
The Constitutional Obligation of the State to Protect the Weaker Party in a Horizontal Relationship*

Monika Florczak-Wątor**

Summary: The aim of this paper is to present how the State's obligation to protect the weaker party in a horizontal relationship can be reconstructed from the provisions of the constitution. The paper outlines the concept of the protective obligations of the State as well as the peculiarities of the horizontal relationships. It deals with normative grounds for the general obligation to protect an individual by the State and for the specific protective obligations with respect to particular rights and freedoms. The analysis is primarily based on the constitutional provisions of Visegrad Group countries and includes the provisions of the European Convention on Human Rights. The paper concludes that conflicts of the State's protective obligations resulting from conflicts of the rights and freedoms of individuals should be resolved in the same way in which the theory of law recommends resolving conflicts of constitutional principles.

Keywords: protective obligations – horizontal relationships – constitution – weaker party – conflict of State's obligation – protection of individuals – rights and freedoms

1. Introduction

Protecting the rights and freedoms of an individual is a fundamental obligation of any State. Discharging the obligation by the State authorities is an argument justifying the State's existence and actions. The monopoly of State power and the individual's duty to obey – combined with the prohibition of any form of self-help that involves the use of force – means that the State is the sole guarantor of all the rights and freedoms vested in an individual. The obligation to protect is also inherent in these rights and freedoms. For an individual, the rights and

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** Monika Florczak-Wątor is a professor of the Jagiellonian University, Faculty of Law and Administration, Department of Constitutional Law. Contact: m.florczak-wator@uj.edu.pl

freedoms mark the boundaries of a sphere that is free from interference and whose protection the State guarantees. Any holder of these rights and freedoms can demand that the State provides such protection, while the State has an obligation to treat all its citizens equally. Yet in horizontal relationships, the individual's rights and freedoms are often in conflict, and so are the State's protective obligations. The State is obligated by the constitution to ensure the protection of the weaker party in a horizontal relation from the actions of the stronger party. This is precisely the topic covered herein.

2. Horizontal relationships and their particularities

Let us start by explaining the particular nature of a horizontal relationship, because understanding this term is pivotal for our further consideration. A horizontal relationship is a relationship between two private entities that are on an equal footing. It can arise as a result of entry into an agreement (for instance, between the tenant and the landlord), the expression of consent to enter into a specific relationship with another person (such as the relationship between spouses), or it can result from the regulations concerning the legal position of certain persons (for example, parents and children). Its opposite is a vertical relationship between the State and an individual, where the individual is subordinate to the State.¹

The basic principles underpinning a horizontal relationship are those of the autonomy of the parties' will and their equal standing.² The first of these principles means that parties in a horizontal relationship are free to define the relationships between them, which they achieve through a variety of legal transactions: unilateral, bilateral, or multilateral ones.³ The consequence of the autonomy of will is the freedom of contract, meaning the freedom to decide whether or not to conclude a contract, the freedom to define the substance of a contractual relationship, the freedom to choose the counterparty and the freedom to terminate

¹ On the difference between horizontal and vertical positive obligations see LAVRYSEN, L. *Human Rights in a Positive State. Rethinking the Relationship between Positive and Negative Obligations under the European Convention on Human Rights*. Cambridge, Antwerp, Portland: Intersentia, 2016, pp. 78–82.

² See FLORCZAK-WĄTOR, M. *Obowiązki ochronne państwa w świetle Konstytucji RP i Europejskiej Konwencji Praw Człowieka*. Kraków: Wydawnictwo Księgarnia Akademicka, 2018, pp. 23–26.

³ On the autonomy of will from the philosophical perspective see: DWORKIN, G. *The Theory and Practice of Autonomy*. Cambridge: Cambridge University Press, 1988; DARWALL, S. The Value of Autonomy and Autonomy of the Will. *Ethics*, 2006, vol. 116, no. 2, pp. 263–284; YOUNG, R. The Value of Autonomy. *The Philosophical Quarterly*, 1982, vol. 32, no. 126, pp. 35–44.

the agreement.⁴ The second principle that applies in horizontal relationships is the equality of the parties. Both parties have corresponding rights and obligations and hold an equal influence on the formation of their horizontal relationship. Naturally, in practice, there can be actual inequalities between the parties, which may put the parties on an unequal footing. In employment relations, the employer will always be the stronger party compared to the employee, just as in economic relationships where the entrepreneur will always have the advantage over the consumer. However, where the parties' equal footing is not distorted to an extent preventing either party from influencing the substance of the legal relationship between them, we can still refer to it as a horizontal relationship. But where the parties are clearly not on an equal footing or where there is a high risk that this will be the case, then the State's corrective intervention may be necessary to protect the weaker party from the actions of the stronger one.⁵ Such an intervention aims to restore the balance between the parties involved in a horizontal relation. It needs to be stressed that the principle of the equal footing of the parties to such a relation is closely linked with the principle of autonomy of will, because the latter can be implemented only if neither party has an advantage over the other to the extent that would enable the former to subordinate the latter.

