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## The rule of law “on the ground”. The Polish courts’ perspective

**Abstract:** The aim of this article is to demonstrate how often and in what ways the concept of the rule of law is utilised by the Polish courts. The authors examined the case law of the Constitutional Tribunal, the Supreme Court, but above all, of the common courts, published after 1997 (the year in which the Constitution of the Republic of Poland entered into force) with regard to how often judges invoke the concept of the rule of law and how they explain it. The main idea was to capture certain tendencies, in an attempt to take a wider view rather than analyse individual rulings. It is a look “from above” adapted to determine if and how often courts refer to the concept of the rule of law and what changed in this regard after 2015, when the systematic and consistent destruction of the judicial system began. Analysis of the judicial decisions of the common courts, whose actions are especially important for the individual, are the focal point. It is in these courts that majority of cases are settled, as they are the closest to the citizen. Of course, the common courts do not act in isolation and so the judicial activity of the Constitutional Tribunal and the Supreme Court was also examined. However, rulings of those entities are frequently subject to in-depth analysis, so

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the focus was placed only on examining regularities in their invoking the concept of the rule of law. Since the Constitutional Tribunal and – to a certain degree – the Supreme Court have been captured by the ruling political group, entailing that the authorities have destroyed judicial independence, it is worthwhile to concentrate on the common courts, as they could possibly be representing the last bastions of an independent justice system.

**Keywords:** Rule of Law, Democracy, Constitution, European Union law, national law, constitutional law, legal order, judiciary, common courts, Constitutional Tribunal.

## Introduction

The “rule of law” is one of the constitutional principles of the European Union. In the 2014 Communication “A new EU framework to strengthen the Rule of Law”<sup>1</sup> the European Commission not only articulated a definition of the rule of law but for the first time presented the core meaning of the rule of law within EU legal order.<sup>2</sup> The rule of law is understood as a “constitutional principle with both formal and substantive components” but also the view that “the rule of law is intrinsically linked to respect for democracy and for fundamental rights.”<sup>3</sup> The idea of the rule of law which has emerged from the common law system overlaps and corresponds with the concept of a democratic state ruled by law developed from continental law, with the latter arising out of the rule of law concept.

In Poland discussion on the democratic state ruled by law has been held since the early 1990s. It intensified in recent years since the democratic state ruled by law was being dismantled by the “reforms” of the justice system intro-

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1 COM(2014) 158 final/2 (n 2) 3–4.

2 Amichai Magen, and Laurent Pech, “The rule of law and European Union” in *Handbook on the Rule of Law*, eds. Ch. May, and A. Winchester. Cheltenham, Northampton, 2018, 243.

3 COM(2019) 163 final (n 40) 4.

duced by the governing Law and Justice Party.<sup>4</sup> In the public sphere, it has been accepted that there existed a discrepancy between the expectations entailed by the avowed role and function of a democratic state ruled by law and its actual operation in the lived experience of the citizenry.<sup>5</sup> The chasm between the proclamation of the rule and its realization grew and led to public resentment and fear of the judiciary.<sup>6</sup> For years, the prevailing view was that the community shows no understanding of this concept whatsoever and there was no public debate that could help understand what the rule of law is. Wonicki even pointed to this sphere as being a sort of specific legal and political culture, or even constitutional patriotism.<sup>7</sup> Unfortunately, it took the destruction of what was developed after the year 1997 to trigger mechanisms that contributed to raising and broadening of the level of knowledge and awareness of the idea of a democratic state ruled by law.

Unquestionably, a huge role has been played here by the judges who through their rulings and statements had a chance to become real educators

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4 To learn more about the so-called reforms in Poland see: Patryk Wachowiec, Marek Tatała, and Eliza Rutynowska, *Rule of Law in Poland. How to Contain the Crisis and Reform the Justice System?*. Warsaw, 2020, <<https://for.org.pl/>>; Laurent Pech, Patryk Wachowiec, and Dariusz Mazur, “Poland’s Rule of law Breakdown: A Five-Year Assessment of EU’s (In)Action”, *Hague Journal on the Rule of Law* 13. 2021 and visit the page: <<https://www.iustitia.pl/en/>>.

5 Rafał Wonicki, *Spór o demokratyczne państwo prawa. Teoria J. Habermasa wobec liberalnej, republikańskiej i socjalnej wizji państwa*. Warszawa, 2007, 185.

6 This discrepancy is highlighted in a series of publications on the state of the Polish judiciary. Ewa Łętowska (w rozmowie z Krzysztofem Sobczakiem), *Rzeźbienie państwa prawa. 20 lat później* [Sculpting the state governed by the rule of law. 20 years later]. Warszawa, 2012, 149, 165. It is a must-read for anyone interested in finding out *what* and *why* went wrong with Polish courts and *how* to move forward and more recently “Orzekł jak orzekł a nikomu nic do tego” [The judge decided and it is nobody’s business], *Dziennik Gazeta Prawna Prawnik*, 29–31 August 2014. See also Tomasz Tadeusz Koncewicz, “Prawo i niesprawiedliwość” [Law and Injustice], *Gazeta Wyborcza*, 11 September 2012; “Sądzie sądz”, *POLITYKA* no. 50, 12 December 2012; “Jaka interpretacja w polskim sądzie?” [What kind of interpretation in the Polish court?], *Rzeczpospolita*, 8 November 2013; “Sędziów polskich trzeba uczyć” [Polish judges must be taught], *IN GREMIO* 3/2013; “Nie(ludzki) polski sąd” [(In) human Polish Court], *IN GREMIO* 4/2013. For a theoretical analysis see also Zdeněk Kühn, *The Judiciary in Central and Eastern Europe. Mechanical jurisprudence in Transformation?*. Leiden, Boston, 2011, 67–77.

7 Wonicki, 186.

in the domain of the rule of law. For many years, though, the judges had been working in “isolation” from society. As Bodnar (the former Commissioner for Human Rights) put it, their judgments in certain cases were legally sustainable, albeit divorced from life and practice.<sup>8</sup> The first obstacle was the absence of communication, which engendered strong hostility towards people pursuing this profession and that expressed itself through, among other things, malignant campaigns against judicial environments. The second being the fact that any jurisprudence which misconstrues the context and fails to tailor its message to the environment will be short-lived. The events after the year 2015 awakened the judicial environment to engage in the process of building society’s consciousness from the bottom up. A change in the judges’ approach has been detected, manifested by unprecedented activation in the mass media and participation in a variety of social actions.<sup>9</sup> Additionally, individual judges like Tuleja, Juszczyzyn and others began their own crusades in defence of values present in Art. 2 and Art. 7 of the Constitution of the Republic of Poland. This activism and individual judges’ bravery offer some hope. Polish judges act in an extremely hostile environment, in which the executive might interfere in any specific case, either directly or indirectly. In the opinion of Pech and Wachowiec, justice cannot be done in such a situation.<sup>10</sup> The aim of this article is to demonstrate how invoking the “rule of law”, expressed directly in Art. 2 and Art. 7 of the Constitution, functions in the everyday practice of the judiciary.

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8 “Commissioner for Human Rights Adam Bodnar: On the Anatomy of the Crime Against the Polish Judiciary”, Rule of Law, 20 February 2020, <<https://ruleoflaw.pl/commissioner-for-human-rights-adam-bodnar-on-the-anatomy-of-the-crime-against-the-polish-judiciary/>>, access: 16.04.2021.

9 For more detailed discussion, see: Barbara Grabowska-Moroz, and Olga Śniadach, “The Role of Civil Society in Protecting Judicial Independence in Times of Rule of Law Backsliding in Poland”, *Utrecht Law Review* 17, no. 2. 2021: 56–69.

