

REVERSED RULE OF LAW IN THE CREATION,  
INTERPRETATION AND APPLICATION OF LAW IN  
POLAND

*Methods and Consequences*

**Studies of the Central European Professors' Network**

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# REVERSED RULE OF LAW IN THE CREATION, INTERPRETATION AND APPLICATION OF LAW IN POLAND

*Methods and Consequences*

EDITED BY  
**MARIUSZ MUSZYŃSKI**



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## CONTENTS

List of Abbreviations .....	17
Mariusz Muszyński Introduction .....	19
1. Lilla Berkes The Rule of Law. Conceptual Challenges .....	31
2. Anna Faber-Wiercińska The Rule of Law in Poland – Values and Legalism .....	59
3. Aleksandra Syryt The Reversed Rule of Law in Legislation and Its Evaluation .....	97
4. Karol Dobrzeńiecki The Reversed Rule of Law in the Executive: Legitimacy via ‘Restoring Lawfulness’ .....	139
5. Mariusz Muszyński The Reversed Rule of Law in the Justice System and the Status of Judges .....	165
Mariusz Muszyński Summary .....	209



# NOTES ON THE CONTRIBUTORS

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## EDITOR AND AUTHOR

**Mariusz Muszyński** is a Professor at the Cardinal Stefan Wyszyński University in Warsaw, specializing in international public law and EU law. He has published widely on international, European and constitutional law, as well as state studies and foreign policy, in several countries including Poland, Germany, Hungary, Romania and the USA. Alongside his academic career, he held numerous public roles, notably at the Ministry of Foreign Affairs and the Polish Embassy in Berlin. He also served in key Polish–German cooperation institutions. He was a member of the Legislative Council, the Tribunal of State, and the National Development Council. In 2015 he became a judge of the Constitutional Tribunal, and in 2017–2023 served as its Vice-President. He was also a member of the Venice Commission.

## AUTHORS

**Lilla Berkes** is an Associate Professor at the Faculty of Law and Political Sciences at Pázmány Péter Catholic University (PPKE). She graduated from PPKE in 2008 and subsequently studied Chinese at Renmin University of China as a scholarship recipient. Since 2009, she has been teaching administrative law at PPKE. Her doctoral dissertation focused on Canadian multiculturalism. She has worked at the Independent Police Complaints Board, the Office of the Commissioner for Fundamental Rights (Ombudsman), and the Curia. Currently, she is the Chief Legal Advisor at the Constitutional Court and is a member of the Ereky Public Law Research Centre, the Association for Education Law and Policy, and the Central and Eastern European Association for Public Administration.

**Anna Faber-Wiercińska** obtained a master's degree in applied linguistics (German and English) from the University of Warsaw and in law from Cardinal Stefan Wyszyński University in Warsaw. She is a PhD student at the Ferenc Deák Doctoral School of Faculty of Law of the University of Miskolc. She is also a certified court interpreter and translator of the English language in Poland. She works as a judicial assistant in the Constitutional Tribunal of the Republic of Poland.

**Aleksandra Syryt** is a Senior Researcher at the Central European Academy. Her scholarly activity focuses on constitutional law and public law, including constitutional justice, adjudication, and the constitutional status of the individual. Her research also addresses legislative processes, constitutional standards of public authorities, and higher education law. She has participated in national and international research projects funded by the National Science Centre, the National Centre for Research and Development, the Ministry of Education and Science of Poland, and the Horizon programme. She is a member of the CEA Professors' Network. She cooperates with universities and research centres in Italy, the Czech Republic, Hungary, and Croatia.

**Karol Dobrzeniecki** is a Professor of jurisprudence and since 2003 member of the Faculty of Law and Administration, Nicolaus Copernicus University in Torun, Head of the Chair of Legal Theory. He received his PhD and postdoctoral degree (habilitation) in law and MA in art history from the University. He has published five books in Polish and was the scientific editor of four other books. He participated in numerous national and international research projects devoted to key problems of contemporary law e.g. human rights during the pandemic or the concept of the right to truth. His main fields of interests are the states of emergency, transformations of contemporary constitutionalism and the rule of law. A significant part of his scientific achievements is devoted to the law of electronic commerce and the regulation of the Internet.

## **REVIEWERS**

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Professor, University of Split, Croatia

Ádám Rixer  
Professor, Károli Gáspár University of the Reformed Church, Hungary

Bartosz Majchrzak  
University Professor, Cardinal Stefan Wyszyński University in Warsaw, Poland

---

## **TECHNICAL EDITOR**

Szabolcs Szilágyi  
Legal Counsel, University of Miskolc; Project Administrator, Central European  
Academy



## LIST OF ABBREVIATIONS

Act on the NCJ – Ustawa z 12 maja 2011 r. o Krajowej Radzie Sądownictwa (Act of 12 May 2011 on the National Council of the Judiciary)

CE – Council of Europe

ChFR – Charter of Fundamental Right

CJEU – Court of Justice of the European Union

Code of Civil Procedure – Ustawa 17 listopada 1964 r. kodeks postępowania cywilnego (Act of 17 November 1964, Code of Civil Procedure)

Code of Criminal Procedure – Ustawa z 6 czerwca 1997 r. Kodeks postępowania Karnego (Act of 6 June 1997, Code of Criminal Procedure)

CT – Constitutional Tribunal

EC – European Commission

ECHR – European Convention on Human Right and Fundamental Freedom

ECtHR – European Court of Human Rights

Electoral Code – Ustawa z 5 stycznia 2011 Kodeks wyborczy (Act of 5 January 2011 on Electoral Code)

EU – European Union

Law on administrative courts – Ustawa z 30 sierpnia 2002 r. Prawo o postępowaniu przed sadami administracyjnymi (Act of 30 August 2002, Law on Proceedings before Administrative Courts)

Law on the Common Courts – Ustawa z 27 lipca 2001 r. Prawo o ustroju sądów powszechnych (Act of 27 July 2001 – Law on the System of Common Courts)

NCJ – National Council of the Judiciary

Polish Constitution or Constitution – Konstytucja Rzeczypospolitej Polskiej z 2 kwietnia 1997 r. (Constitution of the Republic of Poland of 2 April 1997)

Resolution of the Three SC Chambers – Uchwała trzech połączonych Izb: Cywilnej, Karnej, Pracy i Ubezpieczeń Społecznych z 23 stycznia 2020 r. (Resolution of the Three Combined Chambers: Civil, Criminal, Labour and Social Security of 23 January 2020)

SAC – Supreme Administrative Court

SC – Supreme Court

TEU – Treaty on EU

TFEU – Treaty on Functioning of EU



# INTRODUCTION



MARIUSZ MUSZYŃSKI

‘The rule of law’ is among the most commonly used terms to describe a state’s political system, the conduct of public authorities, and the principles underpinning the functioning of a democratically organised society. However, it remains an ambiguous concept without a single, universally accepted definition. It refers broadly to the supremacy of law over the actions of authorities and the behaviour of individuals, binding both to legal norms and the obligation to obey them. It therefore stands in direct contrast to tyrannical or arbitrary governance.

Debates concerning the rule of law are shaped by differing views on the proper scope of governmental power and the appropriate separation of powers. Any theory of the rule of law must reconcile competing claims and demonstrate whether the assertion that the law – rather than judges or politicians – governs, is justified.<sup>1</sup>

The rule of law is a concept with a long historical trajectory, originating in non-democratic regimes and evolving gradually over the centuries.<sup>2</sup> Today, it is widely acknowledged that the rule of law is the outcome of historical developments and is closely linked to the emergence of the liberal-democratic government in the West. It has given rise to various theories, some of which focus solely on its formal dimension.<sup>3</sup> Under such an approach, the state is required to act in accordance with its own laws, which must satisfy a minimum set of conditions. Other perspectives assign to the concept a broader, more substantive meaning, incorporating ideals of justice and integrity. Different political ideologies may also ascribe further interpretations to the rule of law.

1 Bellamy, 2005.

2 The Global Rule of Law Recession Continues, But Some Progress Emerges, 2024; Tamanaha, 2012, pp. 232–247.

3 A concise summary of the competing approaches is provided by Craig, 2005, pp. 95–116.

Mariusz Muszyński (2026) ‘Introduction’ in Muszyński, M. (ed.) *Reversed Rule of Law in the Creation, Interpretation and Application of Law in Poland: Methods and Consequences*. Miskolc–Budapest: Central European Academic Publishing, pp. 19–30.



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The modern articulation of the rule of law is commonly attributed to the British constitutional theorist A. V. Dicey, whose 1885 treatise, *Introduction to the Study of the Law of the Constitution* set out the doctrine based on an analysis of doctrinal and political traditions. Dicey identified three core principles underpinning the rule of law: (1) the absolute supremacy or predominance of ordinary law, as opposed to arbitrary power; (2) equality before the law, or the equal subjection of all persons to the general law administered by ordinary courts; and (3) the recognition that constitutional law arises from individual rights defined and enforced by the courts.<sup>4</sup>

According to the *Stanford Encyclopedia of Philosophy*, the rule of law constitutes one of the ideals of political morality, signifying the ascendancy of law itself and of legal institutions within a system of governance.<sup>5</sup> In this sense, it forms part of the broader constellation of values that define liberal political morality.

The most important postulate of the rule of law is that those in authority must exercise their power within a framework of well-established public norms, rather than arbitrarily, ad hoc, or on the basis of personal preferences or ideology. In other words, authority must be exercised in accordance with the law, and those in power must be held legally accountable for any unauthorised actions. This principle must be upheld in alignment with the separation of powers.<sup>6</sup>

The perceived success of the rule of law is grounded in the belief that a consistent legal system fosters a degree of predictability in social relations by stabilising, regulating, protecting, and even constituting many valuable interactions. The concept presumes that the law mitigates certain risks by shielding individuals from potentially harmful and unpredictable conduct by others. At the same time, the rule of law requires public authorities to act within the bounds of legality in order to guard against the misuse of power.

The notion of the rule of law is often linked to the modern state, characterised by formalised power structures, a defined political constitution, a monopoly on law-making, and the coercive capacity to enforce its laws. However, it is important to note that the power to legislate does not equate to the right to issue any command, just as holding executive authority does not legitimise any act of force merely by labelling it as law enforcement. The rule of law aims to constrain the exercise of political will and discretion, ensuring that lawmaking is accompanied by the establishment of conditions conducive to governance under the law. In a state governed by the rule of law, law takes precedence over individual discretion, and all people are required to observe it faithfully.<sup>7</sup>

The rule of law is not concerned merely with isolated provisions or legal principles. Instead, it pertains to law as a legal order – a system of values, principles,

4 Dicey, 1915.

5 Waldron, 2016.

6 Rixer, 2023, pp. 125–180.

7 Hatfield, 2022.

and procedures recognised as necessary (though not sufficient) for the existence and operation of law as a coherent whole. Therefore, the rule of law must also be viewed from the perspective of institutional cooperation, involving the legislator, the government and the courts. It is equally important to consider the dynamic between the state and the citizen – a dimension often overlooked but essential to the doctrine of the separation of powers. Within this cooperative framework, each institution plays a role: some create the law, others interpret it, while others implement or oversee its application. Any disruption to this collaborative process risks undermining the rule of law.

While the understanding of the rule of law has evolved over time and differs across legal systems, it is generally accepted that the concept encompasses fundamental principles, including both formal and substantive legal requirements. These requirements aim to prevent tyranny, arbitrariness, and the monopolisation of power, as the rule of law is intrinsically linked to justice. Its primary function is to establish boundaries that guard against injustice. While Hart rightly observed that the rule of law may coexist with significant injustices, it is equally important to recognize that a just society cannot be built on the foundation of systematic violations of the rule of law.<sup>8</sup>

It may be said that the rule of law forms the basis of modern state systems, shaping legal norms, guiding their interpretation and application, and thus informing decision-making by public authorities. It is also understood to guarantee individual protection and the realisation of freedoms, while preserving the democratic character of government – though not invariably.<sup>9</sup> There are moments in the life of states when practice diverges from the rule of law. Political power may, at times, instrumentalise legal norms for its own ends. Nonetheless, the rule of law remains a vital component of the political life of any organised community.

Poland has also operated within this conceptual framework of the rule of law. According to the Constitution adopted on 2 April 1997 by the National Assembly, the rule of law became the foundation of the state, enshrined in Art. 2 (as a system of values) and Art. 7 (as a set of operational rules).

A decisive shift in the approach to the rule of law occurred on 13 December 2023. On this date, following the decision of a newly formed parliamentary majority comprising members from three parliamentary groupings – Civic Coalition (*Koalicja Obywatelska*, which includes Civic Platform – *Platforma Obywatelska*, Modern – *Nowoczesna*, Polish Initiative – *Inicjatywa Polska*, and the Greens – *Zieloni*); Poland 2050 – Third Way (*Polska 2050 – Trzecia Droga*); and the Polish People's Party – Third Way (*Polskie Stronnictwo Ludowe – Trzecia Droga*); along with the Left (*Lewica*, comprising New Left – *Nowa Lewica*, PPS – *Polska Partia Socjalistyczna*, Together – *Lewica Razem*, and the Labour Union – *Unia Pracy*) – the President of the Republic of Poland, Andrzej Duda, appointed Donald Tusk as Prime Minister. At the Prime

<sup>8</sup> Hart, 1994, p. 207.

<sup>9</sup> Valcke, 2012.

Minister's request, the President subsequently appointed and swore in the Council of Ministers.

This date marked a significant moment in national history, signalling the beginning of a period in which certain activities emerged that sought to invoke the rule of law to justify actions that appeared to circumvent or even violate the law. These actions were initiated by actors whose vision of the state, its institutions, and legal order diverged from the constitutional framework implemented by the previous government. It is important to note that these developments had been set in motion several years earlier. Almost immediately after the new Sejm and Council of Ministers were constituted, a series of initiatives were launched aimed at reconstructing the prior understanding of the rule of law. This reconstruction, which had begun earlier, initially focused on the judiciary. After the 13th of December 2023, actions intensified that sought to restructure the state's political sphere and interfere with the composition of other entities, including not only those subordinate to the executive, but also constitutionally protected bodies shielded from such interference by systemic safeguards – such as the separation of powers, fixed terms of office, and statutory limitations on dismissal. The system of sources of law also came under significant pressure.

Two public statements by senior state officials – the Prime Minister and the Minister of Justice–Prosecutor General – are particularly noteworthy. These statements were a telling symbol of the legal logic of these actions, and were articulated explicitly within the framework of the rule of law.

The first was made by Donald Tusk during a public media appearance following his appointment as Prime Minister.<sup>10</sup> In response to journalists' questions regarding the government's planned measures, he delivered the now widely cited remark: 'Everything will be in accordance with the law as we understand it'.<sup>11</sup>

The second was delivered by Adam Bodnar, the newly appointed Minister of Justice and former Commissioner for Human Rights in Poland. Commenting in the media on the actions of the Minister of Culture regarding Polish Television he stated: 'We have a situation in which we are restoring this constitutionality, and we are looking for some legal basis to do so'.<sup>12</sup>

Today, these statements symbolise the onset of a process led by the newly formed authorities that reflects a significant relativisation of the values constituting the rule of law. State bodies may, in some instances, reject applicable legal norms to pursue political goals. At the same time, there appears to be a reluctance to acknowledge

10 'When it comes to sorting out the situation in public media, the matter is simpler than anyone might think. It does not require mysterious actions. No one expects soft solutions. Everything will be in accordance with the law, as we understand it'. See *Niezależna*, 2024.

11 In fact, this statement appeared on 21 November 2023 at a press conference regarding TVP. However, it was not widely noticed. It was also repeated several times in other situations. See: *Baran*, 2023. See also: *Sołdan*, 2024.

12 See Minister Bodnar dał popis! 'Przywracamy tę konstytucyjność i szukamy jakiejś podstawy prawnej'. *Bezlitosne KOMENTARZE*, 2023.

this inconsistency. The rhetoric of ‘restoring the rule of law’ is employed even in situations where the measures in question seem to contradict both the formal and substantive dimensions of the rule of law. These actions may lack an appropriate legal foundation, exceed designated competences, or rely on unconstitutional interpretations of legal provisions. Such practices risk undermining civil rights and other constitutional values and standards, and this warrants critical attention. It is essential to understand that this characterises the actions of various authorities, whether among the legislative majority, the executive, or segments of the judiciary. As a result, a phenomenon has emerged in Poland – a pattern of action by public authorities that may be described as the ‘reversed rule of law’.

This term is not new. It originates in 2015, when the conservative United Right (*Zjednoczona Prawica*) coalition came to power following elections and embarked on a broad reconfiguration of state institutions. These efforts were described at the time as violations – or, more moderately, reversals – of the rule of law.

Such characterisations reflected the attempt to name reforms that were not fully aligned with the constitutional or institutional realities. The United Right pursued these reforms through legal channels, and it is important to acknowledge this fact. During 2015–2019, the coalition held a legislative majority in both the Sejm and Senate. Between 2019–2023, it retained a majority in the Sejm, enabling it to override amendments proposed by the opposition-controlled Senate.

The President of the Republic of Poland also originated from the right-wing political camp, enabling the ruling party to adopt favourable positions toward the proposed reforms. During constitutional review, it could be assumed that the Constitutional Tribunal (CT) viewed these legal changes positively, as its composition was gradually expanded by individuals elected by the ruling parliamentary majority, often selected from circles with conservative views. This convergence of perspectives on the necessity for systemic reform granted the incumbent authorities a degree of autonomy in determining objectives, strategies, and legal instruments.

However, the political landscape has shifted since 13 December 2023. Despite holding a majority in both the Sejm and Senate, the ruling coalition has encountered difficulties in finalising the legislative process without presidential endorsement. This impasse has prompted a departure from established legal standards in the coalition’s actions. The concept of the reversed rule of law has thus resurfaced in academic discourse to describe this phenomenon. Five premises characterise this current iteration: (a) the first concerns the goals purportedly justifying actions outside the legal framework. These are understood to include the interests of the state and the rights of citizens, which are believed to have been previously violated by the former government’s disregard for fundamental values and legal norms, particularly those associated with democracy, the Constitution, and the rule of law as a constitutional value. In this narrative, an alleged state crisis is defined and used to justify operating under a doctrine of ‘constitutional higher necessity’; (b) the second premise involves

grounding action in political decision-making, framed by Prime Minister Tusk as operating within the logic of ‘militant democracy’.<sup>13</sup>

Given current circumstances, it is argued that serious challenges have arisen due to certain individuals having allegedly betrayed public trust. In response, exceptional measures are deemed necessary, even if they fall outside conventional boundaries. While respect for the rule of law is invoked, the implication is that such respect may be upheld even when pursuing unorthodox approaches; (c) the third premise relates to external legality and legitimisation. The actions of public authorities are not explicitly supported by Poland’s constitutional framework; thus, external formal or evaluative support is sought to simulate legal validity. This includes referencing external legal instruments – particularly, law-making decisions of the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU) – as well as drawing on the political positions adopted in recent years by the European Commission, the Venice Commission, or foreign politicians; (d) the fourth premise concerns the creation of an appearance of legality.

In the absence of meaningful collaboration with the President to conclude the legislative process, there appears to be a strategic reliance on mechanisms which, while constitutionally questionable, succeed in projecting legitimacy. This includes avoiding constitutional or legislative amendment and instead using Sejm resolutions (e.g. regarding the National Council of the Judiciary (NCJ) and the CT), appointment acts (e.g. regarding the National Prosecutor), or even physical force, as reportedly used in the takeover of TVP and the Prosecutor’s Office; (e) the fifth premise involves an extensive propaganda apparatus. The ‘forceful’ takeover of public media and the appointment of individuals linked to the new government into key positions may have disrupted media pluralism. This has arguably restored the one-sided narrative familiar from 2008–2015, though now without even a pretence of objectivity. Notably, individuals with academic credentials – including some who previously held high-ranking national<sup>14</sup> or international positions,<sup>15</sup> as well as others frustrated by unmet personal ambitions – have participated in these propaganda efforts.<sup>16</sup>

This propaganda mechanism is also said to involve liberal-left political elites and non-governmental actors in Western Europe supporting the behaviour of the current Polish coalition. One glaring manifestation of the apparent falsification of values was the awarding of a prize ‘for his work restoring democracy in Poland’ to Donald

13 Robert Gwiazdowski: Donald Tusk wprowadza demokrację walczącą. Do zobaczenia na spacer-niaku, 2024.

14 A. Zoll: ‘If you want to introduce the rule of law – remembering that this is a condition for us to receive money from the European Union – the new government cannot go the legislative route’. See Siwek, 2024.

15 See Safjan, 2023.

16 Sadurski, 2024.

Tusk by the London think tank Chatham House.<sup>17</sup> The institution's website offers the following justification:

Donald Tusk has played an extraordinary role championing the democratic values of the European Union and is a more than worthy recipient of our annual prize. We look forward to awarding it to him in person at Chatham House later in the year.<sup>18</sup>

It is perhaps surprising that some observers interpret the government and parliamentary actions in this area as violations of law undertaken to achieve political objectives. This, indeed, is the rationale behind the title of this book, *Reversed Rule of Law*.

The study aims to present the contemporary understanding of the rule of law from national, international, and European Union (EU) perspectives, and to contrast this with how the concept is currently being interpreted and instrumentalized. The analysis will consider the use of the rule of law as a political slogan to justify actions that exceed legal boundaries.

It is hoped that this research will yield insights of relevance to other countries, particularly during political transitions when new governing forces may attempt to negate or reverse the actions of their predecessors, but without legal basis. The findings should draw attention to: the types of unlawful actions that may be undertaken across the legislative, executive, and judicial spheres; how best to prepare for or guard against such developments; and what counter-arguments may be employed in response. The study will also explore how the concept of the rule of law in connection with the internationalisation of domestic law and changes in political leadership. This will contribute to an understanding of how the rule of law is applied in this new, relativised framework and of the risks such shifts pose to legal certainty, the stability of public authority, and national sovereignty.

The research has practical value in that it highlights the potential dangers of abusing the rule of law to advance particular political interests, offering a cautionary perspective relevant to other jurisdictions.

The structure of the book will be as follows:

17 Chatham House on X: 'We are delighted to announce that the Prime Minister of Poland, Donald Tusk, has been awarded this year's Chatham House Prize for his work restoring democracy in Poland. We look forward to welcoming the Prime Minister to @ChathamHouse in July to accept the award'. See: We are delighted to announce that the Prime Minister of Poland, Donald Tusk, has been awarded this year's Chatham House Prize for his work restoring democracy in Poland, 2024.

18 Donald Tusk awarded 2024 Chatham House Prize, 2024.

## **Chapter 1**

### **The Rule of Law. Conceptual Challenges**

This Chapter provides a concise introduction to the concept of the rule of law. It outlines classical interpretations, including formal and substantive dimensions, and procedural requirements. It then identifies which of these requirements have gained prominence in contemporary understandings and highlights new meanings that have emerged over time.

The Chapter offers a comprehensive theoretical overview, tracing the evolution of the rule of law from its historical origins to its contemporary interpretations within a European context.

Particular attention is paid to the systems of the Council of Europe and the European Union. By examining the legal frameworks and jurisprudential practices of these institutions, the Chapter highlights the critical role of the rule of law in sustaining democratic governance and ensuring the accountability of public authorities. It discusses the mechanisms used by the ECHR and the CJEU to uphold these principles, as well as the impact of their decisions on Member States. The Chapter also considers the evolving interpretation of the rule of law in the case law of these courts and reviews the statements of the Venice Commission on this subject. In addition, it explores the challenges and transformations facing the rule of law in the current political environment.

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## **Chapter 2**

### **The Rule of Law in Poland – Values and Legalism**

The rule of law is widely recognised as a fundamental principle of statehood, delineating the boundaries within which public authorities operate. Although the concept is frequently referenced at both national and international levels, its practical interpretation is far from uniform. It is therefore necessary to examine how the rule of law is understood within a given national context and what it signifies for the functioning of the state and its institutions.

This Chapter presents the distinctive nature of the rule of law in the Polish legal system, viewed from a constitutional perspective. It discusses the historical background to the introduction of the rule of law clause in Polish law, its content as interpreted by the CT, and its role in shaping the constitutional order.

The conclusions offered here aim to inform actions undertaken by public authorities in Poland across the legislative, executive, and judicial spheres.

## **Chapter 3**

### **The Reversed Rule of Law in Legislation and Its Evaluation**

In Poland, state power is divided into the legislative, executive, and judicial branches, and it is hoped that these powers function in balance and with effectiveness. The legislature is a crucial component, as it establishes the framework within which the rule of law operates. For public institutions to act solely on the basis of law, it is essential to clarify what is meant by ‘law’ in this context and to analyse how it is created and evaluated. This Chapter examines the methods of law-making in Poland and outlines the system of legal sources, including statutes, regulations, and constitutional provisions. It evaluates whether these sources comply with the requirements of the Polish Constitution and whether their status within the legal system is respected in practice. The Chapter also identifies the most frequent violations occurring at both parliamentary and executive levels, including issues of overreach, opacity, and constitutional inconsistency. Finally, the Chapter discusses the conditions necessary for ensuring legal effectiveness, including institutional structures, procedural safeguards, judicial review, and the role of the CT and other oversight bodies.

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## **Chapter 4**

### **The Reversed Rule of Law in the Executive: Legitimacy via ‘Restoring Lawfulness’**

This Chapter explores the emergence of the slogan ‘restoring lawfulness’ as a novel form of legitimacy for executive action in Poland. Since late 2023, public authorities appear increasingly inclined to prioritise the attainment of vaguely defined objectives – such as eliminating ‘lawlessness’ – over adherence to the rule of law itself. This shift may not be immediately visible to the public. The Chapter aims to shed light on how this approach may undermine foundational constitutional principles, including the hierarchy of legal sources, the separation of powers, and the duty of cooperation among public authorities. Functionally, the issue concerns how decisions are justified, how regulations are interpreted, and how law is applied for political purposes. The Chapter examines instances in which executive actions have been undertaken outside the framework of the rule of law to achieve specific objectives and assesses this emerging form of legitimacy.

## **Chapter 5**

# **The Reversed Rule of Law in the Justice System and the Status of Judges**

In recent years, developments in Poland's judiciary have raised serious questions regarding adherence to rule of law standards. This Chapter addresses these concerns through a detailed constitutional analysis.

It begins by examining the constitutional role of the judiciary and the influence of two central institutions: the NCJ and the President of the Republic.

The discussion then turns to three key areas: first, the role of the international judiciary and judges' associations; second, the challenges faced by judges in (from the perspective of their appointment process); and third, the challenges that arise in the context of judicial decision-making.

In a spirit of constructive reflection, the Chapter considers how courts and judges may, at times, deviate from rule of law standards while justifying their conduct as aligned with those very standards. It is therefore important to assess whether a legal basis exists for such actions and, if so, to identify the limits of that legitimacy. Courts, as public authorities, are expected to act within the bounds of the law, and judges are bound by professional legal standards.

Any effort to rebuild the concept of the rule of law must begin with rigorous philosophical and doctrinal inquiry, supported by normative and empirical analysis, particularly of case law. Such a comprehensive study may help clarify the true meaning of the rule of law and its significance for the state, the legal system, and the individual. At the same time, it raises the question of whether, in light of evolving social dynamics, the rule of law is being used as a justification for advancing the interests of political or ideological factions. If so, how might one respond to the phenomenon of the reversed rule of law to ensure that the rule of law remains substantive and not merely a rhetorical tool? The study covers the legal and factual situation as at 31 December 2024.

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## CHAPTER 1

# THE RULE OF LAW. CONCEPTUAL CHALLENGES



LILLA BERKES

### Abstract

This Chapter introduces the concept of the rule of law. It outlines the classical approaches to the rule of law, including the formal and substantive dimensions. As the topic has been widely examined, this chapter does not aim to provide a detailed theoretical account but instead offers a basic introduction. It presents a comprehensive theoretical overview, tracing the evolution of the rule of law from its historical origins to its contemporary interpretations within the European framework. The Chapter seeks to demonstrate that, while the formal rule of law lends itself to relatively objective definition, the substantive rule of law introduces a normative and moral element – an aspirational dimension that invites diverse interpretations and inherent ambiguity. Building on this premise, the Chapter shows how the rule of law has become increasingly internationalised and framed as a normative requirement, with major international organisations embedding it as a core legal and political standard. In this context, the Chapter focuses on the systems of the Council of Europe (CE) and the European Union (EU). Examining the legal frameworks and institutional practices of these organisations highlights the critical role of the rule of law in preserving democratic governance and ensuring the accountability of public institutions. In describing this process, the Chapter emphasizes how the moral imperative of the substantive rule of law – particularly the distinction between ‘just law’ and ‘just bad law’ – reflects a fundamental distrust of the state. This development has contributed to increasingly complex procedures, heightened legal requirements, and the expansion of institutional frameworks.

**Keywords:** rule of law, Rechtsstaatlichkeit, Etat de droit, Venice Commission, European Union, democracy, national sovereignty, institutional trust

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## 1. Introduction

The concept of the rule of law – and the rule of law itself – shapes our understanding of power, its exercise, and the role of law in governance. Although it is now at the forefront of political debate, it is worth revisiting its origins, tracing its development, and reaffirming its importance as the ultimate normative measure that binds the state and limits the exercise of state power through law.

### *1.1. The Importance of the Rule of Law*

Why is the rule of law important?<sup>1</sup> There exists a longstanding consensus that, in a democracy, state power must operate within defined limits. It is also well established that the rule of law is not, in its origins, a rigid or comprehensive set of detailed requirements, but rather a principle – a normative framework – within which multiple conceptions may coexist and evolve. Over time, however, the rule of law has gained status as a normative requirement,<sup>2</sup> not only because it has been constitutionalised, but also because both national and international institutions have assigned concrete content to it and established mechanisms of accountability.

On the one hand, these requirements reflect the social and political contexts in which they emerged; on the other, they risk being relativized through reinterpretation. The rule of law is often criticised for failing to spread globally as anticipated, for proving ineffective in limiting power, and for falling short of realising the vision of a fairer society. In a recent study, Fernanda Pirie, Professor at the University of Oxford, offers a novel perspective. She asks:

why should we expect an ethos, let alone systems of accountability to accompany the laws that tell the powerful how to behave? Why are we disappointed when the laws do not, in fact, constrain our rulers? Maybe to assume that they should, that laws were always or ever supposed to be enforced on the most powerful, is to approach the rule of law in the wrong way. What if we accepted that at least some of these laws were only ever supposed to make clear how the powerful will ought to act, not actually to constrain them? (...) Maybe at least some of the standards expressed as laws were supposed to guide rulers who wanted to act well rather than to constrain those who were determined to act badly.<sup>3</sup>

This raises the question of whether debates surrounding the rule of law are, in fact, a particular expression of public frustration with the exercise of power. Does this dissatisfaction risk undermining the very principle without which democracy

1 See more on the concept of the rule of law: Bóka, 2024.

2 Varga, 2019, pp. 11–12, 27–43.

3 Pirie, 2024, p. 137.

cannot function?<sup>4</sup> As the rule of law evolves and its scope expands, it becomes essential to identify those elements that preserve its original purpose – limiting power and advancing justice. This requires examining the rule of law in its historical context and understanding how subsequent developments have built upon its foundational meaning in response to changing societal and political conditions.

### 1.2. Methodological Questions

The nature, functioning, and limits of public power have been central to philosophical inquiry since antiquity. The rule of law, therefore, has deep historical roots. Nor is the contemplation of law's role in restraining authority exclusive to Europe. However, this Chapter adopts a European focus, particularly on nineteenth-century conceptions of public authority, both because the volume addresses Poland's legal and political system and because modern rule of law theory largely emerged in this period.

Given the complexity of the subject, which can be approached from numerous perspectives, this Chapter focuses on how the rule of law evolved into a normative system imbued with moral considerations about the legitimate exercise of power. It particularly examines how the rule of law became central to post-communist states – commonly referred to as regime-change states – even decades after their political transitions. The Chapter argues that one of the central forces driving the transformation of the rule of law is the growing public distrust of those in power, often coupled with a partial rejection of the democratic model rooted in popular sovereignty. In this context, democratic governance has increasingly been replaced by procedural automatism, detailed legal regulation, an expansion of oversight institutions, and a reduction in the autonomous exercise of public power.

In support of this thesis, the Chapter reviews the foundational concepts of the rule of law and the three jurisprudential traditions from which they derive: the English 'rule of law', the German *Rechtsstaatlichkeit*, and the French *état de droit*. It is argued that the contemporary emphasis on the substantive rule of law reflects a paradigm shift born of twentieth-century experiences – most notably, the replacement of the *Rechtsstaat* with the *Unrechtsstaat*. This historical context explains the moral turn in legal thought and the present dominance of the substantive conception.

The Chapter then examines the globalisation of the rule of law, focusing on the role of international organisations. The universalisation of human rights has led to the emergence of numerous bodies capable of influencing how individual states understand and apply power. Rather than analysing all such entities, this Chapter concentrates on the United Nations (UN), the Venice Commission, and the European Union (EU).

<sup>4</sup> In a formal sense, rule of law can exist without democracy, if the criterion is merely that the exercise of public power is regulated by law, but democracy cannot exist without the rule of law in general. The real question is obviously the nature of the criteria for the rule of law.

Finally, the Chapter explores how trust – or the erosion of it – in public authority has contributed to the development of an increasingly complex and formalised body of rule of law criteria.

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## 2. Historical Background of the Rule of Law

The origins of the rule of law lie in a historical process aimed at gradually limiting the exercise of state power, evolving from arbitrariness and unchecked discretion to legality and liberty. Broadly speaking, the development of the rule of law can be examined through two principal approaches: the philosophical and the historical-legal. The former focuses on the idea itself, while the latter concerns its institutional realisation and the mechanisms designed to constrain power.

This Chapter adopts the latter perspective. The philosophical significance of the rule of law is, however, aptly summarised by Jeremy Waldron's glossary in the *Stanford Encyclopaedia of Philosophy*, where he highlights the major thinkers who shaped the concept:

The Rule of Law has been an important ideal in our political tradition for millennia, and it is impossible to grasp and evaluate modern understandings of it without fathoming that historical heritage. The heritage of argument about the Rule of Law begins with Aristotle (c. 350 BC); it proceeds with medieval theorists like Sir John Fortescue (1471), who sought to distinguish lawful from despotic forms of kingship; it goes on through the early modern period in the work of John Locke (1689), James Harrington (1656), and (oddly enough) Niccolò Machiavelli (1517); in the European Enlightenment in the writings of Montesquieu (1748) and others; in American constitutionalism in *The Federalist Papers* and (and even more forcefully) in the writings of the Federalists' opponents; and, in the modern era, in Britain in the writings of A. V. Dicey (1885), F.A. Hayek (1944, 1960, and 1973), Michael Oakeshott (1983), Joseph Raz (1977), and John Finnis (1980), and in America in the writings of Lon Fuller (1964), Ronald Dworkin (1985), and John Rawls (1971).<sup>5</sup>

On the institutional side, essential components of the rule of law include the principle that no one – not even the monarch – is above the law. This notion is reflected in early legal charters such as the Magna Carta of 1215 and similar documents that emerged across Europe. The tradition of natural law also reinforced the idea that power is limited and that individuals, made in the image of God, are entitled to certain inalienable rights.

<sup>5</sup> Waldron, 2023.

A major historical development was the emergence of parliament – not only the idea of parliamentary sovereignty, wherein power derives from the people and is exercised by elected representatives, but also the principle that the executive is accountable to the legislature. If the government fails to act in accordance with the will of parliament, it may be lawfully removed.

Equally significant is the role of the courts. It is no longer a lord, king, or vassal who arbitrarily decides the fate of individuals, but an independent and impartial judiciary bound solely by law.

Parallel to these developments, certain fundamental rights gradually emerged – such as *habeas corpus*, freedom of expression for representatives, the right to property, equality, and eventually additional generations of fundamental rights.

As the ultimate safeguard against the abuse of power, the doctrine of checks and balances took shape. This mechanism entails not only legal limitations on power but also institutional oversight, contributing incrementally to the transition from authoritarianism to liberty.

These developments laid the foundation for the modern conception of the rule of law, which, by the end of the nineteenth century and alongside the maturing of civil law systems, had crystallised around principles such as legal equality, the supremacy of law over tyranny, and the resolution of disputes by an independent judiciary. In such a system, society is governed by law rather than by individuals or arbitrary decisions.

Yet, this historical evolution – which unfolded in a broadly similar fashion across European states – also gave rise to differing expectations and institutional outcomes. Accordingly, a traditional distinction is drawn between the English, French, and German conceptions of the rule of law.

### ***2.1. The English Rule of Law***

The English Rule of Law is governed primarily by a strong emphasis on legal pragmatism and the recognition of the judge's central role in the making of common law. On the one hand, the English Rule of Law clearly departs from a purely formal or normative perspective on the rule of law.

The focus is on the expectation that the rules should be based on purposes and reasons which are open to public debate, thus the focus is on both of the parliamentary sovereignty and the judge's law-making function (the *stare decisis* doctrine).<sup>6</sup>

<sup>6</sup> Burnay, 2018, pp. 12–15.

Dicey<sup>7</sup> articulated three distinctive features of the rule of law: the absence of arbitrary or discretionary power on the part of government;<sup>8</sup> the subjection of all individuals to the ordinary law administered by ordinary courts;<sup>9</sup> and the derivation of constitutional principles and individual rights from judicial decisions.<sup>10</sup> This version of the rule of law, in its allocation of governmental powers, implicitly favours the dominance of the judiciary. At the same time, it places strong emphasis on procedural safeguards, including the right to a fair trial and due process of law. Another foundational element is the belief in natural law and reason as guiding principles of legal authority.<sup>11</sup>

## 2.2. *The German Rechtsstaat*

The German conception of the rule of law (*Rechtsstaatlichkeit* or *Rechtsstaatprinzip*) is grounded in the principle of individual liberty. Although Robert von Mohl emphasised the importance of the state as an institution that organises and promotes social coexistence – arguing that the purpose of the state may vary depending on its form – his conception of the *Rechtsstaat* centres on organising coexistence in such a

7 Dicey, 1915.

8 ‘We mean, in the first place, that no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary Courts of the land. In this sense the rule of law is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary, or discretionary powers of constraint’. Dicey, 1915, p. 147.

9 ‘We mean in the second place, when we speak of the ‘rule of law’ as a characteristic of our country, not only that with us no man is above the law, but (what is a different thing) that here every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals. In England the idea of legal equality, or of the universal subjection of all classes to one law administered by the ordinary Courts, has been pushed to its utmost limit. With us every official, from the Prime Minister down to a constable or a collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen. The Reports abound with cases in which officials have been brought before the Courts, and made, in their personal capacity, liable to punishment, or to the payment of damages, for acts done in their official character but in excess of their lawful authority’. Dicey, 1915, p. 149.

10 ‘We may say that the constitution is pervaded by the rule of law on the ground that the general principles of the constitution (as for example the right to personal liberty, or the right of public meeting) are with us the result of judicial decisions determining the rights of private persons in particular cases brought before the Courts; whereas under many foreign constitutions the security (such as it is) given to the rights of individuals results, or appears to result, from the general principles of the constitution’. Dicey, 1915, p. 150

11 Harvey, 1961, pp. 493–499.

way that each member of society can freely and fully exercise their faculties.<sup>12</sup> At the core of *Rechtsstaat* theory lies the notion of the *Staat der Vernunft* (state of reason), which is based on moral law and aims to foster peaceful coexistence. It is not merely a theory of legality, but a form of constitutionalism that seeks to realise ‘public reason’, thereby grounding both the normative foundations and the legitimacy of the legal system.<sup>13</sup>

According to von Mohl, the rights afforded to participants in a *Rechtsstaat* include equality before the law, the freedom to pursue life goals not prohibited by law, equal participation in public affairs, personal liberty, freedom of expression, freedom of worship, movement, and association.<sup>14</sup>

Later, however, the concept ‘lost its liberal-political impetus and, instead, was reduced to mean mere formal legal protection in civil and administrative matters’.<sup>15</sup>

While both the English and German traditions seek to limit state power, the former focuses on the judiciary, while the latter emphasises the law itself.

The *Rechtsstaatlichkeit* (...) strives to achieve its goals through comprehensive and cross-the-board regulations issued by the force of the state authority. It attaches guarantee to each aspect that it wishes to protect through this regulation. Its overall conception of law postulates that we subject ourselves to the authority of a text; this accounts for the axiomatic ideal and logical pattern of legal thinking, rooted in the ideal according to which mental operation in law is basically a sequence of logical submission and, in the form of normative syllogism, also the sequence of a series of deductive conclusions. Conversely the Rule of Law rests on the principle of all covering justiciability, and all it institutionalises is the right to contact a judicial forum for a definitive legal verdict via due process in any case that may have legal relevance.<sup>16</sup>

12 ‘Je nach der allgemeinen Lebensansicht des Volkes müssen denn natürlich auch die Einrichtungen getroffen seyn, welche das Leben ordnen und fördern sollen. Unter diesen Einrichtungen ist aber die umfassendste und wichtigste der Staat, d. h. die Ordnung des Zusammenlebens des Volkes auf einem bestimmten Gebiete und unter einer höchsten Gewalt. Zwischen dem Zwecke des Lebens nach der herrschenden Volksansicht, und zwischen dem Zwecke des Gesammtlebens dieses Volkes kann nicht nur kein innerer oder äußerer Widerspruch stattfinden, sondern es müssen die beiden Zwecke auch völlig dieselben seyn. (...)’

Hienach läßt sich denn nun die Grundfrage aller Staatswissenschaften: was der richtige Staatszweck sey? dahin beantworten, daß es nicht bloß Einen solchen richtigen Staatszweck giebt, sondern so viele verschiedene, an und für sich gleich richtige, als verschiedene Staatsgattungen bestehen. (...)’

Ein Rechtsstaat kann also keinen andern Zweck haben, als den: das Zusammenleben des Volkes so zu ordnen, daß jedes Mitglied desselben in der möglichst freien und allseitigen Uebung und Benützung seiner sämtlichen Kräfte unterstützt und gefördert werde’. von Mohl, 1966, pp. 11–16.

13 Burnay, 2018, p. 34.

14 von Mohl, 1995, pp. 34–36.

15 Mecke, 2019, p. 34.

16 Varga, 2021, p. 16.

### 2.3. The French *État de Droit*

The French conception of the rule of law, the *État de Droit* emerged partly in opposition to the German *Rechtsstaat*, which French jurists criticised for empowering bureaucracy at the expense of parliament. In contrast to the German emphasis on normative reasoning, the French tradition focused on legality – understood as the subordination of administrative acts to statutory law. The core idea was that legal norms should constrain the administration and protect civil liberties, while also restraining excessive democratic participation and legitimising administrative actions taken by the state. In this model, the law functions as both a shield for the citizen and a tool for regulating executive power.

French legal thought has historically been wary of expanding judicial power – stemming from fears of a ‘government by the judiciary’ rooted in experiences preceding the French Revolution. Consequently, the *État de Droit* tradition has consistently resisted proposals to enhance the judiciary’s role in relation to the executive and administrative authorities.<sup>17</sup> While the English Rule of Law

was the consequence of an attempt to give a formalized interpretation of the engagement of the common law with modern ideas of constitutionalism, and the German concept of *Rechtsstaat* evolved from the tensions between authoritarianism and liberalism in governmental practice. But the French concept was explicitly introduced by French jurists as a normative principle to highlight perceived deficiencies in post-revolutionary governing arrangements.<sup>18</sup>

It should be noted that, despite its theoretical significance, the term *État de Droit* does not appear in French constitutional texts or in the constitutional jurisprudence as a binding legal norm. Furthermore, unlike in the German tradition, French constitutional scholars and judges have not generally adopted natural law theory as the cultural basis for legal reasoning.<sup>19</sup>

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## 3. The Substantive Rule of Law and Its Post-War Evolution

The first major conceptual shift occurred with the emergence of the substantive rule of law, which evolved in parallel with the of universalization of human rights. This conception infused the rule of law with moral expectations, aiming to ensure

17 Burnay, 2018, pp. 19–22.

18 Loughlin, 2010, p. 322.

19 Heuschling, 2021, pp. 84–85.

that the exercise of power – including legislation and law enforcement – is not determined by law alone but also by intrinsic normative standards.<sup>20</sup>

This approach accepts that the state acts only through legal forms (the principle of legality) but recognises that legality alone does not prevent the enactment of repressive laws. The doctrine therefore seeks a secondary principle that can provide additional protection. Several solutions have been proposed. One approach relies on complex legislative procedures, grounded in a balance of powers, to prevent the passage of oppressive laws by enabling institutional resistance through the interplay of competing interests. Another trusts in democratic mechanisms to fulfil this function. The most prevalent solution, however, involves subordinating legislation to higher principles – typically through constitutional review. One such approach is based on *super-regulatory* principles, which are those enshrined in the Constitution by the original framers. These principles are considered part of positive law and can be amended through constitutional procedure. Under this view, the constitutional judge's discretion is limited to ensuring procedural compliance, while the legislature retains the power to redefine the guiding principles. A more robust interpretation holds that supra-legislative principles are not reducible to positive law and do not derive their authority from written instruments. Such principles would be binding on the state even if unwritten, thereby granting judges greater interpretive discretion.<sup>21</sup>

The substantive rule of law encompasses the requirements of the formal rule of law – independent and impartial adjudication, human rights protection, legal equality, pluralism, separation of powers, democracy, and democratic legitimacy.<sup>22</sup> An alternative formulation defines these criteria to include a hierarchical legal system led by a constitution, a constitutionally regulated law-making process, legal clarity regarding the scope of legislation, the prohibition of retroactivity, the guarantee of fundamental rights, the subordination of public authorities to the law, legal certainty, administrative adjudication, and constitutional review.<sup>23</sup>

What distinguishes the substantive rule of law from its predecessors is its moral foundation. It goes beyond formal legality to assess whether laws are 'good' or 'bad', placing the court at the centre of the evaluation. Courts are thus expected to resolve legal questions according to the most justifiable moral theory. The ideal law should thus express and enforce moral rights. What makes this requirement elusive, however, is that definitions of 'law' vary widely, and the incorporation of morality into legal reasoning implies that the rule of law becomes inseparable from specific theories of justice. As a result, some critics argue – often for political purposes – that the rule of law cannot be precisely defined.

20 Gyórfi and Jakab, 2009, pp. 158–159.

21 Hamon and Troper, 2015, pp. 77–79.

22 Tóth, 2021, pp. 690–691.

23 Tamás, 2005, p. 229.

The essence of this concept is also reflected in the theory of Kaarlo Tuori, who, as a member of the Venice Commission, has had considerable influence on its approach. Tuori structured law into three layers: the surface layer, legal culture, and deep culture. His model simultaneously considers formal law, judicial practice, legal scholarship, general legal doctrines and principles – including constitutional culture – and the deep structures that form the enduring foundations of the legal system. He regards the *Rechtsstaat* as one of the elements embedded deeply within this structure.<sup>24</sup>

A focus on just law thus implies a profound understanding of both the legal system and the functioning of the state. The expectation that law should be just and uphold the fundamental human rights of all members of society distinguishes a government under the rule of law from one operating merely under rule by law. Justice, in principle, implies universal justice, which presupposes a broad consensus on the nature of substantive justice. However, in practice, such consensus has not materialised, which is why international law and human rights instruments have emerged as benchmarks. These instruments reflect principles widely accepted as representing the fundamental rights of all human beings.<sup>25</sup>

In conclusion, the primary value of the rule of law, as developed through this evolution, lies in the state's enactment of laws that are just for society and in the exercise of power in accordance with this principle. The law applies equally to all; individuals know what they are entitled to, what is prohibited, and what consequences they may face. They know they are not at the mercy of institutions, and that these institutions exist for their protection. Where rights and freedoms are infringed, institutions exist to defend against unlawful state interference.

The rule of law has thus transformed the conception of the state and its mode of operation. It is worth noting that this transformation was truly realised only after the Second World War, when the freedoms associated with the rule of law began to take tangible form.

The post-war period brought an expansion of the concept, prompted by the realisation that the mere recognition of rights and the establishment of institutions was insufficient. Law, as a tool, can be used for almost any purpose, and institutions often fail to function as originally intended.

The substantive conception of the rule of law developed in response to both existing and emerging challenges, resulting in a more expansive doctrine supported by an increasingly diverse toolbox. In Western countries, this process unfolded gradually, shaped by historical experience, specific challenges, and national characteristics.

This multi-layered development led to increasingly detailed regulations concerning both the equal protection of rights and the limitation of power. Consequently, more institutions were established to defend rights and supervise state bodies. Legal rules concerning the accountability of power holders became more

<sup>24</sup> Sunnqvist, 2023, pp. 12–13.

<sup>25</sup> Stein, 2019, pp. 188, 195–196.

precise and complex. Rights protection mechanisms proliferated, both at national and international levels. Legislation is no longer the exclusive domain of parliament and government. A growing number of autonomous legislators have emerged, transparency in the legislative process has become a normative expectation, and greater public participation is now regarded as essential to legitimacy.

This evolution means that the people no longer exercise power solely through elected representatives or referenda. Rather, public participation itself has become a vital source of legitimacy for decision-making.

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## 4. International Standards and Requirements

The development of the rule of law has thus acquired not only a moral dimension but also the form of an international, objective standard. In this context, the role of international institutions as interpretative – and increasingly regulatory – entities has grown in importance.

One foundation of this evolution is the universality of human rights, encompassing both horizontal and vertical, formal and substantive dimensions.<sup>26</sup> The other is the growing desire for common, global standards – standards that were gradually adopted and promoted by emerging international institutions.

This period marked a revival of the rule of law. From the 1990s onwards, the concept was increasingly invoked as a global solution to systemic problems, resulting in a wave of rule of law reform initiatives. These efforts were largely driven by the recognition that many states were

struggling with poorly performing institutions, citizens' low regard for governments, and the challenges of going beyond mere democratic processes to genuinely democratic values and practices. (...) For states grappling with democratic consolidation, fortifying usually weak rule of law appears to be a way of pushing patronage-ridden government institutions to better performance, reining in elected but still only haphazardly law-abiding politicians, and curbing the continued violation of human rights that has characterized many new democracies. For backsliding systems, strengthening the rule of law seems an appending bulwark against creeping authoritarianism and the ever-present threat of a sabotage of constitutional order.<sup>27</sup>

<sup>26</sup> Arnold, 2013, pp. 1–2. However, it should also be noted, that 'to include all human rights in the rule of law would blur the difference between the rule of law and human rights, when they are distinct ideas', thus there is also a debate present which human rights (other than the fair trial which is consensually included to the list) should be considered as part of the rule of law principle.

<sup>27</sup> Carothers, 1998, pp. 95, 98.

In parallel, there emerged a belief that rule of law reforms in so-called developing countries were essential for stability and for establishing norms conducive to investment and sustainable economic growth.<sup>28</sup>

Consequently, UN bodies began referencing the rule of law with increasing frequency from the 1990s onward. McCorquodale compiled numerous examples of this trend, noting, for instance, that the restoration or establishment of the rule of law was frequently included among the objectives of UN peacekeeping missions. The Security Council invoked the concept in discussions on good governance and justice; in fact, the phrase ‘rule of law’ appeared in at least 69 Security Council resolutions between 1998 and 2006. References to the rule of law also feature prominently in the policies and reports of international financial institutions, such as the World Bank, particularly in relation to contract enforcement, the police, and the judiciary. Promoting the rule of law has also become an integral component of the UN Sustainable Development Goals.<sup>29</sup>

This phenomenon intensified in Europe following the democratic transitions in Eastern European countries. The regime changes necessitated the creation of institutions capable of operating within democratic frameworks, including those necessary for the rule of law. This process also formed part of the preparations for accession to the EU, which provided a normative and institutional framework for reform. As a result, these states became central participants in the discourse on the rule of law.

One key initiative was the Phare programme, designed to support countries in transition on their path toward EU membership. As part of this initiative, a 600-page volume titled ‘Reinforcement of the Rule of Law’<sup>30</sup> was published in 2002. The book offered an overview of the judiciary, the status and role of public prosecutors, court procedures, and enforcement mechanisms across several countries – Bulgaria, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, Slovak Republic, and Slovenia.

While the project did not address the entire scope of the rule of law, it was significant in scale. More importantly, its title and intent reflect the underlying assumption: that the rule of law in these countries required strengthening as a precondition for integration into the European legal and political order.

It should be noted, however, that the process of strengthening the rule of law – particularly through the importation of legal institutions and democratic practices – was not rooted in an understanding of society as a dynamic phenomenon. Although efforts elements of established legal systems in the post-socialist states, the socio-economic context, distinct social functions, and differing institutional objectives were either overlooked or, in hindsight, given insufficient consideration.<sup>31</sup> Too much

28 Upham, 2002, p. 7.

29 McCorquodale, 2016, pp. 285–286.

30 Reinforcement of the rule of law. Final report on the First Part of the Project. Phare Horizontal Programme on Justice and Home Affairs, August, 2002.

31 See e.g. Péteri, 2010, pp. 108–110.

emphasis was arguably placed on positive law, with inadequate regard for social realities. Legal institutions and democratic practices function most effectively when deeply institutionalised, yet Eastern European societies ‘had their own ways, their own rationales’. When the Soviet system collapsed, it was assumed that democracy, the market economy, and the rule of law represented the victorious model to be adopted. However, these values were not deeply embedded within the institutional or cultural fabric of the societies in which they were introduced.<sup>32</sup>

#### ***4.1. The United Nations Rule of Law Indicators***

Within the UN system, no conceptual consensus has ever been reached regarding the rule of law – neither between the policy and operational branches, nor among member states, who have never agreed upon a single definition. Nonetheless, the UN has consistently promoted the substantive dimensions of the rule of law within states.<sup>33</sup> Over time, an increasing number of UN documents have centred on the rule of law,<sup>34</sup> highlighting themes such as accountability, fairness, separation of powers, equality before the law, and the importance of rebuilding justice.<sup>35</sup> These documents present the rule of law as fundamental to the three pillars<sup>36</sup> of the UN: peace and security, human rights, and development. They emphasise the universal commitment to promoting the rule of law and the pivotal role of judicial mechanism in doing so.<sup>37</sup> Operational frameworks have also been developed to guide UN Rule of Law initiatives, including mechanisms for monitoring, evaluation, and coordination.<sup>38</sup>

In 2011, the UN adopted the Rule of Law Indicators, establishing a framework for measuring progress in this domain and paving the way for efforts to evaluate and rank rule of law performance. The rationale behind the indicators rests on the positive assumption that indicators are indirect measures of elements that, taken together, can be used repeatedly and over time to assess progress towards specific goals and objectives. They often have the dual role of spurring reform and holding agencies and individuals accountable for their past performance.

