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THE "CONSTITUTIONALIZATION" OF THE LEGAL ORDER

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I. The Notion of "Constitutionalization" of the Legal Order

The constitutionalization of the legal order, understood as the direct influence exerted by constitutional norms and principles upon the application of law in relations between the individual and the State or between individuals, occurs nowadays in many countries of the world. The term "constitutionalization", as suggested by its semantic form, denotes a continuous process and refers, in particular, to a situation where such phenomenon has occurred secondary to an already established system of State organization and resulted from constitutional amendments, adjudicative practice or appeared after a new constitutional act had been adopted. The United States is a good example of a State where the legal order is highly constitutionalized.[1]

The main reason for the phenomenon of constitutionalization of legal order is the very nature of Constitution as an act of self-limitation of the state, preventing the future possible "tyranny of the majority". The role of the Constitution in the light of the doctrine of liberal constitutionalism was well described by Cass Sunstein, "Constitutions can be understood as *precommitment strategies,* in which nations use a founding document to protect against the most common problems in their usual political processes. Constitutions should therefore work against a nation's most threatening tendencies."* [1] [2] From the point of view of the legitimtization requirement, the Constitution should at the same time be an act of minimum of national consensus, which determines the fundamental principles accepted by the community which constitutes the State and it should define the "rules of the game" concerning the relations between public authorities and individuals. If the Constitution is to fulfil such role, it must acquire a normative significance and its observance must be sanctioned.[3]

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[1] L. F a v o r e u: "La Constitutionnalisation du droit" [in:] *L'Unité du droit. Mélanges en hommage à Roland Drago,* Paris 1996, p. 25-35; *idem:* "La Constitutionnalisation de l'ordre juridique", theses and outline of the report for 15th Congress of Comparative Law, Bristol, 1998.

[2] C. S u n s t e i n: "Against Positive Rights", *East European Constitutional Review* 1993, vol. 2, No. 1, p. 36. More on this subject in W. S a d u r s k i: "Konstytucyjna kwadratura kola" [Constitutional Squaring of the Circle] , *Civitas* 1997, vol. 2, No. 1, p. 11-36.

[3] See: W. S a d u r s k i: *Racje liberała* [Liberal's Arguments], Warszawa 1992; *idem, Myślenie konstytucyjne* [Constitutional Thinking], Warszawa 1994.

It would be difficult to ascribe identical views to all authors of constitutional acts currently in force, as they come from different, sometimes distant times. However, such view of the Constitution and its role seems to correspond at least to the American model of State organization, which envisages protection of the Constitution by common courts (judicial review), and those European states where separate constitutional courts exists (constitutional review). Naturally, there are also national particularities resulting from different traditions and development of constitutions in individual states, as well as from the version of the institution of constitutional control adopted in a given country, based on different specific doctrinal assumptions.

As a consequence of perceiving the Constitution as a principal point of reference, one seeks in it important messages, concerning the fundaments of State organization in the situation where statutes - the next level in the hierarchy of sources of law - have become an instrument of regulation of specific issues, sometimes even technical ones.[4] Keeping in mind the differences in the content of constitutional acts, they owe their special position in the system of sources of law to laying down the socially accepted principles and general rules which public authorities are obliged to observe in their actions. This is, in turn, connected with such messages, fundamental for the State organization, becoming especially lasting by virtue of greater rigidity of constitutional acts, which are ascribed higher status in comparison to ordinary legislation, easily changable with changes of political groups constituting the parliamentary majority.

The rigidity of the Constitution, where principles and procedures are formulated, in confrontation with their changeable social context is softened by the institution, referring to the Common Law system, of control of constitutionality of law,by courts (or quasi-judicial organs) whose task is making interpretations and relaxing the rigidity. Judicial control of compliance of laws with the Constitution is an instrument particularly frequently used in order to enforce observance of constitutionally guaranteed citizens' rights and freedoms by public authorities.[5] On the other hand, it is also used as a weapon by parliamentary opposition, which strives to ensure that authorities observe fundamental rules of State organization enacted in the Constitution. However, sometimes - in the case of initial control - such actions aim at slowing down the legislative process.

The constitutionalization of the legal order has, in its essence, a lot in common with international mechanisms of protection of human rights, especially those within the framework of the European Convention of Human Rights and Fundamental Freedoms (to a lesser extent within the framework of the International Treaty on Civil and Political Rights of the UNO). As for rights and freedoms, to which regulations of the Convention apply they are equal to the typical constitutional regulations. Yet, the most important thing is the similarity of method, which in both cases consists in referring to higher norms (Constitution, international commitments) when looking for legal protection.

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[4] The phenomenon of the so-called "inflation of law", and especially of statutes results, among other things from expanding the organizational activities of the State and from increasing interference of the state, including legislative bodies, into various fields of activity of its citizens. See e.g. papers presented at the Round Table Conference of the International Association of Constitutional Law, Warszawa, October 1985.

[5] See J. Zakrzewska: *Spór o konstytucję* [Dispute around the Constitution], Warszawa 1993, p. 147.

Effective constitutionalization of the legal order is contingent upon the above mentioned main requirement, that is the recognition of the direct validity of constitutional norms, either those explicitly formulated in constitutional provisions or interpreted secondarily by common courts and courts of public law. However, an equally important factor is the social awareness: familiarity with the Constitution as a source of laws, the methods of inferring them and readiness to apply them. It seems that representatives of legal professions, who act as a link between individuals and the public authorities applying law, have particular influence upon the formation of such awareness.

II. The Mechanism of Constitutionalization. How Does the Constitutionalization Operate?

In the Polish context, the meaning of the term "constitutionalization" is not limited to the increasing significance of directly regulative character of constitutional norms, judgments of the Constitutional Tribunal and their influence upon particular branches of law, or to vesting the constitutional judge with the task of resolving conflicts as to competence or even political disputes between authorities.

The source of the above mentioned - by way of example - occurences is the social phenomenon of increasing prestige of law in general, and of constitutional law in particular. In Poland, the tremendous growth of awareness of the significance of law coincided with the adoption of the new Constitution, which sets the institutional framework for constitutionalization.

