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THE GRADATION OF CONSTITUTIONAL VIOLATIONS*

I. Constitutional violation (breach) results from an act or omission that is incompatible with the content of binding constitutional norms, subject to the conditions set forth in their provisions which trigger either prohibition or compliance. It may therefore involve taking actions that are prohibited by a constitutional norm, or actions prescribed by a norm but which are not performed.[1] Violation of the constitution (conduct *contra constitutionem*) is a form of non-compliance, but it should be distinguished from circumvention of the constitution (conduct *praeter constitution*). This latter being when the implementation of a constitutional norm leads to the attainment of an objective prohibited by another constitutional norm.[2]

It is obvious that breaking the law can take many forms—from minor infringements to gross violations. This differentiation between violations is not merely an emotional tone added to statements which justify or condemn a specific case of law-breaking—it can also be found in legal terminology. Many of the normative acts in force use the concept of flagrant or gross violation of the law, or of provisions of the law. Such violations are typically the grounds for: revoking professional licences,[3] the dismissal of a person from a position in the public administration,[4] the resumption of proceedings, and the annulment or

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[1] T. Chauvin, T. Stawecki, P. Winczorek, *Wstęp do prawoznawstwa*, Warsaw, 2016: 184.

[2] For more extensive discussion, see W. Brzozowski, Obejście konstytucji, *Państwo i Prawo* 69(9), 2014: 3–22.

[3] See, for example, Article 18a sec. 3 of the Act of 15 June 2007, On the License of a Restructuring Advisor [o licencji doradcy restrukturyzacyjnego] (consolidated text—Journal of Laws of the Republic of Poland [JL RP] 2016, item 883), Article 46 sec. 1 item 4, Article 46 sec. 2 item 4, Article 71 sec. 1 item 4 of the Act of 5 January 2011, On the Drivers of Vehicles [o kierujących pojazdami] (consolidated text—JL RP 2017, item 978 as amended), Article 77 sec. 3a item 4 of the Act of 18 August 2011, On Safety at Sea [o bezpieczeństwie morskim] (consolidated text—JL RP 2016, item 281 as amended), Article 45 sec. 1 item 2 of the Act of 19 August 2011, On the Transportation of Dangerous Goods [o przewozie towarów niebezpiecznych] (consolidated text—JL RP 2016, item 1834, as amended).

[4] See, for example, Article 37a sec. 1 item 1 of the Act of 25 September 1981, On State Enterprises [o przedsiębiorstwach państwowych] (consolidated text—JL RP 2013, item 1384, as amended), Article 16d sec. 4 item 1 of the Act of 28 March 2003, On Rail Transport [o transporcie kolejowym] (consolidated text—JL RP 2016, item 1727, as amended), Article 6 sec. 6 item 2 of the Act of 8 December 2006, On the Polish Air Navigation Services Agency [o Polskiej Agencji Żeglugi Powietrznej] (consolidated text—JL RP 2015, item 1641, as amended), Article 8 sec. 2 item 2 of the Act of 26 September 2014, On the Polish Space Agency [o Polskiej Agencji Kosmicznej] (consolidated text—JL RP 2016, item 759, as amended).

revocation of an erroneous judgment[5]—and the basis for other actions in other contexts.[6] The legislature refrains from formulating and providing a legal definition of flagrant violation, leaving it to the authorities applying the law to specify this. Sometimes, in the existing law, there is reference to offences that are less serious than typical ones, such as a negligible violation of the law,[7] and the notion of crimes of lesser gravity is used in criminal law.[8] A distinction is also made between minor infringements and serious or very serious violations.[9] From this cursory review, it is evident that Polish legal culture allows for the gradation of violations, and the various degrees of infringement are often associated with a variety of legal consequences.

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[5] See, for example, Article 156 § 1 item 2 of the Act of 14 June 1960—Administrative Proceedings Code [Kodeks postępowania administracyjnego] (consolidated text—JL RP 2017, item 1257), Article 91b of the Act of 26 May 1982—Law of the Advocates' Profession [Prawo o adwokaturze] (consolidated text—JL RP 2016, item 1999, as amended), Article 523 sec. 1 of the Act of 6 June 1997—Code of Criminal Procedure [Kodeks postępowania karnego] (consolidated text—JL RP 2016, item 1749, as amended), Article 285a sec. 3 of the Act of 30 August 2002—Law of the Administrative Courts Proceedings [Prawo o postępowaniu przed sądami administracyjnymi] (consolidated text—JL RP 2017, item 1369, as amended), Article 70 item 2 of the Act of 9 October 2009, On Military Discipline [o dyscyplinie wojskowej] (consolidated text—JL RP 2016, item 772, as amended).

