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DO WE NEED TO REVISE THE CONSTITUTIONAL CHARTER OF RIGHTS?*

I. It is hardly possible to answer the title question without at least a brief reflection as to whether the 1997 Polish Constitution has kept apace with reality, some two decades after its adoption. Already its preamble leaves no doubt that the charter of rights is its integral part not only in an editorial sense, but, more importantly, also in a substantive one. It says that the Constitution has been established 'as the basic law for the State, based on respect for freedom and justice, cooperation between the public powers, social dialogue as well as on the principle of subsidiarity in the strengthening the powers of citizens and their communities'. Those who apply the Constitution should do so, paying respect 'to the inherent dignity of the person, his or her right to freedom, the obligation of solidarity with others, and respect for these principles as the unshakeable foundation of the Republic of Poland'.[1] Devoting Chapter II of the Constitution, immediately after setting out the principles of the constitutional order, to the freedoms, rights and duties of individuals attests to the paramount importance attached by its drafters to their legal status.

II. The year 1997 represented a watershed in the history of Polish constitutional lawmaking. It crowned years of discussions, disputes and negotiations with a social contract for Poland, in the form of a new democratic Constitution.[2] However, constitutional matters were given serious thought already in the 1980s when the prospects of the demise of the then political system were growing more real but still without any specific time horizon. Luckily, the debates were set from the start in the context of modern constitutionalism, drawing on the experience of democratic countries.

There are no grounds to believe that this legacy, an integral component of which is formed of the rights and freedoms of the individual stemming from human dignity and the principles of freedom and non-discrimination,

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[1] *The Constitution of the Republic of Poland*, Sejm Publishing Office, Warsaw, 2010 (trans. Albert Pol & Andrew Caldwell).

[2] On the subject of the drafting of the Polish Constitution *see* R. Chruściak, W. Osiatyński, *Tworzenie Konstytucji w Polsce w latach 1989–1997 (Drafting the Constitution in Poland 1989–1997)*, Warsaw, 2001.

has 'grown old' over the last 20 years and become inadequate in defining the political system of democratic states. On the contrary, its impact continues to expand. The constitutions adopted in recent decades by democratic countries and those which, not only in Central and Eastern Europe, but also in other regions of the world,[3] have made constitutions one of the major instruments of democratic transformation, bear out this opinion. Likewise, the founding treaties of the European Union adopted as part of the Lisbon reform.

Nor does it seem that the 1997 Constitution ceased to satisfy the needs of the society whose ambition is to build an efficient state, protecting the freedom of the individual, being friendly to its people, ensuring protection against all kinds of discrimination, including social exclusion, and respected as a reliable and cooperative partner in the community of nations. This is a modern piece of legislation, creating a functional framework for the state and civil society to operate in. It provides conditions for good governance as it is defined in the international doctrine.[4]

The Constitution has, of course, one weakness that is inherent in instruments of this type in democratic countries. It stems from their virtue and this is probably enough to justify it. This weakness and virtue at the same time is the assumption that people called upon to implement the constitution will act in good faith. In this sense, a comment made about the American Constitution by John Adams, the second US president, in the early years of its two-and-half century long history, can be applied to the 1997 Constitution. He wrote that it had been made for a moral people and was wholly inadequate to the government of any other.[5]

The Polish Constitution, admittedly, does set up mechanisms of correction in respect of actions that breach it, but like other constitutions of democratic countries, it may be helpless in the face of a direct assault. It rests on the assumption that democratic procedures and the judicial review should in principle be enough to defend democracy and the rule of law.[6]

The Polish Constitution does not provide for the right to resist (*ius resistendi*) or to civil disobedience in the event the above assumption proves wrong. Interestingly enough, such provisions can be found in some other recent constitutions, including the Constitution of Slovakia. Its Article 32 reads:

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[3] Cf. Constitutions of the Republic of South Africa, Timor Leste or Nepal out of many others.

[4] On this concept see S. Agere, *Promoting Good Governance: Principles, Practices and Perspectives*, Commonwealth Secretariat, London, 2000, especially pp. 2–10, and also J.F. Helliwell, H. Huang, S. Grover, S. Wang, *Good Governance and National Well-being: What Are the Linkages?*, OECD Working Papers on Public Governance, 2014, <http://www.oecd-ilibrary. org/governance/good-governance-and-national-well-being_5jxv9f651hvj-en>.

[5] *From John Adams to Massachusetts Militia*, 11 October 1798, National Archives and Records Administration, Founders Online, <https://founders.archives.gov/documents/Adams/99-02-02-3102>.

[6] Cf. The concepts of 'democracy capable to defend itself' or 'contentious democracy' developed in the German social doctrine (*wehrhafte* or *streitbare Demokratie*).

> The citizens shall have the right to resist anyone who would abolish the democratic order of human rights and freedoms set in this Constitution, if the activities of constitutional authorities and the effective application of legal means are restrained.[7]

A quite common view holds, however, that regardless of the silence of a constitution on this point, the right to civil disobedience should be inferred from the provisions on the rights of an individual.[8]

As everybody knows, however, it is not only political conditions that determine the practical impact of any constitution on public institutions, governance and the situation of an individual. To a considerable degree, it is also a resultant of a natural tension that characterises the relationship between the text of a constitution and evolving social, political and economic environment. The quality of the constitution as an anchor of the legal order is its stability, protecting the state and society against drifting of the political system and legal order. On the other hand, the dynamics of socio-political changes is a natural phenomenon stimulated not only by planned and intended actions, but also by events, both internal and external in nature, independent of those who by virtue of their positions may influence the life of society. Moreover, no mean role in all this is played by social emotions whose nature, direction and energy are not fully foreseeable. This dynamics of socio-political changes poses a constant challenge to the text of a constitution, which is rightly protected by a more rigid procedure for amendment, compared to regular statutes. Constitutionalism has developed methods to deal with this problem. In the German legal doctrine, they are described by distinguishing between development (*Verfassungswandel*) and amendments to a constitution (*Verfassungsänderung*).[9]

A constitution develops through its interpretation without amending its text. Amendments, in turn, involve the revision of its provisions. Conclusions following not only from the hierarchy of the sources of law, but also from the constitutional practice of democratic countries argue in favour of following the path of constitution development as long as this is possible and only when tensions between the text of a constitution and its environment cannot be resolved in this way, advice for constitutional amendments. This means that

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[7] Constitution of the Slovak Republic, <https://www.prezident.sk/upload-files/46422.pdf> (accessed 21 November 2018). See also the Constitution of Estonia, § 54, or the Basic Law for the Federal Republic of Germany, Article 20(4): 'All Germans shall have the right to resist any person seeking to abolish this constitutional order if no other remedy is available'. <https://www.btg-bestellservice.de/pdf/80201000.pdf> [accessed 21 November 2018]. It is worth remembering that already Article II of the French Declaration of the Rights of Man and of the Citizen counted the right to resist oppression among the inherent and inalienable rights of man next to freedom, property and safety.

