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REVIEW OF THE CONSTITUTIONALITY OF LAW IN THE DIRECT APPLICATION OF THE CONSTITUTION

There is a heated debate over the constitutional position of the Constitutional Tribunal and its role in a democratic state of law. This is due to the adoption of further reforming laws, and according to the authors responsible for its arrangement, the functioning of the Constitutional Tribunal. The undisputed and invaluable role of the Constitutional Tribunal as a guardian of constitutional conformity makes it comparable to a democratic fence that protects against attempts made by parliamentarians to introduce a solution that is incompatible with the provisions of the Constitution. There is a fear that the changes will prevent the functioning of the Constitutional Tribunal, which will not be able to fulfill its tasks. In this way, there will be a lack of authority to protect against the introduction of solutions that can undermine constitutional values. The absence of any control by the ordinary legislator, who, by relying

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on the will of the sovereign, can accomplish any purpose, including that which will hinder the achievement of constitutional values. It is feared that, despite seemingly ultralegalism, all the actions of the authorities will be justified by appropriate legal provisions, the rule of law may be transformed into statutory lawlessness. It is worth recalling that in Europe, the experience of the consequences of the distortion of the legal positivism has led to the emergence of extra-parliamentary control of the constitutionality of the law. It should be stressed that the observance and application of the Constitution is the responsibility of every state body, including the courts. This is not only a task of the Constitutional Tribunal, but it is incumbent upon all the courts whose function is underestimated in this area.

In such a situation, all the judges obliged to protect civil rights and freedoms, who are more than ever obliged to guard the Constitution, have a special role to play[1]. In carrying out this duty, the judges have the tools to oppose the dictatorship of the parliamentary majority. The first limitation on the rulers is the regulation of the European law, which requires Member States to fulfil the criteria of a democratic state of law. One of the pillars of the primary law of the European Union is the Charter of Fundamental Rights, which has the same legal force as the Treaties[2]. The Charter of Fundamental Rights defines the rights and freedoms enjoyed by citizens of the Member States. The provisions of the Charter are applicable not only to the European institutions but also to member states to the extent in which they follow the EU laws[3]. The Charter provisions bind not only the member states themselves but all their authorities. The national courts are obliged to ensure the protection of the rights conferred by the law of the union and the effectiveness of the law through control of the way in which the related law is implemented, pro-EU interpretation of the national law and refusal to apply national regulations in the event of their non-compliance with the law of the Union. This applies only to cases of a Community nature, i.e. where there is a cross-border element. The national court is required to establish a provision of the EU law relevant to the resolution of the case and to determine the nature of the relationship between the European Union and Polish law (compatibility or incompatibility) with the need to remove incompatibility by way of interpretation consistent with the Union law.

The second limitation, more common in practice, is the application by the common and administrative courts of the Constitution in the issuance of judgments. This is possible through the direct application of the Constitution. The basis for this is the principle of direct application of the Constitution. The call for the direct

[1] Art. 178 section 1 of the RP Constitution says that "Judges in the exercise of their office are independent and subject only to the Constitution and the statutes".

[2] Art. 6 of the Treaty on the European Union says that the European Union recognizes the rights, freedoms and principles stipulated in the Charter of Fundamental Rights of 7.12.2000 as amended 12.12.2007 in Strasburg.

[3] Art. 51 section 1 of the Charter of Fundamental Rights.

application of the provisions of the Constitution was formulated in Poland for the first time in the Basic Law of 2 April 1997[4]. Art. 8 section 2 of the Constitution states that "the provisions of the Constitution shall apply directly unless the Constitution provides otherwise." Thus the model of applying of the Constitution effective in the PRL (Polish People's Republic) was rejected, where except for the absence of the non-parliamentary control of the constitutionality of the statutes, it is characterised by the subordination of the judges to the statute understood as excluding the possibility of direct application of the norms of the Constitution by the courts, including the reference to them by individuals in the absence of "executional" ordinary statues[5]. Thus, the problem of direct application of the Constitution has been transferred from the sphere of postulates to the sphere of duty[6].

The principle of direct application of the Constitution does not concern only Polish constitutionalism, but is one of the most intricate and discussed problems in modern legal systems. This issue also has a distinct axiological dimension, as the constitutional regulations of democratic states remain strongly influenced by international human rights acts[7]. The boundaries between the interpretations of the direct application of the Constitution are also blurred in judicial practice.

DIRECT APPLICATION OF CONSTITUTIONAL NORMS

There is no doubt that the Constitution as a law must be applied by all public authorities and other entities that are addressees of the norms and principles contained therein[8]. It is only when there are procedures that guarantee the observance of the Constitution by all its recipients, this obligation becomes real[9]. Applying the Constitution is also the establishment of norms and principles of the Constitution, as a direct basis for actions, resolutions or norms wherever possible.

The basis for introducing the notion of direct application of the Constitution was the notion of application of law. The direct application of the Constitution is widely understood in the literature and judicature. The spontaneous use, parallelism and in-

[4] S. Wronkowska, *W sprawie bezpośredniego stosowania Konstytucji,* „Państwo i Prawo" 2001, no. 9, p. 3.
[5] W. Lang, *Obowiązywanie normy prawnej w czasie w świetle logiki norm,* Zeszyty Naukowe Uniwersytetu Jagiellońskiego 1960, volume 31, p. 72 and following.
[6] L. Garlicki, *Polskie prawo konstytucyjne zarys wykładu,* Warszawa 2003, p. 45.
[7] S. Wronkowska, *W sprawie bezpośredniego stosowania…,* op. cit., p. 4-5; A. Łabno-Jabłońska, *Zasada bezpośredniego obowiązywania konstytucyjnych praw i wolności jednostki* [in:] Podstawowe prawa jednostki i ich sądowa ochrona, red. L. Wiśniewski (red.), Warszawa 1997, p. 64.
[8] L. Garlicki, *Polskie prawo konstytucyjne…*, op. cit., p. 45.
[9] Control of constitutional observance developed from the procedure of the so-called constitutional responsibility, i.e. qausi-penal responsibility of highest state officers for the violation of the Constitution when in office, which was formed in the Middle Ages in England (as the so called impeachment procedure) and as such it was taken over by the United States. In Europe special courts (called state tribunals) were created for judging such cases. Next administrative courts developed which kept developing throughout the 19th century in France, Germany and Austria. Ultimately these institutions were supplemented by the procedures of court supervision of statutes in terms of their compatibility with the Constitution.

terpretive co-ordination are distinguished[10]. It is said about the direct application of the Constitution in a broad and exact sense. Broadly speaking, the meaning of the term "application of the Constitution" is to make use of the powers conferred by the constitutional competence standard on the authorized entity[11]. The sign of direct applicability of the Constitution in broad terms is the duty of all state authorities to interpret and apply the ordinary law ("co-application of the Constitution"). In a narrower sense it is said of the application of the Constitution when public authorities acquire by virtue of the Constitution the powers to legislate and when the act of a state body is based on a constitutional standard rather than the norm of the law. In this sense, the direct application of the Constitution occurs when the substantive basis for the resolution is contained in the provisions of the Constitution, and indirect application, where such a basis is contained in the law[12]. Strictly speaking, the direct application of the Constitution refers to the process by which a legitimate constitutional authority determines the legal consequences of constitutional norms in an individual case solely on the basis of a constitutional norm that satisfies the condition of sufficient specificity and unambiguity[13].

