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The Role of the Constitutional Tribunal in Harmonizing the Institutional System in Poland

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Abstract

Aim: The article focuses on the impact of formal institutions on the efficiency of economic processes. It presents mechanisms intended to safeguard the institutional framework against destabilisation. In the final, empirical section, the article attempts to demonstrate how the Constitutional Tribunal may influence institutional harmonisation, and consequently, the quality of economic processes.

Methodology: The article employs a hypothetical-deductive approach based on general propositions concerning the concept of institutions. The empirical section is formulated using case study analysis and a deontic modal character assessment.

Results: The findings indicate that although the Constitutional Tribunal's influence on the harmonisation of the institutional system is a real phenomenon, its capacity to protect this system remains marginal.

Implications and recommendations: The article highlights the need to strengthen institutional safeguards that extend beyond constitutional adjudication. Enhancing the Tribunal's independence and developing its procedural instruments could improve its effectiveness as a guardian of institutional stability.

Originality/value: This study offers an interdisciplinary perspective at the intersection of constitutional law and institutional economics. It contributes to the literature by demonstrating the systemic consequences of constitutional adjudication for economic governance and path dependence.

Keywords: new institutional economics, institutional change, institutional system, harmonisation of the institutional system

1. Introduction

In the field of economic inquiry, Adam Smith, the precursor to the scientific understanding of economics, emphasised the crucial role of regulations and norms in shaping the economic policies of nations. It is important to note, however, that the significant advancement of thought regarding institutions, broadly defined, only emerged in the 19th century. During the last century, Spencer (1987), while formulating his "Principle of Sociology", focused on institutions as a paramount factor in understanding society. Durkheim (2012) developed the principles of sociological methodology, in which the concept of a social fact played a crucial role, corresponding to the understanding of institutions. The culmination of thinking about the significance of institutions came with the reflections of Veblen (2007), laying the foundation for the development of institutional economics. In the 20th century there was a growing emphasis on examining the role and importance of institutions in the efficiency of economic processes, leading to the specialisation of research within broader social processes. It was demonstrated that the mechanical neoclassical economics of Marshall could not serve as the "theory of everything", whereas Coase (1998) argued that institutional arrangements, including legal norms, govern the efficiency of an economy. This idea remains relevant today, as evidenced by the similar views expressed by representatives of the Polish institutional school (Czetwertyński & Sukiennik, 2023; Fiedor, 2015; Ratajczak, 1994).

The significance of institutions in economic processes is widely recognized and accepted; however, the direction of their influence remains a distinct issue. In the field of economics there is a prevailing belief that the efficiency of economic processes depends on the quality of institutions (see Bunge, 1996). Moreover, the institutional system often referred to as the institutional framework comprises institutions situated at different levels. For example, drawing on the classification proposed by Williamson (2000), one can differentiate between the level of embedding which encompasses informal institutions (such as customs and social norms), and the level of institutional order which consists in formal institutions (such as legal norms).

In such a broad and complex system, it is challenging to argue that complete harmonisation exists among all institutions. Furthermore, it is more reasonable to assume that various inconsistencies, and even outright contradictions, are likely to cause disruptions within the institutional system. Williamson (2000) also asserted that the institutional system cannot function perfectly, and thus the level of reflectively created institutional order is inherently limited. This is why the focus of this article rests specifically on the issue of harmony or coherence among institutions.

The article attempts to demonstrate that harmonisation can be a purposeful and rational process which can be achieved through legal solutions, including, in this case, through the rulings of the Constitutional Tribunal. It is worth noting that in Poland, from 1991 until 20 February 2023, 5767 laws were enacted (see Table 1), yet research on the mechanisms for protecting the institutional system points to their low effectiveness (Sukiennik, 2023).

Table 1. The number of enacted laws in Poland broken down by the parliamentary terms

Parliamentary term	I	II	III	IV	V	VI	VII	VIII	IX
Years	1991-1993	1993-1997	1997-2001	2001-2005	2005-2007	2007-2011	2011-2015	2015-2019	2019-06.09.2023
The number of enacted laws	94	473	640	894	384	945	752	923	655

Source: own analysis based on data available on the website of the Sejm of the Republic of Poland (2015a, 2015b, 2019, 2024)

The aim of this article was to demonstrate the role played by the Constitutional Tribunal in harmonising the institutional system. Achieving this objective required presenting the essence of institutions, their role in the institutional system, and possible disruptions in this system caused by the lack of coherence among individual institutions. It was also necessary to outline the practice of lawmaking in Poland and illustrate the role of the Constitutional Tribunal in rectifying inconsistencies within the institutional system. The research section presents specific case studies of Constitutional Tribunal rulings to showcase how institutional harmonisation can unfold. The authors employed a hypothetical and deductive reasoning approach grounded in general statements regarding the concept of institutions. The empirical part was based on case studies and a deontic modal character analysis.

