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Mańko, R.

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‘War of Courts’ as a Clash of Legal Cultures: Rethinking the Conflict Between the Polish Constitutional Tribunal and the Supreme Court Over ‘Interpretive Judgments’

Rafał Mańko

Abstract

Since 1986, Poland has had its Constitutional Tribunal, placed outside the structure of ordinary judiciary. Since 1993, this court has been issuing ‘interpretive judgments’ in which it decides that a certain statutory rule is constitutional only under a certain interpretation. On numerous occasions the Supreme Court has refused to follow the Constitutional Tribunal’s decisions, claiming that they are unconstitutional, *ultra vires* and non-binding. An analysis of the arguments put forward by both courts in this ‘war of the courts’ reveals that the Supreme Court prefers ultra-formalist arguments typical of the hyperpositivist legal culture of the former state-socialist period, whilst the Constitutional Tribunal seems to prefer pragmatist arguments, more typical of contemporary Western legal culture. The article concludes that behind the ‘war of the courts’ in Poland there is a clash of legal cultures and attempts at identifying the reasons for it.

1. Introduction

The establishment of a separate, specialised constitutional court, placed outside the structures of the ordinary judiciary often leads to constitutional conflicts (Comella 2011, 273). Such conflicts are defined as ‘quarrels in which either two or more actors draw upon the same constitutional competence or one actor claims a competence that draws the disapproval of another’ (Hein 2011, 3), in this case the actors in question being the constitutional court and the ordinary courts, usually the supreme court. Famous examples include Germany (Heun 2011, 182), Italy (Garlicki 2007, 54–56), South Africa (Michelmann 2011, 286–287) the Czech Republic (Sadurski 2005, 22–23; Kühn 2011, 194–195, 200–207) or recently Spain (Leslie 2006, Turano 2006). One could even go as far as to say that such conflicts, especially some forms of questioning the authority of the constitutional court by the chief court of the ordinary judiciary, are a commonplace struggle for power and prestige between highest courts, which can be ascribed, *inter alia*, to the judges’ inclination to expand their power, authority and competences (Garlicki 2007, 64–65), especially that a newly created constitutional court is viewed with envy by the existing ordinary judiciary (Sadurski 2005, 21).

Following the German model Poland has had, since 1986, a separate Constitutional Tribunal (*Trybunał Konstytucyjny*, ‘TK’), distinct from the Supreme Court

(*Sąd Najwyższy*, ‘SN’), established in 1917, and the Chief Administrative Court (*Naczelny Sąd Administracyjny*), established in 1980. This division of power within the apex of the Polish judiciary has led to conflicts. In the Polish case, the ‘war of the courts’ between the TK and SN has been focused on the binding force of those TK judgments which declare that a certain statutory rule is constitutional only under a certain interpretation (‘interpretive judgments’). The SN has, on several occasions, openly refused to follow such decisions, claiming they are unconstitutional, *ultra vires* and not binding. This chapter will analyse the arguments used by the two contenders in the Polish ‘war of the courts’ on the basis of a case study, regarding one of the battles of that ‘war.’ The analysis will show that the SN displays a tendency to cling to the hyperpositivist, ultra-formalist legal culture typical of the former state-socialist period, whilst the TK seems more inclined to employ a pragmatist, instrumentalist and realist argumentative style. This will lead me to the conclusion that behind the Polish ‘war of the courts’ there is actually something deeper than only a struggle of power – it is a clash of legal cultures and a struggle for ideological hegemony between the post-socialist hyperpositivism (nurtured by the SN) and the new European legal pragmatism (detectable in the style of the TK). I will explain this difference between the two courts by proposing to link the style of adjudication with such factors as institutional history, career trajectories of judges, the relevant auditorium and the place of each court in the structure of the judiciary.

