REDEFINING THE PRINCIPLE OF LEGALISM (ARTICLE 7 OF THE CONSTITUTION) TOWARDS 'THE BOGUS RULE OF LAW' IN POLAND AFTER 13 DECEMBER 2023

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ABSTRACT

The principle of legalism is the base of every democratic state system. There is no modern state without this vital rule. 'Breaking the law by public authorities undermines a whole idea of the law as a system of binding standards of conduct', as the Constitutional Tribunal said. That is why the principle of legalism is relevant for a society that claims to create a state of law.

The principle of legalism predicates that 'the organs of public authority shall function on the basis of, and within the limits of, the law', as the Polish Constitution predicts.

How does this principle look like in practice? Are the Polish authorities indeed complying with it?

The shift of political power should be a typical phenomenon in a democratic state of law but in Poland, after the 2023 elections, it seems like an undermining of the constitutional order with a hurried 'takeover' of individual institutions and revanchism. Illegal acquisitions of public media and the National Prosecutor's Office, undermining of the National Council of Judiciary, the Constitutional Tribunal, the Supreme Court and the judges appointed since 2018, the dismissal of court authorities in violation of laws, harassment of judges with criminal proceedings, problems with correct law making and wide-ranging plans to dismiss judges could mean are observing an illegal attempt to change the political system of the state.

Although it takes place under the banner of the fight for restoring the rule of law, it is in fact a break with classically understood legalism. As such, this study explains the ideological foundations of such actions and whether they have been planned.

KEYWORDS

rule of law
legal order
irremovability of judges
fighting democracy
repressive tolerance
bogus rule of law

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1. What is the rule of law?

Eunomia was the goddess of good order and lawful conduct in ancient Greece. She was associated with the internal stability of the state, including the enactment of good laws and the maintenance of civil order. Eunomia was also an important political slogan in ancient Greece during the archaic and classical periods, as well as one of the major Greek political thought schools. This term consists of two parts: 'eu', which means 'good', and 'nomos', which means 'law'; in short, it acknowledge good law, a fair social order, law-abidingness or simply rule of law.[2]

In every modern democracy a state's system is based on the principle of legalism. The importance of this principle is emphasised by the fact that it should be a vital rule of every legal system. As it was ascertained by the Constitutional Tribunal, 'breaking the law by public authorities undermines a whole idea of the law as a system of binding standards of conduct',[3] that is, why it is relevant for a society which claims to create a state of law to obey to the principle of legalism.

The principle of legalism predicates that all public authorities should function on the basis of and within the limits of the law. The law not only should provide competences to take action but also be a source of order and limit the range of legal functioning. Jurisdiction to take action must not be surmised to be constructed by regulations of different nature such as material, procedural and systemic.[4]

The idea of a lawful state is that the public authorities should only take action when the Constitution or the acts which are materially and formally consistent with the Constitution allow them to do so. The goal of their actions is to protect human dignity, fairness and legal certainty.[5]

It can be assumed that the principle of legalism has a formal status and that the material requirements, according to the law, underlie its origins from the rule of a democratic state of law[6]. In the Polish Constitution (Article 2) it is stated: 'The Republic of Poland shall be a democratic state ruled by law and implementing the principles of social justice', which means enriching the classical rule of the state of law by values such as justice, especially social justice[7], and democratism which makes universal election the main path to create law-making bodies and other overarching state authorities, as well as guaranteeing a political pluralism.[8]

2 | Eunomia [Online]. Available at: www.theoi.com/Ouranios/HoraEunomia.html (Accessed: 25 November 2024). PWN Encyklopedia: Eunomia [Online]. Available at: www.encyklopedia.pwn.pl/haslo/;3899090 (Accessed: 25 November 2024). Eunomia corresponds to the Latin 'legalitas'.

3 | Judgment of the Constitutional Tribunal of 16 March 2011, file no. K 35/08, OTK ZU no. 2/A/2011, item 11.

4 | M. Florczak-Wątor in Tuleja (ed.), 2023, Article 7.

5 | Morawska, 2003, p. 60.

6 | M. Florczak-Wątor in Tuleja (ed.), 2023, Article 7.

7 | The Constitution of Poland borrowed the concept of the principle of social justice from the period of the Polish People's Republic, where Article 5 of the Constitution of the People's Republic of Poland (in the version in force since 14 February 1976, consolidated text – Journal of Laws 1976.7.36, i.e. of 1976.02.21), declared that the People's Republic of Poland 'implements the principles of social justice, eliminates the exploitation of man by man and counteracts the violation of the principles of social coexistence'.

8 | Banaszak, 2004, p. 217.

The jurisprudence says that the requirement to act on the basis of and within the limits of the law does not mean that the legal foundation for public authorities must be consonantly formed. Depending on the field of the issue connected with the actions taken by public authorities, law acts can formulate additional requirements concerning the legal foundation of their action. For example actions limiting rights and freedom of an individual, especially criminal and tax law norms may be only carried out based on the statute. However, substatutory law acts require a specific enablement stated in the statute.[9]

The principle of legalism cannot function in a democratic state within its formal meaning without a material component. Otherwise it would serve to legalise illegal actions taken by public authorities, leading to the conclusion that the authority acting on a behalf of an unconstitutional law and within the limits of this law is lawful. This material meaning of the principle of legalism comes from Article 2 of the Constitution, which is the essential complement of Article 7. Respecting the principle of legalism by public authorities also helps accomplishment other rules originating from Article 2 of the Constitution, particularly the rule of protecting the trust of citizens in the state and the law established by the state, as well as the principle of law certainty and protection.[10]

In Poland, the principle of legalism is also a valid rule resulting from Article 7 of the Constitution. According to this provision, public authorities act on the basis of, and within the limit of, the law:

> The purpose of the principle of legalism is to counteract the discretion and arbitrariness of the actions of state authorities and to control this action based on the criterion of compliance with applicable law. Actions of authorities without a legal basis and outside the limit of the law or in violation of these limit are always illegal and may give rise to constitutional and criminal liability of the people undertaking these actions, as well as the state's liability for damages.[11]