3. Source of protective obligations

The State's protective obligations are expressed in different ways in constitutions and international agreements. My further reflections are primarily based on the analysis of the constitutions of four Visegrad Group States⁶ and the European Convention on Human Rights as a part of their constitutional orders.⁷ Case-law and legal literature have seen attempts at inferring from these legal acts both

⁴ RADWAŃSKI, Z. *Teoria umów*. Warszawa: Państwowe Wydawnictwo Naukowe, 1977, p. 99.

⁵ The Bundesverfassungsgericht held in the *Bürgschaftsverträge* case of 19 October 1993 (1 BvR 567/89, 1 BvR 1044/98) that when a 'structural inequality' of the bargaining positions of the contracting parties has resulted in a contract that is exceptionally onerous on the weaker party, the courts are obliged to intervene. See also NOLAN, D., ROBERTSON, A. (eds.). *Rights and private law*. Oxford: Hart Publishing, 2012, p. 104; SMITS, Jan. *The making of European Private Law. Towards a Ius Commune Europaeum as a Mixed Legal System*. Antwerp-Oxford-New York: Intersentia, 2002, p. 27.

⁶ See the Constitution of the Slovak Republic of 1 September 1992; the Constitution of the Republic of Poland of 4 April 1997; the Fundamental Law of Hungary of 25 April 2011 and the Constitution of the Czech Republic of 16 December 1992 together with the Charter of Fundamental Rights and Freedoms.

⁷ Convention for the Protection of Human Rights and Fundamental Freedoms open for signature in Rome on 4 November 1950 and came into force in 1953. Available at: https://www.echr.coe.int/Documents/Convention_ENG.pdf

a general obligation to protect an individual by the State and some more specific obligations with respect to the protection of particular rights and freedoms. Of the latter obligations, we will be looking especially at those connected with protecting the weaker party in a horizontal relationship from the stronger party's actions. We are going to treat them as the aforementioned instrument of State interference aimed at restoring the balance between the parties of such relations.

Before embarking on an analysis of the normative basis for the general and specific protective obligations, we should explain that when such protective obligations are enshrined in a legal act such as a constitution or convention, this has the nature of a guarantee for the individual, because it is one of the ways in which a State binds itself to these obligations. Yet there can be doubts regarding whether a provision that enshrines the State's protective obligations is actually the source of these obligations. As mentioned earlier, protecting the individual is the basic function of the State, or the reason why it exists, while the State's protective obligations are inherent in the rights and freedoms of an individual. Thus, the individual can demand the protection of his/her rights and freedoms from the State even when the laws do not expressly provide for the State's obligation to grant such protection. This leads to the conclusion that the legal regulation of the State's protective obligations is declarative rather than constitutive in character. In other words, this regulation does not establish these obligations, but confirms their existence, although we also need to stress that it clarifies the substance of these obligations. However, for an individual, the legal regulation of the State's protective obligations predominantly has the function of a guarantee. It allows for a more precise definition of the claims for the protection of rights and freedoms that an individual can address to public authorities. Knowing what the State is obliged to do, the individual can more effectively enforce the protection of his/her rights and freedoms.

