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The Apparent Dilemma - Dangerous Consequences? Between the Legal and Ethical Standards.

Abstract: Democratic rule of law has been struggling with the occurring problem of pluralism of values. It is therefore still faced with the dilemma of ordering the relationship of law and ethics, namely with the question whether in the issue of legal solutions the priority is granted to ethics or to law. In the case of dominance of the positivist paradigm, it is all the more important because the ethical issue is marginalized in it. It turns out that the same authority, deciding on similar issues, at the junction of two areas: ethics and law, can make mutually contradictory decisions: once giving priority to ethics, whereas - at different times - to positive law. On a closer analysis, this contradiction proves illusory because under the guise of protection of a positive paradigm, the hidden fact is that the axiological decision underlies the resolution concerning law. This decision protects the values that have priority in the scale of preferential value of decision-making body. The example considered in the article concerns the interface between ethical and legal norms against selected rulings of the Constitutional Court. The doubts that arise in this context may be in future avoided or perhaps, if necessary, resolved by adopting a two-aspect model of legal norm. This model in its vertical approach has an evaluative element. This allows to deem the seemingly contradictory decision in similar cases as justified one. It also shows that in practice the rightness of the resolution takes precedence both over ethics as well as over law.

Keywords: axiology; Constitutional Court; ethic; ethical standards; legal norm; legal standards; positivist paradigm; two-aspect model of legal norm.

I. Introduction

The legal system is just one of many normative systems operating within broadly understood culture. Although the coordination of legal norms with the norms of other normative systems does not constitute a *sine qua non* condition of formal introduction of the former norms in the social structures, without a doubt it has a fundamental impact on their functioning (particularly in matters of compliance). Existing law, even if only formally valid, is not created in a "social vacuum", but it is the result, at least in part, of the same influences that affect other normative systems. There is no doubt that the need to seek consensus and cohesion among them is in the interest of the law, though achieving completely satisfactory results in this matter seems – least to say – difficult and sometimes even impossible.

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Furthermore, the pluralistic society of liberal democracy faces legal policy and the legislator with even higher demands due to the contrary tendencies that occur within it. On the one hand, there is a significant expansion of the boundaries of the social agency of individuals, which is manifested by a widespread emphasis on: relativism, especially in matters of morality, individuality and the activation of individuals. All these factors taken together contribute to the occurrence of "axiological antagonisms". The democratic state indeed does not preclude even a simultaneous existence of mutually polarising ethical systems as long as they do not violate the core of democracy. The latter is understood as to maintain democracy, namely a certain degree of order, guaranteed by law.[1] On the other hand, in a world where there are still unpredictable changes that generate new forms of risk,[2] there is the need to trust the experts[3] and the increasing trend of globalization and international integration processes, necessitate the need to maintain the widest possible degree of coherence.

This paper focuses on the relationship between law and morality, or to put it more precisely, the relation of legal norms to ethical norms, which I treat as normative morality.[4] This article aims to draw attention to the presence of axiological problems in decision making processes of the judges of the Constitutional Tribunal.[5] Thus, it is used as an excuse to ask questions about the future of the philosophy of law. The question which may accordingly be asked is whether in the event of taking legal decisions, there is the need (meaning: it is desirable, postulated or simply useful) to establish an unconditional priority between different normative systems, in particular between the ethical and legal ones? Whether the body that undertakes a resolution at the interface between these two normative systems should clearly identify this issue, and what consequences its argumentation could lead to.

II. Between law and ethics - general considerations in the theory of law

The issue of the relationship between the legal and ethical norms constitutes one of the most exploited problem in the theory and philosophy of law. It has been reflected in seemingly the oldest dispute between the conceptions of natural law and legal positivism, in other words, between axiological and anti-axiological trend. The first position emphasizes the relationship