Each action taken by a public authority should be based on a statutory authorisation: to take action on a given matter, to deal with the case in a given form and to give the decision a specific legal form.[12]

According to the principle of legalism understood as an interpretative directive, the presumption of competence as well as surmising competences of public authorities are forbidden. In foregoing judicial decisions of the Constitutional Tribunal, the principle of legalism was mostly bound with the ban of the presumption of competence by a public authority[13]. This ban excludes public authorities' actions without a proper permission given by the law:

9 | Article 92 of the Constitution. They can be given by authorities mentioned in the Constitution on the basis of a specific enablement stated in the statute and in the purpose of executing it.
10 | M. Florczak-Wątor in Tuleja (ed.), 2023, Article 7.
11 | Ibidem.
12 | Zubik, and Sokolewicz in Garlicki (ed.), 2016, Article 7.
13 | Judgment of the Constitutional Tribunal of 27 May 2002, file no. K 20/01, OTK-A 2002 no. 3 pos. 34.

> Pursuing the competences, legal authority must include the content of the authorising standard and cannot look for an analogy in different law regulations concerning different or even similar regulations within competences given by the lawmaker.[14]

The recipients of the principle of legalism are all public authorities on a central and local levels. These bodies must obey every law act, no matter of its weight, unlike judges who, within the exercise of their office, are independent and subjected only to the Constitution and statutes.[15] They can skip, while adjudging, sub-laws such as regulations which they value as unconstitutional. The judges cannot avoid the statute on their own, even if they consider it unconstitutional.

In such a case, the judge, acting as a court, has the privilege to advance a question of statute to the Constitutional Tribunal for a review of its constitutionality.[16] Differently, the principle of legalism concerns the judges of the Constitutional Tribunal, who in the exercise of their office are subject only to the Constitution.[17]

For authorities applying the law, Article 7 of the Constitution produces the duty of acting when the premises indicated in the legal basis are updated. An omission of actions is also a violation of these duties equivalent to transgressing the principle of legalism.[18]

This leads to the issuance of a decision in the form prescribed by law, based on a proper legal basis and in compliance with the provisions of substantive law binding on a specific authority[19]. 'Acting on the basis of law' means the requirement of legal standing (basis of competence) for all activities consisting of the exercise of public authority. This competence cannot be presumed, it must be defined clearly and precisely by the law. The term 'within the limits of the law' means the constitutional obligation of public authorities to strictly obey in their activities not only the norms determining their tasks and competences (not to exceed their competences), but also not violate any other applicable norms.[20]

Transgressing the rule of law, such as in the case of illegal actions taken by public authorities, has different aftereffects in the fields of civil, criminal pr constitutional law. Compensatory responsibility of the state towards its citizens has its source in Article 77

14 | M. Florczak-Wątor in Tuleja (ed.), 2023, Article 7.

15 | Article 178, p. 1 of the Constitution: 'Judges, within the exercise of their office, shall be independent and subject only to the Constitution and statutes.'

16 | Article 193 of the Constitution: 'Any court may refer a question of law to the Constitutional Tribunal as to the conformity of a normative act to the Constitution, ratified international agreements or statute, if the answer to such question of law will determine an issue currently before such court.'
It remains debatable whether, in the process of adjudication, the court is entitled to independently disregard a statute that it considers to be unconstitutional. It seems that this can only happen exceptionally, for example, in the case of secondary unconstitutionality of a provision or gross unconstitutionality, visible prima facie to every honest person.

17 | Article 195 of the Constitution: 'Judges of the Constitutional Tribunal, in the exercise of their office, shall be independent and subject only to the Constitution.'

18 | M. Florczak-Wątor in Tuleja (ed.), 2023, Article 7.

19 | Judgment of the Constitutional Tribunal of 16 March 2011, file no. K 35/08, OTK ZU no. 2/A/2011, item 11.

20 | Judgment of the Constitutional Tribunal of 27 May 2002, file no. K 20/01, OTK-A 2002/3/34; judgment of the Constitutional Tribunal of 23 March 2006, file no. K 4/06, OTK-A 2006/3/32.

section 1 of the Constitution.[21] However, a repressive nature may lead to the constitutional responsibility of some persons fulfilling public functions which they face in front of the State Tribunal, as well as criminal responsibility for their actions that have the features of criminal offences.

The measures of reacting to law violations by the authorities that enact the law is the review of the constitutionality of the law entrusted to the Constitutional Tribunal. This can lead to the abolition of unconstitutional regulations and legal acts.

The problem of legalism may lead to questions about the proper form of the broader understood principles guaranteeing legalism such as the tripartite separation of powers or independence of judiciary, as well as a general question about who should take care of accomplishing the rule of law and who should be equipped with measures to stop illegal actions carried out by public authorities, and if they happen, punish them.[22] In other words, who will guard the guards themselves, as the ancient Romans asked.[23]

2. Rule of law in action

2.1. Introduction

In 2023, the parliamentary elections in Poland were won by foregoing opposition, which formulated a government making a past coalition in power become the opposition. The shift of political power is a typical phenomenon in a democratic state of law. This change should not lead to the undermining of the constitutional order of a country. Unfortunately, in Poland the change of government did not look like a shift of the guardians of state power but as a hurried 'takeover' of institutions and revanchism.

On 13 December 2023, new Council of Ministers – with Donald Tusk as a Prime Minister – have been appointed. Then, the new Polish government operating on the behalf of resolutions given by the Sejm started to take illegal actions, which struck foundations of a democratic state of law, which are to pose as 'temporary time' order. The term 'temporary time' was used in a resolution brought in by the Sejm on the day of 19 December 2023 'in order to bring back a legal order, impartiality and reliability of public medias and the Polish Press Agency', where these actions were declared as 'in harmony with standards of the state of law in the temporary time, it means until enacting and implementing appropriate legislative solutions'.[24] Minister of Justice Adam Bodnar also referred to the doctrine of

21 | Article 77 of the Constitution:
1. Everyone shall have the right to compensation for any harm done to him by any action of an organ of public authority contrary to law.
2. Statutes shall not bar the recourse by any person to the courts in pursuit of claims alleging infringement of freedoms or rights.

