) 41–42, 51, 55).

22 In accordance with Article 193 of the Constitution: 'any court may refer a question to the Constitutional Tribunal as to the conformity of a normative act to the Constitution, ratified international treaty or statute, if the answer to such question will determine an issue currently before such court'.

23 See Leszek Garlicki, 'Niekonstytucyjność: formy, skutki, procedury' ('Unconstitutionality: forms, consequences and procedures') (2016) 9 Państwo i Prawo 7). Also see, for example, Andrzej Mączyński, 'Bezpośrednie stosowanie Konstytucji przez sądy' ('Direct application of the Constitution by the courts') (2000) 5 Państwo i Prawo 3.

24 The question remains whether this was due to a drafting defect in constitutional regulation expressing the intention of the system's architects with insufficient precision, or the consequence of an effort, understandable in ethical terms, to equip the constitutional system, beyond the limits of the letter of the law, with additional guarantees of the primacy of the Constitution, along with the defence of individuals' fundamental rights contained within the 'logic' of the system.

25 See, for example, Ewa Łętowska, 'Kryzys wokół TK. Co mogą zrobić sądy' ('*Crisis around TK. What can courts do?*') (2016) 4 Kultura Liberalna 19.

the Constitutional Tribunal in similar cases).[26] Normative consequences were drawn from the fact that – unlike in the concentrated review model – courts do not adjudicate *erga omnes*, and their decisions do not cause the derogation of unconstitutional legislation, and therefore they do not directly clash with the powers reserved for the Constitutional Tribunal.[27] It was stated that the constitutional grounds for courts to disregard a statute are present in Article 8(2) of the Constitution (direct applicability of the Constitution), Article 178(1) (courts bound by the Constitution and statutes) and Article 193 (courts may refer questions to the Constitutional Tribunal).[28] No information, however, is provided as to what method or what criteria should govern that interpretation. Not even, as a bare minimum, an outline of arguments to prove in a credible manner – regardless of the need and purpose for which various supporting arguments were given – that the cited provisions of the Constitution establish a power for the courts to disregard a binding statute due to finding it unconstitutional (this occurs in a similar manner, by analogy, in the case of the Constitutional Tribunal, see Article 188), while the constitutional system of the state allows a shift in this kind of power of courts with respect to the legislature on the separation of powers map (Article 10 of the Constitution).[29]

Until the constitutional crisis broke out, however, the common courts had never made light of the Constitutional Court's powers of constitutional review, let alone put them in doubt.

2.4. THE TURNING POINT IN 2016

In the past, numerous scholars used to defend the idea of centralised constitutional review. In 2016, the first signs of a constitutional crisis began to emerge. From then on, many of those scholars shifted their loyalty to the idea of a diffuse constitutional review. The dangers posed to the constitutional order and individual rights and freedoms, which during this period were proven to be entirely credible, also led courts to resort to various forms of direct application of the Constitution in an increasingly active manner. Neither the practice itself, nor the fact that it was becoming increasingly common was anything new. However, there was one new development. The courts took the liberty of openly expounding views on their own role in the constitutional review process in a time of crisis affecting the Constitutional Tribunal, and they announced that they would be intensifying their diffuse constitutional review of statutes, should the necessity arise in practice. Accordingly, court opinions began to include arguments derived from the fact that the Constitutional Tribunal was dysfunctional and had ceased to be independent.

One symptomatic standpoint was delivered by a Supreme Court panel in March 2016 in an oral opinion, stating explicitly that

> in view of the unclear situation regarding the Constitutional Tribunal, the Supreme Court has taken on the duties of the Constitutional Tribunal and has by itself found a provision in the Tax Code to breach the Polish Constitution, without submitting a request to the Constitutional Tribunal for a ruling.[30]

The Supreme Court referred to past Constitutional Tribunal rulings and found no reason to submit a request for a ruling to the 'new' Constitutional Tribunal.

In a resolution adopted on 23 March 2016,[31] while considering the alleged unconstitutionality of a provision in a statute, the Supreme Court explained that

26 See, for example, Roman Hauser and Janusz Trzciński, *Prawotwórcze znaczenie orzeczeń Trybunału Konstytucyjnego w orzecznictwie Naczelnego Sądu Administracyjnego* (*The law-making significance of Constitutional Tribunal decisions in the case law of the Supreme Administrative Court*) (Lexis Nexis 2008) 20.

27 See, for example, Maciej Gutowski and Piotr Kardas, *Wykładnia i stosowanie prawa w procesie opartym na Konstytucji* (*Interpretation and application of law in a process based on the Constitution*) (C.H. Beck 2017) 622.

28 See, for example, Bogusław Banaszak, *Konstytucja Rzeczypospolitej Polskiej. Komentarz* (*The Constitution of the Republic of Poland. Commentary*) (C.H. Beck 2009) 69.

