Warszawskie Studia Teologiczne
XVII/2004, 219-232

Gediminas MESONIS
Kazimieras MEILIUS[*]

CONSTITUTIONAL CONVENTIONS AND THE THEORY OF RELATIVITY OF MORAL NORMS

These norms <...>besides from a number of other norms of the same kind make up modern constitutional law.[1]
Albert Venn Dicey

Contains : I. The relativity of morality and the system of law; II. Moral values as a source of law: constitutional conventions; Conclusions.

I. The relativity of morality and the system of law

Immanuel Kant has written: „Two things fulfill my soul with ever new and ever stronger fascination and deep respect, the longer and deeper we think about that, - it is the starlit sky above me and the law of morality inside of me".[2] With this the great philosopher has shown the importance of morality, showing that it is typical of man only. In the I. Kant epoch the manhood is regarded as a unique community, whose source of exceptionality stems form the metaphysical understanding of the world. At that time there was not a strong theoretical opposition to contradict universal norms of morality and their social universality, whereas theory and practice, whereby we mean the existing thinking paradigm and the established system of values, agreed on principal matters. Thus, strange as it may seem, it those times public consciousness and theoretical conclusions of philosophy of morality were not in conflict.

Formation of the national laciest model of the state and avoidance of extraneous influences as well as agnostic approach towards the religion, which was the spiritual and moral basis unifying Europe in the 20th century, have set the man and his freedom

[*] **Gediminas Mesonis -** associated professor at the Law University of Lithuania, department of Constitutional law. Inspector of Journalist Ethics, expert.

Kazimieras Meilius - associated professor at the Law University of Lithuania, department of Civil Procedure, associated professor at the Vytautas Magnus University, department of Cannon Law, Vice-official of Tribunal of Vilnius Archiepiscopate

[1] A.V. DICEY, *Konstitucinės teisės studijų įvadas,* Vilnius: Eugrimas, 1998, 282.

[2] I. KANTAS, *Praktinio proto kritika*, Vilnius: Mintis, 1987, 186.

of expression free and effected changes in the existing thinking paradigm and the system of values and started the creation of morality with "modern freedom".[3] It was at that point in time, that parallel but totally opposite trends emerged in the doctrines of philosophy of law and philosophy of morality. The development of theories and quest for truth seem to be natural and positive aspect of social expression. However, the shift of paradigms as well as social and technological transformations brought about the shift in moral values in the minds of public at large. This shift can be regarded as an important social transformation which bears a long time effect.

The modern (XX end XXI beginning) thinking paradigm which has taken root in the nowadays theoretical debates has in principle changed the subject of the research. In the epoch before I. Kant and right after it the main problem faced by the doctrine was to get to know and establish the source of universal moral norms and the answer was being tried to find in the totality of metaphysical or social arguments and approaches. These days, however, researches challenge even the initial approach, which maintains the existence of universal norms of morality. These debates have already become a perpetual problem of theory of law and philosophy of morality. Similar changes in the subject of research are noted by Joseph Ratzinger. He maintains that the modern society and doctrine have became so courageous that not only they are challenging the quality of belief, which was typical of the reformist and contr-reformist epochs, more that that, they raise question about the meaningfulness of Christian belief, despite the fact that for ages Christian truths were undisputed source of moral norms.[4] It is obvious that when the doctrine challenges Christian values it also challenges Christian moral values. There is nothing wrong with the challenge in itself as science must be challenging different concepts, however the variety of concepts or doubts about what was previously regarded as a norm is reflected in the existing system of values.

Thus modern paradigm of philosophy is characterized by rejection of any preliminary assumptions and it challenges things that have been unchallenged for centuries. Secularization of Christian morality is followed by inevitable tendency of law becoming more and more positivist, the tendency aggressively prevailing over morality. Even though Universal Declaration of Human Rights or Constitution attributes certain rights to every individual, quite often protection of human rights through laws becomes ambiguous[5].

There are two quite equal tendencies in modern Legal theory and Philosophy of morality. One of them recognizes the existence of universal moral norms, the other denies it. Representatives of the first viewpoint do not separate law from morality and argue that it is only the law, which does not contravene norms of morality, which may justify the name of the Law. Advocates of the second theory argue that norms of morality are relative and therefore can not be universal, thus law does not necessarily need to reflect existing norms of morality, as it is impossible.

---

[3] G. BATTISTA GUZETTI, *L'uomo e gli altri uomini,* Torino: Marietti, 1965, 204-247.

[4] J. RATZINGER, *Krikščionybės* įvadas, Vilnius: Katalikų pasaulio leidinys, 1991, 5-30.

