

prof. dr hab. Piotr Krajewski

ORCID 0000-0001-7233-899X

e-mail: piotr529@wp.pl

Wydział Prawa i Administracji

Uniwersytet Warmińsko-Mazurski w Olsztynie

“Climates” of constitutional amendments

„Klimaty” zmian konstytucji

Abstract

The aim of this paper is to present the impact of metaphorical “climates” on understanding and modifying the content of the constitution, which has its source in natural phenomena and social and political events around the world which shape the new thinking and sometimes result in altering the text and/or interpreting the fundamental laws. Although it emphasises their importance as acts that guarantee stability, it also shows that one must think of the future and take actions where a change is necessary. Some examples from EU countries may prove helpful in this regard. Usually these are very complex situations, requiring the involvement of all spheres of life and the functioning of state institutions and bodies. The unsatisfactory pace of changes results from caution and the need for forward thinking.

Keywords: constitution, constitutional amendment, non-political reasons for a constitutional amendment.

Streszczenie

Celem niniejszego artykułu jest przedstawienie wpływu metaforycznych „klimatów” na rozumienie i modyfikowanie treści konstytucji mających swe źródło w fenomenach naturalnych, wydarzeniach społecznych i politycznych na świecie kształtujących nowe myślenie, czasami skutkujące zmianą tekstu i/lub interpretowania ustaw zasadniczych. Z jednej strony podkreśla to ich znaczenie jako aktów gwarantujących stabilność, z drugiej strony wskazuje na konieczność myślenia perspektywicznego i podejmowania działań w kwestiach wymagających zmiany. Pomocne w tym względzie może okazać się kilka przykładów z państw Unii Europejskiej. Zwykle są to sytuacje bardzo złożone wymagające zaangażowania wszystkich sfer życia i funkcjonowania instytucji i organów państwa. Niezadowalające tempo zmian wynika z ostrożności i konieczności myślenia perspektywicznego.

Słowa kluczowe: konstytucja, zmiana konstytucji, „pozapolityczne” przesłanki zmiany konstytucji.

1. Introduction

A constitution is an important and lively document, as it is usually born out of the same spirit which inspired previous generations and which was present in the nation in dramatic moments that threatened the state's existence. It is a document of special importance, which can only be a fruit of a deep feeling of unity, of a combination of historical memory, current experience and needs for the future. Therefore, it is not true – despite common belief – that a constitution should be a stiff¹ and unalterable document and a point of reference for all legislation and interpretation activities. Obviously, its prime purpose is to provide the framework for legislation activities of lawmakers, but it is also subject to interpretation. It can, and should, undergo improvements and be adapted (but not freely) to the objective needs (not only expectations) of members of the community governed by it.

Each community, whether a small, local one, or a larger one, national, or even the one referred to as global, is a lively structure, changing dynamically in time and space. It seems obvious, but it is true. Therefore, in order to exist and develop while respecting a certain legal order, the structure needs stable perspectives, and these are usually outlined in legal regulations. But what if the external conditions, which are beyond, or almost beyond human control, suddenly change? To maintain the common good, one can then only change the regulations or come up with their relevant interpretation. This also applies to what seems to be a "stiff" constitution.

2. "Covid-related climates" of the constitution

Such adaptations are necessary, as life is a sequence of events that dynamically form and affect new factual states. This is difficult to deny, because two years ago, we lived in a different "constitutional climate", in which constitutional freedoms were guaranteed and institutions had the powers subordinated to the rules provided in the law. Everyone could enjoy the freedom of movement and travelling abroad (art. 52), conduct individual business activity (art. 20, 22), use cultural goods (art. 73), enjoy personal freedom (art. 41), access places of religious worship and practise one's religion (art. 53) or participate in gatherings (art. 57). After taking their children to schools and kindergartens, adults went to

¹ J.B. Bryce, *Constitutions, Reprinted*, 2010, Memphis, Tennessee, USA; A.V. Dicey, *Wstęp do nauki o prawie konstytucyjnym [Elements of the science of constitutional law]*, Warszawa 1907 [in:] A. Ławniczak, *Geneza konstytucji [Origin of the Constitution]*, Wrocław 2015, p. 216.

work undisturbed and young adults studied at universities. One could even fall ill, counting on help from a decent healthcare system (art. 68), mostly financed by the state.

