Toruń, 28/09/2016

Wojciech Włoch
ul. Gagarina 45/106-107
87-100 Toruń

Abstract

The concept of the constitution
in the light of the normativist and normative theory of law

The subject of the thesis is the concept of the constitution formulated within an antinaturalistic theory influenced by the philosophical thought of Immanuel Kant. The first discussed theory is the normativism of Hans Kelsen, which is associated with the thesis of the possibility of evaluation-free description of legal norms, not limiting them to facts. The second theory is the normative theory of political liberalism of John Rawls, formulating essential elements that the constitution should contain. The Kant's concept is *tertium comparationis* for the analysis of the following work, because it formulates the basic theses of the antinaturalistic theory and determines its structure. These theories relate to different aspects of legitimacy of law, namely the validation of applicability and legitimacy of law. The first answers the question why law can be seen as objectively important, while the other, what values and principles it should pursue. In both theories the constitution is indicated as a legal act being respectively the basis of law applicability or justice of law and of fundamental institutions of the state. The primary thesis of this work is therefore the thesis about the dependency of the concept of the constitution on the resolutions on the level of morality theory.

A hearing is purely theoretical. It primarily refers to the concepts, principles and arguments developed by the creators of the above-mentioned theory, in particular to the way in which they answer the question "What is the constitution?". The method adopted in a hearing can be described as a reconstructive and argumentative one. Reconstructive, as it based on the analysis of the terms, concepts, and ideas contained in the studied theories. However, its purpose is not only to restore them in a historical form, but to present the proper way of argumentation for them, allowing to answer the questions posed in a hearing. The Penetration into the studied way of argumentation is about to lead to an attempt to provide

solutions to posed problems. The textualistic method was adopted in the research, involving the analysis and interpretation of source texts, which, however, are regarded as a certain way of argumentation and recognized from the perspective of the contemporary philosophy of law. The subject of deliberations in the first chapter is the philosophy of law by Immanuel Kant, which accurately and systematically expresses the idea of distinguishing the realm of facts and norms. It is, therefore, the reference point for the theories that respect this distinction. In the first section we present the antinaturalistic theory of Kant and the concept of morality resulting from it. The Kant's philosophy of law, deliberated in the second section, is somehow a consequence of a particular theory of the moral subject. On the one hand, it is considered as an empirical being, and on the other as intelligible. A codified law expresses a substituted duty as long as it complies with the laws of reason, and fulfils its regulatory functions by applying coercion. A state system is only then legitimized morally, when it allows the implementation of the natural rights of a man as a rational being. The concept of the constitution, dealt with in the third section, is a rational idea from the point of view of the practical philosophy of Kant. The main issues which arise from the antinaturalistic perspective described by the philosophy of Kant, is the question of the relation of the normative idea of a system to the socio-political reality and the status of juridical science, and thus questions about the binding force of a normative assessment of a state system and the nature of statements that describe a system. Therefore, the antinaturalistic theory adopts a concept of moral subjectivity and the theory of morality (Section 1), which determines the concept of law and the general concept of interpersonal relations (Section 2), which in turn affects the concept of the constitution, developed within its framework (Section 3). Some difficulties associated with the standpoint of Kant open the theoretical possibilities within the framework of antinaturalistic theories that are developed in the theories of Hans Kelsen and John Rawls (Section 4).

The Kant's *respublica oumenon* is a kind of a system implementation of the normative concepts of law, and thus the idea of an autonomous entity. "Constitution of Pure Republic" defines the standard model of a political system, in which free individuals are treated as an entity legitimising legislation and political power. However, the Kantian sharp distinction between phenomenal and noumenal world, the individual as an empirical and intelligible being, does not allow to determine a simple dependency of the first sphere on the other. From the empirical point of view, we can describe an existing political system, but from the normative perspective (practical reason), evaluate it. However, Kant argues that the normative evaluation of law or the principles of a political system does not affect the need to comply

