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AUTONOMY AS CONSTITUTIONAL ESSENTIALS
– THE KANTIAN INTERPRETATION AND POLISH
CONSTITUTIONAL TRIBUNAL

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Summary. The thesis of the article is the claim that the democratic constitution should contain elements that are relatively constant, necessary to preserve its identity. As an example of such an element, I point to the principle of autonomy contained implicitly in Article 30 of the Constitution of the Republic of Poland, which I interpret from the perspective of Kant's theory. In this approach, the principle of autonomy is a kind of "fundamental constitutional essentials", and thus defines the importance of two types of "constitutional essentials": (a) the political system and the legislative process, and (b) the constitutional system of rights. Kant's interpretation of this principle emphasizes its importance not only in the shade to the content of sub-constitutional legal norms (prohibition of instrumentalization), but also the form of their establishment (duty of justification). Violation of constitutional legislative procedures would also be violation the principle of political autonomy of citizens.

Keywords: constitutional essentials, autonomy, Constitutional Tribunal, Rawls, Kant.

Autonomia jako „constitutional essentials” – interpretacja Kantowska i polski Trybunał Konstytucyjny. Tezą artykułu jest twierdzenie, że demokratyczna konstytucja

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powinna zawierać elementy względnie stałe znaczeniowo, niezbędne dla zachowania jej tożsamości. Jako przykład takiego elementu wskazuję zasadę autonomii zawartą *implicit* w artykule 30 Konstytucji Rzeczypospolitej Polskiej, który *intepretuję* z perspektywy teorii Kantowskiej. W takim ujęciu zasada autonomii stanowi swoiste „fundamentalne constitutional essentials”, a więc określa znaczenie dwóch rodzajów “constitutional essentials”: (a) politycznego ustroju i procesu prawodawczego oraz (b) systemu konstytucyjnych praw. Kantowska interpretacja zasady autonomii podkreśla jej wagę nie tylko w odcieniu do treści pod-konstytucyjnych norm prawnych (zakaz instrumentalizacji), ale też formy ich ustanowienia (nakaz uzasadnienia). Naruszenie konstytucyjnych procedur prawodawczych stanowiłoby w takim razie naruszenie zasady autonomii politycznej obywateli.

Słowa kluczowe: constitutional essentials, autonomia, Trybunał Konstytucyjny, Rawls, Kant.

1. INTRODUCTION

Contemporary democratic constitutions are not merely legal acts. In addition to the basic norms essential for the functioning of the political system, constitutions also contain the moral principles which are fundamental for democracy. They constitute a moral foundation of the state, but they do not lend themselves to be restrictively defined. On the one hand, it results in endless disputes over their significance, and on the other hand, it makes the constitution be treated as a “living and dynamic” act, possible to be easily adapted to ever changing contexts. As a consequence, the question arises about the scope of “flexibility” of basic political solutions, namely, should a democratic constitution contain relatively constant elements that are essential for maintaining its identity? Could the principle of autonomy be this kind of element? In this essay, I shall try to give the answer in the affirmative by referring to Article 30 of the Constitution of the Republic of Poland seen from I. Kant’s perspective. In order to achieve it, I will present J. Rawls’ concept of constitutional essentials (Part 2). Then, in Part 3, I will discuss Kant’s interpretation of the principle of autonomy whose traces I will look for in the case-law of the Polish Constitutional Tribunal (Part 4). In the summary (Part 5) I shall claim that Kant’s interpretation of the principle of autonomy is a kind of “fundamental constitutional essentials”, and therefore it defines the meaning of two types of “constitutional essentials”: (a) fundamental principles that specify the general structure of government and the political process; (b) equal basic rights and liberties of citizenship that legislative majorities are to respect.

2. AUTONOMY AS CONSTITUTIONAL ESSENTIALS²

According to Aristotle, the essence of things is “just like the what-it-is”³. If this “it” changed, the “thing” itself would change. Grasping the essence means getting to know a given thing and identifying its necessary elements without which it would not be “this very thing”. In such a provisional approach, without any complex ontology or epistemology⁴, the essence in other words means constitutive features of a given “thing”. According to this approach, when speaking about a democratic constitution, we must have a concept of its essence. As H. Kelsen points out, the essence of democracy is to give the systemic form to “two primitive instincts of man as a social being”, that is, freedom and equality, taking the form of equal rights and freedoms, and participatory method of law-making⁵. From an abstract point of view, the essence of a constitution is expressed by I. Kant in the concept of the idea of a constitution: “A constitution providing for the greatest human freedom according to laws that permit the freedom of each to exist together with that of others [...] is at least a necessary idea, which one must make the ground not merely of the primary plan of a state’s constitution but of all the laws too”⁶. The idea of a constitution which emerges from it is “the idea of a constitution that is consistent with the natural rights of

² The above part of the article is based and develops the considerations contained in W. Włoch, *Wolność sumienia i religii jako „constitutional essentials” w orzecznictwie polskiego Trybunału Konstytucyjnego*, “Przegląd Prawa Konstytucyjnego” 2019, No 1, p. 172–176; see also A. Bień-Kacała, A. Tarnowska, W. Włoch, *Nation-Delegation-Constitution: Reconsidering Role of Religion in Polish Identity Development*, “Bratislava Law Review” 2019, No 1 (forthcoming).