2. Institutions in Economic Processes

For the purposes of this article, it was essential to clarify the concept of an institution and how its definition influences the understanding of institutional harmonisation. In this case, i.e. regarding strictly formal and deductive considerations, the lack of a specific definition can be a source of cognitive imprecision (Czetwertyński, 2023), which can lead to difficulties in conducting empirical research on institutions and describing the process of institutional change. It should be noted that in the case of the relationship between the concepts of institution and institutional change, the definition of the former creates the set of designates considered in the latter concept, therefore an alteration in the definition of an institution affects the understanding of institutional change. Naturally, a straightforward solution to these problems is to create a formal discourse and adopt a specific definition or create a new one, however in this case, the aforementioned tradition of intuitive use of the concept of an institution led to a series of misunderstandings.

This article examines the concept of institutions as introduced into economics by North. According to his definition, institutions represent the "rules of the game" within a society, or more formally, the human-made constraints that govern interactions between individuals (North, 1990). These constraints create incentives in various spheres of interpersonal exchange, including political, social, and economic domains. North pointed out that institutions encompass all forms of restrictions established to shape interpersonal relations, and furthermore differentiated between formal institutions, such as rules consciously created by people, and informal institutions, e.g. customs and patterns of behaviour. This distinction is fundamental to the discussion presented here and warrants clarification.

Formal institutions consist primarily in legal norms codified within legal frameworks. These institutions are products of deliberate, rational processes aimed at creating structured regulations. Conversely, informal institutions emerge through historical, spontaneous transmission of knowledge and values from one generation to the next, often through processes of learning and imitation. Moreover, it is important to recognize that institutions also include mechanisms for enforcing the constraints they impose.

The institutional system can be defined as a framework of legal and social norms, along with enforcement mechanisms, that establishes the rules governing the actions of economic entities and individuals, as well as the constraints and incentives guiding their behaviour (Sukiennik et al., 2017). In this article, particular attention was given to disruptions stemming from a lack of institutional harmony, which implies the existence of inconsistencies between various types of institutions. Achieving harmony within the institutional system is largely dependent on the shaping of laws subject to purposeful and rational influence. Consequently, influencing institutions of this type is complicated and requires a quite sudden mode. Additionally, the article focused on the role of the Constitutional Tribunal in harmonising the institutional system in Poland, narrowing the study to formal institutions as the influence of the Constitutional Tribunal primarily concentrates on this group of institutions.

Regarding disruptions in the institutional system, depending on the relationship (hierarchy) between legal provisions, there may be attempts to reduce disruptions in the institutional system and

transform/change certain formal institutions. These transformations may or may not align with national informal institutions, other national formal institutions, and international formal institutions. Considering the compilation of the legal system hierarchy, the number of inconsistencies is typically substantial in normative terms, therefore cognitively significant research was focused on the purposeful rational process of eliminating inconsistencies between individual institutions, thereby introducing harmonisation.

3. The Role of the Constitutional Tribunal in Institutional Harmonisation

The legislative process plays a vital role in ensuring the optimal functioning of the institutional system. It facilitates the introduction of new formal institutions into the broader institutional framework, which includes both legal provisions and social norms. A properly executed legislative process also helps identify potential inconsistencies within newly established legal acts across various levels of the legal hierarchy (Ciżyńska et al., 2017). In doing so, it allows for the reduction of *ex-ante* costs – those incurred before the implementation of specific legal norms – by addressing possible issues early in the process. In this context, the Constitutional Tribunal (CT) can conduct *a priori* (preliminary) control; however, it should be stressed that the only entity authorised to initiate this control is the President of the Republic of Poland, therefore the role of the CT in protecting the institutional system *ex-ante* is minimal. As a result, since the inception of this institution (prior control by the CT), the President exercised this option 39 times (Internetowy Portal Orzeczeń Trybunału Konstytucyjnego, 2024). During the same period, the CT ruled on 13,025 cases, which means that *a priori* control accounted for approximately 0.29% of all cases and 1.16% of cases heard during the proper adjudication process. Thus, it can be considered that the CT's actions to protect the institutional system are rarely used, and its role in protection is marginal. Furthermore, due to the limitation associated with the possibility of initiating *a priori* control by a single entity, it can be assumed that the effectiveness of this type of protection is not complete. Yet, in the case of subsequent actions to protect the institutional system, i.e. *a posteriori*, the role of the Constitutional Tribunal (CT) is to identify and eliminate introduced formal institutions that are inconsistent with the Constitution or other legal acts that have a higher hierarchical status[1].

