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**The court as a subject of the process of applying the constitution**

**1.** In recent years, there has been a particular interest among legal theorists and scholars in the issue of judicial application of the law, especially concerning the direct application of the constitution in the practice of justice. A deeper analysis is required regarding the functions that courts fulfill in the process of applying the constitution. This paper advocates the view that in light of the wording and axiology of the Polish constitution, courts are not only authorized but also obligated to directly apply the fundamental law. As a result, they bear numerous duties from which they cannot shy away in judicial practice.

**2.** From a historical perspective, determining the limits of judicial authority in the process of applying the law has always been particularly significant for jurisprudence. In this context, attention has been primarily drawn to the principle of judges' binding by the constitution and statute, although one can also observe a multitude of definitions of this principle[[1]](#footnote-1). In the 17th century, there was a call to limit the judge's tasks to establishing the factual state and subsuming it under a clear, unambiguous, and non-interpretative legal norm. This demand aligns with Immanuel Kant's postulate to prohibit judges from relying on principles of equity in adjudication. Thus, a clear distinction was drawn between the legislator, establishing legal rules, and the courts, whose task was solely the application of those norms. In this purely bureaucratic model of judging, it is impossible to develop a completely different way of thinking about the interpretation and application of the law. It is also difficult to accept an interpretative paradigm that considers the equivalence of various types of interpretation, thereby rejecting the absolute primacy of linguistic interpretation, while also aiming to saturate the law with values and achieving an axiological goal set by the constitution.

**3.** It seems undeniable to assert that today the judicial model described above is widely rejected. It is obvious that the constitution cannot be understood solely in terms of its impact on the organization of the state and the exercise of power, as well as the formal legal shape of the legal system. Without diminishing the importance of the constitutional structure of the political community, especially in the context of its ability to achieve important social goals, it should be noted that the phenomenon of the fundamental law lies in establishing the source of the axiological axis of the legal system[[2]](#footnote-2). The legal relevance of the supposition of the mutual interconnection of law with morality[[3]](#footnote-3) constitutes one of the main determinants of the process of interpretation and application of the law, also playing a significant role in defining the function of the judiciary in the Polish constitutional model.

Even a cursory reading of the constitutional provisions leads to the conclusion that the primary role of the courts is to administer justice by adjudicating “cases” within the meaning of Article 45(1) of the Constitution of the Republic of Poland[[4]](#footnote-4). Guaranteed by this provision, the right to a fair trial includes, in particular, the right to obtain a binding decision[[5]](#footnote-5). The judicial process serves as a means of protecting constitutional freedoms and rights (Article 77(2) of the Constitution), and the courts, in interpreting the constitution and statutes, reconstruct the normative content of the constitutional rights of individuals[[6]](#footnote-6).

The obligation of judicial application of constitutional laws stems from the normative nature of these laws (Article 8(1) of the Constitution) and the related principle of direct application of the constitution (Article 8(2) of the Constitution). The implementation model of these principles is based on the dualistic protection of the constitution[[7]](#footnote-7), which requires judicial activity at the individual-concrete level. This means that courts must be unequivocally classified as recipients of constitutional norms. Directness primarily refers to the possibility of recourse to the provisions of the Constitution of the Republic of Poland without the intermediary of legislation[[8]](#footnote-8). The Constitution, as the supreme element of the legal order's structure, establishes the basis for setting the boundaries of law, with the assumption that it must comply with constitutional standards[[9]](#footnote-9). The legislature has determined that the provisions of the constitution directly bind all public authorities without exception - including the courts in their adjudicative capacity.