³ Aristotle, *Metaphysics*, trans. C. D. C. Reeve, Indianapolis–Cambridge 2016, 1030 a.

⁴ Here we are not interested in either the problem of the existence of the essence or whether it is discovered or produced. In the above provisional approach, the term “essence” is close in its meaning to a given concept, and that is why with such an “essence” it does not exclude the possibility of accepting an anti-essentialist approach, as done for instance by Ch. Mouffe, and hence it is possible to claim that every social identity (that what we perceive as an “essence”) is contingent and particularistic, see Ch. Mouffe, *The Democratic Paradox*, London–New York 2000, p. 21–22. From this point of view, it can be said that in a given context democracy was constituted in a certain way and within this context we may interpret its essence in this particular way (the act of interpretation has a political meaning here because it reflects the nature of a given political system). It can therefore be said that in a given context, we consider the essence to be certain properties or traits. At the same time, we may further argue whether they are objective in nature or socially constituted (objectified) by means of the structures of power.

⁵ See H. Kelsen, *The Essence and Value of Democracy*, trans. B. Graf, Lanham–Boulder–New York–Toronto–Plymouth 2013, p. 27 et seq.; H. Kelsen, *Foundations of Democracy*, “Ethics” 1955, Vol. 66, No. 1, p. 1–101.

⁶ I. Kant, *Critique of Pure Reason*, trans. P. Guyer and A. W. Wood, Cambridge–New York–Melbourne 1998, A 316.

human beings, the idea, namely, that those who obey the law should also, united, be legislators thereof, underlies all forms of state”⁷. Therefore, Kant claims that “Any true republic is and can only be a *system representing* the people, in order to protect its rights in its name, by all the citizens united and acting through their delegates (deputies)”⁸. A democratic constitution would have to contain both elements: a guarantee of equal basic rights and a representative political system. They are necessary conditions that must be met in order for a given system to conform with the essence of a constitution that combines human rights and democratic procedures⁹.

J. Rawls develops the idea of “systemic essentials” in the form of the concepts of essential constitutional elements (*constitutional essentials*). According to the author of *A Theory of Justice*, a democratic constitution should contain two elements that make up its essence. “These are of two kinds:

- a) fundamental principles that specify the general structure of government and the political process: the powers of the legislature, executive and the judiciary; the scope of majority rule; and
- b) equal basic rights and liberties of citizenship that legislative majorities are to respect: such as the right to vote and participate in politics, liberty of conscience, freedom of thought and of association, as well as the protections of the rule of law”¹⁰.

The aforementioned elements are not equal, since it is the latter that determines a democratic character of the system, as it defines the political and legal subjectivity of citizens. The structure and the system of functioning of the political authorities may be realized in various ways, whereas “the essentials of the second kind concern basic rights and liberties and can be specified in but one way, modulo relatively small variations. Liberty of conscience and freedom of association, and the political rights of freedom of speech, voting, and running for

⁷ I. Kant, *The Contest of the Faculties, Part 2* in I. Kant, *Toward Perpetual Peace and Other Writings on Politics, Peace, and History*, trans. D. L. Colclasure, New Haven–London 2006, AA VII 90–91.

⁸ I. Kant, *The Metaphysics of Morals*, trans. M. Gregor, Cambridge–New York–Port Chester–Melbourne–Sydney 1991, AA VI 341.

⁹ See J. Habermas, *Über den inneren Zusammenhang von Rechtsstaat und Demokratie in Zum Begriff der Verfassung. Die Ordnung des Politischen*, Hrsg. U. K. Preuß, Frankfurt am Main 1994, p. 83–94.

¹⁰ J. Rawls, *Political Liberalism*, New York 1993, p. 227. On the subject of Rawls’ *constitutional essentials*, see for example L. G. Sager, *The Why of Constitutional Essentials*, “Fordham Law Review” 2004, Vol. 72, s. 1421–1433; W. Włoch, *Pomiędzy czystym prawem a ideą polityczną. Pojęcie konstytucji w doktrynach Hansa Kelsena i Johna Rawlsa*, Toruń 2018, p. 149 et seq.

office are characterized in more or less the same manner in all free regimes”¹¹. The way in which the lawmaker sets out the issues contained in the first essential element must respect the requirements arising from the second element. The universalism of Rawls’ “constitutional essentialism”¹² is that it proclaims the necessity of establishing and guaranteeing equal basic rights and freedoms for a given system to be characterized by a democratic identity.

