THE CONTEMPORARY IMPORTANCE OF INTERNAL CONSTITUTIONAL LAW

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Abstract: The second part of the 20th century saw the development of multiple links of global and regional character which stimulate the question whether the internal constitutional law, the research of the political systems of individual democratic states make sense and whether the constitutional principles providing the grounds for their existence and the existence of their institutions are not deformed by the globalisation process and the uniformisation processes conected with the european integration.

1. The second part of the 20th century saw the development of multiple links of global and regional character which stimulate the question whether the internal constitutional law, the research of the political systems of individual democratic states make sense and whether the constitutional principles providing the grounds for their existence and the existence of their institutions are not deformed by the globalisation process and the uniformisation processes conected with the european integration..

First i would like to discuss the problem of the globalisation. The attempts to define the notion are undertaken primarily by political sciences, but the issue remains within the sphere of interest of lawyers, who are confronted in their everyday activities, in the usual conduct of legal transactions with new problems resulting from civilisational transformations, the transformations in the area of international political and economical relations as well as international law itself. From the point of view of this conference, the most significant definition of globalisation among the many quoted in the literature (none of which, incidentally, has been universally accepted) is that proposed by W. Aniol, who perceives it as "a complex of links between economic, legal, technological, moral, scientific and artistic orders, which aim at unifying the basis of social-economic and political life of the world"[1]. In view of the above the question arisses do the currently existing states make sense? If such a form of organisation of societies as the state were to disappear, the research of the political systems of states, and thus of their national laws would not make sense.

It would not be easy to answer both questions as we are at the beginning of a certain process and there are no sufficient premises for predicting the directions of its development and its results. The currently existing phenomena lend themselves to various interpretations. However, the decline of the state can not be diagnosed, on the contrary, there is a distinct tendency in Europe for new states to emerge, to strengthen the sense of separateness of the societies living in certain territories. Globalisation "does not denote the end of the state or unification of states under one authority"[2]. The phenomenon may be variously judged and various conclusions may be drawn as to the effect of globalisation on the constitutional law.

Some point to negative effects of the globalisation process on the role of the contemporary state, like Z. Bauman, who thinks that "the drive towards creating new and in each instance weaker, with increasingly poorer means at their disposal but 'politically independent' territorial entities does not contradict the economic trend towards globalisation. [...] World finance, trade and information industry, due to the liberty of action and unlimited freedom in attaining their aims are dependent on the dispersion of the world political scene. They all favour the existence of weak states [...] [which] may be easily reduced to the useful role of police districts providing the minimum order indispensable for conducting business"[3]. In such states the significance of the constitutions and the basic principles of the political systems should be re-evaluated, especially the principle of sovereignty and constitutional regulation of the sources of law, which would result in the need to redefine the notions rudimentary for the constitutional law. This, in turn, would set new tasks for the comparative law, which would have to focus on researching the changes in understanding these notions in individual states and the effect of their institutional manifestation in one state on another. "Only this [...] makes sense if constitutions and constitutionalism are to survive as the reflection of real social processes and not merely as museum exhibits"[4].

Another group of authors seems not to notice a direct relation between globalisation and systemic transformation of contemporary states. They refer to the constitutions of individual states, which did not introduce any fundamental changes in the regulation of the principles of political systems, the rights of an individual, the system of state institutions, etc., which are connected with the processes of globalisation. This results from the fact that we are faced with the phenomena *in status nascendi* exceptionally difficult to comprehend and evaluate. Therefore, many constitutions remain as they were formulated in the 19th and in the first half of the 20th centuries, still performing their functions sufficiently well. Even the new, recently resolved constitutions do not include any revolutionary changes constituting a reaction to globalisation, thus not differing substantially in its regulation from the constitutions of democratic states resolved earlier. This is well exemplified by the Polish constitution of 1997 or the Swiss constitution of 1999. In both cases the legislator of the political system purposefully resigned from regulating certain issues, postponing their legislation. Yet, in each case they are different matters, which escape interpretation within the context of globalisation processes. As by P. Häberle observed in relation to the new Swiss constitution, the only justification for the omissions is the fact that the legislator of the political system did so in the cases where there is no consensus and the issues are still being discussed[5]. The same may be said of the Polish constitution of 1997.