Despite praise of the style of the TK and criticism of the style of the SN, the contentions of this essay should be read as relating to the context of the ‘war of the courts’, in which the TK is more pragmatic, and the SN more hyperpositivist. However, this does not imply an unqualified endorsement of the judicial style and case-law of the TK in general, especially that, as persuasively shown by Dębska (2013a, 330–338; 2013b, 226–251), it still remains tainted by a number of formalist features itself, such as ‘guru style’, one-sidedness of argumentation, magisterial and deductive argumentation, inherent in Polish legal culture (Mańko 2005, 541–542). Nevertheless, it seems that it is the TK, rather than the SN, which is evolving in the desirable direction towards a more transparent culture of adjudication (Mańko 2005, 548).

In order to avoid terminological confusion, I will explicitly define the key notions of ‘formalism’ and ‘pragmatism.’ I will understand ‘formalism’ as an approach to law which concentrates on linguistic and logical analysis of legal texts, whilst factoring out political, social and economic considerations, treats systemic coherence of the law as a value, draws a sharp distinction between legislation and adjudication (Gray 2003, 478; Matczak 2007, 64–66). As its opposite, I will treat ‘pragmatism’ which I will understand as an approach to law which treats law as a means to attaining political, economic, social, cultural and other aims, which shifts

focus from legal texts to purposes, interests, and policies, as well as legal actors, legal institutions and law in action (Hesselink 2001, 73; Gray 2003, 479). I will characterise hyperpositivism (defined in section 2) as permeated with an extreme form of legal formalism.

The chapter is structured as follows: I first introduce the notion of ‘hyperpositivism’ as a salient feature of Polish legal culture (section 2), then I present crucial socio-political data about the TK and SN (section 3), before discussing the constitutional framework of the ‘war of the courts’ (section 4). The main part of the chapter is devoted to the case study (section 5), before ending with conclusions which are an attempt to explain the detected phenomenon (section 6).

2. Hyperpositivism in Polish Legal Culture

Following World War II, Poland found itself in the Soviet block and its legal culture was subject to a strong influence of the USSR (Mańko 2013b). A salient feature of Soviet legal culture, starting from the Stalinist period, was so-called ‘hyperpositivism’ – an extreme form of textual positivism, also referred to as ‘primitive positivism’ (Zirk-Sadowski 2006, 308–309). Although initially born out of a reception of Western European legal ideas (classical positivism), Soviet hyperpositivism developed a number of distinct features making it a unique phenomenon (Mańko 2013a, 218). Paradoxically, the Soviet bloc experienced a rise of hyperpositivist legal thinking in the aftermath of Stalinism, owing to the belief that formalism could place checks on totalitarianism; at the same time, in the West, German lawyers associated formalism *with* totalitarianism, and moved away from it towards a more transparent, pragmatic and informal legal culture (Hesselink 2001; Kühn 2004, 535; Kühn 2011, 154–157).

Hyperpositivism as a paradigm of legal theory and practice can be defined by resorting to four fundamental features (Mańko 2013a, 218), which have a typological character and need not always be present with the same intensity. First of all, hyperpositivism is based on the notion of a ‘limited law’, meaning that only texts emanating from the State are considered to be ‘the law’ (Sadurski 1984, 203; Izdebski 1986, 18; Łętowska 1997, 56; Kühn 2004, 540–541; Mańko 2005, 534; Kühn 2011, 209; Mańko 2013a, 218–219). The law, rather than being conceived as a form of social practice or a system of principles, values and rules, is reduced to a set of written texts – codes and statutes. General principles, customary norms, case-law or doctrinal writings are denied the status of law (Mańko 2013a, 218–219). The dichotomy of binding (law) vs. non-binding (hence, ‘non-law’) is strongly emphasised (Kühn 2011, 273). The notion of law in hyperpositivism can, therefore, be described as hermetically closed, as opposed to softer forms of positivism.

Secondly, hyperpositivism reduces legal interpretation to the grammatical and logical exegesis of texts considered as being part of the ‘law’ (Łętowska 2002, 43; Kühn 2011, 207–208; Mańko 2013a, 219). There is a belief in ‘only one correct’ interpretation of a text, usually its ‘literal’ interpretation (Łętowska 2002, 43).