[5] P. D'AGOSTINO, *Filosofia del diritto*, Torino: G.Giappichelli, 1993, 23-45.

Most prominent representatives of the first doctrine are Ronald Dworkin, John Finnis, Tom Nagel, Tom Scanlon; the second doctrine is represented by Hans Kelsen, Richard A. Posner, Bernard Williams and others. All researchers mentioned hereinabove are famous professors of law and philosophy, who have had an impact on the scientific paradigm.

What is the influence of the theoretical competition between the mentioned theories and changes in the thinking paradigm on the question debated in n this article i.e. constitutional legal relations and formation of constitutional conventions?

Even though the content of the concept of morality is quite problematic, doctrines of different sciences describe it using more or less similar definitions. The definition given in Oxford dictionary maintains that morality is "a system of norms, which establish responsibilities of a man in relation to the society and other men".[6]

As mentioned hereinbefore, academic tendencies which deny the objectiveness of existence of common norms of morality are quite obvious. Denial of morality rests on several key arguments. The main argument holds that norms of morality are relative, i.e. some things are regarded as moral by some persons, whereas others think, others things are moral. This holds very much true in individualized society of today, where virtually everyone has his own list of norms and the vision of morality, therefore the universal system of morality is nothing but an utopia and objectively is impossible. Hans Kelsen in his "Pure Theory of Law" does not think for a moment that norms of morality can not be relative, more that than he maintains that even Jesus Christ came to earth having other objectives but spreading peace.[7] Richard A. Posner also describes Jesus Christ as a violator of the then existing norms of morality. With this argument the author makes an effort to deny the Christian nature of morality.[8]

Having recognized that the universal system of moral values is impossible we come to a logical conclusion that we should not even aim at establishing one, whereas every effort to establish one could be classified as Sizif job. From the viewpoint of this attitude the models of communication and behavior are only influenced by subjective understanding of moral norms.

Another argument which denies the existence of universal norms of morality holds that even if there are universally recognized laws, there will be no mechanism, which could force one to fulfill the duty bestowed upon him and there are no ways as to how transform this moral norm an imperative. Therefore, even if there were universal laws of morality, they may merely be regarded as a declaration, whose implementation depends on goodwill of the person.

It is natural that this position of the doctrine in a sense legitimizes the relativity of morality in modern society. Once the concept of subject morality is possible, why

---

[6] *Oxford Dictionary*, Dorling Kindersley Limited and Oxford University Press, Vilnius: Alma littera, 2001, 529.

[7] H. KELSEN, Grynoji teisės teorija, Vilnius: Eugrimas, 2002, 85-88.

[8] A.R. POSNER, *The Problematics of Moral and Legal Theory,* Cambridge, Massachusetts, London, England: The Belknap Press of Harvard University Press, 2002, 10.

should not it be possible for everyone to have his personal set of values, whose quality would depend solely on the person himself? The usefulness of subject concept of morality was soon noticed by public at large. "Subjective moralities" nowadays not only influence behavioral motives between public at large, but also the behavior of other constitutional legal subjects, comments on the norms of law etc. Thus dominant becomes an attitude that all types of behavior are moral, given the fact they are within law. It is obvious that this approach lumps morality and legal norms together, therefore the expected degree in morality can be as high or low as it is entrenched in legal norms. The conclusion is, that legal norms are not based on universal norms of morality and the concept of morality being subjective eliminates it as a source of law, which could be applied in everyday life. If only a fraction of the society takes this stanza, we are indirectly involved in a situation which reminds of the state described by Max Weber, which continued until the arrival of capitalism, where co-existence of several moralities was possible. One of these was "external morality" which allowed things to be condemned in relations "between brothers", the other was much stricter if compared to the external one.[9]

This position which sadly enough is dominant in the majority of post communist states makes us look for morality in legal norms even the , when the contents of the norm are contrary to common reason or other legal acts. If we accept that norms of morality are relative and they do not necessarily command duty and that everyone is entitled to judge the environment from "his own" subjective perspective, we become entangled in a paradoxical situation where legal norms as sole possible models of moral behavior become absolutely immoral for public at large as they can not mirror the plethora of existing subjective systems of morality.

Therefore we may state that by discarding the view that there are universal legal norms, we have to oppose the statement that legal norms can be moral at all, because no existing legal norm can reflect all systems of subjective morality. Society and maybe even the state finds itself in a dangerous position, where de facto the society does not recognize the existing norms of morality and the existing norms of law are nothing but strict imperatives, who are followed because of fear of sanctions, conformism or other motives. Therefore when a subject of constitutional legal relations behaves within the boundaries of existing norms, this behavior is regard as exceptionally immoral. In circumstances like these the public not only airs its opinion about a particular institution or official, but also states that the norm of law does not comply with its own conception of morality and therefore can not be treated as moral. It is obvious that the theory which approves of non-objectivism of moral norms only facilitates legal nihilism.