29 See, for example, the Supreme Court's judgments of 7 April 1998 in I PKN 90/98 and of 21 October 2003 in SNO 59/05; the Supreme Administrative Court's judgments of 24 October 2000 in V SA 613/00 and of 9 October 1998 in SA 1246/98; the Supreme Court's judgment of 4 July 2012 in III PK 87/11. Contrast with, among many other examples, the Supreme Court's judgment of 16 April 2004 in I CK 291/03 and the Supreme Administrative Court's judgment of 12 June 2002 in OPS 6/00.

30 See the Supreme Court's judgment of 17 March 2016 in V CSK 377/15 <*www.prawo.pl/prawnicy-sady/sad-najwyzszy-stwierdzil-niekonstytucyjnosc-przepisu-bo-tk-w-kryzysie,65090.html*> accessed 27 December 2021.

31 See the Supreme Court's judgment in III CZP 102/15.

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> a question formulated in that manner should be submitted to the Constitutional Tribunal and not to the Supreme Court (Article 188(1) and Article 193 of the Constitution). The division of the roles played by the Constitutional Tribunal and by the Supreme Court and common courts is demonstrated by the fact that constitutional review of legal norms is performed by the Constitutional Tribunal; it is not performed, as a rule, by the Supreme Court and common courts (...). This is a valid premise as long as the Constitutional Tribunal remains capable – in the existing normative environment – of fulfilling its role within the constitutional system.

The Supreme Court concluded that the Constitutional Tribunal could be confirmed to have become incapacitated from acting when the executive decided not to publish its rulings despite being legally required to do so. This was sufficient grounds for a common court to take over the task of the constitutional review of a statute without referring the question to the Constitutional Tribunal.

Later, in a ruling of 31 October 2019,[32] the Regional Court in Warsaw referred the following legal question to the Supreme Court: can a court refuse to apply a provision in a statute due to it being unconstitutional 'without first submitting a request for a ruling to the Constitutional Tribunal?' Among other things, the Regional Court cited 'changes to the Constitutional Tribunal that [had] occurred since 2015', the unclear status of some Constitutional Tribunal judges (referred to as 'persons not having the power to adjudicate') and the 'doctrine of necessity', which states that in times of constitutional crisis, a court is entitled to refuse to apply a statute that is unconstitutional. The Regional Court's view was as follows:

> There are presently grave concerns as to the status of the persons appointed to be Constitutional Tribunal judges in 2016. (...) Where persons who are not so empowered are involved in the making of a Constitutional Tribunal ruling, such a ruling will evidently be legally defective, and in such a case the "doctrine of necessity" is legitimate under the Constitution.

The Regional Court also remarked that the Constitutional Tribunal likewise lacked legal legitimacy due to the following: (i) the President of the Constitutional Tribunal having been appointed in an unconstitutional manner, (ii) the appointment in July 2017 of a Vice-President of the Constitutional Tribunal from among persons whose appointment as Constitutional Tribunal judges was defective, (iii) Constitutional Tribunal judges appointed prior to 2015 being unlawfully prevented from taking part in adjudication, and (iv) 'controversial actions of Constitutional Tribunal judges appointed in the current parliamentary term, who appear not to abide by the principle of impartiality'.

Important statements were made by the Supreme Court in reference to matters concerning the procedure used in the appointment of judges to the newly created National Council of the Judiciary. In those cases, the Supreme Court based its arguments on EU law but also found Polish statutes to be unconstitutional within the national order. In a ruling of 5 December 2019,[33] it found that the Constitutional Tribunal's judgment of 20 June 2017[34] on the rules for appointments to the new National Council of the Judiciary presented a 'constitutional crisis' and was unacceptable. This was because the decision had been entered by a panel that included 'persons appointed to judicial posts on the Constitutional Tribunal that were occupied'. The Supreme Court stated:

> Information about various kinds of dependencies and informal relationships with people representing the political powers, which is public knowledge, cannot be disregarded. In the light of this information, the Constitutional Tribunal cannot be regarded as a court that guarantees impartiality and independence when discharging its constitutional duties (Article 195 of the Constitution).

That prompted the Supreme Court to disregard the Constitutional Tribunal's judgment of 20 June 2017 in K 5/17 and refuse to apply a statute specifying new rules for appointments to

32 See the Supreme Court's judgment in XXIII Ga 797/18.

33 See the Supreme Court's judgment in III PO 7/18.

34 See the Constitutional Tribunal's judgment in K 5/17, OTK ZU-A/2017/48.

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the National Council of the Judiciary. Unlike the Constitutional Tribunal, it found the statute to be in violation of the Constitution and of EU law.[35] The Supreme Court made reference to the order of 5 December 2019 in the resolution of 23 January 2020, in which it concluded that several provisions in the statute was unconstitutional. Those concerned issues such as the Constitutional Tribunal's basis and procedure for operation and the status of judges nominated to the new National Council of the Judiciary.[36]

In its ruling of 21 May 2019[37] the Supreme Court was critical of the Constitutional Tribunal's conduct and did not comply with its decision of 25 March 2019[38] in K 12/18 upholding the constitutionality of the statutory provisions on the appointment of judges to the National Council of the Judiciary by the Sejm. The Supreme Court found that the Constitutional Tribunal's ruling had been issued 'by an adjudicating panel made up solely of judges appointed by the current government majority, including persons who had been appointed to posts of Constitutional Tribunal judges that were occupied at that time'. It added that 'in its current form, the Constitutional Tribunal' was being utilised 'in an instrumental manner' by the political powers. The Supreme Court found that statutory provisions on the procedure for judicial appointments violated the Polish Constitution and EU law.