The framework comprises 135 indicators, grouped under three institutions: the police (41 indicators), the judiciary (51 indicators), and the prison system (43 indicators). For each institution, indicators are organised into thematic categories corresponding to four key dimensions: performance, integrity, transparency and accountability, treatment of vulnerable groups, and capacity. For example, in the case of the judiciary,

32 Lazovic, 2024.

33 Birkenkötter, 2024.

34 For the complete system of the UN and the Rule of Law, see: Rule of Law, 2025.

35 The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies (S/2004/616).

36 The Three Pillars, no date.

37 Declaration of the High-Level Meeting on the Rule of Law at the National and International Levels (A/RES/67/1).

38 Strengthening and Coordinating United Nations Rule of Law Activities (A/68/213); Secretary-General’s Report on Strengthening and Coordinating Rule of Law Activities (A/74/139).

the performance dimension includes public confidence, access to justice, and procedural efficiency. The integrity, transparency and accountability dimension encompasses judicial independence and transparency. The capacity dimension addresses material and human resources, as well as administrative and managerial capabilities. The treatment of vulnerable groups dimension is acknowledged but not broken down in the same manner. The implementation guide provides the full list of indicators, survey instruments, sampling methodologies, and technical instructions.<sup>39</sup>

The use of indicators is a well-established method in social science research. An indicator is typically defined as a specific, observable measure of a more abstract concept, often employed in evidence-based decision-making where direct measurement is unavailable. Indicators have the advantage of rendering complex phenomena measurable and, in principle, objectively assessable. However, they are also ‘prone to abuse by governments and other international and local actors’, frequently suffering from poorly defined targets, inadequate proxies, and insufficient contextualisation.<sup>40</sup> Although widely used in the field of human rights monitoring, indicators have also been subject to criticism. As Merry observed, there exists a persistent tension between human rights principles and audit culture.<sup>41</sup> Another challenge lies in the use of abstract concepts to explain other abstract concepts, with meanings shaped largely by those conducting the measurement. In this process,

international civil servants play an increasingly important role in shaping what is perceived as ‘UN activities’, (...) through executive interpretation, i.e. imbuing vague concepts and notions with more concrete definitions and normative claims; and through interfacing, i.e. connecting various other actors – experts, non-governmental organizations, eminent persons and individuals – with member states. Often, both of these mechanisms go hand-in-hand.<sup>42</sup>

#### ***4.2. The Venice Commission’s Role in Rule of Law Oversight***

Although the Venice Commission has traditionally exercised caution in developing formalised standards,<sup>43</sup> it adopted its Rule of Law Checklist at its 106th Plenary Session in 2016.<sup>44</sup> The reasons for its adoption included: (a) the need for universal adherence to and implementation of the rule of law at both national and international levels; (b) recognition that the rule of law has become a dominant organisational model in modern constitutional law and international governance; (c) acknowledgement of its formal proclamation as a basic principle by the UN and its consistent inclusion in the political documents of the CE, as well as in numerous Conventions

39 The United Nations Rule of Law Indicators. Implementation Guide and Project Tools, pp. 1, 4.

40 Botero, Pinzon-Rondon and Pratt, 2016, pp. 51–52.

41 Merry, 2011, p. 87.

42 Birkenkötter, 2023, p. 453.

43 Bartole, 2000, p. 353.

44 CDL-AD(2016)007, see also Venice Commission of the Council of Europe, 2016.

and Recommendations; (d) the engagement of various Council of Europe bodies – such as the European Court of Human Rights (ECHR), the European Commission for the Efficiency of Justice (CEPEJ), the Consultative Council of Judges of Europe (CCJE), the Group of States against Corruption (GRECO), the Monitoring Committee of the Parliamentary Assembly, the Commissioner for Human Rights, and the Venice Commission itself – in promoting and reinforcing the rule of law.

Since its 2011 report,<sup>45</sup> the Venice Commission has recognised the plurality of definitions of the rule of law and the role of legal traditions in shaping diverse interpretations and applications. In response, the Commission has sought to identify common elements across these varied perspectives. These shared principles include a system of certain and foreseeable law, where everyone has the right to be treated by all decision-makers with dignity, equality and rationality and in accordance with the laws, and to have the opportunity to challenge decisions before independent and impartial courts through fair procedures.

At the same time, the Commission warned of the risks inherent in an overly formalistic conception of the rule of law.

Its report compares this conceptual complexity with the German theory of the substantive rule of law and concludes that a consensus may be reached among differing legal traditions.<sup>46</sup> It identified six core elements: (1) legality, including a transparent, accountable, and democratic legislative process; (2) legal certainty; (3) the prohibition of arbitrariness; (4) access to justice before independent and impartial courts, including judicial review of administrative acts; (5) respect for human rights; and (6) non-discrimination and equality before the law.

During the following years, the Venice Commission further developed its interpretation of the rule of law and established its checklist. However, it also emphasised that full realisation of the rule of law remains an ongoing task, even within well-established democracies. Thus, the checklist is neither exhaustive nor final.

The checklist divides the requirements of the rule of law into two categories. On the one hand are the core elements – already included in the previous report and traditionally recognised as rule of law criteria – namely: legality, legal certainty, prevention of abuse of power, equality before the law and non-discrimination, and access to justice. On the other hand are the more advanced requirements, which respond to particular contemporary challenges to the rule of law, such as corruption, conflicts of interest, and the collection of data and surveillance. Within these, the checklist distinguishes between hard law and soft law obligations.

To compare with the UN checklist, one may consider the requirements relating to the judiciary. The Venice Commission's checklist focuses on judicial independence and impartiality, including the independence of the judiciary as a whole and of individual judges; the impartiality of the judiciary; the autonomy and accountability of the prosecution service; the independence and impartiality of the Bar; the right to

45 CDL-AD(2011)003rev.

46 Varga, 2020, pp. 347–348.

a fair trial; access to courts; the presumption of innocence; and the effectiveness of judicial decisions.

From this brief summary, it is evident that the Venice Commission's requirements are more specific. However, it should also be noted that each requirement is only briefly defined and is supplemented by a list of hard law and soft law sources. As such, the checklist does not offer direct practical guidance but rather points to sources for interpretation, leaving room for case-by-case application – with all the advantages and disadvantages this entails. Furthermore, owing to its global outlook, the soft law sources include legal instruments that have not previously been prominent in Europe.

The Venice Commission was established to promote mutual understanding and convergence among the legal systems of CE member states, to develop awareness of their differing legal cultures, and to address problems in the functioning of democratic institutions. Over time, the Commission has gained increased authority, and although its opinions are always tailored to the requesting state, the concept of the rule of law it developed has become an internationally accepted doctrine and theoretical paradigm. Its authority stems from the expertise of its members, many of whom are distinguished legal scholars delegated by the participating states.<sup>47</sup>

In the process of internationalizing, centralising, and embedding the rule of law as a normative requirement, the Venice Commission has issued numerous opinions concerning Eastern European states.

In Poland, core issues have included the status of judges and the judiciary (e.g. changes to the National Council of the Judiciary (NCJ) and the Supreme Court (SC)),<sup>48</sup> the Public Prosecutor's Office<sup>49</sup> and the Constitutional Tribunal (CT).<sup>50</sup> During the ongoing 'reversed rule of law' phase, several (including urgent) opinions have addressed reforms introduced by the new parliament, particularly regarding the judiciary and the CT.<sup>51</sup> In Hungary, similar concerns have centred on judicial reforms, including the status of judges, court administration,<sup>52</sup> and the prosecution service.<sup>53</sup> Comparable opinions have been adopted regarding Romania, focusing on the status of the Superior Council of Magistracy, judicial independence, and the appointment of judges.<sup>54</sup> In Bulgaria, the Venice Commission has reviewed the judicial system,<sup>55</sup> constitution-making processes,<sup>56</sup> and, as a regional exception, electoral legislation.<sup>57</sup>

47 *Ibid.*, pp. 347–350.

48 CDL-AD(2017)031, CDL-AD(2020)017.

49 CDL-AD(2017)028.

50 CDL-AD(2016)001, CDL-AD(2016)026.

51 CDL-AD(2024)018, CDL-AD(2024)029, CDL-AD(2024)035.

52 CDL-AD(2012)001, CDL-AD(2012)020, CDL-AD(2013)012, CDL-AD(2019)004, CDL-AD(2021)036.

53 CDL-AD(2012)008.

54 DL-AD(2014)010, CDL-AD(2018)017, CDL-AD(2018)021, CDL-AD(2022)045.

55 CDL-AD(2024)004, CDL-AD(2022)032, CDL-AD(2022)022, CDL-AD(2019)031, CDL-AD(2017)018, CDL-AD(2010)041.

56 CDL-AD(2023)039, CDL-AD(2020)035, CDL-AD(2015)022.

57 CDL-AD(2017)016, CDL-AD(2014)001, CDL-AD(2011)013.

Compared to these countries, Slovakia and Czechia have drawn considerably less attention. In Slovakia, opinions have addressed only disciplinary proceedings against barristers<sup>58</sup> and the appointment of Constitutional Court judges.<sup>59</sup> In Czechia, only reports from conferences and seminars are available over the past two decades.<sup>60</sup>

This overview remains illustrative rather than exhaustive and does not encompass all states central to the resurgence of rule of law discourse following the regime changes of 1989–1990 and the rebuilding of democracy. It should also be borne in mind that the Venice Commission only acts at the request of a state. Therefore, no definitive conclusions should be drawn from the frequency – or absence – of its involvement, as this may simply reflect a state’s success (or strategic effort) in avoiding the organisation’s scrutiny.

### ***4.3. European Union’s Rule of Law Mechanisms***

The rule of law is one of the EU’s foundational values – applying not only to individual member states but also collectively to the Union as a whole. Although EU institutions initially treated the rule of law in descriptive terms, they have progressively moved towards defining and operationalising it more concretely. The process began in 1993 with the Copenhagen criteria, which established the rule of law as a prerequisite for accession.<sup>61</sup> As noted above, this contributed to the heightened emphasis placed on rule of law compliance by post-socialist transition states – a process that remains ongoing.

The rule of law was also referenced in the preamble of the 1992 Maastricht Treaty and later enshrined in the Treaty on European Union (TEU). However, the Court of Justice of the European Union (CJEU) had already invoked the rule of law in earlier decisions. In its 1979 *Granaria* judgment and its 1986 *Les Verts* ruling, the Court held that loyalty to the EU legal order is a core expression of the rule of law.<sup>62</sup>

It should be stressed, however, that the primary function of the CJEU is not the protection of fundamental rights but the interpretation and enforcement of EU law. Its role is to ensure the effectiveness and primacy of EU law across all member states. Accordingly, the CJEU does not invoke the rule of law in abstract or philosophical terms but rather to secure the primacy of the EU legal order over national systems. The rule of law is also closely tied to the principle of mutual trust, which presupposes a unified constitutional space governed by shared values.<sup>63</sup>

Within the EU legal framework, the Conditionality Regulation is the first legislative act to include a formal definition of the rule of law. It mandates that all public powers act within the constraints set out by law, in accordance with democratic

58 CDL-AD(2021)042.

59 CDL-AD(2017)001, CDL-AD(2014)015.

60 Council of Europe, no date.

61 Sunnquist, 2023, p. 18.

62 *Ibid.*, pp. 18–19.

63 Spielmann, 2021, pp. 4–5, 19.

values and respect for fundamental rights as stipulated in the Charter of Fundamental Rights of the European Union, and under the supervision of independent and impartial courts.

The applicable criteria, interpreted through case law, include: legality, requiring a transparent, accountable, democratic and pluralistic legislative process; legal certainty; the prohibition of arbitrariness in the exercise of executive power; effective judicial protection, including access to justice before independent and impartial courts; and the separation of powers.<sup>64</sup>

The underlying rationale of conditionality lies in utilitarian reasoning: the allocation of certain benefits, especially financial aid, is linked to the implementation of specific policies, reforms, or the fulfilment of concrete conditions. Depending on the outcome, a distinction can be drawn between positive conditionality (reward) and negative or punitive conditionality (withholding rewards or imposing sanctions). Conditionality may also be classified as *ex ante* or *ex post*, depending on the point in time at which it is applied. As such, a conditionality mechanism serves as a tool for political and/or economic adjustment. Within the EU, various types of conditionality exist. In the case of rule of law conditionality, the stated purpose is to protect the EU's financial interests. However,

the political function of the regulation is essentially to build an argumentative bridge between the disbursement of European funding and the commitment to common fundamental values of the EU, in particular the rule of law. This political conditionality is purely punitive and needs permanent monitoring. With this conditionality, domestic policy, normative and constitutional decisions and fundamental political values, which are constitutive for membership in the EU, become conditions for the disbursement of European funding.<sup>65</sup>

One reason for the controversy surrounding this procedure is the combination of legal coercion and political bargaining and homelessness, which may ultimately result in a form of enforced compliance. These concerns underlie, for example, the proposal that

while the simultaneous threat of sanctions might not be conducive to persuasion, the EU could still try to maintain or create channels of contact that allow for a depoliticized setting and a highly deliberative quality of interactions with the target government.<sup>66</sup>

Indeed, there is a discrepancy between the EU's efforts to exert financial pressure on Member States to uphold the rule of law and the criticisms regarding its selective

<sup>64</sup> Sunnquist, 2023, pp. 20–21.

<sup>65</sup> Becker, 2024, pp. 1–2, 8.

<sup>66</sup> Blauburger and van Hüllen, 2021, p. 14.

application. Nevertheless, the fact that rule of law conditionality can result in the suspension or forfeiture of EU funds renders it a more powerful tool than those previously available to the Union.<sup>67</sup>

The most potent instrument in the EU's hands appears to be the procedure set out in Art. 7 TEU, which provides a mechanism for determining whether a Member State has committed a serious and persistent breach of fundamental EU values, or whether there is a clear risk of such a breach. The mechanism comprises both preventive and sanctioning components, which are distinct and not mutually dependent. The former assesses whether there is a clear risk, while the latter applies only when a serious and persistent breach has already occurred. These are supplemented by the Council's monitoring powers. Although the use of this procedure is rare rather than unprecedented, EU institutions are generally reluctant to invoke it due to political risks, including the possibility of increased popular opposition and democratic backlash.<sup>68</sup>

More significant in practice are the associated monitoring mechanisms. In 2014, the EC adopted the Rule of Law Framework to address systemic threats to the rule of law as a pre-Art. 7 procedure. These procedures enable the Commission to enter into a structured dialogue with the Member State to prevent the escalation of systemic threats to the rule of law. The process consists of three main procedural stages: assessment, recommendation, and follow-up by the Commission. It is a pre-Art. 7 TEU procedure that is regarded as a constructive means of initiating dialogue. While it provides a definition of the rule of law and partially addresses the inherent limitations of Art. 7 TEU, it does not necessarily offer an effective solution to the problems due to the soft and diplomatic nature of the Commission's approach.<sup>69</sup>

In 2020, the Rule of Law Report Mechanism was introduced as a further preventive measure and a means of fostering dialogue. Methodologically, it focuses on significant developments in four pillars: the justice system, the anti-corruption framework, media pluralism, and institutional issues related to checks and balances.<sup>70</sup> Similarly to the conditionality mechanisms, it connects the basic requirement of the rule of law with anti-corruption efforts. From its inception, the Rule of Law Report expanded the EU's anti-corruption toolbox by providing a comprehensive overview of anti-corruption policies across Member States.<sup>71</sup>

#### ***4.4. Additional Remarks***

Although each of the organisations and aspects presented here represents a dimension of the internationalisation of the rule of law, they are not truly comparable. On the one hand, the European Union and the Venice Commission stand out as

67 Łacnyp, 2021, p. 103.

68 Coli, 2018, pp. 277–278, 295.

69 Kochenov and Pech, 2015, pp. 521, 534, 539.

70 Panov, 2023, p. 82.

71 Stiegel and De Schamp, 2023, p. 345.

regional organisations, in contrast to the UN, which, owing to its global scope, places greater emphasis on various (typically war-torn) conflict regions and is therefore inherently reticent in its approach to European states. On the other hand, the two European bodies employ different methodologies, criteria, objectives, and investigators. The EU's rule of law mechanism and its instruments are political in nature, with criteria rooted in political agreement and, accordingly, reflective of current political conditions. This remains the case even where the procedures for preparing the EU's rule of law reports and the Venice Commission's opinions appear similar – such as the process of posing questions, collecting responses, and consulting public authorities and civil society – since the individuals conducting the investigations differ, and the resulting documents reflect these differences. Their consequences also diverge: the EU holds an advantage in that it can enforce its position over time, whereas the Venice Commission exerts influence only indirectly; in its case, implementation of recommendations depends largely on the perceived legitimacy of the organisation and its investigators.

Consequently, scientific conclusions cannot be drawn from comparing their individual positions. Rather, they should be treated separately, as each may exert exclusively political or scientific influence, or a particular combination of both.

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## 5. Trust in Public Institutions and Decision-Makers

In the course of the aforementioned evolution, the focus of rule of law discourse has shifted to emerging states. A question arose: while the substantive model of the rule of law is increasingly accepted as the norm – a normative system with a claim to exclusivity – might alternative paths nonetheless be possible? After all, that which is not a *Rechtsstaat* is not a democracy, and if it is a democracy, it must function in accordance with the requirements of the rule of law.

This principle also underpins the rule of law mechanism of the European Union. The question, therefore, is not merely what principles and standards the rule of law comprises, but what meaning is ascribed to it by those who assert it as a normative standard.

In Western states, various models of the rule of law have developed organically, as von Mohl had already observed. By contrast, in emerging states, a certain formalism prevails. The aim is to reinforce the rule of law through standardised tools derived from Western experience. However, in the absence of organic development or institutional similarity, and within distinct social contexts, a situation has emerged akin to *duo cum faciunt idem, non est idem* – when two do the same thing, it is not the same. As a result, externally imported solutions have not always aligned with the domestic understanding of the rule of law.

This process has led to the greatest expansion of the rule of law concept in this region (as evidenced, for example, by reports of the Venice Commission), along with the realisation of the significance of the rule of law – understood as the necessity of comprehensive legal regulation – but also a concurrent lack of trust in both the law and the institutional system.

Generally, public institutions – the state and its representatives – function not only on the authority granted to them by the people through popular sovereignty, but also on the public's trust in their competence, integrity, and benevolence. Where trust exists, a more favourable view of institutional intentions prevails, encouraging cooperation and thus enabling the state to more readily achieve its goals. These aims typically involve striving for an ideal condition *in* and *for* society.

Trust is a natural phenomenon, a behavioural pattern acquired through socialisation. It is a durable disposition developed early in life, primarily shaped by parents. However, it may also be based on lived experience. Just as perceptions and experience can nurture trust, they can also lead to its breakdown. When public institutions are perceived as fair and effective, trust is strengthened.<sup>72</sup>

Accordingly, trust is relational. It depends on relationships – either direct, through ongoing interaction or indirect, via intermediaries and reputational effects. The deeper and more meaningful a relationship, the more likely trust and trustworthiness are to develop within it. If distrust arises, it tends to manifest incrementally. Trust is inherently moral; although distrust is often viewed negatively, it may at times serve as a protective response rather than a purely rational judgement. The relationship between trust and distrust is asymmetrical: distrust tends to emerge more swiftly.<sup>73</sup>

As Mishler and Rose observed in their 2001 study, trust is critical to democracy because it links citizens to institutions, thereby reinforcing both the legitimacy and effectiveness of democratic governance. Trust is especially vital in newly established regimes, whose predecessors proved unworthy of it. The authors emphasise that both cultural and institutional theories suggest citizens in post-communist societies are likely to exhibit minimal initial trust in democratic institutions. This is because their prior experience compelled them to depend heavily on interpersonal relationships and informal networks to meet their material and emotional needs and shield themselves from an intrusive and repressive state. As their research showed, public responses to new social and political institutions across the 10 post-communist countries studied ranged from scepticism to outright distrust.<sup>74</sup>

Trust or distrust may therefore stem from experience or assumption, whether based on facts or subjectivity. In Eastern European countries, efforts to build trust have been hampered not only by differing patterns of socialisation but also by the socio-economic difficulties of the 1990s and the obstacles to developing democratic

<sup>72</sup> Sønderskov and Dinesen, 2016, pp. 180–181.

<sup>73</sup> Hardin, 2002, pp. 3–4, 89–90.

<sup>74</sup> Mishler and Rose, 2001, pp. 30–31, 39, 41.

institutions. These challenges coincided with the emerging focus on the rule of law, as described above. In this context, internal distrust overlapped with external scepticism, the latter rooted in the perceived need to strengthen the rule of law in these states. This dual distrust continues to shape discourse on the rule of law, revealing a contradiction: while the state and those in power expect trust, citizens expect these same institutions to dispel their distrust.

Strengthening the rule of law aims to ensure a just society and the adoption of ‘just laws’ whose moral foundation lies in the substantive conception of the rule of law and the broader effort to improve governance and prevent future challenges. Yet, distrust, whether grounded in experience or in well-founded or unfounded assumptions (including those related to the methodological shortcomings of rule of law assessments), gives rise to a demand for highly detailed regulation – even in areas that previously required no such oversight. The requirements of formal legality alone are insufficient. As Bedner argues, procedural compliance cannot guarantee substantively just outcomes. If many perceive the outcomes of legal processes as unjust, the legitimacy of the entire legal system may be endangered.<sup>75</sup>

Even comprehensive legislation with extensive safeguards is insufficient in the absence of trust in its implementation. A presumption of legal abuse persists where there is a lack of confidence in parliament and government. Although members of parliament are the custodians of popular sovereignty, and thus closest to the people in the chain of legitimacy, this distrust extends to them and, by implication, to the institutions they oversee.

This climate of distrust also generates uncertainty about which institution or legal solution may be challenged on rule of law grounds. A salient example is the judiciary: issues such as judicial administration, the selection and appointment of judges and court leaders, the scope of their powers, and even whether case allocation should be done by software rather than humans, have all become rule of law concerns.

Behind the increasing reliance on detailed regulation, the elimination of human discretion, automation and the diminishing space for political participation lies a deeper distrust of the state and those who exercise state power. While these measures are ostensibly aimed at ensuring the rule of law, they are, in fact, driven by a lack of trust in political authority.

The core questions remain: is there trust that power will not be abused? Does the law deserve confidence in its resistance to misuse? Here, too, a discrepancy emerges. New regulations are introduced in an attempt to compensate for the lack of trust in both legal norms and those in power – relying once again on the law itself to provide a solution.

As previously noted, the rule of law evolved organically in established democracies, through gradual development and experimentation. By contrast, Eastern European countries received it as a package of ready-made solutions, bypassing this

<sup>75</sup> Bedner, 2010, p. 64.

developmental process and largely ignoring national specificities. The advantage of the process lay in its speed, enabling the rapid establishment of democratic institutional systems. Its disadvantage, however, was the absence of natural progression, self-evidence, trust and experience. In practice, it did not always produce the intended outcomes.

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## 6. Conclusions

Today, the concept of the rule of law has become an interpretative principle in its own right – used by both advocates and critics – and even a form of ideological bias. It is employed in a variety of ways, not only by lawyers and politicians. The rule of law is now also a normative concept. The term ‘rule of law’ appears in the legislation of numerous countries, including constitutions, particularly in states with a history of dictatorship. It functions as a constitutional value category, yet it is not monolithic. It exists in different variants, and its adoption – specifically the preference for one model of implementation – varies across countries. The rule of law is a vision of the state: a general interpretive framework, a deliberately developed structural model shaped by the person and will of the state. This will is a fusion of the public interest and public law.<sup>76</sup>

Conceptions of the rule of law as an inherently moral ideal have often focused on abhorrent legal systems in which officials act out of self-interest, seeking to consolidate their own power and exploit the population. However, to

ascertain the considerations that in fact motivate evil officials, we would have to undertake a lot of social-scientific research within the legal systems of a wide range of countries. Such a project would undoubtedly involve complex questionnaires and interviews as well as careful observation of the patterns of official decisions and actions.<sup>77</sup>

It is a well-known critique that political rule of law ‘investigations’ lack sufficient depth. Numerous practical examples have led to disputes over how the rule of law should be interpreted. The issue is not the absence of definable content in the concept, but rather that any requirement or notion which fails to align with the socio-legal and institutional realities of a particular context cannot truly serve its purpose. The focus should therefore lie on ensuring that, as a normative standard, it is applied predictably and within a fair procedural framework.

<sup>76</sup> Tamás, 2005, pp. 227–231.

<sup>77</sup> Kramer, 2016, pp. 3–4.

This also necessitates a deeper understanding of the context in which these requirements operate. So-called rule of law rankings, for example, overlook this essential dimension. They attempt to compare the incomparable – using legal and institutional indicators, facts, assumptions and perceptions – while ignoring the vastly differing historical and cultural backgrounds of the assessed states. As a result, one country may be labelled a more complete *Rechtsstaat*, another a lesser one, or even an *Unrechtsstaat*. Yet in reality, concepts such as equality do not carry identical meanings across cultures. Moreover, recent developments in South Korea have shown how easily a functioning system of checks and balances may be dismantled with the stroke of a pen. A less frequently discussed challenge to the rule of law is the readiness with which societies abandon it in times of crisis, as well as the increasing tendency to delegate decision-making to ostensibly neutral algorithms. Both trends represent real and significant risks for which no adequate solutions currently exist.

In conclusion, modern democracies and legal cultures are rooted in the pursuit of freedom and the need to constrain arbitrariness and unchecked power. The concept of the rule of law – and the normative criteria it embodies – aims to offer a range of mechanisms to uphold this pursuit. However, in shaping both individual and institutional decision-making processes, we must remain aware of the need to realise the rule of law in ways that respect national specificities, rather than through rigid uniformity. The rule of law must be implemented in accordance with its purpose and through means that are both necessary and proportionate. This awareness should be at the heart of any dialogue on the rule of law. It is through such an approach that trust in state institutions – and in the EU institutions striving for a just society – can be built and sustained.

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## CHAPTER 2

# THE RULE OF LAW IN POLAND – VALUES AND LEGALISM



ANNA FABER-WIERCIŃSKA

### Abstract

The rule of law is one of the fundamental principles of a state's political system; however, in practice, its meaning proves to be non-uniform. The concept is generally understood as a set of principles and values that constitute the legal order of the state. This Chapter explores the understanding of the rule-of-law clause within the Polish legal system. It first presents the historical background to the introduction of this clause, which entered the Polish legal order through the December Amendment to the Constitution of the People's Republic of Poland in December 1989, serving primarily a symbolic function. It then outlines the definition of the rule of law coined by Polish legal scholars, who view the concept as encompassing systemic principles, fundamental rights and freedoms, and principles of good legislation. Further, the Chapter examines how this clause has been interpreted in the jurisprudence of the Constitutional Tribunal, and the role it has played in shaping the state's system. For the CT, the clause served as a source of systemic principles and individual rights and freedoms before the current Constitution came into force. Today, it is primarily interpreted as a source of the principles of good legislation.

**Keywords:** Art. 2, Constitutional Tribunal, December Amendment, democracy, legalism, rule of law

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## 1. Introduction

The principle of the rule of law is a cornerstone of a state's political system, setting boundaries within which public authorities may act. Although both states and the international community reference this principle, its practical meaning varies. It is therefore necessary to determine how the rule-of-law principle is understood within a particular national system and what significance it holds for the functioning of the state and its organs. This Chapter focuses on the distinctive nature of the rule of law in Poland, as seen from the constitutional perspective. Specifically, it addresses the historical context of the clause's introduction, its interpretation by the CT, and its relevance to the formation of the state system. The Chapter concludes by considering how this understanding affects the actions of Polish public authorities across the legislative, executive, and judicial branches.

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## 2. The Historical Background of the Rule-of-Law Clause in Poland

### *2.1. The Rule-of-Law Clause in the Polish Legal Order Since 1989*

The clause affirming the Republic of Poland as a democratic rule-of-law state was introduced at the outset of the systemic transformation in December 1989,<sup>1</sup> through amendments to the Constitution of the People's Republic of Poland of 22 July 1952. This was the second amendment in the spirit of democratic transition; the first, known as the April Amendment,<sup>2</sup> restructured the organisation of public authority but did not alter the state's fundamental principles. Rather, it introduced institutional reforms aimed at establishing a new system.<sup>3</sup> Only the December Amendment<sup>4</sup> – formally the Act amending the Constitution of the People's Republic of Poland, enacted on 29 December 1989 by the Sejm of the People's Republic of Poland (10th term) – altered the state's foundational principles.

This amendment changed the title of the Constitution to 'the Constitution of the Republic of Poland' and revised the heading of Chapter One to read 'The foundations

1 Banaszak, 2012.

2 i.e. the Act amending the Constitution of the People's Republic of Poland of 7 April 1989. It resulted from the so-called round table arrangements, i.e. a systemic agreement reached between the party representing the communist government (Pl. PZPR, Eng. the Polish United Workers' Party) and the so-called social party, representing the Solidarity movement. More on the historical background of the transformations in 1989, Sokolewicz, 1990, p. 23.

3 More on that: Kruk, 1998, pp. 57–58.

4 The Act of 29 December 1989 amending the Constitution of the People's Republic of Poland (Journal of Laws, No. 75, item 444).

of the political and economic system'. Art. 1, as amended, then read: 'The Republic of Poland is a democratic rule-of-law state, implementing the principles of social justice'.<sup>5</sup>

This formulation introduced three systemic clauses into the Polish legal order: the rule-of-law state, the democratic state, and the state implementing social justice. These clauses signalled a new axiological framework and set out directives, imperatives, and prohibitions.<sup>6</sup> The December Amendment also abolished the core principles of socialist constitutionalism, replacing them with those recognised in democratic legal orders. While intended as a temporary solution, the amendment addressed urgent obstacles to political, social, and economic transformation, and introduced reforms necessary for the transition process.<sup>7</sup> At the time, there was little prospect of the swift adoption of a new constitution.

The Legislative Commission worked on introducing amendments to the Constitution. Its working party proposed two versions of Art. 1 on 28 December 1989. The first read: 'the Republic of Poland is a democratic rule-of-law state' (*Rzeczpospolita Polska jest demokratycznym państwem prawnym*), and the second one: 'the Republic of Poland is a state of legality' (*Rzeczpospolita Polska jest państwem praworządnym*). The Commission adopted the first version by majority vote. During the Sejm's plenary debate, the provision was ultimately formulated as follows: 'the Republic of Poland is a democratic rule-of-law state and implements the principles of social justice' (*Rzeczpospolita Polska jest demokratycznym państwem prawnym, urzeczywistniającym zasady sprawiedliwości społecznej*).<sup>8</sup>

It should be noted that Polish scholars did not use the concept of a 'rule-of-law state' during the transformation period, and most jurists were unfamiliar with the term. The more familiar concept was that of legality (*praworządność*). During the Commission's deliberations, it was argued that the term 'legality' was better rooted in Polish legal scholarship than 'rule-of-law state'. Legality, understood as the obligation of state organs to act in accordance with the law, had already been envisaged in the Constitution of the People's Republic of Poland under the framework of socialist legality (*praworządność socjalistyczna*). It was believed that legality expressed the idea of the rule of law, and that introducing a new term would be unnecessary. Ultimately, however, the term 'rule of law' was chosen to highlight the systemic shift and to symbolise a departure from the previous regime of socialist constitutionalism, as a reference to legality alone could not fulfil that purpose.<sup>9</sup>

5 Morawska, 2003, pp. 14–19, 35.

6 Morawska, 2003, p. 35. More on the principles of the political, social and economic system in the December Amendment, see Mołdawa, 1993, p. 76.

7 Morawska, 2003, p. 25.

8 Wyrzykowski, 1998, p. 65. More on the opposing views expressed in the works of the subcommittee and on the proposals of the new wording of Art. 1, see: Morawska, 2003, pp. 30–37. The members of the subcommittee stated that the declaration 'the Republic of Poland is a democratic state' says too little, while the formulation 'a democratic rule-of-law state' refers to ample theoretical analyses.

9 Morawska, 2003, p. 34. Likewise: Tuleja, 2016.

The principle of a rule-of-law state, recognised as a fundamental element of the Republic of Poland's constitutional system, symbolised a departure from the socialist systems of Central and Eastern Europe. In the following years, several countries in the region adopted the same principle in their newly enacted constitutions.<sup>10</sup> The inclusion of this clause in the Polish legal order marked a turning point in the transition from real socialism to democracy symbolising the systemic transformation.<sup>11</sup>

The December Amendment was not a mere reform or revision but the start of a qualitative transformation. It also signalled the direction of the political and economic reforms that had begun in April 1989, aimed at building a fundamentally different system based on opposing political values.<sup>12</sup> With the introduction of this clause, a new formula of statehood emerged. In accordance with the amended provision, the Republic of Poland is a democratic rule-of-law state that implements the principles of social justice. The three systemic clauses introduced – democratic state, rule-of-law state, and state implementing social justice – reflected a new axiological order intended to serve as the foundation for the emerging constitutional system. These clauses also marked a rejection of socialist democracy, as expressed in Art. 7 of the Constitution of the People's Republic of Poland, under which power was exercised in a monocentric manner.<sup>13</sup>

This new axiological system was built upon the principles of democracy, human rights and freedoms, and legality. These values replaced the principles characteristic of totalitarian and authoritarian regimes, which aimed to create ideologically uniform states and societies.<sup>14</sup> The newly established legal principles underpinning the political system of the Republic of Poland included the principles of a democratic state, a rule-of-law state, and a state of social justice. In addition, the Constitution introduced the principles of national sovereignty, representative democracy, legality (obliging state organs to act within the law), political pluralism, and the participation

10 For example: Section 2(1) of the Constitution of the Republic of Hungary of 1990: 'the Republic of Hungary shall be an independent and a democratic state governed by the rule of law'. Art. 2 of the Albanian Act on the Fundamental Constitutional Regulations of 29 April 1991: 'The Republic of Albania is a democratic rule-of-law state'. Art. 1(3) of the Constitution of Romania of 9 December 1991: 'Romania is a democratic and social State governed by the rule of law (...)'. Art. 1 of the Constitution of the Slovak Republic of 1 September 1991: 'The Slovak Republic is a sovereign, democratic state governed by the rule of law (...)'. Art. 1 of the Constitution of the Czech Republic of 16 December 1992: 'The Czech Republic is a sovereign, unitary, and democratic state governed by the rule of law (...)'.  
 11 Morawska, 2003, pp. 15–16.  
 12 Morawska, 2003, p. 35.  
 13 The adopted shape of the clause of the democratic rule-of-law state constituted a revolutionary change. It meant severance with the principle of the sovereignty of the working people and introduction of the principle of the sovereignty of the Nation, as well as the expression of its will in the form of direct and indirect democracy. Cf. the resolution of the CT of 16 January 1994, W 12/94, OTK ZU No. 1/1996, item 4.  
 14 Kubiak, 1991, p. 15.

of local self-government in the exercise of power. Additionally, the freedom of economic activity was recognised as a foundational principle of the Republic.<sup>15</sup>

Between 1990 and 1997, a series of constitutional statutes were enacted as temporary solutions to prepare the ground for a comprehensive constitutional framework. During this transitional period, the clause on a democratic rule-of-law state ensured that public authority in Poland would operate within the framework of the Constitution and statutory law amid significant political and economic change.<sup>16</sup>

The Polish constitution-maker did not define the term ‘democratic rule-of-law state’. Although this notion appeared in the constitutions of other democratic countries, no universally accepted definition existed. Legal scholarship and jurisprudence have since offered varied interpretations of its constituent elements. Constitutional courts, in particular, have interpreted the term in context, inferring specific principles from it on a case-by-case basis.<sup>17</sup> Hence, when the clause was incorporated into the Polish Constitution, there was no comprehensive legal conception to clarify its meaning.<sup>18</sup> The Constitutional Tribunal (CT) gradually developed the content of the principle through its rulings, deriving from it such principles as citizens’ trust in law, trust in the state, protection of acquired rights, *lex retro non agit*, and the right to a court.<sup>19</sup>

In introducing the clause of a rule-of-law state into the Polish legal order, the Polish constitution-maker drew on the German concept of the *Rechtsstaat*.<sup>20</sup> This concept had been present in German political and legal thought for 150 years before it received a constitutional basis in the Basic Law of the Federal Republic of Germany of 23 May 1949. German legal scholars regard Arts. 20(1) and 28(1), first sentence, of the Basic Law as the legal foundation of the *Rechtsstaat*. Over time, this principle became firmly embedded as one of the fundamental principles of the Federal Republic of Germany’s free and democratic constitutional order.<sup>21</sup>

The idea of *Rechtsstaat* has consistently focused on limiting state arbitrariness and protecting individuals through appropriate legal procedures, ensuring at least a minimum level of rights and legal certainty – such as the predictability of the law. The concept also safeguards the constitutional system by upholding principles such as the supremacy of the constitution, the direct binding force of certain provisions, the unamendability of fundamental rights and constitutional principles, and judicial constitutional review. Furthermore, it provides for the right to resistance and the

15 Mołdawa, 1993, p. 75.; Kubiak, 1991, p. 16.

16 Morawska, 2003, p. 16.

17 Banaszak, 2012.

18 Wronkowska, 1995, p. 63.

19 Mołdawa, 1993, p. 78.

20 More on the source of the concept of *Rechtsstaat*, see Morawska, 2003, p. 9.

21 Art. 28(1), first sentence, states that ‘the constitutional order in the Länder must conform to the principles of a republican, democratic and social state governed by the rule of law within the meaning of this Basic Law’; Morawska, 2003, pp. 11, 59.

possibility of restricting the rights of individuals and organisations that violate or endanger the constitutional order.<sup>22</sup>

What served as a significant reference point for the Polish constitution-maker was the definition of a rule-of-law state developed in German scholarship, particularly by Klaus Stern. The post-war development of West German statehood demonstrated that the concept of *Rechtsstaat*, as constitutionalised in the Basic Law and elaborated by the Federal Constitutional Court, provided a model that stood in contrast to totalitarian regimes and the systems prevalent in Eastern Bloc states.<sup>23</sup> This explains the popularity of the *Rechtsstaat* concept among European states which, following dictatorial rule in the 1970s, transitioned to democracy and linked the *Rechtsstaat* with principles and values such as democracy, political pluralism, equality, justice, freedom, and above all human rights. European socialist states that dismantled totalitarian regimes soon followed suit.<sup>24</sup>

## ***2.2. The Rule-of-Law Clause Under the Small Constitution of 1992***

Subsequent amendments to the Constitution of the People's Republic of Poland<sup>25</sup> clearly showed that the document, following numerous changes and its incompatibility with emerging socio-political realities, had lost its regulatory capacity and failed to address the needs arising from systemic transformation. Therefore, in 1992, a new act was enacted – the Constitutional Act of 17 October,<sup>26</sup> commonly referred to as the Small Constitution. This act formally abolished the Constitution of 22 July 1952, as amended. However, certain chapters of the 1952 Constitution remained in force, particularly Chapter One, 'The Foundations of the Political and Economic System' containing the fundamental principles upon which the new system would

22 Wyrzykowski, 1998, pp. 66–68.

23 Morawska, 2003, p. 13.

24 Cf. the preamble to, and Art. 1 of, the Constitution of Spain and Art. 2 of the Constitution of Portugal. The states which in the 1970s, after the period of dictatorship, entered the circle of democratic states as part of restoring democracy and the rule of law introduced to their newly enacted constitutions the principle of the rule of law. Hungary also did that – it was the first state in Central Europe to introduce the rule-of-law clause to the legal order, Poland was the second state to do so, in enacting the December Amendment. More on that: Morawska, 2003, pp. 13–14; Kubiak, 1991, p. 16 and Wyrzykowski, 1998 pp. 65–66.

25 After the December Amendment, the subsequent amendments followed, in 1990 there were three of them: of 8 March (departure from the system of national councils, which represented state authority and served as organs of local self-government, introduction of the principle of territorial government as the basic form of organisation of public life in a commune), of 11 April (amendment of that of 8 March, the foundation for the restructuring of local administration), of 27 September (direct election of the President); two amendments in 1991 referring to parliamentary elections and the right to asylum; in 1992 – abolishment of honorary titles vested by the President; introduction of the National Broadcasting Council. More on that: Kruk, 1998, pp. 59–60.

26 The full name: The Constitutional Act of 17 October 1992 on the mutual relations between the legislature and executive of the Republic of Poland and on the territorial government, Journal of Laws of 1992 No. 84 item 426.

be built, including the provision concerning the rule-of-law state as envisaged in Art. 1 in its 1992 form.<sup>27</sup> During the period in which the Small Constitution remained in force, constitutional matters were not codified within a single act named ‘Constitution’ but were instead dispersed across several legal instruments of varying form.<sup>28</sup>

Notably, the enactment of the Small Constitution represented a break – achieved through evolution and within the framework of the prevailing constitutional order – with the constitutional continuity of the previous system. This shift occurred because the legal foundations of the state’s system now rested solely on provisions enacted or explicitly retained by decision of the Parliament of the Third Republic.<sup>29</sup>

### ***2.3. The drafting of Art. 2 of the 1997 Constitution***

The clause of a democratic rule-of-law state remained operative under constitutional statutes until 1997, when the current Constitution of 2 April 1997 came into force. The rule-of-law clause was incorporated into the new Constitution with wording identical to that of Art. 1 of the Constitution of the People’s Republic of Poland.<sup>30</sup> It is now found in Art. 2 of the current Constitution, which assigns to it new contents and functions. The entry into force of the new Constitution marked the end of the transitional period and the beginning of a new chapter in Polish constitutional law. The principle became the foundation of a new democratic system of values and aligned Poland’s constitutional framework with the principles of Western constitutionalism.<sup>31</sup>

The Constitutional Commission of the National Assembly (*Komisja Konstytucyjna Zgromadzenia Narodowego*, KKZN) oversaw the drafting of the 1997 Constitution. There was consensus on including the principle of the rule of law in the new Constitution. It was noted that the clause of a democratic rule-of-law state featured in many new constitutions of post-communist states and served to define the socio-political character of the state.<sup>32</sup> However, debates arose regarding whether the second part

27 Kruk, 1998, p. 62.

28 The Constitution of Poland in 1992-1997 was composed of the following acts: the Constitutional Act of 17 October 1992 on the mutual relations between the legislature and executive of the Republic of Poland and on the local government, as amended; the provisions of the Constitution of 1952 retained in force on the basis of Art. 77 of the Constitutional Act of 17 October 1992, which at the same time repealed that Constitution; the Constitutional Act of 23 April 1993 on the mode of preparation and enactment of the Constitution of the Republic of Poland, as amended. More on that Kruk, 1998, p. 63.

29 More on the content of the Small Constitution: Kruk, 1998, pp. 60–61; Mołdawa, 1993, pp. 86–92.

30 Tuleja, 2016. Its inclusion within the text of the new constitution was obvious to everyone. Out of the constitutional drafts lodged with the KKZN, only two – authorised by the Senate and the Confederation of Independent Poland did not contain the rule-of-law clause. See: Biuletyn KKZN No. VIII, p. 53.

31 See: Morawska, 2003, pp. 18, 339.

32 Biuletyn KKZN, No. VIII, p. 51.

of Art. 2 should be retained and, if so, what its precise content should be – whether the Republic of Poland should be described as a state implementing the principles of social justice, a state of social justice (*państwo sprawiedliwości społecznej*), a social state (*państwo społeczne*) or a societal state (*państwo socjalne*).<sup>33</sup>

The discussions also addressed whether the terms ‘democratic state’ and ‘rule-of-law state’ should appear together in a single provision.<sup>34</sup> Various formulations of the article were proposed, such as

the Republic of Poland is a republican democratic rule-of-law state, the Republic of Poland is a republican, democratic rule-of-law state implementing the principles of social justice, as well as the Republic of Poland is a democratic rule-of-law state implementing the principles of social justice, or also the Republic of Poland – the common good of all citizens – is a republican, democratic rule-of-law state, implementing the principles of social justice.<sup>35</sup>

It was also noted that it would be worthwhile retaining the existing concept of the rule-of-law state, which had functioned in Polish constitutional law since 1989 and had become firmly established in constitutional jurisprudence.<sup>36</sup> Ultimately, the following version was adopted: ‘The Republic of Poland is a democratic rule-of-law state, implementing the principles of social justice’.

The CT interpreted the literal repetition of the provision containing the rule-of-law clause as the constitution-maker’s intention to retain the previous formulation and understanding of the clause, as developed in constitutional practice, particularly in jurisprudence between 1989 and 1997. The CT further stated that the clause should be understood in the same way as under the previous constitutional order, though it acknowledged that modifications could arise from specific provisions of the new Constitution or from the general context of its norms. However, unless such modifications are clearly demonstrated, it must be assumed that the previous interpretations and constructs related to the principle of a democratic rule-of-law state remain applicable.<sup>37</sup>

During the Commission’s deliberations, a point of contention arose as to whether the principle of legality (i.e. the obligation of public authorities to act in accordance with the law) should be enshrined in a separate constitutional provision, given that legality is already encompassed within the rule-of-law principle.<sup>38</sup> It was observed,

33 Biuletyn KKZN, No. XI, pp. 115, 158–159, 198–199, 207.

34 Biuletyn KKZN, No. XII, p. 88.

35 Biuletyn KKZN, No. XIII, p. 7.

36 The discussion also concerned the issue whether to adopt the formula of a democratic rule-of-law state or a democratic state ruled by law. Eventually, it was recognised that the term rule-of-law state was more correct linguistically than a state ruled by law. See: Biuletyn KKZN, No. XIII, pp. 9–12, although it was noted that those terms do not differ and are treated equally even by the CT.

37 The judgment of the CT of 25 November 1997, K 26/97, OTK 1997, Nos. 5–6, item 64, p. 445.

38 Biuletyn KKZN, No. VIII, p. 55.

however, that the principle of legality had long featured in Polish constitutional provisions and had been well developed in the CT's jurisprudence. Omitting the principle could beg the question as to why the constitution-maker had deliberately excluded it, whereas explicitly including it would serve as a reminder to public authorities of their obligation to act within the bounds of the law. It was further suggested that the principle of legality represents a specific aspect of the rule-of-law state, and that comparative constitutional practice – for example, in Austria – supports the inclusion of both principles in separate provisions.<sup>39</sup>

### 3. Defining the Principle of a Democratic Rule-of-Law State

#### 3.1. Core Principles of a Rule-of-Law State

In the Polish legal system, the clause of a democratic rule-of-law state constitutes one of the foundational principles underpinning the state's legal and organisational framework. It is often referred to as a supreme principle of the Polish Constitution.<sup>40</sup> Scholarship emphasises that a rule-of-law state lacks a fixed legal or academic definition, and in constitutional theory, the clause is interpreted in different ways depending on which factors or features are highlighted. In jurisprudence, each court defines it with reference to the specific case at hand, inferring therefrom subsequent principles or elements of a rule-of-law state.<sup>41</sup> Moreover, the content of the concept of a democratic rule-of-law state continues to evolve. It encompasses a set of values, either explicitly or implicitly articulated in the Constitution, which form an open and dynamic canon. The normative content of the principles comprising the rule-of-law state may also evolve over time.<sup>42</sup> Although a precise definition of a democratic rule-of-law state should reflect the nature of the constitutional system and be grounded in the Constitution and jurisprudence, certain features are generally recognised as intrinsic. These include, *inter alia*, a democratic political system, legislation grounded in shared values, and the operation of state organs in accordance with the principle of legality. Each of these features incorporates specific principles that underpin the constitutions of contemporary democratic states.<sup>43</sup>

The concept of a democratic rule-of-law state in the Polish Constitution draws upon the proposals advanced by Klaus Stern in his 1971 rectoral address. He outlined therein eight core principles of a rule-of-law state. First, the state and its authority

39 Biuletyn KKZN, No. VIII, pp. 66–68.

40 See: Seweryński, 2022, p. 11. More on the legal meaning of the clause of a rule-of-law state: Wrótkowska, 2006, p. 101.

41 Banaszak, 2012.

42 Tuleja, 2016.

43 Seweryński, 2022, p. 11.

must be founded on the constitution as the highest-ranking legal instrument. Second, relationships between the state and its citizens is governed by fundamental rights – specifically, human and civil rights, which primarily ensure individual liberty. Third, state authority is not concentrated in a single institution but is functionally divided – typically among the legislature, executive, and judiciary. Fourth, the constitution and laws set the boundaries for all state actions: legislation defines the limits for the legislature, while administrative actions and judicial decisions are constrained by statutes and regulations. Fifth, all individuals are equal before the law, with equality serving as a link between the rule-of-law and democracy. In accordance with the sixth principle, extensive legal protection is provided by independent courts, operating under statutorily regulated procedures, including oversight of legislative actions. In such a state, there is a framework for holding public authorities accountable, including criminal and civil liability for harm caused to individuals or for infringements on their rights. The concept also includes operational principles for public authorities, as clarified by the Federal Constitutional Court of Germany, such as proportionality and the predictability of state intervention.<sup>44</sup>

### ***3.2. The Building Blocks of a Democratic Rule-of-Law State***

Polish constitutional scholarship identifies several components of a rule-of-law state: the sovereignty of the nation; democratic mechanisms for legitimising power; separation of powers; a hierarchical legal system in which the constitution and statutes hold a privileged position and serve as the basis for the functioning of state organs, especially with regard to citizens; judicial independence; robust systems for monitoring legal compliance by state authorities, particularly through constitutional adjudication; guarantees of citizens' rights and freedoms; and legislative principles such as the protection of citizens' trust in the law.<sup>45</sup>

A rule-of-law state requires a formal constitution – a legal document that provides the normative basis for the exercise of state power. This document holds primacy over other legal norms and prevails in the event of a collision with other norms. The constitution forms the foundation for the state's entire legal system, outlines the essential principles of the constitutional order, defines the entity vested with authority, and prescribes the mechanisms through which that authority is exercised. It also regulates citizens' rights, freedoms, and obligations, as well as the structure and organisation of public administration. Moreover, it defines the individual's position in the state, particularly in relation to the implementation of the principle of national sovereignty. The constitution is binding on all state authorities.<sup>46</sup>

44 Professor Dr. Klaus Stern, speech delivered by him as a rector, pp. 7–8, see: Stern, 1971; Zmierczak, 1992, pp. 41–52.

45 Wronkowska, 1995, p. 76.

46 Wyrzykowski, 1998, p. 70.

The principle of constitutional supremacy in the Polish legal order derives from Art. 8 of the Constitution. In negative terms, this means that no subordinate legal norm may conflict with the Constitution, either substantively or procedurally. In positive terms, all state organs are obliged to enforce and adhere to constitutional norms. The CT serves as the guardian of the Constitution.<sup>47</sup>

The Constitution defines the fundamental legal order, guarantees its coherence – especially in axiological terms – and serves as the foundational norm for the entire legal system. It is the highest-ranking legal source in the state.<sup>48</sup>

The next component of the clause of a democratic rule-of-law state is the principle of the hierarchy of sources of law. It stipulates that each legal enactment holds a specific position within the hierarchy of legal sources, and that lower-ranking enactments must conform to those of higher rank. In such a hierarchically organised system, the relative status and interrelations of legal acts can be clearly identified. This principle ensures the internal coherence of the legal system.<sup>49</sup> In a rule-of-law state, international legal norms are also respected within this hierarchical structure.<sup>50</sup>

In a rule-of-law state, law is superior to the state and serves as a framework for the functioning of both the state and society. This is reflected in the principle of legality (*legalność*, *legalizm* or *praworządność*), set out in Art. 7 of the Constitution, which builds upon Art. 2.

The principle of legality has two aspects: the first concerns the assumption and succession of power, while the second relates to the legal basis for the functioning of state organs. According to the former, the acquisition and transfer of power must be based on established legal rules. Power in a rule-of-law state must have normative legitimacy, although other forms of legitimacy may be acknowledged. What is impermissible, however, is the seizure of power through revolutionary means. With respect to the latter, the principle of legality requires that state organs act only within the limits permitted by law. Every act must have a legal basis and must not violate any other legal provisions.<sup>51</sup>

In a law-governed state, public authorities may be established only by law.<sup>52</sup> Legal norms define their competences, responsibilities, and operational procedures, as well as the limits of their activity. Public authorities may act only where

47 In accordance with Art. 8(1) of the Constitution, the Constitution has the supreme legal force: ‘The Constitution shall be the supreme law of the Republic of Poland’, and links the highest rank of the norms contained in the Constitution with the principle of their direct application, which is envisaged in Art. 8(2). More on that: Wyrzykowski, 1998, p. 70; Muszyński, 2024, pp. 30–32; Syryt, 2019, pp. 35–43.

48 Cf. Wronkowska, 1995, p. 71; Banaszak, 2012; Skrzydło, 2004, pp. 25–26.

49 Sokolewicz, 2016.

50 Wronkowska, 1995, p. 71; Muszyński, 2024, pp. 5–48.

51 Wronkowska, 1995, pp. 67–68.

52 The legislative power is bound by constitutional norms, the executive and judicial powers are bound by statutes. All organs are also bound by non-state law, which the state committed to observing. Banaszak, 2012.

authorised by law, and only within the scope so authorised. Citizens have the right to demand that a legal basis be cited for any action taken by a public organ. This legal framework applies to all branches of public authority and is intended to protect individuals from arbitrary state interference and the abuse of power. It also guards against the instrumentalisation of law according to the political group in power. The subordination of public authority to law symbolises the freedom of citizens, understood as protection from illegitimate and unforeseeable interference in their lives.<sup>53</sup>

In a rule-of-law state, law operates within a coherent system and is enacted through democratic procedures. It also reflects a universally recognised axiological system, with human dignity and freedom at its core.<sup>54</sup>

A rule-of-law state also has an extensive system of specialised institutions, tasked with ensuring that all actors comply with the law and with restoring legal order where necessary – especially in relations between the state and the individual. In Poland, these responsibilities are assigned to the CT, the Commissioner for Human Rights, the Supreme Administrative Court (SAC), and independent courts.<sup>55</sup>

Another key element of a rule-of-law state is the principle of the separation of powers, which governs the relationships among state organs. This principle rejects the concentration of power in a single entity and prevents any one branch from dominating the others – a situation that could lead to abuses and dysfunctions in public life. It safeguards against antidemocratic governance and promotes respect for civil rights and freedoms.<sup>56</sup> It also ensures that state organs function effectively, divide responsibilities rationally, and collaborate appropriately. A crucial aspect of this principle is the clear delineation of the tasks and competences of each organ, which facilitates accountability and enables individuals to enforce their rights before the court.<sup>57</sup>

What is essential in a rule-of-law state is not merely the division of functions among the legislative, executive, and judicial powers, but the presence of a mutual system of checks and balances. Power is divided so that it can be constrained – thus guaranteeing the freedom of the individual. The Preamble to the Constitution expressly affirms the obligation of the powers to cooperate.

