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FEW REMARKS ON THE STATE UNDER THE RULE OF LAW AND INDIVIDUAL RIGHTS IN THE SYSTEM OF SWITZERLAND

This paper aims at the attempt to discuss the idea of the state under the rule of law and the issue of individual rights in contemporary Switzerland, especially after the Federal Constitution was accepted in 1991.¹ Due to the fragmentary character of the paper resulting mainly from its limited content, the paper will focus only on a few interesting issues which are, nevertheless, discussed in a somehow limited manner.

One of the principal aims of the state under the rule of law is to bind it legally. Therefore, in this paper, although in a limited manner and with a special consideration of the role of international law in Switzerland, the author will deal with normative assumptions of the system of the proclaimed federal law including practical solutions basing especially on the judiciary practice of the Federal Court (*Bundesgericht*). On the other hand, the author aims at drawing the reader's attention to the change of the Swiss approach to the constitutionality of some norms remaining in the sphere of individual rights and freedoms.

Being conditioned historically, the Swiss Confederation is characterized by a great deal of stability. When evaluated with the comparison to its previous solutions, the actual federal Constitution does not reveal any revolutionary character. It is the effect of the pragmatic actions of its citizens. The former constitution was obligatory for 125 years. The Constitution of 1874² was a collection of regulations from different periods (it

¹ The Federal Constitution of the Swiss Confederation dated 18 April, 1999, *Bundesverfassung der Schweizerischen Eidgenossenschaft*, SR 101. Further general references in the paper will refer to this Constitution.

² The Federal Constitution of the Swiss Confederation dated 29 May, 1874, *Bundesverfassung der Schweizerischen Eidgenossenschaft*; cited after A. Kölz, *Quellenbuch zur Neuen schweizerischen Verfassungsgeschichte*, t. 2, *Von 1848 bis in die Gegenwart*, Berno

was changed 163 times);³ it was written in a rather archaic language and presented regulations containing a different degree of details.

The system of the Swiss Federation is based on several pillars. These pillars are given different names by Swiss. For instance, in the proclamation of the Swiss Federal Council regarding the new Constitution they call them “structure-defining basic solutions” (*strukturbestimmende Grundentscheidungen*).⁴ U. Häfelin and W. Haller define them as “leading basic values” (*tragende Grundwerten*)⁵ whereas P. Tschannen calls them “structural principles of the Federal Constitution” (*Strukturprinzipien der Bundesverfassung*).⁶ Independently of the accepted terminology, they reveal the basic leading ideas which significantly influence the system of the state, interpretation of individual regulations of the Constitution as well as the process of law application. What is more, the jurisdiction organs are obliged to consider the basics of the Federal Constitution of the Swiss Confederation in their practice.

It is necessary to highlight here that these principles are not always directly expressed in the Federal Constitution. One cannot find a regulation which is a direct content equivalent of the art. 20 Law 1 of the Constitution of the Federal Republic of Germany: “The Federal Republic of Germany shall be a social democratic welfare”,⁷ or art. 2 of the Constitution of the Republic of Poland: “The Republic of Poland shall be a democratic state ruled by law and implementing the principles of social justice”.⁸ It is necessary to add here that the Cantonal Constitutions comprise a “similar” recording. It can be illustrated by the art. 1 of the Constitution of the Canton of Bern: “The Canton of Bern shall be a politically independent, democratic and welfare state ruled by law”.⁹

1996, p. 151 and following. The Constitution of 1874 in its latest shape before it was cancelled (accessed April 20, 1999): http://www.ofj.admin.ch/etc/medialib/data/staat_buerger/gesetzgebung/bundesverfassung.Par.0006.File.tmp/bv-alt-d.pdf.

³ Compare The Federal Department of Justice (*Bundesamt für Justiz*), *Reform der Bundesverfassung*, <http://www.ofj.admin.ch/d/index.html>.

⁴ Compare the Proclamation of the Federal Council of November 20, 1996 regarding the new Federal Constitution, *Botschaft über eine neue Bundesverfassung*, BBl 1997 I 14.

⁵ Compare U. Häfelin, W. Haller, *Schweizerisches Bundesstaatsrecht*, Zurich 2001, p. 51 and following.

⁶ Compare P. Tschannen, *Staatsrecht der Schweizerischen Eidgenossenschaft*, Berno 2004, p. 81 and following.