It is worth noting one more decision concerning the status of judges recommended by the newly created National Council of the Judiciary. Therein, the Supreme Court pointed out that, since 2017, Poland had 'ceased to subscribe to the values of a state governed by the rule of law'.[39] As in the above-discussed body of decisions, the Supreme Court was critical of the way in which the Constitutional Tribunal functioned, and it refused to comply with the Constitutional Tribunal's judgments on the constitutionality of statutes regulating the procedure for judicial appointments and the rules for appointments to the National Council of the Judiciary. It stated, among other things, that the Constitutional Tribunal's rulings were intended to 'freeze the powers of common courts to review the legitimacy of the actions of the Constitutional Tribunal, which adjudicates in the form of a panel of judges appointed to judicial posts already occupied at the time'. This statement by the Supreme Court also subscribes to the judicial trend that underlines the power of the common courts to assess, by themselves, whether statutes fall in line with the Constitution or not and enables the Constitutional Tribunal, which is engulfed in a crisis, to be circumvented.

All this can be summarised by a recent ruling of the District Court in Gorzów Wielkopolski, of 23 April 2021.[40] The case concerned hunting schools. The owner of land adjacent to the hunting grounds of the Polish Hunting Association (hunters' self-government body) is entitled to compensation for crops damaged by wild game. The method for calculating the damages was controversial. The Constitutional Court had spoken on the subject, finding the disputed provisions to be in violation of the constitutionally protected right to own property.[41] The District Court in Gorzów Wielkopolski decided to disregard the decision of the Constitutional Court, claiming that the latter was wrongly composed. According to the District Court:

> The panel included a "double", Mariusz Muszyński, irregularly appointed in lieu of a justice properly and lawfully elected by the Sejm. In the act of appointment, the President of the Republic of Poland disregarded the properly elected justice and appointed in his stead the doubles elected by the dominant party in the Sejm.

35 'The Supreme Court finds that the Constitutional Tribunal "judgment" in question was issued by a panel including judges appointed in violation of Article 190(1) of the Constitution (...)' (Supreme Court judgment of 5 December 2019 in III PO 7/18).

36 For example, in the Supreme Court's view: 'The solutions adopted in the Act of 8 December 2017 amending the Act on the National Council of the Judiciary on appointment of judges to the National Council of the Judiciary are contrary to the principle of the separation of powers and checks and balances (Article 10(1) of the Polish Constitution), as well as to the principle of the separate status and impartiality of courts (Article 173 of the Polish Constitution) and independence of the judiciary (Article 178 of the Constitution)'. See the resolution adopted by an adjudicating panel of the combined Civil, Criminal, and Labour and Social Security Chambers of the Supreme Court of 23 January 2020, BSA I–4100–1/20. Available in English: <*www.sn.pl/aktualnosci/SitePages/Wydarzenia.aspx?ItemSID=602-0dc69815-3ade-42fa-bbb8-549c3c6969c5&ListName=Wydarzenia*> accessed 27 December 2021.

37 See the Supreme Court's judgment in III CZP 25/19.

38 See the Constitutional Tribunal's judgment in K 12/18, OTK ZU-A/2019/17.

39 See the Supreme Court's judgment of 15 July 2020, II PO 3/19.

40 See the Supreme Court's judgment in I C 1326/19.

41 See the Constitutional Tribunal's judgment of 8 May 2019, K 45/16, OTK ZU A/2019/22.

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Accordingly, the District Court took it upon itself to judge the constitutionality of the provisions of hunting law and found them to be incompatible with the constitutional provisions protecting ownership. Thus, it arrived at the same conclusion as the Constitutional Court had, though by embarking on diffuse review.[42] As a marginal note, the District Court recalled the European Court of Human Rights's (ECtHR) fresh decision of 7 May 2021 in *Xero Flor w Polsce sp. z o.o. v. Poland*, in which the Strasbourg court found Poland to have violated Article 6(1) of the Convention because the Constitutional Court had decided in a panel including a person appointed to an already occupied seat. Accordingly, the Constitutional Court was not a court established by law.[43]

The way in which the Constitutional Court itself responded to the ECtHR judgment in *Xero Flor* is as symptomatic as it is vehement. This response amply shows that diffuse review is being undertaken by common-court judges in difficult circumstances calling for exceptional civil courage.[44] In its order of 15 June 2021, given on the Civil Rights Ombudsman's motion to recuse a CC justice appointed to an already occupied post, the Constitutional Court held that:

> The ECtHR judgment of 7 May 2021, to the extent it refers to the Constitutional Court, is underpinned by theses demonstrating the ignorance of Polish legal order, including the foundations of the constitutional order, defining the position, organisation and role of Poland's constitutional court. In this scope the judgment was given without a legal basis, overstepping the limits of the powers vested in the ECtHR, and constitutes an unlawful interference with the domestic legal order, notably with matters lying outside the competence of the ECtHR, for which reason it must be regarded as a nonexisting judgment (*sententia non existens*).[45]

One can predict that *Xero Flor* and the arguments raised therein will reinforce the trend for the application of diffuse review by common courts.

