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Problems of interpretation of law in accordance with the Constitution – Polish construction in historical and comparative aspects

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Constitution, Constitutional Court, interpretation of the Constitution, interpretation in harmony with the Constitution

Introduction

In the light of art. 188 of the Constitution of the Republic of Poland[1] The Constitutional Court adjudicates on the compliance of laws and other normative acts with the Constitution. The interpretation of law in accordance with the Constitution has been a key issue since the beginning of the jurisprudential activity of Polish Constitutional Court and it is a term that is part of the legal language. According to Andrzej Bator and Artur Kozak, "the Constitutional Court and other law enforcement bodies do not have the competence – defined in a legal act – to interpret acts of law »in accordance with the Constitution«"[2]. However, it is difficult to imagine that it would be possible to assess the conformity of legal norms without establishing their content, and thus without interpreting them. Since the Constitution in the above-mentioned provision speaks of adjudicating on the compliance of laws and other acts with the Constitution, how can this be done without prior interpretation of the template and without understanding the object of the control? The interpretation of law amounts to reconstructing the norms from the laws and legal acts and determining their significance. The result of

[1] Constitution of the Republic of Poland of April 2, 1997 (Journal of Laws of August 16, 1997, No. 78, item 483).

[2] A. Bator, A. Kozak, *Wykładnia prawa w zgodzie z konstytucją*, [in:] S. Wronkowska (ed.), *Polska kultura prawna a proces integracji europejskiej*, Cracow 2005, p. 54.

these interpretations is part of this control, and such a position was adopted by the Constitutional Court. In one of its judgments, it stated that the subject of control is a legal norm, the content and meaning of which has been reconstructed and established through the application of appropriate interpretative and inferential rules. "Among several possible meanings of the provision established through the rules of interpretation, a normative sense should always be sought, which allows for a law to be agreed with the constitution [systemic aspect of interpretation]. Such a position is in full harmony with the presumption of conformity of the statutory norm with the Constitution, universally accepted in constitutional case-law."[3] The Constitutional Court appealed in its ruling to the inference of the norms, but it did not specify their nature or their relation to other methods of interpretation, so it can be supposed that it assumed inference rules based on some norms resulting from other norms, as well as those "resulting" from axiological assumptions.

At the source of the constitutional interpretation – American practice

The Constitution of the United States of America was enacted in the Constitutional Convention in 1787 and entered into force after its ratification by the states on July 26, 1788. It is stressed on the ground of the American doctrine that the problem of interpreting law in line with the constitution raises the need to compare the content of a controlled act with its constitutive pattern. It cannot always be clearly stated whether the audited act is compatible / incompatible with the constitution because of the ambiguity of the expressions used there and the role of a court is to harmonize the legal system with constitutional legislation. This type of interpretation was defined as an interpretation *in harmony with the Constitution*. In many cases a legal article cannot be understood without interpretation. Antonin Scalia and Bryan A. Garner believed that any attempt to establish the linguistic content of a basic editorial unit of a legal act by means of grammar and meaning rules is already a manifestation of a legal interpretation[4]. In order to avoid doubts whether the acts are in line with the constitution, the theory of avoiding constitutional doubts *(avoidance doctrine)* was adopted. It has been recognized as one of the canvases of legal interpretation. The authors gave this principle the name of *Constitutional-Doubt Canon*. It corresponds with the principle of *presumption of validity*, indicating the priority of such a result of an

[3] Judgment of the Constitutional Court of November 8, 2000, ref. SK 18/99, p. 21.