Thirdly, hyperpositivism nurtures a reductionist vision of a judge as someone performing an automatic act of ‘subsumption’ of facts under legal rules (Mańko 2005, 534–535; Zirk-Sadowski 2006, 308–39; Milej 2008, 68–69; Mańko 2013a, 219–220).

Finally, hyperpositivism entails a high degree of formalism, whereby judges prefer to decide cases on formal, rather than substantive grounds and the formal side of the law enjoys precedence over the underlying substantive issues (Kühn 2004, 555; Milej 2008, 69; Uzelac 2010, 383–385, Kühn 2011, 204–207; Mańko 2013a, 220).

Whereas this description could in a way fit to many Western European legal cultures in the 19th century, it must be emphasised that hyperpositivism is a social phenomenon directly linked to the particular historical setting of Actually Existing Socialism and as such reflects the reduced social role of lawyers in that system (Mańko 2013a, 222–224). Its persistence after the transformation from state socialism to capitalism may be viewed as a legal survival, i.e. an example of a phenomenon of legal culture which persists despite the disappearance of its original socio-economic foundation (Mańko 2013a, 215–216).

3. Socio-Political Background of the Two Courts

An underlying assumption of this chapter is the existence of a causal link between the socio-political background of a judicial body and the legal culture of its individual members and the body as a whole; hence the need of inquiring into the institutional history of the TK and SN, the social background and career paths of their members, and the place of the two courts in the structure of Polish judiciary. The two institutions differ sharply with regard to all these features.

The SN, established in 1917, has enjoyed almost 100 years of uninterrupted existence, save for the period of WW II (Malec 2011). Despite the two radical socio-economic transformations experienced by Poland in the 20th century, it even managed to maintain a relatively high continuity of its judicial personnel (Bereza 2011). Following the transition to capitalism, the SN’s term was ended prematurely (Bereza 2011, 285); however, among the 57 new appointees, 38% originated from the pre-1990 SN (Kozielewicz 2011, 302), and the others mainly from career judges. In contrast, the TK’s history is much shorter – it has been operational only since 1986, originally intended as a means of boosting the legitimacy

of the military dictatorship of General Jaruzelski (Mażewski 2011, 333; Dębska 2013b, 103–104). Until 1990, it was a weak institution, more of an advisory body than a real constitutional court (Sadurski 2005, 1; Mażewski 2010, 127), since its decisions on the unconstitutionality of statutes were subject to the parliamentary review. After 1990 its position was strengthened, especially after the creation of a direct complaint to the TK, available against a statutory rule which served as a basis of determining the rights and duties of an individual in a definite manner.

The two courts differ as regards the social background of its members. The SN is dominated by career judges, the majority of whom (75%) do not hold a PhD (SN website, 2013). The system of judicial appointments at the SN favours the reproduction of the judicial elite: the SN itself screens candidates and forwards its selection to the National Council of the Judiciary (KRS), which makes the final selection and presents it to the President (SN Act 2002, KRS Act 2011). In practice the KRS, itself is a corporate body representing judges, who constitute 68% of its members (KRS website 2013; Sadurski 2005, 57), rejects roughly 34% of SN candidates (data for 1990–2006, see Kozieliwicz 2011, 369). In practice, neither Parliament, nor the public opinion are involved actively in the selection process.

In contrast to the SN, the process of appointment of TK Justices is much more transparent, political and contested, involving civil society and the media (Sadurski 2005, 15–16; Safjan 2008, 10). Appointments are voted in the lower house of the Polish Parliament (*Sejm*) by ordinary majority, allowing the ruling coalition to impose its preferred candidates (Sadurski 2009, 5; Zdziennicki 2013). The candidates must either be fully qualified academics, or legal practitioners with 10 years' experience (TK Act 1997, SN Act 2002). Until now, of all TK Justices 80% were academics (out of which 36% pure academics), 50% had links with politics, whilst only 36% Justices originated from the judiciary in general, and 3% were career judges without other experience; 21% Justices were practitioners, usually with some kind of political background (Dębska 2013b, 184, 196–197, 205).