Then, suddenly, literally everyone had to face a totally new reality, shaped by the coronavirus. The easily transmitted pathogen, quickly spreading from China to all the continents, forced the World Health Organisation (WHO) to declare the state of public health emergency of international importance²; the Covid-19 pandemic put national healthcare systems and the legal pillars of so-called “old democracy”, to a difficult test³. In many countries, constitutional provisions provided grounds for restricting the freedom of leaving one’s home and of movement, for imposing quarantine duty when the virus was detected, or even when its presence was possible⁴. The restrictions affected shops, schools, nurseries, cultural institutions, places of leisure and sports activity. Wherever possible and necessary, remote teaching and working from home were made obligatory. The aim of all this was to support and to improve the efficiency of the national sanitary security system, which was supposed to protect (some) rights of the individual, but also the common good: life and health – whose importance people are aware now more than ever in the past.

In this new situation, government and local government institutions made unanimous appeals for people to behave responsibly, asking them to observe social distancing and to stay at home. Despite being deeply affected by the restrictions, Poles – like never before – proved to be a mature nation, usually showing understanding to the government actions, following the sanitary recommendations which restricted these highly valued constitutional freedoms. Furthermore, they demonstrated responsibility for other people’s health and helped those in need – in short, “the obligation of solidarity with others” (par. 22 of

² Główny Inspektorat Sanitarny, *WHO ogłasza stan zagrożenia zdrowia publicznego o znaczeniu międzynarodowym [WHO declares the state of public health emergency of international importance]*, <https://www.gov.pl/web/gis/who-oglasza-stan-zagrozenia-zdrowia-publicznego-o-znaczeniu-miedzynarodowym-pheic> [access: 4.06.2021].

³ Rozporządzenie Ministra Zdrowia z dnia 20 marca 2020 r. w sprawie ogłoszenia na obszarze Rzeczypospolitej Polskiej stanu epidemii [Regulation of the Minister of Health concerning the declaration of the state of pandemic in the territory of the Republic of Poland of 20 March 2020] (Journal of Laws, 2020, item 491).

⁴ The regulations implemented by: the Act on preventing and controlling infections and infectious diseases in humans of 5 December 2008 (Dz.U.2020.1845 as amended); Regulation of the Minister of Health concerning infectious diseases resulting in the hospitalisation, isolation or home isolation obligation and the quarantine obligation or the epidemic supervision of 6 April 2020 (Dz.U.2020.607 as amended); Regulation of the Council of Ministers concerning the introduction of certain restrictions, obligations and prohibitions in connection with the state of pandemic (Dz.U.2020.2132).

the Preamble); the obligation that replaced egoism and individualism, which were sometimes experienced acutely in the pre-covid times.

3. Green trends in constitutional changes

Changing the format of life during the pandemic was not and is not the only test of the community awareness, responsibility and understanding of the need for adapting the law. Sometime earlier, the French President E. Macron stated that a referendum would be held on including in the constitution all issues related to climate and environmental protection. In a sense, it is an effect of the (politically) acutely felt "yellow vest" protests of autumn 2018 – the greatest social unrest since 1968⁵. The changes are justified by the gradual (but felt increasingly strongly) climate changes that affect the economic results. Therefore, the reform is to be a response to the increasingly popular conviction that environmental degradation and decreasing biodiversity are caused by human activity and that climate change must be stopped. In these circumstances, the Citizens' Council for Climate proposed that paragraph 3 should be added to Art. 1 of the French Constitution: "The Republic guarantees conservation of biodiversity and the natural environment, and combating climate change".

It can be regarded as a sort of constitutional experiment aimed at adapting it to new challenges. Apart from the symbolic stressing of the importance of climate-related issues, the proposed changes will also have other meanings. Their content itself is solely declarative. Without other executive acts, it can just show an awareness of the gravity of the situation and the will to act (which in itself would be significant). This is not surprising because major investments and environmental programmes are always complicated, they consume considerable resources and usually carry with them a risk of failure. Therefore, these initiatives are highly desirable, even necessary, from the economic point of view, but politically uncertain and environmentally doubtful.

4. Environmental climates of Italian constitutionalists

Proposed changes in the French constitution have received favourable comments in the Italian press. This confirmed that some of the Italian political elites

⁵ *Klimat w konstytucji. Francja przeprowadzi referendum [Climate in the Constitution. France to hold a referendum]*, <https://www.tvp.info/51332159/francja-prezydent-emmanuel-macron-chce-spraw-klimatu-w-konstytucji> [access: 4.06.2021].

were right to strive to “supplement” their constitution with provisions aimed at more effective environmental protection. Nearly a year earlier, the Five Star Movement initiated work on a new constitutional draft. Its aim was to change article 9 of the Constitution⁶ by adding a passage on the conservation of the environment, ecosystem, biodiversity and animals, and on promoting sustainable development. Making the natural environment one of the pillars of democracy – according to the authors of the idea – should help to create the substrate of values, which will have to provide the basis for future policies and actions to be implemented on the national and the European level; it is to be a manifestation of solidarity and responsibility towards future generations⁷.

