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ON BINDING INDIVIDUALS WITH NON-CONSTITUTIONAL EXECUTIVE ACTS FROM THE PERSPECTIVE OF RULES OF CONVENTIONALISATION AND FORMALISATION

KAMIL DĄBROWSKI*

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Abstract
Understanding the Constitution as the essential act of a legal system prompts us to turn to it in search of answers to even the most difficult questions. One such question is the issue of binding individuals with executive regulations that violate constitutional guarantees. While the question of binding common courts with such acts is beyond doubt, the scope of the rights of the addressees of these acts is not unambiguously settled in legal commentary. Therefore, the purpose of this study is to determine the extent to which individuals are bound by unconstitutional regulations. This paper employs the method of investigation of the law in force, particularly using the perspective of describing executive acts as products of conventional activities. In the author's opinion, it is precisely this perspective that makes it possible to formulate and justify the thesis that, in the case of certain types of unconstitutionality of executive acts, individuals may also refuse to apply them.

Keywords: conventional activities, executive acts, rules of conventionalisation and formalisation

* LLD, Faculty of Law and Administration, University of Szczecin (Poland), e-mail: dabrowski91kamil@gmail.com, ORCID 0000-0003-1714-6260

I.

The notion that an executive act may be defined as a substantive substrate of a conventional act is undisputed. Despite this, legal scholars and commentators rarely refer to this concept to explain complex legal problems. However, this does not mean that there is no value in examining studies that adopt this perspective without explaining terms specific to a particular branch of law. Janusz-Pohl[1] and Gutowski[2] offer interesting articles in this context, where they use presumptions of the concept of conventional acts to assess the validity of acts in criminal proceedings and acts in civil law.

Since this study shares the belief in the significance of the concept of conventional acts for legal scholarship, it also relies on the presumption of this concept to address a specific legal issue. It seeks to reflect on the binding force of executive acts on individuals from the perspective of the rules of conventionalisation and formalisation. The primary aim is to answer the question of whether an individual is always obliged to abide by a given executive act if a court rules it unconstitutional, or whether they may then disregard it. While it is widely accepted that courts are competent to review and refuse to apply executive acts,[3] the existence of a similar entitlement for individuals is far less certain. Nevertheless, even though it is difficult to derive such a right directly from the text of the Constitution, the adoption of certain legal theoretical presumptions sometimes appears to legitimise a comparable entitlement, even among administrative bodies or authorities.

It should be noted, however, that the title of this paper was not chosen randomly. It is the product of the author's reflections, developed around the debate on the effects of the judgment of the Polish Supreme Court of 18 January 2022, ref. no. I KK 171/21, which took place during a scholarly meeting of the Chair of Criminal Law at Jagiellonian University. Nevertheless, this paper does not aspire to be a comprehensive study of all the issues raised during that debate; rather, it constitutes a contribution to the discussion, illustrating another possible perspective for defining the effects of the unconstitutionality of executive acts. Accordingly, the starting point will be a reflection on the concept of the rules of conventionalisation and formalisation and the effects of their violation. This discussion will then lead to an analysis of the Constitution as a source of the rules of conventionalisation and formalisation governing the issuance of an executive act and the consequences of their violation.

II.

The concept of conventional acts has been present in Polish legal thought since the 1970s, when authors affiliated with the Szczecin-Poznań school of legal theory began examining the characteristics of behaviours which, due to specific cultural

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[1] See B. Janusz-Pohl, *Formalizacja i konwencjonalizacja jako instrumenty analizy czynności karnoprocesowych w prawie polskim*, Poznań, 2017.

[2] See M. Gutowski, *Nieważność czynności prawnej*, Warszawa, 2017.

[3] See Order of the Constitutional Tribunal of 13 January 1998 r., case No. U 2/97 (OTK 1998, No. 1, item 4).

rules – also known as cultural conventions – are assigned a meaning different from what would result from their mere psycho-physical essence.[4] This concept was subsequently developed by later legal scholars and commentators,[5] introducing into Polish legal studies a universal basis for analysing the existence, materiality, and effectiveness of legally significant acts in the broadest sense.