[8] Cf. M.J. Falcón y Tella, *Civil Disobedience*, The Eric Castrén Institute of International Law and Human Rights, Martinus Nijhoff Publishers, Leiden–Boston, 2004: 86; according to J. Rawls: 'The problem of civil disobedience is a crucial test case for any theory of the moral basis of democracy.' — *A Theory of Justice*, rev. edn., Cambridge, Massachusetts, 1999: 319. See also K. Brownlee, 'Civil Disobedience', in: *The Stanford Encyclopedia of Philosophy* (Fall 2017 Edition), E.N. Zalta (ed.), <https://plato.stanford.edu/archives/fall2017/entries/ civil-disobedience/>.

[9] Cf. B.-O. Bryde, *Verfassungsentwicklung. Stabilität und Dynamik im Verfassungsrecht der Bundesrepublik Deutschland*, Baden-Baden, 1982: 17 ff., especially p. 21.

if the socio-political environment essentially evolves within the framework of constitutional order, the first method as a rule is sufficient. Only when entirely new solutions are necessary or deficiencies or mistakes must be removed after they have come to light during the implementation of the constitution the changes in the text of basic law may occur inevitable. For such an approach, however, it is necessary to maintain judicial review of the constitutionality of law, independent of political actors, including the parliament and government.[10] In the case of Poland, this would mean the complete independence of the Constitutional Tribunal (CT) and its justices. Otherwise, there might not be any checks preventing the development of the Constitution and constitutional practice *contra legem fundamentalem*. Therefore, any actions undermining the independence of the constitutional judiciary and its justices not only breach the Constitution, but—*what's more*—actually prevent the development of a state based on the rule of law in accordance with the will of the sovereign; on law in the meaning given to it by modern free societies, including Polish people back in 1997.

The situation is different when a new constitution is to be adopted or an existing one is to be thoroughly revised, when fundamental elements of the constitutional order, or their significant part/s, have reached the limits of their functionality, what John G. A. Pocock calls the 'Machiavellian moment'.[11] Referring yet again to the nature of a constitution, specifically the requirement of its stability, it would seem that a debate if the situation is ripe for a profound revision of the constitution should be initiated only after a comprehensive analysis has proven that the country cannot properly function and develop without taking it. The analysis should be objective and balanced, and not merely a result of the desire to dissociate oneself politically from the current constitution by a certain part of the political establishment or commemorate a round anniversary of an event, even if its high place in the history of the nation cannot be denied (e.g. comments below on by the proposal made by the Polish President). Instead, one should remember the words of the well-known constitutionalist Bruce Ackerman, referring indeed directly to American constitutionalism, but being arguably more broadly applicable. He writes:

> But we cannot build a better future by cutting ourselves off from the past […] My aim here will be to persuade you that our present patterns of constitutional talk and practice have a deeper order than one might suppose, an order that is best rediscovered by reflecting on the course of its historical development […].[12]

In other words, a careful assessment must be made whether the potential of adjusting the constitution by interpreting it with recourse to existing knowledge and experience has already been exhausted and whether sufficiently strong reasons have objectively arisen, arguing in favour of a fundamental

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[10] Cf. B. Ackerman, *We the People. Foundations*, vol. 1, Cambridge, Massachusetts, 1991: 10.

[11] J.G.A. Pocock, *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition*, PUP, Princeton, 1975: VIII.

[12] B. Ackerman, op. cit.: 5.

constitutional reform. However, even affirmative answers to these questions may not be enough. Crucially important is also a strong and conscious engagement of the society in the process of changes, deriving its force from common political experience and the awareness of the long-lasting effects of the steps to be undertaken. In other words, as Bruce Ackerman calls it, a 'constitutional moment' should occur. The moment is gauged by explicit public support at three levels: depth (quality of social involvement), scope of support, and the determination of supporters to rally for the reform.[13] The meaning of this moment is made explicit by András Sajó, referring to Bruce Ackerman's proposal: 'The concept of the 'constitutional moment' is distinguished by lasting constitutional arrangements that result from specific, emotionally shared responses to shared fundamental political experiences'.[14]

Anna Młynarska-Sobaczewska, citing Bruce Ackerman's conception, asks with respect to Poland: 'Is this already a constitutional moment?'[15] This is no doubt a weighty question and was asked in a publication issued in cooperation with the Presidential Chancellery. It is to be noted that the current President of the State, Andrzej Duda, on some occasions called for the adoption of a new constitution, indicating at 11 November 2018—the 100 Anniversary of regaining by Poland of its sovereignty after more than 150 years of partition—as a suitable symbolic time for such a step.

Młynarska-Sobaczewska is inclined, as it seems, to consider a constitutional crisis to be a source of the constitutional moment and wonders if Poland is faced with such a crisis. According to her: 'It is not a symptom of a constitutional crisis even when an organ of state authority abuses it or behaves in breach of rules as long as the conflict can be overcome, using normal methods and instruments provided for in the Constitution'. It may be understood in such a way that one can hardly speak of a constitutional crisis when the aforementioned abuses occur, but, for instance, an independent constitutional court composed of independent justices whose judgments in compliance with the Constitution are properly promulgated, come into force and are implemented, is able to restore respect for the Constitution; nor is a constitutional crisis present when procedures for bringing to account those who are guilty of such abuses are in place and can be effectively used. If this would be, indeed, the interpretation of Młynarska-Sobaczewska, one could agree with her. Unfortunately, after the parliamentary election held in the autumn 2015, violations of rules concerning the appointment of judges of the Constitutional Tribunal and the refusal by the Prime Minister of the publication of some 'uncomfortable' Tribunal's judgements have led to undermining the role of the

[13] Ibidem: 272ff. See also an interview with Prof. M. Matczak, Nie odwiązujcie Odyseusza, *Tygodnik Powszechny* 11 March 2016, <https://www.tygodnikpowszechny.pl/nie-odwiazujcie--odyseusza-32718>.

[14] A. Sajó, Constitution without the constitutional moment: a view from the new member states, *International Journal of Constitutional Law* 3(2/3), 2005: 243.