4. Normative grounds for the general obligation to protect

The general obligation to protect the rights of the individual by the State can be derived in case of all Visegrad Group countries mainly from the constitutional provisions that require the State to protect the dignity of the individual.⁸ It is generally accepted that the rights and freedoms of the individual stem from the

⁸ MAHLMANN, M. Human Dignity and Autonomy in Modern Constitutional Orders, in ROSENFELD, M., SAJO, A. (eds.). *The Oxford Handbook of Comparative Constitutional Law*, Oxford: Oxford University Press 2012, p. 385.

individual's dignity; hence, the obligation to protect such rights and freedoms also stems from the obligation to protect the individual's dignity. Apart from guaranteeing the inviolability of human dignity, the contemporary constitutions expressly require public authorities to respect and protect that dignity.⁹ The obligation to respect human dignity is mainly a negative one: it prohibits violating this dignity. However, the obligation to protect human dignity also belongs to the category of positive obligations, because activity and commitment are part of the essence of protective measures. Another difference between the obligation to protect human dignity and the obligation to respect it is the source of the threat.¹⁰ Whereas the obligation to respect human dignity refers to public authorities' own actions, whereby they should not violate human dignity when exercising their powers, the obligation to protect it concerns measures taken by public authorities in response to threats or violations of human dignity coming from private entities. Therefore, we reach the conclusion that not only are public authorities required to refrain from measures that violate human dignity, but they are also obligated to protect human dignity against the actions of third parties.

Human dignity is not a value mentioned expressly in the European Convention on Human Rights.¹¹ It is inferred from the essence of the Convention¹² and from Art. 3 thereof; it provides that '[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment.'¹³ Although from this provision, the European Court of Human Rights (ECtHR) does infer, in its case-law, certain positive obligations of State Members of the Convention, it is not treated as a source of the general protective obligation. Such an obligation is, however, inferred from Art. 1 of the Convention, which requires every State Member of the Convention to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention. The literature stresses that this provision is

⁹ See Art. 30 of the Polish Constitution, Art. 12 of the Slovak Constitution, Art. II of the Hungarian Constitution, and the Preamble to the Czech Constitution.

¹⁰ See SONIEWICKA, M., HOLOCHER, J. Human Dignity in Poland, in: BECCHI, P., MATHIAS, K. (eds.). *Handbook of Human Dignity in Europe*, Cham: Springer International Publishing, 2017, pp. 708–713.

¹¹ See COSTA, J. P. Human dignity in the jurisprudence of the European court of human rights. In: MCCRUDDEN, Ch. (ed.). *Understanding human dignity*. Oxford: Oxford University Press, 2013, pp 393–402; HESELHAUS, S., HEMSLEY, R. Human Dignity and the European Convention on Human Rights. In: BECCHI P., MATHIAS K. (eds.). *Handbook of Human Dignity in Europe*, Cham: Springer International Publishing, 2017, pp. 970–971.

¹² See judgments of the ECHR: *Pretty v. the United Kingdom*, no. 2346/02, 29 April 2002; of *Van Kück v. Germany*, no. 35968/97, 12 June 2003.

¹³ Judgments of the ECHR: *Bouyid v. Belgium*, no. 23380/09, 28 September 2015; *Svinarenko and Slyadnev v. Russia*, no. 32541/08 and 43441/08, 17 July 2014; *M. S. S. v. Belgium and Greece*, no. 30696/09, 21 January 2011.

‘the foundation of the doctrine of “positive obligations”’¹⁴ and that it underpins the obligation to protect the rights and freedoms of the individual against any threats, regardless of whether they result from the actions of the State or from a private entity.¹⁵ State Members of the Convention are obligated not only to respect the rights and freedoms it enshrines, but also to secure their enjoyment by all beneficiaries, hence to prevent violations or counteract the effects of violations once they occur. Following this train of thought, we reach the conclusion that the obligation, provided for in Art. 1 of the Convention, to ‘secure’ the rights and freedoms defined in the Convention means more than ‘not disturbing’ or ‘not interfering,’ but also comprises of the obligation to take measures to guarantee that these rights and freedoms are protected.

In the contemporary constitutions such a general obligation of the State to secure its citizens’ rights and freedoms is rarely *expressis verbis* formulated, precisely because it results, by and large, from the aforementioned obligation to respect and protect human dignity. It is, however, worthwhile observing that sometimes the obligation is expressed in the provisions that define the State’s tasks.¹⁶ Protecting the rights and freedoms of the individual is, after all, a basic task of the State. And the State’s tasks generate obligations whose discharge serves to fulfil these tasks. Hence, we can consider that the State’s task, defined as securing the rights and freedoms of its citizens, also comprises of a general obligation to protect those rights and freedoms.

