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The constitutional principle of social market economy and its protection

The article aims at presenting the content of the constitutional principle of social market economy including the standards established by the doctrine and constitutional case law. The constituents of the principle are: freedom of economic activity, private property, and solidarity, dialogue and cooperation between social partners. The authors attempt at reconstructing the practical protection of this principle. This issue is profound as the said principle constitutes the basis of the social and economic system of the Republic of Poland.

Key words: social market economy, freedom of economic activity, private ownership, solidarity, dialogue and cooperation between social partners.

I. My presentation is devoted to the constitutional principle of social market economy and forms of its protection in the jurisdiction of the Polish Constitutional Court. This principle has been developed in legislation, which might be considered to be evidence of its protection. It may also be seen as a manifestation of the lawmaker's respect, that is to say, the parliament's respect. Article 20 of the Constitution of the Republic of Poland provides that social market economy, based on the freedom of economic activity, private ownership and solidarity, dialogue and cooperation between social partners shall be the basis of the economic system of the Republic of Poland.

According to the Polish doctrine of constitutional law and the jurisdiction of the Constitutional Court, the principle of social market economy holds a status of the fundamental principle of the Constitution of the Republic of Poland. Therefore it is a constitutional standard of particular significance, defining one of the foundations of the political system of the Republic of Poland. Thus, it has its own legal and constitutional dimension, but its content has been developed largely outside legal science.

II. The notion and concept of social market economy should be derived from the doctrine of ordoliberalism and the Freiburg school, gathered around the «Ordo» [1], a periodical published in Germany. In general terms, this school's representatives supported the normatively ordered economic freedom. They emphasised the importance and significance of the relations occurring between the constitutional regulation of economic system and the legal regulations concerning economy included in other subconstitutional normative acts. All the regulations ought to form a coherent and consistent system of ordered economy, taking into account the principles of freedom (Freiheit ordnen). The first normative stage of building an economic order was to be developed at the second stage which was to be practical influence exerted by the state on the course of the currently running economic processes in the spirit of some definite values such as order, moderation and balance [2].

III. The principle of social market economy within the framework of the Constitution of the Republic of Poland is of a dynamic character. It bears the hallmarks of a general clause. Therefore, the descriptive method must prevail when defining the principle's connotation. The process of constructing the connotation of the principle of social market economy is not a closed process. However, it cannot be described as a «dead» principle or being in the initial stage of its construction. It should be stressed, that its connotation (significance) involves the considerable output of the doctrine of law and the jurisdiction of the Constitutional Court, which Article 20 of the Constitution of the Republic of Poland has produced for the 14 years, that the Constitution has been in force. As a result of this Article, a lot of content being part of the output of the German doctrine has permeated the Polish legal order [3]. Thus, from German ordoliberalism we have taken the arrangement, that an essential quality of economic system is safeguarding fundamental values: social order and economic order, which may be effected by means of a stable and cohesive economic policy, primarily aiming at ensuring competition [4]. A particular importance should be attached to the stimulation and revision of market mechanisms by the state in such a way, so that the economic system can guarantee the market freedom of action, protect free competition, while assuring social security at the same time. Implementation of the discussed concept is to prevent excessive social stratification, social market economy is assumed to mean a middle-of-the-road solution based on compromise [5].

IV. An insight into the character and particular elements of social market economy should be preceded by a presentation of the assumptions of market economy, deprived of the adjective «social». Let me remind

you that in market economy the prevailing importance and special tasks are on the part of private entrepreneurs acting in terms of economic freedom. The characteristics of this economy are the following: 1. dynamics (speed) of establishing legal relations, 2. guaranteeing safety of business transactions, 3. funding this kind of activity first of all on the basis of credit, 4. permanence of the relations of business transactions, often taking the form of mass relations, 5. raised standard of requirements concerning the entrepreneur's performance, resulting from his professionalism. Laws regulating business transactions result from the pursuit of certain principles which indicate a certain system of values, set directions of further legislative actions, thus determining the manner of their interpretation and preferences in case of conflict of legal norms as well as define the limits of making use of subjective rights within the framework of this type of economy. These principles also indicate certain directions of establishing norms of the law of business transactions in respect of their social and economic background, allowing for regulating them in such a way as to enable parties of the economic relation to enjoy subjective rights more extensively [6].

Let's emphasize that the state's constitutional duty is to guarantee under the law that it makes fundamental principles of market economy. The doctrine generally agrees on a catalogue of fundamental principles of market economy, although sometimes there are doubts about their interpretation. We should, however, consider the fact that these principles must be considered comprehensively, which means that they cannot be treated selectively, but we should seek to apply them all in the practice of business transactions. These principles include: 1. the principle of freedom to undertake business activity, 2. the principle of equality of business enterprises, 3. the principle of professionalism of entrepreneurs and raised professional diligence, 4. the principle of freedom of contract, 5. the principle of protection of market and freedom of competition as well as transparency of data and 6. the principle of security of business transactions [7].

