1. Research objective

A subject matter of the planned research project is developing an answer to a question of what constitutionality without a constitutional court means. An analysis of this problem will be conducted from the perspective of Polish constitutional law. Additionally such exemplary European states will be included in which, in relation to a crisis of a functioning of a constitutional court or a specific model of hierarchical verification of conformity of law, the need of finding an answer to a question of how it affected the understanding of constitutionality of law appeared. It should be stated that jurisprudence of the Constitutional Tribunal, that is of universally binding application and final, particularly determines the concept of constitutionality and non-constitutionality of law. In a situation when a constitutional court is restricted or stops performing its task, a question of meaning of "conformity to the constitution" and its significance in a legal system appears.

The first research problem will be the matter of determination of an actual meaning of "constitutionality of law", taking into account transformations of the contents of the principle of constitutionalism in Poland and in the contemporary world.

Next it will be necessary to determine the existing alternative methods of securing constitutionality of law. Different types of means for verification of constitutionality, other that review performed by a constitutional court, may affect understanding and securing constitutionality of law.

Finally, after determination of the current definition of "constitutionality of law" and possible ways of its securing, it will possible to refer to examples of such Member States of the European Union, in which the current significance of a constitutional court has changed or in which such a body does not operate. The purpose of this activity will be considering, if systemic experiences of such states affected the understanding of constitutionality of law and its securing, and if yes, than in what way.

In the light of the above research problems the following questions have to be asked:

1) what is the current definition of constitutionality of law in the light of the principle of constitutionalism in Polish law;

2) in what way the systemic position of a constitutional court [the Constitutional Tribunal] does affect the contents of the term "constitutionality of law";

3) to what extent can alternative methods of verification of conformity of law to the constitution in Poland influence (or may influence) the contents of the concept of "constitutionality of law" and execution of the principle of constitutionalism;

4) how is the concept of "constitutionality of law" understood in selected Member States of the European Union;

5) did a restriction of the role of a constitutional court in the selected Member States of the European Union affect the contents of the concept of constitutionality of law" and execution of the principle of constitutionalism;

6) in what way did the contemporary foreign legal doctrine perceive the principle of constitutionalism (if it has accepted it at all) in such situations when

a) a constitutional system of a given state did not include the verification of constitutionality of law by a constitutional court (created according to the classical "kelsenic" model of such institution);

b) an existing constitutional court was transformed (by decreasing its competences), or

c) an existing constitutional court became, due to various reasons, temporarily or permanently dysfunctional;

7) has, „instead" of a classical constitutional court, any other body (or bodies) having the power (to any extent and with any effects) of verification of constitutionality of law, been created.

In the light of the above research problems the following research hypotheses will be verified in the course of the realisation of the project:

1) the concept of constitutionality of law is independent of the existence of a constitutional court;

2) determination of the contents of constitutionality of law is possible without the existence of the constitutional court;

3) the concept of constitutionality of law derives itself from general constitutional principles of a state ruled by law;

4) the constitutional court influences forming the contents of the concept of constitutionality of law and increases its significance in the system of the state;

5) forms of verification of conformity of law to the Constitution, other than the constitutional court, may influence the contents of the concept of constitutionality of law;

6) depending on a systemic model of verification of constitutionality of law, the concept of constitutionality would have a different meaning with regard to the processes of law-making and application of law.

2. Significance of the project

a) State of art

The problem of constitutionality of law has been present in the Polish legal literature for a long a time, both regarding constitutional law and legal theory. Thus we will refer here only to newest publications, that indicate a continuity of the existing scientific achievements concerning this matter. Constitutionality of law is analysed by scholars in different contexts. Usually the concept of constitutionality of law is only a background for discussing detailed issues (see e.g. *Kontrola konstytucyjności prawa a stosowanie prawa w orzecznictwie Trybunału Konstytucyjnego, Sądu Najwyższego i Naczelnego Sądu Administracyjnego*. *[Materiały pokonferencyjne. Warszawa 26.11.2015 r.]*, J. Królikowski, J. Podkowik, J. Sułkowski (eds.), Warsaw 2017; M. Korycka-Zirk. *Filozoficznoprawny wymiar kontroli konstytucyjności.*, Torun 2017; M. Zelek, *Konstytucja z 1997 r. a model kontroli konstytucyjności prawa,* [in:] *20 rocznica Konstytucji Rzeczypospolitej Polskiej 1997-2017. 100 lat odrodzonego sądownictwa polskiego*, „Palestra" 2017, vol. 4; A. Kustra, *Kelsenowski model kontroli konstytucyjności prawa a integracja europejska. Studium wpływu*, Torun 2015, and earlier literature referred to in these publications).