2. A more detailed analysis of the binding constitutions and even the practice of their application does not reveal any simple cause and effect relation between globalisation and the constitutional norm or the application of the constitution. If it were assumed that globalisation is a process which actually began in the time of great geographical discoveries, i.e. before first constitutions were ever resolved, this absence of direct relation is hardly surprising. On the other hand, the globalisation processes can not be easily separated from some other phenomena characteristic for the modern world, to mention only the scientific and technological revolution and its consequences. One of the latter is the increasing complexity of social relations and the resulting necessity of their legal regulation. The number of resolved norms is increasing and their quality is rapidly decreasing. The excessive number of norms results in increasingly deteriorating awareness of the law, which is accompanied by the application of only these norms that from a certain point of view seem sensible. This in turns results in impairing the certainty of law, thus impairing the principle of the lawful state. Democratic states attempt to limit this specific deluge and inflation of legal acts, despite the absence of new and effective way of doing it. It is not even the fact that such unusual proposals are made as that proposed by the German FDP aiming at

limiting the number of resolved legal acts, but rather the absence of new institutions, procedures, etc. Therefore, for the time being, the so-far existing mechanisms resulting from the lawful state must suffice. One of them is the supervision of constitutionality of law performed by constitutional courts[6]. Thus, the increasing popularity of this institution and transforming it into a judicial or quasi-judicial body, even though originally it was not to assume such a function (e.g. the French Constitutional Council).

The second example, more directly related to the reaction to globalisation, is regionalisation and decentralisation. Here, the institutions already existing in some states are becoming more universal as they respond to new social needs. "Even there where federal states or the states with distinct regions do not exist, a growing significance of regionalisation and decentralisation is observed. They play a role in economy, especially in the employment and industrial policy. More and more advantages of the organisation based on regionalism and decentralisation are being found. [...] the significance of regional economic areas in the globalised economy is confirmed"[7].

Similar examples are numerous. They well substantiate the argument that for the time being such effect of globalisation on the internal law that would contradict the sense of its existence can not be unequivocally found. The authors writing about the states reduced to the role of police districts stipulate the need to re-direct the research of constitutional principles and institutions but as a rule they do not indicate what changes reflecting the ongoing processes may already be observed and what legal implications they entail. They only state that this is significant for the notion of sovereignty, the idea of the constitution, etc., avoiding indicating what concrete significance is the matter, thus lacking a complex approach. It is not enough to state that the concepts of sovereignty to date are no longer valid as this should be accompanied by the definitions of the new ones, of the new subjects of sovereignty ruling the police districts mentioned above, what should replace the state constitutions, what principles a new legal system should be based on, etc. Today, these question can not be answered by the comparative-legal research. The answers may at most belong to the sphere of acceptable intellectual speculation, which does not undermine the contemporary significance of the internal law. The results of its research are not so much useful in the context of the effect of globalisation on the political system but to show how the legislators of the political systems in individual states react to the technological, economic, social, etc. changes occurring on the global scale. They will not, however, result in re-evaluating and re-defining the notions rudimentary for the internal law. It transpires that the reality may still be described with the existing notional apparatus.

A reference to the WTO conference in Cancun in Mexico in 2003 may prove useful here. It showed that states, even the poor ones, have resisted the attempts to be reduced to the role of specific police districts. They are still able to defend their interests if they consider them to emerge from the idea of sovereignty and independence. This example shows that states, faced with global phenomena, must undertake action together if they want to attain their goals, which is not identical with loss of independence. Referring to the values contained in their constitutions, they will try to influence the international law. This was indicated earlier. D. Thürer wrote: "Today the need arises to supervise the concentrations of power of a new kind which remains, e.g. within the multinational companies. The supervision in the conditions of economy undergoing the globalisation process may only be executed with the aid of the national law. Only the joint effort of states, also concerning the economy, will ensure the implementation of the ideals emerging from the idea of a lawful state, such as: restriction of authority and its division, freedom of individuals, transparency and responsibility in executing authority or social and ecological honesty"[8].

3. The development of European integration also stimulates the questions concerning the future of the classically understood internal law and the perspectives of comparative research. The future is not very

promising if it were assumed that "the notion of the constitution, at least in its wide meaning, may be transformed onto the supranational level, onto the legal order of the European Community, which emerged from the transfer of the national sovereign laws as the Community increasingly takes over the functions of the states and thus increasingly more intensively substitutes a functional state"[9]. This proposal corresponds with the idea of emergence of a new decision-making subject in the EU, i.e. the citizens of the Union[10]. But are these premises still relevant?