In line with the view set out above, a democratic constitution is not morally indifferent. Constitutional essentialism allows a democratic system to be based on the idea of the autonomy of an individual subject, that is, the subject that is characterized by inalienable dignity and the ability to act in accordance with the law given to themselves by themselves¹³. At the level of the political system, it manifests itself in the form of respect for and the guarantee of human and civil rights on the one hand (the second essential element), and on the other in the form of the establishment of a democratic legislative procedure (the first essential element). Universal equal rights and freedoms introduce a moral dimension into the scope of the concept of a democratic constitution¹⁴. The actual implementation of the idea of autonomy will depend, however, on how *constitutional essentials* are to be interpreted by the authorities applying the constitution¹⁵. Even if the essential elements of the constitution are established “more or less in the same way”, their realization may take on different forms. It may be said that a unique feature of democratic states is the possibility of conducting a dispute over the interpretation and implementation of *constitutional essentials*¹⁶.

Defining the meaning of constitutional essentials is an action in the political sense, because it not only explains *how to understand* the relevant element, but above all it expresses the view of *how it should* be understood¹⁷. A democratic

¹¹ J. Rawls, *Political Liberalism*, p. 228.

¹² See F. I. Michelman, *Rawls on Constitutionalism and Constitutional Law* in *The Cambridge Companion to Rawls*, ed. S. Freeman, Cambridge 2003, p. 395–396; F. I. Michelman, *Constitutional Authorship* in *Constitutionalism. Philosophical Foundations*, ed. L. Alexander, Cambridge 1998, p. 65.

¹³ I. Kant, *Groundwork of the Metaphysics of Morals*, trans. M. Gregor, Cambridge–New York–Melbourne–Madrid–Cape Town 2006, AA 432–436.

¹⁴ See. J. Habermas, *Between Facts and Norms. Contributions to a Discourse Theory of Law and Democracy*, trans. W. Rehg, Cambridge 1996, p. 113–118.

¹⁵ On the subject of the moral interpretation of the constitution see R. Dworkin, *Freedom’s Law. The Moral Reading of American Constitution*, New York 1997, p. 2 et seq.

¹⁶ J.-W. Müller, *Constitutional Patriotism*, Princeton–Oxford 2007, p. 54–55.

¹⁷ It may be stated that they are interpretive concepts according to R. Dworkin: “People participate in social practices in which they treat certain concepts as identifying a value or disvalue but disagree about how that value should be characterized or identified. The concept of justice and other moral concepts work in that way for us. We agree—mainly—that these are values, but we

constitution would be characterized by an explicit duality, that is by achieving a consensus on the basic principles it at the same time allows one to have a dispute over a proper interpretation of these principles. In order to agree to certain principles to be constitutional essentials for a democratic system, it should be possible for them to be accepted from different points of view. Pluralism which democracy is characterized by requires the basic ideas and principles on which a constitution is based to be expressed in the language of political values governing “the basic framework of social life”¹⁸, for instance all the basic rights and freedoms as well as the means of public debate. However, they cannot be an expression of only one of many different doctrines or views functioning in a democratic society; neither can they assume that only one of them is valid¹⁹. Supposing that the agreement on the interpretation of constitutional essentials will never be full and final, the dispute over the interpretation of basic political principles will be an inherent feature of democracy²⁰. When presenting a philosophical interpretation of any principle, it should be taken into account that it is either the only one existing, or a priori, it is to settle the dispute completely. However, it may indicate some assumptions and values underlying the system, which would not be visible without a philosophical analysis.

3. KANT’S INTERPRETATION OF AUTONOMY

The principle of autonomy is not a principle explicitly expressed in the Constitution of the Republic of Poland. One may even have doubts whether it includes the principle at all. In order to dispel such a doubt, one should first determine its true meaning. We find the philosophical grounding of this princi-

do not agree about the precise character of these values [...] But we agree sufficiently about what we take to be paradigm instances of the concept, and paradigm cases of appropriate reactions to those instances, to permit us to argue, in a way intelligible to others who share the concept with us, that a particular characterization of the value or disvalue best justifies these shared paradigms”, R. Dworkin, *Justice for Hedgehogs*, Cambridge–London 2011, p. 160–161.

¹⁸ J. Rawls, *Political Liberalism*, p. 139–140.

¹⁹ *Ibidem*.

