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Judicial Authority – Fundamental Dilemmas[2]

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Abstract

One of the fundamental dilemmas in judicial application of the law is to respect the principle of the rule of law and not only the principle of legalism. The principle of legalism as enshrined in Article 7 of the Constitution insufficiently protects the constitutionally guaranteed rights and freedoms of the individual, and therefore judicial activism is required, i.e. a correction of the established law in the process of interpretation and application of the law in order to give the law such content that is consistent with the constitutionally defined values underlying the axiology of the Polish Constitution. The correction of the legislated law involves going beyond the content of the principle of legalism and referring to such values as – equity, justice, goodness, human rights and freedoms.

The judge, due to the fact that under the Constitution he is first and foremost subject to its provisions, and secondarily to the laws, may – if he is able to justify it – reject the content of the statutory provisions and base his decision exclusively on the provisions of the Constitution. This is justified when the Constitution protects individual rights and freedoms to a greater extent than the law. A judge may not invoke the rule dura lex sed lex in the process of interpretation, as it destroys the standards of legal culture. The correction of statute law in the process of its interpretation relates to judicial independence and responsibility for the issued decision.

Keywords: principle of legalism, principle of the rule of law, significance of the antinomy of legal rules (*dura lex sed lex, summum ius summa iniuria*), judicial activism, judicial independence, significance of the principle of aequitas.

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The essence of the problem

The history of the judiciary is, to a significant extent, the story of judges being bound by the law.[3] This story demonstrates that a legal norm, severe in its content, may nonetheless be accepted because its provisions carry the dignity and essence of law. At the same time, however, it is a narrative that illustrates how a strict legal norm, devoid of the dignity and essence of law, when applied literally, meticulously, faithfully, and unrelentingly, can lead to tragic consequences. And thoughtlessness and insensitivity in the process of interpreting the law can result in a travesty of justice.[4]

The history of the judiciary is, above all, the story of impartial judicial justice. And this story, this narrative would be made look warmer, more humane, in situations where judges, guided by the principle of *aequitas* when issuing rulings, referred to a set of subjectively perceived universal axiological values, and, over time, to constitutional values.[5] They acted thus because, in the process of adjudication, judges engage in a dialogue with the law.

St. Ivo of Kermartin, referred to as "advocate of the poor" and renowned as a just judge, "diligently sought the truth in every case and, having found it, as a fervent advocate of justice, rendered justice to all, never considering their social standing."[6]

In the adjudicative process, values associated with the ideals of *Iustitia* and *Veritas* are therefore of paramount importance. Thus, if Ulpian's dictum (quod quidem perquam durum est, sed ita lex scripta est – "this indeed is extremely harsh, but thus is the law written") and Marcus Tullius Cicero's claim (ius summus saepe summa est malitia – "extreme law is often extreme injustice") are juxtaposed,[7] only one of them can be considered relevant.

Clearly, Cicero's argument comes out victorious and prevails, for *iniuria* signifies harm, injustice, immorality, and unlawfulness.

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3 R. Tokarczyk, *Etyka prawnicza,* Lexis Nexis, Warszawa 2007, p. 100 *et seq.*

4 J.M. Kelly, *Historia zachodniej teorii prawa*, Kraków 2006; see: T. Romer, M. Najda, *Etyka dla sędziów*, Warszawa 2007, pp. 51–55.

5 W. Dziedziak, *O prawie słusznym*, Maria Curie-Skłodowska University 2015, p. 41 *et seq.*

6 E. Waliszewska, *Św. Iwo patron prawników*, Dom Bretanii, Poznań 2003, p. 13.

7 F. Longchamps de Bérier, *Summum ius summa iniuria. O ideologicznych założeniach interpretacji starożytnych tekstów źródłowych*, [in:] P. Sadowski, A. Szymański (eds.), *Historia w służbie sprawiedliwości*, Opole 2006, pp. 63–70.

