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Economic Determinants of Constitution

Ekonomiczne uwarunkowania konstytucji

ABSTRACT

The aim of the article is to draw attention to the systemic problem of mutual relations between constitution and its economic environment, in particular in the context of attempts to explain various interdependent economic and constitutional crisis phenomena. In this approach, theoretical and doctrinal aspects of the functions and guarantees of constitution as well as the economic constitution and constitutional economics are discussed herein, and the basic relations between them are analyzed. The main finding of the study is the conclusion that constitution and the practice of its application are directly legitimized by the efficiency of the economic system of the state. This efficiency influences the feasibility of the functions and guarantees of constitution to a significant extent, which consequently requires the use of instruments not only of legal but also of economic analysis of constitution in systemic practice.

Keywords: functions and guarantees of constitution; economic constitution; constitutional economics; economic analysis of constitution

INTRODUCTION

A very illustrative historical example, indicating the theoretical and practical relations between constitution and its economic determinants discussed in this study, is the Constitution of the Weimar Republic of 1919. As is commonly known, since 1933, this Constitution became meaningless in practice and provided only a formal basis of the functioning of the German state. The literature rightly indicates that it

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was not the "fault" of the provisions contained therein, as these are also nowadays considered to be fully democratic constitutional norms of the modern state, but of its social, political and, importantly, economic environment, which took the form of a long-term and a serious economic crisis.[1] As a result, it was mainly the economic problems that resulted, at least initially, in the making of this Constitution an act of a façade nature rather than a real one. This also applied to many other constitutions that in the past were enacted or used in various countries in a difficult economic environment, and which nowadays also applies to many crisis situations affected by economic factors.[2] The systemic experience of many states of the modern world shows that the constitutions that formally bind in them do not constitute real normative acts and do not fulfill the assumed functions in systemic practice, and it is either a state existing throughout the term of constitution or a state related to the occurrence of a systemic crisis (constitutional crisis). At the same time, the analysis of these historical and contemporary examples allows us to draw a conclusion about the fundamental influence of economic circumstances on negative systemic phenomena. It also allows for the expression of a more general thesis about the direct legitimization of constitution and the practice of its application by the effectiveness of the economic system of the state, due to the fact that this effectiveness significantly affects the feasibility of the functions and guarantees of constitution. As a consequence, the practical application of the provisions of constitution in order to ensure its real character should include not only the instruments appropriate for legal sciences, but also the economic analysis of its regulations and the effects of their application.

Due to the limited framework of this study and the adopted preliminary assumptions, the issues outlined above are analyzed only in the basic theoretical and doctrinal dimensions.[3] Consequently, the main research method used in the article is the doctrinal analysis of the relationship between constitution, its functions and guarantees and factors related to its economic environment. Due to the adopted perspective, the analysis carried out in this study is based primarily on Polish and foreign literature on the theory of constitutional law, and on the literature in the field of political economy and political science as a supplementary source.

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[1] N.M. Tończyk, *Konstytucja Republiki Weimarskiej z 11 sierpnia 1919 roku jako demokratyczna podstawa prawna totalitarnego państwa*, "Studia Iuridica Toruniensia" 2014, vol. 14, pp. 377–397.

[2] The literature points to, i.a., the economic determinants of contemporary systemic crises, in particular in countries that have undergone systemic transformation, but which deviate from the assumptions of the rule of law and liberal democracy. See I. Krastew, S. Holmes, *Światło, które zgasło. Jak Zachód zawiódł swoich wyznawców*, Warszawa 2020; D. Gros, *Why are illiberal democrats popular?*, 4.8.2017, https://www.ceps.eu/ceps-publications/why-are-illiberal-democrats-popular (access: 28.2.2022).

[3] However, the issues discussed here may also be of practical importance, in particular in the context of the possible identification of the causes of specific interdependent economic and systemic crisis phenomena.

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FUNCTIONS AND GUARANTEES OF CONSTITUTION

According to doctrinal assumptions, constitution is a set of fundamental (superior) legal norms regulating the state system. Simultaneously, each constitution should fulfill specific functions, which primarily include the legal function, but also axiological, organizational and social functions.[4] Thus, not only should constitution be a formalized set of fundamental (superior) systemic norms, but it should also be adapted to the expectations of its addressees in terms of the expressed values, in terms of the adopted mechanisms of the organization of social and state life, and should also play an actual role in the systemic practice, shaping the activity of state organs and its citizens. Ensuring convergence between the assumed and actual functions of constitution[5] is served by the so-called constitutional guarantees, which include not only formalized institutional and procedural guarantees, in particular such as constitutional review systems[6], but also social and political guarantees related to the reception of its norms by citizens and by representatives of the authorities. In this context, constitution is a permanent object of legitimacy not only in legal, but also in social and political terms, which leads to the conclusion that the majority of addressees of its norms must be convinced that "it is an expression of common will and common values",[7] and which, as a consequence, determines its real "legal legitimacy"[8] or the lack thereof. Thus, the specific "authority of constitution" cannot only be decreed in its norms, but is built in the systemic practice functioning in a given social, political and economic environment.