22 | M. Florczak-Wątor in Tuleja (ed.), 2023, Article 7.

23 | 'Quis custodiet ipsos custodes?' is a Latin phrase found in the Satires (Satire VI, lines 347–348), a work of the 1st–2nd century Roman poet Juvenal.

24 | Uchwała Sejmu Rzeczypospolitej Polskiej z dnia 19 grudnia 2023 r. w sprawie przywrócenia ładu prawnego oraz bezstronności i rzetelności mediów publicznych oraz Polskiej Agencji Prasowej [Online]. Available at: https://web.archive.org/web/20240528232223/www.isap.sejm.gov.pl/isap.nsf/download.xsp/WMP20230001477/O/M20231477.pdf (Accessed: 28 May 2024).

transitional justice in his public statements.[25] In the practice of the current government, it relies on departing from normal rules of functioning of a democratic state of law, as well as taking actions with no legal foundation, based on using violence (e.g. one MP was beaten up during her intervention in defence of public media;[26] on 3 July 2024, the police and the prosecutor's office forcibly entered the premises of the NCJ and locks have been broken and judges' cabinets to take files on the cases conducted by disciplinary judges[27]) as well as diversionary actions (e.g. switching of a signal of a TV station TVP Info).[28] The very issuance these resolutions by the Sejm (i.e. acts of internal law) is a flagrant and unprecedented violation of the constitutional principle of a closed system of sources of universally applicable law. Thereby, this is a 'direct violation against the constitutional regulation for a public authority to act only on the basis of, and within the limit of, law.'[29]

Despite the described above principle of legalism, everyday practice provides the impression that the law is being treated by governing instrumentally. Below, I provide some examples of this practice.

2.2. Public media

By virtue of the resolution by the Sejm of 19 December 2023, the government made an unlawful takeover of the public media. On this day, the Minister of Culture and National Heritage, Bartłomiej Sienkiewicz, as a body executing owner's privileges of the State Treasury called the current presidents of the Polish Television JSC, Polish Radio JSC and the Polish Press Agency JSC off as well as supervisory boards of those companies. The minister replaced them with new supervisory boards which appointed new company management. On 27 December 2023, the minister adopted a resolution of liquidation of these public companies.

Those actions were not valid by law, because the competencies to appoint and recall personnel of public radio broadcasting, television broadcasting and Polish Press Agency are reserved to the National Media Council. Moreover, liquidation of public media is unacceptable in the Polish legal system.[30] Those actions led to a stop in the broadcasting of public television, as well as lack of admission for the workers of this institution to their workplaces.

In a verdict from 18 January 2024, the Constitutional Tribunal confirmed that such actions were illegal,[31] but this has not reversed the effects of the unlawful actions.

2.3. The National Council of Judiciary (NCJ)

Rulers continue their efforts to undermine the status of the NCJ. Hitherto, these actions have been reflected in the resolution of the Sejm on 20 December 2023[32]and the adoption of a bill shortening the term of office of the judicial part of the NCJ and returning

25 | Bodnar, 2022.
26 | Chaos wTVP. Pobita poseł PiS trafiła do szpitala, 2023.
27 | Skandaliczny atak na KRS: dziennikarze usunięci, szafy pancerne rozprute, 2024.
28 | Rule of Law Observer, no date.
29 | Uchwała Sejmu RP w sprawie usunięcia skutków kryzysu konstytucyjnego, no date.
30 | Act of 22 June 2016 on the National Media Council, Journal of Laws 2021.692 (see Article 2(1)).
31 | Judgment of the Constitutional Tribunal of 18 January 2024, file no. K 29/23, Dz. U. 2024/96.
32 | ISAP: Internetowy System Aktów Prawnych [Online]. Available at: www.isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WMP20230001457 (Accessed: 18 June 2024).

to the previous methods of election.[33] Moreover, current members of the NCJ are threatened with criminal and disciplinary liability, including expulsion from office.[34]

The resolution of the Sejm, which has no legal power, states that the election of judges – as members of the NCJ – was adopted in manifest breach of the Constitution. The Sejm also called on the elected members of the NCJ to immediately cease their activities 'in this body'.

Any doubts as to the constitutionality of the current method of electing judges as members of the NCJ have been already removed in the proper procedure. In the judgment of 25 March 2019,[35] the Constitutional Tribunal adjudicated that the method of electing them by the Sejm is consistent with the Constitution.[36] As a result, judges as members of the NCJ are now considered legally elected and this assessment cannot be changed by any unlawful expectations and postulates.

2.4. Prosecutors

Since taking power in Poland, the current government has tried to take over the office of the National Prosecutor and thus gain control over Polish prosecutors.

On 12 January 2024, General Prosecutor Adam Bodnar informed National Prosecutor Dariusz Barski that he was removing him from his duties due to the ineffectiveness of restoring him to active service from retirement in 2022; therefore, in Adam Bodnar's opinion, he could not perform the functions of National Prosecutor. At the same time, at the request of General Prosecutor Adam Bodnar, by decision of Prime Minister Donald Tusk, prosecutor Jacek Bilewicz was appointed as the (acting) first deputy of the General Prosecutor and National Prosecutor.

Adam Bodnar, when asked for a legal basis of his actions, pointed at 'external legal opinions of respected experts and law authority figures [...] concerning results of effectiveness of restoring a prosecutor, Mister Adam Barski to the active duty'.[37]

New authorities started a personnel revolution in the prosecutor's office, replacing prosecutors managing the organisational units of the prosecutor's office and appointing new prosecutors to the National Prosecutor's Office.

In this way, prosecutor Dariusz Korneluk was appointed and, on 14 March 2024, the Prime Minister appointed prosecutor Dariusz Korneluk to the position of National Prosecutor despite the lack of the President's opinion required by law.

By an interim measure resolution from 15 January 2024 in a case Ts 9/24 the Constitutional Tribunal ordered all public authorities to stop taking action to prevent Dariusz Barski from exercising his privileges, tasks and competences as the prosecutor of the

33 | Ustawa z dnia 12 kwietnia 2024 r. o zmianie ustawy o Krajowej Radzie Sądownictwa [Online]. Available at: https://web.archive.org/web/20240618194803/www.orka.sejm.gov.pl/proc10.nsf/ustawy/219_u.htm (Accessed: 18 June 2024).

