

# THE RULE OF LAW AND POPULISM INTERDEPENDENCIES: THE PERSPECTIVE OF POLITICAL STABILITY

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**Abstract.** This paper sheds new light on comprehending populist politics and its relation to the rule of law. Dealing with the fact that populist parties are competing and struggling with the courts, one can say that the tension between judicial and legislative institutions is a crucial element of contemporary liberal democracy condition. The following article proposes a new approach to be used as an analytical tool for surveying the interdependencies between the rule of law and populism. According to this view, dialectical analysis should replace the axiological analysis of judicial/democratic dualism. The purpose of this shift is to regard the tension between given elements of a political system in a mechanical way rather than in terms of a clash of values. Using the pendulum metaphor, one can track the relations between static and dynamic elements of a given political system.

**Keywords:** the rule of law, populism, political stability, judicial politics, separation of powers

## Introduction

There are three possible paths of thinking about the relationship between the Rule of Law and populist politics these days. The first approach goes along with blaming populists for abusing the will of people, acting against legal standards and procedures, and dishonorably treating law in general and courts in particular.<sup>2</sup> The second approach takes the

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<sup>2</sup> Mátyás Bencze, "Everyday Judicial Populism in Hungary," *Review of Central and East European Law* 47, no. 1 (2022): 37-59, DOI: 10.1163/15730352-bja10062; Dimitros Giannouloupoulos

opposite position and says that we are dealing with the judicialization of politics, which means that courts go beyond their competencies and make policy instead of being guardians of justice and procedures.<sup>3</sup> In his latest book, Martin Loughlin presents the third possible approach, which we find very elucidating and fresh. The crucial point of his critiques toward the idealization of constitutionalism reads:

“Many if not most of these populist movements have arisen in opposition not to constitutional democracy but to the way it has been reshaped by constitutionalism. Consider, for example, the rise of populism in central and eastern European states that have undergone a rapid transition from Soviet-style socialism to market capitalism. Here, the growth of populism seems directly linked to the imposition of constitutionalism.”<sup>4</sup>

What we found most interesting in this perspective is the accentuation of interdependencies between two elements – the populist and the constitutional one. The relation of these elements is based on some feedback loop. The increasing intensity of populist politics makes the courts more willing to adopt extraordinary means of securing the rule of law. The overdevelopment of judicative power, which leads to the judicialization of politics, influences the strategy that populists employ. That said, one should agree with Loughlin’s observations:

“The solution commonly touted to threats associated with the rise of populism is to strengthen the institutional mechanisms of constitutionalism. Having wrongly diagnosed the ailment, what is proposed as a remedy is an intensification of the treatment that is one of the main sources of the original disorder.”<sup>5</sup>

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and Yvonne McDermott (eds.), *Judicial Independence Under Threat*, (Oxford: Oxford University Press, 2022), DOI: 10.5871/bacad/9780197267035.001.0001; Jan Petrov, “(De-) Judicialization of Politics in the Era of Populism: Lessons from Central and Eastern Europe,” *The International Journal of Human Rights* 26, no. 7 (2022): 1181-1206, DOI: 10.1080/13642987.2021.1931138; Sergiu Mișcoiu, „Introducere” [Introduction] in *Partide și personalități populiste în România post-comunistă* [Populist Parties and Personalities in Post-communist Romania], eds. Sergiu Gherghina, Sergiu Mișcoiu (Iași: Institutul European, 2010): 9-52.

<sup>3</sup> Ran Hirschl, *Towards Juristocracy. The Origins and Consequences of the New Constitutionalism* (Cambridge, MA: Harvard University Press, 2004); Thomas M. Keck, *Judicial Politics in Polarized Times* (Chicago: The University of Chicago Press, 2014); Christine Landfried ed., *Judicial Power. How Constitutional Courts Affect Political Transformations*, (Cambridge: Cambridge University Press, 2019).

<sup>4</sup> Martin Loughlin, *Against Constitutionalism* (Cambridge, MA: Harvard University Press, 2022): 200.

<sup>5</sup> Loughlin, *Against Constitutionalism*, 199.

Based on Laughlin's observations, we shall be developing this way of thinking toward a dialectical approach. Whereas he grasped the action and reaction, we are going to consider the situation as a dynamic, ongoing process that happens before our eyes in the case of controversy between democratic principles and constitutional requirements.

