



Resilience of Constitutional Courts in Poland and Germany

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The political context surrounding the reform of the Federal Constitutional Court (FCC) ties closely to Germany's domestic politics. Since last year, Germany has been debating ways to enhance the "resilience of the rule of law." This discussion includes potential changes to the rules governing the FCC, particularly the procedure of electing its justices. Three main factors are fueling this debate: the upcoming Bundestag elections in 2025, the possible rise in voter support for the AfD and the BSW, and the absence of detailed provisions in Germany's Basic Law regarding the FCC. There is also concern that the AfD or another party might challenge or disrupt the "established state practice."¹

ESTABLISHED STATE PRACTICE AND TRADITIONAL CROSS-PARTY AGREEMENTS ON THE FCC

The "agreed state practice"² involved cross-party agreements on "personal package deals"³, initially negotiated between the SPD and CDU, and later expanded to include the FDP and the Greens. These agreements covered key appointments in the judiciary, including positions at the FCC. A scenario of changes to the FCC's functioning, or at least the blocking of judicial

appointments, seems increasingly plausible given the AfD's electoral success. This includes their victory in the Thuringia state elections, their second-place finishes in Brandenburg and Saxony in the autumn of 2024, and their growing support in western Germany. For instance, in Hesse during the 2023 elections, the AfD garnered more than 18% of the vote. Alongside the AfD's rising popularity, attention has also shifted to the strong performance

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² J. Bender, *Die Misere der wehrhaften Demokratie*, „Frankfurter Allgemeine Zeitung“, 25.03.2024.

³ R. Zuck, *Politische Sekundärtugenden: Über die Kunst, Pakete zu schnüren*, „Neue Juristische Wochenschrift“ 1994, p. 4970; U. Domgörgen, *Vom parteipolitischen Zugriff auf hohe Richterämter. Die „causa BFH-Vize“, amtsgemäße Anforderungsprofile und der Grundsatz der Bestenauswahl*, „Neue Zeitschrift für Verwaltungsrecht“ 2022, p. 1078.



of the new left-wing party, Bündnis Sahra Wagenknecht (BSW).

Amendments to the German Basic Law and the Federal Constitutional Court Act were achieved through the decades-long tradition of cross-party compromise. This involved the SPD, the CDU/CSU, the Greens, and the FDP while excluding both the AfD and the BSW. However, after the 2025 Bundestag elections, the 'traditional players' might need to bring these two parties to the table.

Nevertheless, the German process for amending laws remains, in many ways, exemplary – also from the Polish perspective. It strictly adheres to the Basic Law of the Federal Republic of Germany, particularly Article 79(2). This ensures respect for the rule of law and the protection of individual rights, in particular the right to a fair trial. These principles—respect for human rights and the rule of law—are, in my view, fundamental to implementing meaningful legal changes in any country, even when the expressly stated goal is to protect democracy and its resilience against internal threats.

The German legislative process has avoided undue haste. The Ministry of Justice, in collaboration with all governing parties and the opposition CDU, carefully drafted the proposals. A broad public debate has taken place, and the drafts were submitted to the

FCC for review. Apart from introducing a substitute election mechanism, the proposed changes are not groundbreaking and do not weaken individual rights, which are firmly upheld by the rule of law. The legislative process stands out for its quality: it is systematic, thorough, and concise, both in terms of the legislation in force and draft legislation. These attributes contribute to the durability of the reforms and reinforce the credibility of Germany's legal system and governance overall.

The summer of 2024 marked the publication of *Resilience of the Federal Constitutional Court – Fraction Clarification Document. Talks between the Federal Ministry of Justice and the SPD, the Greens, the FDP and the CDU/CSU conclude successfully*⁴. This document outlined the principal provisions of the non-partisan compromise, which were incorporated into draft amendments to Germany's Basic Law and the FCC Act submitted to the Bundestag in September 2024.