[4] See A. Scalia, B. A. Garner, *Reading Law: The Interpretation of Legal Text*, St. Paul 2012, p. 53.

interpretation that allows the analyzed provision to be maintained in force[5]. This technique was applied in the case of *Marbury v. Madison*, which is considered to be the beginning of judicial review of the constitutionality of legal acts. „When a court applies the avoidance canon to reject the court's otherwise-preferred reading of a statue in favor of a construction that is less constitutionally dubious, the court has made constitutional decision. […] Such a decision is not only perfectly legitimate, but it also is a useful mechanism for realizing important constitutional values"[6]. In the so-called *hard cases* – ones that are particularly complicated, or difficult due to different moral judgments involved, the court may face the necessity of choosing between two possible interpretations. One of them may correspond to the values accompanying the creation of a law by the legislator, the second – to the values found by the court through interpreting the constitution[7]. The dispute about the validity of such values and how to interpret them using the constitution lies at the basis of the interpretation itself[8]. American constitutionalism, much earlier than the European doctrine, faced the problem of the activist – passivist interpretation of the constitution. One can briefly summarize this argument by referring to the statements of two judges of the Supreme Court in the USA: Charles Evans Hughes and Felix Frankfurter.

According to the first one: "We are subject to the Constitution, but the judges say what the Constitution is." For the second: "The final touchstone of constitutionality is what the constitution says, not what the judges have said about it"[9]. These aphoristic statements are an example of the clash in American constitutionalism of the two concepts of constitutional interpretation: *Living Constitution* and *Originalism*. Nowadays, one can see the emergence of the third way of interpreting the constitution which allows to eliminate the shortcomings of the two mentioned above. This concept, referred to as Non *Originalism* (or *Living Originalism*), allows us to go beyond the text of the constitution and the intention of the Founding Fathers[10].

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5 Ibidem, p. 247.

6 E. A. Young, *Constitutional Avoidance, Resistance Norms and the Preservation of Judicial Review*, «Texas Legal Review» 2000, vol. 78, p. 1585.

7 See. B. L. Ross*, Against Constitutional Mainstreaming*, «University of Chicago Legal Review» 2011, vol. 78, p. 1206.

8 L. D. Jellum, *The Theories of Statutory Construction and Legislative Process in American Jurisprudence*, [in:] M. Araszkiewicz, K. Płeszka (eds.), *Logic in the Theory and Practice of Lawmaking*, Heidelberg–New York–Dordrecht–London 2015, p. 173–202.

9 I quote: B. Banaszak, M. Bednarczyk, *Aktywizm sędziowski we współczesnym państwie demokratycznym*, Warsaw 2012, p. 63. For more on this subject, see *Judical Acitivism v. Judicial Restraint*: P. Laidler*, Sąd Najwyższy Stanów Zjednoczonych Ameryki: od prawa do polityki*, Cracow 2011, p. 234–246.

10 J. M. Balkin, *Living Originalism*, Cambridge–London 2011, *passim*.

The interpretation of law in accordance with the constitution – European practice

The model of *judicial review* was adopted in the USA whereas the model of the constitutional court was introduced in Europe. The idea of constitutional judiciary appeared during the Spring of Nations in German countries and in Austria. Austria is widely regarded as the cradle of constitutional judiciary. The concept of protection of the constitution by the court independent of the judiciary appeared for the first time in the draft of the Frankfurt Constitution of 1849, designed for the united German empire, and in the constitution for Austrian countries – passed almost simultaneously in Kroměříž. . Both constitutions were a systemic projection of the concept of the rule of law *(Rechtsstaat)* created by German liberal thought and the theories of state law. They did not enter into force, but they determined in a visionary way the direction of systemic transformations in these countries[11]. On December 21, 1867, the Basic Law of the State was passed, in which, inter alia, the general rights of citizens were defined and the State Tribunal *(Reichsgericht)* – the precursor of Austrian constitutional court, was established[12]. After the end of the First World War and the abdication of Habsburg rule after 500 years, a special role was to be played by Hans Kelsen who introduced several versions of the new Constitution of the Republic of Austria and designed a system of constitutional review of laws later called the "Kelsene regime". In his proposal, he made a provision that the decisions of this body will be legally binding and irrevocable. This led to the elimination by the court of unconstitutional norms from the system of applicable law with the effect of *erga omnes*. He provided the Constitutional Court with the power to scrutinize abstractly the legality of legal acts in terms of their compliance with the Constitution[13]. It was not until the 1960s that the so-called interpretation of laws in accordance with the Constitution appeared in the case-law of this body[14]. Within its framework, the Court indicates in its opinion an appropriate "interpretation of constitutional