The paper's primary purpose is to comprehensively analyze the structural conditions of the interdependencies and discrepancies between populist politics and the rule of law principles. This problem is also recognized as a problem of integrity of the rule of law and democratic constitutionalism. As we read in the literature:

"Critics argue that populist-nationalist regimes have undermined constitutional norms and the rule of law based on a particular notion of illiberalism and popular sovereignty. In response, populists assert the democratic legitimacy of their governments, contest judicial overreach, present alternative views on law and human rights, and strategically utilize constitutional mechanisms to their advantage, such as appointing sympathetic judges and implementing hard-to-repeal policies. They reject claims of opposing the rule of law and, at times, put forth their own conceptions of the relationship between democratic governance and constitutional structure."<sup>6</sup>

The research problem has the shape of a question: What is the reason behind the structural tension between democratic and judicial bodies in contemporary political systems affected by the crisis of the rule of law? The argument proposed as a tentative answer to the question reads that the main reason for such a state of affairs consists of the temporal conditioned dialectical tension between static and dynamic elements, determining the degree of political stability in the systems affected by the separation of powers idea. We will reach the philosophical level of investigation to clarify this argument and descend toward the legal (constitutional) and institutional dimensions. An essential element of the analysis is the multifaceted approach to political stability, which can be identified as a paradigm for studies on political systems operations. As an initial point, we should look at the antinomy of political theory, which is related to the split between judicial and other branches of

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<sup>6</sup> Eszter Bodnár, Jeremy Webber, Oliver Schmidtke, "Special Issue of the Hague Journal on the Rule of Law on Populism, Democracy, and the Rule of Law in Central and Eastern Europe," *Hague Journal on the Rule of Law* 16 (2024): 220, DOI: 10.1007/s40803-024-00241-4.

power. Thus, the following research seeks dynamic and static elements within the remit of populism and rule of law relations. These elements reflect on several levels of comprehension of the structure of a political system and its stability. It is worth mentioning that this dynamism of populist politics is reflected in literature as an ability to adjust to the circumstances and conditions, which is a kind of chameleonic character thereof.<sup>7</sup> That is another reason for analyzing the accommodation strategies of populists and the reactions of the judicial branch against it.

### On the Antinomy of Political Theory

In his study on the notion of authority, Alexandre Kojève expresses the purpose of the research in the following way:

“It is a study of this kind that will allow us to resolve in a definitive fashion the problem of «Separation of Powers» and that of the «Constitution,» as well as the structure of the State in general.”<sup>8</sup>

Assuming this purpose, he paid particular attention to the temporal background of each branch of power. Four main approaches to political power are distinguished as follows: (1) theological (based on the authority of the father over the child); (2) Aristotelian (reflected in the authority of the leader over the band); (3) Platonian (manifested most accurately in the authority of the judge); and (4) Hegelian (having its core in the authority of the master over the slave). Each type of power (except for the power of the father, which is more general and embraces all other types) can correlate with a branch of political power, that is, respectively, judicial (Authority of Judge), legislative (Authority of Leader), and executive (Authority of Master).<sup>9</sup> Taking into account the temporal aspect of power, he has arrived at the conclusion which needs to be clearly emphasized:

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<sup>7</sup> Sergiu Gherghina, Sergiu Miscoiu, and Sorina Soare, “How Far Does Nationalism Go? An Overview of Populist Parties in Central and Eastern Europe,” in *Political populism*, eds. Reinhard C. Heinisch, Christina Holtz-Bacha, Oscar Mazzoleni (Frankfurt-am-Main: Nomos, 2021): 205.

<sup>8</sup> Alexandre Kojève, *The Notion of Authority* (London: Verso, 2014): 31.

<sup>9</sup> *Ibid.*, 28-30.

"[...] the Authority of the Master (Present) and the Leader (Future) must therefore necessarily come into conflict with the Authority of the Judge (Eternity). If, however, the Eternity that has come into conflict with Time – or more precisely, has been separated from it – no longer has any reality, Justice separated from the Authority of the Leader and the Master also loses all real Authority."<sup>10</sup>

Hence, the temporal aspect of power is crucial in distinguishing types of authority. That allows us to perceive politics as a matter of peculiar dialectics: "Eternity setting itself against Time, the Authority of the Judge sets itself, by virtue of its essence, against the other three."<sup>11</sup> Many contradictions could appear since the judge assumes a timeless perspective of dealing with authority. In contrast, other branches of political power are focused more or less on time dimensions, which is reflected in theories of authority: Past (the theological theory of authority), Future and Past (Aristotelian account), and Future and Past (Hegel's theory). This temporal split affects all political systems, and the situation has its roots *a priori* the idea of politics as such. As Kojève has concluded: "We are therefore in the presence of a («Kantian») antinomy of political theory."<sup>12</sup> This antinomy constitutes the perspective of analysis that shall be going toward grasping a mechanism of political stability in this paper. To formulate it in a definite way, judicial power is to be perceived as an anchor launched in eternal that is timeless, not a dynamic sphere of authority. It is a static perspective that should be immune to contingent factors. That perspective is congruent with the principle of impartiality as a central feature of justice. A contrary perspective should be imposed on legislative and executive powers, which are consistent with dynamic operations in the political sphere. This Kantian antinomy is of an *a priori* character, which is why it can be used as a lens through which empirical studies can be done.

### Judicative *versus* Legislative Dualism

The split between judicative and legislative power is also present in the institutional dimension of politics, and it influences many essential phenomena

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<sup>10</sup> Ibid., 68-69.

<sup>11</sup> Ibid., 73.