For most judges at the SN, an appointment to the court is the last step in their professional career. The ambitions of TK Justices seem to go further, and former Justices have been appointed to the Court of Justice of the EU, the European Court of Human Rights, the SN, as well as to the post of the Ombudsman (Dębska 2013b, 206).

4. The 'War of the Courts' in Poland

The legal axis of the war of the courts in Poland is the issue of the so-called 'interpretive judgments' of the Constitutional Court. An interpretive judgment is a decision in which a constitutional court 'declares a legal rule under scrutiny to be in conformity with the Constitution, provided that a norm deduced from the rule

will have a content determined by the Court' (Sulikowski 2008, 50–51; see also Florczak-Wątor 2006, 93–103, 150–152; Sadurski 2009, 22). Interpretive judgments are issued by Western European constitutional courts, including the Italian, German and French (Florczak-Wątor 2006, 94; Garlicki 2007, 54; Kühn 2011, 240). Interpretive judgments are considered to be 'an efficient instrument of management – rationalisation of the law, furthering changes in an appropriate direction identified by constitutional courts.' (Sulikowski 2008, 52).

In this context it should also be added that between 1989 and 1997 the Constitutional Court enjoyed the power to issue abstract, binding interpretations of statutes (Constitution 1952 as from 8.4.1989; TK Act 1985 as from 19.7.1989). This right was inherited from the socialist period, when the Council of State – an equivalent of the Presidium of the Supreme Soviet – enjoyed this power between 1952 and 1989. The fact that the Constitutional Court had enjoyed this right before it was taken away by the 1997 Constitution is often relied upon by the SN (see e.g. SN 17.12.2009, III PZP 2/09, para II.3).

In general, within the Polish 'war of the courts', the SN has displayed a tendency towards employing hyperpositivist and ultra-formalist arguments, whereas the TK has rather preferred pragmatic, instrumentalist and realist arguments. First of all, the SN bases its arguments on the 'literal meaning' of the text of the Constitution and TK Act, pointing out that 'interpretive judgments' are not mentioned there as a separate category (e.g. III PZP 2/09, para. II.6). Secondly, the SN relies on the hyperpositivist sharp distinction between 'creating' law (allegedly only by the legislature) and 'applying' law, and uses this argument to accuse TK of law-making, which is to make interpretive judgments *ultra vires* (e.g. III PZP 2/09, II. 5) and contrary to the division of powers between the legislative and judiciary (SN 25.4.2007, IV CSK 34/07; SN 17.11.2008, I CO 23/08; III PZP 2/09, II.20). The SN is programmatically deaf to any purposeful arguments, stating that '[p]ragmatic reasons [...] do not entitle the Constitutional Court to [...] enter the sphere reserved for the law-maker' (III PZP 2/09, II.11). The obvious fact that judges create the law, and in particular that '[c]onstitutional judges *make the law* through interpreting the constitution' (Stone Sweet 2012, 827; see also Hein 2011, 17), still escapes the SN's hyperpositivist imagination. The 'analogy between the function of the judge and the function of the legislator' (Cardozo 2010, 49), noted by American scholars already in the 1920s, and accepted in Western Europe at least after World War II (Wieacker 2000, 421; Kühn 2004, 537; Kühn 2011, 87–88, 197–198; Mańko 2013a, 221), still remains outside the cognitive capacity SN judges who repeat the mantra that 'courts in the Republic of Poland *apply* the law, but do not *create* it' (IV CSK 34/07, emphasis added). Thereby, they refuse to recognize what 'has always been recognized, at least by the realists,

that judicial interpretation entails some component of lawmaking' (Garlicki 2007, 66). The SN also rejects TK's comparative law arguments in favour of interpretive judgments, stating that the 'judicial practice of constitutional courts of other states should not be uncritically transferred, replicated or copied' (III PZP 2/09, II.7).

On the other hand, TK has resorted mainly to pragmatic arguments to support its practice, underlining that a legal rule has more than one interpretation (TK 11.12.2001, SK 16/00), that if a rule is capable of being interpreted in conformity with the Constitution, it would be too harsh to strike it down completely (TK 15.9.1999, K 11/99). The TK considers its interpretive decisions as binding on the entire judiciary (TK 6.7.2005, SK 27/04).