V. Article 28 paragraph 1 of German Constitution determines the social lawful state (soziale Rechtsstaat). The party, which subscribed to the practical implementation of the policy in the spirit of this German constitutional principle, was not only the traditionally social party — Social Democratic Party of Germany, but also the CDU/CSU coalition, which was the first to include it in their political and economic programme back in 1949. As a result, today Germany is seen as a social state, on the background of other EU countries [8].

The Polish constitution maker of 1997 did not go as far. On the one hand, after the system transformation in 1989, Poland was, and in a way still is, a country which is making its way and undertaking the task of building a social state was beyond its financial capacities. On the other hand, the same system transformation resulted in a politically powerful trade union movement as well as aroused social expectations. Thus, the Polish constitution maker (parliament) was aware of the existing limitations and did not introduce the social state clause to the Constitution of the Republic of Poland in 1997. However, they decided to establish at least a social market economy [9]. For a country which has only just begun to make its way to market economy, this was a significant political and constitutional challenge.

Generally, we know what market economy is about, including such notions as competition and profit. However, there arises a question of the scope of correction of the notion of market economy resulting from using the adjective «social» for its description. So, the social dimension of economic system should reveal in the humanization of work process, equal opportunities and even participation in enterprise management. One of Polish authors, professor Zbigniew Witkowski, even says — perhaps a little idealistically — that Article 20 of the Constitution of the Republic of Poland expresses a necessity of adopting „the attitude of economic humanism» under the economic system [10]. The point is, to base the national economy on market mechanisms which are influenced by the state in order to mitigate social effects of the functioning of free market [11].

The Polish Constitutional Court pronounced further on the idea of social market economy in 2001 [12]. In its judgment, the Court held, that at constitutional level social market economy is indicated, on the one hand, by fundamental, traditional elements of the market in the form of economic freedom and private ownership, and, on the other hand, by means of social solidarity, social dialogue and cooperation between social partners. Thus, according to the Polish Constitutional Court, social market economy is not just an economic model, but also a more general vision of social order, as desired by the constitution maker.

In its jurisdiction concerning social market economy, the Polish Court refers not only to relevant provisions of the German Constitution, but also to corresponding norms of the constitutions of Italy, Spain and Slovakia.

The latter, however, do not contain the wording «social market economy», but some of their norms bear a certain resemblance in terms of the content. Therefore, I will be very much interested in Professor Filip's position. We will try to answer the question of whether the provisions of the Constitution of the Czech Re-

public, as well as the provisions of the Charter of Freedoms and Rights correspond with the idea of social market economy, distinctly present in European constitutionalism.

I am sure that during these comparative studies, their European aspect will emerge. We will certainly have to refer among others to the Charter of Fundamental Rights of the European Union, including the provisions of its Chapter III called Equality and Chapter IV, called Solidarity [13].

VI. In accordance with the provisions of Article 20 of the Constitution of the Republic of Poland, social market economy is based on three pillars. Firstly, freedom of economic activity. Secondly, private ownership. Finally, solidarity, dialogue and cooperation between social partners. The mentioned bases of social market economy are characterized by a more straightforward normative dimension than the very notion of social market economy, analyzed in abstracto [14]. They are also constitutional reference norms of the principles of social market economy, often used by the Constitutional Court in its jurisdiction.

VII. Concerning the first pillar of social market economy, the Constitution of the Republic of Poland does not define the notion of economic activity. According to the position established in the doctrine, freedom of business activity means freedom to undertake and run business activity in a selected legal forms and on the independence basis, yet with non-violation of public interests [15]. Subjects of the principle of economic freedom are only private business entities, that is entrepreneurs. The Constitutional Court held, that economic freedom is not on the part of organizational units with the prevailing share held by the State Treasury or local government units. Thus, economic freedom does not refer to the state and other state (as well as economic) organizational units [16]. It is stressed in the doctrine that the tasks of the state do not include conducting business activity, aimed at making profit on one's own behalf and on one's own account, as it would be contrary to the political role of social organization that it performs [17].

Moreover, the principle of economic freedom means having to conduct this activity without any unnecessary limitations and obstructions introduced by the state, although such restrictions may result from a necessity to protect the market and contractors and security of transactions. The idea of social market economy is not opposed by the limitations resulting from the necessity to put in order certain areas of activity, for instance construction permit, necessity to register business activity, or security reasons, for example limitations resulting from the provisions on work health and safety [18].

VIII. The second pillar of social market economy is private ownership. Article 20 of the Constitution of the Republic of Poland establishes private ownership as a constitutional principle, and consequently, private ownership is of primary importance as a material basis of business activity [19]. Yet, since the Constitution of the Republic of Poland does not contain a legal definition of private ownership, it should be broadly understood, as any ownership of non-state entities. As the Constitutional Court held, it includes also units of territorial government in the scope of property which does not serve directly public benefit [20]. In other words, private ownership is any ownership belonging to entities which are autonomous in relation to the state. Although the Constitution allows the existence of state and local government ownership, yet it does not change the fact, that the prevailing and basic form of ownership should be and in fact is private ownership.

I should add, that in Polish circumstances private ownership is in a way of a developing character, as it is where the constitutional, aimed at the lawmaker (parliament), imperative of continuation and completing the processes of privatization and denationalization (reprivatisation) should be derived from.