[6] See, for example, Article 29a sec. 4 of the Act of 24 April 2003, On Public Benefit and Volunteer Work [o działalności pożytku publicznego i wolontariacie] (consolidated text—JL RP 2016, item 1817, as amended), Article 18 sec. 1 item 5 and Article 18 sec. 3 of the Act of 16 September 2011, On Exchanging Information between the Law-Enforcement Bodies of the Member States of the European Union [o wymianie informacji z organami ścigania państw członkowskich Unii Europejskiej] (JL RP no. 230, item 1371, as amended), Article 25 sec. 2 item 4 of the Act of 11 February 2016, On State Help with Raising Children [o pomocy państwa w wychowywaniu dzieci] (JL RP item 195, as amended). The notion of gross violation of the law not only appears in the provisions but also in the name of the Act of 20 January 2011, On the Financial Liability of Officials for Gross Violation of the Law [o odpowiedzialności majątkowej funkcjonariuszy publicznych za rażące naruszenie prawa] (consolidated text—JL RP 2016, item 1169).

[7] See Article 91 sec. 4 of the Act of 8 March 1990, On Local Self-Government [o samorządzie gminnym] (consolidated text—JL RP 2016, item 446, as amended), Article 11 sec. 3 of the Act of 7 October 1992, On Regional Accounting Chambers [o regionalnych izbach obrachunkowych] (consolidated text—JL RP 2016, item 561), Article 79 sec. 4 of the Act of 5 June 1998, On County Self-Government [o samorządzie powiatowym] (consolidated text—JL RP 2016, item 814, as amended), Article 82 sec. 5 of the Act of 5 June 1998, On Provincial Self-Government [o samorządzie województwa] (consolidated text—JL RP 2016, item 486, as amended).

[8] See, for example, Article 144 § 2, Article 228 § 2, Article 229 § 2, Article 230 § 2, Article 230a § 2, Article 250a § 3 of the Act of 6 June 1997, Penal Code [Kodeks karny] (consolidated text—JL RP 2016, item 1137, as amended), Article 56a § 2, Article 60 § 4, Article 61 § 2 of the Act of 10 September 1999—Tax Penal Code [Kodeks karny skarbowy] (consolidated text—JL RP 2016, item 2137, as amended), Article 62 sec. 3 of the Act of 29 July 2005, On Counteracting Drug-Addiction [o przeciwdziałaniu narkomanii] (consolidated text—JL RP 2017, item 783, as amended), Article 46 sec. 3 of the Act of 25 June 2010, On Sport [o sporcie] (consolidated text—JL RP 2017, item 1463, as amended).

[9] See § 2 sec. 2 regulation of the Minister for Infrastructure [rozporządzenie Ministra Infrastruktury] of 15 April 2010, On the Risk Assessment System for Road Transport Operators in Respect of the Occurrence of Infringements of Regulations Concerning Driving Time, Mandatory Breaks and Rest Periods for Drivers [w sprawie systemu oceny ryzyka podmiotów wykonujących przewóz drogowy w zakresie występowania naruszeń dotyczących czasu prowadzenia pojazdu, obowiązkowych przerw i czasu odpoczynku kierowców] (JL RP No. 72, item 462).

The Constitution is, of course, a normative act that is a constituent part of the Polish legal order. Furthermore, it is the supreme law of the Republic of Poland (Article 8(1) of the Constitution of the Republic of Poland of April 2 1997[10]). Violation of the Constitution belongs to the broader category of violations of the legal order. It is therefore somewhat surprising that the gradation of violations has yet to receive the attention of a dedicated study focused on the issue of constitutional norms. It has even been suggested that the Constitutional Tribunal's assigning degrees of unconstitutionality has no legal basis, since

> something is either in conflict with the Constitution, or it is not, *tertium non datur*, and considerations along the lines of 'even more in conflict' relativise these judgments, only introducing […] chaos and legal uncertainty.[11]

This paper will attempt to show that, contrary to the foregoing view, violations of the Constitution are gradable, as is evidenced by both the legal text and the case-law of the Constitutional Tribunal (Section II). Then the scope for applying the concept of the gradation of constitutional violations will be determined, that is to say the practical application of such gradations will be considered (Section III). The remaining sections of the article will be devoted to identifying and analysing different ways of distinguishing between 'normal' and 'gross' violations of the Constitution that have been proposed to date (Section IV), and to proposing my own criteria for gradating violations (Section V).

II. The most obvious support for the thesis that the violations of constitutional norms can be subject to gradation is provided by Article 171(3) of the Constitution, according to which the Sejm, at the request of the Prime Minister, may dissolve a constitutive organ of local government, 'if it has flagrantly violated the Constitution or a statute'. In other words, in this provision the flagrant nature of the constitutional (or statutory) violation has been identified as a condition which authorises the use of a specific instrument of state intervention. A merely 'ordinary' infringement would not provide grounds for dissolving a constitutive organ of local government. This therefore entails that that the central state authorities involved in implementing the act of interference—namely, the Sejm and the Prime Minister—are required to determine whether the violation of the constitution (or statute) was flagrant.

Additionally, in ordinary legislation there are references to flagrant forms of constitutional violation. One act grants the Prime Minister and the Council of Ministers the power to dismiss the Financial Ombudsman, *inter alia*, 'in the event of flagrant violation of the provisions of the Constitution of the Republic of Poland or statutes'.[12] The Prime Minister's proper exercise of this compe-

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[10] JL RP No. 78, item 483, as amended (henceforth: The Constitution).