The starting point for this concept is the notion of a conventional act, which, in the most general terms, is equated with a psycho-physical act (or a lower-level conventional act) that, due to a specific rule of reasoning developed within a culture – referred to as a rule of conventionalisation – is assigned a new meaning. It is further pointed out that this newly assigned meaning essentially constitutes the creation of a conventional act (Ck), which is realised by performing a psycho-physical act (C) or a lower-level conventional act (Ck^{-1}), yet at the same time cannot be reduced to it.[6] Moreover, a conventional act is distinguished from its substantive substrate, which, as the carrier of its content and meaning, may take the form of specific gestures, words, behaviours, or written records.[7] Recognising these presumptions as fundamental to this study, it is worth formulating a few more specific comments and reflections.

First and foremost, it must be emphasised that the aforementioned rules of reasoning are cultural rules characteristic of the specific cultural groups that created them.[8] Although this does not mean that the rules of conventionalisation of particular acts cannot be shared by certain cultural groups, the presumption of their cultural nature allows for their differentiation – both within distinct societies and within the same cultural group, depending on the moment at which their content is established. The evolution of societies also entails changes in the semantic rules of language, which, as a fundamental element of every cultural group, often shapes the essence of a given conventional act. The simultaneous connection between rules of reasoning and the culture of a given society encourages the search for their content within the norms of a legal system. Every culture incorporates certain procedural norms concerning interpersonal relations, based on the presumption that an individual is a social being and that other individuals in their environment are

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[4] See L. Nowak, S. Wronkowska, M. Zieliński, 'Czynności konwencjonalne w prawie', *Studia Prawnicze*, 1972, No. 33, pp. 73–99.

[5] See Z. Ziembiński, M. Zieliński, *Dyrektywy i sposób ich wypowiadania*, Warszawa, 1992; T. Gizbert-Studnicki, 'O nieważnych czynnościach prawnych w świetle koncepcji czynności konwencjonalnych', *Państwo i Prawo*, 1975, No. 4, pp. 70–82; S. Czepita, *Reguły konstytutywne a zagadnienia prawoznawstwa*, Szczecin, 1996, W. Patryas, *Performatywy w prawie*, Poznań, 2005.

[6] See S. Czepita, 'O pojęciu czynności konwencjonalnej i jej odmianach', *Ruch Prawniczy, Ekonomiczny i Socjologiczny*, 2017, No. 1, p. 86; O. Bogucki, 'O konstytutywnej współzależności wyjaśniania i identyfikowania czynności konwencjonalnych', *Ruch Prawniczy, Ekonomiczny i Socjologiczny*, 2019, No. 2, p. 52; M. Herman, 'Stwierdzenie niekonstytucyjności jako czynność konwencjonalna unieważnienia aktu normatywnego', in: Bernatt M., Królikowski J., Ziółkowski M. (eds), *Skutki wyroków Trybunału Konstytucyjnego w sferze stosowania prawa*, Warszawa, 2013, p. 249.

[7] See P. Kroczek, 'Teologiczne podstawy reguł sensu czynności konwencjonalnych i norm kompetencyjnych w prawie kanonicznym i ich konsekwencje dla decyzji prawodawczych', *Annales Canonici*, 2013, No. 9, p. 57; S. Czepita, 'O pojęciu…', op. cit., p. 87.

[8] See S. Czepita, 'O pojęciu…', op. cit., p. 87; O. Bogucki, 'O konstytutywnej…', op. cit., p. 52.

persons, not objects, thereby creating certain obligations towards them.[9] Given the phenomenon of the increasing juridification of social relations, it seems natural to seek many rules of conventionalisation within legal norms.

Secondly, it should be noted that not every legal norm that shapes a legal position associated with a conventional act serves as a source of rules that define its essence (sense). This definition intentionally does not equate rules of conventionalisation with legal norms. As noted in the literature, legal norms may indicate elements that are constitutive of a given conventional act, as well as elements that merely formalise it. While the former determines the essence of a specific conventional act, justifying the assignment of a reason for performing it to specific acts, the latter, most often defined as rules of formalisation, merely indicate the desired manner of performing the act. This is also why their violation does not affect the existence of the conventional act itself but may result in its classification as illegal, invalid, ineffective, or simply defective.[10] Furthermore, while rules of conventionalisation set out the necessary criteria for an act to be classified as a specific type of conventional act, rules of formalisation only establish a recommended (desired) manner of performing the act. In cases of formalisation through the setting of consequences, they may also define the legal effects of non-compliance with the prescribed manner.[11]

