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Pushback or Backlash against the European Court of Human Rights?

A Comparative Case Study of Russia and Democratically Backsliding Poland

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Abstract

This article uses the theoretical model of 'pushback-backlash' developed by Madsen, Cebulak and Wiebusch (2018) for a comparative analysis of the differing patterns of reaction to the European Court of Human Rights (ECtHR) by two Eastern European countries – Russia, and Poland. We argue that Russian Constitutional Court's (RCC) rejection of ECtHR authority, while extraordinary and legislated by the Duma, was in fact self-limiting, as observed in politically motivated cases. The decisions of the Polish Constitutional Tribunal (PCT), by contrast, go further than pushback, as rights enshrined in the Convention may soon become illusory to Polish citizens. Having chosen a country that was expelled from the Convention (Russia), and one that is still a member (Poland), we suggest opening the conceptual binary between 'pushback' and 'backlash' towards a dynamic continuum.

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1 Introduction

The literature on pushbacks, rejection, and backlash against international courts (ICs) – the European Court of Human Rights (ECtHR) in particular – is vast, and there is a burgeoning scholarship conceptualizing the patterns and forms of such rejection.[1] This resistance is highly uneven; it comes in many forms and 'often differs in both scope and intensity and across the Member States and the actors involved'.[2] Despite this global diversity, the authors and editors of the most authoritative special issue on the backlash against international tribunals introduced two analytical categories – conceptual pillars of the 'critical feedback to ICs from their audiences, including their consequences'.[3] They distinguished 'mere' pushback from more substantively serious backlash against the ICs.

The Central and Eastern European countries became signatories of the European Convention of Human Rights (ECHR) in the early to mid-1990s. Citizens from these countries have become active users of the convention system, expanding the ECtHR's docket and gradually leading to an increased resistance to Court's jurisprudence among the respondent states. Yet it is primarily backlash against the Court's authority from 'Western' states – the UK,[4] Austria,

1 Mikael Rask Madsen, Pola Cebulak and Micha Wiebusch, "Backlash Against International Courts: Explaining the Forms and Patterns of Resistance to International Courts", *International Journal of Law in Context* 14, no. 2 (2018): 202; Mikael Rask Madsen, "The European Court of Human Rights", in *International Court Authority*, ed. Karen J. Alter, Laurence R. Helfer and Mikael Rask Madsen (Oxford: Oxford University Press, 2018); Alexandra Huneeus and Mikael Rask Madsen, "Between Universalism and Regional Law and Politics: A Comparative History of the American, European, and African Human Rights Systems", *International Journal of Constitutional Law* 16, no. 1 (2018); Jonas Christoffersen and Mikael Rask Madsen, *The European Court of Human Rights between Law and Politics* (Oxford University Press, 2011).

2 Madsen, Cebulak and Wiebusch, "Backlash Against International Courts", 198.

3 Madsen, "The European Court of Human Rights", 199.

4 Ed Bates, "Analysing the Prisoner Voting Saga and the British Challenge to Strasbourg", *Human Rights Law Review* 14, no. 3 (2014); "Democratic Override (or Rejection) and the Authority of the Strasbourg Court: The UK Parliament and Prisoner Voting", in *The International Human Rights Judiciary and National Parliaments: Europe and Beyond*, eds Matthew Saul, Andreas Follesdal, and Geir Ulfstein (Cambridge: Cambridge University Press, 2017).

Switzerland,[5] France, or the Nordic countries[6] – that has attracted most interest in the academic literature (except for in Russia).[7] To fill this gap in the scholarship, this article applies the theoretical model of pushback-backlash to conceptualize the different patterns of recoil from the ECtHR by two Eastern European countries: Russia, and the democratically backsliding Poland. Moreover, Russia was recently expelled from the Council of Europe (CoE), while the Polish Constitutional Tribunal (PCT) in a series of judgments (K 6/21 and K 7/21 delivered in 2021 and 2022, respectively) has seriously questioned, if not undermined, the authority of the ECtHR. The choice of a country for which the trajectory and breach of international law has led to the expulsion from the CoE (Russia), and a country that is still a member (Poland), helps us avoid the empirical bias of sampling on the dependent variable and studying only cases where the outcome of backlash was allegedly 'successful'. Focusing on the less definite forms of recoil, where countries remain members of international treaties and conventions, can produce important and nuanced analysis of the processes and mechanisms that may or may not result in withdrawals but can have profound impact on creating a broad understanding of what a backlash against ICs really means.

From these empirical case studies we posit that the binary between 'a pushback' and 'a backlash' is too analytically constraining to capture the dynamic situation of contesting the ECtHR's authority in Central Eastern Europe. Instead, we propose a more fluid and flexible model whereby the two analytical categories are seen as opposite ends of a dynamic continuum, whereby both 'pushback' and 'backlash' may be considered more as transitional stops along this way. The examples of Russia and Poland defy the simplistic conceptual boxes of 'backlash' and 'pushback'. We argue that Russia's rejection of the ECtHR's authority, while extraordinary and legislated by the Duma, was

5 Katja Achermann and Klaus Dingwerth, "Helping v. Hindering Sovereignty: The Differential Politicization of the European Court of Human Rights in the Austrian and Swiss Press" *Temple International & Comparative Law Journal* 33, no. 2 (2018).

6 Jaakko Husa, "Nordic Constitutionalism and European Human Rights-Mixing Oil and Water?", *Scandinavian Studies in Law* 55 (2010).

7 Lauri Mälksoo and Wolfgang Benedek, eds., *Russia and the European Court of Human Rights: The Strasbourg Effect* (Cambridge University Press, 2017); Lauri Mälksoo, ed. *Russia and European Human-Rights Law: The Rise of the Civilizational Argument* (Leiden, Boston: Brill – Martinus Nijhoff, 2014).

in fact self-limiting, particularly observed in politically motivated cases.[8,9] Poland's questioning of the ECtHR's authority, while restricted to the decisions of the PCT, is more perennial and potentially serious in its consequences as it pertains to questioning ECtHR's jurisdiction in core rule of law cases,[10] questioning the ECtHR's doctrinal approach to the Convention, or its role as the regional human rights arbiter.[11] While Russia's path eventually led to the country's expulsion from the Convention system, we posit that it was not the Russian Constitutional Court's (RCC) contestation of the authority of the ECtHR that led to this outcome, but its brutal attack on a sovereign neighbor state, also signatory to the European Convention – Ukraine. It was ultimately a political decision: Russia's withdrawal from the ECtHR was caused by an external factor of foreign policy and could not easily be traced to Russia's historical relationship with the ECtHR. On the other hand, the relatively recent actions of the PCT consistently undermine the work of the ECtHR and put in question the country's future association with the Convention.

This article proceeds in three parts. First, we present the conceptual building blocks of a pushback-backlash model against international tribunals drawing on the theory developed by Madsen, Cebulak and Wiebusch. Second, we trace the dynamics and particularities of Russian and Polish recoil from the ECtHR taken under the guise of promotion of state sovereignty vis-à-vis international judicial institutions. Third, we conclude the analysis by discussing the

8 See the contribution by Geir Flikke and Daniella Slabinski in this Special Issue; they argue that the backlash was aimed at strengthening Russia's sovereignty. Our interpretation of a self-limiting backlash highlights the idea that, even though Russia possessed the legal tools to block the enforcement of all ECtHR judgments, especially those it disapproved of, it chose to exercise this discretion selectively, in a restrained manner, focusing primarily on politically significant cases.

9 Agnieszka Kubal, *Immigration and Refugee Law in Russia. Socio-Legal Perspectives* (Cambridge University Press, 2019); Anton Burkov, "The Use of European Human Rights Law in Russian Courts," in *Russia and the European Court of Human Rights: The Strasbourg Effect*, eds Lauri Mälksoo and Wolfgang Benedek (Cambridge University Press, 2017); Wolfgang Benedek, "Russia and the European Court of Human Rights: Some General Conclusions," in *Russia and the European Court of Human Rights: The Strasbourg Effect*, eds Lauri Mälksoo and Wolfgang Benedek (Cambridge University Press, 2017).

