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CONFERENCE PRESENTATION: *NAVIGARE NECESSE EST. LEX FUNDAMENTALIS SEMPER REFORMANDA*¹

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Abstract. The year 2017 saw the celebration of the 25th anniversary of the adoption of the Constitution of Lithuania and the 20th anniversary of the adoption of the Constitution of the Republic of Poland. This article presents the common constitutional heritage of these two countries primary as commonwealth est. in 1385 year and next as Polish–Lithuanian Union from 1569 to the end of the 18th century when we lost our independence. It sets out the main assumptions of the theory of the norms of basic law. The author also sums up the importance of legal culture and the social acceptance of the legal order set by a constitution as a fundament of democratic states. The author presents his reflections using metaphors from nautical terminology.

Keywords: Constitution, theory of law, rule of law, constitutional heritage, constitutional values.

Introduction

If I had presented a paper in Vilnius three centuries ago, when, like Warsaw, the city was politically bound to both of our nations, I would certainly have done it in the language of Cicero. Today, the lingua franca is not Latin, but Shakespeare's language. However, I think that at least the title of my paper could be contain two ancient maxims, both of which were used in a specific context. The first refers to the Roman heritage that so strongly affected contemporary legal culture in our part of Europe. Sailing on *Mare Nostrum*³ was the basic communication method, allowing the spread of the culture of Civitas – Rome. Nautical phrases and considerations will be the main axis of considerations. The second sentence refers to the experience of the Roman Catholic Church in regard to its constant need to adjust organisational structures, with the unchanged deposit of doctrine (science). Both maxims are recognisable elements of our common culture, and I think they form a good introduction to scientific reflection on the meaning of basic law and the constant preoccupation with keeping it current.

The keel laid under the construction of our two states' political systems is undoubtedly the same legal culture, dating back to the Latin tradition and saturated with the Christian vision of the dignity of every human being. The year 2017 saw the celebration of the 25th anniversary of the Constitution of the Republic of Lithuania of 25th October 1992. It also saw the 20th anniversary of the Constitution of the Republic of Poland of 2nd April 1997. Both constitutions, as binding normative acts, have already reached their "mature years". The basic laws of Lithuania and Poland have not been in force for as long as the Constitution of the United States of America.

¹ This speech was presented at International Scientific – Practical Conference 25th Anniversary of Constitution: Experience, Problems and New Challenges. The event was held on 27 October 2017 at the Parliament of the Republic of Lithuania. Conference organisers: University of Mykolas Romeris, Office of Seimas, Committee of legal affairs of Seimas, Ministry of Justice, Lithuanian BAR.

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³ For ancient Romans - Mediterranean Sea.

However, we should be proud of our constitutional tradition dating back to 1791, making it only a little shorter than the American one. The constitution of 3 May 1791 was the first constitution in Europe. Adopted for Polish-Lithuanian Union "for the general welfare, for the establishment of liberty, for the preservation of our country and its borders". This was done four months before the first French constitution.

Anniversaries, especially "round" ones, provide a good opportunity for summaries and reflections. Basic law certainly constitutes an anchor for the whole system of norms in force. If we will follow this nautical metaphor, it is worth asking where have our states anchored? Is it in a safe port that gives us a chance for growth? Or did either any of our countries settle in the shoals, with no economic significance and no hope for better times in the social field as well.

1. The immanent feature of the constitution, as a basic law, is its stability, which translates into the durability of the fundamental principles. The socially accepted axiological framework of the whole the state is based on these principles. It is therefore important to ensure the continuity of the norms, which is a different and higher requirement than just a simple stabilisation of the wording of its provisions. The change in the content of norms can take place through the intervention of the lawmaker and a departure from the current understanding of a formally unchanged provision. These two possibilities jointly determine the actual solidity of the normative text's regulatory meaning. The stability of constitutional solutions does not derive from a state's legal and political culture. It also stems from other factors – the assessment of the adequacy and fullness of regulation. The stability of constitutional solutions needs to serve the state and its citizens, and not *vice versa*.

2. The creator and the eventual addressee of all norms is always a human being – once in charge, once simply performing his own individual freedoms, rights and obligations. Without the cognition of and respect for their him, there is no possibility of either adequately establishing laws or of applying them skilfully and fairly – especially for purposes that can be harmonised with the common good. In turn, an inability to assess the effects of the creation of norms in a single, social or global aspect, will cause feelings of rejection, loneliness or injustice. As a consequence, this may lead to a challenge to the democratic mechanisms of the idea of the rule of law, even if they were not a cause of a bad organisation of social life. Eventually, the social order or even the state may be rejected. The legal order Order and the state would be equated with a system of oppression instead of being recognised understood as incoming the actual and important element of the this common good.