[1] Joanna Byrska, *Pochodzenie treści etycznych w życiu publicznym,* in: *Etyka i polityka*, ed. D. Probudzka, 2005, 228.
[2] Urlich Beck, *Risk society: Towards a New Modernity*, 1992.
[3] Anthony Giddens, *Living in a Post-Traditional Society*, in: Beck U., Giddens A., Lash S., *Reflexive Modernization. Politics, Tradition and Aesthetics in the Modern Social Order*, 1994, 56-109.
[4] It is much easier to analyse the ethical norms – understood in such way – in relation to legal norms. They cease to exist in the minds of the entities that experience them, and thus they become conventional creations resulting from the belief of a given community (they are based on the commonly accepted axiological orientation) that arranges them in a set of moral norms. See Arno Anzenbacher, *Wprowadzenie do filozofii*, 2005, 337. A typical example of a detailed ethics are the norms contained in the code of professional ethics.
[5] In the Polish language also referred to as *Trybunał Konstytucyjny* (*Trybunał*, *TK*)

between law and morality, thus emphasizing the importance of axiological issues in the researches on law (in the process of definition, interpreting and justifying law). The second trend, represented mainly by the continental positivism and normativism, not only opposes the fact of defining law by means of extra-legal categories, but by offering a consistent separation of the two systems of norms – it denies the importance of moral issues. The problem of the relationship between law and morality has been and is being discussed in all the legal theories (even in a seemingly neutral, analytic philosophy of law). Initially conflicting positions have been modified over the years so that one can risk a statement that "soft" versions of positivism and new conceptions of natural law are no longer antagonistic, and they have "overlapping points". Despite the latter, there has yet been no satisfactory solution concerning the relationship between legal and moral norms.

The extensive literature both on the interconnection between law and morality/ethics/ has been limited in this paper to the most important issues.

What is undoubtedly most beneficial in the relations between law and ethics is mutual interaction of these normative systems, namely a similar regulation of the same behaviour of the addressee of these norms. Such a situation allows to achieve a greater degree of social order. *A contrario,* the situation of the independence of these systems can lead to conflicts, tensions and antagonizing the public. It should be also added that it very often happens that the content of legal norms coincides extensionally with other normative systems of a given society, cooperating with them all, though not always in compliance with all of them (such an approach has been already well established for several years.[6] When drawing the boundaries between them, it is crucial to clearly specify under what criteria the relationship between law and morality is determined. These divisions can concentrate on the following basis: (a) the genesis, (b) the content, (c) the formulation of norms, (d) the conditions, manner and character of validity, (f) the penalties.[7] The theory of law analyses several types of relations that determine the interconnection between law and morality: (a) subjective, (b) validating, (c) functional, which can form five configurations.[8]

These relations imply the corresponding philosophical standpoints in the discourse on the interconnections between law and morality, classically revolving around the discourse on paternalism, moralism and moral neutrality of the law. These theories seek to answer the following questions: to what extent can law encroach on the realm of moral autonomy of

[6] Wiesław Lang, Jerzy Wróblewski, Sylwester Zawadzki, *Teoria państwa i prawa,* 1986, 15.
[7] Maria Ossowska, *Norma moralna a norma prawna*, in: *Elementy socjologii prawa- wybór tekstów*, vol. 1., ed. A. Kojder, E. Łojko, W. Staśkiewicz, A. Turska, 1990, 112-117. See also Krzysztof Pałecki, *Prawoznawstwo. Zarys wykładu. Prawo w porządku społeczny,* 2003, 97.
[8] Lech Morawski, *Wstęp do prawoznawstwa*, 2002, 44-52; Lang, Wróblewski, Zawadzki (note 7), 301-312.

individuals? To what extent moral beliefs can be, and should be imposed on those who do not share them.[9] What seems to gain utmost importance nowadays, even in the legal discourse, there are the conceptions of ethical pluralism (pluralism of values) which, according to Polanowska- Sygulska, assume that: there are many objective values that are knowable and disproportionate (namely, they are irreducible and they cannot be subject to hierarchical ordering, thus there is no possibility to resolute conflicts between them).[10]