In addition, concluding a contrario from the preference and dominance of private ownership as established by Article 20 of the Constitution of the Republic of Poland, it is where the prohibition of nationalization of sectors of economy and the prohibition of returning to the system based on the dominance of ownership of the state and state enterprises should be derived from.

IX. As far as the third pillar of social market economy is concerned it was not defined in the Constitution of the Republic of Poland either. Solidarity, dialogue and cooperation between social partners do not have a well-established tradition in Polish constitutional law [21]. Therefore, the Constitutional Court had come to play a significant role in this case, too. The Polish Court held, that basing social market economy among others on solidarity, dialogue and cooperation between social partners involves the concept of balance of interests of market participants, as well as respect for their autonomy, creating constitutional guarantee of dispute settlement based on negotiation which enables to overcome tensions and conflicts in the process of management [22]. By this settlement, the Constitutional Court referred clearly to the doctrine of social solidarity which derives from the social teaching of the catholic church. This doctrine stresses the importance of the existence of moral and social bonds between people and places the idea of common good at the heart of social and economic thought. Also, the opening Article 1 of the Constitution of the Republic of Poland says, that the Republic of Poland is the common good of all its citizens. The Constitutional Court's reasoning is

complemented by a requirement, which involves all social classes being able to use it at the time of good economic situation [23].

This thread of settlement of disputable social matters through negotiation is enlarged on in Article 59 of the Constitution of Poland, especially in paragraph 2 which says that trade unions and employers and their organizations have the right to bargain, particularly for the purpose of resolving collective disputes and to conclude collective labour agreements and other arrangements. A statutory extension of the constitutional imperative of dialogue of social partners is the Act on the Tripartite Commission for Social and Economic Affairs and voivodship (regional) social dialogue commissions [24]. The Tripartite Commission is composed of representatives of the government, trade unions and employers' organizations. The Commission deals basically with negotiation of pay related matters. Moreover, the constitutional imperative of pursuing social partnership gives rise to a duty to take into consideration opinions expressed by social partners, when resolving matters connected with social consequences of the functioning of social market economy [25].

Set in the climate of the principles of solidarity, dialogue and cooperation between social partners are also judgements by the Constitutional Court. For example, one can point to a judgement upon which applying the previously existing, dissolved collective agreement until a new agreement comes into force was found incompatible with the principle of social market economy. According to the Tribunal this situation would violate not only employers' freedom of business activity of employers as entrepreneurs, but also dialogue and cooperation of social partners, because its consequence would be preference of one of the partners (namely employees) participating in collective bargaining [26].

However, in another judgement the Tribunal held that the introduction in the so-called salary cap act, of a restriction in the limits of remuneration of managerial personnel is compliant with the Constitution [26].

X. In conclusion, I wish to make one more comment of a more general nature. In Polish perception of the principle of social market economy along with the already discussed positive dimension, it has also its negative dimension, which refers to the reality of the past system. Thus, observance of the principle of social market economy must denote the constitutional prohibition of return to the so-called socialist planned economy. In other words, Article 20 of the Constitution narrows down the lawmaker's discretion (parliament) in respect of choosing the economic system in the country. To be specific, Article 20 of the Constitution of the Republic of Poland imposes a duty to reject the centralized, command and control system of economy management. Therefore, it is a constitutional barrier to the return of economic legal regulations typical of the so-called real socialism.

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20 However, it should be noted that even in 1989 the notion of «social market economy» was used by first Polish non-communist PM Tadeusz Mazowiecki in his first parliamentary political speech. At that time it was not followed with any further in-depth definition of this notion.

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Анджей Бистыга, Станислава Калус

Әлеуметтік-нарықтық экономикадағы конституциялық қағидалар және оның қорғанысы

Мақаланың мақсаты конституциялық қағидалар мазмұнының әлеуметтік-нарықтық экономикадағы доктринамен және конституциялық заңдармен бекітілген стандарттардың ұсынылуы болып табылады. Құрамдас қағидалары: экономикалық іс-әрекеттің бостандығы, жеке меншік, ынтымақ, диалог және әлеуметтік серіктестіктер арасындағы ынтымақтастық. Авторлар осы қағиданың тәжірибелік қорғанысын қайта құруға талпынды. Бұл терең мәселе болып табылады, жоғарыда айтылғандай, бұл қағидалар Поляк Республикасының әлеуметтік-экономикалық жүйесінің негізі болып саналады.

Анджей Бистыга, Станислава Калус

Конституционные принципы в социально-рыночной экономике и его защита

В статье представлено содержание конституционного принципа в социально-рыночной экономике, включая стандарты, установленные доктриной и конституционным законом. Отмечено, что составляющими принципами являются свобода экономической деятельности, частная собственность, и солидарность, диалог и сотрудничество между социальными партнерами. Авторами сделана попытка реконструировать практическую защиту этого принципа. Отмечена глубина исследуемого вопроса. Определено, что конституционный принцип составляет основу социально-экономической системы Республики Польша.