Dariusz Makiłła
Faculty of Law and Administration University of Economic
and Human Studies in Warsaw, Poland
d.makilla@vizja.pl

Normative and Doctrinal Origins of Fundamental Rights in Early Modern Times

Abstract
The main subject and purpose of the paper is to touch in a short way the question of defining, the development and functioning the term of Fundamental Rights, especially liberty, equality and dignity that are usually embodied in modern time mostly in constitutional acts. In paper is displayed the process of the forming of Fundamental Rights in tradition of political reflection and also some very important aspect of their functioning. The paper presents also some reflections concerning the tendencies in their contemporary development and understanding.

Keywords: fundamental rights, early modern times, liberty, equality.

1. Introduction

Question whether the Fundamental Rights arise from the normative solutions constituting a rule or they are the result of political thought which only have an influence for preparing the normative regulations, and saying precisely, the question whether the origin of the Fundamental Rights is a rule or in other way the Fundamental Rights are natural rights existing objective of the man finding only his normative reflection through the political thought – seems still to be opened. From a regular point of view for the Fundamental Rights are usually numbered first of all the liberty, equality and dignity (this right relatively newly). All these rights were also embodied in modern time mostly in constitutional acts.

2. A short historical view

However the process of rising of Fundamental Rights in constitutional acts was long and not to the end explicitly[1]. But otherwise it is also not true that the legal construction of Fundamental Rights is an invention of modern times. The rights and liberties of the individuals were already earlier regulated normative[2]. Very often these rights were appeared in privileges conferred on the individuals or groups of the people formally instituted only through the monarch's grace. That however didn't mean that these people who were beneficiaries of the privileges had not the direct influence for their forming. From one side it could come under the compulsion of a threat of rebellion as it was for example in England, 1215)[3]. In another way the nation staying against the necessity of election of the ruler, formed the principles of the government, enclosing also to it the catalogue of rights and liberties of the people, which was submitted to accept to the ruler elected through their will and made it as condition of entering upon his rules (as it was for example in Polish Commonwealth, 1573-1576)[4]. To be sure the normative regulations of these rights had then yet an incomplete and still restricted character[5]. Nevertheless several rights (including especially liberty, but up to the certain degree equality) were in these old laws distinctly exposed as a collection of the rights of individuals distinguished from amongst the all laws cause their higher place in the hierarchy of rights accepted by the people and states. Anyway the old constitutional acts

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[1] R. von Keller, *Freiheitsgarantien für Person und Eigentum in Mittelalter*, Heidelberg 1933; J. Coleman, *The Individual and Medieval State*, w: *The Individual in Political Theory and Practice*, Ed. J. Coleman, Oxford 1996, p. 1-34; W. Schulze, *Ständische Gesellschaft und Individualrechte*, w: *Grund-und Freiheitsrechte von der ständischen zur spätbürgerlichen Gesellschaft*, G. Birtsch (Hrsg.), Göttingen 1987, p. 161-179

[2] B. Sutter, *Die Entwicklung der Grundrechte. Ein Forschungsbeitrag zum Schutz der Persönlichkeit im Mittelalter als Baustein zu einer Geschichte der Grundrechte in Österreich*, in: *Die Föderalismus in die Zukunft der Grundrechte*, Wien/Köln/Graz 1982, p. 101-239.

[3] D. L. Kyriazis-Gouvelis, *Magna Carta. Palladium der Freiheiten oder Feudale Stabilimentum*, Berlin 1984; J. C. Holt, *The Barons and the Great Charte*r, w: The English Historical Review 70, 1955, p. 1-24; J. C. Holt, *Magna Carta*, Cambridge 1992 A. Pallister, *Magna Carta. The Heritage of Liberty*, Oxford 1971,

[4] D. Makiłła, *Artykuły Henrykowskie (1573-1576). Geneza-Obowiązywanie-Stosowanie. Studium historyczno-prawne*, Warszawa 2012.

[5] G. Oestreich, *Die Entwicklung der Menschenrechte und Grundfreiheiten*, in: *Die Grundrechte*, Bittermann/Neumann Hrsg. Bd. 1.1, Berlin 1966, p. 1-125; B. Sutter, *Der Schutz der Persönlichkeit in mittelalterlichen Rechten. Zur historischen Genese der modernen Grund-und Freiheitsrechte*, in: *Grund-und Freiheitsrechte von der ständischen zur spätbürgerlichen Gesellschaft*, G. Birtsch (Hrsg.), Göttingen 1987, p. 17-41.

have been grounded the idea of community where the legal order was standing its legal and constitutional guarantee arising of quick-witted concluded consent[6].