III. Law and ethics in the judicial practice of the Constitutional Tribunal.

The resolutions at the interface between ethics and law, are reflected in the sphere of practical problems faced by the Constitutional Tribunal. It is erroneous to believe that the resolution at the interface between these two fields is an issue likely to find simple/obvious solutions, in a democratic state of law, which is still dominated by the positivist paradigm, or in which as if were in a principle, "a democratic way of law-making guarantees the realization of socially acceptable system of values as a source of morally legitimate legal norms, while preserving validating independence of law and morality".[11] This situation is partly due to the wording of article 188 of the Constitution, which defines the scope of cognition of the Court and brings down its activities to "a verification of the conformity of statutes with the Constitution". The content of this article is not only unclear for me, but most of all, insufficient, because it does not provide the justification/the rationale of the basis on which this "activity" could occur. In my opinion, this verification does not refer in all cases to the comparison understood as the analysis of the content of the legal norms contained in the provisions of statutes or other legislation and relevant norms contained in the provisions of the Constitution. In many cases, this comparison is made on another, apparently extra-legal, level of values. Thus, in my opinion, the Constitutional Tribunal is often forced, in addition to the exegesis of the content of the legal norm, to assess in its analyses the degree of coherence, which occurs between the value that is protected by a given legal norm, and the value protected by the constitutional norm (it is the very ground that the Tribunal undertakes comparisons between them). Under this assumption, it cannot be the case that the legal norm would safeguard the values that would not be constitutional values (or worse, they would be in contrast to constitutional values. Axiological compliance, or perhaps more precisely: *the lack of axiological antagonism*, which I postulate, would correspond to the standpoint expressed by B. Zdziennicki, according to whom, apart from the jurisprudence of concepts and interests, the

[9] Tomasz Pietrzykowski, *Etyczne problemy prawa. Zarys wykładu,*2005, 83-134.
[10] Beata Polanowska–Sygulska, *Pluralizm wartości i jego implikacje filozofii prawa*, 2008.
[11] Kazimierz Działocha, the dissenting opinion to the case U. 1/92.

Tribunal undertakes "*the jurisprudence of values*" that "departs from the solid statutory foundations". I entirely agree with the author that "there is a great need to refer to values when assessing the constitutionality of the challenged solutions (...), it can be defined as the need to "positivize values".[12]

This standpoint would indicate such a plane (although not capable of being precisely defined and perhaps disapprovingly received by the positivist lawyers) on which the Tribunal's activity would be nonetheless fully understood and justified. I am convinced that it is nothing that would contradict the common-sense understanding of the actions undertaken by the Constitutional Tribunal. The novelty of this idea, or rather its straightforward expression, shifts values from their extra-legal status to the status of remaining, "being" in the law. The value – as I believe – does not only underlie the legal norm, does not merely legitimize it, but above all, it constitutes its intrinsic element (as presented by the two-aspect model of a legal norm).

In its judicial activity, the Tribunal often has to deal with the need to resolve not only the issue of the content conformity of legal norms with the Constitution, but also between the priority of legal and ethical norms introduced into the legal system. The latter can be illustrated on the example of analysing the codes of professional ethics norms that are granted statutory legitimization. This argumentation reveals that this is not a collision of legal and ethical norms that in fact constitutes the subject of the decision in these issues, but rather the conflict between the values protected by the legal and ethical norm. Thus the problem of determining the priority is not reduced to establish the primacy of ethics or law, but to determine in each case the value which the Tribunal considers more crucial (worthy of constitutional protection), is it the one contained in the legal norm or the one in the ethical norm. Accordingly, the Constitutional Tribunal more or less arbitrarily weighs values – it verifies the compliance with the Constitution of the value contained in the legal norm, with the one contained in the constitutional norm (leaving aside at this point the speculation about the basis on which such "balancing" of the values takes place). This thesis, as I believe, does not contradict a commonly adopted requirement of the neutrality of the Constitutional Tribunal judges, namely the fact that in their activities they are subject only to the Constitution.

It can be assumed that in similar cases, at the interface of these two normativities, there can be issued seemingly mutually contradictory rulings, once giving the priority to legal norms (which granted the legitimization to enact deontological norms) and at different times –

[12] Bohdan Zdziennicki, *Skuteczność prawa z perspektywy Trybunału Konstytucyjnego*. in: Skuteczność prawa. X Konferencja Wydziałowa WPiA UW, 2009, 17-19.

to ethical norms (issued on the basis of this authorization). It may also turn out that the ethical norms, incorporated into the law, will protect – not always rightly – crucial constitutional values and law, paradoxically, will have to play their role. The fact that in such cases the law takes over the role of ethical norms (*sic!*), would not raise much "controversy" if it was not for the continental model of law in Poland and the fact of perhaps not a complete, but partial (as far as it is possible) avoidance of being entangled in axiological discourse that does not provide satisfactory results. As it was already pointed out, in the literature, axiological issues, which nonetheless gain in importance and whose role in influencing law is not denied – are still treated as an element outside the legal system and outside the framework of the legal norm.

