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Hierarchisation of Values in Acts of Law Application

Hierarchizacja wartości w aktach stosowania prawa

ABSTRACT

When creating a legal system, a rational lawmaker formulates not only legal norms, but also binding legal values. The lawmaker does so either directly (e.g. through the principles of law) or indirectly (when the interpreter of a legal text assigns a positive value to a prescribed action and a negative value to a prohibited action). The specificity of the values, in particular their collision nature, means that if the lawmaker itself does not resolve the expected conflict, the court must do so. The lawmaker should do this in accordance with the pattern of applying values; a pattern that can be reconstructed analogously to the pattern of applying legal norms.

Keywords: legal norms; binding legal values; rational lawmaker; specificity of the values; pattern of applying values

INTRODUCTION

Both the legal system defined as a properly ordered set of applicable legal norms, and the legal order identified as an actually formed effect of the operation of law, despite the dominant normative dimension, also have a distinct axiological aspect. At the level of the system, "the applicable law expresses in its norms certain sets of values which it is supposed to serve and which constitute the axiological

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Data: 18/11/2026 02:34:05

rationale for the legal norms established. We call them the 'internal' values of law".[1] The basic part of the set of these internal values of law is formed by values such as justice, equity, certain political goals, protection and development of certain morality, rule of law, certainty, objectivity, rationality.[2] From the perspective of the generality of legal norms in force, the aforementioned values are rather a kind of peculiar meta-values, whose task is to ultimately verify whether the already specified values 'translated' into the conduct governed by orders and prohibitions correspond to the generally defined standards, such as the standard of objectivity. Internal values, as values inscribed in law, originally form a component of the characteristics of the rational lawmaker. This is because the lawmaker as a rational entity shapes his behaviour in accordance with two orders: a non-contradictory, systemic knowledge and a consistent, relatively stable and hierarchical class of values. Fulfilling the principle of rationality, if the lawmaker recognizes certain knowledge that is non-contradictory and forms a system, and has preferences that are asymmetric and transitive – then he takes such of the possible (in view of his knowledge) actions that most reliably lead (according to this knowledge) to the best preferred state of affairs.[3] Ultimately, therefore, values not only guide the behaviour of the lawmaker, but, moreover, materialize in the form of an ordered or prohibited act of the addressee of the norm.

The opposite category to the internal values of law is the category of external values. The function of these values is to evaluate the law from the perspective of an external observer.[4] Despite the clear opposition between these two types of assessments, one can point out a kind of area of vagueness between these orders, in which movement takes place from the sphere of external to internal values and the other way around.[5]

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[1] J. Wróblewski, *Stosowanie prawa*, [in:] W. Lang, J. Wróblewski, S. Zawadzki, *Teoria państwa i prawa*, Warszawa 1979, p. 415. See also idem, *Sądowe stosowanie prawa*, Warszawa 1988, pp. 82–83; L. Leszczyński, *Zagadnienia teorii stosowania prawa. Doktryna i tezy orzecznictwa*, Kraków 2001, p. 174.

[2] J. Wróblewski, *Sądowe*..., p. 82.

[3] L. Nowak, *Interpretacja prawnicza. Studium z metodologii prawoznawstwa*, Warszawa 1973, p. 39.

[4] J. Wróblewski, *Sądowe*..., pp. 83–84.

[5] J. Leszczyński, *Elastyczność stosowania prawa a wartości sprawiedliwości i słuszności*, [in:] A. Korybski, L. Leszczyński, *Stanowienie i stosowanie prawa. Elementy teorii*, Warszawa 2015, p. 172.

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Data: 18/11/2026 02:34:05

THE CONCEPT OF HIERARCHISATION OF VALUES

The lawmaker's axiological system contains not only internal values. If they were to be classified along other dividing lines,[6] those values would form a set which corresponds, in principle, to a set of legal values. Defined as adopted (in the strict sense of the word) by the lawmaker, the legal values apply in the same way as the legal norms. They are likewise decoded from the legal text by means of interpretation, albeit by means of the application of directives typical of them, such as a directive requiring the attribution of value status to the substrate of the name of a legal principle (the legally applicable value for the principle of equality is equality). It should also be noted that such an adopted value, the content of which has been established in other axiological systems, and introduced into law by legislative *fiat*, will be regarded as a legal rather than moral value or a value coming from any other normative non-legal order. However, the system of rational lawmaker's assessments is not limited to legal values. Apart from them, the lawmaker 'recognises' also at least two other categories: reference values and universal values. By requiring law-applying entities, through general clauses, to take into account in their decisions also non-legal values pointed out by the lawmaker and which are functioning, e.g., in moral systems, the lawmaker thus explicitly accepts them.[7] Thus, by referring, e.g., to the social interest, the public interest, the principles of equity, the requirements of good faith, legitimate reasons or established practices, he determines their importance, primarily for the legal order in which they will be 'incorporated' through the acts of their application. And universal values – in the case of the Polish constitutional legislature expressly referred to in the preamble to the Polish Constitution – create, on the one hand, an ideal-standard in the axiological system of law, and on the other, an absolute legislative boundary.