[15] An opinion published in *Dziennik Gazeta Prawna*, 21 Dec. 2017, no. 247, *Wspólnie o Konstytucji (Together about the Constitution)*, Informational-Promotional Supplement published in partnership with the Presidential Chancellery.

Constitutional Tribunal as an independent guardian of the constitutionality of law. At the same time, requirements for the Polish version of impeachment have been set in such a way that in order to hold high ranking officials (e.g. President, ministers) supported by the parliamentary majority accountable for the abuse of power and breaches of the Constitution, it would be practically necessary to have a new political composition of the parliament supportive for such measures. In other words, to effectively use this procedure is hardly imaginable as long as the new elections or a collapse of a ruling coalition will not reverse the political relations in the parliament, or the ruling majority decides to take steps against officials from among their own ranks. This does not seem to happen any time soon. Taking this into account many see that there are enough reasons to speak about a constitutional crisis in the country.

Does it mean, however, that 'a normal method of overcoming' this type of constitutional crisis could be to change the constitution by those who have abused power or violated rules of constitutional order and seek to justify their conduct by such a change? The response in a democratic state must be negative for obvious reasons.

Młynarska-Sobaczewska continues by saying that the questioning of the constitutional operating rules or the operating system of the State as written down in the Constitution may amount to a constitutional crisis. It is unclear by whom and in what manner may such a questioning be considered legitimate and distinguished by the 'Machiavellian moment'. For example, would it be enough that the authority of the constitution is questioned by some political factions or the campaigns by some media or perhaps by a few of scholarly opinions? It would be impossible to give a positive answer to such questions in the light of the principles of constitutionalism.

In other words, when there is a widespread agreement in society that the Constitution has lost its ability to regulate government processes and the status of an individual, a diagnosis of a constitutional crisis might be arguably thinkable. However, if such an opinion of the Constitution does not dominate in the society, it will be hardly possible to consider it a crisis symptom. It may be a sign of a crisis only in the case when it directs the public authorities and leads to undermining the Constitution. Such a situation, however, is not an argument for amending the Constitution but rather a call for the restoration of the constitutional order. Hence, the competent organs of the State should apply and enforce the provisions of the Constitution.

Młynarska-Sobaczewska goes on to list examples of 'issues that are imprecisely or incompletely regulated in the Constitution'. They are supposed to illustrate the opinion, it might be seen, that a constitutional crisis looms. The examples can hardly be discussed here, as this would take another article, but there cannot be any doubt that the 1997 Constitution, as certainly any other constitution, does not lack provisions of general nature, a phenomenon which is, of course, typical for a basic law. Reading the Constitution proves, however, that the drafters paid a lot of attention to choosing between different levels of precision depending on the subject matter. In general, these efforts seemed to be quite successful, sometime inevitably not. Otherwise, if an incidentally im-

precise or incomplete constitutional clause were to be considered a symptom of a constitutional crisis then it would have to be concluded that all democratic countries are in a permanent crisis of this kind. Judicial interpretations of the constitution, which often are considered part of the constitution itself, help to address this problem.

The constitutional discussions in Poland could greatly benefit from Bruce Ackerman's reflections, who carefully distinguishes four stages of so-called higher law-making, concerning crucial questions of the political system, as distinguished from the limited in scope amendments of the Constitution, staying within the bounds of so-called normal politics. The stages are: signalling the need to amend the Constitution, drafting suitable proposals, mobilising public debate and—if this leads to a broad and conscious public support for reform—taking steps to legal codification.[16]

To conclude this subject, undoubtedly, the process of optimizing the Polish Constitution may produce more complete and precise solutions. What's more, questions as to how institutions of the democratic political system could be designed always remain open. They concern, for example the choice between a Westminster or presidential system, between a unicameral or bicameral parliament, etc. Młynarska-Sobaczewska rightly mentions in this context the fact that the Polish Constitution does not define the status of the Office of Public Prosecutor.[17] Any suggestions for reform should remain, however, within the bounds marked by contemporary constitutionalism. They include respect for the dignity of a human person and his/her freedoms and rights, system of government based on the separation of powers, the rule of law, including a judiciary independent of the legislative and executive powers, political pluralism, unrestrained civil society and free media, including both traditional and electronic (Internet). Any ambiguities or inaccuracies in this respect at the stage of initiating reforms threaten a dysfunction of the current system established by the Constitution and, in an extreme case, the destruction—and not consolidation—of the democratic system of government. Such results may also be brought about by high state officials, deprecating the current Constitution on account of its alleged 'questionable provenance', supposedly justifying suggestions for its replacement. Such comments were made *inter alia* with a view to explaining the President Duda's proposal to draft a new constitution.

It must be assumed that the deeper the intervention in the text of a constitution is to be, the more legitimate is the question if Ackerman's constitutional moment is present. It is worth remembering that—as Sajó emphasises—the drawback of the constitutions that emerge without the blessing of

[16] B. Ackerman, op. cit.: 266–267.

[17] It was difficult to agree on the position of the Office of the Public Prosecutor. The choice was between making it independent of the political authorities and making the Minister of Justice responsible for discharging the duties of the Public Prosecutor General. As a result, in the last 20 years, after initially entrusting the function of the Public Prosecutor General to the Minister of Justice, the model has already been changed twice: firstly, creating an independent Office of the Public Prosecutor and then, returning to the previous solution. By the way, it does not seem that the current model is to stay for good.

a constitutional moment is that 'they do not contribute to a sense of union, or the formation of identity, among members of the society […]'.[18] With the deep divisions of society witnessed now in Poland, are there conditions for a broad and fully conscious consensus around suggestions for constitutional amendments? Młynarska-Sobaczewska writes vividly, but not without reason, about Polish tribal warfare.[19] Does that 'tribal warfare', however, follow from the principles of the democratic and freedom-oriented system of government enshrined in the current Constitution? Doesn't it rather come from undermining them? If, in this situation, the remedy for stopping this 'warfare' is to be a new constitution, will its adoption mean the rejection of these principles? Certainly, a constitutional moment is not served by the arguments that the present Constitution 'is a constitution of elites' and its defenders are driven by the desire to preserve their own *status quo*.