In Poland, on the crucifix hanging in the chamber of the Crown Tribunal in Lublin, judges who presided there could see and read the Latin maxim *iustitias vestras iudicabo* ("I will judge your justice");[8] this maxim is now inscribed on the columns of the Supreme Court in Warsaw's building. It serves as a reminder that the Capitoline Hill is associated with the origins of law, whereas another hill, Golgotha, makes one bear in mind that law must embody certain universal values in its essence. It also reminds us that, besides the fallible judges here on earth, there is One who is an infallible Judge.[9] Hence the importance of the maxim *I will judge your justice,* which reminds judges of their responsibility to prevent the dehumanisation of the law. For this reason, it is crucial to uphold the highest standards not only of law itself, but also of ethics inherent to the law in the adjudicative process.[10]

This is because *ius est a iustitia appellatum* ("law derives its name from justice").

In Aristotle's conception of justice, which remains to this day a foundational framework for understanding notions of "just law" and "just judgement," justice is equated with adherence to a standard of ethical perfection.[11] It denoted the act of a person acting in a manner consistent with high moral standards.[12]

Justice is an abstraction derived from the term "just,"[13] and a judge can only be just when delivering a just judgement.

According to Aristotle's view of justice, when the justice of the legislator fails, the justice of judges (judicial justice) must emerge as *corrective justice*. For what is equitable is, in essence, just; this represents the "correction of legal justice" in order to restore the authority of the law that has been undermined by the legislator.

Thus, in the process of legal interpretation and application, the maxim *dura lex sed lex* ("the law is harsh, but it is the law") cannot be elevated to the status of a dogma. Instead, it is necessary to employ legal interpretation methods that effectively safeguard constitutionally established universal rights and freedoms of individuals, while simultaneously invoking the constitutional principle of a democratic state governed by the rule of law, which embodies humanistic values.[14]

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8 Latin inscriptions on the columns of the building of the Supreme Court of the Republic of Poland, W. Wołodkiewicz (ed.), Warszawa 2001; S. J. Karolak, *Sprawiedliwość. Sens prawa*, Warszawa 2007, p. 186 *et seq.*

9 R. Tokarczyk, Etyka prawnicza, LexisNexis, Warszawa 2007, p. 119; *"God the Judge is the ideal judge to whom the imperfect, real-world models of both secular and religious judges are compared. Only God the Judge can fully achieve impartiality, which represents the highest value – both moral and legal – of the judicial profession. Real-world judges are always vulnerable to some degree of partiality, whether caused by subjective or (and) objective factors."*

10 T. Romer, M. Najda, *Etyka dla sędziów*, Warszawa 2007.

11 Arystoteles, *Etyka nikomachejska*, Warszawa 1956, p. 160 *et seq.*

12 W. Lang, *Prawo a moralność*, Warszawa 1990; M. Ossowska, *Podstawy nauki o moralności*, Warszawa 1963, and by the same author, *Normy moralne. Próba systematyzacji*, Warszawa 1970; Cz. Znamierowski, *Rozważania wstępne o moralności i prawie*, Warszawa 1964.

13 Z. Ziembiński, *Sprawiedliwość społeczna jako pojęcie prawne*, Warszawa 1996, p. 14.

14 More extensively on this matter – see: R. Hauser, J. Trzciński, Prawotwórcze znaczenie orzeczeń Trybunału Konstytucyjnego w orzecznictwie Naczelnego Sądu Administracyjnego, 2nd edition, Warszawa

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Judges versus law

The principle of legalism versus the principle of the rule of law

In a "dialogue with the law," a judge encounters both the principle of legalism and the principle of the rule of law.

Each of these principles has its own distinctive content. For this reason, the relationship between the content of these principles, the potential conflicts between them, and the possible ways to resolve those conflicts are of critical importance.

It is therefore essential to delineate both the scope of application of the principle of legalism and the principle of the rule of law (their target audiences and circumstances) as well as the scope of regulation, i.e. the specific conduct required under these principles.

Both principles serve to realise or protect certain values. However, they should not be considered tantamount. It is erroneous to equate the principle of the rule of law with the principle of legalism.

