Between Polycentrism and Fragmentation

The Impact of Constitutional Tribunal Rulings on the Polish Legal Order

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1. Introduction

The present research project attempts to answer the question about the real impact of Constitutional Tribunal rulings on the Polish legal order. Researching this question seems to be justified for at least three related reasons.

Firstly, the Polish Constitutional Tribunal (CT) has recently celebrated the twentieth anniversary of its founding and, despite many twists and turns of history, it is an institution that is deeply rooted in the Polish legal order. It has already accumulated a considerable body of rulings which, especially since 1997, has been growing fast. Also, the work of the CT is subject to intensive dogmatic and juristic scrutiny aimed at analyzing and criticising individual theses or examining the rules of law regulating its operations. However, in the writings on the CT of which we are aware, there is no attempt at answering the important question whether and to what degree its achievements translate into the activities of the judicial and legislative branches of government. Meanwhile, on the founding of the CT, and also on its partial reform brought about by the adoption of the 1997 Constitution, great hopes were pinned concerning the rise of ‘a democratic state ruled by law’, protection of civil rights and bringing order to the legislation chaos of recent years (Chruściak 1997, Chruściak, Osiatyński 2001, P. Winczorek 1996). Our research, consequently, aims at filling the gap – even if only in part – in the available knowledge on the CT and, through this, at supplying ideas to reflect upon possible changes to its operations or the legal provisions by which they are governed.

Secondly, a more fundamental problem lurks behind the operations of the Polish CT, namely that of legitimating constitutional courts as institutions going beyond customary roles of judicial organs (cf. Sadurski 1998, Rousseau 1999, Czeszejko-Sochacki 2003, Smolak 2003, Sadurski 2003). On the one hand, their jurisdiction is not typical for courts of law; at times they are charged with encroaching on the competences of democratically legitimated lawmakers, for the principal role of constitutional courts is finding normative acts in contravention of acts of a higher rank. Owing to the natural indeterminateness of constitutional rules, however, they are not solely ‘negative legislators’, i.e. they do not only set aside unconstitutional provisions and those contravening other normative acts, but, exercising their competences, they add some meaning to provisions they interpret. On the other hand, constitutional courts are not judicial organs in the traditional juristic sense of this term. Unlike ordinary courts, judges who sit on them are most often political appointees. They are appointed to constitutional
courts with a view to influencing their rulings. Moreover, the very handing down of rulings does not follow the subsumable model of adjudication, i.e. does not consist in assessing facts in a case in light of the existing rules of law, but in assessing whether rules of law are in agreement with one another.

Although there is no doubt that from the point of view of jurisprudence this argument cannot be settled using a study like ours, the advisability of conducting it is closely related to the determining of the real impact of constitutional courts on legal orders involved. Since the weaker is the impact of constitutional courts on legal practice, the smaller is practical importance of the charge of their insufficient legitimation. In this sense, this report is supposed to be a voice in the contemporary discussion on the scope and legitimation of authority enjoyed by constitutional courts and which may be enjoyed by them.

Thirdly, the rulings of the Polish CT have given rise to discrepant opinions. What is meant here is above all differences in opinion, coming to the knowledge of the general public, between the Constitutional Tribunal, the Supreme Court and the Supreme Administrative Court on some constitutional provisions. This problem has been discussed already for some time going back to the 1980s (cf. Marmaj 1988, Kolański 1992, Sanetra 1996, Stelmachowski 1996, Dudek 1997, Garlicki 1998, Zoll 2001). Although it is not considered urgent now (Garlicki 2006), it has given rise to the presentation of a known thesis about the polycentrism of the Polish legal system (Łętowska 2005a, 2005b, 2006). The thesis basically claims that the courts and other judicial organs in the European legal space exercise their jurisdiction in a manner that is relatively independent of each other and in doing so they use different manners of interpretation. This is also a question of the degree to which legislation can influence a legal order and court rulings, and of the manner in which the CT restricts the scope of activity of legislative institutions. The last mentioned question was raised in public discussions in Poland against the background of a political claim about ‘legal impossibilism’, i.e. an opinion that CT rulings (and more broadly - of independent organs of the judiciary) supposedly hamper effective governance. Our research, thus, is to verify allegations, made already some time ago but unsupported by any results of empirical studies, about the impact of the CT on the Polish legal order.

1.1. Main assumptions of the study

The problems outlined above are discussed from the so-called external, and not internal, point of view (Hart 1998:127ff, cf. Cotterrell 2003:90ff.). Consequently, we take the position of an observer who
stays out of a given dispute and only records certain patterns in the actions taken by its participants following from the binding force of specific rules of law. Hence, we take the question of the CT impact on the legal order without regard to the juristic understanding of constitutional rulings and being guided instead by the sociological approach to law holding it to be an autonomous “social subsystem” (Luhmann 1993, Teubner 1989). We hold it thus to be an order of communication acts forming a separate whole and distinguished from other acts making up society on the basis of its specific functional characteristics. Without going into unnecessary theoretical discussions on the precise sense of this term (a similar approach to a legal order in Chauvin, Winczorek J., Winczorek P., 2006), we want to stress that we are interested in the real activity of individual ‘actors’ within the Polish legal order and not in the alleged impact of their rulings or decisions on the abstract ‘legal system’. Unlike many authors interested, at first glance, in similar problems (see for instance Holländer 2000, Nita 2001, Oliwniak 2003), we do not take the impact of the CT on the legal order to be a removal from or introduction to it specific rules of law. Instead, the object of our study is the relationship between the CT rulings and the actions of entities making and applying the law.

From this point of view, contrary to assumptions made in the dogmatics of constitutional law, the handing down of a ruling by the CT does not appear to be an event having any immanent bearing on the Polish legal order. Rather, it is viewed as an event the impact of which on the legal order is yet to be determined, as the scope and strength of the CT impact on other actors in the legal order depend on the way such a ruling modifies their actions which together make up this legal order. This, of course, does not mean that the impact is independent of the CT’s will, but rather that it does not consist solely in removing from a ‘legal system’ specific rules of law following an interpretation of the Constitution and other normative acts by the CT. The effect of this is the fact that the strength and scope of the CT’s impact on the legal order are a resultant of its own actions and typical reactions to these actions characteristic of the other actors in the legal order.

Naturally, the strength of the relationship between the actions of the CT, ordinary courts and lawmaking bodies is of utmost importance. It seems that even if one adopts a purely instrumental external perspective, then it is necessary to adopt a view holding it to be desirable to have the actions of all these institutions clearly interrelated. The reasons behind this view are twofold. First, quite obviously, this is all about the effectiveness of law. The effective implementation of civil rights and freedoms and those enjoyed by other entities as well as of principles underlying the political system is conceivable only when CT rulings finding
in abstracto that such rights or principles have been infringed will be respected in concreto by appropriate legislative and judicial bodies.

It must also be stressed that the expectation of effectiveness applies not only to direct realization of a specific CT ruling (e.g. its enforcement after the proceedings have been resumed or amendments to legislation have been introduced), but also to similar cases entertained by courts in the future or to future legislative bills referring to similar legal institutions, methods of regulation or legislating techniques. What is meant here is situations where a specific court judgment or a piece of legislation - even if it does not directly concern the issues that were subjected to constitutional review - refers to CT rulings. Hence, in a desired state of affairs, the CT’s ruling policy - expressed as a theory of human and civil rights and freedoms, and manifested in interpretations of the institutions and principles underlying the political system etc. - is relied on by the other actors together making up the legal order in their own actions. If it is not so, CT rulings will remain abstract juristic constructs and will not have any bearing on the situation of citizens. Thus, the more strongly CT rulings will affect judicial decisions and legislation, the better will be satisfied the demand that civil rights and freedoms, and principles underlying the political system should be protected.

Second, the question of the impact the CT has on the legal order is not limited only to the problem of effective protection of civil rights and those enjoyed by other entities. Hence, it is neither simply a question of the internal organization of a legal order nor even of the relationship between law and politics. Today constitutional courts (and more broadly constitutional law) cannot be considered solely in terms of the classic theory of democracy, i.e. as an element of the system of checks and balances. Instead, it must be recognized that they perform other more wide-ranging functions (cf. e.g. Luhmann 1966, Rotter 1974, Teubner 2003, Habermas 2005, Priban 2006). In the quite consistent opinion of the named authors, constitutional courts guarantee the existence of social spheres of freedom, which is supposed to mean that by narrowing down the scope of possible political interventions into social life, they contribute to the rise of spontaneous, non-political mechanisms for organizing it, which do not result from legal regulations. At the same time, however, the power to set final limits to politics and, therefore, to set up specific ‘spheres of freedom’ entails the power to build specific relationships between individuals, organizations or social groups within such spheres. If courts and legislatures ignore CT rulings, they will hinder the development of such spheres of freedom. Consequently, this may lead to the rise of patterns in social life relying on too strong a dependence on political decisions (e.g. in the form of political patronage or emergence of radical interest groups) and, as a result, bringing about their dysfunctionality.
A case in point is the question (taken up by the Polish Constitutional Tribunal) of pension funds or charging tuition in institutions of higher learning. Laying down constitutionally admissible framework for regulating these issues, provided, of course, it is ‘taken up’ by judicial decisions and legislation, does not mean only an abstract defining of civil rights and duties. It also decides the incomes of pension funds and institutions of higher learning, determines the financial situation of old-age pensioners, decides the educational chances of young people from different backgrounds, indirectly bringing about far-reaching and hardly foreseeable social consequences. A situation where such social problems are used as a munitions store in political struggle is, for obvious reasons, socially unfavourable. In this sense, the scope of the CT’s impact on the Polish legal order is a governance problem (Gerstenberg 2002) - it touches upon the ‘technology of power’. A decision on constitutionality or unconstitutionality of a given rule of law means making a decision on the admissibility or inadmissibility of political intervention and, consequently, on the size of the said spheres of freedom.

It is worth noting here that in the literature on the ‘sociology of constitution’ one can find descriptions of cases of symbolic constitutionalization, i.e. cases of using human and civil rights as political symbols or objectives referred to without any intent of attaining them. In such situations, the guarantees of civil freedoms function as an instrument of political manipulation (being, in this sense, an effective instrument of power) but they are not real guarantees (Neves 1998, Neves 1997, Priban 2007 see also Podgórecki 1997, Moś 1989). Hence, they are not ‘internally’ effective and their ‘external’ effectiveness is based on subjecting other spheres of life to the logic of political actions. In effect, this type of constitutionalization is socially dysfunctional as it does not let people develop any spheres of freedom, which, in turn, harms the autonomy of business, academic or religious spheres, etc. The activity of constitutional courts is, in this context, of fundamental importance, because providing effective protection to civil liberties is a prerequisite of effective functioning of both legal order, the state and other spheres of social life. From this point of view, the impact of the CT on judicial decisions and legislative policies favours the development of socially advantageous rules of politics, whereas an opposite situation contributes towards the emergence of socially dysfunctional logic of politics.

1.2. Normative models of adjudication and legal order

Our findings concerning the above indicated issues rely upon a conviction that regardless of their jurisdictions defined by statute, courts (including constitutional courts) may influence the scope of their impact on a legal order. This power is, obviously, to some degree
related to their 'bargaining' power when changes are introduced to a political system (on successes and failures of the Polish CT in this area see Garlicki 2006). It depends most, however, on the adjudication methodology adopted by constitutional courts and, consequently, on the way they understand their aims and tasks. Following Robert Alexy, we adopt here a distinction into two major and one secondary models of adjudication prevailing among constitutional courts (Alexy 1985:104ff.). The first one - the 'principles model' takes constitutional rules to be standards of conduct guaranteeing civil liberties. To apply them, one needs each time to 'weigh' them, that is to determine the relative importance of a given constitutional rule vis à vis others, and to accord protection to a specific interest at the same time weakening the protection given to all other interests.

Juxtaposed to this model, the 'rules model' draws on the classic understanding of duties entrusted to constitutional courts, following the ideas of Hans Kelsen, where the subject and basis of adjudication are exclusively rules, i.e. standards that allow courts to assess a situation in binary terms only. A rule may be complied with or infringed (e.g. a driver on a public road either stays within a speed limit or exceeds it). Alexy, recognizing that it is not possible to implement fully any of these models, proposes to apply an intermediate model of 'principles-rules'. From this point of view, constitutional courts may adopt adjudication strategies placed somewhere on the continuum between the rules model and the principles model.

A separate issue is the possible use of so-called external standards by constitutional courts when adjudication, in particular, making reference, when interpreting constitutional provisions and others being an object of judicial review, to the presumed aims and motives of policies (cf. Dworkin 1998, Dworkin 2006, Morawski 2006) that were behind the adoption of provisions being reviewed. Hence, constitutional courts in their opinions may refer to socially recognized values and ascribe to the legislator the intention to achieve specific social effects. The courts will word their opinions in such a way so that, as much as it is possible, they serve the purpose of materializing desired values or attaining set goals. In this way, the courts 'add' a specific pool of meanings to the legal text and at the same time they go beyond the approach to law associated with the positivist tradition in legal scholarship. At the opposite extreme, courts may restrict their opinions to analyses of the legal text and consider as admissible only such rulings that follow only and directly from it.

It must also be observed that the use of the options named above can be graded. In the writings on the subject, attention is drawn to the

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**“Principles model”**

**“Rules model”**
problems of judicial activism and restraint (Garlicki 1987, Smolak 2005). In case of constitutional courts, activism may consist in the activity of judges searching for any incompatibility of law with rules of a higher rank and expanding thus their jurisdictions or taking specific decisions being guided by the desire to introduce certain social changes (Powers 2002:2). However, it is observed that constitutional courts (inter alia because of the problems with legitimation mentioned earlier) rather favour restraint, i.e. they do not use their power to declare laws unconstitutional, unless, in their opinion, it is absolutely necessary (see Informacja 2006:37). Nevertheless, the existence of such options results, in our opinion, in a possibility that a constitutional court will hand down different rulings in the same legal situation. It may be presumed that discrepant rulings in the same case stand different chances of affecting other courts and legislation. In this sense, the adjudication strategy adopted by the CT determines its chances of success in exerting an impact on the legal order.

Similar questions have already been discussed in Poland on several occasions, and in different contexts for that matter. First, the discussions touched upon the problem of the consistency of the Polish CT’s model and practice with one of the existing models of constitutional courts known around the world. There is a widespread agreement, in this context, that the Polish CT’s formula shows clear affinities with the model mentioned earlier, developed by Hans Kelsen, where a possibility of adjudication with reference to external standards and principles is rejected outright. In this model the only object of review allowed is abstract and general rules of law (and not, for instance, administrative or judicial decisions). A different view, however, holds that the special character of political transformations in Eastern European countries would suggest adopting a different model of constitutional courts from Kelsen's or at least modifying it (Granat 2003, Smolak 2005).

Second, the CT’s rulings have been occasionally criticised for exceeding formalism and excessive attachment to the positivist tradition in interpreting the law. An argument was offered that a positivist adjudication strategy might work when political situation is relatively stable. Whereas the political situation in the countries of Eastern Europe is volatile enough to justify adopting a different strategy (Morawski 1994, Czarnota, Krygier 2007, see also for opposite views Działocha, Gromski 1995).

Finally, the literature on the subject draws attention to the differences between the so-called Austrian, German and decentralized models of constitutional review (Garlicki 1987, Czeszejko-Sochacki 2003, Banaszak 2007). The Austrian model provides that constitutional review is to be performed by a body specially appointed for this purpose.
The impact of CT model of adjudication on legal order (Constitutional Tribunal) and that the review should be carried out in separation from specific disputes; instead, it consists in ‘abstract’ settling the question of constitutionality. In the decentralized model, the power to interpret and apply constitutional rules is vested in all courts, although the rulings of the Supreme Court usually carry the most weight. In this model, too, constitutional review is to be performed in relation to specific cases while a court has no power to entertain an abstract question of law or issue a general opinion. Finally, in the German model, which may be considered as an intermediate one, there is a specialized body which, however, next to performing abstract constitutional review, may entertain also complaints on administrative or judicial decisions contravening the constitution.

In relation to the above possibilities, Polish authors widely discussed the jurisdiction of the CT with respect to the institution of constitutional complaint and the power of giving universally binding interpretations of statutes. It was considered in this connection whether it would not be proper to adopt a different model of constitutional review from the existing one, i.e. moving away from the Austrian model in favour of a solution closer to the German one. Our study differs from these discussions in that it does not intrinsically matter, from the external point of view we have adopted, which adjudication model is followed. The choice of a model, however, has a decisive impact on the way a legal order is organized (cf. Luhmann 1993:214ff., 297ff., 338ff.), and may be assessed from this perspective. Hence, we do not believe that the adoption of any of the models is right in itself but rather that a model of adjudication should be consistent with the goals set for constitutional review. Depending on the model prevailing in the rulings of the CT and its relationship to adjudication models in similar matters followed by ordinary courts, the impact of the CT on the legal order will be weaker or stronger and, consequently, such will be the functionality of the system of civil liberties protection vis-à-vis other areas of social life.