²⁰ According to C. Lefort “the important point is that democracy is instituted and sustained by the dissolution of the markers of certainty. It inaugurates a history in which people experience a fundamental indeterminacy as to the basis of power, law and knowledge, and as to the basis of relations between self and other, at every level of social life (at every level where division, and especially the division between those who held power and those who were subject to them, could once be articulated as a result of a belief in the nature of things or in a supernatural principle)”, C. Lefort, *The Question of Democracy* in C. Lefort, *Democracy and Political Theory*, trans. D. Macey, Cambridge 1988, p. 19.

ple in Kant's conception. In his approach²¹, the principle of autonomy expresses a general idea that every operating entity, (a) having the ability to act on the basis of some subjective principles (or *maxims*²²) used to accomplish and fulfil individually defined goals and desires, (b) may choose an action which results not so much from a subjective desire, but from a valid principle, that is the principle important for all acting entities (i.e. from its realization in the form of universal law). Such a principle is perceived by the individual as a duty which they impose on themselves (of their own will). The principle that fulfils the condition of compliance with the universality is a law that can be recognized by anyone acting on the basis of a certain procedure of moral reasoning presented in the procedure of Categorical Imperative²³. Considering the moral value of a certain maxim, the entity makes its validity independent from their own personal goals and desires, gradually expanding the scope of this maxim. If reasoning leads to such a result that each acting entity can, without contradictions, accept such a maxim as the basis determining their actions, then the maxim meets the condition of compliance with the form of universal law. In Kant's conception, due to the procedure of categorical imperative, a moral subject is able to see from the perspective of a universal legislator and in this way becomes "the author (*autor*) of the obligation in accordance with the law"²⁴. „*Morality* is thus the relation of actions to the autonomy of the will, that is, to a possible giving of universal

²¹ On the subject of Kant's practical philosophy see e.g. H. E. Allison, *Kant's Theory of Freedom*, Cambridge 1990; O. O'Neill, *Constructions of Reason. Explorations of Kant's Practical Philosophy*, Cambridge 2000; *Kants Ethik*, Hrsg. K. Ameriks und D. Sturma, Paderborn 2004. The interpretation contained in this article is based on W. Włoch, *Wolność i przymus. Kantowska teoria legitymizacji prawa i państwa*, Toruń 2014.

²² "A maxim is [...] therefore the principle of action of a particular agent at a particular time [...]. the same principle might be adopted as a maxim by many agents at various times or by a given agent on numerous occasions. [...] *Maxims are those underlying principles or intentions by which we guide and control our more specific intentions*", O. O'Neill, *Constructions of Reason*, p. 83–84.

²³ See I. Kant, *Groundwork of the Metaphysics of Morals*, AA IV 421. J. Rawls presents a categorical imperative using a procedure consisting of four steps: (1) "I am to do *X* in circumstances *C* in order to bring about *Y* unless *Z*. (Here *X* is an action and *Y* is an end, a state of affairs.); (2) "Everyone is to do *X* in circumstances *C* in order to bring about *Y* unless *Z*"; (3) "Everyone always does *X* in circumstances *C* in order to bring about *Y*, as if by a law of nature (as if such a law was implanted in us by natural instinct)"; (4) "We are to adjoin the as-if law of nature at step (3) to the existing laws of nature (as these are understood by us) and then think through as best we can what the order of nature would be once the effects of the newly adjoined law of nature have had sufficient time to work themselves out"; J. Rawls, *Lectures on The History of Moral Philosophy*, Cambridge–London 2000, p. 168–169.

²⁴ I. Kant, *The Metaphysics of Morals*, AA VI 227.

law through its maxims.”²⁵ Autonomy is, according to Kant, the most important principle which states that “to choose only in such a way that the maxims of your choice are also included as universal law in the same volition.”²⁶ In this approach, autonomy becomes the basic condition of normativity. It embodies the thesis that it is in an individual subject that there is a source of moral obligation (a duty as a self-imposed obligation), and that it has an intersubjective character (a duty as a universal law binding all the entities acting)²⁷.

The principle of autonomy can be understood as an expression of moral equality, because by carrying out the procedure of categorical imperative, each individual somehow leaves aside contingent determinants that in mutual relations differentiate their positions from positions of others. If one adopts the perspective of the universal legislator, each entity, as the creator of moral obligation and as the one obliged to act morally, is equal and is equally subject to universal law. The definition of humanity is closely related to the principle of autonomy: “So act that you use humanity, whether in your own person or in the person of any other, always at the same time as an end, never merely as a means.”²⁸ In accordance with the principle of autonomy a moral subject is an entity that has the absolute right to their humanity. In other words, any normative system, and a legal system in particular, must guarantee that humanity will be honoured so as to obtain a moral legitimacy based on the principle of autonomy. Ensuring such legitimacy allows for the construction of such a *positive* legal system which functions not only under the threat of the imposition of sanctions (coercion), but above all that its addressees manifest the will to comply with the norms of this system. From such a perspective, the acceptability of the system norms is associated with the recognition of the moral subject’s autonomy. The legitimate moral law should consist of norms that are acceptable, without prejudice to any sanc-

²⁵ I. Kant, *Groundwork of the Metaphysics of Morals*, AA IV 439.

²⁶ *Ibidem*, AA IV 440.