5. Case Study: Conflict over Retrospective Application of a Case Selection Mechanism by the SN Civil Chamber

In order to illustrate the difference in the style of adjudication of the TK and SN, I will resort to a case study – a conflict over the interpretation of two rules of Polish civil procedure, one introducing a case selection mechanism in proceedings before the SN in civil matters, and another regarding the reopening of civil proceedings following a TK decision favourable for an applicant.

The cassation in civil matters, introduced to Polish civil procedure in 1996, was a form of third-instance proceedings available to litigants as a matter of right. Hence, the SN could not refuse to hear a case on account of its insignificance for the development of the law. This led to a serious overload of the SN's docket and persuaded the legislature to introduce a case selection mechanism. The act introducing the case selection mechanism contained an intertemporal rule which provided that cassations filed before its entry into force should be subject to the old rules, both as regards the requirements for their 'filing', and as to 'deciding' them. This relatively plain language was initially understood at face value by the SN, which was working hard through its overloaded docket. However, at some point the SN came up with the apparently brilliant idea of reinterpreting the intertemporal provision in a way which would allow it to reject all the 'old' cassations for want of a significant legal issue. Faced with the need of overcoming the plain meaning of the intertemporal provision, the SN (17.1.2011, III CZP 49/00) resorted to a sophisticated form of linguistic and logical trickery, aimed at presenting its interpretation as compelling and justified as a *literal* interpretation of the rule. Strangely (for a legal realist, at least), it did not try to balance the public interest of the administration of justice (clearing up of the SN's docket, and hence speeding up of proceedings for all litigants) with the private interest of those litigants, who had filed their cassations under the old

rules (who would retroactively be deprived of their procedural right to be heard, on a point of law, in third-instance proceedings). Instead, the SN concentrated on the linguistic level, relying on the fact that the old provisions are to apply to the ‘filing’ of cassations and ‘deciding’ upon cassations brought under the old rules. Drawing upon dictionary definitions from the 1960s, the SN argued that in between the litigant’s act of ‘filing’ and the SN’s act of ‘deciding’, there is still room for an additional act of ‘selecting’, and this selection process is to be governed by the new law. It also drew on the intertemporal rules of the socialist Code of Civil Procedure (‘CCP’) to propose a general principle of retrospective application of new procedural rules to pending cases. This allowed the SN to rely on the classical canon of strict interpretation of exceptions to treat ‘filing’ and ‘deciding’ as exceptions to the general rule of applying the new rules to cassations filed before the entry into force of the new rules. The SN thus treated the legal rules in an instrumental way, eager to broaden the scope of its judicial discretion, but simultaneously factoring out any concerns for the social justice of the outcome.

The style of the TK within the battle over the retrospective application of the case selection mechanism in civil proceedings was, in comparison, much more pragmatic. In its first case on the topic (18.2.2004, SK 12/03), it made the realist assumption that it would not analyse the controversial intertemporal rule in the abstract, but would rather concentrate on its interpretation adopted by the SN. On the basis of parliamentary proceedings, the TK found that SN’s interpretation departs from the obvious intent of the legislature. However, instead of entering into a polemic on this basis (and adopting an intentionalist position with regard to legal interpretation), the TK accepted the SN’s reading of the rule as a legal fact and went on to evaluate it in the light of constitutional values and principles. Framing its analysis as a balancing exercise, the TK identified three applicable principles: a rigorous, though not absolute prohibition of retroactive laws (application of new law to facts in the past); secondly, a limitation on retrospectiveness (application of new law to existing legal relationships), and thirdly, the principle of protection of vested rights of individuals. Entering the details, the TK identified two conflicting interests: the public interest in the immediate application of the new procedural rules, even to pending cases (for the sake of speeding up proceedings at the SN), and on the other hand, the individual interest of having the old procedural rules applied to pending cases. The TK also underlined the principle of trust, pointing out that litigants had filed their petitions for cassation on the understanding that a certain set of procedural requirements would apply.