ECONOMIC CONSTITUTION

The model assumptions concerning the theoretical nature and essence of constitution, its functions and guarantees, refer to all system levels regulated by its provisions, including the level of the economic system. The economic system of

[4] The concept of the function of constitution is a doctrinal concept of the science of constitutional law, but there is no full agreement as to its content and the catalog of these functions. In this approach, individual authors propose various definitions and catalogs, while the legal function of constitution is always distinguished as the primary function and other functions that are complementary. More on the functions of constitution, see A. Chmielarz, *Funkcja prawna konstytucji na przykładzie Konstytucji Rzeczypospolitej Polskiej z 2 kwietnia 1997 roku*, Warszawa 2011.

[5] On the subject of this distinction with regard to the function of law, see S. Wronkowska, Z. Ziembiński, *Zarys teorii prawa*, Poznań 2001, p. 233.

[6] See J. McClellan Marshall, *Examining Judicial Decision-making: An Axiological Analytical Tool*, "Studia Iuridica Lublinensia" 2020, vol. 29(3).

[7] See A. Młynarska-Sobaczewska, *Autorytet państwa. Legitymizacyjne znaczenie prawa w państwie transformacji ustrojowej*, Toruń 2010, p. 89.

[8] *Ibidem*.

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the state is, along with the social and political system, one of the essential elements of its functioning, and thus one of the basic elements of the content of each constitution (the so-called constitutional matter).[9] This is because each state, apart from other functions, performs also an economic function, which generally boils down to defining the systemic conditions related to the broadly understood business activity of various entities.[10] In this approach, constitution determines the normative framework of the state's economic system, which should be binding on state bodies and on other participants in economic transactions. It is therefore also the constitution which affects the economic sphere, which boils down to the possibility of its doctrinal definition as the so-called "economic constitution".[11] This term emphasizes the fact that the constitutional system also covers the economic system, and in a broader sense it is also related to the very genesis of the concept of modern constitution, in which economic factors constitute its important structural element.[12]

Economic factors are at the same time an important element of the actual functioning of constitution in practice. The influence of these factors is one of the basic elements of the concept of constitution as a special social contract (the so-called theory of contractualism), according to which constitution, in the economic dimension, should refer to the idea of social justice and take into account the interests of many citizens, which, by definition, should ensure increased systemic stability of the state.[13] Thus, the chance for a practical convergence between the assumed

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[9] See M. Granat, *Prawo konstytucyjne. Pytania i odpowiedzi*, Warszawa 2018, p. 28, 43; M. Jagielski, *Konstytucyjna regulacja materii społecznych i gospodarczych (aspekty teoretyczne)*, "Gdańskie Studia Prawnicze" 2014, vol. 31, pp. 589–602. See also K. Nizioł, *Model ustroju społeczno-gospodarczego w świetle Konstytucji RP oraz wybranych krajów europejskich*, "Ekonomia i Prawo" 2006, vol. 2, pp. 423–438.

[10] V. Serzhanova, *Functions of Contemporary States*, "Przegląd Prawa Konstytucyjnego" 2018, no. 6, pp. 302–303.

[11] See K.W. Nörr, *"Economic Constitution": On the Roots of a Legal Concept*, "Journal of Law and Religion" 1994, vol. 11(1), pp. 343–354; K. Strzyczkowski, *Konstytucyjna zasada społecznej gospodarki rynkowej jako podstawa tworzenia i stosowania prawa*, [in:] *Zasady ustroju społecznego i gospodarczego w procesie stosowania konstytucji*, ed. C. Kosikowski, Warszawa 2005, p. 9; M. Przybysz, *Pojęcie „konstytucji gospodarczej" w dwudziestowiecznej niemieckiej nauce prawa i orzecznictwie Federalnego Trybunału Konstytucyjnego RFN*, [in:] *Wokół konstytucji i zdrowego rozsądku. Prace dedykowane Profesorowi Tadeuszowi Smolińskiemu*, eds. J. Ciapała, A. Rost, Szczecin–Jarocin 2011, pp. 137–139.

[12] As a consequence, modern constitutions have become a formalized expression of not only political and social ideas, but also economic ones, departing from the assumptions of the feudal economy towards the capitalist model, and then also towards the model of the Marxist economy or drawing on the trends of ordoliberalism. See more on this topic R. Małajny, *Geneza konstytucji*, "Annales UMCS sectio G (Ius)" 2019, vol. 66(1), pp. 307–319; W. Skrzydło, *Zasady ustroju politycznego i gospodarczego Rzeczypospolitej*, [in:] *Ustrój polityczny i gospodarczy współczesnej Polski*, ed. W. Skrzydło, Lublin 1996.