<sup>12</sup> Kojève, *The Notion of Authority*, 73.

in the public sphere. Using some simplification, Ronald Dworkin gave a clear explanation of the structure of the political system based on the idea of separation of power, where the two main pillars of that system comprise judicative and legislative power. In both sections, there are different levels to be analyzed. As Dworkin points out, we can trace a specific dualism of the political system.<sup>13</sup> On the one hand, some policies express goals to be pursued by the community. By their nature, they lay in the legislative body's competencies, that is, Congress. On the other hand, the Supreme Court is an institution in charge of securing individual rights and justice. These are phenomena entailed by the principles, that is:

"[...] a standard that is to be observed, not because it will advance or secure an economic, political, or social situation deemed desirable, but because it is a requirement of justice or fairness or some other dimension of morality."<sup>14</sup>

Again, these two judicial and legislative perspectives seem to have discrepancies. One is dynamic, while the other is to be static. Although this approach could be criticized because of the imposing perspective, which is somehow black and white, it displays the main problem. There are two sections in the political system; what is really at stake is the question of adequately assigning given issues to a particular section. The question of fundamental importance is which institution should be in power to decide over the most relevant social issues. For example, reproductive freedom as a factor of significant social impact should be concerned with judicial power (which lacks democratic legitimacy), or it should belong to legislative power (which has no competence to defend individual rights). Some reflections of this problem are to be found, of course, in reversing *Roe v. Wade* in the USA, but also in other countries, amongst which there is the most recent case of Poland where the Constitutional Tribunal brought the abortion law into consideration and made a controversial decision which caused a blatant social disagreement<sup>15</sup>.

<sup>13</sup> Ronald Dworkin, *Taking Rights Seriously* (London: Bloomsbury, 2013): 38-45.

<sup>14</sup> Dworkin, *Taking Rights Seriously*, 39.

<sup>15</sup> Karine Coen-Sanchez, Bassey Ebenso, Ieman Mona El-Mowafi, Maria Berghs, Dina Idriss-Wheeler and Sanni Yaya, "Repercussions of Overturning *Roe v. Wade* for Women Across Systems and Beyond Borders," *Reproductive Health* 19, no. 184 (2022), DOI: 10.1186/s12978-

It seems to have become some competition between political bodies where the wages of the game are competencies that a given subject of power might colonize. Thus, the question is how it can be adequately diagnosed and elaborated. First and foremost, one should figure out that the system structure mentioned above is based on peculiar dualism. Although this description is valuable as a preliminary approach to the subject matter, it should be developed to obtain a more precise picture of how the political system operates. Many doubts exist about the proper shape and prerogatives assigned to particular system sections. These are the questions about the legitimacy and justification of some visions of politics. It also depends on the way of defining given social problems. If one expresses a security problem regarding individual rights, then it should belong to the judiciary. However, in many cases, the same problem might be defined in terms of political goals and demands. This situation leads to confusion and misunderstandings. What is the reason for such a state of affairs? As we will argue in the following part of this paper, the problem has its source in merely static instead of dynamic perspective in analyzing stability and interdependencies of particular elements within a political system. To put it as shortly as possible: one should replace the perspective of dualism with the dialectic perspective. Dualism is deprived of the dynamic functional process-tracing analysis that appears in the functioning of political systems. Moreover, dialectic includes a more comprehensive view of stability, which can be understood as invariability and flexibility.

### From Dualism to the Dialectic

Although many other interesting conclusions can be inferred from Kojève's research on authority, one of extreme importance is the fundamental split between the legislative/executive and judicial powers. Suppose legislative power is meant to be an instrument for dealing with many

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022-01490-y; Marta Bucholc, "Abortion Law and Human Rights in Poland: The Closing of the Jurisprudential Horizon," *Hague Journal on the Rule of Law* 14 (2022): 73-99, DOI: 10.1007/s40803-022-00167-9; Aleksandra Kustra-Rogatka, "Populist but not Popular: The Abortion Judgment of the Polish Constitutional Tribunal," *VerfBlog*, November 3, 2020, <https://verfassungsblog.de/populist-but-not-popular/>, DOI: 10.17176/20201103-235627-0.

incentives and factors that play an essential role in the political dimension. In that case, the judicative power is set as a counterbalance to dynamic legislative/executive activity. The case is purely dialectical. The tension between *Eternity* and *Time* is fueled by friction between timely and timelessly comprehended attitudes to reality as such. It is worth noticing that this dichotomy is a fundamental one. So, it means that the classical account of the tripartite of powers should not be regarded as a fundamental of thinking about the polity of the modern state, but rather as a consequence of a deeper assumption of the actions based on power in the frame of temporality. That way of thinking is valuable in the political philosophy dimension, but it can also be utilized to explain phenomena occurring at the institutional level of politics. These dialectical tensions are based on interactions between constitutionalism and the democratic approach. Allan Hutchinson correctly draws the context of the problem by analyzing the split between a constitution and a democracy.<sup>16</sup> Considering the role of the constitution in democratic societies, he asserts that:

“Consequently, constitutionalism is also characterized by an obsession with permanence, a resistance to constitutional change, and a suspicion of constituent assemblies. Underlying many constitutionalist theories is the idea that once the constitution contains the right abstract principles and the correct balance of institutional safeguards, it is a good and finished constitution. [...] Indeed, the claim is that to alter the constitutional arrangement in significant ways is to look for political trouble to play with the stability of the governance system, and to risk the precious ideal of Rule of Law.”<sup>17</sup>

As we can see, it aligns with the argument presented above. Namely, the tension between judicative and legislative power could be constancy and variability. Hutchinson perceives this way of comprehending the political system as a mistake that diminishes people’s role in political decision-making. To solve this problem, he proposes making courts more democratic by, for example, providing parliamentary oversight of judicial appointments or election of judges to give them better democratic legitimacy.<sup>18</sup> On the other hand, a constitutional convention, which is strictly democratic,

<sup>16</sup> Allan C. Hutchinson, *Democracy and Constitutions. Putting Citizens First* (Toronto: University of Toronto Press, 2021).

<sup>17</sup> *Ibid.*, 36.

<sup>18</sup> Hutchinson, *Democracy and Constitutions*, 145.



could be organized in a recurring cycle every twenty-five years.<sup>19</sup> It is worth noticing that some constitutions had this kind of expiry date, like, for example, the Constitution of May 3, 1791 in Poland (it was set for twenty-five years and after this period could be revised or amended – article VI). By dealing with scopes of institutional flexibility and correlation between given political institutions one can find a proper balance, that is the balance which can provide an adequate response to current needs of the political system. What is interesting from the perspective of our analysis is not only related to normative postulates but, above all, the diagnosis. As Hutchinson points out:

“At the bottom, the constitutionalist response comes down to the unedifying and self-serving notion that the judiciary’s very unaccountability and unrepresentativeness actually works to ensure that fundamental and contested matter of political justice are addressed and resolved in the impartial, detached and principled way.”<sup>20</sup>

Dealing with openly partial issues by using an impartial perspective seems to be a crucial problem in social justice. However, one should remember that it is only one possible manifestation of the antinomy of political theory introduced by Kojève. That antinomy becomes more problematic if we look at the constitutional binding process and constraints that might be imposed from a temporal perspective on political bodies. A very important view in connection to this topic is presented by Jon Elster, who displays the problem of constitutional binding. Considering his account, we want to address the following questions: How is this possible, and what are the consequences of the binding ongoing activity of legislative power by constitutional instruments set in the dimension of eternity, that is, timeless perspective? His account refers to the metaphor of Ulysses, which has been introduced in the context of the rule of law by Baruch Spinoza:

“Kings, too, commonly follow the example of Ulysses, and instruct their judges to practice justice without giving special consideration to anyone, not even the King, if he commands something in a particular case which they know to be contrary to the established law.”<sup>21</sup>

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<sup>19</sup> Ibid., 174.

<sup>20</sup> Ibid., 143.

<sup>21</sup> Benedictus de Spinoza, *The Collected Works of Spinoza*, vol. 2, trans. E. Curley (Princeton: Princeton University Press, 2016): 544.

Elster elaborates on the binding logic using the options matrix, where reasons for precommitment are crossed with devices for precommitment. The interesting point from this article's perspective lies in the field where separation of powers is used as a device and overcoming strategic inconsistency is perceived as a reason.<sup>22</sup> The core of the analysis conducted by Elster is based on the metaphor of Ulysses' decision to self-bind himself in order to protect himself from decisions that can be made in the future.<sup>23</sup> This metaphor is applied to constitutional thinking and understanding the time factor in the dialectical approach proposed in our investigations. Elster changed his mind on the justification for taking individual and collective decision-making as equivalents.<sup>24</sup> Moreover, one of his critiques reads as follows:

"In short, constitutionalization is often not merely, or even mainly, a form of Ulysses-like self-binding against one's own desires, but rather a self-interested binding of other credibly threatening actors who advance rival worldviews and policy preferences."<sup>25</sup>

One should agree with the assertion that constitutionalism might be a field of struggle between political factions. Nonetheless, even in this kind of bargaining, the time perspective is utilized as a reason for arguing. Even if the outcome is a purely interest-oriented form of political confrontation, some subjects are still trying to impose, out of time, a conservative frame on the one based on tendencies toward changing reality more dynamically. The controversy goes along with discrepancies in perceiving time preference; on the one hand, there is a preference to anchor the position in the perspective of eternity (which means a lack of changes and modifications). On the other hand, changes and modifications can be superior to principles of reasoning out of time. To elucidate this dichotomy that has a crucial impact on the dialectical approach, one should look at two concepts of political stability, which are included in the multifaceted approach to political stability.

<sup>22</sup> Jon Elster, *Ulysses Unbound* (Cambridge: Cambridge University Press, 2000): 91.

<sup>23</sup> Jon Elster, *Ulysses and the Sirens: Studies in Rationality and Irrationality* (Cambridge: Cambridge University Press, 1984).