For a long time there was a dispute over the content and validity of this principle. The legal nature of the Constitution, the evolution of the content of the Constitution, and the new provisions and the application of the Constitution by the courts and the review of the constitutionality of the law were discussed.[14]. At present, the Polish dispute over the direct application of the Constitution by the courts concerns whether a constitutional norm and only such a norm can be a legally substantive basis for the decision of the court and whether in the case of incompatibility between the constitutional norm and the statutory norm, the court has the right to refuse to apply the statutory norm and to make a constitutional norm without referring the matter to the Constitutional Tribunal.

Implementing the principle of direct application of the Constitution required the Constitution to be normative, since initially the provisions of the Constitution were merely programmatic. At present there is no doubt that the Constitution is a normative act that contains the norms of various types addressed to many entities, including the substantive, competence, normative and programmatic norms.[15]. It is the highest

[10] P. Tuleja, *Stosowanie Konstytucji RP w świetle zasady jej nadrzędności (wybrane problemy)*, Kraków 2003, s. 63 and following; L. Garlicki, *Polskie prawo konstytucyjne …*, op. cit., p. 45.

[11] Z. Ziembiński uses the term "application of law" in such a broad meaning – S. Wronkowska, Z. Ziembiński, *Zarys teorii prawa,* Poznań 1997, p. 213-214; S. Wronkowska, *W sprawie …*, op. cit., p. 9.

[12] L. Leszczyński, *Zagadnienia teorii stosowania prawa, doktryna i tezy orzecznictwa*, Zakamycze 2001, p. 15; S. Wronkowska, *W sprawie bezpośredniego stosowania …,* op. cit., p. 9.

[13] S. Wronkowska, *W sprawie bezpośredniego stosowania …,* op. cit., p. 12-13; J. Wróblewski, *Sądowe stosowanie prawa*, Warsaw 1988, p. 42.

[14] S. Wronkowska, *W sprawie bezpośredniego stosowania …,* op. cit., p. 3-4.

[15] T. Gizbert-Studnicki, A. Grabowski, *Normy programowe w Konstytucji,* [in:] *Charakter i struktura norm w konstytucji* , ed. J. Trzciński, Warsaw 1997.

legal act, which has a special position in the whole legal system[16], which means that no applicable legal norm can be incompatible with it. The Constitution is perceived as a normative act that formulates the system of values on which the legal system is to be based, and the principles of law that are legally binding in it define the direction of legislation, the interpretation of legal provisions and the direction of the application of the interpreted norms[17]. It is also nowadays considered to be an act which directly determines the fundamental rights of the individual and the obligations of the State [18].

In the United States, the binding nature of constitutional principles was much earlier than in Europe, where the process was countered. This is due in part to the differences in both legal systems, which differ in a different system of sources of law, a clear division into lawmaking and the application of law and the role of courts. In the US system, the court is empowered to seek a fair settlement based on the norms contained in the Constitution, which need not be unequivocally expressed. In Europe there is a clear distinction between legislative acts and acts of the law application, and the task of the court is to be the mouth of the law. Hence, despite the fact that the Constitution constituted the highest act in the system of sources of law, its application was limited in Europe by the concept of the mediating role of the law, where judges undertook legality checks based on the law and did not examine the constitutionality[19].

The binding nature of the provisions of the Constitution required reference to the notion of rule of law and binding the court by it. Hence the provisions of the Constitution should be unequivocal, so that one can talk about binding the judge to the Constitution[20]. Applying the Constitution refers first of all to statutes, whose provisions are the result of the concretization of constitutional provisions or the prohibition of lawmaking contradicting its provisions. Recognition of the normative nature of the constitution, and not merely of the programming one, was the basis for its application by the courts, although the judicial use of the constitution was very limited[21].

The modern conception of the application of the Constitution rejects the concept of the mediating role of ordinary law. This concept treats the Constitution as an act addressed primarily to the ordinary legislator – so the parliament, and only the development of constitutional provisions in ordinary law, allows them to be used by other bodies and by citizens – the constitution is therefore applied through statutes.

This concept is opposed to the principle of the direct application of the Constitution according to which a law-abiding party should base its actions, first of all, di-

[16] S. Wronkowska, *Zamknięty system źródeł prawa w praktyce oraz dostosowanie prawa do wymogów Konstytucji RP*, [in:] Konferencja naukowa: Konstytucja RP w praktyce, Warsaw 1999, p. 65-67.
[17] S. Wronkowska, *W sprawie bezpośredniego stosowania …,* op. cit., p. 4-5.
[18] P. Tuleja, *Stosowanie Konstytucji RP ...,* op. cit.
[19] L. Garlicki, *Bezpośrednie stosowanie konstytucji,* [in:] *Konstytucja RP w praktyce*, Warsaw 1999, p. 12.
[20] P. Tuleja *Stosowanie Konstytucji RP …,* op. cit.
[21] P. Sarnecki, *Stosowanie Konstytucji PRL w orzecznictwie Naczelnego Sądu Administracyjnego*, „Studia Prawnicze" 1988, no. 3, p. 68 and following.

rectly on the constitutional provision, and only then should it refer to the provisions of ordinary law. The laws aim at ensuring the proper implementation of constitutional rights and the scope of the legislator's freedom is limited in such cases[22]. With this perception, the Constitution is constantly used in the activities of all public authorities, and the fundamental role in this respect must be taken by the courts.

The Constitution is implemented through the normative acts which it is specified by and through the acts of application of the law which, in their interpretation, take into account the necessity of realizing constitutional values[23]. The principles of law expressed in the Constitution require development in other normative acts[24]. Expressing the fundamental values in the Constitution underpinning the system of law leads to their posivitisation and facilitates consideration in the process of applying the law, allowing for the evaluation of the content of statutes and other normative acts by the prism of constitutional values. In addition, it broadens the legal basis which can and should be referred to by the court issuing an individual resolution[25]. The Constitution, as the act of the highest legal power, determines the position of the individual, guarantees the individual of liberty and law without intermediary acts, and imposes obligations upon him or her, and, moreover, grants the individual some measures of legal protection[26]. This required the evolution of the basic law as a normative act – from the country's organisational statutes, regulating the system of public authorities and relationships between them, to the act normalising the status of an individual in the state community[27]. The meaning ascribed to the expression "direct application of the Constitution" formed by evolving of the views on the role of the Constitution in the life of the state community[28].