This principle is envisaged in Art. 10(1) of the Constitution. It vests legislative power in the Sejm and the Senate, executive power in the President and the Council of Ministers, and judicial power in the courts and tribunals. These organs, acting on behalf of the Nation, are responsible for legislating, governing, and administering

53 Wronkowska, 1995, p. 70.

54 Wronkowska, 1995, p. 70.

55 Skrzydło, 2004, p. 110.

56 Wyrzykowski, 1998, p. 78.

57 Wronkowska, 1995, pp. 69–70.

justice. Each branch influences the functioning of the others, as complete separation is impossible.<sup>58</sup>

A rule-of-law state is characterised by the sovereignty of the nation, which underpins the democratic legitimisation of state authorities and the democratic process of lawmaking, as well as the establishment of institutions responsible for holding state organs accountable.<sup>59</sup> A further essential element is the existence of a democratically elected parliament that exercises legislative authority on behalf of the people. Only the parliament, as the representative of the sovereign – namely the people or the Nation – may enact statutes, which constitute the highest-ranking legal acts. This legitimacy accounts for the privileged position of statutes within the legal system. Historically, the enactment of law by an elected parliament was seen as ensuring its justness. Today, this requirement is instrumental: it increases the likelihood that legal norms will align with the axiological system accepted by society.<sup>60</sup> In the Polish legal order, this principle is enshrined in Art. 4.

In a rule-of-law state, law must satisfy specific requirements relating to its enactment, systemic structure, and normative content. Law must be enacted democratically – meaning that legislative action must derive from direct democratic legitimacy (as in the case of the constitution-maker or legislator) or indirect legitimacy, derived from their mandates. The democratic nature of law enactment also entails transparent legislative procedures and negotiated law-making processes. This means that the parties concerned reach agreement on the content of the legal norms that will govern them. A negotiated form of law-making implies that the recipients of legal norms participate in shaping their substance.<sup>61</sup>

The concept of a rule-of-law state also encompasses fundamental rights – namely dignity, freedom, and equality – which constitute its foundation. In such a state, the legal status of the individual must be determined primarily by constitutional norms. An effective mechanism must also exist to prevent violations of fundamental rights. To safeguard this sphere of liberty, the state must both refrain from undue interference and undertake positive measures to ensure freedom. Legislation plays a crucial role in this respect: it is the obligation of the legislature to enact legal norms that enable individuals to exercise their rights, protect them from infringements by others, and provide procedural guarantees allowing them to seek enforcement when those rights are violated. At the same time, legislators must avoid discretionary encroachment upon the sphere of individual rights.<sup>62</sup>

Another feature of a rule-of-law state is legal certainty, which is ensured through principles guiding legislative activity – particularly with regard to individuals. These principles include the clarity and precision of law, the prohibition of excessive

58 More on the division of functions and on the mechanism of mutual balancing, see: Wyrzykowski, 1998, pp. 78–79.

59 Banaszak, 2012.

60 Wronkowska, 1995, pp. 65–70.

61 *Ibid.*, p. 70.

62 *Ibid.*, p. 72.

interference, the prohibition of retroactive legislation, and the principle of protecting trust.

The principle of protecting citizens' trust in the law entails the belief that all state organs will comply with the law in force. This obligation extends to the legislative bodies, which must observe procedural rules governing the form, content, and method of enacting legislation.<sup>63</sup> The principle is based on the trust that law constrains, separates, and rationalises state authority, and that it is capable of shielding individuals against abuse of power. It also requires the permanence and predictability of state decisions.<sup>64</sup> This principle applies to both the enactment and application of law – legislation and judicial rulings must not subject individuals to legal consequences that they could not have reasonably foreseen when making a decision or taking action.<sup>65</sup>

Legal systems in rule-of-law states must also be accessible and clear. The system of norms should be structured in a way that allows individuals to readily obtain legal guidance. Citizens should be able to determine which substantive norms are in force, which authority is empowered to enact rules in a given area, in what form such rules are made, and where they are promulgated.<sup>66</sup>

When legislators impose obligations on citizens, such obligations should be based on clearly defined prerequisites. These criteria enable individuals to anticipate the conduct of state organs and monitor them for arbitrariness. In the absence of such clarity, arbitrary decisions become more likely.<sup>67</sup>

The activity of legislative and other state organs must also adhere to the principle of proportionality. Among available lawful measures, they should select those that are most effective in achieving objectives while imposing the least burden on affected individuals. If a measure must be dissuasive, it should be so only to the extent necessary to accomplish its intended purpose.<sup>68</sup>

Decisions made by public authorities in a rule-of-law state must not be arbitrary or unpredictable: they must instead promote legal certainty and stability. This stability refers not to the permanence of individual legal provisions, but to the continuity of rights granted to individuals. The legislator must also respect acquired rights, uphold the prohibition of retroactive and generally retrospective – laws and mitigate any burdens arising from legislative amendments.<sup>69</sup>

Departures from these principles may be justified only in exceptional circumstances, unforeseen by the legislature. In such cases, compensatory measures should be introduced to mitigate the resulting inconvenience.<sup>70</sup>

63 *Ibid.*, p. 75.

64 Banaszak, 2012.

65 Wyrzykowski, 1998, p. 83.

66 Wronkowska, 1995, p. 74.

67 *Ibid.*, p. 74.

68 *Ibid.*, p. 74.

69 *Ibid.*, p. 75.

70 *Ibid.*, p. 75.

To guarantee the effective protection of individual rights, institutions must exist through which individuals may assert those rights. These include the right to a fair trial before an impartial court, the right to a defence during proceedings, and the right to have one's case resolved within a reasonable time.<sup>71</sup>

The historical development of the rule-of-law state concept allows a distinction between the formal and substantive models. In the formal sense, the rule-of-law state requires all subjects, especially state organs, to act in accordance with the law, as set out in Art. 7 of the Constitution.<sup>72</sup> This provision mandates that the organisation, competence, and functioning of state organs must be grounded in statute. The consequence thereof is the adoption of the principle that a public authority is prohibited from acting unless expressly authorised by law. This imperative to abide by the law applies to both the enactment and application of legal norms, whereby the law itself determines the conditions of its creation, its binding force, and the circumstances under which it ceases to be binding.<sup>73</sup>

The formal model is also based on the principles of constitutionalism, separation of powers, judicial independence, legality – especially in the sense that courts and the administration are bound by statutes – and the primacy of the statute. These principles imply that state interference in individual freedoms or property is permissible only on the basis of statutory authorisation. They also encompass the prohibition of retroactive laws, the existence of a robust legal framework for supervising compliance with the law by state organs, particularly the executive, and the liability of the state and its officials for unlawful actions. In this model, administrative courts play a central supervisory role.<sup>74</sup>

Within the formal conception, law takes precedence over the state, its organs, and individuals. The state is governed by law – more precisely, by statute – and is thus a 'state of the statutes'. Statutes are regarded as the primary and sole source of law, which makes the entire legal system one of enacted norms. The ideal of a rule-of-law state can only be realised by adhering to statutes. It is the statute that confers rights and freedoms, delineates the boundaries of state authority, and regulates the scope and methods of governance, particularly in relation to the executive.<sup>75</sup> In this framework, the 'rule of law' – not the 'rule of the people' – is the authoritative principle. This means that state authorities are bound by laws they themselves enact, both in their legislative and administrative capacities.<sup>76</sup>

However, adherence to these formal elements does not entail a requirement for the state to undertake a specific action. The purpose and essence of the formal model

71 Wyrzykowski, 1998, pp. 82–83.

72 Seweryński, 2022, p. 13.

73 More on that: Skrzydło, 2004, p. 109.

74 See Morawska, 2003, p. 64; Karp, 2004, p. 182. Cf. Skrzydło, 2004, p. 109.

75 See Morawska, 2003, p. 65.

76 Cf. Skrzydło, 2004, p. 109.

is to establish procedural and organisational constraints that limit the abuse of state power against individuals.<sup>77</sup>

Nevertheless, a state that meets these technical legal requirements without respecting a higher normative order remains merely a formal rule-of-law state.

By contrast, the substantive model of the rule-of-law state requires that the content of law reflect certain moral ideals. Law must respect human rights and serve the principles of justice. State activity should be guided by values such as social justice and support for individuals in financial hardship. The ultimate aim is to guarantee and uphold human rights and freedoms, including those enshrined in the Constitution, as well as the equal treatment of all citizens.

The next value in such a state is democracy, which stipulates that legislative bodies and other supreme state organs are formed through universal elections. Substantive elements also include political pluralism,<sup>78</sup> the principle of local self-government, sovereignty, and the guarantee of public participation in decision-making, as well as an independent judiciary that oversees the legislature and the executive.

A substantive rule-of-law state, in this sense, is not the opposite of a formal one. Rather, the formal elements complement the requirements of substantive constitutional law – by making the abuse of public power against citizens more difficult, and by prohibiting such abuse through constitutional norms.<sup>79</sup>

It is noted in scholarship that the concept of a rule-of-law state should not be examined by separating formal and substantive aspects, as a comprehensive analysis must consider both. Scholars also emphasise that privileging one dimension is rare and that it is essential to integrate formal and substantive elements to fully comprehend the essence of a rule-of-law state. These elements were brought together in response to totalitarian regimes, as avoiding substantive value judgments may result in recognising such regimes as rule-of-law states. Conversely, the development of substantive elements revealed the importance of grounding them in the values inherent in democratic governance.<sup>80</sup>

### ***3.3. The Democratic Character of the State***

The principle of democracy is one of the core elements of a democratic rule-of-law state, as enshrined in Art. 2 of the Constitution. Etymologically, democracy denotes the rule of the people. Its objective is to enable the majority of citizens to influence public authorities and participate in state decision-making, while also shaping social reality according to their will. The democratic system thus protects the will of the majority, with respect for the voice of the minority. It embodies the ideals of freedom and justice, ensuring equality and access to political participation

<sup>77</sup> Morawska, 2003, p. 64; Wyrzykowski, 1998, p. 67.

<sup>78</sup> Banaszak, 2012.

<sup>79</sup> Cf. Skrzydło, 2004, p. 110; Wyrzykowski, 1998, p. 69.

<sup>80</sup> Banaszak, 2012.

and influence over social affairs.<sup>81</sup> A democratic state is characterised by a political system in which the nation is the sovereign, and supreme authority rests with the people. The nation exercises this authority either directly or indirectly through its democratically elected representative.<sup>82</sup>

The principle also encompasses the democratic process of law-making. This is visible in both parliamentary and non-parliamentary stages, which involve the participation of multiple stakeholders, including public consultations and hearings. Law, in this context, expresses the general will, shaped through procedures that include diverse social groups.

Describing the rule-of-law state as ‘democratic’ serves as an interpretative directive for clarifying the principles, rules, and values inferred from the rule-of-law clause. The term ‘democratic’ means that only institutions endowed with democratic legitimacy – directly or indirectly conferred by the people – may perform authoritative public functions. These institutions are obliged to act in the interest of the nation, as failure to do so may result in the loss of legitimacy.<sup>83</sup> Another feature of democracy is the constitutional structure based on the separation and mutual balance of powers: legislative, executive, and judicial. The legislative power is exercised by the parliament, elected in democratic elections. It operates democratically – in a manner open to the public – guarantees the participation of the opposition in deliberations, and adopts resolutions by a majority of votes. The executive power is exercised by the president, who is elected in universal elections, and by the government. The judicial power is exercised by courts and tribunals, where independent judges adjudicate. In a democratic state, public authorities are accountable and subject to oversight. The parliament is accountable to voters, and its statutes are subject to constitutional review by a constitutional court. The government is accountable to the parliament, and constitutional liability also applies.<sup>84</sup>

Democracy also requires that the processes of enacting, interpreting and applying law follow rigorous democratic principles. The relationship between democracy and the rule-of-law state lies in the fact that law – the central category in such a state – must be informed by democratic values, from its creation and content to its interpretation and application. The purpose is to guarantee political pluralism, freedom to form political parties, representative democracy through elections, mechanisms of direct democracy such as referenda, and the role of various forms of social self-government, including local government.<sup>85</sup>

81 Chmielewski, 2020, pp. 4–5.

82 Seweryński, 2022, p. 12.

83 See: Sarnecki, 2014, pp. 71–72.

84 Seweryński, 2022, p. 12.

85 Cf. Grochowski, pp. 140–149.

### 3.4. *Embedding Social Justice in the Rule-of-Law State*

Art. 2 of the Constitution also declares that the Republic of Poland is a state implementing the principles of social justice. This general clause<sup>86</sup> imposes certain legal obligations on the state. These include the incorporation of social justice standards into legislation, as well interpretative guidance for other legal provisions.<sup>87</sup> The term ‘principles of social justice’ guides the operation of state organs and other entities.<sup>88</sup>

The concept of ‘justice’ in this context is inherently ambiguous and subject to change.<sup>89</sup> Aristotle distinguished between *justice sensu largo*, understood as encompassing all human virtues, and *justice sensu stricto*, which includes distributive and corrective (equalising) justice. According to this conception, equal situations should be treated equally. Within corrective justice, good must be repaid with good, and wrong with proportionate redress; in distributive justice, individuals sharing relevant characteristics should receive equal treatment in the distribution of goods or burdens.<sup>90</sup> In this sense, each individual ought to receive what he or she deserves, based on merit, effort, or ability.<sup>91</sup>

The adjective ‘social’ indicates that the constitutional principle in question pertains to relations among groups – that is, categories, classes, or strata of society – rather than relations among individuals, between individuals and groups, or between individuals and the state. Thus, the provision does not address subjective perceptions of justice, but rather justice as a social construct. From this perspective, the principle of justice informs the substance of other constitutional norms and imposes an obligation on the state to pursue economic policy aligned with the social interest, rather than merely protecting disadvantaged groups. It is therefore incumbent upon the legislature to ensure the implementation of social justice within economic development, through instruments which need not be legal in nature – such as subsidies or taxes.<sup>92</sup> ‘The implementation of the principles of social justice’ is an imperative,

86 Karp, 2004, pp. 169–172.

87 The principle of social justice impacts the content of constitutional norms related to the rights and freedoms of the individual, in particular, this refers to the principle of equality. Equality should not be comprehended in a total manner as equality in every aspect, whereas such tendencies were present in the period of real socialism and were visible in the expansion of equality into the socio-economic sphere. See: Banaszak, 2012.

88 Ziemiński, 1996, p. 9.

89 *Ibid.*, p. 11. One of the general definitions of justice is the obligation to determine actions with regard to other subjects from the perspective of equality, which assumes balance between burdens and prizes as well as mutual gains. See Karp, 2004, pp. 36–38, 54–57.

90 Inequality may not arise in a relation between equal parties. For example, one should follow justice while examining two identical legal cases, as everyone must be equal before the law. More on the conceptions of justice, see Ziemiński, 1995, p. 13. More on the views of Aristotle, I. Kant or J. Rawls see: Karp, 2004, p. 69.

91 Chmielewski, 2020, p. 7.

92 Banaszak, 2012.

directed at the state, to properly shape legislative acts,<sup>93</sup> to ensure a baseline of justice within social structures, and to guarantee dignity, equality of rights, social solidarity, and a minimum level of social security or subsistence for those who are involuntarily unemployed.<sup>94</sup> This imperative entails an expectation that the state will create conditions that shield individuals from harm, although it does not confer specific enforceable claims by the aggrieved citizen against the state.

It is also widely accepted that social justice, in this context, refers to a form of justice that is socially institutionalised and relates to issues of general societal concern. It does not extend to questions of individual fairness in private matters, such as the outcome of an artistic competition.<sup>95</sup>

Social justice also concerns the welfare of every member of society. It requires the introduction of incremental changes to the social, political, and economic life of the state that progressively bring society closer to the ideal of social justice.<sup>96</sup>

The clause of a democratic rule-of-law state does not have a universally accepted meaning. It is generally understood as a set of values and principles. Polish legal scholarship widely recognises that the key elements of a rule-of-law state include, *inter alia*, democracy, legality, the hierarchical structure of legal sources, constitutionalism, judicial independence, the separation of powers, national sovereignty, citizens' rights and freedoms, elements of good legislation or social justice. These features are also reflected in the provisions of the Polish Constitution.

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#### 4. CT Jurisprudence on the Democratic Rule-of-Law State

The provision declaring the Republic of Poland to be a rule-of-law state is a general clause and a vague concept. In applying such clauses, the legislator acknowledges that their meaning may be specified through judicial practice. Accordingly, it is the constitutional adjudicating bodies that are authorised to define the content of the clause in the course of legal interpretation and application. The actual substance of the clause is therefore revealed only through the application of the law.<sup>97</sup> Thus, also considering the lack of a universal scholarly definition of the rule-of-law state, it is necessary to rely on the constitutional jurisprudence of the relevant country to interpret the concept.

93 Ziemiński, 1996, p. 56.

94 Tuleja, 2016. However, social justice is not an idea, which serves to guarantee welfare or happiness to every subject. Nor does it require that everyone at any moment of their life, possess equal fortune regardless of how much they work or that they be able to fulfil all their costly wishes. More on that: Karp, 2004, p. 65.

95 Ziemiński, 1996, p. 56.

96 Domańska, 2001, p. 57.

97 Morawska, 2003, p. 237.

The CT has contributed to the development of this concept since it was first introduced into the Polish legal order. Soon after the adoption of the December Amendment to the Constitution of the People's Republic of Poland, the CT began building its jurisprudence concerning former Art. 1 – a line of reasoning later continued under the new Constitution.

The current Constitution includes certain elements of a rule-of-law state that were not previously codified, but which the CT had derived from the rule-of-law clause – notably, human rights, fundamental freedoms, and systemic norms. The entry into force of the 1997 Constitution did not signal a rupture with previous the developments in the interpretation of the clause. Even where specific elements are now expressly provided for elsewhere in the Constitution, they remain within the scope of the rule-of-law clause. The CT itself acknowledged that Art. 2 continues to serve as a source of many principles not *expressis verbis* contained in the Constitution. In its judgment of 25 November 1997, the CT observed that the literal repetition of the former Art. 1 in the new Art. 2 should be regarded as a clear indication of the constitution-maker's intention to preserve the established interpretation of the democratic rule-of-law clause developed in constitutional practice, especially in the jurisprudence of the preceding eight years. It further held that the essential meaning of the principle under Art. 2 ought to be interpreted in continuity with its previous understandings, unless it is demonstrated that modifications have occurred. These may arise from particular provisions in the new Constitution or from the broader constitutional context. Absent such demonstration, the earlier interpretations and doctrinal constructions remain valid.<sup>98</sup>

Above all, the CT defined the principle of a democratic rule-of-law state as a collection of 'diverse values, which are explicitly or implicitly expressed in the Constitution, and which refer to law, the state's system as well as relations between the state and individuals'.<sup>99</sup> It also emphasised that this set of values is inherently open-ended.<sup>100</sup> This Chapter now turns to the systemic principles that, according to the CT, are encompassed within the rule-of-law clause.

#### ***4.1. Systemic Principles Derived from the Rule-of-Law Clause***

The clause encompasses several systemic principles: sovereignty, democracy, the separation of powers, legality, decentralisation, and political pluralism. In its judgment K 32/09 concerning the ratification of the Treaty of Lisbon, the CT held that sovereignty is expressed in the Constitution not only through the preamble but also through the very existence of the fundamental law and the declaration in Art. 2 that the Republic of Poland is a democratic rule-of-law state.<sup>101</sup> According to the

<sup>98</sup> The judgment of the CT of 25 November 1997, K 26/97, OTK ZU No. 5-6/1997, item 64.

<sup>99</sup> *Ibid.*

<sup>100</sup> Węśławska-Misiurek, 2021, p. 19.

<sup>101</sup> The judgment of the CT of 24 November 2010, K 32/09, OTK ZU No. 9/A/2010, item 108.

CT, the sovereignty and independence of the Republic affirm the Polish Nation's exclusive right to determine its own fate. The Constitution – and in particular its preamble and Art. 2 – constitutes the normative expression of this principle, which manifests in the inalienable powers of state organs that form part of the constitutional identity of the state.

Another systemic principle derived by the CT from Art. 2 is the principle of legality. In its judgment K 7/90, the CT affirmed that legality is embedded within the rule-of-law clause.<sup>102</sup> Specifically, Art. 7 of the Constitution states that 'organs of public authority act on the basis of and within the limit of the law'. This provision, according to the CT, establishes one of the fundamental principles of a modern rule-of-law state. Legality, as a formal constraint on public authorities, is intrinsic to the concept of a democratic rule-of-law state and is often considered one of its essential components.<sup>103</sup> The CT clarified the detailed content of the aforementioned principle, which comprises the following elements: (1) the requirement that public organs possess legitimacy to undertake any authoritative action; (2) the prohibition against assuming the powers of other public authority organs; (3) the restriction on the legislator's arbitrariness in assigning powers to other entities; (4) the prohibition against interpretations that falsely treat actions, which *de facto*, transgress the powers of a given entity as the lawful exercise of those powers; and (5) the prohibition – unless expressly permitted by law – against public authority organs delegating their powers and tasks to another entity.<sup>104</sup>

In the judgment K 14/92, the CT clarified that the constitutional principle of a rule-of-law state, as set out in Art. 1 of the Constitution and the principle of legality in Art. 3 of the [former] Constitution, entails a norm prohibiting state organs from enacting normative acts inconsistent with acts of a higher rank, as well as a norm requiring each organ to act exclusively within the limits of its powers conferred by law. Any violation of law by a state organ, including in the legislative process, constitutes a failure to fulfil the obligation to abide by legal norms.<sup>105</sup>

The CT further emphasised that the principle of legality forms the foundation of state organs' operation. This means that each state organ may act only within the scope authorised by law and solely on the basis of legal provisions. Failure to comply with this obligation renders such actions unlawful.<sup>106</sup>

The CT also observed that democratism, as an inherent element of a rule-of-law state, requires combining the formal and substantive dimensions of the rule-of-law state principle, as explicitly stated in the Polish fundamental law. Minimum content requirements for legislation enacted by the Polish legislator include, *inter*

102 See also *inter alia* the ruling of the CT of 24 October 1995, K 14/95, OTK No. 2/1995, item 12; the ruling of the CT of 23 October 1996, K 1/96, OTK No. 5/1996, item 38.

103 See the decision of the CT of 30 November 2023, K 16/20, OTK A/2023, item 99.

104 Cf. the decision of the CT of 30 November 2023, K 16/20, OTK-A 2023/99 and the jurisprudence cited therein.

105 The ruling of the CT of 19 October 1993, K 14/92, OTK No. 2/1993, item 35.

106 The resolution of the CT of 16 March 1994, W 8/93, OTK p. I/1994, item 18.

*alia*, adherence to the principle of democracy.<sup>107</sup> According to the CT, the principle of democratism, understood as a component of the rule-of-law state envisaged in Art. 2 of the Constitution, requires not only embedding law in democratic values but also basing the entire process of creating, interpreting and applying law on the rigours of democracy. Moreover, democratism demands that democratic institutions and procedures be designed and function in a manner consistent with the requirements of a rule-of-law state.

The CT noted, drawing on legal scholarship, that democracy is such a broad and ambiguous concept that it must be specified by reference to ‘parallel’ constitutional principles such as the sovereignty of the nation, the separation and balance of powers, political freedoms of the individual, political pluralism, civil society and free elections. Democratism as an inherent element of the principle of a democratic rule-of-law state, encompasses not only the obligation to guarantee the sovereign the ability to elect its representatives in democratic parliamentary elections and to safeguard political pluralism, but also the freedom for citizens to organise themselves from the bottom up. Moreover, the CT clarified, *inter alia*, that the substantive dimension of the principle of a democratic rule-of-law state requires law to reflect values aligned with the democratic character of the state. These include the freedom of association, allowing citizens wishing to combine their activities to choose freely the legal and organisational form best suited to their objectives.<sup>108</sup>

The next principle inferred by the CT from the clause under discussion is the separation of powers.<sup>109</sup> The issue of separation of powers appeared in the CT’s jurisprudence even before it was codified in Art. 1 of the Small Constitution. According to the CT, a core component of the separation of powers is the judiciary’s ability to review acts undertaken by the other branches, including norms enacted by the legislature. This was articulated in ruling U 6/92,<sup>110</sup> in which the CT held that in a democratic rule-of-law state based on the division of powers, it is unacceptable to enact legal norms that cannot be reviewed for conformity with the constitution through proceedings designed to eliminate existing inconsistencies. After the Small Constitution entered into force, the CT confirmed that the principle of separation was explicitly enshrined in Art. 1.

As the CT highlighted, in a democratic rule-of-law state founded on the separation of powers, enacting law is the domain of the legislative branch, which enjoys significant discretion in determining the content of law, subject to constitutional limits.<sup>111</sup>

107 The judgment of the CT of 1 July 2012, K 8/10, OTK ZU No. 7/A/2012, item 78.

108 *Ibid.*

109 Cf. the ruling of the CT of 21 November 1994, K 6/94, OTK No. 2/1994, item 39; the ruling of the CT of 9 January 1996, K 18/95, OTK No. 1/1996, item 1.

110 The ruling of the CT of 19 June 1992, U 6/92, OTK No. 1/1992, item 13.

111 See the ruling of the CT of 20 November 1996, K 27/95, OTK No. 6/1996, item 50. Cf. also the ruling of the CT of 23 October 1996, K 1/96, OTK No. 5/1996, item 38; the ruling of the CT of 9 January 1996, K 18/95, OTK No. 1/1996, item 1.

The CT also examined the significance of Art. 2 of the Constitution in delineating the boundaries of permissible influence among the branches of state authority, for instance in the context of ‘freezing’ judges’ salaries. The CT highlighted that in a democratic rule-of-law state based on the separation of powers, it is impermissible for one branch – the judiciary – to be undermined by others, for example through measures affecting judges’ financial security, as this could create dependency on the other powers and erode judicial authority.<sup>112</sup>

Decentralisation is another principle extracted by the CT from the rule-of-law clause, discussed *inter alia* in the judgment K 1/96.<sup>113</sup> The CT observed that the Republic of Poland guarantees local self-government participation in the exercise of power. This principle obliges the state to establish legal frameworks enabling local self-government to participate effectively in the exercise of state authority.

The CT further stressed that the principle of a democratic rule-of-law state, together with the requirement that the Republic of Poland be treated as a common good of all citizens, means that the tasks of central state administration must serve the fulfilment of social needs. The activities of local government administration, subordinate to the central authorities, undoubtedly serve the interests of local communities.<sup>114</sup>

In its jurisprudence, the CT also clarified the scope of decentralisation, arguing that it does not preclude excluding certain issues from the powers of local organs and delegating them to other state authorities; however, such exclusions should comply with the Constitution, be enacted by statute and respect the requirement of rationality. Decentralised organs are characterised by self-reliance – the right to act with relative independence within statutory limits – and independence, understood as freedom from interference by higher-level authorities. The boundaries of decentralisation may also depend on changes in state policy, the condition of the local economy and the need to adapt administration to the delivery of public services in line with the principle of subsidiarity. The underlying social and constitutional premise is to place the administrative apparatus responsible for fulfilling tasks as close to citizens as possible. However, this must be implemented with due consideration of the socio-economic circumstances affecting the changes.<sup>115</sup>

What is also connected with the clause of a democratic rule-of-law state is the principle of political pluralism. In the judgment Pp 1/99, the CT clarified the meaning of this principle, the foundation of which is ‘the freedom to establish political parties and their freedom to operate’. It further indicated that political pluralism is regarded as an inviolable systemic principle due to the significance and role of political parties in a democratic state. Its content is determined by other fundamental principles of the Republic’s constitutional system, in particular the

112 The judgment of the CT of 12 December 2012, K 1/12, OTK ZU No. 11/A/2012, item 134.

113 The ruling of the CT of 23 October 1996, K 1/96, OTK No. 5/1996, item 38.

114 The judgment of the CT of 6 June 2006, K 23/05, OTK ZU No. 6/A/2006, item 62.

115 The judgment of the CT of 18 July 2006, U 5/04, OTK ZU No. 7/A/2006, item 80.

principle of a democratic rule-of-law state (Art. 2), the principle of the Nation's supremacy (Art. 4) and the principle of legality (Art. 7). The CT emphasised that political parties are obliged to respect democratic principles both in their internal organisation and in their activities. It added that, under previous constitutional provisions, this obligation was inferred not only from the requirement to apply 'democratic methods', but also from 'the essence of the functioning of a democratic rule-of-law state'.<sup>116</sup> The same ruling underlined that political parties constitute an indispensable element of a liberal democratic legal order. Moreover, it explained that

what follows from the fact that political parties are rooted both in the individual's freedom to realise his/her political aspirations in an organised form, as well as from the fact that these organised forms impact the state's policies, are general constitutional assumptions referring to the principles of the freedom to establish political parties and the freedom of political parties to operate, as well as the limitations acceptable in that regard.

#### ***4.2. The Rights and Freedoms of the Individual***

The rights and freedoms of the individual arising from the principle of a rule-of-law state include the right to a court, the right to life, the right to privacy, the right to the protection of dignity, the individual's right to the protection of personal data, and the principle of proportionality. These principles are currently *expressis verbis* stated in the Constitution, whereas previously they were derived from the democratic rule-of-law state and supplemented the then incomplete constitutional catalogue. They are divided into two groups. The first includes measures for the protection of rights and freedoms, the most important being the right to a court. The second encompasses the substantive rights and freedoms of the individual, with the right to life as the foremost, followed by the rights to dignity and privacy.<sup>117</sup>

The constitutional provisions in force between 1990 and 1997 did not contain the right to life. Therefore, the CT inferred the principle of the legal protection of the *foetus*<sup>118</sup> from the principle of a democratic rule-of-law state in the case K 26/96.<sup>119</sup>

According to the CT, the right to life is inherent and cannot be granted or abolished by the legislator. The inherent nature of this right does not depend on the legislator's will, and it cannot be derogated by a legislative act. The CT held that

116 The judgment of the CT of 8 March 2000, Pp 1/99, OTK No. 2/2000, item 58. See also the decision of the CT of 24 November 2010, Pp 1/08, OTK ZU No. 9/A/2010, item 115.

117 Morawska, 2003, pp. 271, 329.

118 The CT analysed the aforementioned right while examining the provisions in Art. 4a(1)(4) of the Act of 7 January 1993 on Family Planning, Human Foetus Protection and Conditions for Terminating Pregnancy, which allowed abortion if a pregnant woman found herself in difficult life conditions or in a difficult personal situation.

119 The ruling of the CT of 28 May 1997, K 26/96, OTK No. 2/1997, item 19.

life is the fundamental attribute of a human being; depriving an individual of life simultaneously annihilates the human being as a subject of rights and obligations.

If the content of the rule-of-law principle is understood as a collection of fundamental directives inferred from the essence of democratically enacted law, guaranteeing its minimum justice, then the first such directive must be respect for human life from its beginning. A democratic rule-of-law state regards the human being and the goods most precious to him/her as a supreme value. Life is such a good and must be constitutionally protected at every stage, including the prenatal phase. The prohibition against terminating pregnancy, referring also to the pregnant woman herself, is therefore justified by the recognition of the value of the life of a conceived human being.

To sum up, the right to life is based on the following assumptions: (1) human life is subject to protection from its beginning, (2) it constitutes the fundamental good of the human being, and (3) the protection of life may not vary depending on the stage of development.

In the judgment of 20 October 2020, K 1/20, the CT once again referred to Art. 2 in the context of protecting a conceived child. It held that the obligation of public authorities to protect human life is rooted in Art. 2, especially in the principle of a democratic rule-of-law state. The essence of such a state is that it is created by a community of people who are subjects of constitutional rights and freedoms. Each individual enjoys the same personal dignity, meaning it is impermissible to treat any individual as an object. Art. 30 of the Constitution expresses this idea normatively. The obligation to respect and protect human dignity, linked to its inherent and inalienable nature, entails recognition that the existence of an individual is an independent constitutional value. The human being is an aim in him/herself, not a means to an end. Consequently, the state must protect the central good inherent in every human being: life. This obligation is expressed in Art. 38 of the Constitution.<sup>120</sup>

The clause of a democratic rule-of-law state is also the source of the right to a court. In the ruling K 8/91, the CT explained that the principle of citizens' access to a court, aimed at enabling them to protect their interests before an independent organ bound solely by the law in force, constitutes one of the fundamental assumptions of a democratic rule-of-law state.<sup>121</sup>

The CT identified three essential elements comprising the right to a court: (1) the right of access to a court, i.e. the right to initiate proceedings before an impartial and independent organ; (2) the right to a proper court procedure, complying with the requirements of a fair and public hearing; and (3) the right to a court ruling, i.e. the right to have a case determined in a legally effective manner by a court.<sup>122</sup>

120 See the judgment of the CT of 20 October 2020, K 1/20, OTK A/2021, item 1.

121 See also the ruling of the CT of 27 June 1995, K 4/94, OTK No. 1/1995, item 16 and the ruling of the CT of 13 March 1996, K 11/95, OTK No. 2/1996, item 9.

122 More on the right to a court, see the judgment of the CT of 9 June 1998, K 28/97, OTK ZU No. 4/1998, item 50; the ruling of the CT of 7 January 1992, K 8/91, OTK No. 1/1992, item 5.

In the ruling K 4/94, the CT also recognised the right to a measure of appeal, i.e. the requirement of two-instance proceedings, as an essential element of the right to a court. Although the principle of two-instance proceedings does not follow directly from the Constitution, it is embedded in the model of the common judiciary and belongs to binding global standards of legality.<sup>123</sup> In the resolution W 14/94, the CT further linked the formal aspect of the right to a court (i.e. access to court proceedings) with the substantive aspect, understood as the ability to seek legally effective protection of rights before a court.<sup>124</sup> Moreover, it underlined that an essential element of the guarantee of independence is the irremovability and substantive independence of judges.<sup>125</sup>

The current Constitution explicitly expresses the right to a court in Art. 45(1) and Art. 77(2). This right remains a foundation of a rule-of-law state.

The CT also held that the principle of proportionality, serving as a limitation clause, follows from the principle of a rule-of-law state.<sup>126</sup> In the ruling K 18/95, the CT clarified that the principle of proportionality, inferred from Art. 1 of the constitutional provisions, applies to statutory interferences in the sphere of individuals' rights and freedoms. It stated that the legislator may not introduce limitations that impose an excessive burden, particularly where such limitations disturb the balance between the burden on individual rights and the public interest being protected. This prohibition is one of the manifestations of the principle of protecting citizens' trust in the state. When analysing the constitutionality of statutory interference, three questions must be answered: (a) is a given regulation capable of achieving the intended result; (b) is it indispensable for the protection of the public interest with which it is linked; and (c) do its results remain proportionate to the burdens imposed on the citizen?<sup>127</sup> This is the so-called proportionality test.<sup>128</sup>

In the ruling W 3/93, the CT discussed this principle in the context of limiting the freedom of speech. It clarified that statutory limitations may only be introduced within the necessary scope and must be treated as exceptions. Their existence must always follow from clearly formulated statutory provisions, and it is forbidden to rely on presumptions of such provisions. It also reserved that specific statutory limitations, or their cumulative effect, may not infringe the essence of a given right.<sup>129</sup>

At present, it is emphasised that the principle of proportionality stems from two sources. When the subject of review concerns statutory regulations relating to the rights and freedoms of the individual, their limitation in the context of the principle of proportionality may be examined on the basis of Art. 31(3) of the Constitution.

123 More on that: Morawska, 2003, p. 274.

124 Ibid.

125 Ibid., p. 282.

126 See the judgment of the CT of 12 January 1999, P 2/98, OTK No. 1/1999, item 2; the judgment of the CT of 12 February 2014, K 23/10, OTK ZU No. 2/A/2014, item 10; Tuleja, 2016.

127 Cf. the ruling of the CT of 26 April 1995, K 11/94, OTK p. I/1995, item 12.

128 See also the judgment of the CT of 29 June 2001, K 23/00, OTK ZU No. 5/2001, item 124.

129 See the ruling of the CT of 19 June 1992, U 6/92, OTK No. 1/1992, item 13.

This Art. indeed enshrines the principle of proportionality. By contrast, for regulations unrelated to the sphere of individual rights and freedoms, the CT infers the principle of proportionality from the concept of a democratic rule-of-law state. This principle is not explicitly stated in Art. 2 of the Constitution but arises from the CT's interpretation of that Art.<sup>130</sup> The Tribunal further clarified that the principle of proportionality derived from Art. 31(3) of the Constitution applies to the assessment of interferences with certain constitutional rights and freedoms. Meanwhile, Art. 2 of the Constitution, understood rather as the principle of adequacy, refers to the formal manner in which the legislator exercises its freedom of regulation and is distinct from the assessment of interferences with specific individual rights. Only this distinction justifies deriving these principles from different constitutional provisions.<sup>131</sup>

The principle of the protection of human dignity was the first substantive element inferred from the principle of the rule-of-law, which occurred in 1992.<sup>132</sup> In the case U 6/92,<sup>133</sup> the CT stated that human dignity is a personal good entitled to enhanced protection in a democratic rule-of-law state. At that time, however, the CT equated human dignity with the right to the protection of honour and good name, i.e. a specific human right. It did not yet recognise dignity as an inalienable and inviolable source of human and civil freedoms and rights, as the current Constitution does.<sup>134</sup> Nevertheless, it classified dignity as a personal good, thereby invoking the doctrine of civil law, and did not accord it the status of a constitutional value capable of shaping the axiology of constitutional solutions.<sup>135</sup> The CT held that all interferences by a state organ with human dignity and other personal goods must be grounded exclusively in statutory authorisation. This requirement, rooted in the principle of a democratic rule-of-law state, is absolute.

It also stated that any norm limiting citizens' rights established by an act of a lower rank than a statute breaches Art. 1 of the (former) Constitution. Moreover, it stressed that statutory interference with human dignity must meet the requirement of sufficient precision, meaning that the permissible scope of interference must be clearly defined and the manner in which a person whose rights and freedoms have been limited may defend him/herself from unjustified infringement of personal goods must be determined.<sup>136</sup>

In the case W 16/92,<sup>137</sup> the CT addressed dignity in the context of participation in a medical experiment without the participant's personal consent and held that this violated the clause of a rule-of-law state through the infringement

130 See Banaszak, 2012. See also Syryt, 2022, pp. 367–378.

131 See the judgment of the CT of 4 July 2019, K 16/17, OTK A/2019, item 49.

132 Morawska, 2003, p. 353.

133 The ruling of the CT of 19 June 1992, U 6/92, OTK No. 1/1992, item 13.

134 Morawska, 2003, p. 354.

135 *Ibid.*, p. 355.

136 See the ruling of the CT of 19 June 1992, U 6/92, OTK No. 1/1992, item 13.

137 The resolution of the CT of 17 March 1993, W 16/92, OTK No. 1/1993, item 16.

of human dignity.<sup>138</sup> In turn, in the case P 7/92,<sup>139</sup> the CT assigned certain elements clarifying the content of the imprecise concept of dignity. The case concerned the aspect of dignity in the context of unemployment. In its reasoning, it stressed that the state is obliged, within the sphere of social activity, to guarantee an unemployed individual conditions enabling him/her to exercise the right to existence and freedom arising from inalienable, inherent human dignity.

In the case K 21/96,<sup>140</sup> the CT derived from the clause of a democratic rule-of-law state the constitutional right to privacy, understood *inter alia* as the right to keep secret information about one's private life. At the time, the constitutional provisions then in force did not expressly provide for such a right. The CT defined privacy as encompassing principles and rules relating to various spheres of the individual's life, whose common denominator is the individual's right to live his/her life according to his/her own will, with any external interference restricted to the necessary minimum. It also noted that this right was not absolute and could be subject to limitations, which had to be formulated in conformity with constitutional requirements.

### 4.3. Principles of Good Legislation

The clause of a democratic rule-of-law state is also the source of principles concerning good legislation.<sup>141</sup> The CT expressed the view that it is the parliament's task to select the best legislative solutions and that it enjoys relative freedom to enact laws serving political and economic objectives. However, the legislator must respect the procedural aspects of a democratic rule-of-law state. It is not the CT's role to review the purposefulness or appropriateness of the adopted solutions, as the parliament is accountable for these before the electorate. The CT's role is to examine whether parliament has violated the norms, principles, and values laid down in the Constitution.<sup>142</sup> Among the principles that may be enumerated are the principle of protecting the individual's trust in the state and its laws (principle of loyalty), the principle of legal certainty (stable and secure law), the requirement for precise legal provisions (principle of unambiguous law), the principle of protecting acquired rights, and the principles *lex retro non agit* and *vacatio legis*. These principles set the formal framework for the legislator's discretion and guarantee that a public authority may not express its will in an entirely unrestricted manner.<sup>143</sup>

The CT highlighted that the principle of loyalty is an inherent feature of a rule-of-law state because a democratic rule-of-law state is one in which trust in the state and its laws is protected. This principle is rooted in legal certainty and security,

138 See the ruling of the CT of 19 June 1992, U 6/92, OTK No. 1/1992, item 13.

139 The ruling of the CT of 13 July 1993, P 7/92, OTK No. 2/1993, item 27.

140 The ruling of the CT of 24 June 1997, K 21/96, ZU OTK No. 2/1997, item 11.

141 Zaleśny, 2000, p. 12.

142 The judgment of 17 May 2005, P 6/04, OTK ZU No. 5/A/2005, item 50. Cf. Zaleśny, 2009, p. 13.

143 Zaleśny, 2009, p. 47.

and above all it entails the need to protect and respect acquired rights and on-going interests, especially the proper exercise of rights obtained under previous provisions.<sup>144</sup>

The principle of protecting trust in the state and its laws<sup>145</sup> is based on the assumption that public authorities should act in a loyal and fair manner towards the individual, providing a sense of legal stability and security.<sup>146</sup> It also presumes that the law should not operate as a ‘trap’ for citizens, who should be able to organise their lives with confidence that they will not incur unforeseen negative legal consequences of their decisions and actions.<sup>147</sup> Legal security further requires that individuals be able to determine their conduct based on full knowledge of the prerequisites for state action, to familiarise themselves with these prerequisites, and to understand the legal consequences that may follow from their conduct.<sup>148</sup> The individual’s legal security, which is linked to legal certainty, enables the prediction of state actions and facilitates the planning of one’s own actions.<sup>149</sup> Therefore, legal certainty should be understood as the assurance that an individual may organise his/her life on the basis of the law in force rather than as mere stability of legal provisions.<sup>150</sup>

Moreover, the principle of the protection of citizens’ trust in the state reflects the prohibition against excessive interference with the sphere of individual rights and freedoms. As a rule, the legislator, when enacting laws, should not limit individual freedoms. Such a limitation is acceptable only if required by an important social or individual interest protected under the Constitution. The legislator should not enact laws that limit the catalogue of constitutional rights or restrict the exercise of those

144 Cf. the judgment of the CT of 24 October 2000, SK 7/00, OTK No. 7/2000, item 256 and the judgment of the CT of 25 November 1997, K 26/97, OTK nos. 5–6/1997, item 64.

145 The principle of the protection of trust was present in the jurisprudence of the CT as early as 1988, that is, before the entry into force of the December Amendment. The CT derived it then from some provisions of the Constitution of the Republic of Poland (Arts. 9, 20(2), 101). This principle was not explicitly envisaged in the December Amendment and in the Small Constitution. The CT recognised that it followed from the principle of the rule-of-law state and the principle of the legality of operation of organs of state and local-government administration (the ruling of the CT of 23 October 1990, U 1/90, OTK No. 1/1990, item 9; the ruling of the CT of 15 December 1992, K 6/92, OTK No. 2/1992, item 27). In later judgments, the CT derived the said principle only from the principle of the rule-of-law state. This stance has become solidified in the jurisprudential practice of the CT, which held that in a rule-of-law state relations between the state and citizens should be based on trust and the state’s loyalty vis-à-vis citizens.

146 See inter alia the judgment of the CT of 8 December 1992, K 3/92, OTK ZU 1992, item 26. More on that Tuleja, 2016.

147 See inter alia the judgment of the CT of 25 April 2001, K 13/01, OTK No. 4/2001, item 81; the judgment of the CT of 7 February 2006, SK 45/04, OTK ZU No. 2/A/2006, item 15; the judgment of the CT of 15 July 2013, K 7/12, OTK No. 6/A/2013, item 76.

148 See inter alia the judgment of the CT of 14 June 2000, P 3/00, OTK No. 5/2000, item 138; the judgment of the CT of 2 April 2007, SK 19/06, OTK ZU No. 4/A/2007, item 15; the judgment of the CT of 20 January 2009, P 40/07, OTK ZU No. 1/A/2009, item 4.

149 See inter alia the judgment of the CT of 14 June 2000, P 3/00, OTK No. 5/2000, item 138.

150 See e.g. the judgment of the CT of 13 November 2013, K 2/12, OTK ZU No. 10/A/2012, item 12.

rights.<sup>151</sup> This principle is also linked to the requirement to establish an appropriate *vacatio legis* period when amendments to existing law worsen the legal situation of an individual.<sup>152</sup>

Additionally, the principle of trust in the state and its laws is connected with the permanence and finality of individual determinations delivered on the basis of legal provisions, which themselves should be formulated precisely and clearly. The legislator is obliged to enact laws that are coherent, clear and understandable to citizens.<sup>153</sup> The principle under discussion embraces the stability<sup>154</sup> and public accessibility of law. The CT has emphasised that, in particular, provisions referring to individual rights and freedoms should be formulated in a correct, clear and precise manner.<sup>155</sup> The requirement of legal stability focuses on the prohibition against temporary statutes and against 'surprising' the addressees of legal norms by changes, namely, enacting law without appropriate *vacatio legis*.<sup>156</sup> Clarity, in turn, entails the obligation to create provisions that are understandable to addressees, who are entitled to expect a rational legislator to enact legal norms free from ambiguity regarding the content of imposed obligations and vested rights. Precision is closely related to clarity and manifests itself in the certainty of those obligations and rights, enabling their effective enforcement.<sup>157</sup>

This principle also entails the prohibition against the creation of apparent rights, meaning situations where specific legal regulations are illusory. The legislator may not create normative constructions that are impossible to implement, that merely create the illusion of a right, and that, consequently protect individual interests only superficially. In principle, the legislator should not significantly limit the exercise of an individual right formally assigned to the individual, as this would result in a *nudum ius* – a right devoid of practical effect.<sup>158</sup>

An unclear or imprecise provision leaves addressees uncertain about the scope of their rights and obligations and grants organs applying it excessive discretion, effectively allowing them to replace the legislator in deciding matters regulated ambiguously. According to the CT, the legislator may not, by drafting imprecise provisions, provide implementing organs with undue freedom to determine, in practice, the *ratione materiae* and *ratione personae* scope of limitations on constitutional rights and freedoms of the individual. This assumption is referred to as the principle of the precision of statutory interference in the sphere of constitutional rights and freedoms.

151 See the ruling of the CT of 26 April 1995, K 11/94, OTK No. 1/1995, item 12.

152 See e.g. the judgment of the CT of 24 May 1994, K 1/94, OTK No. 1/1994, item 10; the judgment of the CT of 4 January 2000, K 18/99, OTK No. 1/2000, item 1.

153 See the ruling of the CT of 26 April 1995, K 11/94, OTK No. 1/1995, item 12.

154 See the ruling of the CT of 8 November 1989, K 7/89, OTK No. 1/1989, item 8.

155 The judgment of the CT of 21 March 2001, K 24/00 OTK No. 3/2001, item 51.

156 See inter alia the ruling of the CT of 2 March 1993, K 9/92, OTK No. 1/1993, item 6; the ruling of the CT of 15 July 1996, K 5/96, OTK No. 4/1996, item 30.

157 See the judgment of the CT of 23 October 2007, P 28/07, OTK ZU No. 9/A/2007, item 106.

158 See e.g. the judgment of the CT of 8 January 2013, K 18/10, OTK ZU No. 1/A/2013, item 2 and the judgment of the CT of 10 January 2012, P 19/10, OTK ZU No. 1/A/2012, item 2.

Exceeding a certain threshold of imprecision in legal provisions may justify declaring their non-conformity with the principle of the rule of law.<sup>159</sup>

The principle of the protection of citizens' trust in the state and its laws is not absolute, and legislative practice may permit exceptions. Yet such departures must be justified. The legislator may sacrifice the value of respect for this principle only to protect a more important constitutional value. The limit of the legislator's obligation to respect the principle of trust is defined by the presence of an important social or individual interest protected under the Constitution.<sup>160</sup>

The precision of legal provisions is also linked to the principles of good legislation inferred by the CT from the clause of a rule-of-law state. It constitutes an element of the principle of the protection of citizens' trust in the state and its laws and is closely connected with the principles of legal certainty and security. The requirement of precision applies to all regulations directly or indirectly defining the legal position of the citizen.<sup>161</sup> In accordance with this principle, the legislator is obliged to enact provisions as precise as possible in a given case, both in content and in form. Both dimensions of law are defined by three criteria: the precision of the regulation, the clarity of the provision and its legislative correctness.<sup>162</sup>

Three assumptions are crucial in assessing whether a given provision complies with the requirements of good legislation: (1) each provision limiting constitutional freedoms or rights should be formulated in a manner allowing to unequivocally establish who is subject to the limitation and under what circumstances; (2) the provision should be sufficiently precise to ensure uniform interpretation and application; and (3) it should be formulated so that its scope of application extends only to situations where a rational legislator genuinely intended to introduce a regulation limiting the exercise of constitutional freedoms and rights.<sup>163</sup> Moreover, provisions should comply with the requirements of good legislation set out in the 'principles of legislative technique'. These requirements, while secondary to the first two criteria, serve to ensure that legal norms are expressed with sufficient precision and clarity.<sup>164</sup>

The CT also derived from the principle of the rule-of-law state the principle of the protection of acquired rights, which is connected with the principle of trust in relations between the citizen and the state.<sup>165</sup> To assess whether a limitation on acquired rights is acceptable, the following factors must be considered: (1) whether

159 See the judgment of the CT of 22 May 2002, K 6/02, OTK ZU No. 3/A/2002, item 33.

160 See e.g. the judgment of the CT of 24 May 1994, K 1/94, OTK No. 1/1994, item 10.

161 Ibid.

162 See e.g. the judgment of the CT of 21 March 2001, K 24/00, OTK 2001, No. 3, item 51.

163 More on that: Tuleja, 2016; see inter alia the judgment of the CT of 22 May 2002, K 6/02, OTK ZU No. 3/A/2002, item 33 and the judgment of the CT of 30 October 2001, K 33/00, OTK ZU No. 7/2001, item 217.

164 See the judgment of the CT of 28 October 2009, Kp 3/09.

165 See the ruling of the CT of 22 August 1990, K 7/90, OTK ZU No. 1/1990, item 5. Cf. the judgment of the CT of 15 February 2005, K 48/04, OTK ZU No. 2/A/2005, item 15.

other norms, principles or constitutional values justify the limitation; (2) whether the norm, principle or value can be implemented without infringing acquired rights; (3) whether, in a specific situation, constitutional values should take precedence over those underlying the principle of acquired rights; and (4) whether the legislator has undertaken necessary measures to allow individuals to adapt to the new regulation.<sup>166</sup>

However, the CT noted that protecting acquired rights does not mean that every amendment unfavourable to a certain group of citizens is prohibited. Nor is it prohibited to regulate existing rights differently if the changes lead to solutions that better reflect constitutional principles from the perspective of citizens' rights.<sup>167</sup> Departures from the protection of acquired rights are most often justified by the need to maintain budgetary balance or by the deterioration of the state's economic condition. It must be stressed that this principle applies only to rights justly acquired,<sup>168</sup> rights obtained unjustly are not protected under Art. 2.<sup>169</sup>

As noted earlier, the principle of the protection of trust in the state and its laws is also related to the principle *lex retro non agit*. The CT highlighted that this principle is based on values such as legal security, the certainty of legal relations and respect for acquired rights. The Tribunal has consistently treated it as a guideline for law-making organs and as one of the fundamental principles of the legal order.<sup>170</sup> According to this principle, laws should not be applied retroactively, that is, to events that occurred before their entry into force.<sup>171</sup>

It is noteworthy that the prohibition against retroactivity applies only to provisions that worsen an individual's situation. Where provisions improve this situation, retroactive application is permissible. This prohibition is interpreted most strictly in criminal and tax law.<sup>172</sup> However, retroactive provisions may be deemed constitutional if they improve the legal situation of certain addressees of a legal norm without worsening that of others.<sup>173</sup> Limiting this principle is permitted only exceptionally and for very compelling reasons.<sup>174</sup>

The principles of good legislation also include the one of *vacatio legis*. This principle requires that amendments to existing laws that negatively affect the legal situation of subjects should, as a rule, be introduced with transitional provisions or, at the very least, with an appropriate *vacatio legis*. These mechanisms provide affected subjects with the opportunity to adapt to the new legal framework.

166 See the judgment of the CT of 7 May 2014, K 43/12, OTK ZU No. 5/A/2014, item 50.

167 The ruling of the CT of 22 August 1990, K 7/90, OTK No. 1/1990, item 5.

168 See *ibid.*; the judgment of the CT of 20 December 1999, K 4/99, OTK No. 7/1999, item 165.

169 Cf. Tuleja, 2016.

170 See the judgment of the CT of 19 November 2008, Kp 2/08, OTK ZU No. 9/A/2008, item 157.

171 The judgment of the CT of 16 March 2017, Kp 1/17, OTK ZU A/2017, item 28 and the jurisprudence cited therein. Cf. the ruling of the CT of 29 January 1992, K 15/91, OTK No. 1/1992, item 8.

172 More on that Tuleja, 2016; see e.g. the ruling of the CT of 7 December 1993, K 7/93, OTK No. 2/1993, item 42.

173 Cf. the judgment the CT of 25 September 2000, K 26/99, OTK ZU No. 6/2000, item 186.

174 See the judgment of the CT of 19 November 2008, Kp 2/08, OTK ZU No. 9/A/2008, item 157.

The legislator may dispense with them and introduce immediate application of new laws only if this serves to protect an important public interest that cannot be balanced against individual interests. An example of such an interest is the prevention of fraud and tax abuse.<sup>175</sup>

This principle is not explicitly set out in the Constitution, and the CT derived it directly from the concept of a rule-of-law state. However, the CT did not analyse its content in detail or devote significant attention to it in its jurisprudence. Nonetheless, it held that it governs the insurance system.<sup>176</sup>

The CT examined this principle in the ruling of 15 December 1992, K 6/92.<sup>177</sup> It held that in a rule-of-law state, agreements should be honoured, and the legal system should be structured to guarantee the certainty of legal relations. This certainty is not undermined by a clause allowing one party to change the content of the performance owed to the other during an obligation relationship. Such a clause falls within the scope of freely shaping the legal relationship and aims to guarantee the equal value of the parties' performances when external conditions beyond their control lower the value of one performance.<sup>178</sup>

What is essential for the protection of the individual's rights is the principle of prohibition against violating ongoing interests. This protects individuals who have embarked on specific projects based on existing provisions. It is not an absolute principle. However, this obligation is more categorical when the legislator has indicated specific timeframes during which particular projects could be carried out in accordance with previously determined rules. These situations include: (1) provisions of law that indicate a temporal horizon for the realisation of certain projects; (2) projects that are staged in nature; (3) cases where an individual had *de facto* begun implementing a project when the relevant regulation was in force.<sup>179</sup>

From the perspective of protecting ongoing interests, the definition of the projects to which a given regulation applies is crucial. A normative act may set timeframes for projects explicitly defined within the act, or it may provide a general legal framework for all economic or social projects. Ongoing interests are subject to stronger protection when the legislator introduces regulations for clearly specified types of projects.<sup>180</sup>

175 The ruling of the CT of 2 March 1992, K 9/92, OTK No. 1/1993, item 6. See also the judgment of the CT of 4 January, K 18/99, OTK No. 1/2000, item 1.