34 | Sędzia Cezariusz Baćkowski powołany przez Ministra Sprawiedliwości Adama Bodnara do pełnienia funkcji Rzecznika Dyscyplinarnego, 2024; Rojek-Socha, 2024.

35 | Judgment of the Constitutional Tribunal of 25 March 2019, file no. K 12/18, OTK-A 2019/17 [Online]. Available at: www.trybunal.gov.pl/sprawy-w-trybunale/art/10382-wybor-czlonkow-krs-przez-sejm-sposrod-sedziow-odwolanie-od-uchwaly-krs-dotyczacej-powola (Accessed: 4 August 2025).

36 | Article 190(1) of the Constitution: 'Judgments of the Constitutional Tribunal shall be of universally binding application and shall be final.'

37 | Mrowicki, 2024.

National Prosecutor's Office in active duty, as well as performing the function of the National Prosecutor; it also stopped a resolution brought in by the Prime Minister on 12 January 2024, which presumed the appointment of Jacek Bilewicz to perform the function of the National Prosecutor and forbade the execution of privileges, tasks and competences of the National Prosecutor by a person appointed to be a National Prosecutor with no legal foundation.[38]

Questioning the appointments of the most important prosecutors of the Republic of Poland and making a number of appointments that raised doubts as to their effectiveness caused chaos in the justice system, undermining the validity of prosecutors' decisions the influence the right to a fair trial.

To illustrate these consequences, it is enough to mention the competences of specific prosecutors to act as public prosecutors are already being questioned in court proceedings.

Moreover, on 27 September 2024, the Supreme Court adopted a resolution stating that Dariusz Barski is still the National Prosecutor.[39]

2.5. Court presidents

The functions of presidents and vice-presidents of courts are for a tenure.[40] However, there are provisions allowing the Minister of Justice to dismiss court presidents and vice-presidents before the end of their statutory term of office, which the current minister has used so far nearly 90 times.[41]

According to these provisions, the Minister of Justice may dismiss the president and vice-president of a court during their term of office in cases generally specified in the Act - Law on the System of Common Courts.[42] The exercise of this right is conditional on the

38 | Auzbiter, 2024.

39 | Sąd Najwyższy, 2024a.

40 | The presidents and vice-presidents of district courts are appointed for a four-years tenure, while the presidents and vice-presidents of courts of appeal and regional courts are appointed for a six-years tenure (Article 26 § 1-4 of the Act of 27 July 2001 Law on the System of Common Courts, Journal of Laws 2024.334, i.e. of 2024.03.08).

41 | By 13 June 2024, the Minister of Justice had initiated 79 procedures for the dismissal of presidents and vice-presidents of common courts but further appeals also followed that date. See Ministerstwo Sprawiedliwości, 2024.

42 | Article 27 of the Act of 27 July 2001. Law on the System of Common Courts, Journal of Laws 2024.334, i.e. of 2024.03.08, Journal of Laws 2024.334, i.e. Of 2024.03.08):
§ 1.The president and vice-president of a court may be dismissed by the Minister of Justice during their term of office in the following cases:
1) gross or persistent failure to perform official duties;
2) when the continuation of the function cannot be reconciled with the interests of the administration of justice for other reasons;
3) finding particularly low effectiveness of activities in the field of administrative supervision or organisation of work in a court or lower courts;
4) resignation from the function.

Minister obtaining a positive opinion from the college of the competent court or a positive opinion of the NCJ.[43]

This procedure, as well as the introduction of a high qualified majority of the required votes, were noticed by the NCJ, which, in its resolution of 16 February 2024, requested the Constitutional Tribunal to declare these regulations inconsistent with the provisions of the Constitution of the Republic of Poland. The NCJ argues that the statutory regulation strengthens the role of the executive (i.e. the Minister of Justice) and means that he will be able to influence the third power. The possibility of dismissing a president or vice-president of a court without the opinion of the NCJ contradicts the idea of control of supervisory decisions over the administration of justice by the NCJ in the procedure for dismissing the president and vice-president of the court and violates the balance of powers in favour of the executive and legislative powers.[44]

Moreover, there is likely the secondary unconstitutionality of the challenged provisions resulting from the judgment of the Constitutional Tribunal issued in 2004.[45]

By virtue of its decision on 24 April 2024, the Constitutional Tribunal prohibited the Minister of Justice from dismissing the presidents and vice-presidents of courts; however, the minister does not comply with this provision.[46]

In the verdict from 16 October 2024, the Constitutional Tribunal confirmed that it was illegal for the Minister to take such actions.[47] A declaration of unconstitutionality of the challenged provisions means the illegality of the previous actions of the Minister of Justice, who dismissed presidents and vice-presidents of courts en masse.

43 | If the opinion of the college of the competent court on the dismissal of its president or vice-president is negative, the Minister of Justice may present the intention for dismissal, together with a written justification, to the NCJ. A negative decision is binding on the Minister of Justice if the resolution on this matter was adopted by a two-thirds majority. (Article 27 § 1 - 5a of the Act of 27 July 2001. Law on the System of Common Courts, Journal of Laws 2024.334, i.e. of 2024.03.08).

44 | Resolution of the NCJ on submitting to the Constitutional Tribunal a request to examine the conformity to the Constitution of the Republic of Poland of Article 27(5) and Article 27(5a), second sentence, of the Act of 27 July 2001 – Law on the Organisation of the Courts p (www.krs.pl).
The NCJ argues that the statutory regulation strengthens the role of the executive (i.e. the Minister of Justice) and means that he will be able to influence the decision of the NCJ to a greater extent than by applying the general voting rules. The possibility of dismissing the president or vice-president of a court without the opinion of the NCJ contradicts the idea of control of supervisory decisions over the administration of justice by the NCJ in the procedure for dismissing the president and vice-president of the court and violates the balance of powers in favour of the executive and legislative powers.