Therefore, if, as a result of our study, we take sides in the above mentioned discussions, it is solely because such a position seems to be best for maximizing the impact of the CT on the Polish legal order. The position presented in this report does not represent the positions individual authors might have taken, had they adopted an ‘internal’ perspective.

1.3. Methodology of research

Before discussing the research methods used by us, it must be made clear that the term ‘legal order’ is very capacious. It comprises the law itself, judicial decisions, administrative rulings and legislation, as well as science of law or other phenomena known to sociologists of law as legal...
culture or legal awareness, etc. Our research covers, out of necessity, only a section of the object of study so defined.

First, the research focuses only on institutionally defined actors active in the Polish legal order, namely courts of law and the Sejm as a lawmaking bodies. Our research does not cover the CT impact on the legal awareness of citizens (especially on the awareness of rights they enjoy and the procedures necessary to exercise such rights), nor does it discuss the reception of CT rulings in juristic writings and the science of law.

Second, we have adopted an assumption that these actors are ‘black boxes’, i.e. that their activities are an ultimate object of study which does not let itself to be analyzed any further. Hence, we do not analyze parliamentary debates nor the mechanisms used by judges to reach final judgments; what we do analyze, however, is only the products of such discussions or mechanisms, i.e. judicial decisions and promulgated normative acts.

Third, the scope of our research is restricted by the availability of materials for study.

It just so happens that it is impossible to analyze all the rulings of all Polish courts or the whole body of legislation (including, inter alia, local bylaws). The reason is that suitable material for study is unavailable and even if it were, its sheer volume would be overwhelming. Consequently, we have studied only published judgments of the courts of the last instance4 and published legislation adopted by the Sejm.

To these research goals, we have subordinated our methodology (see Fig. 1). The research we have undertaken can be divided into two stages. We have set out by performing a qualitative analysis of CT rulings issued under the 1997 Constitution until 2005 and concerning constitutional review. The purpose of the analysis was to find an answer to the question which of the adjudication models the CT approached and describe its rulings in other respects. In order to do that each analyzed ruling was described using ninety categories (variables) subsequently entered into a suitable data base. We placed a special emphasis on determining the methods of interpretation and main motives of each ruling. In this respect, a unit of analysis was a ‘thesis’, i.e. a pronouncement by the CT, capable of being distinguished in terms of its contents and interpretation technique, included in the opinion attached to the ruling. Some of the categories used by us applied to a ruling as a whole.
To this analysis, we have subjected a sample of 228 rulings\(^6\) of the CT, selected at random from about 500 rulings issued in this period and deciding a case on its merits.\(^6\) Thus, we have not analyzed arguments of the CT offered during a preliminary review of constitutional complaints nor opinions to judgments discontinuing proceedings in their entirety.\(^7\) This follows from the assumption that a possible impact of the CT on the Polish legal order will, to a much greater degree, follow from rulings deciding a case upon its merits than from those where such a decision is not made. As a result of this procedure we have obtained data on 1871 theses of the CT.

In the second step, we have subjected to a similar analysis the rulings of the Supreme Court (SC) and courts of appeal as well as the Supreme Administrative Court (SAC) and Provincial Administrative Courts (PACs), and, finally, the legislation enacted by the Sejm (lower house of Parliament). In the case of the SC and SAC the study included all rulings published after 1997 and available in electronic databases. To a contentwise analysis we have subjected only those rulings that referred to the same regulations that had been scrutinized by the CT. In sum, the study comprised 491 rulings of the SC and other ordinary courts and 285 rulings of administrative courts which together supplied 600 theses of the SC and courts of appeal and 463 theses of the SAC and PACs. The theses were paired with relevant theses of the CT and assessed as to their consistency. A record was also made of the fact of citing specific CT theses by the court in question.
Of crucial importance for our research is, obviously, the concept of ‘impact’. As it has already been said, we define it by referring to the actions of individual actors in the legal order: courts and lawmaking bodies. This means that in the case of the two major domains of our interest we find the existence of impact relying on different premises. In the case of judicial decisions, we believe that the CT may be taken to have an impact on the actions of courts when the following three conditions are met: when its theses are reflected in the theses of courts, when courts point to the CT as the source of beliefs shared by them, and when between the CT ruling and the decision of a court there is a time sequence. Consequently, we believe that the frequency of situations when the theses of the CT and ordinary courts meet the conditions listed above is the index (measure) of the CT impact on judicial decisions.

With regard to lawmaking our understanding of the CT impact is simpler. We have not analyzed statutes adopted by the Sejm from the point of view of their consistency or inconsistency with CT rulings, nor have we investigated whether the opinion of the CT on the issues at hand was taken into account during the passage of a bill through the Sejm. This would call for detailed qualitative analyses and should be studied separately. Going beyond the scope of research thus defined would require adopting a different research perspective from the external perspective adopted by us and making hypotheses also about what the CT should have done and not only about what it, and the lawmaking bodies, actually did.

What we were interested in was whether the CT’s finding some provisions of normative acts unconstitutional drew any response from the lawmaker, i.e. whether it took any action in response to the regulations he enacted.
being declared null and void. As it is known, the CT’s judgments bind all
actors by the operation of law and none of them may cite a provision
that has been struck out as a basis for a decision or judgment. It does
not follow from this, however, that the striking out of specific legal
provisions by the CT alone always restores constitutionality and allows
organs applying the law to make decisions. In some cases, CT rulings
bring about real legal loopholes that may be removed only by the
action of the lawmaker. Similar situations arise when the striking out of
some provisions results in the contradictions in the law that cannot be
removed through interpretation or questions the ratio legis of a given
normative act. In such cases lawmaking bodies must undertake some
remedial actions. The situation becomes even more complicated when,
following the CT ruling, a statute is struck out and replaced with a new
one. Although the provision questioned by the CT ‘disappears’, the
problem mentioned in the opinion to a ruling rests unsolved.

In the course of research, it has turned out that even this modestly
drafted research plan faced major difficulties related to the necessary
defining of the concept of ‘judgment execution’, i.e. determining what
amendment to a piece of legislation, whose constitutionality has been
questioned by the CT, is the execution of its judgment, and what is not
(see part IV below). Since the sample of 228 CT rulings has turned out
to be inadequate to analyze the effects of rulings holding some legislation
unconstitutional (the sample comprised only a smaller portion of
judgments of interest to us), the analysis has been extended to all
judgments containing such a finding, 302 in number. Next, we
focused on 242 judgments that found some statutory regulations
unconstitutional.® Our research steps are shown in the diagram below.

Table 1. Research stages

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<tr>
<th>No</th>
<th>Action</th>
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<tbody>
<tr>
<td>1</td>
<td>Analysis and coding of CT judgments concerning statutory provisions and executive regulations contravening the Constitution</td>
</tr>
<tr>
<td>2</td>
<td>Analysis of statutory provisions questioned by the CT (Determining authors of bills and the number of amendments)</td>
</tr>
<tr>
<td>3</td>
<td>Analysis of amended statutory provisions questioned by the CT (determining the authors of amendment bills and the number of amendments after CT judgment)</td>
</tr>
<tr>
<td>4</td>
<td>Determining the number of amended statutes ‘enforcing’ a CT judgment</td>
</tr>
</tbody>
</table>

Source: own compilation.

The material for our study consisted of statistics published by the CT
and the Internet database Rulings of the Constitutional Tribunal. Next,
we tried to trace what happened to the statutes whose constitutionality
had been questioned. For this purpose we made use of data contained
in the electronic data base Lex by Wolters Kluwers and publicly accessible bases of the Chancellery of the Sejm. In this way we have gathered data illustrating the processes of making and amending the law. The most difficult aspect of this query was finding the information whether a piece of legislation questioned by the CT had been repaired - amended.

1.4. Plan of the report

The remaining text of this report is divided into four parts. In the first part, we present a general description of CT rulings that emerges from the study. We attempt there to answer the question what the adjudication model adopted by the CT is and what other factors influencing its rulings are: the activity of individual applicants and other participants in proceedings, the structure of constitutional review patterns cited by them and the structure of normative acts examined by the CT, etc. The second part of the report is devoted to the impact of the CT on courts and has been divided further into two sections. In the first one, we analyze the impact of CT rulings on the decisions of administrative courts while in the second we present the results of research into the impact of the CT on the rulings of the Supreme Court and courts of appeal. The next part of the report discusses the impact of the CT on legislation. The report concludes with a summary of preceding parts and a presentation of conclusions following from the research.
2. The structure and character of Constitutional Tribunal rulings as factors determining the Tribunal’s impact on the legal order

We begin the presentation of the results of our research with findings on the adjudication methodology adopted by the CT. In sum, we attempt to answer the question what, empirically, the adjudication model adopted by the Polish Constitutional Tribunal is. We also undertake an analysis of selected characteristics of legal acts being benchmarks used in constitutional review and being objects of such review as well as data on the activity of entities appearing before the CT. We assume that ultimately it is these factors that determine the possibilities and consequences of the way the CT shapes its rulings, ergo they affect the impact of the CT on the legal order.

2.1. Methods of interpretation used by the Constitutional Tribunal

The CT uses all methods of interpreting the law known to the Polish legal culture. What is interesting, however, is the fact that both in the case of interpreting provisions serving as benchmarks in constitutional review (provisions of the Constitution in 85 per cent of cases in the researched sample) and the provisions subjected to such review, the CT most often uses linguistic and systemic interpretations. Each of them served to formulate over 30 per cent of theses that we have found in the rulings of the CT. On the other hand with respect to provisions serving as benchmarks for constitutional review, only in 15 per cent of theses functional interpretation was used. Other interpretation methods were taken advantage of even more rarely. We have also observed a relatively large group of theses (almost 20%) in which it is hard to identify clearly the interpretation method. In the opinions to the rulings studied one could come across such phrases as “in the opinion of the Tribunal from section X follows Y” or “The Tribunal believes that from principle X follows rule Y”. These were not so much cases of interpretation in the strict sense of the word, as rather a reference to the argument from authority.

These patterns are observable not only in all reconstructed cases of interpreting constitutional review benchmarks but also in those methods of interpreting constitutional provisions, which we considered as principal
when analysing some of the CT theses. There were frequent cases of constructing a given legal norm by the CT using several interpreting methods (e.g. linguistic interpretation with respect to the meaning of terms used in a provision and simultaneously systemic interpretation modifying the meaning of the provision being interpreted, taking account of other provisions comprised in the system of law and affecting the case in hand). Only in the second most important or subsequent method of interpretation, the CT considerably more often used teleological interpretation (almost 20% of theses), while linguistic interpretation was taken advantage of in fewer than 15 per cent of cases. This is understandable: in the Polish legal culture the prevailing opinion holds that legal reasoning begins with linguistic interpretation. The reverse is true for teleological interpretation: Polish jurists are not willing to begin with it, but they readily avail themselves of an argument from ratio legis as a supplement to linguistic and systemic interpretations.

Interpreting the provisions of the Constitution, the CT focuses on their linguistic aspect and not on other contexts. It follows that, next to the linguistic interpretation, the key role in its rulings is played by such variety of systemic interpretation where the meaning of a given provision of the Constitution is determined by making reference to another provision (e.g. the right to have one’s case heard formulated in Sect. 45(1) is considered in the context of Sect. 77(2), Sect. 78, Sect. 176(1) and Sect. 177, etc.). The relationships between the provisions of the Constitution are considered here in term of conflicts of norms and their removal by precisely delineating the scope of their application, and not of optimizing their mutual and simultaneous application. This configuration of interpreting techniques is not conducive to making use of the ‘balancing’ method (Alexy 1984; Tuleja 1997: 82ff.; Morawski 2001: 77-81).

**Figure 3. CT Adjudicating Methodology**

Interpretation methods - review Benchmarks

- percentage of theses

Source: own compilation.
Predominance of formal reasoning

Rules

We have observed that systemic and linguistic interpretations clearly dominate also in the case of interpreting provisions being the objects of revision by the CT. Both methods of interpretation served as basis for over 30 per cent of thesis. The functional interpretation is used by the CT far less frequently (only about 10%). The CT more readily resorts to comparative interpretation (about 10%) than in the case of the interpretation of provisions serving as basis for judicial review. If, however, one considers such comparative interpretation to be a special form of systemic interpretation, broadly understood to comprise not only the Polish law but also the legal systems of foreign countries or the European law, then almost half of indications referring to objects of constitutional review deal with systemic interpretation.

2.2. Adjudication according to rules versus balancing of constitutional principles

Another important element of the description of CT rulings, is its analysis in terms of rules, principles, policies and instances when it cites its own rulings.

As it has been mentioned, following the terminology adopted in the theory of law, by rules one should understand such standards that are conclusive i.e. qualify prescript forms of conduct in binary terms: obedience – breach (Dworkin 1998: 56ff.). In those cases there is no third solution, nor is it possible to weaken such a dichotomy. Rules are thus norms relying on the reasoning of the ‘all or nil’ type. In the event of a conflict of rules one should resort to the formulae of solving conflicts such as ‘higher norm invalidates a lower norm’ and adopt one rule at the same time rejecting the other.
By principles one should understand, in turn, such standards that may be implemented to a greater or lesser degree. Thus, they are inconclusive i.e. they allow for an assessment of the degree to which they have been satisfied. In the event principles come into conflict, no conflict-solving rules are applied which would invalidate one of them in order that the other could be used, but rather ‘principles are balanced so that each of them may be used optimally, i.e. to a degree that makes it possible to use the other one at the same time.

Finally, policies are standards that prescribe conduct not by showing a model of such conduct, but rather by showing the state of affairs that should be achieved. Interestingly enough, policies are formulated in most cases by organs applying the law (for instance, courts) and not by the legislator itself and are believed to be extra-legal standards. A court defines what, in its opinion, the result of a conduct should be, the attainment of which was the legislator’s goal, while it is not interested in the very course the conduct takes.

The analysis of CT rulings conducted by means of the aforementioned categories has shown that 70% of thesis - constitutional and other norms serving as a basis for the review were taken by the CT to be rules. Only in about 25 per cent of thesis justifying a ruling, did the CT consider these norms to be principles. In turn, policies could be identified in only about 2 per cent of theses contained in the studied rulings of the CT. We have arrived at a similar result also in the case of provisions subjected to review: rules cover 75 per cent of directives given expression to in the studied rulings, principles make up about 20 per cent of cases, while policies could be identified in single cases only.

In light of the above results, the manner of interpreting the law by the CT is highly surprising, even more so in the case of the provisions of the Constitution. This is so because the manner of interpreting entails in most cases qualifying civil rights and freedoms, and other constitutional norms as rules. One either has such rights and freedoms in their entirety or one is completely deprived of them. *Tertium non datur*. Speaking slightly metaphorically, being ‘a judge of law’ the CT is a severe judge. It also turns out that, in spite of the opinions prevailing in modern theory and philosophy of law, the process of principles balancing, i.e. a mutual accommodation of two or more conflicting standards, plays a minor role in the adjudication practice of the CT.
The structure and character of Constitutional Tribunal Rulings as factors determining the Tribunal's impact on the legal order
These results are borne out by the findings concerning interpretation methods preferred by the CT. In the case of the provisions serving as a basis for the review, a relationship holds between recognizing a standard as a rule and using linguistic interpretation: almost 40 per cent of all CT’s theses led to the pronouncement of rules, and, at the same time, followed from the use of linguistic interpretation; another 35 per cent of theses also formulating rules were a result of systemic interpretation.

From the point of view of the methods of interpretation, it can be noticed that the use of linguistic interpretation resulted in a formulation of a rule, and not a principle, in over 80 per cent of cases. Meanwhile, systemic interpretation led to a conclusive rule only in 50 per cent of cases and functional interpretation brought the same result in fewer than 30 per cent of cases. We have obtained similar results studying the relationship between the interpretation methods and the reconstruction of the norm as rules and principles with respect to the objects of constitutional review. Also in these cases, linguistic interpretation usually resulted in formulating rules (85%), with systemic interpretation this is true in 70 per cent of cases, while functional interpretation brought such results in 55 per cent of theses.

These results can be plausibly explained. If a court, including a constitutional tribunal, makes use of linguistic interpretation and confines its analysis to legal language only, it is easier for him to make an interpretation decision finding that an addressee of a norm, state of affairs or circumstance is covered by the meaning of a word or phrase, or not. Systemic interpretation does not have to bring such consequences as it consists in determining relationships between many provisions. This can be done by reconstructing both a rule and a principle. This relationship is even weaker in the case of functional and teleological interpretations, because an effect or goal can be achieved both without regard to other socially acceptable values and in agreement with them. Such relationships hold in the opposite direction as well: the more frequently we think in terms of rules, the easier it is to accept a norm reconstructed relying solely on linguistic interpretation; and vice versa: the stronger emphasis is laid on the need to balance different reasons or values, the more willing one becomes to avail oneself of functional or teleological interpretation.