The document advised that Articles 93 and 94 of the Basic Law be amended to include provisions establishing the FCC's status as a constitutional body. These provisions addressed a 12-year term limit for judges, a mandatory retirement age of 68, the total number of 16 judges divided into two adjudicating Senates, a ban on the

⁴ Resilienz des Bundesverfassungsgerichts – Gemeinsames Erläuterungspapier der Fraktionen Gespräche zwischen Bundesministerium der Justiz und den Fraktionen von SPD, Grünen, FDP und CDU/CSU erfolgreich beendet, https://www.bmj.de/SharedDocs/Downloads/DE/Gesetzgebung/Dokumente/Erlaeuterungspapier_Resilienz_Bundesverfassungsgericht.pdf?__blob=publicationFile&v=1



re-election of judges, and the stipulation that judges remain in office until a successor is chosen. They also affirmed the binding nature of the Court's judgments and the FCC's organizational autonomy.

Previously, these rules were part of the FCC Act, which could theoretically be repealed or amended by the new party line-up. To prevent this, the provisions were transferred to the Basic Law, whose amendment process is governed by the stringent requirements of Article 79 of the Basic Law.

The rules governing the procedure for electing FCC judges will remain part of regular federal law, but with an amended version that introduces a so-called substitute election mechanism (*Ersatzwahlmechanismus* in German). Under this mechanism, if either of the two bodies responsible for selecting judges—the Bundestag or the Bundesrat—fails to make a selection within three months, the authority to choose the judge will pass to the other body. The German Basic Law will also include a new introductory clause (*Öffnungsklausel* in German), which allows for a temporary derogation from the principle that half of the FCC judges are selected by the Bundestag and the other half by the Bundesrat, such a principle to apply in case the electoral process is deadlocked in one of the bodies.

These amendments were approved by the Bundestag and Bundesrat in late

December 2024. Shortly thereafter, the German President announced the dissolution of the Bundestag and scheduled new snap elections for February 23, 2025. In light of the election results, the practical application of this newly enacted legislation may soon be put to the test.

LAG A DECADE-LONG DISPUTE OVER POLAND'S CONSTITUTIONAL COURT

The provisions governing Poland's Constitutional Court (CC), set out extensively in Articles 188 to 197 of the 1997 Constitution of the Republic of Poland, have never been amended. Six of these articles refer explicitly to the Constitutional Court's jurisdiction and procedural issues, while three others deal specifically with the status of Constitutional Court judges. Recent disputes have not directly concerned the Constitution itself but rather the provisions of the Constitutional Court Act and the Constitutional Court's Regulations. This does not mean, however, that constitutional provisions should not be revised—particularly to address contentious issues like the selection of judges.

Taking inspiration from Germany, Poland would benefit from amending and expanding its constitutional provisions, including an amendment or replacement of the Constitutional Court Act. Unfortunately, this is currently impossible. Under Article 235(4) of the Polish Constitution, constitutional amendments require approval by a



two-thirds majority in the Sejm (Lower Chamber of the Polish Parliament), with at least half of all deputies present, and an absolute majority in the Senate (Upper Chamber), again with at least half of senators present.

Poland lacks the kind of strong cross-party consensus on critical state issues that has long been a cornerstone of Germany's success. The chronic absence of such an agreement in Poland is a major impediment to the development of the state.

The Constitutional Court Act lacks the same stability as the Polish Constitution or Germany's laws on the FCC. The first Constitutional Court Act was enacted in 1985, three years after the establishment of the Constitutional Court itself during martial law—declared in response to the mass anti-communist movement sparked by the Solidarity Trade Union. Incidentally, judicial offenses against opposition activists from that era remain unaddressed to this day⁵. In 1997, following the adoption of the Constitution of the Third Republic, a new Constitutional Court Act was enacted to align with the new constitutional framework, ensuring the Court's stability until 2015.

Between 1997 and 2015, Poland's constitutional doctrine regarding EU membership took shape, firmly grounded in the principle of constitutional supremacy under Article

8 of the Polish Constitution. This was reflected in key Constitutional Court rulings: the 2005 judgments on the EU Accession Treaty and the European Arrest Warrant, and the 2010 judgment on the Lisbon Treaty, which emphasized the need to protect Poland's constitutional identity.

However, 2015 marked a turning point, with a disastrous repeat of the political and legal chaos reminiscent of U.S. President John Adams's infamous "midnight judge" appointments in 1801, made just before he left office on the basis of a law on the courts passed a month earlier.