The general obligation of the State to protect the rights of the individual also stems from the provisions specifying when the constitutional rights and freedoms of the individual can be limited. In the Polish Constitution, such a general limitation clause is contained in Art. 31(3), which reads: ‘Any limitation upon the exercise of constitutional freedoms and rights may be imposed only by statute, and only when necessary in a democratic State for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. Such limitations shall not violate the essence of freedoms and rights.’¹⁷ It should be added that some provisions of the Polish Constitution that enshrine a given right or freedom also contain the

¹⁴ SPIELMANN, D. The European Convention on Human Rights. The European Court of Human Rights. In: OLIVER, D., FEDTKE, J. (eds.). *Human rights and the private sphere. A comparative study*, New York: Routledge-Cavendish 2007, p. 432.

¹⁵ GARLICKI, L. Relations between private actors and the European Convention on Human Rights. In: SAJO, A., UITZ, R. (eds.). *The Constitution in private relations. Expanding constitutionalism*, Utrecht: Eleven International Publishing 2005, p. 130.

¹⁶ See Art. 5 of the Polish Constitution and Art. I sec. 1 of the Hungarian Fundamental Law.

¹⁷ See also the limitation clauses in: Art. I sec. 3 of the Hungarian Fundamental Law, Art. 13 of the Slovak Constitution, Art. 5 of the Charter of Fundamental Rights and Freedoms of the Czech Republic.

so-called specific limitation clauses, which modify the conditions of limiting the constitutional rights or freedoms specified in Art. 31(3) or introduce additional conditions. A good example is Art. 22 of the Polish Constitution, stating that '[1] imitations upon the freedom of economic activity may be imposed only by means of statute and only for important public reasons.' Unlike the Polish Constitution, the European Convention on Human Rights does not have a general limitation clause and the conditions for limiting the rights that it regulates are specified in the provisions concerning those rights. As an example, we can quote Art. 8(2) of the Convention, according to which no interference by a public authority with the exercise of the right to respect for private and family life is permitted 'except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.'

An analysis of the contents of the above limitation clauses warrants the conclusion that the conditions for limiting the rights of an individual guaranteed by the constitutions and the European Convention on Human Rights are similar, but, more importantly for our further reflections, both kinds of limitation clauses allow the State to limit the rights and freedoms of one person in order to protect the rights and freedoms of another. Moreover, State interference is permitted as an exception to the rule prohibiting such interference. This exception can be described as necessary. It is worth stressing that rights and freedoms are not absolute and their enjoyment without any limitations by some individuals would prevent other individuals from enjoying them. Therefore, it is the State's obligation to set the limits of enjoyment of all individuals in terms of their rights and freedoms. This leads to the conclusion that provisions introducing limitations upon the enjoyment of rights and freedoms by one person may serve to protect the rights and freedoms of another person. Provisions of this kind do not permit the State to interfere too much in the first person's rights and freedoms, as they require these provisions to interfere when this is necessary to protect the rights and freedoms of other persons. This necessity requirement means that State interference is indispensable, unless, of course, it is excessive, as it is useful to provide protection, and at the same time, it takes into account the need to balance the values underlying the rights and freedoms of both persons. These three elements form the so-called principle of proportionality¹⁸, to which I shall return to later in this paper. Any provision that protects one right while limiting another

¹⁸ See SCHLINK, B. Proportionality & BARAK, A. Proportionality, both in ROSENFELD, M., SAJO, A. (eds.). *The Oxford Handbook of Comparative Constitutional Law*, Oxford: Oxford University Press 2012, pp. 718–737, 738–755; BARAK, A. *Proportionality. Constitutional Rights and their Limitations*, Cambridge: Cambridge University Press, 2012.

must meet the conditions specified in the limitation clauses quoted above. Thus, these clauses have the function of guarantees, but they also serve to prevent, in statutory law, any abuses of the possibility of limiting the rights and freedoms of some individuals justified by the alleged need to protect the rights and freedoms of other individuals.

The existence of a general and universal protective obligation on the part of public authorities may also be inferred from the provisions on whose basis individuals can claim protection of their violated rights and freedoms. Contemporary States (among them also Visegrad Group States) introduce such provisions that establish different means for the protection of rights and freedoms as a form of their commitment to react when the individual claims that such protection is needed.¹⁹ The basic constitutional means of protection of the rights and freedoms of the individual include the right to fair trial and the right to claim damages. However, the constitutions of particular States can grant the individual also other means of protection such as the right to submit a constitutional complaint, the right to file an application with the Ombudsman, the right to submit a petition to the State authorities, or the right to appeal against decisions issued by first-instance courts or bodies of public administration.