The essence of the Constitutional Tribunal's actions in protecting the institutional system involves ruling on the vertical conformity of lower-order normative acts with higher-order normative acts and eliminating the former from the legal system in cases of non-conformity. Therefore, the role of the Tribunal is limited to formal institutions, although it should be noted that the Tribunal also takes into account informal institutions in its rulings. However, the Tribunal's role in this area is limited because the number of entities that can turn to the Tribunal with questions about institutional compatibility is also limited, as specified in Article 191(1) of the Constitution. Such entities include:

1. The President of the Republic, the Marshal of the Sejm, the Marshal of the Senate, the Prime Minister, 50 Members of Parliament, 30 Senators, the First President of the Supreme Court, the President of the National Administrative Court, the General Prosecutor, the President of the Supreme Chamber of Control, and the Ombudsman.

[1] Following Article 188 of the Constitution, the Constitutional Tribunal conducts hierarchical control of the conformity of legal norms. The role of the Tribunal is to derogate (remove) lower-order norms from the legal system that are inconsistent with higher-order norms (Kochanowski, 2008). However, the role of the Tribunal is limited because it only acts upon the request of entities specified in the Constitution (Konstytucja Rzeczypospolitej Polskiej, 1997), namely in Article 79 (constitutional complaint) and Article 191 (hierarchical control of norm conformity). Furthermore, by Article 67 of the Act on the Organization and Proceedings before the Constitutional Tribunal (Constitutional Tribunal, 2016), the Tribunal is bound by the scope of the complaint indicated in the application.

2. The National Council of the Judiciary in the scope referred to in Article 186(2).
3. Authorities of local government units. Nationwide bodies of trade unions and nationwide authorities of employers and professional organizations.
4. Churches and other religious associations.
5. Entities specified in Article 79 within the scope defined therein.

The entities mentioned in points 3 to 5 can apply for an examination of the harmonisation of institutions if the normative act concerns matters falling within their scope of operation. This implies the limited effectiveness of this mechanism for protecting the institutional system, which means that firstly, only a finite number of entities and in a restricted scope can submit a case to the Constitutional Tribunal, and secondly, the Constitutional Tribunal itself has limited capabilities in terms of its actions, which are influenced by human factors.

4. Selected Examples of Institutional Harmonisation

Despite the existing mechanisms in the legislative process aimed at safeguarding against disruptions in the institutional system, such disorders still occur and generate various costs for the system's operation. For instance, disturbances have been identified and highlighted in judgments of the Constitutional Tribunal, such as SK 7/06 (Constitutional Tribunal, 2007), and K 44/12 (Constitutional Tribunal, 2014).

The first judgment discussed in this article pertains to the declaration of unconstitutionality of Article 135 § 1 of the Law on the Organization of Common Courts, which permitted non-judges, known as court assessors, to perform judicial functions. The Constitutional Tribunal identified the primary issue as: "Judges without guarantees of independence cannot constitute an independent court". It is worth noting that according to data from the Minister of Justice, cited by the Tribunal, as of June 30, 2006, there were 1,637 assessors performing judicial duties, representing 23.81% of those adjudicating in district courts, compared to 5,237 judges. The Tribunal emphasised that declaring the provisions unconstitutional would not only prevent assessors from adjudicating, leading to disorganization of the judiciary (Constitutional Tribunal, 2007). This judgment can be interpreted as follows: detecting a disruption in the institutional system, such as appointing individuals lacking guarantees of independence and impartiality, as determined by the Tribunal, could lead to even more significant disorders within the functioning institutional system if removed. Therefore, while deeming the contested provision unconstitutional, the Tribunal simultaneously postponed its loss of legal force by eighteen months, and it declared that the actions of assessors were irrevocable.

Another judgement of the Constitutional Tribunal concerned the Law on gatherings (Obwieszczenie Marszałka Sejmu Rzeczypospolitej Polskiej z dnia 20 lutego 2013 r. w sprawie ogłoszenia jednolitego tekstu ustawy – Prawo o zgromadzeniach, 2013). The Constitutional Tribunal declared seven provisions to be unconstitutional and revoked five provisions of the aforementioned Law. The provisions expired 12 months after publication of the judgment, however in the meantime a new law was passed to regulate this issue, which came into effect on 14 October 2015 (Ustawa z dnia 24 lipca 2015 r. – Prawo o zgromadzeniach, 2015). Thus the judgement of the Constitutional Tribunal affected the institutional system for 11 days. For the purpose of this article, it seemed important to point out that the ruling concerned, among other things, such issues as the number of people forming an assembly within the meaning of the Law on gatherings, and/or the number of days between the notification of the authority and organization of the gathering. It therefore dealt with issues that, irrelevant of their significance, constituted only a small fraction of the entire act (the Constitutional Tribunal examined the constitutionality of 13 provisions, in some cases not in their full scope), which itself consisted of 49 separate provisions.