If the democratic state of law is aimed wishes to respect the common good (of which it is a constituent element), it must remember that it is obliged to accomplish all that comes with the dignity of every human being. The enactment of laws is just an instrument. That is important, but is not the only, nor even the most important factor in fulfilling these obligations. First and foremost, the public authorities need to conduct decent public policy.

The basic law must be an element of the properly understood common good. It is also a symbol of the sovereign will of the whole of society, not just the will of the state. It defines the fundamental rights and, at the same time, gives a perpetual guarantee for civil rights (compare with the preamble to the 1997 Constitution). It should be an object of pride for both its creators and its everyday users".

The constitution is a part of the common good. Destroying its authority must be considered as a negative action from public morality point of view. A conscious and public tearing it from authority must be considered a negative action. This is particularly the case when this activity is the result of the actions of a person who is in power that is based on and limited by a constitution. Such negative and ostentatious action should be seen as a depravation and a wrongdoing, especially because of the natural interdependence between the performance of a public function and the power of persuasion arising from authority.

Violations of constitutional norms are not indifferent acts from an ethical perspective. A violation of these standards is a manifestation of both the violation of law in general (as an element of the common good that shapes the social

order and peaceful coexistence of people and nations) and the violation of the social contract. In both cases, such an act cannot be considered neutral and should generally not be left without evaluation by the political community.

3.⁴ The Constitution of the Republic of Poland generally allowed the mechanisms of power to function properly until 2015. It also ensured the proper legal status of individuals in the state. Throughout the two decades, there was a tendency not to change the basic law. In mainstream constitutional law literature, it was hard to find any pronounced demands for the overall replacement of the existing basic law, with only some proposals formulated for modifications or improvements. This factor may confirm that the authors of the basic law succeeded in creating a tailor-made normative act. There were only two inconsiderable changes made to the text of the Constitution⁵.

4. The fundamental importance of the way a the basic law currently functions is, undoubtedly, its regulatory function. A threat to basic law would neglect its role as a useful normative act in everyday legal affairs. This function of this law is proclaimed under article 6⁶ of the Lithuanian Constitution and article 8⁷ of the Polish Constitution. The difference between the real meaning of our constitutions and part of its predecessor from soviet times is radical. This fundamental importance is not only noted by the central public authorities. Thanks to individuals' greater awareness of the guarantee role of the Constitution in general, the Polish Constitution entered into the judicial practice. Scientific discourse also equally influenced the normative meaning of the Polish Constitution. In this case, the self-invigorating mechanism of the exchange of ideas, corrected by jurisprudence, played the first fiddle – mainly through the work of the Constitutional Tribunal, the Supreme Court and the Supreme Administrative Court.

5. The further we move away from the moment of a the basic law's entry into force, the stronger and more stable the text should be. We also arrive at a point where we can question whether or not its provisions are up to date. The increasing pace of change in the reality surrounding us, the consequences of globalisation (including in the sphere of economic exchange), the technological revolution, and new civilisational and social challenges cause tensions between processes *processus* of the "fossilising" of texts of the basic laws and the response to changes in current needs. I would not ignore this dilemma. The specificity of a law as a system of norms the law not only raises questions about the preservation of its features of abstractness and avoidance of regulatory casework, but also limits its openness to interpretation and handicaps its flexibility to adapt to emerging challenges. A greater abstractness of the rules would allow a greater plasticity in interpreting the text. It helps to stabilise the text. A legal text will be stabilised as long as its interpretation gives results - norms - useful for resolving real public problems. , unless the acceptable range of interpretation is not exceeded. This relationship works in reverse too: the greater the specificity of the text and the greater the impracticability of the solution, the faster and stronger the need for intervention by the legislator.

This dilemma is also occur in Poland, where the Constitution is a very detailed text – and it is detailed in a some fields of regulation differentiated way, even in the traditional scope of regulation of the basic law. Nevertheless, the Polish Constitution covers regulation in a broad way is a broad regulation, referring to almost all branches of legal sciences.

6. Formal stabilisation of the text of Poland's basic law is accompanied by permission to redefine its concepts. These ideas had their own meanings and comprised the *acquis* achievements and the constitutional identity of Poland.

⁴ Some of the following parts of the text refer to text published in Polish (Zubik, 2007).

⁵ The first, forced by the Constitutional Court, introduced the possibility of the extradition of a Polish citizen in certain situations (Article 55). The second concerned extending prerequisites of passive electoral law that were ~~was~~ more of a political consideration of the quality of the political class (Article 99 (3)).