II. Moral values as a source of law: constitutional conventions

In this article we will follow the assumption that norms of morality, as universal, have to manifest in any sphere of life. Thus norms of morality have to be important for any legal and constitutional legal relations.

[9] M. WEBER, *Protestantiškoji etika ir kapitalizmo dvasia*, Vilnius: Pradai,1997, 48.

The doctrine of constitutional law recognizes that constitutional legal relations are not regulated by written norms only but by constitutional conventions as well, which are developed through daily workings of constitutional subjects. Thus constitutional conventions may be described as a particular behavior of government representative or official, which is in compliance with established norms of constitutional morality, which is constitutional behavior.

If we were to agree with proponents of the relativism theory, we will have to agree that compulsory legal norms are non- existent and therefore the behavior of subjects of constitutional legal relations, which is not regulated by written word, shall not necessarily be regulated by requirements to abide by universal norms of morality. The question then is what are the motives of behavior of government representative or official if legal norms do not regulate their behavior in an imperative manner anymore? In our opinion, the best we can be looking forward to is the behavior of the subject based on the requirements the subject creates for his own system of values. However it is more likely that this behavior will be influenced by personal, political or conjuncture benefits, because without universal system of moral norms, there is no instrument, which serve for the purpose of evaluation of the quality of behavior.

Don't we see the same situation in the practice constitutional legal relations of a number of post communist states? Is this the same everywhere? How and why in some countries morality is universally regarded basis for not only constitutional but also public legal relations? It goes without saying that in Anglo-Saxon countries both moral values and guarantees safeguarding the application of moral values have a different status, which is the reason they deserve a deeper insight in this article.

Albert Venn Dicey having analyzed the models of behavior of constitutional legal subjects and sources of law firmly states that in the United Kingdom there is a system of political morality – „orders, regulating the work of public officials, which are not found in any law <...>".[10] The author has also noted that it is moral and political responsibility which makes the subjects of constitutional legal relations follow them without challenging their existence.

More importantly, in the hierarchy of sources of constitutional law in the United Kingdom general political and moral values stand on equal footing with statute law and common law. General political and moral norms are so important that they are reflected in formal written norms and in the practice of constitutional legal relations. Adherence to the norms of morality at highest level, i.e. constitutional legal relations, guarantees that when adjudicating a case the court will follow norms of morality when interpreting an Act of Parliament or a previously resolved case. This way the court not only resolves a case but is deeply involved in the mechanism of checks and balances as an independent and free judiciary. Despite of the fact that English courts have to follow written norms, in extreme cases they may disregard an act of parliament which violates common moral norms.[11] The doctrine of British constitutional law recognizes that common moral values must have major support of the society to make sure there

[10] A. V. DAISY, *Konstitucinės teisės studijų įvadas*, Vilnius: Eugrimas,1998, 22-24.

[11] J. ALDER, *Constitutional and Administrative law*, London: Macmillan Press LTD, 1994, 68-69.

is no conflict between competing norms of morality. Thus legal doctrine of the United Kingdom recognizes that moral values are universal and therefore applicable to public relations. It is important that moral values may be protected in courts. It is obvious that here a norm of morality becomes a moral imperative, failing to follow it is not only immoral but also not useful, because the court may base its decision on the basis moral values.

The attitude of the United States of America is similar and maybe even more vivid. The President of the United States swears with his hand on the Bible. Above the chairs of Chairmen of the Senate and the Congress carved in stone is the maxim In God we trust. Is this only respect to history, customs, architectural and artistic authenticity the place?

Answers to these questions call for a brief passage into the history of the United States of America. The first to settle in New England were protestants, Congregationalists, Presbyterians, Quakers, puritans and other whose political views are were influenced by ideas of Christian Protestantism, noted for ascetics, feeling of responsibility and very stringent moral requirements. That's why M. Weber has written "<…> hardly there could have been a more intensive form of religious evaluation of moral behavior, that that spread by Calvinist amongst its supporters".[12] Thus moral assumptions became moral imperatives of political theory and practice, which are up to now very well reflected in constitutional legal relations. Most probably there is no other state in the world, which had such strict moral requirements to every man in the society and the society itself from the very beginning. The Mayflower Compact (11 October, 1620) was one of the most important documents, which had a tremendous influence on the further development of constitutionalism in the United States of America. The Compact is so important that in our opinion it call for a deeper analysis.[13]

Needless to say there was a logical connection between Mayflower Compact and the requirement of the Old Testament. The Compact bound all members of the new community to adhere to the requirements of the Bible. It is important that The Mayflower Compact, taking it's root from the Old and New Testaments, already at that time was regarded as a political covenant. These days a political covenant is under-

[12] M. WEBER, *Protestantiškoji etika ir kapitalizmo dvasia*. Vilnius: Pradai, 1997, 102.