[13] This was pointed out, among others, by J. Rawls, who, within his theory of justice, pointed to the necessity of eliminating economic and social inequalities resulting from the theory of the social

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and actual functions of constitution on all system levels should also be increased, due to the acceptance of its economic influence by the majority of citizens and, as a result, strengthening the system of social guarantees of constitution. Constitution, as an "economic constitution", should therefore fulfill its assumed functions – legal, axiological, organizational and social one – in a real way, also in the dimension of the economic system. This, in turn, allows us to conclude that in the context of the implementation of the assumptions expressed in it regarding this system, there is a need to analyze its provisions not only taking into account legal factors and methods, but also with the use of instruments appropriate for the economy. The assessment of the degree of implementation of the economic assumptions indicated in constitution exceeds the framework of legal sciences and is possible only with the simultaneous use of economic instruments.

CONSTITUTIONAL ECONOMICS

A broader look at constitution and the state system in general, assuming the need to analyze constitution taking into account not only legal factors and methods but also economic ones, causes a natural interest in its influence by economists. In a broad sense, the currents of economic and constitutional thought are linked in this context by the doctrine of constitutional economics, which is part of the political economy.[14] In terms of this doctrine, constitution is not only a mechanism for solving social and political problems but also those of an economic nature. On the other hand, within the framework of the indicated assumptions regarding the functions and guarantees of

contract, as they have a destabilizing effect on the state system. See J. Rawls, *Teoria sprawiedliwości*, Warszawa 2021. On the concepts similar in meaning to "systemic stability of the state", "systemic stabilization" and "political stability", see M. Bożek, *W poszukiwaniu władzy stabilizującej porządek konstytucyjny*, "Przegląd Sejmowy" 2018, no. 5, pp. 8–9; K. Trzciński, *Czym jest stabilność polityczna państwa?*, "Przegląd Politologiczny" 2015, no. 2, pp. 37–47. As part of the theory of legal sciences, the issue of relations between economics and the constitution was, in turn, referred to by, among others, R. Dworkin, who pointed to the theory of redistribution of goods as an important factor of the systemic stability. For more, see J. Karp, *Równość w myśli prawno-politycznej Ronalda Dworkina*, "Państwo i Społeczeństwo" 2005, no. 4, pp. 131–138.

[14] The creator of this concept and the most developed doctrinal foundations of "economic thinking" about constitution is the Nobel laureate in economics in 1986, J. McGill Buchanan, who in his work on the theory of public choice stated, i.a., that constitution as a special social contract constitutes "a set of rules limiting the actions of individuals in their pursuit of their own goals". See K. Metelska-Szaniawska, *Konstytucja w świetle nauk ekonomicznych*, "Przegląd Sejmowy" 2010, no. 1, pp. 49–62; J.M. Buchanan, *Freedom in Constitutional Contract – Perspectives of a Constitutional Economist*, College Station–London 1977, p. 292. An interdisciplinary approach to economic issues in the analysis of constitution was also presented by economist F. Hayek, who pointed to representative and constitutional democracy as the best systemic structure from an economic perspective. See F. Hayek, *Konstytucja wolności*, Warszawa 2006.

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constitution, the economic mechanisms envisaged therein, in particular in the field of economic and social freedoms and rights, should also, in the opinion of the majority of its addressees, be assessed in the systemic practice as being properly implemented. If the assessments of the economic situation of the state and citizens expressed by the majority or at least by a significant part of the addressees of constitution's norms are negative, this at least indirectly threatens its social guarantees and, as a result, may lead to some citizens' blaming constitution for this state of affairs. It is irrelevant whether this assessment is correct or not. As a consequence of such negative assessments, the degree of risk concerning the scale of the discrepancy between the theoretical assumptions about constitution and its functions and their actual social evaluation increases. The emerging economic problems, therefore, increase the risk of social problems, and as a result political and, consequently, constitutional problems, which also applies to problems of a crisis nature, which are characterized by the fact that constitution does not fulfill its assumed functions in practice.[15] Unsolved and growing economic problems weaken social guarantees and subsequently political constitutions, as they lead to an increased acceptance of often demagogic methods offering simple solutions to these problems, disregarding or violating constitutional norms. In order to maintain the realistic character of constitutional norms in the public perception, one should not ignore economic factors in the interpretation and application of its regulations in the systemic practice.[16] These factors constitute an important source of stability of constitution as the basis of the state system. Economic problems, in turn, are the most important source of possible constitutional crises and systemic destabilization, as social dissatisfaction with economic conditions causes constitution to "distance itself" from citizens and its social legitimacy to decline. As a consequence, this leads to the real possibility of increasing the scale of consent to violating its provisions. It should therefore be emphasized that the neglect of economic factors in the context of the application of constitution by political and judicial authorities, at least "bodes badly" for its reality in terms of the functions performed. In such a situation, the system of social guarantees of constitution is weakened, which then leads to an increase in the scale of risk, at least partially socially accepted and legitimated, of attempts at politically motivated bypassing and violating its provisions.