⁶ The Constitution shall be an integral and directly applicable act. Everyone may defend their rights by invoking the Constitution.

⁷ The Constitution shall be the supreme law of the Republic of Poland. The provisions of the Constitution shall apply directly, unless the Constitution provides otherwise.

Constitutional law doctrine should observe the reinterpretation of the provisions in the basic law. There is a question about whether it is necessary and desirable to confirm the practice of defending the original meaning of the terms used in the text for the basic law. This process will inevitably lead to rigidity in the text. There is also the question of whether or not we accept the process of actual interpretation of its provisions without amending it. The stronger the tendency to change the understanding of constitutional concepts, particularly with regard to the freedoms, rights and duties of individuals, the more inevitable the question about the borders of interpretation of its provisions by public authorities. This question would also arise in the context of the public trust and positive law passed by the authorities.

During the last two decades, meaning of the constitutional provisions of the Polish Constitution have been redefined without amendment of official text. This was especially in reference to the joining the EU. In the case of Poland, no revision of the Constitution has been carried out. Meanwhile, Lithuania adopted a new constitutional act on 13 July 2004.

It is important to point out that in the Polish Constitution, a departure was made from the classical ("existing") understanding of the consequences of the distinction between civic rights and human freedoms and rights. This distinction plays a significant role in the context of passive suffrage of non-Polish EU citizens in local government elections or the extension of civic rights to public information to the "everyone" (as a subject of rights) category. In the classical interpretation, non-Polish EU citizens would not have the right to vote or the right to public information. Without amending the text of the constitution, after a verdict of the Constitutional Tribunal (sign. K 18/04), in fact we have now a revised legal meaning of the norms of the Constitution. This means that the political context of EU accession had as so significant importance as a formal amending of legal text.

7. A constitution is both an anchor and a compass on a state ship. An anchor provides safety and keeps a state in place on a rippling sea of politics. The compass allows the state to set a safe direction, allowing the ship to navigate to the intended destination. Continuing the metaphor, the sailors are in turn citizens, not just passengers on board safely waiting for service; they are actively involved in their duties. The crew members are the public officials. The captain is the individual (or group) to whom the nation has entrusted the exercise of power. All these people contribute to the control of the ship and, recognising interdependencies, they can safely sail flow.

A basic law should indicate the basic values and principles that underlie the organisation of the political community, the state itself and the adoption of the constitution. It therefore sets the direction for not only interpreting its provisions, but also pursuing state policy. It allows to assessment of the compliance of all actions of organs of a state with this binding principle standards. It allows an assessment of the compliance of binding standards citizens and specific actions of organs of a state. In this sense, it plays a similar role to a compass. It indicates the desired direction for the legislator in establishing legal norms and appropriate actions be undertaken by the state authorities. At the same time, the expression of specific values and principles, when the law is applied in good faith, does not allow for a departure from democratic standards recognised in our circle of civilisation. However, the stabilising force of constitutional norms for maintaining the state's democratic system depends on the weakest element of the chain that holds the state boat. As experience shows, the a constitution itself, even the best-tailored one for a democratic society, when it does not conform to the level of the legal culture of a particular society, is unable to maintain itself in the calm waters of a democratic system that respects human dignity, the rule of law and the separation of power. As experience shows, a constitution itself, even the best-tailored one for a democratic society, when it does not conform to the proper level of the legal culture of this particular society, is unable to maintain itself in the calm waters of a democratic system that respects human dignity, the rule of law and the separation of power.

To ensure the proper place of the constitution in the life of the state, it must function in individuals' consciousness as an accepted social contract. Its content and commitments should be in force for everyone and have solid legal

grounding provide for the highest legal force in the country. Amending of a constitution is the procedure for entering into force a new legal norms and as social contract as well. Stabilisation of the text of the constitution, understood as not amending it, must at the same time preserve the identity not only of its general assumptions, but also of its individual solutions. This view sets the limits for the margins of interpretation of the constitutional provisions and, *inter alia*, for the process of redefining the terms it contains. These limits will not always remain the same: they will be different in a situation in which the process of redefining meaning of the terms of the basic law is adopted as a substitute for the procedure for making the necessary changes to the constitution without formal amending it. There is significant scope for intellectual interpretation of the provisions of the basic law by state bodies, mainly the courts and the Constitutional Tribunal. However, an important question remains: is this scope greater than the socially accepted level of modification of the basic law made solely through the process of interpretation? This question primarily relates to the norms that are considered an important element of positive constitutional consensus that allowed for enactment of the basic law.