176 More on that: Morawska, 2003, pp. 305–306.

177 The ruling of the CT of 15 December 1992, K 6/92, OTK No. 2/1992, item 27.

178 See inter alia the judgment of the CT of 13 November 2013, K 2/12, OTK ZU No. 10/A/2012, item 121.

179 See e.g. the judgment of the CT of 25 June 2002, K 45/01, OTK ZU No. 4/A/2002, item 46.

180 Ibid.

#### 4.4. *The Principle of Social Justice*

The principle of social justice is also part of the content of Art. 2. The CT described this principle as ‘the inviolable foundation of the Republic of Poland’.<sup>181</sup> It stressed that the content of the principle of social justice comprises many elements. It also emphasised that a state is not a democratic rule-of-law state if it does not implement the idea of justice, and that social justice is an aim that a democratic rule-of-law state must achieve.<sup>182</sup>

The CT noted that the concept of justice has many interpretations, but it endorsed the distributive concept of justice. It also linked the concept of justice with that of equality, clarifying *inter alia* that inequality arises from differences in the distribution of goods and the categorisation of people related to that distribution, and that justice is the opposite of arbitrariness. Justice requires that differences among individuals correspond appropriately to differences in their circumstances.<sup>183</sup> The principle of social justice also imposes on the state the duty to guarantee citizens the social minimum.<sup>184</sup> In the case K 8/98,<sup>185</sup> the CT explained that the principle of justice should be regarded as a factor ensuring a fair balance between the general interest (the common good) and the interests of individuals.

The broad catalogue of values that must be protected and taken into account when implementing the principle of social justice includes the creation of conditions for healthy and stable economic development, budgetary balance, and the right of citizens and their representatives to determine – and to adjust according to circumstances – the current priorities of social and economic policy through proper democratic procedures.<sup>186</sup> The CT also stated that social justice entails maintaining balance in social relations and refraining from granting unjust privileges to selected groups of citizens without objective justification.<sup>187</sup> Furthermore, the principle of justice includes: the equality of rights, social solidarity, the minimum level of social security, and ensuring basic conditions of existence for persons who are involuntarily unemployed.

In the decision K 14/00, the CT outlined the relationship between equality and justice. It noted that the specific norms defining social justice include, in particular, equality, and added that the principle of social justice prohibits, *inter alia*, the introduction of unfair differentiation between individuals subject to the of law. This

181 The judgment of the CT of 12 April 2000, K 8/98, OTK No. 3/2000, item 87.

182 Ibid.

183 The ruling of the CT of 22 August 1990, K 7/90, OTK No. 1/1990, item 5.

184 The ruling of the CT of 13 July 1993, P 7/92, OTK No. 2/1993, item 27.

185 The judgment of the CT of 12 April 2000, K 8/98, OTK No. 3/2000, item 87.

186 The ruling of the CT of 25 February 1997, K 21/95, OTK No. 1/1997, item 7. More on that Banaszak, 2012.

187 The judgment of the CT of 12 April 2000, K 8/98, OTK No. 3/2000, item 87.

prohibition is expressed through equality, which also sets out, in a more precise and specific manner, the criteria for fair differentiation among individuals.<sup>188</sup>

The clause of a democratic rule-of-law state has been developed by the CT ever since it entered the Polish legal order through the December Amendment. The CT has gradually derived from it a range of principles that form the foundation of the Polish constitutional order – systemic principles such as sovereignty, democracy, the separation of powers, legality, decentralisation and political pluralism, as well as the rights and freedoms of the individual, including the right to a court, to life, protection of dignity and privacy. These principles are now explicitly expressed in the Constitution. By contrast, those relating to good legislation derived from the clause of a rule-of-law state are as follows: the principle of loyalty, the certainty of law, the unambiguity of law, the principle of the protection of acquired rights, *lex retro non agit* and *vacatio legis*.

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## 5. Conclusions

The concept of a rule-of-law state entered the Polish legal order with the enactment of the December Amendment to the Constitution of the People's Republic of Poland in December 1989. This concept, originally developed by German legal scholars, was then unfamiliar to Polish legal scholars and carried primarily a symbolic meaning. It signified a break with the hitherto system of socialist democracy and the establishment of a new system based on values typical of Western legal orders grounded in democracy.

During the systemic transformation, this concept was incorporated into the constitutions of central European states as a symbol of the new order and as a source of principles forming the foundations of democratic systems. The binding force of the clause of a rule-of-law state in Poland can be divided into three periods: the December Amendment (1989–1992), the Small Constitution (1992–1997) and the current Constitution (since 1997).

The rule-of-law state has no universally accepted definition. Its content is shaped by legal scholars and by the constitutional jurisprudence of each state, and it can evolve over time. This concept is understood as a set of principles and values forming the state's legal order. However, certain elements are regarded as typical of the rule-of-law state. Polish legal scholars recognise that these include, *inter alia*: constitutionalism, a hierarchical system of sources of law, the principle of legality, the separation of powers, the sovereignty of the nation, the democratic legitimacy of law, the constitutional regulation of fundamental rights and freedoms and mechanisms for their effective protection, principles of good legislation (including the unambiguity

188 See the decision of the CT of 27 November 2001, K 14/00, OTK No. 8/2001, item 265.

and precision of law, the prohibition against excessive interference, the *lex retro non agit* principle, the principle of protecting citizens' trust in the state and its laws), and the right to a court.

For the CT, the concept also served as a source of systemic principles and of individual rights and freedoms in the period before the current Constitution entered into force. The systemic principles inferred by the CT from the clause of a rule-of-law state include: sovereignty, democracy, the separation of powers, legality, decentralisation and political pluralism. The individual rights and freedoms derived from the clause encompass: the right to a court, to life, to the protection of dignity and the right to privacy. These principles, rights and freedoms are now explicitly laid down in the Polish Constitution. However, the clause in question continues to serve the CT as a source of the principles of good legislation, which include: the principle of loyalty, the certainty of law, the unambiguity of law, the principle of the protection of acquired rights, *lex retro non agit* and *vacatio legis*.

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## CHAPTER 3

# THE REVERSED RULE OF LAW IN LEGISLATION AND ITS EVALUATION



ALEKSANDRA SYRYT

### Abstract

Poland's power is divided among the legislative, executive and judicial branches. These elements must be balanced and of comparable quality. The legislature plays a crucial role, establishing the framework for the rule of law. For public institutions to operate solely on a legal basis, it is essential to understand what the law means in this context and how it is created and evaluated. This Chapter examines law-making in Poland and outlines the foundations of its legal system, including statutes, regulations and constitutional provisions. Based on these foundations, it assesses whether the requirements of the Polish Constitution and the status of the sources of law are being met. Common violations at parliamentary and executive levels are highlighted, focusing on excesses, lack of transparency and conflicts with constitutional norms. The Chapter also discusses how to ensure the legality and effectiveness of law, exploring substantive conditions, institutional frameworks and procedural safeguards. Key mechanisms for judicial review, including the role of the Constitutional Tribunal and other oversight bodies, are also addressed.

**Keywords:** legislation, sources of law, Constitution, the rule of law, legalism, constitutional review

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## 1. Introduction

The rule of law, a cornerstone of democracy, is essential for ensuring justice, stability and the protection of freedoms and human rights. It defines the boundaries of public authority and identifies the values that the state must protect. Legislative action, as the primary instrument for ensuring compliance with the rule of law, shapes the scope of state activity and private entities, thus organising social life. Upholding the rule of law is not only a legal requirement but also a moral imperative that sustains order and justice.

Abuses of the legislative process – including the redefinition of fundamental legal principles, disregard of Constitutional Tribunal (CT) judgments, substitution of centralised control mechanisms with decentralised ones, justification of such actions through claims of higher necessity or inaction by constitutional authorities, and the use of extra-legal forms of oversight – undermine the foundations of the state and the rule of law. These practices relativize the law – undermine its role as the bedrock of the legal system – and lead to the destabilisation and unpredictability of the legal system. This, in turn, creates uncertainty as to the nature and content of the law. The potential consequences are grave, underscoring the need to prevent such abuses.

This Chapter therefore analyses the fundamentals of law-making, the system of legal sources and the framework for constitutional review. Drawing on existing legal provisions, it examines whether public authorities in Poland uphold the requirements of the Constitution and the established hierarchy of legal sources. It highlights common legislative violations at both parliamentary and executive levels, focusing on abuses, lack of transparency and breaches of constitutional norms. Finally, it presents and evaluates measures for ensuring legality and effectiveness in law-making, considering substantive requirements, institutional safeguards and procedural standards.

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## 2. Law as the Object of the Rule of Law Principle

### 2.1. *The Concept of Law*

Law is the primary instrument through which the rule of law is realised. It establishes the boundaries of public authority and defines the obligations and rights of individuals and institutions.

As a fundamental element of social organization, law comprises principles, norms and structures that regulate individual and collective behaviour. It provides the framework for maintaining order, resolving disputes and upholding rights and responsibilities. Legal theories and doctrines offer diverse perspectives on the nature, purpose and application of law, shaping its interpretation and enforcement. These

perspectives underscore law's complexity and its crucial role in balancing authority, justice and social order.<sup>1</sup>

Theories provide the philosophical foundation for understanding law, while doctrines offer practical frameworks for its interpretation. A balanced legal system integrates both, thereby ensuring consistency and adaptability. This integration allows the legal system to uphold the rule of law, maintain social order and promote justice.<sup>2</sup>

The concept of law encompasses diverse perspectives, including natural law theories, legal positivism and realism, along with doctrinal approaches like formalism and pragmatism. Theory gives law legitimacy and purpose, while doctrine shapes its interpretation and application in specific contexts. Together, they strengthen the legal system's stability, capacity to adapt and ability to deliver justice.<sup>3</sup>

In analysing the rule of law in the continental legal culture – to which the legal systems of Central European countries belong – it is essential to consider both the substantive content of the law applicable law and the prevailing concept of law within this culture. Continental law relies heavily on written instruments, especially statutes, which are expected to be clear and predictable. Such statutes must fulfil both formal and substantive requirements. The rule of law in this system assumes that laws must provide a supreme framework governing the actions of public authorities. Their content should protect individual freedoms and rights while limiting arbitrariness in governance.<sup>4</sup>

The concept of law within the continental legal culture views law as the product of a rational legislator. This legislator creates a system of norms designed to regulate social life comprehensively and predictably, exercising the authority vested by the sovereign. This understanding rests on a hierarchy of norms, in which higher-ranking acts, such as the constitution, establish the framework for lower-ranking norms, including statutes and executive regulations.

Analysing the rule of law in this context requires assessing whether the laws enacted reflect democratic values, adhere to constitutional principles and respect human rights standards. Laws that do not satisfy these criteria raise serious concerns about their alignment with the rule of law.

The relationship between a law's content and its implementation is particularly important in continental legal culture, where cultural values and norms strongly influence how law operates in practice.

A full evaluation therefore requires analysing both the substance of the law and the principles inherent in this legal tradition. This approach makes it possible to determine whether the legal system effectively fulfils its essential functions: protecting individual rights, ensuring social stability and preventing arbitrary exercise

1 Potrzyszcz, 2005, pp. 7–37.

2 Kotowski, 2021, p. 13.

3 Ziemiński, 1991, pp. 3–14.

4 See more on civil law and common law culture, e.g. Siems, 2018, pp. 50–83; Pejovi, 2001, pp. 7–31.

of authority. The continental system's characteristic reliance on rationality, hierarchy and formal coherence provides a framework for understanding how the rule of law is applied in practice.

## ***2.2. The Concept of Legislation***

Legislation is a fundamental process in any legal system and plays a critical role in the functioning of democratic states. The term 'legislation' derives from the Latin *legislatio*, meaning 'establishing law'.<sup>5</sup> In its broader sense, legislation encompasses the creation, enactment and implementation of normative acts – such as statutes, regulations, and local legal acts – that govern the social, economic, and political life of society. The legislative process is complex and multi-staged, requiring the balancing of diverse social interests, consultations, and adherence to established procedures and standards.<sup>6</sup> From a terminological perspective, legislation can be understood as the enactment of law in its strictest sense.<sup>7</sup>

Legislation is the primary tool for implementing state policy, enabling those in power to influence the lives of citizens and regulate society's various spheres. However, this process is not merely an exercise of authority; it is also intended to uphold legal order and protect individual freedoms and rights. In democratic states, legislation must reflect the rule of law, ensure justice, and safeguard equality before the law. Laws should serve all citizens and be developed through extensive public debate to incorporate diverse perspectives and interests. For the rule of law to be effective, it must permeate both the form and substance of legislation and the legislative process itself.<sup>8</sup>

The legislative process generates normative acts, the most important of which are statutes. These are the primary regulatory instruments in a democratic state governed by the rule of law. They rank just below the Constitution in the hierarchy of legal sources and must be adopted according to strict procedural guidelines. This process involves multiple state bodies, including parliament, the president and, in certain cases, the constitutional court, which reviews statutes for constitutional compliance.<sup>9</sup>

Legislation can be understood from various perspectives. At its core, it is the process through which legal norms are created, while its products are normative acts issued by authorised bodies. Effective law-making requires that all aspects of this process be properly addressed to uphold the rule of law.<sup>10</sup>

Legislation is inherently complex, involving the creation and enactment of provisions that regulate public and private life. Guided by legality, proportionality,

5 Lewis and Short, 2024; Legislation, 2024.

6 Wintgens, 2005, p. 3.

7 Kaźmierczyk and Pulka, 2000, pp. 128–132.

8 Cormacain, 2017, pp. 115–135.

9 If a given state system provides for a model of centralised constitutional review of law.

10 Wróblewski, 2015, p. 431.

transparency and stability, it forms the foundation of the rule of law and ensures state stability. It establishes the framework for public institutions, safeguards citizens' rights, promotes equality before the law and serves the public interest.

Stable and predictable laws also build social trust, which is essential for economic development, investment security and cooperation.

The quality and consistent application of laws directly affect the stability of the state. Excessive legal volatility, insufficient public consultation or disregard for fundamental legislative principles can lead to uncertainty, undermine citizens' trust and provoke social tensions. For this reason, the legislative process must be transparent, inclusive and grounded in broad public debate.

When the legislative process aligns with the principles of the rule of law, especially constitutional and legal requirements, citizens can trust that new regulations will respect their fundamental rights and that public authorities will act for the common good. This adherence not only upholds the rule of law but also maintains the coherence and predictability of the legal system and strengthens confidence in state institutions.

### ***2.3. The System of Legal Sources in the Polish Constitution***

For law to effectively uphold the rule of law, it must be rooted in a clear legal culture and system. The Constitution of the Republic of Poland primarily defines the framework for legal sources in Chapter III, complemented by other constitutional provisions. These collectively set out the principles underlying the legal system and form the basis for evaluating the legality of Polish law.

The key principles include the supremacy of the Constitution (Art. 8(1)), the hierarchical structure of legal sources, the dichotomous division between universally and internally binding sources; and the closed catalogue of universally binding legal sources. The Constitution also clarifies the role of international law and sets forth fundamental rules for creating secondary legislation intended to implement statutory provisions.<sup>11</sup>

Each normative act occupies a defined place in the hierarchy and lower-ranking acts must comply with and be interpreted consistently with higher-ranking ones. This principle to both law-making and its application.

The distinction between different types of legal sources shapes both their interpretation and the assessment of their legality. Legal sources are classified into two categories: universally and, respectively, internally binding. Consequently, every normative act falls within one of these two groups.<sup>12</sup>

Universally binding sources apply to all individuals and entities under Polish jurisdiction and form the basis for rights, obligations, grants of authority, mandates

11 Bałaban, 1997, p. 33.

12 Cf. The judgments of the CT of 28 June 2000, K 25/99, OTK ZU No. 5/2000, item 141; 14 April 2014, U 8/13, OTK ZU No. 4/A/2014, item 39.

and prohibitions. These sources are structured hierarchically and must be published in the official journal to take effect.

The principle of a closed catalogue of universally binding sources can be analysed from two perspectives: the subjective, which concerns the entities authorised to create these sources, and the objective, which pertains to the acts constituting universally binding legal sources.<sup>13</sup>

From the subjective perspective, the Constitution expressly enumerates the authorities empowered to issue such acts. This means that it is impermissible at a sub-constitutional level to authorise other entities to establish universally binding legal sources, whether in normative or non-normative form.

From the objective perspective, the Constitution also explicitly lists the acts that qualify as universally binding legal sources. Therefore, it is not permissible to create new types of universally binding legal sources at a sub-constitutional level if they are not specified in the Constitution.

Nevertheless, this principle raises concerns because certain acts produce universally binding effects despite not being expressly listed in the Constitution.<sup>14</sup> Although the CT attempted to clarify this issue soon after adopting the 1997 Constitution, uncertainty persists, creating potential for abuses.<sup>15</sup>

Internally binding law is subordinate to universally binding acts and may be issued only on the basis of the Constitution (resolutions) or statutes (resolutions and regulations). It applies solely to entities organisationally subordinate to the issuing authority and cannot serve as the basis for decisions affecting citizens or legal entities.<sup>16</sup>

According to Art. 87 of the Constitution

1. The sources of universally binding law in the Republic of Poland are the Constitution, statutes, ratified international agreements, and regulations. 2. The sources of universally binding law in the Republic of Poland are, within the scope of the activities of the authorities that established them, acts of local law.

Additionally, Art. 234 provides for regulations issued by the President with the force of law. Although some scholars suggest that Art. 87 establishes the full hierarchy of universally binding sources, this is not entirely accurate. The provision neither addresses all sources nor resolves the precedence issues stemming from the ratification method of international agreements (Art. 91(1) and (2)). Therefore, the hierarchy must be interpreted through the principle of constitutional supremacy, with the CT competent to review constitutionality (Art. 188 Points 1–3).

<sup>13</sup> Jarosz, 1999; Jarosz, 2005.

<sup>14</sup> The issue of a closed catalogue of legal sources remains a debate in legal doctrine cf. Dąbrowski, 2004, pp. 91–107.

<sup>15</sup> Cf. the Judgment of CT of 28 June 2000, K 25/99, OTK No. 5/2000, item 141.

<sup>16</sup> See more: Płowiec, 2006, pp. 84, 132.

Regulations, local laws and internally binding acts rank lower in the hierarchy because they are issued on the basis of statutes and must comply with them. The relationship between statutes and international agreements is specifically defined in Art. 91 of the Constitution.<sup>17</sup>

In addition to the Constitution, which sets the framework of the state's political, social and economic structure and outlines the competences of the highest public authorities and the rights of individuals, the primary normative act is the statute. A statute is an autonomous, universally binding act enacted under the legislative powers granted by the Constitution. Under Art. 120 of the Constitution, the Sejm adopts laws. Once signed by the President, the act is published in the Official Journal. A statute has a broad scope of regulation, although matters under the jurisdiction of the Sejm, the Senate and the National Assembly regulations are excluded. Additionally, some statutory matters have been transferred to regulation under EU law.

Regulations, referred to in Art. 92(1) play a key role in the system. They are issued by bodies named in the Constitution based on detailed statutory authorisation. This authorisation must specify the issuing body, the matters subject to regulation, and guidelines for the content of the act. Under Art. 92(2), this authority cannot be delegated to another body. Regulations are therefore non-autonomous executive acts, issued solely on the basis of specific authorisation. Two types of relationships exist between these acts: functional and competency-based.

The functional relationship reflects the purpose of the regulation to implement the statute. Conversely, the competency-based relationship indicates that the regulation is issued based on detailed statutory authorisation, whose nature often determines the regulation's legality. Due to ambiguities in statutory authorisation, the CT has frequently held that such authorisation may be inconsistent with the Constitution. If the legal force of the statutory authorisation lapses, the regulation issued pursuant to it becomes null and void.<sup>18</sup>

A less detailed authorisation must also exist for acts of local law. Art. 94 provides that local government and territorial administration bodies establish local laws within their jurisdiction based on statutory authorisation, and the principles and procedures are set by statute. Local law cannot be enacted independently but must have statutory authorization.<sup>19</sup>

17 Muszyński, 2022, pp. 34–69.

18 Cf. Judgment of CT of 24 September 2013, K 35/12, OTK ZU No. 7/A/2012, item 94.

19 Skwara, 2010. Cf. M. Kordela: 'Only a regulation that is legitimized by meeting the constitutional conditions of statutory authorization, within the specified scope, fulfilling the purpose of the parent statute, and not conflicting with the Constitution or any legislative act – whether authorizing or otherwise – will be considered a valid component of the system of legal sources. The restrictiveness of the concept of regulation as an executive act is emphasized by the clear formulation of the prohibition on enacting autonomous regulations, the prohibition on presuming law-making competence, and the prohibition on subdelegation'. (Kordela, 2016, p. 23).

The Constitution specifies requirements for ratifying international agreements, which are central to assessing the legality of ratification and, consequently, the rule of law. Art. 89 Para. 1 lists agreements requiring prior consent expressed in a statute. Art. 90 governs agreements transferring powers of state authorities to international bodies, requiring consent through statute or referendum. In the latter case, the Sejm decides on the method of expressing consent by an absolute majority with at least half of the statutory number of deputies present (Art. 90(4)).<sup>20</sup>

The choice of ratification procedure and its observance influence the assessment of a law's constitutionality. According to Art. 68 of the Act on the Organisation and Procedure of the CT, when the Tribunal assessed the compliance of a normative act or a ratified international agreement with the Constitution, it examined both the content of the act or agreement and the competence and adherence to the procedure required by law for issuing the act or for the conclusion and ratification of the agreement.<sup>21</sup>

The model of the Polish system of legal sources outlined above is therefore essential when evaluating actions concerning the rule of law in legislation and the use of legislation to implement it.

#### ***2.4. Fundamental Constitutional Principles Regarding Lawmaking***

The principles governing lawmaking in Poland aim to ensure that the legislative process reflects the values and standards of a democratic rule-of-law state. A key principle is legality, which obliges legislators to act strictly within the law. All legal acts must comply with the Constitution, and no provision may contravene the fundamental principles of the state's system.<sup>22</sup>

The foundation of lawmaking principles is set out in Art. 2 of the Constitution, which enshrines the concept of a democratic rule-of-law state. This principle emphasises the importance of building citizens' trust among citizens and other individuals in the state and the laws it enacts, a concept also referred to as the principle of state loyalty. It prohibits the creation of legal traps, the making of empty promises, or the sudden withdrawal by the state from established commitments or rules.<sup>23</sup>

The CT's case law highlights that the principle of trust in the state and its laws is rooted in legal certainty. Legal certainty requires characteristics in the law that ensure individual security. Individuals must be able to make decisions based on a clear understanding of public authorities' actions and the legal consequences of those actions.<sup>24</sup>

<sup>20</sup> Muszyński, 2022, p. 39.

<sup>21</sup> Compare: under the previous provisions of the CT Act, this competence was identical. See more: Syryt, 2014.

<sup>22</sup> Syryt, 2011, pp. 365–374.

<sup>23</sup> The judgment of the CT of 19 November 2008, Kp 2/08, OTK ZU No. 9/A/2008, item 157; the judgment of the CT of 4 November 2015, K 1/14, OTK ZU No. 10/A/2015, item 163.

<sup>24</sup> The judgment of the CT of 7 February 2001, K 27/00, OTK No. 2/2001, item 29.

Individuals should be able to determine the repercussions of specific behaviours and events based on the laws in effect at any given time, and they should expect that lawmakers will not change these consequences arbitrarily.<sup>25</sup> Legal security, linked to legal certainty, enables predictability in the actions of state authorities and allows individuals to forecast the outcomes of their actions.<sup>26</sup>

The principle of loyalty underpins that of proper legislation. These principles establish general guidelines that every legislator should follow. Observing them reinforces the foundation of a democratic rule-of-law state. Although the principle of trust in the state and its laws and the principle of proper legislation both promote legal certainty, they are distinct. Breach of proper legislation always constitutes a breach of loyalty, but not every breach of citizens' trust necessarily derives from defective lawmaking.<sup>27</sup>

The principles of good legislation include protecting rights legitimately acquired and well-founded expectations,<sup>28</sup> considering ongoing interests,<sup>29</sup> prohibiting retroactive legislation,<sup>30</sup> ensuring an appropriate *vacatio legis*,<sup>31</sup> clarity and specificity in the law.<sup>32</sup>

Lawmaking is also shaped by the principles of adequacy and proportionality. According to established case law, the principle of proportionality under the Constitution is directly tied to protecting the constitutional rights and freedoms of individuals and citizens.<sup>33</sup> It is fully and independently articulated in Art. 31(3) of the Constitution. This does not sever its axiological or functional ties to the rule-of-law principles,<sup>34</sup> derived from Art. 2 of the Constitution, which can also be invoked when assessing the adequacy of legislative intervention. The CT has confirmed that

invoking Art. 2 of the Constitution as the direct basis for the principle of proportionality is permissible when it is impossible to conduct a proportionality test under Art. 31 Para. 3 of the Constitution. The inability to conduct such a test arises when the challenged regulation, although limiting the rights or freedoms of individuals (natural persons or legal persons under private law), guarantees these rights only at the statutory level, not at the constitutional level, or introduces limitations regarding rights of variously understood public entities.<sup>35</sup>

25 The judgment of the CT of 24 February 2010, K 6/09, OTK ZU No. 2/A/2010, item 15.

26 The judgment of the CT of 14 June 2000, P 3/00, OTK ZU No. 5/2000, item 138.

27 The judgment of the CT of 14 November 2018, Kp 1/18, OTK ZU A/2019, item 4.

28 The judgment of the CT of 24 February 2010, K 6/09, OTK ZU No. 2/A/2010, item 15.

29 See the judgment of the CT of 5 July 2011, P 36/10, OTK ZU No. 6/A/2011, item 50.

30 The judgment of the CT of 16 March 2017, Kp 1/17, OTK A/2017, item 28.

31 The judgment of the CT of 19 May 2011, K 20/09, OTK ZU No. 4/A/2011, item 35.

32 The judgment of the CT of 28 October 2009, Kp 3/09, OTK ZU No. 9/A/2009, item 138.

33 The judgment of the 31 January 2013, K 14/11, OTK ZU No. 1/A/2013, item 7.

34 The judgment of the CT of 12 January 1999, P 2/98, OTK ZU No. 1/1999, item 2; see also, for example, the judgment of the CT of 6 March 2012, K 15/08, OTK ZU No. 3/A/2012, item 24.

35 The judgment of the CT of 11 February 2014, P 24/12, OTK ZU No. 2/A/2014, item 9, along with the referenced case law on the indicated issue.

The principle of proportionality derived from Art. 2 emphasises the adequacy of legislative goals and the means used to achieve them. Among all legally permissible options, legislators must select the most effective means of achieving their objectives while imposing the least possible burden on those affected. Compliance with this principle requires assessing three key issues: (1) whether the regulation is necessary to protect and realise the relevant public interest, (2) whether it effectively achieves the intended goals, and (3) whether its effects are proportionate to the burdens imposed on citizens or other legal entities.<sup>36</sup> Thus, the proportionality test in Art. 31(3) applies to assessing interferences with specific constitutional freedoms and rights, whereas Art. 2, understood primarily as adequacy, concerns the formal exercise of legislative discretion, regardless of whether constitutional rights are directly affected. It is therefore appropriate to derive these two principles from different constitutional provisions.

The adherence to the principle of adequacy (proportionality) of legislative solutions to the intended regulatory objective is thus assessed from the perspective of necessity, purposiveness, effectiveness, and the degree of burdens imposed.<sup>37</sup>

Regardless of the legislative level, all laws should adhere to principles that uphold the values of a democratic rule-of-law state. This ensures that legislative provisions are of high quality. Central among these is the principle of legality, requiring legislators to act in accordance with the law, particularly the Constitution. Complementing this is the principle of constitutional supremacy, which stipulates that no normative act may conflict with the Constitution. In practice, this means all legislative actions must respect and reflect the foundational values of the legal system.

### ***2.5. The Legislative Process***

Legislative procedures ensure that every legal act undergoes the requisite stages before coming into force. They safeguard the reliability and legality of legislation, as they are grounded in legal provisions. The Constitution of the Republic of Poland regulates the legislative process, with further detail provided by the Rules of Procedure of the Sejm and the Senate. The legislative initiative is additionally governed by law (in the case of citizens' initiatives) and by the Rules of Procedure of the Sejm, the Senate and the Council of Ministers. The legislative process encompasses all actions that condition the successful passage of a law. A defining feature of the legislative process is its sequential and multi-stage structure. The Constitution identifies five main stages: (1) the exercise of the legislative initiative; (2) the Sejm stage, ending with the adoption of the bill; (3) the Senate stage; (4) where the Senate introduces amendments to the bill or reject it in its entirety; and (5) the presidential stage.

<sup>36</sup> The judgment of the CT of 16 July 2009, Kp 4/08, OTK ZU No. 7/A/2009, item 112.

<sup>37</sup> The judgment of 26 June 2019, K 16/17, OTK A/2019, item 49.

Entities entitled to exercise the legislative initiative are enumerated in Art. 118(1) and (2) of the Constitution. These include Members of Parliament (a group of at least 15 deputies, as well as parliamentary committees, except investigative committees),<sup>38</sup> the Senate, the President of the Republic of Poland, the Council of Ministers and at least 100,000 citizens entitled to vote in parliamentary elections.

The Constitution limits the right to legislative initiative for certain bills, such as the budgetary bill, the provisional budgetary bill, the bill on public debt and the bill on state financial guarantees, granting this right exclusively to the Council of Ministers. Under Art. 235(1), the right to submit a bill amending the Constitution is granted to a group of at least one-fifth of the statutory number of deputies, the Senate, and the President. Only the Council of Ministers may assign an urgency clause to its bill,<sup>39</sup> though this clause cannot be applied to bills concerning taxes, the election of the President, the Sejm, the Senate, and local government bodies, the structure and jurisdiction of public authorities, or the codes.<sup>40</sup>

Once a bill is submitted to the Sejm, the Marshal of the Sejm conducts formal and substantive checks. The formal check verifies whether the bill contains a justification and complies with the procedural requirements set by the Rules of Procedure.<sup>41</sup> The Marshal may return the bill to the proposer if the justification is inadequate. This authority is discretionary and evaluative.<sup>42</sup>

The substantive check concerns the compliance of the proposed bill with the law, including EU law and legislative drafting principles. If doubts arise, the Marshal may, after consulting the Presidium of the Sejm, refer the bill to the Legislative Committee for an opinion. If at least half of its members are present, the Committee may, by a 3/5 majority, declare the bill inadmissible,<sup>43</sup> in which case the Marshal may decide not to proceed further.

The Sejm considers bills in three readings. The first reading may occur during a plenary session or in a parliamentary committee, though certain bills must be discussed at a plenary session, as per the Rules of Procedure. These include bills amending the constitution, budgetary bills, tax laws, bills concerning the election of the President, the Sejm, and the Senate, bills concerning local government, and those regulating the structure and jurisdiction of public authorities, and codes. In any other case, the Marshal of the Sejm may decide that first reading will take place in a plenary session.

The first reading comprises the presentation of the bill's justification by the proposer, a debate on its general principles and questions from deputies with answers from the proposer.<sup>44</sup> If held in a plenary session, the first reading concludes with

38 Art. 32 para. 2 of the Rules of Procedure of the Sejm of the Republic of Poland.

39 Art. 221 of the Constitution.

40 Art. 123 para. 1 of the Constitution.

41 Art. 34 para. 2 of the Rules of Procedure of the Sejm of the Republic of Poland.

42 Art. 34 para. 7 and 7a of the Rules of Procedure of the Sejm of the Republic of Poland.

43 Art. 34 para. 8 of the Rules of Procedure of the Sejm of the Republic of Poland.

44 Art. 39 para. 1 of the Rules of Procedure of the Sejm of the Republic of Poland.

referral to a committee unless the Sejm votes to reject the bill outright.<sup>45</sup> Committees examine the bill thoroughly between the first and second readings, scrutinising each provision. The proposer may withdraw the bill or propose amendments at any time before the conclusion of the second reading.<sup>46</sup>

The second reading always takes place in the Sejm. During this stage, the reporting deputy presents the committee's report, followed by a debate and the submission of amendments or motions. The right to propose amendments is granted to the proposer, the Council of Ministers and at least 15 deputies. If the bill is not referred back to the committee, the third reading follows immediately. The third reading includes the committee's position and a final vote. A simple majority, with at least half the statutory number of deputies present, is required for adoption. Once adopted, the law is sent to the Senate by the Marshal of the Sejm.

The Senate has 30 days to consider the law in the standard procedure. If it does not act within this period, the law is deemed adopted in the form passed by the Sejm.<sup>47</sup> The Senate may adopt the law without amendments, propose amendments or reject it entirely.<sup>48</sup>

Amendments proposed by the Senate must remain within the scope of the statute passed by the Sejm. Amendments that extend beyond the statute's scope constitute a concealed legislative initiative. However, the Senate may propose entirely different solutions from those in the statute, provided these do not amount to a new normative innovation.<sup>49</sup>

The Senate stage differs in the case of urgent procedures and for budgetary laws. In such instances, the time limit for the Senate's consideration is shortened to 14 days for urgent bills and 20 days for the budgetary law. Additionally, in the case of the budgetary law, the Senate may not reject the law in its entirety.

Another deviation from the standard procedure occurs when amending the Constitution. Under Art. 235(2) of the Constitution, both chambers must adopt the bill in identical wording. Consequently, the Senate cannot propose amendments, and there is no possibility of a second Sejm stage.

Unanimity between both chambers is also required when adopting a bill granting consent for the ratification of an international agreement that transfers the competences of state authorities to an international organisation or body.<sup>50</sup> In such cases, the Senate may not propose amendments, which excludes the second Sejm stage.

The second Sejm stage occurs if the Senate proposes rejecting the statute or adopting amendments. The Senate's position is examined at a plenary session of the Sejm. A resolution rejecting the Senate's position requires an absolute majority of

45 Art. 39 para. 2 of the Rules of Procedure of the Sejm of the Republic of Poland.

46 Art. 36 paras. 2 and 4 of the Rules of Procedure of the Sejm of the Republic of Poland.

47 Art. 121 para. 2 of the Constitution.

48 Art. 121 para. 2 of the Constitution.

49 Cf. the judgment of 19 June 2002, K 11/02, OTK ZU No. 4/A/2002, item 43.

50 Art. 90 para. 1 of the Constitution.

votes, with at least half of the statutory number of deputies present. If such a majority is not reached, the Senate's proposal is accepted.<sup>51</sup>

After the proceedings in the Senate and, if necessary, the second Sejm stage, the Marshal of the Sejm presents the adopted bill for the President's signature. According to Art. 122(2) of the Constitution, in the standard legislative procedure, the President must sign the bill within 21 days. In the case of the budgetary law, the provisional budgetary law,<sup>52</sup> and statutes passed under the urgent procedure,<sup>53</sup> the President has 7 days to sign the bill.

Before signing, the President may refer the bill to the CT for preventive constitutional review. If the CT confirms its compliance with the Constitution, the President must sign the bill. However, if the CT deems the bill unconstitutional, the President cannot sign it, and the legislative process ends.

If the President does not request CT review, they may exercise the legislative veto by returning the bill to the Sejm for reconsideration.<sup>54</sup> The President cannot veto the budgetary law, the provisional budgetary law or constitutional amendments. The veto reflects a negative assessment of the bill and may be based on any grounds. The Sejm can override the veto with a 3/5 majority vote, with at least half the statutory number of deputies present.<sup>55</sup> The President's final act in the legislative process is ordering the bill's publication in the Official Journal of Laws.<sup>56</sup>

## ***2.6. The Creation of Executive Acts***

Sub-statutory acts are adopted based on the competences conferred by the Constitution and statutes. In the case of government legislation, the legal basis also derives from the Rules of Procedure of the Council of Ministers. It is essential to adhere to the constitutional conditions for issuing regulations, which require proper statutory delegation.

Statutory authorisation to issue an executive act (regulation) cannot be in blank form or grant excessive discretion over the regulation's substantive content. The authorisation must, therefore, be detailed, which implies three dimensions: (1) subjective – it must identify the body authorised to issue the regulation, and only a constitutionally competent body may be authorised; (2) objective – it must define the scope of matters to be regulated; and (3) content-related – it must set out detailed guidelines for shaping the content of the regulation.<sup>57</sup>

51 Art. 121 para. 3 of the Constitution.

52 Art. 224 para. 1 of the Constitution.

53 Art. 123 para. 3 of the Constitution.

54 Art. 122 para. 5 of the Constitution.

55 Art. 122 para. 5 of the Constitution.

56 Art. 122 para. 2 of the Constitution.

57 Cf. Wronkowska and Zieliński, 1997, pp. 137, 150.

The authority issuing the regulation must act strictly within the scope of the authorisation. Exceeding that scope or acting without authorisation violates the principle of legality and the Constitution.

In summary, enacted law is a key pillar of the rule of law, and its creation requires adherence to established principles and procedures. The Polish legal system operates on a hierarchy of legal sources, with the Constitution at the apex. The legislative process, encompassing both statutes and executive acts, is underpinned by the principles of legality, adequacy, proportionality, transparency and stability. Complying with these standards ensures respect for the democratic rule-of-law state and fosters citizens' trust in state institutions.

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### **3. Evaluation of Law as a Guarantee of the Rule of Law**

The rule of law requires that all actions of state authorities comply with legal norms and respect the Constitution and individual rights. Evaluating law – defined as systematically assessing its compliance with higher legal norms – is therefore crucial. This process guarantees the stability of the legal system and prevents arbitrary actions by authorities, which is fundamental to the rule of law.

#### ***3.1. Constitutionalism and Legalism as Foundations for Evaluating Law***

Constitutionalism is a fundamental tenet of modern democratic states governed by the rule of law. It establishes the structural and functional limits of state authority. While closely linked to legalism and the rule of law, constitutionalism has distinct aims.

It is rooted in the belief that power must be subject to limitation and oversight to prevent arbitrariness and abuse. The constitution, as the highest-ranking legal act, ensures this by organising governance, protecting individual rights and freedoms, and defining the state's system. Beyond its legal function, the constitution carries a moral dimension, expressing the core values of the political community such as liberty, equality and justice. Thus, constitutionalism treats law not merely as a tool of power but as a safeguard against its misuse.<sup>58</sup>

Legalism requires state authorities to act strictly within the law and in compliance with legal provisions. It primarily addresses the formal dimension of the rule of law, mandating that laws be created and applied according to established procedures.

The rule of law is broader than legalism. It requires all authorities to operate within the law, but also that laws themselves protect fundamental rights and

<sup>58</sup> Tsagourias, 2007, pp. 1–10.

freedoms. This concept integrates formal legality with substantive content. Laws must comply with constitutional norms and promote values such as justice, dignity and equality.

The rule of law thus integrates elements of legalism and constitutionalism. While legalism emphasises formal safeguards, constitutionalism ensures that law serves broader axiological aims. Principles such as the prohibition of retroactive legislation and the requirement of transparency and openness in the legislative process stem from this integration, ensuring legal stability and predictability.

Legal philosophers like Lon Fuller have argued that law must satisfy certain procedural and axiological conditions to be valid. In his concept of the ‘inner morality of law’, Fuller emphasised that law must be clear, consistent, stable and aligned with moral values. This bridges legalism’s formalism and constitutionalism’s values and is reflected in the principles of good legislation derived from Art. 2 of the Constitution of the Republic of Poland.

Constitutionalism, legalism and the rule of law are interrelated yet distinct. Legalism underpins the formal dimension of the rule of law by ensuring all authority acts within the law, irrespective of its moral content. The rule of law, in turn, combines formal legality with axiological standards. Constitutionalism enriches this framework by embedding constitutional values, which define law’s aims and limits. Modern doctrines of the rule of law thus emphasise both procedural compliance and alignment with constitutional values, such as dignity, justice and liberty.

Together, constitutionalism, legalism and the rule of law form the foundation of democratic states, ensuring that law serves not only as a regulatory instrument but also as a safeguard for citizens’ fundamental rights and freedoms.

### ***3.2. Reviewing the Constitutionality of Law***

One of the fundamental mechanisms for evaluating law is the review of constitutionality, which determines whether statutes and normative acts comply with the constitution. In Poland, this function is entrusted to the CT, which adjudicates the conformity of legal acts with the Constitution and removes provisions that conflict with it.

Constitutional review is essential for preventing the legislative and executive branches from enacting regulations that violate fundamental principles or citizens’ rights. It ensures that the legal system adheres to constitutional standards, upholding the rule of law and safeguarding individual freedoms and values enshrined in the Constitution.

Poland’s constitutional framework adopts a centralised model of constitutionality review, vesting exclusive authority in the CT. This model ensures uniform interpretation and application of constitutional principles.<sup>59</sup>

<sup>59</sup> Siemieński, 2000, pp. 266–267.

Under Art. 188 of the Constitution, the CT adjudicates on the following matters: (1) the constitutionality of statutes and international agreements in relation to the Constitution; (2) the compliance of statutes with ratified international agreements requiring prior legislative consent; (3) the constitutionality of legal provisions issued by central state authorities in relation to the Constitution, ratified international agreements, and statutes; (4) the compliance of political parties' objectives or activities with the Constitution; and (5) constitutional complaints submitted by individuals or entities regarding violations of constitutional rights.

Additionally, Art. 189 authorises the CT to resolve competence disputes between central constitutional bodies, while Art. 193 allows it to consider legal questions referred by courts. This broad jurisdiction underscores the Tribunal's pivotal role in preserving the Constitution's supremacy and ensuring the state functions within constitutional boundaries.<sup>60</sup>

The Constitution provides several avenues for initiating review. The preventive mode examines statutes prior to presidential signature<sup>61</sup> and international agreements before ratification. The subsequent mode applies after the legislative process is complete, either during the *vacatio legis* period or once a normative act is in force. Moreover, a motion submitted by authorised entities can initiate the review of normative acts. Such a motion may concern assessing the compliance of statutes and international agreements with the Constitution, the compliance of statutes with ratified international agreements requiring prior statutory consent for ratification, and the compliance of legal provisions issued by central state authorities with the Constitution.<sup>62</sup>

Proceedings may further be initiated through constitutional complaints<sup>63</sup> or legal questions referred by courts,<sup>64</sup> in which case, the Tribunal evaluates the compliance of the normative act with higher-ranking legal acts.<sup>65</sup>

Before the 1997 Constitution entered into force, the CT already affirmed that

In a democratic state governed by the rule of law, and thus in a state based on the principle of separation of powers, it is inadmissible to establish legal norms that are not subject to review for their compliance with the Constitution in a manner that allows for the elimination of existing inconsistencies. In particular, it would be unacceptable to lack such review with regard to legal norms established by the highest legislative authority, whose function is to create law. Adopting a contrary interpretation

60 In the context of legislation, one could also hypothetically consider a dispute over the scope of legislative competence between the constitutional central state authorities.

61 Art. 122(3) of the Constitution.

62 Art. 191(1) Points 1–5 of the Constitution.

63 Art. 79(1) of the Constitution.

64 Art. 193 of the Constitution.

65 Wiącek, 2014, p. 734.

would pave the way for arbitrary enactment of legal regulations through resolutions not subject to review for compliance with the Constitution and statutes.<sup>66</sup>

Beyond the CT's hierarchical review, courts may, to a limited extent, address the constitutionality of legal norms. However, they cannot substitute the CT or remove norms from the legal system. This decentralised application of constitutionalism is tied to the concept of the direct application of the Constitution and arises in individual cases.

Art. 178 of the Constitution stipulates that judges are bound by the Constitution and statutes, empowering them to refuse to apply lower-ranking legal acts in a given case. Such refusals do not remove these acts from the legal order;<sup>67</sup> for derogation to occur, the court must submit a legal question to the CT under Art. 193 of the Constitution, which addresses the conformity of normative acts, applies to higher-ranking acts. The CT ultimately determines the constitutionality or legality of such an act. Once the Tribunal's judgment is published in the appropriate official journal, it enters into force and affects the legal system.

The review of legality is addressed in Art. 184 of the Constitution, which entrusts the Supreme Administrative Court (SAC) and provincial administrative courts with overseeing public administration activities. This includes adjudicating on the compliance of local government resolutions and normative acts issued by territorial government bodies with statutory laws.

Parliamentary oversight also plays an important role in upholding constitutionalism. The Sejm and the Senate analyse draft laws and the legislative process, introducing amendments to ensure compliance with constitutional standards.

This oversight allows for interventions during the legislative phase to prevent unconstitutional provisions from entering into force,<sup>68</sup> and enables the adaptation of regulations to changing social and political realities. As representatives of the citizenry, parliamentarians play a vital role in protecting societal interests against measures that could undermine the rule of law. By eliminating inefficient or unlawful provisions, parliamentary oversight contributes to the stability of the legal system, provided that the legislative authority operates according to the principle of legality.

In sum, the evaluation of law – encompassing constitutionalism, constitutional review, judicial review, and parliamentary oversight – is fundamental to safeguarding citizens' rights and maintaining the rule of law. This evaluation preserves a legal order consistent with constitutional principles and prevents arbitrary exercises of power. Reviews must rest on clear legal foundations and transparent criteria limiting

66 Cf. the judgment of CT of 19 June 1992, U 6/92, OTK No. 1/1992, item 13. The position of the CT regarding the assurance of mechanisms for constitutional review of law remains relevant to this day and reflects the implementation of the principles of constitutionalism and the rule of law.

67 Cf. Mikuli, 2002, p. 190; Fox and Ozimek, 2017, p. 53.

68 Gierach, 2014, pp. 551–566.

discretion, and their outcomes must be respected by all public authorities. Art. 190 Para. 1 of the Constitution explicitly provides that CT judgments have universally binding force and are final.

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## 4. Abuse of the Rule of Law in Lawmaking

The above standards and regulations provide a benchmark for evaluating legislative actions. Without them, the rule of law becomes a hollow slogan that can legitimise any action by those in power. Though intended to guarantee the stability and predictability of the legal order and protect individuals from state arbitrariness, misuse of the rule of law in the legislative process undermines the foundations of a democratic state. This not only erodes public trust but also creates the risk of arbitrary governance.

In legislation, various irregularities can be observed that call into question compliance with the rule of law. These undermine the system of legal sources, legislative principles, the law-making process itself, and the mechanisms for reviewing constitutionality.

### 4.1. *Violation of the Constitutional Hierarchy of Legal Sources*

Poland's constitutional system of legal sources is hierarchical: lower-ranking acts must comply with higher-ranking ones, with the Constitution at the apex. This structure guarantees coherence, predictability, and stability in the legal order and forms the basis of the rule of law. Legal theorists emphasise that strict adherence to the hierarchical system prevents the enactment of regulations conflicting with fundamental constitutional values. Breaches of the hierarchy lead to systemic disintegration and weaken the Constitution's supervisory role over the legislature.

#### 4.1.1. *Replacing Generally Binding Law with Internally Binding Law*

A phenomenon has emerged in legislative practice whereby authorities competent to enact laws and amend the Constitution, instead of issuing acts of generally binding law, adopt resolutions purporting to have such force and producing legal effects.

Examples include the Sejm resolution of 19 December 2023 on restoring legal order and ensuring impartiality in public media and the Polish Press Agency (PAP);<sup>69</sup> the Sejm resolution of 20 December 2023 on addressing the consequences of the

69 M.P. of 2023, item 1477.

constitutional crisis in the context of the National Council of the Judiciary (NCJ);<sup>70</sup> and the Sejm resolution of 6 March 2024 on addressing the consequences of the 2015–2023 constitutional crisis concerning the CT.<sup>71</sup>

The 19 December 2023 resolution concerning public media underlined the urgent need to restore their independence and public mission. The Sejm asserted that media company boards had been appointed based on unconstitutional regulations, subordinating public media to political interests. It called for immediate corrective measures, particularly by the State Treasury, to ensure that public media and PAP function in accordance with the standards of a rule-of-law state.

During the transitional period, these measures sought to reinstate the public mission of public media – pluralism, impartiality, and high-quality content – until new legislation was adopted. Although publicly acknowledged to lack binding legal force,<sup>72</sup> the resolution became the basis for government actions concerning changes in public media, influencing the operations of companies not organisationally subordinate to the Sejm.

The 20 December 2023 resolution regarding the NCJ declared that members representing the judiciary should be selected by the judiciary itself. The Sejm concluded that the 2018, 2021 and 2022 NCJ selection resolutions had been adopted in gross violation of the Constitution, resulting in a composition inconsistent with the Constitution and international standards such as the Convention for the Protection of Human Rights and Fundamental Freedoms and the Treaty on the European Union.

As a result, the NCJ was deemed unable to perform its constitutional functions, including safeguarding judicial independence. The Sejm urged current members to cease their activities, stating that their continued operation undermined the constitutional order, and declared its intention to introduce legislative and organisational measures to restore the NCJ to its proper institutional position. It also appealed to the President and other public authorities to ensure the NCJ's operation complies with constitutional and international standards. In this way, the Sejm assessed the legality of another constitutional body through an internal act.

The 6 March 2024 resolution concerning the CT formed part of a 'package of measures to restore the CT'.<sup>73</sup> It identified legal violations in the Tribunal's operations, including resolutions appointing judges in gross breach of the law, including the Constitution and the European Convention on Human Rights (ECHR). The SEJM declared these resolutions void, stating that the individuals concerned were not legitimate CT judges.

It also highlighted irregularities in the constitution of adjudicating panels, including the participation of unauthorised individuals and the improper appointment of panels. Motions to exclude judges questioned by the Sejm were systematically

70 M.P. of 2023, item 1457.

71 M.P. of 2024, item 198.

72 Biejat: Uchwała Sejmu ws. TVP nie ma mocy prawnej, 2023.

73 Ministerstwo Sprawiedliwości, 2024a.

rejected. The Sejm determined that the appointment of Julia Przyłębska as President of the CT was unlawful and that her term had expired on 21 December 2022, rendering her procedural decisions questionable.

The resolution referenced judgments from international tribunals and EU institutions which indicated that the CT no longer met the criteria of an independent court. It asserted that the Tribunal was incapable of fulfilling its duties and required reconstruction. The Sejm warned that reliance by public authorities on CT judgments issued in violation of the law could itself constitute a breach of the principle of legality.

The resolution was subsequently challenged before the CT, which on 28 May 2024, in case U 5/24,<sup>74</sup> ruled that the act was inconsistent with Art. 7 in conjunction with Art. 87 Para 1, Art. 10 in conjunction with Art. 173, and Art. 190 Para. 1 of the Constitution. The CT found that the Sejm had issued the resolution without a legal basis and outside the constitutional catalogue of universally binding sources of law. The resolution sought to prohibit the enforcement of CT judgments deemed unlawful, which the CT held.

By flagrantly violating the principles of a democratic state governed by law, formal legality, and the separation and balance of powers, the Sejm declared in the contested resolution that CT judges who had served for several years were not members of the Tribunal. It also asserted that the President of the CT, appointed by decree of the President of the Republic of Poland, was not the legitimate head of the Tribunal.

The Tribunal emphasised that neither the Constitution, laws, the Rules of Procedure of the Sejm, nor any other legal act authorises the Sejm to use a resolution to challenge the adjudicative powers of CT judges, undermine the universally binding force of its judgments, prevent other authorities from enforcing its decisions, repeal provisions governing CT proceedings, or delay the publication of its judgments. These matters lie exclusively within the constitutional domain and, to some extent, statutory regulation. This interference through a resolution constituted a direct breach of the constitutional provisions delineating the limits of the Sejm's legislative competence.

The Rules of Procedure governing the adoption of resolutions confer no such authority. The CT explained that none of the judges affected by the resolutions referenced in the contested act had influenced the adoption or content of those resolutions. Recipients of CT judgments were entitled to presume that judges had been appointed constitutionally. Annulment of their appointments after swearing-in by the President violated the separation of powers and the Tribunal's independence.<sup>75</sup>

The 6 March 2024 resolution provoked significant controversy concerning constitutional principles on sources of law and the status of the CT. Public authorities not

<sup>74</sup> OTK A/2024, item 65.

<sup>75</sup> As of this document's preparation date, the CT's judgment had not been published in the relevant official journal (Monitor Polski).

subordinate to the Sejm have relied on it as a source of law, for instance, by refusing to participate in proceedings before the CT or to publish CT judgments in official journals.

Concerns regarding the resolution relate both to the system of sources of law and to fundamental constitutional principles. In particular, its use as a means of producing generally binding effects is highly contentious. Under the Constitution of Poland, Sejm resolutions are not sources of universally binding law. They cannot interfere with the competences of other public authorities and should not affect the CT's functioning or the status of its judges.

Furthermore, the Constitution guarantees the CT's independence as a judicial body. The Sejm's resolution undermines this independence by questioning the legality of judicial appointments and demanding resignations, thereby disrupting the balance of powers of powers and eroding public trust in state institutions.

The Sejm has no authority to assess the legality of CT judicial appointments, interfere with its judgments, or undermine their final and universally binding nature. By engaging in such evaluations, the Sejm exceeded its constitutional competences. Challenging CT judgments, which are final and universally binding, on any basis other than a constitutional one lies outside the legal framework.

Substituting generally binding law with internally binding resolutions violates the rule of law because it undermines the hierarchy of legal sources and the principle of legality, which requires that public authorities act on the basis of democratically adopted legislation. Such practices foster arbitrariness, reduce legal transparency, and erode trust in the legal system, thereby threatening the stability of a democratic state governed by the rule of law.

#### *4.1.2. Executive Regulations Encroaching on Higher-Rank Legislative Matters*

Violations of the legal source hierarchy can also be observed where executive authorities, acting beyond their delegated powers, regulate matters reserved for higher-ranking acts or intrude into areas of governance exclusively reserved for the Constitution.

On 6 February 2024, the Minister of Justice issued regulations imposing various obligations on judges, including requirements concerning the application of EU and international law in adjudication. The Minister further established criteria for judicial recusal and created two categories of judges: those appointed before and after 2018. These provisions formed part of the 6 February 2024 amendment to the Rules of Procedure for Common Courts.<sup>76</sup> The regulation was ostensibly intended to ensure the uniform application of EU and international norms in the Polish legal order, requiring judges to give effect to EU law in accordance with its primacy and to apply international agreements to which Poland is a party.