The imposition on the judge of the obligation to apply the Constitution makes his binding by the law not absolute. The relative nature of the bond results from the fact that the legislator can only to a certain degree determine the content of an individual resolution, and to the rest it is the task of the judge. Laws are sources of general-abstract norms, which must be specified by the court for the purpose of settling individual cases. The task of a judge is not merely to reconstruct in such a way the objective will of the legislator. The notion of binding the judge by the law has been considered from the beginning not only as binding the judge by the letter of the law[29], but it has also been the guarantee of the independence of the judges. The relative character of this binding strengthens the judicial position of the judges. In

[22] P. Tuleja, *Stosowanie Konstytucji RP …,* op. cit.
[23] S. Wronkowska, *W sprawie bezpośredniego stosowania …,* op. cit., p. 5.
[24] S. Wronkowska, M. Zieliński, Z. Ziembiński, *Zasady prawa – zagadnienia podstawowe*, Warsaw 1974.
[25] P. Tuleja. *Stosowanie Konstytucji RP …,* op. cit.
[26] S. Wronkowska, *W sprawie bezpośredniego stosowania …,* op. cit., p. 5.
[27] P. Tuleja, dyskusja nad referatem L. Garlickiego, *Bezpośrednie stosowanie konstytucji. Tezy referatu,* Konferencja naukowa: Konstytucja RP w praktyce, Warszawa 1999, p. 40-44.
[28] S. Wronkowska, *W sprawie bezpośredniego stosowania …,* op. cit., p. 6.
[29] According to Montesquieu's formulation, the judge was to be the mouth of the law.

the absolute monarchy, the judge, based on the law, could resist the arbitrariness of the monarchy. Over time, the role of the law as the basis for the judicial decision changed. The binding of the judge by the law is realized by the application of appropriate rules of interpretation. The application of the law by the court includes the interpretation of the law (secundum legem), the fulfillment by the judges of the legislative gaps (preter legem) and the creation of the law by the judges (contra legem)[30]. In systems based on acts of lawmaking and law enforcement, the law is still the primary source of law on which judicial decisions are based[31]. However, the law is to be one of the elements that make it possible to make a rational decision[32]. The legislator cannot unequivocally resolve all possible problems or conflicts of interest, leaving it to the court performing the guarantee function.

CONTROL OF THE CONSTITUTIONALITY OF LAW

To say that a constitutional provision can be applied directly does not automatically mean that the court may omit the statutory norm and make an explicit pronouncement on the basis of the Constitution if it is convinced of the non-conformity of the two norms. In the situation of the conflict between the constitutional norm and the norm of the lower order, the application of the Constitution is primarily based on the interpretation of the law in line with the Constitution. It means that with different possibilities of understanding the legal text, one should choose such understanding which will allow the normative act to be considered compatible with the Constitution[33]. If the pro-Constitutional interpretation of the provision of the law does not resolve the conflict of norms, the admissibility of omission when deciding if the statutory norm depends on the way of understanding the current constitutional control model and the principle of the supremacy of the Constitution[34]. There are various models of ensuring the conformity of law with the Constitution. In the case of structural system taking a supervisory role of the parliament in the state apparatus a concept of the so called self-control of the parliament was formed assuming that the parliament itself can take care of the consistency of its laws with the Constitution. Such systems are unwilling to establish any external (extra-parliamentary) mechanisms of control of the constitutionality of the laws. It is an approach typical of the French doctrine, where till today, it is thought that courts (general and administrative) cannot check the constitutionality of laws and it was also assumed by the so called socialist constitutionalism[35]. Systems emphasising

[30] P. Tuleja, *Stosowanie Konstytucji RP …*, op. cit. and publications indicated therein.
[31] Ibidem.
[32] Ibidem.
[33] See judgement of the CT of 15.7.1996, K 5/96 OTK, ZU 1996, Nro.4, item 30.
[34] P. Tuleja, *Stosowanie Konstytucji RP…,* op. cit., p. 303 and following.
[35] L. Garlicki, *Polskie prawo konstytucyjne…*, op. cit., p. 46.

the enforcement were characterised by the so called theory of sanctions developed at the end of the 19th century in Germany. The constitutional protection of statues was to be ensured by the requirement that the law should be signed by the head of state, treating the monarch's signature as an authoritative statement of the law's conformity with the constitution[36].

In practice, none of these concepts has worked out and it has been widely acknowledged that the primary role in controlling the constitutionality of statutes should fall to the judiciary. Two basic models were formed in this respect. The first is dispersed control (deconcentrated), which appeared at the turn of the 18th and 19th century in the USA. In this model, competence to rule on constitutional conformity is vested in all courts and there is no need to create a separate constitutional (tribunal) court. Declaration on the constitutionality of the acts is incidental, meaning that it can be made only within a specific framework. Moreover, a decision on the unconstitutionality of a law means that the court refuses to apply such a law when deciding the case before it (the so-called inter partes effect); the court has no right to revoke the law and remove it from the system of applicable law. Due to the special role of precedents in the US law – in practice, the US Supreme Court ruling on the incompatibility of the law with the Constitution puts an end to its application.

Europe has not adopted the American solutions. For example, Article 64 section 5 of the Constitution of the Republic of Poland of April 23, 1935, expressly stated that "the courts have no right to examine the validity of legislative acts duly proclaimed". It was not until the First World War that a second model of judicial protection of the Constitution emerged, referred to as centralized control. Its primary feature is the existence of a special court or quasi-judicial body – a constitutional (court) tribunal, which is solely competent to rule on the conformity of statutes with the constitution. The other courts may only appeal to the Constitutional Tribunal for a decision, but they cannot issue such decisions independently. The constitutional control of statutes includes concrete and abstract control. The first is performed by the courts in the form of legal questions, so when dealing with individual cases. The other is at the initiative of some authorized government bodies (the president, the government, the ombudsman, as well as groups of parliamentary deputies) who may apply for a ruling of the constitutional tribunal even if the problem of constitutional law does not appear in any particular case. The decision of the Constitutional Tribunal on the unconstitutionality of the law causes it to be annulled (the so-called erga omnes effect), and thus finally removed from the system of law. This model was formed in Austria and Czechoslovakia, but in the interwar period was not widely accepted. It was only after the Second World War that the demand for the creation of new systems for the protection of the rule of law was met. Constitutional

[36] Ibidem, p. 46-47.

tribunals emerged in countries that lost the war (Germany, Italy, Austria), then in countries liberating themselves from all kinds of dictatorships (Spain, Portugal, and after 1989 almost all former Soviet bloc countries). In this trend, Poland also found itself, where the Constitutional Tribunal was established in 1985, but it was only in 1997 that the Constitution was granted to it.[37]

This dichotomy of the models of constitutional control of the law affects the discussions on the division of powers in this area between the judicial authorities and the Constitutional Tribunal. The Constitutional Tribunal itself represents a traditional approach, likewise the majority of the doctrine[38] and part of the practice of the Supreme Court and the Supreme Administrative Court[39]. It is assumed that to detect the incompatibilities between the constitutional norm and the norm lower in terms of hierarchy, a special authorisation is required, granted to selected authorities (constitutional courts)[40]. Art. 188 of the Constitution recognizes the absolute exclusivity of the Constitutional Tribunal to adjudicate on the incompatibility of the content of the statutory norm with the constitutional norm[41]. The model of centralized control expressed in the Constitution is based on the concept of presumption of constitutionality, that is, the unconstitutional norm in spite of its defect, until the ruling of its incompatibility with the Constitution. The settlement of the constitutional doubts arising during the court proceedings should be effected by the referral by the court of a legal question under Art. 193 of the Constitution (for each court in each instance)[42]. The Constitutional Tribunal strongly emphasises that the institution of a legal question is an essential element of the constitutional control model and its application is not excluded by the one provided for in art. 178 of the Constitution on subordination of the judges (and not courts) to the Constitution and statutes. Article 193 of the Constitution lays down "the obligation to make use of the possibility afforded by that provision whenever the court adjudicates that the rule constituting the basis of adjudication is contrary to the Constitution" (SK 18/00), on no grounds the reason for refusal there can be a principle of direct application of the Constitution[43].