2.5. SUPPORT COMING FROM SCHOLARS

At the same time, firm views were being expressed in the literature supporting diffuse judicial review as a specific remedy against the subversion of the principles of constitutional democracy and of the rule of law. Leszek Garlicki (former Judge of the Constitutional Tribunal and former Judge of the ECtHR) revised his previous position due to the fact that, in his words,

> even today it can be said that a major interference in the functioning of the Constitutional Tribunal has occurred. In the best-case scenario its capacity to exercise its constitutional powers has been reduced, and in the worst-case scenario that capacity has been destroyed completely.[46]

Leszek Garlicki acknowledged that diffuse review is, under certain conditions,[47] not only possible *de constitutione lata*, but is in fact a necessity. This was because as long as the Constitutional Tribunal remained capable of effectively exercising its powers of the constitutional review of statutes, 'other courts could exercise restraint in conducting constitutional review of statutes'. Meanwhile, because the Constitutional Tribunal's capacity to function has been severely disrupted, this must not lead to gaps in the systemic safeguards of the primacy of the Constitution. In Garlicki's view, this

> disruption of the Constitutional Tribunal's capacity to function means that its duty to ensure the primacy of the Constitution is transferred to other courts, while at the same time those courts are required, of course, to act within the limits of their powers.[48]

42 A similar decision pointing out the improper composition of the Constitutional Court had been handed down some time earlier by the District Court for Wrocław-Krzyków. In consequence, that court did apply the statutory provision found to be unconstitutional by the Constitutional Court and referred to the Constitutional Court's pronouncement as not a judgment.

43 See paragraphs 268–290 of *Xero Flor w Polsce sp. z o.o. v. Poland*, appl. No. 4907/18.

44 See the remarks on judges' disciplinary liability (n 10).

45 See the Constitutional Tribunal's judgment in P 7/20, OTK ZU A/2021/30.

46 Leszek Garlicki, 'Sądy a Konstytucja Rzeczypospolitej Polskiej' ('The courts and Constitution') (2016) 6–7 Przegląd Sądowy 11.

47 See Leszek Garlicki (n 46) 23.

48 Leszek Garlicki (n 46) 14.

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Marek Safjan (former president of the Constitutional Tribunal and judge of the Court of Justice of the European Union since 2009) also triggered a turning point in legal thinking when, drawing on the experience of thirty years of functioning of the Kelsenian model in Poland and referring to the intensification of the constitutional crisis, he concluded that, despite its drawbacks and shortcomings, diffuse review should, at that time, be adopted as a constituent element of the constitutional system. Additionally, in the future and following the probable restoration of balance to the legal system, the advisable model would be one centred around a specialised constitutional court with a greater role of diffuse review.[49]

The overall concept of diffuse review, regarded as a segment of the most general concept possible of the judicial process of enforcement of law based on a constitution, was presented by Maciej Gutowski and Piotr Kardas. In their view, under the 1997 Constitution, there exists a 'hybrid' model of diffuse review, and, in strictly defined circumstances, including when the Constitutional Tribunal has been 'paralysed', courts are fully entitled to disregard statutes they consider to be unconstitutional if the wording cannot be aligned with the Constitution with the available methods of interpretation.[50]

In addition, other arguments have been presented in the literature in support of the need for diffuse constitutional review of statutes in response to the constitutional crisis. Those include 'special situation',[51] 'doctrine of necessity',[52] 'total' nature of the conflict between statutes and the Constitution (caused by the legislature's instrumental approach),[53] necessity caused by loss of capacity for effectively guaranteeing the constitutionality of the law,[54] 'necessity for a new approach to the issue of direct application of the Polish Constitution following changes in the political landscape'[55] or, for instance, 'the Tribunal's reduced operational capacity' and the effect of the crisis on the Tribunal, which has undermined its legal standing and mandate, both in normative terms and in the terms of public opinion.[56]

2.5. LIMITATIONS OF DIFFUSE REVIEW

In this context, questions also arise about the natural limitations of diffuse review, and whether this institution is capable of replacing the Constitutional Tribunal entirely. A fully functional and independent constitutional court, especially if it is available for private constitutional appeals, provides effective protection for the fundamental rights and principles of a democratic state governed by the rule of law. It also protects individuals against the arbitrariness of the ruling majority. Firstly, diffuse review, by its very nature, applies neither to preventive (*a priori*) review of a statute, which, when correctly applied, is an effective means of influencing the legislative

49 See Marek Safjan, 'Trybunał Konstytucyjny po trzydziestu latach: doświadczenie i przyszłość' ('The Constitutional Tribunal after thirty years: experience and the future') (2017) 1 Przegląd Konstytucyjny 39.