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11 A. Dziadzio, *Ochrona konstytucyjności prawa w Europie XIX wieku*, «Studia z Dziejów Państwa Polskiego» 2008, item. 11, pp. 170-171. Electronic version: [http://bazhum.muzhp.pl/media//files/Studia_z_Dziejow_Panstwa_i_Prawa_Polskiego/Studia_z_Dziejow_Panstwa_i_Prawa_Polskiego-r2008-t11/Studia_z_Dziejow_Panstwa_i_Prawa_Polskiego-r2008-t11-s169-183/Studia_z_Dziejow_Panstwa_i_Prawa_Polskiego-r2008-t11-s169-183.pdf (access: 16.06.2018).

12 Z. Czeszejko-Sochacki, *Sądownictwo konstytucyjne w Polsce na tle porównawczym*, Warsaw 2003, p. 18; K. Grzybowski, *Galicja 1848–1914. Historia ustroju politycznego na tle historii ustroju Austrii*, Cracow–Wrocław–Warsaw 1959, p. 106; A. Dziadzio, *Monarchia konstytucyjna w Austrii 1867–1914. Władza – obywatel – prawo*, Cracow 2001, p. 49 and n.

13 H. Kelsen, *Istota i rozwój sądownictwa konstytucyjnego*, Warsaw 2009, *passim*.

14 VfSlg 2264/1952, 3151/1957, 3556/1959 – I quote B. Banaszak, M. Bednarczyk, *Aktywizm sędziowski…*, p. 140–141.

norms or statutory norms by specifying what interpretation should be rejected or what should be applied"[15]. This method of interpretation is recognized in law sciences as legitimate. It prevents the repeal of acts in a situation where they can be given a content consistent with the Constitution. Some authors, fearing excessive activism of the Court, warn that the competence of this body does not include giving an act of law, by its own interpretation, the opposite meaning to the one explicitly assigned by the legislator. "An interpretation in accordance with the Constitution – properly applied – should not lead to the development of statutory norms through judicial decisions"[16].

The catalog of fundamental rights of the citizens *(Grundrechte)* had already been broadly defined in the draft of the Frankfurt Constitution of German Empire[17]. In the light of § 194 of this constitution, no provision in the constitution or statute of the federal state could be in conflict with the federal constitution (principle of the primacy of the constitution). No other act (constitution or national law) could either reduce or repeal the fundamental rights of an individual envisaged in the Reich Constitution (§ 130). The *Reichsgericht* was to guard the observance of federal constitution and the civil rights and freedoms contained there. By virtue of the powers conferred upon it, the *Reichsgericht* basically considered all the matters related to the interpretation of the constitution. The Reichs' Court was equipped with the possibility of exercising an abstract review of the compliance of laws with the Constitution, not only on the basis of a complaint lodged by authorized state authorities, but also at the request of every citizen.

The revolution of 1848 led to the return of autocratic rule. The subsequent constitutions of 1850 and 1871 did not refer to the solutions of the Frankfurt constitution, they were imposed by the monarch (octroyed constitutions). This situation changed in 1919 with the adoption of the Weimar Constitution which, from the point of view of a legislative technique, was a coherent and clear act[18]. It regulated the Reich's political system, the structure and competences of its various organs, as well as the issues of citizens' rights and obligations. However, the time of crisis in which Germany was at that time meant that this act could not fulfill its role. Thomas Mergel stated that the very modern and high-level solutions that were introduced there proved to be insufficient. According to him, only good law

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15 Ibidem, p. 141.

16 H. Schäffer, *Verfassungsgericht und Gesetzgebung*, [in:] H. Schäffer, W. Berka, H. Stolzlechner, J. Werndl (eds.), *Staat – Verfassung – Verwaltung. Festschrift anlässlich des 65. Geburtstages von Prof. D.Dr. D.Dr. H. c. Friedrich Koja*, Wien–New York 1998, p. 126.