Making due allowances, we should remember, and people in power in particular, the words of Jean Jacques Rousseau addressed to the Poles two and half centuries ago. The great philosopher, referring to his *Social Contract*, wrote about:

> […] the state of weakness and anarchy in which a nation finds itself as soon as it establishes or reforms its constitution. In this moment of disorder and effervescence, it is incapable of putting up any sort of resistance, and the slightest shock is capable of upsetting everything. It is important, therefore, to arrange at all costs for an interval of tranquillity, during which you may be able without risk to work upon yourselves and rejuvenate your constitution.[20]

It seems that a point of departure for an inclusive discussion over constitutional reforms, bridging gaps where this is possible and building a common civil identity, should be the restoration of mutual respect and confidence in the society, reliability of a legally established order, faith in the common good and free political participation. This should be a preceding stage, coming before the actual drafting of specific proposals for constitutional amendments. For this to succeed, it is absolutely necessary to respect the principles of democratic government enshrined in the Constitution in force. Only in this way can a 'constitutional moment' be reached. For it cannot arise as a result of the arbitrary rejection of the current Constitution by a part of the political establishment.

III. In this context, we should go back to the question whether the charter of rights included in the Polish Constitution needs to be thoroughly revised or replaced on account of its supposed axiological foundation losing adequacy or its imperfections, including drafting ones.

Undoubtedly, the assessments of the Polish Constitution cited above, concerning its embedding in contemporary constitutionalism, are true also

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[18] A. Sajó, op. cit.: 243.

[19] See Opinia, op. cit.

[20] *Considerations on the Government of Poland and on its Proposed Reformation* by Jean Jacques Rousseau, pp. 51–52, <www.files.ethz.ch/isn/125482/5016_Rousseau_Considerations_on_the_Government_of_Poland.pdf> [accessed 26 November 2018].

of the charter of rights. This charter resembles greatly, in its major points, provisions made in newer constitutions adopted not only in the Western hemisphere, including Central and Eastern Europe, but also in other regions of the world, in particular in the countries that had shed foreign domination or undergone a democratic transformation. The semblance is a by-product of, on the one hand, the dissemination of the idea of human rights by international law and related jurisprudence by international and domestic courts and others similar bodies, and on the other hand, the universal impact of today's constitutionalism.

Searching, however, for a more accurate answer to the question posed, let us focus on the following two issues:

– First: How fares the Polish constitutional charter of rights in the light of the criteria that were applied during its drafting?

– Second: What issues would need to be considered in the discussion of possible amendments to the Constitution?

1. Criteria for drafting the constitutional charter of rights

At the outset of the Polish political transformation, while discussing a new constitution, it was decided that the charter of rights should meet the following major criteria:

(1) Adequacy to the views dominating in society on relations between an individual and community

(2) Consistency with international standards of human rights

(3) Universality of content

(4) Juridical character.[21]

The reading of contemporary constitutions shows that these criteria are in principle universally applied.

1.1. Adequacy to the views dominating in society on relations between an individual and community

This criterion is particularly difficult to apply. Above all, the dynamics of views on the desired relations between an individual and community as well as the level of perception of problems related thereto make any findings in this respect difficult to arrive at. In discussions held at the outset of the political transformation, importance seemed to be attached to such factors as the significance of matter and the range of support or rejection for proposals in public comments. Even if there was awareness of the shortcomings of this approach, a different one was hardly feasible due to the pressure of time. Furthermore,

[21] Cf. Z. Kędzia, Kryteria kształtowania konstytucyjnego katalogu praw, wolności, obowiązków człowieka i obywatela [Criteria for shaping the constitutional catalogue of rights, freedoms and duties of man and citizen], in: *Prawa, wolności i obowiązki człowieka i obywatela w nowej polskiej konstytucji [Rights, freedoms and duties of man and citizen in the new Polish constitution)*, Z. Kędzia (ed.), Poznań, 1990: 36 ff. (a summary of the research project conducted by the Poznań Human Rights Centre, Institute of Law Studies, Polish Academy of Sciences.

it was justified inasmuch as considerable enthusiasm for the chief aims of the transformation (independence, democracy, freedom, economic revival) in that period helped capture what dominated the public mind. Moreover, the hope for a positive change made people more willing to compromise, which, in turn, helped clarify the directions of public debate.

However, romanticism sometimes accompanying historical transformations usually passes quite quickly as the experience of many countries shows. It is often followed by a period of disputes characterised by vindication and populism. Poland proved to be no different. Initially, personalism,[22] translated into such values as human dignity, freedom, tolerance and respect for others and inclusiveness, decency, equality and a rejection of discrimination, seemed to provide enough grounds to design the constitutional position of an individual in the community. Do these values still resound in the same way in society? Answering this question is not easy. Perhaps, it should be phrased differently: Does the reference to these values, once common and unquestionable, carry more weight with the general public than instrumentally motivated political arguments? Do these values have enough motivating power to make people effectively oppose a governance through the exploitation of populistic emotions?

Not very long ago, it would seem that the views that had been intellectually abandoned and survived only on the margins of debate would no longer be treated as innovative and important. This expectation, however, as can be seen now, was largely premature. For instance, a respectable website has recently published an article, maintaining that according to 'intellectuals' and 'liberals' freedom is about 'doing what one wants, provided that the freedom of another person is not infringed'. This, in turn, means for the author of the article that:

> First, the liberal definition of freedom allows one to harm another person. For example, when somebody sets fire to another's house or slanders another person, they does not infringe their freedom, does they? What becomes infringed is only their property or reputation. Hence, freedom understood the way liberals do, allows one to harm another person in any manner imaginable, provided that their freedom is not infringed.[23]

Regrettably, arguments of this kind are embraced by quite many and thus mark one of the poles of discourse on the axiological foundations of the constitutional charter of rights. Hence, they cannot be left without a comment.

To remind, the representatives of the liberal doctrine from its inception stressed that freedom could not mean the absence of any shackles binding an individual. It was not tantamount to lawlessness and irresponsibility inevitably leading to anarchy. In this context, John Locke is unequivocal: 'Freedom then is not […] a liberty for everyone to do what he wants, live as he

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[22] What is meant here is the general trend of personalism that places an autonomous human person in the centre of social discourse and makes him/her a reference point for the order of a human community and not its specific stream.