[13] The Mayflower Compact. In the name of God, Amen. We, whose names are underwritten, the Loyal Subjects of our dread Sovereign Lord, King James, by the Grace of God, of England, France and Ireland, King, Defender of the Faith, e&. Having undertaken for the Glory of God, and Advancement of the Christian Faith, and the Honour of our King and Country, a voyage to plant the first colony in the northern parts of Virginia; do by these presents, solemnly and mutually in the Presence of God and one of another, covenant and combine ourselves together into a civil Body Politick, for our better Ordering and Preservation, and Furtherance of the Ends aforesaid; And by Virtue hereof to enact, constitute, and frame, such just and equal Laws, Ordinances, Acts, Constitutions and Offices, from time to time, as shall be thought most meet and convenient for the General good of the Colony; unto which we promise all due submission and obedience. In Witness whereof we have hereunto subscribed our names at Cape Cod the eleventh of November, in the Reign of our Sovereign Lord, King James of England, France and Ireland, the eighteenth, and of Scotland the fifty-fourth. Anno Domini, 1620. S. DONALD LUTZ, *Colonial Origins of the American Constitution. A Documentary History*, Indianapolis: Liberty Fund, 1998, 32.

stood as a behavior of legal and undoubtedly constitutional subjects, which is regulated by a system of norms.

The Mayflower compact first creates a community and only after that a government for that community.[14] This short compact underlined fundamental values, which are binding for everyone. Constitutional doctrine of the USA, recognizes that there is a clear link between the Mayflower Compact and Connecticut constitution (the first in the world) which transpires through the contents of legal norms. Ever since that time, moral values have become an inextricable part of legal and political life, and have been further reflected in the development of constitutionalism in the United States. The contents of constitutional norms in the current constitution of the United States obviously take root in those documents. Even in the 1803 Merburi v Madison case the Supreme Court of the United States chaired by J. Marshall applies not only legal but also moral argumentation.[15]

Changes in the religious composition of the population of the US followed by the influx immigrants with other but Christian religious values did not have any significant effect on the contents and imperativeness of moral norms. New Christian arrivals would accept the morality of the United States in an acceptable Christian form, whereas representatives of other religions, such as Buddhists, Muslims had to adopt the existing system of values not in the form of compulsory Christianity, but as established and therefore compulsory rules of moral behavior. Requirements of the Decalogue were compulsory and even useful for followers of all religions. The binding character of moral norms was guaranteed by granting the courts with the right to use moral values as a source of law. In case there were loopholes in law or collision of norms or any other unforeseen circumstances someone taking another person's property could not justify his behavior because of lack of legal norms. Moral requirement "Thou shall not steel" comes from the Decalogue and commands not to take anything which does not belong to you, it is very strict and has no exceptions. Thus in this case the court would plead a person guilty, because everyone, including the culprit, knows that no one can take another persons property, even if there is no provision on that in law or there is another circumstance which seemingly might justify the wrongdoer.

Modern international law also rests on the recognition of universal moral values. The Nuremberg court when adjudicating the case of leaders of the Third Reich based its opinion on the fact that the defendants violated universal moral values.[16] However, how could one violate such values if they are non existent? Thus the court when taking the decision has recognized that compulsory moral values do exist and the violation of the said values must be punished. It is true, that this argument does not convince the opponents. They claim that the Nuremberg process does not prove the existence of universal norms of morality, it has only established the victory of one of sub-

---

[14] S. D. LUTZ, *The Origins of American Constitutionalism.* USA: Louisiana State University Press, 1988, 21.

[15] P. C. MARGRATH, *Constitutionalism and Politics: Conflict and consensus,* Scott, Foresman and Company. Glenview, Illinois, USA, 1968. 59.

[16] J. Alder, *Constitutional and Administrative law,* London: Macmillan Press LTD, 1994, 17.

jective conceptions of morality.[17] It is difficult, however, top agree with this position as norms of morality applied by courts can hardly ever be classified as subjective, if this was the case we would deny the legitimacy and justice of such system of law.

