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SOME CRITICAL REFLECTIONS ON THE BROAD HUMAN RIGHTS CONSTITUTIONALISATION

Summary

In the last three decades, the broad constitutionalisation of human rights took place in the context of profound changes in the make-up of contemporary societies brought about by globalisation and rapid technological development. The paper approaches human rights constitutionalisation through the prism of these changes in an attempt to study the phenomenon at the more basic theoretical level. It does so by addressing certain doctrinal, ideological and structural considerations engendered by human rights constitutionalisation, which tend to be neglected by the normatively focused legal theory. Three broad themes have emerged in the course of this inquiry. The first one is about inflation of matters discussed in terms of individual, judicially enforceable human rights, which leads to the trivialisation of human rights and redefines the relationship between legal justice and social justice. Under the second one, the author examines the link between growing social fragmentation and the rights-based approach to distributional and other public matters. The third broad theme investigated in the paper concerns the tendency to conflate human rights and legal interests as a consequence of which human rights cease to be treated as a value per see and become an instrument for the realisation of other goals.

Keywords: *constitutionalisation of human rights, globalisation, technological progress, instrumentalisation of human rights, the power of law.*

1. INTRODUCTION

The basic conditions of life in most societies have changed. In less than three decades, our individual and societal *modus vivendi* has passed through subtle but profound transformations. The way we work, communicate with each other, get information about the outside world, relate to the natural resources, think of the common good, all have been undergoing such intensive developments that many of us have lost the capacity to imagine the nearest future.

That has been particularly evident in the political realm. The global society is still organised as a system of states, yet, we are not sure anymore to what extent our political representatives have a say about the major developments. New actors more powerful than many national governments have emerged from the political and economic order

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established after the fall of the Berlin wall. The pandemics have temporarily and only to some extent slowed down the velocity of changes. However, those that have already happened will for a long enough remain beyond the reach of our comprehension.[1] Given their complexity and the complexity of their mutual interactions, it is hard, if not impossible, to understand and evaluate their overall long-term effects. Hand in hand with uncertainty, the pronounced anxiety has become a salient feature of our individual and societal life. This anxiety does not come from our lack of control over future events, which is a very basic characteristic of life, but it springs from our lack of capacity to think in a structured way about the changes that the future is on the verge to bring. The rapid technological progress and its promise of radically enhanced life conditions stand in stark contrast with this state of being and make it even more confusing and somewhat bizarre.

Another prominent feature of our age, that goes hand in hand with the growing anxiety and increasing complexity of the political sphere of our societal life, is an unprecedented reliance on the power of law to organise, integrate and stabilise our societies.[2] The law has become a stronghold of our cries for more certainty, a warranty that the future will not be so radically different from the present. That is in the first-place observable in the developments taking place in the area of constitutional law. Both in theory and in practice, the language of constitutionalism has penetrated not only legal but also common parlance about politics and society. The constitutional law concepts became central elements of attempts to build a system capable of capturing the new governance structures and overcoming the weakening capacity of the contemporary states to perform their traditional functions.

The revival of constitutionalism in the changed historical circumstances required a substantive conceptual recasting of its main categories.[3] Many constitutional law concepts have been broadened and twisted to serve the new role entrusted to the law in securing the basic premises of justice. A good example of this is the concept of constitutionalisation. Constitutionalisation became the main doctrinal response of the legal scholarship faced with the undeniable erosion of statehood in both domestic and international spheres. It turned into a key term to denote a phenomenon of using constitutional or quasi-constitutional norms to protect diverse values and interests in diverse spheres of law and governance.[4]

[1] The COVID-19 pandemics have created barriers to the physical movement of people, goods and services and, with it, led to the waning of the pace of the world's economic integration. For some scholars, this points to the slowdown in the global integrations, popularly termed as the phenomenon of „slowbalisation" (see, for instance: I.Arbidane *et al*., „Digital Transformation Modelling in the Context of Slowbalization", SHS Web of Conferences 100, 01003, 2021). The author departs from the position, based on the common sense insights and supported by the findings of some recent studies on the subject, that the given slowdown only partially and temporarily affects the process of globalisation (see, for instance, J.Titievskaia *et al*., „Slowing Down or Changing Track? Understanding the Dynamics of 'Slowbalisation'. In-Depth Analysis", European Parliamentary Research Service 2020).

[2] This observation relates only to the growing role of law in ordering matters that were so far almost entirely in the domain of broadly defined political decision-making. As such, it has nothing to do with the question how much citizens rely on the legal system to realise their objectives and to what extent the legal system is accessible for the citizens. On the latter subject, see: G.Vermeesch, „Reflections on the Relative Accessibility of Law Courts in Early Modern Europe", *Crime, Histoire & Sociétés / Crime, History & Societies*, Vol. 19, No. 2, 2015, 53-76.

[3] For a well-structured analysis of this „paradigm shift" see: L.Lacche, „Rethinking Constitutionalism between History and Global World: Realities and Challenges", *Giornale di Storia Costituzionale* 32, 2016, 5-32.

[4] A.Peters, „Fragmentation and Constitutionalisation", in: A.Orford, F.Hoffmann, M.Clark, *The Theory of International Law,* Oxford University Press 2016, 1015, 1020-1023.

Constitutionalisation of human rights has had a vital role in this process. An intensive human rights constitutionalisation, and together with it their judicialisation,[5] has come about as a consequence of manifold changes occurring both in the domestic and in the global realm. Domestically, through the constitutionalised human rights, states often try, to borrow the words of Schiel, Langford and Wilson, to „'constitution-proof' their policies"[6] as a pledge that access to basic public goods will be preserved despite the intensity and pace of the ongoing privatisation and commodification. Civil society activists push for human rights constitutionalisation to shield them from everyday politics, often misdirected by short-term political incentives. For citizens lost in a maze of new forms, levels and mechanisms of governance, the courts became guardians of their values, rights and privileges. The translation of human rights into constitutional rights became a path towards predictability and stability, something to count on in these times of rapid changes.

In the legal theory, the new positioning and the new expectations placed before the law through the process of constitutionalisation have been approached as a positive development. The constitutionalisation debate for a long while remained confined to the normatively focused scholarship, busy with the task of recasting the traditional constitutional categories. The overly positive voices were particularly strong in the mainstream theoretical and public discourse about the constitutionalisation of human rights. The connection between their constititionalisation and their advanced realisation and protection in the domestic legal orders has been promoted, at least in the beginning, almost without critical scrutiny. Such an uncritical stance was especially present in the studies about the relationship between judicial review and effective human rights protection which, for the majority of researchers and practitioners, became „a matter of principle".[7]

The dissonating positions have been rare and mainly evolving around the issue of a democratic deficit of the court-centred protection of constitutional rights. Only recently, the legal doctrine begun with more realistic investigations of the broader material, institutional and legal conditions needed for human rights constitutionalisation. Some scholars have begun to point out that the outcomes of constitutionalisation are context-dependent and hinge upon many institutional factors, as much as human rights themselves represent at the same time a claim to universal validity and context-sensitive implementation.[8] Others have recognised that constitutionalisation of certain human rights can become a double-edged sword, at the same time both favourable and harmful for different sections of the population. Nevertheless, studies about the human rights constitutionalisation as such, its effects on the organisational matrix of contemporary societies and, in particular, on the position of law within that matrix, are rare in

[5] As already noted in the paper, the costitutionalisation of human rights is studied as a phenomenon that implies, as its direct or indirect effect, their judicialisation.