2.3. Rules, principles and policies versus the Constitutional Tribunal as a ‘negative legislator’

Our research has revealed that the CT only rarely makes reference to policies. This finding is consistent with opinions about the role of the CT as a ‘negative legislator’ recurring in a number of rulings and books of authority. The opinion derives from Hans Kelsen and is related to his
idea of constitutional courts, which confine themselves to performing abstract reviews (Sadurski 2005: XVI; cf. Ludwikowski 2000: 144-146). This aspect is also taken up by authorities on constitutional law (e.g. Zubik 2006:32). In the first place, the idea has been developed by the CT itself in recent years. It justifies such conduct by “necessary restraint and selective interference” with the system of legal norms. Furthermore, the CT observes that a ‘positive’ legislative power is vested only in the Sejm, the Senate and other lawmaking bodies. The CT makes such observations even being aware that a failure of the legislator to respond to the CT’s ruling finding certain provisions unconstitutional usually results in “a legislative vacuum and a new dysfunctionality in the legal system” (Informacja 2006:55, see also 37).

It may be presumed that the CT’s giving up of formulating policies or only its lack of interest in this kind of standard carries momentous effects for its capacity to exert influence on other entities of which the legal order is comprised. Specifically, any such influence is weakened. If the CT does not deduce principles relevant for the system of government from the Constitution (which has been discussed in the preceding paragraphs) and if, at the same time, it gives up ‘cultivating a common field’ together with other key public authorities, then it gives up this ‘field’ to other actors or leaves it lying fallow.

A similar effect to that brought about by the idea and practice of ‘negative legislator’ is produced by a rare use made by the CT of indicatory decisions (decisions whereby the CT indicates a loophole or a fault in the law to appropriate legislative bodies). In 1997-2005, the CT issued only 12 such decisions, including 10 directed to the Sejm only, 1 addressed to the Sejm and the Council of Ministers jointly, and 1 addressed to the Council of Ministers only (Informacja 2006: 126-128). However, if one takes into account widespread criticism of the quality of the Polish law, its contentwise and axiological incoherence as well as its effectiveness, questioned on many occasions, in protecting civil rights and freedoms (which is evidenced by inter alia 5,000 complaints filed by citizens), then it seems that the number of 12 indicatory decisions is symptomatic of the poor use made of this potential channel of influence on the legal order.

While studying the effects of the adoption by the CT of the concept of ‘negative legislator’, it is also worthwhile to consider the practice of postponing the date when the CT’s rulings enter into force. It is meant to give enough time to state organs responsible for the legislative process, to replace a faulty regulation with a constitutional one, avoiding at the same time a gap in the law or a similar state when the legal situation of the addressees of the regulation in question is not completely
determined. In this sense, a study of the postponements of the date when CT rulings enter into force is a partial test for the CT’s attitude to the charge of ‘legal impossibilism’. Immediate effectiveness of CT rulings could be a way to paralyze the executive branch of the government by quickly changing the law. A postponement of the effectiveness of a ruling provides the executive and legislative branches with time to ensure that the law is constitutional. Of course, there are sometimes no reasons for such a postponement as the striking down of a faulty provision does not open a gap in the law but abolishes a specific unconstitutional obligation imposed on citizens or a limitation of their rights. The issue of the postponement of the date when CT rulings enter into force, however, merits further consideration.

Our study has shown that the CT, while finding some normative acts unconstitutional, chose to postpone the date of a ruling entering into force only in the case of 12 of the studied rulings. Considering this number, one should remember, however, that finding a provision in contravention of a review benchmark takes place only in about 30 per cent of the provisions reviewed (in our study in 355 rulings out of 1225). Varied periods of postponement were applied by the CT, too; they varied from 105 to 487 days, although a mean postponement period lasted 263 days or almost 9 months.

Table 2. Period of postponement

<table>
<thead>
<tr>
<th>Period of postponement</th>
<th>Number of the rulings</th>
</tr>
</thead>
<tbody>
<tr>
<td>Lack of postponement</td>
<td>217</td>
</tr>
<tr>
<td>Postponement for less than 6 months</td>
<td>4</td>
</tr>
<tr>
<td>Postponement from 6 to 12 months</td>
<td>5</td>
</tr>
<tr>
<td>Postponement for 12 months and more</td>
<td>2</td>
</tr>
<tr>
<td>TOTAL</td>
<td>228</td>
</tr>
</tbody>
</table>

Source: own compilation.

It may be presumed that the CT is very reasonable when taking advantage of the powers vested to it by the art. 71 al. 2 of the Constitutional Tribunal Act: where it made sense the CT introduced a postponement period of an appropriate length, thought it tried not to prolong the unconstitutional legal situation. A more thorough evaluation of the postponements would be possible only if we analysed concrete cases and took into account reactions of state organs responsible for the legislative process. To postpone the date when a ruling enters into force would not be reasonable if, following the CT actions, the ruling was not enforced.
2.4. References to itself and to juristic literature

It is characteristic of CT rulings to make frequent references - while formulating individual theses - to its own earlier rulings and to decisions of other courts.

The CT made references mostly to its own earlier rulings while handing down new decisions. Such references to its own oeuvre are particularly frequent in the case of provisions contained in the Constitution; they can be found practically in almost every ruling. At the same time, in such cases the CT almost ignored the decisions of other courts. While the interpretation of provisions subjected to constitutional review is supplemented by references to its own rulings, but also to the decisions (in a several times lower number of cases) of the Supreme Court and the Supreme Administrative Court (see Fig. 8 and 9).

Figure 8.  CT Adjudicating Methodology – Review Benchmarks

Number of references to rulings or decisions

![Figure 8](image)

Source: own compilation.

Figure 9.  CT Adjudicating Methodology – Objects of Review

Number of references to rulings or decision

![Figure 9](image)

Source: own compilation.
What is interesting in this context is the character of such references, because they support conclusions as to the interpretation methods used by the CT drawn earlier. First, the CT's references to its own rulings were, almost without exception, affirmative and any changes in the ruling policy accompanying such references were basically unencountered. It appears, therefore, that the CT treats its own earlier rulings as a body of precedents. The reading of CT rulings makes one actually think that references to its own rulings replaced an in-depth interpretation of a provision on many occasions. Only very rarely do we encounter situations of reinterpreting provisions expounded earlier. Hence, references to its own rulings were of persuasive nature: they served as decisive arguments settling disputes and not as steps in moulding ruling policies.

What's more, on many occasions the CT referred to its own rulings in such a way as if a thesis formulated earlier had been a norm-rule regardless of the fact whether in reality it referred to a norm-principle or a norm-rule. In this way, the CT transformed principles into rules in a way, thus eliminating a possibility of referring to inconclusive standards of conduct, mentioned earlier, from its rulings. Since the use of this method of 'interpretation' seems to be related to infrequent references to principles, one can hardly escape a conclusion that the application of this kind of adjudication method diminishes the CT's rulings.

Next to the analysis of the above-named variables, our study covered also an analysis of the literature to which the CT made references in its theses. To make an all-round presentation of the CT's activities, one should mention two patterns discovered through this study.

First, the CT, in principle, did not refer critically to the legal theoretical literature. As a rule, the references are affirmative; if they are argumentative, it is mostly for the purpose of pre-empting the charge of selective nature of the references. This observation does not come as a particular surprise, but it carries some meaning in combination with the second finding we have made. In the 670 juristic publications recorded by us to which the CT makes references in its rulings only few concern the philosophy or theory of law. In particular, we recorded five references to the works by S. Wronkowska, M. Zieliński and A. Redelbach; three references to the works by J. Nowacki and only single references to works by such authors as J. Wróblewski, Z. Ziemiński, P. Winczorek and Fr. F. Mazurek. Far more often - which is understandable - we recorded references to authors writing on constitutional law: L. Garlicki (32 references), Z. Czeszejko-Sochacki (27 references), J. Trzciński (12 references), B. Banaszak and P. Sarnecki (10 references each). However, the most quotations come from works of purely dogmatic character. Next to works on constitutional
In CT rulings, we recorded single references to publications on civil law (by T. Dybowsk, E. Gniewek, E. Łętowska, Z Radwański, S. Rudnicki, M. Safjan and others), civil procedure (by inter alia T. Erećinski and A. Mączyński), criminal law (by inter alia L. Gardocki and A. Zoll), criminal procedure (by inter alia K. Buchała and S. Waltoś), administrative law and procedure (by inter alia B. Adamik, J. Borkowski, H. Izdebski, M. Kulesza, R. Mastalski and M. Wyrzykowski), labour law (by inter alia Z. Salwa and T. Liszcz) etc. Very rarely (in two rulings) did we encounter references to foreign-language literature.

While analyzing references to juristic literature, specifically the sources cited, we noticed that the CT almost did not adduce any works on the methodology of adjudication, modes of interpreting the law, its axiological foundations, types of norms, etc. The cited works concerning specific sciences of law (so-called juristic dogmatics) served rather the purpose of confirming that the linguistic and systemic interpretations of the law, which the CT used in its rulings, were reflected in a broad range of juristic writings. The choice of the literature cited and the mostly affirmative nature of references mean that the CT rather looks for support for his position than shows a need for in-depth studies. It does not attempt to balance different arguments encountered in the literature and sensitize the addressees of its opinions to the complexity and multi-faceted character of legal interpretations rendered.

2.5. Branches of law in Constitutional Tribunal rulings.

Next to the findings presented above, several other circumstances have a bearing on the description of CT rulings. First and foremost, it is important what branches of law were scrutinized in CT rulings as this may be a variable which could explain the methods of interpreting the law used by the CT. This is so because detailed interpretation and inference methods and rules slightly differ in the case of constitutional law, administrative law, and criminal or civil law. However, it must be remembered that the CT is bound by the choice of regulations (and thereby branches of law) made by petitioners, authors of questions on points of law and constitutional complaints. In the formal sense, the CT has no influence on what matters are submitted to it for adjudication.

An analysis of the rulings shows certain patterns although they do not form a key powerful enough to explain the methodology applied by the CT while adjudication. As regards the benchmarks for constitutional review, 80 per cent of provisions interpreted by the CT come from Chapter I (“The Republic”) and Chapter II (“The Freedoms, Rights and Obligations of Persons and Citizens”) of the 1997 Constitution. Whereas as regards provisions subjected to constitutional review, we
deal with a full spectrum of sources and spheres of regulation. For the most part, however, these are provisions representing a broad range of public law concerning, in particular, administrative regulations of civil rights and freedoms (e.g. rights of association and assembly), rights to information and its restrictions, administration and public order, national security and defence, local self-government and professional self-rule, as well as financial law (chiefly tax and budget law), court procedures (civil and criminal), social insurance law, legal regulation of business, etc.

If the rulings we studied are evaluated using a completely neutral criterion, namely the year of issuing a norm-setting act subjected to constitutional review, it turns out that some years stand out from others. Normative acts issued in 1997 and 1998 are in the forefront. This is understandable: these are provisions enacted immediately after the adoption of the Constitution and aimed at bringing order to the legal system after a profound legal and political change. The year 1997 witnessed the enactment of both criminal codes that often appear before the CT. For the same reasons it comes as no surprise that provisions from 1990 and 1991 as well as from 2000 and 2001 frequently come under scrutiny by the CT. The fact that 1982 ranks high on the list is equally understandable, thought for different reasons than those that we come up with first. The CT was busy not so much with the purging of the Polish law of the relics of the martial law of 1981 as with examining dubious regulations included in the Bar Act and Land Register and Mortgage Act adopted at that time.

The CT adjudicated with an unproportional frequency on the provisions of three codes adopted in 1964. These were the Civil Code, Code of Civil Procedure and the Family and Guardianship Code. In the case of the first of them, the CT adjudicated on the constitutionality of the provisions on praedial servitudes, perpetual usufruct and, albeit indirectly, ownership. In relation to the Code of Civil Procedure, constitutional review focused on the provisions on entertaining civil cases, disqualifying a judge, legal counsel, appeals, cassation, proceedings in matters of consumer protection, writs of payment and others. Of course, the frequency of constitutional review of provisions of individual codes varies, which is shown in the table below.
Table 3. CT rulings pertaining to codes

<table>
<thead>
<tr>
<th>The code and the date of its adoption</th>
<th>Number of CT rulings relating to the code</th>
</tr>
</thead>
<tbody>
<tr>
<td>Code of Civil Procedure (1964)</td>
<td>36</td>
</tr>
<tr>
<td>Code of Penal Procedure (1997)</td>
<td>19</td>
</tr>
<tr>
<td>Civil Code (1964)</td>
<td>12</td>
</tr>
<tr>
<td>Penal Fiscal Code (1999)</td>
<td>6</td>
</tr>
<tr>
<td>Penal Code (1997)</td>
<td>5</td>
</tr>
<tr>
<td>Code of Administrative Procedure (1960)</td>
<td>5</td>
</tr>
<tr>
<td>Petty Offences Code (1971)</td>
<td>4</td>
</tr>
<tr>
<td>Family and Guardianship Code (1964)</td>
<td>2</td>
</tr>
<tr>
<td>Petty Offences Procedure Code</td>
<td>1</td>
</tr>
<tr>
<td>Code of Commercial Companies (2000)</td>
<td>1</td>
</tr>
<tr>
<td>Total</td>
<td>102</td>
</tr>
</tbody>
</table>

Source: own compilation.

Although the analysis of CT rulings concerning the codes should be the subject of a separate study, it is worth noticing that if the constitutionality of codes was frequently questioned, then it is bad news for the supporters of a normativist, monocentric vision of the legal order, for disputes over codes mean that the system of legal norms has lost cohesion. The pillars of the system - the codes - turn out to be equally unreliable as statutes and enactments ranking below them introduced for the purpose of regulating detailed issues and problems.

2.6. The positions of actors in proceedings before the Constitutional Tribunal

The last commentary on the adjudication methodology adopted by the CT may be the positions of those actors, important for the moulding of the legal order, who may participate in proceedings before the CT, especially the Sejm, Public Prosecutor-General and Minister of Justice as well as, in a slightly different role, Commissioner for Civil Rights Protection (RPO). Their positions may be identified, in the first place, by comparing their opinions on petitions entertained by the CT with its final position given expression to in its ruling.
The CT found about 33 per cent of challenged provisions to conform with the review benchmark, almost 30 per cent were adjudged incompatible with their benchmarks, while with respect to the rest, the CT found that there was no incompatibility (22%) or it discontinued the proceedings (15%). A similar distribution of positions is observed in the case of the Public Prosecutor-General, although he was slightly less willing to claim absence of incompatibility. Equally often the constitutionality of provisions was challenged by the RPO: in the case of over 20 per cent of rulings he served as a petitioner, which means that he considered the challenged provisions unconstitutional. In addition, the RPO joined proceedings before the CT in 10 per cent of cases we studied and in 35 per cent of them argued that the challenged provisions be found unconstitutional. Whereas the ‘author’ of challenged provisions in over 50 per cent of cases claimed that a provision in question was constitutional or consistent with another review benchmark and in 40 per cent of cases it was convinced that there was no incompatibility. It is worth mentioning that the source of 85 per cent of provisions scrutinized by the CT, in the rulings we studied, was the Sejm.

A similar level of criticism displayed by different actors regarding provisions entertained by the CT does not mean that their views are identical. The analysis of the degree of similarity between the CT’s position taken in its ruling concerning the constitutionality of challenged normative acts and the positions of the other participants in proceedings represented in the grounds of their petitions shows that the similarity is quite close. In the cases of the Public Prosecutor-General it was 55 per cent, in the case of the entity that issued the challenged normative act the degree of similarity was 35 per cent, which was the same as in the case of the RPO (in the cases which he joined). Hence, it may be...
presumed that the Public Prosecutor-General interprets provisions in controversy similarly to the CT more often than the Sejm or another body being the author of challenged regulations. This in turn leads us to a conclusion that if differences in interpretation are a barrier, or only a factor modifying the strength of the CT’s impact on the actions of other entities, then it will be a harder task to influence legislative organs than entities playing only a subsidiary role in the legislative process.

2.7. The Constitutional Tribunal and the question of constitutional complaint

As it has already been said, the normative scope of the constitutional complaint has been extensively discussed in Poland. From among two classic models of the constitutional complaint – a complaint against an unconstitutional judicial decision and a complaint against an unconstitutional legal act – it is the latter model that has been chosen in Poland. Decisive in this respect was the opinion of members of the Constitutional Committee of the National Assembly who rejected the model of popular complaint (*actio popularis*) and departed from the classic German model of constitutional complaint. “The principal cause of so narrow a definition of the object of the constitutional complaint, in particular excluding from its scope any acts of administering the law, lay, (...) in the anxiety, shared by the majority of the Committee’s members, about the CT’s assessing the actions of organs administering the law, especially courts” (Banaszak, Repel 2002:42, see also Tuleja 2007). As a result, the object of the complaint was limited only to the unconstitutionality of a normative basis of a final decision.

Only for this reason, it seems interesting to show how this institution functions in practice. Another reason is the fact that the admissibility of the complaint is one of these aspects of proceedings before the CT on which the CT alone has the greatest impact. It follows that the CT’s policy with respect to constitutional complaints may translate into its impact on other entities in the Polish legal order. By ruling on the admissibility of constitutional complaints, the CT may indirectly decide the type of arguments it will be able to use when handing down a ruling. In other words, the constitutional complaint, from the CT’s point of view, is a source of diverse ‘material’ for rendering rulings. The CT may draw on it – of course in a certain, normatively defined scope – appropriately adjusting its ruling policy.