50 See Maciej Gutowski and Piotr Kardas, 'Spory ustrojowe a kompetencje sądów (Granice bezpośredniego stosowania konstytucji)' ('Constitutional disputes and the competence of courts (limits of direct application of the Constitution)') (2017) 12 Palestra 38. Similarly: Maciej Gutowski and Piotr Kardas, 'Sądowa kontrola konstytucyjności prawa. Kilka uwag o kompetencjach sądów powszechnych do bezpośredniego stosowania Konstytucji' ('Judicial review. The competence to review the constitutionality of statutory law by common and administrative courts in light of direct application of the Constitution') (2016) 4 Palestra 5; Maciej Gutowski and Piotr Kardas, 'Konstytucja z 1997 r. a model kontroli konstytucyjności prawa' ('The Constitution of 1997 and the model of constitutional review of legislation') (2017) 4 Palestra 11; Maciej Gutowski and Piotr Kardas (n 23) 567.

51 See Jan Podkowik, 'Sądy wobec niekonstytucyjnych aktów normatywnych u progu trzeciej dekady obowiązywania Konstytucji RP' ('Courts towards unconstitutional statutory provisions at the beginning of the third decade of the Constitution of 1997') (2018) 5 Przegląd Sądowy 21.

52 See Piotr Mikuli, 'Doktryna konieczności jako uzasadnienie dla rozproszonej kontroli konstytucyjności ustaw w Polsce' ('Doctrine of necessity as the justification for the decentralised constitutional review in Poland') (2018) XL Gdańskie Studia Prawnicze 641.

53 See Paweł Wiliński and Piotr Karlik, 'Komentarz do art. 178 Konstytucji' in Marek Safjan and Leszek Bosek (eds), *Konstytucja RP. Tom II. Komentarz do art. 87–243* (*The Constitution of the Republic of Poland. Volume II. Commentary to articles 87–243*) (C.H. Beck 2016) 1019.

54 See Ryszard Balicki, 'Bezpośrednie stosowanie konstytucji' ('Direct application of the Constitution') (2016) 4 Krajowa Rada Sądownictwa 18.

55 See Walerian Sanetra, 'Bezpośrednie stosowanie Konstytucji RP przez Sąd Najwyższy' ('Direct application of the Polish Constitution in the jurisprudence of the Supreme Court') (2017) 2 Przegląd Sądowy 23.

56 See Ewa Łętowska, 'Aktualność sporu o zdekoncentrowaną kontrolę konstytucyjności w Polsce: uwagi na tle art. 10 Konstytucji RP' ('The actuality of the dispute about deconcentrated control of constitutionality in Poland: comments on the background of Article 10 of the Constitution of the Republic of Poland') in Marek Zubik (ed), *Minikomentarz dla Maksiprofesora. Księga jubileuszowa Profesora Leszka Garlickiego* (Wydawnictwo Sejmowe 2017) 797.

power, nor to abstract review of applicable norms if they have not been applied previously in court proceedings (due to having not long been in force or due to the specific nature of the subject matter – for example, laws governing the administrative structure). Secondly, a concentrated model adequately prevents the uncertainty and unpredictability of the law; the judgment of a constitutional court eliminates unconstitutional laws and is effective *erga omnes*. Thirdly, the operation of a specialised judicial body ensures that the Constitution has a widespread impact on the shape taken by the legal system, creating a coherent axiology (an orderly system of values) in it, and creating a constitutional culture in society.[57] Also, unlike in common-law tradition, Poland's system is a codified one, with no formal or hierarchical system of precedent. For this reason, it is not impossible for discrepancies to arise in constitutional interpretation and thus for the safety and predictability of the law to suffer a temporary reduction.[58] In the current situation, all of these objections need to be regarded as a kind of 'price' to be paid for the constitutional crisis and the inconvenience resulting from the weakening of the Constitutional Tribunal in its role as an adjudicator.

In summary, diffuse judicial review of statutes was not envisaged as a constituent part of the constitutional system of the state, and this, until recently, with a few exceptions, was the *communis opinio doctorum*. A change only took place when the constitutional crisis arose.