The opposite position challenges the exclusive jurisdiction of the Constitutional Tribunal and states that direct application of the Constitution may consist in refus-

[37] Ibidem, p. 48.

[38] Ibidem, p. 257, 317; P. Sarnecki, *Wprowadzenie konstytucji w życie*, p. 17, [in:] *Wejście w życie nowej Konstytucji RP,* Z. Witkowski (ed.), Toruń 1998, 17-18; A. Mączyński, *Bezpośrednie stosowanie Konstytucji przez Sądy,* „Państwo i Prawo" 2000, no. 5, p. 5; B. Nita, *Bezpośrednie stosowanie konstytucji a rola sądów w ochronie konstytucyjności prawa*, „Państwo i Prawo" 2002, no. 9, p. 41 and following.

[39] Supreme Court rulings of:18.9.2002, III CKN 326/01, not published; of 30.10.2002, V CKN 1456/00, not published; of 7.11.2002, V CKN 1493/00, not published; resolution of the National Administrative Court of 12.6.2002, OPS 6/00, ONSA 2001, No. 1, item 4.

[40] Under the assumption of this principle, the courts (general and administrative) are entitled to examine the conformity of the sub-statutes with the law.

[41] A. Mączyński, *Bezpośrednie stosowanie Konstytucji …*, op. cit., p. 5.

[42] See the Supreme Court ruling of 16.4.2004, I CKN 291/03, OSN 2005, No. 4, item. 71.

[43] Judgment of the full CT sitting of 31.1.2001, P 4/99, OTK ZU 2001, No. 1, item 5.

ing to apply a statutory provision incompatible with it[44]. It is pointed out that the implementation of the postulate of the direct application of the Constitution can only be said when other judicial capacity segments start to do so, especially the Supreme Court and the Supreme Administrative Court[45].

The high approval of the courts was gained by the idea according to which, regardless of the procedural forms available, all courts, legislator, and even administrative authorities were obliged to apply the constitution directly ("co-application of the Constitution")[46]. It is based on such an interpretation of art. 8 section 2 in conjunction with Art. 178 of the Constitution of the Republic of Poland, from which a competence standard is issued, giving the judge, subject to the Constitution and the laws, the right and, according to some approaches, an obligation[47], to not apply a law on which unconstitutionality was not ruled by the Constitutional Tribunal. The advocates of this approach point out that it is another matter to adjudicate on the power of the law in force, and another is the refusal to apply the law in concerto, which implements in practice the principles of direct application and supremacy of constitutional norms, which should not be confined to the case of a loophole in the statutory regulation[48]. This does not prejudice the competence of the Constitutional Tribunal to adjudicate on the compatibility of statutes with the Constitution, since another is the object of adjudication and the resulting consequences. While the Constitutional Tribunal rules on the law and abrogates the binding force of the law, and its ruling is universally binding and final (Article 188 (1) of the Constitution of the Republic of Poland), the ordinary court rules on an individual social relationship, and its view on the contradictions of the Act with the Constitution is not binding to other courts adjudicating on the same matters. Part of the Supreme Court practice and the Supreme Administrative Court practice go in this direction[49]. The Supreme Court points out that the decision whether to ask a question of law to the Constitutional Tribunal depends on the opinion of the court adjudicating ad casum[50]. The application of constitutional norms in addition to statutory norms

[44] S. Wronkowska, *W sprawie bezpośredniego stosowania …,* op. cit., p. 13; K.Gonera, E. Łętowska, *Article 190 of the Constitution and its consequences in judicial practice*, „Państwo i Prawo" 2003, no. 9, p. 11-12.

[45] L. Garlicki, *Polskie prawo konstytucyjne…*, op. cit., p. 45.

[46] Judgment of the Supreme Court of 27.3.2003, V CKN 1811/00, judgment Z SN of 26.9.2000, III CKN 1089/00.

[47] Judgment of the Supreme Administrative Court (Poznań) of 14.2.2002, I SA/Po 461/01, OSP 2003, No. 2, item 17.

[48] N. Półtorak, *Odpowiedzialność odszkodowawcza państwa w prawie Wspólnot Europejskich*, Kraków 2002, p. 380-381; K. Gonera, E. Łętowska, *Article 190 of the Constitution…*, op. cit., p. 11-12.

[49] Resolution of the Supreme Court of 4.7.2001, III ZP 12/01, OSN 2002, No. 2, item 34; judgment of the Supreme Court SN of 26.5.1998, III SW 1/98, OSN 1998, No. 17, item 528; judgment of the Supreme Court of 10.11.1999, I CKN 204/98, OSN 2000, No. 5, item 94; Judgment of the Suprme Administrative Court (Poznań) of 14.2.2002, I SA/Po 461/01, OSP 2003, No. 2, item. 17.

[50] K. Kolasiński, *Zaskarżalność ustaw w drodze pytań prawnych do Trybunału Konstytucyjnego,* „Państwo i Prawo" 2001, no. 9, p. 24.

appeared initially in the case law of the Supreme Administrative Court (beginning in the 1980s), and in the judicature of the Supreme Court since the judgment of 28.11.1990, III ARN 28/90[51]. The concept of direct application of the Constitution refers to a situation in which a constitutional provision specifically and precisely regulates a matter, which may constitute a direct basis for the act of the application of the law – regardless of whether it is regulated in the ordinary legislation[52].

It seems legitimate to say that if a normal provision is in force and is not in the opinion of the court contrary to the constitution, whatever kind of authority we give the court, in any event we will release it from the obligation to "be the mouth of the law" - at least the sense that it would reproduce the content, without its own contribution, creative assessment"[53]. This principle does not necessarily has to lead to the admission of any authority to adjudicate as a non-binding act, in its conviction "abrogated" by the Constitution. However, in our legal tradition it is recognized that this kind of lawful activity of the judge serves only to fill the gaps in the law, cannot be directed contra legem[54]. With the latter in mind, it is considered that if it is not possible to find a satisfactory interpretation of a provision (and thus interpretations in conformity with the Constitution) from the point of view of the implementation of constitutional norms, the court should suspend (or postpone) the proceedings in the matter to refer the legal question to the authorized body to resolve the conflict between the law and the Constitution[55]. If it does not do so, it is exposed to the fact that it enters into competences that do not belong to it, but to the CT[56]. Confirmation of such a position is admissible, but by way of exception of the direct application of a constitutional standard to protect the rights or freedoms of an individual, if there is an obvious contradiction of the sub-constitutional standard, with full symmetry of the norms, and where the lower norm is so clear, specific and unequivocal that it excludes the interpretation doubts[57]. However, Art. 8 sec. 2 of the Constitution guarantees the completeness of the legal system so that the court has the right, in the event of a malfunction in ordinary legislation, to settle the question directly on a constitutional standard suitable for direct application, in principle the norms guaranteeing the individual freedom and rights e.g. Article 77 section 1 of the civil code[58].

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[51] K. Działocha, *Bezpośrednie stosowanie podstawowych praw jednostki (w związku z projektem Karty Praw i Wolności,* [in:] *Z zagadnień współczesnego prawa cywilnego. Księga pamiątkowa ku czci Profesora Tomasza Dybowskiego,* „Studia Iuridica" 1994, vol. 21, p. 36.

[52] M. Haczkowska, *Odpowiedzialność odszkodowawcza państwa według Konstytucji RP*, Warsaw 2007, p. 238.