with them. Thus the antinaturalistic theory risks the danger of playing the role of an ideological supplement to the empirical need to comply with a political system and legal requirements. In order to preserve the validity of the distinction between facts and norms, the antinaturalistic theories can either introduce the reasonable concept of non-empirical descriptions of norms, or such a concept of normative ideas of the right (just) system that would not be fully pure and a priori. This would require a reformulation of the initial idea of the moral personality, the moral theory and the concept of society. It would therefore lead respectively to a particular theory of norm descriptions or their assessment. Within these different theories, other concept of the constitution comes to the fore, as well as various ways to determine the status of political principles expressing the idea of an autonomous entity (interpreted as a principle of democracy). Therefore, the normativism of Kelsen tries to justify the possibility of an objective description of norms, while the normative theory of Rawls to develop binding criteria for their evaluation. The concept of the constitution which results from them is somehow subordinated to their general theoretical intentions.

The subject of the discussion of the second chapter is the analysis and interpretation of normativism and its assumptions. The starting point (Section 1) is a critique of moral theory of Immanuel Kant and the related concept of law. Hans Kelsen somewhat radicalises the principle of moral autonomy. Based on the distinction between the realm of facts and obligations, normativism develops a theory of morality, which does not assign features of "objective truth or validity" to moral pronouncements, therefore rejects the moral criterion for the validity of law (Section 2). The lack of an absolute moral criterion validity leads to an ascertainment of ethical relativism and the recognition of democracy as the system compatible with the thesis on the relativity of moral norms (Section 3). Yet, an objective description of legal norms is possible provided that moral issues (equity, justice) are totally disregarded. It is focused on the question whether the norm is important. Therefore, it strictly refers to legal issues, i.e. whether the establishment of a specific norm is governed by a different legal norm (Section 4). Adopting the perspective of the description of norms, a researcher of law abstracts from both socio-political as well as moral/ideological issues. We can assume here that in a given legal system there is a specified norm in force without the necessity to evaluate it or to place it in a political context. The evaluation is relative, and the description objective.

An objective description of norms does not mean that you can give an objective interpretation of the content of a specific norm, but that such description applies to an objectively valid norm. Therefore, it refers to a norm established by an act governed by a different legal norm. In this way, regardless of the evaluation of a given norm, we can assume

its validity. Dependency of the validity of legal norms on norms of common sense justice would lead to a total subjectivity, because they express only subjective attitude (emotions) of evaluators. Assuming the relative nature of the common sense justice norms, normativism states that it is possible to describe \law objectively with various subjective attitude towards it, i.e. the assessment. From the mathematical point of view, the assessment of law both in an absolutist regime, and a democratic one, is relative. A possible advantage of democracy is that it accepts this variety of assessments. Therefore, especially in a democracy, a normativist ascertainment of objectivity of legal norms is important, because absolutism can provide stability and certainty of law by means of political force. Democracy needs a common point of reference that allows ascertaining the validity of legal norms. The issue of the objective validity of norms leads us to legal norms underpinning the validity of other norms, which allow us to ascertain the objective legal validity with various assessment of their content. Therefore, this leads us to the specific structure of a legal system and the concept of the constitution which is the foundation of the objective validity of norms.

The subject of our interest in the third chapter is the normativist concept of the constitution. It is closely connected with the problematic aspect of the objective validity of law. Our deliberations start from the analysis of the general structure of a legal system, the important feature of which is its dynamic nature (Section 1). The validity of lower norms is to authorize the acts of their establishment by higher norms. The concept of the constitution in legal and logic terms is a norm that determines the validity of other norms, without being conditioned by itself (Section 2). It is the norm assumed by the science of law, and not established by an act of will. Conversely, the constitution in the positive and legal sense, which is the highest act of law in the hierarchy of positive law acts, which defines the lawmaking procedure (Section 3). An important function of the constitution is the establishment of the legislative process. From purely a legal point of view, it cannot be determined which procedure is more or less correct, more or less valuable. Such ascertainment requires going beyond a purely normativist perspective. Nonetheless, referring to ethical relativism, underlying this theory, we can point to democracy as the system most compatible with the diversity and relativity of ethical attitudes and political ideals. Going beyond the purely formal and procedural perspective, we can point to the specific rules, which allow realising the ideal of autonomy of an individual in a political practice (Section 4). From the point of view of normativism, it cannot be ascertained that the democratic system is fair or fairer than others, but only that the system is democratic because meets certain criteria.