3. THE CHANGE TO THE LAW-IN-ACTION OF THE CONSTITUTIONAL FRAMEWORK FOR CONSTITUTIONAL REVIEW

The Section 1 of this article stated that a new development in Polish constitutional practice would be addressed, which is a specific kind of empirical phenomenon that emerged and developed rapidly when the constitutional crisis happened. This phenomenon is the diffuse constitutional review of statutes now conducted by the judiciary due to the adjudicatory authority of the Constitutional Tribunal having been undermined. The judiciary is now attempting to replace the Constitutional Tribunal and make independent decisions regarding the constitutionality of provisions in statutes. The courts refer substantially fewer questions about constitutionality of statutes to the Constitutional Tribunal, explaining in their judgments that they engage in constitutional review of statutes themselves due to the fact that the Constitutional Tribunal has ceased to be independent. They also state that the constitutional crisis requires extraordinary legal remedies. The Supreme Court also takes a similar position, which stabilises diffuse review, makes it a common practice and validates it. The authority enjoyed by the Supreme Court will undoubtedly provide an incentive for courts of lower instance to use this new tool. It is difficult to predict how things will unfold with regard to this practice in the future. Today, however, it has become an element of the 'collective awareness' of the judiciary, to whom it comes as a means of defending the primacy of the Constitution, the fundamental rights of individuals and the principles of a constitutional democracy. More general discussion of the characteristic features of such a phenomenon is also possible.

Firstly, due to the impact of political events in Poland in recent years, which bear the characteristics of a constitutional crisis, the constitutional system of the state is changing. This change is occurring without the Constitution being amended; that is, without any modification of the Constitution's wording through the proper legislative procedure and without invoking any rules

57 These suppositions are theoretical and idealised. They show the positive impact that a centralised constitutional judiciary would potentially have on the constitutional order in a state that did not have a long tradition of judicial review and had to undergo transformation from an authoritarian to a democratic state. In practice, there have been numerous obstacles to embedding a constitutional judiciary in Poland's legal culture. There was also a moderate level of public awareness of the Constitutional Tribunal's judgments. This is also discussed more broadly in the context of other CEE countries, see Paul Blokker, *New Democracies in Crisis? A Comparative Constitutional Study of the Czech Republic, Hungary, Poland, Romania and Slovakia* (Routledge 2014) passim.

58 Many years previously, Hans Kelsen, the architect of the European model of constitutional review done by a specialised court, raised similar objections regarding diffuse review. Among other things, he stressed that judicial review was not suited to the reality of legal systems in Continental Europe, as they came from a different legal culture, were less open to active approaches to adjudication on the part of a judge and to regarding precedents as a source of generally applicable law, placed a different emphasis on the understanding of principles of the separation of powers and checks and balances, with judges ill-suited to resolve constitutional issues and apply refined interpretative methods referring to the theory of argumentation instead of syllogistic conclusions. For more information see Hans Kelsen (n 7) 197–259; Hans Kelsen, 'Judicial Review of Legislation: A Comparative Study of the Austrian and the American Constitution' (1942) 4(2) The Journal of Politics 183; Alec Stone Sweet, 'Why Europe Rejected American Judicial Review and Why It May Not Matter' (2003) 101 Michigan Law Review 2744; Theo öhlinger, 'The Genesis of the Austrian Model of Constitutional Review of Legislation' (2003) 16(2) Ratio Juris 206.

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of constitutional interpretation to explain the change. Secondly, the justification for the change is sought in arguments pertaining to political philosophy and specifically the canon of liberal constitutionalism. Such arguments are mostly references to system-related rules, which in this case means the protected matter and the grounds for that protection. Thirdly, the architects of change in this sense are specific public authorities, and thus, paradoxically, the state itself (with the assumption that any entity exercising an element of public power does so on behalf of the state), with active support from scholars. This gives the entire occurrence an unusual overall form, precluding simple analogies to constitutional crises in which the opponents are state institutions on the one hand and civil movements or social organisations acting outside of the legal system on the other hand. Finally, the stated motivation of the key players (that is, judges, gathered around the concept of the rule of law, which is traditionally perceived in their cultural circle and has its foundations in the legal literature and court decisions) for pursuing a change to the constitutional system is good faith and a stronger rationale.

This change to the constitutional system is something that falls within a different category from, and at the same time means more than, an ordinary change in the established meaning of a provision or group of provisions in a constitution, effected, for example, by a constitutional court or by common courts.[59] Equally, it cannot be reduced to the straightforward violation of some specific constitutional norm due to the action or omission of a public authority (such as passing unconstitutional legislation or engaging in some other unconstitutional conduct). This is because, as a rule, this revision relates to individual and incidental matters for which we can always find an explanation, to a greater or lesser extent, even if it means the necessity to adapt the law for social and political purposes and find grounds in a pertinent method of interpretation of legal text. Such unconstitutional actions form part of the legal system, and prosecution and enforcement in this respect is the task of state institutions created specifically for that purpose. On the other hand, in cases of change to the constitutional system, there is no capability or obvious way to provide constitutional grounds for certain types of conduct on the part of those in power. Despite this, such actions are fully effective in a factual sense because they are backed up by state authority (they are performed in the name of the state) and are protected by overall mechanisms and measures provided for in applicable law. They are also of major legal importance because they concern constitutional matters, which is a sphere regulated by the architects of the constitutional system and is of special political and social significance.