[53] J. Łętowski, Wpływ konstytucji na prawo cywilne [in:] *Konstytucyjne podstawy systemu prawa* ed. M. Wyrzykowski, Warsaw 2001, p. 153.

[54] S. Langrod, *Praworządność w problemie odszkodowania*, Warsaw 1926, p. 47.

[55] Judgment of 16.4.2004, I CK 291/03, not published.

[56] P. Tuleja, *Stosowanie Konstytucji RP …,* op. cit., p. 367, 373 and following.

[57] Supreme Court judgment of 8.1.2009, I CSK 482/08, OSN ZD 2009, No. D, item 95.

[58] S. Wronkowska, *W sprawie bezpośredniego stosowania …,* op. cit., p. 13, 23.

DIRECT APPLICATION OF THE CONSTITUTION BY COURTS

There is a distinction between legislative acts and acts of the application of the law. Legislative acts of individual character are acts of the application of the law, and acts regulating norms are the acts of lawmaking[59]. It is assumed that the operation of the law enforcement bodies is not of a law-making nature, understood as the creation of general and abstract norms, since the decisions of such organs create individual and specific rules[60].

When talking about the application of law, there are judicial acts and executive acts of the application of law. The distinction is made from the view of the legal basis determining the manner of the authority. In the case of the first, the content of the act of application of law is strictly defined by the content of the rules of substantive law that underlie the decision. This applies where the content of an act of a public authority is designated by the substantive law, and the body has limited discretion and the application of the law consists in determining the legal effects of a particular situation. With respect to the leading application of the law, the norm of substantive law sets forth the content of the act of law application only in general terms [61]. In the latter case, the authority is entitled to issue an act whose content is only broadly defined by the norms of substantive law. The type of law enforcement body does not, however, decide on the type of application of the law[62]. Administrative action can be reduced to judicial use, and the activities of the court will take the form of a judicial application of the law. Due to the manner of designating the content of an individual act of law application through the constitutional provisions, self-serving application (the constitution is the sole basis for resolution), co-application (the constitution, as well as the law or other normative act); and the declaration of conflict (declaration of nonconformity of constitutional norms with lower rank standards) are distinguished[63].

Applying the law is a decision-making process undertaken by a competent state body, leading to a binding decision of a single nature[64]. The application of the constitution by the public authorities in individual cases involves some complications. First and foremost, there is a need to prioritize the application of the general provisions contained in the Constitution and the more specific provisions contained in lower-level legislation. In the case of a judicial application of the law, the State authority establishes the legal consequences of the facts in a binding way on the basis of the rules of law in force, resulting in a judicial decision consisting in the formulation of a unitary and specific norm[65]. The broad court

[59] Z. Ziembiński, *Podstawowe problemy prawoznawstwa,* Warszawa 1980, p. 418.
[60] S. Wronkowska, *System źródeł prawa w nowej Konstytucji,* Biuletyn RPO – Materials 2000, no. 38, p. 79-103.
[61] J. Wróblewski, *Sądowe stosowanie prawa …,* op. cit., p. 42-92.
[62] A. Redelbach, S. Wronkowska, Z. Ziembiński, *Zarys teorii państwa i prawa,* Warszawa 1993, p. 250-251.
[63] L. Garlicki, *Bezpośrednie stosowanie konstytucji…,* op. cit., p. 16.
[64] L. Leszczyński, *Zagadnienia teorii stosowania prawa …,* op. cit., p. 16 i 18.
[65] J. Wróblewski, *Wybrane zagadnienia teoretyczne stosowania prawa przez Sąd Najwyższy PRL,* ActaUL 1991, p. 7 and following.

application of the law will be a binding determination of the rights or obligations of persons or legal status[66]. Courts guarantee the constitutional rights of individuals at the level of the law.

The issue of the direct application of the Constitution by the courts is whether the constitutional norms can be the substantive basis of a court judgment and whether, in the event of a conflict of statutory norms with the constitution, the court is authorized to refuse to apply the former and issue a ruling on the basis of the norm expressed in the constitution without referring the matter to the Constitutional Tribunal[67]. In the judicial application of the Constitution, the judge must deal with the interpretation of the generally formulated provisions of the Constitution, where the purpose of the interpretation is to determine the content of the individual norm and when making individual decisions it must evaluate the existing laws and other normative acts from the point of view of values set forth in the Constitution. Whereby settling individual cases on the basis of the constitution, the judge must solve a number of problems arising from the hierarchical differentiation of the constitution and the law. For the application of the Constitution by the courts, Article 178 sec. 1 of the Constitution defining the constitutional role of a judge as a guarantor of individual rights is significant. This provision emphasizes that the judge exercising justice is bound by the principles contained in the Constitution and the principles to which the Constitution refers. The task of the judge applying the constitution and the law is to decide how to interpret relations between the general principles laid down on the constitutional level and the norms establishing them at the statutory level[68].

It is understood that the court has the right to base its decision directly on constitutional norms, if these are norms, guaranteeing individuals certain freedoms and powers. At the same time, it is recognized that the jurisdiction of the court is to resolve the discrepancies between constitutional and statutory norms, which can be removed in the course of the exegesis of the legal text, using non-contradictory rules of conflict. Non-conformances may be content or procedural. In the case of incompatibility between the constitutional norm of legislative competence and the norm which arises as a result of making use of this competence, the removal of incompatibility lies in the exclusive requirements of the constitutional mandate[69]. The subject matter of the study is not the content of the two norms, but whether the act of drafting statutory norms was made in accordance with the provisions of the Constitution on drafting the acts of a given type. The court would have to examine the so- called legislative procedure and whether the legislative process was complied with the rules of fair legislation and to examine the scope of the legislative compe-

[66] P. Tuleja, *Stosowanie Konstytucji RP ….,* op. cit.
[67] S. Wronkowska, *W sprawie bezpośredniego stosowania …,* op. cit., p. 5.
[68] P. Tuleja, *Stosowanie Konstytucji RP…,* op. cit., p. 63 and following; L. Garlicki, *Polskie prawo konstytucyjne…*, op. cit., p. 47.
[69] S. Wronkowska, *W sprawie bezpośredniego stosowania …,* op. cit., p. 23.

tence granted to the author of the act to determine whether the established standard goes beyond the authorization granted[70]. The legal systems of modern countries have not assumed that any entity may, in the course of its interpretation, resolve the incompatibility between the norm of legislative competence and the norm which results from the exercise of that competence. They are based on the assumption of the "presumption" of the constitutionality of a normative act. A special authorization is required for the determination of nonconformity, which is granted only to selected bodies (constitutional tribunal or Supreme Court). The doctrine and judicature provide for some exceptions, allowing the courts to examine the compliance of sub-statutes with the law from both the content and the procedure[71]. Control powers in relation to statutes were granted by the constitutional authority to the Constitutional Tribunal (Article 188 of the Constitution)[72]. Despite the provisions of Article 178 section 1 of the Constitution, the court is not obliged to apply the law if it finds it incompatible with the Constitution. The principle of presumption of constitutionality is not bound by a law. Such a view is based on numerous provisions of the Constitution, including art. 7, art. 8 sec. 1 and Art. 193[73].