17 Ibidem, p. 9.

18 For more information on the Weimar Republic's legal solutions, see T. Kotłowski, *Historia Republiki We-imarskiej (1919–1933),* Poznań 1991 together with the literature cited there; M. Labijak, *Rozwiązania prawno-ustrojowe Republiki Weimarskiej w perspektywie historycznej i porównawczej*, «Studia Iuridica Toruniensia» 2014, vol. 14, p. 173–192.

is not enough in the democratic system since good will is needed to implement this law through a democratic path[19]. Paradoxically, this most democratic German constitution led to the creation of a system of totalitarian rule.

According to Domenique Rousseau, the lack of judicial control over the constitutionality of the law led to the overthrow of democracy in Germany. The cataclysm of fascism and Nazism ruined constitutional theories based on the primacy of the constitutional law[20]. As the founders of the Basic Law of the Federal Republic of Germany of May 23, 1949 were conscious of that, they adopted the solutions of the Austrian model whose essence was the examination of the conformity of legal acts with the constitution. At the same time they "decided to expand the competences of the newly created Federal Constitutional Court in accordance with the contrary American model, allowing for the examination of the constitutionality of the application of law"[21]. The result was the establishment of The Constitutional Court with a much broader competence, effective procedures and a relatively broad availability compared to the Constitutional Court of the Republic of Austria.

According to art. 92 of German Basic Law, The Federal Constitutional Court is an organ of the judiciary. It is listed first before the Supreme Court and other federal and national courts. The legislator emphasized its primary role in the system of state authorities of Germany. The Basic Law itself devoted only two articles to this body (Articles 93 and 94). The Law on the Federal Constitutional Court was its development in which it was unequivocally stated that this body is "independent in relation to all constitutional order „(§ 1 section 1)[22]. The Constitutional Court is inscribed in the "liberal democratic order"[23]. Its task is to create a constitutional consensus. It does so by interpreting the constitution and examining the conformity of legal acts with the constitution. The main reason for this form of adjusting the law to the changing social and cultural-ethical reality is the openness of normative acts, their ambiguity, generality and their multiple reference. This is especially visible in basic rights whose specifying is an interpretation of the constitution. It is even claimed that they are offer

[19] T. Mergel, *Dictatorship and Democracy (1918-1939)*, [in:] H. W. Smith (ed.), *The Oxford Handbook of Modern German History*, Oxford 2011, p. 435–436.

[20] See D. Rousseau, *Sądownictwo konstytucyjne w Europie*, Warsaw 1999, p. 23.

[21] D. Janicka, *Ustawa Zasadnicza w praktyce Republiki Federalnej Niemiec (1949–1989)*, Toruń 2009, p. 244.

[22] Gesetz über das Bundesverfassungsgericht vom 12. März 1951, BGBI. I, 243 (consolidated text: Bekanntmachung der Neufassung des Gesetzes über das Bundesverfassungsgericht vom. 3. Februar 1971, BGBI. I, 105); J. Trzciński (ed.), *Sądy konstytucyjne w Europie*, vol. 1, *Austria, Francja, Niemcy, Włochy*, Warsaw 1996, p. 152–207.

[23] G. Kellermann, *Verfassungsinterpretation*. *Das Grundgesetz als normative Ressource im gesellschaftlichen Wandel*, Schwalbach 2011, p. 19.

a possibility for future interpretations, which, in the long term, secure political and social changes[24].