²⁷ The fact that the principle of autonomy, apart from “independence”, requires “legislation”, distinguishes Kant’s concept from the concepts of autonomy formulated by our contemporaries who limit their analysis only to the first condition. It rather means the “independence in granting oneself the right”; O. O’Neill, *Autonomy and the Fact of Reason in the Kritik der praktischen Vernunft* (§§ 7–8, 30–41) in *Immanuel Kant. Kritik der praktischen Vernunft*, Hrsg. O. Höffe, Berlin 2002, p. 92. This “independence” itself can be the principle of activity for an individual. The validity of the principles that he or she considers important is limited only to himself / herself and does not affect the rules of activities of other independent actors. By means of the principle of independence, only the rational sphere of the individuals’ actions can be described. In order to reconstruct the sphere of rational interactions, an additional requirement is needed, that is the universality of application.

²⁸ I. Kant, *Groundwork of the Metaphysics of Morals*, AA IV 429.

tions, for all the individuals as the rules of their own actions. Conversely, the law violating the principle of humanity could not be considered to be in line with the principle of autonomy, since it would put an end to the equal moral subjectivity of all human beings.

The feature that fundamentally distinguishes human beings from other living beings is not, according to Kant, any special biological characteristic, but the ability to act in accordance with the principle of autonomy. Viewed in this light, a personality allows acting entities to be attributed with their own deeds and only the personality understood in this way can be the object of respect, being a moral feeling. The “idea of the *dignity* of a rational being, who obeys no law other than that which he himself at the same time gives”²⁹ is based on the principle of autonomy. The individual entity, acting in compliance with the moral law, acts according to their own will as well, and, at the same time, according to the general legislative will of the people (giving the right to oneself can be considered as an act of the generally legislative will). Every rational and autonomous being can perceive themselves “as lawgiving in the kingdom of ends”³⁰. The only goal that may be seen as the one binding all intelligent beings, i.e. “something the *existence of which in itself* has an absolute worth”³¹, is the very existence of such an intelligent being. Therefore, Kant claims that “the human being and in general every rational being *exists* as an end in itself, *not merely as a means* to be used by this or that will at its discretion; instead he must in all his actions, whether directed to himself or also to other rational beings, always be regarded *at the same time as an end*”³². Mutual interactions of acting individuals as rational and autonomous beings cannot, therefore, only be shaped by instrumental principles, but in any case it should be taken into account that the acting entity has a moral personality. The principle of humanity (*Menschheit*) is “the supreme limiting condition of the freedom of action of every human being”³³. The mutual and unconditional recognition of intelligent beings as “ends in themselves” should be the highest principle defining their mutual relations. The respect for “the moral law inside me”, as expressed in Kant’s famous *dictum*³⁴, is at the same time the respect “for the moral law inside everyone”. Therefore, every human being, rational and autonomous, is equally characterized by dignity and humanity. In other words, the violation of humanity in one particular case is an action

²⁹ Ibidem, AA IV 434.

³⁰ Ibidem, AA IV 435.

³¹ Ibidem, AA IV 428.

³² Ibidem, AA IV 428.

³³ Ibidem, AA IV 430 431.

³⁴ See I. Kant, *Critique of Practical Reason*, trans. M. Gregor, Cambridge 2015, AA V 161.

against the principle of humanity in every other case. The principle of humanity excludes such maxims of action (considers them being not in compliance with the moral law) that completely deprive certain entities of freedom of being the authors of their own actions as well as of bearing responsibility for their actions. Humanity is a feature of entities, because every acting entity is “by virtue of the autonomy of his freedom he is the subject of the moral law”³⁵.

Actions bound by the universal law can be presented, according to Kant’s theory, only as being subject to the principle of autonomy. The rules that stem from other sources, that is from individual interests or interests of a specific community, are always contextually conditioned and expressed in the form of hypothetical imperatives, i.e. these whose goal is always relative and conditioned, never autonomous³⁶. Therefore, the goal binds the acting entities only insofar as for various reasons they desire a given state of affairs to be reached. However, obligations resulting from the principle of autonomy are absolute. The respect for equal subjectivity, expressed in the principles of humanity and dignity, cannot be limited due to the need to achieve any goals. The usefulness or benefit may not make a case for limiting them³⁷. According to such a conception, all the legal regulations or political decisions would have to fulfil the condition of justification³⁸ for autonomous entities. The basic criteria for this condition are as follows: the absolute respect for the subjectivity of each individual, that is the prohibition of instrumentalisation resulting from the principle of humanity; and the requirement to maintain such a form of general law which treats its addressees as persons having the capacity to act as a result of the acceptance of law, that is a dictate to justify the fact that the rule “is fit for becoming the common law”, which results from the procedure of categorical imperative. As a consequence, the legal system may become not only an “external” system of coercion, but also

³⁵ Ibidem, AA V 87.

³⁶ See I. Kant, *Groundwork of the Metaphysics of Morals*, AA IV 414 et seq.