A. The fundamental conditions

Polish post-war constitutions did not contain any provisions confirming their character of directly operative legal instruments. Such rule was not introduced even by the constitutional amendment of 1989, which formulated new principles of State organization. Yet in the post-war doctrine of constitutional law in Poland the opinion of the normative character of the Constitution was present: its legal function and the normative character of its provisions were emphasized, and also it was pointed out that it needed to be applied in legal relations between various subjects, including the contacts between public authorities and citizens.[6] At the same time, certain provisions were regarded as having a limited normative value due to their character, formulation or subject matter.[7] Also, the normative value of the Constitution was usually understood in a specific way since it was, at the same time, impossible to apply constitutional

[6] See, for example, S. R o z m a r y n: *Konstytucja jako ustawa zasadnicza PRL* [The Constitution as the Fundamental Law of the People's Republic of Poland], Warsaw 1967; J. T r z c i ń s к i: *Funkcja prawna konstytucji socjalistycznej* [Legal Function of a Socialist Constitution], Wroclaw 1978.

[7] See, for example, W. Z a k r z e w s k i: "Konstytucja państwa a konstytucja społeczeństwa" [The Constitution of the State and the Constitution of the Society], *Państwo i Prawo* 1969, vol. 11; K. D z i a ł o c h a: "Stosowanie Konstytucji PRL" [Application of the Constitution of the Peoples' Republic of Poland], *Acta Universitatis Nicolai Copernici, Prawo XXIV,* 1985, vol. 156.

provisions as a sufficient basis for courts' adjudication (Rozmaryn), or, exceptionally, in the cases of lacunas in laws (Działocha). An extended interpretation of the doctrine of "special scope of legislation" established traditionally, according to which certain matters are reserved for regulation in the form of a statute (which in fact aimed at excluding acts of lower status). Without statutory regulation, the constitutional regulations of such matters would hang in mid-air. Later, in order to negate the normative value of the constitution, it was claimed that such had been the intentions of the creators of the 1952 constitution, who saw it mainly as a political document, confirming the rules of State organization and fulfilling educational and propagandist functions.

The contrary opinion as to the permissibility of applying the constitutional provisions as the basis for courts' adjudication was also expressed, especially in the 1980s. Among other arguments it was stressed that the Constitution is also a statute, in spite of its specific nature.[8] It was generally approved in the doctrine that courts should apply the Constitution together with the statutes.

In practice, the application of the Constitution in judgments of State organs within the scope of "substantive" constitutional law was different for administrative organs, quasi-judicial organs (e.g. State economic arbitration, petty offences boards) and courts. Administrative organs, being hierarchically and, in fact, politically subordinate, and acting on the basis of specific provisions and directives, did not treat the Constitution as the source of legal norms. The case of quasi-judicial organs was similar, and even though they were not hierarchically subordinate, they were subject to supervision by the central organs of administration. All this favoured atomization of the law. The position of courts was different, as, according to the 1952 Constitution, they were independent and subject only to statutes, and due to specific organizational and procedural principles had more possibility of utilizing constitutional provisions. However, until 1980, when the Chief Administrative Court was established, they had not used this possibility too often, since the whole sphere of administrative substantive law, closely connected with the constitution, was beyond their competence.

In the precedential judgment of 13 November 1954, the Supreme Court showed great reserve as to the courts' possibility of applying the constitution. Similarly, the resolution of the Civil Chamber of the Supreme Court of 12 February 1955 stated that the Constitution did not lend itself to direct application. For long years, the opinion of the Supreme Court influenced the practice of common courts in a decisive way. However, there appeared the practice of coexistence of the Constitution and the statutes, and also the practice of making references to the Constitution while substantiating court rulings. Constitutional provisions served then as an additional "ornament", a political and ideological argument.

After the fall of communism, and especially after the introduction into the Constitution of a capacious formula of the "democratic state of law", courts have made fre-

[8] See, for example, J. T r z c i ń s k i, op. cit.; P. S a r n e c k i: "Stosowanie konstytucji PRL w orzecznictwie Naczelnego Sądu Administracyjnego" [Application of the Constitution in Judgments of the Chief Administrative Court], *Studia Prawnicze* 1988, vol. 3.

quent use of the Constitution as a guideline while establishing the interpretation the applied law. The Supreme Court formulated a principle of interpreting law in such a way that the interpretation applied should not be contrary to constitutional principles (III AZP 14/92). Constitutional norms are applied subsidiarily and not independently. Both the Supreme Court and the Chief Administrative Court make references to the constitutional norms in this manner. Occasionally, those instances use constitutional norms as the basis for resolving concrete disputes (examples from the Supreme Court judgments: freedom of association belongs to fundamental human rights and to the foundations of democracy and as such cannot be limited at the discretion of the administration; international law shall be directly applied to internal relations (I ARN 45/93); administration guided by commercialism and fiscalism must not violate fundamental human rights (I ARN 45/93); the right of ownership belongs to fundamental human rights (III ARN 49/93)).[9]

The new Polish Constitution of 2nd April 1997 recognizes explicitly and unambiguously the normative character of the fundamental law. In the first chapter entitled "The Republic of Poland" (Rzeczpospolita) and containing the principles of State organization, Article 8 states that "1. The Constitution shall be the supreme law of the Republic of Poland. 2. The provisions of the Constitution shall apply directly, unless the Constitution provides otherwise." Consequently, in the chapter devoted to the sources of law, Article 87, paragraph 1 refers to the Constitution in the first place in the catalogue of sources of universally binding law of the Republic of Poland.

Contrary to the hitherto operative constitutional provisions, the new Constitution states that "judges, within the exercise of their office, shall be independent and subject only to the Constitution and statutes" (Article 178, paragraph 1) - previously only the statutes were invoked in this context. This means an explicit indication of the Constitution as the basis for quotidian adjudicative activity, being at the same time the limit of a judge's subordination. It seems that what the creators of the Constitution had in mind was not the problem of direct application of the Constitution as the basis for judgment in a concrete dispute, as the factual circumstances of a dispute hardly ever permit or require doing so. What they had in mind was rather persuading courts to seek in the Constitution - the structural and axiological keystone of the legal system - some interpretative inspiration, a "code" for reading ordinary legislation. According to Ewa Łętowska and Janusz Łętowski, a change of the constitutional provision on the basis of adjudication entails the necessity of revaluating of the concept of "statute" in the consciousness of courts: from, as it was seen so far, "a concrete basis for decisions, beyond which the power of a judge does not extend and whose legality he does not deal with" to "a non-erroneous component of the legal system, complying with the Constitution and interpreted in compliance with the latter." Since then more creativity has been required on the part of judges while interpreting the law: "the narrow positivist vision