<sup>76</sup> Journal of Laws of 2024, item 149.

From the standpoint of constitutional lawmaking principles, the regulation raised serious concerns regarding compliance with the enabling provision authorising its issuance. There was no explicit statutory delegation empowering the Minister to impose obligations on judges relating to EU and international law by way of regulation. Moreover, a general principle exists that a lower-ranking act cannot mandate the application of a higher-ranking act. Any obligations concerning the application of EU and international law should derive from the Constitution, not from subordinate legislation.

Thus, although the regulation's purpose aligned with the need for uniformity in applying EU and international law, its form and the absence of appropriate statutory delegation called its constitutionality into question.

The act was subsequently challenged before the CT by the NCJ. In its judgment of 16 May 2024, U 1/24, the Tribunal declared that

Para. 1 of the Regulation of the Minister of Justice of February 6, 2024, amending the regulation – Rules of Procedure for Common Courts (...) is inconsistent with Art. 7 in conjunction with Art. 186 Para. 1, Art. 45 Para. 1, Art. 92 Para. 1, Art. 176 Para. 2, Art. 178 Para. 1, Art. 179, and Art. 190 Para. 1 of the Constitution of the Republic of Poland. 2. Paras. 2 and 3 of the regulation mentioned in Point 1 are inconsistent with Art. 7 in conjunction with Art. 186 Para. 1 of the Constitution.

The CT held unconstitutional the provisions of the regulation that amended Art. 43 of the *Rules of Procedure for Common Courts* by adding paras. 1a and 1b. These provisions allowed for the exclusion of certain judges from random case assignments in specified categories, thereby affecting the court composition, judicial independence and impartiality. The Tribunal stressed that such actions violated the constitutional principle of legality and undermined judicial autonomy.

The CT further explained that the Minister had failed to consult the NCJ before issuing the regulation, contravening the NCJ's constitutional function of safeguarding judicial independence and impartiality. This omission violated Art. 7 and 186 Para. 1 of the Constitution. Furthermore, the CT determined that the regulation exceeded the statutory delegation contained in Art. 41 Para. 1 of the Law on the Organisation of Common Courts, thereby breaching Art. 92 Para. 1 of the Constitution, which requires clear and precise statutory delegations.

The CT also pointed out that the regulation unlawfully altered the structure and jurisdiction of courts, contrary to Art. 176 Para. 2 of the Constitution, which stipulates that such changes can only be affected by statute. Introducing automatic disqualification criteria for judges infringed the right to a fair trial guaranteed under Art. 45 Para. 1 and violated the principle of judicial independence enshrined in Art. 178 Para. 1.

Additionally, the Tribunal held that the regulation interfered with the President of the Republic of Poland's prerogative under Art. 179 to appoint judges. By introducing

two categories of judges – those appointed before and after 2018 – the regulation violated constitutional guarantees of equality and judicial irremovability.

Furthermore, it disregarded an earlier CT judgment (U 2/20),<sup>77</sup> Art. 190 Para. 1, which affirms the universally binding and final nature of CT judgments.

#### *4.1.3. Replacing Formal Sources of Law with Extralegal Actions*

Another violation of the constitutional system of legal sources arises when formal sources of law are replaced by extra-legal actions. The use of measures such as undefined guidelines, recommendations or ‘declarative acts’, falls outside the formal system of legal sources. Treating such measures as normative circumvents established legislative procedures and erodes the rule of law.

Substituting formal normative acts with extra-legal measures undermines legal certainty, making it difficult for citizens to discern which norms are binding. These measures are not subject to ordinary legislative procedures or constitutional review and thus evade the scrutiny applied to normative acts. This misuse of the rule of law turns legal instruments into tools of arbitrariness rather than guarantees of stability and predictability. Examples include the issuance of guidelines on abortion procedures or reliance on legal opinions in place of statutory provisions.

In Poland, abortion is strictly regulated by statute. In 2020, the CT held that termination on grounds of severe foetal defects was unconstitutional, substantially narrowing the legal grounds for the procedure.<sup>78</sup> In response, on 30 August 2024, the Ministry of Health issued guidelines to facilitate access to lawful abortion where a woman’s health – including mental health – was at risk.<sup>79</sup> The guidelines state that a single doctor’s opinion confirming a risk to the woman’s health is sufficient to perform the procedure, aiming to streamline the process and expand access to this service. They imply that this criterion could effectively replace the statutory provision allowing abortion in cases of severe foetal defects, which the CT had declared unconstitutional under the pretext of assessing risks to the woman’s health. The guidelines thus amount to a means of circumventing the effects of the CT’s universally binding judgment, yet they do not possess the legal force of a statute.

Although the guidelines may have influenced medical practice, they lacked the force of law. They could not alter or substitute statutory provisions. The legal basis for abortions remained the statute itself, and the guidelines functioned solely as recommendations. Ministerial guidelines cannot contravene statutory provisions or CT judgments, both of which are universally binding. In reality, these guidelines were intended to circumvent the binding effects of the CT’s judgment, contrary to constitutional standards.

<sup>77</sup> The CT judgment of 20 April 2020, U 2/20, OTK A/2020, item 61, declared the unconstitutionality of the Resolution of the Three Chambers of the SC Chambers.

<sup>78</sup> The judgment of CT of 22 October 2020, K 1/20, OTK A/2021, item 4.

<sup>79</sup> Ministerstwo Zdrowia, 2024.

If doubts arise regarding the compatibility of such guidelines with the law, an assessment of their conformity with applicable legislation and the Constitution is required.

Another example of misuse involves relying on legal opinions as sources of normative authority rather than on the law itself. This occurred in changes made to the National Prosecutor's Office, based on a legal opinion treating permanent provisions as temporary. In 2016, Art. 47 Paras. 1 and 2 of the Introductory Provisions to the Act on the Prosecution Service allowed prosecutors already in retirement on the date of its entry into force to request reinstatement.

In February 2022, a retired prosecutor exercised this right, and the Prosecutor General approved the request. The prosecutor was subsequently appointed as the National Prosecutor. However, in January 2024, a new Prosecutor General declared the reinstatement legally ineffective, claiming that Art. 47 was a temporary measure valid only for two months after the law's enactment.<sup>80</sup> This conclusion was based on legal opinions asserting the provision's temporary nature.<sup>81</sup> The resulting change in the National Prosecutor's position occurred outside the framework of established legal procedures.<sup>82</sup> From the standpoint of legislative drafting, Art. 47 was not temporary, despite its placement in the *Introductory Provisions Act*.

On 27 September 2024, the SC, sitting as a three-judge panel of the Criminal Chamber, ruled that Art. 47 Paras. 1 and 2 were neither temporary nor subject to time limits.<sup>83</sup> In response, the National Prosecutor's Office stated that 'the position in case No. I KZP 3/24 is not a resolution of the Supreme Court (SC) within the meaning of Art. 441 of the Code of Criminal Procedure. This position does not produce legal effects because unauthorised individuals adopted it'.<sup>84</sup>

The above demonstrates that arbitrarily assigning a particular nature to legal provisions through interpretation, such as attributing ephemerality to permanent provisions, poses a serious threat to the rule of law. It undermines fundamental principles of a legal state, including legal certainty, predictability, and stability of the legal system. The principle of legal certainty requires that laws be clear, unambiguous, and applied predictably, enabling citizens and state authorities to act with confidence that the law will be enforced consistently and in line with its original purpose. Arbitrary reinterpretations of the nature of legal provisions generate legal chaos, rendering norms unclear and undermining their validity.

Such practices also risk instrumentalising the law, using it for political purposes or to advance particular interests rather than the common good. Treating the law as a political instrumental undermines its apolitical nature, diminishes its role as a guarantor of justice and equality before the law, and erodes public trust in legal

80 Ministerstwo Sprawiedliwości, 2024b.

81 Szymanik, 2024.

82 See: Stanowisko zastępców Prokuratora Generalnego dotyczące próby bezprawnego pozbawienia funkcji Prokuratora Krajowego i obsadzenia tej funkcji w trybie nieznanym ustawie.

83 The resolution of S.C. of 27 September 2024, I KZP 3/24.

84 Pietryga, 2024.

institutions. Moreover, attributing characteristics to legal provisions that do not arise from their content or the legislature's original intent weakens the principle of the separation of powers and violates the principle of legality. If the nature of legal provisions can be altered arbitrarily during interpretation, it undermines the foundations of the entire legal order and paves the way for abuses. In such circumstances, the law ceases to serve as a mechanism for protecting the freedoms and rights of citizens and instead becomes a tool of arbitrary power. This erosion of trust in the state and its legal institutions has a profoundly negative impact on the functioning of the rule of law.

#### ***4.2. Breaches of the Legislative Procedure***

The legislative process is designed to ensure that legal provisions comply with constitutional principles and serve the public interest. Adherence to legislative procedures is essential to guaranteeing the legitimacy and acceptance of enacted laws. In practice, however, numerous forms of violations of legislative principles can be observed, many of which may be scrutinised during constitutional review to assess compliance with constitutionally established procedures.

One such issue concerned the exclusion of Members of Parliament (MPs) whose status was challenged from participating in legislative votes.

In January 2024, a controversy arose regarding the participation of two MPs who had previously been convicted by a court but were pardoned by the President of Poland in 2015. Despite the pardons, the Speaker of the Sejm declared mandates void in January 2024, citing the binding court verdict, and excluded them from participating in parliamentary voting.

This decision sparked controversy because the Polish Constitution authorises the President to grant pardons, and the 2015 pardons should have annulled the legal consequences of the convictions. Voters grant parliamentary mandates, which can only be terminated under specific conditions, such as a final conviction resulting in a custodial sentence. A presidential pardon can affect the legal status of such a conviction. Excluding MPs from voting may, therefore, violate democratic legislative principles, as every elected representative has the right to represent their constituents.

In response to the Speaker of the Sejm's decision, the President issued a further pardon for the two MPs in January 2024, releasing them from detention.<sup>85</sup>

The exclusion of MPs from the voting process subsequently became grounds for the President to challenge laws before the CT, citing a violation of the legislative procedure by the Sejm.<sup>86</sup> On 19 June 2024, the CT declared one such law entirely inconsistent with Art. 7 in conjunction with Art. 4 Para. 2, Art. 104 Para. 1, and

85 See the reconstruction of the factual and legal state in the reasoning of case K 7/24, points III.2 and III.4.

86 Cf. Cases in the ref. No. K 4/24, K 5/24, K 6/24, K 13/24, K 14/24, K 17/24, K 18/24, K 19/24, K 20/24, K 21/24, K 22/24, K 23/24. Trybunał Konstytucyjny, 2024.

Art. 96 Para. 1 of the Constitution.<sup>87</sup> It held that the law was passed in breach of constitutional principles, primarily due to the Speaker's actions the preventing two MPs from exercising their mandates. By disregarding binding SC decisions, deactivating the MPs' voting cards, and barring them from entering the Sejm building, the Speaker violated the principle of legality and citizens' right to representation. As a result, proceeding with the legislative proposal without allowing the participation of these MPs rendered the legislative process flawed. The CT stressed that even when a quorum and voting majority are maintained, unlawfully excluding a single MP from the legislative process renders the law unconstitutional.<sup>88</sup>

Another violation of legislative procedure involved executive acts and consultation obligations. In July 2024, the Minister of National Education issued a regulation amending the rules for organising religious education in public preschools and schools. The new provisions allowed students from different classes to be grouped together for religion lessons and limited these lessons to one hour per week.

The regulation was issued without following procedures required by law, including those mandated by the Constitution, as no agreement was reached with churches and religious organisations. Existing regulations stipulated that changes to religious education in public schools had to be agreed upon with these bodies. The absence of such agreements violated established legislative procedures and could be interpreted as disregarding the voice of religious institutions.

Under Art. 12 Para. 2 of the Education System Act, the minister must act in agreement with church and religious authorities when determining the conditions for organising religious education through regulation. Although these bodies participated in public consultations, their positions were ignored and no agreement was reached.

This failure to consult raised doubts about the regulation's constitutionality and its compatibility with international commitments concerning the Catholic Church. According to Art. 25 Para. 3 of the Constitution, relations between the state and churches must be based on cooperation. The 1993 concordat between the Republic of Poland and the Holy See also requires that matters relating to religious education in public schools be agreed upon by both parties. Therefore, issuing regulation without fulfilling these requirements may be considered a violation of Art. 7 of the Constitution and could undermine state–church cooperation, which is crucial in shaping policy in this area.

The First President of the SC recognised this issue and, on 26 August 2024, submitted a motion to the CT to examine the constitutionality of the Minister of Education's regulation of 26 July 2024.<sup>89</sup> In its judgment of 27 November 2024, the CT declared the regulation unconstitutional. The Tribunal explained that the Minister of National Education acted unilaterally, disregarding the substantive positions of the

87 The judgment of the CT of 19 June 2024, K 7/24, OTK ZU A/2024, item 60.

88 Ibid.

89 Journal of Laws of 2024, item 1158.

relevant churches and religious organisations, and therefore failed to comply with the statutory authorisation requiring agreement with these bodies.<sup>90</sup>

With the above in mind, it is important to emphasise that a normative act is a complex legal construct comprising both formal and substantive elements. The formal elements pertain to the lawmaking procedure, including compliance with legally established principles and processes, while the substantive elements concern the conformity of the act's content with higher legal norms, including the Constitution. Violation of either element undermines the law's constitutionality, as both are essential to maintaining the rule of law.

The principle of legality, a central pillar of the rule of law, requires legislative processes to adhere to existing laws, including constitutionally defined procedures and detailed statutory requirements for drafting normative acts. Omitting or violating any of these elements may render an act unconstitutional, regardless of its intended purpose.

Even the pursuit of the most important objectives, such as protecting the rule of law, does not justify acting outside the law. A democratic state governed by the rule of law is founded on the premise that public authorities, including legislative bodies, act within and on the basis of the law. Otherwise, the stability of the legal system is undermined.

The illegal enactment of normative acts, even when intended to uphold the rule of law, creates a paradox: an attempt to defend the law by violating it. Such practices undermine the perception of law as stable and predictable. As a result, acts adopted in breach of legislative procedures may be challenged, annulled, or disregarded, further destabilising the legal system.

This principle is particularly significant in the constitutional requirement that public authorities operate not only within the law but also in a manner consistent with other constitutional principles, including the protection of individual rights, equality before the law, and independence of the judiciary.

The legality of the legislative process is therefore not a mere technicality but a cornerstone of a democratic state governed by the rule of law, safeguarding both the constitutional order and the rights of citizens.

### ***4.3. Enactment of Laws Modifying the Constitution***

In legislation, another concerning phenomenon can be observed that, while linked to the previously discussed issues, warrants separate consideration: the enactment of laws whose content effectively alters the constitutional system and its

90 The judgment of CT of 27 November 2024, U 10/24, OTK ZU A/2024, item 118.

principles. The most striking example of this is the new law on the CT and the associated Introductory Provisions.<sup>91</sup>

These acts have generated considerable controversy and debate in Poland. Criticisms primarily concern the legislative procedure, the representativeness of public consultations, and the changes introduced to the composition and functioning of the CT. The law modifies the procedures for appointing CT judges and regulating the Tribunal's operations. These measures risk deepening the constitutional crisis and rendering this institution dysfunctional.

From an institutional perspective, the key issues include: (1) The law declares the nullity and legal ineffectiveness of CT judgments and decisions resolving competence disputes between central constitutional state authorities when issued by adjudicating panels that included 'unauthorized persons' or individuals appointed in their place. However, it upholds judicial judgments and final administrative decisions binding at the time of the Introductory Provisions' entry into force, even if based on legal states shaped by invalid CT judgments (Art. 10 Paras. 1, 2, and 4 of the Introductory Provisions to the Act on the CT). (2) The CT must draft and publish, in *Monitor Polski*, a list of invalid judgments and decisions within one month of the law's entry into force (Art. 10 Para. 5 of the Introductory Provisions to the Act on the CT). (3) The validity of CT judgments dismissing proceedings and decisions issued during the preliminary review of motions and constitutional complaints by the panels mentioned in Art. 10 Para. 1 is upheld (Introductory Provisions to the Act on the CT, Art. 11 Para. 1). (4) Constitutional complaints may be resubmitted within three months of the Introductory Provisions' entry into force in cases where the Tribunal dismissed the complaint or failed to process it with panels mentioned in Art. 10 Para. 1 (Introductory Provisions to the Act on the CT, Art. 11 Para. 2). (5) All procedural actions in proceedings where invalid judgments and decisions regarding competence disputes were issued must be repeated (Introductory Provisions to the Act on the CT, Art. 12 Para. 3). (6) The duties of the President of the CT must be assigned, as of the entry into force of the Act of 13 September 2024 on the CT, to the judge with the longest tenure until a new President and Vice-President of the CT are appointed by the President of Poland (Introductory Provisions to the Act on the CT, Art. 14). (7) CT judges whose terms began before the Act of 13 September 2024 entered into force may retire by submitting an appropriate declaration to the President of the CT. This provision does not apply to individuals deemed 'unauthorized to adjudicate' under the law (Introductory Provisions to the Act on the CT, Art. 15).

These measures raise serious doubts about compliance with the principle of the finality of CT judgments and undermine the separation and balance of powers. Declaring CT judgments invalid effectively amends constitutional provisions and creates a precedent whereby the effects of public authorities' constitutional actions

91 These are the Act of 13 September 2024 on the Constitutional Tribunal and the Act of 13 September 2024 Introductory Provisions to the Act on the Constitutional Tribunal. Both acts were submitted to the President for signature.

may be overturned by statute. Such regulations risk generating legal chaos, eroding trust in the state and its institutions.

Because the CT's competences derive directly from the Constitution, the legislature cannot unilaterally change them by invalidating judgments, removing judges, or interfering with the Tribunal's institutional role.

Another example of circumventing constitutional obligations is Resolution No. 162 of the Council of Ministers of 18 December 2024, adopted to counteract the negative effects of the constitutional crisis in the judiciary.<sup>92</sup> The Council of Ministers cited the implementation of judgments issued by the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU) as the legal basis for its actions.<sup>93</sup> It asserted that the current composition of the CT was incapable of fulfilling its constitutional tasks. Since obligation to publish CT rulings in official journals applies only to acts adopted by a legitimate body, measures addressing the rule of law crisis must begin by preventing further consequences of the CT's unconstitutional actions.

The Council therefore sought to exclude the possibility of incorporating future Tribunal rulings into the legal system. It argued that publishing such rulings in official journals would entrench the rule of law crisis and that documents issued by an unauthorised body must not be published. In its view, considering unlawful CT rulings in public authorities' actions could itself violate the principle of legality.<sup>94</sup>

Moreover, the Council stated that the texts of acts issued by the NCJ and the SC, in panels involving judges appointed at the request of the restructured NCJ under the Act of 8 December 2017, should include a non-interfering annotation when published in official journals, stating:

In accordance with the judgments of the European Court of Human Rights in the cases: *Wałęsa v. Poland* (application No. 50849/21), *Reczkowicz v. Poland* (application No. 43447/19), *Dolińska-Ficek and Ozimek v. Poland* (applications nos. 49868/19 and 57511/19), *Advance Pharma sp. z o.o. v. Poland* (application No. 1469/20), and *Grzęda v. Poland* (application No. 43572/18), as well as the case law of the Court of Justice of the European Union, including the judgment of 21 December 2023 in the case of *L.G. v. National Council of the Judiciary*, Case C-718/21, and the judgment

92 M. P. of 2024, item 1068.

93 See the pilot judgment of the European Court of Human Rights (ECtHR) of 23 November 2023, *Wałęsa v. Poland* (application No. 50849/21), as well as the judgments of 22 July 2021, *Reczkowicz v. Poland* (application No. 43447/19), 8 November 2021, *Dolińska-Ficek and Ozimek v. Poland* (applications Nos. 49868/19 and 57511/19), 3 February 2022, *Advance Pharma sp. z o.o. v. Poland* (application No. 1469/20), 15 March 2022, *Grzęda v. Poland* (application No. 43572/18), 7 May 2021, *Xero Flor v. Poland* (application No. 4907/18), and 14 December 2023, *M.L. v. Poland* (application No. 40119/21). See also the judgment of the Court of Justice of the European Union (CJEU) of 21 December 2023, *L.G. v. National Council of the Judiciary* (Case C-718/21), and the judgment of 7 November 2024, *C.W. S.A. and others v. President of the Office of Competition and Consumer Protection* (Case C-326/23).

94 Cf. para. 1 Resolution No. 162 of the Council of Ministers.

of 7 November 2024 in the case of C.W. S.A. and others v. President of the Office of Competition and Consumer Protection, Case C-326/23, the National Council of the Judiciary restructured under the Act of 8 December 2017 amending the Act on the National Council of the Judiciary and certain other acts (Journal of Laws of 2018, item 3) does not provide guarantees of independence from the legislative and executive powers. Furthermore, irregularities in the process of appointing judges do not allow the SC – adjudicating in panels involving individuals appointed as judges by the President of the Republic of Poland upon the request of the National Council of the Judiciary restructured under the provisions of the Act of 8 December 2017 amending the Act on the National Council of the Judiciary and certain other acts – to be recognised as a court established by law.<sup>95</sup>

Commentators have regarded this resolution as merely an internally binding act,<sup>96</sup> intended, among other things, to justify the Council of Ministers' failure to fulfil its obligation to publish CT rulings and to create a legal basis for that omission. In doing so, the Council used an internal executive act to alter the scope of its constitutional and statutory duties, which is incompatible with the constitutional system of sources of law and the principle of the rule of law. This action, ostensibly aimed at restoring the rule of law, flagrantly violated the principle of legality and the Constitution. It set a dangerous precedent for public authorities, suggesting that when constitutional or statutory amendments are unattainable, arbitrary measures may be employed to achieve intended goals, undermining legal certainty and security.

The above examples concerning sources of law and the procedures for their creation demonstrate how non-compliance with constitutional principles and legislative procedures can destabilise the legal system. These violations include disregarding the hierarchy of legal sources, employing extra-legal actions, and breaching the principles of the legislative process.

From the perspective of legal theory and doctrine, adherence to these principles is indispensable to ensuring stability, predictability and coherence in the legal system – key components of the rule of law. Justifying measures that replace legitimate legislation under the guise of defending the rule of law constitutes an abuse of that principle. Such practices ultimately undermine the protection of individual rights and freedoms and erode public trust in state institutions.

95 Cf. Art. 2 para. 7 Resolution No. 162 of the Council of Ministers.

96 Cf. Sewastianowicz and Rojek-Socha, 2024.

## 5. Abuse of the Rule of Law in Legal Assessments

The rule of law, as a foundational principle of a democratic state governed by law, requires that state authorities act in compliance with existing legal provisions and respect constitutional mechanisms for reviewing and evaluating enacted laws. It is based on the premise that state power must operate within the boundaries of the law, and recipients of legal norms have the right to expect predictability and stability in the legal system.

In Poland, recent developments have raised concerns about violations of this principle in the area of legal assessment. These include undermining the supremacy of the Constitution and its mechanisms, disregarding the role of the CT, uncritically replacing concentrated oversight with dispersed oversight, and using extra-legal forms of control.

### *5.1. Redefining Constitutional Legality of Law*

The constitutional legality of law constitutes a fundamental pillar ensuring the stability and predictability of the legal system in a democratic state governed by law. It presupposes that all legal norms comply with the Constitution, which stands as the supreme legal act establishing the fundamental principles of state functioning and the protection of individual rights. Redefining the concept of ‘constitutional legality of law’ risks rendering the interpretation of the Constitution subject to the prevailing political power, thereby undermining its assumed stability and independence.

Amid violations of principles related to lawmaking and the system of legal sources, the criteria for assessing the legality or constitutionality of laws have become increasingly relative. Measures aimed at reforming the legal system and addressing the consequences of the so-called constitutional crisis have substantially altered the notion of constitutional legality by weakening established, legally regulated institutions and mechanisms.

Traditionally, constitutional legality entailed conformity of normative acts with the Constitution, as determined by an independent CT. However, challenges to the composition and judgments of the Tribunal, coupled with parliamentary resolutions influencing its operation, have disrupted the constitutional order. Additionally, constitutional arguments have increasingly given way to imperatives arising from EU and international law, as well as judgments of the ECtHR and the CJEU, effectively elevating these to sources of law.

Consequently, the supremacy art. of the Constitution under Art. 8(1) is, to an extent, compromised. Despite clear CT rulings, circumvention of constitutional

principles has become more evident.<sup>97</sup> This raises uncertainty regarding the reference point for evaluating laws.

### *5.2. Disregarding the CT and Its Judgments*

The relativisation of law and the denial of the legality of constitutional state bodies, including the CT, undermine mechanisms safeguarding the rule of law within the legislative context. Disregarding CT judgments permits the application of normative acts despite their inconsistency with the Constitution. This substantially weakens the role of the CT as guarantor of constitutional supremacy, destabilising the legal system.

This phenomenon manifests firstly in certain actors, such as the Sejm and the Prosecutor General, refusing to participate in CT proceedings, justifying their stance by reference to a Sejm resolution that lacks legal binding force. Secondly, it is evident in the failure to publish CT judgments in official journals.

As a result, two divergent legal realities emerge: one where the CT is effectively ignored by some state bodies, and another where the CT exercises constitutional review but the effects of its judgments remain partial, owing to non-publication. Under Art. 190(2), publication in the Official Journal is necessary for judgments to take effect. Experts emphasise that failure to publish judgments undermines the separation of powers and public trust in institutions. The Constitution clearly prescribes the conditions and timing for publication.<sup>98</sup>

Interestingly, this issue affects not only constitutional disputes but also the broader legal system and citizen rights. For instance, the CT's judgment of 4 June 2024<sup>99</sup> challenged provisions concerning retirees who opted for early retirement before 6 June 2012, receiving reduced pensions at standard retirement age. The unconstitutionality centred on retirees' lack of knowledge at the time of early retirement about subsequent benefit reductions.

The judgment potentially benefits 150,000 to 200,000 seniors with pension increases up to 1,200 PLN and compensations up to 64,000 PLN. However, implementation depends on reopening pension decisions, particularly via proceedings under Art. 145a of the Code of Administrative Procedure and Art. 190 Para. 4 of the Constitution of Poland. However, reopening proceedings is impossible until the

<sup>97</sup> The position arising from statements by EU institutions such as the European Commission or the CJEU is supported by representatives of legal doctrine. Cf. Łętowska, 2002, p. 110; Biernat, 2011, p. 48. The absolute primacy of European law is justified by the obligation to ensure the effectiveness of EU norms within the legal systems of member states, the necessity of treating the principle of primacy as a tool for achieving the Union's objectives, and the requirement to fulfill international commitments. There is also a call for discussing constitutional pluralism. This reasoning is also used to justify actions aimed at bypassing constitutional provisions in the activities of public authorities in Poland.

<sup>98</sup> Cf. About publishing the CT's judgments: Rojek-Socha, 2024.

<sup>99</sup> The judgment of CT of 4 June 2024, SK 140/20, OTK ZU A/2024, item 67.

CT's judgment takes effect. According to the interpretation adopted by the Social Insurance Institution (ZUS), this occurs only when the judgment is published in the Journal of Laws (Art. 190 Paras. 2 and 3 of the Constitution). The Prime Minister issues the Journal of Laws with the assistance of the Government Legislation Centre.

To date, the judgment has not been published. On 23 October 2024, the Ombudsman requested the Head of the Chancellery of the Prime Minister to clarify the factual and legal grounds for withholding publication of the CT's judgment of 4 June 2024.<sup>100</sup> In practice, the effects of the CT's judgment are nevertheless considered in some cases despite its lack of publication,<sup>101</sup> and in the public debate, some participants refer to the binding nature of certain judgments.<sup>102</sup>

This situation confirms that the current stance of some public authorities, notably the government, towards the CT and its judgments violates the principle of state loyalty to citizens, thus contravening the rule of law.

### ***5.3. Replacing Concentrated Review with Dispersed Review in a Centralised Constitutional System***

Poland's constitutional review is centralised, vesting the CT with authority to adjudicate conformity of legal acts with the Constitution. Centralised review ensures uniform constitutional interpretation and prevents divergent readings. Introducing dispersed review, whereby all courts assess constitutionality, risks legal fragmentation.

Replacing centralised with dispersed review undermines legal certainty, a cornerstone of the rule of law. Legal certainty assumes that the law is predictable and understandable for all citizens. Divergent court interpretations of constitutional provisions erode this certainty and diminish the Constitution's supreme status. Dispersed review also threatens legal system coherence, impairing uniform and predictable law application.

Should the Polish constitutional legislator seek to adopt a mixed model allowing dispersed alongside centralized review, it must enact suitable constitutional and statutory provisions.<sup>103</sup>

The notion of dispersed review emerged during the 2015 CT crisis, with the first explicit endorsement in a 2016 judgment of the Voivodeship Administrative Court in Łódź.<sup>104</sup> The court acknowledged that the presumption of constitutionality is rebutted by CT judgments but held that courts retain limited authority to apply the Constitution directly, limited to cases with published CT judgments.

100 Starzewski, 2025.

101 Kamińska, 2024; Król, 2024.

102 Ciechoński and Kryszkiewicz, 2024.

103 Gutowski and Kardas, 2024. See more Maroń, 2023.

104 Judgment of the Voivodeship Administrative Court in Łódź of 20 July 2016, III SA/Łd 362/16, LEX No. 2106088.

Subsequent judgments expanded the scope of dispersed review, though judicial consensus about its legitimacy or parameters remains absent. Dissenting opinions highlight significant disagreement.<sup>105</sup>

Most rulings neither categorically accept nor reject dispersed review;<sup>106</sup> those opposing it outright are in the minority.<sup>107</sup> Occasionally, dispersed review is posited as superior to centralised CT review, arguing that the CT's abstract preventive model oversimplifies complex issues.

This debate influences legal practice, with procedural representatives and citizens invoking dispersed review in appeals.<sup>108</sup> Courts commonly encounter such claims, often accompanied by suggestions to refer questions to the CT.<sup>109</sup> While courts typically decline declaring provisions unconstitutional in individual cases, appeals alleging overreach by first-instance courts rarely succeed.<sup>110</sup>

The narrative favouring dispersed constitutional review is evolving, bolstered by growing scepticism toward the CT and its judgments.

#### ***5.4. Use of Extra-Legal Forms of Control***

Extra-legal oversight encompasses actions assessing law conformity with the Constitution without legal basis or adherence to prescribed procedures. These include political pressure, informal guidelines, or 'declarative acts' influencing law application despite lacking formal authority. Such conduct represents a grave breach of the rule of law.

Expert opinions and doctrinal statements, while valuable for legal discourse, do not possess authoritative weight and cannot substitute for definitive constitutional adjudication. Nonetheless, such statements often yield effects comparable to constitutional review by shaping public perception that particular acts or institutions are unlawful.<sup>111</sup>

This perception prompts certain public authorities to refuse action, ultimately stripping the state of the rule of law's defining characteristic.

105 Judgment of the Voivodeship Administrative Court in Warsaw of 8 December 2020, VI SA/Wa 2319/19, LEX No. 3157107.

106 Judgment of the Court of Appeal in Rzeszów of 26 June 2020, III AUa 1014/19, LEX No. 3353117.

107 Judgment of the District Court in Rzeszów of 16 March 2021, IV U 586/20, LEX No. 3356268; Resolution of the SC16 of November 2021, I DO 13/21, LEX No. 3259129; Judgment of the District Court in Szczecin of 26 May 2022, VI U 2553/20, LEX No. 3392198.

108 Judgment of the Voivodeship Administrative Court in Gliwice of 28 March 2019, I SA/GI 1255/16, LEX No. 2647358; Judgment of the SC of 3 November 2021, III KK 373/20, LEX No. 3306162; Judgment of the Voivodeship Administrative Court in Lublin of 19 November 2021, I SA/Lu 504/20, LEX No. 3366364.

109 Judgment of the SAC of 17 December 2020, II FSK 1958/18, LEX No. 3109692; Judgment of the Voivodeship Administrative Court in Kraków of 31 March 2021, SA/Kr 11/21, LEX No. 3185493.

110 Judgment of the Court of Appeal in Wrocław of 1 March 2018, III AUa 1725/17, LEX No. 2956887; Judgment of the SAC of 20 July 2021, II FSK 1832/16, LEX No. 3232398.

111 For example, the CT, the NCJ, the SC (or at least some of its judges).

Abuse of the rule of law principle in legal assessment poses a severe threat to legal system stability, coherence, predictability, and citizens' rights protection. Redefining constitutional legality, disregarding the role of the CT, substituting centralised with dispersed review, and using extra-legal oversight weaken fundamental constitutional principles, transforming law from a protective mechanism into an instrument of power.

Meanwhile, respecting constitutional review mechanisms is essential to ensuring legal uniformity, predictability, and stability. Abuses undermine law's protective function and, consequently, the foundations of a democratic state governed by the rule of law.

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## 6. Conclusions

The relationship between law and the rule of law is fundamental to understanding how the state and society function. Law comprises the rules and norms that regulate the behaviour of individuals and institutions, while the rule of law is the principle that both citizens and public authorities must act in compliance with those rules. It defines how the law should be applied to guarantee justice, stability, and transparency.

Law provides the foundation for the rule of law. Without a legal system, there would be no framework to regulate social and institutional conduct. It establishes the principles underpinning society, delineates the powers of authorities, and defines citizens' rights and obligations. However, to serve its role within the framework of the rule of law, law must be applied consistently and impartially. In a state governed by the rule of law, law is not an arbitrary instrument but the basis for protecting individual rights and ensuring that state institutions act predictably and with certainty.

The rule of law prescribes that the law must be applied according to specific standards: it must be transparent, stable, predictable, accessible, and equally binding on everyone. It protects against arbitrary use of the law and ensures that the law functions as a tool for the common good. In this sense, the rule of law upholds individual rights against abuses of power, shielding citizens from arbitrary decisions by authorities and requiring equal treatment of all. National constitutions often include catalogues of civil rights that all state institutions must respect, and the rule of law demands that these be upheld.

Equally crucial is the limitation and division of power, preventing the concentration of authority in the hands of one person or group. The law establishes and regulates the functioning of legislative, executive, and judicial branches, ensuring mutual oversight and balance. This separation of powers is essential to prevent arbitrary exercise of authority. Courts play a crucial role in this framework, and their

independence is indispensable for applying the law according to the principles of justice and impartiality.

The rule of law also requires legal mechanisms for monitoring the actions of public authorities. Instruments such as the right to access public information, the right to appeal administrative decisions, and oversight institutions including administrative courts, ombudspersons, and constitutional tribunals are vital guarantees for citizens. When the law functions in accordance with the rule of law, it not only regulates individual actions but also limits the power of authorities through accountability and oversight.

Law and the rule of law together form the foundation of any democratic system. Law defines the principles of democratic participation, electoral rights, and freedoms of expression and assembly, and it ensures the fairness and transparency of the electoral system. The rule of law ensures that power emanates from the citizens and is constrained by legal provisions, thereby safeguarding citizens from abuses of authority.

The interdependence between law and the rule of law is clear. Law provides the framework of principles, while the rule of law ensures those principles are applied fairly and serve the common good. Law without the rule of law risks becoming a tool of arbitrariness, while the rule of law cannot function without law as an organizing principle of society. Together, they create a system that organises social life, protects individuals, and fosters stability and trust in state institutions.

Abuses of the rule of law in the legislative domain have grave and far-reaching consequences. They undermine the integrity, predictability, and stability of the legal system and weaken the function of law as the cornerstone of democracy. Such abuses transform law from a means of protecting citizens' rights into an instrument for arbitrary action by those in power. A detailed analysis of this phenomenon reveals how legislative practices that violate constitutional principles corrode the foundations of a democratic state governed by the rule of law and erode public trust in state institutions.

A central problem is the redefinition of the concept of constitutional legality, which relativises the highest constitutional values. As the supreme legal act, the constitution sets overarching principles that regulate state functioning. Altering the scope or meaning of constitutional legality dilutes its protective function. In a democratic state, the constitution constrains the actions of authorities and safeguards citizens' rights and freedoms. Shifting the boundaries of constitutional legality enables authorities to introduce regulations contrary to the Constitution's original spirit, violating the principle of legality, which requires all norms to conform with higher-ranking legal acts, especially the constitution.

The disregard for the role of the Constitutional Tribunal (CT), poses another serious threat. The CT is the guardian of constitutional compliance, and its judgments are normative and binding. Ignoring these judgments erodes constitutional supremacy, destabilises the legal system, and breaches the separation of powers by denying the oversight of an independent body. Without respect for the CT's authority,

the state is unable to ensure coherence in the legal system, and citizens lose a vital instrument for the protection of their rights. Undermining the CT therefore compromises the guarantees of equality and justice.

Replacing concentrated constitutional review with dispersed review constitutes a further violation of the principles of a state governed by the rule of law. Concentrated review, where the CT alone determines the constitutionality of laws, ensures uniform interpretation and legal stability. Dispersed review, by contrast, allows multiple courts to undertake this task, creating a risk of conflicting interpretations and inconsistent application of law. Citizens face uncertainty, as provisions may be interpreted differently by different courts. Such inconsistency undermines equality before the law and erodes the predictability required for a functioning legal system.

Finally, granting non-legal forms of control – such as political pressure, informal guidelines, or the opinions of experts and scholars – the status of binding oversight mechanisms undermines legality. Law should be created and applied strictly in accordance with established legal procedures. When control over the law is exercised through informal means, citizens lose confidence in the validity and impartiality of the legal system. These practices introduce arbitrariness and opacity, transforming law into an instrument for advancing narrow political interests rather than protecting citizens.

The shift from concentrated to dispersed constitutional review and the introduction of non-legal mechanisms of control diminish the integrity and reliability of the legal system. They destabilise the rule of law and undermine citizens' trust in legal protections. Upholding legality, coherence, and transparency in legislative processes is therefore indispensable for maintaining the foundations of a democratic state governed by the rule of law.

The violations of the rule of law described above highlight that constitutional principles and mechanisms are not mere formalities but essential safeguards for the stability and integrity of the state. Democracy relies on a balance of power and strict adherence to constitutional provisions, which limit the arbitrariness of state actions and guarantee the protection of citizens' rights. Abuses of the rule of law in the legislative sphere weaken the protection of individual rights and undermine the foundations of a democratic state governed by the rule of law. When authorities ignore established legal boundaries, the law loses its protective function, and state institutions cease to act as independent guardians of legal order. Adherence to the hierarchy of legal sources, respect for CT judgments, uniform constitutional review, and rejection of informal mechanisms of control are crucial for ensuring a legal system that is stable, predictable, and fair.

Abuses in these areas infringe fundamental rights and weaken citizens' trust in the state and its institutions, ultimately threatening the very foundations of a democratic state governed by the rule of law. By strictly upholding constitutional and legal principles, states can protect individual rights, preserve institutional independence, and foster public confidence in the justice system and governance as a whole.

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## CHAPTER 4

# THE REVERSED RULE OF LAW IN THE EXECUTIVE: LEGITIMACY VIA ‘RESTORING LAWFULNESS’



KAROL DOBRZENIECKI

### Abstract

This Chapter examines the extent to which the assumptions underlying the of restoration of the rule of law have been realised by the executive branch. To this end, it will first present the constitutional model governing the operation of the Council of Ministers and the government administration. It will then highlight selected examples of the practical implementation of the postulate of restoring the rule of law and assess the compliance of these measures with constitutional standards. The analysis focuses in particular on the practices of specific administrative departments of government, including justice, science, higher education and culture. Furthermore, it will explore how the implementation of the political programme of ‘restoring the rule of law’ affects relations between the executive and legislative powers and other constitutional bodies, such as the President of the Republic of Poland, the Constitutional Tribunal and the Supreme Court. Drawing on one year of experience with the functioning of the new government (December 2023–December 2024), the Chapter will evaluate the extent to which the government has operated in accordance with the constitutional model of being bound by law and the standards expected in a democratic state governed by the rule of law.

**Keywords:** rule of law, the executive branch of government, militant democracy, legal nihilism, instrumentalisation of law

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## 1. Introduction

The political forces forming the Polish government after the 2023 elections came to power under the slogan of restoring the rule of law. They alleged that in recent years the legislative and executive authorities had departed from the constitutional standards of a democratic state governed by the rule of law, particularly the principles of legality and the separation and balance of powers. It was claimed, for example, that the Constitutional Tribunal (CT) had become an institution openly supporting government policy, rendering the system of constitutional review in Poland dysfunctional. In response to these accusations, a number of measures were announced to restore compliance with the Polish Constitution while mitigating adverse social consequences.

The purpose of this Chapter is to assess the extent to which the political mission of restoring the rule of law has been realised, by comparing the declared objectives with the actions of the executive branch. To this end, the constitutional model for the operation of the Council of Ministers and the government administration will be presented. It will then highlight examples of the practical implementation of the postulate of restoring the rule of law and evaluate the compliance of these measures with constitutional standards.

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## 2. A Constitutional Model of Executive Power

Chapter Six of the Constitution is dedicated to the Council of Ministers. The Council directs the government administration and coordinates and supervises the work of government administration bodies.<sup>1</sup> The Prime Minister ensures the implementation of the Council's policies, determines the methods of their execution, and

<sup>1</sup> Art. 146 of the Constitution of the Republic of Poland: (1) The Council of Ministers shall conduct the internal affairs and foreign policy of the Republic of Poland. (2) The Council of Ministers shall conduct the affairs of State not reserved to other State organs or local government. (3) The Council of Ministers shall manage the government administration. (4) To the extent and in accordance with the principles specified by the Constitution and statutes, the Council of Ministers, in particular, shall: (1) ensure the implementation of statutes; (2) issue regulations; (3) coordinate and supervise the work of organs of State administration; (4) protect the interests of the State Treasury; (5) adopt a draft State Budget; (6) supervise the implementation of the State Budget and pass a resolution on the closing of the State's accounts and report on the implementation of the Budget; (7) ensure the internal security of the State and public order; (8) ensure the external security of the State; (9) exercise general control in the field of relations with other States and international organisations; (10) conclude international agreements requiring ratification as well as accept and renounce other international agreements; (11) exercise general control in the field of national defence and annually specify the number of citizens who are required to perform active military service; (12) determine the organisation and the manner of its own work.

coordinates and supervises the work of the Council's members. Ministers are responsible for directing specific departments of government administration.<sup>2</sup>

At present, the prosecution service is not defined at the constitutional level within the Polish legal system. Its tasks, including prosecuting crimes and safeguarding the rule of law, are set out in legislation. Under the current legal framework, its place within the state system is derived from the provisions of the Law on the Prosecution,<sup>3</sup> which assigns the office of Prosecutor General to the Minister of Justice. As a result of this merger, the prosecution service is part of the executive branch.<sup>4</sup>

In performing their constitutional tasks and competences, the President of the Republic of Poland, the Council of Ministers and the Prime Minister are guided by the principle of cooperation between the authorities of the Republic of Poland. This principle requires mutual respect for each body's constitutional tasks and competences, respect for the dignity of offices, mutual loyalty, good faith, timely communication of initiatives, willingness to cooperate and reach agreements, and diligent performance of agreed actions.<sup>5</sup>

The convergence of goals as an expression of the principle of cooperation, derives from the fundamental constitutional principle enshrined in Art. 1 of the Constitution: 'the Republic of Poland is the common good of all citizens'. Constitutional organs of the state are therefore obliged to act in a manner that realises this directive.

Art. 10(2) of the Polish Constitution establishes the principle of dualism within the executive branch. The President and the Council of Ministers function as structurally, competently and functionally distinct bodies. The President performs the functions and tasks assigned by law independently of the Council and bears full responsibility for them. The President's functional independence is constitutionally limited in the issuance of official acts: some acts are performed independently as prerogatives, while others require the countersignature of the Prime Minister, which entails the Prime Minister assuming political responsibility for their issuance and content before the Sejm.

Under the Constitution, the President is largely excluded from the day-to-day management of the state and the shaping of its internal policy. Consequently, the Council of Ministers is the principal body of the dualistic executive.

The President nevertheless retains instruments of influence over government decisions. According to the Constitution, the President appoints the Prime Minister and other members of the Council and administers their oaths of office. The oath-taking ceremony has moral, symbolic and legal significance, representing a solemn commitment to uphold the constitutional values expressed in its wording. It also constitutes a legal guarantee of adherence to the Constitution. Taking the oath is an indispensable prerequisite for assuming office. Each member of

2 Bałaban, 2002; Grzybowski, 2012; Patyra, 2002; Stembrowicz, 1982; Zieliński, 2001.

3 The Act of 28 January 2016, on the Prosecutor's Office (consolidated text: Journal of Laws of 2024, item 390).

4 Stanek, 2021.

5 See Opałiński, 2012.

the Council of Ministers recites the full text of the oath individually and orally, as prescribed in Art. 151 of the Constitution.

This Chapter will therefore analyse the activities of the Council, its members and the subordinate government administration as entities with a decisive influence on shaping the internal policy of the state, whose primary programme after 2023 was the ‘restoration of the rule of law’.

The Constitution obliges public administration to act diligently. Diligence entails ‘the assessment of actions in terms of both due diligence in conducting activities and the substantive tasks being carried out’, as well as ‘adhering to existing standards, rules, and parameters in a given activity’.

The essence of Art. 7 of the Constitution (‘The organs of public authority shall function on the basis of, and within the limits of, the law’) is that public authorities, including the Council of Ministers and the government administration, must act within legal limits, which define both the basis and the boundaries of their actions. The legalism of public administration requires, *inter alia*, that decisions be issued in the form prescribed by law, on an appropriate legal basis, and in accordance with the relevant substantive provisions.

Legalism also entails a strict interpretation of competence-related provisions, rejecting the principle that ‘what is not prohibited is permitted’ in the case of public authorities.<sup>6</sup> Any action taken by state authorities in breach of the obligation to act within the law ceases to have legal character, and this rule admits no exceptions. Public authorities may not arrogate to themselves powers constitutionally reserved to other bodies; they must adhere fully to all regulations defining their powers and duties. The addressees of the principle of legality include all state bodies, whether legislative, executive or judicial, and they must operate on the basis of the opposite principle: ‘what is not permitted is prohibited’.

The Constitution of the Republic of Poland provides that the statute is the fundamental normative act on which public authorities must base their activities. This principle serves, on the one hand, to legitimise the actions of public authorities and, on the other, to define the limits of their interference with human rights. It also underpins the prohibition against public authorities presuming competences. Deriving from the constitutional principle of legality, public authorities may not act without a legal basis or evade exercising their competences when binding legal norms impose specific obligations upon them. The Constitutional Tribunal expressed the view that

the principle of the rule of law is an instrumental principle with respect to the principle of legal certainty and the citizen’s trust in the state, in the sense that acting on the basis of and within the limits of the law is a necessary condition for the realisation of the principles of certainty and trust.<sup>7</sup>

6 The judgments of CT of 27 May 2002, K 20/01, 12 May 2015, P 46/13.

7 The judgments of CT of 12 May 2015, P 46/13.

As a rule, action based on and within the law's limits is institutionally implemented so that the law defines the competences, legal forms of action and substantive grounds for decisions taken by public authorities. The issuance of a decision in accordance with the law is safeguarded by appropriate procedures, including the right to appeal and judicial review. These safeguards ensure the durability of decisions, which are presumed to be lawful. Durability, or legitimacy, thus reinforces the principle of the rule of law.

The CT has derived numerous specific principles from the concept of a democratic state governed by the rule of law, among which is the principle of legal certainty. This principle is closely linked to legal security and the protection of citizens' trust in the state and its legislation.<sup>8</sup> Legal certainty refers to a set of characteristics inherent in the law

that ensure legal security for individuals, enabling them to decide on their actions based on full knowledge of the premises of state authorities' actions and the legal consequences their actions may entail. Individuals should be able to determine the consequences of specific behaviours and events under the current legal framework and expect that the legislature will not arbitrarily change them. The legal security of individuals associated with legal certainty thus allows for the predictability of state authorities' actions as well as the ability to forecast one's own actions.<sup>9</sup>

The CT has identified two aspects of legal certainty: (1) the relative stability of the legal order, linked to the principle of legality; and (2) the assurance that citizens can organise their lives in reliance on the applicable law.

In its jurisprudence, the Tribunal developed the view that the essence of citizens' trust in the state and its legislation lies in the creation and application of law in a way that does not entrap the addressees of legal norms. Citizens should be able to organise their affairs confident that they will not face unforeseen legal consequences for their decisions and that actions taken in accordance with the law will continue to be recognised by the legal order in the future.<sup>10</sup> The predictability of state authorities' actions ensures individuals' legal security, which is closely tied to legal certainty, and also allows them to plan their own actions accordingly.<sup>11</sup>

In conclusion, the position of the Council of Ministers, as derived from the constitutional model established in the 1997 Constitution of the Republic of Poland, is

<sup>8</sup> Potrzeuszcz, 2013, pp. 256–263.

<sup>9</sup> The judgments of CT of 14 June 2000, P 3/00.

<sup>10</sup> The judgments of CT of 21 December 1999, K 22/99; 16 June 2003, K 52/02; 30 May 2005, P 7/04; 27 January 2010, SK 41/07; 25 November 2010, K 27/09; 10 March 2015, K 29/13; 18 April 2018, K 52/16.

<sup>11</sup> The judgments of CT of: 10 July 2000, SK 21/99; 25 April 2001, K 13/01; 27 February 2002, K 47/01; 25 June 2002, K 45/01; 16 June 2003, K 52/02; 4 May 2004, K 8/03; 21 December 2005, K 45/05; 21 March 2006, K 13/05; 12 March 2007, K 54/05; 19 March 2007, K 47/05; 2 April 2007, SK 19/06; 30 October 2007, P 28/06; 3 December 2007, SK 45/06; 16 January 2007, U 5/06.

as follows: (1) as the main organ of the executive power, it must operate on the basis of and within the limits of the law; (2) the Council and its members are politically accountable to the Sejm for their activities and also bear individual constitutional responsibility before the State Tribunal; (3) the Council is a collegial body, with most members functioning as distinct, single-person constitutional bodies with their own areas of competence; (4) the Council, as an executive organ, takes the most important decisions regarding the current conduct of state policy; (5) the Council manages the entire system of government administration; and (6) the system of government is based on the separation of, and balance between, the legislative, executive and judicial powers. Consequently, the executive power of the Council is limited by the legislature, the judiciary and the President of the Republic of Poland.

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### **3. The Rule of Law in Practice: Case Studies of Administrative Government Departments**

The following section identifies examples of political actions taken by the executive branch that have raised serious concerns among constitutional law scholars from the perspective of the principle of the rule of law.

#### ***3.1. Removal of the National Prosecutor from Office***

The Minister of Justice – Prosecutor General and his subordinate units have been particularly active in implementing the postulate of ‘restoring the rule of law’. His statutory powers include matters relating to the judiciary, the notary public, the legal profession and legal advisers, the execution of punishments, educational and correctional measures ordered by the courts, post-penitentiary assistance and sworn interpreters. The Minister of Justice is also responsible for preparing draft codifications of civil law (including family law) and criminal law.<sup>12</sup> By law, the Prosecutor General assumes office on the date of his appointment as Minister of Justice. The merger of these offices has made the prosecutor’s office part of the executive authority. The Minister of Justice – Prosecutor General is a member of the Council of Ministers and simultaneously serves as the head of the prosecutor’s office and the superior of all prosecutors.<sup>13</sup>

In January 2024, National Prosecutor Dariusz Barski received a letter from Public Prosecutor General Adam Bodnar stating that his reinstatement to active duty in 2022 by the former Prosecutor General had been carried out in violation of the

12 Art. 24(1), of the Act of September 4, 1997, on the Divisions of Government Administration (Journal of Laws of 2024, item 1370).

13 Stanek, 2021.

applicable legislation and had no legal effect because it relied on a repealed provision of the law. A new National Prosecutor was subsequently appointed. This decision was contested by part of the legal community, including prosecutors, and both the Supreme Court (SC) and the Constitutional Tribunal (CT) opposed it.

In a resolution adopted in September 2024, the SC held that the 2022 reinstatement of the dismissed prosecutor and his appointment as National Prosecutor had a binding legal basis and was effective.<sup>14</sup> In response, the new leadership of the National Prosecutor's Office declared that the resolution had no legal effect because it had been adopted by unauthorised persons. In November 2024, the CT ruled that the removal of the National Prosecutor from office was unconstitutional and infringed his right of access to public service.<sup>15</sup>

The Prosecutor General responded that the CT's examination of the dismissed prosecutor's constitutional complaint was inadmissible because the formal requirements for its submission had not been met. He also questioned the independence and impartiality of judges appointed with the participation of the National Council of the Judiciary (NCJ) constituted under the 2018 law. This reasoning was not based on formal legal grounds or sources of law but on the opinions of a few legal scholars and politicians. It is noteworthy that the Prosecutor General's interpretation of the law provoked opposition from prominent constitutionalists.<sup>16</sup>

### ***3.2. Dismissal of Court Presidents***

Changes to the positions of presidents of common courts after 2023 have raised significant legal concerns. Under the law, the court president heads the court, represents it externally and, in particular, directs its administrative activities. The procedure for appointing and dismissing court presidents is set out in the Law on the System of Common Courts.<sup>17</sup> The power to appoint and dismiss rests with the Minister of Justice, who may appoint the president of an appellate court from among judges of an appellate or circuit court, the president of a district court from among

14 Resolution of the SC of 27 September 2024, I KZP 3/24: 'The provisions of Art. 47(1) and (2) of the Law of 28 January 2016. The provisions introducing the Law – Law on the Public Prosecutor's Office (Journal of Laws of 2016, item 178, as amended) are not episodic in nature and do not contain a temporal limitation on their validity. These provisions are of a constitutional nature and continue to be in force, pending possible elimination in the manner prescribed by law'.

15 The judgment of CT of 22 November 2024, SK 13/24.

16 According to Professor Jacek Potulski of the University of Gdansk, 'the statement that Dariusz Barski did not take the National Prosecutor position has no legal basis'. In turn, Professor Ryszard Piotrowski believes that we are dealing with an attempt to circumvent the law. 'This is also how the appointment of an acting state prosecutor, that is, a body that the law does not provide for, should be treated. Public authorities act on the basis and within the limits of the law, which means that what is not allowed is forbidden. Therefore, one cannot create arbitrary constructions for oneself, because this is not how a democratic legal state functions'. See: Żółciak, 2024.

17 See: Arts. 23–27 of the Act of 27 July 2001, on the System of Common Courts (Journal of Laws of 2024, item 334, as amended).

judges of an appellate, circuit or district court, and the president of a district court from among judges of a circuit or district court. This discretionary power has been criticised by the Venice Commission, among others.<sup>18</sup>

Appointments are made for a fixed term. The presidents of appellate and district courts are appointed for six years and may not be reappointed as president or vice-president of the same court until six years have passed since the end of their term. The president of a district court is appointed for four years, for a maximum of two consecutive terms, and may not be reappointed as president or vice-president of a district court until four years have elapsed since the end of the term. The appointment of vice-presidents is similarly regulated, requiring a proposal from the court president.