Similarly, the European Convention on Human Rights provides for different means of protecting the rights and freedoms of the individual. It established a collective enforcement mechanism of the fundamental freedoms²⁰ that are the foundation of justice and peace across the globe.²¹ The State Parties to the Convention maintain this mechanism based on, as stated in the Preamble, the ‘common understanding and observance of the Human Rights upon which they depend.’ As can be seen, human rights are not only guaranteed by individual States in their territories, but also collectively by all State Parties to the Convention in the whole territory where the Convention applies. Thus, each of the State

¹⁹ See the subchapter on ‘Means for the protection of freedoms and rights’ (Art. 77–Art. 81) of the Polish Constitution and the chapter on ‘The right to judicial and other legal protection’ (Art. 46–Art. 50) of the Slovak Constitution.

²⁰ See SCHABAS, W. *The European Convention on Human Rights. A Commentary*. Oxford: Oxford University Press, 2017, p. 73–74.

²¹ As the ECHR states in the judgment on *Ireland v. the UK*, no. 5310/71, 18 January 1978: ‘the Convention comprises more than mere reciprocal engagements between contracting States. It creates, over and above a network of mutual, bilateral undertakings, objective obligations which, in the words of the Preamble, benefit from a ‘collective enforcement’. By virtue of Article 24 (art. 24), the Convention allows Contracting States to require the observance of those obligations without having to justify an interest deriving, for example, from the fact that a measure they complain of has prejudiced one of their own nationals. By substituting the words “shall secure” for the words “undertake to secure” in the text of Article 1 (art. 1), the drafters of the Convention also intended to make it clear that the rights and freedoms set out in Section I would be directly secured to anyone within the jurisdiction of the Contracting States.’

Parties can refer another State Party to the ECtHR for a violation of the rights enshrined in the Convention (Art. 33), regardless of the fact that an individual application can be made by the victim of such a violation (Art. 34). The fact that even the title of the Convention stresses its basic aim of protecting human rights and fundamental freedoms and that its provisions establish the aforementioned mechanism of collectively guaranteeing the rights enshrined in the Convention leads to the conclusion that the basic obligation of the State Parties is precisely to protect these rights.²²

5. Normative grounds for specific protective obligations

Apart from the general protective obligation, the constitutions of four Visegrad Group States also provide for protective obligations of a more specific nature with respect to particular rights and freedoms. As an element of the normative structure of these rights and freedoms, the obligations can be expressed in different ways in the aforementioned provisions.²³

The first method involves identifying the protected goods, thus precisely defining the object of protection. In such cases, the constitution usually provides that the State protects, or agrees to provide protection to, a specific good. Such a good that the State declares to protect can be marriage, family, motherhood, parenthood, employment, property, or the environment.²⁴ A more in-depth analysis of the contents of these provisions leads to the conclusion that the intention was to provide protection not so much to particular goods that the constitution-maker considered as valuable but to the holders of these goods, meaning, respectively, spouses, parents, children, employees, owners, and persons using the environment.

The second way in which protective obligations can be expressed in the normative structure of rights or freedoms is by indicating that a given person

²² On the theory of positive obligations of the States see also: MOWBRAY, A. R. *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights*, Oxford, Portland, Oregon: Hart Publishing, 2004; XENOS, D. *The Positive Obligations of the State under the European Convention of Human Rights*, New York: Routledge, 2012.

²³ See also FLORCZAK-WĄTOR, M. *Obowiązki ochronne państwa w świetle Konstytucji RP I Europejskiej Konwencji Praw Człowieka*. Kraków: Wydawnictwo Księgarnia Akademicka, 2018, pp. 72–79.

²⁴ See e.g. Art. 18 of the Polish Constitution: ‘(...) the family, motherhood and parenthood, shall be placed under the protection and care of the Republic of Poland’ or Art. 41(1) of the Slovak Constitution: ‘Matrimony, parenthood, and family shall be protected by the law. Special protection of children and minors shall be guaranteed’.

has the right to protection of a given good or value. Obviously, this also means that the State provides protection for the good or value in question, but in this case, the constitution-maker focuses directly on the right to which protection is accorded and defines this right as a classical public right. Examples of protective obligations expressed in such a way include constitutional provisions granting everyone the right to protection of their privacy, the right to the protection of their health, the right to the legal protection of life, or the right to protection of their dignity. Any right to protection generates, on the part the State, an obligation to protect.