The content and scope of the principle of legalism are defined by Article 7 of the Polish Constitution, according to which public authorities must act on the basis of and within the limits of the law. The norms codified under this provision allow the content-related features of the principle of legalism to be outlined as follows:

(1) it mandates action in compliance with the law, meaning that actions taken by public authorities must be based on powers expressly conferred upon them;
(2) public authorities may act only on the basis of universally binding legal provisions, which means that interference in the legal sphere of an individual must be grounded in a specifically identified legal provision (i.e. actions must rest on a clear legal basis applicable to the specific factual circumstances);
(3) public authorities must act within the boundaries of the law, which means that their actions must be diligent. Diligence in public authority actions is achieved when the actions of such authorities are devoid of arbitrariness. Freedom from arbitrariness implies that public authority actions must be rationally justifiable based on both the factual and legal circumstances of an individual case. They must not exhibit traits of persecution or excess;

2010, as well as J. Trzciński, Prawotwórcza funkcja sądów, [in:] B. Banaszak, M. Jabłoński, S. Jarosz-Żukowska (eds.), *Prawo w służbie państwa i społeczeństwa. Prace dedykowane prof. Kazimierzowi Działosze z okazji 80-tych urodzin*, Wrocław 2012, p. 261 *et seq.*

(4) the scope of public authority actions, procedures, and forms must derive from universally binding legal provisions; the legality of public authority actions is assessed in terms of their compliance with applicable law, rather than the content, merits, or justification of the legal regulation itself (these latter aspects are not considered);
(5) the observance of binding legal provisions (and the norms codified within them) is a value in itself; legalism, therefore, requires strict adherence by public authorities to the "letter of the law," with no regard for the "spirit of the law" on top of that;
(6) the term "law" as used in the principle of legalism refers to Article 87 of the Constitution, which identifies the sources of universally binding law in Poland;
(7) the content of the principle of legalism is aimed at public authorities.

The content-related features of the principle of legalism clearly indicate that this principle emphasises the formal compliance of public authority actions with universally binding law. This may mean that a decision made "in accordance with the principle of legalism" does not always align with the principle of the rule of law.

Violations of the principle of legalism are manifested primarily in:

(1) actions taken without a legal basis,
(2) actions based on an incorrect legal foundation,
(3) actions involving gross violations of the law.

The principle of the rule of law is not explicitly and directly formulated in a constitutional provision. Instead, it is derived from Article 2 of the Constitution, which establishes the principle of a democratic state governed by the rule of law. This principle is one of the most general constitutional principles and is subject to continuous interpretation by bodies directly applying the Constitution.

The principle of a democratic state governed by the rule of law requires that legal provisions not only meet impeccable standards of legislative technique, but also embody the assumptions underlying Poland's constitutional order. These provisions must safeguard the set of values expressed in the Constitution.

The rule of law encompasses the principle of legalism enriched by all elements that go beyond mere compliance with the "letter of the law," taking into account the "spirit of the legal system" (fairness, justice, general principles of law as carriers of universal humanistic values, and references to values rooted in the legal tradition – dignity, freedom, equality, individual good, and public welfare).

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The principle of the rule of law, therefore, constitutes legalism plus the content of the law, manifested in the value of the law. This means moving beyond the "letter of the law" and emphasising the axiological aspect – one that concerns the content of the law.

The principle of the rule of law is intended to form the foundation of a state governed by the rule of law. This means that the primary task of the law is to reflect a certain defined system of values. For this system of values to serve as the basis for the law's role as an effective regulator of social relations, it must be coherent and relatively stable.

If the content of enacted law diverges from the system of values, then a decision made under that law by a public authority may adhere to the principle of legalism – but be not aligned with the principle of the rule of law. A judge must determine this *ad casum* in the process of interpreting and applying the law, which often requires judicial activism.

A violation of the principle of the rule of law, as understood here, involves not only a breach of the principle of legalism, but also:

(1) violations of general principles of law,
(2) violations of constitutionally protected values and goods,
(3) violation of uncontested axiological values,
(4) overstepping the rules of legal interpretation,
(5) neglect of pro-constitutional interpretation of applied legal provisions,
(6) neglect of pro-European Union interpretation of the law.

Distinguishing the scope of application and the scope of regulation of the principle of legalism and the principle of the rule of law in the judicial practice of administrative courts is significant for the administration of justice by administrative courts in accordance with Article 175 of the Constitution.