The law stipulates that the term of office may be interrupted by revocation.<sup>19</sup> This may be effected by the Minister of Justice in the following circumstances: (1) gross or persistent failure to perform official duties; (2) continuation in office being otherwise incompatible with the good of the administration of justice; (3) particularly low efficiency in performing administrative supervision or organising work in the court or subordinate courts; (4) submission of a resignation from the position; or (5) gross failure to perform official duties in supervising judicial officers.

However, dismissal may only take place through a statutory procedure. This procedure requires consultation with the college of the competent court, following submission of the intention to dismiss together with a written justification.<sup>20</sup> A positive opinion of the college permits dismissal. The same consequence follows if the college fails to issue an opinion within thirty days of receiving the notification of the intention to dismiss. If the opinion is negative, the Minister of Justice may submit the intention to dismiss, with written reasons, to the NCJ. A negative opinion of the NCJ is binding if adopted by a two-thirds majority. Failure by the Council to issue an opinion within thirty days from the date of receiving the intention to dismiss does not preclude dismissal.

When requesting an opinion, the Minister of Justice may suspend the president or vice-president of the court concerned. The college issues its opinion after hearing the views of the president or vice-president of the court facing dismissal. During the United Right government (2015–2023), this procedure was criticised for undermining the ‘independence’ of the judge serving as president or vice-president. The case was even brought before the European Court of Human Rights, which, in its judgment of 29 June 2021 in *Broda and Bojara v. Poland*, held that the removal of

18 The Venice Commission, in its opinion on the amendment to the Law on the System of Common Courts, stated that the appointment should be made with the prior approval of the NCJ or the assembly of judges of a given court, and ideally the courts should present candidates to the minister. Opinion dated 11 December 2017, No. 904/2017.

19 The aforementioned recommendation of the Venice Commission also concerned the removal of presidents and vice-presidents with the participation of the NCJ and the assembly of judges of the relevant court. In this dimension, the procedure takes into account the recommendation.

20 Does not apply in the event of resignation.

presidents and vice-presidents of courts without providing the right to appeal to a court breached the Convention.<sup>21</sup>

After 2023, the new Minister of Justice began systematically changing the presidents and vice-presidents of common courts.<sup>22</sup> He commenced this process on 19 December 2023 by revoking the appointments of those who had not yet assumed their roles following the expiry of their predecessors' terms after that date.<sup>23</sup> These revocations were carried out without complying with statutory procedures, as it was claimed that such procedures could not apply to persons whose terms had not yet commenced. The first revocations involved the president and vice-presidents of the appellate court in Poznań, followed by the appellate court in Cracow, and subsequently the district court in Kielce.<sup>24</sup> A general practice was also to suspend those against whom dismissal proceedings had begun.

Some of the dismissed presidents and vice-presidents lodged constitutional complaints with the CT.<sup>25</sup> In some cases, the CT issued interim orders to the Minister of Justice, prohibiting further proceedings until the constitutional complaints were resolved.

In a judgment of 16 October 2024 (ref. K 2/24), the Tribunal held that provisions of the Law on the System of Common Courts were unconstitutional insofar as they deprived the NCJ of participation in the procedure for suspending or dismissing a president or vice-president of a court, and allowed dismissal even where the NCJ failed to issue an opinion within thirty days. The Minister of Justice refused to comply with the judgment.<sup>26</sup>

The Ministry justified the dismissals on several grounds: (1) failure to involve the judicial self-government of the relevant courts in the 'selection' of presidents and vice-presidents;<sup>27</sup> (2) appeals by judges, primarily those affiliated with the Iustitia and Themis associations, seeking to dismiss court leadership,<sup>28</sup> alleging disapproval of the appointees;<sup>29</sup> (3) the recalled presidents and vice-presidents signing lists supporting candidates for the NCJ, which the Ministry claimed was improperly constituted under the law of 8 December 2017;<sup>30</sup> and (4) recalled judges participating in competition procedures before the Council despite the fact that, following the CJEU ruling of 19 November 2019, it was widely known among judges since at least 19 November 2019, that the Council, shaped by the law of 8 December 2017, does not

21 Applications Nos. 26691/18 and 27367/18.

22 PAP, 17.07.2024, 18:33.

23 Adam Bodnar odwołuje prezesów sądów. Oto lista, 2024.

24 Jałoszewski, 2024a. Information about dismissals can be found on the Ministry of Justice website in the news tab.

25 Ref. No. K 2/24.

26 See: CT preliminary injunction of 1 February 2024, Ts 19/24 regarding the president of the Court of Appeal in Warsaw.

27 See e.g. Ministerstwo Sprawiedliwości, 2024.

28 Jałoszewski, 2024a.

29 See: Jałoszewski, 2024b.

30 See: Sądownictwo, prokuratura: odwołania, powołania (odc. 16–23), 2024.

meet the criteria for independence from the executive and legislative branches of government.<sup>31</sup>

Appeals were either initiated directly by the Minister of Justice or prompted by letters from groups of judges from the relevant courts. However, these groups were often unrepresentative. For instance, the request to dismiss the president of the Warsaw district court was signed by only 129 out of 377 judges (34%), while the motion to dismiss the president of the Warsaw Wola district court was supported by only 12 out of 70 adjudicators. In the Warsaw Mokotów district court, no such motion was submitted.

These figures demonstrate the political motivations behind the dismissals. The rationales cited by the Minister of Justice bore no relation to the statutory grounds for dismissal. In response to the widespread dismissals, the NCJ requested that the CT review the constitutionality of the entire dismissal mechanism for presidents and vice-presidents of common courts. The Council considered some of the dismissals a potential form of interference with the administration of justice.<sup>32</sup> The Ombudsman also criticised these<sup>33</sup> actions, some of which were denounced as blatant legal violations. These included allegations that the Minister of Justice, by instrumentally suspending most members of the relevant body, sought to manipulate the composition of the college to secure the negative opinion he desired.<sup>34</sup> Warsaw provides a particularly illustrative example. On 18 June 2024, the Minister of Justice emailed his intention to dismiss the leadership of the district and subordinate district courts, suspending the presidents and vice-presidents simultaneously. As this announcement contained no justification, the district court college issued a negative opinion. The Minister then reversed the suspension decision on 26 and 27 June. On 1 July, he emailed an identical announcement of his intention to dismiss the same individuals. When the college again rejected the proposal, the Minister ignored its opinion.

The acting judge appointed by the Minister convened the college on 15 July, when most resigned members and college members were on holiday or sick leave. The reconstituted college issued a third opinion, this time approving the Minister's action. On 16 July, the Minister dismissed the presidents and vice-presidents.<sup>35</sup>

The legal breaches included:<sup>36</sup> (1) resubmitting the same request for an opinion when the law required the Minister, after receiving a negative opinion from the college, to seek an opinion from the NCJ, rather than repeating the request; and (2)

31 PAP, 17.07.2024, 18:33.

32 See: The resolution of the National Council of the Judiciary No. 365/2024 of 19 June 2024, where the National Council of the Judiciary states, among other things, that the suspension of the management of the District Court in Warsaw from the performance of their official duties coincided with the submission to the District Court in Warsaw by the National Prosecutor's Office subordinate to the Minister of Justice – Prosecutor General of an application for the extension of temporary detention of persons deprived of liberty in a case of political interest to the Minister of Justice.

33 YGI, 2024.

34 Polish Press Agency, 17 July 2024, 18:33.

35 Unlawful Procedure for Removal of President and Vice-Presidents from Warsaw Courts, 2024.

36 Ibid.

failure by the district court college to hear the individuals concerned before issuing an opinion, despite their formal request for a postponement to allow them to be heard.

The Minister subsequently appointed activists from politicised judges' associations and individuals criticised for serious judicial errors to the vacant positions.

### ***3.3. Removal of Judges from Lecturer Positions at the National School of the Judiciary and Public Prosecution***

Legal concerns also arose regarding personnel changes made after 2023 at the National School of the Judiciary and Public Prosecution (NSSiP), the central institution responsible for initial and continuing training of judicial and prosecutorial personnel in Poland. The School's tasks include conducting judicial and prosecutorial apprenticeships to equip candidates with the necessary knowledge and practical preparation to serve as judges, court assessors, prosecutors and prosecutors' assistants as well as providing specialist and in-service training for those already holding these roles.

On 12 July 2024, the director of the NSSiP announced<sup>37</sup> the removal of two groups of judges from their teaching roles. These judges had been appointed at the request of the NCJ formed under the provisions of the Law of 8 December 2017 amending the Law on the NCJ and certain other laws.<sup>38</sup>

The Presidium of the NCJ criticised<sup>39</sup> the director's actions, arguing that they violated the established rules for recruiting lecturers, disregarded the binding position of the School's Programme Council set out in Resolution 17/2018 of 6 September 2018, and constituted discrimination on the basis of worldview under Art. 3(1) of the Act of 3 December 2010 on implementing certain provisions of European Union law on equal treatment (Journal of Laws 2023, item 970, as amended). It also called for the director's resignation. It is important to note that the director is one of two governing bodies of the NSSiP,<sup>40</sup> the other being the Programme Council who oversees the quality of the teaching staff and is tasked with issuing opinions on NSSiP lecturers and all other matters concerning the School.<sup>41</sup> The director, by acting unilaterally, therefore encroached upon the statutory competences of the Programme Council.

37 Krajowa Szkoła Sądownictwa i Prokuratury, 2024.

38 Journal of Laws of 2018, item 3.

39 The resolution of the Presidium of the National Council of the Judiciary of 17 July 2024, on the discrimination of judge-lecturers at the National School of the Judiciary and Public Prosecution.

40 See: Art. 5 of the Act of 23 January 2009, on the National School of the Judiciary and Public Prosecution (KSSiP) (Journal of Laws 2022 item 217 as amended)

41 Art 10(2)(13) of the Act on KSSiP.

### ***3.4. Unlawful Dismissal and Termination of Mandates of National Council of Prosecutors Members***

The decision of the Minister of Justice – Prosecutor General to dismiss five members of the National Council of Prosecutors (NCP) and appoint five replacements also caused controversy.<sup>42</sup> According to the Law on the Public Prosecutor’s Office, the Council safeguards prosecutors’ independence. It issues opinions on, *inter alia*, draft normative acts concerning the prosecutor’s office, the development of prosecutorial staff and training, periodic evaluations of the performance of the prosecutor’s office, and measures aimed at improving the professional qualifications of prosecutors.<sup>43</sup> By law, the NCP is a tenure body with a four-year term of office. Termination of a member’s mandate may only occur in the instances explicitly set out in the law. In the absence of any justification for the Prosecutor General’s decision enabling an assessment of its legitimacy, those affected questioned the decision’s legal effect.

The Assembly of Prosecutors of the National Prosecutor’s Office argued that the Prosecutor General was not authorised to act in this way because the statutory prerequisites for the expiry of the mandate had not been met. It stressed that the ‘dismissals’ therefore lacked legal effect, meaning that the former members of the NCP appointed by the Prosecutor General had not been lawfully removed from office.

In light of the principle of the rule of law, it must be concluded that dismissals require an unequivocal legal basis. It is impermissible, especially in the context of a public authority, to presume competences that would enable it unilaterally to determine the legal situation of another entity. It would therefore be inadmissible to assume that the Minister was exercising discretionary power to dismiss a member of the Council; in the circumstances, the action was not merely discretionary but entirely arbitrary. Moreover, considerations of expediency favour interpreting the regulations in a manner that guarantees the independence of Council members.

### ***3.5. Compliance Challenges with International Law on Immunities***

One of the campaign promises included in the programme entitled ‘100 Concretes’ of the political bloc that came to power in 2023 was the pledge that ‘violations of the Constitution and the rule of law will be swiftly accounted for and tried’.<sup>44</sup> Under media pressure to deliver on these commitments, the prosecutor’s office initiated numerous criminal proceedings. This haste, however, resulted in certain fundamental aspects of the rule of law, including adherence to international law on immunity being overlooked in some cases.

Marcin Romanowski, a former Polish Deputy Justice Minister, was detained as part of an investigation into the misuse of public funds and was charged in relation

42 Łukaszewicz, 2024.

43 Art. 43 of the Act of 8 January 2016, on the Prosecutor’s Office (Journal of Laws of 2024, item 390).

44 Rozliczymy rządu PiS, 2024.

to his supervision of the Justice Fund. Prosecutors sought to extend his detention beyond the usual time limit, citing the gravity of the alleged offences. Romanowski's lawyers appealed to the Council of Europe, noting that he had been a member of the Parliamentary Assembly of the Council of Europe (PACE) since January, and claimed that Polish authorities had failed to notify PACE of his arrest. The President of PACE, Theodoros Rousopoulos, wrote to the Speaker of the Sejm, Szymon Hołownia, stating that Romanowski enjoyed immunity as a PACE member and that judicial proceedings against him should be suspended. In July 2024, a Warsaw court ordered Romanowski's release on the basis of his PACE immunity.<sup>45</sup>

Prime Minister Donald Tusk reacted to the decision with the comment: 'Scenes like from a gangster movie. The suspect is released from custody thanks to legal loopholes, hiding behind questionable immunity'.<sup>46</sup>

In December 2024, Romanowski was granted political asylum in Hungary. Gergely Gulyás, Chief of the Hungarian Prime Minister's Office, asserted that Poland had been undergoing a crisis of the rule of law since Donald Tusk's government assumed office. As an example, he cited the failure to enforce the decisions of the Polish CT and the use of criminal law against political opponents, in disregard of immunity and presidential pardons.

Gulyás emphasised that Romanowski's arrest despite his PACE immunity, and his release only after PACE's formal intervention, demonstrated a lack of due process. He argued that Romanowski's case qualified for political asylum, which may be granted where there is no guarantee of an impartial, politically independent assessment in the applicant's home country. A political director in the Hungarian Prime Minister's Office also expressed concern about what he described as the Tusk government's 'lawfare' against its political opponents.<sup>47</sup>

Another potential violation of international law by the Polish executive authority arose during preparations for the 80th anniversary of the liberation of the Auschwitz camp in January 2025, particularly concerning the attendance of representatives of the State of Israel.

Poland ratified the Rome Statute of the International Criminal Court (ICC) in October 2021, following the Sejm's consent expressed through the Act of 5 July 2001.<sup>48</sup> The ICC is the first permanent international tribunal established to prosecute individuals accused of the most serious crimes, including genocide, crimes against humanity, war crimes, and aggression. Since ratifying the Statute, Poland has been legally obliged to comply with ICC decisions.

On 21 November 2024, the ICC issued arrest warrants for Benjamin Netanyahu (Prime Minister of Israel) and Yoav Gallant (Israeli Minister of Defence), for crimes

45 Reuters, 2024.

46 Gurgul, 2024.

47 Körömi, 2024.

48 Act of 5 July 2001, on the ratification of the Rome Statute of the International Criminal Court, Journal of Laws No. 98, item 1065.

against humanity and war crimes committed between at least 8 October 2023 and 20 May 2024. The Court found reasonable grounds to believe that international humanitarian law governing armed conflict between Israel and Palestine applied during that period because both states are High Contracting Parties to the 1949 Geneva Conventions and Israel occupies at least parts of Palestine. The ICC also concluded that Netanyahu and Gallant were responsible for inhumane acts causing great suffering to those in need of medical treatment. Doctors were allegedly forced to operate, including performing amputations on children, without anaesthetics or using unsafe sedation methods, thereby inflicting extreme pain and suffering. These acts constituted the crime against humanity of other inhumane acts.

There were further grounds to believe that Netanyahu and Gallant, as civilian superiors, bore responsibility for the war crime of intentionally directing attacks against Gaza's civilian population. The ICC determined that, despite having the means to prevent or punish such crimes or refer them to competent authorities, they failed to act.<sup>49</sup>

When the ICC issues an arrest warrant, it simultaneously transmits a request to the state where the individual is believed to be located. Under Polish criminal procedure (Art. 611g Para. 1 of the Code of Criminal Procedure), the Minister of Justice must forward such a request to the appropriate regional court, which is then required to order pretrial detention (Art. 611j Para. 1).

Only if the arrest would be 'contrary to the principles of the legal order of the Republic of Poland' may the court decline to issue an order, in which case it must return the case files to the Minister of Justice for clarification with the ICC (Art. 611m). This authority rests solely with the judiciary, not with the Council of Ministers or the Prime Minister.

Despite this, the Polish Council of Ministers adopted a resolution guaranteeing free and safe access for Israel's highest state representatives to attend the 80th anniversary ceremony of Auschwitz's liberation on 27 January 2025.<sup>50</sup> Under Polish law, decisions on executing ICC arrest warrants are within the exclusive remit of the judiciary, not the executive branch. The ICC responded to the resolution by reminding Poland that states party to the Rome Statute are legally bound to enforce ICC decisions and cannot unilaterally reinterpret them.<sup>51</sup>

The Supreme Bar Council emphasised that, under applicable law, the enforcement of an arrest warrant issued by the ICC in The Hague lies exclusively with the judiciary, not the President, the Council of Ministers, the Prime Minister or the Minister of Justice. It further noted that judicial and international tribunal rulings must not be selectively observed. The Council stated that

49 International Criminal Court, 2024a; International Criminal Court, 2024b.

50 The resolution, RM-06111-2-25, No. 3 of the Council of Ministers dated 9 January 2025, addressed the commemoration of the liberation of the Auschwitz-Birkenau Nazi concentration and extermination camp.

51 Jest komentarz Międzynarodowego Trybunału Karnego odnośnie decyzji polskiego rządu. Chodzi o przedstawicieli władz Izraela, 2025.

The resolution of the Council of Ministers and statements by senior representatives of the executive branch suggesting the possibility of Poland not adhering to its binding international agreements undermine citizens’ trust in the rule of law in Poland and the commitment of Polish authorities to respect the law, including the Constitution of the Republic of Poland and the rulings of courts and tribunals. Such actions, especially during a period of rebuilding the rule of law in Poland, are extremely dangerous and harmful – even if they stem from concerns about Poland’s external security or other non-legal motives.<sup>52</sup>

The Bar’s critique underscores the imperative of strict compliance with international and constitutional obligations. It warned that any deviation from these principles risks eroding public confidence in the legal order and jeopardising efforts to restore the rule of law. This situation highlighted the tension between international obligations and domestic political calculations, raising concerns about compliance with international law and the separation of powers.

### ***3.6. Science and Higher Education: Constitutional Issues in Ministerial Appointments***

Questions of constitutionality also arise from certain actions of the Minister of Science, notably the premature termination of the statutory terms of bodies within the higher education system. The Law on the National Science Centre stipulates that ‘in order to identify candidates for members of the Council, the Minister shall appoint a Council Member Identification Team for a period of four years’. This team prepares and submits to the Minister a list of at least twenty-four candidates drawn from nominations by the scientific community.

The Minister dismissed the team appointed by his predecessor and replaced it with new appointees. Like any public authority, however, he is bound by Art. 7 of the Constitution to act strictly on the basis of the law and within its limits. He was required to identify the specific provision authorising the dismissal of the Chairman of the Identification Team. A public authority cannot presume competences yet that is precisely what occurred in this instance.

### ***3.7. Culture and Protection of National Heritage***

In an effort to introduce changes in the public media, the new Minister of Culture and National Heritage replaced the management and supervisory boards of Polish Television, Polish Radio and the Polish Press Agency without legal basis, bypassing the National Media Council. The dismissal of the supervisory boards and the appointment of new ones was contrary to the statutes of the public media, which

<sup>52</sup> This statement was formalized in Resolution 168/2025 of the Supreme Bar Council, dated 11 January 2025. See: Naczelna Rada Adwokacka, 2025.

clearly stipulate that their supervisory boards are appointed and dismissed by the National Media Council. In January 2024, the CT ruled that certain provisions of both the Broadcasting Act and the Commercial Companies Code were unconstitutional, rendering the minister's actions legally ineffective. The Ministry of Culture, however, argued that the CT judgment was delivered in an improper composition and therefore lacked any legal significance.

When asked about the legality of these actions, the Minister of Justice replied, 'We have a situation where we are restoring constitutionality and are looking for some legal basis to do so'.<sup>53</sup>

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## 4. 'Restoring Rule of Law' by the Executive and the Constitutional Role of State Institutions

Following the 2023 elections, the new government had to govern alongside a President from the opposition camp. Many institutions, including the CT and the NCJ, remained composed of appointees chosen by the previous parliamentary majority or the President during the eight years of Law and Justice rule (2015–2023). The SC had also been reconstituted on the basis of laws adopted in the previous parliamentary term. The parliamentary majority after 2023 questioned the constitutionality of certain legal provisions underpinning the formation of these bodies, referring to the situation as a 'constitutional crisis'.<sup>54</sup> This narrative served as justification for various actions, including attempts by representatives of the executive branch to reinterpret or even undermine the powers and status of certain constitutional bodies.

### *4.1. The President of the Republic of Poland*

In September 2024, the Prime Minister withdrew his countersignature from President Andrzej Duda's decision appointing the chairman of the SC Civil Chamber's assembly of judges, tasked with selecting candidates for the chamber's president. He justified this by noting that two SC judges had contested his countersignature and that administrative law permits a body to rescind its own decision under the doctrine of 'self-control'. The Prime Minister's decision to withdraw his countersignature from President Andrzej Duda's decision was unprecedented in Polish political history and provoked considerable controversy among lawyers. Constitutionalists argue a countersignature – being the Prime Minister's signature on presidential decision – cannot

<sup>53</sup> Nizinkiewicz, 2023.

<sup>54</sup> Matczak, 2018.

be withdrawn, as it gives rise to legal effects that cannot be unilaterally revoked. As constitutional law expert Prof. Ryszard Piotrowski explained:

There is no such concept or procedure, nor such a possibility, because a countersignature is a signature by the Prime Minister on the President's decision. Therefore, the President is the host of this act. After countersignature, there are effects that cannot be undone by the Prime Minister's unilateral action.<sup>55</sup>

#### ***4.2. Constitutional Tribunal***

Another contentious element of the government's policy was the Government Legislation Centre's decision to cease publishing CT judgments in the Journal of Laws of the Republic of Poland after the Sejm adopted a resolution on 6 March 2024 aimed at removing the effects of the 2015–2023 constitutional crisis.<sup>56</sup>

The resolution stated that, although public authorities are obliged to respect the Constitution – particularly the principle of legalism under Art. 7 – the inclusion of CT rulings issued by a contested bench in the activities of public authorities would itself violate that principle.

A subsequent resolution of the Council of Ministers of 18 December 2024, aimed at counteracting the constitutional effects in the area of the judiciary,<sup>57</sup> further entrenched this position. Citing the Sejm's earlier resolution of 8 March 2024, the Council asserted that

the Constitutional Tribunal in its current configuration is incapable of performing the functions set out in Art. 188 and Art. 189 of the Constitution of the Republic of Poland. The Council of Ministers is responsible for taking remedial actions to restore the implementation of the constitutional judiciary in accordance with the constitutional standard.

In addition,

in accordance with the principle of legalism of public bodies based on and in the provisions of law, resulting from Art. 7 of the Constitution. This principle also applies to the publication of legal acts. For this reason, the notification of the CT's rulings in official journals may only apply to acts that have been approved by the competent body in the procedure of the applicable law. [...] Explanation of the ruling, the Council of Ministers constitutes a position that includes the announcement in the journals of the

<sup>55</sup> Sitnicka, 2024.

<sup>56</sup> The resolution of the Sejm of the Republic of Poland of 6 March 2024, on the removal of the effects of the constitutional crisis of 2015–2023 in the context of the activities of the Constitutional Tribunal (M.P. item 198).

<sup>57</sup> Resolution No. 162 of the Council of Ministers, dated 18 December 2024, M.P. Item 1068.

final decisions of the constitutional decisions, which constitute the consolidation of the definition of the rule of law. Therefore, the Council of Ministers, which is not the disclosure of documents that have been published by an unauthorised body.<sup>58</sup>

Thus, the Council of Ministers decided that the CT was not an authorised body to assess the constitutionality of law. Its rulings would not be published, effectively abolishing constitutional oversight for many months, and possibly years.

### ***4.3. The Supreme Court and the National Council of the Judiciary***

In the same resolution of 18 December 2024, the Council of Ministers found that

the National Council of the Judiciary, established under the Act of 8 December 2017 amending the Act on the National Council of the Judiciary and certain other acts, is not a body that guarantees independence from the legislative and executive authorities. [...] The Supreme Court, adjudicating in panels in which a person appointed to the office of a judge by the President of the Republic of Poland at the request of the National Council of the Judiciary, established in the manner specified in the provisions of the Act of 8 December 2017 amending the Act on the National Council of the Judiciary and certain other acts, does not meet the requirements of independence and impartiality.

As a result, the texts of acts issued by the NCJ and by benches of the SC deemed by the Council of Ministers not to meet these criteria were to be published in official journals with a note that the NCJ did not guarantee independence from the legislative and executive authorities, and that irregularities in the appointment process prevented the SC from being recognised as a court established by law.

A notable example of state bodies acting on the reasoning contained in this resolution was the procedure concerning the financial report of the PiS electoral committee for the 2023 parliamentary elections. The matter falls within the competence of the National Electoral Commission, the highest electoral authority in Poland, responsible for conducting elections and referenda. The Commission, dominated by members nominated by the current parliamentary majority, rejected the committee's report in August 2024, citing violations of the Electoral Code. This decision required the return of the disputed funds to the State Treasury and a reduction in the party subsidy, leaving a shortfall of several dozen million zlotys.

In accordance with the Code, the PiS Committee appealed the decision to the SC. On 11 December 2024, the SC upheld the committee's complaint, which should have led to the immediate adoption of its financial report by the National Electoral Commission. However, on 16 December 2024, the Commission deferred its decision,

<sup>58</sup> Ibid.

refusing to recognise the SC ruling on the grounds that the bench which issued it lacked the attributes of an independent court. This arrangement effectively constrained the opposition party's ability to function, including the conduct of a full-scale campaign in the 2025 presidential elections.<sup>59</sup>

#### **4.4. Common Courts**

According to Art. 173 of the Constitution 'The courts and tribunals shall constitute a separate power and shall be independent of other branches of power'. Art. 178 Para. 1 adds: 'Judges, within the exercise of their office, shall be independent and subject only to the Constitution and statutes'.

On 6 February 2024, the Minister of Justice issued a regulation amending the *Rules of Office of Common Courts* (Journal of Laws item 149). The regulation stipulated that cases concerning the exclusion of a judge, where the grounds were the circumstances of their appointment, could not be assigned to judges appointed with the participation of the NCJ constituted following the 2018 Act. The current ruling camp contests the status of these judges. The regulation was published on 7 February 2024 and entered into force the following day.

In its judgment of 16 May 2024 (reference number U 1/24), the CT found this regulation unconstitutional. It held that the Minister of Justice had unlawfully supplemented, through sub-statutory regulation, the provisions of the Code of Criminal Procedure of 6 June 1997 and the Code of Civil Procedure of 17 November 1964. This action directly interfered with the institution of exclusion of a judge by operation of law (*iudex inhabilis*). The Tribunal ruled that including such provisions in an act of sub-statutory rank breached Art. 176 Sec. 2 of the Constitution. Furthermore, Art. 1 of the amending regulation violated Art. 45 Sec. 1 of the Constitution by undermining the independence of the courts and the impartiality of judges.

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## **5. Conclusions**

On 10 September 2024, the Polish Prime Minister stated:

If we want to restore constitutional order and the foundations of liberal democracy, we must act in terms of militant democracy. This means that we will probably, more than once, make mistakes or take actions that, according to some legal authorities, may not be in accordance with the letter of the law, but nothing relieves us of our duty to act.

<sup>59</sup> PAP, 23.12.2024, 14:38.

The political project of ‘restoring the rule of law’ has been imbued with warlike and revolutionary rhetoric. According to some academics, restoring the rule of law resembles the ‘action of a sapper’ who may deviate from legalism in the belief that doing so will ultimately preserve the rule of law.<sup>60</sup>

A defining feature of liberal legal culture is the law’s relative autonomy from politics. Under normal circumstances, politics does not dominate law but coexists with it in a mutually competitive relationship, where the outcome is not always pre-determined in favour of political rationale. Scholarship often distinguishes between ‘legal policy’ and ‘political policy’ to describe this balance. The transition from a normal to an extraordinary situation raises questions about both the meaning and the feasibility of maintaining the relative autonomy of law. The actions of the Polish executive after 2023 suggest that the ruling authorities perceive the situation as extraordinary. This assessment appears to underpin measures such as the instrumentalisation of law, presented as indispensable for achieving political objectives, particularly safeguarding public security. In such a context, the usual balancing of reasons and principles central to the rule of law tends to be replaced by a more radical reordering of legal values.

The autonomy of law diminishes as political actions increasingly respond to immediate needs. Legal constraints on the arbitrariness of political acts are perceived by a state perceiving itself as existentially threatened as an unnecessary obstacle to the execution of essential defensive measures. At the same time, judicial oversight of administrative actions is treated as a risk that the state finds increasingly difficult to tolerate under such conditions.

The new government’s unorthodox approach to the ‘letter of the law’ was already evident during its appointment and swearing-in by the President on 13 December 2023. Two appointees altered the constitutionally mandated wording of the oath, and one swore to assume a different office from that specified in the appointment decree.<sup>61</sup> Regardless of whether this affects the validity of the government’s acts *in gremio* (as the Council of Ministers) or whether it will ever be reviewed by courts or a tribunal, this incident signalled a new approach to the Constitution.

In mature democracies, the oaths of senior officials are treated with full seriousness as a pledge to respect the law. For instance, US President Barack Obama retook the oath of office in 2009 after a minor error in its wording.<sup>62</sup>

Short-cutting or disregarding the letter of the law is a double-edged sword. Social processes have their own momentum, and escalation can have lasting consequences. It is impossible to know whether an act presented as exceptional will remain so or develop into a systemic practice eroding the last constitutional barriers. This approach closely aligns with the doctrine of decisionism. The essence of this school of political thought, epitomised by Carl Schmitt, is the view that a decision possesses

60 Zajadło and Koncewicz, 2024.

61 Donald Tusk – kanał oficjalny, 2023.

62 Siddique, 2009.

intrinsic value independent of the legal system. Between the extremes of Exception (*Ausnahmefall*) and Normalcy (*Normalfall*) lies a continuum of situations in which the 'moment of decision' coexists alongside the 'moment of norm'. Each has distinct significance within the legal framework. A decision retains relative autonomy from the legal norms it references; it is more than a derivative of law. Decisionists view the interdependence between norms and decisions as fundamental to the legal order. Legal rules gain meaning when a recognised authority – whether a judge or a holder of power – issues a ruling and invests it with personal judgment. In so doing, the authority provides concrete validation of a resolution. This perspective underscores the dynamic interplay between abstract legal norms and the context-specific decisions of those tasked with their interpretation and enforcement. Decisionism thus highlights the centrality of human agency in shaping the practical application of legal principles.

Another model that illustrates the transformation of the rule of law principle in Poland after 2023 is the concept developed by Clinton L. Rossiter, an American political scientist and historian. After World War II, Rossiter formulated a doctrine advocating the adaptation of institutions and methods typically associated with dictatorial regimes to the constitutional needs of democratic states facing extraordinary threats. He referred to this doctrine as 'constitutional dictatorship'. It promotes the use of measures deemed absolutely necessary to safeguard the constitutional order, provided such measures are temporary and directed at restoring the previous political framework. Extraordinary powers delegated to a specific authority should serve to re-establish the prior legal order concerning individual rights, legal processes, and normal social life, rather than introducing permanent systemic changes.

The foundation of Rossiter's theory was the assumption that 'no form of government can survive if it excludes dictatorship when the survival of the nation is at stake'. Rossiter sought to provide a positive answer to the question: 'Can a democratic country wage a successful total war and remain democratic after its conclusion?' He argued that the term 'constitutional dictatorship' is only seemingly an oxymoron, as democracy may in extreme cases need to temporarily sacrifice itself to ensure its survival.

Rossiter maintained that short-term dictatorial governance, when indispensable to counter an existential threat, could remain constitutional. He explicitly referenced the ancient Roman institution of dictatorship, describing the dictator as someone legally empowered to restore normal conditions and governance, subsequently relinquishing power once the circumstances necessitating the dictatorship ceased to exist. According to Rossiter, transitional dictatorial governance might be necessary to protect national independence, preserve the constitutional order, or defend individuals' political and social freedoms. He viewed constitutional dictatorship as a regrettable yet integral phenomenon that has historically accompanied constitutional governance. Rossiter developed several guidelines intended to preserve democracy in such circumstances. The legitimacy of constitutional dictatorship is supported by three primary arguments: democratic systems – designed for normal, peaceful

conditions – lack the capacity to act effectively during a major national crisis; constitutional dictatorship allows a temporary restructuring of governance proportionate to the severity and duration of the crisis; and a strong executive authority – sometimes taking the form of outright dictatorship – is necessary to safeguard the state's independence, uphold constitutional order, and protect political and social freedoms. The government receives powers in proportion to the crisis's severity and duration, with the aim of resolving the crisis. Any changes introduced during such a dictatorship must be reversible once the crisis has passed. Its goal must always be the complete restoration of the *status quo ante bellum*.

Rossiter's normative theory of constitutional emergency powers specifies conditions for introducing, maintaining, and terminating a constitutional dictatorship: (1) Necessity: it must only be invoked when essential to preserve the state and its constitutional order; (2) Control: decisions to continue or end the dictatorship must not rest with the authority exercising dictatorial powers; (3) Duration: it must not outlast the crisis it was established to address; and (4) Restoration: the political order must be restored to a condition as close as possible to that which existed beforehand.

Rossiter's theory emphasises the need to balance state preservation with the protection of liberal democracy, establishing a framework for extraordinary measures that does not compromise the long-term integrity of democratic governance.<sup>63</sup>

The actions of the executive branch after 2023, even when viewed through Rossiter's concept of constitutional dictatorship, lack legitimacy due to several critical shortcomings:

- (1) Absence of an objective threat: there is no clear evidence of an extraordinary danger warranting actions inconsistent with the rule of law. For Rossiter, constitutional dictatorship is permissible only when required to address a crisis threatening the state's survival or its constitutional order. Without such a crisis, invoking extraordinary measures undermines the theoretical foundation of this concept.
- (2) Lack of demonstrated necessity: the government has offered no compelling argument that these measures are indispensable for preserving the state or its constitutional framework. Nor is it evident which specific social or political rights require protection through actions contravening existing laws.
- (3) Deviation from restoring the rule of law: rather than seeking to restore the *status quo ante bellum* – a cornerstone of Rossiter's theory – these actions appear aimed at consolidating power and circumventing constitutional constraints. This shift runs counter to the principle that extraordinary measures must be temporary and directed at re-instating normal democratic governance as soon as the crisis subsides.
- (4) Misuse of crisis justifications: by framing these actions as necessary to 'restore the rule of law', the government not only distorts the intent of constitutional dictatorship but also erodes the distinction between emergency powers and

<sup>63</sup> Rossiter, 1948, pp. 5–7.

authoritarian practices. The apparent goal of strengthening executive authority and circumventing legal checks conflicts with Rossiter's insistence that such measures must prioritise the eventual restoration of constitutional norms.

In sum, these actions do not meet Rossiter's normative criteria for constitutional emergency powers. Instead, they reflect a pattern of instrumentalising the notion of crisis to justify political objectives that undermine the rule of law, rather than reinforcing it.

The preamble to the Constitution of the Republic of Poland obliges state authorities to cooperate, a directive that remains essential for resolving serious antagonisms and political tensions. Departing from the letter of the Constitution is not only dangerous but also, as the experience of the past year in Poland demonstrates, counterproductive. Legal nihilism and attempts to bypass constitutional standards can only be effectively countered by a stance known as constitutional absolutism. This stance asserts that the Constitution applies equally in times of war and in periods of peace and must be strictly enforced because its principles remain unchanged, even if their application during emergencies produces different effects from those expected in normal circumstances. However, rulers do not possess any extraordinary authority to counteract danger during a crisis unless the constitution explicitly grants such powers. This view reflects faith in the constitutional perfection, completeness, and resilience, assuming that its drafters anticipated future threats and entrusted the necessary powers to the appropriate authorities. A constitution that can withstand any danger should never be suspended, even in the face of emergencies, constitutional crises, or other exceptional circumstances.<sup>64</sup>

64 Dobrzeniecki, 2018, p. 188.

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## CHAPTER 5

# THE REVERSED RULE OF LAW IN THE JUSTICE SYSTEM AND THE STATUS OF JUDGES



MARIUSZ MUSZYŃSKI

### Abstract

The judiciary in Poland had long been identified as requiring reform, both in terms of its organisational structure and the status of judges. The reform was implemented in 2018. These changes were not accepted by the political opposition or the legal community associated with it, including parts of the judicial community. Opponents of the reform received support from international institutions. As a result, these groups began contesting the reforms in an organised manner, including attempts to obstruct the functioning of the reformed institutions. This Chapter presents the actions of judges opposed to the reform and analyses their judicial activities in light of the standards enshrined in the Constitution of the Republic of Poland and Polish statutes. It also reviews international case law (judgments of the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR)) concerning the Polish judicial reform. Since the actions of the judiciary lacked a legal basis in Polish law, judgments of the CJEU and the ECtHR were used as a source of external authorisation and legitimisation. The analysis leads to the conclusion that the Polish judiciary, supported by international tribunals, violates the standards of the rule of law as defined by the Constitution of the Republic of Poland and undermines the legal and political order of the state.

**Keywords:** judiciary, judicial power, CJEU, ECtHR, National Council of Judiciary, Disciplinary Chamber, judicial independence test

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## 1. Introduction

The judiciary is one of the two components of the judicial power, which constitutes one of the three constitutional branches of power in Poland. It had long been recognised that reforms were necessary, both regarding its organisational structure and the status of judges. These reforms sought to establish effective mechanisms for social oversight of the courts and to free them from corruption, nepotism, and inappropriate social or business ties. In the legal dimension, this objective was pursued by redefining the powers of the President of Poland and the Minister of Justice in relation to courts and judges, tightening disciplinary policy, reforming access to the office of judge, and restructuring the judiciary. This was also an element of the election manifesto of the United Right (*Zjednoczona Prawica*) before the elections in 2014.<sup>1</sup>

The legislative process concluded in 2017. As a result, the Sejm adopted: (1) the Act of 20 July 2017 on the SC; (2) the Act of 12 July 2017 amending the Act on the National Council of the Judiciary (NCJ) and certain other acts; and (3) the Act of 12 July 2017 amending the Act on the Organisational Structure of Common Courts and certain other acts.

The first two acts were vetoed by the President on 24 July 2017. The President signed only the third act<sup>2</sup> and announced that he would submit his own draft legislation in lieu of the vetoed acts, which he did on 25 September 2017. Consequently, the following acts entered into the legal order: the Act of 8 December 2017 on the SC<sup>3</sup> and the Act of 8 December 2017 amending the Act on the NCJ and certain other acts.<sup>4</sup>

The reforms included, *inter alia*, the election of 15 judicial members of the NCJ, lowering the retirement age of some judges of common courts, the SC and the Supreme Administrative Court (SAC), transferring the power to announce judicial vacancies in the SC from the First President of the Supreme Court (SC) to the President of the Republic of Poland, reforming the procedure for appointing presidents of common courts and the SC, and introducing changes to the disciplinary procedure, including the establishment of the Disciplinary Chamber of the SC.

These reforms were rejected by the political opposition and the legal community associated with it, including parts of the judicial community. As a result, these groups began to contest the reforms in an organised manner, using every available legal and political instrument, including attempts to block the functioning of the reformed institutions. In this way, the judiciary became a sphere of state functioning where the application of the so-called reversed rule of law began even before the change

1 See the 2014 manifesto of Law and Justice (*Prawo i Sprawiedliwość*) 'Project for Poland' (*Projekt dla Polski*), pp. 63–69.

2 Journal of Laws of 2017 item 1452.

3 Journal of Laws of 2018 item 5.

4 Journal of Laws of 2018 item 3.

of government on 13 December 2023. After this turning point, such activities intensified and were framed as ‘the restoration of the rule of law’. In practice, however, they entailed judges abusing the law or directly violating constitutional or statutory provisions.

The purpose of this Chapter is to catalogue and discuss the actions undertaken by opponents of the reforms and to assess their impact on the constitutional position of courts and judges. The discussion begins with an outline of the applicable constitutional standards.

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## 2. The Justice System in Poland: Constitutional Principles and Institutional Design

In accordance with Art. 10 of the Constitution of the Republic of Poland (hereinafter: the Constitution), Poland’s constitutional system is based on the separation and balance of the legislative, executive and judicial powers. Courts form part of the judicial power;<sup>5</sup> and their task is to administer justice.<sup>6</sup>

The judiciary in Poland comprises common, military, and administrative courts, as well as the SC.<sup>7</sup> Common courts administer justice in all matters (criminal, civil, family and guardianship, labour and social security) except those explicitly reserved by statute for other courts.<sup>8</sup> This entails a presumption of jurisdiction in favour of common courts. If no court has jurisdiction over a particular matter, a common court must hear the case. Common courts also adjudicate cases placed under their jurisdiction by separate statutes.<sup>9</sup> These courts include district, circuit and appellate courts.<sup>10</sup> The SC supervises common courts in matters relating to adjudication.

Military courts administer justice in the armed forces in criminal matters. They adjudicate criminal cases involving military personnel and, exceptionally, may hear cases involving civilians for specified offences.<sup>11</sup>

The Constitution assigns the SC a special role. It is currently composed of five chambers: the Civil, Criminal, Labour and Social Security, Extraordinary Review and Public Affairs, and Professional Liability Chambers.<sup>12</sup> Its primary function is to

5 Art. 10(2) of the Constitution. The Constitution includes also tribunals within the judicial power, yet it clearly distinguishes between them and courts.

6 Art. 175 of the Constitution.

7 Art. 175 of the Constitution. During a time of war, it is allowed to establish extraordinary courts.

8 Art. 177 of the Constitution.

9 See e.g. Art. 20(4) of the Electoral Code of 5 January 2011, Journal of Laws of 2011, No. 21, item 112.

10 Art. 1(1) of the Act of 27 July 2001 on the Organisational Structure of Common Courts, Journal of Laws of 2001, No. 98, item 1070.

11 Grzegorzcyk and Tylman, 2011, p. 1099.

12 Art. 183 of the Constitution.

exercise judicial supervision over common and military courts in respect of adjudication. This supervision may be direct (in specific matters), indirect (in the form of abstract interpretation) or substantive (interfering with the content of a determination when procedural circumstances permit).<sup>13</sup> The SC exercises its supervisory role through: (1) extraordinary appeal measures and other instruments in accordance with procedural law; (2) resolutions clarifying questions of law that raise significant interpretative doubts; and (3) resolutions addressing discrepancies in jurisprudence.

Resolutions may be elevated to the status of legal principles,<sup>14</sup> which are binding on relevant levels of the SC depending on the level at which they were adopted. Departure from such a legal principle requires a new resolution adopted at least at the same level.<sup>15</sup> Although a legal principle is not formally binding on common and military courts, it directly influences their jurisprudence. If ignored, it is almost certain that a judgment inconsistent with it will be overturned during appeal proceedings or by the SC through extraordinary appeal measures. The SC also performs other duties provided for in the Constitution and statutes.

Administrative judiciary forms a distinct part of the judiciary. It consists of the voivodeship administrative courts and the SAC.<sup>16</sup> Administrative judiciary is independent of common, military, and SC structures. Its constitutional function is to 'supervise the activity of public administration',<sup>17</sup> thereby safeguarding public order.

This function is generally exercised by annulling unlawful administrative acts. Administrative courts compare public administration acts with the relevant binding legal standards, considering whether the authority was competent, whether a proper legal basis was chosen without violating the hierarchy of norms (except for constitutional review of statutes), procedural compliance, and substantive legality. When appropriate, administrative courts derogate unlawful acts. Additionally, administrative courts may indicate in a judgment how a matter should be handled by a public administration authority or notify that authority or its superior of a breach of law. They may also issue rulings declaring the existence or absence of a right or obligation.

Their powers also include: (1) abstract review of local law, adjudicating on the conformity to statutes of resolutions adopted by local government bodies and normative acts adopted by territorial government administration;<sup>18</sup> (2) review of other types of authoritative acts adopted by local public administration bodies for conformity with statutes, ratified international agreements, and acts of international organisations enacted under Art. 91(3) of the Constitution, as well as regulations;<sup>19</sup> and

13 Judicial supervision does not embrace the jurisprudence of administrative courts, which are subordinated to the SAC.

14 Art. 87(1) Act on the SC, Journal of Laws of 2018, item 5, as amended.

15 See Art. 88 of the Act on the SC.

16 Art. 184, first sentence, of the Constitution.

17 Art. 184 of the Constitution.

18 Art. 184, second sentence, of the Constitution.

19 Garlicki, 2005, p. 9. Cf. the judgment of the SAC of 28 May 2010, II OSK 531/10.

(3) resolving disputes over competence between local government and government administration bodies.<sup>20</sup>

Unlike common courts, the administrative ones are not generally bound by the allegations, requests, or legal basis invoked in administrative appeals when adjudicating.<sup>21</sup>

The SAC plays an exceptional role. Its power is, in principle, identical to that of the voivodeship administrative courts, although a key difference lies in the fact that it is the *supreme* court in that judiciary. It is the SAC that exercises judicial supervision over the voivodeship administrative courts, not only as a body adjudicating cases in the second instance but also in a general capacity,<sup>22</sup> through resolutions that are binding on administrative courts.<sup>23</sup> If any administrative court disagrees with the stance adopted in a resolution, it may only refer the legal issue to the SAC.

The judiciary in Poland enjoys distinctness from, and independence of, the other branches of power.<sup>24</sup> No branch may interfere with the structure, composition or operation of the judiciary except in circumstances explicitly provided for in the Constitution. This position is secured by the principle of judicial independence and the judiciary's exclusive power to administer justice, that is, to issue final determinations on the rights and obligations of individuals and legal persons. However, the constitutional principle of the separation and balance of powers does not remove links between the branches. On the contrary, the mutual influence of the branches is a natural feature of the system and affects various aspects of the judiciary's functioning. Within this framework, the legislative power enacts the state budget,<sup>25</sup> which includes the budget of the courts, and determines the organisational structure and jurisdiction of courts by statute.<sup>26</sup> The executive branch supervises the administrative activity of the courts through the Minister of Justice, appoints certain court bodies (the President appoints the First President and Presidents of the SC, and the President and Vice-President of the SAC), and exclusively appoints judges through the President.<sup>27</sup> This constitutes a presidential prerogative,<sup>28</sup> meaning it does not require the signature of the President of the Council of Ministers to be valid.<sup>29</sup> It highlights the independence of the judiciary from the government and its subordinate bodies.

20 Art. 166(3) of the Constitution.

21 Art. 134(1) of the Act on the Procedure before Administrative Courts, Journal of Laws of 2002, No. 153, item 1270.

22 Art. 187 of the Act on the Procedure before Administrative Courts.

23 See Art. 269(1) of the Act on the Procedure before Administrative Courts.

24 Art. 173 of the Constitution.

25 Art. 219 of the Constitution.

26 Art. 176(2) of the Constitution.

27 Art. 179 of the Constitution.

28 Art. 144(3)(17) of the Constitution.

29 The judgment of the CT of 11 September 2017, K 10/17, OTK ZU A/2017, item 64.

The prerogative is a right, not an obligation, of the President to appoint judges.<sup>30</sup> As a result, the person appointed is vested with the right of jurisdiction exercised in a specific office and location, thereby establishing that individual's judicial status.<sup>31</sup> This power is constitutional rather than administrative in nature and is not subject to judicial review.<sup>32</sup>

The President appoints judges upon a motion from the NCJ, and the appointment procedure cannot be initiated without the NCJ's motion.<sup>33</sup> In addition to participating in the appointment process, the constitutional role of the NCJ includes '(...) guarding the independence of courts and judges'.<sup>34</sup> This body, which does not belong to the constitutional formula of the separation of powers, safeguards the integrity of this separation and facilitates dialogue between the branches. Its key instrument for performing these tasks is its constitutional right to submit applications to the Constitutional Tribunal (CT) regarding the constitutionality of normative acts insofar as they affect the independence of courts and judges.<sup>35</sup> Other tasks of the NCJ, particularly, its role in consulting on legislative acts concerning the judiciary, its organisational structure and its operations, are determined by statute.<sup>36</sup>

The NCJ's constitutional significance stems from its composition.<sup>37</sup> It comprises: (1) representatives of the executive, namely the Minister of Justice and one person appointed by the President of the Republic of Poland; (2) representatives of the legislature, that is, four members elected by the Sejm from among deputies and two members elected by the Senate from among senators; and (3) representatives of the judiciary, including the First President of the SC, the President of the SAC and 15 members elected from among the judges of the SC, common courts, administrative courts and military courts.

The Constitution does not specify the details of the election of elective members, which are regulated by statute.<sup>38</sup> This applies in particular to the election of judges.

30 See the decision of the CT of 23 June 2008, Kpt 1/08, OTK ZU No. 5/A/2008, item 97; the judgment of the CT of 11 September 2017, K 10/17, OTK ZU A/2017, item 64, the judgment of the SC of 10 June 2009, III KRS 9/08, OSNP No. 7-8/2011, item 114. See: Sarnecki, 2000, p. 53; Jaskiernia, 2008, p. 368. The systemic practice is familiar with the cases of refusal to appoint a person as a judge. See the decision of the President of the Republic of Poland of 3 January 2008 refusing to appoint to a judicial office nine persons indicated in the motion of the NCJ. The refusal was not reasoned. M.P. No. 4, item 38.

31 Cf. the judgment of the CT of 8 May 2012, K 7/10, OTK ZU No. 5/A/2012, item 48; the judgment of the CT of 15 January 2009, K 45/07, OTK ZU No. 1/A/2009, item 3.

32 The jurisprudence in that regard is uniform and settled. See e.g. the decisions of the SAC of: 9 October 2012, I OSK 1872/12, I OSK 1883/12; of 20 March 2013, I OSK 3129/12; of 7 December 2017, I OSK 857/17; of 27 February 2023, II GSK 1362/22.

33 See the decision of the CT of 23 June 2008, Kpt 1/08, OTK ZU 5/A/2008, item 97.

34 Art. 186 of the Constitution. See also the judgments of the CT, K 39/07, OTK 129/10A/2007, and K 40/07, OTK 44/3A/2008.

35 Art. 186(2) of the Constitution.

36 Art. 187(4) of the Constitution.

37 Art. 187(1) of the Constitution.

38 Art. 187(4) of the Constitution. See also the judgment of the CT, K 40/07 OTK 2008/3A/44.

Under the current provisions, the Sejm elects judges to the NCJ<sup>39</sup> for a four-year term.<sup>40</sup>

Within the balance of powers, judges occupy an exceptional position. The Constitution confers upon them the attribute of independence in the exercise of their duties,<sup>41</sup> the purpose of which is to guarantee the constitutional right to a court.

The Constitution does not define judicial independence. In its simplest sense, it means independence from the other branches of power, from judicial and non-judicial organs, and from political influences, as well as the inner resolve of a judge to deliver decisions based on the law, even when they are unpopular.<sup>42</sup>

The Constitution provides two categories of instruments guaranteeing judicial independence: systemic safeguards and personal guarantees for judges. Systemic safeguards include the principles already discussed: the separation of powers and the independence of the judiciary, expressed in its autonomy in areas where the Constitution does not authorise other branches to act in relation to the courts (e.g. constitutional provisions concerning jurisdiction, finality and enforceability of court rulings, immunities and disciplinary liability). Personal guarantees encompass specified positive duties (imperatives) and negative ones (prohibitions), such as such as adequate working conditions (including assistants and facilities), remuneration consistent with the dignity of the office and the scope of duties, the prohibition on membership in a political party or a trade union, the prohibition on engaging in public activities incompatible with judicial independence

A judge's independence is limited only by the constitutional imperative to act on the basis of, and within the limits of, the law, which the Constitution expressly defines as subordination to the 'Constitution and statutes' in the exercise of office.<sup>43</sup> This subordination applies not only to the text of the provisions but also to the systemic principles contained in them, particularly the primacy of the Constitution and the direct applicability of its provisions.<sup>44</sup> When adjudicating conflicts between national and international law, the judge is first and foremost bound by the Constitution's conflict-of-law rules,<sup>45</sup> as well as by its standards for implementing other international legal instruments.<sup>46</sup>

39 Art. 9a of the Act of 12 May 2011 on the NCJ, Journal of Laws of 2011, No. 126, item 714 as amended. This is a vital change. From the establishment of the NCJ until 2017, judges were elected by judges.

40 Art. 187(3) of the Constitution.

41 Art. 178(1) of the Constitution.

42 Banaszak, 2012, p. 890. Cf. The judgment of the CT of 24 June 1999, K 3/98, OTK ZU No. 4/1998, item 52; the judgment of 14 April 1999, K 8/99, OTK ZU No. 3/1999, item 41.

43 Art. 178(1) of the Constitution.

44 Art. 8 of the Constitution.

45 Art. 91 of the Constitution.

46 Art. 9 of the Constitution.

### 3. International Legal Framework Challenging the Polish Judiciary

Considering the aforementioned legal standards and the lack of formal possibilities to redefine them, the judicial and political community sought sources outside the Polish constitutional framework to ‘reverse the rule of law’. They resorted to international law and exploited its complexities, including the nuanced relationship between domestic and international law. They turned to the legal systems of two international organisations of which Poland is a member – the Council of Europe and the EU. The case law of the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU) became direct instruments in this regard.