The applicants also see the proposed change as significant for other reasons. The constitution of Italy does not define the concept of the environment as an asset which requires special protection. Nowadays, Italy faces environmental and social challenges, which the constitution creators could not have foreseen and which for many are still unknown and unimaginable, although procrastination about entering the sustainable development path creates a risk for present and future generations by depriving them of the opportunities which until recently were regarded without any deeper thought.

The presence of a sustainable development concept in the constitution – according to those who propose the change – would reinforce the future “legislation production” by prohibiting the lawmakers from disregarding sustainability; it would also deprive them of the ability to introduce short-term, environmentally unjustified solutions in return for the voters’ support. Hence, there is another idea for a change, but this time in Art. 2. It is proposed that the following phrase should be added after the word “social”: “also towards future generations”⁸.

⁶ It is about adding section three: «Recognises the need for and guarantees environmental protection as the foundation of the individual rights and the interest of the community», and: «Creates conditions for sustainable development» (transl. from Italian).

⁷ *M5S: tutela ambiente in Costituzione, Bravo Macron*, https://www.ansa.it/canale_ambiente/notizie/vivere_green/2020/12/15/m5s-tutela-ambiente-in-costituzione-bravo-macron_0d56ab8b-bcc3-48b5-99b7-040d813f6dfd.html [access: 5.06.2021].

⁸ Apart from the changes in art. 2 and 9 of the constitution, others, associated with them and resulting from them, are put forward in consequence of the growing sensitivity to the environmental security. They concern art. 41 and art. 117. The proposed version of art. 41 would be as follows: “Private business initiatives are not restricted. They cannot be executed in contradiction to the principle of social usability or in a manner that harms human health, environment, security, freedom, human dignity. The act defines programmes and the relevant forms of supervision necessary for private and public business activity to be coordinated and oriented towards achieving social objectives and sustainable development. The proposed version of letter s) in section 2 of art. 117 would be as follows: The state is a sole lawgiver in the following areas: [...] s) protection of the environment, ecosystem, animals and cultural goods. *BioEcoGeo, La Costituzione*

These proposals of constitution change arise from the need to make obvious what is now possible only by interpretation. Meanwhile – still according to the proposal makers – it should be evident and included in the central part of the constitution, i.e. among the articles identifying the fundamental principles defining the society and the legal order. Such initiatives show that the environmental awareness in the society is high enough to update the environmental protection law on the constitutional level; experiencing (usually negative) changes in the environment – both on a local and on the global scale – and the awareness of their impact on the nearer and further future puts the environment on a par with other fundamental values; a secure environment has become a priority. It cannot be regarded by the law other than with the maximum attention and respect, i.e. in the same manner as other principles which serve man, citizens and the state.

These examples are manifestations of “ecologisation” of constitutions under the influence of the “climate” created as a fashion, necessity or arising from authentic concern about the future. “A climate for change” is favoured by various, natural or anthropogenic, determinants. These usually include social, political and economic crises, which sometimes just converge and/or overlap with acute environmental issues. Who knows, for example, what the migration crisis will bring – one strongly initiated and interrupted, or rather just slowed down, by the covid-19 pandemic? Perhaps, like environmental pressure, it will become a stimulating factor for constitutional “updates” or a change in understanding and interpretation of executive regulations based on it.

5. Constitutions and the migration phenomenon

This approach manifests itself in a decision of the Grand Chamber of the European Court of Human Rights in the case of ND and NT vs Spain. The case concerned the immediate bringing to the border of illegal immigrants, who travelled

si fa green, a favore dello sviluppo sostenibile, <https://www.bioecogeo.com/la-costituzione-italiana-si-fa-green/> [5.06.2021]. Some countries even included animal protection in the set of values protected by the constitution. It was first done in the EU by the Federal Republic of Germany (art. 20a). Articles concerning animal protection can be found in the constitutions of Slovenia (art. 72), Switzerland (art. 80.1), Luxembourg (art. 11 bis) and Slovakia (art. 44.4). Switzerland intends to hold a referendum on granting basic rights to primate mammals. Propositions for “ecologisation” of the constitution in Poland concern animals. According to one of them, the obligation to treat animals in a humane manner would be added to art. 5. According to another, a new provision would be added – art. 74a – which would obligate the state “to guarantee welfare to animals that are able to suffer, taking into consideration their interests in creating and application of the law”. T. Pietrzykowski, *Moralność publiczna a konstytucyjne podstawy ochrony zwierząt [Public morals and the constitutional foundations of animal protection]*, „Studia Prawnicze” 2019, No. 1(217), p. 20–22.

from Morocco to Melilla⁹ – the Spanish enclave in North Africa. The Spanish authorities were accused of applying controversial measures in response to illegal immigration¹⁰, but it was concluded that the European Human Rights Convention (EHRC) had not been violated.