In this light, the discourse on the collision of legal and ethical norms does not only become less attractive, but it loses its "real existence". It becomes apparent. It turns out that contradictory decisions of the Constitutional Tribunal are not mutually contradictory – trivially: they are consistent with the axiology of the one who takes the decision. The judges of the Constitutional Tribunal do not rule in isolation from axiology; they make the aforementioned juridization of values. In addition, it has to be kept in mind that the Constitutional Tribunal does not have the possibility to shirk taking the decision – it is obliged to make it, irrespective of substantive difficulties of the case in question. In the civil law legal system, referring to the argument of incommensurability of values, or referring directly to axiology in the justification, would simply be unacceptable, because it would raise doubts as to the neutrality and impartiality of the judge. Thus, it would be contrary to the requirements of this system. It is therefore crucial to get rid of the superstition under which one cannot rationally discuss values or argue in their favour.

In fact, the judges of the Constitutional Tribunal have repeatedly found themselves in an insurmountably difficult situation because they decide on the basis of the axiology – recognized by them – whose justification is far from being unambiguous. Furthermore, it is impossible to determine the extent to which their decision relates to society and the environment in which they rule (in order to undertake the latter, extensive sociological and psychological research would be indispensable). Faced with such difficulties and the simultaneous need to issue a ruling, it appears that when "ignoring" axiological issues, the Constitutional Tribunal enjoys the protection afforded to it by legal positivism, which allows it to use the safe buffer manifested in the phrase "action pursuant to the law".

The result of consistent avoidance of axiological dilemmas in the justification of rulings, although in fact they are indeed settled, is an apparent contradiction in the consistent

judicature. What needs to be explained at this point is the issue of what I mean by the concept of a consistent judicature. Judges cannot be expected that their judgments will be consistent with each other in the sense of almost identical convergence in almost identical cases, and that their line of reasoning remains static. What should be expected at most is an idiosyncratic similarity. However, it should not come as a surprise that the decisions issued in similar cases may differ. The same values can be in fact interpreted differently and their place in the preference scale of the one who takes the decision is not immutable. From the standpoint of this article, such rulings which once give priority to the legal norms, whereas at different times – to ethical norms, shall not be contrary because they will always be related to the comparison, the process of weighing and association of values. As I nevertheless emphasize below, the very mode of balancing values requires adopting some philosophical conception.

The issue that needs to be separately presented, which is crucial for further consideration, is the question on the nature of the ethical norms incorporated into the law. One can adopt one of two assumptions, which imply different consequences for the problem at issue. If it is assumed that the ethical norms automatically become legal norms (they are transformed from ethical to legal norms) by means of being granted statutory legitimization to enter into the composition of the legal system, then the dispute over the precedence/priority of legal norms over ethical ones, and vice versa, does not exist. In such case, in fact, the decision would be taken between two legal norms.

It seems that this first standpoint is not entirely obvious. Although the Constitutional Tribunal accepts that the scope of cognition over the ethical norms results from the statutory delegation, which allows to introduce ethical norms to the legal system, yet such incorporation may not deprive the latter of the nature of ethical norms. Thus, in the discussed approach, ethical norms incorporated into the legal system still preserve their ethical character, which means that the legal norms are indeed the basis for their establishment, but only in a formal sense, rather than in respect to the content. Ethical norms contained in professional ethics codes, are in fact the manifestation of values commonly accepted by a given corporation, while they do not necessarily have to extensionally overlap with the legal norms, though of course their compliance is postulated due to purely practical reasons (increasing obedience to the law, positive attitudes vis-à-vis the law). When adopting the second standpoint, the question that the conflict of ethical norms with legal ones comes down to the conflict between the values protected by these norms, is still justified.

IV. The conflict of decisions - or only an apparent dilemma?

Let us now analyse these problems on the example of two judgments of the Constitutional Tribunal at the interface of ethics and law, discussed when examining the compatibility of the Code of Medical Ethics with the Constitution, with the reservation that it leaves aside the question of the content of a given dispute.