45 | The Constitutional Tribunal stated the unconstitutionality of the provisions authorising the Minister of Justice to dismiss the president of a court during his term of office, despite the negative opinion of the NCJ, when the continuation of his functions for reasons other than failure to perform his official duties cannot be reconciled with the interests of the administration of justice (judgment of the Constitutional Tribunal of 18 February 2004, file ref. no. K 12/03).

46 | Prezesi sądów od Ziobry jednak bez parasola. Bodnar nie uzna zabezpieczenia TK, 2024.

47 | Documentation of the proceedings before the Constitutional Tribunal, Ref. No. K 2/24, trybunal.gov.pl; [Online]. Available at: www.niezalezna.pl/media/tv-republika/wszystko-bedzie-zgodnie-z-prawem-tak-jak-my-je-rozumiemy-zapowiadal-tusk-w-sprawie-mediow-publicznych/507546#:~:text=„Wszystko%20będzie%20zgodnie%20z%20prawem,%20tak%20jak%20my%20je%20rozumiemy” (Accessed: 4 August 2025).

2.6. Criminal proceedings

Criminal proceedings against judges have been launched, being often groundless and political in nature. They are intended to depress and freeze judges and perhaps even eliminate them from their profession. In addition, such proceedings publicly discredit judges because they are suspected of committing crimes. Such an accusation is discrediting for any judge.

On 11 June 2024, the prosecutor's office initiated proceedings concerning the abuse of powers and acting to the detriment of the public interest to achieve personal benefits for the judge members of the NCJ in the period from 2017 onwards. The investigation concerns 20 judges whose only fault was the application of the law in force in Poland.[48]

Moreover, the prosecutor's office began a series of unfounded motions to waive immunity to judges it considered its enemies, mainly because they fulfilled their official duties. The basis of individual applications is the thesis that judges acted 'in an organised criminal group'. The participants of the group were to conduct 'actions against judges, including, primarily, those gathered in the Association of Polish Judges Iustitia'. 'The criminal activity consisted primarily of the unauthorised processing of personal data of judges and the disclosure of information obtained about these judges' between each other. A further goal was to be public criticism of the aggrieved judges.[49]

Surprisingly, the prosecutor was the one that has tried to block the proceedings by filing further fragmental motions (which must be considered together), as well as by threatening to bring charges against one of the defence counsels,[50] while another defence counsel had his judge salary unlawfully reduced on the eve of the court session.[51]

There are other motions for the permission to prosecute disciplinary judges for allegedly 'concealing' the files of disciplinary cases they legally kept, which constituted a failure to comply with official duties.[52]

2.7. Law making

The Sejm has deliberated in an improper composition, violating the principle of legalism. The adopted acts have been affected by a legal defect, which implies the necessity of stating that such acts are inconsistent with Article 7 of the Constitution.

The Constitutional Tribunal found that the act adopted by the Sejm in which, due to the unlawful actions of the speaker of the Sejm, two MPs were refused participation, is inconsistent with the provisions of the Constitution of the Republic of Poland, in particular with the principle of legalism.[53] The Constitutional Tribunal stated the unlawful differentiation of the legal status of individual MPs. Upon taking office, each of the 460 MPs – elected by the nation in universal elections – gains the possibility of exercising parliamentary rights, in particular the possibility of participating in voting, and has the same status in relation to other MPs and analogous rights and obligations. Meanwhile, the unlawful

48 | Sędzia Cezariusz Baćkowski powołany przez Ministra Sprawiedliwości Adama Bodnara do pełnienia funkcji Rzecznika Dyscyplinarnego, 2024; Rojek-Socha, 2025.
49 | Prokuratura Krajowa, 2024b.
50 | Broński, 2024.
51 | Broński and Romaszewski, 2024.
52 | Prokuratura Krajowa, 2024b.
53 | The judgment of the Constitutional Court from 19 June 2024, K 7/24; [Online]. Available at: www.trybunal.gov.pl/postepowanie-i-orzeczenia/wyroki/art/12818-tryb-uchwalenia-ustawy (Accessed: 4 August 2025).

actions of the speaker of the Sejm led to the permanent exclusion of specific individuals from the work of the Sejm, thus de facto creating an unknown category (in relation to the Constitution) of deputies who do not perform their mandates. Therefore, the Sejm proceeded in a composition formed as a result of unlawful actions of the speaker of the Sejm, preventing specific MPs from participating in legislative work. For this reason, this body cannot be classified as the Sejm in the constitutional sense. Consequently, the adoption of a law by an improperly formed body leads to its unconstitutionality.

2.8. Attempted illegal removal of judges

On 6 September 2024, politicians and judges from organisations such as Iustiitia and Themis (cooperating with the government) decided to announce their plan on how to remove judges in bulk, stating that they are no longer judges.[54] After the meeting (there were no invitations to the jurisprudents critical to government's actions, including those consociated in the Association Lawyers for Poland, the Association of Judges of Republic of Poland or the Independent Association of Prosecutors Ad Vocem), its participants came up with an idea of how to change a judiciary system. They euphemistically named it as 'restoration of the constitutional order' and regulating the status of 'neojudges'.[55]

As a result of this meeting, it was said that the appointments of judges since 2018 were made illegally with an involvement of the 'unconstitutional NCJ' and that they have no legal force and their appointments are not identical with the appointments referred to in the Constitution. This means that 'neojudges' are to 'come back to their previous position'.[56]

As a result, a segregation scheme for judges was invented, distinguishing among them a group of judges appointed after 2017. They were also defined as 'neojudges', that is, judges appointed incorrectly.[57]

The group of these judges was split into three subgroups.

54 | Kancelaria Prezesa Rady Ministrów, 2024b.