[6] R.Schiel, M.Langford, B.M.Wilson, „Does it Matter: Constitutionalisation, Democratic Governance, and the Human Right to Water", *Water 12*, 2020, 350.

[7] W.Sadurski, „Judicial Review and the Protection of Constitutional Rights", *Oxford Journal of Legal Studies*, Vol. 22, No. 2, 2002, 298.

[8] For an interesting analysis on how to reconcile the human rights claim to universality and the need for their context-sensitive implementation, see: M.Jovanović, „Human Rights - Universality and Context-Sensitive Implementation", in: K.E.Himma, B.Spaić (eds.), *Fundamental Rights: Justification and Interpretation*, Eleven International Publishing 2016, 7-26.

the mainstream legal theory. The reasons for that should be sought not only in the fact that the phenomenon of constitutionalisation takes place in, what many researchers call, the „post-state world“[9], but also in the very fragmented theory and practice of constitutionalisation. The constitutionalisation-related processes are found at different levels of governance, in different fields of law and both public and private realms. That results in an extraordinary fragmentation of the intellectual framework behind constitutionalisation,[10] easily observable at the terminological plain where the notion of constitutionalisation embraces so many different meanings and roles that it became „fluid and metamorphic“.[11]

There is no doubt that the constitutional entrenchment of some human rights, at least theoretically, can be of great significance for their protection. However, the question is, what are the limits of the constitutionalisation of human rights for the advancement of societal and individual well-being. For many human rights practitioners and legal scholars, constitutionally entrenched human rights are the precepts of a just society. Longer the list, the better the position of a citizen in a given polity. But what if the list was too long, the methods for their protection too complex, too feeble or accessible to only a few, and the ambitions laid down in a constitutional norm beyond what could be reasonably expected from the law to protect? These issues cannot be tackled by analysing the particular manifestations of the phenomenon in isolation from each other and along discrete fields of different legal sciences. The complexity, diversity of its manifestations and its importance for a fuller understanding of our contemporary condition point to the need to investigate the phenomenon of human rights constitutionalisation at the more basic theoretical level. There is a need to study it in its totality and through its relationship with the law and the politics as such. To look into the mutual relationship of the constitutionally endorsed human rights and their relationship with the other legal interests and societal domains, past the normative dilemmas faced by the constitutional courts. Such studies need also consider the features of contemporary societies that would not be confined to the questions of how democratic they are, what is the institutional position of their constitutional courts or the other considerations of institutional requirements needed for a meaningful constitutionalisation of distinct human rights. A more basic theoretical account of human rights constitutionalisation should also analyse it through the prism of major changes triggered by the ongoing globalisation, technological development and macroeconomic tendencies. Such non-doctrinal, basic research of human rights constitutionalisation would probably not be able to meet the scientific rigour of the studies with the predominantly normative or legalistic focus. Its results would be affected by numerous methodological difficulties arising from the complex causal nature of the relationship between the social phenomena. However, given the momentum in which we live, in which pace and sway of changes create an almost impenetrable barrier to our attempts to see the larger picture, such studies could be useful at least as an attempt to look beyond the narrow confines of compartmentalised legal research. Despite all their potential methodological shortcomings, studies of

[9] See, for instance: N.Walker, „Multilevel Constitutionalism: Looking Beyond the German Debate“ LSE ‘Europe in Question’ discussion paper series, June 2009, 30.

[10] A.Peters, „Constitutionalisation“, MPIL Research Paper Series No. 8, 2017, 12.

[11] L.Scuccimarra, „Vedi alla voce „costituzione“. Semantiche costtuzionali nell’ epoca globale“, *Giornale di Storia Costituzionale* 33, 2016, 36.

this kind are, at the moment, maybe the only possible response of the social sciences to the blossoming of conspiracy theories in the popular culture caused by the fear of the unknown.

In the wake of such reflections, this paper represents an attempt to analyse the phenomenon of human rights constitutionalisation as embedded in the social landscapes of contemporary societies. It does so by addressing a certain number of doctrinal, ideological and structural considerations engendered by the human rights constitutionalisation, which tend to be neglected by the normatively focused legal theory. Its humble objective is to point to the themes for a broader analysis of the effects of constitutionalisation on the capacity of human rights and the law itself to contribute to the realisation of the values they are meant to protect. Given the depth and breadth of its subject, the aim of the paper is not to provide answers but to contribute to the further widening of the frontiers of the mainstream theoretical discourse for the investigations of the social origins and social implications of the broad constitutionalisation of human rights.

The themes which have surfaced in the paper are not a novelty in legal scholarship. Many of them have already found their way to the legal theory through the studies written within different schools of legal research that could be broadly associated with the critical legal studies. However, the difference between the present research and the works on the subject related to this jurisprudential movement, which needs to be stressed, lies in their different theoretical premises. Whereas the critical legal studies depart from the premise that the law is the same as the politics, *i.e.* reject the assumption that the law can be an embodiment of public morality, here the point of departure is the proposition that the law needs to be preserved in its role of a public ideal despite all the imperfections of its real-life application. The paper approaches the law as a specific technique of social organisation, to use Kelsen's words, the primary task of which is to make an ordered and peaceful societal life possible despite all its complexities,[12] and as a distinct sphere of justice. In order to preserve the law in both of its emanations, the boundaries between the spheres of legal and social justice need to be marked out again. That is not only the most visible difference between this paper and the works on the subject inspired or arising from the critical legal studies, but also an aspect of the analysis that needs to be considered in the evaluation of its findings.