A constitutional complaint lodged by a citizen undergoes a preliminary review which - as it appears - has several stages. A flow chart of constitutional complaints through successive stages of review (without, however, maintaining correct proportions) is shown below.
As it can be seen, the CT adjudicates on their merits only a vast minority of complaints filed with it. A still smaller number of complaints are adjudicated in accordance with the complainant’s wishes. From 1997 to 2006, proceedings before the CT were successfully completed only by 57 complainants, i.e. fewer than one-third of those whose complaint the CT adjudicated on its merits.

This may be a result of two circumstances: strict regulations concerning the proceedings before the CT, which appear to be an insurmountable barrier for complainants, and the manner of handling complaints by the CT itself. Regardless of the fact which of the two circumstances is more significant, this means that the significance of constitutional complaints (even if they represented a substantial percentage of all matters adjudicated by the CT) for all rulings of the CT is rather small (differently Tuleja 2007:45).

What’s more, of the 57 rulings in which complainants were successful only some were relied upon to resume proceedings. In reply to a questionnaire sent by us to all the successful complainants, 14 out of 21 attorneys of the complainants indicated that they petitioned to have proceedings resumed. In fact, proceedings were resumed only in 10 cases: in two cases courts dismissed petitions for resumption, in 1 case the provision was amended in accordance with the CT ruling and in another case the Minister of Culture has not issued yet a decision to which...
he has been obligated. Furthermore, at the time when we received the questionnaire, in the case of resumed proceedings no judgement has been given in two cases. In sum, only in eight cases (out of 21) complainants were successful in obtaining a satisfying decision. This means that the effectiveness of the constitutional complaint is lower than it is presented in the diagram above and is staying below 1 per cent of all complaints filed with the CT and less than 3 per cent of all the matters that qualified as constitutional complaints. Admittedly, in the Federal Constitutional Tribunal of the Federal Republic of Germany (BVG), the percentage of constitutional complaints that were adjudicated in favour of the complainants is similar and stays at the level of 2.5 per cent. However, the number of such rulings is much greater - in 55 years the BVG ruled on 157,342 constitutional complaints of which 3,835 were adjudicated in favour of the complainants (see also: Czarny 2007, Šmíček 2007).

It appears thus that Ewa Łętowska is right claiming that the constitutional complaint has been defined too narrowly in Poland and that it has never been properly understood, which carried the threat of making this institution hollow. The threat was made even more real by a 2001 CT ruling (SK 10/01) narrowing down its scope even more (Łętowska 2002, 2006).

2.8. Conclusions

A conclusion may be drawn from our study that the rulings of the CT are a complex matter.

On the one hand, the CT’s actions are rather consistent. The domination of linguistic and systemic interpretation is reflected by a clear tendency to interpret legal norms, contained in the provisions of both the 1997 Constitution and statutes, as rules. Also, pushing functional and teleological interpretations into the background harmonizes with great restraint in treating provisions as sources of principles negotiated with other competing principles. What also deserves attention is the giving up of formulating policies and justifying opinions by referring to them, stressing - especially declaratively - the conception of ‘negative legislator’ as the only admissible role of the CT, making only a rare use of indicatory decisions, and believing in procedural strictness resulting in the downplaying of the role of the constitutional complaint. These circumstances prove that the CT follows a passivist model of adjudication. One can also, maybe more elegantly, describe this type of conduct as reserve in rendering interpretations and making inferences. Using a different word, however, does not change the essence of the matter. The above opinions bear out - on a purely descriptive level - allegations
made by jurists of the CT’s attachment to the positivist tradition in interpreting and administering the law.

On the other hand, despite some consistency in the CT’s conduct, its rulings give rise to certain doubts both formal and content-oriented. As far as the first question is concerned, it is amazing how diverse methods are used by the CT to construct arguments in favour of the theses it formulates, which can be seen in opinions accompanying individual rulings. What is meant here is the manner of presenting arguments by the CT and not their content value. Reading successive rulings, it is difficult to trace uniform argumentation patterns used by the CT. Moreover, this diversity of forms did not seem to be a manifestation of juristic richness, it rather appeared to be a result of the absence of standards in this area.

The study of CT rulings raises doubts about the contents of theses and arguments adopted by it. A careful reading of rulings bore out a charge levelled in the Polish theory of law that the CT not only used varied methods of interpreting, but also, doing this, not always faithfully followed interpretation and inference directives developed by the science of law. In the course of our research, we have noticed the vagueness of the axiological context of interpretation decisions with which the CT was charged. “From this unstable interpretation practice”, wrote a distinguished Polish jurist in 1997, “it is hard to reconstruct any axiological order. A supposition comes to mind that the CT uses different interpretation methods incidentally making axiological choices that have no legal character but are entangled in political, ideological or ethical conflicts” (Kozak 1997:66). The results of our research did not provide any foundation to disprove this criticism.
3. The impact of the Constitutional Tribunal on court decisions

This part of the Report presents the main results of our research. We shall present first the results of the study of the CT's impact on the decisions of the Supreme Administrative Court (SAC) and the other administrative courts. Next, we shall discuss the CT's impact on the rulings of the Supreme Court (SC) and courts of appeals. Both parts of the Report have been written using the same methodology and present analogous data.

As it has already been said, the principal category used in our study is the impact of CT rulings on court decisions. It is operationalized as co-occurrence of three circumstances. First, CT and court theses must concur in terms of subject matter: a situation where the CT and a court rendered an interpretation of the same provision and arrived at the same conclusions. Second, a court decision contains a reference to a CT ruling. Third, there is a time sequence between the CT ruling and the court decision. ‘Lack of impact’ is defined by analogy.

We have assessed the ‘concurrence’ of a CT ruling with a court decision on a standard five-degree scale calling individual theses found in the opinions to the judgements ‘concurrent’, ‘rather concurrent’, ‘rather inconsistent’, ‘inconsistent’ and ‘referring to a different aspect of a given matter’. It must, however, be stressed that we have not understood the term concurrence as identity of theses pronounced by individual adjudication organs but rather as a possibility of reconciling them using the rules of legal reasoning admissible in the Polish legal culture or other rules of inference. Hence, we have treated theses as ‘concurrent’ with each other even when their scope differed as well as others which, referring to the same matter, were pronounced in different contexts. As inconsistent with each other we have treated, in turn, only such theses which evidently contradicted each other or whose contradiction may be shown relying on accepted rules of legal reasoning (e.g. a contrario).

When we speak of ‘references’ without any further qualification, we mean situations where theses of courts contain references to CT rulings. In such cases, we have recorded a reference regardless whether the theses of the courts were in agreement and whether the views of the CT were cited by a court in question in error or contrary to the CT’s intentions. We have not taken into account, either, the fact whether references to CT rulings were central to the reasoning of a given court, or not, and whether they referred to the principal thesis the CT expounded in a given ruling, or not.
In an attempt to determine the existence or absence of impact of the CT on courts, we have analyzed differences and similarities in the adjudication methodology of the CT and courts. The method of adjudication is thus treated as an independent variable. For the purpose of showing the adjudication methodology of courts, we have used the same variables we employed to describe the rulings of the CT. In addition, some variables describing CT rulings, proceedings before it, and the properties of legal acts analyzed by the CT and courts have been used as independent variables. We have tried in this way to find an answer to the question what categories of CT rulings have the greatest impact on court decisions and in what situations.

Owing to the complexity of the accumulated data, our analyses have focused on several different data categories. As it has already been stated, the basic unit of analysis is the theses of courts and the CT or relatively independent fragments of opinions of individual rulings. In such cases, the results of our research are given as a number or percentage of analyzed theses of a given institution. However, in the analyses, we also refer to the rulings of the CT and courts by giving the results as the number or percentage of their rulings. We have also taken into account the number or percentage of the normative acts that were reviewed by the CT and interpreted by courts as well as the number or percentage of individual sections that were subjected to interpretation. What’s most important, in all the cases in which we comment on the relationships between CT rulings and court decisions or the impact of the former on the latter, we give the number of cases meeting all or some of the definition conditions of impact. The number may differ from both the number of CT theses on a given subject and the number of theses pronounced on the same subject by a given court, because our study allowed for the same thesis of a court to be simultaneously related to several theses of the CT and vice versa.

What the research results presented below also have in common is the distinction between the analysis of the impact of interpretations relating to the benchmarks of constitutional review performed by the CT and the analysis of the impact of interpretations concerning provisions subjected to such a review.

3.1. Constitutional Tribunal rulings and decisions of administrative courts

As the most general measure of the CT’s impact on the work of administrative courts may be considered the number of rulings of these courts, which have been included in our study. The reason for this is
the fact that the analysis of CT rulings was a point of departure for the search of court decisions ‘inspired’ by CT rulings.

Hence, the ratio of the number of court decisions in the data bases available to us to CT rulings included in our study testifies to the scale of impact of the latter on the former. As it has been said, our study included 228 CT rulings which contained 1871 theses about legal provisions, being a benchmark or object of review (there were 1050 and 821 theses, respectively). To this number correspond 285 rulings of the SAC and other administrative courts. On 326 occasions, we have recorded a situation in our data base where a ruling of the SAC or another administrative court was entered after a ruling corresponding to it in terms of subject matter had been handed down by the CT; we have also taken into account 137 instances when this happened before a CT ruling was given. In sum, we have obtained, respectively, 985 cases where a specific thesis of an administrative court was pronounced after a corresponding CT ruling and 359 ones when this happened prior to the fact, and where we were able to determine a content relationship between the thesis of the court and one of the CT.

Considering the large number of theses and rulings included in the study, it may be surprising to note that subject matter concurrence with the decisions of administrative courts was found in the case of only 99 CT rulings. In other words, the 463 (326+137) theses and 285 decisions of administrative courts were included in the study, because they concerned the same questions as the theses included in only 99 of 228 CT rulings. This follows in part, of course, from the special characteristics of the rulings and different jurisdictions of the CT and administrative courts. Obviously, not all matters that can be adjudicated by the CT may have their counterparts in the work of administrative courts. However, what else was characteristic of administrative courts was a difference between the number of administrative court judgments concerning review benchmarks and regulations reviewed by the CT. With respect to the former, we have recorded 86 cases, while with respect to the latter we have encountered as many as 201 cases.

What is even more important is the fact that the 285 decisions by the SAC and provincial administrative courts included in our study represent only 2 per cent of all decisions of these courts entered after 1 January 1998 and included in the Lex data base we have used. This means that the CT and administrative courts for the most part adjudicate relying on different normative foundations. An indirect conclusion is that administrative courts do not feel a need to refer to the provisions of the Constitution and thus bar a possibility of citing CT rulings.10 Hence, it must be concluded that, in most general terms, the degree of subject-matter
The impact of the Constitutional Tribunal on court decisions

The concurrence of CT rulings with those of administrative courts is very low. Naturally (on the strength of the definition formulated above), this is of utmost importance for assessing the impact of CT rulings on administrative court decisions. It is hard, for obvious reasons, to suggest any objective impact measures that would justify assessing the CT’s impact as substantial; nonetheless, the number of references determined using the research procedure described earlier seems to unequivocally justify a conclusion about its weak impact. If administrative courts made references to CT rulings in at least every other thesis they formulate in respect of matters to which the CT related earlier, the indices named above would have to grow multiple times.

For the sake of fairness, it must be observed that, more fundamental reasons notwithstanding, the above state of affairs may be related to the manner of drafting opinions to decisions by administrative court judges, which is not conducive to making references to the decisions of other courts. The opinions are, pure and simple, (especially when compared with opinions attached to CT rulings) exceedingly brief so much as to prevent one, on occasion, from tracing in full the judge’s line of reasoning. Of course, one can hardly consider these circumstances objective barriers stopping administrative courts from citing CT rulings (not as reasons for failing to cite them, either). What they do show is available ways of referring to CT rulings within the arsenal of adjudication techniques now acceptable to administrative courts. It cannot be denied, however, that these circumstances could be changed, if only there were a will to do so.

3.1.1. Assessment of concurrence of Constitutional Tribunal rulings with administrative court decisions

In the most general terms, the analyzed theses of the CT and those of administrative court decisions are concurrent. About 60 per cent of administrative court theses included in our study (regardless of the date of decision and regardless whether there was a reference to a CT ruling or not) we found ‘concurrent’ or ‘rather concurrent’ with a corresponding CT thesis. However, 15 per cent of theses were, in our opinion, ‘inconsistent’ or ‘rather inconsistent’. The remaining 25 per cent of administrative court decision theses were found to pertain to other issues than those adjudicated on by the CT, therefore, neutral from the point of view of assessing their concurrence with CT theses. These were situations where administrative courts related to another issue involving a given provision than the issue to which the CT related in its theses in connection with the same provision. Similar proportions hold in the group of administrative court decisions concerning review benchmarks as well as those concerning provisions subjected to
constitutional review. The percentages of theses consistent and inconsistent with corresponding CT theses did not change depending on whether the decisions in question were entered before or after relevant decisions of the CT nor did they depend on the fact whether the decisions contained a reference to CT theses, or not.

**Figure 12. Review Benchmark SAC**

General assessment of concurrence

![Bar chart showing general assessment of concurrence for SAC](chart.png)

1 concurrent, 2 rather concurrent, 3 pertain to other issues 4 rather inconsistent, 5 inconsistent

Source: own compilation.

**Figure 13. Object of review – SAC**

General assessment of concurrence

![Bar chart showing general assessment of concurrence for Object of review – SAC](chart.png)

1 concurrent, 2 rather concurrent, 3 pertain to other issues 4 rather inconsistent, 5 inconsistent

Source: own compilation.

As far as the second element of our definition of impact is concerned, i.e. a reference to CT rulings, the number of such references in administrative court decisions is very small. In 463 theses of administrative courts we have analyzed, such a reference was included only in 52 (11%), with a relative frequency of references to CT rulings being higher in the case of theses referring to review benchmarks. Also, an additional index of impact, namely the average time lapsing between a CT ruling and an administrative court decision referring to it, does not leave any doubt: between the two events as many as 1,081 days lapsed on the average.
The number of references to the decisions of other courts, including administrative courts themselves, is small as well. As it has been said, this is partly due to the adjudication methodology adopted by administrative courts. What is significant, however, is the differentiation of the relative frequency of references to CT theses depending on whether a provision being an object or benchmark of review is referred to. In the case of review benchmarks, references to CT rulings formed an absolute majority of all references, in contrast to the group of theses referring to objects of review where references to administrative court decisions were slightly more numerous (see Figs. 15 and 16). A conclusion may be drawn (albeit strongly restricted by the low incidence of such situations) that if the CT may be credited at all with any impact on administrative court decisions, then it is greater in the case of interpretation of constitutional review benchmarks.

**Figure 14. Review benchmark - SAC**

Number of references to court decisions - number of theses

Source: own compilation.
Characteristically, administrative courts referred to a rather limited group of CT rulings. This can be seen equally well in the case of decisions concerning review benchmarks and others concerning provisions subjected to review. The most frequently cited were, respectively, decisions in cases K 22/97 (six times), K 17/95 (five times) and K 17/00 (four times) and P 2/98 (seven times) and SK 18/99 (five times). The decisions of administrative and ordinary courts, cited by administrative courts, however, are more differentiated. Curiously enough, older CT rulings were relatively more popular, even those that had been issued when old constitutional provisions, abrogated since then, were in force. Hence, a conclusion may be drawn that there is a series of CT rulings that are ingrained in the memory of adjudication benches of administrative courts better than others. However, it would be hard to give any particular reasons, relating to the merits of the decisions, for the ingraining. On the contrary, it seems that the choice of decisions is quite random. Hence, it can be argued that references to CT rulings are rather of an ‘ornamental’ nature than decisive for the reasoning of a judge.

These findings prove that the overall concurrence of CT rulings and administrative court decisions can hardly be attributed to the CT’s impact on these courts. A supposition that such impact truly exists is contradicted primarily by the low frequency of references by administrative courts to CT rulings. The claim of the absence of CT’s impact on administrative court decisions, however, is supported by the fact that the assessment of concurrence does not differ no matter when a judgement was entered: before or after the relevant CT ruling. If the concurrence were the work of the CT, the percentage of theses

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**Figure 15. Object of review - SAC**

Number of references to court decisions - number of theses

<table>
<thead>
<tr>
<th></th>
<th>CT</th>
<th>SC&amp;C of App</th>
<th>SAC&amp;PACs</th>
<th>Others</th>
</tr>
</thead>
<tbody>
<tr>
<td>Count</td>
<td>25</td>
<td>15</td>
<td>20</td>
<td>0</td>
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</table>

Source: own compilation.
considered concurrent should be higher in the group of theses contained in decisions issued after relevant CT rulings.