Even though the times of the New Testament start with the birth of Jesus, he has warned: "Don't you think that I have cam to abolish Laws and Prophets. I came not to abolish them but to follow, and he who would violate the most insignificant of the laws and would urge people to do so, he shall be the smallest in the Heavenly Kingdom (Mt 5, 17-20).[18] From this and other texts we can understand that Jesus follows and consolidates moral requirements of the Old Testament and also underlines the importance of inner aspect by showing that Christian behavior must exceed requirements of the Moses' law and pagan ethics. That's why Jesus, having finished his sermon on justice, valor and determination in relation to Him says: "Do not think that having come to the Earth to spread peace, I came to confront sons against fathers, daughters against mothers (Mt 10, 26-36; Lk 11, 37-53; Lk 12, 1-12).It is understandable that even when some members of the same family start believing in Christ and others do not share the same belief, often there may be disagreements. That's why apostil Paul urges believers to be living building blocks and build the spiritual home, where the main building block is Jesus and you are the chosen kin, the holy nation, called to worship the deeds of the one who called you from darkness to the light. Before that you were not a nation, you did not know mercy before and now you do (1 Pt 2, 1-12).

The declaration of religious freedom *Dignitates Humanae*,13 states: "When exercising all rights and freedoms the principle of personal and social responsibility should be born in mind: when exercising their rights individuals and social congregations are bound by moral la to take account of others rights, and their own duties towards other people and common welfare of man…this should be done not in an arbitrary manner or showing unlawful favor to a party, but by abiding by legal norms, which are in compliance with objective moral order as it is required by effective protection of rights of all citizens and their peaceful co-existence, by taking account of public order, which manifest through good co-existence on the basis of the real justice and by the compulsory protection of public morality. All this makes the main part of welfare of the society and is attributed to the concept of public order.[19]

Even though constitutional cannon law took shape only in XIX century, the majority of researchers identify it with public cannon law, as the nation of God was not only a totality of legal structures. In the case of church the term constitution in general means status, described by legal elements, the content of belief and believers, who at the same time are a unified and organized structure.[20]

---

[17] A. R. POSNER, *The Problematics of Moral and Legal Theory,* Cambridge, Massachusetts, London, England: The Belknap Press of Harvard University Press, 2002, 10-20.

[18] *Šventasis Raštas,* Vilnius: Katalikų pasaulis, 1998.

[19] Religinės laisvės Deklaracija *Dignitatis humane // II Vatikano Susirinkimo nutarimai*, Kaunas, 1994; K. MEILIUS, *Individo teisės ir visuotinis gėris // Jurisprudencija*, Vilnius: LTU, 24(16), Leidybos centras, 2002, 168-173.

[20] J. HERVADA , *Diritto Costituzionale Canonico,* Milano: A. Giuffre, 1989, 5-24.

Therefore we maintain that the system of moral values objectively exists and must be used. Those public relations which are not regulated by constitutional norms are found in political practice. In this situation moral values become a source, which indicates the behavior and principles to be used by the subject of constitutional legal relations.

As our objective is to analyze secular constitutions, we may have a question as to weather these examples aren‘t typical of Anglo-Saxon countries only and we, as followers of continental system of law, are left to be sorry about unfavorable historic circumstances and „wrong” system of la in our region.

For this purpose we only need to analyze some European constitutions and their contents to be able to tell that not only they do not contradict moral norms, but they are treated with great respect there. The preamble of the 1949 of German constitution states that, the German nation creating this constitution understands the responsibility “before God and people”. Greek constitution of 1975 was adopted “in the name of holy, unite and inextricable Trinity”.

When analyzing one of the most recent and modern constitutions, the 1997 constitution of Poland, we find a clear reference to the system of values “We recognize our responsibility before God and our consciousness“ in another paragraph “ <…> Those who believe in God as the source of truth, justice, good and beauty <…> “[21].

Probably no one would dare to call Polish constitution medial and falling outside the scope of modern constitutionalism. Given it is modern, why then the Polish nation obliges to God and asks him to be the witness just as in the Mayflower Compact passed three hundred years ago? The question is how those references to religion in Polish, German or Greek constitutions should be treated from the viewpoint of modern constitutional doctrine. The question is as to how this responsibility before God is to manifest in constitutional legal relations?

It is obvious that authors of the constitutions mentioned hereinabove perceived that it is impossible to foresee and regulate all future public phenomena and it is futile to expect that constitutions will be able to give answers to all the questions that the future has in store. Thus reference to Christian values sends a clear message that the subject of constitutional legal relations, when confronted to loopholes in the constitution or in other cases has to behave in a way whereby he is made responsible for common values. It is obvious that the declaration of moral values, which indirectly mirrors the contents of the Decalogue becomes an important source of law, which should influence the thinking of the subject at times when no other written source is available. It is only those constitutional conventions which will take shape this way, which will not only complement the written constitution, but will be in harmony with its spirit.