The concept of constitutionality of law is not over-exploited as a separate research problem. If it is discussed as a separate problem, researchers analyse the concept of "non-constitutionality", explaining, what happens, when law violates constitutional rules (see e.g. L. Garlicki, *Niekonstytucyjność: formy, skutki, procedury,* „Państwo i Prawo" 2016, vol. 9). They refer also to the state of the so-called presumption of constitutionality, but their explanations do not provide a single answer to what constitutionality of law is (see e.g. A. Dębowska, M. Florczak-Wątor, *Domniemanie konstytucyjności ustawy w świetle orzecznictwa Trybunału Konstytucyjnego*, „Przegląd Konstytucyjny" 2017, vol. 2; M. Dąbrowski, *Domniemanie zgodności ustaw z Konstytucją Rzeczypospolitej Polskiej z 1997 roku*, Olsztyn 2017).

Moreover doctrinal research carried out up to now does not allow to explain, in what way the change of position of a constitutional court or the lack of such court affect the understanding of constitutionality law and its guarantees. Additionally the current state of comparative research regarding the discussed matter is not satisfactory from the perspective of assumptions of the planned research project.

The Polish doctrine of constitutional law has discussed the problem of various models of constitutional control many times, including the so-called dispersed review (conducted by common courts). Another discussed issue concerned the so-called constitutional crises, which affected (or still affect) various existing constitutional courts (see with regard to the Slovakian crisis A. Chmielarz-Grochal, J. Sułkowski, *Odmowa mianowania sędziów konstytucyjnych (casus Słowacji)*, „Przegląd Sejmowy" 2016, vol 2). However it should be stressed that, apart from, a valuable to a Polish specialist, description of functioning of a given body of constitutional review, the current literature has been dedicated to strictly institutional problems, e.g. drawing up conclusions aimed at indicating the most preferable model of creation of such bodies (with regard to latest publications see e.g. *Prawne i pozaprawne uwarunkowania obsady składu personalnego sądów konstytucyjnych w wybranych państwach europejskich*, K. Skotnicki, A. Michalak, J. Sułkowski, A. Chmielarz-Grochal (ed.), Warsaw 2017). In the planned research such an aspect is in fact insignificant, because the purpose of our analysis would be the effects of the existence of a "non-kelsenic" form of verification of constitutionality of law or of the dysfunctions of the earlier effective constitutional court on the perception of the mere institution of verification of conformity of law to the constitution, being essential for the – presumably fundamental to the current doctrine of constitutional law – the principle of constitutionalism.

b) Justification for tackling scientific problems by the proposed project

The fact that since its origins the matter of constitutionality of law has been differently perceived and various concepts concerning ensuring constitutionality of law and its verification were developed, leads to a conclusion that an analysis of the research problem taking into account the current state of art and constitutional problems currently appearing in the legal system is up-to-date.

Tackling the described scientific problems is justified by the lack of a clear definition of "constitutionality of law". It is particularly important in a situation when a body which is constitutionally entitled to decide upon conformity to the constitution, and, in other words, to adjudicate on what is constitutional, cannot effectively perform its function due to normative or other restrictions.

An importance of conducting basic research is increased by the fact that current conclusions of the legal science are not sufficient in the light of occurring constitutional crises. In Poland legal changes of 2015 and 2016 resulted in a temporary cease of adjudicating by the Constitutional Tribunal. That caused a diminishment of importance and authority of the CT. The described circumstances lead to a question, whether, when a constitutional court does not exist or does not operate, any other form of constitutional verification of law may replace such body. Moreover an additional issue appears: do such circumstances cause a transformation of the principle of constitutionalism, or, should a redefinition of this principle be made through basic research.

c) Justification for the innovative nature of the research

The research project is innovative, because it encompasses basic research concerning up-to-date problems of the Polish constitutionalism, also from a comparative perspective. A unique character of the research is related to the fact that it will stay in relation to the current constitutional crisis concerning the position of the

Constitutional Tribunal in Poland. Thanks to explaining fundamental theoretical concepts the project will indicate an interdependence between the understanding of the concept of constitutionality of law and the functioning of a constitutional court in a state. Due to the fact that such issue, intrinsically touching theoretical bases of constitutional law in various legal systems, has not been thoroughly analysed so far, we are in the opinion that the planned research is innovative.

d) The impact of the project's results on the development of the research field and scientific discipline

A system of a state is dynamics and appearance of new challenges related to the functioning of state institutions result in a constant need of conducting research on a given matter. The way of understanding and ensuring constitutionality of law, especially during constitutional crises, is significant with regard to developing directives of a state ruled by law, as well as a status of an individual in the state.