However, earlier, in the first instance decision of 3 October 2017, the Court in Strasbourg stated that Spain had violated art. 4 of the Protocol No. 4 of the Convention for the Protection of Human Rights and Fundamental Freedoms and art. 13 of the Convention for the Protection of Human Rights and Fundamental Freedoms. The Spanish government appealed against this decision to the Grand Chamber, which decided that the border guards were right to detain the immigrants as the case under analyses concerned individuals who had forced the fence without any previous attempt to use legal ways of crossing the border.

Importantly, before the decision was made public, the media predicted a different result, unfavourable to Spain. This conviction was so strong that even the government of Pedro Sánchez saw these deportations as violating the EHRC and the constitution. He also declared that the appeal had not been withdrawn only to make the court's decision a basis for changing the domestic law. Moreover, even the Spanish Constitutional Tribunal – while waiting for the ECHR's decision – was ready to declare non-compliance of the new law with the constitution regarding a special regime for Ceuta and Melilla, which had been submitted for evaluation¹¹.

This decision of the ECHR is, in a sense, ground-breaking. On the one hand, it is because, in fact, it allows Spain to deport individuals who cross the border illegally¹² (which ultimately was also recognised by the Spanish Constitutional Tribunal). On the other hand, it departed to a certain extent from the previous understanding of the migration issue, which other European countries also had to face.

⁹ Decision (of 13 February 2020) in the case of ND and NT vs Spain (complaints No. 8675/15 and 8697/15).

¹⁰ Illegal immigrants detained by Spanish border guards in the enclaves of Ceuta and Melilla have been handed over to the Moroccan police since 2002. Meanwhile, Denmark is the first European country whose authorities revoked Syrian refugees' residence permits, claiming that it was safe for them to return to some parts of the war-torn country, <https://tvp.info/53316822/syryjscy-uchodzczy-w-danii-kraj-pozbawia-ich-pozwolenia-na-pobyt> [access: 6.06.2021].

¹¹ Cfr. El País, *El Constitucional, obligado a cambiar su proyecto de sentencia para permitir las devoluciones en caliente*, z 14.02.2020, https://elpais.com/politica/2020/02/13/actualidad/1581622843_610090.html [access: 6.06.2021].

¹² Despite reservations concerning the compliance with the constitution of the law regulating such actions. Ley Orgánica 4/2000, de 11 de enero, sobre derechos y libertades de los extranjeros en España y su integración social, <http://www.exteriores.gob.es/Portal/es/ServiciosAlCiudadano/InformacionParaExtranjeros/Documents/LEY%20ORG%C3%81NICA%2042000%20DE%2011%20DE%20ENERO.pdf> [access: 6.06.2021].

A special legal regime was adopted for these enclaves to counteract the states of emergency resulting from the migration pressure, which the relevant services could not cope with. For this reason, this issue should be regarded as associated with the security of citizens and the receiving country. Therefore, a question arises about its further consequences and the ability to reconcile the domestic interests with the international commitments, mainly related to human rights. It seems that the social climate related to such issues, shaped by the nature and intensity of the phenomenon affected, to a certain extent, the understanding and interpretation of the constitutional provisions aimed at safeguarding the interests of the state and society. As in other countries that face such issues, increasingly radical social moods determine the direction of political decisions, and these, in turn, affect the way the law is understood and applied¹³.

6. Conclusions

Transformations in the surroundings make one aware of both the changing climate and the “climates” of human moods. Counteracting the effects of the former escapes human control, and the latter is the “product” of human activity, and now – the main reason for adopting regulations to the current requirements of organised life of communities. The “climate” created in this manner forces the relevant interference with the law and/or its understanding (interpretation) and then application, which is sometimes slightly different than earlier. Therefore, introducing constitutional changes can bring about significant results. First of all, it helps to improve the consistency and compliance of our (and any other) legal system with the international one, in accordance with what happened and what is happening in other European countries.