[9] See K. D z i a ł o c h a, op. cit., p. 85; E. Ł ę t o w s k a, J. Ł ę t o w s k i: *O administrowaniu, państwie prawa i sądach w okresie przekształceń ustrojowych* [On Administration, State of Law and Courts in the Period of Systemie Transformations], Warszawa 1995, p. 228-234.

of searching for the 'basis' for decision is over, and the methods of reading the text cannot neglect systemic and axiological matters connected with the constitution."[10]

Under the rule of the new Constitution, however, judges did not acquire any special rights in the event of finding statutes not to be in conformity to the fundamental act - the decision on unconstitutionality of any acts is vested exclusively in the Constitutional Tribunal and remains beyond the scope of competence of the judiciary. In such an event a court should follow the procedure of referring a question of law to the Tribunal (Article 193 of the Constitution) and the latter shall resolve the question within its competence.[11]

B. The Emergence of "Constitutional Justice"

The Constitutional Tribunal was introduced into the Constitution in 1982 and commenced its adjudicative activity early in 1986. It is an organ of constitutional justice of the continental European type, where the basic assumption is the control of constitutionality of law exercised through special proceedings by a separate constitutional court (concentrated control). This control is abstract - it is exercised without making reference to individual cases of application of law, on the basis of a general conviction of unconstitutionality. If a norm is declared to be unconstitutional, it is eliminated from the legal system.[12]

The control of constitutionality exercised by the Constitutional Tribunal finds its doctrinal justification in the supreme position of the constitution in the system of sources of law, and its judicial justification in the constitutional obligation of conformity of law to the constitution. According to the new Constitution, the Constitutional Tribunal shall adjudicate regarding the conformity of statutes and international agreements to the Constitution, the conformity of statutes to ratified agreements which ratification required prior consent granted by statutory law, the conformity of legal provisions issued by central State organs with the Constitution, ratified international agreements and statutes, the conformity to the Constitution of the purposes or activities of political parties, as well as regarding complaints concerning constitutional infringements (Article 188). The Constitutional Tribunal also resolves disputes as to competence between central constitutional State organs, upon a motion of the President of the Republic, the Marshals of both Chambers, the Chairman of the Council of Ministers, the First President of the Supreme Court, the President of the Chief Administrative Court (Article 189).

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[10] E. Ł ę t o w s k a, J. Ł ę t o w s k i: "Co wynika dla sądów z konstytucyjnej zasady podziału władz" [What Results from the Constitutional Principle of Separation of Powers for Courts], [in:] *Konstytucja i gwarancje jej przestrzegania. Księga pamiątkowa ku czci prof. Janiny Zakrzewskiej* [Constitution and Guarantees of the Observance Thereof. In honour of Prof. Janina Zakrzewska] , Warszawa 1996, p. 391-393.

[11] See A. Z o l l: "Związanie sędziego ustawą" [Binding the Judge with the Statute], [in:] *Konstytucja i gwarancje jej przestrzegania* [Constitution and Guarantees of the Observance Thereof], op. cit., p. 241-251; L. G a r l i c k i: "Konstytucja a ustawy przedkonstytucyjne" [The Constitution and the Acts Preceding the Constitution], [in:] Z. Witkowski (ed.), *Wejście w życie nowej Konstytucji RP* [Entry into Force of the New Constitution of the Republic of Poland], Toruń 1998, p. 42-66.

[12] See W. S k r z y d ł o (ed.): *Polskie prawo konstytucyjne* [Polish Constitutional Law], Lublin 1997, p. 28-29.

Many of the above mentioned competence of the Constitutional Tribunal was only introduced in the constitution which came into force as of 17th October 1997 and developed in the new act on the Constitutional Tribunal of 1st August 1997. Among the new institutions which may influence the constitutionalization of the legal order in Poland we can mention adding international agreements to the controlling competence of the Constitutional Tribunal, and also the institution of constitutional charge and the competence of the Constitutional Tribunal to resolve competence disputes. The position of the Constitutional Tribunal in the State organization will be basically changed by the recognition of its judgments on unconstitutionality of statutes with the Constitution as final reference, since at present these judgments are subject to revision by the Sejm (this principle will become operative after two years from the Constitution coming into force).

The practice of the new solutions is only emerging, which does not allow the evaluation of its effectiveness. We may limit ourselves here to the information on the legal conditions of submitting a complaint concerning a constitutional infringement to the Constitutional Tribunal. In the systemic organization of the Constitution it is placed in the chapter "Means for the defence of freedoms and rights". In accordance with principles specified by the statute, everyone whose constitutional freedoms or rights have been infringed, shall have the right to apply to the Constitutional Tribunal for its judgments on the conformity of a statute or another normative act upon which basis a court or an organ of public administration has made a final decision on his freedoms or rights or on his obligations specified in the Constitution (except for the right of asylum and granting the status of a refugee - Article 79 in connection with Article 56). Also here, like in other cases, a judgment on unconstitutionality of a hitherto operative norm results in its abolition; it has a constitutive character and causes effects *ex nunc.* The abolition takes effect by being made public in an official organ. The complaint concerning a constitutional infringement is treated as subsidiary means of protection of the rights guaranteed by the Constitution since the subject, whose basic rights have been infringed by the application of a legal instrument incompatible with the Constitution as the legal basis for the judgment, may only submit the complaint after having used other methods of appeal and means of protection of his/her rights (completion of the instance procedure). A complaint concerning a constitutional infringement may only be submitted if the court's judgment, decision or another administrative adjudication infringes a constitutional right of the appellor, but only if the applied legal provision is contrary to the constitution. Therefore, this institution is also subsidiary in relation to other procedures of enforcing cohesion and compliance with the Constitution of the whole legal system: it increases the number of instruments found to be contrary to the constitution. It may be feared, however, that its scope will prove to be disproportionately narrow as compared with the social expectations which arose, chiefly, due to unfamiliarity with law. *Ignorantia iuris nocet,* but a large number of unsatisfied citizens who have retorted to the complaint concerning a constitutional infringement is likely to decrease the Tribunal's popularity in the society.