[11] D. Dudek, *Autorytet Prezydenta a Konstytucja Rzeczypospolitej Polskiej*, Lublin, 2013: 198, n. 298; approving B. Szczurowski, *Prezydent Rzeczypospolitej Polskiej jako organ czuwający nad przestrzeganiem konstytucji*, Warsaw, 2016, s. 99. See also A. Kowalski, *Glosa do uchwały SN z dnia 27 marca 2014 r., I KZP 30/13*, Lex/el., 2014.

[12] See Article 15 item 4 of the Act of 5 August 2015, On Dealing with Complaints Lodged by Financial Market Actors and on the Financial Ombudsman [o rozpatrywaniu reklamacji przez

tence is therefore dependent on his or her establishing that constitutional (or statutory) regulations have been violated by the Ombudsman in a flagrant manner.

The Constitutional Tribunal also employed the gradation of non-compliance with the Constitution in its case-law. Such a measure may be necessary in the application of Article 190(3) of the Constitution, which allows the Tribunal to make an exception to the principle that judgments of the Constitutional Tribunal take effect on the date of their publication, and to specify another date for the end of the binding force of a normative act. One of the reasons for using this instrument may be the observation that the provision under review is indeed contrary to the specified benchmarks for the control of constitutionality, but that its immediate derogation would only deepen the state of unconstitutionality. Consequently, it is assumed that:

> The Constitutional Tribunal cannot declare a normative act unconstitutional if the elimination of the specified provisions from the legal order would lead to even more serious violations of the Constitution than the violations associated with issuing the provisions under review. In order to prevent situations in which Constitutional Tribunal judgment could contribute to the violation of certain norms, values and constitutional principles, the Tribunal is entitled to determine the effects of its judgment on a prospective basis by deferring its entry into force.[13]

In the practice, the case-law of the Tribunal did not normally provide detailed justification of the way in which it determined that the unconstitutionality caused by the judgment's immediate entry into force would be deeper than the unconstitutionality resulting from temporarily keeping the flawed norm in force. The Tribunal merely stated that deferring the end of the binding force of such a norm

> aims to minimise the negative systemic consequences of confirming unconstitutionality by preserving the constitutional principles which, in the circumstances of the present case, have priority over the hierarchical conformity of the legal system,[14]

or simply indicated that such a measure was necessary to avoid the secondary unconstitutionality that would have occurred had there been no deferral.[15] Occasionally, however, more general observations were made, indicating, for example, that

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podmioty rynku finansowego i o Rzeczniku Finansowym] (consolidated text—JL RP 2016, item 892, as amended).

[13] The judgment of the Constitutional Tribunal of 24 October 2007, SK 7/06, OTK ZU 2007, no. 9/A, item 108; see also the resolution of the Supreme Court of 16 October 2014, III CZP 67/14, OSNC 2015, no. 7–8, item 82.

[14] See the judgments of the Constitutional Tribunal of: 25 June 2013, K 30/12, OTK ZU 2013, no. 5/A, item 61; 28 November 2013, K 17/12, OTK ZU 2013, no. 8/A, item 125; 22 September 2015, SK 21/14, OTK ZU 2015, no. 8/A, item 122; 25 October 2016, SK 71/13, OTK ZU 2016, series A, item 81.

[15] See the judgment of the Constitutional Tribunal of 24 November 2015, K 18/14, OTK ZU 2015, no. 10/A, item 165. Similarly, a justification for reviving a flawed and annulled norm derives from the Tribunal's ruling: 'This issue should be considered in situations in which the mere withdrawal of the new, binding provision without the simultaneous revival of repealed provisions could lead to a deepening of a state of affairs incompatible with the Constitution'—the resolution of the Constitutional Tribunal of 17 July 2014, P 28/10, OTK ZU 2014, no. 7/A, item 83.

> the formal correctness of the law cannot […] lead to the negation of more fundamental values, in particular the need to protect the constitutional rights and freedoms of the individual[16].

The notion of protecting fundamental values for the sake of public order was used by the Tribunal to justify its refraining from making a formal declaration concerning the unconstitutionality of provisions which, in the reasoning of the judgment, were assessed negatively because of the failure to ensure a minimum period of *vacatio legis*.[17]

Thus, it can be seen that the criteria employed by the Tribunal with regard to the gradation of unconstitutionality are not entirely clear. It has been found that in the Tribunal's case-law constitutional violation can take many forms—sometimes it only becomes apparent in the process of implementing the law, but sometimes it can be seen in the text of a law, which contains norms incompatible with the Constitution, regardless of which methods of interpretation are used.[18] This could suggest there is a preference for recognising flagrant unconstitutionality in a manner consistent with popular intuition, and thus favouring examples that are obviously non-compliant, unambiguous and evident at first glance. At the same time, however, the Tribunal has criticised the notion of a 'flagrant' constitutional violation, claiming there is no legal basis for it.[19]

In some instances, the Tribunal has referred to a violation of the Constitution as flagrant, although it could be suspected that such an evaluation merely served to highlight the negative judgments contained in the reasoning of the judgment, thereby strengthening its persuasive power. Without a doubt, this kind of reproach is evident in the statement that

> withholding or obstructing the immediate publication of the judgment of the Tribunal in the Journal of Laws is a clear and flagrant breach of Article 190(2) of the Constitution.[20]

Also, defining the violation of a constitutional norm as 'drastic'[21] should be seen in the same light, although the Tribunal has also used this term to

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[16] The judgment of the Constitutional Tribunal of 17 December 2008, P 16/08, OTK ZU 2008, no. 10/A, item 181.