The reflections of French Enlightenment philosopher Paul-Henri Holbach on the essence of judicial authority remain relevant in the 21st century, to this day.[15] In addressing the question of the dignity of a judge, Holbach responded: "The dignity of a judge lies in their reason, virtues of character, and justice." When asked about judicial fame, Holbach remarked:"A judge derives and enhances their fame not merely from the power to judge, but from judging justly." Of course, Holbach acknowledged the existence of unjust judges. That is why he made the following remark: "An unjust judge would be a monster in the political and social order,

[15] P. H. Holbach, *Teokracja*, Warszawa 1979.

wielding tyranny – a repugnant form of authority, one that commands obedience solely through fear."[16]

The authority of law

A judge, in the process of interpreting and applying the law, refers to the ideas and essence of law.[17] This prompts three questions. First, can a judge disregard the undisputed set of constitutional principles and values, and can they overlook the content of Article 8(2) of the Constitution in conjunction with Article 178? Second, can a judge uncritically apply the maxim *dura lex sed lex*? Third, when is it necessary for a judge to break with the maxim *dura lex sed lex* during the interpretation and application of law?

The content of the maxim *dura lex sed lex* evolved over centuries through an evolutionary process. Ulpian, a Roman jurist, when commenting on a legal provision under which a wife's marital infidelity was punishable by death, expressed his thoughts as follows: *Quod quidem perquam durum est, sed ita lex, scripta est*.[18] Centuries passed, and people – citing Ulpian's commentary – forgot that it concerned a specific case. Glossarists – during the Middle Ages – shortened Ulpian's commentary to just four memorable words: *dura lex sed lex*.[19] The maxim, being one of the most commonly cited, contains deceptive reasoning that has distorted legal culture for centuries.

Cicero already pointed out that "law must be judged," as it sometimes happens – not always, but often – that what can be said about law is: *summum ius summa iniuria* ("the highest justice is the highest injustice").[20]

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16 T. Romer, M. Najda, *Etyka…*, p. 79: "A judge, in fulfilling their duties, serves the good that is justice. If this good becomes the axis of the judge's entire – not merely professional – life, then all their actions, thoughts, and emotions occurring in their daily experience will, in one way or another, be directed toward that good."

17 T. Romer, M. Najda, *Etyka…*, p. 14: "(…) A judge should always adhere to the principle of subjecting even seemingly the simplest cases to reflection; only then will they be able to perceive the moral context and grasp the full, meaningful essence of the case at hand. One must not forget that the law, particularly the part that constitutes the professional domain of judges, is in various and inseparable ways connected with morality."

18 S. J. Karolak, *Sprawiedliwość prawa. Wydanie 2.* Warszawa 2007, p. 120: "The proposal of my translation reads as follows: «Though this is indeed very harsh, it has nonetheless been written into the statute.» However, Ulpian's elaboration does not conclusively reveal his stance on the law he commented on.

19 *Ibidem*, pp. 119–120: "Nevertheless, the word *lex* is commonly rendered as 'law.' In this form, despite the seemingly identical content of the phrase, its original narrow connotation has acquired a universal character and is generally cited as 'harsh law, but law nonetheless.'" On the subject of the antinomy of legal rules, see more extensively: S. J. Karolak, *Sprawiedliwość…* pp. 117–123.

20 For more on this matter, see: e.g. M. Matczak, *Summa iniuria. O błędzie w stosowaniu prawa*, Warszawa 2007.

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This leads a fundamental question: what is law?[21] And there arises another question: how should a judge apply a law that is affected by significant errors and deficiencies due to the legislator's fault? These are both praxeological and axiological errors. A judge, by the very nature and character of their function, is an independent authority. This means that they are free to choose how to act. They must not only recognise bad law but also, acting independently, decide on the substance of their judgement. A judge may determine that, in a specific and exceptional case, they go beyond the boundaries of statutory law to remain faithful to the idea of law.[22] It is necessary for a judge to reject the maxim *dura lex sed lex* when a norm reconstructed through interpretative directives (linguistic, systemic, and – finally – functional) would violate the principles of the legal culture of a state governed by the rule of law. This applies particularly when it undermines universally accepted values as expressed in the Constitution.