In Poland, the controversy centered on the election of Constitutional Court judges. In May 2015, Andrzej Duda, supported by the Law and Justice Party (PiS), won the presidential election. Parliamentary elections in both chambers scheduled for September were expected to also favor PiS. On June 25, 2015, a new Constitutional Court Act was passed by a simple majority, introducing Article 137, which allowed the outgoing 7th Sejm to circumvent existing rules about the time limit for nominating Constitutional Court judges. Previously, the Sejm's Rules of Procedure required nominations to be submitted to the Speaker of the Sejm 30 days prior to the expiry of the term of office of an incumbent judge. The new Constitutional Court Act changed

⁵ Cf. W. Kulesza, *Crimen laesae iustitiae*, Łódź 2012, p. 411 f.



this to 30 days from the date the law took effect, i.e. August 30, 2015.

This change was particularly significant because the terms of five Constitutional Court judges—one-third of the Court—were set to end in late 2015. Three judges' terms expired on November 6, while the terms of two more elapsed on December 2 and December 8, respectively. On October 8, 2015, during its final days, the outgoing Sejm of the 7th term elected five new judges under the new law of June 2015.

This election was challenged by the newly elected Sejm of the eighth term and by President Andrzej Duda. New judges were appointed to replace those chosen in October 2015, despite a December 2015 Constitutional Court ruling that the earlier election of three of the five judges had been lawful⁶. In 2016, two additional laws were passed to regulate the Court, including the current law of November 30, 2016, and the accompanying Law on the Status of Constitutional Court Judges.

To summarize this turbulent history, a quote from a scholarly article by A. Sulikowski and K. Otręba offers an apt metaphor, borrowed from the iconic Polish motion picture *Wielki Szu (Big Shar)* about professional poker players: "We played a fair game: you cheated, I cheated, and the better man won." While the gravity of the legal breaches

on each side may not have been equal, it is clear that neither party can claim to have played entirely fair⁷.

LATEST DEVELOPMENTS IN POLAND'S CONSTITUTIONAL DISPUTE

The situation in Poland remains tense and unresolved, despite the constitutional principle of the common good set forth in Article 1 of the Polish Constitution. Sadly, the heightened involvement of external actors in recent years has only complicated matters, undermining this core principle. This ongoing conflict is damaging Poland—a key frontline state whose resilience is critical to the security of Europe as a whole.

In 2023, the majority of the newly-elected Sejm of the ninth term initiated sweeping reforms to the Constitutional Court, culminating in the passage of the fifth Constitutional Court Act on September 13, 2024, along with the Act on Introductory Provisions to the Constitutional Court. Both legal instruments, drafted with input from a non-governmental organization, are strongly contested by the opposition party. However, they cannot take effect without the signature of the President who, citing concerns about their constitutionality, referred the laws to the Constitutional Court for preventive review.

⁶ A. Działdziej, *Quis custodiet custodes ipsos? Trybunał Konstytucyjny jako (nie)obiektywny strażnik Konstytucji*, „Forum Prawnicze” 2015, p. 12 ff.

⁷ A. Sulikowski, K. Otręba, *Perspektywy podjęcia rozproszonej kontroli konstytucyjności przez sądy powszechne*, „Państwo i Prawo” 2017, Issue 11, p. 41.



One of the President's key concerns relates to Article 10(1) of the Introductory Act. This provision invalidates judgments issued by panels that included judges whose appointments violated the June 25, 2015 Act on the Constitutional Court. It also invalidates judgments involving their replacements, labeling them "persons not entitled to adjudicate." However, Article 10(4) of the Law on Introductory Provisions of 2024 states that individual court rulings and administrative decisions that are final as of the enactment of this Law, issued in individual cases on the basis of the legal status shaped by the judgments referred to in paragraph 1, shall remain in force. This creates tension with Article 190(1) of the Polish Constitution, which grants Constitutional Court rulings universal binding force and finality.

Another provision held to be controversial by the President of the Republic of Poland is Article 17(3) of the September 2024 Act. This article allows newly elected judges to bypass the requirement of taking their oath before the President. Instead, judges may submit a notarized written oath to the Speaker of the Sejm after a 14-day waiting period, but no later than 30 days after their election.