And finally, the third way in which protective obligations are formulated in the normative structure of the particular rights or freedoms is by indicating the categories of persons to whom special protection is accorded, because the constitution-maker believes that these persons are a weaker social group and require such protection. This way of expressing the protective obligations can be found in the provisions stating that the State provides protection of the rights of a child, the protection of tenants' rights, and the protection of the rights of consumers, customers, hirers, or lessees.²⁵ They provide for an obligation to protect all the rights of the persons they name, and this is precisely what sets them apart from the second category of provisions that concern the protection of specific kinds of rights, regardless of the persons who enjoy them.

6. Protection of the weaker party in a horizontal relation

A special kind of protective obligation of the State comprises of those concerned with the weaker party in a horizontal relation.²⁶ This involves a legal relation where either the balance between parties has been upset or, due to the actual advantage of one party to the horizontal relation over the other, the balance between them is highly likely to be upset. As mentioned earlier, corrective State interference is required in this case. Its aim should be to restore or maintain the balance between the parties, because it is a condition for the autonomy of will and the freedom of the contract, both of which define the essence of horizontal relations. Attention should be drawn to three categories of this kind of horizontal

²⁵ See e.g. Art. 76 of the Polish Constitution: 'Public authorities shall protect consumers, customers, hirers or lessees against activities threatening their health, privacy and safety, as well as against dishonest market practices.' or Art. XV sec. 5 of the Hungarian Constitution: 'Hungary shall adopt special measures to protect children, women, the elderly and persons living with disabilities.'

²⁶ FLORCZAK-WĄTOR, M. *Horyzontalny wymiar praw konstytucyjnych*. Kraków: Wydawnictwo Uniwersytetu Jagiellońskiego, 2014, pp. 399–403.

relation that are constitutionalized in all Visegrad Group States to accord protection to the weaker parties of such relations.

The first category includes employer–employee relations, whereby the employee is subordinate to the employer by agreeing to perform work according to the employer’s instructions, in a place and at the hours set by the employer, while the employer agrees to employ the employee and pay him a salary for his work. Therefore, one could say that by definition, the unequal statuses of the parties of an employment relation and the element of subordination inherent in this relation make the employee the weaker party. If employment is a constitutionally-regulated relation, then this regulation is predominantly protective in nature. Consequently, employees can have guarantees provided by the constitution for freedom of association in trade unions, the right to days off, the right to healthy and safe working conditions, or the right to organize workers’ strikes or other forms of protest.²⁷ Contemporary constitutions often also apply the principle of equal treatment to employment relationships by prohibiting discrimination in the workplace or guaranteeing employees equal rights to employment, promotion, and the same pay for work of equal value. In the Polish Constitution, this protective character is visible in the provision that prohibits permanent employment of children of up to 16 years of age, which is a direct interference of the State in the freedom to define the employment relationship, including the employer’s freedom to choose the employee.²⁸

The second kind of horizontal relation that often gets constitutionalized to accord protection to the weaker party is the relation between businesses and consumers. It is common knowledge that the consumer is the weaker market participant, with limited knowledge or information compared to the professional partner (vendor, service provider).²⁹ The State’s consumer-protection measures, aimed at strengthening the consumer’s position vis-à-vis the professional partner, serve to level the playing field and give the consumer the freedom to choose and to make a decision without external influence. In the Polish Constitution, protective obligations in the sphere of consumer transactions are defined in Art.

²⁷ See e.g. Art. 59 of the Polish Constitution, Art. 36 of the Slovak Constitution, Art. XVII of the Hungarian Constitution, Art. 28 of the Charter of Fundamental Rights and Freedoms of the Czech Republic.

²⁸ See Art. 65 (1) of the Polish Constitution. Special protection of minors in employment relations are also guaranteed by Art. 38 (2) of the Slovak Constitution and Art. XVIII of the Hungarian Constitution.

²⁹ See e.g. DEVENNEY, J., KENNY, M. (eds.). *European Consumer Protection: Theory and Practice*. Cambridge: Cambridge University Press, 2012; CHEREDNYCHENKO, O. O. *Fundamental Rights, Contract Law and the Protection of the Weaker Party. A Comparative Analysis of the Constitutionalisation of Contract Law, with Emphasis on Risky Financial Transactions*, Utrecht: Sellier. European Law Publishers, 2007.