[23] M. Dziewiecki, *Wolna „wolność" czy wolny człowiek? (Free "liberty" or a free human being)*, <http://www.opoka.org.pl/biblioteka/F/ FE/wolnosc_czl.html>.

pleases, and not be tied by any laws'.[24] Jean Jacques Rousseau, who was more of a democrat than a liberal, and this distinction was significant in his times, emphasised:

> Many attempts have been made to confuse independence and liberty. These two things are so different that they are even mutually exclusive. When each does what he pleases, he often does what displeases others, and that is not called a free state. Liberty consists less in doing one's will than in not being subject so someone else's.[25]

Charles de Montesquieu, considering the need to set limits on the freedom of an individual maintained that 'there are cases in which a veil should be drawn for a while over liberty, as it was customary to cover the statues of the gods'.[26]

Is it not the case that the controversies, however, over the elements of constitutional axiology suggest that time has arrived to treat the catalogue of the rights of an individual as a set of 'practical agreements' that does not need a foundation of mutual fundamental values? Jacques Maritain, a distinguished personalist, when speaking on the Universal Declaration of Human Rights of 1948, used this very term, doubting if it was possible to reach an agreement on the philosophical foundations of human rights in a strongly diversified world.[27] Nonetheless, it must be remembered that it was Maritain who, in accordance with the doctrine of personalism, suggested that the Declaration be based on the universal value of human dignity.

Returning to our society: has its diversification gone so far that we should speak of a practical agreement, following Maritain, in the case of our constitutional charter of rights and give up any references to its axiological foundation? Is Sajó right when he says:

> […] people will have to learn to live in a world where traditional forms of constitutional identity and traditional constitutional safeguards of liberty are to be replaced with new, pragmatic forms of interest protection.[28]

Should we conclude then that there is no normative legitimation of the constitutional charter of rights and that it has merely legal legitimation, being a form of incorporating those practical agreements and pragmatic forms of interest protection in the Constitution? Consequently, are the rights of man and citizen to be fully a hostage to the will of the parliamentary majority, even if this were a majority necessary to amend the Constitution?

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[24] John Locke, *Second Treatise of Government:* 9, ,https://earlymoderntexts.com/assets/pdfs/locke1689a.pdf [accessed 27 November 2018].

[25] J.-J. Rousseau, Jean-Jacques Rousseau, *Letter to Beaumont, Letters from the Mountain and Related writings. The Collected Writings of Rousseau,* ed. Ch. Kelly and J. R.Bush, Darmouth College, University Press of New England 2001, Eights Letter: 260–261.

[26] Charles Louis de Secondat, Baron de Montesquieu, *The Complete Works of M. de Montesquieu* (London: T. Evans, 1777), 4 vols. Vol. 1. 27.11.2018. <https://oll.libertyfund.org/titles/837>.

[27] J. Maritain, *Man and the State*, Catholic University of America Press, Washington 1998 (orig. University of Chicago Press 1951): 76–77.

[28] A. Sajó, op. cit.: 244.

It does not seem that we are at this point in Poland, nor in other countries that have chosen the democratic option. It must be assumed that personalist argumentation, placing a free and also responsible individual and the protection of his/her freedom in the centre of discourse, continues to offer basic grounds for the charter of rights. In the post-truth and post-argument era, however, it is necessary to double our efforts to disseminate knowledge of fundamental democratic and humanist values, including human rights, as well as promote desirable attitudes in this respect. Unfortunately, the rather universal hope has not come true (perhaps, it could not) that progressive reforms, in the spirit of democracy, rule of law and human rights, once generally completed, would automatically as it were, inculcate these ideas into the public mind for good. Meanwhile, it appears that they need 'renewable energy'.

The opinion that a democratic political turning point should not be treated as a one-off act, the achievements of which will be permanently safe, was insightfully voiced by another outstanding personalist, Karol Wojtyła. Already beginning with his first papal encyclical *Redemptor Hominis*,[29] he stressed the paramount importance of human rights for an individual and political community. He did not, however, treat them as a legacy received once and for all. In the Message for the Celebration of the 32nd World Day of Peace in 1999, crowning the 50th anniversary of the adoption of the Universal Declaration of Human Rights, he wrote 'Only when a culture of human rights which respects different traditions becomes an integral part of humanity's moral patrimony shall we be able to look to the future with serene confidence'.[30] His encyclical *Centesimus Annus*, issued at the outset of the political transformation in Central and Eastern Europe, devoted *inter alia* to the system of government and the rights of an individual, should be read more as a warning against swerving from the course taken than charting the latter. Referring to the ideas proclaimed by Pope Leo XIII, he wrote:

> The organization of society according to the three powers — legislative, executive and judicial […] reflects a realistic vision of man's social nature, which calls for legislation capable of protecting the freedom of all. To that end, it is preferable that each power be balanced by other powers and by other spheres of responsibility which keep it within proper bounds. This is the principle of the 'rule of law', in which the law is sovereign, and not the arbitrary will of individuals.[31]

He continued by insightfully stressing that 'As history demonstrates, a democracy without values easily turns into open or thinly disguised totalitarianism.'[32]

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[29] John Paul II, Encyclical *Redemptor hominis* of 4 March 1979, para. 17. 27.11.2018 <http://w2.vatican.va/content/john-paul-ii/en/encyclicals/documents/hf_jp-ii_enc_04031979_redemptor-hominis.html>.

[30] Message for the XXXII World Day For Peace 1999, 27.11.2018, < http://w2.vatican.va/content/john-paul-ii/en/messages/peace/ documents/hf_jp-ii_mes_14121998_xxxii-world-day-for-peace.html>.

[31] Encyclical *Centesimus Annus* (44) 27.11.2018, <http://w2.vatican.va/content/john-paul-ii/en/encyclicals/documents /hf_jp-ii_enc_01051991_centesimus-annus.html>.

[32] Ibidem, (46).

It appears that John Paul II's views and the moral authority he enjoyed in Polish society supported well the claim about the central position, certainly not always and not fully realized on society's scale, of personalism as an axiological approach to the definition of the legal status of an individual in the Polish Constitution. An alternative that could integrate society around the constitutional charter of rights is barely imaginable even today. Certainly, neither a post-modernist axiological abdication in favour of treating the rights of an individual as a regulation of a purely positivistic provenience, nor some version of a nationalistic vision of relations between an individual and the state should be such an alternative.