3. Work plan

a) Outline of the work plan

1. Collection and presentation of definitions of the concept „constitutionality of law" - it will result in formulation of a definition of constitutionality law, which could be applied to a legal system independent on how such a state of law is guaranteed.
2. Determination of the current meaning of the principle of constitutionalism; such a principle has different aspects in legal science. An analysis including various factors and relations should indicate an optimal definition of this principle, which may be related to the concept of constitutionality of law and should show whether, and if yes, to what extent, such forms of control match the definition of constitutionality of law, developed in the course of the planned research;
3. Discussing alternative methods of securing constitutionality of law than the one conducted by a constitutional court;
4. analysis of the concept of "constitutionality of law" in selected Member States of the European Union (see part 3c); results of the research will enable comparison of particular systems of state and explanation, whether a universal definition of "constitutionality of law" exists; it will be also a starting point for an assessment, whether the lack of a constitutional court affects the perception of constitutionality of law;
5. Analysis of exemplary states, in which a "kelsenic" constitutional court does not exist; the research will be focused on verification of constitutionality in the Netherlands and Finland;
6. Analysis of exemplary states, in which legal transformations of a constitutional court occurred; the research will be focused on Hungary. The purpose of the research will determination, whether instead of constitutional court which undergoes marginalisation an alternative model of verification of constitutionality of law appears;
7. Analysis of exemplary states, in which an existing constitutional court became temporarily dysfunctional (the Czech Republic, Croatia and Slovakia).

b) Specific research goals

The specific research goals are:

1) creating a definition of the concept „constitutionality of law"; 2) indicating relations between a form of verification of constitutionality of law and understanding of constitutionality, including assessment of effectiveness of a given form with regard to realisation of the principle of constitutionalism; 3) assessment, whether a universal definition of "constitutionality of law" exists or whether it has an own meaning in in each state; 4) assessment, whether the lack of a constitutional courts allows the realisation of the principle of constitutionalism.

c) Results of initial research

The results of initial research show that while the concept of "non-constitutionality" is easier to define, because "non-constitutionality of law is a decision within the scope of provisions and norms, made exclusively by the Constitutional Tribunal (it is connected to the derogation of a rule (norm) covered by a given decision)", conformity to the Constitution has to be deduced (see M. Granat's speech delivered during the Congress of Departments of Constitutional Law in Kliczków, 2018). The presumption of constitutionality is immersed in the principle of constitutionalism, which should be preliminarily, in this project, understood normatively as an requirement of conformity of all legal acts in Poland to the Constitution of the Republic of Poland (see Article 8 of the Constitution as well as P. Tuleja, *Commentary to Article 8*, [in:] *Konstytucja RP. Tom I. Komentarz do art. 1-86*, L. Bosek and M. Safjan (eds.), Warsaw 2016 and publications referred to in there; W. Płowiec, *Gwarancje zasady nadrzędności Konstytucji RP*, „Ruch Prawniczy, Ekonomiczny i Socjologiczny" 2018, vol. 1; see also judicial decisions of the CT concerning supremacy of the Constitution, in particular the judgement of 11th May 2005, ref. no. K 18/04).

Despite the determined meaning of the principle of constitutionalism, a result of the current state of law is that neither the concept of constitutionality of law, nor the principle of constitutionalism itself are unambiguous. Complexity of the legal system and its polycentric character, as well as occurrence of the so-

called difficult cases, result in the need of a thorough research on such matters (see: A. Kustra, *Współczesny paradygmat nadrzędności konstytucji*, „Studia Iuridica Toruniensia" 2008, vol. IV).

The understanding of constitutionality could be determined by other public authorities. However it would be necessary to examine, to what extent such other authorities and other forms of assessment of constitutionality are able to realise the principle of constitutionalism.

It means that other forms of ensuring constitutionality of law have to be taken into account. However, without defining the concept "constitutionality of law", determining, which forms would be correct and adequate to assumed purposes, is not possible.

Initial research indicates that there are the following alternatives to review of constitutionality of law by a constitutional court: parliamentary verification, dispersed review conducted by courts, as well as verification conducted by bodies of public administration. However a fundamental question appears, if in the light of constitutional principles any of these alternatives and if it can fully replace the one conducted by the constitutional court.