The nature of law requires that it possess authority, and the source of this authority should be the content of the law itself. A judge who rejects the maxim *dura lex sed lex* restores to the law its rightful constitutional values, thus acting as a rational legislator should.[23] Judges are supported in this regard by standards outlined by Poland's Constitutional Tribunal. The Tribunal has reasoned that the process of interpretation should strive for "establishing the interpreted provisions in accordance with the axiology of our political system and the axiology of the legal system,"[24] and, furthermore: "The Constitution, in the entirety of its provisions, expresses an objective system of values, whose realisation should guide the process of interpreting and applying individual provisions."[25]

This means that law, by its very nature, must embody certain values. However, this is not an automated mechanism, so to speak, and thus law may abandon this function. Therefore, judges must resolve the fundamental dilemma: what does it mean to adjudicate justly? Is a judge just when "they seemingly rule *contra legem*, basing their judgement on law unjust in its content,"[26] or are they just when "ruling

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21 A state ruled by law, as stated in Article 2 of the Constitution of the Republic of Poland, is also a state in which there is a system of norms that is autonomous from the state. Autonomous from statutory law. For more on *lex non scripta*, see: L. Morawski, *Główne problemy współczesnej filozofii prawa. Prawo w toku przemian*, Warszawa 1995.

22 Norms derived from a system of law autonomous from statutory law (*lex non scripta*) may justify a judge's correction of statutory law. This is especially true since the principle of a democratic state ruled by law prohibits both the instrumental enactment and the instrumental application of law.

23 A. Gomułowicz, *Sędzia a „poprawianie" prawa – zasadnicze dylematy*, ZNSA 2012, 1, pp. 9–17.

24 CT ruling of 5 November 1986, U 5/86, OTK 1986, no. 1, item 1.

25 CT judgement of 23 March 1999, K 2/98, OTK 1999, no. 3, item 38.

26 S. J. Karolak, *Sprawiedliwość…*, p. 12.

strictly in accordance with a law unjust in its content"?[27] A legal norm that is clearly incompatible with a system of universally accepted axiological values may, in extreme cases, lack binding force, as provisions that are a mere semblance of law do not possess any binding authority.[28]

Justice as an interpretative directive

The judicial debate on the justice of law has persisted since antiquity.[29] In contemporary times, both legal doctrine and judicial rulings revisit the foundational ideas of Aristotle, Socrates, Ulpian, and Cicero.[30]

Ancient Greeks, in their analysis of the nature and essence of law as well as its purpose, introduced the concept of righteousness. The ancient Romans, in turn, referred to the pursuit of full justice as equity (*aequitas*).[31] Both Greeks and Romans shared an understanding of law as a value that can lead to justice and a conviction that the realisation of the justice of law in life is the responsibility of the judge.

Justice was perceived not only as a moral category, but also as a legal one.[32]

Increasingly, judicial reasoning shows that administrative court judges follow the path indicated by Cicero, who wrote: *"True law is right reason, consonant with nature, spread through all people. It is constant and eternal."*[33] He also argued that *"law is the highest reason, seated in nature, which orders what is to be done and forbids the opposite. This reason, when it is settled and accomplished in the mind of a human being, is law."*[34] Cicero also reminded that "*true law is therefore true prudence in accordance with nature, eternal, and present in every man."*[35]

The principle of *summum ius summa iniuria* as a key interpretative tool; abandoning this principle would mean that law transforms into its opposite.

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27 *Ibidem*.

28 W. Dziedziak, *O prawie słusznym*, *op. cit*., p. 215 *et seq.*

29 K. Amielańczyk, *Obecność i znaczenie zasady słuszności w rzymskim prawie karnym*, „Studia Iuridica Lublinensia", XV, Lublin 2011; T. Banaszczyk, *Pojęcie sprawiedliwości u Arystotelesa*, „Studia Filozoficzne" 1973, issue 1; M. J. Gądek, *Sprawiedliwość jako cel pracy prawnika i podstawa niezawisłości sędziowskiej*, [in:] Wzmocnienie niezawisłości sędziowskiej w Polsce i na Ukrainie w dobie przemian. Zagadnienie teorii i praktyki, M. J. Gądek, A. Kosyło, R. Pelewicz (eds.), Łuck 2008; R. A. Tokarczyk, *Sprawiedliwość jako naczelna wartość prawa*, „Państwo i Prawo" 1997, 6; Z. Ziembiński, *O pojmowaniu sprawiedliwości*, Lublin 1992 and *idem*, *Sprawiedliwość społeczna jako pojęcie prawne*, Warszawa 1996.