1.2. Consistency with international standards of human rights

In the debate over the constitutional charter of rights, international standards were one of the chief inspirations. It was not only about incorporating them into the domestic legal order but also about the identity of Polish society. Adoption of these standards as a point of reference for the Polish legal order confirmed the recognition of inherent human dignity as the source of human rights. This was later spelled out in the Polish Constitution, Article 30.[33] However, in the early years of the transformation, they had still another function. Their incorporation into domestic law was a road to the Council of Europe and joining it was tantamount to the acquisition of a 'certificate of nobility', securing membership in the club that for decades had seemed an unattainable dream. It is also for this reason that invoking the need of consistency with international standards had incredible persuasive power in arguments over the wording of particular provisions of the constitutional charter of rights. On the constitutional level, the requirement of consistency with international standards was ultimately considerably strengthened by adopting a uniform system of sources of universally binding law, involving the monistic system. According to the Constitution, the sources of law encompass international human rights treaties, which have priority over statutory provisions if they cannot be reconciled.[34]

Does the criterion of consistency with the international standards of human rights still have the same force? A question of no small importance. Many still believe that these standards protect what is of fundamental importance for the life of individuals and society, and that their incorporation, on the one hand, and the access they give to international institutions and protective procedures based on them, on the other, are vital for the completeness and effectiveness of the system of protecting an individual. However, an opinion can also be heard, practically absent at the outset of the transformation, that if universal or regional standards are felt as a restraining straitjacket, it is better not to adopt them or possibly free oneself from them. One of the examples of this line of thinking is the Polish-British Protocol to the Charter of

[33] Cf. The Preamble and Article 1 of the Universal Declaration of Human Rights.

[34] Polish Constitution, Article 91(2).

Fundamental Rights.[35] Admittedly, Anna Wyrozumska emphasises that the purpose of the Protocol is not to make the Charter inapplicable to Poland and the United Kingdom,[36] but rather to clarify the terms of its application. However, in practice, the Protocol weakens the influence of Charter standards on the situation of persons falling under the jurisdiction of the Polish State.

Does this mean that the significance of the criterion under discussion of designing, interpreting and, possibly, amending the constitutional charter of rights may be questioned? Of course not if we believe that values protected by human rights are vital for the individual and the state. Of course not if we do not wish to breach the principle *pacta sunt servanda*. Of course not if we do not wish to fall into international isolation, which could hardly be called 'splendid'.

It can be assumed that at its inception, the constitutional charter of rights was in principle consistent with international human rights standards. From today's perspective, to assess the consistency, it would be necessary to analyse it on two planes.

The first involves the perception of international obligations, while the second is defined by the evolution of the international standards that has occurred in the last twenty years. Since the limits of this article do not allow for such an analysis, only a few general observations will be offered. As to the first plane, the fact that the legislator has treated the international standards for many years as a criterion of national legislation, the control and interpretative impact of the Constitutional Tribunal as well as the implementation of EU acquis have all contributed to the situation wherein the constitutional charter of rights has in principle remained consistent with the international standards also in its implementation process.

On the second plane the question lies in whether the evolution of international human rights standards due to changes in treaty law, international case law, and the development of so-called soft international law expose certain shortcomings in the constitutional charter of rights that were not there or were not conspicuous enough two decades ago? They may relate to problems for individuals faced with challenges posed by scientific and technologi-

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[35] Protocol (No 30) on the application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom. M. Wyrzykowski, Awantura o Lizbonę [A dispute over Lisbon], in: Z. Kędzia, A. Rost (eds.), *Współczesne wyzwania wobec praw człowieka w świetle polskiego prawa konstytucyjnego [Contemporary challenges to human rights in the light of Polish constitutional law]*, Poznań, 2009.

[36] A. Wyrozumska, Znaczenie prawne zmiany statusu Karty Praw Podstawowych Unii Europejskiej w Traktacie Lizbońskim oraz Protokołu polsko-brytyjskiego [Legal significance of the change in the status of the Charter of Fundamental Rights of the European Union in the Lisbon Treaty and the Polish-British Protocol], *Przegląd Sejmowy* 16(2), 2008: 25ff.; see also Preamble, sentence 9 & 10; see also judgment of the Grand Chamber of ECJ of 21 December 2011 r., Joined Cases C-411/10 and C-493/10, no. 119; <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX: 62010CJ0411: EN:HTML>, and M. Wyrzykowski, op. cit.: 257ff.; K. Szymański, Kompetencje Unii jak plama oleju [Union powers like oil stains], *Rzeczpospolita* of 3 July 2007; M. Księżniakiewicz, Stosowanie Karty Praw Podstawowych Unii Europejskiej: Protokół brytyjski i Sprawozdania ze stosowania KPP UE [Application of the Charter of Fundamental Rights of the European Union: The United Kingdom Protocol and Reports on the application of the EU CFR], *Rocznik Integracji Europejskiej* 2012, no. 6: 333ff.

cal advances (for instance, research into and interference in human genome, access to and rules of using the Internet, use of *big data* and their impact on autonomy and dignity of an individual and the democratic processes). Other problems include the prevention of social exclusion and marginalisation, and the exploration of the significance of the horizontal effect of human rights standards (for instance, in relation to business responsibility). Finally, a mention must be made in this context of the fact that the human rights standards have begun to reflect the evolution of opinions on cultural issues (for instance, protection of people living in civil partnerships and protection against discrimination on account of sexual orientation).

One more question needs to be raised in this context. Has the importance of the international standards eroded in the public mind due to the rise of radicalism in relation to national and cultural identity in contemporary societies? Radical attitudes are often provoked or stoked by, on the one hand, social stratification and consequent exclusion of considerable population groups and on the other, management of populist emotions by various political forces. An exhaustive answer to this question would call for a thorough study. One can assume, however, that if such an erosion did not proceed, it would be more difficult for successive governments to demonstrate the attitude of, let's call it, 'lowered readiness' to accept international obligations of Poland in the area of human rights. This attitude can be illustrated by some international conventions that have been awaiting ratification for many years, a marked reluctance to accept international complaint procedures in recent years or the Polish-British Protocol mentioned earlier.

1.3. Universality of content

When the Constitution was being drafted during the political transformation, doubts were raised, especially in the early phase, whether social rights should be included in the Constitution or whether it should list only civil and political rights. The doubts reflected frequent views in the Anglo-American doctrine and diplomacy that denied the international standards of social rights the character of human rights. In addition, the doubts could have stemmed from the desire to cut off from everything that brought memories of the previous political system, if in appearances only. The drafters of the Constitution eventually upheld the principle of universality of content or—as it is sometimes called—of the holistic scope of human rights which as a principle was reinforced at the 2nd World Conference on Human Rights in 1993. Its final document clearly stressed that all categories of rights are equally important and interdependent.[37] The constitutional charter covers all categories of rights, devoting to them successive sections, but taking into account their legal characteristics it adjusts the form of specific provisions to the peculiarity of their subject.