We have to state, that there is an important difference between safeguarding moral norms in Anglo-Saxon and civil law countries. The divide between the two systems is that courts in civil law countries do not have authorization to base its decisions on

---

[21] http://www.sejm.gov.pl/english/konstytucja/kon1.htm

moral norms and therefore the safeguarding of moral norms depends on the systems of values of the subject. This is reflected in the behavior of subjects constitutional relations.

Even if differently, the constitution of Lithuania seeks to solve the same issue as constitutions of Poland and Germany, - that is the issue of quest to a common system of values. The preamble of the constitution states that Lithuanian nation shall seek for "an open, just, harmonious civil society and the state ruled by law". Needless to say that equitable and harmonious society is the one which respect and cherishes moral values. Of course moral values can not be protected by courts. Our courts follow laws only (article 109 of the Constitution). However some legal writers think that our constitution "does not block way for court precedent to be one of the sources of law"[22]. Evidently, that "weather this phenomena finds its place in Lithuania or not will depend on the degree of wisdom in the work of judges. The authors agree that it is important weather a particular wrongdoing is interpreted in the right way by courts, however, the system of moral values, on which decisions will be based is equally important.

The purpose of constitutional peacekeeping is "peacekeeping in social life"[23]. Our question is weather grammatical interpretation of constitutional norms solely can ensure peacekeeping in social sphere? Even the decision of the Constitutional Court of Lithuania on the abolishment of capital punishment passed in December 1998 was based on moral grounds apart from those of legal, criminological and sociological nature.

Fairly often legal writers discuss what should be done when "a provision of legal act clearly violates the human essence itself, however, no direct answer is found in the text of law "[24]. Thus interpretation of legal norms, even if indirectly, falls onto requirements of moral norms, as "human essence" is too complex to describe by legal norms. It is only those constitutional conventions, which form on the basis of moral values, which will be recognized and respected. The importance of constitutional conventions is not challenged by the national legal doctrine,- "The following are regarded as auxiliary sources of constitutional law- court practice, legal principles, conventions, doctrine (auxiliary sources of constitutional law have a special place in the hierarchy of sources; when needed they supplement other sources of constitutional law"[25]. The authors concur with the opinion of other legal writers, who argue that in terms of hierarchy written constitutional norms are preferred over constitutional conventions. It case of competition between a written norm and a convention, the preference is given to the former. That's why a number of legal writers (A. Aleksejev,

---

[22] J. ŽILYS, *Konstitucijos stabilumas teisinės kultūros kontekste // Konstitucija, žmogus, teisinė valstybė.* Konferencijos medžiaga, Vilnius: Lietuvos žmogaus teisių centras, 1998, 21.

[23] E. JARAŠIŪNAS, *Apie konstitucinės justicijos funkcijas // Konstitucija, žmogus, teisinė valstybė. Konferencijos medžiaga,* Vilnius: Lietuvos žmogaus teisių centras, 1998, 145.

[24] E. JARAŠIŪNAS, *Pagrindinių teisių katalogas ir konstitucinė justicija // Žmogaus teisių apsaugos mechanizmas,* Konferencijos medžiaga. Lietuvos žmogaus teisių centras, 1997, 8.

[25] T. BIRMONTIENĖ, *Lietuvos konstitucinės teisės šaltiniai // Lietuvos konstitucinė teisė,* Vilnius: LTU Leidybos centras, 2001, 57.

T. Birmontienė, J. Žilys) show their respect to conventions, but treats them as auxiliary sources of law anyway. However, the importance of constitutional conventions grows substantially, when there is no written norm, because it is then that the conventions become the main, rather than an auxiliary source of law and the motives of behavior of the subject can draw on this source exclusively.

It goes without saying that constitutional conventions are and will remain an important source of reference in Lithuanian constitutional law. It takes quite a while before they form. This tendency as noticed by Woodrow Wilson ages ago: Frankly speaking our democracy does not copy the doctrine, it has been in constant development. Our democracy is not comprised of theory, but also of common rules of behavior. It was crated on the basis of aspiration and belief, and slow formation of customs".[26]

However, even though a number of models of behavior of subjects of constitutional relations are not regulated *de jure*, they are abided by and in a sense are binding. Thus constitutional conventions fill in the gaps of written law. J. Alders's statement that „written constitutional can never be perfect" applies to Lithuania as well.[27] Thus the function of constitutional conventions is to fill in the existing gaps in law.