In order to realize the two important factors of "constitutionalization" of the legal order in Poland, it is helpful to go back to the period before the new Constitution was

adopted. The Constitutional Tribunal played a crucial role in creative interpretation of the principle of a "democratic state of law", introduced as a feature of the Republic of Poland by the December 1989 amendment to the Constitution of 1952. "Democratic state of law" is a general clause and has frequently served the Tribunal in issuing judgments on the conformity or unconformity to the Constitution where the text of the fundamental law, the majority of which came from the previous epoch, provided no independent bases for issuing judgments. This concerned especially the principles of shaping the relations between citizens and public authorities, such as principle of proportionality, principle of retroaction of law, or protection of rights of acquisition. The messages interpreted by the Tribunal from the principle of a democratic state of law began to exist independently and became elements of the legal system; for example they were referred to in judgments of the administrative court. Despite the usefulness of the work done by the Tribunal, from the point of view of the need of an axiological rebuilding of the legal order in Poland, one may have doubts as to the limits of its freedom of interpretation. Even in the judgments it has frequently admitted that the principles drawn from the principle of a democratic state of law were not found expressly formulated in the Constitution (see e.g. K 3/88, K 5/90, K 7/89, K 15/91), admitting consequently to arbitrariness, which seems to be in conflict with the explicit, this time, constitutional principle that the State organs shall act within and pursuant to the law.[13]

When writing about the factors of constitutionalization, one must stress the role which the Commissioner for Citizens' Rights (the National Ombudsman) has played in this issue, and especially the role of the first Commissioner, Prof. Ewa Łętowska. It was in fact the Commissioner that acted as the moving force of many Tribunal's actions in the field of control of the constitutionality of law and establishing the commonly binding interpretation of statutes (the Tribunal has already lost this competence), by which the principle of a democratic state of law and international standards of human rights were promoted. It is also impossible to overestimate the Commissioner's education work for building the legal awareness of Poles in the field of rights which are granted under the Constitution or international law instruments.

III. Areas or Scope of Constitutionalization

A. The "Constitutionalization" and "Juridicization" of Political Life

So far, no cases of abusing constitutional means for political fight have been noticed in Poland. Where the mechanisms of functioning of the central State organs are, in principle, regulated by the Constitution in a way which is, quite naturally, general and, thus, leaves a certain margin of interpretative freedom, the viewpoints of political

[13] See J. N o w a c k i: "Klauzula 'państwo prawne' a orzecznictwo" TK [The Clause of a 'Democratic State of Law and Judgments of the Constitutional Tribunal], [in:] E. Z w i e r z c h o w s k i: *Prawo i kontrola jego zgodności z konstytucją* [The Law and Control of Its Conformity with the Constitution], Warszawa 1997, p. 163-174.

adversaries will unavoidably differ. Some of such instances are resolved by the Constitutional Tribunal. In the course of establishing the commonly binding interpretation of statutes, the Tribunal expressed its opinion in disputes concerning, among other things, the competence of the President of the Republic of Poland to recall the president of the National Radio and Television Council (W 7/94), the competence of the Sejm regarding the decision of the Constitutional Tribunal declaring a statute unconstitutional, such decision being issued as a result of initial control (W 1/95), the President's competence to dissolve the Parliament if it has not adopted the Budget Act in time (W 2/95). Naturally, these are not the only cases where the initiators of submitting certain actions of their political opponents for the Tribunal's evaluation were not only concerned about the cohesion of law. For example, the famous judgment of 21st November 1994 on the unconstitutionality of the Budget Act with the constitutional principle of separation of powers, due to infringement of the government's competence to decide freely on budgetary spending was issued after an application of the President, who, at this time, remained in the relation of "cohabitation" with political opposition being the parliamentary majority. The system of executive dualism and the procedure for electing the head of State by universal direct suffrage makes such situation likely to repeat. It depends on the main political actors and on how often they will use the Tribunal to achieve temporary goals.

Among the subjects holding the right to submit applications to the Constitutional Tribunal there are groups of at least 50 Deputies or 30 Senators. This enables parliamentary opposition to efficiently control the compliance of the actions of those in power with the Constitution. Practically, the most frequently attacked acts before the Tribunal are those containing ideological connotations (see the question whether it is permissible to oblige emitters of radio and television programmes to respect Christian values or whether a pregnancy may be terminated for social reasons).

The new Constitution clearly foresaw the Tribunal's competence connected with evaluating the observance of the Constitution in the process of application of law: resolving competence disputes. The Tribunal's task is resolving horizontal dispute - those between central constitutional State organs, which simultaneously claimed to be competent to resolve the same matter, or issued an adjudication, or where both such organs claimed to lack competence. An application to the Tribunal should indicate the questioned action or cessation together with the provision of the Constitution, or of statutory law, which has been infringed (Article 53 of the Act on the Constitutional Tribunal). The result of the Tribunal's arbitration is a statement. The practice will show to what extent the institution of involving the constitutional court in resolving disputes, in which frequently political antagonism is implied, will be applied.

B. The Constitutionalization of the System of the Sources of Law

The Constitutional Tribunal has made a great contribution towards the constitutionalization of the sources of law in Poland, even in the period before the principle of a democratic state of law was introduced into the Constitution and the sources of law were clearly specified in the fundamental act.

The object of the Tribunal's control is the activity of the legislative organ, and especially its effect which is a specific legislative instrument. Such instrument should satisfy certain requirements concerning its form and content. Both the quality (content) of such instrument and the manner in which it was adopted by the law-making organ are subject to the Tribunal's evaluation from the point of view of the observance of norms of the Constitution. The latter usually contains only the basic elements of the "organizational status of the state": adopted system of normative instruments, division and scope of legislative competence of individual organs, elements of the procedure for the establishment and promulgation of normative instruments, as well as the scope of their operation. Constitutional norms may also determine the permissible content of legal instruments. The limits of the part of this norm granting legislative competence are formed, on the one hand, by the necessity, resulting from systemic assumptions, of compatibility of all legislative instruments with instruments of a higher status, and especially with the Constitution, and on the other hand by certain evaluative assumptions formulated by the founder of the State organization in the text of the Constitution, and relating to the content of law (formulated as general clauses they offer the possibility of further determination in the course of the Tribunal's adjudicative activity).

The Tribunal formulated, among other things, the following rules of formation of the system of law: exclusiveness of statutory law in regulating the duties and rights of citizens and other subjects of law (U 1/86, U 3/88, Uw 4/88); unlimited objective scope of statutory law (K 3/89); conditions for issuing regulations: of the Council of Ministers, pursuant to a statute, in order to implement a statute (K 1/87); prohibition of subdelegation not being justified in statutory law and related to the essentials of a statutory instrument (U 3/86).