The paper is structured in the following way. In the first part of the paper, the author reflects upon the current phase of globalisation and the resulting weakening of the nation-state, as the background conditions which have given an impetus to the phenomenon of constitutionalisation and through it placed the new expectations before the law. A short overview of constitutionalisation provided in the second part of the study was deemed necessary to situate the subsequent analysis given the immense varieties of the meanings assigned to the notion of constitutionalisation in the scholarly literature. In the third, central part of the paper, the phenomenon of human rights constitutionalisation is investigated. The inquiry evolves around three broad themes. The first one is about the overabundance of issues framed as individual, judicially enforceable human rights, leading to the trivialisation of human rights and redefining the

[12] H.Kelzen, *General Theory of Law and State*, Transaction Publishers, 2006 (originally published in 1949 by Harvard University Press), 5.

relationship between legal justice and social justice. Under the second one, the author examines link between the rights-based approach to distributional and other public matters and the growing social fragmentation. The third broad theme analysed in the paper concerns the tendency of conflation of rights and interests, the outcome of which is an instrumentalist view of human rights in which they cease to be seen as the value per see and become an instrument for the realisation of remote public goals. Each of the themes is given a separate chapter of the analysis. In conclusion, the author connects the three themes with the question, with which the investigation started, of the effects of constitutionalisation on the position of law in contemporary society.

2. GLOBALISATION AND WEAKENING OF THE NATION-STATE AS THE BACKGROUND CONDITIONS

Today, the ever-greater interconnectedness of the local and global brought by the current wave of globalisation[13] to a serious extent questions power of a citizen to influence societal decision-making in many important fields. Although globalisation is not a new phenomenon, its intensity is certainly a novelty.[14] The interdependency of different parts of the globe developed in the context of rapid technological advancement, internationalisation of trade, production and financial markets is growing day by day. Given that the pace of globalisation is dictated by the developments in the field of communication, transportation and information technology which are constantly evolving, there is nothing on the horizon that would suggest that the level of interconnectedness would soon stabilise.

The complexity and intensity of the interaction between the local and the global generate a high level of unpredictability and uncertainty. Globalisation is a multidimensional phenomenon taking place in diverse social domains, where each domain exhibits different patterns of interaction.[15] As a consequence of globalisation, „[s]ingle events may give rise to a variety of interpretations and ramifications across a multiplicity of communities."[16] The interdependency between the local and global brought about by globalisation is not a linear process because they interact in complex, sometimes even contradictory ways.[17]

[13] The paper departs from the classic definition of globalisation given by Anthony Giddens, whereby it represents a phenomenon of „the intensification of worldwide social relations which link distant localities in such a way that local happenings are shaped by events occurring many miles away and vice versa". A.Giddens, *The Consequences of Modernity,* Polity Press, 1990, 64.

[14] Most of the authors stress that globalisation is not a new phenomenon. Twinning, for instance, traces globalisation back to the 16th century, while Piketty speaks about the „first globalisation" of finance and trade that took place between 1870 and 1914, and of the „second globalisation" that has been underway since the 1970s (W. Twining, *Globalisation and Legal Theory,* 2000, 7; T.Piketty, *Capital in the Twenty-First Century*, The Belknap Press of Harvard University Press 2014, 28). The same is claimed by Hirst, Thompson and Bromley (P.Hirst, G.Thompson, S.Bromley, *Globalisation in Question*, Polity Press, 2009_3, 27). David B. Goldman speaks about contemporary globalisation being in many respects „revolutionary in terms of scale, although not necessarily in terms of conception" (D.B.Goldman, *Globalisation and the Western Legal Tradition: Recurring Patterns of Law and Authority,* Cambridge University Press 2007, 316). In this study, the term globalisation is used in the meaning of „the current phase of globalisation".

[15] D.Held, *Models of Democracy,* Stanford University Press 2006_3, 294

[16] D.B.Goldman (2007) 296.

[17] W.Twining (2000) 5.

The unpredictability and uncertainty also stem from the decline of the old and the rise of new actors as the bearers of political, economic and legal authority. A common theme of the studies on globalisation is how the growing economic interdependency has unleashed the power of non-state actors, which is not confined only to the global economy but has important ramifications in almost every field of social life. Even the most modest attempts to understand the reality in which one lives require an analysis of the myriad of less formal but important players, such as multinational corporations, transnational, regional and local governmental and non-governmental organisations, etc. The new players have become „major political actors and important sites of law production, whose decisions have an enormous impact on people's lives, affecting where they live, how they work, what they eat and the quality of their environment".[18] In this new constellation, the state can no longer claim exclusive political and legal power in society.[19]

With the new regulatory arrangements, many strands of public power in the fields of security, financial regulation, competition, trade, environmental protection, etc., are now in the hands of supranational bodies of regional or global character.[20] Given the importance of these fields for the distributional and other functions of the state, it can be said that globalisation brought a pronounced incongruity between the scope of political and the capacities of the state to provide a transparent framework for political decision-making.[21] The notion of government is being gradually replaced by the notion of governance, more suitable to express the changing role of the state and the degree of involvement of non-state actors in the ordering and managing of public matters.

However, oddly enough, these processes do not mean the end of the nation-state. The increased interdependency of different parts of the globe and the growing power of non-state actors have not resulted in the centralisation or the greater homogenisation in the governance of globalised world affairs.[22] The interdependence and the rise of new and powerful players brought by globalisation have undermined the state's authority and capacity to perform its traditional functions. However, we are still far away from some form of global governance. Although globalisation in practice invalidates the idea of the state as the primary locus of politics, the state has nominally retained its main functions.

Simultaneously with the declining capacity of the state to autonomously manage societal affairs, the importance of its legal system is growing. It has gained in importance as a substitute for the lack of ability of the state to have the last say on the major

[18] G.W.Anderson, *Constitutional Rights in the Age of Globalisation,* Hart Publishing 2005, 145.

[19] For the more elaborate arguments on this, see: ibid ch 2. For the opposite view consult, for instance, Paul Hirst, Grahame Thompson and Simon Bromley who claim that globalisation related rhetoric in all its dimensions, including the growing feebleness of the nation-states, can be excessively inflated: „One key effect of the concept of globalisation has been to paralyse radical reforming national strategies, to see them as unfeasible in the face of the judgement and sanction of global markets. If, however, we face economic changes that are more complex and more equivocal than the extreme globalists argue, then the possibility remains of political strategy and action for national and international control of market economies in order to promote social goals." P.Hirst, G.Thompson, S.Bromley (2009_3), 26.

[20] M.Loughlin, „What is Constitutionalisation?", in: P.Dobner, M.Loughlin (eds.), *The Twilight of Constitutionalism?*, Oxford University Press 2010, 63.

[21] P.Dobner, M.Loughlin, „Introduction", in: P.Dobner, M.Loughlin (eds.), *The Twilight of Constitutionalism?*, Oxford University Press 2010, xi.

[22] W.Twining (2000) 5. See also D.Held (2006_3) 294.

distributive and related matters. In academic writing, this phenomenon is primarily analysed under the notion of constitutionalisation.