76, which requires public authorities to ‘protect consumers, customers, hirers or lessees against activities threatening their health, privacy and safety, as well as against dishonest market practices.’ The scope of the above protection is specified by statute.³⁰

The third kind of relation that is worth mentioning in this context is parent–child relations. They belong to the sphere of private life and are protected as part of the protection of the right to privacy. Nevertheless, granting parents parental authority over children, thus legally subordinating children to their parents, obligates the State to supervise how this authority is exercised and to intervene when it is abused. How children are brought up by their parents is also an element of civic education, which additionally justifies the State’s interest in this kind of horizontal relation. Some constitutions expressly grant parents the right to bring their children up – also including their moral and religious upbringing – in accordance with their beliefs.³¹ They also give children the right to have their parents consider their degree of maturity and their rights and freedoms in the process of their upbringing.³² The constitutional regulation almost invariably deals with the issues of children’s education. Constitution can obligate parents to provide their children with education, while leaving the choice of school to the parents’ discretion.³³ Moreover, constitutions often define the boundaries of State interference in the relation between parents and children.³⁴ Such interference should be justified by the need to protect the child’s interests. It is important that the State protects the parents in bringing their children up rather than substituting for them, let alone relieving them of the task. Thus, the State can only take over the care of the child when the parents are unable to exercise their parental authority, or when it is in the child’s interest that they stop doing so.

7. Conflict of the State’s protective obligations

It is inherent in the essence of horizontal relationships that the parties’ rights and freedoms conflict because they usually have conflicting interests, giving

³⁰ See also Art. M of the Hungarian Constitution: ‘Hungary shall ensure the conditions for fair economic competition, act against any abuse of a dominant position, and shall defend the rights of consumers’.

³¹ See e.g. Art. 48 of the Polish Constitution, Art. 41 (4) of the Slovak Constitution, Art. XVI (2) of the Hungarian Constitution, Art. 32 (4) of the Charter of Fundamental Rights and Freedoms of the Czech Republic.

³² See Art. 48 (1) of the Polish Constitution.

³³ See Art. 70 (3) of the Polish Constitution.

³⁴ See Art. 48 (2) of the Polish Constitution; Art. 41 (4) of the Slovak Constitution; Art. 32 (4) of the Charter of Fundamental Rights and Freedoms of the Czech Republic.

rise to different expectations about what the State should do. A typical example is the tenancy relation, which the parties establish recognizing that it furthers their interests and which they terminate when it is no longer advantageous for them to remain in it for various reasons. However, whereas establishing a tenancy relation requires the mutual consent of both parties, it is often terminated without the consent of one of the parties. Then the landlord can demand that the tenant move out, while the tenant can demand that the landlord ensures his/her quiet enjoyment of the premises. Both parties to this relation, as beneficiaries of rights and freedoms, can also expect protection from the State, and their demands made on the State will be mutually excluded. The landlord will require the State to help to evict the tenant, while the tenant will expect help in ensuring the quiet possession of the premises he/she has rented. And here it turns out that the consequence of a conflict of rights and freedoms of individuals is a conflict of the State's protective obligations, as the State is unable to fully satisfy both parties' demands for protection.

Conflicts of the State's protective obligations resulting from conflicts of the rights and freedoms of individuals should be resolved in the same way in which the theory of law recommends resolving conflicts of principles.³⁵ The norms that provide for the State's protective obligations belong to the category of norms-principles rather than of norms-rules.³⁶ Protection in a certain state which may be ensured to a greater or smaller degree, though there is naturally a minimum degree of protection below which we can conclude that no protection is guaranteed at all. Since the norms that provide for protective obligations are included in the category of principles, we should say that if there is a conflict, the State cannot limit itself to selecting one obligation that it will discharge, giving up the discharge of other obligations that are in conflict with the former one. The State is obligated to discharge all its obligations to the greatest extent possible in the given situation and in accordance with the existing laws. Thus, protection must be guaranteed to all beneficiaries of rights and freedoms, although the scope of such protection and the degree of its intensity may vary depending on the facts and the legal status of each beneficiary. This justifies granting stronger protection to the weaker party in a horizontal relation, but also requires that the

³⁵ FLORCZAK-WĄTOR, M. *Obowiązki ochronne państwa w świetle Konstytucji RP i Europejskiej Konwencji Praw Człowieka*, Kraków: Wydawnictwo Księgarnia Akademicka, 2018, p. 112 ff.

