

LAW-GOVERNED STATE IN THE LITHUANIAN CONSTITUTIONAL DOCTRINE (1918 – 1940)

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Abstract

How must the state life be organized to ensure right protection of all the people and realization of the rights? Striving this aim, it is orienting on a law-governed State model which is formulated as the long-term and strategic ideal of the State's development in the preamble of 1992 Constitution of Republic of Lithuania. While analysing the current constitutional regulation and searching for the methods to improve and resources to strengthen the constitutional system, researchers of the constitutional law look for the background information in the most recent legal experience, EU constitutional tradition and even more – in the experience of constitutionalism in the entire world and Lithuania. The reason is simple – it is Western tradition where the concepts of the constitutionalism, democracy and rule of law gained their true meaning. The idea and practise of law-governed state is the product of the capitalistic epoch in essence. It developed as an organized effort of a citizen to restrict the self-will of the State authority with respect to his rights in the Western Europe and America. This trend evolved from the legal state to the law-governed state (rule of law) and, finally, to the social state or the welfare state. A conscious realization of law-governed State model is based on the knowledge what kinds of measures of human rights protection it disposes and what the possibilities of those measures to reach this aim were in Lithuania. This article is an attempt to revise a tradition of the European constitutionalism and assess its impact on the Constitutions of the first Republic of Lithuania (1918-1940), to discuss application of the European constitutional heritage while developing the constitutional provisions in Lithuania. Moreover, it analyses (in the context of the European constitutionalism tradition) the Lithuanian scientific heritage related to theoretical and practical issues of the constitutionalism. It is analysis of scientific, national and legal experience of the Western European countries of 19th-20th century that the Lithuanian legal scientists referred to in their attempts to create a model of a perfect state under the rule of law. They also reviewed ideas of the constitutionalism that evolved into the constitutional provisions of the independent Lithuania in early 20th century.

Keywords: law-governed state, rule of law, constitutionalism, human rights.

1. Introduction

In the course of drafting both the provisional and full-fledged Constitutions of the Lithuania of that time, which were the legal basis of the former state and which created preconditions for the Lithuania to gain experience in constitutionalism, one applied the experience of European constitutionalism, as well. Professor Alfonsas Vaišvila (2000, p. 216) stated that “ideological link to the doctrine of the legal nationalism of Lithuania of 16th century has been terminated therefore the generation of that time in Lithuania had no opportunity to search for the ideas of the state under the rule of law in the legal tradition of the nation. This generation had to discover such ideas in the course of examination of the logics of democratic order and legal experience of the Western European countries of that time”. The notion of individual elements of the constitutionalism, as presented by experts in law, was in line with the contemporary trend of liberalistic interpretation of philosophy, school of innate rights and rules of solidarity of society, which prevailed in Western Europe. The conception of law-governed state concentrated an attention not to the form of Law, but on the matter of it. It tried to restrict the freedom of actions of the authority not by the statutes which were promulgated by the state, but by the human values (life, health, freedom and etc.) which would not have to be infringed by the state legislation. The conception of inborn human rights arose from the ground of a recognition of the independence of these values on the State authorities; this conception had to become the matter of the newly understandable law and also the objective foundation of the restriction of the authority will. The state must develop as the political organization which must recognize, respect and guarantee a realization of these inborn rights. There it means that the legality

had not to be any, but only such which matter consisted of the real respect to inborn human rights. Constitution was perceived as an approved by the nation supreme law (written legal act) that restricts the power – the law that is based on priority of the citizens’ rights and division of power. The first full-fledged Constitution of the State of Lithuania of 1922, as adopted by the Constituent Assemble (the Seimas), “has finalized the temporal nature of the national political institutions and laid a constant constitutional foundation of an independent Republic of Lithuania” (Mackevičius, 1991, p. 70). M. Romeris (1990, p. 123) has attributed this Constitution to the tradition of constitutional regulation, which comprised Finland, Estonia, Latvia, Lithuania, Poland, Czech Republic and Germany.

2. The state as the organisation protecting human rights

The Lithuanian Constitution of 1922 was based on the provisions of the liberal philosophy, which was popular in western countries at that time. These provisions declared that the state has the purpose – it was creation of welfare for its citizens. The state is an instrument rather than the purpose. In other words, the power of the state may not interfere in the innate human rights, therefore the state and its law is aimed not only at regulating relations of individuals, but it should also restrict and regulate the power of its own. By such provisions, that mean respect to human being, one recognises equality of persons and their freedom of decision and declares that the rights of a person restrict the rights of the state, that the state must refrain from interfering in a certain spheres of life and ensure a free space for activity of an individual.