10 Pech, Wachowiec, and Mazur, 37.

## Constitutional framework

Along with the commencement of political changes, the principle of the rule of law was introduced to the Polish legal system with the Act of 29 December 1989 on the amendment to the Constitution of the People’s Republic of Poland to amend the substance of Art. 1 of the Constitution.<sup>11</sup> The constitutional amendment also provided a revised version of Art. 3, whose acquired wording read: “1. The observance of law of the Republic of Poland shall be a primary duty and obligation of each and every public authority. 2. All state and public administration authorities shall act pursuant to the rules of law.” Interestingly enough, the Act of 1989 also contained the concept of the “rule of law,” however attaching solely to the operation of the public prosecution. Under Art. 64(1), “The Prosecutor’s Office shall safeguard the rule of law and ensure the prosecution of crimes.”

The Constitution of the Republic of Poland of 2 April 1997<sup>12</sup> relies on two concepts associated with the rule of law – the principle of a democratic state ruled by law<sup>13</sup> and the principle of legality.<sup>14</sup> Under Art. 2, the Republic of Poland shall be a democratic state ruled by law and implementing the principles of social justice, whereas, under Art. 7, public authorities shall function in reliance upon and within the limits of law.<sup>15</sup> Emphasis in the Constitution on dem-

11 Journal of Laws of 1989, no. 75, item 444.

12 The Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws of 1997, no. 78, item 483 as amended), hereinafter: the Polish Constitution.

13 Art. 2 of the Polish Constitution.

14 Art. 7 of the Polish Constitution.

15 The rule of law is the subject of numerous doctrinal studies, which intensified especially after 2015. E.g.: Adam Bodnar, and Adam Płoszka, eds., *Wokół kryzysu praworządności, demokracji i praw człowieka. Księga jubileuszowa Profesora Mirosława Wyrzykowskiego*. Warszawa, 2020; Łukasz Bojarski, Krzysztof Grajewski, Jan Kremer, Gabriela Ott, and Waldemar Żurek, eds., *Konstytucja, praworządność, władza sądownicza. Aktualne problemy trzeciej władzy w Polsce*. Warszawa, 2019; Wojciech Sadurski, *Poland’s Constitutional Breakdown*. Oxford, 2019; Karol Kiczka, Tadeusz Kocowski, and Witold Małecki, eds., *Praworządność, decentralizacja, przedsiębiorczość. Księga jubileuszowa profesora Leona Kieresa*. Wrocław, 2018; Jan Zimny, ed., *Praworządność w dobie XXI wieku*. Stalowa Wola, 2016; Tomasz Pietrzykowski, *Ujarzmianie Lewiatana. Szkice o idei rządów prawa*. Katowice, 2014; Krzysztof Sobczak, and Andrzej Zoll, *Państwo prawa jeszcze w budowie. Andrzej Zoll w rozmowie*

ocratic state ruled by law (Article 2) and on the principle of legality (Article 7) has existed in the constitutional law since 1989.

As the doctrine puts it, Article 2 of the Constitution of the Republic of Poland clearly sets forth the principle of a democratic state ruled by law and the principle of social justice, which are functionally and substantively related.<sup>16</sup> The principle of a democratic state ruled by law can be described as a set of different values directly and indirectly defined in the Constitution of the Republic of Poland pertaining to the state policy, law, system and relationships between the state and an individual.<sup>17</sup> Since its introduction into Polish legal system, the underlying principle has been viewed as a source from which subsequent principles of a more specific nature have evolved.

The principle of legality is one such rule laid down in Art. 7 of the Constitution.<sup>18</sup> In Leszek Garlicki's view, "in respect of a democratic state ruled by law, the rule of law overlaps the principle of legality (Art. 7) extended by the principle of the Constitution's supremacy (Art. 8) and by the principle of the respect for international law (Art. 9). Further, it might be concluded that legality constitutes the very core of the rule of law, originally being considered even as equivalent to the rule of law".<sup>19</sup> The principle of legality related to the so-called rule of good legislative design derives from and is inferred from Art. 2 of the Constitution. In M. Sajan's and L. Bosek's opinion: "Expressed in Art. 7 of the Polish Constitution, the principle is an element of the rule of law. The relationship between the principle of legality and the rule of law is complex: firstly, the rule of law principle justifies the principle of legality, in particular, indicating the values constituting the ratio of Art. 7; secondly, it serves as the foundation for determin-

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*z Krzysztofem Sobczakiem*. Warszawa, 2013; Iwona Wróblewska, *Zasada państwa prawnego w orzecznictwie Trybunału Konstytucyjnego RP*. Toruń, 2010.

16 Monika Florczak-Wątor, "Art. 2" in *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, ed. P. Tuleja. Warszawa, 2019.

17 Judgment of the Constitutional Tribunal of 25 November 1997, K 26/97.

18 Florczak-Wątor.

19 Marek Zubik, and Wojciech Sokolewicz, "Art. 2" in *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, vol. 1, ed. L. Garlicki, 2nd ed. Warszawa, 2016.

ing the consequences of the public authorities violating Art. The principle of legality is linked to the principle of the supremacy of the Constitution of the Republic of Poland (Art. 8) and the principle of favouring the Polish law to the international law (Art. 9).”<sup>20</sup>

Notwithstanding the fact that it was in the Constitution of 1997 that the rule of law found its reflection, thereby setting some form of a meta standard, it warrants nothing that had been applied in the Polish legal system much earlier.<sup>21</sup> The principle of the rule of law does not appear literally in the current Constitution – the concept of the rule of law results from Art. 2 and Art. 7 of Constitution. But the concept itself is not only an expression of Art. 2 or Art. 7, thirst of which constitutes a norm of a material nature with the latter being its procedural aspect. Both are crucial for ensuring the standards of the rule of law. The following analysis of jurisprudence takes into account the fact that both Articles are related but, in practice, can be applied independently. Furthermore, the practice has invariably referred to the application of the “principle of a democratic state ruled by law”, the “principle of a formal rule of law” and the “concept of the rule of law,” thereby producing terminological confusion that is noticeable not only on the doctrinal level but also, and above all, in the case law. The study of the courts’ case law has allowed the authors to shed light on the broader context and highlight the dilemmas that arise in understanding and applying the above listed rules and principles.

## Case law

### Judiciary system in Poland

In Poland, justice is administered through the common courts of law (in Polish *sądy powszechne*), specialized courts (pl. *sądy szczególne*) and the Supreme

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<sup>20</sup> Piotr Tuleja, “Art. 7” in *Konstytucja RP. Komentarz*, vol. 1, eds. M. Safjan, and L. Bosek. Warszawa, 2016.

<sup>21</sup> More on the genesis of the principle of a democratic state ruled by law see: Florczak-Wątor; Zubik, and Sokolewicz.

Court (pl. *Sąd Najwyższy*).<sup>22</sup> Judgments in the name of the Republic of Poland may also be issued by the Constitutional Tribunal (in Polish “Trybunał Konstytucyjny”).<sup>23</sup>

The analysis of the case law embraces the case law of the Constitutional Tribunal, the Supreme Court, and the common courts, and presents the understanding and application of the rule of law and associated standards.<sup>24</sup>

The role of the Constitutional Tribunal is for the most part to decide on the constitutionality of legal acts, their compatibility with international treaties, with a statutory consent to ratification thereof, and the compliance of such acts with laws.<sup>25</sup> Such review may assume an abstract or concrete form, although in the latter case the judgment may result in the derogation from the state’s system of law of a given or literally interpreted the provision of law. The Constitutional Tribunal does not directly determine the merits of the case in respect of which doubts have arisen. Thus, its role tends to differ in comparison with the objectives of the common courts of law and the Supreme Court, which led to bypassing its work in this regard.

The underlying research encompasses the case law of the Supreme Court. This results from the fact that the Supreme Court, in the Polish system of law, exercises judicial supervision over the common and military courts. The Supreme Court primarily determines, under statutorily defined circumstances, extraordinary appellate remedies, which renders the study of its authorities indispensable to discern the approach Polish courts tend to assume in the un-

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22 Art. 175(1) of the Polish Constitution.