³⁶ I follow the meaning of rules and principles adopted by Robert Alexy and other scholars referring to his concept. See: ALEXY, R. *Theorie der Grundrechte*, Baden-Baden: Nomos-Verlagsgesellschaft, 1985, p. 71 ff; ALEXY, R. Rights and liberties as concepts, in ROSENFELD, M., SAJO, A. (eds.). *The Oxford Handbook of Comparative Constitutional Law*, Oxford: Oxford University Press, 2012, pp. 291–297; GIZBERT-STUDNICKI, T. Zasady i reguły prawne, *Państwo i Prawo*, 1988, no. 3, pp. 16–26; NOVAK, M. Three models of balancing (in Constitutional Review), *Ratio Juris*, 2010, no. 1, pp. 101–112.

other party of this relation—the stronger one in the given context—be provided with sufficient protection.

If a conflict of the State's protective obligations is resolved in the same way as a conflict of principles, we should also bear in mind that resolving conflicts of principles requires determining the conditional order of precedence and implementing both principles to the extent determined by the order of their precedence. The principle that is given precedence limits the ability to implement the competing principle. Resolving a conflict of principles that takes the form of the protective obligations of the State also requires reference to the principle of proportionality.³⁷ This principle comprises of three sub-principles. The first one is the principle of suitability, which requires the State, while limiting the rights of an individual in order to achieve certain objectives, to select such means that will enable successful attainment of these objectives. The next one, the principle of necessity, requires the State to select such means of attainment of the intended objectives that will be the least onerous for the individual. And finally, the principle of proportionality in the strict sense, the third sub-principle, makes it necessary to maintain an adequate balance between the means selected and the objectives set. It requires applying the mechanism of weighing the conflicting interests, i.e. the interest violated by the means undertaken and the interest protected by means of the State's interference. The weighing process defined in this way, according to Robert Alexy, is a special form of applying the principles understood as optimization requirements.³⁸ The sub-principles of suitability and necessity make it possible to determine the required scope of implementation of protective obligations in a certain factual situation, while the sub-principle of proportionality in the strict sense and the objective which justifies the interference determine the scope of implementation of the principle of proportionality in the broad sense under particular normative conditions. The aim of the interference and the means to attain it are defined by statute, thus it is the legislator who is the direct addressee of the sub-principles of suitability and necessity. At the same time, the legislator is obligated to determine the conditional order of precedence, which was mentioned earlier, doing so on the basis of the sub-principle of proportionality in the strict sense, that is, by decoding the constitutional preferences of the values underpinning the particular rights and freedoms and weighing them

³⁷ LAVRYSEN, L. *Human Rights in a Positive State. Rethinking the Relationship between Positive and Negative Obligations under the European Convention on Human Rights*, Cambridge, Antwerp, Portland: Intersentia, 2016, pp. 171 ff.

³⁸ ALEXY, R. Rights and liberties as concepts. In: ROSENFELD, M., SAJO, A. (eds.). *The Oxford Handbook of Comparative Constitutional Law*, Oxford: Oxford University Press, 2012, p. 291; ALEXY, R. Discourse theory and fundamental rights. In: MENENDEZ, A., ERIKSEN, E. (eds.). *Arguing fundamental rights*, Dordrecht: Springer Netherlands, 2006, p. 23.

up. This serves as the basis for determining the conditional order of preference of conflicting obligations of the State that are aimed at protecting the particular rights and freedoms. Finally, a conflict of constitutional rights, and consequently also a conflict of State obligations, is resolved by a court on a case-by-case basis. The court's task is to apply the sub-principle of proportionality in the strict sense to specific facts. It means that the court weighs up the values, taking into account the facts of the case at hand, and being, in this regard, bound by the conditional order of precedence determined by the statute.

8. Conclusions

Summing up the above considerations, it should be stated that the State's protective obligations are an important element of regulations contained in the contemporary constitutions, including the constitutions of all Visegrad Group countries, namely the Republic of Poland, Czech Republic, Slovak Republic and Hungary. These obligations are expressed in various ways and justify State interference in a horizontal relationship in order to protect one of the parties, more precisely, the one considered as weaker. A conflict of the rights and freedoms of different individuals who are parties to horizontal relationships can potentially result in a conflict of the State's protective obligations. This conflict needs to be resolved in the same way as a conflict of principles understood as optimization requirements, because the constitutional norms that provide for protective obligations of the State can be included in the category of constitutional principles.

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