It is also worth noting that, even though constitutive rules indicate how a given act must be performed to acquire the attributes of a specific type of conventional act, this presumption does not justify equating rules of reasoning solely with the specification of requirements reflecting the characteristics of a given behaviour. As Patryas rightly points out, rules of conventionalisation consist of at least three conjunctively linked elements: (1) subject, (2) situation it is in; and (3) the nature of the act itself. Only when all three are met can it be concluded that a specific act has acquired the attributes of a conventional act of a specific type.[12] Some approaches also supplement this possible catalogue of elements with content requirements, recognising that, particularly in the case of operations constituting legal acts, the scope of the content of conventional acts also plays a role in determining their essence.[13]

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[9] S. Czepita, 'O pojęciu…', op. cit., p. 102.

[10] S. Czepita, 'Formalizacja i konwencjonalizacja w systemie prawnym', in: Bogucki O., Czepita S. (eds), *System prawny a porządek prawny*, Szczecin, 2008, pp. 110–111; J. Wieczorkiewicz-Kita, 'O konwencjonalnych i formalnych aspektach procesu karnego', in: Choduń A., Czepita S. (eds), *W poszukiwaniu dobra wspólnego*, Szczecin, 2010, pp. 753–756; M. Gutowski, *Nieważność…*, op. cit., pp. 8–9; B. Janusz-Pohl, 'O konstrukcji niedopuszczalności czynności karnoprocesowej', *Ruch Prawniczy Ekonomiczny i Socjologiczny*, 2014, No. 4, p. 162.

[11] S. Czepita, 'Formalizacja a konwencjonalizacja działań w prawie', in: Czepita S. (ed.), *Konwencjonalne i formalne aspekty prawa*, Szczecin, 2006, pp. 11–13; S. Czepita, 'Formalizacja i konwencjonalizacja…', op. cit., pp. 110–111; J. Wieczorkiewicz-Kita, 'O konwencjonalnych…', op. cit., pp. 753–756; R. Piszko, 'Sposoby i niektóre skutki formułowania treści czynności konwencjonalnych doniosłych prawnie', in: Czepita S. (ed.), *Konwencjonalne i formalne aspekty prawa*, Szczecin, 2006, p. 121.

[12] See W. Patryas, *Performatywy …*, op. cit., pp. 28–29.

[13] See K. Gmerek, 'Z problematyki treści czynności konwencjonalnych w prawie', *Krytyka Prawa*, 2022, No. 2, p. 98.

Thirdly, the distinction between the possible character of legal norms as those establishing rules of conventionalisation or formalisation of a given act also contributes to assessing the effects of their violation. While the violation of norms that merely formalise a given act justifies, depending on the legislator's decision, assigning it attributes such as unlawfulness, invalidity, or defectiveness, the violation of norms that set out requirements for conventionalisation means that the given act must be classified as a so-called conventional non-act or non-activity (e.g., a non-judgment or non-statute).[14] Although such a qualification excludes the possibility of labelling a non-act with a name reserved for a conventional act of a specific kind, this does not necessarily mean that an act so defective cannot produce any legal effects whatsoever. It cannot be ruled out that the legislator may attach specific legal effects to the defective act (other than those arising from the execution of a valid act) or may impose an obligation on law-applying individuals to accept a legal fiction regarding the correctness of a conventional act.[15]

Fourthly, it must be emphasised that the differentiation of the nature of legal norms described above does not depend on their position within the hierarchy of legal sources. While Kardas is correct in highlighting the need to regard the Constitution as a normative source of criteria delineating the non-transgressible limits of the law,[16] and while Czepita rightly argues that the rules of conventionalisation of law-making acts should primarily be derived from constitutional norms,[17] it must simultaneously be stressed that the concept of a conventional act does not assume that every constitutional norm must be the source of a specific constitutive rule or that only constitutional norms can serve as sources of such rules. This perspective allows for the differentiation of the effects of violations of norms within a uniform legal act, including the Constitution itself. At the same time, this view aligns with arguments put forward by legal scholars and commentators who emphasise the necessity and validity of gradually assessing the effects of violations of constitutional norms.[18]