<sup>24</sup> Elster, *Ulysses Unbound*.

<sup>25</sup> Ran Hirschl, *Comparative Matters. The Renaissance of Comparative Constitutional Law* (Oxford: Oxford University Press, 2014).

### A Multifaceted Approach to Political Stability

A multifaceted approach to political stability analysis has been widely presented in research papers that preceded the research stage evoked here.<sup>26</sup> The main discovery that has been made in this field consists in the refutation of the thesis according to which stability is to be seen as a universal, homogenous feature of the political system. On the contrary, it is impossible to gain the momentum of total stability, understood as the stability of the whole object or all its parts. Moreover, endeavors toward obtaining the state of ideal stability may lead to the collapse of the political system.<sup>27</sup> Not to go deeper into these theoretical findings, it is worth noticing the consequences of this account for approaching dialectical studies on the role of judicial and legislative/executive powers. Assuming that there are many elements in the political system and each element may operate on different degrees of stability, it is easy to conclude that what is most relevant in considering stability mechanisms is related to the relation and rules of intertwining given elements. How is the stability of a given political institution dependent on the stability of another? What looks paradoxical at first glance makes more sense when looking closer at a multifaceted approach to political stability. To elucidate these issues, one should distinguish between static and dynamic elements of the system. In every operating system, two types of elements are mutually conditioned and set as counterbalancing factors. Static elements are characterized by invariability, rigidity, and steadiness, whereas dynamic elements are oriented toward resilience by being equipped with flexibility and responsiveness. According to the multifaceted approach, many elements can be regulated by many factors in every political system. What can be regarded as a principle is that the system's well-being is constituted by the composition of stable and unstable elements reflected in the set of static and dynamic institutions.

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<sup>26</sup> Radu Carp and Łukasz Perlikowski, "Notes towards a Multifaceted Approach to Political Stability," *Polish Political Science Yearbook* 53 no. 2 (2024): 5-14, DOI: 10.15804/ppsy202413.

<sup>27</sup> Łukasz Perlikowski, *Teoretyczne podstawy badania stabilności politycznej* [Theoretical Foundations of the Study of Political Stability] (Torun: Nicolaus Copernicus University Press, 2023), DOI: 10.12775/978-83-231-5278-1.

### The Metaphor of the Pendulum

The abovementioned elements allow us to conclude that the elements of political systems operate according to the logic inherent in dynamism. This logic is dialectical, meaning that the dynamic of one element presupposes a lack of dynamic in the other elements. It is now clear that the antinomy mentioned at the outset of the paper is, at the same time, problematic but needed if one regards a political system in terms of stability. It is crucial to notice that modern politics is inextricably related to a movement, which can be adequately understood using dialectics as an explanatory device. That is to be explained more clearly using the pendulum metaphor. Much research in physics, mathematics, and other related sciences is designed to inquire about different forms and modes of stability using pendulums.<sup>28</sup> A pendulum is used as an experimental device in these kinds of works. These experiments consist of obtaining data that is subsequently utilized for analyzing estimations, probability, setting of order, analysis in chaos theory, etc. Our paper aims to provide more modest and apparent reasons for different natures. Nonetheless, it is not without any background to link pendulums and stability.

Thus, the pendulum is intended to be used as a metaphor depicting some mechanism of stability instead of being strictly a tool of experiment. Speaking to the imagination of the reader, it is clear that every kind of pendulum must contain two elements, of which one is static and the second is dynamic. The latter is somehow conditioned by the former, but the swinging mechanism presupposes feedback of both elements. Let us assume that the political system with both elements in its structure can maintain stability by some swinging. Shortly speaking, it is impossible to have exclusively static or only dynamic elements. If that could happen, then any swinging would be impossible. In terms of our research, there are two swings to be indicated.

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<sup>28</sup> Gregory L. Baker and James A. Blackburn, *The Pendulum: A Case Study in Physics* (Oxford: Oxford University Press, 2005).

*Populism Swinging*

First, there is a populist type of swinging, which manifests itself in preserving the attitude of the populist movement. This attitude is based on presumptions that the role of politics is to restore a lost order, or to return to the natural state of affairs. Thus, it is hard to find any progressive elements in populism since it is usually established as a response toward rotten elites, detached from the people regarded as an origin and source of political power and legitimacy. In the case of populist swinging, the situation's structure is set as a play between the democratic (populist) element and a judicial (perceived as undemocratic) element. In this context, the former can be described as static, whereas the latter is more dynamic. It allows us to conclude that in terms of the pendulum metaphor, legislative power is, in some sense, static. At the same time, the judiciary is overloaded with activities that generally belong to law-making institutions. The competence of judicial power increases due to the urge for response to preserve the attitude of the legislative body. What is very important here is to make a caveat that one should look not only at values like human rights, lawfulness, justice, moral issues, *etc.* The activity of both sections of the political system is to be grasped from a different angle. The issue is how far the decisions of a given political body deviate from the status quo. Then, the inclination toward the progress of a particular body can be counted by analyzing the number of decisions that have been made beyond the regular field of competencies. To conclude, the populist type of swinging could be depicted by the pendulum, in which the tendency to prevent change and progress is related to legislative power (static element), and the judicial power can be characterized as a proactive and dynamic element that presents itself as a defender of values and principles. What is of extreme interest is that the legislative/executive body is conditioning the judicative activity. The latter is superior and dependent to the former, as seen in the example of taking control over some judicial institutions (*e.g.*, Constitutional Tribunals).