8. *Necessitas non habet legem!* Sometimes the effective management of the state requires decisive action by its organs, but on the other side there is a problem of legality that the lawmaker must be aware of. This happened in Poland after the presidential plane crash in Smolensk in April 2010. This may mean the need to recognise certain rules of conduct even when it is difficult to find the related normative basis in the text of the basic law. A departure from the existing understanding of the norms of basic law because of its utility for the functioning of the state can only be justified under very specific circumstances.

9. There is no simple relationship between the assurance of stabilising the text of the basic law and the continuity of the state. Even the best-prepared text of basic law will not be perfect or sustained finite forever. Excessive tension between the model described in legislation and political and social reality is a threat to the real regulatory role of the a constitution.

Divergence between the assumed and real situation will sooner or later lead to deprive of role of a basic law and makes its as the assignment of a fake facade role. to the basic law, a This situation discrepancy that will be too visible and disruptive for individuals and . This is a simple way to depreciate its importance of a basic law in the life of the state.

The study of politics and constitutional law should be expected to cover an analysis and evaluation of the correct functioning of the constitutional system, and there should be a strict corrective mechanism in the state. Such mechanisms relate to the activities of state organs and to ensuring the use of the activity of groups of citizens in these matters. No less important is the acceptance by persons governing of a certain level of compromise. It is necessary to make any formal changes to the text of the basic law. Noteworthy Significant are the circumstances surrounding the political environment. All this conditions are necessary to preserve It is about the ability to build consensus in society and make essential ammendments in a basic law. If internal self-preservation mechanisms have not been developed, it will be difficult to make rapid and radical changes, even if it turned out to be necessary for the proper functioning of the state. In this case, it may be necessary to assess break down the possibilities arising from political processes connected with the entry into force of law amending the constitution. The right to initiate legislative measures does not mean the ability chance of capacity for constitutional reform of the state. Initiating of formal reform of a basic law does not give certainty of successful and quick proceedings of amendment of legal text⁸.

10. In our part of Europe, some increasingly disturbing phenomena can be seen, as if society were tired of the political side of the democratic system. It is undoubtedly necessary to remove all that may be is destructive from the perspective of ensuring a decent social order. The fact that the boat is moving cannot turn off vigilance and

⁸ See: 27th amendment to the United States Constitution, delays laws affecting Congressional salary from taking effect until after the next election of representatives, was proposed in 1789 but entered into a force in 1992.

constant concern for proper navigation and maintaining the right course. There is always a fear that the course is collisional, and then the state-owned ship will be more like the Titanic than the Mayflower. Both sailed in the same direction, from continental Europe to America, although at different times. The first remains a symbol of pride and fall, especially in light of its name; the second a symbol of a splendid human beginning, with a view to creating a new social order based on a social contract (the Mayflower Compact).

Conclusions

So the question remains open: has the science been able to establish mechanisms to determine where the rational limits of invariance of the text of a the basic law reside? The experience of succeeding in making or failing to change the state system is important. We should keep in mind the days of the birth of modern constitutionalism – that is, the end of the 18th century. Our common ancestors tried to make systemic changes in the fallen Polish–Lithuanian Commonwealth. The changes were made many times through procedural tricks, but these attempts did not allow sovereignty to be saved. This experience should take into account by our politicians, the law and the society of our countries.

We must beware of hasty recourse to the procedure of changing a the basic law. However avoiding this where a change is necessary can be harmful as well. Undoubtedly, the captain of the ship, whoever it may be, must want and be able to issue an order to raise the anchor. Firstly, it is desirable to know where he or she intends to lead the ship entrusted to him or her. Secondly, the captain he should choose the safest route to navigate. Thirdly, the chosen direction must be accepted by the passengers. But whatever happens and whatever obstacles we face, the ship on which we are sailing should not sink. Nevertheless, of all the obstacles the ship on which we are sailing should not sink.

References

- The Constitution of the Republic of Lithuania, 1992.
- The Constitution of the Republic of Poland, 1997.
- The Constitution of the United States of America.
- The Constitution of the Polish–Lithuanian Commonwealth, 1791.
- Zubik, M. (2007). *Navigare necesse est. Lex fundamentalis semper reformanda (Rzecz o niebanalności stabilności tekstu ustawy zasadniczej)*. In: *Problemy zmiany konstytucji* (ed. Chruściak, R.). Warsaw: Wydawnictwo Sejmowe, p. 235-253.
- Constitutional Act of 13 July of the Republic of Lithuania, 2004.
- Judgment of the Constitutional Tribunal of the Republic of Poland No. K 18/04, 2004.

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