**4.** Rejecting the bureaucratic model of judiciary entails imposing a series of obligations on the courts in the field of adjudication. Firstly, it is essential to highlight the duties in the field of legal interpretation. In this context, the obligation to adjudicate based on the constitution up to the limits of *contra legem* interpretation should be considered indisputable. As accurately noted in jurisprudence, the basis of adjudication is not the provision established by the legislator, but the legal norm decoded through interpretation (a mental operation), which involves translating the set of provisions published in legislative acts into a set of procedural norms equivalent as a whole to the given set of provisions[[10]](#footnote-10). Due to the shortcomings of the language in which the law is enacted, linguistic ambiguity, so-called textual openness, etc., interpreting clear, unambiguous, and justice-compliant norms requires advanced corrective and adaptive measures carried out in the field of legal interpretation. The limits of interpreting statutes in accordance with the constitution cannot in any way set a prohibition on establishing the content of legal norms contrary to linguistic rules of interpretation[[11]](#footnote-11). There must be a clear commitment to the equivalence of basic rules of interpretation (linguistic, systemic, functional), while treating directives for the direct application of the Constitution and international law as sui generis metarules of interpretation. Courts interpreting without reference to constitutional provisions, thus violating interpretation rules in accordance with the constitution, leads to a violation of the law, a reversal of the hierarchy of sources of law, and a disruption of the constructive assumptions of the legal system.

**5.** Secondly, courts should be obligated to weigh conflicting principles of law, thus determining conditional precedence relationships between principles in specific cases. This applies particularly to constitutional norms establishing individual rights and freedoms. The specificity of the constitution, characterized by the framework of its regulations, semantic openness of its text, and the presence of established concepts and doctrinal references, determines the formulation of rights and freedoms primarily in the form of teleologically determined principles with a directional and optimization-oriented character[[12]](#footnote-12). Constitutional subjective rights are inherently susceptible to collision with other principles, including other rights and freedoms.

As rightly noted by M. Kordela, the application of the weighing mechanism - by virtue of the collision law - results in the acknowledgment of the existence in the system of a rule (ordinary norm), constructed from the structural elements of a principle, which overcame the competing principle[[13]](#footnote-13). Although the application of the weighing mechanism and collision law should generally be situated in the realm of legal application[[14]](#footnote-14), it cannot be overlooked that due to the difficulties in reconstructing fundamental legal norms[[15]](#footnote-15), imprecision and heterogeneity of collision resolution criteria[[16]](#footnote-16), the associated lack of automatism, as well as the need for the application of complex argumentative methods in this process, the specificity of weighing essentially exhibits characteristics of law-making activities[[17]](#footnote-17). The specificity of weighing argumentation therefore dictates that the legal practice requires the establishment of conditional precedence relationships at a sub-constitutional level. This is a task primarily incumbent upon the legislator.

The result of weighing is to determine which of the conflicting principles, when applied to a specific case (*casu ad casum*), will take precedence over the other. The requirement for resolving a collision of principles in concreto arises from the complexity of social reality, which necessitates the assessment of the priority of one principle over another in light of a particular aspect of reality[[18]](#footnote-18). The precedence of principle Z1 over the competing principle Z2 under conditions W1 does not imply that weighing these principles under conditions W2 will yield the same result. Therefore, if the outcome of the weighing mechanism is influenced by the totality of factors constituting a given factual situation, it is noteworthy that the occurrence of specific circumstances may determine differences in the results of weighing compared to a hypothetically considered (model) factual situation devoid of these circumstances. Hence, the ultimate determination of conditional precedence relationships should be made by authorities capable of conducting the weighing mechanism *in concreto sensu stricto*, namely the courts[[19]](#footnote-19).

In this context, I disagree with the view expressed in the literature regarding the permissibility of courts independently resolving collisions of constitutional rights in the absence of legislative decisions only when the application of the weighing mechanism by the court of conflicting constitutional values ​​would give a clear and unquestionable result[[20]](#footnote-20).

Since, as previously demonstrated, the application of the weighing mechanism is sometimes necessary to resolve a pending case before the court, and thus protect individual rights, in such a situation, resolving conflicts of constitutional rights by the court is not only the prerogative of the adjudicating panel but also its duty. This obligation is not limited to situations where weighing would yield a clear and unquestionable result, which in hard cases would either lead to the impossibility of issuing a judgment due to an unfillable legal gap (legal vacuum[[21]](#footnote-21)) or to a technical decision that does not address the essence of the matter.