A form of a non-judical ensuring constitutionality of law is parliamentary verification, understood as an intra-parliamentary review of constitutionality, not as a control (oversight) of government. The current achievements of doctrine show that such a form of ensuring constitutionality was mostly examined with regard to parliamentary practice (see e.g. E. Gierach, *Parlamentarna kontrola konstytucyjności projektów uchwał Sejmu*, [in:] *Studia ustrojoznawcze. Księga jubileuszowa Profesora Andrzeja Pułło*, A. Szmyt (ed.), Gdansk 2014, p. 551-566; P. Radziewicz, *Pojęcie sejmowej kontroli legalności ustawy*, p. 11-32). Still there has been no detailed research so far regarding how this form of verification – not initiated by entities external to the parliament – influenced the understanding of constitutionality of law.

The verification conducted by bodies of public administration could raise objections concerning the legitimacy of intervention of the executive power in legislative activity. It could be linked to an accusation of violating the principle of separation and balance of power.

A particularly interesting research problem is the issue of a possible dispersed review conducted by courts. It is a subject of many recent publications (see E. Łętowska, *Aktualność sporu o zdekoncentrowaną kontrolę konstytucyjności w Polsce - uwagi na tle art. 10 Konstytucji RP*, [in:] *Minikomentarz dla maksiprofesora. Księga jubileuszowa profesora Leszka Garlickiego*, M. Zubik (ed.), Warsaw 2017; A. Sulikowski, K. Otręba, *Perspektywy podjęcia rozproszonej kontroli konstytucyjności przez sądy powszechne*., „Państwo i Prawo" 2017, vol. 11; M. Gutowski, P. Kardas, *Sądowa kontrola konstytucyjności prawa. Kilka uwag o kompetencjach sądów powszechnych do bezpośredniego stosowania Konstytucji*, „Palestra" 2016, vol. 4; D. Tomzik,; K. Sobczak, *Sędzia a Konstytucja. Kryzys sądownictwa konstytucyjnego a rozproszona kontrola zgodności prawa z Konstytucją. (Katowice, 3.03.2017 r.)*, „Krajowa Rada Sądownictwa" 2017, vol. 2).

The above remarks made in the course of initial research concerning the discussed matter will be further developed with a perspective of defining the concept "constitutionality of law" in a situation of the lack of a constitutional court. An added value to the conducted research will be a comparative analysis that may allow to determine to what extent the Polish understanding of constitutionality of law and the principle of constitutionalism in a situation of the lack of a constitutional courts is of universal application.

An initial analysis of the comparative aspect of this research project allowed to select states which seem interesting in the context of the planned subject of the research. A group of states chosen for the analysis encompassed all cases described in initial remarks of this part of the application. The group a) (states that do not have a "kelsenic" constitutional court includes the Netherlands and Finland. Initial research indicates that in both states postulates of creation of a typical constitutional court have been expressed, what may suggest that the lack of such court is deemed problematic in the context of the principle of constitutionalism.

The group b) (states, in which legal transformations of a constitutional court occurred) encompasses one state, Hungary. Following acquiring a constitutional majority in the parliament, the currently ruling party made, within the frame of adoption of a new state constitution (2011), a significant reduction of powers of the constitutional court, and, moreover, there are current suggestions to dispose of it. Such a situation creates an interesting subject of a research concerning determination, whether instead of the constitutional court undergoing marginalisation any alternative model of verification of constitutionality of law appears, through activities of the legislative power or as "grassroots movement", and therefore, whether the idea of a supremacy of the constitution still remains in this state.

The last group (c) (states, in which the existing constitutional court became at least temporarily ineffective) encompasses the Czech Republic, Croatia and Slovakia. In the former two states the so-called appointment crises, hindering or even disabling the functioning of a constitutional court took place and in the latter one it is still underway (since 2014). The Croatian case is interesting, because it seems that the crisis was paradoxically caused by a belief in a particular importance of a judicial, "kelsenic" model of verification of constitutionality of law. Dysfunction of the constitutional court was not a result of questioning its systemic value or current political conflicts, but of an intention to increase its authority (legitimacy) – in fact understood

as a political neutrality – by introducing in 2011 the principle of appointing judges by the parliament with a qualified majority of 2/3 of votes, so upon a consensus of main parliamentary groups.

d) Risk analysis

The risk that may appear is that comparative analysis may show that it is not possible to create a universal definition of the concept of "constitutionality of law".

4. Methods of research

With regard to constitutional law, which belongs to legal dogmatic, but also relates with legal theory, a basic method is an analysis of law currently being in force (dogmatic method). The research will not concern only an exegesis of legal texts, but a review of legal literature will be conducted. Moreover an analysis of judicial decisions will be performed.

The research will be performed with the use of databases and library searches.