[17] The case concerned controlling the constitutionality of local government electoral law when electoral procedures were already under way. See the judgment of the Constitutional Tribunal of 3 November 2006, K 31/06, OTK ZU 2006, no. 10/A, item 147; M. Zubik and M. Wiącek criticised this solution, Kompetencje sądu konstytucyjnego a granice swobody orzekania przez sędziów Trybunału Konstytucyjnego, *Przegląd Sejmowy* 93(4), 2009: 56–57.

[18] See, for example, the judgment of the Constitutional Tribunal of 12 January 2000, P 11/98, OTK ZU 2000, no. 1, item 3.

[19] The judgment of the Constitutional Tribunal of 20 November 2006, SK 66/06, OTK ZU 2006, no. 10/A, item 152.

[20] The judgment of the Constitutional Tribunal of 11 August 2016, K 39/16 (not published in the JL RP, removed from OTK ZU).

[21] See, for example, the judgments of the Constitutional Tribunal of: 27 November 1997, U 11/97, OTK ZU 1997, no. 5–6, item 67; 25 April 2001, K 13/01, OTK ZU 2001, no. 4, item 81; 20 November 2002, K 41/02, OTK ZU 2002, no. 6/A, item 83; 11 May 2007, K 2/07, OTK ZU 2007, no. 5/A, item 48; 12 December 2011, P 1/11, OTK ZU 2011, no. 10/A, item 115.

justify judicial restraint, that is, to limit its own power with respect to issues over which the legislature has considerable freedom, and therefore where the interference of the Tribunal would only be justified in the event of flagrant violation of constitutional norms.[22]

In one of Tribunal's rulings, it was concluded that the flagrant nature of the violation was due to the accumulation of several reasons that contributed to the unconstitutionality of the regulation in question.[23] However, the Tribunal has repeatedly stressed that the incompatibility of a norm under review with many benchmarks does not thereby necessarily make it more unconstitutional, even going so far as to state that

> there is no gradation of the unconstitutionality of provisions, and the number of benchmarks with which a particular legal norm is incompatible does not translate into a correspondingly diverse set of legal consequences.[24]

When considering this statement, however, it should be borne in mind that it was formulated in a very specific context, namely in a justification for discontinuing proceedings on the grounds that a judgment was superfluous. It is understood that the Tribunal finding that the norm under consideration is incompatible with even one benchmark makes it unnecessary to adjudicate on the compatibility of the norm with other benchmarks.[25] This is sometimes justified through appeal to the economy of procedure. The fact that one procedural condition is not met allows the Tribunal to refrain from further examination of the same subject-matter, as its 'single' hierarchy of incompatibility justifies eliminating it from judicial matters; this is therefore sufficient for achieving the principal aim behind the initiation of the procedure. It is only in this sense that there is no difference between a norm that is incompatible with one constitutional benchmark and a norm disqualified due to incompatibility with many benchmarks, and it is thus only in this sense that there is no gradation.

III. As is evident from the foregoing considerations, flagrant (gross) constitutional violation is a concept employed in legal terminology, and gradation

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[22] See, for example, the judgments of the Constitutional Tribunal of: 14 November 2000, K 7/00, OTK ZU 2000, no. 7, item 259; 22 October 2001, SK 16/01, OTK ZU 2001, no. 7, item 214; 26 September 2013, K 22/12, OTK ZU 2013, no. 7/A, item 95.

[23] The judgment of the Constitutional Tribunal of 14 June 2011, Kp 1/11, OTK ZU 2011, no. 5/A, item 41.

[24] See the judgments of the Constitutional Tribunal of: 21 March 2001, K 24/00, OTK ZU 2001, no. 3/A, item 51; 26 June 2001, U 6/00, OTK ZU 2001, no. 5, item 122; 18 March 2003, K 50/01, OTK ZU 2003, no. 3/A, item 21; 11 May 2004, K 4/03, OTK ZU 2004, no. 5/A, item 41; 21 July 2010, SK 21/08, OTK ZU 2010, no. 6/A, item 62; 20 April 2011, Kp 7/09, OTK ZU 2011, no. 3/A, item 26; 12 December 2012, K 1/12, OTK ZU 2012, no. 11/A, item 134; 8 April 2014, SK 22/11, OTK ZU 2014, no. 4/A, item 37; 22 June 2015, SK 29/13, OTK ZU 2015, no. 6/A, item 83; the resolution of the Constitutional Tribunal of 20 March 2013, SK 66/12, OTK ZU 2013, no. 3/A, item 35.

[25] Examples of procedural situations in which the issuance of a judgment is unnecessary are summarised in the judgment of the Tribunal of 3 December 2015, K 34/15, OTK ZU 2015, no. 11/A, item 185.

of these violations is often used in the judicial review of constitutionality, not just for rhetorical purposes. However, when such evaluations are conducted, the criteria used for qualifying some violations as more serious than others are not disclosed. The elaboration of such criteria, and thus incorporating the gradation of constitutional violations into a theoretical framework, is justified—for several reasons.