The answer requires defining the character of the EU and the role of the EU law in the member states' legal systems. As to the former issue, the EU is not a state nor is it an entity resembling a state. It is composed of member states, which transfer their competence in the matters defined by treaties. It is necessary to point out that the art. 5 of the Constitution emphasize such values as the independence and integrity of territory of Republic of Poland . The art. 90 (l) states: "The Republic of Poland , by virtue of international agreements, delegates to an international organization or international institution the competence of organs of State authority in relation to certain matters". This regulation allows only to delegate the competences but not to limit the sovereignty. The Constitutional Tribunal have stated: "The Constitution remains 'the supreme law of the Republic of Poland ' in relation to all international agreements, including agreements delegating competence. In particular […] there could not come about a delegating of competence to the extend that would cause Poland not to be able to function as a sovereign and democratic state. Furthermore, the limiting of the scope of delegating to 'certain matters' means a prohibition on delegating: firstly, the entirely of the competence of a given organ; secondly, competence in the entirely of matters in a given field; and thirdly, competence as to the essence of matters defining the management of a given organ of state authority"[11].

As has been aptly noted by Polish legal commentators dealing with EU law, "the lack in the treaty materials of any clear delimitation as to the EU institutions' powers to legislate, in effect allows them to enact secondary law on the basis of competencies that arise under primary Community law. This occurs by applying a teleological interpretation enabling the EU [...] to so function notwithstanding the absence of any specific treaty authorization. One can scarcely fail to note here, that such a *modus operandi* represents a serious challenge to the sovereignty of the Member States"[12].

Perceiving this risk, the Constitutional Tribunal has held that: „Each international organisation is a secondary subject whose functioning is dependent on the will of member states. The Member States of the European Union, therefore, retain the right to assess whether the organs managing the European Community are acting within the frameworks of the delegated competences and the principles of subsidiarity and proportionality. Regulations passed in the contravention of these frameworks are not covered by the principle of the primacy of Community law"[13].

The Union is developing very dynamically but the development is based on consecutive treaties expressing the will of the member states, the will democratically authorised and stemming from the will of the citizens of individual states. The process of forming the will is determined by the constitutional law of individual states and it determines the principles of their representatives' participation in the activities aiming at integration and the scope of their authority. Neither the EU primary nor the derivative laws comprise the whole of social relations but only these areas which the members of the EU have decided to subject to its regulation. Considering the above, the emergence of a new supreme power, constituted by the citizens of all the EU member states, can not be confirmed.

Discussion of the role played by the EU law in the legal systems of the member states requires the analysis of how the issue is regulated by their constitutions. Only the constitution of the Republic of Ireland admits the superior role of the EU law. In the remaining member states the constitutions (e.g. Germany) or at least basic constitutional principles (Italy[14], Austria[15]) still retain the superiority over the EU law. Not much would change in this respect after adopting the Treaty of Lissabon. From

the point of view of a decisive majority of binding constitutions of the member states, this act could be unequivocally determined only as an international agreement.

Recognising the supreme position of the constitution in the system of sources of law is the logical consequence of the fact that the constitution defines the subject of state authority and delegates competencies (including legislation) to state institutions. It should be reminded here that the discussion in the National Assembly preceding the resolution of the Constitution of the Republic of Poland distinctly emphasised the fact that the supreme legal force of the constitution is tightly linked with the sovereignty and independence of Poland[16].

Interestingly, there is an opinion in the Polish literature proposing the supremacy of the EU primary law over the Polish constitution[17]. It is based on the recognition of art. 91, sect. 2 of the Polish constitution, which in this case is not fully applicable. The argument here is the complex character of the integration act and the special procedure of its ratification in the referendum, i.e. the constitutional act of integration executed in agreement with the constitution and autonomous towards its remaining resolutions. The supporters of this point of view quote the unity of the EU primary law and the Constitution of the Republic of Poland in its axiological stratum, its aims and the issue of human rights.

The principles of the supremacy of the constitution and the hierarchical structure of the system of sources of law in a democratic state prevent legal chaos. It may thus be assumed that if, on the basis of an international agreement, a country ceded the competence of proclaiming law to an international organisation or an institution, the constitution remains the supreme law. It should be borne in mind that - as is emphasised in the Polish legal sciences - "the fact of ceding does not result in [...] the loss of sovereignty of a state over the ceded powers as it is not of an absolute character and may be revoked"[18].

The EU member states retain their sovereignty and "the multi-level character of the Union offers great flexibility. Participation in the EU policies differs relative to their nature and the member states themselves. The Schengen Agreement, the euro zone or the Western-European Union do not comprise the same countries. Similarly, some states are neutral, while others are the NATO members. [...] Rejection of one of the policies does not entail the rejection of the entire process"[19]. Thus, the constitutions of the member states expressing the state sovereignty still retain their significance and their disappearance can not be expected to in the foreseeable future.