23 Art. 174 of the Polish Constitution.

24 The common courts’ case law is accessible via the Government Common Courts Case Law Portal, albeit limited to selected cases. Equally popular are the Lex and Legalis case law bases which offer access to a miscellany of selected judgments, or the Supreme Court Case Law Base containing the Supreme Courts’ decisions and the Constitutional Tribunal Case Law Base. The authors have decided to rely on Lex and the Constitutional Tribunal Case Law Base since it attracted a comprehensive collection in comparison with the one proposed by the competitive system of legal information. The public base, in turn, is not equipped with an adequate browser that could enable effective examination of the issue under survey.

25 Art. 188–190 of the Polish Constitution.



derstanding and implementation of the rule of law principle. It warrants mentioning that the Act of 8 December 2017<sup>26</sup> on the Supreme Court led to the introduction of a new instrument to the Polish legal regime – an extraordinary appeal which enables rebuttal of valid court decisions. Art. 89(1) Act on the Supreme Court states: “If it is necessary in order to ensure compliance with the principle of a democratic state ruled by law and implementing the principles of social justice, an extraordinary appeal may be lodged against a final ordinary court or military court ruling closing proceedings in the case provided that: (1) the ruling violates the principles or the rights and freedoms of persons and citizens enshrined in the Constitution; or (2) the ruling is a flagrant breach of the law on the grounds of misinterpretation or misapplication; or (3) there is an obvious contradiction between the court’s findings and the evidence collected; and the ruling cannot be repealed or amended by way of other extraordinary remedies”. This new ‘remedy’ has been criticised by both the EU Commission<sup>27</sup> and the Venice Commission.<sup>28</sup>

Pursuant to the Polish law in force, the system of common courts of law consists of:

- district courts (which hear the cases in the first instance; the cases not referred to regional courts for review; with the presumption of the district court’s jurisdiction);
- regional courts (which review appellate remedies against district court decisions and determine the first instance cases in situations prescribed

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26 Act of 8 December 2017 amending the Law on the National Council of the Judiciary and certain other laws (Journal of Laws of 2018, item 3). The Law entered into force on 17 January 2018 (Journal of Laws of 2018, item 5, as amended).

27 Commission Recommendation (EU) 2018/103 of 20 December 2017 regarding the rule of law in Poland complementary to Recommendations (EU) 2016/1374, (EU) 2017/146 and (EU) 2017/1520, OJ L 17, 23.1.2018, 50–64, available on: <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32018H0103>>.

28 Opinion on the Draft Act amending the Act on the National Council of the Judiciary; on the Draft Act amending the Act on the Supreme Court, proposed by the President of Poland, and on the Act on the Organisation of Ordinary Courts, adopted by the Commission at its 113th Plenary Session (Venice, 8–9 December 2017), available on: <[https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2017\)031-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2017)031-e)>.

by law; with the Regional Court in Warsaw functioning as the Court of Competition and Consumer Protection);

- courts of appeal (which review appellate remedies against rulings issued in the first instance by regional courts).

The common courts of law, in reliance on presumption, hear the cases not referred to other courts for review. In Poland, as of 31 December 2018, there were as many as 11 courts of appeal with 426 judges, 45 regional courts with 2,515 judges and 318 district courts with 6,356 judges. The number of courts of respective instances translates distinctly into the number of cases examined on the foregoing levels. In 2018, as many as 14,915,000 cases were resolved, 13,933,800 of which were heard by the district courts, 868,300 by regional courts and 112,900 cases decided by the courts of appeal.<sup>29</sup>

The case law of specialized – military and administrative – courts has been left aside. The jurisdiction of military courts carries both objective and subjective limitations. The administrative judiciary has been delimited under the principle of objectiveness, with the system built by the regional administrative courts and the Supreme Administrative Court. Their fundamental role lies in a broadly understood supervision of public administration. Systemic isolation of specialized courts allowed the authors to focus on the operation of the common courts of law and the Supreme Court.

### **The Constitutional Tribunal**

The Constitutional Tribunal's jurisprudence has made a significant contribution to clarifying the meaning of the rule of law and as such contains an important source of inspiration and guidance for the day-to-day build-up of the rule of law standards in the case law of ordinary courts. In the Polish legal system, the Constitutional Tribunal has a precisely defined role, beginning with it being the only body in the legal system with the authority to challenge

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<sup>29</sup> Statistical Yearbook of the Republic of Poland 2019, available on: <<https://stat.gov.pl/obszary-tematyczne/roczniki-statystyczne/roczniki-statystyczne/rocznik-statystyczny-rzeczypospolitej-polskiej-2019,2,19.html>>, access: 10.03.2021.

the legality of legal provisions with binding effect. Secondly, it examines the constitutionality of legal provisions that operate under domestic law. Thirdly, in practice, the interpretation of regulations by the Tribunal, due to the authority of judges, has had a significant impact on the understanding of regulations by other state authorities. The Polish reality after 2015 is characterised by a complete absence of independent constitutional judiciary. In essence, as pointed out by Koncewicz, the Polish Constitutional Tribunal “once a proud institution and an effective check on the will of the majority, is now a shell of its former self.”<sup>30</sup> Regrettably, changes made at the Constitutional Tribunal after 2015 have shifted the perspective on how the Tribunal’s activities should be evaluated. The legal basis for the Tribunal’s operation, as well as its actual activities raise a lot of questions and often undermine the purpose of the existence of such a body. The Constitutional Tribunal’s capture has, in effect, led to the actual deprivation of its role. In a time of scattered constitutionality, the role of the common courts takes on a new meaning and for that reason their rulings were examined in-depth instead of that of the Constitutional Tribunal.<sup>31</sup>

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30 Tomasz Tadeusz Koncewicz, “No more ‘Business as Usual’”, *VerfBlog*, 24 October 2020, <<https://verfassungsblog.de/no-more-business-as-usual/>>.

31 For more on the case law of the Constitutional Tribunal: Lech Garlicki, “Disabling the Constitutional Court in Poland?” in *Transformation of Law Systems in Central, Eastern and Southeastern Europe in 1989–2015. Liber Amicorum in Honorem Prof. dr. dres. H. C. Rainer Arnold*, eds. A. Szmyt, and B. Banaszak. Gdańsk, 2016, 63–69; Mirosław Wyrzykowski, “Bypassing the Constitution or Changing the Constitutional Order outside the Constitution” in *Transformation of Law Systems in Central, Eastern and Southeastern Europe in 1989–2015. Liber Amicorum in Honorem Prof. dr. dres. H. C. Rainer Arnold*, 159–179; Tomasz Tadeusz Koncewicz, “Of Institutions, Democracy, Constitutional Self-Defence and the Rule of Law: The Judgments of the Polish Constitutional Tribunal in Cases K 34/15, K 35/15 and Beyond”, *Common Market Law Review* 53, no. 6. 2016: 1753; Tomasz Tadeusz Koncewicz, “The Capture of the Polish Constitutional Court and Beyond: Of Institution(s), Fidelities and the Rule of Law in Flux”, *Review of Central and East European Law* 43, no. 2. 2018: 116; Tomasz Tadeusz Koncewicz, “Unconstitutional Capture and Constitutional Recapture: Of the Rule of Law, Separation of Powers and Judicial Promises”, *Jean Monnet Working Paper*, no. 3. 2017, <<https://jeanmonnetprogram.org/paper/unconstitutional-capture-and-constitutional-recapture-of-the-rule-of-law-separation-of-powers-and-judicial-promises/>>. For more recent and exhaustive analysis of the developments and the examples of the abuse of judicial review, consult the comprehensive report *Narzędzie w rękach władzy. Funkcjonowanie Trybunału Konstytucyjnego w latach 2016–2021* [The tool in the hands of the political