**6.** Thirdly, attention should be drawn to the obligations of the court when making validation decisions, namely establishing the normative state that forms the basis for the judgment issued in the case. Article 178(1) of the Constitution expresses a conjunction, meaning the judge is bound by both the Constitution and the law. This duty should be understood as the obligation to comply with the legal norms contained in these (binding) legal acts, interpreted on the basis of commonly accepted rules of interpretation of legal provisions[[22]](#footnote-22). The court cannot apply an unconstitutional law because, by violating the state of being bound by the constitution, it acts *contra legem*, and at the same time, refusing to apply the law is also *contra legem*. This problem can be addressed in at least two ways. The first involves presenting a legal question to the Constitutional Tribunal, which will either find no collision (no violation of the state of being bound by the constitution in the case of applying the law) or issue a derogating judgment nullifying the unconstitutional provision of the law, which will exclude the state of being bound by the law. The second method refers to the court making a negative non-derogatory validation decision, which amounts to recognizing that, according to the rule *lex superior derogat legi inferiori*, the unconstitutional provision of the law cannot be attributed the quality of being binding. Due to the theoretical-legal conditions of this collision rule, its scope of application is limited, particularly relating to cases of strict unconstitutionality, secondary unconstitutionality, circumvention of the constitution, and unlawful legislation[[23]](#footnote-23). It should also be noted that there is a qualitative difference between the state of being bound by the law and the absence of being bound by sub-statutory acts. Blurring this difference through the application of mechanisms of dispersed constitutional control by the courts would lead to unjustified interpretation *per non est*.

**7.** The obligation of judicial application of constitutional law arises from the normative nature of these rights and the principle of direct application of the constitution. This model is based on the dualistic protection of the constitution, requiring active application of constitutional norms by the courts in individual cases. Consequently, the courts have a duty to engage in various aspects of judicial decision-making, including the interpretation of the law, weighing conflicting principles, and establishing the normative state. Their role in the judicial process is crucial for safeguarding individual rights and ensuring that judgments comply with constitutional principles.­