Both the act of making law and the act of its application must take into account the specificities of values. The axiological order differs radically from the normative order and from the actual order. However, despite concerns that the sphere of assessment is inevitably linked to subjectivity and relativism and is therefore not subject to the criteria of inter-subjective communication and control, these concerns can be dismissed in the case of legal analyses. This is done by consistently adopting the assumption of rationality of the lawmaker. The entity interpreting the legal text neither reproduces its own values nor makes subjective assessments of what has been reconstructed in the form of legal norms. Its methodological obligations include decoding the values already enshrined in the legislation by the lawmaker itself. The whole process of reading such values, naming them and their precise jus-

[6] M. Kordela, *Zasady prawa jako normatywna postać wartości*, "Ruch Prawniczy, Ekonomiczny i Socjologiczny" 2006, vol. 1, pp. 52–53.

[7] L. Leszczyński, *Stosowanie generalnych klauzul odsyłających*, Kraków 2001, pp. 70–73.

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Data: 18/11/2026 02:34:05

tification should be constructed in such a way that its understanding and repetition, e.g. in court proceedings at second instance, is formalised at least to a basic extent.

Values are assigned to objects as expressions that may be stated in modal sentences such as "it is fair that law equates the rights of all social groups".[8] Given this explanation of values and the fact that the act of attribution of value in the legal sphere is within the lawmaker's responsibility, it is possible to adopt the position of logical objectivity in relation to values. When interpreting law, the interpreter refers to the applicable legal values as those which are objectively given, primarily through distinctive wording and categories of legal language, such as rules governing individual rights and freedoms, legal principles or programme norms.

As abstractable from law, values affirm their categorial autonomy. It becomes deeper with a more detailed characterisation of the value.

The most specific characteristics of the values include the following:

- scalability of implementation;
- directionality;[9]
- optimization;[10]
- inconclusiveness;[11]
- immanent collision – the maximum implementation of a given value inevitably leads to the restriction or even elimination of other values (the maximum implementation of the value of property may result in the violation of other property, health, life, sense of security, social peace);[12]
- weight of values (constitutional values 'weigh' more than statutory values);[13]
- the need to balance them in the event of their collision nature;[14]
- no loss of legal force in the event of 'being overbalanced' by another value.

Each value can be fulfilled to a varying degree: from complete failure to maximum implementation. Between the edges of this continuum, there are intermediate stages. In a typical case of legislative activity, it is the originator of the legislative act who determines the level of implementation of the protected value, not by formulating a direct order for its fulfilment to a specific extent but by 'translating' it into a particular conduct which will bring such an expected form of the value. However, there is at least one exception to this rule in the legal system. As it seems, such an exception is legal principles, whose nature and way of operation indicate that their

[8] T. Czeżowski, *Czym są wartości?*, [in:] *Filozofia na rozdrożu (Analizy metodologiczne)*, Warszawa 1965, p. 120.

[9] R. Dworkin, *The Model of Rules*, [in:] *Philosophy of Law*, eds. J. Feinberg, H. Gross, Wadsworth 1986, p. 155; R. Alexy, *The Theory of Fundamental Rights*, Oxford 2002, p. 57.

[10] R. Alexy, *The Theory*..., p. 51.

[11] *Ibidem*, p. 60.

[12] L. Nowak, *U podstaw marksistowskiej aksjologii*, Warszawa 1974, p. 18.

[13] R. Dworkin, *op. cit.*, p. 161; R. Alexy, *The Theory*..., p. 50.

[14] R. Alexy, *The Theory*..., pp. 50–56.

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Data: 18/11/2026 02:34:05

intended purpose is to implement values, not behaviour. It is the very addressee of the principle, when it is applicable, who must decide what conduct will constitute its implementation – in specific, individualised circumstances, both factual and legal. It turns out, therefore, that it is right to say that the addressees of principles are primarily public authorities, since the scale of responsibility for the implementation of a principle is disproportionately greater than the implementation of regular norms.