The normativist concept of the constitution in each of the dimensions described above raises the question of the objective validity of law. An important function of the constitution is an establishment of a normatively legitimized lawmaking procedure. Both from the purely legal and political point of view, the constitution defines the procedure for lawmaking. From *legal man* perspective, one cannot perform any evaluation, but can only give a description of a specific procedure, while a political idea provides the principles and values according to which such a procedure should function. However, ethical relativism based on emotivism does not allow normativism to determine that a certain type of system is fairer and equitable than others. Kelsen merely states that democracy is compatible with relativism. Individual freedom, realised in a democratic lawmaking procedure and resulting from the principle of autonomy, is a fundamental value for such system. The ascertainment of compatibility does not mean, however, that a normative claim that democracy is objectively correct and democratic law has a greater binding force, is justified. Any law established in accordance with the constitutional procedure is an objectively important law, and its positive or negative evaluation, due to rules and political ideas, has only a relative value. It can be concluded that the normativist concept of a material constitution is compatible with democracy, and democracy itself is compatible with the philosophical foundations of normativism. It does not translate, however, into justification of the validity of the principles of a democratic system. The ideal of democracy, from this point of view, can only be applied as a criterion of a political system identification, and not its evaluation. When interpreting the norms of a democratic constitution, *legal man* cannot assess the "degree of democracy." This type of evaluation requires the adoption of a different theoretical perspective.

The subject of the discussion of the fourth chapter is the theory of justice and the assumptions developed in the framework of political liberalism of John Rawls. It is a different type of theory than normativism, continuing and reinterpreting the Kantian antinaturalism. As in the case of the theory of Hans Kelsen, we start from the analysis of the theory of the moral subject. Political liberalism significantly restricts the concept of autonomy and adapts it to the political question of the system allowing for its implementation (Section 1). Basing on the political idea of autonomy, the political liberalism develops a theory granting primacy to the principles of justice over specific concepts of good, adapting the concept of social contract for this purpose (Section 2). They can provide a common ground for people adopting different conceptions of good and striving for different goals. In the third section, the subject of our interest is the idea of a society adequate for a political system implementing the idea of democratic autonomy, characterized by the fact of rational pluralism. Political liberalism

formulates a thesis that the essence of a democratic constitution is the power of free and equal citizens who affirm a shared political conception of justice from different points of view. Political liberalism is a normative theory, which is aimed at impartial principles of social co-operation within a democratic system, which can be formulated regardless of various doctrines and interests dividing citizens (Section 4). It is not strictly a priori theory, because it refers to the ideals contained in a democratic culture, and therefore its range is limited. On the other hand, the relationship with democratic beliefs, rooted in a society, makes the principles of a democratic constitutional system considered binding within such society.

From the perspective of political liberalism, a democratic constitutional system is based on a concept of free and equal people adopting different conceptions of good and striving for different purposes. The concept of democratic citizenship involves emphasizing the importance of moral ability of individuals to affirm the principles of co-operation, recognized as legitimate, and grant them priority. In the framework of rational pluralism, characteristic for a democratic society, these principles can serve as a common reference point for assessing the legitimacy of the functioning of the basic institutions, and when they are socially recognized and respected, can serve as principles of a well-furnished democratic system. To be able to fulfil such a function, they cannot be a simple expression of a particular conception of good or a moral and political doctrine. They should be perceived as fair, regardless of the doctrines espoused by citizens and the adopted goals of their activity. The rules defining the basic institutions of the constitutional democracy should not be a reflection of one of the many intelligent political doctrines existing within a heterogeneous society. Therefore, they cannot constitute principles perceived as - criticized by Hans Kelsen - the objective laws of nature, but as the principles of equity acceptable to the representatives of the various doctrines that express the strictly political values.