It must be noted, however, that in the group of theses consistent with a relevant thesis of the CT, the frequency of references to its rulings was higher than in the group of theses inconsistent with a corresponding CT thesis; it may be supposed, however, that courts, facing a need to write an opinion and not to give reasons why they did not follow a given line of reasoning, as a rule avoid directly challenging CT theses.

Finally, these were very rare situations when a pronouncing of a view by an administrative court involved a direct indication of a specific CT thesis and a simultaneous renunciation of the adjudication line hitherto followed by the court itself. Practically, no situations were encountered, either, where differences in the decisions of an administrative court in a given type of matters would be eliminated because of a CT ruling. It must be noted, too, that in situations where courts referred to CT rulings, in most cases there was no fundamental dispute between the courts themselves.

As far as areas of conflict between CT rulings and administrative court decisions are concerned, it has to be said that they are quite commonly known and our research has not added much on the subject, which is broadly discussed in the relevant literature. While on this issue, it can be only observed that conflicts between the two institutions are rather of a jurisdictional and not subject-matter nature. These areas, as we all know, include the problem of direct application of the Constitution by the courts and the problem of effects brought about by CT rulings. The data collected in the course of our research bear out, in respect of SAC decisions and those of other administrative courts, common knowledge. Inconsistency between decisions concerned chiefly the interpretation of Sects. 8 and 190 (4) of the Constitution (providing for, respectively, direct application of the Constitution and specifying the effects of CT rulings).

Without going into unnecessary dogmatic details, it is worth mentioning that the fact that inconsistencies are found in this area is highly characteristic. It appears that the small number of references to CT rulings and the virtual absence of situations where the pronouncement of a view by the CT would settle disputes pending before administrative courts can be attributed to the fact that courts use mostly the linguistic method of interpretation. This allows them to avoid the necessity to consider the theses of other courts and to separate themselves from the body of their decisions while maintaining internal cohesion of decisions (or at least its appearances). In such a situation it is not
The role of linguistic interpretation

necessary to argue with decisions of other courts concerning similar issues nor even to refer to them. However, the downside of the situation is the fact that it may give rise to contradictions in rulings where the law imposes a duty on individual entities to respond to one another’s decisions. In such situations we are faced with a forced confrontation of two ruling policies and with a conflict of jurisdictions.

It can be claimed, of course, that the CT’s impact on administrative court decisions is exercised through other channels than those which can be recorded by analyzing judicial decisions. In the Polish literature on the subject, one can encounter the concept of constitutional culture. If applied to the matter in hand, the concept could suggest that administrative courts formulate their decisions remaining within a ‘radiation field’ of CT rulings, i.e. that they adopt a specific way of thinking about the law by assuming the general principles of interpreting the law following from the rulings without accepting specific theses of the CT. To empirically verify such a hypothesis seems to be rather difficult. It may be assumed, however, that in such a situation there would be some concurrence between more general ways of interpretation followed by the CT and administrative courts. To this question, we have devoted the next section of the Report.

3.1.2. The adjudication methodology of the Constitutional Tribunal and the adjudication methodology of administrative courts

The results of our research bear out, in principle, the results of an earlier study by Galligan and Matczak of adjudication strategies in administrative courts (Galligan, Matczak 2005). In administrative court decisions linguistic interpretation dominates. It was used in a majority of administrative court theses, which we have included in our study, and in the case of both review benchmarks and objects of review. The second most frequent type of interpretation is systemic interpretation, occurring especially next to linguistic interpretation and supplementing it (see Figs. 17 and 18). It must be stressed that a high frequency of such a combination of interpretations leads to a conclusion that in most cases the systemic interpretation shows the qualities of an interpretation type ‘internal systemic’. As the data collected by us show that the technique of interpreting the law in accordance with the Constitution is practically absent from administrative courts, it does not appear plausible for the high percentage of cases of systemic interpretation to be a sign of administrative courts’ going beyond the text of the statute under interpretation and taking advantage of other variants of systemic interpretation than internal systemic.
The second, next to interpretation methods, important circumstance that we studied was the relationship between the interpretation method used in constitutional review performed by the CT and the interpretation method used for interpreting the same provisions by administrative courts. The results are shown in Figs. 19 and 20. As it can be seen, there is hardly any relationship between the manner the same provision is interpreted by the CT and administrative courts. Similar relationships between interpretation methods hold also in the other categories of data analyzed.

One could expect that the use of a specific interpretation method by one of the studied institutions in a given case should, in principle, be related to the use of similar methods by the other institutions in similar cases. In particular, it seems false to claim that the use of a certain interpretation method by the CT determines the interpretation method applied by administrative courts. This conclusion is surprising, because
it contradicts a common belief that this formalistic method helps avoid discrepancies between rulings. A circumstance that may have an impact on the cohesion of rulings is the choice of second-order interpretation methods, i.e. principles of choosing an interpretation method.

A significant exception to the domination of linguistic and systemic interpretations is formed by considerable differences between interpretation methods used by administrative courts when administrative court theses were concurrent with the CT’s theses and when they were inconsistent with them. In the former case, the domination of situations where administrative courts relied on linguistic and systemic interpretations was overwhelming, whereas in the latter systemic interpretation dominated and the frequency of linguistic and functional interpretations was much lower. This is true, however, only in respect of the provisions that were used earlier as constitutional review benchmarks. Hence, a conclusion may be drawn that (as a clear majority of provisions used by the CT as review benchmarks are the provisions of the Constitution) in administrative court decisions a ‘constitutional methodology’ appeared consisting in making a more frequent use of functional and teleological interpretations.13

This state of affairs becomes more easily understood when one takes into consideration R. Alexy’s theses, discussed in part 1 of this Report, regarding the manners of adjudication by constitutional courts. It seems in particular that rendering a purely linguistic interpretation of at least some of the provisions of the Constitution is an extremely difficult task, if not impossible. The knowledge of legal norms that can be obtained by interpreting, for instance, Sect. 2 of the Constitution or similar provisions using this method is very narrow. Hence, it can be suspected that administrative courts, as a rule ill-disposed towards interpretations other than a formalistic one, resort to the functional interpretation of provisions, only when not being able to render it using the linguistic method.14 In such situations, they are more willing to ‘seek help’ in CT rulings.
This observation is borne out by the manner in which administrative courts reconstruct legal norms. Specifically, they treat far more frequently legal norms as rules and not as principles. Practically nonexistent, the situations in which administrative courts would refer to policies in their interpretations, which would seem particularly needed with regards to these courts, are evidence of a formalistic approach to adjudication by administrative courts and may be regarded as a reason for a weak impact of CT rulings on these courts.

3.1.3. Factors determining the impact or lack of impact of the Constitutional Tribunal on administrative court decisions

The material collected as a result of the research makes it possible to carry out diverse analyses of circumstances under which administrative courts render a specific type of interpretation. However, due to a low frequency of situations when a CT ruling can be taken to have an impact
on administrative court decisions, an analysis of independent variables, which would determine the impact, cannot be expanded without running a risk of drawing false conclusions. This fact determines also the credibility of conclusions presented below.

The collected data show that there is a relationship between the impact of CT rulings on administrative courts and the manner legal norms are reconstructed from provisions by these courts. Specifically, the data leads to a conclusion that references to the CT's theses, concurring with its assertions, co-occur with the interpretation of the law which presupposes a reference to principles. On the other hand, ‘challenging’ references, or a lack of those, rather correlate with the interpretation that does not make any such presupposition. This pattern does not occur when administrative courts refer to rules. Hence, one may think that the courts are more willing to refer to CT rulings when they see the need to refer not to ‘binary’ standards but rather to principles. What is even more interesting, this pattern can be observed in relation to both benchmarks of constitutional review and provisions subjected to such a review. This phenomenon, apparently, is not related to ‘constitutional methodology’; it is independent of the latter.

Searching for circumstances strengthening the impact of the CT on administrative court decisions, certain significance can be attributed to the fact whether a given CT ruling was handed down in response to a question on a point of law, constitutional complaint or a petition to have a law reviewed in the abstract. Administrative courts slightly more frequently refer to CT theses pronounced while entertaining “a question of law” than to others that were formulated on different occasions; in such cases they more often decide in agreement with the theses of the CT. This pattern is more easily observable in the case of provisions subjected to review than constitutional benchmarks. However, the observed differences are not very significant. The reasons for a greater number of references in such situations seem understandable. First, it follows from the fact that cases heard under this procedure correspond better, in terms of their subject matter, to questions settled by administrative court decisions. Second, it seems that the mechanisms of higher court supervision come here into play.

As it has already been said, with respect to many factors included in the study no such conclusions can be drawn due to such factors being too rare. This is the case, for instance, with the participation in the proceedings before the CT of the Commissioner for the Protection of Citizens’ Rights. It is hard to tell conclusively, either, whether a dispute within the CT, manifested by giving dissenting opinions, may have an impact on the dissemination of theses presented in a given CT ruling. A small number
of decisions in which administrative courts refer to CT rulings prevents us from finding whether any evolution in this respect is under way and whether the impact of the CT on administrative court decisions is growing or not.

3.2. The rulings of the Constitutional Tribunal and decisions of the Supreme Court and ordinary courts

The analysis of Supreme Court rulings and - to some extent - other ordinary court decisions has been carried out similarly to that of administrative courts decisions presented earlier in this report. The study examined in aggregate 491 rulings. The theses formulated by the Supreme Court clearly dominate - it is the author of 509 or 84 per cent of all theses included in the study, whereas the theses formulated by courts of appeal (91) represented 16 per cent of the set. Despite significant jurisdictional differences with respect to the Supreme Court, actions of courts of appeal actually did not differ much, hence we have decided to include the judgments of both types of courts.

Having adopted the above assumption, we have identified 600 theses contained in the decision opinions of ordinary courts. Of this number 302 theses referred to a review benchmark and 298 to provisions subjected to review. Owing to the fact that the same provision could be referred to by more than one theses of the Supreme Court and more than one theses of the CT, we have recorded 802 cases in which the theses of these judicial bodies referred to the same provision. Of this number, 456 cases related to a review benchmark and 337 to an object of review. The Supreme Court and ordinary court decisions in the above-mentioned quantities have been included in the analysis, because they concerned the same questions as theses comprised by only 116 of 228 rulings of the CT. As was the case with administrative courts, the decisions of the Supreme Court and courts of appeals made up a small fraction (2.5%) of all their decisions issued after 1 January 1998 and comprised in the Lex data base. Hence, to the problem discussed here, the conclusions drawn in respect of SAC decisions apply.

As was the case with administrative courts, the question of the impact of the Constitutional Tribunal on the SC jurisprudence, was studied making a distinction between the decisions issued before and after the relevant CT ruling. In the aggregate number of 802 cases where the objects of Supreme Court, court of appeals and CT decisions or rulings agreed, a clear majority (about 85% of cases included in our study) is made up of cases of agreement occurring later than the date of the relevant CT ruling.
3.2.1. A general assessment of concurrence of Constitutional Tribunal rulings with Supreme Court decisions

The assessment of the concurrence of CT and Supreme Court theses yields interesting data. It shows above all differences in concurrence in the case of theses formulated in respect of review benchmarks and review objects. In the former case the positions of the CT and the SC are concurrent in 53 per cent of cases (320 theses), rather concurrent in 25 per cent (150 theses); whereas the positions rather inconsistent represented 7 per cent (40 theses) and inconsistent – 4 per cent (25 theses). The remaining 10 per cent of theses concerned other aspects of interpreted provisions than those focused on by the CT.

While as regards provisions subjected to review, the distribution of concurrence categories is almost even except for definite inconsistency: ‘concurrent’ and ‘rather concurrent’ with CT theses were believed to be about 23 per cent of Supreme Court decisions in each case (190 and 195 theses, respectively); 23% courts’ theses were ‘rather inconsistent’ (195). Finally, there are 28 per cent of courts’ theses (230) that concern other aspects of interpreted provisions and less than 5 per cent of theses that turned out to be definitely inconsistent.

The differences in the degree of concurrence of Supreme Court theses with CT theses may result from different phenomena. First of all, if one focuses on a relatively low degree of concurrence of positions with respect to statutory provisions and others ranking below statutes, then, he/she must admit that the fact is a sign of independence of the two institutions: opinions to CT rulings are not universally binding so the Supreme Court and courts of appeals do not have to conform to the CT’s ruling policy and may take their own positions with respect to the meaning of the statutory provisions and others ranking below statutes that are involved in litigation and, at the same time, are reviewed by the CT.
A relatively high degree of concurrence, in turn, of theses concerning review benchmarks means that, in principle, the CT and Supreme Court interpret the Constitution in a similar way. To explain this concurrence, it is necessary, however, to take into account other variables: the time of issuing decisions, frequency and nature of references to CT rulings and adjudication methodology adopted by the entities studied. A prima facie relatively high degree of concurrence of actors’ conduct in interpreting the Constitution and, at the same time, considerably lower degree of concurrence in respect of statutes and provisions ranking below them may prove at best that courts are affected by the constitutional culture
mentioned in relation to the SAC. Any stronger impact of this kind is observable only with respect to the norms of the Constitution.

The application of the first criterion of impact, i.e. examining the subject matter of court decisions in the context of time sequence between the actions of courts and the CT, proves, however, that the hypothesis about the existence of constitutional culture, common for the CT, the SC and courts of appeal is not borne out. In respect of theses formulated in relation to both review benchmarks and review objects, the distribution of concurrence calculated for all theses resembles closely the distribution of concurrence degrees determined for theses formulated after a CT ruling which became the source of initial theses. Changes up or down in individual categories of concurrence of court theses with CT ones do not exceed 5 per cent of degrees determined for all theses. This means that in respect of both the provisions of the Constitution and normative acts of a lower rank the handing down of a ruling by the CT did not produce any significant change in the adjudication practice of the Supreme Court.

Another important test of the concurrence of analysed organs was the references to CT rulings, one's own decisions and decisions of other courts found in the studied decisions of the Supreme Court. In respect of constitutional review benchmarks, references to CT rulings were found in 37 per cent (137 out of 456) of analysed Supreme Court theses. By contrast, in the group of theses concerning review benchmarks, references to Supreme Court decisions (i.e. its own) were found only in 13 per cent of cases (61 out of 456).16

The fact that in cases when the Supreme Court touches upon constitutional matters, it refers to CT rulings in every third case and to its own decisions as many as three times less frequently, can be interpreted as a sign of recognition that it is the CT who is responsible for interpreting the Constitution, though this statement is undermined by the proportion of references with regards to all SC theses. A different policy is adopted by the Supreme Court and administrative courts in the case of interpretation of provisions subjected to review by the CT. In this case, courts referred to CT rulings in 30 per cent of cases (102 out of 337) and to their own decisions in 47 per cent of cases (161 out of 337). These proportions mean that with respect to statutory provisions and others ranking below them, the Supreme Court feels more bound by its own earlier decisions.

Furthermore, the patterns expressed in numbers are contrasted with the results of qualitative analysis of references to CT rulings. They are often routine or in a sense ‘eruditional’ for they often read like this:
“a similar decision was also reached by the Constitutional Tribunal in case no. X” or “this question was also ruled on by the Constitutional Tribunal in case no. Y”. Such references are naturally meant to support the decision reached by the court. Relying on such statements, it cannot be determined what the real inspiration of the bench was and what role played the CT ruling and to what extent it served only an ‘ornamental’ purpose.

Among the references to CT rulings, there are some that give expression to a far more sweeping position, namely to the conviction about the admissibility of direct application of the Constitution, provided that the constitutionality of statutory provisions does not raise any doubts. This position of the Supreme Court may even be grasped statistically: in 10 per cent of cases (46 out of 465) in which the Supreme Court reached to the provisions of the Constitution serving earlier as benchmarks for constitutional review, the Court considered their sense to be obvious and did not believe it necessary to adduce an earlier ruling of the CT in support of its own interpretation. By contrast, in the case of provisions subjected to review, such attitude occurred in a negligible number of cases (4 out of 465). On the other hand, only very rarely can one encounter criticism of CT rulings in Supreme Court decisions. There are very few cases where CT theses are directly challenged, an opposing view is presented or noncohesiveness of rulings is pointed out. In theses formulated in connection with both review benchmarks and objects of review we found such references in only single cases (4 and 3 cases, respectively).

The fact of relative subject-matter agreement between CT, Supreme Court and courts of appeal theses does not provide evidence for the impact of CT rulings on the operations of other courts. An additional criterion of interpretation of these facts may be the consistency of adjudication methods adopted by the two institutions. Hence, it is necessary to answer the question whether the Supreme Court decides cases as it does using the same adjudication methods as the CT or whether it uses other adjudication methods.

3.2.2. The adjudication methodology of the Constitutional Tribunal versus the adjudication methodology of the Supreme Court

The study of Supreme Court decisions from the point of view of adopted adjudication methods and ways of reasoning yields important observations. First, it appears that the Supreme Court interpreted in a different way review benchmarks and provisions subjected to review. In the case of the former, three interpretation methods were most often used: systemic (31% of theses), functional (26% of theses) and linguistic (23% of theses).
A very similar distribution of adjudication methods we found in the case of first indications concerning review benchmarks. In turn, in the succeeding (‘second’) indications of interpretation methods, the dominant position was held by functional and teleological interpretations followed by linguistic and systemic ones. Thus, it can be assumed that the Supreme Court interpreted the provisions of the Constitution, ratified international agreements and statutes, if they were review benchmarks, truly from many angles.