### *Rule of Law Swinging*

In the case of the rule of law swinging, the issue is even more evident than in populist swinging. According to the classical concept of the rule of law, the role of judicial power was reduced to the guardian of rule and principles. The law should be applied to resolve a given legal problem, and judges are nominated to supervise this process. The logic behind the idea of the rule of law is to prevent the legal system and adjudication process from being arbitrary. Thomas Bingham, enumerating the main principles of the rule of law, asserts that one of the most relevant is the principle that reads: "Questions of legal right and liability should ordinarily be resolved by application of the law and not the exercise of discretion."<sup>29</sup> Moreover, the core idea of the rule of law may be summarized as follows:

"[...] all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking (generally) in the future and publicly administered in the courts."<sup>30</sup>

This means that the activity of the judicial body is to be limited by the reasonableness of the balance between discretion and procedures anticipated by the legal system. This assumption leads us to another essential element in thinking about the rule of law. Namely, there is a necessary presumption of the formal character of the idea of the rule of law. It is formulated most clearly in Joseph Raz's observation:

"A non-democratic legal system, based on the denial of human rights, on extensive poverty, on racial segregation, sexual inequalities, and religious persecution may, in principle, conform to the requirements of the rule of law better than any of the legal systems of the more enlightened Western democracies [...]."<sup>31</sup>

We found this argument very telling. It makes sense from the perspective of dynamic analysis. All political potential or character issues have their place at the forum of the legislative body, where democratic decisions

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<sup>29</sup> Tom Bingham, *The Rule of Law* (London: Penguin Books, 2011).

<sup>30</sup> Ibid., 8.

<sup>31</sup> Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford: Oxford University Press, 1979): 211.

are to be made by the people or the representatives of the people. In this view, the static element is manifested in judicial power, whereas the dynamic element should be associated with legislative power. Again, the question of values seems to be of secondary importance. What is at stake is mainly the scale of activity measured by the extent of departing from the status quo. Although it lies beyond the scope of this paper, it is worth noting that the distance between the status quo and the state of affairs created by political decision-making could be measured in terms of qualitative and quantitative research methods.

Both concepts mentioned above deserve further explanation. This is due to the urge to be precise about what we think about populism and the rule of law when framing it in the set dynamic-static dichotomy. As an additional theoretical background, one can assume a distinction between political and populist constitutionalism. On the basis of empirical studies focused on Hungarian and Polish populist activity, the authors describe the problem as follows:

“Political constitutionalism prevents the concentration of power in the hands of one person or group. However, constitutions alone cannot restrain a dictatorship. [...] Political constitutionalism guarantees equal votes, majority rule, and competitive party elections. Political constitutionalism likewise makes courts use constitutional law as a benchmark to reach impartial judgments and even resist pressures from democratic governments that may be prone to populist sentiments among the majority. Yet, populist constitutionalism disagrees with this duality of law and politics in political, constitutional states such as the United States and the United Kingdom since it rejects the authority of the law over legislative power that represents popular will. The disappointment with the structural problems of liberal democracies has thus escalated the populist criticism of liberal constitutionalism.”<sup>32</sup>

These two visions of constitutionalism are contradictory, and strategies or agendas must oppose each other. One must prevail over the other since it is a zero-sum game.

What is to be proven is the static character of judicial power in the rule of law design, and the dynamic way of proceeding in response to

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<sup>32</sup> Sanem Özer, Asiye Gün Güneş Gülal, and Yusuf Kenan Polat, “The Rule of Law in the Grip of Populist Authoritarianism: Hungary and Poland,” *Politics & Policy* 51, no. 5 (2023): 950-951. DOI: 10.1111/polp.12554.

populist politics. On the other hand, we need to find out if the populist approach presupposes static, that is, reactionary, the role of legislative power. In contrast, legislative power is designed as a dynamic element by the design of the rule of law. Before going into details, it is worth presenting a graphical depiction of this problem, making it more transparent and valuable in further interpretation steps (Figure 1).