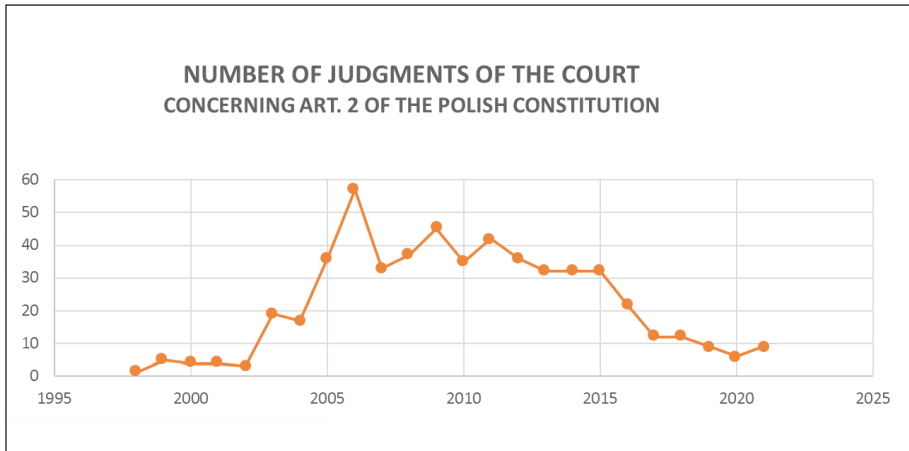


Chart 1: The number of judgments of the Tribunal concerning Art. 2 of the Polish Constitution. Source: the authors' own study.

The Constitutional Tribunal issued 1,439 judgments between the Constitution's entry into force (October 16, 1997) and the end of 2021. The control model in 540 decisions was, among other things, Article 2 of the Constitution. There were 68 judgments based on Article 7 of the Constitution.

Article 2 of the Constitution establishes the principle of a democratic state and the principle of social justice, according to the Tribunal's jurisprudence. It is seen as the foundation for principles such as legal certainty, protection of acquired rights, protection of legitimate expectations, proportionality, non-retroactivity, and sufficient *vacatio legis*,<sup>32</sup> the principle of legal certainty and

power. The functioning of the Constitutional Tribunal 2016–2021] available at: <<https://www.hfhr.pl/wp-content/uploads/2021/08/TK-narzedzie-w-rekach-wladzy-FIN.pdf>>. For analysis, see also Tomasz Tadeusz Koncewicz, "From Constitutional to Political Justice: The Tragic Trajectories of the Polish Constitutional Court", *VerfBlog*, 27 February 2019, <<https://verfassungsblog.de/from-constitutional-to-political-justice-the-tragic-trajectories-of-the-polish-constitutional-court/>>; and the most recent Tomasz Tadeusz Koncewicz, "When Legal Fundamentalism Meets the Political Justice: The Case of Poland", *Israel Law Review* 55, no. 3. 2022: 302–359 with further references.

32 Judgment of the Constitutional Tribunal of 27 February 2002, K 47/01, OTK ZU no. 1/A/2002; judgment of the Constitutional Tribunal of 10 December 2002, K 27/02, OTK ZU no. 7/A/2002, item 92; judgments of the Constitutional Tribunal of 16 September 2003, K 55/02, OTK ZU no. 7/A/2003, item 75; judgments of the Constitutional Tribunal of 15 December 2005, K 48/04, OTK ZU no. 2/A/2005; judgments of the Constitutional Tribunal of 6 and 12 December 2012, K 1/12, OTK ZU no. 11/A/2012; judgments of the

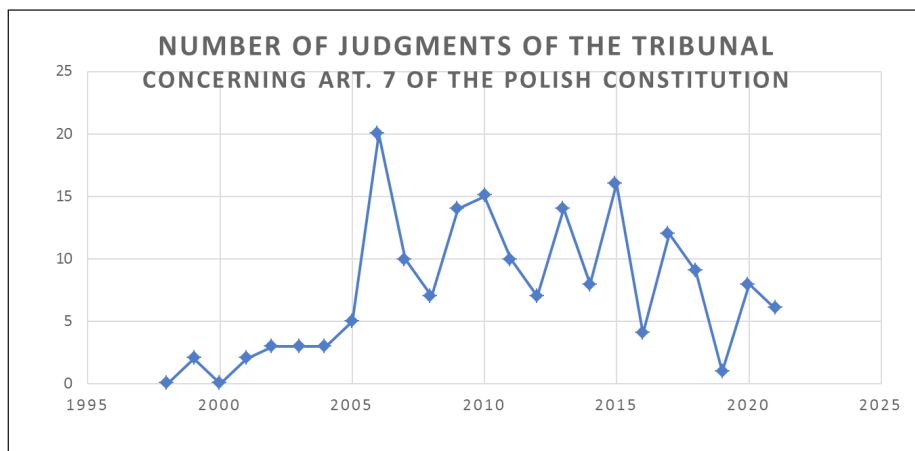


Chart 2: The number of judgments of the Tribunal concerning Art. 7 of the Polish Constitution. Source: the authors’ own study.

citizens’ trust in the state and the laws it enacts, the principle of unambiguity (specificity) of the law, the principle of ensuring public participation in state decisions, in particular in law-making, including the principle of all public institutions having a democratic mandate, as well as the principle of the judiciary’s and judges’ independence.<sup>33</sup> It also includes the proper correctness, precision, and clarity of legal provisions (principles of legislative technique)<sup>34</sup> and

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Constitutional Tribunal of 2 December 2014, P 29/13, OTK ZU no. 11/A/2014, item 116. See also: Stanisław Biernat, and Monika Kawczyńska, “The Role of the Polish Constitution (Pre-2016): Development of Liberal Democracy in the European and International Context” in *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law*, eds. A. Albi, and S. Bardutzky. Berlin, 2019, 759.

33 See: judgment of the Constitutional Tribunal of 20 December 1999, K 4/99, OTK ZU no. 7/1999, item 165; judgment of the Constitutional Tribunal of 27 May 2002, K 20/01, OTK ZU no. 3/A/2002, item 34; judgment of the Constitutional Tribunal of 31 January 2005, P 9/04, OTK ZU no. 1/A/2005, item 9; judgment of the Constitutional Tribunal of 16 March 2011, K 35/08, OTK ZU no. 2/A/2011, item 11; judgment of the Constitutional Tribunal of 18 November 2014, K 23/12, OTK ZU no. 10/A/2014, item 113; judgment of the Constitutional Court of 3 December 2015, K 34/15; judgment of the Constitutional Tribunal of 14 November 2018, Kp 1/18, OTK ZU no. A/2019, item 4.

34 One of the first rulings in which the Constitutional Tribunal expressed a broader than ever understanding and construction of the principle of legality was the ruling U 11/97. The Tribunal took the view that the infringement of the principle of legality may consist in making law so imprecise for it not only to become the ground for an unreasonable infringement of the right of an individual, but also to become the requirement (in the positive sense) to

the prohibition of excessive interference (proportionality principle), which apply in relationships between the individual and the authorities.<sup>35</sup>

Principles which the Tribunal derives or reconstructs are fully in line with the operationalization of the principle of the rule of law by the constitutional courts of the other Member States. For instance, in several Member States such as France, Italy, Belgium and the Netherlands, a lack of formal constitutional enshrinement of the rule of law principle can be found. However, the key elements of this concept have been provided in the constitutions and developed by the case law of the constitutional courts.<sup>36</sup>

According to the Tribunal's jurisprudence, Article 7 of the Constitution requires the public authorities to act on the basis of and within the bounds of the law.<sup>37</sup> The powers of the public authorities must be specified in regulations in a precise and unambiguous manner, according to this interpretation of the principle. The competence of government officials cannot be assumed. This rule applies to all bodies and there are no exceptions to it. The principle of legality, according to the Tribunal, is a refinement, if not the core, of the rule of law's formal dimension.