The EU law can not be discussed in isolation from the internal laws of its member states. It is created by the representatives of individual member states legitimised by the binding constitutions. EU does not replace the states but the states remain - as formulated by the German Federal Constitutional Tribunal - "the lords of the treaties". The Tribunal reserved the right to investigate "whether the legal acts of the European institutions and organisations remain within the limits of the ceded sovereign laws and do not exceed them"[20]. Similar attitude admitting supervision of constitutionality of the treaties constituting the EU primary law was adopted by constitutional tribunals in Italy[21] and Spain[22] and also Poland . Polish Constitutional Tribunal stated: “Establishment treaties are international agreements. The sovereign parties to these agreements are Member States. They independently and in accordance with their constitutions ratify the treaties and have at their disposal the right to terminate them”[23].

In this context the issue of resolving conflicts between the constitutions and legal acts and the Community primary and derivative law in the practice of member states' political systems is exceptionally interesting. The EU law does not include any provisions concerning the resolution of conflicts between it and the internal law of the member states. The EU constitution only states the principle of its superiority over the internal law of the member states (art. 10). It should be added here that as early as in the 1960s the European Tribunal of Justice resolved that the superiority of the EU

law is absolute and does not depend on the rank of the internal law norm or their temporal sequence. Besides, the uniformity of the EU law stipulates that it must be uniformly applied in all the member states and therefore its interpretation is reserved for the European Tribunal of Justice as it would be unacceptable that in individual member states their agencies, and especially courts, should interpret the law, which would cause chaos. Therefore, in the case when a member state's legal system retains the norms contradicting the Community law, the Tribunal may declare that it does not meet the requirements resulting from the treaties constituting the EU. Such ruling, however, does not entail direct legal consequences and the elimination of the legal norms conflicting with the Community law rests within the competence of a given state - a EU member.

In the case of conflict between the Community law and the constitution, courts and other legal institutions implementing the constitution attempt to use the interpretation favouring the EU law. But, as stated the Polish Constitutional Court “the interpretation favouring the EU law has its limits. In cannot after all lead to results not in accordance with the Constitution”[24].

If, however, the contradictions can not be removed, two solutions are available: either, due to the superiority of the constitution, the conflicting norms of the Community law are not enforced (which in the case of the primary law denotes the refusal to ratify the treaty which belongs to it or the denunciation of the ratified treaty) or - which is a much more frequent case - a constitution is modified before a EU regulation comes in force, which aims at ensuring the effectiveness of the Community law and the process of European integration. The above is exemplified by the modifications of several constitutions (French, German, Belgian and Spanish) performed to facilitate the ratification of the Maastricht Treaty. An interesting solution was adopted in Finland . International treaties discordant with the constitution may be incorporated into it by a majority of votes of the members of the parliament (two thirds), which practically denotes modifying the constitution. Constitutions are modified even when its provisions collide with the derivative law (e.g. in Germany).

In the practice of the political systems of the member states, the jurisdiction of constitutional courts, where they exist, or supreme courts attributes the EU law with superiority over internal regulations of a lower rank than the constitution, which has been based not so much on the EU law and the jurisdiction of the Tribunal but on the constitutional norms[25]. In Great Britain , where there is no constitution, in the early 1990s the House of Lords advocated the non-application of the internal law if it conflicted with the EU law. The superiority of the Community law over the constitution if both can not be reconciled denotes that "the restriction of the constitutional laws below the standards resulting from the international norms in relation to a ratified international agreement or a law resolved by an international organisation should not be admissible"[26].

The constitutions of the EU member states and the judicial decisions of courts do not decide about the results of the principle of the superiority of the Community law and it is not clear whether the application of a regulation conflicting with the agreement of that category is only suspended or whether the regulation is invalid or ineffective. The analysis of judicial decisions prompts the conclusion that an internal law regulation which is not applied due to the superiority of the Community law still remains a part of the legal system and will be applied when the provisions of the Community law cease to be binding in the country.