The binding force of interpretation of the constitutional norms, made in the course of the adjudicative activity of the Constitutional Tribunal derives from the binding force of its judgments. Assuming that, in similar future situations, the Tribunal would take a similar standpoint as to compliance with the Constitution, the central organs of administration - especially in the first period of the Tribunal's activity - practised amending the charged, but not yet resolved, provisions in accordance with the adopted adjudication of the Constitutional Tribunal. As Józef Repel justly observed, "The binding force of the interpretation of the Constitution made by the Constitutional Tribunal with respect to courts and other organs which apply the law is not based on *ratione imperi* but on *imperio rationi*, mainly on the authority of an organ founded especially to adjudicate on the compatibility of legal norms with constitutional ones." In practice, it is the content of the adjudication and force of argumentation that decide upon the recognition of binding force by courts, and in particular by the Chief Administrative Court and the Supreme Court.[14]

[14] J. R e p e l: "Zasady orzecznictwa TK RP i ich znaczenie w procesie stosowania norm konstytucji" [Principles of Adjudication of the Constitutional Tribunal of the Republic of Poland and their Importance for the Process of Application of Constitutional Norms!, [in:] E. Z w i e r z c h o w s k i, op. cit., p. 143-162.

The regulation of the question of the sources of law, mentioned earlier, is a new standard in the Polish Constitution. The concept of the sources of law expresses new principles of State organization and a new idea of the State apparatus. Beside a catalogue of sources of the commonly operative law of the Republic of Poland, a special chapter dedicated to this matter regulates: principles of individual types of legal instruments entering into force, principles of operation of international agreements in the legal order of the state, agreements whose ratification requires prior statutory consent, conditions on which the Republic of Poland may delegate the competences of organs of State government to an international organization, conditions for issuing regulations, orders and local provisions. The system of the sources of law is discussed in the Constitution right after the Preamble and chapters devoted to the principles of State organization and citizens' rights and freedoms. This fact proves the great weight attached to it by the creators of the Constitution.

In the new formulation, normative instruments and relations between them do not reflect the positions and relationships between the organs issuing them. A great novelty is the distinction between the sources of commonly operative law and those of an internal character. The Constitution lists only five types of instruments in the first category: Constitution, statute, ratified international agreement, implementing regulations and regulations of the President having the force of a statute. Implementing regulations are issued by the organs indicated in the Constitution , which means exclusion of those central organs of administration which are not mentioned in the Constitution as authorized. On the one hand, this solution is justified by the concern with an appropriate legislative level of such instruments, but, at the same time, it forces centralization of the legislative activity of the organs of administration, which seems contrary to the principle of subsidiarity, set forth in the Preamble to the Constitution. Internal provisions are a separate category, and the only types mentioned here are resolutions of the Council of Ministers and regulations of the President of the Council of Ministers and Ministers. It seems likely that this enumeration is not limitative and that internal instruments may continue to be issued at lower levels of the State apparatus. The regulation concerning the category of internal provisions is so brief (issued "pursuant to and within the limits of authorization granted in the Act") that it is imaginable to apply it, without amendments, to various levels of local self-government above the commune level, which are being created now.

Another new solution is taking into account the impact of closer integration with the European Union on the legal system in Poland. As Andrzej Balaban observes, "decisions in this scope [...] result in the necessity of re-valuation of previous opinions based on autonomy of the sources of law within a country." It is symptomatic that the creators of the Constitution assumed that it would meet the conditions of a closed system of the sources of commonly operative law, which had long been postulated in the doctrine. By taking into account unspecified instruments which are directly operative and having force over statutory law, the system acquires an open character.

The same author expresses also the opinion that constitutional regulation of problems of the system of sources of law (beyond Chapter III as well) will require under-

taking immediate legislative work, which could lead to the codification of the principles of law-making, including those formulated in the judgments of the Constitutional Tribunal.[15]

C. The Constitutionalization of Fundamental Rights and Freedoms

Until the new Constitution came into force, the operative regulation of the problem of protection of citizens' rights and liberties was that of 1952 with numerous amendments. Simplifying slightly, we can say that until 1989 those amendments were concerned with verbal widening of the scope of citizens' rights, particularly within the scope of social rights. The stylistics of the chapter of the Constitution devoted to those matters corresponded to the Constitution's function of political propaganda. The judicial implementation of constitutional rights was not practised for the reasons quoted above. It was the first Commissioner for Citizens' Rights that first departed from the old perception of the binding the State character of constitutional norms (and also its international commitments in this matter) and referred to them in applications to the Constitutional Tribunal or speeches before the Supreme Court (for example, prohibition against discrimination on grounds of sex, political membership, confessed beliefs and the right to marry).

The amendments made to the constitutional regulation of rights and freedoms at the time of State systemic transformation were paradoxically small and consisted mainly in "clearing" the relevant chapter of the Constitution of 1952 of any ideological and completely outdated formulas (such as citizens' duty to observe socialist work discipline). The main novelty was the introduction of the formula of a "democratic state of law, implementing the principles of social justice", which became the main point of reference, particularly for the Constitutional Tribunal and the Commissioner for Citizens' Rights, in interpreting provisions of law (as we have already mentioned, often widening them "creatively").

The new Constitution normalizes citizens' rights and freedoms in such a way as to ensure their being real: it provides for a number of institutions which individuals may use for effective defence, like the above mentioned complaints concerning constitutional infringements. Besides, everyone has the right to compensation for any harm done to him by any action of an organ of public authority contrary to the law and the right to recourse to the courts of in pursuit of claims alleging infringement of freedoms or rights (under Article 77, paragraph 2, the statute cannot bar recourse to courts). The last item in the catalogue of means for the defence of freedoms and rights is the right to appeal against judgments and decisions made at first stage (exceptions to this principle and the procedure for such appeals are specified by statutes). The Constitution differentiates between rights in this respect: certain rights can be asserted subject to limitations specified by statute. These rights are: the right to ownership, other property rights; the right of succession, the freedom to choose and pursue one's occupation and to

[15] See A. B a ł a b a n: "Źródła prawa w polskiej konstytucji z 2 kwietnia 1997 r." [Sources of Law in the Polish Constitution of 2 April 1997], *Przegląd Sejmowy* 1997, vol. 5, p. 39-62.

choose one's place of work; the right to safe and hygienic conditions of work, to statutorily specified days free of work, annual paid holidays and to maximum permissible hours of work, the right of disabled persons to aid ensuring their subsistence, adaptation to work and social communication, the right of families in difficult material circumstances, families with many children or single parents, as well as of mothers, before and after birth, to special assistance from public authorities; the right to ecological security and to information of the quality of environment, the right of tenants to protection; the right of consumers to protection by public authorities against activities threatening their health, privacy and safety, as well as against dishonest market practices. The majority of rights listed above have the character of a commitment of the State to undertake special social and organizational actions in order to satisfy specified needs of certain categories of individuals, which entails a considerable financial burden. The limitation of possibility to assert such rights demonstrates the realistic attitude of the creators of the Constitution, however, their long catalogue is a departure from the established rule, giving way to the constitutionalization of the protection of rights and freedoms in Poland.