⁷ The Constituion of Germany, *Konstytucja Niemiec – Grundgesetz für die Bundesrepublik Deutschland*, Warszawa 1993, p. 32 and following.

⁸ The Constitution of the Republic of Poland dated 2 April, 1997, The Journal of Laws of 1997, nr 78, item 483, later changes provided.

⁹ Th Constitution of the Canton of Bern dated 6 June, 1993, *Verfassung des Kantons Bern*, BSG 101.1.

Generally, the Swiss literature highlights the following basic principles of the Swiss system: a democratic state, a state under the rule of law, a federal state and a welfare state. Sometimes this catalogue is extended by the principles of respect and protection of human dignity, a free competition as the basis of the economic system, subsidiarity of political authority's actions as well as an international cooperation.¹⁰

In Switzerland there is a close link between the ideas of democracy and the state under the rule of law. A discrepancy between them would only be marked when one assumed that the power was to be permanently held in an unlimited way by the actual majority. However, such an assumption cannot be accepted in the light of the necessity to protect human dignity, individual freedoms and interests of the minorities in the contemporary civilized states penetrated by the ideas of humanism.

A state under the rule of law is the state in which the formation of national life and a great deal of social life is achieved with the use of a specific subordinating medium – law. A state under the rule of law is also the state where the actions of public authority are limited by law,¹¹ where one has to deal with its rule – law and order (Compare art. 5 of the Constitution). Since Switzerland is a state under the rule of law, the powers and obligations in the relations between an individual and the government result from the Constitution or law; the organization of its authority and their functioning are based on the binding law. Authority is bound by law whereas in relation to individuals there is a presumption of the freedom of their actions.¹²

Generally, the Swiss literature considers the concept of the state under the rule of law on two grounds: material and formal. Here the authors frequently relate to the considerations of Z. Giacometti. “A material state under the rule of law should provide each individual with the protection of their personality (*Persönlichkeit*) in the organized society. This is done through the recognition of their sphere of freedom in relation to the authority in the sense of the constitutional guarantee of their particular rights and liberties. When considered from a material point of view, a state under the rule of law guarantees the development and support of particular

¹⁰ Compare R. Rhinow, *Die Bundesverfassung 2000, Eine Einführung*, Bazylea – Geneva – Monachium 2000, p. 31 and following as well as the literature mentioned there.

¹¹ Compare G. Schmid, F. Uhlmann, *Idee und Ausgestaltung des Rechtsstaates*, in: D. Thürer, J.-F. Aubert, J. P. Müller (ed.), *Verfassungsrecht der Schweiz Verfassungsrecht der Schweiz – Droit constitutionnel suisse*, Zurych 2001, p. 224.

¹² Compare P. Tschannen, *Staatsrecht...*, p. 87.

individuals in the social community which is understood as a sum of these individuals. A politically independent system of values defined in the Constitution should be realized in the whole legal order of the system. A material state under the rule of law conditions the democracy of a given system where freedom and human dignity are primary values.

When considered from a formal point of view, a state under the rule of law should protect an individual against authority's abuse of power, especially when it comes to the acts of lawlessness of their organs. This is possible due to the binding of the state organs in their activities by the norms of general and abstract character. By doing so, the range of these organs' power is limited whereas the treatment of individuals with an equal and defined by law measure protects against authority's lawlessness. The scope of property of an organ and the content of its tasks are determined by legal norms. In other words, a state under the rule of law from a formal point of view means the rule of law or, more precisely, the rule of the Constitution and its regulations".¹³

Let us consider the model which should be applied by the legislators and law applicants in their actions. Undoubtedly, these are acts of the positive law such as the Constitution or laws.¹⁴ While considering the structure of the competence relationships between the acts of law on the federal level, it is necessary to notice that this structure is hierarchical and takes a clear shape: Constitution – laws – regulations; or: Constitution – international agreement – law – regulations; or (in case of autonomous regulations): Constitution – regulations.

However, if one studies the relations between norms being the code of conduct in the aspect of derogation relations, it is obvious that in this aspect the legal power of norms constructed on the basis of regulations included in normative acts does not correspond with the hierarchical position of these acts when examined on the ground of the competence relations. Here the description of the very interesting and rather complex system of relations between norms of the proclaimed law in its narrow sense (Constitutional norms and norms constructed on the basis of different categories of laws or regulations) is not going to be developed. Even a brief characteristics of these solutions would have to be extensive. Therefore, here the author has

¹³ Compare Z. Giacometti, *Rechtstaat und Notrecht*, (in:) A. Kölz (ed.), *Ausgewählte Schriften*, Zurych, 1994, p. 233 and following.