In conclusion, the TK acknowledged that fighting the backlog on the SN’s docket is an important public interest which justified the introduction of a case selection mechanism to cassation proceedings, but nevertheless it is not an

overriding interest which would justify a retrospective introduction of this new requirement. The TK pointed that petitioners, at the time of filing their cassations, could not have even known the new rules, which were introduced only later. By applying those requirements retrospectively, the SN was committing a denial of justice. On the basis of a balancing of interests, the TK came to the conclusion that with regard to those litigants who had filed their petitions for cassation before the entry into force of the new rules, the protection of their trust in the justice system must prevail over pragmatic needs of combating the SN's backlog. It invited the SN to revise its case-law on the topic in order to opt for an interpretation of the intertemporal rule conforming to the Constitution.

When litigants, armed with TK's interpretive judgment in their favour, tried to reopen proceedings to have their cassations heard, the SN blatantly refused (6.3.2003, I CO 7/03), relying this time on a highly formalist interpretation of a detailed rule in the CCP governing the reopening of proceedings following a TK judgment. The relevant rule provided for reopening of civil proceedings which ended with a 'judgment.' However, the technical term for the SN's decision refusing to hear a cassation is not 'judgment' but 'order.' In a hyperpositivist spirit, drawing on this terminological flaw in the CCP rule, the SN refused to reopen cassation proceedings, despite TK's interpretive judgment in their favour. The SN also raised a series of formalist arguments questioning the binding force of TK's interpretive judgment, condemning it as a form of 'law-making.' It also added that since 1997 the TK has not enjoyed the power to issue abstractly binding interpretations of statutory rules, and therefore interpretive judgments have the form of a 'non-binding interpretation.' Finally, the SN relied on a formalist reading of the principle of judicial independence, stating that independence of the SN and ordinary judiciary means that they are free to interpret statutes by themselves, without being bound by TK's precedent.

Faced with the SN's refusal to reopen proceedings, litigants came back to the TK, this time complaining against the CCP rule on the reopening of proceedings, applied by the SN in a formalistic manner to their detriment (2.3.2004, SK 53/03). Analysing the constitutionality of that rule, the TK pointed out that the framers of the Constitution clearly wished to create a remedy which would allow having a case which had been decided on the basis of an unconstitutional rule, reopened and decided once again in conformity with the Constitution. This constitutional right of the individual must find its embodiment in the ordinary rules governing the civil, criminal and administrative procedure. Conceding that the drafting quality of the contested CCP rule may give rise to doubts, the TK nevertheless invited the SN to give it an interpretation in conformity with the Constitution or to rely on other CCP rules which would permit to achieve the result prescribed by the

Constitution. The TK even gave the SN specific suggestions as to which of the already existing rules in the Code of Civil Procedure could be used to set aside an order which has been based on an unconstitutional rule. Therefore, hoping that the SN would take a flexible and constitution-friendly approach to the text of the CCP, the TK decided to refrain from annulling its rule on the reopening of proceedings. Simultaneously, as if anticipating the SN's obstinacy (Hermeliński 2012, 15) the TK invited the legislature to enact a new rule, this time literally obliging the SN to reopen proceedings even if they ended with an 'order' and not a 'judgment' (2.3.2004, S 1/04), which the legislature later accomplished.

In the meantime, the SN did remain obstinate, and consequently refused to reopen proceedings upon request from litigants, whose cassations, filed under the old rules, had been summarily dismissed by the SN in violation of TK's case-law. When litigants, having attempted in vain to have proceedings reopened, complained once again to the TK against the CCP rule invoked by the SN to their detriment, the TK decided that the time was ripe to declare the CCP rule in question unconstitutional instead of pronouncing yet another interpretive judgment which the SN would ignore (27.10.2004, SK 1/04).