With a purpose of determining state of law in the selected EU Member States study visits on universities functioning in these states (see part 3c of the project) will be held. They will concern discussions with specialists in constitutional law concerning the research underway. Becoming acquainted with foreign legal achievements and, above all, such a selection of literature that will match the problems of current transformations of the principle of constitutionalism, seems difficult without consultations with foreign specialists in constitutional law. The research and its partial results will be presented and discussed during legal seminars. Final results of the research will be presented during a scientific conference and in the form of a monograph issued by a renowned publishing house.

5. Literature

Banaszak B., *Konstytucja RP*, Warsaw 2012.

Chmielarz-Grochal A., *Inicjowanie przez Prezydenta Rzeczypospolitej Polskiej prewencyjnej kontroli konstytucyjności prawa,* [in:] *Instytucja prezydenta w polskim i litewskim prawie konstytucyjnym*, Lodz 2017.

Chmielarz-Grochal A., Sułkowski J., *Odmowa mianowania sędziów konstytucyjnych (casus Słowacji)*, „Przegląd Sejmowy" 2016, vol. 2.

Dąbrowski M., *Domniemanie zgodności ustaw z Konstytucją Rzeczypospolitej Polskiej z 1997 r*., Olsztyn 2017.

Gierach E,, *Parlamentarna kontrola konstytucyjności projektów uchwał Sejmu*, [in:] *Studia ustrojoznawcze. Księga jubileuszowa Profesora Andrzeja Pułło*, A. Szmyt (ed.), Gdansk 2014

Gutowski M., Kardas P., *Domniemanie konstytucyjności a kompetencje sądów, „*Palestra" 2016, vol. 5.

Gutowski M., Kardas P., *Sądowa kontrola konstytucyjności prawa. Kilka uwag o kompetencjach sądów powszechnych do bezpośredniego stosowania Konstytucji*, „Palestra" 2016, vol. 4.

Kontrola konstytucyjności prawa a stosowanie prawa w orzecznictwie Trybunału Konstytucyjnego, Sądu Najwyższego i Naczelnego Sądu Administracyjnego. *[Materiały pokonferencyjne. Warszawa 26.11.2015 r.]*, J. Królikowski, J. Podkowik, J. Sułkowski (eds.), Warsaw 2017.

Korycka-Zirk M,. *Filozoficznoprawny wymiar kontroli konstytucyjności.*, Torun 2017.

Kustra A., *Kelsenowski model kontroli konstytucyjności prawa a integracja europejska. Studium wpływu*, Toruń 2015.

Kustra A., *Współczesny paradygmat nadrzędności konstytucji*, „Studia Iuridica Toruniensia" 2008, vol. IV.

Łętowska E., *Aktualność sporu o zdekoncentrowaną kontrolę konstytucyjności w Polsce - uwagi na tle art. 10 Konstytucji RP*, [in:] *Minikomentarz dla maksiprofesora. Księga jubileuszowa profesora Leszka Garlickiego*, M. Zubik (ed.), Warsaw 2017.

Płowiec W., *Gwarancje zasady nadrzędności Konstytucji RP*, „Ruch Prawniczy, Ekonomiczny i Socjologiczny" 2018.

Prawne i pozaprawne uwarunkowania obsady składu personalnego sądów konstytucyjnych w wybranych państwach europejskich, red. K. Skotnicki, A. Michalak, J. Sułkowski, A. Chmielarz-Grochal, Warsaw 2017.

Radziewicz R., *Pojęcie sejmowej kontroli legalności ustawy*, Instytut Nauk Prawnych.

Sobczak K., *Sędzia a Konstytucja. Kryzys sądownictwa konstytucyjnego a rozproszona kontrola zgodności prawa z Konstytucją. (Katowice, 3.03.2017 r.)*, „Krajowa Rada Sądownictwa" 2017, vol. 2.

Sulikowski A., Otręba K., *Perspektywy podjęcia rozproszonej kontroli konstytucyjności przez sądy powszechne*., „Państwo i Prawo" 2017, vol. 11.

Tomzik D., Weber N., *Kryzys sądownictwa konstytucyjnego a rozproszona kontrola zgodności prawa z konstytucją*, [in:] *Dwudziesta [20-sta] rocznica Konstytucji Rzeczypospolitej Polskiej 1997-2017. 100 lat odrodzonego sądownictwa polskiego*, „Palestra" 2017, vol. 4.

Tuleja P., *Commentary to Article 8*, [in:] *Konstytucja RP. Tom I. Komentarz do art. 1-86*, red. L. Bosek, M. Safjan, Warsaw 2016.

Zelek M., *Konstytucja z 1997 r. a model kontroli konstytucyjności prawa*, [in:] *20 rocznica Konstytucji Rzeczypospolitej Polskiej 1997-2017. 100 lat odrodzonego sądownictwa polskiego*, „Palestra" 2017, vol. 4.