Firstly, establishing the grounds for classifying certain constitutional violations as flagrant makes it possible to assess the need to apply Article 171(3) of the Constitution, whereby a constitutive organ of local government can be dissolved due to flagrant violations of the Constitution. It should be mentioned, however, that the practical applications of the criteria employed by the Sejm for making such an assessment are limited, as under the current legislative framework the resolution to dissolve such an organ is not subject to the control of any judicial authority.[26] This means that any possible criteria for gradating the unconstitutional activities of an organ of local government may only be used for the Sejm's self-monitoring. Moreover, to date, Article 171(3) of the Constitution has not been applied—even once. The situation is similar with regard to the practical applicability of the criteria employed for assessing the correctness of the Financial Ombudsman's dismissal by the Prime Minister on the basis of the relevant provision of the Act.

Secondly, defining the grounds for evaluating the constitutional violations as more or less serious would be useful from the point of view of constitutional justice, particularly with regard to applying the clause which can defer the termination of a normative act's binding force, citing the argument that if the Tribunal's judgment immediately entered into force it would create a state of even greater unconstitutionality. Failure to disclose the motives for deferral, or revealing them piecemeal, or with reference to purely intuitive measures, is not conducive to the Tribunal's judgments being transparent.

Thirdly, in certain situations the President makes similar calculations when deciding on the signing of a bill. It may happen that, in the opinion of the head of state, the bill is unconstitutional, but not signing it would entail retaining existing solutions which violate the Constitution even more, or creating a legal vacuum that the President views as causing an even deeper state of unconstitutionality. In such cases, the President should be expected to carry out reasoning similar to that of the Tribunal, when it considers the implementation of Article 190(3) of the Constitution; if the President concludes that not introducing the bill into circulation would lead to a more serious violation of the Constitution than if it entered into force, the President should sign it and then use the available instruments for the restitution of constitutionality.[27] The past provides many examples of such presidential conduct.[28]

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[26] This has led to legitimate criticism, see M. Radajewski, Rozwiązanie organu stanowiącego jednostki samorządu terytorialnego przez Sejm, *Samorząd Terytorialny* 26(6), 2016: 26–27.

[27] See W. Brzozowski, Prawne relacje Prezydenta RP z Trybunałem Konstytucyjnym, in: T. Mołdawa, J. Szymanek (eds.), *Instytucja president. Zagadnienia teorii i praktyki na tle doświadczeń polskich oraz wybranych państw obcych*, Warsaw, 2010: 24.

[28] This happened with the Act of 16 September 2011, On Amendments to the Law on Access to Public Information and Other Acts [o zmianie ustawy o dostępie do informacji publicznej oraz

Fourthly, the use of clear criteria for assessing the degree of constitutional violation could be useful in the process of enforcing constitutional responsibility. It should be noted, however, that this assessment is irrelevant from the point of view of the admissibility of initiating proper proceedings. The Constitution does not limit the liability before the Tribunal of State to cases of flagrant (gross) infringement of its provisions (see Articles 145(1) and 198 (1) of the Constitution), so it is to be assumed that such liability may also be incurred for infringements of lesser gravity; finally, however, the decision to initiate proceedings and bring an indictment is made by the will of the parliamentary majority. Determining the degree of constitutional violation can, however, be important when the Tribunal of State decides on the sanctions for constitutional transgressions, for example, in order to determine the applicable time frame for prohibitions and the loss of certain rights laid down in the law.[29]

Fifth, there is a clear relationship between the gradated nature of constitutional violation and the concept of a normative act that does not exist (the so-called 'non-act'). This concept is based on the assumption that in the context of the law-making process it is possible to distinguish rules that are so important that breaking them not only results in a flawed act, but in the failure to create the act.[30] It can be argued that distinguishing between violations of constitutional norms that lead to one of these consequences—either the unconstitutionality of the act or the ineffective creation of the legislative act—in fact involves the gradation of infringements in the field of law-making.

IV. In legal science, criteria for the gradation of unconstitutionality have so far been sought primarily in connection with the need to interpret the notion of flagrant violation of the Constitution referred to in Article 171(3) of the Constitution. These attempts usually consisted of paraphrasing the classification of 'flagrant' with words with similar meanings (such as *vivid*, *obvious*, *significant*, *obviously unacceptable*), which led to the conclusion that it would be difficult

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niektórych innych ustaw] (JL RP No. 204, item 1195, as amended), the Act of 13 January 2012, On Amendments to the Law on Pensions from the Social Security Fund and Other Acts [o zmianie ustawy o emeryturach i rentach z Funduszu Ubezpieczeń Społecznych oraz niektórych innych ustaw] (JL RP item 118), the Act of 22 November 2013, On the Conduct towards People with Mental Disorders Constituting a Danger to the Life, Health of Sexual Freedom of Other People [o postępowaniu wobec osób z zaburzeniami psychicznymi stwarzających zagrożenie życia, zdrowia lub wolności seksualnej innych osób] (JL RP 2014, item 24, as amended), the Act of 6 December 2013, On Amendments to Certain Laws with Regard to Determining the Regulations for Paying Pensions from Funds Saved in Open Pensions Funds [o zmianie niektórych ustaw w związku z określeniem zasad wypłaty emerytur ze środków zgromadzonych w otwartych funduszach emerytalnych] (JL RP item 1717) and the Act of 25 June 2015, On Infertility Treatment [o leczeniu niepłodności] (consolidated text—JL RP 2017, item 865).