Therefore, the criterion for qualifying a specific legal norm as a rule of conventionalisation or formalisation remains somewhat puzzling. While the differentiation of the effects of their violation appears relatively clear, establishing an unequivocal criterion for determining the specific classification of a given legal norm is far less straightforward. Although the literature suggests that such a criterion is based on '(…) the meaning – or, more specifically the linguistic content – of the name for a conventional act of a given type',[19] the decision as to which attributes of

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[14] Cf. J. Wieczorkiewicz-Kita, 'Zagadnienia wyrokowania w procesie karnym w świetle koncepcji czynności konwencjonalnych', in: Czepita S. (ed.), *Konwencjonalne i formalne aspekty prawa*, Szczecin, 2006, pp. 60 et seq.

[15] See S. Czepita, 'Czynności konwencjonalne i formalne w prawie a proces prawotwórczy i rola Trybunału Konstytucyjnego', *Państwo i Prawo*, 2014, No. 12, pp. 14–15.

[16] See P. Kardas, 'Rozproszona kontrola konstytucyjności prawa w orzecznictwie Izby Karnej Sądu Najwyższego oraz sądów powszechnych jako wyraz sędziowskiego konstytucyjnego posłuszeństwa', *Czasopismo Prawa Karnego i Nauk Penalnych*, 2019, No. 9, p. 9.

[17] See S. Czepita, 'Czynności konwencjonalne…', op. cit., p. 17.

[18] See W. Brzozowski, 'Stopniowalność naruszeń Konstytucji', *Ruch Prawniczy, Ekonomiczny i Socjologiczny*, 2017, No. 4, pp. 5–13.

[19] S. Czepita, 'Czynności konwencjonalne…', op. cit., p. 7.

the referents of a given name constitute its essence is often disputed or, at the very least, debatable. Nevertheless, this does not imply that the described concept allows for such broad discretion that it becomes unusable in legal scholarship and practice. As noted in the literature, rules of reasoning essentially define the terms that denote these acts.[20] While it must be acknowledged that almost any definition may be contested to some degree, the usefulness of such definitions is rarely questioned. Regardless of the disputes that may arise in this context, they typically capture the fundamental nature of the *definiendum* in a relatively uniform manner. For this reason, even though assigning a specific norm to the category of a rule of reasoning based on the name content of a given conventional act may often be imprecise, this does not preclude the possibility of indisputably differentiating a group of norms that determine its essence.

Moreover, it cannot be overlooked that, although the actual burden of determining whether a given norm constitutes a rule of reasoning or a rule of formalisation often falls on judicial decisions and the interpretations of legal scholars and commentators, this task is primarily the responsibility of the legislator, who – for example, through various legal definitions – identifies the constitutive elements of a given conventional act.[21] In some instances, even the mere fact of leaving successive versions of specific legal provisions unamended may suggest that the norms they express are regarded as determining the essential features of the regulated conventional act.[22]

III.

Taking these considerations as a starting point, we must acknowledge that defining executive acts as a form of conventional act naturally leads to further reflection on the concept of non-executive acts – acts that, despite resembling executive acts, do not qualify as such. This presumption opens the door to exploring questions concerning the legal force of non-executive acts and the extent to which individuals are bound by them, particularly in the context of the effective presumption of constitutionality of promulgated legal acts.

At the same time, it remains unclear which legal norms constitute rules of conventionalisation in relation to executive acts and, therefore, determine the characteristics of an executive act as a conventional act. Given the scope limitations of this paper, a comprehensive analysis of this issue is not possible. However, there should be no doubt that the concept (as expressed in constitutional norms) of an executive act as an implementing act of a statute, issued by executive bodies pursuant to delegated authority, is fundamental to its essence as a conventional act. This characteristic of an executive act appears deeply embedded in the Polish constitutional tradition, which dates back to the interwar period and was certainly

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[20] See S. Czepita, 'O koncepcji czynności konwencjonalnych w prawie', in: Smolak M. (ed.), *Wykładnia Konstytucji. Aktualne problemy i tendencje*, Warszawa, 2016, p. 132.