5. The Role of the Constitutional Tribunal – the Statistical Perspective

Despite the significant prerogatives the Constitutional Court has, the influence of this body on the harmonisation of the institutional system in Poland is minimal (see Table 2).

Table 2. The number of judgments issued, provisions (footnote[2]) declared inconsistent with the Constitution of the Republic of Poland and revoked by the Constitutional Tribunal from 2014 to 2024

Year	2014	2015	2016	2017	2018	2019	2020	2021	2022	2023	2024
The number of judgements	71	63	36	36	36	31	24	18	14	23	2
The number of provisions declared inconsistent	89	62	26	53	25	27	14	20	14	19	4
The number of provisions revoked	56	17	1	0	7	3	2	1	0	4	0

Source: own analysis based on data available on (Internetowy Portal Orzeczeń Trybunału Konstytucyjnego, 2024).

According to the data presented above, only 0.26% of total 354 judgements led to revoking the unconstitutional provisions by the Constitutional Tribunal, while, on average, 0.997 provision per judgment was declared unconstitutional. How insignificant an influence the Constitutional Tribunal was in the process of harmonising the institutional system became even more apparent when considering the number of enacted acts (see Table 2) compared to the number of judgments issued by this body. Each enacted act generally contains hundreds or even thousands of provisions, while the Constitutional Tribunal, when issuing a judgment, analyses only a few of them. This results in the Constitutional Tribunal having no viable influence on the functioning of the institutional system and its harmonisation.

6. Conclusion

This article aimed to demonstrate the Constitutional Tribunal's role in harmonising the institutional system. In the theoretical part of the article, the authors pointed out the provisions that allow the Constitutional Tribunal to influence the legal order in Poland. This Tribunal can protect the institutional system, both *a priori* and *a posteriori*, but these possibilities are strictly limited. In the practical part, the authors showed the Constitutional Tribunal's activities in protecting the institutional system. The examples of Constitutional Tribunal judgments discussed in this article illustrate its capacity to address inconsistencies between institutions and thereby influence the emergence of qualitative economic processes. However, it is important to recognise that the complexity of the system may result in situations where resolving one inconsistency gives rise to new discrepancies. Consequently, in complex systems such as the institutional framework, disturbances are somewhat inevitable, and the complete elimination of inconsistencies is unlikely, as there is always a margin of inconsistency, and thus continuous harmonisation is necessary.

The role of the Constitutional Tribunal as described in this article is to address inconsistencies between institutions, thereby contributing to the harmonisation of the institutional system. In doing so, the Tribunal plays a role in fostering the emergence of qualitative economic processes in a purposeful and rational manner. However, due to the various limitations on the Tribunal's capacity to act, its role in safeguarding the institutional system is relatively marginal, and its overall ability to protect the system remains constrained.

[2] The provision is understood to be a legal norm or set of legal norms isolated as a separate item in a judgment of the Constitutional Tribunal.

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Rola Trybunału Konstytucyjnego w harmonizacji systemu instytucjonalnego w Polsce

Streszczenie

Cel: Artykuł koncentruje się na zagadnieniu wpływu instytucji formalnych na efektywność procesów gospodarczych. Przedstawiono tu mechanizmy zabezpieczające przed jego destabilizacją. W końcowej empirycznej części artykułu podjęto próbę pokazania, w jaki sposób Trybunał Konstytucyjny może wpływać na harmonizację instytucji, a tym samym na jakość procesów gospodarczych.

Metodyka: W artykule zastosowano podejście hipotetyczno-dedukcyjne oparte na ogólnych stwierdzeniach dotyczących koncepcji instytucji. Część empiryczna została sformułowana w oparciu o studia przypadków i deontyczną analizę charakteru modalnego.

Wyniki: We wnioskach stwierdzono, że pomimo faktu, że wpływ Trybunału Konstytucyjnego na harmonizację systemu instytucjonalnego jest zjawiskiem realnym, Trybunał Konstytucyjny ma jedynie marginalną zdolność do ochrony systemu instytucjonalnego.

Implikacje i rekomendacje: Artykuł wskazuje na potrzebę wzmocnienia mechanizmów ochrony instytucjonalnej wykraczających poza orzecznictwo konstytucyjne. Zwiększenie niezależności Trybunału oraz rozwój jego instrumentarium proceduralnego mogłyby podnieść jego skuteczność jako strażnika stabilności instytucjonalnej.

Oryginalność/wartość: Opracowanie wnosi interdyscyplinarne spojrzenie na przecięciu prawa konstytucyjnego i ekonomii instytucjonalnej. Stanowi wkład do literatury, ukazując systemowe konsekwencje orzecznictwa konstytucyjnego dla ładu gospodarczego oraz zależności ścieżkowej.

Słowa kluczowe: nowa ekonomia instytucjonalna, zmiana instytucjonalna, system instytucjonalny, harmonizacja systemu instytucjonalnego