Recognition of human rights and security of them are directly related to the democratic order, which is entrenched in Article 1 of the 1922 Constitution (the State of Lithuania is the independent sovereign democratic country) and political democracy of Western Europe. According to J.Varnas (1978, 2 (40), p. 47) “democracy that is perceived in a wider sense is a way of life that is based on social justice, recognition of human value in every person, equality of people and love of survivors. It is also a moral duty to respect a person and a personality”. In the Constitutional acts of 1922 and 1928, according to J. B. Laučka (1985, 3, p. 146), advantage is given to the person, citizen, resident besides his fundamental rights are ensured. In order to regulate the legal status of residents the Constitution of the State of Lithuania (1922) has a separate Chapter II “Lithuanian Citizens and Their Rights”. Human rights are listed in the beginning of the Constitution and Chapter I sets forth only the basic principles of the State. A part of the rights is consolidated in other chapters of the Constitution. For example, electoral right, opportunities to restrict the rights are listed in Chapter III called “The Seimas”, principles of election to local government bodies – in Chapter VI, rights of minorities – in Chapter VII, social and cultural rights – in Chapters IX, XI and XII. Articles 10 to 21 of the Constitution are devoted to political and civil rights of a person: declaration is made of equal rights of citizens irrespective of their sex, origin, religion or nationality; immunity of a citizen (a person); immunity of apartments of the citizen; freedom of religion and conscience; confidentiality of correspondence, communication by mail, phone, and telegraph; freedom of speech and press; freedom of assembly; freedom of movements and unions; protection of ownership rights (when property may be ceased only further to the law and only in the event of public necessity); citizens’ right of petition; right to bring charges against an official who caused harm to a citizen and to claim damages; citizens’ right to initiate law-making procedure. Cultural rights are the following: right to education, which is entrenched in Article 81 of Chapter IX “Education Matters” of the Constitution, and minorities’ rights, which are listed in Chapter VII.

The list of civil and political rights, which is presented in the Constitution, is traditional to the contemporary constitutional doctrine and has a link to the provisions of the French Declaration of the Rights of a Person and a Citizen of 1789.

3. The state as the welfare organization of all citizens

When assessing a catalogue of human rights, which is formulated in the Constitution, one should pay attention to the fact that the Constitution declared not only the basic civil and political rights, but paid attention to the social rights, as well. Social and economic rights, which were linked through the constitutional regulation to Weimar constitutional ideas of 1919, are announced in Chapter XI “Fundamentals of the Economic Policy of the State” of the Constitution; freedom of employment and initiative, protection of workers in case of illness and old age, accidents and unemployment – Chapter XIII “Social Security” – is to be regulated by law. Laws also protect health and social welfare of a family. Moreover, they grant security to honesty and good health of society.

When analysing the compliance of human rights, as determined in the Constitution of 1922, with economic and political theory of liberalism of 18th and 19th centuries, in his publication “Issues Related to Lithuanian Constitutional Law” K. Račkauskas stated that authors of the Constitution in some cases deviated from the classic liberal philosophy towards socialistic ideas of Catholics, nationalistic ideas of peasantry, and social ideas of social-democrats. This deviation was made in order to reflect the true economic and social situation of the State of Lithuania. In Lithuanian economy agriculture was of utmost importance. Therefore in Paragraph 90 of the Constitution (1922), along with the concept of economic liberalism, which determines that land management is based on the rules of private ownership, one has stressed that “the State retained its right to regulate land management so that proper conditions are created for prosperity of correct agricultural production, and especially small and medium farmers. Estates are sold upon procedure determined by law”. In this case the State decided to regulate the size of agricultural units and to give priority to small and medium farmers, and to eliminate big agricultural units – estates. The second important intervention by the State was projected in the labour sector. According to the Constitution (1922) the State itself was the owner of some agricultural and industrial units. It took care of the employees and also protected and safeguarded the very employment – along with standard freedom of work and initiative that was in line with the liberal concept, which may be restricted only by law and only in the event of “public necessity” (Article 88), Paragraph 97 of the Constitution (1922) declared that “by separate laws the State protects an employee in case of illness, old age, accidents and unemployment”. The said “deviations” were justified by K. Račkauskas (1967, p. 72), who referred to the circumstances which were characteristic to Lithuania at that time – actual economic situation in the country. He also referred to the fact that in non-profitable but necessary economic sectors the State had to take its own initiative and regulate the economic activity. Besides, he noted the catholic social doctrine, which was against liberal approach and which was followed by the Christian Democratic Party, Union of Farmers and Federation of Work – the Christian Democratic Wing of the Constituent Seimas that held the majority. They demanded the improved conditions to workers and their families and drafted the boundaries of freedom. Private property was recognised to the inherent human right. But, according to Catholic part of intelligentsia, there are not only rights, but duties also, which are imposed by the very possession of property. The right to private property was considered to be especially important factor, which encourages the cultural activeness of a person, which results in social progress and evolution of the society. The idea existed that along with the scope of property the freedom of a person increases and his dignity becomes secured. Members of Christian Democratic Party considered the principle of justice to be the organiser of social life and the foundation of law. Justice in the relations is especially important to human co-existence. Every individual strives to participate in universal exchange in assistance and seeks for physical and moral perfection. In this respect one of the forms of justice – the distributive justice – becomes of special importance. It may be construed as a balance between the things that one gives and gets in return. If this balance turns weaker, a social inequality appears. According to A. Kaupas (1911, p. 352), property is important in psychological aspect as well, because this is a factor that