An almost the same distribution of interpretation methods was found upon analyzing the interpretation of review benchmarks in those Supreme Court and courts of appeal decisions that had been issued later than the CT rulings included in the study and referring to the same provision. A conclusion drawn from such an analysis left no doubt: the handing down of a ruling by the CT did not change in any way the position of the Supreme Court on the issue of interpreting the provisions of the Constitution, ratified international agreements, etc.

Figure 22. Review Benchmark – SC
Interpretation methods

Figure 23. Object of review – SC
Interpretation methods

Source: own compilation.
There was a clear difference in the way the Supreme Court interpreted the provisions that were earlier subjected to constitutional review. In this case, among interpretation methods, a dominant role was played by systemic interpretation: 60 per cent of all theses and 75 per cent of theses when the principal interpretation method is concerned. The second most popular method was functional interpretation (45% of theses) followed by linguistic one (33% of theses). Curiously enough, in respect of these provisions, too, the distribution of preferred interpretation methods remained practically unchanged among the judicial decisions issued after relevant CT rulings. As was the case with the analysis of the concurrence of Supreme Administrative Court theses with CT theses, the handing down of a ruling by the CT did not affect the position of the Court. This constant discrepancy in adjudication methods may serve as evidence not only for the claim of independence of the Supreme Court and the Constitutional Tribunal in their actions but also for their clear methodological separation.

It should not escape our notice that the Constitutional Tribunal and the Supreme Court were at variance with each other as to the choice of interpretation methods, when they undertook to interpret the same provisions. The analysis of the collected data shows that when the Supreme Court took advantage of the systemic interpretation of review benchmarks, the CT, in respect of the same provisions (theses), was equally willing to use linguistic and systemic interpretations (30% of indications each) and sometimes the functional one (around 15%). When, in turn, the Supreme Court resorted to functional interpretation, the CT interpreted the same provisions of the Constitution using systemic (33%), linguistic (23%) or, though more rarely, functional (only 10%) interpretations. Furthermore, with functional interpretation used by the Supreme Court we found the highest index of theses (25%) in regard to which it was difficult to accurately determine the kind of interpretation used by the CT.

Figure 24. Review benchmark – SC

Interpretation method

- systemic
- null
- linguistic
- functional
- theological
- undetermined

Source: own compilation.
Likewise, it was hard to find any relationship in the use of specific methods of interpretation with respect to provisions subject to review by the CT and adjudicated upon by the Supreme Court. There was a considerably higher frequency of co-occurrence of systemic interpretation; however, earlier findings suggested that the relationship followed rather from the fact that both institutions used relatively often the same interpretation method than from the impact that could be convincingly proven, the reason being that while the CT interpreted statutory provisions in most cases in the context of the Constitution, in the decisions of the Supreme Court the reasoning along constitutional lines and the attitude to provisions applied in everyday life were poles apart. It follows that both institutions adhered to slightly different conceptions of a legal order and its internal cohesion.

Furthermore, important conclusions can be drawn from the analysis of Supreme Court decisions from the point of view of distinguishing between principles, rules and policies. It turned out that among the theses of the Supreme Court referring to a review benchmark, there were 40 per cent of cases where courts interpreted provisions as containing conclusive standards, i.e. rules. Far more frequently, in 50 per cent of cases, a decision was founded on principles. This is yet another difference in respect of CT rulings since, as it is remembered, the CT interpreted the provisions of the Constitution in terms of rules in most cases.

It can also be observed that the Supreme Court derived rules from the provisions of the Constitution relying on systemic (almost 50% of theses qualified as sources of rules) and linguistic interpretations. This pattern is absolutely understandable since, as it has been pointed out earlier, these two kinds of interpretation represent almost two thirds of methods used by the Supreme Court (in the group of all theses). In contrast, where the Supreme Court, interpreting review benchmarks, construed them as rules it did it relying on functional interpretation in almost 50 per cent of cases.

Whereas interpreting provisions subjected to review, the Supreme Court saw rules in almost 90 per cent of cases of interpretation use. Moreover, such a practice was consistent with the use of systemic interpretation (65% of indicated rules). In addition, another interpretation method that relatively often resulted in deriving a conclusive standard of conduct from provisions was, as can be easily guessed, linguistic interpretation.
For form's sake, it must be added that Supreme Court and courts of appeals decisions or CT rulings only very rarely contained references to policies. This pattern was found in respect of both constitutional review benchmarks and provisions subjected to such review. Any factors at play in current politics notwithstanding, this attitude of the Supreme Court and Constitutional Tribunal must have followed from a political system principle saying that courts are guided by law only and not by any reasons of purposefulness and effectiveness as the other branches of government are (Garlicki 2005: 358).

3.2.3. Conclusions

Summing up, the following conclusions can be drawn. In the first place, the Supreme Court and courts of appeals make a clear distinction between the use of constitutional norms, other norms being the benchmark for constitutional review and statutory norms as well as others ranking below them, i.e. those that can be called operative and whose constitutionality is usually questioned and which are reviewed by the CT. The former norms set the fundamental rules and principles of the legal system, they set goals and determine the results that should be attained by legal regulations. Whereas the norms of statutes and executive provisions are to determine specific conduct by the addresses of the law or specific results of such conduct and resolve disputes which may find their way to a courtroom. Keeping the distinction in its adjudication practice and defending its own adjudication policy, the Supreme Court limited beforehand the impact of the CT on its actions.

Second, poor response of the Supreme Court to successive rulings of the CT and a low degree of concurrence in the use of interpretation methods by the CT and the Supreme Court indicates a lack of impact
The impact of the Constitutional Tribunal on court decisions

Lack of CT’s impact on SC and courts of appeal

Since CT rulings affect the manner of adjudication in certain case types only in a very small degree and each of the actors interprets the law ‘after its own fashion’, there are no grounds to claim that the CT’s actions draw any response from other actors in the legal order.

A noticeable number of cases in which the Supreme Court, while adjudication upon matters earlier dealt with by the CT, referred to CT rulings shows that the Supreme Court and courts of appeals knew CT rulings. Nevertheless, they derived their own decisions in most cases from the their earlier decisions and the CT’s actions did not have any stronger impact on judgements passed.

Third, the attitude of visible distinctiveness and ‘self-sufficiency’ of the Supreme Court and courts of appeals justifies a claim that the impact of the CT on the Supreme Court and courts of appeals is relatively weak.

Of course, it is possible that such an impact exists although it is hidden. Anyhow, the actions of the Supreme Court and the CT can hardly be held as examples of an effective discourse. Such areas or matters did exist (e.g. in matters concerning political screening of public officers in 1997-2001) but in the extensive collection of decisions and rulings we have found only few such instances.18

3.3. Conclusions

The results of our research into the impact of CT rulings on court decisions justify, with a quite high degree of certainty, drawing the following conclusions.

First, it seems that Ewa Łętowska’s hypothesis of ‘multicentricity’ of the Polish legal order, in its descriptive aspect, is correct. The same goes for the hypothesis, formulated in the early 90s, stating that “in the Central and Eastern European countries we encountered a ‘paradoxical acceptance’ of constitutional courts by the citizens and by the legislative branch, whereas in places where we could not expect it, i.e. judicial branch, a strong opposition against the authority of new constitutional courts emerged” (Zupani 1998 in: Šmeek 2007:25). In the light of the research, the impact of the CT on legal interpretation rendered by the other judicial organs appears small. Although, in general terms, theses advanced in the decisions of both the Supreme Court and other ordinary courts as well as the Supreme Administrative Court and other administrative courts are consistent with theses pronounced in the
rulings of the CT, this state of affairs does not result from the intensity of discourse between these organs, but rather from a lack thereof. The CT makes references in its rulings primarily to its own rulings, while administrative and ordinary courts take advantage of CT rulings only sporadically and ‘symbolically’. This is especially clearly visible with regard to the frequency of references to the provisions of a constitutional rank. Indeed, such references could take place in a much greater number of cases than the number revealed in the study. The same pattern is revealed in the number of theses in which courts refer to CT rulings. The number shows that even if courts adjudicate relying on the provisions that have been interpreted earlier by the CT, they cite CT rulings only infrequently and in a rather superficial manner.

These findings are borne out by the results of the study of adjudication methodology. In all the studied judicial organs, with just a few exceptions regarding the SC jurisprudence, a dominant position is occupied by linguistic or systemic interpretations in a configuration that, using Galligan and Matczak’s terminology, can be called formalistic. It allows the courts to pursue ‘independent’ ruling policies in individual matters, which – mechanisms enforcing uniformity of rulings non-existing – however, leads to individual judicial organs developing their own peculiar ruling policies. Although, in terms of subject matter, the differences between organs we analysed are not significant, they follow a pattern. This conclusion is supported by the observed differences in adjudication methodology adopted by judicial organs belonging to each studied category in relation to the same provisions. On the other hand, at least in the case of administrative courts, there is a positive relationship between the use of functional and teleological methods of interpretation by a court and the acceptance of CT rulings.

Second, it seems that it is the adjudication methodology that makes individual judicial organs ‘turn their backs on each other’. The possibility of individual ‘centres’ in the legal order referring to one another is not used, because it could expose contradictions between them or, still worse, bring about differences in rulings within the same areas. In this sense, the normative meaning of Ewa Łętowska’s hypothesis about the multicentricity of the legal order seems to be questioned. Administrative and ordinary courts, on the one hand, and the Constitutional Tribunal, on the other, co-exist and are separated from each other by boundaries they implicitly recognize. The sharing of duties suggested by Łętowska is not accompanied by the implementation of another idea of hers, namely, a recommendation that mechanisms of collaboration be developed.
Third, with regard to the courts, the thesis of impossibilism following from the CT’s actions must be considered false. Considering the research results, the CT’s impact on court decisions is far too modest to actually influence the situations of citizens or even the government policy implemented with the use of the law. What’s more, the ideology of judicial decisions, based for the most part on linguistic and systemic interpretations, makes relatively easy for legislative organs to anticipate possible paths of judicial decisions. In particular, the courts do not take advantage of a possibility to expand their interpretative power that would follow from breaking with the ideology of bound judicial decision. This means that the courts do not make it more difficult to use the law as an instrument of political power. Hence, the model of legal order sometimes recommended (Rousseau 1999:95), in which the judicature, including constitutional courts, the executive branch and the parliament create law in common, maintaining a dialogue with one another, remains outside the sphere of interest of the courts.
4. The impact of the Constitutional Tribunal on legislation

In this part of the Report we shall discuss the second of the two major areas of impact by the Constitutional Tribunal (CT) on the Polish legal order, namely its impact on legislation. Owing to the differences in the object of study, we use here a slightly different methodology from that employed to analyze the CT’s impact on judicial decisions. The discussion of research results concerning the relations between the CT and the Sejm would be imperfect and would prompt queries if we did not present it against the background of possible model solutions developed in Europe over the last century by parliaments and ‘guardians of constitution’. We shall also discuss earlier experience of collaboration between the Sejm and the CT (prior to 1997) as it is strongly reflected in today’s relations between them.

4.1. Historical background

In order to comprehend the merits of the problem under discussion, one should bring to mind the following characteristics of contemporary legislative process, describing at the same time the situation of the Polish Parliament:

1. Parliaments have not been set up to replace lawyers at lawmaking as specialized bodies capable of producing law on their own (Sartori 1994: 399);
2. Over the century, the composition of parliaments changed; they have fewer representatives of social elites and specialists, and more politicians (Laporte 2005:27);
3. Despite the fact that governing should not be mixed with lawmaking, as such mixing is detrimental to both (Sartori 1994: 398), this practice became widespread in the 20th century and has been discussed in detail in the relevant literature (Morawski 1999:47ff); in the case of Poland, the practice has become something of a permanent characteristic.
4. The law itself has changed together with legislating technology; amendments have become a common practice while codifying commissions have ceased to perform their functions because of the disintegration of the branches of law. Technical and organizational standards have dominated legal regulations.
5. Law as a medium has become incomprehensible not only for common citizens but for politicians as well. To prevent this, albeit in part only, stress has been laid on founding institutions ensuring transparency in lawmaking.
Attempts are made to prevent these phenomena by setting up diverse institutions or legal bodies:

1. In the countries of Western legal culture, legislative centres are set up and made responsible for drafting legal acts, carrying them through the lawmaking process and monitoring their functioning: the Conseil d'etat in France, Parliamentary Counsel Office in the United Kingdom (Pelczyński 2005: 35ff) or the Office of Legislative Council in the United States (Rundquist 2005:60). Some of the countries, admittedly, have maintained structures that developed already in the 19th century, leaving these matters within the remit of ministries of justice and codifying commissions, but have given them new powers (cf. The Role of Legislative Services in the Legislative Process 2005: 161ff).

2. At the same time, the development of civil rights and freedoms, and of the ideas of Rechtsstat and rule of law brought to life institutions monitoring how statutes are implemented and civil rights observed. Such institutions take different forms (e.g. in Finland, this function has been carried out by a parliamentary committee for 150 years), with the most popular one being constitutional courts.

3. Two solutions have been offered to the problem of the power of the executive branch to issue decrees to be later approved by parliaments. Hence, the executive branch may intervene when an urgent need arises in society.

4. By no means is it a rule that parliamentary bills are treated on a par with government bills. It follows from the study mentioned above that this is the case in a majority of countries studied, however, in 11 of them government bills have an absolute priority. Consequently, there are no legislative services in parliamentary administrations, because the drafting of bills is the responsibility of government services.

The rise of these institutions was a response to changes that were taking place in the lawmaking system. Both legislative centres and constitutional courts are inextricably bound to that response and dependent on each other. Nonetheless, just as there is no single model of constitutional courts and their functions may be fulfilled by various institutions, the models of legislative technocratic bodies are varied; however, most frequently they are tied to the executive branch. It does not take great perspicacity to notice that the processes and phenomena have determined the actions of constitutional courts and parliaments in individual countries. The adoption of some of the above solutions in Poland would solve automatically, as it were, the problem of enforcing CT rulings.

In the context of this report it is important to realize that there are two theoretical models depicting relationships between parliaments and constitutional courts: a popular one and a technocratic one.
The former assumes that there are many actors participating in making law, legislative actions are fragmented (a significant role of initiatives by deputies in lawmaking, private member’s bills are considered on a par with government ones, governments have no power to issue legal acts ranking with statutes, specialized juristic bodies are absent, traditional methods of lawmaking dominate) - which is accompanied by a belief that it is possible to codify the provisions of law and by the poor knowledge how legal acts function in society. The technocratic model, in turn, is characterized by the domination of a ‘juristic body’ in lawmaking, which is authorized to monitor statutes in force and draft bills. In this model, government bills enjoy a preference over private member’s ones, legislative projects are uniform and planned and a new legislative technology is taken advantage of, especially that brought to us by the revolution in electronics. New forms of regulation, for instance sunset legislation, are used as well. It is pluralistic, however, because despite the fact that it assumes a far-reaching autonomy of organs applying and making law, it is based on the acceptance of common values by the participants in these processes. One should also take note of a strong, formalised impact exerted by the subjects of civil society on the legislative process (white and green books, public hearings, rights of lobbyists).

The Polish model of the relationship between the CT and the Sejm corresponds to the popular model, which besides has a local history of its own. The relations between the CT and the lawmaker seem to be burdened with a conviction about the superior position of the Sejm in the system of state authority organs originating with Sect. 20 of the Constitution of the Polish People’s Republic. Furthermore, the relations are tainted with the CT’s experiences accumulated prior to the 1997 Constitution coming into force. The requirement that CT rulings be approved by a legislative organ hampered any possibility of an open challenge to the poor effects of the Sejm’s legislative activity for years. This contributed to the CT’s rendering compromise interpretations of the law, which was aggravated by the prevailing ideology of bound judicial decision limiting the discretionary power of justices.

It must also be remembered that the Sejm has operated under special conditions in the last fifteen years. The conditions made it acquire an instrumental attitude to adopted statutes and grant to itself a special role in the legal order - that of a creator of new social relations. All this followed in the wake of spontaneous political system transformations and the harmonization of the Polish law with the EU law. Moreover, an underlying conviction was that lawmaking was a collective effort and subject to state control only to a limited degree. Consequently, private member’s bills were treated on an equal footing with government ones;
what's more, they dominated numerically over government ones in the 1990s. Even if one considers the fact that government bills became statutes twice as often as private member’s ones, the thesis about ‘socializing’ the lawmaking process at that time remains valid (Staśkiewicz 2006:174).

Statutes adopted by the Sejm above all served the purpose of attaining immediate (short-term) goals without giving any deeper thought to the effects of statutes in the future. As a consequence, we witnessed a growing number of amendments (Staśkiewicz 2007:70ff). The Sejm, strongly influenced by lobbyists and interest groups, ever more often adopted statutes serving from the start interest groups and not the public interest. It was all the easier with the absence of strong political parties and their constant transformations, which made it unclear what political objectives were to have priority. Constant worries about the reaction of constituents discouraged politicians from publicly finding a compromise between the common good and local or particular interests contributing to the rise of the system of non-public bargaining.