³⁷ Idea of human dignity „supposes that there are ways of treating a man that are inconsistent with recognizing him as a full member of the human community, and holds that such treatment is profoundly unjust. [...] It makes sense to say that a man has a fundamental right against the Government, in the strong sense, like free speech, if that right is necessary to protect his dignity, or his standing as equally entitled to concern and respect, or some other personal value of like consequence. It does not make sense otherwise”, R. Dworkin, *Taking Rights Seriously*, Cambridge 1978, p. 198–199.

³⁸ R. Forst claims that “moral persons have a fundamental right to justification, and a corresponding unconditional duty to justify morally relevant actions. [...] in Kantian terms, respect for moral persons as „ends in themselves” means that one recognizes their right to justification and the duty to be able to give them appropriate reasons”; R. Forst, *The Right to Justification*, trans. J. Plynn, New York 2012, p. 21, see p. 21–22 and 57–58.

a system considered to be right, and thus the one having an “internal” value for all the individuals.

4. AUTONOMY IN THE CASE LAW OF THE POLISH CONSTITUTIONAL TRIBUNAL

The meaning of autonomy, as defined above, is not expressed directly in the Constitution of the Republic of Poland. We can interpret autonomy basing on the principle of dignity: “The inherent and inalienable dignity of the person shall constitute a source of freedoms and rights of persons and citizens. It shall be inviolable. The respect and protection thereof shall be the obligation of public authorities” (Article 30). According to Kant “*Autonomy* is [...] the ground of the dignity of human nature and of every rational nature”³⁹, and in the case-law of the Constitutional Tribunal related to the principle of dignity⁴⁰, we may find elements of the principle of autonomy understood as (a) the basis of normativity, (b) the prohibition of instrumentalisation and (c) the imperative of justification.

- (a) First of all, dignity and Kant’s autonomy are linked due to their unique character of being the normative basis of the entire legal order as well as their ruthless nature. As the Constitutional Tribunal sees it, “pursuant to Article 30 of the Constitution, the character of the constitutional value of a vital importance for building the axiology of current constitutional solutions should be attributed to the notion of human dignity. A democratic state of law is a state based on the respect for a human being and on the respect for and the protection of human life and dignity in particular. These two goods are directly linked. Article 30 of the Constitution is an essential element for the interpretation and application of all the other provisions on the rights, freedoms and duties of the individual”⁴¹. Dignity is considered by the Constitutional Tribunal as a negative criterion allowing for the delegitimisation of norms when the Tribunal states

³⁹ I. Kant, *Groundwork of the Metaphysics of Morals*, AA IV 436.

⁴⁰ To find comments on the influence of Kant’s concept of dignity on its understanding by the Constitutional Tribunal see K. Jesiołowski, *Kantowskie pojęcie godności a współczesne prawodawstwo*, “Societas et Ius” 2017, No 2. On the principle of dignity in the Polish Constitution and the case law of the Constitutional Tribunal see e.g. M. Granat, *Godność człowieka z art. 30 Konstytucji RP jako wartość i jako norma prawna*, “Państwo i Prawo” 2014, No 8; J. Potrzeszcz, *Godność człowieka w orzecznictwie polskiego Trybunału Konstytucyjnego*, “Roczniki Nauk Prawnych” 2005, No 1; *Godność człowieka jako kategoria prawna*, red. K. Complak, Wrocław 2001.

⁴¹ The Ruling of the Constitutional Tribunal, K 44/07.

that “under no circumstances should we introduce legal solutions to the Polish legal system, which would undermine this value”⁴². It is treated by the Constitutional Tribunal as both the moral and axiological basis of the entire legal order as well as the inherent right of the individual simply because they were born as human beings. As a positive criterion it is to interpret the norms of the whole system because “the constitutional principle of respecting human dignity is the source of important interpretative directives which are applicable not only in the interpretation of sub-constitutional normative acts, but also in situations in which detailed constitutional provisions may raise interpretational concerns over their linguistic interpretation”⁴³. As in case of autonomy in Kant’s system, dignity is also the foundation of the legal system and its main moral criterion. However, dignity itself is not constituted by this system, but is considered to be an inseparable part of humanity itself. The semantic similarity of these two principles is particularly visible when the Constitutional Tribunal states that “the confirmation of both inalienable dignity of a human being as a constitutional principle and the individual right of every human being, regardless of their qualifications or psychological and physical condition and current life situation, constitutes the basis for the recognition of the human being’s subjectivity. This statement determines a specific way of the state authorities’ action, including the legislative and the executive power as well. A human being should be treated as a free, autonomous entity, capable of developing their personality and shaping their own behaviour”⁴⁴. The Polish constitutional court binds dignity with human subjectivity the recognition of which is independent of random empirical (psychological, social or economic) features that mark every individual. In this approach, dignity means treating a human being as an autonomous entity, that is the entity who defines the ways of and bears responsibility for their own actions. The constitutional dignity means the moral autonomy of the entity that has the ability to shape their actions by adopting appropriate rules of conduct and setting objectives of their actions. Thus, the entity may act as the creator of their own “life path” and bear responsibility for their own actions⁴⁵.