3. THE PHENOMENON OF CONSTITUTIONALISATION

Constitutionalisation embraces a broad spectrum of practices and processes, from those related to governance in the global realm to the transformations occurring in the domestic political and legal spheres. It is a worldwide phenomenon in Europe taking place both in the old, western European democracies with the long-standing constitutions and in the countries of former Soviet dominance which, after the collapse of the communistic regimes, mostly enacted new constitutional texts. Given that it takes place in different constitutional milieus, the manifestations of constitutionalisation differ from country to country. However, one can still speak about a common trajectory of changes embodied in the notion of constitutionalisation, which is evolving, in the first place, around constitutional rights and constitutional review and adjudication.

There is no uniformity in the way different authors name the phenomenon under study. The most often used are the terms „constitutionalism" and „constitutionalisation", with many different adjectives such as new, global, neo -, transformative, progressive, etc., being added to it.[23] The debate on constitutionalisation *en general* suffers from an apparent lack of terminological consistency. The key terms are used in different meanings and with the tendency of their inflationary application. The majority of legal scholars under this term analyse the attempts to provide legitimacy and create checks for the newly emerging transnational sites of governance[24]. Here, however, the phenomenon is primarily examined regarding its manifestations at the national level[25] Constitutionalisation in the latter sense is taken to denote a trend of placing a growing number of societal matters, which were so far a domain of political institutions, within the purview of the judiciary, by being included in the constitutions, interpreted as matters of constitutional importance, or regulated in the higher-ranked laws. Similarly, for Martin Loughlin, „constitutionalisation embraces a set of different processes, guided by the goal of subjecting ever greater areas of public life, in particular of governmental activities, to the norms of liberal-legal constitutionalism".[26]

[23] On the other hand, some authors distinguish between constitutionalism and constitutionalisation by using the first term to refer to the academic approach and the second to the practice of constitutionalism. See on this: A.F. Lang, Jr., A.Wiener, „A Constitutionalising Global Order: An Introduction", in: A.F.Lang, Jr., A.Wiener (eds.), *Handbook on Global Constitutionalism*, Edward Elgar Publishing 2017, 15-17.

[24] See, for instance: A.Peters, „Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures", *Leiden Journal of International Law* 19, 2006, 579; A.Atilgan, *Global Constitutionalism: Socio-legal perspective,* Springer 2017, ch 3.1.1.3.; K.Armingeon, K.Milewicz, „Compensatory Constitutionalism in Comparative Perspective" (Paper prepared for the workshop on „Policy Ideas, Discourses and Debates in the Globalisation Process, Have Developing Countries a chance to compete?" at the ECPR Joint Sessions, April 2006, Nicosia). However, there are also authors who analyse the process of constitutionalisation at the domestic level. See, for instance: R.Hirschl, „The Political Origins of the New Constitutionalism", *Indiana Journal of Global Legal Studies* 11, 2004, 71; S.Gill, „New Constitutionalism, Democratisation and Global Political Economy", *Pacifica Review: Peace, Security and Global Change* 10, 2007, 23.

[25] With the clear understanding that the two dimensions of the phenomenon of constitutionalisation are intertwined in many respects.

[26] M.Loughlin, „What is Constitutionalisation?" (2010) 47.

Many authors approach constitutionalisation as another, more advanced phase of the political theory and practice of constitutionalism, born from the 18th-century movements that shaped the modern idea of a constitution. In this paper, however, constitutionalisation is understood as a relatively new phenomenon that emerged simultaneously with the intensification of globalisation-related processes in the last few decades and which needs to be distinguished from the evocative, French-style constitutionalism.[27] While classic constitutionalism was built on the need to create constraints on the political power of a state *qua* constitutional rights, the concept of constitutionalisation embraces so many different practices and processes that „it appears little more than *metaphorical* to anyone who has even a minimal grasp of the traditional history of the concept".[28] With its markedly legalistic approach to the constitution[29], constitutionalisation resulted in the substantial „reconfiguration of the political theory of constitutionalism".[30] Compared to traditional constitutional rights, the newly constitutionalised rights often look like vaguely defined social claims wrapped in a constitutional norm. In that sense, as observed by Spector, through constitutionalisation many constitutional rights become a policy rather than a trump that should protect citizens from state interference.[31] Through the new paradigm, constitutionalisation turns the normative claims raised before courts into a privileged methodology for reflecting upon and deciding on important societal matters, while constitutional adjudication of individual rights becomes an optimum form of promoting autonomy and freedom. [32] In that way, the constitution as the highest law of the country and a pledge that its fundamental values will be preserved becomes the source of an expanding authority of the judiciary to regulate the matters traditionally in the sphere of political decision-making.

The main manifestations of the process of constitutionalisation are constitutional reforms. They take place either through the adoption of new constitutions or through the constitutional revisions aimed at creating some sort of bill of rights or higher ranked laws and some form of judicial review. The phenomenon seems to be inspired by the US constitutionalism and, as such, is yet another example of the growing influence of common law on continental law systems and their tradition of formal legal analysis. Following its US model, the primary purpose of constitutionalisation remains that of taming of the Leviathan.[33] That is achieved through expanding the list

[27] The first important feature of the French style constitutionalism which makes this distinction meaningful is that, traditionally, the constitution was not seen as the source of positive law as it was the case with the American style constitutionalism. Although in the French style constitutional theory, the constitution is the supreme law of the land, it is not a source of positive law in the way the Constitution of the United States is, and its application is narrow. More on this in: M.A.Rogoff, „A Comparison of Constitutionalism in France and the United States", *Maine Law Review* 49, 1997, 21. When it comes to the theory of constitutionalism, the Oxford Handbook of Political Institutions describes the French tradition of constitutionalism as „a species of the 'old institutionalism' in that it is descriptive, normative, and legalistic [that] focuses on the formal-legal aspects of institutions, but not on case law." S.A.Binder, R.A.W.Rhodes, B.A.Rockman (eds.), *The Oxford Handbook of Political Institutions,* Oxford University Press, 2006, 96.

[28] L.Lacche (2016), 5.

[29] M.Loughlin, „What is Constitutionalisation?" (2010) 61.

[30] *Ibid.*

[31] H.Spector, „Modern Constitutionalism and Social Values", in: K.E.Himma, B.Spaić (eds.), *Fundamental Rights: Justification and Interpretation*, Eleven International Publishing 2016, 79.

[32] G.W.Anderson (2005) 146.