Although one may list types of values the implementation of which is carried out in one predetermined manner, such as the value of the statutory designation of the constituent elements of a criminal act or the value of non-retroactivity of law, their primary function is to indicate the direction of action rather than to provide their addressee with precise methods of achieving the final result, ultimately classified as the desired good. Such a characteristic applies even to the exceptions mentioned, since both specific values are a form of specification of the abstract value of legal certainty. The lawmaker itself, having in mind an ideal – the ideal of certain law – translated it into an obligation in the sphere of criminal law to define criminal offences only statutorily and, in the sphere of legislation, to refrain from giving retroactive effect to legal norms. Thus, the general direction determined by the value of legal certainty has been specified to a level which can be grasped in factual categories – through ordered and prohibited acts. Given the large number of legally binding values, it may happen that the directions of implementation of different values in a given area will intersect. Without their legislative arrangement, it is the court who will be required to develop a decision in which relevant and conflicting values become components of a coherent ruling.

A value considered relevant in a given sphere tends to be total. It covers the whole scope of this sphere. What conduct is classified as adequate implementation of the value depends on the specific, individual – and actually unique – conditions for its application. Those conditions are composed of specific factual circumstances, but also legal ones, if the value in question is of a binding nature. A situation where there is only one binding value in a regulated area is extremely rare. Mutual relationships between many values can be partially or even fully harmonious – the values then either mutually reinforce each other in pursuit of a common goal, or act independently to meet distinct goals. However, it is more the rule than the exception that the maximum implementation of a value inevitably leads to the violation of at least one other value. This practically certain collision of values entails the necessity to set the degree of implementation (or alternatively: non-implementation) of each of them, which can be defined as ‘optimal’. Thus, optimization of value implementation depends on its maximum fulfilment in the existing factual and legal conditions.

Since values can be implemented by many different behaviours, the predictions about the future state of the world on their basis are limited. Hence, values are referred to in argumentative terms as non-conclusive.

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Data: 18/11/2026 02:34:05

The 'totality' of values combined with their multiplicity, both in the legal system and in the legal order, result in that the maximum implementation of any legally valid value prevents in whole or in part the implementation of others. As little as two values are enough that their actions, aimed at covering the entirety of the regulated area, definitely meet at some point, often leading to an application dispute. The opposition of values forces the choice of one of them, or the implementation of both, but not in their entirety, but in certain proportions. The colliding nature of values is their immanent feature, and not a sign of lack of knowledge or axiological experience of those who introduce them, e.g. into the legal system. Part of the incompatibility of values is abolished by the lawmaker itself through the creation of ordinary norms (rules), but a significant part of them is revealed only in acts of law application, where the duty to resolve them is primarily assumed by courts.

Both internal and external legal values are characterised by their 'weight' ('gravity'). This characteristic primarily indicates the mutual strength of values. A given value can be stronger than another value, weaker than it and of equal strength. At the abstract level, the general order of preference of legal values is determined by the legal system itself. Constitutional values are of utmost gravity, statutory values have lower gravity, then the values of sub-statutory generally applicable acts, and the lowest weight is attributable to the values of internally applicable acts. A collision of values from the same hierarchical level must be resolved in the act of applying the law.

In a situation of making law application decision in which the relevant opposition values are reconstructed, the adjudicating entity has to carry out a procedure of special nature – the procedure of balancing (weighing, harmonizing) the values.[15] Which of the incompatible values will ultimately prevail over the other (the remaining values) and become the basis of, e.g., the judgment, depends on the specific circumstances of the case. Thus, the order of preference of the colliding values is determined for the individual facts. Enforcement of the judgment will entail the obligation to construct a hierarchy of incompatible values in analogous situations.

The elimination of a lower-gravity value takes place only in the order of law application. That value is still valid as a legal value, and moreover may become dominant in other factual circumstances.

It is not a mere coincidence that the characteristics of the value coincide with those of the principles of law. If we assume that the principles of law are norms which require the implementation of a value not conduct,[16] then this conformity becomes manifestly justified.

[15] *Ibidem*.

[16] M. Kordela, *Zasady prawa. Studium teoretycznoprawne*, Poznań 2014, p. 102.