Interpretation of the constitutional act

A particular problem related to the interpretation of the constitution is that we must not depart from the clause of literal understanding of the text. This is due, on the one hand, to the positivity of the law and, on the other, to the functions that are imposed on modern constitutions. Undoubtedly, each interpretation assumes the stability of the text (maintaining its original meaning), but it is possible to understand it better by making an interpretation[25]. It should be borne in mind that written texts (laws, the constitution) depend on the meanings derived by means of legal interpretation. As in the case of ordinary acts whose general parts determine the interpretation standards for their specific parts, the constitution is the highest level of standards for all other acts. Thanks to this, the entire legal system is provided with stability and also flexibility (it allows to adjust each act of law to life without having to change the foundations of the legitimacy of the legal system). The concern over the stability of the constitution gives rise to the fear of political arbitrariness. The fact that the constitution is an act of the highest rank in the system of positive law does not mean, in the light of the arguments of some authors, that its interpretation should be limited. It should rather "be made free from these ties"[26].

Gero Kellermann wrote that the discussion on the correct methods of interpreting the constitution is the "Archimedes point" of constitutional law. "The interpreting body adapts the content of the constitution (and its consequences) to the stage of social life"[27]. The need to update this consensus, especially in a conflict situation, is an open process. The key to solving it is a reasonable interpretation of constitutional provisions, which, on the one hand must take into account the changes taking place, and on the other – justice, while keeping these variables in equilibrium. The role of interpreting the constitution boils down to defining the goal of the legislator and policies corresponding to constitutionality. Ethical and cultural problems such as human dignity, freedom and security, as well

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24 R. Wahl, *Verfassungsänderung – Verfassungswandel – Verfassungsinterpretation*, [in:] *Verfassungsänderung, Verfassungswandel, Verfassungsinterpretation: Vorträge bei deutsch – japanischen Sympozien in Tokyo 2004 und Freiburg 2005*, Berlin 2008, p. 29.

25 G. Roellecke, *Das Paradox der Verfassungsauslegung*, Paderborn–München–Wien–Zürich 2012, p. 8.

26 Ibidem, p. 10.

27 G. Kellermann, *Verfassungsinterpretation*…., p. 25.

as the problems of marriage and family, and the discussions emerging in these matters, indicate that it is difficult to bring about their unanimous synchronization (compatibility) with the constitution[28].

In constitutional systems with strong constitutional jurisdiction (e.g. the Federal Republic of Germany), the Constitutional Court plays a large role in determining the forms and methods of interpreting the law. The construction and reconstruction of the constitutional interpretation carried out by this body has long been the subject of scientific and political disputes. One of the ways to solve them is an interpretation referring to the specific will of the historical constitutional legislator. The original intention must be determined in each case separately. The Federal Constitutional Court expressed the opinion that the "objective will of the legislator" or "the will of the law" should be taken into account in resolving any constitutional issues. This allows to adjust the constitutional law to changing social and technological conditions[29]. Therefore, it is permissible to "develop" the Constitution through its interpretation, which raises the question of whether we are dealing with specific methods of constitutional interpretation.

The necessity to turn to the goal or intent of the legislator or the act raises the need for many methods of interpretation, which include the following: grammatical, systemic, functional (teleological), and historical methods[30]. This division was introduced into German literature by Friedrich Carl von Savigny and it is still functioning today[31]. These methods are used when interpreting all legal norms. However, the interpretation of constitutional norms in the light of the prevailing view is in many respects specific in its nature – the specificity of the language, its political character, openness to fundamental rights and the axiology contained there – determine its unique nature. After all, it refers to the law as an "abstract composition" that safeguards the development of fundamental rights. The interpretation can therefore be treated as a kind of an expert opinion with the legal value. Although it is based on traditional methods, they refer to constitutional law whose peculiarity determines the specific character of constitutional interpretation. This interpretation includes:

– the principle of unity of the constitution – its aim is to avoid contradictions between constitutional norms;
– the principle of practical agreement – its aim is to achieve optimal effectiveness;
– the principle of functional correctness – it manifests itself in the fact that the constitution has been interpreted by a non-legislator, but the non-legislator's competences set out in the constitution make this body's activity appropriate;

[28] Ibidem.
[29] Ibidem, p. 26–27.
[30] Ibidem, p. 27.
[31] F. C. von Savigny, *System des heutigen Römischen Rechts*, vol. 1, Berlin 1840.