	The Constitutional Tribunal – ruling as of 1993 U. 1/92 and W. 16/92	The Constitutional Tribunal – ruling as of 2008 SK 16/07
Ontological status of ethical norms – when entering the legal system, do they become legal norms or do they remain ethical norms?	The norms contained in the Code of Medical Ethics remain ethical norms – even when they enter the legal system;	The ethical norm can exist in law only due to the legal norm; the existence of the former is conditioned by the existence of the latter; "ethics does not concern law directly";
The relation in the extension of the systems of ethical and legal norms	"Ethical norms are separate from legal norms"	"The ethical and legal norms are separate; they constitute autonomous systems"
The extent of the dependence of the Code of Medical Ethics on the content of the legal norm?	"Deontological norms do not have *per se* legal nature. They indeed belong to a set of ethical norms independent from the law (...) Nonetheless, the sets of legal and ethical norms do not overlap and they consist of two relatively independent ranges" "The claim that the ethical norm must be consistent with the legal norm is unauthorised. Such hypothesis would imply the priority of legal norms over the ethical norms. In fact law should rather have the ethical legitimacy. Ethics does not require legalistic legitimacy"	"On account of the source and the basis, its independent normative character is challenged" "they (...) belong to a separate normative order and they obtain legal quality under commonly valid law, precisely due to the statute (...) and to the extent specified by its provisions (...) the subject of the control is the legal norm inferred from the provisions and regulations (of law – HD) " "what remains outside the scope of substantive control is the fragment (...) issued without express statutory basis (...), it has influenced the decision to dismiss the proceedings in this regard" Accordingly, the norms of the Code of Medical Ethics exist in law only on the basis of explicit consent; On entering the legal order, the norms contained in the Code of Medical Ethics become legal norms.
The extent to which the content of the legal norm	"The legal norms should be supported by the system of values accepted by the society,	The Constitutional Tribunal refuses to issue a decision to the extent in which the ethical norms

depends on the Code of Medical Ethics?	especially when it comes to the basic values" "By means of an act of law, ethical norms can be incorporated into the system of valid law. An Act on Chambers of Physicians has undertaken this very incorporation of the norms of the Code of Medical Ethics. The norms of this Code have specified the content of legal norms contained in the Act on Chambers of Physicians".	have no direct statutory delegation; The Constitutional Tribunal made the extent of the Code of Medical Ethics conditional on the extent to which an act of law defines the extent of the Code of Medical Ethics, where the norms of the Code of Medical Ethics have become legal norms;
The extent of the ethical norms of the Code of Medical Ethics in relation to the extent of legal norms	It is anauthorised to claim that the ethical norm must be consistent with the legal norm." (...) "Since, naturally, one cannot implicitly require the compliance of the ethical norms with the Constitution and statutes, then determining such inconsistency cannot result in the duty to repeal the ethical norm. What is more, these norms are neither adopted nor repealed as provided for legal norms." - *de facto*, they are not legal norms, and they may have a wider extent than the legal norms	The ethical norms of the Code of Medical Ethics must be consistent with the legal norms;
Legal legitimization of ethical norms	"It is law that should have ethical legitimization. Ethics does not require legalistic legitimization."	Ethical norms must be consistent with legal norms that delegated them;

The above table shows that the norms of the Code of Medical Ethics, in order to be tested for their compliance with the Constitution, must be issued under statutory authorisation. Yet, the latter is not equivalent to the fact that those norms become legal norms after being incorporated into the legal order.

The analysis of the judgments: W.16/92 and U.1/92 shows that the Constitutional Tribunal gives priority to the ethical norms of the Code of Medical Ethics, in the sense that it allows them to be created in a wider extent than it results from the underlying legal norms. On the other hand, in the event of a collision of these norms, it is the law that should be modified and adapted to ethics.