Nevertheless, the trend of treating social rights as rights of a lower category is still present in our (Polish) public life. The official position of the government

[37] Vienna Declaration and Programme of Action, part I, para. 5.

presented in the UN human rights treaty bodies maintains that social rights granted in the treaties ratified by Poland—in spite of the fact that under the Constitution such treaties prevail over Polish statutes in case of conflict—have no normative character, because they differ in their nature from civil and political rights, which in turn, are directly applicable in the Polish legal order.[38] In the opinion of the government the courts 'refer to the International Covenant of Economic, Social and Cultural Rights as a set of guidelines [!] used to interpret national legislation'.[39] This unfortunate reading—contravening the interpretation of the Covenant by the Committee on Economic, Social and Cultural Rights,[40] in fact depreciating the legal significance of the standards under discussion—is borne out as to its intention is characteristic of successive governments. This can be seen e.g. in the refusal to ratify the European Social Charter (Revised),[41] complaint procedures relating to social rights enacted by both the Council of Europe and the UN and, finally, in the co-authorship of the Polish-British Protocol that for the most part concerns Chapter IV of the EU Charter of Fundamental Rights that is devoted to social rights.

These facts and opinions do not bear out the thesis that the constitutional charter of rights does not satisfy the criterion of universality. However, to counteract effectively the depreciation of social rights, it would be appropriate, if the Constitution is to be amended, to consider the possibility of dropping the reservation included in its Article 81, which says 'The rights specified in Article 65, paras. 4 and 5, Article 66, Article 69, Article 71 and Articles 74–76, may be asserted subject to limitations specified by statute' [these provisions deal with some aspects of economic and social rights—see below]. Furthermore, it would help if the public authorities changed their official stance on the international standards of these rights. This is, however, a question for voters to decide if government policies remain not only consistent but also coherent with the Constitution and Poland's international obligations. Ditto, it would greatly matter if the courts readjusted as appropriate their line of case law and unequivocally recognised that international social rights standards establish legal entitlements of an individual that may be asserted *mutatis mutandis* within the national jurisdiction.[42]

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[38] Cf. Comments by the Government of Poland on the concluding observations—UN Doc. E/C.12/POL/CO/5, §§ 1–6 (this document was cited in the last report of Poland [E/C.12/POL/6 §§ 2–4 of 2016] but referred to the Concluding Observations formulated in the preceding reporting cycle).

[39] Replies of Poland to the List of issues [in relation to the sixth periodic report of Poland], UN Doc. E/C.12/POL/Q/6/Add.1, § 3.

[40] Cf. General comment No 9: The domestic application of the Covenant, UN Doc. E/C.12/1998/24, § 5–7; Committee on Economic, Social and Cultural Rights. Concluding observations on the sixth periodic report of Poland, UN Doc. E/C.12/POL/CO/6 (2016), § 5.

[41] Already 13 years have passed since the Ministry of Labour and Social Policy published a communiqué about the signing (but not ratification) of the European Social Charter (Revised) by Poland in 2005 on its website and informed that 'In connection with the results of the analysis of the consistency of Polish legislation with the Charter provisions and the possible economic and social consequences of their adjustment, it is expected that systemic measures to ratify the document will be taken in 2006.' Unfortunately, this announcement has not brought any results yet.

[42] It is only fitting to cite the decisions on which the government stance is based, concerning the international standards of social rights: the SC in decision II UKN 347/99 of 8 Feb. 2000 found that

1.4. Juridical character

When one reads the charter of rights included in the Polish Constitution, the determination of its drafters to give it the character of a regulatory instrument is immediately noticeable. Clearly, they did not content themselves with drawing up a political manifesto. This option may be seen in both precise phrasing and a careful choice of normative forms as well as in enacting procedures for asserting rights.

I still remember discussions in the Sejm with experts from common law countries, who wondered why both deputies and national experts strove to make the provisions of the charter of rights as precise as possible. They believed that ultimately 'a judge will anyway manage to resolve considered cases and should not be overly restricted by unequivocal and detailed regulations'. The Constitution, however, is firmly rooted in the Continental system of law. It distinguishes, albeit not always consistently,[43] between provisions in the form of principles of law, subjective rights and programme norms. All this makes the constitutional charter of rights of 1997 satisfy, the criterion under discussion.

To the guarantees of individual rights granted by the Polish Constitution, another article is devoted in this volume. Hence, it suffices to mention here that in principle they were designed similarly to solutions adopted in contemporary constitutions. Next to systemic guarantees (establishing a democratic system of government, separation of powers with courts being independent of the other powers, in particular the executive power, independence of judges, judicial review), there are institutional and procedural ones, including the right to have one's case heard, right to appeal against a judgment or an administrative decision, right to a constitutional complaint, right to compensation for any damage done to the rights holder by any organ of public authority contrary to law, and the right to petition for assistance by the Commissioner for Citizen's Rights and the Commissioner for Children's Rights, as appropriate.

However, this is not a complete system of protection. As constitutional practice shows in situations where a final decision is made by the President of the State within his/her prerogatives, the rights holder is in fact deprived of the right to appeal, including recourse to the courts, in asserting his/her rights, which is contrary to the Constitution, Article 77(2).[44]

Another question is how the rights function and if they are effectively guaranteed. Considering the text of the Constitution alone, it does not seem to require any major amendments or additions, apart from—perhaps—regulating the problem of the final nature of the aforementioned President's decisions and

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the International Covenant of Economic, Social and Cultural Rights does not indicate any uniform principles that would have to be applied by the States to the Covenant [?] and, therefore, concluded that the implementation of the Covenant was a matter of national legislation. A similar decision was handed down by the Supreme Administrative Court in case I OSK 8/06 of 16 May 2006.

[43] E.g. the use of the term 'rights' with respect to some provisions of a programme character in Article 81.

[44] A separate analysis, from the point of view of the completeness of constitutional regulation, would be necessary to study the decisions of the CT and SAC, reviewing the acts of the President of the Republic made within his powers granted in the Constitution, Article 144(3).

considering the possibility of introducing public interest litigation to the Polish legal order. It is to be hoped that the Polish Parliament will be guided also in the future by the observation of Justice Frankfurter who said that 'The history of liberty has largely been the history of the observance of procedural safeguards'.[45]

2. Examples of possible amendments to the text of the constitution

From what has been said so far a conclusion can certainly be drawn that the constitutional charter of rights does not require any general revision or replacement for any principal reasons. Generally speaking, it is an example of an up-to-date regulation of the legal situation of an individual, consistent with the requirements of contemporary constitutionalism. This overall assessment does not mean, however, that it is inadvisable to consider the possibility to improve some specific solutions when the Constitution comes up for amendment in due course. This article allows for giving but a few examples by way of illustration.