55 | The term 'neojudge' cannot be found in any Polish dictionary affirmed by the Council for the Polish Language, which operates at the Presidium of the Polish Academy of Science by the article 12 of Act of 7 October 1999 about Polish language (Journal of Laws of the Republic of Poland 2021.672 (12 April 2021). Each time I used the term 'neojudge' my text editor would underline this term informing me that such word does not exist in Polish language. The Constitution and other legal acts constantly use the term 'judge'. The term 'neojudge' is nowhere to be found. Moreover, the Polish language does not allow this word. It was made up as a way to describe judges appointed after 2018. As such, it has a disdainful scope and is used to humiliate them. Unfortunately, due to cunning propaganda action, this term became a constant work used by certain media sources, politicians and resolutions and other documents of judges associations. Further, since 6 September 2024, this term has been included in the dictionary of the Polish Government. On this date, it was officially used in a statement on the website of the Ministry of Justice and the Chancellery of the Prime Minister.

56 | Rojek-Socha, 2024.

57 | Before 2018, judge appointments were made by the motion of the NCJ that the Constitutional Tribunal reached at least five times the verdict that procedures, rules of functioning and the way in which new members were elected were unconstitutional (Ref. No. SK 43/06, K 40/07, SK 57/06, K 62/07, K 5/17). However, since 2018, judges' appointments are motioned by the NCJ which procedures of electing new members has been affirmed as consistent with the Constitution by the verdict of the Constitutional Tribunal (K 12/18).

The first one consists of young judges who became judges after graduating from the National School of Judiciary and Public Prosecution. It was said that 'the statute will treat their appointment as constitutional'. This means that, although their nominations are considered faulty, they will be 'healed' by virtue of the Act.

The second group is composed of people who 'are connected by so-called common design', which is said to be 'taking part in building undemocratic order in Poland'. It was not explained in detail what is understood by these populist slogans. Unofficially, there is talk about a group of 500 people who are to be simply removed from the judge profession.

The third group consists of people who 'got their promotions due to their overwhelming desire to do so'.

These two last groups will be able to 'return to their previous offices' only if they make a declaration that getting promoted was 'their mistake in life' that is referred to as 'active regret'. People who were practising other law related jobs such as attorneys or legal counsels before becoming judges were told that there is no going back to their previous jobs. They were 'generously' offered positions of judge assistants.

The presented solutions sharply interfere with the constitutional order of the Republic of Poland. Specifically, they ignore the regulations of the Constitution in particular the principle of irremovability of judges.[58]

These announcements about governmental repressions against judges are a brutal attack on the independence of the judge, and their realisation will mean the destruction of the judiciary. Those repressions may affect more than 3,000 judges, who successfully and rightfully underwent law determined procedures. Foreshadowed actions may only be compared to the repressions that affected judges during the martial law launched by the communist regime.

2.9. The Constitutional Tribunal

During its first days of ruling, the new government already demonstrated its attitude towards the Constitutional Tribunal, undermining the status of its judges by leaving an annotation to Tribunals' verdicts in the Journal of Laws of the Republic of Poland (published by the Prime Minister) that says that the Constitutional Tribunal is deprived of characteristics of the legally appointed tribunal due to the presence of an unauthorised member. The published verdict was released in a form appointed with a violation of a basic

58 | Article 179 of the Constitution: 'Judges shall be appointed for an indefinite period by the President of the Republic on the motion of the National Council of the Judiciary.'
Article 180 of the Constitution:
1. Judges shall not be removable.
2. Recall of a judge from office, suspension from office, transfer to another bench or position against his will, may only occur by virtue of a court judgment and only in those instances prescribed in statute.

rule having use in electing judges to the Constitutional Tribunal and as a consequence violating the core of the right to a tribunal established by law.[59]

This annotation on the verdicts given by the Constitutional Tribunal has no legal foundation. In official journals, legal acts are to be published in the form given by the author – without any annotations.

As of 6 March 2024, the government has ceased publishing any rulings of the Constitutional Tribunal. The Sejm also proceeded with a bill that will allegedly restore the functioning of the Constitutional Tribunal. There are plenty unconstitutional ideas in it, but there are provisions that blatantly violate the legal order. It is planned, for example, that any rulings issued in the adjudicating panel which consisted of 'a person unauthorised to adjudicate' are worthless and does not sway the results mentioned in the Constitution.[60] In this way, the legislature gives itself eligibility to determine who is an unauthorised person, ergo who is a judge of the Constitutional Tribunal or undermining the legal force of currently valid verdicts given by the Constitutional Tribunal. This is entirely a constitutional matter and entering this area of regulations by the Sejm is an obvious abuse of the law determining the border of competences of the legislature. It is also a violation of the Constitution and an obvious interference in the judiciary.

3. Reversal of meanings

The above examples of breaking the law do not deplete all the 'achievements' of the current governments. We can also point out the following: lacking the legal basis for the withdrawal of the person assigned by the Prime Minister under the resolution of the President for scheduling a judge to be a chairman of the assembly of judges of the Civil Chamber of the Supreme Court[61]; attempts to intimidate the First President of the Supreme Court by initiating criminal proceedings for compliance with the law[62]; trying to prevent the election of Presidents managing the work of the chambers of the Supreme

59 | 'According to the verdict of the European Court of Human Rights in case: Xero Flor in Poland LLC v. Poland from the day of 7.05.2021, complaint number 4907/18; Wałęsa v. Poland from the day of 23.11.2023, complaint number 50849/21; M.L v. Poland from the day of 14.12.2023, complaint number 40119/21, the Constitutional Tribunal bereft of characteristics of the legally appointed tribunal due to the presence of an unauthorised member. According to this opinion, published verdict was released in a form which had been appointed with a violation of a basic rule having use in electing judges to the Constitutional Tribunal and as a consequence violating the core of the law to a court appointed on a basis of the resolution.' Rule of Law Observer, no date.

60 | The bill provides: a bench of judges of the Tribunal in which a person elected to the position of judge of the Tribunal sat in violation of the provisions of the Act of 25 June 2015 on the Constitutional Tribunal (Journal of Laws of 2016, item 293 and of 2018, item 1077) and the judgments of the Tribunal of 3 December 2015, file no. K 34/15 (Journal of Laws, item 2129) and of 9 December 2015, file no. K 35/15 (Journal of Laws, item 2147), as well as the person elected in his place, hereinafter referred to as 'persons not entitled to adjudicate'. (Article 10 Law of 13 September 2024 – Provisions introducing the Act on the Constitutional Tribunal) [Online]. Available at: www.orka.sejm.gov.pl (Accessed: 4 August 2025), Akt prawny.