In this context, therefore, a distinction has to be drawn between an ordinary change in the interpretation of a constitution and what could be referred to as informal change to a constitution (less than a formal amendment but more than a mere change of established interpretations). The former is narrow in scope and is the typical legal issue of how constitutional norms are decoded. The latter, which is a descriptive and not a normative term, describes a development relating to the constitutional system and transforming the entire sphere in which the state acts, which can manifest itself, for example, in the creation of new institutional forms. It is something more than merely a creative change to existing interpretations and yet no amendment by the legislature takes place. Such a change is stable and creates various kinds of tools for action, legal relationships and bases for powers, and thus demonstrates its capacity for long-term use in a recurrent and orderly fashion.[60]

59 Constitutional interpretation knows a vast cognitive wealth of interpretation theories, originating especially from the United States: originalism and the theory of a living constitution, or variations such as textualism, pragmatism, and intentionalism. In Continental terminology, however, a method of constitutional interpretation is usually described with reference to either its static or dynamic nature. To put it very simply, static concepts assume that the meaning of words used in a legal text is attributed at the moment the text is adopted, and it is reconstructed only by seeking the intention of the legislator or the concept of the original public meaning. Dynamic concepts, by contrast, assume that a constitution is not an interpretatively fixed instrument but instead requires subsequent revision or adaptation of the meaning of its phrases on the part of the entity interpreting it if prompted by important social, axiological or linguistic considerations or civilisational progress; constitutional norms are thus subject to reinterpretation (see, for example, Sotirios A. Barber and James E. Fleming, *Constitutional Interpretation: The Basic Questions* (OUP 2007) 3; David A. Strauss, *The Living Constitution* (OUP 2010) 7.

60 Literature also notes the susceptibility of written constitutions to informal changes occurring without the passage of amendments conforming to the established legislative process but instead on the basis of, for example, judicial interpretation, the shaping of constitutional practice by the executive or the passage of ordinary legislation. Such changes are not without impact on the system of governance and rule of law. For examples from Canada and the United States, see, for example, Richard Albert, 'How Unwritten Constitutional Norms Change Written Constitutions' (2015) 38 Dublin ULJ 387. See also Agnieszka Bień-Kacała, 'Informal Constitutional Change. The Case of Poland' (2017) 6 Przegląd Prawa Konstytucyjnego 199.

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This type of change, as exemplified by the practice of diffuse review during Poland's constitutional crisis, is a solution that stands apart from the existing constitutional system but is in line with its logic. This means consistency with the system of government and underlying principles of the constitutional system, despite the lack of inclusion in that system. In other words, the architects of the constitutional system could have provided for that particular legal institution in the constitution, which would have been natural under the adopted political philosophy, but for some reason they did not do so, making a different political decision.

A change taking place in this manner is triggered when there is a growing disproportion between the existing constitutional system and the social and institutional realities of the state. This leads to the impression that the existing legal institutions can no longer solve problems arising around them that they themselves have caused. Hence, a paradigmatic change is generated by a political crisis of some kind, or, in a more severe form, by a constitutional crisis, which the forms and procedures provided for in the current constitution are not sufficient to resolve.

The change of the law-in-action of constitutional review in connection with the challenge to the Constitutional Court's legitimacy leads to the spontaneous formation of a hybrid (mixed) system. The constitutional review of statutes by the Constitutional Court continues to be an element of this system, for it has never ceased to be mandated by the Constitution of 1997. The centralised model, as we have observed on multiple occasions by now, is, however, largely paralysed and unable to function properly. Common courts fill in this gap by invoking the basic functions of the judiciary in a constitutional democracy, which include not only the administration of justice in individual cases but also the guardianship of the separation and balancing of the various powers and the protection of human rights. Accordingly, diffuse review becomes the second ingredient of this hybrid system, implemented by common courts on the basis of general constitutional clauses concerning the direct applicability of the Constitution and the subordination of the judiciary to the Constitution and statutes.[61] This practice remains outside of the narrow outline of Poland's system of constitutional review and informally supplements the institutional order without contravening the law. Its participants include the courts of various types and instances (such as district and regional courts, courts of appeal and the Supreme Court) and the various decisions subscribing to the trend have surfaced regularly since early 2016. Simultaneously, this is full-scope diffuse review, that is, it can be used against any statutory provision relevant to the outcome of the pending case. What is important is the common courts' and the Supreme Court's underlying motivation. Diffuse review is undertaken not only due to the circumstances of the case, such as may require constitutional analysis, but first and foremost due to the necessity of substituting for the Constitutional Court, which has ceased to be independent. The courts' activities are competitive with those of the Constitutional Court and opposed to its decisions. Prior to the outbreak of the constitutional crisis the courts did disapply statutory provisions without making a reference to the Constitutional Court on an incidental basis,[62] but without disputing the validity of its rulings. By contrast, nowadays the courts refuse to accept the Constitutional Court's decisions and consequently their legal effects. These are the characteristics of diffuse review forged in an hour of constitutional crisis.