The view that this interpretation is correct has been manifestly confirmed in a dissenting opinion expressed by C. Bakalarski, the judge of the Constitutional Tribunal, in relation to the judgment W.16/92:

"Accordingly, by virtue of the statute, the provisions of ethics and deontology were granted the character of legal norms by providing the sanction of the state. The fact that the Constitutional Tribunal is interested in these provisions follows not from the fact that these are merely moral norms – as adopted by the Constitutional Tribunal in its judgment – but also because under the statute itself, these norms have become legal norms (...) (Chamber of Physicians – HD) could not and cannot be placed above the law, regardless of its objectives" (...) "As a result of the ruling (of the Constitutional Tribunal – HD), the Sejm may, if deemed appropriate, amend the relevant provisions of statutes rather than the provisions of the Code of Medical Ethics. It follows that the Sejm is to adjust statutory provisions to the provisions of the resolution of one of the professional corporations (*sic!*) (...). Such an assessment already encroaches the realm of judicial independence. It should be noted at the same time that these assessments do not provide any legal argument, and they are made on the single legitimate moral basis (...) it is in the interest of the citizens to preserve judicial independence and, consequently, to assure that (...) the judges of the Constitutional Tribunal were subject only to the Constitution (article 33a paragraph. 5 of the Constitution)".[13]

In light of the second judgment, citation SK 16/07, the legal norms are given priority over the ethical ones. In my opinion, this claim is illegitimate. Such decision protects the values that have the priority in the preferential scale of decision-taking body. These values are the values of the legal norm rather than ethical one. Thus, as it seemingly appears, the judgment does not stand for choosing a positivist paradigm. Referring to the formalist position makes it unnecessary to justify the undertaken axiological decision and allows to avoid the objection of arbitrariness.

Another issue is the scope of the delegation that can be determined by the legal norms. Can the ethical norms established by the professional self-government exceed in their scope the boundaries of statutory delegation, while not going beyond the Constitution, or whether they should have the same limits as executive acts issued under the provisions of a higher level? We must consider whether the ethical norms introduced into law, may have different scope than the Constitution. One should undoubtedly reject the possibility that they could be contrary to the Constitution. It is worth considering whether such norms could further clarify the values that already exist in constitutional norms, or even introduce additional ones, worthy

[13] Czesław Bakalarski, dissenting opinion to the case W.16/92.

of protection, since the feature of the Constitution should be, by its very nature, a proper degree of generality. We must therefore consider whether adopting such a position would not undermine the social order, in the situation when the professional corporations created the codes of ethics containing a broader catalogue of values than the constitutionally protected one.

V. Are the apparent dilemmas dangerous?

In conclusion, is it really necessary to define the status of the ethical norms incorporated into law? If the ethical norm becomes the legal norm, then the activities of the Constitutional Tribunal, as I believe, focus on the analyses within the same normative– legal system and its underlying values (axiological dispute between the values contained in comparable legal norms). When it is deemed that these are ethical norms that are indeed a part of the legal system, yet which retain the status of ethical norms, then the activities of the Constitutional Tribunal rely on the assessment of values: the one contained in the legal norm and ethical norm. In this case, the problem also boils down to an axiological dispute between the values contained in the legal norm and ethical one. This means that the activities of the Constitutional Tribunal consist in the analysis whether there is an axiological antagonism in the legal order and, if so, in issuing the ruling that aims at removing the said antagonism. Given that the values rather than norms constitute the subject of research, it is less important to resolve the character of ethical norms incorporated into the law.

The effect of the failure to adopt such a position is a situation in which the recipient of the judgment can be convinced of the absence of a uniform judicature, or even of a "rebirth" of positivism (the latest ruling gives priority to legal norms). Yet, these are not all of the consequences of this apparent dilemma. Another one is the inability to determine the basis (justification) of the decision, and hence the unpredictability of the judicial verdict. In practice, the professional associations will be confused of what authority they have as regards the creation of deontological norms in the codes of ethics. In fact, it will not be clear whether they are a kind of "executive regulations", issued on the basis of statutory delegation, or whether they constitute their natural complement, not necessarily manifested in the legal norms. It should be kept in mind though that decisions on creating the professional ethics are not detached from the judicature of the Constitutional Tribunal which also shapes in this area broadly understood policy of law.

A dangerous paradox can be also encountered in situations in which ethical norms negatively affect the system of constitutional values and the law must take over the role of

ethical norms. It seems that this was the case in the decision of the Constitutional Tribunal of 2008. In the latter decision, the Tribunal did not grant priority to legal norms in order to protect the positivist paradigm. It held only that the value which is protected by the legal norm is consistent with the constitutional value and it is more crucial than the one protected by the ethical value, therefore, it should "defend" the constitutional order.