10 Adam Ploszka, "It Never Rains But It Pours. The Polish Constitutional Tribunal Declares the European Convention on Human Rights Unconstitutional", *Hague Journal on the Rule of Law* 15 (2022): 51–74.

11 Steven Greer and Luzius Wildhaber, "Revisiting the Debate About 'Constitutionalising' the European Court of Human Rights" *Human Rights Law Review* 12, no. 4 (2012); Alec Stone Sweet, Wayne Sandholtz and Mads Andenas, "The Failure to Destroy the Authority of the European Court of Human Rights: 2010–2018", *The Law & Practice of International Courts and Tribunals* 21, no. 2 (2022).

conceptual advancements for the theory of pushback-backlash against ECtHR drawing on the two case studies.

2 Applying the Theoretical Model of Pushback-Backlash against International Tribunals

In the current geopolitical climate, and especially following a series of High-Level Conferences – in Brighton (2012) and Copenhagen (2018) and the resulting Protocols Nos 15 and 16 – it has become increasingly difficult to find countries in the Council of Europe (CoE) that would accept unhesitantly the decision of the ECtHR pertaining to violations of human rights. Critics from the UK and Denmark, but also supported by Russia, Hungary and often Poland, have sought to limit the Court's authority, reduce 'activism' in interpreting the Convention as 'a living instrument', and expand the principles of rights minimalism, subsidiarity, and margin of appreciation.[12] There has been a fierce debate as to whether the 'detractor' states were successful: Helfer and Voeten claimed that these conferences made the ECtHR 'walk-back' on its commitment to human rights,[13] Madsen concluded that the 'UK and Denmark achieved exactly what they set out to do',[14] whereas Sweet, Sandholtz and Andenas argued that the High-Level Conferences resulted in the 'failure of States and reformers to curb the powers of the Court' and that the Court has never 'retreated from its basic jurisprudential orientations.'[15] Given the intensity of the debate, the resultant benchmark therefore is not outright acceptance, but a protracted acceptance or pushback, according to the member states' systematic critique of the Convention and the place of the ECtHR in European law.[16] Even the firmest advocates of the ECtHR's authority recognize that 'the ECtHR's decision-making is constrained by intramural divisions, and the preferences of the Court's most important interlocutors: judges on national supreme courts.'[17]

12 Sweet, Sandholtz and Andenas, "The Failure to Destroy the Authority of the ECtHR".

13 Laurence R. Helfer and Erik Voeten, "Walking Back Dissents on the European Court of Human Rights: A Rejoinder to Alec Stone Sweet, Wayne Sandholtz and Mads Andenas", *European Journal of International Law* 32, no. 3 (2021).

14 Mikael Rask Madsen, "Rebalancing European Human Rights: Has the Brighton Declaration Engendered a New Deal on Human Rights in Europe?," *Journal of International Dispute Settlement* 9, no. 2 (2018).

15 Sweet, Sandholtz and Andenas, op. cit., 244.

16 Madsen, Cebulak and Wiebusch, "Backlash Against International Courts", 197, 202.

17 Sweet, Sandholtz and Andenas, op. cit., 270.

However, this general trend of pushback, contestation, and dissent – considered 'normal' or natural by many social theorists[18] – should be distinguished from backlash that challenges 'the international court's authority as such' with the aim of 'overturning or, as a particular alternative in international law, exiting the system'.[19] Madsen, Cebulak and Wiebusch conceptualize backlash as being in opposition to mere pushback. Pushback they define as, 'a contestation and disagreement over the direction and contents of law, the situation in which some audiences are unsatisfied with the (new) contents of the law as developed by an IC, and they seek to push back against it with the goal of reverting to an earlier or different legal situation.'[20]

Pushbacks are quite common in the area of European human rights – but they differ from a more serious and substantial form of contestation of ICs authority: *backlash*, which 'is not only targeting the contents of the law itself, but also targets the institutions as such and their authority with the goal of not only reverting to an earlier situation of the law, but also transforming or closing the IC.'[21]

'Backlash' refers to a legal conflict that is not only more intense (pertaining to the jurisprudence produced by the IC), but also challenges the very existence of the international tribunal – the institution of the Court itself. In our analysis we follow this conceptualization. Backlash therefore 'conveys the idea of a reaction to a development with the goal of reversing that development' aimed at changing the 'rules of the game' by 'limiting the competences or abolishing an IC altogether'.[22]

To summarize: in conceptualizing the different forms of recoil from the ICs, Madsen, Cebulak and Wiebusch differentiate between ordinary pushback (criticizing the substance of the law produced by the tribunal within the confines of the formal legal system with the goal of reversing certain legal developments) and an extraordinary critique or *backlash*,[23] which refers to profound criticisms of not only law or jurisprudence developed by the ECtHR 'but also

18 Pierre Bourdieu, "The Force of Law: Toward a Sociology of the Juridical Field", *Hastings Law Journal* 38, no. 5 (1987): 807; Ralf Dahrendorf, "Toward a Theory of Social Conflict", *Journal of Conflict Resolution* 2, no. 2 (1958); Ralf Dahrendorf, *The Modern Social Conflict: The Politics of Liberty* (Routledge 2017).

19 Madsen, Cebulak and Wiebusch, "Backlash Against International Courts," 202.

20 Ibid.

21 Ibid., 202–03.

22 Ibid., 200, 209.

23 Ibid., 200.

TABLE 1 Summary of definitional distinctions between a pushback and a backlash against IC

Pushback	Backlash
Contesting the jurisprudence of the IC	Contesting the jurisprudence of the IC Contesting the institution/authority of the IC

SOURCE: MADSEN, CEBULAK AND WIEBUSCH (2018)

the very institution – the court – and its authority', seeking 'an institutional transformation or even a suspension or closing of an IC'.[24]

Given the binary categories of a pushback and a backlash, this theory invites an empirical question: when does a pushback end and a backlash start? Madsen, Cebulak and Wiebusch have provided a set of conceptual tools that can serve as a roadmap for empirical studies tracing a degree or threshold of negative reaction needed to warrant a distinction between a backlash and a mere pushback. We review these points below and show how our case studies of Russia and Poland take these ideas forward.

3 In Search of a Threshold – Unpacking the Binary

Madsen, Cebulak and Wiebusch locate their theoretical model of pushback/backlash against international tribunals within the context of broader political and social cleavages, 'more general societal trends where ICs are perceived as being on the side of alleged progressive globalization and thus against entrenched values and ideas of national societies'.[25] In the Western European context this can be traced back to right-wing Euroscepticism and conservative attempts to 'take back control' from European institutions (especially in the UK); in Eastern Europe they have coincided with advance of populism or authoritarian backsliding, whereby countries' contestation of the decisions of the ECtHR makes them go back 'on their commitments to democracy and the

24 Ibid., 199, 203.
25 Ibid., 201.

rule of law'.[26] The ascendance to power of the Law and Justice Party in 2015 has marked a shift towards authoritarianism and populism in Polish politics.[27] Russia has been considered a 'decorative democracy' at least since 2009;[28] by the mid-2010s it was firmly on the path toward an authoritarian political system and consolidated autocracy, according to the Freedom House index.[29]

These brief observations indicate the general context within which the Constitutional Tribunals for Russia and Poland – the 'most important interlocutors' for the ECtHR – have been operating. The RCC for years has considered itself as a 'buddy' to the ECtHR.[30] Until about 2009 the two courts had a very close and harmonious relationship;[31] the RCC often noted its 'cooperative relationship' with the ECtHR[32] and affirmed ECtHR jurisprudence as relevant for important domestic judgments on, e.g., post-Soviet statelessness.[33] However, the RCC operated in a rather unfavorable broader political environment in terms of wider negative discourse around Europe, European institutions, and 'Western' values, accelerated by the increasingly authoritarian executive

26 Nick Sitter and Elisabeth Bakke, "Democratic Backsliding in the European Union," in *Oxford Research Encyclopedia of Politics* (Oxford University Press, 2019); David Waldner and Ellen Lust, "Unwelcome Change: Coming to Terms with Democratic Backsliding," *Annual Review of Political Science* 21, no. 1 (2018).