The conceptual basis for the ECtHR’s actions towards Poland was the judgment in the case *Guðmundur Andri Ástráðsson*.<sup>47</sup> This judgment, issued in a case against Iceland, was nonetheless highly significant for Poland because the ECtHR developed a new concept of the right to a court. It linked the appointment of a judge to his or her adjudicative independence, defining this link as the essence of the right to be tried by a court established by law. The ECtHR held that the term ‘law’ in Art. 6(1) ECHR includes not only principles concerning a court’s functioning (its powers and jurisdiction) but also the legal basis for a judge’s appointment. It determined that this construction reflects the rule-of-law requirement,<sup>48</sup> which is the underlying purpose of a court’s establishment. Only a court ‘established by law’ is independent and impartial, and only a judge’s independence can dispel any reasonable doubts individuals may have about the court’s independence from external pressures, its neutrality towards competing interests, and its independence from the legislative and executive branches.<sup>49</sup>

The mechanism for monitoring compliance with this new standard involves a specific test verifying whether irregularities in the judicial appointment process are sufficiently serious to constitute a violation the requirement of being established by law. This test consists of three stages: (1) at the first stage, the ECtHR determines whether ‘a manifest breach of the domestic law, in the sense that the breach must be objectively and genuinely identifiable as such’<sup>50</sup> has occurred. The absence of such a breach means there has been no violation of Art. 6(1) of the Convention;<sup>51</sup> (2) at the second stage, the ECtHR examines whether the breach affected the court’s ability to fulfil its adjudicative functions, namely whether it created undue interference by other branches of power;<sup>52</sup> (3) at the third stage, it evaluates the state’s response, verifying whether national courts effectively examined and rectified the breach of

47 The Grand Chamber, app. No. 26374/18.

48 Para. 226.

49 Paras. 212 and 213 of the judgment.

50 Para. 244 of the judgment.

51 See para. 245 of the judgment.

52 Para. 246 of the judgment.

the right to a court established by law. Although ECtHR adjudication is subsidiary in nature, ‘it falls ultimately on the Court to determine whether the way in which that law is interpreted and applied produces consequences that are consistent with the principles of the Convention’.<sup>53</sup>

The mechanism thus created was subsequently applied in rulings delivered directly in Polish matters. Evidence that it was deliberately designed to undermine the Polish judicial reforms lies not only in speculation and suspicion but also in the fact that Polish institutions – the Helsinki Foundation for Human Rights and the then Commissioner for Human Rights – were permitted to join the case as *amicus curiae*. Both parties were actively involved in the domestic dispute over judicial reform in Poland, supporting the then opposition. Furthermore, during the proceedings, they explicitly connected the issue under examination with Poland. This is also confirmed by the reasoning of the judgment,<sup>54</sup> and by the fact that this case was later cited in the CJEU’s case-law concerning Polish matters.<sup>55</sup>

Having established this instrument, the ECtHR began adjudicating on Polish cases that had been pending before it for several years.<sup>56</sup> The first judgment was delivered in *Broda and Bojara* case, which addressed the dismissal of court presidents. The Court held that the right to a fair trial must be interpreted in light of the principle of the rule of law, which requires the availability of effective remedies enabling the exercise of civil rights. It stressed, in particular, that members of the judiciary must be protected from arbitrary acts of the executive where the relevant provisions permitting their dismissal did not set out *expressis verbis* conditions for such action.<sup>57</sup> Judicial review alone could guarantee the rule-of-law standard.<sup>58</sup>

In the *Reczkowicz* case, the ECtHR found that the NCJ was no longer independent ‘or able to fulfil its constitutional obligation of safeguarding the independence of courts and judges’.<sup>59</sup> This conclusion was based on circumstances pertaining the constitution of the Council,<sup>60</sup> which enabled ‘(..) the executive and the legislature

53 Para. 250 of the judgment.

54 Para. 200 and para. 203.

55 See joined cases C–585/18, C–624/18, C–625/18 (para. 138) and case C–619/18 (para. 139).

56 The crucial ones embrace: the judgment of 29 June 2021 in the case *Broda and Bojara v Poland* (applications Nos. 26691/18 and 27367/18), the judgment of 22 July 2021 in the case *Reczkowicz v Poland* (application No. 43447/19), the judgment of 8 November 2021 in the case *Dolińska-Ficek and Ozimek v Poland* (applications Nos. 49868/19 and 57511/19), the judgment of 3 February 2022 in the case *Advance Pharma sp. z o.o. v Poland* (application No. 1469/20), the judgment of 15 March 2022 *Grzęda v Poland* (application No. 43572/18), the judgment of 10 June 2022 *Żurek v Poland*, (application No. 39650/18), the judgment of 6 October 2022 *Juszczyszyn v Poland* (application No. 35599/20), the judgment of 6 July 2023 *Tuleya v Poland* (applications Nos. 21181/19 and 51751/20), the judgment of 27 November 2023 *Wałęsa v Poland* (application No. 50849/21). Altogether, based on the data (see the judgment *Wałęsa v Poland*, para. 323), the number of cases against Poland amounts to 492 registered cases.

57 Para. 132.

58 Paras. 130–131 of the judgment.

59 *Reczkowicz v Poland*, para. 269 of the judgment.

60 Para. 270 of the judgment.

to interfere directly or indirectly in the judicial appointment procedure'. As a consequence, the Disciplinary Chamber of the SC was deemed to lack the characteristics of an independent and impartial court established by law.<sup>61</sup> To support its assessment, the Court referred to a resolution adopted by three Chambers of the SC on 23 January 2020 and dismissed the CT's judgment declaring that resolution unconstitutional,<sup>62</sup> describing the latter as arbitrary and unfounded.<sup>63</sup> The Court also questioned the statutory authority of the CT stipulated in Art. 86 of the Act on the Organisation of the CT and the Mode of Proceedings before the CT. Similar findings concerning the Disciplinary Chamber of the SC were later confirmed in the *Żurek* and *Tuleya* judgments.<sup>64</sup>

In the case *Dolińska-Ficek and Ozimek*, the ECtHR held that the SC's Chamber of Extraordinary Review and Public Affairs was not a court established by law.<sup>65</sup> In the statement of reasons, it referred to the same circumstances as in *Reczkowicz*.<sup>66</sup> The Court additionally alleged that the President of Poland had manifestly disregarded the principle of the rule of law by appointing judges despite the SAC having stayed his power to do so.<sup>67</sup>

In *Advence Pharma*, the ECtHR reiterated its allegations towards the NCJ<sup>68</sup> and consequently challenged the appointment of seven new judges to the Civil Chamber of the SC, holding that 'the breaches of the domestic law (...) arising from non-compliance with the rule of law, the principle of the separation of powers and the independence of the judiciary, inherently tarnished the impugned appointment procedure'.<sup>69</sup> The Court also indirectly undermined the legality of the NCJ's operations in *Grzęda* and *Żurek*,<sup>70</sup> where it held that the premature termination of an NCJ member's term of office without a right of appeal violated the right to a court.

Finally, in the case *Wałęsa v Poland*, the ECtHR summarised its findings. This is evidenced by both the use of the pilot-judgment procedure and the content of the decision itself. The Court held that violations of the right to a fair trial under Art. 6(1) of the Convention stemmed from interlinked systemic issues<sup>71</sup> (1) a defective judicial appointment procedure involving the NCJ as reconstituted under the 2017 Amending Act; (2) the resulting lack of independence of the SC's Chamber of Extraordinary Review and Public Affairs of the SC; (3) the exclusive competence of that

61 Para. 276 of the judgment.

62 U 2/20, OTK 61/A/2020.

63 *Reczkowicz v Poland*, para. 262 of the judgment.

64 The judgment of 16 June 2022, *Żurek v Poland*, app. No. 39650/18; the judgment of 6 July 2023, *Tuleya v Poland*, app. Nos. 21181/19 and 51751/20.

65 Para. 354 of the judgment.

66 Para. 353 subpara. 1 of the judgment.

67 Para. 353 subpara. 2.

68 Para. 316 subpara. 2 of the judgment.

69 Para. 345 of the judgment.

70 The judgment of 22 March 2022, *Grzęda v Poland*, app. No. 43572/18; the judgment of 16 June 2022, *Żurek v Poland*, app. No. 39650/18.

71 Para. 324 as well as para. 6 of the statement of reasons for the judgment.

Chamber to determine challenges to the independence of a judge or court; (4) flaws in the extraordinary appeal procedure;<sup>72</sup> and (5) the Chamber's exclusive jurisdiction to adjudicate extraordinary appeals.

It concluded that

(...) in order to put an end to the systemic violations of Art. 6(1) (...) identified in the present case, the respondent State must take appropriate legislative and other measures to secure in its domestic legal order compliance with the requirements of an 'independent and impartial tribunal established by law' and the principle of legal certainty as guaranteed by this provision.<sup>73</sup>

The CJEU was simultaneously active. Its rulings resulted from two procedural tools: (1) actions brought by the EC against Poland under Art. 258 of the Treaty on the Functioning of the European Union (TFEU); and (2) requests for preliminary rulings by Polish courts pursuant to 267 TFEU.

The distinction between these two mechanisms is significant. In the first scenario, the CJEU directly attacked the Polish legal system. In the second, it developed reasoning and criteria that national courts could use to justify departing from domestic law.

The first judgment arising from an action brought by the Commission was delivered on 24 June 2019.<sup>74</sup> It concerned the Act on the SC.<sup>75</sup> The CJEU held that EU law is premised on the assumption that Member States share the values enshrined in Art. 2 of the Treaty on European Union (TEU). Although the organisation of justice lies within Member States' competence, they must comply with their obligations under EU law when exercising that competence. The Court found that the provisions lowering the retirement age of judges and granting the President of Poland discretionary powers to extend their tenure violated Art. 19(1)(2) TEU. It held that the former provisions were disproportionate and unrelated to the stated objectives, while the latter were discretionary and failed to provide for judicial review of the President's decision. Both elements breached the guarantees of judicial independence and impartiality.<sup>76</sup>

A similar allegation regarding the Act of 12 July 2017 amending the Act on the Organisational Structure of Common Courts and certain other acts was examined by the CJEU in its judgment of 5 November 2019,<sup>77</sup> with similar conclusions.<sup>78</sup>

72 Paras. 228–239 and 323(c) of judgment.

73 Statement of reasons para. 7.

74 The judgment in the case C-619/18 of 24 June 2019.

75 This act stipulated that the retirement age of the SC judges was lowered to 65 years.

76 Paras. 91 and 96.

77 C-192/18.

78 C-192/18, statement of reasons.

The next judgment arising from an action brought by the European Commission was delivered on 15 July 2021.<sup>79</sup> The CJEU ruled that by establishing the Disciplinary Chamber of the SC, Poland had failed to fulfil its obligations under Art. 19(1) and Art. 267(2) and (3) TFEU. The breach of Art. 19(1) TEU stemmed from the Chamber's inability to guarantee independence and impartiality or protection from direct or indirect influence by the Polish legislature and executive. These failures were evidenced *inter alia* by: (1) the involvement of the NCJ, whose independence was questionable;<sup>80</sup> (2) the exclusive appointment of new judges to the Disciplinary Chamber; (3) the significantly higher remuneration and greater organisational, functional, and financial autonomy of the Chamber's judges compared to other SC chambers; (4) the President of the Disciplinary Chamber's discretionary power to designate the disciplinary tribunal at first instance in cases involving ordinary- court judges; and (4) acceptance of the classification of judicial decisions as disciplinary offences.

The breach of Art. 267(2) and (3) TFEU arose from the *de facto* limitation of courts' ability to request preliminary rulings, resulting from the threat of disciplinary proceedings.<sup>81</sup> This judgment was preceded by a decision ordering Poland to: (1) suspend the application of provisions granting jurisdiction to the Disciplinary Chamber of the SC in disciplinary cases concerning judges; and (2) refrain from assigning cases pending before that Chamber to benches whose composition did not meet the independence requirement.<sup>82</sup>

The judgment of 5 June 2023 summarised the works of the CJEU concerning Art. 258 TFEU.<sup>83</sup> The case concerned the Act of 20 December 2019 amending the Act on the Organisational Structure of Common Courts, the Act on the SC and certain other acts.<sup>84</sup> Indeed, the CJEU stated that

the European Union respects the national identities of the Member States (...) such that those States enjoy a certain degree of discretion in implementing the principles of the rule of law, it in no way follows that that obligation as to the result to be achieved may vary from one Member State to another. Whilst they have separate national identities (...) the Member States adhere to a concept of 'the rule of law' which they share, as a value common to their own constitutional traditions, and which they have undertaken to respect at all times.<sup>85</sup> It follows that, in choosing their respective constitutional model, the Member States are required to comply, *inter alia*, with the requirement that the courts be independent stemming from Art. 2 and the second Subpara. of Art. 19(1) TEU (...). They are thus required, in particular, to ensure that, in the light of the value of the rule of law, any regression of their laws on the

79 C-791/19.

80 C-791/19, para. 103.

81 See the statement of reasons for the judgment C-791/19 and its para. 117, para. 154 and para. 215.

82 See the statement of reasons for the decision of 8 April 2019, C-791/19.

83 C-204/21.

84 Journal of Laws of 2020, item 190.

85 C-204/21, para. 73.

organisation of justice is prevented, by refraining from adopting rules which would undermine the independence of judges.<sup>86</sup>

Consequently, it held that, by amending the challenged act, Poland infringed Subpara. 2 of Art. 19(1) TEU read in conjunction with Art. 47 of the Charter of Fundamental Rights (ChFR) and Art. 267 TFEU.<sup>87</sup>

The series of the CJEU's preliminary judgments began with the judgment of 19 November 2019.<sup>88</sup> From a temporal perspective, this was the first international judgment concerning the Polish justice system. The CJEU referred to its previous judgments,<sup>89</sup> recalling determinations and findings contained therein, particularly the imperative to disapply any domestic norm contrary to EU law, arising from the principle of the primacy of EU law.<sup>90</sup> It therefore stated that it was unnecessary to answer the first question, while the second and third questions were answered as follows: Art. 47 of the ChFR and Art. 9(1) of the Directive of the Council 2000/78/EC of 27 November 2000 'must be interpreted as precluding cases concerning the application of EU law from falling within the exclusive jurisdiction of a court which is not an independent and impartial tribunal, within the meaning of the former provision'.<sup>91</sup> It also set out the criteria for such a court and authorised the referring court to assess the Disciplinary Chamber of the SC in that context.<sup>92</sup> It clarified that

if that is the case, the principle of the primacy of EU law must be interpreted as requiring the referring court to disapply the provision of national law which reserves jurisdiction to hear and rule on the cases in the main proceedings to the abovementioned chamber, so that those cases may be examined by a court which meets the abovementioned requirements of independence and impartiality and which, were it not for that provision, would have jurisdiction in the relevant field.<sup>93</sup>

The systemic essence of this judgment lay in the authorisation of the referring court – which, under domestic provisions, was not competent to adjudicate in the pending case – to assume adjudicative powers.<sup>94</sup> The CJEU derived this from the principle of the primacy of EU law as a consequence of a national court's obligation

86 C-204/21, para. 74.

87 C-204/21, statement of reasons.

88 Joined cases C-585/18, C-624/18 and C-625/18.

89 The judgment of 24 June 2019, C-619/18 as well as the judgment of 24 June 2019, C-573/17.

90 Para. 149.

91 C-585/18, statement of reasons, para. 2 subpara. 1.

92 If the circumstances in which that court was formed, its characteristics and the means by which its members have been appointed are capable of giving rise to legitimate doubts as to the imperviousness of that court, in particular, as to the influence of the legislature and the executive, that court is not independent or impartial within the meaning of Art. 47 of the ChFR. Case C-585, statement of reasons and para. 165.

93 C-585/18, statement of reasons 2 subpara. 2.

94 Case C-585/19, para. 166.

under Art. 47 of the ChFR to guarantee individuals effective legal protection. It reiterated this point in the preliminary judgment of 2 March 2021,<sup>95</sup> additionally indicating that it was not necessary to repeal the norm assigning this power to another court through either legislative or constitutional procedure.<sup>96</sup>

In the judgment of 26 March 2020,<sup>97</sup> the CJEU commented on the judicial disciplinary system. Although it declared the references made by the Polish courts inadmissible due to procedural issues,<sup>98</sup> it nonetheless highlighted the connection between disciplinary measures and the guarantees of judicial independence and impartiality, as well as protection from the abuse of disciplinary liability mechanisms. It thus repeated the analysis outlined in judgment C-791/19, holding that ‘provisions of national law which expose national judges to disciplinary proceedings as a result of the fact that they submitted a reference to the Court for a preliminary ruling cannot therefore be permitted’.<sup>99</sup> Such a guarantee is essential to their independence.<sup>100</sup>

In the preliminary judgment of 2 March 2021,<sup>101</sup> the CJEU defined the key criteria for assessing the independence of the NCJ. These included: reducing the term of office of the previous composition, changes to the procedure for appointing judicial members, procedural irregularities in constituting the new body, concerns about how the NCJ fulfilled its mandate to safeguard judicial independence and, the potential existence of special relationships between the newly appointed members and the executive.<sup>102</sup> It also highlighted the link between the NCJ’s formation and the reform of the SC.<sup>103</sup>

In the preliminary judgment of 6 October 2021,<sup>104</sup> it held that such a court composition may not be regarded as an independent and impartial tribunal established by law

if it follows from all the conditions and circumstances in which the process of the appointment of that single judge took place that appointment took place in clear breach of fundamental rules which form an integral part of the establishment and functioning of the judicial system concerned (...).<sup>105</sup>

95 C-824/18.

96 C-824/18, para. 141. See also para. 167.

97 In joined cases C-558/18 and C-563/18.

98 The national courts de facto made a reference for a preliminary ruling to the Court concerning the conformity to EU law of the provisions of the Polish law regulating the regime of professional liability, which does not fall within the competences of the Court with regard to the preliminary procedure.

99 C-558/19, para. 58.

100 C-558/19, para. 59.

101 C-824/18.

102 C-824/18, paras. 131–134.

103 Those provisions were held by the CJEU to be in breach of Poland’s obligations arising from Art. 19(1), second para., of the TEU (case C-619/18).

104 C-487/19.

105 C-487/19, the statement of reasons.

In the preliminary judgment of 16 November 2021,<sup>106</sup> which examined the powers of the Minister of Justice to second a judge to a higher court, it found that ‘(...) it is necessary that judges be protected from external intervention or pressure liable to jeopardise their independence and impartiality’.<sup>107</sup> If the Minister could second a judge and freely terminate that secondment, there was a risk that such power could be used to exert political influence over judicial decisions.<sup>108</sup> Therefore, decisions taken by the Minister ‘must be taken on the basis of criteria known in advance and must contain an appropriate statement of reasons’.<sup>109</sup> Otherwise,

the possibility to terminate the secondment of a judge could also give the seconded judge the feeling of having to meet the expectations of the Minister for Justice.<sup>110</sup> And (...) the termination of the secondment without that judge’s consent is liable to have effects similar to those of a disciplinary penalty.<sup>111</sup>

In the preliminary judgment of 13 July 2023,<sup>112</sup> the CJEU held that Subpara. 2 of Art. 19(1) TEU prevents the Disciplinary Chamber of the SC from ruling on the professional accountability of judges of common courts because it does not guarantee independent and impartial adjudication. Therefore, another court may disregard its rulings, and where national provisions prohibit doing so, it may also disregard those provisions.<sup>113</sup> In the preliminary judgment of 21 December 2023,<sup>114</sup> the CJEU refused to answer a question submitted by the Extraordinary Review and Public Affairs Chamber of the SC, stating that the question was not submitted by a body with the status of an independent and impartial court.<sup>115</sup>

To conclude, it needs to be stressed that the rulings of both courts were delivered in the period 2018–2023. In essence, they recognise that the rule of law guarantees everyone the right to effective judicial review, which comprises the principle of judicial independence and impartiality. This conception of the rule of law is protected under Art. 19(1)(2) TEU, Art. 47 of the ChFR and Art. 6(1) of the ECHR. As judicial independence is also affected by the manner of a judge’s appointment, the rulings of the CJEU encroached upon the state’s constitutional system and raised questions concerning the functioning of constitutional bodies such as the NCJ and three chambers of the SC (the Civil, Disciplinary, and Extraordinary Review and Public Affairs Chambers). This interference was partly indirect and partly conducted through

106 Joined cases C-748, 749, 750, 751, 752, 753, 754/19.

107 Para. 69.

108 Para. 73.

109 Para. 79.

110 Para. 82.

111 Para. 83.

112 Joined cases C-615/20 and C-671/20.

113 C-615/20, the statement of reasons.

114 C-718/21.

115 The statement of reasons and paras. 47–57, as well as paras. 62–76.

the construction of assessment instruments within the EU legal system, which were subsequently applied by certain national courts.

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#### 4. Systemic State Reactions to ECtHR and CJEU Judgments on the Judiciary

Despite allegations that the CJEU and the ECtHR unlawfully interfered with systemic matters and acted *ultra vires*, what occurred in Poland under the influence of the case-law of both courts during 2018–2023 was the adoption of two amendments to the Act on the SC, which redefined certain elements of the reform. These involved: (1) reinstating judges who had retired as a result of the judicial reform,<sup>116</sup> both in the exercise of judicial office and in judicial administrative functions where applicable;<sup>117</sup> (2) dissolving the Disciplinary Chamber of the SC and replacing it with the Professional Liability Chamber;<sup>118</sup> and (3) introducing the so-called judicial independence test.

The legal basis for reinstating judges was the Act of 21 November 2018 amending the Act on the SC. The formal reason advanced was the obligation to implement the interim decision of the President of the CJEU.<sup>119</sup> Judges resumed office by virtue of the statutory provision, although this solution was manifestly in breach of Art. 170 and Art. 183(3) of the Constitution.<sup>120</sup>

The dissolution of the Disciplinary Chamber of the SC and the introduction of the independence and impartiality test were later enacted through the Act of 9 June 2022 amending the Act on the SC and certain other acts. This was the outcome of a political agreement with the European Commission concerning the acceptance of the National Recovery Plan.<sup>121</sup> This statute led to the estab-

116 Art. 111(1) of the Act on the SC.

117 Art. 2(1) as well as (4) of the Act of 21 November 2018 amending the Act on the SC (Journal of Laws of 2018, item 2507).

118 See Art. 1(1) and Art. 8 of the Act of 9 June 2022 amending the Act on the SC and certain other acts, Journal of Laws of 2022, item 1259.

119 See the decision of the CJEU of 11 July 2019, C-619/18, para. 1 subpara. 2. There were three *de facto* reasons for those changes: pressure from the EU, which denied Poland the approval of the National Recovery Plan; a series of cases in the CJEU as a result of references for preliminary rulings as well as the case C-619/18 arising from the action of the European Commission; pressure from the judicial community, which boycotted the statutory amendments.

120 These two provisions indicate how it is possible to assume the office of a judge and the function of the First President of the SC. In both cases, this is exclusively appointment by the President of the Republic of Poland. The provision envisaging the reinstatement relies however on the assumption of constitutionality. It has not been challenged before the CT. More on that: Muszyński, 2023b, pp. 20–50.

121 Koślicki and Rzemek, 2024.

ishment of the Professional Liability Chamber of the SC.<sup>122</sup> Other effects of the amendment included: (1) allowing judges of the dissolved Disciplinary Chamber of the SC to assume office in one of the remaining chambers of the SC or to retire;<sup>123</sup> (2) discontinuing, by virtue of a statute, proceedings commenced in the Disciplinary Chamber of the SC and unfinished before the amendment entered into force;<sup>124</sup> (3) revising rulings of the Disciplinary Chamber of the SC and granting judges who had been subjected to disciplinary penalties, or against whom consent had been given to prosecute criminally, the right to request the reopening of proceedings within six months; and (4) restricting the disciplinary offence of refusing to implement the administration of justice by formulating a catalogue of negative requirements, thereby excluding such liability.<sup>125</sup>

This act also introduced a new procedural institution – the so-called test of judicial independence and impartiality.<sup>126</sup>

The change of legal status in line with the intentions arising from the case-law of international courts did not, however, prevent actions by certain national courts, nor did it halt further activity by the ECtHR and the CJEU. Occasional judgments of the CT, which from the constitutional perspective limited the normative content of Art. 19(1), second sentence, TEU and Art. 6(1) ECHR,<sup>127</sup> initiated either by a question of law referred by the SC or by an application submitted by the Prosecutor General, did not help. A period of divided jurisprudence and legal uncertainty prevailed in the national legal system.

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## 5. Systemic Undermining of Judicial Status Through National Case-Law on Judicial Appointments

### 5.1. Judicial Responses of the SAC and the SC

The judicial reform provoked an institutional reaction from some judges. *De facto*, it was the judges' engagement that transformed the national political dispute

122 See Art. 1(22) of the Act of 9 June 2022 amending the Act on the SC and certain other acts.

123 Art. 10(4) of the Act of 9 June 2022 amending the Act on the SC and certain other acts.

124 See Art. 15 of the Act of 9 June 2022 amending the Act on the SC and certain other acts.

125 This catalogue does not include: an error regarding the interpretation and application of provisions of national law or EU law, or relating to fact finding or the assessment of evidence; reference to the CJEU for a preliminary ruling; the examination of the fulfilment of the requirements of a court's or judge's independence, or of a judge's independence and impartiality, yet exclusively in the cases indicated in the statute. See: Art. 2(2) of the Act of 9 June 2022 amending the Act on the SC and certain other acts.

126 See: Art. 1(24) of the Act of 9 June 2022 amending the Act on the SC and certain other acts.

127 See: the judgment of 7 October 2021, K 3/21, OTK 2022/A/65; the judgment of the CT of 10 March 2022, K 7/19, OTK ZU A/2022, item 24.

between the governing coalition and the opposition into a legal issue. This occurred when judges began using adjudicative instruments as a tool to challenge the legislator and chose to fill the gaps in legal bases for systemic actions by invoking the case-law of international courts.

The SAC was the first to act, doing so immediately after the entry into force of the new statutes.

The procedure for appointing SC judges began on 24 May 2018, when the President of Poland announced judicial vacancies in the newly formed SC.<sup>128</sup> As a result, the NCJ conducted a competition procedure and adopted resolutions to submit to the President motions for the appointment of candidates to the SC.<sup>129</sup> Judicial appointments by the President occurred on: 20 September 2018 (the Disciplinary Chamber of the SC), 10 October 2018 and 30 January 2019 (the Extraordinary Review and Public Affairs Chamber), 10 October 2019 (the Criminal and Civil Chambers of the SC).

Certain individuals who were not recommended to the President as candidates submitted appeals with the SAC, seeking a stay of enforcement of the resolutions.<sup>130</sup> Some SAC benches granted the stay applications. Then, on 21 November 2018, the SAC referred a question to the CJEU for a preliminary ruling concerning NCJ resolution No. 330/2018, adjourning hearings in related cases until the CJEU delivered its decision.

On 2 March 2021, the CJEU delivered a judgment,<sup>131</sup> stating that Art. 19(1)(2) TEU must be interpreted as precluding amendments to national law that deprive a court of jurisdiction to review NCJ resolutions concerning judicial appointments that declare such proceedings discontinued by operation of law, or that prevent appeals from appeals from alleging that the NCJ misassessed candidates' compliance with the competition criteria. It added that where such a law exists, a national court may disapply it regardless of its rank (statute or constitution) and continue exercising the jurisdiction previously vested in it by repealed provisions.<sup>132</sup> Consequently, on 6 May 2021, the SAC annulled the part of NCJ resolution No. 330/2018 that recommended

128 M.P. of 2018, item 633. There were 20 vacancies in the Extraordinary Review and Public Affairs Chamber, 7 in the Civil Chamber, and 1 in the Criminal Chamber.

129 See: Krajowej Rady Sądownictwa, 2024.

130 Accordingly, on 25 September 2018, the SAC (II GW 22/18) stayed the enforcement of the resolution of the NCJ of 24 August 2018 (318/2018 appointment of a candidate to the Criminal Chamber of the SC). On 27 September 2018, the SAC (II GW 28/18) stayed the enforcement of the resolution of the NCJ of 28 August 2018 (331/2018, appointment of the candidates to the Extraordinary Review and Public Affairs Chamber of the SC). On 8 October 2018, the SAC (II GW 31/18) stayed the enforcement of the resolution of the NCJ of 28 August 2019 (330/2018, appointment of candidates to the Civil Chamber of the SC). Some applications were dismissed for substantive reasons (e.g. the decisions of 14 September 2018, II GW 21/18 and of 25 September 2018 GW 24/18).

131 C-824/18.

132 C-824/18, the operative part of the judgment, para. 2, subpara. 1.

the appointment of seven candidates as SC judges in the Civil Chamber.<sup>133</sup> The SAC issued annulment judgments in the remaining cases on 21 September 2021.<sup>134</sup>

The systemic essence of the SAC rulings was the assertion that the NCJ is dependent on the legislature and the executive. This view was based on: (1) the Sejm's procedure for electing judicial members of the NCJ;<sup>135</sup> (2) the NCJ's failure to 'guard the independence of courts and independence of judges' demonstrated by its disregard for national and international criticisms of the reform and its failure to oppose the authorities' rejection of the CJEU President's interim decision of 8 April 2020;<sup>136</sup> and (3) alleged manipulation of appeal proceedings against NCJ resolutions to obstruct SAC judicial review.

The SAC concluded that the judicial candidates selected by the NCJ did not fulfil the requirement of independence and impartiality under Art. 47 of the ChFR.<sup>137</sup> Notably, those candidates were not parties to the proceedings and were never formally informed of them.

The SAC also endorsed the SC's interpretation in its judgment of 5 December 2019 and its resolution of 23 January 2020 that the Polish President's announcement of SC judicial vacancies required the countersignature of the President of the Council of Ministers for validity.

Simultaneously, the SC sought to undermine the reforms. The pretext was the lowering of the retirement age for judges,<sup>138</sup> which also applied to sitting judges.<sup>139</sup> The formal basis was three cases pending before the Labour and Social Security Chamber of the SC, which referred three preliminary questions on 30 August and 19 September 2018.<sup>140</sup>

The situation was complicated because the reform stripped the Labour and Social Security Chamber of jurisdiction in such cases, transferring it to the Disciplinary Chamber of the SC, which had not yet been constituted.<sup>141</sup> The Labour and Social Security Chamber asked the CJEU whether: (1) Art. 47 of the ChFR read in conjunction with Art. 9 of Directive 2000/78 empowered it to disapply provisions assigning jurisdiction to a body that had not yet been formed; (2) Art. 267(3) TFEU read in conjunction with Art. 19(1) and Art. 2 TEU and Art. 47 meant that the newly created chamber composed of NCJ-appointed judges who lacked guaranteed independence was not an independent tribunal under EU law; and (3) Art. 267(3) TFEU read in

133 II GOK 2/18.

134 See also II GOK 8/18, 9/18, 11/18, 12/18, 13/18,14/18.

135 The SAC also referred to the preliminary judgment of 19 November 2019 delivered in response to the reference for a preliminary ruling made by the SC (case C-585, A.K. and others).

136 C-791/19, suspension of the Disciplinary Chamber of the SC.

137 Para. 125 of the judgment of the CJEU C-824/18.

138 Art. 37 of the Act on the SC, Journal of Laws of 2018, item 5, which entered into force on 3 April 2018.

139 Art. 111(1) of the Act on the SC.

140 The CJEU joined the cases under one reference number C-585/18 (two remaining cases are C-624/18 and C-625/18).

141 The President of the Republic of Poland appointed the judges on 20 September 2018.

conjunction with 19(1) TEU and Art. 2 TEU and Art. 47 of the ChFR, required it to disregard provisions reserving jurisdiction to the Disciplinary Chamber, given the circumstances of the appointment of its judges raised doubts about their independence and impartiality.<sup>142</sup>

The doubts concerning the Disciplinary Chamber stemmed from the fact that NCJ judicial members were elected by the Sejm rather than by the judiciary, as under the previous system,<sup>143</sup> and that the NCJ's record indicated subordination to political authorities and an inability to ensure judicial independence.<sup>144</sup>

The CJEU answered in its judgment of 19 November 2019.<sup>145</sup> As a result, in its judgment of 5 December 2019, the Labour and Social Security Chamber held that it could disregard a binding statutory provision allocating jurisdiction to another SC chamber, that the NCJ did not meet independence requirements, and that the Disciplinary Chamber was not a court.

The SAC rulings, based on international case-law and referring to institutional and systemic issues, lacked any national legal basis. They even exceeded the constitutional limits of judicial powers and disrupted the balance of powers.

### ***5.2. The Resolution of the Three SC Chambers***

The SC's next step was adopting resolution BSA I-4110-1/20 on 23 January 2020, sitting as a joint bench of three chambers: the Civil Chamber, the Criminal Chamber and the Labour and Social Security Chamber.<sup>146</sup> The SC stated that in this way

it enforces the judgment of the Court of Justice of the European Union of 19 November 2019 in the cases C-585/18, C-624/18 and C-625/18, by clarifying the practical procedural consequences which are linked to the fact that a judge sits on the adjudicating bench of a court who was appointed to his/her office in the proceedings conducted by the National Council of the Judiciary, with regard to which the test of independence from the legislative and executive authorities has a negative result, and the very proceedings before the said Council and also possible prior or subsequent

142 Paras. 44 and 45 of the judgment.

143 C-585/18 para. 41. Cf. Recommendation of the Council of Ministers CM/Rec(2010)12 of 17 November 2010 on judges: independence, efficiency, responsibilities the Opinion of the European Commission for Democracy through Law (Venice Commission) No. 904/2017 [CDL-AD(2017)031] of 11 December 2017 as well as the Opinion of the Consultative Council of European Judges (CCJE) No. 10(2007) of 23 November 2007 on the Council for the Judiciary at the service of society.

144 Paras. 42 and 43 of the judgment.

145 More on that: the excerpt concerning international case law.

146 59 judges participated in the adoption of the resolution. The SC made it impossible for the judges of the Disciplinary Chamber and of the Extraordinary Review and Public Affairs Chamber to participate. Also, the participation of the judges of the Civil Chamber who were appointed by the President of the Republic of Poland after the amendment of the Act on the SC in 2018 was prevented.

stages of proceedings aimed at the appointment of a particular person to the office of a judge are affected by yet other irregularities.<sup>147</sup>

It also highlighted its obligation to clarify whether the appointment of judges by the President of Poland under the Act of 8 December 2017 amending the Act on the NCJ undermined impartiality and independence standards under Art. 6(1) ECHR, Art. 45(1) of the Constitution and Art. 47 of the ChFR and, if so, to determine the procedural consequences of administering justice in such circumstances.<sup>148</sup>

Consequently, the SC attributed the following interpretation to Art. 439(1) (2) of the Code of Criminal Proceedings and to Art. 379(4) of the Code of Civil Proceedings.<sup>149</sup>

1. Irregular composition of the court (...) or inconsistency of the composition of a court with statutory provisions (...) also occurs when a person appointed to the office of a judge of the Supreme Court, upon the motion of the National Council of the Judiciary, which was formed under the provisions of the Act of 8 December 2017 amending the Act on the National Council of the Judiciary and certain other acts (Journal of Laws of 2018, item 3), sits on the bench of that court;
2. The irregular composition of a court (...) or the inconsistency of the composition of the court with statutory provisions (...) also occurs when a person appointed to the office of a judge in a common or military court upon the motion of the National Council of the Judiciary, which was formed under the provisions of the Act of 8 December 2017 amending the Act on the National Council of the Judiciary and certain other acts (Journal of Laws of 2018, item 3) sits on the bench of that court if the irregularity of the process of appointment leads, under specific circumstances, to a violation of the independence and impartiality standard within the meaning of Art. 45(1) of the Constitution of the Republic of Poland, Art. 47 of the Charter of Fundamental Rights of the European Union as well as Art. 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms.<sup>150</sup>

At the same time, it defined the temporal effects of this interpretation by attributing value to the interpreted institutions of national law from the perspective of their retroactive effect (*lex retro non agit*). For the Disciplinary Chamber of the SC (Para. 1), the interpretation applied retroactively; for common courts (Para. 2) it did not.

147 Para. 4 of the statement of reasons for the resolution, p. 8.

148 Para. 16 of the statement of reasons for the resolution, p. 27.

149 The operative part of the resolution.

150 Ibid.

In this way, the resolution of the three chambers of the SC reconstructed the national standard of judicial independence from the perspective of Art. 6 ECHR and Art. 47 of the ChFR based on the case-law of the ECtHR and the CJEU at the time. It adopted that: (1) the legal acts of legislative and executive bodies are insufficient for legitimising the independence and impartiality of a judge, and thus the independence of a court. These acts only constitute formal criteria reflecting the appointment process. In turn, effective protection of judicial independence and impartiality requires that the participation of the judiciary in the process of appointing judges be guaranteed. Only such participation ensures sufficient insulation from political authorities' influence; (2) *a posteriori* review of the judicial appointment process by courts is necessary. The admissibility of review is justified when institutional guarantees related to the NCJ or the recruitment competition in the appointment process give rise to doubts. Only this guarantees the proper standard of the individual's right to a court arising from Art. 45(1) of the Constitution;<sup>151</sup> (3) the review must be conducted in accordance with the procedural institutions provided for in the Civil Procedure Code and the Criminal Procedure Code.

Although the resolution did not formally undermine the status of judges, it *de facto* prevented them from adjudicating, as each bench with their participation was (in the SC) or could be (in common courts) treated as failing to meet the requirements for the formation of a court arising from international law and, as a result – according to the SC – from the Constitution and the codes.<sup>152</sup>

On 22 June 2022, the SC adopted another resolution supporting the aforementioned resolution. In the light of its Subpara. 5,

a motion to exclude from the composition of a common court a person appointed to the judicial office by the President of the Republic of Poland, who acted upon the request of the National Council of the Judiciary formed under the provisions of the Act of 8 December 2017, may not be examined by a court whose adjudicating bench is composed of such a judge; otherwise, the situation will arise which falls under the prohibition *nemo iudex in causa sua*.

Subsequent attempts were made to extend this reasoning to the procedure of the independence and impartiality test.

The resolution of the three Chambers was formally derogated from the legal system by virtue of the CT judgment of 20 April 2020,<sup>153</sup> which held it inconsistent with the Constitution. Despite this, it was *de facto* applied by some judges from the day of its adoption, most often in ongoing adjudication in the SC, which also affected the adjudication of common courts. Judges continued to refer to the resolution even

151 The statement of reasons for the resolution of joined (three) Chambers of the SC, para. 44, pp. 53–54.

152 Art. 87(1) and (2) as well as Art. 88 of the Act on the SC. This resolution was not published.

153 The judgment of the CT of 20 April 2020, U 2/20, OTK A/2020, item 61.

though the CT classified it in its decision of 21 April 2020<sup>154</sup> as law-creating, thereby violating the powers of the Sejm to enact legal acts and hence unlawful.

### ***5.3. The Prime Minister's Countersignature and the Validity of the Polish President's Announcement About SC Judicial Vacancies***

A separate issue was the declaration contained in the resolution of the three Chambers of the SC that the Polish President's announcement of 24 May 2018 about judicial vacancies in the SC<sup>155</sup> was invalid, as it required the countersignature of the President of the Council of Ministers.<sup>156</sup> This assessment was based on the thesis that a procedure initiated invalidly cannot end validly. The thesis drew on the analysis that the power of Poland's President to announce judicial vacancies in the SC is a new statutory power not listed in Art. 144(3) of the Constitution among the 30 presidential prerogatives. It cannot be recognised as a secondary prerogative derived from the prerogative concerning the appointment of judges (Art. 144(3)(17) of the Constitution), as only a prerogative whose exercise is necessary for the proper realisation of the main prerogative may be secondary. Thus, publishing such an announcement requires the countersignature of the Council of Ministers' President. This obligation is introduced by Art. 144(2) of the Constitution with regard to every official act of the President which is not a prerogative.

An opposite stance was taken by the SC in the resolution of 16 December 2021 by a bench composed of seven judges of the Extraordinary Review and Public Affairs Chamber. This resolution acquired the force of a legal principle.<sup>157</sup> Subsequently, the CT ruled on 23 February 2022 that the Polish President's announcement about judicial vacancies in the SC did not require a countersignature.<sup>158</sup> Upon the prom-

154 The decision of the CT of 21 April 2020, Kpt 1/20, OTK A/2020, item 60. The resolution of the three Chambers was adopted in violation of the law. See also the statement of reasons for the resolution of the three Chambers of the SC, para. 5, pp. 9–10 and para. 8, pp. 12–13, in which it acknowledges itself that it also dismissed the protective decision of the Civil Chamber of the SC of 20 January 2020, V CSK 347/19 issued in connection with the references for a preliminary ruling to the CJEU. The SC also refused to comply with Art. 86(1) of the Act of 30 November 2016 due to the fact that on 21 January 2020 the Marshal of the Sejm submitted an application with the CT, in which the Tribunal was asked to settle a dispute over powers between the SC and the Sejm with regard to the ability of the SC to adopt abstract resolutions changing the normative situation in the realm of the structure and organisation of the justice system in reference to a ruling of an international court.

155 M.P. of 2018, item 633. There were 20 vacancies in the Extraordinary Review and Public Affairs Chamber, seven in the Civil Chamber, and one in the Criminal Chamber.

156 This power of the President was the result of changes implemented by the Act on the SC, which granted it to the President (Art. 31(1)). Previously, the First President of the SC was the organ competent in that regard. Para. 34 of the statement of reasons for the resolution, pp. 43–45. In turn, the stance of the SC was adopted and applied in the judgments of the SAC of 6 May 2021 and of 21 September 2020 in the cases in which the candidates who were not elected to the SC appeared in August 2018 against the resolutions of the NCJ.

157 The Resolution of the Bench of Seven Judges of the Extraordinary Review and Public Affairs Chamber of the SC of 16 December 2021, I NZP 5/21.

158 Para. 2 of the operative part of the judgment, P 10/19, OTK 14/A/2022.

ulgation of the CT judgment, the problem faded, not due to the direct effect of the ruling but rather the weak argumentation of those seeking to use that formula to undermine judicial reforms.

#### ***5.4. The Test of Judicial Independence***

By virtue of the Act of 9 June 2022 amending the Act on the SC and certain other acts, the procedure called the ‘judicial independence and impartiality test’ was introduced into the legal system.<sup>159</sup> Its source is Art. 1(24) of the said Act, which amends Art. 29 of the Act on the SC. It allows examination of

the fulfilment by a judge of the Supreme Court or a judge seconded to perform judicial activities in the Supreme Court of the requirements of independence and impartiality, including the circumstances surrounding his/her appointment and his/her conduct after the appointment (...) if, under the circumstances of a given case, this may lead to the violation of the independence or impartiality standard, which affects the outcome of the case, having regard to the circumstances concerning the empowered person and the character of the case.

Analogous changes were introduced in the Act on the Organisational Structure of Common Courts, the Act on the Organisational Structure of Administrative Courts, and in the Act on the Organisational Structure of Military Courts.<sup>160</sup>

The purpose of the new institution is ‘to provide the participants of judicial proceedings or administrative judicial proceedings with procedural guarantees that there are no doubts as to the impartiality and independence of a judge adjudicating in the case’.<sup>161</sup> This *prima facie* corresponds to the third criterion of the test laid down by the ECtHR (Grand Chamber) in the case *Ástráðsson v Iceland*.<sup>162</sup>

By introducing the independence test, the legislator refused to undermine the process of appointing judges in a general manner,<sup>163</sup> but admitted the possibility of an individual assessment of a judge. The purpose was to prevent courts from making this assessment, by referring directly to judgments of international courts.<sup>164</sup> Courts had previously used the institution of the exclusion of a judge based on the Code of

159 Journal of Laws of 2022, item 1259.

160 Arts. 2, 4 and 5 of the Act of 9 June 2022 amending the Act on the SC and certain other acts.

161 The statement of reasons for the draft act.

162 More on that: the Chapter referring to the case law of the ECtHR. Cf. The judgment of the Court of Appeals in Warsaw – I Civil Division of 11 February 2022, I ACa 565/21.

163 See added Art. 29(4) of the Act, in accordance with which the circumstances surrounding the appointment of a judge of the Supreme Court may not constitute the exclusive basis for challenging a ruling delivered with the participation of that judge or for challenging his/her independence and impartiality.

164 See the part referring to the judicial violation of the Constitution by way of the so-called ‘direct application of judgments of international courts’.

Criminal Procedure and the Code of Civil Procedure<sup>165</sup> or conducted an *a posteriori* review by examining, by way of a plea or *ex officio*, the irregular composition of a court related to a procedural irregularity mentioned in Art. 439(1)(2) of the Code of Criminal Procedure (absolute grounds for reversing the judgment) and Art. 379(4) of the Code of Civil Procedure (grounds for the invalidity of proceedings).

The new provision also prohibits undermining a ruling delivered with the participation of a judge appointed to that office as a result of a recommendation by the NCJ formed by the Act of 8 December 2017 amending the Act on the NCJ and certain other acts.

This leads to the conclusion that, by introducing the ‘independence and impartiality test’, the legislator sought to regulate courts’ actions by creating a procedural framework. This framework included: (1) a weekly period for initiating the ‘test’ procedure, after which ‘the right to submit an application extinguishes’; (2) the requirement to specify the circumstances justifying the request together with evidence to support them,<sup>166</sup> making this a formal requirement for submissions and simultaneously justifying the scope of examination within the test; (3) the limitation of the right to request the ‘independence and impartiality test’ only to cases permitted by statute (in the Act on the Organisational Structure of Common Courts – from the negative perspective, in the Act on the SC – from the positive perspective);<sup>167</sup> and (4) a partial limitation of the appellate procedure.<sup>168</sup>

The new institution proved ineffective. In practice, the solution was undermined and conflated with the existing bases for the exclusion of judges.<sup>169</sup> It was acknowledged that the statutory prohibition against challenging rulings delivered by judges of the SC due to the circumstances of their appointment violated the constitutional right to a court, thereby allowing refusal to apply the test under Art. 91(2) of the Constitution. Instead, references were made to judgments of the ECtHR and both SC resolutions the,<sup>170</sup> and procedures for the exclusion of a judge set out in the Code of Criminal Procedure and the Code of Civil Procedure were applied.<sup>171</sup> The effects are evident in practice.

165 The judgment of the CT of 23 February 2019, P 10/19, OTK ZU A/2022, item 14.

166 Art. 29(9)(2) of the Act on the SC, Art. 42a(7)(2) of the Act on the Organisational Structure of Common Courts.

167 E.g. the application or prolongation of pre-trial detention – Art. 42a(9) of the Act on the Organisational Structure of Common Courts.

168 Art. 29(22) or (25) of the Act on the SC.

169 The judgment of the District Court in Grudziąc I Civil Division of 30 October 2023, I C 976/22. See also the judgments of the Appellate Court in Kraków I Civil Division of 19 April 2023, I ACa 518/21 and of the Appellate Court in Warsaw I Civil Division of 11 February 2022, I ACa 565/21.

170 The decision of the Circuit Court VI Civil and Family Division in Olsztyn of 8 May 2024, VI Co 32/24.

171 Cf. the resolution of the Bench of Seven Judges of the SAC of 3 April 2023, I FPS 3/22; the judgment of the Circuit Court in Łomża II Criminal Division of 18 October 2023, II Ka 58/23; the decision of the Circuit Court in Legnica VI Economic Division of 4 March 2024, VI GCo 32/24.

An analysis of jurisprudence shows that the prerequisites for a negative assessment in the test included: (1) public statements by a judge about the political situation in the country, expressed either during the recruitment competition or later, especially public acceptance of acts regarded by parts of the judicial community as unconstitutional, particularly where such statements were linked to the appointment and could imply alignment with political circles dominating the works of the NCJ;<sup>172</sup> (2) employment immediately before the appointment in units subordinated to the Minister of Justice or other executive bodies,<sup>173</sup> where those bodies were managed by the parliamentary majority that enacted the Act of 8 December 2017 amending the Act on the NCJ and other acts; (3) participation in recruitment competitions where the procedure enabled the selection of a manifestly less competent person over other candidates; (4) in the case of judges proposed for promotion, the nature and speed of the promotion and the position attained, as these were considered signs of political support rather than legal merit; (5) elements indicating irregularity in individual NCJ proceedings, including: (5a) refusal by NCJ members to recuse themselves in cases involving related candidates, or favouring candidates who had received administrative promotions in the judiciary through arbitrary decisions of the Minister of Justice; (5b) a lack of transparency in recruitment competitions, such as holding deliberations *in camera*, denying access to records of the proceedings, or NCJ members voting *in pleno* without providing reasons and disregarding the opinions of smaller teams; (5c) nominating a candidate despite a negative or insufficiently supported opinion from the judicial self-government, or advancing a candidate with significantly less support than another candidate without rational justification, including cases where the candidate had previously been seconded to a higher court through arbitrary ministerial decisions despite the low quality of their work.<sup>174</sup>

It was not ruled out that significant doubts about independence and impartiality could be resolved through the test.<sup>175</sup> It was stressed that the stance of the person concerned and his/her attempts to clarify any doubts before hearing a case were important (e.g. by personally raising doubts under Art. 41 of the Code of Criminal Procedure and Art. 49(1) of the Code of Civil Procedure).

It was highlighted that even serious irregularities in the appointment procedure could not, in themselves, lead to the invalidation of the act of appointment by the

172 Sieniecka-Kotula, 2024a.

173 The resolution of the Bench of Seven Judges of the SAC of 3 April 2023, I FPS3/22; the judgment of the Appellate Court in Białystok III Labour and Social Security Division of 14 December 2023, III APa 8/23.

174 The judgment of the Appellate Court in Białystok – III Labour and Social Security Division of 14 December 2023, III APa 8/23.

175 The judgment of the Appellate Court in Gdańsk – I Civil Division of 26 April 2023 I ACa 1109/22. The decision of the Circuit Court – VI Civil and Family Division in Olsztyn of 8 May 2024, VI Co 32/24. The decision of the District Court in Katowice-Zachód in Katowice VII Labour and Social Security Division of 22 June 2023, VII Pz 10/22.

President of Poland,<sup>176</sup> and that an irregular NCJ resolution could not be equated with its non-existence, *ex lege* invalidity, or the invalidity of the proceedings before the NCJ.<sup>177</sup>

It is impossible to provide a definitive number of proceedings conducted in courts since the introduction of this institution. Media data from 2023 cited 350 cases,<sup>178</sup> and preliminary surveys provided limited insight. Publicly known cases typically involved high-profile judges engaged, in various capacities, in the dispute over judicial reform.<sup>179</sup>

The analysis of available cases indicates highly divergent jurisprudence. Rulings included: (1) courts that, as part of an appeal, *ex officio* noted the existence of a problem in a case, analysed it broadly, but did not resolve it;<sup>180</sup> (2) courts that, after conducting the impartiality test (on request or *ex officio*), positively assessed the judge and confirmed that the right to a court had not been infringed;<sup>181</sup> (3) courts that, after conducting the independence and impartiality test, declared that a judge was not empowered to adjudicate in a case.

The latter rulings often arose in cases of public interest,<sup>182</sup> or when the test was conducted by judges seeking retribution against former ruling authorities, for instance, because they had been dismissed as court presidents, or subjected to disciplinary proceedings.<sup>183</sup> These cases frequently involved judges who ‘battled’ judicial reforms, particularly members of certain judicial associations.<sup>184</sup>

Such rulings often paralysed adjudication. One example is the Criminal Division of the Appellate Court in Rzeszów, which was unable to function because only one of its five members passed the independence and impartiality test. Judgments delivered by the remaining judges were quashed by the SC’s Criminal Chamber. These judges were accused of signing support lists for NCJ candidates or of being promoted too quickly.<sup>185</sup> Eventually, this resulted in the suspension of the division’s activity.<sup>186</sup>

The independence and impartiality test did not fulfil the drafter’s objectives. It became a concession used against the legislator and an additional, entirely legal systemic instrument creating adjudicative chaos. This sometimes resulted in absurd

176 Likewise: the judgments of the CT of 29 November 2007, SK 43/06, OTK ZU No. 10/A/2007, item 130 and of 27 May 2008, SK 57/06, OTK ZU No. 4/A/2008, item 63.

177 Cf. Grajewski and Pułło, 2011, pp. 5–17.

178 Sąd Apelacyjny w Rzeszowie sparaliżowany. Zawiesił orzekanie w procesach odwoławczych, 2024.

179 See e.g. the cases of disciplinary commissioners: Jałoszewski, 2024c.

180 The judgment of the Appellate Court in Warszawa I Civil Division of 11 February 2022, I ACa 565/21.

181 The judgment of the Appellate Court in Gdańsk I Civil Division of 26 April, I ACa 1109/22.

182 See e.g. the judgment of the Circuit Court in Olsztyn I Civil Division of 28 December 2021, I C 593/21.

183 See the judgment of the Appellate Court in Białystok III Labour and Social Security Division of 14 December 2023, III APa 8/23.

184 The judgment of the Circuit Court in Łomża II Criminal Division of 18 October 2023, II Ka 58/23. Cf. Jałoszewski, 2024.

185 In the first half of the year, ten judgments were quashed. Kulczycka, 2024.

186 Sobczak, 2024.

situations where judges who declared another judge non-independent subsequently failed the test themselves.<sup>187</sup> Judges excluded one another, often for personal reasons, as nothing prevented them from doing so.<sup>188</sup>

### ***5.5. The Problem of Direct Application of International Judgments by National Judges***

The ECtHR and CJEU jurisprudence in Polish matters has created the phenomenon of directly applying European court judgments. Polish law does not permit this. Judgments of these courts are not part of the national legal order.<sup>189</sup> They constitute international obligation, whose fulfilment is guaranteed by Art. 9 of the Constitution, and generally require legislative action. Until the law is amended, national provisions held inconsistent with the EU Treaties or the ECHR remain in force. No national body may infer rights directly from such judgments, even where it appears that a judgment confers rights,<sup>190</sup> or where failure to enforce it would exacerbate a breach of international obligations.

National courts do not enforce international judgments either; they only consider them within specific national procedures, in which a judgment may serve as grounds.<sup>191</sup> to reopen national proceedings. Whether to reopen rests with the court.

International judgments may sometimes be used by national courts to interpret provisions of the TEU, TFEU and ECHR (only those that, under Art. 91, are directly applicable) as well as sub-constitutional national provisions. Two points are noteworthy: (1) only provisions meeting the technical standards of direct applicability and the constitutional requirements may be applied directly;<sup>192</sup> (2) interpretation of national provisions has limits – it cannot contradict their clear wording, nor can it create new content that violates the Constitution or undermines its guarantee functions.<sup>193</sup>

From the outset of the judicial reform, excesses of this kind appeared in jurisprudence. A group of judges identifying as ‘European judges’, dubbed by the media as ‘judges

187 Sędzia wykluczony ze względu na przynależność do Iustitii, 2024.

188 See e.g. the judgment of the Appellate Court in Kraków I Civil Division of 19 April 2023, I ACa 518/21, where judge P. Rygiel excluded judge Z. Drożdźejko and, in turn, a couple of months later the latter excluded the former, alleging that he could not guarantee the independence of the court. See Skowrońska, 2023.

189 See Art. 288 in conjunction with Art. 299 TFEU. Cf. Art. 260 TFEU and Art. 46 ECHR.

190 See the judgment of 21 December 2021 in the case Eurobox Promotion. and Others (joined cases C-357/19, C-379/19, C547/19, C811/19 and C840/19). In this judgment, the CJEU imposed the obligation on national courts to disregard the ruling of the constitutional court if the constitutional court does not fulfil the requirements of a ‘court’ within the meaning of EU law or if the content of its rulings is inconsistent with EU law.