### Application

The theoretical framework introduced above serves a primary purpose: to go beyond the eye of the beholder. The crucial point of analysis is to grasp interdependencies instead of seeking a cause that could lay upon one side of the conflict or tension. The legislative/executive-judicative dichotomy can be grasped on many different levels of thinking, whereas the Time-Eternity approach is perhaps the highest level of abstraction. The other one is institutional, and nowadays, it is said that we are witnessing an unprecedented shift in the functioning of the political systems of European Union member states. They are no longer framed by the tripartite model of the separation of powers but rather a bipartite one. This change goes vertically instead of horizontally. One of the most recent Polish commentaries on the system of European law reads:

“Currently, we are witnessing the evolution in the way of understanding the separation of power. Modern separation of power does not consist of tripartite but a bipartite. The sole counterbalance to the executive-legislative section of power (political power) is a judicative power whose function and role are determined by the rule of law.”<sup>33</sup>

Adjusting our theoretical framework to the context of this new bipartite, one can grasp interesting findings related to the mechanism of political stability. In this particular context, we are dealing with the blatant controversy between member states of the EU (particularly with populist governments in power) and the core of the EU judiciary, the Court of Justice of the European Union (CJEU). Amongst many available examples from contemporary European

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<sup>33</sup> Leszek Leszczyński, ed., *Wykładowia prawa Unii Europejskiej* [Interpretation of European Union Law] (Warszawa: Wydawnictwo C. H. Beck, 2019): 79-80.



politics, we shall focus on the Polish example, which is of the utmost importance nowadays. Our interest in this case can be justified because the Third Republic of Poland has been experiencing one of the most severe constitutional crises in history due to the confrontation of Law and Justice party politics with the requirements of the European Union legal system. The crisis has gone as far as to hinder the Polish Constitutional Tribunal through controversial judges' nominations of party provenance.<sup>34</sup>

The core of controversy from the perspective of legal dimensions lies in the clash of two views of legal system validity. On the one hand, there is a principle of EU law supremacy and the direct effect doctrine.<sup>35</sup> Both make the EU's legal and institutional system superior to member states' governments and constitutional orders. On the other hand, particularly in the case of Poland, there was an explicit dissent toward this superiority, expressed in the Constitutional Tribunal's decision. On July 14, 2021, the Constitutional Tribunal ruled that CJEU decisions on the judiciary do not apply in Poland. As the ground for this decision, the following articles of the Polish constitution have been pointed out:

"Article 7: The organs of public authority shall function based on, and within the limits of, the law.

Article 8: The Constitution shall be the supreme law of the Republic of Poland. [...]

Article 178: Judges, within the exercise of their office, shall be independent and subject only to the Constitution and statutes."<sup>36</sup>

In the eyes of Constitutional Tribunal judges, these articles provide sufficient rationale for treating a European legal system as a secondary source of law with a rather facultative character. It is necessary to understand the statement of the Constitutional Tribunal as an expression of the will of the legislative/executive section of the political system determined by the ruling political party, which was Law and Justice. As we can see in the case elaborated above, we are dealing with different approaches toward

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<sup>34</sup> Wojciech Sadurski, *Poland's Constitutional Breakdown* (Oxford: Oxford University Press, 2019): 58-95.

<sup>35</sup> Paul Craig and Gráinne de Búrca, *EU Law. Text, Cases, and Materials* (Oxford: Oxford University Press, 2011): 183-186.

<sup>36</sup> The Constitution of the Republic of Poland, accessed November 22, 2024, <https://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm>.

comprehending democratic systems. Taking the concept of sovereignty into consideration, Ramona Coman and Cécile Leconte observe that:

“Contesting the authority of the EU on issues related to the organization and the independence of the judiciary, the Hungarian and Polish governments do not only embrace classical sovereigntist arguments. They also pretend to be acting in the name of a different understanding of democracy, which they depict as a possible model for other EU countries. For instance, commenting on the adoption of a non-liberal Constitution in Hungary in 2010, Prime Minister Orbán proudly declared that his government sought to build «an illiberal democracy in the heart of Europe» (Interview with PM Viktor Orbán, Kossuth Rádió, 5 July 2013). The Hungarian and Polish governments indeed claim that there are different models of democracy and different ways to organize the functioning of the judiciary.”<sup>37</sup>

Hence, *illiberal democracy*, which could be identified with a populist account, is focused on combating judicial activism, which is a concept used for describing elements normally belonging to the Rule of Law.

As we can see in this example, the model that is described by populist swinging leads to a situation where the judicial power is focused on extending judicial as well as political competencies. In contrast, member states ruled by populists are about to provide counterbalances. Bojan Bugarcic observes,

“Aggressive judicial activism inevitably raises the issue of counter-majoritarianism and democratic accountability of independent institutions like courts.”<sup>38</sup>

Member states’ politics are determined by executive-legislative power and are anchored on a specific static ground. We are dealing with a peculiar shift according to which member state authorities take the perspective of *Eternity* while European courts are close to a dynamic *Time* perspective characterized by constant changes that must be managed. Thus, the Kojevian approach might be utilized to comprehend the problem of the ideological content of populism. There is a relevant question about the direction of actions undertaken by populists. They are somehow oriented

<sup>37</sup> Ramona Coman, Cécile Leconte, “Contesting EU Authority in the Name of European Identity: The New Clothes of the Sovereignty Discourse in Central Europe,” *Journal of European Integration* 41, no. 7 (2019): 41- 861, DOI: 10.1080/07036337.2019.1665660.