27 Heino Nyyssönen and Jussi Metsälä, "Highlights of National History? Constitutional Memory and the Preambles of Post-Communist Constitutions", *European Politics and Society* 21, no. 3 (2020); Radoslaw Markowski, "Creating Authoritarian Clientelism: Poland after 2015," *Hague Journal on the Rule of Law* 11, no. 1 (2019); Bojan Bugaric and Alenka Kuhelj, "Varieties of Populism in Europe: Is the Rule of Law in Danger?," *Hague Journal on the Rule of Law* 10, no. 1 (2018).

28 Daniel Kimmage, "Russia. Selective Capitalism and Kleptocracy," in *Undermining Democracy 21st Century Authoritarians* (Freedom House, Radio Free Europe/Radio Liberty, Radio Free Asia, 2009).

29 Freedom House, "Russia" in *Freedom in the World*. https://freedomhouse.org/country/russia/freedom-net/2023 (Accessed on 5 December 2022).

30 Sergey Marochkin, "ECtHR and the Russian Constitutional Court: Duet or Duel?," in *Russia and the European Court of Human Rights: The Strasbourg Effect*, ed. Lauri Mälksoo and Wolfgang Benedek (Cambridge University Press, 2017).

31 Vladislav Starzhenetskii, "Assessing Human Rights in Russia: Not to Miss the Forest for the Trees: a Response to Preclik, Schönfeld and Hallinan", in *Russia and European Human-Rights Law: The Rise of the Civilizational Argument*, ed. Lauri Mälksoo (Leiden, Boston: Brill – Martinus Nijhoff, 2014), 962.

32 Alexander Blankenagel, "The Relationship between the European Court of Human Rights and the Constitutional Court of the Russian Federation: A Reply to Jeffrey Kahn," *European Journal of International Law* 30, no. 3 (2019): 968. See also Kournosov in this volume.

33 Kubal, *Immigration and Refugee Law in Russia*.

authorities.[34] This resulted in the notorious 2015 judgment where the Court gave itself a supervisory role over the ECtHR's decisions.

Since 2015 the PCT has been effectively captured by the executive, becoming 'a mere enabler' of the government.[35] The state-controlled public media presented the extensive legal reforms undertaken by the Law and Justice Party as aimed at 'eliminating corruption and the abuse of power' within the judiciary – 'a privileged cast: corrupt, criminal and incompetent'.[36] The new reforms brought systemic attacks on judicial independence and embroiled Poland in a full-blown constitutional crisis over the legality of the Constitutional Tribunal,[37] the self-organization of judiciary as a professional body,[38] and institutional mechanisms of the control of the judiciary by the executive through the reorganization of the Supreme Court. Several cases were filed with the ECtHR and the Court of Justice of the European Union (CJEU) to counter this authoritarian backsliding. Indeed, the ECtHR developed a clear jurisprudence in this matter, pronouncing the reformed courts (PCT and the new chambers of the Supreme Court) 'not a court according to the law' (see *Xero Flor v Poland 2021, Reczkowicz v Poland 2021, Dolińska-Ficek and Ozimek 2021, Advance Pharma 2022*) and criticizing the attacks on judicial independence as a clear violation of Art 6(1) ECHR. While public support for Europe and European institutions (including the ECtHR) remains very high

34 Elisabet Fura and Rait Maruste, "Russia's Impact on the Strasbourg System, as Seen by Two Former Judges of the European Court of Human Rights", in *Russia and the European Court of Human Rights: The Strasbourg Effect*, eds. Lauri Mälksoo and Wolfgang Benedek (Cambridge University Press, 2017).

35 Wojciech Sadurski, "How Democracy Dies (in Poland): A Case Study of Anti-Constitutional Populist Backsliding", paper presented at the Bochum University Seminar on Rule of Law and Constitutional Backsliding, Bochum University, April 2022, 2018); "Polish Constitutional Tribunal under PiS: From an Activist Court, to a Paralysed Tribunal, to a Governmental Enabler," *Hague Journal on the Rule of Law* 11 (2019); "Populism and Human Rights in Poland", in *Human Rights in a Time of Populism: Challenges and Responses*, ed. Gerald L. Neuman (Cambridge University Press, 2020).

36 Anne Sanders and Luc von Danwitz. "Defamation of Justice – Propositions on How to Evaluate Public Attacks against the Judiciary", *Verfassungs Blog*, 31 October 2017. https://verfassungsblog.de/defamation-of-justice-propositions-on-how-to-evaluate-public-attacks-against-the-judiciary/ (accessed 17 February 2022).

37 Sadurski, "Polish Constitutional Tribunal under PiS."

38 Gábor Halmai, "Comparative Constitution Making", in *The Making of 'Illiberal Constitutionalism' with or without a New Constitution: The Case of Hungary and Poland*, eds. David Landau and Hanna Lerner (Edward Elgar, 2019); Piotr Radziewicz, "Kryzys Konstytucyjny I Paradygmatyczna Zmiana Konstytucji [Constitutional Crisis and Paradigmatic Constitutional Change]," *Państwo i Prawo* [*State and Law Journal*] 75, no. 10 (2020); Miroslaw Wyrzykowski, "Experiencing the Unimaginable: The Collapse of the Rule of Law in Poland", *Hague Journal on the Rule of Law* 11 (2019): 16.

in Poland, the reformed (or some would say: politically controlled) PCT has engaged in a systemic process of negating and contesting the jurisprudence from Strasbourg and questioning the authority of the ECtHR itself.[39]

In view of recent events – particularly Russia's exit from the CoE – it is not difficult to see the preceding Russian criticism of the ECtHR as an extraordinary critique and a backlash. This was a deeply political contestation of the Court's authority: the use of state legal and political institutions to distance Russia formally from the ECtHR. This peaked with the law passed by the Russian Duma on 14 December 2015, which accorded to the RCC a supervisory role over enforcing ECtHR judgments if they would violate the Constitution of the Russian Federation. In the analysis below we show, however, that such broad powers were actually used very sparingly in practice and were limited to two judgments (*Anchugov and Gladkov, 2013* and *OAO Neftyanaya Kompaniya Yukos*, 2014) deemed as political encroachments on the part of the ECtHR by the Russian state. Thus, we believe that Russia's actions cannot be defined as backlash.

Further, we argue that the developments in Poland should now also be seen as more than the ordinary pushback or 'clipping the wings of' the ECtHR.[40] A set of judgments delivered by the PCT in the course of 2021 and 2022 (K 6/21 and K 7/21) that countered or directly pronounced as void (*sententia non existens*) jurisprudence developed by the ECtHR concerning the rule of law cases from Poland has, in effect, deemed the ECtHR unconstitutional in Poland.[41] Combining the analysis of these judgments with the broader socio-legal discourse around the ECtHR by the PCT's judges and politicians associated with the dominant Law and Justice Party shows that the aim of the PCT's judgment was not only to revert to an earlier situation of the law but also to question the authority of the ECtHR as applying to Poland. There are currently five judgments of the ECtHR contested by the PCT[42] and three cases where the Polish authorities have openly refused to comply with the interim measures (Rule 39 of the Rules of the Court),[43] citing the decision of the PCT to question the ECtHR's authority. As there are over three hundred pending and communicated

39 Ploszka, op. cit.

40 Madsen, Cebulak, and Wiebusch, "Backlash Against International Courts", 204.

41 Ploszka, op. cit.

42 These cases are *Xero Flor v Poland* (application no. 4907/18, 2021), *Broda and Bojara v Poland* (application nos. 26691/18 and 27367/18), *Reczkowicz v Poland* (application no. 43447/19, 2021), *Dolińska-Ficek and Ozimek v Poland* (application nos. 49868/19 and 57511/19, 2021), and *Advance Pharma v Poland* (application no. 1469/20, 2022).