Bibliography

BioEcoGeo, La Costituzione si fa green, a favore dello sviluppo sostenibile, <https://www.bioecogeo.com/la-costituzione-italiana-si-fa-green/>.

Bryce J.B., *Constitutions, Reprinted*, 2010, Memphis, Tennessee, USA.

¹³ Due to the covid-related restrictions, in particular closing of Italian ports, those who try to reach Europe by sea cannot count on help from NGO ships (la Repubblica, *Coronavirus, le Ong fermano le missioni di salvataggio in mare. Migranti senza più soccorsi*, https://www.repubblica.it/cronaca/2020/03/18/news/coronavirus_le_ong_fermano_le_missioni_di_salvataggio_in_mare_migranti_senza_più_soccorsi-251590974/ [access: 6.06.2021]. The Greek and Cypriot authorities also close their borders for refugees. Similar incidents also take place on the Franco-Italian border.

- Cfr. El País, *El Constitucional, obligado a cambiar su proyecto de sentencia para permitir las devoluciones en caliente*, z 14.02.2020, https://elpais.com/politica/2020/02/13/actualidad/1581622843_610090.html.
- Dicey A.V., *Wstęp do nauki o prawie konstytucyjnym [Elements of the science of constitutional law]*, Warszawa 1907 [in:] A. Ławniczak, *Geneza konstytucji [Origin of the Constitution]*, Wrocław 2015.
- Główny Inspektorat Sanitarny, *WHO ogłasza stan zagrożenia zdrowia publicznego o znaczeniu międzynarodowym [WHO declares the state of public health emergency of international importance]*, <https://www.gov.pl/web/gis/who-oglasza-stan-zagrozenia-zdrowia-publicznego-o-znaczeniu-miedzynarodowym-pheic>.
- <http://www.exteriores.gob.es/Portal/es/ServiciosAlCiudadano/InformacionParaExtranjeros/Documentos/LEY%20ORG%20C3%81NICA%2042000%20DE%2011%20DE%20ENERO.pdf>.
- <https://tvp.info/53316822/syryjscy-uchodzcy-w-danii-kraj-pozbawia-ich-pozwolenia-na-pobyt>.
- Klimat w konstytucji. Francja przeprowadzi referendum [Climate in the Constitution. France to hold a referendum]*, <https://www.tvp.info/51332159/francja-prezydent-emmanuel-macron-chce-spraw-klimatu-w-konstytucji>.
- La Repubblica, *Coronavirus, le Ong fermano le missioni di salvataggio in mare. Migranti senza più soccorsi*, https://www.repubblica.it/cronaca/2020/03/18/news/coronavirus_le_ong_fermano_le_missioni_di_salvataggio_in_mare_migranti_senza_piu_soccorsi-251590974/.
- M5S: tutela ambiente in Costituzione, Bravo Macron*, https://www.ansa.it/canale_ambiente/notizie/vivere_green/2020/12/15/m5s-tutela-ambiente-in-costituzione-bravo-macron_0d56ab8b-bcc3-48b5-99b7-040d813f6dfd.html.
- Pietrzykowski T., *Moralność publiczna a konstytucyjne podstawy ochrony zwierząt [Public morals and the constitutional foundations of animal protection]*, „Studia Prawnicze” 2019, No. 1(217).

Legal Acts

- Ustawa z 5 grudnia 2008 r. o zapobieganiu oraz zwalczaniu zakażeń i chorób zakaźnych u ludzi (Dz.U. z 2020 r., poz. 1845 ze zm.).
- Rozporządzenie Ministra Zdrowia z dnia 20 marca 2020 r. w sprawie ogłoszenia na obszarze Rzeczypospolitej Polskiej stanu epidemii (Dz.U. z 2020 r., poz. 491).
- Rozporządzenie Ministra Zdrowia z 6 kwietnia 2020 r. w sprawie chorób zakaźnych powodujących powstanie obowiązku hospitalizacji, izolacji lub izolacji w warunkach domowych oraz obowiązku kwarantanny lub nadzoru epidemiologicznego (Dz.U. z 2020 r., poz. 607 ze zm.).
- Rozporządzenie Rady Ministrów z 1 grudnia 2020 r. w sprawie ustanowienia określonych ograniczeń, nakazów i zakazów w związku z wystąpieniem stanu epidemii (Dz.U. z 2020 r., poz. 2132).
- Decision ECtHR (of 13 February 2020) in the case of ND and NT vs Spain (complaints No. 8675/15 and 8697/15).