<sup>38</sup> Bojan Bugarcic, “Populism, Liberal Democracy, and the Rule of Law in Central and Eastern Europe,” *Communist and Post-Communist Studies* 41, no. 2 (2008): 191–203.

toward the past (reactionary), but this past is rather imagined or invented instead of particular traditional thinking. They are also, in some sense, progressive since their political strategy is revolutionary. In the literature, the ideal state of affairs, which is a purpose toward which all efforts should be directed, is called *retrotopia*.<sup>39</sup> This is the state: "Vision is located in the lost/stolen/abandoned but undead past, instead of being tied to the not-yet-unborn and inexistent future."<sup>40</sup> Although Bauman's observation is adequate, it can also be described in Kojève's theory as the timeless perspective of eternity. If so, then our dialectical proposition works also in this context. The legislative-executive body takes the position that normally is occupied by judicial power, and the judicial power takes what normally belongs to legislative institutions. Marek Safjan, a judge of the CJEU, directly expresses the tendency of judicative power toward expansion and being a dynamic rather than static subject of power. Moreover, his approach is openly affirmative and normative in this case. He argues,

"Contemporary legal culture is marked by dynamism, indispensable flexibility, and the need to adapt to rapidly incoming changes and constantly emerging challenges. [...] Constitutional dynamism, peculiar flexibility of constitutional standard, become the subject of highly justified claims."<sup>41</sup>

This quote would not evoke doubt if used to describe political institution activity. According to an a priori analysis, these are designed to deal with dynamic circumstances, which take place in temporal dimensions determined by future, past, and present factors. Thus, so-called constitutional dynamism breaks some ordinary views and casts new light on the political activity of courts. Our task is not to condemn or criticize this approach but rather to examine the consequences of this state affair in connection with other elements that occur in the context of political stability.

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<sup>39</sup> Zygmunt Bauman, *Retrotopia* (Chichester: Polity, 2017).

<sup>40</sup> Ibid., 4-5.

<sup>41</sup> Marek Safjan, *Wyzwania dla państwa prawa* [Challenges for the Rule of Law] (Warszawa: Wolters Kluwer, 2007): 79.

## Conclusions

To recall the main research problem, the reason behind the structural tension between democratic and judicial bodies is based on dialectical relations of given sections of the political system. This tension is to be found on many levels of consideration. Starting from the most abstract, we can refer to the temporal conditioned dialectical tension between static and dynamic elements. Binding temporal issues from the perspective of eternity is, as Kojève pointed out, one of the crucial issues in balancing legislative and judicial. Hence, we can name this level of investigation a metaphysical one that works *a priori*.

Another level of thinking about this particular dialectic is institutional, which fits with the regime's structure, which Hutchison pointed out in his work on democratizing constitutionalism. The constitution is usually invented as imposed from the outer perspective. As proof of coherence between the levels of research, we can evoke some elements of the constitution that openly refer to timeless perspectives like the so-called eternal clause.<sup>42</sup> Thus, this level of investigation can be called institutional, where democratic will is bound by constitutional force.

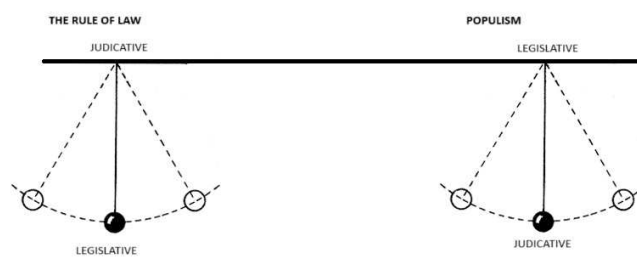
The third and most detailed level is based on a constitution and its legal dimension. An adequate understanding of constitutionalism at this level should appeal to constitutionalism as a rule for governments instead of constitutionalism as an ideology, which Loughlin elaborated. Here, we are dealing with the legal level on which the dialectic is palpable.

This shows that interdependencies and discrepancies stem from the primary split, which comes from antinomy in political theory. The main advantage of this way of thinking is the avoidance of axiological bias in researching phenomena of populism. Instead, we are proposing a dynamic analysis of legislative-judicial relations. The interdependencies of populism and the rule of law are exposed in the above theoretical framework. Populism might be interpreted as an attempt to replace judicial position by setting democratic power above the political system in space where temporal aspects are, so to speak, reformulated. On the

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<sup>42</sup> Silvia Suteu, *Eternity Clauses in Democratic Constitutionalism* (Oxford: Oxford University Press, 2021).

other hand, the reaction of judicial bodies, which manifests itself in judicial activism, can be perceived as an outbreak in the separation of powers, according to which courts play a political role in decision-making processes. It goes like that because of dialectical tension, which determines the dynamic of both elements. We found this mode of thinking about subject matter attractive and fresh, and foremost, one of promising potential for further research.



*Figure 1. Pendulums of political stability*  
(Source: author's own elaboration)