Moral norms become a very important source as the longevity of constitutional convention will depend on the behavior and motivation of subjects of constitutional law. The model of behavior which is not bases on moral values, entails future conflicts. Therefore the contents of a convention in new circumstances depend on the system of values and will of the subject. The behavior model formed on the basis immoral values will form a convention which, just as the stability of constitutional system, will be revised one day anyway.

Conclusions

1. The norms of morality must be an important source of law, which determine the behavior of a subject of constitutional legal relations.

2. In Anglo-Saxon countries moral values are regarded as a source of law and stem fro the Decalogue (the USA, the UK). Imperativeness an universal character of moral values is not challenged in theses countries and courts often base their decisions on moral values as well.

3. Constitutions of the countries of civil law tradition (Germany, Greece, Poland, Lithuania etc) make reference to moral values as the highest manifestation of justice. However, possibility to protect values violated is not provided therein.

4. The behavior of the subject of constitutional relations may transform to a constitutional convention. Therefore it is very important that the behavior of the subject would mirror the contents of moral maxim right from the outset. Precedent of behavior,

---

[26] L. S. SCHECHTER, *Roots of the Republic,* American Founding Documents Interpreted. Madison: Madison House, 1990, 3.

[27] J. ALDER, *Constitutional and Administrative law,* London: Macmillan Press LTD, 1994,.22.

which does not follow the mentioned values, programs conflicts of other subjects in the future.

5. Moral norms are not a source of constitutional law in Lithuania. The preamble of the constitution of the Republic of Lithuania states that justice is the value we should aim at. Thus moral values as a source of law are recognized indirectly only. Quite often the subjects of constitutional legal relations base their behavior on moral values.

6. The subjects of constitutional legal relations should follow the constitution and universal moral maxim. This, however, is yet to be achieved.

KONWENCJE KONSTYTUCYJNE I TEORIE RELATYWNE NORM MORALNYCH

Streszczenie

Celem artykułu jest spojrzenie na znaczenie norm moralnych w formowaniu i zmianach konstytucyjnych stosunków prawnych. W pracy spróbujemy odpowiedzieć na kilka pytań. Po pierwsze, czy wpływ maksym norm moralnych w stosunkach prawnych jest typowym tylko dla państw anglosaskich z ich ustalonym układem. Analizując praktykę stosunków prawnych, motywację zachowania podmiotu, korzystamy z literatury doktrynnej i periodycznej państw. Staramy się spojrzeć, czy na pewno normy moralne są relatywne i dlaczego nie odpowiadają pozytywistycznemu spojrzeniu na stosunki prawne.

W artykule zwracamy uwagę na to, że aspekt moralny jest nie tylko ważnym fundamentem, który wpływa na normy zachowania społeczności, ale w niektórych wypadkach może być jedynym prawnym źródłem, który może harmonizować konstytucyjne stosunki prawne.

Zachowanie się konstytucyjno-prawne podmiotu może przekształcać się w zwyczaje konstytucyjne. Dlatego ważnym jest, aby stosunek prawny podmiotu od początku odzwierciedlał treść maksym norm moralnych. Precedens w zachowaniu się, który nie opiera się na tych ustawach, powoduje w przyszłości konflikty pomiędzy podmiotami prawa konstytucyjnego.

W państwach anglosaskich wartości moralne są uważane za źródło prawa i pochodzą z Dekalogu (Stany Zjednoczone, Wielka Brytania). W tych państwach imperatyw uniwersalizmu norm moralnych nie podlega wątpliwościom; często odpowiadają im decyzje sądów. Tradycje w prawie cywilnym niektórych konstytucji (Niemcy, Polska, Grecja i inne) wskazują na wartości moralne jako najwyższy wyraz praworządności. Lecz istnieje zawsze możliwość załamania się tych wartości i problem ich obrony w sądzie. Na Litwie normy moralne nie są źródłem prawa konstytucyjnego. W preambule Konstytucji 1992 roku jest powiedziane, że sprawiedliwość jest wartością, którą trzeba zdobywać. Więc normy moralne jako źródło sprawiedliwości nie są uznawane wprost. Konstytucyjny stosunek prawny Republiki Litewskiej często motywuje swoje zachowanie odwołaniem do norm moralnych. Podmiot prawa konstytucyjnego musi opierać się na istniejącej konstytucji i uniwersalnych maksymach norm moralnych. Lecz na razie pozostaje tylko dążeniem.