Statistics show that, despite some fluctuations, the Constitution's Articles 2 and 7 serve as a common higher-level norm for review. What is worth noting is that this happens after 2015, too, also in highly contentious cases like the performance of the Ombudsman's duties after his term ends until the new Om-

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make law comprehensible to an individual. The judgment of the Constitutional Tribunal of 27 November 1997, U 11/97. See also: the judgment of the Constitutional Tribunal of 21 March 2001, K 24/00, OTK ZU no. 3/2001, item 51; the judgment of the Constitutional Tribunal of 22 May 2002, K 6/02, OTK ZU no. 3/A/2002, item 33; the judgment of the Constitutional Tribunal of 7 October 2015, K 12/14; judgment of the Constitutional Tribunal of 2 April 2015, P 31/12.

35 The judgment of the Constitutional Tribunal of 18 February 2003, K 24/02, OTK ZU no. 2/A/2003, item 11; the judgment of the Constitutional Tribunal of 4 May 2004, K 40/02, OTK ZU no. 5/A/2004, item 38; the judgment of the Constitutional Tribunal of 25 May 1998, U 19/97, OTK ZU no. 4/1998, item 47.

36 For further analysis of the understandings of the "Rule of Law" principle in the EU see: Unity and Diversity in National Understandings of the Rule of Law in the EU, available on: <<https://reconnect-europe.eu/wp-content/uploads/2020/05/D7.1-1.pdf>>.

37 The judgment of the Constitutional Tribunal of 27 May, K 20/01, OTK ZU no. 3/A/2002.

budsman takes office;<sup>38</sup> electing members of the National Council of the Judiciary from among judges by the Sejm; appealing against a resolution of the National Council of the Judiciary concerning a judge’s appointment,<sup>39</sup> or an act’s entry into force before the deadline for the President of the Republic of Poland to decide on its signing expires.<sup>40</sup> Currently, the Tribunal invokes Articles 2 and 7 of the Constitution to take a position that is in violation of constitutional standards.

The concept of the rule of law was also mentioned in the ruling on the constitutionality of an EU Member State’s obligation to exercise provisional measures relating to the shape of the system and functioning of the constitutional organs of that state’s judiciary.<sup>41</sup> “Article 4 sec. 3, second sentence, of the Treaty on European Union (...) in connection with Art. 279 of the Treaty on the Functioning of the European Union (...) is incompatible with Art. 2, art. 7, art. 8 sec. 1 and art. 90 sec. 1 in connection with Art. 4 sec. 1 of the Constitution of the Republic of Poland and to that extent shall not be subject to the principles of primacy and direct applicability set out in Article 91 sec. 1–3 of the Constitution,” the Tribunal concluded. Furthermore, the Tribunal notes that Art. 2 of the Constitution “is identical in content to the legal and democratic state principles established – as common values of the member states – in Art. 2 TEU.”<sup>42</sup> Art. 7 of the Constitution, on the other hand, is in line with the Art. 2 formal principle of the rule of law. The findings of the analysis of judgments from before and after 2015 show that its understanding has not changed, in the sense that it is still treated as a guiding principle for the system; however, it is now being used to justify illegal activities, which are in violation of the principles derived from Articles 2 and 7 of the Constitution. A politicized Constitutional Tribunal serving as a standard of control over Art. 2 and Art. 7 of

38 The judgment of the Constitutional Tribunal of 15 April 2021, K 20/20.

39 The judgment of the Constitutional Tribunal of 25 March 2019, K 12/18.

40 The judgment of the Constitutional Tribunal of 17 July 2019, Kp 2/18.

41 The judgment of the Constitutional Tribunal of 14 July 2021, P 7/20.

42 According to the Tribunal, the shape of Article 2 TEU was influenced by Poland’s “centuries-old legal culture”.

## CASE LAW CONCERNING ART. 2 OF THE POLISH CONSTITUTION THE SUPREME COURT

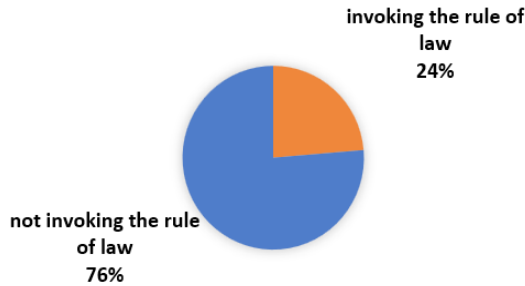


Chart 3: Case law concerning Art. 2 of the Polish Constitution.

Source: the authors' own study.

the Constitution creates a pretence of the rule of law principle being applied, which is an extremely dangerous phenomenon. Only after consideration of the broader context of dismantling the Polish constitutional judiciary, as well as the changes to legislation in regards to the justice system, is one able to appreciate that the principle is absent from the prevailing practice.<sup>43</sup> For instance, the position of the Constitutional Tribunal in case Kp 2/18 exemplifies the hypocrisy of justifying the failure to follow Union law by invoking the rule of law principle. It should be demonstrated that the Constitutional Tribunal's referring to Art. 2 and Art. 7 of the Constitution stems from the applicant's indication of the Articles (the Constitutional Tribunal is related to the scope of control indicated by the applicant) and in the case of the applicant's association with the ruling political party the Court supports the applicant's vision.

### **The Supreme Court**

The Supreme Court exercises judicial supervision over the common courts, determines cassations, cassation appeals and extraordinary appeals. The role of the Supreme Court is to ensure judicial control and uniform application of

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<sup>43</sup> Koncewicz, "No more 'Business as Usual'".



### CASE LAW TO THE ART. 7 OF THE POLISH CONSTITUTION THE SUPREME COURT

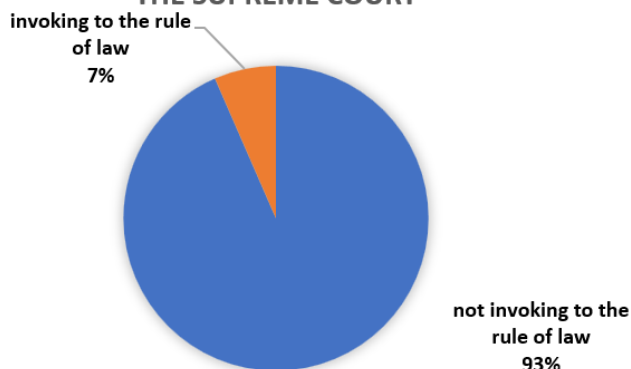


Chart 4: Case law concerning Art. 7 of the Polish Constitution.  
Source: the authors’ own study.

the law, which determines the key importance of the Supreme Court in creating the concept of the rule of law. The authors selected the judgments of the Supreme Court in which the parties – litigants or the court invoked Art. 2 of the Constitution (131 judgments). In respect of Art. 7 of the Constitution, 168 rulings of the Supreme Court were subject to study.

Therefore, within the meaning of the judgment of I NSNc 9/19 (Supreme Court of 24 July 2019), there is an explanation of the substance of the law stemming from the wording and systematics of Art. 2 of the Constitution – a principle of trust in the state and its law.<sup>44</sup> It is for this reason that a reconstruction of the judgment under appeal is necessary to ensure compliance with the principle of a democratic state ruled by law implementing the rules of social justice. Thus, in the operative part of the judgment, the Supreme Court explains, in reference to the Judgment of the Constitutional Tribunal of 7 February 2001,<sup>45</sup> the meaning of the principle derived from Art. 2 of the Polish Constitution, the prin-

<sup>44</sup> The judgment of the Supreme Court of 24 July 2019, I NSNc 9/19, see also: the judgment of the Supreme Court of 11 March 2019, IV CO 50/19; judgment of the Supreme Court of 20 August 2013, I UK 100/13; the judgment of the Supreme Court of 17 October 2008, II UK 62/08; the judgment of the Supreme Court of 11 March 2004, II UK 285/03.