¹⁴ Compare Y. Hangartner, *Kommentar zu Art. 191 BV*, (in:) B. Ehrenzeller, P. Mastronardi, R. J. Schweitzer, K. A. Vallender (ed.), *Die schweizerische Bundesverfassung – Kommentar*, Zurych – Bazylea – Genewa 2002, p. 55.

chosen to tackle only one problem. The author has decided to concentrate on the illustration of the position of international law, especially international agreements being acts of the proclaimed law in its wide sense, in the legal system of Switzerland as the state under the rule of law.

“A weighty interest of Switzerland – a small country – is for law to have priority over force in its international relations”.¹⁵ The Constitution of 1999 fulfils this postulate. Its preamble – “(...) We, the Swiss People and Cantons (...) in solidarity and openness towards the world (...) now, therefore, we adopt the following Constitution”, art. 2 law 1 – “The Swiss Confederation (...) shall protect the liberty and the rights of the people and shall ensure the independence and security of the country, art. 5 item 4 – “The Federation and the Cantons shall respect international law”, art. 54 item 2 – “The Confederation shall strive to preserve the independence of Switzerland and its welfare; it shall, in particular, contribute to alleviate need and poverty in the world, and to promote respect for rights, democracy, the peaceful coexistence of nations, and the preservation of natural resources”, as well as numerous detailed competence regulations – especially art. 54–56 and art. 189 item 1 l. b giving the Federal Court the competences to have jurisdiction over violation of international law or art. 190 giving the Supreme Court and other law application authorities to follow the federal statutes and international law which are to be the measure (*massgebend*) for them, reflecting a friendly attitude of the Federation towards foreign countries and their respect for this category of law.

In comparison to the regulations of the Constitution of 1874, one may notice some changes. Among all, the above-mentioned Constitution stated that the aim of the Confederation was to ensure safety of the nation (Compare its art. 2) or that the Federation might proclaim war (Compare art. 5 and 85 item 6). It was the indication of the contemporary concept of the Swiss international politics, or even its international relations, as a sphere of potential threat to the existence of the young nation and permanent state of war as *bellum omnium contra omnes*.¹⁶

On margins one should note that those regulations were not reflected by practice. Apart from the fact that the Constitution of 1874, just as the

¹⁵ Compare the Report of the Federal Council of June 29, 1988 regarding the Swiss politics of peace and safety, *Bericht des Bundesrates über die Friedens- und Sicherheitspolitik der Schweiz*, BBl 1989 I 680.

¹⁶ Compare T. Cottier, M. Hertig, *Das Völkerrecht in der neuen Bundesverfassung: Stellung und Auswirkungen*, (in:) U. Zimmerli (ed.), *Die neue Bundesverfassung. Konsequenzen für Praxis und Wissenschaft*, Berno 2000, p. 2.

preceding one,¹⁷ did not directly define the relations between international and national law, on the Swiss ground there had appeared the practice of a favourable attitude towards international law. The final effect of that evolution was the act of binding the organs of public authority by that law. A sign of positive attitude of the Swiss nation towards that law was a wide foundation of the conviction in the doctrine as well as in the jurisdiction of the Federal Court that it constitutes an integral part of the national law and order and is obligatory as such. The consequence of that assumption was the acceptance of the principle corresponding with international law in the interpretation of national law. For the first time the Federal Court referred to it *expresses verbis* in 1968 when it was stated that “in case of doubts national law should be interpreted in accordance with international law so that the result of its interpretation does not contradict with that law”.¹⁸ If it is impossible to reach the meaning of the national regulation which does not contradict the regulations of international law, the legal norm of international law gets the priority.¹⁹

The priority of international law over the law of Cantons, inter-Cantonal and federal law, which is not subjected to referendum, is recognized on a common basis. Doubts appear when considering the relation of international regulations of federal law, which is accepted (or can be accepted) directly by people, with the Federal Constitution and federal laws.