61 | Sąd Najwyższy, 2024c.

62 | Prokuratura wszczęła trzecie śledztwo ws. pierwszej prezes Sądu Najwyższego, 2024.

Court[63]; pressurising courts by announcing depletion of budget of judiciary institutions, which oppose government's authoritarian actions[64]; ignoring verdicts and undermining the Supreme Court.[65]

With such a range of actions marked by bad will it is the government must be aware of the illegality of their actions. For the time of being in the opposition the current governing were alarming the public opinion that the rule of law was violated, basic human rights were invaded, as were are the rules of functioning of publicly-funded institutions. The independence of judges as well as autonomy of courts were said to be in danger. While assuming authority, the current government promised the restoration of the rule of law and 'constitutional order'.

Nowadays, the constitutional principle of legalism is thus being treated as a dummy tool to hide an intention to take over every publicly-funded institution. Instead of operating on the basis of, and within the limit of, the currently valid law, which is required by the principle of legalism, everyday practice gives us impression that the law is being treated instrumentally. In the official interview the Prime Minister Donald Tusk defined this way of acting: 'everything will be agreeably with the law as we understand it'.[66] It can be seen that the government first act and then look for the legal justification of their actions. According to the Minister of Justice Adam Bodnar: 'We have a situation in which we are restoring the constitutionality and try to find a legal foundation to do so'.[67]

The shift in political power is a typical phenomenon in a democratic state of the law. However, such a change should not lead to the undermining of the constitutional order of the country. Unfortunately, in Poland, the change of authority did not look like a shift of state power but as a hurried 'takeover' of individual institutions and often unlawful personnel changes and revanchism. Representative is a speech of the Prime Minister Donald Tusk at the conference 'Ways of leaving a constitutional crisis', organised in the building of the Senate 10 September 2024, where he was accompanied by the Speaker of the Sejm, Szymon Hołownia, and the Speaker of the Senate, Małgorzata Kidawa-Błońska, and a string of Polish constitutionalists. Donald Tusk then announced a de facto break with the rule of law and the principle of legalism in public actions, stating:

> Today we have a need to act in categories of a fighting democracy. Probably not once will we make mistakes or take actions which according to some legal authority figures will not be consistent with the law or not fully consistent with the law but nothing exempts us from acting every day.[68]

The Prime Minister gave legitimacy to these actions by saying that 'a kind of 'contamination' affected public authorities, legal acts, regulations as well as the Constitution of the Republic of Poland:

63 | Sąd Najwyższy, 2024b.
64 | Mikowski, 2024.
65 | Prokuratura Krajowa, 2024a.
66 | „Wszystko będzie zgodnie z prawem, tak jak my je rozumiemy" - zapowiadał Tusk w sprawie mediów publicznych, 2023.
67 | Minister Bodnar dał popis! "Przywracamy tę konstytucyjność i szukamy jakiejś podstawy prawnej". Bezlitosne Komentarze, 2023.
68 | Kancelaria Prezesa Rady Ministrów, 2024a.

> The real problem is the matter of interpreting the acts of law and their usage by the government [...]. If we want to restore a constitutional order, foundations of the liberal democracy, everyday we encounter the situations in which we have tools on command which does not give us chance to repair our reality.[69]

The theoretical bases for the 'fighting democracy' methods were delivered by the participants to the project 'Transition 2.0.' since 2023.[70] Adam Bodnar, nowadays the Minister of Justice, lamented about Polish legal system:

> [...] they have to be taken into account as a scenario in which political and legal actions are achievable, and which of them are merely theoretical and illusory. They are like traps installed in the system that may prevent a natural return to the rule of law system.[71]

Moreover, he has been stubbornly looking for a way to get past the constitutional rule of irremovability of judges. As he wrote,

> [...] one of the most important obstacles could be the implementation of any vetting procedure for judges. The President of Poland Andrzej Duda declared on different occasions that any judicial nominations made by him cannot be challenged, as they were made within his constitutional prerogative. [...] This is a controversial view.[72]

With regard to the matter of the NCJ, Adam Bodnar noticed:

> [...] it is a fundamental task to resolve the problem of the NCJ. The only solution is the appointment of judges to the NCJ in accordance with constitutional and legislative practices that existed before 2018. 15 judicial members should be appointed by other judges, in order to guarantee judicial independence standards. For this purpose, a relevant legislative act should be implemented.

Simultaneously, the future Minister wondered how to reduce the constitutional tenure of the judges in the NCJ: 'The question is whether the existing terms of current members could be shortened'.[73] Because of this he came forward with the journalistic statement that 'original nominations for the period 2018–2022 (first term) and 2022–2026 (second period) were made in grave violation of the Constitution'. While lacking legal arguments he invoked the argument of public discourse [74] and judgments made by international tribunals without any normative value, he came to the conclusion that 'Their nominations have been challenged in the public discourse and in the jurisprudence of the CJEU and the EctHR'. After such reasoning, Adam Bodnar gave a statement that 'These

69 | Ibidem.
70 | Bobek et al., 2023.
71 | Bodnar in Bobek et al., 2023, p. 301.
72 | Ibidem, p. 301.
73 | Ibidem, p. 304.
74 | A. Bodnar forgot that 'the crowd does not desire the truth and despises reality, but idolises deceptive illusions'. Le Bon, 2018, p. 39.

developments potentially provide an argument that the existing terms of some members could be shortened'.[75]

Mirosław Wyrzykowski, a retired judge of the Constitutional Tribunal, professor at the University of Warsaw, as well as a determined critic of the previous government (he wrote about 'the process of destroying the Polish constitutional order' and about 'the political villainy that the destruction of the state's constitutional order by unconstitutional and anti-constitutional accomplished facts has become'[76]), announced in 2023 that 'a real dilemma will arise: whether it is possible, in order to restore constitutionality, to use methods that will be questionable from the perspective of their constitutionality'.[77] He also raised the question of 'how to restore the state of affairs in accordance with the Constitution without violating the constitutional guarantee of the irremovability of judges?'[78] As a solution, he offered 'to create a mechanism that would lead to the rectification of defects in the appointment of a judge'[79] and 'to differentiate the situation of three groups of judges appointed after 2018'. He then assumed that 'the two categories of judges who would be subject to this mechanism of re-evaluation and appointment'[80]. By the way, it is significant that he treats the holders of the judicial power as an 'object' of politics.