191 See e.g. Art. 540(3) of the Code of Criminal Procedure. This provision is also applied in the vetting and fiscal penal procedure by way of a reference. See also Art. 272(2) and (3) of the Act on the Procedure before Administrative Courts or Art. 240(1)(11) of the Tax Ordinance.

192 Muszyński, 2023a, pp. 5–36.

193 The judgment of the CT of 7 October 2021, K 3/21, OTK ZU A/2022, item 65.

applying the case-law of international courts', began adjudicating directly on the basis of international judgments.<sup>194</sup> These judgments, in violation of the constitutional framework governing the sources of law, thereby became treated as national law at all levels of adjudication. They were used as a direct basis for undermining the position of judges appointed by the President on NCJ motions made under the Act of 8 December 2017 and, consequently for quashing judgments they delivered. The principle of the primacy of EU law was invoked to justify this practice. Although that principle addresses conflicts between legal provisions, courts extended it to the case-law of the CJEU.<sup>195</sup> By doing so, they disapplied national provisions without offering an alternative EU legal basis, or they directly cited the CJEU's case-law.<sup>196</sup> Courts declared that 'the primacy of EU law over national law is absolute',<sup>197</sup> that the Republic of 'does not operate in a Treaty vacuum', and that the ample case-law of the CJEU and the ECtHR 'has already determined those issues'.<sup>198</sup> To justify specific rulings, they also applied case-law from unrelated cases or foreign jurisdictions.<sup>199</sup> CJEU judgments were juxtaposed with CT rulings declaring the inconsistency of Treaty provisions with the Constitution, and courts concluded that this did not mean that the organisation of the judiciary was inconsistent with the EU Treaties.<sup>200</sup>

Such adjudication resulted in the negation of judicial status, which led to the quashing of substantive judgments,<sup>201</sup> the blocking of proceedings,<sup>202</sup> or even their reopening *ex officio*.<sup>203</sup> One of the most unfortunate outcomes was the SC's Criminal Chamber quashing the conviction of a professional driver for premeditated murder on the grounds that a so-called neo-judge had been on the first-instance bench.<sup>204</sup>

Over time, international judgments were increasingly used to challenge systemic institutions. A judge in Wrocław argued that if, according to the ECtHR, the participation of a neo-judge on the bench meant that the court was not established by

194 See e.g. Jałoszewski, 2024d. See also: Jałoszewski, 2023b or Jałoszewski, 2023a.

195 See e.g. the judgment of the Circuit Court in Łomża II Criminal Division of 18 October 2023, II Ka 58/23 and the judgment of the Appellate Court in Białystok III Labour and Social Security Division of 28 February 2022, III AUa 1032/21.

196 See e.g. the judgment of the SC of 5 December 2019, III PO 7/18.

197 See e.g. the judgment of the Circuit Court in Łomża II Criminal Division of 18 October 2023, II Ka 58/23; the judgment of the Appellate Court in Warsaw II Criminal Division of 13 July 2022, II KA 173/21. Cf. the judgment of the Appellate Court in Wrocław II Criminal Division of 6 February 2023, II AKa 190/22; the judgment of the SAC of 4 November 2021, III FSK 3626/21; the judgment of the SAC of 4 November 2021, III FSK 4104/21.

198 The judgment of the Circuit Court in Olsztyn I Civil Division of 28 December 2021, I C 593/21.

199 See e.g. the judgment of the Circuit Court in Łomża II Criminal Division of 18 October 2023, II Ka 58/23; the decision of the SC of 16 September 2021, I KZ 29/21.

200 The decision of the Appellate Court in Gdańsk II Criminal Division of 14 October 2021, II AKa 154/21.

201 The decision of the Circuit Court in Kraków I Civil Division of 11 October 2021, I. Cz 311/21-I.

202 The decision of the Circuit Court in Kraków I Civil Division of 10 October 2021, I C 846/20.

203 See e.g. the Criminal Chamber of the SC reopened the proceedings in the case No. III KK 81/23, in which the decision of 22 June 2023 had already been delivered.

204 Walaszczyk, 2024.

law under the ECHR or the Constitution, then statutory procedures could not apply. A first-instance court is bound by a second-instance court's determination only if the latter qualifies as a court. If it does not, then its judgment is not binding. Consequently, the judge held that the second-instance ruling was non-existent as it was not delivered by a lawfully established court.<sup>205</sup> Similarly, the Łódź-Śródmieście District Court ruled that, because the NCJ was unconstitutional, it could not validly move to appoint a judge, rendering the President's appointment invalid and the appointee not a judge. An appellate court in Katowice delivered a comparable ruling.<sup>206</sup>

These actions are unlawful. A judgment is an international obligation of the state, not a source of law. A national court 'sees' a judgment of an international court only through the lens of national law, that is, exclusively through the constructs set out in the aforementioned procedural provisions. There are also no CT judgments that would undermine the presidential act of judicial appointment or allow judgments to be declared non-existent. On the contrary, particularly in the case of common courts, the protection of judges consists solely in the review of their independence and impartiality, and only upon a request submitted in accordance with the proper procedure.

### ***5.6. Other Forms of Harassing Judges***

Disciplinary or criminal measures were taken against certain judges, related to their prior professional activity. The most notable case involved disciplinary charges brought against the First President of the SC on 26 February 2024.<sup>207</sup> This stemmed from her conduct during the paralysis of the College of the SC, when some members refused to participate in its works until Poland enforced the preventive decision of the President of the CJEU of 14 July 2021 and the CJEU judgment of 15 July 2021.<sup>208</sup> The First President of the SC wrote to college members, informing them that draft resolutions would be subject to correspondence (electronic) voting and that failure to vote by the deadline would be treated as abstention. She justified the change by referring to the Special Anti-Covid Act. This practice continued until 14 July 2022. A group of judges argued that this action formed grounds for disciplinary and criminal liability of the First President of the SC. The necessary information was submitted.<sup>209</sup> The paradox of this case was that the First President of the SC had no authority to enforce CJEU rulings, as these required the legislator's intervention. She was bound

205 Słowik, 2024.

206 Ambroziak and Jałoszewski, 2024.

207 Czuchnowski, 2024b.

208 The first of those rulings ordered the suspension of the Disciplinary Chamber of the SC, and the second one stated that this chamber did not fulfil the standards of a court. Ten judges of the SC refused to participate in the College of Judges: D. Dończyk, M. Romańska, A. Piotrowska, T. Artymiuk, M. Laskowski, J. Matras, B. Skoczowska, B. Bieniek, P. Prusinowski and K. Rączka.

209 Jałoszewski, 2024d.

by the statute in force, and it was the judges who had refused to fulfil their statutory obligations who should have faced disciplinary liability.

A second case concerned the Minister of Justice appointing an *ad hoc* disciplinary commissioner to investigate allegations against the judicial members of the NCJ of both the current and previous terms.<sup>210</sup> This was prompted by a report from the Association of Polish Judges Iustitia. The commissioner was tasked with determining whether these members had committed disciplinary offences, or even crimes, by standing as candidates for the NCJ in elections ordered by the Marshal of the Sejm pursuant to the Act of 8 December 2017 amending the Act on the NCJ and certain other acts. The allegation relied on the view that the Act on the NCJ was inconsistent with the Constitution insofar as the Sejm's selection of 15 judicial members was concerned,<sup>211</sup> despite no CT judgment having confirmed such inconsistency. This position reflected only the opinion of certain jurists,<sup>212</sup> not the binding legal situation.

Another case involved a report to the public prosecutor alleging that a judge of the SC was impersonating a public officer,<sup>213</sup> as defined in Art. 227 of the Criminal Code.

Judges were also administratively removed from adjudicating by presidents of courts, based on the Minister of Justice's Regulation of 6 February 2024 amending the Rules and Regulations of Common Courts. The amendment to Para. 43(1)(a) stipulated that cases concerning the exclusion of a judge related to the circumstances of his/her appointment would not be assigned to judges appointed upon the motion of the NCJ formed in accordance with Art. 9(a) of the Act of 12 May 2011 on the NCJ, as amended on 8 December 2017. Those judges were excluded from the Random Case Allocation System.

In some courts, newly appointed presidents also administratively removed from other judicial duties judges appointed by the President upon the motion of the NCJ formed after the amendment of the Act on the NCJ introduced on 8 December 2018. This occurred in district courts in Warsaw, Słupsk and other cities.<sup>214</sup> In the Criminal Division of the Appellate Court in Warsaw, these judges were reassigned from direct adjudication to the Interlocutory Appeals and Applications Section.<sup>215</sup>

Such actions not only constitute abuses of law intended for judicial scheming and retaliation but also violate binding legal standards. They *de facto* undermine judicial independence, thereby eroding public trust in the justice system.

210 Nowaskowska, 2024.

211 Ministerstwo Sprawiedliwości, 2024.

212 Krajowa Rada Sądownictwa, 2024.

213 Jałoszewski, 2024a.

214 The so-called 'old' judges from the district court in Słupsk, lodged in this case, as part of a protest, appeals with the NCJ, which were allowed.

215 Jałoszewski, 2025.

## 6. Conclusions

In the area of the justice system, multidimensional lawlessness has emerged.

The first dimension concerns axiological issues: some courts, the executive, and the legislature negate fundamental constitutional principles such as the rule-of-law state, the separation of powers, the supremacy of the Constitution, and the presumption of the constitutionality of statutes, upon which public authority rests. External systems, particularly through the judicial and political activism of the ECtHR and the CJEU, are now shaping the constitutional order by attributing new content to these principles.

The second dimension is institutional. The constitutional status of judges, courts, the NCJ, and the President's powers of judicial appointment is undermined directly by the ECtHR and the CJEU, as well as by national courts.

The third dimension is substantive and procedural. This includes the undermining of court rulings delivered in the name of the Republic of Poland<sup>216</sup> (e.g. 'non-existent judgments', judges unauthorised to adjudicate), disregard of binding statutes, and the importation of non-existent legislative constructs into judicial practice, such as the so-called 'revival of repealed law'. Judgments have been delivered without legal basis or on fictional grounds, including international courts judgments.

This situation has created legal chaos incompatible with the rule of law or the right to a court. Those standards aim to determine individuals' cases, not to reshape the state's constitutional system, advance political agendas, or facilitate judicial vendettas.

Yet, as a result of judicial practice – which the state cannot and, since the change of government in December 2023, will not restrain – long-standing standards of legal application have been redefined, or at least their boundaries shifted. This phenomenon has been called 'the reversed rule of law'.

A characteristic feature of the reversed rule of law is its attempted legitimisation by detaching it from the Constitution and embedding it in the realm of international law. Historically, the constitutional order and its derivatives (democracy and the rule of law) belonged exclusively to the state, with no equivalent international standards. Today, international legal constructs not only specify but even create the content of these principles, safeguarded by mechanisms intended for defending the rule of law.

At the forefront of this process are the legal systems of two international organisations of which Poland is a member: the Council of Europe and the EU. Both are regional systems of international law. The Council of Europe operates as a traditional international law system, while the EU is a supranational order whose bodies hold Treaty-based competences to enact law directly binding on Member States. In both

<sup>216</sup> Art. 174 of the Constitution.

systems, the relationships between international and national law are framed in terms of supremacy and subordination, albeit in different ways.<sup>217</sup>

In the Council of Europe system, the European Convention on Human Rights and Fundamental Freedoms (ECHR, 1950) is of crucial importance. It imposes specific obligations on states towards individuals under their jurisdiction<sup>218</sup> and has become a strategic act with a quasi-constitutional role in Europe's politically integrated region. The standards contained therein have been elevated to the foundations of the rule-of-law state.<sup>219</sup>

Consequently, the ECtHR has gained considerable significance. Initially, it was a body established 'to ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto (...)'.<sup>220</sup> By the turn of the 21st century, taking advantage of the growing importance of the Convention,<sup>221</sup> the ECtHR strengthened its Treaty-based role by expanding its case-law instruments,<sup>222</sup> and extending its judgments into systemic and political spheres.<sup>223</sup> In this way, it has become an external body overseeing state authorities, operating under an international treaty while simultaneously shaping the normative content of that treaty through its own case-law. It now acts with increasing latitude, including by juxtaposing the content of the ECHR with the state's constitution. Thus, it influences not only the state's autonomy in conducting domestic and foreign policy, but also its constitutional structure, thereby affecting not merely the exercise of sovereignty but its very substance.

In the EU system, the international standardisation of the rule of law is related to Art. 2 TEU. The CJEU now interprets this provision not merely as EU axiology but as a binding obligation requiring Member States to reflect these values in their legal systems.<sup>224</sup> These values are both substantive (human rights, the rule of law, democracy) and procedural (transparent, accountable, democratic, and pluralistic law-making). Through its case-law, the CJEU has also linked these values to Art. 19 TEU and Art. 47 of the ChFR.<sup>225</sup> extending their effect to the entirety of state authority, including Treaty-based exclusive competences. Under Art. 4 TEU, Member States

217 See: Muszyński, 2023c, pp. 178–179.

218 Art. 1 ECHR.

219 Muszyński, 2022, p. 674.

220 Art. 19 ECHR.

221 The Convention as the so-called living instrument.

222 Pilot judgments. More on that: Lubiszewski and Czepek, 2016.

223 The judgment of 29 April 1988, *Belilos v Switzerland* (application No. 10328/83) and the Report of the Commission of Human Rights of 8 June 1993 in the joined cases *Metropolitan Chrysostomos and Georgios Papachrysostomou* (applications Nos. 15299/89 and 15300/89) as well as the judgment of the ECtHR of 18 December 1996, *Loizidou v Turkey* (application No. 15318/89). The judgment of 9 April 2024 in the case *Verein KlimaSeniorinnen v Switzerland* (application No. 53600/20).

224 Case C-156/21, *Hungary v Parliament and Council*, para. 232.

225 Case C-156/21, *Hungary v Parliament and Council*, paras. 157–163.

must exercise these competences in accordance with EU standards,<sup>226</sup> as required by the principle of loyalty.

Two mechanisms enforce these standards: the principle of the primacy of EU law and the CJEU itself. The principle of primacy requires national law that is inconsistent with EU law to be disapplied and replaced by EU norms, even at the constitutional level,<sup>227</sup> thereby breaching the *ordre public* principle traditionally governing the application of foreign law. The CJEU, as the Treaty-based interpreter of EU law, determines the content of these standards and the compliance of Member States, thereby limiting their sovereignty.

Poland remains a rule-of-law state committed to binding international law. One of its tasks is to harmonise national and international standards, subject to the supremacy of the Constitution.

The growing importance of human rights in international law underscores this need. Yet, while international and national standards share axiological foundations, they are not fully convergent.

The guarantees arising from the European Council and EU systems are inherently interventionist, reflecting the specificities of international law and enforcing the unification of standards, notably the right to a court. In Poland, however, this standard has been misused to interfere with the state's constitutional system. The independence of judges and courts is a constitutional standard, hierarchically superior to Treaty-based norms. Nevertheless, through international case-law, constitutional solutions have been reinterpreted to fit within an international-law framework, resulting in the reversal of the Constitution's supremacy over international agreements.<sup>228</sup> This transformation occurred outside the legislative process, driven by the judicial activism of international courts.

The Constitution of Poland guarantees judicial autonomy, a standard that had not changed since its enactment. Yet, international case-law has been used to redefine it in order to reverse judicial reforms enacted by the legislature.

This involved not only altering legal standards, but also granting national courts powers not provided by the Constitution. Courts used these powers uncritically and unlawfully, attempting to redefine the constitutional balance between the legislative and judicial branches by, for example, applying repealed law.

The Constitution remains the supreme law of Poland, and its observance is the foundation of the rule-of-law principle. In the EU, this principle, derived from Member States' constitutional traditions (Art. 2 TEU) is formally recognised, ensuring coherence between national and EU systems.

226 Case C-896/19, *Repubblica*, para. 48; Case C-791/19, *Commission v Poland*, paras. 51, 56. Case C-157/21, *Poland v Parliament*, para. 267.

227 See the case C 430/21-RS, the judgment of the CJEU of 22 February 2022, para. 51.

228 This is visible in the provision referring to the powers of the CT indicating the direction of constitutional review. See: Art. 188(1) and (2) of the Constitution.

The judicial reform in Poland did not attempt to change these relations. It re-defined certain statutory-level issues within the constitutional framework, as confirmed by CT jurisprudence. It did not dismantle the system's foundations but operated within the acceptable scope of differentiation permitted at the European level, where no uniform judicial organisation exists.

This reform was nevertheless perceived as an attack on European values. International bodies sought to block it, not through dialogue but by advancing interpretations of national law and state powers without constitutional basis. This was justified by portraying Poland as a 'new (young) democracy', lacking established democratic structures and thus requiring external guidance and control.

The rule of law guarantees effective judicial review by an independent court composed of impartial judges. Judicial independence and impartiality are constitutional standards. However, in the actions of the ECtHR and the CJEU, these standards have become tools of interference in Polish statehood. To this end, Art. 6 of the ECHR and Art. 19(1)(2) TEU have been reinterpreted beyond their traditional wording. The ECtHR extended the lawful judge concept by adding a substantive element: that irregularities in judicial appointments could infringe the right to a court. Similarly, the CJEU altered the nature of Art. 19 TEU. Until 2017, this provision required Member States to provide legal protection of individuals in EU legal relations through national courts, obliging legislatures to create the necessary institutional, procedural, and substantive guarantees. It was not a provision that could be applied directly.<sup>229</sup> In the new formulation, it became a source of substantive-law content relating to the standards of the justice system. This content was subsequently created and developed in the CJEU's case-law.

Such actions interfered with national legal structures, including judicial appointments and institutional arrangements. The NCJ, the presidential prerogative and, consequently, newly appointed judges came under attack. These were, however, indirect interferences. Both courts defined in their rulings only the essence of the values, requiring that this standard be achieved either by amending national law (ECtHR and CJEU judgments under Art. 258 TFEU) or by creating instruments to challenge the reform of national courts (CJEU preliminary rulings).

In relation to the NCJ, allegations concerned the method of electing new members and the unlawful termination of the 'old' council term, although the latter bore no causal link to the functioning of the 'new' council. As a result, instead of assessing the independence and impartiality of a judge after appointment, the point of assessment was shifted to the stage of appointment, when the candidate was not yet a judge. His or her conduct could not be assessed in term of independence, as this attribute was not yet required. The assessment instead considered whether the candidate guaranteed future independence and possessed impeccable character, a subjective judgment by the appointing body or the candidate.

229 Cf. Wegener, 2016, pp. 308–330, in particular, note 32 and note 43. This is an assessment that was previously universally shared by legal scholars in Europe.

After appointment, failure to remain independent may constitute grounds for removal from office, but not for undermining the validity of the appointment itself.

Both courts' actions sought to challenge the President's prerogative, undermining its exercise under Art. 179(1) of the Constitution, by removing the presumption of the regularity of appointments in light of the newly interpreted provisions of Art. 19(1)(2) TEU and Art. 6(1) ECHR.

If independence and impartiality must be real and not merely formal, then failure to meet certain substantive standards during the appointment process – whether by the appointing bodies or the candidate – may be deemed to violate the right to a court. Consequently, appointments became relative and subject to review.

It is paradoxical that this concerns a prerogative, a right exercised entirely freely, even arbitrarily, by the President. In exercising it, the President acts solely on the basis of, and within the limits of, the Constitution. This prerogative is fully empowered and cannot be redefined by sub-constitutional acts, which include international treaties such acts. It may be only supplemented in ways that do not alter its essence. A prerogative is also unquestionable, as no procedure exists for its review. All state organs are bound by the presidential act and cannot invoke their own powers to challenge it, as those powers end where the presidential prerogative begins.

In Polish practice, some even criticised the very concept of prerogatives and demanded that they be subject to national and international review,<sup>230</sup> reflected in the initiation of cases. Administrative courts dismissed the possibility of classifying this empowerment as an administrative act, although they attempted to obstruct its exercise.<sup>231</sup> The ECtHR did not attempt to settle this matter, and even the SC, in its three-chamber resolution, refrained from directly evaluating the prerogative. However, the SC did, for the first time, reject the constitutional presumption of independence of an appointed judge and the statutory presumption of his/her impartiality, thus undermining the constitutional construction of the separation of powers. It also indicated mechanisms to review appointments, relying on procedural institutions and instructing their use for *ex post* evaluations of judicial appointments as systemic institutions. It did so by providing a *contra legem* interpretation to bypass the prerogative. The CT later found this resolution unconstitutional, both formally (lack of SC competence) and (substantively (the interpretation conflicted with the Constitution). Despite this, some courts at all levels complied, although the procedural mechanisms invoked were inapplicable. Impartiality is distinct from independence.

Attempts were also made to challenge the presidential prerogative externally, with arguments such as the irregular NCJ issuing an irregular motion and the

230 On 14 May 2020, the ECtHR informed the Polish Ministry of Foreign Affairs of hearing joined applications which were submitted by persons who had not been appointed to judicial positions by the President of the Republic of Poland. See: Helsińska Fundacja Praw Człowieka, 2020. See also: the decision of the Voivodeship Administrative Court in Warsaw of 27 January 2005, II SAB/WA 378/04, LEX No. 827243, the decision of the SAC of 7 December 2017, I OSK 857/17, LEX No. 2441401.

231 See e.g. the decision of the SAC, II GW 22/18, II GW 28/18, II GW 31/18, 330/2018.

announcement of SC judicial vacancies lacking the Prime Minister's countersignature. Both claims were dismissed by the CT.

The judgments of the ECtHR and the CJEU addressed virtually the entire judicial reform. Their enforcement, however, is as a rule carried out by state organs within their national (constitutional) competences, ensuring state influence over how these judgments are enforced and over the delineation of the boundaries of subordination to them. Only those organs authorised by national law may enforce these judgments, as it is the constitution-maker or, where appropriate, the legislator who determines who is empowered to do so, and in what manner.

Judges enforcing judgments of international courts often confused the direct application of an international agreement with the state's enforcement of an international court's judgment. A judgment of such a court, established by an international agreement, is not identical to a substantive provision of the agreement that meets the criteria for direct applicability. In enforcing such judgments, national courts also began determining whether a state body or its organisational unit constituted a court. They had no authority to do so, as the Constitution or statute alone confers this status. Neither the Constitution nor statute, nor the provisions of an international agreement, empowers national courts to resolve systemic issues. Yet they inferred such a power from international court judgments, which themselves improperly conferred it.

This posed a paradox. Under an international court's ruling, a body was not considered a court established by law from the perspective of international law, yet it remained a court under national law. National courts, bound by the Constitution and statutes, rejected this, even though that binding force holds constitutional rank.<sup>232</sup> Their judgments assessing whether a body or its organisational unit met the prerequisites of a court established by law were thus inconsistent with binding legal provisions.

No international judgment provides a basis to conclude that a ruling issued by judges appointed by the President upon the motion of the NCJ formed under Art. 9(a) of the Act of 12 May 2011 on the NCJ is *de iure* non-existent. Nor do such judgments undermine the status of common court judges. They merely indicate the need for mechanisms enabling a party with doubts – arising from the appointment procedure – about a judge's independence or impartiality to file an appropriate motion. There has never been any automaticity in this regard or any possibility for a court to act *ex officio*.

Nonetheless, national courts adjudicated on this issue. In doing so, not only did they violate the constitutional content of the rule of law but also sought to introduce changes exceeding those required by ECtHR and CJEU rulings. They acted in breach of their obligation to administer justice and even infringed the individual's right to a court.

<sup>232</sup> See Art. 178(1) of the Constitution.

The preliminary ruling procedure has become the most dangerous instrument for undermining the rule of law. Previously undervalued and primarily applied in administrative, legal and economic matters,<sup>233</sup> these rulings have allowed the CJEU to create a number of interpretations of Treaty provisions. These interpretations not only conflict substantively with national legislation but also interfere with the constitutional structure of the separation of powers. Such actions include authorising national courts to act on the basis of repealed laws no longer binding in the state,<sup>234</sup> or even without any legal basis.<sup>235</sup> The CJEU derived this authority from the principle of the primacy of EU law, extending its effect to include the ‘revival’ of repealed national laws. It thus broadened the scope of the said principle to cover the suspension of the application of national norms inconsistent with EU norms and triggered a cascade effect, namely a return to previously binding national law.

No international court is competent to interfere with the constitutional principle of the separation and balance of powers (Art. 10 of the Constitution), by altering it or redistributing the constitutional powers of state organs exercising legislative and judicial authority. International courts may not entrust national courts with this function, and the so-called principle of the primacy of EU law cannot serve as a basis for doing so. This principle is merely a conflict-of-law rule stemming from ECJ/CJEU case-law. It is not a competence-conferring norm allowing a national court to act beyond its statutory powers. A national court cannot refuse to apply a national norm inconsistent with EU law and simultaneously apply another norm that has been repealed and is no longer binding,<sup>236</sup> nor can it invoke the primacy principle to disregard both a national and a valid EU norm.<sup>237</sup>

Neither court adopted a consistent methodology for determining national law. They asserted the existence of national norms in a literal manner, disregarding purpose, axiology and national jurisprudence, contrary to the national rules of interpretation. This produced absurd consequences.<sup>238</sup> ECtHR judgments even created substantive

233 Cf. Muszyński, 2023c, pp. 177–199.

234 C-824/18, A.B. and others. The first para., the second subpara. of the operative part of the judgment. Likewise, the second para. of the operative part.

235 In the preliminary judgment of 13 July 2023 in joined cases C-615/20 and C-671/20, the CJEU highlighted the obligation to implement the standards even in the situation where there are no national statutory provisions. See case C-615/20, para. 76. C-824/18 para. 167.

236 See the judgment of 5 December 2019. The Labour and Social Security Chamber of the SC, where the Chamber, by referring *inter alia* to the principle of the primacy of EU law, decided the case that fell beyond its statutory powers, but within the powers of another chamber of the SC.

237 By referring to the aforementioned principle, the SC refused to refrain from proceeding with the resolution of the joined Chambers of the SC, so in favour of the principle of the primacy of EU law, it refused to comply with the disposition arising from Art. 86(1) of the Act of 19 December 2019 on the Organisation of the Constitutional Tribunal and the Mode of Proceedings before the Constitutional Tribunal (the imperative to stay proceedings before the authorities that are involved in a dispute). At the same time, it did not indicate a specific provision of EU law (the basis for its action), and merely wrote in the statement of reasons that the refusal to apply that provision followed from the obligation to enforce a preliminary judgment.

238 See the separate opinion of Judge Wojtyczek, case Broda and Bojara, para. 2.

norms absent from national law,<sup>239</sup> or attributed incorrect effects to certain national rulings. In the judgment *Dolińska-Ficek and Ozimek v Poland*, the ECtHR stated that the President was obliged to suspend judicial appointments because the SAC had stayed the application of NCJ resolutions.<sup>240</sup> In doing so, it not only confirmed the SAC's unlawful actions, by which the SAC had conferred upon itself powers unknown in the legal system, but also attempted to define the President's constitutional prerogative and undermine its essence.

Both courts redefined the systemic elements of the Polish State, including the rank and mutual relations of certain state organs (CT, SC, SAC), and as well to the legal effects of their jurisprudence. They freely balanced and assessed these elements despite their role and legal rank being enshrined in Polish law, at the constitutional level.<sup>241</sup> This rank cannot be changed. Consequently, the courts incorrectly reconstructed the national legal order, thereby violating the international-law imperative that requires international courts to abide by national law. Only correctly reconstructed law may form the basis for assessment under the Convention (ECtHR) or the Treaties (CJEU). Faulty reconstruction leads to faulty judgments, as the CT has indicated in its rulings.<sup>242</sup>

As a consequence, international judgments have depreciated the role of national organs, particularly the Sejm's power to enact binding law and the CT's authority. They have permitted the refusal to apply binding law in favour of repealed provisions and vested common courts with the power to disregard CT judgments, in violation of Art. 190 of the Constitution.<sup>243</sup>

Tribunals and national courts have manipulated their case law to create a judicative network. The ECtHR and CJEU cite themselves and each other, cross-referencing this case law with selectively treated national jurisprudence.<sup>244</sup> They assign

239 See the separate opinion of Judge Wojtyczek, case Broda and Bojara, para. 4. There is no individual right of a judge to irremovability. Independent adjudication may not be considered in the categories of an individual right. Likewise, there is no individual right to a term of office for a judge to fulfil his/her function, and it may not be analysed in the category of acquired rights. See e.g. the judgment of the CT in the case No. K 1/12, OTK ZU No. 11A/2012, item 134 or the judgment in the case No. P 37/14, OTK ZU No. 8A/2015, item 121.

240 Subpara. 353, second para.

241 Directly, see Art. 174 of the Constitution. And as a derivative of the systemic position of the organ, see: Art. 190(1) of the Constitution.

242 E.g. K 3/21, OTK 2022/A/65; K 6/21 OTK 2022/A/9 or K 7/21 OTK 2022/A/24.

243 In the judgment of 5 June 2023, case C-204/21, para. 80, the CJEU stated that in the light of the second para. of Art. 19(1) TEU in conjunction with Art. 47 ChFR, as well as in the light of the principle of the primacy of EU law, the case-law of a national constitutional court may not prevent national provisions from being subject to review by the said Court. In turn, in the preliminary judgment of 13 July 2023, in joined cases C-615/20 and C-671/20, second indent of para. 94(4), the said Court ordered the rejection of the jurisprudence of the CT if it prevented from reviewing acts issued by the Disciplinary Chamber (a body whose independence and impartiality are not guaranteed).

244 C-718/21. The CJEU adjudicated on the basis of the findings and assessments made by the ECtHR and the SAC, by juxtaposing it with its own case-law referring to the conditions of appointing judges to the Polish SC.

meanings to Treaty provisions that often lack basis in the provisions' wording or character. The CJEU even reinterprets Treaty provisions so that competence-based provisions become substantive norms and attributes to them direct effect.<sup>245</sup> A growing practice is the mutual copying of argumentation: a national court sets out arguments in an application, the CJEU adopts and develops them, and the national court then uses them as the CJEU's own reasoning.<sup>246</sup>

Judgments from both courts have also introduced vague non-legal criteria, such as 'giving rise to reasonable doubts, in the minds of individuals, as to the independence and impartiality of the judge concerned'. These interpretations are illogical from a legal perspective. Substantive meanings are assigned arbitrarily to provisions, disregarding the causative link between the assigned content and the literal wording of the provision. Moreover, these judgments often contain numerous substantive and factual errors, sometimes to an embarrassing degree.

The Polish judiciary enjoys a constitutionally strong position regarding both adjudicative independence and the independent status of judges. These standards give judges significant freedom. However, they assumed that only individuals of high ethical standards would occupy judicial office. Before 2018, the process of creating judges functioned as a form of self-selection, where the judicial community's consent determined which candidatures reached the President. This fostered a closed system, the proverbial 'extraordinary caste'.<sup>247</sup> When this fundamental interest was violated, combined with strong guarantees of inviolability subsequently reinforced by international case law, a form of rebellion arose among some members of the judiciary.

This rebellion was supported by the liberal and leftist political opposition, which sought to take power in Poland. It used its influence in the EU and the Council of Europe, institutions also dominated by representatives of liberal and leftist factions. Both courts are largely composed of judges of this provenance,<sup>248</sup> which proved crucial in reversing the rule of law. Without the creation of new international standards, national courts would have been powerless. These standards bypassed constitutional safeguards, enabling their circumvention or outright disregard. As a result, the Polish judiciary faced near collapse. Courts created formal obstacles, prolonging case resolution by returning cases to the starting point on the pretext of an irregular bench, often in the SC and through extraordinary measures after the entire appellate procedure had ended. Some advocates joined this unlawful and unethical practice

245 In the preliminary judgment of 13 July 2023 (joined cases C-615/20 and C-671/20), the CJEU stressed the obligation to respect its judgment due to the direct effectiveness of the second para. of 19(1) of the TEU. It reiterated it in case 824/18 (para. 111). As regards the *ratione materiae* scope of the application of Art. 19(1), first para., TEU, it needs to be reminded that this decision refers to 'areas covered by EU law', regardless of the situation in which the Member States apply that law within the meaning of Art. 51(1) of the ChFR. See the judgment of 5 November 2019, case C-192/18, para. 101 and the case-law cited therein.

246 See in particular case C-585/18 (the joined cases are C-624/18 and C-625/18).

247 'Nadzwyczajna kasta' – kto i kiedy to powiedział? *Jestem chyba najczęściej cytowanym mówcą w Europie*, 2024.

248 More on that: Puppink and Loisseau, 2020.

when they perceived calculable, albeit fallacious advantages for their clients. This caused chaos and destroyed legal certainty, a fundamental element of the rule-of-law state. Thus, the right to a court was undermined in the guise of its protection.

In this context, the United Right's arbitrary introduction of the statutory test of judicial independence and impartiality was particularly ill-considered. It was intended as a political gesture to the European Commission during negotiations over National Recovery Plan payments and to resolve disputes over reviewing judicial appointments. It was also assumed that a minimal protection would apply: independence and impartiality could not be challenged solely on the basis of judicial appointment.

The measure proved ineffective and emboldened both the European Commission and judges challenging the constitutional system. This time, they received a fully legal instrument. It must be recalled that the previous instruments they had relied upon – the resolution of the three Chambers of 20 January 2020 and provisions related to challenging a judgment due to a judge's appointment – had formally been declared unconstitutional. Their use did not make them lawful. However, the statutory test duplicated the mechanism for excluding a judge while simultaneously strengthening the position of those challenging judicial status. This was despite the fact that reviewing judicial independence is a legal paradox. Independence is inherent to the judicial function: an abstract state that requires a judge to act assertively against all external influences when assessing a case and delivering a judgment. A finding that a judge is not independent should lead to removal from office, not exclusion from a case, as was permitted in this instance.

Although the quantitative impact has not yet become widespread, challenges to the independence and impartiality of judges appointed on the motion of the NCJ under Art. 9a of the Act on the NCJ remain an issue.<sup>249</sup> The test is administered by the same judges who previously pursued other avenues, and a qualitative shift has emerged: some lower courts have begun rejecting judgments of higher-instance courts.<sup>250</sup> Legal certainty has disappeared in Poland.

249 Sieniecka-Kotula, 2024b.

250 See: the District Court Warszawa-Praga Południe, case I CO 149/24, declared the judgment of the SC to be non-existent. See also the judgment of the District Court Wrocław-Krzyki.

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# SUMMARY



MARIUSZ MUSZYŃSKI

1. This monograph presented a case study of Polish constitutional experiences, focusing on the reversal of the rule of law – the use of arguments invoking its restoration or implementation while simultaneously violating the fundamental principles of the state’s constitutional order.

Against the backdrop of theoretical and doctrinal assumptions concerning the rule of law and the jurisprudence of the Constitutional Tribunal (CT) and international courts, the study identified behavioural standards and instances of their transgression within the legislative, executive, and judicial branches. It also examined the influence of international and EU law on these processes and assessed public authority actions lacking a basis in domestic competence norms governing the creation and application of law.

The research did not seek to evaluate Poland’s compliance with the rule of law requirements under Art. 7 TEU. Instead, it adopted a broader perspective, treating the rule of law as a fundamental principle of the Polish legal system that has shaped its constitutional framework and evolved through the jurisprudence of the CT. This principle serves as a standard of review for public authorities’ actions.

However, as the analysis has demonstrated, the rule of law can be reduced to a rhetorical device used to justify actions that, in reality, violate legal norms, including fundamental constitutional values. This approach breeds legal chaos, undermines state loyalty towards legal subjects – particularly citizens – erodes legal certainty and security, and relativizes the concept of law itself, ultimately diminishing public trust in state institutions.

The study aimed to diagnose the forms and justifications of reversing the rule of law and to develop arguments capable of deconstructing these narratives.

2. Accordingly, it found that the rule of law has evolved into an interpretative principle, often employed in both apologetics and criticism, at times as an ideological

Mariusz Muszyński (2026) ‘Summary’ in Muszyński, M. (ed.) *Reversed Rule of Law in the Creation, Interpretation and Application of Law in Poland: Methods and Consequences*. Miskolc–Budapest: Central European Academic Publishing, pp. 209–217.



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tool. While a normative constitutional value in many legal systems, especially in former dictatorships, its interpretation varies across countries due to distinct historical and political contexts.

A key challenge is the inconsistent application of the rule of law, frequently shaped by political will and public interest. Critics argue that political assessments are often superficial, disregarding deeper societal and cultural factors. International rankings oversimplify the concept, failing to account for historical and institutional differences. The fragility of the rule of law is also evident in its ready abandonment during crises or its replacement by algorithmic decision-making, which carries separate risks.

Democratic systems balance freedom and the need to restrain arbitrariness. The rule of law should be adapted to national contexts rather than imposed through rigid uniformity. Building trust in state and EU institutions through meaningful, context-sensitive dialogue is essential to ensuring fairness and predictability in governance.

3. The study's analysis of the reversed rule of law was grounded in the Polish legal order. The concept of a rule-of-law state was introduced in the December Amendment of 1989 to the Constitution, marking a symbolic break with socialist democracy and a turn towards Western democratic values. Initially unfamiliar to Polish jurists, it gained constitutional significance during systemic transformation and became a fundamental principle shaping the new political and legal order. Over time, its legal force evolved through three phases: the December Amendment (1989–1992), the Small Constitution (1992–1997), and the current Constitution (since 1997), where it became fully institutionalised.

Although the rule-of-law state has no universally accepted definition, it denotes a set of principles underpinning legal order. In Poland, these include constitutionalism, legality, the separation of powers, democratic legitimacy, and the protection of fundamental rights and freedoms. Additionally, it encompasses legislative principles such as legal clarity, non-retroactivity, legal certainty, and state loyalty to citizens. Before the 1997 Constitution, the CT played a decisive role in shaping these principles, deriving systemic norms such as democracy, legality, decentralisation, and pluralism, as well as individual rights including life, dignity, privacy, and access to justice. While now embedded in the Constitution, the rule-of-law clause continues to guide legislative processes and uphold democratic standards.

The rule-of-law state remains a cornerstone of Poland's legal system, influencing governance, legal stability, and the protection of fundamental rights. Yet its interpretation is dynamic, continuously shaping constitutional debates and state practice.

The CT's stance on the rule of law remains consistent: it has not endorsed doctrines permitting violations of this principle under the guise of its restoration. The requirements of the rule of law, developed over decades from the Constitution and CT jurisprudence, provide the benchmark for assessing the legislative, executive, and judicial branches' actions.

4. A fundamental issue examined was how the rule of law is reversed in relation to the constitutional system of legal sources and the legislative process. Law underpins the rule of law; the relationship between the two is central to a democratic state's stability, justice, and transparency. While the law provides the framework for regulating society, the rule of law guarantees its fair and consistent application, preventing arbitrary governance. However, recent legal and political developments have revealed alarming trends that erode constitutional legality and destabilise democratic governance.

The manipulation of legal sources and the erosion of the rule of law in the legislative sphere pose a severe threat to democratic governance. When legislative processes deviate from constitutional principles, law ceases to safeguard citizens' rights and instead becomes an instrument for arbitrary political action. Violations such as circumventing constitutional legality, marginalising independent oversight bodies like the CT, and introducing dispersed constitutional review create legal uncertainty and weaken institutional checks and balances.

Undermining the hierarchy of legal sources is particularly damaging. Constitutional norms must retain primacy to ensure coherence and predictability. Yet, political interference, extra-legal control mechanisms, and attempts to redefine constitutional legality distort this hierarchy, allowing norms to be reshaped contrary to democratic values. Additionally, the increasing reliance on informal mechanisms – such as political directives or non-binding expert opinions – exacerbate arbitrariness, further destabilising the legal order.

These abuses do more than impair technical aspects of the legal system; they undermine the core principles of democracy by weakening transparency, accountability, and public confidence in institutions. A democratic state governed by the rule of law requires clear, stable, predictable legal standards and independent judicial oversight to prevent legislative overreach. Without such safeguards, law becomes a tool of political expediency rather than a framework for justice and rights protection. Restoring trust requires a return to constitutional integrity, judicial independence, and adherence to legal certainty so that law can resume its proper role as the foundation of democratic governance.

A significant threat arises from redefining constitutional legality in ways that relativise fundamental constitutional values. As the supreme legal act, the Constitution should establish clear limitations on state power and guarantee rights. When its principles are reinterpreted to justify political actions, the legal system loses its coherence, and the rule of law becomes an instrument of power rather than a check upon it. Weakening the CT is particularly destructive. As the primary guardian of constitutional compliance, it ensures that legislation conforms to democratic principles. Ignoring or undermining its authority destabilises the legal system, disrupts the separation of powers, and deprives citizens of an essential mechanism for protecting their rights.

Another concerning development is the shift from concentrated constitutional review – whereby a single independent body ensures legal consistency – to dispersed

review, allowing multiple courts to assess the constitutionality of laws. While intended to democratise legal oversight, this leads to conflicting interpretations, legal uncertainty, and inconsistent judicial decisions. Citizens risk unequal treatment depending on how courts interpret their cases, violating the principle of equality before the law and eroding trust in the judiciary. The growing use of non-legal mechanisms – political pressures, informal guidelines, or expert opinions without legal basis – further undermines the rule of law, enabling those in power to manipulate the law to serve their own interests.

The cumulative effect of these practices is the destabilisation of the legal system and a profound loss of public confidence in state institutions. When authorities disregard constitutional constraints, circumvent oversight mechanisms, and introduce unpredictable legal standards, the protective function of the law collapses. This not only weakens individual rights but also undermines the fundamental principles of a democratic state. Upholding the rule of law requires strict adherence to constitutional provisions, respect for judicial independence, and a firm commitment to legal clarity and consistency. Without these safeguards, the integrity of governance is compromised and democracy deteriorates.

5. The political narrative surrounding the restoration of the rule of law in Poland has increasingly been framed in revolutionary and militarised terms. The assertion that constitutional order must be defended through ‘militant democracy’ has led to the instrumentalisation of legal norms, where adherence to the rule of law is subordinated to political imperatives. This shift undermines the autonomy of law from politics, a cornerstone of liberal legal culture, and promotes a model in which political decisions override legal constraints in the name of higher objectives. The executive’s actions after 2023 suggest that it perceives itself as operating in an exceptional state, where ordinary legal standards are subordinated to urgent political needs. This approach erodes legal stability as principles central to the rule of law – judicial oversight, the separation of powers, and legal predictability – give way to ad hoc decision-making driven by short-term goals.

This rhetoric of emergency governance echoes key tenets of the decisionism doctrine, which prioritises the act of decision over adherence to established legal norms. The premise that exceptional situations require exceptional measures allows political actors to redefine legality on their terms, effectively blurring the line between the rule of law and rule by law. This trend reflects historical theories of emergency powers, particularly the concept of constitutional dictatorship, which permits temporary departures from democratic norms to safeguard the state. However, such measures are legitimate only, when necessary, temporary, proportionate to the crisis, and directed at restoring the pre-existing constitutional order. In Poland’s case, these criteria are not met. There is no demonstrable existential crisis, and actions taken in the name of defending the rule of law appear to entrench new power dynamics rather than restore constitutional normalcy.

A telling example of this shift was the government's appointment process in December 2023, where key constitutional requirements were openly disregarded. Alterations to the oath of office text – a symbol of commitment to legal continuity in established democracies – signalled a readiness to sideline constitutional formalities. Such departures from legal norms, even when justified by political necessity, set a dangerous precedent: the law is selectively followed or ignored according to expediency. These risks transforming what is framed as temporary exception into systemic practice, dismantling constitutional barriers intended to protect democratic governance.

The reliance on crisis rhetoric to justify these actions is particularly problematic because it fosters a self-perpetuating cycle in which political leaders claim the necessity of extraordinary measures while simultaneously eroding the very legal framework that enables disputes to be resolved institutionally. This further destabilises the legal system and diminishes trust in state institutions, as laws and constitutional principles are reduced to tools for consolidating power. The shift from concentrated constitutional review by an independent tribunal to a fragmented, politically influenced process exacerbates legal uncertainty, enabling those in power to shape interpretations for immediate advantage.

The Polish constitutional framework does not recognise a doctrine of emergency powers that would allow fundamental principles to be suspended. Constitutional absolutism – the idea that the Constitution applies equally in all circumstances – directly opposes the notion that legal norms can be temporarily overridden to address perceived crises. This approach assumes that the Constitution was designed with sufficient foresight to handle all challenges and does not grant political actors discretionary authority to circumvent its requirements. Any departure from this principle undermines the legal order and the democratic legitimacy of governance itself.

Ultimately, attempting to restore the rule of law through measures that violate legal norms is self-defeating. Bypassing constitutional procedures under the pretext of defending democracy leads to legal nihilism, where the ends justify any means. The experience of the past year in Poland demonstrates that ignoring constitutional constraints weakens democracy rather than strengthens it. The preamble to the Polish Constitution underscores the duty of state authorities to engage in dialogue and cooperation, even amid political tensions. Respect for constitutional provisions, legal certainty, and institutional checks and balances remains the only viable path to preserving the rule of law and rebuilding public trust in democratic governance.

6. The Polish justice system is experiencing multidimensional lawlessness, characterized by breaches of constitutional principles, institutional disruption, and procedural irregularities. At the core of this crisis is the erosion of fundamental constitutional values, including the rule-of-law state, the supremacy of the Constitution, and the separation of powers. Courts, the executive, and the legislature have sometimes disregarded these principles, instead aligning judicial interpretations with external legal frameworks shaped by international courts. This has shifted Poland's

constitutional system, with domestic legal standards redefined through international judicial activism, upsetting the balance between national sovereignty and international obligations.

Institutionally, the authority of judges, courts, the NCJ, and the President's role in judicial appointments has been openly challenged. International courts, particularly the ECtHR and the CJEU, have influenced these changes by extending their authority beyond conventional treaty obligations. National courts have followed suit, questioning judicial appointments and rulings, further destabilising the system. This process has blurred the lines between constitutional and international law, allowing foreign judicial interpretations to shape domestic governance, often without a clear legal basis.

Procedurally, the judiciary has been destabilised by rulings that contradict established legal norms. Courts have disregarded binding laws, introduced fictional legal constructs, and adjudicated cases without a legitimate legal foundation. The application of repealed laws, judgments based on interpretations lacking statutory authority, and manipulation of legal precedents have fuelled legal chaos. Such practices have undermined the constitutional framework and eroded legal certainty, a core element of the rule-of-law principle. As a result, the judiciary has become increasingly detached from constitutional legitimacy, prioritising international rulings and political narratives over domestic legal order.

A central feature of this reversed rule of law is the attempt to legitimise legal disruptions by shifting them from the constitutional domain into the sphere of international law. Traditionally, constitutional order and democratic governance were matters of national sovereignty, yet recent judicial interventions have reframed them as subject to international oversight. This shift has been driven by EU law and the Council of Europe's legal framework, which imposes standards that at times conflict with national constitutional principles. The ECtHR, originally tasked with upholding human rights, has evolved into a quasi-constitutional body shaping member states' legal systems beyond its original mandate. Similarly, the CJEU has expanded its influence by interpreting Art. 2 TEU as an enforceable legal obligation rather than an aspirational principle. This reinterpretation has directly affected Poland's judicial system, imposing external standards that override constitutional provisions.

A particularly alarming consequence of this external interference is the erosion of national sovereignty in judicial matters. The primacy of EU law has been invoked to replace national legal norms with EU standards, even at the constitutional level. The CJEU's expanded influence – moving from interpreting EU treaties to reshaping national legal structures – has resulted in Polish courts, under pressure from international rulings, questioning the legitimacy of judicial appointments and the President's prerogative to appoint judges. This has created a legal paradox: decisions reached within the constitutional framework are challenged by external interpretations, placing domestic judicial authority under international supervision.

In response, some national courts have overstepped their constitutional mandates, acting as self-appointed arbiters of systemic legal disputes. Judges have questioned

the status of their colleagues, refused to apply laws they deemed politically motivated, and disregarded CT rulings. This internal judicial rebellion, supported by political factions and external legal narratives, fractured the judicial hierarchy, with lower courts at times rejecting the decisions of higher courts. The resulting legal uncertainty eroded public trust in the judiciary and weakened the rule of law.

The crisis deepened through procedural manipulations, notably the use of preliminary rulings to challenge national legal standards. The CJEU has expanded the scope of preliminary rulings beyond their original purpose, enabling Polish courts to bypass domestic procedures in favour of EU law. This has led to the 'revival' of repealed national laws, the suspension of valid norms, and the application of legal principles without grounding in Polish constitutional law. The result is a fragmented legal system where different courts apply conflicting standards, creating an unpredictable and unstable judiciary.

Moreover, the judiciary has been politicised by ideological divisions, with some judges aligning with external political forces to resist domestic judicial reforms. The influence of political factions within the EU and the Council of Europe has intensified international legal pressure on Poland, offering a means to circumvent domestic processes through external rulings. This intervention has had a profound impact: legal principles have been selectively applied, judicial appointments questioned, and constitutional guarantees overridden.

A crucial factor in this judicial disarray was the introduction of the statutory test of judicial independence and impartiality, which was intended as a compromise to meet EU conditions for accessing recovery funds. Rather than resolving disputes, this legal concession backfired, furnishing judges with a formal instrument to challenge appointments, thereby strengthening opposition to reforms. It institutionalized judicial uncertainty, allowing courts to question their peers' independence on subjective grounds. Its use by judges previously involved in related disputes has further eroded credibility and impartiality, deepening the instability of the judicial system.

The collapse of legal certainty in Poland results directly from judicial activism, international interference, and internal judicial conflict. The rule of law has been paradoxically undermined in the name of defending it, as courts selectively interpreted legal principles to serve political agendas. The judiciary no longer operates under a unified constitutional framework but is instead divided along political and legal lines. Judicial authority has been eroded, constitutional principles redefined by external rulings, and legal predictability dismantled, creating a justice system in crisis.

To restore legal stability, the judiciary must return to constitutional foundations, reestablish clear boundaries between national and international legal obligations, and reaffirm the supremacy of the Constitution as the highest legal norm. Judicial independence must be protected but cannot be used as a tool for institutional anarchy. Without a constitutional realignment, the erosion of the justice system will continue, ultimately threatening the stability of Poland's democratic governance.

7. One of the core elements of the rule of law in Poland is the supremacy of the Constitution. A coherent interpretation of constitutional principles underpins the concept of the rule of law, which forms part of each state's unique identity. By contrast, the EU's conception of the rule of law, as enshrined in Art. 2 TEU, is derived from the constitutional traditions of its Member States.

This raises the question of whether – and to what extent – the constitutional value of the 'rule of law' can be defined by other legal systems reflexively. Even if the Constitution permits the operation of other legal systems on Polish territory, it determines the form and effectiveness of their operation. For many years, the coherence of these systems remained unchallenged. Difficulties arose when international bodies, by interpreting guarantees of human rights, attempted to influence values that also formed part of Poland's political system and thus fell within the sphere of absolute state sovereignty.

Poland's position is not one of rejecting the rule of law, contrary to its portrayal internationally, but rather of defending its sovereign right to define standards relating not to human rights as such but to the structure of the political system. Even if these standards support the effective implementation of human rights, such implementation can be achieved through various legitimate means. External intervention that redefines state obligations through interpretative expansions of treaties, rather than formal amendments, lacks authorisation and legal basis.

External legal systems should respect constitutional individualism. International conceptions of the rule of law cannot dictate how domestic systems regulate the relationship between the judicial power and other authorities in the state. Nor can they prescribe the allocation of powers among state organs, which remains the prerogative of the Constitution and the sovereign will of the legislature. This diversity explains the variety of judicial systems, court positions, and judges' statuses across European countries. While outcomes may be evaluated, prescriptive directives cannot be imposed.

8. The government's uncritical subordination to the CJEU and ECtHR poses serious risks to Poland's statehood. Both tribunals, through their rulings, have encroached upon areas reserved for the state's discretionary competence. EU treaties themselves delimit the competences transferred to the Union, leaving all others to the state. As for the ECtHR, the matters at issue lie entirely outside the *ratione materiae* of the ECHR.

Both tribunals have relied on the construction of human rights – particularly the right to a fair trial and the right to a court – to exert influence over the organisation and personnel of the judiciary. They have sought to eliminate any role of domestic law in defining the content of the 'right to a court', contrary to the CT's judgment K 7/21, which affirmed the primacy of the Polish Constitution.<sup>1</sup>

By accepting this judicial overreach, the government effectively consents to the extra-treaty expansion of the tribunals' jurisdiction at the expense of state

1 Judgement of CT, K 7/21, OTK ZU A/22 pt. 5.2.5.

sovereignty. This infringes Poland's right to determine its political system and the structure of its statehood. It also violates the essence of state sovereignty. The two tribunals are not concerned with overseeing the exercise of sovereignty in areas where the state has granted consent through treaty provisions; rather, they seek to influence the structure of the state's political system and the status of state officials (judges),<sup>2</sup> the foundations of which are enshrined in constitutional provisions such as Art. 144(3)(17), Art. 173, Art. 178(1), Art. 180(1), Art. 186, Art. 187, and others.

Such actions undoubtedly also breach the Constitution as interpreted in the CT's judgment of 11 May 2004, K 18/04, which held that competences cannot be transferred 'to the extent that would result in the Republic of Poland being unable to function as a sovereign state'.<sup>3</sup>

Moreover, by consenting to expansive treaty interpretations by the tribunals, the government transfers new competences by extra-constitutional means, bypassing the procedures of Art. 90 of the Constitution – a matter warranting scrutiny in terms of both constitutional and criminal liability.

At the substantive law level, the conflict pits tribunal rulings against constitutional law. These rulings are based on ratified international agreements, which, as sources of law, rank below the Constitution. By attempting to implement such judgments through legislative amendments, the government risks introducing norms that conflict with the Constitution.

As the CT has repeatedly emphasised, it is not permissible for norms derived from international agreements to exist in the legal system if they are inconsistent with the Constitution. This prohibition stands regardless of Art. 9 of the Constitution, which obliges Poland to respect binding international law. That obligation cannot be interpreted in a manner that modifies constitutional content through external treaties, circumventing constitutionally prescribed amendment procedures and encroaching upon the competences of public authorities.<sup>4</sup>

9. In conclusion, while this analysis focuses on Poland, its findings extend to the protection of the rule of law in other states. The diagnosis conducted has identified the areas and mechanisms through which the rule of law can be subverted under the guise of its restoration, and it offers arguments that can be tailored to the specific constitutional and institutional contexts of individual states to counter such practices.

The rule of law is predicated upon the supremacy of law. However, when the very concept of law is relativised and the constitutionally mandated hierarchy of legal sources is disregarded to the point that it becomes unclear what constitutes binding law, a critical question arises: can the rule of law still be said to exist? If law no longer governs, then what – or who – does ultimately govern?

2 See Judgement of CT, K 18/04, OTK 2005/5A/49 pt. I.3.

3 Judgement of CT, K 18/04, OTK 2005/5A/49 pt. III.8.4.

4 Judgement of CT 7/21, OTK ZU A/22 pt. 5.3.2 and 5.3.4.