T. Cottier and M. Hertig have noticed that the issue of the relation of international law with the Federal Constitution has not been explicitly regulated so far. A perspective of the European integration and the subordination of national law to the primary (and secondary) law of the European union has not encouraged the legislator to acknowledge the unconditional priority of international law.²⁰

During works on the actual Federal Constitution it was suggested to state directly that “international law has a priority over national law in

¹⁷ The Constitution of the Federal Confederation of Switzerland dated 12 September, 1848, *Bundesverfassung der Schweizerischen Eidgenossenschaft*, tekst pierwotny za A. Kölz (ed.), *Quellenbuch zur Neueren schweizerischen Verfassungsgeschichte*, vol. 1, *Vom Ende der Alten Eidgenossenschaft bis 1848*, Berno 1992, p. 447 and following.

¹⁸ Compare the decision of the Federal Court of November 22, 1968, BGE 94 I 669, 678.

¹⁹ Compare T. Cottier, M. Hertig, *Das Völkerrecht...*, p. 11, see also D. Thürer, *Prawo międzynarodowe a prawo krajowe*, (in:) Z. Czeszejko-Sochacki (ed.), *Konstytucja Federalna Szwajcarskiej Konfederacji z 1999 r. i Konstytucja Rzeczypospolitej Polskiej z 1997 r.*, Białystok 2001, p. 115 and following.

²⁰ Compare T. Cottier, M. Hertig, *Das Völkerrecht...*, p. 18 and following as well as the literature mentioned there.

case of contradictions”.²¹ Finally, a less explicit notation was made: “The Federation and the Cantons shall follow international law” (art. 5 item 4 of the Constitution of 1999). This formulation does not make an interfering rule. The legislator was aware of the fact that a great deal of international law is made of agreements which do not have a self-executing character which may lead to controversy over the issue of priority of such regulations when related to national law. The acknowledgement that a given agreement does not reveal a *self-executing* character allows for the avoidance of questioning its position in relation to the national regulations.²² According to the Federal Court, a norm of international law can be applied directly when its content is well-defined and clear enough to constitute the basis for judging an individual case. The norm has to reveal a jurisdiction character (*justiziabel*), “ready to apply” – define somebody’s rights and duties and should be addressed to the law application organs.²³

The Constitution of 1999 clearly anticipates some changes if there are obligatory regulations of international law (*zwingende Bestimmungen des Völkerrechts*) – compare 139(alt) item 3, art. 193 item 4 and 194 item 2. They have the priority over the regulations of the Federal Constitution. The Swiss frequently highlight that such solutions do not interfere with such values as the certainty of law and, therefore, they do not contradict the concept of the state under the rule of law. Other cases of a possible conflict between the norms of international law and the Constitution demand a careful consideration. Undoubtedly, a constitutionally defined guarantee of the basic individual rights are given a more important place in the hierarchy of the legal norms when compared to the international resolutions of the administrative character. It goes without saying that federal authority while making or accepting their international agreements should follow the resolutions of the Federal Constitution.²⁴

What are the above-mentioned “obligatory regulations of international law”? According to U. Häfelin and W. Haller, they are solutions which, because of their significance in international law and order, should unconditionally and directly bind in the system of a given state as normative

²¹ Compare art. 4 item 4 Vorlage B, of the project of the Constitution of June 26, 1995, <http://www.admin.ch/cp/d/1995Jun26.150836.4270@idz.bfi.admin.ch.html>.

²² Compare R. Patry, *Le Tribunal fédéral et le droit international*, (in:) F. Antoniazzi (ed.), *Mélanges Assista*, Geneva 1989, p. 528.

²³ Compare the decision of the Federal Court of December 22, 1997, BGE 124 III 90, 91.

²⁴ Compare U. Häfelin, W. Haller, *Schweizerisches...*, p. 564.

regulations of arbitrary obligation (*ius cogens*). They include the prohibition of genocide, torture, slavery, or expulsion of refugees for the reason of racial, religious, national, social or political threats refugees would face in their countries. The resolutions of international law are not the only source of these regulations; they may originate from common law.²⁵

It is necessary to highlight here that the recognition of the obligatory norms of international law as the ones marking the boundary of changes in the federal constitutions took place even before the actual Constitution was accepted. The literature often relates to the example of the events of the first half of the nineteenth of the twentieth Century. Following the Constitution of 1874, which, as it was mentioned before, did not directly relate to the position of international law in the legal system of Switzerland, the Federal Assembly (*Bundesversammlung*) acknowledged people's initiative regarding "sensible refuge politics" (*vernünftige Asylpolitik*) to be intolerable. It suggested that illegal immigrants should be repelled from the territory of Switzerland without the possibility of appeal. According to the deputies, such a solution would severely interfere with the obligatory norms of international law.²⁶