⁴² The Ruling of the Constitutional Tribunal, P 12/99.

⁴³ The Ruling of the Constitutional Tribunal, P 20/09.

⁴⁴ The Ruling of the Constitutional Tribunal, K 44/07.

⁴⁵ The principle of responsibility is, according to Dworkin, one of two (apart from the principle of intrinsic value) dimensions of human dignity: “each person has a special responsibility for realizing the success of his own life, a responsibility that includes exercising his judgment about

- (b) Second of all, the constitutional principle of dignity resembles Kant's autonomy when one takes into account the absolute prohibition on the instrumentalisation of a human being since this prohibition results from these two principles. Pursuant to Article 30 of the Constitution, the situation in which a human being would only become the object of actions taken by the authority, these human beings would become "replacable", and their role would be reduced to a purely instrumental form or "statutory deprivation of subjectivity and reification" can generally be considered a violation of dignity⁴⁶. The recognition and guarantee of the entity's subjectivity are strictly related to the prohibition of making them only a means of achieving a goal. The instrumentalisation makes the individual be treated as an object (a means): such entity has no value of being a unique personality able to define and establish the objectives of their own actions, but is only claimed to be a means to an end for the external authority. If we treat people only instrumentally, we add a value to them only if and when they serve us to achieve our goal. Speaking "the language of Kant", the prohibition of instrumentalisation means that an individual must always be treated as an end in themselves⁴⁷. As a consequence, depersonification of a human being undermines the constitutional and axiological foundations of the system of the Republic of Poland. The whole legal system is based on the recognition of the subjectivity and freedom of each individual as well as on the guarantee of their possible development inspired by their own will. Each individual should be able to be the creator of their own "life path" and to bear responsibility for their actions. It is the individual who ultimately shapes and is responsible for the choices made and resulting actions. Respecting the inherent dignity (Article 30 of the Constitution) results in "the maximum protection of the autonomy of the individual, creating the possibility of a full personality development in the surrounding cultural environment"⁴⁸. A full development of personality is impossible without granting the individual a certain sphere of autonomy, that is a sphere in

what kind of life would be successful for him", R. Dworkin, *Is Democracy Possible Here? Principles for a New Political Debate*, Princeton–Oxford 2006, p. 10.

⁴⁶ The Ruling of the Constitutional Tribunal, SK 06/02.

⁴⁷ It is important to add the expression "at the same time" here because in social interactions we exploit each other, for instance in trade in services. The point is that we should not be reduced to this dimension only.

⁴⁸ The Ruling of the Constitutional Tribunal, SK 43/05.

which individuals decide on their own matters⁴⁹. Subjecting the individual's life to a completely "external authority" causes the personality to either develop through a conflict with that authority or to die completely in the act of submission. "The principle of respect for dignity establishes a presumption that all the actions of the public authority should take into account the existence of a certain sphere of autonomy in which a person is able to fulfil themselves in a society. It is about the most important elements for an individual's identity, which concern the individuals' self-determination, physical and mental integrity, maintaining relations with other people, as well as their safe place in a community. Actions of public authorities cannot lead to factual and legal situations that would violate this autonomy, depriving the individual of dignity"⁵⁰. Assuming that the sphere of individual autonomy will never be absolute, one cannot lead to a situation in which the individual is only subject to the decision of others.

- (c) Thirdly, the connection between dignity and autonomy is evident in the subjective treatment of the addressees of law. The principle of autonomy at the political level is associated with civic subjectivity, namely the recognition of political autonomy of citizen as a subject who has certain rights to participate in the democratic procedure of law-making⁵¹. A citizen is treated subjectively by the legislator when the addressee of norms is presented with their justification in public, or when such justification is available for the public⁵². From this perspective, a democratic procedure of establishing law guaranteeing transparency and the possibility for all interested parties of public presentation of arguments, is to ensure political legitimacy and to provide justification. The compliance with the constitutionally defined legislative procedure is, from this point of view, the expression of recognition of the subjectivity of citizens, and indirectly also the recognition of their personal autonomy. "As stated by the Constitutional Tribunal, the obligation to respect and protect human dignity is connected with the

⁴⁹ A total surrender to the "external instance" would mean a reduction to the disposable object (thing). Man as a moral agent "cannot give himself away for any price", I. Kant, *The Metaphysics of Morals*, AA VI 463.

⁵⁰ The Ruling of the Constitutional Tribunal, K 27/15.

⁵¹ See J. Habermas, *Between Facts and Norms*, chapter III.