[33] U.K.Preuss, „Disconnecting Constitutions from Statehood: Is Global Constitutionalism a Viable Concept?", in: P.Dobner, M.Loughlin (eds.), *The Twilight of Constitutionalism?* (2010) 24.

of matters that become susceptible to the judicial review, either directly, through the power to strike down laws or declare them unconstitutional, or indirectly, by widening the range of issues that can become subject of individual rights litigation. However, the results of constitutionalisation, Beatty notes, go beyond the goal of limited government that American constitutional fathers had in mind.[34] It leads to a shrinking of the dominion of representative institutions and „transformation of judicial institutions into major political actors".[35] That, eventually, leads to „the conversion of the Constitution into a species of ordinary law (albeit with „higher" status)", Martin Loughlin notes, „and the consequent establishment of the judiciary as the authoritative determinants of its meaning."[36]

In developing countries, instigated under the „rule of law" banner, constitutionalisation has been pursued by the governmental and civil society organisations through the blooming number of projects focused on domestic legal reform.[37] In the old democracies, it commenced through the reforms aimed at curing the weaknesses of majoritarianism. In the countries of western Europe, the phenomenon of constitutionalisation was also steered by the European integrations, characterised by the „non-political mode of decision making" and „over-constitutionalisation".[38] The entire process has been reinforced by, what comparative lawyers call, a „cross-fertilisation of the field", taking place through the convergence of constitutional practice around the universalising nature of human rights discourse.[39]

In fact, the unifying narrative of the diverse manifestations of constitutionalisation evolves around the abstract individual and his/her human rights. Human rights and how best to shield them from the precariousness of everyday politics are the privileged theme of constitutionalisation.

4. CONSTITUTIONALISATION AND HUMAN RIGHTS

Human rights are the „centralising philosophy" of constitutionalisation, to borrow the words of Martin Loughlin.[40] Through the „rule of law" developmental strategies pursued in the new democracies and the constitutional revisions in the old democracies, the symbolic, emancipatory force of human rights has been translated into an expanding catalogue of justiciable individual rights.[41] The individual and the societal are not anymore bound together only through the solemn human rights aspirations laid down in the constitution. Instead, these aspirations became the fully-grown legal norms aimed at governing the public decision-making, and the entire provinces of

[34] D.M.Beatty, *The Ultimate Rule of Law,* Oxford University Press, 2004, 30-39.
[35] R.Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism*, Harvard University Press, 2004, 214.
[36] M.Loughlin, „What is Constitutionalisation?" (2010) 63.
[37] A.Slaughter, *„*Judicial Globalization*", Virginia Journal of International Law* 40, 2000, 1117.
[38] D.Grimm, „The Democratic Costs of Constitutionalisation: The European Case", *European Law Journal* 21, 2015, 470.
[39] Anne Peters, in that sense, speaks about the „'horizontal' convergence of national constitutional law". A.Peters, „Constitutionalisation" (2017) 2.
[40] M.Loughlin, „What is Constitutionalisation?" (2010) 61.
[41] A brief account of the relationship between human rights and the rule of law in: A.Sajó, „Universalism with Humility", in: A.Sajó (ed.), *Human Rights with Modesty: The Problem of Universalism*, Springer, 2004, 1, 2.

individual and societal life came under the sway of the judiciary as the authoritative determinant of their meaning.

The „legalisation of politics" in the meaning of setting the limits of political decision-making, of the „red line" which ought not to be crossed, is nothing new.[42] What is new is the extent to which this process now evolves around the concept of individual human rights and the extent to which the so conceived human rights have redefined the relationship between the three branches of state and, with it, the role of law in ordering societal affairs.

The primary goal of human rights constitutionalisation is not only to make sure that the basic societal values guide political praxis, or to protect the existing human rights standards from being repealed in the future. Through their constitutionalisation, human rights have evolved into a promise of a more predictable life, a stronghold for a citizen lost in the confusing new world of intensive globalisation and rapid technological progress.

The process of human rights constitutionalisation mostly takes place through the conversion of human rights standards into justiciable constitutional provisions, bills of rights and other forms of quasi-constitutional legislation. Translated into domestic legal norms, they often become „broadly drawn statements of rights and open-ended exception clauses which place the full weight of legislative responsibility on the „'interpretations' of courts".[43] The court-centred protection of human rights is the fundamental consequence and, for many human rights activists and legal scholars, the prime achievement of the process of human rights constitutionalisation. For a long while and for the greatest part of the mainstream political and legal theory, one implies another. At the same time, any critical reflections on the court-administered bills of rights are seen as desacralisation of human rights. The court-centred human rights provisions are praised as the universal cure for the maladies of modern democracies. „The veneration for fundamental rights", Tom Campbell explains, „is to an extent tied in with the fact that they are seen as removed from the banalities and trade-offs of routine politics."[44] In that way, legal empowerment becomes the strategy for a more just and dignified social order, not susceptible to the ebb and flow of daily politics that have long lost the substantive dose of transparency.[45]

Through the individual and justiciable affirmations of human rights, the courts are given an entirely new role in the process of societal decision-making, at least on

[42] See on this: D.Grimm, „The Achievement of Constitutionalism and Its Prospects in a Changed World", in: P. Dobner, M.Loughlin (eds.), *The Twilight of Constitutionalism?* (2010) 5.

[43] T.Campbell, *Prescriptive Legal Positivism: Law, Rights and Democracy*, UCL Press, 2004, 41.

[44] *Ibid.,* 187.

[45] The word 'transparency' is not used in the meaning of a demand that information of public interest should be easily accessible and that the formal features of the decision-making process should be identifiable and predictable. Here it is used in its less technical meaning as a reference to the claim that something can be comprehended by those who have the interest to comprehend it. It is argued that, with the current wave of globalisation, and even more so in the context of European integrations, public decision-making has become so complex that citizens generally do not manage to grasp it fully. On the other hand, the public discourse is overwhelmed with the demand for transparency in the first meaning. In the words of Ida Koivisto, transparency became the socio-legal ideal with the self-justificatory metaphorical authority, and its importance is constantly growing (I.Koivisto, „The Anatomy of Transparency: The Concept and its Multifarious Implications", European University Institute Working Paper, MWP 9, 2016, 1). Some authors canonise transparency as a cross-cutting human rights principle, together with the principle of non-discrimination (see: M.Sepúlveda, C.Nyst, „The Human Rights Approach to Social Protection", Ministry for Foreign Affairs of Finland, 2012, 19).

the face of it. Besides the much-discussed question of the capacity of a non-elected body to set the limits of political decision-making through the binding interpretations of human rights provisions,[46] there are also several other important issues arising from the constitutionalisation of human rights which merit further deliberation.