The normative concept of the constitution, discussed in the fifth chapter, developed by political liberalism, refuses the possibility to derive the principles of a democratic constitution from a certain concept of rights and principles recognized as objective. It states, however, that it is possible to present them as a result of the procedure, which somehow reflects the political freedom and equality of individuals (Section 1). The principles of justice achieved through the use of this procedure can serve as an impartial criterion for the normative legitimacy of a political system. The principles of justice arrange the basic institutions of a democratic society, and their lexical order allows assigning a priority to them. In the context of pluralism, in order for them to effectively regulate the functioning of the basic institutions, a partial consensus limited to the political realm should take place as to their validity (Section 2). The

designation of such realm, and a consensus on the principles of justice regulating it, is the axiological foundation of stability for the democratic constitutional order. Political liberalism formulates the liberal principle of legitimacy of political power, which is based on the compliance of its functioning with the essential elements of the constitution (Section 3). They express the rights and freedoms which may constitute a core of partial consensus guaranteeing the stability of the political system and moral legitimacy. Whereas the justification of their primacy results from the importance of the first principle of justice (as defined in the first section), which somehow determines the scope of the fundamental structure of a democratic society governed by the constitution. Democratic constitutional system based on a partial consensus with reference to the essential elements of the constitution, makes a political system stable and a democratic political debate can be conducted in a deliberative form (Section 4).

Political liberalism claims that the condition of stability for a democratic system is to base the constitution on the principles being the core of a partial consensus of intelligent extensive doctrines. The functioning of democratic institutions can gain a broad affirmation when they respect and guarantee the essential elements of the constitution, to which the principles of justice ascribe absolute priority. The presumption of the possibility of the occurrence of the above partial consensus is that it expresses the freedom and equality of citizens as moral individuals. The value of political autonomy is an immanent element of a political culture focused on dialogue and understanding. Both the basic constitutional principles and procedures for shaping political will, can only be regarded as democratic, if they guarantee subjectivity to citizens and allow for their participation in the legislative procedure. Therefore, the stability and adequate functioning of a democratic system consists primarily in a social affirmation of the constitutional principles, and not only in such and no other legal shape of state authorities. According to liberalism, the constitution will only be civil when it provides a specific set of fundamental rights and policies to citizens that will be seen by them as just. However, it will only then be stable when the principles of justice, expressed in the constitution, are not only affirmed by individual, but a special primacy is assigned to them. In other words, they must occupy a special place in a civic political culture. Democratic constitution shall obtain complete stability only if its basic principles become part of a broad agreement-oriented political culture. This does not mean that political conflicts should be seen as evil within the framework of democracy, but should be solved within the logic of coming to terms and openness to arguments, and not within the logic of conflict and

the absolute desire to force through own standpoint. A partial social consensus, as to the essential elements of the constitution, determines its real impact on political practice.

The deliberations contained in chapter six are summarising. In the first section we analyse the distinction between descriptive and prescriptive concept of the constitution, which allows linking normativism with the first concept, and political liberalism with the other. Assuming that both, the theory of Hans Kelsen, and of John Rawls accept the reinterpreted Kant's idea of autonomy at the point of departure, we try to summarize how they incorporate the problem of a democratic constitution. In the second section we find that the normativist concept of the constitution should be understood as a Weberian ideal type, which can be supplemented by certain political issues, and with the knowledge that such supplementation goes beyond the purely descriptive theory. The third section refers to the normative concept of the constitution developed by the normative theory of Rawls, which emphasizes the civic point of view and the importance of a political culture. In it, we suggest the interpretation of this theory as the one formulating a practical regulative idea, stemming from a political culture and binding social actors within its frames. At the end (Section 4) we answer the question whether it is necessary to adopt the normative perspective of a citizen in the issue of a democratic constitution (prescriptive concept of the constitution), or can we just limit to a purely legal perspective *legal man* (descriptive concept of the constitution).