References

1. ALDER J. *Constitutional and Administrative law*. London: Macmillan Press LTD, 1994.
2. BATTISTA GUZZETTI G**.** *L'uomo e gli altri uomini*. Torino: Marietti, 1965.
3. BIRMONTIENĖ T., *Lietuvos konstitucinės teisės šaltiniai // Lietuvos konstitucinė teisė*. Vilnius: LTU Leidybos centas, 2001.
4. D`AGOSTINO P., *Filosofia del diritto*. Torino: G. Giappichelli, 1993.
5. V. DAISY. *Konstitucinės teisės studijų įvadas*. Vilnius: Eugrimas,1998.
6. HARE R. M., *The Language of morals*. London, Oxford, New York: Oxford University Press, 1967.
7. HERVADA J., *Diritto Costituzionale Canonico*. Milano: A. Giuffre, 1989.
8. JANET L. HIEBERT, *Limiting Rights. The Dilemma of Judicial Review*. Montreal and Kingston, London, Buffalo: Mcgill-Queen's University Press, 1996.
9. HOGUE R. A., *Origins of the common law*. Indianapolis: Liberty Fund, 1986.
10. JARAŠIŪNAS E., *Apie konstitucinės justicijos funkcijas // Konstitucija, žmogus, teisinė valstybė*. Konferencijos medžiaga. Vilnius: Lietuvos žmogaus teisių centras, 1998.
11. JARAŠIŪNAS E., *Pagrindinių teisių katalogas ir konstitucinė justicija // Žmogaus teisių apsaugos mechanizmas.* Konferencijos medžiaga. Vilnius: Lietuvos žmogaus teisių centras, 1997.
12. KANTAS I., *Praktinio proto kritika*. Vilnius: Mintis 1987.
13. KELSEN H., *Grynoji teisės teorija*. Vilnius: Eugrimas, 2002.
14. KRIEGEL B., *The state and the rule of law*. Princeton: Princeton University Press, 1995.
15. DONALD LUTZ S., *The Origins of American Constitutionalism*. Louisiana: State University Press, 1988.
16. DONALD LUTZ S., *Colonial Origins of the American Constitution*. A Documentary History. Indianapolis: Liberty Fund, 1998.
17. PETER C. MARGRATH. *Constitutionalism and Politics: Conflict and consensus*. Scott, Foresman and Company. Glenview, Illinois, USA, 1968.
18. MEILIUS K., *Individo teisės ir visuotinis gėris // Jurisprudencija*, Vilnius: LTU, Mokslo darbai. 24 (16), Vilnius 2002.
19. MESONIS G., *Valdžių padalijimas kaip teisinės valstybės elementas // Žmogaus teisės ir jų gintis.*Vilnius: LTU leidybos centras, 2000.
20. PELTASON J. W., *Understanding the Constitution*. Hinsdale, Ilinois: Dryden Press, 1976.
21. *Oxford dictionary*. Dorling Kindersley Limited and Oxford University Press, Vilnius: Alma littera, 2001.

22. POSNER A. R., *The Problematics of Moral and Legal Theory*. Cambridge, Massachusetts, London, England: The Belknap Press of Harvard University Press, 2002.

23. RATZINGER J., *Krikščionybės įvadas*. Vilnius: Katalikų pasaulio leidinys, 1991.

24. *Religinės laisvės Deklaracija Dignitatis humane // Vatikano II Susirinkimo nutarimai*. Kaunas, 1994.

25. VAN CAENGEM R.C., *An historical introduction to western constitutional law*. Cambridge, 1995.

26. VAITIEKIENĖ E., MESONIS G., *Konstituciniai papročiai nacionalinėje teisės sistemoje //Jurisprudencija*. Mokslo darbai. Nr.14(6) Vilnius: LTU Leidybos centras, 1999.

27. STEPHEN SCHECHTER L., *Roots of the Republic*. American Founding Documents Interpreted. Madison: Madison House, 1990.

28. *Šventasis Raštas.* Vilnius: Katalikų pasaulis, 1998.

29. VON DAM H., *Sincerely, Ronald Reagan*. Ottawa, Illinois: Green Hill Publishers, 1976.

30. WEBER M., *Protestantiškoji etika ir kapitalizmo dvasia*. Vilnius: Pradai, 1997.

31. ŽILYS J., *Konstitucijos stabilumas teisinės kultūros kontekste // Konstitucija, žmogus, teisinė valstybė*. Konferencijos medžiaga. Vilnius: Lietuvos žmogaus teisių centras, 1998.

32. ŽILYS J., *Konstitucinis teismas ir viešoji nuomonė // Teisminė valdžia ir visuomenė*. Konferencijos medžiaga. Vilnius: Lietuvos žmogaus teisių centras, 1999.

33. http://www.sejm.gov.pl/english/konstytucja/kon1.htm

34. http://www.uni-wuerzburg.de/law/gm00000_.html

35. http://www.uni-wuerzburg.de/law/gr00000_.html