educates and individualises a person, helps him to develop such characteristics as consistency, sophistication, precaution, and responsibility. Therefore property is just an instrument rather than a purpose – as declared by the liberals. It should not be turned into a purpose without taking due account of the measures applied. For this reason everybody should be entitled to possession, private property was considered to be inherent, and, according to the representative of the Catholic thought – the lawyer J. Žagrakalys (1936, p. 286), the inherent right is the right of sense, which corresponds to the nature, which is seeded in the mind of every human being, which is unchanging, ever lasting. K. Šaulys (1910, p. 62) noted a public nature of the property and its social function. A stress was made on the fact that the right to have property is inseparable from the liability for consequences of its utilisation against another person and society. They claim that the private property is inter-related with human existence and is the foundation of maintaining such existence and providing for himself and the family. The private property was treated not only as an instrument for flattering the normal ego, for ensuring the material independence, but also as the major instrument for meeting the need for security, which is of special importance to family in the first place. The fundamental law of nature requires that parents provide their children with anything necessary for subsistence and education; the very nature implanted in a person a wish to guarantee future to the children and to protect them from misery (Paltarokas, 1921, p. 80). S. Šultė referred to encyclical letter of the Pope Leo XIII “Rerum Novarum” and claimed that the property does not only grant to its owner the right to hold it, but also imposes certain social duties on him, namely the duty to care about welfare of members of the society. It is not profit, but serving the public, which is the true mission and duty of the owner. Nobody may relieve the owner from it. This duty is discharged by the owner not like a charity, but like a social obligation. S. Šultė (“n.d.”) proposed to grant legal power to discharge it by means of law. It may be done through taxes. For example, K. Šaulys (1910, p. 59-60) believed that workers may acquire the right to property by becoming shareholders of the company. K. Račkauskas (1967, p. 72) stated that the said deviations from the liberal system in 1922 Constitution “in terms of the entire economic and social life of the Nation were a sort of insignificant and the whole system remained liberal.”

Constitutions that are based on liberal philosophy have a certain characteristic – the legislator is free only within the limits that are set by the constitution. The Constitution of 1922 (Article 3) also reads that any law, which determines contrary, shall be null and void. This provision, according to Dr. P. V. Raulinaitis (1953, 1 (10), p. 34), prohibited the legislator from adopting laws that restrict citizens’ rights and narrow their freedom. “In other words, the Seimas was prohibited from passing the laws that cross the boundaries of the basic constitutional provisions, restrict the citizens’ rights and narrow their freedom, or become expressed in appropriation by the government of too many powers and failure to follow the constitution or effective legislation.” Opportunity to restrict citizens’ freedom and other human rights by virtue of law, while believing that the law may be adopted only upon consent of representatives of the citizens, according to K. Račkauskas (1967, p. 66 – 67), meant that it was solely the citizens who had the opportunity to restrict their fundamental rights. It is important to note that the grounds for restricting the use of the constitutional rights were democratic in the Constitution of 1922. They were in line with the contemporary approach to human rights and dominating doctrine. It provided that the citizens’ rights may be restricted only by law and only for the purpose of protection of the public interests. Article 32 of the Constitution provided for a possibility to restrict certain rights in the event of war, riot or other dangerous turmoils in the State. The legal self-dependence was linked with the creation of legal mechanism for the aim to protect personal rights against the abuse of the authority and unsocial individuals and for the restoration of those rights if they would be infringed. The role of the state, organising the realization of personal rights especially when the person because of the objective reasons wasn’t able to use his rights, wasn’t specially emphasized. The ideology of Lithuanian state declared the most of the principal ideas of law governed state:

it was widely operated with the idea of national sovereignty; the centre of the relation state- citizen was transferred from the state to an individual considering the state organization protecting human rights. There were discussions on the concept of law-governed state, the “just statute”, the formal (lawful) and pithy (democratic) models of law-governed state were recognized (often the legal state was identified with law-governed state); there were debate for the relation of nature law and positive law, the separation of powers, the legal positivism and its method were criticized. Much attention was paid to the administrative and constitutional control, of the activities of state authority; it was offered to find the solution of the problem rising from the responsibility of state officials for damage caused by their illegal actions; the legal grounds of such responsibility were formulated; the other problems, which were dealt with the conception of law-governed state, were widely discussed (such as on: liberty and the authority, the relation between legal and economic equality, the role of corporatism while providing the universal welfare, the possibilities of various social or economic systems (capitalism and socialism) to ensure the protection of human rights. The future Lithuanian economic-social system was dealt with synthesis of capitalism and socialism. According to S. Šultė (1919, p. 33), the Catholic sociologist, capitalism and socialism – these are two phases of development of the state on its way to the state of welfare. Therefore the order of modern state should be based on the synthesis of these two extremities: the truth lies in the middle between two extreme theories final order of the people will be the one that unites individualism and collectivism, freedom of a person and his initiative in public matters. This order will be based on synthesis of capitalism and socialism and will preserve the viable principles of both orders.

It is important to note, it was tried to develop the legal state towards the social self-dependence on the theoretical grounds of the necessity of the social policy, increasing the number of owners in the way of share capital increase. These measures were considered as one of the most important factors while forming the middle stratum of the society – the social basis and guarantee of law-governed state. It was considered that the corporatism was the strengthening of the protection of personal rights which used measures of the collectivism, and the corporative law was interpreted as the alternative and base for the positive law.

4. Corporatism as the background of law

Constant crises of the governments and conflicts between the parties incited the idea that one must change the constitutional provisions and strengthen the power of the head of the State. This was implemented after the revolution of 17 December 1926, because the Constitutions of 1928 and 1938 consolidated the authoritarian regime. In the Constitution of the State of Lithuania of 1928, which was adopted through a non-constitutional octroed act of the President and which was sometimes referred to as the Provisional Constitution (Mackevičius, 1991, p. 71), continued with treating Lithuania to be a democratic state, in which “power is vested in the Nation”. Provisions of the Constitution (1928), which was effective for ten years, related to citizens’ rights did not formally deviate from the previous Constitution (1922). According to M. Romeris (1990, p. 298 -299), human rights were formulated with minor changes and were almost identical. In the third decade of 20th century, when political situation changed and authoritative regime gained its power, the scientific doctrine has transformed and one started to stress the corporative nature of the society. The nationalists openly expressed their admiration of Italian ideology and encouraged the corporative society regime. According to A. Andrašiūnas (1938, p. 915), the state must assist the underprivileged citizens so that they might not only rely on external support, but gain power and opportunity to independently take care of implementation and protection of their rights. He stressed the paternalistic function of the state, which supports the attempts of the individual to secure his own rights and freedoms, rather than the state, which makes presents and gives instructions. Corporatism is an intention of an individual to eliminate restrictions of individualistic instruments, to strengthen opportunities of enjoying

his own rights by making the employer to regard the rights of those, who have none or little capital. It should be treated as one of the measures aimed at avoiding socialism. Corporatism is a turn from liberal, fractioned society to the “organic” one, in which the contest of the classes is replaced with collaboration of employers and workers for the mutual benefit. Our future state will be the corporatism-state in its form and structure, declared G. Valančius (1933, p. 554). Search for a social compromise and security was considered to be purpose not only of the individuals, but of the society and of the state. Efficient administration was depicted as formation and implementation of equitable laws and active social policy. This had to influence the effective implementation of social rights, reduce social tension and weaken destructive forces in the society.