Judicial application of the Constitution may consist in spontaneous application, parallel co-application and modifying application[74]. The application of a constitutional standard as the sole basis for a settlement will take place when the constitutional norm is formulated in such a way that it can be applied spontaneously and the ordinary legislation does not regulate the issue or regulates it only partially. The direct application of the Constitution does not lead to a conflict between the constitutional norm and the provisions of the ordinary law, but it comes down to the adoption of the constitutional norm as the essential basis of the ruling.

The most common situation is the co-application of the constitutional norm and the statutory provisions governing the particular issue. The constitutional standard plays a fundamental role in the interpretation of the detailed provisions of the law, because if logic is possible to adopt several different interpretations of the law, the court will have to give priority to such an interpretation, which corresponds most fully to the contents expressed by the constitutional norm.

If there is a conflict between the constitutional standard and specific statutory provisions, modifications will be applied. This conflict should be removed by interpretation, by finding such an understanding of the provision of the law, which will allow for its conformity with the constitution (the so-called interpretation tech-

[70] Ibidem, p. 20-21.

[71] Zob. A. Zieliński, *Sprzeczność aktu normatywnego niższego rzędu z ustawą w orzecznictwie Naczelnego Sądu Administracyjnego,* „Przegląd Sądowy" 1993, book 11-12, p. 51-60.

[72] A. Mączyński, *Bezpośrednie stosowanie Konstytucji…,* op. cit., p. 5.

[73] S. Wronkowska, *W sprawie bezpośredniego stosowania…,* op. cit., p. 22.

[74] L. Garlicki, *Bezpośrednie stosowanie konstytucji…,* op. cit., p. 23-25; L. Garlicki, *Polskie prawo konstytucyjne…*, op. cit., p. 44-45.

nique in accordance with the Constitution). When this is not possible, the court is obliged to take actions aimed at removing the unconstitutional provision of the law from the system of law.

In the case of spontaneous application, constitutional norms are the essential basis for a resolution which will be based exclusively on the provisions of the Constitution[75]. The question at issue is whether the content of the judgment of the court or of another body can be directly determined by the norm articulated in the constitution, and therefore whether the constitutional norm may be a substantive basis for a court judgment[76]. The former view that the norms of the constitution may be the basis for the acts of the application of law by various authorities other than the courts, has been questioned for axiological reasons today. For the sake of human rights protection, there established the conviction that the content of the judicial decision can be also determined by the norms contained in the acts of international law and the norms contained in the basic law. Recognition that the norms contained in the Constitution may designate the content of court rulings required to advocate for a specific pattern of direct application of the Constitution[77]. For the direct application of constitutional norms by the courts, it was necessary to fulfill one more condition, i.e. the substantive basis for the act of constitutional application by the courts can be only those norms that are "concrete" and "unequivocal", that it is technically possible to base settlement on them[78]. Entities applying the law should base their decision directly on the provisions of the Constitution if these provisions are sufficiently precise and unambiguous to allow them to refer to specific situations in the legal context. Provisions are applied directly in which the formulated norms are suitable for the so-called spontaneous implementation, without the need to express them in ordinary law. Rules should be formulated unequivocally and decisively at the same time[79]. An example of such rules is, according to the case law, a regulation guaranteeing the right to a legal proceeding. Hence, it is assumed that if there is no explicit provision in the Polish legal system of a law providing for judicial protection in respect of the protection of fundamental freedoms or constitutional rights, such guarantee shall be granted to any person directly under Art. 45 section 1 and Art. 77 section 2 in connection with Art. 175 and Art. 177 of the Constitution and the case should be recognized by a common court[80]. The criterion of unambiguous formulation of the provision is also mentioned to the statement that the provision of the Constitution cannot be an independent basis for resolution. For example, this applies to art. 2 of the Constitution, whose general nature excludes the sole basis of

[75] See judgment of the Supreme Court of 8.5.1997, I PKN 125/97, OSNAPiUS 1998, no. 5, item 152.
[76] S. Wronkowska, *W sprawie bezpośredniego stosowania …,* op. cit., p. 11.
[77] B. Banaszak, *Prawo konstytucyjne*, Warsaw 1999, p. 90-92.
[78] L. Garlicki, *Bezpośrednie stosowanie konstytucji* …, op. cit., p. 24.
[79] See the Supreme Court resolution of 18.1.2001, N III ZP 28/00, OSNAP 2001, no. 7, item 210.
[80] Ibidem.

an individual decision, does not preclude its inclusion in the interpretation of other provisions. It is unacceptable to apply art. 2 alone, but its co-application is acceptable[81]. Currently among the norms concerning the rights and freedoms of an individual, except the sphere of economic and social rights, the so-called self-executed standards are the rule. The constitutional norms, defining the scope of the protection of individual freedoms, do not require "intermediary" and "concretizing" laws. Such laws could limit the scope of the individual's protected freedom, but only if the Constitution so authorized the legislator. And only in those above-mentioned events the scope of individual freedom would be co-defined by the law[82].

Reference to the criterion of unambiguity of provisions can in practice make it difficult to determine which of these provisions can be applied directly. The greatest difficulty is to identify among the constitutional norms those that may be the substantive basis of a judicial ruling. There is also no effective tool to decide which constitutional standards can be effectively applied by the court[83]. It can only be accepted that, since the direct application of the Constitution is a principle, all doubts should be explained in favor of this principle[84]. Unambiguous standards of conduct which may be the basis of a court judgment are expressed primarily in the provisions defining the freedom of the individual and in the provisions conferring specific rights on the individual[85].

Therefore, not in any case, the Supreme Court, by basing its rulings on the provisions of the Constitution, analyzes their unambiguity, but points out that it suffices to state that the conflict of constitutionally protected rights and freedoms is settled according to the constitutional law of conflict of laws and in no way is it about an irremediable contradiction between these rights and freedoms, as this would inevitably lead to the construction of hierarchies of constitutional rights and freedoms, which is not justified in the provisions of the Constitution. Assessing the limitations of constitutional freedoms should be based on the constitutional legitimacy of this freedom. Freedom in the constitution should be considered from the point of view of its content and substance, and not merely from the point of view of the statutory limitations of a given freedom. Without a deeper constitutional analysis of this freedom, the formulation of an evaluation of the boundaries of a given freedom, and in particular of the alleged irremediable contradiction between that freedom and other constitutional rights and freedoms, must be considered superficial and accidental. Such settlements should be made in any form or arbitrarily[86]. The collision of constitutional principles, which consists in limiting the rights expressed in the

[81] See the Supreme Court resolution of 2.9.1999, III RN 92/99, OSNAPiUS 2000, no. 15, item 568.
[82] S. Wronkowska, *W sprawie bezpośredniego stosowania …,* op. cit., p. 14.
[83] Ibidem, p. 13.
[84] Ibidem, p. 13.
[85] S. Wronkowska, Z. Ziembiński, *Zarys teorii prawa …,* op. cit., p. 103 and following.
[86] See the Supreme Court judgment of 5.1.2001, III RN 38/00, OSNAPiUS 2001, no. 18, item 546.

Constitution, should be established on the basis of the constitutional rules of conflict. The permissible range of restrictions on freedom should be determined solely on the basis of the constitutional provisions, and then it should be decided whether the restriction is beyond the scope. The basis for resolving the conflict of constitutional principles is expressed in Art. 31 sec. 3 of the Constitution, the principle of proportionality. In the Supreme Administrative Court's assessment, the direct application of the constitution does not lead to an indication of a conflict between the constitutional norm and the provisions of the ordinary law, but it comes down to the adoption of a constitutional norm as the principal basis for resolution[87].

