Chapter 3

The Reversed Rule of Law in Legislation and Its Evaluation

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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.[1]

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.[2]

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.[3]

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.[4]

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 Potrzeszcz, 2005, pp. 7–37.
2 Kotowski, 2021, p. 13.
3 Ziembiński, 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'.[5] 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.[6] From a terminological perspective, legislation can be understood as the enactment of law in its strictest sense.[7]

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.[8]

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.[9]

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.[10]

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.[11]

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.[12]

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.[13]

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.[14] Although the CT attempted to clarify this issue soon after adopting the 1997 Constitution, uncertainty persists, creating potential for abuses.[15]

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.[16]

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).

13 Jarosz, 1999; Jarosz, 2005.

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

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

16 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.[17]

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 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.[18]

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.[19]

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)).[20]

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.[21]

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.[22]

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.[23]

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.[24]

20 Muszyński, 2022, p. 39.

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

22 Syryt, 2011, pp. 365–374.

23 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.

24 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.[25] Legal security, linked to legal certainty, enables predictability in the actions of state authorities and allows individuals to forecast the outcomes of their actions.[26]

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.[27]

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

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.[33] 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,[34] 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.[35]

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.[36] 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.[37]

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.

36 The judgment of the CT of 16 July 2009, Kp 4/08, OTK ZU No. 7/A/2009, item 112.
37 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),[38] 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,[39] 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.[40]

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.[41] The Marshal may return the bill to the proposer if the justification is inadequate. This authority is discretionary and evaluative.[42]

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,[43] 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.[44] 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.[45] 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.[46]

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.[47] The Senate may adopt the law without amendments, propose amendments or reject it entirely.[48]

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.[49]

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.[50] 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.[51]

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,[52] and statutes passed under the urgent procedure,[53] 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.[54] 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.[55] The President's final act in the legislative process is ordering the bill's publication in the Official Journal of Laws.[56]

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.[57]

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.[58]

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

58 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.[59]

59 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.[60]

The Constitution provides several avenues for initiating review. The preventive mode examines statutes prior to presidential signature[61] 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.[62]

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

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.[66]

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;[67] 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,[68] 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.

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);[69] 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);[70] and the Sejm resolution of 6 March 2024 on addressing the consequences of the 2015–2023 constitutional crisis concerning the CT.[71]

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,[72] 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'.[73] 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,[74] 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.[75]

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

74 OTK A/2024, item 65.

75 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.[76] 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.

76 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),[77] 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.[78] 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.[79] 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.

77 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.

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

79 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.[80] This conclusion was based on legal opinions asserting the provision's temporary nature.[81] The resulting change in the National Prosecutor's position occurred outside the framework of established legal procedures.[82] 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.[83] 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'.[84]

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.[85]

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.[86] 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.[87] 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.[88]

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.[89] 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.[90]

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.[91]

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.[92] 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.[93] 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.[94]

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.[95]

Commentators have regarded this resolution as merely an internally binding act,[96] 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.[97] 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.[98]

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[99] 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

97 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.

98 Cf. About publishing the CT's judgments: Rojek-Socha, 2024.

99 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.[100] In practice, the effects of the CT's judgment are nevertheless considered in some cases despite its lack of publication,[101] and in the public debate, some participants refer to the binding nature of certain judgments.[102]

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.[103]

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.[104] 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.[105]

Most rulings neither categorically accept nor reject dispersed review;[106] those opposing it outright are in the minority.[107] 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.[108] Courts commonly encounter such claims, often accompanied by suggestions to refer questions to the CT.[109] While courts typically decline declaring provisions unconstitutional in individual cases, appeals alleging overreach by first-instance courts rarely succeed.[110]

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.[111]

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/Gl 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 aw 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.

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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