Political experience of the “Absence of Parliament” regime, which lasted for eight years after adoption of the Constitution of 1928 and which was named as *de facto* authoritarian regime of rule of the President, helped to form a system of authoritative regime of the president. This regime gained its legitimate expression in the Lithuania Constitution of 1938, which expanded and highlighted the already existing regime of priority of the President (Masiulis, 1991, p. 80). This Constitution was based on new political philosophy, its separate elements were taken from circumstances, tradition and needs of the Lithuanian reality.

The said Constitution of 1938 did not define the Republic of Lithuania to be a democratic state – its first article described the State of Lithuania as “independent sovereign” country. It clearly exalted the state, which was above a human being, which did not depend on it, and which was able to impose certain duties on the citizen. In majority of cases the Constitution united the citizens’ rights with his duties. The rights went hand in hand with duties. The citizen must not infringe the rights of others and always remember his duties against the State, and the most important of such duties – his loyalty to the State. The very first sentence of this chapter referred to the grounds of the duties at issue – “To the citizen it is the State that forms the foundation of his existence” (Article 16). These general requirements of the Constitution of 1938 were followed by a catalogue of citizens’ rights and freedoms, namely freedom of consciousness, immunity of a citizen (a person), immunity of apartments of the citizen; confidentiality of correspondence, communication, freedom of movement, freedom of actions in the society, right of petition. The Constitution has set the frames, within which the rights had to be enjoyed. Article 51 “National Economy” of the Constitution (1938), to which the tradition formula was removed (from the chapter on citizens’ rights), declared that the state protects the ownership right. However, along with the said standard provision this article read: “Property imposes an obligation to the one who holds it to use the property in line with interests of the State”. In the declaration (programme) by the leading party K. Račkauskas (1967, p. 94-95) assessed provisions of Chapters VII and VIII of the Constitution (1938) related to freedom of employment. He quoted articles of the Constitution: “Successful functioning of economy of the State is based on the perceived intention of the citizen to engage in creation aimed at benefit of his own or the State, and harmonious interaction of work and capital” (Article 49), “Every job is a part of universal creativity and should be equally respected. It is a constant work that keeps the State running. Power of work of the citizen is the treasure to the State. The citizens are raised in the spirit of love and creative approach to work” (Article 44), “The State may use force in respect to those, who avoid work” (Article 46). He treated these declarations as the political philosophy of the Constitution, which imposed higher requirements on a person compared to the liberal Constitution of 1922. The private property was not defined as sacred or inviolable already. It’s use was limited by the social aims: it was required to reach a personal profit through a servicing for the mutual benefit. The Constitution also provided for an active position of the State in the spheres of family, maternity, education, employment, healthcare and social care, and absolutely avoided any liberal ideas. Thus, the foundation of the Constitution of 1938 was a strive for solidarity of the society and a well-organised nation – the incarnation of unity of the Nation. These were based on the declaration that the State, while striving for unity of the Nation, must mobilize attempts of all its members, lead the actions of the

citizens in the direction intended by the State, that the citizen is not an abstract individual, but a particular person, who has spiritual links to other members of the society and is in need of spiritual communication. The Nationalists' approach that every organisation and, in particular – the State, needs order, restriction of citizens' freedom and duties, has originated under the influence of European Processes and prevailing political trends.

At that time the authoritarian regime of the Lithuanian state was considered as the legal state. On the other hand, it was considered only as an intermediate station while coming from totalitarian regimes to democratic (with such condition that such regime wouldn't be continued for a long time). Too long duration of authoritarianism, but not the authoritarianism itself was considered as a dangerous thing for the development of society, because the authoritarianism was devoted only for the execution of temporary mission, but not for the permanent ruling of the state.

5. Conclusions

Two tendencies could be seen in the ideology of Lithuania in 1918-1940 years: the state's ideology inclined to the positivism, the academic one – to the concept of natural law. The latter declared the most of the principal ideas of law governed state: the democratic method of legislation, the constitutional establishment of human rights, the rule of law, separation of powers and the others. The notion of individual elements of the constitutionalism, as presented by experts in law, was in line with the contemporary trend of liberalistic interpretation of philosophy, school of innate rights and rules of solidarity of society, which prevailed in Western Europe. In the course of drafting both the provisional and full-fledged Constitutions of the Lithuania of that time, which were the legal basis of the former state under the rule of law and which created preconditions for the Lithuania to gain experience in constitutionalism, one applied the experience of European constitutionalism, as well.

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