Let us present the relations between international agreements and federal resolutions. In case of their collision, later international agreements have the priority over federal resolutions which have come into force in accordance with the rule – *x posterior derogat legi priori*. However, it is necessary to note here that the decision of the Federal Court as to which act should have the priority – later resolution or earlier international agreement – has changed. In the jurisdiction of the inter-war period the Federal Court advocated the use of national law.²⁷ By the end of the sixties of the twentieth Century the Federal Court had pointed out that collisions between resolutions' norms which had come into force and the later norms of international agreements should be sorted out according to the interpretation of the national law which was in agreement with international law.²⁸ In 1973 the Federal Court decided that the legislator had the right to consciously pro-

²⁵ Compare *Ibid.*, p. 509.

²⁶ Compare the proclamation of the Federal Court dated 22 June, 1994 regarding the people's initiative of "sensible refuge politics" and "against illegal migration", *Botschaft über die Volksinitiativen "für eine vernünftige Asylpolitik" und "gegen die illegale Einwanderung"*, BBl 1994 III 1495.

²⁷ Compare the decision of 1933, BGE 59 II 331, 337 referred to by U. Häfelin and W. Haller, *Schweizerisches...*, p. 564.

²⁸ Compare especially the above-mentioned decision of the Federal Court dated 22 November, 1968, BGE 94 I 669.

claim laws which are in disagreement with international law.²⁹ They did not mean deviations from the law and duties of the state in the relations with other countries. What they meant was the matter of regulations; although contradictory with the agreement, they would be applied exclusively within the state. The opinion was heavily criticized by the doctrine.³⁰ Later the Federal Court stated that the norms of the international agreements are to preserve the priority in case of their collision with resolutions' norms independently of the fact which act was accepted earlier and which one was accepted later.³¹ A direct continuation of this thesis was revealed by the decision in 1999.³²

As it was mentioned before, in accordance with the Constitution, federal resolutions and international law are authoritative for the Federal Court as well as other authorities applying law. It results in the order for the law applicants to apply the federal resolution even if it is certain that it contradicts the Federal Constitution (assuming that its interpretation in accordance with the Constitution is impossible). The order of its applications does not mean prohibition of the constitutionality control understood as the law application organs' expressing their views on the disagreement of a given resolution with the Federal Constitution and encouraging the legislator to correct the mistake; the Federal Court remains the most active agent in this field.

Contemporary the common acceptance on the Swiss ground of the priority of international agreements over federal resolutions enables the control of resolution norms. Interesting is the fact that it is not the Federal Constitution that is the model. The model is revealed by international agreements where Switzerland in one of the sides. The most significant here is the European Convention on Human Rights³³ as well as the International Pact on Civil and Political Rights.³⁴ When it comes to the International Pact

²⁹ Compare the decision of the Federal Court dated 2 March, 1973, BGE 99 Ib 39.

³⁰ Compare T. Cottier, M. Hertig, *Das Völkerrecht...*, p. 13 and following as well as the literature mentioned there.

³¹ Compare the decision of the Federal Court dated 25 August, 1993, BGE 119 V 171; dated 27 June, 1996, BGE 122 II 234 or dated 1 November, 1996, BGE 122 II 485.

³² Compare the decision of the Federal Court dated 26 July, 1999, BGE 125 II 417.

³³ Convention for the protection of human rights and fundamental freedoms dated 4 November, 1950, *Konvention zum Schutze der Menschenrechte und Grundfreiheiten*, SR 0.101, was accepted in Switzerland in November 28, 1974.

³⁴ International Pact on Civil and Political Rights dated 16 December, 1966, *Internationaler Pakt über bürgerliche und politische Rechte*, SR 0.103.2, was accepted in September 18, 1992.

on Economic, Social and Cultural Rights,³⁵ the Federal Court expresses its doubts regarding the self-executive character of its resolutions and, what is more, the possibility to base individual decisions on this act.³⁶ Potentially, although obligated to apply norms of the federal resolution which, in their opinions, contradict the Constitution, every organ applying law, especially the Federal Court, can withdraw the norm of the federal resolution if it contradicts the norms of international law in the framework of their accessory norm control.³⁷ Within accessory control one deals with annulment of the application of certain norms in the case under consideration with no influence on the obligation of this regulation with *erga omnes* effect.

