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New elements of constitutional solutions in the sphere of individual rights

ABSTRACT

The inventory of freedoms and rights in contemporary constitutions contains numerous solutions that open up new prospects for entire social groups: for example the right to protect personal information the right of persons of national origin to settle permanently in their mother country, protection of the rights of children, protection of the consumer rights and many others. Any limitation upon the exercise of constitutional freedoms and rights should be imposed only by statute and only when necessary for the protection of state's security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. The constitutions also provides that no one shall be compelled to do that which is not required by law. This scope of constitutional regulations (characteristic particularly for post-communistic constitutions) made the need of constitutional revisions not very urgent and wide. For the another countries the intensive developing of human rights, taking place in field of international regulations and jurisdiction determine the scope of new conception of multi-law regulation of the discussed problem.

KEYWORDS: *constitution, constitutional law, international law, human rights, polish law, European law*

My report is founded on three basic thesis. New solution in field of human and citizen's rights must be adopted only in three connected ways.

First: in way of concretising national constitutional acts (supported on national law and directly binding) on the way of regular developing and modernising the current legislation.

The second way is adopting constitution be constant interpretations done by international tribunals and national courts (R. Alexy, 2002, p. 150–170). Lawyers from member states (particularly EU members) need to change their approach to the interpretation national law because the adjustment of some new interpretations habits has become necessary.

Third and last solution is discussing and making the amendments and even bigger revisions of international treaties and national constitutions.

The most dangerous for contemporary constitutions is saturating them with ideological elements gave it the nature of a political declaration. (A. Bałaban, 2018, p. 851–859). In contrast, in the present times we can only accept the idea of a constitution ranging between the concept of an act of the sovereign power of the nation with reference to state and political institutions, and the concept of a constitution as a social agreement (R. Ludwikowski, 1993, p. 97–108.) between the nation and the holder of state power concluded in a referendum. The variety of tasks the constitution has to fulfil allows this act to assume different roles, including the extra-legal ones.

The literature mentions the historical, political, ideological, propagandistic, educational, cultural and many other functions of the constitution. (P. Haberle, 1994, p. 112–135) Identification of such roles of the constitution is not insignificant, provided that such roles are treated as secondary, reflective to the fundamental role of creating the basis for the functioning of the state and the law. Perceiving these functions as equally important leads to incorrect evaluation, and sometimes even "correcting", the constitution in such a manner that it meets – simultaneously, or above all – the non-legislative objectives. Nowadays, the desired concept of modern constitution should be understood as a precise normative act, defining in detail the rights and obligations of the most important participants of the state life, particularly the individual beings.

Taking various approach or emphasising various aspects of the constitution may only be done within the framework of a legal concept

understood in such manner. (A. Bałaban 1988, p. 93–120.) For example, depending on the adoption of a universalist or individualistic concept of the relationship between the state and its citizens, it is possible to distinguish and examine the mutual relations between the roles of the constitution as, first and foremost, a guarantee of the state interests, or, primarily, a guarantee of the citizen rights. (U. Bernitz, J. Nergelius, C. Gardner, 2008, p. 80–105) The relationship between these roles is reflected in the contents of the provisions of the constitution, the proportions of provisions from both groups mentioned, the systematics of the constitution, the nature of institutional guarantees of citizens rights, the direct applicability of the provisions of the constitution, etc.

Distinguishing the two aforementioned roles of the constitution – stabilising and dynamizing – is one of the classic research directions in studying the role of the constitution. For the sake of this certainty and clarity, the constitution itself must create an unambiguous political system of permanent character, in spite of the changes taking place in the public life nowadays. According to the very apt maxim: *quieta non movere* – "do not move settled things" – systemic adjustments can be implemented not when the need arises, but when the constitution becomes well-established and accepted following the discussion in competent state bodies and social groups.

It is also related to preventing the divergence of the paths of the formal and real constitution through the system of improvement and protection of the former. Obviously, the said principle does not apply to minor constitutional adjustments of technical nature, but to the provisions of significant systemic importance. Weighing up the importance of the two aforementioned roles of the constitution, it has to be emphasised that they are not equivalent. The stabilising effect is the essence of the constitution. Its formal features work towards the implementation of constitutional solutions and their protection against violation by both the legislation and the wider understood "practice" of public life. The implementation of the constitutional systemic model and its validity last for the entire period of its validity, even on the eve of the change.

Manifestation of the dynamic role of the constitution – this time perceived in an active way – is the promise of passing the law which expands the provisions of the constitution. In the event of their inclusion, the constitutional lawmaker resigns from regulating the given issue in more detail and transfers it to the jurisdiction of the legislator. The constitutional announcements of passing the law are quite a complex issue which can be analysed at least in several dimensions:

1) the content and consequences of a specific announcement,
2) the place in the system of sources of law of the act executing the announcements,
3) the importance of all the references contained in the constitution, recognised jointly in order to establish the legal concept of the constitution and the Act (in particular, in the sense of the mutual relations of constitutional legislation and legislation).