[21] See M. Hermann, 'Stwierdzenie niekonstytucyjności…', op. cit., p. 254.

[22] See S. Czepita, 'O pojęciu czynności…', op. cit., p. 101.

not overlooked by the drafters of the current Constitution.[23] For this reason, it must be assumed that, for example, the issuance of an executive act without proper authorisation or by a body outside the executive branch does not, in fact, constitute the issuance of an executive act.[24] While this observation does not define all rules of conventionalisation applicable to the issuance of executive acts, it nonetheless effectively illustrates the research perspective adopted in this paper. It underscores that a violation of at least certain constitutional norms may not only justify a claim of unconstitutionality regarding a given executive act but may also warrant refusing to recognise it as an executive act at all.

Another crucial question that arises is what legal effects follow from the issuance of a non-executive act. A review of the literature reveals at least two opposing perspectives on this issue.

The first view holds that non-executive acts are, in essence, non-existent acts. Consequently, '(…) each entity, whether private or public, should regard such an act as having no consequences, even in the absence of a prior, authoritative determination of the issue by a state authority.'[25] Any decision by such an authority, particularly a ruling of the Supreme Court, would be declaratory in nature, and the specific sanction of 'non-existence' or 'invalidity' of a legal act would apply *ex tunc*.[26]

The second view, expressed by legal scholars and commentators, directly opposes this position. It primarily argues that the declaratory nature of potential tribunal decisions cannot be reconciled with constitutional provisions, particularly Article 190(3) of the Constitution.[27] The presumption of constitutionality, as established in that provision, requires that normative acts – despite violating the Constitution – be recognised as binding until they are declared otherwise by a competent authority through a statutorily prescribed constitutional review procedure.[28] Thus, even though a defective legal act is, in essence, a non-act, the presumption of constitutionality imposed by the legislator appears to oblige legal actors to accept the legal fiction of its correctness. As a result, they are required to attribute appropriate legal consequences to the act from the moment it enters into force until a relevant ruling of the Constitutional Tribunal is announced, or another date specified by the Tribunal under Article 190(3) of the Constitution.[29]

Despite clear criticism of the first view from one of the co-creators of the contemporary concept of conventional acts, its outright rejection does not seem justified, at least for several reasons.

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[23] See M. Wiącek, 'Komentarz do art. 92 Konstytucji', in: Safjan M., Bosek L. (eds), *Konstytucja RP. Komentarz do art. 87–243*, Warszawa, 2016, pp. 172–174; K. Działocha, 'Komentarz do art. 92', in: Garlicki L. (ed.), *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Warszawa, 2008, pp. 2 et seq.; M. Wiącek, 'Wpływ konstytucji marcowej na treść i praktykę stosowania Konstytucji z 1997 r.', *Państwo i Prawo*, 2018, No. 11, p. 45.

[24] See S. Czepita, 'Czynności konwencjonalne…', op. cit., p. 16.

[25] M. Hermann, 'Stwierdzenie niekonstytucyjności…', op. cit., pp. 259–260.

[26] See S. Czepita, 'Czynności konwencjonalne…', op. cit., p. 14.

[27] Ibidem, p. 14.

[28] See M. Gutowski, P. Kardas, 'Domniemanie konstytucyjności a kompetencje sądów', *Palestra*, 2016, No. 5, p. 56.

[29] S. Czepita, 'Czynności konwencjonalne…', op. cit., p. 15.

First and foremost, it must be noted – contrary to what some authors argue[30] – that the principle of the presumption of constitutionality does not confer exclusive competence on the Constitutional Tribunal to assess the compliance of legal acts with the Constitution.[31] The literature instead interprets this principle as a rule governing the distribution of the burden of argumentation in proceedings before the Tribunal, or as an interpretative directive requiring the search for and preference of constitutional or at least pro-constitutional interpretations wherever possible.[32] Moreover, it has been rightly pointed out that a broader, so-called formal approach to the presumption of constitutionality is not only substantively flawed but also lacks textual grounding in the Constitution.[33] Nowhere in the fundamental law can a clear justification be found for interpreting the presumption in strictly formal terms. Consequently, since this presumption is a creation of legal scholarship and judicial decisions – particularly rulings of the Constitutional Tribunal[34] – it cannot be binding on individuals, who are subject to a closed system of legal sources, or on judges, who are bound solely by the Constitution and statutes.