– the principle of action integration – its aim is to provide an advantage of such an interpretation that is an expression of a harmonization of the results obtained through these different methods;
– the principle of a normative life of the constitution – this is not about the effectiveness of normative regulations, but about their control from the point of view of axiological assumptions that have been expressed in fundamental rights and in the principles of organizational and legal Grundnorm of the political order of the state[32].

These basic principles form an integral part and the core of each democratic and political order. Their function is to defend against unjustified interference of the state with fundamental rights guaranteed by the constitution.

Final remarks

The activity of the Federal Constitutional Court of Germany and the achievements of the constitutional law in this country had the greatest influence on Polish judicial practice[33]. The Polish name of this institution is a translation of the German term *fervassungskonforme Auslegung von Gesetzen*. In the initial years of its activity the Federal Constitutional Court limited itself only to the analysis of whether the statutory norms examined by it were compatible / inconsistent with the Basic Law[34]. Starting from the 1960s, it has also adjudicated on partial unconstitutionality. Undoubtedly, the recognition of a partial unconstitutionality of a norm leads to a change in its content. Among the meanings that could have been assigned to it earlier one distinguishes the meaning that is consistent in its content with the constitution, and rejects those meanings that have been considered inconsistent by the Court.

The Polish Constitutional Court has been included in the judiciary, but it does not exercise the judiciary. It has a fairly wide margin of freedom when interpreting the constitution. Piotr Tuleja noted that "the legitimization of constitutional judiciary does not result only from the reference to the formal aspect of being bound by law, including the Constitution, but it has been based on substantive understanding of the rule of law. The principle of the rule of law, in its material content, means first of all the priority of an individual over the state and limiting the freedom of each individual by the state only to the necessary extent. On the

[32] G. Kellermann, *Verfassungsinterpretation…*, p. 27–28.
[33] Z. Czeszejko-Sochacki, *Orzeczenia Trybunału Konstytucyjnego: pojęcie, klasyfikacja, skutki*, «Państwo i Prawo» 2000, item. 12, p. 22.
[34] See T. Maunz, G. Dürig et al., *Grundgesetz Kommentar*, München 1958, commentary to art. 100.

basis of this principle, the Constitutional Court is perceived as a guardian of the constitution, that is, the body which, based on the provisions of the constitution, determines the acceptable extent of the interference of the state in each individual's freedom"[35].

Assessing whether an interpretation complies with the constitution is not a simple or unambiguous procedure[36]. Some experts treat this interpretation as a technique of a system interpretation[37], others – functional interpretation[38]. The distinction of this type of interpretation as an independent method / technique of interpretation, however, seems to be disputable. In the literature on the subject, interpretation in accordance with the constitution is presented as a kind of operative interpretation[39]. It is indicated that it is functionally coupled with the decision-making process. The Constitutional Court acts in this matter within its constitutionally acquired competence. However, the difference between this court and other courts as well as other law enforcement institutions lies in the fact that the process of the court's operationalization of the interpretation of law is abstract[40].

The USA is the only country where a specific interpretation of law was created along with methods complying with the constitution. This is the concept of originalism[41] – a specific construction only for the interpretation of this act. Another concept of interpretation – textualism – refers to the interpretation of laws[42]. In none of the three countries: Austria, Germany or Poland, a different concept of interpretation was created that would include methods designed only for the interpretation of the constitution. While examining the conformity of legal acts with the constitution, one can note, however, that more emphasis is put in these countries on systemic, functional or teleological methods, which generates the problem of the peculiarity and autonomy of such an interpretation[43].

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35 P. Tuleja, *Stosowanie Konstytucji RP w świetle zasady jej nadrzędności (wybrane problemy)*, Cracow 2003, p. 187.