The concept of a democratic constitution expresses the idea of a normative system that guarantees the subjectivity of individuals allowing them to affect the legislative procedures. It, therefore, realises the ideal of autonomy. In this sense, without a normative component, a democratic constitution would be one of the many "lawmaking methods." Starting from the Kant's idea of autonomy we can say that the essence of a democratic system is to establish conditions for its implementation. According to John Rawls, this requires the existence of a partial consensus on the essential elements of the constitution defining the fundamental freedoms and forms of participation in political processes. However, we also need, as indicated by Hans Kelsen, a theory which explains why the norms, contained in the constitution, are themselves an important objective law and authorise acts of lawmaking regulated in it. From this point of view, the constitution is valid as long as its establishment is authorised by other norms, while it authorises the establishment of sub-constitutional norms. From the point of view of normativism, the essence of the constitution lies in establishing an authorised legislative procedure, whereas the normative theory presents ideas that it should pursue. The constitution is not democratic, if it does not provide the subjectivity of individuals. This requires not only a formal guarantee of rights and freedoms, but also the

realization of their importance in the attitudes and beliefs of citizens. Firstly, a democratic constitution must be civil, and secondly objectively valid. Its actual functioning in a political culture allows for the integration of the two dimensions of the "obligation nature of the constitution", thus being an objective law that should be observed because of its inherent value resulting from the adopted democratic axiology.

The simplest summary would be a statement that the normativist theory of Hans Kelsen emphasizes the formal aspect of the constitution, and its purpose is to establish the terms of its objective description. The theory of John Rawls instead focuses on an essential aspect, and its purpose is to formulate acceptable criteria for the evaluation of its legitimacy. We might say that the pure theory of law clarifies the possibility of a normative way of interpretation *respublica phaenomenon*. It rejects the normative question about the legitimacy of the constitution and is focused on its function for establishing the foundation of the validity of the socially effective hierarchical system of norms (the law is precisely this type of system of patterns of behaviours). Normativism assumes the point of view of an observer who is interested in learning the norms and in their description. With such outlined perspective, the constitution is an act that allows an observer to identify the legal system and to determine its scope, to later be able to focus on the description of its contents. Political liberalism of Rawls adopts the perspective of a citizen. It reconstructs some general characteristics of individuals as citizens, which constitute the basis for the derivation of normative criteria for the legitimacy of the constitution. From this point of view it is important not only that law effectively regulates the behaviour of recipients, but also determines what features can be assigned to them to prevent law from being a purely external coercion, and to make a system of norms that can be recognized as legitimate (acceptable). Otherwise - law will only be a social technique, and not a plane integrating various forms of social life. Therefore, the normative theory assumes a certain conception of an individual and a well-organised society. The constitution would not only constitute a system of important norms, but above all, a political system acceptable to the citizens. From the "civil point of view", it should express a specific concept of a just system.

The concept of the constitution is, within the frames of the above theory, somehow determined by the concept of a moral person and the nature of an evaluative judgment. Both theories are based ultimately on different conceptions of an individual, and to be more precise: interpret the principle of autonomy differently. When we assume that all commitments unsupported by coercion are the result of an autonomous decision (or so should be treated), and their nature is purely subjective, then it is difficult to argue that under the

constitution it is necessary to establish the principles that express the concept of free and equal citizens. From this point of view, strictly legal issues, of which one can be certain, should be distinguished from moral and political issues of relative and subjective nature. It is different when it adopts a pluralist thesis that the diversity of views and attitudes is a standard consequence of the use of reason in the framework of institutions guaranteeing freedom. This does not mean that individuals cannot be attributed to the general and common features, such as rationality and reasonableness. Consensus as to the principles of a democratic constitution is possible if social actors recognise pluralism as a non-transferable fact, and renounce the use of violence as a tool to address philosophical and political issues. This assumes that citizens limit their claims about the correctness of their own views and recognition of their interests. In such conditions, constitutional principles can fulfil the role of acceptable self-limiting principles. From the normative perspective, a democratic constitution will be stable when the rules will result from a partial consensus of extensive doctrines. Therefore, it formulates the condition of constitutional principles deeply rooted in the differing beliefs of citizens. Otherwise it will only be *modus vivendi*. You could say that Kelsen formulates minimum conditions for the functioning of a democratic constitution in the form of a compromise, while Rawls maximum conditions.