All these circumstances underlay a structural conflict between the Sejm and the CT. Statutes aimed at attaining short-term goals of interest groups and lobbyists were often in conflict with long-term goals as defined in the Constitution and legal principles, namely, reliability of legal order, protection of private property, right to have one’s case heard before a competent court, or equality before the law. In a natural way, the CT became the Sejm’s opponent trying to stop it from taking short cuts and adopting bad laws. For these reasons, a game was played in which one party attempted to attain particular and individual goals included in statutes. Such goals had not been ‘negotiated’ with the public interest during the legislative process and often stood in conflict with it. The other party – relying on the Constitution – tried to prevent this pointing out that statutes produced in this way contravened the principles of a democratic state ruled by law laid down in the Constitution.

It appears to be one of the circumstances that helped the CT adopt a formalistic model of adjudication shown in our study as well. This happened when the legal system had been ‘decapitated’ - the legal principles developed by jurists and justices in the times of socialism had been rejected - and it took time for jurists and courts to work out new ones. A similar stand is adopted by some legal sociologists (Czarnota, Krygier 2007, Priban 2007:158). The shirking of assessment of values used by the legislator and goals it set for itself helped avoid open conflicts with the Sejm, but, at the same time, the policy meant that the dilemmas of today and tomorrow remained unresolved. When one considers that no cabinet that was in power in the 1990s implemented any consistent
social policy, but that it was conducted rather by trial and error and that the CT concentrated more on rules than on principles, fairness, legislative objectives or substantive conceptions of justice, it becomes clear that the instrumentalization of the law was aggravated bringing about numerous amendments to statutes in force. This, in turn, obscured the goals intended by the legislator, which resulted in incomplete and vague regulations.

4.2. Possible scenarios

With the principles of legal interpretation remaining unchanged, the possibilities of interactions between the actors are normatively defined by the Constitution, Constitutional Tribunal Act and the Standing Orders of the Sejm. Without going into detail, it must be observed that the normative mechanism of collaboration between the CT and legislative organs is clear as far as its structure is concerned, although it gives rise to certain interpretative doubts among jurists. The matters become more complex, however, when it comes to describing the actual responses of legislative organs to CT rulings finding a law constitutional, or not. If the arguments used in debates in the Sejm are left out of the analysis, as we have done, it is necessary to study empirically the problem of legal loopholes appearing after the CT hands down a ruling. It appears that making any comments on the Sejm’s taking or not taking up any specific actions in relation to a CT ruling is though tantamount with making a stand with regard to the expected relations between these two organs. We work here on an assumption following from the theses presented already in the Introduction and concerning the expected relationships between CT rulings and the actions of the other actors within the legal order. Under this assumption the relationships should be as close as possible. This means that we acknowledge that a CT ruling has an impact on the Sejm, if the latter takes action that seems necessary according to a ‘standard’ legal interpretation adopted in the legal system and rendered after the CT has handed down the ruling. Therefore, (which, however, does not breach the above-mentioned assumption about making these analyses from an external perspective) it is necessary to refer to legal regulations concerning the work of the CT.

It must be therefore said that, from the point of view of legal dogmatics, the most momentous power of the CT is its prerogative to remove from the system legal provisions contravening the Constitution. From the formal point of view, once they are published in the Dziennik Ustaw (Journal of Laws), CT rulings become binding by the virtue of the law unless their coming into force has been postponed. As the attribute of universally binding force is enjoyed in principle only by decisions forming the conclusion of a ruling which usually have a ‘negative’ character, it might
seem that finding a given legal provision unconstitutional is a constitutive act closing a case and that it is not necessary for the Sejm to take any action. However, it is not so. On many occasions abrogating specific provisions by the CT calls for amending a statute as it is necessary to keep the legal system functioning effectively as a whole. This calls for action on the part of the Sejm or ministers – creators of executive regulations. The responsibilities of the Sejm in respect of collaboration with the CT have not been legally defined. Taking action to amend the provisions questioned by the CT, the Sejm is autonomous. Specifically, it may take an active role and begin cooperating with the CT, acknowledging the need to take ‘remedial’ action, or it may ignore the need for an amendment or enacting a new statute. The Constitutional Tribunal is positioned in such a way so as to guarantee its relative political independence and, at the same time, prevent it from acting on its own. Even when the CT hands down an anticipatory ruling (22 such rulings in all), by no means it is certain that the fate of the challenged statute will be decided quickly and finally.

However, the CT not only removes norms contravening the Constitution, but - which in the long run is more important - interpreting the provisions of the Constitution, it can build up a catalogue of legal principles binding not only organs applying the law, but legislators as well (Kordela 2001). Notwithstanding the comments made above on the practice of creating such principles by the CT, it must be observed here that it is the noticing of the existence of the catalogue, or not, by the political class that determines the relations between the CT and legislative organs. If the existence of the catalogue of principles is noticed, then, this will be reflected not only in the approval of CT rulings, but also in the legislator’s conduct consisting in implementing CT rulings - by appropriately and quickly responding to its indicatory decisions. If, however, an opposite situation prevails - the existence of the catalogue remains unnoticed - and the CT’s expectations are not reflected in the legislator’s actions - in extreme cases, CT rulings will not be enforced. Such a situation will be most conspicuous in the case of absence of appropriate regulations which legislators were supposed to enact in reaction to a CT ruling. 19 Hence, one has to acknowledge that the only ‘medium’ of impact by the CT on the legislator, next to finding a provision unconstitutional, is the consistent formulating of a ruling policy and making reference to rules. Depending on how the CT carries out this task, it will be more or less successful in exerting influence on legislative organs.

4.3. Real actions by actors

Finally, the above conclusions clearly show that the CT’s impact on the legislator can be measured by a change in its legislative policy which
can be expressed as the swiftness and range of amendments relating to CT rulings. The use of these measures led to the following conclusions:

First and foremost, a review of all 242 CT rulings from 1997-2006 which found some statutes unconstitutional justifies a claim that until the end of April 2007 40 per cent of the rulings did not meet with any reaction of the legislator. In the case of the others there was either an amendment passed or a new statute enacted. It is not possible, however, to find out whether the reaction of the Sejm was a direct response to the CT’s actions or not. What can be seen instead is that on some occasions, despite introducing multiple amendments to the statute the CT adjudicated upon, the unconstitutional provision has not been amended. In contrast, it did happen, too, that an amendment was swiftly introduced. Since it was not possible to find any relationship between the swiftness of the Sejm’s reaction and the kind of legal provisions which were considered unconstitutional by the Tribunal or the features of a ruling or a proceeding that led to its pronouncement, it is justified to claim that the Sejm’s reactions are unplanned and thus hard to anticipate.

Figure 26. Legislation - types of action

The above Figure shows – besides the principal relation “no legislator response-amendment, new statute” – the frequency of situations when a statute was promulgated after an anticipatory ruling (Sect. 122(3) of the Constitution), in the period set by the CT (postponement) and when no action was necessary, because the provision in question had already been abrogated at the time of adjudication by the CT.

The above state of affairs is borne out by other data. It turned out that in the period set by the CT for removing inconsistencies in the law (postponement of a ruling), the Sejm discharged its duty only in 70 per cent. Hence, even in the situations that had been judged by the CT as requiring immediate attention – in almost one third of cases – no reaction was forthcoming.
Our research proves that the CT most frequently challenged the statutory provisions that had been originally proposed by the cabinet. This is not something cabinet lawyers should be proud of, however, in all fairness, the cabinet cannot prevent deputies from introducing amendments to government bills, which happens all the time in the Polish parliament. Nor can it withdraw a bill beginning with the second reading. The second most frequently challenged provisions are those initiated by deputies – alone or together with other partners – followed only by the provisions of statutes enacted prior to 1991, i.e. before the first term of the Sejm. To some degree, they fare better under the test of time and transformations than statutes enacted in the 1990s.
It is of no significance whatsoever for the reaction of the legislator which of the organs took the case to the CT. The above Figure shows that similar proportions between abrogated and amended provisions prevailed in the case of constitutional complaints, petitions and questions on points of law.

This leads to an extremely important question concerning the initiator of amendments to the provisions questioned in a CT ruling. It might seem that here the cabinet would reign supreme. As the Figure shows, this is not obvious. Admittedly, it was the cabinet who proposed the most bills, but all other entities enjoying the right to initiate bills proposed only by half fewer. This means that even in so difficult a field as drafting amendments to statutes we deal with a popular model of “improving” the law.

To sum up, it can be said that in the Polish legal order, the relations between the CT and the legislator are not as they should be. Both the cabinet and
4.4. Between struggle and discourse

The game going on in the Polish political system is set to achieve quick ‘payouts’ for its participants. Consequently, there is a natural tendency to use the law in an instrumental manner. Moreover, the law is considered a restraint on governing powers and an obstacle to achieving spectacular successes that could be celebrated for the benefit of one's own constituency. The powers of the CT to influence this situation are very limited as it makes a point of not commenting the political goals of legislation and, in addition, it is set to achieve long-term ‘payouts’ – the strengthening of the democratic state ruled by law. This parting of short- and long-term interests implies – even when one ignores circumstances mentioned earlier – a structural conflict.

From the facts that CT rulings are now universally binding and final, and the normative position of the CT as an organ of the judiciary has been greatly strengthened by no means follows that the relations between the CT and the legislator have improved in any substantial manner. Furthermore, what can be immediately seen is the great moderation of the Polish Constitutional Tribunal in playing the role of negative legislator – especially when compared with its Hungarian counterpart, which had no qualms about abrogating as many as one third of statutes enacted by the parliament (Czarnota, Krygier 2007). The Polish CT has not struck down so far a single statute in its entirety, taking into account the statutes that have come into force. When considered together with the fact that the Sejm is very unwilling to perform its role of positive legislator in relation to remedial measures concerning the statutes that have been adopted earlier and that have been questioned by the CT, it is justified to call it passive.

To make the picture clearer, the actions of the actors may be classified using the following categories of relations holding between them: co-existence, synergy and discourse. Co-existence is a situation when both institutions (CT and Sejm) function in accordance with the constitutional norms, but they do not work together and their relations are limited to solely conventional conduct that is absolutely necessary as is the case with amendments taken up by the Sejm now. No meaningful discussion is going on concerning collaboration between them or improving the effectiveness of their efforts in the sphere of legislation.
Each of the partners functions on its own, acknowledges the existence of the other but keeps contacts with the other at a bare minimum.

Synergy is a state when both institutions working together achieve a better result than when each of them severally exercises its powers. In our case, this added value would be a greater number of enforced CT rulings, improvement in the quality of the law and abatement of dysfunctions in the legal order. Synergy does not imply a full agreement on the values and goals that guide the two institutions - they are not reflected upon - but it does provide a platform for co-operation on attaining the goal of enforcing CT rulings.

The third category - that of discourse - implies co-operation and efforts by one partner to uphold the position of the other, which follows from a conviction that both institutions - acting on behalf of society - strive towards a common goal and do not compete with each other. Discourse implies also agreement on values that underlie the legitimacy of their actions. The subject of the discourse is, in the first place, the relations of both institutions with society and the functioning of the legal order and not the relations of individual institutions with each other. In the case in hand discourse could focus on the quality of the law, the work of institutions applying the law but not on amendments to single provisions or short-term legislation projects. Our research shows that the relationship between the CT and the Sejm takes a form similar to the first category of relations, i.e. co-existence. A low level of political and legal culture of one of the partners makes synergy impossible. Attaining synergy in Poland seems rather improbable, also because of the adjudication methodology adopted by the CT. The methodology helps the Sejm ‘bypass’ CT rulings.

4.5. Statute as a common good

In our study, we have attempted to answer the question which branches of law are the most prone to contravene the Constitution, which of them are ‘responsible’ for bringing disharmony to the conception of law described earlier. For this purpose we have coded all unconstitutional provisions using categories employed in the Lex database and our own classification of normative acts. The results are shown in diagrams below. It follows from the first that the CT finds unconstitutional almost exclusively the provisions of the public law (administrative, financial, labour and constitutional law), with the administrative law clearly dominating. The second diagram was not designed to show the branches of law, at least not in the first place, but rather the problems dealt with by the CT and which are important for the legislator. On the one hand, it shows areas of life that are particularly hard to regulate, if only because of their constant changes. On the other hand, it shows the need to comprehensively regulate them, which often requires a change in the public policy.
Figure 31. Legislation - Basic Information
Branches of law


Source: own compilation.

Figure 32. Legislation - Basic Information
Branches of law - different division


Source: own compilation.
Accordingly, the CT most frequently dealt with the unconstitutionality of provisions included in codes with the Constitution, which are acts accorded fundamental significance for the legal system. For this reason, they should contravene the Constitution in the least. However, it is not so. If one may understand the reasons why the CT adjudicated 36 times on the provisions of the 1964 Code of Civil Procedure, an act amended the greatest number of times among codes, it is harder to explain why so many rulings concern codes adopted recently (Criminal Code, Code of Criminal Procedure, Penal-Fiscal Code). It can be presumed (having also other premises to draw this conclusion) that the significance of codifying commissions and the quality of their work are on the decline.

Second, the CT is chiefly interested in the problems relating to the ownership of immovable property, the co-operative law, and the management of premises and immovables. The problems relating to the lease of premises and apartments (they are regulated by two statutes) occupied the CT 16 times (together with issues relating to living quarters for the police and the services - more than 20); on the co-operative law, the CT ruled 8 times. A considerable number of rulings concern social security benefits. A conclusion emerges that the views of citizens and public officers differ in relation to benefits due to citizens from the state, which is aggravated by frequent changes of the law in this respect. This bears out the above thesis about the ‘loss of cohesion’ by legislative goals and the absence of a clear public policy in this respect.

Finally, it must be observed that when it comes to the enforcement of CT rulings a popular belief holds that the problem can be taken care of by amending a statute that has functioned so far without major changes. Our research (as well as experience collected while conducting it) proves this to be a major error for in the case of the Polish legislation we are faced with a process of constant amendments, where haste certainly makes waste (See also Reforma.... 2004:19; Ustawy... 2006:13). This is clearly seen in the charts below. The charts rely on statistics from the Lex data base; however, they also include ‘horizontal amendments’, i.e. incidental changes following from enacting other statutes (‘domino effect’).
The charts vividly show how weak the impact is of the CT on statutes enacted in Poland. They have ‘a life of their own’ and the fragmentation of the legislation aggravates every year. The also illustrate a much broader phenomenon - a change in the paradigm: the Kelsenian conception of a system of legal norms is gone.

The fundamental question posed by our study is what path of development will be followed by the Polish legal order and what role
the development will be played by the Constitutional Tribunal? On the one hand, the fragmentation of the legal order is evident, on the other, the actors who decide what the order is going to be like are convinced that they deal with a classic, monocentric, 19th-century system of law. In the sphere of legislation the opposition leads to the following dilemma: acknowledging the diversification of the legal order implies the death of the idea of rational legislator, while maintaining that, despite many transformations, we still have a monocentric legal order (in spite of ever more visible signs of pluralisation of its elements). It entails a need to strengthen legislation and expert services, and, consequently, boost legislative organs, which would have to face new challenges. (Staśkiewicz 2005:15ff.). The latter path means that in relations between the legislator and the CT a new partner should appear: a body that would supply information about the law, consequences and costs of its operation as well as full and reliable knowledge on social consequences of statutes abrogated by the CT and the reception of its findings by organs applying and enacting the law alike.
5. Conclusions

Conclusions following from our research seem to be rather straightforward. There is no evidence that the suggestion, made in the Introduction, that the Constitutional Tribunal makes an impact on the activities of other actors, making up together with the CT the legal order, is actually followed. It is not borne out by the data we have collected on administrative and ordinary court decisions, neither is it visible in practical lawmaking by the Sejm. Hence, if one rejects as ‘metaphysical’ and resistant to falsification the thesis about CT rulings ‘radiating’ upon the other institutional actors in the Polish legal order, one has to conclude that the activities of each of them are relatively independent of the rest.

Having said this, we are made to consider the following two problems. First, our findings question the monocentricity of the Polish legal order, even if it were to be relative, imperfect or incomplete monocentricity. In light of the results we have obtained, the Polish legal order - within the scope covered by our research - appears to be diversified. The activities of the individual organs of the judiciary are independent of the activities of the others and CT rulings do not have any impact on legislation. There is no ‘central organ’ of the legal order which could decide how other organs should act. Hence, it seems justified to attempt to find out, if only preliminarily, what concepts or models – since the widespread conception of the monocentric legal order is of no avail - should be used to describe the situation. Second, a question arises how - in light of our findings - it would be possible to protect effectively, internally and externally, human and civil rights, and the foundations of the political system. In other words, this is a question how the dismemberment of the legal order can be reconciled with the suggestion made earlier that the CT exerts influence on it.