3. Political and doctrinal conception of Fundamental Rights in Modern Times

However this understanding of the order of Community appeared soon already in the past insufficient. The searching of the origins of the society and then also the state which became a main subject of political reflection was connected simultaneously with searching for the rights of individuals that was founding their reflection in political and legal thought assuming from the 16th Century a character of an explicit tendency[7]. It was based not yet on a quite precisely conception of political claims finding then only their normative expression but it was supported on a rational trial of approach to an idea of liberty, equality that were made in a philosophical way which should give them a real substantiation of their existence[8]. The enact of these rights had to recall to one process of thinking showing the circumstances and course of events connected with their arising but also with the grounds on which they were founded. Because generally it was not able to formulate this process as an evolution it was repealed to the hypothetical constructions showing the mankind in the transition from a conjectural state of nature to the community state. It was presumed that liberty and equality in the state of nature stated only that people had then no obligations in the presence of other people and they were not forced to appreciate another authority of it and the only border of their natural rights was their strength, because in the state of nature existed any objective natural law, that could be discovered through the reason which ordered the man an adequate for him and the others behavior.

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[6] R. Lieberwirth, *Die historisch Entwicklung der Theorie vom Vertraglichen Ursprung des Staates und der Staatsgewalt,* Siztungsberichte der Sächsischen Akademie der Wissenschaften zu Leipzig, Philologisch-historische Klasse, Bd 118, H. 2, 1977, p. 3-54; H. Höpfl, M. P. Thompson, *The history of contract as a motif in political thought*, w: *American Historical Review 84 (1979)*, p. 919-944

[7] D. Klippel, *Persönlichkeit und Freiheit. Das >>Recht der Persönlichkeit<< in der Entwicklung der Freiheitsrechte im 18. Und 19. Jahhundert*, in: *Grund-und Freiheitsrechte von der ständischen zur spätbürgerlichen Gesellschaft*, G. Birtsch (Hrsg.), Göttingen 1987, p. 273-282

[8] J. Plamenatz, *Man and Society*, 2 vols., London 1963; J. Franklin, *John Locke and the Theory of Sovereignty*, Cambridge 1978; R. Tuck, *Natural Rights Theories*, Cambridge 1979; E. Balibar, *What Is 'Man' in Seventeenth-Century Philosophy? Subject, Individual, Citizen*, w: *The Individual in Political Theory and Practice*, Ed. J. Coleman, Oxford 1996, p. 215-241.

The conception of leave the menaces placed in the state of nature was the idea in searching of a community. The construction of the community processed in the early modern political thought which resulted with a loss of natural liberty, was however artificial. It was based on a contract that was concluded together by all the people. The contract was the way to set the people free from the dangers for their life and property having a place in state of nature. In contract was containing the idea bringing the people cause their staying in the state of nature the contractual expression of the people's relations, principles and the manners of their existence[9]. But the breach of the contract even through one person can destroy the whole community and bring them back to the wild and not comfortable but dangerous relations like in state of nature[10]. In other way the contract became the most important instrument but also the principle of peoples actions permitting them to regulate all the situations amongst the people and to make all what is possible of the subject of contract (as well as subject of each transaction). This subject of contracts could be everything, even all human's goods like property, liberty, equality and to some degree the dignity belonging not only the separate man or groups of people but as well the whole nations[11]. The only essence of every social contract was the will of contracting parties because the man according with the nature has no obligations and if he has some of obligations they can arise only from his free will[12]. The idea of liberty and equality resulting from the contract, was penetrated however to a common circulation, forming in a longer process of development the base for a normative constructions, drawing the position of a peculiar laws of individuals that were raised to range of the Fundamental Rights. They were standing the foundation for the ideological and next constitutional order[13].

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[9] K. Haakonssen, *The Moral Conservatism of Natural Rights*, w: *Natural Law and Civil Sovereignty. Moral Right and State Authority in Early Modern Political Thought*, Ed. Ian Hunter, David Saunders, Houndmills 2002, p. 28-33

[10] P. Haggenmacher, *Droits subjectifs et système juridique chez Grotius*, w: *Politique, droit et théologie chez Bodin, Grotius et Hobbes*, Préface de Yves Charles Zarka, Paris 1997, p. 106-107

[11] J. Gough, *The Social Contract. A Critical Sudy of its Development*, 2nd Ed., Oxford 1957; K. Haakonssen, *Natural Law and Moral Philosophy: From Grotius to the Scottish Enlightenme nt*, Cambridge 1996, p. 322-341

[12] C. B. Macpherson, *The Political Theory of Possessive Individualism*, Oxford 1962, p. 194-262; J. W. Gough, *John Locke's Political Philosophy*, Oxford 1950, p. 64-92; H. Denzer, *Moralphilosophie und Naturecht bei Samuel Pufendorf. Eine geistes-und wissenschaftliche Untersuchung zur Geburt des Naturrechts aus der praktischen Philosophie*, München 1972; T. Behme, *Samuel von Pufendorf: Naturrecht und Staat*, Göttingen 1995

[13] F. Grunert, *Normbegründung und politische Legitimität. Zur Rechts-und Staatsphilosophie der deutschen Frühaufklärung*, Tübungen 2000, p. 148-167.