6. Conclusions

The analysis has shown that the 'war of the courts' in Poland is not only a simple struggle for power between two judicial bodies, but also a clash of legal cultures. The stakes are therefore very high, and are crucial for the future of Polish legal culture – whether it will leave behind the simplistic and simultaneously intransparent hyperpositivist style of adjudication and embrace an open, pragmatic and transparent style, where all the actual interests and values involved can be openly weighed against each other. It seems from the case study, and more broadly from the 'war of the courts' the TK has been the champion of pragmatic adjudication in Poland, while the SN generally lagged behind, attached to the outdated clichés of hyperpositivism. I will now try to identify a number of factors which can be assumed to determine the choices of the two courts with regard to their argumentative strategies.

First of all, the two courts are staffed with persons having different experiences within the Polish legal community: the SN is dominated by high-level career judges with a minority of academics, whilst the TK is dominated by academics, with almost no career judges. Furthermore, academics at the SN tend to represent 'core' areas of private and criminal law, whilst academics at the TK represent, apart from the dominant practical disciplines (e.g. private law, financial law) also

legal theory and history (Dębska 2013b, 188–189). Different backgrounds translate themselves into different argumentative habits. Whereas SN judges, originating from the community of career judges, represent its habits and values, TK Justices, recruited from academia, legal practice and often linked to the world of politics, do not share that professional experience and hence do not necessarily represent the habits and values of the ordinary judiciary.

Secondly, of importance is the issue of institutional role models. Whereas the SN, boasting an almost centennial tradition, does not need to look to foreign supreme courts for inspiration, the TK has been a novelty on the Polish legal scene. In building their institutional identity, TK Justices certainly looked up to Western European constitutional courts as their role models, thereby taking over ideas of judicial activism and pragmatist argumentation (Kühn 2011, 264–265). Other courts, to which the TK is prone to look up to in search of inspiration include the European Court of Justice (‘ECJ’) and the European Court of Human Rights (‘ECtHR’), both of which have a proven track-record of pragmatist adjudication, very far from the hyperpositivist ultra-formalism.

Thirdly, it is possible to argue that the two courts speak to slightly different audiences. Although, in general, it can be said that their decisions are addressed to the Polish legal community and, to a smaller extent, to society at large, it seems plausible to put forward a more nuanced picture. It seems that owing to its strict institutional and genetic ties with the ordinary judiciary, and its relatively greater separation from the world of politics, the SN addresses its decisions mainly to judges of the ordinary judiciary. Therefore, regardless of the personal preferences of SN judges, they are inclined to formulate their arguments in a way which will persuade not a politician or academic, but a typical Polish career judge. Therefore, if career judges demonstrate a preference for hyperpositivist simplified adjudication, the SN does what it can to cater to their unrefined taste. The TK is in a different position. Owing to its closer ties with the world of politics and greater media focus upon its judicial activity, it must formulate its arguments in a more pragmatic fashion, assuming that it will be more persuasive. Furthermore, on account of its close bonds with the academia, TK Justices certainly write their opinions with the academic auditorium of constitutionalists and legal theorists in mind. Finally, the TK, which publishes its landmark cases in English on its own website, seems to be more concerned with its own perception by Western judiciaries and scholars, rather than the SN is. This strengthens the trend towards emulating the pragmatic style of Western constitutional courts.

Fourthly, the general institutional setting should also be mentioned as a factor. Whilst the SN enjoys, within the judiciary, an authority and prestige based on tradition and continuity, and can influence the case-law of the lower courts *via* a

number of procedures which allow it directly to quash or modify a lower court's judgment, the TK's situation is much more difficult. Not only is its history much more recent, its Justices accused of being politicians in gowns, but also, for want of a direct complaint against a judgment, it cannot force the ordinary judiciary and the SN to obedience by quashing or modifying their decisions. The TK's insistence on persuasiveness and pragmatist style can be seen as a way of compensating for these weaknesses in comparison with the SN.

Finally, one should not underestimate the very nature of constitutional adjudication, as opposed to ordinary civil and criminal adjudication, which, on account of deliberate vagueness and open-textured character of constitutional instruments, invites and favours a more pragmatic style of adjudication, focused more on principles, values and legally protected interests, rather than detailed rules lending themselves to purely semantic analysis (Rytter 2007, 257–259; Kühn 2005, 7).

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