1. A. Zoll, *Związanie sędziego ustawą*, in: *Konstytucja i gwarancje jej przestrzegania. Księga pamiątkowa ku czci Prof. Janiny Zakrzewskiej*, Warszawa 1996, pp. 241 and beyond. [↑](#footnote-ref-1)
2. M. Zygmunt, *Państwo demokratyczne w klauzuli limitacyjnej. Redundancja, aksjologiczna konieczność czy praktyczna potrzeba?*, „Przegląd Prawa Publicznego” 2023, vol. 5, p. 58; M. Gutowski, P. Kardas, *Wykładnia i stosowanie prawa w procesie opartym na Konstytucji*, Warszawa 2017, p. 209; P. Tuleja, *Stosowanie Konstytucji RP w świetle zasady jej nadrzędności (wybrane problemy)*, Kraków 2003, pp. 64-65; M. Florczak-Wątor, *Aksjologia Konstytucji Rzeczypospolitej Polskiej*, in: *Argumenty i rozumowania prawnicze w konstytucyjnym państwie prawa: komentarz*, ed. M. Florczak-Wątor, A. Grabowski, Kraków 2021, pp. 61-89. [↑](#footnote-ref-2)
3. M. Safjan, in: *Konstytucja RP. Tom I. Komentarz do art. 1-86*, eds. M. Safjan, L. Bosek, Warszawa 2016, Legalis; A. Grabowski, *Postpozytywizm prawniczy: teoria prawa między pozytywizmem a prawem natury*, in: *Metodologiczne dychotomie. Krytyka pozytywistycznych teorii prawa*, eds. T. Gizbert-Studnicki, A. Dyrda, A. Grabowski, Warszawa 2016, p. 412. [↑](#footnote-ref-3)
4. Constitution of the Republic of Poland of 2 April 1997 as published in Dziennik Ustaw No. 78, item 483. [↑](#footnote-ref-4)
5. rulings and decisions of the Constitutional Tribunal: ruling dated June 9, 1998, case no. K 28/97; ruling dated May 13, 2002, case no. SK 32/01; ruling dated November 8, 2001, case no. P 6/01; ruling dated April 20, 2017, case no. K 10/15; ruling dated October 24, 2007, case no. SK 7/06; decision of the Constitutional Tribunal dated December 15, 2008, case no. SK 84/06. [↑](#footnote-ref-5)
6. P. Tuleja, *Sądowa wykładnia prawa jako podstawa hierarchicznej kontroli norm*, in: *Kontrola konstytucyjności prawa a stosowanie prawa w orzecznictwie Trybunału Konstytucyjnego, Sądu Najwyższego i Naczelnego Sądu Administracyjnego*, ed. J. Królikowski, J. Podkowik, J. Sułkowski, Warszawa 2017, p. 56. [↑](#footnote-ref-6)
7. P. Tuleja, *Stosowanie Konstytucji RP…*, p. 375. [↑](#footnote-ref-7)
8. P. Tuleja [in:] *Konstytucja RP. Tom I…*, eds. M. Safjan, L. Bosek, art. 8, bn 33, Warszawa 2016. [↑](#footnote-ref-8)
9. M. Gutowski, P. Kardas, *Wykładnia i stosowanie prawa…*, p. 210. [↑](#footnote-ref-9)
10. Judgment of the Provincial Administrative Court in Poznań dated November 22, 2007, case no. IV SA/PO 391/07. [↑](#footnote-ref-10)
11. P. Tuleja presents a contrary view, see P. Tuleja, *Stosowanie Konstytucji…*, p. 305. [↑](#footnote-ref-11)
12. M. Gutowski, P. Kardas, *Wykładnia i stosowanie prawa…*, p. 509. [↑](#footnote-ref-12)
13. M. Kordela, *Kategoria norm, zasad oraz wartości prawnych. Uwagi metodologiczne w związku z orzecznictwem Trybunału Konstytucyjnego*, „Przegląd Sejmowy” 2009, vol. 5, p. 28. [↑](#footnote-ref-13)
14. T. Gizbert-Studnicki, *Konflikt dóbr i kolizja norm*, „Ruch Prawniczy, Ekonomiczny i Socjologiczny” 1989, vol. 1, p. 1; M. Kordela, *Kategoria norm…*, p. 28; M. Gutowski, P. Kardas, *Wykładnia i stosowanie prawa…*, pp. 219-220, 536. [↑](#footnote-ref-14)
15. P. Tuleja, *Interpretacja konstytucji,* in: *Konstytucja i gwarancje jej przestrzegania. Księga pamiątkowa ku czci prof. Janiny Zakrzewskiej*, ed. J. Trzciński, A. Jankiewicz, Warszawa 1996, p. 480. [↑](#footnote-ref-15)
16. T. Gizbert-Studnicki, *Konflikt dóbr…*, p. 12. [↑](#footnote-ref-16)
17. P. Tuleja, *Postępowanie przed Trybunałem Konstytucyjnym w sprawie hierarchicznej kontroli norm*, „Przegląd Sejmowy” 2009, vol. 5, p. 35. [↑](#footnote-ref-17)
18. M. Sarnowiec-Cisłak, T. Grzybowski, *Ważenie zasad prawa w orzecznictwie sądów administracyjnych*, „Zeszyty Naukowe Sądownictwa Administracyjnego” 2018, vol. 6, p. 55. [↑](#footnote-ref-18)
19. M. Zygmunt, *Ważenie praw i wolności konstytucyjnych w procesie sądowego stosowania prawa*, „Przegląd Prawa Konstytucyjnego” 2023, vol. 3, pp. 127-139. [↑](#footnote-ref-19)
20. M. Florczak-Wątor, *Horyzontalny wymiar praw…*, p. 234; M. Florczak-Wątor, *Ważenie zasad konstytucyjnych jako podstawa sądowej wykładni*, in: *Argumentacja konstytucyjna w orzecznictwie sądowym*, „Studia i Analizy Sądu Najwyższego. Materiały naukowe”, eds. A. Kotowski, E. Maniewska, t. 4, Warszawa 2017, p. 35. [↑](#footnote-ref-20)
21. M. Safjan, *O różnych metodach oddziaływania horyzontalnego praw podstawowych na prawo prywatne,* „Państwo i Prawo” 2014, vol. 2, p. 17. [↑](#footnote-ref-21)
22. P. Wiliński, P. Karlik, in: *Konstytucja RP. Tom II. Komentarz do art. 87-243*, eds. M. Safjan, L. Bosek, art. 178, bn 53. [↑](#footnote-ref-22)
23. A. Grabowski, *Konstytucja RP jako lex superior względem prawa ustawowego (w ramach sądowego stosowania prawa),* „Państwo i Prawo” 2022, vol. 10, pp. 46-47. [↑](#footnote-ref-23)