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Data: 18/11/2026 02:34:05

THE GENERAL PATTERN OF THE PROCEDURE OF THE HIERARCHISATION OF VALUES – CONCLUSIONS

Given the properties typical of the value, a general pattern of the procedure of their balancing (hierarchisation) can be developed in the act of law application:

1. Reconstruction of legally binding values. The identification which values have been encoded in legal rules is made by means of interpretative directives which are axiological interpretation directives. It is not only the direct indication of values in the principles of law or human rights regulations that determine their legal validity. The mere fact that a certain conduct has been ordered by the lawmaker makes it possible to assume that that conduct is positively assessed by it (and, where appropriate, in the case of a prohibition, negatively assessed).
2. The choice of relevant values for a given case. In many situations, there is no express reference to the axiological arguments in the grounds for the law application decision, since the process of determining the legal consequences has been clearly defined at the very level of legal norms. However, where discretion margin arises or the sphere in question is governed at least partially by the principles of law, there is a need to refer to values. The first step on this path is to gather all the legal values that are relevant to the case under consideration.
3. Naming the relevant values correctly. Only principal legal values have their own names, such as human dignity, common good, equality, economic freedom. Lower values use the names of behaviours, either desirable or rejected by the lawmaker. It should always be specified, when speaking of payment of taxes, whether it is a value-rooted act or simply prescribed conduct, e.g. by using the phrase 'paying tax as a legal value'.
4. Attributing the abstract degree of weight to each of the relevant values.[17] At this stage, assigning the 'priority' to values takes place only *prima facie*. First of all, the legal force of a normative act in which values are expressed is used. Material (functional) criteria are also taken into account for which the code values are considered to be more important than those contained in laws which do not have such status. On the other hand, in the context of a given legislative act, the values protected by the category of principal values defined by scholars in the field outweigh those non-principal ones.
5. Attributing the specific weight to each of the relevant values. After abstract ordering of values, a correction – sometimes radical – of their weighting is introduced, according to their role in the circumstances of a particular, specific and individual case.

[17] R. Alexy, *The Theory*..., p. 52.

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Data: 18/11/2026 02:34:05

6. Value hierarchization. Taking into account the criteria listed in paragraphs 4 and 5, a corresponding hierarchy is built in the set of values under consideration. It can take very different forms. The most elementary case occurs when each value occupies a position of a different preference level. However, it is much more common when there is more than one value of the same strength.
7. The selection and application of the strongest value. If, as a result of the creation of a preferential order, only one value has obtained the status of a principal value, the value will be used as the basis for the decision. However, in a situation in which the directly lower value(s) is/are slightly different from the principal value, the entity applying the law has the power to take into account also the lower value. Its lower position will manifest itself in the fact that only in part will be met, e.g. the main value will cover 80% of the application sphere, and the complementary value – 20%.
8. Indication of collision of equivalent values. Where there is more than one principal value at the highest level and there is an incompatibility between them, their application must be preceded by the removal of that collision.[18]
9. Weighing of colliding values.[19] The elimination of the conflict of values takes place through the procedure of balancing (weighing). The court hearing the case determines, for each individual case, which of the values must play a fundamental role in the resolution. If this turns out to be impossible due to all of the values analysed being equally important, then there is a case of so-called structural discretion.[20] Then the court must take a decision, ensuring not to exceed the margin of discretion. But where it is established that one value prevails over others, the court either merely applies it or, when applying it along other values, attributes most of the scope of action to the dominant value.
10. Application of a single value or harmonised values by the court.

Lawmaking does not end at the level of adopted legal norms. This is only the beginning, a necessary complement of which is the sphere of values both internal and external to law, not only at the level of system structure, but above all in the sphere of its application.

[18] Cf. L. Leszczyński, *Kryteria pozaprawne w sądowej wykładni prawa*, Warszawa 2022, pp. 161–174.

[19] R. Alexy, *On the Structure of Legal Principles*, "Ratio Juris" 2000, vol. 13(3), pp. 296–298.

[20] Idem, *Postscript*, [in:] idem, *The Theory*..., p. 408.

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Data: 18/11/2026 02:34:05

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ABSTRAKT

Tworząc system prawny, racjonalny prawodawca formułuje nie tylko normy prawne, lecz także obowiązujące wartości prawne. Czyni to bezpośrednio (np. poprzez zasady prawa) lub pośrednio (gdy interpretator tekstu prawnego przypisuje działaniu nakazanemu wartość dodatnią, a działaniu zabronionemu – wartość ujemną). Specyfika wartości, a w szczególności ich kolizyjny charakter, powoduje, że jeśli ustawodawca sam nie rozwiąże oczekiwanego konfliktu, musi to zrobić sąd. Powinien to czynić zgodnie ze wzorcem stosowania wartości; wzorcem, który można zrekonstruować analogicznie do wzorca stosowania norm prawnych.

Słowa kluczowe: normy prawne; obowiązujące wartości prawne; racjonalny prawodawca; specyfika wartości; wzorzec stosowania wartości