The context of the taking shape of this new hybrid system is the axiological and constitutional dispute between the common courts and the Supreme Court on the one hand and the Constitutional Court supported by the legislative and the executive on the other hand. This is a formative stage in which, naturally, only some courts are participating, establishing practical precedents.[63] Until the constitutional crisis in Poland subsides, it is impossible to predict the continued fate of diffuse review. This also applies to the Constitutional Court, whose position is currently relatively stable due to the legal basis for its operation being found explicitly in the 1997 Constitution but which will doubtless need to undergo a reform once a constitutional transformation favourable to the

61 See Section 2.3 above.

62 See Sections 2.1, 2.3 above.

63 See Section 2.4 above.

rule of law becomes possible.[64] The existing commitment of the courts (including the Supreme Court) to diffuse review in circumstances of a threat of disciplinary action makes it possible to surmise that diffuse review is not going to vanish and will continue to be present in the same or similar form as part of the state's constitutional dispensation in the years to come.

4. CLOSING REMARKS

The aim of this analysis was to draw attention to the recurrent, legally efficacious judicial practice of Polish courts that has led to a significant modification of the state's constitutional system. This practice brings a constitutional change in the material sense. We are observing, *in statu nascendi*, a new kind of source of constitutional law, or at least a new constitutional practice of major social significance that has been emerging in Poland. This has been accompanied by the formulation of a new rationale supporting diffuse constitutional review in an unprecedented way.

More frequently than in the past, although not universally, judges are attending to one of their duties regarded within their cultural circle as an intrinsic element of a judge's position in democracies. That duty is to defend the state's constitutional system. This automatically requires courts to adopt an active adjudication strategy and fundamentally invalidates the Montesquieu vision of a judge as merely *la bouche de la loi* ('a mouthpiece for the law').[65] In a democratic state governed by the rule of law, in which the constitution has supreme legal force, is directly applicable and contains a list of fundamental rights that are universally applicable norms of law, this type of approach to adjudication may well be indispensable within the constitutional system itself.

COMPETING INTERESTS

The author has no competing interests to declare.

AUTHOR INFORMATION

Habilitated Doctor of Law: Associate Professor, Warsaw University of Technology, Poland, Faculty of Administration and Social Science. Expert in constitutional and administrative law. Assistant to a Constitutional Tribunal Judge from 2012–2017. Member of the Polish Association of Constitutional Law. Email: *piotradziewicz@gmail.com*. The article is a part of a research project no. 2017/25/B/HS5/01824 funded by the National Science Centre (Poland).

AUTHOR AFFILIATION

Piotr Radziewicz *orcid.org/0000-0001-5709-5715*
Warsaw University of Technology, PL

64 Poland's current constitutional situation could be described with terms such as 'abusive constitutionalism' (David Landau, 'Abusive Constitutionalism' (2013) 47 UC Davis Law Review 189) or 'anti-constitutional populist backsliding' (Wojciech Sadurski (n 1) passim). These terms are an apt encapsulation of the continuing erosion of the rule of law and departure from the liberal-democratic order. Among other things, this includes the principle of separation of powers along with checks and balances, judicial independence, non-political nature of the Civil Service, protection of the fundamental rights and freedoms of individuals, weakened control over the legislative branch. In this context one must bear in mind, however, the relative specificity of the Polish case. Unlike, for example, the Hungarian case, Poland's constitution has not been amended, and the majority of changes opposed to the rule of law are introduced or entrenched through the enactment of ordinary legislation and constitutional practice of the executive branch (for example, the President of the Republic) and rulings of the Constitutional Court. Accordingly, in numerous situations one can speak explicitly of the violation of constitutional norms or the abuse of power by the government. Although the end effect will probably tend to be similar (a weakening of the rule of law, drifting toward authoritarian solutions), the internal mechanism of such changes may be relevant when searching for ways of repairing the rule of law in the future.

65 Regarding the role of courts in resolving constitutional crises, including when state institutions 'are at a dead end' and cannot deal with the social and political problems within the existing constitutional system, see Nicholas Barber and Adrian Vermuele, 'The Exceptional Role of Courts in the Constitutional Order' (2016) 92 Notre Dame Law Review 847. For more information about the duties of courts with respect to defending an individual's fundamental rights and the principles of a constitutional democracy, see, for example: Christoph Möllers, *The Three Branches: A Comparative Model of Separation of Powers* (OUP 2013) 128–131, 134–139; David Prendergast, 'The Judicial Role in Protecting Democracy from Populism' (2019) 20 German Law Journal 245; Dominique Rousseau, 'The Constitutional Judge: Master or Slave of the Constitution' (1993–1992) 14 Cardozo L Rev 775; Aharon Barak, 'A Judge on Judging: The Role of a Supreme Court in a Democracy' (2002) 116(1) Harvard Law Review 19; Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (OUP 2000) 127; Wojciech Sadurski, *Rights Before Courts: A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe* (Springer 2008) 27; Christopher F. Zurn, *Deliberative Democracy and the Institutions of Judicial Review* (CUP 2007) 254; Maartje de Visser (n 12) 93–155.

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