Secondly, it must be noted that, when referring to the wording of Article 190(3) of the Constitution, the formal approach to the presumption of constitutionality appears to fail to distinguish between the concepts of 'force' and 'application' of the law. While the former signifies that a given norm (provision) is an element of a particular legal system, the latter concerns the establishment of legal effects in a specific individual case.[35] Although the application of the law is inherently linked to the question of whether it remains in force, the legislator is also clearly aware of the need to differentiate between these two concepts. Adhering to the prohibition of homonymous interpretation, it cannot be overlooked that the legislator consistently employs both terms in distinct semantic contexts within Article 91(3) and Article 190(3) of the Constitution. Furthermore, this differentiation aligns with judicial interpretations, including rulings of European courts,[36] which have also justified departing from a formal understanding of the presumption of constitutionality. In light of this, it seems reasonable to interpret Article 190(3) of the Constitution merely as a confirmation of the derogative effect of Tribunal judgments and as the source of the Tribunal's competence to determine the precise moment at which an unconstitutional act is removed from the legal system.[37] Consequently, this provision does not preclude

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[30] See S. Wronkowska, 'W sprawie bezpośredniego stosowania Konstytucji', *Państwo i Prawo*, 2001, No. 9, p. 21.

[31] See W. Sanetra, 'Bezpośrednie stosowanie Konstytucji RP przez Sąd Najwyższy', *Przegląd Sądowy*, 2017, No. 2, p. 25.

[32] See M. Florczak-Wątor, A. Grabowski (eds), *Argumenty i rozumowania prawnicze w konstytucyjnym państwie prawa. Komentarz*, Kraków, 2021, pp. 862–863.

[33] See ibidem, pp. 874–876; P. Radziewicz, 'Wzruszenie "domniemania konstytucyjności" aktu normatywnego przez Trybunał Konstytucyjny', *Przegląd Sejmowy*, 2008, No. 5, p. 74.

[34] See W. Sanetra, 'Bezpośrednie stosowanie…', op. cit., p. 24; M. Florczak-Wątor, A. Grabowski (eds), *Argumenty…*, op. cit., p. 863.

[35] See S. Wronkowska, *Podstawowe pojęcia prawa i prawoznawstwa*, Poznań, 2005, pp. 51 and 140.

[36] See W. Sanetra, 'Bezpośrednie stosowanie…', op. cit., pp. 11–13.

[37] See M. Gutowski, P. Kardas, 'Sądowa kontrola konstytucyjności', *Palestra*, 2016, No. 4, pp. 12 et seq.

entities other than the Tribunal from being granted the power to refuse to apply acts issued in violation of rules of reasoning (so-called 'non-acts'), especially since it simultaneously legitimises the distinction between the entitlement to refuse to apply a legal act and the power to determine the its non-binding nature.

Thirdly, it cannot be overlooked that even if we accept the formal approach to the presumption of constitutionality, its application to so-called non-acts remains debatable. As noted in Constitutional Tribunal rulings, '(…) the principle of a democratic rule of law primarily gives rise to the presumption of constitutionality of a law that has been correctly enacted and promulgated.'[38] Accordingly, since a non-act is not a correctly enacted normative act, it may be argued that it does not fall within the scope of the presumption of constitutionality.[39] Nevertheless, while not fully endorsing such a radical position adopted by certain legal scholars, it must be acknowledged that the Constitutional Tribunal itself recognises that the presumption of constitutionality may be overridden by means other than its own executive act.[40] It is, after all, commonly accepted, that courts have, among other things, the power to refuse to apply unconstitutional substatutory acts[41] or the obligation to not apply an unconstitutional legal act as of the moment of the ruling's promulgation, rather than its official publication by the Constitutional.[42] Hence, the question also remains open as to why other legal events, such as an established position in legal doctrine and case law, could not break the presumption of constitutionality, understood as the binding force on individuals of an act issued in violation of the rules of conventionalisation, until it is formally repealed or declared unconstitutional by the Constitutional Tribunal. While some might argue that such a conclusion risks destabilising the legal system, it must be noted that the current model of judicial review already allows for the gradual resolution of interpretative and application-related discrepancies over time.[43]