<sup>45</sup> The judgment of the Constitutional Tribunal of 7 February 2001, K 27/2000.

ciple of protecting an individual's trust in the state and the law it implements requires that the law be enacted and applied in such a way that it does not entrap citizens and that they can arrange their affairs in confidence; that they do not expose themselves to legal consequences which they could not have foreseen at the time of making decisions and actions; and in the belief that their actions undertaken in accordance with applicable law would also be recognized by the legal system in the future. Ensuring legal security for citizens is a necessary requirement for implementing the principle of trust.

Pursuant to the judgment of the Supreme Court of 28 July 2020,<sup>46</sup> Art. 7 of the Constitution delimits a minimum standard within the governance system, in pursuance of which the actions of public authorities, the grounds and boundaries of said actions should be strictly determined by law.<sup>47</sup> Hence, arbitrary and legally unsubstantiated actions that go beyond said boundaries are inadmissible. What also transpires from the underlying principle is that the public authorities are obliged to duly perform the assigned tasks. This specifically pertains to judicial authorities.<sup>48</sup>

The latest case law of 2020 and 2021 regarding the constitutional elements of Art. 2 and Art. 7 of the Constitution relates to the interpretation and scope of application of the “rule of law principle” in the context of both national and European Union law. The Supreme Court's ruling practice exhibits an interrelation between the rule of law and the fundamental values of the European Union.<sup>49</sup> Thus, in respect of doubts on the construction of the EU provisions of law (Art. 19(1)(2) in tandem with Art. 4(3)(3) and Art. 2 of TEU, Art. 267 of

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46 The judgment of the Supreme Court of 28 July 2020, IV CO 55/20, see also: the judgment of the Supreme Court of 9 July 2008, II KK 92/08; judicial decision of the Supreme Court of 13 August 2013, III SK 65/12.

47 See: the judgments of the Constitutional Tribunal of: 14 June 2000, P 3/00; 12 June 2002, P 13/01.

48 The judgment of the Constitutional Tribunal of 12 June 2002, P 13/01.

49 See also: Sylwia Majkowska-Szulc, “Safeguarding European Union's core values, The Rule of Law mission in Poland” in *Rule of Law, Common Values, and Illiberal Constitutionalism Poland and Hungary within the European Union*, eds. T. Drinóczi, and A. Bień-Kacała. London, 2020, 174–194.

TFEU, and Art. 47 of the Charter of Fundamental Rights) in conjunction with national law provisions on the principle of irremovability of judges, which is an element of the principle of effective judicial protection and of the principle of the rule of law, the Supreme Court found it reasonable to refer for preliminary ruling the questions pertaining to the principle of the independence of the judiciary as the principles of the EU law and of the Union’s prohibition of age discrimination.<sup>50</sup> Raising preliminary questions, the Supreme Court was driven by its conviction as to the gravity of a currently strict correspondence and correlation between proper understanding and application of the rule of law in the national legal system and compliance with the values upon which the European Union is founded.

In response to the CJEU preliminary ruling issued on the 19<sup>th</sup> of November 2019 in the joined cases C-585/18, C-624/18 and C-625/18 A.K<sup>51</sup> concerning the National Council of the Judiciary and the Supreme Court, the Supreme Court adopted the resolution on the 23<sup>rd</sup> of January 2020<sup>52</sup> regarding the criteria and standards of the independence of judges as one of the key elements of the rule of law principle, in terms of Art. 47 Charter of Fundamental Rights and Art. 19 of Treaty on European Union provisions on the national level. Therefore, the main objective of this resolution is to provide the cohesion of the national law derived from Art. 2, Art. 45 and Art. 183 of the Polish Constitution in terms of the rule of law principle and its understanding together in compliance with EU law, in order to unify the national practice of interpretation of the “rule of law principle” of all common courts.

With the regard to the Resolution of the 23<sup>rd</sup> of January 2020, it is important to note that only judgments issued after the 23<sup>rd</sup> of January 2020, by the courts

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50 Judicial decision of the Supreme Court of 2 August 2018, III UZP 4/18 and the judgment of the Supreme Court of 18 December 2019, V CSK 347/19.

51 The judgment of the Court (Grand Chamber) of 19 November 2019. *A. K. and Others v. Sąd Najwyższy, CP v. Sąd Najwyższy and DO v. Sąd Najwyższy* in the joined cases C-585/18, C-624/18 and C-625/18A.K, ECLI:EU:C:2019:982.

52 Resolution of the joint Chambers: Civil, Criminal and Labour Law and Social Security, of the Supreme Court of 23 January 2020, ref. no. BSA I-4110–1/20.

composed of judges elected by the new National Council of the Judiciary, were to be rebuttable, and that the Disciplinary Chamber of the Supreme Court was exempted from the latter limitation, thus, regardless of the date, the decisions of the Disciplinary Chamber are invalid, and the judges of these Chambers cannot adjudicate anymore from the date that the resolution was adopted. In practice, all rulings of the Disciplinary Chamber of the Supreme Court issued both before and after the resolution of the Supreme Court will be affected.

### **The common courts**

Understanding how the courts of lower instance, which adjudicate cases closest to the citizen, relate to the rule of law is critical. Courts, as M. Safjan pointed out, are the final and definitive mediators of disputes in the modern state of law, becoming the ultimate instance of truth and oracle.<sup>53</sup> Courts, through their decisions, and therefore judges, through their actions, should create and deliver the complex concepts of law which is understandable.

Having regard to the fact that the principle of a democratic state ruled by law, as well as legality or the rule of law, derive from Art. 2 or Art. 7 of the Constitution, the authors have investigated the system of legal information and invoked judgments where courts referenced the foregoing provisions of the Constitution. In selecting this as the object of research, regard has been given to the rulings, where the parties – litigants or the court invoked Art. 2 of the Constitution:

- 303 rulings of regional courts (incl. 20 decisions of the Court of Competition and Consumer Protection);
- 100 rulings of the courts of appeal;
- 41 rulings of the district courts.

In addition, emphasis has been placed on the rulings pertinent to Art. 2 of the Constitution:

- 72 rulings of the regional courts (incl. 13 rulings of the Court of Competition and Consumer Protection);

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<sup>53</sup> Marek Safjan, *Wyzwania dla państwa prawa*. Warszawa, 2007, 67.

- 19 rulings of the courts of appeal;
- 2 rulings of the district courts,

where there was an express reliance on the rule of law, with this principle treated as a synonym of the principle of a democratic state ruled by law (look at the Chart 1). Both concepts were applied alternately in the ruling, however, at times, the reference was made exclusively to the rule of law.

In respect of Art. 7 of the Constitution, the following were subject to study:

- 372 rulings of regional courts (incl. 51 rulings of the Court of Competition and Consumer Protection);
- 100 rulings of the courts of appeal;
- 66 rulings of the district courts (look at the Chart 2).

From this group, 82 rulings were selected where the courts relied on the underlying principles more specifically rather than merely providing a relevant provision of law (see Figure 1).

Individual examples of referring to the constitutional principles expressed in Article 7 can be found in district court jurisprudence. The District Court in Brzesko linked Art. 7 to the principle of citizens’ trust in state bodies.<sup>54</sup> In the opinion of the court, the task of state organs (including courts) is to execute their duties in such a way that citizens have faith in them, which is essential in a democratic state governed by law. Regional court jurisprudence based on Article 7 of the Constitution emphasizes the obligation of public authorities, including judges to act on the basis of and within the boundaries of the law. A good example is a judgment of the Regional Court in Częstochowa,<sup>55</sup> in which judge Marek Przysucha, in a dissenting opinion, denied the possibility of the President of the Social Insurance Institution (ZUS) to create the position of acting director of the ZUS branch on a discretionary basis. From Article 7 of the Constitution, judge Przysucha derived the injunction for the state authorities to act on the basis and within the boundaries of the law. On the

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<sup>54</sup> The judgment of the District Court in Brzesko of 15 February 2017, I C 391/16.