Regarding constitutional norms, which designate specific entities with simple prohibitions or prescriptive behavior, they cannot be the basis of judgments of the criminal court - as the fundamental principles of our legal culture determine - because the court decides solely on the basis of rules that order (or prohibit) to behave in a certain way under the threat of punishment, and such norms are not contained in the constitution[88].

When issuing a ruling the court directly apply the constitutional standard when the substantive basis for the resolution of the case will be contained only in the constitution and in the situation where the law repeats literally the norm of the same content as the constitutional norm. The problem arises when a statutory norm that could be a substantive basis for resolution is in the judgment of a court incompatible with the Constitution. There are two possible situations, i.e. the court refusing to apply an unconstitutional statutory norm may not find a basis of the settlement in the constitution, or by refusing to apply a statutory standard may settle the matter on the basis of the norm articulated in the Constitution.

In order to find a solution to this situation it is necessary to indicate what kind of conflict of norms is occurring. Two notions of nonconformity of norms are established - formal and praxeological incompatibilities[89]. Norms are praxeologically incompatible if it is possible to implement each of them, but the implementation of one of them nullifies the partial or full effect of implementation of another norm[90]. The legal doctrine has not worked out effective conflict rules to eliminate praxeological discrepancies, the removal of which would require legislative intervention. The second type of nonconformity of norms is the formal incompatibilities that arise primarily as a result of a defective legislative technique. Such an incompatibility of norms is, for example, where one norm commands someone to do something, while the other in the same situation, prohibits the same entity to do something or orders him to do something that prevents the implementation of the first norm.

[87] See the judgment of the Supreme Administrative Court of 24.10.2000, V SA 613/00, ONSA 2001, no. 2, item 57.
[88] S. Rozmaryn, *Konstytucja jako ustawa zasadnicza PRL*, Warszawa 1967, p. 309 and following.
[89] S. Wronkowska, Z. Ziembiński, *Zarys teorii prawa …,* op. cit., p. 181-183.
[90] S. Wronkowska, *W sprawie bezpośredniego stosowania …,* op. cit., p. 16.

Formal discrepancies can be removed using the rules of conflict of laws developed in the legal culture[91]. Using indisputable conflict rules to remove incompatibility between constitutional and statutory norms is not a direct application of the Constitution.[92] Collision rules serve to eliminate certain elementary technical errors of the legislator. Their use to remove incompatibilities between standards requires careful consideration of the nature of the conflicting standards. Incompatibilities may arise between the same type of standards (each is a substantive standard or each one is a competence standard) and between the norm of legislative competence and the substantive or competence standard that has arisen as a result of making use of that competence. While the collision rules make it possible to settle only the incompatibilities between the norms of the same type[93].

Substantive standards which may be the substantive basis for the resolution of a legal proceeding may be expressed in the constitution and in the law in three ways: 1) both acts contain a standard with the same content, or 2) the substantive norm with a specific content contained in the constitution is earlier than the norm with the non-compliant content articulated in the law and 3) the substantive standard with the specified content contained in the constitution is later than the norm with the content inconsistent with it expressed in the statute. In the first case, both when the norm provided in the law is later than the constitutional norm and when the constitutional norm is the later norm, the statutory norm should be denied the binding character and the constitutional norm should be applied on the basis of the rules of conflict of law, *lex superior derogat legi inferiori and lex posteriori superiori derogat legi inferiori.* In the second case, the basis for the resolution is the norm stated in the constitution. The application of the statutory standard is denied based on the principle *lex superior derogat legi inferiori.* In the last situation, a constitutional standard is applied, regardless of whether the scope of application or standardization of the constitutional norm is the same as the earlier statutory norm, or if their scopes are only partially[94]. The incompatibility of norms is removed through the application of the principle *lex posteriori derogat legi priori*.

The above considerations show that the control of the constitutionality of law in Poland despite the adoption of a concentrated model of this protection is dispersed. In this way, certain powers, although to a limited extent, are granted to other bodies than the Constitutional Tribunal, in particular the common and administrative courts. This is due to the ever-increasing appeal of the courts to the idea of human rights and fundamental freedoms, which are described in the norms of the Constitution as well as in the norms of

[91] Z. Ziemski, *Rola i miejsce reguł kolizyjnych w procesie dekodowania tekstu prawnego,* RPEiS 1978, book 2, p. 1-15.
[92] S. Wronkowska, *W sprawie bezpośredniego stosowania …* op. cit., p. 18-19.
[93] Ibidem, p. 17-18.
[94] Ibidem, p. 18.

international law. The creation of a mixed model of constitutional control is thus possible through the adoption by the legislator of the principle of direct application of the Constitution. The empowerment of bodies exercising the right to base their decisions on individual issues on constitutional norms means that these norms may constitute an independent basis for resolution, be co-applied with statutory norms, or cause a modification of statutory norms if there is a finding of nonconformity between constitutional and statutory norms. Non-conformities of this kind, which are content-related, may be resolved independently by the law-enforcing authority on the basis of existing principles of interpretation of the legal text. This does not apply only to inconsistencies between standards which are procedural. In this case, the Constitutional Tribunal is the exclusive competence in this respect. It should be borne in mind that the decisions of other organs than the Constitutional Tribunal are only incidental and will not have a universally binding validity, but may, however, affect the compliance of the law with values expressed in the Constitution.

Bibliography

Legal acts:
Constitution of the Republic of Poland, Journal of Laws 1997 no. 78 item 483.
Treaty on European Union, Official Journal UE 2016/C 202/1.
Charter of Fundamental Rights, Official Journal UE. 2016/C 202/1.

Literature:
Banaszak B., *Prawo konstytucyjne*, Warsaw 1999.
Działocha K., *Bezpośrednie stosowanie podstawowych praw jednostki (w związku z projektem Karty Praw i Wolości,* [in:] *Z zagadnień współczesnego prawa cywilnego. Księga pamiątkowa ku czci Profesora Tomasza Dybowskiego*, "Studia Iuridica" 1994, vol. 21.
Garlicki L., *Bezpośrednie stosowanie konstytucji* [in:] *Konstytucja RP w praktyce*, Warsaw 1999.
Garlicki L., *Polskie prawo konstytucyjne zarys wykładu,* Warsaw 2003.
Gizbert-Studnicki T., Grabowski A., *Normy programowe w Konstytucji,* [in:] *Charakter i struktura norm w konstytucji*, J. Trzciński (ed.), Warsaw 1997.
Gonera K., Łętowska E., *Artykuł 190 Konstytucji i jego konsekwencje w praktyce sądowej,* „Państwo i prawo" 2003, no. 9.
Haczkowska M., *Odpowiedzialność odszkodowawcza państwa według Konstytucji RP,* Warsaw 2007.
Kolasiński K., *Zaskarżalność ustaw w drodze pytań prawnych do Trybunału Konstytucyjnego*, „Państwo i prawo" 2001, no. 9.
Lang W., *Obowiązywanie normy prawnej w czasie w świetle logiki norm*, Zeszyty Naukowe Uniwersytetu Jagiellońskiego 1960.