Every constitutional announcement to pass a law should be treated as a binding order of the constitutional legislator, an obligation to prepare and issue a law regulating the envisaged categories of matters as soon as possible. The very fact of publishing the announcement indicates the particular importance and urgency of regulating the issues mentioned therein, as the obligation to statutorily specify the constitution is incumbent on the legislator, regardless of the existence of constitutional announcements.

Stimulus for the development of contemporary constitutionalism has been provided by the development of international organisations and international law. The basic organisational and programming documents of international organisations, constituting their specific constitution, are of particular importance to the state constitutions. The obligations of UN Member States and other international organisations, as well as the consequences of ratification processes regarding international law, result in the obligation for their application *ex proprio vigore* or by "translating" them into the language of the domestic legal order. However, the impact of international law on domestic law in its classic form is rather modest. In contrast to this process, the activities of supranational organisations, nowadays embodied by the

European Union, have a much stronger impact on national constitutions and law. (E. Engle, 2011, p 19–33.) As a result of their activities, a category of European law is created which originates from the bodies of the Union and have the authority to directly shape the duties of the countries and citizens included in the integration.

From this point on, it is but a short way to the global government and parliament and the global constitution as the only solution to the hazards threatening human civilisation on a global scale. Meanwhile, local integration processes are gradually transforming the global economic, political and military balance of powers. Global and local international law has a varying impact on individual constitutional "matters".

International law has a particularly strong impact on the constitutional chapters on "human and civil rights and freedoms". The emphasis on the supranational nature of these rights and the creation of systems for their protection that "follow the human being" across national borders is marking the new era. Some civil rights are directly related to the achievements of global civilisation and culture, as well as to social protection. It is also acknowledged that the degree of citizen protection is a criterion for the assessment of the development of a given legal system and exercising one's rights over the state may be carried out before the international judicial bodies.

This problem can we analyse on an example of very modern polish constitution of 2nd April 1997 which demonstrates a new approach to "rights of citizens" (A. Bałaban, 1996–7, p. 116–122). One cannot fail to notice that legal protection of the citizen is an underlying idea that is developed throughout the entire constitution. Relevant provisions are found in preamble, in chapter I, in regulations concerning the state administration, extraordinary measures and even the state finances. The fact that the freedoms, rights and obligations of persons and citizens are specified in chapter II is indicative of the individualistic view on the relation between the state and individual. Citizens rights have, with but a few exceptions, been extended over to "persons" – citizens of other countries and non-citizens who reside on the territory of Poland. Chapter II contains a well-developed part devoted to freedoms and personal rights – in keeping with the liberal and

natural premises of the entire constitution (A. Bałaban, 1993, p. 503–509). The constitution also introduces a novelty – a separate part that describes "the means for the defence of freedoms and rights" (articles 77–81). The biggest innovation is the right to appeal to the Constitutional Tribunal, offers a long and winding road before the final decision and sentence is revoked.

The inventory of freedoms and rights in contemporary constitutions contains numerous solutions that open up new prospects for entire social groups: for example the right to protect personal information (W.G. Voss, 2014, p. 25–43) the right of persons of national origin to settle permanently in their mother country, protection of the rights of children, protection of the consumer rights and many others. Any limitation upon the exercise of constitutional freedoms and rights should be imposed only by statute and only when necessary for the protection of state's security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. The constitutions also provides that no one shall be compelled to do that which is not required by law. This scope of constitutional regulations (characteristic particularly for post-communistic constitutions) made the need of constitutional revisions not very urgent and wide. For the another countries the intensive developing of human rights, taking place in field of international regulations and jurisdiction determine the scope of new conception of multi-law regulation of the discussed problem.

The general question is whether it is necessary to revise the charter of rights of an individual in field of constitutional standards or in case of particular, national constitution (or their group). The reform consisting in a thorough revision of the existing constitutions or in replacing them with new basic law would have to be justified by the fulfilment of the "constitutional moment" conditions in theoretical sense of this term. (A. Sajo, 2005, p. 11–52).

At the end of this thesis we can also talk about completely new groups of human rights in general or national sphere of regulation (Z. Kędzia, 2018, p. 62–75). We find many doctrinal and political propositions in this field. The most popular are so called "rights of III generation" meaning "group rights" in variety versions. For example they are rights of business groups and opposite for them consumer rights or trade unions rights. Next, rights

of variety social groups or communities: professional, cultural, political, regional, religious, etc. Between them the most important are rights of self government groups in versions citizen rights to s.g. or s.g.'s rights to autonomy of competences, finances, property or international contacts. Particularly actual now are rights of strangers and rights of emigrants to non deportation without important reasons, legal regulated. Another group postulated rights are rights of cripples or disabled persons. The principle of Sustainable Development is another particularly important source of plenty new human rights in field of Nature Protection.

The limit of discussed proposals is capacity and generality of constitutional provisions but also its relation to changes make in international conventions.

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