43 These cases are *Leszczyńska-Furtak v Poland* (application no. 39471/22), *Gregajtys v Poland* (application no. 39477/22) and *Piekarska-Drążek v Poland* (application no. 44068/22).

cases before the Strasbourg Court concerning the rule of law backsliding,[44] dynamic developments can be expected in this field.

Framing analytically the processes of contestation of the ECtHR's jurisprudence and authority in Russia and Poland – they seem to escape the neat conceptual boxes of backlash and pushback as suggested by Madsen, Cebulak and Wiebusch.[45] We argue that the RCC's selective and self-limiting contestation of the Strasbourg court in a narrow group of politically salient cases would not have reached the threshold of a backlash resulting in the expulsion of Russia, had it not been for Russia's brutal and unprovoked attack on Ukraine in 2022. In the case of Poland, the conflict with ECtHR goes beyond the contestation of the Court's jurisprudence and a 'mere' backlash. The two judgments of the PCT that pertain to potentially hundreds of ECtHR's applications from Poland, when combined with a vitriolic political rhetoric directed at the Strasbourg court seem to indicate that Poland is at least headed towards backlash. As a basic comparative analytical framework, we propose opening the conceptual binary between a pushback and a backlash against ICs, seeing both concepts as transitional stops on a dynamic continuum. This is not merely a discursive task or a quibble, but a closer reflection of the empirical legal reality. The apparent ignorance of the multiplicity of 'in-between' categories and their indiscernibility in scholarly debates indicates that they have been 'blissfully,' albeit inappropriately, hidden under the rigid conceptual binary.[46] The proposed model of a continuum, with pushback and backlash seen as dynamic and transitional stages, adds nuance to the existing scholarship on responses to international courts and tribunals, particularly in cases influenced by the logic of autocratization, albeit concealed under the guise of promoting state sovereignty in relation to international judicial institutions.[47]

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44 ECtHR "Non-compliance with interim measure in Polish judiciary cases", *Press Release issued by the Registrar of the Court* on 16 February 2023, Source: HTTPS://HUDOC.ECHR.COE.INT/APP/CONVERSION/PDF/?LIBRARY=ECHR&ID=003-7573075-10409301&FILENAME=NON-COMPLIANCE%20WITH%20INTERIM%20MEASURE%20IN%20POLISH%20JUDICIARY%20CASES.PDF, accessed on 16 June 2023.

45 Madsen, Cebulak and Wiebusch, "Backlash Against International Courts", 200.

46 Agnieszka Kubal, "Conceptualizing Semi-Legality in Migration Research", *Law & Society Review* 47, no. 3 (2013): 562.

47 An alternative conceptual framework would involve considering the variation in state behaviour along a continuum, ranging from unconditional acceptance of ECtHR authority to complete rejection and denial, with both ends of the spectrum representing ideal types in the Weberian sense. However, given our empirical focus on Poland and Russia, we lack a concrete empirical case that would exemplify an unequivocal endorsement of ECtHR authority. Developing such a case would require an entirely different research

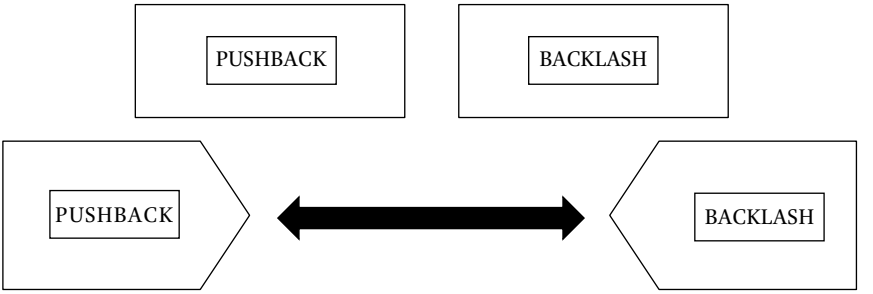

FIGURE 1 Visual representation of the empirical processes of pushback and backlash against IC: a binary replaced by a dynamic continuum
SOURCE: BASED ON MADSEN, CEBULAK, WIEBUSCH (2018)

4 Case Study of Russia: a Self-Limiting Backlash?

The severed relationship between Russia and the ECtHR is often traced back to the legal position of the RCC, which in its decision from 14 July 2015 (which later became law, see Federal Law No. 7-FKZ of 14 December 2015) gave itself a supervisory role over enforcing ECtHR judgments if they were seen as violating the Constitution of the Russian Federation.[48] Thus, if the RCC were to conclude that a given ECtHR judgment was incompatible with the Russian Constitution, it would not be implemented.[49] However, this prerogative has been used very sparingly – on only two occasions – in relation to the highly politicized 'Yukos case' (*OAO Neftyanaya Kompaniya Yukos v. Russia* 2014) and the constitutionally contested *Anchugov and Gladkov v. Russia*, (2013). The RCC had repeatedly stressed that it would use these powers only in 'exceptional circumstances.'[50] A sole focus on these politically motivated cases as examples of Russia's backlash against the ECtHR would lead to rather skewed conclusions about the Russian relationship with the ECHR.

Yukos was a politically sensitive case that resulted in approximately €1.9 billion compensation – the largest ever awarded by the ECtHR. The human rights violations concerned Art. 6 of the ECHR ('right to fair trial'), and Art. 1 of Protocol No. 1 ('Every natural or legal person is entitled to the peaceful enjoyment of

focus. Further research is required to broaden this continuum and illustrate it with additional empirical examples.

48 This section is largely based on Kubal, *Immigration and Refugee Law in Russia* (Cambridge University Press, 2019).

49 Burkov, "The Use of European Human Rights Law in Russian Courts", 66.

50 Starzhenetskii, "Assessing Human Rights in Russia".

his possessions') with regard to the unlawful, arbitrary, and disproportionate imposition and enforcement of the 2000–2003 tax assessments on Yukos. While it is beyond the scope of this article to undertake a detailed analysis of this judgment, the unprecedentedly large compensation must be viewed in the context of the compensations awarded in cases of arguably more serious human rights violations in which the ECtHR ruled against Russia. In the infamous 'Chechen cases' concerning torture (Art. 3 of the ECHR), enforced disappearances and extrajudicial executions (Art. 2), in conjunction with Russia's failure to investigate these crimes properly (Art. 6), the compensation awarded by the Strasbourg Court to the applicants ranged from €5,000 to €40,000 – a mere fraction of what the ECtHR awarded to Yukos (see, e.g., *Musayev and Others v. Russia*, 2007). This leads to a rhetorical question: would a Chechen life be worth less to the ECtHR than the property of Mr. Khodorkovsky?[51]

The question of prisoners' voting rights and the non-enforcement of the ECtHR decision in *Anchugov and Gladkov* should be placed in a broader comparative perspective, as Russia was not the only country where problems were observed in cases in this area. Since *Hirst v. United Kingdom* (No 2) (2005) – the first case in which the Court ruled that a blanket ban on British prisoners exercising the right to vote was contrary to the ECHR (as incompatible with Art. 3 of Protocol No. 1) – seven other applications to the ECtHR followed from the UK due to the non-enforcement of the original judgment and lack of corresponding legislation. Nine years after the Hirst judgment, the British government attempted to introduce legislation that would give prisoners right to vote (see *Firth and Others v. United Kingdom*, 2014). However, the bill was rejected by the Parliament; since then, the government has repeatedly stated that prisoners will not be given the right to vote despite the repeated rulings of the ECtHR.[52] The conflict over prisoners' voting rights, together with the *Othman* (*Abu Qatada*) *v. United Kingdom* (2012) case, in which under Art. 6 the UK could not lawfully deport Abu Qatada to Jordan because of the risk of that, in an event of Othman's trial in Jordan, evidence obtained by torture might be used, led then Home Secretary Theresa May to say that the UK would

51 The authors are fully aware about the pitfalls of comparing the non-comparable: the damages awarded in Yukos case were pecuniary, while in the Chechen cases the ECtHR awarded non-pecuniary damage. Nor do we wish to embark on a dubious journey of proving the general unfairness of the system of just satisfaction in Strasbourg. We use the Chechen cases for demonstration purposes, as legal experts involved in Yukos case repeatedly stressed that the judgment would have been acceptable to Russia had it not been for the exorbitant compensation involved (Bill Bowring, personal communication).