[15] Sometimes, in order to ensure the implementation of these functions in practice, it becomes necessary to amend constitution due to economic crises, an example of which is Spain and its constitutional amendment of September 2, 2011, which introduced a limit on the budget deficit and public debt. See M. Chrzanowski, *Stabilność systemu konstytucyjnego Królestwa Hiszpanii*, [in:] *Aktualne problemy reform konstytucyjnych*, ed. S. Bożyk, Białystok 2013, p. 392.

[16] In this approach, see the views of R. Posner, associated with the so-called economic analysis of law. In his research, he focuses on the relationship between constitution and the economic growth of the state, and emphasizes the importance of economics as a science helpful in determining the effects of a possible alternative interpretation of constitutional regulations. See R.A. Posner, *The Constitution as an Economic Document*, "George Washington Law Review" 1987, vol. 56(4), pp. 4–38.

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CONCLUSIONS

Obviously, the issue of the fundamental and permanent influence of economic conditions on constitution is not new. These issues have been and are the subject of many scientific analyzes, as evidenced for example by the literature cited in this study. However, it is difficult to shake off the impression that the economic determinants of constitution are "forgotten" in the systemic practice of many constitutional states. The economic legitimization of constitution, as an important part of its social legitimization, is not at the same time the subject of too common political reflection in the conditions of the stable functioning of the system. These issues are usually referred to only at times of systemic crises and in the context of searching for their causes. These negative systemic situations, however, usually stem from previous neglect, which, at least in some social assessments, boil down to the feeling of "empty constitutional norms" from the economic and social spheres. As a result, these assessments lead to a generally negative assessment of the entire constitution, which facilitates possible unconstitutional actions.

It is worth noting, however, that it is not unconstitutional measures, but a stable and real constitution that increases the chances for achieving a smaller scale of the negative effects of possible problems and economic crises. As part of the feedback loop, due to unconstitutional actions, the risk of destabilizing the state's economic system only increases in the long run, which also leads to the further deepening of constitutional problems.[17] Thus, it becomes necessary to permanently and reciprocally link the legal guarantee mechanisms of constitution with the guarantee mechanisms of the economic system, as these factors are significantly interdependent.[18]

[17] It is particularly visible in countries whose system is doctrinally described as abusive constitutionalism. In these countries, their constitutions do not play a real systemic role, also in the economic sphere, and the sources of income are reserved mainly for the representatives of the government, while ensuring a certain social protection for citizens, which is mainly used as a guarantee of re-election. See G. Skąpska, *Znieważający konstytucjonalizm i konstytucjonalizm znieważony. Refleksja socjologiczna na temat kryzysu liberalno-demokratycznego konstytucjonalizmu w Europie pokomunistycznej*, "Filozofia Publiczna i Edukacja Demokratyczna" 2018, vol. 7(1), p. 286; D. Landau, *Abusive Constitutionalism*, "UC Davis Law Review" 2013, vol. 47(1), pp. 189–260.

[18] An example of such an approach to the relationship between the legal and economic system is the so-called rule of law mechanism in the European Union. More on this, see R. Grzeszczak, *Skuteczność unijnych procedur ochrony praworządności w stosunku do państw członkowskich*, "Państwo i Prawo" 2019, no. 6, pp. 28–54.

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ABSTRAKT

Celem artykułu jest przybliżenie problematyki wzajemnych relacji pomiędzy konstytucją i jej otoczeniem ekonomicznym, w szczególności w kontekście prób wyjaśnienia różnych współzależnych kryzysowych zjawisk gospodarczych i konstytucyjnych. W tym ujęciu omówione zostały tutaj aspekty teoretyczno-doktrynalne dotyczące funkcji i gwarancji konstytucji oraz konstytucji gospodarczej i ekonomii konstytucyjnej, a także przeanalizowane zostały podstawowe relacje między nimi. Zasadniczym wnioskiem płynącym z opracowania jest wniosek o bezpośrednim legitymizowaniu konstytucji i praktyki jej stosowania przez efektywność systemu ekonomicznego państwa. Efektywność ta wpływa bowiem na realność funkcji i gwarancji konstytucji w istotnym zakresie, co w konsekwencji nakazuje sięganie po instrumenty nie tylko prawnej, ale także ekonomicznej analizy konstytucji w praktyce ustrojowej.

Słowa kluczowe: funkcje i gwarancje konstytucji; konstytucja gospodarcza; ekonomia konstytucyjna; ekonomiczna analiza konstytucji