30 J. Finnis, *Prawo naturalne i uprawnienie naturalne*, Warszawa 2001; J. M. Kelly, *Historia zachodniej teorii prawa*, Kraków 2006.

31 M. Kuryłowicz, *Wokół pojęcia* aequitas *w prawie rzymskim*, „Studia Iuridica Lublinensia" 2011, XV.

32 J. Raz, *Autorytet prawa. Eseje o prawie i moralności*, Warszawa 2000.

33 M.T. Cycero, *Pisma filozoficzne, t. II*, Warszawa 1969, p. 215.

34 M T. Cycero, *O prawach*, *t. I*, Kęty 1999, p. 105.

35 M.T. Cycero, *O państwie, t. III,* Kęty 1999, p. 71 *et seq.*

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Turning to the idea of *aequitas* – in the judicial practice of administrative courts – *"… reflects a consideration of truth, goodness, justice, and human dignity. Equity integrates these values; it is, as one might say, built upon them. Equity, understood in this way, should guide the content of law."*[36] When equity is absent from the substance of law, values such as truth, goodness, justice, and human dignity – essential to the application of law – must be derived by the judge from the humanistic values rooted in the tradition of legal culture.

The duty of a judge to decide cases in a morally responsible manner stems not only from the very idea of law, but also from the roles the judge is expected to fulfil.[37] In imparting meaning to the law, a judge ceases to merely echo it. The judge does not follow the misleading maxim *dura lex sed lex*. This implies that: *"the dignity of a judge lies in their reason, virtues of character, and sense of justice"; moreover, "a judge gains renown not merely from the ability to adjudicate but from judging in accordance with justice."*[38]

By applying axiological corrections to the law during the interpretative process, the judge adheres to Aristotle's conception of justice,[39] *"restoring balance where justice has been disrupted."*

A judge wields the power of adjudication, which entails responsibility for how the law is applied. Judicial independence, combined with conscience, enables the judge to remain faithful to the idea of law, even when, in specific cases, they go beyond the boundaries of enacted law.

The limits of fidelity to the law depend on its content, characteristics, and consequences. The law must earn respect. Just content of the law constitutes a compelling moral reason to respect it, while *iniuria* within the law provides a moral justification that allows the law to be disrespected and not complied with.[40]

"If we reject the assumption," argues M. Smolak, *"that methodological rules (such as linguistic, functional, adaptive, historical, or communicative interpretation) serve as criteria for choosing between legality and legalism, and if no method can resolve whether, in a given situation, it is necessary to go beyond the text of the law in interpreting it, then we must accept that this conflict can only be resolved based on certain, often contradictory, values inherent in legal interpretation, such as flexibility and adaptability versus the culturally positivist principles of certainty, predictability, simplicity, and clarity."*[41] Law – as a social fact –

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36 W. Dziedziak, *O prawie słusznym (perspektywa systemu prawa stanowionego)*, Lublin 2015, p. 57.

37 T. Romer, M. Najda, *Etyka dla sędziów. Rozważania*, Wolters Kluwer, Warszawa 2007; L. Morawski, *Kilka uwag w sprawie sędziowskiego aktywizmu*, [in:] Dyskrecjonalność w prawie, W. Staśkiewicz, T. Stawecki (eds.), Warszawa 2010 and *Zasady wykładni prawa*, 2nd edition, Toruń 2010, as well as *Podstawy filozofii prawa*.

38 P.H. Holbach, *Etokracja*, Warszawa 1979, p. 60 *et seq*.

39 T. Banaszczyk, *Pojęcie sprawiedliwości u Arystotelesa*, Studia Filozoficzne 1973, issue 1.

40 D. Lyons, *Etyka i rządy prawa*, Warszawa 2000, p. 59 *et seq*.

41 M. Smolak, *Wykładnia prawa a zmiana społeczno-polityczna*, [in:] J. Stelmach (ed.), *Studia z filozofii prawa*, Kraków 2001, p. 170.

exists through the judge, for it is the judge who enables law to fulfil its purpose as an effective regulator of social relations.