Fourthly, it should be noted that the option to refuse to apply an 'executive act' that violates constitutional constitutive rules may also be understood as an expression of the direct application of the Constitution within the meaning of Article 8(2).[44] Since the direct application of the Constitution primarily involves transferring constitutional axiology onto the plane of other legal regulations in the process of their interpretation,[45] it is inadmissible for any act of law application to be based on a legal provision contrary to the Constitution.[46] Therefore, it is rightly pointed out in the literature that one manifestation of the direct application

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[38] Judgment of the Constitutional Tribunal of 5 May 2011, case No. P 110/08 (OTK-A 2011, No. 4, item 31).

[39] See M. Hermann, 'Stwierdzenie niekonstytucyjności…', op. cit., p. 258.

[40] See M. Gutowski, P. Kardas, 'Domniemanie konstytucyjności…', op. cit., pp. 57–58.

[41] See R. Hauser, J. Trzciński, 'O formach kontroli konstytucyjności przez sądy', *Ruch Prawniczy, Ekonomiczny i Socjologiczny*, 2008, No. 2, pp. 14–16.

[42] See Resolution of the General Assembly of the Supreme Court of 26 April 2016.

[43] See M. Gutowski, 'Bezpośrednie stosowanie Konstytucji w orzecznictwie sądowym', *Ruch Prawniczy, Ekonomiczny i Socjologiczny*, 2018, No. 1, p. 94.

[44] Cf. P. Kardas, M. Gutowski, 'Konstytucja z 1997 r. a model kontroli konstytucyjności prawa', *Palestra*, 2017, No. 4, p. 23, W. Sanetra, 'Bezpośrednie stosowanie…', op. cit., p. 7.

[45] See P. Tuleja, *Stosowanie Konstytucji w świetle zasady jej nadrzędności*, Kraków, 2003, pp. 327 et seq.

[46] See P. Kardas, M. Gutowski, 'Konstytucja z 1997 r. a model…', op. cit., p. 13.

of the Constitution is the so-called collisional application, which justifies omitting a provision when its application cannot be reconciled with norms in force at the constitutional level.[47] Although it must be acknowledged that such observations are currently most often made in the context of discussions concerning the legitimisation of dispersed constitutional review of statutes, they remain valid in relation to the research problem discussed here.

It is worth noting at this point that the obligation to apply the Constitution directly is not limited to courts but extends to all individuals involved in the application of the law.[48] As is rightly pointed out in the literature, '(…) after the adoption of the Constitution, it became clear that its application cannot be the sole domain of the Constitutional Tribunal and that other individuals also hold the right to apply it (…).'[49] The wording of Article 8(2) of the Constitution not only suggests the existence of an obligation to apply it directly – as indicated by the use of the phrase 'shall apply' rather than 'may apply' – but also emphasises its universality by not explicitly limiting the addressees of this obligation. Consequently, it applies both to public authorities and to individuals seeking to establish the legal consequences of their actions. For this reason, they too appear to be entitled to refuse to apply non-executive acts that violate constitutional constitutive rules.

Fifthly, it is also worth noting that the right to refuse to apply a non-act is deeply rooted in the axiology of the legal system. Legal scholarship rightly asserts that fragmented constitutional review should be regarded as one of the ways in which individuals realise their claim to the justice of the law.[50] Its essence lies primarily in enhancing individual protection by affirming the Constitution's status as a normative act that establishes real subjective rights.[51] In this regard, invoking one of the fundamental legal topoi (*lex iniusta non est lex*)[52] the hierarchical structure of legal sources. Furthermore, it is justified by the praxeological coherence of the legal system. Just as it is difficult to justify a situation in which an administrative body is required to issue a decision despite being aware of the unconstitutionality of the executive act on which it is based – a situation that may be justified, for example, by the jurisprudential stance of administrative courts in analogous cases – it is equally difficult to find praxeologically coherent arguments for requiring individuals to base their behaviour on defective executive acts, even when they are aware that, in the event of legal disputes, such acts will be deemed ineffective due to their unconstitutionality.[53] From this perspective, restricting the ability to refuse to apply non-executive acts solely to courts appears unjustified.