2.1. Naming so-called prohibited grounds of discrimination

The Polish Constitution is exceptional in the way it regulates the prohibiton of discrimination. Unlike human rights treaties and many other constitutions, this Constitution, while establishing the ban on discrimination, does not define its prohibited grounds. This formula was motivated by the fact that international and national instruments listing such grounds do so only by way of example. This is borne out by the phrase often added at the end of respective provisions: '…and for any other reasons', and by national and international case law. Thus, since discrimination should be prohibited for all reasons whatsoever, Constitution drafters decided to name none and avoid the suggestion that the discrimination grounds listed *expressis verbis* were more prohibited than others. However, in the discussions on countering discrimination (e.g. on account of sexual orientation) arguments were also raised that the Constitution did not clearly prohibit such discrimination. If the current wording of Article 32(2) were to support discrimination in whatever case (so-called affirmative action or positive discrimination remains outside this discussion), then, it perhaps should be considered if it would not be better to include in this article an open but as complete as possible list of prohibited grounds for discrimination.

2.2. Recognition of the rights of persons with disabilities

The Constitution is rather terse on this issue. It does not recognise any special rights of this category of people and talks about their protection only in terms of a duty of the public authorities.[46] Instead, persons with disabilities should be recognized under the Constitution as holders of rights stemming

[45] US Case Law, U.S. Supreme Court, McNabb v. United States, 318 U.S. 332(1943): 308.
[46] Cf. Polish Constitution, Articles 68 & 69.

from the general human right to have an independent and active life.[47] It must be emphasised that to improve protection in this respect, it would not be enough to list a disability as one of the prohibited grounds for discrimination.

2.3. Substantive universality of constitutional rights

As it has already been mentioned, the equal status of civil, political and social rights in the Constitution requires dropping the reservation concerning the direct applicability of some provisions on economic and social rights, named in Article 81. The provisions concern four rights: to safe and healthy conditions of work, to days free from work, to be informed on the quality of the environment and its protection, and the right of a mother before and after birth to special assistance from public authorities. Since the drafters of the Constitution purposefully distinguished between the language of rights and that of programme norms, which cannot form independent grounds for individual claims, there is no convincing reason to uphold the discussed provision.

2.4. Binding business with human rights

It goes without saying that this question has been rapidly growing in importance recently both internationally and nationally. The Constitution is silent on this matter. Hypothetically, a general solution of this question could consist in the constitutional recognition of the horizontal applicability of the rights of an individual. Such a measure, however, would have very serious consequences for non-state actors, both natural and legal persons, as it would enable to interpret their legal obligations from the constitutional rights which have been drafted in a different context and different objectives. Therefore, the question calls for a very careful analysis and discussion prior to taking any steps in this direction. At the moment, it seems safer to include specific norms applicable to business. They could impose not only a duty of business to respect the rights of an individual established in the Constitution and statutes, but also a duty to exercise due diligence in order to avoid a negative impact on human rights.[48] With Polish businesses increasingly investing abroad, it would be advisable, too, if the Constitution recognised the extraterritorial dimensions of the obligations of the state in the area of human rights.[49]

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[47] Cf. Charter of Rights of the Disabled of 1 August 1997, Resolution of the Polish Sejm of 1 August 1997, M.P. 1997, No. 50, item 475.

[48] Cf. Committee on Economic, Social and Cultural Rights, General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, UN Doc. E/C.12/GC/24, §§ 15–17, 31–33, 50; Polish Institute for Human Rights and Business, Friedrich Ebert Foundation, NSZZ Solidarność, Beata Faracik (ed.), *Wytyczne dotyczące biznesu i praw człowieka. Wdrażanie dokumentu ramowego ONZ: „Chronić, Szanować i Naprawiać [Guiding Principles on Business and Human Rights. Implementation of the UN Framework Document: "Protect, Respect and Remedy]*, Częstochowa, 2014: 31–37; official source: UN Doc. A/HRC/17/31, §§ 17–21.

[49] Cf. General comment No. 24 (2017), op. cit., in particular §§ 25–37.

2.5. Principle of *non-refoulement*

It seems that the generality of constitutional provisions on the right to asylum[50] reflects a rather low number of asylum seekers when the Constitution was being drafted. Keeping in mind incidents at Polish border crossings and controversies over Polish policies in this respect, it seems that the Constitution would need a clear formulation of the *non-refoulement* principle provided for in the Convention on the status of refugees.[51]

2.6. Rights of foreigners

The Constitution makes it clear that anyone being under the jurisdiction of Poland enjoys the freedoms and rights proclaimed by it.[52] This provision is consistent with the principles of human rights protection. But. it is weakened by the accompanying clause that allows for exemptions introduced by ordinary statutes. A more consistent approach would be, as it seems, if the Constitution itself articulated at least principles and delineates the admissible scope of such exemptions.

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DO WE NEED TO REVISE THE CONSTITUTIONAL CHARTER OF RIGHTS?

Summary

The article seeks to answer the question whether it is necessary to revise the charter of rights of an individual included in the Constitution of the Republic of Poland of 1997. The starting point is the reflection on the topicality of the Basic Law from the perspective of 20 years of its applicability. The conclusion is that the Constitution meets the criteria of modern constitutionalism upon which the systems of democratic states are based. The reform consisting in a thorough revision of the existing Constitution or in replacing it with a new basic law would have to be justified by the fulfilment of the 'constitutional moment' conditions, in line with Bruce Ackerman's understanding of the term. The discussion devoted to the constitutional charter of rights focuses on the assessment of how the fundamental rights charter fulfils the criteria which guided its drafting, namely: the adequacy to the assessment of the relationship between the individual and the community that prevails in society; the compliance with international human rights standards; the universality of content; the jurisprudence. They lead to the conclusion that the charter of rights contained in the Constitution is an example of a modern regulation of the legal situation of an individual, consistent with the requirements of contemporary constitutionalism. However, this general assessment does not mean that it is pointless to consider the possibility or the need to refine the detailed solutions, or supplement the list charter, that could be made within the framework of the revision of the Constitution when this proves necessary. This thesis is illustrated with selected examples.

Keywords: constitution; democracy; independence of the judiciary and independence of judges; control of constitutionality of the law; constitutional reform; constitutional moment; constitutional crisis; human and civil rights

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[50] Polish Constitution, Article 56.

[51] Article 33(1) of the Convention of 28 July 1951; see also Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984.

[52] Polish Constitution, Article 37(1).