The 2024 Act also introduces extensive and complex procedures for electing Constitutional Court judges. According to Article 16(1), judges are individually elected by the Sejm for nine-year terms with a 3/5 majority, provided at least half of all deputies are present. While

this mechanism aims to ensure broader support, it falls short of fostering meaningful cross-party consensus, which is crucial for building trust in judicial appointments. A more effective approach would be to adopt a model similar to Germany's FCC Act, requiring a 2/3 majority of votes cast and at least a majority of votes of Bundestag members, which would ensure democratic legitimacy of decisions, many of which are fundamental for the functioning of the state.

Meanwhile, the ruling parties have signaled that the Sejm should avoid appointing CC judges under the 2015 Act. If this approach is taken, the Constitutional Court could face paralysis as judges' terms expire, leaving seats vacant. Under Article 31 of the 2016 Constitutional Court Act, CC judges retire at the end of their term, underscoring the urgent need for a constitutional amendment to allow judges to remain in office until their successors are appointed.

COULD GERMANY LEARN FROM POLAND?

When considering European judicial standards and the current legislation and practice in Germany, certain provisions of Poland's 2024 Constitutional Court Act could offer valuable lessons for that country. One notable example is Article 17(2), under which "A person who has served as the President of the Republic of Poland, a member of parliament as



a deputy or senator, a member of the European Parliament, on the Council of Ministers, or as secretary of state, undersecretary of state or government plenipotentiary, may stand for election as a judge of the Court if at least four years have elapsed since the termination of their office, the expiry of their mandate or the termination of their office". Similarly, Article 17(3) applies the same waiting period to former members of political parties. However, one might argue that extending this period to at least five years would be even more prudent.

Another related and highly significant provision is Article 55 of the 2024 Constitutional Court Act, which excludes judges from hearing cases if they were involved in drafting or voting on the legal acts, legal question or constitutional complaint under review while serving as deputy or senator.

Incorporating these provisions into German law would have prevented the controversy surrounding the appointment of FCC judges, such as the case of S. Harbarth, current FCC President. His appointment highlights that the practice of "personal package deals" has not been entirely abandoned. It also reflects that medium- and long-term planning is not just a hallmark of German foreign policy—for instance, in matters like EU reform—but is also relevant to internal affairs. While these internal issues may carry less weight and shorter timelines,

they still have a significant impact on the functioning of the state. Notably, in 2018, major German newspapers featured articles on who would succeed the then FCC President, A. Voßkuhle, even though his term was not due to end until mid-2020.

Several aspects of the situation make it noteworthy. First, the decision to appoint a successor was made unusually early. Second, the chosen candidate was not drawn from the existing pool of FCC judges who had an established record in constitutional doctrine and jurisprudence but was instead someone who had never served on any court—let alone a constitutional one. Third, the appointee was an active and prominent CDU politician. And fourth, the media's speculation about this decision turned out to be completely accurate. To this day, it remains unclear why Germany's major political parties made this choice, which seems to fly in the face of R. Künast's (Greens) assertion that, in light of what she saw as extreme politicization of Supreme Court appointments in the U.S. and Poland, Germany must remain "a beacon of the rule of law for the world"⁸.

CONCLUSIONS

The above brief analysis does not inspire much optimism, especially as regards the situation in Poland. A panacea here would be to thoroughly revise how the state operates, both at

⁸ W. Janisch, *Leuchtfuehrer für den Rechtsstaat*, „Süddeutsche Zeitung“, 18.10.2018.



the level of the political class and the legal experts involved in shaping systemic solutions. For the latter, the lessons of Germany's Rosenberg Project—successfully undertaken by the Federal Ministry of Justice—are particularly relevant. While the project is rooted in Germany's recent historical experience, its broader message carries universal significance to be taken *cum grano salis*. As the project states: "For far too long, jurists in Germany saw themselves as apolitical legal technicians; this mindset turned many of them into accomplices of Nazi injustice. Today, jurists must live embody and uphold the values of the Basic Law—human dignity, individual freedom, and social diversity"⁹.

From a Polish perspective, one should add the principle of the common good, as outlined in Article 1 of the Polish Constitution, to this list of essential values.

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⁹ *The Rosenberg – The Federal Ministry of Justice in the shadow of the Nazi past. Exhibition booklet*, p. 64.