As far as the former problem is concerned, it appears to be necessary to refer to the attempts to conceptualize the problem of legal pluralism long present in the global juristic, anthropological and sociological literature (e.g. Hooker 1975, Griffith 1986, Sousa Santos 1987, Merry 1988, Teubner 1992, Petersen, Zahle 1995, Chiba 1998, Tie 1999, La Torre 1999, Griffiths 2002). They were originally made in relation to cultural diversity, especially in colonial and post-colonial countries, while legal pluralism itself was taken to mean a co-existence of many legal orders on the same territory. 21 Authors propounding these theories strove to show that next to the official legal order – frequently an imposed one – there was an unofficial legal circulation where different rules and institutions functioned. Many authors took on this question not only a descriptive position but also a normative one. They argued
that the thesis about legal pluralism not only was empirically correct but allowing many legal orders to exist on the same territory was desirable, because of the need to protect minority groups or preserve cultural diversity.

No one can maintain, of course, that such attempts stay in the mainstream of legal thought, nevertheless, in the last decade, owing to the globalization of law and ever tighter integration among European legal orders, they have gained some importance. In this context the problem of legal diversity has been moved to an institutional level, i.e. referred to the ever more acute problem of coordination of individual legal institutions functioning in the global or European legal area. For instance, it is observed that the problem of European integration can be solved with a specific vision of a pluralistic legal order (Delmas-Marty 2005, Arnaud 1995), and that the spreading of legal pluralism could contribute to the building of a global order which would not be based on the domination of countries cherishing great-power ambitions (Teubner 1997, Sousa-Santos 2002).

We believe that the situation prevailing in the Polish legal order can be described, referring to the above discussion, using the opposition between two different legal orders: a fragmentary and a polycentric one. Both assume that a legal order is not hierarchically organized and that individual actors making up an order act relatively independently from one another. They assume further that a legal order has no centres or peripheries, or institutions placed higher or lower than others. Hence both orders illustrate a version of the thesis on legal pluralism. The former assumes, however, with a relative permanence of this division, that individual actors are not interested in maintaining a dialogue with one another; they only observe rules of operation separating them from one another. With the passage of time, such a situation makes the division even more permanent as the development of the internal operational logic of each of the actors strengthens the rules of non-interference, which are behind the division. In other words, the breaching of the set rules of the game by one of the centres entails a high ‘negative payout’ related to the necessity of breaking with activity practised hitherto. Whereas the latter of the legal orders, a polycentric order, is founded on collaboration of individual actors following not so much from strict separation of areas of their activity, due to observing some ‘rules of separation’ (or rules of conflict) as from recognizing rules of collaboration common to all entities.

It is worth mentioning in this context that the terms ‘polycentrism’ or ‘polycentric order’ are well rooted in Polish sociology as well (Ossowski 1983:82ff.) and are usually associated with the dispersion of power (coordination) centres in various areas and on different levels of social life (economy, politics, morality, religion, art, science, etc.).
Consequently, it consists in the separation (independence) of assessment criteria, authorities, and hierarchies of people and values. Sometimes it is stressed that in a polycentric order, social life is determined by interference of decisions, that it is an outcome of uncoordinated actions. In such a system, it is possible to anticipate actions if one knows motivations of people acting and relationships between them (Karpiński 1985:264). What's more, a polycentric order is distinguished from or even juxtaposed to a monocentric one.

However, one should not make easy analogies between Stanisław Ossowski's conceptions and the Polish legal order or the present Polish constitutional system. Stanisław Ossowski stresses that the social balance of these individual uncoordinated decisions is achieved automatically thanks to the 'natural laws' of interaction, provided that certain rules of the game (norms of cohabitation) are observed (Ossowski 1983:82). A polycentric order stands for clarity of procedures; in turn, the clarity and acceptance of rules, for instance the rules of market game, limit the uncertainty of its results (Patrycki 1999:156). This idea of social order is related to the classical liberal conception of minimal state and today to the principles of liberal democracy. This approach to the idea of polycentric order was formulated by M. Polanyi (Polanyi 1951) and later was reflected in the works by F.A. Hayek and L.L. Fuller. It expanded the idea of legal limits on state authority and developed principles of federalism, division of powers, and checks and balances, etc. (Barnett 2000:257ff.). The conceptions of pluralism go beyond this way of thinking arguing that it does not solve satisfactorily the problem. One deficiency is that it assumes (implicitly or explicitly) existence of some kind of appeals instance settling any disputes concerning the accurate meaning of the “rules of the game”. Meanwhile, in a polycentric order - as a rule lacking any centre or Archimedean points - the existence of any such institution is not possible. It must be observed, however, that although this solution appears - within the Western culture - natural, by no means it is the only one possible.

M. Delmas-Marty refers in this context, for instance, to the conception of 'vagueness' as a ‘regulatory idea’ of a new legal order in Europe. It is supposed to help avoid direct conflicts between individual organs while keeping them independent. Under it, decisions of individual courts should give interpretative leeway to successive ones who, by using a similar adjudication strategy, would be able to refer to the decisions of the former. At the same time, the appearance of contradictory interpretations would be less likely. In light of our research, the Polish legal order is closer to the fragmentary than to polycentric legal order mentioned above. Contrary to the assertions by Ewa Łętowska, cited already several times earlier, one can hardly find in it any quod ad usum...
rules, which would define a modus of co-operation common to all. On
the contrary, it appears that the adjudication methodology adopted by
courts and the technology and ‘philosophy’ of legislation behind the
law preclude a possibility of leaving certain issues for settlement to
other actors in the legal order making them conflict-prone at the same
time and discouraging from making any such attempts. The Polish legal
order, at least in the scope in which propounding such theses is justified
by the scope of our research, has pluralistic character; however, it is
a ‘bad pluralism’ which does not serve the purpose of effectively protecting
fundamental rights and which, consequently, is socially dysfunctional.

This finding allows us to move to the other question mentioned above.
In order to discuss it, we must go back to the thesis presented in the
Introduction and supported by the results of our research that the impact
of the Constitutional Tribunal on the Polish legal order does not depend
solely on itself. What it depends on is largely the willingness of other actors
in the legal order to accept its theses and actions. One could, of course,
imagine a return to a monocentric legal order in which some actors
are obligated to react in a certain way to actions by others. This would
be possible, as it seems, if the CT were given back its power to render
universally binding interpretations of statutes, of which it was deprived
by the 1997 Constitution. In respect of judicial decisions, however, this
would call for granting the CT a power to review the decisions of
administrative and ordinary courts, including the Supreme Court and
the Supreme Administrative Court, hence abandoning the model of
abstract constitutional review existing today. On the other hand, the
stronger would be the CT’s position – in terms of power to bind other
actors with its rulings – the more exposed it would be to the charge of
lack of legitimation mentioned in the Introduction.

This could result in courts looking for such adjudication methods which,
while strengthening their position, would even more distance them
from the work of the CT. Another result could be the rise of competition
between the CT and legislative organs as the use by the former of its
power to render universally binding interpretations of statutes would
be hard to distinguish from the power to make laws. It should not be
expected that such a situation would be conducive to the acceptance of
CT rulings by legislative organs. Hence, it is hard to remove in abstracto
a doubt that expanding the CT’s powers would lead to opposite effects
than the intended ones. It seems rather that in the situation as it is now,
there are no chances for removing differences in judicial decisions and
abolishing the independence of legislation, because of opposing potent
political system reasons and expected low effectiveness of efforts aimed
at this end.
What can be done instead is to attempt to change the form of legal order diversity from fragmentary to polycentric. Hopes for making such a change should be pinned on giving constitutional courts and courts in general a power to make decisions concerning themselves and to define the remit of their activities. Hence, if it is possible at all to increase the impact of the CT on the Polish legal order, it has to be done using ‘soft’ methods without making any direct references to legislation. It appears that the greatest possibilities in this respect are offered by adjudication methodologies adopted by courts. The same applies to the strategies of lawmaking followed by legislative organs.

This agrees with the works on polycentrism of law mentioned earlier. J. Arnaud and M. Delmas-Marty maintain that collaboration between different judicial organs in Europe, allowing them, however, to keep their distinguishing characteristics, will be possible when the heritage of legal positivism is rejected and non-traditional adjudication methods are adopted. To a limited extent, their conclusions are borne out by the results of our research, which show that the use by courts of other interpretation methods than linguistic and systemic is conducive to their citing of CT rulings. From this point of view, the co-operation among individual adjudication bodies would be served also by re-orienting their decisions – by both the CT and courts – from those based on rules to others based on principles. Ordinary courts – but the CT too – would increase the chance for a co-operation among themselves if they used more the idea of policy in their decisions. It must be stressed once again that it would bring favourable effects with respect to direct conflicts between their decisions.

Similar conclusions can be drawn on the interactions between the CT and the Sejm. As it has been said, the relations between the two organs at times take a form of a game where strictly defined (using binary standards) limits of legislation are ‘by-passed’ by the legislative organ. This, in turn, results in the CT setting another standard. In contrast to this situation, if both centres, under a polycentric legal order, would recognize certain principles and policies, it would bring about the effect of ‘blurring’ the limits, i.e. it would allow the organs in question at the same time to pursue a specific legislative policy and perform the review of the constitutionality of the law. This effect could be achieved even if the catalogue of principles were not understood in the same way. Of course, especially with respect to the legislative activity of the Sejm, such a change would call for a much greater intellectual input into the process of lawmaking. This end could be easier to achieve with the help of a centre monitoring legislation.
Finally, it must be observed that all the processes proposed by us depend, above all, on the will to implement them by individual institutional actors. This requires, however, a ‘self-limitation’ in airing one’s own views and restraining oneself from formulating them in a peremptory manner. In the current state of affairs, there is not a single authority that would bring about the desired state of affairs by an order from above (if it were so, the thesis about the plurality of the Polish legal order would be false). Neither on the part of the courts and the CT, nor the legislative organs are there any, as it seems, institutional ‘encouragements’ to do so. In the literature devoted to the relations between the Constitutional Tribunal and other institutional actors in the Polish legal order, it is occasionally observed that co-operation depends above all on the creating by them of appropriate atmosphere and making - not easy at times - efforts towards this end. The results of this research do not cast any doubt on this thesis.
Endnotes

1 This does not mean, of course, that it is a one-way relationship.

2 Individual authors use different terms of a similar meaning in this context.

3 Wojciech Sadurski speaks in this context, citing the works by Ely and the game theory, of the social rationality of ‘self-limiting’ by politics.

4 This last restriction seems to be the most serious. There are two reasons why such a decision may have an adverse effect on the credibility of research. First, the rulings of the courts of the last instance are specific as they comprise only those cases that have reached that stage of adjudication. Such cases are by no means representative of the whole body of rulings; they rather present significant difficulties with the interpretation of the law. Hence, drawing conclusions on the impact of the CT on courts from such material may carry an error of ‘overestimation’. On the other hand, however, the mechanisms of hierarchical supervision in place may lower the number of such errors. Second, limiting the study to published court decisions, although necessary for practical reasons, may result in too rash an ascribing of any conclusions obtained from such material to all court decisions. For one has to assume that, similarly to the judgments of the courts of the last instance, published judicial decisions are not representative.

5 A random selection of 228 out of the 500 Constitutional Tribunal rulings was part of the methodology, but also partly a result of the amount of work the authors were able to put in. The decision to concentrate on a random sample was based on the processing abilities of the team, since the hypothesis also stated that the adjudication issued by other courts and decisions in the legislative process grew in number in a non-linear fashion with the number of CT rulings under study. On the other hand, the high number of rulings chosen for the study was based on the need to keep to a (theoretical) random distribution within the years of study with respect to the entire population under study. The study of CT rulings was based on a timeline with each ruling and thesis described by a further 90 variables. Based on this, the assumption was that a satisfactory level of materiality of distribution of each of the variables would require a study of around 30 rulings per year of study (taking into account the changes in number of rulings each given year). That was also the method used for the random selection of rulings chosen for this study. This was further tested by an issue not taken into account during the random sampling, that is that not all of the CT rulings marked as conclusive to the substance of the case (signature K, P, U) do in fact contain such ultimate conclusion. Finally, it is worth stressing that for the above to be verified through a calculation of the confidence level of the actual distribution of the variables, which would allow for a classification of the hypothesis, would be difficult due to the nominal nature of scales used for this study (i.e. the descriptive approach to methods of interpretation).
6 Determining the final number of CT rulings issued in 1997-2005 unexpectedly turned out to be a difficult task, with the reason being that not all CT rulings designated with docket symbols Sk, K, or P etc. were in fact decided upon their merits.

7 We have taken into consideration CT rulings in which a case was in part decided upon its merits and in part discontinued.

8 Hence, we do not study the actions of entities creating executive acts. To analyze those relations a different set of methodological tools would have been required. Understatutory acts do, as a matter of fact, contain such solutions which serve only to define the statutory matters in precise detail, and their reversal would usually be with reference to breach of art. 92 section 1 of the Constitution. Through overstepping authority they were, under the act, regulating the matters reserved for statutory regulation and their reversal does not normally carry such complications as would the reversal of an act, whilst their amendment is far easier both technically and politically, as the individual ministers and the entire government are accountable to the Sejm on this. Regardless of this, several such regulations have come under the Tribunal more than once – for example the regulation pertaining to the technical conditions of buildings and their location issued by the Ministry of Spatial Planning and Built Environment was judged on as many as four times. The influence of the CT on understatutory acts is an issue which merits its own, in-depth analysis in the future. The CT has, ever since the Constitution came into power, put a very high importance on control of legality of regulation and its conformity with the guidelines of the statutes, correctly defining the understatutory infringement of statutory matter as a threat to civil rights. It seems a clear success story for the Tribunal, since the number of regulations under question has gone down in recent years, and the executive authorities exercise additional caution when checking for compliance with the statutes.

9 Source: Constitutional Tribunal

10 We sent out 57 questionnaires and received 25 replies including 21 discussing the cases on their merits.

11 These reservations notwithstanding, the amount of material accumulated for study should be deemed sufficient to draw conclusions. In particular, it can be safely concluded that our study, at least roughly, reflects relationships holding between the rulings of the CT and administrative courts. The representativeness of the studied segment of rulings for the views of all benches of administrative courts on all matters discussed in the study is of course quite another issue. Meanwhile, the opinions of decisions of administrative courts contained a reference to one or more CT ruling only in 52 cases (i.e. such a reference contained 15 per cent of theses of administrative courts comprised in decisions issued after the CT had handed down a relevant ruling).

12 Anyhow, no inference of the existence of any such dispute can be made by studying the decisions of the courts.
13 Here, it should be mentioned that in the case of the interpretations of review benchmarks, difficulties were often encountered in classifying an interpretation method as one of commonly recognized types. On most occasions, such difficulties were caused by either the conciseness of the opinion, preventing us from tracing the court's line of reasoning, or a non-standard interpretation method used by the court.

14 This is indirectly borne out by our findings concerning the rulings of the CT, which, keeping linguistic and systemic interpretations, use the technique of 'autocitation' in interpreting the provisions of the Constitution.

15 We have referred particularly often to the rulings of the Court of Appeals in Kraków: out of 90 theses referring to the basis of control almost 70% of theses by courts of appeal; on a smaller scale from the Court of Appeal in Warsaw - almost 10% of theses by courts of appeal. Other adjudication referreeing to the basis of control were issued by the courts of appeal in Katowice, Wrocław, Białystok, Poznań, Gdańsk, Łódź and Szczecin. With reference to the object of control, almost half the theses interpreted from the rulings were from the Court of Appeal in Warsaw, one fourth from Kraków and the rest from other courts listed above.

16 Over a dozen references to CT rulings consisted exclusively in a statement that due to the finding of a specific provision to be unconstitutional by the CT, the provision was struck down as of X or that until X the provision may and should be applied by courts. See, e.g., decisions in II KK 305/04, I PKN 330/00, III RN 128/99, IV CSR 161/05.

17 See e.g. Supreme Court decisions in the following cases: III CK 319/03, II KK 33/05, II CKN 267/00

18 See Supreme Court decisions no. V CK 344/02, I PKN 580/99, II UK 77/02, II UKN 233/99, etc.

19 Of course the existence of such a need is also the result of the ideology of bound court decision universally accepted by the courts. However, if we were to establish a position that the courts are authorized to interpret the law, also by analogy, or perhaps even to create certain legal norms in given situations, the appearance of loopholes as a result of CT rulings would not be of such grave importance.

20 Classical examples of such a situation include the Sejm's omission to enact a statute regulating the issue of succession to the estate of the former Employee Vacation Fund (K 34/97) or lack of response of employers to the co-liability of the State Treasury for salaries in the health service - the so-called 'Lex 2003'. There are many more examples (Florczak, Wątor 2006 pp. 179ff).

21 In Poland, the problem was raised as recently as in the 1980s in the context of relations between the ecclesiastical and secular legal orders.

22 It seems that without rejecting the assumption about the necessary existence of the Constitutional Tribunal as an independent institution, it will not be possible to grant this power to the Supreme Court.
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