52 Anonymous, "Prisoners Will Not Get the Vote, Says David Cameron", *BBC*, 24 October 2012, http://www.bbc.co.uk/news/uk-politics-20053244 (accessed 21 April 2018).

have to leave the ECtHR altogether.[53] The Home Secretary firmly criticized the Strasbourg Court as posing an impediment to the constitutional autonomy and national security of the UK: 'the ECHR can bind the hands of parliament, adds nothing to our prosperity, makes us less secure by preventing the deportation of dangerous foreign nationals'.[54]

Perhaps, therefore, Russian resistance to certain ECtHR judgments simply reflected a broader trend of a sustained pushback among other CoE countries?[55] Regardless, whenever the British and Russian relationships with the ECtHR have been compared, the same rather patronizing arguments are brought up: 'one [Britain] thinks it knows better; the other [Russia] does not want to be told that it knows worse'.[56] Not surprisingly, therefore, some Russian commentators saw the ECtHR judgments as biased. Russian delegates at the various meetings of the Parliamentary Assembly of the CoE (PACE – the parliamentary arm of the CoE) have declared: 'From the outset, the ECtHR's judgments left people perplexed by its inconsistency, contradictory nature, subjective stance, and flagrant political bias. That said we invariably proceed on the basis that the decisions of the Strasbourg court *must be executed*.'[57] The Russian Constitutional Court, in its ruling of 19 January 2017 on the refusal to fulfil the judgment in the Yukos case, repeated that such refusal was 'an exception' rather than the rule.[58]

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53 Asthana, Anushka and Rowena Mason, "UK Must Leave European Convention on Human Rights, Says Theresa May", *The Guardian*, 25 April 2016, https://www.theguardian.com/politics/2016/apr/25/uk-must-leave-european-convention-on-human-rights-theresa-may-eu-referendum, (accessed 18 April 2018).

54 As quoted in Asthana and Mason, op. cit.

55 See Benedek, "Russia and the European Court of Human Rights", 395.

56 Lauri Mälksoo, "Concluding Observations. Russia and European Human-Rights Law: Margins of the Margin of Appreciation," in *Russia and European Human-Rights Law: The Rise of the Civilizational Argument*, ed. Lauri Mälksoo (Leiden, Boston: Brill – Martinus Nijhoff, 2014), 222.

57 Parliamentary Questions for Oral Answer, Addendum 1, 4 October 2006, quoted in Petr Preclik, "Culture Re-introduced: Contestation of Human Rights in Contemporary Russia." in *Russia and European human-rights law: the rise of the civilizational argument*, ed. Lauri Mälksoo (Leiden, Boston: Brill–Martinus Nijhoff, 2014), 61, our emphasis.

58 Marochkin, "ECtHR and the Russian Constitutional Court: Duet or Duel?," 119. Such high-profile politicized cases, or cases demonstrating conflicts between Russian constitutional law and its self-imposed international law obligations, should be distinguished from a separate group of ECtHR cases against Russia that have pointed out structural and systemic deficiencies in the Russian legal system since its accession to the Council of Europe. The latter primarily concern cases relating to the obstruction of the enforcement of ECtHR judgments (Burdov v. Russia, no. 59498/00, judgment of 7 May 2002; Burdov v. Russia (No. 2), no. 33509/04, judgment of 15 January 2009; Konstantin Markin v. Russia, no. 30078/06, judgment of 22 March 2012), or the conditions of confinement in Russia

However, a more complex relationship with the ECtHR emerges from the analysis of how domestic Russian courts recognized the ECtHR jurisprudence. Anton Burkov offered a rather somber conclusion based on his empirical examination of three 'test cases' pursued by Russian human rights lawyers through the different levels of the domestic courts: the case of Alina Sablina against secret organ harvesting (*Sablina and others v. Russia*, no. 4460/16, lodged on 28 December 2015), the case of Korolevs on the right to conjugal meetings during long-term imprisonment (partially addressed in *Khoroshenko v. Russia*, no. 41418/04, 2015) and the case of Valentina Mikhaylova, a pensioner who was refused free legal assistance when charged with a criminal offence in administrative proceedings (*Mikhaylova v. Russia*, no. 46998/08, 2016).[59] Burkov's research revealed that Russian domestic judges at different levels of the legal system (from justices of the peace, via district and regional courts, all the way to the Constitutional Court) had adjudicated these test cases 'based on national law in favor of the state authorities when the case should have been decided for the applicant based on the Convention and ECtHR case law'.[60] The domestic judges, for various reasons – lack of motivation, political will, and fear of having the decision overturned on appeal – 'simply did not follow the Constitution, legislation, or even relevant Supreme Court Plenum Regulations' with regard to the ECtHR jurisprudence and its applicability.[61] Agnieszka Kubal's research among human rights and immigration lawyers in Moscow has found that Russian domestic courts were far from being integrated with European jurisprudence.[62] The great majority of immigration and refugee law cases had to reach the ECtHR for a successful conclusion – or, as the lawyers put it, 'for justice to be achieved'. These empirical observations, however, were countered by the research conducted by Vladislav Starzhenetskii, whose long-term study of the Russian Arbitrazh court system revealed that Russian courts 'borrow much from the Convention and ECtHR practice; in a substantial number of cases, they frequently use the same language, legal tools, and approaches as the ECtHR'.[63] To support this observation, Starzhenetskii presented a long list of Russian Higher Arbitrazh Court cases adjudicated between

(Kalashnikov v. Russia, no. 47095/99, judgment of 15 July 2002). We are grateful to Jeffrey Kahn for this insightful observation.

59 Burkov, "The Use of European Human Rights Law in Russian Courts."

60 Ibid., 71.

61 Burkov, "The Use of European Human Rights Law in Russian Courts", 70, 91.

62 Kubal, *Immigration and Refugee Law in Russia. Socio-Legal Perspectives*.

63 Starzhenetskii, "Assessing Human Rights in Russia", 209; Timur Bocharov and Kirill Titaev, "When Business Goes to Court: Arbitrazh Courts in Russia," in *Sociology of Justice in Russia*, eds Marina Kurkchiyan and Agnieszka Kubal (Cambridge University Press, 2018).