4.1. Value pluralism and competing human rights

The first is found in the fact that, since a pre-set rank of rights does not exist, the constitutional and quasi-constitutional provisions embodying human rights inevitably exhibit a „foundational value pluralism", as Zucca observes.[47] This value pluralism, boosted by the expansion of the list of justiciable human rights, undermines the very basic idea of human rights as „trump cards"[48] and eventually leads to their trivialisation. For Dimitrina Petrova, the trivialisation comes from the overabundance of issues framed as individual, judicially enforceable human rights. Through the rights-based approach, the idea that human rights are vital for societal and individual well-being turns into an imperative demand that each interest found within the scope of human rights becomes treated as a legal right.[49]

In the individual human rights litigations, which typically involve an amalgam of individual and public interests, courts are entangled in the delicate process of weighing and balancing. This process often involves issues that are pre-political and, as such, beyond the law. The given problem is visible in the way constitutionalisation has redefined the relationship between social and legal justice. Through the process of „legalisation of politics", intensified by constitutionalisation, many social justice matters are formulated as the individual, corrective justice claims and moved to the domain of legal justice. That goes against the very nature of the relationship between these two realms of social praxis in which legal justice plays a secondary role and is to be derived from social justice. „Legal justice is at the mercy of social justice: it cannot do any independent job", Sadurski argues. „The only job it can do", he says further, „is to translate the postulates of social justice into the language of legal rules and judicial decisions."[50] The dichotomy between social and legal justice created by constitutionalisation is false because the two emerge in different phases of the societal process of setting and applying rules and concern activities of different societal actors.[51] The first

[46] These issues are to a great extent beyond the ambit of the study, yet, there is a rich literature to consult. See, for instance: E.Maes, „*Constitutional Democracy, Constitutional* Interpretation and *Conflicting Rights",* in: E.Brems (ed.), *Conflict Between Fundamental Rights*, Intersentia, 2008, 69; D.M.Beatty (2004); P.O'Connell, „Vindicating Socio-Economic Rights: International Standards and Comparative Experiences", PhD dissertation, National University of Ireland, 2010.

[47] L.Zucca, „Conflicts of Fundamental Rights as Constitutional Dilemmas", in: E.Brems (ed.), *Conflict Between Fundamental Rights* (2008) 21.

[48] The famous Ronald Dworkin's metaphor suggesting that rights trump all non-rights goals that arise as background justification in political decision-making. Ronal Dworkin, „Rights as Trumps", in: J.Waldron (ed.), *Theories of Rights*, Oxford University Press, 1984, 153-167.

[49] D.Petrova, „Social and Economic Dimensions of Universal Rights" in: A.Sajó (ed.), *Human rights with Modesty: The Problem of Universalism* (2004) 187.

[50] W.Sadurski, „Social Justice and Legal Justice", in: H.W. Micklitz (ed.), *The Many Concepts of Social Justice in European Private Law,* Edward Elgar Publishing, 2011, 61.

[51] W.Sadurski, *Giving Desert Its Due: Social Justice and Legal Theory*, D. Reidel Publishing Company, 1985, 36.

one is about the distributive quality of the societal rules that regulate the distribution and is a matter for a legislator. The second one is about complying with the rules, and it concerns the work of judges.

4.2. Rights-based approach and social fragmentation

The blending of social and legal justice leads to the transition of many societal issues from the public domain to the domain of private interests. That, together with the constant broadening of the list of individually conceived human rights through the process of their constitutionalisation, creates a fertile ground for the further fragmentation of society. As one of the basic features of human rights constitutionalisation, the rights-based approach defines personhood through the concepts of personal autonomy and independence. Its goals are often closely tied to the maximisation of opportunities through integration, participation and choice.[52] With its emphasis on independence, the rights-based approach provokes further social fragmentation, which is already amplified by the changes ensuing from globalisation and the accelerated technological progress. When seen through the lenses of the rights-based approach, dependence is not anymore viewed as a normal feature of human existence but becomes approached as a „discarded state of being".[53] In that way, vulnerability and insecurity start to be treated not as the basic conditions of human life but as exceptional, temporary circumstances in which few, less fortunate individuals find themselves. The rights-based approach also brings a simplistic pairing up of rights with responsibilities. Consequently, the domestic level constitutionalisation becomes detached from the real-life and social solidarity that life implies and easily slips into the world in which efficiency and productivity become a measure for everything. That opens the door to the instrumentalisation of human rights and their conflation with the free-market essentials.

4.3. The conflation of rights and interests and human rights instrumentalisation

The judicialisation of an ever-longer list of human rights brings to the blurring of the difference between human rights and legal interests. While the rights-based approach focuses on individually conceived human rights, individual legal interests creep into the world of constitutionalised rights.[54] That results in shifting of boundaries between private and political by narrowing the scope of the latter and in the expansion of private interests at the expense of the public.[55]

The terminology mirrors these changes. Through the process of constitutionalisation, human rights became fundamental rights, and with the latter notion being

[52] N.Ziv, „The Social Rights of People with Disabilities", in: D.Barak-Erez, A.M.Gross (eds.), *Exploring Social Rights: Between Theory and Practice*, Hart Publishing, 2007, 370.
[53] *Ibid.,* 387.
[54] Differently, for Janneke Gerards the new fundamental rights in some part reflect „novel aspects of the conditions of human life". J.H.Gerards, „Fundamental Rights and Other Interests: Should It Really Make a Difference?", in: E.Brems (ed.), *Conflict Between Fundamental Rights* (2008) 656, 686.
[55] D.Grimm, „The Democratic Costs of Constitutionalisation: The European Case", *European Law Journal* 21, 2015, 470.

detached from a „human being“ and his/her needs as the non-negotiable exigencies of human existence and the original source of human rights, many negotiable interests become embraced by the notion of „fundamental rights“. That is the most apparent in the terminological and symbolic fusion of market freedoms with fundamental freedoms. The legal framework of the European Union is probably the best illustration of how the neoliberal conception of freedom becomes a path for an easy transition of free-market economic rules to the status of fundamental freedoms and, in some situations, even to that of fundamental rights.[56] In the European Union treaty provisions and in the case-law of the European Court of Justice, the four economic freedoms (free movement of goods, persons, services and capital) are elevated to the same level of normativity as the constitutional human rights.[57] While it is true that they are fundamental for the integration of the different member states into this admirable supranational project, the use of the words „fundamental“ and „freedoms“ in the legal norms that should provide for an unhindered circulation across national borders of economic goods, services, capital and persons in the role of economic agents, is very far from the meaning in which the two words are used in national constitutions and international human rights documents.

In the case-law of the European Court of Justice, the four economic freedoms are given the status which is very similar to the one given to human rights in the national constitutions.[58] That the treaty provisions guaranteeing the four economic freedoms are accorded a status similar to the status of constitutional rights can be firstly discerned from their broad material scope, as the European Court of Justice case-law shows.[59] The Court translates them in the prohibition of any national measures which are „capable of hindering, directly or indirectly, actually or potentially, intra-Community trade“, which means that individuals have a very far-reaching right to legally challenge any public measure which restricts their economic rights guaranteed through the four market freedoms.[60] The „fundamental nature“ of the four market freedoms also ensues from the rulings in which the Court, while examining the national laws, policies and standards that affect the exercise of the four economic freedoms, applies the proportionality test, which is very much alike the proportionality test developed

[56] J.Morijn, „Conflict Between Fundamental Rights or Conflicting Fundamental Rights Vocabularies?' – An analysis of diverging uses of 'fundamental rights' in the context of international and European Trade Law“, in: E.Brems (ed.), *Conflict Between Fundamental Rights* (2008) 593.