In spite of the fact that formulating the constitutional catalogue of rights and freedoms reveals strong inspiration derived from instruments of international law in this field (particularly as to individual and political freedoms and rights - from the European Convention and the International Covenant on Civil and Political Rights), it is often more elaborate and casuistic. This solution was affected by earlier judgments of the Constitutional Tribunal, where the content of fundamental rights had been expanded, for example the ones derived from the definition of a democratic state of law. The principle of equality, beside the general formula ("All persons shall be equal before the law." - Article 32, paragraph 1, sentence 1), is expanded in many aspects, like the right to equal treatment by public authorities (Article 32, paragraph 1, sentence 2); the prohibition of discrimination in political, social or economic life (Article 32, paragraph 2); equal rights of women "in family, political, social and economic life", women's "equal rights regarding education, employment and promotion; the right to equal compensation for work of similar value, to social security, to hold offices and to receive public honours and decorations" (Article 33); citizens' right of "access to the public service based on the principle of equality" (Article 60); equal rights of churches and other religious organizations (Article 25) - all these "concretizations" have had their antecedents in judgments of the Constitutional Tribunal.[16]

Many of the newly introduced in rights and other regulations, indirectly influencing a citizen's position in relation to public authorities, previously had been formulated in the judgments of the Constitutional Tribunal. Among them are, for instance, the right to trial and the principle of publication of legal instruments, which is a necessary condition for the principle of citizens' trust to the State. It is difficult to establish whether the inspiration for including them in the Constitution came from the judg-

[16] See more in B. B a n a s z a k: "Prawa człowieka i obywatela w nowej Konstytucji RP" [Human and Citizens' Rights in the New Constitution of the Republic of Poland], *Przegląd Sejmowy* 1997, vol. 5, p. 56-57.

merits of the Constitutional Tribunal, instruments of international law or from the concern for "internal morality of the law".[17]

One may attempt a theory that a certain overload of content and excessive casuistry of the Constitution are logical consequences of the shortcomings of the limited normative material, which remained from the previous epoch, and also the lengthy period of preparation of the Constitution and, by the fact that before it was adopted (which was problematic because of unstable support of individual political groups), several motions of deputies representing particular interests were adopted. One cannot exclude the influence of "constitutional fetishism" either. The casuistry of the chapter on rights and freedoms may be seen as a vote of no confidence for judges, who are responsible for the practical defence thereof. As this mission of the judiciary became real such a short time ago, we can accept such pedagogical function of the Constitution for a certain period, yet in the long run it would not be necessary.

As we have already mentioned, the contents of rights and freedoms guaranteed in the Polish Constitution correspond, to a large extent, to international standards (one of the few exceptions is treating the institutionalized ethnic minorities as Polish citizens and not, as in the document of the Human Rights Committee, all persons remaining in the territory of Poland). The relationship between domestic and international mechanisms of protection of rights remains an open question. In particular, we do not know what will be the interpretation of the requirement of completing domestic procedure of appeal when submitting a complaint to the control institutions of the European Convention, and especially whether the complaint concerning constitutional infringements will be required (in certain cases of complaint to Strasbourg. We can find here some similarity to the Spanish institution of *amparo.).*

IV. The Results and Effects of the Constitutionalization

The adoption of the new Constitution puts Poland in a special situation, where the first manifestation of constitutionalization is amending the whole legislation in conformity to its content. Not excluding, and rather expecting - in the light of the new constitutional provisions - the application of the provisions of the fundamental law by courts and the formation of the adjudicative practice of the Tribunal on the new basis, we now can observe activities of the authorities aimed mainly at amending legislation and bringing its content in conformity to the content of the new fundamental law as fast as possible. The new Constitution does not present any opinion on the hitherto existing legal order. In cases where the Constitution regulates differently matters previously regulated by statutory law (it is of course one of the hypotheses), such Acts are deemed unconstitutional. The Constitution sets forth, in the transitional and final provisions, a special obligation of the Council of Ministeis: to present to the Sejm, within two years of the coming into force of the fundamental act, draft legislation which is necessary in order to apply the Constitution

[17] See W. G r o m s k i: "Autonomia prawa wobec polityki i jej konstytucyjne uwarunkowania" [Law's Autonomy from Politics and its Constitutional Conditions!, [in:] E. Z w i e r z c h o w s k i, op. cit., p. 49-62.

(Article 241, paragraph 6). It can easily be noticed that this provision does not contain a norm maintaining in force those provisions which are contrary to the Constitution, that is classic collision rules are applied. The situation, however, varies significantly, according to how detailed the old and new provisions are and to their character (e.g. that of constitutional norms). Referring to judgments of the Constitutional Tribunal of 1924, Leszek Garlicki distinguishes between two situations: the principle *lex posterior derogat priori* would apply in the event of a hitherto existing statute being contrary to the new Constitution, which might occur in the situation of formal sameness or closeness of norms. Whereas incompatibility of an earlier statute with the new Constitution would occur in the case of lack of symmetry between them, and, especially if new constitutional principles came into play, the principle *lex posterior derogat priori* would not apply, and the matter should be solved by the Constitutional Tribunal.[18]

The question appears who should decide whether a given situation is a case of contrariness or incompatibility of the former statute with the new Constitution. Only in a limited scope is this question answered by Article 241, paragraph 6 of the Constitution, quoted above, imposing on the Council of Ministers the obligation to be actively involved in the process of bringing legislation in accordance with the new Constitution by initiating appropriate legislative activity. Undertaking legislative initiative by the government and both chambers of the parliament is connected with their political views and expresses a certain legislative policy.