The above analysis allows to conclude that the Constitutional Tribunal is afraid to admit that it is impossible to rule only by means of the legal norms, and, thus, that the law does not provide sufficient guidance to issue a ruling. As emphasized above, admitting that it undertakes the assessment of values, would face it with the objections on the arbitrariness of the decisions and I would like to avoid it at all costs.

One might try to avoid the doubts that can be encountered in this aspect or even resolve them by adopting *a two-aspect model of the legal norm* that corresponds to the postulate of juridization of values. In this model, the term legal norm is not exhausted in terms of its horizontal perspective (the latter is understood by me as referring to a three-part or a two-part conception of the legal norm). It is essential to understand the legal norm also in vertical perspective, which consists of two elements – commanding element, and evaluative (axiological) one. Thus, the overall reconstruction of the term of the legal norm requires to take into consideration and to interconnect its two abovementioned aspects which, while not equivalent to each other, are functionally linked. The horizontal structure determines who should behave, in what way and under what circumstances (often in the event of a failure to comply with the norm, there are consequences in the form of sanctions), but it does not provide any answer to the question concerning the conditions/ reasons for such a command. They may be interpreted only when referring to the evaluative component of the legal norm contained in the vertical aspect of this norm. The value is therefore contained in the legal norm, even though for the sake of law making practice, it is not explicitly expressed in it.[14]

Since the element of the legal norm is the value, the Constitutional Tribunal – when using such a model – could undertake juridization of values on the basis and within the limits of the law. It would thus help to avoid the objection that the Tribunal does not act only on the basis of the Constitution. Accepting that any legal norm (including constitutional norm) contains in its structure a value, would mean that the Constitutional Tribunal has the right to compare the values and to undertake axiological argumentation. The objection on the arbitrariness of decisions would then be refuted by means of the argument of broadly understood "fairness" of the decision, based on transparency and predictability, rather than on

[14] Hanna Dębska, *Nowe spojrzenie na „strukturę normy prawnej*", in: *Dobre prawo- Złe prawo. W kręgu myśli Gustawa Radbrucha,* ed. P. Mochnaczewski, A. Kociołek- Pęksa, 2009, 95-105.

feigned axiology obscured by invented positivist constructions. The activity of the Constitutional Tribunal – understood as above – allows to regard as a plausible the view according to which its decisions at the interface of law and ethics are only seemingly contradictory, because the compliance with the Constitution does not result from the character of the norm to be examined, but from the assessment of the value that this norm contains. Accordingly, the dilemma whether the ethical norm, when entering the legal order, becomes the legal norm or whether it remains the ethical norm, and therefore what is the mutual hierarchical relation between them, is illusory.

I am aware of the difficulties resulting from taking such standpoint. The recognition that in its activity, the Constitutional Tribunal resolves axiological issues, solves neither practical nor theoretical problems, but it puts even higher demands since it transfers the considerations in the area which is not formalised, far from the precision and orderliness, but mostly, still unsatisfactorily analysed from scientific perspective, what must arouse the resistance of a lawyer, especially the one that is trained in thinking by positivist categories.

I would also like to add that although the problem at issue was presented in the context of law application, the attempt to deal with it requires the development of a new philosophical – (theoretical) – legal conception which would "support" the practice.

I do hope that this article will become a contribution to the discussion on the future of this branch of law. Is it ready to take a possibly heroic effort – which might prove to be fruitless for a long time – to develop a conception, the element of which would be the discourse on values in the legal system? This will entail engaging in a difficult philosophical axiological discourse.[15] The current state of knowledge does not allow to decide what would be more useful for the law - secure fiction or uncertain, but honest revolution. It seems that the expectation to undertake new challenges, in particular by the philosophy of law, is most legitimized, even if the efforts are not crowned with success for a long time. If this issue is not undertaken, the Constitutional Tribunal, being left to its own actions, will continue to recourse to safe fiction, to reconcile what is with what ought to be.

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[15] A good step in this direction is the research on the phenomenon of "Axiological neutralization of the law" (K/PBW/000661) conducted in the Chair of Sociology of Law, Faculty of Law and Administration of the Jagiellonian University in Cracow, in which the author is analyzing rulings given by the Constitutional Tribunal by using Critical Discourse Analysis.

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