[57] See on this: J.H.Gerards, „Fundamental Rights and Other Interests: Should It Really Make a Difference?“, in: E.Brems (ed.), *Conflict Between Fundamental Rights* (2008) 655; M.P.Maduro, „Europe's Social Self: „The Sickness unto Death““, in*:* J.Shaw (ed.), *Social Law and Policy in an Evolving European Union*, Hart Publishing, 2000, 332. For the positive view of this process: G.Comandé, „Co-determining European Private Law(s) and Constitutionalization Process(es)“, in: S.Grundmann (ed.), *Constitutional Values and European Contract Law,* Kluwer Law International, 2008, 161.

[58] The ECJ refers to the four economic freedoms as the fundamental freedoms, fundamental principles and similar. See, for instance: *Ålands vindkraft AB v. Energimyndigheten* (Case C573/12) Judgment of the Grand Chamber of 1 July 2014, para. 65.

[59] S.A. de Vries, „Balancing Fundamental Rights with Economic Freedoms According to the European Court of Justice“, *Utrecht Law Review* 9, 2013, 175.

[60] In cases: *Ålands vindkraft AB v. Energimyndigheten* (Case C573/12) Judgment of the Grand Chamber of 1 July 2014, para. 66; *Procureur du Roi v. Benoît and Gustave Dassonville* (Case 8-74) Judgment of 11 July 1974, para. 5. See on this: M.P.Maduro, *We the Court, The European Court of Justice and the European Economic Constitution: A Critical Reading of Article 30 of the EC Treaty*, Hart Publishing, 1998, 35-60.

to balance conflicting constitutional rights.[61] Not only that there is no *a priori* hierarchy between human rights and the free market rules, but when the two clash and the European Court of Justice undertakes the balancing exercise, it actually departs from the *prima facie* breach of the free movement rules and, accordingly, shifts the burden of proof to those who argue for the protection of human rights. „Where in *Strasbourg* the proponents of economic rights might have to justify a restriction on human rights", Sybe A. de Vries writes, „in *Luxembourg* the fundamental, human rights proponents will have to justify their actions and establish that the restriction on free movement is justified on the basis of protecting fundamental rights".[62] Equally important, when the European Court of Justice applies so conceived proportionality test - conceived in the way that the measure in question must be justified in the light of market rules - the human rights goals, especially those which spring from the basic socio-economic rights, are often treated as the measures of last resort.[63] The case-law of the European Court of Justice also includes examples, such as, for instance, the *Danish Bottles case*,[64] in which the EU law has been interpreted in a way that sets a „ceiling of protection" of human rights above which the Member States should not go not to jeopardise the goal of economic integration.[65] Although the effects of this and the reasoning of the European Court of Justice in similar cases remain limited due to the unique position of this judicial body and the nature of the project which the Court is called to preserve, the general conclusions are, nonetheless, valid and follow the general trends characterising the process of constitutionalisation.

The phenomenon of conflating human rights and economic rules can be observed from two directions. In their neoliberal conception, human rights are understood primarily as freedoms. At the same time, the economic rules on which neoliberal capitalism is based are named „economic freedoms" and assigned to the rank of fundamental freedoms and fundamental rights. Both serve the same objective, protection of a free legal subject whose freedom is primarily measured by the extent to which he or she is free to participate and pursue own choices in a free market. As Dieter Grimm notes, through their concretisation in the EU treaties, the four economic freedoms are „transformed from objective principles for legislation into subjective rights of the market participants."[66] Under this conception of fundamental rights, the concept of rights holder becomes easily broadened to include companies and other profit-making legal

[61] See the ECJ decisions in the cases referred to it by the national courts for preliminary rulings: *Liga Portuguesa de Futebol Profissional and Bwin International Ltd, formerly Baw International Ltd v. Departamento de Jogos da Santa Casa da Misericórdia de Lisbo* (Case C42/07) Judgment of Grand Chamber of 8 September 2009, para. 60; *Dieter Kraus v. Land Baden-Württemberg* (Case C-19/92), Judgment of 31 March 1993, para. 32; *Reinhard Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* (Case C-55/94), Judgment of 30 November 1995, para. 6.

[62] S.A. de Vries, 187.

[63] As seen in the well-known cases *Viking and Laval*, the European Court of Justice asked the national court to ascertain „whether the collective action initiated by FSU is suitable for ensuring the achievement of the objective pursued and *does not go beyond what is necessary to attain that objective* (italic added)" (*International Transport Workers' Federation and Finnish Seamen's Union v. Viking Line ABP and OÜ Viking Line Eesti* (Case C-438/05) Judgment of the Grand Chamber of 11 December 2007, para. 84). For the further analysis of the two cases: F.Fabbrini, *Fundamental Rights in Europe: Challenges and Transformations in Comparative Perspective,* Oxford University Press 2014*,* 141 – 192.

[64] *Commission of the European Communities v. Kingdom of Denmark* (Case 302/86), Judgment of 20 September 1988.

[65] For a more in-depth analysis: F.Fabbrini, 39.

[66] D.Grimm, „The Democratic Costs of Constitutionalisation: The European Case", 467.

persons. In that way, legal entities become the holders of the right to property, the right to a fair trial, the right not to be discriminated against, the right to privacy, and other human rights which were so far preserved for the natural persons.[67] At the same time, the general insusceptibility to the judicial inquiry of the acts of profit-making legal entities regarding their effects on individuals has remained almost intact, although they are as likely to result in human rights violations as the acts of state.

For Morijn, this is „an opportunistic attempt at co-opting a language with great moral force for narrow instrumentalist reasons".[68] The process of constitutionalisation of human rights brings to an instrumental view of human rights. Human rights cease to be a value per see and become an instrument for realising various public goals, such as security, social cohesion, etc. In the monolithic landscape of public discourse built on the neoliberal postulates, these goals become easily paired up with the economic ends. The business case for human rights has especially gained in prominence in the last decades. The importance of the rule of law and human rights is now ordinarily derived from the need to prevent economic stagnation, to prevent social conflict and, in general, to provide a stable and predictable business environment.[69]

5. CONCLUSION

The phenomenon of constitutionalisation exploits the symbolic appeal of constitutional law, which rests on the eighteenth and nineteenth-century oaths to justice, freedom and equality, in an attempt of new social ordering amidst profound changes brought by globalisation and rapid technological development. Through the solemn declarations it brings, we cherish the delusion that our world will remain as we know it. In the law, in the predictability embodied in its rules, procedures and hierarchies, we seek refuge from the anxiety born out of perplexity and pace of changes, as if all of that did not rest on the same precarious foundations we are trying to neglect. The promise that our world can still be ordered and managed by invoking some higher system of values, brought by the process of constitutionalisation, has an empty sound. As Somek notes, „[t]he promise that resides in the inherited concept of the constitution becomes drained of its normative force, where major elements of the original context of constitutional law, such as consolidated state authority, can no longer be taken for granted."[70] The groundless broadening of the domain of constitutional law drains its key concepts from their substance, while the noble aura around them has faded already some time ago.