In the doctrine the Swiss Federal Constitutions are described as rigid. The procedure of their change has been complicated and long-term. This procedure is conducted not only with the participation of the state authority and the Cantons but also citizens who take part in referendum to make the accepted solutions durable. Young as it is, the actual Constitution has already faced changes of 62(!) of its regulations. 12³⁸ constitutional referendum have taken place in the state (the last one took place in May 17, 2009).³⁹ Among numerous changes the change regarding the extension of jurisdiction competences of the Federal Court (art. 189) deserves a special consideration. Now the Federal Court does not only deal with appeals regarding violation of international agreements but also judges litigation resulting from the violation of international law (this point was already discussed above). It was already some time ago that U. Häfelin and W. Haller highlighted that such a change would result in long-term consequences. Apart from the agreements that the Federation or particular Cantons have with other countries, the source of international law is international convention or commonly accepted principles. Thus, a “new opening” that is faced by the Federal Court as well as by international courts and views of the

³⁵ International Pact on Economic, Social and Cultural Rights dated 16 December, 1966, *Internationaler Pakt über wirtschaftliche, soziale und kulturelle Rechte*, SR 0.103.1, was also accepted in September 18, 1992.

³⁶ Compare the decision of the Federal Court of February 11, 1994, BGE 120 Ia 1 or the decision of the Federal Court of September 22, 2000, BGE 126 I 240.

³⁷ Compare U. Häfelin, W. Haller, *Schweizerisches...*, p. 564 and following.

³⁸ Compare Federal Department of Justice (*Bundesamt für Justiz*), *Änderungen/Aufhebungen Bundesverfassung der Schweizerischen Eidgenossenschaft vom 18. April 1999*, <http://www.admin.ch/ch/d/sr/1/a101.html>.

³⁹ Compare the resolution of the Federal Court regarding the results of the referendum dated 17 May, 2009, *Bundesratsbeschluss über das Ergebnis der Volksabstimmung vom 17. Mai 2008*, BBl 2009 7539.

doctrine regarding the issue of defining which rules of the procedure are in agreement with international law.⁴⁰

Continuing the consideration of the activity of the Federal Court in Switzerland as in the state under the rule of law, it is necessary to highlight that it constitutes a reflection of the concept of constitutional democracy which is perhaps best realized in France.⁴¹ Similarly to the Constitutional Council of France, which has created the so-called constitutionality block, fr. *bloc de constitutionnalite*, (comprising the resolutions of the Constitution of the French Fifth Republic of 1958, the decisions of the organic resolutions, certain resolutions of the preamble of the Constitution of 1946, resolution of the Declaration of Rights of 1789 as well as “basic principles acknowledged by the rights of the Republic”⁴²), the Swiss Federal Court has extended the constitutionality subject with the principles formulated on their own. A special role has had the notion of “constitutional rights of citizens” as defined by the Federal Court. The Federal Constitution (Compare art. 164 item. 1 l. b) uses the formulation constitutional rights (*verfassungsmässige Rechte*) without giving a further explanation of its meaning. W. Kälin, having carefully analysed the jurisdiction of the Federal Court, gives the name of “constitutional rights of citizens” to “pursuits of claim to be pursued in the court regarding the protection of not only public interest but also individual interests whose importance is big enough to be protected in accordance with the will of a democratic state or with a compatible (*konsensfähig*) stand of the Federal Court to demand such a protection”.⁴³ First of all, the basic rights defined in the Federal Constitution (art. 7–34) or in the Constitutions of the Cantons as well as principles constituting the picture of the federal state under law such as the principle of the division of authority, derogative power of federal law (art. 49 item 1) or the prohibition of double taxation between the Cantons (art. 127 item 3) fall under the category of constitutional rights in Switzerland. The Federal Court, being the “guard of the principle of the democratic and federal order in the state under law”,⁴⁴

⁴⁰ Compare U. Häfelin, W. Haller, *Schweizerisches...*, s. 583, passim.

⁴¹ For more information on the constitutional democracy see M. Granat, *Od klasycznego przedstawicielstwa do demokracji konstytucyjnej (ewolucja prawa i doktryny we Francji)*, Lublin 1994, p. 135, passim, see also A. Jamróz, *Demokracja konstytucyjna – kilka konsekwencji dla systemu prawa*, in: Z. Czeszejko-Sochacki (ed.), *Konstytucja Federalna Szwajcarskiej Konfederacji...*, Białystok 2001, p. 17 and following.