The judiciary plays a very special role in making this distinction, and this concerns common and administrative courts and also the Constitutional Tribunal, which follows from the principle of completeness of judicial proceedings in all cases and disputes concerning the citizen and similar subjects, and also, among others, from the principle of judicial protection of independence of local self-government. The role of courts will be important in the cases where the entry into force of the Constitution will be directly linked with the derogative effect ("contrariness" according to the above presented distinction) and especially in such cases as will concern the legal situation of citizens. This results from the full competence of courts to protect the rights and freedoms of an individual (Article 77 of the Constitution: "1. Everyone shall have the right to compensation for any harm done to him by any action of an organ of public authority contrary to law. 2. Statutes shall not bar the recourse by any person to the courts in pursuit of claims alleging infringement of freedoms or rights.") It will depend on the courts whether to recognize the derogation which occurred or to submit a question of law to the Constitutional Tribunal for an evaluation of conformity to the Constitution of the questioned Act. It seems that it may be said that the necessary participation of the judiciary in the process of bringing the previous legislation in conformity to the new Constitution, which is possible thanks to the creators of the fundamental act having adopted a certain vision of the function of the Constitution and of courts in a democratic state of law, is a particularly important manifestation of the phenomenon of constitutionalization of the legal order in Poland.

See L. G a r 1 i c k i: "Konstytucja a ustawy przedkonstytucyjne", op. cit., p. 39-62.

A. The Direct Effects: The Constitutionalization of the Various Branches of the Law

It is too early to State how big the share of norms of the new Constitution will be in the adjudication of courts in cases belonging to various branches of law, though, undoubtedly, favourable legal conditions have been established. Now, one of noticeable effects of the new constitutional regulations, and especially including in the fundamental act provisions relating to many fields of human activity, legally regulated, is the fact that public authorities have undertaken the task of bringing former legislation in conformity to them. By way of example, we will mention selected proposals of amendments to statutory law, put forward during a session, entirely devoted to this matter, of the Legislative Council of the Chairman of the Council of Ministers - a consultative body composed of distinguished representatives of legal sciences.

In the field of constitutional law, the new Constitution introduced numerous institutions regulated differently than previously or completely new institutions, which were not known in the previous Constitution. The need to make amendments to legislation is also a result of indirect influence exercised on the law of State organization by new elements in the character of the state, new principles and standards of democracy. New criteria of self-government and of territorial division of the country, as well as the principle of subsidiarity formulated in the Preamble, demand that, for example, the structure and competence of local authorities be in compliance with them, however, the Constitution formulates this matters flexibly enough to leave legislators a large margin of freedom. Yet, there are matters which are unequivocally decided upon in the Constitution and they must be taken into account in the future legislation. The principles of relations between the State and churches are determined in a different way than up to now, which entails the necessity of making amendments to respective Acts. Amendments must also be made to the Act on Polish Citizenship of 1962, representing a completely outdated view of this issue: the amendment must follow the constitutional norms which foresee that one cannot lose Polish citizenship otherwise than by renunciation thereof.

The new right to information and right to silence require the introduction of a separate statutory regulation, since the hitherto existing regulations in various Acts are incomplete and chaotic.

The new Constitution demands that legislative provisions in the field of criminal law, economic law, financial law, civil and family law, administrative law, organization of the judicature, labour and social insurance law, and other, be brought in conformity to its provisions. The scope and detailed character of the necessary amendments do not allow an exhaustive discussion here.

B. The Indirect Effects

It is difficult to predict what shape the constitutionalization of the legal order will take under the rule of the new Constitution, although the latter creates favourable conditions for it by vesting the courts with an important and, at the same time, independent role in the application of constitutional norms. It is beyond a shadow of a doubt that before the entry into force of the new fundamental act, the Constitutional

Tribunal played a particularly positive role in such interpretation of constitutional provisions as to draw from them messages corresponding to contemporary standards of State organization. As we have already mentioned, on the basis of the clause of a democratic state of law and regulations originating from the previous epoch, like the principle of equality, the Tribunal interpreted the principle of proportionality, the principle of prohibition of retroaction of law, the principle of validity of international law which binds Poland in the internal legal order, the principle of the citizen's trust in the state, the principle of positive discrimination, the principle of protection of rights of acquisition, the right to information and a number of rules concerning the legal order. Similar trends appeared also in judgments of the Supreme Court and the Chief Administrative Court, but whereas the judgments of the Tribunal were of greater importance for shaping wide social awareness of the binding character of these principles (judgments were publicized in the media), the judgments of the remaining two judicial instances contributed greatly to educating judicial staff. The principles of a modern and citizen-friendly state, mentioned here just as examples, have thereby been considered permanent elements of the order of State organization, and some of them were concretized and petrified in the new Constitution. Thus we can refer to a specific Polish course of constitutionalization - from creative judicial interpretation of anachronistic and limited in content constitutional provisions to a more complete and exhaustive formulation of modern principles of State organization in the new Constitution, as a written law, while the role of courts in the application of constitutional law is also granted in this Constitution.

V. The Limits and Obstacles of Constitutionalization

A. Technical Limits

The conditions and limits of effective constitutionalization are, to a large extent, determined by the competence of the Constitutional Tribunal.

In the present legal status, competence of the Constitutional Tribunal comprises adjudicating: on the conformity of statutes and international agreements to the Constitution, on the conformity of statutes to ratified international agreements, if such ratification required prior consent expressed in statutory law, and on the conformity of legal provisions issued by central State organs to the Constitution, ratified international agreements and statutory law. Such forms of control have the character of consequent control, which is one of the principles of activity of the Polish Constitutional Tribunal. It should be distinguished from the Tribunal's competence to determine, upon the President's application, whether an Act before signing or an international agreement before ratification are in conformity to the Constitution, which has the character of initial control. The Tribunal has expressed several times its opinion on the special rules connected with its exercise of initial control: due to the fact that it is unable to evaluate the functioning of an instrument submitted for such control, the assumption of constitutionality of such instrument is reinforced (K 32/95). If an instrument is declared consti-

tutional in the course of initial control, it can still be subject to the procedure of consequent control (K 12/95, K 23/95). Also, the formal effects of declaring unconstitutionality in the course of initial control and in the course of consequent control are different (W 1/950).

In some cases the control of constitutionality of law by the Tribunal has an abstract character: if the subjects specified in the Constitution submit an application tor declaring incompatibility of legal instruments with the Constitution. In other cases they have a concrete character: when the Tribunal answers questions of law and inquiries in the form of complaints concerning a constitutional infringement.

The fundamental limitation of the Tribunal's competence, until the Constitution of 2nd April 1997 was adopted, had been the fact that its judgments on incompatibility of statutes with the Constitution were not considered final and they could be rejected by the Sejm. The new Constitution preserves this legal status for the period of another two years from its coming into force (Article 239, paragraph 1), which seems a highly controversial solution.