In this context the following view expressed by the Polish Constitutional Tribunal should be quoted: “In the light of the constitutional principle of the priority of Community law over statutory norms (art. 92 par. 2 and 3 of the Constitution), if there are no doubts as to the content of the norms of Community law, the court should refuse to apply the provision of the statute not in conformity to this norm and apply directly the provision of Community law. The court does not adjudicate in this case on repealing the norm of national law but only refuses to apply it in the scope in which it is obliged to give priority to the norm of Community law. The legal act in question is not affected by invalidity, it is still

binding and is applied in the scope not covered by the norms of Community law. If however, it is not possible to apply directly the norms of Community law, the court should seek the possibility of an interpretation of national law in accordance with the Community law. In the case of the appearance of interpretative doubts in relation to Community law, the court should turn to the European Court of justice with a prejudicial question"[27].

It follows from the discussion so far that the constitutions of the EU member states have retained their legal significance. Thus, the existing notional apparatus and research methods remain still valid, while the research of the constitutional law, including comparative research, makes sense. The member states, facing the same or similar external challenges and internal problems, solve them not only with the aid of the EU institutions but also adopting in their internal legal systems certain systemic measures verified in other member states. It would also be interesting to examine the reasons of rejecting the solutions present in the constitutions of other EU member states.

Doubtless the Member-States and the states attending to get access to EU are obliged to respect the Unions fundamental values. However, this does not define either the contents of constitution itself nor the form of a given state organ or scope of regulations concerning the human rights. For example the democracy means division of powers and ensurance of society's control over the executive. Achievement of these aims is possible in several ways: it can be the system with strong presidential power or the system with parliament as supreme state organ, or else the English-Model of strong prime-minister or similar to it - the chancellor model of government etc. We should not forget that the constitution is not used for establishing or adoption a hierarchy of values - this is the role of church. Constitutions are meant to materialize the values in form of legal norms, to establish the hierarchy of norms and rules in the organization of the state. The constitution does not create any economic or political system. It only serves to organize the state and to create relations between the individual and the state. Constitution is the essence of the state and national identity.

In the case of the so-called primary EU law there are international agreements ratified on a consent granted in a statute or referendum. Their position in the internal legal systems of the majority of EU member states is over statutes. The secondary EU law has a similar position, i.e. primacy over statutes.

In this context the following view expressed by the Polish Constitutional Tribunal should be quoted: „The very concept and model of European law created a new situation, where autonomous legal orders are binding independently of each other. Their mutual relations can not be fully described by the traditional concepts of monism and dualism in the following arrangement: internal law – international law. Existence of relative autonomy of legal orders based on their own internal hierarchical principles does not denote absence of mutual influence and does not eliminate the possibility of collision between EU legal regulations and the provisions of the Constitution. This would occur if there was a contradiction between a constitutional provision and an EU legal norm and a contradiction could not be reconciled with the use of the interpretation respecting relative autonomy of the European law and the national law. Such a situation can not be excluded, but it may – due to […] common character of assumptions and values – occur only exceptionally. Such a contradiction can by no means be solved in the Polish legal system by adopting the view of superiority of an EU legal norm over a constitutional standard. It also could not result in the loss of legal force of a constitutional standard and its replacement by an EU legal norm or in restricting the application of the norm in the area which is not regulated by the EU law. In such a situation the Polish legislator would have to decide to amend the Constitution or to cause changes in the EU regulations, or – eventually – to leave the European Union.. The decision should be made by the sovereign – the Polish Nation – or the body of state power which, according to the constitution, may represent the Nation"[28]

If it results from an international agreement ratified by the Republic of Poland creating an international organisation, the principle of direct implementation (art. 91(3) of the Constitution) refers to the law proclaimed by legislative organs of this organisation. In practice this formulation transpired to be too restrictive and the complicated process of implementation of the EU law deserves a more precise description. The hitherto implementation practice consisting in issuing acts of internal law in its essence emulating the acts of the EU law is not rational and a new provision regulating this issue should be introduced into the Constitution. Polish Parliament frequently decided to create its own regulations essentially emulating EU regulations, which in Poland could be binding directly. The example is Polish Classification of Products and Services as well as Polish Classification of Entrepreneurial Activity. The decree of the Council of Ministers of 20 Jan. 2004 on Polish Classification of Entrepreneurial Activity states that the classification "retains complete methodological, substantive and code unity and compatibility with respective EU classification" (i.e. NACE – classification of entrepreneurial activity in the EU). A simple conclusion follows – the classification can not contradict the EU regulations and any discrepancies should be amended with the EU norms, while inconsistencies should be interpreted according to the EU classification.

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[26] P. Policastro *Prawa podstawowe...*, p. 346.
[27] OTK ZU Nr 11/A/2006, pos . 177.
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