[29] See Article 25 sec. 2 of the Act of 26 March 1982, On the Tribunal of State [o Trybunale Stanu] (consolidated text—JL RP 2016, item 2050).

[30] See J. Podkowik, Czy „istnieją" akty normatywne „nieistniejące" (nieakty)?, *Przegląd Legislacyjny* 74(4), 2010: 5; M. Hermann, Stwierdzenie niekonstytucyjności jako czynność konwencjonalna unieważnienia aktu normatywnego, in: M. Bernatt, J. Królikowski, M. Ziółkowski (eds.), *Skutki wyroków Trybunału Konstytucyjnego w sferze stosowania prawa*, Warsaw, 2013: 256ff.

to establish unambiguous evaluation criteria.[31] Occasionally, the interpretation of the term 'flagrant violation' has received more detailed consideration, which for example concludes that a key element is the social harm caused, and that a flagrant violation can only be committed in respect to areas covered by local government.[32] It is difficult to predict how these considerations can be generalised, and whether they could find application in cases falling beyond the scope of those described in Article 171(3) of the Constitution.

Appealing to the obviousness of the violation would certainly not be sufficient, for at least three reasons. Firstly, over the years the concept of the direct comprehension of legal text has met with some basic theoretical objections.[33] Secondly, many constitutional norms are formulated in such an abstract way that it is more difficult to establish they have been violated than is the case with statutory norms, and it is complex and demanding from an intellectual point of view. Thirdly, it is highly questionable whether the ease with which a violation can be established should be linked to the gravity of the violation.[34] For similar reasons—and also because of the political context of implementing the constitution—it would be misleading to use sociological criteria, such as social outcry or widespread disapproval of the perpetrator's conduct.

Neither can psychological factors that might accompany a constitutional violation make it flagrant, such as the intention or motivation behind it, which might deserve condemnation. A deliberate attempt to violate the Constitution can make it more reprehensible,[35] however, from the point of view of constitutional sanctions, it is in principle irrelevant whether the conflict with the Constitution is the result of deliberate action or, for example, ignorance of the law.[36]

A novel of criterion for the gradation of unconstitutionality was included in one of the dissenting opinions of judge Zbigniew Cieślak on a judgment of the Constitutional Tribunal.[37] The author of this *votum separatum* argued that in the legislative process the Constitution could be violated either flagrantly or in an ordinary manner, and the deciding factor is whether the principle of common good is violated:

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[31] See A. Skoczylas, W. Piątek, comments on Article 171, in: M. Safjan, L. Bosek (eds.), *Konstytucja RP. Komentarz*, vol. 2, Warsaw, 2016: 957 and the views of other authors cited therein.

[32] M. Radajewski, op. cit.: 28.

[33] See, for example, M. Zieliński, M. Zirk-Sadowski, Klaryfikacyjność i derywacyjność w integrowaniu polskich teorii wykładni prawa, *Ruch Prawniczy, Ekonomiczny i Socjologiczny* 73(2), 2011: 102–104.

[34] The criterion of the ease of identifying the violation may be applicable in other contexts. It suffices to mention the concept of obvious unconstitutionality, which, according to creators of this concept, allows the court to refrain from applying the provisions of a statute and use a self-executing constitutional provision instead. See R. Hauser, J. Trzciński, *Prawotwórcze znaczenie orzeczeń Trybunału Konstytucyjnego w orzecznictwie Naczelnego Sądu Administracyjnego*, Warsaw, 2008: 29.

[35] See the judgments of the Constitutional Tribunal of 16 January 2007, U 5/06, OTK ZU 2007, no. 1/A, item 3; and 11 August 2016, K 39/16 (not published in the Journal of Law, removed from OTK ZU).

[36] See M. Dąbrowski, Sankcje konstytucyjne. Istota, funkcje oraz rodzaje, *Przegląd Sejmowy* 124(5), 2014: 20–21.

[37] The dissenting opinion of Z. Cieślak on the judgment of the Constitutional Tribunal of 7 May 2014, K 43/12, OTK ZU 2014, no. 5/A, item 50.

> A flagrant violation of the Constitution is one in which there is an immanent violation (related essentially to the given case) of Article 1 of the Constitution, and a simultaneous and total violation of the values relating to the basis for constitutional control. [...] The consequences of a flagrant violation of the Constitution are as follows: 1) the violation is detrimental to the interests of the Republic as a systemic emanation of Poland, in the literal meaning of the preamble of the Constitution; 2) abolishes the relationship between a citizen and the state, or significantly threatens this; 3) significantly disturbs the harmony of communities in the state; 4) undermines the solidarity between people; 5) is detrimental to the cultural and civilisational foundations of national identity.