36 A. Bator, A. Kozak, *Wykładnia prawa…*, p. 44–51.

37 See L. Morawski, *Wykładnia w orzecznictwie sądów. Komentarz*, Toruń 2002, p. 168 and n.

38 P. Tuleja, *Stosowanie Konstytucji RP…*, p. 308.

39 T. Stawecki, *Operatywna wykładnia konstytucji w świetle badań empirycznych*, [in:] L. Leszczyński, A. Szot (eds.), *Wykładnia operatywna prawa – perspektywa teoretyczna i dogmatyczna*, Toruń 2017, p. 49–73.

40 A. Bator, A. Kozak, *Wykładnia prawa…*, p. 57.

41 See A. Scalia, *Originalism: The Lesser Evil*, «University of Cincinnati Law Review» 1988–1989, vol. 57; idem, *A Matter of Interpretation: Federal Courts and the Law*, Princeton 1997, *passim*; J. M. Balkin, *Living Originalism…*, *passim*.

42 See J.T. Hutchens, *A New Textualism: Why Textualists Should Not Be Originalists*, «Kansas Journal of Law & Public Policy» 2006–2007, vol. 16, no. 2.

43 See. collections of studies on this subject (I limit myself to Polish literature): T. Stawecki, J. Winczorek (eds.), *Wykładnia Konstytucji. Inspiracje, teorie, argumenty*, Warsaw 2014; M. Smolak (ed.), *Wykładnia Konstytucji. Aktualne problemy i tendencje*, Warsaw 2016; M. Hermann. S. Sykuna (eds.), *Wykładnia prawa. Tradycja i perspektywy*, Warsaw 2016.

RÉSUMÉ

In the light of art. 188 of the Constitution of the Republic of Poland The Constitutional Court adjudicates on the compliance of laws and other normative acts with the Constitution. The interpretation of law in accordance with the Constitution has been a key issue since the beginning of the jurisprudential activity of Polish Constitutional Court. It is stressed on the ground of the American doctrine that the problem of interpreting law in line with the constitution raises the need to compare the content of a controlled act with its constitutive pattern. This type of interpretation was defined as an interpretation *in harmony with the Constitution*. In American constitutionalism two concepts of constitutional interpretation can be distinguish: *Living Constitution* and *Originalism*. Nowadays, one can see the emergence of the third way of interpreting the constitution which allows to eliminate the shortcomings of the two mentioned above. This concept, referred to as *Non Originalism* (or *Living Originalism*). The model of *judicial review* was adopted in the USA whereas the model of the constitutional court was introduced in Europe. Austria is widely regarded as the cradle of constitutional judiciary. Hans Kelsen designed a system of constitutional review. He provided the Constitutional Court with the power to scrutinize abstractly the legality of legal acts in terms of their compliance with the Constitution. It was not until the 1960s that the so-called interpretation of laws in accordance with the Constitution appeared in the case-law of this body. The cataclysm of fascism and Nazism ruined constitutional theories based on the primacy of the constitutional law. As the founders of the Basic Law of the Federal Republic of Germany of May 23, 1949 were conscious of that, they adopted the solutions of the Austrian model whose essence was the examination of the conformity of legal acts with the constitution. The discussion on the correct methods of interpreting the constitution is the "Archimedes point" of constitutional law. The activity of the Federal Constitutional Court of Germany and the achievements of the constitutional law in this country had the greatest influence on Polish judicial practice. The Polish name of this institution is a translation of the German term *fervassungskonforme Auslegung von Gesetzen*.

Bibliography

J. M. Balkin, *Living Originalism*, Cambridge–London 2011.

B. Banaszak, M. Bednarczyk, *Aktywizm sędziowski we współczesnym państwie demokratycznym*, Warsaw 2012.

A. Bator, A. Kozak, *Wykładnia prawa w zgodzie z konstytucją*, [in:] S. Wronkowska (ed.), *Polska kultura prawna a proces integracji europejskiej*, Cracow 2005.