An even more restrictive mechanism had been prepared by Mirosław Wyrzykowski for the judges of the Constitutional Tribunal, assuming that 'zeroing out the tribunal is an attractive concept, as it removes the most serious obstacle to restoring constitutionality'.[81] He justified an obvious conflict of these ideas with the constitutional principle of irremovability of judges by saying that 'ordinary legal instruments will not be effective in achieving the intended goal' and 'an extraordinary situation requires extraordinary measures'.[82] It is clear that Mirosław Wyrzykowski, while writing those words, was fully aware of the illegality of the suggested measures. He wrote about 'extraordinary measures, including when their legality may be in dispute'. He excused by the need of the moment that, in his opinion, we are 'dealing with an extraordinary unconstitutional state and an extraordinary state requires extraordinary measures'.[83]

It can be clearly seen how the rule of law is treated in today's Poland ruled by decrees and opinions with no normative value. Applying various tricks from juggling the appearance of the law to open violations of the law under the banner of fighting for the restoration of the rule of law is a premeditated act. If someone was under the illusion that these actions were taken on impulse, he or she should sober up. A proper name for this group of notions and actions presented by the government of today's Poland is 'the bogus rule of law'. 'Bogus' means one that is false, feigned, pretended or – as it is used in everyday, colloquial speech – fake.

I think the core of this phenomenon had been shown by its keen proponent, Marek Safjan, who is the retired judge of the Court of Justice of the European Union and ex-President of the Constitutional Tribunal. By formulating that 'We need to break out from

75 | Bodnar in Bobek et al., 2023, p. 304.
76 | Wyrzykowski in Bobek et al., 2023, p. 228.
77 | Ibidem.
78 | Ibidem, p. 241.
79 | Ibidem, p. 242.
80 | Ibidem.
81 | Ibidem, p. 247.
82 | Ibidem, p. 248.
83 | Ibidem.

the trap of legal formalism' in the article named 'Rule of law immediately'[84], he got to the heart of the matter.

This concept combines the declared 'fighting democracy'[85] by Prime Minister Donald Tusk with ideas such as transitional justice[86] or repressive tolerance.

The concept of 'fighting democracy' (in German: streibare demokratie) originated in 1937 and was popularised by the political scientist named Karl Loewenstein. Compendiously, this concept assumes that the democracies should defend themselves from undemocratic actions with the help of tools and measures set in the constitution, with simultaneous creation of repressions set against certain groups in the country.[87] However, the idea of repressive tolerance assumes that one that does not tolerate it should be repressed.[88] The term was created by Herbert Marcuse, a leading neo-Marxist of the second half of the 20th century, in an essay named 'Repressive Tolerance' published as a chapter of a book called 'A Critique of Pure Tolerance' from 1965. According to this idea 'real and deep tolerance must rely on intolerance of certain fake ideas and movements' and 'the real tolerance can not protect false ideas and undeserved actions'.[89]

Echoes of all these ideas can be seen nowadays in Poland as a demonstrational violation of the principle of legalism by a whole gamut of actions: from replacing laws with decrees and lawyers' opinions through a legal mask to open law violations. All these are made under the banner of 'restoring the rule of law'. The issues is that the details show the opposite, as these intellectual concepts are only excuses for violence and deprivation of civil rights of those whose political views are not consistent with those imposed by liberal and revolutionary elites. A common characteristic of briefly presented ideas is showiness and superficiality in the execution of goals opposite than those declared. They consist of a bogus rule of law that in the name of establishing the rule of law assumes breaking the law and raping the constitution.

By adding to traditional and classical ideas of democracy, equity or tolerance adjectives such as 'fighting', 'transitional' or 'repressive', their true meaning is skewed, creating not only products of the Newspeak but also institutions that distort beautiful and good ideas.[90] They only serve to strengthen a certain political system, which will neither give citizens a free choice of their representatives nor freedom of expression of opinions, information and ideas without the interference of public authorities. The bogus rule of law being introduced in Poland is a signal to the entire society that acting under the flag of the rule of law could mean a lack of certainty of tomorrow for everyone. It is obvious that every human being can be subject to arbitrary treatment by the authorities, to a

84 | Safjan, 2023.
85 | This is the English term used by the Chancellery of the Prime Minister in an official announcement (The Chancellery of the Prime Minister, 2024). However, it is correct to speak of 'militant democracy', which is the translation of the German 'streibare demokratie'. For more details on this topic, see Ossowska-Salamonowicz and Giżyńska, 2022, p. 33.
86 | García-Sayán in Bobek et al., 2023, p. 92.
87 | Wiśniewski, 2020, p. 16.
88 | Dorosiński, 2024, p. 67.
89 | Kołakowski, 1988, p. 1117.
90 | According to the Constitution of 1952, in force until 14 February 1976, the People's Republic of Poland was a state of people's democracy (Article 1(1)). What kind of democracy it was is best evidenced by a joke comparing the relationship between democracy and people's democracy to the relationship between a chair and an electric chair.

derogatory search, be charged with imaginary charges or deprived of property and even taken away the right to express her/his own opinions. I leave unanswered the question of whether Poland is already an anocracy or is only heading in this direction.[91]

Nowadays, if we remain passive to this attack on the world as we know and if we do not shout about it at the top of our voice, we can soon forget that 'freedom is the freedom to say that two plus two make four. If that is granted, all else follows'.[92]

91 | Anocracy is a hybrid form of a state 'suspended' between democracy and authoritarianism, a political-legal regime that is internally incoherent, possessing the constitutive features of democracy and autocracy at the same time (see Prokop, 2015, pp. 31–46).

92 | Orwell, 1949, p. 68.

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