2004 and 2010, all of which referred to either the specific rights and freedoms contained in the ECtHR or the Strasbourg Court jurisprudence.[64]

Yet, despite this plural and complex picture, many commentators were quick to evaluate judgement of the RCC as 'distancing itself from certain liberal (Western) values to follow its own concept of Russian sovereign democracy and traditionalist (Orthodox) ideology and culture'.[65] In the context of Russia's annexation of Crimea, the war in Donbas since 2014 and the periodic suspension of Russia's voting rights in the Parliamentary Assembly of CoE between 2014 and 2019, it would be difficult to say that these comments did not have a ring of truth in them; however, they were also linked to international political developments. In terms of a purely legal analysis: Russia appeared to be no less cooperative with ECtHR's judgments than some other states of the CoE.[66]

5 From Backlash to Ruxit: the Full-Scale Invasion of Ukraine

The full-scale invasion of Ukraine in February 2022 resulted in a real threat of Russia being excluded from the CoE unless it halted its military operations. In response, on 15 March 2022 the Russian Ministry of Foreign Affairs invoked Article 7 of the Statute of the CoE, announcing its immediate withdrawal from the Convention and the jurisdiction of the ECtHR. On 16 March 2022 the Committee of Ministers voted to expel Russia from the Council with immediate effect. A statement issued by the Court added, however, that it would consider cases against Russia regarding human rights violations committed until 16 September 2022. In retaliation, the Russian Duma passed a law which marked a process of *de jure* disintegration of the Russian domestic law from the European Convention (11 June 2022). The publication of Russia's official withdrawal from the CoE (15 March 2022) was announced as a cut-off date for Russia's implementation of ECtHR judgments – meaning any judgments issued after that date would not be respected by Russia: no compensation awarded by the Court would be paid, no proceedings would be re-opened. After 16 March 2022, Russia would not even inform the Committee of Ministers of any measures taken towards the execution of judgments.[67] This was followed by extremely critical comments on the ECtHR by leading Russian politicians. Vyacheslav Volodin, the speaker of the Duma, said in a statement: 'the ECtHR

64 Starzhenetskii, "Assessing Human Rights in Russia," 209.
65 Fura and Maruste, "Russia's Impact on the Strasbourg System," 223.
66 Benedek, "Russia and the European Court of Human Rights," 398.
67 Kirill Koroteev in this Special Issue.

has become an instrument of political battle against our country in the hands of Western politicians. Some of its decisions were in direct contradiction to the Russian constitution, our values, and our traditions.'[68]

There is an immediate conclusion that could be drawn from this analysis: Russia's alleged backlash against the ECtHR was largely political in nature. The contestation of the ECtHR's decisions was used by the RCC strategically, but also very sparingly – it was limited to politically salient cases. This unfolded in a context of the broader political critique and negative discourse on the ECtHR by the consolidating authoritarian regime of President Putin and the increasing conflict involving Russia, NATO and 'the West', especially after the 2014 annexation of Crimea and the war in Donbas. It could therefore be concluded that the relationship between Russia and the ECtHR deteriorated as 'collateral damage' from a broader political conflict, rather than the decisions of the RCC as such. The legal criticism of the ECtHR by the RCC *per se* and the questioning of the Court's authority would not have led to Russia's expulsion from the ECtHR had it not been for Russia's full-scale invasion on Ukraine – again, the expulsion was an extension of a broader political conflict. The case study of Russia therefore cannot be said to fall within the neat conceptual framework of a backlash against the ECtHR. It should be placed on the continuum between a pushback and a backlash, closer to backlash, without yet reaching the threshold.

6 Case Study of Poland: More Than a Mere Pushback?

In the Polish case, while the fallout with the ECtHR's jurisprudence is quite recent (as contained in the decisions of the Polish CT K 6/21 and K 7/21 delivered in 2021 and 2022, respectively), it should be traced back to 2015, when the Law and Justice Party (PiS) won the parliamentary elections and began systemically dismantling the justice system. The first 'victim' became the Constitutional Tribunal itself. Its 'reforms' resulted in a permanent undermining of the basic values expressed in the Constitution and eroded the democratic order.[69] The judges of the PCT were appointed by the parliamentary

68 Al Jazeera, "Russian MPs vote to quit European Court of Human Rights", 7 June 2022, https://www.aljazeera.com/news/2022/6/7/russia-exits-european-court-of-human-rights-jurisdiction, accessed 21 January 2023.

69 Piotr Tuleja, "Geneza, Rozwój I Upadek Sądownictwa Konstytucyjnego W Polsce. [The Emergence, Rise and Fall of Constitutional Justice in Poland.]," *Państwo i Prawo* [*State and Law Journal*] 10 (2022).

majority in a way that gave rise to serious questions about their impartiality.[70] In effect, the PCT simply rubberstamped the legislative acts adopted by the ruling party.[71] When the PCT ceased to fulfil its function as a place of public debate and lost its legal legitimacy and (partially) social acceptance, disputes relating to systemic changes in the Polish justice system have moved to the ECtHR and the CJEU.[72]

Between 2020 and 2022 a series of judgments delivered by the ECtHR addressed the above changes within the meaning of Article 6 ECHR (right to fair trial). *Xero Flor v Poland* (2021) concerned the 'grave irregularities' in the appointment of judges to the PCT, which the ECtHR pronounced 'not a court according to law'. Cases *Broda and Bojara v Poland* (2021), *Reczkowicz v Poland* (2021), *Dolińska-Ficek and Ozimek v Poland* (2021), *Advance Pharma v Poland* (2022) concerned the political interferences within the structure of the PCT and the common judiciary in Poland (e.g. the Minister of Justice dismissing the presidents of lower courts), political reorganization of the National Council of the Judiciary (the professional body responsible for electing new judges) – and finally, introducing constitutional changes to the Polish legal system by simple parliamentary majority: establishing new chambers of the Supreme Court (Disciplinary Chamber and the Chamber of Extraordinary Review) and nominating new judges to other chambers of the Supreme Court (Civil Chamber).[73]

These ECtHR judgments were met with staunch opposition and criticism by the Polish government (as expected), but also became the subject of separate judgments of the PCT. Following the example of the RCC, the PCT applied the doctrine of *ultra vires* review to the constitutionality of the ECtHR judgments.[74] The PCT substantively engaged with the ECtHR's argumentation

70 Michał Ziółkowski, "Przesłanki Wyznaczania Sędziów Do Składu Orzekającego Trybunału Konstytucyjnego I Konsekwencje Ich Naruszenia. [The Rules of Assigning Judges to Judicial Panels of the Constitutional Trybunał and the Consequences of Violations of These Rules.]," *Ruch Prawniczy, Ekonomiczny I Socjologiczny* [*Poznań Journal of Law, Economics and Sociology*] 82, no. 3 (2020).

71 Małgorzata Pyziak-Szafnicka, "2020 Trybunał Konstytucyjny Á Rebours [Constitutional Tribunal Á Rebours]", *Państwo i Prawo* [*State and Law Journal*] 5 (2020).

72 Tuleja, "Geneza, Rozwój I Upadek Sądownictwa Konstytucyjnego W Polsce [The Emergence, Rise and Fall of Constitutional Justice in Poland]."

73 Halmai, "Comparative Constitution Making."; Radziewicz, "Kryzys Konstytucyjny I Paradygmatyczna Zmiana Konstytucji [Constitutional Crisis and Paradigmatic Constitutional Change]."; Wyrzykowski, "Experiencing the Unimaginable: The Collapse of the Rule of Law in Poland".

74 Anna Wyrozumska, "Wyrok Trybunału Konstytucyjnego (K 6/21) Dotyczący Orzeczenia Europejskiego Trybunału Praw Człowieka W Sprawie Xero Flor, Które Rzekomo "Nie Istnieje" [Judgment of the Constitutional Tribunal (K 6/21) Concerning the Ruling of the

and stated in no uncertain terms that the norms created by the ECtHR by way of these rulings 'negated the basic systemic principles expressed in the Polish Constitution'. It 'accused' the Strasbourg Court of being an *activist court*: going beyond the essence of the Convention and the conventional functions of the ECtHR (Judgment K 7/21, point. 5.1.4). In fact, by declaring that the ECtHR was incompatible with the Constitution, the PCT went further than the RCC, which 'only' declared that the judgments of the ECtHR would be constitutionally impossible to enforce.[75]

6.1 *Judgment K 6/21*

Exactly what did the judgments of the PCT say? In Judgment K 6/21, on the enforceability of *Xero Flor* (*2021*), it was argued that the ECtHR, by assessing whether the Constitutional Tribunal qualified as 'a court according to the law' under Article 6(1) ECHR, had introduced a new standard not in line with the intentions of the States Parties. In simpler terms, the PCT concluded that the standards in the Xero Flor judgment went beyond what was covered by the Convention. This suggests that when Poland joined the CoE in 1991 and ratified the Convention in 1993, it did not agree to be bound by these standards (Judgment K 6/21, section 3.2.2). The PCT explained that:

> [it] was obliged to uphold the sovereignty of the Republic of Poland and could not allow the ECtHR, using its jurisprudence in the field of international human rights, to interfere with the legal system of Polish constitutional bodies. By ratifying the Convention, Poland did not consent to the jurisdiction of the ECtHR in this respect. The duty of the Tribunal was to defend the Polish constitutional identity (Judgment 6/21, point 3.2.3).