With the idea of Fundamental Rights are connected the questions whether their catalogue is already closed, normative fixed, constant and inviolable, but perhaps we are able to say that this catalogue can be still opened and is dependent on this what we just now recognize as important or we are ready to admit it as important in one of admissible for us convention? We can also agree with concept that if the Fundamental Rights find and have their origins in the nature but however they are also expressed in law, and otherwise if we admit that Fundamental Laws are existing objective, it doesn't mean that they have always to be normative formulated. Another problem is the question whether the Fundamental Rights are ruling or governing the law system or just in contrary the law system defining this what can be called as the Fundamental Rights showing us out simultaneously what are their borders?

The constitutional settlement of Fundamental Rights is contemporary obvious. When however the liberty and equality, but also the dignity became a general passwords in modern conception of laws finding their normative expression in the most important constitutions all over the world, in fact their contemporary meaning, their form and ideological background have been undergone an explicit evolution, what happened through an ideological emancipation that was evoked to cut of the legal notions of liberty and equality from tradition. If the human individual appreciate himself for an Absolut, in this way all the relations with the others should be submitted their own utility and all these relations have been taken a contractual character, especially as long as it gives us the profits.

This what we understand now as the idea of Fundamental Rights is based on the contemporary interpretation. It verifies the traditionally view of liberty and equality as the values very deep anchored and closed connected with the vision of community. In this sense the new view of liberty and equality have no restrictions. It is an interpretation of the conception of liberty without borders and everything what is not agreed with the meaning of an absolute liberty is rejected. The concept of liberty is reduced to the elimination, how it is said, all exterior restrictions of men's will. This individualistic conception based on a modern interpretation of Fundamental Rights finding the man as an individual and also separate person from others subjects whose relations with the other people should be defined and determined only through the contract. The contemporary comprehension of no limited liberty as one of the Fundamental Rights arising today to a conviction in fact based on a myth in which the identity of men's existence is the vision of social contract. In this case of course is not important whether we believe that

the society was founded as the result of peoples contract. This view was a mental experiment, a hypothesis which should prove that all collective bodies have to be found on an agreement of the individuals. The idea of social contract in fact was a reversal of traditional conception, that man from the very beginning is born in community and it also means that the man didn't create the community himself if he only wants it as is said very often. The view that community can be made through the separate man according to his free will is a denial of fact that man is always built by the culture which is a common work made by many people generations where the freedom consists in forming of an own fate, but always as a common enterprise. This liberty arise from the conscious that the man exists only in a community having there also the right to participate in his governance. This true coming from the tradition is remained in contemporary conception of liberty as explicitly impaired and even, as we can say, it was taken up a trial to his annulment. We can of course reflect on the consequences of abandonment our own anthropology which have their ancient roots, what also results a rejection of the acceptance of order in which we were born, created and educated, where the ethics was its ground.

3. Conclusions

The considerations connected with the modern, contemporary understanding of Fundamental Rights, especially these concerning the liberty, equality and dignity, in fact following of their false perception, a depraved vision where the catalogue of Fundamental Rights seems still to many contemporary people as insufficient. Actually we have now to do with the tendencies to extension of the catalogue of Fundamental Rights what goes now in a quite unrestricted manner. If someone, or one group of people acknowledge that in their meaning something is, or something also ought to be a Fundamental Right, they will strive to realize this idea first as an ideological point and next they also will try to reach for it his normative guarantee. The point of departure of these arguments can be one of already accepted now Fundamental Rights that will be occurred as a base for expressing of a new view of personal subjective right. The substance of this claim will be the expression of an individual will or another adopted point of view which after a time will be tried to set a new sense of the right in social and political turnover for accustoming the others to the new conception, and then to make it as a heart of new legal regulation. And it means that if we come out from the place

of such comprehension of Fundamental Right as unlimited liberty permitting us to respect nothing beyond our free will, we can come to the conclusion that doing without any restrictions we can decide about all our problems ourselves also in such rudimental questions whether we want to have a child when it happened or we can order to kill him at one's leisure for it appears from our personal subjective right, saying this in other words, because it is our personal subjective right. And in this way again we return once more after all to the question connected with the borders and restrictions of our freedom and liberties.

The problems concerning the Fundamental Rights in fact are the questions of civilization identity where the most important problem is our cultural identification. The contract which was used in past in political reflection but is also used today in political debate and actions as an instrument to make the people free from the restrictions and inconveniences of the state of nature it has become today as so called tool for the future detachment from traditional anthropology of our culture. However the most intrinsic question is that if we will formulate the Fundamental Rights trying also to indicate their origins, at the same time we will be able to preserve for us the very real understanding of Fundamental Rights. When we do it this idea should not bring us to an excessive extrapolation of the comprehension of Fundamental Rights which can conduct us to the loss of their meaning and to detachment from this what is the real essence of these rights.

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