The violation of the principle of common good as a measure of the degree of the unconstitutionality of an investigated norm is interesting and is worthy of consideration, but it would seem that Article 1 of the Constitution is still too little recognised by the case-law for it to be considered as a sufficiently precise indicator. Questions arise concerning the way that values and phenomena are defined in the passage cited above (for example, 'detrimental to the Republic', 'the relationship between the citizen with the state', 'harmony of the communities', 'undermining the foundations'). Moreover, it is difficult to judge whether the above findings could be used for gradating the unconstitutionality of implementing acts of law, or if they were developed solely for the benefit of the constitutional review.

V. The main thesis of this paper is that the gradation of unconstitutionality should be based on a combined consideration of two fundamental factors: 1) the importance (weight) of the norm violated when the overall context of constitutional norms is considered; 2) the intensity of the constitutional norm violation, which means the scope of eliminating its normative consequences by an incompatible act of law creation or application. Both of these criteria are, of course, interpretative guidelines for evaluation and should be applied *a casu ad casum*.

Re. 1) As for the first element, there is no doubt that constitutional norms, despite their lack of formal hierarchy, may differ in terms of their structure and function in the legal order of the state.[38] On the basis of the concept of the internal hierarchy of constitutional norms, norms of particular importance, which express the fundamental determinants of the state's identity, are recognised as systemic principles. There are, however, no obstacles to seeing other dependencies and interdependencies between the constitutional norms.

Some constitutional norms operate as part of a complex set of actions that must be implemented together so as to achieve the state of affairs desired by the Constitution. The implication of this is not so much that one act of law-making or implementation thereby violates many constitutional benchmarks, as is it rather a situation in which a primary violation would entail the violation of subsequent benchmarks. For example, if an authorised state body refused to exercise its competence to appoint another state body—contrary

[38] See K. Działocha, Hierarchia norm konstytucyjnych i jej rola w rozstrzyganiu kolizji norm, in: J. Trzciński (ed.), *Charakter i struktura norm konstytucji*, Warsaw, 1997: 91ff.

to the requirements of constitutional norms—this leads to the latter body being unable to perform its constitutional function, and thus 'deactivates' the whole set of provisions determining its tasks and competences. Causing the appointment of a constitutional body to be conducted in an irregular manner is not only a violation of a norm that affects its competence to appoint, but also results in the flawed decisions being made by that body.[39]

Interdependencies between constitutional norms can also be more difficult to grasp and less obvious. Breaching the principle of proportionality in the Sejm elections by implementing majority rule not only violates Article 96(2) of the Constitution, but is also in conflict with the meaning of the constitutional regulations for performing conventional acts with a specified minimal number of Members, or adopting resolutions by qualified majority voting (for example, Article 98(3), Article 121(3), Article 122(5), Article 158(1) and (2) of the Constitution). These regulations have been formulated in such a way as to ensure that the opposition has access to the parliamentary process, and to force political cooperation between the ruling party and the representatives of parties in the minority. At the same time, deformations resulting from the use of a majority rule—in a party system other than a two-party or two-block system, leads to a genuine disregard of the meaning of these regulations and to a cascade of unconstitutional consequences.

There are also constitutional norms whose purpose is to guarantee other constitutional norms, and for example, the violation of the principle of the Constitutional Tribunal's judicial independence affects the proper exercise of the powers conferred on this body, since the independence of this body is not a value *per se,* but is instrumental and thus serves to protect other values. In turn, the denial of judicial process to a particular category of subjects not only constitutes an infringement of Article 77(2) of the Constitution (and, potentially, of the prohibition of discrimination in Article 32(2)), but it also deactivates the protection of all the rights that are enforceable in the court.[40]

A violation of constitutional norms that restricts, deforms or prevents the implementation of other constitutional norms should be judged as more serious than the 'isolated' violation of a single norm.

With regard to provisions devoted to individual rights and freedoms, the criterion of the importance of the norms violated, considering the overall context of constitutional norms, should also be evaluated with reference to the connection between a given right or freedom and the inherent and inalienable dignity of the person (Article 30 of the Constitution). Although it would be impossible to establish *in abstracto* a hierarchy of constitutional rights and freedoms, there is no doubt that the relationship of some of them to the sphere of people's self-determination is particularly strong. Thus, it is difficult

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[39] A separate issue—which falls beyond the scope of the current work—is the possibility of declaring such flaws in a legally binding manner and describing their consequences so as to resolve the problem with the authority.

[40] This corresponds to the right sometimes highlighted in the doctrine, namely the right to a court as a 'meta-right', a right guaranteeing other rights—see A. Zieliński, Prawo do sądu i organizacja władzy sądowniczej, in: M. Zubik (ed.), *Księga XX-lecia orzecznictwa Trybunału Konstytucyjnego*, Warsaw, 2006: 492–493.

to imagine a situation in which, for example, the violation of freedom from torture (Article 40 of the Constitution) could be judged as less serious than the violation of the right to information on the quality and the protection of the environment (Article 74(3) of the Constitution).