The PCT, through this judgment, asserted its role as the sole guardian of the principle of the supremacy of the Constitution; its duty was to prevent attempts by an international court to shape a completely new Convention standard, to which Poland, as a state-party to the ECtHR, had not agreed. Similarly, the PCT stated that the ECtHR's interpretation of ECHR Art. 6(1) constituted 'an unprecedented encroachment on the powers of the constitutional authorities of the Republic of Poland – the Sejm, which elected the judge, and the President, to whom the elected judges swear the oath' (Judgment 6/21, point 6.5.) The PCT found the *Xero Flor* ruling to be an unauthorized (and

European Court of Human Rights in the Case of Xero Flor, Which Allegedly "Does Not Exist"]," *Europejski Przegląd Sądowy* [*European Courts Review*] 2 (2023).

75 Ploszka, "It Never Rains But It Pours," 52.

consequently erroneous) interpretation and violation of the principle of the subsidiarity of the Convention.

In summary, the PCT decided that Poland, as a party to the Convention, followed its obligations under ECHR by submitting *only* cases from its common courts and the Supreme Court to the ECtHR's jurisdiction. However, the status of the PCT and the status of its judges, including the rules for their appointment, could be defined only by the Polish Constitution, and were not subject to the jurisprudence of the ECtHR (Judgment 7/21, point 8.2). This ruling made it clear that Poland is not obliged to subject the PCT's legal framework, legal proceedings, or the validity of its judicial appointments to ECtHR control.

6.2 *Judgment K 7/21*

In the judgment K 7/21 concerning the enforceability of *Broda and Bojara* (2021), *Reczkowicz* (2021), *Dolińska-Ficek and Ozimek* (2021), *Advance Pharma* (2022), the PCT went even further and declared ('contrary to the Polish Constitution') Article 6(1) of the ECHR as unconstitutional, as the assessment of the term 'court established by law' allowed the ECtHR or national courts to disregard the provisions of the Constitution, laws and judgments of the PCT and enabled the independent creation of norms regarding the procedure for the nomination of national judges. The PCT also determined that an interpretation of Article 6 empowering the ECtHR or national courts to evaluate the alignment of domestic laws concerning the judicial system, court jurisdiction, and the legislation governing the structure, functions, and the appointment of members of the National Council of the Judiciary with the Convention, contradicted the Polish Constitution: such matters were governed exclusively by explicit provisions in the national constitution.

Thus, the PCT deemed it unacceptable for the ECtHR to interfere in shaping the system and jurisdiction of the Polish judiciary from the perspective of the right to a fair trial and Article 6(1) (taking the role of a legislator, even a negative one). The action taken by the ECtHR was thus seen as 'an attempt to redefine the content of the constitutional separation of powers in Poland and to interfere with the constitutional powers and empowerment of the organs (Judgment K 7/21, point. 5.1.4).' The Polish CT invoked the constitutional right to resistance referring to the need to protect the fundamental elements of the constitutional order, because a norm or act of international law was blatantly contrary to constitutional standards (Judgment K 7/21, point. 3.1).[76]

76 Anne Peters, "Supremacy Lost: International Law Meets Domestic Constitutional Law", *Vienna Online Journal on International Constitutional Law* 3 (2009).

The subsequent arguments further exacerbated the conflict between the PCT and the ECtHR. The PCT emphasized its commitment to avoiding conflicts with the international order: however, collision was inevitable. This conflict resulted from the significant shortcomings in the ECtHR's process of formulating norms based on Article 6(1) of the Convention. Firstly, the ECtHR displayed a fundamental lack of understanding of the Polish legal system at the constitutional and statutory levels. Secondly, its actions, as described, constituted interference with the essence of the Convention, which aims to safeguard individual rights enshrined within it. The ECtHR purportedly introduced new normative elements into its provisions related to the oversight of the Polish state and its legal system, without authorization from the Polish government or the consent of the Polish Parliament (Judgment K 7/21, point 3.4).

From the perspective of legal analysis, the judgments of the PCT represent only a pushback. They question the 'activist' role of the ECtHR in interpreting the Convention (by creating new standards without the authorization of the specific state party) and accuse it of violating the principle of subsidiarity. They primarily concern the substance of the jurisprudence and do not question the authority of the ECtHR as such. However, viewed from a broader public discourse perspective, the actions of the Polish state and government representatives amount to more than a mere 'pushback' against the ECtHR. 'Negative statements about ICS can be examples of pushback or backlash, depending on their context'.[77] The judgments of the PCT, when read in the context of the negative reactions from the Polish authorities, active politicians (MPS), and the very judges of the PCT – speaking as public figures of authority – send a chilling message: Poland has inadvertently entered the path toward a full-scale backlash.

6.3 *Negative Public Discourse on ECtHR's Judgments*

Following the delivery of the – now contested – judgments concerning Article 6 by the ECtHR, the Polish Minister of Justice Zbigniew Ziobro (who was also the Prosecutor General), in an official statement, called it 'a dangerous precedent'. He warned that the ECtHR might have initiated 'a line of jurisprudence that will *nonsensically* modify the freedoms guaranteed in the Convention by extending the scope of human rights to the right to retain a specific function in public authorities [our emphasis].'[78]

77 Madsen, Cebulak and Wiebusch, "Backlash Against International Courts," 211.

78 Polish Ministry of Justice, " Statement on the Judgment of the European Court of Human Rights," 25 November 2021. Accessed from: https://www.gov.pl/web/sprawiedliwosc

The same statement accused 'the European Court of Human Rights, similarly to the CJEU' of 'dangerously striving to create *legal chaos* in the Polish justice system' [our emphasis].[79] Such sharp criticism of the ECtHR by the Ministry of Justice has clearly surpassed purely legal arguments and ventured into the sphere of ideology and Western values: 'this institution [ECtHR], instead of law and conventions, is increasingly guided by politics and ideology, as evidenced by judgments indicating the broad admission of abortion, the possibility of same-sex marriage and the adoption of children [by same-sex couples].'[80]

Similarly, Elżbieta Witek, the speaker of the Sejm (Polish Parliament) expressed her criticism and disapproval of the ECtHR's judgments in the core rule-of-law cases: '[ECtHR's] ruling sets a dangerous precedent and constitutes unlawful interference in the sovereignty of the Polish state. The European Court of Human Rights, a judicial body established to protect the law, is usurping powers it does not have. This dangerous new practice will result in no positive impact or respect for the case-law of the European Court of Human Rights.'[81]

These examples of negative public discourse advanced by active government officials questioned the authority of the ECtHR. Such 'negative statements' about the ECtHR's legal reasoning and methods were accompanied 'by substantive critique concerning its judgments or by more general resentment' towards the ECtHR as such.[82] The criticisms of the ECtHR delivered by the government representatives were joined by equally strong statements from PCT judges, acting as public figures. In response to the *Xero Flor* judgment, the President of the Polish Constitutional Tribunal, Julia Przyłębska, issued the following statement:

> The European Court of Human Rights has issued a judgment on the composition of the PCT without legal basis and outside its competence. This constitutes a flagrant violation of the law and finds no basis in the

/europejski-trybunal-praw-czlowieka-nie-moze-oceniac-legalnosci-wyboru-polskich-sedziow on 8 February 2023.

