

# INTRODUCTION



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

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

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

1 Bellamy, 2005.

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

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

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

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

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

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

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

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

4 Dicey, 1915.

5 Waldron, 2016.

6 Rixer, 2023, pp. 125–180.

7 Hatfield, 2022.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

15 See Safjan, 2023.

16 Sadurski, 2024.

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

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

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

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

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

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

The structure of the book will be as follows:

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

18 Donald Tusk awarded 2024 Chatham House Prize, 2024.

## **Chapter 1**

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

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

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

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

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## **Chapter 2**

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

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

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

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

## **Chapter 3**

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

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

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## **Chapter 4**

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

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

## **Chapter 5**

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

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

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

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

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

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

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