Re. 2) The second of the criteria for the gradation of unconstitutionality is the intensity (depth) of the constitutional norm violation. The starting point for explaining this criterion should be the observation that the conduct of the person obliged to implement the norm may deviate to a greater or lesser extent from the desired pattern, and thus may to a greater or lesser extent achieve the objective of the norm. The commands of norms usually include elements of varying magnitude, and this translates into the intensity (depth) of the violation. When the President signs a bill one day after the constitutional period has expired, this should be considered a less serious constitutional violation than not signing it at all.[41] Conduct which is unsatisfactory from the point of view of the requirements of the norm, but which nevertheless fulfils its basic objective, is a less serious violation than conduct which does not fulfil the norm at all.

On the other hand, conduct which leads to a norm not being fulfilled, for example by abandoning it, can in some cases mean a less serious violation than conduct that is aimed at achieving an objective which is opposed to the *ratio* of that norm (according to the everyday principle that it is better to do nothing than to do harm). Accordingly, if a constitutional authority temporarily puts a hold on the appointment of another constitutional authority, this is a serious infringement, but not as serious as the effective exercise of that competence by an unauthorised authority. It must be borne in mind that reasoning regarding the gradation of unconstitutionality in this area is subject to a great deal of subjectivity, since its correctness depends on the identification of the *ratio* behind the violated norm.

With regard to rights and freedom, one criterion which bears witness to the intensity (depth) of the violation of the norm is derived directly from the text of the Constitution. This concerns the violation of 'the essence of freedoms and rights', which is strictly forbidden (Article 31(3), the second sentence, of the Constitution).[42] When there is an absolute ban on interference with a giv-

[41] The example given does not, however, demonstrate that the procedural aspects of the implementation of a norm are always less relevant than its substantive content. The case-law of the Tribunal states, for example that 'if it is not based on the appropriate authorisation, a normative act which restricts constitutional rights is an example of an exceptionally drastic violation of those rights. Such an act leads in practice to the issuing of acts that implement laws which continue the interference with constitutional law, leading to actions being taken without due legal basis. From the individual's point of view, legislative interference which violates the rules defining the powers of public authorities in the field of law-making is no less serious than interference that violates the substantive requirements of the Constitution' (the judgment of the Constitutional Tribunal of 16 March 2011, K 35/08, OTK ZU 2011, no. 2/A, item 10).

[42] This guarantee prohibits either the formal deprivation of an individual of his or her constitutional right, or the temporary suspension of that right, or the restricting of a right to such an extent that it becomes empty. See A. Niżnik-Mucha, *Zakaz naruszania istoty konstytucyjnych wolności i praw w Konstytucji Rzeczypospolitej Polskiej*, Warsaw, 2014: 322.

en right or freedom (for example Articles 39, 40 and 52(4) of the Constitution), any interference amounts to the violation of its essence. However, there are also reasons for subjecting violations that do not cross this ultimate barrier to gradation. The extent to which public authorities can encroach upon the sphere of an individual's legally protected rights may vary. For example, as noted by the Constitutional Tribunal concerning inviolability and personal freedom: 'interference in human freedom guaranteed by Article 41 of the Constitution is "gradated". In the context of this constitutional guarantee, it is necessary to distinguish the deprivation of human liberty from further interference in this liberty during the period of imprisonment.'[43] Also, the extent of departure from the principle of proportionality can vary—from the use of slightly excessive measures to the use of instruments that can be described as 'grossly disproportionate'.[44] Both the depth of the interference and the extent of the disproportionality should be taken into account. It could be the case that a more serious violation of the constitution will be a somewhat shallower interference, but deviate much more from the purpose of the restriction and thus be grossly disproportionate.

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THE GRADATION OF CONSTITUTIONAL VIOLATIONS

Summary

The constitution can be breached in many ways, from minor infringements to flagrant violations. How serious a violation is depends on two factors: (i) the importance of a violated norm in the structure of the Constitution; (ii) the intensity of the violation (the range of consequences following from that norm, yet eliminated by an unconstitutional act or action). (Ad i) Even though constitutional norms are not arranged in a hierarchical order, some of them need to be respected together so that a particular goal set by the Constitution can be achieved. If the principle of judicial independence is not respected, such a violation affects not only that principle but also the way in which the courts perform their constitutional tasks. If an authorised state body refuses, against the Constitution, to exercise its right to appoint another body, such an action violates a provision determining the appointment procedure, but also leads to the shutdown of the latter body and 'deactivates' the whole set of provisions determining its powers and duties. (Ad ii) Actions taken by a state body may be distant from the pattern desired by the Constitution to a lesser or greater extent. An action which is flawed but pursues the right objectives may be simply unconstitutional, while an action which neglects these objectives or even promotes adverse ones is flagrantly unconstitutional. From that perspective, signing a bill one day after the constitutional period has expired is a violation, but it is a less serious one than not signing it at all.

[43] The judgment of the Constitutional Tribunal of 24 July 2013, Kp 1/13, OTK ZU 2013, no. 6/A, item 83.

[44] See, for example, the judgment of the Constitutional Tribunal of 7 March 2007, K 28/05, OTK ZU 2007, no. 3/A, item 24.