By applying axiological corrections to the law and invoking the maxim *summum ius summa iniuria*, judges invoke universal axiological values, which constitute the ethical order of the state.[42] This approach is challenging but responsible, for *"judges should play a significant role in protecting the fundamental goods of individuals based on the moral principles of the political community."*[43] This is also about ensuring that *"at the level of applying the law and justifying judicial practices, a coherent moral view of justice, equity, and fair procedure is maintained."*[44]

A judge faces a moral dilemma when applying a law that results in *iniuria*. Is the obligation to be faithful to the law and obey it unconditional and independent of its content? Or, given the moral fallibility of law, is this obligation relative in certain cases? Can law withstand the opposition of judicial conscience and the legal culture embraced by judges?

"The principle of the judge's obligation to adhere to the law," M. Smolak argues, *"and the departure from the literal text of the law in its interpretation are interconnected. Departing from the text is possible only when adopting a stance of legalism (adherence to statutory law), yet precisely for the purpose of occasionally overriding this principle."*[45]

In such cases of judicial activism,[46] two authorities collide: the authority of the legislator and the authority of the judge.[47] This reveals the divergence between the values represented in the content of the law by the legislator and the axiological

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42 T. Barankiewicz, *Aksjologiczna problematyka prawa*, „Roczniki Nauk Prawnych" 2004, XIV, book 1, Lublin 2004; M. Piechowiak, *Aksjologiczne podstawy polskiego prawa*, [in:] T. Gus, J. Głuchowski (eds.), M.R. Pałubska, *Prawo polskie. Próba syntezy*, Warszawa 2009.

43 M. Smolak, *Trzy modele uzasadnienia aksjologicznego decyzji orzeczniczej*, [in:] J. Stelmach (ed.), *Filozofia prawa wobec globalizmu*, Kraków 2003, p. 148.

44 M. Smolak, *Trzy modele…*, *op. cit*., p. 148; also on the subject: K. Ajdukiewicz, *O sprawiedliwości*, [in:] *Język i poznanie. Wybór pism z lat 1920–1939*, Warszawa 2006; Ch. Perelman, *O sprawiedliwości*, Warszawa 1959; Z. Ziembiński, *Prawo a inne normy*, [in:] Zarys teorii państwa i prawa, Warszawa 1992.

45 M. Smolak, *Wykładnia prawa…*, *op. cit*., p. 170.

46 J. Trzciński, *Prawotwórcza funkcja sądów*, [in:] Prawo w służbie państwa i społeczeństwa. Prace dedykowane Prof. K. Działosze z okazji 80. urodzin, B. Banaszak, M. Jabłoński, S. Jarosz-Żuchowska (eds.), Wrocław 2012, p. 261. The author stresses that "there is no universal rule for how a judge should act when faced with a situation where strict adherence to the law would be unjust and irrational, violating constitutional principles of justice. When issuing a decision, one can only consider the following guidelines: – seek solutions using the available legal instruments; – refer to the general principles of law, which embody humanistic values (justice, equality, dignity, the common good); – rely on established precedents and interpretative methods that protect rationally developed universal rights and freedoms of individuals; – display activism, but act in a way that avoids accusations of arbitrariness and legal nihilism; – refrain from overstepping too far in correcting the legislator; – remember that the test of legality in adjudicating a case cannot rest solely on the will of the judge; – do not elevate the maxim *dura lex sed lex* to the level of dogma."

47 Z. Ziembiński, *O stanowieniu i obowiązywaniu prawa. Zagadnienia podstawowe*, Warszawa, Sejm publishing house 1995, p. 112 "referring to the theoretical justification of legal norms, however, is not the only criterion conclusive of the validity of such norms, as the corrective role may be played by the factor of

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assessment of that law made by the judge. The principle of equity, applied by the judge in accordance with the maxim *hominum causa omne ius constitutum est* ("all law should be established for the sake of humanity"), aims to protect individuals and their dignity.[48]

The Polish Constitutional Court, in analysing the relationship between ethical norms and legal norms, has held that *"ethical norms are autonomous in relation to legal norms"* and that *"legal norms should be marked by axiological legitimacy, whereas ethical norms do not require juridical legitimacy."*[49]

Applying the law in accordance with the ideals of *aequitas*, *veritas*, and *iustitia* must be a cornerstone of the legal culture among judges, especially given that a model of legal interpretation viewed solely as a cognitive operation, detached from evaluations and values, is unreliable and may lead to injustice.