⁴² Compare S. Oliwniak, *Wpływ orzecznictwa Trybunału Konstytucyjnego na system prawa*, Białystok 2001, p. 25 and following.

⁴³ Compare W. Kälin, *Das Verfahren der staatsrechtlichen Beschwerde*, Berno 1994, p. 39 and following, especially p. 67.

⁴⁴ Compare J. P. Müller, *Die Verfassungsgerichtsbarkeit im Gefüge der Staatsfunktionen*, in: *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer*, 1981, p. 69.

has also acknowledged guarantees revealed by the European Convention on Human Rights⁴⁵ and the International Pact on Civil and Political Rights⁴⁶ to be constitutional rights of the citizens.

It is worth noticing that nowadays the legislator in the Federal Constitution, which is the act of the proclaimed law, guarantees a range of values which were not included before at that level of regulation.

Before the Constitution of 1999, the issue of human dignity (see art. 7) was tackled only in the European Convention on Human Rights (compare its art. 3) as well as in the International Pact on Civil and Political Rights (compare its art. 7, 8 and 10). The Constitution of 1874 in a somehow casual manner commented on the right to a decent funeral (art. 53 item 2), abolishment of arrest for debts (art. 59 item 3), abolishment of death penalty for political crimes (art. 65 item 1) as well as the application of corporal punishment (art. 65 item 2), protection against abuses in the field of reproduction and geneticist engineering (art. 24novies) and transplantation medicine (art. 24decies). The right to life and individual freedom (compare art. 10 of the Constitution of 1999), apart from the regulations indicated above referring to the sphere of human dignity, was perceived as an unwritten constitutional law.⁴⁷ The issue of the existence protection (today's right to help in difficult situations – art. 12) was treated directly as the basic individual right for the first time in 1995.⁴⁸ Protection of private life (art. 13) was regulated at the constitutional level only as a guarantee of post and telegraph confidentiality (art. 36 item 4 of the Constitution of 1874), whereas protection of personal data was only a resolution matter.⁴⁹ The Federal Court has been recognizing the freedom of expressing one's views (now art. 16) as the unwritten constitutional norm since 1961,⁵⁰ a similar situation has had freedom of speech (since 1965)⁵¹ (art. 18) or freedom of gathering (since 1970)⁵² (art. 22).

⁴⁵ The Federal Court referred to in, among others, in the decision dated 19 March, 1975, BGE 101 Ia 67, 69 and following, or the decision of the Federal Court dated 15 November, 1991, BGE 117 Ib 367, 371 and following.

⁴⁶ Compare the decision of the Federal Court dated 22 August, 1994, BGE 120 Ia 247.

⁴⁷ Compare the decision of the Federal Court dated 20 March, 1963, BGE 89 I 92 and 25 March, 1964, BGE 90 I 29.

⁴⁸ Compare the decision of the Federal Court dated 27 October, 1995, BGE 121 I 367.

⁴⁹ Federal law dated 19 June, 1992 regarding personal data protection, *Bundesgesetz vom 19. Juni 1992 über den Datenschutz*, SR 235.1.

⁵⁰ Compare the decision of the Federal Court dated 3 May 1961, BGE 87 I 114.

⁵¹ Compare the decision of the Federal Court dated 31 March 1965, BGE 91 I 480.

⁵² Compare the decision of the Federal Court dated 24 June 1970, BGE 96 I 219.

Few remarks on the state under the rule of law...

The acceptance of the Constitution of 1999 has not affected the activity of the Federal Court in the issue under consideration (since the Constitution of 1874 its jurisdiction has been actual). It has been the author of norms of conduct. It is possible to state that up to some degree its jurisdiction has had both a normative meaning and character. Thus, it has been developing the Swiss constitutional law.

Discussing the system of the Swiss Federation, it should be concluded that the Swiss people have been very pragmatic. The history and contemporary situation have proved that not only can they use the output of the doctrine and experiences of other nations but they are capable of creating rational solutions. While characterizing the state under the rule of law in Switzerland, it is impossible to point out explicitly a complete or exclusive realization of some grasp of that concept. Here the state under law is understood in a formal sense because of its emphasis of the certainty of law; hence the basis for the organs of public authority is to be found in the essence and boundary of law, in the first place, in the proclaimed law. On the other hand, it also guarantees individual freedom and dignity as leading values in democracy in the sphere of both positive law and norm-creative jurisdiction activity of the Federal Court.