Z. Czeszejko-Sochacki, *Sądownictwo konstytucyjne w Polsce na tle porównawczym*, Warsaw 2003.

A. Dziadzio, *Monarchia konstytucyjna w Austrii 1867-1914. Władza – obywatel – prawo*, Cracow 2001.

A. Dziadzio, *Ochrona konstytucyjności prawa w Europie XIX wieku*, «Studia z Dziejów Państwa Polskiego» 2008, item. 11.

K. Grzybowski, *Galicja 1848–1914. Historia ustroju politycznego na tle historii ustroju Austrii*, Cracow–Wrocław–Warsaw 1959.
M. Hermann S. Sykuna (eds.), *Wykładnia prawa. Tradycja i perspektywy*, Warsaw 2016.
J. T. Hutchens, *A New Textualism: Why Textualists Should Not Be Originalists*, «Kansas Journal of Law & Public Policy» 2006–2007, vol. 16, no. 2.
L. D. Jellum, *The Theories of Statutory Construction and Legislative Process in American Jurisprudence*, [in:] M. Araszkiewicz, K. Płeszka (eds.), *Logic in the Theory and Practice of Lawmaking*, Heidelberg–New York–Dordrecht–London 2015.
G. Kellermann, *Verfassungsinterpretation*. *Das Grundgesetz als normative Ressource im gesellschaftlichen Wandel*, Schwalbach 2011.
H. Kelsen, *Istota i rozwój sądownictwa konstytucyjnego*, Warsaw 2009.
M. Labijak, *Rozwiązania prawno-ustrojowe Republiki Weimarskiej w perspektywie historycznej i porównawczej*, «Studia Iuridica Toruniensia» 2014, vol. 14.
P. Laidler, *Sąd Najwyższy Stanów Zjednoczonych Ameryki: od prawa do polityki*, Cracow 2011.
T. Maunz, G. Dürig et al., *Grundgesetz Kommentar*, München 1958.
L. Morawski, *Wykładnia w orzecznictwie sądów. Komentarz*, Toruń 2002.
G. Roellecke, *Das Paradox der Verfassungsauslegung*, Paderborn–München–Wien–Zürich 2012.
B. L. Ross*, Against Constitutional Mainstreaming*, «University of Chicago Legal Review» 2011, vol. 78.
F.C. v Savigny, *System des heutigen Römischen Rechts*, vol. 1, Berlin 1840.
A. Scalia, *A Matter of Interpretation: Federal Courts and the Law*, Princeton 1997.
A. Scalia, *Originalism: The Lesser Evil*, «University of Cincinnati Law Review» 1988–1989, vol. 57.
A. Scalia, B. A. Garner, *Reading Law: The Interpretation of Legal Text*, St. Paul 2012.
Schäffer H., *Verfassungsgericht und Gesetzgebung*, [in:] H. Schäffer, W. Berka, H. Stolzlechner, J. Werndl (eds.), *Staat – Verfassung – Verwaltung. Festschrift anlässlich des 65. Geburtstages von Prof. D.Dr. D.Dr. H. c. Friedrich Koja*, Wien–New York 1998.
M. Smolak (ed.), *Wykładnia Konstytucji. Aktualne problemy i tendencje*, Warsaw 2016.
T. Stawecki, *Operatywna wykładnia konstytucji w świetle badań empirycznych*, [in:] L. Leszczyński, A. Szot (eds.), *Wykładnia operatywna prawa – perspektywa teoretyczna i dogmatyczna*, Toruń 2017.
T. Stawecki, J. Winczorek (eds.), *Wykładnia Konstytucji. Inspiracje, teorie, argumenty*, Warsaw 2014.
P. Tuleja, *Stosowanie Konstytucji RP w świetle zasady jej nadrzędności (wybrane problemy)*, Cracow 2003.
R. Wahl, *Verfassungsänderung – Verfassungswandel – Verfassungsinterpretation*, [in:] *Verfassungsänderung, Verfassungswandel, Verfassungsinterpretation: Vorträge bei deutsch – japanischen Sympozien in Tokyo 2004 und Freiburg 2005*, Berlin 2008.
E. A. Young, *Constitutional Avoidance, Resistance Norms and the Preservation of Judicial Review*, «Texas Legal Review» 2000, vol. 78.