Only because the judge serves as the interpreter of the law, *"laws are the earnest of dignity, the foundation of liberty, and the source of justice"* (M. Cicero).

The administration of justice depends not only on the content of statutory provisions, but also on the judge's attitude, which is influenced by the prevailing legal culture and the value systems embraced and approved within the judiciary.[50]

Justice *in concreto* in the judicial application of the law is a protest against the soulless, wrongful, and ignoble application of the law by authorities.

In the processes of applying law, *"the role of equity relates to the requirement to deliver appropriate (fair) and specific rulings. It concerns the equity of a specific decision, a concrete equity, which may refine the established law in the sense of its practical realisation."*[51]

Conclusion

M.T. Cicero emphasised that in the process of applying the law, *existunt etiam saepe iniuriae calumnia quadam et nimis callida sed malitiosa iuris interpretatione*, meaning that injustices often arise from some distortion or overly scrupulous yet malicious inter-

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their axiological justification"; see also: M. Smolak, *Wykładnia celowościowa z perspektywy pragmatycznej*, Warszawa 2012, pp. 25–42.

48 W. Dziedziak, *O prawie słusznym*, *op. cit.*, p. 278; see also: P. Policastro, *Godność człowieka wobec wartości konstytucyjnych,* [in:] A. Choduń, S. Czepita (eds.), *W poszukiwaniu dobra wspólnego. Księga Jubileuszowa Prof. Macieja Zielińskiego*, Szczecin 2010; J. Potrzeszcz, *Godność człowieka w orzecznictwie polskiego Trybunału Konstytucyjnego*, „Roczniki Nauk Prawnych" 2005, XVI, 1, Lublin 2005, and by the same author: *Idea prawa w orzecznictwie polskiego Trybunału Konstytucyjnego*, Lublin 2007, as well as *Bezpieczeństwo prawne z perspektywy filozofii prawa*, Lublin 2013;

49 CT ruling of 17 March 1993, W 16/92, OTK 1993 no. 1, item 16; see also: S. Tkacz, *Rozumienie sprawiedliwości w orzecznictwie Trybunału Konstytucyjnego*, Katowice 2003.

50 Z. Ziembiński, *O stanowieniu i obowiązywaniu prawa. Zagadnienia podstawowe*, Warszawa 1995.

51 W. Dziedziak, *O prawie słusznym (perspektywa systemu prawa stanowionego)*, Lublin 2015, p. 225.

pretation of the law.[52] Therefore, Cicero argued that the concept of the judiciary, and thus the construction of its authority, must be viewed from the perspective of the universal good served by the judicial profession – namely, justice.

Judicial rulings cannot be devoid of individual reflection, consideration, and deliberation. If they are, uncritical acceptance of legislative authority paves the way for legal conservatism and submission to errors in legislation, even when they contradict one's own convictions and judgements. A judge, in the name of the universal value of justice in law, should – in exceptional circumstances – depart from the literal wording of a legal provision. Such action is necessary to equip the law with a just, fair content in the process of its application. Law should serve the realisation of axiological values, and the resolution of disputes over these values must ultimately rest with the judge's conscience. For a judge, their conscience always serves as the ultimate criterion for evaluating behaviour as lawful or unlawful.

Judicial activism, grounded in Article 178(1) of the Polish Constitution, empowers judges, in accordance with Article 8(2) of the Constitution, to perform pro-constitutional interpretations of both acts (statutes) and regulations. This is one of the four forms of direct application of the Constitution. Pursuant to Article 178(1), the framework for judicial discretion is determined by the Constitution and acts. Since judges are bound by the Constitution, they are also bound by its values – that is, its axiological foundation. The idea of a fair resolution, as it pertains to judicial application of the law, is embedded in the ethos of the function of a judge, in the role judges play in the judicial system. Moreover, under Article 175(1) of the Constitution, the administration of justice in the Republic of Poland is carried out by e.g. administrative courts.

If the content of enacted law diverges from the system of values underlying the Constitution, a decision issued under that law by a public authority may bear the traits of legalism, but that does not mean it aligns with the principle of a democratic rule of law. It is the judge who must assess this *ad casum*, within the process of interpreting and applying the law, and this requires judicial activism.

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