79 Polish Ministry of Justice, "Statement on the Judgment of the European Court of Human Rights", (25 November 2021).

80 TVN, "Resort Ziobry reaguje na wyrok Europejskiego Trybunału Praw Człowieka," 29 June 2021, accessed from: https://tvn24.pl/polska/etpc-o-odwolaniu-polskich-sedziow-narus zono-europejska-konwencje-praw-czlowieka-komentarz-resortu-sprawiedliwosci-5135327 on 20 February 2023.

81 Ploszka, "It Never Rains But It Pours," 57.

82 Madsen, Cebulak and Wiebusch, "Backlash Against International Courts," 212.

> acts of international law, which established the Court in Strasbourg. (…) The unlawful encroachment by the ECtHR onto the competence of the Sejm of the Republic of Poland in the field of election of judges of the Constitutional Tribunal and the competence of the President of the Republic of Poland to take the oath from a person elected by the Sejm, has no effect in the Polish legal order.[83]

Julia Przyłębska's colleague from the bench, Mariusz Muszyński – elected to the CT with 'grave irregularities' and thereby personally affected by the *Xero Flor* judgment – stated to the press: 'this judgment stinks of politics rather than justice'.[84]

The vitriolic language directed toward the ECtHR, explicitly questioning its legitimacy, was followed by calls from the Minister of Justice that 'the activity of the European Court of Human Rights should be met with an appropriate response'. What should that response be? Krystyna Pawłowicz, a judge of the PCT (although she was until recently an MP and a coalition partner to the Minister), expressed her allegedly 'private opinion' that was delivered to the press during the hearing in case K 7/21: 'How to evaluate the judgments of the ECtHR, which create for Polish judges the right to adjudicate contrary to the CT and the Constitution? You can, after all, terminate the Convention, there is no obligation [on Poland] to continue being a member state [of the CoE].'[85]

The allegedly independent PCT judge Pawłowicz in her eager public reply to the Minister of Justice's call for 'an appropriate response' might have set in motion a series of processes toward 'Polexit' – Poland's withdrawal from the ECHR (at least at the discursive level). This also provides a clear illustration that the democratically backsliding Poland has now surpassed the definitional boundaries of a mere pushback against the ECtHR. The public calls denouncing the Convention and openly questioning the authority of the ECtHR, when combined with the partial or non-enforcement of the ECtHR's judgments[86] in

83 Ploszka, "It Never Rains But It Pours," 57.

84 Idem, 57.

85 Agnieszka Jędrzejczyk, "Pawłowicz W TK: Europejską Konwencję Praw Człowieka Można Wypowiedzieć. To Moje Prywatne Zdanie [Pawłowicz in the Constitutional Tribunal: The European Convention on Human Rights Can Be Terminated. This Is My Private Opinion]," *Oko Press* 2022, Accessed from: https://oko.press/pawlowicz-w-tk-konwencje-praw-czlowieka-nalezy-wypowiedziec on 21 February 2023.

86 Poland was highly inconsistent in implementing the ECtHR judgments challenged by the PCT in its 2021 and 2022 judgments. Just satisfaction was paid in the case of *Reczkowicz* and *Broda and Bojara*. On 6 September 2022, the representatives of the applicants in *Dolińska-Ficek and Ozimek* complained about the lack of payment of just satisfaction (DH-DD(2022)943). They indicated that, in statements made in the media, the

the core rule-of-law cases, have set Poland dangerously beyond a pushback – and on a path towards a backlash.

As the Law and Justice Party lost the parliamentary elections in autumn 2023, the situation is expected to undergo changes. Two official proposals have been put forth to restore the PCT to its constitutional role. According to Wojciech Sadurski, all constitutional judges should step down, making way for the creation of a new Constitutional Tribunal consisting of newly and lawfully selected judges.[87] Here, however, we concur with former Civil Rights Ombudsman, Adam Bodnar, that achieving this objective in Poland's new political landscape would be challenging, without also amending the Constitution.[88]

A most-likely scenario has been outlined by the Batory Foundation.[89] Initially, changes in the PCT will occur gradually due to the expiration of judges' terms, their resignations, and the removal of 'double judges' – judges elected by the Parliament and appointed by the President, when there were no free places on the PCT bench.[90] Any modification to the law governing the Constitutional Tribunal would likely face a veto by the current President, whose term concludes in 2025. The transition of the PCT before 2025 appears therefore improbable, but over time, it should gradually return from its current pushback-backlash trajectory.

7 Conclusions

The case studies of Russia and the democratically backsliding Poland escape the clear conceptual boxes of 'a pushback' versus 'a backlash' against the

representatives of the Polish Ministry of Foreign Affairs and Ministry of Justice referred to the CT's findings in the case K 7/21 to justify the non-execution of this judgment. It appears that no just satisfaction was paid in cases *Dolińska-Ficek and Ozimek* and *Advance Pharma* (source: https://hudoc.exec.coe.int/eng?i=004-59085).

87 Wojciech Sadurski, "How Democracy Dies (in Poland): A Case Study of Anti-Constitutional Populist Backsliding." Paper presented at the Bochum University Seminar on Rule of Law and Constitutional Backsliding, Bochum University, April 2022.

88 Adam Bodnar, "Poland after Elections in 2023: Transition 2.0 in the Judiciary," in *Transition 2.0: Re-Establishing Constitutional Democracy in Eu Member States*, ed. Michal Bobek, Adam Bodnar, Armin von Bogdandy, Pál Sonnevend (Baden-Baden: Nomos Verlagsgesellschaft, 2023).

89 The Stefan Batory Foundation is an independent Polish non-government organization established by US financier and philanthropist, George Soros, along with a group of Polish opposition leaders of 1980s, and registered in Poland since May 1988.

90 The Batory Foundation, "Draft Law on the Polish Constitutional Court of 18 July 2022", (2022).

ECtHR. We therefore conclude that the definitional binary between 'a pushback' and 'a backlash' as posited by Madsen, Cebulak and Wiebusch is too analytically constraining to capture the dynamic situation of contesting the ECtHR's jurisprudence and authority in Eastern Europe.[91]

Drawing on these two empirical case studies, we propose a more fluid and flexible model whereby the two analytical categories of 'pushback' and 'backlash' are treated as opposite ends of a spectrum. We argue that Russia's rejection of ECtHR authority, while extraordinary and legislated by Duma, was in fact self-limiting, observed only in politically motivated cases. With the benefit of hindsight, many might see Russia's actions as a backlash against ECtHR. However, we argue that the political mode of contesting the ECtHR did not necessarily have to result in Russia's withdrawal from the Convention. It was not RCC's contestation of the authority of the ECtHR that led to this, but Russia's brutal attack on a sovereign neighbor state, also signatory to the European Convention – Ukraine.

Similarly, Poland's questioning of the authority of ECtHR eludes the neat analytical box of a mere 'pushback'. The decisions of the PCT are potentially far more serious in their consequences, as they openly question ECtHR's jurisdiction in core rule-of-law cases and encourage broader discursive contestation of the Court's jurisprudence and authority.[92] We posit that the decisions of the PCT, especially when read in the context of the broader negative and highly critical political discourse, indicate more than a mere pushback, as the scale and intensity of the contestation pertaining to the core of the Convention could result in the country leaving the ECtHR in all but name. By focusing on a country that was expelled from the Convention (Russia), and one that is still a member (Poland), this study has highlighted the dynamism of the various processes and forms of resistance toward international tribunals, and their legal outcomes.

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91 Madsen, Cebulak and Wiebusch, "Backlash Against International Courts."

92 Ploszka, "It Never Rains But It Pours."