<sup>55</sup> The judgment of the Regional Court in Częstochowa of 21 July 2018, IV Ua 9/18.

### CASE LAW CONCERNING ART. 2 OF THE POLISH CONSTITUTION

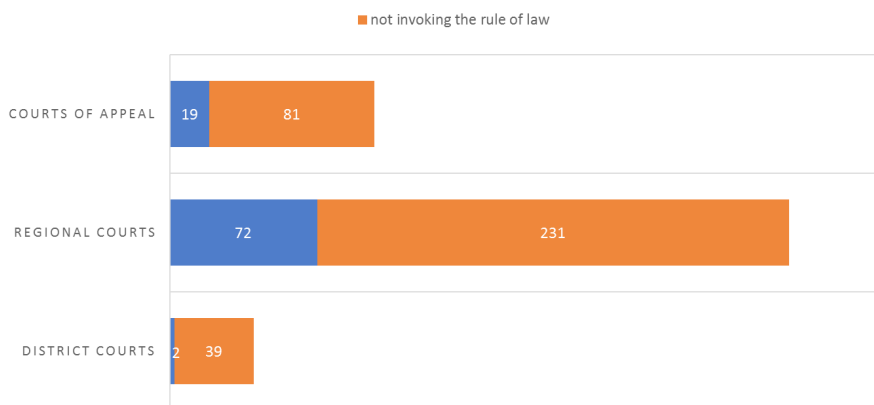


Chart 5: Case law concerning Art. 2 of the Polish Constitution.

Source: the authors' own study.

same grounds, regional Courts underlined in the case law that the rule of law requires the transparency and predictability of legislation.<sup>56</sup> Art. 2 and Art. 7 of the Constitution and the EU rule of law are construed as asserting the necessity of making law predictable, non-volatile and.

Another such demonstration can be found in the judgment of the Regional Court in Suwałki – III U 789/19 – in the lawsuit of J.M. against the Director of the Pension Office of the Ministry of Internal Affairs and Administration in Warsaw over the number of benefits for the uniformed services, with regard to J.M's appeal against the decision made by the Director of the Pension Office of the Ministry of Internal Affairs and Administration.<sup>57</sup> In

<sup>56</sup> The judgment of the Regional Court in Częstochowa of 12 April 2019, IV U 1371/18, see also: the judgment of the regional Court in Częstochowa of 8 June 2018, IV U 156/18; the judicial decision of the regional Court in Kraków of 14 July 2016, II Ca 1121/16; the judgment of the regional Court in Piotrków Trybunalski of 29 June 2017, II Ca 403/17; the judgment of the regional Court in Słupsk of 19 February 2016, IV Ca 621/15; the judgment of the regional Court in Częstochowa of 25 May 2017, IV Pa 9/17; the judgment of the regional Court in Częstochowa of 6 April 2017, IV Pa 90/16; the judicial decision of the regional Court in Częstochowa of 12 November 2014, IV U 515/14.

<sup>57</sup> The judgment of the Regional Court in Suwałki of 29 October 2019, III U 789/19, see also: the judgment of the regional Court in Częstochowa of 21 October 2016, IV U 1608/15; the

## CASE LAW CONCERNING ART. 7 OF THE POLISH CONSTITUTION

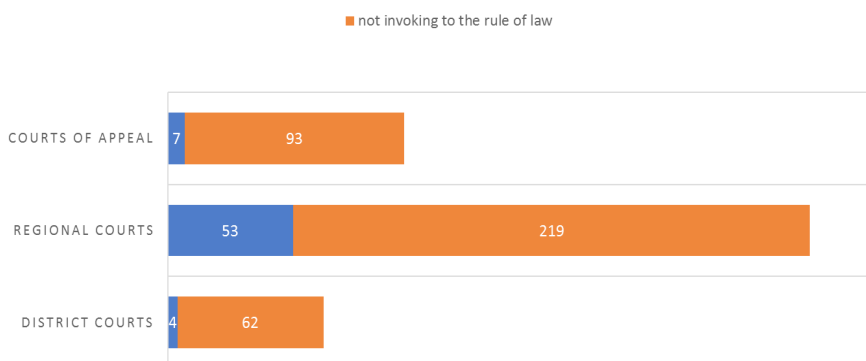


Chart 6: Case law concerning Art. 7 of the Polish Constitution.

Source: the authors’ own study.

said proceeding, the applicant alleged that the contested decisions were in breach of the substantive law provisions, i.e. Art. 2 of the Constitution of the Republic of Poland, since the pension entitlement had been arbitrarily decreased, which violates the principle of the protection of vested rights, the principle of social justice, as well as the principle of citizens’ trust in the state and its legislation, and its non-retroactivity, which stem from the principle of a democratic state ruled by law.

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judgment of the regional Court in Częstochowa of 27 July 2012, IV U 1820/11; the judgment of the regional Court in Gliwice of 17 May 2018, III Ca 1953/17; the judgment of the regional Court in Gliwice of 19 October 2017, III Ca 610/17; the judgment of the regional Court in Gliwice 23 January 2014, III Ca 1295/13; the judgment of the regional Court in Szczecin of 22 May 2015, II Ca 1355/14; the judgment of the regional Court in Gliwice of 5 June 2014, III Ca 188/14; the judicial decision of the regional Court in Szczecin of 21 December 2012, VIII Ga 392/12; the judgment of the regional Court in Sieradz of 15 July 2016, I Ca 260/16; the judgment of the regional Court in Konin of 30 October 2015, III I 752/15; the judgment of the regional Court in Sieradz of 10 April 2013, I Ca 107/13; the judicial decision of the regional Court in Szczecin of 9 September 2016, II Ca 205/16; the judicial decision of the regional Court in Szczecin of 14 January 2016, II Ca 856/15; the judgment of the regional Court in Szczecin of 30 July 2015, II Ca 193/15; the judgment of the regional Court in Warszawa of 29 January 2015, IV C 117/13; the judicial decision of the regional Court in Kraków of 14 July 2016, II Ca 1121/16.

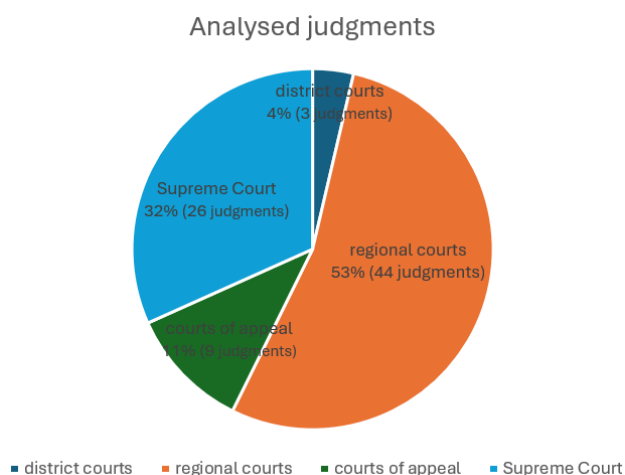


Figure 1: Analysed judgments. Source: the authors' own study.

Such a stance resulted in the Court ruling in favour of the applicant, pointing out that the essence of the concept of a democratic state ruled by law, the rule of law and the clause of social justice is that everybody is treated by the state and law with fairness, i.e., in the manner that is adequate and proportionate to their actions. In its reasoning, the Court cited the judgment of the Constitutional Tribunal where it outlined certain obstacles the implementation of the rule of law might meet in the face of decommunization processes.<sup>58</sup>

Looking further still, in the case law of the courts of appeal, one may clearly notice, as in the case of the regional courts, increased activity in the matter of adjudication in relation to the constitutional foundations of democratic governance again at the turn of 2014 and 2015.<sup>59</sup>

<sup>58</sup> The judgment of the Constitutional Tribunal of 11 May 2007, K 2/07, item 48.