⁵² From the point of view of the Kantian conception, the justification is closely related to the "form of publicity": "All actions that affect the rights of other human beings, the maxims of which are incompatible with publicity, are unjust", I. Kant, *Toward Perpetual Peace* in I. Kant, *Toward Perpetual Peace and Other Writings on Politics, Peace, and History*, AA VIII 381.

implementation of the principles of a democratic state ruled by law, including the implementation of the principle of the legality of public authority. The condition for the respect and protection of human dignity by public authorities is the compliance with applicable legal norms, established in a correct manner”⁵³. Establishing law in a proper way, whether it is done procedurally or substantially, is a necessary condition for the citizens to consider themselves not only as the subjects of legal regulations, but also their authors, which can be taken as the essence of a democratic system⁵⁴. As at the level of moral obligations, the procedure of categorical imperative is a kind of a test for the subjective principles of individuals, for the legislation such a test is a social contract⁵⁵. “Namely, this idea obligates every legislator to pass laws in such a way that they *would have been able* to arise from the united will of an entire people and to regard every subject, insofar as it wishes to be a citizen, as though it has given its assent to this will. For that is the touchstone for the lawfulness of any public law. If a public law is so composed that an entire people *could not possibly* give its assent to it (as, for example, in the case of a certain class of *subjects* having the hereditary privilege of a *ruling rank*), then it is unjust”⁵⁶. Of course, this does not mean that there is a necessity of obtaining actual consent of every citizen, but one ought to carry out a legislative process in which all the positions could be listened to⁵⁷. In other words, a legislative debate

⁵³ The Ruling of the Constitutional Tribunal, K 35/08.

⁵⁴ See J. Habermas, *Between Facts and Norms*, p. 32–34.

⁵⁵ See W. Kersting, *Wohlgeordnete Freiheit. Immanuel Kants Rechts- und Staatsphilosophie*, Berlin–New York 1984, p. 222–223.

⁵⁶ I. Kant, *On the Common Saying: This May Be True in Theory, but It Does Not Hold in Practice, Parts 2 and 3* in I. Kant, *Toward Perpetual Peace and Other Writings on Politics, Peace, and History*, AA VIII 297. To some extent dignity is related to justice: “One may hold that the sense of justice is a necessary part of the dignity of the person, and that it is this dignity which puts a value upon the person distinct from and logically prior to his capacity for enjoyment and his ability to contribute to the enjoyment of others through the development of his talents. It is because of this dignity that the conception of justice as fairness is correct in viewing each person as an individual sovereign, as it were, none of whose interests are to be sacrificed for the sake of a greater net balance of happiness but rather only in accordance with principles which all could acknowledge in an initial position of equal liberty”, J. Rawls, *The Sense of Justice* in J. Rawls, *Collected Papers*, ed. S. Freeman, Cambridge–London 1999, p. 115.

⁵⁷ J. St. Mill describes the parliament as a deliberative body: “What can be done better by a body than by any individual, is deliberation. When it is necessary, or important, to secure hearing and consideration to many conflicting opinions, a deliberative body is indispensable”, J. St. Mill, *Considerations of Representative Government* in J. St. Mill, *Essays on Politics and Society*, ed. J. M. Robson, Toronto 1977, p. 424.

would be a collection of arguments serving as justification for the decisions of the majority both in terms of a form (that is the compliance with all the procedures) and content (the rationality of all the solutions and their compliance with the constitution). Any violation of the constitutionally defined “correct form of legislation” would not only breach the principles of democracy, but would also affect the treatment of the addressees of law as autonomous persons, that is the people who are not only objects of legislative decisions, but also the subjects who have to be respected.

5. CONCLUSIONS

The Polish Constitutional Tribunal treats human dignity in connection with ensuring its autonomy. Pursuant to Article 30 it recognizes dignity as the source of freedoms and rights. Having regards to Kant’s theory, a human being is characterized by inalienable dignity due to their moral autonomy. Yet, the interpretation of these principles is similar. Both of them are inalienable and inherent, and both impose the subjective treatment on human persons owing to the prohibition of instrumentalisation and the dictate of justification. The Constitutional Tribunal emphasizes the importance of dignity not only for the constitutional system of human and civil rights, but for the whole constitutional order. Kant’s interpretation of this principle, emphasizing the principle of autonomy, lays particular stress on its importance not only when it comes to the content of sub-constitutional legal norms (the prohibition of instrumentalisation), but also to the form of their establishment (the duty of justification). Accepting such an interpretation, the principles of autonomy and dignity are not so much one of constitutional essentials, but are “fundamental constitutional essentials”, since they are the basis of both “constitutional essentials: “(a) fundamental principles that specify the general structure of government and the political process; (b) equal basic rights and liberties of citizenship that legislative majorities are to respect. The prohibition of instrumentalisation refers directly to the second element, while the justification to the first one. On the other hand, they indirectly relate to each other, because dignity and autonomy as “key issues” refer to the entire legal system. From the perspective of Kant’s interpretation, the principle of autonomy is the basis not only of the system of constitutional rights but also of the political form of legislation. Thus, the violation of constitutional legislative procedures would also constitute a violation of the principle of political autonomy of citizens: non-compliance with universally binding norms regulating the creation of law can lead to political voluntarism and, consequently, to the instrumental treatment of citizens.

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