[67] See, for instance, the European Court of Justice case *DEB*, in which the Court held that the fundamental right to have adequate access to justice could be invoked by legal persons. *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v. Bundesrepublik Deutschland* (Case C-279/09), Judgment of 22 December 2010.

[68] J.Morijn, 593.

[69] As the American Bar Association puts it, „there is a growing belief 'that rule of law promotion is the most effective long-term antidote to the pressing problems facing the world community today, including poverty, economic stagnation, and conflict". Cited in: P.Dobner, „More Law, Less Democracy? Democracy and Transnational Constitutionalism", in: P.Dobner, M.Loughlin (eds.), *The Twilight of Constitutionalism?* (2010) 142.

[70] Somek notes this in the context of supranational constitutional projects, but his observation is equally applicable to the domestic level constitutionalisation. A.Somek, „Administration without Sovereignty", in: P.Dobner, M.Loughlin (eds.), *The Twilight of Constitutionalism?*, Oxford University Press, 2010, 269.

That can be easily observed in the process of human rights constitutionalisation. „Constitutional rights and constitutional rights norms are substantively fundamental, because they incorporate decisions about the basic normative structure of state and society", Alexy notes, but this is „quite independent of how much or how little content they are given".[71] In the ambient of human rights inflation and instrumentalisation, which ensue from their unselective and broad constitutionalisation, human rights tend to lose their emancipatory potential. The overabundance of matters framed as individual, judicially enforceable human rights leads to their trivialisation. The boundary between the private and the public is also becoming blurred. The tendency to transform the social justice issues into individual, corrective justice claims brought by constitutionalisation undermines the idea of common morality and leads to the further fragmentation of our societies. At the same time, the legalisation of human rights fails to grant any serious protection against „structural sources of human rights degradation".[72] The fading capacity of the state to fulfil its essential functions and other structural changes which occurred in the last three decades make the constantly growing number of judicially enforceable human rights detached from the very material prerequisites for their realisation. Instead of protecting the values from which they spring, through the process of constitutionalisation, human rights as legal rights become a way to divert our attention from the sobering realisation of how much our world has changed in the last decades, how little we have had a say in those changes and how little we understand them.

The phenomenon of constitutionalisation, as an attempt to understand, verbalise and protect the common morality and its ideals, also has an important bearing on the relationship between the law and politics. It structures the way we think about human rights by narrowing them down to fit the legal categories of rights and duties and by confining determination of their content and scope to the legal methods of interpretation. Once they are moved from the political forum to the courtroom, human rights *qua* legal rights start to symbolise a more just, ideologically neutral and predictable solutions to the politically charged or the seemingly infinitely complex problems of a globalised world. Translated into judicially enforceable norms, this blind optimism in human rights blends the law and common morality in a way which places upon the law the goals it can never achieve.[73]

As it is clear by now, instead of the methodologically sound conclusions, the paper presents no more than a bundle of thoughts on what might be wrong with the broadly conceived human rights constitutionalisation. These thoughts, in the first place, concern the potential effects the human rights constitutionalisation can have on the power of law to remain what it is: a specific technique of social organisation and a distinct sphere of justice. Today, maybe as never before, legal research needs to step out from the familiar and neat spaces built of legal norms and judicial pronouncements and venture into the complexities of the world these norms are supposed to regulate.

[71] R.Alexy, *A Theory of Constitutional Rights* (translated by Julian Rivers), Oxford University Press, 2010, 350.

[72] E.S.A.Catalán, „Back to the Future: Human Rights Protection Beyond the Rights Approach", in: D.Lettinga, L.van Troost (eds.), *Can Human Rights Bring Social Justice? Twelve essays*, Amnesty International, 2015, 43.

[73] Menèndez and Eriksen expresses this in a less dramatic tone by speaking about „a danger of assimilating law and morality and of overburdening the legal medium itself". A.J.Menéndez, E.O.Eriksen, „Introduction", in: A.J.Menéndez, E.O.Eriksen (eds), *Arguing Fundamental Rights,* Springer, 2006, 7.

„In order to save the law", Owen Fiss says, „we must look beyond the law".[74] The investigations about the negative and positive consequences of constitutionalisation need to go beyond the normatively focused legal scholarship.

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NEKOLIKO KRITIČKIH CRTICA O ŠIROKOJ KONSTITUCIONALIZACIJI LJUDSKIH PRAVA

Apstrakt

Do široke konstitucionalizacije ljudskih prava dolazi tokom poslednje tri decenije, koje karakterišu duboke promene u ustrojstvu savremenih društava nastale usled dejstva globalizacije i naglog tehnološkog razvoja. U radu se fenomen konstitucionalizacije ljudskih prava analizira kroz prizmu ovih promena u nastojanju da se njegovom proučavanju pristupi sa što bazičnijeg teorijskog nivoa. Autorka to čini na taj način što u istraživanje uključuje određena doktrinarna, ideološka i strukturalna razmatranja koje normativno usredsređena pravna teorija ima tendenciju da zanemari. Tokom istraživanja na površinu su izronile tri široke teme. Prva se tiče prevelikog broja društvenih pitanja o kojima se raspravlja u kategorijama individualnih i utuživih ljudskih prava, što dovodi do trivijalizacije ljudskih prava i redefinisanja odnosa između pravne pravde i socijalne pravde. Pod drugom, autorka ispituje vezu između rastuće društvene fragmentacije i metoda, karakterističnog za fenomen konstitucionalizacije ljudskih prava, koji važna društvena pitanja raspravlja u kategorijama individualnih prava. Treća široka tema kojom se rad bavi odnosi se na tendenciju mešanja ljudskih prava i pravnih interesa, usled čega ljudska prava prestaju da budu viđena kao vrednost po sebi i postaju instrument za ostvarivanje ciljeva koji su često daleko od njihove suštine.

Ključne reči: *konstitucionalizacija ljudskih prava, globalizacija, tehnološki napredak, instrumentalizacija ljudskih prava, mogućnosti prava*

[74] O.M.Fiss, „The Death of the Law?", *Cornell Law Review* 72/1, 1986-1987, 14.