Langrod S., *Praworządność w problemie odszkodowania*, Warsaw 1926.
Leszczyński L., *Zagadnienia teorii stosowania prawa, doktryna i tezy orzecznictwa*, Zakamycze 2001.
Łabno-Jabłońska A., *Zasada bezpośredniego obowiązywania konstytucyjnych praw i wolności jednostki,* [in:] *Podstawowe prawa jednostki i ich sądowa ochrona*, L. Wiśniewski (ed.), Warsaw 1997.
Łętowski J., *Wpływ konstytucji na prawo cywilne* [in:] *Konstytucyjne podstawy systemu prawa* ,ed. M. Wyrzykowski, Warsaw 2001.
Mączyński A., *Bezpośrednie stosowanie Konstytucji przez Sądy*, „Państwo i Prawo" 2000, no. 5.
Nita B., *Bezpośrednie stosowanie konstytucji a rola sądów w ochronie konstytucyjności prawa*, Państwo i Prawo 2002, no. 9.
Półtorak N., *Odpowiedzialność odszkodowawcza państwa w prawie Wspólnot Europejskich*, Kraków 2002.
Redelbach A., Wronkowska S., Ziembiński Z., *Zarys teorii państwa i prawa,* Warsaw 1993.
Rozmaryn S., *Konstytucja jako ustawa zasadnicza PRL*¸ Warsaw 1967.
Sarnecki P., *Stosowanie konstytucji PRL w orzecznictwie Naczelnego Sądu Administracyjnego*, Studia Prawnicze 1988 no. 3.
Sarnecki P., *Wprowadzenie Konstytucji w życie,* [in:] W*ejście w życie nowej Konstytucji RP,* Z. Witkowski (ed.), Toruń 1998.
Tuleja P., dyskusja nad referatem L. Garlickiego, *Bezpośrednie stosowanie konstytucji. Tezy referatu,* Konferencja naukowa: Konstytucja RP w praktyce, Warsaw 1999.
Tuleja P., *Stosowanie Konstytucji RP w świetle zasady jej nadrzędności (wybrane problemy),* Kraków 2003.
Wronkowska S., *System źródeł prawa w nowej Konstytucji,* Biuletyn RPO – Materiały 2000, no. 38.
Wronkowska S., *W sprawie bezpośredniego stosowania Konstytucji,* „Państwo i Prawo" 2001, no. 9.
Wronkowska S., *Zamknięty system źródeł prawa w praktyce oraz dostosowanie prawa do wymogów Konstytucji RP*, Konferencja naukowa: Konstytucja RP w praktyce, Warsaw 1999.
Wronkowska S., Ziembiński Z., *Zarys teorii prawa,* Poznań 1997.
Wronkowska S., Zieliński M., Ziembiński Z., *Zasady prawa. Zagadnienia podstawowe*, Warsaw 1974.
Wróblewski J., *Sądowe stosowanie prawa*, Warsaw 1988.
Wróblewski J., *Wybrane zagadnienia teoretyczne stosowania prawa przez Sąd Najwyższy PRL,* ActaUL 1991.
Zieliński A., *Sprzeczność aktu normatywnego niższego rzędu z ustawą w orzecznictwie Naczelnego Sądu Administracyjnego,* „Przegląd Sądowy" 1993, books 11-12.
Ziembiński Z., *Podstawowe problemy prawoznawstwa*, Warsaw 1980.

Ziembiński Z., Wronkowska S., Ziembiński Z., *Zarys teorii prawa,* Poznań 1997.
Ziemski Z., *Rola i miejsce reguł kolizyjnych w procesie dekodowania tekstu prawnego,* RPEiS 1978, book 2.

Judicial decisions:

Judgment of the Constitutional Tribunal of 15.7.1996, K 5/96 OTK, ZU 1996, No. 4, item 30.
Judgment of the Supreme Court of 8.5.1997, I PKN 125/97, OSNAPiUS 1998, no. 5, item 152.
Judgment of the Supreme Court of 26.5.1998, III SW 1/98, OSN 1998, No. 17, item 528,
Judgment of the Supreme Court of 2.9.1999, III RN 92/99, OSNAPiUS 2000, no. 15, item 568.
Judgment of the Supreme Court of 10.11.1999, I CKN 204/98, OSN 2000, No. 5, item 94,
Judgment of the Supreme Administrative Court of 24.10.2000, V SA 613/00, ONSA 2001, no. 2, item 57.
Judgment of the Supreme Court of 5.1.2001, III RN 38/00, OSNAPiUS 2001, no. 18, item 546.
Resolution of the Supreme Court of 18.1.2001, N III ZP 28/00, OSNAP 2001, no. 7, item 210.
Judgment of the full composition of the Constitutional Tribunal of 31.1.2001, P 4/99, OTK ZU 2001, No. 1, item 5.
Resolution of the Supreme Court of 4.7.2001, III ZP 12/01, OSN 2002, No. 2, item 34.
Judgment of the Supreme Administrative Court (Poznań) of 14.2.2002, I SA/Po 461/01, OSP 2003, No. 2, item 17.
Resolution of the Supreme Administrative Court of 12.6.2002, OPS 6/00, ONSA 2001, No. 1, item 4.
Judgment of the Supreme Court of 18.9.2002, III CKN 326/01, not published.
Judgment of the Supreme Court of 30.10.2002, V CKN 1456/00, not published.
Judgment of the Supreme Court of 7.11.2002, V CKN 1493/00, not published.
Judgment of the Supreme Court of 27.3.2003, V CKN 1811/00, judgment of the Supreme Court of 26.9.2000, III CKN 1089/00.
Judgment of the Supreme Court of 16.4.2004 r, I CKN 291/03, OSN 2005, No. 4, item 71.
Judgment of the Supreme Court of 8.1.2009, I CSK 482/08, OSN ZD 2009, No. D, item 95.

Summary: Polish Constitution has introduced the principle of direct application of the Constitution, which imposes on all the state organs, especially the courts, not only the right, but the obligation to refer to the norms set forth in the Constitution as a direct basis for a resolution. In this context, there is a problem of the right of every judge to

refuse to apply a provision of the law which, in his opinion, is contrary to constitutional standards without directing a legal inquiry into the Constitutional Tribunal.

Keywords: Constitution, direct application of the Constitution, Constitutional Tribunal, control of constitutional law, nonconformity of norms, spontaneous application, coexistence, judicial review

KONTROLA KONSTYTUCYJNOŚCI PRAWA W RAMACH BEZPOŚREDNIEGO STOSOWANIA KONSTYTUCJI

Streszczenie: Konstytucja RP wprowadziła zasadę bezpośredniego jej stosowania, która nakłada na wszystkie organy państwa, zwłaszcza sądy, nie tylko prawa, ale i obowiązek odwoływania się do norm wyrażonych w konstytucji jako bezpośredniej podstawy rozstrzygnięcia. W tym kontekście pojawia się problem uprawnienia każdego sędziego do odmowy zastosowania przepisu ustawy, który w jego ocenie jest sprzeczny z normami konstytucyjnymi bez kierowania zapytania prawnego w tej sprawie do Trybunału Konstytucyjnego.

Słowa kluczowe: konstytucja, bezpośrednie stosowanie konstytucji, Trybunał Konstytucyjny, kontrola konstytucyjności prawa, niezgodność norm, samoistne stosowanie, współstosowanie, *judical review*