<sup>59</sup> The judgment of the Court of Appeal in Szczecin of 13 November 2017, IACa 501/17; the judgment of the Court of Appeal in Warszawa of 4 November 2016, VIACa 1140/15; the judgment of the Court of Appeal in Katowice of 5 February 2016, III AUa 556/15; the judgment of the Court of Appeal in Łódź of 7 July 2015, III AUa 1296/14; the judgment of the Court of Appeal in Szczecin of 23 December 2014, IACa 680/14; the judgment of the Court of Appeal in Szczecin of 23 July 2014, III AUa 1190/13; the judgment of the Court of Appeal in Szczecin of 23 July 2014, III AUa 1191/13; the judgment of the Court of Appeal in Białystok of 20 May 2014, III AUa 30/14.



A number of the court judgments point to derivative rights and elements of the principle of a democratic state ruled by law. In light of the judgment of the Court of Appeal in Kraków (13<sup>th</sup> of October 2015, II AKa 168/15), in a democratic state ruled by law embodying social justice, the principle of citizens’ trust in the state and its law applies in compliance with Art. 2 of the Constitution.<sup>60</sup> What this apparently means is that the protection of citizens’ trust in law is not only ensured by the letter of law, but also by its interpretation adopted by the state authorities in the practice of applying law, especially when this practice is uniform and permanent. Addressees of legal norms may assume that the substance of applicable law is exactly as established by the courts, the more so when it was practised and performed by the Supreme Court.

### **Conclusion**

The study of the Polish courts’ rulings has led to a number of conclusions. The first that suggests itself is that Polish courts refer somewhat interchangeably to the concept of a democratic state ruled by law, the rule of law, and the principle of legality. In their rulings, the courts invoke either the principle of the protection of respect for the state and law or the principle of a democratic state ruled by law, which is to complete and effectuate the principle of social justice. Yet, the reference to said fundamental principles does not entail any notably deeper reflection. Rarely have the Art. 2 or Art. 7 constituted an autonomous or independent ground for a judgment. In fact, they were an additional argument raised in the courts’ statement of reasons for a judgment. This seems quite

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<sup>60</sup> The judgment of the Court of Appeal in Kraków of 13 October 2015, II AKa 168/15, see also: the judgment of the Court of Appeal in Warszawa of 15 June 2015, II Aka 82/13; the judicial decision of the Court of Appeal in Łódź of 22 January 2010, III AUa 423/09; the judgment of the Court of the Appeal in Warszawa of 11 April 2018, I Aca 66/18; the judgment of the Court of the Appeal in Katowice of 8 December 2015, I Aca 655/15; the judgment of the Court of Appeal in Kraków of 13 October 2015, II Aka 168/15; the judgment of the Court of Appeal in Szczecin of 23 April 2015, I Aca 1003/14; the judgment of the Court of Appeal in Białystok of 27 March 2015, I Aca 978/14; the judgment of the Court of Appeal in Warszawa of 26 November 2016, III AUa 2335/13.

an interesting observation, considering the fact that both provisions are broadly discussed in the doctrine.<sup>61</sup> It has been relatively uncommon for the judges to have recourse to the foregoing references in their daily practice. The provision of Art. 2 of the Constitution is treated as *lex generalis*, and in most cases, the courts invoke more specific provisions aimed at the protection of rights and freedoms.<sup>62</sup>

A large disproportion is seen in the courts referring to constitutional standards – Art. 2 and Art. 7, with the regional courts being the most active, and district courts being the least active. The division of rulings also looks specific with regard to the type of a case heard. With regional and appellate courts, the cases predominantly concern public administration, labour law or social security. In addition, the courts of appeal invoked the rule of law in deciding on reversing the arbitral award (under Art. 1206(2) of the Code of Civil Procedure, an arbitral award shall be set aside if the award is contrary to the fundamental principles of the legal order of the Republic of Poland [public policy clause]). In district courts, however, reference to the foregoing principles is often made in criminal cases. The majority of rulings exhibited reference by a party-litigant or the court to Art. 7 of the Constitution in tandem with the reference to Art. 2 of the Constitution.

The subsequent conclusion that arises from the statistics is that there has been a considerable rise in the number of references to the rule of law since the year 2015, i.e., since the very moment the demolition of a democratic state ruled by law began. A certain dormancy of the courts, lack of understanding, and sense of a shared responsibility for forming an awareness of their rights in society, facilitated the capture of the justice system in Poland. It may appear, however, that even though, depending on the type of case, the elements that encourage reference to said principles vary and their meaning is

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61 See: Marcin Wiącek, “Constitutional Crisis in Poland 2015–2016 in the Light of the Rule of Law Principle” in *Defending Checks and Balances in EU Member States: Taking Stock of Europe’s Actions*, eds. A. von Bogdandy, P. Bogdanowicz, I. Canor, C. Grabenwarter, M. Taborowski, and M. Schmidt. Berlin, 2021; Petra Bárd et al., “Rule of Law in Constitutional Principle in Poland” in *Unity and Diversity in National Understandings of the Rule of Law in the EU*, eds. L. Pech, and J. Grogan. 2020. available on: <<https://reconnect-europe.eu/wp-content/uploads/2020/05/D7.1–1.pdf>>.

62 Biernat, and Kawczyńska, 762.

emphasised differently, they in fact lead to a common vision of the shape that an ideal democratic state ruled by law should assume.

These are broadly known postulates of foreseeable standards governing social life in compliance with the principle of equality of all, including the authorities, before the law. The principle of a democratic state ruled by law has derived from the concept of the rule of law<sup>63</sup> which is strictly associated with specific values, beyond which it has no sense whatsoever, and its significance carries more weight than the principles laid down in Art. 2 and 7 of the Polish Constitution. The rule of law’s significance is dictated by how it is understood by society and this largely depends on how it is explained on the courtroom floor by judges. Therefore, it is absolutely vital for judges to remember, paraphrasing Dworkin, that the rule of law is something more than the principle of legality. It is a genuine obligation to obey the law, and the rule of law is something more than the rule of texts of law.<sup>64</sup> This finding is more relevant than ever to the European public space, especially in terms of application.<sup>65</sup> The rule of law has become one of the First Principles of the European legal order.<sup>66</sup> It must be now practised and lived through to build habits of heart. This is the existential challenge that the Polish courts now face.<sup>67</sup>

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63 Andrzej Pułło, “Państwo prawne (uwagi w związku z art. 1 Konstytucji RP)” in “Z teorii i praktyki konstytucjonalizmu. Prace ofiarowane Profesorowi Andrzejowi Gwiżdżowi”, *Studia Iuridica* 28. Warszawa, 1995, 127.

64 Ronald Dworkin, *Taking Rights Seriously*. Harvard, Cambridge, 1986, 338.

65 Consult Gianluigi Palombella, “The EU’s Sense of the Rule of Law and the Issue of its Oversight”, *Robert Schuman Centre for Advanced Studies Research Paper*, no. 125. 2014, available at SSRN : <<https://ssrn.com/abstract=2538086>> and his “Beyond Legality – Before Democracy Rule of Law Caveats in the EU Two-Level System” in *Reinforcing Rule of Law Oversight in the European Union*, eds. C. Closa, and D. Kochenov. Cambridge, 2016.

66 Laurent Pech, and Dimitry Kochenov, *Respect for the Rule of law in the Case Law of the European Court of Justice: A Casebook Overview of Key Judgments since the Portuguese Cas.* Stockholm, 2021, 208; Tomasz Tadeusz Koncewicz, “The Supranational Rule of Law as First Principle of the European Public Space – On the Journey in Ever Closer Union among the Peoples of Europe in Flux”, *Palestra* 5. 2020: 167.

67 <<https://verfassungsblog.de/the-court-is-dead-long-live-the-courts-on-judicial-review-in-poland-in-2017-and-judicial-space-beyond/>>.

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