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[47] See L. Garlicki, 'Stosowanie konstytucji przez sądy i trybunały (ile monopolu, a ile dekoncentracji?)', *Studia Prawnicze*, 2022, Vol. 226, No. 2, p. 35.

[48] See M. Florczak-Wątor, 'Komentarz do art. 9 Konstytucji', in: Tuleja P. (ed.), *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Warszawa, 2019, p. 51.

[49] R. Hauser, J. Trzciński, *Prawotwórcze znaczenie orzeczeń Trybunału Konstytucyjnego w orzecznictwie Naczelnego Sądu Administracyjnego*, Warszawa, 2010, p. 25.

[50] See P. Kardas, 'Rozproszona kontrola…', op. cit., p. 17.

[51] See P. Kardas and M. Gutowski, 'Konstytucja z 1997 r. a model…', op. cit., p. 29.

[52] See M. Florczak-Wątor, A. Grabowski (eds) *Argumenty…*, op. cit., pp. 417 et seq.

[53] Cf. A. Preisner, 'Dookoła Wojtek. Jeszcze o bezpośrednim stosowaniu Konstytucji RP', in: Balicki R., Jabłoński M., Wójtowicz K. (eds), *Dookoła Wojtek… Księga pamiątkowa poświęcona Doktorowi Arturowi Wojciechowi Preisnerowi*, Wrocław, 2018, pp. 43–44.

It is also worth noting that the possibility of refusing to recognise an executive act that violates constitutional constitutive rules is, in essence, a modernised reference to the thesis of statutory lawlessness in a constitutional state. If we assume that the Constitution itself is the nucleus of the constitutional state governed by the rule of law, then, in line with Radbruch's reasoning,[54] it seems reasonable to distinguish three levels of injustice (unconstitutionality) within a given legal framework. The first level consists of unjust laws, which, nonetheless, remain binding due to considerations such as legal certainty, even though they do not constitute statutory lawlessness. These are regulations that, while formally compliant with the Constitution, do not necessarily reflect its axiology. The second level includes unjust laws that, having exceeded a certain threshold of unconstitutionality (injustice), should be deemed non-binding by a competent constitutional court. The third level encompasses regulations that so severely violate the Constitution that they are no longer merely unjust laws but entirely devoid of the character of law.[55] Although it may be difficult to draw clear-cut boundaries between these categories,[56] acts that violate constitutional constitutive rules must undoubtedly be classified within the third category. This understanding of the levels of injustice within a constitutional state highlights the foundation of the thesis advanced in this paper: only such extreme unconstitutionality of an executive act, which effectively precludes it from being recognised as an executive act at all, justifies individuals being bound by its norms.

IV.

In light of these considerations, it should be acknowledged that recognising the act of issuing an executive act as a conventional act legitimises, in cases of severe inconsistency with the Constitution, the right of individuals or administrative bodies to refuse its application. While it must be acknowledged that this thesis is based solely on certain legal-theoretical assumptions, the Constitution neither unequivocally prohibits nor expressly grants such a right, just as it does not explicitly endorse the right to fragmented constitutional review of statutes.[57] However, the author argues that this concept lacks a strong constitutional basis, particularly as it may be viewed not only as an adaptation of the Radbruch formula (adjusted to the reality of a constitutional state governed by the rule of law and widely accepted), but also as an essential guarantee of upholding constitutional standards of individual rights.

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[54] G. Radbruch, 'Ustawowe bezprawie i ponadustawowe prawo', in: Radbruch G., *Filozofia prawa*, transl. Nowak E., Warszawa, 2009, pp. 244–254.

[55] M. Florczak-Wątor, A. Grabowski (eds.), *Argumenty…*, op. cit., pp. 418–419, and the literature cited therein.

[56] Ibidem, p. 432.

[57] Cf. A. Rytel-Warzocha, 'Jak nie Trybunał Konstytucyjny to co? O rozproszonej kontroli konstytucyjności prawa w Polsce', *Przegląd Prawa Konstytucyjnego*, 2022, No. 3, pp. 27.

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