Another significant limitation was excluding of instruments of international law from its cognition, which the Tribunal tried to circumvent slightly by referring to them in reasons for its judgments and for commonly binding interpretations of statutes.

A limitation of the Tribunal's competence was time restrictions on legal instruments submitted for its control. The Act on the Constitutional Tribunal of 1985 stated that its provisions applied to legislative instruments and other normative instruments promulgated, approved of established after its entry into force. As for legislative instruments or other normative instruments issued by the Council of the State, the President, supreme and central organs of State administration before the day of the Act entering into force, proceedings before the Constitutional Tribunal could be initiated if they were promulgated, and decrees - approved, or if they became binding after the day of the entry into force of the Act of 16th March 1982 on Amendments to the Constitution of the Polish People's Republic. Clearly, an important reason for introducing time restrictions was the intention to exclude, from the control of constitutionality the Decree on Martial Law of December 1981. The instruments which were examined according to the procedure of questions of law, were not subject to this restriction. The new Constitution abolished the time restriction established in 1985, which ensures completeness of the cognition of the Constitutional Tribunal in respect of the operative legal system.

A legal instrument, frequently and efficiently used by the Tribunal (often due to the initiative of the Commissioner for Citizens' Rights), was establishing the commonly binding interpretation of statutes (introduced in 1989). This competence was abolished in the new Constitution - to a large extent upon request ol common judiciary and the Supreme Court, which gave rise to serious controversy. The Supreme Court, from the moment of granting the Constitutional Tribunal with this function, was of the opinion that the commonly binding interpretation of statutes by the Constitutional Tribunal limited the independence of judges, by subordinating the interpretation made in the course of a trial to the interpretation imposed by the Tribunal. The resistance against

considering the Tribunal's interpretation as binding increased when the "Small Constitution" of 1992 adopted the principle of separation of powers, since in an event of a conflict of both interpretations the Supreme Court would have to accept the interpretation of a provision as provided by the Tribunal. According to the Supreme Court such legal status was contrary to the principles of separation of powers and of a democratic state of law. The Supreme Court submitted this opinion to the Constitutional Commission of the National Assembly, requesting in the resolution of the General Assembly of Judges that the Constitutional Tribunal be deprived of this competence. The Supreme Court assumed a similar standing: it was expressed in the answer to a question of law of one of the voivodship courts in May 1995 where it openly opposed accepting the interpretation of the Constitutional Tribunal, making a diametrically different interpretation which the common court applied in the judgment. Depriving the Tribunal of the competence to make commonly binding interpretations of statutes in the new Constitution is a systemic consequence of adopting the principle of separation of powers, and the independence of courts and judges, who in their adjudicative activity are subordinated to the Constitution and statutory law. The bitterness of some Deputies about the Tribunal having lost this competence is connected with appreciation of the significance of its interpretations for "completing" the former legal order with principles and messages which made it more modern and allowing its application to the new social and economic relations. In the light of the entry into force of a more complete constitutional regulation and the consequent gradual transformation of the legislation in its entirety, the main reason for the Tribunal's competence becomes invalid.

B. "Theoretical" or "Pedagogical" Limits

As we have frequently reminded in this paper, it is only the new Constitution that created really favourable conditions for development of the constitutionalization of the legal order in Poland. It seems that neither the judicial environments, nor the doctrine of individual branches of law, nor any factions of the political environment negate this developmental tendency. A strong and influential environment connected with the Helsinki Foundation of Human Rights, which groups many distinguished representatives of legal science and - formerly oppositionist - protectors of citizens' freedoms, spoke particularly consistently for the appropriate shaping of constitutional provisions. It is a fact that the practical implementation of the constitutionalization of the legal order depends on the way of thinking and viewing the role of the Constitution and courts by practitioners. In the Polish judiciary, there occurred a serious generational change, which followed democratic transformations, and soon a formal examination [lustracja] of judges is due to take place. (It seems that its scope will cover a very small circle of judges who have broken their independence in a particularly drastic manner.) This does not signify, however, that education of judicial, prosecutorial or solicitorial/attorney staff in recent years emphasized the questions of direct operation of the Constitution in the legal order as neither the legal status, not adjudication favoured doing so. It is probably only now that we can expect the development of the phenomenon of constitu-

tionalization, when the new Constitution has entered into force and the significance and "operativeness" of the fundamental law have been established firmly in social awareness as a result of a wide constitutional debate in the media before the referendum in which the Constitution was accepted. It would, however, be a mistake to overvalue the level of constitutional knowledge in the society (its presence in school programmes is definitely insufficient!), which usually becomes familiar with this knowledge in the case of seeking protection of rights.

VI. Does the Constitutionalization Process Appear Desirable or Necessary?

In Poland the phenomenon of constitutionalization has played a positive role in the process of democratic transformation of the State and law, when the "hunger for judges' law" resulted from the discrepancy between the new reality of economy and social relationships and old legal regulations. It has not, however, achieved - except in the activity of the Constitutional Tribunal and, to a lesser degree, of the Supreme Court and the Chief Administrative Court - the size which it might have been ascribed and which would seem desirable. After the entry into force of the new Constitution, thanks to new legal instruments and its philosophy as a whole, this tendency seems to have the potential for significant further development. The promotion of awareness of the new possibilities which the Constitution offers will probably play the key role. This phenomenon must be evaluated as positive, since it will probably affect the "discipline" of legislators in observing the principles of State organization and it may reduce opportunism and instrumental treatment of law. It is of special importance in a country where political culture and culture of State organization, even that of the governing elite, is in the making. The possibility of progressing internalization of the principles of State organization by a wider circle of the society would not be insignificant, either. There are chances that together with constitutional education the sense of security in relation to the State apparatus would increase as well, if the arbitrariness of such apparatus had less chance in the case of confrontation with constitutional norms and if there existed appropriate, available procedures of protection of the citizen.

It seems that the boundary to the constitutionalization of the legal order should be the postulate of clarity and sureness of law. The domination of judges' law *(vide* the USA) may lead to obstacles to the access of citizens, who do not deal with law professionally, to the sources of law, and particularly to judicial interpretations. This would force them to seek the intermediation of professionals - attorneys/solicitors. A complete regulation in the form of written law, in spite of its progressing hermetism has advantage over the above mentioned system from the point of view of the subject seeking legal protection.